ANTITRUST AND ECONOMIC OPPORTUNITY: COMPETITION IN LABOR MARKETS

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

TUESDAY, OCTOBER 29, 2019

Serial No. 116–61

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ANTITRUST AND ECONOMIC OPPORTUNITY: COMPETITION IN LABOR MARKETS

Tuesday, October 29, 2019

House of Representatives

Subcommittee on Antitrust, Commercial and Administrative Law

Committee on the Judiciary
Washington, DC

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. David Cicilline [Chair of the subcommittee] presiding.

Present: Representatives Cicilline, Neguse, Johnson, Jayapal, Scanlon, McBath, Sensenbrenner, Buck, and Steube.

Staff Present: David Greengrass, Senior Counsel; John Doty, Senior Advisor; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Advisor; Amanda Lewis, Counsel; Joseph Van Wye, Professional Staff Member; Lina Khan, Counsel; Slade Bond, Chief Counsel; Matt Robinson, Counsel Daniel Flores, Minority Chief Counsel; and Andrea Woodard, Minority Professional Staff.

Mr. Cicilline. This Subcommittee will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone to our hearing on the state of competition in labor markets, and I'll now recognize myself for an opening statement.

Today's hearing is an opportunity to examine the state of competition in labor markets, as well as ways to promote the economic opportunity of hardworking Americans through the robust enforcement of our antitrust laws. Across the political spectrum, Americans know that the economy's not working for them. They feel it in every paycheck, every job application, and every credit card payment.

Nobel Laureate Joseph Stiglitz described this as, and I quote, "a widespread sense of powerlessness, both in our economic and political life. We seem no longer to control our own destinies," end quote. That's because for too long waves of consolidation have decimated jobs and wages, while rigging the economy against locally owned businesses, working families, and entrepreneurs. In the midst of this trend, there's overwhelming evidence that corporations are earning monopoly profits that aren't being reinvested in higher wages or our economy, threatening the financial security of working people.

As Professor Ioana Marinescu will testify today, because the majority of labor markets in the United States are highly concentrated, employers have market power and are able to pay lower wages than they would in the competitive market, while many workers are unable to find new jobs because there are few alternatives.

Simply put, in the absence of competition, employers have virtually no incentive to pay fair wages to attain workers or attract new talent, and workers are trapped in low-paying jobs. While the effects of economic concentration have been devastating for nearly all workers, it most severely harms workers in vulnerable groups, such as women and people of color who have less bargaining power against wage discrimination and other forms of workplace inequality.

Today's hearing is also an opportunity to examine anticompetitive conduct in labor markets such as the widespread and growing use of noncompete and no-poach agreements. According to a 2015 report by the Treasury Department, nearly 30 million working Americans at all levels of employment are covered by noncompete clauses. As the Treasury Department reported, these restraints, and I quote, prevent workers from finding new employment, even after being fired without cause, and are widespread even among workers who do not possess trade secrets, such as workers in the fast-food industry.

Since then, more recent economic data indicates that noncompetes have become even more prevalent across a variety of occupations. For example, 30 percent of hairstylists, 42 percent of engineers, and 45 percent of physicians are covered by noncompetes, according to a study by Professor Evan Starr. There's also no shortage of examples of employers colluding at the expense of workers through the use of no-poach clauses in employment contracts.

Even though these restraints are criminally illegal, no-poach clauses appear in everyday employment contracts, including nearly 60 percent of agreements among major franchises in the United States, driving down wages and preventing workers from moving to better job opportunities.

Finally, today's hearing is also an opportunity to examine the effects of occupational licensing requirements on everyday workers. Today, nearly a third of jobs require licensure, including many jobs that have little impact on public health or consumer safety. Although there are many benefits associated with establishing credentials for professions, particularly those with important public health and safety considerations, excessive licensing can create barriers to entering the workplace, impose additional costs on workers, and result in job losses.

Moreover, because these standards differ by state, licensing barriers can disproportionately harm military families which are 10 times more likely to relocate across state lines than other working families.

As the late economist Alan Krueger explained, the most common jobs for military spouses are nurses and teachers who often have to get licensed in the new state when they move, pay a licensing fee, and by the time they're permitted to work in those state, they often move again. Even worse, many states have begun weaponizing these requirements as leverage to collect educational debt, suspending or even seizing these licenses from firefighters, nurses, teachers, psychologists, barbers, lawyers, real estate brokers, and others who fall behind on student loan payments. According to a *New York Times* investigation in 2017, there are at least 8,700 cases in which licenses were taken away or put at risk of suspension in recent years, although that tally almost certainly understates the true number.

On the other hand, as Professor Frank Pasquale and Sandeep Vaheesan have written, several occupations could benefit from more training requirements, not less, and there are important goals other than consumer welfare that licensing can promote, such as stable employment in decentralized private power.

In closing, I look forward to hearing testimony from our esteemed panel of witnesses on these matters and those potential paths forward for fixing these problems. I firmly believe that it's imperative that we explore every path for creating economic opportunity for all working Americans. This must be our top national priority.

With that, I now recognize the gentleman from Wisconsin, the Ranking Member of the Subcommittee, for his opening statement.

Mr. SENSENBRENNER. Thank you, Mr. Chair.

Today we conduct oversight of a critical area of antitrust concern: The intersection of labor and antitrust issues. As we look at the relevant labor issues, it is important that we first take a step back and look at the overall strength of the labor scene in our economy.

I am happy to say that today the outlook for labor is very good. Since election day 2016, America's economy has added 6.4 million jobs. Our unemployment rate is lower today than it has been since May of 1969, over 50 years ago. That is historically good news.

As we measured in the third quarter of 2019, nearly 75 percent of workers entering employment were coming, not moving from among unemployed workers, but from entirely outside the previous labor force. That is in no spark because the Trump economy and the Administration for some time now the number of unemployed people has been lower than the number of open jobs. This is tremendous news for American workers.

Another notable statistic is the trend in unemployment insurance claims. As of this September, those claims had remained below 300,000 for 329 consecutive weeks. This is the longest time since 1967, even though our labor force is twice the size of those 52 years ago.

I want to also highlight the success of the Administration's Pledge to American Workers initiative. This initiative asks companies to commit to expand programs to educate, train, and re-skill American workers. More than 300 companies have signed the pledge to date. These companies have committed to creating over 14 million new jobs and training opportunities over the next 5 years.

In short, a lot of good things are happening for America's workers and the young people who are about ready to enter the workforce. That being said, there are still issues for us to look at and potentially tackle through legislation.

Each of the issues we will examine today fits that description. These include occupational licensing, noncompete and no-poach agreements, and labor monopsony issues. In one way or another, each of these issues involves practices that can inhibit the mobility of labor. It would be a good thing if Members on both sides of the aisle could work together to find appropriate and commonsense ways to help workers move freely through the economy as they search for the work they most prefer.

I hope that our witnesses today can help us work our way through these important issues; and yield back the balance of my time.

Mr. CICILLINE. I thank the gentleman for yielding back.

We have two panels of witnesses today. It's now my pleasure to introduce today's first panel.

Our first witness is Federal Trade Commissioner Noah Phillips. Prior to his 2018 nomination and unanimous confirmation to the FTC, he served as chief counsel to Senator John Cornyn on the Senate Judiciary Committee from 2011 to 2018. In this role, he advised the Senator on issues involving antitrust, constitutional law, consumer privacy, and intellectual property. Commissioner Phillips is also an experienced litigator, having worked at both Cravath, Swaine & Moore, as well as Steptoe & Johnson, before his tenure with Senator Cornyn. Commissioner Phillips received his A.B. from Dartmouth College and his J.D. from Stanford Law School.

Our second witness, Doha Mekki, is counsel to the Assistant Attorney General at the United States Department of Justice. She joined the Antitrust Division in 2015 as a trial attorney in the Defense, Industrials, and Aerospace Section, where she litigated merger challenges in the rail, commercial vehicle, and aviation industries. Previously, she was an antitrust associate at Crowell & Moring, LLP. Ms. Mekki received her A.B. from Duke University and her J.D. from the University of Pennsylvania Law School.

I'd now like to recognize the gentlelady from Washington, Ms. Jayapal, to introduce our third witness.

Ms. JAYAPAL. Thank you, Mr. Chair.

It's a particular privilege and honor to introduce a constituent of mine and also I would say the Attorney General of the state of Washington as a constituent of mine. We're so proud of the work that the State Attorney General's Office is doing.

So, our third witness today is Washington Assistant Attorney General Rahul Rao from the State Office of the Attorney General. Mr. Rao is a key member of the State Attorney General's Antitrust Division, which has eliminated no-poach clauses from over 150 corporate chains in about 160,000 locations in the United States. Mr. Rao clerked for the Honorable Eric T. Washington on the D.C. Court of Appeals and has worked at major firms, including McDermott Will & Emery and Morgan, Lewis & Bockius.

Mr. Rao, we're very grateful to you for making the long trip today to be with us.

Mr. Chair, I would just again say that our State Attorney General's office has done tremendous work on civil rights, on consumer protection, and, of course, on antitrust. So, we're delighted to have a witness from there today.

Thank you.

Mr. CICILLINE. Thank you very much.

We welcome all our distinguished witnesses on the first panel and thank them for participating in today's hearing.

Now if you would please rise, we will begin by swearing you in. Please raise your right hand.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

Thank you.

Let the record show the witnesses answered in the affirmative. Thank you. You may be seated.

Please know that each of your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in 5 minutes. To help you stay within that time, there's a timing light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals your 5 minutes have expired.

I will begin with you, Commissioner Phillips. You are recognized for 5 minutes.

TESTIMONY OF THE HONORABLE NOAH PHILLIPS

Mr. PHILLIPS. Chair Cicilline, Ranking Member Sensenbrenner, Members of the subcommittee, thank you for the opportunity to appear before you today. Let me just begin by noting it is something today to sit here with the portrait of Mr. Conyers looking down.

My name is Noah Phillips, and I serve as a Federal Trade Commissioner. I commend you for convening this hearing to discuss policy issues that bear directly on a pressing problem facing American workers.

America has a labor mobility problem. For the past several decades, workers in America have been increasingly unlikely to move new places and start new jobs, even in the same location. That is not what we might expect since the costs of transportation have declined and the costs of communication reduced essentially to zero.

This decline in American labor mobility is bad for workers and for the country as a whole. When Americans can move, they can adjust to changing economic or life circumstances, the prospect of opening a business, getting a better job, or moving to help a family member. Labor mobility isn't just about leaving the job you want tomorrow; it's about making the job you have today better. When you can leave a job, you have greater leverage to improve conditions, including to demand a higher wage.

When workers cannot move, they have less leverage. So, it is not surprising that scholars point to declining labor mobility as a culprit in slow wage growth. One important solution is competition. The more options workers have, the more firms effectively compete for their labor. Policies that favor labor mobility increase that competition. Policies that inhibit mobility reduce it.

Labor mobility stokes commerce and innovation. It reduces inequality, as people who are less well-off can move to areas where the benefits of economic growth are more broadly shared. People get bigger raises when they switch jobs than when they stay put. As Yale Law School Professor David Schleicher describes in his article "Stuck!", labor mobility allows the Federal economic policies we choose, whatever they are, to work better, as it brings our national economy together. This isn't about labor versus capital, splitting the pie a different way. It's about matching workers with employers, increasing the productivity of businesses, empowering workers, and growing the pie for everyone.

All of that is why I'm so eager to be here today to talk about occupational licensing, no-poach agreements, and noncompete agreements, the risks they pose, and how the FTC is approaching them. I'll focus in my oral statement on occupational licensing and noncompetes.

Licensing has a role to play in protecting health and safety, but studies suggest that some 25 to 30 percent of the U.S. workforce is now employed in occupations requiring a license, often in areas where the need for licensing is not apparent. Like the guilds of old, licensing regimes can impede competition and keep people from pursuing the work they want. Scholars estimate they reduced employment by nearly 3 million jobs and cost consumers over $200 billion. That may be good for incumbents and those who make money off licensing, but it's bad for consumers. It is also bad for workers, especially the most vulnerable, the marginal worker, the young person who wants to start their career, the servicemember and their spouse.

Part of the problem is that states empower members of professions to erect barriers around themselves. When the North Carolina Board of Dental Examiners tried to ban teeth-whitening services sold to drugstores, the FTC pushed back, and the Supreme Court agreed.

Our competition advocacy continues today. For example, in an amicus brief filed this month with DOJ in the SmileDirect case, on noncompetes, Members of the House and Senate and State legislatures are devoting increased attention and skepticism to noncompete agreements. English common law was similarly skeptical, deeming them great abuses by employers that threatened workers with the loss of livelihood and society by depriving it of a useful member. Today, the enforceability of noncompetes is a matter of state law which varies widely.

Noncompetes can serve good purposes, incentivizing investment in workers and protecting trade secrets, worthy goals in our knowledge-based economy, but they also reduce labor mobility. A recent Treasury Department study found noncompetes associated with both lower wage growth and lower initial wages. Research reveals a surprising prevalence of noncompetes across the economy. We do not know if they have been increasing in frequency, but they are certainly more ubiquitous than we thought, and occur where the justifications for them are not obvious. That concerns me.

The FTC is putting together a workshop on noncompetes. We will consider both competition and consumer protection issues and what Federal approach is warranted. Labor mobility is a complex issue, and examining the inputs to it from both sides has a better chance of contributing to a thoughtful response that will improve a lot of American workers and the nation as a whole.

Thank you.

[The statement of Mr. Phillips follows:]

PREPARED STATEMENT OF

COMMISSIONER NOAH JOSHUA PHILLIPS*

of the

FEDERAL TRADE COMMISSION

on

ANTITRUST AND ECONOMIC OPPORTUNITY: COMPETITION IN LABOR MARKETS

Before the

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW

JUDICIARY COMMITTEE

U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

OCTOBER 29, 2019

* This written statement, my oral testimony, and my responses to questions reflect my views and do not necessarily reflect the views of the Commission or any individual Commissioner.

Chairman Cicilline, Ranking Member Sensenbrenner, Members of the Subcommittee, thank you for the opportunity to appear before you today. I commend you for convening this hearing to discuss policy issues that bear directly on a pressing problem facing American workers.

America has a labor mobility problem. For the past several decades, workers in America have been increasingly *un*likely to move to new places and start new jobs,[1] or even to switch jobs in the same location.[2] That is not what we might expect, since the costs of transportation have declined and the costs of communication reduced essentially to zero.

This decline in American labor mobility is bad for workers, and the country as a whole. When Americans can move, they can adjust to changing economic or life circumstances—the prospect of opening a business, getting a better job at a new company, or moving to help a sick parent or a child with a new baby, if they can find work. Labor mobility isn't just about leaving for the job you want tomorrow—it's about making the job you have today better. When you can leave a job, you have greater leverage to improve conditions, including to demand a higher wage.

When workers cannot move, they have less leverage; so it is not surprising that scholars point to declining labor mobility as a culprit in slow wage growth.[3] One important solution is

[1] Steven J. Davis & John Haltiwanger, *Labor Market Fluidity and Economic Performance* (Nat'l Bureau of Econ. Research, Working Paper No. 20479, Dec. 2014), https://www.nber.org/papers/w20479; Ryan Nunn, *Americans Aren't Moving to Economic Opportunity*, THE HAMILTON PROJECT: BLOG (Nov. 19, 2018), https://www.hamiltonproject.org/blog/americans_arent_moving_to_economic_opportunity.

[2] David W. Perkins, *Declining Dynamism in the U.S. Labor Market*, CONG. RESEARCH SERV. INSIGHTS (June 15, 2016), https://fas.org/sgp/crs/misc/IN10506.pdf (showing "churn" rates are in long-term decline).

[3] Alan Krueger, Opening Remarks at the Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century, No. 3: Multi-Sided Platforms, Labor Markets, and Potential Competition (Oct. 16, 2018), https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century. People already working in an industry protected by occupational licensing regulations will typically earn higher wages. *See e.g.*, Ryan Nunn, *How Occupational Licensing Matters for Wages and Careers*, THE HAMILTON PROJECT (Mar. 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_3152018_how_occupational_licensing_matters_for_wages_and_careers.pdf. However,

competition—the more options workers have, the more firms effectively compete for their labor. Policies that favor labor mobility increase that competition; policies that inhibit it—including occupational licensing, no-poach agreements, and non-compete agreements ("non-competes")—reduce it.

Labor mobility stokes commerce and innovation. It reduces inequality, as people who are less well-off can move to areas where the benefits of economic growth are being shared more broadly. It's worth noting: evidence shows that people get bigger raises when they switch jobs than they do when they stay where they are.[4] And, as Yale Law School professor David Schleicher describes in his article "Stuck!", labor mobility allows the federal economic policies we choose—whatever they are—to work better, as it brings our national economy together.[5] This isn't about labor versus capital, splitting the pie a different way. It's about matching workers with employers, increasing the productivity of businesses, empowering workers, and growing the pie for everyone.

All of that is why I am so eager to testify today about occupational licensing, no-poach agreements, and non-competes, the risks they pose, and how the FTC is approaching them.

Occupational licensing

All of us are familiar with professions that require licenses, like medicine and law. And licensing has a role to play in protecting health and safety. But studies suggest some 25-30% of the U.S. workforce is now employed in occupations requiring a license—often in areas like hair-

all those who are unable to enter the field are hurt. Non-compete agreements also result in reduced wages. *See* Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements* (Sept. 10, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452240.

[4] Bourree Lam, *The Special Few Who Are Getting Raises in this Economy*, THE ATLANTIC (Feb. 8, 2016), https://www.theatlantic.com/business/archive/2016/02/job-switchers-raise/460044/.

[5] *See generally* David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 1 (2017).

braiding or makeup application, where the need for licensing is less apparent.[6] Like the guilds of old, licensing regimes can impede competition and keep people from pursuing the work they want. Morris Kleiner and Alan Krueger estimated they reduced employment by nearly *three million* jobs, and cost consumers over $200 billion.[7] That may be good for incumbents[8], who are shielded from competition,[9] and those who make money off licensing, like for-profit and other occupational schools,[10] but it's bad for consumers,[11] raising prices, dampening innovation, and making markets less responsive to consumer demand. It is also bad for workers, especially the most vulnerable: the marginal worker, the young person who wants to start their career, the service-member or their spouse. Occupational licensing leaves these workers stuck.[12]

Part of the problem is that states empower members of professions to erect barriers around themselves: the fox guarding the henhouse.[13] When the North Carolina Board of Dental Examiners tried to ban low-cost teeth-whitening services sold at drugstores, the Federal Trade

[6] U.S. DEP'T OF THE TREASURY, COUNCIL OF ECON. ADVISORS & DEP'T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS 6 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf; Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. 173 (2013); Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 2 (2010).

[7] Morris M. Kleiner, Alan B. Krueger & Alex Mas, *A Proposal to Encourage States to Rationalize Occupational Licensing Practices: A Proposal to the Brookings Institution Hamilton Project* (Apr. 1, 2011), https://www.hhh.umn.edu/file/9441/download; *see also* Morris M. Kleiner & Evan J. Soltas, *A Welfare Analysis of Occupational Licensing in US States* (Nat'l Bureau of Econ. Research, Working Paper No. 26383, Oct. 2019), https://www.nber.org/papers/w26383.pdf.

[8] U.S. DEP'T OF THE TREASURY, COUNCIL OF ECON. ADVISORS & DEP'T OF LABOR, *supra* note 6 at 12.

[9] Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSP. 189, 192 (2000) ("The most generally held view on the economics of occupational licensing is that it restricts the supply of labor to the occupation and thereby drives up the price of labor as well as of services rendered."); *see also* Carolyn Cox & Susan Foster, Bureau of Econ., *Fed. Trade Comm'n, The Costs and Benefits of Occupational Regulation* 21-36 (1990), http://www.ramblemuse.com/articles/cox_foster.pdf.

[10] U.S. DEP'T OF THE TREASURY, COUNCIL OF ECON. ADVISORS & DEP'T OF LABOR, *supra* note 6, at 12.

[11] *Id.* at 14.

[12] Schleicher, *supra* note 5, at 117-122.

[13] *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1114 (2015).

Commission pushed back on antitrust grounds.[14] The Supreme Court agreed, holding that "state action immunity" only applies to state professional boards where there is (i) a clear state policy to displace competition; and (ii) active state supervision.[15] Our competition advocacy continues today, for example in an amicus brief filed this month with DOJ in the SmileDirectClub case. This is important work, but it's also important to note that, at the end of the day, states control licensing regimes, and can limit competition if they choose. Antitrust has a role, but it is limited.

No-Poach Agreements

A no-poach agreement is when two or more companies agree to restrict hiring or recruitment efforts. That impedes labor mobility. In 2016, the FTC and DOJ released Antitrust Guidance for Human Resource Professionals, which addressed concerns like no-poach agreements and put firms on notice that they may face criminal or civil liability.[16] The FTC has continued its work in this area, last year going after two small home health agencies in Texas that tried but failed to set wages.[17] We will remain vigilant. The Department of Justice's Antitrust Division is doing important work in this area, bringing cases and warning employers that they will be prosecuted for per se violations criminally.[18]

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[14] *Id.* at 1108-9.

[15] *Id.* at 1113-4; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-6 (1980).

[16] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 2 (2016).

[17] Complaint, In the Matter of Your Therapy Source, Neeraj Jindal and Sheri Yarbray, FTC Matter No. 171-0134 (July 31, 2018), https://www.ftc.gov/system/files/documents/cases/1710134_your_therapy_source_complaint_7-31-18.pdf.

[18] *U.S. v. Knorr-Bremse AG and Westinghouse Air Brake*, 1:18-cv-00747-CKK (D.D.C. July 11, 2018) (settlement with rail equipment companies who engaged in naked no-poach agreements); U.S. DEP'T OF JUSTICE, DIVISION UPDATE SPRING 2019, NO-POACH APPROACH (Sep. 30, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach.

Non-Compete Agreements

Non-competes are contractual terms in which the worker promises their employer some limitation on the worker's labor, generally after their employment ends. Members of the House and Senate, and state legislators, are devoting increased attention—and skepticism—to non-competes. English common law was similarly skeptical, deeming them "great abuses" by employers that could lead to "the loss of [one's] livelihood and the subsistence of his family" and an abuse against society "by depriving it of a useful member".[19] Today, the enforceability of non-competes is a matter of state law, which varies widely. California generally prohibits non-competes.[20] Oregon voids them for lower-wage workers.[21] Hawaii prohibits them for tech workers.[22] Non-competes can serve good purposes, incentivizing investment in workers and protecting trade secrets—worthy goals in our increasingly knowledge-driven economy.[23] Note, however, the work of Stanford Law professor Ronald Gilson, who attributes the innovation boom in California to the cross-pollination of ideas stoked by that state's prohibition.[24]

But non-competes also reduce labor mobility. A 2016 study by the Department of the Treasury found that non-competes are "associated with both lower wage growth and lower initial

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[19] *Mitchel v. Reynolds*, 1 P. Wms. 181, 189 24 Eng. Rep. 347, 350 (K.B.1711). *See also* Daniel P. O'Gorman, *Contract Theory and Some Realism About Employee Covenant Not to Compete Cases*, 65 SMU L. REV. 145, 185 (2012).

[20] *See, e.g.*, CAL. BUS. & PROF. CODE § 16600 (West 2019).

[21] OR. REV. STAT. ANN. § 653.295 (West 2019).

[22] HAW. REV. STAT. ANN. § 480-4 (West 2019).

[23] Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force* 8 (Univ. of Michigan Law & Econ. Research, Paper No. 18-013, Sep. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714. Note that the authors find that there is only an increase in training when workers are notified of the non-compete before accepting the job offer. *Id.* at Table 7.

[24] Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999). Note, however, that California's restrictive approach to non-competes may have led firms to engage in no-poach arrangements, which are more problematic from a competition perspective and are not even apparent to the workers.

wages".[25] Professor Evan Starr and his colleagues have revealed a surprising prevalence of non-competes across the economy.[26] We do not know if they have been increasing in frequency; but they are certainly more ubiquitous than we thought and occur in contexts where the justifications for non-competes are not obvious, for example some twelve percent of workers earning less than $40,000 per year,[27] or seasonal Amazon warehouse workers.[28] That concerns me.

The FTC is putting together a workshop to examine non-competes. We will consider both the competition and consumer protection implications of different kinds of non-competes, and what federal approach is warranted.[29] Labor mobility is a complex issue, and examining the inputs to it from both sides has a better chance of contributing to a thoughtful response that will improve the lot of American workers and the nation as a whole.

Labor Monopsony and Mergers

The forces that impede labor mobility can contribute to market power that firms have over workers. The FTC and DOJ have long been concerned about monopsony power generally, incorporating it into the Merger Guidelines in 1992.[30] And scholars like Ioana Marinescu have

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[25] U.S. DEP'T OF THE TREASURY, COUNCIL OF ECON. ADVISORS & DEP'T OF LABOR, *supra* note 6 at 19.

[26] Starr, et. al., *supra* note 23 at 17.

[27] U.S. DEP'T OF THE TREASURY, COUNCIL OF ECON. ADVISORS & DEP'T OF LABOR, *supra* note 6 at 3.

[28] Spencer Woodman, *Exclusive: Amazon makes even temporary warehouse workers sign 18-month non-competes*, THE VERGE (Mar. 26, 2015), https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts.

[29] Although we are still exploring the appropriate policy toward non-competes in general, the agency has long understood that non-competes in specific contexts can hinder entry and expansion and has taken them into account in merger review. *See* Complaint at ¶ 4, In the Matter of Visant Corp., Jostens, Inc., and Am. Achievement Corp., No. 9362 (F.T.C. Apr. 17, 2014), https://www.ftc.gov/system/files/documents/cases/140417visantcmplt.pdf; Complaint at ¶ 70, In the Matter of Sysco Corp., USF Holding Corp., and US Foods, Inc., No. 9364 (F.T.C. Feb. 19, 2015), https://www.ftc.gov/system/files/documents/cases/150219syscopt3cmpt.pdf; Complaint at ¶ 12, In the Matter of American Renal Associates, Inc., and Fresenius Med. Care Holdings, Inc., No. 4202 (F.T.C. Sep. 7, 2007), https://www.ftc.gov/sites/default/files/documents/cases/2007/09/070907complaint.pdf.

[30] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 0.1 (1992); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 12 (2010). As a routine part of our merger investigations, we continually look for instances in which monopsony power might be used to drive down input prices. For example, the FTC recently required global health care company Grifols S.A. to divest blood plasma

brought increased attention to the notion that labor monopsony concerns deserve more attention from antitrust regulators. Last year, the FTC's Hearings on Competition and Consumer Protection in the 21st Century included several expert panels on labor monopsony and the role of antitrust in labor markets, to challenge and update our thinking on these issues. As a result, the FTC has now made it standard practice to screen for harms from enhanced labor monopsony power as part of every merger review. This process has just begun.

Whatever our merger investigations and the continued research on the effects of mergers on labor monopsony yield, mergers by themselves are unlikely to explain the declining share of national income that is captured by workers.[31] Labor mobility must be a central part of this discussion.

Thank you, and I look forward to your questions.

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collection centers in three U.S. cities, among other conditions, to resolve charges that Grifols' acquisition of Biotest US Corporation would be anticompetitive. Decision & Order, In the Matter of Grifols, S.A., and Grifols Shared Services North America, Inc., No. C-4654 (F.T.C. Sept. 18, 2018), https://www.ftc.gov/system/files/documents/cases/181_0081_c4654_grifols-biotest_decision_and_order_9-18-18.pdf. The FTC's administrative complaint alleged that Grifols and Biotest were the only two buyers of human source plasma in three U.S. cities, and that these three cities constituted relevant geographic markets because plasma donors typically do not travel more than 25 minutes to donate plasma. Without the divestitures, Grifols likely would have been able to exercise market power by unilaterally decreasing the donor fees in the three cities. Complaint at ¶¶ 11, 16, In the Matter of Grifols, S.A., and Grifols Shared Services North America, Inc., No. C-4654 (F.T.C. Sept. 18, 2018), https://www.ftc.gov/system/files/documents/cases/181_0081_c4654_grifols-biotest_complaint.pdf.

[31] *See e.g.*, Guy Rolnik, Labor Market Monopsonies and the Decline of the Labor Share: Q&A with Sandra Black, U. OF CHICAGO BOOTH SCH. OF BUS., STIGLER CTR.: PRO-MARKET BLOG (Jan. 6, 2017), https://promarket.org/labor-market-monopsonies-decline-labor-share-qa-sandra-black ("Market concentration is one way that firms might be able to gain wage-setting power through behaviors such as collusive wage-setting. That would be one example. But there are a number of other ways that firms could have wage-setting power, even in the absence of product market concentration").

Mr. CICILLINE. Thank you, Commissioner Phillips.

I now recognize Ms. Mekki for 5 minutes.

TESTIMONY OF DOHA MEKKI

Ms. MEKKI. Thank you.

Chair Cicilline, Ranking Member Sensenbrenner, and distinguished Members of the subcommittee, thank you for holding this hearing on competition labor markets. I am honored to offer the Department's perspective during this critical moment for the American worker. It is also my privilege to appear with my enforcement colleagues, Noah Phillips and Rahul Rao.

Today's topic could not be more timely or important. Much of the Division's recent work in this area is reflected in my written testimony. Therefore, I'd like to use my time this morning to make just a few observations about competition and labor markets.

As the Subcommittee considers labor competition matters, I hope you will always start with the principle that there's something special about work. Today, we'll talk about the aspects of work that are rooted in economic value and bargaining power, but it's important to remember that labor is also an expression of identity or values. For many Americans, their work is essential to their dignity and purpose.

I know as much firsthand. I joined the Department in 2015, as the Chair noted, and nothing I've done professionally has been more worthwhile than investigating and litigating anticompetitive mergers and conspiracies, including collusive agreements and labor markets that harm workers. Representing the American people has been the honor of my life.

For some, their first exposure to labor competition matters was the issuance of the DOJ and FTC Antitrust Guidance to Human Resource Professionals in 2016. Of course, our labor antitrust enforcement didn't actually begin with the issuance of the guidance. The Division has for years challenged anticompetitive conduct in transactions in labor markets. Between 2010 and 2012, for example, the Division sued eight Silicon Valley firms for entering into unlawful no-poach agreements. In 2016, the Division challenged the proposed merger of Anthem and Cigna in part based on the ability of the merged firm to suppress reimbursement rates to healthcare providers. The Division has also challenged unlawful wage fixing and information exchange.

Our experience in labor matters crystalized important principles and helped set out the Division's priorities in this area. Let me focus on four of them.

First, there is no faithful reading of the antitrust laws that excludes competition for the American worker. Congress understood corporate power broadly. The idea that it can harm workers rests in the foundations of U.S. antitrust laws. Senator John Sherman of Ohio, for whom our first antitrust law was named, warned that monopoly power commands the price of labor without fear of strikes for in its field it leaves no competitors.

Today, there should be no serious doubt that the antitrust laws seek to preserve the free market opportunities of buyers and sellers, including workers who sell their employment services. Antitrust enforcement and labor markets can go a long way towards restoring the bargaining power of workers that was lost due to anticompetitive restraints or monopsony power. Such action is not only grounded in the Rule of law, but faithful to Congress' intent.

Second, agreements that limit worker mobility and suppress wages are found across economic sectors and geographies, and they do not discriminate with respect to the skill, education, or earnings of workers. Anticompetitive no-poach agreements are classic restraints on worker mobility that distort the normal bargaining and price-setting mechanisms that would otherwise apply in the labor context. They sometimes prohibit cold calling, soliciting, recruiting, or hiring of employees without permission. When these agreements are naked, meaning when they serve no purpose but to stifle competition, they are considered, *per se*, illegal.

Beginning in October 2016, the Division announced that it intends to criminally prosecute naked no-poach and wage-fixing agreements because they eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers for territories, which the Division prosecutes criminally.

After his confirmation in September 2017, AAG Delrahim confirmed that under his leadership, the Division would remain committed to the criminal prosecution of labor market conspiracies, and for the first time in recent history, he created a role in the front office for a lawyer to focus on labor competition matters, including criminal enforcement therein.

Inaction is not a price the public can afford. So, while the time and resources required to build criminal cases is intensive, corporate and individual liability is necessary to punish criminal conspiracies and deter their occurrence.

Third, the Division continues to identify ways to detect and challenge transactions that harm competition and labor markets. In particular, the Division has been busy developing potential screens, including document and information requests and improved search and review technologies, to help agency staff detect mergers that are likely to create or enhance monopsony power.

Finally, continued study and research about competition labor markets helps improve our enforcement. The Division continues to think about ways to identify gaps in the legal and economic literature and incentivize areas for continuing study.

Thank you again for the opportunity to testify. The Department looks forward to working with the Subcommittee on these important issues.

