AN ANTITRUST APPROACH TO SEX EQUALITY

BAILEY K. SANDERS*[1]

Abstract

This Article argues that antitrust law can and should promote gender equality by prioritizing key consumer markets, namely markets for products and services complementary to women's labor force participation. These products and services include those that facilitate efficient outsourcing of home production (e.g., childcare, infant formula, and labor-saving household technologies) and those that reduce or eliminate the burdens of biological reproduction (e.g., maternity care, contraception, and abortion care). Drawing on economics, sociology, and feminist literatures, this Article develops a theoretical approach to antitrust law that takes into account the complementarities between these key markets and women's labor force participation and also links consumer harm to worker harm. Importantly, this Article argues that using antitrust law to promote sex equality requires neither deviation from the conventional consumer welfare standard nor an equity-efficiency tradeoff. On the contrary, prioritizing these key consumer markets is conducive to the simultaneous pursuit of efficiency, sex equality, and constitutional equal protection principles.

* Visiting Assistant Professor, Duke University School of Law. Many thanks to Stanislav Rabinovich, Kimberly Krawiec, Mitu Gulati, Barak Richman, Rachel Lamorte, Glenna Siegel, Elai Katz, Ashlee Paxton-Turner, Anna Van De Stouwe, Jonathan Seymour, Jon Petkun, Bobby Bishop, Emilie Aguirre, Kyle Compton, Danny Sokol, Eleanor Fox, and the members of Women Connected (https://www.americanbar.org/groups/antitrust_law/about/committees/women-connected/ [https://perma.cc/8RFH-EM3Q]).

INTRODUCTION

Since the 1970s, American antitrust jurisprudence has focused on maximizing economic efficiency and, more specifically, maximizing consumer welfare.[1] Efforts to broaden the scope of antitrust law to include social and/or political goals such as equality have generally been dismissed as misguided, on the assumption that using antitrust law to pursue such "noneconomic" goals requires sacrificing economic efficiency[2] to the detriment of consumers and the larger economy. In this Article, I will argue that this is a false assumption, at least when it comes to gender equality. I will show that the consumer welfare standard is an effective and natural vehicle for promoting gender equality, as measured by women's labor market participation. I also show that antitrust law and constitutional sex equality doctrine reinforce each other and that Fourteenth Amendment equality values demand rigorous antitrust enforcement.[3]

A half century has passed since the Supreme Court repudiated state action that directs women to the role of unpaid caregiver in the family and home while preserving the breadwinner role for men.[4] Despite this, women still face significant challenges when it comes to accessing the labor market on equal terms with men.[5] Of the many reasons for this, two stand out. First, although constitutional sex equality jurisprudence calls for a world without prescribed gender roles in the private-family and public-economic spheres, those gender roles retain considerable force in practice.[6] Working mothers still routinely shoulder a disproportionate share of the family and caregiving work of the home, making

---

1 *See, e.g.*, Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 1 (1982) ("The view that the federal antitrust laws ought to promote allocative efficiency in American business and markets has come to dominate antitrust policy in the last decade.").

2 *See*, *e.g.*, Robert H. Bork, *Antitrust and Monopoly: The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 253 (1967) (arguing that "the introduction of goals other than consumer welfare into antitrust is destructive of antitrust as law").

3 Scholars have previously argued that First Amendment values demand antitrust enforcement. *See, e.g.*, Barak Richman, *Religious Freedom Through Market Freedom: The Sherman Act and the Marketplace for Religion*, 60 WM. & MARY L. REV. 1523, 1525 (2019). To my knowledge, however, I am the first to show the link between antitrust and Fourteenth Amendment sex equality doctrine.

4 *See* Stanton v. Stanton, 421 U.S. 7, 15 (1975).

5 *See infra* Part I.

6 *See, e.g.*, Julie Suk, *Gender Inequality and the Infrastructure of Social Reproduction*, LAW & POL. ECON. PROJECT: LPE BLOG (Apr. 16, 2018), https://lpeproject.org/blog/gender-inequality-and-the-infrastructure-of-social-reproduction/ [https://perma.cc/BT97-NHJ6].

it difficult for women to perform as ideal workers and exacerbating stereotypes that paint motherhood as incompatible with market work.[7] Second, women face certain health challenges that men do not—pregnancy, childbirth, and the recovery from childbirth being the most salient—which can make it harder to participate in paid work, particularly in institutions designed around male bodies.[8]

While antitrust law has not traditionally been viewed as a tool for ameliorating gender inequality,[9] this is a significant oversight. A deep and diverse literature makes clear that one of the ways in which women overcome gendered barriers to market work is to rely upon consumer markets that support their labor force participation.[10] That is, certain consumer markets are complementary to women's labor force participation because women use the products and/or services produced to overcome gender-based barriers impeding their full access to the labor market.[11] Two broad sets of markets are particularly important: first, those that allow for the outsourcing of home production tasks that typically fall to women; and second, those that supply products and services that allow for greater control over or reduce the burdens of biological reproduction. Key examples of the former include childcare services, infant formula, and labor-saving household technologies; key examples of the latter include maternity care, contraception, and abortion care.[12] Numerous studies show that when more women and their families can afford these products and services, more women are able to participate in the labor market—and for longer periods and at higher pay.[13]

Unfortunately for female consumers, however, many of the key markets upon which they rely to support their labor force participation are in poor health.[14] Both the childcare and maternity care markets, for example, are characterized by high prices and low output—

---

7 *See, e.g.*, *id.*

8 In this Article, I use the term "women" while recognizing that the capacity for pregnancy is not exclusive to women; this group also includes some men and nonbinary people.

9 *See infra* Part II.A.

10 *See infra* Part II.

11 *See infra* Part II.B.

12 *See infra* Part II.B.

13 *See infra* Part II.

14 *See infra* Part II.C.

indeed, a great many American consumers live in childcare and maternity-care "deserts."[15] The infant-formula market, for instance, is characterized by excessive concentration, making it susceptible to supply-chain disruptions.[16] Meanwhile, certain hospital mergers pose a serious threat to the provision of reproductive services like abortion care, contraception, and in vitro fertilization.[17] The markets for abortion care and contraception are also characterized by excessive and punitive regulations aimed at eliminating those markets entirely.[18]

Antitrust enforcers at the federal and state levels should be deeply concerned by these market troubles.[19] Not only is there clear evidence that consumers are being harmed,[20] but these market inefficiencies also undermine women's ability to participate in the labor market and, more broadly, undermine gender equality.[21] While the state may not pass legislation aiming to push women away from market work and towards the home,[22] the

---

15 *See* Rachel Treisman, *Millions of Americans Are Losing Access to Maternal Care. Here's What Can Be Done*, NPR (Oct. 12, 2022), https://www.npr.org/2022/10/12/1128335563/maternity-care-deserts-march-of-dimes-report [https://perma.cc/C9MC-WQ23] (reporting that 36% of counties nationwide constitute maternity-care deserts, meaning they have no obstetric hospitals or birth centers and no obstetric providers); RASHEED MALIK ET AL., CTR. FOR AM. PROGRESS, AMERICA'S CHILDCARE DESERTS IN 2018 (2018), https://www.americanprogress.org/article/americas-child-care-deserts-2018/ [https://perma.cc/LE8K-K6S8] (showing that approximately half of the country has too few licensed childcare options).

16 *See* LINA M. KHAN ET AL., FED. TRADE COMM'N, MARKET FACTORS RELEVANT TO INFANT FORMULA SUPPLY DISRUPTIONS (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/infant-formula-report.pdf [https://perma.cc/AJD5-E6H5].

17 *See* Caitlin Durand, *Who Blesses This Merger? Antitrust's Role in Maintaining Access to Reproductive Health Care in the Wake of Catholic Hospital Mergers*, 61 B.C. L. REV. 2595, 2601–23 (2020) (examining the impact of Catholic hospital mergers on access to reproductive healthcare in the United States).

18 *See infra* Part II.

19 In the United States, antitrust enforcement takes place at the federal, state, and individual levels. 15 U.S.C. §§ 4, 15, 15c. In this Article, the term "antitrust enforcers" refers to both federal and state authorities possessing the ability to challenge anticompetitive conduct under state and/or federal law. Although individual suits brought by consumers and firms also play an important role in protecting market competition, this Article primarily directs its focus at antitrust enforcers. Future work should dig more deeply into how advocacy organizations and grassroots organizers can incorporate an antitrust approach to sex equality into their larger strategic initiatives.

20 *See infra* Part II.C.

21 *See infra* Parts II–IV.

22 The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment prohibits laws that steer men and women into traditional gender roles. *See* Stanton v. Stanton, 421 U.S. 7, 15 (1975)

same outcome may result if families are unable to find affordable childcare or purchase the necessary labor-saving household technologies that many families rely on.[23] Similarly, while the state cannot tell women they should choose motherhood over career,[24] women's ability to structure their family and career goals may be impeded if they are unable to purchase key healthcare services.[25] In other words, market-based frictions can push women into the home just as easily as discriminatory state action.[26]

Yet while constitutional protections cannot ward against such market-based frictions, antitrust law, with its focus on promoting low prices and high output, can. Put simply, because women rely on certain consumer markets to support their labor force participation, protecting and promoting competition in these markets will not only result in greater consumer welfare (because more women are able to purchase the necessary products and services when they are competitively priced and abundant) but also greater gender equality in the labor market (because more women will be able to use these products and services to support their labor force participation).[27]

Given this, I argue that antitrust enforcers should adopt what I term an "Antitrust Approach to Sex Equality." An Antitrust Approach to Sex Equality acknowledges the link between certain consumer markets and women's labor force participation and accordingly prioritizes the competitive functioning of those markets. It calls not only for active antitrust enforcement in the markets key to women's labor force participation but also for full-throated competition advocacy on behalf of women consumers and workers—advocacy that targets legislators and the public alike. In doing so, an Antitrust Approach to Sex Equality not only seeks to safeguard the competitive functioning of these markets but also to promote a more optimal allocation of talent within the nation by reducing the gendered labor market frictions that push women out of the workforce. Put differently, an Antitrust Approach to Sex Equality allows enforcers to pursue efficiency and equality simultaneously.

("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas . . . .").

23 *See infra* Part II.B.

24 *Id.*

25 *Id.*

26 *See infra* Parts II.B–II.C, IV.

27 *See* discussion *infra* Part II.B (detailing how certain consumer products and services are complementary to women's labor force participation).

Importantly, by developing an Antitrust Approach to Sex Equality, this Article provides advocates for gender equality with another tool to add to their toolbox. While other areas of law, such as Title VII's prohibition of sex discrimination in the workplace, can advance gender equality more directly,[28] it is nonetheless imperative that society use every tool at its disposal to promote a more equal society. And although some feminist scholars have critiqued market-based approaches to gender equality as a cooptation of feminist ideas,[29] we should strive to ensure that the fruits of market competition flow to all citizens, male and female alike. An Antitrust Approach to Sex Equality therefore contributes to the fight for greater gender equality by identifying anticompetitive market frictions with gendered effects as particularly worthy targets of antitrust enforcement.

This Article is organized as follows. In Part I, I provide a stylized overview of the history of women's labor force participation in the United States, showing that while much progress has been made, more work remains to be done. In Part II, I show why antitrust law—and in particular, the consumer welfare paradigm—is a natural vehicle for promoting greater gender equality. Part II.A provides a brief overview of the long-running debate concerning the "legitimate" goals of antitrust law and the common assumption that pursuing equity goals requires sacrificing economic efficiency goals. Part II.B shows why there is no tradeoff between the pursuit of efficiency and equity when it comes to promoting women's labor force participation. Because women rely upon certain key consumer markets to overcome gendered barriers to the labor market, antitrust enforcers can focus on promoting consumer welfare in these markets while knowing they will also achieve positive—and equality-promoting—spillover effects in labor markets. Indeed, as Part II.C makes clear, by adopting an Antitrust Approach to Sex Equality, antitrust enforcers can make a real difference in our nation's march towards greater gender equality. Currently, many of the markets women rely upon to support their labor force participation are functioning poorly and overdue for procompetitive interventions.[30] By working to improve the competitive functioning of these markets, antitrust enforcers can reduce the market "frictions" that push women away from the labor market. Part III therefore outlines how enforcers can implement an Antitrust Approach to Sex Equality by engaging in both antitrust enforcement

---

28 42 U.S.C. § 2000e-2(a)(1). While Title VII protections directly advance gender equality by prohibiting discriminatory conduct, the antitrust laws can only be used to promote gender equality indirectly (i.e., by harnessing market competition in support of gender equality goals).

29 *See, e.g.*, Maria Stratigaki, *The Cooptation of Gender Concepts in EU Policies: The Case of "Reconciliation of Work and Family"*, 11 SOC. POL. 30, 31 (2004) (arguing that the shift in meanings of gender equality concepts in the context of economic policies represents a cooptation of feminist potential).

30 *See infra* Part II.C.

and competition advocacy. Finally, Part IV concludes by demonstrating the important but (until now) overlooked synergy between antitrust law and the goals of sex equality doctrine.

I. Gendered Barriers to Market Participation

For much of American history, women's ability to pursue market work was severely limited.[31] This was particularly true in the late nineteenth and early twentieth centuries, a time in which the "separate spheres tradition," or a "dyadic structuring of sex roles in which men are expected to perform as breadwinners and women are expected to perform as economically dependent caregivers," dominated American society and thought.[32] Perhaps the most infamous encapsulation of this belief system can be found in Justice Bradley's 1869 concurring opinion in *Bradwell v. Illinois*, the case in which the Supreme Court held that the state of Illinois could prohibit women from practicing law.[33] According to Justice Bradley, the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."[34]

Beginning in the 1970s, however, women's rights activists began a litigation campaign challenging laws that reflected a "separate spheres" mentality and seeking to establish

---

31 Part I provides a brief and stylized overview of women's labor force participation in the United States. As Alice Kessler-Harris has noted, "[t]he diversity of women's experience as wage workers" in American history has been considerable. ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES ix (1982). To recount it in detail is beyond the goals of this Article. Yet an enduring theme across race and class has been that of women's exclusion.

32 Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 779 (2010). It is important to note that the public spheres tradition is a particular class and racial construct. "Since the era of slavery, the dominant view of Black women has been that they should be workers, a view that contributed to their devaluation as mothers with caregiving needs at home." Nina Banks, *Black Women's Labor Market History Reveals Deep-Seated Race and Gender Discrimination,* ECON. POL'Y INST.: WORKING ECON. BLOG (Feb. 19, 2019), https://www.epi.org/blog/black-womens-labor-market-history-reveals-deep-seated-race-and-gender-discrimination/ [https://perma.cc/T9VR-B5TB]. Compared with other women in the United States, Black women have always participated in the labor market at much higher rates, primarily in low-wage agricultural or domestic service positions. *See* KESSLER-HARRIS, *supra* note 31, at viii.

33 Bradwell v. Illinois, 83 U.S. 130, 139 (1873).

34 *Id.* at 142.

a heightened level of constitutional scrutiny for sex-based classifications.[35] Over the course of several key cases,[36] the Supreme Court developed a constitutional jurisprudence that prohibited sex-based distinctions "supported by no more substantial justification than 'archaic and overbroad' generalizations" about men and women's proper roles in society.[37] This constitutional jurisprudence was paralleled by the development of a similar jurisprudence under Title VII, the key federal law prohibiting employment discrimination based on sex,[38] such that in 1989 the Court declared:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[39]

The dismantling of discriminatory laws based on sex-role stereotypes, along with concomitant changes in public attitudes,[40] led to a major weakening of the separate spheres tradition and a dramatic increase in women's labor force participation. Women's total labor force participation rose from 34% in 1950 to 60% in 2000,[41] and, as of 2023, the labor force participation rate for "prime-age" women was 77%, a new high-water mark.[42] Women

35 *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 119–32 (2010) (detailing how Ruth Bader Ginsburg's litigation campaign challenging the constitutionality of sex-based discrimination was animated by an anti-stereotyping theory of sex discrimination).

36 *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (holding unconstitutional a rule that servicemen but not servicewomen had the automatic right to claim their spouses as dependents); Weinberger v. Wiesenfeld, 420 U.S. 636, 636 (1975) (holding unconstitutional a federal law that provided widows, but not widowers, with social security benefits based on their spouse's past contributions); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (holding unconstitutional a rule automatically awarding survivors' benefits to women but not to men).

37 *Califano*, 430 U.S. at 206–07.

38 42 U.S.C. § 2000e-2 (a)(1) (prohibiting employer discrimination based on sex).

39 Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

40 *See* Kelsey D. Meagher & Xiaoling Shu, *Trends in U.S. Gender Attitudes, 1977 to 2018: Gender and Educational Disparities*, 5 SOCIUS 1, 2 (2019) (showing how attitudes about gender equality and women's role in society have transformed over four decades).

