CONSUMER WELFARE AND THE COMPETITIVE PROCESS

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Should antitrust promote economic welfare or protect the competitive process itself? Defenders of the 'consumer welfare standard' contend that the law should maximize a welfare outcome, while critics suggest that antitrust policy should instead focus on the preservation of the competitive process. This paper argues that both answers are incomplete and share an underlying conceptual fallacy: conflating normative goals with legal tests for anticompetitive conduct and liability. First, the paper shows that a consumer welfare goal does not automatically translate into legal tests based on consumer surplus. Rather, an element of process is already embedded in antitrust liability under the consumer welfare standard. Second, the paper argues that approaches seeking to adopt the competitive process both as a goal and a legality test remain normatively indeterminate and fail to provide a coherent alternative. Emphasis on process, however, has a valuable role in redirecting antitrust debates toward reassessing the optimal balance between Type I and Type II errors. From an error-costs perspective, the problem of the consumer welfare standard is not a lack of concern for process, but the very notion of competitive process that it already embeds.

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INTRODUCTION

There is longstanding controversy regarding the optimal goals of antitrust. The mainstream interpretation is that modern competition policy promotes "consumer welfare."[1] The term was originally popularized by Robert Bork in *The Antitrust Paradox*[2] and reflects the ascendance of the Chicago School and its growing influence on antitrust policy in the United States and other jurisdictions beginning in the 1970s.[3] Chicago thinkers argued that economic theory should be the sole guide of antitrust enforcement and synthetized this view using a new label – the consumer welfare standard (CWS) – to advance

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[1] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); Robert H. Bork, *The Goals of Antitrust Policy*, 57 THE AMERICAN ECONOMIC REVIEW 242 (1967); Herbert Hovenkamp, *The Slogans and Goals of Antitrust Law*, FACULTY SCHOLARSHIP AT PENN CAREY LAW (2022), https://scholarship.law.upenn.edu/faculty_scholarship/2853 [hereinafter *Slogans*]; Herbert Hovenkamp, *On the Meaning of Antitrust's Consumer Welfare Principle*, REVUE CONCURRENTIALISTE (2020), https://scholarship.law.upenn.edu/faculty_scholarship/2152; Steven Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOYOLA CONSUMER LAW REVIEW 336 (2010); A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REVIEW OF INDUSTRIAL ORGANIZATION 741 (2019); Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710 (2017); *In Defence of the Consumer Welfare Standard*, THE ECONOMIST, https://www.economist.com/leaders/2022/01/29/in-defence-of-the-consumer-welfare-standard; Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 THE JOURNAL OF CORPORATION LAW.

[2] BORK, *supra* note 1.

[3] Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); Hovenkamp, Herbert J. & Scott Morton, Fiona, *Framing the Chicago School of Antitrust Analysis*, FACULTY SCHOLARSHIP AT PENN CAREY LAW (2020); JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY (2019); JONATHAN TEPPER & DENISE HEARN, THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION (2018); F. M. Scherer, *Conservative Economics and Antitrust: A Variety of Influences*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008); Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARVARD BUSINESS REVIEW, Dec. 2017, https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement; Herbert Hovenkamp, *Chicago and Its Alternatives*, 1986 DUKE LAW REVIEW 6 (1986); Nicola Giocoli, *Old Lady Charm: Explaining the Persistent Appeal of Chicago Antitrust*, 22 JOURNAL OF ECONOMIC METHODOLOGY 96 (2015); Anu Bradford, Adam Chilton & Filippo Lancieri, *The Chicago School's Limited Influence on International Antitrust*, 87 U. CHI. L. REV. 2 (2019); Filippo Lancieri & Luigi Zingales, *The Political Economy of the Decline in Antitrust Enforcement in the United States*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (2022), https://corpgov.law.harvard.edu/2022/10/06/the-political-economy-of-the-decline-in-antitrust-enforcement-in-the-united-states/.

a theoretical and doctrinal shift away from the pursuit of broader social objectives such as the protection of small businesses, inequality, fairness, and control of corporate bigness and undue political influence.[4] The consumer welfare label was later adopted in US jurisprudence and other antitrust regimes to endorse an economic framework focused on allocative efficiency and competitive prices for consumers.[5]

Contemporary debates have resurrected perennial dilemmas on the role of socio-political considerations beyond concerns for price and output.[6] Among others, Neo-Brandeis critiques[7] identify the consumer welfare standard as the main culprit for the weakening of antitrust enforcement, condemning its consumer-centric focus for being unduly fixated on short-term price effects[8] and for neglecting broader and far more relevant social ills resulting from private concentration of economic power, including the growing political influence of large corporations.[9]

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[4] See ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); Robert H. Bork, *The Goals of Antitrust Policy*, 57 THE AMERICAN ECONOMIC REVIEW 242 (1967); Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 THE JOURNAL OF CORPORATION LAW; Francesco Ducci & Michael Trebilcock, *The Revival of Fairness Discourse in Competition Policy*, 64 THE ANTITRUST BULLETIN 1 (2019).

[5] See however Lancieri & Zingales, *supra* note 3.

[6] Carl Shapiro, *Antitrust in a Time of Populism*, 61 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION (2018).

[7] See for example Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 131 (2018); Khan, *supra* note 1; Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370 (2014); *Hipster Antitrust*, CPI ANTITRUST CHRONICLE (Apr. 2018), https://www.competitionpolicyinternational.com/antitrust-chronicle-hipster-antitrust/. See also Ioannis Lianos, *Polycentric Competition Law*, 71 CURRENT LEGAL PROBLEMS 161 (2018); *What More Should Antitrust Be Doing?*, THE ECONOMIST (Aug. 7, 2020), https://www.economist.com/schools-brief/2020/08/07/what-more-should-antitrust-be-doing

[8] Common criticisms include that the standard neglects longer term effects of anti-competitive conduct on quality and innovation; that its emphasis on price effects fails to capture the growing importance of zero-price markets, where advertising-based services are provided for free in exchange for users' data; as well as broader public interest goals such as inequality and sustainability. See Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 THE ANTITRUST BULLETIN 479 (2019); Leah Samuel & Fiona Scott Morton, *What Economists Mean When They Say "Consumer Welfare Standard",* PROMARKET (Feb. 16 2022), https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists/.

[9] See for example: Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. F. 960 (2018); Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE JOURNAL OF CONSTITUTIONAL LAW AND PUBLIC POLICY 1 (2014); Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*

In recent times, however, a different strand of criticism extends beyond the merit of multiple, non-economic objectives and targets an even more fundamental theoretical premise of modern antitrust: the *welfarist* foundation of the consumer welfare standard. The premise of this critique is that testing the legality of conduct by exclusive reference to an abstract and unmeasurable welfare maximizing outcome[10] is detached from competitive market realities and ultimately an impossible task for a legal system.[11] The proposed alternative is to reorient the antitrust regime toward the protection of the *competitive process* or *competition* itself, without reference to welfare. Tim Wu, among other commentators, offers a succinct summary of the proposed alternative paradigm:[12]

> I think the antitrust law should return to a standard more realistic and suited to the legal system — the "protection of the competitive process" […] It posits a basic question for law enforcement and judges. Given complained-of conduct, is that conduct actually part of the competitive process, or is it a sufficient deviation as to be unlawful? In this view, antitrust law aims to create a body of common-law rules that punish and therefore deter such disruptions — hence "protecting the competitive process." At the risk of abusing a metaphor, the question is, in many ways, not unlike that faced by a sports referee in football or soccer. One player tackles another. Is the maneuver actually part of the competition (a legal tackle), or something that

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(2018). For broader discussion on antitrust and politics, see: Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV.1051 (1979); Andrea Prat, Tommaso Valletti, Bo Cowgill, *Political Power And Market Power: Evidence From Mergers*, CEPR (2022), https://cepr.org/voxeu/columns/political-power-and-market-power-evidence-mergers; Sepehr Shahshahani & Nolan McCarty, *Testing Political Antitrust*, (2023), N.Y.U. L. REV. (forthcoming).

[10] Tim Wu, *After Consumer Welfare, Now What? The "Protection of the Competitive Process" Standard*, COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 14-612 (2018); Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 THE ANTITRUST BULLETIN 479 (2019). See also discussion in A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REVIEW OF INDUSTRIAL ORGANIZATION 741 (2019).

[11] Jonathan Kanter, *Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture*, United States Department of Justice (May 18 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association

[12] Tim Wu, *After Consumer Welfare, Now What? The "Protection of the Competitive Process" Standard*, COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 14-612 (2018).

> threatens the competitive process itself […] But unfortunately the "consumer welfare" approach has tended to take antitrust away from this key and central inquiry, and weakened the common law development of rules or standards.[…] It is not unlike asking our referee not only to assess that an illegal maneuver was used in a football game, but then also prove that it *also* harmed the fans watching the game. That would be an absurd undertaking — how would we ever know? Yet here we are.

Interestingly, disputes about the merit of a competitive process standard are harder to classify than traditional attacks on consumer welfare. The latter are usually categorized as being a clash between conservatives, mainstream progressives, and populists,[13] or Chicago, post-Chicago, and Neo-Brandeis view.[14] In contrast, arguments in favour and against the competitive process cut across philosophical camps. The term is both criticized and endorsed by economists and non-economists alike and is frequently used in conjunction with disparate considerations relating to market structure, market openness, freedom of choice, as well as economic welfare analysis. Case law is also ambiguous on this issue, as decisions refer to the *Sherman Act* as being a "consumer welfare prescription"[15] while also routinely describing its mission as preserving the "competitive process"[16] and "competition itself".[17] For these reasons, current debates on the competitive process paradigm pose a seemingly relevant question for existing debates on the goals of competition policy—*should* antitrust be based on a measure of welfare or should it seek to protect some defined notion of the competitive process itself without reference to welfare considerations?

This question, however, glosses over a prior and equally important descriptive question, which is the focus of this paper: to what extent *is* the current antitrust paradigm welfare-based or process-oriented? Through the analysis of this issue, this paper seeks to challenge the premise that consumer

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[13] Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST LAW JOURNAL (2020);

[14] Jonathan B. Baker, *Finding Common Ground Among Antitrust Reformers*, 84 ANTITRUST LAW JOURNAL (2022).

[15] Reiter v. Sonotone Corp., No 78-690, 442 U.S. 330 (1979).

[16] See United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001). See also Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 40 (2014).

[17] Spectrum Sports, Inc. v. McQuillan, No. 91-10, 506 U.S. 447, 459 (1993). Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 40 (2014), footnote 89; Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437 (7th Cir. 1986); Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986).

welfare is a welfarist standard. In contrast, it suggests that a more consistent interpretation of consumer welfare is that it already seeks to protect the competitive process. In so doing, the paper leaves aside the vexed issue of non-economic objectives' role in competition law and concentrates instead on the relationship between welfare and process within an economic paradigm of antitrust policy. Showing that the current standard already embeds an element of process as a necessary element of antitrust liability is salient, as it can help clarify the normative, substantive, and procedural implications of a potential shift toward an alternative, competitive process standard.

In order to develop this analysis, this paper proposes an analytical framework that separates two normative dimensions and levels of examination: (1) a question about *antitrust goals* (what is the general justification of antitrust law as public policy against market power); and (2) a question about *legal tests for antitrust liability* (how to distinguish between anticompetitive and benign practices in specific areas of enforcement). As will be discussed more in detail later in this paper, these two dimensions have independent value and should not be conflated.[18] This distinction, however, remains largely ignored in antitrust debates. Questions on desirable goals of antitrust policy serve to demarcate the role of economic and non-economic considerations in antitrust policy as a whole. They do not necessarily provide a legal test or methodology for the assessment of antitrust liability in discrete cases. Unlike a policy goal, antitrust liability is filtered through anticompetitive *conduct,* which in turn necessarily starts from a distortion of the competitive process and therefore is not subsumed by pure welfare analysis. Moreover, legal tests cannot be analyzed at the general level, treating competition law as a uniform corpus of legal principles, but instead require looking at the specificities of different subdomains of enforcement (mergers, horizontal and vertical agreements, unilateral conduct). For several reasons highlighted throughout this paper, a given normative goal may at times be better vindicated by a legal test *other than* the maximization of the goal itself.

This distinction between normative goals and legal tests helps reveal that, contrary to conventional wisdom, antitrust agencies and courts do not apply the consumer welfare standard as an equivalent to the concept of consumer surplus in welfare economics. As will be discussed, historically the two terms

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[18] H. L. A. HART, *Prolegomenon to the Principles Of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW, 3-4 (H.L.A. Hart & John Gardner eds., 2008), https://doi.org/10.1093/acprof:oso/9780199534777.003.0001.

were not meant to be synonyms, and antitrust law actively declines opportunities to intervene when action would undoubtably increase consumer surplus. In contrast, the standard is better interpreted as a legal 'term of art' reflecting a general endorsement of economics, while at the same time mixing together concerns about welfare effects, the competitive process, and a specific posture in terms of error-cost balance for enforcement.[19] The coexistence of these factors makes the standard *consequentialist*, but not fully welfarist.

For these reasons, while the consumer welfare standard provides a general answer to the first normative question about goals, it fails to offer a comprehensive description of antitrust liability based on harm to consumer surplus.[20] The paper analyzes this issue in depth by comparing four different pillars of competition law and policy—horizontal agreements, unilateral conduct, vertical restraints, and mergers—and demonstrating how each sub-area displays a unique balance and interplay between welfarism and process considerations. As will be discussed, some areas of antitrust can be described as purely welfarist (mergers), while in other domains the two dimensions co-exist, sometimes harmoniously (horizontal agreements), sometimes in tension (unilateral conduct and vertical restraints). Within the general normative umbrella provided by the consumer welfare standard, an element of process exists and is directly proportional to the importance of *conduct* in each area of enforcement.

Further building on the proposed demarcation between goals and legal tests across different pillars of antitrust enforcement, this paper argues that an economic interpretation of antitrust law would not only reject a competitive process standard, but also favour abandoning the existing consumer welfare label. In particular, economic analysis of market power would identify economic efficiency as the overarching economic goal of antitrust policy, but as argued in this paper, it would also simultaneously recognize that harm to the competitive process, and not welfare harm, is often the most suitable and administrable legal test or liability proxy for several sub-domains of antitrust law. As it will be argued, such characterization properly revolves around conduct that artificially enables, maintains, or enhances market power, and provides a more rational foundation for the strengthening of enforcement through appropriate adjustments to standards and/or burdens of proof in

[19] See infra, Section__.