[The statement of Ms. Mekki follows:]

Department of Justice

STATEMENT OF

DOHA MEKKI
COUNSEL TO THE
ASSISTANT ATTORNEY GENERAL
OF THE
ANTITRUST DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

FOR A HEARING ENTITLED

"ANTITRUST AND ECONOMIC OPPORTUNITY: COMPETITION IN LABOR MARKETS"

OCTOBER 29, 2019

STATEMENT OF DOHA MEKKI
COUNSEL TO THE ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW

FOR A HEARING ENTITLED
ANTITRUST AND ECONOMIC OPPORTUNITY:
COMPETITION IN LABOR MARKETS

OCTOBER 29, 2019

Chairman Cicilline, Ranking Member Sensenbrenner, and distinguished members of the Subcommittee, thank you for holding this hearing on competition in labor markets. I am honored to offer the Antitrust Division's perspective during this critical moment for the American worker.

Today's topic could not be more timely or important. While labor competition issues have attracted interest at various times in the history of antitrust enforcement, recent national interest in the topic likely has its roots in the aftermath of the 2008 Financial Crisis. As labor economists, scholars, and policymakers set out to understand why wage stagnation continued despite declining unemployment rates during the economic recovery, many stakeholders looked to antitrust for possible solutions. To be sure, the challenges facing the American worker are both complex and numerous. While antitrust is not a panacea for resolving every societal ill, it is undoubtedly an important tool for ensuring robust competition for workers.

Anticompetitive behavior and transactions are possible in a labor market just as they are in other markets. Accordingly, enforcers and courts alike have reaffirmed the important principle that antitrust law seeks to preserve the free market opportunities of both buyers and sellers of employment services. Indeed, the Antitrust Division of the U.S. Department of Justice (Division) has taken companies to court in order to give meaning to this fundamental proposition of law. As discussed *infra*, labor competition issues are a high priority for Assistant Attorney General Delrahim and for the Antitrust Division. We have devoted significant resources to enforcement and advocacy in this area recently.

The idea that unlawful corporate power can harm both buyers and sellers of labor rests in the foundations of U.S. antitrust law. In supporting the passage of the law that came to bear his name, Senator John Sherman of Ohio warned that monopoly power:

> [C]an control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break

> down competition and advance prices at will where competition does not exist. [...] The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, ***it commands the price of labor without fear of strikes***, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and . . . by the rule of both the common and the civil law, is null and void and the just subject of restraint by the courts, of forfeiture of corporate rights and privileges, ***and in some cases should be denounced as a crime, and the individuals engaged in it should be punished as criminals***.[1]

That corporate power can harm workers was not particularly novel even in 1890 when the Sherman Act was passed. More than 100 years earlier, the Scottish economist Adam Smith observed:

> We rarely hear, it has been said, of the combinations of masters; though frequently of those of workmen. But whoever imagines, upon this account, that masters rarely combine, is as ignorant of the world as of the subject. Masters are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labor above their actual rate.[2]

That Adam Smith is revered as the father of free-market economics and also someone who was rightly concerned about the position of workers[3] parallels an important point: there is no faithful reading of the law, economics, or the legislative history of the antitrust laws that excludes competition for the American worker. Where companies or individuals engage in anticompetitive conduct in a labor market, antitrust enforcers must quickly step in to enforce the law.

Thus, timely and effective antitrust enforcement in labor markets is not only grounded in the rule of law, but also faithful to Congress's intent.

<u>Labor Monopsony in Mergers</u>

The federal antitrust agencies encounter labor competition concerns in a variety of investigations, including investigations of proposed or consummated transactions. In merger investigations, the Division considers, among other things, whether a transaction is likely to enhance monopsony power in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

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[1] 21 Cong. Rec. 2457 (1890). (emphasis added).
[2] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* I.viii.13 (Glasgow Edition of the Works and Correspondence of Adam Smith, 1776).
[3] *See, e.g.*, Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* I.x.c.61 (Glasgow Edition of the Works and Correspondence of Adam Smith, 1776) ("Whenever the legislature attempts to regulate the differences between masters and their workmen, its counsellors are always the masters. When the regulation, therefore, is in favour of the workmen, it is always just and equitable; but it is sometimes otherwise when in favour of the masters.").

Monopsony power is, in essence, market power exercised by a buyer against sellers of a good or service. It is well-founded that mergers of competing employers can enhance buy-side market power, just as mergers of competing sellers can enhance sell-side market power.[4] Because labor is an input that merging parties buy, Division staff assess whether a proposed transaction would allow the merged firm to reduce competition substantially in a labor market and use its enhanced bargaining power to depress workers' wages and benefits, including salary, commissions, and reimbursements. This buy-side competitive effects analysis employs a similar framework as that used to evaluate sell-side competitive effects.[5]

The Division has, for years, taken enforcement action where mergers are likely to create or enhance monopsony power at the expense of workers. For example, in 2016, the Division filed a successful lawsuit to block the proposed merger of Anthem and Cigna, two companies that compete in the sale of health insurance. The Division alleged, among other things, that the merger should be blocked because it would allow the merged firm to suppress reimbursement rates to providers.[6] Several years earlier, the Division filed a consent decree imposing certain conditions on the merger of Aetna and Prudential Insurance on the grounds that the merged firm would have the ability to harm competition by giving Aetna the ability to depress physicians' reimbursement rates in certain markets. At the time the deal was announced, Aetna and Prudential were the largest and ninth largest health insurance companies in the United States, respectively.

These cases demonstrate that the consumer welfare standard is flexible enough to take into account harm to competition that is localized in an upstream labor market. And while there is often a symmetry between upstream and downstream harms, the law does not require evidence of harm to competition in a downstream product market for liability under Section 7.

The Division has also been busy developing and implementing screens to help agency staff detect mergers that are likely to create or enhance monopsony power in labor markets. Over the last 18 months, the Division has developed important new specifications for Second Requests and Civil Investigative Demands to determine whether a transaction will create or enhance labor monopsony. Moreover, the Division has leveraged improved search and review technology to identify labor competition concerns in merger and non-merger investigations.

Conspiracies and Coordinated Conduct

In addition to challenging labor monopsony in merger cases, the Antitrust Division has challenged anticompetitive agreements between employers under Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits contracts, combinations, and conspiracies that unreasonably restrain trade.

Historically, labor competition cases have comprised a smaller portion of the agencies'

[4] *See* Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines § 12 (2010) (providing that a buy-side competitive effects analysis need not be based strictly, or even primarily, on the basis of effects in downstream product markets in which the merging firms compete).
[5] *See id.*
[6] Complaint, *United States et al. v. Anthem Inc. et al.*, 16-cv-01493 (D.D.C. July 21, 2016).

civil non-merger and criminal dockets than enforcement actions involving tangible goods and services. And where there has been antitrust enforcement in labor markets, it has been uneven. While several early cases marshaled the antitrust laws against labor unions, in the modern era, enforcement in conduct cases has largely focused on collusive agreements, including anticompetitive no-poach and wage-fixing agreements, and unlawful information exchanges.

No-Poach & Wage-Fixing Agreements

A no-poach agreement is an agreement between two or more employers not to solicit, cold-call, recruit, interview, hire without permission, or otherwise compete for workers. It can be formal or informal, written or unwritten, and exist in any industry. A wage-fixing agreement is an agreement between two or more employers who compete for workers regarding employee salary, wages, benefits, or other terms of compensation, either at a specific level or within a range.

These types of agreements can be anticompetitive because they restrict worker mobility, and distort the normal bargaining and price-setting mechanisms that would otherwise apply in a labor context.

In 2007, the Division sued the Arizona Hospital and Healthcare Association, a trade group acting on behalf of Arizona hospitals that used a registry program to fix certain terms and conditions about temporary nursing personnel. It also set a uniform bill rate schedule that the hospitals would pay for temporary and per diem nurses.

Between 2010 and 2012, the Division sued Adobe, Apple, Google, Intel, Intuit, Lucasfilm, Pixar, and eBay for entering into unlawful no-poach agreements. In April 2018, the Division sued the world's largest train equipment manufacturers, Knorr-Bremse and Westinghouse Air Brake Technologies Corporation, for entering into unlawful no-poach agreements. As part of the resolution of that case, the companies were required to immediately halt their illegal conduct, enter into a broad seven-year injunction, and implement rigorous compliance and reporting obligations. Moreover, the Antitrust Division required the companies to notify employees, recruiters, and the industry at large of their settlement with the Division. In addition, the companies were required to cooperate in any future investigations by the Division into alleged no-poach agreements with other employers.

Criminal Enforcement of "Naked" No-Poach and Wage-Fixing Agreements

The Division has had significant experience investigating no-poach and wage-fixing agreements. That experience made clear that naked no-poach and wage-fixing agreements are indistinguishable from and eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers.[7] That conclusion is not merely formalistic but reflects consideration of the real harms that are likely to flow from such arrangements, including lower wages and reduced worker mobility. Moreover, they distort competition to the detriment of

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[7] It is well established that naked restraints of competition among horizontal competitors, such as price-fixing or market allocation agreements, are per se unlawful. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 48-50 (1990).

employees by depriving them of the chance to bargain for better job opportunities and terms of employment.

Further, market allocation agreements cannot be distinguished from one another based solely on whether they involve input or output markets.

Consistent with these precedents, the United States has challenged naked no-poach agreements that are not reasonably necessary to a separate, legitimate business transaction or collaboration as per se unlawful allocations agreements in labor markets under Section 1 of the Sherman Act – that is, without elaborate inquiry into the actual effects of the agreements.

Beginning in October 2016, the Division made a number of public announcements that it intends to prosecute naked no-poach and wage-fixing agreements criminally. In particular, the Division explained that it intends to proceed criminally against agreements that began or continued after October 2016. As a matter of prosecutorial discretion, the Division will resolve no-poach agreements that were entered into and terminated before that date by civil action. These public statements were made in order to give the public additional clarity regarding our intentions going forward.

Competitive labor markets require timely and effective antitrust enforcement. Inaction is not a price the public can afford. So while the time and effort required to build a criminal case is intensive, corporate and individual liability is also necessary to punish economic conspiracies and deter their recurrence.

The Division has a number of active criminal investigations into naked no-poach and wage-fixing agreements. While we cannot comment on the status or the timing of these investigations, I want to reaffirm that criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division.

Information Exchanges

Even in the absence of an express or implied agreement, companies can still violate the antitrust laws by sharing information with each other about terms and conditions of employment. For example, in *United States v. Utah Society for Healthcare Human Resources Administration*, the Division sued a group of human resource professionals at Utah hospitals for conspiring to exchange non-public prospective and current wage information about registered nurses. The exchange caused defendant hospitals to match each other's wages, keeping the pay of registered nurses in Salt Lake County and elsewhere in Utah artificially low.

Advocacy

The Division has also devoted its advocacy resources to studying labor matters and public education. Through illustrations and examples from prior enforcement actions, the Antitrust Guidance for Human Resource Professionals (Guidance) educates and informs human resource and business professionals about how antitrust law applies to hiring and compensation decisions. It affirms that workers are entitled to the benefits of a competitive market for their labor, and also encourages strong compliance programs and safeguards to prevent antitrust violations. The Guidance was intended to reach an audience that is broader than just antitrust practitioners and in order to increase deterrence, which helps preserve resources. Since then, the Division has participated in numerous lectures and panel discussions throughout the country to raise awareness about labor competition issues.

In March 2019, the Division filed a statement of interest in *Seaman v. Duke University* in order to address, among other things, the standard for judging the legality of alleged no-poach agreements under Section 1 of the Sherman Act.[8] The Division argued in its brief and through oral argument at a hearing on March 12, 2019, the Division argued that a naked no-poach agreement is a per se unlawful allocation agreement in a labor market.

Although the case settled shortly after the March hearing, the Division intervened in the litigation for the purpose of enforcing the injunctive relief provisions of the settlement, which bars unlawful no-poach agreements. This action allowed the Division to assist in providing crucial protections to workers without incurring the significant taxpayer resources that conducting its own, duplicative litigation would have entailed.

In addition on September 23, 2019, the Antitrust Division hosted a full workshop on competition in labor markets. By hearing from experts who focus on different aspects of worker welfare, the Division sought a more nuanced understanding of the marketplace for the employment services of the American worker, and for the role of antitrust enforcement therein.

In particular, the Division recognized the importance of gathering economists who focus on labor and industrial organization, antitrust practitioners, academics, and policymakers for a multi-dimensional discussion about the role of antitrust enforcement in labor markets. Not only did the workshop inform our competition enforcement and advocacy in labor markets, but it brought together stakeholders with diverse viewpoints. The workshop also helped identify and incentivize areas for continuing research and study. In our view, such discussions are an essential public good and the hallmark of an open society.

The workshop included, among other things, a presentation by Drs. Ioana Marinescu and Elena Prager, two scholars who have contributed to our understanding of labor market competition. We also invited thought-provoking speakers, like Professors Orley Ashenfelter and Sanjukta Paul, who discussed labor monopsony, employer collusion in franchise settings and the sharing economy, the competition concerns facing collegiate athletes, and the scope of the statutory and non-statutory labor exemptions for collective bargaining and other labor union activities.

The workshop was also held as the first event in a two-part series with the Federal Trade Commission (FTC). The next workshop will be hosted by the FTC and will focus on the legal, economic, and consumer protection issues associated with the use of non-compete clauses, and whether additional research would allow the agencies to better understand the short-term and long term micro and macro effects of such clauses. We look forward to working with the FTC

[8] Statement of Interest of the United States of America, *Seaman v. Duke University*, No. 1:15-cv-462 (M.D.N.C. Mar. 7, 2019), https://www.justice.gov/atr/case-document/file/1141756/download.

on this next workshop.

Thank you again for the opportunity to testify regarding the Antitrust Division's focus on competition for the American Worker. The Division looks forward to working with the Subcommittee on these important issues.

Mr. CICILLINE. Thank you very much.

I now recognize Mr. Rao for 5 minutes for his opening.

TESTIMONY OF RAHUL RAO

Mr. RAO. First, I would like to thank Congresswoman Jayapal for the kind words and introduction.

Chair Cicilline, Ranking Member Sensenbrenner, and all distinguished Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss important issues on competition and labor markets. I'm here on behalf of Attorney General Bob Ferguson, who appreciates the invitation to appear and regrets that he could not attend in person.

I'm proud to represent the state of Washington, which, while not alone among antitrust regulators in focusing on labor markets, has been on the forefront of labor competition enforcement. Without a doubt, the effort that has brought the most attention to Washington's leadership on labor competition is our initiative to end the nationwide use of no-poach provisions in franchise agreements. By their terms, franchise no-poach clauses prevent entities in a franchise system from hiring or recruiting employees of another entity within that same system.

Viewed through an antitrust lens, by limiting a potential employer's ability to recruit or hire, this restriction decreases competition for the labor of franchise employees, and this decrease in competition for labor has the potential to reduce opportunities and stagnate wages, benefits, and working conditions.

As these clauses restrict the recruiting or hiring decision of independent employers who would otherwise compete for the very same workers, they are horizontal restrictions between direct competitors for labor. Analogizing this to product markets, this type of agreement is akin to price fixing or market allocation, and like their product market analogs, we believe that anticompetitive provisions between competing employers are *per se* violations of antitrust law.

We launched our no-poach initiative in January 2018, and in less than 2 years, through our negotiations, have secured binding agreements from corporate chains representing over 160,000 locations throughout the United States to remove no-poach provisions from franchise agreements nationwide. This represents—this frees up competition for millions of workers throughout the country.

Although no-poach provisions for all workers raise the same antitrust concerns, low-wage workers, in particular, are uniquely vulnerable and victimized by reduction in labor competition. For low-wage workers, any marginal increase in competition we create for their labor has the potential to create direct, real, and meaningful benefits for those workers. Whether that competition results in better shifts, better benefits, better working conditions, or better wages, that competition creates real value that flows directly to those who need it most.

This is work we are very proud of. We have investigated hundreds of companies, negotiated over 150 agreements to remove no-poach clauses, sued one franchise system, and obtained a favorable settlement 2 months before trial, and are nearing the finish line of investigating the final 100 or so targets. As Attorney General Ferguson has said, our goal is to end no-poach practices, period.

On top of this initiative, we are also investigating noncompete agreements that some employers impose on workers, including low-wage or low-skilled work employees. And today, I am happy to announce that my office right now is filing a complaint and consent decree against a multilocation Washington coffee shop that uses oppressive noncompetes against all its employees, including its baristas. As set forth in our complaint, this noncompete is an unfair method of competition.

Noncompetes used against employees such as baristas serve no legitimate purpose. All they do is stifle competition for labor. An employer that uses noncompetes to eliminate its competitors' access to workers has less incentive to compete to retain those employees. Importantly, these types of noncompetes don't just harm workers; they also harm competing employers by depriving them the opportunity to hire available, qualified employees. When done simply to decrease competition for labor, noncompetes present an unfair method of competition.

Finally, I want to reaffirm my office's commitment to evaluating merger effects in merger reviews, including those reviews we do alongside the Federal regulators. Because labor is inherently localized, state attorneys general are uniquely positioned to identify and evaluate mergers with companies who may not necessarily compete or raise monopoly concerns in outbound product markets but may still compete for employees and raise monopsony concerns in a local inbound labor market. We and 17 other state attorneys general set forth the need to evaluate labor markets and merger reviews in public comments submitted to the FTC earlier this year.

In closing, Washington state looks forward to working with the subcommittee, the Department of Justice, the Federal Trade Commission, and other state regulators as we all further explore efforts to preserve free and open competition in labor markets.

Mr. Chair, thank you for your time, and I look forward to your questions.

[The statement of Mr. Rao follows:]

Written Testimony of
Assistant Attorney General Rahul Rao
Office of the Attorney General of the State of Washington
Antitrust Division

Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust, Commercial and Administrative Law

Hearing on
Antitrust and Economic Opportunity: Competition in Labor Markets

October 29, 2019

Chairman Cicilline, Ranking Member Sensenbrenner, my home-city Congresswoman Jayapal, and all distinguished Members of the Subcommittee, thank you for holding this hearing, and thank you for the opportunity to appear before you today to discuss important, yet historically under-looked, issues on competition in labor markets.

My name is Rahul Rao. I am an Assistant Attorney General in the Antitrust Division for the Washington State Office of the Attorney General. Within the Antitrust Division, I am part of a team responsible for our office's labor competition enforcement and litigation efforts, including our office's initiative to end the nationwide use of no-poach clauses in franchise agreements. This initiative has eliminated no-poach clauses—restrictive provisions on labor mobility and competition—from over 150 corporate chains, representing about 160,000 locations in the United States, and positively impacting *millions* of workers throughout the country. I have spoken on labor competition issues at a public workshop hosted by the U.S. Department of Justice's Antitrust Division, to the Antitrust Committee of the National Association of Attorneys General, and at a conference hosted by the American Bar Association. I would also like to take a moment to acknowledge that my office's work in this space is truly a team effort, and would not be possible without my fellow Assistant Attorneys General and incredible support staff.

As a leader in labor competition enforcement, the Washington Attorney General's Office is pleased to see this Subcommittee's bipartisan commitment to affirming the uncontroversial, but sometimes overlooked, truism that our nation's antitrust laws apply as equally to labor markets as they do to product markets. This principle is now seeing renewed vigor, in part because of new research and data coming from those in academia—including by labor economists—that give us a better understanding of labor market concentration and anticompetitive labor practices and effects. But more importantly, the enforcement community as a whole recognizes that we can do more. My office has been at the forefront of labor competition enforcement, and I come here today to tell you a bit about the things we have seen and the work we are doing.

Initiative to Eliminate No-Poach Clauses in Franchise Agreements

The matter that has brought the most attention to the Washington Attorney General's labor competition efforts is our office's initiative to end the use of no-poach clauses in franchise agreements nationwide.

The no-poach provisions we are investigating are covenants in lengthy franchise agreements—agreements between a franchisor and a legally distinct and independent franchisee—that restrict employee mobility among locations within the same franchise system. Typically, employees of the franchisee never see this provision and are not even aware that it exists.

No-poach provisions can come in different shapes and sizes. For example, some no-poach provisions plainly prohibit the hiring of another location's employees, while others may prohibit the recruitment—for example, through solicitation or inducement—of another location's employees. Similarly, some no-poach provisions only prevent the poaching of a franchisor's employees. Some protect only company-owned locations. Some only restrict franchisees from hiring or recruiting other franchisee employees. And finally, some no-poach provisions are "all of the above." Importantly, as these no-poach provisions exist in agreements between franchisor and franchisee—and not in the employment agreement between an employer and employee—they are often times invisible to those whose mobility is actually being restricted.

Notwithstanding their many forms, all no-poach provisions have the same effect: they artificially restrict competition for labor. By restricting franchise entities' ability to hire or recruit new employees, no-poach provisions decrease competition for the labor of franchise employees. This decrease in competition for labor has the potential to lead to reduced opportunities and stagnant wages. It can also diminish competition for better benefits and working conditions.

The use of no-poach provisions in franchise agreements first came to our office's attention from a September 2017 New York Times article titled "Why Aren't Paychecks Growing? A Burger Joint Clause Offers a Clue."[1] That article asked the question why wages were stagnating across the country's economy, specifically looking at low-wage employees in fast food and quick serve restaurants. Underlying that New York Times article was research by leading labor economists—Alan Krueger and Orley Ashenfelter, both of Princeton University—suggesting that downward pressure from no-poach agreements may be partly responsible for the stagnating wages.[2]

Finding Professors Krueger and Ashenfelter's conclusions compelling and concerning, our office took their research and viewed it through the lens of the antitrust laws. Despite the vertical nature

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[1] Rachel Abrams, *Why Aren't Paychecks Growing? A Burger Joint Clause Offers a Clue*, New York Times, September 27, 2017, *at https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html.*

[2] Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (September 28, 2017), Working Paper #614, Princeton University Industrial Relations Section, *at https://dataspace.princeton.edu/jspui/handle/88435/dsp014f16c547g.*

of a franchisor and its franchisees related to their product market, those same entities—entities that are independent corporations—were still horizontal competitors for workers in a labor market. Indeed, the no-poach provision itself—which only make sense if the two parties to the agreement are trying to employ the same worker—should be all that is necessary to evidence the direct horizontal nature of that competition. As a naked restraint of trade among horizontal competitors for labor, our office concluded that these no-poach provisions are per se illegal under the antitrust provisions of Washington State's Consumer Protection Act.

With this research and legal analysis, we began to investigate franchise systems' use of no-poach provisions in January 2018. Within seven months of launching our investigation, we secured legally binding agreements, in the form of an Assurance of Discontinuance (AOD), from seven fast food franchisors to immediately stop enforcing and eliminate no-poach clauses from their franchise agreements nationwide.[3] The AOD also requires the franchisor to provide notice of the agreement nationwide to the entire franchise system. This notice ensures that all franchisees know that they are no longer subject to the restriction.

To be clear, we did not begin our initiative in the fast food industry because we thought antitrust law uniquely applied to no-poach provisions in this specific labor market. While our investigation initially focused on the fast food industry, where the majority of workers tend to make minimum wage and may be especially vulnerable to anticompetitive practices that artificially suppress their wages, we believe that all no-poach provisions in franchise agreements are per se violations of Washington's antitrust laws, and its federal analogues.

Thus, we have or are investigating all franchise systems that have a significant presence in Washington State. To-date, we have investigated hundreds of franchise systems, and are still actively investigating a little over 100 companies. On a macro level, based on our investigation, we estimate that the majority franchise systems currently have or recently had a no-poach provision in their franchise agreement. For the minority of franchise systems that have never used a no-poach provision, we close the investigation with no further enforcement action. But for those systems who currently use or have recently used a no-poach provision, we begin negotiations to secure their compliance with our AOD terms. Through our negotiations, we have secured binding commitments from over 150 corporate chains to eliminate no-poach clauses from all franchise agreements nationwide. This number represents about 160,000 locations and frees competition for the labor of millions of workers across the United States.

We offer all franchisors the opportunity to amicably negotiate a resolution to our investigation. However, if a franchisor refuses to enter into a legally binding agreement securing a commitment to end their use of no-poach provisions, we will file an enforcement action. In October 2018, we filed one such suit against Jersey Mike's Franchise System and all of its Washington franchisees in

[3] *See* Press Release, Washington State Office of the Attorney General, AG Ferguson Announces Fast-Food Chains Will End Restrictions On Low-Wage Workers Nationwide (July 12, 2018), *at https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers.*

state court in Seattle. This was the first suit brought by a state attorney general against a company for using no-poach clauses. We filed our complaint on a per se theory of liability, and alleged liability under a quick-look analysis in the alternative. The court rejected Jersey Mike's attempt to dismiss our suit, leaving intact both our per se and quick look theories of liability. The parties eventually settled in August 2019—two months before trial—on terms substantively identical to the AOD offered to Jersey Mike's pre-litigation, as well as every other target as described earlier, plus a $150,000 monetary component. No target since has tested our resolve to file suit.

Although starting in fast food, our initiative has expanded across several industries that use no-poach clauses in their franchise agreement, including: automotive services, child care, cleaning services, convenience stores, custom window treatment, electronic repair services, home healthcare services, home repair services, hotels, insurance adjustors, parcel services, tax preparation, and travel agencies.

As Attorney General Bob Ferguson has stated, our "goal is to end no-poach practices. Period." We are confident we are nearing the point where we can say we have achieved our goal.

Non-compete Agreements Against Low Wage Employees

Building off our franchise no-poach initiative, we began receiving and investigating consumer complaints regarding non-compete clauses in employment agreements with low wage workers. As the Subcommittee is aware, non-compete agreements or clauses prevent employees from one business from leaving and working for or starting a competing business. This restriction deprives workers of the right to use their labor as they choose, and deprives workers the opportunity to seek employment that betters their wages or working conditions.

There is evidence suggesting that nearly 20 percent of labor force participants in the United States are bound by non-competes, and that as much as 12 percent of workers without a bachelor's degree and earning less than $40,000 a year are restricted by a non-compete agreement.[4] Low wage and low skill workers are far less likely to be in a position to negotiate terms of an employment agreement. Thus, they tend to be far more vulnerable to anticompetitive behavior in labor markets and improper use of overbroad non-compete agreements. Interestingly, this research suggests that non-compete agreements are as prevalent in states that permit enforcement of non-competes as in states that do not. This would suggest that for an employer, the simple existence of a non-compete agreement—even one unenforceable—has value in hindering competition for its workers.

Our office is currently investigating non-competes. In particular, we are looking at non-compete agreements with low wage or low skilled workers, because such restrictions protect no legitimate business interest of the employer. Its *only* purpose is to stifle competition for workers' labor. By

[4] *See* Starr, Evan and Prescott, J.J. and Bishara, Norman D, *Noncompetes in the U.S. Labor Force* (Aug 30, 2019). U of Michigan Law & Econ Research Paper No. 18-013, *at https://ssrn.com/abstract=2625714.*

eliminating competitors for labor, an employer has reduced incentives to compete to retain its own employees; competition that would otherwise result in the employer providing market wages, better working conditions, or promotional opportunities. Non-competes also harm competition by depriving businesses, who were not a party to the non-compete agreements, the opportunity to hire available, qualified workers. In sum, by hindering competition on the merits for a worker's labor, non-compete agreements used in such contexts present an unfair method of competition in violation of antitrust law.

It is important to note that whether or not a non-compete is enforced is of no moment. Non-competes, by themselves, necessarily create a chilling effect in labor markets. When dealing with widely used non-competes against low wage or low skilled workers, we may never know how many employees chose not to re-enter the labor market out of fear of being sued. Similarly, we may never know how many employees turned down a job solicitation or offer because of a non-compete. Simply put, the chilling effect that non-competes have on labor competition may be unquantifiable, but quite pervasive.

Merger Review of Monopsonization

Along with enforcement efforts, the State of Washington also conducts merger reviews—both on its own, and with the federal regulators. While much of the public attention in mergers focuses on potential harm to buyers of the merged firms' products, the enforcement community should also focus on reviewing potential harm to sellers that provide inputs to the merged company. Labor "sold" by current or future employees is one such input. In antitrust terms, a dominant buyer of a good or service raises "monopsony" concerns. Monopsonists, like monopolists, have the potential to cause inefficiencies and distort competition that would otherwise fairly dictate appropriate pricing. In the labor monopsony context, appropriate pricing is better known as wages.

Because labor is inherently localized, we believe that state attorneys general, including the Washington Attorney General, are uniquely positioned to identify situations in merger review where two merging companies who may not necessarily compete or raise monopoly concerns in an outbound product market, may still compete for employees and raise monopsony concerns in a local input labor market.

As part of our merger review, where appropriate, we should look at whether the merger involves companies that have specialized labor needs or are within the same geographic area with a small labor force. Specialized laborers involve antitrust consideration because those laborers are less likely or able to switch to other types of work.

Although there are no hard guidelines on reviewing mergers for labor market concerns, we suggest that to evaluate properly labor market effects, enforcers should consider gathering information from human resources departments earlier and more often in merger review. As but one example, reviewing "diversion ratios" and the hiring history of the merging companies could provide useful data points that can show how often the companies hire each other's employees and whether they recruit from the same places. Interviewing human resources managers from both the merging companies and from competitors—those who compete outbound with products, as well as compete inbound for labor—could also be useful in identifying possible labor market concerns.

These, and other positions, are laid out in a joint letter submitted by eighteen states, including the State of Washington, to the Federal Trade Commission, advocating that merger review must take into account labor market impacts.[5] We look forward to working with Congress and the federal regulators to better define parameters and best practices for reviewing mergers for labor market considerations.

Conclusion

In closing, I'd like to repeat where I started in saying how pleased we are to see bipartisan commitment to affirming that our antitrust laws apply as equally to labor markets as they do to product markets. By summarizing the work our office has been doing and the front-line issues we have been seeing, I hope that my testimony better informs the members of this Subcommittee of the need for vigorous enforcement to preserve free and open competition in labor markets.

We look forward to working with this Subcommittee, as well as federal and state enforcers, as we all further examine these issues. Thank you for your time, and I look forward to your questions.

[5] *See* FTC Hearings on Competition and Consumer Protection in the 21st Century, Public Comments of 18 State Attorneys General on Labor Issues in Antitrust (July 15, 2019), at https://oag.dc.gov/sites/default/files/2019-07/State_AGs_Comments_to_FTC_on_Labor_Issues_in_Antitrust.pdf (in addition to the Washington Attorney General, the Attorneys General of the District of Columbia and the states of California, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Pennsylvania, Rhode Island, and Virginia signed the public comments).

Mr. CICILLINE. Thank you, Mr. Rao.

I thank the witnesses for their opening statements.

We'll now proceed under the 5-minute Rule with questions. I will begin by recognizing the gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you, Chair Cicilline, for holding this important hearing.

In all of our discussions about the impact of anticompetitive behavior in the labor market, I think it's important that we remember who we're protecting. This is about making sure that workers have options, and when they do, it helps both our economy and the worker. I'm particularly concerned about the rampant use of noncompete clauses, not just in Silicon Valley, but across the worker spectrum.

Three years ago, the sandwich chain Jimmy John's got their noncompete clauses for their workers as part of a settlement in a lawsuit, but the use of noncompete clauses between fast food companies and their workers is rampant. These clauses are often conditions of employment, and many employees don't know what rights they're signing away.

On any given day, around 18 percent of the U.S. labor market is governed by noncompete clauses, and they are prevalent among workers who don't have access to trade secrets that these clauses purportedly protect. So, I'm looking forward to hearing your answers to Committee questions about this important issue.

Mr. Rao, I'm concerned about low-income individuals being most affected by noncompete clauses because they have fewer options and less bargaining power. In your written testimony, you note that noncompete clauses can undermine competition in labor markets, even if they are never enforced. How does that happen?

Mr. RAO. Thank you, Congressman. How that happens is through what is best described as a chilling effect. Whether a noncompete is enforced or not is actually of no moment in the analysis. We may have no ability to fully quantify how many potential employees never apply for a job because they feel that they are subject to a noncompete, how many turn down a solicitation, how many potential employers who may be aware of an applicant's noncompete throws that application into the waste bin.

So, the enforcement of the noncompete is a relevant fact but is not dispositive of the negative impact that noncompetes have on labor markets, especially for low-wage workers who don't have the resources to hire lawyers or fight a lawsuit and are just in a very unequal bargaining position with respect to their current employer as well as a potential future employer.

Mr. JOHNSON. Thank you.

Ms. Mekki, in your written testimony, you state that labor market competition issues are a high priority for the Antitrust Division and that DOJ is devoting significant resources in this area. How does the Antitrust Division evaluate labor effects in merger enforcement?

