

# Breaking Up Consumer Welfare's Antitrust Policy Monopoly

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### ABSTRACT

Two recent papers by prominent antitrust scholars argue that a revived anti-trust movement can help reverse the dramatic rise in economic inequality and the erosion of political democracy in the United States. Both papers rely on the legislative history of the key antitrust statutes to support their case. Not surprisingly, their recommendations have been met with alarm in some quarters, and with skepticism in others. Such proposals by antitrust reformers are often contrasted with the Consumer Welfare Standard that pervades antitrust policy today. The Consumer Welfare Standard suffers from several defects: (1) it employs a narrow, unworkable measure of welfare; (2) it excludes important sources of welfare based on the assumption that antitrust seeks only to maximize wealth; (3) it assumes a constant and equal individual marginal utility of money; and (4) it is

often combined with extraneous ideological goals. Even with these defects, however, if applied consistent with its theoretical underpinnings, the consideration of the transfer of labor rents resulting from a merger or dominant firm conduct is supported by the Consumer Welfare Standard. Moreover, even when only consumers (and not producers) are deemed relevant, the welfare of labor still should consistently be considered part of consumer welfare. In contrast, fostering political democracy—a prominent traditional antitrust goal that was jettisoned by the Chicago School—falls outside the Consumer Welfare Standard in any of its constructs. To undergird such important broader goals requires that the Consumer Welfare Standard be replaced with the General Welfare Standard. The General Welfare Standard consists of modern welfare economics modified to accommodate objective analyses of human welfare and purged of inconsistencies.

## I. INTRODUCTION

Competition can be a powerful tool to help tackle such important social problems as increased inequality, reduced privacy, rampant misinformation, and the erosion of political democracy. For example, in their recent paper, Lina Khan and Sandeep Vaheesan demonstrate how practices that increase market power have facilitated the transfer of income and wealth from the working class, small businesses, the middle class, and the poor to large corporations and wealthy shareholders.<sup>1</sup> They contend that reenergized antitrust enforcement can help slow this destructive trend toward inequality.<sup>2</sup> Kahn and Vaheesan lay blame for this wealth transfer at the feet of the Chicago School, which emphasized limited antitrust enforcement under the banner of the “Consumer Welfare Standard.”<sup>3</sup> Adoption of the Consumer Welfare Standard resulted in the abandonment of the traditional antitrust goals of protecting “consumers and small suppliers from the market power of large sellers and buyers, [maintaining] the openness of markets, and [dispersion of] economic and political power.”<sup>4</sup> The authors document the large monopoly rents generated by six major economic sectors in the U.S. economy.<sup>5</sup> They contend that the current limited goals of antitrust enforcement stand in stark contrast to the broad concerns expressed by Congress in passing the major antitrust laws.<sup>6</sup>

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1. See Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 238-39 (2017) (noting distributional effect transfers income and wealth upwards).

2. See *id.* at 276 (identifying essential antitrust policy reforms to mitigate inequality).

3. See *id.* at 275 (attributing cause of highly concentrated markets to Chicago School intellectual revolution); Mark Glick, *Antitrust and Economic History: The Historic Failure of the Chicago School of Antitrust*, 64 ANTITRUST BULL. 295, 322-23 (2019) (describing Chicago School policies during 1970s).

4. See Khan & Vaheesan, *supra* note 1, at 237.

5. *Id.* at 246 (examining hospital, pharmaceutical, food, telecommunication, airline, and electric sectors).

6. See *id.* at 270-271 (explaining false interpretation of legislative history by proponents of limited antitrust enforcement).

In a complementary analysis, Robert Lande and Sandeep Vaheesan argue that the antitrust laws should once again be concerned with firm size.<sup>7</sup> They argue that excessive firm size must be addressed even when not accompanied by reductions in competition, as in many conglomerate mergers.<sup>8</sup> They advise that excessive firm size inevitably leads to an erosion of political democracy, especially in an environment where limitations on political spending have been eliminated on constitutional grounds.<sup>9</sup> Like Kahn and Vaheesan, the authors rely on an extensive review of the statutory history of the antitrust laws that reveals a concern for preservation of political democracy.<sup>10</sup>

We endorse these works throughout this paper; but we go one step further by offering an alternative to the outdated Consumer Welfare Standard—which we term the General Welfare Standard—and by demonstrating how that standard is supported both in economics and in recent advances in biology and the social sciences. Our argument is straightforward: progressive antitrust reforms are not “populist” or “hipster,” as detractors have maintained; they are fully supported by economic theory. Progressive policies of reducing income inequality and fostering social democracy are entirely compatible with fundamental economic principles, and they are historically consistent with the purposes of the antitrust statutes.

Part II of this Article validates the contentions of the earlier works by Kahn, Lande, and Vaheesan (and others) that Congressional intent in passing the antitrust statutes was never limited to correcting only “pure” economic effects such as higher prices, lower output, compromised product quality, or even reduced innovation. It was much broader. In general, Congress saw antitrust law as a tool to curb the practices and influence of dominant firms in the economy.<sup>11</sup> The damage from excessive influence of large firms ran the gamut of limiting the opportunities of small business, undermining political democracy through domination of the political process, creating income inequality, distorting corporate governance, harming innovation and growth, and yes, raising prices and lowering output to consumers. Today, one would have to add concerns about privacy and misinformation to that list.

Part III of this Article critically assesses the Consumer Welfare Standard and its theoretical flaws. As originally articulated by Judge Bork, the Consumer Welfare Standard was simply a restatement of Marshall’s theory of consumer’s

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7. See Robert Lande & Sandeep Vaheesan, *Preventing the Curse of Bigness Through Conglomerate Merger Legislation*, 52 ARIZ. ST. L.J. 75, 81-82 (2020) (“Since the early 1980s, the federal antitrust agencies have broken with Supreme Court precedent and reinterpreted the anti-merger statute to focus exclusively on mergers’ effects on consumer welfare—an unsettled term.”).

8. See *id.* at 79 (contending Congress should revisit conglomerate merger legislation and target mergers beyond specified thresholds).

9. See *id.* at 86-89 (outlining political power of large firms and their influence over enforcement of antitrust).

10. See *id.* at 82-85 (examining Congress’s intent behind antitrust laws).

11. See Land & Vaheesan, *supra* note 7, at 82 (discussing congressional intent of antitrust laws).

surplus.<sup>12</sup> As one of us has argued elsewhere, Marshall's approach assumed cardinal utility and interpersonal comparison of utility.<sup>13</sup> This point is addressed at length in the Appendix to this paper, where we discuss aggregation of ordinal utility and its problems. Marshall also assumed that the marginal utility of income was constant and equal among individuals, although he acknowledged this was not a reliable assumption. Marshall measured utility by willingness to pay and did not consider willingness to accept as another measure of utility.<sup>14</sup> These assumptions were ported over by Judge Bork in his Consumer Welfare Standard. Bork, however, did not accept (or was unaware of) Marshall's views that poverty and inequality were particularly harmful to human welfare based on his reading of the empirical evidence. Quite the opposite, the Consumer Welfare Standard has come to be associated with conservative and/or libertarian values that are unconnected to welfare economics.

Part IV of this Article discusses two critical aspects of human well-being ignored by the Consumer Welfare Standard: the deleterious results of transferring labor rents to corporations, their executives, and shareholders; and the undermining of political democracy caused by the concentration of political power in large corporations and the wealthy. The Consumer Welfare Standard is not a barrier to a revitalized antitrust concern for income inequality and transfers wealth from labor to shareholders; nevertheless, that has been the practical result of its application. Even under the Consumer Welfare Standard, the welfare of all individuals impacted by mergers or dominant firm conduct must be considered. And even if courts impose restrictions, such as limits on cross markets effects or singular consideration of consumer surplus, the welfare of workers should be considered part of consumer welfare.<sup>15</sup>

Transfers of labor rents have to date been ignored primarily because the Consumer Welfare Standard assumes that the marginal utility of income is constant and equal for everyone—an assumption that has no economic supporters. Treating transfers of income from the poor to the rich as welfare-neutral has no

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12. See ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 103 (8th ed. 2009) (terming “consumer surplus”); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 20-21 (Basic Books 1978).

13. See Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 ANTITRUST BULL. 455, 461 (2018) (discussing assumptions of Marshall's theory of economics).

14. See MARSHALL, *supra* note 12, at 86 (highlighting consumer willingness to purchase as key measurement of utility).

15. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370-71 (1963) (discussing potential effects of Philadelphia banks merging); *United States v. Topco Assocs.*, 405 U.S. 596, 609-10 (1972) (describing importance of restrictions); Daniel Crane, *Balancing Effects Across Markets*, 80 ANTITRUST L.J. 391, 407-08 (2015) (stating labor welfare is part of consumer welfare); Ted Tatos & Hal Singer, *The Abuse of Offsets as Procompetitive Justifications: Restoring the Proper Role of Efficiencies After Ohio v. American Express and NCAA v. Alston*, 38 GA. ST. U.L. REV. 1179, 1203-04, 1213 (2022) (emphasizing relation between labor and consumer welfare). “Equity requires that employee surplus is part of consumer welfare,” any other result “is absurd as well as inapposite to Supreme Court precedent.” Clayton Masterman, *The Customer is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law*, 69 VAND. L. REV. 1387, 1400 (2016).

justification. Moreover, in this section we show how lowering wages dilutes incentives to innovate and harms the economic performance of the economy generally.

Part IV then turns to another important source of welfare loss—welfare losses from reduced political democracy—that could be ameliorated by antitrust enforcement but is beyond the ability of the Consumer Welfare Standard to address. Indeed, it is particularly ironic that a key concern of Congress in crafting the antitrust laws—protecting political democracy—falls outside of the boundaries of the Consumer Welfare Standard. Judge Bork claimed that the pursuit of antitrust’s traditional goals “would have serious deleterious effects upon national wealth.”<sup>16</sup> Subsequent research, to the contrary, has shown that political democracy is a critical element of economic growth, innovation, and efficiency. This is because dominant firms use their influence to raise their own profitability by avoiding competition, rent seeking from the government, shifting costs (such as environmental costs) to the public, outsourcing legal responsibilities for worker safety and medical benefits to smaller firms, and reducing the power of unions. Nonetheless, the Consumer Welfare Standard’s narrow subjective measure of welfare makes it virtually impossible to bring modern social science to bear in the debate about how antitrust policy can advance welfare.

In the last section, Part V, we contend that the Consumer Welfare Standard should be replaced with a “General Welfare Standard,” informed by advances in modern welfare economics and other disciplines. Modern welfare economics considers every effect of dominant firm conduct on every impacted individual. It treats the welfare of all individuals, whether workers in the firm or hedge fund shareholders, as relevant. Obviously, judicial rules and presumptions would be fashioned, but artificial limitation of antitrust goals would be eliminated. A General Welfare Standard could accommodate congressional concern for political democracy because democracy increases welfare by establishing social cohesion and by giving citizens greater control over their lives. We argue, however, that to be meaningful, a General Welfare Standard must be capable of incorporating objective evidence of welfare, not simply subjective measures based on willingness to pay.<sup>17</sup> In this way, a General Welfare Standard would necessarily

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16. See Robert Bork, *The Goals of Antitrust Policy*, 57 AMER. ECON. REV. 242, 245 (1967).

17. A similar point is made by Robert Cooter and Peter Rappoport: “The aim of this paper is to demonstrate that the arguments developed some fifty years ago to criticize the material welfare school do not in fact address the claims of that school, whose scientific integrity remains intact.” Robert Cooter & Peter Rappoport, *Were the Ordinalists Wrong About Welfare Economics?*, 22 J. ECON. LITERATURE 507, 509 (1984). The material welfare school focused on the material needs of individuals such as school meals, health care, and training. *Id.* at 514. Our discussion of objective measures of welfare is broader and follows in the modern work by Senator Griffin, and others. See generally JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT AND MORAL IMPORTANCE* (Clarendon Press 2002); Amartya Sen & Bernard Williams, *Introduction: Utilitarianism and Beyond*, in *UTILITARIANISM AND BEYOND* (Cambridge Univ. Press ed., 1977) (categorizing utilitarianism as species of welfare consequentialism, which adds up individual welfares to assess consequences).

incorporate the contributions of leading welfare economists like A.K. Sen and major moral philosophers like James Griffin and T. M. Scanlon.

## II. U.S. ANTITRUST POLICY'S BROAD, MULTI-GOAL TRADITION

Reading antitrust's legislative history from today's viewpoint, it is surprising how thoroughly the Consumer Welfare Standard and its narrow focus on "legitimate" goals has taken hold in antitrust policy circles. The Consumer Welfare Standard stands in stark contrast to the rich legislative history demonstrating congressional intent to tackle much broader social goals. Indeed, it is unsettling how the courts, enforcement agencies, and antitrust lawyers have been so willing to sidestep the clearly stated goals of Congress when implementing antitrust policy.

### A. Antitrust in the Late Nineteenth Century

The Sherman Act, the first of the antitrust statutes, was a response to the economic and political tensions caused by the industrial revolution in the United States.<sup>18</sup> The industrial revolution gained its full stride after the Civil War, helped by a series of events, including the discovery of new coal deposits in eastern Pennsylvania, the influx of immigrants following the 1848 Revolutions in Europe, and the rise of the railroads—a joint effort by local governments and private interests.<sup>19</sup> The railroads opened up mass markets and large corporations arose. These large corporations attempted to shield themselves from the emerging fierce competition by the formation of trusts and cartels.<sup>20</sup> At the same time, the new firms generated enormous wealth for their owners, giving rise to extreme income inequality and political corruption.<sup>21</sup> The legislative debates around the Sherman Act pitted big business against the interests of other economic classes including agriculture, small business, and, to a lesser degree, labor. At the time, the power of these two sides were roughly comparable in the Senate.<sup>22</sup>

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18. See Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (banning businesses from engaging in monopolies and outlawing contracts in restraint of trade); Glick, *supra* note 3, at 298 (tracing roots of Sherman Antitrust Act to American industrial revolution and the Gilded Age).

19. See Glick, *supra* note 3, at 298 (discussing early stimulants for industrial revolution).

20. See *id.* at 300 (describing how price competition led to formation of cartels). The fierce competition was referred to as "ruinous competition" because it involved price competition among homogeneous products. See *id.* See generally NAOMI LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904* (Cambridge Univ. Press 1985) (arguing first merger movement and vertical integration curtailed ruinous competition).

21. See BENJAMIN PAGE & MARTIN GILENS, *DEMOCRACY IN AMERICA? WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT* 25-26 (Univ. Chicago Press 2020) (arguing Gilded Age brought high degree of political inequality and decline in democracy). At that time, journalists investigated how key senators on the payrolls of wealthy bankers or industrialists did the bidding of their employers. See *id.* (discussing "Treason of Senate").

22. See Glick, *supra* note 3, at 300 (discussing how Congressional debate for Sherman Act reflected contention between big businesses and agriculture).

### 1. *Antitrust Goals in the Sherman Act Legislative History*

As noted by legal historian James May, the Sherman Act Congressional “debates appear to indicate a widespread congressional commitment to the long-established ideals of economic opportunity, security of property, freedom of exchange, and political liberty, and considerable hope that antitrust law might prove to be an effective vehicle for their substantial, simultaneous realization.”<sup>23</sup> The Senate debaters voiced concerns beyond higher prices and lower output resulting from the cartels. Indeed, discussions of “pure” economic effects are hard to locate in the legislative history. The three main protagonists in the Sherman Act Senate debates—Senators Sherman, Hoar, and George—all expressed concerns arising from political domination by big business. An obvious example is Senator Sherman’s famous floor speech:

The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and break down competition.<sup>24</sup>

Senator Hoar likewise voiced concern about monopolies and described the great monopolies as “a menace to republican institutions themselves.”<sup>25</sup> Senator George hoped the legislation would specifically protect small businesses that were harmed by monopolies: “It is a sad thought to the philanthropist that the present system of production and of exchange is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises.”<sup>26</sup> Hence, the major legislator contributors to the text of the Sherman Act expressed concern for two non-economic goals of antitrust

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23. See James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 288 (1989) (discussing congressional attitudes surrounding Sherman Act debates). May also commented that Senator Sherman continued to uphold the nineteenth century ideal that treated “economic opportunity, efficiency, competition, wealth distribution and political liberty as all of a piece.” *Id.* at 290 (noting Senator Sherman’s treatment of economic, social, and political issues).

24. 21 CONG REC. 2460 (1890).

25. 21 CONG REC. 3146 (1890).

26. 21 CONG REC. 2597 (1890).



laws: political democracy and protection of small business.<sup>27</sup> At least, there cannot be doubt that these were the stated goals of Congress.<sup>28</sup>

Still, it is one thing to pass a federal statute and it is quite another to enforce it. President Harrison signed the Sherman Act into law, but during the remaining thirty-two months of the Harrison Administration, it brought only seven antitrust cases.<sup>29</sup> The Cleveland Administration brought eight cases, of which four were against labor.<sup>30</sup> The McKinley Administration brought only three cases.<sup>31</sup> Although the Sherman Act was a criminal statute, in the first few decades of enforcement, only Eugene Debs, a prominent labor leader and self-proclaimed socialist, went to jail.<sup>32</sup>

## 2. Early Antitrust Cases Support Broad Stated Antitrust Goals

Early Supreme Court cases also interpreted the goals of the Sherman Act broadly. In *United States v. Trans-Missouri Freight Association*,<sup>33</sup> Justice Peckham made clear that his understanding of the goals of the Sherman Act included protection of smaller business.<sup>34</sup>

In business or trading combinations [trusts or similar arrangements] may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for

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27. The Sherman Act was debated in the context of a period of deflation and economic instability, and efforts by big business to avoid the impact of competition and deflation on profits. See generally GABRIEL KOLKO, *RAILROADS AND REGULATION, 1877-1916* (Princeton ed. 1965) (discussing ability of railroad magnates to craft legalized railroad cartel, and garner requisite political support); RUDOLPH PERITZ, *COMPETITION POLICY IN AMERICA 1888-1992: HISTORY, RHETORIC, LAW* (Oxford Univ. Press 1996) (exploring conflicting ideologies of Sherman Act debates). The U.S. Industrial Commission reported in 1900 that competition was the first cause of formation of industrial combinations because nearly all competing establishments had no profit. See MARTIN SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916* 56 (Cambridge Univ. Press 1988) (discussing causes of industrial combination).

28. Nevertheless, Gabriel Kolko has argued that much of the early antitrust activity was motivated by big business interests and only couched in the interests of the other classes. See GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* 58-59 (Free Press 1963) (arguing big business interests guided early antitrust activity).

29. See Glick, *supra* note 3, at 301.

30. See *id.*

31. See *id.*

32. See *id.*

33. 166 U.S. 290 (1897).

34. See Harlan Blake & William Jones, *Towards a Three-Dimensional Antitrust Policy*, 65 COL. L. REV. 422, 423 (1965) (discussing Trans-Missouri analyzed sound antitrust policy).

by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital.<sup>35</sup>

In later cases, several well-known jurists also recognized that the Sherman Act had broad-ranging goals, including dispersion of economic and political power and support for small business.<sup>36</sup> For example, in his dissent in the *Columbia Steel* case, Justice Douglas noted:

The philosophy of the Sherman Act is that it [economic power] should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men . . . That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.<sup>37</sup>

And, in *United States v. Aluminum Company of America*, Judge Hand expressly acknowledged:

[Congress in passing the Sherman Act] was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.<sup>38</sup>

Finally, Chief Justice Warren's construction of the goals of the antitrust laws in *Brown Shoe Company v. United States*<sup>39</sup> was as follows: "It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and

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35. *Trans-Missouri Freight Ass'n*, 166 U.S. at 323-324; see also George Bittlingmayer, *Did Antitrust Policy Cause the Great Merger Wave*, 28 J. LAW & ECON. 77, 87-92 (1985) (arguing early antitrust cases, including *Trans-Missouri Freight*, caused first great merger wave in United States).

36. See Stephen Martin, *Dispersion of Power as an Economic Goal of Antitrust Policy* 16, 18-19 (Purdue Univ. Inst. for Rsch. Behav., Econ., and Mgmt. Sci., Working Paper No. 1285, 2016) (collecting relevant quotations).

37. *United States v. Columbia Steel Co.*, 334 U.S. 495, 535 (1948) (Douglas, J., dissenting).

38. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945).

39. 370 U.S. 294 (1962).

prices might result from the maintenance of fragmented industries and markets.”<sup>40</sup>

The first sentence of the last quotation—antitrust protects competition, not competitors—is oft-repeated in antitrust conferences and speeches without acknowledgement of the context that followed it.

*B. Antitrust During the Progressive Era: The Clayton Act and the Federal Trade Commission Act*

Recognition of the antitrust laws’ multi-goal foundations persisted into the twentieth century. The United States entered the twentieth century in the midst of the first great merger movement.<sup>41</sup> As described by Gabriel Kolko, the newly formed large firms were largely organized as corporations with professional managers in control.<sup>42</sup> The financial backers of these mergers took board seats and bankers exercised substantial corporate control.<sup>43</sup> Unsurprisingly, opposition to mergers during this period combined antipathy not only for mergers *per se*, but also for the size and corporate practices of the new enterprises. Resultant reform efforts included legislative proposals that combined regulation of large corporations with limitations on efforts by banks to control corporate boards. Lawrence Mitchell described the efforts as follows:

No fewer than sixty-two unsuccessful bills embraced federal incorporation or federal licensing. An additional eight attacked overcapitalization and seven more tried to create some form of securities regulation . . . . Antitrust concerns remained central. But the growing congressional understanding that the “corporations” problem was bigger than monopoly alone led federal incorporation or licensing proposals to become the most frequently introduced type of antitrust legislation.<sup>44</sup>

Thus, the antitrust reform debates at the turn of the century were about corporate power and corporate governance, not prices paid by consumers. Many of these legislative reforms were efforts by big business to establish “reasonable” reforms to insulate them from the political dangers posed by the Grangers, Populists, trade unionists, and socialists.<sup>45</sup> The American Federation of Labor

40. *See id.* at 344.

41. *See* LAMOREAUX, *supra* note 20; Anthony P. O’Brien, *Factory Size, Economies of Scale, and the Great Merger Wave of 1898-1902*, 48 J. ECON. HIST. 639, 639 (1988).

42. *See generally* KOLKO, *supra* note 28.

43. *See id.* at 1900-16. For example, the Morgan partners held 167 directorships in eighty-nine corporations with assets over \$20 billion. *See* MICHAEL HILTZIK, *THE NEW DEAL: A MODERN HISTORY* 82 (Free Press 2011).

44. *See* LAWRENCE MITCHELL, *THE SPECULATION ECONOMY: HOW FINANCE TRIUMPHED OVER INDUSTRY* 136 (2nd ed. 2008).

45. *See* SKLAR, *supra* note 27, at 77. Many of the reforms were the product of the National Civic Federation, the major organization for big business. JAMES WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE 1900-*

participated in the debates around antitrust policy and fought hard to prevent the erosion of labor's bargaining power within the new large enterprises, and to eliminate the use of Sherman Act injunctions against union activity.<sup>46</sup>

### 1. *Legislative History of the Clayton Act and the Federal Trade Commission Act*

The last two major comprehensive antitrust statutes, the Federal Trade Commission Act (FTC Act) and the Clayton Act, were passed in 1914 during the Wilson Administration.<sup>47</sup> Once again, the legislative history of those acts evinces broad concerns significantly beyond traditional economic factors. Zephyr Teachout and Lina Khan point out that the Congressional debates around the FTC Act displayed much consternation about the political influence of large corporations and the resulting lesser opportunities open to other social classes.<sup>48</sup> Robert Lande and Sandeep Vaheesan have collected Congressional statements during the Clayton Act debates expressing disquiet about corporate size, political influence of corporations, and closure of economic opportunities for others.<sup>49</sup> For example, they note the remarks of Representative Kelly who stated: "Enterprises with great capital have deliberately sought not only industrial domination but political supremacy as well . . ."<sup>50</sup> The House Committee Report on section 8 of the Clayton Act further expressed a concern for political democracy. It noted that "[t]he concentration of wealth, money and property in the United States under the control and in the hands of a few individuals or great corporations has

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1918 6 (Beacon Press 1968) (describing Civic Federation's impact on businessmen, academics, and political theorists before WWII).

46. Both Roosevelt and Wilson opposed a labor exemption from the antitrust laws. But, the AFL had Congressional supporters and the Clayton Act contained a statement that labor was not a commodity (Section 6) and created a qualified limitation to the labor exemption (Section 20). The Supreme Court in a series of cases held that virtually all strike, boycott, picketing, or other union protest activity was not exempted. *See, e.g.,* *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921). *See generally* WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (Harvard Univ. Press 1989).

47. *See generally* DAVID MARTIN, *MERGERS AND THE CLAYTON ACT* (Univ. Cal. Press 1958) (providing in-depth examination of original Clayton Act and 1950 amendments).

48. *See* Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. LAW & PUB. POL'Y 1, 62 (2014) (discussing impact of large corporations in politics and society). This is not to say that the FTC Act was not favorable to big business. It was largely the work of the National Civic Federation, a policy organization dominated by big business. *See generally* JAMES WEINSTEIN, *supra* note 45.

