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Clarifications and Gratitude

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Clarifications and Gratitude

CHRIS SAGERS*

CONTENTS

I began writing this reply on New Year's Day. At least in our better moments, we use that day to reflect on the past year's reasons for gratitude and to make new commitments for the year ahead. That was fitting. As a reason for gratitude, I am in the unusual position of getting elaborate, written feedback on a book from two commenters who are leaders in their fields,[1] even though the project is only complete in the sense that a first-draft manuscript exists. That sort of thing seems hard to come by, especially for an unknown author writing a first monograph. Both did that, by the way, even though they are essentially strangers to me and even though there is nothing really in it for them, after reading a very long manuscript that I delivered to them catastrophically late. Moreover, Professor Peter Shane, this journal's advisor, not only made the opportunity available, but took a

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[1] Guy A. Rub, *Amazon and the New World of Publishing*, 14 ISJLP 151, 367; Abraham L. Wickelgren, *Against Simplicity in Antitrust: A Comment on Chris Sagers'* Apple, Antitrust, and Irony, 14 ISJLP 151, 353.

big chance on a book that still required a huge amount of writing on a tight schedule. He also put up with a lot of delays and blown deadlines. For those reasons, it would feel wrong to write this reply in the usual manner of armed combat. Instead I've just tried to explain how I'll use the valuable gift these three have handed me to make the book better.

Anyway, as for new commitments, the coming year just happens to be roughly the period I think it will take to finish this essentially half-done book. I already had a lot of resolutions for its final year, but they now include fixing a new problem that seems serious: Certain things plainly require clarification to avoid misunderstanding. In fact, I think this little discussion was among three people who mostly agree with each other, except that the reviewers may not have known it because I failed to explain myself well enough. Because I didn't, they mostly didn't discuss what I always intended to be the book's real contribution and its most interesting material.

Early in writing the book, my excellent and far-seeing editor pointed something out to me that is probably obvious, but that still strikes me as foundational: there are problem-books and there are solution-books. From the beginning I saw this as a problem-book, in which solutions would play supporting roles at best. As I tried to make clear in the book, but will now try do even more clearly, the reason *Apple* seemed remarkable enough to write a book about was not its facts or circumstances or the legal issues it raised. It was the fact that popular reaction to it was so different than the antitrust-professional's reaction. That in turn seemed to pose a very interesting theoretical opportunity. Attacking it—working out that big-picture social phenomenon in theoretical terms—is the problem at the heart of this problem-book. In any case, while it is probably in some respect just because policy prescriptions are what law professors *do*, both reviewers apparently took it as a solution-book, especially Professor Wickelgren. He gives mainly just a long critique of rules of *per se* illegality in reply to a book that makes few if any real policy proposals at all, much less recommendations for more *per se* rules.

That being the case, I will start out in Part I by trying to restate what I see as the problem that is the book's only immediate concern. That restatement will be a first draft for how I will try to clarify it in the book. Part II will then react to the two critiques individually. They happen to be full of useful points from which this book will benefit, even beyond the clarification of its purpose. Even their specific doctrinal points are apposite in that I do happen to set out *some* thoughts of a doctrinal nature. (I do that for the practical reason that

if I didn't, then this pretty down-beat book could be misunderstood as *me* arguing that antitrust is hopeless or bad.) Part III briefly concludes by saying what I think really was at the heart of these two reviews, though they may seem quite different.

I. WHAT I REALLY MEANT

The big-picture theoretical problem that I envision was inspired by something Thurman Arnold once said. (This is in the book, but at present it appears way at the end, and it bears repeating here.) A bit chillingly, he said it *after* having served as the nation's most celebrated, tireless, and influential antitrust chief. On an academic panel in the late 1940s, at which legal and economic scholars debated whether antitrust had done any good, he said this:

> The antitrust laws have not been effective in the real world . . . . Unfortunately, all antitrust law enforcement under any plan depends on the public attitude.[2]

With that in mind, it dawned on me when first thinking about *Apple* that the public view of antitrust had been poor toward antitrust not just in that case, but in all kinds of cases, for a long time. That in turn seemed important in understanding the larger political problem of having a competition policy at all. It seemed promising to try to figure out if any common themes unite the different cases that have lacked popular support, however different they might otherwise seem. And indeed, to me something did seem common among them.

The common theme is this: the very competition itself that is supposed to be our preferred state of affairs is price competition. Theoretical details vary and people fight over them, but basically, price competition means comparatively numerous, autonomous units vying non-cooperatively for the same customers, on the basis of quality-adjusted price. As a practical matter our antitrust laws imply that it is our default position, and that departures from it require antitrust analysis. But it is in many respects disagreeable to its participants and bystanders, even though it may generate the best overall outcomes on an aggregate basis. Their incentives therefore are to seek government or private protection from it, and to rationalize

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[2] Thurman Arnold, Symposium, *The Effectiveness of the Federal Antitrust Laws*, 39 AM. ECON. REV. 690, 690 (1949).

the protection as not just service of their own pecuniary interest. They argue in many ways that protection is needed to preserve important social values. And though their rationalizations will seem varied and idiosyncratic—and though they may believe in them very sincerely—it seemed to me that very often they could be understood as boiling down to one, comparatively simple argument. The common thread seemed to be that the pressure on firms to reduce their costs would in some cases prevent them from doing things that would be otherwise desirable. *Apple* is such a case, obviously enough. Some critics, for example, said that publishers need protection from price competition because if they are forced to cut costs in marketplace combat, they won't subsidize high literature. Others said that very low retail prices would reduce author royalties so much that they wouldn't write books anymore. Other critics yet said that if Amazon could compete fiercely on price, competing entrants would be unable to enter, because for some reason or other no one else could devise the relevant technology and negotiate the contracts. In other words, in each case the argument was that if Amazon could set price where it wanted, exploiting whatever advantages it had been able to come by, then markets would be unable to do the most basic thing they are predicted by theory to do. They would be unable to evolve institutional means to deliver the things that are desired at the most desirable quality-adjusted price. I then spend most of the book explaining that the same inner core unifies all kinds of arguments people have made throughout the history of competition law in all kinds of other cases. That is why I say in the book that the many, highly varied arguments for special treatment that have characterized the policy are in fact just disguised opposition to competition itself. That claim may or may not prove as true as I think it is, but it seems like an interesting and worthwhile thing to explore, and it is wholly unrelated to the state of antitrust doctrine.

