


7-6-2017

# Antitrust Policy and Inequality of Wealth

Herbert J. Hovenkamp  
*University of Pennsylvania Law School*

Follow this and additional works at: [http://scholarship.law.upenn.edu/faculty\\_scholarship](http://scholarship.law.upenn.edu/faculty_scholarship)

 Part of the [Antitrust and Trade Regulation Commons](#), [Courts Commons](#), [Economic Policy Commons](#), [Law and Economics Commons](#), [Law and Society Commons](#), [Policy Design, Analysis, and Evaluation Commons](#), [Political Economy Commons](#), and the [Social Welfare Law Commons](#)

---

## Recommended Citation

Hovenkamp, Herbert J., "Antitrust Policy and Inequality of Wealth" (2017). *Faculty Scholarship*. 1769.  
[http://scholarship.law.upenn.edu/faculty\\_scholarship/1769](http://scholarship.law.upenn.edu/faculty_scholarship/1769)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

## ANTITRUST POLICY AND INEQUALITY OF WEALTH

Herbert Hovenkamp\*

All legal policies have consequences for the distribution of wealth. Caps on punitive damages in tort law make tort plaintiffs poorer and tort defendants wealthier. Fines for speeding make speeders poorer and state treasuries wealthier. For most legal policy, however, wealth distribution is not a primary or even a secondary goal. Further, the consequences are typically quite random in relation to social class or economic status. For example, fining speeders may not hit one particular economic group harder than another unless poorer people are either more or less likely to speed. Caps on medical malpractice awards may injure those who are sicker or more likely to be injured, but whether this group of victims is poorer or wealthier than society as a whole is hard to say.

Special interest legislation can distribute wealth more explicitly, because often its actual although often unstated goal is to benefit one particular interest group. Antitrust law's Robinson-Patman Act is an example of this.<sup>1</sup> It was intended to protect small grocers from the rise and development of vertically integrated chain stores such as A & P.<sup>2</sup> The intended beneficiaries were the small stores. Other victims, perhaps unintended, were consumers who would have to pay higher prices. Of course, the supporters of the statute did not articulate its goals as harming consumers with higher prices.

Antitrust law unquestionably has consequences for the distribution of wealth. Rigorous antitrust enforcement can make condemned price-fixers and monopolists worse off while benefitting their customers or sometimes competitors. Once again, however, these wealth transfers are not always systematically from the rich to the less rich or vice-versa. For example, cartel members need not be rich firms. Many small, family owned companies that produce things such as milk or cement have been prosecuted for price fixing.<sup>3</sup> Further, cartels often form precisely because the cartel members are losing money as a result of adverse shifts in their industry. The long history of railroad collusion bears this out.<sup>4</sup>

---

\*James G. Dinan University Professor, Penn Law and Wharton Business, University of Pennsylvania. Thanks to Erik Hovenkamp for commenting on a draft.

<sup>1</sup> 15 U.S.C. §2 (as amended in 1936).

<sup>2</sup> See Henry Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 *FORDHAM L. REV.* 1113 (1983); Frederick M. Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 *COL. L. REV.* 1059 (1957).

<sup>3</sup> See Robert F. Lanzillotti, *The Great School Milk Conspiracies of the 1980s*, 11 *REV. INDUS. ORG.* 413, 440 (1996) (cartels of relatively small dairies); *United States v. Vandebroke*, 679 F.3d 1030 (8<sup>th</sup> Cir. 2012), cert. denied, 133 S.Ct. 1457 (2013) (cartel of small ready-mixed cement companies).

<sup>4</sup> HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1780-1860* at 313 (1991); Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 *YALE L.J.* 1017 (1988). Other markets have exhibit similar situations. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-221 (1940) (collusion resulting from excess capacity and distress in oil industry); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 273 (6<sup>th</sup> Cir. 1898) (similar; cast iron pipe). Cf. *United States v. Apple, Inc.*, 791 F.3d 290, 332 (2d Cir. 2015), cert. denied, 136 S. Ct. 1376 (2016) (speaking of ruinous competition in book industry); *General Cinema Corp. v. Buena Vista*

Why would someone want to use the antitrust laws as a wealth distribution device when far more explicit statutory tools are available for that purposes, including tax law, minimum wage laws, welfare laws and Medicaid, to name a few? One feature of antitrust is its very open-textured, nonspecific statutes that are interpreted by judges. As a result, using antitrust to redistribute wealth may be a way of using the judicial process without having to go to Congress or a state legislature that is likely to be unsympathetic. Of course, a corollary of that position is that someone attempting to use antitrust law to redistribute wealth is going to have to rely on the existing antitrust statutes rather than obtaining a new antitrust provision that is more explicitly distributive. If that is the case, then the question is whether §§1 and 2 of the Sherman Act or §§3 or 7 of the Clayton Act in their current form are useful wealth distribution tools.

