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Antitrust and Inequality

Eric A. Posner* and Cass R. Sunstein**

Abstract

In its current form, antitrust law is often said to advance consumer welfare and to disregard economic inequality. But with the right priority-setting and other modest reforms, efforts to increase consumer welfare might simultaneously reduce economic inequality. Because monopoly and monopsony benefit shareholders at the expense of workers and consumers, ideal enforcement of antitrust law should redistribute resources from shareholders to workers and consumers. Antitrust enforcement agencies seeking to reduce inequality might adjust their priorities and target markets that are disproportionately important for low-income people. We also suggest that antitrust law could, with little violence, be turned toward advancing consumer welfare (in the sense of utility) rather than consumer surplus. Agriculture and health care would be good places to start; food and medicine compose a larger share of the budget of low-income people than of others, and these goods are essential to basic well-being. Regulators should also give priority to labor markets, especially labor markets in which lower-income people participate, and especially where pay gaps based on race or gender are large. In some cases, it is also appropriate to consider sacrificing economic efficiency for distributional goals by introducing distributional weights into antitrust analysis; doing so can increase social welfare.

I. Very Briefly

If the goal is to reduce economic inequality, public officials have a large number of tools. Does antitrust law have a role to play? Could it be refashioned so as to reduce inequality more effectively? Our answer to both questions is yes. Insofar as it might transfer resources from shareholders to workers and consumers, greater enforcement of the existing antitrust paradigm could, on uncontroversial assumptions, have beneficial effects in terms of equality.¹ An explicitly equality-focused approach to antitrust enforcement could have larger effects still. And incorporating distributional effects into substantive antitrust law could do even more, though this approach would raise complex questions. We shall also discuss, and endorse, some significant reforms.

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¹ See Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1 (2015); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017). Additional sources will be discussed *infra*.

We shall argue that in some cases, it is appropriate to consider sacrificing economic efficiency for distributional goals by introducing distributional weights into antitrust analysis; doing so can increase social welfare. We do not contend that for those who seek to reduce economic equality, antitrust law deserves pride of place, but it can make a significant contribution.

II. Inequalities: Income, Wealth, Welfare

If antitrust law is to be enlisted to reduce inequality, what, exactly, is it supposed to reduce? When people worry about inequality, they usually consider two kinds: income inequality and wealth inequality. Income inequality refers to differences across annual incomes (resulting from salaries or wages), which people earn from their work. Wealth inequality refers to differences in the stock of wealth owned by people—for example, home equity, possessions like jewelry, and stocks, bonds, and other financial instruments. Income and wealth inequality are usually correlated across lifetimes, but there are exceptions—for example, wealthy heirs who do not work, or highly talented young workers (like top athletes or artists) who are paid vast incomes but have not yet accumulated wealth.

A different and more fundamental concept is welfare or utility, which refers to a person's well-being. We can imagine a society in which half of the population has a great deal of welfare and in which the other half has very little. The idea of "welfare" is of course contested, and some people question whether interpersonal comparisons are possible.² Suppose, however, that in our imagined society, half of the population is healthy and happy, with lives full of both pleasure and purpose, and that half of the population is unhealthy and unhappy, with lives lacking either pleasure or purpose. It is safe to say that with respect to welfare, that society is highly unequal. In our view, the proper focus, strictly as a matter of principle, should be on inequality of welfare, not inequality of income or wealth.

For various reasons, many people believe that inequality of income, wealth, or welfare may be a serious problem. It may be, for example, that disparities of opportunities, including educational opportunities, have produced inequality in terms of welfare, which means that a morally irrelevant factor has been at work.³ It may be that discrimination on the basis of race and sex has contributed to inequalities, so that one group is systematically below another.⁴ It may be that some practice – for example, the income tax system – has contributed to, or produced, the relevant inequality, and the practice is itself difficult to justify. Some people are "prioritarians"⁵; they think that in deciding on relevant policies, it is important to focus on improving the welfare of the least well-off. Prioritarianism has significant implications for regulation, including antitrust law, and those implications have only started to be explored.⁶

² See Jon Elster & John E. Roemer, *Introduction*, in *INTERPERSONAL COMPARISONS OF WELL-BEING* 1-17 (Jon Elster and John Roemer eds., 1998).

³ See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

⁴ See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2412 (1994).

⁵ See generally Matthew D. Adler, *Theory of Prioritarianism*, in *PRIORITARIANISM IN PRACTICE* (Matthew D. Adler ed., forthcoming 2022) (outlining the theory of prioritarianism as a branch of welfare consequentialism).

⁶ For one discussion, see Ioannis Lianos, *Competition Law as a Form of Social Regulation*, 65 ANTITRUST BULL. 3, 27 (2020).

It is difficult to measure welfare directly,⁷ and many economists believe (or assume) that welfare is correlated with wealth and income. The extent of the correlation is an empirical question.⁸ Importantly, economists also assume that welfare increases with money at a decreasing rate. In terms of welfare, a poor person is likely to benefit more than a rich person from a \$1,000 check. If you are very rich, that \$1,000 check might not benefit you at all; if you are poor, it might produce a significant difference in your life. It follows that if we care only about welfare, and not about inequality per se, we will prioritize policies that reduce (economic) inequality by helping the worst off. We might be less interested in policies that reduce inequality by helping people in the middle catch up to those wealthier than they are, or by hurting people at the top without benefiting anyone else.

