Conflict of Laws? Tensions Between Antitrust and Labor Law

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Not long ago, economists denied the existence of monopsony in labor markets. Today, scholars are talking about using antitrust law to counter employer wage-setting power. While concerns about inequality, stagnant wages, and excessive firm power are certainly to be welcomed, this sudden about-face in theory, evidence, and policy runs the risk of overlooking some important concerns. The purpose of this Essay is to address these concerns and, more critically, to discuss some tensions between antitrust and labor law, a more traditional method for regulating labor markets. Part I addresses a question raised in the very recent literature, about why antitrust has not been a traditional tool of labor market regulation. Part II addresses some drawbacks in the social objectives of antitrust regulation, namely, the so-called consumer welfare standard or, as proposed for the labor market, the "worker welfare" standard, and suggests an alternative standard. Finally, Part III asks whether antitrust is an appropriate response to labor market monopsony. That Part shows that there are some significant tensions between antitrust and labor law and, given those tensions, explains why more traditional methods of wage regulation, collective bargaining, and even minimum wage legislation offer some distinct advantages.

INTRODUCTION

It is both welcoming and surprising to witness a renewed interest in labor market regulation on behalf of workers. It is just as astonishing to see this interest appear in, of all places, antitrust law.[1] Welcoming, because income inequality is a serious concern. But also surprising, because not very long ago, at least within academic economics and influential policy circles, it was

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1 Two recent articles have made the case for using antitrust to regulate the monopsony power of employers in the labor market. *See generally* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031 (2019).

received wisdom that minimum wage legislation was a misguided, and even harmful, attempt to help workers.[2] To the extent that income—and more precisely wage—inequality was recognized, the problem was chalked up to a transient predicament of skill mismatch produced by technological change.[3] A judicious investment in education might be recommended, but out of the question were minimum wage regulation and, even more so, collective bargaining and labor law reform. Even more certainly, an antitrust response to labor market regulation was inconceivable.

Professors Thomas Piketty and Emmanuel Saez's influential study on income inequality in the United States presented stark evidence that the inequality problem was not, or at least not only, a problem of skills.[4] Along with the financial crisis of 2008 and the ensuing Great Recession, this study also prompted a shift among academic economists. Additional research then began to challenge the idea that minimum wage legislation would cause increased unemployment.[5] This research was accompanied by

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2 In the legal literature, the most sustained criticism of minimum wage policy comes from Professor Daniel Shaviro. *See generally*, Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405 (1997). There is an extensive debate on the minimum wage in economics literature, with several studies finding that the minimum wage does more harm than good. *See* David Neumark & William Wascher, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania: Comment*, 90 AM. ECON. REV. 1362, 1381, 1390–91 (2000); David Neumark & William Wascher, *Employment Effects of Minimum and Subminimum Wages: Panel Data on State Minimum Wage Laws*, 46 INDUS. & LAB. RELS. REV. 55, 75, 78–80 (1992). *See generally* DAVID NEUMARK & WILLIAM L. WASCHER, MINIMUM WAGES (2008).

3 For a review that discusses the literature on what has been described as "skill-biased technological change," see Martina Morris & Bruce Western, *Inequality in Earnings at the Close of the Twentieth Century*, 25 ANN. REV. SOC. 623, 633–36 (1999). *See also* Peter Cappelli, *Rethinking Employment*, 33 BRIT. J. INDUS. RELS. 563, 574–75 (1995). *See generally* Eli Berman, John Bound & Stephen Machin, *Implications of Skill-Biased Technological Change: International Evidence*, 113 Q.J. ECON. 1245 (1998); David R. Howell & Edward N. Wolff, *Trends in the Growth and Distribution of Skills in the U.S. Workplace, 1960–1985*, 44 INDUS. LAB. RELS. REV. 486 (1991).

4 Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. ECON. 1, 3, 34 (2003) (providing evidence that dramatic historical changes in wage inequality were "too sudden to be accounted for by technical change alone" and that "the huge increase in top wage shares since the 1970s cannot be the sole consequence of technical change" because the "increase is very large and concentrated among the highest income earners" and "has not taken place in most European countries which experienced the same technical change as the United States").

5 *See generally* Arindrajit Dube, Suresh Naidu & Michael Reich, *The Economic Effects of a Citywide Minimum Wage*, 60 INDUS. & LAB. RELS. REV. 522 (2007); Arindrajit Dube, T. William Lester & Michael Reich, *Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties*, 92 REV. ECON. & STAT. 945 (2010); Arindrajit Dube,

studies seeking to understand why, in contravention of the textbook supply and demand model, minimum wages might not reduce employment.[6] This research made the contention that employers exercise market (wage-setting) power and that labor markets are "monopsonistic." Employers with market power push wages below their competitive, "market-clearing" level; lower wages reduce labor supply to the market; and contracted labor supply reduces output and is inefficient.[7] In such a context, not only can minimum wages increase employment (rather than decrease employment, as conventional wisdom claimed), but they can increase efficiency as well.[8] Once it is accepted that employers exercise market power in labor markets, not just product markets, only then does the possibility of an antitrust response to labor market regulation become conceivable.

It is certainly heartening to see scholars both accept wage and income inequality as legitimate social and economic problems and acknowledge that these problems are a consequence of labor markets actually operating in a way that departs from their first-pass, textbook presentation—that labor markets are in fact monopsonistic.[9] But the sudden rush to embrace antitrust law as a solution, if not the ideal solution, to employer market power produces a sense of whiplash. This is because it overlooks the advantages of other, albeit more traditional, approaches to labor market regulation as well as some decisive tensions between those approaches and antitrust.

T. William Lester & Michael Reich, *Minimum Wage Shocks, Employment Flows, and Labor Market Frictions*, 34 J. LAB. ECON. 663 (2016). Bucking the trend were David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772, 778–86 (1994), and DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 20–77(1995), which both pioneered the use of more experimental data and causal analysis in minimum wage studies and found that the minimum wage did not increase unemployment among fast-food workers. To get a sense of how controversial these results were at the time, see generally Shaviro, *supra* note 2.

6 ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS 338–47 (2003). For evidence of monopsony power even in supposedly frictionless online labor markets, see Arindrajit Dube, Jeff Jacobs, Suresh Naidu & Siddharth Suri, *Monopsony in Online Labor Markets*, 2 AM. ECON. REV. INSIGHTS 33, 39–44 (2020).

7 For a classic and straightforward illustration of monopsony power in the labor market, see generally William M. Boal & Michael R. Ransom, *Monopsony in the Labor Market*, 35 J. ECON. LITERATURE 86 (1997).

8 *Id.* at 98.

9 Naidu et al., *supra* note 1, at 560; Marinescu & Hovenkamp, *supra* note 1, at 1040–47.

Attuned to these tensions, the purpose of this Essay is to present a series of reflections on the proposal to use antitrust law as a response to monopsony in the labor market. Part I seeks to further add to a question raised in the very recent literature about why antitrust has not been a traditional tool of labor market regulation.[10] While the answers given to this question are correct, I point out in this Part that they understate thus far the historical antipathy between antitrust regulation and labor unions. Overcoming this longstanding antipathy may be an important step toward making antitrust a conventional tool against employer wage-setting power.

Part II responds to what I see as some significant gaps and drawbacks in the social objectives of antitrust regulation, namely, the so-called consumer welfare standard or, as proposed for the labor market, the "worker welfare" standard.[11] If remedying wage inequality, and not just efficiency, is an important antitrust objective, current legal standards are both haphazard and fail to respond to the famous "double-distortion" critique that legal rules, including antitrust, should *not* have inequality or distribution among their goals.[12] Part II, assuming that antitrust is an appropriate response to labor market monopsony, proposes an alternative antitrust standard, one that both is sensitive to equity concerns *and* answers the double-distortion critique.

Part III asks whether antitrust *is* an appropriate response to labor market monopsony. I first show that there are some significant contradictions between antitrust and collective bargaining. When collective bargaining works best—that is, most efficiently and equitably—it often pursues wage-equalizing and employment-maximizing goals in ways that facilitate and encourage product and labor market concentration, effects that contradict the premises of antitrust. Further, labor market regulation other than collective bargaining substitutes for, and crowds out, labor unions' central functions, weakening labor unions in the process even when those negative effects are unintended.

Given those tensions, Part III also explains why more traditional methods of wage regulation, such as collective bargaining and even minimum wage legislation, are superior to antitrust

10 Naidu et al., *supra* note 1, at 541.

11 *Id.* at 586–87.

12 For the most persuasive argument that the law should not be used for distributive objectives, see generally Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

law. First, direct wage regulation is simply much more administrable than antitrust law, particularly in the case of merger review where the imperfect-information burden faced by antitrust regulators makes their task both costly and highly error prone. If merger review entails the extraordinarily complicated task of attempting to guess whether the merger will depress wages or not, why not simply impose a wage floor, either through collective bargaining or minimum wage regulation? Second, if antitrust regulation crowds out and weakens labor unions, we will further miss a series of secondary, yet significant, benefits of labor unions. Among those benefits are the associational virtues of building social capital and the inculcation of important virtues of democratic norms and participation. Rebuilding labor unions and collective bargaining are themselves monumental tasks, but the effort, in my view, is well worth the benefits.

I. WHY IS THERE NO LABOR MARKET REGULATION IN ANTITRUST?

The recent recognition of labor market monopsony in the legal literature raises a perplexing question. Why has so little attention been given to labor market monopsony by scholars, regulators, and policymakers? Professors Ioana Marinescu and Herbert Hovenkamp told us, for instance, that challenging the mergers of competitors is "conventional[ ]"[13] when, as sellers, they threaten to weaken competition in a product or service market and raise prices. Receiving "little attention" in merger law, by contrast, is the effect of mergers on the ability of buyers to lower prices, especially with respect to labor markets and wages.[14] Because the implications of employer monopsony power are "staggering," however, this oversight must surely present a puzzle.[15] Marinescu and Hovenkamp observed, "To the best of our knowledge no court has ever condemned a merger because of its anticompetitive effects in labor markets."[16]

Professor Suresh Naidu, Professor Eric Posner, and economist Glen Weyl are even more perplexed by this puzzle than are Marinescu and Hovenkamp. They find the lack of attention given to monopsony power "[c]urious[ ]"[17] and explicitly ask, "Why . . .

13 Marinescu & Hovenkamp, *supra* note 1, at 1031.
14 *Id.* at 1031–32.
15 *Id.* at 1031.
16 *Id.* at 1032.
17 Naidu et al., *supra* note 1, at 539.

the imbalance between product and labor market antitrust?"[18] Naidu, Posner, and Weyl acknowledged that they "do not know the answer to this question" but proposed four possible reasons.[19] The first is that legal theory has traditionally focused more on product market competition.[20] The second reason is that postwar economists believed that labor markets were reasonably competitive and therefore antitrust scrutiny was not necessary.[21] The third is that traditional ways of regulating the labor market, such as through minimum wages and collective bargaining (which are now considerably weakened), were believed adequate to the task of protecting employees against employer monopsony power.[22] The fourth and final reason offered is that antitrust litigation presents particular challenges to workers that are not faced by consumers.[23]

I am no more qualified to solve this puzzle than any of these other authors. And I have no reason to doubt the explanations offered by Naidu, Posner, and Weyl. Their second and third reasons—a widespread belief among academics, policy makers, and politicians that labor markets were reasonably competitive and that other tools, minimum wages and labor unions, were adequate to the task—are particularly compelling to me. That said, I believe there is a little more to the story worth telling. This story is hardly new, especially to historians of labor, law, and politics. But its absence in the contributions of Marinescu and Hovenkamp and Naidu, Posner, and Weyl, which is scarcely surprising or blameworthy given their more immediate objectives, justifies repeating that story.

Historically, antitrust and labor law were not merely two separate tracks for regulating product-market competition, on the one hand, and labor market power, on the other. Whatever the intentions of the Sherman Act's[24] authors, after it was enacted, it was weaponized in an (at times) bloody battle against labor unions.[25] From a certain perspective, this response has a rationale

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18 *Id.* at 541.

19 *Id.*

20 *Id.*

21 *Id.* at 541–42.

22 Naidu et al., *supra* note 1, at 542–43.

23 *Id.* at 543–44.

24 15 U.S.C. §§ 1–7.

25 *See In re* Debs, 158 U.S. 564 (1895). Petitioners were arrested after the U.S. Attorney General requested the first federal injunction to block a strike during the American Railway Union's strike in Illinois. *Id.* at 597–98. The Court held that the federal

consistent with antitrust philosophy. If one's baseline assumption is that labor markets are essentially competitive—an assumption shared, not just by postwar economists, as Naidu, Posner, and Weyl acknowledged, but also by many nineteenth-century political economists[26]—then labor unions, as "combinations" to raise wages, are conspiracies in the proverbial and condemnable "restraint of trade."[27]

Perhaps the most shocking use of antitrust law against labor unions is found in the infamous *Loewe v. Lawlor*[28] case (known more popularly as the *Danbury Hatters* case), which the U.S. Supreme Court decided in 1908.[29] The context of the case is perhaps more interesting than its narrow legal holding. The dispute arose out of a labor union's response to the dramatic technological and organizational changes occurring at the time in the hat-making industry.[30] (The present-day technological and organizational changes animating concerns about labor market monopsony, and other economic challenges, are therefore nothing new.) In 1899, the United Hatters of North America called for a boycott against nonunion hatmakers, in order to enforce a fifty-five-hour work week for its members.[31] Because new technology was rapidly reducing the need for labor, the fifty-five-hour work week was aimed at reducing unemployment among hat-making employees.[32] Unionized hatmakers would affix a union label to their products, letting buyers know that they were produced under union-approved standards.[33] This boycott was effective enough that

government could issue a strike injunction through its power to regulate interstate commerce. *Id.* at 599–600. The power to issue a strike injunction was later revoked. Norris-LaGuardia Act, 29 U.S.C. § 101.

26 "Political economy" was the phrase for economics before the "political" was dropped sometime in the twentieth century. Political economy originally meant something like national economy, as distinct from household economy, which is the etymology of the word "economy." *See* NATE HOLDREN, INJURY IMPOVERISHED: WORKPLACE ACCIDENTS, CAPITALISM, AND LAW IN THE PROGRESSIVE ERA 90–92 (2020).

27 United States v. Workingmen's Amalgamated Council of New Orleans, 54 F. 994, 996 (E.D. La. 1893); *see also* Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 999–1011 (1984).

28 208 U.S. 274 (1908).

29 *Id.*; *see also* Loewe v. Lawlor, 235 U.S. 522, 523 (1915).

30 MATTHEW W. FINKIN & TIMOTHY P. GLYNN, COX, BOK & GORMAN'S LABOR LAW: CASES AND MATERIALS 18 (17th ed. 2021).

31 *Id.* at 19.

