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Monopoly Broth and the Perils of Treatise-Driven Antitrust

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I. Introduction

Good morning and thank you for the opportunity to speak with you today. As always, my comments are mine alone and do not represent the views of the Federal Trade Commission or any other Commissioner.

Given that we're here in Texas, I thought it would be appropriate to talk about a case involving the energy industry. Texas is known for its oil and gas industry, where access to infrastructure and long-term supply arrangements can have significant implications for the ability of firms to compete. Those same considerations arise in electricity markets and were central to a recent Fourth Circuit decision, which is one of the most important Section 2 decisions in recent decades.¹

In *Duke Energy Carolinas v. NTE Carolinas*, the Fourth Circuit addressed a recurring question in monopolization law: how should courts evaluate business practices that may be lawful individually but potentially anticompetitive when considered together?

Companies rarely pursue their commercial objectives through isolated decisions. Business planning, much like effective antitrust compliance counseling, requires an enterprise-wide assessment of how individual practices contribute to a broader commercial strategy. Whether an arrangement involves conditional pricing, exclusivity restrictions, or other practices, the associated commercial and legal risks must be evaluated in light of how those practices operate together.

Yet much of the debate surrounding what has come to be known as “monopoly broth” claims has moved in a different direction. Defendants and certain academic voices have increasingly sought categorical limitations on liability and on the use of holistic analysis by calling for strict application of what are referred to as “conduct-specific tests,” like those applied for predatory pricing and unilateral refusal-to-deal claims. In defending this approach, these commentators often talk about the risk of false positives and the need for “clear rules.”²

The difficulty with this approach is that limiting the use of holistic analysis increases error costs while the application of such conduct-specific tests is often anything but clear in practice. These

¹ *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 2748 (2026).

² *See Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 452 (2009).

tests often prolong litigation by requiring courts to resolve disputes over doctrinal classifications that may have little bearing on how the challenged conduct actually operates on trading partners. They can also complicate compliance by encouraging firms to structure their activities around formal legal distinctions rather than evaluating the competitive implications of their overall business strategy.

Businesses need predictable legal standards, and courts and enforcers should remain attentive to the risk of deterring conduct that benefits competition. But there are many reasons to question whether those objectives are actually advanced by categorical limitations that prevent courts from considering how different forms of business conduct interact, particularly given that businesses themselves routinely consider those interactions when making commercial decisions and designing compliance programs.

A more workable approach begins with market context and a careful assessment of a company's overall market position. It requires courts to understand how challenged practices relate to one another and whether their interaction produces anticompetitive effects that would otherwise escape scrutiny when challenged practices are analyzed on an individualized basis.

These questions are the subject of an article I recently co-authored that is titled *Duke Energy, Monopoly Broth, and Academic Appeals to Authority: A Response to Hovenkamp and Crane*.³ It is slated to be published next year in the *Houston Law Review*.

The article examines the Fourth Circuit's use of holistic analysis and critiques the more narrow approach advanced by Professors Herbert Hovenkamp and Daniel Crane. It also considers broader methodological problems concerning the role of courts' reliance on certain secondary sources in antitrust adjudication—perhaps most notably the Areeda-Hovenkamp treatise.

II. The Duke Energy Litigation

It helps to start with some background.

The *Duke* case arose from a Section 2 monopolization claim involving competition in North Carolina's wholesale electricity market.⁴ Duke Energy, a regulated utility with a market share approaching 90 percent, faced potential competition from NTE Carolinas, an independent power producer seeking to construct a more efficient natural gas generation facility.⁵

NTE's entry depended on securing an anchor customer to finance construction. The City of Fayetteville, whose long-term supply agreement with Duke was approaching expiration, was the most promising candidate.⁶

NTE alleged that Duke undertook a coordinated effort to prevent its entry.

³ The article is co-authored with Daniel Graulich.

⁴ *Duke*, 111 F.4th at 342–43.