[20] See also Hovenkamp, *supra* note 1, at 72: "For all of the attention that has been given to consumer welfare or alternative welfare measures as a guiding principle for antitrust, one thing that has largely escaped notice is that courts almost never measure "welfare"".

specific areas of antitrust law.

With regard to general goals, efficiency is not only more consistent with welfare economics than consumer surplus, but it also has the major advantage of focusing on harm to the market— allocative inefficiency or deadweight loss resulting from conduct that artificially reduces constraints on market power—as opposed to harm to particular groups (final consumers? Intermediate purchasers? Workers? Input suppliers? Trading parties?), settling unnecessary terminological disputes created by the consumer welfare standard. Conceptualizing antitrust liability around efficiency does not mean that legality tests are necessarily based on measuring harm to total surplus in specific cases. As will be discussed at length, this is currently not the case with consumer surplus either. Rather, efficiency provides a coherent normative basis to determine what constitutes an anticompetitive distortion of the competitive process—arguably the existing benchmark of antitrust liability. Put simply, the direct task of antitrust law is not to maximize total welfare but to police conduct that artificially removes a constraint on the exercise of market power. Hence, problematic conduct reflects a distortion of the competitive process that *reduces* total welfare.

This perspective adds much needed clarity to various areas of antitrust law. For example, it provides a more coherent basis than consumer welfare for the equivalent per se treatment of price fixing and wage fixing (both are inherent distortions of competition that cause a deadweight loss, regardless of the group that is harmed by the practice). This perspective is also coherent with language used in rule of reason analysis and related standards of proof, which tend to focus on lessening of *competition* rather than the lessening of a welfare standard.[21] Moreover, clarifying that antitrust analysis focuses on the process through which efficiency is reduced, and not on welfare trade-offs, helps better conceptualize competitive problems at play in multi-sided platform markets that naturally involve different groups of users. A more explicit endorsement of economic efficiency raises important questions about the structure of merger review, where welfare analysis has a more central role than other domains of antitrust, and where parties may raise claims about productive efficiency outweighing allocative inefficiency on the basis of total

[21] Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition"); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 603 n.32 (1985): defining anticompetitive conduct as impairment of rivals that does not further competition on the merit.

welfare. As will be explained, however, given the uncertainty surrounding these arguments, there is nothing preventing the control of potential concerns over excessive emphasis on producer surplus and productive efficiency through adequate standards and burden of proofs, or even the use of a different welfare standard in this area.[22]

Endorsing a welfarist interpretation of the competitive process, as opposed to using welfare harm as a direct metric of liability, leaves open an important legal and procedural question related to the balance of error-costs between type I and type II errors. The notion of competitive process implicit in the consumer welfare standard, as least as interpreted in US antitrust law, is one where market power lacks durability and market forces quickly self-correct. The relative benefits of false positives compared to the stickiness of false negatives were well-described by Frank Easterbrook in the influential paper *The Limits of Antitrust*.[23] Economic efficiency as a goal, however, does not necessarily demand a hostile attitude toward risks of false positives and dynamic effects. Given that error-cost assumptions are reasonable but empirically questionable under any overarching objective, the desire to strengthen antitrust should start from re-evaluating their validity for present enforcement. And because such presumptions significantly influence the content of legal standards and burdens of proof, they can have a more profound impact than the choice of antitrust goals. From this perspective, a more constructive criticism of consumer welfare is not that it lacks a concern for process, but rather the very notion of competitive process that it already embeds.

The balance of the paper is as follows. Section I reviews current debates on the competitive process standard as a potential alternative to consumer welfare in antitrust enforcement. Section II explains why neither standard fully conforms with a welfare economics interpretation of competition and market power and suggests an interpretative framework for both paradigms based on a distinction between antitrust goals and legal tests for anticompetitive conduct. Section III then investigates the balance of welfare and process across four distinct pillars of antitrust enforcement: horizontal agreements, mergers, unilateral conduct, and vertical restraints. Section IV discusses substantive and procedural implications. Section V concludes.

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[22] See infra, Section__

[23] Frank Easterbrook, The Limits of Antitrust 63 *Texas L.Rev.* 1 (1984); Herbert Hovenkamp, *Antitrust Error Costs*, FACULTY SCHOLARSHIP AT PENN CAREY LAW (2021).

I. THE DEBATE ON THE *COMPETITIVE PROCESS STANDARD*

The current Assistant Attorney General for the US Department of Justice, Antitrust Division, Jonathan Kanter, recently condemned the use of the consumer welfare standard in antitrust cases.[24] As an alternative, Kanter proposed reforms based on the competitive process as a normative lodestar.[25]

> "The legislated goals of the antitrust laws are clear — Congress sought to protect competition and the competitive process […] What do I mean by the competitive process? The competitive process is how rivalry plays out in the market among multiple competitors […] The heart of the competitive process is the guarantee that everyone participating in the open market—consumers, farmers, workers, or anyone else—has the "the free opportunity to select among alternative offers […] It should also be clear at this point in our history that focusing on competition is a much more administrable standard than one that attempts to quantify consumer welfare effects. The consumer welfare standard was originally promised as a solution to the hard cases, but experience has demonstrated just the contrary."

This view echoes academic literature usually associated with the Neo-Brandeis movement. [26] For example, a proposal in favor of a competitive process paradigm has been endorsed by Lina Khan, a notoriously harsh critic of the consumer welfare standard, as a way to cure the ills of the existing antitrust policy paradigm. In particular, Khan argues that "adopting consumer welfare as the single goal of antitrust codified the central role of welfare analysis in antitrust enforcement […] But as is now clear, it also turned out to be deeply damaging for enforcement."[27] She concludes that "one reason the present antitrust framework fails to adequately address market power is that the law pegs liability to welfare *effects* rather than to the competitive *process*".[28]

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[24] Jonathan Kanter, *supra* note 11.

[25] Id.

[26] Khan, *supra* note 1.; Marshall Steinbaum, and Maurice Stucke, *The Effective Competition Standard: A New Standard for Antitrust* (2020) UNIVERSITY OF CHICAGO LAW REVIEW Vol. 87: Iss. 2, Article 11.; Stucke & Ezrachi, *supra* note 3.

[27] Khan, *supra* note 9, at 971.

[28] Id. See also Khan, *supra* note 1.

Tim Wu further elaborates on the rationale for a similar competitive process (or competition) standard as follows:

> "There is a fundamental and important difference between a law that seeks to maximize some value, and one that is designed to protect a process. The maximization of a value, particularly one as abstract as "welfare," necessarily puts enforcers and the judiciary in a challenging position, given that welfare is abstract and ultimately unmeasurable. In contrast, the protection of competition standard puts the antitrust law in the position of protecting the competitive process, as opposed to trying to achieve welfare outcomes that judges and enforcers are ill-equipped to measure […] It is based on the premise that the legal system often does better trying to protect a process than the far more ambitious goal of maximizing an abstract value like welfare or wealth. The former asks the legal system to eliminate subversions and abuses; the latter, in contrast inevitably demands some exercise in social planning, and ascertaining values that can be exceeding difficult, if not impossible, to measure."[29]

Many commentators are critical of these proposals and reject a competitive process standard for providing an incurably vague and unprincipled paradigm. According to Herbert Hovenkamp, for instance, "people from the right and the left embrace it, and it cannot produce useful tools for decision making about competition issues. It operates as a slogan, not a goal."[30] Einer Elhauge, commenting on Kanter's proposal, laments that "the analysis "starts and ends" with "competition and the competitive process" test. As such, his test amounts to a conclusory I-know-it-when-I-see-it test. This hardly provides the "clear, administrable" test."[31] Similarly, John Newman comments that "the actual content of the competitive-process approach remains mercurial, a cipher. The scholarly arguments in favor of it never seem to identify what, exactly, constitutes the "competitive process.""[32] And Jonathan Baker concludes that "Because the competitive process is hard to define, the goal of protecting it can mean different things to different people.

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[29] Wu, *supra* note 12, at 2.

[30] Hovenkamp, *Slogans, supra* note 1, at 101.

[31] Einer Elhauge, *Should The Competitive Process Test Replace The Consumer Welfare Standard?*, PROMARKET (2022), https://www.promarket.org/2022/05/24/should-the-competitive-process-test-replace-the-consumer-welfare-standard/.

[32] John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 INDIANA L.J. 2, 514 (2019).

[…] I am not persuaded that courts should be asked to identify antitrust violations based on whether the conduct harms the competitive process."[33]

At the same time, some commentators who endorse an economic perspective and maintain the relevance of welfare analysis in antitrust also reference competitive process in their discussion of goals. For example, Scott Hemphill and Nancy Rose criticize the view that antitrust is solely concerned with the welfare of consumers and suggest that "the evidence is more consistent with the view that antitrust law protects the competitive process".[34] As explained by Douglas Malamed, "Anticompetitive conduct can increase the actor's market power only by impairing the competitive process. By definition, market power reflects harm to the competitive process."[35] Additionally, Carl Shapiro proposes an alternative to consumer welfare defined as follows: "A business practice is judged to be anticompetitive if it harms trading parties on the other side of the market as a result of disrupting the competitive process."[36]

An earlier iteration of the antitrust literature struggled with similar questions on this issue. Although past debates mostly focused on the relative virtues of total surplus versus consumer surplus,[37] commentators also emphasized, from different perspectives, the role of competitive process standards in antitrust policy. Eleanor Fox has been a precursor of this approach.[38] In her interpretation, a focus on the competitive process is the most appropriate

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[33] Jonathan B. Baker, *A Competitive Process Goal Won't Strengthen Antitrust,* NETWORK L. REV. (2022), https://www.networklawreview.org/baker-goal/.

[34] C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 7, 2091 (2018).

[35] Melamed, *supra* note 13, at 271.

[36] Carl Shapiro, *The Consumer Welfare Standard in Antitrust: Outdated, or a Harbour in a Sea of Doubt?* (Opening Statement of Professor Carl Shapiro, Senate Judiciary Committee, Subcommittee on Antitrust, Consumer Protection and Consumer Rights) 2, http://faculty.haas.berkeley.edu/shapiro/consumerwelfarestandard.pdf (December 13, 2017).

[37] See RICHARD POSNER, ANTITRUST LAW (University of Chicago Press, 2001) Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Analysis*, 78 ANTITRUST L.J. 471 (2012); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. (1982); Salop, supra note 1; Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009).

[38] Eleanor M. Fox, *Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981) [*Modernization of Antitrust*]; Eleanor M. Fox, *Economic Concentration, Efficiencies and Competition: Social Goals and Political Choices*, 142 INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM (1969).

focus of antitrust,[39] as it does not pursue efficient outcomes but works on fostering an environment of market rivalry, openness, greater opportunity for entry, and dispersion of economic power. Based on a more descriptive lens and analysis of case law, Gregory Werden concluded that the focus of the rule of reason is the competitive process and not consumer welfare, as instead frequently assumed by commentators,[40] but unlike Fox also added that "economics is the primary source of wisdom as to what we think we know about the impact of trade restraints on the competitive process."[41] The competitive process also appeared in Richard Posner's own definition of antitrust law's economic objective.[42]

When looking closely at the constellation of proposals in favour or against different welfare or process standards, both current and past debates share a common ambiguity fueling substantive and terminological tensions: a failure to distinguish between *goals* from *legal tests* as two separate normative dimensions of analysis.[43] The nature of this distinction is further explored in

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[39] Fox emphasizes the preconditions for robust competition rather than defining the competitive process directly. She emphasizes two preconditions: open markets, in which firms without market power and entrants have the opportunity to compete, and dispersed economic power, shown by the presence of numerous rivals: "For this reason, the concept focuses on preserving opportunities at the margin for firms without market power, more than promoting opportunities for cost-savings for firms with market power, but it facilitates both." "Efficiency" is not an ultimate goal. It is an intermediate goal pursued in order to facilitate freedom of choice, to serve other interests of consumers, and to make the best use of society's resources. Economics provides useful tools to achieve solutions that promote or harmonize with efficiency. Efficiency frequently corresponds directly with promotion of the competition process and with developed antitrust case law. I make the following proposal. Antitrust should serve consumers' interests and should also serve other, established, non-conflicting objectives. There are four major historical goals of antitrust, and all should continue to be respected. These are: (1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor. Ibid, Fox, *Modernization of Antitrust,* at 1180.

[40] Blair and Sokol, *supra* note 37.

[41] Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 40 (2014).

[42] Richard Posner writes that "The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency." Morrison v. Murrary Biscuit Co, *supra* note 17. Compare to Ronald Coase's explanation of economic competition: "Adam Smith's view of competition was quite robust. He thought of competition, as the quotations given earlier illustrate, as rivalry, as a process, rather than as a condition defined by a high elasticity of demand, as would be true for most modern economists. I need not conceal from you my belief that ultimately the Smithian view of competition will prevail." Ronald H. Coase, *The Wealth Of Nations*, 15 ECONOMIC INQUIRY 3, 318 (1977).

[43] H. L. A. Hart, *The Presidential Address, Prolegomenon to the Principles of*

the next section, as it arguably provides an essential framework to disentangle some of the ambiguities and apparent inconsistencies in the existing antitrust debates on consumer welfare and the merit of an alternative process-oriented standard.

II. WELFARIST PERSPECTIVE ON MARKET POWER: BETWEEN GOALS AND LEGAL TESTS

A. Distinguishing Between Antitrust Goals and Legal Tests for Anticompetitive Conduct

Goals or general aims of a legal regime are important because they provide a normative foundation and set boundaries between considerations that should be included and those that are to be excluded in the overarching design and application of the law. Goals, however, are not necessarily legal tests. The latter specify what law enforcers should do in a particular context, and their function is to assign liability rather than simply maximize a given objective. For example, the question of why property is a valuable social and legal institution is connected but distinct from questions about the ways individuals may become legally entitled to property rights and how much they should be allowed to transfer and acquire.[44] Likewise, criminal law's main aim and social justification for punishment (e.g. deterrence or retribution) would obviously be expected to inform criminal liability, but the specific content of liability (i.e., how liability is "distributed") is not defined solely in terms of the general justificatory aim and legal rules, and remedies against a particular crime are not always maximizing a chosen general aim.[45] In other words, consistency between goals and legal tests is different from the maximization of a goal in every particular context where the law is enforced.

