*CPI's North America Column Presents:*

# Before "After Consumer Welfare" -- A Response To Professor Wu

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## Introduction

In a short article *After Consumer Welfare, Now What? The "Protection of Competition" in Practice,* Professor Tim Wu proposes abandoning the "consumer welfare" ("CW") paradigm in favor of a "return to the 'protection of competition' as the recognized goal of American antitrust law".[3] Wu reasons that the CW paradigm is not faithful to Congress' intent in enacting the antitrust laws and is defended by its proponents, instead, on instrumental or policy grounds. But, Wu argues, the CW paradigm should be rejected even on those grounds. Wu's argument, however, rests on a misunderstanding of antitrust law under the CW paradigm and is wrong as a policy matter.

## I. The Fundamental Flaw in Wu's Analysis

The "fundamental and important difference between" the CW paradigm and the "protection of competition" standard, according to Wu, is that the former "seeks to maximize some value" while the latter "is designed to protect a process." As a result, Wu argues, antitrust law asks enforcers and judges to act as regulatory maximizers, rather than simply "calling out fouls and penalties."

That distinction is not correct. There is, to be sure, abundant rhetoric in antitrust literature about maximizing consumer welfare, but that is not how antitrust law and the CW paradigm actually work or what they mean. Antitrust law prohibits the creation or increase of market power by conduct that is not competition on the merits.[4] Period. There are two elements to an antitrust violation: bad conduct and more market power than there would be absent that conduct. Bad conduct is, to oversimplify, conduct that does not reduce costs or price or increase output or product quality (including innovation). Such conduct can create or increase market power only by either coordinating the conduct of rivals and thus reducing competition among them, such as by a price fixing cartel, or by weakening competitors and thus decreasing market rivalry, such as by tying arrangements or exclusive dealing – only, in other words by undermining the competitive process. Antitrust law does not prohibit conduct just because there might be more efficient alternatives or because the court or enforcer determines that the conduct failed to maximize consumer welfare. Nor does antitrust law prohibit the creation of market power by competition on the merits.

Instead, the CW paradigm serves two very different but nonetheless important functions. Requiring judges and enforcers "to maximize some value" is not one of them. First, the CW paradigm cabins antitrust enforcement to economic matters rather than a hodgepodge of political and social objectives. Second, it provides a criterion to guide the formulation and case-by-case application of the specific rules – the "fouls," to use Wu's term – of antitrust law.[5] As will be seen, both elements of the antitrust offense in the CW paradigm are about "protect[ing] a process."

## II. Wu's Criticisms of the CW Paradigm

Wu makes two specific policy arguments against the CW paradigm. First, use of CW as a decisional standard biases antitrust law toward a focus on short term price increases and causes it to overlook nonprice and "dynamic harms" like anticompetitive exclusion, reduced innovation, loss of quality competition and industry stagnation. Second, because "contemporary consumer welfare driven antitrust" conditions enforcement on "economic criteria" characterized by "indeterminacy" and "abstraction", antitrust practice is reserved to an elite class of experts, often economists, leading to a "democratic deficit". As Wu explains it, the second problem compounds the first because antitrust decision makers have incentives to place an emphasis on the simplest cases like price fixing and mergers with clear price effects. Both arguments are flawed.

### A. The Price Fixation Problem

As Wu tells it, the CW paradigm causes a "price fixation" in antitrust analysis. It leads antitrust decision makers to use a "narrow lens" and to focus on possible deviations from the competitive price equilibrium and to neglect dynamic, non-price related harms.[6]