Ms. MEKKI. Thank you, Congressman. The horizontal merger guidelines that the agency uses as a starting point for its merger analysis expressly contemplate buy-side merger effects, just as you might think of mergers potentially enhancing market power and the sale of tangible goods and services. The horizontal merger guidelines expressly lay out that the labor market effect in a merger would—I'm sorry—the buy-side effect in a merger would employ a similar framework for analysis as sell-side effects.

We've done this in the past. In Anthem-Cigna, for example, we demonstrated that, in certain geographies, the merged firm would have the power to suppress reimbursement rates to physicians. In Aetna-Prudential—that was a merger in 1999—similarly, there was a buy-side harm alleged rooted in the suppressed reimbursement rates paid to physicians.

So, the task for the Division really is to separate alleged efficiencies from the creation or enhancement of monopsony power, the latter of which is a problem.

Mr. JOHNSON. Exactly how does the Division evaluate labor effects in merger enforcement?

Ms. MEKKI. As I mentioned, it employs a similar analysis as any other kind of merger analysis. It's certainly aided by ample data.

Mr. JOHNSON. Well, what information does the Division request when evaluating whether a transaction may harm workers?

Ms. MEKKI. That's an excellent question. We are still developing specifications to include in our second request and civil investigative demands. As we think about labor market competition, one of the most helpful pieces of information is switching information. So, if you have a good sense of where a buyer of a good or service is likely to turn in response to a suppression in wages, then you have some sense of the degree of concentration potential for effects in that market.

Mr. JOHNSON. Thank you.

Are there any examples of transactions that have been reviewed by the Justice Department within the last 2 years that have raised labor monopsony concerns?

Mr. CICILLINE. The gentleman's time has expired, but the witness may answer the question.

Ms. MEKKI. Thank you, Chair.

Mr. JOHNSON. Thank you.

Ms. MEKKI. Thank you for the question, Congressman. Sitting here, I'm not aware of a merger in the last couple of years that actually led to an enforcement action based on labor market effects. Again, thinking through investigations, it was probably considered during the investigative phases.

Mr. JOHNSON. Thank you.

I yield back.

Mr. CICILLINE. Thank you. I thank the gentleman.

I now recognize the distinguished gentleman from Wisconsin, the Ranking Member of the Subcommittee, Mr. Sensenbrenner, for 5 minutes.

Mr. SENSENBRENNER. Thank you, Mr. Chair.

Before I came here, I spent 10 years in the Wisconsin legislature, and during every session, there was always legislation in various occupations to tighten licensing requirements, always with a grandfather clause, and we refer to those as fence-me-in legislation. As a matter of fact, I remember one debate on the senate floor where the author of the bill, who had a rather bizarre wig that was somewhat blue-gray, where one of the opponents of the bill accused the author of having a barber turning him prematurely blue. Now, that was during speech or debate immunity. So, nothing happened to that, aside from a few chuckles in the press.

That being said, licensing requirements are a state prerogative. I think it would be very difficult to win an antitrust case when the licensing requirements were tightened as a way of preventing sideways mobility of people in a licensed profession or people trying to get into a licensed profession.

Now, the question I have, is there any way, Mr. Phillips, that the FTC could announce some type of guidelines that could be used in state legislatures when the regular fence-me-in bills come up for debate and vote there?

Mr. PHILLIPS. Ranking Member, thank you for the question. I'm reminded of the song, "Don't Fence Me In."

Mr. SENSENBRENNER. Yeah.

Mr. PHILLIPS. The agency has been working for decades on this critical question, and you're right to know that there's often a sympathetic story when licensing requirements are adopted. What we've seen over decades is a trend of them increasing and often in areas where they don't make as much sense.

We do two things that are really important. The first thing is that we do competition advocacy. So, when invited, because we want to respect federalism, we will give advice to state legislatures and others formulating policy on the potential competitive impacts of what they're doing. Occasionally, we go to court. We are less often protecting, saying—protecting against a particular limitation; more often focused on the process.

So, in the North Carolina dental case that I described, what the Supreme Court said is that when the state takes a licensing regime and gives it to the power of a board of people who participate in that industry, there are two things that are required for antitrust law not to apply.

The first thing is that the state has to have a clear and evinced policy of displacing competition. They have to have a reason, and they have to be accountable for that reason not to allow competition. Second, they need to actively supervise what's going on. It can't just be the Members of that profession fencing themselves in.

We brought that case in court and will continue to look for opportunities to articulate that principle. A few weeks ago, we joined with the Department of Justice in the SmileDirectClub case to protect that principle in, I believe, the Eleventh Circuit.

Mr. SENSENBRENNER. Thank you very much.

Mr. Rao, I'm sure you got fence-me-in bills that are introduced in the Washington legislature. Do the state of Washington Attorney General's Office express concerns when the effect of those bills are to prevent either horizontal transfers or to prevent more people from coming and practicing the licensed occupation?

Mr. RAO. Thank you, Ranking Member. To answer your question, as a general matter, the attorney general's office does comment and provide—you know, does weigh in on prospective legislation. The Antitrust Division, whom I represent today, I don't know specifically if it has done that. We have other divisions within the attorney general's office that do focus on occupational licensing. That is a bit outside of the scope of my division's work. So, I am not fully prepared to maybe answer your question as thoroughly as you would like. I'm happy to provide supplemental comments afterwards from the other divisions, if requested.

Mr. SENSENBRENNER. Please do.

I yield back the balance of my time.

Mr. CICILLINE. I thank the gentleman.

I now recognize the gentlelady from Washington, Ms. Jayapal, for 5 minutes.

Ms. JAYAPAL. Thank you, Mr. Chair.

I have mentioned and you have heard today about the excellent work that our Washington State Attorney General's Office is doing, specifically to end no-poaching provisions in franchise agreements. Now, the Washington AG's Office is also looking at how major industries may be harming low-wage workers' economic prospects in other ways as well, and also carefully reviewing the impacts that mergers will have on workers, a crucial reminder that enforcement agencies must aggressively protect consumers, workers, and businesses against monopsonies.

One of the things I have appreciated about our State AG's office is that you don't wait for people to come to you. You actually identify a problem, and in this case, no-poach agreements, based on stories that were in the news, economic analysis, and consumer complaints, and then you Act aggressively, pursue an enforcement strategy that has resulted in positive gains for millions of workers across the country.

Mr. Rao, what can other enforcement agencies learn from your division's very successful example?

Mr. RAO. Well, I don't want to be necessarily looked that—put in a position to tell other agencies how to behave or where to get their cues. But at least what we have done in the attorney general's office is we take inspiration where we can find it. Our attorney general is very aggressive, in the best way possible, with respect to protecting the rights of Washingtonians, and he understands the use and power of the office to do that.

We get our inspiration for our potential enforcement actions from everywhere. With no-poach, it specifically came from a New York Times article and underlying research by Professors Orley Ashenfelter and Alan Krueger. We have also received consumer complaints. We are plugged into the academia, including with Members of the second panel that will be appearing before you. We also receive consumer complaints, as well as we are open to hearing complaints from competitors. Competitors are on the front line of being harmed by anticompetitive practices.

We listen to it all and we evaluate it all, and my advice is, be aggressive and be open and look for opportunities to help.

Ms. JAYAPAL. What's your relationship with some of the Federal agencies like, the FTC and the Department of Justice? How do you interact with them? Do you collaborate a lot with those agencies? How does that work?

Mr. RAO. We actually, I believe—I'll let the other agencies speak from their perspective. I believe we have a very good working relationship with our federal enforcers, as well as with other state regulatory antitrust enforcers.

Antitrust inherently is large. It crosses state borders. It sometimes crosses national borders. Being able to collaborate and share each other's resources is something that all the regulators value about antitrust enforcement specifically.

Ms. JAYAPAL. Excellent.

Why did your office choose to investigate antitrust violations in the context of labor markets? That's not always what antitrust enforcers are doing. So, why did you make that choice?

Mr. RAO. Well, one is, at least on the front end, a lot of times, the antitrust community, to butcher a term that the labor economists would use, we're trailing actors. Part of labor is historically in over a hundred years-plus of antitrust jurisprudence. Ms. Mekki is right, the labor has always been a focus of antitrust. Maybe in the last few decades, it has been forgotten to a certain extent or at least overlooked, and we are seeing more research and more data coming up from labor economists that's showing and evidencing that there's a real problem out here.

Part of our focus is that there is a real problem. We know that now, and we see this with growing wage disparity. We're seeing the data that's pointing to our understanding of monopsony markets is no longer the company town or the single-factory town outside of Pittsburgh. In what it looks like a robust market like Seattle, there are pockets of monopsony power, and we know that now, and using our guide of being aggressive enforcers, we are looking at labor markets.

Ms. JAYAPAL. So, let me ask you about labor market effects of mergers, in particular, because your office pays close attention to how working people might be harmed when large corporations try to get even bigger. You submitted a letter to the FTC, along with 18 other states, arguing that enforcement agencies must take labor market impacts into account when evaluating mergers.

Why is it so important for enforcement agencies at the state and local—state and federal levels to pay attention to the ways in which mergers might impact working people?

Mr. RAO. Well, labor—in general, with merger reviews, we have always looked at outlook markets and products, but we've also looked at input markets. Labor is an input, and it is a critical input. It's one that directly affects people's lives in that, when there's a monopoly power, the effect is increase in prices for consumers. When there is monopsony power of a dominant buyer, it decreases wages for workers. Because labor is inherently localized, that effect may not be fully appreciated when looking at a macrolevel, which is where the State Attorneys General can come in, because we're on the ground floor and we're on the front lines.

Ms. JAYAPAL. My time is almost—oh, actually, my time is expired. I yield back, Mr. Chair.

Mr. CICILLINE. I thank the gentlelady for yielding back. I now recognize myself for 5 minutes.

Commissioner Phillips, several states, and you make reference to this in your written testimony, including the state of California, have banned the use of noncompete agreements. What effects have these bans had on innovation and investment and workers? Do you believe that this kind of state-based activity has been procompetitive as a general matter?

Mr. PHILLIPS. Thank you, Chair, for the question. What's really interesting that we've seen is a variety of different things that states have done. You're going to hear from some of the academic experts who will speak to these effects and the studies that they have done. So, you see in Washington State—rather, excuse me—Oregon, looking at low-wage workers, noncompetes with respect to low-wage workers. You see in Hawaii tech workers being the focal point.

I think we've seen, from the data, some positive effects, both with respect to wages and with respect to innovation, and there is information from California. What I will say also is that we do see, in the studies, some nuance, and we do know that there are some benefits that noncompetes also provide.

Mr. CICILLINE. Did you see any evidence, as a general principle, that the banning of the noncompetes in California has undermined the protection of a firm's trade secrets? That's an argument that's often advanced.

Mr. PHILLIPS. That is an argument, and there are data to support that argument. The banning of noncompetes in California goes back a very long way, I believe to the 19th century. I think it is fair to say that California has been a hub of innovation.

Mr. CICILLINE. Thank you. That's my point. Thank you.

Ms. Mekki, is it the position of the Antitrust Division that no-poach agreements are a *per se* violation of antitrust laws?

Ms. MEKKI. Thank you for the question, Chair. The Antitrust Division has certainly made statements that naked no-poach agreements are essentially just market allocations. It is a species of market allocation, and there's no need to distinguish between allocations of labor markets, like no-poach agreements, and allocations of territories or customers, which, for the last century, the Federal dockets are replete with examples of enforcement there.

Mr. CICILLINE. So, I take that as a yes. I'm not sure if a no-poach agreement is different from a naked no-poach agreement. I assume you mean a no-poach agreement that's really a no-poach agreement is a *per se* violation of antitrust laws?

Ms. MEKKI. In a matter of speaking, certainly. I would say that the law does not treat all no-poach agreements equally. For example—

Mr. CICILLINE. I'm asking—I'm sorry to interrupt, but I'm asking what the Department of Justice's position is.

Ms. MEKKI. The Department of Justice's view is that naked no-poach agreements are *per se* unlawful, and there may be circumstances where an otherwise naked no-poach agreement might be taken out of the *per se* category because it is, for example, ancillary to the sale of a business.

Mr. CICILLINE. So, in various briefs, the Antitrust Division has argued that no-poach agreements entered by franchisors should be analyzed under the far more permissive Rule of reason standard. The idea that we would want to ever protect the right of a powerful franchisor to block workers from switching between franchises seems, to me, really outrageous. I can't—I'm trying to understand why the Department of Justice would engage in this kind of anti-worker advocacy.

What's the explanation for carving out this exception for no-poach agreements in franchising contracts, which is some of the places where it happens most frequently with low-wage workers? It seems like a really odd exception for a carveout.

Ms. MEKKI. The Antitrust Division has filed a number of briefs in no-poach cases. In two instances, it took the view that no-poach agreements in the *Seaman* v. *Duke University* case are *per se* unlawful, and in the In Re: Railway matter, which I personally had the honor of arguing, that those agreements were *per se* unlawful.

In the franchise context, it was the Department's view that there's a spectrum for rules of analysis. For the Department, on one end of the spectrum, naked agreements are routed towards potential felony prosecution and resolution. On the other hand, the Department also views certain economic literature as being persuasive, that there are sometimes benefits when such restraints were imposed in joint ventures or franchise collaborations and, therefore, strict intra-brand competition.

As I understand the Department's brief, it also left open the possibility that there can be cartelization of a labor market, even in the franchise context when, for example, the franchisees get together and it's at their behest that a no-poach agreement is implemented.

Mr. CICILLINE. That doesn't sound like a *per se* Rule then, to me.

Ms. MEKKI. It is not a *per se* rule, but it is also not an endorsement or a belief that these agreements are useful, procompetitive, lawful—

Mr. CICILLINE. If the Department of Justice is not taking the position that they're not, and challenging them in the fact that, you say, it's not a statement that they're useful, by implication, your position that you will do that sort of analysis and provide that quite different standard is, in fact, an invitation, isn't it?

Ms. MEKKI. It is the Department's view that courts should undertake a balancing. Even in the event that the restraints were upheld in a low percentage of the time, it is the Department's view that some balancing might be warranted in cases like franchise context.

Mr. CICILLINE. I thank you.

I now recognize the gentlelady from Georgia, Ms. McBath, for 5 minutes.

Ms. MCBATH. Thank you, Mr. Chair.

Thank you so much to each and every one of you that are here today. I apologize I was not here earlier, but I do have your testimony. So, the questions that I'm asking are based upon that testimony.

Thank you for sharing your expertise. I'm especially pleased that we can come together as Republicans and Democrats to focus on issues that truly are affecting millions of people as they earn a living and provide for their families. Any competitive labor practices affect so many sectors of our economy.

A number of the experts that we're hearing from today have—you've specifically noted how these issues have affected nurses. My mother was a registered nurse. She taught nursing for many years. So, my home State of Georgia has one of the worst nursing shortages in the Nation. I'm concerned about how these practices can hurt nurses, people who are thinking about becoming nurses, and also our ability to make sure that people can get the care that they need. I do remember spending—my mother would oftentimes spend a lot of time tutoring a lot of the young students, the young nurses, and so I understand the gravity of being able to make sure that we have enough nurses in the country to care for our patients.

I also come at this from the perspective of being a working mom. I know what it's like to provide for my family, and I know how important it is for people to have good options and employment mobility to be able to do that. This is a conversation that's been going on for some time in some government and academic circles, but, for me, it's critical that we think about it in terms of what it means for people who are working hard to provide for their families.

Ms. Mekki, my question is for you. You also mentioned nurses in your testimony. You describe two separate instances where anticompetitive practices were used to target nurses specifically. You mentioned that DOJ sued a trade group in Arizona for fixing nurses' wages at a rate lower than healthcare providers would have otherwise been paid. DOJ also sued a group of hospitals in Utah that impermissibly shared nonpublic information such that they could similarly pay nurses less.

Notably, both of those cases you mentioned settled within a matter of months, and both resulted in agreements by the defendants to stop their anticompetitive practices. These cases are especially concerning, given that artificially low nursing wages could discourage people from going into nursing, when our communities really, really need nurses.

What do these cases say about the importance of robust government action to address these violations?

Ms. MEKKI. Thank you so much for that excellent question, Congresswoman. I have often marveled at the number of labor market cases that seem to locate harm against workers myself. You've noted two cases, and I would also note that at a labor workshop we held last month, we invited in Dr. Elena Krieger from Northwestern University, who published a wonderful paper about the effect of hospital consolidation on the wages of several groups, including nurses.

For me, this only underscores why it is so important that the Department announced in 2016 that it would prosecute wage-fixing agreements. To me, they're indistinguishable from price fixing. In the future, if the Department were to find examples of naked wage fixing, perhaps like the Arizona hospitals case, that is the kind of thing that the Department has committed to investigating criminally and potentially leading to a felony conviction.

Ms. MCBATH. Thank you.

So, what can Congress do to reduce this kind of behavior which is already illegal and harms both our workers and the needs of our country? What can we do?

Ms. MEKKI. Respectfully, I don't think I can comment on any proposed legislation or specific actions that Congress can take, but as the Department's representative and witness here today, what I can say is that we are fully in a position to exercise all of the lawful law enforcement authority that is prescribed to the Antitrust Division. It is the AAG's commitment that we will, in fact, exercise that authority, because this is important, because we value the work of all Americans. Truly, who is more honorable than people like nurses and teachers, et cetera?

Ms. MCBATH. Thank you so much.

I yield back the balance of my time.

Mr. CICILLINE. I thank the gentlewoman.

We're going to do a second round of questions, if we can have the indulgence of the witnesses. I'll recognize the gentleman from Georgia for 5 minutes.

Mr. JOHNSON. Thank you.

Commissioner Phillips, how have anticompetitive contracting practices such as no-poach and noncompete agreements affected labor mobility?

Mr. PHILLIPS. Congressman, thank you for your question. Just a caveat at the beginning. It's not clear that at in every instance, let's say, a noncompete is anticompetitive. One of the things that we're seeing with the prevalence of no-poach agreements and the prevalence of noncompetes, about which you're going to hear in the next round of testimony, is that a lot of people are facing legal barriers and even barriers, as Mr. Rao described, that aren't necessarily legal in states where noncompetes are not necessarily enforced, to leaving their job, to starting a new job, and with respect to licensing, to starting a new business. All of these can be thought of as friction for labor mobility.

Mr. JOHNSON. Friction?

Mr. PHILLIPS. Yes, sir.

Mr. JOHNSON. What do you mean by that?

Mr. PHILLIPS. What I mean is it's something that keeps a person where they are maybe when they don't want to be there. Another consideration they have to add to the mix when they think about their options, when they approach their boss to quit or to ask for a raise. That's what I mean by friction.

Mr. JOHNSON. I see. So, you're concerned that the prevalence of noncompete agreements has harmed economic opportunity for working Americans? Are you concerned?

Mr. PHILLIPS. Yes. Not in every case, but I think we're seeing them as more prevalent than we thought they were.

Mr. JOHNSON. In his written testimony, Professor Topel suggests that restrictions on noncompete agreements would be, quote, "a dangerous law that would prohibit a widely used business practice, a practice used even in situations where the employer could not have substantive monopsony power," end quote. What is your response to that quote?

Mr. PHILLIPS. Well, I think there's some truth to that. I think, as with all kinds of policy, what you want to look at is, in terms of the thing you're looking at, how is it operating in the market, right? When you talk about a blanket ban, that isn't necessarily reflective of what the state of play is.

One of the things we see in the research, for instance, is that the effects for workers, where a noncompete is made apparent to them, where it's negotiated, where there's consideration for it, the effects are better. So maybe that's an area you want to protect. We also see that there may be different justifications, depending on whether someone is high wage or low wage. Those are all kinds of nuances that Federal policy ought to have in mind.

Mr. JOHNSON. So, you do see a Federal need—you do see a need for federal legislation to address some of the ills of noncompete agreements and the impact on workers?

Mr. PHILLIPS. What I said in my testimony is that we're convening a workshop to look at this question, and I think it's a little too early to answer that particular question on the need for federal legislation.

One of the things we've seen in the last few years in states is a tremendous flowering of different kinds of legislation. As I said before, Hawaii's looking at tech workers. Oregon is looking at low-wage workers. That's federalism at work, and I think we want to understand the effects of what the states are doing before we arrive at a federal solution.

Mr. JOHNSON. Thank you.

In connection with the workshop that you're planning, are you already or will you be collecting data on the use of noncompete clauses in low-wage employment scenarios?

Mr. PHILLIPS. I'm not sure about the precise plans. My expectation is that we'll hear from experts who have studied that. There are also proposals to take other measures to collect a lot more data, and that's something at which we're going to look.

Mr. JOHNSON. Can you commit to compiling data that can be used to analyze this issue moving forward?

Mr. PHILLIPS. We can certainly compile information. I can't commit at this point to like a 6(b) study, for instance, but we're absolutely undertaking this effort in order to get the right information to determine how best to proceed.

Mr. JOHNSON. Thank you.

In his written testimony, Professor Topel also argues that noncompetes allow, quote, "the employer to capture some of the returns on its investments in identifying and recruiting and training talented workers," end quote. Even if true, wouldn't this rationale also justify wage fixing and other collusive behavior by employers that is criminally illegal?

Mr. PHILLIPS. I hope nothing would justify wage fixing or any criminal behavior. My understanding of the evidence is that noncompetes can function to help support worker training, and worker training is an important thing, and that's part of the nuance that I think we all need to take into account.

Mr. JOHNSON. Well, do you believe that there are less restrictive ways to recoup the cost of hiring new workers?

Mr. PHILLIPS. There may be, depending on the—on the context. Noncompetes are pretty ubiquitous in the economy, and they're not always bad.

Mr. JOHNSON. Thank you.

Mr. CICILLINE. Thank you. The gentleman yields back.

I now recognize myself for 5 minutes.

I just want to continue, Ms. Mekki. You made reference in your opening statement to the criminal prosecutions, and I realize this is not you, this is Mr. Delrahim's. So, I recognize these decisions aren't being made by you, but you're here, so I want to ask you this question. Because you're quite right, Mr. Delrahim has made quite a bit of this commitment to criminally prosecute for these no-poach agreements. In fact—and I'm quoting him—he said, "in the coming couple of months, you will see announcements, and to be honest with you, I've been shocked about how many of these there are, but they're real."

There's been this sort of suggestion that the Department of Justice was going to take this no-poach agreement enforcement so seriously that it would begin to criminally prosecute. In this article as of October 3, they write, but for all of its talk of putting executives behind bars, the agency hasn't brought a single criminal no-poach case in the nearly 3 years since this guidance was announced.

So, my first question is, is that true that there hasn't been a single criminal prosecution brought for a no-poach case in the last 3 years?

Ms. MEKKI. There have been no public filings with respect to criminal no-poach cases. As AAG Delrahim has confirmed, there are a number of active criminal investigations.

Mr. CICILLINE. Okay. I will just say, for those of us who consider these no-poach agreements to be a substantial violation of law but also a very powerful force in keeping workers in place and stagnating their wages, the promise to be rigorous in their enforcement and not in 3 years have brought a single criminal case, frankly, rings hollow.

I hope you will bring that message back to Mr. Delrahim, that those of us who think this is key to ensuring that labor markets work think that this is a valuable tool. Alhough, he's spoken very forcefully about it, it doesn't seem to be playing out in the way that he's suggested. I know investigations take time, but 3 years is a long time to not be able to bring a single case.

I just want to finally say that with respect to the franchising position that the Department of Justice has argued, there have been a number of filings in which the right of franchises to enter no-poach agreements have been recognized, and particularly one of the cases involved Washington State.

So, I'd like to ask Mr. Rao, tell us a little bit about that pleading.

Then I'm going to ask Ms. Mekki whether this was a useful expenditure of resources, the limited resources at the DOJ, because it seems as if your attorney general had concluded that no-poach agreements were a *per se* violation.

Mr. RAO. That's right. Just for quick background, we're talking about three class actions that were filed in the Eastern District of Washington involving private parties where during the motion to dismiss phase the Department of Justice filed statements of interest in all three cases. They were consolidated for argument purposes.

Our office, the Washington Attorney General, filed an amicus brief articulating the state's position that—Department of Justice position, I will let Ms. Mekki articulate better what DOJ's position is, but generally was that these were not *per se* violations and were subject to the rule of reason. The state of Washington filed amicus briefs that took the opposite position and also articulated that state claims were made.

Part of the rational here, at least for the state's position, is that in DOJ's briefing they made the point that agreements that would otherwise be *per se* violations of antitrust law may escape *per se* liability if they're ancillary to a broader agreement. It's called the

Ancillary Restraint Doctrine. The Ancillary Restraint Doctrine, however, is triggered only when that provision is reasonably necessary to further effectuate the broader purpose of the agreement.

We in Washington, in the antitrust division, are on the forefront of franchise no-poach. We have, at that time, it was a little less than a 100, but we're over 150 companies that have voluntarily removed these provisions on their own accord. We have heard first-hand from parties that have removed these provisions prior to our investigation. We have heard from the parties that some of these provisions were never enforced, that they didn't know they exist.

All in all, the facts that we have understood is that these provisions were—they're just not necessary. I describe them as vestigial organs. The franchises don't necessarily know how they got in the agreement to begin with. They're like an appendix. You don't know what it is, you don't know what it does, and you're happy to get rid of it when it causes a problem.

That does not trigger the Ancillary Restraint Doctrine if it's not necessary and, therefore, *per se* liability would still attach.

Mr. CICILLINE. Am I correct, Mr. Rao, that as a result of the enforcement actions by the Washington Attorney General, there are already over 60 corporate chains that have dropped their no-poach clauses from their franchise agreements?

Mr. RAO. Point of correction, Mr. Chair, it's over 150 corporate chains.

Mr. CICILLINE. One-hundred and fifty, okay. So, it seemed like that enforcement action, this notion of its necessity for business purposes has been completely refuted by subsequent events.

Mr. RAO. Just by the plain facts that surround the enforcement would more than suggest that these provisions are not reasonably necessary.

Mr. CICILLINE. Thank you.

I see my time has expired. I recognize the gentlelady from Georgia for 5 minutes, Ms. McBath.

Ms. MCBATH. Thank you, Mr. Chair.

Mr. Phillips, you spoke about how state licensing can be restrictive anti-competitive practice. Georgia is now part of an agreement with 32 other states that allow nurses to maintain their licenses across state lines. What are the effects of agreements like these that allow workers to work across state lines?

Mr. PHILLIPS. Congresswoman, thank you for that question.

I think the effects are really good. These kinds of agreements, like the one into which Georgia has entered, allow for precisely the thing that I'm asking the Committee and policymakers generally to focus on, and that is labor mobility. You're licensed in Georgia, you can go work elsewhere.

Let me give you an example. I'm going to borrow from psychology. A psychologist has a patient that they treat regularly, but the patient goes and travels. When the patient's on travel, they want to have that regular appointment, they want to get that care. Because the patient is travelling, that could be the unlicensed practice of psychology. The same thing applies to nursing.

These kind of interstate compacts allow for the ability of care providers to provide that care more generally. They allow for innovation in telemedicine. They also empower the worker. If the worker needs to move to care for a family member or go with a spouse who got a different job or just needs to get out of the state, they don't also have to go through these licensing burdens. You talked about working moms. They can focus on caring for their children and doing their work.

Ms. MCBATH. Thank you for that.

I have often spoken to healthcare providers, nurses, who have said that, I'm licensed in a particular state, but I'm not licensed, here, to work here. So, on behalf of, you know, the mindset of my mother, who was a registered nurse, who when we moved from Illinois to Washington, DC, to Columbia, Maryland, she then, again, had to take the licensing testing all over again. I remember her studying, and I remember her being stressed that if she didn't pass the licensing here that she wouldn't be able to practice as a nurse.

So, thank you for that. I appreciate that.

I give back the balance of my time.

Mr. CICILLINE. I thank the gentlelady for yielding.

I thank the witnesses. In keeping with our committee's practices, the witnesses are at this point excused. We thank you very much for coming here today to share your thoughts about the state of competition in labor markets. This was a very informative hearing, and it will help us as we consider these issues moving forward and we really appreciate it.

Members of the second panel please are invited now to take your seats once our staff has made the administrative arrangements. That is, put the new name cards up.

Mr. CICILLINE. Welcome. I will now introduce our second panel of witnesses.

The first witness on our second panel is Professor Sanjukta Paul, Assistant Professor of Law at Wayne State University and a fellow of the Thurman Arnold Project at Yale University. Professor Paul's scholarship and teaching focus on the intersection of antitrust law and labor regulation.

Prior to joining the faculty of Wayne State University, Professor Paul was a public interest attorney in Los Angeles focused on labor and civil rights. She is widely published, with her work having appeared in the UCLA Law Review and the Berkeley Journal of Employment and Labor Law. Her paper, "The Enduring Ambiguities of Antitrust Liability for Worker Collective Action," was granted the Jerry S. Cohen Memorial Fund Award for Best Antitrust Scholarship of 2016.

Professor Paul received her B.A. from the University of Iowa and her J.D. from Yale Law School.

Our second witness is Professor Ioana Marinescu. Professor Marinescu currently serves as Assistant Professor at the School of Social Policy and Practice at the University of Pennsylvania.

Before going to Philadelphia, Professor Marinescu was an Assistant Professor at the Harris School of Public Policy at the University of Chicago as well as a postdoctoral researcher in economics at Harvard University. She's a Faculty Research Fellow in labor studies at the National Bureau of Economic Research as well as a Research Fellow at the Institute of Labor Economics.

Professor Marinescu received her master's degree from the Pantheon-Sorbonne and her Ph.D. from the London School of Economics.

Our third witness on the panel is Evan Starr, Assistant Professor of Management Organization at the Robert Smith School of Business and Management at the University of Maryland.

Professor Starr's research focuses on employer-employee contracting practices, particularly the impacts of post-employment restrictive covenants. His work was used predominantly by the White House and Department of Treasury when they compiled their report on noncompete agreements in 2016. He also worked to coordinate a 2016 White House convening on noncompete agreements.

Prior to joining the faculty at the University of Maryland, Professor Starr taught economics at the University of Illinois. Professor Starr received his B.A. from Denison University and his Ph.D. from the University of Michigan.

Our fourth witness is Rick Masters, Special Counsel for Interstate Compacts at the Council of State Governments' National Center for Interstate Compacts.

A national expert on interstate compacts, Mr. Masters is the principal draftsman of the Interstate Compact for Adult Offender Supervision enacted by all 50 states, the Interstate Compact for Juveniles enacted by 46 states, and the Interstate Compact in Educational Opportunity for Military Children enacted by 31 states. He has testified numerous times in front of various state legislative committees on these compacts.

Mr. Masters has also worked with the National Highway Traffic Safety Administration, Department of Defense, and the Department of Justice on various interstate compact projects.

Mr. Masters received his B.A. from Asbury College and his J.D. from the Louis D. Brandeis School of Law at the University of Louisville.

Our fifth witness is Kate Bahn, the Director of Labor Market Policy at the Washington Center for equitable growth. Dr. Bahn's research focuses on gender, race, and ethnicity in the labor market, care work, and monopsonistic labor markets.

Before joining the Washington Center, Dr. Bahn was an economist at the Center for American Progress. She also serves as the Executive Vice President and Secretary for the International Association for Feminist Economics. She's been published in a wide range of journals and periodicals, including The Guardian, the Nation, Salon, and Newsweek.

Dr. Bahn received her B.A. from Hampshire College and her Ph.D. from the New School for Social Research.

Our last witness, Robert Topel, is joining us today via video conference, to our left, from the Booth School of Business at the University of Chicago where he's served as professor of economics since 1979. His research revolves around labor economics, industrial organization and antitrust, economic growth, and public policy.

He's the author of several books on labor and health economics and has been published by multiple academic journals, including the American Economic Review and the Journal of Political Economy. Professor Topel also serves as a Research Associate at the National Bureau of Economic Research and has held visiting positions at the World Bank, the RAND Corporation, and the Board of Governors at the Federal Reserve.

Professor Topel received his B.A. from the University of California at Santa Barbara and his Ph.D. from the University of California at Los Angeles.

Welcome all our distinguished witnesses on our second panel and thank you for participating in today's hearing.

Now, if you would please rise, I will begin by swearing you in. Please raise your right hand.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

Thank you.

Let the record show the witnesses answered in the affirmative. Thank you. You may be seated.

I think you heard about the lights, because you were all in the room, so I won't repeat that. I'll ask now that you summarize your testimony in 5 minutes.

We'll begin with Professor Paul. There's a microphone button right there.

TESTIMONY OF SANJUKTA PAUL

Ms. PAUL. Thank you. Chair Cicilline, Ranking Member Sensenbrenner, and Members of the subcommittee, thank you so much for holding this important hearing on the place of labor markets and workers in antitrust law. I'm honored to offer my perspective at a moment that is critical both for antitrust law and for workers.

