

# The Influence of the Areeda–Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust

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## I. INTRODUCTION

It is often pointed out that while the United States Supreme Court is the final arbiter in setting antitrust policy and promulgating antitrust rules, it does so too infrequently to be an efficient regulator.<sup>1</sup> And since the antitrust agencies, the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”), rarely issue guidelines, and even more rarely issue rules or regulations, very little antitrust law is handed down from on high. Instead, circuits split, and lower courts must muddle through new antitrust problems by finding analogies in technologically and socially obsolete precedents.

When faced with this void of authority, especially covering cutting-edge antitrust issues raised by new technology and business arrangements, lower courts often turn to a single treatise, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, by the late Philip E. Areeda and Herbert Hovenkamp.<sup>2</sup> The treatise’s influence is such that Justice Breyer has remarked “that most practitioners would prefer to have two paragraphs of Areeda’s treatise on their side than three Courts of Appeals or four Supreme Court Justices.”<sup>3</sup> Why courts are so influenced by the treatise is no secret: It is up-to-date, technologically savvy, politically middle-of-the-road, economically literate, comprehensible, and comprehensive. The monopoly that Professor Hovenkamp (as the only living editor of the treatise) has inherited and lovingly maintains is certainly the kind of which antitrust would approve: It is a monopoly “thrust upon it”<sup>4</sup> by simply being the best. But its dominance in lower courts and, therefore, in firm decision-making, should raise concerns

1. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 4 (2005) (“Lack of adequate Supreme Court supervision has led to many divisions among the federal courts of appeal.”).

2. See generally Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039 (2015).

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

4. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945).

among those who believe it was Congress's intent to put the courts, not a professor, in charge of antitrust policy.

The solution, of course, is not to force the lower courts away from the Areeda–Hovenkamp treatise; in the absence of binding authority, reliance on such a fine treatise can only improve antitrust jurisprudence. But this reliance may illustrate the need for institutional reform. It suggests that something should be done to solve the bottleneck problem at the Supreme Court and to encourage the antitrust agencies to issue more rules to guide firms in their business deals and lower courts in their resolution of disputes. This Essay explores the structural and institutional causes of the void of antitrust authority, explains how the Areeda–Hovenkamp treatise fills that gap, and identifies the legitimacy problems that inhere when lower courts treat a secondary source as speaking for the Supreme Court. Finally, this Essay points out how a more economically literate bench and *Chevron* deference to FTC antitrust rules would help alleviate the problem.

## II. THE AREEDA–HOVENKAMP TREATISE IN THE LOWER COURTS

It is difficult to overstate the importance of the Areeda–Hovenkamp treatise. Whether evaluated quantitatively or qualitatively, the reach that the treatise has had on antitrust law and policy is staggering. The market power that Herbert Hovenkamp enjoys over influencing antitrust law in the courts is honestly gained, but no one can argue that he enjoys anything short of a monopoly.

### A. THE TREATISE BY THE NUMBERS

The modern treatise—a 21-volume set, updated semiannually, 5950 pages long, and retailing for \$4225<sup>5</sup>—takes its origins in a three-volume set published by Harvard antitrust legends Philip E. Areeda and Donald F. Turner in 1978.<sup>6</sup> Under the Areeda–Turner brand, it has been cited in over 500 federal cases;<sup>7</sup> under the Areeda–Hovenkamp title, which was obtained after Professor Hovenkamp replaced Professor Turner in 1989, it has been cited in another 700.<sup>8</sup> Many opinions cite the treatise repeatedly.<sup>9</sup> That makes

5. *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, WOLTERS KLUWER, <http://www.wklawbusiness.com/store/products/antitrust-law-analysis-antitrust-principles-their-application-prod-0735564280/hardcover-item-1-0735564280> (last visited Apr. 15, 2015) (retailing the treatise online).

6. Thomas W. Rhodes, Book Review, 13 GA. L. REV. 1110, 1110 (1979) (reviewing the original edition of the treatise).

7. A Westlaw search restricted to federal district and appellate courts for [Areeda /4 Turner /10 “antitrust law”] yields 602 cases as of March 23, 2015.

8. A Westlaw search restricted to federal district and appellate courts for [Areeda /4 Hovenkamp /10 “antitrust law”] yields 758 cases as of March 23, 2015.

9. See, e.g., *Fed. Trade Comm'n v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) (citing the treatise 13 times); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (citing the treatise 12 times).

the treatise the single most-cited antitrust authority, including such ubiquitous cases as the Supreme Court's 1918 decision in *Chicago Board of Trade*, which established the "Rule of Reason," and the U.S. Court of Appeals for the Second Circuit's *ALCOA* case, which defined the offense of monopolization under the Sherman Act in 1945.<sup>10</sup> And it outstrips citations to antitrust agency materials, including the Merger Guidelines, at a ratio of three-to-one.<sup>11</sup> As for other treatises, hornbooks, and academic materials, nothing even comes close. The next most cited academic work on antitrust, Robert Bork's *The Antitrust Paradox*, has been cited in only 183 federal district and appellate court cases.<sup>12</sup>

### B. OTHER MEASURES OF INFLUENCE

Qualitative analysis of the citations confirms the impression given by the numbers: The treatise is an essential source of antitrust authority at all levels of federal practice. Courts commonly quote portions of the treatise at length, setting apart passages as block quotes rather than rephrasing the point.<sup>13</sup> And courts will often explicitly adopt propositions offered by the treatise as law. For example, in the U.S. Court of Appeals for the D.C. Circuit's *Microsoft* case, the court adopted the treatise's position on structural relief in vacating the remedy below and cautioning against a heavy-handed structural remedy on remand.<sup>14</sup> Likewise, in *LePage's Inc. v. 3M*, the U.S. Court of Appeals for the Third Circuit adopted the treatise's position that a competitor offering a broader range of products can use bundled discounting to exclude an equally efficient rival.<sup>15</sup> Another case even used the treatise's language to name a section heading: "Plaintiff Fits Areeda and Hovenkamp's Description of 'A Nascent Firm.'"<sup>16</sup>

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10. According to Westlaw, *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918), has been cited by federal courts in 660 cases as of March 23, 2015, and *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), has been cited in 839.

11. A Westlaw search restricted to federal district and appellate courts for ["merger guidelines"] yields 253 cases as of March 23, 2015. Similar searches for each of the other joint-issued FTC and DOJ guidelines yield a total of 62 citations.

12. This Westlaw search was restricted to federal district and appellate courts for ["antitrust paradox" /10 Bork]. In comparison, a Westlaw search restricted to federal district and appellate courts for [Areeda /4 Hovenkamp /10 "antitrust law"] yields 758 cases as of March 23, 2015.

13. See, e.g., *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 271, 322-23 (3d Cir. 2012) (quoting approximately 990 words from the treatise in only three block quotes found between the majority and dissenting opinions).

14. See *Microsoft*, 253 F.3d at 107. The opinion cites the treatise's passages on structural relief three times. *Id.* at 105-07.

15. *LePage's Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003). For another example of courts explicitly adopting the treatise's position on a particular point of law, see *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) ("Professors Areeda and Hovenkamp therefore suggest that intent be removed as a subject in predatory pricing cases, and we are persuaded that this is the right approach." (citation omitted)).

