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Is the Problem with Antitrust Law or Antitrust Enforcement?

Abstract: There is an emerging belief that antitrust has failed marginalized populations. For example, exclusionary practices have helped to produce banking and food deserts in low-income communities, though antitrust has seldom intervened. But is this a problem of antitrust law? In fact, another claim is that antitrust *law* is just fine as opposed to how federal agencies *enforce* antitrust. Since agencies must decide which cases to bring, they should perhaps pay better attention to marginalized communities or draft complaints to emphasize their unique injuries. This topic is especially salient, given the ongoing debate about whether the consumer welfare standard is able to promote competition in modern markets. In essence, the root of why antitrust has yet to meet its potential of serving marginalized communities may lie with the law and its interpretation or, alternatively, people and organizations enforcing it.

Keywords: antitrust, Sherman Act, discrimination, equality, agencies

I. Introduction

There is an emerging belief that antitrust law has failed marginalized persons (Posner and Sunstein 2022). According to research, not only are markets becoming more concentrated but the anticompetitive effects seem to burden people of color (Hafiz 2023), immigrants (Day 2024), and residents of low-income communities the most (Capers and Day 2023).

To use a few examples, mergers have diminished competition in markets for grocery stores (Leslie 2023a), medical care (Stavroulaki 2022), and banking (Kress 2023). While these events have brought the efficiencies of megahospitals, large banks, and big grocery stores to affluent areas, they have also led large companies to shutter stores in primarily low-income communities (Capers and Day 2023). An effect is that food deserts have surfaced in poorer communities, forcing residents to purchase low-nutrition food from dollar stores and gas stations (Brown 2022). Similarly, with the exodus of banks, people of color are disproportionally likely to use payday lenders, title pawns, and check-cashing joints to execute basic transactions at significantly higher costs (Kress 2023, 558).[1] In terms of health care,

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[1] Kress (2023, 558) notes that "high-fee check-cashing companies and other predatory financial service providers have proliferated in LMI areas affected by bank consolidation. In addition, households in LMI neighborhoods are more likely to experience evictions and have debts sent to collection agencies following bank mergers."

low-income individuals must often travel substantial distances to see a doctor, which has eroded community health (Dobis and Todd 2022). Even though antitrust is supposed to promote consumer welfare, it hasn't helped all consumers equally.

Marginalized persons have also struggled to use antitrust remedies in their capacity as competitors. For starters, dominant groups can form licensing agencies under the auspice of health and safety, though their activities have often prevented marginalized groups from competing (Allensworth 2023). As examples, licensing agencies have erected barriers to entry impeding African women who are in the business of braiding hair (Christian 2019; Makonnen 2020), undocumented immigrants who sell food from trucks (Pileri 2021), and Asian women in the business of manicuring nails (Day 2023; Federman et al. 2006, 237–38). Thus, by mandating a license or refusing to grant one, dominant actors can harness the state's power in ways that eliminate their competitors (Allensworth 2023).

Antitrust's tools have even been used *against* marginalized people, as lawsuits have successfully alleged that the hiring of undocumented people entails an anticompetitive or "unfair" way of competing (Day 2024). Employing undocumented labor has also been characterized as anticompetitive because it can allow an employer to lower the wages of "native" workers. *Nichols v. Mahoney*, 608 F. Supp. 2d 526, 544 (S.D.N.Y. 2009). Despite the fact that antitrust is meant to promote consumer welfare, it has blocked competition from marginalized communities as illegitimate or unfair—no matter the benefits that would inure to consumers (Hafiz 2023).

So why has antitrust been so myopic to the plight of marginalized persons as both consumers and competitors? One explanation lies in the law of antitrust itself. When antitrust underwent a "consumer welfare revolution" spurred by the Chicago School in the 1960s and 1970s, enforcement morphed into an entirely economic body of law trained on promoting efficiency. The consequences have been significant. By caring only about the economic plight of consumers in an expressly "colorblind" or "neutral" way, the enterprise—according to critics—is unable to promote the welfare of minority populations (Capers and Day 2023). After all, modern antitrust is generally a numbers game in which a reduction of competition that benefits a majority group but harming a minority population would often signal a procompetitive net increase in welfare (ibid.). Scholars have thus claimed that antitrust law is ill-equipped to help marginalized people.

