

## Should Antitrust Go Beyond “Antitrust”?

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### I. INTRODUCTION

Toward the end of the Obama administration, a number of prominent officials raised the possibility that antitrust enforcement should be motivated by goals other than economic efficiency. Renata Hesse, the acting Assistant Attorney General for Antitrust in 2016, gave a speech that posited that antitrust should be concerned with fairness.<sup>1</sup> Jason Furman, Chair of President Obama’s Council of Economic Advisers, expressed the view that stronger antitrust enforcement can and should be employed as a tool to address rising economic inequality in the United States.<sup>2</sup> These views were mirrored in opinion pieces in in the New York Times.<sup>3</sup>

The unexpected victory by Republican candidate Donald Trump in the 2016 presidential election, along with continuing Republican majorities in both houses of Congress, has likely

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<sup>1</sup> Renata Hesse, Opening Remarks, 2016 Global Antitrust Enforcement Symposium (Sep. 20, 2016). For a critique, see Alden Abbott, Acting AAG’s Policy Speech Sends the Wrong Signals on Antitrust Enforcement (or “a Wild Ride Back to the Fifties and Sixties”) (Sep. 22, 2016), *available at* <http://www.heritage.org/economic-and-property-rights/commentary/acting-aags-policy-speech-sends-the-wrong-signals-antitrust>.

<sup>2</sup> Jason Furman, Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth, Searle Center Conference on Antitrust Economics and Competition Policy (Sep. 16, 2016).

<sup>3</sup> Eduardo Porter, *In a Merger Boom, Labor Loses Ground*, NEW YORK TIMES B1 (Nov. 2, 2016).

made changes along these lines less immediate—although Mr. Trump’s campaign statements indicated that other populist concerns should play a role in antitrust enforcement.<sup>4</sup> Moreover, the Democrat Party has argued that antitrust enforcement should be strengthened, although a specific role for considerations other than consumer welfare was not set out.<sup>5</sup> In light of the mushrooming of these arguments and the likelihood of political cycles, it is worth considering whether antitrust enforcers should go beyond what has become standard practice and incorporate these other goals.

The view that antitrust should be guided by static economic efficiency is a relatively recent development. Its practical manifestations might be traced to the creation in 1974 of an independent group of economists in the U.S. Department of Justice’s Antitrust Division (the Economic Policy Office, now the Economic Analysis Group), the Supreme Court’s 1977 elimination of the *per se* rule for non-price vertical restraints<sup>6</sup>, the 1978 establishment of the Bureau of Economics in the Federal Trade Commission, and the first edition in 1982 of the modern Horizontal Merger Guidelines under William Baxter’s leadership of the Antitrust Division.<sup>7</sup> This trend by

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<sup>4</sup> Contrast Alan Neuhauser, *On Antitrust, Trump Signals a Return to the Bush Years*, U.S. NEWS AND WORLD REPORT (Dec. 9, 2016) with David Kully, *Trump Team May Inject Populist Agenda into Antitrust Decisions*, THE HILL (Jan. 31, 2017).

<sup>5</sup> Schumer, Chuck, *A Better Deal for American Workers*, NEW YORK TIMES A19 (July 24, 2017).

<sup>6</sup> *Continental Television v. GTE Sylvania*, 433 U.S. 36 (1977),

<sup>7</sup> U.S. DEP’T OF JUSTICE, HORIZONTAL MERGER GUIDELINES (1982), available at <https://www.justice.gov/archives/atr/1982-merger-guidelines>.

and large has continued.<sup>8</sup> In 2007 the Supreme Court added vertical price restraints—resale price maintenance—to non-price restraints as requiring a rule of reason analysis rather than illegal *per se*.<sup>9</sup> The most recent 2010 edition of the Horizontal Merger Guidelines widened the set of analytical tools to assess price effects and consumer harm of mergers, from market definition under a “SSNIP”-based hypothetical monopolist test to unilateral effects evaluated through models including but not limited to upward pricing pressure and econometrics-based merger simulation.<sup>10</sup>

Nevertheless, the idea that something other than static economic efficiency is and should be the motive for antitrust enforcement has been around for some time. Robert Bork advocated the view that economic efficiency was the motivation for antitrust, but not without objection from Robert Lande, who viewed antitrust as preventing “theft” from consumers when firms exploit their market power to raise price.<sup>11</sup> Decades before, Richard Hofstadter articulated the

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<sup>8</sup> A potential exception to this trend arguably was the when the leadership of the Antitrust Division, newly appointed following President Obama’s inauguration in 2009, withdrew guidelines for assessing “single firm conduct” under Section 2 of the Sherman Act.

<sup>9</sup> *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

<sup>10</sup> U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010), *available at* <https://www.justice.gov/atr/file/810276/download>.

<sup>11</sup> ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *HASTINGS L. J.* 65 (1982).

view that the purpose of antitrust enforcement was to limit the political power that would otherwise accrue to large businesses.<sup>12</sup> Objections to that static view have not necessarily been in the direction of more active antitrust enforcement. Going back at least to Joseph Schumpeter, a view has been the antitrust should be guided and perhaps tempered by the view that dynamic efficiency, that is, innovation, is driven by the prospect of monopoly profit.<sup>13</sup> On the other hand, others take the view that competition, not monopoly profit, encourages innovation.<sup>14</sup>

Within the last few years, however, the idea that currently unorthodox considerations should be incorporated into antitrust enforcement has become widespread. Including what has been mentioned above, my dozen—some seemingly similar but with important differences—includes:

Fairness<sup>15</sup>

Inequality<sup>16</sup>

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<sup>12</sup> Richard Hofstadter, *What Happened to the Antitrust Movement?*, in *THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES* (Daniel Crane & Herbert Hovenkamp eds., 2013).

<sup>13</sup> For a review, see Timothy Brennan, *Should Innovation Rationalize Supra-Competitive Prices? A Skeptical Speculation*, in *THE PROS AND CONS OF HIGH PRICES* 88 (Arvid Fredenberg ed., 2007).

<sup>14</sup> Baker, Jonathan, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 *ANTITRUST L.J.* 575 (2007), Furman *supra* note 2; See also Brennan, *supra* note 13.

<sup>15</sup> Hesse, *supra* note 1.

<sup>16</sup> Furman, *supra* note 2. Jonathan Baker & Steven Salop, *Antitrust, Competition Policy, and Inequality*, 104 *GEORGETOWN L.J.* 1 (2015); Sean F. Ennis, Pedro Gonzaga & Chris Pike, *Inequality: A Hidden Cost of Market Power* (Mar. 29, 2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2942791](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942791).

Labor share of income<sup>17</sup>

Jobs<sup>18</sup>

Effect on competition (apart from consumer welfare)<sup>19</sup>

Consumer choice<sup>20</sup>

Promoting democracy; concentration of political power<sup>21</sup>

Anti-globalization; domestic control over resources<sup>22</sup>

Media veracity<sup>23</sup>

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<sup>17</sup> Furman, *supra* note 2, Porter *supra* note 3, David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *Concentrating on the Fall of the Labor Share*, 107 AMER. ECON. REV. 180 (2017).