The separation between goals and legal tests proposed here finds a philosophical analog in a theory of punishment originally advanced by legal

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Punishment, 60 PROCEEDINGS OF THE ARTISTOTELIAN SOCIETY, 9-10 (1959) ("in relation to any social institution, after stating what general aim or value its maintenance fosters we should enquire whether there are any and if so what principles limiting the unqualified pursuit of that aim or value").

[44] Id at 3-4.

[45] Hart, *supra* note 19, at 12 ("Similarly the moral importance of the restriction of punishment to the offender cannot be explained as merely a consequence of the principle that the General Justifying Aim is Retribution for immorality involved in breaking the law. Retribution in the Distribution of punishment has a value quite independent of Retribution as Justifying Aim").

theorist H. L. Hart.[46] In the well-known paper *The Presidential Address: Prolegomenon to the Principles of Punishment*, Hart argued that traditionally opposed theories of criminal punishment often fail to recognize that different principles are relevant in any interpretation of punishment, in particular a distinction between definitions, general justifying aims, and principles of distribution for liability. Hart concluded that "failure to distinguish separate questions or attempting to answer them all by reference to a single principle ends in confusion."[47] Analogous problems are arguably at play in the antitrust context, where debates about the consumer welfare standard and potential process-oriented substitutes fall into the similar error of conflating two different questions, one about goals, another about legal tests for anticompetitive conduct. A similar argument has also been advanced in the specific context of merger review by economists Joe Farrell and Michael Katz.[48] Their analysis builds on a distinction between 'objectives' and 'decision rules' as necessarily separate levels of merger analysis when multiple layers of decision-makers are at play. On this basis, they argue that the objective of merger policy should be to maximize total surplus, but that the optimal decision rule for discrete merger cases should be based on consumer surplus rather than total surplus (even if the general objective is to maximize the latter).[49]

This paper expands and further develops this framework to show how debates about the consumer welfare standard and potential substitutes fall into a similar error as they risk conflating two different questions: (1) What should be the *goal*, or general justifying aim of competition law as a public policy concerned with market power? (2) How should a particular *legal test* be designed to distinguish between anticompetitive and benign conduct in a specific area of enforcement? At its core, the answer to the first question requires a determination of whether antitrust should be guided by an economic goal or broader non-economic considerations. At this level, the clearest, uncontroversial meaning of the consumer welfare standard is that it seeks to exclude non-economic values. Its function, therefore, is best interpreted as providing a negative policy prescription, one that favours a competition law regime *not* concerned with the protection of small firms and competitors, inequality, fairness, and other social concerns. In this sense, consumer welfare provides a clear dividing line between economic and socio-

[46] Id.

[47] Id at 3.

[48] See Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, 2 COMPETITION POLICY INTERNATIONAL 2 (2006)

[49] Id at 12.

political paradigms, rooting antitrust in a welfarist framework.[50]

This answer, however, does not offer a complete determination of the scope and content of legal tests for anticompetitive conduct. Setting consumer welfare as a general guide for antitrust law does not imply that, in every single case, antitrust determination of liability will entail an exercise of welfare maximization or solely depend on identification of welfare harm in a market. Unlike regulation, antitrust harm also requires anticompetitive conduct. Therefore, legal tests for liability must link welfare outcomes to the nature of conduct and to distortions of the competitive process. In contrast, arguments that antitrust should be guided by a consumer welfare standard or a competitive process standard often fail to specify whether either standard is supposed to serve as a goal, legal test, or both. As discussed below, a significant part of the confusion in the antitrust literature on this issue stems from neglecting the two-pronged nature of the problem.

The proposed goals-legal tests duality also intersects with the literature on rules versus standards.[51] The essence of these conceptual categories rests on whether a given legal command should be specified ex ante (e.g., a fine for driving above a specific speed limit) or left to the enforcer to specify ex post (a fine for driving too fast). The choice of rules versus standard can be independent of the worthiness of a general goal and captures instead a concern for the legal costs associated with different types of legal commands. Rules, for example, are costly to promulgate but can be applied at relatively lower cost, while standards are easier to create but are more costly for parties and enforcers as they require further specifications ex post.[52] Like rules and standards, the dichotomy between antitrust goal and legal test for anticompetitive conduct finds one its main sources in the difficulty of identifying and quantifying welfare harm in specific instances that involve complex economic determinations. Stated more precisely: as the law deals with situations where maximization of a welfare goal is too costly to determine or implement on a case-by-case basis – e.g., parties may not be able to predict the legality of their conduct based on whether it harms a given measure of welfare thus potentially creating perverse incentives as a result,

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[50] As will be discussed in more detail below, however, economic efficiency or total surplus offers a more coherent interpretation than consumer welfare.

[51] Luis Kaplow, Rules Versus Standards: An Economic Analysis 42 Duke Law Journal 557-629 (1992); Colin S. Diver, The Optimal Precision of Administrative Rules, 93 YALE L.J. 65 (1983), and. Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. LEGAL STUD. 257 (1974)

[52] Kapow, Id.

or a feasible remedy may not exist even when welfare harm is present – it resorts to proxies and shortcuts to infer welfare effects in specific contexts, and may even settle on condoning a welfare-reducing practice if intervention is deemed on balance too complex or costly.

As a result, distortion of the competitive process becomes a proxy that surfaces under *both* rules and standards to deal with the difficulty of proving welfare harm, and to delineate the contours of liability depending on the nature of the conduct and the practical limitations associated with available remedies. As will be explained, a process proxy may for example be present under a per se illegality rule to distinguish price fixing from conscious parallelism and exclude the latter from liability, due the distortive incentives that may result from condemning mere parallel conduct in the absence of a proper remedy; and it may be at play under a monopolization standard in the form of a price-cost test preferred for its administrability and predictability to a welfare harm test (e.g., predation).

But this very process, which complements the role of rules and standards in striving to develop administrable and predictable legality tests that are simpler and less costly than maximizing a given normative goal directly, arguably has the secondary but powerful effect of redefining antitrust liability around distortions of the competitive process. As such, economic regulation of market power within a law enforcement framework starts from welfarist premises but is operationalized through the inductive common law process, which refines the meaning of anticompetitive conduct starting from specific cases and facts.[53] Through precedents, the nature of legal tests for anticompetitive conduct is as a result recentered toward process-based liability, even if the general goal remains economic welfare. The following discussion on the meaning and scope of the consumer welfare standard can help elucidate this claim further.

B. Consumer Surplus and the Consumer Welfare Standard

Economic analysis of market power builds on a welfarist foundation.[54] Standard theory defines competitive markets as desirable because they lead to Pareto optimality and economic efficiency traditionally measured as total

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[53] Additional differences and nuances are related to the respective role of public and private enforcement.

[54] ANDREU MAS-COLEL, MICHAEL D. WHINSTON, & JERRY R. GREEN, MICROECONOMICS (1995); JEAN TIROLE, INDUSTRIAL ORGANIZATION (1988); MASSIMO MOTTA, COMPETITION POLICY AND PRACTICE (2004).

surplus, the sum of consumer and producer surplus. Consumer surplus reflects the difference between the willingness to pay for another unit of output and the price actually paid by consumers at the optimal consumption level. It is also a measure of opportunity cost for the consumer.[55] Producer surplus is the difference between the price and cost of supply, or how much the producer would have to be compensated in order to forego the opportunity to sell at a given price. The aggregate measure of total surplus for a given quantity in a market measures the value created by economic activity. From this perspective, competition is not an end on its own. It is a means to achieve economic efficiency.[56]

The central economic problem created by market power is that it distorts competitive outcomes toward inefficient levels.[57] The monopolist has an incentive to produce too few units, and as a result, market output and total surplus decline compared to the counterfactual competitive outcome. The result is a deadweight loss, the difference between total surplus under monopoly and total surplus under competition, which also reflects the lost economic surplus due to units no longer being produced and exchanged.[58] While market power can only persist in the long run if there are barriers to entry, firms may engage in behaviour that artificially creates, maintains, or extends their market power. Competitive forces are instrumental to economic efficiency because they induce competitors to impose negative externalities on one other. Under competition, each firm acts independently without accounting for the harm that its decision imposes on rivals, fueling a process that leans toward competitive prices and efficient outcomes.[59] In all their forms, restrictions of competition are attempts to escape or eliminate such negative externalities imposed by rivalry either by coordination (agreement or ownership) or exclusion, with the aim to artificially create, maintain, or

[55] Namely, how much would a consumer have to be paid to forego the opportunity to purchase the product quantity at a given price.

[56] In the extreme case of natural monopolies, promoting competition is not a mean to economic efficiency.

[57] The ability to price above marginal cost is problematic because the profit maximizing strategy of a firm with market power will lead to a deadweight loss. Distortions are not limited to price, but also include quality, innovation, variety, etc.

[58] Since total surplus is not maximized by a monopolist, potential Pareto improvements must be possible.

[59] Market power persists in the long run only if there are barriers to entry. Natural monopolies are an extreme case where economic efficiency is not served by competition. See also OCED, *Methodologies to Measure Market Competition*, OECD COMPETITION COMMITTEE ISSUES PAPER (2021), https://www.oecd.org/daf/competition/methodologies-to-measure-market-competition.htm.

increase market power. Hence, the welfarist justification for the existence of antitrust policy is the market failure resulting from market power,[60] and its mandate is to identify and police conduct that, by reducing constraints on market power, imposes a deadweight loss and diverts competitive forces away from economic efficiency.

The jargon of 'consumer welfare' is traditionally used in the literature and case law to refer to an economic model of competition policy,[61] and while the term has no accepted meaning in economic theory, it possesses an appealing correspondence with the just described notion of consumer surplus.[62] This equivalence has important implications.[63] From a normative perspective, grounding antitrust liability on the harm to the area of surplus between the demand curve and the equilibrium price suggests a distributive preference in favour of consumers over producers.[64] Unlike in the case of total surplus where harm is limited to the deadweight loss, wealth transfers resulting from price increases are not welfare neutral but are to be counted as negative effect because they reduce consumer surplus. This gives competition policy a mandate that is loosely consistent with economic welfare but attaches a specific weight to the effects of enforcement on consumers.[65]

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[60] See Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, 2 COMPETITION POLICY INTERNATIONAL 2 (2006); Shapiro, *supra* note 36; Tirole,*supra* note 47; Motta, *supra* note 47.

[61] Hovenkamp, *Antitrust's Consumer Welfare Principle Imperiled?, supra* note 1.

[62] See, for example: Salop, *supra* note 1; Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. (1982); Blair & Sokol, *supra* note 37; Elhauge, *supra* note 37, at 437; Gregory Werden, *Essays on Consumer Welfare and Competition*, SSRN (2009); Gregory Werden, Competition, *Consumer Welfare and the Sherman Act*, 9 SEDONA CONF. 87 (2008).

[63] Some authors distinguish between welfare and surplus. See Barak Orbach, *The Antitrust Consumer Welfare Paradox* (2011) 7(1) JOURNAL OF COMPETITION LAW & ECONOMICS 133-164. For the purpose of this paper this distinction is not relevant, and the two will be treated as synonyms.

[64] Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2476 (2013), ("[C]ourts almost invariably apply a consumer welfare test."); Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, ANTITRUST SOURCE, 2 (Aug. 2015) (The "consumer welfare standard is the standard understood to be employed in practice by the federal enforcement agencies"). Lande*, supra* note 56.

[65] According to Hovenkamp "The consumer welfare principle must therefore be counted as 'distributive' to the extent that it produces outcomes that shift wealth or resources in favor of consumers even though an alternative outcome would produce greater total wealth. Hovenkamp, *Id*. at 2473; See also Francesco Ducci & Michael Trebilcock, *The Revival of Fairness Discourse in Competition Policy*, 64 THE ANTITRUST BULLETIN 1 (2019).

In addition, a precise overlap between the legal and economic term is also valuable as it helps demystify misconceptions about the content of the standard. For example, taken as a synonym for consumer surplus, consumer welfare does not only focus on short-term low prices, but it also includes concerns about quality and innovation as factors that are reflected in the demand curve.[66] Its scope is also theoretically broader than final consumers and can include the surplus of any downstream and intermediate buyers. For this reason, consumer welfare can be seen as focusing on discrete harm to buyers in a particular market, without the need to trace down negative effects on final consumer surplus.[67]

At the same time, the interpretation of the consumer welfare standard as consumer surplus is fraught with contradictions. First, as noted by various commentators,[68] the label "consumer welfare" promoted by Robert Bork in the *Antitrust Paradox*[69] was defined as "merely another term for the wealth of the nation" and was in fact originally meant to reflect economic efficiency[70] (total surplus) rather than consumer surplus.[71] From this

[66] Leah Samuel & Fiona Scott Morton, *What Economists Mean When They Say "Consumer Welfare Standard",* PROMARKET (Feb. 16 2022), https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists/; Thomas W. Ross & Ralph A. Winter, The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments, 72 ANTITRUST LAW JOURNAL 2 (2005); for arguments, see: Khan, *supra* note 1; John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149 (2015); Christine S. Wilson, Thomas J Klotz & Jeremy A. Sandford, *Recalibrating The Dialogue On Welfare Standards: Reinserting The Total Welfare Standard Into The Debate*, 26 GEO. MASON L. REV. 5 (2019).

[67] Hovenkamp, *On the Meaning of Antitrust's Consumer Welfare Principle, supra* note 1, at 3, proposes the following definition: "The consumer welfare principle in antitrust should seek out that state of affairs in which output is maximized, consistent with sustainable competition" On the Meaning of the CW principle. While there is much to recommend in focusing on output rather than price, this definition requires a clarification of what "sustainable competition" means.