Price information is often the most readily available and the easiest to compare over time and across markets. And like others, antitrust lawyers and economists may look for the lost keys under the lamppost because that is where the search is easiest. But CW is not antitrust's version of the drunkard's search problem. There is nothing about the CW paradigm that inherently confines the antitrust inquiry to static analysis or a focus on prices. To the contrary, since the early 20th Century, economists have used "consumer welfare" and "consumers' welfare" to encompass various hedonic properties of competitive markets: "utility", "pleasure", "satisfaction", "benefit" or "gratification", "surplus", "wealth", "wants", etc. and not strictly as meaning a price valuation.[7] Across the world, CW-spirited antitrust regimes have thus focused on entry barriers, incipient exclusion, dynamic competition, innovation, quality and choice.[8]

To put the point differently, when economists draw demand (and supply) curves, they are often not literally talking about prices. Instead, they are depicting a metaphor that represents marginal benefit (and costs) from which one can infer a rich set of individual preferences not confined to a dollar valuation. A consumer's price point on the demand curve denotes, for example, a quality-adjusted marginal benefit. The slope of the demand curve reflects consumers' actual and potential alternatives in and out of the market. Upwards and downwards shifts of the demand curve reflect dynamic competition and innovation, or lack thereof. Downward shifts of the supply curve reflect innovation and increased efficiency. There is nothing about antitrust nomenclature or metaphors that restricts the focus to static price analysis.

The cases make this clear, for they have often emphasized the very dynamic, non-price harms with which Wu is concerned. At least as early as Judge Hand's seminal 1945 decision in *United States v. Aluminum Co. of America*, antitrust law has been keenly interested in dynamic competition and entry. The court held that Alcoa had unlawfully prevented new entry[9] and articulated the concern about monopoly power by noting that "possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity

from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone".[10]

Cases decided after the triumph of the CW paradigm in the late 1970s or early 1980s are to the same effect.[11] The Supreme Court's 1985 *Aspen Skiing* decision underlines the role of loss to quality competition in modern, economics-focused Section 2 jurisprudence.[12] The Court based its conclusion that the defendant Ski Co., had unlawfully refused to deal with its smaller rival Aspen Highlands in large part on evidence that consumers valued the All-Aspen ticket, which "provided convenience and flexibility, and expanded the vistas and the number of challenging runs available to [the skier] during the weeks' vacation".[13] In *Jefferson Parish*, too, which concerned a tying arrangement, the Court focused, not on price, but on the fact that tying harms consumers when "freedom to select the best bargain in the second market is impaired by [the consumer's] need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package".[14] And in *U.S. v. Microsoft Corporation*, the court condemned practices, unrelated to price, that threatened to raise entry barriers and thus a slowing of innovation.[15]

The problem is not that the CW paradigm conceptually requires or even is biased toward a focus on prices. The problem is a practical one: some data are easier to obtain and some facts are easier to establish. As all decision-makers, antitrust agencies and courts are understandably constrained in their ability to discover facts that are imperfectly observable (e.g., successful entry deterrence), measurable (e.g., product quality) or predictable (e.g., innovation and technological progress).

Antitrust law can deal with this practical challenge in one or more of these three ways without jettisoning the CW paradigm: first, it can err on the side of humility and accept that practical constraints limit ability to reach ideal decisional outcomes or even case selection; to some extent, antitrust law has done that. An example of that is the refusal to condemn a merger based on mere speculation that it might lead to some anticompetitive outcome, like predatory pricing or unmeritorious patent suits.[16]

Second, it can stimulate efforts to find new ways to prove previously hard-to-prove propositions. Antitrust academics, lawyers and economists have done that by, for example, developing various formal and empirical tools, such as those described in the agencies' merger guidelines for defining markets as a proxy for measuring market power.[17] The widespread recognition that yesterday's static and slowly evolving markets are being replaced by dynamic markets characterized by winner takes all competition, multi-sided platforms, network effects, and often utilization of big data and provision of services for a zero nominal price will no doubt stimulate similar advances in the future.