In terms of both income inequality and wealth inequality, there has been a great deal of concern about changes in the United States over the last fifty years.⁹ This is not the place for a full accounting, but the actual picture is both complicated and mixed.¹⁰ Since 1970, both median incomes and income inequality have increased. In 1970, the median income was \$50,200; by 2018, it had grown to \$74,600, an increase of 49%. (We use 2018 dollars.) At the same time, the incomes of the wealthy have grown far more than the incomes of middle-class and lower-income households. In the relevant period, the lower-income group gained 43%; the middle-income group gained 49%; and the upper-income group gained 64%.¹¹ And within the upper-income growth, the largest winners have been those at the very top. As a result, income inequality has been rising for several decades.

Some people might think that the increase in inequality is not terribly disturbing if all groups are experiencing significant income growth. But in terms of wealth inequality, the picture is worse. In 2016, upper-income families had 7.4 times as much wealth as middle-income families, and 75 times as much as lower-income families – an increase from 3.4 and 28 in 1983.¹² From 2001 to 2016, the wealth of middle-income and lower-income families did not increase at all. Indeed, there was a loss of 45% among lower-income families and of 20% among middle-income families – alongside an increase of 33% among upper-income families.¹³ A central reason is that the wealthier group was particularly able to gain from a rising stock market, because upper-income families have a larger percentage of their wealth in equities and financial market assets.¹⁴ The bottom half of the families in terms of net worth owns only 1% of equities, while the top 10%

⁷ For some influential efforts, see generally PAUL DOLAN, *HAPPINESS BY DESIGN* (2014); Daniel Kahneman, Peter P. Wakker & Rakesh Sarin, *Back to Bentham? Explorations of Experienced Utility*, 112 Q.J. OF ECON. 375 (1997).

⁸ See Ed Diener & Robert Biswas-Diener, *Will Money Increase Subjective Well-Being?* 57 SOC. INDICATORS RSCH. 119, 120 (2002).

⁹ See Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States*, 2008 Pathways Magazine 6–7 (illustrating the “explosion of top wages and salaries” since 1970).

¹⁰ See Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer Than Half Call it a Top Priority* 12–13 (Pew Rsch. Center, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/> [https://perma.cc/E73V-HVMA], from which we draw heavily here.

¹¹ *Id.* at 16.

¹² *Id.* at 20.

¹³ *Id.*

¹⁴ See Neil Bhutta et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 105 FED. RESRV. BULL. 1, 2–3 (2020).

owns 84%.¹⁵ (This will be highly relevant to our account here.) One consequence is that from 1983 to 2016, lower-income and middle-income families have had a declining share of aggregate wealth in the United States, falling from 32% to 17% and from 7% to 4% respectively. By contrast, the share held by upper-income families has jumped from 60% to 79%.¹⁶

Another statistic that shows the rise of inequality is labor's share of national income. Over the last twenty years, labor's share has departed from a relatively stable historical level and plunged several percentage points.¹⁷ If everyone owned the same amount of capital, this would not matter for inequality. But because ownership of capital is concentrated in wealthy people, the decline of labor's share harms the less well-off. While the causes of the decline of labor's share are complex and contested, part of the explanation is likely the declining bargaining power of labor (which reduces returns to labor) and increasing concentration of product markets (which increases returns to capital).¹⁸ A substantial decline in union density since the 1950s coincided with rising inequality and helps explain the divergence in returns for labor and capital.¹⁹ Various knock-on effects exacerbate inequality, including reduced intergenerational mobility as the wealthy monopolize educational opportunities for their children, higher housing prices as the wealthy buy second and third homes, and distortion of political outcomes as a result of the influence of political donations. These and other trends have led some commentators to posit the existence of widening inequality of welfare or utility, as famously encapsulated in the claim of rising "deaths of despair" from suicide, drug overdose, and alcoholism.²⁰

For those who are concerned about income inequality or wealth inequality, there can be no doubt that the current trends are troubling. And for those who are concerned about economic inequality, the situation was not particularly good in the 1970s or 1980s, when there was also a

¹⁵ See Robert Gebeloff, *Who Owns Stocks? Explaining the Rise in Inequality During the Pandemic*, N.Y. TIMES, Jan. 26, 2021, at B3 (summarizing 2019 Federal Reserve figures).

¹⁶ Horowitz et al., *supra* note 11, at 20.

¹⁷ See, e.g., Andrea L. Eisfeldt, Antonio Falato & Mindy Z. Xiaolan, *Human Capitalists*, 1–7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28815, 2021); Matthew Smith, Danny Yagan, Owen M. Zidar & Eric Zwick, *The Rise of Pass-Throughs and the Decline of the Labor Share*, 1–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29400, 2021).

¹⁸ See Yasser Abdih & Stephan Danninger, *What Explains the Decline of the U.S. Labor Share of Income? An Analysis of State and Industry Level Data*, 4–6 (International Monetary Fund, Working Paper No. 17/167, 2017); David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 35 Q.J. OF ECON. 645, 647–48 (2020); Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy*, 1–8 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020). The question of whether increasing inequality is due to rising market power in capital and product markets has received enormous attention. For some discussions, see Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1291 (2016); Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline in Antitrust Enforcement in the United States* (Stigler Center, Working Paper No. 314, 2021).

¹⁹ See Henry S. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, 136 Q.J. OF ECON. 1325, 1326–27 (2021).

²⁰ ANNE CASE & ANGUS DEATON, DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM (2021).

great deal of such inequality.²¹ The interest in a more progressive income tax, or some kind of wealth tax,²² stems from such concerns. Might antitrust law help?