One possible lever for redistributive antitrust is a link between market competitiveness and wealth equality. A good deal of literature suggests that competitive markets are conducive to the more even distribution of wealth.<sup>5</sup> To the extent this is true we might use antitrust to equalize wealth distribution simply by making markets more competitive.

Of course, the antitrust laws already have a generally agreed upon goal of making markets more competitive. The most defensible goal for the antitrust laws is prohibition of practices that serve to reduce output anticompetitively, which is simply a statement of the consumer welfare principle. An output reduction is anticompetitive if its profitability depends on higher profits or margins.

For a long time people have been debating the merits of two different welfare goals for the antitrust laws: “general” welfare and “consumer” welfare.<sup>6</sup> General welfare is the ordinary measure that neoclassical economists use to talk about the economy. It calculates the amount of welfare (surplus) enjoyed by everyone, not only consumers and producers, but also competitors, employees, and anyone else who is affected. The general welfare test may approve some practices that harm consumers, provided that the benefit to producers (and others) is greater than consumer losses. For example, suppose a merger results in a price increase that injures consumers in the aggregate by \$100,000,000, but also produces production efficiencies of \$1,200,000,000 that accrue to the merging parties and are not passed on via lower prices. That merger is general welfare increasing, because producers are benefitted by a greater amount than consumers are injured.

---

Distribution Co., Inc., 532 F.Supp. 1244 (C.D.Cal. 1983) (rejecting ruinous competition defense to market division agreements in motion picture screening).

<sup>5</sup>See Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: the Antitrust Counterrevolution and its Discontents*, 11 HARV. L. & POL’Y REV. 235 (2017); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. 1 (2015).

<sup>6</sup>See Charles S. Dameron, *Present at Antitrust’s Creation: Consumer Welfare in the Sherman Act’s Statutory Forerunners*, 125 YALE L.J. 1072 (2016); Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, 81 FORDHAM L. REV. 2471 (2013); Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659, 690-98 (2010).

Under a consumer welfare standard the merger would be condemned, however, because consumers are harmed and we do not count the benefits to producers. This strikes some people as wrong, but I believe it is the best approach to antitrust analysis and the only one that is capable of reasonable implementation. The arguments for an antitrust consumer welfare approach are of three general kinds – those derived from legislative history, those derived from principle, and those derived from administrative concerns. The legislative history makes a weak case for consumer welfare, but as between consumer welfare and general welfare the former is a clear winner. Second, the arguments from principle do not get us anywhere because they are very sensitive to assumptions. Third, the arguments from administrability strongly favor a consumer welfare approach. Finally, however, as a practical matter selection of a standard as between general and consumer welfare rarely makes a difference, certainly not often enough to justify the greatly increased cost of antitrust analysis under a general welfare standard.

First, a fair reading of the legislative history of the Sherman Act suggests that it was dominated by two concerns. One is high prices and the other is protection of smaller competitors from what was regarded as the emerging threat of large businesses, or trusts.<sup>7</sup> Neither of these concerns strongly suggests a general welfare approach. The concern with higher prices is at least consistent with a consumer welfare concern. Further, the legislative history of the Clayton Act (1914), Robinson-Patman Act (1936), and the Celler-Kefauver Amendments to the merger statute (1950) indicate that to the extent Congressional concerns changed over time it was in the direction of greater concern for the protection of smaller rivals.<sup>8</sup>

The framers of the Sherman Act clearly did not want to punish someone for being more efficient than rivals. For example, they praised and would have exonerated the rancher who was better than anyone else at producing shorthorn cattle, and thus got the “whole business.”<sup>9</sup> But that is hardly the same as supporting a general welfare test. A general welfare test has its bite in situations where consumers are actually injured, whether by higher prices or lower quality, but this injury is more than offset by producer gains. That is hardly the situation when someone gets the whole business by being better than anyone else. Someone does that by benefitting rather than injuring consumers, and nothing in the legislative history account suggests to the contrary.