16. *Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc.*, 331 F. Supp. 2d 513, 532 (E.D. Tex. 2004).

Judicial references to the treatise are glowing; in addition to Justice Breyer's high praise quoted above, it is not uncommon for courts, in citing the treatise, to comment on its high quality or accessibility.<sup>17</sup> The depth of the treatise's influence is complemented by its breadth, and it is cited for a wide range of ideas. Although often cited for a succinct restatement of the law,<sup>18</sup> it is also treated as authoritative on antitrust policy,<sup>19</sup> relevant economic concepts,<sup>20</sup> and on the state of lower court disagreement about particular issues.<sup>21</sup> Even its prescriptive positions—advocating a change in the law or a resolution to a circuit split—have frequently found traction in the courts.<sup>22</sup> It would seem that an early review of the treatise made an accurate prediction when it praised it thus:

In the tradition of classic encyclopedias like Wigmore's and Williston's, it is both a monument and an indispensable guide. Its magisterial pronouncements will, for a generation, be the starting point of research by practitioners, judges, and students of law and industrial organization.<sup>23</sup>

Arguably, the flaw in this prediction was that it did not go far enough. It has been for two generations, not one, that the treatise has provided the starting point—and in many cases the final analysis—for antitrust practitioners and judges.

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17. See, e.g., *United States v. LSL Biotechnologies*, 379 F.3d 672, 689 (9th Cir. 2004) (referring to Areeda and Hovenkamp as “distinguished commentators”); *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 293 (4th Cir. 2002) (referring to the treatise as a “noted commentary”); *Town of Norwood, Mass. v. New Eng. Power Co.*, 202 F.3d 408, 418 (1st Cir. 2000) (adopting “a view endorsed in some measure by several circuits and by the always enlightening Areeda treatise” (citations omitted)).

18. See, e.g., *Amarel v. Connell*, 102 F.3d 1494, 1509–10 (9th Cir. 1996) (quoting the treatise for the law of antitrust standing).

19. See, e.g., *Andrx Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 805 (D.C. Cir. 2001) (citing the treatise's explanation for the private right of action and treble damages in antitrust); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 1001 (9th Cir. 2000) (endorsing Areeda–Hovenkamp's justification for the antitrust injury doctrine); *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1372 (Fed. Cir. 1998) (quoting an Areeda–Hovenkamp claim that a rule holding some innovation predatory would be inadministrable).

20. See, e.g., *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 998 (11th Cir. 1993) (citing the treatise for the idea that brand loyalty may facilitate monopolization by allowing price discrimination).

21. See, e.g., *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 437 (2d Cir. 2005); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1404 (7th Cir. 1989).

22. See, e.g., *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1376 (Fed. Cir. 2004); *Automated Salvage Transp., Inc. v. Wheelabrator Env'tl. Sys., Inc.*, 155 F.3d 59, 70 (2d Cir. 1998).

23. Louis B. Schwartz, Book Review, *On the Uses of Economics: A Review of the Antitrust Treatises*, 128 U. PA. L. REV. 244, 246 (1979) (reviewing PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* (1978) and LAWRENCE ANTHONY SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* (1977)).

## III. ACCOUNTING FOR THE DOMINANCE OF THE AREEDA–HOVENKAMP TREATISE

It is easy to conclude that the superior quality of the Areeda–Hovenkamp treatise (which is what I shall call it because that is what it is today and what it has been for more than twice as long as it was the Areeda–Turner treatise) has contributed to its influence. But it is equally clear that the success of the treatise has something to do with the state of antitrust law itself. I will discuss the merits of the treatise in Subparts A through C and what I call the “law vacuum hypothesis” in Subpart D.

## A. CLEAR AND COMPREHENSIVE

The treatise is extremely clear. The complexity of antitrust law is second only to the complexity of the economics on which it is based, and the Areeda–Hovenkamp treatise deals with both masterfully. It is honest about confusion in the lower courts and offers its own solutions for simplicity. It breaks down technical economic arguments for a lay or legal audience without oversimplifying to the point of being unhelpful. It merges its roles as antitrust hornbook, economics textbook, and policy guide seamlessly. It demystifies the alchemy of econometrics and statistical inference for lawyers and judges who are understandably worried about being bamboozled by economists in the courtroom.

And the treatise is comprehensive. It covers everything from substantive antitrust law to questions about how expert evidence, litigation procedure, remedies, and statutory exemptions impact the practice of antitrust law. It collects thousands of lower court cases and summarizes their takes on contested points of law. The authors carefully navigate jurisdictional divides on many difficult issues, and they bring the law up-to-date in areas where technology and new markets have created ambiguity in the doctrine. Simply put, anything you want on antitrust—from case law to policy to economics, from misuse of patents to market definitions to a historical account of the FTC—can be found in the treatise. It is probably no accident that a single-volume treatise,<sup>24</sup> published the year before the original three-volume Areeda–Turner treatise, has not gained the same level of influence. At 21 volumes, the Areeda–Hovenkamp treatise proves that size matters.

## B. RIGHT TIME, RIGHT PLACE

Its timing was perfect. The original *Antitrust Law: An Analysis of Antitrust Principles and Their Application* was published in 1978, at an opportunistic moment in the development of antitrust law. In the decade before, Richard Posner had forcefully,<sup>25</sup> and Robert Bork stridently,<sup>26</sup> argued for a purely economic standard to govern antitrust law. The Supreme Court in 1977

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24. See generally SULLIVAN, *supra* note 23.

25. See, e.g., RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976).

26. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

handed these professors the first win in what would become the antitrust revolution when it decided *Continental T.V., Inc. v. GTE Sylvania Inc.*<sup>27</sup> according to the “Chicago School” paradigm. But despite this early interest in wedding economic principles to antitrust law, most of the Chicago School’s ideas were too far afield from existing antitrust law—and perhaps too politically extreme—for easy judicial adoption. Enter the Areeda–Turner treatise, which grafted economic thinking onto existing antitrust doctrine in a way that was both more moderate and more workable than the scholarly proposals offered by professors like Bork and Posner.

### C. AUTHORIAL PEDIGREE

The intellectual stature of its authors also contributed to its widespread adoption. Like Wright and Miller’s *Federal Practice and Procedure*, *Wigmore on Evidence*, and *Corbin on Contracts*, the treatise derives much of its persuasive power from the personalities behind it. Phillip Areeda was a distinguished Harvard Law professor for 34 years, after serving as special counsel to President Eisenhower.<sup>28</sup> He educated two generations of lawyers and scholars in the new economic paradigm of antitrust law. When he died, he was remembered as “the country’s foremost specialist on antitrust legislation.”<sup>29</sup> Donald Turner had also held a high-level government position, serving as the head of the Antitrust Division of the DOJ under President Johnson, before joining the Harvard Law faculty.<sup>30</sup> Holding both a Ph.D. in economics and a J.D., Professor Turner held special sway in the newly interdisciplinary field of antitrust.<sup>31</sup>

And this intellectual pedigree has certainly been maintained. The Areeda–Hovenkamp treatise could now more accurately be called the Hovenkamp treatise because Phillip Areeda died just six years after Professor Hovenkamp joined as an editor, and Donald Turner died the year before that.<sup>32</sup> Thus, for almost two decades, Professor Hovenkamp has been the sole custodian of the now 21-volume treatise.<sup>33</sup>

27. *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 66, 69 (1977) (citing Richard Posner and Robert Bork in the opinion).