49. *See* Robert Lande & Sandeep Vaheesan, *supra* note 7, at 82-85. The final Clayton Act did not contain the exemption for labor that the American Federation of Labor sought. "The New York Times reported on February 2, 1914 that the president [Wilson] had let it be known that he would veto any antitrust measure that exempted labor from its provisions." PHILIP FONER, 5 HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES 131 (Int'l Pub. 1980). As a result, there were thousands of labor injunction cases during the 1920s. *See* FORBATH, *supra* note 46, at 118.

50. Lande & Vaheesan, *supra* note 49, at 83.

grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions.”<sup>51</sup>

## 2. *Antitrust After the Passage of the Clayton Act and the Federal Trade Commission Act*

The outbreak of World War I cut short much of the potential for economic and social change implicit in the new antitrust statutes. As the United States prepared for the war effort, Wilson established the War Industries Board, which in turn established trade committees to gather market information, coordinate supply, and stabilize prices.<sup>52</sup> The “scientific management” practices of the War Industries Board carried over into the 1920s, and little attention was paid to antitrust enforcement.<sup>53</sup> The antitrust debates, however, still were not primarily about consumer prices. The main issues were how to maintain macroeconomic stability through trade commission planning, while limiting the dangers of price fixing and big rigging.<sup>54</sup>

### C. *The Great Depression and the New Deal*

Antitrust policy’s broad goals continued into the New Deal era; indeed, that emphasis both accelerated and expanded. The Great Depression resulted in a loss of confidence in the ability of big business and large banks to achieve economic stability. As Peter Temin has demonstrated, the initial downturn in 1929 was strongest in the industries dominated by big business.<sup>55</sup> In addition, the financial sector created massive instability by forcing businesses to dilute retained earnings by paying high dividends.<sup>56</sup> In the early years of the New Deal, the Roosevelt Administration focused on regulation of banks and finance, in part a result of the powerful non-Morgan investment banking firms that backed

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51. See *id.* It is also no accident that Congress introduced an independent commission to house antitrust oversight. See Darren Bush, *Out of the DOJ Ashes Rises the FTC Phoenix: How to Enhance Antitrust Enforcement by Eliminating an Antitrust Enforcement Agency*, 53 WILLAMETTE L. REV. 33, 52 (2016).

52. See generally ROBERT CUFF, *THE WAR INDUSTRIES BOARD, BUSINESS-GOVERNMENT RELATIONS DURING WORLD WAR I* (Johns Hopkins Press 1973).

53. See PERITZ, *supra* note 27, at 77 (describing trade association movement in 1920s).

54. See *Maple Flooring Mfrs. Ass’n v. United States*, 268 U.S. 563, 567-68 (1925) (discussing insufficiency of evidence to prove price fixing among trade association); *Cement Mfrs. Protective Ass’n v. United States*, 268 U.S. 588, 606 (1925) (discussing lack of evidence of collusion or concerted action to effect prices or production); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 411-12 (1921) (holding colluding to restrict production and increase prices violates Sherman Act). *American Column* reflects Louis Brandeis’ support for the trade association movement. See *Am. Column*, 257 U.S. at 414-15 (discussing open competition plan).

55. See PETER TEMIN, *LESSONS FROM THE GREAT DEPRESSION* 163 (MIT Press 1991) (assessing how more concentrated industries have suffered largest decline in production).

56. See Apostolos Fasianos et al., *Have We Been Here Before? Phases of Financialization within the 20<sup>th</sup> Century in the United States* 14 (Levy Econ. Inst. Bard Coll., Working Paper No. 869, 2016) (showing negative average retained earnings during 1920s).

Roosevelt.<sup>57</sup> Immediately following Roosevelt's inauguration, Congress passed the Banking Acts of 1933 (The Glass-Steagall Act), and the Securities Acts of 1933 and 1934.<sup>58</sup> At the same time, Roosevelt embraced greater corporate planning through the National Recovery Administration (NRA).<sup>59</sup> The NRA created 546 industrial codes covering 550 industries and issued 11,000 orders interpreting the various code sections.<sup>60</sup>

Nevertheless, even before it was declared unconstitutional, the Roosevelt Administration became disenchanted with the NRA. The NRA was racked with conflict between protectionists and free traders and between big firms and small firms (especially in the oil industry), while labor grew dissatisfied with enforcement of the NRA's 7A clause guaranteeing employee representation.<sup>61</sup> Clarence Darrow was asked to review the NRA in 1934. The Darrow Report concluded that the NRA was creating greater monopoly power and was not improving the position of labor as Roosevelt had hoped.<sup>62</sup> In 1935, the NRA was declared unconstitutional by the Supreme Court in *A.L.A. Schechter Poultry Corporation v. United States*.<sup>63</sup>

A second major policy shift occurred in what is sometimes called the second New Deal, but which we refer to as the New Deal Consensus. This policy change resulted from the emergence of a new political coalition of capital-intensive firms with internationalist free trade interests.<sup>64</sup> The ideological expression of the new coalition was that income and wealth inequality causes macroeconomic instability. It was posited measures that increase social equality (unfortunately racial equality was rarely included) would create the foundations for both a growing economy and political democracy.<sup>65</sup> The historian Ellis Hawley described the policy as follows: "But if one insisted on a dominant theme, he could probably

57. See Thomas Ferguson, *From Normalcy to New Deal: Industrial Structure, Party Competition, and American Public Policy in the Great Depression*, 38 INT'L ORG. 41, 82 (1984) (describing pleas for new banking law separating investment and commercial banking).

58. See Julia Maues, *Banking Act of 1933 (Glass-Steagall)*, FED. RESRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/glass-steagall-act#:~:text=The%20Glass%2DSteagall%20Act%20effectively,Roosevelt%20in%20June%201933> [<https://perma.cc/XLT6-RADH>] (explaining reason for passing Banking Act of 1933); *The Laws That Govern the Securities Industry*, SEC (Oct. 1, 2013), <https://www.sec.gov/about/about-securities-laws> [<https://perma.cc/RW78-84Z7>] (providing background of securities laws).

59. See *The National Recovery Administration (1933-1935)*, VCU LIBRS. SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/eras/great-depression/u-s-national-recovery-administration/> [<https://perma.cc/2UC2-67XL>] (describing how NRA affected U.S. industry). Interestingly, the Blue Eagle emblem of the NRA was the origin of the name Philadelphia Eagles. See Rebecca Onion, *The Other NRA (or How the Philadelphia Eagles Got Their Name)*, SLATE (May 22, 2013), <https://slate.com/human-interest/2013/05/national-recovery-administration-forgotten-symbol-of-new-deal-agency-gave-philadelphia-eagles-their-team-name.html> [<https://perma.cc/GW3X-8KY4>] (noting Philadelphia Eagles' adoption of NRA's symbol).

60. See Glick, *supra* note 3, at 313.

61. See Ferguson, *supra* note 57, at 86.

62. See National Recovery Review Board: First Report to the President of the United States (1934).

63. 295 U.S. 495, 541-42 (1935).

64. See Ferguson, *supra* note 57, at 86.

65. See generally HAROLD MOUTON, INCOME AND ECONOMIC PROGRESS (1934) (developing theory of inadequate effective demand before Keynes).

find it in the concept of counter organization, in the idea of using government to promote the organization of economically weak groups, thus restoring economic balance.”<sup>66</sup>

This sentiment provided the foundation for much of the later New Deal legislation: The National Labor Relations Act (the “Wagner Act”) promoted unionization; the first minimum wage was passed as part of the Fair Labor Standards Act; the Social Security Act created unemployment insurance; the Civilian Conservation Corps and other programs increased the income of the unemployed; and the Agricultural Adjustment Act increased farm income.<sup>67</sup>

In 1938, President Roosevelt introduced a new antitrust agenda. His focus was on the use of competition policy to curb the power of big business and the protection of political democracy. He stated:

The liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That, in its essence, is fascism—ownership of government by an individual, by a group, or by any other controlling private power.<sup>68</sup>

The economic strategy of the New Deal Consensus was wildly successful. Among other things, it initiated a trend of more egalitarian income distribution. At the end of the 1920s, the top 1% of the population garnered about 24% of total income.<sup>69</sup> During the 1930s, this percentage declined to 16.6%.<sup>70</sup> Worker productivity soared in the 1930s,<sup>71</sup> as did growth in innovation.<sup>72</sup> On almost every economic measure of performance, increased income equality in the period

66. See ELLIS HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIGUITY* 187 (Princeton Univ. Press 1985).

67. See National Labor Relations Act, 29 U.S.C. §§ 151-169; Fair Labor Standards Act, 29 U.S.C. §§ 201-262; Social Security Act, 42 U.S.C. §§ 301-1397; Agricultural Adjustment Act, 7 U.S.C. §§ 601-627. All these programs, passed by majority democratic Congresses, required the support of Southern Democrats. This resulted in concessions to Jim Crow policies and exclusion of black Americans from many New Deal programs. See generally IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (Liveright 2013).

68. Laura Phillips-Sawyer, *Jurisdiction Beyond Our Borders: United States v. Alcoa and the Extraterritorial Reach of American Antitrust, 1909-1945*, in *ANTIMONOPOLY AND AMERICAN DEMOCRACY* 21-22 (Daniel A. Crane & William J. Novak ed., 2023).

69. Glick, *supra* note 3, at 314.

70. See Glick, *supra* note 3, at 314.

71. See ROBERT GORDON, *THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR* 535, 538-40 (Princeton Univ. Press 2016) (“The Great Leap Forward of the American level of labor productivity that occurred in the middle decades of the twentieth century is one of the greatest achievements in all of economic history.”).

72. See Alexander J. Field, *The Most Technologically Progressive Decade of the Century*, 93 AM. ECON. REV. 1399, 1406 (2003) (“[E]mployment of research scientists and engineers grew 72.9 percent between 1929-1933 while employment totals in other occupational categories collapsed. Between 1933 and 1940, R&D employment in U.S. manufacturing almost tripled, from 10,918 to 27,777.”).

of the 1930s and continuing into the 1940s through the 1960s was associated with favorable economic outcomes.<sup>73</sup>

In the decades of the New Deal Consensus and the first decade following World War II, Congress twice amended the Clayton Act. We call these the “New Deal Consensus Antitrust Amendments.” The first revision was the Robinson-Patman Act that amended section 2 of the Clayton Act.<sup>74</sup> During the 1930s, opposition grew among small retailers to the growth of large chain stores. The FTC opened an investigation and issued its Final Report on Chain Stores in 1934.<sup>75</sup> The FTC discovered that the chain stores were not monopolists because they competed among themselves. Nevertheless, it found that the chain stores had buyer power that allowed them to obtain lower prices from manufacturers and farmers, resulting in a competitive advantage that harmed smaller retailers. The FTC found that, on average, chain grocery stores were able to underprice independents by 7.31%.<sup>76</sup>

In 1935, Representative Wright Patman of Texas introduced the Patman Bill in the House, which would become the Robinson-Patman Act the next year. Patman described the purpose of the bill thusly: “This bill is designed to accomplish what so far the Clayton Act has only weakly attempted, namely to protect the independent merchant, the public whom he serves, and the manufacturers from whom he buys, from exploitation by his chain competitor.”<sup>77</sup>

Similarly, in the Senate debate, Senator Joseph Robinson of Arkansas posed the following question revealing the bill’s task: “How long does the Senator think the little man, the little man, the independent dealer, would last if he were left to the mercy of the larger dealer . . . ?”<sup>78</sup> Accordingly, the explicit purpose of the 1935 revision to the Clayton Act was to protect small business. That protection was not from monopoly power *per se* (indeed, the FTC expressly concluded that the chain stores were not monopolists) but instead from price discrimination benefitting a larger competitor with buyer power. The Robinson-Patman Act did not, however, ignore the benefit of the lower costs that a larger competitor might garner due to its size. Rather, it added a cost justification defense, allowing price differences up to the amount of the cost savings, but allocated the burden of proving such savings to the larger competitor.<sup>79</sup> Thus, it is

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73. See GORDON, *supra* note 71, at 555 (noting general reduction of inequality from 1920s to 1950s).

74. See Robinson-Patman Antidiscrimination Act, Pub. L. No. 74-692, 49 Stat. 1526 (codified as amended at 15 U.S.C. § 13 (2022)) (prohibiting certain forms of price discrimination).

75. See FED. TRADE COMM’N, FINAL REPORT ON THE CHAIN STORE INVESTIGATION, S. DOC. NO. 4, 70th Cong., 1st Sess. (1934).

76. See *id.* at 29.

77. EARL KINTNER & JOSEPH BAUER, FEDERAL ANTITRUST LAW, A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES 2933 (Anderson Pub. 1989).

78. *Id.* at 3117.

79. See Mark Glick et al., *Towards a More Reasoned Application of the Robinson-Patman Act: A Holistic View Incorporating Principles of Law and Economics in Light of Congressional Intent*, 60 ANTITRUST BULL. 279, 284 (2015) (describing price differentials Act intended to redress). Since the Robinson-Patman Act



evident that Congress was sufficiently concerned about protecting small businesses that an entire amendment was devoted to such protection.

Congress also passed the Celler-Kefauver Act in 1950.<sup>80</sup> The Celler-Kefauver Act sought to close a loophole in the Clayton Act by expanding section 7's application to include mergers through stock acquisitions.<sup>81</sup> During the Celler-Kefauver Act debates, Congress made clear that it was concerned with economic concentration because of its impact on political democracy.<sup>82</sup> Senator Kefauver stated:

I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.<sup>83</sup>

The legislative history of the antitrust statutes is clear: Congress's concerns went well beyond traditional notions of monopoly power and its impact on consumer prices. Rather, Congress expressed broad intentions that economic and political power not become too concentrated and that small businesses be protected from their larger competitors.

#### *D. Chicago School Efforts to Rewrite History*

By the end of the 1970s, however, corporate profits fell, and the stock market was flat. It was a period of high inflation, and bond investments were losing value. The combination of these four factors eroded incomes at the high end, creating conditions for a counter-revolution against the New Deal Consensus by large corporations and the wealthy.<sup>84</sup>

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expressly authorizes price differences resulting from efficiencies of scale, its modern critics focus their criticisms on the Act's allocation of the burden of proof on big business to prove such efficiencies. *See id.*

80. *See* Antimerger Act of 1950, 64 Stat. 1125 (1958) (codified as amended at 15 U.S.C. § 18) (enacting Celler-Kefauver Act).

81. *See id.* (revising Section 7 of the Clayton Act). With the Celler-Kefauver Act, Congress effectively closed the exception created by the Supreme Court's decision in *Brown Shoe Co. v. United States*. *See* 370 U.S. 294, 313-14 (1962) (highlighting exception created via Court's decision).

82. *See* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PENN. L. REV. 1051, 1064 (1979) (noting perceived dangers stemming from economic concentration of merger movement).

83. Robert Lande & Sandeep Vaheesan, *supra* note 7, at 84-86. Lande and Vaheesan assemble numerous statements during the 1950 Amendment's congressional debate with similar import. *See id.* (citing remarks during Celler-Kefauver Act debates).

84. *See* Glick, *supra* note 3, at 323-24. During the 1970s, corporate profits fell, the stock market was not growing, and interest rates were zero or negative because of inflation. *See id.* at 324 (discussing 1970s crisis). As a result, the income share of the top 1% of earners hit a post-World War II low. *See id.* (discussing impact of

The core themes of this counter-revolution were the elimination of regulations and other impediments to expanding high incomes, reductions in the influence of unions and worker power, shareholder dominance in corporate governance, and a general return to free market laissez-faire ideology.<sup>85</sup> This paradigm shift is often referred to as the “rise of neoliberalism.”<sup>86</sup> In antitrust, the Chicago School exemplified the principles of the neoliberal revolution.<sup>87</sup> At the core of the Chicago School approach to antitrust was the Consumer Welfare Standard.

In fairness to other neoliberals, only Judge Bork and a few of his most ardent devotees had the audacity to contend that Congress endorsed anything like the Consumer Welfare Standard when passing the Sherman Act. According to Judge Bork, Congress “was confined by the policy of advancing consumer welfare,” and “[t]he wide variety of other policy goals that have since been attributed to the framers of the Sherman Act is not to be found in the legislative history.”<sup>88</sup> Among antitrust historians, not surprisingly, Judge Bork’s analysis of the legislative history of the Sherman Act is considered thoroughly debunked.<sup>89</sup>

In sum, it is a matter of historical fact that the goals of the antitrust laws prior to the rise of neoliberalism and the Chicago School included dispersion of economic and political power, and protection of small business. From today’s vantage point, looking back on antitrust history, the Consumer Welfare Standard has been only a brief digression in a long history of a multi-goaled antitrust.

### III. UNDERSTANDING THE CONSUMER WELFARE STANDARD

Contrary to the rich history detailed in Part II above, the Consumer Welfare Standard applied from the late 1970s on authorized antitrust action directed at

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crisis on wealthy and political backlash). This political backlash led to the founding and growth of conservative think tanks such as the Heritage Foundation (1973), and centers in law and economics at law schools. See, e.g., ALAN NASSER, *OVERRIPE ECONOMY AMERICAN CAPITALISM AND THE CRISIS OF DEMOCRACY* 155 (Pluto Press 2018) (describing spectacular increase in corporate lobbyists and corporate PACs in late 1970s and early 1980s).

85. See Glick, *supra* note 3, at 320-24 (2019) (considering theories on political action).

86. See generally QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* (Harvard Univ. Press 2018); PHILIP MIROWSKI & DIETER PLEHWE, *THE ROAD FROM MONT PELERIN* (Harvard Univ. Press 2009); ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION* (Harvard Univ. Press 2012); GÉRARD DUMÉNIL & DOMINIQUE LEVY, *THE CRISIS OF NEOLIBERALISM* (Harvard Univ. Press 2011).

87. See MIROWSKI & PLEHWE, *supra* note 86, at 140 (discussing Chicago School as embracing neoliberalism); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 231-33 (1985) (highlighting neoliberal approach of Chicago School); Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. PENN. L. REV. 925, 925-28 (1979) (detailing foundations of Chicago School).

88. BORK, *supra* note 12, at 20-21. See generally Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) (arguing Congress intended courts to implement only consumer welfare).

89. John Flynn, *The Reagan Administration’s Antitrust Policy, “Original Intent” and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 263-64 (1988) (remarking on Judge Bork’s fidelity to judicial restraint and original intent); Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 88 (1982) (suggesting alternative for Bork’s thesis); Herbert Hovenkamp, *Antitrust’s Protected Classes*, 88 MICH. L.R. 1, 22 (1989). See generally Thomas Hazlett, *The Legislative History of the Sherman Act Re-examined*, 30 ECON. INQUIRY 263 (1992).

only a limited number of economic consequences from mergers or conduct by dominant firms. Today, a majority of jurisdictions around the world have adopted the Consumer Welfare Standard, and even most of the post-Chicago school economists appear to accept it.<sup>90</sup>

The central text and source behind the Consumer Welfare Standard is Judge Bork's book *The Antitrust Paradox*.<sup>91</sup> Bork's formulation and popularization of the Consumer Welfare Standard suffers from four fundamental problems. First, Bork erroneously understood welfare to be a measurement of wealth, by which he meant GDP. Noneconomic sources of well-being are excluded. As applied to antitrust policy, this translates into a scenario where only "economic effects" count. Second, Bork accepted wholesale Marshall's assumptions of cardinal utility and a constant and equal marginal utility of money, without acknowledging limitations on both that Marshall himself recognized. For example, it is widely acknowledged (including by Marshall) that there is diminishing incremental welfare when income increases. Third, Bork's formulation of the Consumer Welfare Standard is susceptible to, and has suffered from, contamination by political philosophies independent from (and largely irrelevant to) welfare economics. Indeed, the Consumer Welfare Standard has wrongly come to be viewed as inherently coextensive with conservative or libertarian political values, values that are foreign to welfare economics. Lastly, the topic of Sections IV and V of this paper, the subjective measure of welfare embodied in the Consumer Welfare Standard is unsupportable and limits its applicability and usefulness.

#### *A. The Neoliberal Banishment of Antitrust's Traditional Goals and its Detrimental Effects*

While antitrust policy's history supports multi-faceted policy goals, the neoliberal construct limits antitrust to a single goal. According to Bork, the goal of antitrust is to maximize wealth.<sup>92</sup> As Bork contended in a Yale Law Journal article prior to the publication of the *Antitrust Paradox*: "The existing scope and nature of the Sherman Act, as well as considerations of effective administration, thus indicate the statute is better suited to implement the policy of wealth maximization than the policies underlying the Brandeis approach."<sup>93</sup>

Unfortunately, Bork consistently confused the concept of wealth maximization and the economic concept of welfare in the *Antitrust Paradox*. He believed, for example: "Consumer welfare, in this sense, is merely another term for the

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90. See MARSHALL STEINBAUM & MAURICE STUCKE, THE EFFECTIVE COMPETITION STANDARD: A NEW STANDARD FOR ANTITRUST, ROOSEVELT INST. 11 (Sept. 2018), <https://rooseveltinstitute.org/publications/the-effective-competition-standard-a-new-standard-for-antitrust/> [<https://perma.cc/Q95Z-FFWQ>] (listing thirty of thirty-three countries identifying consumer welfare as antitrust objective according to survey).

91. See generally BORK, *supra* note 12.

92. Robert Bork, *The Rule of Reason and the Per Se Concept: Price fixing and Market Division*, 74 Yale L.J. 775, 838 (1965).

93. See *id.*

wealth of the nation. Antitrust, thus, has a built-in preference for material prosperity, but it has nothing to say about the ways prosperity is distributed or used.”<sup>94</sup>

But Judge Bork’s construct is manifestly false. Wealth, by which Bork means output measured in current prices or GDP, is not welfare. Normally, we would think of wealth as a stock of assets valued at current prices. Bork appeared to use wealth as synonymous with GDP—the annual physical production of goods and services valued at current prices. But welfare is much more; it is the total additional utility individuals receive from that annual economic activity. The two are manifestly not the same: Indeed, welfare and GDP can move in different directions.<sup>95</sup> Moreover, the amount of welfare inescapably depends on how economic output is distributed.<sup>96</sup>

Judge Bork further misapplied the term “efficiency.” Greater productive output does not necessarily translate into greater welfare. For example, the resulting increased goods and services achieved may not be useful or, indeed, they could even be harmful. Rather, properly understood, efficiency necessarily means achieving the maximum welfare. Wealth maximization can also not be used to identify efficient policy. The measurement of wealth depends on current prices, but these prices change whenever distribution—which results from a policy shift—changes, thus resulting in an inconsistent measure.<sup>97</sup>

After promoting wealth as the sole goal of antitrust enforcement, Bork then argued that wealth could be increased by ridding antitrust of its misguided traditional goals—labeled value judgments by him—of protecting small business and promoting political democracy: “Because [antitrust] serves the single, unchanging value of wealth maximization it does not require the courts to choose or

94. BORK, *supra* note 12, at 90.

95. For example, a point on the production possibility frontier can be on a lower social welfare curve than a point within the production possibility frontier.

96. Economists trained in industrial organization may be forgiven for ignoring the welfare effects of distribution. In his leading graduate textbook in Industrial Organization, Jean Tirole candidly admits:

In this book, I will treat income distribution as irrelevant. In other words, the redistribution of income from one consumer to another is assumed to have no welfare effect (the marginal social utilities of income are equalized). I certainly do not feel that actual income distributions are optimal, even with an optimal income-tax structure (because there are limits and costs to income taxation, as is emphasized by the optimal-taxation literature). Market intervention does have desirable or undesirable income-redistribution effects. But I will focus on the efficiency of markets . . .

JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 12 (MIT Press 1989).

97. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 36 (Harvard Univ. Press 2002). Maximization where wealth is defined using current prices is not a consistent measure of efficiency because, as Kaplow and Shavell point out, “one must know the prices of different goods and services, yet there is no natural set of prices to use.” *Id.* To apply the principle of wealth maximization, one must take current prices as a given and then compute the wealth implication of the policy under consideration. See Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 *HOFSTRA L. REV.* 509, 525-26 (1980). However, once the policy impacts legal rules and distribution, relative prices change and wealth changes. See *id.*

weigh ultimate values in the decision of individual cases or in the continuing evolution of doctrine.”<sup>98</sup> But Bork seems to miss the fact that limiting antitrust policy solely to wealth maximization is, itself, the result of a value judgment.