I am aware that the argument will strike some as lumping together theoretically distinct arguments that each deserve evaluation on their own terms. Quite often the suspicion of price competition will be formulated in externality terms, as with the fear of lost literary values in publishing or the free-riding defense of resale price maintenance (RPM). Other times it will manifest more like a classic destructive competition argument, in claiming that some inherent flaw in a market will keep firms from covering their basic costs of production. It could probably take other, superficially distinct forms. But it doesn't really matter. The precise form in which the instinct manifests itself is not the point. My point instead was a political or sociological one. The

common theme in these cases is *a popular susceptibility to skepticism of market outcomes*, justified by more or less rigorous models in which price competition itself precludes the optimal satisfaction of some value. So, the problem is not precisely *why* people believe that a market doesn't work in a given case, but their proneness to believe it because they doubt that decentralized price rivalry can really accomplish so much. Most specifically, what seems unifying in all the theories I discuss is that they attempt to explain injuries or dissatisfactions that really are just ordinary incidents of healthy competition. In short, what unites the cases is a propensity to mistake the ordinary losses characteristic of competition for idiosyncratic, case-specific market defects.

I likened those models to the traditional destructive competition reasoning of the turn of the 20th century in part for a possibly unwholesome or manipulative reason. It links them with disfavored theories, and I think the newer ones should be disfavored too. But I also think it serves a legitimate purpose to show that this same process has come and gone more frequently than we think. First, real or perceived loss or change occurs. Margins are too thin, and businesses may fail. Jobs and investments might be lost or well-loved products or ways of doing business disappear. Affected parties and observers model the problem as an exception to the normal order, arguing that low prices themselves, in the particular circumstances, rob the market's ability to provide something that society needs. The thing might be a product, an informational or marketing service, a kind of retail organization, innovation, entrepreneurial opportunity, the entry of new firms, a broad or "non-economic" social value, or whatever. As it happens, I believe the history discloses another common step in the process. After some sort of protection is deployed for a while, to correct the perceived market failing, different evidence emerges showing that in fact markets would have been able to figure out solutions and that the protections just posed problems of their own, if indeed they did any good at all.

This is a crude kind of reasoning on my part, even if one agrees with my portrayal of the many arguments over time and their failures. It does not logically follow that because something happened a certain way before that it will again. But it seems useful to confront the popular propensity to fear price competition by showing that it has happened before, and that the fears have mostly not been borne out.

Importantly, in any case, while I explain at some length why I think price rivalry can be trusted quite a lot, it is not ultimately necessary for my basic theoretical claim to prove that all those

critiques of price competition were wrong. My claim is that whether they are right or wrong, the public is prone to believe in them, and that if it looks for it the public can find similar evidence of harm from price competition in most situations. That in itself is a fairly significant result for competition policy, and how well it can be expected to work. But more poignantly, if in fact the public is right about how often price competition fails, that is then a very serious policy problem. On the one hand, I don't happen to agree with Professor Wickelgren that antitrust must or should bother with "robust rule of reason" in all or most cases to accommodate local failures of price rivalry (as to which see Part II.A to follow). But if it is in fact true that problems serious enough to require the in-depth inquiry that he seems to favor in nearly all antitrust litigation, then it will work poorly at best and will be expensive and little used. If antitrust must work in that way, then I think it is probably not worth the trouble.

II. TWO RESPONSES, THAT ARE MORE INTERRELATED THAN THEY MAY SEEM

A. *The Case for Simplicity: I'll Have the Bacon (Method), Please*

I will confess that of the two essays, Professor Wickelgren's was rather more frustrating, but only for the same reason that I think he probably found my book frustrating as well. Though I think he and I are largely on the same ideological side, for whatever that may be worth, the difference between us is a very familiar one in antitrust and it has sometimes gotten pretty hot. On the brighter side, dealing with the things that frustrate us is usually all the more productive for us personally.

Strictly speaking, Professor Wickelgren makes at least two separate points, one of which I think is extremely good and I'll address separately below,[3] and the other of which I'll hit first. The one I address first was less persuasive to me, but then again, it's the one that has been the focus of so much disagreement in antitrust. It is obviously a matter about which people can differ.

(1) *The Reason for Simplicity: It Is a Mistake to Confuse Law and Social Science.* With my apologies, because Professor Wickelgren

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[3] *See infra* Part II.A.2.

might characterize it differently or find my characterization problematic, I see the difference between us as judging how much of the cost of uncertainty in antitrust should be on defendants, and how much on plaintiffs. His paper implies that it should be pretty heavily on the plaintiffs, and that this is so because of a basic problem of human epistemology. In this, his essay follows an assumption that has dominated antitrust for at least forty years, and that has gone essentially unquestioned even though it begs questions of foundational significance. The assumption is that there is no difference between social science and law. But indeed they differ a great deal. To borrow famous words from Derek Bok, who, like Professor Wickelgren, had formal training both as a lawyer and as an economist:

> Lawyers have perhaps not always been explicit enough in articulating the peculiar qualifications which their institutions place upon the unbridled pursuit of truth, [to the] irritation . . . [of] even thoughtful economists. . . . [But] [u]nless we can be certain of the capacity of our legal system to absorb new doctrine, our attempts to introduce it will only be more ludicrous in failure and more costly in execution.[4]

In abstract principle, we have framed the question in every individual antitrust case to be the same: whether the challenged conduct has a net-positive social impact. Because we now think the "social impact" should be measured by "efficiency" as defined in economic theory, that means in principle that the question is whether the conduct causes a net-positive or net-negative change in surplus, measured in dollars.[5] On some abstract level, that change itself could be rigorously quantified and precisely measured. Obviously, though, actually measuring it is problematic for various reasons, among them that it is laborious, expensive, and inevitably controverted. So as a matter of policy we have spared plaintiffs the cost of it in cases where

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[4] Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 228 (1960).