41 Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, 125 MONTHLY LAB. REV. 15, 15 (2002), https://www.bls.gov/opub/mlr/2002/05/art2full.pdf [https://perma.cc/MFS5-W6WM].

42 BETH ALMEIDA & ISABELA SALAS-BETSCH, CTR. FOR AM. PROGRESS, FACT SHEET: STATE OF WOMEN IN THE LABOR MARKET IN 2023 (2023), https://www.americanprogress.org/article/fact-sheet-the-state-of-women-in-

also made important strides in high-skilled professions. For instance, while women only accounted for 7.1% of physicians in 1970,[43] they now account for 37%.[44] Similarly, while women accounted for only 3% of lawyers between 1950 and 1970, that number rose to 38% in 2022.[45] And in both professions, there are more women in the pipeline than ever before: women accounted for 54% of medical students and 55% of law students in 2022.[46]

Yet despite the great strides society has made toward enabling women's participation in the labor market, the fight is far from over. The growth in women's overall labor force participation began slowing in the 1990s and early 2000s before beginning a decline that accelerated in the wake of the 2007–2009 recession—with women's participation hitting a pre-pandemic low of 56.7% in 2015.[47] Moreover, the American workforce is characterized by high levels of occupational segregation; positions that pay higher wages—such as physicians, lawyers, architects, and financial analysts—are disproportionately filled by white men, while lower-paid positions—such as fast food workers, childcare workers, and

---

the-labor-market-in-2023/ [https://perma.cc/6HLL-ENJH] [hereinafter *Fact Sheet*]; s*ee also* U.S. BUREAU OF LAB. STAT., WOMEN IN THE LABOR FORCE: A DATABOOK (2022), https://www.bls.gov/opub/reports/womens-databook/2021/home.htm [https://perma.cc/F9ZS-ZEHH] [hereinafter *Labor Databook*].

43 Phillip R. Kletke et al., *The Growing Proportion of Female Physicians: Implications for US Physician Supply*, 80 AM. J. PUB. HEALTH 300, 300 (1990).

44 Hailey Mensik, *Women Making Up More of Physician Workforce*, HEALTHCAREDIVE (Jan. 18, 2023), https://www.healthcaredive.com/news/AAMC-us-physician-workforce-women-specialties/640621/ [https://perma.cc/T5DL-TQHD]; Linda Searing, *The Big Number: Women Now Outnumber Men in Medical Schools*, WASH. POST (Dec. 23, 2019), https://www.washingtonpost.com/health/the-big-number-women-now-outnumber-men-in-medical-schools/2019/12/20/8b9eddea-2277-11ea-bed5-880264cc91a9_story.html [https://perma.cc/VWP4-5S22] (noting that women account for 60% of doctors under thirty-five); *see also* Patrick Boyle, *Nation's Physician Workforce Evolves: More Women, a Bit Older, and Toward Different Specialties*, AM. ASS'N OF MED. COLLS., (Feb. 2, 2021), https://www.aamc.org/news-insights/nation-s-physician-workforce-evolves-more-women-bit-older-and-toward-different-specialties [https://perma.cc/WC6D-WRAD].

45 Jaline S. Fenwick, *See Her, Hear Her: The Historical Evolution of Women in Law and Advocacy for the Path Ahead*, A.B.A., (Nov. 15, 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-november/see-her-hear-her-historical-evolution-women-in-law/?login [https://perma.cc/7H48-UUV3].

46 Press Release, Am. Ass'n of Med. Colls., Diversity Increases at Medical Schools in 2022 (Dec. 13, 2022), https://www.aamc.org/news-insights/press-releases/diversity-increases-medical-schools-2022 [https://perma.cc/6TEN-6MH5]; *Law School Rankings by Female Enrollment* (2022), ENJURIS, https://www.enjuris.com/students/law-school-women-enrollment-2022 [https://perma.cc/JM6B-VJQ8].

47 *Labor Databook*, *supra* note 42.

cashiers—are disproportionately filled by women, particularly women of color.[48] And even though the gender wage gap has narrowed over time, male workers continue to outearn female workers in every age group, and studies show that while women's earnings plateau midcareer, men's continue to climb.[49]

Even these encouraging statistics regarding women's representation in law and medicine require an important caveat: although increasing numbers of young women set high career goals for themselves, far fewer find themselves able to reach the highest rungs of their chosen field. For instance, although entering law firm associate classes have been comprised of approximately 45% women for several decades now,[50] women are still severely underrepresented as one moves up the law firm ladder.[51] Only about 22% of equity partners and 32% of non-equity partners were women in 2022, and they constituted only 12% of managing partners, 28% of governing committee members, and 27% of practice group leaders.[52] Moreover, only *2%* of law firms in 2022 said their highest-paid attorney is female.[53] Nor is this leaky pipeline unique to law. It exists across a wide range of fields and professions, including business, the sciences, and medicine.[54] Thus, while the doors of the

---

48 *See* MARINA ZHAVORONKOVA ET AL., CTR. FOR AM. PROGRESS, OCCUPATIONAL SEGREGATION IN AMERICA (2022), https://www.americanprogress.org/article/occupational-segregation-in-america/ [https://perma.cc/K8QJ-QWAM].

49 *See Fact Sheet*, *supra* note 42.

50 A.B.A., FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER 1947-2011 1–2, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf [https://perma.cc/9CG6-BMYH].

51 *See* ROBERTA D. LIEBENBERG & STEPHANIE A. SCHARF, WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE 17 (2019), https://www.americanbar.org/content/dam/aba/administrative/women/walkoutdoor_online_042320.pdf [https://perma.cc/VU2Q-RLCF].

52 A.B.A., ABA PROFILE OF THE LEGAL PROFESSION 2022 62 (2022), https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf [https://perma.cc/MMV3-S9AU].

53 *Id.*

54 *See generally* MARC GOULDEN ET AL., STAYING COMPETITIVE: PATCHING AMERICA'S LEAKY PIPELINE IN THE SCIENCES 1 (2009), https://cdn.americanprogress.org/wp-content/uploads/issues/2009/11/pdf/women_and_sciences.pdf [https://perma.cc/EPC4-T3VK]; Jacob Clark Blickenstaff, *Women and Science Careers: Leaky Pipeline or Gender Filter?*, 17 GENDER & EDUC. 369 (2005); Souha R. Ezzedeen et al., *The Glass Ceiling and Executive Careers: Still an Issue for Pre-Career Women*, 42 J. CAREER DEV. 355 (2015); S.M. van Anders, *Why the Academic Pipeline Leaks: Fewer Men than Women Perceive Barriers to Becoming Professors*, 51 SEX ROLES 512 (2004).

workplace have been thrown open to women, and while many have entered,[55] there is still considerable work to do.

II. Theorizing the Gender-Antitrust Link

When most people think about the various tools available for promoting gender equality, antitrust does not generally make the cut. In fact, many have argued that antitrust has absolutely nothing to say about social or political values and is instead solely focused on promoting economic efficiency.[56] Yet, this is a false dichotomy. Once one recognizes the link between certain consumer markets and women's ability to participate in the labor force, it becomes clear that antitrust enforcers[57] can pursue efficiency and equity simultaneously.

Part II.A first provides a brief overview of the long-running debate regarding the proper goals of antitrust law. Although many have argued that antitrust law cannot be used to promote social goals without sacrificing its focus on economic efficiency,[58] this is not true. Part II.B delineates a novel theoretical framework that connects the competitive functioning of key consumer markets to women's ability to participate in the labor market. Because women rely upon certain consumer markets to support their labor force participation,[59] the prioritization of consumer welfare in those markets creates positive—and equality-promoting—spillover effects in the labor market. Part II.C shows that many of the key markets women rely upon to support their labor market participation are in dire straits, thereby presenting an opportunity for antitrust enforcers to make a real difference in our nation's quest for greater gender equality.

A. Antitrust's (Contested) Goals

Our nation's antitrust laws make it illegal for individuals and businesses to act in ways that harm competition. At the federal level, the primary antitrust statutes are the Sherman

---

55 *See* Megan Brenan, *Record-High 56% of U.S. Women Prefer Working to Homemaking*, GALLUP (Oct. 24, 2019), https://news.gallup.com/poll/267737/record-high-women-prefer-working-homemaking.aspx [https://perma.cc/5K5B-J3BN].

56 *See* discussion *infra* Part II.A.

57 Although I approach this Article from an enforcement perspective, private plaintiffs can play an equally important role.

58 *See* discussion *infra* Part II.A.

59 *See* discussion *infra* Part II.B.

Act (1890), the Clayton Act (1914), and the Federal Trade Commission (FTC) Act (1914). The Sherman Act prohibits restraints of trade[60] and attempts to monopolize,[61] while Sections 2[62] and 3[63] of the Clayton Act prohibit price discrimination, tying, or exclusive dealing arrangements that substantially lessen competition or create a monopoly. Section 7 of the Clayton Act prohibits mergers or other combinations that could reasonably be expected to reduce competition or create a monopoly.[64] The FTC Act, in turn, prohibits unfair methods of competition[65] and also authorizes the Commission to conduct studies that allow enforcers to gain a deeper understanding of market trends and businesses' practices.[66] In addition, every state (and the District of Columbia) has some kind of antitrust law,[67] which generally allows state attorneys to file civil or criminal suits and permits private suits for damages and injunctions.[68] State attorneys general can also file federal antitrust suits because their states and their political subdivisions are "persons" for those purposes.[69]

Although it is widely accepted that the antitrust laws are meant to protect and encourage competition,[70] the intellectual history of antitrust law is characterized by a fierce debate over whether antitrust law can also be used to promote other important social goals. [71] On the one hand are those who adhere to the Chicago School of Law and Economics,

---

60 15 U.S.C. § 1.

61 *Id.* § 2.

62 *Id.* § 13.

63 *Id.* § 14.

64 *Id.* § 18.

65 15 U.S.C. § 45(a).

66 *Id.* § 45(b).

67 State statutes are reprinted in 6 TRADE REG. REP. (CCH) ¶¶ 30,201.03–35,585 (2016).

68 *See* A.B.A. SECTION OF ANTITRUST L., ANTITRUST LAW DEVELOPMENTS 812–13 (5th ed. 2002).

69 *See* Georgia v. Pa. R.R., 324 U.S. 439, 447 (1945) ("Georgia, suing for her own injuries, is a 'person' within the meaning of § 16 of the Clayton Act …"); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906) ("The city was a person [and] was [i]njured in its property … by being led to pay more than the worth of the pipe.").

70 Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2160 (2013).

71 *See, e.g.*, Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency*, *What Else Counts?*, 125 U. PA. L. REV. 1191, 1191 (1977) ("Whether antitrust policy promotes, or should promote, social goals other than efficiency and competitive markets . . . lies at the root of so much controversy in antitrust.").

which emphasizes microeconomics, efficiency, and the "consumer welfare standard."[72] This is the dominant paradigm in American antitrust law today,[73] ascending, at least in part, due to the intellectual works of Robert Bork, who argued that "the introduction of goals other than consumer welfare into antitrust is destructive of antitrust as law."[74] Thus, under a consumer welfare standard, antitrust policy is singularly focused on "encourag[ing] markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low."[75] The "distribution of . . . wealth or the accomplishment of noneconomic goals," in contrast, "are [viewed as] the proper subject of *other* laws and not within the competence of judges deciding antitrust cases."[76]

Others, however, have argued that the antitrust umbrella is large enough to encompass both economic and social/political goals. Robert Pitofsky, while acknowledging the important role of economics in antitrust, has argued that it is "bad history, bad policy, and bad law" to completely exclude certain political values from the interpretation of antitrust law.[77] Doing so might result, among other things, in an "economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs."[78] More recently, others have argued that making any one economic value the singular lodestar of antitrust is problematic and that antitrust should instead "be [about the] promotion and protection of a system that provides the society's best mixture of

---

72 *See* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 215 (1985).

73 *See* Herbert Hovenkamp, *Chicago and Its Alternatives*, 1986 DUKE L.J. 1014, 1020 (1986) (noting that "[n]o one, including myself, can escape [the Chicago School's] influence on antitrust analysis").

74 Robert H. Bork, *Antitrust and Monopoly: The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 253 (1967); *see also* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 91 (1978) ("The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.") [hereinafter BORK, PARADOX].

75 Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 101, 102 (2019). Although antitrust law also ostensibly cares about the promotion of higher quality products, it often relegates quality and nonprice considerations to a secondary position. *See generally* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST BULL. 83 (1993); E. Thomas Sullivan, *On Nonprice Competition: An Economic and Marketing Analysis*, 45 U. PITT. L. REV. 771 (1984); Peter J. Hammer & William M. Sage, *Antitrust, Health Care Quality, and the Courts*, 102 COLUM. L. REV. 545 (2002).

76 BORK, PARADOX *supra* note 74, at 427 (emphasis added).

77 Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

78 *Id.*

competition and cooperation, given its culture, history, technology, and political situation at a given period of time."[79] Still other scholars, particularly Eleanor Fox, have argued that fairness goals can be desirable in an antitrust framework and that, indeed, "some goals are more important than efficiency."[80]

Notably, those who argue that antitrust has nothing to say about political or social goals often assume that any attempt to integrate noneconomic considerations into antitrust law would lead to legal chaos. Judge Richard Posner, for instance, suggested that if courts were to rely on noneconomic considerations, "they would be completely at sea and might also shipwreck the economy," whereas a focus on economic efficiency enables judges to develop antitrust rules that are "reasonably objective."[81] Similarly, Judge Frank Easterbrook argued that "Goals based on something other than efficiency (or its close proxy consumers' welfare) really call on judges to redistribute income . . . [but] judges have no metric, and we ought not attribute to Congress a decision to grant judges a political power that lacks any semblance of 'legal' criteria."[82]

In other words, because a focus on consumer welfare and "objective economic criteria" is seen as fundamentally orthogonal to the pursuit of any social goals, it is assumed that accounting for social goals must necessarily require the alteration (or adulteration) of the consumer welfare standard. But this assumption only holds true if one accepts the premise that economic efficiency is not an inherently suitable vehicle for pursuing (at least some) social goals. And, as Section II.B. discusses, this is very much a faulty premise.

B. Complementary Consumer Markets and Women's Labor Force Participation

Antitrust law does not have to choose between promoting economic welfare and promoting gender equality.[83] In fact, an antitrust regime premised on maximizing consumer

79 ALBERT A. FOER, *The Goals of Antitrust: Thoughts on Consumer Welfare in the U.S.*, *in* HANDBOOK OF RESEARCH IN TRANS-ATLANTIC ANTITRUST 494, 495 (Phillip Marsden ed., 2007).

80 Eleanor M. Fox, *Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia*, 41 HARV. INT'L L.J. 579, 593 (2000).

81 Richard A. Posner, *Legal Formalism, Legal Realism, and Interpretations of Statutes and the Constitution*, 37 CASE W. RSRV. L. REV. 179, 211 (1987).

82 Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1704 (1986).

83 It should be noted that the European and Canadian antitrust communities began exploring the intersection of antitrust and gender several years ago. In 2018, the Organization for Economic Co-operation and Development

welfare is eminently suited to promoting greater gender equality in our nation,[84] particularly if we operationalize "gender equality" in terms of women's ability to participate in the labor market (i.e., the public sphere).[85] To see why this is so requires recognizing (1) the link between competition in consumer markets and competition in labor markets and (2) the important ways in which women in particular rely upon consumer markets to overcome the social and biological barriers to their labor force participation.

First, we must step back from a myopic focus on consumer markets, standing alone, and think more broadly about the linkages between competition in consumer markets and competition in labor markets.[86] That the fortunes of labor rise with those of product markets

---

(OECD) hosted a global forum examining the intersection of gender and competition and considered whether a gender lens might help deliver a more objective competition policy by identifying additional relevant features of the market, including gender differences in consumer and firm behavior. *See* Org. for Econ. Coop. & Dev. [OECD], *Gender and Competition Executive Summary* (Aug. 11, 2020), https://one.oecd.org/document/DAF/COMP/GF(2018)19/en/pdf [https://perma.cc/7KYN-ZTY8] (detailing key findings from the Global Forum in 2018). Two years later, with support from the Canadian government, the OECD launched the Gender Inclusive Competition Policy Project, which focuses on developing new evidence to guide a gender-conscious antitrust policy. *See* Org. for Econ. Coop. & Dev., *Gender Inclusive Competition Policy and the OECD Gender Toolkit* (Sept. 2, 2023), https://www.oecd.org/competition/gender-inclusive-competition-policy.htm [https://perma.cc/TQU6-8DLA].

