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### Channeling and Contending with Bill Kovacic

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Nicolas Charbit  
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Anna M. Pavlik - Jessica Rebarber

# William E. Kovacic

## An Antitrust Tribute *Liber Amicorum* - Volume II

Donald I. Baker, Jonathan B. Baker, Caron Beaton-Wells, Margaret Bloom, John DeQ. Briggs, George S. Cary, Andy C.M. Chen, Daniel A. Crane, Elaine Ewing, Eleanor M. Fox, Damien Geradin, Laurie-Anne Grelier, Omar Guerrero Rodríguez, Doris Hildebrand, Merit E. Janow, Joseph Kattan, Molly Kelley, Bruno Lasserre, Robert C. Marshall, Leslie M. Marx, Robert Ian McEwin, Andreas Mundt, Ali Nikpay, Maureen K. Ohlhausen, Julián Peña, Alan Ramírez Casazza, Patrick Rey, Simon Roberts, Jan M. Rybnicek, Jacques Steenbergen, John Terzaken, Thibaud Vergé, Florian Wagner-von Papp, Wouter P.J. Wils, Marc Winerman, Chris Wood, Joshua D. Wright.

# Editors' Note

Nicolas Charbit

Elisa Ramundo

Following the success of William E. Kovacic *Liber Amicorum*—Volume I published in 2012, the Institute of Competition Law is proud to release the second volume of this book within the European tradition of *Liber Amicorum*.

In witnessing the constant growth of antitrust regimes around the world and in recognizing the significant role played by William Kovacic in favoring the antitrust dialogue at the international level, this Volume II pays tribute to Professor Kovacic's outstanding career offering a unique combination of theoretical insights and practical knowledge of competition and antitrust law issues worldwide.

In this Volume II, thirty-seven prominent authors signed twenty-seven contributions that tackle some of the most stimulating and current topics in competition policy and antitrust laws.

**PART I**, entitled “**THE INTERNATIONAL DIMENSION OF COMPETITION POLICY**,” includes twelve articles that offer a dynamic overview of international competition policy. Thus, **Jonathan Baker** reviews Kovacic's work on the design of antitrust enforcement institutions analyzing how antitrust norms exhibit continuity over the time; **Doris Hildebrand**, stemming from Kovacic's advocacy for convergence, discusses how the US/EU divide can be surpassed by superior norms; **Florian Wagner-von Papp** delineates a comparison between the US antitrust laws and EU competition law pointing out some thoughts on the importance of defining the relationship between antitrust law on the federal (or EU) level and antitrust laws on (Member) state level; **Jacques Steenbergen** offers some reflections on legitimacy, accountability and independence of competition authorities; **Maureen Ohlhausen** discusses the recommendations in the “FTC at 100 Report” for improving agency performance; **John Briggs** and **Donald Baker** suggest a critical revision of the US antitrust policy and administration to join the rest of the world; **Marc Winerman** steps into the past discussing the international issues arising when the FTC first opened its doors and even before; **Bruno Lasserre** highlights successes and challenges of the European Competition Network; **Wouter Wils** gives a retrospective

analysis of the EC Regulation 1/2013, after ten years since its enactment; **Ali Nikpay** tries to assess the OFT's performance by reference to the analytical framework set down by Kovacic on agency effectiveness; **Julián Peña** outlines the role of international cooperation in the development of competition law in Latin America; **Ian McEwin** delves into the existing connection between business, politics and competition law in Southeast Asia.

The fifteen articles of **PART II**, entitled “**COMPLEXITIES OF ANTITRUST RULES AROUND THE WORLD**”, guide readers through some of the intricacies in the application of antitrust rules in different countries around the world. In Part II, **John Terzaken** and **Molly Kelley** analyze the expanding role of behavioral remedies in cartel enforcements; **Damien Geradin** and **Laurie-Anne Grelier** offer some critical considerations on the EU Directive on Antitrust Damages Claims; **Omar Guerrero** and **Alan Ramírez** explore how effective criminal cartel provisions could be to deter cartel behavior; **Robert Marshall** and **Leslie Marx** discuss compliance with Section 1 of the Sherman Act from an economic perspective; **Caron Beaton Wells**, drawing on the Australian experience, tests effectiveness of a range of leniency policies; **Eleanor Fox** and **Merit Janow**, by examining the Vitamin C cartel case, set forth the main points at which trade and competition ought to meet; **Andy Chen** analyzes impacts and implications arising from the LCD cartel case for the Taiwanese competition policy; **Simon Roberts** reviews the approach of the South African Competition Commission to uncovering collusion in the construction sector and draws out some lessons for establishing new institutions; **Patrick Rey** and **Thibaud Vergé** outline vertical restraints treatment in the EU; **Andreas Mundt** conducts an insightful digression on some forms of vertical restraints vis-à-vis the rapid development of the Internet economy; **Daniel Crane** provides some analytical clarity on the legal rules governing predatory innovations claims; **Joseph Kattan** and **Chris Wood** explain the standard-essential patents and the related problem of hold-up; **Margaret Bloom** discusses convergence and cooperation in international merger control; **Joshua Wright** and **Jan Rybnicek** advocate for a more committed consideration of the evolution of out-of-market efficiencies in the US and around the world; **George Cary** and **Elaine Ewing** consider what can the US/EU experience in the merger context tell us about convergence with MOFCOM.