III. Market Power, Efficiency, and Inequality

A. Conceptual Preliminaries

Antitrust theory is (roughly) concerned with market power—the ability of sellers to charge prices above the competitive rate (“markup”) and the ability of buyers (including employers) to push prices (wages) below the competitive rate (“markdown”). Market power produces two types of effects: efficiency and distributive. The price markup (or wage markdown) causes fewer people to buy things and fewer people to work, resulting in a deadweight economic loss. The price markup (or wage markdown) also transfers wealth from consumers and workers to investors. As we will explain, the distributive effect is normally from poorer to wealthier, though there may be exceptions in practice.

Antitrust law is governed by the so-called consumer welfare standard. The term is unfortunate and has caused much confusion, even among experts. Start by contrasting the consumer welfare standard with what is sometimes called the “total welfare standard.” In a simple model of supply and demand, “consumer welfare” (or, usually, “consumer surplus”) refers to the difference between price and the amount that buyers at the price would be willing to pay. “Producer welfare” (“producer surplus”) refers to the difference between price and the amount that sellers at the price would be willing to accept. Total welfare is consumer welfare plus producer welfare. Outside of antitrust law, total welfare just means efficiency. Antitrust law, as currently understood, advances efficiency only when consumers benefit from the reduction in deadweight loss or, in other words, receive a portion of the surplus that is generated.

But there are further complications. Consumer welfare does not refer only to the welfare of “consumers”; it also refers to the welfare of other buyers such as firms (and thus potentially the investors in those firms); sellers, including workers (who sell their labor) and firms and other independent contractors (who sell goods or services); and even investors (if those investors are the victims of anticompetitive behavior).²³ Indeed, under current law antitrust will often give remedies to consumer-firms and not to consumer-humans because the firms are intermediaries in a supply chain and thus more likely to be the direct victims of antitrust violators, even though the consumers may actually bear the loss.²⁴ Roughly speaking, the consumer welfare standard excludes from antitrust consideration the welfare of the investors of the firms engaging in the allegedly anticompetitive behavior but not the welfare of firms that are victimized by such behavior. A total-welfare or efficiency standard would incorporate that source of welfare.

²¹ Cf. CONG. RSCH. SERV., R44705, THE U.S. INCOME DISTRIBUTION: TRENDS AND ISSUES 7–8 (2021) (charting steady and consistent rise in U.S. income inequality starting in the early 1970s).

²² See Emmanuel Saez & Gabriel Zucman, *Progressive Wealth Taxation*, 2019 BROOKINGS PAPERS ON ECON. ACTIVITY 437, 438–39.

²³ This is all plain from the case law, but has tripped up even sophisticated commentators. For example, Katz and Farrell argue that what they call the “consumer surplus” standard (by which they apparently mean “consumer welfare”) would exclude impacts on workers, and for that reason they prefer a “total surplus” standard. See Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, 2 COMPETITION POL’Y INT’L 3 (2006).

²⁴ See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745–46 (1977).

Moreover, consumer welfare in antitrust law does not refer to welfare in the sense of utility. It refers to dollar gains and losses, that is to say, consumer surplus. A consumer surplus of \$100 will contribute more to the welfare or utility of a poor person than to a wealthy person. Currently, this difference plays no role in antitrust analysis.²⁵

B. The Current Impact of Antitrust Law on Distribution

A simple and straightforward proposition is that insofar as antitrust law is designed to promote consumer welfare, it will also, on standard assumptions, reduce economic inequality as well, essentially as a byproduct.²⁶

To see why, imagine that the firm is a monopolist in the product market and a monopsonist in the labor market. It exercises its market power by raising prices and lowering wages. As a result, the customers are hurt (relative to a competitive product market) and workers are hurt (relative to a competitive labor market). The shareholders (the investors) benefit. The overall effect is that input (labor) and output (products) are shrunk, while the shareholders obtain a larger portion of the smaller pie, becoming better off on net. Antitrust law that unraveled the monopoly and monopsony, or prevented them in the first place, would thus have two distributive effects: (1) transferring wealth from investors to workers and (2) transferring wealth from investors to consumers. The law would also increase output on net.

It should be immediately clear that antitrust law in this picture would likely—though not necessarily—increase equality and improve social welfare.²⁷ Most consumers are poorer than most investors; thus, the transfer from investors to consumers will reduce inequality and (because a given amount of money will benefit the poor more than the wealthy) increase welfare. Most workers are poorer than most investors; thus, the transfer from investors to workers will also reduce inequality and increase welfare. And because the consumers and workers share the surplus, both groups should be better off (or, at a minimum, one group will be better off and the other no worse off). In many cases, the workers and consumers will be the same people: think of a hospital that draws workers from a local market and provides health care in the same local market. In other cases, there may be some or little overlap.

We can think of cases in which the distributive effects would be not merely good but extremely good, from the standpoint of those who care about equality. Imagine that the relevant product (say, food) is bought by many poor consumers. Imagine too that the workers who are employed by the relevant companies are near or at the bottom of the economic ladder. Imagine, finally, that the investors are quite wealthy, and that the effect of monopoly and monopsony are to enrich them at the expense of consumers and workers. In cases of this kind, antitrust law could

²⁵ For one of many helpful discussions of this tangle, see Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010). A further absurd wrinkle is that Robert Bork and some of his followers have used the term “consumer welfare” to refer to total welfare (in the sense of aggregate efficiency). For a discussion, see Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMP. L. & ECON. 133 (2011).