[5] With the usually minor qualification that, technically, it is not total welfare that counts, but consumer surplus. *See generally* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982) (originating this now widely accepted argument).

we think the risk of mistakenly condemning conduct is low enough that a full demonstration just to make sure would seem unjustified. We have often taken it as an important policy problem to decide which cases should fall within categories exempted from full empirical demonstration. That debate takes place both in academic journals and in the decisions of federal judges. In the nature of things, it mostly consists of theoretical arguments about whether particular categories of conduct can be said to be reliably, categorically net-harmful. If so, then in various ways we give plaintiffs some relief from full factual demonstration of actual economic effects. Empirical evidence figures as well, but typically the empirical evidence is scarce, and even where it is plentiful the questions usually remain inconclusive or controversial.

The making of this choice is Professor Wickelgren's only theme. "Antitrust is complicated," he says in an introductory passage, and he argues that trial procedures must accordingly be used to ventilate all that complexity fully.[6] He so argues mainly because of what I will describe as an epistemological problem. In making policy, it is hard for us to think about the task except by categorizing kinds of conduct and deciding how the different categories should be treated by law. But the problem with categories is saying which things should be included in them and which things excluded. No matter how carefully we define a category, specific examples will occur that pose unanticipated doubts whether they should be treated the same as other instances in the category. We can never, in antitrust or elsewhere, make legal rules with objective certainty, and it will always be possible in principle to argue that some applications of a rule are undesirable.

Professor Wickelgren argues that where there is uncertainty whether particular cases should be in a prohibited category, we must err on the side of caution. An issue in responding to his view is knowing when he thinks there is sufficient "uncertainty." In fairness, he does not say that *every* possible uncertainty should trigger full-blown balancing, but his explanation for how we make that call seems—again with my apologies—capricious and uninformative. All he really says is that some kind of "robust" review must happen whenever arguments exist creating a "plausible" or "credible" possibility that a category of conduct is even sometimes not harmful. He doesn't say how that judgment is made or who makes it, but the

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[6] Wickelgren, *supra* note 1, at 354.

essay makes it seem like a very low standard. At one point he says that "[t]he current literature"—which is to say, the mostly a priori, theoretical literature in economics and law speculating that particular kinds of conduct might be harmful or beneficial—"*makes clear* that any other approach" would be unacceptable.[7] With respect, I'm not sure how the current literature makes anything "clear" to anyone. The only thing that is clear from reading it is that questions left to a priori speculation will always, irremediably remain unclear.

And so, if "uncertainty" depends on the presence of not plainly false theoretical arguments in the literature demonstrating the possibility of pro-competitive explanations, then I think defense experts should be able to make the case for full-blown factual consideration in just about any case except the narrow range of cases now treated as a matter of law under *per se* or "quick look" standards. Indeed I'm not really sure why Professor Wickelgren says that *Apple* was so plainly a case for *per se* treatment. Even I don't doubt that reasonable people could consider *Apple* complex, with "plausible" or "credible" reasons to suspect that the conspiracy could generate benefits, and I wrote a whole book saying it should be illegal. After all, in the *Apple* case, Apple had the assistance of an expert witness named Benjamin Klein, who is not only a preeminent economist, but a main progenitor in the RPM literature that Professor Wickelgren considers plausible and credible. In *Apple,* Klein provided arguments implying that Apple's conduct should not be automatically illegal. Unless he was in this particular case a transparently obvious liar, it's hard to see why we can just rule his arguments more obviously out of order than in the RPM context. In fact, on Professor Wickelgren's plausibility standard, defense experts should be able routinely to mislead courts into treating horizontal cartels and naked hub-and-spoke deals with full-blown fact consideration, because in fact there are very, very frequently arguments of abstract speculation available, that are at least conceivably correct, that those things might do some good.

In any case, to handle this complexity, Professor Wickelgren says that "a robust rule of reason" is the only acceptable procedure for antitrust cases wherever there is his specified measure of uncertainty. He never quite says what it consists of, and as I'll explain, he may not mean quite what he seems to. As it happens, a common problem when people talk about the rule-of-reason is that they may be talking about

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[7] *Id.* at 356 (emphasis added).

different things without knowing it. So, it may be that he and I do not differ so much as either of us think. But it sounds like he favors something I consider radical and very undesirable. The essay reads as though he wants courts in most cases not only to apply the multi-step burden-shifting procedure that now constitutes the full, unabbreviated rule of reason.[8] He wants them always or commonly to give defendants so much benefit of the doubt that there would be a case-by-case "balancing" of the quantified costs and benefits of challenged conduct. That is, he seems to be arguing not only about the choice between *per se* and rule of reason treatment, but about how the rule of reason should be applied. In most cases, a court would receive evidence from at least one economist for each side on not only the plaintiff's *prima facie* showing of anticompetitive effect—which typically consists of a plausible theory of harm and proof of sizable market share—and not only on whatever pro-competitive upsides the defendant might allege, but also on the ultimate quantitative question whether plaintiff's proof of actual harm outweighs whatever benefits there might be.[9]

If this is really Professor Wickelgren's vision for antitrust, then I'm afraid I can't agree at all. First, he seems unconcerned with—and never mentions, really—the widely shared abhorrence for case-by-case judicial "balancing" in antitrust.[10] Actual balancing is disfavored by academics, lawyers, and judges across the political spectrum for an

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[8] *See, e.g.*, O'Bannon v. Natl. Collegiate Athletic Ass'n, 802 F.3d 1049, 1070 (9th Cir. 2015); Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993); Agnew v. Natl. Collegiate Athletic Ass'n, 683 F.3d 328, 335 (7th Cir. 2012); PHILLIP E. AREEDA & HERBERT HOVENKAMP, Vol. VII, ANTITRUST LAW 389-90 (3d ed. 2006).

[9] *See* Wickelgren, *supra* note 1. There remains some real confusion over what is supposed to happen at this very last step, since the caselaw implies that plaintiffs must also prove that the defendant's purported benefits could be achieved by less harmful means. There is little law on how courts actually should handle this tail-end of the analysis, no doubt because reaching it is so rare, but in any case, there are seriously conflicting signals within the caselaw how it actually works. *See* Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U.L. REV. 561, 561 (2009). It does not really matter much for what I say here.

