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ANTITRUST AND WEALTH INEQUALITY

Daniel A. Crane†

In recent years, progressive public intellectuals and prominent scholars have asserted that monopoly power lies at the root of wealth inequality and that increases in antitrust enforcement are necessary to stem its rising tide. This claim is misguided. Exercises of market power have complex, cross-cutting effects that undermine the generality of the monopoly regressivity claim. Contrary to what the regressivity critics assume, wealthy shareholders and senior corporate executives do not capture the preponderance of monopoly rents. Such profits are broadly shared within and dissipated outside the firm. Further, many of the subjects of antitrust law are middle-class professionals, sole proprietors, or small business owners who extract rents from households above them in the income distribution. On the consumer side, the monopoly regressivity claim is confounded by the fact that large swaths of overcharged goods and services are purchased by government buyers or third-party healthcare payers, who pass on the incidence of the overcharge progressively, or by other corporate buyers who absorb a share of the overcharge. Even as to household spending, exercises of monopoly power may have progressive wealth redistribution effects to the extent that market power facilitates progressive price discrimination. Finally, antitrust law sometimes stymies private efforts to redistribute income, further casting doubt on the generality of the monopoly regressivity claim.

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INTRODUCTION

In recent years, wealth inequality has reemerged as a popular political issue. President Obama has made reducing wealth inequality the signature issue of his second term,[1] and the topic is shaping up as a potentially defining focal point for the 2016 presidential election.[2] Important recent scholarly work has reignited academic discussion on the incidence, causes, and cures for wealth inequality.[3]

Amid this broad debate, a particular claim has emerged regarding the relationship between market competition and inequality. A wide array of scholars and public intellectuals, including such notable figures as Nobel Laureates Joseph Stiglitz[4] and Paul Krugman[5] and former Labor Secretary Robert Reich,[6] among others, have claimed that monopoly and anticompetitive market conditions are among the root causes of wealth inequality.[7] Some of these commentators blame the

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1 *See* Barack Obama, U.S. President, Remarks by the President in State of the Union Address (Jan. 20, 2015), https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015 [https://perma.cc/E2TT-9WC8]; Barack Obama, U.S. President, Remarks by the President on Economic Mobility (Dec. 4, 2013), http://www.whitehouse.gov/the-press-office/2013/12/04/remarks-president-economic-mobility [https://perma.cc/G5Y8-8VBD].

2 *See, e.g.*, David Lauter, *Income Inequality Emerges as Key Issue in 2016 Presidential Campaign*, L.A. TIMES (Feb. 5, 2015, 4:00 AM), http://www.latimes.com/nation/la-na-campaign-income-20150205-story.html [https://perma.cc/4VUV-7C9K] (noting that popular sentiment has forced both Democratic and Republican candidates to promise a correction to income inequality); *Stiglitz: Inequality a 'Key Issue' for US Election 2016*, BBC (Apr. 25, 2015), http://www.bbc.com/news/world-us-canada-32459519 [https://perma.cc/2RZ2-C84A] (asserting that the United States has reached a tipping point for awareness of inequality).

3 *See, e.g.*, ANTHONY B. ATKINSON, INEQUALITY: WHAT CAN BE DONE? 126–27 (2015) (claiming that the United States can use competition policy to combat inequality); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 291–303 (Arthur Goldhammer trans., 2014) (analyzing the historical evolution of inequality); JOSEPH E. STIGLITZ, THE GREAT DIVIDE: UNEQUAL SOCIETIES AND WHAT WE CAN DO ABOUT THEM 192–202 (2015) (asserting that corporate welfare and our tax system contribute to America's growing inequality); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 28–33 (2012) [hereinafter STIGLITZ, PRICE OF INEQUALITY] (arguing that rent seeking, market forces, societal norms, and social institutions help create America's high level of inequality).

4 STIGLITZ, PRICE OF INEQUALITY, *supra* note 3, at 53–59.

5 Paul Krugman, Opinion, *Robots and Robber Barons*, N.Y. TIMES, at A27 (Dec. 9, 2012), http://www.nytimes.com/2012/12/10/opinion/krugman-robots-and-robber-barons.html [https://perma.cc/FT95-JS83].

6 Robert Reich, *Antitrust in the New Gilded Age* (Apr. 16, 2014), http://robertreich.org/post/82938136466 [https://perma.cc/D9AH-WX9R]; *see* Kevin Roose, *Is America Catching Up with Robert Reich's Income-Inequality Crusade?*, N.Y. MAG.: DAILY INTELLIGENCER (Sept. 20, 2013, 1:55 PM), http://nymag.com/daily/intelligencer/2013/09/qa-robert-reich-discusses-inequality-for-all.html [https://perma.cc/RJJ5-4PLK].

7 *See also* ATKINSON, *supra* note 3, at 126–27 (discussing the need for more robust competition policy to combat inequality); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 11–13 (2015) (same); Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267,

rising tide of wealth inequality on a weak record of antitrust enforcement in the United States.[8] All seem to propose that enhancing antitrust enforcement against mergers, monopolies, and anticompetitive agreements could contribute to creating a more equal society.

This Article challenges this emerging monopoly regressivity claim in two ways. First, it shows that the relationship between enforcement of the antitrust laws and wealth inequality is far more complex than monopoly regressivity critics recognize. The relationship between market power (the subject of antitrust law) and income distribution is subtle, circumstantially contingent, and, at least for a developed economy, extremely difficult to generalize. Whatever their other faults, it is far from certain that antitrust violations (including cartels, anticompetitive mergers, and abuses of dominance) systematically redirect wealth from the poor to the rich. To sustain a showing that they do, one would need information about a large number of factors, including the relative wealth of producers and consumers, overcharge pass-on rates, the effects of market power on employees of the firm, the distribution of rents between managers and shareholders, the progressive or regressive effects of antitrust violations where government entities are the purchasers, and the distribution of rents among classes of managers. Although there are undoubtedly cases where antitrust violations have regressive effects, there are also undoubtedly many cases where their effects are progressive or distributively neutral. It is virtually impossible to calculate the net effect on wealth distribution from general increases or decreases in overall antitrust enforcement.

The second response this Article makes to the monopoly regressivity claim is that a significant set of antitrust interventions actually *impede* voluntary efforts to secure a more equitable and just society. In a set of important cases, application of

1292–93 (2016) (arguing that horizontal share ownership by large investors distorts economic competition within industries and causes regressive wealth redistribution).

8 *See* STIGLITZ, PRICE OF INEQUALITY, *supra* note 3, at 44–45 (asserting that Chicago School economic theories of competition and antitrust played a role in creating monopolistic conditions that exacerbated wealth inequality); Baker & Salop, *supra* note 7, at 11 (asserting that "[t]he adoption of more permissive antitrust rules during the past quarter century has . . . likely increased the prevalence of market power" and with it wealth inequality); Barry C. Lynn, *Killing the Competition: How the New Monopolies Are Destroying Open Markets*, HARPER'S MAG., Feb. 2012, at 27, 32 (arguing that growth of market concentration and inequality in the United States is attributable to Chicago School arguments in favor of economic efficiency).

conventional antitrust principles frustrated private actors seeking to promote social justice by diverting market forces from their ordinary paths.[9] Hence, an undifferentiated increase in antitrust enforcement could, in many instances, exacerbate rather than diminish inequality and related forms of social justice.

To motivate this angle, consider some glimpses of the kinds of cases in which antitrust has posed an obstacle to private actors pursuing wealth redistribution goals. Examples include an antitrust challenge to an agreement by the Ivy League universities on a financial aid system designed to increase educational diversity;[10] antitrust concerns preventing garment manufacturers in the United States from joining forces to pressure foreign suppliers to conform to minimal labor and employment standards;[11] and antitrust challenges to National Collegiate Athletic Association (NCAA) rules prohibiting its members from paying student athletes, which could disrupt the cross subsidization of women's athletic programs and other less popular sporting programs.[12] In each of these cases, discussed in greater detail below, there is a plausible argument that application of unqualified antitrust principles would increase the welfare of consumers but also impair the ability of private actors to pursue solutions to serious equality problems.

In tandem, these twin objections throw a wrench into the growing progressive claim that more antitrust enforcement would lead to a more just distribution of wealth. Not only could an undifferentiated increase in antitrust enforcement exacerbate wealth inequality in various ways but it could also impede private, voluntary pursuit of related social justice objectives.

Thus far, this introduction has considered the effect of an *undifferentiated* increase in antitrust enforcement—actions to augment and strengthen enforcement as a general matter, such as by providing more funding to the antitrust agencies, liberalizing rules for private enforcement, increasing fines and penalties, or adopting rules making antitrust claims easier to win. Changes in the level of antitrust enforcement have no

9 *See infra* Part II.B.

10 *See* United States v. Brown Univ., 5 F.3d 658, 662–64 (3d Cir. 1993).

11 *See* Daniel A. Crane & Ben Kobren, *Making Antitrust Help, Not Harm Workers Abroad*, THE HILL: CONGRESS BLOG (Apr. 28, 2015, 1:00 PM), http://thehill.com/blogs/congress-blog/labor/240231-making-antitrust-help-not-harm-workers-abroad [https://perma.cc/2CTZ-F9YJ].

12 *See* Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN (Mar. 18, 2014), http://espn.go.com/college-sports/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model [https://perma.cc/2VAE-N668].

clear effect on the regressivity or progressivity of wealth distribution and social justice more generally, but one could try to tailor antitrust policy to maximize wealth redistribution and social justice in particular cases. Although it might sometimes be prudent as a matter of prosecutorial discretion to prioritize resource allocation in the direction of fighting antitrust violations with highly regressive effects, it would be a mistake to recalibrate antitrust doctrine in an effort to combat wealth inequality. Even putting aside the likely deleterious effects on productive and allocative efficiency such doctrinal shifts might entail, it is impossible to craft a distributively-oriented body of antitrust law that would reliably increase wealth equality by clamping down on regressive forms of market power exploitation.

On the other hand, it may be possible for institutions of antitrust law to avoid exacerbating wealth inequality by understanding when to get out of the way of private efforts to address inequality or related social justice objectives. That is to say, when it comes to wealth equality and social justice in a developed economy, antitrust law cannot be calibrated *to help*, but it can be calibrated *not to harm*. Practically speaking, this means that courts and agencies could develop doctrines designed to create space for civil society actors to pursue bona fide wealth equality and related social justice objectives without undue interference from antitrust law.

The remainder of this Article proceeds as follows. Part I critiques the progressive claim that increasing antitrust enforcement would diminish wealth inequality. It shows that this view rests on a simplistic claim that antitrust violations involve wealth transfers from relatively poor consumers to relatively rich producers. That claim simply cannot be robustly generalized. Part II presents evidence that antitrust enforcement frequently impedes private efforts to achieve a more just distribution of wealth by insisting that market actors pursue competition and output maximization, even when those objectives are inconsistent with wealth redistribution. Finally, Part III considers potential reforms to antitrust enforcement strategies and doctrines that might advance the cause of equality. It shows that, apart from targeted instances of prosecutorial discretion, efforts to reconfigure antitrust law to advance the cause of progressivity are unlikely to be successful. On the other hand, there is some promise in adapting antitrust law to avoid discouraging certain private efforts at advancing income equality and related social justice objectives, although any such exemption would need to be narrowly circumscribed.

I
DOES MORE ANTITRUST ENFORCEMENT MEAN MORE WEALTH EQUALITY?

A. The Contingency of Economic Context: The Developing and Developed Worlds

When it achieves its ostensible purposes,[13] antitrust law causes essentially two economic effects. First, it eliminates deadweight losses that arise from monopoly pricing and hence grows the social welfare pie.[14] Second, antitrust enforcement prevents redistribution of wealth from consumers to producers.[15] The elimination of deadweight loss has no direct distributive effects, but the consumer-to-producer wealth transfers have obvious potential effects for the progressive or regressive redistribution of wealth. If producers, as a class, are wealthier than consumers, then, at first blush, antitrust violations should have regressive effects on average.

However, the story is not that uniformly simple. Even sticking with the reductionist typology of consumers and producers, any analysis of the distributive consequences of antitrust violations must take into account the effects between classes of producers and classes of consumers. Thus, for example, even if consumers as a class are poorer than producers as a class, antitrust violations might have progressive effects if they tended to redistribute wealth from the richest subclasses of consumers to the poorest subclasses of producers. Or, even while generally redistributing wealth from consumers to producers, antitrust violations might simultaneously redistribute wealth from richer consumers to poorer consumers (or vice versa) or from richer producers to poorer producers (or vice versa).

The upshot is that the distributive consequences of antitrust violations (and, correspondingly, antitrust enforcement)

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13 Of course, antitrust law may in fact cause very different effects from those that it is ostensibly designed to achieve. *See, e.g.*, William F. Shughart II, *Public-Choice Theory and Antitrust Policy*, *in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE 19 (Fred S. McChesney & William F. Shughart II eds.,1995) (arguing that antitrust law has tended to favor special interest groups at the expense of consumers). For purposes of this Article, I assume that antitrust law operates essentially as it is supposed to operate—that is to say, that it promotes competition for the benefit of efficiency and consumer welfare.

14 *See* DANIEL A. CRANE, ANTITRUST 6–8 (2014).

15 *See id.*

are contingent on particular facts about the economic environment in which they occur. In asking whether changes in the level of antitrust enforcement have significant progressive or regressive wealth distribution effects, it is important to specify a particular economic context in which that question is to be posed. The answer might very well be different for developing countries than for more developed ones.

There is a strong a priori argument that the introduction of competition laws—prohibitions on monopolistic conduct and agreements—in developing countries can have progressive wealth redistribution effects. Where wealth and economic power are heavily concentrated in a few closely held, conglomerate, and vertically integrated enterprises; labor mobility is low; capital markets are underdeveloped; exclusive legal privileges for incumbents or formerly state-owned enterprises abound; and trade barriers are high, the introduction of antitrust principles as part of a wider package of liberalization and development reforms would likely contribute to shrinking the gap between rich and poor. It is thus not surprising to find that proponents of antitrust law for developing countries have stressed the wealth distribution effects of competition and antitrust laws.

In recent years, proponents of competition law have argued that the adoption of competition principles is an important tool for generating economic growth for the benefit of the poor in developing countries.[16] Intergovernmental organizations like the OECD, WTO, and UNCTAD have taken a leading role in promoting competition law as a means of reducing poverty in the developing world.[17] Other international organizations and

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16 *See, e.g.*, Eleanor M. Fox, *Economic Development, Poverty and Antitrust: The Other Path*, 13 SW. J.L. & TRADE AM. 211, 221–24 (2007) (arguing that developing countries should buck the assumption, dominant in the West, that competition law is concerned about economic efficiency and utilize competition policy as a means of addressing wealth inequality).

17 In 2013, the OECD conducted a policy roundtable on "[c]ompetition and [p]overty [r]eduction" that ultimately touted competition law as a means of reducing poverty and achieving a superior distribution of wealth. GLOBAL FORUM ON COMPETITION, DAF/COMP/GF(2013)12, COMPETITION AND POVERTY REDUCTION 5 (2013) http://www.oecd.org/daf/competition/competition-and-poverty-reduction2013.pdf [http://perma.cc/PLM2-EZNK].

The OECD's summary of the roundtable gives as an example a 2007 South African prosecution of a bread cartel that had a disproportionate negative economic impact on low-income people. *Id.* at 245. The roundtable included submissions from more than twenty developed and developing countries as well as several other intergovernmental organizations. *See id.* at 3. Brazil's submission characteristically pointed to Brazil's major fall in the "Gini coefficient" equality index and attributed it in part to competition law regime in place since 1994. *Id.* at 79. At an UNCTAD meeting, the Competition Commission of India presented governments have struck a similar tune. The WTO presents competition policy as a means of producing poverty reduction.[18] Non-governmental organizations have also gotten into the mix by advocating competition law as an antidote to global and regional wealth inequality.[19]

However, advocacy of antitrust law as an antidote to poverty often glosses over a potentially important distinction between increasing the economic position of the poor and decreasing the wealth gap between rich and poor. Although the two issues are obviously related, they pose analytically and empirically distinct questions. Increases in a market's competitiveness because of antitrust enforcement might improve the position of the poor without reducing wealth disparity if the rising tide lifted all boats. For example, if the position of the poor improved by 10% while the position of the rich improved by 20%, then poverty would lessen even while inequality grew.[20] If the premise of modern antitrust law—that more competitive markets increase efficiency—is correct, then competition law enforcement should generate a larger pie, not merely redistribution within the pie. Still, the progressivity of competition law remains a broadly accepted article of faith

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an argument that cartels have a particularly negative effect on the poor and competition law would create progressive wealth effects by stimulating economic growth. *See* Intergovernmental Group of Experts on Competition Law and Policy, *Impact of Cartels on the Poor: Competition Law, Poverty Reduction and India*, at 18 (July 2013), http://unctad.org/meetings/en/Presentation/IGE2013_PRESImp_INDIA_en.pdf [http://perma.cc/XC5U-Q8YT].