<sup>18</sup> UNITED STATES, DOES COMPETITION KILL OR CREATE JOBS, GLOBAL FORUM ON COMPETITION, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (Oct. 2015), *available at* <https://www.justice.gov/atr/file/813036/download>; Richard Steuer, *The Horizons of Antitrust* (Feb. 1 2017), *available at* <https://ssrn.com/abstract=2908172>.

<sup>19</sup> Hesse, *supra* note 1; Warren Grimes, *Entrepreneurial Choice: Restoring a Relevant Antitrust Policy*. (May 1, 2017), *available at* <https://ssrn.com/abstract=2969103>.

<sup>20</sup> Neil Averitt & Robert Lande, *Using the “Consumer Choice” Approach to Antitrust Law*, 174 Antitrust L. J. 175 (2007).

<sup>21</sup> James Cooper, *A Return to Antitrust Populism?*, 16 THE ANTITRUST SOURCE 1 (no. 4, 2017); Steuer, *supra* note 18; Matt Stoller, *Monopolies Are Antithetical to Democracy*, NEW YORK TIMES (Jan. 14, 2016), *available at* <https://www.nytimes.com/roomfordebate/2016/11/14/should-the-government-bring-back-trust-busting>.

<sup>22</sup> Mark Scott, *E.U. Rules Look to Unify Digital Market, but U.S. Sees Protectionism*, NEW YORK TIMES B1 (Sep. 14, 2016), Steuer, *supra* note 18.

<sup>23</sup> Sally Hubbard, *Why Fake News Is an Antitrust Problem*, FORBES (Jan. 10, 2017), *available at* <http://www.forbes.com/sites/washingtonbytes/2017/01/10/whyfakenewsisanantitrustproblem/print>.

Environmental protection<sup>24</sup>

Managerial competence<sup>25</sup>

Mitigating consumer error<sup>26</sup>

This list does not include regarding innovation and dynamic efficiency as a potential counter to promoting static efficiency through increased competition.<sup>27</sup>

This is an impressive list of options. Although different factors come into play in assessing each of them, some generic arguments against their incorporation into antitrust policy apply to all of them. Those generic arguments will be described more fully in the subsequent section; following that will be a discussion of factors specific to each of these alternatives to the efficiency approach. Before getting to that, however, it is crucial to note that by and large this critique is not based on the merits of these concerns. Reducing equality, promoting democracy, employment opportunity, and environmental protection among others on this list are all worthy

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<sup>24</sup> Michael Pertschuk, *New Directions for the FTC*, Eleventh New England Antitrust Conf. (Nov. 18, 1977), reprinted in 308 TRADE REG. REP. (CCH) (Supp. 1977), cited in Steuer, *supra* note 18; Jeffrey L. Harrison, *Some Inconvenient Truths About Antitrust Law and Economics*, (Jan. 23, 2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2902719](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2902719).

<sup>25</sup> Robert Steiner, *Management Competence: The Missing Input in Antitrust Analysis* (June 11, 2013), available at <http://www.antitrustinstitute.org/sites/default/files/SteinerPresentation.pdf>.

<sup>26</sup> Maurice Stucke, *How Can Competition Agencies Use Behavioral Economics?*, 59 ANTITRUST BULL. 695 (2014).

<sup>27</sup> Brennan, *supra* note 13. For a useful discussion of innovation, political power, and inequality as goals of antitrust, see Washington Bytes Chat, *The Future of Antitrust Enforcement: Innovation, Wage Inequality and Democracy*, FORBES (Jun. 15, 2007), available at <https://www.forbes.com/sites/washingtonbytes/2017/06/15/the-future-of-antitrust-enforcement-innovation-wage-inequality-and-democracy/#16010a0f145d>.

policy objectives. The question is not so much whether they are meritorious policy goals, but whether they should be objectives of antitrust enforcers and relevant considerations for antitrust courts.

This last point is crucial. It is one thing to say that antitrust enforcement should be stronger because it would lead to these other benefits. It is another to say that the decision in any individual case should change because these other considerations should be taken into account. However, if individual case decisions do not change, then the effects of antitrust enforcement do not change, regardless of the power of these platitudes. Those who believe antitrust should reflect these other considerations need to propose ways in which judges in antitrust cases should apply a standard other than, if perhaps along with, economic efficiency, in deciding when a merger should be blocked or a practice be proscribed. That principle colors the discussion to come.

## II. GENERIC CONCERNS

There are two kinds of generic arguments against broadening the scope of antitrust to include these other dimensions. One is the merits of using antitrust to pursue and trade off these other goals against the goals of economic efficiency, when there generally are other policy tools available to pursue those other goals. The second argument is that antitrust has already become a highly complex and technical enterprise even when economic efficiency is the goal. That complexity will only be increased if other policy objectives are added to the mix, increasing costs of counseling clients, litigating cases, and the added uncertainty regarding which practices might face antitrust liability.

### A. *Better Options*

In looking at whether antitrust should pursue other objectives in addition to economic efficiency, two factors need to be compared. One is the contribution antitrust enforcement could make toward achieving that objective. That contribution has to be assessed in light of whether other policy tools can achieve those goals. For most if not all of the alternative objectives that have been recently proposed, there are other better-tailored policy tools. Moreover, those tools can be implemented in ways that cover society and the economy at large—they do not depend on whether a particular firm, person, or group of firms or persons may have violated the antitrust laws.

Innovation is a good example.<sup>28</sup> There can be little doubt that innovation is crucial to economic well-being; whether it has only a lot to do with it or almost all is the range of the debate. For this reason, many have argued that antitrust enforcement should be constrained, lest it get in the way of the profits that spur innovation. Others have argued that competition complements innovation. Most likely is that sometimes competition complements innovation, sometimes it does not. Only a fact-specific inquiry with relevant evidence, for example, documents saying that if a merger goes through innovation effort will be increased or decreased, can tell whether an innovation effect merits consideration.

However, the arguments here as to whether antitrust should focus on innovation is not whether one side or the other of the monopoly vs. competition debate is right. Rather, it is that other policies are available, and are employed, to promote innovation. The list includes intellec-

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<sup>28</sup> Much of this discussion here and in this subsection is adapted from Brennan, *supra* note 13.



tual property law, investment tax credits, research and development subsidies, government institutes, laboratories and research programs, industry and public grants to universities, among others. Whether antitrust has anything significant to add to this, beyond looking for specific evidence of innovation promotion or reduction in a specific case, is doubtful. Notably, the application of these programs does not depend on the happenstance of an antitrust violation. If one thought, for example, that monopoly profits promote innovation, then perhaps industries should be told to form cartels regardless of whether they were so inclined.