[10] *See, e.g.*, ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 207 (2d ed. 2008); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLES AND EXECUTION 30 (2005); Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The* Chicago Board of Trade *Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis, in* 15 RESEARCH IN LAW AND ECONOMICS 1, 65-68 (Richard O. Zerbe, Jr. & Victor P. Goldberg eds., 1992).

important reason that he doesn't acknowledge. The problem is definitely not just that it is difficult and costly. That is admittedly its own concern, and I humbly submit it is a big one. It probably pretty significantly impedes the bringing of actions by the contingency-fee class action lawyers who finance virtually all antitrust enforcement in America.[11] Rather, it so happens to be just deeply unlikely to improve accuracy. Even under the best circumstances, the measurement involves complexity—really, philosophical challenges—beyond human capacity to manage objectively. In the end, even in best-case circumstances, we can only estimate the welfare consequences of any particular conduct, and different economists' estimates will ordinarily differ substantially.

To be sure, in a significant way, this emphasis on adjudication through fulsome social science analysis, rather than through categorical rules fashioned by courts over time, is really just a procedural distinction. But it is an important one, and it seems to me likely to make antitrust litigation less rather than more accurate. Its real effect is to put even more of antitrust decision-making into the hands of the individual expert-witness economists hired by the parties. Cases will still be decided by non-economist factfinders—which could be a lay jury if either party exercises its right to one.[12] The difference would be that in each case they would have freedom to decide not only the facts needed for application of a judge-made rule, but which of two opaquely complex expert positions better captures the actual state of the world.

It is in part for these reasons that true net-benefits balancing, in which a fact-finder in merits litigation formally chooses among expert economists' quantified estimates of welfare consequences, is very rare.

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[11] With respect, Professor Wickelgren's one point attempting to downplay this cost is wholly unpersuasive. He says that requiring plaintiffs to put on fuller rule-of-reason demonstrations will not matter, because, as did the Justice Department in the *Apple* case, they already routinely plead and prepare both *per se* and rule of reason allegations in the cases they bring. Wickelgren, *supra* note 1, at 360. But that is, candidly, ridiculous. They do that, but only because the only cases they bring, by and large, are cases they feel pretty sure will give them *per se* or quick look treatment. That they add rule of reason allegations is not because they like rule of reason cases or do not consider them costly. They add them as failsafes so that the cases they are hoping are *per se* cases—the only cases they really bring—will not get tossed if a judge decides *per se* treatment is not appropriate.

[12] *See, In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1079 (3d Cir. 1980).

In American law, it almost never happens.[13] That could be so for various reasons, including that antitrust litigation itself is relatively rare and those antitrust suits that are filed rarely reach the final merits on any standard. But balancing is also thought to be rare just because courts avoid it when they can, through means for early dismissal or by resolving cases either on the *prima facie* showing or the defendant's initial rebuttal. Even those who argue that this still involves a kind of balancing recognize that full net-benefits consideration is problematic, and favor the search for judge-made short-cuts.[14]

But all that said, I have a bigger problem with this fulsome-fact-inquiry agitation, and it goes to whether antitrust can exist as a meaningful policy or not. Professor Wickelgren does not state it in these terms and does not cite the relevant literature, but his argument follows more or less directly the reasoning of the so-called "decision theory" or "error cost" literature in antitrust. Decision-theory advocates observe that in social science we approach the adoption of conclusions skeptically and conservatively—we accept them only when there is strong reason to do so. They argue that in law, just the same, government should be reticent to act where there is uncertainty surrounding challenged conduct. They have been criticized for any number of specific incautious assumptions and elisions, including a surprisingly strong empirical assumption that entry is so generally, globally easy and effective in American markets that markets self-correct better than antitrust can fix them. They made that claim with no meaningful evidentiary support then or now.[15]

But the most important criticism of that reasoning, and one that I think applies to Professor Wickelgren's essay, is that it is emphatically not an ideologically neutral move to presume that law can simply adopt the same epistemic conservatism as social science. Taking the risk of antitrust uncertainty from defendants does not mean that it no longer poses costs, and those costs are not just shifted to plaintiffs.

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[13] Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1346 (compiling evidence that actual balancing is rare); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 829 (2009) (updating prior research and finding that actual balancing had become even less common).

[14] C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 947 (2016).

[15] *See, e.g.*, Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 10, 12 (2015).

They are shifted *to society*. Moreover, whatever he may intend, the practical consequence of Professor Wickelgren's position—at least as it seems to be stated here—will be that the government should do nothing or little because humans remain irremediably epistemologically frail. If (1) it is the case that a mere conjectural possibility of uncertainty is enough to trigger trial procedures that meaningfully impede enforcement, and (2) that there will *always* be conjecturally possible doubts in every case or most of them, by virtue of an epistemological frailty that is inalienably human, then a very significant policy judgment has been made without much consideration of the costs. In my opinion it would render antitrust largely inert.[16]

Admittedly, I, too, want to use the edifice of contemporary price theory just as much as Professor Wickelgren does—all of it, as much as economists can produce, and, even better, all the empirical testing of it that can be done. Indeed, to some large degree it is what my book is all about. I defended *Apple* and the very traditional antitrust rule it applied using economic arguments, and one of the main counter-arguments I challenged was the leftward view that the case should have been handled on much simpler terms. Consistent with the arguments of a popular movement in antitrust getting a lot of attention right now, many said that *Apple* should be resolved on the simple grounds that Amazon was very big, and therefore that it was the antitrust problem. That would reflect that movement's return to "structuralism" or the like, which is not so far all that clearly elaborated, but appears to mean breaking up big firms and deciding who is the bad guy in a given case by asking which one looks biggest.[17] I tend to agree with Professor Hovenkamp that just tallying up social problems and assigning them to an anti-bigness policy is "worse than useless,"[18] and one reason I think so is that this group got the *Apple* case itself so wrong. They saw that Amazon was big on various measures, had behaved very aggressively, and compared it to the more sympathetic figures of publishing houses and the authors they represent. On that basis they decided that the only right policy was to sue Amazon or do nothing at all. For reasons I spent about 500 pages

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[16] *See generally, id.*; Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75 (2010).

[17] *See, e.g.*, Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 718 (2017).