84 In the past few years, the topic of labor market competition has gained increasing salience in antitrust circles. At the heart of this movement is the belief that many American workers are being harmed by the anticompetitive machinations of their employers and that vigorous antitrust enforcement in labor markets is imperative. Eric Posner, for instance, has argued that labor monopsony—a situation that occurs when a lack of competition in the labor market enables employers to suppress the wages of their workers—is a major driver of economic inequality. *See* ERIC POSNER, HOW ANTITRUST FAILED WORKERS 3, 13 (2019). Similarly, Ioana Marinescu and Herbert Hovenkamp have argued that the antitrust law against anticompetitive mergers affecting employment markets is underenforced, possibly by a significant amount, and that this has likely contributed to the decline in the labor share of gross domestic product (GDP), as well as the unlawful suppression of wages. *See* Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1032 (2019). But this new focus on labor markets has focused on how anticompetitive harms originating *within* labor markets harm workers. I focus on how anticompetitive conduct and market inefficiencies in *consumer* markets impact workers.

85 Although labor force participation is by no means the only relevant measure of gender equality, it is a natural measure to consider within the context of antitrust law and its focus on market competition.

86 In this Article, I focus on the ways in which anticompetitive behavior in consumer markets impacts the competitive functioning of labor markets. However, the relationship most certainly works in both directions. Consider, for instance, recent reporting finding that Catholic healthcare systems often impose clauses in their employment contracts that prohibit doctors from working at clinics providing abortion care. Under the right facts (e.g., the Catholic hospital has scooped most of the local providers), restrictive employment clauses can prevent local abortion clinics from securing sufficient numbers of staff. This leads to consumer harm if the

is not a novel idea.[87] As others have noted, the demand for labor is strongly linked to product market activity.[88] Anticompetitive behaviors by producers that result in less output can mean not only higher prices but also fewer jobs in those sectors.[89] Far less attention, however, has been paid to the ways in which anticompetitive behavior in product markets *complementary* to individuals' labor force participation harms workers.[90] A complementary product market produces products or services that help to lower the costs of participating in the labor market in one way or another. If certain consumer markets produce products and services that make it easier (or possible) for an individual to participate in the labor market, an increase in price or a decrease in output does not just mean that some consumers are not able to purchase the product; it also means that they can no longer use that product to support their labor force participation. Anticompetitive behavior in key product markets can therefore act as a labor market "friction" that impedes labor force participation.[91] And the workers impacted by such frictions will not be limited to those who happen to work for the producers of a particular product but will instead be found throughout the national economy, across industries.

---

clinics are therefore forced to reduce output or shut down. *See* Mara Gordon, *For Doctors Who Want to Provide Abortions, Employment Contracts Tie Their Hands*, NPR (Nov. 26, 2018), https://www.npr.org/sections/health-shots/2018/11/26/668347657/for-doctors-who-want-to-provide-abortions-employment-contracts-often-tie-their-h [https://perma.cc/27TH-M2AQ].

87 *See, e.g.*, Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. CHI. L. REV. 511, 521 (2023).

88 *See, e.g.*, *id.*

89 *See id.*

90 Estefania Santacreu-Vasut and Chris Pike have previously argued that procompetitive interventions in markets producing products and services that are complementary to women's labor force participation—specifically, financial markets, infrastructure markets, and markets supplying substitutes for services traditionally provided by women in the home—can help reduce gender inequality. *See* Estefania Santacreu-Vasut & Chris Pike, *Competition Policy and Gender*, LAW & ECON. 1, 2 (2019). While I agree that financial markets and infrastructure markets produce products and services that are complementary to labor force participation, it is not clear that anticompetitive behavior in such markets falls disproportionately upon women, at least in the present-day United States. Santacreu-Vasut and Pike point to sex-based legal restrictions concerning property rights or inheritance rules, restrictions that are now prohibited in the United States. *See id.* Moreover, Santacreu-Vasut and Pike make no mention of the markets providing reproductive healthcare services, markets that are undeniably complementary to women's labor force participation. *See id.*

91 Economists have recognized that certain market-based barriers (i.e., frictions) can impede efficient labor market functioning. *See generally* Stanislav Rabinovich & Ronald Wolthoff, *Misallocation Inefficiency in Partially Directed Search*, 206 J. ECON. THEORY 1 (2022) (finding that market frictions harm workers' abilities to find the right jobs). But as of yet there is little recognition that anticompetitive behavior in product markets can act as a labor market friction.

Next, we must recognize that there are gendered dimensions to this consumer-labor market linkage. Although the Supreme Court's sex equality decisions have had a powerful impact on society,[92] they only speak to state actions. Certain social and biological forces continue to push women towards the home and away from market work. First, gender-based stereotypes about women's proper role as mothers first and workers second, along with the uneven distribution of caregiving burdens, make it particularly challenging for working mothers to balance family and paid work.[93] Second, while the workplace doors have been thrown open to women, workplace institutions (and legislatures) have been slow to account for the different bodily experiences of men and women.[94] And while legislative protections and state-sponsored support are one important way in which society can ameliorate such gendered barriers,[95] market-based solutions also have an important role to play. Indeed, a deep and diverse literature has shown that one of the key ways in which women overcome gendered barriers to market work is to rely upon certain products and services that reduce the costs of participating in the labor market.[96] These products and services can be organized into two broad groupings: those that allow for the outsourcing of home production tasks that typically fall to women and those that supply products and services that allow for greater control over, and which either reduce or eliminate, the burdens of biological reproduction.[97] The following Sections draw upon economic, sociological, and feminist literatures to demonstrate the important role the markets for these products play in supporting women's labor force participation.

1. Markets Supporting Home Production

The first set of markets that disproportionately impact women's labor force participation are those that allow for the outsourcing of the home production tasks that have traditionally

92 *See* discussion *supra* Part I.

93 *See* Suk, *supra* note 6.

94 For instance, the United States continues to remain an outlier by failing to provide paid maternity leave to mothers. *See* MOLLY WESTON WILLIAMSON, CTR. FOR AM. PROGRESS, THE STATE OF PAID FAMILY AND MEDICAL LEAVE IN THE U.S. IN 2023 (2023), https://www.americanprogress.org/article/the-state-of-unpaid-family-and-medical-leave-in-the-u-s-in-2023/ [https://perma.cc/B7HN-LCZJ].

95 For example, I have previously advocated for parental leave for federal law clerks, noting that failing to provide such leave fosters gender inequality in the legal profession. *See* Bailey Sanders, *On the Basis of Childbirth: How the Federal Clerkship's Lack of Parental Leave Fosters Gender Inequality,* 30 UCLA J. GENDER & L. 1, 15 (2023).

96 *See* discussion *infra* Parts II.A–II.B.

97 *See* discussion *infra* Parts II.A–II.B.

been viewed as women's responsibilities: the care and raising of children, cooking and cleaning, and the care of the elderly, disabled, or sick.[98] Although feminists had hoped that women's mass entrance into the paid labor market over the second half of the twentieth century would be balanced by a similar entrance of men into the unpaid labor market of household production, this has not been the case. Women in the United States—and other developed countries—continue to bear the lion's share of caregiving and household work.[99] This has been referred to as the "stalled,"[100] "incomplete,"[101] "unfinished,"[102] and "uneven"[103] revolution in women's roles.[104] Because society continues to view the caregiving and household management tasks of the home sphere as primarily women's responsibilities,[105] many working women face what Arlie Hochschild termed the "second shift"—several hours of household and childcare duties following a day's work outside the home, hours that exceed those expended by their husbands.[106] This is true even among couples that profess egalitarian attitudes towards the division of household and caregiving

---

98 Research has consistently shown that women do the lion's share of unpaid labor in the home. *See, e.g.*, Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. MARRIAGE & FAM. 1208, 1209 (2000).

99 *See, e.g.*, Suzanne M. Bianchi et al., *Is Anyone Doing the Housework? Trends in the Gender Division of the Household Labor*, 79 SOC. FORCES 191, 206–07 (2000); Suzanne M. Bianchi et al., *Housework: Who Did, Does, or Will Do It, and How Much Does It Matter?*, 91 SOC. FORCES 55, 57 (2012); Mylène Lachance-Grzela & Geneviève Bouchard, *Why Do Women Do the Lion's Share of Housework? A Decade of Research*, 63 SEX ROLES 767, 768 (2010); Sara Moreno-Colom, *The Gendered Division of Housework Time: Analysis of Time Use by Type and Daily Frequency of Household Tasks*, 26 TIME & SOC'Y 4, 5 (2017).

100 ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME xv (1989).

101 GØSTA ESPING-ANDERSEN, THE INCOMPLETE REVOLUTION: ADAPTING TO WOMEN'S NEW ROLES 50 (2009).

102 KATHLEEN GERSON, THE UNFINISHED REVOLUTION: COMING OF AGE IN A NEW ERA OF GENDER, WORK, AND FAMILY 214 (2010).

103 Paula England, *The Gender Revolution: Uneven and Stalled*, 24 GENDER & SOC'Y 149, 149 (2010).

104 This is not necessarily true for women in same-sex relationships. *See* Gerrit Bauer, *Gender Roles, Comparative Advantages and the Life Course: The Division of Labor in Same-Sex and Different-Sex Couples*, 32 EUR. J. POPULATION 99, 107 (2016).

105 *See, e.g.*, Maria Godoy, *Out of the Binder, Into the Kitchen: Working Women and Cooking*, NPR (Oct. 18, 2012) https://www.npr.org/sections/thesalt/2012/10/17/163091281/out-of-the-binder-into-the-kitchen-working-women-andcooking [https://perma.cc/4XRP-3BE4].

106 HOCHSCHILD, *supra* note 100, at 3–4.

duties[107] and in couples where the wife is in a particularly time-consuming and intense profession like law or business.[108] And this gender gap only widens after couples establish a family, as the enormous labor costs involved in raising a child generally fall more heavily upon the woman's shoulders.[109]

Not surprisingly, maintaining a full-time job while also carrying the majority of the household and caregiving load makes it difficult for women to pursue both work and family. This uneven distribution of labor can lead women to decrease their working hours,[110]

---

107 As one female professional explained: "Most of my friends at work have very, I think, equal marriages and the husband takes his responsibility for the kids as seriously and doesn't think it's the woman's job. Yet in the end, it's always the woman who bears the burden." MARY BLAIR LOY, COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES 68 (2005). Another female professional noted: "It's up to me to find someone to replace the cleaning lady, to hire the babysitters when it's the nanny's night off. I make the doctor and dentist appointments. I fill out the school forms. I check for homework in the stuff they bring home . . . I do all the letter writing and present sending to my family and to [my husband's] family." *Id.* at 69.

108 Sylvia Hewlett, for instance, found that 55% of high-achieving women assume primary responsibility for meal preparation, while only 9% of their husbands/partners take primary responsibility for this task. SYLVIA ANN HEWLETT, CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN 106 (2002). Similarly, 56% of women reported taking primary responsibility for laundry, compared to only 10% of men. *Id.*

109 *See, e.g.*, Lucia Ciciolla & Suniya S. Luthar, *Invisible Household Labor and Ramifications for Adjustment: Mothers as Captains of Households*, 81 SEX ROLES 467, 469, 480 (2019) (finding that there were several "invisible" aspects of household management for which mothers felt disproportionately solely responsible); Shira Offer & Barbara Schneider, *Revisiting the Gender Gap in Time-Use Patterns: Multitasking and Well-Being Among Mothers and Fathers in Dual-Earner Families*, 76 AM. SOCIO. REV. 809, 821 (2011) (finding that mothers spend an average of ten more hours multitasking household tasks compared to fathers); Sanjiv Gupta, *The Effects of Transitions in Marital Status on Men's Performance of Housework*, 61 J. MARRIAGE & FAM. 700, 708–09 (1999) (finding that the birth of a first child substantially increased women's housework hours but had no effect on men's hours).

110 *See* Sébastien Fontenay et al., *Child Penalties Across Industries: Why Job Characteristics Matter*, 30 APPLIED ECON. LETTERS 488, 490 (2023) (finding mothers tend to reduce their work hours following motherhood).

downgrade their career aspirations,[111] engage in occupational sorting,[112] or withdraw from the workforce altogether in order to manage the work-family conflict.[113]

Previous literature has suggested three main mechanisms for improving the work-family conflict for women: (1) encouraging men's greater contribution to domestic labor in the home,[114] (2) updating workplace institutions to account for women's experiences and needs,[115] and (3) increasing the ability of families to outsource their domestic labor.[116] My focus here is on the third mechanism and the studies demonstrating a positive relationship between women's ability to outsource domestic and care work and their overall labor participation.[117]

---

111 *See* Brooke Conroy Bass, *Preparing for Parenthood? Gender, Aspiration, and the Reproduction of Labor Market Inequality*, 29 GENDER & SOC'Y 362, 363 (2015) (finding that women are more likely to alter or downshift their present-day career goals in anticipation of the changes and preferences that accompany new parenthood).

112 *See* Jennifer L. Hook & Beck Pettit, *Reproducing Occupational Inequality: Motherhood and Occupational Segregation*, 23 SOC. POL. 329, 331 (2016) (finding that motherhood is associated with occupational segregation among women).

113 For instance, a recent American Bar Association survey found that caretaking commitments were the number one reason why experienced female lawyers said they left their law firm. *See* LIEBENBERG & SCHARF, *supra* note 51, at 58.

114 *See* Peter McDonald, *Gender Equity in Theories of Fertility Transition*, 26 POPULATION & DEV. REV. 427, 436–37 (2000); Berna Miller Torr & Susan E. Short, *Second Births and the Second Shift: A Research Note on Gender Equity and Fertility*, 30 POPULATION & DEV. REV. 109, 123 (2004); Lynn Prince Cooke, *Gender Equity and Fertility in Italy and Spain,* 38 J. SOC. POL'Y 123, 136–37 (2008).

115 *See* Karin L. Brewster & Ronald R. Rindfuss, *Fertility and Women's Employment in Industrialized Nations*, 27 ANN. REV. SOCIO. 271, 291 (2000); Henriette Engelhardt & Alexia Prskawetz, *On the Changing Correlation Between Fertility and Female Employment Over Space and Time*, 20 EUR. J. POPULATION 35, 42 (2004).

116 *See* Tanja Van der Lippe et al., *Outsourcing of Domestic Tasks and Time-Saving Effects*, 25 J. FAM. ISSUES 216, 217 (2004); Esther de Ruijter et al., *Outsourcing the Gender Factory: Living Arrangements and Service Expenditures on Female and Male Tasks*, 84 SOC. FORCES 305, 306 (2005); Liat Raz-Yurovich, *A Transaction Cost Approach to Outsourcing by Households*, 40 POPULATION & DEV. REV. 293, 294 (2014); Liat Raz-Yurovich & Ive Marx, *Outsourcing Housework and Highly Skilled Women's Labour Force Participation—An Analysis of a Policy Intervention*, 35 EUR. SOCIO. REV. 205, 206 (2019).

117 Because I am focused on the ways in which antitrust law can promote equality, only mechanism three is relevant for the purposes of this Article. However, the other two mechanisms should, of course, be pursued. For instance, I have argued that the federal clerkship's lack of parental leave enables pregnancy discrimination, restricts women's reproductive choice, and perpetuates gender inequality within the legal profession writ large. *See* Sanders, *supra* note 95.

These studies suggest that a woman's decision and ability to enter into and/or remain in the workforce are often determined by the relative value of market participation versus non-market (home) participation. "The availability and affordability of market substitutes for the services that women produce in the household" can therefore function as a "key incentive" for women's labor market participation because it makes market participation more valuable and worthwhile.[118] For example, studies show that the increasing availability and affordability of household appliances that reduce the costs of household chores—such as refrigerators, vacuum cleaners, washers, dryers, dishwashers, and microwaves—is positively associated with women's labor force participation.[119] Similarly, studies show that access to affordable caregiving and cleaning services is also positively associated with women's labor force participation.[120] Patricia Cortés and Jessica Pan find that the increased supply of affordable and flexible substitutes for household production[121] enables women to close the gender pay gap in occupations that reward overwork, such as business and law,[122] while Liat Raz-Yurovich and Ive Marx find that the introduction of state-subsidized household outsourcing options in Belgium increased women's employment rates, particularly among highly educated women.[123] Similarly, research shows that affordable

---

118 Santacreu-Vasut & Pike, *supra* note 90, at 2.

119 *See* Tiago V. de V. Cavalcanti & José Tavares, *Assessing the "Engines of Liberation": Home Appliances and Female Labor Force Participation*, 90 REV. ECON. & STAT. 81, 83 (2008) (finding that a decrease in the price of home appliances led to a significant increase in women's labor force participation); Jeremy Greenwood et al., *Engines of Liberation,* 72 REV. ECON. STUD. 109, 110 (2005) (finding that technological progress in the household sector played a major role in liberating women from the home); Taryn Dinkelman, *The Effects of Rural Electrification on Employment: New Evidence from South Africa*, 7 AM. ECON. REV. 3078, 3080 (2011) (finding that access to electricity services in South Africa had a disproportionate and positive impact on women's labor force participation).