The other crucial point is that antitrust is largely the primary if not only tool we have to promote static efficiency, by preventing agreements or practices that harm consumers by limiting competition. Debates continue, to be sure, on the conditions (if any) necessary for whether a particular agreement, practice, or merger reduces economic efficiency or harms consumers. Those will not be resolved here, but the overall point remains that if antitrust enforcement is to be guided by concerns other than static efficiency, innovation or others in this list, there may be little left that can take its place.<sup>29</sup>

In sum, antitrust enforcement would like have only a limited effect other policy objectives in the presence of better designed and more broadly applicable policy tools. On the other hand, antitrust enforcement is our best and perhaps only policy tool to promote static economic efficiency. Combining these suggests that redirecting antitrust enforcement toward other goals is

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<sup>29</sup> In settings where competition will not be present, price regulation can promote static economic efficiency. KIP VISCUSI, JOSEPH HARRINGTON & JOHN VERNON, *ECONOMICS OF REGULATION AND ANTITRUST* 376-78 (2005). We also should remember that some policies can harm competition, a leading example being public policies that limit entry or grant exclusive franchises in sectors that could be competitive and not prone to other market failures.

not likely to significant benefits in these other areas and may well reduce competition and efficiency. Such redirection should be advocated and approached with caution.

### *B. Increased Complexity*

In a recent issue of this Journal, I suggested that antitrust enforcement may have become too complex.<sup>30</sup> The growth in data availability, in large measure due to electronic transaction recording, has led to a vastly more complex body of econometric techniques that can be used to estimate the competitive effects of a merger. The growing dominance of unilateral effects mergers is undoubtedly a result of the ability to measure upward pricing pressure and, through merger simulation, project changes in market shares and prices through direct estimation of the effects of one firm's price on the demand for another firm's product. We are no longer in an antitrust environment where one defines markets, looks at market shares, and reaches conclusions about a merger based essentially on whether it will facilitate collusion among the parties.

With these tools available, it is not surprising that litigants on both sides of cases have been willing to go to great lengths to apply them; we might call it an "arms race" of sorts. Unfortunately, while incorporating ever more complex models may lead to more accurate resolutions of antitrust disputes, it comes at a cost. Simple rules, while perhaps less accurate, have the virtue of being understood by businesses and the general public. Making antitrust less comprehensible increases uncertainty over whether a practice might be subject to private or public challenge. The desire to mitigate that uncertainty means that businesses have to spend money on

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<sup>30</sup> The discussion in this section draws from Timothy Brennan, *The Lost Virtue of Simplicity in Antitrust*, 59 *Antitrust Bull.* 827 (2014).

lawyers and economists to attempt just to guess the antitrust exposure of their various activities—perhaps creating a scale economy that makes it more difficult for smaller enterprises to compete successfully. The increased uncertainty also would predictably lead to more antitrust litigation, costly in itself and perhaps discouraging novel practices that could improve business operations.

My view on this was very much influenced by an observation Judge Diane Wood made during the 2006 Spring Meetings of the American Bar Association’s Antitrust Section. Speaking on a panel discussing the merits of specialized antitrust courts, she took a position in favor of keeping antitrust in general federal courts, pointing out (wishing I had the exact quote) that, “If a federal judge cannot determine whether a practice violated the antitrust laws, how can we expect the business community to do so?”<sup>31</sup> As an economist I had thought that specialized courts would be best because of the expertise they could bring to bear on antitrust matters, but Judge Wood persuasively reminded me of the costs of catering to complexity.

If one takes the view that antitrust may already be erring on the side of complexity rather than simplicity, that error becomes only worse if one incorporated additional goals for antitrust courts, since that will make the decision process even more intricate. Along with balancing an ever more complicated set of benefits and costs, those now will have to be balanced against other objectives that may well be difficult to measure in comparable terms. Rather than have antitrust enforcement pursue multiple goals, one should consider having a “division of policy labor” akin to the “division of labor” in the workplace and economy that Adam Smith proposed almost two-

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<sup>31</sup> *Id.* at 828.

and-a-half centuries ago.<sup>32</sup> Unless one is not adding other objectives to static efficiency and competition but replacing them, these objectives will increase the complexity and thus the cost of antitrust enforcement. Such a replacement, however, makes vivid the proposition that if we do not have antitrust enforcement on which to rely as a tool to promote efficiency through competition, there will be no other legal or policy framework to do so.

### III. APPLICATION TO SPECIFIC EXAMPLES

Having set out the general concern that having antitrust enforcers and courts pursue other objectives is likely to be ineffective compared with better policy options, counter to the pursuit of efficiency through competition, and costly because of added complexity, we can turn to the above list of proposed alternatives for specific insight into the relevance and importance of these concerns.

#### *1. Fairness*

Many years ago, a friend about to drive somewhere was confronted by his two daughters, each of which wanted to ride up front. When he chose one, the other complained that that was “unfair”. He responded by forbidding either of them to use the word “unfair”. There is wisdom in this. “Unfairness” or “fairness” is an expression against or for a decision or outcome, but it is typically a substitute for a reason why that outcome is bad or good, not a reason in itself.

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<sup>32</sup> A similar argument can be made for having antitrust agencies not get involved in economic regulation or consumer protection, again not because those are unimportant, but because they involve different considerations than how competition can promote static economic efficiency.

Fairness sounds like a worthy addition to the pursuits of antitrust enforcers and litigants. Who, after all, is in favor of unfairness? The problem is that that question is in effect a tautology: Fairness is that which we think good; unfairness is that which we think bad. It is like the oft heard phrase “needless regulation” or perhaps “needless enforcement”. I conjecture that no one is in favor of “needless” regulation, but views differ dramatically as to whether a particular regulation is needless or warranted.

Attempts have been made to define “fairness”, but those attempts illuminate how difficult that concept is to delineate. John Rawls, in a 1958 article “Justice as Fairness”<sup>33</sup> and then elaborated in his classic 1970 book *A Theory of Justice*,<sup>34</sup> proposed a framework for whether social institutions were designed in a fair manner. To make a very long story short, Rawls proposed that social institutions were fair if they would be those people would agree to institute in a hypothetical setting apart from and prior to the world as it exists—the “original position”—where they knew all there is to know about each person’s life goals and how social institutions perform, but do not know which of those persons will turn out to be them—the “veil of ignorance”. Rawls inferred from the fairness of that setting that social institutions should be designed first to maximize freedom to pursue one’s life goals—the “priority of liberty”—and then to choose institutions to maximize the ability of the worst off person to achieve those goals—the “maximin principle”.

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<sup>33</sup> John Rawls, *Justice as Fairness*, 67 *PHILOSOPHICAL REV.* 164 (1958).