32 *Id.*

33 *Id.*

"by 1902, only 12 of the Nation's 120 hat manufacturers remained non-union."[34]

One very determined holdout, however, remained. Dietrich Loewe owned a hat factory in Danbury, Connecticut.[35] His employees appeared content and, in any case, he refused to meet union standards—he could not do so without going out of business.[36] On a walk in the woods one day with a fellow manufacturer, Charles Hart Merritt, Loewe concocted the idea of starting an organization to combat union boycotts, such as the one by the United Hatters, in the courts.[37] This organization became the American Anti-Boycott Association and an influential antagonist in the battle against organized labor in the late nineteenth century.[38]

When Loewe's own company was targeted by the union, he enlisted the Anti-Boycott Association's legal counsel, David Davenport, to fight back.[39] Davenport "compiled a list of over 2000 union members and, comparing the real estate and bank records in Danbury, Bethel, and Norwalk, identified over 240 hatters who owned homes or had bank accounts."[40] Davenport and the Association then filed suit against the individual union members on September 13, 1903, claiming a violation of the Sherman Act and demanding treble damages, and had the Sheriff of Fairfield County attach the union members' property.[41] These damages amounted to $240,000—slightly more than $7 million in today's dollars.[42]

At the lower court, the union's demurrer was sustained, the court concluding that the plaintiffs had not stated a claim that was within the reach of the Sherman Act.[43] The U.S. Supreme Court reversed and remanded for further proceedings, rejecting

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34 *Id.*

35 FINKIN, *supra* note 30, at 19 (citing DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM 34 (1995)).

36 *Id.*

37 *Id.* (citing ERNST, *supra* note 35).

38 *Id.*

39 *Id.*

40 FINKIN, *supra* note 30, at 19.

41 *Id.*

42 *Id.* Inflation-adjusted dollars were estimated by the author using data from the Federal Reserve Bank of Minneapolis' "[h]istoric data including estimates before the modern U.S. consumer price index (CPI)." Consumer Price Index, 1800–, FED. RSRV. BANK OF MINNEAPOLIS, https://perma.cc/LP9M-JPES.

43 *Loewe*, 208 U.S. at 282.

the union's contentions.[44] The union and its members had argued that the restraint was primarily intrastate, rather than interstate; that the restraint involved no actual physical obstruction of goods; and that they themselves were not engaged in interstate trade.[45] After several more years of litigation following the Supreme Court's reversal, the American Federation of Labor (AFL) petitioned the workers of the United States to donate one day's wages, on January 27, 1916, in order to assist the individual defendants who were at risk of losing their homes.[46] "In total, the case had cost the labor movement over $400,000,"[47] approximately $11,914,000 in today's dollars.[48]

Alarmed by the potential costs of the Sherman Act and at the receiving end of the liberal use of labor injunctions issued under the authority of the same Act, the U.S. labor movement sought desperately to have the law amended.[49] These efforts culminated in the passage of the Clayton Antitrust Act of 1914.[50] Section 6 of the Act declared:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.[51]

Section 20 declared that "no restraining order or injunction shall be granted by any court of the United States" in any case involving a labor dispute between employer and employees.[52] Passage of the Clayton Act led Samuel Gompers, President of the AFL, to rejoice that the Clayton Act had conferred a veritable

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44 *Id.* at 309.

45 *Id.* at 281–83.

46 FINKIN, *supra* note 30, at 23.

47 *Id.*

48 *Id.* This number was calculated using the same methodology described in note 42.

49 ERNST, *supra* note 35, at 130–31.

50 Pub. L. No. 63-212, 38 Stat. 370 (codified at 15 U.S.C. §§ 12–27 and 29 U.S.C. §§ 52–53)

51 Clayton Act § 6; 38 Stat. 731; 15 U.S.C. § 17.

52 Clayton Act § 20; 38 Stat. 738; 29 U.S.C. § 52.

"Magna Carta" upon organized labor.[53] Also recognizing its significance, Naidu, Posner, and Weyl have offered that "prior to the Clayton Act, antitrust law in labor markets was used to enjoin labor unions as anticompetitive."[54]

But Naidu, Posner, and Weyl's observation is not exactly correct. Not only was antitrust used to enjoin labor unions prior to the Clayton Act, it was used to enjoin them *after* its passage as well. The Clayton Act, despite its celebration by organized labor, turned out to be a monumental disappointment—once the Supreme Court was given the opportunity to interpret it. In an equally infamous decision from labor legal history, the Supreme Court concluded in *Duplex Printing Press Co. v. Deering*[55] that the Clayton Act did "no more than declare lawful those labor activities that were lawful prior to the statute's enactment."[56] The Supreme Court in *Duplex Printing* also said that § 6's language did not "authoriz[e] any activity otherwise unlawful."[57] Moreover, despite the Clayton Act's attempt to deprive courts of their equity jurisdiction in labor disputes, the Supreme Court in *Duplex Printing* also said that § 20 was merely "declaratory of the law as it stood before."[58]

It was not until much later that the Supreme Court changed its interpretation of the Sherman and Clayton Acts with respect to labor unions and labor disputes. In *Apex Hoisery Co. v. Leader*,[59] the Supreme Court began this more labor-protective interpretation of antitrust regulation. Union members in a hosiery factory in Philadelphia seized the factory after members ordered a strike because the petitioner refused to sign a closed shop agreement.[60] The leader of the Federation declared a "sit down strike."[61] The Court held that the actions of the workers were not violations of the Sherman Act.[62] Although there was a delay in the distribution of hosiery, the Court found that these delays were not intended to have and in fact had no effect on the price of hosiery.[63]

53 ERNST, *supra* note 35, at 165.

54 Naidu et. al., *supra* note 1, at 570.

55 254 U.S. 443 (1921), *superseded by statute* as recognized by Brown v. Pro Football, Inc., 518 U.S. 231, 236 (1996).

56 FINKIN & GLYNN, *supra* note 30, at 26.

57 *Duplex Printing*, 254 U.S. at 469.

58 *Id.* at 470.

59 310 U.S. 469 (1940).

60 *Id.* at 481–82.

61 *Id.* at 482.

62 *Id.* at 512.

63 *Id.* at 501.

Soon after this decision, in 1941, the Supreme Court held in *United States v. Hutcheson*[64] that the acts of union members against another trade union are not punishable as criminal under the Sherman Act.[65] Members of the United Brotherhood of Carpenters and Joiners came into conflict with the International Association of Machinists over the distribution of certain jobs.[66] The Carpenters went on strike and were indicted with criminal conspiracy in violation of the Sherman Act.[67] In its judgment, the Court acknowledged that the views expressed in *Duplex Printing* had "misconceived" the area of industrial conflict that Congress had intended to leave to "economic forces and the pressure of public opinion" rather than to the intervention of the federal courts.[68] Reading the Norris-LaGuardia Act,[69] which in 1932 had withdrawn equity jurisdiction over labor disputes from federal courts,[70] alongside § 20 of the Clayton Act, the Court concluded: "It is at once apparent that the acts with which the defendants are charged are the kind of acts protected by § 20 of the Clayton Act."[71] Although the Norris-LaGuardia Act had withdrawn the power of federal courts to issue injunctions in labor disputes, the Court said: "to argue . . . that the *Duplex* case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison."[72]

Refusing to read Norris-LaGuardia and the Clayton Act with such "mutilating narrowness,"[73] the Supreme Court instantiated a new, broadly protective view of labor union conduct as intended by Congressional policy: "[W]hether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct."[74] Thus, it was not until the arrival of the New Deal that

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64 312 U.S. 219 (1941).
65 *Id.* at 232–33.
66 *Id.* at 228.
67 *Id.*
68 *Id.* at 231.
69 29 U.S.C. §§ 101–115.
70 29 U.S.C. § 101.
71 *Hutcheson*, 312 U.S. at 233.
72 *Id.* at 234–35.
73 *Id.* at 235.
74 *Id.* at 231.

the federal courts substantially changed their attitude toward labor unions and their tactics—almost thirty years after the passage of the Clayton Act.

Therefore, when asking why antitrust law has not been a major tool in regulating wages and employer monopsony power, it is hard to ignore the use of those very laws in opposing and obstructing the labor movement. The absence of antitrust enforcement in labor markets is not surprising given the antipathy that labor unions, as the voice and representative of workers, have felt toward it. Naidu, Posner, and Weyl highlight the barriers that workers face when contemplating antitrust actions on their behalf: low damage awards for individual plaintiffs and diversity obstacles for worker class actions.[75] Labor unions, of course, are in a better position to avoid or navigate these challenges as well as to push and promote public policy—including antitrust policy—in directions more favorable to workers, as they have in countless other areas of public policy. That they have chosen not to do so says something significant about their attitudes towards antitrust law. Notwithstanding that history, much has changed since these conflicts of more than a century ago. By now, unions' disinterest in antitrust may have more to do with lack of awareness than animosity. Still, unions' former aversion says much about the path-dependent reasons for the lack of antitrust concern in labor markets. And, in looking for actors willing to undertake antitrust litigation on behalf of workers, unions remain important, if not essential, candidates. Overcoming unions' long-standing antipathy, even if now merely inertial, may therefore be necessary to make antitrust a conventional tool against employer wage-setting power. Even then, as we will see in Part III, unions may have other, more functional reasons to be wary of antitrust law.

II. What Should Antitrust Law Maximize?

Economists are always optimizing something.[76] Traditionally, economists have advanced the idea that economic, legal, and social policy should strive to maximize welfare, well-being, or

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75 Naidu et al., *supra* note 1, at 572–74.

76 ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 12 (Sally Yagan et al. eds., 6th ed. 2011) ("Economists usually assume that each economic actor maximizes something . . . ."). In this Part, I adopt the economists' point of view exclusively, primarily because of economics' dominance in the field of antitrust. As I indicate at the end of this Part, there may well be other values or concerns not recognized by economists that antitrust law should pursue.

(what is often assumed to be the same thing) wealth.[77] Falling under the rubric of "efficiency," the thought has also been that wealth or welfare should be maximized without regard to its distribution.[78] Although it seems relatively clear that, in practice, current antitrust law pursues the goal of maximizing consumer welfare, this standard fits uncomfortably with economists' more considered policy objectives to maximize general welfare (not just consumer welfare). In addition, this goal conflicts with the other concerns that monopsony raises, in particular its perverse effects on the distribution of welfare or wealth.

From an economist's perspective, monopsony raises two concerns: it is inequitable and inefficient.[79] When firms have wage-setting power, they push wages below their competitive level.[80] Because this lowers wages and raises profits, monopsony is inequitable; especially insofar as firms' owners are wealthier on average than their employees, which is generally true.[81] Furthermore, when wages are below their competitive level, workers want to supply less labor to the firms paying those wages.[82] Thus, reduced labor supply also restricts output and wealth, which is inefficient.

Given these two disfavored consequences of monopsony power, one might ask which of the two is the greater concern. The response might be that, because inequality and inefficiency go in the same direction, it is not necessary to answer that question. That is, confronting monopsony power will improve both efficiency and reduce inequality, and therefore, because there is no tension or trade-off between them, there is no reason to worry about which objective should have priority.

However, this would be a hasty conclusion for two, interrelated reasons. First, as is well-known, there are some fundamental tensions between efficiency and distribution, both abstractly as well as practically in the case of monopsony and antitrust.[83]Abstractly, it has long been recognized that increases in wealth or

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77 For discussions and overviews of efficiency in the law and economics literature, see generally Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979), and Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980).

78 For a strong case for this claim, see Kaplow & Shavell, *supra* note 12, at 675. *See also* COOTER & ULEN, *supra* note 76, at 7–9.

79 Naidu et al., *supra* note 1, at 558–60.

80 *Id.* at 558.

81 *Id.*

82 *Id.*

83 Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 757 (2004) ("Those commentators who believe efficiency played a role in the legislative history nonetheless see

well-being may, in general, come at the expense of others. This is why law and economics scholars usually embrace a conception of Kaldor-Hicks efficiency rather than the more austere conception of Pareto efficiency.[84] Policy prescriptions sometimes, but probably rarely, produce gains for everyone. Rather, they are more likely to generate winners and losers. Applying a conception of Kaldor-Hicks efficiency, a policy is approved if the winners can potentially compensate the losers and still be better off with the policy. A free trade policy, for example, that produces great wealth for some domestic exporters should be adopted only if they can compensate those who are bankrupted or unemployed by foreign imports that put competing domestic industries out of business. No actual compensation need take place. The winners must merely be willing to adopt the policy if they would gain enough such that they could be better off while hypothetically compensating the losers such that the losers are indifferent. In general, then, there is a tension between efficiency and inequality, insofar as efficiency gains may be unevenly distributed and may even increase inequality.

On a more practical level, antitrust policy actually illustrates quite well the conflict between efficiency and equality. This is particularly so with respect to merger policy, as Naidu, Posner, and Weyl[85] as well as Marinescu and Hovenkamp[86] observe, and as this Essay will discuss further below. In a famous article, Professor Oliver Williamson addressed the efficiency-equity tradeoff directly, asking how the law should respond if "a merger (or other combination) is proposed that yields economies but at the same time increases market power."[87] As Williamson contended, antitrust law and theory had no real answer to these questions because, although the relevant economic theory was "widely available," it had "never been developed explicitly on this issue."[88] As

efficiency in constant tension with distributional goals."); *see also* COOTER & ULEN, *supra* note 76, at 7–9; 106–08 (opposing the consideration of distributive concerns in economics because of its negative effect on efficiency); Kaplow & Shavell, *supra* note 12, at 675–77 (discussing whether it is ever efficient for legal rules to take distributive concerns into consideration).

84 COOTER & ULEN, *supra* note 76, at 42–43.

85 Naidu et al., *supra* note 1, at 585–89.

86 Marinescu & Hovenkamp, *supra* note 1, at 1057–63.

87 Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 18 (1968).

88 *Id.* at 19.

Williamson's intuitive explanation and technical analysis demonstrated, it is indeed possible for a merger to both increase market power at the expense of income equality, and also be net efficient because the deadweight losses that result from an increase in market power are offset by the efficiencies created by the merger—for example, greater economies of scale in production or savings on advertising costs.[89]

In fact, the tension between equity and efficiency is at the heart of some of the most heated debates in antitrust policy. Antitrust scholars have long been divided on the issue of whether antitrust policy should maximize consumer welfare or general welfare (otherwise known as total welfare).[90] General welfare is understood to mean the sum of consumer welfare and producer welfare; alternatively, consumer welfare is general or total welfare less producer welfare.[91] Strictly speaking, an efficiency standard would choose a policy that maximizes total welfare—the general welfare standard. But a general welfare standard would endorse mergers that raise efficiency at the expense of income equality and, especially in the antitrust scenario, consumer welfare—like the mergers at the heart of Williamson's famous paper.[92] This makes the consumer welfare standard, which considers only the welfare of consumers and not producers, appealing. Because the consumer welfare standard would bar any practice or merger that made consumers worse off and raised inequality on average, it has a prima facie egalitarian thrust.

Given that, in practice, courts adopt a consumer welfare standard rather than a general welfare standard,[93] one might think that the secondary status of distributional concerns could be avoided. But this is untrue for at least two reasons. First, the consumer welfare standard is rather strange—at least from an

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89 *Id.* at 21–23.

90 For some of the contributions in this debate, see generally Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The* True *Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010), Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011), Russell Pittman, *Consumer Surplus as the Appropriate Standard for Antitrust Enforcement*, 3 COMPETITION POL'Y INT'L 204 (2007), and Louis Kaplow, *On the Choice of Welfare Standards in Competition Law*, *in* THE GOALS OF COMPETITION LAW 3 (Daniel Zimmer ed., 2012) [hereinafter Kaplow, *On the Choice of Welfare Standards in Competition Law*].

91 *See, e.g.*, Orbach, *supra* note 90, at 138–42. Note that "consumer welfare" often does not mean the same thing in economics as it does in law. *Id.* at 137.