Third, antitrust law can replace rules that require detailed factual assessment of individual cases with simpler, more categorical rules, such as the *per se* prohibition of price fixing; the modified *per se* rule applicable to most tying arrangements under Jefferson Parish; presumptions such as those used in horizontal merger analysis: and abbreviated rule of reason standards which do not require plaintiffs to prove harm to competition. While antitrust law moved away from such short-hands in recent years, there is nothing about the CW paradigm that would preclude a movement of the pendulum in the other direction, as

evidenced by past episodes of antitrust expansion in monopolization doctrine and enforcement policy.[18]

As Wu sees it, however, the proof is in the pudding, and the CW paradigm, "in practice, has proven a narrow lens that suffers from many well-documented infirmities."[19] The alleged "infirmities," however, turn out to have little to do with the CW paradigm.

"Price fixation," Wu suggests, makes it harder to fight exclusionary practices.[20] But most proven exclusion cases have little, if anything, to do with price. Most concern conduct like exclusive dealing, most-favored-nations clauses, tie-ins and tie-outs, refusals to deal, and sometimes tortious damaging of a rival's property or misrepresentations.[21] It is certainly possible that predatory pricing law has been too deferential to defendants and has thus deterred or wrongly decided sound cases challenging excessively low prices. But that inhospitality to pricing cases can hardly be called a problem of price fixation, and its correction does not require abandonment of the CW paradigm.[22]

Because the CW paradigm is by nature empirical, it has fostered ongoing debate and research about and evolution of antitrust standards, much of which has concerned exclusionary conduct. Since the triumph of the CW paradigm in the 1980s, the very economists and "lawyers pretending to be" economists whose prominence in antitrust law troubles Wu have developed a rich understanding of anticompetitive tactics for raising rivals' costs by non-price exclusionary practices that seem more likely to undermine competition than the pricing practices on which so much pre-CW paradigm antitrust law was focused. Wu undervalues the "dynamic potential" of the antitrust laws to evolve within the CW paradigm in response to new market developments or poor enforcement performance.[23]

More generally, Wu alleges, the CW paradigm is "too restrictive" in the sense that antitrust law prohibit less that it is designed to. It is hard to win an antitrust case. That is because antitrust precedent has been heavily influenced by (i) beliefs that false positives are more costly than false negatives and (ii) a concern about the predictability of legal rules with which companies are expected to comply. The case-law has thus both required high standards of proof of unlawful conduct in the particular case and formulated specific legal rules that limit risks of false positives when uncertainty is unavoidable.

The CW paradigm does not require any of this. Consider, for example, the courts' greater concern about false positive than about false negatives. That rests on empirical beliefs, specifically the premise that "errors on the side of excusing questionable practices are preferable" because markets almost always end-up self-correcting.[24] That view has been criticized on the grounds that it "relies too greatly on average tendencies" and the "implied time horizon for self-policing to be efficacious may be unacceptably long."[25] Moreover, the greater willingness to risk false negatives tends to treat all false negatives alike and overlooks tail risks, namely low-probability harms with irreversible effects that might be implicated in dynamic, multi-sided, heterogeneous markets with winner takes all dynamics, lock-in and network effects.

If we believe that consumer or economic welfare is more likely to be harmed by false negatives than false positives in general or in certain kinds of cases, the balance embedded in antitrust doctrine can be recalibrated. The recalibration could take the form of increased recourse to

presumptions or incipiency tests in merger or unilateral conduct assessment (e.g., the *Philadelphia National Bank* presumption),[26] new threshold rules for specific restraints (e.g., exclusive dealing agreements longer than X years shift the burden of proof to the defendant); relaxing evidentiary requirements, such as belief that *Brooke Group*[27] requires meticulous proof of both below-cost pricing and recoupment in the same (monopolized) market and/or in the short term;[28] and changing the conduct requirements themselves (e.g., refusals to deal and patent manipulation).