[18] Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 109 & n.214 (2018).

explaining, it is contemporary price theory that shows why they were mistaken. In some important sense, that was an argument for rules based on complexity—rules formulated on the basis of economic analysis—rather than simplicity—those that more or less ask who looks like the bad guy. The rule actually applied by the courts in the *Apple* case happens to be one that radically simplifies what happens in the courtroom. But it has been formulated and defended by using the full apparatus of contemporary price theory over a long time.

But to be clear, there is a key difference between how I would deploy all that theoretical prowess and how Professor Wickelgren would. He seems to want the full weight of economic theory to be applied *in each case to its particular facts, pretty much most of the time*. The exceptions would be apparently only hard-core cartel restraints and the horizontal conspiracy cases now treated under the "quick look."[19] Only in those cases would factual possibilities be taken off the table as too implausible to waste the world's time. I think that is a bad idea, for reasons I will explain. By contrast, I want to use economic theory and empirical evidence to fashion rules, to whatever extent possible, *before* litigation. I favor common-law antitrust rules made by judges over time with the input of our system's large economic and legal commentariat. In the case of *United States v. X*, I would urge that to whatever extent possible, the court should be permitted only to ask whether some set of objective facts of the market's nature and *X*'s conduct imply harm at odds with antitrust law, as determined through academic debate *before* litigation.

I humbly do not believe much is added by the cases that Professor Wickelgren discusses to show that "robust" net-benefits measurements are desirable. He points to *NCAA v. Bd. of Regents of the Univ. of Oklahoma*[20] as proof that despite their cost and difficulty, rule-of-reason cases "can be viable."[21] But the Court there took one of the best-known short-cuts in contemporary antitrust, and stressed at length that courts should use their judgment in appropriate cases radically to circumvent all the case-specific factual inquiry that Professor Wickelgren says is the only way to handle most antitrust cases. Likewise, he takes the Justice Department's famous and ill-

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[19] Abraham L. Wickelgren, *Determining the Optimal Antitrust Standard: How to Think About Per Se versus Rule of Reason*, 85 S. CAL. L. REV. POSTSCRIPT 52, 54 (2012).

[20] 468 U.S. 85 (1984).

[21] Wickelgren, *supra* note 1, at 360.

fated monopolization suit against American Airlines[22] as proof that simple antitrust rules are bad. His point here is a little unclear to me, and I hope I'm not unfairly missing something, but that case strikes me as showing the outright failure of "robust" analysis. It is quite true that the doctrinal predation standard applied there, first adopted by the Supreme Court in the 1990s,[23] is a "simple" rule in the sense that it states a nominally bright-line rule for illegality. But making the factual demonstration needed to meet the elements of that bright-line test is an intensely factual, uncertain inquiry flawed by all the sins of full-blown net-benefits balancing. The plaintiff and defendant must put on the testimony of competing expert witnesses who have to sort through not just a large volume of evidence, but conceptually difficult uncertainties about which costs are variable and which are not, which are properly allocable to the goods in question, and so on and so on. And, sure enough, the cost and difficulty of making this showing has essentially killed price predation as a viable theory of antitrust liability. It is now a common-place that price predation plaintiffs essentially never win, but what is less well-known is that they just never bring the cases at all.[24] If price predation can sometimes be anticompetitive, as Professor Wickelgren apparently believes,[25] then a doctrinal procedure making it so hard to prove that no one is willing to challenge it anymore is not a very desirable approach.

But anyway, again, I think Professor Wickelgren and I may not actually be so far apart as all that makes it sound. As is often the case in discussing antitrust standards, I think we may just misunderstand each other. In a different paper, Professor Wickelgren once wrote this:

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[22] *Id.* at 358 (discussing United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003)).

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

[24] In the course of countering this very common claim, Professor Crane once pointed out that one plaintiff did in fact win a jury verdict after *Brooke Group*, that three others procured settlements, and that overall at least 57 complaints alleged predation. Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1, 4 & n.12, 15-16 (2005). (He actually omits one other significant success, presumably because summary judgment for the defendant was not reversed until just after his article had gone to print. *See* Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917 (6th Cir. 2005)). However, between *Brooke Group* in 1993 and Professor Crane's article in 2005, there were something on the order of 10,000 antitrust filings. So it appears that plaintiffs didn't even bother to allege predation in more than about 0.6% of all antitrust cases, and they achieved even limited success in no more than about 0.05% of them.

[25] Wickelgren, *supra* note 19, at 53.

> One way to express the justification for the per se rule is that the probability that... evidence will exist [that could overcome the presumption of anticompetitiveness in a particular case] is so small that it is not worth examining it. In that light, one can also view the structured rule of reason approach as one that should (although, in practice may not) reflect a similar paradigm in less extreme cases: we require stronger evidence of anticompetitive effects for conduct that we think are less likely to be anticompetitive and are more receptive to procompetitive effects arguments in such cases.[26]

If I understand correctly, and he sees this as an acceptable way to make antitrust rules, then I think the space between us actually gets pretty small. All I really want is to use economic theory and empirical evidence to measure those same probabilities and formulate those judgments into rules. In my judgment, the theory and evidence unsurprisingly support a fairly strong preference for goods to be produced by comparatively numerous autonomous units vying non-cooperatively for the same customers on the basis of quality-adjusted price. That is, the evidence pretty strongly favors price competition most of the time, and so we just don't have to be that solicitous of arguments for avoiding it.

In practical effect, the only change I envision from current law would be no more radical than shifting the burden of antitrust uncertainty back to where it had been for a long time—on defendants. That does not mean adopting *per se* rules or prohibiting defendants from defending themselves. It means measuring the probability that pro-competitive values can exist in academic debate, *before* litigation, to make rules by which the courts remove the ultimate decision from the realm of capricious fact-finders attempting to choose between extremely complex reports prepared by experts paid to serve the parties' interests.