[68] Hovenkamp, *Antitrust's Consumer Welfare Principle Imperiled?, supra* note 1, at 101.

[69] Bork, *supra* note 1, at 7.

[70] The argument of this book, of course, is that competition must be understood as the maximization of consumer welfare or, if you prefer, economic efficiency. *Id*. at 427.

[71] Bork, *supra* note 1. One possible interpretation of Bork's choice of label is that non-specialist constituencies may find the term consumer welfare as politically more attractive than efficiency to advance an economic model of antitrust that included a concern for consumers. Seen as a political bargain between producers, understood as primarily composed of large firms defending the benefits of economies of scale; and consumers, as smaller buyers, farmers, and final consumers disrupted by the growth of large enterprises, the debate over what goal should dominate the enforcement of competition rules by antitrust agencies and courts could be seen as a bargain to advance efficiency-enhancing antitrust policies by

historical perspective, consumer welfare (as discussed, a term not derived from economics) was not intended to actively maximize the welfare of final consumers as a particular group. It was instead introduced mainly to signal a shift away from the pursuit of multiple socio-political goals—in particular the protection of *competitors*—and their replacement with economic efficiency as the single objective.[72] While the latter benefits consumers generally, it is different from promoting consumer surplus as such.

Second, the normative rationale for singling out harm to consumers as a specific group remains nebulous. As already mentioned, a common explanation is a distributional preference in favour of consumers. Such a concern is clearly alive in merger review, and specifically in the context of a Williamson-type merger, which increases market power while generating efficiency gains.[73] Under total surplus, the transfer of surplus between shareholders and consumers would be treated as neutral, and the outcome of the merger would depend on deadweight loss and the efficiency gains accruing to producers. Under consumer surplus, in contrast, the wealth transfer from consumers to producers would also count as an anticompetitive effect.[74] However, this redistributive rationale ascribed to consumer welfare is severely limited in many other contexts. Consumer welfare often includes firms as intermediate purchasers, suggesting by implication that the distributive preference also questionably applies to buying firms vis-à-vis selling firms. Moreover, consumer welfare treats all consumers alike without distinguishing between wealthier and poorer consumers,[75] and it routinely condones practices such as monopoly pricing that unambiguously transfer wealth from consumers to producers.[76] Further, in most other areas of enforcement welfare trade-offs are generally not particularly salient as total surplus and consumer surplus go in the same direction.[77] For example, per se illegality against naked cartels is justified under both consumer and total

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securing the required political support through the protection of consumers as part of competition laws. Ducci & Trebilcock*, supra* note 59.

[72] Brown Shoes: the purpose of antitrust law is "the protection of competition, not competitors", Brown Shoe Co v. United States 370 US 294 320 (1962).

[73] Oliver E. Williamson, *Economies as an Antitrust Defence: The Welfare Tradeoffs*, 58 THE AMERICAN ECONOMIC REV. 1 (1968).

[74] The distributive case for consumer surplus builds on the premise that shareholders are on average wealthier than consumers.

[75] Ducci and Trebilcock*, supra* note 59.

[76] See Infra, Section __

[77] See discussion in Louis Kaplow, *Efficiencies in Merger Analysis*, Discussion Paper No. 1056 03/2021, ANTITRUST L.J. (forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3811790

surplus, and efficiency arguments are routinely part of procompetitive theories within a rule of reason analysis.[78] More generally, given that total surplus focuses on changes to the *sum* of consumer and producer surplus, price and output effects are relevant benchmarks under both welfare standards, and the impact of a potential shift from consumer surplus toward economic efficiency is highly overstated beyond the merger context.[79]

Finally, explicit reference to consumers is additionally problematic because it risks excluding equally harmful effects of market power on other relevant groups beyond consumers. Monopsony is an obvious example, as the harm created by anticompetitive conduct in labour markets may appear either inconsistent with consumer welfare or require interpretative acrobatics to fit workers into the existing label (a similar logic applies to input suppliers). This would be a peculiar conclusion because, if a distributional justification is cogent, it is not clear why consumers should be preferred over workers. Some commentators suggest a way out of this contradiction by adjusting the focus from consumers to other groups. For example, Hemphill and Rose favour a 'trading parties' standard.[80] Shapiro suggests a similar proposal and adds a "supplier welfare standard" in the case of buyer power.[81] And in the context of mergers, Naidu, Posner, and Wu endorse a "worker welfare standard."[82] But all these group-centric alternatives simply add further ambiguities. A "trading parties standard", for example, loses a distributive basis while also not specifying who the relevant trading parties should be – for instance, a manufacturer engaging in anticompetitive exclusive dealing may offer a benefit to the its direct trading partners as inducements to become exclusive distributors. Likewise, singling out a separate 'worker welfare' would

[78] See for instance Broad. Music, Inc. v. Columbia Broad. Sys, Inc., 441 U.S. 1 (1979) defining a justifiable restraint under the rule of reason as one aimed to "increase economic efficiency and render markets more, rather than less, competitive." At 19-20; Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984): "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." Continental T.V., Inc. v. Sylvania, Inc., 433 U.S. 36 (1977) at 58 (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)) "manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products."

[79] See, e.g., ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY 328–34 (1995).

[80] Hemphill & Rose, *supra* note 34.

[81] "A business practice is judged to be anticompetitive if it harms trading parties on the other side of the market as a result of disrupting the competitive process" Shapiro, *supra* note 36, at 2.

[82] Suresh Naidu, Eric A. Posner, & E. Glen Weyl, *Antitrust Remedies for Labor Market Power,* 132 HARV. L. REV. 537 (2018).

potentially exclude input suppliers, which is problematic if the goal is to evaluate the unilateral or coordinated effects of monopsony power more generally. The common shortcoming of these alternatives is that, like the consumer welfare standard, they define the domain of antitrust liability around harm to a particular group.

For these reasons, delineating the correspondence between consumer welfare and consumer surplus is not a straightforward exercise. Besides a clear rejection of *competitor*-oriented competition law, the choice of welfare standard remains ambiguous. Not only was the term arguably in itself a 'populist' label for economic efficiency (and not a synonym for consumer surplus), but the normative case for a standard that centers harm around consumers is in itself questionable. From a welfare economics perspective, economic efficiency provides a more coherent benchmark. While a focus on the deadweight loss associated with distortions of competition may be criticisable for being distributively neutral, neutrality is also its strength as it avoids the need to identify harm to a particular category of stakeholders and ties the mission of antitrust to the social loss resulting from market power enabled by anticompetitive conduct, independently from ambiguous categorizations between consumers, workers, input suppliers, or trading parties more generally.

C. Consumer Welfare as a Process-Based Standard

Notwithstanding these recognized limitations, the correspondence between consumer surplus and consumer welfare is conventionally taken as an endorsement of at least *some* measure of welfare.[83] Contrary to conventional interpretation, however, a closer look at the congruence between the economic concept and the legal standard shows that consumer welfare does not in fact provide a truly *welfarist* basis for competition law enforcement.[84] In welfare economics, competition is simply instrumental to the maximization of some measure of welfare as the desirable outcome—an interpretation that is radically at odds with views of competition policy discussed in this paper that instead attach intrinsic value to the preservation of rivalry or the competitive process per se. As noted by Kaplow and

[83] See Louis Kaplow, *On the Choice of Welfare Standards in Competition Law*, Harvard Law and Discussion Paper No. 693 (2011); Francesco Ducci & Michael Trebilcock, *The Revival of Fairness Discourse in Competition Policy*, 64 THE ANTITRUST BULLETIN 1 (2019)

[84] LOUIS KAPLOW & CARL SHAPIRO, HANDBOOK OF LAW AND ECONOMICS (2007).

Shapiro,[85] "For normative purposes, the ordinary metric is welfare, or efficiency, or perhaps utility to each party or class of parties, not the degree of competition according to some competition index." Therefore, for the correspondence to be valid, antitrust liability would be predicated on harm to consumer surplus. But in many cases that fails to be the case under the consumer welfare standard. In contrast, consumer welfare better reflects a process-oriented standard. This conclusion, while seemingly counterintuitive, should become clear under the framework established earlier to differentiate antitrust goals from legal tests for anticompetitive conduct.

The apparent paradox can be illuminated by first identifying several policy prescriptions that would flow from a truly welfarist competition policy based on consumer surplus. For instance, monopoly pricing should be condemned on the basis that it harms consumer surplus. Price discrimination should be seen with great suspicion because it can reduce consumer surplus even when total surplus increases. Predatory pricing should be assessed based on the overall welfare effects on present consumers benefitting from the predatory price and future consumers facing monopoly prices, as opposed to cost-based tests. Merger policy should be far more aggressive in highly competitive markets than already concentrated ones, given that the quantum of lost consumer surplus tends to be larger in the former case,[86] and so on. The fact that these prescriptions contradict existing legal principles in consumer welfare-oriented regimes shows that harm to consumer surplus is an over-inclusive benchmark, and one that does not provide a reliable description of antitrust liability in practice. As discussed at the outset of this section, the reason for this apparent incongruence is that debates on the optimal objectives of antitrust tend to conflate *goals* with *legal tests*. Often, current proponents of a competitive process standard describe the consumer welfare standard as both a goal *and* a legal test based on consumer surplus. Likewise, commentators refer to the competitive process without specifying whether their claims are about antitrust liability or the preservation of the competitive process as a worthy objective in itself. But goals and legal tests are not necessarily the same.

As a general antitrust goal, the consumer welfare standard unambiguously

[85] Id. at 1134: authors also note "Yet, if the rule of reason is legally defined in terms of competition itself—that which promotes competition is legal, that which suppresses competition is illegal, end of story—then economics cannot directly address the legal test."

[86] Louis Kaplow, *On the Choice of Welfare Standards in Competition Law*, Harvard Law and Discussion Paper No. 693 (2011).

serves the purpose of rejecting non-economic values, excluding harm to competitors as such as objectionable beyond the realm of economic torts,[87] and dismissing the competitive process as having standalone value beyond being instrumental to a welfare outcome. At the same time, equating consumer welfare with a legal test based on consumer surplus is incorrect and potentially misleading because antitrust liability also requires a distortion of the competitive process—a concern that is foreign to the economic notion of consumer surplus. The conduct requirement separates antitrust policy from no-fault regulation and gives content to liability beyond welfare outcomes. As will be explored in the next section, antitrust law doctrines systematically carve distinctions between anticompetitive conduct and legal behaviour by evaluating whether one or the other distorts the competitive process, *even* when welfare effects are the same, and antitrust doctrines do not offer a basis for intervention in all instances where consumer surplus could be improved or maximized.

Once the distinction between goals and tests is identified, it is possible to see that each area of antitrust displays varying balances between welfare and process consideration. This aspect remains overlooked in much scholarly commentary.

III. THE WELFARE-PROCESS DICHOTOMY IN ANTITRUST ENFORCEMENT

In this section, the paper explores the interplay between welfarism and process-oriented considerations in four distinct domains of antitrust law: horizontal agreements, unilateral conduct, vertical restraints, and mergers. In each area, it asks whether existing doctrines are more consistent with goals and legal tests based on consumer or other measures of welfare, on the one hand, or emphasis on some notion of competitive process, on the other. The answer is different in each case. Starting with horizontal agreements, all standards converge and provide an independent justification for the treatment of collusion as per se illegal. Welfare analysis alone, however, does not offer a comprehensive description of antitrust liability in this area, as distinctions between explicit collusion and conscious parallelism are better captured through a process perspective. Unilateral conduct and vertical restraints are instead areas where welfare and process coexist but also where tension and ambiguity are most pronounced in terms of doctrinal and policy implications. In contrast, merger policy is essentially welfarist. Because ex ante review is

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[87] *Brown Shoes*: the purpose of antitrust law is "the protection of competition, not competitors" Brown Shoe Co, *supra* note 66, at 320; Nicolas Cornell, *Competition Wrongs*, 129 YALE L. J. 7 (2020).

conduct-neutral, consumer welfare can serve both as a goal and a legal test based on consumer surplus. The new US merger guidelines will be discussed to show how a competitive process model could radically shift merger analysis in several conflicting directions.

A. Horizontal Agreements

Consider an oligopoly where direct competitors meet secretly in a hotel room to discuss output and set common prices. Most antitrust thinkers would agree that this behavior "is the supreme evil of antitrust."[88] Indeed, price fixing is generally treated as per se illegal and criminalized in several jurisdictions.[89] This policy conclusion is consistent with a consumer surplus prescription. Collectively, competitors can act as a monopolist charging monopoly pricing. Since collusion systematically increases the price paid by consumers without offsetting benefits, it is a reasonable approach to presume negative welfare effects on buyers through a per se rule. This assessment is also consistent with economic efficiency, as price fixing reduces output and creates deadweight loss.[90] The fact that producer surplus and not just consumer surplus is included does not affect the result (total surplus still decreases), because no countervailing productive efficiency can be expected to arise from price fixing (in fact, the practice entails wasteful use of resources to sustain coordination).[91] Further, per se illegality can also find a rationalization in a competitive process oriented-interpretation consistent with welfare analysis. By actively replacing independent decision-making on price with coordination, collusion is a way to internalize the negative externalities imposed by competition. This makes the nature of the conduct inherently antithetical to the expectation of competitive behaviour. The link between such distortion of the competitive process and negative welfare effects is

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[88] Verizon Communications Inc. v. Law Office of Curtis V. Trinko, 540 U.S. 398, 408 (2003).

[89] OCED, *Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentences*, Working Party No. 3 on Co-operation and Enforcement (2020), https://one.oecd.org/document/DAF/COMP/WP3(2020)1/en/pdf; LOUIS KAPLOW, COMPETITION POLICY AND PRICE FIXING (2013).

[90] Kaplow & Shapiro, *supra* note 78.

[91] Cases where there may be credible efficiency gains fall under the rule of reason. As described in Broadcast Music Inc., rule of reason analysis captures horizontal practices that are "designed to increase economic efficiency and render markets more, rather than less, competitive" Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20 (1979). In EU Competition law, Consolidated Version of the Treaty on the Functioning of the European Union, art. 101(3) 2012 O.J. C 326/47 [hereinafter TFEU], recognizes the role of efficiencies but requires them to be passed on to consumers.

clear.