⁵ *Id.* at 344.

⁶ *Id.* at 345.

First, Duke allegedly offered Fayetteville approximately \$325 million in financial incentives conditioned on extending its existing supply agreement for an additional eight years.⁷ NTE argued that the arrangement operated much like exclusive dealing because it conditioned substantial financial benefits on Fayetteville's commitment to continue purchasing nearly all its electricity requirements from Duke.⁸

Second, Duke allegedly manufactured a breach of NTE's transmission interconnection agreement, which was necessary for NTE to deliver electricity from its proposed facility.⁹ Duke allegedly instructed NTE to withhold scheduled payments pending revised invoices that Duke never issued, then cited NTE's nonpayment as grounds for terminating the agreement.¹⁰

Internal communications expressed Duke's desire to, quote, "ruin NTE's plans" for the facility, with one Duke official exclaiming, "Breach! Breach! Punt 'em!" when the opportunity to terminate the agreement arose.¹¹ NTE further alleged that Duke made misleading statements to regulators and pursued litigation in bad faith as a means of impairing NTE's operations and relationships with potential customers.¹²

The district court granted summary judgment for Duke after separately finding that the financial incentives did not satisfy the predatory-pricing standard established in *Brooke Group* and that the interconnection termination did not constitute an unlawful refusal to deal under *Aspen Skiing* and *Trinko*.¹³

The Fourth Circuit subsequently reversed.

The court identified numerous genuine disputes of material fact relevant to the standalone claims.¹⁴ But it also concluded that it was unnecessary to determine whether either set of practices independently satisfied those conduct-specific standards because the overall effect of the strategy was to raise NTE's costs and foreclose its access to an anchor customer.¹⁵ In drawing this conclusion, the court emphasized that the challenged practices were, quote, "executed simultaneously and *to the same effect*."¹⁶ The Fourth Circuit therefore held that the challenged practices warranted evaluation "as a whole" for their "combined" anticompetitive effect.¹⁷

⁷ *Id.* at 347.

⁸ *Id.* at 357.

⁹ *Id.* at 347–50.

¹⁰ *Id.* at 347–49.

¹¹ *Id.* at 347–48.

¹² *Id.* at 350–51.

¹³ *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 608 F. Supp. 3d 298 (W.D.N.C. 2022), *vacated and remanded*, 111 F.4th 337 (4th Cir. 2024). *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

¹⁴ *Duke*, 111 F.4th at 354.

¹⁵ *Id.* at 366.

¹⁶ *Id.*

¹⁷ *Id.* at 354–55.

The Supreme Court subsequently denied certiorari in January 2026, and the parties settled before trial.¹⁸

III. The Hovenkamp-Crane Brief

The FTC and U.S. Solicitor General had urged the Supreme Court to deny cert in support of the Fourth Circuit decision.¹⁹ But the Fourth Circuit’s decision drew criticism from Professors Herbert Hovenkamp and Daniel Crane, two of the most influential academic voices in antitrust, who filed an amicus brief supporting Duke’s petition for Supreme Court review.²⁰

Their brief argued that the Fourth Circuit improperly endorsed a “monopoly broth” theory pursuant to which independently lawful practices could be amalgamated into an unlawful monopolization claim.²¹

Under their proposed alternative approach, conduct that fails to satisfy established liability standards for predatory pricing or unilateral refusals to deal should be treated as, quote, “privileged and immune” from antitrust scrutiny.²² Such conduct, they argue, once found not to satisfy a conduct-specific test is “lawful and procompetitive,” and, therefore, must be categorically excluded from analysis on an aggregated basis.²³

The brief does recognize exceptions where challenged practices collectively foreclose a substantial share of the market, such as with exclusive dealing, or practices that involve independently wrongful conduct, such as business torts.²⁴

The authors justify their limitations through broader economic judgments about the competitive value of practices like discounting and unilateral decisions not to deal with rivals.²⁵ Because these practices ordinarily promote investment and innovation, they argue that categorical protection is warranted.²⁶