92 Salop, *supra* note 90, at 352; Marinescu & Hovenkamp, *supra* note 1, at 1058–59.

93 Salop, *supra* note 90, at 339.

economist's considered point of view. Because the consumer welfare standard considers only the welfare of consumers, it is haphazard. Why favor the welfare of consumers? Some consumers can be quite wealthy, so the connection between distributive objectives and consumer welfare is, at best, "crude."[94] Second, a merger that is opposed on the grounds that it lowers consumer welfare by a total of $1000 or even $1 million seems strange when the total gains of the merger might produce several multiples of that amount for the firm owners. This is especially so in light of the availability of the income tax, which could be used to make both consumers and firm owners better off by allowing the merger and then redistributing the gains.[95] Indeed, blocking the merger in this case, far from protecting consumers, would actually make them worse off.[96] We will return to the role of the income tax in just a moment.

In light of these difficulties, one often reads a defense of the consumer welfare standard not as a welfare standard at all. Rather, the consumer welfare standard is an injunction against illicit transfers of wealth.[97] The concern is with neither distribution nor efficiency, but with something more like theft. But from an economist's perspective, this is still an odd conclusion.[98] For an economist, *any* policy or legal rule can be justified only according to the maximization of well-being, wealth, or (maybe) its distribution.[99] This includes laws prohibiting theft.[100] From a wealth-maximization perspective, prohibiting theft is done so far as, and only so far as, it generates gains in wealth and welfare. This of

94 *See* COOTER & ULEN, *supra* note 76, at 8.

95 Kaplow & Shavell, *supra* note 12, at 667–69; Kaplow, *On the Choice of Welfare Standards in Competition Law, supra* note 90, at 10–14.

96 Kaplow & Shavell, *supra* note 12, at 674.

97 Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 873–74 (1999); Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631, 632 (1989).

98 One might condemn a transfer by criticizing the assumption, implied in the general welfare or efficiency standard, that consumers and producers value a dollar equally. *See* Salop, *supra* note 90, at 343. Producers and consumers may not value a dollar equally because of different levels of wealth and the principle of declining marginal utility. That principle says that the wealthier person (say, the producer) values an additional dollar less than a poorer person (the consumer). Thus, a transfer from consumer to producer, without any other efficiency effects, would lower social welfare. But this kind of analysis implies the use of a social welfare function, which neither the general nor consumer welfare standard applies. I discuss the use of social welfare functions in the next paragraph.

99 COOTER & ULEN, *supra* note 76, at 12–13.

100 *Id.* at 79–80.

course seems likely to be the case. Individuals would not trade, innovate, or compete unless they could be reasonably secure in their possessions and property, personal and productive. But if we take the perspective that prohibitions against theft are desirable because they increase wealth, then we are back to square one. Given that maximizing total wealth is the objective, we need to explain why we adopt a truncated expression for that objective in the form of the consumer welfare standard. For an economist, it is no answer to say that the consumer welfare standard protects against illicit transfers of wealth. Advocates of the consumer welfare standard are then again at a loss to explain why the general welfare standard is not the more compelling, consistent, and capacious requirement.

An alternative method of evaluating the tradeoff between the equity and efficiency of a policy would be to employ a social welfare function.[101] A social welfare function weighs the welfare of each person or income group at every income level.[102] It is therefore sensitive not just to the total amount of well-being in society but to its distribution as well.[103] How sensitive it is to the distribution of wealth depends on which social welfare function is utilized.[104] A utilitarian social welfare function is the least sensitive to inequality because it places no additional weight on levels of well-being other than an individual's actual well-being.[105] Nevertheless, inasmuch as it is assumed that people have roughly the same utility function, which features a declining marginal utility of money or wealth, a utilitarian social welfare function is at least somewhat sensitive to the distribution of income.[106] One can place additional weights in the social welfare function at each income level in order to make it more sensitive to income inequality. There is a continuous distribution of weights one can choose from, meaning, strictly speaking, that there are an infinite number of social welfare functions. At the opposite end of the spectrum from

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101 For a recent and extensive argument in favor of using social welfare, and social-welfare functions, in legal and regulatory policy, see generally MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS (2012) [hereinafter ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS], and MATTHEW D. ADLER, MEASURING SOCIAL WELFARE: AN INTRODUCTION (2019) [hereinafter ADLER, MEASURING SOCIAL WELFARE: AN INTRODUCTION].

102 JEAN HINDRIKS & GARETH D. MYLES, INTERMEDIATE PUBLIC ECONOMICS 421–26 (2d ed. 2013).

103 *Id.* at 403.

104 *Id.* at 423–24.

105 *Id.* at 424–25.

106 *Id.* at 403.

the utilitarian social welfare function is the so-called “Rawlsian” social welfare function.[107] The Rawlsian social welfare function places all the social marginal welfare weight on the least well-off person. Under this social welfare function, policies cannot be justified unless they benefit the least well-off person, no matter how large the gains are for the rest of society. Accordingly, the Rawlsian social welfare function is the most sensitive to inequality and the least sensitive to total wealth.[108]

Indeed, because a social welfare function is sensitive to both total wealth and its distribution, it appears well-placed to resolve the tension between those two objectives and, in particular, the debate between whether antitrust should adopt a consumer welfare standard or a general welfare standard. By adopting a social welfare function that is moderately or greatly sensitive to inequality, merger analysis could discriminate more rationally about “how much” efficiency gain is required to offset any loss in consumer welfare. For example, one could commit to a social welfare function that would weight consumer welfare losses greater than producer gains, such that a merger that produced only slightly more dollar gains than losses in consumer welfare would be prohibited.[109] But this social welfare function might not be so extreme as to prohibit all mergers that produced very small losses in consumer welfare, no matter the size of the producer gains. That is, a moderate or even strongly sensitive-to-inequality social welfare function would permit mergers only when producer gains, measured in dollar amounts, were very large compared to the consumer welfare losses. In sum, a social welfare function would manage the efficiency and distribution trade-off in a much more consistent and defensible way than the more haphazard, if more easily applied, consumer welfare standard.

However, if such an approach is at least partly motivated by the “compensating” function of a tax-and-transfer system, then a social-welfare-function approach to antitrust and merger policy is still radically incomplete. A second, and more fundamental, problem is that, if we accept that the distribution of wealth (and not

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107 ADLER, MEASURING SOCIAL WELFARE, *supra* note 101, at 87 n.3.

108 HINDRICKS & MYLES, *supra* note 102, at 403.

109 Insofar as “consumer” and “producer” are still based on social aggregates, we still face the problem of haphazardness. Ideally, we should estimate the effects of the merger, via price changes, on the welfare of individuals. The drawback to this is that an individual, as opposed to an aggregate, approach to measuring welfare requires finer-grained data.

just its total amount) is an important and animating policy principle, then we have thus far failed to address other instruments for redistributing income. A complete and consistent approach to distribution and wealth ought to take a fully integrated perspective.[110] Professor Louis Kaplow has long argued that it is both socially harmful and intellectually inconsistent to treat policy matters in separate silos.[111] Indeed, for Kaplow and Professor Steven Shavell, because the income tax can redistribute more efficiently than legal rules, including antitrust law, it is a mistake to interject distributive concerns into areas of policy like antitrust law.[112] To put the matter bluntly, given the availability of the income tax, it may actually improve the well-being of the least well-off if antitrust policy makers adopted a general welfare standard, disregarded the distributional consequences in antitrust, and instead pursued redistribution exclusively though the income tax system.[113] It is hard to argue with this objection if the concern about inequality is motivated by the maldistribution of well-being or wealth (take your pick). Any welfare standard, social welfare or consumer welfare, may actually be harming those we are intending to help if it does not reckon with the availability of the income tax.

At a general level, Kaplow and Shavell claim that while redistributive legal rules generate two distortions, the income tax creates only one.[114] The income tax distorts labor supply or, in other words, the utility maximizing trade-off between labor and leisure.[115] Call this the tax, or labor supply, distortion. Increasing taxes on income makes labor less worthwhile, causing individuals to supply less labor and increase leisure.[116] The deadweight loss caused by the tax moves labor-supplying individuals away from the competitive, efficient benchmark. In contrast to the income tax, legal rules generate two distortions.[117] First, by redistributing

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110 LOUIS KAPLOW, THE THEORY OF TAXATION AND PUBLIC ECONOMICS 13–34 (2008).

111 *Id.* at 15–19.

112 Kaplow & Shavell, *supra* note 12, at 669.

113 *Id.* at 673–74 (showing how implementing a tax-and-transfer scheme that is distributionally equivalent to a hypothetical redistribution legal policy can improve the welfare of the poor).

114 This is how Professor Chris William Sanchirico interprets Kaplow and Shavell's argument. Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1014–16, 1057–58 (2001).

115 *Id.* at 1015–16.

116 *Id.*

117 Matthew Dimick, *The Law and Economics of Redistribution*, 15 ANN. REV. L. & SOC. SCI. 559, 566–67 (2019) [hereinafter Dimick, *The Law and Economics Redistribution*].

income and altering the returns to labor, redistributive legal rules reduce labor supply in the same manner that the income tax does. Second, the legal rule also distorts the behavior regulated by the legal rule itself.[118] Call this the legal-rule distortion. For example, a redistributive damages rule adopted in tort not only affects labor supply incentives but also distorts individuals' precautionary behavior when anticipating the risks of harm to themselves or other individuals.[119] Therefore, while the income tax has one distortion (the tax, or labor supply, distortion) the redistributive legal rule has two (the tax, or labor supply, distortion *and* the legal-rule distortion).[120] Furthermore, notice that because the tax distortion under either the tax or the legal rule is equal (because, for the sake of argument, they redistribute the same amount of income) and because both distortions associated with the legal rule are inefficient, the legal rule always causes a greater waste in resources than the income tax.[121] Therefore, because the income tax can always achieve the same amount of redistribution as the legal rule, policymakers can avoid the additional waste that comes from the legal rule by making a change to the income tax schedule instead.[122] Thus, everything else equal, the income tax can achieve just as much redistribution as obtained by the redistributive legal rule *and* save on resources.[123] These savings can be used to increase transfers to the poor, thus improving the welfare of the poor even beyond that achieved by the redistributive legal rule.[124]

To make Kaplow and Shavell's claim more concrete, we can use a monopsony example. In fact, let's borrow an example that Kaplow uses on behalf of the total welfare standard (and against the consumer welfare standard) in the product market context.[125] Instead of producers and consumers, we will refer to employers and employees and assume that employers are richer than employees. Suppose that permitting a merger results in an employee surplus of 10 and an employer surplus of 10, for a total welfare of

118 *Id.*
119 Kaplow & Shavell, *supra* note 12, at 677.
120 *Id.*
121 *Id.*
122 *Id.* at 673–74.
123 *Id.* at 674.
124 Kaplow & Shavell, *supra* note 12, at 674.
125 Kaplow, *On the Choice of Welfare Standards in Competition Law*, *supra* note 90, at 13–14.

20. In contrast, assume that blocking the merger yields a consumer surplus of 12 and a producer surplus of 2, for a total welfare of 14. In the case of blocking the merger, employee surplus is larger than employer surplus. While employers are supposed to be richer than employees, perhaps Kaplow (in his monopsony example) assumes that the surpluses from the transaction are not the only sources of income or wealth, especially in the case of the richer party. Clearly, if we are applying a worker welfare standard—as articulated by Naidu, Posner, and Weyl, for example—we should block the merger, which sacrifices greater efficiency but does so for the sake of more income equality.[126] Equally clearly, if we are employing a total welfare standard—as advocated by Kaplow and others—we should permit the merger, which has the opposite results for equity and efficiency.[127]

But what if we also consider the income tax in this policy scheme? Then permitting the merger appears to have additional policy advantages. Suppose, Kaplow asks us to consider, that we permit the merger to proceed and then tax an additional 5 from employers (with an increase in the corporate tax, for example) and distribute an additional 5 to employees (through increased transfers to the poor or a reduction in the income tax targeted to the lower brackets, for example).[128] Although employees lose 2 from the permitted merger, they gain 5 in tax benefits, for a net gain of 3 and a group total of 15. Permitting the merger gives employers a gain of 8, but they also lose 5 in taxes, also for a net gain of 3 and a group total of 5. Total social wealth is again 20, as in the originally permitted merger case.[129] Because both employers and employees enjoy a net gain under the merger-plus-tax policy, it is a Pareto improvement over the blocked merger: *both* groups are made better off by the policy that aims to maximize efficiency. Moreover, because this pro-merger-plus-tax policy turns an efficiency-equity conflict into a Pareto improvement, it would be

[126] Naidu et al., *supra* note 1, at 587; Kaplow, *On the Choice of Welfare Standards in Competition Law*, *supra* note 90, at 13.

[127] Kaplow, *On the Choice of Welfare Standards in Competition Law*, *supra* note 90, at 13.

[128] *Id.* at 13–14.

[129] *Id.* Oddly, while assuming that blocking the merger is inefficient, Kaplow also assumes there are no efficiency losses in using the tax system to transfer income. There is not even a "single" distortion, which contradicts Kaplow and Shavell's argument. In the subsequent example, I assume there is some efficiency loss involved in using the tax system, which is more consistent with Kaplow and Shavell's original argument.

preferred to the blocked merger policy under *any* social welfare function.[130]

Based on this sort of reasoning, Kaplow and Shavell argue that, as a general matter, legal rules should never be used to redistribute income.[131] This very much includes antitrust law, as the example we borrowed from Kaplow demonstrates.[132] This constitutes a powerful argument in favor of adopting the general welfare standard in antitrust law and merger analysis because it resolves the tension between efficiency and distribution. Any concerns about the inequitable consequences of efficient mergers should and can be addressed by the income tax system in a Pareto-improving way.

Several authors have responded critically to Kaplow and Shavell's argument for why legal rules should ignore equity and focus exclusively on efficiency.[133] But none have addressed specifically their claim as applied to antitrust. Addressing this oversight is important for a few reasons. First, most of the responses to Kaplow and Shavell have been conducted at the same abstract level of Kaplow and Shavell's own argument.[134] As a result, it is often hard to know how persuasive these criticisms are. Kaplow and Shavell's typical answer is that they merely instantiate exceptions to their otherwise more general, and therefore more

130 Because the pro-merger-plus-tax policy would make the poor at least as well-off as they are under the antimerger policy, it would be favored even under a Rawlsian social welfare function, which is the social welfare function most in favor of the poor and the least sensitive to total wealth. The choice of social welfare function would only determine how the surplus—the Pareto improvement—would be distributed. Dimick, *The Law and Economics of Redistribution*, *supra* note 117, at 572 & n.31.

131 Kaplow & Shavell, *supra* note 12, at 677**.**

132 Kaplow, *On the Choice of Welfare Standards in Competition Law*, *supra* note 90, at 13–14.

133 *See generally* Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000); Ronen Avraham, David Fortus & Kyle Logue, *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125 (2004); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998); Tomer Blumkin & Yoram Margalioth, *On the Limits of Redistributive Taxation: Establishing a Case for Equity-Informed Legal Rules*, 25 VA. TAX REV. 1 (2005); Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051 (2016); Zachary Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478 (2014). For an overview of the debate over taxes versus legal rules in redistributing income, see generally Dimick, *The Law and Economics of Redistribution*, *supra* note 117.