Second, the arguments from principle are based mainly on standard models of neoclassical economics, such as Pareto efficiency or Kaldor-Hicks efficiency, that measure the efficiency of an economy but purport to be indifferent to how wealth is distributed. These

---

<sup>7</sup>See, e.g., Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) (general welfare); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: the Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982) (consumer welfare); George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1 (1985) (small business protectionism); HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION*, ch. 2 (2005) (small business protectionism).

<sup>8</sup>For a summary, see HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE*, Ch. 2 (5<sup>th</sup> ed. 2015).

<sup>9</sup>See 21 Cong. Rec. 3151-3152 (1890) (exchange among Senators Kenna, Edmunds, and Hoar concluding that the statute’s monopolization provision would not condemn someone who “got the whole business because nobody could do it as well as he could....”).

models are valuable for the function that they perform, which is to measure the economy's overall efficiency. Whether they are the best models for assessing the legality of competitive behavior is a different question.

Bork famously used the term “consumer welfare” when he really meant “total surplus,” which is general welfare.<sup>10</sup> Bork generally assumed that what drives economic assumptions about efficiency is its benefits to consumers. To the extent that is true, there is very little tension between a general welfare and a consumer welfare test for antitrust policy. Bork's efficient producer is the legislative history's producer of short horn cattle, who “got the whole business” because no one could do it better than he could.<sup>11</sup> Importantly, that piece of legislative history was discussing superior performance by a single actor. It was not discussing mergers, which can present different issues.

In his highly influential “welfare tradeoff” model, Oliver E. Williamson essentially set competition policy scholars off on a wild goose chase looking for practices such as mergers or joint ventures that simultaneously injure consumers while producing efficiencies that exceed consumer losses. In one of the most storied figures in antitrust economics, Williamson illustrated a merger that increased prices but also led to productive efficiencies. He then showed how the size of the efficiencies could exceed that of the consumer losses from the price increase.<sup>12</sup>

In the subsequent literature this welfare tradeoff conception became the norm for thinking about efficiencies. In fact most of the “general welfare” vs. “consumer welfare” debate since that time has swirled around it by focusing on what we should do when a practice produces both productive efficiency gains to producers and allocative efficiency losses that accrue to consumers? The answer under the general welfare approach is that we condemn the practice only if the productive efficiency gains are smaller than the consumer losses. The answer under the consumer welfare approach is that we condemn the practice whenever consumer harm has occurred and we do not offset the gains in productive efficiency.

But this entire “welfare tradeoff” debate depends on the existence of a non-empty, verifiable set of instances in which a practice simultaneously injures consumers by reducing output and benefits producers by yielding productive efficiencies. Without denying that such situations occur, the fact is that in 125 years of antitrust litigation no American court has yet identified one. In virtually every case where a practice has been proven to yield efficiencies it has also been shown to leave consumers unharmed – or perhaps to say it more accurately, it has not been shown to harm them.

---

<sup>10</sup>Bork, *Legislative Intent*, *supra* note \_\_ at 10; and see Douglas H. Ginsburg, *Legislative Intent and the Courts*, 71 ANTITRUST L.J. 941, 942 & n. 11 (2014) (collecting sources).

<sup>11</sup> Bork relies on this passage in ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 12, 28-31, 138 (1978). See Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 18 (1982).

<sup>12</sup> Oliver E. Williamson, *Economies as an Antitrust Defense: the Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 21 (1968).

Welfare tradeoff modeling appears most frequently in analysis of horizontal mergers. The reason is not hard to identify: mergers have a tremendous capacity to cause significant changes in market structure in a short period of time. The union of two relatively large firms can threaten the immediate creation of market power. Offsetting this, the same union can do a number of things that reduce production costs or improve product quality. Given the amount of merger litigation and the legal and economic resources poured into it, we should have a relatively substantial database of cases requiring tradeoff. But in fact we do not, even though the so-called efficiency defense is raised in a high percentage of litigated merger cases. Courts sometimes cite efficiencies as justifying a merger after holding that the merger is not anticompetitive, meaning that there was no consumer harm.<sup>13</sup> They also sometimes dismiss efficiency claims after finding that the merger is anticompetitive.<sup>14</sup> One thing they have not done, however, is found a merger that both reduced output and raised prices, but that produced offsetting efficiencies that were thought sufficient to justify it.