Perhaps more importantly, though, the brief also presents these limitations as reflecting established precedent, placing a particular emphasis on the considerable influence of the authors’ own scholarship on courts and specifically pointing to the Areeda-Hovenkamp treatise.²⁷

¹⁸ *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 145 S. Ct. 2748 (2026); see Katie Arcieri, *Duke Energy Settles Carolinas Power-Monopolization Lawsuit*, BLOOMBERG L. (Mar. 6, 2026), <https://news.bloomberglaw.com/antitrust/duke-energy-rival-power-firm-reach-deal-in-monopolization-suit>.

¹⁹ Brief for the United States as Amicus Curiae, *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 145 S. Ct. 2748 (2026) (No. 24-917).

²⁰ Brief of Professors Daniel A. Crane and Herbert Hovenkamp as Amici Curiae in Support of Petitioners, *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 145 S. Ct. 2748 (2026) (No. 24-917) [hereinafter Hovenkamp-Crane Brief].

²¹ *Id.* at 8.

²² *Id.* at 10–11.

²³ *Id.* at 3.

²⁴ *Id.* at 4, 12–13.

²⁵ *Id.* at 9–10.

²⁶ *Id.* at 2–3, 9–10.

²⁷ *Id.* at 1–2.

This naturally raises some questions. First, does applying this proposed framework to the factual record in *Duke Energy* actually support the conclusions the authors advance? And second, do these proposed limitations actually follow from precedent? I won't keep you in suspense. The answer to both questions is a resounding, "No."

IV. Factual and Economic Problems with the Brief's Approach

The first problem concerns the treatment of the factual record.

The professors' brief proceeds from the premise that conduct failing to satisfy a particular conduct-specific liability test is necessarily lawful and, moreover, affirmatively procompetitive.²⁸

That reasoning conflates the failure to establish an antitrust violation under one legal theory with a determination that the underlying conduct is inherently lawful under any theory and further that it produces beneficial economic effects—conclusions that do not follow as a matter of either economics or logic.

The premise is especially difficult to reconcile with the core of the Fourth Circuit's holding in *Duke Energy*, where the Fourth Circuit expressly identified "numerous" examples of material factual disputes concerning the legality and economic effects of the challenged practices.²⁹

The difficulty becomes more apparent when the brief's proposed exceptions are applied to the record facts read in a light most favorable to NTE at the summary judgment stage.

Recall that the authors would permit aggregation where practices collectively foreclose a substantial share of the market or involve independently wrongful conduct.³⁰

Both considerations were directly implicated by the facts. The Fourth Circuit recognized that Duke's conditional offer to Fayetteville was comparable to exclusive dealing.³¹ It also identified evidence of deceptive and tortious conduct, including termination on false pretenses and misrepresentations to regulators.³²

Thus, under the authors' proposed framework, those factual disputes would actually support aggregation. Yet the brief, in claiming the Fourth Circuit "effectively outlawed lawful and procompetitive conduct," reaches the opposite conclusion having taken contested questions of facts and resolving them in defendant Duke's favor without explanation.³³

This divergence raises a practical concern about administrability. If the authors' proposed framework cannot be correctly or consistently applied to a record implicating its own stated exceptions, there is reason to question whether it supplies the clarity its proponents claim.

²⁸ *Id.* at 3.

²⁹ *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337, 366–67 (4th Cir. 2024).

³⁰ Hovenkamp-Crane Brief, *supra* note 20, at 4.

³¹ *Duke*, 111 F.4th at 356–57.

³² *Id.* at 362, 365–67.

³³ Hovenkamp-Crane Brief, *supra* note 20, at 3.

The framework also presents a basic logical problem, commonly described as the fallacy of composition. This fallacy occurs when the characteristics of individual components are assumed to hold when considered as a whole, without considering whether the interaction among those components changes the nature or consequences of the underlying acts.