134 Dimick, *The Law and Economics of Redistribution, supra* note 117, at 568–76.

policy-relevant, claim.[135] Second, there are *specific* reasons that Kaplow and Shavell's claim fails in the antitrust context. These reasons have not been identified before, to the best of my knowledge. Furthermore, showing how Kaplow and Shavell's argument fails in a specific but extraordinarily relevant case may actually throw more doubt onto their argument than some of the more abstract responses have.

The specific reason that Kaplow and Shavell's argument fails in the antitrust case is that it ignores another important dimension of the antitrust problem.[136] One could say it ignores a key, *third* distortion.[137] This dimension is the anticompetitive effects of mergers, which will normally include a reduction in labor demand in the case of employer monopsony power. Call this the anticompetitive distortion. To be explicit about this, we can list each distortion separately. Thus, as we identified in our example previously, by changing the distribution of income, mergers or their prohibition affect labor supply incentives, just like taxes (the tax, or labor supply, distortion). This is the first "distortion." The second distortion is that merger and antitrust policies also affect the behaviors they regulate (the legal-rule distortion). Insofar as mergers produce efficiencies, especially in competitive markets, one function of antitrust policy is to ensure that mergers are done for these sorts of "good" reasons rather than for the collusive or anticompetitive "bad" ones.[138] But Kaplow does not explicitly recognize that, even if a proposed merger would be efficient, strictly speaking, such gains may be masking or offsetting precisely these

135 This is essentially the tenor of their response in Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor?: Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 827–34 (2000).

136 In a recent paper, Kaplow addresses the problem of market power and income taxation. *See generally* Louis Kaplow, *Market Power and Income Taxation*, 13 AM. ECON. J.: ECON. POL'Y 329 (2021). The paper analyzes the effects of price markups (i.e., where price exceeds cost) and capital earnings on labor supply of individual income earners and how these affect the optimal income tax schedule, *id.* at 350, but it does not model firm behavior, competitive conditions, or industrial organization that cause such markups and earnings inequalities. Kaplow's approach therefore sidesteps the "Williamsonian" offsetting effects on merger behavior that are included in this Essay's analysis. As this Essay's analysis shows, it will sometimes be redistributively efficient to block some efficient mergers, which contradicts Kaplow's counsel.

137 Dimick, *The Law and Economics of Redistribution*, *supra* note 117, at 573–74 (pointing out how the number of distortions can change the conventional verdict about using legal rules to redistribute income).

138 As Hovenkamp pointed out, if mergers never had any social benefits, then "a strong presumption against them would be warranted." Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 704 (2017).

kinds of anticompetitive effects, such as increasing barriers to entry for potential competing firms and an inefficient reduction in labor demand. This is the "third" distortion, the anticompetitive distortion. To put it in slightly different terms: Blocking a proposed merger to monopsony will (1) reduce labor supply incentives because the income gains the owners of the firms would have obtained with the merger are effectively "taxed" away and (2) obviate the efficiency gains that would have obtained under the merger. Hence, two distortions. But blocking the merger will also (3) maintain more competitive market conditions, say by keeping barriers to entry low, which will, among other things and ceteris paribus, increase labor demand incentives.[139]

The existence of these *offsetting* distortions totally changes the typical "double-distortion" analysis. Ultimately, it implies that we may want to block efficient mergers for distributive reasons, in contradiction to Kaplow and Shavell's argument. More precisely, once we identify a legal rule or policy that produces offsetting economic effects, we cannot assume that the total of these effects will be more inefficient than the single, labor supply effect under an equally redistributive income tax policy. The assumptions that the legal and tax redistributions will have identical labor supply effects and that the two distortions under the legal rule are both inefficient are a crucial part of Kaplow and Shavell's argument.[140] It is only by making these assumptions that we can definitively conclude that legal rules will add greater distortion or economic waste than taxes in redistributing income. That is, it is only the case that if the first labor supply distortion is the same (for the same distribution of income) for both tax and legal-rule redistributions that we can know that the second distortion, however small, will add up to a greater total loss of efficiency.[141]

139 One can refer to the procompetitive effects of antitrust policy as increasing "labor supply incentives," but one should think of this as shorthand for more general "economic supply incentives," to use a more abstract and imprecise phrase. For instance, procompetitive conditions, such as lower barriers to entry, will, strictly speaking, increase the supply of firms into the relevant product market. This is not exactly the same thing as labor supply incentives, but it has precisely the same nature as in Kaplow and Shavell's more customary labor supply analysis.

140 The importance of this assumption is made particularly clear in Louis Kaplow, *On the (Ir)Relevance of Distribution and Labor Supply Distortion to Government Policy*, 18 J. ECON. PERSP. 159, 163–64 (2004).

141 For example, suppose the distributional change caused by both the tax and legal rule policy also causes a loss of efficiency in the labor demand incentives of 5, and that the legal-rule distortion also causes a loss of efficiency in the behavior regulated by the legal rule of 1. Because 6 is greater than 5, the redistributive legal rule is less efficient than the

But these assumptions fail in the antitrust case. For example, blocking the proposed merger to monopsony will generate losses through channels (1) and (2), respectively, that is, reduced labor supply incentives and losses of merger-specific efficiencies. But the third distortion, increasing competition (3), will enhance, among other things, labor demand incentives. The sum of (1) and (3) is less than (1) and, consequently, we can no longer be sure that the sum of (1), (2), and (3) will be greater than (1) alone. Because the third distortion goes in the opposite direction as the first two, it is entirely possible that, for example, the sum of (1), (2), and (3) could be zero. If that were the case, blocking the proposed merger would have no effect on efficiency. But it would prevent income inequality from rising. In that sense, it is a "free lunch" redistribution, without any loss of efficiency.[142] When there is no efficiency loss, it is perfectly permissible—even efficient—to use antitrust law for redistributive purposes, in contradiction to Kaplow and Shavell.

To illustrate these possibilities, let us return to the monopsony example. Again, assume that permitting the merger results in an employee surplus of 10 and an employer surplus of 10, for a total welfare of 20. However, suppose that if the merger is blocked, the employee surplus is 15 and the employer surplus is 4, for a total welfare of 19. One might be tempted to argue that we could simply increase taxes and transfers after permitting the merger and obtain an identical distribution of welfare as when the merger is blocked. This proposal would tax 5 from employers, leaving them with a net welfare of 5, and transfer that same amount to employees, leaving them with a net welfare of 15. However, we can only make this argument if we assume that increased taxation has zero distortionary effects, which is clearly an impermissible claim even under Kaplow and Shavell's own framework.[143] Another possible response might be, because blocking the

tax policy, and the tax policy wins. But if it wasn't the case that the labor demand distortions were the same—both 5—we could not be certain that the tax policy would always prevail. If, for example, the redistributive legal rule caused a loss of efficiency in labor demand incentives of only 4, the policies would be equivalent from both a distributive and an efficiency perspective.

142 This example of a blocked merger that has no net effect on efficiency could be described as a "zero distortion" legal rule, in Professor Zachary Liscow's sense. *See* Liscow, *supra* note 133, at 2486–88. What perhaps sets this example apart from Liscow's analysis is that, in Liscow's case, the legal rule (strict liability in tort) has zero distortion because of the *absence* of any distortions. In the antitrust case, *multiple* distortions act in an *offsetting* way, yielding a *net* zero distortion.

143 *See* Kaplow & Shavell, *supra* note 12, at 677.

merger also has labor supply effects that follow from the blocked merger's distributive effects (the first, tax, or labor supply, distortion), a tax adjustment coupled with permitting the merger could be equivalent to blocking the merger. However, that claim is also impermissible because it assumes that the only effect of blocking the merger is that it has distributional labor supply effects that are equivalent to taxes. This claim ignores the third "distortion" we have drawn the reader's attention to: increasing market power has anticompetitive effects that, among other things, restrict labor demand. Hence, a more plausible scenario is that an optimal tax adjustment, when permitting the merger, (1) taxes 3 from the employers, leaving them with a net welfare of 7; (2) transfers 2 to the employees, leaving them with a net welfare of 12; and (3) results in a total welfare of 19.[144] This outcome is clearly inferior to blocking the merger under any social welfare function because, although both yield identical wealth, blocking the merger delivers lower income inequality.[145] Notice that, setting aside the tax adjustment, blocking the merger is *inefficient* compared to permitting the merger.[146] This example therefore contradicts Kaplow and Shavell's main claim: that inefficient, redistributive transfers are always less efficient than the tax system.

Although our numerical assumptions about the effects of blocking the merger differ from Kaplow's, there is nothing implausible about them. They simply recognize the efficiency tradeoffs in antitrust law illustrated by Williamson's famous analysis.[147] Mergers may both enhance efficiency (e.g., improvements in economies of scale) and reduce it (e.g., anticompetitive effects of consolidation or reduced labor demand in monopsony). Permit-

144 Hence, the loss of efficiency caused by the tax system is captured in the "leaky bucket" loss of 1 when transferring income from rich to poor.

145 Note that transferring a full 5 from the employers might result in even more lost wealth, only mustering 13 for the employees and a total welfare of 18. This may be preferable to the other tax adjustment when permitting the merger—depending on a social welfare function that places a lot of weight on the poor. But it would still be inferior to blocking the merger under any social welfare function.

146 Blocking the merger reduces total welfare from 20 to 19 and is hence an inefficient legal or policy decision. When Kaplow and Shavell speak of efficiency, they typically mean it more narrowly in the sense of total welfare or wealth while ignoring "the tax system, imperfect private insurance, any desire to redistribute, and social welfare maximization." Liscow, *supra* note 133, at 2483. Liscow called legal rules or policy decisions that are in this sense "internal-to-legal-rule" efficient," "i-efficient" legal rules or policy decisions. *See id.*

147 *Supra* note 87 and accompanying text.

ting or blocking a merger may have positive, negative, or no effects for efficiency. Kaplow's numerical example is not necessarily wrong; it simply fails to carry the generality Kaplow wants it to have. According to Kaplow and Shavell's "double-distortion" argument, because the income tax always redistributes more efficiently than legal rules, any inefficient redistributive merger policy will be inferior to an efficient merger policy coupled with a redistributive income tax adjustment. However, as the counterexample demonstrates, this conclusion is false. Blocking some efficient mergers might be superior to permitting efficient mergers with tax adjustments. Our counterexample is plausible because, following Williamson, it recognizes the importance of *offsetting* effects that make it ambiguous whether the merger-specific efficiencies will actually be net positive. So, the claim that antitrust policy should focus exclusively on efficiency and let the tax system address inequities is wrong.[148]

We are now in a position to return to the question we raised earlier: What should antitrust law maximize? I have argued that the consumer welfare standard (or, equivalently, the worker welfare standard as proposed by Naidu, Posner, and Weyl)[149] is a haphazard standard for incorporating fundamental, and entirely relevant, distributive concerns into antitrust policy. I have also shown why Kaplow and Shavell's argument does not support the conclusion that antitrust policy should select the general welfare standard as its normative yardstick. Consequently, because Kaplow and Shavell still cannot avoid confronting the distributive

[148] Another common response to the double-distortion argument is that using legal rules to redistribute income is simply more practical than using the tax system. This is particularly the case because it seems extremely unlikely that efficient, but inequality-increasing, legal decisions or administrative rulings will always be accompanied by compensatory legislative income tax adjustments. For example, Posner and Professor Cass Sunstein wrote: "Policymakers might rationally decide to seek a better wealth distribution through regulatory law, including antitrust law, if political or practical barriers prevent expansion of the safety net." Eric A. Posner & Cass R. Sunstein, *Antitrust and Inequality*, 1, 12 (Feb. 1, 2022), https://perma.cc/MSS8-5JCE. For an extensive treatment of this argument, see Fennell & McAdams, *supra* note 133, at 1073–77. I agree with the practicality argument for using legal rules to redistribute income, but this response, at some level, leaves the double-distortion argument untouched. The objection to the double-distortion argument provided in this Essay means we need not worry about that claim on either practical *or theoretical* grounds. Certainly, that argument's theoretical power explains its practical persuasiveness. The following analysis also provides some guidance for when antitrust *and* tax policy options are both on the table. I thank both Eric Posner and Ioana Marinescu for raising this point in the symposium discussion, and I thank Hiba Hafiz for bringing Posner and Sunstein's article to my attention.

[149] Naidu et al., *supra* note 1, at 586–87.

concerns raised in antitrust policy, I recommend that antitrust adopt a welfare standard that explicitly incorporates distributional weights given by a social welfare function. This approach can be simplified by turning it into an efficiency standard. In other words, antitrust policy should block a merger when it would be more efficient to do so, compared to permitting the merger, coupled with an optimal income tax adjustment. If allowing the merger, subject to the income tax adjustment, would be more efficient, it should be permitted. Critically, the social welfare function enters this comparison through the optimal income tax choice. The optimal income tax requires choosing a social welfare function and, based on that function, will determine the amount of efficiency loss from the optimal tax choice. This essentially gives us the cost of taxation, which then becomes part of the efficiency comparison.[150] If the costs of blocking the merger—the distribution-induced labor supply costs and the loss of merger-specific efficiencies, less the procompetition gains—are less than the costs of permitting the merger—the anticompetition costs and the costs of the optimal tax, less the distribution-induced labor supply gains and the gains from the merger-specific efficiencies—then the merger should be blocked. Otherwise, the merger should be permitted.

Because economists have become adept at estimating the efficiency effects of both mergers and optimal tax policies, this standard of evaluation for antitrust should also be practical and implementable. There will be a debate about which social welfare function should be adopted.[151] This is not a question that can be optimized like a mathematical problem, and it is inherently a "values" question, as economists might say.[152] This is why they

[150] In the standard double-distortion analysis, the costs of taxation, captured by the first, labor supply distortion, effectively drop out of the analysis because they are, as noted previously, assumed to be identical. Once that assumption is no longer tenable, as shown in the antitrust case, the costs of redistribution must be reintroduced as an explicit step in the analysis comparing the most efficient methods of redistribution.

[151] Kaplow has argued, on Pareto grounds, for the utilitarian social welfare function. KAPLOW, *supra* note 110, at 373–74. For an alternative perspective, in favor of stronger distributive weights in the social welfare function, see Matthew D. Adler & Chris William Sanchirico, *Inequality and Uncertainty: Theory and Legal Applications*, 155 U. PA. L. REV. 279, 297–98 (2006). For more general remarks on social welfare functions and policy, see ADLER, WELL-BEING AND FAIR DISTRIBUTION, *supra* note 101; ADLER, MEASURING SOCIAL WELFARE, *supra* note 101.

[152] LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 27 n.20 (2002) (citing Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment,* 48 ECON. J. 635, 637 (1938)).

sometimes talk about the social welfare function as not embodying the preferences of the population, which are arguably incomparable, but as embodying the preferences of the government or social planner, whoever that is.[153]

This raises the question of values more generally. Should antitrust law pursue goals other than efficiency or even distribution? What about concerns such as liberty or democracy? On this question, too, Kaplow and Shavell contend that each and every value can ultimately be reduced to a question of preferences and their satisfactions.[154] This raises questions that cannot be answered in the space of this Essay. Suffice it to say, I am inclined to believe, along with others outside of economics, that wealth and its distribution cannot encompass all of the values relevant to our moral lifeworld. For the purposes of this Part, I have only talked about how economics and economists should approach antitrust policy. For now, I simply acknowledge that there may be other values, besides equity and efficiency, worth pursuing through antitrust law.