<sup>34</sup> JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

My point in bringing this up is not to argue for or against Rawls or the multiple interpretations that can be made of his argument. It is to ask whether antitrust would be promoted by inviting if not demanding enforcers and litigants to make such arguments and asking courts to consider them. One might respond that one is talking about fairness only in antitrust contexts and not as part of some broad theory regarding the justice of social institutions. In that case, however, one has to wonder what if anything fairness adds. In 2015, the Federal Trade Commission issued a policy statement saying that “unfair competition” cases under Sec. 5 of the Federal Trade Act would be “guided by the public policy underlying the antitrust laws, namely the promotion of consumer welfare.”<sup>35</sup> Under that statement, “fairness” adds nothing to conventional antitrust standards.<sup>36</sup>

One other possibility falls into this category—the view that antitrust is designed to prevent theft from consumers—or sellers if monopsony—through the exercise of market power by increasing (or decreasing) the price from what it would be under a competitive market. However, whether this is thought of as fairness depends on the notion that a competitive outcome is fair, which is by no means obvious. While economists are comfortable with the idea that everyone should pay the same price for a scarce good, my sense is that many are uneasy with the idea

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<sup>35</sup> FEDERAL TRADE COMMISSION, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING “UNFAIR METHODS OF COMPETITION” UNDER SECTION 5 OF THE FTC ACT (Aug. 13, 2015), *available at* <https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition>.

<sup>36</sup> A long standing debate is whether the common law is guided by efficiency or fairness apart from efficiency. See Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980).

that poor people should pay the same prices as to the rich for heating, water, electricity, or that they have to be relegated to housing or medical care below that which the wealthy can afford. Also, if the idea of theft requires the notion of property, one then has to consider the extent to which a buyer or seller has a right, legal or moral, to buy or sell at a competitive price. Yet another conception of fairness is a fair opportunity to compete, which raises questions about whether low costs firms should be able to drive higher cost firms out of business. Accordingly, I will consider “fairness” as defined by other more specific possibilities in the aforementioned list.<sup>37</sup>

## *2. Reducing Wealth Inequality*

The first and probably the most prominent alternative goal in recent debates is income inequality. A byproduct of most efficiency based antitrust enforcement is likely to be a reduction in income inequality. Typically, although by no means necessarily, successful antitrust enforcement will lead to an increase in buyers’ wealth and a reduction in the wealth of the owners and managers of firms that are exercising market power to increase profits. One does have to be careful. To the extent that increased profits to sellers are partially passed through to workers, for example through collective bargaining, anticompetitive activity could reduce income inequality. In addition, as retirement accounts have become based on defined contribution investments in equities rather than company-funded pensions, stockholders who receive anticompetitive profits

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<sup>37</sup> Even conceding this, antitrust courts could and perhaps do regard as unfair theft a situation when anticompetitive acts by relatively poor sellers raise prices paid by relatively wealthy buyers, for example, collusion by restaurants in Monte Carlo.

have presumably become more like the general public and less like a small minority of the very wealthy (who still hold a disproportionate share of asset wealth, to be sure).

These considerations emphasize that the issue is not whether antitrust enforcement happens to systematically reduce wealth inequality. It is whether it should be an additional criterion that enforcers, litigants, and courts should incorporate in their arguments and decisions. In some jurisdictions, this does take place to a limited extent; Canada, for example, gives less weight to profits under a total welfare test if plaintiffs can show that those who get the profits are substantially wealthier than the buyers.<sup>38</sup> Sensitivity to income inequality may underlie the advocacy for a consumer welfare rather than total welfare standard, and the “theft” view of antitrust violations. Moreover, such a standard avoids some of the complications of incorporating inequality as an additional condition and may even simplify the assessment of liability by omitting the need to calculate efficiency benefits that do not lead to price reductions.

The story ought not end there. Even if these concerns could be incorporated in a rough but simple way that does not make enforcement more complex, antitrust still needs to be compared with other policies to address inequality. The prospect of antitrust enforcement will arise only in sectors that are relatively prone to violations, particularly entry barriers and characteristics that might facilitate collusive agreements. Wealth inequality may be affected by the potential for the exercise of market power in those sectors, but there is far more to inequality than that. Policies better suited to reduce wealth inequality include earned income tax credits and other income floors, progressive taxation, public education, Medicaid, and other programs to provide to

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<sup>38</sup> Canada (Commissioner of Competition) v. Superior Propane Inc., 2002 COMP. TRIB. 16, 18 C.P.R. (4th) 417, *aff'd* 2003 FCA 53, [2003] 3 F.C. 529; Thomas Ross & Ralph Winter, *Canadian Merger Policy Following Superior Propane*, 21 CAN. COMP. REC. 7 (2003)



low income people goods and services on which they would spend a large share of their incomes. Compared to these, antitrust is likely to be of minimal consequence.

Moreover, political capital devoted to promoting antitrust as a tool to alleviate inequality may well be counterproductive. Many years ago, I attended a summer program on telecommunications policy for new academics in that area. A prominent policy at the time was subsidy of basic “dial tone” access, paid through long distance surcharges that might not be sustainable under competition following the breakup of AT&T.<sup>39</sup> Some in attendance expressed in very strong terms the horror if basic service were to go up from a subsidized \$15/month to a \$25/month. I pointed out then that the \$120/year difference was unlikely to push many households from one side of the property line to another. Efforts to institute policies based on the inequality effects of telephone rates would only reduce effort toward policies that matter, and thus be the plutocrat’s dream. Those desiring to make a case for antitrust as a tool for reducing inequality rather than promoting efficiency should keep this in mind.

### *3. Labor share of income*

The notion of “share”, while an important macroeconomic concept, needs to be clarified in this context. Labor’s share is essentially the ratio of labor income to capital income.<sup>40</sup> We can think of labor income as the average wage salary times the average number of hours or person-years worked. “Capital income” is money that goes to stockholders, bondholders, and perhaps upper management. One could therefore get an increase in labor’s share by holding labor

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<sup>39</sup> U.S. v. AT&T, 552 F. SUPP. 131 (1982).

<sup>40</sup> Labor’s share is actually labor income divided by the sum of labor income and capital income, but that specificity does not change any of the points in the discussion here.

income constant and reducing capital income, through among other things, antitrust enforcement that reduces profits obtained through the exercise of market power over buyers. That would be a byproduct of antitrust enforcement, so even if labor's income share was not a goal of antitrust, it could be an outcome of it.