Now imagine the same competitors operating in a tight oligopoly where they never communicate with each other but can easily observe the behavior of other players due to the concentrated and transparent nature of the market. Each competitor simply reacts rationally to the other observable behavior of the other players (two competing gas stations on the opposite side of the same road), and they eventually reach the same collusive outcome without ever communicating (a scenario defined as conscious parallelism). The welfare effects may be exactly the same as in the case of the hotel meeting. However, per se illegality applies to the first scenario, but there is no antitrust liability in the second case. If it is true that antitrust is welfarist, no distinction should be made between explicit and tacit collusion. Yet the law makes such demarcation. What is the theoretical justification for criminal liability in the first case and no liability at all in the second scenario, if the objective is to promote consumer welfare?

Much has been written on this question.[92] Posner, for example, proposed treating the two scenarios of collusion and conscious parallelism alike,[93] and a similar purely welfarist idea that was subsequently developed by Kaplow on game-theoretic grounds.[94] Later, Posner retracted from his own proposal, recognizing the difficulty of designing a proper remedy for oligopolistic interdependence where communication is lacking.[95] Indeed, the feasibility of a remedy such as price regulation provides one forceful explanation for the different treatment of illegal collusion and conscious parallelism. But the distinction is also consistent with a different interpretation that recognizes, under any welfare standard, the presence of a competitive process benchmark for liability. Explicit collusion, on the one hand, distorts the essence of the competitive process by artificially removing an existing constraint against the collective exercise of market power. Conscious parallelism, on the other hand, remains consistent with price competition between rational agents, whose choice is made interdependent solely by the oligopolistic structure of the market and not by communication.[96] It is important to emphasize here

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[92] See Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal (1962) 75(4) Harvard Law Review 655-706

[93] Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969).

[94] Kaplow, *supra* note 83, at 448.

[95] Richard A. Posner, *Book Review (reviewing Louis Kaplow, Competition Policy and Price Fixing (2013))*, 79 ANTITRUST L.J. 761 (2014).

[96] Even if a remedy was available, this process dimension may still justify different legal

that a process dimension may simply be the by-product of inherent challenges posed by detection and regulation of mere parallel conduct and therefore may be explainable purely on those terms. Nonetheless, it retains a powerful descriptive role for existing doctrines in this area.

Incidentally, this analysis is also relevant to the application of per se illegality to wage fixing and buy-side cartels under the consumer welfare standard. Like price fixing, wage fixing occurs when competing employers coordinate to artificially lower the wages of workers below competitive levels.[97] Consumer welfare has an awkward relationship with this problem and some commentators suggest a way around it by including trading parties in the existing standard.[98] But another possible explanation is simply to recognize that, as in the case of price fixing, there is a deadweight loss created by conduct that, by its very nature, distorts the competitive process and artificially creates market power in labour markets. From this perspective, a defence of per se illegality does not require an assessment of the relative incidence of welfare effects between workers and consumers. This aspect is simply unnecessary and redundant.[99]

In sum, welfarist and process-interpretations can be said to converge in this area of antitrust. Process, however, arguably retains standalone descriptive value in that it provides a more granular rationalization of existing legal doctrines and antitrust liability. It is consistent with the idea that antitrust law may condemn a collusive agreement even when its execution fails to harm welfare. And it provides an explanation as to why the law distinguishes between practices with similar welfare harm, based on how conduct distorts the competitive process and beyond questions related to remedies. So at least when it comes to horizontal agreements, proposals for a competitive process standard seem to start from a questionable initial point and add nothing to current interpretations of the law.

B. Unilateral Conduct

Now imagine a monopolist with power to impose supra-competitive prices.

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consequences (for example, criminal sanctions or monetary penalties) for conducts that have same welfare effects.

[97] ERIC POSNER, WHY ANTITRUST FAILED WORKERS (2021).

[98] Shapiro, *supra* note 36. For a general discussion on monopsony power, see also Blair, Roger D., and Jeffrey L. Harrison. "Antitrust policy and monopsony." Cornell L. Rev. 76 (1990): 297.

[99] See Hemphill & Rose, *supra* note 34.

Market power will result in a deadweight loss from consumers priced out of the market and a wealth transfer from consumers to producers. In welfare terms, monopoly pricing is clearly harmful for consumers. Yet monopoly pricing is perfectly legal under the consumer welfare standard. A similar conclusion applies price discrimination, which is allowed even if the practice can theoretically reduce consumer surplus to zero while increasing total surplus. More generally, antitrust law distinguishes between a dominant firm using its market power to *exclude* rivals and maintain or extend the exercise of its market power, and the behaviour of a dominant firm that simply *exploits* market power without exclusionary effects, as in the case of monopoly pricing. Exclusionary conduct by a dominant firm is illegal.[100] Exploitative exercise of market power, including monopoly pricing, is condoned.[101] But how can such a distinction be justified under a true consumer welfare standard, given when the welfare effects of exclusionary and exploitative conduct can be similar?[102] The operative test in this area is clearly not a welfare standard based on either consumer or total surplus.

One possible explanation is the feasibility of a remedy. As in the case of conscious parallelism, tackling the problem of monopoly pricing through antitrust enforcement essentially requires a definition of the competitive price, determination of costs, and ongoing monitoring of price adjustments,

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[100] For discussion, see: Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST JOURNAL 2 (2006); Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. (2006); A. Douglas Melamed, *Exclusionary Conduct under the Antitrust Law*, 20 BERKELEY TECH. L.J. (2005); *Competition and Monopoly: Single-Firm Conduct Under Section 2 Of The Sherman Act : Chapter 1,* (2015), https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1

[101] This is not the case in EU Competition Law. Article 102 TFEU covers practices that consist in "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions" https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008E102. For literature in exploitative conduct, see Gal, Michal, Abuse of Dominance - Exploitative Abuses (March 10, 2015). in HANDBOOK ON EUROPEAN COMPETITION LAW (Lianos and Geradin eds., Edward Elgar, 2013), Chapter 9, pp. 385-422; Akman, Pinar, Exploitative Abuse in Article 82EC: Back to Basics? (December 25, 2008). Cambridge Yearbook of European Legal Studies, Vol. 11, 2009, ESRC Centre for Competition Policy CCP Working Paper No. 09-1; Werden, Gregory J., Exploitative Abuse of a Dominant Position: A Bad Idea That Now Should Be Abandoned (January 24, 2021). Available at SSRN: https://ssrn.com/abstract=3790472.

[102] Successful exclusionary conduct will allow the dominant firm to maintain or extend its dominant position, allowing it to then exercise market power without competitive constraints.

tasks which essentially gravitate toward price regulation.[103] Another interpretation is a presumption of positive welfare effects from a more dynamic perspective: while monopoly prices reduce consumer surplus and allocative efficiency in the immediate present, the resulting monopoly profits rewards investments and induce entry, which will on net increase welfare. Akin to per se legality, a dominant firm is not required to prove that the latter exceeds the former; beneficial dynamic welfare effects are presumed in the long run.[104]

Both interpretations are cogent and compelling on their own. However, a further perspective coexists with and reinforces these explanations, namely that antitrust doctrines under consumer welfare are not purely welfarist but rather process oriented. The outcome of successful exclusion and exploitation is the same—i.e., the exercise of market power lowering total and consumer surplus. But the process leading to such welfare outcome is different. Exclusionary conduct is harmful because it artificially dilutes or removes a constraint on the exercise of market power (forcing equally or more efficient rivals to exit the market and in so doing reducing the competitive constraints imposed by rivalry), in that way distorting the normal functioning of competitive forces. In contrast, monopoly pricing is an integral ingredient of the competitive process. Monopoly profits will be seen by new entrants as a signal of profitability, which in turn will encourage new entry, and increase competition. Thus, while exploitative behavior harms consumer welfare in the short term, it does not artificially remove existing constraints on the exercise of market power. On the contrary, it erodes its durability. As described in *Trinko*:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices–at least for a short period–is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.[105]

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[103] See Werden, supra__

[104] See Michal Gal, *Abuse of Dominance - Exploitative Abuses*, HANDBOOK ON EUROPEAN COMPETITION LAW (Lianos and Geradin eds., Edward Elgar, 2013).

[105] Verizon v. Trinko, 540 U.S. 398 (2004) § 3.

Competitive process analysis is also relevant in the assessment of exclusionary practices, such as predation. In welfarist terms, one approach may be to allow predatory pricing unless harm to future consumer welfare is expected to be greater than the benefit accruing to present consumers buying the product below cost; the law however does not actually engage in an exercise of welfare trade-offs between present and future consumers to assess the legality of predation,[106] and certainly the accused firm cannot claim welfare benefits as a defense. In contrast, legal tests are based on whether price is below a given measure of cost and the likelihood of recoupment.[107]

Again, such tests may be considered an indirect proxy for overall welfare effects and can be justified on administrability grounds, but the fact that they are not fully consistent with a true consumer welfare prescription still holds.[108] In practice, for example, determining antitrust liability based on whether price is below marginal cost implies that a dominant firm can legitimately exclude a rival even if entry would have increased consumer surplus.[109] Specifically, if the dominant firm is slightly more efficient than the entrant, it can block entry by pricing above its own costs but just below the entrant's marginal cost, and this constitutes legal conduct even though entry would have increased price competition and as a result consumer surplus.[110]

This conclusion may nonetheless be consistent with a competitive process perspective. Successful predation is not rational unless it artificially removes a constraint on the incumbent's market power by forcing an equally or more efficient entrant to respond by either exiting the market or engaging in inefficient below-cost price responses. In contrast, pricing above cost is seen as a legitimate competitive response to entry, even when the net result is lower consumer surplus. Allowing a firm to price at cost, even when this excludes consumer surplus-enhancing entry, is in a way analogous to allowing a dominant firm to charge a price at the monopoly, consumer

[106] While increasing the welfare of some consumers in the short term, predation leads to inefficient overproduction and distorts the incentives of existing and future players who may be deterred from entering the market due to the dominant firm's gained reputation as a predator.

[107] The requirement of recoupment applies in US antitrust law but not in EU law. For a quick summary, see Concurrences, Predatory Pricing, Definition: https://www.concurrences.com/en/dictionary/predatory-pricing

[108] Recoupment for example is not a proxy for welfare harm because profitability could simply result from additional sales, not higher prices.

[109] For more discussion see Kaplow & Shapiro, *supra* note 78.

[110] Kaplow, *supra* note 80.

surplus-decreasing level. In both cases there may be harm to welfare, but no artificial distortion of the competitive process is at play. From this perspective, price-cost tests serve to demarcate the boundary between efficient competition and inefficient distortion to the competitive process; they do not seek to identify conduct that harms consumer surplus in a given context.

This point can be generalized: one hypothetical approach to exclusion could be to calculate in each unilateral conduct case the welfare benefits and the deadweight loss and then categorize conduct as anticompetitive when the latter effect is greater than the former.[111] However, due to the high burden of information required to assess these welfare effects in unilateral conduct cases, this approach is simply not feasible in practice and would likely be counterproductive. A more manageable alternative is to build proxies that focus on distortions of the competitive process from which welfare harm can be inferred. Alternatives include a "sacrifice test",[112] "no economic sense test", the "as efficient competitor test" or the "disproportionality test." The merit of different tests remains an open question, but the main idea stands. Even if the goal is economic or consumer welfare, the objective may be better served by adopting a legal test *other than welfare harm* itself.[113] In one way or another, most available options look at various signals to evaluate whether the competitive process has been distorted through entry deterrence and increasing rivals' costs. This may include looking at issues such as changes in output and price or the productive efficiency of the firm vis-à-vis competitors, through which welfare effects are inferred.[114] Ultimately, even if this is the result of an underlying information problem, it generates a doctrinal framework whereby the law on unilateral conduct appears to place weight on *how* a given outcome is achieved, consequently redefining antitrust doctrines in ways that are not rationalizable on purely welfarist grounds.

Given the existence of this process dimension, the starting point of existing

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[111] See for instance, discussion in Melamed, *supra* note 99.

[112] The sacrifice test focuses on the accused firm and asks whether the conduct would be profitable without anticompetitive effects. Conduct that makes no sense a part from exclusion and its effects on market power would be condemned. See *Id*.

[113] See Werden, *supra* note 99 argues that "the best decision rule for promoting a particular welfare objective [like maximizing consumer or total welfare] could be a criterion other than the objective itself"; see Farrell & Katz, *supra* note 53 ("For several reasons, which we discuss below, it may be optimal to have specific agents within the broader system act to maximize a different objective (e.g., consumer surplus) even when the ultimate goal of antitrust policy is to maximize total surplus").

[114] Hovenkamp, *Slogans, supra* note 1.

proposals to adopt competitive process standard points toward underspecified policy prescriptions. One possible interpretation, for example, may be that these proposals would seek to the reduce the evidentiary burden in single-firm conduct cases. However, it is then not at all clear how a competitive process standard would be any different from a per se rule. If that is the objective, why not simply advocate for more reliance on per se liability? The question would then be one of rules versus standards, and the relative costs of proving competitive effects stemming from a given behaviour in various contexts. Another possibility may be that a competitive process standard seeks to challenge theoretical assumptions about the fragility of market power and the disciplining role of market forces ingrained in certain antitrust doctrines. For instance, jurisdictions that condemn monopoly pricing while endorsing consumer welfare may do so, among other reasons,[115] due to concerns that the competitive process may not be expected to be effective in eroding monopoly power. More generally, antitrust doctrines may reflect an error-cost framework dictated by assumptions about the strength of market self-correction, which a competitive process standard may seek to reject in favour of a more open attitude towards false negatives. Such a critique of error-cost preferences would potentially have merit. However, challenging questionable assumptions about type I and II errors does not require a new antitrust purpose based on the preservation of the competitive process, but rather a recalibration of the competitive process dimension already identifiable in existing legal tests.