Consider a simple example. Taking prescribed narcotics, consuming alcohol, and driving a car can each be lawful activities when undertaken on an individualized basis. But I think everyone in this room can agree that doing all three activities together would be a bad idea. Accounting for the legality and dangers associated with each individual activity therefore does not fully identify the consequences of engaging in all three acts simultaneously.

The same principle applies to aggregation claims in the antitrust context. Practices that are lawful or economically beneficial when considered independently may interact in ways that produce a distinct mechanism of exclusion, which highlights a critical problem with the brief's economic approach more generally.

Recall that the alleged harm in *Duke Energy* concerned foreclosure of an essential customer relationship through the interaction of conditional financial incentives and interference with NTE's ability to enter the market.

Considered together, those practices implicated a mechanism of exclusion extending beyond predatory pricing or a conventional unilateral refusal to deal. The principal concern was raising rivals' costs and foreclosure of customer access, reinforced by disruptions to the rival's operations and regulatory delays.³⁴ Accordingly, solely relying on predatory pricing and unilateral refusals analyses would prevent a court from truly understanding the economic implications of the challenged conduct.

The brief's approach also risks letting contractual form determine legal outcomes. Suppose Duke had offered Fayetteville a single payment of \$325 million in exchange for an express exclusive-supply commitment covering the same period as the actual arrangement, with no misrepresentations and no termination. The commercial effect would be much the same as the conduct at issue in *Duke*, since either way it forecloses NTE's access to an anchor customer.

The Fourth Circuit's approach would not necessarily produce divergent outcomes here, because its analysis centered on identifying "foreclosure."³⁵ Under Professors Hovenkamp and Crane's approach, however, the express exclusive-dealing arrangement would warrant full rule of reason analysis, while the stricter bar of conduct-specific tests would govern the facts of *Duke*.³⁶

That result is perverse. The hypothetical exclusive-supply contract is actually, on its face, the harder case, since a transparent, bargained-for exclusivity commitment hypothetically may be justified on efficiency grounds. By contrast, the *Duke* case involved misrepresentations and termination on false pretenses, which is conduct with no plausible efficiency justification. Yet

³⁴ *Duke*, 111 F.4th at 366–67.

³⁵ *Id.*

³⁶ Hovenkamp-Crane Brief, *supra* note 20, at 12–13.

the brief's framework would subject the more defensible arrangement to the flexible, effects-focused inquiry while holding the more culpable conduct to a standard that is harder for a plaintiff to satisfy.

The key point, then, is that the competitive significance of business practices cannot be determined by rigid contractual or conduct-based categories alone.³⁷ It depends on the parties' relative market positions and on the commercial and regulatory context in which they operate.³⁸ What amounts to an ordinary business negotiation over price in one setting may, in another, form part of a coordinated effort to obstruct entry and interfere with trading partners' relationships with rivals.

V. The Brief's Treatment of Precedent

Compounding all of this, the second concern involves the brief's characterization of governing precedent.

The authors present their proposed limitations as reflecting established Supreme Court precedent and a judicial consensus among the courts of appeals. Yet the cited authorities reveal a considerably more nuanced picture.

Consider the professors' treatment of the Supreme Court's famous decision in *Continental Ore*, which stated that "plaintiffs should be given the full benefit of their proof, without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."³⁹ Despite this rather straightforward instruction that courts employ holistic analysis, the brief nevertheless argues that the *Continental Ore* Court permitted aggregation only because the challenged practices collectively foreclosed a "substantial share" of the market.⁴⁰ But, in fact, the Court did not use that terminology or articulate such a requirement. To the contrary, it expressly rejected the argument advanced by defendants that liability "can be measured by any rigid or mechanical formula."⁴¹

Continental Ore involved practices restricting a rival's access to essential sources of supply for certain chemicals.⁴² The court of appeals had required the plaintiff to establish that it exhausted all alternative sources.⁴³ The Supreme Court rejected that requirement, emphasizing that defendants interfered with independent supply outlets upon which the plaintiff relied.⁴⁴ It

³⁷ *United States v. Am. Tobacco Co.*, 221 U.S. 106, 181 (1911) (noting that the Sherman Act cannot be frustrated by "resorting to any disguise or subterfuge of form").