²⁶ See, e.g., Baker & Salop; Khan & Vaheesan, *supra* note 2.

²⁷ This is well-known in the economics literature. For a forceful discussion in the legal literature, see Baker & Salop, *supra*; Khan & Vaheesan, *supra*.

have significant effects in decreasing inequality. As we shall see, such cases are not merely hypothetical.

At the same time, it is not hard to think of cases in which distributive effects would be bad or even extremely bad, or simply poorly tailored to the current problems associated with the distribution of wealth.²⁸ Imaginably, a firm could have poor investors and wealthy consumers and workers. If antitrust law broke its monopoly, wealth would flow from poor to wealthy. Another, more interesting example involves labor monopsony. As a general matter, wage markdowns will be larger for high-income people than for low-income people. The reason is that high-income people typically have highly specialized talents, and those talents are usually bought by a relatively small number of firms. A pediatric oncologist who lives in a small town may have only one potential employer (the local hospital), while unskilled laborers may be able to obtain work from many different employers—fast food franchises, warehouses, factories. So a push to use antitrust law in labor markets, if applied broadly, could end up helping high-income workers more than low-income workers. Even so, the overall impact on inequality is likely to be socially desirable, as low-income workers greatly outnumber high-income workers, and few high-income workers earn more than the top investors.

C. Some Limits of Antitrust Law

The discussion so far has assumed an ideal antitrust law, perfectly enforced. A potential concern is that real antitrust law may be over-enforced or poorly enforced, making the situation worse rather than better. Robert Bork, for example, argued that antitrust law, as it existed in the 1970s at least, was used by inefficient small producers to protect themselves from more efficient firms that sought to enter their markets.²⁹ There is now a great deal of skepticism about Bork's claim, but if it is true, then antitrust law will cartelize some markets and potentially transfer wealth from poor to rich. The broader point is that versions of antitrust law that do not advance competitive markets but seek to protect industries will not necessarily produce desirable distributive effects.³⁰ There is a practical concern that aggressive enforcement of the antitrust laws, not focused on promoting competition, might reduce efficiency and have unwelcome or even perverse distributive consequences.

Even with respect to the narrower question of market power, the scope of antitrust law is limited: even if perfectly enforced, it would not eliminate all markups (or markdowns) created by market power. There are two reasons for this. First, antitrust law tolerates market power when it is a reward for innovation and risk-taking—that is, when the market power occurs “naturally.” So if low-income people cannot afford a particular medicine that is cheap to produce because the manufacturer owns a patent, those people are out of luck. Second, antitrust law generally does not address market power that results from frictions other than concentration or collusion. In labor markets, search costs, job differentiation, and other frictions give employers market power that enables them to suppress wages. Even if antitrust law were able to eliminate all labor market power caused by concentration and collusion, markdowns would still be significant.³¹ The problem exists

²⁸ See Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 Cornell L. Rev. 1171 (2016). For a rebuttal of Crane's argument, see Elhauge, *supra* note 18, at 1291-97.

²⁹ See generally Bork, *supra* note 25.

³⁰ See Herbert J. Hovenkamp, *Antitrust Policy and Inequality of Wealth*, 2017 CPI ANTITRUST CHRON. 1, 1-2.

³¹ See Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of the Law*, 2021 J. HUMAN RES. 37-38.

in certain product markets as well, like housing. High housing prices are not due to concentration: nearly all houses are owned by different people. But homeowners have market power deriving from search costs and related frictions.

D. A Note on Race and Gender

Many economists believe that wage and wealth gaps between men and women, and between the general population and historically disadvantaged groups, can be traced to market structure. With respect to the gender pay gap, there is some evidence that women are more tied to location than men are, and therefore are less often able to seek jobs that are far away from where they live.³² If this is true, then women will on average live in a smaller labor market area than men do, and that means that fewer employers will compete for their work. With fewer workers competing for their work, they will face larger wage markdowns than men will, even if the employers are not motivated by animus and simply seek to maximize profits. Antitrust law that was aimed at labor markets, and thus that prevented mergers and other combinations that reduced competition between employers, would help women more than men. This is particularly likely to be true in places (towns rather than cities) where there are relatively few employers. Antitrust theory says that if two employers compete for women, and three employers compete for men of equal ability, the wages of the men will be significantly higher than those of women.

A similar conclusion may be true for groups that have been subject to past and present discrimination or are otherwise vulnerable.³³ Black people who live in depressed economic neighborhoods in cities with poor public transportation may be able to find work only with a limited number of employers, compared to other people who live in more prosperous neighborhoods and have access to better public transportation. As Gary Becker pointed out long ago (and Joan Robinson, even longer ago), employers who harbor animus can more easily satisfy that animus by reducing wages if they face little competition.³⁴ But even if employers do not act on animus, and simply maximize profits, they might be tempted to pay differential wages to employees of different races. Those who cannot credibly threaten to quit and work for a competitor can be paid less than those who can make such credible threats.

Antitrust law, by enhancing competition, should reduce the wage gaps between men and women, and between majorities and minorities. As before, however, there are limits to what it can do. Where a monopolist is benign or susceptible to political pressure, it could use its monopoly power to provide benefits to vulnerable employees that an employer in a competitive market cannot afford to do.³⁵ And if consumers or workers themselves are discriminators, competitive

³² For a recent summary of the evidence, see Alan Manning, *Monopsony in Labor Markets: A Review*, 74 ILR REV. 3, 20 (2021).