The second way one might affect labor's share would be to hold capital income constant and focus on reductions in labor income. One of those would be to hold average wage and salary levels constant but reduce the number of jobs; we discuss jobs in the next section. Here, the focus is on reductions in wages and salaries themselves. That, too, is in principle the subject of antitrust enforcement against monopsony in labor markets.<sup>41</sup> Monopsony of labor means reducing

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<sup>41</sup> Non-compete clauses in hiring agreements have received antitrust attention in recent years. FEDERAL TRADE COMMISSION, IN THE MATTER OF OLTRIN SOLUTIONS LLC ET AL., DOCKET NO. C-4388, DECISION AND ORDER (Jan. 18, 2013). The tradeoff is akin to that with exclusive dealing. Those may be reasonable if the employee obtains expertise from the first firm that it could then exploit were it to go to a competitor, thus reducing the incentive of the first firm to provide such expertise to its employees, to the detriment of consumers as well as employees. However, if an employer obtains non-compete agreements with a large share of employees that its rivals would want, it might effectively monopolize the supply of labor, raising its price to its competitors and raising prices in the downstream market. In this case, however, the workers are presumably compensated for entering into what essentially is a labor cartel, and thus labor's share of income, all else equal, could go up. In any event, the harm is not to labor but to the downstream victims of the monopolization of the labor market. For a review of this way of looking at exclusionary contracts, see Timothy Brennan, *Saving Section 2: Reframing U.S. Monopolization Law*, in THE POLITICAL ECONOMY OF ANTITRUST 417 (Vivek Ghosal & Johan Stennek, eds., 2007).

hiring in order to reduce the wage it takes to higher the amount of labor one wants to hire. This reduces labor's share by reducing both the number of workers and the payment they get.<sup>42</sup>

This suggests that enforcement to prevent monopoly or monopsony by those who hire workers would tend to boost labor's share of income. In that regard, there is no tradeoff between economic efficiency and labor's share as goals. However, there will be a conflict between these goals if labor acquires market power for itself. This conflict underlies the exemption, of labor unions from the antitrust laws.<sup>43</sup> This indicates, however, that rather than have antitrust enforcers and courts balance a social interest in labor's share of income against competition, Congress took responsibility for the balance itself. This exemplifies the general principle that when goals other than economic efficiency are at stake, antitrust should stick to the latter and leave Congress to address those other goals.

#### *4. Jobs*

To the extent that antitrust enforcement discourages firms from decreasing output in order to raise price, and to the extent that output and labor are positively correlated, antitrust enforcement would boost demand for labor. However, that need not imply either that efficiency and the number of jobs are correlated; nor does it imply that boosting—or reducing—demand for labor by one firm or in one sector will have any effect on employment itself.

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<sup>42</sup> One might think that by lowering input prices, that of labor for example, a monopsonist lowers its cost and thus one would get lower output prices. This is not so. To reduce input prices, a monopsonist has to reduce input purchases, in this contest hiring less labor than it would have had it been competing as a buyer in the labor market. To oversimplify only slightly, reducing labor or other inputs reduces output, and reducing output increases price (or buyers to go to other sellers). The price to consumers cannot go down.

<sup>43</sup> 15 U.S. Code §17 (Clayton Act §6).

However, there can be conflict, not just between efficiency and jobs, but between how economists and others think about jobs. I have no better illustration than a true anecdote. In the late 1970s or early 1980s, when I was beginning my career as a staff economist at the Antitrust Division, word came that then professor and now retired Judge Richard Posner was testifying as an expert in a rail merger hearing at the Interstate Commerce Commission. A bunch of us walked over to hear him in action. When we arrived, he was being cross-examined by an attorney representing an opponent of the merger.<sup>44</sup> The attorney asked Prof. Posner about a claim that the merger would reduce employment of these railroads. Prof. Posner's response was something like, "If so, that's not a cost of the merger; that's a benefit."

I was at first shocked, but then realized—I was still relatively new to economics—that Prof. Posner was exactly right. Saving resources, producing the same with less, is the hallmark of economic efficiency. Labor is a resource, just like land, energy, and raw materials. If those workers are not needed on the railroads, in principle they can produce other goods and services elsewhere that would not have been produced otherwise. Moreover, if these workers were being paid the competitive wage in the labor market, these laid off workers could make the same amount elsewhere.

However, labor markets may not work so smoothly. In some cases, it may not be easy to find a job, if doing so involves extensive search and relocation. More perniciously, if the economy as a whole has seen a shock to demand, as happened following the credit crisis in 2007-08, employers may not believe that they could sell what that worker might produce. This can make

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<sup>44</sup> I wish I had access to the transcript of this hearing, so I could get the quotes precisely.

employment persistent, in which case otherwise efficient layoffs could actually increase unemployment.<sup>45</sup>

It is no small or uncontroversial task for labor economists or macroeconomists to determine whether a labor market is subject to frictions or the economy is suffering from a shock that led demand and employment to fall. It is difficult to imagine presentations on these subjects presented to an antitrust judge charged with weighing the effects of a potential violation on employment. Because these kinds of labor effects are on the production side, the closest antitrust can come to incorporating jobs as a concern is to commit to ignore efficiency gains, where the labor saving would enter into the analysis.

Even more pertinent is that there are far better policies than antitrust to promote job growth. Frictions preventing those who lose a job from finding another can be reduced through assorted public information services. When job loss follows from a shock to the economy that leads to a recession-driven increase in unemployment, government spending programs can step in to replace that fall in demand and bring back hiring. The hardest case is when jobs are lost because of innovation that reduces demand for a particular form of labor, for example, when hydrofracking dramatically reduces the cost of natural gas, substantially reducing demand for coal and, by extension, jobs in the coal industry. Arguably, our country and the world could and should do a better job of ensuring that the benefits of innovation go, beyond the firms and customers who

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<sup>45</sup> EDMOND MALINVAUD, *THE THEORY OF UNEMPLOYMENT RECONSIDERED* (1977).

directly benefit of that information, to those who lose by it as well.<sup>46</sup> But that magnitude and difficulty of those policies shows that antitrust is but a drop in the bucket, and should remain focused on its core competency—promoting economic efficiency.

5. *Effect on competition (apart from consumer welfare)*

The perhaps classic conflict of goals in antitrust is between “protecting competition” and “protecting competitors”. Stated as such, it has become pretty much a disparagement of viewing antitrust as a way to maximize the numbers of competitors for its own sake. This is despite Letwin’s characterization of the British common law precursors to the US antitrust laws as motivated by ensuring that guilds could not keep others from plying their trade.<sup>47</sup> Perhaps because of this, a recent formulation is Grimes’ “entrepreneurial choice”, following Lande’s “consumer choice” perspective, discussed in the following section.<sup>48</sup>

Clearly some forms of exclusionary conduct deter entry, whether abuse of market power by regulated firms,<sup>49</sup> or monopolizing a market in a complement rivals need.<sup>50</sup> The heart of merger cases is that disappearance of a rival through acquisition increases prices either because competition between the two firms is itself reduced (unilateral effects) or removing a rival facilitates

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<sup>46</sup> Note also that those who gain from innovations and free trade are consumers, who get better goods at lower prices. There can be a conflict between the goals of promoting employment and increasing consumer welfare.

<sup>47</sup> WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1956).

<sup>48</sup> See Grimes, *supra* note 19; Averitt and Lande, *supra* note 20.