³⁸ *NCAA v. Alston*, 594 U.S. 69, 93 (2021) (citations omitted) ("Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. If those market realities change, so may the legal analysis."); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992) (quoting *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 579 (1925)) (instructing courts to resolve antitrust claims on a "case-by-case basis, focusing on the 'particular facts disclosed by the record'").

³⁹ *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

⁴⁰ Hovenkamp-Crane Brief, *supra* note 20, at 6, 12–13.

⁴¹ *Continental Ore*, 370 U.S. at 699; *see id.* at 707 ("[I]t is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme.").

⁴² *Id.* at 693–95, 697.

⁴³ *Id.* at 698.

⁴⁴ *Id.* at 699–700.

therefore focused on the practical significance of those suppliers and whether the defendant denied rivals efficient means to reach the market, without requiring a quantified showing of substantial foreclosure.⁴⁵

Similar concerns arise from the brief's characterization of circuit authority.

For example, the authors claim that the Second Circuit rejects monopoly broth claims, but they support that claim only with an unpublished decision, *Eatoni v. Research in Motion*.⁴⁶ Even putting aside that the decision itself lacks precedential value, that decision favorably cited the Second Circuit's earlier opinion in *City of Groton*, which expressly stated that "it is the mix of the various ingredients of utility behavior in a monopoly broth that produces the unsavory flavor."⁴⁷

The brief also does not address the Second Circuit's subsequent published decision in *New York v. Actavis*, which recognized that a "product improvement" and "product withdrawal" may be lawful were they to be analyzed individually, but could become anticompetitive when combined with "some other conduct," including practices leveraging regulatory processes to foreclose alternatives.⁴⁸

My forthcoming article examines these and other cases cited in the brief in greater detail. But the broader point is methodological.

There is no issue with academics, or anyone else, advocating for changes to antitrust doctrine or drawing lessons from precedent about how legal standards should develop. Rather, the issue arises when arguments are made that do not delineate between descriptive accounts of law and the authors' own policy views, a point to which I will return momentarily.

VI. A Framework for Course of Conduct Claims

Before I do, let me now briefly discuss what a more workable framework for course of conduct claims could look like.

The Fourth Circuit's approach offers a useful starting point for handling course of conduct, or "monopoly broth," claims that accounts for business and market realities. It can also be implemented consistently with the principles developed in Supreme Court cases like *Swift & Co., Creamery Package*, *Continental Ore*, *Aspen Skiing*, and *linkLine*.⁴⁹

⁴⁵ *Id.* at 699–702.

⁴⁶ See *Eatoni Ergonomics, Inc. v. Research in Motion Corp.*, 486 F. App'x 186, 191 (2d Cir. 2012) (citing *City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921, 928–29 (2d Cir. 1981)).

⁴⁷ See *City of Groton*, 662 F.2d at 928 (quoting *City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980)).

⁴⁸ *New York v. Actavis PLC*, 787 F.3d 638, 653–54 (2d Cir. 2015).

⁴⁹ See *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); *Virtue v. Creamery Package Mfg. Co.*, 227 U.S. 8, 33–36 (1913); *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602–05 (1985), *aff'd* 738 F.2d 1509, 1521–22 (10th Cir. 1984); *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 455 (2009).

The approach involves two stages.

First, courts evaluate the individual alleged acts on a standalone basis while preserving the option to analyze the same conduct under multiple frameworks, including predatory pricing, unilateral refusals to deal, or conditional dealing. Failure to satisfy a conduct-specific test, then, would not prevent a court from proceeding to the next step.