Notably, this landscape has generated debate about what exactly antitrust is meant to do. Just recently, a Commissioner of the Federal Trade Commission (FTC), Rebecca Slaughter, exclaimed that antitrust's race-neutral framework is "bizarre" and, further, enforcement must become "antiracist" (Morales 2021). But her comments have sparked backlash. To many observers, Slaughter missed the mark because "that's not what the antitrust laws are meant to do" (Victor 2020). Scholars have similarly insisted that racism and structural oppression entail serious problems but that constitutional and civil rights regimes should intervene instead of antitrust (Hovenkamp 2021, 811).[2] So while some enforcers and scholars believe that antitrust must become cognizant of race, an equal pushback has surfaced about whether antitrust can properly remedy discrimination or foster equality. Given the lack of clues in the Sherman Act's text (Carrier 1999, 1294),[3] debate has kindled about what antitrust's goals are or should be.

[2] Hovenkamp asserts that remedying discrimination and racism are "essential policy goals but best left to the constitutional and statutory institutions meant to address them".

[3] According to Carrier (1999, 1294), "The legislators realized that they could not define 'the precise line' between 'lawful combinations in aid of production' and 'unlawful combinations to prevent competition and in restraint of trade.' That task

But there is another camp whose position is that antitrust, *the law*, is largely fine and that the problem lies in the way that the Department of Justice (DOJ), FTC, and others *enforce* antitrust law. That is, antitrust's text and interpretation could perhaps serve vulnerable communities if only the agencies (or private litigants) possessed the will or imagination to enforce antitrust law—as it is currently written and interpreted—in ways that exercise the rights of marginalized persons. It could indeed be an issue with lawyering in terms of the antitrust cases accepted and pushed through trial, or the ability to find proper plaintiffs. Along the same lines, antitrust enforcers could perhaps consider the disparate impact of anticompetitive behaviors (Posner and Sunstein 2022). When the DOJ or FTC challenges a merger of grocery stores or hospitals, they could better highlight the resulting burdens inflicted on marginalized communities (Stavroulaki 2022). In fact, antitrust courts are slowly becoming open to considering disputes in their socioeconomic contexts; for example, an antitrust judge in a criminal case involving the price-fixing of canned tuna delivered a harsh sentence, telling the defendant-CEO that his behavior was particularly bad because it price-gouged a product on which low-income persons depend (Sebastian 2020).

In essence, antitrust has entered a period of flux animated by its potential to remedy structural inequalities. A salient question is thus whether the problem lies with antitrust *law* or antitrust *enforcement*. If the problem resides in the former, we may need another revolution—akin to the Chicago School's takeover in the 1970s (Yoo 2020)—in which the goals of antitrust are overhauled to promote the welfare of marginalized people. But the other hypothesis appears equally plausible in that the issue involves people as opposed to laws; if political will existed, then antitrust could better address these issues without changing a statute or altering a precedent. In fact, Commissioner Slaughter said that "antitrust *enforcement*" must adapt (Feiner 2020), perhaps suggesting that the law itself is fine. Nevertheless, the question of whether, or how, antitrust should evolve strikes at important issues about antitrust's purpose and capacity.

This article proceeds in three substantive parts. Part II explores antitrust's criticisms. It begins with a primer about how the Chicago School reformed antitrust to institute the consumer welfare era. Then this part discusses how the consumer welfare standard might disproportionally hurt marginalized communities via its neutral or colorblind application. Part III discusses why an array of scholars believe that antitrust tends to be underenforced, or perhaps underenforced, when people of color, undocumented immigrants, or low-income people would benefit from its enforcement. Then Part IV discusses how antitrust law or enforcement could be enhanced to achieve the goals of helping vulnerable communities on par with how it helps dominant groups.

II. Is the Problem with Antitrust Law?

Scholars are increasingly criticizing antitrust's consumer welfare standard derived from the Chicago School's faith in microeconomics. Part of Chicago's restructuring of antitrust included an adherence to colorblindness. And to many scholars, race neutrality entails a prevalent method of ignoring people of color, even if unintentionally; the theory is that colorblind standards tend to reinforce dominant structures. Subsection A traces the rise of the consumer welfare standard. Subsection B discusses how

was 'left for the courts to determine in each particular case.' But the courts were not without guidance; in particular, they were to turn to the 'old and well recognized principles of the common law.'"

anticompetitive practices can levy heavier burdens on marginalized communities and why antitrust has seemingly failed to help.