[18] *See* Robert D. Anderson & Anna Caroline Müller, *Competition Policy and Poverty Reduction: A Holistic Approach* 5 (World Trade Org., Working Paper No. ERSD-2013-02, 2013), http://www.wto.org/english/res_e/reser_e/ersd201302_e.htm [http://perma.cc/6XEL-8F3R].

[19] A January 2014 Oxfam report makes the case for antitrust enforcement as a progressive income-distribution vehicle. *See* RICARDO FUENTES-NIEVA & NICK GALASSO, OXFAM, WORKING FOR THE FEW: POLITICAL CAPTURE AND ECONOMIC INEQUALITY 15 (2014).

> Weak regulatory environments are ideal settings for anti-competitive business practices. Without competition, firms are free to charge exorbitant prices, which cause consumers to lose out and ultimately increase economic inequality. When elites exploit weak or incompetent anti-trust authorities, price gauging follows as a form of government *rent* to big business. By not acting when dominant firms crowd out competition, government tacitly permits big business to capture unearned profits, thereby transferring income from the less well-off sections of society to the rich. Consumer goods become more expensive, and if incomes do not rise, inequality worsens.

Id. (emphasis in original).

[20] It is also possible that the growth in inequality would reduce the well-being of the poor in real terms, even though their income grew in nominal terms, if the increased wealth and spending of the rich led to inflationary pressures.

among policy elites in the developing world and I shall not quarrel with it here.

This matter is different when it comes to the developed—and economically more complex—world. In societies with liquid capital markets, high degrees of labor mobility, widely held corporations, low barriers to trade, and relatively low regulatory or legal entry barriers, the case for the progressivity of antitrust enforcement is correspondingly subtler.

B. The Positive Claim that Antitrust Advances Wealth Progressivity

Claims that antitrust enforcement contributes significantly to reducing wealth inequality are not limited to the developing world. Economists in the United States and Europe have sounded similar themes for decades. Studies from the 1960s to the 1980s attempted to empirically measure the effects of monopolistic market power on wealth distribution. For example, William Comanor and Robert Smiley argued that the reinvestment of legacy monopoly wealth contributes to the long-run growth of inequality.[21] A 1987 study by Irene Powell,[22] discussed at length in F.M. Scherer and David Ross's influential *Industrial Market Structure and Economic Performance*,[23] found that reductions in a market's four-firm concentration ratio resulted in a decline in average income for the wealthiest of six income distribution strata.

With rising levels of public discourse on inequality in recent years, these themes have assumed new prominence. Some of the claims regarding the relationship between market power and wealth inequality are implicit in broader claims regarding the root causes of wealth inequality, such as Thomas Piketty's much-publicized argument that market-driven economies produce inequality when the return to capital exceeds economic growth.[24] Many progressive, public intellectuals and scholars in the United States and Europe have gone further,

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21 William S. Comanor & Robert H. Smiley, *Monopoly and the Distribution of Wealth*, 89 Q.J. ECON. 177, 193 (1975).

22 Irene Powell, *The Effect of Reductions in Concentration on Income Distribution*, 69 REV. ECON. & STAT. 75, 75–79 (1987).

23 F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 679–80 (3d ed. 1990).

24 PIKETTY, *supra* note 3, at 1 ("When the rate of return on capital exceeds the rate of growth of output and income, as it did in the nineteenth century and seems quite likely to do again in the twenty-first, capitalism automatically generates arbitrary and unsustainable inequalities that radically undermine the meritocratic values on which democratic societies are based.").

laying the blame for income inequality at the feet of lax antitrust enforcement and proposing invigorating antitrust enforcement as one of several governmental tools to engineer a more equal society. Claims about the relationship between antitrust enforcement and wealth inequality have come from some of the most prominent progressive voices speaking on wealth inequality, which increases the likelihood that such claims could influence future political action.

Nobel Laureate Joseph Stiglitz offers a conventional neoclassical account of how weak antitrust enforcement leads to wealth inequality in his 2012 book *The Price of Inequality*.[25] Stiglitz begins with the ordinary economic assumption that in a fully competitive market there are zero economic profits and fortunes cannot be built.[26] Hence, alterations of competitive markets that lead to monopoly are the forces that build wealth inequality.[27] Per Stiglitz, the Progressive Era antitrust reforms were intended to prevent inequality by curtailing monopoly.[28] In recent decades, however, the Chicago school of antitrust analysis, with its emphasis on "free and unfettered markets," has eroded antitrust enforcement and thus facilitated the rise in wealth inequality.[29] Stiglitz sees monopolies or highly-concentrated markets in operating systems, telephony, and banking as prime culprits in the unequal distribution of wealth.[30]

Another Nobel Laureate, Paul Krugman, similarly attributes growing income inequality to the alleged collapse of antitrust enforcement during the Reagan administration.[31] Citing a study by Barry Lynn and Phillip Longman from the New America Foundation,[32] he argues that "increasing business concentration could be an important factor in stagnating de-

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25 STIGLITZ, PRICE OF INEQUALITY, *supra* note 3, at 43–47.

26 *Id.* at 43.

27 *See id.*

28 *Id.* at 44.

29 *Id.* at 44–45. For a contrary view on the influence of the Chicago School, see Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911, 1916–20 (2009) (reviewing HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008) (arguing that the Chicago School was not monolithically opposed to antitrust enforcement and, in several ways, advocated stronger antitrust enforcement).

30 STIGLITZ, PRICE OF INEQUALITY, *supra* note 3, at 44–47.

31 For a contrary view on antitrust enforcement during the Reagan administration, see William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 416–20 (2003) (arguing that the Reagan administration vigorously enforced the antitrust laws against cartels).

32 Barry C. Lynn & Phillip Longman, *Who Broke America's Jobs Machine?*, WASH. MONTHLY (Mar./Apr. 2010), http://www.washingtonmonthly.com/features/2010/1003.lynn-longman.html [https://perma.cc/D8KC-N88G].

mand for labor, as corporations use their growing monopoly power to raise prices without passing the gains on to their employees."[33]

Former Labor Secretary Robert Reich has made increasing antitrust enforcement a major part of his policy prescription for decreasing income inequality.[34] In essays and interviews, Reich has argued that weak antitrust enforcement leads to "hidden upward redistribution from the majority of Americans to corporate executives and wealthy shareholders."[35] He attributes the supposedly ineffective antitrust enforcement to the excessive power of corporations over the political process.[36] Arguing that the toxic combination of weak controls on corporate political contributions and weak antitrust enforcement is a root cause of income inequality, Reich urges the federal government and his 287,000 Twitter followers[37] to take bold antitrust action: "unless government unrigs [the market] through bold antitrust action to restore competition, the upward distributions hidden inside the 'free market' will become even larger."[38]

Similar arguments have been made by European scholars. In his recent book *Inequality: What Can Be Done?*, Oxford and London School of Economics economist Anthony Atkinson argues that the United States has erred in shifting away from the Sherman Act's original focus on wealth inequality to a pure consumer welfare orientation for antitrust law.[39] Atkinson argues that competition law can and should expressly take distributional concerns into account.[40] He worries that weak antitrust enforcement will lead to particular harms to poorer households because when markets have a limited number of suppliers, those suppliers may choose not to produce goods desired by the poorest households, such as cheaper cuts of meat.[41] Atkinson concedes that "competition authorities cannot achieve fine-tuned redistribution" but nevertheless urges

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33 Paul Krugman, *supra* note 5, at A27.

34 Reich, *supra* note 6; Robert Reich, *Whatever Happened to Antitrust?* (May 24, 2015), http://robertreich.org/post/119767465905 [http://perma.cc/K3N4-YVTV]; *see* Roose, *supra* note 6.

35 Reich, *supra* note 34.

36 *See id.*

37 Robert Reich (@RBReich), TWITTER, https://twitter.com/RBReich (last visited June 8, 2016).

38 Reich, *supra* note 34.

39 ATKINSON, *supra* note 3, at 126.

40 *Id.* at 126–27.

41 *See id.* at 127.

competition authorities to pursue wealth redistribution goals in enforcing the antitrust laws.[42]

Arguments in favor of enhancing antitrust enforcement to combat wealth inequality are appearing with increasing frequency in popular media outlets.[43] Academics specializing in antitrust law have begun to pick up on these themes as well.[44] Antitrust enforcement is often depicted as an additional regulatory tool—along with stricter corporate regulation, progressive taxation, and strengthening employee labor and employment rights—to achieve a more equitable distribution of wealth.[45]

The most thorough examination of the subject, from two distinguished economists with substantial expertise in antitrust law, comes in a recent article by Jonathan Baker and Steven Salop.[46] Baker and Salop claim that "[t]he returns from market power go disproportionately to the wealthy—increases in producer surplus from the exercise of market power accrue primarily to shareholders and the top executives, who are wealthier on average than the median consumer."[47] Since they

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42 *Id.* Atkinson assumes, as do several other public intellectuals writing in this space, that public enforcement drives antitrust law. In the United States, however, private enforcement outstrips public enforcement 10 to 1. *See* Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1179 (2008).

43 *See* Lina Khan & Sandeep Vaheesan, Opinion, *How America Became Uncompetitive and Unequal*, WASH. POST (June 13, 2014), http://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499_story.html [http://perma.cc/P8EG-HZK7] (arguing that lax antitrust enforcement creates inequality by enabling employers to drive down worker wages and creating diminishing opportunities for the middle class to compete and build assets); Eduardo Porter, *What the Debate on Inequality Is Missing*, N.Y. TIMES (May 5, 2015), http://www.nytimes.com/2015/05/06/business/thinking-outside-the-debate-on-income-inequality.html?_r=1 [http://perma.cc/UG4W-62HR] (advocating that government "reform antitrust law, to broaden its narrow focus on efficiency and explicitly consider its impact on the distribution of wealth").

44 *See, e.g.*, Maurice E. Stucke, *Occupy Wall Street and Antitrust*, 85 S. CAL. L. REV. POSTSCRIPT 33, 40–42, 46–47 (2012) (exploring antitrust angles on the Occupy Wall Street movement and observing that some of the deep unease reflected by the anticorporatist movement may lie at the feet of income inequalities generated by lax antitrust enforcement); *see also* Maurice E. Stucke, *Should Competition Policy Promote Happiness?*, 81 FORDHAM L. REV. 2575, 2620–25 (2013) (arguing that lax antitrust enforcement contributes to severely concentrated profits within the financial services industry, causing income inequality between bankers and average employees); Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370, 413 (2014) ("With consumers in general not being as affluent as shareholders, antitrust enforcement can prevent regressive wealth transfers from consumers to producers with market power.").

45 *See, e.g.*, Vaheesan, *supra* note 44, at 413–14 (arguing that besides antitrust enforcement, tools such as labor and tax laws are also needed to stop the growing economic inequality).

46 Baker & Salop, *supra* note 7, at 1–5.

47 *Id.* at 11–12.

believe that "market power contributes to the development and perpetuation of inequality,"[48] Baker and Salop offer a range of antitrust responses to reduce inequality. Specifically, they argue for (1) retaining consumer welfare (as opposed to economic efficiency) as the goal of antitrust law,[49] (2) increasing the budget of the antitrust agencies,[50] (3) exercising prosecutorial discretion to prioritize cases that benefit the middle class and less advantaged,[51] (4) designing remedies to benefit less advantaged consumers,[52] (5) creating more interventionist antitrust and regulatory standards,[53] (6) recognizing the offense of excessive pricing by dominant firms,[54] and (7) adopting inequality as an explicit competition policy focus.[55]

In sum, a growing body of technical academic literature, more popularly focused books and essays by economists and academics, and public commentary generally advances the claim that market power acquired through anticompetitive acts exacerbates wealth inequality and more vigorous antitrust enforcement could contribute toward creating a more equal society. The claims are sufficiently emphatic, detailed, and common and come from sufficiently influential sources that they are likely to play an increasing role in progressive political agendas to combat wealth inequality. It is therefore important to ask whether the claims are correct.

C. Why the Monopoly Regressivity Claim Is Misguided

The argument that antitrust violations are regressive and hence that antitrust enforcement is progressive is founded on two, sometimes unstated, axiomatic assumptions: (1) relatively rich classes of producers, in particular shareholders and senior corporate managers, capture the majority of the monopoly rents generated by anticompetitive behavior and (2) relatively poorer consumers bear the brunt of monopoly overcharges.[56] These assumptions may be generalizable in some circumstances—particularly in the developing world—where the means of production are concentrated in a very small number of private hands and the vast bulk of society interacts with

48 *Id.* at 13.
49 *See id.* at 15.
50 *See id.* at 18.
51 *See id.*
52 *See id.* at 20.
53 *See id.* at 21.
54 *See id.* at 22.
55 *See id.* at 24.
56 *See supra* note 47 and accompanying text.

capital only as an employee and a consumer.[57] But they are far more difficult to generalize in more economically developed societies where ownership of the means of production is widely distributed, both in terms of active management and passive investment, and there exists a broad middle class capable of appropriating monopoly rents as entrepreneurs, managers, investors, employees, and sellers of assets. As the case for each of the axioms weakens, the case for the progressivity of antitrust enforcement correspondingly diminishes.[58]

It is doubtful that antitrust violations involve systematic transfers from comparatively poor consumers to comparatively wealthy producers. Almost everyone, both rich and poor, who participates in markets does so both as a consumer and as a producer. People participate as producers in their capacities as employees, sole proprietors, and shareholders. They participate as buyers in their capacities as end consumers, business purchasers, and taxpayers. Thus, any assertion about the regressivity of antitrust violations cannot rest on the bare claim that such violations involve wealth transfers from consumers to producers.

In order to sustain the claim, there would need to be a further specification of the ways in which identified classes of producers skim money from identified classes of consumers. When the actual operation of market power exercises in developed economies and antitrust enforcement seeking to curtail them is explored, it becomes apparent that general claims about the wealth redistribution effects of antitrust violations and enforcement are extraordinarily difficult to sustain. Monopoly rents are not systematically borne by the poor or col-

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57 *See supra* text accompanying notes 16–20.

58 There is a long-standing and well-known debate about whether antitrust law should focus purely on allocative efficiency or whether it should also concern itself with wealth transfers from consumers to producers, whether or not such transfers result in any decline in efficiency. *Compare* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 82–83 (1978) (arguing that antitrust law should not be concerned with wealth transfers from consumers to producers), *with* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 69–70 (1982) (arguing that preventing monopolistic wealth transfers was a central concern of the Sherman Act's framers). That debate is not at issue for present purposes. The question of progressivity or regressivity is distinct from the question of wealth transfers from consumers to producers. As discussed further below, it is possible that consumer-to-producer wealth transfers would have regressive effects if consumers were on average poorer than producers—an assumption that is difficult to generalize. However, even if it is infeasible to prove regressivity effects from wealth transfers, there may still be independent, normatively appealing reasons to use antitrust law to resist such wealth transfers. Such arguments are beyond the scope of this Article.

lected by the wealthy. Rather, in a complex, advanced economy, the lines of exploitation and profit run in too many complicated and crosscutting directions to permit broad generalizations.

1. *Who Captures Monopoly Rents?*

The primary axiom underlying the claim that antitrust violations are generally regressive is that relatively wealthy producers are capturing most of the rents attributable to anticompetitive conduct.[59] The problem with this assumption is that "producers" are an extremely diffuse class. Many different classes of producers may have their fingers in the till. Which producers are capturing the monopoly rents attributable to antitrust violations is a complex and circumstantially contingent question. As on the consumer side, to be discussed next, these complexities make it doubtful that any general claim about the regressive effects of antitrust violations can be sustained.

a. *Shareholders and Senior Managers*

Contrary to the assumption underlying the monopoly regressivity claim, a monopoly position in the market is neither a necessary nor a sufficient condition for accumulations of wealth by the capitalist class. For instance, a study by Scherer and Ross reported that of the twenty-five wealthiest families reported in *Forbes* magazine in 1988, "only six owed their fortunes primarily to industries in which profitability depended crucially upon monopoly positions."[60] According to the study, six of the other families "became rich by building great enterprises in industries characterized for the most part by vigorous competition."[61] And most of the others achieved success by buying assets cheap and selling them high in more competitive than monopolistic industries.[62] Thus, the mere fact of growing wealth in the hands of the wealthiest owners of capital does not necessarily point to an increase in market power as a root cause.

Nonetheless, the assumption underlying the progressive claim challenged in this Article is that senior managers and wealthy shareholders of large companies are capturing the majority of the rents attributable to anticompetitive conduct and

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59 *See supra* note 47 and accompanying text.
60 SCHERER & ROSS, *supra* note 23, at 679–80.
61 *Id.* at 680.
62 *See id.*

hence outpacing the modal consumer in the accumulation of wealth.[63] But are CEOs and rich shareholders in fact capturing the lion's share of monopoly profits? It is far from certain that they are.