<sup>49</sup> Timothy Brennan, *Why Regulated Firms Should Be Kept Out Of Unregulated Markets: Understanding the Divestiture in U.S. v. AT&T*, 32 ANTITRUST BULL. 741 (1987).

<sup>50</sup> Brennan, *supra* note 41.

collusion among the remaining firms in the market (coordinated effects).<sup>51</sup> In those settings, protecting competition and protecting competitors (current or potential) are correlated goals.

Whether protecting competitors should be a separate goal comes up when those goals conflict. The examples that force the issue are mergers, horizontal or vertical, where the likely effect is to generate cost savings. In this case, more competitors are kept around, even when it is less efficient to do so. This tradeoff may be avoided to some extent under a consumer welfare standard, as cost reductions associated with a merger that eliminates separate firms would not be part of the policy calculus. To the extent that preserving firms increases prices, the tradeoff is more telling. Asking antitrust courts to decide how tolerable a price increase should be in order to protect competitors or, in Grimes's terms, preserve "entrepreneurial choice," strikes me as a burdensome if not impossible task.

Moreover, if business creation and preservation are worthy social goals, they can be addressed on an economy-wide basis apart from the happenstance of whether a potential antitrust violation might be taking place. Among the relevant policy tools might be subsidized education in business skills, tax incentives for business formation, funding and expertise assistance programs, and the like. We should leave antitrust to economic efficiency and promote small businesses and enterprise growth through these other means.

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<sup>51</sup> Department of Justice and Federal Trade Commission, *supra* note 10.

## 6. *Consumer choice*

Many readers of this Journal know the recent prominence of consumer choice as a goal of antitrust. Less clear to me is exactly what consumer choice means.<sup>52</sup> One sense I have is that it refers to looking at harms to consumers not just in terms of higher prices but also declines in quality, reduction of available products, and less innovative activity that would reduce consumer choices in the future. To the extent evidence is available that a particular practice or merger would harm consumers in ways apart from price, those would be considered under an efficiency standard.

The interpretation of consumer choice that creates a tradeoff with economic efficiency objectives is the extent to which something that leads to lower prices also reduces consumer choices. Perhaps a notable example would be when a large “box store” firm has scale economies that allows it to set prices sufficiently low to drive a number of small “mom and pop” sellers out of the market. The basic analysis of the setting is that absent higher prices following the exit of the “mom and pop” stores, consumers benefit from the lower prices. Those consumers would be harmed if they had to pay higher prices as an umbrella to keep the mom and pop stores in business.

It may be that if a few consumers prefer a high cost seller’s product, but not enough to keep that seller in business were the low cost seller to come into the market, then the overall benefit to consumers might fall despite the general price decrease because of the loss of a favored

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<sup>52</sup> I thank Bob Lande for many conversations on this topic, and I apologize to him and to others if despite his best efforts I still do not understand it correctly. I bear sole responsibility for my misinterpretation.



product—consumer choice—to this relative handful of customers. If so, reduced choice and economic efficiency would remain consistent, despite higher prices. But this does not mean antitrust enforcers and courts will be able to determine if and when this special case applies. If the enforcers and courts guess wrong, they will be harmed because they are getting “choice” that they were not willing to pay for. So, unless I am missing something, “consumer choice” as a general rule appears to harm, not benefit consumers. The higher prices necessary to make it work may add to the profits of the low cost “box store” and provide some profits to the “mom and pop” shops, but consumer choice is not making consumers better off. If consumer choice reminds us to look at non-price benefits of competition, consistent with economic efficiency, it is of some value, although more as an admonition than as a separate policy objective.

#### *7. Promoting democracy; concentration of political power*

Concern that industrial concentration would lead to concentration of political power is longstanding in economics commentary. Historian Richard Hofstadter suggested in the 1950s that political power should be the main focus of antitrust, in part because economic assessments would typically be too ambiguous to be reliable policy guides.<sup>53</sup> This concern has recently surfaced on both sides of the political spectrum. On the progressive side, Sen. Elizabeth Warren has expressed concern that a lack of vigor in the enforcement of antitrust laws has led to, citing Louis Brandeis, the “rule of a plutocracy.”<sup>54</sup> During his campaign, President Trump expressed concern

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<sup>53</sup> Hofstadter, *supra* note 12.

<sup>54</sup> Elizabeth Warren, Reigniting Competition in the American Economy, Keynote Remarks at New America’s Open Markets Program Event (Jun. 29, 2016), *available at* <https://www.warren.senate.gov/files/documents/2016-6->

with AT&T’s proposed acquisition of Time Warner in such a way to lead some to wonder if he would “[bring] about a return to the populist political consideration (as opposed to a strictly economic analysis) in antitrust enforcement.”<sup>55</sup>

As with the other goals, the problem is that even if political power is a worthwhile goal, one still needs to see if it can be coherently integrated into antitrust law. Wright and Ginsburg argue that antitrust law became coherent only after it rejected this goal.<sup>56</sup> Moreover, also as with other goals, more direct ways may be available to address this concern, such as campaign finance reform (including free media time for political candidates) or reducing politically-motivated setting of boundaries of legislative voting districts.<sup>57</sup> Perhaps few if any of these are feasible following decisions invoking the First Amendment to prevent limits on spending on behalf of candidates or positions.<sup>58</sup> But this is a larger social problem than can be productively resolved on a

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29\_Warren\_Antitrust\_Speech.pdf. Sen. Warren voiced other concerns in this list including the disappearance of small businesses, reduced consumer choice, and economic inequality.

<sup>55</sup> Donald Klawiter, *What is Trump Antitrust: Reflections on the Next Four Years of Antitrust Enforcement*, 4-2016 Concurrences 5 (2016). Since the campaign, the prevailing view seems to be that antitrust in the Trump administration is unlikely to reflect a radical change from the economic efficiency viewpoint. Neuhauser, *supra* note 4.

<sup>56</sup> Joshua Wright & Douglas Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406 (2013).

<sup>57</sup> At this writing, the Supreme Court will consider whether such “gerrymandering” is unconstitutional. Adam Liptak, *Justices to Hear Major Challenge to Partisan Gerrymandering*, NEW YORK TIMES A1 (Jun. 20, 2017). The case in question is *Gill v. Whitford* 218 F.Supp.3d 837 (W.D. Wisc. 2016).

<sup>58</sup> *Citizens United v. Federal Election Commission* 558 U.S. 310 (2010).

case-by-case basis by antitrust judges, even if they had the inclination and ability to weigh this objective to rule against an otherwise benign practice.

8. *Anti-globalization; domestic control over resources*<sup>59</sup>

When I attended a conference on postal and delivery economics in Europe in late May of 2016, I saw a flyer from one of the sponsoring institutions, the European University Institute, announcing an upcoming symposium on “Anti-Globalisation and Antitrust”. This reminded me that free trade may be a factor in a number of respects. Most within the efficiency paradigm is that benefits to foreign firms may not be counted in an efficiency defense. Canada has this as policy,<sup>60</sup> and I would be surprised whether any country has otherwise.