Finally, this all begs what seems to me an important and virtually never-asked question. Why is it that we put so much more effort into this kind of argument in antitrust than in most other areas of law? Other areas of law, including tort-like, law enforcement rules resembling antitrust, also pose significant risks of interfering with what may be socially desirable business conduct. Is compliance with

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[26] *Id.* at 53.

antitrust rules really so much more costly than compliance with, say, the law of fraud or bribery? Or, for that matter, real estate conveyancing? In those areas we tend not to see massive literatures of scholastically metaphysical navel-gazing to measure whether the precise tuning of its rules could be net allocationally inefficient. I don't really know the explanation, though I have some guesses. For one thing, while I don't think this is true at all of Professor Wickelgren, for some *agonistes* it's really just politics. They tend to renounce the very suggestion pretty bitterly, but occasionally we see the acknowledgment of a genuine insider that conservative antitrust has had less interest in social-scientific truth for its own sake than in undermining the legitimacy of big government.[27] But for those many whom this does not capture, like, I imagine, Professor Wickelgren, I think there is a different explanation. We consider social-scientific standards of empirical skepticism appropriate to antitrust law because there happens to be an entire profession devoted to it. There is an entire academic and professional institution devoted to industrial organization economics, and its professional mores are rather imperial in their designs on the rest of the world.

In the end, the reason I think this is all about bacon (that is, the preference for empirical investigation over a priori speculation, associated with Francis Bacon) is not that I think the state of econometrics or the evidence existing on any particular question makes anything simple. Rather, the disagreement between Professor Wickelgren and I goes to how much significance we would put on the fact that humans can *always* come up with a priori arguments to argue *anything*. It is the degree to which we would let the conceptual *possibility* of pro-competitive explanations upend the application of manageable rules. I think the mere possibility of uncertainty is omnipresent, because it is irremediable in human nature. But I don't think that the cost of uncertainty is always substantial or that it always outweighs the cost of government quietude.

Ultimately, I believe the question is not whether we should entertain complexity. Of course we should. The question is at what point in the policy process we should give it the time of day.

(2) *That Other Thing, That Was Really Good: Antitrust as a Theory of the Firm.* In the course of making the argument above,

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[27] *See, e.g.*, George L. Priest, *The Limits of Antitrust and the Chicago School Tradition*, 6 J. COMP. L. & ECON. 1, 9 (2010).

Professor Wickelgren makes one specific point that I think is very good and perceptive, and captures something I must address more clearly in the book. It seems to me to go to the heart of the theoretical contribution I hope to make. That he misunderstood me is my fault, and it shows that I need more careful explanation.

In his extended defense of the economic literature on RPM, Professor Wickelgren points out that it can be seen as just an extension of a set of institutions we consider so legitimate that we scarcely think about them. Firms exist, and they make their internal decisions by fiat rather than exchange. Even if we did not take their existence as a pre-conscious given—as most of us do most of the time—an ingenious little theoretical literature happens to explain them nicely. Assuming that markets do in fact optimize values in the way that theory predicts, then wherever market exchanges are costless, every decision made by every person would be made by bilateral exchange between individuals. There would be no firms, because hierarchical decisions within them could not improve on market outcomes, and the costs of making them would therefore be wasteful.[28] Professor Wickelgren objects to my characterization of the RPM literature as "anti-market" (his words) because in fact everyone agrees that there should be firms, because exchanges are in fact costly, and sometimes more so than decision by internal fiat. And indeed the transaction-cost literature has for a long time argued that vertical integrations of various kinds—including by vertical contract—might be desirable transaction-cost accommodations.

To some degree, I think Professor Wickelgren's points here reflect a real and pretty uncharitable misunderstanding, though the blame is mine for not explaining myself better and I hereby resolve to do so in the final product. With respect I don't believe I have a "very extreme view of the role of markets," and my position doesn't require some insane, atomistic rejection of all long-term contracting (as my discussion of the *Addyston Pipe*[29] case might have made clear, but since it didn't I will expand it to make it more clear). I don't consider it

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[28] The point was observed originally in Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA (n.s.) 386 (1937). It has been developed in various ways by many others, but best known and most influential has been the "transaction cost" economics associated chiefly associated with Oliver Williamson. *See, e.g.*, OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES (1975).

[29] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

important to prove that anyone is theologically "anti-market" or not.[30] Separately, I never say and I don't believe that theoretical defense of RPM requires that consumers are "irrational."[31] In misunderstanding me on those points, Professor Wickelgren misunderstands my more important point about the RPM literature. I take its history as an example in which mere theoretical possibilities persuaded a lot of people to suspend the usually strong presumption of economic theory that competitors, including resellers of a thing, should compete with each other on price. That example seemed important to me in part because it involves the very mechanism at the heart of my theoretical argument, and usefully shows it to be the same (in that respect) as other defenses of private conduct that we don't usually think of as related.

Specifically, many defenses of RPM argue that intra-brand competition keeps resellers from providing costly services, like in-store demonstrations, well-trained sales staff, or brand-specific repair facilities. But it is necessarily the case that if providing these services is net socially desirable, then they *will* be provided in ordinary competition unless something is wrong with the particular market in question. The literature's own most important progenitor himself recognized precisely this problem, and he said so in his most famous paper. He there devised the "free-riding" defense of RPM precisely because, in the absence of that externality, all retail services that would be efficient would be provided without it.[32]

Professor Wickelgren says I mistook the RPM literature for an argument of consumer irrationality because I say in the book that "the claim was that consumers can't be trusted to know what they want, and markets can't be trusted to give it to them." But by that I didn't mean at all that RPM defenses assume consumer irrationality. Rather, they assume a flaw that can keep markets from giving consumers what

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[30] Wickelgren, *supra* note 1, at 363.

[31] *Id.* at 362.

[32] *See* Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. L. & ECON. 86, 89 (1960). A handful of other common justifications for RPM don't require this kind of criticism of price competition, like the argument that new entrants may need to give retailers the promise of some margin, through protection from intra-brand price competition, just to secure any distribution at all. For what it may be worth, those arguments have their own problems. *See generally* Warren S. Grimes, *The Path Forward After* Leegin: *Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 ANTITRUST L.J. 467, 482 (2008).

they want, and betray—I humbly believe—a credulous willingness to believe that such flaws are common and hard to address by any means except restraining price competition. I guess from context I assumed that would be apparent, but obviously I must clarify. Either way, though, again, it doesn't really matter. My point was that, as in other circumstances in which I think our unspoken propensity to doubt price rivalry as an organizing tool, the history of the RPM literature shows how easily mere conceptual, a priori *suggestions* of uncertainty can throw our whole competition policy upside down.