Acceptance of the Chicago School’s own value judgment that antitrust regulation of business should be limited, and its misunderstanding that this result was somehow dictated by welfare economics, has led to at least two important detrimental consequences for antitrust enforcement. First, important Congressional concerns and traditional antitrust goals were banished from “legitimate” discussion among antitrust policy makers. Even today, such discussions are labelled “hipster” antitrust. The second detrimental consequence is more practical in nature: Recognition of the broader, traditional noneconomic antitrust goals was important in preventing courts and agencies from shifting the burden of proof in antitrust inquiries to plaintiffs, i.e., the party challenging the proposed business activity. When the antitrust inquiry is limited to “economic effects,” economists can question the link between structural variables such as increased concentration, introducing the argument that the effects themselves are unlikely and cannot be presumed from structural changes.<sup>99</sup>

This is, of course, what happened in merger enforcement when the *Philadelphia Bank* structural presumptions were loosened by the lower courts and by the Department of Justice and Federal Trade Commission 1982 Horizontal Merger Guidelines.<sup>100</sup> It is much harder to shift burdens of proof to regulators and antitrust plaintiffs when the goals of antitrust include a commitment to preserve dispersion of economic and political power. The consequences are readily apparent: The rise to prominence of the Chicago School and the Consumer Welfare Standard has led to ineffective and lax antitrust enforcement.<sup>101</sup>

98. Bork, *supra* note 92, at 838.

99. See JONATHAN BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* 76-77 (Harvard Univ. Press 2019) (considering overarching policy goals).

100. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963) (discussing economic effects). In 1963, the Supreme Court, in *Philadelphia Nat'l Bank*, explained that the “intense congressional concern” about increasing concentration “warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects.” *Id.* The Court created a presumption of an anticompetitive effect from a structural increase in concentration, placing the burden on the merging parties to refute the presumption. See *id.* at 363-66. This is referred to as a “structural approach,” as opposed to an economic “effects approach,” which requires marshalling detailed proof of future competitive effects. See *id.* In 1982 and 1984, the Department of Justice and Federal Trade Commission drafted merger guidelines in which concentration acts as a screening device to determine if further analysis is required. See U.S. Dep’t of Just., 1982 Merger Guidelines § 3 (2015) (stating concentration of market-first focus); U.S. Dep’t of Just., 1984 Merger Guidelines § 3 (2015) (confirming concentration of market-first focus). The DOJ, then, imposed on itself the burden to further demonstrate anticompetitive effects (coordinated or unilateral), essentially shifting the burden of proof from the merging entities. See U.S. Dep’t of Just., 1984 Merger Guidelines § 3.11 (2015) (explaining DOJ considers factors related to impacts of competition).

101. See JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* 158-59 (MIT Press 2015) (finding merger enforcement diminished, resulting in cleared price increases); BAKER, *supra* note 99, at 15 (noting Antitrust Rules insufficient in deterring exclusionary practices); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT’L J. INDUS. ORG. 714, 717-21 (2018) (collecting popular press stories about competitive decline in United States).

*B. Alfred Marshall and The Consumer Welfare Standard's Assumption That Marginal Utility of Money is Constant and Equal*

Judge Bork based his Consumer Welfare Standard on Alfred Marshall's much earlier work. In 1890, the same year that Congress passed the Sherman Act, Alfred Marshall introduced the concept of consumer's surplus or consumer surplus to the English-speaking world.<sup>102</sup> Marshall held the prestigious chair of Political Economy at Cambridge University.<sup>103</sup> His famous work, *Principles of Economics*, became the leading textbook in economics for two generations (until Samuelson's textbook). Marshall defined consumer's surplus as follows: "The excess of price which he [a consumer] would be willing to pay rather than go without the thing, over that which he actually does pay, is the economic measure of this surplus satisfaction. It may be called consumers' surplus."<sup>104</sup> For Marshall, the amount of money that a consumer is willing to pay expresses the "utility" that the consumer receives from the purchase.<sup>105</sup> Utility is a measure of well-being, and for Marshall well-being derived from the satisfaction of preferences.<sup>106</sup>

Marshall's model is founded on two critical assumptions that also underlie Bork's Consumer Welfare Standard. For Marshall: (1) utility is cardinal (not merely ordinal), and therefore individual utilities can be added;<sup>107</sup> and (2) the marginal utility of money is constant and equal for all individuals, so that a unit of utility can be directly associated with a unit of money.<sup>108</sup>

Marshall assumed that utility could be compared between individuals.<sup>109</sup> In antitrust analysis, individual utilities must be summed among market participants since antitrust is concerned with welfare in markets. Nevertheless, interpersonal comparability of utility has been a major challenge for welfare economics, a

102. See generally R. W. Houghton, *A Note on the Early History of Consumer's Surplus*, 25 *ECONOMICA* 49 (1958) (discussing Jules Dupuit's understanding of consumer surplus).

103. See Geoffrey Hodgson, *'The Present Position of Economics' by Alfred Marshall*, 1 *J. INST. ECON.* 121, 121 (May 27, 2005), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/DD6D0B189-81170F1F6631F7509593ED2/S1744137405000068a.pdf/the-present-position-of-economics-by-alfred-marshall.pdf> [https://perma.cc/4R8N-ZGC3] (providing background on Marshall).

104. MARSHALL, *supra* note 12, at 103.

105. See *id.* at 78 (noting Marshall viewed willingness to pay as sole measure of value). Kaldor and Hicks would later recognize that the measure of value includes both a willingness to pay and a willingness to accept.

106. See Jacob Viner, *The Utility Concept in Value Theory and its Critics*, 33 *J. POL. ECON.* 369, 372-73 (1925) (discussing psychological measures).

107. See Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 *ANTITRUST L.J.*, 713, 713 (2014) (describing struggle formalizing sum utilities of all individuals in economy).

108. Marshall was a partial equilibrium theorist, meaning that he chose to analyze markets one at a time—a principle compatible with antitrust analysis. See Yoon-Ho A. Lee & Donald J. Brown, *Competition, Consumer Welfare, and the Social Cost of Monopoly* 4 (Cowles Found. Rsch. Econ. Yale U. Discussion Paper, No. 1528, 2005) (describing partial equilibrium analysis, which focuses on one sector's social surplus without considering others).

109. See MARSHALL, *supra* note 12, at 690 (providing Marshall's mathematical formulas for calculating utility).

problem that one of us has addressed elsewhere.<sup>110</sup> In the Appendix to this paper, we describe the modern ordinal approach to aggregation of utility and its difficulties.

More fundamental, however, are the problems associated with Marshall's and Bork's assumption of an equal and constant marginal utility of money. It is widely acknowledged, and we are unaware of any serious dissenting opinions, that people who lack resources benefit more from additional resources than those with abundant resources.<sup>111</sup> Indeed, there is growing confirmatory empirical literature on this point. Some of this evidence shows that, above a certain initial level of income that brings one out of poverty, additional income brings little increase in utility. For example, Robert Frank summarizes the evidence on happiness and additional income, finding that "beyond some point across the board increases in spending on many types of material goods do not produce any lasting increment in subjective well-being."<sup>112</sup> According to Richard Layard, "[t]he fact [is] that, despite massive increases in purchasing power, people in the West are no happier than they were fifty years ago."<sup>113</sup>

Accepting the false assumption of constant marginal utility of money allows some antitrust pundits and policy makers to simply ignore the welfare effects of transfers from labor to corporations altogether.<sup>114</sup> Operating under an assumption of constant and equal marginal utility of money, these pundits and policy makers believe transfers have no welfare impact.<sup>115</sup> Worse still, antitrust

110. See Glick, *supra* note 13, at 463-64 (collecting citations to the literature addressing this issue).

111. See Joseph Farrell & Michael Katz, *The Economics of Welfare Standards in Antitrust*, U.C. BERKELEY COMPETITION POL'Y CTR. 9 (2006) (considering worth of dollar "in . . . hands of [] poor person than those of [] rich one."); see also WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 40-41 (Oxford Univ. Press 2002) (citing to the literature in moral philosophy on this point).

112. Robert H. Frank, *Does Money Buy Happiness*, in *THE SCIENCE OF WELL-BEING*, 460, 465 (Felicia Huppert et al. eds., 2005). Macroeconomic data on income growth and growth in aggregate happiness demonstrates a similar result. See Ruben Hernandez-Murillo & Christopher J. Martinek, *The Dismal Science Tackles Happiness Data*, FED. RES. BANK ST. LOUIS (Jan. 1, 2010), <https://www.stlouisfed.org/publications/regional-economist/january-2010/the-dismal-science-tackles-happiness-data> [perma.cc/W496-5F3D].

Most people believe that they would be happier if they were richer, but survey evidence on subjective well-being is largely inconsistent with that belief. . . . Surveys in many countries conducted over decades indicate that, on average, reported global judgments of life satisfaction or happiness have not changed much over the last four decades, in spite of large increases in real income per capita.

Daniel Kahneman et al., *Would You Be Happier if You Were Richer*, *SCI. MAG.*, June 30, 2006, at 1908.

113. Richard Layard, *Happiness and Public Policy: A Challenge to the Profession*, 116 *ECON. J.* 510, 510 (2006).

114. See Farrell & Katz, *supra* note 111, at 9 (quoting Canadian Merger Enforcement Guidelines discussing dollar valuation between people indeterminable). Farrell and Katz further note that "[i]f enforcers do not, or cannot, undertake a case-by-case determination of relative deservingness, then it may be best simply to assume that all affected parties are equally deserving." *Id.*

115. See Peter H. Van der Meer & Rudi Wielers, *Happiness, Unemployment and Self-Esteem* 1 (Univ. of Groningen Rsch. Inst. SOM, Working Paper No. 16016-HRM&OB, 2016) (explaining unemployment's subjective effects on well-being). Van de Meer and Wielers further explain:

economists operating under this false assumption often inexplicably treat cost reductions resulting from labor rent transfers as a potentially procompetitive benefit by simply ignoring the deleterious effects of such transfers on labor surplus.<sup>116</sup>

But Marshall himself did not believe that the constant marginal utility of money was a realistic assumption. Both Marshall and Pigou recognized that the utility gain resulting from additional income declines as income rises.<sup>117</sup> Indeed, Marshall expressly recognized that a more even distribution of income would increase welfare.<sup>118</sup> Moreover, unlike Judge Bork, Marshall favored government action to help the poor, was concerned that capital had too much bargaining power with labor, and that children did not receive adequate education, as well as other progressive social concerns.<sup>119</sup> In stark contrast, many of the Chicago School defenders of the Consumer Welfare Standard erroneously graft libertarian values and assumptions on to the theory, as we now explain.

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An obvious reason for this drop in well-being is of course the loss of income. But that is not the major explanation. . . . The psychic costs of unemployment are much bigger than the loss of income. But worse than that: unemployment has lasting, scarring effects. That is, the long term unemployed remain unhappy even if they find a job again. They feel and stay unhappy.

*Id.*

116. See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) (noting benefits and other effects of mergers to economies); Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 95 CHI.-KENT L. REV. 37, 42 (2020) (describing false beliefs regarding labor reductions). "In the merger context, until very recently, enforcement agencies almost exclusively regarded merger's workforce reductions and other adverse labor market effects on workers as procompetitive efficiencies, in part due to the rise of the Chicago School as the dominant intellectual force behind modern antitrust." *Id.* (discussing assumed benefits of mergers). See C. Scott Hemphill & Nancy Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2083 (2018) (discussing adverse effects of lower wages from merger on labor).

117. See DANIEL HAUSMAN ET AL., *MORAL PHILOSOPHY, AND PUBLIC POLICY* 114 (Cambridge Univ. Press 2017).

Citing the diminishing marginal utility of income, they [Marshall and Pigou] maintained that, for example, an extra thousand dollars contributes less to the well-being of someone with an income of fifty thousand dollars than to the well-being of someone with an income of ten thousand dollars. Other things being equal, then, a more equal distribution of income increases total welfare.

*Id.*

118. See R.F. Harrod, *Scope and Method of Economics*, 48 ECON. J. 383, 395 (1938) (noting Marshall's view of utility gain from money on poor). "Marshall says in the Principles that the marginal utility of two pence is greater in the case of a poorer man than in that of a richer. If such comparisons are allowed, recommendations for a more even distribution of income seem to follow logically." *Id.*

119. See Theodore Levitt, *Alfred Marshall: Victorian Relevance for Modern Economics*, 90 Q.J. ECON. 425, 427 (1976) (noting Marshall worked to alleviate plight of poor through improving conditions of commerce affecting them). Marshall's concern about the bargaining power of labor led him to look to "the state and to trade unions" for the solution. See *id.* at 431; see also Cooter & Rappoport, *supra* note 17, at 514-15 (explaining Marshall's school of thought concerned economic conditions aimed at improving material welfare).



### C. The Consumer Welfare Standard Does Not Embody Libertarian Values

Defenders of the Consumer Welfare Standard often contaminate welfare analysis with conservative or libertarian assumptions. To take one example, consider the following statement from Frank Easterbrook in his famous Article, *The Limits of Antitrust*:

For a number of reasons, errors on the side of excusing questionable practices are preferable. First, because most forms of cooperation are beneficial, excusing a particular practice about which we are ill informed is unlikely to be harmful . . . . Second, the economic system corrects monopoly more readily than it corrects judicial errors . . . . Third, in many cases the costs of monopoly wrongly permitted are small, while the costs of competition wrongly condemned are large . . . .<sup>120</sup>

None of the assumptions made by Easterbrook necessarily follow from the Consumer Welfare Standard, however. Moreover, his assumptions have proven factually false. Coordinated practices are more widespread than Easterbrook claims.<sup>121</sup> The average cartel in the studies reviewed by Levenstein and Suslow survived 3.7 to 10 years.<sup>122</sup> Historically, some cartels endured for more than fifty years.<sup>123</sup> The Organization of the Petroleum Exporting Countries (OPEC) has survived decades, despite Milton Friedman's predictions to the contrary. Using a more current example, there is no sign of market forces undermining the monopoly power of the tech platforms, to take another example of many.

Finally, the economic effects of market power are dramatic. Thomas Philippon estimates the costs of increased market power in the U.S. economy at about \$1 trillion per year because of lower investment and lower productivity.<sup>124</sup> In contrast, during the New Deal Consensus period, productivity and investment were higher, despite the stronger antitrust regime.<sup>125</sup> Indeed, the post-Chicago school economists have debunked most of the Chicago School claims about specific antitrust enforcement policy.<sup>126</sup> As Tim Wu has summarized:

120. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984).

121. See Margaret Levenstein & Valerie Suslow, *What Determines Cartel Success?*, 44 J. ECON. LIT. 43, 43 (2006) (asserting temptation to raise profits by fixing price led many firms to cooperative relations with rivals).

122. See *id.* at 50.

123. See *id.* at 53.

124. See THOMAS PHILIPPON, *THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS* 293 (Harvard Univ. Press 2019).

125. See Glick, *supra* note 3, at Appendix I (specifying historical data regarding economic performance).

126. See KWOKA, *supra* note 101, at 148-49 (showing average efficiency gain of reviewed mergers "near zero"); Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 1 (Fin. & Econ. Discussion Series, Div. Rsch. & Stat. & Monetary Affs. Fed. Rsrv. Bd., Working Paper No. 2016-82, 2016) (finding mergers posed "little evidence for effects on plant level productivity" or other efficiencies); Steven C. Salop, *Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC*

The Chicago movement, unsurprisingly, began to encounter major resistance during the 1980s through the 2000s. A group of economists and other academics, styled the “post-Chicago school,” emerged to challenge many of its basic premises. What the post-Chicago academics demonstrated was this. Even if you took a strictly economic view of the antitrust laws, you didn’t actually reach Bork’s conclusions.<sup>127</sup>

Accordingly, in evaluating the Consumer Welfare Standard, it is important to separate the actual theory itself from the ideological baggage of the neoliberals and the Chicago School.<sup>128</sup>

### 1. *Free Markets Do Not A Priori Increase Welfare*

Neoliberals often claim that the goal of the antitrust laws is to protect free markets, and that the consumer welfare standard is somehow connected to this goal.<sup>129</sup> This is patently false. The term “free markets” is ideological not definitional, because no market is truly free of regulation. Some markets such as those for wholesale electricity *only* exist because of regulation.<sup>130</sup> Nor are markets analytically “free” prior to government or other social organization. Markets cannot exist without secure property rights, contract rules, and criminal

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ANALYSIS ON U.S. ANTITRUST 141, 145 (Robert Pitofsky ed., 2008) (demonstrating potential anticompetitive effects of vertical restraints); John Kwoka & Margaret Slade, *Second Thoughts on Double Marginalization*, 34 ANTITRUST 51, 55-56 (2020) (showing narrow circumstances under which double marginalization efficiencies occur in vertical mergers); Jonathan Baker, *Predatory Pricing After Brooke Group: An Economic Perspective*, 62 ANTITRUST L.J. 585, 591 (1994) (arguing predatory pricing not always irrational). See generally Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008).

127. TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 107 (Columbia Glob. Reports 2018).

128. See John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 509-16 (2019) (categorizing procompetitive justifications). Values unrelated to welfare often appear as procompetitive justifications for conduct. See *O’Bannon v. NCAA*, 802 F.3d 1049, 1072 (9th Cir. 2015); *United States v. Brown Univ.*, 5 F.3d 658, 674 (3rd Cir. 1993). Antitrust defendants have offered, and antitrust courts have accepted, numerous justifications for their conduct, whether to avoid the per se rule, or as a defense in a rule of reason case. See *Brown Univ.*, 5 F.3d at 658. Such non-welfare-based concepts promoting “amateurism,” increased access to Ivy League colleges, and many others have been advanced. See *O’Bannon*, 802 F.3d at 1049; *Brown Univ.*, 5 F.3d at 658.

129. See Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2409 (2013) (detailing consumer choice standard and its flaws).

130. See BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS* 185 (Harvard Univ. Press 2011) (highlighting existence of regulatory schemes despite terminology of “free markets” utilized).

sanctions.<sup>131</sup> Nor can markets exist without social norms for cooperation.<sup>132</sup> Yet, these are only the most fundamental of regulatory requirements.<sup>133</sup> The existence of corporations, limited liability, financial markets, credit, currency, unions, work rules, and many other prerequisites of modern markets require detailed legal regimes. As Bernard Harcourt describes:

The fundamental problem is that the foundational categories of, on the one hand, “market efficiency” or “free markets,” and on the other hand, “excessive regulation,” “governmental inefficiency,” or “discipline,” are illusory and misleading categories that fail to capture the irreducibly individual phenomena of different forms of market organization. In all markets, the state is present.<sup>134</sup>

Thus, there are not “free markets” and “non free markets.” There are many diverse market organizations depending on how the law and governmental

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131. See JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 57-58 (Norton 2012) (opining setting rules of game via laws “most important role of government” impacting distributive consequences). Furthermore, “[c]ompetition presupposes a stable, enforceable scheme of property rights. Any such scheme is a collective or public good.” See JULES L. COLEMAN, *RISKS AND WRONGS* 61 (Cambridge Univ. Press 1992). Finally, “[e]very market transaction requires contract enforcement, which must be coercive, to protect expectational interests. Voluntary exchange presupposes a world of collective external contract rules and enforcement.” See Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 772 (1981).

132. See STIGLITZ, *supra* note 131, at 152 (noting historically successful economies where honor in “man’s word” and deals made with handshake).

Cooperation and trust are important in every sphere of society. We often underestimate the role of trust in making our economy work or the importance of the social contract that binds us together. If every business contract had to be enforced by one party’s taking the other to court, our economy, and not just our politics, would be in gridlock. The legal system enforces certain aspects of “good behavior,” but most good behavior is voluntary. Our system couldn’t function otherwise. If we littered every time we could get away with it, our streets would be filthy, or we would have to spend an inordinate amount on policing to keep them clean. If individuals cheated on every contract—so long as they could get away with it—life would be unpleasant and economic dealings would be fractious. . .

*Id.*; see also SAMUEL BOWLES, *THE MORAL ECONOMY: WHY GOOD INCENTIVES ARE NO SUBSTITUTE FOR GOOD CITIZENS* 1-2 (Yale Univ. Press 2016) (arguing incentive-based models inherently flawed).

[T]hese and other policies advocated as necessary to the functioning of a market economy may also promote self-interest and undermine the means by which a society sustains a robust civic culture of cooperative and generous citizens. They may even compromise the social norms essential to the workings of markets themselves . . . . Markets and other economic institutions do not work well where these and other norms are absent or compromised.

*Id.* at 2. See FRED L. BLOCK, *CAPITALISM: THE FUTURE OF AN ILLUSION* 89, 91 (Univ. Cal. Press 2018) (emphasizing widely accepted social theory noting market economy depends on anti-market values).

133. See JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* 55 (Simon & Schuster 2010) (detailing troubling Native American history of government involvement in markets).

134. HARCOURT, *supra* note 130, at 47.

regulatory structures shape these markets. Welfare economics does not advocate *a priori* any particular market organization. Instead, it advocates regulations that improve and ultimately maximize human well-being.

## 2. *There is No Road to Serfdom*

Welfare economics provides no support for the libertarian arguments advanced by Friedrich Hayek's, *The Road to Serfdom*, or in Milton Friedman's influential book, *Capitalism and Freedom*.<sup>135</sup> The central point Hayek posits is that increased government involvement in the economy undermines economic prosperity, political liberty, and freedom.<sup>136</sup> Reading Hayek today, one is struck by how any government regulation, including the New Deal, is lumped together with Nazi Germany and Soviet Russia. J. M. Keynes, for example, commented to Hayek that:

I should guess that according to my ideas you greatly underestimate the practicability of the middle course. But as soon as you admit that the extreme is not possible, and that a line has to be drawn, you are, on your own argument, done for, since you are trying to persuade us that so soon as one moves an inch in the planned direction you are necessarily launched on the slippery path which will lead you in due course over the precipice.<sup>137</sup>

Hayek famously argued that any interference with a pure laissez-faire economy would thwart the ability of prices to relay the necessary information for the economy to naturally equilibrate.<sup>138</sup> Unfortunately, Hayek offered no theoretical or empirical justification for this argument. Later microeconomists demonstrated that if the equilibrium is disturbed, market price signals do not guarantee a return to equilibrium and markets under laissez-faire regimes are not stable in any event.<sup>139</sup> Hayek's famous argument for unregulated markets was pure conjecture.

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135. See F. A. HAYEK, *THE ROAD TO SERFDOM* 74 (Bruce Caldwell ed., Routledge Classics 2001) (1944) (asserting both democracy and dictatorships compromise individual freedoms); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 2-3 (Univ. Chi. Press 2002 ed.) (1962) (arguing limited government scope and dispersed government power).

136. See HAYEK, *supra* note 135, at 246 (contending government policy only truly progressive if furthers individual freedom).

137. See RICK TILMAN, *IDEOLOGY AND UTOPIA IN THE SOCIAL PHILOSOPHY OF THE LIBERTARIAN ECONOMISTS* 33 (Praeger 2001).

138. See BLOCK, *supra* note 132, at 87 (arguing Friedman "consistently exaggerate" market's effectiveness processing information).

139. See Samuel Bowles et al., *Retrospectives: Friedrich Hayek and the Market Algorithm*, 31 J. ECON. PERSP. 215, 221 (2017) (demonstrating no general proof of stability of competitive equilibrium); Michael Mandler, *Sraffian Indeterminacy in General Equilibrium*, 66 REV. ECON. STU. 693, 707 (1999). See generally Frank Ackerman, *Still Dead After All These Years: Interpreting the Failure of General Equilibrium Theory*, 9 J. ECON. METH. 119 (2002) (reviewing literature on topic).

Both Hayek and Friedman contended that political liberties are undermined by the growth of the government.<sup>140</sup> In retrospect, this also appears to be empirically false. During the New Deal consensus and the Great Society programs, periods of government growth, the United States passed the Civil Rights Act of 1964, the Voting Rights Act of 1965, the right to vote was lowered from twenty-one to eighteen, and the Supreme Court recognized the right to counsel (*Gideon v. Wainwright*, 1963), rights to privacy (*Griswold v. Connecticut*, 1965; *Roe v. Wade*, 1973), and reaffirmed freedom of the press (*N.Y. v. Sullivan*, 1964).<sup>141</sup> These cases expanded citizen rights and liberties, not reduced them.

Friedman contrasts the “freedom” of the market economy, where transactions are voluntary, with the “coercion” of government and law.<sup>142</sup> This description is deeply flawed, however. Indeed, it is questionable whether private sector relationships are truly voluntary.<sup>143</sup> Second, coercion also exists in the private sector.<sup>144</sup> Most private production occurs within firms. Employees in large private sector firms work under a system of command and control, supported by substantial coercion.<sup>145</sup> In 2012, for example, there were “1,906 business enterprises with 5,000 or more employees in the United States average[ing] 20,366

140. See HAYEK, *supra* note 135, at 64; Friedman, *supra* note 135, at 25-26.

141. See TILMAN, *supra* note 137, at 30 (referencing Hayek and Friedman’s claims of demonstrable causal relation between market freedom and political freedom). Tilman disagrees, stating: “[i]t appears, instead, that within as yet undetermined limits, there are many market structures that are quite compatible with political freedom as it exists in the nations of the Atlantic Community and English speaking nations of the Commonwealth.” *Id.*

142. Voluntary transactions do not necessarily increase economic welfare. People could, theoretically, voluntarily accept a life of hardship and unrelenting poverty rather than a worse alternative, while a few lead lives of wealth. Such circumstances, however, are extremely unlikely to maximize human well-being, even if it meets Friedman’s definition of free and voluntary transactions.