120 Feminist scholars like Dorothy Roberts and Evelyn Nakano Glenn have rightly pointed out that it is problematic that when women outsource their home labor, most often it is another woman (and often a woman of color) who steps in to fill the gap. *See* Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 SIGNS 1, 3 (1992); Dorothy Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 59–62 (1997). This problem, however, is not inherent to the outsourcing of domestic work but instead a function of society's devaluation, gendering, and racialization of care work.

121 Proxied by intercity variation in predicted low-skilled immigration.

122 *See* Patricia Cortés & Jessica Pan, *When Time Binds: Substitutes for Household Production, Returns to Working Long Hours, and the Skilled Gender Wage Gap*, 37 J. LAB. ECON. 351, 385 (2019).

123 *See* Raz-Yurovich & Marx, *supra* note 116, at 205.

daycare options positively impact mothers' labor force participation rates,[124] while Stefania Albanesi and Claudia Olivetti show that the development of safe and effective infant formula, allowing women to outsource at least some amount of infant feeding, played a significant role in the increase in married women's labor force participation in the United States during the twentieth century.[125]

2. Markets Supporting Reproductive Health and Control

The second set of markets that disproportionately impact women's labor force participation are those that supply products or services that allow women greater control over, and which either reduce or eliminate the burdens of, biological reproduction.[126] This group of markets includes, but is not limited to, the markets producing menstruation-related products, contraception, abortion care, fertility care, and prenatal, delivery, and postpartum healthcare services.[127] I focus on two key ways in which these products and services can enhance women's ability to participate in the paid labor market. First, all of these products and services contribute to better health outcomes for women, making it more likely that

---

124 *See* Taryn M. Morrissey, *Child Care and Parent Labor Force Participation: A Review of the Research Literature*, 15 REV. ECON. HOUSEHOLD 1, 19 (2017). Researchers have also shown that drops in women's employment are tightly synchronized with the start and duration of school summer breaks; the steepest drops are among moms with young school-age children, who require substantial supervision. *See* BRENDAN M. PRICE & MELANIE WASSERMAN, STANFORD INST. FOR ECON. POL'Y RSCH., SCHOOL'S OUT: SUMMER BREAKS TIED TO WOMEN LEAVING WORK 1–2 (2023).

125 *See* Stefania Albanesi & Claudia Olivetti, *Gender Roles and Medical Progress*, Working Paper 14873, 1 (April 2009) (on file with author). Albanesi and Olivetti show that in the early 1990s, women spent more than 60% of their prime childbearing years either pregnant or nursing. *Id.* at 2. Advancements in medical knowledge, along with the introduction of infant formula, however, decreased the adverse health effects of pregnancy and reduced the time costs of raising children, thereby leading to an increase in the labor supply of young married women with children. *Id.* at 4.

126 While I included infant formula in Part II.B.1 discussing substitute products, it could easily fall within this category of markets as well. Breastfeeding is both a time-intensive and labor-intensive process and, for many women, very uncomfortable. Infant formula allows women the ability to sidestep the breastfeeding process altogether should they desire to do so.

127 It should go without saying that all of these markets are important for reasons other than their relationship with women's labor force participation. The ability to decide if, when, and how to have a child is fundamental to a free and equal society. Similarly, the ability to use feminine hygiene products is essential to a person's ability to "participate in daily life with dignity." Julie Kosin, *Getting Your Period Is Still Oppressive in the United States*, HARPER'S BAZAAR (Oct. 9, 2017), https://www.harpersbazaar.com/culture/features/a10235656/menstrual-period-united-states/ [https://perma.cc/64GT-VVWU].

women are physically able to participate in the labor market.[128] Second, contraception and abortion care also provide women with the ability to decide if and when they wish to become pregnant and give birth, an ability that can prove essential to pursuing educational and career goals.[129] And sometimes these two mechanisms work in tandem.[130]

Let us consider the health mechanism first, starting with two basic points. First, good health increases one's ability to participate in the labor market; ill health does the opposite. Therefore, the ability to access affordable and quality medical care, when needed, can be a key determinant of an individual's ability to participate in the paid labor market. Second, it is women who conceive, carry, and give birth to the next generation. As such, compared to men, women require more health products and services during their reproductive years and routinely face health challenges that men do not.[131]

Although the list of reproductive-related health challenges women may face is quite long,[132] the most salient are those associated with pregnancy and childbirth. Pregnancy and childbirth are arduous physical processes, recovery from which requires significant rehabilitation even in the best of circumstances.[133] And when complications arise, women can experience severe maternal morbidity: unexpected outcomes of labor and delivery that

---

128 *See, e.g.*, Albanesi & Olivetti, *supra* note 125, at 1 (finding that advances in maternal medicine and therefore women's health outcomes allowed for greater female labor force participation).

129 *See generally* Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decision*, 4 J. POL. ECON. 730 (2002).

130 A woman may seek an abortion, for instance, both because continuing a pregnancy poses significant health risks and because she does not wish to have a child (or an additional child). Similarly, a woman may use birth control not only to avoid an untimely pregnancy, but to preserve her health.

131 *See* Gary M. Owens, *Gender Differences in Health Care Expenditures, Resource Utilization, and Quality of Care*, 14 SUPPLEMENT J. MANAGED CARE PHARMACY S2, S2 (2008); Klea D. Bertakis et al., *Gender Differences in the Utilization of Health Care Services*, 49 J. FAM. PRAC. 147, 149 (2000) (finding women had a significantly higher mean number of visits to their primary care provider); Cameron A. Mustard et al., *Sex Differences in the Use of Health Care Services*, 338 N. ENG. J. MED. 1678, 1680 (1998) (finding 22% of health care expenditures for women in the study were associated with conditions specific to sex, including pregnancy and childbirth, as compared with 3% of expenditures for men).

132 *See, e.g.*, NAT'L INST. OF ENV'T HEALTH SCIS., REPRODUCTIVE HEALTH IN FEMALES AND MALES (2020) https://www.niehs.nih.gov/sites/default/files/health/materials/reproductive_health_in_females_and_males_508.pdf [https://perma.cc/TY7J-UXDZ] (providing a non-exhaustive list of common reproductive health challenges).

133 *See, e.g.*, Mattea Romano et al., *Postpartum Period: Three Distinct But Continuous Phases*, J. PRENATAL MED. 22, 22–24 (2010) (detailing the ways in which childbirth can lead to a whole host of conditions, the severity and duration of which vary across individuals).

result in significant short- or long-term consequences to a woman's health or even death.[134] This, in turn, affects women's ability to participate in the labor force. Studies show, for instance, that women with maternal morbidity have a greater risk for presenteeism (reduced productivity and accuracy at work), absenteeism (regularly missing work), and unemployment.[135] Importantly, studies *also* show that most pregnancy and childbirth complications can be prevented or successfully treated with proper medical care.[136] Indeed, the CDC reports that more than *80%* of pregnancy-related deaths between 2017 and 2019 could have been prevented.[137]

Reproductive products and services, however, are important not only because they allow women to achieve better health outcomes than they would without them, but also because they can provide women with a significant degree of control over the reproductive process. In a world without birth control and abortion care, women face a limited set of tools for preventing pregnancy and childbirth.[138] This poses challenges to labor market participation, with the most obvious obstacle being the fact that every pregnancy requires

---

134 That is, pregnancy may not be an illness, but that does not mean it cannot be harmful to a woman's health. *See* EUGENE DECLERCQ & LAURIE ZEPHYRIN, COMMONWEALTH FUND, SEVERE MATERNAL MORBIDITY IN THE UNITED STATES: A PRIMER (2021), https://www.commonwealthfund.org/publications/issue-briefs/2021/oct/severe-maternal-morbidity-united-states-primer [https://perma.cc/J3UP-A5WK]. Indeed, as one doctor put it, "[b]eing pregnant is always more dangerous than not being pregnant." Kathleen McLaughlin, *No OB-GYNs Left in Town: What Came After Idaho's Assault on Abortion*, GUARDIAN (Aug. 22, 2023), https://www.theguardian.com/us-news/2023/aug/22/abortion-idaho-women-rights-healthcare [https://perma.cc/6HBH-E6QV].

135 *See* SO O'NEIL ET AL., COMMONWEALTH FUND, THE HIGH COSTS OF MATERNAL MORBIDITY SHOW WHY WE NEED GREATER INVESTMENT IN MATERNAL HEALTH (2021), https://www.commonwealthfund.org/publications/issue-briefs/2021/nov/high-costs-maternal-morbidity-need-investment-maternal-health [https://perma.cc/VT4U-REJB] (considering nine maternal morbidity conditions: amniotic fluid embolism, cardiac arrest, gestational diabetes mellitus, hemorrhage, hypertensive disorders, maternal mental health conditions, renal disease, sepsis, and venous thromboembolism).

136 *See* Press Release, CDC Newsroom, Four in 5 Pregnancy-Related Deaths in the U.S. Are Preventable (Sept. 19, 2022), https://www.cdc.gov/media/releases/2022/p0919-pregnancy-related-deaths.html_[https://perma.cc/58YR-PY5H] [hereinafter CDC Newsroom] (noting that data from 2017 to 2019 showed that 80% of pregnancy-related deaths were preventable); Elizabeth A. Howell, *Reducing Disparities in Severe Maternal Morbidity and Mortality*, 61 CLINICAL OBSTETRIC GYNECOLOGY 387, 388 (2018) (noting that nearly half of severe maternal morbidity events and maternal deaths are preventable).

137 *See* CDC Newsroom, *supra* note 136.

138 Oral contraception is much more effective than a diaphragm or condom. *See* Goldin & Katz, *supra* note 129, at 731.

a temporary exit from the labor market in order to recover from childbirth.[139] It also makes investing in formal education (college and postgraduate studies) and other long-term career investments more costly.[140] For example, in a world where women have no access to contraception, one can imagine that pursuing college, then law school, and then the partnership track at a law firm would require either remaining abstinent until one's late twenties or early thirties or accepting that one might become pregnant—at any time, and potentially multiple times—along the way.[141] With each pregnancy would come a necessary pause on one's studies or work following childbirth,[142] and each additional child would impose caregiving burdens that would then make resuming those studies or work more difficult.[143] In such a world, then, the costs of investing in a long-term professional career are high, necessarily depressing women's labor force participation. For some number of women, the costs would simply be too high—they will choose not to invest from the start. Others may attempt to pursue long-term careers but find themselves pushed off course along the way due to unintended pregnancies and the rising health and caregiving burdens. Others would continue to return to the labor market after each birth but will likely face decreased wages and a flatter promotion curve (relative to what they would experience if they could control reproduction).[144]

---

139 Due to a lack of maternity leave (paid and unpaid), however, many American women are forced to return to work much sooner than they would like. A 2012 survey conducted for the Department of Labor found that 12% of women who took time off of work following the birth of a new child took only a week or less. *See* Sarah Kliff, *1 in 4 American Moms Return to Work Within 2 Weeks of Giving Birth – Here's What It's Like*, VOX (Aug. 22, 2015), https://www.vox.com/2015/8/21/9188343/maternity-leave-united-states [https://perma.cc/SJ8F-DA5H]. Another 11% took between one and two weeks off, meaning that nearly one in four of the women interviewed were back to work after two weeks of having a child. *Id.*

140 *See* Goldin & Katz, *supra* note 129, at 731 (arguing that access to birth control lowered the costs of long-durational professional education for women).

141 Stefania Albanesi and Claudia Olivetti calculated that the average woman born around 1900 spent 36% of her life between the ages of twenty-three and thirty-three pregnant. *See* Albanesi & Olivetti, *supra* note 125, at 2.

142 *See* Kenneth R. Troske & Alexandru Voicu, *The Effect of the Timing and Spacing of Births on the Level of Labor Market Involvement of Married Women*, 45 EMPIR. ECON. 483, 515 (2013) (finding that births reduce both participation and the level of labor market involvement of women).

143 *See id.*

144 *See generally* Elizabeth Ty Wilde et al., *The Mommy Track Divides: The Impact of Childbearing on Wages of Women on Differing Skill Levels* (Nat'l Bureau of Econ. Rsch., Working Paper No. 16582, 2010), http://www.nber.org/papers/w16582 [https://perma.cc/K42S-3TQ7].

Thankfully, we do not live in a world where contraception and abortion care were never invented.[145] Women are no longer (or should not be) at the whims of nature when it comes to deciding how many children to have and at what time.[146] Indeed, the development of the birth control pill in the 1960s was a game changer for women.[147] Its efficacy rate exceeded all other methods available at the time by a huge margin, and it placed fertility control in the hands of women and women alone, allowing them to time conception to suit their life goals.[148] And as studies have shown, this newfound control positively impacted women's ability to participate in paid work and to achieve higher earnings. Claudia Goldin and Lawrence F. Katz, for instance, by analyzing the variation across states in the legal availability of oral contraceptives in the 1960s and the 1970s, found that access to contraception was a major factor behind the growing number of women obtaining a college education and pursuing advanced professional degrees.[149] Similarly, Martha Bailey showed that changes in contraceptive access during this time period significantly contributed to increases in young women's labor force participation and pursuit of professional

---

145 We do, however, live in a world where others would seek to deny women the ability to use these technological advancements. I address this reality shortly.

146 Here I refer to the ability to choose not to have a child or additional children, as infertility certainly can and does impede many women's family-building goals.

147 In the first year following the approval of the first birth control pill, over 400,000 women saw their doctors about getting a prescription—despite the fact that the pill, when it first debuted, cost about $10 or $11 a month ($80 or more today). As *Time* magazine put it in 1966, "[n]o previous medical phenomenon has ever quite matched the headlong U.S. rush to use the oral contraceptives now universally known as "the pills." Megan Gibson, *One Factor That Kept the Women of 1960 Away from Birth Control Pills: Cost*, TIME (June 23, 2015), https://time.com/3929971/enovid-the-pill/ [https://perma.cc/BQC7-B6UD].

148 *See* Goldin & Katz, *supra* note 129, at 766–67. Today more women than ever seek to delay pregnancy while pursuing their educational and career goals. Over the last several decades, the average age at first birth among American women has increased substantially. In 1972, the year in which the Supreme Court ruled that single women have a constitutional right to use contraception, the average age of first birth among American women was twenty-one. Today, it is thirty. *See* Mike Schneider, *Motherhood Deferred: U.S. Median Age for Giving Birth Hits 30*, U.S. NEWS & WORLD REP. (May 6, 2022), https://www.usnews.com/news/us/articles/2022-05-06/motherhood-deferred-us-median-age-for-giving-birth-hits-30 [https://perma.cc/RKD8-RSSS]. Moreover, the increase has been particularly significant for women pursuing postgraduate degrees. A recent Pew study found that more than half (54%) of mothers near the end of their childbearing years with at least a master's degree had their first child in their thirties, and 20% of those women did not become mothers until they were at least thirty-five. GRETCHEN LIVINGSTON, PEW RSCH. CTR., FOR MOST HIGHLY EDUCATED WOMEN, MOTHERHOOD DOESN'T START UNTIL THE 30S (2015), https://www.pewresearch.org/fact-tank/2015/01/15/for-most-highly-educated-women-motherhood-doesnt-start-until-the-30s/ [https://perma.cc/LS63-4H48].

149 *See* Goldin & Katz, *supra* note 129, at 748–49.

occupations,[150] and Heinrich Hock found that unrestricted access to contraception during this period allowed almost 400,000 more women to obtain a B.A. by the age of thirty.[151] More recent studies have found that requiring insurance companies to cover contraception increases transitions of women into employment by 34%, with large effects for African American and Asian women.[152]

Abortion access also has been shown to have a positive relationship with women's labor force participation (and empowerment). Several studies have found that legalized abortion access prior to *Roe v. Wade*[153] increased the labor force participation rates of women, particularly single Black women.[154] More recent scholarship has found that public funding for medically necessary abortions increases the occupational mobility of women working full time,[155] while reduced access to abortion care due to gestational limits reduces the likelihood that a woman would be working for pay full time six months later.[156] And another study found that, had women been free to access abortion care in 2019 without restriction, an additional 597,000 women would have been in the workforce between 2020 and 2022.[157]

To summarize, consumer markets can impact an individual's ability to participate in the workforce because certain consumer products and services are complementary to

---

150 *See* Martha Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply*, 121 Q.J. ECONOMICS 289, 317 (2006).

151 Heinrich Hock, *The Pill and College Attainment of American Women and Men* 26 (Dep't of Econ., Fla. State Univ., Working Paper, 2005), https://paa2006.populationassociation.org/papers/61745 [https://perma.cc/FK7W-AA9Q].

152 Kate Bahn et al., *Do US TRAP Laws Trap Women into Bad Jobs?*, 1 FEMINIST ECON. 44, 92 (2020).

153 410 U.S. 113 (1973).