Shareholding is far from an exclusively upper class vocation. Tens of millions of middle class Americans indirectly own productive capital through defined contribution, defined benefit, or state and local pension plans. In 2012, for example, the Federal Reserve calculated that pensions controlled 16% of domestic corporate equity assets.[64] Participation in these plans is widely distributed across the population. There are currently 88 million total participants in 401K retirement plans (73 million of these are active).[65] When one adds the large additional shares of U.S. equities owned by retail investors and intermediaries such as state and local governments, charitable trusts and endowments, and depository institutions, it is apparent that gains to shareholders from anticompetitive conduct are not enjoyed exclusively by the wealthy. At a minimum, the widely held distribution of share ownership may mitigate the regressive effect from monopoly power.[66]

Still, proponents of the view that exercises of market power tend to be regressive note that corporate shareholding is disproportionately concentrated in the hands of the very wealthy.[67] So the question arises whether corporations are

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63 *See, e.g.*, Baker & Salop, *supra* note 7, at 11–12 ("The returns from market power go disproportionately to the wealthy—increases in producer surplus from the exercise of market power accrue primarily to shareholders and the top executives, who are wealthier on average than the median consumer.").

64 GOLDMAN SACHS, AN EQUITY INVESTOR'S GUIDE TO THE FLOW OF FUNDS ACCOUNTS 5 (Mar. 11, 2013), http://www.btinvest.com.sg/system/assets/12141/Goldman%20Sachs%20-%20US%20Strategy%202013%20Mar%2011%20GS.pdf [https://perma.cc/E7BB-7NGQ].

65 AM. BENEFITS COUNCIL, 401(K) FAST FACTS 1 (Apr. 2014), http://www.americanbenefitscouncil.org/documents2013/401k_stats.pdf [https://perma.cc/N2YB-28C6].

66 *See* SCHERER & ROSS, *supra* note 23, at 680–81 (observing that the wide incidence of shareholding by intermediary institutions could mitigate the regressive effects of monopoly but arguing that pension fund beneficiaries likely do not capture the benefits of capital gains from monopolies).

67 Baker & Salop, *supra* note 7, at 12 n.47 (citing Edward N. Wolff, *Household Wealth Trends in the United States, 1962–2013: What Happened over the Great Recession?* 56 tbl.7 (Nat'l Bureau of Econ. Research, Working Paper No. 20733, Dec. 2014, http://www.nber.org/papers/w20733.pdf [http://perma.cc/A6FB-XD7P]) ("[A]s of 2013, the top 1% of the wealth distribution hold 49.8% of stock and mutual fund assets . . . ; if indirect ownership through retirement plans and similar accounts is taken into account, the top 10% own 81.4% of those assets."); *see also* Edward N. Wolff, *Recent Trends in Household Wealth in the United States: Rising Debt and the Middle-Class Squeeze—an Update to 2007*, at 19–20, http://www.levyinstitute.org/pubs/wp_58589.pdf [http://perma.cc/A6FB-XD7P] ("[I]n

passing a large share of monopoly profit through to their shareholders—a necessary condition for the regressive shareholder effect. Perhaps surprisingly, the case that they are is murky.

Monopoly is not free money to corporations—it has to be purchased. As Richard Posner has shown, one of the significant social costs of monopoly is that firms invest considerable sums of money in attempting to acquire monopoly profits and, once they have them, to retain them.[68] In neoclassical economic terms, these expenditures to obtain monopoly rents are considered economic waste since they benefit neither consumers nor producers.[69] In more practical terms, the cost of acquiring and maintaining monopoly power is a significant drag on the profitability of monopoly to shareholders. Empirical work has cast doubt on whether firms in concentrated industries earn greater average profits than other firms,[70] implying either that increases in concentration do not create market power or market power is not cheap to acquire and maintain. If firms are spending a large share of their rents to obtain monopoly power, the remaining margins left for shareholders may be relatively small.

Monopoly rents are not captured uniformly by the owners of capital (i.e., shareholders) but are distributed in various complex ways throughout the firm.[71] Perhaps executive suite managers benefit disproportionately at the expense not only of the firm's customers but also its shareholders; for example, they could leverage short-run income gains from antitrust violations to justify higher compensation even though shareholders do not realize long-term value. The evidence on that will be considered in a moment. But it is also possible that monopoly

2007 the richest 1 percent of households held about half of all outstanding stock, financial securities, trust equity, and business equity . . . . The top 10 percent of families as a group accounted for about 85 to 90 percent of stock shares, bonds, trusts, business equity . . . .").

68 *See* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 11–12 (1976) ("[A]n opportunity to obtain a lucrative transfer payment in the form of monopoly profits will attract real resources into efforts by sellers to monopolize . . . .").

69 *See id.*

70 *See, e.g.*, GEORGE J. STIGLER, CAPITAL AND RATES OF RETURN IN MANUFACTURING INDUSTRIES 67–69 (1963) (finding the average rate of return of monopolistic industries to be almost the same as that of competitive industries); Michael Salinger, *The Concentration-Margins Relationship Reconsidered*, 1990 BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS 287, 319 ("[T]he results suggest that increases in concentration may eventually result in increased costs and prices.").

71 *See* Mark J. Roe, *Rents and Their Corporate Consequences*, 53 STAN. L. REV. 1463, 1465 (2001) ("[R]ents give managers slack and attract grabs by players inside the firm.").

rents are captured by midlevel managers at the expense of both senior managers and shareholders. For example, midlevel managers and other firm employees may expend considerable firm resources to exclude rivals simply to obtain John Hicks's famous "quiet life"[72] or internally expend monopoly profits through the wastefulness and sloth qualities of monopoly identified by Judge Learned Hand in his famous *Alcoa* decision.[73] Indeed, it is a common assumption in antitrust law that many monopolists do not show high economic profits on their balance sheets, as *Alcoa* did not, but rather internally dissipate monopoly rents through complacency.[74] In such cases, the shareholder regressivity effect from product market monopoly would shrink or vanish altogether.

Further evidence against the claim that shareholders are regressively grabbing a large share of monopoly rents comes from another progressive critique of antitrust law—that large corporate mergers do *not* in fact produce positive returns to the shareholders of the acquiring firm, but rather negative ones.[75]

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72 J. R. Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 ECONOMETRICA 1, 8 (1935) ("[Monopolists] are likely to exploit their advantage much more by not bothering to get very near the position of maximum profit, than by straining themselves to get very close to it. The best of all monopoly profits is a quiet life.").

73 United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) ("Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.").

74 *See* United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 347 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) ("The very absence of strong competitors implies that there cannot be an objective measuring rod of the monopolist's excellence, and the test of its performance must, therefore, be largely theoretical. What appears to the outsider to be a sensible, prudent, nay even a progressive policy of the monopolist, may in fact reflect a lower scale of adventurousness and less intelligent risk-taking than would be the case if the enterprise were forced to respond to a stronger industrial challenge. Some truth lurks in the cynical remark that not high profits but a quiet life is the chief reward of monopoly power."); Donald F. Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 310 (1956) ("Monopoly gives not only the power to control price and exclude competitors but also the choice of dissipating that power through indolence and 'the quiet life.'").

75 *See, e.g.*, Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 235, 256 (Robert Pitofsky ed., 2008) (arguing that antitrust law has been too sanguine about the efficiencies attributable to corporate mergers and that corporate mergers often do not benefit shareholders of the acquiring company); Spencer Weber Waller, *Corporate Governance and Competition Policy*, 18 GEO. MASON L. REV. 833, 874 (2011) ("[C]ertain categories of mergers destroy shareholder value and do little, if anything, to create meaningful efficiencies or to enhance market competition.").

These claims are generally based on economic studies showing that the shareholders of acquiring firms experience negative returns in various windows after the relevant corporate acquisitions.[76] In light of such studies, progressives claim that corporate mergers are often not genuine efforts to create efficiencies and hence build wealth for the benefit of shareholders, but rather "kingdom building" exercises by narcissistic CEOs.[77] If that claim is correct, then shareholders do not reap a large share of the monopoly profits attributable to anticompetitive mergers.[78]

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76 *See* CHRISTIAN FUNKE, *Information Signaling and Competitive Effects of M&A: Long-Term Performance of Rival Companies*, *in* SELECTED ESSAYS IN EMPIRICAL ASSET PRICING 9, 36–37 (2008) (ebook); DAVID J. RAVENSCRAFT & F. M. SCHERER, MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY 207–10 (1987); Anup Agrawal et al., *The Post-Merger Performance of Acquiring Firms: A Re-examination of an Anomaly*, 47 J. FIN. 1605, 1610–11 (1992); Gregor Andrade et al., *New Evidence and Perspectives on Mergers*, 15 J. ECON. PERSP. 103, 110–11 (2001) (summarizing several studies between 1973 and 1998 and finding abnormal negative returns to acquiring shareholders of 3.8%); Marc Goergen & Luc Renneboog, *Shareholder Wealth Effects of European Domestic and Cross-Border Takeover Bids*, 10 EUR. FIN. MGMT. 9, 23 tbl.6 (2004) (focusing on takeovers in the U.K. between 1993 and 2000 and finding negative abnormal returns to acquiring shareholders of 1.65%); Tim Loughran & Anand M. Vijh, *Do Long-Term Shareholders Benefit from Corporate Acquisitions?*, 52 J. FIN. 1765, 1774–75 (1997); Sara B. Moeller et al., *Wealth Destruction on a Massive Scale? A Study of Acquiring-Firm Returns in the Recent Merger Wave*, 60 J. FIN. 757, 761 (2005); P. Raghavendra Rau & Theo Vermaelen, *Glamour, Value and the Post-acquisition Performance of Acquiring Firms*, 49 J. FIN. ECON. 223, 235–36 (1998); Ulrike Malmendier et al., *Winning by Losing: Evidence on the Long-Run Effects of Mergers* 19 (Nat'l Bureau of Econ. Research, Working Paper No. 18024, 2012). *But see* Henk Peer, *The Netherlands, 1962–1973*, *in* THE DETERMINANTS AND EFFECTS OF MERGERS 163, 187 (Dennis C. Mueller ed., 1980) (concluding that the horizontal acquiring firms gradually perform better than the industry average with respect to return on stock and "the conglomerate acquiring firms do better than the predicted performance only in the period immediately after the merger"); Shantanu Dutta & Vijay Jog, *The Long-Term Performance of Acquiring Firms: A Re-examination of an Anomaly*, 33, J. BANKING & FIN. 1400, 1406 (2009) ("[B]y using both an event-time approach and a calendar-time approach, we do not find any strong support for long-term underperformance for acquiring firms in the post-acquisition period."); Sandra Betton et al., *Corporate Takeovers* 74 (Tuck Sch. of Bus., Working Paper No. 2008-47, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1131033 [http://perma.cc/R62E-LLGH] ("[W]hen using the rolling portfolio technique, there is no evidence of abnormal stock returns following mergers.").

77 *See, e.g.*, Baker & Shapiro, *supra* note 75, at 256 ("This evidence supports the view that many mergers are motivated by managerial hubris, perhaps exacerbated by distorted managerial compensation schemes, and that managers often underestimate integration problems.").

78 One might argue that shareholders do not gain from nonanticompetitive corporate mergers, since there are not often efficiencies to be exploited, but that they do gain from monopolistic mergers because there are monopoly rents to be exploited. But such a claim could not be squared with the claim that lax antitrust enforcement in the last several decades is a significant cause of the growing wealth inequality. *See supra* text accompanying notes 56–58. If the set of all

Turning now to top corporate managers, the question is whether managers are in fact able to extract significant monopoly profits in terms of executive compensation. There is no clear evidence that they are. Empirical studies find that the relationship between increases in product market competition and managerial compensation is ambiguous.[79] For instance, a study by Patricia Funk & Gabrielle Wanzenreid found a decrease in executive compensation with an increase in competition in industries such as paper, wood products, petroleum, chemicals, plastics, and minerals but an increase in executive compensation with increases in competition in the metal product manufacturing, machinery, computers and electronics, electrical equipment, transportation equipment, furniture, and general manufacturing industries.[80] No general effect on increasing compensation was observed.

Other literature suggests that, if anything, increases in product market competition might *increase* managerial compensation. A leading critique of corporate compensation claims that prevailing corporate compensation structures inflate managerial compensation by disproportionately rewarding managers based on general market profitability rather than individual corporate performance.[81] Other literature shows that the use of relative performance evaluations, which compensate managers based on the performance of their own company compared to the performance of other firms in the same industry, decreases as the competitiveness of the industry increases.[82] The

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consummated mergers in the last several decades includes both monopolistic ones contributing significantly to wealth inequality because rich shareholders realized significant gains and nonmonopolistic ones, then one would expect to see positive returns to shareholders on average.

79 Patricia Funk & Gabrielle Wanzenried, *Product Market Competition and Executive Compensation: An Empirical Investigation*, at 4 (Universität Bern Diskussionsschriften, Working Paper No. 03-09, 2003), http://www.vwl.unibe.ch/papers/dp/dp0309.pdf [http://perma.cc/8SSM-439W] ("[O]ur results are consistent with the literature which posits an ambiguous relationship between competition and executive compensation . . . ."); *see also* Vicente Cuñat & Maria Guadalupe, *Executive Compensation and Product Market Competition* 19 (Ctr. for Econ. Policy Research, Working Paper No. 4425, 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=562446 [http://perma.cc/8HGC-MYRZ] (finding that a higher level of product market competition increases performance pay sensitivity of executive compensation schemes).

80 Funk & Wanzenried, *supra* note 79, at 3–4, 42 tbls 32 & 33.

81 *See* Lucian Bebchuk & Jesse Fried, PAY WITHOUT PERFORMANCE 138–39 (2004) (showing that corporate executive compensation is 70% driven by general market profitability and 30% driven by firm-specific performance).

82 *See* Rajesh K. Aggarwal & Andrew A. Samwick, *Executive Compensation, Strategic Competition, and Relative Performance Evaluation: Theory and Evidence*, 54 J. FIN. 1999, 2000 (1999).

intuition behind these empirical results is that compensating senior managers based on the negative performance of peer firms induces those managers to take actions that dilute the profitability of the industry.[83] Hence, from a principal-agent perspective, a more competitive market structure may increase the principal's incentive to reward managers in ways that may lead to more inflated pay structures. Antitrust enforcement that increased market competitiveness could produce the unintended byproduct of increased executive compensation.

In sum, the argument that senior managers are the primary beneficiaries of anticompetitive market structures is weak, at best. And while shareholders may capture *some* of the gains from monopoly pricing, any such regressivity effect is weaker than assumed in the monopoly regressivity claim.

b. *The Labor Monopoly Wage Premium and Spillovers Outside the Firm*

Contrary to the assumption that shareholders and senior managers are capturing virtually all of the monopoly rents obtained by corporations, the evidence suggests that a significant amount of rent sharing occurs within the firm. As Mark Roe has noted, "[e]mployees of monopoly firms can, and do, ally with capital to split the rents, to facilitate constricting production and raising price, and to seek barriers to competitive entry."[84] Empirical evidence shows that nonunion employees see higher wages as the market concentration of their industry increases and also that higher seller concentration leads to stronger unionization, which in turn leads to higher wages.[85]

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[83] *See id.* ("Although the relative performance evaluation contract reduces the executive's exposure to risk, it provides incentives to take actions that lower industry returns.").

[84] Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2068 (2001).

[85] *See* SCHERER & ROSS, *supra* note 23, at 682 (surveying literature); John S. Heywood, *Labor Quality and the Concentration-Earnings Hypothesis*, 68 REV. ECON. & STAT. 342, 345 (1986) (analyzing panel data to confirm relationship between increase in product market concentration and wages); Thomas Karier, *Unions and Monopoly Profits*, 67 REV. ECON. & STAT. 34, 41 (1985) (reporting that unionization leads to a reduction in a firm's monopoly profits in concentrated industries, since unionized workers capture a share of the monopoly rents generated by the corporation); *see also* Walter Y. Oi & Todd L. Idson, *Firm Size and Wages*, *in* 3B HANDBOOK OF LABOR ECONOMICS (Orley Ashenfelter & David Card eds., 1999) ("A worker who holds a job in a large firm is paid a higher wage . . . ."); William E. Even & David A. Macpherson, *Is Bigger Still Better? The Decline of the Wage Premium at Large Firms* (Inst. for the Study of Labor, Working Paper No. 4082, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1369828 [http://perma.cc/5L6M-UMSJ] ("[A] summary of empirical studies shows that the

The monopoly labor wage premium has been observed across a variety of industries.[86] For present purposes, the monopoly labor wage premium is important because it suggests the ability of blue-collar workers to extract significant monopoly rents from their employers, thus counterbalancing any regressive effects from shareholder or senior management rent extraction.[87]

Consistent with the evidence that increases in market power yield higher wages for blue-collar employees, there is evidence of labor union support for large corporate mergers that raise serious competitive issues. For example, the Communication Workers of America came out in favor of the AT&T and T-Mobile merger that the Federal Communications Commission and the Justice Department both opposed, and that AT&T and Deutsche Telekom, T-Mobile's parent corporation, ultimately withdrew from.[88] An editorial published in the *Huffington Post* explained that progressives should support the proposed merger "[b]ecause AT&T is the *ONLY* unionized wireless company in the country and the merger would ensure that 20,000+ T-Mobile workers would have the chance to join the 43,000 currently unionized AT&T Mobility employees with de-

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largest firms (e.g., firms with 500 or more employees) pay wages that are 30-50 percent higher than the smallest firms (e.g., firms with less than 25 employees).").