The only cases where the choice of a welfare standard makes a difference are when the challenged practice, whether merger or otherwise, actually reduces output. The biggest efficiency gain to come from challengeable antitrust practices such as mergers is economies of scale, but except in idiosyncratic situations these are achieved under higher, not lower, output. The set of efficient but output reducing practices is not necessarily empty, but it is certainly not very large. I am not aware of a single antitrust decision in the United States in which a court has found actual consumer harm from reduced output or higher prices, but then went ahead to approve the practice because producer gains exceed consumer losses.<sup>15</sup> In sum, once all the facts are known it is virtually never necessary to apply the welfare tradeoff model, because there is nothing to trade off.

The third consideration is administrability. How we assess situations in which both consumer harm and efficiency gains are possible depends critically on which measure of welfare we choose. Under a general welfare test consumer losses would first have to be quantified fairly precisely, at least in close cases. This is true because their size needs to be measured against the size of any efficiency gains that accrue to producers. Consumer losses consist of two parts. First is the output reduction and the amount of lost consumer surplus that each lost unit represents.

---

<sup>13</sup>*E.g.* United States v. Carilion Health Sys., 707 F.Supp. 840 (W.D. Va. 1989), *aff'd mem.*, 892 F.2d 1042 (4<sup>th</sup> Cir. 1989) (finding efficiencies, but also that government failed to prove its structural case).

<sup>14</sup>*Saint Alphonsus Medical Center-Nampa, Inc. v. St. Luke's Health sys., Ltd*, 2014 WL 407446 (D.Id. Jan. 24, 2014), *aff'd*, 778 F.3d 775 (9<sup>th</sup> Cir. 2015); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721-722 (D.C. Cir. 2001).

<sup>15</sup>Canadian antitrust law, which adopts a total welfare approach, includes one widely debated decision, *Comm'r of Competition v. Superior Propane, Inc.*, (2003) 23 CPR (4<sup>th</sup>) 316 (FCA) (approving a merger of producers of liquefied gas because, while it led to reduced output and higher prices, efficiency gains more than offset these losses). For commentary, *see Darwin V. Neher, David M. Russo, and J. Douglas Zona, Lessons from the Superior-ICB Merger*, 12 GMU L. REV. 289 (2003); Daniel J. Gifford & Robert T. Kudrie, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423 (2005); Richard O. Zerbe, Jr. and Sunny Knott, *An Economic Justification for a Price Standard in Merger Policy: the Merger of Superior Propane and ICG Propane*, 21 REC. L. & ECON. 409 (2004).

This loss is depicted by the “deadweight loss” triangle in the standard monopoly graph. So making that measure requires a fact finder to know the size of the output reduction and the size of the surplus that each lost unit represents. The other part of consumer losses accrues to those customers who stay in the market but pay a higher price. Their loss, roughly estimated in antitrust damages actions, is the number of units consumers actually purchase during the monopoly/cartel period multiplied by the price increase. As a general matter we need not worry about these consumer losses under a general welfare test, because they are precisely offset by producer gains.<sup>16</sup>

Under a general welfare test consumer losses would have to be offset against the productive efficiency gains that accrue to producers. In the simple cases where the product is not changed but production costs are lower, these would be assessed as the cost savings per unit. That would require the fact finder to discover how many units per time period the firm produced and how much were the efficiency-induced cost savings on each unit. If efficiency gains show up in other ways, such as improvements in product quality, this calculation would be more difficult because some value would have to be put on the quality increase.<sup>17</sup>

By contrast, under a consumer welfare test the fact finder need answer only one question: has output been reduced? We need not even know the amount, as long as we can determine that there was a non-trivial output reduction. So if the output consists in a decline in product quality rather than number of units, the fact finder need not measure the decline but only identify that it has occurred. Once we know that output has declined and can infer that this happened for an anticompetitive reason, then we know that there is consumer harm. Of course, damages measurement would still require consumer losses to be quantified, as we already do in damages actions for price fixing.

In sum, assessing welfare losses under a consumer welfare test is much, much easier than under a general welfare test. In fact, assessing welfare under a general welfare test in a moderately close case would be heroic. Thus the best choice for a welfare standard for antitrust is consumer welfare as measured by output.

That then leaves one question pertaining to wealth inequality. Suppose we start out with the premise that antitrust harm consists in a market-power-driven output reduction. Accepting that competitive markets are conducive to greater wealth equality, hasn't antitrust already done all it can do? To ask the question somewhat differently, are there any situations that warrant antitrust intervention even though intervention would push market output lower rather than higher?