A. Antitrust's Text, Goals, and Reforms

When the Sherman Act, 15 U.S.C. §§ 1–38, was passed in 1890, Congress seemed unsure about which acts should violate an "anti-trust" law,[4] so it drafted vague language in both Section 1 (prohibiting "every" restraint of trade) and Section 2 (condemning the monopolizations of any part of the market). 15 U.S.C. §§ 1–2. The purpose of generalized language, according to Senator Sherman, was to incorporate an array of authorities such as the common law of competition.[5] In fact, some believed that types of anticompetitive practices were already illegal on the state level before the Act's passage (at least) due to US common law (Day 2023)—but a federal statute was needed to ingrain competition law and empower federal authorities to review activities occurring across multiple states.[6] The point is that Congress put little guidance in the Act's text but rather assumed that historical practices would, at least at the outset, inform courts and enforcers about antitrust's architecture.[7] Shortly thereafter, courts imported an array of common law rules (Carrier 1999).

But the lack of clarity in the Sherman Act led to problems of interpretation because courts could seemingly condemn almost any activity or business practice. Even the Supreme Court remarked that the Sherman Act "cannot mean what it says" given the litany of legitimate practices that antitrust's text could restrict. *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 687 (1978). Critics contended that a company could violate antitrust law by levying a political or social injury even if consumers benefited, which might sometimes force consumers to pay higher prices.[8] This landscape prompted scholars from Harvard University and the University of Chicago to assert that enforcement was actually harming competition (Bork 1978; Capers and Day 2023). Indeed, since a firm engaged in a legitimate form of competition may drive rivals out of business, the fear was that remedying political

[4] 21 Cong. Rec. 2, 460 (1890) ("I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries.").

[5] Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."). See also Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731 (1988) ("In resting our decision upon the foregoing economic analysis, we do not ignore common law precedent concerning what constituted 'restraint of trade' at the time the Sherman Act was adopted."); Apex Hosiery Co. v. Leader, 310 U.S. 469, 494–95 (1940) ("For that reason the phrase 'restraint of trade' which, as will presently appear, had a well-understood meaning at common law, was made the means of defining the activities prohibited.").

[6] Gavil (1993, 658–659) ("State regulation of the trusts, however, quickly proved to be inadequate to the task. With the limitations placed on the power of the states by nineteenth-century conceptions of jurisdiction—both subject matter and personal—as well as by the resources of state enforcers, the states proved no match for the trusts in their heyday. With the ability to structure and restructure their conduct around states whose laws and law enforcers proved hostile, the trusts could evade attempts at condemnation and remedial restructuring with relative ease at the state level.").

[7] See Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940) ("[C]ourts should interpret [The Sherman Act] in the light of its legislative history.").

[8] McCart and Shahshahani (2023, n.p.) write: "Does increasing market power and economic concentration undermine democracy by shifting power from regular citizens to those in charge of large corporations? This possible political implication of economic power has been a long-running concern in American political thought and was in the mix of considerations leading up to the passage of the Sherman Antitrust Act in 1890." See also Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets.").

and social injuries was discouraging firms from competing too hard. A scholar from the Chicago School, Robert Bork, argued in his seminal book, *The Antitrust Paradox*, that antitrust was only meant to constitute a "consumer welfare prescription" defined in economic terms (Bork 1978, 63). This culminated in an antitrust revolution in the 1970s whereby enforcement morphed into an exclusively economic tool.[9] No longer can antitrust foster social or political goals; enforcement is limited to curing economic injuries eroding consumer welfare.

That said, disagreement prevails about what currently qualifies as consumer welfare. Bork referred to allocative efficiency or "the wealth of the nation"—instead of consumers exclusively.[10] An antitrust offense occurs, in his vision, if wealth is inefficiently destroyed (Hammer 2000). The implication is that a dominant firm can monopolize a market and charge supracompetitive prices so long as the monopolist raises more revenue than consumers lose; if so, the monopolist has *efficiently* created wealth at the expense of consumers.[11] But more commonly, courts hold that consumer welfare refers to consumers: a monopoly or trade restraint violates antitrust law when an anticompetitive conduct raises prices without providing consumers with an efficiency like more innovation or investment (Newman 2019). In fact, it is often asserted that the hallmark of an antitrust offense is restricted output, not monopoly prices, because high prices can rise for numerous valid reasons—for example, increasing the product's quality—whereas artificially restricting output (which should naturally produce higher prices via lowering supply) is more likely to render deadweight loss and inefficiencies (Hovenkamp 2021).[12] The point is that modern antitrust has significantly narrowed its remedial scope whereby enforcement is limited to identifying an economic offense by calculating collective welfare across a market.