III. LABOR LAW VERSUS ANTITRUST?

Although labor law and antitrust law ultimately share the same goal or goals—redistributing wage income among wage earners—I want to argue in this Part that there are some fundamental conflicts in the means of accomplishing these goals. This is particularly true when unions pursue this goal in the best way possible.

A. Union Objectives and the Problem of Excessive Firm Entry

Let me first discuss what this "best way possible" is. This "best way possible" is when unions reduce wage inequality with the least cost to the efficiency of the labor market, perhaps even improving efficiency. We need to discuss the conditions under which unions are able to pursue both objectives, in order to appreciate the implications and tradeoffs for antitrust law.

Under more traditional economic analyses, where labor markets are already assumed to be functioning efficiently, unions and

153 For an example of this manner of speaking, see HINDRIKS & MYLES, *supra* note 102, at 424–26.

154 KAPLOW & SHAVELL, *supra* note 152, at 23. For an opposing perspective, see Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 343–44 (2006).

collective bargaining can only impair the efficient functioning of the labor market. In the well-known "monopoly union" model, where the union is assumed to set the wage and the employer the level of employment, unions raise wages above the market clearing wage.[155] This in turn causes employers to reduce the amount of labor they employ. This can result in either unemployed workers looking for work from other employers and in other labor markets, or in workers "queuing up" at the unionized employer paying supracompetitive wages, or some combination of both.[156] Whatever the outcome, the unemployment of labor is an inefficiency, and both employed labor and output are lower than at their efficient levels.[157]

Responding to this, some economists developed alternative models of the labor market. Many of these responses hinged on defining and refining what exactly the union's objective is.[158] For instance, most unions do not try merely to maximize wages; they care about jobs, too.[159] Unions may seek to increase wages, but do so only over the largest number of employees possible. It is easy to write an objective function that maximizes union utility as a product of wages and the number of workers.[160] These two goals—wages and employment—can be weighted in different ways. Some unions may care more about wages, some may care more about employment; more realistically, unions probably place some weight on each. Scholars and students of unions have also debated how this objective function emerges through the union's

155 For an overview, see generally Bruce E. Kaufman, *Models of Union Wage Determination: What Have We Learned Since Dunlop and Ross?*, 41 INDUS. RELS. J. 110 (2002).

156 This assumes that nonunionized employers will respond exclusively to market forces, as they lower wages in response to growing or excess labor supply. Economists call this the "displacement" effect. MICHAEL C. HARPER & SAMUEL ESTREICHER, LABOR LAW: CASES, MATERIALS, AND PROBLEMS 14–15 (7th ed. 2011). But an alternative response appears to have more empirical support. This is the "threat effect": when one employer is unionized, other employers in the same or adjacent labor markets will raise wages to avoid unionization. *Id.* at 15. It is interesting to think about how much of this effect is owed to the existence of monopsony in the labor market. A nonunion employer that raises wages in response to a different employer's unionized wage increase even makes more sense, beyond just the rationale of staving off a unionization drive, when employers exercise some market power, as the union actually improves the competitiveness of the labor market.

157 For analyses in the legal literature, see Posner, *supra* note 27, at 991, and HARPER & ESTREICHER, *supra* note 156, at 7–8.

158 *See generally* Douglas H. Blair & David L. Crawford, *Labor Union Objectives and Collective Bargaining*, 99 Q. J. ECON. 547 (1984).

159 John H. Pencavel, *The Tradeoff Between Wages and Employment in Trade Union Objectives*, 99 Q. J. ECON. 215, 220 (1984).

160 PIERRE CAHUC & ANDRÉ ZYLBERBERG, LABOR ECONOMICS 377–80 (William McCuaig trans., 1st ed. 2004).

own internal democratic structure.[161] The median union member is likely an employed worker, but the incidence of employment will make even that union member concerned about the possible unemployment effects of overly large wage increases.[162] This concern may depend on other institutional features of the employment context. Seniority policies, for example, may reduce the risk of unemployment for some employees more than others. In any case, unions internalize, to some extent, the effects of unemployment when they bargain for wage increases.

The union's concern for wages and unemployment has important, even dramatic, consequences. For example, if the union and the employer are able to make binding contracts on both terms, both parties have an incentive to reach an "efficient" collective bargaining agreement: one where wages are supracompetitive but where employment is fixed at its competitive, market-clearing, efficient level.[163] Bargaining over employment with a binding commitment fully internalizes the negative externalities of unemployment for both parties, leading to an efficient outcome.[164] Scholars call this "efficient" or "off the demand curve" bargaining, in recognition of the fact that joint gains can be made by departing from the employer's market, labor demand curve.[165]

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161 *See, e.g.*, Blair & Crawford, *supra* note 158, at 553.

162 *Id.* at 555–57.

163 Ian M. McDonald & Robert M. Solow, *Wage Bargaining and Employment*, 71 AM. ECON. REV. 896, 899–901 (1981); Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 436–40 (1992). Getting a union and an employer to agree on the efficient level of employment also depends on the "risk preferences" of unions or union members. If unions are risk averse, they will want to increase employment above its efficient level, leading to too much employment from the standpoint of efficiency, rather than too little. CAHUC & ZYLLBERBERG, *supra* note 160, at 397–99. There may appear to be little downside from a situation of overemployment, especially for employees. But if employers are profit-maximizing and thus minimize their marginal and average costs, overemployment will not be cost-minimizing from a standpoint of total social efficiency.

164 The bindingness of this commitment is essential. In the absence of a binding commitment, employers have an incentive to "cheat" by laying off workers after the union has agreed to a lower level of wages. But even without legally enforceable agreements, repeated bargaining may generate some informally enforceable norms. *See* Maria Paz Espinosa & Changyong Rhee, *Efficient Wage Bargaining as a Repeated Game*, 104 Q. J. ECON. 565, 568–70 (1989).

165 Dau-Schmidt, *supra* note 163, at 423–24. One should also note that, although this contract is efficient with respect to employment, because wages are supracompetitive, wages come out of employer profits. If we assume only a single firm, there may be no further economic consequences. These wage increases may also be provided without other economic consequences if they are "paid for" by various forms of rents or union-specific productivity increases. *Id.* at 426–34. However, in the absence of such rents or productivity increases, lower profits may reduce the supply of firms or capital into the relevant market,

Various permutations on this insight can be made, leading to different models of collective bargaining.

Further implications can be discovered when we also relax the assumptions about the structure of bargaining. Collective bargaining models begin by assuming that one union bargains with one firm. But in a variety of countries, mainly outside the United States, unions often bargain with an employers' association representing many employers.[166] This is another way that unions can internalize the effects of wage increases on employment levels.[167] The basic intuition is that, as unions become more encompassing in who they represent, the more they internalize any negative employment effects they may generate.[168] When labor unions only represent a subset of all employees—or a subset of all workers, employed or unemployed—they take into account the gains they obtain for union members, but not for nonmembers, who are either unemployed or employed in other, nonunion firms and industries. In contrast, when labor unions represent a broader cross section of the wage-earning population, it is less possible for unions to ignore any negative externalities it creates for nonmembers.[169] To use an extreme, but illustrative, example, if unions represented every single wage earner (employed or unemployed), the union, which seeks to maximize the welfare for all its members, would be compelled to internalize any unemployment effects it created through excessive wage demands. Therefore, the more representative the union is of the wage-earning population, the more it must reckon with any negative externalities its wage-setting goals generate.[170]

The most important indicators of if and when unions are able to take such a broader view of their objectives are the institutional makeup of unions and collective bargaining practices. When union organizations are more decentralized, with more decision-making authority and financial autonomy located at lower and smaller units, the less the union will be able to weigh the effects

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which can be a departure from efficiency in a different dimension, outside the labor market.

166 Matthew Dimick, *Productive Unionism*, 4 U.C. IRVINE L. REV. 679, 689–91 & n.55 (2014) [hereinafter Dimick, *Productive Unionism*].

167 *Id.* at 692 & n.62.

168 For the basic argument, see Lars Calmfors & John Driffill, *Bargaining Structure, Corporatism and Macroeconomic Performance*, 3 ECON. POL'Y 13, 35 (1998).

169 Dimick, *Productive Unionism*, *supra* note 166, at 692.

170 *Id.*

of its bargaining on those outside its purview.[171] Conversely, when union authority is more centralized, the ability to translate a capacious policy outlook into collective bargaining practice is more feasible. To make this more concrete, one can usually distinguish three levels of union authority in the official, organized labor movement. At the lowest level, there are union locals, which often represent specific workplaces, even within a multisite employer. At the middle level, we have national union organizations, which link all local union organizations, such as the American Federation of Teachers or the United Automobile Workers. Above that, we have confederations of national unions, such as the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). As it currently stands, the confederations, such as the AFL-CIO, almost always take the broadest, most public-interest oriented standpoint on workers and the economy. But because an astonishing amount of union authority resides at the local level, the confederation's ability to translate this outlook into palpable results at the bargaining table is very limited. Hence, confederations like the AFL-CIO have little role in collective bargaining and act more like the political lobbying arm for labor unions in national politics. In other countries, by contrast, national confederations, representing all unions and the vast majority of workers, have often taken the lead role in bargaining sector-level agreements and nationwide "pacts."[172]

Varying collective bargaining practices and institutions also encourage or discourage labor unions from taking a more encompassing view of the consequences of their wage-setting activities. Similar to the level of authority within unions, the level of collective bargaining will influence whether the parties, and unions in particular, will gauge the impact of their bargaining demands on the economy as a whole.[173] When bargaining is decentralized and unions represent only a single workplace or (at most) a single firm, they will have little ability or inclination to measure these impacts.[174] On the other hand, when a national union confederation bargains with an employer's federation, covering the economy's entire workforce, broader macroeconomic concerns, such as inflation or unemployment, will be the primary concerns on the

171 *Id.*
172 *Id.* at 685.
173 *Id.* at 692.
174 Dimick, *Productive Unionism*, *supra* note 166, at 692.

bargaining parties' agenda.[175] In this instance, too, the United States has represented one end of the pole, with collective bargaining carried on in a highly fragmented and decentralized way. Other countries, most notably Scandinavian ones, have witnessed highly centralized and coordinated forms of collective bargaining.[176]

When we further relax assumptions about the nature of product and labor market competition among employers, the case for unions' abilities to pursue both equality and efficiency becomes even stronger.[177] If labor markets are perfectly competitive, the role of unions is still quite modest, even if they do internalize the effects of their employment decisions. For instance, if unions merely internalize the unemployment effects of their wage-setting activities, they will simply arrive at wage levels equivalent to those of a competitive labor market.[178] Therefore, if the labor market is competitive to begin with, there is not much difference between having no unions and having centralized unions. One may want to prohibit or dismantle powerful, uncoordinated unions. But there is no real value added to having strong, centralized unions. Such unions just deliver what the untrammeled labor market would have produced anyway.

But this conclusion relies on the baseline assumption of perfect competition, either in the product market or in the labor market. If the product market is monopolistically competitive, for example, price will not equal marginal cost, and this means that product markets will not be efficient.[179] One can also have monopsonistic competition in the labor market, with similar inefficiencies.[180] Moreover, monopolistic and monopsonistic competition is compatible with *excessive* firm entry: too many inefficient, high-

[175] *Id.*

[176] *Id.* at 691.

[177] *Id.* at 699.

[178] Lars Calmfors, *Comment*, *in* TRADE UNION BEHAVIOR, PAY-BARGAINING, AND ECONOMIC PERFORMANCE 136, 138 (Robert J. Flanagan et al. eds., 1993).

[179] Avinash K. Dixit & Joseph E. Stiglitz, *Monopolistic Competition and Optimum Product Diversity*, 67 AM. ECON. REV. 297, 297 (1977). Unlike a standard monopoly or oligopoly model, where supracompetitive prices are sustained by barriers that inhibit the entry of other firms into the market, a market is monopolistically competitive when barriers to entry are zero. What sustains monopoly prices in such a market is a different feature such as product differentiation.

[180] V. Bhaskar, Alan Manning & Ted To, *Oligopsony and Monopsonistic Competition in Labor Markets*, 16 J. ECON. PERSP. 155, 160 (2002); V. Bhaskar & Ted To, *Minimum Wages for Ronald McDonald Monopsonies: A Theory of Monopsonistic Competition*, 109 ECON. J. 190, 197 (1999).

cost producers entering the market and maintaining positive profit margins.[181] This might be particularly likely in monopsonistically competitive labor markets, where monopsony or oligopsony pushes down wages, increases profits, and attracts new firm entrants.[182] Raising wages, especially through an industry-wide bargaining procedure, can actually improve the efficiency of product and labor markets.[183] Raising wages across the board can eliminate inefficient, high-cost producers from the market.[184] By contrast, wage differentials based on firm characteristics may also detract from efficiency in imperfectly competitive markets, for example, when there are persistent rents and either wage posting or wage bargaining between firms and individual workers.[185] In this context, centralized wage bargaining can lower wages in low-cost, high-productivity firms, raise wages in high-cost, low-productivity firms, and still raise wages on average across the industry's workforce as a whole, while improving efficiency by subsidizing industry leaders and taxing industry laggards. In dynamic models, rewarding leaders and taxing laggards can also accelerate investments in productivity.[186] Under these more complicated but arguably more realistic assumptions, unions improve efficiency, as well as equality, compared to the unregulated, "free"

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[181] Martin K. Perry, *Scale Economies, Imperfect Competition, and Public Policy*, 32 J. INDUS. ECON. 313, 329 (1984); C. C. von Weizsäcker, *A Welfare Analysis of Barriers to Entry*, 11 BELL J. ECON. 399, 405 (1980); N. Gregory Mankiw & Michael D. Whinston, *Free Entry and Social Inefficiency*, 17 RAND J. ECON. 48, 57 (1986).

[182] Bhaskar et al., *supra* note 180, at 190 (explaining that a minimum wage in a monopsonistic labor market will not only restore efficiency but also reduce profits and cause firms to exit the market).

[183] Amitava Krishna Dutt & Anindya Sen, *Union Bargaining Power, Employment, and Output in a Model of Monopolistic Competition with Wage Bargaining*, 65 J. ECON, 1, 9 & n.11 (1997).

[184] As Rudolf Meidner, one of the architects of the Swedish model of collective bargaining, explained: "The equalizing of the wage structure squeezes out unprofitable firms unable to pay market wages." Rudolf Meidner, *Why Did the Swedish Model Fail?*, 29 SOCIALIST REG. 211, 217 (1993).

[185] Calmfors & Driffil, *supra* note 168, at 43–44 (acknowledging the enhanced ability of firms to raise wages when product markets are monopolistically competitive). More generally, see the large literature on search models of the labor market and wage bargaining. *See generally* Arthur J. Hosios, *On the Efficiency of Matching and Related Models of Search and Unemployment*, 57 REV. ECON. STUD. 279 (1990).

[186] Karl Ove Moene & Michael Wallerstein, *Pay Inequality*, 15 J. LAB. ECON. 403, 427 (1997).

labor market and especially the decentralized, collectively bargained labor market.[187] These implications go double in our contemporary setting. Labor economists appear more willing than ever to concede that labor markets are monopsonistic. That likely being the case, under the right set of institutional arrangements, labor unions can counter the effects not just of inefficiency but also of wage inequality in both product and labor markets.