In addition to the important issues that are being highlighted in the rest of this hearing, noncompete and no-poach agreements, occupational licensing, as well as emerging empirical research concerning the power that employers wield over workers in labor markets, I also want to draw attention to numerous other implications that antitrust law has for workers and labor markets.

First, antitrust law currently functions as an obstacle to the collective action of workers who find themselves beyond the bounds of labor regulation.

Second, and relatedly, the lax regulation of vertical restraints has contributed to what's been called the fissured workplace, which includes, in fact, the proliferation of work beyond the bounds of employment.

Third, harms to workers across areas of antitrust, including but not limited to employer cartelization and corporate mergers, are insufficiently scrutinized under the consumer welfare standard as currently applied.

In my remaining time, I'll focus on framing the overall issue of antitrust law's relationship to workers by summarizing the legislative history on this topic and will describe the antitrust obstacles to workers' collective action in the fissured workplace.

To start with the legislative history, the Sherman Act, of course, is the statutory foundation of antitrust on which subsequent statutes have built. The statute was a response to a broad social movement focused on a particular phenomenon: The rise of corporate power, especially as manifested in the legal form of the business trust.

The farmer-labor coalition that pushed for federal antitrust legislation was specifically concerned with the concentration of control over the economy in fewer and fewer hands and with the accompanying disempowerment of many American working people who had previously enjoyed some level of autonomy and control over their economic lives.

Legislators, like the political coalition to which they were responding, were concerned mainly with dispersing control over the economy rather than with the lowest consumer prices or even with competition for competition's sake. Legislators spoke again and again about the harms caused by the powerful new business trusts which were the precursors to the industrial megacorporations that would emerge over the next decade or two.

At one point, Senator Sherman read the following statement in the record, and I want to read it now: "The trusts and combinations are great wrongs to the people. They operate with a double-edged sword. They increase beyond reason the cost of the necessities of life and business and they decrease the cost of raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy, and increase the price of what they sell. They aggregate to themselves great, enormous wealth by extortion, which makes the people poor. Then they make this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States . . . till they are fast producing that condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command."

I just want to remind us that this is the statutory purpose of antitrust law, the affirmative purpose.

Furthermore, from a review of the legislative record, it's also evident that legislators manifestly did not intend to target collective action, joint price setting, or collective bargaining among workers, small producers, or entrepreneurs, the very people the statute was intended to help, with or without any expressed labor exemption, as is further set out in my written testimony.

The courts nevertheless interpreted the statute in just the way Congress had thought to avoid, turning it into a weapon against working people's collective action during an era when such action was one of the few limited checks upon sweatshop labor, child labor, and the general dispensability of workers' lives.

It was not until the New Deal era that further legislation and subsequent court decisions finally, although only partially, reinstated legislators' original intent.

Fast forwarding to today's labor market, this original worker welfare, if you will, legislative purpose has been inverted. In the so-called gig economy, dominant firms can fix prices across thousands of supposedly independent businesses while antitrust law functions to prevent individual workers and entrepreneurs from engaging in collective bargaining to improve their pay and working conditions.

The fissured workplace refers to business arrangements in which firms have vertically disintegrated, but in which lead firms are nevertheless able to maintain control over smaller firms and workers in their orbits while largely disclaiming responsibility for what happens outside their formal firm boundaries. This is true when Uber, for example, sets the prices charged by the very drivers the firm insists are independent businesses, and it is also true when franchisers control their franchisees' business decisions.

Antitrust law's lax attitude toward vertical restraints since the 1970s has allowed this sort of control to proliferate. Indeed, the ride share platform's price setting as to ride services, services they do not sell, tests the bounds even of existing antitrust law.

Importantly, the economic arguments for relaxing the law of vertical restraints have generally been premised upon largely hypothetical benefits to consumers without considering the effects upon workers, franchisees, or other smaller actors in the orbits of dominant firms.

The Department of Justice Antitrust Division engaged in this style of reasoning recently when it filed a brief in favor of franchisors' impending cases involving no-poach agreements, which you were just discussing, pointing to speculative consumer benefits as legitimate justifications for restraints upon competition in labor markets.

Mr. CICILLINE. Professor Paul if you could just summarize. Your time has expired. We're going to have lots of time for questions.

Ms. PAUL. Okay. Well, I will just summarize by saying that given the original purposes of antitrust law, it should do more to restrain the control exerted by powerful firms over workers and small players and at the same time it should not impose obstacles upon workers' attempts to engage in collective action to balance the bargaining power of more powerful contracting parties.

[The statement of Ms. Paul follows:]

TESTIMONY BEFORE THE COMMITTEE ON THE JUDICIARY, SUBCOMMITEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW

UNITED STATES HOUSE OF REPRESENTATIVES

October 29, 2019

Hearing on Antitrust and Economic Opportunity: Competition in Labor Markets

Sanjukta Paul
Assistant Professor, Wayne State University Law School
Detroit, Michigan

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for holding this important hearing on the place of labor markets and workers in antitrust law, and thank you for the opportunity to testify. I am honored to offer my perspective at a moment that is critical both for antitrust law and for workers.

My name is Sanjukta Paul, and I am an Assistant Professor of Law at Wayne State University, where I teach, research and write in the areas of labor, antitrust, and corporations law. My academic research has focused mainly on the intersection of labor and antitrust issues.[1]

I. **Introduction**

Antitrust law has significant implications for workers and labor markets in a number of respects. I understand that this hearing will highlight noncompete and "no-poach" agreements along with the issue of occupational licensing, and will also consider emerging empirical research concerning the power that employers wield over workers.

In additional to these issues, antitrust law affects workers and labor markets in many other ways, through both action and inaction. First, antitrust law currently functions as an obstacle to the collective action of nontraditional workers who find themselves beyond the bounds of labor and employment law. Second, and relatedly, the lax regulation of vertical restraints has contributed to what David Weil has called the fissured workplace, which itself has given rise to the proliferation of work beyond the bounds of

[1] *See* Sanjukta Paul, "Antitrust as Allocator of Coordination Rights," 67 UCLA L. REV. (forthcoming 2020); Paul, "Fissuring and the Firm Exemption," 82 LAW & CONTEMP. PROBS. 65 (2019); Paul, "Recovering Labor Antimonopoly," 28(3) *New Labor Forum* 34 (2019); Paul, "Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications," 38 BERKELEY J. EMP. & LAB. L. 233 (2017); Paul, "The Enduring Ambiguities of Antitrust Liability for Worker Collective Action," 47 LOYOLA UNIV. CHICAGO L. J. 969 (2016). My in-progress book project on the development of antitrust law from working people's perspective, *Solidarity in the Shadow of Antitrust*, is under contract with Cambridge University Press. Parts of this testimony, particularly Part II, draw upon that project.

employment.[2] Finally, harms to workers across areas of antitrust, including but not limited to employer cartelization[3] and merger review,[4] are insufficiently scrutinized under the consumer welfare standard as currently applied.

The remainder of this testimony focuses on framing the overall issue of antitrust law's relationship to workers by summarizing the legislative history of this topic, and on antitrust obstacles to the collective action of workers beyond the bounds of employment.

II. Legislative History of the Antitrust Laws as to Labor and Workers

Legislative history arguments have helped to erect some of the keystones of today's antitrust framework. These include the consumer welfare standard itself, and more generally, the idea that Congressional intent supports a judicial methodology reliant on social science experts to not only determine facts (as is the case in many other areas) but also to effectively decide basic questions of law. Legislative history is certainly a helpful guide to the topic of today's hearing: the place of labor markets and workers in antitrust law.

The Sherman Act, of course, is the statutory foundation of antitrust. The statute was a response to a broad social movement focused upon a particular phenomenon: the rise of corporate power, especially as manifested in the legal form of the business trusts.[5] Those same trusts soon became, in the "great merger movement" of the 1890s, the first industrial mega-corporations.[6] The farmer-labor coalition that pushed for federal antitrust legislation[7] was specifically concerned with the concentration of control over the economy in fewer and fewer hands, and with the accompanying disempowerment of

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[2] David Weil, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (Harvard, 2014). The fissured workplace refers to business arrangements involving vertical disintegration, in which "lead firms" are nevertheless able to maintain control over smaller firms and workers in their orbits, while largely disclaiming responsibility over what happens outside their formal firm boundaries.

[3] See Ted Tatos, "NCAA Amateurism as an Anticompetitive Tying Restraint," 64(3) *The Antitrust Bulletin* (September 2019). Even when consumer benefits are not expressly invoked, courts seem to apply a leniency to coordination among employers that is difficult to imagine in cases where firms coordinate consumer prices. See, e.g., Brief of Amicus Curiae Open Markets Institute in Support of Plaintiffs-Appellants in Llacua v. Western Range Association, Case No. 17-1113 (9th Cir. 2019) (supporting *en banc* review of Circuit's affirmance of district court decision in favor of sheep ranch owners' cartel engaged in wage suppression with regard to shepherds), available at https://openmarketsinstitute.org/wp-content/uploads/2019/09/OMI-Brief-in-Llacua-v.-WRA-FINAL.pdf.

[4] See, e.g., Ioana Marinescu and Herbert J. Hovenkamp, "Anticompetitive Mergers in Labor Markets," 94 INDIANA LAW JOURNAL __ (forthcoming 2019).

[5] Paul, "Recovering Labor Antimonopoly," *supra* note 1.

[6] Naomi R. Lamoreaux, *The Great Merger Movement in American Business, 1895-1904* (Cambridge, 1985).

[7] See, e.g., Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877-1917*, at 268 (Chicago, 1999) (writing that the "agitation" that led to the Sherman Act "was clearly rooted in the political crusades of the Grange, the Farmers' Alliance, and the Antimonopoly, Greenback, and Union Labor Parties of the 1870's and 1880's," all of which themselves represented arms of the farmer-labor antimonopoly movement).

many American working people who had previously enjoyed a level of autonomy and control over their economic lives.[8]

Legislators, like the political coalition to which they were responding, were concerned mainly with dispersing control over the economy—or if you will, with dispersing economic coordination rights—rather than with the lowest possible consumer prices or even with competition for competition's sake. Senator Sherman himself was a Republican. That party's platform, in the year immediately preceding the introduction of the legislation that eventually became the Sherman Act, included an antitrust plank entitled, "COMBINATIONS OF CAPITAL," which declared the party's opposition to "all combinations of capital, organized in trusts or otherwise, to control arbitrarily the condition of trade among our citizens…"[9] It also explicitly targeted "all schemes to oppress the people." That last clause specifically related to "the people" qua producers, not just qua consumers: it sought to prevent "undue charges on their supplies, or [] unjust rates for the transportation of their products…"[10]

This sentiment was echoed on the Senate floor. For example, Senator George, a key figure in the shaping of the law, stated that he was "extremely anxious" that Congress pass a law to "put an end forever to the practice, now becoming too common, of large corporations, and of single persons too, of large wealth, so arranging that they dictate to the people of this country what they shall pay when they purchase and what they shall receive when they sell."[11] His emphasis was certainly not on the lowest possible prices in all cases: in fact, he specifically identified the lowering of suppliers' prices as one of the harms to be addressed by legislation—a fact that should make us think of small businesses and gig economy workers today. Senators spoke of the "commercial monsters called trusts" whose growth "in the last few years has been appalling."[12] The trusts' success was "an example of evil that has excited the greed and conscienceless rapacity of commercial sharks." These included specifically the steel trust, "the iniquities of the Standard Oil Company," the "long, felonious fingers" of the sugar trust, and more.[13] Importantly, each of these trusts was far more akin to what we would now call a single firm than to an association of firms, with coordination concentrated in a single board of trustees and grounded in the trustees' controlling interest in each formally separate corporation. (In just a few more years, these trusts would take the final step and become single corporations, eliminating the formal trust mechanism.)

The Standard Oil Trust surfaced as a frequent example; Sherman after all represented Ohio, where John D. Rockefeller's empire had begun, and he in particular discussed the company at length. His comments make it very clear that he was primarily concerned with the *concentration of economic coordination rights* in too-few hands, and not with low prices or even with competition as such. He said:

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[8] Paul, "Recovering Labor Antimonopoly," *supra* note 1.
[9] Thomas Hudson McKee, *The National Conventions and Platforms of all Political Parties 1789-1905* (1906) (Republican Party platform of June 19, 1888; emphasis added).
[10] Id.
[11] Earl W. Kintner, *Legislative History of the Federal Antitrust Laws and Related Statutes*, Part I, p. 77 (1978) (20 Cong. Rec. 1458, Feb. 4, 1889).
[12] Kintner at 76.
[13] Id. at 76-77.

> I do not wish to single out the Standard Oil Company, which is a great and powerful corporation, composed in great part of the citizens of my own state, and some of the very best men I know of. Still, they are controlling and can control the market as absolutely as they choose to do it; it is a question of their will. *The point for us is to consider whether... it is safe in this country to leave the production of property, the transportation of our whole country, to depend on the will of a few men sitting at their council board ...*[14]

Unfortunately, antitrust law today has inverted this emphasis, treating economic coordination that takes place within large, powerful corporations with deference, while making the cooperation of small players, including workers beyond the bounds of employment, an enforcement priority.[15]

At one point, Sherman read into the record an excerpt from a prior speech by George, with the specific purpose of expressing the central meaning of the legislation:[16]

> The trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business and they decrease the cost of raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. The aggregate to themselves great, enormous wealth by extortion which make[s] the people poor. Then making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States ... till they are fast producing that condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command.[17]

Again, Sherman's central statement of statutory purpose specifically expressed the depression of prices, not only the inflation of prices, as one of the harms to be addressed by the statute. Moreover, the metric by which we are to locate the harm is also supplied in this passage: the ultimate goal of the statute is to target the aggregation of wealth and power, which "makes the people poor." Thus, a powerful firm or group of firms that are depressing suppliers' prices (which may in turn depress their workers' wages) is an antitrust harm.

From a review of the legislative record as a whole, it is also evident that legislators manifestly did not intend to target collective action, joint price-setting, or collective bargaining among workers or small producers by means of the Sherman Act.[18]

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[14] 21 Cong. Rec. 2570 (March 21, 1890) (emphasis added).
[15] Paul, "Antitrust as Allocator," *supra* note 1.
[16] Sherman introduced the quotation by asking: "How is such a law to be construed? Liberally with a view to promote its objects. What are the evils complained of? They are well depicted by the Senator from Mississippi in this language, and I will read it as my own with quotation marks..." 21 Cong. Rec. 2461 (March 21, 1890).
[17] Id.; quoting statement originally made by George (21 Cong. Rec. 1768 (February 27, 1890)).
[18] Other scholars who have made a direct study of the issue have come to the same conclusion. See, e.g., Edward Berman, *Labor and the Sherman Act* (Harper & Brothers, 1930); Louis Boudin, "The Sherman Act and Labor Disputes," 39 COLUMBIA L. REV. 1283 (1939); Joseph L. Greenslade, "Labor Unions and the Sherman Act: Rethinking Labor's Nonstatutory Exemption," 22 LOY. L.A. L. REV. 151 (1988).

Legislators made repeated express statements to this effect, with little debate or disagreement.[19] The only issue relating to this topic that was seriously debated was how great a risk a *judicial* interpretation of the statute targeting workers' collective action was—with some, like Sherman, expressing incredulity that the courts would invert the purpose of the statute so—and whether this risk required re-writing the bill altogether. That is what eventually happened: the bill was sent back to committee in large part for the reason of avoiding a judicial interpretation under which workers and small producers, the very people the statute was meant to help, would be further disempowered by it.

The courts nevertheless interpreted the statute in just the way Congress had sought to avoid, turning it into a weapon against working people's collective action during an era when such action was one of the few, limited checks upon sweatshop labor (entailing low wages, dismally poor working conditions, and widespread workplace injuries), child labor, and the general dispensability of workers' lives. The Supreme Court's brief discussion of the legislative history of the Sherman Act made a critical error, ignoring all of legislators' express statements and instead relying upon the absence of a farmer-labor exemption amendment.[20] The absence of an amendment sheds no light on legislative intent, however, because the record shows that legislators re-wrote the bill—which they saw as aimed at rising corporate power and aggregations of wealth—precisely to address this issue, and that they believed they had obviated the need for any such amendment. The legislative history of the statute shows that even absent an express "labor exemption,"[21] the statute was not intended to proscribe coordination among workers or small producers. Nevertheless, antitrust law's relationship to workers has been shaped by these Lochner-era opinions at a deep level ever since.[22] It is time for Congress to consider this relationship anew.

A final note. Legislators invoked the common law of restraint of trade in the text of Section 1 of the Act, and courts continued to invoke the common law tradition for quite some time when applying the statute. At common law, the classic restraint of trade was a non-compete clause or agreement: indeed, preventing or at least limiting such

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[19] For example, Senator George, a key figure in the crafting of the statute, stated (regarding an earlier version of the bill) that prohibiting combinations designed or tending to "prevent free and full competition" could have the unintended consequence of "bringing under the punitory provisions of the bill" the "most innocent and necessary arrangements" of the very "farmers and laborers of the country who are sending their voices to the Congress … asking, pleading, imploring us to take action to put down trusts." Kintner, *supra* note 8, at 78. Senator Hoar echoed this sentiment later in the deliberations: "The laborer who is engaged lawfully and usefully and accomplishing his purpose in whole or in part in endeavoring to raise the standard of wages is engaged in an occupation the success of which makes republican government itself possible and without which the Republic can not in substance, however it may nominally do in form, continue to exist." 21 Cong. Rec. 2728.

[20] *Loewe v. Lawlor,* 208 U.S. 274 (1908).

[21] Congress subsequently addressed the courts' targeting of labor under the Sherman Act by expressly enacting a "labor exemption" in the Clayton Act of 1914; yet the courts largely rendered that too a dead letter. Only after the Norris La Guardia Act was passed, New Deal-era court decisions created the modern law of the labor exemption. See generally Paul, "Enduring Ambiguities," *supra* note 1.

[22] Robert Bork and others effectively built upon these and other Lochner-era decisions in the 1970s remaking of antitrust law. Paul, "Antitrust as Allocator," *supra* note 1. Meanwhile, the "labor exemption," intended to make space for countervailing collective action by workers, has not fared very well in these last decades.

contracts was the *origin* of the restraint of trade doctrine.[23] (Price-fixing agreements were secondary—only conditionally prohibited at common law, and even then only in the age of the trusts and not before.[24]) The freedom to pursue one's livelihood was a primary value with which the common law doctrine was concerned. Together with the pro-worker aims that animated the passage of the Sherman Act, this may suggest to the committee that regulating noncompete agreements with workers' welfare in mind should be one of its concerns—and that speculative consumer benefits must not be allowed to justify harms to workers from such agreements.[25] This is especially so when noncompete agreements are imposed by more powerful parties, such as national or international fast-food franchisors, upon much weaker parties, such as low-wage workers—precisely the sort of unfair bargain that Senators George, Sherman, and their colleagues had in mind when they crafted the first antitrust law.

III. **Labor and Antitrust in Today's Fissured Workplace**

Fast-forwarding to today's labor market, this original, "worker welfare" legislative purpose has been inverted. In the so-called gig economy, dominant firms like Uber and Lyft are able to fix prices across thousands of supposedly independent businesses, while antitrust law functions to prevent individual workers from engaging even in collective bargaining to improve their pay and working conditions. And that is only the tip of the iceberg.

Both in the so-called gig economy and in the fissured workplace more broadly, more powerful firms are able to coordinate the activities of smaller players in their orbits, often up to and including prices. This is true when Uber, for example, sets the prices charged by the very drivers the firm insists are independent businesses, and it is also true when franchisors control their franchisees' business decisions.[26] Antitrust law's lax attitude toward vertical restraints since the 1970s has allowed this sort of control, exerted by powerful firms beyond their firm boundaries, to expand and proliferate. Indeed, Uber's and similar firms' price-setting as to ride services—services they insist they do not sell—tests the bounds even of existing law. Uber claims that it is a two-sided platform that mediates between riders and drivers. A classic vertical restraint, however, is one in which the restraining firm sells a commodity that is then re-sold by the restrained firm.[27] Uber thus stretches the limits of the current law, but precisely in the direction of

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[23] See, e.g., Hans B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (1955).
[24] Thorelli, id.; John C. Peppin, "Price-Fixing Agreements under the Sherman Anti-Trust Act," 28 CAL. L. REV. 297, 350 (1940).
[25] Because noncompete agreements were in any case generally disfavored by state courts during the early decades of the Sherman Act, federal courts did not usually have occasion to address the issue squarely at this time.
[26] This argument in this Part is set out in greater detail in Sanjukta Paul, "Fissuring and the Firm Exemption," *supra* note 1 (attached).
[27] "The paradigm cases that liberalized the law of vertical restraints never immunized price restraints *as far removed* from the transaction that Uber claims to have with its drivers. Uber and similar firms say that they license the use of software to drivers, which facilitates drivers' transactions with riders. But the price restraints Uber places on drivers relate to the *rides themselves* ... *GTE Sylvania* involved the re-sale of TV's, where the TV market was the subject of the restraint at issue. *State Oil Co. v. Khan* involved the re-sale of gas and oil, where the prices of those commodities were the subject of the restraint at issue. *Leegin*

the law's underlying tendency to reward economic coordination in the form of control by more powerful actors over less-powerful ones.

Relatedly, although Uber's and similar firms' price coordination pushes beyond the limits of existing law, the turn toward laxness in the law of vertical restraints is what has helped to bring about the fissured workplace in the first instance. Economist Brian Callaci has shown that the ability to impose vertical restraints upon franchisees is critical to the franchising business model and that the liberalization of this area of antitrust law has therefore been critical in enabling it.[28] In particular, powerful franchisor firms exert control beyond firm boundaries while largely escaping responsibility for its consequences. As he notes, franchisors' endeavor to "persuade regulators, legislators, and courts that their business form was sui generis and should not be regulated according to existing conceptions" will "be familiar to observers of twenty-first century gig economy firms."[29] Importantly, the economic arguments for loosening vertical restraints have generally been premised upon (hypothetical) benefits to consumers—without considering effects upon workers, franchisees, or other smaller actors in the orbits of dominant firms.[30] The Department of Justice Antitrust Division engaged in this style of reasoning when it recently filed a brief in favor of franchisors in pending cases involving "no-poach" agreements, pointing to speculative consumer benefits as legitimate justifications for restraints upon competition in *labor* markets.[31]

And yet, the least powerful actors in the gig economy and the fissured workplace, namely individual workers and entrepreneurs, receive no such special consideration from antitrust institutions today. Even their attempts to engage in collective bargaining in order to receive a fair share of the revenues they generate have so far met with prohibitive antitrust obstacles. For example, the City of Seattle's enactment of a collective bargaining ordinance covering rideshare drivers was met with a Sherman Act preemption lawsuit brought by the U.S. Chamber of Commerce, in which the Department of Justice and the Federal Trade Commission filed a brief in favor of the Chamber and against workers.[32] Rideshare drivers currently do not enjoy collective bargaining rights in Seattle or anywhere else in this country, and neither do other gig economy workers.

involved the re-sale of clothing, whose prices were the subject of the restraint at issue. None involved price restraints on commodities (here, ride services) that were themselves unrelated to the commodity (here, use of the app) sold by the restraining firm (Uber) to the purchaser-firm (drivers)." Paul, "Fissuring," at 73-74.

[28] Brian Callaci, "Vertical Power and the Creation of a Fissured Workplace: The Case of Franchising" (U. Mass. Amherst, Dept. Econ., Working Paper, Sep. 5, 2018).

[29] Brian Callaci, "Vertical Dis-Integration and the Creation of a New Business Form: Franchising 1960-1980," 10 (Washington Center for Equitable Growth Working Paper Series, 2018).

[30] *See, e.g.,* Roger D. Blair & David L. Kaserman, *Law and Economics of Vertical Integration and Control* (1983); Marshall Steinbaum, "Antitrust, the Gig Economy and Labor Market Power," 82 LAW & CONTEMP. PROBS. 45, 49-50 (2019) (discussing economists' arguments for the efficiency of vertical restraints, including Blair & Kaserman).

[31] Corrected Statement of Interest of the United States of America, Harris v. CJ Star, LLC, No. 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019), ECF No. 38; Paul, "Fissuring," at 71-72 (discussing no-poach cases).

[32] Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Appellant and in Favor of Reversal, United States Chamber of Commerce v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640). *See also* Steinbaum, "Antitrust, the Gig Economy and Labor Market Power," at 59-60.

These antitrust obstacles to organizing and collective action by workers are not limited to the app-based rideshare sector. Antitrust law serves as an obstacle to collective action among a wide variety of workers who currently do not fall within the bounds of labor and employment law, and whose ranks are only swelling. The FTC itself has engaged in investigations and enforcement actions targeting workers and independent professionals for engaging in collective action to better or maintain their circumstances, from truck drivers to church organists.[33] And this is only the tip of the iceberg, because private lawsuits, informal demands, and the fear of prosecution keep most such collective action entirely at bay. Work outside the traditional employment relationship continues to proliferate. It is perverse for antitrust law to pose obstacles to such workers' collective bargaining, which is necessary to balance the power of the firms that retain them and that unilaterally determine the terms of any resultant contracts.

While this is in part a story about the failures of labor law, and while labor law reform is also necessary, it is not a problem that antitrust law can afford to outsource or ignore. Indeed, the fact is that antitrust law's current bias against democratic cooperation—including coordination among workers—and in favor of top-down corporate control has contributed to the institutional weakness and perceived illegitimacy of workers' collective action rights more generally, even when grounded in labor law.[34]

IV. **Conclusion**

Given the original purposes of antitrust law, its current stance toward workers is perverse. It should do more to restrain the control exerted by powerful firms, from franchisors to rideshare platforms to trucking companies, over workers and small players. At the same time, it should not impose obstacles upon workers' attempts to engage in collective bargaining or other collective action in order to better their conditions, by balancing the bargaining power of more powerful contracting parties. And in navigating these and all other issues arising under antitrust law, decision-makers should not justify harms to workers by means of often-speculative benefits to consumers.

Thank you for the opportunity to testify.

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[33] See, e.g., *In the Matter of American Guild of Organists* (FTC Case No. 151-0159, 2017), *In the Matter of Music Teachers National Association, Inc.* (FTC Case No. 131-0118, 2014); *In the Matter of Professional Skaters Association, Inc.* (FTC Case No. 131-0168, 2014); Paul, "Enduring Ambiguities," *supra* note 1 (discussing antitrust law's effects on port truck drivers' movement for decent pay and working conditions over a period of decades); Sandeep Vaheesan, "Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages," 78 MD. L. REV. 766 (2019).

[34] See Paul, "Antitrust as Allocator," *supra* note 1.

Mr. CICILLINE. Thank you.

Dr. Marinescu is recognized for 5 minutes.

TESTIMONY OF IOANA MARINESCU

Ms. MARINESCU. Chair Cicilline, Ranking Member Sensenbrenner, and Members of the subcommittee, thank you so much for inviting me to testify today. My name is Ioana Marinescu. I'm a professor of economics at the University of Pennsylvania.

I am particularly glad to be here today because since 2017 I have coauthored nine papers, all on the topics of competition in the labor market, both in economics and law scholarship. I have recently been invited to speak about my research in the federal antitrust enforcement unit, that is the Federal Trade Commission, as well as the Department of Justice Antitrust Division.

So, in my testimony I want to make four points. The first is that employers can suppress wages due to limited competition in the labor market. The second is that the majority of U.S. labor markets are highly concentrated. The third is that this kind of concentration, higher concentration, tends to lower wages. The fourth is that antitrust enforcement in labor markets should be strengthened, and this fourth point is based on the current evidence that I'm going to be describing today, together with existing antitrust law principles.

So, to my first point, employers can suppress wages due to limited competition in the labor market. Think about an example. Let's think about a legal secretary in Columbus, Ohio. She's the mother of three small kids, like me, and her employer tells her, you know what, this year we won't give you a pay raise, which will make it harder for her to afford the necessities of life.

Will she quit? Well, it depends. It depends on what other jobs are available close to her home. With small kids she cannot afford to move or commute far away to go to another job. There might be other jobs, other administrative assistant jobs, but not a legal secretary job, and those jobs may pay less and do not make full use of her skills.

So simply put, workers cannot easily find alternative jobs, and so this allows employers to suppress wages. Particularly, our research shows that workers produce as much as 17 percent more than what they are paid.

Furthermore, we use an accepted antitrust test, the SSNIP test, which you apply to the labor market, and we find that essentially all labor markets defined by an occupation and a commuting zone, like in my example, a legal secretary in the Columbus, Ohio, commuting zone, all these kinds of markets are valid antitrust markets that can be used to analyze competition in the labor market.

My second point is that the majority, or 60 percent more precisely, of U.S. labor markets are highly concentrated. These are defined as an occupation by a commuting zone. So, what does that mean, highly concentrated? They have in the Herfindahl-Hirschman Index, HHI, above the 2,500 high concentration threshold that has been established by the horizontal mergers' guidelines. Concretely, what turns out to be the case is that the average market in the U.S. has only barely above two effective employers competing at any point of time to hire workers.

Now, it is true that larger cities are generally much less concentrated. So, if our legal secretary in Columbus, Ohio, were instead looking for jobs here in Washington, DC, she would face a less concentrated labor market, more competition for her labor.

Third, my third point, is that higher labor market concentration tends to lower wages. This is true in general, but I want to focus on the example of hospitals.

There's been a recent study of hospital mergers showing that they decrease wages by increasing labor market competition.

Specifically, the wage growth of specialized personnel, like pharmacy workers, has decreased by 25 percent in the aftermath of wages that have significantly increased labor market concentration.

So given that workers in concentrated labor markets are underpaid, there is room to increase the minimum wage, for example, without reducing employment, as our recent work shows.

My fourth point, and to conclude, is that antitrust enforcement in labor markets should be strengthened. This is based on the current evidence together with existing legal principles.

There is currently a big, a large antitrust enforcement gap that you guys have just been talking about in that there is almost no enforcement of the antitrust law in labor markets, a point we demonstrate in my paper with Eric Posner. Yet it is straightforward to take into account the anti-competitive effects on the labor market in mergers, in particular, as shown in my paper with Herb Hovenkamp.

So, to conclude, legislative action could facilitate antitrust enforcement and more generally antitrust litigation in the labor market by codifying and clarifying the antitrust law. I invite you to consider our legislation proposal that Eric Posner and I wrote.

So, I thank you for your attention, and I really look forward to your questions.

[The statement of Ms. Marinescu follows:]

Prepared Testimony for the Hearing "Antitrust and Economic Opportunity: Competition in Labor Markets"

Ioana Marinescu
Assistant Professor, School of Social Policy and Practice, University of Pennsylvania

US House of Representatives
Committee of the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law

October 29, 2019

Chairman, Ranking Member, and Members of the Subcommittee, thank you for inviting me to testify today. My name is Ioana Marinescu and I am an Assistant Professor at the School of Social Policy and Practice, University of Pennsylvania. I am a faculty research fellow at the National Bureau of Economic Research. I have written many academic articles focusing specifically on competition in labor markets, including economics and law articles. I have been invited to speak about my research on competition in labor markets at the Federal Trade Commission in 2018, and at the Department of Justice Antitrust Division in 2019.

In my testimony, I will make four points:

1. **Employers can suppress wages due to limited competition in the labor market**. Simply put, workers cannot easily find alternative jobs in response to wage decreases (Azar, Berry, and Marinescu 2019). This allows an employer to pay a worker less than the marginal revenue product—the amount of value that the worker adds to the employer's bottom line
2. **The majority (60%) of US labor markets are highly concentrated** (Azar et al. 2018), i.e. they have a Herfindahl-Hirschman index (HHI) above the 2,500 high concentration threshold established by the Horizontal Merger Guidelines.
3. **Higher labor market concentration tends to lower wages** (Azar, Marinescu, and Steinbaum 2017). For example, hospital mergers decrease wages by increasing labor market concentration (Prager and Schmitt 2018). Workers in concentrated labor markets are underpaid, so there is room to increase the minimum wage without reducing employment (Azar et al. 2019).
4. **Antitrust enforcement in labor markets should be strengthened**. There is currently a large antitrust enforcement gap between product and labor markets, with labor antitrust lagging behind (I. E. Marinescu and Posner 2019). Yet, it is straightforward to take into account anticompetitive effects on the labor market in merger reviews (I. Marinescu and Hovenkamp 2018). Legislative action could facilitate antitrust enforcement in the labor market by codifying, clarifying, and in some cases strengthening the antitrust law (I. Marinescu and Posner 2019).