154 *See* Joshua D. Angrist & William N. Evans, *Schooling and Labor Market Consequences of the 1970 State Abortion Reforms* (Nat'l Bureau of Econ. Rsch., Working Paper No. 5406, 1996), https://www.nber.org/system/files/working_papers/w5406/w5406.pdf [https://perma.cc/LCY9-YWBV]; David E. Kalist, *Abortion and Female Labor Force Participation: Evidence Prior to* Roe v. Wade, 25 J. LAB. RSCH. 503, 512 (2004).

155 *See* Bahn et al., *supra* note 152, at 63.

156 *See* Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive Abortions and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407, 409 (2018).

157 *See* CHRISTINE CLARK ET AL., INST. FOR WOMEN'S POL'Y RSCH., UPDATED ANALYSIS OF THE COST OF ABORTION RESTRICTIONS TO STATES (2024), https://iwpr.org/wp-content/uploads/2024/01/Updated-Analysis-of-the-Cost-of-Abortion-Restrictions-to-States-1.pdf [https://perma.cc/75UE-KDND].

individuals' labor force participation (i.e., they help lower the costs of participating in the labor market in one way or another). But while both men and women rely upon certain markets to support their labor force participation, evidence shows that the ability to do so is particularly important for women. Women face certain gendered barriers to labor force participation that men do not, barriers that can be ameliorated (although perhaps not entirely eliminated) through the purchase of market-based solutions. This suggests that promoting competition in these markets (i.e., promoting consumer welfare) will lead to positive—and equality-promoting—spillover effects in the labor market. In other words, the promotion of efficiency and equality can go hand in hand.

C. The Status Quo: Multiple Market Impediments

Given the important role the above markets play in supporting women's labor force participation, one would hope that they are thriving. But in reality, many of these markets are in poor health. Some are characterized by low output and high prices,[158] while others have experienced severe supply chain disruptions due, in part, to their highly concentrated nature.[159] Still other markets have been negatively impacted by mergers and acquisitions, not to mention restrictive laws aimed at eliminating them completely.[160] The following Sections, Parts II.C.1–II.C.4, highlight some of the most pressing market problems to show that there may be opportunities for procompetitive interventions: clearly, consumer welfare is not being maximized in these markets. The specific role that antitrust might play, as well as its limitations, is discussed in Part IV.

1. Childcare Market

The American childcare market is characterized by low output and high prices. More than half of American children are living in what are called "childcare deserts," or areas where there are too few licensed slots for the number of children who need care,[161] while the average annual cost of childcare—for those families who could find it—was $10,174

158 *See infra* Parts II.C.1, C.3.

159 *See infra* Part II.C.2.

160 *See infra* Parts II.C.3–C.4.

161 *Child Care Deserts*, CTR. FOR AM. PROGRESS, https://www.americanprogress.org/series/child-care-deserts/ [https://perma.cc/M86Z-XCMZ].

in 2020.[162] That is more than 10% of the median income for the average married couple and more than a third of the median income of a single parent.[163] Combined with other household expenses, such a price tag can be—or in hard times, can become—out of reach for many families.

2. Infant Formula Market

The infant formula market is highly concentrated; three major manufacturers control over 90% of the market, and formula is produced at just nine factories.[164] When one manufacturer is taken offline for any significant amount of time, shortages can result.[165] This was the case in the summer of 2022, when Abbot Industries was forced to shut down production at a single plant.[166] The country witnessed a nationwide shortage, and parents, particularly those in rural and low-income parts of the country, were faced with empty shelves.[167] In response, the U.S. Food and Drug Administration (FDA) introduced new guidance to make it easier to import formula from other countries and help domestic manufacturers enter the market,[168] while Congress passed an emergency spending bill

---

162 Nicolas Vega, *Child Care Now Costs More than $10,000 Per Year on Average—Here's Why That's a Problem,* CNBC (Feb. 21, 2022), https://www.cnbc.com/2022/02/21/average-cost-of-child-care-is-now-more-than-10000-dollars-per-year.html [https://perma.cc/SFG3-27JD].

163 *See id.*

164 *See* Mariel Padilla, *The 19th Explains: Why Baby Formula Is Still Hard to Find Months After the Shortage*, 19TH (Dec. 1, 2022), https://19thnews.org/2022/12/19th-explains-infant-formula-shortage/ [https://perma.cc/9SZT-WU7E].

165 *See* Jen Christensen, *'We Never Want to Have This Happen Again,' FDA Official Testifies About Formula Shortage*, CNN (May 11, 2023), https://www.cnn.com/2023/05/11/health/formula-hearing-hill/index.html [https://perma.cc/75V7-8YG9]; Diedre McPhillips, *A Year Later, Formula Stock Has Recovered From the Shortage, But Parents Haven't*, CNN (Feb. 17, 2023), https://www.cnn.com/2023/02/17/health/formula-shortage-one-year-later/index.html [https://perma.cc/BFT5-DBPS].

166 *See* AROHI PATHAK ET AL., CTR. FOR AM. PROGRESS, THE NATIONAL FORMULA SHORTAGE AND THE INEQUITABLE U.S. FOOD SYSTEM (2022), https://www.americanprogress.org/article/the-national-baby-formula-shortage-and-the-inequitable-u-s-food-system [https://perma.cc/VF8Q-HWFZ].

167 *See* Clarice Bajkowski, *In Rural, Low-Income Parts of the Country, How Do You Find Baby Formula When There Is Nowhere to Look?*, 19TH (May 19, 2022), https://19thnews.org/2022/05/baby-formula-shortage-low-income-rural-families-limited-access/ [https://perma.cc/8BDN-YTRX].

168 On May 16, 2022, the FDA issued guidance describing the agency's intention to temporarily exercise enforcement discretion on a case-by-case basis for certain requirements that apply to infant formula. *See* HASSAN Z. SHEIKH ET AL., CONG. RSCH. SERV., IF12123, INFANT FORMULA SHORTAGE: FDA REGULATION AND FEDERAL RESPONSE (2022), https://crsreports.congress.gov/product/pdf/IF/IF12123 [https://perma.cc/PKY3-YGW4].

to provide the FDA with more resources.[169] President Biden also invoked the Defense Production Act to expedite supplies.[170] But parents still struggled to find a sufficient supply of formula for their children.[171] Moreover, problems persist: a recent recall of hundreds of thousands of Nutramigen Hypoallergenic Infant Formula Powder, a specialty powder for infants with allergies to cow's milk, has raised concerns that another shortage might result.[172]

3. Maternity Care Market

Pregnant and postpartum women in America face a failing maternal care market. Giving birth in the United States is extremely expensive,[173] even for individuals with health insurance. One study, for instance, found that pregnant women of reproductive age (ages fifteen to twenty-nine) enrolled in large group health plans incur an average of $18,865 more in health care costs than women who do not give birth.[174] Another recent study found that the mean total of out-of-pocket spending for all modes of delivery, vaginal and cesarean, increased from $3,069 in 2008 to $4,569 in 2015.[175] But it is not just high prices facing pregnant and postpartum women. They also face an output problem. Over the past two decades, an increasing number of maternity wards have closed across the

---

169 *See* H.R. 7790, 117th Cong. (2022) (enacted); TuAnh Dam, *House Passes $28M Emergency Spending Bill to Address Baby Formula Shortage*, AXIOS (May 18, 2022), https://www.axios.com/2022/05/19/house-baby-formula-shortage-emergency-spending-bill [https://perma.cc/W9P6-HLGD].

170 *See* Padilla, *supra* note 164.

171 *See id.*

172 *See* Chabeli Carrazan & Sara Luterman, *Latest Baby Formula Recall Draws Concerns from Congress and Caregivers*, 19TH (Jan. 9, 2024), https://19thnews.org/2024/01/nutramigen-baby-formula-recall-congress-caregivers/ [https://perma.cc/3KGS-PMQW].

173 *See* MATTHEW RAE ET AL., HEALTH SYS. TRACKER, HEALTH COSTS ASSOCIATED WITH PREGNANCY, CHILDBIRTH, AND POSTPARTUM CARE (2022), https://www.healthsystemtracker.org/brief/health-costs-associated-with-pregnancy-childbirth-and-postpartum-care/ [https://perma.cc/F56F-6K3H].

174 *Id.* This included additional health spending associated with pregnancy, delivery, and postpartum care paid by insurance (an average of $16,011) and by the woman ($2,854). *Id.*

175 Michelle H. Moniz et al., *Out-Of-Pocket Spending for Maternity Care Among Women with Employer-Based Insurance*, *2008-15*, HEALTH AFFS. 18, 20 (2020). Breaking it down by method of delivery, researchers found that the mean total out-of-pocket spending for vaginal birth increased from $2,910 to $4,314, while for cesarean birth it increased from $3,364 to $5,161. *Id.*

United States.[176] Indeed, over *400* labor and delivery units closed between 2006 and 2020, with some states—such as Pennsylvania and North Dakota—witnessing particularly high closure rates.[177] As of 2022, 36% of counties nationwide, largely in the Midwest and South, had no obstetric hospitals or birth centers and no obstetric providers.[178] Moreover, this problem is particularly acute in rural areas and among communities of color. Researchers have found, for instance, that while nearly 18 million reproductive-age women lived in rural counties in the United States in 2010, the percentage of rural counties with hospital-based obstetric services declined from 55% to 46% between 2004 and 2014, with less-populated rural communities experiencing more rapid declines.[179] In addition, the hospitals that are most deeply impacted by maternity ward closures tend to be hospitals serving Black and Latino populations.[180]

4. Contraception and Abortion Care Markets

The markets for contraception and abortion care face multiple challenges. Following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,[181] both markets have been the target of increased efforts by conservative politicians and activists to

---

176 *See Maternity Care Deserts Grow Across the US as Obstetric Units Shut Down* (PBS News television broadcast Sept. 4, 2022), https://www.pbs.org/newshour/show/maternity-care-deserts-grow-across-the-us-as-obstetric-units-shut-down [perma.cc/CQ9U-JHVY] [hereinafter *Maternity Deserts*].

177 *See id.*

178 Nicole Karlis, *Labor and Delivery Centers are Closing in Red States. What Happens to Pregnant Women Next?*, SALON (Mar. 23, 2023), https://www.salon.com/2023/03/23/labor-and-delivery-centers-are-closing-in-red-states-what-happens-to-pregnant-women-next/ [https://perma.cc/WK99-RW7Y] ("There are high fixed costs for operating maternity services, [and] obviously they have to be available 24/7 because babies come when they want to come in, so having the staff on hand and the clinical training and all of the necessary . . . equipment that is required for any kind of emergency situation has a high fixed cost … When you have a low birth volume, then you don't have a good balance of payments coming in for that."). *See also* Sarah Al-Arshani, *Maternity United Closing in Alabama: Pregnant Women Have to Travel Further for Care*, USA TODAY (Oct. 16, 2023), https://www.usatoday.com/story/news/health/2023/10/16/alabama-maternity-units-closing-pregnant-women-care/71201726007 [https://perma.cc/GFP4-SJU4] (reporting on the closing of three maternity wards in Alabama, closures which will leave women across Shelby and Monroe counties without any birthing units).

179 Katy B. Kozhimannil et al., *Association Between Loss of Hospital-Based Obstetric Services and Birth Outcomes in Rural Counties in the United States*, 319 JAMA 1239, 1240 (2018); s*ee also* Neel Shah, *Eroding Access and Quality of Childbirth Care in Rural US Counties*, 319 JAMA 1203, 1203 (2018).

180 *See Maternity Deserts*, *supra* note 176.

181 597 U.S. 215 (2022).

limit access to care. Indeed, these groups have sought to eliminate these markets entirely[182] by outright banning abortion, imposing burdensome and unnecessary regulations on abortion providers (TRAP laws),[183] and passing laws that allow certain sellers of healthcare (doctors, nurses, and pharmacists) to refuse to provide the standard of care (e.g., standard contraception services, emergency abortion care) without facing liability.[184] Because of these legislative efforts, abortion care is banned in all or almost all circumstances in thirteen states, severely restricted in eleven states, and under threat in many others,[185] while consumers' ability to purchase contraceptive services is undermined in at least eight states.[186] Such efforts have had a devastating impact on women's ability to access necessary reproductive care, particularly lower-income women and women of color.[187]

---

182 The Supreme Court's overruling of *Roe* in *Dobbs* dealt a tremendous blow to women's equality by eliminating women's constitutional right to bodily autonomy and allowing states to pass laws outlawing abortion care. It must be noted, however, that conservative (and sometimes even liberal) politicians have long sought to undermine the functioning of the abortion care market through excessive and punitive regulations. Thus, even prior to *Dobbs*, women's ability to obtain and purchase abortion care, particularly lower-income women and women of color, was severely undermined. As a young woman growing up in Mississippi, I was keenly aware of the fact that my home state possessed only one abortion clinic.

183 *See What Are TRAP Laws?*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/types-attacks/trap-laws [https://perma.cc/ZA3Q-VK37].

184 *See* Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1504–05 (2012) (explaining how most states have passed broad "conscience" protections that allow individuals, clinics, hospitals, and healthcare systems to refuse to provide certain treatments on moral grounds); Andrea Michelson, *Contraception Is Already Restricted in Many States and It Could Be the Next Battleground. Here's What You Need to Know*, INSIDER (June 28, 2022), https://www.insider.com/will-contraception-be-banned-plan-b-iuds-roe-v-wade-overturn-2022-6 [https://perma.cc/28XA-ANSM].

185 *See After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/W6Q5-M9AK].

186 *See* Michelson, *supra* note 184.

187 For instance, Black, American Indian, and Alaska Native women ages 18–49 are more likely than other groups to live in states with abortion bans and restrictions. LATOYA HILL ET AL., KFF, WHAT ARE THE IMPLICATIONS OF THE *DOBBS* RULING FOR RACIAL DISPARITIES? (2024), https://www.kff.org/womens-health-policy/issue-brief/what-are-the-implications-of-the-dobbs-ruling-for-racial-disparities [https://perma.cc/PR4M-EHMY]. About 60% of Black women and 59% of American Indian/Alaska Native women ages 18–49 are living in states with abortion bans or restrictions compared with just over half (53%) of white, less than half of Hispanic (45%), and about three in ten Asian (28%) and Native Hawaiian or Pacific Islander (29%) women of the same age group. *Id.* Moreover, most Americans receiving abortion care in the United States pay out of pocket, irrespective of their health insurance status. *See* Ortal Wasser et al., *Catastrophic Health Expenditures for In-State and Out-of-State Abortion Care*, 7 JAMA NETWORK OPEN 1, 2 (2024). Studies have found that individuals often must take out loans, sell personal belongings, or forego essential household expenditures like food, bills, and rent to finance abortion care. *See generally* Amanda Dennis et al., *A Qualitative Exploration of Low-Income Women's*

But there is a lesser-known threat to these markets: the steady growth of Catholic hospital systems through hospital mergers.[188] Between 2001 and 2016, the number of acute care hospitals that are Catholic-owned or -affiliated grew by 22%.[189] This growth is problematic for consumers of reproductive healthcare for two reasons. First, Catholic hospitals operate according to the Ethical and Religious Directives for Catholic Healthcare ("the Directives"),[190] which generally prohibit the provision of most standard forms of reproductive healthcare: abortion,[191] sterilization[192] (vasectomies, tubal ligations, and hysterectomies), birth control,[193] emergency contraception (including in the event of sexual assault[194]), certain miscarriage treatments,[195] and many common infertility techniques.[196] A growth in the proportion of Catholic care therefore means less access to these services. Second, when a Catholic hospital acquires a secular hospital, the providers at that hospital are generally required to begin adhering to the Directives.[197] This means that the community

---

Experiences Accessing Abortion in Massachusetts, 25 WOMEN'S HEALTH ISSUES 463 (2015); Samuel L. Dickman et al., *Financial Hardships Caused by Out-of-Pocket Abortion Costs in Texas*, 112 AM. J. PUB. HEALTH 758 (2018).

188 *See* TESS SOLOMON ET AL., BIGGER AND BIGGER: THE GROWTH OF CATHOLIC HEALTH SYSTEMS 3 (2020).

189 LOIS UTTLEY & CHRISTINE KHAIKIN, MERGERWATCH, GROWTH OF CATHOLIC HOSPITALS AND HEALTH SYSTEMS: 2016 UPDATE OF THE MISCARRIAGE OF MEDICINE 1 (2016), https://static1.1.sqspcdn.com/static/f/816571/27061007/1465224862580/MW_Update-2016-MiscarrOfMedicine-report.pdf [https://perma.cc/84KC-SETG] (stating that in some states, 30% or more of all acute care hospital beds are in a Catholic facility).

190 *See* U.S. CONF. OF CATH. BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 14 (6th ed. 2018).

191 *Id.* at 18.

192 *Id.* at 16.

193 *Id.*

194 *Id.* at 15.

195 *Id.* at 18 (stating that in certain cases of miscarriage, termination of the pregnancy by induction or by dilation and curettage may be the appropriate form of treatment; however, Directive 46 states that such care is only allowed if "their direct purpose" is "the cure of a proportionately serious pathological condition of a pregnant woman" and care "cannot be safely postponed until the unborn child is viable").