B. Collective Bargaining and Antitrust Conflicts

We are now finally in a position to see how these different assumptions about labor union goals bring collective bargaining into conflict with antitrust objectives. The most direct conflict is between collective bargaining's market concentration effects—particularly more centralized, public-oriented collective bargaining—and the antitrust injunction against market concentration. As we have seen, under assumptions of monopolistic competition, the free entry of firms can actually produce an inefficient allocation of resources. Normally, antitrust policy in particular affirmatively endorses the entry of more firms into a product space.[188] Competition per se is valued, if not as an intrinsic good itself, then

[187] For evidence of the negative effects of decentralized wage bargaining on firms' investment decisions, see Stephen G. Bronars, Donald R. Deere & Joseph S. Tracy, *The Effects of Unions on Firm Behavior: An Empirical Analysis Using Firm-Level Data*, 33 INDUS. RELS. 426, 439–42 (1994) (finding that unionization is associated with less investment in durable assets, such as research and development, in the United States); Robert A. Connolly, Barry T. Hirsch & Mark Hirschey, *Union Rent Seeking, Intangible Capital, and Market Value of the Firm*, 68 REV. ECON. & STAT. 567, 568–69 (1986) (finding that unionization is associated with lower investment in research and development in the United States); Kevin Denny & Stephen J. Nickell, *Unions and Investment in British Industry*, 102 ECON. J. 874, 882 (1992) (finding that unionization is associated with lower investment rates in the United Kingdom); Barry T. Hirsch, *Firm Investment Behavior and Collective Bargaining Strategy*, 31 INDUS. REL. 95, 112 (1992) (finding that unionization is associated with lower investment in research and development and physical capital in the United States); Cameron W. Odgers & Julian R. Betts, *Do Unions Reduce Investment?: Evidence from Canada*, 51 INDUS. & LAB. RELS. REV. 18, 23 (1997) (finding that unionization is associated with lower net investment rates in Canada). For evidence of the absence of these negative effects in countries with more centralized collective bargaining, see Naercio Menezes-Filho & John Van Reenen, *Unions and Innovation: A Survey of the Theory and Empirical Evidence*, *in* INT'L HANDBOOK TRADE UNIONS, 293, 328 (2003). A related study found that wage compression associated with centralized wage bargaining in Sweden was consistent with increases in productive efficiency as long as it focused on reducing wage inequalities between firms and did not compress within firm wage differentials too greatly. *See* Douglas A. Hibbs, Jr. & Håkan Locking, *Wage Dispersion and Productive Efficiency: Evidence for Sweden*, 18 J. LAB. ECON. 755, 776–77 (2000).

[188] Naidu et al., *supra* note 1, at 589–90.

as one essentially *identical* with the goal of efficiency.[189] This identity is confounded, however, when competitive conditions are monopolistically or monopsonistically competitive, because then the important link between price and marginal cost is severed. When average and marginal cost are no longer joined, there can be *excessive* entry of firms from the standpoint of efficiency. Of course, the idea that there are too many firms in our contemporary, concentrated product markets sounds astonishing. But what counts as "excessive" is very much relative in this discussion. Under monopolistic or monopsonistic competition, with persistent cost differentials between firms, three firms could be too many relative to two firms.

In this kind of monopolistically competitive environment, unions can improve efficiency by changing the cost structure of an industry and weeding out inefficient producers. But this effect comes into direct contradiction with antitrust law's preference for reduced concentration and lowering barriers to entry.[190] It does not appear that current antitrust policy has a method for evaluating monopolistic competition. From descriptions given by Naidu, Posner, and Weyl and by Marinescu and Hovenkamp, it appears that the main methods of evaluating competition are the "Market Definition and Concentration" approach[191] and "Upward Pricing Pressure" indices.[192] These methods attempt to determine whether firms have price-setting (or wage-setting) power, but because the existence of wage-setting power is not inconsistent with excessive entry, it is not clear whether these approaches are able to account for this problem. Antitrust policy appears to be motivated, in much the same way that labor market policy toward unions has been, by an underlying assumption that markets are naturally competitive. But this assumption does not appear persuasive, once one takes into account realistic concerns about information and differences between firms (in production methods, access to markets and suppliers, internal organization and

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189 This is essentially an implication of the market concentration indices used in antitrust regulation. *See, e.g.*, *id.* at 574.

190 To be clear, centralized wage bargaining need not always restrict entry. Rather, when unions care about the unemployment and labor market participation rates, they will tend to restrict entry when it is inefficiently excessive. Centralized wage bargaining will enhance entry when it is efficient to do so by subsidizing wages for low-cost, efficient producers.

191 Naidu et al., *supra* note 1, at 574; Marinescu & Hovenkamp, *supra* note 1, at 1048–50.

192 Naidu et al., *supra* note 1, at 578.

culture, etc.).[193] Promoting competition and free entry, on the assumption that more of both is always better, may actually lead to inefficient outcomes, the costs of which may be borne by workers more than firms (insofar as monopoly induces inequality). Of course, the market power of fewer firms must be balanced against the problem of excessive entry. Excessive entry is not the sole concern, and perhaps that concern has waned in more recent years compared to the problem of market power. Squaring this circle is certainly no easy task.

One can legitimately ask whether unions are any better than antitrust law at pursuing the objectives of efficiency and equity. The danger is that unions, in attempting to correct for employer monopsony power, will overcorrect by bargaining wages above their efficient level.[194] But as argued above, if, under the right set of institutions, unions seek to maximize the greatest good for the greatest number of wage earners, this goal will largely translate into satisfying both egalitarian and efficiency standards. When bargaining is relatively centralized and union representation of the labor market is broad and widely encompassing, unions will internalize the inefficient (unemployment) effects that would result from excessive wages. In fact, labor unions' goals of lowering the unemployment rate and raising the employment-participation rate may track efficiency better than an unfettered labor market or a market concentration index. A low unemployment rate, when combined with an egalitarian wage distribution, is a much more proximate measure of efficiency and equity than a market concentration index. Given conditions where governments could control capital flows and monetary authority, unions' achievements in this area look impressive.[195] Excessive entry does seem to be a concern expressed by at least some U.S. employers, who have been heard to complain about "chislers" (high-cost inefficient producers) entering the market, seizing market share, and

[193] Somewhat contradicting the textbook model of firms, which assumes homogeneous firms with equal access to the most recent technical and organizational innovations, the real world is characterized by massively heterogeneous firms. These differences produce the rents that underlie much of the recent increase in earnings inequality. *See, e.g.*, Jae Song, David J. Price, Faith Guvenen, Nicholas Bloom & Till von Wachter, *Firming Up Inequality*, 134 Q. J. ECON. 1, 14 (2019).

[194] This concern was raised by Herbert Hovenkamp and Eric Posner during discussion at the symposium.

[195] *See* Hibbs & Locking, *supra* note 187, at 759–61 (showing evidence of success in Sweden with lower wage dispersion, low unemployment, and high workforce participation).

making it difficult for lower-cost producers to maintain normal or adequate rates of return.[196] Of course, what counts as normal or adequate is not a disinterested judgment here. But the concerns are not necessarily thinly veiled statements of business self-interest; as just shown, the idea that excessive entry can be a drag on efficiency is consistent with economic theory.

In summary, the tension between excessive, inefficient entry and the assumption that entry and reduced concentration are always beneficial translates into a significant policy conflict between collective bargaining and antitrust policy. To the extent that competition is monopolistic, and average and marginal costs no longer align, we should be concerned with the problem of excessive firm entry. Collective bargaining can address these concerns, if in an indirect way, through wage policies that eliminate high-cost producers and subsidize low-cost industry leaders. Restricting entry in any way, by contrast, appears anathema to current and accepted antitrust policy. Moreover, antitrust policy, which appears to always favor entry and less concentration, does not appear to currently have a way of addressing the concern of excessive entry. The central concern of antitrust policy is that fewer producers enhance the danger of price-setting power. This concern is always relevant, even in a monopolistic competition setting, but it does not obviate the competing concern of excessive entry.

C. Unions and Antitrust: Substitutes or Complements?

Another potential source of conflict between antitrust and labor law may arise if antitrust enforcement in the labor market substitutes for, or crowds out, labor unions. In economics, goods are complements when the demand for one good tends to increase when the price of another decreases, like bread and butter.[197]

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196 PETER A. SWENSON, CAPITALISTS AGAINST MARKETS: THE MAKING OF LABOR MARKETS AND WELFARE STATES IN THE UNITED STATES AND SWEDEN 63 (2002). Another interesting, if indirect, historical example of this comes from Senator Robert F. Wagner's speech on the National Labor Relations Act, in which he stated, "We have released the business man from the undiscriminating enforcement of the antitrust laws, which had been subjecting him to the attacks of the price cutters and wage reducers—the pirates of industry." 79 CONG. REC. S2371 (daily ed. Feb. 21, 1935) (statement of Sen. Robert F. Wagner). For a contemporary example, see Matt Day & Spencer Soper, *Amazon Has Turned a Middle-Class Warehouse Career into a McJob*, BLOOMBERG (Dec. 17, 2020), https://perma.cc/ALR9-FQ4J.

197 WALTER NICHOLSON & CHRISTOPHER SNYDER, MICROECONOMIC THEORY 184–85 (10th ed. 2013).

Goods are substitutes, on the other hand, when the demand for one good tends to decrease when the price of another decreases, like orange juice and apple juice.[198] Similarly, we can ask whether the greater enforcement of antitrust law in the labor market will facilitate or impede the unionization of workers and the other goals of labor law and labor unions. If antitrust and labor law are complements, unions may actually stand to benefit from more proactive antitrust enforcement in the labor market. On the other hand, if antitrust and labor law are substitutes, the more active enforcement of antitrust may make it harder for unions to form and do their job. It is a comforting thought that, because antitrust and labor law both help workers, they must also be complementary policies. In this Section, however, I provide some reasons for why they may be substitutes.

We have already seen one area where antitrust and labor law may be substitutes, and this is where the two conflict with respect to firm entry in product market space. But there are probably other areas of substitution as well. Consider, for instance, the central goal of wage-setting policy. Antitrust seeks to counter inequality and employer monopsony power by reducing product or labor market concentration or explicitly banning collusive wage-setting practices. Labor unions also seek to counter inequality and employer monopsony power, but do so through collective bargaining and the threat of strikes as a way of bringing employers to the bargaining table. The question is, if antitrust policy is successful at achieving equality and efficiency in the labor market, what interest or motivation will there be for workers to join unions and pursue wage policies that are consistent with the broad, public interest?[199]

The concern that vigorous enforcement of antitrust in the labor market will crowd out labor unions is not just idle speculation. Historically, unions in the United States have adamantly opposed

198 *Id.* at 71.

199 Naidu and Posner have acknowledged very recently that antitrust policy offers only a partial remedy to labor market power. *See generally* Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of the Law*, 57 J. HUM. RESOURCES 284 (2022). This is because many of the sources of labor market power are "frictional" and inherent in the labor market, not just a consequence of barriers to entry or collusive practices, and therefore beyond the reach of antitrust policy. *Id.* at 302. Obviously, if antitrust law only offers a partial remedy to labor market monopsony, then this reduces the substitution effect of antitrust with collective bargaining. Nevertheless, we may well ask whether antitrust is at all necessary in labor market regulation, particularly if more direct approaches (such as minimum wage law or collective bargaining) are *fully* adequate. I discuss the advantages of labor law over antitrust law in Part III D.

government intervention into areas traditionally conceived as part of their jurisdiction.[200] And one reason they have taken this stance is because they have been concerned about external intervention undermining workers' commitment and loyalty to the union.[201] In other words, they have been concerned about the substitution effects of government intervention on union membership.

This claim goes against some mainstream assumptions about the history of U.S. labor unions. Several scholars have interpreted the concerns about government intervention into the labor market not as worries about substitution effects but as reflecting a certain political posture. The concerns expressed by unions have been said to represent a narrow, even classical liberal approach to collective labor relations.[202] Construing this philosophy as "voluntarist," such antipathy toward government intervention in union domains is seen as a kind of free market version of collective bargaining.[203] This vision, so interpreted, is contrasted with a more political version of union power, defined precisely by the role of state intervention into labor relations.[204] As the story goes, whereas unions in the United States have pursued a form of collective bargaining marked by voluntarism and the autonomy of labor relations from government regulation, labor movements elsewhere have rejected this approach. This interpretation is said to explain, in large part at least, the higher levels of wage inequality and the impoverished welfare state that prevails in the United States, in comparison with other, European capitalisms.[205] Because labor unions in the United States have sought to regulate the workplace without government support or interference, it is assumed that this also causes reduced union support for a range of social benefits, from unemployment insurance to public healthcare. Skepticism about government intervention in labor markets is said to translate into skepticism about the role of government generally.

200 WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 130–32 (1991); VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES 3–9 (1993); *see also* CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA 1880–1960, at 86–87 (Louis Galambos & Robert Gallman eds., 1985) (discussing unions' opposition to being incorporated).

201 HATTAM, *supra* note 200, at 5; *cf.* Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319, 371 (2012).

202 FORBATH, *supra* note 200, at 130–31; HATTAM, *supra* note 200, at 5.

203 HATTAM, *supra* note 200, at 3.

204 *Id.* at 3–9.

205 FORBATH, *supra* note 200, at 1–2.

The trouble with this interpretation is that it does not survive critical examination, particularly when one takes a closer look at European labor movements. Consider Germany, for example, a country not exactly known for an anti-regulatory approach to social problems.[206] A fundamental, long-recognized principle of German collective labor relations goes under the name of *Tarifautonomie*, which translates roughly to "collective bargaining autonomy."[207] Not at all dissimilar to the perspective of U.S. unionists of the past, German unions have insisted on claiming a domain of workplace regulation that is "hands off" to the intrusion of the state. In fact, this fundamental principle of collective bargaining finds its basis in Article 9, subsection 3 of the German constitution.[208]

This principle is effectively illustrated in political debates over the minimum wage. Like other strong European labor movements, German unions have historically eschewed and even opposed the introduction of a state mandated and enforced minimum wage.[209] To be sure, a minimum wage prevails in many of these countries because they are set in broad, encompassing collective bargaining agreements between unions and employer associations.[210] But they are not legally enforceable, and employers abide by them because of the threat of organized strikes and boycotts if they fail to pay the collectively negotiated minimum wage.[211] In Germany, a minimum wage was introduced as recently as 2015, and this timing had much to do with neoliberal reforms and weakening labor union power.[212] Germany went through a series of labor market and social insurance reforms in the 2000s, known as the "Hartz reforms," because of allegations that such regulations were contributing to high unemployment and an unresponsive labor market.[213] The Hartz reforms did lead to increased employment, but many, if not the majority, of these

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[206] For a brief overview of German labor and employment law, see ROGER BLANPAIN, SUSAN BISOM-RAPP, WILLIAM R. CORBETT, HILARY K. JOSEPHS & MICHAEL J. ZIMMER, THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW–CASES AND MATERIALS 394–431 (2007).

[207] Rudolf Buschmann, *Workers Participation and Collective Bargaining in Germany*, 15 COMP. LAB. L.J. 26, 26 (1993).

[208] *Id.* (citing GRUNDGESETZ [Basic Law] art. 9, § 3 (F.R.G.))

[209] Brett Meyer, *Learning to Love the Government: Trade Unions and Late Adoption of the Minimum Wage*, 68 WORLD POL. 538, 546 & n.16, 554–55 (2016).