Volume II, with its 27 papers, takes readers around the world providing them with provoking reflections, insightful thoughts, and learning experiences on competition policy and antitrust laws. This is the same world that Bill Kovacic has traveled so much to share knowledge and favor dialogue among different players in the international antitrust arena.

The editors would like to give their sincere thanks to the thirty-seven authors for their hours of labor in dedication to the Volume II of this Liber Amicorum and to Anna Pavlik and Jessica Rebarber for their precious editorial assistance.

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# Table of Contents

Editors' Note .....	III
Contributors.....	V
Professor William E. Kovacic Biography .....	XI
Contributors' Bios .....	489

## PART I: The International Dimension of Competition Policy

Channeling and Contending with Bill Kovacic.....	1
Jonathan B. Baker	
Bill's Advocacy for Converging Economic Schools of Thought in the US and EU.....	11
Doris Hildebrand	
Comparative Antitrust Federalism and the Error-Cost Framework or: Rhetoric and Reality: You Protect Competitors, We Protect Competition – Except When We Protect Competitors.....	23
Florian Wagner-von Papp	
Some Reflections on Legitimacy, Accountability and Independence .....	93
Jacques Steenbergen	
The Federal Trade Commission at 100: Recommendations for Improving Agency Performance .....	101
Maureen K. Ohlhausen	

Rethinking US Antitrust Policy and Administration:  
 Joining the Rest of the World in the 21<sup>st</sup> Century .....115  
 Donald I Baker, John DeQ. Briggs

International Issues in the FTC’s First Decade (1915-1925)—and Before .....133  
 Marc Winerman

The European Competition Network: Past Successes  
 and Challenges for Its Second Decade .....149  
 Bruno Lasserre

Ten Years of Regulation 1/2003—A Retrospective.....161  
 Wouter P.J. Wills

Kovacic on Agency Effectiveness: How Does the OFT Measure Up?.....175  
 Ali Nikpay

The Role of International Cooperation  
 in the Development of Competition Law in Latin America .....195  
 Julián Peña

Business, Politics and Competition Law in Southeast Asia.....217  
 Robert Ian McEwin

**PART II: Complexities of Antitrust Rules around the World**

You’re Fired! The Expanding Role of Behavioral  
 Remedies in Cartel Enforcement .....243  
 John Terzaken, Molly Kelley

Cartel Damages Claims in the European Union:  
 Have We Only Seen the Tip of the Iceberg? .....257  
 Damien Geradin, Laurie-Anne Grelier

Cartel Criminalization: A New Old Story .....277  
 Omar Guerrero Rodríguez, Alan Ramírez Casazza

Section 1 Compliance from an Economic Perspective.....293  
 Robert C. Marshall, Leslie M. Marx

Leniency Policies: Testing for Effectiveness .....	303
Caron Beaton-Wells	
China, the WTO, and State-Sponsored Export Cartels: Where Trade and Competition Ought to Meet .....	319
Eleanor M. Fox, Merit E. Janow	
The LCD Cartel: Impacts and Implications for the Competition Policy of Taiwan .....	325
Andy C.M. Chen	
Establishing New Institutions: A Note on the Role of Strategy and Economic Analysis in Uncovering Collusion in the South African Construction Sector .....	351
Simon Roberts	
Vertical Restraints in European Competition Policy .....	365
Patrick Rey, Thibaud Vergé	
Vertical Restraints and the Internet Economy .....	383
Andreas Mundt	
Legal Rules for Predatory Innovation .....	395
Daniel A. Crane	
Standard-Essential Patents and the Problem of Hold-Up .....	409
Joseph Kattan, Chris Wood	
Convergence and Cooperation in International Merger Control .....	425
Margaret Bloom	
Outside In or Inside Out? Counting Merger Efficiencies Inside and Out of the Relevant Market .....	443
Joshua D. Wright, Jan M. Rybnicek	
Divergence Then and Now: What Does the US/EU Experience Tell Us about Convergence with MOFCOM? .....	463
George S. Cary, Elaine Ewing	

# Channeling and Contending with Bill Kovacic

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## Abstract

This essay discusses the work of Professor William E. Kovacic on the design of antitrust enforcement institutions, the interplay between the Chicago and Harvard schools in the transformation of antitrust that took place a generation ago, and the extent to which antitrust norms exhibit continuity over time.