143. See JONATHAN WOLFF, ROBERT NOZICK: PROPERTY, JUSTICE AND THE MINIMAL STATE 27-33 (Stanford Univ. Press 1991). A similar debate arises when unemployment is “voluntary.” Robert Lucas states that “there is . . . a voluntary element in all unemployment, in the sense that however miserable one’s current work options, one can always choose to accept them.” Robert E. Lucas Jr., *Unemployment Policy*, 68 AM. ECON. R. 353, 354 (1978). Indeed, taxation of property is also voluntary under this logic because the rich could accept jail time rather than pay taxes.

144. See Barbara Ehrenreich, *Earth to Wal-Mars*, in INEQUALITY MATTERS: THE GROWING ECONOMIC DIVIDE IN AMERICA AND ITS POISONOUS CONSEQUENCES 41, 45 (James Lardner & David Smith ed., 2005) (discussing legality of employer banning employee assembly while requiring antiunion lectures); see also PAGE & GILENS, *supra* note 21, at 133-34 (linking labor’s decline to antiunion public policies).

145. See WILLIAM LAZONICK, SUSTAINABLE PROSPERITY IN THE NEW ECONOMY? BUSINESS ORGANIZATION AND HIGH-TECH EMPLOYMENT IN THE UNITED STATES 200 (Upjohn Inst. 2009) (noting corporate control defines larger private sector firms to maximize shareholder value).

In all of the richest economies, business corporations are repositories of large, and in many cases vast, quantities of resources over which corporate managers, rather than markets, exercise allocative control. Indeed, it can be argued that corporate control, as distinct from market control, of resource allocation represented the defining institutional characteristic of twentieth-century capitalist economies.

*Id.* Moreover, “it is impossible to explain U.S. dominance in computers, microelectronics, software, and data communications without recognizing the role of government in making seminal investments that developed new knowledge and infrastructural investments that facilitated the diffusion of that knowledge.” *Id.* at 211-12.

employees.”<sup>146</sup> These businesses accounted for 34% of all business employees.<sup>147</sup> Moreover, the private sector benefits immensely from the support of the government.<sup>148</sup> The U.S. government accounts for 57% of basic research funding and has infused massive amounts of investment to develop the internet, agriculture, drug development, biotech, communications, and other critical private sectors.<sup>149</sup> Dominant private sector firms in the United States do not consistently advocate for “less government,” rather, they seek a regulatory scheme that favors them at the expense of other organizations, including labor and environmental groups. Earlier this century, Louis Brandeis persuasively argued that it was the existence of large centers of private power, not government intervention, that threatened the existence of a politically free people, a stark contrast to Friedman.<sup>150</sup>

#### *D. Judge Bork’s Rendition of the Consumer Welfare Standard*

We now turn a critical eye towards Judge Bork’s particular application of the Consumer Welfare Standard. In *The Antitrust Paradox*, Judge Bork introduced his own interpretation of Marshall’s consumer surplus model using a standard economics graph of demand and price in a perfectly competitive market:<sup>151</sup>

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146. WILLIAM LAZONICK & JANG-SUP SHIN, *PREDATORY VALUE EXTRACTION: HOW THE LOOTING OF THE BUSINESS CORPORATION BECAME THE U.S. NORM AND HOW SUSTAINABLE PROSPERITY CAN BE RESTORED* 3 (Oxford Univ. Press 2020).

147. *See id.*

148. *See* MARIANA MAZZUCATO, *THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS* 60 (Anthem Press 2013) (noting American business accounted for 67% of total R&D expenditures in 2008).

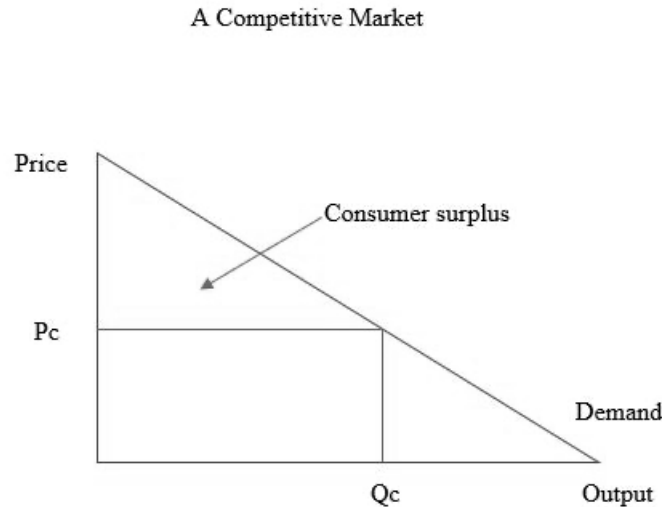
149. *See id.* at 79-90; LAZONICK & SHIN, *supra* 146, at 33-38; LAZONICK, *supra* note 145, at 211-212 (explaining U.S. dominance in computers and data communications due to government investments); *see also* FRED L. BLOCK & MATTHEW KELLER, *STATE OF INNOVATION: THE U.S. GOVERNMENT’S ROLE IN TECHNOLOGY DEVELOPMENT* (Routledge 2016). *See generally* STEVEN JOHNSON, *WHERE GOOD IDEAS COME FROM: THE NATURAL HISTORY OF INNOVATION* (Riverhead Books 2010) (showing most of major inventions arose from non-market decentralized organizations).

150. *See* HACKER & PIERSON, *supra* note 133, at 81 (discussing Brandeis’ theory gaining power in twentieth century from legal realism school of thought).

Legal realism, challenged the common notion, frequently invoked by those advantaged by the economy, that the structure of the market and the division of its gains was a natural phenomenon, completely separate from politics and government, the result of free choice and unfettered competition that yielded a distribution of property based on merit and hard work. The legal realists countered that property and markets were instead deeply intertwined with politics and government. There are no pre-political markets. Markets are inevitably shaped and channeled by political forces, dependent on the rules that are created and enforced by those who control the coercive power of the state.

*Id.*

151. *See generally* Bork, *supra* note 88.



*Figure 1: Consumer's Surplus in Perfect Competition*

In Marshall's approach, the demand curve represents the amounts that consumers are willing to pay for associated units of output. The willingness to pay represents the dollar amount of utility consumers receive from the purchase. If Judge Bork had been familiar with the broader concepts of welfare economics when he authored his book in the 1970s, he would have been forced to acknowledge that there are two measures of value, not one. There is a measure of willingness to pay and there is a measure of willingness to accept. Under specific assumptions, like when there are no wealth effects, the area under the demand curve represents willingness to pay.<sup>152</sup> In Marshall's model, willingness to pay is assumed to represent the utility a consumer obtains from consuming each unit of the product regardless of the consumer's wealth. While Marshall made this assumption and raised doubts about its general applicability, Bork was either unaware of the assumption or was less than transparent about making it. Under these assumptions, consumers receive utility as read off of the demand curve, but only pay the uniform competitive price ( $P_c$ ). Thus, the consumer increases their utility by the amount of the consumer's surplus equal to the difference between the demand curve and the uniform competitive price.<sup>153</sup>

152. If a consumer purchases multiple units of a product, it is assumed that after each purchase the consumer's income is restored to the amount prior to the first purchase.

153. Even under this assumption, however, it is not clear that consumer's surplus results in greater welfare. For example, greater consumption of cigarettes due to lower cigarette prices is not likely to result in greater human well-being. See Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. ECON. 133, 137 (2011) (distinguishing between surplus and welfare).

In chapter five of his book, Judge Bork builds on the consumer's surplus analysis by introducing Oliver Williamson's model of welfare tradeoffs following a merger.<sup>154</sup> Superimposing a monopolized market on top of the graph of a competitive market renders the following:

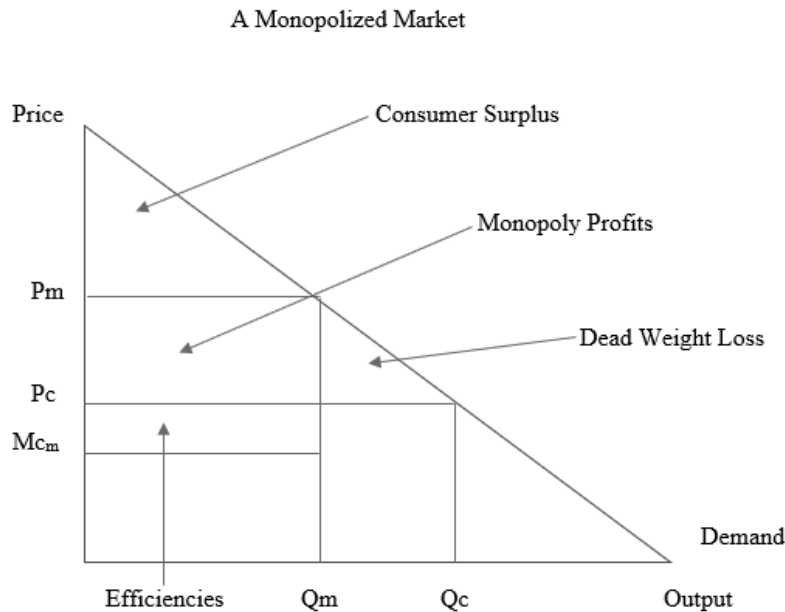


Figure 2: Judge Bork's welfare tradeoffs from mergers

In Figure 2, the monopolist maximizes profits by reducing output below the competitive level and raising price above the competitive level. This is because the monopolist realizes that increasing  $Q$  can only be sustained by decreasing price. To clear the market at a lower  $Q$  requires a higher price. When a market is monopolized,  $P_m$  is above  $P_c$ , the competitive price.  $Q_m$ , the monopolist's output, is below the competitive output,  $Q_c$ . In practice, when the monopolist raises the price, some consumers switch to a substitute product (perhaps margarine for butter, for example), resulting in a lower  $Q$ . The firm's reduction in output creates a "deadweight loss." The area below the demand curve between  $Q_m$  and  $Q_c$  is called deadweight loss because consumers are willing to pay a price higher than the marginal cost of producing these units of the product ( $P_c =$  marginal cost), yet these units of the product are not produced. We can call this an allocative inefficiency to the extent that the demand curve measures the utility

154. See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AMER. ECON. REV. 18, 27 (1968).



consumers gain from purchasing the product. The consumers who do not switch away at the higher price pay more, and this increases the profits of the monopolist. This is represented by the square with area  $(Q_m - Q_c)Q_m$ . This area also represents a redistribution of income from purchasers to the monopolist. Even under this scenario, however, there is still some consumers' surplus enjoyed by the non-switching consumers. This is represented by the area under the demand curve up to  $Q_m$ .

Finally, if the merger to monopoly leads to reduced variable costs, as reflected in this example, then there is a resulting efficiency—the reduction from  $P_c$  to  $M_{cm}$ .<sup>155</sup> Bork's discussion of this aspect of the model shows that he was actually applying a total welfare approach, not a consumer welfare approach. In a full model of the monopolist's pricing decision, some of the monopolist's cost reduction will be passed through to consumers.<sup>156</sup> The economist's assumption is that this cost reduction will result in additional investment or lower prices, or both, and that these processes will, in turn, increase utility.<sup>157</sup> But these are only assumptions. As we will later discuss, if instead of reinvesting these cost savings or reducing prices, businesses use those savings to buy-back their own stock, or increase executive pay, or pay increased dividends to hedge fund managers (as appears to be the recent trend), the result can be a reduction in utility.

Moreover, it is important to determine the welfare effect of the reduction in variable costs resulting from the merger, which involves analyzing the input markets in which these variable costs are generated. As discussed later, reductions in variable costs resulting from lower wages and less employment after a merger (i.e., what some may view as efficiencies resulting from the merger), decreases labor surplus, with just as important of an effect on total welfare as any decrease in consumer surplus. Yet, such negative welfare effects are almost uniformly ignored in practice.

Under the Consumer Welfare Standard, business strategies that reduce consumer welfare in a market, or reduce consumer welfare plus profits (total welfare) in a market, are deemed anticompetitive. Labor surplus is inexplicably not considered. The U.S. Department of Justice and the Federal Trade Commission's Horizontal Merger Guidelines issued in 2010 (the "Merger Guidelines") include as goals of merger enforcement (under the Consumer Welfare Standard), prevention of price increases, reductions in product quality or variety, reductions

155. See KWOKA, *supra* note 101, at 149 (finding data corroborates single-merger studies regarding product prices, including price decrease, quality, and efficiency). The Chicago School assumed that mergers led to significant efficiencies of this type, however, the evidence has not supported this assumption. See *id.* Most of the many studies of merger efficiencies find few or no such benefits. See Lande & Vaheesan, *supra* note 1, at 84-86.

156. See Paul L. Yde & Michael G. Vita, *Merger Efficiencies: Reconsidering the "Passing-On" Requirement*, 64 ANTITRUST L.J. 735, 735 (1996) (noting courts and antitrust enforcement agencies should not recognize efficiencies unless passed to consumers).

157. See Louis Kaplow, *Efficiencies in Merger Analysis*, 83 ANTITRUST L.J. 557 (2021) (providing thorough review of merger efficiencies).

in service, and lower innovation.<sup>158</sup> These are all cognizable under the Consumer Welfare Standard because they reduce consumer surplus. But other equally important, welfare-reducing effects are simply ignored, as we shall now discuss.

#### IV. MISSING ASPECTS OF HUMAN WELFARE UNDER THE CONSUMER WELFARE STANDARD

In the hands of the Chicago School, the Consumer Welfare Standard results in critical aspects of human welfare being left by the wayside; most notably, the transfer of rents from labor and welfare-reducing impacts from the erosion of political democracy.

##### *A. The Transfer of Labor Rents to Corporations and Shareholders*

###### *1. The Origin of Labor Rents*

Just as consumers receive consumer surplus when their reservation price—what they are willing to pay—is above the market price, workers receive rents when the prevailing wage is above the reservation wage—the minimum wage required for a worker to accept the job.<sup>159</sup> Labor rents occur for a variety of reasons.<sup>160</sup> Unions that increase worker bargaining power can cause a transfer of firm rents to employees.<sup>161</sup> In addition, it may be in the interest of firms to share rents with workers in certain circumstances for wage efficiency reasons.<sup>162</sup> Moreover, fairness often requires that firms keep the relative pay among

158. See U.S. Dep't of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines 30 (2010) (explaining when agencies will not challenge mergers).

159. Theoretically, the competitive wage is the marginal revenue product of labor. Both Marshall and Pareto criticized this theory because in the real world the contributions of the various inputs into the production process cannot be disentangled. See generally JOHN PULLEN, *THE MARGINAL PRODUCTIVITY THEORY OF DISTRIBUTION: A CRITICAL HISTORY* (Routledge 2010) (providing extensive summary of problems inherent in marginal productivity theory); GEOFFREY HARCOURT, *SOME CAMBRIDGE CONTROVERSIES IN THE THEORY OF CAPITAL* (Cambridge Univ. Press 1972) (discussing Cambridge Controversy, debated by Paul Samuelson and Joan Robinson, questioning logical consistency of theory).

160. See Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evaluation of the American Economy*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2020, at 5 (describing and defining worker power).

161. See Henry S. Farber et. al., *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data*, 39 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24587, 2021) (discussing impact of unions in Great Compression); Lawrence Mishel, *Unions, Inequality, and Faltering Middle-Class Wages*, ECON. POL'Y INST. (2012) (noting 26.7% union wage premium in 1973 and 13.6% in 2011). Unions impact more than wages. See Mark Stelzner & Kate Bahn, *Discrimination and Monopsony Power*, 49 REV. BLACK POL. ECON. 1, 7-8 (2021) (discussing factors impacting workers ability to "wield monopsony power more freely"). See generally RICHARD FREEMAN & JAMES MEDOFF, *WHAT DO UNIONS DO* (Basic Books 1984).

162. See Janet Yellen, *Efficiency Wage Models of Unemployment*, 74 AM. ECON. REV. 200, 201 (1984) (addressing circumstances when increased wages lead to increased incentive to work).

employee groups within certain proportions.<sup>163</sup> Finally, labor laws have protected working conditions and benefits.<sup>164</sup>

The Sherman Act applies to agreements that restrain labor markets and adversely impact wages.<sup>165</sup> In principle, plaintiffs should also be able to challenge a single firm that “monopsonizes” a labor market, but successful cases of this type are very rare or nonexistent.<sup>166</sup> Mergers can also increase buyer power in labor markets. Yet the Horizontal Merger Guidelines say nothing about wages, and no mergers have been blocked because they adversely impacted workers.<sup>167</sup>

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163. See Albert Rees, *The Role of Fairness in Wage Determination*, 11 J. LAB. ECON. 243, 243-44 (1993) (noting importance of fairness, often judged by wage comparisons); DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 82-83 (Harvard Univ. Press 2014) (discussing impacts of subjective fairness perceptions); see also STIGLITZ, *supra* note 131, at 104 (arguing inequitable societies result in economic instability). “Recent experiments in economics have confirmed the importance of fairness. One experiment showed that raising wages of workers who felt they were being treated unfairly had a substantial effect on productivity—and no effect on those who felt they were being treated fairly.” STIGLITZ, *supra* note 131, at 130; see also Gerald Davis & J. Adam Cobb, *Corporations and Economic Inequality Around the World: The Paradox of Hierarchy*, WHARTON FAC. RSCH. 11 (2010) (finding percent of employment in large firms negatively related to inequality). The authors may be capturing this fairness effect within firms. See Davis & Cobb, *supra*, at 4 (noting higher concentration of employers in large firm more equitable).

164. See WEIL, *supra* note 163, at 78 (discussing how firms avoid legal obligations to protect working conditions and benefits).

For example, the federal laws regulating employee benefits require that if a benefit like health care is offered to one worker, it must be offered to all workers. By shifting out employment to another business (such as a temporary agency that does not provide its workforce with health benefits) the company can lower the de facto cost of hiring additional workers . . . . A third incentive for shedding employment arises from the desire to minimize liability. With employment comes responsibility for outcomes like workplace injuries, illnesses, and fatalities as well as for discrimination, harassment, and unjust dismissal. If shedding employment shifts liabilities to other parties, it lowers expected costs to lead businesses.

*Id.*

165. See ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY IN LAW AND ECONOMICS* 30-34 (Cambridge Univ. Press 2010); ERIC A. POSNER, *HOW ANTITRUST FAILED WORKERS* 45-60 (Oxford Univ. Press 2021); Julian Kleinbrodt & Jacqueline Sesia, *Antitrust Considerations in Labor Market Enforcement*, 10 PERSPS. IN ANTITRUST 2 (2022); see also *In re High Tech Emp. Antitrust Litig.*, 985 F. Supp.2d 1167, 1172 (N.D. Cal. 2013) (discussing agreement by Apple, Google, Intel, and others not to recruit each other’s employees); *No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute “No-Poach” and Wage-Fixing Agreements*, U.S. DEP’T OF JUST.: ANTITRUST DIV. (last updated Spring 2018), <https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements> [<https://perma.cc/JBW5-QYKL>] (explaining prohibition and enforcement against wage fixing and “no poach” practices of employers).

166. See POSNER, *supra* note 165, at 63 (summarizing recent Westlaw search yielding only two cases in past six years); BLAIR & HARRISON, *supra* note 165, at 38 (analogizing monopsony and monopoly pricing powers by, finding lowering price does not violate antitrust laws).

167. See Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets* 1 (Wash. Ctr. for Equitable Growth, Working Paper, 2018) (noting no court condemnation of merger due to anticompetitive effect on labor market); POSNER, *supra* note 165, at 76 (explaining FTC and DOJ never blocked merger based on labor markets); Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1512 (2013) (noting in spite of concerns, larger jurisdictions rarely challenge mergers targeting monopsony or buyer power); see also Hafiz, *supra* note 116, at 38 n. 1 (collecting recent citations on this topic); Stelzner & Bahn, *supra* note

The absence of a concern for the transfer of labor rents by courts and antitrust agencies is unjustifiable. There are two ways in which the Consumer Welfare Standard bears on antitrust protection of labor. First, under any welfare standard, including the Consumer Welfare Standard, the welfare of all individuals impacted by the conduct at issue must be considered. There is simply no justification for considering some welfare effects and ignoring others. When mergers or dominant firm conduct causes transfers of labor rents from the work force to corporations, or their executives or shareholders, it harms welfare. This is because, as a general rule, income is transferred from low-income individuals to high income individuals. The losses at the lower end of the income ladder cause serious harm and reduce utility more than the additions to income the wealthy experience from this transfer. This is particularly true when a merger reduces costs by increasing unemployment.<sup>168</sup> Some courts and commentators (contrary to Judge Bork) equate consumer welfare with only the consumer's welfare or consumer surplus, while the welfare of workers should properly be considered as part of the consumers welfare.<sup>169</sup> Anticompetitive restraints in any output market inevitably impact a firm's internal operations including its buyer power on the input market. Likewise, a restraint imposed on the input market directly impacts consumers of the firm's output. Any restraint of trade automatically will have effects on inputs and outputs of the firm at issue. On the output side, the protected group is consumers measured by consumer surplus. While, on the input side, the analogous group is workers, with their impact measured by labor rents. Thus, under any proper interpretation on the Consumer Welfare Standard,

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161, at 9 (discussing impact of monopsony on vulnerable groups such as minorities and women); Aryeh Mellman, *Measuring the Impact of Mergers on Labor Markets*, 53 COLUM. J.L. SOC. PROBS. 1, 21 n.97 (2019) (quoting FTC chairman, Joseph Simons, instructing staff to look for impacts on labor mergers have).

168. Gritta Gehrke et al., *Post-Merger Restructuring of the Labor Force*, IZA INST. OF LAB. ECON., May 2021, at 1, 53-55 (collecting thirty-nine studies of impact of mergers on employment). Most studies, but not all, find a negative average impact of mergers on employment. *See id.* at 7, 53-55 (discussing how seventeen studies documented negative effects compared to four positive). There is also anecdotal evidence that mergers result in significant layoffs in many cases. *See Sarah Miller, Corporate Mergers Hurt Workers—And Drag Down the Job Market*, WASH. POST (Oct. 21, 2021), <https://www.washingtonpost.com/outlook/2021/10/21/corporate-mergers-layoffs-antitrust/> [https://perma.cc/3P73-D6NK] (opining on harms caused by corporate consolidation, including unemployment).

169. *See Masterman, supra* note 15, at 1400 (arguing under consumer welfare standard employee surplus must be included and employer surplus ignored).

[A]nticompetitive agreements in a labor market affect both the input and output markets sufficiently that a court must analyze welfare changes in the labor market. The issue is whether employees and employers are "consumers" such that their welfare counts, or whether they are producers who are to be ignored. Equity requires that employee surplus is part of consumer welfare. Otherwise, the rule of reason provides no protection to employees who are the victims of anticompetitive schemes that decrease prices in the output market. Such a result is absurd as well as inapposite to Supreme Court precedent.

*Id.*

the impact on consumers and workers should be considered together.<sup>170</sup> Yet, this is not what happens in practice: Consumer impacts are considered, while worker impacts are ignored.

## 2. *Methods by Which Labor Rents are Transferred*

Anna Stansbury and Larry Summers show how labor rents have materially declined over the last few decades:

Over recent decades however, a number of forces have likely reduced labor rents in the United States, particularly for lower-wage workers. Most obvious have been the decline in unionization and union bargaining power and the erosion of the real value of the minimum wage. In addition, the increase in shareholder activism and the rise of the shareholder value maximization doctrine increased the power of shareholders relative to managers and workers, likely increasing pressure on firms to cut labor costs, and in particular, to redistribute rents from workers to shareholders. The increased fissuring of the workplace, with outsourcing of noncore business functions, may be an outgrowth of this phenomenon.<sup>171</sup>

Stansbury and Summers estimate that labor rents have declined “from 12 percent of net value added in the nonfinancial corporate business sector in the early 1980s to 6 percent in the 2010s.”<sup>172</sup> The main contributing factors to this decline are the inability of workers to achieve wage premia in industries with product market concentration, the decline of unions, and the increased bargaining power of large firms.<sup>173</sup> Mergers and dominant firm conduct can exacerbate all three of these processes.

David Weil documents how labor rents have been eliminated by many firms through a process called fissuring, by which firms outsource labor activities such as janitorial, logistics, IT, manufacturing, accounting, human resources, and other jobs to smaller, less stable firms.<sup>174</sup> By so doing, large corporations can

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170. See *id.* (arguing for inclusion of employers' welfare in Consumer Welfare Standard). Moreover, this analysis is not impacted by the judicial “market-specificity” rule. See Crane, *supra* note 15, at 1 (referring to Supreme Court's prohibition on balancing effects across market as “market-specificity” rule). When, for example, the Supreme Court emphasized its “inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector” it could not have been referred to the dual effects of a restraint on a firm's output prices and its input prices which are inextricably intertwined. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609-10 (1972) (explaining courts limited utility in examining difficult economic issues and formation of per se rules). Rebecca Allensworth demonstrates convincingly how antitrust courts routinely deal with tradeoffs between consumer groups impacted by a restraint. See Rebecca Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 9-10 (2016) (discussing “interconsumer” tradeoffs). See generally Crane, *supra* note 15 (discussing cross-market balancing).