86 *See* George J. Borjas & Valerie A. Ramey, *Foreign Competition, Market Power, and Wage Inequality*, 110 Q.J. ECON. 1075, 1078 (1995); David Card, *The Impact of Deregulation on the Employment and Wages of Airline Mechanics*, 39 INDUS. & LAB. REL. REV. 527, 537 (1986); Maria Guadalupe, *Product Market Competition, Returns to Skill, and Wage Inequality*, 25 J. LAB. ECON. 439, 442 (2007) (surveying literature); Ana L. Revegna, *Exporting Jobs? The Impact of Import Competition on Employment and Wages in U.S. Manufacturing*, 107 Q.J. ECON. 255, 277 (1992).

87 Baker and Salop dismiss the market-power wage effect, asserting that it has "limited practical importance today with the decline of private sector unionization." Baker & Salop, *supra* note 7, at 12. However, even if only 6.6% of private sector employees are unionized, unionization rates are considerably higher in certain sectors that have been of particular antitrust concern, such as transportation and warehousing (18.9%) and telecommunications (13.3%). Press Release, Bureau of Labor Statistics, Union Member Summary 1–2 (Jan. 28, 2016), http://www.bls.gov/news.release/pdf/union2.pdf [http://perma.cc/ZQX9-BPYC]. Further, increasing concentration leads to increasing unionization, and the monopoly labor wage premium is observed in nonunionized markets. *See* Guadalupe, *supra* note 86, at 469; Karier, *supra* note 85, at 37.

88 *See* Order at 1, *In re* AT&T Inc. & Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses & Authorizations, WT Docket No. 11-65 (F.C.C. 2011); Comments of Commc'ns Workers of Am. at 1, *In re* AT&T Inc. & Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses & Authorizations, WT Docket No. 11-65 (F.C.C. 2011); Tom Schoenberg, *T-Mobile Antitrust Challenge Gives AT&T Little Recourse*, BLOOMBERG BUS. (Sept. 1, 2011, 9:55 AM), http://www.bloomberg.com/news/articles/2011-08-31/u-s-files-antitrust-complaint-to-block-proposed-at-t-t-mobile-merger [http://perma.cc/TZF9-W97U].

cent wages and legal protections on the job."[89] Similarly, the three airline employee unions supported American Airlines' questionable merger with US Airways, believing that employees would fare better in the combined company.[90]

A related point concerns the differentiating effects among different classes of workers from increases in product market competition. Such competition may increase wage inequality by shifting demand in favor of skilled labor at the expense of unskilled labor, with the effect that a wage gap grows between skilled and unskilled labor.[91] Such instances of income stratification have ambiguous effects on the overall distribution of wealth but would likely be regressive on net since they would shift down the average salaries of workers at the lowest end of the income distribution.

The progressive effects of market power–enhancing mergers may go beyond the financially quantifiable and spill outside the boundaries of the firm. Civil rights organizations have supported controversial mergers, arguing that the combined firm would cater better to the needs of minorities. For example, the Reverend Al Sharpton played a leading role in supporting the Comcast and NBC Universal merger, arguing that the deal would enhance racial diversity in broadcasting.[92] The NAACP supported the AT&T and T-Mobile merger, arguing that AT&T had been a progressive corporate citizen that would bring a better culture to T-Mobile's employment conditions and con-

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[89] Nathan Newman, *Pro-Labor Progressives Should Support the AT&T - T-Mobile Merger*, HUFFINGTON POST: THE BLOG (Aug. 23, 2011, 5:12 AM), http://www.huffingtonpost.com/nathan-newman/prolabor-progressives-sho_b_883321.html [http:// perma.cc/RD37-BK35].

[90] *See* Mike Spector & Susan Carey, *American Airlines Unions Support US Airways Merger*, WALL STREET J. (Apr. 19, 2012, 7:59 PM), http://online.wsj.com/news/articles/SB10001424052702303425504577354493373319140 [http://perma.cc/QP8K-D43F].

[91] *See* Ramon Marimon & Vincenzo Quadrini, *Competition, Human Capital and Income Inequality with Limited Commitment*, 146 J. ECON. THEORY 976, 1001–02 (2008); Maria Guadalupe, Does Product Market Competition Increase Wage Inequality? 28 (Apr. 23, 2003) (unpublished manuscript), http://www.iza.org/en/webcontent/events/transatlantic/papers_2003/guadalupe.pdf [http://perma.cc/PB8Q-796A].

[92] Sharpton was later criticized for entering into a lucrative contract with a subsidiary of the merged company, MSNBC, in what some commentators described as a reward for his support for the deal. Wayne Barrett, *Al Sharpton's Radio Power Play*, DAILY BEAST (July 28, 2011, 11:20 PM), http://www.thedailybeast.com/articles/2011/07/28/al-sharpton-comcast-nbc-merger-another-new-conflict-of-interest.html [http://perma.cc/778N-4EVX].

tracting practices.[93] It also supported the Sirius and XM merger, which resulted in a monopoly in satellite radio.[94] Other civil rights organizations have similarly weighed in favor of mergers ultimately challenged on antitrust grounds.[95]

At a minimum, the monopoly labor wage premium and evidence of union and civil rights organization support for competitively controversial corporate mergers should call into question the progressive argument that stronger merger enforcement would advance progressive wealth redistribution. Many interests within and without the firm have an opportunity to extract monopoly rents or otherwise benefit from business reorganizations that contribute to the creation of market power.

c. *Noncorporate Subjects of Antitrust Law*

The progressive argument for enhanced antitrust enforcement on wealth inequality grounds assumes that large corporate actors are the principal subjects of antitrust law and enforcement. However, apart from a portion of section 7 of the Clayton Act, which applies solely to the acquisition of securities,[96] the prohibition of the antitrust laws is not limited to corporate entities but applies generally. The antitrust laws apply to any persons who engage in anticompetitive behavior,

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93 *See* Hilary Shelton, NAACP, Letter to the Editor, *AT&T Merger with T-Mobile: The N.A.A.C.P's View*, N.Y. TIMES (July 14, 2011), http://www.nytimes.com/2011/07/15/opinion/l15naacp.html?_r=0 [http://perma.cc/CF4D-PHU6].

94 *See* Charles LaRocca, *NAACP Supports Satellite Radio Merger*, SIRIUS BUZZ (June 30, 2007, 2:54 PM), http://siriusbuzz.com/naacp-supports-satellite-radio-merger.php [http://perma.cc/3MGX-HFFH].

95 In one of the strangest merger stories in recent years, the Gay & Lesbian Alliance Against Defamation (GLAAD), a leading LGBT organization, initially supported the AT&T/T-Mobile merger, arguing that "faster wireless" was somehow connected to "social justice." Michelangelo Signorile, *How Gay Media Helped Sink the AT&T/T-Mobile Merger*, HUFFINGTON POST QUEER VOICES: THE BLOG (Feb. 19, 2012, 5:12 AM), http://www.huffingtonpost.com/michelangelo-signorile/how-gay-media-helped-sink_b_1160449.html [http://perma.cc/G3G8-KBCN] (quoting a letter from Jarrett Barrios, President, GLAAD, & Justin Nelson, President & Co-founder, Nat'l Gay & Lesbian Chamber of Commerce, to Julius Genachowski, Chairman, Fed. Commc'n Comm'n (May 31, 2011), http://apps.fcc.gov/ecfs/document/view?id=7021682707). However, after the emergence of allegations of favor trading on the GLAAD board, the group withdrew its support. *See id.*

96 *See* 15 U.S.C. § 18 (2012) ("No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . ."). The Celler-Kefauver Act of 1950 closed the asset loophole in Section 7 and made the statute applicable to asset acquisitions as well. Pub. L. No. 81-899, 64 Stat. 1125, 1126 (1950) ("[A]nd no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets . . . ."); *see* PHILLIP E. AREEDA ET AL., 4 ANTITRUST LAW ¶¶ 903–04 (1998).

whether large corporations or hot dog vendors on opposite street corners.[97] This point is not merely theoretical. The antitrust laws extensively regulate the market behavior of noncorporate actors. It bears recalling that out of the first thirteen successful antitrust cases, only one involved a combination of capitalists, with the majority involving labor combinations.[98] Since that time, the creation of statutory and nonstatutory labor exemptions from the antitrust laws has mitigated—if not entirely stopped—the direct use of antitrust law against labor organizations.[99] However, a wide swath of antitrust enforcement continues to be focused on noncorporate actors, with confounding effects for claims about the regressivity of market power exercises.

Many of the producers whose commercial arrangements antitrust authorities have challenged in recent decades are not large corporations but professionals such as doctors, dentists, engineers, lawyers, real estate brokers, stock brokers, and small business owners involved in trade associations.[100] While in some cases members of the petty bourgeoisie and professional classes may be wealthier on average than their clients, thus implying regressive effects from antitrust violations, in many cases the effects of the antitrust violations are likely progressive, since the regulated classes would otherwise extract income from clients up the income distribution from themselves. As with most of these questions, the effects on income distribution are simply too complex to ascertain economy-wide.

In the past several years, a large portion of the Federal Trade Commission's (FTC) docket has centered on anticompetitive rules and practices by trade associations organizing and regulating middle class professions. Take, for instance, the FTC's 2014 enforcement action against the Music Teachers

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97 *See* Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 43–46 (2008) [hereinafter Crane, *Antitrust Antifederalism*] (explaining the reach of federal antitrust laws to natural persons); Daniel A. Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal* 1 (forthcoming) (explaining the rejection of proposals during the Progressive Era and New Deal to focus antitrust prohibitions specifically on corporations).

98 *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW: 1836–1937, at 229 (1991).

99 *See* Milton Handler & William C. Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 481 (1981).

100 *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1118–30 (2014).

National Association based on an ethical rule prohibiting music teachers from soliciting clients from rival teachers.[101] According to the Bureau of Labor Statistics, music, art, and drama teachers average a squarely middle-class income of $66,260.[102] In recent years, the FTC has also brought an enforcement action against property managers,[103] with an average annual income of $65,880,[104] and legal support professionals,[105] with an average annual income of $52,830.[106] Professional lighting and sign managers[107] and ice-skating coaches[108] have also felt the FTC's wrath over anticompetitive agreements in the last two years.

The Justice Department has brought similar suits. For example, in 2005 it successfully sued to enjoin the National Association of Realtors from preventing its members from using password-protected Internet sites that enabled the brokers' customers to search for and receive real estate "multiple listing services" listings over the Internet.[109] If the Justice Department's factual allegations were correct, the Association's restriction inhibited competition among brokers that would have "place[d] downward pressure on brokers' commission rates."[110] In other words, the restriction facilitated a wealth transfer from home sellers to realtors. The median income of home sellers,

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101 *In re* Music Teachers Nat'l Ass'n, No. C-4448, 2014 WL 1396512, at *1–3 (F.T.C. Apr. 3, 2014).

102 *Occupational Employment and Wages, May 2014: Art, Drama, & Music Teachers, Postsecondary*, BUREAU OF LABOR STATISTICS (Mar. 25, 2015), http://www.bls.gov/oes/current/oes251121.htm [http://perma.cc/2XTV-ZD5E].

103 *See In re* Nat'l Ass'n of Residential Prop. Managers, Inc., No. C-4490, 2014 WL 5298210, at *1–3 (F.T.C. Oct. 1, 2014).

104 *See Occupational Employment and Wages, May 2014: Property, Real Estate, and Community Association Managers*, BUREAU OF LABOR STATISTICS (Mar. 25, 2015), http://www.bls.gov/oes/current/oes119141.htm [http://perma.cc/4WEE-FWFQ].

105 *See In re* Cal. Ass'n of Legal Support Prof'ls, No. C-4447, 2014 WL 1396499, at *1–3 (F.T.C. Apr. 3, 2014).

106 *See May 2014 National Occupational Employment and Wage Estimates United States*, BUREAU OF LABOR STATISTICS (Mar. 25, 2015), http://www.bls.gov/oes/current/oes_nat.htm#23-0000 [http://perma.cc/53NZ-RK5W].

107 *See In re* Prof'l Lighting & Sign Mgmt. Cos. of Am., No. C-4507, 2015 WL 1088940, at *1–3 (F.T.C. Feb. 5, 2015).

108 *See In re* Prof'l Skaters Ass'n, No. C-4509, 2015 WL 1088939, at *1–5 (F.T.C. Feb. 13, 2015).

109 Amended Complaint at ¶¶ 2, 5–6, United States v. Nat'l Ass'n of Realtors, No. 05 C 5140 (N.D. Ill. Oct. 4, 2005), http://www.justice.gov/atr/case-document/amended-complaint-6 [http://perma.cc/ZH5U-WNL6]. The suit ended in a consent decree requiring the realtors to abandon the allegedly anticompetitive restrictions. Final Judgment at 6–9, *Nat'l Ass'n of Realtors*, No. 05 C 5140 (N.D. Ill. Nov. 18, 2008), http://www.justice.gov/atr/case-document/final-judgment-142 [http://perma.cc/Z88G-KLXL].

110 Amended Complaint, *supra* note 109, at ¶ 3.

who typically bear the incidence of real estate commissions, is approximately $97,500[111] and that of realtors is $43,430.[112] Thus, on average, higher commissions would allow realtors to extract income from clients with more than double their income. The effect of the antitrust enforcement decision was to redistribute that income back up to the sellers.

The effects of antitrust enforcement on noncorporate, middle-class actors cannot be dismissed as insignificant. In the *Realtors* case, the Justice Department alleged that virtual office website brokers, whose activities the challenged rule tended to suppress, had offered discounted commission rates that had saved their customers tens of millions of dollars in commissions.[113] Given the sheer volume of existing home sales in the United States—$1.2 trillion per year[114]—even a comparatively small change in broker commission rates due to increased competition would have very significant economic effects. For example, a reduction in the average broker commission from 5.5% to 4.5%[115] would redistribute $12 billion annually from brokers to their clients with strongly regressive effects.

To be clear, my point here is not to criticize the agencies for bringing antitrust cases with regressive wealth redistribution effects. There are many sound reasons for agencies to bring these cases. Rather, the point is that claims that the chief beneficiaries of monopoly power are large corporate shareholders and managers is altogether too facile. The actual operation of the antitrust laws, both in terms of the cases that are publicly brought and their often invisible deterring effects, is considerably broader.

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111 NAT'L ASS'N OF REALTORS, HOME BUYER AND SELLER GENERATIONAL TRENDS 77 Exhibit 6-2 (Mar. 2014), http://www.realtor.org/sites/default/files/reports/2014/2014-home-buyer-and-seller-generational-trends-report-full.pdf [http://perma.cc/5459-M6A9].

112 *Occupational Outlook Handbook: Real Estate Brokers and Sales Agents*, BUREAU OF LABOR STATISTICS (Dec. 17, 2015), http://www.bls.gov/ooh/sales/real-estate-brokers-and-sales-agents.htm [http://perma.cc/L4JF-2CSF].

113 *See* Competitive Impact Statement at 7, *Nat'l Ass'n of Realtors*, No. 05 C 5140, http://www.justice.gov/atr/case-document/competitive-impact-statement-160 [http://perma.cc/BC89-RRX2].

114 LAWRENCE YUN ET AL., NAT'L ASS'N OF REALTORS, 2014 PROFILE OF INTERNATIONAL HOME BUYING ACTIVITY: PURCHASES OF U.S. REAL ESTATE BY INTERNATIONAL CLIENTS FOR THE TWELVE MONTH PERIOD ENDING MARCH 2014, at 3 (June 2014) (reporting a U.S. existing home sale market of $1.2 trillion during the period of April 2013 through March 2014).

115 *Home Prices and Commissions Over Time*, U.S. DEP'T OF JUSTICE (July 2, 2015), http://www.justice.gov/atr/home-prices-and-commissions-over-time [http:// perma.cc/5AVJ-8PKR] (reporting steady average commission of 5.5% to 5.0% over the last decade and observing that if competition among brokers were effective, commission rates should have declined as home values increased).

2. *Who Pays Monopoly Rents?*

Contemporary antitrust enforcement is justified as protecting the welfare of "consumers."[116] In antitrust parlance, the consumer has become a ubiquitous shorthand identification. Any purchaser is effectively a "consumer" in antitrust discourse. Thus, antitrust institutions fret about losses of consumer welfare when antitrust violations lead to price increases, whether or not there is evidence that consumers in the proper sense end up paying higher prices.[117] For present purposes, the distinction between "consumer welfare" as a slogan and actual regressive overcharges to end consumers is important because anticompetitive conditions in many markets have little effect on actual consumers in the sense of the consumer/producer dichotomy assumed by those who argue that antitrust violations are regressive. And, even when genuine consumers—in the sense of household customers—are the purchaser, there is no general case that exercises of market power tend to be regressive.

a. *Taxpayers and Third-Party Payers*

The first difficulty in equating overcharges to "consumers" with regressive excises by wealthy corporations is that the purchasers to whom monopolists sell are often not household customers but large intermediary organizations, which may distribute the incidence of monopoly charges progressively. This is particularly true of government purchasers and the health care insurance system, which amount to large swaths of the economy.