³³ The evidence so far is suggestive rather than conclusive. See Lisa Dettling, Joanne W. Hsu, Lindsay Jacobs, Kevin B. Moore & Jeffrey Thompson, *Recent trends in wealth-holding by race and ethnicity: Evidence from the Survey of Consumer Finances*, FEDS Notes (Sep. 27, 2017); Mark Stelzner & Kate Bahn, *Discrimination and Monopsony Power*, 2–3 (Equitable Growth, Working Paper No. 071320, 2020).

³⁴ See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 39 (1971); see generally JOAN ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* (1933). As noted in the text, there are important qualifications. If, for example, customers favor men over women, competitive pressures might lead to more discrimination, not less.

³⁵ This was the case for a range of postwar industries in the United States, including automobiles and steel. The oligopolized industries shared their rents with workers, albeit with the informal prodding of the U.S. government. See

markets may encourage sellers and employers to accommodate their prejudices (as Becker also pointed out).

E. Implications

Taking together the opportunities and limits of antitrust law, one can imagine some possible reforms that would enhance equality. As these reforms have been extensively discussed in the literature,³⁶ we describe them only briefly here.

Enhanced enforcement. If, as we argue, antitrust law can reduce inequality, then one approach is simply to increase enforcement. No special consideration needs to be given to distributive questions. The Department of Justice and the Federal Trade Commission are the main regulatory agencies responsible for antitrust enforcement. Resources available to those agencies for antitrust enforcement have stagnated over the last forty years, even as the size and concentration of the economy has risen and the legal environment in which they have operated has become more challenging, thanks to a series of adverse rulings by the Supreme Court.³⁷ Many commentators have called for larger antitrust enforcement budgets, and Senator Amy Klobuchar has proposed a bill to do just that.³⁸ Larger budgets would lead to greater antitrust enforcement, and greater antitrust enforcement would likely increase equality.

Prioritizing equality. Regulatory agencies could also adjust their priorities in two ways. *First*, they might target markets that are important for poorer people.³⁹ Agriculture and health care would be a good place to start. Food and medicine compose a larger share of the budget of low-income people than of others, and these goods are essential to basic well-being. The two markets are also notorious for the degree of concentration in crucial sectors and the ubiquity of anticompetitive behavior.⁴⁰ With an equality-focused approach to antitrust law, markets for expensive products like automobiles and jewelry would receive less priority. *Second*, regulators should also give priority to labor markets, and especially labor markets in which lower-income people participate, and where pay gaps based on race or gender are large. As antitrust enforcement has ignored labor markets until recently, anticompetitive behavior is likely to be common.⁴¹

generally SAMUL MILNER, ROBBING PETER TO PAY PAUL: POWER, PROFITS, AND PRODUCTIVITY IN MODERN AMERICA (2021).

³⁶ See Baker & Salop, *supra* note 2.

³⁷ For a summary of the literature, see Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline in Antitrust Enforcement in the United States* 1–3 (Stigler Center, Working Paper No. 314, 2021).

³⁸ This seems to be the view of Khan & Vaheesan, *supra* note 26, though they also deny that the goal of antitrust law should be efficiency, and Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 4–5 (2015), though some of their proposals go beyond the efficiency standard. See also Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33, 34 (2021). See generally JONATHAN BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY (2019).

³⁹ See Baker & Salop, *supra* note 38, at 20–21; Khan & Vaheesan, *supra* note 26, at 248–50.

⁴⁰ On agriculture, see David Baumer, Robert T. Masson & Robin Abrahamson Masson, *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILLANOVA L. REV. 183, 185–86 (1986). On health care, see Khan & Vaheesan, *supra* note 26.

⁴¹ As suggested by the literature on noncompetes, see Evan Starr, J.J. Prescott & Norman Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J. OF L. AND ECON. 53, 80–82 (2021); and franchise no-poaching agreements, see Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 4

Procedural reform. A consensus is forming that the Supreme Court has excessively weakened antitrust enforcement by raising the barriers to litigation. A string of cases going back to the 1970s has weakened antitrust law by reducing the number of possible plaintiffs to those most directly affected by anticompetitive behavior; raising the threshold for surviving a motion to dismiss; enforcing arbitration agreements that effectively block class actions; raising the standards for class actions; and requiring more proof for a broad range of claims, including conspiracy claims and claims of vertical misconduct.⁴² Most of these cases were controversial at the time they were decided. In the aggregate, they seem to have seriously depressed antitrust enforcement, especially by private parties. Legal reforms that reversed some or all of these decisions would enhance antitrust enforcement and to that extent promote equality.

IV. Antitrust Law, Doing More

We see two general approaches to enhancing the role of antitrust law in advancing equality. The first approach would involve strengthening antitrust liability standards so that they advance efficiency *and* equality. The second approach would involve sacrificing efficiency to equality while retaining the general structure and character of antitrust law. We discuss the advantages and disadvantages of each approach.