171. See Stansbury & Summers, *supra* note 160, at 1, 10 (examining reasons for decline in labor rents).

172. See *id.* at 5 (demonstrating importance of labor rent in macroeconomics and drastic decline).

173. See *id.* at 23-25 (discussing decline of labor rent due to changes within given industry).

174. See DAVID WEIL, *supra* note 163, at 88 (defining fissuring and demonstrating effect on labor rents).

reduce their internal wages and avoid other labor related costs such as benefits and legal liability. As Weil describes:

By shifting employment to smaller organizations external to the enterprise that operates in competitive markets, the lead firm creates a mechanism whereby workers will receive a wage close to the additional value they create. At the same time, this avoids the problem of having workers with very different wages operating under one roof. The lead firm captures the difference between the individual additional productivity of each worker and what would be the prevailing single wage rate if it set one.<sup>175</sup>

As labor rents are being decimated, hedge funds and wealthy shareholders are gaining control of boards and siphoning cash through high dividends and share buyback programs.<sup>176</sup> This trend results from several factors, including SEC rule changes and shareholder activism by hedge firms, and the emergence of the ideology of maximizing shareholder value.<sup>177</sup> In addition, executive compensation that is tied to company stock through performance or derivatives aligns executive incentives with shareholder interests to the exclusion of worker interests, productivity growth, or firm health in general.<sup>178</sup> As a result, firms have increased the cash paid out to shareholders in the form of dividends and have significantly increased their stock buybacks in order to keep their share prices high.

These practices have dramatic, adverse consequences on economic performance and worker welfare as we shall now see.

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175. See *id.* at 88-89 (explaining how large firms reduce labor costs by fissuring).

176. See NEIL FLIGSTEIN & TAKE-JIN SHIN, *THE SHAREHOLDER VALUE SOCIETY: A REVIEW OF THE CHANGES IN WORKING CONDITIONS AND INEQUALITY IN THE UNITED STATES, 1976-2000*, in *SOCIAL INEQUALITY* 401, 402-03 (Kathryn Neckerman ed., 2004). As the authors discuss:

During the 1980s changes in the market for corporate control promoted 'shareholder value' over stakeholder rights. It was thought that management was not focused enough on profits and too focused on growth and size. With this change in perspective, management culture began to view employees not so much as partners as costs to be minimized. Plants were closed, some economic activities were moved offshore, others were outsourced to lower cost operations . . . The beneficiaries of the 'shareholder value' solution to the economic crisis of the 1970s were shareholders and the managers and professionals who controlled the restructuring of firms.

*Id.*

177. See Jang-Sup Shin, *The Subversion of Shareholder Democracy and Rise of Hedge Fund Activism* 3-4 (INET, Working Paper No. 77, 2018) (explaining how SEC rule changes led to greater shareholder power and cash extraction from firms).

178. Harvard Law Forum on Corporate Governance (April 16, 2019) (noting "stock-based compensation comprises . . . majority of S&P 500 and 400 CEO pay"); LAZONICK & SHIN, *supra* note 146, at 70 (discussing rise in stock-based pay, including options and stock awards since 1980s).

### 3. *Transferring Labor Rents Reduces Investment, Innovation, and Productivity*

Transferring labor rents to shareholders, corporate executives, and hedge fund managers reduces firm investment, including investment in retaining employees with deep human capital as well as in-house research and technological innovation. This process supplants the prior firm “retain and reinvest” regime that was so successful in the United States up until the 1980s, with a “downsize and distribute” approach through which short run cash is extracted from the firm to increase executive and shareholder incomes, as described by Lazonick and Shin:

Under the retain-and reinvest regime, senior executives made corporate resource-allocation decisions that, by retaining people and profits within the company, permitted reinvestment in productive capabilities that could generate competitive (high-quality, low-cost) products. The social foundation of retain and reinvest was employment relations that offered decades long job security, in-house promotion opportunities, rising real earnings, and health insurance coverage, with a defined benefit pension at the end of a long career . . . . In sharp contrast, under downsize and distribute a company is prone to downsize its labor force and to distribute to shareholders, in the form of cash dividends and stock buybacks, corporate cash that it might previously have retained.<sup>179</sup>

The impact of this transfer of labor rents to shareholders can be seen in U.S. investment data. There has been a steady decline in the proportion of profits dedicated to investment since the 1990s.<sup>180</sup> As Thomas Philippon describes:

In recent years firms have been plowing back into investment only a bit more than 10 cents for each dollar of profit. . . . [W]e see that the growth rate of the capital stock of corporate businesses was 3.7 percent on average between 1962 and 2001, but only 1.9 percent on average between 2002 and 2012.<sup>181</sup>

Philippon directly attributes the low investment rate in the United States to the rise of market power among large corporations.<sup>182</sup> Others attribute the low investment rate to the drain of corporate internal cash to dividends and share buybacks.<sup>183</sup>

179. LAZONICK & SHIN, *supra* note 146, at 2-3.

180. See G. Gutierrez & T. Philippon, *Declining Competition and Investment in the U.S.* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23583, 2017).

181. PHILIPPON, *supra* note 124, at 65.

182. *Id.* at 70-71 (discussing decreasing competition hypothesis relation to concentrated industries).

183. See DUMÉNIL & LEVY, *supra* note 86, at 151-52 (contending high cash payouts to shareholders have reduced funds for investment); Jonathan Lewellen & Katharina Lewellen, *Investment and Cash Flow: New Evidence*, 51 J. FIN. & QUANTITATIVE ANALYSIS 1135, 1161 (2016) (noting results suggest investment and cash flow strongly linked after controlling investment opportunities); see also Laurent Cordonnier & Franck Van de

In any event, low investment should be a major antitrust concern because it means a reduction in spending on product improvements, innovations, and other standard antitrust goals.<sup>184</sup> Yet, all of these concerns are simply swept under the rug by the Consumer Welfare Standard as dollars in shareholder, hedge fund manager, and corporate executive pockets are given equal weight to dollars paid out to employees or reinvested in improvements to technology and productivity.

Historical evidence establishes the benefits of eliminating or reducing the transfer of labor rents to corporations. Periods of ascendancy of worker rights correlate with increased growth and productivity.<sup>185</sup> A comparison of the period 1947 to 1973 at the height of the welfare state, with the period of neoliberalism

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Velde, *The Demands of Finance and the Glass Ceiling of Profit Without Investment*, 39 CAMBRIDGE J. ECON. 871, 883 (2015).

184. There is also a direct adverse impact on innovation from inequality. See ROBERT C. ALLEN, *GLOBAL ECONOMIC HISTORY: A VERY SHORT INTRODUCTION* 33 (Oxford Univ. Press 2011); Gérard Duménil & Dominique Lévy, *A Stochastic Model of Technical Change: An Application to the US Economy (1869-1989)*, 46 METR-OECONOMICA 213, 214-15 (1995); GORDON, *supra* note 71, at 563; Lance Taylor & Ozlem Omer, *Race to the Bottom: Low Productivity, Market Power, and Lagging Wages* 5 (Inst. New Econ. Thinking, Working Paper No. 80, 2018). See generally H.J. HABAKKUK, *AMERICAN AND BRITISH TECHNOLOGY IN THE NINETEENTH CENTURY: THE SEARCH FOR LABOUR SAVING INVENTIONS* (Cambridge Univ. Press (1962).

185. See STIGLITZ, *supra* note 131, at 107 (explaining in rent-seeking economy incentives do not match contributions).

The large gaps between private rewards and social returns that characterize a rent-seeking economy mean that incentives that individuals face often misdirect their actions, and that those who receive high rewards are not necessarily those who have made the largest contributions. In those instances where private rewards of those at the top exceed by a considerable amount their marginal social contribution, redistribution could both reduce inequality and increase efficiency.

*Id.* at 134. See JAMES K. GALBRAITH, *INEQUALITY: WHAT EVERYONE NEEDS TO KNOW* 124 (Oxford Univ. Press 2016) (explaining egalitarian society produce stronger growth). Galbraith notes that

[G]reater equality is associated with stronger growth, mainly because a more egalitarian society creates stronger incentives to develop education, training, and job skills . . . and indeed if one looks at a selection of Asian countries in the 1990s, it does appear that the more egalitarian ones had stronger rates of growth.

*Id.* Block states that “when workers are able to win wage gains, they increase the pressure on the capitalist to find ways to substitute machines for people.” Fred Block, *The Ruling Class Does Not Rule: Notes on the Marxist Theory of the State*, in *THE POLITICAL ECONOMY: READINGS IN THE POLITICS AND ECONOMICS OF AMERICAN PUBLIC POLICY* 33, 33-42 (Thomas Ferguson & Joel Rogers eds., 2021) (explaining capitalist substitute machines for people when wages increase). There is also a robust economic literature on inequality and growth. See, e.g., Simon Kuznets, *Economic Growth and Income Inequality*, 45 AM. ECON. REV. 1 (1955). Studies differ by time period, countries, data sets, econometric approaches, and control variable. See *id.* at 1 (noting differing datapoints and studies). Most, but not all, such studies, however, show a negative impact of inequality on growth. See Francesco Grigoli et al., *Inequality and Growth: A Heterogeneous Approach* 5 (IMF, Working Paper No. WP/16/244, 2016) (detailing recent literature reviews).



and free market ideology, 1980 to 2015, reveals a deterioration of economic performance across numerous metrics during the neoliberal period:

Year	Real GDP Growth Rate	Profit Rate	Labor Productivity Growth Rate	Real Wage Growth Rate	Unemployment Rate	Investment Growth Rate	Top 1% Share of Income
Golden Age (1947-1973)	3.88	19.95	2.36	2.28	4.77	8.95	10.61
Neoliberalism (1980-2015)	2.51	16.86	1.18	1.12	6.42	5.25	17.01

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Growth, productivity, investment, and wage growth were all higher under the New Deal Consensus.<sup>187</sup> This pattern holds not only in the United States, but also in Europe.<sup>188</sup> One explanation for waning economic performance when income inequality worsens is that firm motivation for innovation is diluted.<sup>189</sup>

186. See Glick, *supra* note 125, at 335 (showing Age of Neoliberalism displays dismal economic performance).

187. See *id.* (comparing Golden Age of Capitalism and Age of Neoliberalism on variety of economic measures).

188. See SAMUEL BOWLES & HERBERT GINTIS ET AL., *RECASTING EGALITARIANISM: NEW RULES FOR COMMUNITIES, STATES, AND MARKETS* 13 (Verso Books 1998) (identifying correlation between egalitarian policies and positive economic growth).

Countries experiencing rapid productivity growth between the 1960s and the 1980s, including China, Singapore, Taiwan and South Korea, exhibited a degree of economic equality and a level of state involvement in economic decision-making considerably greater than in the relatively laissez-faire industrialized countries which, in the same period, experienced weak productivity growth and increases in economic inequality.

SAMUEL BOWLES, *THE NEW ECONOMICS OF INEQUALITY AND REDISTRIBUTION* 20 (Cambridge Univ. Press 2012); see JOE STUDWELL, *HOW ASIA WORKS: SUCCESS AND FAILURE IN THE WORLD'S MOST DYNAMIC REGION* (Grove Press 2013) (stressing role of agricultural reform, protectionism, government planning and support for manufacturing, and financial controls on successful development).

189. See GALBRAITH, *supra* note 185, at 130-31 (discussing development of Swedish wage structure and its role in transforming economy).

In the early 1950s, two Swedish trade union economists, Rudolf Meidner and Gosta Rehn, formulated a theory of egalitarian wage structures that had been guiding Swedish social democratic policy since the mid-1930s and that would continue to do so for another thirty years. . . . [W]age policy should prohibit the payment of low wages, on the ground that this will force backward firms to upgrade, and will give progressive firms a strong competitive advantage. . . .

It may be argued that this "Scandinavian" or "LO" model played a powerful role in transforming Sweden from a country with roughly average income for Europe, strongly dependent on timber, iron, and other natural resources, into the engineering, aviation, and automotive powerhouse that it eventually became.

*Id.*

Another explanation is the traditional Keynesian argument that redistribution favoring the rich lowers the average marginal propensity to consume.

#### 4. *Transferring Labor Rents Leads to Greater Income Inequality*

Finally, the cumulative effects of transfers between labor and wealthy shareholders results in greater income inequality and concomitant reductions in well-being. Richard Wilkinson and Kate Pickett document how high levels of income inequality undermines human well-being through numerous social mechanisms. Income inequality creates social barriers, undermines common understanding and discourse, erodes sense of community, and creates status anxiety.<sup>190</sup> Communities and friends engender “trust” or “social capital” and make us feel “safe,” which activates the parasympathetic nervous system that reduces the cortisol levels in the blood.<sup>191</sup> Reduced social connections lead to greater anxiety and insecurity as well as increased feelings of shame—all of which are related to violence. Indeed, Wilkinson and Pickett find a strong statistical relationship between income inequality—across countries and U.S. states—and lower trust,<sup>192</sup> increased mental illness,<sup>193</sup> greater illegal drug use,<sup>194</sup> lower life expectancy,<sup>195</sup> greater violence,<sup>196</sup> and lower social mobility.<sup>197</sup> Yet, supporters of the

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190. RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* 38-39 (Bloomsbury Pub. 2010) (identifying social evaluative threats for stressors with most effect on individuals); Shigehiro Oishi et al., *Income Inequality and Happiness*, 22 PSYCH. SCI. 1095, 1097 (2012) (showing U.S. happiness levels negatively related to inequality, suggesting perceived unfairness and lack of trust).

191. See Dirk Krueger & Fabrizio Perri, *Does Income Inequality Lead to Consumption Inequality? Evidence and Theory* 31 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9201, 2002) (suggesting income inequality increases debt levels thus contributing to anxiety).

192. See WILKINSON & PICKETT, *supra* note 190, at 52-53; see also Jan Delhey & Georgi Dragolov, *Why Inequality Makes Europeans Less Happy: The Role of Distrust, Status Anxiety and Perceived Conflict*, 30 EUR. SOCIO. REV. 151, 159 (2013) (finding inequality erodes trust in developed countries causing lower welfare).

193. See WILKINSON & PICKETT, *supra* note 190, at 67 (2010); Christine Eibner & William Evans, *The Income-Health Relationship and the Role of Relative Deprivation*, in SOCIAL INEQUALITY 545, 545 (Kathryn M. Neckerman ed., 2004).

While there is a strong, positive relationship between individual income and individual health, there is less evidence of a relationship between aggregate income and aggregate health. Several recent papers argue that increases in individual income affect health and well-being not just through increases in absolute material standards but also through a relative deprivation effect.

Eibner & Evans, *supra*, at 545. See Richard Layte, *The Association Between Income Inequality and Mental Health: Testing Status Anxiety, Social Capital, and Neo-Materialist Explanations*, 28 EUR. SOCIO. REV. 498, 498 (2012) (arguing more unequal European Societies face worse mental health).

194. WILKINSON & PICKETT, *supra* note 190, at 71.

195. See *id.* at 82-83.

196. See *id.* at 134-35.

197. See *id.* at 160.

The sons of fathers from the bottom three-quarters of the socioeconomic scale (defined by income, education, and occupation) were less likely to move up in the 1990s than in the 1960s. By 1998, only 10 percent of sons of fathers in the bottom quarter had moved into the top quarter; in 1973, by comparison, 23 percent of lower-class sons had moved up to the top. The evidence shows that there is today a smaller chance than in the past that someone from a low-income family will move up the income ladder.

Consumer Welfare Standard paradoxically purport to place “consumer welfare” front and center in antitrust policy debates while ignoring the obvious welfare-reducing impact of dominant firm conduct on income inequality.<sup>198</sup>

### B. Welfare Losses from Reduced Political Democracy

Current application of the Consumer Welfare Standard also ignores the detrimental welfare effects from reduced political democracy. Louis Brandeis argued in the early twentieth century that “we have to make a choice. We may have democracy, or we may have wealth concentrated in the hands of a few, but we can’t have both.”<sup>199</sup>

As detailed in Part II, protection of political democracy has been a traditional antitrust goal since the Congressional debates surrounding passage of the Sherman Act.<sup>200</sup> Yet the Consumer Welfare Standard cannot effectively theoretically underpin this goal. Accordingly, a more general conception of welfare (as we advocate in Part V below) is required to support the use of competition policy to defend political democracy.<sup>201</sup> But first, one must appreciate why promoting political democracy is such an important economic objective.

#### 1. Political Democracy Improves Economic Performance

Judge Bork and the Chicago School were able to jettison traditional antitrust values, such as improved income equality and protection of political democracy, on the grounds that those values purportedly did not contribute to economic growth (wealth maximization). More recent research defies this premise. For example, in their comprehensive study of why some nations fail, Daron Acemoglu and James Robinson identify inclusive economic and political institutions as the one common element of successful economies:

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JAMES LARDNER & DAVID SMITH ET AL., *INEQUALITY MATTERS: THE GROWING ECONOMIC DIVIDE IN AMERICA AND ITS POISONOUS CONSEQUENCES* 34 (2005). Beller and Hout concluded that there has been slower economic growth since 1975, and the concentration of that growth among the wealthy has slowed the pace of U.S. social mobility. See Emily Beller & Michael Hout, *Intergenerational Social Mobility: The United States in Comparative Perspective*, 16 *FUTURE CHILD* 19, 19 (2006) (reviewing occupational, income and wealth mobility); see also Miles Corak, *Do Poor Children Become Poor Adults? Lessons from a Cross Country Comparison of Generational Earnings Mobility* 42 tbl.1 (Inst. for Study of Lab., Discussion Paper No. 1993, 2006) (finding relatively low-income mobility in U.S.).

198. For an exception to this all-too-common phenomenon see *Mergers that Harm Sellers*. See C. Hemphill & Rose, *supra* note 116, at 2091 (observing misconception in courts’ use of “consumer welfare”).

199. See JACOB S. HACKER & PAUL PIERSON, *LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY* 19 (Liveright 2020). As Paul Krugman put it: “[e]xtreme concentration of income is incompatible with real democracy. Can anyone seriously deny that our political system is being warped by the influence of big money, and that the warping is getting worse as the wealth of a few grows ever larger?” STIGLITZ, *supra* note 131, at 137.

200. See *supra* Section II.A(1) (discussing congressional intent behind Sherman Act).

201. See *infra* Part IV (arguing replacement of Consumer Welfare Standard).

Central to our theory is the link between inclusive economic and political institutions and prosperity. Inclusive economic institutions that enforce property rights, create a level playing field, and encourage investments in new technologies and skills are more conducive to economic growth than extractive economic institutions . . . . Inclusive economic institutions are in turn supported by, and support, inclusive political institutions, that is, those that distribute political power widely in a pluralistic manner . . . .<sup>202</sup>

For Acemoglu and Robinson, an inclusive economy is one in which a few large firms do not dominate and an inclusive political system similarly disperses political power.<sup>203</sup> They argue that inclusive political institutions create successful economies by allowing the creative destruction of old technologies and encouraging new and better innovations (think the replacement of fossil fuels by more efficient climate-friendly technologies).<sup>204</sup> Only when dominant firms unduly wield political power can rent seeking and extraction of value be sustained.<sup>205</sup>

Excessive political influence allows dominant firms to externalize costs. Larger firms can outsource wages and benefits to smaller firms, forcing the public to bear the costs of environmental damage and any necessary social safety protections. Fred Block describes the process as follows:

The more successful firms gradually get larger and larger, either through mergers and acquisitions or simply by driving their competitors out of the marketplace. As their size increases, they see the advantages of locking in profits by finding paths to profits that are protected from any kind of competition and by shifting costs onto others through sweating workers or contributing to environmental degradation. Since their size generates profits and political influence, they have both the incentive and the capacity to get political rulings that support these shortcuts to continuing profitability. Without strong democracy, this degenerative process saps the economy of its dynamism.<sup>206</sup>

Block points out that “oligarchies will have slower rates of economic growth than egalitarian democracies” because, once dominant firms capture political power, they can blunt competitive challenges resulting in “little incentive to invest much in upgrading their production facilities.”<sup>207</sup> As Block describes, “members of the existing elite might occasionally invest in something new, but

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202. DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* 430 (Currency 2013).

203. *See id.*

204. *See id.*

205. *See id.* at 430-32.

206. BLOCK, *supra* note 132, at 75.

207. *Id.* at 70.

this still means a much slower rate of change than occurs in more open [political] systems.”<sup>208</sup> Block continues:

[I]t is almost always easier for firms to make profits by shifting costs onto others than by increasing efficiency. Under oligarchy, the dominant firms and families often shift costs onto employees by paying low wages and maintaining dirty and dangerous work conditions, or they shift costs onto the environment through dumping their waste into water, air, or landfills.<sup>209</sup>

Democracy, in contrast, allows the other classes in society (e.g., smaller firms, workers, smaller agricultural interests, emerging firms) to penalize government officials that subsidize dominant firms, aid in large firm rent seeking, and facilitate the imposition of unreasonable costs on the public.<sup>210</sup> But representative democracy is further imperiled by another phenomenon.

## 2. *The Destructive Influence of Money in Politics*

Mark Hanna, William McKinley's campaign manager, was famously asked what matters in politics; he answered: “There are two things that matter in politics. The first is money. I can't remember the second.”<sup>211</sup> Several studies by political scientists have concluded that the rich have already captured almost complete political power.<sup>212</sup> This power is exercised through numerous mechanisms including direct political contributions,<sup>213</sup> lobbying,<sup>214</sup> dissemination of

208. *Id.*

209. *Id.*

210. Antitrust is concerned that higher prices reduce consumers' consumption of preferred commodities. Concentrated political power has a similar impact. Large firms that capture undue political power will use that power to lower taxes and other costs and increase their share of public goods. Disempowered classes and groups are left to consume a diminishing share of public goods.

211. HACKER & PIERSON, *supra* note 133, at 170.

212. See PAGE & GILENS, *supra* note 21, at 96; Matthias Lalis, *Measuring the Impact of Campaign Finance on Congressional Voting: A Machine Learning Approach* 16 (Inst. New Econ. Thinking, Working Paper No. 178, 2022). See generally LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (Russell Sage 2008). “In the 1980s, about 10 percent of all campaign spending came from one-tenth of 1% (.01 percent) of the voting population. By 2012, more than 40% of the spending came from this tiny sliver of wealthy Americans.” See PAGE & GILENS, *supra* note 21, at 96.

213. See Thomas Ferguson et al., *How Money Drives US Congressional Elections: Linear Models of Money and Outcomes*, 61 *STRUCTURAL CHANGE & ECON. DYNAMICS* 527, 532 (2022) (demonstrating enormous monetary influence on election outcomes for Senate and House from 1980 to 2018).

214. See Lee Drutman, *The Business of America Is Lobbying: Explaining the Growth of Corporate Political Activity in Washington D.C.* (2010) (Ph.D. dissertation, University of California, Berkeley) (on file with University of California Berkeley) (suggesting companies may become increasingly confident in their ability to influence public policy through lobbying).

misleading or misinformation,<sup>215</sup> choice of candidates, sponsorship of think tanks, and co-opting academics.<sup>216</sup>

The investment theory of politics provides a coherent explanation of how large firms can control political decisions even when their interests differ from the vast majority of the voting public. A key tenet of the theory is that the relevant information voters need is prohibitively expensive to access. Voters must instead rely on advertising and political party affiliation to guide their voting decisions.<sup>217</sup> Voters vote for candidates that represent a bundle of positions.<sup>218</sup> Dominant firms, in contrast, are the only entities with sufficient resources to make the required investments to make their preferences attractive, and political parties compete for investment (in the form of campaign contributions) by these dominant firms and rich individuals. As Peter Temin describes:

Elections become contests between several oligarchic parties whose major public policy proposals reflect the interests of large investors. The Investment Theory of Politics focuses attention on investors' interests, rather than those of candidates or voters. The expectation is that investors will not be responsive to public desires, particularly if they conflict with their interests, and they will be responsive to their own concerns. They will try to adjust the public to their views, rather than altering their views to accommodate voters.<sup>219</sup>

Kathleen Kemp describes how dominant firms can assemble in groups to support a particular candidate even though they may have conflicting interests with

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215. See PAGE & GILENS, *supra* note 21, at 64 (noting big money can produce misinformation, which overwhelms truth).

216. See THOMAS FERGUSON, *GOLDEN RULE: THE INVESTMENT THEORY OF PARTY COMPETITION AND THE LOGIC OF MONEY-DRIVEN POLITICAL SYSTEMS* 41 (Chicago Univ. Press 1995) (discussing importance of organizational intervention in political business action).

The beginning of real wisdom in these matters, however, occurs when one reflects that direct cash contributions are probably not the most important way in which truly top business figures . . . act politically. Both during elections and between election campaigns, their more broadly defined 'organizational' intervention is probably more critical. As the earlier discussion of free-riders suggested, such elite figures function powerfully as sources of contacts, as fundraisers (rather than mere contributors) and, especially, as sources of legitimization for candidates and positions.

*Id.*

217. See EZRA KLEIN, *WHY WE'RE POLARIZED* 97 (Avid Reader Press 2020). "You can think of Washington as a machine for making identity protective cognition easier. Each party has its allied think tanks, go-to-experts, favored magazines, friendly blogs, sympathetic pundits, determined activists, and ideological money men." *Id.*

218. See RICHARD R. LAU & DAVID P. REDLAWSK, *HOW VOTERS DECIDE: INFORMATION PROCESSING IN ELECTION CAMPAIGNS* 3-5 (Cambridge Univ. Press 2006) (describing various voters evaluate candidates and make decisions).