196 U.S. CONF. OF CATH. BISHOPS, *supra* note 190, at 16–17.

197 *See Hospital Mergers: The Threat to Reproductive Health Services*, ACLU (Dec. 31, 1995), https://www.aclu.org/documents/hospital-mergers-threat-reproductive-health-services [https://perma.cc/XZ67-VCJM]; Patricia Donovan, *Hospital Mergers and Reproductive Health Care*, 28 FAM. PLAN. PERSPS. 281, 281 (1996); Jennifer Brown, *Another Colorado Hospital Stops Letting Women Get Their Tubes Tied, Renewing Questions*

sees not only a decrease in available services but also a decrease in competitors. And the departure of a competitor from the market provides greater market share to the remaining hospitals, which should allow them to increase their prices.[198]

The sad state of the markets outlined above has serious, negative implications for women's ability to participate in the labor market. Although many women rely on the products produced by these markets to support their labor force participation, they can only do so if the markets producing them do so at affordable rates and sufficient levels. If the markets providing these key products and services are not functioning efficiently or are characterized by high prices and/or diminished output, women are less likely to be able to purchase these key complementary products. Thus, women are harmed not just as consumers but also as workers.

Yet, although the state of these markets is a source of concern, it also suggests that there may be a real opportunity for antitrust enforcers to make a positive contribution to our nation's quest for greater gender equality. If antitrust enforcers turn their attention to promoting and protecting competition in these markets, then we should see an increase in both consumer welfare and gender equality as measured by women's labor force participation. Part III begins to lay out the ways in which antitrust enforcers can utilize antitrust as an equality-promoting tool.

III. Developing an Antitrust Approach to Sex Equality

Given the link between key consumer markets and women's ability to overcome gender-based barriers to labor market participation, and given the poor functioning of many

---

About Reproductive Rights, COLO. SUN (Jan. 31, 2023), https://coloradosun.com/2023/01/31/durango-hospital-tubal-ligations/ [https://perma.cc/J537-2B6A]; Susan Haigh & David Crary, *Catholic Hospitals' Growth Impacts Reproductive Healthcare*, ASSOC. PRESS (July 24, 2022), https://apnews.com/article/abortion-health-religion-new-york-oregon-8994d9b5fd0040d40d19fd1e44c313d8 [https://perma.cc/E75H-SUWJ]. *See also* Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929, 937–47 (2017) (detailing how many secular healthcare providers and institutions have contractual commitments with Catholic healthcare entities, commitments that require the secular provider or institution to comply with a religious standard of healthcare).

198 *See* Richard J. Hoskins, *Antitrust Analysis of Joint Ventures and Competitor Collaborations: A Primer for the Corporate Lawyer*, 10 U. MIA. BUS. L. REV. 119, 121 (2002) (stating that "this is because (everything else equal) the greater the market share of a firm, the greater is its ability (and thus temptation) to reduce its individual output and cause a price rise in the market"). The growth of Catholic hospitals is, of course, not in and of itself a bad thing. The problem is that this growth is taking place at the cost of competitive effects and access to care. I consider the intersection between competition and religious liberty principles more in depth in a separate project. *See* Bailey K. Sanders, *The Market Limits of Free Exercise*, MICH. L. REV. (forthcoming).

of those key markets,[199] it is evident that antitrust's prioritization of consumer welfare can be wielded in the pursuit of greater gender equality. To reiterate: because women rely on certain consumer markets to support their labor force participation, protecting and promoting competition in these markets will not only result in greater consumer welfare but also greater gender equality in the labor market.[200]

Using antitrust law to promote gender equality, then, does not require a deviation from the traditional consumer welfare standard but instead requires that antitrust enforcers, when appropriate, use the tools at their disposal to protect and promote competition in certain key markets. This means engaging not only in active antitrust enforcement (i.e., bringing cases when the facts indicate the antitrust laws are being violated) but also engaging in competition advocacy (i.e., advocating for policy changes that will promote competition).

It is important to note, however, that this Article does not argue that antitrust is a panacea or that it is *the* solution to gender inequality in the labor market. Only some of the market problems described above can be solved by bringing cases under the antitrust laws, and there are other laws (such as Title VII) that advance gender equality more directly.[201] But given that our country has generally taken the position that a free market economy[202]—as opposed to the government provision of goods and services—is the right approach, ensuring that our various markets are functioning efficiently would seem to be a necessary corollary. Many of the problems discussed above are directly linked to excessive market concentration, while others may be due, at least in part, to anticompetitive behaviors.[203] Still others result from misguided and unnecessary government regulations.[204] Active antitrust enforcement can be an appropriate response to the first two, while competition advocacy can be a proper response to the third.[205]

---

199 *See* discussion *supra* Part II.

200 *See* discussion *supra* Part II.

201 *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (2018) (prohibiting employer discrimination based on sex).

202 *See* Roger E. Backhouse, *The Rise of Free Market Economics: Economists and the Role of the State Since 1970*, 37 HIST. POL. ECON. 355, 355 (2005).

203 *See* discussion *infra* Part II.C.

204 *See* discussion *infra* Part II.C.

205 Sometimes enforcers will be limited to applying their expertise to understanding why certain markets are functioning poorly and advising policymakers as to possible paths forward, but this does not make their work any less necessary.

A. Active Antitrust Enforcement

The first component of an Antitrust Approach to Sex Equality is to prioritize the key markets outlined in Part II by engaging in active antitrust enforcement and actively employing the various tools available to the federal and state antitrust agencies. This ought not be controversial. After all, for "over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up."[206] Furthermore, antitrust jurisprudence for the past several decades has been characterized by a strong focus on maximizing consumer welfare by identifying and stopping harmful anti-competitive conduct on the part of producers.[207] Focusing on the consumer markets that are of key importance to women, then, requires no deviation from core antitrust principles.[208] Indeed, by bringing the standard set of cases—Section 1 cases, Section 2 cases, merger challenges, etc.—based on theories of consumer harm, enforcers can not only benefit women as consumers but also generate positive spillover effects in the nation's labor markets.

A good example of the type of case enforcers should prioritize is the FTC's decision to charge twenty-three obstetrician-gynecologists ("OB/GYNs") in Jacksonville, Florida, with illegally conspiring to fix the fees they charged to third-party payers and with boycotting or threatening to boycott third-party payers.[209] The FTC alleged that the physicians' independent practice association ("IPA") was a sham formed to facilitate price agreements

---

206 *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/3TRM-BM45].

207 *See* Hovenkamp, *supra* note 1, at 1 ("[T]he view that the federal antitrust laws ought to promote allocative efficiency in American business and markets has come to dominate antitrust policy in the last decade.") (citation omitted).

208 *See* Eric A. Posner & Cass R. Sunstein, *Antitrust and Inequality*, 2 AM. J.L. & EQUAL. 190, 190 (2022) (arguing that the antitrust authorities seeking to reduce inequality might target markets that are disproportionately important for low-income people, particularly the markets for food, medicine, and labor markets where pay gaps based on race or gender are large; an Antitrust Approach to Sex Equality is similarly an argument of prioritization); *Objective 3.5: Advance Environmental Justice and Tackle the Climate Crisis*, U.S. DEP'T OF JUST., https://www.justice.gov/doj/doj-strategic-plan/objective-35-advance-environmental-justice-and-tackle-climate-crisis [https://perma.cc/52HR-WKFS] (recognizing the need to fight the effects of climate change and committing to prioritizing "enforcement actions that will reduce greenhouse emissions, achieve emission reductions and relief that mitigate the impact of past violations, and hold violators accountable for committing environmental crimes").

209 Matter of Southbank IPA, Inc., 114 F.T.C. 783 (1991) (consent order).

among its members, who constituted nearly the entire OB/GYN medical staff at one of the most highly regarded hospitals in Jacksonville.[210] Under the resulting consent order, the physicians agreed to dissolve their IPA and to refrain from price-fixing activities.[211] Another key example is the FTC's complaint against Barr Laboratories for its alleged decision to unlawfully delay the entry of Barr's generic version of Warner Chilcott's Ovcon birth control pill into the market.[212] Under the resulting settlement agreement, Barr was required to refrain from entering into anticompetitive supply agreements similar in nature to its agreement with Warner Chilcott and to refrain from entering into other agreements with branded manufacturers that unreasonably restrain competition.[213] As a result, a new lower-cost generic version of the birth control pill entered the market.[214] This represents a significant win for female consumers, as research indicates that cost continues to pose a significant barrier to contraceptive access in the United States.[215]

---

210 *See id.*

211 *See id.* The FTC has brought other cases focused on protecting the market for reproductive care. In April 2002, the FTC charged physician members of an IPA that included nearly every OB/GYN with active medical staff privileges at the two acute care hospitals in Napa County, California, with price fixing and refusing to deal. Decision and Order, *Obstetrics & Gynecology Med. Corp. of Napa Valley, et al.*, FTC Docket No. C-4048 (May 14, 2002), https://www.ftc.gov/sites/default/files/documents/cases/2002/05/obgyndo.pdf [https://perma.cc/MKP9-J52P]. This case also resulted in a consent order preventing such anticompetitive conduct in the future. *Id.*

212 *See* Complaint, FTC v. Warner Chilcott Holdings Co. III, No. 105-CV-02179-CKK (D.D.C. Nov. 7, 2005); Press Release, Fed. Trade Comm'n, FTC Sues to Stop Anticompetitive Agreement in U.S. Drug Industry: Warner Chilcott/Barr Pact Deprives Consumers of Access to Generic Oral Contraceptive for Five Years (Nov. 7, 2005), https://www.ftc.gov/news-events/news/press-releases/2005/11/ftc-sues-stop-anticompetitive-agreement-us-drug-industry [https://perma.cc/PP7U-KVNT].

213 Press Release, Fed. Trade Comm'n, FTC Settles Charges Against Barr Laboratories, Protects Consumers from Anticompetitive Agreements in Prescription Drug Market (Nov. 29, 2007), https://www.ftc.gov/news-events/news/press-releases/2007/11/ftc-settles-charges-against-barr-laboratories-protects-consumers-anticompetitive-agreements [https://perma.cc/2PPD-4FD9].

214 *Id.*

215 *See* Kristen Lagasse Burke et al., *Unsatisfied Contraceptive Preferences Due to Cost Among Women in the United States*, CONTRACEPTION 1, 2 (2020); Katherine He et al., *Women's Contraceptive Preference-Use Mismatch*, 26 J. WOMEN'S HEALTH 692, 699 (2017); *Cost Continues to Pose Significant Barriers to Contraceptive Access*, GUTTMACHER (May 24, 2023), https://www.guttmacher.org/news-release/2023/cost-continues-pose-significant-barriers-contraceptive-access [https://perma.cc/P7B6-JXE9]; Liza Fuentes et al., *Primary and Reproductive Healthcare Access and Use Among Reproductive Aged Women and Female Family Planning Patients in 3 States*, 18 PLOS ONE 1, 9 (2023) (finding that a lack of health insurance and inability to afford care were the most common reasons women were unable to secure their desired contraceptive method).

Enforcers should continue to monitor the birth control market to ensure that companies are not engaging in different but equally harmful anticompetitive behavior, including price-fixing and other classic violations.[216] As outlined above, such anticompetitive behavior has ripple effects that extend beyond the most basic harm of artificially high prices. A recent study analyzing the impact of a price-fixing scheme in the birth control market in Chile, for example, found that the increased prices resulting from the illegal scheme led to a significant increase in unplanned pregnancies, particularly among unmarried women and women in their early twenties.[217] Thus, the harms that flow from anticompetitive behavior in this market are more than just "pocketbook" harms and can have lifelong implications for female consumers.

In addition to monitoring all of the key markets outlined above for anticompetitive practices, enforcers at the state and national levels should pay attention to mergers that might reduce competition in these key markets. This is particularly true for hospital mergers and their potential impact on various reproductive healthcare markets. Moreover, in doing so, enforcers must consider how traditional antitrust analyses may fail to capture the competitive realities of reproductive health markets and adjust their analyses accordingly. For instance, in most hospital merger analyses, enforcers and courts "cluster" general acute care ("GAC") services into one product market rather than analyzing the effects of the merger upon each market for the hundreds (or perhaps thousands) of available medical procedures.[218] Obstetric services—such as labor and delivery services, abortion care, and contraceptive care (e.g., tubal ligations)—are therefore generally lumped into the GAC

---

216 Another good example is the FTC's decision to seek a preliminary injunction to stop Cytyc Corporation's acquisition of Digene Corporation, two companies that manufacture and sell products used to screen women for cervical cancer, alleging that the acquisition would substantially reduce Cytyc's only existing competition in the liquid Pap testing market. Press Release, Fed. Trade Comm'n, FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp. (June 24, 2002), https://www.ftc.gov/news-events/news/press-releases/2002/06/ftc-seeks-block-cytyc-corps-acquisition-digene-corp [https://perma.cc/VS5X-3LWC]. At the time, Cytyc had a 93% market share of liquid-based Pap tests in the United States. *Id.* The acquisition ultimately fell through due to the FTC's opposition. *See* Nicholas Johnston, *Digene Calls Off Merger With Cytyc, Citing FTC Opposition*, WASH. POST (July 1, 2002), https://www.washingtonpost.com/archive/business/2002/07/02/digene-calls-off-merger-with-cytyc-citing-ftc-opposition/961d22c5-f35b-407a-8a10-13f482c2cabc/ [https://perma.cc/4LPB-HR86].

217 *See* Tomás Rau et al., *The Children of the Missed Pill*, 79 J. HEALTH ECON. 1, 2 (2021).

218 *See* Sean May & Monica Noether, *Unresolved Questions Relating to Market Definition in Hospital Mergers*, 59 ANTITRUST BULL. 479, 484, 486 (2014).

cluster market under the assumption that separate antitrust analyses are unnecessary when competitive conditions are similar for each.[219]

Yet there is good reason to think that the competitive conditions impacting reproductive healthcare services differ considerably from those of other GAC products. For instance, one of the reasons behind the increasing number of maternity ward closures is that they are generally a money *loser* for hospitals, in sharp contrast to other GAC services.[220] Moreover, because of the growing number of maternity care deserts in the United States, it is increasingly likely that not all of the hospitals involved in a merger (or impacted by a merger) will have maternity wards.[221] Thus, as was the case in *ProMedica v. Federal Trade Commission*, a merger that appears to be a four-to-three situation when GAC services are clustered may actually be a three-to-two situation when one isolates the obstetric services market.[222] Similarly, while standard merger analyses in the hospital context assume that the relevant payors are health insurance plans,[223] such an assumption is undermined when it comes to service lines like labor and delivery, abortion, or contraception. First, a large percentage of deliveries are paid for by Medicaid,[224] including more than two-thirds of births among Black women and American Indian or Alaska Native women.[225] Second, not all

219 *See id.*

220 *See* Caitlin Carroll et al., *Association Between Medicaid Expansion and Closure of Hospital-Based Obstetric Services*, 41 HEALTH AFFS. 531, 531 (2022) (noting that maintaining access to obstetric services is difficult because hospital-based obstetric units tend to be unprofitable due to high fixed costs and low reimbursements).

221 *See id.* (noting that hospital obstetric services have closed at a steady pace during the past decade and that only 44% of rural counties had obstetric services in 2018, down from 55% in 2004).

222 *See* ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 565–66 (6th Cir. 2014) (finding that although the market shares for each of Lucas County's four hospital systems were similar across a range of primary and secondary services, the same was not true for obstetric services, as only three of the hospital systems provided obstetric services).

223 *See, e.g.*, *id.* at 562 (focusing exclusively on privately insured patients).

224 Medicaid funds nearly half of all births, and the Medicaid reimbursement amount for obstetric services is low relative to those of private health plans. *See* Carroll et al., *supra* note 220, at 531.

225 AKASH PILLAI ET AL., KFF, MEDICAID EFFORTS TO ADDRESS RACIAL HEALTH DISPARITIES (2024), https://www.kff.org/medicaid/issue-brief/medicaid-efforts-to-address-racial-health-disparities [https://perma.cc/Y7JE-VEJC]. Future work should dig more deeply into the ways in which a two-stage competition model focused primarily on private insurance plans—thereby ignoring Medicaid recipients—may have contributed to the maternal healthcare crisis. It is notable that antitrust authorities place so much focus on price competition while the nation has faced untenable maternal mortality rates, particularly among women of color. *See* LATOYA HILL ET AL., KFF, RACIAL DISPARITIES IN MATERNAL AND INFANT HEALTH: CURRENT STATUS AND EFFORTS TO ADDRESS

insurance plans provide coverage for abortion or contraceptive services.[226] Moreover, some managed care plans create provider networks dominated by Catholic institutions, meaning that patients have slim pickings for in-network providers of reproductive healthcare,[227] while studies show that most consumers are not aware that certain religious hospitals will not provide particular services such as tubal ligation.[228] This is relevant given the second stage of hospital merger analyses focuses on a hospital's ability to attract patients within health plans.[229]

Notably, while reproductive rights advocates have urged antitrust enforcers to protect reproductive healthcare markets for decades,[230] doing so now is more important than ever. Red state abortion bans mean that more women in those states are being forced to

---

THEM (2024), https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/ [https://perma.cc/EK2Y-LCU3].