Second, courts would assess whether the challenged practices were capable of producing synergistic anticompetitive effects “above and beyond” those captured by analyzing the practices individually.

That inquiry would focus on three considerations.

First, **the defendant’s strategy**. Is there evidence that the practices at issue relate to the same overall business strategy or were part of the same commercial initiative?

Second, **timing and relationship**. Were the practices implemented in temporal proximity or coordinated as part of that same overall strategy?

Third, **synergistic effects**. Did the interaction of these practices produce competitive harm that would not be captured by examining each component in isolation? And how does that speak to the means through which trading partners are being denied access to rivals or otherwise excluded from the marketplace?

For example, a discounting arrangement may implicate predatory-pricing doctrine when analyzed independently. But if a dominant firm simultaneously conducts a deceptive advertising campaign that systematically interferes with rivals’ ability to secure customers, the interaction may produce additional competitive harm, in the form of raising rivals’ costs and foreclosure, that predatory-pricing analysis would not capture.

These considerations likewise provide limiting principles that avoid the fallacy of composition in either direction.

Consider first a situation where the challenged acts are disconnected.

In *Creamery Package*, the Supreme Court considered allegations that two defendants conspired to destroy a competitor’s business through patent licensing arrangements and infringement litigation.⁵⁰ The Court found that the defendants had acted independently of one another in undertaking the challenged conduct.⁵¹ On that basis, the Court concluded that the fact the defendants initiated lawsuits against the plaintiff around the same time was coincidental. Because there was no agreement and the acts lacked a meaningful “connection” to one another, their combination did not establish the alleged conspiracy.⁵²

⁵⁰ *Creamery Package*, 227 U.S. at 24–30.

⁵¹ *Id.* at 33–36.

⁵² *Id.* at 33–34, 37–38.

The opposite situation arises where practices were designed to operate together and produced exclusionary effects that cannot be adequately understood separately.

For example, in *Aspen Skiing*, the defendant allegedly sought to exclude a smaller rival through coordinated practices, including terminating a successful joint lift-ticket arrangement, promoting its own mountains while omitting the rival's, refusing to honor the rival's vouchers, and adjusting prices to impair competing multi-area ticket offerings.⁵³

The Tenth Circuit rejected the argument that each of the six challenged practices had to independently establish a Section 2 violation.⁵⁴ Relying on *Continental Ore*, the court explained that the evidence must be evaluated as a whole and that it was sufficient for the practices, considered together, to support a finding of monopolization.⁵⁵ The Supreme Court subsequently affirmed the judgment.⁵⁶

These decisions illustrate how aggregation can be evaluated within established legal boundaries. Where practices lack a meaningful relationship or present no incremental competitive harm, aggregation is unwarranted. Where their interaction produces a distinct exclusionary effect, their combined operation is relevant to liability.

This approach aligns with how businesses develop commercial strategies in practice. A company assessing a proposed initiative ordinarily considers how it relates to its market position and relationships with trading partners. Antitrust adjudication should similarly employ holistic analysis that considers how practices operate in practice while avoiding legal approaches that elevate form over substance.⁵⁷

VII. The Areeda-Hovenkamp Treatise and Academic Authority

Before concluding, I want to return to the broader concern raised by the Hovenkamp-Crane brief as it relates to the role of academic authority in antitrust adjudication.

The brief emphasizes the extraordinary influence of the authors' own scholarship, particularly the Areeda-Hovenkamp treatise, which has been cited thousands of times by lower courts and dozens of times by the Supreme Court.⁵⁸

Undoubtedly, the treatise has made important contributions in helping courts and practitioners develop organizing principles for applying antitrust law. But whether continued reliance on it is still justified is very much an open question. Its influence and methodology raise significant

⁵³ *Aspen Skiing*, 738 F.2d at 1520–22, *aff'd*, 472 U.S. 585 (1985).

⁵⁴ *Id.* at 1522 n.18.

⁵⁵ *Id.* (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)).