28. David Binder, *Phillip Areeda, Considered Top Authority on Antitrust Law, Dies at 65*, N.Y. TIMES (Dec. 27, 1995), <http://www.nytimes.com/1995/12/27/us/phillip-areeda-considered-top-authority-on-antitrust-law-dies-at-65.html>.

29. *Id.*

30. Wolfgang Saxon, *Donald Turner, Lawyer for U.S. and Writer*, 73, N.Y. TIMES (July 22, 1994), <http://www.nytimes.com/1994/07/22/obituaries/donald-turner-lawyer-for-us-and-writer-73.html>.

31. *Id.*

32. Indeed, it is not uncommon for courts to shorten the citation simply to “Hovenkamp” followed by the paragraph number and page. *See, e.g.*, *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 275, 277, 287 (3d Cir. 2012); *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279, 1300 (S.D. Fla. 2005) (referring to the treatise within the opinion as the “Hovenkamp treatise”).

33. With the exceptions in the third edition of co-authors Roger D. Blair and Christine Piette Durrance in volume IIA and John L. Solow in volume IIB.

Undoubtedly—indeed, hopefully—much of the work of collecting cases and updating its content for the frequent supplements falls on research assistants; nevertheless, the mark of Professor Hovenkamp’s expertise and intellectual dexterity dominates the treatise. The style is scholarly, meticulous, clear, and careful, and is reflected in his impressive body of work beyond the treatise. Professor Hovenkamp has written over 100 law review articles, and, in addition to the treatise, 14 books. In keeping with the treatise’s tradition of interdisciplinarity, Professor Hovenkamp has written enough in constitutional law, legal history, intellectual property, and, of course, antitrust law to qualify for tenure in each of those fields individually. A conservative estimate of his academic citations, excluding the treatise, is about 2700.<sup>34</sup>

#### D. THE LAW VACUUM HYPOTHESIS

Thus far, the explanation for the dominance of the treatise brings to mind the words of Learned Hand in *ALCOA*: “A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry.”<sup>35</sup> “[F]inis opus coronat,” indeed.<sup>36</sup> But it is not enough to say that Areeda, Hovenkamp, and Turner got there first and did it best. The dominance of the treatise is not only unique in its influence within antitrust law, but—with perhaps the exception of Wright and Miller in the field of civil procedure—it is unique to all areas of law.<sup>37</sup> Certainly there are talented scholars with a great sense of timing in every legal field, but outside of civil procedure, it is difficult to think of a single area of law where one treatise exercises the same degree of influence as the Areeda–Hovenkamp treatise does in antitrust. So, in addition to the merits of the treatise and its authors, we must look to the ecology of antitrust law to understand how such a creature as the Areeda–Hovenkamp treatise has thrived.

##### 1. Describing the Law Vacuum Hypothesis: Why So Many Gaps?

The law vacuum hypothesis posits that antitrust law suffers from a lack of guidance from on high—either from the Supreme Court or the agencies tasked with making and enforcing antitrust law—which creates a legal void that is naturally filled with the kind of comprehensive and coherent academic

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34. I arrived at this estimate by taking the total number of pieces citing Professor Hovenkamp’s work and subtracting those citing the Areeda–Hovenkamp treatise. So, because searching Westlaw’s “Law Reviews [and] Journals” database for [Areeda /4 Hovenkamp /10 “antitrust law”] yields 1350 citations, and searching the same database for [Herbert /3 Hovenkamp] yields 4140, I arrived at an estimate of 2700. It is conservative because it excludes pieces, which are probably numerous, that cite to both the treatise and at least one other piece by Hovenkamp.

35. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

36. *Id.*

37. Also, the Wright and Miller treatise does not enjoy a monopoly, but must share its market with the also dominant *Moore’s Manual*. See generally MOORE ET AL., *MOORE’S MANUAL: FEDERAL PRACTICE AND PROCEDURE* (2014) (multivolume treatise with multiple editions and updates).



treatment that the Areeda–Hovenkamp treatise offers. The Supreme Court, which is already poorly positioned to make comprehensive and up-to-date antitrust rules, has only recently begun to grant certiorari in a significant number of antitrust cases, ending a two-decade antitrust dry spell.<sup>38</sup> Even at this brisker pace of granting certiorari in antitrust cases, it is not clear that the Court will be able to make up for lost ground. The federal agencies tasked with antitrust norm creation and enforcement—the FTC and the DOJ—have long focused much more energy on the enforcement of antitrust rules rather than their creation.<sup>39</sup> These two forces have combined to leave lower courts without a clear rule of decision for many common antitrust disputes.

As I have argued elsewhere, the Supreme Court is an inefficient regulator of antitrust both because it is inexpert and because its docket limitations preclude deciding as many cases as would be necessary to provide adequate guidance to businesses in a fast-changing economy.<sup>40</sup> The Court’s lack of economic expertise leads it to wait before resolving pressing antitrust regulatory issues that depend on emerging academic debates.<sup>41</sup> The Court quite reasonably waits for an academic consensus to emerge, but in doing so, it leaves longstanding debates in lower courts unresolved and scientifically outmoded precedent on the books.<sup>42</sup>

The docket limitations on the Supreme Court preclude it from creating an extensive set of specific antitrust norms covering all commonly arising fact patterns. At most, the Court decides a few cases a year, in contrast to the courts of appeals that “decide between fifty and eighty important antitrust cases per year.”<sup>43</sup> These decisions operate as the law of their land since the Supreme Court frequently declines review.<sup>44</sup> Although the Roberts Court has granted certiorari in several antitrust cases each year, the Rehnquist Court heard very few antitrust cases at all.

Professor Hovenkamp himself observed that there is a significant lack of guidance on antitrust policy from the Supreme Court. He cites “a reduction in the Supreme Court’s supervisory role and . . . a growing amount of conflict among the lower federal courts” as the consequences of a light Supreme Court antitrust docket in the 1990s and early 2000s.<sup>45</sup> Thus, he observes,

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38. See HOVENKAMP, *supra* note 1, at 6.

39. See *infra* notes 48–55.

40. See generally Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247 (2011) [hereinafter Haw, *Amicus Briefs*]; Rebecca Haw, *Delay and Its Benefits for Judicial Rulemaking Under Scientific Uncertainty*, 55 B.C. L. REV. 331 (2014) [hereinafter Haw, *Delay*].

41. See Haw, *Delay*, *supra* note 40, at 332.

42. See *id.*

43. HOVENKAMP, *supra* note 1, at 6.

44. *Id.*

45. *Id.* at 5; see also DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* 134 (2011).