Employers can suppress wages due to limited competition in the labor market

When employers establish wages and working conditions, they seek to minimize their labor costs while attracting the workers they need in the production process. In a perfectly competitive labor market, where workers can at no cost quit and obtain comparable work at alternative employers, the employer pays a wage equal to the worker's marginal revenue product—the amount of value that the worker adds to the employer's bottom line. Such a wage "clears" the market, attracting all workers willing to work in return for it, and thus can be taken as a baseline for evaluating actual labor market conditions.

Real-world wages deviate from the competitive ideal when workers have limited alternative job options. The most direct measure of employers' labor market power – also called monopsony power -- is the labor supply elasticity, which refers to workers' sensitivity to wages. An infinite elasticity means that a worker will quit (or not take a job) if the wage is reduced even a tiny amount below the competitive wage, while an elasticity of zero means that a worker will stay put (or still take a job) even if the wage is reduced significantly. Thus, an infinite elasticity would prevail in a perfectly competitive labor market while an elasticity of zero would prevail in a market with no effective competition.

Leveraging data on job applications from the large job board CareerBuilder.com, we estimate how sensitive workers are to wages when applying for jobs. This allows us to approximately measure the labor supply elasticity (Azar, Berry, and Marinescu 2019). Based on the labor supply elasticity, we can infer how much employers are able to underpay workers and define a labor market for antitrust purposes. In our model, workers apply to the best possible jobs for them, allowing different workers to have different job preferences. We define a labor market by an occupation, such as "accountants and auditors" (a SOC-6 occupation), and a commuting zone. The commuting zones are based on data from the 2000 Census on commuting patterns across counties to capture local economies and local labor markets in a way that is more economically meaningful than county boundaries. On CareerBuilder.com, 81% of job applications occur where the job applicant and prospective employer are within the same commuting zone (I. Marinescu and Rathelot 2018).

Workers first choose a labor market to apply to, and, second, they decide on the best job vacancy to apply to in their chosen market. We find **low labor supply elasticities[1], indicating that the labor market is not perfectly competitive and employers have significant market power**. Our analysis shows that **workers produce about 17% more than their wage level**. Using the labor market equivalent of the well-known SSNIP test used in antitrust litigation, we show that **essentially all labor markets defined by an occupation and a commuting zone are valid antitrust markets**.

The majority of US labor markets are highly concentrated

Measuring labor market concentration requires no new tools or methods. We can measure labor market concentration using the Herfindahl-Hirschman Index (HHI), which is what regulators already use for product markets. HHI is equal to the sum of the squares of the market shares of each firm in the market. In this case, market shares are based on the share of job vacancies of all the firms that post vacancies in that market. HHI has become conventional in industry concentration measures and has been used in the government's Horizontal Merger Guidelines for some thirty-five years. The same HHI thresholds apply to both seller and buyer power. For example, an HHI above 1,500 is "moderately concentrated," an HHI above 2,500 is "highly concentrated," and a merger that increases the HHI by more than 200 points, leading to a highly concentrated market, is "presumed likely to increase market power."

To calculate an HHI for the labor market, the challenge is to determine a robust definition of a labor market. Based on our research (Azar, Berry, and Marinescu 2019), a commuting zone by 6-digit Standard

[1] For other studies showing low labor supply elasticity, see also (Manning 2011) and (Dube et al. 2019).

Occupational Classification (SOC) by quarter is generally a relevant antitrust market. This would be, for example, accountants and auditors in the Washington DC commuting zone in the first quarter of 2011.

The selection of the time period is particularly important for the labor market because job seekers can only afford to be unemployed and looking for a job for a limited period of time. The median duration of unemployment is about 10 weeks in 2016 according to the Bureau of Labor Statistics. That is, unemployed job seekers typically are hired or drop out of the market within about one quarter. This is why it is presumptively sensible to calculate labor market concentration over a quarter.

Regulators can thus compute the HHI for the labor market based on vacancy shares in the commuting zone, 6-digit SOC, and quarter, using data from Burning Glass Technologies (http://burningglass.com/), EMSI (http://www.economicmodeling.com/) or Indeed (https://www.indeed.com/). Regulators can then use the thresholds from the Horizontal Merger Guidelines to make a prima facie case against a merger that significantly increases labor market concentration and runs the risk of anticompetitively suppressing wages or salaries.

To calculate the share of each firm among posted vacancies, we use data on all vacancies listed online in 2016 as collected by burningglass.com (Azar et al. 2018). We find that **U.S. labor markets tend to be highly concentrated, with an average HHI of 4,378, which is equivalent to 2.3 firms hiring in the case of equal number of job vacancies for each firm. Overall, 60 percent of labor markets are highly concentrated, having an index above 2,500 HHI**, which corresponds to four firms hiring with equal shares in hiring. These highly concentrated markets account for 20 percent of U.S. employment. Larger cities generally have lower labor market concentration while labor markets are more concentrated in rural areas (Azar et al. 2018).

Wages fall when labor market concentration increases

The term "monopsony" commonly refers to situations where a few companies dominate hiring in the labor market. Compared to a perfectly competitive labor market, monopsony leads to lower employment and lower wages. All else remaining equal, lower employment also entails lower production on the output (product) side. Ultimately, **imperfect competition in the labor market has the same kind of depressing effect on production as we see in cases of imperfect competition in the product market**. For the purpose of a merger review in labor markets, the most important question is whether a merger is likely to increase monopsony in a labor market, thus reducing wages and output.

To analyze the relationship between labor market concentration (HHI) and posted wages (Azar, Marinescu, and Steinbaum 2017), we use data from CareerBuilder.com, the largest online job board in the United States, matching millions of workers and firms. The occupations we cover include the most frequent occupations among CareerBuilder.com vacancies, plus the top occupations in manufacturing and construction. Compared to the BurningGlass data we used to calculate concentration for all occupations, the CareerBuilder data has the advantage of including better information on wages as well as information on the number of job applicants, which allows us to better tease out the relationship between wages and concentration.

We show that average posted wages are strongly and negatively correlated with labor market concentration as measured by HHI. However, this correlation alone cannot be counted as strong evidence that higher concentration depresses wages in a causal sense, as wages in depressed labor markets also tend to be lower.

Instead of simply comparing different labor markets, we look at how changes in concentration within a given market over time affect wages. The data indicate that when labor market concentration increases, posted wages decrease. Furthermore, to account for economic conditions in each specific market, we must control for the number of job postings divided by the number of job applications, also called "labor market tightness" in economic jargon. Labor market tightness is a key determinant of wages because it measures the balance of supply and demand for labor in a market, and hence determines the bargaining power of workers and employers. Even after controlling for tightness, the impact of labor market concentration on wages remains negative and statistically significant. All of these tests show that the negative effect of concentration on wages is likely to be causal and not just driven by unaccounted for market conditions.

The size of the impact of labor market concentration on posted wages depends on the specific statistical model used, but on average, **a 10% increase in concentration is associated with a 0.3% to 1.3% decrease in wages**. Furthermore, **smaller cities are doubly disadvantaged by having higher levels of labor market concentration and by suffering more from any increase in concentration**. The negative impact of labor market concentration on wages is also present when using data on all US vacancies from Burning Glass Technologies (Hershbein, Macaluso, and Yeh 2019).

Using vacancy data gives the most accurate measure of competition for workers at a given point in time because it represents companies that are actively looking to hire. However, one can also use employment shares to measure labor market concentration: this includes companies that are not currently hiring, but has the advantage of drawing on data that is available and consistent over longer time periods. Increases in labor market concentration measured by employment share also lead to decreases in wages, as shown by a rich recent literature (Benmelech, Bergman, and Kim 2018; Rinz 2018; Lipsius 2018; Qiu and Sojourner 2019).

If labor market concentration suppresses wages below workers' marginal productivity, then the minimum wage has the potential to enhance worker income without reducing employment. And indeed, we show that **minimum wage increases tend to increase employment in the most concentrated labor markets** (Azar et al. 2019).

Strengthening labor antitrust enforcement: merger reviews and beyond

Antitrust law is embodied in statutes that broadly prohibit anticompetitive practices in any kind of market. The most important of these statutes are section 1 of the Sherman Act, which prohibits "restraints of trade," and section 2, which prohibits monopolization. The courts have acknowledged that the law applies to labor markets as well as to product and other markets, and on a number of occasions employers have been held liable for anticompetitive labor market practices or settled lawsuits that challenged such practices. However, antitrust cases involving labor market abuse have been exceedingly rare, far less common than product market cases (I. E. Marinescu and Posner 2019).

Yet, the evidence shows that labor market HHIs can be readily calculated and that increases in concentration can reduce workers' wages. Therefore, **some mergers may be unlawful because they injure competition in the labor market by enabling a post-merger firm to suppress wages or salaries**

anticompetitively (I. Marinescu and Hovenkamp 2018). In particular, **mergers that lead to large increases in concentration have been shown to decrease the wages of specialized personnel in the hospital industry: such mergers decrease wage growth by about 25%** (Prager and Schmitt 2018).

Typically, anticompetitive wage suppression goes hand in hand with the suppression of employment and output below the competitive level. Mergers that increase monopsony power have the indirect effect of increasing prices by suppressing output. Therefore, the consumer welfare standard is compatible with the condemnation of such mergers. However, in some cases, an increase in monopsony power may not decrease output and increase prices for consumers. For example, if both workers and employers have some bargaining power, an increase in monopsony power may chiefly result in workers' getting a smaller share of the pie, even if the size of the pie stays the same (Hemphill and Rose 2018). Hemphill and Rose make a strong case for antitrust enforcement broadening its focus beyond harm to consumers by examining the anti-competitive effects of mergers on trading partners, including consumers, workers, and other suppliers.

The **Federal Trade Commission and the Department of Justice antitrust division have indicated their willingness to strengthen enforcement of the antitrust laws in the labor market.** However, we have only seen a handful of labor antitrust cases so far. **Thus, the doctrine has not developed to a point where the outcome of a case can be predicted with reasonable confidence.** Private lawyers and antitrust agencies are reluctant to take on the challenge of labor market antitrust litigation in such adverse conditions. To address these problems, Eric Posner and I propose that Congress pass a bill that would facilitate antitrust litigation against labor market monopsonists (I. Marinescu and Posner 2019).

Our legislative proposal begins with a simple restatement of section 2 of the Sherman Act, except we replace "monopolize" and related words with "monopsonize," and add the term "labor market.": "It shall be unlawful for any employer engaged in commerce, in the course of such commerce, to monopsonize, attempt to monopsonize, or combine or conspire with any other person or persons to monopsonize, a labor market." We then define a labor market as well as labor market power. Finally, we define a set of anticompetitive behaviors that employers with market power are liable for. Such anticompetitive behaviors include mergers, the use of non-competition clauses and mandatory arbitration provisions.

Our **proposed bill would greatly enhance private antitrust litigation against labor market monopsonies by codifying, clarifying, and in some cases strengthening the law.** It does not represent a radical departure from existing law. Instead, we have for the most part taken doctrine and concepts that have been developed by courts for product-market litigation and applied them to the labor market side. Where we go beyond existing law, we do so mainly by establishing presumptions in favor of workers that employers are allowed to rebut. In this way, we preserve the unity and coherence of antitrust law.

Bibliography

Azar, José, Steven Berry, and Ioana Elena Marinescu. 2019. "Estimating Labor Market Power." SSRN Scholarly Paper ID 3456277. Rochester, NY: Social Science Research Network. https://papers.ssrn.com/abstract=3456277.

Azar, José, Emiliano Huet-Vaughn, Ioana Elena Marinescu, Bledi Taska, and Till Von Wachter. 2019. "Minimum Wage Employment Effects and Labor Market Concentration." SSRN Scholarly Paper

ID 3416016. Rochester, NY: Social Science Research Network. https://papers.ssrn.com/abstract=3416016.

Azar, José, Ioana Elena Marinescu, Marshall Steinbaum, and Bledi Taska. 2018. "Concentration in US Labor Markets: Evidence from Online Vacancy Data." SSRN Scholarly Paper ID 3133344. Rochester, NY: Social Science Research Network. https://papers.ssrn.com/abstract=3133344.

Azar, José, Ioana Marinescu, and Marshall I. Steinbaum. 2017. "Labor Market Concentration." Working Paper 24147. National Bureau of Economic Research. https://doi.org/10.3386/w24147.

Benmelech, Efraim, Nittai Bergman, and Hyunseob Kim. 2018. "Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?" Working Paper 24307. National Bureau of Economic Research. https://doi.org/10.3386/w24307.

Dube, Arindrajit, Jeff Jacobs, Suresh Naidu, and Siddharth Suri. 2019. "Monopsony in Online Labor Markets." *American Economic Review: Insights*. https://doi.org/10.1257/aeri.20180150.

Hemphill, C Scott, and Nancy L Rose. 2018. "Mergers That Harm Sellers." *The Yale Law Journal*, 32.

Hershbein, Brad, Claudia Macaluso, and Chen Yeh. 2019. "Concentration in U.S. Local Labor Markets: Evidence from Vacancy and Employment Data," 40.

Lipsius, Ben. 2018. "Labor Market Concentration Does Not Explain the Falling Labor Share." pli1202. 2018 Papers. Job Market Papers. https://ideas.repec.org/p/jmp/jm2018/pli1202.html.

Manning, Alan. 2011. "Chapter 11 - Imperfect Competition in the Labor Market." In *Handbook of Labor Economics*, Volume 4, Part B:973–1041. Elsevier. http://www.sciencedirect.com/science/article/pii/S0169721811024099.

Marinescu, Ioana Elena, and Eric A. Posner. 2019. "Why Has Antitrust Law Failed Workers?" SSRN Scholarly Paper ID 3335174. Rochester, NY: Social Science Research Network. https://papers.ssrn.com/abstract=3335174. Accepted, *Cornell Law Review*.

Marinescu, Ioana, and Herbert Hovenkamp. 2018. "Anticompetitive Mergers in Labor Markets." SSRN Scholarly Paper ID 3124483. Rochester, NY: Social Science Research Network. https://papers.ssrn.com/abstract=3125840.

Marinescu, Ioana, and Eric A. Posner. 2019. "A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony." Roosevelt Institute. http://rooseveltinstitute.org/proposal-enhance-antitrust-protection-against-labor-market-monopsony/.

Marinescu, Ioana, and Roland Rathelot. 2018. "Mismatch Unemployment and the Geography of Job Search." *American Economic Journal: Macroeconomics* Forthcoming. https://doi.org/10.1257/mac.20160312.

Prager, Elena, and Matt Schmitt. 2018. "Employer Consolidation and Wages: Evidence from Hospitals."

Qiu, Yue, and Aaron Sojourner. 2019. "Labor-Market Concentration and Labor Compensation." SSRN Scholarly Paper ID 3312197. Rochester, NY: Social Science Research Network. https://papers.ssrn.com/abstract=3312197.

Rinz, Kevin. 2018. "Labor Market Concentration, Earnings Inequality, and Earnings Mobility." Working Paper 2018–10. CARRA Working Papers. Center for Economic Studies, US Census Bureau. https://kevinrinz.github.io/concentration.pdf.

Mr. CICILLINE. Thank you, Doctor.

I now recognize Dr. Starr for 5 minutes.

TESTIMONY OF EVAN STARR

Mr. STARR. Chair Cicilline and Ranking Member Sensenbrenner and Members of the committee, thank you for the opportunity to testify on the important topic of competition in labor markets. My name is Evan Starr, and I'm an assistant professor at the University of Maryland's Robert H. Smith School of Business.

I'd like to focus my testimony on an employment practice which by definition restrains trade in the labor market, the use of covenants not to compete, which prohibit departing workers from joining or leaving competing firms.

If you're unfamiliar with these so-called noncompete agreements, please allow me to read the text of one signed by a temporarily employed Amazon packer making $12 an hour in 2015: "During employment and for 18 months after the separation date, employee will not engage in or support the development, manufacture, marketing, or sale of any product or service that competes or is intended to compete with any product or service sold, offered, or otherwise provided by Amazon that employee worked on or supported or about which employee obtained or received confidential information."

The reason noncompetes like this are important for labor market competition is that they may prevent workers from working where they want and earning what they could in a competitive labor market. In my research, I've sought to understand how common noncompetes are, how they influence workers and firms, and what sort of effects banning them has on economic activity.

In my testimony today I'd like to make the following points. First, noncompetes are everywhere. Doggy daycare workers, unpaid interns, volunteer coaches, janitors, yoga instructors, and hair stylists are just some of the jobs in which noncompetes have been found.

In a study of 11,500 U.S. workers, my colleagues JJ Prescott, Norman Bishara, and I estimate that approximately one in five private sector workers were bound by noncompetes and that approximately 40 percent of labor force participants had ever signed one. We also find that while noncompetes are more common among highly paid workers, hourly paid workers actually make up the majority of those bound by noncompetes because they represent such a large part of the labor force.

Second, noncompetes are negotiated over just 10 percent of the time and are regularly asked of workers when they have limited bargaining power, such as on the first day of the job.

Third, despite reasonable arguments that noncompetes might benefit workers and firms by spurring investment, most research suggests that the use and enforceability of noncompetes reduces wages, entrepreneurship, and job-to-job mobility, making it harder for firms to hire and creating negative spillovers for others in the market.

For example, in a study of Oregon's 2008 ban on noncompetes for low-wage workers, my colleague Mike Lipsitz and I find that hourly worker wages rose to 6 percent 5 years after the ban while job-to-job mobility rose 12 to 18 percent.

In another study, my coauthors and I examined a ban on noncompetes that Hawaii implemented in 2015 for only high-tech workers, an occupation in which the potential benefits of investment are much more salient. Yet, similar to the low-wage setting, we find that Hawaii's tech noncompete ban raised quarterly earnings for new hires by 4 percent and job mobility by 11 percent. These results suggest that noncompetes were indeed preventing workers from working where they wanted and earning what they could in a competitive market.

Fourth, and importantly, even in states that do not enforce them, noncompetes still cover 19 percent of the workforce. Moreover, these unenforceable noncompetes also appear to chill employee mobility.

Fifth, noncompetes are blunt tools to protect legitimate business interests because they explicitly limit employment options for departing workers. However, other tools can do similar jobs for the firm without constraining worker options so severely.

For example, nondisclosure agreements and trade secret laws can protect trade secrets, while nonsolicitation agreements can protect clients, yet neither of these provisions limit job options for departing workers.

The efficacy of noncompetes should be judged based on the relative value of these alternatives.

Sixth, despite recent advances, data on the actual use of noncompetes in similar provisions remains scarce. With a mandate from Congress, the FTC would be well-suited to gather and analyze employment contracts under section 6(b) of the FTC Act.

Finally, I'd just like to note that this is not a classic firm-versus-worker issue because firms are on both sides of the equation. Firms certainly would not like to lose their employees to competitors, but firms also engage in hiring as well.

Second, I'd like to note that it's also not a conservative-versus-liberal issue, as we've seen several recent bills proposed by both Republicans and Democrats, which has been uplifting.

Thank you.

[The statement of Mr. Starr follows:]

Prepared Testimony for the Hearing on "Antitrust and Economic Opportunity: Competition in Labor Markets"

Evan Starr
Assistant Professor of Management and Organization
University of Maryland Robert H Smith School of Business*

Before the U.S. House of Representatives
Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law

October 29, 2019

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Committee:

Thank you for the opportunity to testify on the important topic of competition in labor markets. My name is Evan Starr and I am an Assistant Professor at the University of Maryland's Robert H. Smith School of Business. Recent research has identified many important concerns related to labor market competition, including the extent of labor market concentration and various anticompetitive practices. Today I'd like to focus my testimony on an employment practice which by definition restrains trade in the labor market: the use of employment provisions that prohibit departing workers from joining or starting competing firms, sometimes called "covenants not to compete" or simply "noncompetes."

If you are unfamiliar with noncompete agreements, here is an example of one such contract, signed by a temporarily-employed packer at Amazon:

> *During employment and for 18 months after the Separation Date, Employee will not, directly or indirectly, whether on Employee's own behalf or on behalf of any other entity (for example, as an employee, agent, partner, or consultant), engage in or support the development, manufacture, marketing, or sale of any product or service that competes or is intended to compete with any product or service sold, offered, or otherwise provided by Amazon (or intended to be sold, offered, or otherwise provided by Amazon in the future) that Employee worked on or supported, or about which Employee obtained or received Confidential Information.*[1]

The reason that noncompetes are important as it relates to labor market competition is that they may prevent workers from working where they want and earning what they would in a competitive market. In my research I have sought to understand how common noncompetes are, how they influence workers and firms, and what sort of effects banning them has on economic activity.

* This testimony represents my own views and not necessarily those of the University of Maryland or the Robert H. Smith School of Business.

1 The text of this noncompete is provided by Spencer Woodman in his article "Exclusive: Amazon makes even temporary warehouse workers sign 18-month non-competes." The article is available at https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts. After this contract was made public, Amazon reportedly withdrew these provisions from hourly workers' contracts.

In my testimony today, I'd like to make the following five points:

(1) Noncompetes are everywhere. They are found most frequently in high-wage jobs, but they are also found regularly in low-wage jobs. Noncompetes are rarely negotiated over, and are regularly presented to workers when they have limited outside options.

(2) Despite reasonable arguments that noncompetes might benefit workers and firms, most research suggests that the use and enforceability of noncompetes reduces wages, entrepreneurship, and job-to-job mobility, making it harder for firms to hire, and creating negative spillovers for others in the market.

(3) Noncompetes are still common in states that do not enforce them, and even these unenforceable noncompetes appear to limit employee mobility.

(4) Noncompetes are blunt tools to protect legitimate business interests because they prohibit individuals from joining or starting other firms in the industry. More precise tools are available to do similar jobs for the firm without constraining worker options so severely. The efficacy of noncompetes should be judged based on the relative tradeoffs between these alternatives.

(5) Despite recent advances, data on the actual use of noncompetes and similar provisions remains scarce. Additional data would be helpful in understanding, for example, actual labor market concentration. With a mandate from Congress, the FTC would be well suited to gather and analyze this data.

Before I elaborate on each of these points, I'd like to make one additional comment. From a conceptual perspective, it is important to note that this is not a classic firm vs. worker issue because firms are on both sides of the equation: The use of noncompetes makes it harder for a firm's workers to leave, but it also makes it more difficult for the firm to hire. It is also not a conservative vs. liberal issue, as we've seen several recent bills proposed by both Republicans and Democrats.

I will now elaborate on each of my main points:

Point 1. Noncompetes are everywhere. They are found most frequently in high-paid jobs, but they are also found regularly in low-wage jobs. Noncompetes are rarely negotiated over, and are regularly presented to workers when they have limited outside options.

Doggy daycare workers, unpaid interns, volunteer coaches, janitors, yoga instructors, and hair stylists are just some of the types of jobs in which noncompetes have been found.[2] In a study of 11,500 US workers, my colleagues JJ Prescott, Norman Bishara, and I estimate that in 2014 approximately 1 in 5 private sector workers were bound by noncompetes, and that approximately

[2] See Greenhouse, Steven "*Noncompete Clauses Increasingly Pop Up in Array of Jobs," New York Times, June 8, 2014* at https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html.

40% of labor force participants have ever signed one.[3] Noncompetes are most common among executives,[4] as one might expect. Yet, hourly-paid workers actually make up the majority of noncompete signers because they represent such a large part of the labor force.[5]

In my study with Prescott and Bishara, we find that only 10% of workers report negotiating over their noncompete or for other benefits in exchange for signing one. Furthermore, 86% of workers report that they were not promised any benefits for agreeing not to compete.[6] These findings do not imply that noncompetes are bad for workers per se, since additional compensation might be baked into the initial employment offer. But they do suggest that workers generally sign noncompetes when they are asked without requiring additional compensation beyond what is offered.

Finally, evidence from two studies finds that approximately 33-45% of workers who have signed noncompetes are asked to sign them *after* the worker has accepted the job offer, but without a promotion, raise, or other change in responsibilities.[7] The issue of timing is important because noncompetes give the firm *future* product and labor market power. For example, if a worker gets a job offer from a competitor, or has an idea to start a new firm in the industry, the employer can use the noncompete as a shield to prevent the worker from taking those opportunities. Given that noncompetes operate in the future, a key question is whether workers are compensated for what they give up *when they agree to these provisions*. The delay of noncompetes until after the worker has accepted the job may erode worker bargaining power if, for example, workers have turned down other offers or have already made important investments in the new job. My research with Prescott and Bishara finds that workers are worse off under these delays relative to workers who receive noncompetes with the job offer.[8]

Point 2. Despite reasonable arguments that noncompetes might benefit workers and firms, most research suggests that the use and enforceability of noncompetes reduces wages, entrepreneurship, and job-to-job mobility, making it harder for firms to hire, and creating negative spillovers for others in the market.

While noncompetes appear to be prima facie anticompetitive in that they can be used as a shield to protect the firm from future labor and product market competition, there are reasonable justifications for their use. These justifications typically include encouraging firms to invest in the development of trade secrets or valuable worker skills that firms fear would otherwise end up subsidizing their competitors. Theoretically, workers would be willing to agree to these

[3] This evidence is reported in Starr, Evan, James J. Prescott, and Norman Bishara. "Noncompetes in the US labor force." *U of Michigan Law & Econ Research Paper* 18-013 (2019).
[4] See, for example, Bishara, Norman, Kenneth J. Martin, and Randall S. Thomas. "When do CEOs have covenants not to compete in their employment contracts?." *Vanderbilt Law Review* 68, no. 1 (2015): 12-33. They find that 70% of executives sign noncompetes (See Table 3).
[5] See, Lipsitz, Michael, and Evan Starr. "Low-Wage Workers and the Enforceability of Non-Compete Agreements." *Available at SSRN 3452240* (2019), finding that 53% of noncompete signers are hourly workers.
[6] See Starr et al. (2019 at 3; Table 5 shows the negotiation propensities and Table B13 shows what workers report their employers promised them in exchange for signing ag noncompete.
[7] See Table 4 in Marx, Matt. "The firm strikes back: non-compete agreements and the mobility of technical professionals." *American Sociological Review* 76.5 (2011): 695-712.
[8] See Starr et al. (2019) at 3, Table 7.

restrictions when they are better off relative to their outside option, which might occur if firms share the returns made from these investments.

Given that it's unclear whether noncompetes (or the laws that regulate them) will hurt or benefit workers, the question is ultimately empirical. Tests of these competing arguments tend to find that when states loosen restrictions on noncompetes (or ban them outright), workers tend to benefit.[9] For example, a recent study of mine with Mike Lipsitz examines Oregon's 2008 low-wage ban on noncompetes. We find that hourly-worker wages rose up to 6% 5 years after the ban, while job-to-job mobility rose 12-18% on average. The fact that wages rose following a ban suggests that they were being held down by noncompetes.

Low-wage workers are unique, however, in that they likely do not have access to the traditionally protectable interests, and so may not be a great test of the investment theory. In another study, my coauthors and I examine a ban on noncompetes that Hawaii implemented in 2015 for *only* high-tech workers—an occupation in which the potential benefits of investment are more salient.[10] Yet similar to the low-wage study, we find that Hawaii's ban on noncompetes for high-tech workers raised quarterly earnings for new hires by 4% and increased job mobility by 11%.[11]

Other studies recognize that noncompetes do not just prohibit moving to another firm within the industry, but also extend to *starting* a new firm within the industry as well. Most studies find that the vigorous enforcement of noncompetes reduces entrepreneurship and makes it difficult for new firms to hire.[12]

Taken together, these results are hard to square with theories that suggest workers should benefit from noncompetes.

[9] In addition to the studies described herein, Starr, Evan. "Consider this: Training, wages, and the enforceability of covenants not to compete." *ILR Review* 72.4 (2019): 783-817, also finds that workers earn less in higher enforceability states. Johnson, Matthew S., Kurt Lavetti, and Michael Lipsitz. "The Labor Market Effects of Legal Restrictions on Worker Mobility," *Available at SSRN 3455381* (2019), finds similar results. For a broad overview see Starr, Evan. "The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements." *Economic Innovation Group. February 2019* https://eig.org/noncompetesbrief.

[10] See, Balasubramanian, N., Chang, J. W., Sakakibara, M., Sivadasan, J., & Starr, E. (2018). Locked in? the enforceability of covenants not to compete and the careers of high-tech workers. *US Census Bureau Center for Economic Studies Paper No. CES-WP-17-09.*

[11] Early studies in this literature documented that enforcing noncompetes reduces and redirects inventor mobility. See Marx, Matt, Deborah Strumsky, and Lee Fleming. "Mobility, skills, and the Michigan non-compete experiment." *Management Science* 55.6 (2009): 875-889, and Marx, Matt, Jasjit Singh, and Lee Fleming. "Regional disadvantage? Employee non-compete agreements and brain drain." *Research Policy* 44.2 (2015): 394-404.

[12] On reductions in entrepreneurship and challenges in hiring, see Starr, Evan, Natarajan Balasubramanian, and Mariko Sakakibara. "Screening spinouts? How noncompete enforceability affects the creation, growth, and survival of new firms." *Management Science* 64.2 (2017): 552-572. See also Starr, Evan, Martin Ganco, and Benjamin A. Campbell. "Strategic human capital management in the context of cross-industry and within-industry mobility frictions." *Strategic Management Journal* 39.8 (2018): 2226-2254. See also Stuart, Toby E., and Olav Sorenson. "Liquidity events and the geographic distribution of entrepreneurial activity." *Administrative Science Quarterly* 48.2 (2003): 175-201. Finally, see Jeffers, Jessica. "The impact of restricting labor mobility on corporate investment and entrepreneurship." *Available at SSRN 3040393* (2019).

It's important to note that these studies do not generally have information on the use of noncompetes—rather, they examine differences in state law and average across those who are and are not bound by noncompetes. Accordingly, it may be the case that enforcing noncompetes results in negative spillovers in the market (i.e., the wage losses are borne not only by those bound by noncompetes but also by others in the market). A recent study of mine with Justin Frake and Rajshree Agarwal finds evidence consistent with negative spillovers: in state-industry combinations where noncompetes are used *en masse* and are vigorously enforced by courts, the whole labor market is less dynamic, with lower mobility and wages, even for those not bound by noncompetes.[13]

It's also important to note that not all studies in this literature find negative effects of noncompetes, and that this research stream is still reaching consensus on some points. For example, there is contrasting evidence on the effects of noncompetes for CEOs.[14] And there are two studies finding evidence that those bound by noncompetes have higher earnings, though both studies acknowledge that they are unable to determine whether it is the noncompete or some other aspect of the worker or firm that causes higher earnings.[15] Other studies look directly at the investment margin, and some do find evidence that firms invest in riskier innovation, more firm-sponsored training, or more investment, though again there is some dispute on these points.[16]

Point 3. Noncompetes are still common in states that do not enforce them. Even unenforceable noncompetes appear to limit employee mobility.

Many recent proposals seek to ban noncompetes, much like California did back in 1872. However, it is important to note that noncompetes are still quite common in California: 62% of CEOs in California have signed them, 31% of physicians, and 20% of hair salons use them; more generally, across states that do not enforce noncompetes, 19% of workers still sign them.[17] My recent research with JJ Prescott and Norman Bishara also suggests that workers are generally unaware of the laws governing noncompetes and that worker mobility is chilled simply by the existence of the contract.[18] Accordingly, any policy that seeks to reduce the effects of noncompetes would need consider ways to disincentivize their use.

13 Starr, Evan, Justin Frake, and Rajshree Agarwal. "Mobility Constraint Externalities." *Organization Science* 30.5 (2019): 961-980.
14 On the contrasting effects on executives, see Garmaise, Mark J. "Ties that truly bind: Noncompetition agreements, executive compensation, and firm investment." *The Journal of Law, Economics, and Organization* 27.2 (2011): 376-425. For the alternative result, see Kini, O., R. Williams, and D. Yin. *CEO Mobility, Performance-Turnover Sensitivity, and Compensation: Evidence from Non-Compete Agreements*. Working Paper, 2017.
15 Starr et al. (2019) at 3. And, Lavetti, Kurt, Carol Simon, and William D. White. "The impacts of restricting mobility of skilled service workers: Evidence from physicians." *Journal of Human Resources* (2019): 0617-8840R5.
16 On firm-sponsored training, see Starr, Evan. "Consider this: Training, wages, and the enforceability of covenants not to compete." *ILR Review* 72.4 (2019): 783-817. On investment, see Jeffers (2017) at 12, Garmaise (2011) at 14. On risky investments, see Conti, Raffaele. "Do non-competition agreements lead firms to pursue risky R&D projects?." *Strategic Management Journal* 35.8 (2014): 1230-1248. And on innovation outcomes, see Samila, Sampsa, and Olav Sorenson. "Noncompete covenants: Incentives to innovate or impediments to growth." *Management Science* 57.3 (2011): 425-438.
17 On executives, see Bishara et al. (2015) at 4. On physicians, see Lavetti et al. (2019) at 15. On hair salons, see Johnson, Matthew S., and Michael Lipsitz. "Why are low-wage workers signing noncompete agreements." Working paper (2019). On the use of noncompetes in non-enforcing states, see Starr et al. (2019) at 3.
18 On what workers believe about the law related to noncompetes, see Prescott, J. J., and Evan Starr. *Subjective Beliefs about Contract Enforceability*. Working Paper, 2019. On the extent to which unenforceable noncompetes

Point 4. Noncompetes are blunt tools to protect legitimate business interests because they prohibit individuals from joining or starting other firms in the industry. More precise tools are available to do similar jobs for the firm without constraining worker options so severely. The efficacy of noncompetes should be judged based on the relative tradeoffs between these alternatives

Noncompetes may be the most effective at protecting firm interests because they stop workers from joining or starting competitors in the first place. But this bluntness also underlies their potential downsides, offering the firm perhaps more protection than they need—at the expense of workers who may forego better opportunities.