Almost as important is an article by Judge Frank Easterbrook, who moved the goal lines even further (Easterbrook 1984). He asserted that too much antitrust imposes greater costs on society than allowing some anticompetitive acts to escape enforcement. Since markets tend to self-correct, competition should typically undo anticompetitive practices without antitrust's help; after all, high prices are expected to draw competitors into the market with lower prices.[13] Easterbrook's position that more harm is created when antitrust accidentally condemns procompetitive activities influenced antitrust law to the point where modern courts and agencies err against enforcement.[14] The general belief is

[9] According to Capers and Day (2023, 540): "Their scholarship convinced courts in the 1970s to reframe antitrust law as an economic doctrine grounded in consumer welfare; key to this new approach, as explained below, is whether a defendant wielded enough power to structurally exclude rivals."

[10] See Ginsburg (2014, 947n38): "In sum, judicial endorsement of the consumer welfare standard has no doubt led to a more efficient allocation of resources, thereby increasing, just as Bork predicted in 1978, 'the wealth of the nature.'"

[11] According to Capers and Day (2023, 539–540), "In his view, a court must measure the 'total welfare' of everyone, i.e., *buyers and sellers*. The implication of this approach is that consumers must incur greater costs than producers gained in wealth, creating a net harm, to violate antitrust law. If surplus was increased—even if a monopolist grew rich and consumers poorer—it wouldn't offend the total welfare view of antitrust law because societal wealth was 'efficiently' enhanced (referred to as allocative efficiency)."

[12] See also Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1444 (9th Cir. 1995) ("As we have noted previously, allocative efficiency is synonymous with consumer welfare and is the central goal of the Sherman Act.").

[13] Bradford et al. (2020, 306–07) write, "The Chicago School's antitrust minimalism was supported by the School's resounding faith in efficient business conduct and self-correcting markets. The Chicago School promoted the view that most corporate conduct was efficient, further justifying the narrow scope for government intervention."

[14] See Church & Dwight Co. v. Mayer Lab'ys, Inc., 868 F. Supp. 2d 876, 898 (N.D. Cal. 2012) ("To justify a finding that a defendant has the power to control prices sufficient to warrant judicial intervention, entry barriers must be . . . capable of constraining the normal operation of the market to the extent that the *problem is unlikely to be self-correcting*.").

thus that monopolies and trade restraints are procompetitive.[15] So why might this framework harm vulnerable communities while benefiting affluent persons?

B. Antitrust's Effect on Marginalized Communities

Scholars have recently identified ways in which anticompetitive practices can disproportionately harm marginalized communities—and also, why antitrust has offered little help so far. The primary issue lies in consumer welfare's neutral or "colorblind" approach, which ignores how anticompetitive conduct can benefit dominant groups while levying costs elsewhere.

One problem is that antitrust is said to entail a numbers game whereby majorities win over minorities. If a restraint of trade or merger creates more value for affluent consumers than marginalized people lose from it, then a mere assessment based on addition/subtraction would conclude that the act should survive antitrust review (Capers and Day 2023). Areas where scholars have identified this dynamic include food and banking. Christopher Leslie notes that grocery stores have frequently merged and, in turn, closed stores in lower-income areas; after enforcing "scorched-earth covenants," a term he coined, dominant grocery stores can prevent new stores from emerging in poorer neighborhoods and thus create food deserts (Leslie 2023a, 1735-36). An effect is that poorer persons face higher prices and lower availability of fresh foods, and so are forced to buy nonnutritious items at dollar stores. Jeremy Kress spotted a similar dynamic in banking, where decades of unchecked mergers have caused branches to shutter in low-income communities (Kress 2023). Again, residents of poorer areas must rely on high-priced check-cashing joints and payday loans for basic services. Theodosia Stavroulaki determined that hospital mergers may strip urban areas of hospitals, a phenomenon that could not be interpreted to offend antitrust law unless "enforcers adopted a new approach to consumer welfare" (Stavroulaki 2022, 120). After all, if more people benefited than lost out—ignoring the disparities between affluent and marginalized communities—then the analysis would find that an exclusionary conduct is procompetitive.

Another critique is that antitrust law ignores the larger costs imposed on marginalized communities. For instance, the typical assessment of hospital mergers emphasizes that people must incur higher prices, paid in most cases by insurance companies (Cooper et al. 2019). But lower-income people are likely to suffer a wider range of anticompetitive effects (Owens 2019). Consider that switching costs are greater where marginalized (and especially uninsured) people face steeper out-of-pocket prices or forgo care altogether, and turn instead to lower-quality medication or even self-medication via narcotics or alcohol (Capers and Day 2023). By ignoring this dynamic, antitrust has frequently adopted the perspective of affluent persons when calculating anticompetitive effects.