“[T]he task of making antitrust rules largely befalls the federal courts of appeals.”<sup>46</sup>

In theory, the law vacuum could be filled with legislative and regulatory activity, as in the case of environmental law or financial regulation, but Congress has been essentially silent on antitrust law for many decades. And partly because of an accident of institutional design and partly because of path dependency, neither antitrust agency makes many authoritative rules or regulations. The DOJ has no formal norm-creation role, although it can influence policy by choosing cases and taking litigation positions. Here, however, its influence is circumscribed by the many private suits under the Sherman Act, which account for the vast majority of antitrust cases decided and over which the DOJ exercises no control.<sup>47</sup>

The FTC is also limited in its ability to create norms. The Sherman Act, unlike most modern regulatory statutes, does not delegate rulemaking to any agency, but section 5 of the FTC Act gives the FTC the power to create rules pertaining to competition.<sup>48</sup> One colorable interpretation of section 5 is that the FTC has the power to create competition law whole-cloth without regard to the Sherman Act and how the Court has interpreted it. But since this interpretation would create two parallel sets of laws depending on who is the litigant (section 5 of the FTC Act for the FTC and the Sherman Act for private parties and the DOJ), the interpretation has understandably gone by the wayside.<sup>49</sup> Today, such an aggressive interpretation of section 5 would simply have no traction in the courts.<sup>50</sup>

Even the idea that the FTC could “invoke[] an independent [s]ection 5” to add to or supplement the laws under the Sherman Act has been met with resistance from the courts.<sup>51</sup> In *Schering–Plough Corp. v. FTC*, the U.S. Court of Appeals for the Eleventh Circuit overturned an FTC decision holding that under section 5, reverse-settlement payments over \$2 million are presumptively anticompetitive.<sup>52</sup> The 2005 case hearkened back to an early decision made shortly after the creation of the FTC Act in which the Supreme Court observed: “The words ‘unfair method of competition’ are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include.”<sup>53</sup>

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46. HOVENKAMP, *supra* note 1, at 6; *see also* Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 56 (2007).

47. *See* CRANE, *supra* note 45, at 63–65.

48. *See* 15 U.S.C. § 45(a)(2) (2012).

49. CRANE, *supra* note 45, at 135–36.

50. *See* Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 766 (2005) (“It used to be thought that ‘unfair methods of competition’ swept further than the practices forbidden by the Sherman and Clayton Acts . . . but [this point] is no longer tenable.”).

51. CRANE, *supra* note 45, at 136.

52. *Shering–Plough Corp. v. Fed. Trade Comm’n*, 402 F.3d 1056, 1058, 1062 (11th Cir. 2005).

53. *Fed. Trade Comm’n v. Gratz*, 253 U.S. 421, 427 (1920).

Professor Daniel Crane has cited this and other examples of the Court's jurisdiction jealousy as a reason for the FTC's timid use of its section 5 norm-creation powers.<sup>54</sup>

Thus, as a practical matter, the FTC's and the DOJ's norm-creation functions are limited to creating enforcement policies concerning the norms they hope to influence through litigation. In the case of the jointly issued Merger Guidelines, these signals are very strong and provide valuable persuasive authority to parties who want to know when their conduct is likely to run afoul of the antitrust laws.<sup>55</sup> Indeed, the Merger Guidelines have been cited by appellate and district court decisions almost 250 times since they were created.<sup>56</sup> And because the Supreme Court has not decided a merger case in several decades, the Merger Guidelines are for all practical purposes the law on merger liability. But the Merger Guidelines are the exceptional case. Although the FTC and the DOJ have jointly issued several other guidelines, including ones for collaborations among competitors and the licensing of intellectual property, they have been cited only a handful of times each.<sup>57</sup>

## 2. Testing the Law Vacuum Hypothesis: Areeda–Hovenkamp Fills in the Gaps

Nature abhors a vacuum; where there is no law handed down from on high, intelligent scholarship will fill the void, and it has been so in the field of antitrust.<sup>58</sup> Identifying the major contributions of the Areeda–Hovenkamp treatise to antitrust law in the lower courts is a daunting task because of an embarrassment-of-riches problem. A comprehensive treatment of where the treatise has influenced judicial decision-making would be much longer than any essay of reasonable length, and so I must choose only a few important examples. Here, I will discuss the role that the treatise has played in determining the law of loyalty discounts and the international reach of the

54. Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1199–208 (2008).

55. For an excellent discussion of the Merger Guidelines and their role in antitrust norm creation, see generally Hillary Greene, *Guideline Institutionalization: The Role of the Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771 (2006).

56. A Westlaw search restricted to federal district courts and courts of appeals for ["merger guidelines"] yields 253 cases as of March 23, 2015.

57. For example, among all the non-Merger Guidelines cited on Westlaw, the ["Antitrust Guidelines for the Licensing of Intellectual Property"] has been cited by the most lower federal court cases, at 25. The next most cited is the ["Antitrust Guidelines for Collaborations Among Competitors"] with eight federal lower court citations.

58. This phenomenon can also be observed in international law, where binding law from on high is scarce. There, scholarship enjoys a special influence. See William J. Aceves, *Symposium Introduction: Scholarship as Evidence of International Law*, 26 LOY. L.A. INT'L & COMP. L. REV. 1, 1 (2003) ("International law has long-recognized the role of scholarship as a 'subsidiary means for the determination of rules of law.'" (quoting Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, T.S. No. 993)); *id.* at 3–5. But see Jack L. Goldsmith, Panel Discussion, *Scholars in the Construction and Critique of International Law*, 94 AM. SOC'Y INT'L L. PROC. 317, 318–19 (2000) (downplaying the importance of scholarship in interpreting international law).

Sherman Act. In both examples, the Court has yet to rule directly on a set of important issues, and so the Areeda–Hovenkamp treatise remains a central authority.

*a. Loyalty Discounts and the Areeda–Hovenkamp Treatise*

The law of loyalty discounts awkwardly straddles the Court’s jurisprudence on predatory pricing, tying, and exclusive dealing, and the treatise provides a cogent explanation of the law on each and the important economic differences between the practices.<sup>59</sup> Loyalty discounts come in several different forms, including volume discounts (price cuts or rebates based on total amount of product purchased); market share discounts (price cuts or rebates based on the percentage of a customer’s requirements purchased from the seller); and multi-product bundling (discounts based on a purchaser buying several different products from a seller).<sup>60</sup> Whether for things the treatise actually says or things that courts wish the treatise had said, Areeda–Hovenkamp has been cited heavily in lower court opinions treating loyalty discount claims.

In *ZF Meritor, LLC v. Eaton Corp.*,<sup>61</sup> the Third Circuit (between the majority and dissent) cited the treatise 12 times. Some of these citations are for uncontroversial points of law,<sup>62</sup> but more interestingly, the court used the treatise to support its use of rather contested economic theories and for explications of antitrust policy. For example, the majority cited the treatise for a hypothetical that illustrates one way in which “a dominant firm [can] foreclose rival suppliers.”<sup>63</sup> And the majority also seems to have adopted the treatise’s position on whether exclusive-dealing cases are theoretically distinct from de facto exclusive deals achieved through discounting.<sup>64</sup> The dissent quoted an entire passage from the treatise, urging the Areeda–Hovenkamp position that above-cost discounting is lawful under both sections one and two

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59. See, e.g., 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 768b4, at 167 (3d ed. 2008) (distinguishing market share discounts from exclusive dealing); see also 11 *id.* ¶ 1800b, at 7 (distinguishing exclusive dealing and tying).

60. See Daniel A. Crane, *Bargaining over Loyalty*, 92 TEX. L. REV. 253, 257–58 (2013).

61. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012).