Alternatively, if concerns about enforcement errors are seen as more important than predictability, the law can move from relatively rigorous rules to more comprehensive factual balancing on a case-by-case basis.[29] Or if it is concluded that fact-intensive antitrust cases inevitably lead to false negatives or deter enforcement altogether, the law could move to simpler *per se* or quasi *per se* rules.[30]

There is an important, ongoing debate about whether antitrust doctrine – the way in which the CW paradigm has been applied – is optimal. There are good reasons to think that changes are in order. The problems are rooted in judgments about how markets work and how economic harms can be identified and deterred. These are ultimately empirical problems. They are not inherent in, and the solutions are not precluded by, the CW paradigm.

### B. The Indeterminacy Problem

The article's second attack against CW driven antitrust is that it is "indeterminate", leading to a concern of "democratic deficit". A "democratic deficit" sounds like a bad thing, but it is far less of a problem than the rhetoric suggests.

Antitrust law is arguably undemocratic in one sense. The short, simple and imprecise economic language used in statutes enacted more than 100 years ago has been given meaning following a common law-like process implemented through thousands of cases litigated in federal courts over many decades. But Wu's complaint is not that antitrust doctrine has been largely built by lay judges rather than elected legislators. It is, rather, that antitrust law has been captured by technocrats living in their own, self-referential world. Notably, however, the normative choices – including the foundational decisions that antitrust law should be about bad conduct and market power – have been made by generalist judges, as is the case with vast amounts of US law. The economists' special role has been, and remains to this day, confined to what in a legal context are significant yet factual issues: establishing market power, measuring efficiencies, estimating damages, etc. There is nothing wrong or undemocratic about relying on fancy tools and experts to help solve tough factual issues (like forensic analysis in criminal cases).

More generally, many areas of law involve arcane rules, often require expert input, and are not accessible to the general public. These include bankruptcy law, health law, tax law, environmental law, mass tort law, labor law, and countless others. It is far from clear that systems of law would be better if, in order to make law simpler and more democratic, they relied on simpler rules that did not attempt to take into account the complexity, heterogeneity and multidimensionality of the problems addressed by the legal system.

To be sure, the CW paradigm does create a certain kind of complexity because it confines antitrust law to a focus on economic welfare and applied economics often involve difficult and sophisticated problems. Perhaps as a consequence, there is no really useful "*Antitrust for Dummies*" book. But that problem – if it is a problem – will surely not be solved if antitrust law is made less "restrictive" by adding other, non-economic objectives to the economic objectives with which it is already concerned.

A straightforward alternative to make antitrust law more accessible – more "democratic" – would consist in using more *per se* rules and presumptions to simplify antitrust decision making. Nothing in the CW paradigm prevents that. It is not obvious, however, that this would improve the law. *Per se* rules, presumptions and other short-hands involve the same, long-studied tradeoff as that involved in the choice between rules and standards – clarity, predictability and reduced enforcement costs versus increased likelihood of an outcome in the individual case that furthers the substantive purposes of the law.[31]

Somewhat paradoxically, Wu complains that one consequence of antitrust law's indeterminacy is that economic experts – and "the occasional lawyer pretending to be one" – dominate the formulation of "credible" arguments in antitrust cases. This, Wu argues, "has led enforcers to place an emphasis on price-fixing cases or horizontal mergers that can be shown to have clear price effects over more complex but potentially much more important cases."

There are a number of problems with this argument. First, if economists wanted to push antitrust law in a direction that would reward their unique skills, they would direct the law toward arcane and esoteric matters, not toward conceptually simple price-fixing and horizontal merger cases. Second, the CW paradigm has nothing to do with any bias toward some types of cases rather than others except to the extent that the paradigm is a way of saying that antitrust law is about economic welfare, rather than a more complex amalgam of economic and non-economic objectives. Third, Wu does not identify the "more complex but potentially important cases" that are currently untouched by the antitrust system and thus does not address the ongoing policy discussions undertaken within the CW paradigm regarding, among other subjects, (i) antitrust harms on a variety of markets other than product and services, like labor markets or capital markets,[32] and (ii) the suppression of incentives for innovation and entrepreneurial initiative.[33]