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\* The author is indebted to Harry First, Andy Gavil, Carl Shapiro, and Spencer Waller.

# I. Channeling Bill: Institutions and Administrability

I first worked with Bill Kovacic more than two decades ago, when he contributed an article to a journal symposium that I edited.<sup>1</sup> Our most sustained professional interaction began at the start of the next decade, when Bill, Andy Gavil and I were drafting the first edition of our antitrust casebook, and has continued through the preparation of annual updates for law professors and new editions.<sup>2</sup> All three of us work on the entire manuscript, but we each take a leading role in areas of special interest and expertise. Bill's casebook focus includes the institutional capabilities of courts and enforcement agencies.<sup>3</sup>

Bill's academic and government work has also emphasized institutions and institutional design. He recognizes, to be sure, that a competition agency must deliver beneficial substantive results to be effective; this is the first of the two broad criteria he set forth for evaluating agency performance while serving on the Federal Trade Commission ("FTC").<sup>4</sup> Substantive results are an outward-looking criterion, focusing on the consequences of agency intervention and policies for the conduct of firms and the performance of the industries involved.<sup>5</sup>

The distinctive Kovacic approach is to place an equal emphasis on internal agency processes; this is Bill's second criterion.<sup>6</sup> Bill gives internal agency operations equal billing by connecting them with substantive outcomes: "Good agency performance consists of using superior administrative techniques to achieve good substantive results and to facilitate improvements in its operations."<sup>7</sup> At the end of his FTC service,<sup>8</sup> Bill summed up what he had learned about the administration of competition agencies by identifying multiple characteristics of good agency process.<sup>9</sup>

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1 William E. Kovacic, *The Identification and Proof of Horizontal Agreements Under the Antitrust Laws*, 38 ANTITRUST BULL. 5 (1993).

2 ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY (1st ed. 2002). A second edition was published in 2008 and a third edition is in preparation. Josh Wright is joining us for the third edition.

3 My comparative advantage is in economics and Andy's is in complex litigation.

4 William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?* 16 GEO. MASON L. REV. 903, 907 (2009). Bill published this article while serving as an FTC Commissioner, shortly after his term as Chairman ended and after his previous service as the agency's General Counsel.

5 *Id.* ("An agency is performing its duties capably if it improves economic performance and social welfare. Among other steps, it does so by stimulating improvements in quality, reductions in cost, and increases in innovation.").

6 *Id.* See also FEDERAL TRADE COMMISSION, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY—THE CONTINUING PURSUIT OF BETTER PRACTICES (2009) (A Report by Federal Trade Commission Chairman William E. Kovacic), available at [www.ftc.gov/os/2009/01/ftc100rpt.pdf](http://www.ftc.gov/os/2009/01/ftc100rpt.pdf).

7 Kovacic, *supra* note 4, at 907.

8 Bill's term as an FTC Commissioner (the position he returned to after he was replaced as the agency's Chair), ended in October 2011.

9 William E. Kovacic, Hugh M. Hollman & Patricia Grant, *How Does Your Competition Agency Measure Up?*, 7 EUR. COMPETITION J. 25 (2011) (suggesting six characteristics (in paraphrase): formulating and communicating well-specified goals, establishing internal planning mechanisms to develop a strategy for accomplishing the goals, using the full-range of available policy tools to solve competition problems, recruiting and retaining skilled

Bill's writing about competition policy institutions has emphasized antitrust enforcement agencies—the FTC, which he led, and foreign agencies, which he has frequently advised and nurtured.<sup>10</sup> He views judicial processes through a similar lens when looking for ways of making institutions work better, as with his call to award bounties to insiders that inform against a cartel.<sup>11</sup>

Bill's perspective on the courts can be understood as descended from the mid-20th century concerns of Harvard's legal process school of jurisprudence, and its competition policy spinoff, the Harvard school of antitrust.<sup>12</sup> The latter school was prominently represented during the mid-to-late 20th century in the writing of Phillip Areeda and Donald Turner. The Harvard school's distinctive attention to the administrability of the antitrust rules framed by courts is closely related to Bill's focus on improving the competence of antitrust institutions.