A more profound and radical shift may be implicated if the desired change is to make the preservation of the competitive process a normative goal on its own, and not just a legal test for liability.[116] To an extent, this perspective shares similarities with the Ordoliberal philosophical tradition,[117] which was

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[115] David S. Evans & A. Jorge Padilla, *Excessive Prices: Using Economics to Define Administrable Legal Rules*, 1 JOURNAL OF COMPETITION LAW & ECONOMICS 1; Massimo Motta & Alexandre de Streel, *Excessive Pricing in Competition Law: Never Say Never*?, *in THE PROS AND CONS OF HIGH PRICES* 14-46 (Swedish Competition Authority ed., 2007); Roller, Lars-Hendrik, Exploitative Abuses, (2007) Business Brief: https://d-nb.info/1012903311/34; OECD (2011), *Roundtable on Excessive Pricing*, DAF/COMP (2011)18, at 317, 321, https://www.oecd.org/competition/abuse/49604207.pdf; Gal, *supra* note 103.

[116] OECD (2020), *Abuse of Dominance in Digital Markets*, www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf

[117] Peter Behrens, *The Ordoliberal Concept of 'Abuse' of a Dominant Position and its Impact on Article 102 TFEU, Discussion Paper*, No. 7/15, Europa-Kolleg Hamburg, Institute for European Integration (2015); Frédéric Marty, *Is Consumer Welfare Obsolete? A European Union Competition Perspective*, 24 PROLEGÓMENOS 47 (2021); Alexandre de

influential in the early decisions of the European Court of Justice on abuse of dominance under Article 102 TFEU. This view, which sits at the polar opposite of existing monopolization doctrines under Section 2 of the Sherman Act,[118] attached a special responsibility on dominant firms not to distort the competitive process and supported condemnation of conduct that distorted competitive market structures[119] and limited buyers' freedom of choice. According to pre-modernization EU case law, competition law was "designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such."[120] This paradigm has been gradually supplanted starting from the early 2000s in favour of a more economic approach.[121] The role of competitive process, nonetheless, may be revived by the European Commission's recent Call for Evidence on the Guidelines on Exclusionary Abuse under Article 102 TFEU.[122]

For any mature antitrust regime, the problem with the preservation of the competitive process as a standalone objective is not necessarily that it proposes to redirect antitrust away from mainstream economic interpretations. Rather, the critical issue is that competitive process cannot be elevated as a goal on its own without further reference to ulterior normative values. For example, an antitrust regime may intend to place some weight on promoting small businesses, restricting political power of big firms, expanding market access, or pursuing income redistribution, and so on. But how can resulting legal tests for unilateral conduct be coherent without explicit reference to objectives other than the preservation of the process of competition per se? A sophisticated antitrust regime seeking to embrace a normative shift would arguably be better off singling out one or more of these desiderata directly. Rather than pointing to a process goal, which historically has always been affected by an underlying conceptual ambiguity, a more

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Streel, *Should Digital Antitrust Be Ordo-Liberal*?, CONCURRENCES (2020); Crane, Daniel, 'Ordoliberalism and the Freiburg School', in Daniel A. Crane, and Herbert Hovenkamp (eds), The Making of Competition Policy: Legal and Economic Sources (New York, 2013; online edn, Oxford Academic, 30 Apr. 2015).

[118] Eleanor Fox, *Monopolization and Abuse of Dominance: Why Europe is Different*, 59 THE ANTITRUST BULLETIN 1, (2014).

[119] See C-202/07, France Télécom SA v. Commission of the European Communities [2009] ECR I2369.

[120] C-8/08, European Court Reports 2009 I-04529 (T-Mobile) ¶ 38

[121] Anne Witt, *The European Court of Justice and the More Economic Approach to EU Competition Law – Is the Tide Turning?* 64 ANTITRUST BULLETIN 2 (2019)

[122] European Commission: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1911

explicit enforcement of the ultimate goal would be a far superior approach. This would enable a more precise assessment not only of its intrinsic merit, but also of the desirability of legal tests that may consequently be derived from it.

C. Vertical Restraints

The analysis of vertical restraints further reiterates the inaccurate interpretation of consumer welfare as a legal test based on harm to consumer surplus, as well as the ambiguous content of alternatives based on a competitive process standard.[123] As a starting point, vertical relations usually involve firms and intermediate purchasers rather than final consumers and common pro-competitive theories are more directly related to the efficient organization of supply chains than benefits to consumers surplus as such.[124] Even under a broader notion of purchasers or trading parties' welfare, practices can have disparate effects across different groups. Loyalty rebates, exclusive dealing, or tying generally can have conflicting effects on the surplus of different buyers, and the legality of these practices is not simply a matter of welfare trade-offs.[125]

For example, the evaluation of practices such as resale price maintenance (RPM) does not require an actual welfare balancing between the negative effects of lower price competition and the positive effects of stronger non-price competition on consumer surplus. Condoning RPM generally does not depend on measuring the increase in output generated by price maintenance (due to inducements to increase service, for example) against the lost consumer surplus for those buyers that do not value better service and end up paying a higher price. Rather than engaging in pure welfare balancing, rule of reason analysis asks whether a restriction on the process of competition finds a justification in a problem related to externalities, free riding etc., which in turn are derived from industrial organization theories grounded on efficiency. This fallacy of equating consumer welfare with a consumer surplus legal test is particularly pernicious in the context of multi-sided

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[123] While economic analysis recommends a rule of reason rather than a per se rule in this area, it is difficult to see how consumer surplus could be a relevant methodology for the legality of vertical arrangements.

[124] Free riding arguments, externalities, etc.

[125] For a general discussion on vertical restraints, see Edward M. Iacobucci & Ralph A. Winter, *Vertical Restraints Across Jurisdictions*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS* (Roger D. Blair and D. Daniel Sokol, Eds', 2014).

platforms,[126] where the economic question may as a result be reduced to a (normatively difficult) determination of who should be the relevant consumer and how to balance welfare trade-offs between different platform sides.[127]

Rule of reason analysis is arguably better explained by an efficiency concern stemming from a distortion of the competitive process. Instead, endorsing the preservation of the competitive process as a goal itself implies changes to the antitrust rules on vertical agreements that are difficult to specify. Every contract or vertical agreement necessarily restricts the competitive process. For example, a one-year contract between a retailer and a supplier will by definition restrict the competitive process by raising a year-long barrier to entry for the products or services included in the agreement. And most recognized pro-competitive strategies solve an externality problem by restricting some dimension of competition along the supply chain. For example, minimum resale price maintenance distorts the competitive process by restricting price competition between retailers, but it is this very fact that may help solve the free rider problem between resellers by shifting competition from price to quality of service. As in the case of unilateral conduct, the fundamental challenge with a competitive process goal for vertical restraints is its theoretical indeterminacy. Unlike an economic welfare objective, competitive process fails to have content as a goal on its own. If the desired result is to support condemnation of efficient intra-brand restraints on the basis that they negatively affect a non-economic value such as buyers' freedom of choice, fairness toward small retailers, or deconcentrating of market structures due to concerns of political power, such policy could be achieved without recourse to the competitive process' normative umbrella.

D. Merger Review

Unlike the domains of antitrust policy canvassed so far, merger review is an area that can be described as essentially welfarist. Imagine, for example, that a competition authority concludes in its review that the merger between firm

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[126] Platform intermediaries connect two or more groups of users, some of which may be final consumer while others may be firms as intermediate purchasers, advertisers, and so on.

[127] See Ohio et al. v. American Express Co. et. al., 585 U.S. ___ (2018); Dennis W. Carlton & Ralph A. Winter, *Vertical Most-Favored-Nation Restraints and Credit Card No-Surcharge Rules*, 61 JOURNAL OF LAW AND ECONOMICS (2018); see also Michael Katz and Douglas Melamed, Competition Law as Common Law: American Express and The Evolution of Antitrust (2020) 168 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 2061; Michael L. Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, YALE L.J. (forthcoming 2018).

A and B should be blocked because it will increase market power, giving the new entity AB the ability to raise prices. In response, the merging parties argue that the transaction creates synergies resulting in productive efficiency gains. Unlike other cases discussed above, this is the main area of antitrust analysis that can be accurately described as welfarist where a welfare standard can serve *both* as a goal and as a legal test. Under a consumer welfare test, for example, the concern is that prices will rise. Both deadweight loss and wealth transfer from consumers to producers[128] are considered negative effects of the merger, and merging parties' arguments about synergies will only be relevant if they translate into lower prices. This approach, which is predominantly followed by US and European authorities, makes consumer surplus the methodology for the assessment of the legality of mergers.

Merger analysis would partially change under total surplus. In this scenario, the operating test for mergers would be based on comparing deadweight loss with productive efficiency gains, while treating the wealth transfer as neutral. In many cases, the outcome is the same as with consumer surplus. For instance, harm to consumer welfare or total welfare will be approximately equal if the merger increases price and produces negligible cost reductions, or in cases where a significant lowering of marginal cost will prevent price increases. There are cases nonetheless where welfare trade-offs between allocative efficiency and productive efficiency can arise. If a merger increases market power while reducing fixed costs, then total welfare may increase even if consumer welfare declines.[129]

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[128] Some consumers will be priced out of the market because they are unable or unwilling to buy the product, while other consumers will still buy the product at the new, higher price post-merger.

[129] This approach was at the center of discussion in the Canadian *Superior Propane* decision, Competition Commr. v. Superior Propane, 2001 FCA 104 (Can.). The Superior Propane merger case provides an excellent case study for the relevance of total welfare. Canadian Competition Act, R.S.C., 1985, c. C-34 (Can.) has an efficiency defence for mergers, which allows a merger when productive efficiencies are greater than and offset anticompetitive effects. In *Superior Propane*, the question was whether efficiency gains should be balanced against the deadweight loss or also include the wealth transfer as a negative effect of the merger. The merger would lead to market share over 90% in several local markets and merger to monopoly in many geographical markets, leading to a substantial lessening of competition. See also: "Fairness as a Counterpoint to Efficiency in Competition Policy?", forthcoming in Nicolas Charbit and Sonia Ahmad, eds., Liber Amicorum for Professor Eleanor Fox, (Concurrences, 2020); Thomas Ross and Ralph Winter, *The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments* (2005) 72(2) ANTITRUST LAW JOURNAL 471–503.

The choice of optimal welfare standards for mergers and the resulting efficiency-equity tradeoff is controversial and beyond the scope of this paper.[130] As explained later in Section IV of the paper, the merit of either test critically depends also on the design of relevant standards of proof, burden of proofs, and presumptions.[131] But regardless of the choice between consumer or total surplus,[132] there is a key feature of merger policy that sets it apart from other areas of antitrust law discussed earlier in the paper: ex ante review is by definition conduct-*neutral*, and as a result, competitive process is irrelevant in the determination of an antitrust violation. Unlike ex post enforcement where the nature of conduct may play a role in defining the

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[130] Edward Iacobucci, "The Superior Propane Saga: The Efficiencies Defence in Canada" in Barry Rodger, ed., Landmark Cases in Competition Law: Around the World in Fourteen Stories (Kluwer International, 2013); Louis Kaplow, *On the Choice of Welfare Standards in Competition Law*, Harvard Law and Discussion Paper No. 693 (2011); Ducci & Trebilcock, *supra* note 59.

[131] It is worth noting here, however, that a literal interpretation of the consumer welfare test would theoretically support blocking mergers in deconcentrated markets, where the initial price is competitive and the marginal reduction of consumer surplus is highest, and it would potentially condone mergers that increase buyer power. Both conclusions however run contrary to existing enforcement approaches under the consumer welfare standard. Total welfare is a more neutral and economically coherent test, but recognition of productive efficiencies can raise concerns about the distributive effects of the merger and more generally about the potential loosening of merger policy in a world of rising market concentration. See analysis in Kaplow, *supra* note 80. For literature on increasing market concentration, see also David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 THE QUARTERLY JOURNAL OF ECONOMICS 2 (2020); De Loecker et al. The Rise of Market Power and the Macroeconomics Implications, 135 THE QUARTERLY JOURNAL OF ECONOMICS 2 (2020); OECD, Executive Summary of the hearing on Market Concentration, Annex to the Summary Record of the 129th Meeting of the Competition Committee held on 6-8 June 2018; Thomas Philippon, The Economics and Politics of Market Concentration, NBER December 2019.

[132] Commentators that criticize a total welfare standard generally do not distinguish between its use as a legal test and as the overarching goal of antitrust policy. For example, Samuel and Scott Morton say: "Using total welfare as a metric in antitrust cases would affirmatively put weight on the benefits to the corporation from its own anticompetitive conduct. Counting producer profits would fly in the face of what most antitrust scholars and practitioners believe antitrust law is supposed to protect against—when firms use anticompetitive strategies to erode consumer welfare, they are illegally transferring wealth and well-being away from their counterparties" Samuel & Scott Morton, *supra* note 8; Hemphill & Rose, *supra* note 34, at 2092, also write: "The weakness of a total welfare test is not the inclusion of a firm in the welfare maxim and, but rather the inclusion of the welfare of the firm or firms causing the reduction in competition. Attention to trading partner welfare does not have this problem". While these arguments are certainly pertinent in the merger context, the claim of this paper is that endorsing economic efficiency as a general antitrust goal does not necessarily mean support for total welfare as a legal test in all areas of antitrust.

contours of antitrust around a process dimension, ex ante analysis is fully determined by the effects of the merger. This allows consumer welfare to operate both as goal (merger policy should be used to promote consumer welfare) and a legal test (i.e., a merger will be allowed if it does not harm consumer surplus).

If the neutrality of conduct in merger review excludes a process dimension from the definition of antitrust liability (unlike the case of price-fixing or exclusionary conduct, as argued above), what would it mean for contemporary merger policy to be guided by a novel competitive process standard? Any horizontal merger can be said to distort the competitive process because it eliminates all existing competition between merging parties. Hence, a competitive process standard could support the unrealistic policy prescription of blocking any merger because, by definition, it would reduce the number of players in a market. But it may also imply the opposite, equally controversial view that all acquisitions except for mergers to monopoly should be allowed because some degree of competitive process is retained in all but in that extreme scenario.[133] In theory, a competitive process standard may alternatively signal support for stronger emphasis on structural presumptions.[134] This however can mean several different things, as some reliance on structural presumptions is not necessarily inconsistent with a welfare goal.[135] It is possible to envision multiple variations of a competition or competitive process standard that have the potential to radically alter the welfarist nature of merger policy. But if competitive process is itself the goal, how is one to judge the performance of merger policy without an agreed metric?