There are several alternative provisions that are more tightly coupled with the firm's protectable interests that do not dictate where a workers can or cannot move. For example, if the firm's goal is to protect investments in specialized training, they might consider a training repayment agreement which stipulates that the firm will invest a certain amount of money in training the worker, a portion of which the worker would repay if they leave too soon. If the firm is worried about the departure of clients, it can use a non-solicitation agreement that prohibits workers from soliciting former clients. If the firm is worried about the disclosure of information, it can use a non-disclosure agreement, or rely on trade secret laws. And so on.

Whether noncompetes are efficacious depends on their relative superiority to these alternative provisions. There is almost no research on such comparisons, but what is clear is that there may be important tradeoffs involved. While noncompetes may be associated with lower wages and economic dynamism, enforcing a non-disclosure agreement may engender larger legal fees and longer court cases. Whatever policy choices are made, policymakers should be cognizant of the ways that firms can and will substitute between these practices, thereby anticipating any unintended consequences.

Point 5. Despite recent advances, data on the actual use of noncompetes and similar provisions remains scarce. Additional data would be helpful in understanding, for example, actual labor market concentration. With a mandate from Congress, the FTC would be well suited to gather and analyze this data.

Although noncompetes have been around for at least 600 years, it wasn't until 2014 that we were able to understand how prevalent they were in the US workforce. One of the central challenges in understanding the prevalence and effects of noncompetes and similar provisions is a dearth of data. Most research to date uses surveys, which can be problematic since respondents may be unaware of what is in their contracts.

The FTC is well suited to collect actual employment contracts from firms to provide evidence on the use of these practices and how they have been evolving over time through their Section 6b authority. Noncompetes are directly relevant to the FTC's mission because they represent an

still influence employee mobility, see Starr, Evan, James J. Prescott, and Norman Bishara. "The *in terrorem* Effects of (Unenforceable) Contracts." *U of Michigan Law & Econ Research Paper* 16-032 (2019).

agreement not to compete between the firm and a potential future competitor in the product market. In addition, noncompetes are also relevant to calculating labor market concentration since they prohibit within-industry moves, which may be relevant for merger analyses. For example, accounting for noncompetes would reveal that labor markets are in fact more concentrated than existing estimates would suggest.

Accordingly, I would urge Congress to consider commissioning the FTC to engage in a 6b study to help expand our understanding of potentially anticompetitive employment contracting practices and the ways that they affect economic activity.

Mr. CICILLINE. That it was uplifting, we don't hear that often enough.

Mr. Masters, you're recognized for 5 minutes.

TESTIMONY OF RICHARD L. "RICK" MASTERS

Mr. MASTERS. Yes. Chair Cicilline and Ranking Member Sensenbrenner, I'm pleased and honored to testify before you today on ways in which interstate compacts can provide for multi-state licensure for occupations, including health professionals.

In my work with the Council of State Governments as the Special Counsel for Interstate Compacts, I have written all the existing health occupational licensure compacts for medicine, nursing, physical therapy, EMT, psychologists, and more recently, speech pathologists.

Currently, there is more activity among state legislatures with regard to occupational licensure compacts than any other category of interstate compacts with which our organization is working. Currently, 34 legislatures have adopted the nurse licensure compact; 31 legislatures, the medical licensure compact; half the states, 25, have adopted the physical therapy licensure compact; 17 states have adopted the EMT licensure compact; and 12 states have adopted the psychology licensure compact.

All these interstate agreements provide for license portability based on the mutual recognition model, which is exemplified by the driver license compact, where you only need to get one license in the state where you reside and then you can practice in all the other member states based on a common set of criteria that are set forward in the compact.

I've also appeared before the FTC's Liberty Task Force, which studied the various issues related to license portability, and in our 2018 report, called "Options to Enhance Occupational License Portability," they recognized the interstate compacts that used this mutual recognition model as a tool to improve licensure portability nationwide.

FTC staff also encouraged stakeholders, licensees, professional organizations, and licensing boards, as well as state legislators, to consider the likely competitive effects of options to improve license portability across state lines.

They also found that reducing barriers for multi-state practice and considering the mutual recognition model will allow States to harmonize their standards using the least restrictive standards that can gain the support of the state legislatures.

Moreover, said the FTC, by unhanding the ability of licensees and licensing boards regarding the provision of services in multiple states and to allow them to become quickly licensed upon relocation, license portability initiatives can benefit consumers by increasing competition, choice, and access to services, especially where providers are in short supply.

We have also been involved in discussions with the Department of Defense, and there is currently a provision in the National Defense Authorization Act which would provide funding for states that are interested in developing increased license portability for spouses of military Members involved in occupations such as cosmetology, teaching, mental health counseling, dental hygiene, and occupational therapy.

Even as we speak, just a few blocks from here, I'm involved with some discussions with occupational therapists over at the Hall of the States with the CSG headquarters.

So, we certainly believe that these issues are served and competition is promoted and antitrust is ameliorated through interstate compacts, and by creating these governing structures to collectively exercise power the states are creating fair and uniform and efficient ways of addressing occupational licensure, which ameliorates these antitrust concerns, continues to allow states to provide reasonable standards to protect public safety, while facilitating multistate employment opportunities for licensed professionals.

We believe interstate compacts provide a shared power approach that preserves state sovereignty in areas such as occupational licensure while transcending individual state boundaries and can remain under the jurisdiction of the several states.

Thank you.

[The statement of Mr. Masters follows:]

STATEMENT OF PROPOSED TESTIMONY

U.S. House of Representatives
House Judiciary Committee
Subcommittee on Antitrust

Richard L. "Rick" Masters, Special Counsel
National Center for Interstate Compacts
The Counsel of State Governments
October 29, 2019

Good Morning. Chair Nadler and Members of the Sub-Committee, thank you for the opportunity to testify today concerning occupational license compacts and to provide some expert testimony ways in which interstate compacts provide for multi-state licensure for health professionals including medicine, nursing, physical therapy, EMT's, psychologists and speech pathologists and audiologists; to address issues regarding certification vs. licensing; and to summarize reasons why interstate compacts are uniquely useful in ameliorating some of the potential anti-competitive aspects of professional licensure while preserving the ability of states to protect the public from harm.

I was privileged to serve as a principal drafter of all of the existing health occupational licensure compacts and also currently serve as legal counsel for five of the statutorily created interstate commissions which administer these compacts. I also serve as Special Counsel to the National Center for Interstate Compacts for the Council of State Governments and a co-author of the largest compilation of legal authorities on the subject of interstate compacts published by the American Bar Association in 2016 entitled "The Evolving Law and Use of Interstate Compacts."

- All aspects of these compacts are generated by state legislatures and implemented by state licensure board officials, with the overall intent being to create a document that reflects the practitioners' need for portability and the states' need to preserve public safety. The Compact Clause of the Constitution (Art. I, Sec. 10, Cl 3) was created for the purpose of allowing states to collectively exercise state sovereignty without the need for federal intervention.

- The Federal Trade Commission Report on Options to Enhance Occupational License Portability (9/2018) concludes stakeholders need to "harmonize state licensure standards, using the least restrictive standard that can gain the support of states nationwide." Occupational interstate compacts use this perspective to establish qualifications.

- In addition to the above referenced professions there are currently at least four more occupations that are prepared to begin the process to develop compacts: teaching, mental health counseling, dental hygiene and occupational therapy. These occupations are estimated to encompass approximately 40% of licensed military spouses.

- The National Center for Interstate Compacts (under the Council of State Governments, the agency with which DoD will enter a cooperative agreement to support the development of compacts), briefs all advisory committee and drafting team members on the need to develop qualifications that reflect the intent expressed by the FTC report: the least restrictive standard that can gain support of states nationwide. As part of this indoctrination, team members are briefed on the anti-trust and personal liability aspects of the FTC v. North Carolina Dental Board case.

Although the general public continues to use the terms interchangeably, there are important functional distinctions between certification and licensure.

Certification

The federal government has defined "certification" as the process by which **a non-governmental organization grants recognition to an individual who has met predetermined qualifications specified by that organization.** [1] Similarly, the National Commission for Certifying Agencies defines certification as "a process, often voluntary, by which individuals who have demonstrated the level of knowledge and skill required in the profession, occupation, role, or skill are identified to the public and other stakeholders."[2]

Accordingly, there are three hallmarks of certification (as functionally defined). Certification is:

1. voluntary process;
2. by a private organization;
3. for the purpose of providing the public information on those individuals who have successfully completed the certification process (usually entailing successful completion of educational and testing requirements) and demonstrated their ability to perform their profession competently.

Nearly every profession certifies its members in some way, but a prime example is medicine. Private certifying boards certify physician specialists. Although certification may assist a physician in obtaining hospital privileges, or participating as a preferred provider within a health insurer's network, it does not affect his legal authority to practice medicine. For instance, a surgeon can practice medicine in any state in which he is licensed regardless of whether or not he is certified by the American Board of Surgery.

Licensure

Licensure, on the other hand, is the state's grant of legal authority, pursuant to the state's police powers, to practice a profession within a designated scope of practice. Under the licensure system, states define, by statute, the tasks and function or scope of practice of a profession and provide that these tasks may be legally performed only by those who are licensed. As such, licensure prohibits anyone from practicing the profession who is not licensed, regardless of whether or not the individual has been certified by a private organization. Licensure is also the only means by which a licensed professional may obtain payment authorization under such programs as Medicaid or Medicare and is the only means by which such a licensed professional may obtain malpractice coverage.

Confusion between the terms "certification" and "licensure" arises because many states call their licensure processes "certification," particularly when they incorporate the standards and requirements of private certifying bodies in their licensing statutes and require that an individual be certified in order to have state authorization to practice.

Regardless of what descriptive title is used by a state agency, if an occupation has a statutorily or regulatorily defined scope of practice and only individuals authorized by the state can perform those functions and activities, the authorized individuals are licensed.

[1] U.S. Department of Health, Education, and Welfare, Report on Licensure and Related Health Personnel Credentialing (Washington, D.C.: June, 1971 p. 7).

[2] NCCA Standards for the Accreditation of Certification Programs, approved by the member organizations of the National Commission for Certifying Agencies in February, 2002 (effective January, 2003).

While some anti-regulatory groups believe that certification or other less 'restrictive' regulatory alternatives should be used, the health care professions and others who are currently licensed have concluded that interstate compacts are uniquely designed to facilitate interstate employment opportunities and provide and even enhance the protection of the public.

Throughout the history of the United States, interstate compacts have been used to define and redefine the relationships of states and the federal government on a broad range of issues, including occupational licensure. The earliest compacts were utilized to settle boundary disputes and disposition of land between two adjoining states and to resolve natural resources issues such as fishing and water rights. Former U.S. Supreme Court Justice Felix Frankfurter referred to interstate compacts as "one of the axioms of modern government." Moreover, in an historic decision in which the Court upheld the validity of a state's authority to enter into an interstate compact and to delegate authority to an interstate compact agency to promulgate uniform rules, he called such state action "a conventional grant of legislative power."[1]

Today there are nearly 200 interstate compacts in effect which provide a uniform means of state-based problem solving in areas as diverse as natural resource conservation, utility regulation, public transportation, and criminal justice to regulation of tribal casinos and horse racing and wagering. More recently these instruments have been used to facilitate license portability in health professions requiring occupational licensure including Medicine, Nursing, Physical Therapy, EMT's and Psychology. On average each state is a member of two dozen interstate compacts and most compacts being developed in the 21st century, like the Nurse Licensure Compact or the Interstate Medical Licensure Compact, involve some aspect of interstate regulation and are designed to achieve state, regional and national goals.[2]

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[1] See West Virginia, ex rel. Dyer v. Sims, 341 U.S. 22 (1951).

[2] Michael Buenger & Richard Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems,* Roger Williams University Law Review, Fall 2003, pp. 73-79.

The appeal of interstate compacts as a useful and effective tool for resolving national-state and interstate conflicts and problems in intergovernmental relations is a function of a number of factors. These include the continued political debate concerning concentration vs. decentralization of federal government activities and the exercise of state responsibilities and prerogatives in the U.S. federal system; our increasingly mobile society and exponential growth of multi-state business activities by both large and small business entities; and the attendant increase in the number of state problems which frequently exceed the jurisdiction of any state to achieve a solution unilaterally. Among the most recent of these enactments of compact based problem solving are the Nurse Licensure Compact (enacted by 34 states to date), the Interstate Medical Licensure Compact (enacted by 31 states to date), the Physical Therapy Licensure Compact (enacted by 25 states to date), the EMT compact (enacted by 17 states to date), and the Psychology Licensure Compact (enacted by 12 states to date.[3]

The Federal Trade Commission Report on Options to Enhance Occupational License Portability (9/2018) cited the above referenced ABA published interstate compact treatise and the numerous times and concluded:

- "interstate compacts improve licensure portability nationwide"
- "FTC staff encourages stakeholders such as licensees, professional organizations, organizations of licensing boards, and state legislators to consider the likely competitive effects of options to improve license portability"
- "For reducing barriers to multistate practice, consider the use of a mutual recognition model, in which licensees need only one state license to practice in other member states"
- "Harmonize state licensure standards, using the least restrictive standard that can gain the support of states nationwide"
- "Moreover, by unhanding the ability of licenses to provide services in multiple states, and to become licensed quickly upon relocation, license portability initiatives can benefit consumers by increasing competition, choice, and access to services, especially where providers are in short supply"

Based on the above, the FTC also determined that interstate compacts also serve to address anti-trust concerns about occupational licensure which have been addressed by the North Carolina Dental Board decision by the U.S. Supreme Court and its aftermath. Among its conclusions in the White Paper were that interstate occupational licensure compacts achieve the following:

- Reduce barriers to licensure portability;
- Create uniform standards for entry into practice;
- Eradicate board member discretion and subjectivity over entry into practice by establishing those uniform standards for entry;
- Create greater access to care by allowing for greater mobility of practitioners and additional practitioners to underserved areas;
- Foster cooperation between professions and member states;

[3] See Caroline Broun, Michael Buenger, Michael McCabe, Richard Masters, *The Evolving Use and Changing Role of Interstate Compacts: A Practitioner's Guide*, American Bar Association 2007, pp. 180-84.

- Create an enforcement mechanism to ensure timely issuance of the compact privilege by participating member states;
- Greater cooperation and information sharing between member states,

The legal standing of compacts as contracts and instruments of national law applicable to the member states annuls any state action in conflict with the compact's terms and conditions. Therefore, once adopted, the only means available to change the substance of a compact (and the obligations it imposes on a member state) are through withdrawal and renegotiation of its terms, or through an amendment to the compact (or in this case, the administrative rules) adopted by all member states in essentially the same form.

While 'state sovereignty' concerns have sometimes been raised as an objection to an interstate compact, in reality a compact usually serves to promote state sovereignty in that interstate compacts, unlike pre-emptive congressional legislation or regulations, allow states to continue to exercise authority over interstate issues without the need for federal intervention or pre-emption. When examined from that perspective, by enacting an interstate compact the State is only giving up the right to act "unilaterally" with regard to an interstate problem which cannot be resolved without a uniform solution agreed to by all the states involved in the form of either congressional action (See U.S. Constitution, Article I, Section 8) or an interstate compact (See U.S. Constitution, Article I, Section 10, Clause 3).

The occupational licensure compacts do not "divest" local occupational licensure boards of their authority. A closer examination of the text of the various licensure compact will reveal that the compact provisions have been broadly drafted with the intent to avoid conflict with or regulation of 'scope of practice' laws. Instead the licensure compact language does not seek to abrogate state control over health care practice or policy, but only to facilitate the interstate portability of licensure while maintaining and enhancing public safety.

Although states actually enhance their power to uniformly regulate interstate transactions such as the interstate transfer of students of military families by collectively maintaining state based regulatory control, their ability to do so relies upon the binding nature of the contractual obligations of the member states which enact the compact. This is one of the principle reasons why state legislatures have employed interstate compacts as an effective means of achieving this objective. In interpreting and enforcing compacts courts are constrained to effectuate the terms of the agreement (as binding contracts) so long as those terms do not conflict with constitutional principles. Once a compact between states has been approved, it is binding on the states and its citizens. *See, New Jersey v. New York,* 523 U.S. 767 (1998). Thus, "Unless the compact . . . is somehow unconstitutional, no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite." *New York State Dairy Foods v. Northeast Dairy Compact Comm'n*, 26 F. Supp. 2d 249, 260 (D. Mass. 1998), *aff'd*, 198 F.3d 1 (1st Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000). For example, in *Texas v. New Mexico,* 462 U.S. 554, 564 (1983) the Supreme Court sustained exceptions to a special master's recommendation to enlarge the Pecos River Compact Commission, ruling that one consequence of the enactment of an interstate compact is that "no court may order relief inconsistent with its express terms." See also *Alabama v. North Carolina*, 560 U.S. 330 (2010).

Whether a given compact should establish a special administrative structure depends upon the subject matter and scope of the compact agreement. While compacts such as those used to resolve boundary disputes or water rights frequently require no formal administrative structure, a compact formed for the purpose of providing regional and national legal channels for uniform governmental action or administrative regulation requires a more formal governing structure. In most recent cases, including the Medical Licensure Compact, the Nurse Licensure Compact, and the Physical Therapy Licensure Compact a state created interstate commission that is a 'sub-federal, supra-state governing body' is being advanced to implement such powers as the delegation of rule-making authority or the authority to contract with third parties such as vendors providing information technology services such as those required to collect and process data necessary for the administration of the compact.[4]

Without legislative creation of and delegation of power to a governmental 'infrastructure' to administer the compact, both the promulgation and efficacy of uniform rules governing the administration of a compact lack legal validity and are not enforceable between and among the member states. In contrast, the creation of an interstate administrative agency or commission – through a specific grant of a state's sovereign authority to it via the provisions of the compact statute – provides a formal regulatory scheme for both the development of rules and enforcement of the obligations established by the compact. The existing health occupational licensure compacts provide such a defined agency through which such issues as uniform provisions for obtaining a multi-state compact license as well as joint disciplinary information sharing and joint investigations of disciplinary complaints. Numerous provisions of the compact will detail the powers and duties delegated to the interstate governing body created by the compact. Equally important is the fact that the uniform rulemaking process of the interstate agency substantially conforms to the principles of due process established by the 'Model State Administrative Procedure Act' which is the basis for administrative rulemaking procedures in a majority of the states.

By creating an intermediate governing authority to collectively exercise power, the states are free to create fair, uniform, and efficient ways of addressing interstate issues such as occupational licensure which not only ameliorates anti-trust concerns and continues to allow states to continue to provide reasonable standards to protect public safety while facilitating multi-state employment opportunities for licensed professionals. Interstate compacts provides a "shared power" approach that preserves state sovereignty over areas such as occupational licensure which, while transcending individual state boundaries, should remain under the jurisdiction of "the several states."

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[4] Ibid.

Mr. CICILLINE. Thank you, Mr. Masters.
I recognize Dr. Bahn for 5 minutes.

TESTIMONY OF KATE BAHN

Ms. BAHN. Thank you, Chair Cicilline, Ranking Member Sensenbrenner, and the rest of the committee, for inviting me to testify today. My name is Kate Bahn. I'm the Director of Labor Market Policy and an economist at the Washington Center for Equitable Growth. We seek to advance evidence-backed ideas and policies that promote strong, stable, and broad-based growth.

The United States is in the longest labor market expansion in U.S. history, yet many workers still feel stuck with few opportunities, or they're changing jobs, but without advancing their skills or improving their incomes. The U.S. economy has been suffering from stagnant wage growth, rising income inequality, and a general decline in the dynamism that once produced a vibrant labor market. Economists and policymakers are increasingly recognizing that monopsony is a major cause of these dynamics.

Monopsony refers to a labor market that lacks competition among employers when hiring workers, the equivalent of the product-and-services markets phenomenon of monopoly that refers to a lack of competition among sellers. While monopoly means consumers pay higher prices or receive lower quality than a competitive market, monopsony in labor markets means workers receive lower wages or worse working conditions than if there were a more competitive market for their services.

Monopsony has traditionally been thought of as a rare circumstance where a labor market only has one or very few employers, such as would be the case in a geographically remote mining town where workers aren't moving in between jobs in search of higher pay. This is because they face so-called frictions, which I know Representative Johnson had asked about, which is anything that inhibits the ability to search for and find jobs that would be a better match for workers.

In a dynamic monopsony model such as this, so-called search frictions and differences between jobs and workers, including workers having imperfect information about employers, caregiving responsibilities outside of work, and other constraints to job mobility, would give employers more power to set wages below competitive levels while still maintaining a sufficient supply of workers. These dynamics will foster inequitable outcomes for workers.

Research by Doug Webber of Temple University uses high-quality restricted-access data from the U.S. Census Bureau's Longitudinal Employer Household Dynamics Survey to estimate economy-wide elasticity of 1.08. What that means, in Webber's estimations, is that wages are 50 percent lower than economists would expect in a competitive labor market.

Yet there's still a lot of variation among firms. Examining monopsony by industry, Webber finds that wages in manufacturing appear to be more competitive, while healthcare and administrative support are the least competitive, giving employers the most wage-setting power in these industries.

Evidence further points to monopsony being particularly detrimental to women workers. Further research by Webber finds that monopsony contributes to the overall gender wage gap. This research estimates that women's greater job search frictions compared to men leads to 3.3 percent lower earnings. That is equivalent to $131 monthly penalty for the median female worker and is essentially a tax on women workers equivalent to half the taxes that workers pay on their income under the Federal Insurance Contributions Act, or FICA.

Webber's analysis concludes that the majority of this difference is due to marriage and child penalties that women face that have no similar effect on men.

The gender-specific social expectations that women face not only impact their disproportionate burden for caretaking in their families, but also reduces their economic opportunities in the labor market. Furthermore, gender-based discrimination in hiring and treatment at work may leave women captive to accept jobs in less-than-ideal conditions or quit and go into potentially lower-paying, lower-quality jobs.

Research suggests that sexual harassment is significantly underreported due to barriers in the complaint process and fears of retaliation. This often leaves women workers with two options: Leave their jobs without a better employment opportunity or put up with harassment with little recourse.

A 2017 study by sociologists McLaughlin, Uggen, and Blackstone finds that sexual harassment has negative financial costs on women. Rather than changing jobs based on better opportunities, women are changing jobs to avoid sexual harassment and taking jobs that pay less or offer less growth, thus stifling their career trajectory.

This is reinforced by additional research from the U.S. military finding that sexual harassment increases the turnover of servicewomen, even when controlling for factors that would predict increased job attachment, such as job satisfaction and organizational commitment.

In cases of decreased competition for workers, workers who have experienced harassment on the job may simply not be able to find another adequate job and could stay in a hostile work environment. As McLaughlin, Uggen, and Blackstone note in their recent study on the financial consequences of sexual harassment, firm-specific human capital is closely linked to earnings, which means that workers may be disinclined to leave their jobs when they have invested in their skills at their current employer.

Employer monopsony power such as exists in many rural labor markets today may just make it impossible to find another job.

When women workers are more likely to quit their jobs for reasons other than seeking a better fit and higher pay or they stay in bad jobs, they ultimately will appear to have lower pay sensitivity. Employers are able to take advantage of women revealed lower pay sensitivity by offering them lower pay without being worried about not being able to compete for a sufficient supply of workers.

Contrary to theories of discrimination that believe discrimination can be competed away, in monopsony markets women will have worse outside options when experiencing harassment at work.

Understanding the myriad of causes of the U.S. labor market monopsony is crucial to implementing policies to address employer wage-setting power. No silver bullet policy solution can solve monopsony when it's the result of multiple factors, such as historical barriers and repressive social norms faced by women. So, research that looks at the several causes of wage exploitation is a crucial step in increasing worker well-being. Instituting policies that increase the outside options available to workers, including—

Mr. CICILLINE. Dr. Bahn, your time has expired. If you could just conclude.

Ms. BAHN. Yeah, sure. Thank you.

Instituting policies that increase the outside options available to workers, including policies that reduce search costs or make it easier for workers to change jobs is a necessary step towards limiting the ability of employers to suppress wages and take advantage of workers.

Thank you.

[The statement of Ms. Bahn follows:]

Kate Bahn
Washington Center for Equitable Growth
Testimony before the U.S. House of Representatives Judiciary Committee
Hearing on "Antitrust and Economic Opportunity: Competition in Labor Markets"

October 29, 2019

Thank you Chair Nadler, Ranking Member Collins, Subcommittee Chair Cicilline and Subcommittee Ranking Member Sensenbrenner for inviting me to testify today. My name is Kate Bahn and I am the Director of Labor Market Policy and an economist at the Washington Center for Equitable Growth. We seek to advance evidence-backed ideas and policies that promote strong, stable, and broad-based growth.

The United States is in the longest labor market expansion in U.S. history, yet many workers still feel stuck with few opportunities or they are changing jobs but without advancing their skills or improving their incomes. The U.S. economy has been suffering from stagnant wage growth, rising income inequality, and a general decline in the dynamism that once produced a vibrant labor market. Economists and policymakers are increasingly recognizing that monopsony is a major cause of these dynamics.

Monopsony refers to a labor market that lacks competition among employers when hiring workers—the equivalent to the product-and services markets phenomenon "monopoly" that refers to a lack of competition among sellers of products or services. While monopoly means consumers pay higher prices or receive lower quality than in a competitive market, monopsony in labor markets means workers receive lower wages or worse working conditions than if there were a competitive market for their services. Monopsony has traditionally been thought of as a rare circumstance where a labor market only has one or very few employers, such as would be the case in a geographically remote mining town where workers don't have outside options. But it also encompasses any situation in which workers aren't moving between jobs in search of higher pay in part because they face so-called frictions that inhibit their ability to search for and find jobs that would be a better match.

New sources of data and innovative econometric methods have allowed researchers to test and confirm the premise that employers have geographic concentration over jobs that lead to lower pay. Using new data from CareerBuilder.com, economists Jose Azar at the IESE Business School at the Universidad de Navarra, Ioana Marinescu at the University of Pennsylvania, and Marshall Steinbaum at the University of Utah, Salt Lake City find that going from a less concentrated labor market to a more concentrated one was associated with a 17 percent decline in the wages employers were posting to the website.[1] While mining towns may be more rare, increasing concentration in a number of sectors of the U.S. economy can still lend market power to individual employers, which leads to low wages.

While empirical estimations of concentration are one way to measure how anticompetitive markets are, many economists instead use something called labor supply elasticity, or how sensitive workers appear to be to wage changes, to then estimate the degree to which employers are able to exploit lower pay sensitivity by undercutting wages. This way of understanding and estimating monopsony was pioneered by economist Alan Manning of the London School of Economics in his 2003 book *Monopsony in Motion*. Manning applied the empirical estimation techniques of the job-search model to demonstrate that anytime workers are not switching jobs in response to wage changes, employers have monopsony power to suppress wages.

The once prevailing competitive labor market model predicts that firms that cut wages would immediately lose all their workers, but new research shows that workers do not behave as the competitive model predicts. In a recent meta-analysis of the monopsony research, economists Todd Sorensen and Anna Sokolova of the University of Nevada, Reno find that, on average, if an employer cuts wages by 5 percent, they only lose 10 percent to 20 percent of their workers over time, not all of them as a competitive model would predict. In these circumstances, individual employers are empowered to suppress wages without risking losing their supply of workers to their competitors.

[1] José Azar, Ioana Marinescu, Marshall I. Steinbaum, "Labor Market Concentration," NBER Working Paper No. 24147 (December 2017, revised in February 2019), available at https://www.nber.org/papers/w24147.

In a dynamic monopsony model such as this, so-called search frictions and differences between jobs and workers—including workers having imperfect information about employers, caregiving responsibilities outside of work, and other constraints to job mobility—would give employers more power to set wages below competitive levels while still maintaining a sufficient supply of workers. These dynamics fosters inequitable outcomes for workers.

Research by Doug Webber of Temple University uses high-quality restricted-access data from the U.S. Census Bureau's Longitudinal Employer Household Dynamics Survey to estimate economywide elasticity of 1.08. Webber's estimations would imply wages 50 percent lower than economists would expect in a competitive labor market.[2] Yet there is still a lot of variation among firms. Examining monopsony by industry, he finds that wages in manufacturing appear to be more competitive, while health care and administrative support are the least competitive, giving employers the most wage-setting power in these industries.

Dynamic monopsony across the U.S. economy may be one of the reasons we experience high income inequality in our nation, and why most workers have not been able to share in the economic growth of the world's wealthiest nation. Webber calculates a "counterfactual earnings distribution," hypothesizing what things would look like without the patterns of monopsony that he finds. He presumes a one-unit increase in firms' labor supply elasticity and finds that it would be associated with a 9 percent reduction in the variance of the earnings distribution. In other words, reducing the impact of monopsony across the economy would make it more equitable for workers.

Evidence points to monopsony being particularly detrimental to women workers. Further research by Webber finds that monopsony contributes to the overall gender wage gap.[3] This research estimates that women's greater job-search frictions compared to men leads to 3.3 percent lower earnings. This is equivalent to $131 monthly penalty for the median female

[2] Douglas A, Webber, "Firm market power and earnings distribution, *Labor Economics* (August 2015), available at https://www.sciencedirect.com/science/article/abs/pii/S0927537115000706.

[3] Webber, Firm-Level Monopsony and the Gender Pay Gap, *Industrial Relations* (March 2016), available at https://onlinelibrary.wiley.com/doi/abs/10.1111/irel.12142.

worker. This is essentially a tax on women workers, equivalent to half the taxes that workers pay on their income under the Federal Insurance Contributions Act.[4] Webber's analysis concludes that a majority of this difference is due to the marriage and child penalties that women face and that have no similar effect on men. The gender-specific social expectations that women face not only impact their disproportionate burden for caretaking in their families, but also reduces their economic opportunities in the labor market.

Monopsony also appears to be more prevalent in industries that have a disproportionate amount of women. Recent research by Elena Prager at Northwestern University and Matt Schmitt at the University of California, Los Angeles published by Equitable Growth finds that hospital mergers reduced wage growth for nurses and pharmacists, both occupations that are heavily dominated by women.[5] They estimate that healthcare workers impacted by a merger had earnings that were 4.1 percent lower for skilled workers and 6.3 percent lower for health care professionals compared to workers not impacted by a merger.

A significant body of research in the monopsony literature also estimates that monopsony reduces earnings for teachers where women are overrepresented, and finds significant monopsony among teachers, especially women teachers.[6] Economists Michael Ransom and Val Lambson of Brigham Young University finds that these differences are due to women teachers being paid less than men even within the same school districts. These outcomes persist despite supposed pay rigidity in school districts with clearly defined salary scales.

Furthermore, gender-based discrimination in hiring and treatment at work may leave women captive to accept jobs in less-than-ideal conditions or quit and go into a potentially lower-paying,

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[4] Kate Bahn, "How Labor Friction and Social Fiction Relate to the Gender Wage Gap ," Center for American Progress (April 2016), available at https://www.americanprogress.org/issues/economy/news/2016/04/27/136559/how-labor-friction-and-social-fiction-relate-to-the-gender-wage-gap/.

[5] Elena Prager and Matt Schmitt, "Employer consolidation and wages: Evidence from hospitals," Washington Center for Equitable Growth (February 2019), available at https://equitablegrowth.org/working-papers/employer-consolidation-and-wages-evidence-from-hospitals/.