The Harvard school remains at the center of antitrust thinking through the antitrust opinions of Justice Breyer, a former law professor who has spent the majority of his career on the bench; the scholarship and government service of Bill Kovacic, who has provided leadership to the Federal Trade Commission and guidance to antitrust enforcement agencies throughout the world; and the writing of Professor Herbert Hovenkamp, who has ably taken over what was originally the Areeda and Turner antitrust treatise.<sup>13</sup> Given their institutional concerns, it is not surprising that two of these antitrust scholars have made substantial contributions in public service. Nor is it surprising that Bill has written an important article highlighting the role that the Harvard school scholars played in the transformation of antitrust law that began during the late 1970s, in tandem with the more well-known role of Chicago school scholars.<sup>14</sup>

In large part through Bill's influence, I have come to see issues involving administrability and institutional design in many of the antitrust topics I have studied. I have attempted to elicit lessons about the sources of institutional effectiveness in implementing competition policy through comparisons between the US and European

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professional and administrative staff, making substantial investments to improve the agency's understanding of economic theory and markets, and evaluating the impact of the agency's substantive initiatives after the fact). Bill's many personal contributions to advancing these process goals in competition policy-making, in the US and abroad, are surveyed in D. Daniel Sokol, Christine Wilson & Joseph S. Nord, *Grading the Professor: Evaluating Bill Kovacic's Contributions to Antitrust Engineering*, in 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 47 (Nicolas Charbit et al. eds., 2012).

10 See David J. Gerber, *William Kovacic on Competition Law and Economic Development*, in 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 71 (Nicolas Charbit et al. eds., 2012); Spencer Weber Waller, *The Next Generation of Global Competition Law*, in 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 95 (Nicolas Charbit et al. eds., 2012).

11 William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 GEO. WASH. L. REV. 766 (2001). See Jonathan B. Baker, *New Horizons in Cartel Detection*, 69 GEO. WASH. L. REV. 824 (2001) (commenting on Kovacic's article).

12 William H. Page, *Areeda, Chicago, and Antitrust Injury: Economic Efficiency and Legal Process*, 41 ANTITRUST BULL. 909 (1996).

13 In addition, Professor Daniel Crane, who is at an earlier stage in his career than Breyer, Hovenkamp and Kovacic, recently wrote an informed study of antitrust institutions in the Harvard school tradition. DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* (2011).

14 William E. Kovacic, *The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1 (2007).

antitrust enforcement agencies,<sup>15</sup> and comparisons between the way a sectoral regulator and the antitrust agencies protect and foster competition in the US<sup>16</sup> I have also relied on considerations of institutional effectiveness to defend an exclusive focus on demand substitution in market definition,<sup>17</sup> and in discussing the use of merger simulation by antitrust enforcement agencies and courts.<sup>18</sup> When I write about the effectiveness of antitrust enforcement institutions and the administrability of antitrust rules, I think of myself as channeling Bill.

## II. Contending with Bill: The Double Helix and Pendulum Metaphors

Channeling Bill does not mean always agreeing with him. In the two areas of difference discussed below, I view our disagreement as a matter of emphasis, not fundamental, and I have learned a great deal from engaging with Bill's position. The two areas can be encapsulated by two metaphors Bill uses: the "Double Helix" image to describe the interplay between the Chicago and Harvard schools in transforming antitrust a generation ago, and the "pendulum" metaphor to sum up the claims of commentators who, in Bill's critical view, downplay the continuity in antitrust norms and overstate partisan differences in the enforcement stance of the US agencies from one administration to then next.<sup>19</sup>

### 1. The Harvard School and the Chicago School

Bill Kovacic's article on the interplay between the Harvard school and the Chicago school in fostering the transformation of the US antitrust doctrine that began during the late 1970s is a significant academic accomplishment. Along with many other commentators, I have described the transformation of antitrust doctrine as led by the Chicago school and have characterized the dominant antitrust approach since that time as a Chicago school era.<sup>20</sup> Writing against this context, Bill contends that the change

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15 Jonathan B. Baker, *My Summer Vacation at the European Commission*, ANTITRUST SOURCE (Sept. 2005), available at <http://www.abanet.org/antitrust/source/>.

16 Jonathan B. Baker, *Antitrust Enforcement and Sectoral Regulation: The Competition Policy Benefits of Concurrent Enforcement in the Communications Sector*, 9 COMPETITION POL'Y INT'L 4 (Spring 2013).

17 Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129 (2007).

18 Jonathan B. Baker, *Merger Simulation in an Administrative Context*, 77 ANTITRUST L.J. 451 (2011).

19 As the warm reminiscences in the first volume of this "*Liber Amicorum*" (festschrift) make clear, Bill is a master at finding apt images to capture arguments.