219. See PETER TEMIN, *THE VANISHING MIDDLE CLASS: PREJUDICE AND POWER IN A DUAL ECONOMY* 72 (MIT Press 2017).

other firms and businesses.<sup>220</sup> While differences exist between the interests of dominant firms, legislation, at best, results in a compromise between these interests. But the interests of the nondominant classes are typically ignored. Larry Bartels finds that, in general, senators give no weight at all to the preferences of lower income groups:

Using both summary measures of senators' voting patterns and specific roll call votes on the minimum wage, civil rights, government spending, and abortion, I find that senators in this period [1980s and 1990s] were vastly more responsive to affluent constituents than to constituents of modest means. Indeed, my analyses indicate that the views of constituents in the upper third of the income distribution received about 50% more weight than those in the middle third, with even larger disparities on specific salient roll call votes. Meanwhile, the views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators.<sup>221</sup>

Similar research by Page & Gilens reached the same conclusion: "[t]he most important result of this research is rather alarming. After interest groups and affluent citizens are taken into account, it becomes clear that average citizens exert little or no influence on federal government policy."<sup>222</sup>

This is particularly worrisome because surveys show that the political preferences of dominant firms and wealthy individuals often conflict with the general public.<sup>223</sup> This divergence of interests between socioeconomic classes is documented by surveys of the political views of Americans over many decades. As Page and Gilens summarize:

[O]n many important issues, affluent and wealthy Americans seriously disagree with average citizens. Most Americans want the wealthy to pay more taxes, but the wealthy do not. Most Americans want tighter regulation of big corporations

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220. See Kathleen Kemp, *Industrial Structure, Party Competition, and the Sources of Regulation*, in *THE POLITICAL ECONOMY: READINGS IN THE POLITICS AND ECONOMICS OF AMERICAN PUBLIC POLICY* 87, 91 (Thomas Ferguson & Joel Rogers eds., 2021).

221. See BARTELS, *supra* note 212, at 253-54.

222. See PAGE & GILENS, *supra* note 21, at 68 (noting research's alarming result). Shawn McGuire and Charles Delahunt apply machine learning techniques to Gilens and Page's data set. See Shawn McGuire & Charles Delahunt, *Predicting United States Policy Outcomes with Random Forests* 10 (Inst. New Econ. Thinking, Working Paper No. 138, 2020). They find that "the high predictability of policy outcomes using models based on a few actors reinforces Gilens and Page's findings about the plutocratic tendencies of U.S. government." *Id.*; see also Thomas Ferguson, *Affluent Authoritarianism: McGuire and Delahunt's New Evidence on Public Opinion and Policy*, INST. NEW ECON. THINKING (Nov. 2, 2020), <https://www.ineteconomics.org/perspectives/blog/affluent-authoritarianism-mcguire-and-delahunts-new-evidence-on-public-opinion-and-policy> [<https://perma.cc/44QG-34QH>] (reviewing McGuire and Delahunt's working paper analyzing data Gilens and Page relied upon).

223. See Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 *PERSPS. ON POL.* 51, 56-63 (2013) (showing gaps in policy preferences between wealthy individuals and general public by percentage).

and financial institutions, but the wealthy disagree. Wealthy Americans also tend to oppose government help with jobs, wages, health care, education, retirement pensions, and other matters of great concern to average Americans. So the political clout of affluent and wealthy Americans does *not* automatically translate into popular policies.<sup>224</sup>

When the preferences between the wealthy and the less affluent are not aligned, the less affluent have little or no political influence: “[t]hese results indicate that when preferences between the well-off and the poor diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor.”<sup>225</sup>

Unlike wealthy individual donors who are often concerned with broad ideological goals, dominant firms typically seek specific regulatory exemptions, tax cuts, and other policies that shift or reduce their costs.<sup>226</sup> These firms utilize strategies such as lobbying and employ large government policy staff that work year-round and offer writing assistance to legislators.<sup>227</sup> Corporate lobbyists typically direct their efforts toward revising specific congressional or state committee.<sup>228</sup> Such efforts can hold up or water down progressive legislation and create special provisions designed to benefit only a few corporations in other legislation.

### 3. *The Conservative Dilemma: How to Maintain Unpopular Policies in a Democracy*

This divergence between the interests of the dominant firms and all other classes in society, especially in a period of high-income inequality, creates the “Conservative Dilemma.”<sup>229</sup>

224. PAGE & GILENS, *supra* note 21, at 70; PETER TEMIN, *supra* note 219, at 79 (discussing attitudes and preferences of wealthy Americans regarding government activity like deficits and taxes).

225. See MARTIN GILENS, *AFFLUENCE & INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 81 (Russell Sage 2012).

226. See, e.g., Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives*, 18 BUS. & POL. 367, 369-70 (2016); Rajesh K. Aggarwal, et al., *Corporate Political Donations: Investment or Agency?*, 14 BUS. & POL. 1, 10 (2012) (describing corporations’ various motivations for donating to political campaigns).

227. See Bonica, *supra* note 226, at 368-69, 371 (discussing prevalence of lobbying efforts amongst large corporations); Dave Levinthal, *Big Companies, Special Interests Hire Private Congressional Delegations to Lobby Government*, OPENSECRETS (May 2, 2011), <https://www.opensecrets.org/news/2011/05/big-companies-special-interests-hire-private-congressional-delegations-to-lobby/> [<https://perma.cc/4LXU-GPX7>] (explaining big companies hire former elected officials to lobby Congress).

228. See Lee Drutman, *Corporate Lobbying*, YALE U. PRESS (Jul. 21, 2020), <https://yalebooks.yale.edu/2020/07/21/corporate-lobbying/> [<https://perma.cc/3CZ9-2EEX>] (stating corporate lobbying historically reactive to regulatory state and specific issues impacting free enterprise).

229. See HACKER & PIERSON, *supra* note 199, at 22. Large corporations need to mobilize voters to support economic policies favoring them. See generally KLEIN, *supra* note 217.



We use “Conservative Dilemma” more specifically to describe the tension facing conservative *parties*. A century ago, in all countries with expanding franchises, conservative parties struggled to maintain their historical defense of elite privilege in the face of electoral challenges from the masses. When suffrage was restricted, conservative parties could ignore the massive gap between the rich and the rest. But this became a losing game once the working class gained the vote. Relatively quickly, conservative parties found themselves caught between a commitment to economic elites and an expanding electorate. How, they were forced to ask themselves, do we reconcile the needs of our core constituency with the need to win elections?<sup>230</sup>

Hacker and Pierson argue that one strategy employed to solve the conservative dilemma is to encourage social divisions within the non-rich population. If such divisions become strong enough, then voters may bypass their economic interests when voting and focus instead on issues related to their group identities, as defined by these divisions.<sup>231</sup> In the United States, these divisions historically have been racial, ethnic, and religious. Exacerbating these toxic divisions may be necessary in a highly unequal society for dominant firms to solve the conservative dilemma, but the solution obviously has serious social welfare reducing ramifications—consequences that are not recognized by the Consumer Welfare Standard.<sup>232</sup>

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230. See HACKER & PIERSON, *supra* note 199, at 22.

231. See PAGE & GILENS, *supra* note 21, at 19, 25.

Economic inequality—the concentration of wealth and income in a few hands, with a big gap between rich and poor—has risen and fallen at various times. And democracy-popular control of government has tended to move in the opposite direction. When citizens are relatively equal, politics has tended to be fairly democratic. When a few individuals hold enormous amounts of wealth, democracy suffers.

*Id.* at 19.

232. See David Dorn et al., *Is it Culture or Democracy? The Impact of Democracy and Culture on Happiness*, 82 SOC. INDICATORS RSCH. 505, 505-06 (2007) (discussing increase in societal happiness by equalizing access to democracy). There is obvious harm to the welfare of the portion of the population that has no effective political power. See *id.* at 505. It may also be the case, however, that a working democracy increases welfare generally through a greater sense of social fairness. See *id.* at 506. For example, David Dorn and his co-authors found a significant positive relationship between democracy and happiness even when controlling for income and culture measured by language and religion. See *id.* at 515; see also Reiniet Loubser & Cindy Steenekamp, *Democracy, Well-Being, and Happiness: A 10-Nation Study*, 17 J. PUB. AFFS. 1646, 1650 (2017) (finding strong relationship between life satisfaction and democracy but only weak or nonexistent correlation between happiness and democracy). Bruno Frey summarized the results from several studies of the impact of democracy on welfare as follows: “Overall, these results suggest that individuals living in countries with more extensive democratic institutions feel happier with their lives according to their own evaluation than individuals in more authoritarian countries.” BRUNO S. FREY, *HAPPINESS: A REVOLUTION IN ECONOMICS* 64 (MIT Press 2008).

## V. THE CONSUMER WELFARE STANDARD SHOULD BE REPLACED WITH THE GENERAL WELFARE STANDARD

From all this, we conclude that the Consumer Welfare Standard is simply too narrow and must be replaced. Even the most important traditional antitrust goals and those that motivated Congress to pass the antitrust statutes in the first place are now firmly located outside the Consumer Welfare Standard's narrow bounds. While the Consumer Welfare Standard has served the goals of the Chicago School and its political adherents well, it has done so only at a great social and economic price, and only by embracing unreliable assumptions.

But there is an alternative. We propose that the Consumer Welfare Standard be replaced by a General Welfare Standard, based on modern welfare economics, modified by an ability to incorporate an objective measure of welfare based on evidence from biology and the social sciences.

We make this proposal to open, not conclude, debate. How trade-offs between the benefits and costs of mergers and dominant firm policies are resolved remains an open question. Moreover, judicial resources are limited and rules and presumptions must be fashioned. Resolving these questions will require deep thinking and probably the kind of knowledge that only comes from years of experience under an antitrust regime comprehensive enough to address such concerns. Nevertheless, important consequences of dominant firm policy would no longer be ruled out by assumption, and other important goals of antitrust would no longer be declared off limits simply because the measuring standard can't accommodate them.

In an effort to provide an analytical framework for our proposed General Welfare Standard, we identify the currently dominate method of measuring welfare and point out its deficiencies. We then propose an alternative measure, combining both subjective and objective indicia.

### A. *The Dominant Approach to Measurement of Welfare and its Problems*

Economists evaluate policy by measuring its aggregate impact on the well-being of individuals. Well-being, in economists' language, denotes what makes an individual's life better, or what makes an individual's life go well.<sup>233</sup> Well-being includes everything that can influence an individual's quality of life, whether positively or negatively, and it must include all individuals that are affected by the policy change, be they consumers, CEOs, competitors, or

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233. See THOMAS M. SCANLON, *WHAT WE OWE TO EACH OTHER* 109 (Belknap Press 2000) (discussing theory of well-being). "[T]o come up with a theory of well-being: a systematic account of 'what makes someone's life go better' [is needed]." See *id.*; see also KYMLICKA, *supra* note 111, at 11 (elaborating on well-being theory).

workers.<sup>234</sup> Utility is another name for well-being, and the term social welfare refers to the measurement of the sum of individuals' well-being.<sup>235</sup>

If welfare is to be used to analyze policy, there must be a means to measure individual welfare and then aggregate those individual measurements over the broader population.<sup>236</sup> The prevailing economic approach (described in more detail in the appendix) is to assume that individuals' preferences, as reflected in the choices they make, determine their well-being. These preferences are the primitive data in economic theory. Economists rely on observations of individual choice to discern preference. When a choice is made, economists assume that preferences are satisfied and that this leads to a welfare gain. Economists defend this approach as nonpaternalistic; nevertheless, its purely subjective nature detracts from its usefulness. But surely there must be some connection between well-being and choice. One cannot assume choice and well-being to be coextensive by assumption otherwise utility would be meaningless.<sup>237</sup>

It is useful to distinguish between two senses of preference. In the first use of preference, one can infer that I prefer  $x$  to  $y$  from the fact that I chose  $x$  when  $y$  was also available. This approach links choice with preference and can be true by definition. Nevertheless, this sense of preference tells us very little of value. But there is a second sense in which one can infer that my choice of  $x$  over  $y$  (i.e., my preference for  $x$ ) improved my well-being. This is the sense in which welfare economics uses preference. It links preference to well-being. This sense of preference is not true by definition, however, and requires justification. Unfortunately, so much about what we now understand about human biology and psychology renders untenable the economist's assumption that observation of choice is enough to infer improvement in well-being. As many economists and other social scientists are now understanding, our preferences are influenced by our genes, by social norms, and by life within our current social institutions.<sup>238</sup>

### *1. Decoupling Choice and Well-Being*

At the most basic level, we are now learning that we cannot reliably postulate that human choices are always motivated by a clear-headed search for greater well-being. Human motivation and cognitive abilities reside in the brain. The

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234. Welfare economics faces a boundary issue, like utilitarianism, because well-being could be extended to animals and the future born. In general, the analysis is restricted to impacted individuals today. In climate policy we may want to make an adjustment to the humans-only approach.

235. Or one could refer to an individual's welfare.

236. Much of the difficulty in welfare economics to date has focused on the problem of aggregation and the use of such principles as Pareto Optimality and Kaldor and Hicks's compensation principles. We describe these issues in more detail in the Appendix for those interested.

237. MICHAEL MANDLER, *DILEMMAS IN ECONOMIC THEORY: PERSISTING FOUNDATIONAL PROBLEMS OF MICROECONOMICS* 79 (Oxford Univ. Press 1999) (noting agent who prefers  $x$  over  $y$  usually believes goals better served by  $x$ ).

238. This may be rejected, as it is in the economics realm, but even still I would feel a little more comfortable with a cite regarding out preferences and influences.

human brain is a product of evolution over the last two plus million years during the Pleistocene epoch, where humans primarily lived in small egalitarian hunter-gatherer groups.<sup>239</sup> This evolution resulted in human cognition and emotions that furthered the reproductive fitness of our genes in the original evolutionary environment.<sup>240</sup> But, it did not necessarily result in the faculties necessary to improve our own well-being.<sup>241</sup> For example, we are hard-wired with emotions such as envy, guilt, rage, pride, anxiety, love, and jealousy. The role of the emotions is not necessarily to advance well-being, but rather to guarantee the survival of our genes.<sup>242</sup> The two goals are not completely coextensive. Robert Frank, an economist who has written extensively on this topic, observes that: “But people who feel envious will accept different jobs, earn different salaries, spend them in different ways, save different amounts, and vote for different laws than predicted by self-interest [alone].”<sup>243</sup>

If cognitive distortions result in greater gene reproductive fitness, then we should expect human cognition to often misread reality.<sup>244</sup> Indeed, the leading school of psychological therapy, cognitive behavioral therapy, focuses on improving well-being by correcting cognitively distorted thinking and redirecting emotions.<sup>245</sup>

Economists and other social scientists interested in understanding human well-being take our genetically based instincts as only a starting point.<sup>246</sup> Natural selection also gave humans the capacity to internalize learned norms and social patterns.<sup>247</sup> Axelrod, for example, theorized that “a norm exists in a given social

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239. The new Darwinian synthesis in biology and psychology is a true science of the rationale behind human motivations. See ROBERT WRIGHT, *THE MORAL ANIMAL: WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* 7 (Oxford Univ. Press 1996) (discussing obliviousness of the conscious mind to its real motivations); RICHARD DAWKINS, *THE SELFISH GENE* 2 (Oxford Univ. Press 1989) (arguing ruthless selfishness predominant quality for genes to survive natural selection); ROBERT H. FRANK, *THE DARWIN ECONOMY: LIBERTY, COMPETITION, AND THE COMMON GOOD* 7 (Princeton Univ. Press 2011) (arguing group and individual interests diverging leads to political paralysis).

240. See ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* 6 (Norton 1988) (suggesting behavior patterns adaptive from feelings).

241. See *id.* at 7 (arguing emotions predispose us to behave contrary to our narrow interests).

242. See *id.* at 8 (arguing emotions advantageous to forming judgments).

243. *Id.* at 15.

244. See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (Farrar, Straus & Giroux 2011) (discussing cognitive distortions); see also ROBERT WRIGHT, *WHY BUDDHISM IS TRUE* 40 (Simon & Schuster 2017) (explaining development of cognitive functions like feelings). “Feelings were designed to get the genes of our hunter-gatherer ancestors into the next generation. If that meant deluding our ancestors – making them so fearful that they ‘see’ a snake that isn’t actually there, say—so be it.” WRIGHT, *supra*, at 40.

245. See DAVID D. BURNS, *FEELING GOOD: THE NEW MOOD THERAPY* 30 (William Morrow 1980).

246. SAMUEL BOWLES & HERBERT GINTIS, *A COOPERATIVE SPECIES: HUMAN RECIPROCITY AND ITS EVOLUTION* 14 (Princeton Univ. Press 2011) (explaining importance of study of genetic transmission). “Efficient information transmission is likely to ensure that the genome encode information relevant not to ephemeral aspects of the organism’s environment but rather those that are constant, or that change only very slowly through time and space.” *Id.*

247. See *id.* (discussing how humans acquire information from one another through process of social learning).

setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way.”<sup>248</sup> The operation of social norms is described by Marc Houser as follows:

[Norms'] effectiveness lies in their unconscious operation, and their power to create conformity. On the other hand, although social norms often exert an unconscious hand of control, we do sometimes violate them. When we do, or observe someone else in violation, our brains respond with a cascade of emotions, designed both to register the violation and to redress the imbalance caused. When we break a promise, we feel guilty. Guilt may cause us to reinstate the relationship, repairing the damage done. When we see someone else break a promise, we feel angry, perhaps envious if they have made out with resources that we desire. When a brother and sister have intercourse and are caught, their incestuous consummation represents a violation of a social norm. It can trigger shame in the siblings, sometimes suicide, and often moralistic outrage in both genetically related family members and interested but unrelated third parties. Again, these processes operate outside of our conscious systems of control. An emotion's effectiveness relies upon two design features: automaticity and shielding from the meddling influences of our conscious, reflective and contemplative thoughts about what ought to be.<sup>249</sup>

The internalization of norms occurs in early childhood through parents, peers, and non-parental adults.<sup>250</sup> Economists recognize that prevailing social norms influence our purchase choices, what we are willing to pay, and what we judge to be acceptable alternatives.<sup>251</sup> As discussed by Elster, however, social norms often are not consistent with the individual's self-interest, and are, therefore, anathema to the notion that we can infer individual utility from one's choices.<sup>252</sup>

Preferences are also influenced by institutions such as the mass media.<sup>253</sup> Some forms of advertising influence preferences by causing products and

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248. Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095, 1097 (1986). “Economists are becoming interested in the origin and operation of norms as they have come to realize that markets involve a great deal of behavior that no one individual can determine alone.” *Id.* at 1096. See Juliet Kostritsky, *The Law and Economics of Norms*, 48 TEX. INT'L L.J. 465, 473 (2013) (defining norms and importance of norms as tools to make decisions).

249. MARC D. HAUSER, *MORAL MINDS: HOW NATURE DESIGNED OUR UNIVERSAL SENSE OF RIGHT AND WRONG* 97-98 (Ecco 2006).

250. BOWLES & GINTIS, *supra* note 246, at 15 (discussing cultural transmission or internalization of norms through social interaction).

251. See *id.* (explaining hypothesis of social learning leading to system of consensus decision making); see also Dennis W. Rook & Robert J. Fisher, *Normative Influences on Impulsive Buying Behavior*, 22 J. CONSUMER RSCH. 305, 305 (1995) (discussing normative views effects on buying behavior).

252. See Jon Elster, *Social Norms and Economic Theory*, 3 J. ECON. PERSPS. 99, 103 (1989) (providing example of norm of vengeance overriding self-interest).

253. AMARTYA SEN & BERNARD WILLIAMS, *Introduction: Utilitarianism and Beyond*, in UTILITARIANISM AND BEYOND 1, 14-15 (Amartya Sen & Bernard Williams eds., 1982) (stating “[a]ny institutionalized or concretely realized processes of social distribution and policy will modify preferences”).

services to be identified with deeper evolved emotions like status or ability to obtain mates.<sup>254</sup> Educational institutions also impact our preferences.<sup>255</sup> When institutions are influenced by the interests of dominant firms, these firms impact preferences, not just consumer choices.

## 2. *Debunking Assumptions Equating Choice with Well-Being*

So, what do economists specifically assume in order to make preference a usable measure of well-being, and how reliable are those assumptions? Economists assume that the decisionmaker is self-interested (i.e., they seek to improve their own well-being), is a competent evaluator, and has sufficient information. But there is no reason to believe that humans inherently possess these qualities, nor have economists presented a forceful argument for their presence.

### a. *Preferences Are Not Always Based on Self-Interest*

The standard view in economics is that preferences align with self-interest in one's own well-being. F.Y. Edgeworth, a founder of neoclassical economics, stated the assumption this way: "The first principle of economics is that every agent is actuated only by self-interest."<sup>256</sup> This is an important assumption because if preferences are not necessarily self-interested, then it cannot be assumed that preferences reflect well-being. For example, as John Broome puts the concern:

To be more exact, the choice needs to be based on good, self-interested reasons. They must be self-interested, because if a person were to make a choice for a reason which was not self-interested, then by considering the choice alone we should not get a proper indication of this person's interest, as opposed to the interests of other people.<sup>257</sup>

But experience tells us that preferences are often not self-interested. While self-interest is a powerful motivation, it is not the only human motivation for choice.<sup>258</sup> People vote when their vote is unlikely to have any impact. They

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254. See STEPHEN MARTIN, *INDUSTRIAL ORGANIZATION IN CONTEXT* 437 (Oxford Univ. Press 2010) (explaining impact of advertising). "[S]ome advertising may inform. But it is difficult to accept that the producers of Wheaties or Cheerios pay for large amounts of advertising with the intent to inform potential consumers about their products' characteristics." *Id.*

255. See Tyler Cowen, *The Scope and Limits of Preference Sovereignty*, 9 *ECON. & PHIL.* 253, 256 (1993) (explaining influence of institutions on preferences creates endogeneity problem). "In the education example, we can imagine that subsidies to a liberal education create individuals who value liberality highly, and subsidies to the authoritarian education create individuals who value strictness and discipline. We might even imagine that each policy change, ex post, is approved of unanimously." *Id.*

256. BOWLES & GINTIS, *supra* note 246, at 9.

257. John Broome, *Choice and Value in Economics*, 30 *OXFORD ECON. PAPERS* 313, 333 (1978).

258. The public choice literature contends that the acts of legislators are motivated purely by the self-interest of the legislators themselves. However, the evidence appears not to support this thesis. See DANIEL A. FARBER

return lost property, giving rise to lost and found centers. They donate blood, they give money to charity, they tip people they are unlikely to encounter again, they pay taxes when an audit is unlikely, they forego littering in pristine nature areas when no one is around, and they engage in many other practices that violate the self-interest assumption. Soldiers volunteer for dangerous missions. Mothers sacrifice themselves for their children. People will take serious risks to help strangers. It is obvious from casual observation, then, that people make many choices that reduce their own well-being to benefit the well-being of others.<sup>259</sup> Robert Frank summarizes the state of the evidence as follows: "On the strength of the evidence, we must say that the self-interest model provides a woefully inadequate description of the way people actually behave. Yet the model continues to flourish."<sup>260</sup>

Experimental economics also finds that people do not behave in accordance with the self-interest model. To take one example, in the ultimatum game, two players are given a sum of money. The first player, called the proposer, offers a portion of the money to the second player, the responder. If the responder accepts, she gets what was offered and the proposer gets what is left. The simple self-interest model predicts that the proposer should offer a penny and the responder should accept; but this is rarely what happens. Colin Camerer and Richard Thaler report that in ultimatum games, "offers typically average 30-40 percent, with a 50-50 split often the mode. Offers of less than 20 percent are frequently rejected."<sup>261</sup> Similarly, in most experiments using a prisoner's dilemma, participants cooperate, which is counter to the expectation of defection predicted by the self-interest assumption.<sup>262</sup> Commenting on the totality of the experimental literature, Earnst Fehr and Urs Fischbacher state: "First, during the last decade experimental economists have gathered overwhelming evidence that

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& PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 33 (Chicago Univ. Press 1991) (arguing mixed model of constituent interest, special interest groups, and ideology all influence legislative conduct). Interestingly, if legislators and consumers are governed purely by self-interest, so should be economists. The founder of the Public Choice school, James Buchanan, commented that his own motivation was never monetary:

To the extent that conscious motivation has entered these [research-publication] efforts, it has always been the sheer enjoyment of working out ideas, of creating the reality that is reflected finally in the finished manuscript. My own proof of normative disinterest lies in my failure to be interested in what happens once a manuscript is a finished draft, a failure that accounts for my sometimes inattention to choice of publisher, promotional details, and to the potentials for either earnings or influence.

James Buchanan, *Better Than Plowing and Other Personal Essays*, in *IDEOLOGY AND UTOPIA IN THE SOCIAL PHILOSOPHY OF THE LIBERTARIAN ECONOMISTS* 114 (Rick Tilman ed., 2001).

259. See SEN & WILLIAMS, *supra* note 253, at 12 (acknowledging self-interest assumption lacks conclusive empirical evidence).