Further, antitrust immunity has enabled states to suppress competition in ways that sometimes harm marginalized persons. The Supreme Court justified immunity on several fronts: (1) the state must occasionally restrain trade to achieve public objectives (*Parker v. Brown*, 317 U.S. 341, 350–52 (1943); Meese 2019), (2) states face fewer incentives to gouge consumers than private corporations do (*N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 508 (2015)), and (3) people can vote leaders out of

[15] As Mastromanolis (1995, 561–62) puts it, "According to the principles of the Chicago School theory, if individuals in business are assumed to be profit-maximizers, they will make only rational decisions, such as adopting vertical restrictions only for efficiency purposes. Further, assuming that the market is self-correcting and punishes individuals who pursue inefficient practices, the long-term survival of vertical or other practices in a market suggests that the latter actually enhance efficiency."

office if they dislike a state-sponsored monopoly. The issue is that states can restrain trade—or grant private actors the state's power to regulate competition—when marginalized communities are likely to suffer (Day 2023). For instance, most states rent out carceral markets, allowing private corporations to extract monopoly profits from vulnerable populations—even when, as courts have found, the monopoly provides no benefits to the public, inmates, or prisons (beyond driving up profits to supracompetitive levels). *People v. Stringham*, 253 Cal. Rptr. 484, 488 (Ct. App. 1988). As the court in *Stringham v. Hubbard* noted, this type of policy inured no functional logic or "cost benefit because all packages must be opened and inspected" and, what's more, "the vendor package program permits the approved vendors to charge ten per cent over retail prices and does not allow families to shop for a bargain price." Findings and Recommendations, No. CIV. S-05-0898 GEB DAD P (E.D. Cal. October 26, 2006). Likewise, licensing agencies have denied immigrants licenses to protect the markets of legacy businesses under the pretext of health and safety. While *Parker* immunity may certainly promote the public's welfare in some instances, at other times it appears to harm insular communities such as (undocumented) immigrants and inmates who are often unable to vote or, as insular minorities, use the political process to seek remedies.

While this list of criticisms is far from exhaustive, a final category I will note here involves the presumption that competition leads to self-correcting markets. Again, courts assume that most conducts are procompetitive since competition should naturally arise and eradicate anticompetitive inefficiencies. The issue is that markets are perhaps less likely to attract competitors or self-correct when insular communities with less spending power are detrimentally impacted, casting doubt on antitrust's faith in self-correcting markets in these scenarios (Hafiz 2023, 1524).[16] The implication is thus that antitrust is ill-equipped to benefit marginalized communities because, in many instances, it implicitly favors the welfare of affluent communities (Capers and Day 2023).

These criticisms of antitrust have recently gained traction while also attracting blowback. As noted above, Commissioner Slaughter has asserted that antitrust must begin to recognize its myopia with regard to issues of race (Feiner 2020). A recent executive order noted the disparate impact of certain mergers on communities of color. [17] Backed by the research of Leslie, Kress, Hafiz, and others, scholars have highlighted numerous markets in which antitrust fails people of color. In fact, Christopher Leslie hosted the first antitrust conference about the enterprise's impact on racial justice. But this landscape has also brought out detractors who assert that antitrust cannot properly remedy discrimination or promote socioeconomic equality. Most notably, commentators have argued that antitrust analysis doesn't include matters of disparate racial treatment or impact as goals. In the view of these critics, the problem seems to be antitrust law. But maybe antitrust law is fine—and it's the enforcement of antitrust law that needs an overhaul.

[16] As Hafiz (2023, 1524) writes, "Because 'taste-based' discrimination—or discrimination based on prejudice or preferences—can have adverse economic effects for the discriminator, traditional economic analyses assumed that competitive market forces would correct for them. . . . But taste-based discrimination can flourish when firms are protected from competitive pressures."

[17] According to this order (White House 2021), "Over the past four decades, the United States has lost 70% of the banks it once had, with around 10,000 closures. Communities of color are disproportionately affected, with 25% of all rural closures in majority-minority census tracts. Many of these closures are the product of mergers and acquisitions."

III. The Problem with Enforcement?

Many scholars are resisting the calls to alter antitrust. A primary contention is that antitrust should only redress economic issues, especially in light of the problems caused historically by using enforcement to remedy all types of social and political problems. The other contention is that antitrust law is actually fine, but that enforcers must reassess which disputes to litigate and how to bring them (Posner and Sunstein 2022). Rather than pursuing claims against luxury manufacturers (Parodi and Spencer 2023), agencies could do a better job of enforcing current antitrust law to benefit marginalized people as well as illustrating their plights in lawsuits. Despite a significant amount of criticism levied at the consumer welfare standard, the content of antitrust law might not actually be the root of the problem. An alternative contention is that antitrust has been underenforced, which is perhaps easier to fix than the law's text.