[6] Michael R. Ransom, "Monopsony, Mobility, and Sex Differences in Pay: Missouri School Teachers," *American Economic Review* (May 2011), available at https://www.aeaweb.org/articles?id=10.1257/aer.101.3.454.

lower-quality jobs. Research suggests that sexual harassment is significantly underreported due to barriers in the complaint process and fears of retaliation.[7] This often leaves women workers with two options: leave their jobs without a better employment opportunity or put up with harassment with little recourse. A 2017 study by sociologists Heather McLaughlin of Oklahoma State University, Christopher Uggen of University of Minnesota, and Amy Blackstone of the University of Maine finds that sexual harassment has negative financial costs on women.[8] Rather than changing changes based on better opportunities, woman are changing jobs to avoid sexual harassment and taking jobs that pay less or offer less growth, thus stifling their career trajectory. This is reinforced by additional research from the U.S. military, finding that sexual harassment increases turnover of servicewomen, even when controlling for factors that one would predict would increase job attachment, such as job satisfaction and organizational commitment.[9]

In cases of decreased competition for workers, workers who have experienced harassment on the job may just simply not be able to find another adequate job and could stay in a hostile work environment. As McLaughlin, Uggen and Blackstone note in their recent study on the financial consequences of sexual harassment, firm-specific human capital is closely linked to earnings, which means workers may be disinclined to leave their jobs when they've invested in their skills at their current employers. Employer monopsony power, such as exists in many rural labor markets today,[10] may just make it impossible to find another job.

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[7] Cortina, Lilia M. Cortina and Jennifer L. Berdahl. "Sexual harassment in organizations: A decade of research in review." *Handbook of organizational behavior* 1 (2008): 469-497.

[8] Heather McLaughlin, Christopher Uggen, and Amy Blackstone, "The Economic and Career Effects of Sexual Harassment on Working Women," U.S. National Library of Medicine, National Institutes of Health (May 2017), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5644356/.

[9] Carra Sims and Louise Fitzgerald, The Effects of Sexual Harassment on Turnover in the Military: Time-Dependent Modeling," *Journal of Applied Psychology* (December 2015), available at https://www.researchgate.net/profile/Fritz_Drasgow/publication/7453306_The_Effects_of_Sexual_Harassment_on_Turnover_in_the_Military_Time-Dependent_Modeling/links/584ac6e108aecb6bd8bd05cc/The-Effects-of-Sexual-Harassment-on-Turnover-in-the-Military-Time-Dependent-Modeling.pdf.

[10] Zoe Willingham and Olugbenga Ajilore, "The Modern Company Town," Center for American Progress (September 2019), available at https://www.americanprogress.org/issues/economy/reports/2019/09/10/474336/modern-company-town/.

When women workers are more likely to quit their jobs for reasons other than seeking a better fit and higher pay or they stay in bad jobs, they ultimately will appear to have lower pay sensitivity. Employers are able to take advantage of women's revealed lower pay sensitivity by offering them lower pay, without being worried about not being able to compete for a sufficient supply of labor. Contrary to theories of discrimination that believe discrimination would be competed away, in monopsony markets, women will have worse outside options when experiencing harassment at work.

Why is understanding monopsony power so important today? Evidence that helps policymakers understand the structure and the dynamics of the U.S. labor market will illuminate the importance of policies and institutions such as unions that ensure workers receive fair wages and that economic growth is broadly shared. This is the main thrust of Equitable Growth's work on the U.S. labor market—endeavoring to improve our understanding of the forces and barriers that shape the lives of workers. A clearer picture of the labor market helps policymakers understand why workers earn what they do, what opportunities they have, and what policies can help all workers share in strong, stable, and broad-based growth.

Understanding the myriad of causes of U.S. labor market monopsony is crucial to implementing policies to address employer wage-setting power. No silver-bullet policy solution can solve monopsony when it is the result of multiple factors such as historical barriers and repressive social norms faced by women, so research that looks at the several causes of wage exploitation is a crucial step in increasing worker well-being. Instituting policies that increase the outside options available to workers, including policies that reduce search costs or make it easier for workers to change jobs, is a necessary step toward limiting the ability of employers to suppress wages and take advantage of workers. Similarly, policies that reduce discrimination and empowers workers help to make the market more operational. Ultimately, when workers are able to freely move about the labor market in search of better pay and a better fit, they will be more productive and be able to share in the economic growth that they create.

Mr. CICILLINE. Thank you so much.

We now recognize Dr. Topel, who is going to testify from Chicago via video.

You're recognized for 5 minutes, sir.

TESTIMONY OF ROBERT TOPEL

Mr. TOPEL. Thank you. Let me just make sure you can hear me.

Mr. CICILLINE. Yes, we can.

Mr. TOPEL. Okay. Good.

Thanks for having me. Thanks for accommodating my need to be here in Chicago at the university.

I'm going to skip a few details because a lot has come up in the discussion from other witnesses. As I understand things, the legislation being considered by the Committee would seek to regulate or prohibit certain business practices or conduct that might harm workers when used by employers with a degree of monopsony power, as defined by other witnesses here today.

In those situations, I've not found it useful to use a merger guidelines type exercise of market definition, which asks what is the labor market in which an employer or employers might have some degree of market power. Rather, as in the analysis of alleged anti-competitive practices in product markets, it's more useful to analyze the practice directly, weighing punitive harms of the practice against any possible pro-competitive effects.

Such an analysis has several steps. First, does the challenged practice, such as a noncompete clause, have a pro-competitive justification? The existence of such a justification is often demonstrated by the fact that employers without substantive monopsony power use it.

Second, if the practice does have a pro-competitive rationale, does it also have a plausible anti-competitive impact?

Third, if the practice has both a possible anti-competitive impact and a pro-competitive justification, do the benefits of the latter offset the costs of the former? Further, even if the pro-competitive effects dominate, is there a less restrictive practice that would achieve the same pro-competitive benefit?

That's the basic framework I have applied in no-poach and noncompete agreements, but it also applies to state-imposed occupational licensing schemes.

Let me say a little bit about no-poach agreements. Under a no-poach agreement, a set of business entities agree they will not recruit or hire certain types of employees from other parties to the agreement. In evaluating the competitive effects of such agreements, it is important to distinguish between collusive agreements that are meant to suppress labor market competition without much pro-competitive justification and agreements among Members of a joint venture or a franchise business model where no-poach agreements have clear pro-competitive justifications.

Because of this, I believe a uniform prohibition on no-poach agreements would be unwise and that additional legislation restricting such agreements is unwarranted. In other words, we have the tools.

Certain no-poach agreements are nakedly collusive and can be challenged under existing antitrust law. For example, in high tech employees, it was found that Apple, Pixar, and other Silicon Valley employers have entered into a set of bilateral agreements to refrain from actively recruiting each other's employees via cold calling. Individuals who unilaterally sought to move from, say, Apple to Pixar by applying for a position were not covered by the agreement, and so Pixar could hire them without violating the agreement with Apple.

Even so, this is a horizontal agreement among competitors who were not engaged in any formal joint venture. As such, the agreements were found to be *per se* violations of section 1 of the Sherman Act, which prohibits horizontal agreements in restraint of trade. Though the agreements might have certain pro-competitive benefits, it's unlikely that any benefits derived from applying a "rule of reason" analysis to every no-poach agreement that might be challenged would offset the cost of such case-by-case evaluation.

Subject to carve-outs for joint ventures in related business models, *per se* illegality of horizontal no-poach agreements is justified in my view. But, existing law is sufficient to achieve this. As I tell my students, don't do that.

Even in such *per se* situations, there's a separate issue related to the extent of harm caused by an illegal no-poach agreement. I'm going to skip over this part of my testimony because others can read it, and I want to get down to the economics of no-poach agreements that are different in the case of joint ventures or franchises, because there's typically a pro-competitive justification.

Suppose that instead of the horizontal agreement described earlier, Apple and Pixar were engaged in a pro-competitive joint venture that required cooperation among teams of software engineers in each company. It's reasonable to assume that Apple and Pixar invest into identifying, recruiting, and training these skilled employees who are now going to work together. The cooperating firms are thus partners in the joint project and competitors in the market for talent.

The simple Act of project cooperation reveals information on employee talents, and both firms know that other workers have been trained in firm-specific methods that might be valuable. They'd like to steal the best who were discovered as a result of the cooperation, but in so doing they reduce the incentive to cooperate in the joint venture and reduce the incentive to invest in identifying, recruiting, and training talented people.

A no-poach agreement with specified parameters, such as a fixed duration and types of workers covered, protects these investments and, therefore, has a credible pro-competitive justification.

Mr. CICILLINE. Dr. Topel, your time has expired, so if you could just summarize.

Mr. TOPEL. Sure.

Whether such an agreement is pro-competitive overall is a question of balancing these effects against possible harms, which means that such agreements should not be considered *per se* illegal. My analysis of no-poach agreements for franchise agreements is very similar and, also my analysis of noncompete clauses.

I'll close there. Thank you.

[The statement of Mr. Topel follows:]

Statement of Robert H. Topel

Isidore & Gladys Brown Distinguished Service Professor of Economics

The University of Chicago

October 28, 2019

I have been asked to comment on issues raised in several pieces of employment-related legislation that are pending in the House and Senate. These bills deal with occupational licensing, alleged monopsony power in labor markets, and certain unilateral business practices of employers that are alleged to enhance or maintain employers' monopsony power, harming workers' welfare. The specific practices at issue are: (1) No-Poach agreements, by which two or more business entities agree that they will not recruit certain types of employees from other parties to the agreement, and (2) Non-Compete clauses in employment contracts, which limit the ability of employees to accept positions with competing employers under certain circumstances.

1. No-Poach Agreements

Under a no-poach agreement, a set of separate business entities agree that they will not recruit or hire certain types of employees from other parties to the agreement. In evaluating the competitive effects of such agreements, it is important to distinguish between collusive agreements that are meant to suppress labor market competition without (much) procompetitive justification and agreements among members of a joint venture or franchise business model, where no-poach arrangements have clear procompetitive justifications. Because of this, I believe a uniform prohibition on no-poach agreements would be unwise and that additional legislation restricting such agreements is unwarranted.

Certain no-poach agreements are nakedly collusive, and can be challenged under existing antitrust law. For example, in *High-Tech Employees* it was found that Apple, Pixar and other Silicon Valley employers had entered into a set of bilateral agreements to refrain from actively recruiting ("cold calling") individuals in certain occupations who were employed by other parties to the agreements. Individuals who unilaterally sought to move from, say, Apple to Pixar by applying for a position were not covered by the agreement, and so Pixar could hire them without violating its agreement with Apple. Even so, this was a horizontal agreement among competitors who were not engaged in any formal joint venture. As such, the agreements were found to be a *per-se* violations of Section I of the Sherman Act, which prohibits horizontal agreements in restraint of trade. Though the agreements might have certain procompetitive benefits in promoting recruiting of talented people to the Silicon Valley area generally—similar to those I will discuss in the context of joint ventures and franchises—it is unlikely that any benefits derived from applying a "Rule of Reason" analysis to every no-poach agreement that might be challenged would offset the costs of such case-by-case evaluation. Subject to carve-outs for joint ventures and related business models, *per-se* illegality of horizontal no-poach agreements is justified, in my view. But existing law is sufficient to achieve this. As I tell my students: "Don't do that."

Even in such *per-se* situations, there is a separate issue related to the extent of harm caused by an illegal no-poach agreement in comparison to illegal price fixing agreements among sellers. In the case of product market collusion, a typical horizontal agreement among sellers restricts output and raises price to a broad class of buyers—the classic monopoly outcome of collusive price setting. Many buyers are harmed by the elevated price, and few if any benefit. In contrast, in a no-poach agreement like the one in *High Tech*, or the allegedly similar "agreement" in *Duke Medical Center*, harm is much more limited. These alleged agreements did not restrict employment or lower wages generally. Instead, such no-poach agreements typically restrict a certain type of recruiting ("cold calling") and even then for only certain types of firm-to-firm moves (lateral hires in the medical schools of Duke and UNC in the case of *Duke*). It follows that an Apple employee who did not receive a superior cold-call-generated offer from Pixar as a result of such an agreement was clearly harmed by some amount. But given that Pixar had an open position it wished to fill, that position would be filled by either promoting an existing Pixar employee or by hiring from some other firm that was outside of the agreement. Those employees *benefitted* from the no-poach agreement. And since recruiting from parties to a horizontal agreement is typically a small fraction of their total recruiting, the overall impact on employees' compensation must be small. In the case of output markets, it is as if firms A and B agreed not to sell to some customers of the other party. If the agreement caused A to sell more to C, then C likely benefitted.

The economics of no-poach agreements are different in the case of joint ventures or franchises because there is typically a pro-competitive justification for the practice. Suppose that instead of the horizontal agreement described above, Apple and Pixar were engaged in a pro-competitive joint venture that required cooperation among teams of software engineers from each company. It's reasonable to assume that Apple and Pixar invested into identifying, recruiting and training these skilled employees, who are now going to work together. The cooperating firms are thus partners in the joint project and competitors in the market for talent. The simple act of project cooperation reveals information about the employees' talents, and both firms know that the others' workers have been trained in firm-specific methods that might be valuable. They would like to "steal" the best, who are discovered as a result of cooperation, but in doing so they both reduce the incentive cooperate on the joint project and reduce the incentive to invest in identifying, recruiting and training talented people, because they might lose them. A no-poach agreement, with specified parameters such as a fixed duration and the types of workers covered, protects these investments and therefore has a credible procompetitive justification. Whether such an agreement is pro-competitive overall is a question of balancing these effects against possible harms, which means that such agreements should not be considered *per se* illegal.

Some have noted the prevalence of no-poach restrictions in franchise agreements, particularly in the fast-food industry. Simplifying a bit, an individual franchise owner for (say) Wendy's is restricted from hiring employees of another franchise owner without that owner's permission. The claim, for which there is virtually no evidence, is that such an agreement restricts mobility of workers among Wendy's franchises, and that such a restriction harms workers by denying them opportunities to advance, reducing their wages.

The franchise business model is a form of joint venture, where the individual franchisees enter into a cooperative relationship to promote the franchise (Wendy's) brand in competition with other chains. The contracts restrict (as all contracts do) the behavior of franchisees in a variety of ways meant to promote the brand—a franchisee may not open a store near another franchise (exclusive territories), must offer products from a limited set of suppliers (exclusive dealing) and so on. Even (perhaps especially) among less-skilled individuals, the identification, recruiting and training of reliable employees is an important brand-promoting activity by franchise owners. These human resource activities are costly. If franchisee A incurs these costs and develops a talented store manager, franchisee B has every incentive to simply hire that manager away—avoiding the cost of developing its own manager, but wiping out A's investment. From the perspective of the franchisor—the brand—B's free riding did not raise the overall level of existing talent but merely moved it around, while at the same time undermining the incentive of other franchisees to invest in improving the workforce. A no-poach rule has the effect of forcing franchisees to recruit externally, raising overall workforce quality. This is a clearly procompetitive effect and justification for the unilateral business practice, which means that a blanket prohibition is unjustified. Again, existing law is sufficient to deal with situations in which such restrictions might unduly restrict labor market competition.

2. Restrictive Covenants ("Non-Compete" restrictions)

Restrictive covenants are elements of employment contracts that restrict an employee from working for certain types of firms—typically close competitors of the employer—during a specified period of time after leaving the employer. The proposed legislation I examined (H.R. 5631) would effectively prohibit such contract restrictions for employers in all lines of commerce—they would be presumptively illegal under antitrust law. The only defense is in Section 3 of the proposed law, which allows an employer to prove by "a preponderance of evidence" that its rule is not anticompetitive. I believe such a broad and sweeping restriction would be unwise, and would harm labor market performance. But the proposed law would increase the employment and earnings of labor antitrust lawyers and experts, so there's that.

In my view, an economic analysis of the competitive effects of restrictive covenants in employment contracts should proceed along the same lines as the analysis of unilateral business practices in product markets. Suppose that a product market practice, such as exclusive dealing or loyalty discounts, is alleged to have anticompetitive impact if practiced by a firm with substantive market (monopoly) power. Does the practice have a legitimate procompetitive justification that should be weighed against possible anticompetitive harm? The existence of such a justification would be evidenced by the fact that other firms without substantive market power also use the practice. Here, in the case of restrictive covenants in labor contracts, their widespread use by employers that have no plausible monopsony power is *prima facie* evidence for such a justification. It is a dangerous law that would prohibit a widely used business practice—a practice used even in situations where the employer could not have substantive monopsony power.

Such a law is also dangerous because it fails to fully contemplate the but-for world that would exist if the law is passed. Suppose that "non-competes" are legal unless proven otherwise. Why would an employer wish to restrict the (later) mobility of its employees if by doing so it harms workers' careers and makes the employer less attractive ex-ante? The obvious reason is that the restriction allows the employer to capture some of the returns on its investments in identifying, recruiting and training talented workers, as described above in my discussion of no-poach agreements. Another, related, effect is to demonstrate to new employees that the employer has the incentive to engage in such investments, a commitment to advance their productivity and careers. Pull this away via a prohibition of non-competes, and employees lose the benefits of such employer-provided investments. Productivity is harmed, not enhanced. The only guaranteed beneficiaries of this legislation are employees who have already realized the productivity gains of employer investments, who can capture the returns of leaving.

That is a one-time transfer of wealth from employers to a cohort of existing workers, not a long-term productivity gain.

One might argue that new employees are ignorant of non-compete clauses, discovering their existence only when attempting to leave for another opportunity. This is itself dubious given their widespread use, but suppose it is true. Then a much simpler remedy is to require that employees be informed by the employer, and that they sign a separate affirmation that they have been informed at the time of hire.

My conclusion regarding legislation that would prohibit non-compete clauses is very similar to my analysis of a no-poach prohibition. Non-competes have clear procompetitive justifications, as evidenced by their widespread use in competitive markets. Economics indicates that a law making them presumptively illegal would be a dangerous extension of antitrust scrutiny and liability into areas where such extension has no proven benefits and potentially large and damaging costs.

Mr. CICILLINE. Thank you, Dr. Topel.

We'll now proceed under the 5-minute rule, and I recognize the gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you.

Dr. Starr, you talked about the camp counselors, yoga instructors, temporarily employed packers at Amazon being subject to an 18-month noncompete agreement.

Professor Paul, have courts ruled on the legality of an 18-month noncompete clause applicable to jobs such as those that I just mentioned?

Mr. CICILLINE. Please put your microphone on.

Ms. PAUL. Sorry. I keep doing that.

So currently, without the intervention of antitrust law, state law as to noncompete agreement varies state by state, so as was discussed, in some states take a very—ban noncompete agreements entirely.

Most other states use what's called a reasonableness test, and they look at whether, first, the purpose of the noncompete agreement is a legitimate one and then whether the geographic—usually the geographical and the temporal duration of the noncompete agreement is reasonable given that objective. So, it would be context dependent on the facts of that case, that sector, that particular labor market, and the text of the agreement.

In my opinion, under that reasonableness test, none of those should be reasonable—

Mr. JOHNSON. Courts have been finding, however, that these types of clauses affecting those kinds of occupations that don't involve trade secrets or proprietary information, state courts have been ruling in favor of these noncompete clauses. Is that correct?

Ms. PAUL. There are a variety of decisions going both ways. I think there are, unfortunately, too many decisions that uphold such noncompete agreements.

Mr. JOHNSON. Dr. Topel, do you see a problem—I know your testimony is pretty much limited to poaching agreements and those pretty much apply to high end, high tech employment. But, I'm speaking of just regular, average workers out here who don't have access to trade secrets or proprietary information. Do you believe that these types of noncompete agreements should be enforced against those workers by state courts or do you think that perhaps a Federal remedy may be necessary?

Mr. TOPEL. I believe that the remedies are in hand in the nature of current antitrust law and that these should be judged on a case-by-case basis because in many situations the practice itself has a pro-competitive justification.

Mr. JOHNSON. Well, cite me some of those justifications that could exist for these types of positions that we just talked about—camp counselors, yoga instructors, packers temporarily employed at Amazon. What could be a justification for a noncompete agreement in those fields?

Mr. TOPEL. Let me come back to what I said. In my testimony about non-poach agreements here, or no-poach agreements—

Mr. JOHNSON. I'm talking about noncompete agreements here.

Mr. TOPEL. I understand. I was about to finish my sentence by saying in the context of noncompetes, similar forces matter because, after all—

Mr. JOHNSON. Cite me some of those factors.

Mr. TOPEL. That's what I'm getting to, sir. In these contexts, employers invest heavily in locating talented people. Talented people are not easy to come by, and you invest in finding them, recruiting them, training them, and it's reasonable to expect that people would want to get the returns on those investments.

Having said that, it depends on the context—

Mr. JOHNSON. Well, let me stop you right there and ask Dr. Starr, what do you think about that response?

Mr. STARR. I think that Dr. Topel makes a good point that the courts have made for years, actually, I think that the evidence doesn't quite support that position.

Mr. JOHNSON. Dr. Marinescu, what is your response?

Ms. MARINESCU. I agree with Dr. Starr that the evidence doesn't seem to support that position.

Mr. JOHNSON. Dr. Topel?

Mr. TOPEL. Yes?

Mr. JOHNSON. Do you disagree with those two responses?

Mr. TOPEL. Remember that both of those responses are making a sweeping statement. As I said, it depends on the context, which is why I think it should be judged on a case-by-case basis. If we can't establish here that a business practice that's so broad, that has existed for so long even for firms that don't have substantive monopsony power, is uniformly anti-competitive or should be subject to a uniform prohibition. That's why I think it shouldn't be judged under the usual methods for section 2 violations.

Mr. CICILLINE. The gentleman's time is expired.

I now recognize the gentlelady from Pennsylvania, Ms. Scanlon, for 5 minutes.

Ms. SCANLON. Thank you.

I'd like to start by thanking our panelists for their written testimony and for appearing, whether virtually or otherwise, before the Committee today.

I represent southeastern Pennsylvania, and we've faced a lot of economic hardship in recent years and felt the effects of stagnant wages. Recent studies have shown that families at the median income, around $75,000 a year, end up underwater or in debt every year once they pay for basics like childcare and healthcare. There's no money left for retirement, for education funding in the future. About 70 percent of the families in my district make less than that.

So, we've seen some major disruptions in our local economy, our local labor force this year, and I'd like to explore that with Dr. Marinescu because she's from that area, from my alma mater, University of Pennsylvania.

Seeing as you work in the Philadelphia region, I'm sure you're aware of the closure of Hahnemann Hospital. Can you speak a little to the sensitivity of healthcare workers to labor monopsony and why these folks might be at greater risk and what the Hahnemann closure means for our region?

Ms. MARINESCU. Thank you for raising this question.

So fundamentally, the effects of a merger or a closure are to affect the competition for workers. So, in the case of a closure, there is one particular hospital that now is no longer hiring workers, which means that there is less competition in the labor market.

Especially if we're talking about a more isolated labor market where there aren't many hospitals, such a closure is likely to negatively impact wages. This is for two reasons, I want to be clear.

One is simply a reduction in labor demand, what we call—there are simply fewer jobs, and that's a natural consequence that wages will go down.

Furthermore, based on my work, I expect a second impact which is, on top of that, a reduction in competition will tend to reduce wages even more. Based on the analysis of a hospital merger, which also reduces competition, we can tell that this can reduce wage growth by as much as 25 percent.

Again, this is a double warning that comes on top of the fact that we have fewer jobs, which already reduces wages by itself.

Ms. SCANLON. Okay. We have a similar example. We have the PES refinery in Philadelphia which recently had an explosion and shutdown, and we've heard reports about, since that was sort of a unique kind of a job prospect, we're hearing that the workers there have to move to other states and do things like that. Can you talk about the impact of something like that?

Ms. MARINESCU. Yes. Thank you so much.

So, an argument that I hear a lot when I talk about labor market concentration, and I define it by occupation, is people will tell me, low-wage workers, they don't have a lot of skills and they can do any job. Go be a fast-food worker or a cashier, it doesn't matter.

The reality is what we see in our data is that no matter the skill, workers are similarly attached to their occupation. Of course, we could also expect that if your skill is particularly unique and there aren't many other uses of it, this is a situation where your current job disappearing puts you in a much worse situation.

So that even if you're able to find a job, this job is not the right job for your skills and you're going to get paid less than you would have gotten paid in a situation with lots of employers vying for exactly the type of skill you have. So, we have a lot of competition in the labor market.

Ms. SCANLON. Thank you.

Dr. Bahn, I wanted to translate a little bit of your paper maybe into English. So, you said that monopsony is detrimental to female workers because they have greater job search friction. So, I translate that to mean they have a harder time changing jobs because they have childcare obligations and there's a threat in some job situations of harassment or a hostile work environment.

Can you talk a little bit about some of the policies that might help reduce job search friction? The ones that come to mind for me are increasing access to childcare and enforcement of sexual harassment policies.

Ms. BAHN. Yeah. So, job search frictions are anything that make it hard to change jobs, and one topic people have talked about is mobility across space. Particularly if you are a secondary income earner or have primary responsibility for caretaking in your family, it may be hard for you to get up and move to another state. So, what you want to do in the case where you're not able to maybe move far for a new job is increase your bargaining power, making anything easier for you to bargain with your employer for higher wages.

There's evidence that I think women can have higher bargaining power if they have a higher floor that they're starting from, that they have things like any sort of universal policy that allows for them to afford childcare, have access to paid leave, paid sick, flexible scheduling, scheduling that they know of in advance. All these types of policies that just sort of raise the floor for the types of jobs that workers are working and the types of support they need to have a job will make it easier for them to bargain with employers so they can have higher wages and reduces their employer's wage-setting power so employers are less likely to undercut their wages.

Ms. SCANLON. Okay. Thank you very much.

I yield back.

Mr. CICILLINE. I thank the gentlelady for yielding back.

I now recognize the gentlelady from Washington, Ms. Jayapal, for 5 minutes.

Ms. JAYAPAL. Thank you, Mr. Chair.

An increasing number of workers earn some or all their living working through online platforms such as Uber. Still, more workers are classified as independent contractors, a status that comes with very few protections and many barriers when they organize. These workers face problems on the job like low compensation rates, little recourse if the company decides to terminate their account, and rating systems that are inherently biased against workers of color. Although in some cases antitrust laws may provide some protections for these workers, in other cases, the law falls short or may even harm workers who try to organize together and improve their working conditions.

Professor Paul, we've seen instances where on-demand companies crack down on worker organizing. For example, a group of Uber drivers here in DC worked together to generate higher pay in a system in which they're not classified as employees, since rates of pay for those drivers are unpredictable, can be as low as $8.77 an hour. In essence, they were acting together for higher pay in a system in which they're not classified as employees. When their activities were exposed, these workers were kicked out of the Uber app.

When workers on these platforms try to organize, are they protected under antitrust law?

Ms. PAUL. They are not.

Ms. JAYAPAL. So, they are not actively protected. Are they, in fact, impeded?

Ms. PAUL. They are, in fact, impeded. I can elaborate if you would like me to.

Ms. JAYAPAL. Yes, please.

Ms. PAUL. Yes. So, for example, in addition to the example that you gave, as you know, the city of Seattle a few years ago passed an ordinance providing for collective bargaining rights for rideshare drivers in Seattle, taking advantage of what's known as the state action exemption to antitrust law.

That was met by a Federal preemption lawsuit by the U.S. Chamber of Commerce. I'm sad to say that the Department of Justice and the Federal Trade Commission actually filed a brief in favor of the Chamber and against workers, some of the most vulnerable workers in the gig economy. Rideshare drivers currently do not enjoy collective bargaining rights in Seattle or anywhere else in the country and neither do other gig economy workers.

So, that this is really kind of a perverse position for our antitrust institutions to take, given the original purposes of antitrust law that I described in my testimony and given that legislators were very clear that they did not intend to prescribe this type of cooperation, and instead, intended to proscribe precisely the type of coordination that is currently being permitted by our antitrust institutions, namely, Uber and other dominant platforms, fixing prices across thousands, hundreds of thousands of putatively independent businesses.

Ms. JAYAPAL. Thank you for that excellent explanation. We were devastated in Seattle to see that happen.

Under current law, workers classified or misclassified as independent contractors are prevented from collective bargaining, as you've talked about. How can antitrust law be reconfigured to better protect workers when they join together to protect their economic interests?

Ms. PAUL. Yeah, that's a great question. So, I think in the first instance, we could see a reordering of enforcement priorities among our enforcement agencies. So, currently, it seems like the Federal Trade Commission is actually prioritizing, cracking down on the cooperation—reasonable cooperation of, frankly, not just gig economy workers, but also other workers beyond the bounds of employment. So, it's really not just the gig economy. It's thousands, hundreds of thousands of truck drivers in this country are independent contractors. That continues to be an important job for low-wage workers and mid-wage workers, and it's also independent professionals and entrepreneurs.

So, the FTC has filed actions involving an investigations from everyone from church organists to truck drivers. We could see, so in the first instance, a reordering of enforcement priorities, let's perhaps consider the coordination top down control firm dominant platforms like Uber are engaging in, rather than workers and independent professionals. Then, secondly, it might be, given decades of some unfavorable decisions since the 1970s or so, there might be room for congressional action here.

Ms. JAYAPAL. There's a major power imbalance between these large cooperation that classify workers as independent contractors and the workers that enrich the corporations. That sounds like a monopsony where one powerful buyer is controlling all the sellers.

How do we address that particular imbalance of power?

Ms. PAUL. So, that antitrust law, as configured, has the ability to go after powerful buyers. I would say a couple of things. It goes beyond monopsony, because that assumes already that we're defining coordination—economic coordination rights in terms of firms. But antitrust law unfortunately prioritizes—current antitrust law as currently constituted, prioritizes the coordination rights of large firms at the expense of small players. I think that we really need to see a reversal of that again, so that we make a priority of coordination that's engaged in by dominant platforms and dominant firms rather than small players.

Ms. JAYAPAL. Very helpful. Thank you so much.

I yield back.

Mr. CICILLINE. I now recognize the gentleman from Colorado, Mr. Neguse, for 5 minutes.

Mr. NEGUSE. Thank you, Mr. Chair.

Just to follow up on a point, a salient point that my colleague from Washington had raised, Professor Paul, in your testimony, you note that Congress in the Clayton Act exempted organized labor from being a target of antitrust laws. Of course, today, the rampant misclassification of workers as independent contractors is exposing collective action by working people to antitrust attack. It was interesting the example you noted.

The ordinance passed by the city of Seattle that would have given independent contractors like Uber drivers the right to collectively bargain was struck down in part on antitrust grounds and that the antitrust agencies actually filed a brief against the workers in favor of the Chamber of Commerce.

So, given that trend, are there specific steps Congress should take to ensure that independent contractors receive protections that lawmakers intended to cover workers?

Ms. PAUL. Thank you for that question. My own opinion is that Congress should consider a broad exemption for work—all workers, whether they're defined as employees or not, anyone who sells labor or services, even if they have small capital investments, independent professionals. I would actually suggest that Congress consider an exemption for small businesses as well, because, again, when we look at the history, this is very much what was intended. I think that this is sustainable.

I would point to an example, because there are other jurisdictions, other countries that have implemented this type of exemption. Australia's competition authority has recently implemented such a broad exemption. This is ultimately good for workers and small business in three ways.

First, it helps small businesses gain sustainable returns that allows them to reinvest in their businesses, in workers, and in communities. It also prevents the kind of gaming the borders that we are going to see, unfortunately, as we've already seen, with any kind of labor exemption. I fear that if we just broaden the labor exemption, that we will then see a new kind of gaming of the borders by businesses where we just—where businesses sort of have truck drivers line up at the office and, okay, now we're going to incorporate three of you as an LLC. You don't get the labor exemption. We've seen that kind of gaming at the border, so we need broad action to reinstate the original congressional purposes.

Mr. NEGUSE. Thank you.

Separate subject, obviously tangentially related on noncompetes. So, I just would like to try to achieve some consensus amongst the many witnesses, all of whom we appreciate your testimony.

So, Mr. Starr—sorry—Dr. Starr—I apologize—I take it you would concede that noncompetes may be justified under certain circumstances. Is that a safe assumption for you to—

Mr. STARR. For example, I have no problem with executives signing noncompetes with their legal teams at their side. I have no problem.

Mr. NEGUSE. Mr. Topel, I know you'll agree with that, and obviously your written testimony attests to that, correct?

Mr. TOPEL. Yes.

Mr. NEGUSE. Okay. By that same token, Mr. Starr—I'm sorry—Professor Starr, in your testimony you note this. There's no public interest for low-wage workers at Jimmy John's, by way of example, to be tied into these noncompete agreements. You agree with that?

Mr. STARR. As Dr. Sanjukta said, in most states, they require some sort of protectable interest. I think that in many of these cases, these low-wage workers don't have access to what would be a traditionally protectable interest.

Mr. NEGUSE. Mr. Topel, I presume you'd agree with that as well?

Mr. TOPEL. I mean, the example of Jimmy John's, I don't know the details, but it's hard to imagine why the noncompete, other than the franchising argument we had about nonpoaching. So, if they said you can't work at Wendy's, I would view that as kind of a competitive problem.