260. FRANK, *supra* note 240, at 256.

261. See Colin F. Camerer & Richard H. Thaler, *Ultimatums, Dictators and Manners*, 9 J. ECON. PERSP. 209, 210 (1995).

262. See, e.g., FRANK, *supra* note 240, at 137-46.

systematically refutes the self-interest hypothesis . . . . Second, there is also strong evidence indicating that the deviations from self-interest have a fundamental impact on core issues in economics.”<sup>263</sup>

*b. Preferences Can be Other-Regarding and Be Perverse*

Preferences can also be other-regarding, meaning that choices are motivated by their effects on others, thereby further compromising the link between choice and human welfare. Some choices are altruistic: someone reduces their own well-being to benefit the well-being of others.<sup>264</sup> Altruism by parents and within families is common and explained by the fact that family members carry the altruist’s genes.<sup>265</sup> And economists, such as Bowles and Gintis, have compiled significant evidence of non-kin-based altruism.<sup>266</sup>

But other-regarding preferences can also be negative. Humans can harbor racial or ethnic bias, can be revengeful, and can at times be sadistic. Adler and Posner offer the following example:

Frank has dedicated his life to leading the Ku Klux Klan and working for the oppression of blacks. Frank prefers that they be subordinated. The traditional welfare economist is committed to saying, in this case, that a race-based caste system might be worse for the oppressed but is better for Frank—better quite apart from any change in Frank’s material welfare or any other tangible benefit that racial oppression might produce.<sup>267</sup>

Modern welfare economists consider negative other-regarding preferences as a serious problem. If we simply include the welfare gained by satisfying all subjective preferences, then the preferences of the racists and the sadists potentially could have considerable influence. For example, John Harsanyi, a Nobel Prize winning welfare economist, believes that “we must exclude all clearly antisocial preferences, such as sadism, envy, resentment, and malice.”<sup>268</sup> But once we

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263. Earnst Fehr & Urs Fischbacher, *Why Social Preferences Matter: The Impact of Non-Selfish Motives on Competition, Cooperation and Incentives*, 112 ECON. J. 478, C1-C33 (2002). Bowles and Gintis summarize the results of the literature on eight types of experimental games, including the prisoner’s dilemma, the dictator game, the ultimatum game, and various public goods games. See BOWLES & GINTIS, *supra* note 246, at 21-45 (summarizing experiential games).

264. The material welfare economists, such as Pigou and Marshall, focused only on measurable outcomes like number of calories, not freezing, and not being a social outcast. Using this approach, it is easy to identify altruism. What is more difficult is identifying altruism when motives are subjective.

265. See BOWLES & GINTIS, *supra* note 246, at 93-94, 102 (explaining altruism in family genetics); see also W.D. Hamilton, *The Genetical Evolution of Social Behavior I*, 7 J. THEORETICAL BIOLOGY 1, 13 (1964) (discussing genetic transmission).

266. See BOWLES & GINTIS, *supra* note 246, at 53 (analyzing evidence of non-kin based altruism).

267. MATTHEW D. ADLER & ERIC POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 33-34 (Harvard Univ. Press 2006).

268. John Harsanyi, *Morality and the Theory of Rational Behavior*, in *UTILITARIANISM AND BEYOND* 39, 56 (Amartya Sen & Bernard Williams eds., 1977).



move away from crediting all actual preferences, the process becomes more complicated because we need a theory to guide what preferences are excluded.<sup>269</sup>

*c. Economists Assume that Choices are Competent*

Another necessary assumption to equating preference with improved well-being involves the cognitive competence of human decisionmakers. The connection between choice and well-being requires that agents are “rational” in the non-technical sense and that their “beliefs are [not] grossly out of kilter with available evidence.”<sup>270</sup> Researchers have identified at least three separate phenomena impacting the competency assumption: (1) negativity bias, (2) the endowment effect, and (3) reference bias.

Evolution has left humans with a “negativity bias.”<sup>271</sup> Our brains react more strongly to negative news than positive news.<sup>272</sup> This bias helped our ancestors avoid life threatening dangers.<sup>273</sup> A central tenet of the Buddhist practice for more than two thousand years has been to neutralize the negativity bias (that Buddhists believe causes “suffering” through fear and anxiety) through mindful meditation.<sup>274</sup> While rules of thumb, self-deception, and other processing errors may have resulted from evolution’s goal of greater reproductive fitness of our genes, they have not developed from any sense of welfare-enhancing preferences.

More than forty years of behavioral economic research has shown that humans are more averse to losing something that they own than they are to value the benefit from obtaining something new, even if the object lost and gained is of the same value.<sup>275</sup> This cognitive feature is called the “endowment effect.” For

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269. For example, Ronald Dworkin argues that it is impossible to avoid counting other-regarding preferences. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (Harvard Univ. Press 1978). But the crediting of negative other-regarding preferences poses a challenge to democracy, as a majority with negative other-regarding preferences can subordinate a minority. See *id.* at 276 (discussing consequences of crediting negative other-regarding preferences). Dworkin makes the interesting proposal that the foundation of legitimate inherent rights involves the protection of liberties that are threatened by large external preferences in a community. See *id.*

270. B.A. Mellers et al., *Judgement and Decision Making*, 49 ANN. REV. PSYCH. 447, 450 (1998).

271. See Hara Estroff Marano, *Our Brain's Negative Bias: Why Our Brains are More Highly Attuned to Negative News*, PSYCH. TODAY (June 20, 2003), <https://www.psychologytoday.com/us/articles/200306/our-brains-negative-bias> [<https://perma.cc/E5SR-3N39>] (attributing humans' strong reaction to negativity to evolution).

272. See *id.* (describing negativity bias).

273. See *id.* (explaining our capacity to weigh negative input is essential to survival).

274. See Alice G. Walton, *Mindfulness Meditation Helps Quell Negative Thoughts, 'Monkey Mind'*, FORBES (Feb. 13, 2017), <https://www.forbes.com/sites/alicegwalton/2017/02/13/mindfulness-meditation-helps-quell-negative-thoughts-monkey-mind/?sh=5cc5c6f95ebe> [<https://perma.cc/X9BB-NHD7>] (showing mindfulness meditation significantly reduced intrusive thoughts).

275. See Don L. Coursey et al., *The Disparity Between Willingness to Accept and Willingness to Pay Measures of Value*, 102 Q.J. ECON. 679, 679 (1987) (addressing psychologists' argument of people's aversion to loss compared to attraction of equivalent gain); see also Jack L. Knetsch & J. A. Sinden, *Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 9 Q.J. ECON. 507, 516 (1984) (showing example of opposition to lose something owned over obtaining something new).

example, Knetsch and Sinden found that individuals demand four times more money to give up a lottery ticket than they are willing to pay to acquire the same ticket.<sup>276</sup> In the classic endowment effect study, students were divided into two groups: One group was given a coffee mug, and a second group was given a candy bar of similar value. Students in the two groups were given a chance to trade the mug for candy or vice versa. 90% of the students in each group opted not to trade. But a control group that received neither candy nor a mug split nearly equally between preference for the mug or preference for the candy. According to Knetsch who conducted the study, “contrary to the expectation of an equal proportion favoring one good over the other in each group, based on conventional assertion of economic theory and practice, the different initial entitlements and subsequent direction of potential trades heavily influenced the participants’ valuation of the two goods.”<sup>277</sup> The endowment effect demonstrates how perceptions of value are influenced by reference points, in this case initial endowment. Herbert Hovenkamp has argued that the endowment effect also runs counter to the assumptions required for the existence of a utility function—something critical to the use of welfare economics to evaluate competing policy proposals.<sup>278</sup>

Points of reference influence people’s valuations and choices through a concept known as “framing effects.”<sup>279</sup> One framing effect, “anchoring,” occurs when exposure to information that is not relevant to the decision influence individual choices. Exposure to large but irrelevant numbers can influence a person’s willingness to pay.<sup>280</sup> Choices are also influenced by the context of the choice or how the choice is framed. Kahneman, Knetsch, and Thaler provide several examples of experiments that demonstrate this effect. For example, consumers seem to consistently judge a list price increase differently from a refusal to give a price discount, even if the resulting sales price is the same.<sup>281</sup> Similarly, workers experience a reduction in money wages when prices are falling differently from the impact of constant money wages during an inflationary period, even if the resulting real wage is the same.<sup>282</sup>

The point is that preferences are merely a prediction of the benefit one expects to receive from the choice made. There is often a gap, however, between

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276. See Knetsch & Sinden, *supra* note 275, at 516 (explaining individuals’ valuation of lottery ticket based on willingness to pay and compensation demanded); see also Coursey et al., *supra* note 275, at 679-80 (noting modifications made to previous experiments).

277. See Jack Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277, 1278 (1989) (outlining results of study).

278. See Herbert Hovenkamp, *Legal Policy and the Endowment Effect*, 20 J. LEGAL STUD. 225, 231, 237 (1991) (balancing competitive markets with wealth maximization).

279. See Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 456 (1981) (describing framing effects).

280. See generally KAHNEMAN, *supra* note 244.

281. See Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPS. 193, 204 (1991) (explaining result of study).

282. See *id.* (showing differences between wage increases and wage cuts during inflationary periods).

formation of the preference and the actual experience of preference satisfaction. In particular, people are notoriously bad at predicting the degree of adaptation to post-choice situations. For example, people's predictions of the satisfaction from a windfall in income do not take account of the immense ability humans have to adapt to higher income levels. Studies have found that recent lottery winners are no happier than those in a control group, for instance.<sup>283</sup> Bruno Frey, summarizing the experimental literature on forecasting utility, concludes that:

Individuals are not good at foreseeing how much utility they will derive from their future consumption. Research on affective forecasting shows, for instance, that people underestimate their ability to cope with negative effects. Usually, therefore, people have biased expectations about the intensity and duration of emotions. People fail to foresee that they will adapt more in the future than they predict at present.<sup>284</sup>

Moreover, humans are programmed to care about status and relative social position.<sup>285</sup> They can seek higher and higher income at the expense of other uses of time to secure or retain a relative position with peers.<sup>286</sup> Concern for relative position can lead to lower overall well-being. For example, Robert Frank believes: “[d]espite their higher incomes, then, the rich now appear to be worse off on balance. Their higher spending on cars and houses has simply raised the bar that defines adequate in those categories, while the corresponding decline in the quality of public goods has had a significant negative impact.”<sup>287</sup>

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283. See Daniel Kahneman & Carol Varey, *Notes on the Psychology of Utility*, in INTERPERSONAL COMPARISONS OF WELL-BEING 127, 131 (Jon Elster & John Roemer eds., 1991).

284. BRUNO S. FREY & ALOIS STUTZER, *HAPPINESS & ECONOMICS* 130 n.62 (Princeton Univ. Press 2002).

285. See WRIGHT, *supra* note 239, at 245 (discussing human instincts). “Once this status ladder exists, and the higher rungs bring reproductive payoffs, genes that help a chimp climb it at acceptable cost will spread. The genes may work by instilling drives that, in humans, get labeled ambition or competitiveness.” *Id.* “[S]ociological studies of soldiers’ morale in World War II identified relative deprivation as a more important factor than objective circumstances.” Kahneman & Varey, *supra* note 283, at 142.

286. See Robert Frank, *How the Middle Class is Injured by Gains at the Top*, in INEQUALITY MATTERS: THE GROWING ECONOMIC DIVIDE IN AMERICA & ITS POISONOUS CONSEQUENCES 138, 138 (Jim Lardner & David Smith eds., 2005).

Suppose you had to choose between two worlds: World A, where you earn \$110,000 a year and everyone else earns \$200,000, and world B, where you earn \$100,000 and everyone else earns \$85,000. Most neoclassical economists would have an easy time deciding. Neoclassical economics, long the dominant wing of the profession, tends to equate personal well-being with absolute income, or purchasing power . . . And yet, when the choice is put to American survey respondents, many seem torn, and most actually end up opting for World B.

*Id.*

287. ROBERT H. FRANK, *SUCCESS AND LUCK: GOOD FORTUNE AND THE MYTH OF MERITOCRACY* 120 (Princeton Univ. Press 2016). Frank argues that an across-the-board consumption tax would lower each person’s relative consumption and, therefore, have little impact on well-being. See *id.* (suggesting diminishing marginal utility of income and wealth).

Behavioral economists and cognitive psychologists have uncovered numerous examples of misperception and cognitive errors.<sup>288</sup> These errors open a gap between preference, choice, and well-being. Nevertheless, these gaps do not entirely undermine the utility of welfare economics as a device for evaluating competing policy proposals. The imperfect is not necessarily the enemy of the good.

*d. Competent Choices Require Adequate Information*

Another necessary assumption for equating choice with improved well-being is that decision makers have adequate and accurate information on which to base their choices. If individuals hold beliefs based on inaccurate information, their decisions will not necessarily accord with their well-being.<sup>289</sup> Economists are well aware that people can make mistakes because of information deficiencies.<sup>290</sup> Because welfare economics is concerned with aligning preferences with well-being, an individual needs to understand completely what makes a life go well for the theory to function optimally.<sup>291</sup>

Information relevant for aligning choice and well-being must concern what is most valuable for someone's well-being. Individuals must base choice on what achieves the most such value. But once the theory used to assemble the information determines value, that nexus is severed and value is no longer derived from individual preference.<sup>292</sup> Elizabeth Anderson has argued that information is a woefully inadequate remedy because choice is often driven by "appetites and whims," "actions prompted by habits," and "blind emotions."<sup>293</sup> For Anderson, no amount of information can ensure that such motivations result in greater well-being.<sup>294</sup>

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288. See, e.g., Luke A. Whittemore, *Proportionality Decision Making in Targeting: Heuristics, Cognitive Biases, and the Law*, 7 HARV. NAT'L SEC. J. 577, 613-14, 619-20 (2016) (applying cognitive errors and biases to study proportionality decision-making in warfare); Jennifer J. Halpern, *Cognitive Factors Influencing Decision Making in a Highly Reliable Organization*, 3 INDUS. CRISIS Q. 143, 148-51 (1989) (examining effect of cognitive errors on naval aircraft decisions); Pat Croskerry, *Achieving Quality in Clinical Decision Making: Cognitive Strategies and Detection of Bias*, 9 ACAD. EMERGENCY MED. 1184, 1186, 1200-01 (2002) (analyzing impact of cognitive bias on clinical decision-making in emergency medicine).

289. See HAUSMAN ET AL., *supra* note 117, at 130 (suggesting individuals may make detrimental choices based on mistaken beliefs about their benefits).

290. See ADLER & POSNER, *supra* note 267, at 38 (stating invoking fully-informed preferences popular approach to idealization among welfare economists); Harsanyi, *supra* note 268, at 55 (arguing preferences based on erroneous factual beliefs).

291. See GRIFFIN, *supra* note 17, at 13 (asserting complete understanding of what makes life go well only way to avoid all utility faults).

292. See SEN & WILLIAMS, *supra* note 253, at 13 (arguing individual preference results in removal of content from valuing ).

293. ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 131-32 (Harvard Univ. Press 1993) (arguing personal preferences, habits, and emotions drive personal choices).

294. See *id.* (suggesting new information cannot ensure well-being).

## B. Reconsidering the Measurement of Well-Being

### 1. Laundered Preferences

Welfare economists are well aware of the many issues that scholars have raised about the viability of measuring well-being based solely on subjective choice. One response has been to switch from actual preferences to “laundered”<sup>295</sup> or “ideal” preferences.<sup>296</sup> For example, as Harsanyi explains:

All we have to do is to distinguish between a person's manifest preferences and his true preferences. His manifest preferences are his actual preferences as manifested by his observed behaviour, including preferences possibly based on erroneous factual beliefs, or on careless logical analysis, or on strong emotions that at the moment greatly hinder rational choice. In contrast, a person's true preferences are the preferences he would have if he had all the relevant factual information, always reasoned with the greatest possible care, and were in a state of mind most conducive to rational choice.<sup>297</sup>

Nevertheless, laundering or adjusting preferences is not an adequate answer to the many problems of subjective welfare measurement. In order to adjust preferences, one needs a theory about what preferences align with human well-being and what preferences do not. But if we had such a theory, we wouldn't need to try to divine “true” preferences from individual choices in any event. Welfare economists could simply rely on the objective evidence of what advances human well-being and promote these goals and processes, and ignore preferences based on choice altogether. Harvard philosophy professor Thomas M. Scanlon makes the same observation:

I mentioned above, as a problem for an informed-desire theory of well-being, that on such a view the value of desire fulfillment seems in the end to play no real role in explaining why some things contribute to a person's well-being. It may be true that something contributes to one's well-being only if one has reason to desire it. But even when this is so, what makes this thing good will not be the fact that it would satisfy that hypothetical desire but rather those considerations

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295. See generally Robert E. Goodin, *Laundering Preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 75 (Jon Elster & Aanund Hylland eds., 1989).

296. See Harsanyi, *supra* note 268, at 55 (explaining switch from actual preferences to true preferences); J. A. Mirrlees, *The Economic Uses of Utilitarianism*, in UTILITARIANISM AND BEYOND 63, 64 (Amartya Sen & Bernard Williams eds., 1977) (arguing mistaken conceptions of well-being “purified” of obvious errors of foresight or memory); Peter Hammond, *Book Reviews: The Economics of Justice and the Criterion of Wealth Maximization*, 91 YALE L.J. 1493, 1501 (1982) (defining individual utility by how individual would want utilitarian moral agent to maximize for them); ADLER & POSNER, *supra* note 267, at 36 (advocating for restricted preference-based view of well-being).

297. Harsanyi, *supra* note 268, at 55.

whatever they may be, that provide reasons for desiring it. The fact of desire itself seems to play no role.<sup>298</sup>

Because of this recognition, many mainstream economists have resisted the call to adjust or launder preferences.<sup>299</sup>

## 2. *Objective Measures of Well-Being*

So, what are we to do when neither actual choice, nor an adjustment of those choices provides a reliable basis for measuring human welfare? Welfare economics take an objective approach to measuring well-being. Objective measures of well-being take the position that humans have a common ancestral heritage and cultural similarities that allow us to identify at least some things that, for the most part, universally advance human well-being.<sup>300</sup> The types of items that are typically listed as objectively beneficial to well-being include basic needs, human relationships, knowledge, freedom, dignity, and true beauty.<sup>301</sup>

Amartya Sen, a Nobel Prize winning economist, has advanced a promising objective theory.<sup>302</sup> According to Sen, people are entitled to equal respect and concern, but it makes little sense to equalize welfare based on subjective actual preferences.<sup>303</sup> This is because the poor and oppressed of the world often adjust their desires and expectations to what little they see feasible, while the rich may have developed expensive tastes.<sup>304</sup> The equalization of subjective welfare in

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298. Thomas M. Scanlon Jr., *The Tanner Lectures on Human Values: The Status of Well-Being* 109 (Oct. 25, 1996).

299. See KAPLOW & SHAVELL, *supra* note 97, at 420. Kaplow and Shavell are consistent in resisting any revision to actual preferences because the revision undermines welfare economics' entire approach to measuring utility.

But such an approach [revising preferences] is troubling from the perspective of welfare economics because the moral force and appeal of welfare economics lies in promoting the actual well-being of people, not in advancing some hypothetical notion of satisfaction that is distinct from that of the individuals who are the object of our concern.

*Id.*

300. See DEREK PARFIT, *REASONS AND PERSONS* 499 (Oxford Univ. Press 1984) (explaining objective list theory). "According to this theory [objective list theory] certain things are good or bad for people. Whether or not these people would want to have the good things, or to avoid the bad things." GRIFFIN, *supra* note 17.

301. See Scanlon, *supra* note 298, at 118 (discussing objective human well-being).

These include such things as friendship, other valuable personal relations, and the achievement of various forms of excellence, such as art or science. These intuitive fixed points provide the basis for rough judgments of comparative well-being: a person's well-being is certainly increased if her life is improved in one of the respects just mentioned while the others are held constant.

*Id.* Marshall and Pigou also identified important items that impact welfare. See MARSHALL, *supra* note 102, at 161 (identifying important items impacting welfare).

302. See generally AMARTYA SEN, *THE IDEA OF JUSTICE* (Harvard Univ. Press 2009).

303. See *id.* at 265, 294, 296 (contending capability cannot pay attention to equity and justice).

304. STUART WHITE, *EQUALITY* 85 (Polity 2007) (arguing unfairness occurs when people subsidize others who develop expensive tastes).

such a situation results in gross unfairness.<sup>305</sup> What Sen proposes is that we seek to achieve equality of real opportunity.<sup>306</sup> This means that people have equal access to what is necessary to function in their choice of work and private life. For Sen, people are free to make the choice to work hard or seek a life of leisure. The first will likely be rewarded with more resources and status than the latter.<sup>307</sup>

For everyone to have the opportunity to choose, however, requires equal access to public goods such as education and medical care, as well as supportive relationships and monetary resources. According to Sen:

The functionings relevant for well-being vary from such elementary ones as escaping morbidity and mortality, being adequately nourished, having mobility, etc., to complex ones such as being happy, achieving self-respect, taking part in the life of the community, appearing in public without shame (the last a functioning that was illuminatingly discussed by Adam Smith). The claim is that the functionings make up a person's being, and the evaluation of a person's well-being has to take the form of an assessment of these constituent elements.<sup>308</sup>

Sen's approach is compelling because he has identified an objective element of human well-being that is difficult to dispute. That is, one's ability to marshal resources to choose the path of one's life for herself, to have equal access and opportunity to these choices, and the freedom to make such choices.<sup>309</sup> This approach is particularly credible when combined with a reimagining of how one looks at and measures welfare in general—replacing the Consumer Welfare Standard with a General Welfare Standard.

### *C. Advantages of Adopting a General Welfare Standard*

While much of the work in this area remains in the future, adopting Sen's approach opens the door to an evidence-based method for evaluating impacts on human well-being. Allowing objective measures of well-being based on social science research would materially increase the usefulness and effectiveness of

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305. See SEN, *supra* note 302, at 282-83 (contending unfairness in equalizing subjective welfare); Jon Elster, *Sour Grapes: Utilitarianism and the Genesis of Wants*, in UTILITARIANISM AND BEYOND 219, 226 (1977) (explaining types of subjective adaptation).

306. See SEN, *supra* note 302, at 296 (discussing substantive equity of opportunities in theories of justice).

307. See *id.* at 272-73.

308. See Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE 31, 36-37 (Martha Nussbaum & Amartya Sen eds., 1993).

309. See L. W. SUMNER, WELFARE, HAPPINESS & ETHICS 61 (Oxford Univ. Press 1996). The ground floor of Sen's account treats an individual's well-being as a matter of his functionings. But Sen then adds a second level to the analysis. A capability is a freedom or opportunity to achieve a certain functioning—the ability to eat well if one chooses, say, rather than actually doing so. Although capabilities may be prudentially valuable chiefly for the functionings which they make available, Sen argues that they also have certain value in their own right: We are better off for having avenues open to us which we never actually choose to pursue. Our level of well-being is therefore determined both by our set of functionings and by our set of capabilities.

welfare measurement. It would also enhance the potential role of economists in the social policy debate.

Replacing the Consumer Welfare Standard with a General Welfare Standard incorporating evidence-based, objective research on human welfare will allow economists to make important policy-based interventions in the debates about the future of antitrust. They will no longer be forced to make policy arguments untethered to economic theory simply because the Consumer Welfare Standard is too narrow to consider many beneficial goals; nor will they be forced to make unrealistic assumptions such as constant marginal utility of money or the many assumptions necessary to sustain a purely subjective measurement of welfare. Rather, economics and economists will be freed up to contribute to the healthy and important debate over antitrust policy and its impact on business decisions, and important welfare-inducing factors like reduced income inequality and increased political democracy.

## VI. CONCLUSION

When properly understood, welfare economics endorses any policy that increases human well-being or welfare. The welfare of all affected individuals must be considered, and the mere complexity of measuring individual well-being or aggregating welfare is not adequate justification for ignoring significant groups impacted by market power or dominant firm conduct. Measured against this standard, the current antitrust policy under the Consumer Welfare Standard is woefully inadequate.

Because of Chicago School influence, courts and antitrust agencies blindly ignore the impact of mergers and dominant firm action on income distribution and our democratic institutions. This is not an oversight. It results directly from the standard applied. But, as established in Part II here and elsewhere, applying the Consumer Welfare Standard inappropriately ignores congressional intent, which envisioned a multi-goal role for antitrust that sought competitive remedies for broad social issues such as the preservation of democracy.

As developed in Parts III and IV, the Consumer Welfare Standard—influenced by political motivations rather than the dictates of economics—improperly truncates “legitimate” antitrust inquiry to “purely-economic” effects, and specifically effects on consumers. This latter limitation is simply a misunderstanding of the Consumer Welfare Standard and its theoretical undergirding. The Consumer Welfare Standard is capable of including within its gambit remedies for the noxious impact that dominant firms have had on labor; but it has largely chosen to ignore those effects, often even categorizing them as efficiencies rather than detrimental effects. But being sensitive to the needs of large corporations while putting on blinders when it comes to labor, does not follow the Consumer Welfare Standard. Rather, this view results from super-imposing a conservative or libertarian political ideology on that standard. The Consumer Welfare



Standard's ignorance to the beneficial economic effects resulting from more robust political democracy is equally troubling, as also addressed in Part IV.