In instances where anticompetitive acts seem to reinforce structural racism, scholars have argued not just that antitrust should intervene, but it can. In Leslie's research on the emergence of food deserts, he insists that antitrust is currently able to offer a remedy (Leslie 2023a). He showed that scorched-earth covenants used to prevent new stores from taking the place of fleeing grocery stores—again, typically in low-income regions—"unreasonably restrain trade because their sole purpose is to reduce competition" (ibid., 1745). Thus, antitrust enforcers could currently intrude, yet they have not.

Kress has similarly discussed policy choices related to antitrust enforcement and their disparate impact on low- and middle-income (LMI) persons. He showed that the Office of the Comptroller of the Currency had previously "ensure[d] that each market would have a range of small, medium, and large banks" (Kress 2023, 590). This approach—whereby enforcers could help to maintain the type of independent and community banks that have disproportionally disappeared from LMI regions, spurring banking deserts—could be replicated today. More directly, Kress noted that "antitrust enforcers do not currently consider reduction in branch access as part of a bank merger evaluation" (595), even though they could. So, without changing antitrust law, enforcers may foster the enterprise's goal of quality by scrutinizing whether closures would likely occur in LMI areas and "deprive communities of financial services" (565). In other words, part of the onus lies on enforcers who could utilize existing antitrust law to benefit marginalized communities in the same way it benefits affluent people.

Another potential remedy lies in how antitrust enforcers and courts define a market. Perhaps the failure of enforcement is due to its "colorblind" mantra—after all, antitrust analyses pay no attention to the importance of the underlying industry or goods when assessing liability, only scrutinizing the challenged act (for example, a tying arrangement or price-fixing agreement) (Day 2021). However, antitrust could actually consider how exclusionary acts levy disparate impacts on marginalized communities by defining a market in ways that shed light on their harm. On one hand, if Coca-Cola monopolized the soda market, it would seem that soda's price should increase for everyone. But on the other hand, the merger guidelines suggest that enforcers could define a market based on whether prices have uniquely occurred within a specific community.[18] In this sense, courts and enforcers may

[18] According to the guidelines (Department of Justice and Federal Trade Commission (2010, 26), "In the absence of price discrimination based on customer location, the Agencies normally define geographic markets based on the locations of suppliers, as explained in subsection 4.2.1. In other cases, notably if price discrimination based on customer location is feasible as is often the case when delivered pricing is commonly used in the industry, the Agencies may define geographic markets based on the locations of customers."

currently define a market, and show the presence of anticompetitive effects, by exploring whether a low-income neighborhood suffered (even if affluent populations benefited). As Leslie asserted in the case of food deserts, the disparate results for low-income versus affluent communities should allow today's courts to define these markets differently (Leslie 2023a). And this would remedy enforcement, not the law.

One of the most important examples comes from cases of anticompetitive discrimination. Recall that discrimination has been called a "social problem" rather than an economic injury within antitrust's purview (Yepez 2022). In fact, scholars such as Bork doubted the presence of discrimination because it seems to make little economic sense.[19] But discrimination is rampant, especially when vulnerable people such as undocumented immigrants compete against legacy businesses and workers (Day 2024). In the instance that rivals organize boycotts against firms employing (undocumented) immigrants, this could qualify as an anticompetitive act under current law (Capers and Day 2023). After all, discrimination creates deadweight loss by raising prices above the competitive level and reducing output. Given the inefficiencies of discrimination—or even the exploitation of immigrant labor based on an exertion of market power by employers—antitrust *should* be primed to remedy this type of harm.

Another consideration is the cases antitrust enforcers bring as well as the language found in the agencies' filings. Since the individuals running the DOJ and FTC are chosen through political processes, their advocacy has generally evolved in line with recent elections. As an example, the rhetoric of current leaders such as Lina Khan and Tim Wu with respect to marginalized communities is different from that of their predecessors. It was also recent when Commissioner Slaughter insisted that antitrust enforcement should become antiracist. To parse Slaughter's words, it seems like her position was not that courts must alter their interpretation of the Sherman Act, but rather that the burden should lie on the agencies enforcing antitrust law to incorporate the welfare of marginalized communities. And by bringing monopoly cases against firms that supply food products in predominantly low-income areas or challenging anticompetitive activities by predatory lenders, the agencies could indeed promote social justice.