Strengthening liability standards. Baker and Salop suggest reconsideration of long-abandoned proposals to use antitrust law to address parallel pricing in oligopolies and monopoly pricing by firms that have obtained their monopolies lawfully, though they are not ready to endorse a change in the law along these lines.⁴³ We agree that antitrust laws should not be available for challenging monopoly pricing. There remains a consensus among economists that the availability of above-market returns is necessary to encourage risk and innovation. And where natural monopolies exist, a specialized regulatory body is the appropriate means for regulating prices.⁴⁴

However, the longstanding refusal of courts to police parallel pricing should be reconsidered.⁴⁵ The usual objection is that firms cannot avoid setting their prices by referring to the prices of competitors, and so if courts enjoined firms from doing so, or awarded damages to plaintiffs, the remedy would be arbitrary, and could result in firms underpricing, which can be just as bad as overpricing.⁴⁶ While that argument might have been a good one when it was first made more than half a century ago, more sophisticated remedies are available today. At least in certain conditions, economists can calculate what prices would be in the but-for world in which firms did not price in parallel—for example, by comparing the pricing activity of defendant firms with the pricing activity of similar types of firms in different market areas where a larger number of

(Nat'l Bureau of Econ. Rsch., Working Paper No. 24831, 2018). For a discussion, *see generally* ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS (2021).

⁴² *See* Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement>.

⁴³ *See* Baker & Salop, *supra* note 38. Another group of reforms center around allowing certain vulnerable sellers (e.g., farmers and ride-for-hire drivers) who face powerful counterparties to form buyers' collectives—effectively unions for sellers. *See, e.g.*, Sandeep Vaheesan, *Gig Workers Need Antitrust Reform*, DISSENT (Dec. 18, 2020), https://www.dissentmagazine.org/online_articles/gig-workers-need-antitrust-reform.

⁴⁴ *See generally* Breyer, *supra* note 24.

⁴⁵ *See generally* LOUIS KAPLOW, COMPETITION POLICY AND PRICE FIXING (2013).

⁴⁶ *See* Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 665–66 (1962).

competitors prevents or reduces the amount of parallel pricing. Firms in concentrated markets would then set prices in anticipation of a sanction if they followed one another's pricing too closely while charging above the but-for rate, and reduce their prices to a level closer to the competitive rate in order to avoid the sanction.

Note that either approach, if it worked, would simultaneously advance efficiency and equality. As a matter of general understanding, prices sustained by monopoly and oligopoly are inefficient; laws that reduced those prices while preserving economies of scale and other efficiencies would result in higher output. Lower prices and higher wages would effect a transfer of wealth, on average, from rich to poor.

Sacrificing efficiency to equality. To clarify this idea, imagine that antitrust law is currently perfectly efficient—it generates competition when competition is optimal, maximizing the economic pie. The distributive effects are better than they would be in a world without antitrust law, but they do not achieve the social ideal. The question then is whether antitrust law should be reformed so as to improve the distributive effects even though the reformed antitrust law would reduce efficiency, and if so, how. To put this point differently, should we want antitrust law to maximize social welfare, accepting reductions in efficiency when the distributional impacts significantly benefit the poor?

As an initial point, the fact that the hypothetical reformed antitrust law would reduce efficiency is not by itself a decisive objection to it. Some well-known social welfare functions, as well as common sense and longtime practice, tell us that efficiency losses can be justified by distributive gains. On utilitarian grounds, we should enthusiastically embrace a reduction in efficiency (measured in monetary terms) if there is an increase in welfare or utility. As an analogy, imagine an occupational safety regulation that costs \$900 million but that delivers \$700 million in benefits. Though the regulation is inefficient, suppose that the \$900 million ends up being paid by investors and wealthy consumers and that the \$700 million is enjoyed by poor workers. On utilitarian (or welfarist) grounds, the regulation would be a good idea. Some uses of antitrust law could have similar effects. Imagine a merger between two superstores that would reduce appliance prices by an aggregate of \$100 million (because of greater efficiencies) but increase food prices by an aggregate of \$50 million. It could make sense to block this merger even though consumers in aggregate benefit if the food buyers tend to be poorer than the appliance buyers, as is likely the case.

While our claim might seem strange or radical in the context of antitrust law, we note that antitrust *already* sacrifices efficiency to distribution. Efficient antitrust law would use the total welfare standard; real antitrust law uses only the consumer welfare standard. As we have explained, the general thrust of this legal approach is to transfer value from (generally wealthy) investors to (less wealthy) consumers and workers, even when a particular action blocked by the law would result in gains for investors that exceed the losses to others. While the consumer welfare standard is often justified on grounds of administrative convenience,⁴⁷ this seems to us a post hoc

⁴⁷ See Hovenkamp, *supra*, at 2.

rationalization of that standard rather than an adequate defense. Indeed, the legal basis of the standard is based on suspicion of monopolies, not concern about administration.⁴⁸

A better objection is that the tax and transfer system redistributes wealth more efficiently than liability rules do.⁴⁹ This point is hardly unfamiliar, and it can be brought against proposals to address income inequality through antitrust law, though it would require a revision of current law so that the total-welfare standard rather than the consumer-welfare standard is used.⁵⁰ But that objection is not decisive. Policymakers might rationally decide to seek a better wealth distribution through regulatory law, including antitrust law, if political or practical barriers prevent expansion of the safety net.⁵¹ Indeed, the safety net may be subject to diminishing returns. Consider unskilled, poorly housed day laborers who try to avoid bureaucracies because of (justified or unjustified) fear of hostility or prejudice, or who simply cannot navigate the rules.⁵² Those laborers would nonetheless benefit from enhanced antitrust enforcement that reduced anticompetitive behavior by their employers, as the antitrust law could operate without the laborer's participation in the legal process.