A more complex set of issues arises that are akin to the aforementioned consumer choice, jobs, and promoting competition goals. Free trade can displace workers, reduce choice while reducing prices, and drive domestic firms out of business. Along with the availability of policies beside antitrust to deal with those, free trade itself could and probably should be the subject of policies to ensure that those who lose (workers, domestic firms) are compensated in some fashion by those who win (consumers, firms who use foreign goods as inputs). An additional consideration with free trade may be a public interest in maintaining domestic production capability for goods and services important for national security, or to prevent the export of raw materials that could be needed here. These should be the responsibility of the State, Defense, and Commerce Departments as well as Congress, and not antitrust enforcers or judges.

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<sup>59</sup> See references at supra note 22.

<sup>60</sup> GOVERNMENT OF CANADA (COMPETITION BUREAU), MERGER ENFORCEMENT GUIDELINES 42-43 (2011).

## 9. *Media news veracity*

During the 2016 presidential campaign, one antitrust issue that caught public attention was when then candidate Donald Trump expressed concern about AT&T's proposed acquisition of Time Warner.<sup>61</sup> Mr. Trump also said he would "would look at breaking up the 2011 merger of Comcast and NBCUniversal" and complained that following Amazon's owner Jeff Bezos' (personal) acquisition of the Washington Post, that Amazon "through its ownership controls the Washington Post."<sup>62</sup> Mr. Trump's concern was motivated by a broader concern with media bias in the coverage of his campaign. On this issue, some of his opponents agree.<sup>63</sup>

This is not the first I have heard expressed the view that mergers should be assessed on the basis of concerns regarding the quality and quantity of news coverage. At a communications faculty conference in the 1980s, some expressed concern that General Electric's purchase of NBC would lead NBC to be less critical in its coverage of defense policy and spending. More recently, some are concerned that Sinclair's proposed purchase of Tribune Media's local television stations would lead to it possibly becoming "to become the next big thing in conservative broadcasting."<sup>64</sup>

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<sup>61</sup> Brian Stelter, *Donald Trump Rips into Possible AT&T-Time Warner Deal*, CNN MONEY (October 22, 2016), available at <http://money.cnn.com/2016/10/22/media/donald-trump-att-time-warner/index.html>. Mr. Trump's concern is shared by some in the other party.

<sup>62</sup> *Id.*

<sup>63</sup> Harper Neidig, *Dems urge Sessions to Reject AT&T-Time Warner Merger*, THE HILL (Jun. 21, 2017), available at <http://thehill.com/policy/technology/338793-dems-call-on-sessions-to-reject-att-time-warner-merger>.

<sup>64</sup> Jeff Guo, *The Imminent Conservative Takeover of Local TV News, Explained*, VOX (May 15, 2017), available at <https://www.vox.com/2017/5/15/15598270/sinclair-broadcast-imminent-conservative-takeover-of-local-tv-news-explained>.

Even if antitrust enforcers and courts were so inclined to take action based on these concerns, they may well be blocked by First Amendment restrictions on content-based policies, even in traditionally business contexts, such as trademarks.<sup>65</sup> If there were such an opening, policies to promote the public's access to neutral content or multiple points of view traditionally have and should remain the province of Congress, through the Federal Communications Commission under its public interest standard, for example, in promoting content diversity through regulations and policies regarding minority ownership of media companies. The FCC is charged with balancing the potential benefits of minority ownership against any potential benefits of, say, increased national concentration of media ownership, through rulemaking processes open to public interest and comment.<sup>66</sup> Antitrust enforcers lack that expertise, and managing that tradeoff would make the antitrust assessment of media mergers much more complex.

#### *10. Environmental protection*

When I began working in antitrust in the late 1970s, major topics at the time were steel industry mergers and the exercise of market power in crude and refined oil products. As I was just out of graduate school, I was still thinking in terms of homework assignments, and wondered whether steel mergers or oil market power were good things because reducing their output (in order to raise price) would reduce air pollution associated with their supply. I thought this idle, but was recently approached by a reporter who asked me, with complete sincerity, what could be

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<sup>65</sup> *Matal v. Tam*, S.Ct. No. 15–1293, *slip op.* (Jun. 19, 2017).

<sup>66</sup> 5 U.S.C. Subchapter II (Administrative Procedure Act).

done to make antitrust more environmentally “sustainable”, which meant paying attention to reducing fossil fuel use and conserving resource use. Others have suggested that antitrust become more concerned with environmental protection as well.<sup>67</sup>

As with many of these alternatives, environmental protection is an important policy goal. But environmental protection has long been the province of other laws; the U.S. has an agency with that name charged with that mission. And that agency should no more worry about antitrust consequences of its regulations than competition agencies should worry about the environmental effects of whether or not to enforce the antitrust laws. Trying to have both agencies pursue both mandates, either guessing what the other is going to do or engaging in extensive attempts at cooperation and setting the same priorities, is just the kind of administrative calamity that the aforementioned “division of policy labor” principle can help avoid.

### *11. Managerial competence*

Robert Steiner has suggested that managerial competence be part of the evaluation of antitrust practices.<sup>68</sup> A precursor to this concern is that market power may allow firms the leeway to become less efficient. As Nobel Prize winner John Hicks famously said, “The best of all monopoly profits is a quiet life.”<sup>69</sup> Steiner’s contribution was more direct, in that a merger may be more beneficial to the extent that the management of the acquiring firm is more competent than that of the acquired firm, and less beneficial if the relative competence is reversed.

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<sup>67</sup> See references at *supra* note 24.

<sup>68</sup> The analysis here follows the assessment of Robert Steiner’s views on the role of managerial competence discussed in Brennan, *supra* note 30.

<sup>69</sup> Hicks, John, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 *ECONOMETRICA* 8 (1935).

Unlike other alternatives reviewed here, it is not clear that there are any policy options for assessing this other than antitrust—other than leaving this to the market, specifically the markets for the good itself and the market for “corporate control”. Competition for the good can reduce the margins that could sustain managerial inefficiency. The market for corporate control can invite takeovers by those who see a profit opportunity in replacing less competent managers with better ones. Moreover, this applies to the market as a whole, and not only to those cases where a merger comes up, except perhaps where the merger is motivated by the potential profits from replacing poor management.

Accordingly, the strongest case among these alternative for incorporation into antitrust analysis is managerial competence. It is also already there, for example, in assessing whether a proposed buyer for a divested asset is prepared to be a strong competitor,<sup>70</sup> or whether acquiring a “maverick” creates a greater potential for competitive harm than other acquisitions, holding other things equal.<sup>71</sup> However, the strongest case is not a guarantee that there is a useful quantitative way to balance competence issues against the benefits and costs of mergers in such a way to change the outcome, other than perhaps these two particular circumstances.