As argued earlier in the paper, one of the key advantages of a welfare goal is that it makes it clear what is *excluded* from the domain of antitrust, and in so doing it provides a useful demarcation of what normative dimensions should be considered in the development of the law. In contrast, a competitive

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[133] Baker, *supra* note 13.

[134] Wu, *supra* note 12.

[135] See Filippo Lancieri and Tommaso Valletti, https://www.promarket.org/2023/04/14/structuring-a-structural-presumption-for-merger-review/ Structuring a Structural Presumption for Merger Review, ProMarket, April 14, 2023. Another approach, proposed by Eric Posner, would be to apply a “marginal increase in market power test” (whether the margin between price and marginal cost widens), rather than the consumer surplus price test, as a way capture a broader range of social harms associated with a reduction of competition See Eric Posner, *Market Power, Not Consumer Welfare: A Return to the Foundations of Merger Law*, (May 26, 2023), at 28, https://ssrn.com/abstract=4364084 https://ssrn.com/abstract=4364084

process goal leaves the overarching normative domain of antitrust law undefined, undermining as a result the interpretation of any resulting benchmark for anticompetitive mergers. Case law such as *Brown Shoe*[136] and *Von's Grocery*[137] emphasized the value of market deconcentration and of preserving a large enough number of competitors in business against dangerous trends of industry concentration resulting from mergers. But if the contemporary mandate of merger policy were to be recalibrated to explicitly promote small businesses or prevent concentration of firms' political power, merger standards could be tailored toward such goals without vague reference to process. Disagreement about ends would remain, but it would be distinct from criticisms relating to legal tests and their effectiveness in vindicating a chosen end.

This tension is arguably at play in the current discussions on new US draft Merger Guidelines.[138] Among other things, the proposed draft place emphasis on mergers that increase or further trends toward concentration. For example, *Guideline 8: Mergers Should Not Further a Trend Toward Concentration* states that "if a merger occurs during a trend toward concentration, the Agencies examine whether further consolidation may substantially lessen competition or tend to create a monopoly."[139] Guideline 7 includes "entrenchment" of a dominant position, preserving the possibility of eventual deconcentration, and substantial reduction in the competitive structure of the industry as reasons to scrutinize mergers, and Guideline 6 mentions trends toward vertical integration as problematic. The most controversial aspect of such proposals is the overarching normative ambiguity resulting from a lack of explicit stated justification and theoretical aim unifying them. An explicit or implicit endorsement of a competitive process objective *simpliciter,* however, would not be capable of filling such a normative vacuum.

IV. CALIBRATING GOALS AND LEGAL TESTS

[136] A version of this idea was descripted for example in Brown Shoe Co, *supra* note 66, "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization".

[137] United States v. Von's Grocery Co. 384 U.S. 270 (1966)

[138] https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines

[139] Merger Guidelines DRAFT – FOR PUBLIC COMMENT PURPOSES – NOT FINAL: https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

Alternative antitrust paradigms are theoretically conceivable. One option could be to embrace a purely *welfarist* model of antitrust law, where a chosen welfare standard would serve both as a goal and a direct legal test in all cases. There are multiple reasons, however, why antitrust law may justifiably fall short of ever being fully welfarist. The first problem, already mentioned earlier to justify a distinction between goals and legal tests, is that proving welfare effects can often be simply too difficult or too costly. In this light, harm to the competitive process becomes a more administrable and predictable legal test to infer welfare effects from conduct, where different degrees of inference can be built on the basis of both economic theory and learning from case law, including reliance on restriction of output and price as proxies, market power requirements, presumptions, and specific standards and burdens of proof.[140] A second, related problem is the ability to address welfare harm with a feasible antitrust remedy. In some cases, lack of effective or administrable remedial instruments may not warrant intervention if the solution to an identified welfare harm would be more costly than the problem itself. This also relates to question of institutional design and different expertise between an industry regulator and a competition authority operating within a law enforcement framework.

A consequential further challenge against complete welfarism is posed by the fact that antitrust liability, as argued, currently differentiates based on the *means* through which certain welfare outcomes are achieved. Unlike regulation, and at least in so far as a fault-based dimension is retained, the nature of the conduct appears to matter in terms of antitrust consequences. To be sure, there are domains where the importance of process is negligible and where antitrust analysis approximates welfare analysis. As discussed, this is clear in merger review where the nature of conduct is not at stake. It may also the case when the law explicitly demands proof of specific effects and their pass-through. In Europe, for example, Article 101(3) TFEU exempts restrictive agreements that generate economic benefits *only* if consumers receive a "fair share of the resulting benefits."[141] Process, however, matters in several other domains of antitrust policy. And even in the case of mergers,

[140] This informational gap is also implicitly a reason why, as a more general matter of policy, competition is in most cases a more appropriate medium to economic efficiency than direct regulation.

[141] *Guidelines on The Application of Article 101(3) TFEU (formerly Article 81(3) TEC),* https://eur-lex.europa.eu/EN/legal-content/summary/guidelines-on-the-application-of-article-101-3-tfeu-formerly-article-81-3-tec.html#:~:text=consumers%20must%20receive%20a%20fair,of%20the%20products%20in%20question.

why then not abandon the current 'reactive' system for one that requires firms to merge or divest any time welfare would improve? It is difficult to see how antitrust enforcement could avoid becoming regulation in a purist welfarist model without conduct as the cornerstone of antitrust liability.

A radically different model for antitrust could be based on a full endorsement of the competitive process both as a goal and a legal test. This is effectively what has been proposed recently by several commentators, although with some variations. Marshall Steinbaum and Maurice Stucke for instance propose an "effective competition standard" to account for a plurality of concerns including individual autonomy, deconcentrated markets, and dilution of corporate power. Lina Khan justifies a similar approach on the basis that "a company's power and the potential anticompetitive nature of that power cannot be fully understood without looking to the structure of a business and the structural role it plays in markets"[142] where competition is identified as a set of structural conditions to disperse economic power and preserve opportunities for smaller competitors. In analogous fashion, Jonathan Kanter's characterization of the competitive process emphasizes the importance of freedom of choice as the "free opportunity to select among alternative offers", while Tim Wu embraces competitive process effectively as a multiple goals standard to tackle cases where "a powerful or unethical firm is seeking to disable the process of competition on the merits." [143]

As argued throughout the paper, both the *pars destruens* and *pars construens* of this model are problematic. Not only it does start from a largely inaccurate premise, which interprets existing antitrust as welfarist and mistakenly assumes that consumer welfare systematically serves both a goal and a methodology used to determine the legality of conduct on the basis of harm to consumer surplus; it then proceeds to single out competitive process as the normative goal itself. But this alternative is essentially indeterminate, as there is no obvious benchmark for what a competitive process standard ultimately entails. Its meaning could include a strict requirement to maintain markets deconcentrated based on specific thresholds like market shares or number of competitors, or a flexible multi-purpose paradigm where economic and socio-

[142] Khan, *supra* note 1, at 717.

[143] "The main advantage of a "protection of competition" standard is that, unlike threats to "consumer welfare," potential threats to the competitive process are far more obvious: it is the allegation that a powerful or unethical firm is seeking to disable the process of competition on the merits. Such episodes do not go unnoticed, and indeed are already what spark the interest of enforcers when such conduct is complained of." Wu, *supra* note 12, at 10.

political concerns such as protecting small businesses or limiting the political power of large firms can be chosen at discretion. Several interpretations are possible in between, potentially opening the door to disparate policy implications.

A competitive process model that focuses on rivalry as opposed to the effects of market power does not have independent meaning on its own. Unlike economic welfare, competition or rivalry does not have normative content but is at most a shortcut for other normative values. One could take the canonical Bertrand model of duopoly or Baumol's perfectly contestable market as a metaphor.[144] Economic welfare provides a basis to judge whether the resulting outcome is desirable. A competitive process standard may nonetheless suggest that rivalry between two firms is not enough even if the outcome is perfectly competitive, but this conclusion is void of normative content because it does not provide a metric to judge what a sufficient degree of competition would be. Other objectives may potentially be lurking in the shadow of the competitive process—atomistic dispersion of economic power, corporate political influence, freedom of choice, protection of small competitors, and so on. But why not identify them explicitly rather than using the process label as an additional normative layer? Legal tests can become uncertain and arbitrary without the boundary of a clear overarching goal.[145]

[144] Joseph Bertrand, Theorie mathématique de la richesse sociale (1883) 48 Journal des Savants 499–508; William Baumol, Contestable markets: An uprising in the theory of industry structure (1982) 72(1) American Economic Review 1-15.

[145] For example, this is how antitrust analysis would unfold under the competitive process standard advocated by Tim Wu: "1. Who is the complainant? An incumbent or a challenger? An entrant with at least a putatively better product, a price-cutting maverick, or an incumbent facing decline and possible displacement? 2. Who is the alleged lawbreaker? An entrant, or a long-standing monopolist, an incumbent who has been losing market share? Does the firm appear to have sufficient market power to actually affect the process of competition? 3. What is the complained-of conduct? It is competition on the merits (i.e. a better or cheaper product) or a potentially illegitimate methods (sabotage, exclusionary deals, tying, predation, manipulation of a standards process, and so on). It is here that any procompetitive justification for the conduct is considered. 4. Is there some evidence of distortion or suppression of the competitive process — anticompetitive effects, exclusion, or the raising of rivals' costs — as defined by competition on the basis of price and quality? It is here that potential harm to consumer welfare might be considered, but it is ultimately suppression of competition that is the concern. 5. Does the complained-of conduct or merger tend to implicate important non-economic values, particularly political values? Might it tend to preserve a long-standing, politically influential oligopoly, or preserve the position of a longstanding monopolist insulated from competition by the power of the state?" Competitive process appears twice in this analysis. First, it appears explicitly at stage 4 as a legal test alongside consumer welfare. It then resurfaces implicitly at stage 5 as an added liability ground based on non-economic, political values See Wu, *supra* note 12, at 11.

The distinction between normative goals and legal tests provides a useful lens to see why a consequentialist yet not fully welfarist model seeks to neither maximize welfare nor competition. Rather, it focuses on how to best infer a reduction in welfare from a given conduct that restricts the competitive process. On the one hand, distortion of the competitive process can be seen as an administrable proxy for liability in light of the informational and remedial limitations affecting enforcement; but it also provides a useful conceptual demarcation between antitrust law and other modes of legal intervention; for example, it separates antitrust from no-fault regulation, from consumer protection primarily tackling problems of asymmetric information, and from economic torts grounded in a private law conception of competitor harm. On the other hand, an overarching goal other than the competitive process itself is necessary because it is otherwise impossible to define what competition is. A welfare objective provides normative content by anchoring rivalry to the economic effects of market power. In some areas, analysis approximates welfare trade-offs (mergers); in other areas where the nature of conduct plays a more central role, it is the direction of welfare change induced by a restriction of the competitive process that becomes determinative.

A. The Case of Efficiency Gains in Mergers

The question of how to incorporate efficiency arguments in merger policy provides a further illustration as to why goals may not necessarily equate legal tests. Canada's merger regime under can serve as a useful example. The *Competition Act*'s purpose clause has been interpreted as elevating economic efficiency as the main goal of Canadian competition law. The *Act* is unique across OECD countries for also including a standalone efficiency defence for mergers. Section 96 of the *Act*, in particular, prevents an order to block a merger if there are "gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition."[146] A standalone efficiency defence was the result of a specific and conscious policy choice:[147]

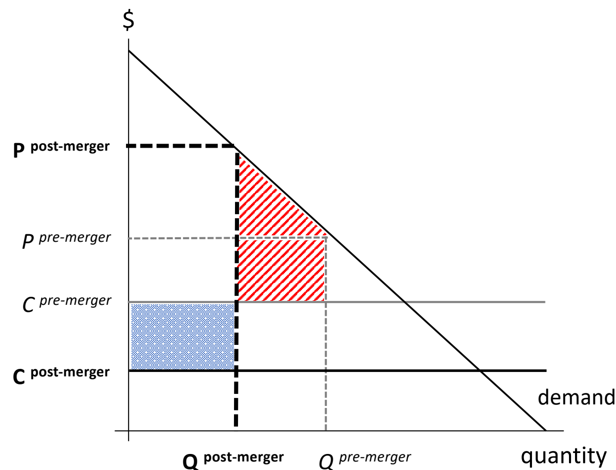
> "A stand-alone efficiencies defence was considered "appropriate for Canada because a small domestic market often precludes more than a few firms from operating at efficient levels of production

[146] Competition Act, *supra* note 93, s. 96(4). Competition Bureau, Merger Enforcement Guidelines, Part 12.

[147] Tervita Corp v. Canada (Commissioner of Competition), 2015 SCC 3, at 87 (Can.).

> and because Canadian firms need to be able to exploit scale economies to remain competitive internationally" (Campbell, at p. 152; see also *House of Commons Debates*, vol. VIII, 1st Sess., 33rd Parl., April 7, 1986, at p. 11962; Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (1985), at p. 4). In the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition."

Procedurally, this created a bifurcated approach where the Competition Bureau must first establish anticompetitive effects under section 92 of the Act; then, even when these effects are established, parties could invoke the efficiency defence under s. 96 to save the merger. Traditionally, the defence adopted a total surplus test—the merger would be allowed if parties could show that the gain in productive efficiency created by the merger (the dotted rectangle) were greater than the deadweight loss (striped area), ignoring the transfer of consumer surplus. In addition, following the *Tervita* decision by the Supreme Court of Canada, a very high quantification burden is imposed on the Commissioner,[148] who is required to quantify all quantifiable evidence when section 96 is invoked—a principle that undermines the ability to prove qualitatively that a merger will lessen or prevent competition.