The crux is whether antitrust enforcers will prioritize these sorts of cases. As scholarship has shown, regulatory enforcement like antitrust derives from the political economy of government. One theory is that agencies are economic actors who respond to interest groups seeking to maximize their self-interest. [20] From this perspective, it's little mystery why antitrust has evolved to err against enforcement—and thus tolerates exclusionary acts and monopolies in questionable scenarios rather than closely scrutinizing dominant firms. It's indeed a political choice as much as an economic one. While Easterbrook convinced courts and enforcers that too much antitrust hurts markets, antitrust authorities could just as easily have decided that allowing an anticompetitive practice to go unchecked, even temporarily, imposes too many unwarranted costs.

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[19] Bork (1996, 237) argues that it is "doubtful . . . that much discrimination occurs .....Any fair-minded observer would have to admit that this country has undergone a drastic decline in racism. Discrimination is alleged much more often than it exists."

[20] Short (2021, 655) describes the economic theory of regulation this way:

> Regulation is conceptualized as a commodity that is supplied by regulators and consumed by the public, regulated industries, and other interest groups. Politicians are presumed to be self-interested maximizers of political support in the form of votes or the money necessary to get votes. Interest groups can buy the regulatory outcomes they prefer by providing financial or other political support to politicians or regulators. The interest groups that supply the most support to politicians or regulators reap the greatest regulatory benefits.

IV. What Should Antitrust Do?

Should antitrust law or enforcement change in order to help marginalized persons? That is, must there be a change in the drafting or interpretation of antitrust that would allow sympathetic agencies—who are currently handcuffed by the doctrine as it exists now—to promote the welfare of marginalized communities? Or is the problem that enforcers lack the motivation or political will to use current antitrust laws to understand competition's impact on vulnerable people? Is the problem with the law or with the people enforcing it?

This is perhaps a false dichotomy. An oddity of antitrust, as outlined earlier, is that it is based on vague text and common law principles. The implication is that antitrust is largely derived not from statutory sources but from the manner in which courts and enforcers construe antitrust. In some sense, how antitrust is enforced affects its interpretation; an increased emphasis on marginalized communities by antitrust enforcers and litigants could therefore impact antitrust's treatment in courts and, in many senses, alter antitrust law itself.

A similar point was made by Eric Posner and Cass Sunstein. Their article demonstrated that enforcement affects income equality, considering that litigation against a monopolist can increase labor's wealth (by improving its bargaining power via creating opportunities) and consumers' wealth (by lowering prices to competitive levels), while sapping revenue from shareholders (Posner and Sunstein 2022). But conversely, antitrust can also widen income disparities by "tolerating" types of market power that ostensibly benefit markets or primarily affluent parties—for example, a pharmaceutical company that patents a lifesaving drug can lawfully charge monopoly prices (ibid.). Even in nonpatent disputes, antitrust courts and enforcers have typically refused to review anticompetitive acts of design or innovation out of fear that enforcement would discourage innovative activities and investment.[21] While innovation is certainly important, this reflects a socioeconomic judgment in which antitrust has chosen higher prices and more innovation over lower prices and less innovation—and this landscape is more likely to foster the welfare of affluent and insured people who can acquire expensive drugs, and perhaps harms low-income people who need lower prices more than the future benefits of innovation. To Posner and Sunstein, antitrust could promote competition in ways that would lessen the disparities between classes, sexes, and races.

Altering enforcement to reduce inequality and discrimination would affect antitrust's interpretation (and vice versa). One approach could be for the agencies to prioritize markets affecting lower-income people such as food and labor (Posner and Sunstein 2022). While these efforts would likely increase equality, note that equality is not a goal of modern antitrust in contrast with consumer welfare, which is often defined as (allocative) efficiency. But as Posner and Sunstein show, antitrust redistributes wealth all the time by favoring efficiency over other goals. The implication is that antitrust needn't shy away from questions of equality due to the (unstated) ubiquity of this dynamic. Antitrust could indeed prioritize the redistributive effects of enforcement in specific scenarios, considering that agencies may prioritize litigation that would benefit marginalized communities on par with how it helps dominant groups (ibid., 196–97). This would notably help to evolve antitrust *and* enforcement. After all, nothing in the Sherman Act states that antitrust must *only* enhance efficiency; rather, this goal was spun from the Chicago School's reinterpretation. Just as enforcers and courts altered enforcement in the 1970s, they may do so again today.

[21] United States v. Microsoft Corp., 253 F.3d 34, 65 (D.C. Cir. 2001) ("As a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes.").