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<sup>70</sup> FEDERAL TRADE COMMISSION, BUREAU OF COMPETITION AND ECONOMICS, *THE FTC’S MERGER REMEDIES* 2006-2012 24 (2017).

<sup>71</sup> Department of Justice and Federal Trade Commission, *supra* note 10.

## 12. *Mitigating consumer error*

Although it has been around for over half a century, behavioral economics in recent decades has become a prominent focus of research and, increasingly, in policy.<sup>72</sup> Commentators are calling on it to play a role in antitrust.<sup>73</sup> Time, space and relevance preclude a full assessment here, but the key feature of behavioral economics is that choices that consumers and firms make in markets may not reflect the chooser's actual interest. A simple way to put it is that revealed preference is not the same as actual preference. An even simpler way to put it is that consumers make mistakes, and policies can help them make the right choices.

This contention creates some problems for making policy as a whole. If consumer choices cannot be trusted, benefit-cost analyses that rely on market data no longer indicate whether a policy is beneficial on net. If consumers cannot be trusted to make correct choices, one has to figure out who will make choices on the consumers' behalf.<sup>74</sup>

For considerations of consumer error to matter, antitrust courts and enforcers would have to use it to change a decision that would have been made had it assumed that consumers make self-interested choices. An example where consumer error could have played a role but apparently did not is the Federal Trade Commission's decision to oppose the merger of the fantasy sports

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<sup>72</sup> Kenneth Gillingham, Richard. Newell & Karen Palmer, *Energy Efficiency Economics and Policy*, 1 ANNUAL REV. RESOURCE ECON. 597 (2009); Timothy Brennan, *Behavioral Economics and Policy Evaluation*, 5 J. BENEFIT-COST ANALYSIS 89 (2014); Shlomo Benartzi et al., *Should Governments Invest More in Nudging*, 28 PSYCHOL. SCI. 1041 (2017).

<sup>73</sup> Stucke, *supra* note 26; Avishalom Tor, *Boundedly Rational Entrepreneurs and Antitrust*, 61 ANTITRUST BULL. 520 (2017).

<sup>74</sup> Brennan, *supra* note 72.



services DraftKings and FanDuel.<sup>75</sup> The FTC believes that these two are essentially the only firms in a market for fantasy sports services and not a larger gambling or entertainment market, and that the merger would create a monopoly in that market. Under conventional economic analysis, this would imply consumer harm, as prices would rise and output would fall. Were behavioral economic and consumer error to be considered, however, one might well say that consumers are mistaken when they gamble on these websites, and in their own interest they should be discouraged from doing so. Since high prices—in this case fees or percentage cuts from the websites—would presumably do that discouraging, the merger should be allowed.

Perhaps that is correct. But I doubt very much that adding that complexity to the nested logit merger simulations that are sure to be part of the assessment and potential litigation of this merger will make antitrust policy more comprehensible and effective.<sup>76</sup> If people make wrong decisions, such as overestimating the odds and returns from gambling and perhaps their own expertise in picking players and teams in fantasy sports contests, that should be handled elsewhere, perhaps as a matter of public health. One could say much the same in many other contexts in

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<sup>75</sup> Federal Trade Commission, FTC and Two State Attorneys General Challenge Proposed Merger of the Two Largest Daily Fantasy Sports Sites: DraftKings and FanDuel: Complaint Alleges Merger Would Lead to Near Monopoly (Jun. 19, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/06/ftc-two-state-attorneys-general-challenge-proposed-merger-two>.

<sup>76</sup> Consumer error could also arise in the merger context in that merger simulations and market definitions depend on the empirical data on what consumers regard as substitutes. Whether they are correct, for example, in the degree to which private label products are substitutes for brand name products on grocery shelves is and should be irrelevant for merger assessment. Timothy Brennan, *Behavioral Economics and Merger Enforcement: A Speculative Guide* 9 THE THRESHOLD: THE NEWSLETTER OF THE MERGERS & ACQUISITIONS COMMITTEE, ANTITRUST SECTION, AMERICAN BAR ASSOCIATION 21 (Spring 2009).

which consumer error is potentially relevant for public policy. That itself is a large debate for another venue.<sup>77</sup> Here, it suffices to observe that inviting antitrust courts to factor consumer mistakes into their decisions does not seem to be doing them, enforcers, litigants, or the public any favors.

#### IV. CONCLUDING OBSERVATIONS

Numerous observers have proposed alternatives to economic efficiency as objectives for antitrust enforcement and decisions. Three factors raise general doubts about the merits of doing so. One is that antitrust is sufficiently complex and that adding additional factors to balance may make it even less comprehensible to the general public (and even experts). A second is that other policies are available to pursue these alternatives that are both better designed to do so and are not subject to the vagary of whether a particular firm or sector might be involved in an antitrust violation. The third is that antitrust ought not be distracted from its economic efficiency mission, since there is no other economy wide tool for promoting economic efficiency.

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<sup>77</sup> A good example of the policy debate is the set of article on whether to count a benefit of a policy the results of choices the consumers chose not to make prior to the policy. Hunt Allcott & Cass Sunstein, *Regulating Internalities*, 34 J. POLICY ANALYSIS & MANAGEMENT 698 (2015); Brian Mannix & Susan Dudley, *The Limits of Irrationality as a Rationale for Regulation*, 34 J. POLICY ANALYSIS & MANAGEMENT 705 (2015); Hunt Allcott & Cass Sunstein, *Counterpoint to Six Potential Arguments Against “Regulating Internalities”*, 34 J. POLICY ANALYSIS & MANAGEMENT 712 (2015); Brian Mannix & Susan Dudley, *Please Don’t Regulate My Internalities*, 34 J. POLICY ANALYSIS & MANAGEMENT 715 (2015).

Considering each of a dozen alternatives does little to assuage those doubts. Many of these alternatives may be a side benefit of antitrust enforcement, but not a factor that antitrust enforcers and courts can be expected to sensibly trade off against economic efficiency. At most, some of these arguments provide support for using a consumer welfare rather than total welfare standard for addressing inequality, labor share of wealth, and jobs. This is mostly because the consumer welfare standard neglects profits that are gained by stockholders who may be wealthier than the average consumer, reduce in a relative sense labor's share of income, and where cost savings resulting from layoffs would not be counted. But even these are problematic; for example, the effects of layoffs depend on the nature of employment frictions and the existence and depth of any economic recession, which antitrust courts are ill equipped to assess and are properly the subject of broader employment and fiscal policies.

This survey of alternatives thus leads to the conclusion that the central debate in antitrust remains whether to pursue consumer welfare or total welfare as the goal of antitrust. I have little to add here to that continually controversial question. I only observe that those who oppose a static total economic efficiency focus for antitrust enforcement do not gain significantly additional traction by adding these alternatives to their arguments on the consumer welfare side of the debate.