62. See, e.g., *id.* at 270, 287.

63. *Id.* at 271 (citing 11 AREEDA & HOVENKAMP, *supra* note 59, ¶ 1802c, at 76–77).

64. See *id.* at 277 (citing 11 AREEDA & HOVENKAMP, *supra* note 59, ¶ 1807b, at 134). I say “seems” because it appears that the court may have misunderstood the Areeda–Hovenkamp point here. Compare *id.* (“That [Eaton’s low prices may have induced OEMs to enter long-term agreements] is not irrelevant, as it may help explain why the OEMs agreed to otherwise unfavorable terms and it may help to rebut an argument that the agreements were inefficient.”), with 11 AREEDA & HOVENKAMP, *supra* note 59, ¶ 1807b, at 134 (“[T]he fact that the inducement to agree to exclusive dealing is a price discount may not be completely irrelevant. . . . [I]n explaining why a buyer has agreed to exclusive dealing[,] the discount policy may render alternative efficiency explanations less likely . . .”).

of the Sherman Act.<sup>65</sup> Thus, both the majority and the dissent turned to the treatise to answer what at least the majority believed was a question left open by the Supreme Court: Does some above-cost discounting run afoul of the antitrust laws? And the fact that the Supreme Court subsequently denied certiorari to the *ZF Meritor* case<sup>66</sup> means that the uncertainty will prevail.<sup>67</sup>

The treatise has proved highly influential in addressing another question raised by loyalty discounts: How should courts calculate whether a bundle of two or more different products is priced below cost? This question arose in the Third Circuit's *LePage's Inc. v. 3M*, and the court cited the treatise extensively to support its holding that 3M's bundled rebates could sustain a Sherman Act section two monopolization charge.<sup>68</sup> As in *ZF Meritor*, both the majority and the dissent cited the treatise, although it was the majority who relied most heavily on it, claiming that the treatise provided a theoretical basis for condemning multi-product bundles.<sup>69</sup>

*LePage's* and the legal uncertainty left when the Supreme Court denied review in that case<sup>70</sup> set the stage for the next case in the bundled-cost test saga. The U.S. Court of Appeals for the Ninth Circuit in *Cascade Health* took its reliance on the Areeda–Hovenkamp treatise even further than the *LePage's* court; the opinion explicitly adopted the cost measurement endorsed by paragraph 749.<sup>71</sup> The case cited the paragraph at length, ultimately adopting a paraphrase of the rule suggested by the treatise.<sup>72</sup> And because the Supreme Court has not yet weighed in on the appropriate measurement of the cost-price differential for bundled goods, the Areeda–Hovenkamp test remains the law in the Ninth Circuit.<sup>73</sup>

#### b. *The FTAIA and the Hovenkamp Treatise*

The Hovenkamp treatise's role is especially striking in the context of the Foreign Trade Antitrust Improvements Act ("FTAIA"). As in many areas of law, the treatise is heavily cited in lower court cases interpreting the FTAIA, which limits the reach of the Sherman Act to domestic violations unless the

65. See *ZF Meritor, LLC*, 696 F.3d at 322–24.

66. *Eaton Corp. v. ZF Meritor LLC*, 133 S. Ct. 2025, 2025–26 (2013) (denying certiorari).

67. For another market share case that relies on the treatise, see *Church & Dwight Co. v. Mayer Labs., Inc.*, 868 F. Supp. 2d 876 (N.D. Cal. 2012), *vacated in part* by No. C-10-4429 EMC, 2012 WL 1745592, at \*1 (N.D. Cal. May 16, 2012).

68. *LePage's Inc. v. 3M*, 324 F.3d 141, 147, 155, 157–58 (3d Cir. 2003).

69. See *id.* at 155, 158; *id.* at 176 n.2 (Greenberg, J., dissenting).

70. *3M Co. v. LePage's Inc.*, 542 U.S. 953 (2004) (denying certiorari).

71. 3A AREEDA & HOVENKAMP, *supra* note 59, ¶ 749, at 305–49.

72. *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 895, 897, 900, 904–05, 907–08 (9th Cir. 2008).

73. For other bundled discount cases relying on the treatise, see *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l Ltd.*, No. 1:05-CV-12024-PBS, 2009 U.S. Dist. LEXIS 108858, at \*19 (D. Mass. Nov. 20, 2009); *Masimo Corp. v. Tyco Health Care Grp., L.P.*, No. CV 02-4770 MRP, 2004 WL 5907538, at \*7, \*9 (C.D. Cal. June 10, 2004).

challenged conduct abroad “has a direct, substantial, and reasonably foreseeable effect on domestic commerce.”<sup>74</sup> In the late 1990s, the treatise essentially played the role of the Supreme Court in resolving a circuit split about whether courts should apply a *per se* rule to foreign cartel activity.

In 1996, the Ninth Circuit decided *Metro Industries, Inc. v. Sammi Corp.*,<sup>75</sup> a case challenging a Korean design registration system as effecting a market division that directly, substantially, and foreseeably affected American importers. Although the plaintiffs urged *per se* condemnation of the defendants’ conduct, the court concluded that “where a Sherman Act claim is based on conduct outside the United States, we apply rule of reason analysis to determine whether there is a Sherman Act violation.”<sup>76</sup> The court reproduced two full paragraphs of text from the first edition of the treatise as support for that proposition.<sup>77</sup> The treatise in 1978 evidently observed that “the conventional assumptions that courts make in appraising restraints in domestic markets are not necessarily applicable in foreign markets,” suggesting, “[f]or example, price fixing in a foreign country might have some but very little impact on United States commerce” and so would not be properly subject to *per se* condemnation.<sup>78</sup>

In the next edition of the treatise after *Metro Industries* was decided, Professor Hovenkamp clarified the meaning of those passages and explained that the *Metro Industries* court had been in error. The 1997 edition points out that *Metro Industries*’s use of the “rule of reason treatment for all restraints abroad [] is squarely in conflict with” precedent in the U.S. Court of Appeals for the First Circuit, and “we are inclined to favor the First Circuit’s conclusion over that of the Ninth Circuit.”<sup>79</sup> Two years later, when the Ninth Circuit had another occasion to consider the question, it reversed course from its holding in *Metro Industries*. It cited the “scholarly criticism” of its previous opinion, quoting the treatise’s observation that “[p]erhaps the [Ninth Circuit’s] conclusion that restraints abroad *always* require rule of reason analysis would have been more qualified had the restraint before it belonged more clearly in the *per se* category without offsetting considerations of comity.”<sup>80</sup> The Ninth Circuit, having been set straight by Professor Hovenkamp and his treatise,

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74. *F. Hoffman-La Roche, Ltd., v. Empagran S.A.*, 542 U.S. 155, 159 (2004) (quoting 15 U.S.C. § 6a(1)(A)) (internal quotation marks omitted).

75. *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996).

76. *Id.* at 845.

77. *Id.*

78. *Id.* (alteration in original omitted) (quoting 1 AREEDA & TURNER, *supra* note 23, ¶ 237 (1978)).

79. 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 273b, at 378–79 (1997).