[210] *Id.* at 538–39.

[211] *Id.*

[212] *Id.* at 539, 560–62.

[213] *Id.* at 560–62.

additional jobs were in the low-wage sector, where the reach of unions had waned.[214] A statutory minimum wage was enacted only after a serious debate within the German labor movement among both unions and political parties. Initially, strong unions with broad, representative coverage in their industries opposed the introduction of a statutory minimum wage; weak unions, unable to make any headway in collective bargaining on their own, supported the minimum wage.[215] As these developments illustrate, the minimum wage was hardly the result of progressive thinking, a state-versus-market vision, or a philosophy of union activities. They were far more practical responses to the state of union *power* in the labor market. If anything, the introduction of government regulation into the labor market is a symbol of the labor unions' defeat in the context of a decidedly neoliberal policy environment.

We can also look at the experience of Sweden to confirm the view that European unions have also prized the principle of collective bargaining autonomy, free from government intervention—and that this attitude hardly implies a classical liberal or retrograde attitude about the regulation of labor relations. Unlike the German labor movement, and even less like the U.S. labor movement, Swedish unions have maintained high rates of union membership and collective contract coverage of the labor force.[216] Mainly for this reason, the Swedish labor movement has seen little need for a statutory minimum wage. But the absence of the minimum wage is not just dictated by lack of necessity. Exactly the same kind of concern that motivated German trade unionists, or even U.S. unionists of yore, has also led Swedish labor movement actors to oppose the introduction of a statutory minimum wage. According to one Swedish trade union official:

> It's all about social power. So if we sort of let the power or the price of labor slip through our fingers and we get someone else doing that for us, then we will lose a lot of influence. And it will lower the wages, other conditions will follow, and that's what you learn from all other countries. So, last resort as a

[214] Meyer, *supra* note 209, at 560–62; KATHLEEN THELEN, VARIETIES OF LIBERALIZATION AND THE NEW POLITICS OF SOCIAL SOLIDARITY 138–41 (Margaret Levi ed., 2014).

[215] Meyer, *supra* note 209, at 566–68.

[216] Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319, 333–34, tbl. 1 (2012) [hereinafter Dimick, *Labor Law, New Governance, and the Ghent System*].

> trade union is to demand a legislative minimum wage. As soon as you're there, I think it's very difficult to get out of it.[217]

It can also be noted that in Sweden, trade unions play an enormous role in the administration of unemployment insurance, which exhibits an interesting "public-private" collaboration.[218] Even the construction of Sweden's famed welfare state had as much (and maybe more) to do with negotiations between unions and employers at the bargaining table as it did with the victories in the legislature of the "official" representation of workers and unions in politics, the Swedish Social Democratic Party.[219]

Of course, trade unions in Germany or Sweden are not *anti*-political, and the line between what counts as private versus public in European labor relations is complicated, to put it mildly. But this hardly helps a theory of the labor movement that assumes that collective bargaining and government regulation are complements or claims that voluntarism is straightforwardly conservative or regressive. Explanations for the failure or disappointment of unions in the United States cannot be pinned on a particular, "voluntarist" philosophy of collective bargaining. Such failures lie elsewhere, I suspect, in the long history of craft-union *organization* (not ideology) in the United States, and its path-dependent overshadowing of the belated emergence of industrial unionism.[220]

There is therefore significant evidence of a crowding out effect of government policy on unions' collective bargaining activities. Unions fear that workers will have no incentive to join the union or maintain membership if the government substitutes for the union's activity. A broad overview of union power and collective bargaining in developed countries bears out this relationship. Where unions have higher rates of membership and contract coverage in the labor force, regulation of labor relations is supplied primarily by labor unions and employer associations, and the government's role is absent or scarce. I make no claim that the cause of weak unions is government intervention. More likely, as the German and Swedish cases illustrate, the government steps in

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217 Meyer, *supra* note 209, at 557.

218 Dimick, *Labor Law, New Governance, and the Ghent System*, *supra* note 216, at 330 n.48.

219 ISABELA MARES, TAXATION, WAGE BARGAINING, AND UNEMPLOYMENT 83–127 (Margaret Levi ed., 2006); *see also* ISABELA MARES, THE POLITICS OF SOCIAL RISK: BUSINESS AND WELFARE STATE DEVELOPMENT 51–53 (Margaret Levi ed., 2003).

220 Dimick, *Productive Unionism*, *supra* note 166, at 683.

when unions cannot or are no longer able to achieve their essential functions. Much the same story could be said for the United States. That fact hardly vitiates the main point, however. If government and union regulation were complements, we should expect to see unions act as strong supporters of government intervention into the wage relation. That we observe this nowhere is a strong reason to be cautious about taking a strong antitrust response to labor market monopsony.

To summarize, a vigorous enforcement of antitrust law may undermine unions' raison d'être. If one of the central, if not *the* central, objectives of labor unions is bargaining over workers' wages, an alternative form of wage regulation, such as antitrust law, may give workers little incentive to form or join unions. Unions throughout place and time have uniformly insisted on an area of autonomy for their activities free of government intrusion or intervention. The introduction of antitrust law into this space violates this basic principle and makes it harder for unions to overcome the enormous obstacles they have faced the past several decades to revive and revitalize themselves. As the Swedish trade union official concluded, once the government enters the domain and unions become dependent, "it's very difficult to get out of it."[221]

One possible response to these concerns is that, as long as the job is done—that is, as long as there is some public policy response to the urgent challenge of wage inequality and employer monopsony power—then it does not particularly matter whether this goal is achieved with antitrust law or labor law. Those who see antitrust as an easier fix to the problem of employer monopsony may be persuaded by this claim that nothing is lost by taking an antitrust response over a labor law response.

Among other things, this argument assumes that there are no other advantages or goods that unions provide that are not secured by antitrust law. In the next Section, I want to argue against that assumption. Given the conflicts between antitrust and labor law, and the choice I think this implies, we may lose a lot by choosing antitrust over labor law.

D. Advantages of Labor Law over Antitrust

Not only may antitrust law threaten to unintentionally crowd out labor unions, as the previous subsection argued, labor unions

[221] Meyer, *supra* note 209, at 557.

and collective bargaining may simply do a better job of maintaining efficiency and equity in the labor market. This Section gives several reasons in favor of that conclusion.

One reason is that the distinctive nature of labor markets may create some inefficiencies that are simply *beyond* the reach of antitrust policy and regulation but not beyond that of labor unions and collective bargaining. In their article, Naidu, Posner, and Weyl urged the use of antitrust to counter employer monopsony power.[222] However, more recently Naidu and Posner have acknowledged the limits of antitrust law in this domain.[223] They observe that much of the source of labor market power is a result of "frictions" and other features inherent in the labor market, and not just a consequence of barriers to entry or excessive concentration.[224] As a consequence, the standard antitrust tools of merger review and the prohibition of collusion only offer a partial role in addressing the problems of labor market power.[225] Naidu and Posner also acknowledge that additional policies will be needed, including minimum wages, labor unions, wage boards, and wage subsidies.[226]

In addition to the unique, frictional nature of labor markets, there are at least two other advantages that collective bargaining and minimum-wage setting have over antitrust law.

1. Informational advantages of direct wage regulation.

Another advantage that labor law and collective bargaining have over antitrust law is a simpler and more straightforward means of enforcement. One can think about collective bargaining, and particularly a minimum wage, as guaranteeing a wage floor.[227] If, indeed, the labor market equivalent to the consumer surplus standard in antitrust would condition a merger approval on the requirement that wages not fall at all, then collective bargaining or a minimum wage already guarantees this outcome. In that respect, no merger review in the interest of labor market regulation is required when labor unions or the minimum wage are

222 *See generally* Naidu et al., *supra* note 1.

223 *See supra* note 199 and accompanying text.

224 *Id.* at 284, 286–92.

225 *Id.* at 297–98.

226 *Id.* at 285.

227 Meyer, *supra* note 209, at 553. However unlikely this is, let us set aside for the time being the possibility that, in the interest of large enough efficiency gains or dramatic changes in the level of skill required, we may want to actually let wages fall.

allowed to do their work. This simplifies the regulatory costs and requirements dramatically.

As Naidu, Posner, and Weyl as well as Marinescu and Hovenkamp indicated, merger review is already a hugely important part of antitrust enforcement, as it would continue to be if the government were to take a more active stance toward labor market monopsony. Private litigants and the government have the ability to sue employers who use nonpoaching agreements or engage in other explicit collusive practices. But as Naidu, Posner, and Weyl observed, this kind of enforcement can have only a limited effect. "After all," they continued, "if mergers that dramatically increase labor market power are allowed with little objection, companies can achieve monopsonies by merging rather than by entering agreements with each other."[228] Indeed, as Marinescu and Hovenkamp pointed out, because market concentration allows employers to implicitly (if not explicitly) coordinate wages and output, employer wage-setting power will not be reachable under the law's prohibitions against collusion. "As a result," they concluded, "it is all the more important that merger law be applied in these cases because, once the merger has occurred, the law of collusion will not be able to reach them."[229] Without the power to limit or block mergers, little could be done to counter growing market concentration in both product and labor markets. For this reason, government regulators have adopted extensive practices of merger review.

Hence, merger review would be an enormously important part of regulating against monopsony power in labor markets (as it already is in antitrust product market regulation). The downside, however, is that merger review is an extraordinarily costly affair, one made so because of the asymmetric information problems faced by government regulators attempting to scrutinize the "true" motives of merging firms.

Implicit in the nature of merger review is a policy that *some* mergers should be permitted, and others blocked. As Hovenkamp noted, the reason not all mergers are prohibited is that we assume some mergers bring efficiency gains. Hovenkamp wrote,

> If mergers of competitors never produced efficiency gains but simply reduced the number of competitors, a strong presumption against them would be warranted. But we tolerate most

[228] Naidu et al., *supra* note 1, at 547.

[229] Marinescu & Hovenkamp, *supra* note 1, at 1043.

mergers because of a background, highly generalized belief that most—or at least many—do produce cost savings or improvements in products, services, or distribution.[230]

Therefore, when regulators are presented with a proposed merger, they have to, in effect, determine which of two motivations the merging companies have.[231] Either the merger will increase profits by delivering legitimate gains in efficiencies, such as by lowering duplication of costs or administrative or advertising expenses. Or the merger seeks to increase profits illicitly, so to speak, by increasing market power and bilking customers, squeezing suppliers, and exploiting workers.[232] Merging companies whose sole means of raising profits is through efficiencies have no reason to disguise their motivations. But companies who are seeking to maximize profits by increasing market power will want to camouflage or conceal their real motivations. Inferring which of these two motivations dominate (because these two motivations are not, of course, mutually exclusive) means that merger review requires considerable guesswork and an appreciable expenditure of resources in time and money. As a consequence, merger review is bound to be an imperfect process, given the limited information regulators have and the lack of incentive that merging companies, who are motivated by market power profits, have to reveal their true intentions. Inevitably, some mergers that are approved will turn out to deliver few efficiencies and, instead, greater market power at the expense of consumers and workers.[233]

Before returning to the comparative institutional choice between antitrust and labor law, some further clarifications about the issue of efficiencies in merger review are in order. Scholars of antitrust will recognize the importance of the issue. Hovenkamp acknowledged, "Few areas of merger law are more controversial than the treatment of such efficiency claims . . . ."[234] The govern-

[230] Hovenkamp, *supra* note 138, at 704.

[231] More exactly, all mergers are motivated by profit, so the more accurate question is which means the merging companies have in mind to achieve those profit gains.

[232] Of course, the motives of the merging firms may be mixed, with the illicit predominating over the licit, and vice versa. But this fact only complicates the informational problem in merger review.

[233] Hovenkamp, *supra* note 138, at 728–30.

[234] *Id.* at 704.

ment's Horizontal Merger Guidelines specifically recognize an efficiency defense in merger review.[235] As Hovenkamp also acknowledged, however, the defense is "often raised but almost never found to justify a merger that has been shown to be prima facie unlawful."[236] One could conclude from this fact that efficiencies are, despite the emphasis I have given to them, a relatively unimportant aspect of merger analysis. But this response does not recognize that, as Hovenkamp also pointed out, efficiencies enter in at *two* stages of the merger-review process.[237] Not only are efficiencies available as a defense to the government's prima facie case against a proposed merger, but efficiencies are also considered when the government is contemplating its prima facie case and deciding whether to forbid the merger.[238] Therefore, even though efficiency defenses are almost always unsuccessful, the existence—or, better, presumption—about efficiencies still influences the government's decision to prohibit a merger. Granted, of course, not all permitted mergers turn out to deliver the promised or presumed efficiencies.[239] Given the growing consensus that merger policy currently is an underdeterrent, the existing enforcement regime appears to be allowing too many mergers that yield profits of the illicit kind.[240] But this problem does not vitiate the main point. The underdeterrence of the current enforcement regime may call for increasing merger scrutiny or shifting burdens of proof. But unless one would argue in favor of adopting an absolute ban on mergers, which seems both absurd and politically impossible, the fact of underdeterrence does not remove the costly and difficult choice that regulators face in trying to determine

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235 DOJ & FTC, HORIZONTAL MERGER GUIDELINES § 10 (2010).

236 Hovenkamp, *supra* note 138, at 704. Hovenkamp added, "[t]he decisions that credit claimed efficiencies as justification typically also find that the government failed to make out its prima facie case against the merger. Thus, in those cases acknowledgement of efficiencies is simply dicta." *Id.*

237 *Id.*

238 *Id.* (writing that "merger analysis takes efficiencies into account in two ways," and that, in the first way, "certain categorical assumptions about efficiencies are made in determining where the line for prima facie illegality should be drawn").

239 But that is, indeed, the problem with any merger-*review* policy.

240 *Id.* at 705. As Hovenkamp also insightfully pointed out, the underdeterrent problem does not lie with the efficiency defense, because defendants have rarely been successful in that claim. Mergers that turn out to be inefficient or anticompetitive have not proliferated because merging companies have been overcome by the government's prima facie case for blocking the merger. "Thus," as Hovenkamp concluded, "the under deterrence problem must lie in the prima facie case itself." *Id.* That is, current antitrust enforcement is under deterring because the government allows too many mergers to pass through its prima facie criteria.

whether mergers will be efficient or inefficient on balance. Indeed, given the information imperfections and uncertain guesswork, antitrust enforcement will inevitably always be an underdeterrent, because as long as some mergers are permitted for any reason, some inefficient and anticompetitive mergers will escape through the cracks of merger analysis.

Labor law therefore offers a significantly simpler and more administrable means than antitrust for countering employer monopsony power, reducing wage inequality, and improving the efficiency of labor markets. Collective bargaining and minimum wage setting remove the costly and uncertain guesswork about whether a merger will be efficient, either raising wages or leaving them undisturbed, or inefficient, possibly coming at the expense of current wage levels. With unions or minimum wages setting a floor, this choice is already made: wages, in general, will not be depressed. In economics jargon, antitrust in the labor market works ex ante, while collective bargaining or minimum wages work ex post. Collective bargaining or minimum wages provide direct wage regulation with considerable savings on information costs.