20 See, e.g., Jonathan B. Baker, *A Preface to Post-Chicago Antitrust*, in POST-CHICAGO DEVELOPMENTS IN ANTITRUST ANALYSIS 60 (Antonio Cucinotta, Roberto Pardolesi & Roger Van den Bergh eds., 2002) (discussing three historical eras in antitrust interpretation and the prospects for a post-Chicago antitrust). As I will discuss in section II.2 below, Bill Kovacic has written about the continuity in some antitrust norms, particularly concerning horizontal restraints, between what I call antitrust's structural and Chicago school eras. William E. Kovacic, *The Modern Evolution of US Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003).

in antitrust policy would have been “less dramatic and pervasive” absent the intellectual contributions of the Harvard school, which often arrived at “similar policy prescriptions” as the Chicago school through a “different analytical path . . . .”<sup>21</sup> His “double helix” metaphor elevates the Harvard school to equal partnership with the Chicago school in the reconstruction of antitrust rules.

Bill has persuaded me that the Harvard school’s contributions—particularly in framing the antitrust injury doctrine and advocating a price-cost screen for predatory pricing—have been underappreciated.<sup>22</sup> But I still see the Harvard school as having a supporting role, not a co-leading role with the Chicago school, in the antitrust drama that took place a generation ago.

I take this view because the Harvard school’s focus on the administrability of rules ties down the form that the rules take but not their substance. The Harvard school’s institutional and process considerations push toward conditioning liability on a limited number of observable factors, as with the price-cost test for predatory pricing, and toward restricting access to the courts, as with the antitrust injury doctrine. But they do not tell us which factors should count and which plaintiffs should be given standing. One could imagine, for example, administrability-minded interventionists advocating an un rebuttable presumption of monopolization from a dominant firm’s below-cost pricing,<sup>23</sup> and supporting the breakup of large firms without the need to prove anti-competitive conduct.<sup>24</sup>

An example suggested by another of Bill’s important academic articles illustrates my point. Bill’s thoughtful and convincing history of the deconcentration movement points out that the intellectual consensus in favor of restructuring concentrated industries fell apart when the economic consensus tying market concentration to market power was undermined.<sup>25</sup> That article convincingly dates the turn of the intellectual tide to the work of Chicago-school critics of structural economic thinking presented in 1974, at what became known as the Airlie House conference on “the new learning” about

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21 Kovacic, *supra* note 14, at 34, 40.

22 *Id.* at 43-50 (predatory pricing), 53-59 (antitrust injury). Prof. Areeda’s role in the development of the antitrust injury doctrine was also highlighted by Page, *supra* note 12. Prof. Page, a Chicago-oriented scholar, made substantial contributions of his own to the doctrine’s development—illustrating Bill’s “double helix.” William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980). Bill also highlights the influence of Prof. Areeda’s critique of the essential facilities doctrine. Kovacic, *supra* note 14, at 62-69. Bill could have added the influence of Prof. Areeda’s “twinkling of an eye” metaphor on the development of “quick look” approaches to the analysis of horizontal restraints. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.39 (1984).

23 Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 712 (1975) (“[A] monopolist pricing below marginal cost should be presumed to have engaged in a predatory or exclusionary practice” unless the price, though below marginal cost, is at or above average cost). See *Pacific Eng’g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir. 1977) (describing Areeda and Turner’s 1975 article as advocating that price below marginal cost, or in the alternative average variable cost, “should be conclusively presumed unlawful”).

24 See William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1137 & 1137 n. 202 (1989) (noting proposals for applying “no-fault” theories of monopolization liability).

25 *Id.* at 1138.

industrial concentration.<sup>26</sup> Yet the central argument at the Airlie conference was focused on economics: whether or not oligopolies systematically perform poorly.<sup>27</sup> It was not focused on administrability, as it could have been had the conversation been framed around the relative merits of deconcentration legislation and antitrust enforcement for addressing concerns about the performance of oligopolies.