226 Twenty-five states have laws that prohibit insurance issuers from offering health care plans that include abortion coverage in the insurance marketplaces set up by the Affordable Care Act. *See* States Banning or Providing Insurance Coverage of Abortion Can Determine a Person's Health and Future, NAT'L WOMEN'S L. CTR. (2021), https://nwlc.org/resource/states-banning-or-providing-insurance-coverage-of-abortion-can-determine-a-persons-health-and-future/ [https://perma.cc/4X8L-U82B]. Eleven of those twenty-five states go even further and prevent all plans—including employer-sponsored plans—in the state from offering coverage of abortion as part of a comprehensive health care plan. *See id.* Moreover, Louisiana and Tennessee do not allow a woman to have insurance coverage for even life-saving abortion care. *See id.*

227 *See* Amelia Thomson-DeVeaux & Anna Maria Barry-Jester, *Insurers Can Send Patients to Religious Hospitals That Restrict Reproductive Care*, FIVETHIRTYEIGHT (Aug. 1, 2018), https://fivethirtyeight.com/features/how-insurers-can-send-patients-to-religious-hospitals-that-restrict-reproductive-care/ [https://perma.cc/LA7G-LP6K].

228 *See* Zarina J. Wong et al., *What You Don't Know Can Hurt You: Patient and Provider Perspectives on Postpartum Contraceptive Care in Illinois Catholic Hospitals*, 107 CONTRACEPTION 62, 64 (2022) (finding that patients in their study knew they were delivering in a Catholic hospital but were unaware that Catholic policies limited their health care options); Maryam Guiahi et al., *Are Women Aware of Religious Restrictions on Reproductive Health at Catholic Hospitals? A Survey of Women's Expectations and Preferences for Family Planning Care*, 90 CONTRACEPTION 429, 430 (2014) (finding that the majority of women surveyed who received care from a Catholic hospital did not anticipate differences in reproductive healthcare based on its Catholic status); Jocelyn M. Wascher et al., *Do Women Know Whether Their Hospital Is Catholic? Results From a National Survey*, 98 CONTRACEPTION 498, 501 (2018) (finding that over one-third of American women surveyed who named a Catholic hospital as their primary hospital for reproductive care are unaware it is Catholic).

229 *See* Cory Capps et al., *The Continuing Saga of Hospital Merger Enforcement*, 82 ANTITRUST L.J. 441, 444–45 (2018) (detailing the recent change in theoretical approach to hospital mergers).

230 *See generally* Jane Hochberg, *The Sacred Heart Story: Hospital Mergers and Their Effects on Reproductive Rights*, 75 OR. L. REV. 945 (1996) (scrutinizing the Sacred Heart merger and religious mergers in general and arguing for the need for public opposition to such mergers); Am. Pub. Health Ass'n, *Preserving*

undertake pregnancies they would not otherwise, while others are being forced to travel across state lines (sometimes multiple state lines) to purchase care far from home.[231] In other words, the demand for maternity care is rising in red states, while blue states face an increased demand for abortion care from out-of-state citizens. Moreover, data indicates that the demand for contraception (including sterilization) is rising among women *and* men.[232] Yet the increasing number of hospital mergers involving a religious institution that refuses to provide abortion, contraceptive, and sterilization care[233] means that even in blue states, consumers can be faced with decreased output and substandard care because of a hospital merger. Studies have found that Catholic hospital OB/GYNs are not able to

---

Consumer Choice in an Era of Religious/Secular Health Industry Mergers (Position Paper), 91 AM. J. PUB. HEALTH 479 (2001).

231 Following the implementation of Florida's six-week abortion ban, women living in the southernmost tip of the state face a fourteen-hour drive to the closest abortion clinic in Charlotte, North Carolina. Lori Rozsa & Caroline Kitchener, *Florida Prepares for One of Nation's Strictest Abortion Bans to Take Effect*, WASH. POST, Apr. 30, 2024, https://www.washingtonpost.com/nation/2024/04/30/florida-abortion-ban/ [https://perma.cc/EB55-BUR5]. A patient whose pregnancy has progressed past twelve weeks will have to drive seventeen hours to southern Virginia. *Id.* The Center for American Progress calculated the typical drive time to the nearest provider of abortion care for a typical woman of reproductive age in each congressional district in 2023; the analysis found that women who earn less and experience the largest gender wage gaps have the longest travel times to the nearest abortion clinic. *See* SARA ESTAP, CTR. FOR AM. PROGRESS, ABORTION ACCESS MAPPED BY CONGRESSIONAL DISTRICT (2024), https://www.americanprogress.org/article/abortion-access-mapped-by-congressional-district/ [https://perma.cc/DWL3-JZJK].

232 *See* Virginia Langmaid, *Contraception Demand Up After* Roe *Reversal, Doctors Say*, CNN (July 6, 2022), https://www.cnn.com/2022/07/06/health/contraceptives-demand-after-roe/index.html [https://perma.cc/X879-B9GL]; Tess Vrbin & Antoinette Grajeda, *A Year Without Abortion in Arkansas: More Sterilizations and Continued Struggles in Maternal Health*, ARK. ADVOC. (June 26, 2023), https://arkansasadvocate.com/2023/06/26/a-year-without-abortion-in-arkansas-more-sterilizations-and-continued-struggles-with-maternal-health/ [https://perma.cc/9QTW-KPTC]; Michelle Crouch & Charlotte Ledger, *Sterilization Surge: Some Doctors Say Abortion Restrictions Are Driving N.C. Women to Choose Permanent Birth Control*, N.C. HEALTH NEWS (July 17, 2023), https://www.northcarolinahealthnews.org/2023/07/17/some-doctors-abortion-restrictions-driving-nc-women-sterilization/ [https://perma.cc/A6C2-H3KA].

233 *See* SOLOMON ET AL., *supra* note 188, at 3.

offer the standard of care with respect to postpartum tubal ligations,[234] ectopic pregnancy management,[235] and timely miscarriage management.[236]

It is therefore imperative that antitrust enforcers—in red and blue states—work to protect reproductive healthcare markets as much as possible by carefully analyzing the likely competitive effects of prospective hospital mergers and, if necessary, either blocking harmful mergers or requiring the merging entities to craft solutions to preserve services.[237] Note, of course, that enforcers in states where the legislature has decided to ban abortion care will likely not be focused on preserving access to abortion services. But they can and should focus on maximizing competition in the contraceptive, prenatal, and obstetric markets. Enforcers in states that seek to protect and promote women's access to abortion care, in contrast, should specifically focus on maximizing competition in their abortion care markets.

Importantly, prioritizing the markets women rely upon to support their labor force participation does not just mean bringing cases in response to discrete instances of anticompetitive behavior. An Antitrust Approach to Sex Equality also calls upon enforcers to take advantage of all the tools in their toolkit. This includes the FTC's ability to use Section 6(b) of the FTC Act to conduct studies without a specific law-enforcement purpose.[238] Such industry studies are generally taken in response to concerns about specific markets and/or market practices and not only allow the Commission to investigate the practices of particular market actors but also to better understand the particular competitive forces at work in a given market.[239] For instance, in 2021, the FTC launched a Section 6(b) study focused on determining the causes "behind ongoing supply chain disruptions and how these disruptions are causing serious and ongoing hardships for consumers and harming

234 *See* Debra B. Stulberg et al., *Tubal Ligation in Catholic Hospitals: A Qualitative Study of Ob-Gyns' Experience*, 90 CONTRACEPTION 422, 425–26 (2014).

235 *See* Angel M. Foster et al., *Do Religious Restrictions Influence Ectopic Pregnancy Management? A National Qualitative Study*, 21 WOMEN'S HEALTH ISSUES 104, 106–08 (2011).

236 *See* Lori R. Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals,* 98 AM. J. PUB. HEALTH 1774, 1776–78 (2008).

237 *See, e.g.*, Durand, *supra* note 17, at 2623–29 (detailing the ways in which abortion services can be preserved following mergers involving Catholic systems).

238 15 U.S.C. § 46(b).

239 *See* Matthew Lane, *The FTC's 6(b) Study Authority: An Important Tool for Policymakers*, DISRUPTIVE COMPETITION PROJECT (Apr. 9, 2019), https://project-disco.org/competition/040919-the-ftcs-6b-study-authority-an-important-tool-for-policymakers/ [https://perma.cc/6REN-NY7A].

competition in the U.S. economy."[240] Similarly, in response to ever-rising prescription drug prices, the FTC launched a study in 2022 examining the role of pharmacy benefit managers in the prescription-drug industry in an effort to "assist policymakers in determining whether Americans would benefit from reforms to [such a] critical industry."[241]

As noted above, many of the key markets women rely upon to support their labor force participation are in dire straits.[242] While some of the causes behind these market dysfunctions are readily evident (e.g., a hospital merger that substantially lessens competition by decreasing the number of providers who can provide standard care), many are not.[243] Federal enforcers should be applying all the tools at their disposal to understand *why* these key markets are failing consumers, including Section 6(b) of the FTC Act, and using the information generated to make substantive policy recommendations. As of now, however, the FTC's track record in doing so leaves much to be desired. For instance, in response to a nationwide shortage of infant formula that left parents facing empty shelves, the FTC did not employ its Section 6(b) powers to understand what caused this specific supply chain disruption,[244] which would have allowed it to demand information from the major infant-formula manufacturers. Instead, it issued a Request for Information[245] and, two years later, quietly produced a two-year report that is best described as a literature review; it provided no information not already evident to those who have been following the infant formula market.[246] It is unclear if the FTC plans to do anything more with respect to the infant formula market.

---

240 Press Release, Fed. Trade Comm'n, FTC Launches Inquiry into Supply Chain Disruptions (Nov. 29, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions [https://perma.cc/DZ8W-J2VM].

241 FED. TRADE COMM'N, COMM'N FILE NO. P221200, STATEMENT OF CHAIR LINA M. KHAN REGARDING 6(B) STUDY OF PHARMACY BENEFIT MANAGERS (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement-Khan-6b-Study-Pharmacy-Benefit-Managers.pdf [https://perma.cc/3XRE-LVYH].

242 *See* discussion *supra* Parts II.C.1–C.4.

243 After all, firms engaging in illegal, anticompetitive behavior do not tend to broadcast it.

244 *See* Press Release, Office of Rep. Ilhan Omar, Rep. Omar Leads Letter Calling for Investigation into Baby Formula Shortage (May 20, 2022), https://omar.house.gov/media/press-releases/rep-omar-leads-letter-calling-investigation-baby-formula-shortage [https://perma.cc/9BJQ-MP8N].

245 Press Release, Fed. Trade Comm'n, Federal Trade Commission Launches Inquiry into Infant Formula Crisis (May 24, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/05/federal-trade-commission-launches-inquiry-infant-formula-crisis [https://perma.cc/TCT7-M6NY] [hereinafter FTC Infant Formula Press Release].

246 KHAN ET AL., FED. TRADE COMM'N, *supra* note 16.

Similarly, it is striking that while it is now well recognized that the market for childcare in the United States is failing to meet the nation's needs, and although it is recognized that this failure is causing significant harm to the United States' economy in terms of lost wages,[247] there has been no discussion as to how antitrust enforcers might play a role in crafting a solution. This oversight seems particularly puzzling given President Biden's April 2023 executive order[248] outlining the need to boost the supply of high-quality childcare. Even if federal enforcers have no reason to believe anticompetitive behavior is taking place within the childcare market (something that would seem to be an open question, as is the case with any industry), they can join the fight to promote affordable childcare by studying the market and developing suggestions about how to better harness competition for the benefit of consumers. Indeed, the FTC should follow the lead of the Australian Competition and Consumer Commission[249] and conduct an inquiry into the market for childcare services to determine the level of competition in the childcare market, the potential impacts of governmental policy, and the possibility that industry practices might be stifling competition.[250]

B. Engaging in Competition Advocacy

The second component of an Antitrust Approach to Sex Equality is to engage in active competition advocacy, again with a particular eye to the markets outlined in Part II. Competition advocacy can broadly be defined as the use of enforcement agencies' "expertise in competition, economics, and consumer protection to persuade governmental actors at all levels of the political system and in all branches of government to design

---

247 *See, e.g.*, SANDRA BISHOP, COUNCIL FOR A STRONG AM., $122 BILLION: THE GROWING, ANNUAL COST OF THE INFANT-TODDLER CHILD CARE CRISIS (2023), https://www.strongnation.org/articles/2038-122-billion-the-growing-annual-cost-of-the-infant-toddler-child-care-crisis [https://perma.cc/HQ3M-BZYP].

248 Exec. Order No. 14,095, 88 Fed. Reg. 24669 (Apr. 18, 2023).

249 *See* AUSTRALIAN COMPETITION & CONSUMER COMM'N, CHILDCARE INQUIRY (2023), https://www.accc.gov.au/system/files/ACCC%20Childcare%20Inquiry-final%20report%20December%202023.pdf?ref=0&download=y [https://perma.cc/J6AX-9Z3K].

250 *See* Maria Flynn, Opinion, *U.S. Child Care Crisis Is Holding Back the Workforce*, FORBES (Nov. 2, 2023), https://www.forbes.com/sites/mariaflynn/2023/11/02/us-child-care-crisis-is-holding-back-the-workforce/?sh=17f484d85bfe [https://perma.cc/G75U-3P2G] (discussing that as many as 100,000 Americans have been forced to stay home from work each month because of childcare problems and that the economic toll is $122 billion each year in lost earnings, productivity, and revenue).

policies that further competition and consumer choice."[251] In practice, it has often taken the form of letters from agency staff, formal comments, and amicus curiae briefs.[252]

Employing competition advocacy within an Antitrust Approach to Sex Equality is important for two reasons. First, although excessive governmental regulation can be directed towards any industry, history suggests it is particularly likely to occur in markets that disproportionately impact women.[253] This is because societal beliefs and stereotypes regarding women's "proper" behavior, specifically with respect to their market behavior, often lead to paternalistic or protectionist regulations that impede market competition and harm female consumers and workers.[254] Second, antitrust enforcers do not possess the necessary authority to tackle all anticompetitive distortions. Antitrust law's state action doctrine shields certain anticompetitive conduct from federal antitrust scrutiny when the conduct is (1) in furtherance of a clearly articulated state policy and (2) actively supervised by the state.[255] Similarly, federal legislation that conflicts with federal antitrust laws is

---

251 James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1091 (2005). As part of their advocacy initiatives, the Department of Justice and FTC have sought to (1) "eliminate unnecessary and costly existing government regulation," (2) "inhibit the growth of unnecessary new regulation," (3) "minimize the competitive distortions caused where regulation is necessary by advocating the least anticompetitive form of regulation consistent with the valid regulatory objectives," and (4) "ensure that regulation is properly designed to accomplish legitimate regulatory objectives." William J. Kolasky, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Address at "Economic Competition Day: Shared Experiences": A Culture of Competition for North America 8 (June 24, 2002), https://www.justice.gov/atr/speech/culture-competition-north-america [https://perma.cc/C77H-X3TK].

252 *See* Maureen K. Ohlhausen, Comm'r, U.S. Fed. Trade Comm'n, Address at Eleventh Annual Competition Day: An Ounce of Antitrust Prevention Is Worth a Pound of Consumer Welfare: The Importance of Competition Advocacy and Premerger Notification (Nov. 5, 2013), https://www.ftc.gov/system/files/documents/public_statements/ounce-antitrust-prevention-worth-pound-consumer-welfare-importance-competition-advocacy-premerger/131105mkochilespeech.pdf. [https://perma.cc/JXZ7-ANX9].

253 For instance, reform movements in the nineteenth century led to the initiation of protective legislation for women, which reduced the jobs available for women, restricted the hours women could work, the type of work they could perform, and their working conditions. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908); Adkins v. Child.'s Hosp. of D.C., 261 U.S. 525 (1923); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

254 For instance, it is almost certainly the case that gender stereotypes have stayed antitrust enforcers' hands in the past. A prime example would be state and federal antitrust agencies' failure to respond to the naked—and very public—price-fixing that took place in the egg donor industry for several years. *See* Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, 72 LAW & CONTEMP. PROBS. 59, 60 (2009).

255 *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); *see also* Parker v. Brown, 317 U.S. 341 (1943).

said to enact an "implied repeal" of the antitrust laws.[256] Thus, competition advocacy may sometimes be the only tool available to enforcers who seek to prevent consumer harm.