This legal framework reflects a precise correspondence between an efficiency

[148] Tervita Corp v. Canada (Commissioner of Competition), 2015 SCC 3, at 87 (Can.).

goal and a legal test based on total surplus. Yet neither an efficiency defence nor its attached evidentiary burdens are necessarily mandated by the overarching efficiency goal. In fact, there have been several proposals to overturn the strong quantification burdens imposed in *Tervita*,[149] and the Federal Court of Appeal in the *Superior Propane* merger saga[150] eventually moved away from pure total surplus, now requiring to attach a case-by-case weight to the wealth transfer a part of the anticompetitive effects of a merger.[151] More recently, several commentators responding to public consultations on the future of the Canadian Competition Act favoured abandoning the standalone efficiency defence altogether.[152] On September 21, Finance Minister Freeland tabled Bill C-56 proposing among other things to repeal section 96 of the Act, but *without* any reference to abandoning the overarching efficiency goal of the Act.[153]

There are several reasons why an efficiency defence based on total surplus may be criticisable under an efficiency goal. For one thing, alleged productive efficiency gains are easy to claim but do not always materialize in practice, which legitimizes some degree of caution in their assessment. For another, even when a merger generates clear efficiencies in the short term, there may be concerns relating to harm to dynamic efficiency in the medium and longer run.[154] As noted by Chiasson and Johnson, for example, one concern is that the new entity may become complacent with reduced pressure to operate efficiently, resulting in X-inefficiency[155] and lower incentives to innovate.[156] While the relationship between competition and innovation is complex, [157] a

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[149] See for example Edward Iacobucci, Examining the Canadian Competition Act in the Digital Age (2021): https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf

[150] Canada (Commissioner of Competition) v. Superior Propane Inc., [2000] C.C.T.D. No. 15 (Comp. Trib.); [2001] F.C.J. No.455 (F.C.A.); Canada (Commissioner of Competition) v. Superior Propane Inc. [2002] C.C.T.C. No. 10; Canada (Commissioner of Competition) v. Superior Propane, Inc. [2003] 3 F.C. 529.

[151] Superior Propane, *Id*.

[152] See https://www.colindeacon.ca/projects/competition-consultation/submissions/

[153] https://www.colindeacon.ca/projects/competition-consultation/submissions/

[154] Matthew Chiasson & Paul A. Johnson, *Canada's (In)Efficiency Defence: Why Section 96 May Do More Harm Than Good For Economic Efficiency and Innovation*, SSRN (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3293790; Kaplow & Shapiro, *supra* note 78, at 1168: Some degree of competition has often been thought conducive to firms' running a tight ship, better serving customers, and being more innovative.

[155] Harvey Leibenstein, *Allocative Efficiency vs. 'X-Efficiency'*, 56 THE AMERICAN ECONOMIC REVIEW 3, 392-415 (1966).

[156] Chiasson & Johnson, *supra* note 141.

[157] Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*,

total surplus standard may be potentially problematic if merging parties can easily identify short-term merger-related gains, while the competition authority faces the difficult task of assessing more uncertain, but potentially significant long-term efficiency losses.[158] For this reason, Chiasson and Johnson argue that an efficiency goal may be better vindicated without the efficiency defence. In the different context of US merger review, Farrell & Katz[159] also argued that there may be a potential justification for consumer surplus under an efficiency objective (not based on a distributive concern, but as a way to better achieve efficiency under multiple layers of decision-making at play in the system of antitrust merger review).[160] These considerations can be generalized to suggest that, under an efficiency objective, there may be legitimate reasons for the use of a methodology to assess mergers other than total surplus.

B. Goals and Error-Costs

The trade-off between Type I errors (condemning a practice that is not anticompetitive) and Type II errors (allowing a practice that has anticompetitive effects) can greatly influence the overall strength of antitrust enforcement.[161] Easterbrook famously argued that enforcement should try to

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in THE RATE AND DIRECTION OF ECONOMIC ACTIVITIES: ECONOMIC AND SOCIAL FACTORS 609 (Richard Nelson ed., 1962); JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 83 (3d ed. 1942); Jonathan Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation* (2007) 3 ANTITRUST LAW JOURNAL 575

[158] Chiasson & Johnson, *supra* note 141. The selected timeframe is also relevant: because in the long run more costs will be variable and passed through, consumer and total welfare will eventually overlap reducing the relevant of welfare standards: Kaplow, *supra* note 71. See also Kaplow & Shapiro, *supra* note 78, at 1168.

[159] *Supra* note 53.

[160] The legal status of efficiencies in US antitrust law remains somewhat uncertain. See DANIEL FRANCIS & CHRISTOPHER JON SPRINGMAN, ANTITRUST: PRINCIPLES, CASES, AND MATERIALS (2023). On the one hand, efficiencies must be “sufficient to reverse the merger’s potential to harm consumers in the relevant market, for example, by preventing price increases in that market.” See *Horizontal Merger Guidelines*, U.S. Department of Justice and The Federal Trade Commission (August 19, 2020), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010. This suggests a consumer surplus test, where relevant efficiency gains include reductions of marginal costs, and exclude reduction of fixed costs. On the other hand, the Guidelines also state in footnote 137 that “Agencies also may consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market […] Efficiencies relating to costs that are fixed in the short term are unlikely to benefit customers in the short term, but can benefit customers in the longer run, e.g., if they make new product introduction less expensive.”

[161] Easterbrook, *supra* note 23; Jonathan B. Baker, *Taking The Error Out of “Error Cost”*

avoid Type I errors based on the claim that market power is less durable than erroneous legal decisions: "judicial errors that tolerate baleful practices are self-correcting while erroneous condemnations are not."[162] This argument rests on the idea that unchecked anticompetitive practices will be eroded by market forces, whereas wrongful condemnation of efficient practices will have a more permanent negative effect due to the stickiness of legal precedents. This interpretation is line with the overall attitude embedded in several of the Chicago School theorems that were highly influential in the development of various antitrust doctrines.[163] Taken as a whole, the Chicago inference of efficiency and support for quasi per se legality from these restrictive theorems can be seen as consistent with a more general, faithful preference for Type II errors.

Later, post-Chicago literature has shown that many of these theories are only valid in exceptional circumstances,[164] and several criticisms have also been raised against Easterbrook's argument. For example, the assumption that markets self-correct and that market power is not durable is ultimately an empirical matter, whose assessment can vary depending on the type of market at issue and the chosen timeframe of analysis.[165] Second, a proper balance

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Analysis, 80 ANTITRUST L.J. 1 (2015); Hovenkamp, *supra* note 23; Jorge Padilla, *Neoclassical Competition Policy Without Apology*, *SSRN* (2018), https://ssrn.com/abstract=4266176

[162] Easterbrook, *Id*. See also Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 THE JOURNAL OF LEGAL STUDIES 2 (1973).

[163] For example, Chicago theorists emphasized that predation is rarely rational and therefore unlikely to occur. SeeJohn S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 JOURNAL OF LAW AND ECONOMICS, 137–169 (1958). McGee argued that: a monopolist could acquire its rivals instead of engaging in predatory pricing; the strategy is not rational because the predator may lose more money than the prey; the results of predation are not sustainable due to new entry; the prey may borrow funds to respond to a predatory price war. The Chicago School also contended that firms have no incentives to leverage market power through practices like tying due to the single monopoly profit theorem. The basic idea is that there is only one monopoly profit that can be extracted by the monopolist. This is however true only in a limited set of cases. Michael D. Whinston, *Tying Foreclosure and Exclusion American Economic Review*, 80 THE AMERICAN ECONOMIC REVIEW 4, (1990); Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, And Antitrust*, 1 HANDBOOK OF INDUSTRIAL ORGANIZATION (1989); Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 3, (1985).

[164] See for example: Whinston, *Id.*; Ordover & Saloner, *Id.*

[165] See for example, Carl Shapiro, *The Consumer Welfare Standard in Antitrust: Outdated, or a Harbour in a Sea of Doubt?*, (Opening Statement of Professor Carl Shapiro, Senate Judiciary Committee, Subcommittee on Antitrust, Consumer Protection and Consumer Rights) 2, http://faculty.haas.berkeley.edu/shapiro/consumerwelfarestandard.pdf (December 13, 2017) ("As I embrace the "consumer welfare" standard, I would like to be

between false positives and false negatives would have to consider the magnitude of the harm[166] and not just its durability.[167] Failure to do so may create a blind spot in cases with low probability but high magnitude of harm. Furthermore, a judicial decision that errs on the side of a Type I error may be as durable as its Type II counterpart if the issue relates to the statement of a problematic legal principle beyond the fact-specific outcome of a case. It is in the domain of error cost analysis that competitive process-oriented proposals raise potentially relevant and legitimate objections to the existing consumer welfare standard. [168] Among other things, such proposals may seek

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very clear: adopting the "consumer welfare" standard absolutely does not mean that one is assuming that market power is rare or transitory. Those who claim or insinuate that anyone adopting the "consumer welfare" standard is necessarily in favor of a laissez-faire antitrust policy are simply incorrect. I put my own career forward as Exhibit A on that point. In my view, durable market power is quite common in the U.S. economy, which is why I favor vigorous antitrust enforcement. And I am hardly alone"; Jonathan B. Baker, Taking The Error Out of "Error Cost" Analysis, 80 ANTITRUST L.J. 1 (2015). See also Kevin A. Bryan & Erik Hovenkamp, *Startup Acquisitions, Error Costs and Antitrust Policy*, 87 U. CHI. L. REV. (2020); Jason Furman, *Digital Competition Expert Panel - Unlocking Digital Competition: Report of the Digital Competition Expert Panel,* (2019) at 3, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf>; https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf.

[166] For example, imagine a dominant firm engages in practices to exclude or acquire a nascent firm that offers a complementary product but has the potential to become a substitute of the incumbent in the future, where the probability that the practice is anticompetitive is only 20%, but where the potential anticompetitive harm is 90 and the cost of wrongly blocking the practice is 10. A competition authority assessing the legality of a practice based on a 50% balance of probabilities may allow the practice. See E-mail from Paul Johnson to Howard Wetston (Oct. 27, 2021), *available at* https://static1.squarespace.com/static/63851cbda1515c69b8a9a2b9/t/63d1f01bfbdfaa78245242da/1674702876138/johnson.pdf

[167] "Competition Policy for the Digital Era" Jacques Cremer - https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption*, 20 INNOVATION POLICY AND THE ECONOMY (2019); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 33 (2004). The key challenge with the uncertainty imposed by long-term competitive effects, magnitudes of harm, innovation and dynamic efficiency is about implementation. However, these considerations may justify in certain areas reconsideration of a simpler and more manageable rebalancing of error-cost framework in favour of false negatives.

[168] Tim Wu, *supra* note 12, for example, suggests that: "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". Eleanor Fox, who notoriously endorsed a process view of

to swing the pendulum away from the excesses of the Chicago's position over fears of Type I errors and toward a more balanced error-cost framework, a claim that is not inconsistent with an economic efficiency goal.

But if there are compelling reasons to believe that Type II errors are more costly than the Chicago School originally thought, standards and burdens of proof can arguably be lowered *without* appealing to the preservation of the competitive process as a goal.[169] In contrast, proposals for simplified or lowered evidentiary burdens, a more central role for structural presumptions, or increased reliance of bright-line rules to establish anticompetitive conduct arguably require stating at the outset an explicit objective providing coherent normative content against which they can be judged. As such, in order for potential reforms to become widely supported and defensible, they must reject the aspiration to elevate the preservation of the competitive process as the new goal of antitrust law and must instead direct criticisms to the very notion of competitive process that is already embedded in legal tests for anticompetitive conduct, as currently expressed in discrete doctrines.

CONCLUSION

The economic goal and justification of antitrust policy can be identified in the welfare loss resulting from the anticompetitive exercise of market power. This foundation makes the law consequentialist and normatively grounded on economic efficiency. The consumer welfare standard, however, does *not* make antitrust law welfarist. The role of antitrust law is not to maximize a given measure of welfare, but to target *conduct* that distorts the competitive process by artificially relaxing or reducing the constraint that a rival exerts on market power. For this reason, a welfarist goal does not necessarily translate into welfarist legal standards or tests. As discussed throughout the paper, some areas of competition law such as merger analysis may be seen as essentially welfarist, but other areas cannot be rationalized in welfare terms

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antitrust policy, also highlighted a similar concern defining it the "efficiency paradox": "by trusting dominant firm strategies and leading firm collaborations to produce efficiency, modern US antitrust protects monopoly and oligopoly, suppresses innovative challenges, and stifles efficiency […] I argue that limiting antitrust to condemning inefficient outcomes and embroidering the analysis with conservative Chicago School economic presumptions (markets are robust; antitrust enforcement normally harms the market) shrinks antitrust law to its smallest possible scope and in doing so harms efficiency in the sense of undermining rivalry and forestalling dynamic change." Eleanor Fox, *The Efficiency Paradox*, N.Y.U LAW AND ECONOMICS RESEARCH PAPER NO. 09-26, 79-80 (2009).

[169] Baker, *supra* note 147; Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 JOURNAL OF COMPETITION LAW & ECONOMICS 1 (2010).

alone. Depending on the importance of conduct, legal doctrines often reflect the co-existence of both welfare and process as integral ingredients of antitrust liability.

Recent proposals in favor of a competitive process standard fail to recognize that an element of process is already embedded in the consumer welfare standard and seek to introduce a new paradigm where the competitive process serves both a goal and a legality test. The normative content of this paradigm remains undefined, however. This is not only a theoretical problem but a practical concern for enforcement: What is the appropriate legal framework (in terms of standards and burdens of proof) to identify anticompetitive conduct if the goal is the preservation of the competitive process as such? Such a normative switch could lead to open-ended substantive and procedural reforms justified by a new, undefined normative umbrella without clear limiting principles.

Despite these shortcomings, proposals in favour of a competitive process standard have a valuable role in redirected antitrust debates toward a reassessment of the existing error-cost framework for antitrust enforcement. Currently, the consumer welfare standard tends to endorse a presumption that market power is fragile and lacks durability due to the self-correcting forces of entry and competition. In turn, this interpretation of the competitive process influences legal doctrines and favours avoidance of Type I errors even when innovation harm and dynamic efficiency may counsel greater concerns for Type II errors. Revisiting the notion of competitive process that is already embedded in existing antitrust policy may be a more desirable and promising way of strengthening antitrust enforcement than making the competitive process the goal itself.

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