It is possible that the difference in our views on the relative importance of the intellectual contributions from Chicago and Harvard in fostering the judicial transformation of antitrust doctrines during the late 1970s and 1980s reflects a difference in our professional orientations—Bill’s toward institutional design and mine toward economics. We may each naturally see our own longstanding professional interest as the more influential.<sup>28</sup> Yet I still maintain that it was necessary to have an economic theory that identified what antitrust rules should accomplish, which the Chicago school supplied, before determining how to implement those goals through such rules, which was the supporting contribution of the Harvard school.<sup>29</sup>

## 2. Continuity and Change in Enforcement Policy

When Tim Muris became the FTC’s Chairman in 2001, he reportedly told his senior staff, which included Bill as the FTC’s General Counsel, “If I ever learn that you have been publicly criticizing our predecessors, you’ll be out the next day.”<sup>30</sup> Muris’ point in emphasizing continuity was to help protect the legitimacy of antitrust (and consumer protection) enforcement from partisan politics: Chairman Muris had been selected by President George W. Bush, a Republican, while his immediate predecessor, Robert Pitofsky, had been chosen by President Bill Clinton, a Democrat.<sup>31</sup> All three of these

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26 See generally, *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* (Harvey J. Goldschmid et. al. eds., 1974) (collecting essays from the 1974 Airlie House conference).

27 The “Chicago school” vs. “non-Chicago school” contest at the conference is highlighted in Lawrence J. White, Book Review, 76 *COLUM. L. REV.* 1051 (1976) (reviewing *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* (Harvey J. Goldschmid et. al. eds., 1974)). Another commentator presents the conference as an argument between the Harvard and Chicago schools of industrial organization economics (not to be confused with the antitrust schools of the same name)—again, that is, as a debate over economics. Richard R. Nelson, Book Review, 7 *BELL J. ECON.* 729 (1976) (reviewing *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* (Harvey J. Goldschmid et. al. eds., 1974)).

28 Bill has an advantage in assessing the shift from the structural to the Chicago school era: he took his first full-time professional positions in antitrust during the late 1970s, when the contest between the two approaches was undecided and bitter battles were being fought, particularly at the FTC (where he was working). I took my first professional positions during the early 1980s, after the Chicagoans had begun to establish their ascendancy. So some of what Bill observed directly about that process was recent history to me.

29 See Page, *supra* note 12, at 910 (Areeda’s work helps explain which features of the Chicago paradigm the Supreme Court chose to accept and which it chose to reject). Cf. Baker, *supra* note 20, at 68-70 (explaining the shift from antitrust’s classical era to its structural era, and from the structural era to the Chicago era, in terms of developments in the economy, the receptivity of the political system to change, and developments in economic thinking).

30 William Blumenthal, *The Toastmaster*, in 1 *WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE* 1, 4 (Nicolas Charbit et al. eds., 2012).

31 The first speech Chairman Muris released praised Pitofsky; the second highlighted continuity in antitrust enforcement. Timothy Muris, Chairman, Fed. Trade Comm., *Robert Pitofsky: Public Servant and Scholar*, Remarks at the Second Annual Conference of the American Antitrust Institute (June 12, 2001), available at <http://www.ftc.gov/speeches/muris/muris010612.shtm>; Timothy Muris, Chairman, Fed. Trade Comm., *Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity*, Remarks at the American Bar Association Antitrust Section Annual Meeting (Aug. 7, 2001), available at <http://www.ftc.gov/speeches/muris/murisaba.shtm> (describing the continuity in his anticipated enforcement approach with the FTC’s approach during both the 1980s and 1990s). By emphasizing continuity, Muris may also have been seeking to disarm those who might have been concerned that the Muris Commission would undercut various enforcement initiatives of the Pitofsky Commission.

Chairmen—Kovacic, Muris, and Pitofsky—had taught law and previously served at the FTC before they led the agency, so each was steeped in the history of antitrust enforcement and understood the role of the Federal Trade Commission in developing and implementing competition policy.

Bill Kovacic stuck to the letter of Tim Muris’ directive: as far as I know, he has never criticized publicly the enforcement decisions of the Pitofsky-era FTC. But Muris’ edict did not apply to academic debate. On several occasions Bill has taken on what he terms the “pendulum narrative” of the US enforcement history—“too active in the 1960s and 1970s, too passive in the 1980s, and properly moderate in the 1990s.”<sup>32</sup> Bill has attributed that narrative to Bob Pitofsky, along with others, including me.<sup>33</sup>

Bill’s alternative narrative emphasizes continuity. “The story of modern US federal enforcement,” Bill writes, “has far more to do with the progressive, cumulative development of policy than with abrupt, discontinuous adjustments in shaping the content of federal agency activity over time.”<sup>34</sup> Bill is a careful scholar, so his criticism of the pendulum narrative is nuanced. When he moves from broad generalization into the details, moreover, Bill recognizes that more than continuity is at work. Bill does not depict antitrust enforcement since the 1960s as a single story of either simple continuity or pendulum swings, but as combining four stories: progressive expansion of the norms governing horizontal restraints,<sup>35</sup> progressive contraction of the norms governing price discrimination (Robinson-Patman Act),<sup>36</sup> contraction then stabilization of the norms governing mergers and joint ventures,<sup>37</sup> and contested norms governing dominant firms and vertical contractual restraints.<sup>38</sup>

I see much to like in Bill’s counter-narrative. I have described a broad US consensus that has supported antitrust since the 1940s, which I have called our “competition policy bargain.”<sup>39</sup> In that sense, I recognize the continuity that Bill identifies. But I also see substantial changes within that broad consensus. Most notably, the US antitrust

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32 Kovacic, *supra* note 20, at 378.