Consider the market for infant formula, which, as noted earlier, was characterized by a severe shortage beginning in early 2022 when a single manufacturing plant shut down.[257] In response, the FTC launched an inquiry seeking to understand the causes behind the shortage.[258] On the FTC's to-do list was to understand (1) how the pattern of mergers and acquisitions in the infant formula market might have contributed to excessive concentration in the industry and (2) how the FTC itself or state or federal agencies may have inadvertently taken steps that contributed to fragile supply chains in the market.[259] Merger analysis, of course, falls within the traditional wheelhouse of Section 7 of the Clayton Act, and thus, to the extent that the FTC finds that the market troubles stem from anticompetitive mergers, enforcement activity is a possibility.[260] But if the FTC determines that state or federal regulations are to blame, then competition advocacy may be the appropriate tool moving forward.

Consider also the market for abortion care. This market is characterized by considerable and variable state-level regulations, some of which are "demand-side" policies (e.g., mandatory ultrasound requirements and waiting periods) and some of which are "supply-

---

256 *See* Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659 (1975).

257 *See* discussion *supra* Part II.D.2.

258 *See* FTC Infant Formula Press Release, *supra* note 245.

259 Although there are several potential causes behind the shortage—including lax merger enforcement—many observers argue that the federal government's widely used Special Supplemental Nutrition Program for Women, Infants, and Children (popularly known as "WIC") was at least partly to blame. Just two companies service close to 90% of the infants who receive benefits under this program, in part because of the way the program's contracting system works. Under this system, winning a state contract means that a company obtains a monopoly over all WIC participants in that state; program participants are unable to use program vouchers to purchase a different brand. *See, e.g.*, Meredith Lee & Helena Bottemiller Evich, *How the Baby Formula Shortage Links Back to a Federal Nutrition Program*, POLITICO (May 19, 2022), https://www.politico.com/news/2022/05/19/baby-formula-shortage-federal-contracts-00033581 [https://perma.cc/Y8WA-68ZK].

260 The federal antitrust authorities have made clear that it retains the authority to challenge transactions whose previous consummation was in violation of the Clayton Act. *See* Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies: Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp. (Feb. 11, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies [https://perma.cc/76WW-6ADL].

side" policies (e.g., facility or licensing requirements and gestational age limits).[261] Both types of policies can and do impact the competitive functioning of this market.[262] While policies that impede the competitive process are in line with red states' opposition to abortion, they are assuredly *not* in line with blue states' commitment to protecting and promoting access to care. Blue state enforcers, then, should work to educate both legislators and the public alike as to the negative consequences such regulations have for women's healthcare and, subsequently, their labor force participation.

Importantly, although competition advocacy may be the only tool available to antitrust enforcers facing state or federal regulations that harm the competitive process, this does not necessarily mean it is an inferior tool. As former FTC Chairman Timothy Muris has explained, competition advocacy can sometimes be a "better or more effective" tool than enforcement, "especially when governments are making major policy changes that fundamentally will reshape the competitive landscape."[263] In 1974, for example, Lewis Engman, then chairman of the FTC, gave a speech in which he argued that burdensome federal transportation regulations were contributing to subpar economic outcomes for the nation.[264] His speech received substantial coverage in the popular press, and over the next decade, the Commission aggressively pursued competition advocacy to promote deregulation of airlines, railroads, trucking, and intercity buses. It has been estimated that deregulation during this period improved consumer welfare by more than $50 billion annually.[265] Thus,

---

261 *See generally* Andrew Beauchamp, *Regulation, Imperfect Competition*, *and the U.S. Abortion Market*, 57 INT'L ECON. REV. 963 (2015).

262 *See id.* (finding that state regulations impact demand, marginal cost, and fixed costs of abortion provision). Advocates of these laws argue that they are intended to protect women's health, but it is widely accepted that regulated abortion procedures are exceedingly safe. The American College of Obstetricians and Gynecologists advocates for an end to such policies. *See* Press Release, Am. Coll. of Obstetricians & Gynecologists, ACOG Updates Committee Opinion on Increasing Access to Abortion (Nov. 23, 2020), https://www.acog.org/news/news-releases/2020/11/acog-updates-committee-opinion-on-increasing-access-to-abortion [https://perma.cc/M7JJ-W9LV].

263 Timothy J. Murris, Chairman, U.S. Fed. Trade Comm'n, Address at the International Competition Network, Panel on Competition Advocacy and Antitrust Authorities: Creating a Culture of Competition: The Essential Role of Competition Advocacy (Sept. 28, 2002), https://www.ftc.gov/news-events/news/speeches/creating-culture-competition-essential-role-competition-advocacy [https://perma.cc/Z8PQ-2YAZ].

264 *Id.*

265 *See* Robert Crandall & Jerry Ellig, *Economic Deregulation and Customer Choice: Lessons for the Electric Industry* 2 (Ctr. for Mkt. Procs, Working Paper, 1997), https://www.mercatus.org/sites/default/files/d7/uploadedFiles/Mercatus/Publications/MC_RSP_RP-Dregulation_970101.pdf [https://perma.cc/L9TT-MXW6].

to the extent that enforcers can convince policymakers of the ill effects of their regulatory initiatives, competition advocacy has considerable potential for improving the competitive process. An Antitrust Approach to Sex Equality therefore calls on enforcement agencies to advocate for female consumers (and workers) "at every opportunity and in every forum. In executive councils, before national and local legislatures, and through public opinion, [they] should increase [their] efforts to produce the evidence and rhetoric necessary to defend the marketplace."[266]

Finally, it is not just policymakers that enforcers should be speaking to. As Thurman Arnold observed sixty years ago, "[t]he antitrust problem must be brought to the public and not reserved for the abstract consideration of the lawyers or the economist."[267] If regulations that harm competition and consumers can only be removed through the political process, then citizens must understand how and why those regulations harm the market. And the FTC, in particular, is no stranger to the business of educating the public. According to the FTC, the Commission's consumer and business education protection program is a critical part of the agency's consumer protection mission.[268] It produces and distributes "actionable, practical, plain-language guidance on dozens of issues and reaches tens of millions of people each year through the FTC's website, the media, and partner organizations."[269] Such educational efforts should also be incorporated into its *competition* protection mission. By alerting citizens (consumers) to the significant economic costs of various governmental regulations, antitrust agencies increase the chances that such regulations can be rescinded following the next election.[270]

---

266 Murris, *supra* note 263.

267 Thurman Arnold, *Antitrust Law Enforcement, Past and Future*, 7 LAW & CONTEMP. PROBS. 5, 10 (1940).

268 *Education*, FED. TRADE COMM'N (2019), https://www.ftc.gov/reports/annual-highlights-2019/education [https://perma.cc/26GA-5KXF].

269 *Id.*

270 Notably, the FTC is not limited to press releases or speeches when it comes to educating the public; popular media can also be an effective tool. For instance, FTC Chair Lina Khan appeared on *The Daily Show* with Jon Stewart to discuss Big Tech monopolies after the government filed a complaint alleging Apple had engaged in illegal monopolization. *The Daily Show* (Comedy Central television broadcast Apr. 1, 2024), https://www.youtube.com/watch?v=oaDTiWaYfcM&t=2s&ab_channel=TheDailyShow [https://perma.cc/X3DA-6PXT]. Within one month, the interview had received 1.5 million views on YouTube. *Id.*

IV. Pursuing Equity Through Efficiency: The Synergy Between Antitrust Law and Constitutional Law

> *"The old gospel of efficiency, not equity, is dead. The two pursuits can move together, in tandem, or apart."*[271]

Calls for antitrust enforcers to begin taking equity into account (among other social values) have spurred much debate within the antitrust community, with many arguing that antitrust is a poor tool for pursuing any social goals other than efficiency.[272] Hopefully by this point readers have realized that this is a false dichotomy. By protecting and promoting competition in the markets that support women's labor force participation, the antitrust laws most certainly can contribute to greater gender equality. But in case doubt persists, this final Part IV more explicitly makes the case for why antitrust can be viewed as complementary to constitutional sex equality doctrine.

Here is my starting proposition: both the antitrust laws and constitutional sex equality doctrine work to promote greater economic efficiency. This is most apparent, of course, when it comes to the antitrust laws. Since the 1970s, American antitrust jurisprudence has focused on maximizing economic efficiencies, particularly with respect to consumer markets, but also with respect to labor markets.[273] To see why our nation's constitutional sex equality doctrine promotes economic efficiency requires us to recognize that the separate spheres tradition was not only discriminatory and contrary to democratic values but that it was also blatantly inefficient.

Under this tradition, cultural norms and laws pushed individuals to specialize in particular spheres of work—unpaid household work or paid work outside the home[274]—regardless of their innate abilities and preferences. This is clearly inefficient, for economic theory tells us that a nation's talent is maximized when individuals in society take on the tasks for which their talents and preferences make them most suited—that is, when

---

271 Eleanor M. Fox, *Competition Policy at the Intersection of Equity and Efficiency: The Developed and Developing Worlds*, 63 ANTITRUST BULL. 1, 6 (2018).

272 *See, e.g.*, Timothy J. Brennan, *Should Antitrust Go Beyond "Antitrust"?*, 63 ANTITRUST BULL. 49, 52 (2018) (suggesting that using antitrust to pursue equality goals requires one to pursue a standard other than (or in addition to) economic efficiency).

273 *See* BORK, PARADOX *supra* note 74, at 91–92; Hovenkamp, *supra* note 1, at 1.

274 *See* discussion *supra* Part I.

each individual works in a position where she has a relative advantage.[275] The separate spheres framework, then, not only restricted individual choice and autonomy, but it also promoted a truly massive misallocation of talent within the nation's economy. Indeed, a recent study shows that a sizeable portion of the aggregate growth from 1960 to 2010 in the United States can be explained by the increasing presence of women (and Black men) in occupations from which they were basically banned in the past.[276] Thus, when the Supreme Court declared that sex-based distinctions "supported by no more substantial justification than 'archaic and overbroad' generalizations" about men and women's proper roles in society violate the Fourteenth Amendment,[277] it advanced not only gender equality but economic efficiency as well.

Now here is my second proposition: both constitutional sex equality doctrine and the antitrust laws seek to promote individual choice. Constitutional sex equality doctrine, with its roots in anti-stereotyping theory, rejects the separate spheres tradition of pushing individuals to specialize in particular spheres of work simply because of their sex, without regard for individual preferences and talents.[278] Antitrust law, in turn, has long been focused on maximizing consumer choice and ensuring that the market produces a sufficient number of quality products for consumers to choose among.[279] Importantly, anticompetitive behavior, excessive concentration, or unnecessary regulation in key consumer markets can result in a deprivation of choice in both the antitrust *and* constitutional sense. This point may perhaps be best made by a real-life example.

As discussed in Part II, the American childcare market is characterized by low output and high prices, making it difficult for parents to find affordable childcare. Erica Manoatl and her husband were no exception.[280] When they put their names on the waitlists for

---

275 Constitutional sex equality doctrine prohibits antitrust enforcers from assuming women hold a natural advantage in home labor as opposed to market work. *See* Califano v. Goldfarb, 430 U.S. 199, 206–07 (1977).

276 *See* Chang-Tai Hsieh et al., *The Allocation of Talent and U.S. Economic Growth*, 87 ECONOMETRICA 1439, 1441 (2019).

277 *Califano*, 430 U.S. at 206–07. Today, equal protection jurisprudence holds that laws that classify on the basis of sex are subject to heightened scrutiny. United States v. Virginia, 518 U.S. 515, 531–34 (1996).

278 *See* discussion *supra* Part I.

279 *See* Hovenkamp, *supra* note 1, at 2.

280 *See* Chabeli Carrazana, *Day Care Waitlists Are So Long, Moms Are Quitting Their Jobs or Choosing to Stop Having Kids*, 19TH (Mar. 30, 2023), https://19thnews.org/2023/03/day-care-waitlists-child-care-strain-parenting/ [https://perma.cc/HXG8-N6MU].

multiple childcare centers in their home city of Denver, Colorado, they thought they had plenty of time to secure a spot: Manoatl was just twelve weeks pregnant.[281] A year and a half after the birth of their daughter, however, they were still waiting for a slot to open.[282] Ultimately, Manoatl and her husband found it too difficult to manage two full-time jobs and childcare just between the two of them: Manoatl quit her job in the child advocacy and policy field and became a full-time caregiver, while her husband switched to a job that paid more.[283] Manoatl described her feelings about the situation: "In my opinion, we were not given a choice here . . . We wanted her to be in a childcare center. It's very hard for me to accept that we can't do that."[284]

Note that Manoatl's story represents a subpar outcome regardless of whether one views it through an antitrust lens (i.e., efficiency) or a sex equality lens. First, both Manoatl and her husband were harmed as consumers because output in the childcare market was too low and unable to meet demand. Second, Manoatl and her husband were also harmed as workers: Manoatl was forced to step away from a career that she loved to become a full-time, unpaid caregiver when her true preference was to remain in the workforce.[285] Her husband, in turn, was forced to take a position that likely required him to spend less time with his family. That is, Manoatl and her husband were pushed into a separate spheres dynamic they did not voluntarily choose.

Importantly, while Manoatl's situation is problematic from both an antitrust and constitutional law perspective, it is only antitrust law that has the potential to provide a solution. While there are many forces that operate to push women into an unpaid caregiving role, constitutional sex equality doctrine's protective reach only extends to *state* actions; it does not extend into the workings of the free market.[286] But antitrust law, of course, does.

---

281 *See id.*

282 *See id.*

283 *See id.*

284 *Id.*

285 As Manoatl explained, it was "still rough acknowledging that [she] spent a lot of time prepping to come into this career, which [she] really love[d]," only to be pushed out of it. *Id.*

286 The same, of course, is true under the Supreme Court's doctrine regarding reproductive rights. The Supreme Court has made clear on multiple occasions that its decisions establishing constitutional rights to contraception and abortion established only negative rights to be free from government interference, not positive rights to the assistance of others. *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (upholding a Missouri statute that prohibited public employees from performing abortions in public hospitals).

Indeed, antitrust is laser-focused on "encourag[ing] markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low."[287] It is therefore a natural place to turn when markets fail to meet society's needs.

To summarize, once we acknowledge the link between certain consumer markets and women's ability to participate in paid work, it becomes clear that antitrust law should be included in the list of tools society can use to promote gender equality. Nor should antitrust enforcers hesitate to take constitutional equality goals, and not just efficiency concerns, into account. As the Supreme Court itself has explained, the antitrust laws "rest[] on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing *an environment conducive to the preservation of our democratic political and social institutions*."[288] To the extent that market inefficiencies or misbehavior are impeding women's ability to not only purchase key products and services but also to participate equally in the labor force, antitrust enforcers should sit up and take notice.

CONCLUSION

It has been argued that antitrust is "not the appropriate tool for pursuing particular goals of social equality" and that gender equality as a policy goal is "best left to the constitutional and statutory institutions intended to address" it.[289] It has also been argued that those who believe antitrust should reflect other considerations—such as equality—"need to propose ways in which judges in antitrust cases should apply a standard other than . . . economic efficiency" when faced with an antitrust claim.[290] This is so, it is said, because "if individual case decisions do not change, then the effects of antitrust enforcement do not change."[291] Neither claim is true. This Article has shown that antitrust law, and more specifically, the consumer welfare standard, is a natural vehicle for promoting greater gender equality, as measured by women's labor force participation. Antitrust enforcers (and private plaintiffs) can play an important role in our nation's march towards greater gender equality simply by prioritizing the consumer markets that are complementary to women's labor force

287 Hovenkamp, *supra* note 75, at 102.

288 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (emphasis added).

289 Herbert Hovenkamp, *Antitrust Harm and Causation*, 99 WASH. U. L. REV. 787, 811 (2021).

290 Brennan, *supra* note 272, at 45.

291 *Id.*

participation. In doing so, they can not only secure greater consumer welfare and worker welfare, but they can help create a market environment that helps fulfill the promises of our nation's constitutional sex equality doctrine. Doing so does no violence to traditional antitrust principles, as promoting efficiency and equity can (at least in the case of gender equality) go hand in hand.

Importantly, this Article represents just one step in a larger movement to begin thinking about antitrust's role in promoting gender equality.[292] It attempts to show that there is not necessarily a tension between promoting efficiency and equality and that the consumer welfare standard can be used as a vehicle for promoting gender equality. But further work remains to be done in terms of building the theoretical, doctrinal, and empirical basis for a gender-inclusive approach to antitrust. Moreover, advocates for gender equality (and perhaps specifically access to reproductive healthcare) should think critically about how best to incorporate antitrust into their larger strategic initiatives. The fight for gender equality is far from over, and we must use every tool at our disposal to continue making forward progress.

---

292 As noted earlier, both the OECD and the Canadian government have begun to explore the role of gender in antitrust law. *See* discussion *supra* note 83.