In the United States, federal government spending accounted for $3.5 trillion or nearly one-fourth of GDP in 2013.[118] State and local governments accounted for another $1.58 and $1.77 trillion respectively.[119] Many of these expend-

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116 Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting BORK, *supra* note 58, at 66)).

117 *See, e.g.*, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 492–94 (1968) (allowing a treble damages suit by a direct corporate purchaser of goods without regard to whether overcharges were passed along to household consumers).

118 ROMINA BOCCIA ET AL., THE HERITAGE FOUND., FEDERAL SPENDING BY THE NUMBERS, 2013: GOVERNMENT SPENDING TRENDS IN GRAPHICS, TABLES, AND KEY POINTS 1 (Aug. 20, 2013), http://www.heritage.org/research/reports/2013/08/federal-spending-by-the-numbers-2013) [http://perma.cc/2MFM-D94N].

119 Christopher Chantrill, *What Is the Total US Government Spending?*, U.S. GOV. SPENDING, http://www.usgovernmentspending.com/ [http://perma.cc/4FAX-ZJTA].

itures go to buying goods and services in markets. The World Bank calculates that general government final consumption (all government expenditures for purchases of goods and services) in the United States was 15% of GDP in 2013.[120] In large slices of the economy (i.e., defense, health care, building materials and contracting, and education) the government is the purchaser and payer.[121]

Of course, taxpayers are the ultimate shareholders of the government and end up paying its bills. Putting aside generational issues created by deficit spending and debt (which raise their own questions of equality), monopoly overcharges in public procurement are passed through to taxpayers in accordance with the distributional baseline of the tax code. Thus, as to large segments of the economy, the regressivity or progressivity of antitrust violations simply mirrors the regressivity or progressivity of the tax code (at least on the incidence of the overcharge side of the ledger).[122] To the extent that the tax code is progressive, which the U.S. tax system generally is,[123] antitrust violations involving public procurement (imagine, for example, anticompetitive mergers in the defense industry or bid rigging for public works projects) could have progressive rather than regressive effects.[124]

Health care, which antitrust law has had a great deal to say about in recent years,[125] is another major segment of the econ-

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120 *General Government Final Consumption Expenditure (% of GDP)*, WORLD BANK, http://data.worldbank.org/indicator/NE.CON.govT.ZS [https://perma.cc/Q5DC-JX77].

121 *See* Chantrill, *supra* note 119.

122 The distribution of the gains from monopoly pricing are considered in Part I.C.1 above.

123 *See* KEVIN PERESE, CONG. BUDGET OFFICE, THE DISTRIBUTION OF HOUSEHOLD INCOME AND FEDERAL TAXES, 2011, at 3 fig.1 (Nov. 2014), http://www.cbo.gov/sites/default/files/cbofiles/attachments/49440-Distribution-of-Income-and-Taxes.pdf [http://perma.cc/P47Y-RZDH] (showing that top quintile of income distribution pays approximately 70% of federal taxes); Jeffrey Rohaly, Tax Policy Center, *Tax Policy Briefing Book: Distribution: Are Federal Taxes Progressive*, TAX POLICY CTR. (June 19, 2008), http://www.taxpolicycenter.org/briefing-book/background/distribution/progressive-taxes.cfm [http://perma.cc/5M5D-SHPY] ("Taken as a whole, the federal tax system is progressive: on average, households with higher incomes pay a larger share of their income in federal tax than do those with lower incomes.").

124 For an example of how the Reagan administration vigorously enforced the antitrust laws against public contracting cartels, see Kovacic, *supra* note 31, at 417, arguably as part of a larger ideological push to lower public burdens on taxpayers.

125 *See, e.g.*, *Competition in the Health Care Marketplace*, FTC, https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care [http://perma.cc/CH3C-KJL3] (summarizing a variety of activities the FTC undertakes to promote competition in health care).

omy in which the consumer is often not the direct or even necessarily the ultimate payer. Rather, health care spending is largely mediated through a complex, regulated insurance system with significant redistributive effects. Health care spending in the United States accounted for 17.1% of the economy in 2013.[126] Of this, public spending (Medicare and Medicaid) amounted to around one trillion dollars in 2014, which is already included in the previously discussed governmental expenditure figure.[127] Private health insurance amounted to $991 billion and out-of-pocket expenditures amounted to $329.8 billion.[128] Overcharges to private health insurers result in premium increases that operate very much like a tax, since they are borne by third-party payers regardless of present consumption. Monopoly overcharges mirror the progressivity or regressivity of the underlying system of health insurance premiums and related tax credits. The Affordable Care Act is designed to have highly progressive wealth redistribution effects.[129] This implies that exercises of market power that increase costs to health insurers (for example, reverse payment settlements between pharmaceutical companies)[130] will be passed on to consumers progressively, with the wealthy bearing a high share of the costs.

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126 *Health Expenditure, Total (% of GDP)*, WORLD BANK, http://data.worldbank.org/indicator/SH.XPD.TOTL.ZS [https://perma.cc/JP8Q-TZES].

127 *National Health Expenditures 2014 Highlights*, CTRS. FOR MEDICARE & MEDICAID SERVS., http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/highlights.pdf [https://perma.cc/22YG-BBFX].

128 *Id.*

129 *See* Henry J. Aaron & Gary Burtless, *Potential Effects of the Affordable Care Act on Income Inequality*, BROOKINGS INSTITUTION (Jan. 27, 2014), http://www.brookings.edu/research/papers/2014/01/potential-effects-affordable-care-act-income-inequality-aaron-burtless [http://perma.cc/R9FT-4AHU] (reporting that the Affordable Care Act will result in Americans in the bottom 10% of the income distribution seeing an average jump of 7.2% in income, those in the second decile seeing their income jump by 5.3%, and those in the top 80% seeing a drop in income); Jonathan Cohn, *Republicans Are Right: Obamacare is Redistribution*, NEW REPUBLIC (Dec. 9, 2013), http://www.newrepublic.com/article/115875/obamacare-redistribution-not-how-republicans-say [http://perma.cc/9QBM-TU7C] (reporting that the "majority of funding in the law is money paid by—or given up by—either the wealthy or parts of the health care industry"); James Oliphant, *Love It or Hate It, Obamacare Redistributes Americans' Wealth*, NAT'L J. (Nov. 20, 2013), http://www.nationaljournal.com/health-care/love-it-or-hate-it-obamacare-redistributes-americans-wealth-20131121 [http://perma.cc/3VEA-6KVB] (discussing redistributive effects of the Affordable Care Act).

130 *See generally* Rebecca S. Eisenberg & Daniel A. Crane, *Patent Punting: How FDA and Antitrust Courts Undermine the Hatch-Waxman Act to Avoid Dealing with Patents*, 21 MICH. TELECOMM. & TECH. L. REV. 197, 229–37 (2015) (explaining the concept of "reverse payment" and summarizing the response of antitrust courts).

Together, general government final consumption and health care constitute approximately a quarter of the entire economy. To the extent that those systems act as progressive wealth redistribution vehicles, exercises of market power in those segments reduce the wealth of the wealthy proportionately more than the wealth of the poor and may thus reduce wealth inequality.

b. *Intercorporate Effects*

A second significant factor determining whether household purchasers bear the brunt of monopoly rents concerns the space between the household purchaser and the antitrust violator in the production and distribution chain. Many antitrust violations occur in input markets considerably upstream from end consumers. In such cases, before affecting a consumer's pocketbook, an overcharge would need to be passed through a chain of other companies—intermediate manufacturers, assemblers, wholesalers, retailers, and so forth. Even if household purchasers ended up absorbing a significant share of the overcharges, the net effect of the overcharge could be to reduce inequality, depending on the relative wealth of the upstream business interests.

Proponents of the thesis that exercises of market power tend to operate directly on household consumers seem to have in mind circumstances where large corporations violate the antitrust laws and then sell their products directly to consumers. However, that paradigm is not reflective of many of the most serious violations of antitrust law. For example, John Connor and Gustav Helmers's study of international cartels found that 62% of all affected sales were in industrial intermediate goods—which would not be purchased directly by consumers—and only 10% of affected sales were in goods manufactured for consumers.[131] In other words, the vast majority of collusive behavior by firms occurs in markets far upstream from household customers. The extent to which upstream overcharges are passed through to end consumers or are instead absorbed by upstream firms is a function of elasticities in the distribution chain and a sharply contested issue in

[131] John M. Connor & C. Gustav Helmers, *Statistics on Modern Private International Cartels, 1990–2005*, at 17 (Dep't of Agric. Econ., Purdue Univ., Working Paper No. 06-11, 2006), http://www.agecon.purdue.edu/working_papers/workingpaper.connor.11.10.06.pdf [http://perma.cc/59UP-SMA6].

private antitrust litigation and merger analysis.[132] Unless the pass-on rate is one (or greater, as is possible in some instances), some share of monopoly overcharges will not be borne by consumers but by other producers.

If the intermediary producer is wealthier than the upstream antitrust violator, the amount of overcharge absorbed by the intermediary could have progressive wealth effects. Even where the pass-through rate is relatively high and all producers are wealthier than all consumers, it is possible for a monopoly overcharge absorbed in part by an intermediate firm that is substantially wealthier (in terms of households benefited by changes in its wealth) than the upstream antitrust violator to result in a reduction in the inequality coefficient. This could occur if the households affected by changes in the wealth of the upstream firm were closer in wealth to the end consumers than to the households affected by changes in the wealth of the intermediary firm.

To illustrate, imagine a family-owned business representing households at the 60th percentile of the wealth distribution selling inputs to a large corporation representing households at the 90th percentile of the wealth distribution, which in turn passes on 70% of the overcharge to consumers representing household wealth at the 50th percentile and absorbs the remaining 30%. Suppose the upstream firm obtains market power through an antitrust violation and charges its corporate customer an inflated price. Every dollar of overcharge redirects 30 cents of income from the 90th percentile to the 60th percentile and 70 cents of income from the 50th percentile to the 60th percentile. If the magnitude of any transfer of wealth between two entities is calculated as the product of the difference in wealth between the two entities and the magnitude of the transfer, then the net effect of this antitrust violation would be progressive.[133]

Exercises of market power have attenuated ripple effects on the economy. In only a relatively small share of cases does an overcharge payment flow directly from a consumer to an antitrust violator without being distributed among various ex-

132 *See* Fei Deng et al., *Economic Analysis in Indirect Purchaser Class Actions*, 26 ANTITRUST 51, 52–53 (2011); Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 76–77 (2010).

133 In effect, this example involves a progressive transfer of 30 cents times .30 (the distance between the antitrust violator and the intermediate firm) and a regressive transfer of 70 cents times .10 (the distance between the antitrust violator and the household consumer). Since .9 > .7, the progressive effect is greater than the regressive effect and the net effect is progressive.

ploiting or exploited business interests. Differences in wealth between the positively and negatively affected business interests would need to be taken into account of before establishing the net wealth redistribution effects of the challenged conduct. Antitrust violations have significant intercorporate effects. Those effects significantly complicate any effort to make general pronouncements about the wealth redistribution consequences of antitrust violations or antitrust enforcement.

c. *Wealthy and Poor Consumers*

Notwithstanding the points emphasized in the previous two sections, it is clear that household consumers do end up bearing some of the brunt of antitrust violations. But it is a long leap from that recognition to the claim that antitrust violations are regressive. The relatively wealthy can be exploited through the exercise of market power at least as much as—and perhaps proportionately more than—the relatively poor.

Anticompetitive conduct is by no means limited to markets involving sales to primarily lower income individuals. One can readily identify examples of antitrust violations in industries producing goods or services sold primarily to the wealthy; for example, gem-quality diamonds,[134] stock brokerage services,[135] auctioning of high-end art,[136] and luxury watches.[137] Picking on just one market, anticompetitive actions have a storied history in the luxury automobile industry. Recently, federal prosecutors in New York recommended the indictment for price fixing of Mercedes-Benz dealers in New York, New Jersey, and Connecticut;[138] while Chinese competition officials mulled bringing price fixing charges against BMW and Audi.[139] Reaching back in automotive history, Rolls-Royce secretly ac-

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134 *See* Sullivan v. DB Invs., Inc., 667 F.3d 273, 286 (3d Cir. 2011).

135 *See* Friedman v. Salomon/Smith Barney, Inc., 313 F.3d 796, 797–98 (2d Cir. 2002).

136 *See* Kruman v. Christie's Int'l PLC, 284 F.3d 384, 390–91 (2d Cir. 2002).

137 *See* Nicoleta Tuominen & Simon Frankel, *Two Polish Distributors of Luxury Watches Fined for Unlawful Price Fixing*, COVINGTON & BURLING LLP: COVBRANDS (Feb. 19, 2014), http://www.covbrands.com/2014/02/19/two-polish-distributors-of-luxury-watches-fined-for-unlawful-price-fixing/ [http://perma.cc/Z69R-B45M].

138 *See* Eric Lichtblau & Stephen Labaton, *U.S. Will Not Pursue Price-Fixing Case Against Mercedes Dealers*, N.Y. TIMES (Dec. 25, 2003), http://www.nytimes.com/2003/12/25/business/us-will-not-pursue-price-fixing-case-against-mercedes-dealers.html [http://perma.cc/6ZQR-HL8W].

139 *See* Jeevan Vasagar, *Car Makers Face Possible China Probe over Price-Fixing Fears*, TELEGRAPH (Aug. 13, 2013, 4:41 PM), http://www.telegraph.co.uk/finance/china-business/10240624/Car-makers-face-possible-China-probe-over-price-fixing-fears.html [http://perma.cc/J59E-NVGZ].

quired Bentley during the Great Depression, largely to forestall competition from its closest rival.[140] And, to pick a famous monopolization case, one can ponder the wealth distribution effects in Aspen, Colorado—playground of the rich and famous—when the Aspen Skiing Company decided to jettison its cooperation with the rival mountain owned by Highlands.[141] In all of these cases—and many others—the modal customer for the relevant good or service was likely to be in the upper stratum of the income distribution.[142]

Looking economy-wide, the effects of increases in market power on the distribution of wealth are subtle. Consumers in the top quintile of household wealth spend four times as much as consumers in the bottom quintile.[143] So, if monopolists extracted equal proportions of wealth from every consumer dollar spent, the burden of monopoly pricing would fall four times as heavily on the wealthiest income stratum than on the least wealthy stratum. However, the effect of monopoly pricing could still be regressive in the sense of increasing the gap in relative wealth between the rich and the poor. Monopoly rent extraction operates essentially like sales taxes, which are known to have regressive properties,[144] because spending as a share of income decreases with increases in income (since the rich save a considerably greater percentage of their income than do the poor).[145] But monopoly pricing probably does not have the regressive characteristics of a sales tax.

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140 1 THE BEAULIEU ENCYCLOPEDIA OF THE AUTOMOBILE 151 (Nick Georgano ed., 2000).

141 *See* George L. Priest & Jonathan Lewinsohn, Aspen Skiing*: Product Differentiation and Thwarting Free Ridings as Monopolization*, *in* ANTITRUST STORIES 229, 236–42 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

142 Baker and Salop dismiss such cases, saying that they "expect [that these] situations are rare," Baker & Salop, *supra* note 7, at 17, but offer no empirical or theoretical basis for their assumption.

143 *See* U.S. BUREAU OF LABOR STATISTICS, CONSUMER EXPENDITURES IN 2013, at 9 tbl.1 (Feb. 2015), http://www.bls.gov/cex/csxann13.pdf [http://perma.cc/63LJ-4RCA] (reporting annual household expenditures of $22,393 for households in the bottom income quintile and $99,237 for households in the top quintile).

144 *See, e.g.*, Daniel R. Feenberg et al., *Distributional Effects of Adopting a National Retail Sales Tax*, 11 TAX POL'Y AND ECON. 49, 86 (1997) (concluding that the tax burden on high income households is generally lower under the retail sales tax than under the income tax because the former's structure is more progressive).

145 *See* Mark Aguiar & Mark Bils, *Has Consumption Inequality Mirrored Income Inequality?*, 105 AM. ECON. REV. 2725, 2736 (2015); Dirk Krueger & Fabrizio Perri, *Does Income Inequality Lead to Consumption Inequality? Evidence and Theory*, 73 REV. ECON. STUD. 163, 186 (2006); Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* 52 fig.9 (Nat'l Bureau of Econ. Research, Working Paper No. 20625, 2014)

First, the regressive effect of sales taxes arises because unspent wealth is not subject to the tax. In the case of monopoly power, however, there is no reason to exclude unspent wealth from the rent-extraction capacity of monopolists. Rents can be extracted from unspent wealth due to monopolistic conditions in the banking, brokerage, investment products, and financial services industries. Indeed, anticompetitive conditions in the banking and financial services industries are among the chief complaints of progressives today.[146] If the general level of monopolistic rent extraction on unspent wealth is equal to the level of monopolistic rent extraction on consumer spending, then the regressivity of the sales tax would vanish altogether for monopoly rent extraction.[147]

Second, the regressivity of the sales tax arises from the tax's flat rate, but monopolists do not extract equal proportions of wealth from rich and poor consumers for every dollar spent. To the contrary, economic theory holds that market power permits monopolists to price discriminate and do so primarily to the disadvantage of the wealthy. Acts that create market power may thus permit the selling firm to charge different prices to different classes of consumers based on their varying demand elasticities and to do so in progressive ways.