33 *Id.* at 378 n.4 (referencing an interview with Robert Pitofsky), 379 n.6 & n.7 (referencing articles by Robert Pitofsky); William E. Kovacic, Book Review, 4 COMPETITION POL’Y INT’L 241, 262-63 (2008) (reviewing Antitrust Stories (Eleanor Fox & Daniel Crane eds., 2007) (discussing a book chapter co-authored by Jonathan Baker and Robert Pitofsky); William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5 COMPETITION POL’Y INT’L 129, 134-137 (2009) (discussing a book chapter written by Jonathan Baker and Carl Shapiro in a book edited by Robert Pitofsky, and referencing in notes articles by Robert Pitofsky, Eleanor Fox and others). In discussing my work, Bill, always a careful scholar and generous colleague, was complimentary as well as critical, and made an obvious and appreciated effort to report my views fairly.

34 Kovacic, *supra* note 20, at 477.

35 *Id.* at 416.

36 *Id.* at 410.

37 *Id.* at 430-48. See also Kovacic, Book Review, *supra* note 33, at 263 n.58 (endorsing the view, attributed to Commissioner Thomas Leary, that “federal merger enforcement across the 1980s and 1990s features significant stability and incremental adjustment rather than inconsistency and policy swings”).

38 Kovacic, *supra* note 20, at 448-64.

39 See generally Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2180-85 (2013); Jonathan B. Baker, *Competition Policy As a Political Bargain*, 73 ANTITRUST L.J. 483 (2006); Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 605 (2010).

rules changed dramatically beginning in the late 1970s, in order to avoid chilling efficiency-enhancing firm conduct. For that reason, I describe the antitrust worlds of the 1960s and 1990s as reflecting different eras in competition policy.<sup>40</sup> Bill identifies a similar dynamic with respect to merger enforcement, when he portrays the norms as first contracting and then stabilizing.<sup>41</sup> I also agree with Bill's observation that the norms governing monopolization and vertical restraints, which I see as proxies for exclusionary conduct generally, are contested.<sup>42</sup>

Our greatest point of disagreement has been over the way we characterize merger enforcement at the Justice Department during two periods, the mid-1980s and the early 21st century.<sup>43</sup> When Bill looks at the landscape, he sees continuity in the norms governing merger review over several decades.<sup>44</sup> He has criticized my view (writing with Carl Shapiro) that the Justice Department merger enforcement was curtailed during the second term of the Reagan administration and the first term of the George W. Bush administration.<sup>45</sup> I suspect that Bill is less prone than me to see substantive differences in enforcement agency approach from one administration to the next because

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40 Baker, *supra* note 20. Cf. Baker, *Political Bargain*, *supra* note 39, at 510 (describing the Chicago school reforms to structural era doctrine as representing dramatic but not fundamental change). In the past, I have used the term Chicago school "revolution," which I now think properly calls attention to the thoroughgoing nature of the doctrinal changes during the late 1970s and 1980s, but also misleads by downplaying the continuity in antitrust since our polity entered into what I have termed a "competition policy bargain." See generally, Baker, *Economics*, *supra* note 39, at 2180-85.

41 Kovacic, *supra* note 20, at 430-48. Bill's 2003 article focuses on enforcement policy at the Justice Department and Federal Trade Commission, not legal rules established by the courts. For that reason, in discussing horizontal restraints, Bill highlights the expansion of criminal cartel enforcement over time, not the limitation on the per se rule governing horizontal agreements to naked restraints on trade. While Bill emphasizes an important continuity between the 1960s and 1990s antitrust over an important change, I am confident he would agree that both developments were significant.

42 See generally Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013).

43 I have also discussed discontinuities in the approach to enforcement involving exclusionary conduct during the Reagan administration and the George W. Bush administration. Baker, *Political Bargain*, *supra* note 39, at 506-10 (discussing agency enforcement, rhetoric, and legislative proposals during the second term of the Reagan administration, without distinguishing between the Justice Department and the Federal Trade Commission); Baker, *Preserving a Political Bargain*, *supra* note 39, at 512 n.107 (discussing partisan differences between enforcers in Republican and Democratic administrations during the 1980s and 1990s in their approach to enforcement against anticompetitive exclusionary conduct), 606-07 (discussing controversy over a report on monopolization issued by the Justice Department in 2008, which the Federal Trade Commission refused to join and the Obama administration withdrew). I agree with Bill that the Division has remained committed to cartel enforcement over time, including during these periods. The criminal cartel program had "major enforcement breakthroughs" during the Clinton administration, but these likely reflected the expansion of the leniency program and the negotiation of information-sharing agreements with foreign governments rather than differences in enforcement philosophy from the Reagan administration. Kovacic, *supra* note 20, at 422-23.