One case that comes to mind as an example is *Brown Shoe*, where the Supreme Court gave effect to a district court decision that condemned the Brown-Kinney Shoe merger precisely because the merger would lead to lower prices, and these would put increased pressure on

---

<sup>16</sup>For a graphic and more detailed explanation, see Herbert Hovenkamp, *Progressive Antitrust*, \_\_ ILL. L. REV. \_\_ (2018) (in press), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2892336](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2892336).

<sup>17</sup>*Ibid.*

smaller, independent shoe sellers who were already struggling.<sup>18</sup> We might take the same approach with the Amazons of the twenty-first century world – condemn their actions precisely because their lower prices attract so many consumers that smaller competitors might be unable to survive.<sup>19</sup>

There are a couple of things worth noting about this approach. First, it clearly injures rather than benefits consumers. They are being robbed of the larger firms' lower prices. Second, there is no obvious way of limiting its application. Should antitrust condemn every practice that reduce the defendant's prices or costs, or improves the quality of its product when rivals are injured or suppliers are worse off? That policy would rather quickly drive the economy back into the Stone Age, imposing hysterical costs on everyone. To be sure, there might be ways of limiting the rule. For example, we might say that lower prices or higher quality ought to be condemned only when it creates or threatens to create a monopoly. That approach might not be quite as bad, but it would be a strong barrier to innovation, and particularly to market shifting innovations that result in dominant firms. There would go Ford, Bell, Kodak, Polaroid, Xerox, Microsoft, Google, Apple, and numerous others.

Finally it is hardly clear that this antitrust policy of condemning firms that produce lower prices or higher quality than their rivals would yield a more attractive distribution of wealth than a policy of simply encouraging maximum, competitive output. To be sure, stockholders of the target of an antitrust prosecution would be worse off. The less competitive rivals who no longer have to compete with lower prices or better products will be better off, but without knowing something about their starting position there is no reason to classify them as relatively "poor" and the antitrust defendant as "wealthy." Indeed, often highly innovative firms are relatively young upstarts facing older money and older technology. For example, one of Amazon.com's principal targets – most likely to be injured by the (at this time) contemplated Amazon/Whole Foods merger -- is Wal-Mart, which is substantially owned by the wealthiest family in the United States.<sup>20</sup>

Of course, we might conclude that Amazon's lower prices are a temporary illusion. Perhaps Amazon is engaging in predatory behavior by charging very low prices today and intends to recoup monopoly profits later. Or perhaps it is exercising monopsony power by suppressing buying prices. If these things occur then antitrust can be brought to bear. But such claims need to be more than asserted as an abstract proposition. They need to be proven. The law of predatory pricing is designed to identify instances in which predatory pricing is a plausible strategy.<sup>21</sup> We might dispute the correctness of those legal rules, but that dispute occurs equally among those who believe general welfare or consumer welfare should be the guiding antitrust principle. As for monopsony, its telltale sign is suppression of output, something that requires both market power in the purchasing market and evidence that the buyer

---

<sup>18</sup>United States v. Brown Shoe, 179 F. Supp. 721, 738 (E.D.Mo. 1959), *aff'd*, 370 U.S. 294 (1962).

<sup>19</sup>Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

<sup>20</sup>The Walton family, which owns roughly half of Wal-Mart. See <https://www.forbes.com/profile/walton-1/>.

<sup>21</sup>3A Id., Ch. 7C (4<sup>th</sup> ed. 2015).



is seeking to keep market wide output down. On casual observation, that hardly seems to be true in the case of Amazon.<sup>22</sup>

Finally, the one class of people that would clearly be injured by a policy of advocating lower output on distributional grounds is consumers. They would pay higher prices. Other losers include employees whose jobs would disappear in a lower output market; creditors, landowners, tax authorities, distributors, and retailers, all of whom face reduced business when output goes down.<sup>23</sup> In sum, it seems very unlikely that a policy of condemning firms who charge lower prices or produce higher quality goods would yield a distribution of wealth any more desirable than a policy of maintaining high output by condemning anticompetitive restraints.

---

<sup>22</sup>In hard, competitive bargaining a buyer tries to obtain lower prices by getting a better deal, typically by increasing the amount purchased. By contrast, a monopsonist tries to force buying prices down by limiting market wide sales. *See* ROGER D. BLAIR AND JEFFREY L. HARRISON, *MONOPSONY IN LAW AND ECONOMICS* (2011); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* §1.2b (5<sup>th</sup> ed. 2016).

<sup>23</sup> While all of these various groups would be injured, most are denied standing to sue for an antitrust violation because their injuries are considered “derivative.” *See* 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶350-353 (4<sup>th</sup> ed. 2014)