Price discrimination through the exercise of market power is a pervasive concern of modern antitrust policy.[148] For example, the Justice Department and FTC's 2010 Horizontal Merger Guidelines repeatedly stress the concern that market power acquired through mergers will facilitate price discrimina-

(reporting savings rate of around 35–40% for the top 1% of households and around 0% for the bottom 90% in the 2010–12 period).

146 *See* Friedman v. Salomon/Smith Barney, Inc., 313 F.3d 796, 797–98 (2d Cir. 2002) (reporting allegations concerning collusion in stock brokerage services); *Examining the Market Power and Impact of Proxy Advisory Firms: Hearing Before the Subcomm. on Capital Mkts. & Gov't Sponsored Enters. of the Comm. on Fin. Servs.*, 113th Cong. 10–11 (2013) (statement of Niels Holch, Executive Director, Shareholder Communications Coalition); STIGLITZ, PRICE OF INEQUALITY, *supra* note 3, at 46–47 (complaining of anticompetitive consolidation in banking industry).

147 It also does not necessarily follow that rent extraction through the financial system would be regressive because the gains would be disproportionately captured by large financial services corporations. As discussed in Part I.C.1, the gains from monopoly profits may be widely shared within, and outside, the corporation. For example, in a cartel of stockbrokers, the stockbroker beneficiaries, with a median annual income of $72,070, *Occupational Outlook Handbook: Securities, Commodities, and Financial Services Sales Agents*, BUREAU OF LABOR STATISTICS (Dec. 17, 2015), http://www.bls.gov/ooh/sales/securities-commodities-and-financial-services-sales-agents.htm [http://perma.cc/7AMP-3Y7P], might be well below their median client in the income distribution.

148 *See generally* 2B PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 517, at 151–53 (3d ed. 2007) (outlining the significance of price discrimination).

tion.[149] Whether or not price discrimination is economically efficient,[150] it usually has progressive wealth effects, since the wealthy are less price elastic than the poor for most goods and services.[151] As firms acquire market power through anticompetitive acts and begin to increase their prices, they often do so employing pricing schemes that extract significantly more monopolistic rents from the wealthy than from the poor. To the extent that antitrust enforcement creates more competitive markets and more competitive markets diminish price discrimination, the effect in many instances could be to decrease the prices paid by the rich while reducing less, keeping flat, or even decreasing the prices paid by the comparatively less wealthy.

3. *Magnitude and Computability of the Crosscutting Effects*

The analysis presented thus far shows that monopoly pricing has complex crosscutting effects, some progressive and some regressive, on the distribution of wealth. In some ways,

149 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 6–7 (2010), http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf [http://perma.cc/UR85-QZCN] (describing federal antitrust agencies' concerns about market power created by horizontal mergers leading to price discrimination).

150 *Compare* BORK, *supra* note 58, at 398 (suggesting that price discrimination is either neutral or positive for output), *with* Brief of Professor F.M. Scherer as Amicus Curiae in Support of Respondent at 17, *Ill. Tool Works*, 547 U.S. 28 (No. 04-1329), 2005 WL 2427642, at *17 (contending that price discrimination reduces output and decreases overall consumer welfare), *and* Brief of Professors Barry Nalebuff, Ian Ayres, & Lawrence Sullivan as Amici Curiae in Support of Respondent at 17–18, Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006) (No. 04-1329), 2005 WL 2427646, at *17–18 (arguing that while the "predominant explanation" for tying requirements is price discrimination via metering, such metering will usually lead to reductions in consumer welfare and is inefficient).

151 *See* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 139 (1988) ("Of course, raising monopoly profits at the expense of consumers may not be very desirable. On the other hand, the low-elasticity groups are often (but not always) the richer consumers."); William W. Fisher III, *When Should We Permit Differential Pricing of Information?*, 55 UCLA L. REV. 1, 25 (2007) ("[P]rice discrimination often, though not invariably, results in a progressive redistribution of wealth."); Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1733 (2008) ("While price discrimination necessarily shifts surplus away from consumers, it also enables poor consumers who would otherwise be unable to afford a product the opportunity to obtain it at a reduced price. For that reason, price discrimination often entails a progressive redistribution of resources."); Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1358 (2015) ("Even if low-income consumers currently pay about the same as high-income consumers for goods, anticompetitive practices could still have distributional implications. It is likely, for example, that some anticompetitive pricing practices are progressive because they enable price discrimination in accordance with ability to pay. For example, because low-income families are more price sensitive, they have greater motivation to spend time collecting and analyzing product information.").

exercises of market power increase wealth inequality, but in other ways such exercises create greater equality. In order to draw any firm conclusions regarding the net effect on wealth distribution of market power exercises and antitrust enforcement, one would need to prove the relative magnitudes of the crosscutting effects. That is a task that, to my knowledge, has never been undertaken and could not likely be done with anything approaching statistical rigor.

Part of the difficulty in calculating a net effect on progressivity or regressivity arises from the dynamic interaction between various crosscutting factors. For example, simultaneous increases in the marginal income tax rate and in antitrust enforcement in the defense industry could have offsetting effects on the distribution of income, with the tax increase extracting proportionately more income from the wealthy and the antitrust enforcement in effect rebating some of those tax increases back to those same wealthy taxpayers.[152] Laxity in merger policy could initially enrich shareholders and senior managers but eventually make it easier for unions to organize against the monopoly employers and to extract a significant share of the rents for the benefit of blue-collar workers.[153] Antitrust enforcement that dissuaded manufacturers from restricting the resale freedom of their distributors might initially transfer economic power from large upstream firms to smaller downstream firms but eventually incentivize the manufacturers to integrate forward into distribution, eliminating smaller, independent distributors altogether.[154] Even if a particular instance of antitrust enforcement would appear to have progressive wealth redistribution effects in the short run, its hydraulic pressures on the economy and interaction with other crosscutting effects could cause offsetting regressive effects.[155]

152 *See infra* text accompanying note 234.

153 *See supra* text accompanying notes 78–89.

154 *See* Robert C. Keck, *The* Schwinn *Case*, 23 BUS. LAW. 669, 686 (1968) (reporting that Arnold, Schwinn & Co. integrated forward into retail distribution after the Supreme Court declared nonprice territorial restrictions per se unlawful); Earl E. Pollock, *Alternative Distribution Methods After* Schwinn, 63 NW. U. L. REV. 595, 609–10 (1968) (discussing the tendency of manufacturers to integrate forward into distribution once their options to control distribution through contract are curtailed by the antitrust laws).

155 *See generally* R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 31 (1956–57) ("It is of the nature of the economic process, therefore, that optimisation takes place at successive levels, and that the maximisation of a welfare function subject to a transformation function is only the topmost of these.").

A further complication relates to the political effects of changes in the levels of market power and market concentration. Work in economics and political science suggests that the political demand for higher tax rates increases as market concentration increases.[156] If so, systematic enforcement of the antitrust laws to ensure competitive markets could, over time, translate into lower electoral demand for progressive income taxation and eventually translate into a reduction in marginal rates and lower incidences of redistribution through governmental taxation and spending. That, in turn, could have very significant regressive effects, since progressive taxation and income redistribution have much more direct progressive effects than antitrust enforcement has (if any).

In sum, the trust-busting prescription to cure wealth inequality is highly speculative, at best. Economy-wide, the wealth distribution effects of anticompetitive conduct and remediation through antitrust enforcement are too ambiguous, attenuated, and dynamically interactive to permit the sort of broad claims commonly advanced in the monopoly regressivity thesis.

II
How Antitrust Enforcement Sometimes Impedes Private Efforts to Advance Equality

A. The Arc of Competition Does Not Bend Toward Equality

There is something odd in the monopoly regressivity claim that lax antitrust enforcement contributes to wealth inequality. The critique implicitly assumes that more market competition—the virtue that antitrust law is supposed to produce—means more equality.[157] But that assumption cannot be squared with a plethora of redistributive social welfare programs, which are predicated on the assumption that when income is based solely on the value of the participants' marginal contributions to impersonal markets, gross income inequality results. For example, if competition achieved a desirable income distribution, then minimum wage laws would be unnecessary. Those laws are necessary because the interaction between downstream product market competition and upstream competition for labor inputs results in wages that are

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156 *See* Margarita Katsimi & Thomas Moutos, *Monopoly, Inequality and Redistribution via the Public Provision of Private Goods* 2–4 (CESifo, Working Paper No. 1318, 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=619061 [http://perma.cc/LR9R-QT93].

157 *See* STIGLITZ, PRICE OF INEQUALITY, *supra* note 3, at 53–59.

deemed socially unacceptable.[158] Organizing unions had to be exempted from the antitrust laws because requiring competition for employment among the laboring classes would result in lower income and poorer working conditions.[159] The entire social welfare state is predicated on redirecting the paths of markets from the outcomes otherwise determined by competitive exchange.

The arc of competition does not inherently bend toward equality. To the contrary, competition tends to concentrate wealth in the hands of those with the resources valued most by the market. To the extent that resources are unevenly distributed—think of intelligence, skill, family upbringing, and educational opportunity—competition often exacerbates inequality as compared to systems that allocate wealth based on some principle of equal desert. As previously noted, for example, increased product market competition tends to lead to wage increases for skilled workers and wage reductions for unskilled workers.[160] Similarly, unregulated markets for executive talent lead to high wages for corporate managers based on competitive benchmarking.[161] Further, increases in product market competition might lead to an increase in CEO compensation since managerial talent might be most valuable to corporations when product market competition intensifies.[162] In sum, competition tends to distribute wealth unevenly and regulatory intervention is often required to alter these inequality effects.

158 *See* Bruce E. Kaufman, *Institutional Economics and the Minimum Wage: Broadening the Theoretical and Policy Debate*, 63 INDUS. & LAB. REL. REV. 427, 432 (2010) (discussing conventional economic assumptions about the relationship between competitive labor markets and competitive product markets).

159 *See* Daniel J. Gifford, *Redefining the Antitrust Labor Exemption*, 72 MINN. L. REV. 1379, 1396–97 (1988) (discussing the legislative history of the antitrust labor exemption and Congress's intention to raise wages of working classes by permitting immunity from antitrust law for noncompetitive agreements).

160 *See supra* text accompanying note 85.

161 *See* Charles M. Elson & Craig K. Ferrere, *Executive Superstars, Peer Groups, and Overcompensation: Cause, Effect, and Solution*, 38 J. CORP. L. 487, 493 (2013) (describing the prevailing approach of setting executive compensation based on competitive benchmarking of peer groups).

162 Hae Won Jung & Ajay Subramanian, *CEO Talent, CEO Compensation, and Product Market Competition* 31–36 (Fin. Res. Network Res. Paper Series, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2187062 [http://perma.cc/JC7V-VNSG] (reporting that CEO compensation is quantitatively in line with CEO contributions to their firms and the degree of market competition affects CEO value to the firm and hence CEO compensation).

B. Private Efforts to Redress Competition's Bent Toward Inequality

Government welfare programs are not the only forces to counteract the regressive wealth distribution effects of market competition. Private firms, both for-profit and nonprofit, sometimes seek to mitigate the unequal outcomes of markets by restricting competition. In such cases, antitrust law poses an obstacle to the private actors' redistributive efforts. In considering the effects of a greater or lesser degree of antitrust enforcement on the distribution of wealth, it is necessary to take into account the ways in which antitrust law may frustrate the efforts of private actors to achieve a more just distribution of wealth through voluntary, if perhaps anticompetitive, arrangements.

The wealth redistribution issue is a subset of a larger question concerning the role of antitrust law in policing potentially anticompetitive action undertaken to address identified social evils or to generate public goods. As discussed in greater detail in Part III.B, the courts have not yet developed robust principles for addressing such questions. In order to set the stage for consideration of circumstances where antitrust enforcement frustrates private efforts to reduce wealth inequality, here are some exemplars of private organizations adopting or considering adopting anticompetitive restrictions for generally (and arguably) altruistic or ethical purposes:

- In 2014, the American Institute of Architects (AIA) considered the promulgation of ethical rules prohibiting its members from designing torture chambers, such as those alleged to exist at the U.S. military facilities at Guantanamo Bay.[163] In declining to adopt such rules, the AIA cited antitrust prohibitions, apparently concerned that its rule could be considered an illegal group boycott.[164]
- In 1983, a group of trial lawyers representing indigent criminal defendants in the Washington, D.C. court system collectively agreed to boycott any new representations until the Superior Court increased their hourly compensation.[165] The lawyers argued that their boycott was intended to increase the quality of criminal representation

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163 *See* Raphael Sperry, Opinion, *Architects and Torture: What Color is Your Waterboard?*, CNN (Dec. 23, 2014, 3:27 PM), http://www.cnn.com/2014/12/23/opinion/sperry-architects-torture/ [http://perma.cc/6F4U-RUKS].

164 *See id.*

165 Donald I. Baker, The Superior Court Trial Lawyers Case–*A Battle on the Frontier Between Politics and Antitrust*, *in* ANTITRUST STORIES, *supra* note 141, at 257.

and hence to protect constitutional values.[166] Though casting doubt on the wisdom of a Federal Trade Commission enforcement action against the trial lawyers, the Supreme Court nonetheless held the arrangement a per se violation of section 1 of the Sherman Act.[167]

- In 1964, the tobacco industry adopted a Cigarette Advertising and Promotion Code prohibiting many varieties of minor-targeted advertising and prohibiting cigarette companies from making representations about the healthfulness of cigarettes in their advertising.[168] In June of 1964, "[t]he Justice Department . . . departed from its set policy of refusing to allow trade associations or other groups of businessmen to enforce their own codes to promote good behavior"[169] and provisionally approved the Code on the grounds of the social desirability of reducing tobacco consumption.[170]
- In 1975, the three major television networks adopted a Family Viewing Policy aimed at curtailing children's exposure to programming containing violence, sex, or offensive language during the first two hours of network prime time programming.[171] The networks abandoned the policy after an antitrust lawsuit by the Justice Department against the National Association of Broadcasters.[172]

In each of these cases, one might take the circumscribed view that the relevant restriction should not have raised an antitrust objection because the act was unlikely to create market power. Or, one might take the more general view that antitrust law's prohibition should not give way simply because of a

166 *See id.*

167 *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 436 (1990).

168 TOBACCO INST., CIGARETTE ADVERTISING AND PROMOTION CODE 3 (Dec. 1990), https://industrydocuments.library.ucsf.edu/tobacco/docs/#id=hnhl01370 [http://perma.cc/5UHB-HXDQ].

169 *Antitrust: Justice Clears Penalty Provision in Proposed Code for Cigarette Advertising*, BUS. POL'YS, June 22, 1964, at A10.

170 See *Cigaret Ad Code Gets Antitrust Immunization from Justice Agency*, WALL ST. J., June 23, 1964, at 3.

171 *See* Writers Guild of Am., W., Inc. v. FCC, 423 F. Supp. 1064, 1072 (C.D. Cal. 1976), *vacated*, Writers Guild of Am, W., Inc. v. Am. Broad. Co., 609 F.2d 355 (9th Cir. 1979).

172 *See* Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 734 (1999). A similar issue arose when William Paley, the founder and longtime chairman of the Columbia Broadcasting System (CBS), proposed that the three major television networks consider jointly setting aside two hours a week at staggered times for quality cultural programming. ROBERT PITOFSKY, HARVEY J. GOLDSCHMID & DIANE P. WOOD, TRADE REGULATION: CASES AND MATERIALS 247 (5th ed. 2003) (citing WILLIAM S. PALEY, AS IT HAPPENED 275–76 (1979)). NBC and ABC apparently were not interested in the proposal. *See id*; PHILLIP AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 4 (1981) (explaining the anticompetitive effects of such an arrangement).

purportedly altruistic motive.[173] For present purposes, the important observation is positive—antitrust law, with its singular purpose of bolstering market competition and consumer choice, sometimes conflicts with private efforts to achieve ideological or social objectives that require subverting market forces.

In an important subset of these cases, the object of the anticompetitive restriction is to achieve a more equitable distribution of wealth or opportunity than the market would otherwise obtain under demand-driven conditions. These cases are thus important to the thesis critiqued in this Article—that antitrust enforcement progressively redistributes wealth—because they demonstrate just the opposite effect. Where private organizations seek to alter the usual play of supply and demand in order to achieve greater equality, aggressive enforcement of antitrust law could have regressive effects. Any account of antitrust law's progressivity must take into account these effects.