Admittedly, the RPM example also seemed delicious to me, because the defense of it has been the focus of such a massive academic endeavor that in retrospect is coming to seem (to me) ridiculous. Even its own most active voices have begun to acknowledge that much of it has been abused and in various ways was probably incorrect or oversold.

In any case, though, Professor Wickelgren's observation struck me as far-sighted and perspicuous, and it will be of use to me. Economics still mostly does without much of a theory of the firm, and antitrust basically has none at all.[33] In fact, antitrust is routinely and casually ignorant of the many ways in which its rules imply some theory of the firm, but leave its implications completely unexplored. As just one routine example, it is rarely asked why "collusion" among separately organized firms is so different than the decisions that would be made by their board of directors if they all just merged. Exploring this problem and its consequences for antitrust will most definitely play a role either in my revisions in this book or in future work.

B. *On Amazon: Dude, Totally*

Professor Rub's generous and thoughtful essay touches on quite a variety of specific points, which will be useful in my revisions,[34] but it seems important only to respond to one major theme. His most

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[33] *See generally* Chris Sagers, *Why* Copperweld *Was Actually Kind of Dumb: Sound, Fury and the Once and Still Missing Antitrust Theory of the Firm*, 18 VILL. SPORTS & ENT. L.J. 377 (2011).

[34] I love, for example, his invocation of survey evidence showing how dismissive economists are of public opinion. Rub, *supra* note 1, at 376 & n 51. I found myself wondering why he didn't take it a next step and make what could have been a nice little criticism of me and the antitrust politics I like—*mea culpa*!—as just reflecting what might be a knee-jerking and unfounded elitism.

important criticism seemed to be that understanding the popular reaction to *United States v. Apple* requires more consideration of how Amazon might pose legitimate threats, even if they are not actionable under American antitrust. Crucially, to me, he says that left-ward criticism of the case did not actually depend on public antipathy or misunderstanding of "competition" as such, but rather on ways that Amazon posed real threats as a "monopoly" in senses not really addressed by present law.[35] That goes pretty directly to the heart of my claim that the public opposition to the case was opposition to competition itself. In the final book, I will respond to these points by clarifying three important things.

First, I agree with Professor Rub emphatically that Amazon poses serious threats and is a proper concern of public policy. I think he mistook my explanation that Amazon would be difficult to sue—and especially my criticism of the *Apple* defendants' price predation claims—as an argument that Amazon *should* be difficult to sue, and should not be constrained by antitrust. On the contrary, I think Amazon deserves serious scrutiny, both by its raw size within its various markets, and because of its record of conduct.

Fortunately, I happen to think Amazon is probably perfectly subject to legal challenge now, under existing American law without the need for any serious modification. On the one hand, I don't actually agree with some of Professor Rub's characterizations of why Amazon is threatening, as he takes a few things factually for granted that could be quite significant. First, he believes that Amazon has "very significant market power."[36] It's not exactly clear, but he appears to use this phrase in the way it is used in economics and antitrust: as the power to raise price.[37] I tend to agree with him that Amazon likely has some pricing power, but with an important qualification. I don't agree that Amazon could substantially raise its *retail* prices. Retail on

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[35] *Id.* at 370 (saying critics of *Apple* opposed Amazon for being a "monopoly" rather than because they opposed "competition"; their views represented not an attack on competition, but rather an "attack on monopolies and the risk they pose to competition.").

[36] *Id.* at 370 n.4.

[37] While Professor Rub doesn't explain his own understanding of "market power," he sometimes says explicitly that Amazon could raise retail prices if it wanted to. He says that Amazon "has enough market power to raise retail prices well beyond its marginal costs, but it refrains from doing it," *id.* at 373; and that, for the time being, Amazon "transfers much of the fruits of its market power to its consumers." *Id.* at 387. As a result, it "uses its power to extract excessive surplus" from suppliers in order to "transfer it to consumers." *Id.*

the whole has remained mostly quite competitive, and Amazon has kept its dominance in large part by the unmatchable aggression of its pricing. Rather, Amazon seems already a genuinely dangerous, predatory monopsonist—a power buyer, as opposed to a power seller—whose publicly-known conduct already seems like it could make out a plausible case for the "exclusionary conduct" component of an action under § 2 of the Sherman Act.[38] I doubt that anyone knows exactly why for sure, but securing distribution through Amazon is now plainly significant enough that suppliers submit to substantially oppressive demands and price pressures from Amazon. Those things may not violate antitrust law, but if the power to impose them was gotten through exclusionary means, then they do. In fact, I think Amazon is pretty well on its way to serious federal antitrust challenge that in many ways could resemble the famous *United States v. Microsoft*.[39] I tend to think such a case is more likely than not within the next decade or so, barring a serious change to Amazon's behavior or its fortunes. Though I would have thought any such suggestion completely absurd a year ago, I think that in light of recent events such a case is not that unlikely even during the Trump administration.[40]

Second, Professor Rub stresses Americans' concerns that even if some antitrust action were taken against Amazon, it wouldn't actually address certain real social problems. He implies therefore that Americans don't doubt *competition* as such, but antitrust. But I will

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[38] Monopsony actions are unusual in American law, but monopsonization is perfectly well recognized as an actionable violation of § 2, and where the claims are brought they are doctrinally more or less indistinguishable from § 2 monopolization claims. *See generally* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS (2d ed. 2010).

[39] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[40] Right now, everybody is trying to figure what is going on with the Trump administration's antitrust program, and the honest answer is that no one outside the agencies can be very sure. For the moment, most attention is fixed on the Justice Department's surprising, apparently brave, and seemingly substantively strong challenge to the merger of AT&T and Time Warner, Inc. Before that suit was filed, there were many highly varied, and mostly wrong, predictions of what would happen during the four years of the Trump administration. The predictions mostly tended to anticipate a very restrained, conservative, and hum-drum enforcement program. Now the question is whether the AT&T/Time Warner challenge is a one-off—as some think, suspecting that it reflected not a renewed enforcement vigor but the personal and political interests of President Trump—or rather that it bespeaks a new commitment to vigorous merger control. In any case, see generally Chris Sagers, *#LOLNothingMatters*, 63 ANTITRUST BULL. 7 (2018).

clarify that existing antitrust could actually address the specific problems he identifies, at least if it is applied a little more vigorously. For example, it is not somehow separately relevant, as distinct from the harms addressed in a § 2 monopsony case, that as Amazon grows in market power, the lower wholesale prices it negotiates will reduce authors' revenues.[41] That is in fact the whole point of having a public policy against monopsony, and it is the same whether or not the sellers happen to enjoy intellectual property rights. The harm is a loss of revenues to authors and other suppliers that leads to inefficient loss of supply and incentives to innovate. Accordingly, it would be better to favor antitrust control of *both* Apple and Amazon, instead of neither.