In fact, wage floors force firms to internalize the costs of their merger decisions. Merging firms seek to increase profits. Given this overriding objective, how these profits are obtained, licitly or illicitly, is a secondary issue for the firms themselves. Perhaps these profits will be derived from efficiencies, perhaps from market power, and probably some of both. Because the merged firm does not bear the costs of the inefficiencies created by the exercise of its post-merger market power, it can externalize the cost of this decision onto others, mainly consumers and workers. Under antitrust policy, the government attempts to prevent mergers where the externalities outweigh the merger efficiencies. But it does not change the fundamental calculus that the merging companies are contemplating and the potential for profits through externalities. Firms may not even be particularly concerned about where the source of the post-merger profits are. It is different under some form of direct wage regulation. Facing a wage floor, merging firms know they will not be able to raise profits by increasing labor market power. Firms will be forced to reckon with where, exactly, any postmerger profits will come from. They will be forced to do their due diligence, in good faith, to assess whether merger efficiencies will be adequate enough to justify the merger. Regardless of where the formal legal burden for demonstrating the reality of these efficiencies lies under antitrust, there is no question that they lie with firms under a regime of direct wage setting.

2. Social capital and civic associations.

Another advantage of collective bargaining over antitrust law is that unions have what sociologists call "associational" benefits that are entirely absent in antitrust law. Another term for these associational benefits is "social capital." Social capital refers to those networks, relationships, and social ties between members of society that increase trust and solidarity and make cooperation and coordinated action possible.[241] Such relationships are not simply given by virtue of being a member of society. For some or all people, society may instead be isolating and anomic.[242] For trust and coordination to develop, people must be included in organizations and associations which facilitate longer-term, repeated interactions.[243] Social capital may develop in a variety of organizations and institutions, from churches, cultural associations, and human rights associations to professional organizations and even sports clubs.[244] The list of "civil society" associations may also include nonprofit, advocacy organizations and sometimes business organizations, including labor unions.[245] Some scholars, however, draw the line between professionalized advocacy organizations, which are funded by donors and staffed by full-time professionals, and membership organizations which are funded by dues-paying members and are run, at least to a significant extent, by volunteers.[246] For some, it is exactly this membership orientation, absent in professional nonprofits, which is critical for a robust civil society and associational benefits to flourish.[247] For similar reasons, other scholars exclude business

[241] For a definition of "social capital," see Pamela Paxton, *Social Capital and Democracy: An Interdependent Relationship*, 67 AM. SOC. R. 254, 256 (2002) ("[S]ocial capital is the notion that social relations can facilitate the production of economic or noneconomic goods.").

[242] EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 202 (George Simpson trans., 1933).

[243] ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 136–37 (2000).

[244] Cheol-Sung Lee, *Labor Unions and Good Governance: A Cross-National, Comparative Analysis*, 72 AM. SOCIO. REV. 587, 590 & n.2 (2007).

[245] *Id.* at 590 & n.2, 594, 597.

[246] THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE 128–32 (2003).

[247] *Id.* at 130.

organizations and labor unions from the category of civic associations.[248] Because firms and unions are oriented toward economic issues and material interests, they are different from, and even antagonistic to, the development of trust, "thicker" social norms, and social capital.[249]

In addition, it is important to note that not all civic associations or even, by themselves, solidaristic social bonds, are positive.[250] Some scholars draw a distinction between "bonding" associations and "bridging" associations.[251] Bonding associations are those organizations that build tighter associations and relationships of trust by drawing hard distinctions between "in" groups and "out" groups.[252] Such organizations fuel division, mistrust as much as trust, and may undermine democratic inclusiveness and broader civic participation.[253] Examples include militias, ethnic separatist groups, and even arguably churches and labor unions.[254] In contrast, bridging associations are those that are open, more inclusive, seek to develop relationships across different, previously separate groups—hence "bridging"—and thereby facilitate inclusive, broad-based democratic participation and engagement.[255] Scholars have offered environmental and peace groups, human rights organizations, and local community organizations as examples of bridging associations.[256] It is quite possible, there-

[248] JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY 106 (Thomas McCarthy ed., 1992).

[249] Michael W. Foley & Bob Edwards, *The Paradox of Civil Society*, 7 J. DEMOCRACY 38, 38–39 (1996) (questioning whether, if civil society is a third category alongside the state and the market, market-oriented organizations such as labor unions should be excluded from the definition of civic associations). Paxton, *supra* note 241, at 270 (finding that trade unions, sports associations, and religious associations are more isolated and less "connected" than other civic associations in terms of the proportion of members who have memberships in other associations and in the number of memberships in other associations held by members).

[250] For an overview of the drawbacks of social capital, see generally Alejandro Portes, *Downsides of Social Capital*, 111 PROC. NAT'L ACAD. SCI. 18407 (2014). For example, Professor Sheri Berman pointed out that Weimar Germany was a society of "joiners," and, for that reason, its democracy should have thrived. Instead, it succumbed to totalitarianism under Hitler and the Nazis. Sheri Berman, *Civil Society and the Collapse of the Weimar Republic*, 49 WORLD POL. 401, 420–21, 424 (1997).

[251] PUTNAM, *supra* note 243, at 22.

[252] *Id.*

[253] Lee, *supra* note 244, at 587.

[254] *Id.*

[255] *Id.*

[256] Paxton, *supra* note 241, at 270 fig. 3 (showing that peace, environmental, human-rights, and community associations are much more "connected" than labor unions in terms

fore, to categorize labor unions as an example of "bad" social capital.[257] Unions are focused on the material needs of their members, rather than the greater social good and encourage an "us-versus-them" mentality by taking a combative stance towards their employers.

There are good reasons, however, to reject the narrow, "economistic," and divisive conception of labor unions. Viewed in a different light, unions are paradigmatic examples of "solidaristic" associations. Trust and solidarity are critical for the functioning and success of labor unions. Labor unions have often spoken in a register quite different from the narrow profit orientation of other business organizations.[258] It is difficult to draw a line between unions' economic and political activities, as even recent Supreme Court decisions have recognized.[259] Labor unions are among the remaining nonprofit organizations that are funded exclusively by member contributions and, especially at the local level, rely on volunteer membership to carry out their activities. Most critically, labor unions as organizations are themselves diverse and have exemplified both "good" and "bad" forms of social capital, having taken different forms with very different orientations with respect to their broader, civic mission and self-conception. Think historically, for example, of the narrow, exclusive AFL, which focused on bread-and-butter union issues and eschewed talk of societal level transformation,[260] compared to the far more inclusive, ambitious, and visionary Knights of Labor.[261] These two organizations offer examples of labor unions as both bonding associations (the AFL) and bridging associations (the Knights of Labor).

In a fascinating article, sociologist Cheol-Sung Lee argued that unions should be thought of as essential civic society organizations.[262] He gave several reasons, and offered interesting evidence, for the conclusion that unions play a positive role in facilitating democratic governance by promoting transparency and

of the number of memberships in other associations held by members and the proportion of members who hold memberships in other associations).

257 *Id.* at 271 (writing that "the results indicate that connected associations have a strong *positive* influence on democracy, while isolated associations [including labor unions] have a strong *negative* influence on democracy" (emphasis in original)).

258 *See* John Brueggemann, *The Role of Organized Labor in Civil Society*, 8 SOCIO. COMPASS 1033, 1035–36 (2014); Lee, *supra* note 244, at 589–90.

259 *See* Janus v. AFSCME, 138 S. Ct. 2448, 2474–75, 2480 (2018).

260 FORBATH, *supra* note 200, at 130–31.

261 *Id.*; Brueggemann, *supra* note 258, at 1036.

262 Lee, *supra* note 244, at 605.

neutrality, government effectiveness, and bureaucratic accountability. First, as both voluntary (inclusive, membership-based) organizations and economic actors, unions serve a "bridging" function between the narrow, material orientation of the economy, the civic society, and the political sphere.[263] Indeed, unions are unique among voluntary, civic associations in their ability to intervene in the economy, through both institutional and noninstitutional channels.[264] Second, labor unions' "power" resources give them the opportunity to act as a "check and balance" on overweening state intrusion and coercion.[265] Labor unions are known for their ability to strike and withhold their labor in the course of production vis-à-vis firms. Less appreciated is the exercise of this power when there are political stakes and state repression.[266] Third, labor unions' own internal, democratic governance procedures familiarize and instill union members with these democratic norms that they then carry into the public sphere.[267] Not coincidentally, "industrial democracy," and its role as a bulwark against fascism, was a central talking point of Senator Wagner when promoting and defending the National Labor Relations Act[268] in the 1930s.[269] Fourth, and finally, unions' role in promoting economic well-being for the poorer and less privileged segments of society easily translates into a broader agenda for inclusion, democracy, and economic and social justice.[270]

Confirming our earlier assertion that labor unions themselves are not unambiguously positive for democratic governance, Lee further elaborated the conditions under which unions can best fulfill this role. To act as enablers of democratic governance, Lee contended that it is critical for unions to forge relationships

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[263] *Id.* at 588–89.

[264] *Id.* at 587.

[265] *Id.* at 587–88.

[266] *Id.* at 588.

[267] Lee, *supra* note 244, at 588.

[268] Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–169).

[269] Robert F. Wagner, Opinion, *"The Ideal Industrial State"—As Wagner Sees It*, N.Y. TIMES, May 9, 1937, at 23. According to Senator Wagner,

> That is why the struggle for a voice in industry through the processes of collective bargaining is at the heart of the struggle for the preservation of political as well as economic democracy in America. Let men become the servile pawns of their masters in the factories of the land and there will be destroyed the bone and sinew of resistance to political dictatorship.

[270] Lee, *supra* note 244, at 588.

with other community and social movement organizations.[271] These relationships, according to Lee, encourage unions to broaden their "economistic" agenda and embrace a longer horizon of social struggle and a more principled rationale for their mission and existence.[272] Otherwise, unions are more likely to be co-opted by the state and economic elites and adopt a more instrumentalist perspective on their role and function in society. Lee provided impressive cross-national quantitative evidence that when unions are more central in the network of civic association relationships, larger union membership rates translate into better democratic governance, as measured by several different indicators.[273]

Unions therefore have a current and potentially positive and powerful role to play in shaping and facilitating the benefits of civic association and social capital. Unions play not just an economic role in protecting workers from the excesses of the market power of concentrated firms. Nor do they merely play a political role as representatives and advocates of workers in the political sphere, whether union members or not. Unions also play an important social role in promoting trust, social solidarity, and inclusivity in much more profound and subtle ways that facilitate democratic participation and governance. To the extent that a vigorous enforcement of antitrust law in labor markets obviates and crowds out the formation of labor unions, these associational benefits of labor unions are lost. Yet it is precisely these social benefits of labor unions that are needed most right now in our worrisome political environment and weakening democratic norms. With this more capacious objective in mind, we should promote public policies that strengthen, not further weaken, unions, especially in their broad and more inclusive economic mission, as a way of also rebuilding the atomized civil society that neoliberalism has left in its wake.

One may argue that, given these considerable—and additional—civic-association benefits of labor unions, workers would have reason to form them even in the face of antitrust crowding out their wage- and economic-related objectives. If unions have positive effects on society and economic and political governance,

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[271] *Id.* at 589–90 ("[S]olidarity with civic organizations from non-working-class origins provides unions with reformist or community-oriented views of struggles and agendas."). This hypothesis, and Lee's supporting evidence, contextualizes and amends Paxton's claim that labor unions are isolated and do not promote democracy. *See also* Paxton, *supra* note 257, and accompanying text.

[272] Lee, *supra* note 244, at 589–90.

[273] *Id.* at 596–603.

will that not obviate the concern that a vigorous enforcement of antitrust law will crowd out union formation? Yet, precisely one of the most interesting and surprising features of civic associations is that they rarely form explicitly, if ever, for these "secondary" benefits.[274] Indeed, for this reason, civic associations have sometimes been termed secondary associations.[275] The civil society benefits of associations are too diffuse and indirect, if no less real for that, to become objects of conscious creation for those reasons alone.[276] This lesson was particularly instructive for social capital scholars, like Robert Putnam, who discovered civic association functions in the unlikeliest of places, Italian soccer clubs, for instance.[277] Hence, labor unions can only form and serve their secondary, civil society functions if they are given the opportunity to act in their primary functions, including wage setting, collective bargaining, and representing workers within the firm.

CONCLUSION

This Essay has covered a lot of terrain. The intersection of antitrust and labor law is an extraordinarily rich area for research. While this Essay agrees strongly with the concern about wage inequality that motivates an interest in applying antitrust more consistently and rigorously in labor markets, it has also signaled a few notes of caution about this endeavor. The first point is to urge a greater sense of historical awareness about the relative absence of antitrust in labor market regulation. This absence, I have argued, is partially a result of the previous, antagonistic relationship between antitrust and pro-labor movements. Antitrust has a more notable track record of suppressing wages, rather than bolstering them. Appreciating this history will be necessary to alleviate any lingering suspicions of worker advocates, including labor unions, about the introduction of antitrust law back into the labor market.

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[274] *See* ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 89–92 (1993); Matthew Dimick, *Revitalizing Union Democracy: Labor Law, Bureaucracy, and Workplace Association*, 88 DENVER U. L. REV. 1, 20 (2010) (writing that "successful secondary [civic] associations are more likely *not* to have democracy as their primary *raison d'etre*" (emphasis in original)).

[275] Dimick, *supra* note 274, at 18.

[276] *Id.* at 19–20.

[277] PUTNAM, *supra* note 274, at 91 (noting that, aside from labor unions, "sports clubs are by far the most common sort of secondary association among Italians").

The second point was to encourage antitrust proponents to take seriously some ambiguity and confusion in what, exactly, antitrust law is supposed to do, especially in labor markets. As the debate about product market regulation has shown, the consumer welfare standard—which would become a worker welfare standard in labor market monopsony regulation—sits on shaky foundations. Especially in light of the existence of the income tax, and its reputed superiority in addressing distributive wrongs, many argue that antitrust law should maximize efficiency—total or general social welfare—and ignore distributive issues. Under this reasoning, if a merger would increase employer monopsony power and wage inequality, but increase wealth overall, it should be permitted; the unequal wage effects can be remedied with the income tax. In response, this Essay has argued that antitrust law can actually be a more efficient method of redistribution than the income tax and has provided a standard by which to determine when this is the case.

Finally, the Essay has addressed some more pressing conflicts between labor law and antitrust. Labor law and collective bargaining, especially when they work best (most efficiently and equitably), will organize the labor market in ways that directly contradict antitrust's goal of promoting competition. Solidaristic wage policies, such as industry- or sector-level wage compression, often reduce competition by pushing high-cost, inefficient employers out of the marketplace. While the net effect is ultimately positive, it is hard to ignore this anticompetitive feature and its conflict with antitrust goals. In addition, I have argued that labor law is simply a more administrable means of regulation than antitrust law. Merger-review policy requires costly and uncertain guesswork about whether a proposed merger will raise or lower wages. Collective bargaining and minimum wage legislation simply guarantee, ex ante, that wages do not fall below a contractually or legislatively established standard. Finally, labor law and collective bargaining have benefits other than wage equity. Labor unions are important secondary, civic associations that promote the formation of "social capital," solidarity, trust, and tolerance. While antitrust also addresses worries about wage inequality, it cannot confer the associational benefits that unions provide.

Antitrust may be the most opportune policy lever at hand for labor's allies in the government. But, before embracing this model completely, we should be aware of what we potentially give up and which alternatives we foreclose when we abandon attempts to revive more longstanding and tested models of labor market regulation.