80. *United States v. Hui Hsiung*, 758 F.3d 1074, 1085 (9th Cir. 2014) (quoting 1B AREEDA & HOVENKAMP, *supra* note 59, ¶ 273b, at 332) (internal quotation marks omitted).

limited *Metro Industries* to its facts and “reiterat[ed] the applicability of the *per se* rule for horizontal price-fixing,” even in cases originating abroad.<sup>81</sup>

Note how in this controversy the treatise functioned as a stand-in for the Supreme Court, which had denied certiorari to resolve the issue.<sup>82</sup> A lower court created a circuit split, which was recognized and discussed extensively by the treatise. The treatise handed down an opinion about the appropriate resolution to the conflict. The circuit subsequently recognized its error and conformed its precedent not only to the other circuits but to the treatise itself. In the absence of a Supreme Court opinion, it appears that the treatise spoke with almost equal authority.

#### IV. THE ANXIETY OF INFLUENCE

Is there anything wrong with lower courts using the treatise as an authority instead of having guidance from on high? Perhaps the treatise merely predicts the future opinions of the Supreme Court and actions by the agencies and thus is merely an oracle of antitrust law and policy. On this view, the law vacuum problem is not so serious: In the interim between when a new antitrust problem arises and the authorities speak, parties can use the treatise to predict the eventual actions of antitrust authorities to organize their business affairs and legal disputes. Thus, the treatise’s role in filling the gaps is relatively unproblematic. On this view, there is nothing democratically or institutionally illegitimate about the use of the treatise in lower courts since ratification by the Supreme Court is all but sure to follow.

This argument has two significant weaknesses. First, the treatise does seem to drive, and not merely predict, antitrust law at the Supreme Court. In the few antitrust cases decided by the Supreme Court, the treatise plays as large a role—if not larger—than it does in the lower courts. Second, the argument assumes that the Supreme Court and the agencies can and do eventually act to ratify or clarify the treatise’s position on important antitrust debates. In fact, the Court decides too few cases, and the agencies exercise too few opportunities to express a position on antitrust rules, to confer democratic legitimacy to the pervasive use of the treatise in the lower courts.

##### A. MORE THAN AN ORACLE

Professor Hovenkamp should be called the Oracle of Iowa City<sup>83</sup> because his ideas often anticipate rules and holdings adopted by courts and agencies. If the treatise merely predicts the antitrust future, then its role in filling the law vacuum would be relatively unproblematic. But if the treatise actually

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81. *Id.* at 1086.

82. *See Metro Indus., Inc. v. Sammi Corp.*, 519 U.S. 868 (1996) (denying certiorari).

83. *Cf.* Daniel A. Crane, Book Review, *Antitrust Modesty*, 105 MICH. L. REV. 1193, 1193 (2007) (reviewing HOVENKAMP, *supra* note 1) (“As custodian of the treatise, Hovenkamp speaks with oracle-like authority on antitrust matters.”).

drives the antitrust future, then one must confront its legitimacy as lawgiver in a context where more democratically legitimate—and perhaps more expert—institutions are at least supposed to be operating. Although conclusive proof of a causal link between the treatise and changes in Supreme Court doctrine would be virtually impossible to prove, all signs point to the treatise's power to influence, and not just foreshadow, the Court's holdings.

### 1. Citation and Admiration

Perhaps most simply, it is clear that the members of the Court have read the treatise and hold it in high esteem. This can be inferred from the frequency of its citation in Supreme Court briefs,<sup>84</sup> the Court's ubiquitous and approving citations to it,<sup>85</sup> and the comment by Justice Breyer about the importance of the treatise to the practice of antitrust law.<sup>86</sup> It seems doubtless that the Court has a well-worn copy in its library.

### 2. Depth of Discussion

The treatise being read and respected is necessary to its being influential, but it is not sufficient; thus, I must examine how the Court treats it in its opinions. The high degree of attention that the Court gives to the treatise, and the apparent flow of ideas from it to their opinions, suggests that the Court uses the treatise for more than window dressing to their own ideas. Of the 16 major antitrust cases decided since 2004, 11 cited the treatise. All 11 of these cases cited the treatise multiple times and reproduced direct quotes—the average case quoted over 40 words from the treatise in the opinion.<sup>87</sup> Thus, it is unsurprising that several key holdings of the Supreme Court appeared first in the treatise.

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84. According to Westlaw, the treatise has been cited in 265 Supreme Court briefs and 299 petitions for certiorari. These numbers are based on a search for [Areeda /4 (Hovenkamp OR Turner)] in the databases "U.S. Supreme Court Petitions for Writ of Certiorari" and "U.S. Supreme Court Briefs."

85. According to Westlaw, the treatise has been cited by the Court in 47 Supreme Court cases. This number is based on a search for [Areeda /4 (Hovenkamp OR Turner)] in the "U.S. Supreme Court" database.

86. See Breyer, *supra* note 3, at 890.

87. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Fed. Trade Comm'n v. Actavis, Inc.*, 133 S. Ct. 2223 (2013); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013); *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010); *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438 (2009); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004); *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).



The Court's recent decision in *FTC v. Actavis* is illustrative.<sup>88</sup> When the Court decided *Actavis* in 2013, much academic ink had been spilled over the status of so-called reverse-settlement payments (or pay-for-delay) in Hatch–Waxman Act litigation, and a significant circuit split had emerged. A comprehensive treatment of the market and regulatory forces that gave rise to pay-for-delay settlements is beyond the scope of this Essay, but here I will quote Justice Breyer's succinct summary of the problem from the opening lines of *Actavis*:

Company A sues Company B for patent infringement. The two companies settle under terms that require (1) Company B, the claimed infringer, not to produce the patented product until the patent's term expires, and (2) Company A, the patentee, to pay B many millions of dollars. Because the settlement requires the patentee to pay the alleged infringer, rather than the other way around, this kind of settlement agreement is often called a “reverse payment” settlement agreement. And the basic question here is whether such an agreement can sometimes unreasonably diminish competition in violation of the antitrust laws.<sup>89</sup>

The issue is treated comprehensively in paragraph 2046 of the Hovenkamp treatise and, even more extensively, in other works by Professor Hovenkamp.

The treatise had been cited in lower court opinions addressing the legality of pay-for-delay settlements,<sup>90</sup> but it was the Supreme Court that gave the treatise its starring role by citing it seven times in *Actavis*. And it is not just the number of citations (some of which are to more general issues of antitrust law such as how “quick look” operates)<sup>91</sup> but rather the fact that the Court used an idea apparently pulled from the treatise to provide tangible guidance to lower courts. The Court cited the treatise for the proposition that “the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.”<sup>92</sup> In other words, the size of the settlement provides the best proxy for its anticompetitiveness. By directly incorporating that decisional factor into Supreme Court jurisprudence—with full attribution to Areeda and Hovenkamp, the Court seemed to be actually influenced by the treatise, rather than merely using it to bolster the Court's own reasoning process.

88. *Actavis*, 133 S. Ct. at 2223.

89. *Id.* at 2227.

90. *Valley Drug Co. v. Geneva Pharm., Inc.*, 344 F.3d 1294, 1312 (11th Cir. 2003) (quoting 12 AREEDA & HOVENKAMP, *supra* note 79, ¶ 2046, at 266, for the proposition that “some care must be taken to ensure that . . . the settlement . . . is not more anticompetitive than a likely outcome of the litigation” (internal quotation marks omitted)).