Therefore, to me, the real policy question is not so much whether Amazon's power should be controlled, but how. Vigorous antitrust toward Amazon right now would commend a few specific steps. Above all, the agencies would benefit from ongoing investigation of Amazon and the other major platforms, and it would be surprising if they have not already done a large amount of it. At least three things would seem quite important for them to surveil. Above all, they should be working to understand if and how Amazon has acquired power as a monopsony buyer. That could mean, among other things, understanding why online distribution over Amazon came to be so critical to so many suppliers, and also understanding the many documented means by which Amazon has disadvantaged its competitors, suppliers, and even the firms that sell things on its own "Amazon marketplace."[42] It could also mean bigger-picture theoretical work to understand how Amazon's raw size or the nature of its business—for example, a network or scope-economy advantage of being almost literally "the everything store"—somehow give it power

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[41] *See* Rub, *supra* note 1, at 387. It is not correct, incidentally, that where one firm controls a vital point in distribution then "that market" in which it is dominant "does not really exist." *Id.* at 385. It exists perfectly well. The market's existence manifests in the fact that the monopolist cannot just set any price it wants. Instead, just like every participant in every market, it sets price so that marginal cost equals marginal revenue. The operation of even that monopolized market would cause any other price to be less profitable to the monopolist. *See* CHRIS SAGERS, EXAMPLES & EXPLANATIONS: ANTITRUST § 2.3.3 (2d ed. 2014).

[42] *See, e.g.*, OLIVIA LAVECCHIA & STACY MITCHELL, INST. FOR LOCAL SELF-RELIANCE, AMAZON'S STRANGLEHOLD: HOW THE COMPANY'S TIGHTENING GRIP IS STIFLING COMPETITION, ERODING JOBS, AND THREATENING COMMUNITIES (2016), https://ilsr.org/wp-content/uploads/2016/11/ILSR_AmazonReport_final.pdf [https://perma.cc/H6CP-3HVQ] (cataloguing many specific instances).

over suppliers, and whether anything about it might be illegal. Second, they should have a careful ongoing concern for Amazon's unilateral vertical relationships, and whether it is using them to shore up power, either as a buyer or a seller. It seems that now that Amazon's market shares are very large, its ability to start shoring up exclusivities either forward or backward seem threatening. Finally, regulators should consider the longer-term, dynamic machinations that may be at play in Amazon's long history of acquisitions, many of which in retrospect look like fairly exclusionary plans to dominate existing or new sectors. Professor Rub tells the well-known story of Amazon's acquisition of Diapers.com, but that is only one among many.

As a third and final clarification, I definitely agree with an ultimate conclusion he suggests, and I did not mean to imply otherwise. In the end, capitalism poses some problems that have no very good solution, and certainly it does not solve them just to have more competition. We will have to live with that even if there are not really any plausible alternatives to it as a basic system. In one respect, however, it seems like we very plausibly could and should solve some of those problems just by making use of some policies other than competition. And so, we plainly do need a social welfare policy to mitigate capitalism's harsh side-effects—particularly the problem of those who are the losers during times of technological or other transition. That seems like something we could manage with progressive taxation and social welfare programs. As a matter of fact, we need such policies for two separate reasons. First, it is plain that microeconomic price competition leaves unaddressed certain problems that are incumbent to address, like inequality of wealth and the distribution of losses following change. It is incumbent both morally and because preserving wealth equity seems likely to have macroeconomic benefits.

But a wholly separate reason to address those harms is to preserve the political viability of antitrust itself. If it is true, as Arnold said, that antitrust enforcement depends on the public attitude, then a serious threat to its legitimacy would be the public perception that it causes ills like these. To borrow from Arthur Schlessinger, "[t]hose who would now have government abandon social responsibility in the name of unbridled individualism are doing Marx's work for him . . . ."[43]

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[43] ARTHUR M. SCHLESSINGER, JR., THE CYCLES OF AMERICAN HISTORY 244 (1986).

This all goes to something important I tried to explain toward the end of the book. It obviously is true that competition generates some harms that seem necessary to remedy, and that competition itself cannot solve. But it does not follow at all that limiting competition is the right solution. Competition does well what it does in its own sphere, but it needs the support of other policies too.

III. THE COMMON THREAD

In the end, I think both these essays really were about one thing, and I need to clarify that the book itself was actually about another thing entirely. On some level, all three of us agree with the premise that there is a problem in America, at this contemporary moment, and the job is to figure out the policy to fix it. But Professors Wickelgren and Rub both take the problem to be that Amazon is big and its suppliers have conspired. They say I should reconsider the doctrinal antitrust specifics to tinker out a correction.

I say in fact that the problem of interest is actually much deeper and inherent in the having of a competition policy at all, and it is fundamentally a political or sociological problem. Having such a policy, at least on the tort-style law enforcement model that has existed in America and most other countries with antitrust laws, means having markets and letting them work. (Even on much more aggressive plans that is true; on a no-fault monopoly or affirmative deconcentration plan, for example, the goal at some point is just to let markets do the regulating.) But we forget much too easily that markets in their ordinary operation are machines for producing pain. And we have repeatedly, throughout the history of antitrust, misconstrued that pain for defects in markets themselves requiring either internal self-regulation or government intervention to protect firms from competition. So the problem in this problem-book is not that firms conspired or that Amazon is big. It is that antitrust itself seems not to work well under many circumstances for the simple reason that, whether they know it or not, the people don't believe in it.

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McGill Guide 9th ed.
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MLA 8th ed.
Sagers, Chris. "Clarifications and Gratitude." I/S: A Journal of Law and Policy for the Information Society, vol. 14, no. 2, Spring 2018, p. 391-418. HeinOnline.

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