Kaplow has pointed out that if judges try to redistribute wealth through, say, the common law, they may find their efforts thwarted by legislatures.⁵³ It may also seem inappropriate for judges to use the common law to advance goals that we normally associate with legislation. But antitrust law is based on statutes, and while the law in practice has common-law elements, the common law development has pushed antitrust law *away* from its original goals.⁵⁴ In a world in which voters do not like the word “tax” but do like redistribution, Congress might (and does) redistribute wealth using other legal means and might (and seems to) tolerate regulatory agencies and courts that do so as well.

Like other commentators who have discussed this issue, we are mindful of the risks of using antitrust law to advance general social values that are not tied to issues of market competition. Consider, for example, a frequently made and historically popular argument that small businesses should be protected from competition by large and more efficient firms.⁵⁵ In some circumstances, this argument makes sense. The commercial areas of many small towns were decimated by the arrival of Walmart and other super-efficient national chains. Prices fell, but it turned out that a bustling Main Street was an amenity that many people valued. Thus, towns have invested taxpayer money to subsidize small businesses; it is possible that blocking the Walmart

⁴⁸ See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 372 (1963).

⁴⁹ See Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. OF LEGAL STUD. 667, 669 (1994).

⁵⁰ See Louis Kaplow, *On the Choice of Welfare Standards in Competition Law* 3-4, in *THE GOALS OF COMPETITION LAW* (Daniel Zimmer ed., 2012). Kaplow has recently published a paper that offers a more qualified view; see Louis Kaplow, *Market Power and Income Taxation*, 13 AMER. ECON. J.: ECON. POL'Y 329 (2021). See also Farrell & Katz, *supra* note 23; Carl Shapiro, *Antitrust Law in an Age of Populism*, 61 INT'L J. OF IND. ORG. 714, 716-17 (2018).

⁵¹ Cf. Zachary Liscow, *Redistribution for Realists* 1 (Aug. 4, 2020) (unpublished manuscript); and Daniel J. Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. CHI. L. REV. (forthcoming 2022).

⁵² See PAMELA HURD AND DANIEL MOYNIHAN, *ADMINISTRATIVE BURDEN* (2019).

⁵³ He makes this argument against redistributive antitrust law as well. See Kaplow, *supra*, at 10-11.

⁵⁴ See Barak Orbach, *How Antitrust Lost Its Goal*, 81 Fordham L. Rev. 2253, 2276 (2013).

⁵⁵ See, e.g., Thomas E. Kauper, *Influence of Conservative Economic Analysis on the Development of the Law of Antitrust*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 43 (Robert Pitofsky ed., 2008).

store would have been a better strategy. But where small businesses are less efficient than large businesses, they will charge consumers more and pay workers less.⁵⁶ The owners of those businesses are often middle-class people who are wealthier than the customers and workers. We accordingly do not think antitrust law should protect small businesses in generic fashion; where small businesses are valued, other forms of legal intervention seem more appropriate.

But antitrust law could be used to advance both market competition and the well-being of the least well off in two ways—which we will designate as “ad hoc” and “systematic.”

For an ad hoc example, consider a recent paper by Christopher Leslie, which investigates the role of anticompetitive behavior in the creation of “food deserts,” areas (frequently inner-city neighborhoods) that lack grocery stores that sell fresh and healthful food.⁵⁷ Leslie argues that many food deserts are the result of restrictive covenants. Many supermarkets that at one time served poor neighborhoods have moved their operations to wealthier parts of town but have used legal arrangements to ensure that a new grocery store would not be able to move into their vacated space. In some circumstances, the departing supermarkets have sold the property subject to covenants preventing use of the land by another grocery store, often for a very long period of time, as much as fifteen years. In other cases, the departing supermarkets retained the land but leased it subject to similar covenants. This behavior is potentially subject to antitrust law because it likely was motivated, at least in part, by the desire to prevent a competitor from setting up in the original location and poaching customers who would otherwise drive to the new location.

Leslie argues that the failure of antitrust challenges to supermarkets that create food deserts is due to erroneous antitrust analysis by courts, including the failure to properly define market areas. This may be true, but one could also argue that the courts should have been responsive to the food desert problem even if the courts ruled correctly under the current understanding of antitrust law. To see why, imagine that the supermarket would have stayed in the poor neighborhood if restrictive covenants were not available. The result would be that the wealthier suburban consumers would be forced to pay higher prices (or travel to more distance supermarkets), while the poorer inner-city residents would retain access to fresh food. Efficiency in dollar terms is down, but welfare in human terms is up. We think this outcome is defensible even if a superior outcome could be hypothetically achieved through a never-to-be-implemented adjustment to the tax and transfer system. To implement the ad hoc system, the antitrust agencies could apply higher standards to mergers and other allegedly anticompetitive actions when they directly affect pricing for low-income people. The actual number of such cases would likely be low, but they could arise in a range of circumstances, when the sellers in question supply basic necessities—food, medical care,⁵⁸ housing, low-skill labor,⁵⁹ low-price goods.⁶⁰

⁵⁶ See Autor et al., *supra*, at 647–48.

⁵⁷ See Christopher R. Leslie, *Food Deserts, Racism, and Antitrust Law*, 110 CALIF. L. REV. (forthcoming 2022).

⁵⁸ See, e.g., Indictment, *United States v. DaVita, Inc.*, No. 21-cr-00229-RBJ (D. Colo. Jul. 14, 2021); Mike Scarcella, *DaVita loses bid to dismiss DOJ’s criminal antitrust charges*, REUTERS, Jan. 28, 2022. But note that the poorest consumers received medical care through Medicaid.