91. *Actavis*, 133 S. Ct. at 2237 (citing 7 AREEDA & HOVENKAMP, *supra* note 59, ¶ 1508, at 435–40).

92. *Id.* at 2236–37 (citing 12 AREEDA & HOVENKAMP, *supra* note 59, ¶ 2046, at 350–52).

### 3. The Pressure to Cohere

Third, as a theoretical matter, if I am right that lower courts often use the treatise to gap-fill where courts and agencies have been silent, then it may have the effect of locking in the Court to its ideas. The FTAIA saga illustrates the point well. At this point in the controversy, Professor Hovenkamp—speaking through his treatise—has resolved the controversy in favor of the notion that at least some international conduct is illegal *per se* under the Sherman Act. Now that all circuits have come into line with the treatise, it would be awkward for the Court to step in and decide on a contrary rule. Not only would it be deciding an issue that is no longer a circuit split (the Ninth Circuit having been corralled by the treatise), but it would also be disrupting a hard-earned consensus among the lower courts that have more experience in the trenches of international antitrust.<sup>93</sup> Of course, not all ideas in the treatise enjoy this level of prominence in the lower courts, but it illustrates that when a secondary source of law has such a powerful influence on courts, the tail can wag the dog.

#### B. HAVE THE AUTHORITIES RATIFIED THE TREATISE?

Although the Supreme Court does heavily rely on the treatise when it decides an antitrust case,<sup>94</sup> its docket limitations mean it must leave many antitrust issues unresolved entirely.<sup>95</sup> In these instances, which are the majority of instances, it cannot confer its democratic and institutional legitimacy on the lower courts' adoption of the treatise. By Professor Hovenkamp's estimation, the Supreme Court decides less than two percent of the important antitrust issues that arise in any given year.<sup>96</sup> And although the Court more often cites the treatise than not, there are several recent antitrust cases that make no mention of the treatise at all.<sup>97</sup>

Perhaps, more fundamentally, if the Court wanted to confer authority on the treatise in a wholesale manner, it should have to do so very explicitly. It has not done this for the Hovenkamp treatise or any other secondary source for obvious reasons. First, the Court simply could not anticipate that a

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93. Such a disruption would not only be difficult to accept politically, but it also may be irrational since there is now unanimity among the presumably diligent and intelligent legal minds that have considered the issue. For an interesting discussion of how deference to lower court consensus may be epistemically justified, see Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 862–74 (2014).

94. See *supra* Part IV.A.

95. See *supra* notes 38–47 and accompanying text.

96. See HOVENKAMP, *supra* note 1, at 6. Professor Hovenkamp suggests that the circuits decide “between fifty and eighty important antitrust cases per year,” while the Supreme Court since 2000 has heard on average about one antitrust case annually. *Id.*

97. See generally *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

secondary source could—in every possible instance now and in future revisions—be an accurate reflection of the views of a diverse and changing set of justices. Second, that delegation would be politically illegitimate and utterly unpalatable to the public.<sup>98</sup>

Nor have the agencies made any such wholesale ratification. In agency decisions, too, the treatise is very influential, but the overlap between agency decisions and the substance of the treatise is not perfect. Additionally, for reasons similar to why the Supreme Court has not adopted the treatise wholesale, the agencies have retained their autonomy to part ways with the Oracle of Iowa City at any turn.

### C. *THE TROUBLE WITH THE TREATISE'S AUTHORITY*

Finally, it is perhaps important to ask whether this is all a lot of hand-wringing for nothing. Some may argue that if the treatise is as excellent as I claim in Part III, then there is nothing lost by it filling the law vacuum. To these critics, it would seem that the treatise very comfortably stands in where the authorities cannot overtly make law because of either practical or political limitations. There is some force to this argument. Given that lack of antitrust law from on high, we are undoubtedly in a better place than we would be without the treatise. But the modifier “given the lack of antitrust law” is important. There are sufficient problems with a single academic speaking for the antitrust authorities that we ought to rethink the structural features that have created the law vacuum in the first place and address the problem at its roots.

Most fundamentally, Professor Hovenkamp’s ideas lack democratic legitimacy. When the Supreme Court writes, it speaks for a coalition of justices that have been appointed by a President, confirmed by Congress, and exposed to pervasive political and media scrutiny. Similarly, the agencies are authorized by Congress, staffed by the President, and subject to a host of oversight mechanisms including judicial review. In contrast, Professor Hovenkamp must answer only to his reputation among his academic peers. And while he is the most well-known scholar actively working in the antitrust field today, his prominence cannot rival the Court or the FTC.

Further, there may be epistemological reasons to prefer antitrust law emanating from the Court or the agencies than from Professor Hovenkamp. The agencies have the benefit of a large staff of expert economists at their disposal to lend expertise to its decision-making process.<sup>99</sup> Agencies have the ability to demand data from firms that can inform policymaking. The Court may not formally have the same means to synthesize expert opinion, but it has

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98. One could perhaps even raise the argument that such a delegation would run afoul of the nondelegation doctrine. For an interesting discussion of the nondelegation doctrine outside of the administrative law context, see generally Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405 (2008).

99. See Haw, *Amicus Briefs*, *supra* note 40, at 1264.

indirect access to many expert points of view through briefs from the solicitor general and typically numerous amici.<sup>100</sup>

Finally, Professor Hovenkamp brings to his treatise an academic perspective on antitrust matters. Although we would all like to believe that the academy is unbiased in its assessment of legal problems, inevitably we approach problems and puzzles differently than elected politicians, appointed bureaucrats, and governmental staffers. The compositions of the agencies and of the Court indicate that the academic perspective is valued—three of five FTC commissioners and five of nine Supreme Court Justices are former law professors<sup>101</sup>—but in a mix with other professional backgrounds. Having at least some decision makers with extensive practical, real-world experience—be it with resolving actual cases and controversies, in firms, or with the government—may improve antitrust decision-making.

## V. INSTITUTIONAL REFORM TO ADDRESS THE LAW VACUUM

Somewhat counterintuitively, the dominance of the very fine Areeda-Hovenkamp treatise may signal a failure of antitrust law. It highlights the need for more and better guidance to firms trying to conform their conduct to the law and to parties trying to optimize their litigation strategy. The problems are institutional: Neither the agencies nor the Supreme Court are designed to optimally regulate competition. Thus, the solutions are likewise institutional. As I and others have argued elsewhere, the FTC should be allowed and encouraged to engage in more notice-and-comment rulemaking in addition to publishing guidelines.<sup>102</sup> Articulating a fix on the Supreme Court side is more difficult, since docket limitations are unavoidable and high-level economic expertise from the bench is impractical. Still, some facility with economics and statistics will assist the Court in making earlier and better changes to antitrust law, and so should be encouraged among the justices. But the Supreme Court's most tangible contribution will be to assist the FTC in taking a stronger norm-creation role by granting deference to the FTC's interpretations of both antitrust law and policy.