The following Part considers three examples of private regulatory activity designed to achieve a more progressive wealth distribution than the market would otherwise produce under the shadow of antitrust law.

C. Three Examples

1. *College Financial Aid*

In 1958, eight Ivy League schools and MIT (the Ivies) embarked on a collaborative scheme to allocate scarce financial aid resources to students based on need rather than merit.[174] The schools formed an "Ivy Overlap Group" that involved financial aid personnel from the nine schools collectively determining the financial need profile of all commonly admitted students.[175] The schools agreed that they would provide financial aid based on need only—merit-based aid was prohibited.[176]

In 1991, the Justice Department brought an antitrust lawsuit against the Overlap program, characterizing it as a form of price fixing for tuition.[177] The eight Ivy League schools immedi-

173 *See* Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918) ("[A] good intention will [not] save an otherwise objectionable regulation . . . .").
174 *See* United States v. Brown Univ., 5 F.3d 658, 662 (3d Cir. 1993). The Ivy League schools implicated were Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, Princeton University, the University of Pennsylvania, and Yale University. *See id.* at 662 n.1.
175 *Id.* at 662.
176 *See id.*
177 *See id.* at 661.

ately entered into a consent decree agreeing to abandon the Overlap program.[178] MIT soldiered on alone, ultimately winning an appellate decision that required a full rule of reason determination of the purposes and effects of the overlap system.[179] On remand, having established an important precedent with little immediate practical importance since the other Ivies had withdrawn, MIT also settled on terms preventing the Overlap program from continuing in the future.[180]

Important to the court of appeals' decision was MIT's "alleged pure altruistic motive and alleged absence of a revenue maximizing purpose."[181] MIT justified the program as enhancing educational opportunities for economically disadvantaged and minority students.[182] Financial aid competition for students with the highest grades and test scores inevitably resulted in scarce financial aid resources being allocated to wealthy students who did not need the money to attend college. By agreeing to match financial aid to need and compete on nonprice factors such as educational quality and fit, the schools could make an elite college education affordable for a wider socioeconomic group.[183]

The abandonment of the Overlap program arguably had regressive effects on admissions to elite higher education programs. According to the president of Yale University, the Overlap program "served the good social purposes of making sure that a limited amount of financial funds went to the neediest students."[184] MIT argued that the Overlap program had dramatically increased the percentage of minority enrollment in its student body in the three decades it was in place.[185] Over a decade after the Overlap program ended, the student bodies at Ivy League schools remain overwhelmingly drawn from wealthy

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178 *See id.* at 662 n.1.

179 *See id.* at 679.

180 *See* Elizabeth T. Bangs, *MIT Settlement Won't Save Overlap*, HARV. CRIMSON (June 9, 1994), http://www.thecrimson.com/article/1994/6/9/mit-settlement-wont-save-overlap-pdid/ [http://perma.cc/3T8J-W4WV] (reporting that MIT settlement "might have effectively killed any possibility for true exchange of information").

181 *Brown*, 5 F.3d at 672.

182 *See id.* at 675.

183 *See id.* at 664.

184 Anthony DePalma, *Ivy Universities Deny Price-Fixing but Agree to Avoid It in the Future*, N.Y. TIMES (May 23, 1991), http://www.nytimes.com/1991/05/23/us/ivy-universities-deny-price-fixing-but-agree-to-avoid-it-in-the-future.html [http://perma.cc/2NAU-QJ8J].

185 *See Brown*, 5 F.3d at 675 ("[T]he percentage of American minorities comprising MIT's student body has dramatically risen over the last three decades, which MIT attributes to the Overlap policy . . . .").

families.[186] Antitrust enforcement against the Ivies is surely not the only cause of this inequality but it may have contributed to it.

2. *College Athletics*

The second example involves the NCAA's rule prohibiting member institutions from compensating their student-athletes, which has the practical effect of keeping NCAA member schools from providing lucrative compensation to a handful of men's football and basketball players. A currently pending antitrust class action lawsuit filed by a high-profile sports labor attorney, Jeffrey Kessler, alleges that the NCAA rule amounts to price fixing.[187] Under current NCAA rules, member schools may grant athletic scholarships and cover various student expenses such as room, board, housing, health insurance, and athletic clothing but may not pay their student-athletes compensation for services rendered.[188] According to Kessler, "[t]he main objective is to strike down permanently the restrictions that prevent athletes in Division I basketball and the top tier of college football from being fairly compensated for the billions of dollars in revenues that they help generate."[189] In other words, NCAA Division I football and basketball players would become school employees compensated for their labor at market-determined rates.

If successful, this lawsuit would likely exacerbate various inequalities due to the role that high revenue–generating sports currently play in subsidizing other educational activities.[190]

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186 *See* David Leonhardt, *How Elite Colleges Still Aren't Diverse*, N.Y. TIMES: ECONOMIX (Mar. 29, 2011, 9:00 AM), http://economix.blogs.nytimes.com/2011/03/29/how-elite-colleges-still-arent-diverse/?_r=0 [http://perma.cc/J64Y-SQD5] (analyzing Chronicle of Higher Education data and concluding that only a small share of students at elite colleges come from low-income families); David Zax, *Wanted: Smart Students from Poor Families*, YALE ALUMNI MAG. (Jan./Feb. 2014), http://yalealumnimagazine.com/articles/3801 [http://perma.cc/63A2-DQKZ] (reporting that two-thirds of Yale's undergraduate population was drawn from households in the top quintile of household wealth).

187 Farrey, *supra* note 12. In a related case challenging the NCAA's rules that prohibit student athletes from being compensated for the commercial use of their names, images, and likenesses, the Northern District of California issued an injunction prohibiting the NCAA from enforcing its rule beyond a cap of $5,000 per student per year. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014), *aff'd in part & vacated in part*, O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).

188 *See Scholarships*, NCAA, http://www.ncaa.org/student-athletes/future/scholarships [http://perma.cc/H73W-CMK7].

189 Farrey, *supra* note 12.

190 The lawsuit would also exacerbate inequality by making millionaires out of a small group of male college basketball and football players.

Most universities have made their athletic departments financially independent from the rest of the university, allowing them to keep their own revenues and reinvest them in athletic programs.[191] The high commercial value sports—particularly football and basketball—generate far more income than they cost (in large part because they rely on free labor). For example, according to the Department of Education's data, in 2013 the top twenty-five football programs had expenses of $561 million and revenues over $1.2 billion.[192] The effect has been the massive subsidization of athletic programs with less commercial market appeal but that still afford important educational opportunities. In particular, the NCAA system has enabled athletic departments to make significant investments in women's athletic programs, some of which are quite expensive to run but have little commercial value.[193] If the antitrust challenge is successful and NCAA schools are forced to pay their football and basketball athletes market wages, there will be considerably less income available to subsidize less popular sports, especially women's sports.[194]

The gender equality implications of reducing the funding for women's collegiate athletics could be felt well beyond college playing fields. Empirical research by Betsey Stevenson has

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191 *See* RANDY R. GRANT, JOHN LEADLEY & ZENON ZYGMONT, THE ECONOMICS OF INTERCOLLEGIATE SPORTS 253 (2008).

192 Alicia Jessop, *The Economics of College Football: A Look at the Top-25 Teams' Revenues And Expenses*, FORBES (Aug. 31, 2013, 10:32 AM), http://www.forbes.com/sites/aliciajessop/2013/08/31/the-economics-of-college-football-a-look-at-the-top-25-teams-revenues-and-expenses/ [http://perma.cc/UF8C-B6NU].

193 *See* GRANT, LEADLEY & ZYGMONT, *supra* note 191, at 295–97 (examining large amount of cross-subsidization of less popular sports from football and basketball programs); ALAN MARZILLI, AMATEUR ATHLETICS 27 (2004) (same); Matthew Mitten & Stephen F. Ross, *Regulate, Don't Litigate, Change in College Sports*, INSIDE HIGHER ED (June 10, 2014), https://www.insidehighered.com/views/2014/06/10/college-sports-would-be-better-reformed-through-federal-regulation-lawsuits-essay [http://perma.cc/Y77E-AUJ9] ("[N]onprofit universities use excess revenues generated by commercially successful football and men's basketball programs to cross-subsidize women's and men's non-revenue sports rather than distributing these 'profits' to owners or investors as professional leagues and clubs do.").

194 A complicating factor is Title IX of the Educational Amendments of 1972, which requires that educational programs receiving federal assistance provide equal opportunities regardless of sex. Title IX has been interpreted to require equal funding of men's and women's sports, a result that would be difficult to sustain if male football and basketball players were paid market rates. However, if male football and basketball athletes were declared employees rather than students, football and basketball might be removed from the denominator for Title IX purposes. *See* Doug Lederman, *College Sports' Antitrust Vulnerability*, INSIDE HIGHER ED (Apr. 16, 2014), http://www.insidehighered.com/news/2014/04/16/sports-antitrust-lawyers-latest-target-ncaa-scholarship-limits#sthash.kdVCfD55.dpbs [http://perma.cc/2CZY-9T6L].

shown that a 10% increase in female sports participation in high school generates a 0.8% increase in the probability that a female attends four years of college and a 1.9% increase in the probability that a female will be employed.[195] She also found that this same 10% increase in opportunities to play sports resulted in greater female participation in traditionally male-dominated occupations, particularly in high-skill professions.[196] If similar effects result from investments in collegiate women's athletics, a collateral consequence of successful antitrust enforcement against the NCAA could be to diminish women's achievements in the workplace.

3. *Sweatshops in the Global Supply Chain*

A final example of antitrust law potentially frustrating private efforts to secure a more just distribution of wealth arises in the U.S. garment industry. For years, U.S. companies, particularly in the garment and apparel industry, have come under pressure from various constituencies to take responsibility for poor and unsafe working conditions in their global supply chains.[197] This pressure intensified after the tragic Rana Plaza building collapse in Dhaka, Bangladesh on April 24, 2013.[198]

Many U.S. garment manufacturers and retailers have expressed a willingness to pressure their global suppliers to ensure safe and decent working conditions and living wages.[199] They are finding, however, that individual company efforts are largely ineffective at improving working conditions. Suppliers would be much more likely to respond to joint pressure by a critical mass of their U.S. customers.[200] That, however, raises

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195 Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports* 15–16 (Nat'l Bureau of Econ. Research, Working Paper No. 15728, 2010), http://www.nber.org/papers/w15728.pdf [http://perma.cc/ARF2-U5DH].

196 *Id.* at 18–19.

197 *See* Crane & Kobren, *supra* note 11.

198 *See* Suzanne Kapner, Biman Mukherji & Shelly Banjo, *Before Dhaka Collapse, Some Firms Fled Risk*, WALL ST. J. (May 8, 2013, 4:12 AM), http://www.wsj.com/articles/SB10001424127887324766604578458802423873488 [http://perma.cc/837B-BRRC].

199 *See* Tierney Sneed, *Why Cleaning Up the Fashion Industry Is So Messy*, U.S. NEWS & WORLD REP. (July 16, 2014, 12:01 AM), http://www.usnews.com/news/articles/2014/07/16/efforts-to-clean-up-fast-fashion-supply-chains-face-a-tough-road [http://perma.cc/3MKK-56NL]; Laura D'Andrea Tyson, *The Challenges of Running Responsible Supply Chains*, N.Y. TIMES: ECONOMIX (Feb. 7, 2014, 12:01 AM), http://economix.blogs.nytimes.com/2014/02/07/the-challenges-of-running-responsible-supply-chains/?_r=0 [http://perma.cc/LF48-ULM2].

200 *See* Crane & Kobren, *supra* note 11.

antitrust issues, since joint efforts by competitive companies to fix their suppliers' labor standards might well be considered a group boycott or price fixing under the operation of antitrust principles.[201] A number of U.S. executives have privately reported antitrust concerns about banding together with their peers to assert serious leverage over labor conditions in global supply chains.[202]

Thus far, the Justice Department has struck a cautious tone about the antitrust implications of business undertakings to improve labor conditions overseas. In 2011, the Antitrust Division responded to a business review letter request by a law firm representing the Worker Rights Consortium (WRC), a non-profit corporation formed "to promote socially responsible initiatives by universities and colleges . . . for the improvement of working conditions and labor standards."[203] The WRC seeks to improve wages and working conditions in the supply chain of garment manufacturers licensed by its member schools by specifying a code of fair labor practices and then certifying compliance by individual producers.[204] The Justice Department cautiously blessed this arrangement, albeit by stressing its limited scope. It noted that "[i]ncorporation of the Proposed Licensing Terms is optional and up to each school and licensee" and that "the factories affected by the Proposed Licensing Terms are likely to constitute only a tiny portion of the labor market, making significant anticompetitive effects in that market unlikely."[205] Its analysis and enforcement intentions might well be different if a similar agreement were undertaken by for-profit horizontal competitors that have a large market share in the U.S. output market and that purchase a similarly significant share of the upstream labor inputs.

The sweatshop example shows how the operation of conventional antitrust principles can have regressive wealth distribution effects, including in the United States. Much of the political pressure on U.S. companies to improve global supply chain labor conditions comes from U.S. labor unions, which believe that poor wages abroad create unfair competitive pres-

201 *See* 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1510, at 416–27 (1986).

202 *See* Crane & Kobren, *supra* note 11.

203 Letter from Sharis A. Pozen, Acting Assistant Attorney Gen., U.S. Dep't of Justice Antitrust Div., to Donald I. Baker, Baker & Miller PLLC (Dec. 16, 2011) (quoting BYLAWS OF THE WORKER RIGHTS CONSORTIUM § 1.2(1) (Apr. 30, 2010)), http://workersrights.org/about/wrc_bylaws.pdf), http://www.justice.gov/atr/public/busreview/278342.htm [http://perma.cc/T7PP-B344].

204 *See id.*

205 *Id.*

sures that erode wages in the United States.[206] For U.S. labor unions to be able to mount effective pressure on U.S. companies to flex collect muscle to increase wages in their global supply chains, the ordinary operation of antitrust law would need to be suspended.

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These three examples illustrate the broader point that simply honoring the sum of individual preferences otherwise known as the market often creates or exacerbates inequalities. Antitrust law insists on the primacy of the consumer and pushes markets to maximize the consumer's preferences.[207] When private organizations push back on the market's consumer-centric tendencies for altruistic purposes, they sometimes run afoul of the antitrust laws. Any comprehensive analysis of antitrust law's wealth distribution properties must take these effects into account.

III
RECALIBRATING ANTITRUST TO ADVANCE INCOME EQUALITY

Thus far, this Article has analyzed only the positive claims that the tendency of antitrust enforcement is to increase wealth equality and that lax antitrust enforcement is partially responsible for the current state of wealth inequality in the United States. As shown, the monopoly regressivity claim is unsustainable at that broad level of generality. This final Part considers a potential refinement in the monopoly regressivity claim. Rather than claiming that antitrust law is *generally* progressive in its wealth redistribution effects, one might claim that antitrust law *could be* progressive if it were properly calibrated to take distributive effects into account.

This refined monopoly regressivity claim makes some improvement on the broad claim debunked above but it is still largely misguided. No general adjustment to antitrust doctrine or practice could reliably improve the Gini index or otherwise

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206 *See, e.g.*, BRIAN FINNEGAN, AFL-CIO, RESPONSIBILITY OUTSOURCED: SOCIAL AUDITS, WORKPLACE CERTIFICATION AND TWENTY YEARS OF FAILURE TO PROTECT WORKER RIGHTS 3-6 (Apr. 23, 2013), http://www.aflcio.org/content/download/77061/1902391/CSReport.pdf [http://perma.cc/K6PZ-LXFA] (discussing unions' efforts to improve conditions in the global supply chain).

207 *See generally* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192 (2008) ("[T]he ultimate purpose of the antitrust laws is to provide the benefits of competition to consumers—lower prices, better products, and more choice . . . .").

promote a more equal distribution of wealth. To the extent that wealth equality considerations could reliably enter antitrust analysis at all, they could only do so modestly, perhaps through the occasional exercise of prosecutorial discretion and doctrinal developments accommodating bona fide private efforts to help economically disadvantaged populations.

A. Limitations to Addressing Income Inequality Through Antitrust

1. *Is a Narrower Version of the Monopoly Regressivity Claim Sustainable?*

One potential response to the central thrust of this Article—that the overall effects of antitrust law on the distribution of wealth are too complexly crosscutting to sustain a general claim about progressivity—would be to narrow the scope of the monopoly regressivity claim. Admitting that antitrust law's overall effects are distributively indeterminate, one might nonetheless argue that certain types or instances of antitrust enforcement—perhaps horizontal merger policy or cartel enforcement against banks—have progressive wealth distribution effects and should therefore be pursued with greater vigor.