Replacing the Consumer Welfare Standard with a General Welfare Standard offers some hope for the future, as proposed in Part V. Those who advocate a broader agenda in antitrust are often referred to in antitrust circles as "populists" or "hipsters." In truth, we maintain that they are simply rejecting unsupportable limitations imposed by an outdated economic approach to welfare, or an indefensible interpretation of that approach. In fact, a strong case can be made that the "hipsters" are merely harkening back to a conception of economic welfare originally held by Marshall and Pigou, the originators of the economics that Judge Bork appropriated and renamed the Consumer Welfare Standard.

In sum, New Brandeis School scholars invite a return to a more traditional role for antitrust policy. One that not only guards against monopolies, but also fosters more equal and fair treatment of disadvantaged groups, and yes, even promotes more democratic institutions. As this Article proves, economic theory—and, more precisely, basic principles of welfare economics—are allied with such efforts.

The process of measuring and aggregating utility or welfare remains complicated, and much more thought and work are needed to develop a workable General Welfare Standard to replace the clearly deficient Consumer Welfare Standard. Nevertheless, Amartya Sen's revolutionary work on objective measures of welfare provides a good starting point, and the basic human needs and wants he identifies are undeniably consistent with the broad, historic, and congressionally-authorized purposes of the antitrust laws.

## APPENDIX: AGGREGATING INDIVIDUAL WELFARE

In this appendix we attempt to sketch how ordinal utilities are aggregated for use in welfare economics. We try to do so in a nontechnical manner for antitrust attorneys. We include the problems and criticisms that are typically raised by economists to various aspects of the theory but are excised from popular summaries. This is just a primer, and many in welfare economics are not covered.

*A. Utility in Economics*

Almost every microeconomics textbook begins with the concept of individual preferences. Preferences are the pre-existing, “given” primitive element in economic theory.<sup>310</sup> Individuals are assumed to know their own preferences for things and are assumed to be able to rank or order those preferences from best to worst.<sup>311</sup>

The term “utility” is often used in policy circles, but rarely is it defined. In fact, the meaning of utility has changed over the history of the economics profession. Early neoclassical economists used utility as a measure of subjective happiness.<sup>312</sup> This was consistent with the view of the utilitarian philosophers.<sup>313</sup> For example, the early neoclassical economists (e.g., Jevons, Walras, Edgeworth) believed that utility was theoretically measurable.<sup>314</sup> They assumed that both the direction of individual preference and the intensity of preferences were knowable, and many thought that interpersonal comparisons of utility were unproblematic.<sup>315</sup>

However, by the time of Jacob Viner’s classical 1925 article on the topic, the economics profession had come around to view utility as a measure of the ability of individuals to satisfy—i.e., achieve—their preferences.<sup>316</sup> By “satisfy”

310. See JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE 15 (Harvard Univ. Press 1996) (acknowledging “modern viewpoint”). “The preference orderings of persons over alternative states are the primitives of economic theory and that utility functions are merely convenient representations of those orderings.” *Id.*

311. See MANDLER, *supra* note 237, at 79 (discussing new view of utility theory).

312. See Kahneman & Varey, *supra* note 283, at 127-28 (discussing Jeremy Bentham and John Stuart Mill’s use “utility” to refer to hedonic quality of experience).

313. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 6 (Oxford Univ. Press 1907); JOHN STUART MILL, UTILITARIANISM 16 (Parker, Son & Bourne 1915); HENRY SIDGWICK, THE METHOD OF ETHICS 283 (1962). See generally UTILITARIANISM AND BEYOND (Amartya Sen & Bernard Williams eds., 1982) (discussing philosophical issues raised by utilitarianism).

314. See George J. Stigler, *The Development of Utility Theory*, 58 J. POL. ECON. 307, 316 (1950) (discussing founder’s acceptance of utility’s existence and congruent causal introspection).

315. See MARC BLAUG, ECONOMIC THEORY IN RETROSPECT 343-47 (3rd ed. 1978) (calculating measurement of utility based on two approaches); J.R. Hicks & R.G.D. Allen, *A Reconsideration of the Theory of Value Part I*, 1 ECONOMICA 52, 57 (1934). Jevons doubted utility was interpersonally comparable. See Stigler, *supra* note 314, at 318. “Unlike Walras and Menger, Jevons considered the question of interpersonal comparison of utilities. He expressly argued that this was impossible but made several such comparisons.” *Id.*

316. See Jacob Viner, *supra* note 106, at 372 (asserting law of diminishing utility heart of utility economics); HAUSMAN ET AL., *supra* note 117, at 131.

economists do not mean achieve a feeling of satisfaction. The word “satisfy” is used only in the sense that the object of the preference was obtained. The notion being that what counts is the satisfaction of preferences, not the satisfaction of human beings.<sup>317</sup> As discussed by Armen Alchian in his classic clarifying article on utility:

Can we assign a set of numbers (measures) to the various entities and predict that the entity with the largest assigned number (measure) will be chosen? If so, we could christen this measure “utility” and then assert that choices are made so as to maximize utility. It is an easy step to the statement that ‘you are maximizing your utility,’ which says no more than that your choice is predictable according to the size of some assigned numbers. . . . Whether or not utility is some kind of glow or warmth, or happiness, is here irrelevant; all that counts is that we can assign numbers to entities or conditions which a person can strive to realize . . . . [I]t is difficult to realize that for present purposes utility has no more meaning than this.<sup>318</sup>

Pareto was the first economist to develop the modern view that only the order of preferences, not their intensity, is knowable. For Pareto, measuring utility simply involves the assignment of numbers to an individual’s preferences.<sup>319</sup> For example, a particular consumer may prefer butter to margarine, and margarine to jam. It is not hard to assign numbers to represent this order of preference, butter = 3, margarine = 2, and jam = 1. The numbers themselves are arbitrary and any set of numbers will suffice so long as the order of choice is preserved.<sup>320</sup> Numbers of this type are called “ordinal” numbers. If two sets of such numbers result in preservation of the ranking or order, they are called monotonic transformations of each other. So, for example, the numbers butter = 9, margarine = 4, and jam = 1 (which result from squaring the original numbers) preserve the order and thus are a monotonic transformation. Intensity of preference cannot be discerned

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The satisfaction of preferences is like the satisfaction of degree requirements. It has no necessary connection to any feelings of satisfaction. To satisfy a preference for a state of affairs x for y is for x to obtain rather than y. Preference itself is now the primitive element of consumer theory; there is no need to peer into agents’ psyches.

MANDLER, *supra* note 237, at 78.

317. See HAUSMAN ET AL., *supra* note 117, at 128. “Measuring well-being by how well satisfied an agent’s preferences are also appeals to the anti-paternalistic view that individuals are the best judges of their own well-being.” *Id.*

318. See Armen A. Alchian, *The Meaning of Utility Measurement*, 43 AM. ECON. REV. 26, 31 (1953) (quantifying utility in terms of preference).

319. See ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 8-9 (Oxford Univ. Press 1995) (noting how economics describes preference relations and assigns numerical value); AJIT K. DASGUPTA & D. W. PEARCE, COST-BENEFIT ANALYSIS: THEORY AND PRACTICE 24 (Macmillan 1972) (discussing possibility of defining utility function based on scale).

320. See Alchian, *supra* note 318, at 30 (summarizing method and concluding any monotone transformation of particular numerical values assigned equally satisfactory).

from these numbers, nor can we know to what degree butter is preferred to margarine. We also cannot add two individual's utilities together or compare them (other than by their order) because the numbers convey order but are otherwise arbitrary. The inability to directly compare individual utilities, referred to as interpersonal comparability, has been a major problem for welfare economics.<sup>321</sup>

But if we cannot add individual utilities, and utility represents welfare, then how do we obtain social welfare, or consumer's surplus which are aggregates of individual utilities? That procedure is explained in the next section. For intermediate economics students, it can appear as a result of magic.

### B. Aggregating Welfare

Once we have a measure of utility, we need to be able to aggregate individual welfare. One can see how this would be necessary in an antitrust analysis because the focus is on the welfare implications of business practices within markets.<sup>322</sup> Markets are aggregations of individuals. Thus, it is important to be able to aggregate individual welfares to at least the market level.<sup>323</sup>

#### 1. Utility Functions

To grasp how aggregation is performed and the assumptions required, we need additional structure. We can express utility in functional form as:

$$\text{Utility} = f(X \text{ butter, } Y \text{ jam})$$

with the *ceteris paribus* assumption of holding all other goods, services, and other factors constant. The existence of a utility function requires that preferences satisfy a few assumptions. Preferences must be rational and continuous.

Preferences are rational when they are both transitive and complete.<sup>324</sup> Preferences are transitive if A (e.g., a quantity of a good) is preferred to B, and B is preferred to C, then A must be preferred to C. Transitivity is a reasonable assumption if choices are not too complex, and if the other assumptions concerning

321. E. J. MISHAN, *INTRODUCTION TO NORMATIVE ECONOMICS* 308 (Oxford Univ. Press 1981) (noting lack of acceptable methods to compare person's utility with another); MANDLER, *supra* note 237, at 114 (recognizing neoclassical welfare economics' inability to go beyond non-controversial interpersonal comparisons of welfare); Ruth Weintraub, *Do Utility Comparisons Pose a Problem?*, 92 *PHIL. STUD.* 307, 318 (1998) (stating preferences' structure causes arbitrary comparisons between individuals).

322. See Werden, *supra* note 107, at 714 (noting economists' struggle).

323. A market or industry is simply the sum of the producers and consumers for a particular product, such as all of the producers of branded soda, like Coke and Pepsi. We leave aside the technical nature of what is included in a relevant market and for now simply rely on intuitive markets: steel, cars, social media, canned tuna, etc.

324. See MAS-COLELL ET AL., *supra* note 319, at 6 (discussing hypothesis of rationality and its basic assumptions regarding preferences relation). Proposition 3.C.1 shows that continuity is also required for a utility function.

measurement of utility are true.<sup>325</sup> If choices are made by whim, emotion, or habit, or are changing, for example, transitivity might not hold.<sup>326</sup>

Completeness is more problematic, however, because it requires that individuals always be able to state which of any two options they prefer.<sup>327</sup> It is not hard to think of situations where completeness may be a problem. For example, behavioral economists have noticed that individuals often value a good more when they own it than when they do not. This is called the endowment effect, as discussed in the body of this Article. When the endowment effect holds, an individual does not have a dependable, objective utility function because the individual's preference will depend on their endowment (whether they own or do not own the good). Thus, the presence of the good in the utility function gives rise to two different utility numbers.<sup>328</sup> Alternatively, which is the same thing as Herbert Hovenkamp shows, the endowment effect makes it impossible to have indifference curves.<sup>329</sup>

## 2. Indifference Curves

Assuming away the endowment effect, we now proceed to define an indifference curve. We need the indifference curve to obtain values for willingness to pay and willingness to accept that are denominated in money, and which will allow us to perform the welfare aggregation. We can define an indifference curve as all the combinations of goods and services that give rise to the same level of utility. In our example, an indifference curve might consist of all the combinations of butter and jam that give rise to 20 units of utility. We then may have another indifference curve consisting of all the units of butter and jam that

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325. See *id.* at n.2. Transitivity implies that if I prefer x to y and y to z, I will prefer x to z. This may not always be the case when choice is influenced by framing. See Tversky & Kahneman, *supra* note 279, at 454.

326. See ANDERSON, *supra* note 293, at 132 (stating “[a]ppetites and whims can without contradiction express themselves in intransitive preference orderings”).

327. See MAS-COLELL ET AL., *supra* note 319, at 6 (requiring individual to have well-defined preference between two alternatives for completeness assumption to stand). Completeness often fails when information about an option is incomplete. See *id.* (implying strength of completeness assumption rests on defined options).

328. The endowment effect is distinct from the wealth effect. As discussed in the body of this Article, the endowment effect is a result of significant research that shows that whether one owns something influences one's valuation and thus one's preference ranking. This means that, depending on the circumstances, one cannot state which of two options is preferred. See Kahneman et al., *supra* note 281, at 1342; Knetsch, *supra* note 277, at 1277-78; MANDLER, *supra* note 237, at 103-04.

Consequently, if preference is defined as choice, the completeness axiom is justified but the rationale for transitivity is undermined. On the other hand, if preference is defined psychologically as an agent's judgment of his or her well-being, transitivity can be argued for convincingly, but completeness cannot be justified. Under either framework, therefore, ordinalism cannot provide an adequate foundation for the entirety of its account of rational action.

MANDLER, *supra* note 237, at 103-04.

329. See Hovenkamp, *supra* note 278, at 226-27 (arguing substantial endowment effect could render traditional indifference curves useless).

give rise to 30 units of utility. Once we have income and prices, we can also define a budget constraint, which reflects all the combinations of butter and jam that one could purchase with a given income, and prices for butter and jam.

Thus, in the figure below:

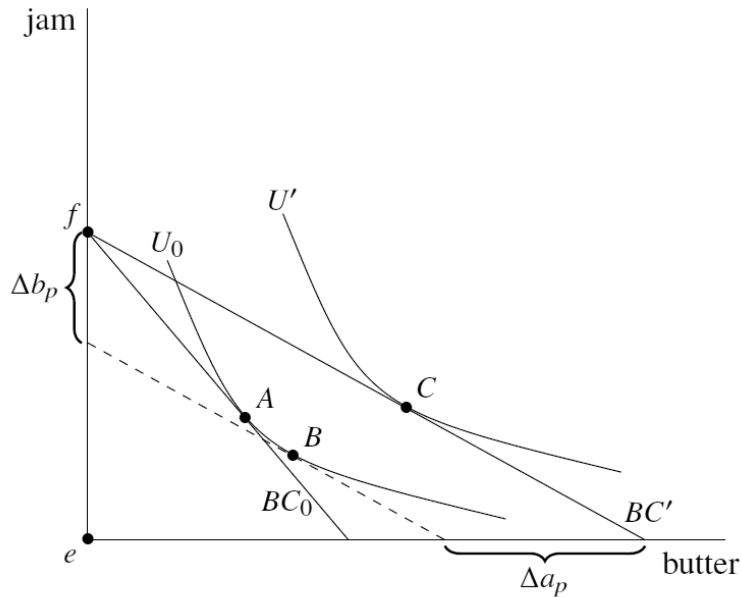


Figure 3: Willingness and Ability to Pay

The original budget constraint in figure 1 is  $BC_0$ . Assume that the price of butter declines, so the amount of butter one can acquire with a given income increases. This causes the intercept where only butter is purchased to shift out and transition to a new budget constraint  $BC'$ . Before the price decline, the consumer was on the  $U_0$  indifference curve and the most utility was achieved at point A. With the shift, the consumer moves to indifference curve  $U'$  and point C. The question then becomes: How much would the consumer be willing to pay to move from A to C? The answer is the additional income represented by the shift of the dotted budget constraint to the new budget constraint  $BC'$ .<sup>330</sup> If the consumer were at B and was given this amount of income, he/she would move to C. This income amount is how much a consumer would be willing to pay to get from B to C. It is labelled  $\Delta b_p$ , which can be an amount of jam or can be expressed in money by multiplying this amount of jam by the price of jam. Again,

330. Equivalently, if the prices had already changed and the consumer was at C, this is the maximum income amount the consumer would be willing to give up in return for continuing to face the new, lower price of butter.

the policy is a fall in the price of butter. The amount that a consumer is willing and able to pay (WATP) in exchange for this policy is this income amount.

One could also ask, what would a consumer accept for being denied a lower price of butter? This is illustrated by the following graph:

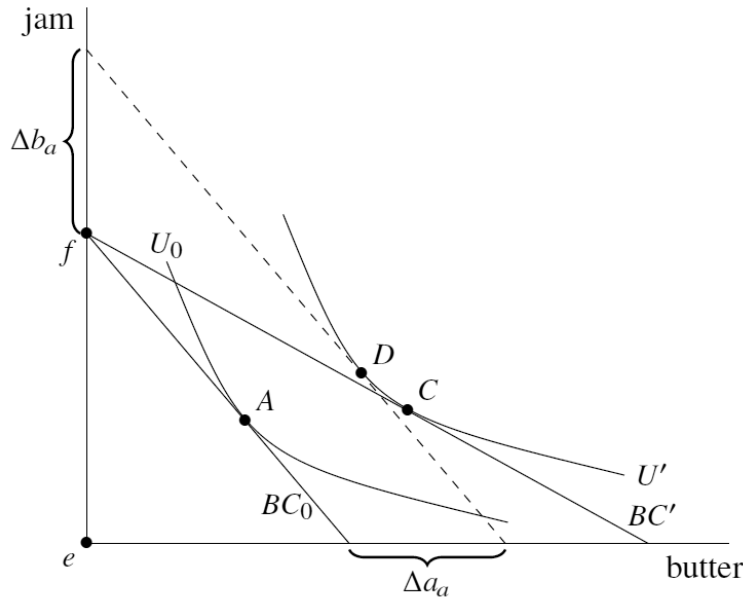


Figure 4: Willingness to Accept

Starting at point C, what would a consumer be willing to accept to forego the price decline of butter prices? We call this willingness to accept (WTA). The consumer would be willing to stay with the higher price of butter if they were given enough income to move to the dashed budget constraint, at point D. So, WTA is the income difference between the dashed line and  $BC_0$ . The two measures, willingness to pay (WATP) and willingness to accept, are typically different. There is no reason for WATP and WTA to be equal except under highly restrictive assumptions.<sup>331</sup>

### 3. Deriving the Demand Curve

To obtain the demand curve, we simply continue to vary prices, of say butter, and find the optimal quantities of butter the consumer would purchase. It is important to note that this approach assumes that the consumer does not actually purchase any butter. If there were an actual purchase, the consumer's income would decline. This, in turn, would change demand. For an individual consumer

331. See Mark Glick & Gabriel Lozada, *The Erroneous Foundations of Law and Economics*, INST. NEW ECON. THINKING 1, 45 (2021).

then, if we adjusted income after each purchase, we could ascertain what the consumer would be willing to pay for each subsequent purchase. For welfare purposes, this would be a more accurate measure of the value of the purchase than using a value measure based on the demand curve.

In the body of the paper, we learned that Judge Bork, following Marshall, used the demand curve in defining consumer's surplus (called consumer welfare by Bork). He should have used "WATP" and "WTA." Had he done so, however, he would have been forced to acknowledge that value has a dual (or "binary") definition. WATP and WTA are both equally viable measures of value. The problem is that the two measures can diverge, making the measure of utility ambiguous.

The fact that WATP and WTA are monetary amounts of utility substantially advances the analysis and provides a starting point for aggregation. Because WATP and WTA are expressed in units of money, they are cardinal (not ordinal) and can be aggregated between individuals. Almost by magic, then, we have found a way to aggregate measures of utility that would otherwise be ordinal only. To do this, however, requires that we know the shape of each individual's indifference curves because that is how we graphically observed the change in utility level in response to price changes in Figures 1 and 2. But do we really know the shape of individual indifference curves? It may be theoretically possible to obtain the shape of the indifference curve from detailed individual level data on purchase responses to price changes, but in practice, this type of household level data is not typically available. The historian of economic thought Mark Blaug concluded his investigation of this issue with the following: "The notion of 'indifference' itself is not subject to direct measurement."<sup>332</sup>

Measuring utility by WAPT (and WTA) poses a problem, however. WAPT and WTA depend on income. A high-income individual is generally willing to pay more for any given item than is a low-income individual. Therefore, it would be improper and unreliable to sum WAPT or WTA for various income groups. This, of course, is part and parcel of the concept of diminishing marginal utility discussed in the body of this paper in relation to Marshall's model that uses cardinal utility. But even in the ordinal context, the psychological assumption that the rich will usually be willing to pay more is obvious and widely acknowledged by most economists.<sup>333</sup> Unfortunately, there is no reliable way to fix this

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332. See BLAUG, *supra* note 315, at 364. Gabriel Lozada shows that current econometric practices in the antitrust field do not solve the aggregation problem. Instead, market level data is employed and assumptions are made in order to be able to think of the market demand curve as being derived from a representative or average consumer. These assumptions include unrealistic constraints on consumers' Engel curves, the relationship between income and expenditures on particular goods and services. See Gabriel Lozada, *A Critique of Antitrust Econometrics: Aggregation, the Representative Consumption, and the Broader Concerns of the New Brandeis School*, 67 ANTITRUST BULL. 75, 13-14 (2022).

333. See Farrell & Katz, *supra* note 111, at 9 (comparing dollars' worth for individuals based on wealth); Peter Hammond, *Welfare Economics*, in ISSUES IN CONTEMPORARY MICROECONOMICS & WELFARE 405, 408



problem. The remedy usually suggested is to multiply the willingness to pay by a factor that reflects differences in wealth. But no one has developed a practical procedure for weighting. As Adler and Posner state: “[w]elfare economists have not proposed a practical way of determining the appropriate method of weighting. The problem is that there does not seem to be a reliable way of determining people’s marginal utility of money.”<sup>334</sup>

Even if there were a weighting system, such as inferring what individuals would prefer if they had higher incomes, it would not be reliable. This is because preferences themselves are impacted by an individual’s life experience, which is strongly influenced by income.<sup>335</sup>

#### 4. Pareto Optimality and the Contribution of Kaldor and Hicks

The inability to reliably weight utilities is a well-recognized problem and explains why economists would rather use normative concepts such as Pareto Optimality, Kaldor and Hicks compensation principles, rather than gross aggregations of WATP or WTA. Pareto Optimality offers economists a way to make policy judgments based on actual preference. Pareto’s approach obviates the concern raised above, but at the expense of applicability. Under the Pareto approach, a situation x, is judged to be a Pareto improvement over situation y, if at least one person prefers x to y, and no one prefers y to x. A situation is then considered Pareto efficient if there are no further Pareto improving moves. Pareto efficiency has the advantage that it is based on actual preferences and presumably could be defended by unanimous consent. However, it is difficult to imagine many situations that could be resolved using Pareto efficiency. In particular, the concept is not helpful for antitrust analysis because typically there are both winners and losers in antitrust cases.<sup>336</sup>

Kaldor and Hicks attempted to develop a different policy criterion when there are winners and losers involved. Cost-benefit analysis is a version of Kaldor and Hicks’s approach using money as the metric for utility.<sup>337</sup> A policy is an improvement under Kaldor if, after adoption of the policy, the winners can compensate the losers and still have some of the winnings left over. The logic is that there is an improvement because the “pie” has enlarged, allowing for a greater capacity to satisfy preferences. A policy is an improvement under Hicks if after refusal to adopt the policy, the winners would not compensate the losers and still

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(George R. Feiwel ed., 1985) (explaining moral compassion of dollar value more valuable to poor individuals). In addition, risk adversity requires a declining marginal utility of income. See Glick, *supra* note 13, at 463.

334. See ADLER & POSNER, *supra* note 267, at 52.

335. See Sen, *supra* note 302, at 282 (discussing how those persistently deprived adjust their preferences and desires based on their circumstances).

336. Nevertheless, Pareto Optimality could be applicable in some cases. In the area of trade, for example, if compensation were provided for the losers, a Pareto Optimal outcome might be possible.

337. See ADLER & POSNER, *supra* note 267, at 52. “The difference between CBA and Kaldor-Hicks is that the former uses money as the numeraire, whereas the latter, a more general criterion, does not.” *Id.*

have some of the winnings left over. If the Kaldor and Hicks criteria are actually compensated, there would be a Pareto improvement.<sup>338</sup>

Unfortunately, the Kaldor-Hicks efficiency approach is seriously deficient.<sup>339</sup> Measuring the size of the economic “pie” is fraught with so many difficulties that the concept is best abandoned. Furthermore, since Kaldor’s approach and Hicks’ approach are based on two different measures of value (WATP and WTA), the Kaldor-Hicks approach can result in inconsistencies, reversals of policy and, because there is no actual compensation made to the losers, it results in morally indefensible results.<sup>340</sup>

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338. ADLER & POSNER, *supra* note 267. Sometimes compensation does not appear to be morally justified. *See id.* In the Consumer Welfare Standard, competition is efficient in the Kaldor-Hicks standard compared to a monopoly because consumers can compensate the monopolist its monopoly rents and still have consumer surplus left over. *See id.* But, should the monopolist be compensated for lost monopoly rents?

339. Use of tax policy cannot rescue Kaldor and Hicks. Tax policy has never been used to compensate losers from policy decisions in other areas such as legal precedent. There are also problems of measuring the compensation required and targeting taxes to the right individuals. Moreover, when the losers are from the groups with the least political influence—as unfortunately is often the case—the likelihood of a change in tax policy in their favor is virtually nil. Indeed, only when big business is the loser is it practical to rely on tax policy for redistribution.

340. *See* Glick & Lozada, *supra* note 331, at 6 (addressing inconsistencies of Hicks’ approach). Many of these failures of the Kaldor and Hicks criteria have been well documented by specialists in welfare economics but ignored by the law and economics literature. *See id.* Of course, this appendix is not comprehensive and does not address many of the other problems of modelling competitive equilibrium.