### A. REFORM AT THE SUPREME COURT: RAISING THE BAR FOR ECONOMIC AND STATISTICAL KNOWLEDGE

The Supreme Court has been slow to adjust competition law in response to advances in economic theory and empirical research, leaving out-of-date precedent on the books for longer than is optimal for antitrust regulation.<sup>103</sup>

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100. See generally *id.*

101. Julie Brill, Maureen Ohlhausen, and Joshua Wright are FTC Commissioners with academic backgrounds; Justices Scalia, Kennedy, Ginsburg, Breyer, and Kagan were law professors before becoming Justices.

102. See CRANE, *supra* note 45, at 143; Crane, *supra* note 54, at 1199; Haw, *Amicus Briefs*, *supra* note 40, at 1287–89.

103. See Haw, *Delay*, *supra* note 40, at 334.

Prominent examples include the survival of the per se rule against resale price maintenance well after economists had articulated significant procompetitive arguments for its use.<sup>104</sup> Delay at the Supreme Court also means that the antitrust consequences of new business practices, especially those that arise because of changes in technology or regulatory regimes, can remain unclear for a significant period of time.<sup>105</sup>

The Court's relative lack of economic expertise contributes to its slowness in these areas. The Court, without the scientific savvy to sift out the best arguments from an existing debate about the competitive consequences of a business practice, quite reasonably waits until all or most discord among academics has been resolved. In other words, the Court waits for a consensus among the experts to emerge—and sometimes, as in the case of resale price maintenance, they wait for that consensus to age—before making a regulatory shift in response. Because academic consensus can take decades to solidify, and because the Court must take cases as they come and so may have to wait further for the right case to petition for certiorari rather than affirmatively set their regulatory agenda, the Court is a very slow regulator of competition.<sup>106</sup>

Although nothing practically can be done about the caseload problem and about the fact that the Court cannot affirmatively set its regulatory agenda but must choose among the cases petitioning for certiorari, some of the delay may be alleviated by having economic and quantitative expertise on the bench. Part of why the Court is so dependent on consensus and, thus, so slow to adjust antitrust law to emerging economic arguments is because of its relative inability to assess the scientific merits of those arguments without resort to the general opinion of the academy.<sup>107</sup> Some facility with economics, quantitative thinking, and use of statistical and empirical models may help the Court close the gap between the law and the science of antitrust. “Some facility” need not mean a Ph.D. in economics; even weekend programs on economics and modeling may improve the justices' economic expertise enough to shorten the delay period. Perhaps more fundamentally, scientific and social-scientific knowledge should be factored into the nomination and confirmation process; inclination towards the scientific and quantitative

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104. Another good example is the endurance of the market power presumption inferred from patent protection. The legal presumption outlasted the economic theory behind it by several decades.

105. One prominent example is the uncertainty that persisted, until the Court decided *Actavis* last year, about the interaction of the Sherman Act and the Hatch–Waxman Act, and the legality of pay-for-delay deals. See generally Fed. Trade Comm'n v. *Actavis, Inc.*, 133 S. Ct. 2223 (2013).

106. See *Haw, Delay*, *supra* note 40, at 356 (“For courts with selective jurisdiction, like the Supreme Court, the cases and controversies requirement slows the execution of any regulatory agenda by forcing the Court to wait for an appropriate case presenting the issue in an ideal posture.”).

107. See *id.* at 349 (describing the “expertise deficit” the Court faces and its need to consult academic experts).

should be thought of as part of the minimal qualifications of a Supreme Court Justice in this era of data- and model-driven law.<sup>108</sup>

But this solution is imperfect. First, more sophisticated judicial engagement with economics will have at best an indirect effect on their willingness to make more and better antitrust law. Other factors that impede the Court's ability to act as an efficient regulator—the docket limitations, for example—may overwhelm the small effect that increased expertise has on the Court's antitrust jurisprudence. It may be that the Court's greatest contribution to filling the law void in antitrust will be to grant the agencies a higher degree of deference, which the next Subpart discusses.

B. *REFORM AT THE FTC: NOTICE-AND-COMMENT RULEMAKING AND DEFERENCE IN THE COURTS*

The best solution to the law vacuum is more norm creation by the antitrust agencies, in particular the FTC. The FTC is better positioned than the DOJ to make rules because it has statutory rulemaking authority under the FTC Act and because the DOJ's prosecutorial pedigree more naturally places it in the litigation sphere.<sup>109</sup> But the FTC has little incentive to create norms if it will not be granted *Chevron* deference by the courts because, without that deference, courts will be free to substitute their own judgment about antitrust policy for that of the FTC. Cases like *Schering-Plough* illustrate that the courts tend not to be particularly generous about granting deference to FTC interpretations of section 5.

But as Professor Crane points out in his piece advocating for more antitrust norm creation at the FTC, the agency may have better luck receiving *Chevron* deference for rules it creates through notice-and-comment rulemaking.<sup>110</sup> The “rule” in *Schering-Plough*, although created “in a manner that loosely mimicked the Administrative Procedure Act's requirements for agency rule making”—exhaustive study and public comment—was created in an adjudicative context.<sup>111</sup> This context made it especially easy for the Eleventh Circuit to “castigate[]” the FTC for not following its precedent in another dispute with similar facts.<sup>112</sup> A rule created through notice-and-comment rulemaking—a decisional mode by definition unavailable to

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108. Rebecca Haw Allensworth, *Law and the Art of Modeling: Are Models Facts?*, 103 GEO. L.J. (forthcoming 2015) (manuscript at 59) (on file with author) (“But perhaps more fundamentally, we need to rethink the criteria by which we select judges. The ubiquity of modeling in legal disputes, and models' importance in allocating justice, redressing wrongs, and designing legal rules, suggest that model competence should be a threshold criterion for judicial appointment.”).

109. See Haw, *Amicus Briefs*, *supra* note 40, at 1287–89 (arguing for the FTC to take over “the responsibility of promulgating and enforcing antitrust rules” from the DOJ's Antitrust Division).

110. See Crane, *supra* note 54, at 1208.

111. *Id.* at 1200–01.

112. *Id.* at 1201.

courts—may allow courts to step aside and defer to the agency.<sup>113</sup> The FTC should test the waters by using its rulemaking authority under section 5 to create norms that complement, but perhaps do not run afoul of, dominant judicial interpretations of the Sherman Act.<sup>114</sup> And the Supreme Court should be more generous in yielding to the norm-creating powers of the FTC because it is so poorly positioned itself to provide the kind of specific guidance that efficient competition policy requires.

## VI. CONCLUSION

Professor Hovenkamp should be applauded for his tireless work in filling the gaps left by the Court and by the antitrust agencies. Without his efforts, lower courts and parties would be adrift in the academic controversies and circuit splits that plague modern antitrust law. But the prominence of his treatise—which is unique in all areas of law—evinces a hollowness at the core of antitrust doctrine. Very few issues are considered by the antitrust authorities, and too many doctrinal disputes endure for too long. But until we solve the institutional limitations that impede lawmaking from on high, I for one am glad we have Professor Hovenkamp at the helm.

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113. Technically, the format of the rule making should not matter for deference purposes. Professor Crane notes, “Arguably, the format of the Commission’s rulemaking—whether adjudicatory or legislative—should not matter to the deference question.” *Id.* at 1208. But he points out that “going through a legislative rule-making process might help to refocus the deference question by highlighting the FTC’s administrative . . . character.” *Id.*

114. Professor Hovenkamp himself also advocates this idea. See Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 893–94 (2010).