Most important, the indeterminacy problem is vastly overstated. The primary function of antitrust law is to deter anticompetitive conduct without discouraging procompetitive conduct. For the most part, the law is not indeterminate. The substantive legal commands are widely accessible and understood. Every sentient business person knows that she should not enter into price fixing agreements or allocate customers with competitors or engage in conduct that benefits her firm only by harming rivals. Of the millions of decisions that business people make every day, only a miniscule portion require the guidance of lawyers and economists, and an even smaller number become the subject of costly and uncertain litigation.

## III. Wu's Preferred Paradigm

Wu would replace the CW paradigm with a focus on "protection of competition" or "protection of the competitive process." That, he says, is "different than the maximization of a value [like consumer welfare]. The legal system often does better trying to protect a process" than maximizing a value.

Wu's proposal seems to us to be deeply flawed. First, as explained above, it rests on a misunderstanding of how antitrust law and the CW paradigm actually work. The paradigm establishes normative – policy – criteria to inform antitrust doctrine, but it does not require or induce antitrust decision makers to maximize consumer welfare or any abstract value. To the contrary, antitrust law simply prohibits certain types of conduct, just as would Wu's preferred alternative. In his bestselling 2010 book *The Master Switch*, Wu praised antitrust law's superiority over sector specific regulation on the ground that antitrust law consists of a list of *negative* rules – "*thou shall not*" – enforced by prosecutorial authority.[34]

Second, it is not clear how "protection of competition" or the "competitive process" differs from the CW paradigm. Wu's articulation of the protection of competition paradigm sounds an awful lot like the conduct element in the CW paradigm. Wu refers to "competition on the merits," "raising of rivals' costs," and "anticompetitive effects" – all terms of art that are central to antitrust law in the CW paradigm. Indeed, the conduct element in contemporary antitrust law requires proof of conduct that is not competition on the merits, conduct that constitutes what Wu calls a "distortion of the competitive process".[35]

Wu identifies a number of questions that "the enforcer should ask" and that Wu believes would "capture far more of the dynamics of the competitive process than does existing analysis". Most of them – who is the complainant, who is the alleged lawbreaker, what is the complained of conduct, is there evidence of anticompetitive effects – are the bread and butter of everyday antitrust law. One does not need to abandon the CW paradigm to put these questions front and center.

To these, Wu adds a new question: "Does the complained-of conduct or merger tend to implicate important non-economic values, particularly political values?" The question whether antitrust law should reject the lodestar of economic welfare is beyond the scope of this paper and does not seem central to Wu's critique of the CW paradigm. For now, we can say only that this suggestion is hardly an antidote to "indeterminacy." Wu neither identifies the "political values" he has in mind nor suggests any kind of algorithm or clear standard for taking such values into account in antitrust decisions. He seems instead to invite an opaque, ad hoc, multi-factor balancing that seems unsuited for judges and, even less so, for lay juries or other more "democratic" decision-makers.

Third, Wu would have antitrust liability turn entirely on the defendant's conduct and would eliminate the requirement that the conduct at issue be shown to increase or be likely in the future to increase the defendant's market power. This change does not require rejecting the CW paradigm because antitrust law can in principle consist entirely of *per se* and other rules that focus exclusively on the defendant's conduct (and perhaps its effect on certain rivals) and do not require proof of market power effects.[36] Whether the change would be wise as a policy matter is another matter.

The market power element in U.S, antitrust law serves several important purposes. In the first

place, it limits antitrust enforcement to those cases that have a material impact on competition and thus serves to weed out cases that do not warrant the often costly and burdensome intrusion of antitrust investigation and litigation. It rests on a reasonable expectation that, absent market power, the market will quickly correct inefficient conduct; and it serves a screening function that reduces the incentive for disgruntled rivals or other third parties to turn every marketplace dispute or alleged misdeed into an antitrust case.