⁵⁹ See e.g., *DeSlandes v. McDonald’s USA, LLC*, No. 17-C-4857, 2021 WL 3187668 (N.D. Ill. Jul. 28, 2021); Daniel Wiessner, *Judge rejects nationwide class in McDonald’s no-poach case*, REUTERS, Jul. 29, 2021.

⁶⁰ See Federal Trade Commission Press Release, *FTC Requires Dollar Tree and Family Dollar to Divest 330 Stores as Condition of Merger* (July 2, 2015).

The systematic approach would simply generalize the ad hoc example. In debates in cost-benefit analysis and regulation, some commentators have argued that the inputs for cost-benefit analysis should be distributively weighted.⁶¹ Under existing law (with an important qualification to be mentioned), regulatory impacts are based on willingness to pay.⁶² All else equal, a wealthy person will pay more for an improvement in health, safety, or other amenity than a poor person will, and so the wealthy person's interest will be given more weight in regulatory practice. The qualification is that although in theory regulatory impact analyses should make distinctions in terms of wealth, they often do not; in the domain of mortality risk, the willingness to pay for reductions in the risk of death are given equal weight for rich and poor, producing a uniform "value of a statistical life."⁶³ Whether or not this is the right approach, there is a plausible argument for distributive weights in the context of regulatory policy.⁶⁴ This approach might sacrifice efficiency, but it would produce equality, and it would also increase social welfare. For purposes of antitrust analysis, where most of the impacts are purely monetary, distributive weighting would result in counting a \$1 higher price paid by the poor as more important than a \$1 higher price paid by a wealthy person. Once again: Such weighting would at once increase social welfare and improve fair distribution.

Because antitrust law already values consumer impacts and mostly disregards producer impacts, a kind of distributive weighting is already embodied in antitrust law. But it is extremely crude. As noted above, the consumer welfare standard often includes "consumers" who are firms, and thus, in effect, investors. Against a normal social welfare function, antitrust law also gives excessive weight to consumers who are wealthy (including, under the *Illinois Brick* rule, supply-chain intermediaries rather than final consumers) and insufficient weight to investors who are not wealthy. With this as backdrop, a more sophisticated version of antitrust law that used distributive weighting would be neither radical nor insignificant in its effects.

There are two possible objections to this argument. First, a range of technical and practical problems must be overcome before distributive weighting could be used with confidence. This is true, but the current approach doesn't so much avoid these problems as assign them to the tax-and-transfer system, which must be based on some social welfare function even if only an implicit one.

Second, and more important, greater emphasis on distributional weights involves one in some potential paradoxes. Consider, for example, a group of buyers who agree not to buy goods from certain sellers above a certain price. This would be an illegal cartel under current law. But if the buyers are sufficiently poor and the sellers are sufficiently rich, a distributively sensitive antitrust law would permit this cartel even though it reduces competition (among the buyers). We mention this objection because we expect many readers will make it. However, there is no real paradox here. Antitrust law already allows firms to merge and enter other cooperative

⁶¹ Matthew D Adler. Cost-Benefit Analysis and Distributional Weights: An Overview. Duke Environmental and Energy Economics Working Paper. EE 13-04. August 2013, available at SSRN: <https://ssrn.com/abstract=2467673>; Matthew Adler. Measuring Social Welfare: An Introduction. 2019.

⁶² See generally Matthew D. Adler, *supra* note 6.

⁶³ <https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis>

⁶⁴ See generally Daniel Hemel, *Regulation and Redistribution With Lives in the Balance*, U. CHI. L. REV. (forthcoming 2022); Chris Hope, *Discount Rates, Equity Weights, and the Social Cost of Carbon*, 30 ENERGY ECON. 1011 (2008).

arrangements that reduce competition. And other areas of law—notably, labor law—allow agents (workers) to aggregate their bargaining power (through unions). The goal of antitrust law, as understood today, is not “competition” (despite the repeated claims of courts), or not just competition, but a version of efficiency that is mostly limited to consumer surplus that is threatened by anticompetitive practices.⁶⁵ Our modest suggestion is that consumer surplus should be replaced with consumer well-being, understood in utilitarian terms.

V. Conclusion

Antitrust enforcement could advance equality through modest reforms, including increased enforcement, equality-based priority-setting, and procedural changes. More aggressive reforms, including that of permitting challenges of certain kinds of parallel price- and wage-setting would also be justified. All of these reforms could be accomplished with little violence to the law—indeed, for many commentators, they would simply help return antitrust law to first principles. More ambitiously, we argue that antitrust reformers should consider reducing the focus of the law on efficiency (as partially embodied in the consumer welfare standard) and see it as a way to improve distributional outcomes even when that involves a sacrifice of efficiency. As we have argued, the law already does that by ignoring producer surplus. A version of antitrust law that addresses this problem in a more rigorous way would produce better outcomes if technical and administrative hurdles could be overcome.

⁶⁵ As Farrell and Katz point out a welfare standard that required antitrust law to maximize welfare in all circumstances would eliminate the distinctive features of antitrust law, notably, its focus on competition. Farrell & Katz, *supra* note 23, at 7. But that is a generic problem with all types of economic analysis, including economic analysis that seeks to maximize efficiency. Domain restrictions are required, and in some contexts may be tricky, but that is inherent in the exercise of law-related policy analysis.