⁵⁶ 472 U.S. at 611.

⁵⁷ *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947) (citing *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 377 (1933)) (“[The Sherman Act] is aimed at substance rather than form.”).

⁵⁸ Hovenkamp-Crane Brief, *supra* note 20, at 1–2.

concerns about relying on secondary sources that seek to advance what the law “should be” rather than objectively describing what the law “is.”⁵⁹

The central problem is that the treatise frequently combines descriptive accounts of existing law based on past cases with the authors’ prescriptive judgments about how doctrine should develop in future cases. Those judgments often reflect economic assumptions whose theoretical and empirical foundations are contested and, in many cases, conflict with advances in the field of economics.⁶⁰

The problem is compounded when courts rely on the treatise because other courts have previously cited it, without independently examining the underlying authorities.⁶¹ Over time, the perceived authority of a secondary source can displace careful examination of precedent and the actual factual record.

The Supreme Court’s decision in *linkLine* illustrates the broader concern.

In rejecting a price-squeeze claim, the Court invoked, quote, “developments in economic theory and antitrust jurisprudence.”⁶² It concluded that the alleged price squeeze presented no independent competitive harm “above and beyond” that associated with a refusal to deal and predatory pricing, supporting separate application of those standards.⁶³

Yet in addressing that economic proposition, the Court relied on a statement from the Areeda-Hovenkamp treatise published over half a decade earlier. Moreover, the opinion did not cite even a single economic study or survey of the relevant literature to substantiate its conclusion.

If advances in economic learning justify changes in antitrust doctrine, the economic propositions supporting those changes should themselves be subject to scrutiny. And if antitrust rules “must be clear enough for lawyers to explain them to clients,” then the secondary sources courts rely upon should be held to a similar standard of clarity.⁶⁴

A treatise that does not carefully distinguish its authors’ own views from an objective account of precedent undermines these goals by leaving courts and practitioners uncertain as to whether a proposition reflects controlling law or is a recommendation about how the law should develop.

⁵⁹ See, e.g., Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039, 2046 n.33 (2015) (“Part of the breadth of the Treatise comes from Hovenkamp’s analysis about what the law should be, rather than just a summary of how the law stands.”).

⁶⁰ Specific examples are discussed in greater depth in my forthcoming paper.

⁶¹ Cf., e.g., Rebecca Haw Allensworth, *The Influence of the Areeda-Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919, 1920–25, 1933–34 (2014) (additionally noting that the treatise’s dominance in lower courts “should raise concerns among those who believe it was Congress’s intent to put the courts, not a professor, in charge of antitrust policy”).

⁶² Pac. Bell Tel. Co. v. *linkLine* Commc’ns, Inc., 555 U.S. 438, 452 n.3 (2009) (citing *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 432 (2d Cir. 1945)).

⁶³ *Id.* at 455.

⁶⁴ *Id.* at 453 (quoting *Concord v. Bos. Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990)).

None of this diminishes the contributions of the treatise or the importance of academic scholarship. But courts have an independent responsibility to interpret and apply the law, including evaluating the factual and economic foundations of the propositions upon which their decisions rest.

Courts adjudicating antitrust disputes would therefore benefit from consulting a broader range of sources, including agency guidance, practitioner-oriented materials addressing compliance challenges, and scholarship representing competing analytical perspectives. Those resources can provide valuable insight into how legal standards operate in contemporary markets.

VIII. Conclusion

In conclusion, the competitive process that antitrust law protects depends on legal institutions capable of distinguishing legitimate business conduct from exclusionary behavior. Making that distinction requires close attention to internal ordinary-course information and the interplay among business practices and firms.

Likewise, the predictability and legitimacy of antitrust enforcement depend on standards that courts can apply consistently and that reflect how businesses actually make commercial decisions. For that reason, courts should ground their analysis in the competitive realities of the case before them. The sources they rely on should reflect that same commitment.

Thank you.