A specific example of antitrust promising to benefit marginalized persons is the DOJ's initiation of an action to condemn price-fixing in rental real estate markets in 2024. The complaint alleges that RealPage offers software that enables landlords to coordinate pricing increases (Kaye et al. 2024). This is important because low-income people are not only more likely to rent by about 400 percent, but they also spend greater portions of their incomes on leases (Mateyka and Yoo 2023). According to the Census Bureau, the cost of rental leases in low-income communities has significantly increased relative to wages, a phenomenon that, recalling the DOJ's lawsuit against RealPage, seems to be buoyed by anticompetitive practices (Michaels and Parker 2024). And by alleging that landlords have fixed prices by adhering to an app or algorithm rather than entering into express agreements, this lawsuit demonstrates how reevaluating antitrust as a way of benefiting low-income persons is a matter of antitrust enforcement (Leslie 2023b). Indeed, scrutinizing the rental market will especially benefit the welfare of low-income people.

Another example involves agriculture in terms of food and labor. First off, in 2023 enforcers settled lawsuits against food producers, alleging that exclusionary practices (for example, the sharing of confidential data) drove up the prices of staple foods such as chicken, pork, and canned tuna (Thomas and Michaels 2023).

> The Justice Department alleged that meat-industry executives use the data service to identify details about rivals' supplies so they could raise prices without worrying they would lose market share. Prosecutors say Agri Stats' data encourages meatpackers to reduce the amount of livestock they slaughter and increase prices paid by consumers. (Ibid.)

As a result, the types of people who disproportionally depend on staples such as canned tuna and pork products—low-income persons—spend a greater percentage of their incomes on food. And antitrust could likely help.

Just as important is the DOJ's fixation on labor practices in this industry and similar ones. Meat processors settled antitrust lawsuits brought by government enforcers in 2024 over their efforts to collude and restrain wages, fixing salaries of low-income workers (Leonard 2022). Other wage-fixing lawsuits against meat processors are still pending. Beyond the meat industry, the FTC instituted a controversial rule in 2023 that outlaws noncompete agreements (Kaye 2024). One element motivating this movement was that fast-food workers were often restrained by noncompetes, which provided few if any benefits to low-income workers while paralyzing their mobility and salaries (to the benefit of dominant corporations) (Day 2020). This theory receives support from research showing that antitrust can promote equality and welfare among lower-income workers (Ezrachi et al. 2022). But one reason why the FTC's rule has garnered such blowback is that, per critics, it stretches antitrust law and the agency's rulemaking authority beyond what's proper (Lambert and Cooper 2024). The point, though, is that the agencies' efforts in labor and agricultural markets demonstrate their capacity to promote the welfare of low-income people via both antitrust law and antitrust enforcement.

It's also worth mentioning that a reevaluation of antitrust law could benefit marginalized people in places beyond the United States. First, it's been shown that that the anticompetitive acts of government are especially pernicious in developing countries, where government and private industry are commonly intertwined (Fox 2022). Scholars such as Eleanor Fox have explained that, by increasing antitrust's scope and enforcement in low-income nations, competition policy might not only boost consumer welfare, but even combat poverty. Fox showed, for instance, that antitrust authorities could

set their guidelines to permit efficiency-increasing mergers while blocking problematic ones; in doing so, antitrust may help to "facilitate the supply and delivery of food, medicines, supplies, and services" and thereby "avoid shortages" (Fox 2020, 277). As she illustrated:

> [I]n a meaningful way, where barriers to markets are high, where most of the population have been excluded from the economic life of the country, where oligarchs and their families control the cream of the economic opportunities, and where powerful state-owned enterprises occupy the lion's share of trade, efficient moves to bring competition to the market and equitable moves to help the people engage in the market coincide. (Fox 2018, 5)

Antitrust's potential, it seems, exists both in the United States and abroad.

V. Conclusion

The point is that antitrust has so far failed to benefit marginalized persons on even ground with dominant groups due in large part to superficial assumptions about economic equality and colorblindness. Given the lack of statutory text defining antitrust's goals and scope, the line between enforcement and law is blurred to a degree such that enforcers could enforce antitrust to highlight, or even remedy, the disparate effects of anticompetitive conduct. To this end, the law's goals and interpretation would likely follow alongside enforcement to benefit vulnerable populations.

So where do we go from here? The easiest answer is that enforcers could carefully select cases and make sure to emphasize harms and scenarios affecting primarily low-income communities. It would be beneficial to advocate for those who have often gone unnoticed by mentioning this dynamic in filings and speeches. But also, courts, enforcers, and scholars could invest greater attention in how antitrust law could be amended or interpreted to achieve these goals. The potential for change is certainly tangible.

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