44 Bill describes "a gradual narrowing of the zone of liability," by which he means a steady relaxation in the threshold above which the enforcement agencies would begin to scrutinize acquisitions strictly. Kovacic, *Assessing*, *supra* note 33, at 143. Using "a rough structural measure," the changing threshold "involved a reduction in the number of significant competitors in the following manner: 1960s (12 to 11), 1970s (9 to 8), 1980s (6 to 5), 1990s (4 to 3), 2000s (4 to 3)." *Id.* Bill derived these thresholds "from parsing the cases which the government chose to litigate." Their relaxation over time, he writes, has been "a function of the agencies' own reassessments of policy and of interpretations of merger law in the lower federal courts. Kovacic, *Assessing*, *supra* note 33, at 144.

45 For the Baker and Shapiro analyses, see Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON US ANTITRUST 235, 244-51 (Robert Pitofsky ed., 2008); Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, ANTITRUST, Summer 2008, at 29, 31; Jonathan B. Baker & Carl Shapiro, *Evaluating Merger Enforcement During the Obama Administration* 65 STANFORD L. REV. ONLINE 28, 29-30 (2012). For Bill's criticism of these studies, see Kovacic, *Assessing*, *supra* note 33. Shapiro and I respond to criticism similar to Bill's in Baker & Shapiro, *Detecting*.

Bill is closely attentive to the institutional constraints facing enforcers.<sup>46</sup> After all, the limits imposed by the Congress and the courts tend to change slowly. But I see more room for variation within those constraints than he does.

Our debate should not obscure the great contribution Bill has made in his scholarship about antitrust policy norms and the degree to which I have learned from his analysis and value it. Bill has persuasively demonstrated that there is a great deal of continuity in those norms, and that a narrative that focuses solely on the changes from one enforcement agency leadership team to the next—or even the changes from the structural to the Chicago school era—will miss an important part of the story.

### III. Conclusion

A professor in another disciplinary field with an interest in policy-making once told me that he believed academics are most productive over their careers when they go in and out of government. Time out of government, teaching and writing, allows an academic to reflect systematically about policy-making, as well as learn about and contribute to current academic thinking on emerging issues. That learning pays off on return to the government, and government experience, in turn, suggests new ideas and topics for later academic treatment. Bill Kovacic's success in both worlds—in his leadership roles in government, and as a legal scholar—illustrates the advantages of such cross-fertilization. I continue to benefit from what Bill has learned and accomplished, when I am channeling him and when I am contending with him.

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46 Bill also downplays the significance of big cases in signaling an enforcement agency's stance, most likely because he focuses on institutional constraints. *See* Kovacic, *supra* note 4, at 907 (questioning the “conventional report card used to grade competition agencies,” which is described as based primarily on “the initiation of new cases” but with “extra credit for high profile matters”). Yet high profile cases—big not just in initiation but also in their litigation outcomes—can have an out-of-size impact on the way firms comply with the antitrust laws. According to a leading investment banker, for example, the FTC's court victory in *Staples* was “a particularly dramatic show-stopper, a sign of the [government's] new assertive posture and of the courts' willingness to block a deal.” BRUCE WASSERSTEIN, *BIG DEAL: THE BATTLE FOR CONTROL OF AMERICA'S LEADING CORPORATIONS*, 148 (1998). Other examples of influential “big case” decisions with substantial symbolic import might include the Clinton administration's initiation and litigation success in its monopolization case against Microsoft, and the Reagan administration's decision to close the its monopolization case against IBM. Big cases that fail may also carry symbolic weight, although they do not stand for what was intended by the agency that initiated them. *Cf.* Kovacic, *supra* note 24, at 1108 (“Never in antitrust history has so massive a litigation program yielded such disappointing results.”) (describing how the government's monopolization case against IBM and its “shared monopoly” initiatives fell apart).

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# William E. Kovacic

## An Antitrust Tribute *Liber Amicorum* - Volume II

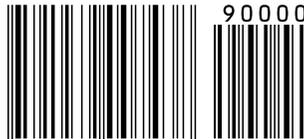
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