In the second place, the market power requirement reduces antitrust compliance costs because it enables firms to act without consulting antitrust lawyers and economic consultants for the vast multitude of matters that plainly do not implicate increased market power. While bundled discounts, for example, can raise difficult antitrust issues, the market power screen enables us readily to determine that a McDonald's "Happy Meal" is not unlawful.

Perhaps the weightiest justification for the market power requirement it that it ensures that antitrust law remains focused on the competitive process and is not looked to as a remedy for all sorts of undesirable commercial conduct. The courts in recent years have made clear that even objectionable conduct that results in higher prices violates the antitrust laws only if it undermines the efficacy of market competition. – only if, in other words, it undermines the competitive process.[37]

The market power requirement reduces the likelihood of false positives because it requires the plaintiff in most cases to establish a second fundamental element. But that requirement also both increases the likelihood of false negatives and, because it broadens an antitrust case, antitrust enforcement costs. Whether these effects are on balance desirable or undesirable is a fair subject for debate. Maybe an optimal antitrust regime would have more *per se* or quick look rules that do not require proof of market power. That debate does not require reexamining or abandoning the CW paradigm.

## Conclusion

Tim Wu is unhappy about the state of antitrust enforcement and the apparent economy wide increase in industry concentration and corporate power. So are many others. These important issues warrant investigation and analysis. But the CW paradigm is not the culprit, and replacing it with a "protection of competition" paradigm is not the solution.

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[3] *See* Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" in Practice*, CPI ANTITRUST CHRONICLE (May 2018) [hereinafter *Wu*].

[4] *See* A. Douglas Melamed, *Antitrust Law Is Not That Complicated*, 130 HARV. L. REV. F. 163 (2016).

[5] There is debate within the CW paradigm as to whether antitrust law is or should be focused on consumer welfare (literally, the welfare of consumers or perhaps all trading partners) or more broadly on total welfare (including the welfare of producers). Wu's critique does not raise this issue.

[6] Lina Kahn makes a similar criticism. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2016) (arguing that antitrust law cannot challenge Amazon's long term predatory pricing policy under existing doctrine).

[7] *See* C. W. Guillebaud, *The Evolution of Marshall's Principles of Economics*, 52 THE ECONOMIC JOURNAL 330 (Dec. 1942); ABBA P. LERNER, THE ECONOMICS OF CONTROL (1946); Simon Kuznets, *On the Valuation of Social Income-Reflections on Professor Hicks' Article. Part I*, 15 ECONOMICA 1 (1948); Oskar Lange, *On the economic theory of socialism: part one*, 4 REV. ECON. STUD. 53 (1936).

[8] For example, the CW-spirited European Commission Guidance Paper on exclusionary conduct states that: "*In this Communication, the expression 'increase prices' includes the power to maintain prices above the competitive level and is used as shorthand for the various ways in which the parameters of competition — such as prices, output, innovation, the variety or quality of goods or services — can be influenced to the advantage of the dominant undertaking and to the detriment of consumers*". *See* Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, ¶ 11 (2009/C 45/02).

[9] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (Alcoa had "effectively anticipated and forestalled all competition"; "[I]t is no excuse for "monopolizing" a market that the monopoly has not been used to extract from the consumer more than a "fair" profit").

[10] Id.

[11] The triumph of CW is often dated to the Supreme Court Opinion in Continental T.V., Inc., v. GTE Sylvania Inc., 433 U.S. 36, 53 n.21 (1977).

[12] Aspen Skiing v. Aspen Highlands Skiing, 472 U.S. 585 (1985) (discussing how the elimination of the all-Aspen ticket prevented "*consumers to make their own choice on these matters of quality*").

[13] Id. (based on "*statistical measures of consumer preference*").

[14] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16, 21 n.34 (1984).

[15] United States of America v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001).