Without categorically rejecting the idea that selective adjustments to antitrust law (as opposed to a general increase in enforcement levels) could have progressive distributive effects, one should be skeptical of any broad claim that more of any particular type of antitrust enforcement will redound to the benefit of the comparatively poor. For instance, one might concede that enforcement against noncorporate entities has ambiguous or even regressive distributive effects and therefore insist that any increase in enforcement be levied solely against corporations. But such a proposal would not establish the progressivity of enhanced enforcement because, among other things, it would still rest on the questionable assumption that shareholders capture the majority of monopoly rents extracted by corporations;[208] disregard the labor wage premium,[209] the progressive effects of government purchasing, and the third-party payer health care system;[210] and ignore the interference of antitrust law with private efforts to redistribute wealth, including by corporate actors.[211]

208 *See supra* text accompanying notes 56–83.
209 *See supra* text accompanying notes 84–95.
210 *See supra* text accompanying notes 118–130.
211 *See supra* text accompanying notes 163–207.

When proponents of the monopoly regressivity claim go beyond the general claim that enhanced antitrust enforcement would have progressive effects and attempt to articulate specific policy interventions that would advance progressivity, they mostly fall back on unsustainable generalizations about the relationship between market power and the distribution of wealth. In particular, Baker and Salop propose "a number of specific antitrust and competition policy approaches and adjustments in legal standards that might be considered by policy makers in response to increasing public concern with inequality."[212] Most of these rest on the assumption that the general effect of consumer-oriented antitrust enforcement is to advance wealth equality and therefore founder for the reasons explored in the previous two sections. Their proposals to reject arguments for abandoning the consumer welfare standard in favor of an economic efficiency standard[213] and to adopt a European-style excessive pricing offense[214] continue to assume that antitrust law reflects, in essence, a tug-of-war between relatively poorer consumers and richer shareholders.[215] For the reasons explained earlier,[216] that assumption is unsustainable. Their proposals to increase the budgets of the antitrust agencies[217] and to become "more interventionist" in antitrust enforcement[218] also assume that a higher level of unspecified antitrust enforcement yields more progressive wealth distribution. Perhaps their proposal to design antitrust remedies to benefit less advantaged consumers[219] could produce progressive income distribution effects in some cases, but it is hard to see how such an approach could yield a significant effect on wealth distribution in the economy at large. Such an approach would only be available in cases of public enforcement (which amount to a small share of all antitrust enforcement),[220] need to involve conduct rather than structural remedies (which are much more common),[221] require identifiable differentiated ef-

212 Baker & Salop, *supra* note 7, at 14.
213 *See id.* at 15–18.
214 *See id.* at 22–24.
215 *See id.* at 16 ("The consumer welfare standard also helps address inequality because it does not permit conduct that would harm consumers while benefiting shareholders.").
216 *Supra* text accompanying notes 56–58.
217 Baker & Salop, *supra* note 7, at 18.
218 *Id.* at 21.
219 *See id.* at 20.
220 *See* Crane, *supra* note 42, at 1179 (explaining that there are ten private antitrust cases filed for every public case).
221 Until recently, the antitrust agencies disfavored conduct remedies, favoring structural remedies instead. Response of the U.S. to the Amicus Brief of Ctr.

fects on poor and wealthy consumers, and require a workable regulatory remedy capable of protecting poor consumers from market power exploitation. Further, if remedies to prevent the exploitation of the poor were available, it is hard to see why similar remedies to prevent the exploitation of the rich would not also be available and, if available, deployed.

A recent paper by Einer Elhauge offers another policy prescription for enhanced antitrust enforcement to advance income equality,[222] but it too has a limited scope of application. Drawing on recent work by José Azar, Martin Schmalz, and Isabel Tecu,[223] Elhauge argues that a small number of institutional investors have acquired large minority horizontal shareholding positions in a large number of U.S. industries.[224] Elhauge argues that this horizontal shareholding reduces the incentives of the shareholders to push for increased competition within the industries in which they own shares of multiple competing producers.[225] This, in turn, causes an economy-wide output reduction that leads to inequality by creating unemployment, reducing the purchasing power of wages, and depressing worker salaries due to monopsony power by employers.[226]

Much of Elhauge's regressivity account is predicated on the claim that the exercise of monopoly power reduces wages[227]—which is inconsistent with the empirical evidence of

for a Competitive Waste Indus. at 3–4, United States v. Republic Servs., Inc., No. 1:08-cv-02076 (D.D.C. Dec. 30, 2009), http://www.justice.gov/atr/cases/f253000/253695.htm [http://perma.cc/E8LA-SFMY] (asserting that "[s]tructural relief is the preferred remedy in all merger cases" and conduct remedies are "disfavored"). More recently, the agencies have acknowledged a "slight shift" in their policy towards a more favorable view of behavioral remedies, even though they still "generally prefer structural solutions." Christine A. Varney, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Oversight of the Enforcement of the Antitrust Laws 3 (June 9, 2010), http://www.justice.gov/atr/public/testimony/259522.htm [http://perma.cc/5L9N-6L43].

222 Elhauge, *supra* note 7, at 1291–01.

223 José Azar, Martin C. Schmalz & Isabel Tecu, *Anti-competitive Effects of Common Ownership* (Ross Sch. of Bus., Working Paper No. 1235, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345 [http://perma.cc/F8TW-BPRL].

224 Elhauge, *supra* note 7, at 1267–69.

225 *Id.* at 1274; *see also* Daniel P. O'Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L.J. 559 app. at 610–14 (2000) (creating economic models to predict anticompetitive effects from market concentration indexes modified to account for partial ownership overlaps among horizontal rivals).

226 *See* Elhauge, *supra* note 7, at 1292–93.

227 *Id.* at 1293 (asserting that anticompetitive markets increase inequality because the rise in product prices lowers the returns to labor and "anticompetitive conduct increases returns to capital relative to returns to labor").

a monopoly labor wage premium.[228] But, in any event, even if the thrust of Elhauge's argument about the anticompetitive effects of horizontal shareholding were correct, it would not point to a general effect on wealth distribution from increasing antitrust enforcement. Rather, it would support a particular, problem-specific antitrust response—taking legal action against anticompetitive horizontal shareholding.[229] His analysis offers no support for the broad monopoly regressivity claim addressed in this Article.

Broad adjustments in antitrust enforcement, such as increasing the funding of the antitrust agencies or changing antitrust doctrine to make antitrust cases easier to win, are unlikely to have demonstrable progressive effects on the distribution of wealth. There would be winners and losers up and down the economy. It remains to be considered whether implementing a case-specific regressivity element as part of the doctrinal fiber of antitrust law would do the trick.

2. *Individualized Proof of Regressivity and Comparative Institutional Advantage*

The distributive effects of antitrust enforcement might be unknowable on an economy-wide basis and yet provable in individual cases. In that event, the cause of wealth equality might be advanced by integrating a regressivity element into antitrust analysis. Baker and Salop propose explicitly adopting income equality as a formal factor in antitrust analysis, allowing that "[c]onduct might be considered anticompetitive if it harms middle- and lower-income consumers, even while benefiting wealthier consumers and shareholders."[230]

There are many problems with this proposal, starting with one acknowledged by Baker and Salop—overwhelming complexity.[231] Proving the crosscutting wealth effects on senior managers, midlevel managers, laboring employees, shareholders, vertically related firms, and different classes of consumers (and all of these same constituencies of other competitively affected firms) even in a single-market case could easily swamp already complicated merger or monopolization cases.[232]

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228 *See supra* text accompanying notes 84–95.

229 This is, in fact, what Elhauge proposes in the concluding portion of his article. Elhauge, *supra* note 7, at 1301–09.

230 Baker & Salop, *supra* note 7, at 24.

231 *Id.* at 25.

232 *See* Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on*

Moreover, once regressivity was admitted as a reason to find the defendant liable, it is hard to see why progressivity should not be allowed as an affirmative defense to liability. For example, defendants in a cartel case might argue that the overall effect of their price-fixing regime was to increase worker wages and segment pricing to consumers in ways that advantaged the lower income distribution. Introducing a regressivity element and hence a countervailing progressivity element would likely make it *more difficult* for the government and private plaintiffs to win antitrust cases. The economic complexity of antitrust law already favors defendants and business interests with the resources to mobilize the best teams of economists and lawyers to produce data and theoretical arguments advancing their case.[233] Increasing the complexity of antitrust cases by adding a regressivity/progressivity element would likely be a boon to defendants in many cases.

One might preempt this possibility by allowing proof of regressivity as an inculpating factor but not allowing proof of progressivity as an exculpating factor. But even if one believed that antitrust institutions were capable of generating a modest progressivity benefit if they allowed only regressivity as an inculpating factor, it would not follow that introducing income-distribution effects into antitrust analysis would be optimal. Not only would pursuing wealth distribution as an explicit antitrust goal add considerable expense and increase error rates in antitrust adjudication but it would also likely come at the cost of other antitrust goals, such as consumer welfare or allocative efficiency. An additional regressivity factor would only have significant purchase in antitrust cases where harmful effects on consumer welfare or allocative efficiency could not be established. If they could be established and hence an antitrust violation proven (with, according to the monopoly regressivity critique, the incidental effect of advancing income progressivity), there would be no need for separate proof of income regressivity as part of the violation. Thus, if introduced as a factor in antitrust analysis, regressivity would likely serve chiefly as a foil to arguments about positive effects on consumer welfare or efficiency of the challenged conduct.

Appeals, 54 J.L. & ECON. 1, 20 (2011) (concluding based on empirical study that some antitrust cases are already too complicated for generalist judges).

233 *See, e.g.*, Glen O. Robinson, *Explaining Vertical Agreements: The* Colgate *Puzzle and Antitrust Method*, 80 VA. L. REV. 577, 607 (1994) (examining arguments that increasing complexity in antitrust cases favors defendants).

Finally, even if one believed that antitrust law could be formally adjusted to combat income regressivity and that concerns over distributive justice should trump concerns over consumer welfare and economic efficiency, it still would not follow that antitrust law should incorporate a regressivity factor. As a matter of comparative institutional advantage, the antitrust system is far inferior to other branches of law and governmental authority in addressing wealth equality. As Louis Kaplow and Steven Shavell have argued, the legal system is generally inferior to the income tax and transfer system in the redistribution of wealth.[234] By contrast, the antitrust system is reasonably competent at generating consumer welfare and economic efficiency. It would be a mistake to deploy antitrust law in service of an income distribution concern that it is entirely ill-equipped to address.

3. *A Modest Role for Prosecutorial Discretion*

If regressivity is not to enter antitrust analysis as a formal factor, it might still play a small role in the exercise of prosecutorial discretion by the antitrust agencies.[235] Despite the general thesis of this Article that economy-wide distributive effects are too complex to ascertain and the further contention that adding an express regressivity element into antitrust analysis would be unwise, the antitrust agencies might occasionally prioritize enforcement against anticompetitive actions with clear and demonstrable regressive effects. Potential examples include anticompetitive mergers between dollar stores[236] or payday lenders catering almost exclusively to low-income individuals. Conversely, they might choose *not* to enforce the antitrust laws in circumstances where the relevant conduct created some degree of market power but had generally progressive wealth-distribution effects.

In considering the potential importance of prosecutorial discretion in antitrust cases, it is important to keep in mind the relatively limited importance of public enforcement to the anti-

234 Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 990–98 (2001); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 676 n.14 (1994).

235 *See* Baker & Salop, *supra* note 7, at 18–20.

236 *See* Press Release, FTC, FTC Requires Dollar Tree and Family Dollar to Divest 330 Stores as Condition of Merger (July 2, 2015), https://www.ftc.gov/news-events/press-releases/2015/07/ftc-requires-dollar-tree-family-dollar-divest-330-stores [http://perma.cc/Z5GJ-Z85Q].

trust field.[237] In recent decades, most of antitrust law has been made in private rather than public litigation.[238] In combination with the fact that regressivity would be hard to demonstrate in most cases, the predominance of private enforcement would render any resolution for the antitrust agencies to consider regressivity in their enforcement decisions relatively moot.

B. Antitrust and Private Redistributive Efforts

There remains the question of whether antitrust law should entertain a limited progressivity defense for benevolent actors—essentially, allowing defendants to escape antitrust liability by demonstrating that their conduct was intended to create a progressive redistribution of income. The law on social welfare justifications for anticompetitive conduct is relatively undeveloped, with few decisions explicitly addressing the question. In the Ivy League Overlap case, perhaps the decision addressing the question most directly, the Third Circuit held that MIT was entitled to raise as a defense the progressivity of the program in making an MIT education affordable to a wider pool of students.[239] In light of Supreme Court precedent rejecting broad social welfare justifications for anticompetitive conduct, the court nonetheless struck a cautious note in its articulation of the defense, observing that MIT was not merely arguing that its conduct "serve[d] a social benefit" but that it "actually enhance[d] consumer choice."[240] In other words, MIT was required to articulate its defense in the vernacular of conventional antitrust with reference to markets and consumer sovereignty.

As noted earlier, wealth redistribution is a subset of a larger question about social welfare justifications for otherwise unlawful anticompetitive conduct.[241] A comprehensive treatment of that issue is beyond the scope of this Article. However, to the extent that progressivity on wealth distribution should

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237 *See* Crane, *supra* note 42, at 1179 (examining the ratio between public and private enforcement of federal antitrust laws); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 682 (1982) (explaining the limitations of prosecutorial discretion in antitrust cases given the prominence of private litigation).

238 *See* Crane, *Antitrust Antifederalism*, *supra* note 97, at 41.

239 United States v. Brown Univ., 5 F.3d 658, 677 (3d Cir. 1993).

240 *Id.* The court had to distinguish two earlier Supreme Court decisions, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 463 (1986) and Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978), which it interpreted as rejecting social welfare justifications for anticompetitive conduct. *See* 5 F.3d at 664.

241 *See supra* text accompanying notes 157–173.

ever enter antitrust analysis as a defense, one might consider three limitations on its assertion.

First, consistent with the broad thesis of this Article, it would be inappropriate to permit a progressivity defense based on incidental, rather than purposeful, effects of the challenged conduct. In other words, a defendant would not be able to immunize itself from charges of anticompetitive behavior just by proving that the behavior happened to have progressive income-redistribution effects. Rather, the defense would need to be limited to circumstances where the progressive redistribution effect was the primary objective of the anticompetitive action. Otherwise, confounding claims about progressivity and regressivity could swamp run-of-the-mill antitrust cases involving ordinary commercial motivations. If a progressivity defense were to be recognized, it should be limited to instances of genuine Tocquevillian collaboration to address a perceived social evil through mobilizations of civil society.

Relatedly, the defense should be limited to instances of unadulterated altruism—ones where the parties imposing the anticompetitive restraint do not stand to reap significant monopoly rents for their own benefit. In the *Trial Lawyers* case involving the boycott of the D.C. court system for the ostensible purpose of improving the quality of indigent criminal representation,[242] the Supreme Court distinguished cases of pure altruism, such as those involving boycotts of discriminating businesses for civil rights purposes, from ones where the boycotters stood to reap an undeniable economic advantage for themselves.[243] Although that decision arose in the First Amendment context,[244] the observation has broader relevance. There are obvious risks in allowing self-interested private individuals to create market power of which they are primary beneficiaries.[245]

Finally, the progressive redistribution effect would have to be a reasonably direct result of the anticompetitive restraint. It would be unworkable to allow a Robin Hood defense that the defendants extracted monopoly rents from wealthier consumers and then voluntarily redistributed them to the poor. Al-

242 *See supra* text accompanying notes 165–167.

243 FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 425–28 (1990) (distinguishing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)).

244 *See supra* text accompanying note 165–167.

245 *See, e.g.*, Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 468 (1941) (rejecting argument that defendants' self-interested anticompetitive restrictions on pirated fashions could be justified on grounds that fashion piracy violated state tort laws).

though monopoly power has enabled some of the most significant philanthropy in American history—think of John D. Rockefeller, Andrew Carnegie, and Bill Gates, for example—allowing assertions about philanthropic plans for monopoly profits would render antitrust adjudication unworkable.

In sum, there may be room in antitrust law for a benevolent actor progressivity defense but it would need to be carefully circumscribed. Antitrust law works best as a set of objective principles regarding measurable economic effects in commercial markets. Concrete proof of progressivity or regressivity from changes in market power is usually unavailable and admitting efforts to prove them could lead to systemic error. While there may be an occasional need for flexibility in antitrust doctrine or practice to accommodate civil society initiatives focused on redistributing wealth or achieving related social justice objectives, the scope of any such exemption should remain narrow.

CONCLUSION

The storyline that monopoly is regressive and hence antitrust enforcement is progressive may be politically attractive, but it is misguided as a generality. There are instances when it is true and instances when it is false. In most instances, it is simply unknowable. As a general matter, there is no reason to expect that more competitive markets will increase equality. To the contrary, competitive markets tend to distribute resources based on demand rather than desert, which, if anything, leads to pronounced inequality.

Part of the reason for the longstanding ideological consensus supporting antitrust enforcement in the United States has been an understanding that, whatever their distributive effects, more competitive markets create a larger pie. Antitrust law is generally ill positioned to describe how the pie is allocated or to prescribe how it should be allocated. Wealth equality does not belong to antitrust law's domain.