[16] Herbert J Hovenkamp, *Prophylactic Merger Policy*, PENN LAW: FACULTY SCHOLARSHIP (2018).

[17] See, for instance, U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) at para 6.1 in relation to upward pricing pressure (UPP) analysis, available at http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

[18] *See* William E. Kovacic and Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, n.13 (2000).

[19] *See* Wu ("*the consumer welfare standard, in practice, has proven a narrow lens that suffers from many well-documented infirmities. Despite the often brilliant ability of economists to make consumer welfare arguments, the emphasis on measurable harms to consumers still tends to bias the law toward a focus on static harms and, especially, on prices. Such "price fixation" inevitably tends to marginalize parts of the antitrust law concerned with dynamic harms – harms like the blocking of potential competition, slowing of innovation, loss of quality competition, and overall industry stagnation*").

[20] *See* Wu ("*price fixation makes it harder to fight exclusionary practices, both unilateral and collusive*").

[21] *See* Conwood Co. v. United States Tobacco Co., 290 F. 3d 768 (6th Cir. 2002); United States v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001).

[22] *See*, e.g., C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048 (2018).

[23] *See* Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176, 2195 (2018).

[24] *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

[25] *See* Oliver Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512 (1972).

[26] United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

[27] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[28] United States v. AMR Corp., 335 F.3d 1109, 1115 n.6 (10th Cir. 2003).

[29] *See* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311 (2006).

[30] *See* Eric A Posner, Fiona M. Scott Morton, and E. Glen Weyl, *A proposal to limit the anti-competitive power of institutional investors* 81 ANTITRUST L.J. (2017).

[31] *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992); Isaac Ehrlich and Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3(1) J. LEGAL STUD. 257 (1974) (Both articles envision the tradeoff in costs terms, and identify the same cost components. The main difference is that Erlich and Posner discuss to the over and under inclusiveness of rules, which Kaplow finds less salient, because standards can too be over and under inclusive.)

[32] *See* Eric A Posner, Fiona M. Scott Morton, and E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors* 81(3) ANTITRUST L.J. (2017).

[33] *See* Nicolas Petit, *Innovation Competition, Unilateral Effects and Merger Policy*, ANTITRUST L.J. (forthcoming, subject to revision prior to publication, 2018).

[34] TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 315 (2012).

[35] It is a little more complicated than that because, for legal process reasons, conduct rules are in some instances (e.g., the rules about predatory pricing) simplified and do not map precisely to a definition of competition on the merits. *See* A. Douglas Melamed, *Antitrust Law Is Not That Complicated*, 130 HARV. L. REV. F. 163 (2016).

[36] Wu says at the end of his paper that "a process-driven approach," by contrast to the CW paradigm," is not "*tied to arguments about whether, in the final analysis, consumer welfare has been served or not.*" It is not clear what this means or whether it is correct. It seems indisputable that a robust, healthy competitive process tends to promote economic welfare, even if not every effort to protect that process promotes welfare in the individual case. In this respect, *per se* rules in the CW paradigm are no different. See, e.g., Continental T.V., Inc. v. GTW Sylvania Inc., 433 US 36, XX (1977) (the *per se* rule applies to "*practices which because of their pernicious effect on competition and lack of any redeeming virtue*" are unlawful regardless whether they harm competition or welfare in the individual case) (quoting Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958).

[37] In *NYNEX*, for example, the Supreme Court explained that a scheme to defraud secular regulators in order to charge higher prices did not violate the antitrust laws because it did not affect the defendant's monopoly position and thus the competitive process. *See NYNEX Corp. v. Discon*, Inc., 525 U.S. 128 (1998). And in *Rambus*, the court held that misleading conduct that enabled the defendant to avoid a contractual restriction on its prices did not violate the antitrust law for the same reason. *See Rambus Inc. v. FTC*, 522 F.3d 456, 466–67 (D.C. Cir. 2008).