Mr. NEGUSE. Precisely. Right. So, I guess my point here is that, clearly, there's somewhere in the middle here where I think we all can come to an agreement that noncompetes may be appropriate in certain circumstances, but the way in which they're being abused in a variety of different industries and across the labor market in the aggregate is clearly not conducive to wage growth, nor in the public interest.

So, I'd be interested—I know my time will soon expire—but interested to hear from this panoply of panelists about solutions that we could potentially get through this Congress that would meet that consensus.

Dr. Starr, perhaps your recommendation to the Congress that we compel the FTC to commission a study, a 6(b) study, to help expand our understanding of potentially anticompetitive employment contracting practices, I suspect that might be, in fact, one way for all of us to kind of move forward to get better data so that we can ultimately craft a solution that addresses this in a surgical way.

So, with that, I would yield back the balance of my time.

Mr. CICILLINE. I thank the gentleman.

I now recognize myself for 5 minutes.

Dr. Marinescu, I want to start with you. I want to give you an opportunity to respond to some of the criticism from others. Some scholars have argued that there's no causation between market concentration and wages, and that wage stagnation in the United States is actually attributable to other factors, such as weakening of labor law.

What is your response to that criticism?

Ms. MARINESCU. Thank you. So, for the point about wage stagnation, I think the evidence right now does not clearly point that an increase in concentration is the cause of wage stagnation. Nevertheless, my research and others clearly show that this is a contributor in making wages today lower than they would otherwise be. So, case closed. This needs to be addressed, whether it has historically contributed. So that's the first point.

Second, some people in academia have criticized—so just let me read from this very briefly. Does it make any sense to ask if labor market concentrations cause lower wages? There might be other factors at play. So, our work is very careful in controlling for a number of factors, but we have two additional—since that original study, we have two additional things.

First, the study on hospital mergers that I told you about is a very well quasi-experimental study that goes in the same direction. Secondly, the same person who criticized that, Steve Berry at Yale, is now a coauthor, and we're doing it the right way and are still finding that there's a lot of monopsony power.

Mr. CICILLINE. Thank you.

Also, some have argued that labor monopsony is not really an antitrust problem, and that making labor markets more competitive will not actually result in a reduction of employer power.

What is your response to that? Why do you think an antitrust framework is an appropriate lens through which to view labor monopsony in particular?

Ms. MARINESCU. Not all monopsony can be addressed by antitrust. For example, the fact that people prefer to work close to home is not something that antitrust can do something about. But there are many dimensions through which behavior of agents in the labor market affects competitions, including things like mergers, noncompetes, and so on. This is where antitrust has a role to play in combating monopsony power that suppresses wages today in the U.S. labor market.

Mr. CICILLINE. Finally, in your testimony, you described the legislative proposal developed by you and Eric Posner to amend the Sherman Antitrust Act to prohibit labor market monopsony, which we'll certainly look at very carefully. Are there other ways that you think that Congress should think about addressing this issue, whether through legislation or oversight?

Ms. MARINESCU. I believe that short of doing legislation, allowing the current antitrust federal agencies more resources to be able to invest in antitrust labor enforcement, which they have started doing, is probably something that would be helpful in making progress on that front.

Mr. CICILLINE. Thank you.

Dr. Starr, you mentioned California as one of the few states that does not allow for the enforcement of most noncompete agreements, and we recognize California as one of the country's most innovative states.

What might this tell us about the importance of noncompetes for innovation? Is it true that, as some businesses claim, wide use of noncompete agreements is essential in order for firms to invest and to innovate?

Mr. STARR. That's a great point. I think that the point about California and its ban on noncompetes, which was adopted in 1872, as a kind of one of the causes for the rise of Silicon Valley, it relates to the ways that innovation occur, and there's two ways. One is you can protect intellectual property like we have with our patent system. A second way is you can spur mobility such that people share ideas across firm boundaries, which results in a recombination of ideas, and so you get new ideas and better ideas. So, Silicon Valley benefited from that immensely, though it is debatable.

I think on the investment front, we have to keep in mind that there are many alternatives to firms. They can rely on trade secrets. They can rely on patents. They don't necessarily need to use noncompetes, *per se*, to invest in trade secrets. I will note that we do see a little bit higher trade secret litigation in California. It's unclear if that's because the tech giants are over there or if it's because of the noncompete laws.

But, in general, in the academic literature, there's a little bit of mixed evidence on the effect of noncompete laws on innovation. There is some evidence that investment is lower in states that more vigorously enforce noncompetes. In some states, some studies find that when states kind of increase their enforceability, that firms do invest in a little bit riskier innovation. So, there's some evidence cutting both ways there.

Mr. CICILLINE. Thank you.

Professor Paul, my last question. As you know, the Department of Justice considers no-poach agreements between competitors to be *per se* illegal. However, as you pointed out, the Department supports exemptions in the franchise context, essentially green-lighting vertical no-poach agreements.

Do you see any reason there should be a distinction between so-called naked no-poach agreements and franchise no-poach agreements? You heard the testimony, so do you see any basis for that distinction?

Ms. PAUL. I really do not. Both restrain competition—horizontal competition, so the effect is the same. If anything, my opinion based on what I said about vertical restraints, is that vertical restraints should be regulated much more stringently than horizontal restraints, because they often embody top down control by a more powerful firm, which is exactly what franchisors do to franchisees. I see no benefit.

The final point I want to make about that is that, at least in the DOJ briefs that I looked at, there were very speculative consumer benefits that were being used to justify this. I think this is one problem. If antitrust law is saying it's going look at workers and labor markets as well, we can't use consumer—speculative consumer benefits to justify harms to workers.

Mr. CICILLINE. Thank you.

I now seek unanimous consent to include a number of letters and statements in the record regarding the state of labor competition, without objection.

I will also ask unanimous consent to include the statement of Chair of the full Committee, Mr. Nadler, and the statement of the Ranking Member of the full committee, Mr. Collins, as part of the record, without objection.

[The information follows:]

MR. CICILLINE FOR THE RECORD

Statement of the Honorable Jerrold Nadler
Subcommittee on Antitrust, Commercial and Administrative Law
Hearing on "Antitrust and Economic Opportunity: Competition in Labor Markets"

Tuesday, October 29, 2019, at 10:00 a.m.
Room 2141 of the Rayburn House Office Building

Thank you, Mr. Chairman, for holding today's hearing.

For decades, it has been standard economic theory that wages are supposed to increase during periods of low unemployment. But as we have seen during the economic recovery in the years since the Great Recession, workers' wages have remained flat despite levels of unemployment that are at record lows.

That is in part because over the past several decades, labor markets across America have become highly concentrated, with a small number of firms dominating a wide variety of markets.

Just as consolidation in product markets tends to result in higher prices and worse quality, the growing concentration of labor markets has saddled workers with depressed wages and fewer opportunities.

When workers lack meaningful choice among employers, they lose leverage necessary to negotiate their wages and salaries. And as with any other market that lacks competition, excessive employer power gives corporations an unfair advantage to harm those workers with a weaker bargaining position.

This power allows employers to set artificially low wages and to discriminate against vulnerable workers, such as women, minorities, and older Americans. And once a corporation is able to depress wages, it has the ability to funnel more money into corporate profits, exacerbating income inequality.

Dominant firms can also abuse their power by imposing anticompetitive terms in employment contract, such as provisions that prohibit workers from moving to a rival employer. For example, employers may restrict the mobility of workers through non-compete agreements, which ban workers from seeking employment at another firm or starting a competing firm. According to a report by the U.S. Treasury Department under the Obama Administration, tens of millions of Americans are subject to these clauses.

More recent evidence shows that nearly 40% of the workforce has signed a non-compete agreement, but this number can be even higher for certain occupations. For example, Professor Evan Starr, one of our witnesses today, has found that 45% of physicians are covered by these restraints. He has also noted that non-competes are so pervasive that "even volunteers in non-profit organizations, in states that do not even enforce them, are asked to sign away their post-employment freedom."

Similarly, in recent years, businesses across the economy—from hospitals to fast-food chains—have also been caught entering into illegal agreements not to hire each other's workers, also called no-poach agreements.

The prevalence of non-compete clauses and no-poach agreements effectively keep workers stuck in place, further depriving them of access to better pay or better work conditions elsewhere and preventing them from exercising bargaining power in their current workplace.

There are several factors that have contributed to this inequality of power, including a long-standing attack on union membership and organized labor, and it is clear that it will take a comprehensive set of reforms to recover economic opportunity and dignity for working people. We must address these problems through lasting solutions, including guaranteeing equal pay for equal work, establishing a living wage, and strengthening unions.

One important solution, however, must also be to *vigorously* enforce the antitrust laws to prevent the concentration of excessive power in the hands of employers in labor markets.

Decades of weak antitrust enforcement—which has been extremely deferential to corporate interests—has undermined the economic opportunity and financial security of American families and small businesses, and has hindered the creative economy.

To reverse this disastrous trend, it is critical that antitrust enforcers challenge both anti-competitive mergers and other conduct that harms working people.

Congress also has an important role in advancing competition in the labor market. Even though the antitrust agencies clarified in 2016 that no-poach agreements are criminally illegal, they remain prevalent in employment contracts. According to one estimate, nearly 60% of franchise agreements contain these illegal terms.

That is why I introduced H.R. 3920, the End Employer Collusion Act, which would restore workers' rights and financial security by prohibiting these clauses in employment contracts and helping workers earn higher wages. I appreciate Senators Cory Booker and Elizabeth Warren, as well as Subcommittee Chairman Cicilline for joining me in introducing this bill.

I look forward to hearing from our distinguished witnesses about this legislation, as well as other proposals to protect the economic security, liberty, and dignity of working people through the full benefits of competition.

I thank the Chairman for holding this hearing, and I yield back the balance of my time.

Statement of Congressman Doug Collins
Subcommittee on Antitrust, Commercial and Administrative Law
Hearing on “Antitrust and Economic Opportunity: Competition in Labor Markets”
Friday, October 18, 2019

Thank you, Chairman Cicilline and Ranking Member Sensenbrenner for holding this hearing.

We’ve had great news under the Trump economy: Female, African-American and Hispanic unemployment levels are at historic lows; the labor force participation rate is strong; the economy has added 6.4 million jobs; and year-over-year wage increases have sustained.

This September’s unemployment rate was just 3.5 percent — making it the 19th straight month with unemployment below 4 percent. September’s unemployment rates for African-Americans, Hispanics and people with disabilities all matched or set the lowest rates on record.

The September unemployment rate for people without a high school diploma fell to just 4.8 percent — a full three percentage points below what it was in November 2016.

To put the icing on the cake, September marked the 17^{th} straight month in which the number of people unemployed was lower than the number of open jobs.

For Americans who struggled to find work and support households during and since the Great Recession, this is very good news.

There really isn't a question about what lies behind these astounding figures. On Election Day 2016, America's voters turned the page on failed economic policies and ushered in new ones through their choice of president. Republican policies on regulatory reform, tax cuts and other important issues have all produced the current jobs boom.

As we work through the remainder of this term of Congress, it is imperative that we devote all of the time we can to keeping this juggernaut going. Cementing pro-jobs policies in place is not a partisan issue. I invite my colleagues from across the aisle to spend all the time they can working with me and my colleagues on my side of the aisle on bills that will keep the economy producing these kinds of gains for American workers, and there is more we can do. The hearing we are holding today highlights that. Although technology and other advances in recent decades would seem to have made it easier for workers to be mobile, the consensus seems to be that labor mobility is not much greater in practice.

One reason is surely occupational licensing. In recent decades, the number of trades and professions subject to occupational licensing has increased dramatically.

In some cases, this can be justified for genuine reasons of health, safety and consumer protection, but, in other cases where those reasons are lacking, occupational licensing requirements block new workers from coming into the profession.

Those barriers are especially tough on military families in which both spouses work. As these families move from a base in one state to a base in another, the non-military spouse often struggles to find a new job in his or her field simply because of unjustified occupational licensing requirements.

These are issues that we can help to address together through legislation.

I'm also concerned about state licensing boards that are dominated by the profession they license. I fear that those issuing the licenses have the potential to block others from joining the industry simply to put themselves at a competitive advantage. If this is happening, we must also consider legislative fixes.

The use of non-compete agreements between employers and employees, as well as no-poach agreements between employers, also restricts worker mobility. In some cases, these agreements may have a legitimate role to play, but it is important that we make sure such agreements aren't broadly used to harm competition.

Finally, there is the issue of labor monopsony — the issue that arises when just one or a few employers in a given area have market power with which to drive down wages and other terms of employment available to a given labor pool. This issue can be particularly problematic in rural areas, and I am glad that we are examining it today.

I look forward to the witnesses' testimony and yield back the balance of my time.

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671 WORDS

Mr. CICILLINE. This concludes today's hearing. Thank you again to our very distinguished witnesses for attending and for your very useful testimony.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

Without objection, the hearing is adjourned.

[Whereupon, at 12:15 p.m., the Subcommittee was adjourned.]

APPENDIX

ANTITRUST, THE GIG ECONOMY, AND LABOR MARKET POWER

MARSHALL STEINBAUM*

I
INTRODUCTION: DECLINING LABOR POWER IS (PARTLY) AN ANTITRUST STORY

Worker bargaining power has diminished over the last forty years. Between 1948 and 1979, median wages closely tracked output per worker.[1] Since then, productivity has continued to increase (until leveling off in the decade of the 2000s), while median pay has stagnated, creating an ever-widening gap between median wages and productivity. The widening gap contrasts with the central prediction of neoclassical economic theory about the labor market: that workers are paid what they are worth.[2] At the same time, inequality within the distribution of labor income is higher, and has risen faster, than can possibly be explained by any notion of a skills gap between workers and the needs of today's employers.[3] And since the 2000s, these dual trends demarcating the declining bargaining power of workers in the economy have been joined by a third: the reduction in labor's share of national income, which economists had assumed was stable over the long run. In fact, it has ratcheted downward over the last two business cycles.[4]

The aim of this paper is to augment the interpretation of these trends with an element that has received very little attention from labor-oriented scholars: the decline and erosion of antitrust law and its enforcement. Whereas there was once a sharp line where labor law ended and antitrust began, there is now a gray area, within which a more powerful firm can tell a less-powerful contractor or worker what to do without being liable under antitrust or labor law. The erosion of the statutory employment relationship, and thus the ability of employers to evade the

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This article is also available online at http://lcp.law.duke.edu/.
* University of Utah, msteinbaum@gmail.com. Thank you to Sanjukta Paul, Brian Callaci, Alex Rosenblat, Catherine Fisk, and participants in the Duke *Law and Contemporary Problems* "Legal Framework of Work After the End of Employment" symposium, March 2019.

1. *See The Productivity-Pay Gap*, ECON. POL'Y INST. (August 2018), https://www.epi.org/productivity-pay-gap/ [https://perma.cc/6NWC-3RV3].

2. *Id.*

3. Thomas Piketty, Emmanuel Saez & Gabriel Zucman, *Distributional National Accounts: Methods and Estimates for the United States*, 133 Q. J. ECON. 2, 533–609 (2018).

4. David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, (Nat'l Bureau of Econ. Res., Working Paper No. 23396, 2017); Simcha Barkai, Declining Labor and Capital Shares (2016) (unpublished manuscript) (on file with the Stigler Center for the Study of the Economy and the State).

obligations that go along with it, has received wide attention from labor scholars and in public debate. What has been ignored is that the deterioration of antitrust is what legally allows more powerful firms to tell subordinate firms, contractors, and workers what to do even if those subordinates are not, legally, their employees. Antitrust has also prevented those same subordinates from coordinating among themselves to strengthen their own hand in negotiations.

This paper considers two different ways that antitrust has contributed to the increasing imbalance of power between employers and workers. First, antitrust has legalized vertical restraints, allowing the economy's most powerful actors to closely direct and supervise the behavior of less-powerful actors. Second, antitrust has been used by those same powerful actors to prevent less-powerful actors from organizing and coordinating on their own behalf against such concentrations of power. Parts II and III of this article deal with each of these, and the Part IV proposes a policy agenda for putting the antitrust laws to work in the labor market according to their original purpose: namely, to de-concentrate economic power.

II

VERTICAL RESTRAINTS AND THE FISSURED WORKPLACE

David Weil's book *The Fissured Workplace* describes a crucial component of the decline in labor's bargaining power: the gradual disappearance of the traditional, and statutory, employment relationship.[5] Instead of uniting workers at different levels of the labor market hierarchy (wages, skills, and social prestige), the contemporary corporation has become a mechanism for segregating low-wage (and even some middle-wage) workers from the economy's dominant decision-makers: the executives and shareholders of the economy's leading corporations and the financial institutions that own and control them. Although most workers remain statutory employees of some employer, they are increasingly remote from the decision-making entity that exerts power over their day-to-day lives and terms of work.[6]

Weil is himself a former senior official responsible for enforcing federal labor law, and he rightly points to the ease with which employers can evade that law by re-classifying workers as either independent contractors or as employees of their contractors as a crucial element in legalizing this fissured business model.[7] Many other scholars and organizations, including worker organizations, have emphasized changes in labor law that are very important to understanding how these trends erode worker bargaining power in the economy and ensure that it takes the form of inter-firm wage segregation.[8] Specifically, the National Labor

5. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

6. *Id.*

7. *Id.*

8. Nelson Lichtenstein, *Two Cheers for Global Integration: Corporate Governance in a World of Global Supply Chains, in* CORPORATIONS AND AMERICAN DEMOCRACY 329–58 (2017); MAYA PINTO,

Relations Act[9] and the Fair Labor Standards Act,[10] as well as numerous other state and federal labor regulations, impose tests for statutory employment as a necessary precondition for a worker to enjoy their protections. Increasingly, employers who classify their workers as exempt contractors rather than employees are able to pass these tests, thanks to deferential court rulings,[11] technologies that enable employers to manage workers from afar, and industry deregulation that legalizes new, vertically dis-integrated business models in a given sector, among many other causes. These all give employers both the legal means and the pecuniary motive to push their workers outside the legal boundaries of the firm under whose effective control they remain.

Weil's research is classified methodologically as industry case studies of what he calls the "lead firms" that direct and control a series of contractors and affiliates that actually employ the workers and do the work. His findings have been confirmed by more traditional economics studies of inter-firm earnings inequality using matched employer-employee data from a variety of sources.[12] For instance, Song and others used social security records to document the rise in inter-firm inequality; increasingly, the highest-paid workers work for the firms where average pay is the highest.[13] This is not because those firms are inherently more productive than other firms due to their firm-specific characteristics, but rather that they have gotten better at sorting out well-paid and highly-educated workers and excluding low- and middle-wage workers from their employment.[14] A study by Abowd and others of data from state unemployment insurance records verifies these distinctions, and attaches further significance to working at a well-paid firm. Not only do workers earn more now, but they do so for the rest of their careers.[15] "High-paying firms facilitate moving workers to the top of the earnings distribution and keeping them there."[16] Labor market surveys paint a similar picture.[17]

In a competitive labor market, the identity of a worker's firm is irrelevant to what he or she gets paid, because if any worker were paid less than they were worth they would quickly switch to a job offering them their competitive market wage. In a competitive labor market equilibrium, all firms pay the same to all

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REBECCA SMITH & IRENE TUNG, RIGHTS AT RISK: GIG COMPANIES' CAMPAIGN TO UPEND EMPLOYMENT AS WE KNOW IT (2019) https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it/ [https://perma.cc/9KHV-XWRD].

9. National Labor Relations Act, 49 Stat. 449 (1935).

10. Fair Labor Standards Act, 55 Stat. 756 (1941).

11. Lawson v. Grubhub, Inc., 2017 U.S. Dist. LEXIS 106291.

12. *Id.*

13. Jae Song et al., *Firming Up Inequality*, 134 Q. J. ECON. 1, 1–50 (2019).

14. *Id.*

15. John M. Abowd et al., *Earnings Inequality and Mobility Trends in the United States: Nationally Representative Estimates from Longitudinally Linked Employer-Employee Data* (Nat'l Bureau of Econ. Res., Working Paper No. 23224, 2017).

16. *Id.*

17. *See* Damir Cosic, Wage Distribution in Large and Small Firms (November 21, 2017) (unpublished manuscript) (on file with the International Labour Review).

workers with similar characteristics. In reality, though, firms have considerable discretion to dictate pay, because outside job offers are sufficiently hard to obtain that it is unlikely that workers will have the option to leave.[18] In other words, labor markets are not competitive, as evidenced by the increasing earnings inequality between firms. The aforementioned research on inter-firm inequality shows that workers are increasingly remote from profits and from centers of economic power.[19] Anyone familiar with the history of labor organizing, worker solidarity, and the conditions for social mobility can recognize that under those conditions, it's impossible for workers to benefit from economic growth. An article from the New York Times in 2017 made this point by contrasting the experience of janitors working at the corporate headquarters of Kodak in the early 1980s versus Apple today. The Kodak janitor was employed by the company, enjoyed a tuition subsidy as part of her benefits package, learned how to use inventory software as part of obtaining a college degree on the job, and ultimately worked her way up within Kodak to be head of IT for the whole company.[20] Meanwhile, the Apple janitor is employed by a contracted, franchised janitorial services firm, enjoys no part of the benefits package of an Apple employee, and has no chance of obtaining a promotion up the hierarchy of what is now one of the economy's most valuable single firms.[21]

The antitrust side of the story of the separation of workers from lead firms is the simultaneous erosion in the jurisprudence of the Sherman Act's prohibitions on vertical restraints. In the context of antitrust, a vertical restraint is a contractual provision or mode of operation that restricts the autonomy of the counterparty in the case where each party operates at a distinct segment of the supply chain. For example, if an automobile manufacturing company operates a network of independently owned dealerships, and its dealers are forbidden from selling within a given radius of another authorized dealer's location, that is territorial exclusivity, a non-price vertical restraint. If such a contract imposes the final retail price of said automobiles, that is vertical price-fixing, or in antitrust lingo, resale price maintenance, which can be either a minimum or a maximum (or both, in the case of one definite price at which the car would be re-sold). Other vertical restraints include the varieties of exclusive practices that suppliers might impose on their affiliated dealers or distributors, like compulsory purchase contracts—known as full-line forcing or requirements contracts.[22]

18. Abowd et al, *supra* note 15.

19. *Id.*

20. Neil Irwin, *To Understand Rising Inequality, Consider the Janitors at Two Top Companies, Then and Now*, N.Y. TIMES: THE UPSHOT (September 3, 2017), https://www.nytimes.com/2017/09/03/upshot/to-understand-rising-inequality-consider-the-janitors-at-two-top-companies-then-and-now.html [https://perma.cc/Q83S-VWWK].

21. *Id.*

22. *See* CHARLOTTE SLAIMAN, DECODING ANTITRUST LAW: A PRIMER FOR ADVOCATES (2019), https://www.publicknowledge.org/documents/decoding-antitrust-law-a-primer-for-advocates [https://perma.cc/KL5C-9ZEG]

Such exclusive dealing was the subject of the 1951 antitrust case *United States v. Richfield Oil Co.*[23] The case concerned the relations between a dominant oil refiner and gasoline supplier—Richfield Oil—and its affiliated service stations, which were required to source their gasoline solely from Richfield and to carry exclusively retail auto parts, sponsored products, according to supply contracts negotiated by Richfield, rather than seeking out and negotiating their own sources of supply according to their customers' preferences. The court ruled unequivocally for the government on the grounds that it exercised de facto control over these "independent business men," in contravention of the antitrust laws, despite the fact that they were not employees of the company. That case created a sharp distinction and a comprehensive delineation between the realm of labor and antitrust: if subordinate entities are "independent business men" and not employees, it is illegal to exercise control. The United States Supreme Court affirmed the same basic principle against coercion of non-employees by vertical supply contract in the 1964 case *Simpson v. Union Oil Co. of California.*[24]

It is precisely through the erosion of the *Richfield Oil* standard that the fissured workplace has been allowed to come about. Independent business people are independent for the purposes of evading labor law, but once pushed outside the border of the firm, the restrictions antitrust places on their domination have been all but erased. As such, what Weil calls lead firms can continue to exercise control and direct their business operations by contract.[25] Those contracts would once have been illegal, before antitrust jurisprudence began to search out spurious justifications for their immunity on the basis of supposed efficiency.[26] For example, manufacturers would want their branded distributors to be bound by contractual provisions to ensure that dealers represent the brand effectively to customers, rather than hide their poor customer service behind the brand's overall prestige, or that they must contribute to its marketing budget and abide by its standardized branding and pricing policies. Theoretically, this would serve the overall collective interest of the supplier-distributor network. The efficiencies to be gained by permitting franchisors to exercise overall direction and control were assumed to flow eventually to consumers in the form of increased output, enhanced variety or quality, or lower prices—all reflecting the fact that vertical control exercised this way is, in fact, pro- rather than anti-competitive and therefore ought not to be penalized by the antitrust laws.[27]

23. *See* United States v. Richfield Oil Corp., 99 F. Supp. 280 (S. D. Cal., 1951), *aff'd*, 343 U.S. 922 (1952).

24. *See* Simpson v. Union Oil Co. of California, 377 U.S. 13 (1964).

25. WEIL, *supra* note 5.

26. *See* Lester Telser, *Why Should Manufacturers Want Fair Trade?*, J. L. ECON. 86 (1960); Thomas R. Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence, Bureau of Economics Staff Report to the FTC (1983).

27. *See* ROGER D. BLAIR & FRANCINE LAFONTAINE, THE ECONOMICS OF FRANCHISING, 291–301 (2005) (containing an explicit argument for permitting franchisors to exercise vertical control in these ways).

Brian Callaci lays out how this process occurred in one sector, so-called business-format franchising.[28] As he writes, "While the economic boundaries of the firm correspond to the extent of centrally planned and hierarchically coordinated production, the legal boundaries are set in politically contested legislatures and courts. Exploiting or creating mismatches between the two has enabled corporations to enjoy economic benefits of vertical integration while avoiding many of the legal risks and costs."[29] In the case of franchising, that took the exact form that courts had ruled illegal in *Richfield Oil* and *Simpson v. Union Oil Co. of California*: franchisors licensed their trademarks and business models to an army of franchisees, who would be granted exclusive territories in exchange for agreeing to exclusive supply contracts, all enforced by the threat of dealer terminations.

Economists, particularly those operating in the Law and Economics tradition, have interpreted the rise of these hybrid structures, part firm, part market organizations, as reflecting the evolution of an efficient allocation of coordination rights and the alignment of incentives between principal and agent so as to remove the need for direct supervision and take advantage of economies of scale and specialization.[30] But Callaci shows that, in fact, the advent and spread of franchising was not due to the law catching up with the natural evolution of a business model marked by superior efficiency. Rather, it is due to a concerted lobbying campaign[31] to pry apart the sharp border between labor and antitrust represented by *Richfield Oil* and grow a whole business model in the legal gray area.[32] As far as antitrust was concerned, the operation was meant to roll back the per se illegality of non-price vertical restraints that existed in antitrust following the Supreme Court's ruling in *United States v. Arnold, Schwinn & Co.* in 1967, and the per se illegality for maximum resale price maintenance that existed following the Court's ruling in *Albrecht v. Herald Company* in 1968.[33] With the Court's decisions in *Continental Television v. GTE Sylvania* in 1977 and in *State Oil Co. v. Khan* in 1997, antitrust immunity for vertical integration by contract was complete.[34]

It was not just antitrust where franchisors and their trade association were able to have their way. In 1966, the Small Business Administration re-classified franchisees as independent to avail themselves of subsidized federal loans,

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28. Brian Callaci, Control Without Responsibility: The Legal Creation of Franchising 1960-1980 (December 2018) (unpublished manuscript) (on file with the Washington Center for Equitable Growth).

29. *Id.*

30. *See generally* ROGER D. BLAIR & DAVID L. KASERMAN, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL (1983); BLAIR & LAFONTAINE, *supra* note 27; Francine LaFontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS, 29 (Pablo Buccirossi ed., 2005).

31. Callaci, *supra* note 28, at 4.

32. LaFontaine & Slade, *supra* note 30.

33. *See* Albrecht v. Herald Co., 390 U.S. 145 (1968); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

34. *See* State Oil Co. v. Khan, 522 U.S. 3 (1997).

despite concerns that this was essentially financing the marketing and distribution activities of some of the economy's largest and most powerful corporations.[35] The general counsel to the agency, Philip F. Zeidman, who had advocated internally for that policy change, subsequently served as counsel to the International Franchise Association for almost four decades.[36] Just last year, the inspector general of the SBA concluded that its loans to poultry growers are likely illegal because those small businesses are in fact under such direct control from the major poultry integrators—Perdue, Tysons, and Koch Poultry—that the farmers cannot be considered small businesses.[37]

In addition to their treatment of franchisees as independent in order to qualify them for subsidized loans, the franchisors were successful at limiting the definition of joint employer under the National Labor Relations Act and the Fair Labor Standards Act so that they could not legally be considered employers of their franchisees' workers.[38] That made any attempt by workers to bargain collectively against both franchisees and franchisors a secondary boycott, a practice expressly prohibited by the Taft-Hartley Act.[39] Altogether, these changes gave franchisors maximum control, but minimal responsibility, and led the business models of franchisees toward poor treatment of low-wage workers, since franchisees have few, if any other margins, in which to exercise their autonomy in order to increase profits.

Recently, the issue of no-poaching restrictions in franchising contracts has drawn attention from researchers,[40] elected officials,[41] and antitrust enforcers.[42] In such contracts, franchisees commit not to hire workers employed by franchisees elsewhere in the franchising network of which they are a member. Correspondingly, the Antitrust Division of the Justice Department has made its view known to a federal court where private litigation against such a no-poach provision is underway. It argued that no-poaching provisions in franchise agreements are akin to other restrictive vertical contractual provisions in franchising contracts and hence subject to the rule of reason, the permissive standard put in place by *Continental Television v. GTE Sylvania* and *State Oil Co.*

35. Callaci, *supra* note 28, at 13.

36. *Id.* at 21.

37. OFF. OF THE INSPECTOR GEN., SMALL BUS. ASSOC., EVALUATION OF SBA 7(A) LOANS MADE TO POULTRY FARMERS (March 6, 2018).

38. Econ. Policy Inst., Comment Letter on Proposed Rule Regarding Standard for Determining Joint-Employer Status (Feb. 8, 2019), https://www.epi.org/publication/joint-employer-comments-feb-2019/ [https://perma.cc/84FQ-FGBV].

39. Labor Management Relations Act, 61 Stat. 136 §8(b)(4)(b) (1947).

40. *See, e.g.*, Brian Callaci, Vertical Power and the Creation of a Fissured Workplace: The Case of Franchising (November 14, 2018) (unpublished manuscript) (on file with the Washington Center for Equitable Growth); Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (Nat'l Bureau of Econ. Res., Working Paper No. 24831, 2017).

41. *See, e.g.*, S. 2480, 115th Cong. (2018).

42. *See, e.g.*, Corrected Statement of Interest of the United States of America, Stigar v. Dough Dough, Inc., No. 2:18-cv-00244-SAB (E.D. Wash. March 8, 2019).

v. Khan.[43] The DOJ specifically rejects the idea that franchising networks are hub-and-spoke arrangements,[44] therefore that no-poach clauses might be horizontal agreements not to compete and thus illegal per se. This intervention by the DOJ leans against the relatively pro-enforcement posture it expressed in 2016 in its "Guidance for Human Resource Professionals."[45] The prior administration never stated whether no-poaching provisions in franchising contracts were to be treated as per se illegal or considered under the rule of reason. But alongside the unwillingness of the NLRB to extend dual-employer status to franchisors as well as franchisees (and notwithstanding a recent federal appellate ruling constraining its ability to do so),[46] this use of no-poach clauses reflects powerful employers' ability to direct and restrict the activities and employment of their workers, without being answerable in any way to those workers themselves.

The contentions the DOJ makes in its statement of interest are in conflict with the economics of no-poaching agreements in labor markets where employer market power is pervasive.[47] There is no functional difference between a series of uniform, bilateral, putatively vertical no-poaching agreements, collectively barring franchisees in a franchising network from hiring workers from elsewhere in the network, and a single multilateral, putatively horizontal no-poaching agreement between the individual franchisees. Those two things have the same anti-competitive effect on labor markets. Thus, antitrust law should not treat them differently based on the horizontal versus vertical formalism. The DOJ brief appeals to the potential for countervailing efficiencies that swayed the Supreme Court to abandon per se treatment of non-price vertical restraints in *Continental Television v. GTE Sylvania*. Notably, however, those ostensible benefits accrue to consumers, not to workers, if they accrue to anyone at all other than the company imposing the restraint. If antitrust law implicates competition in labor markets as well as competition in output markets, as the DOJ agrees is the case, then it should not justify anti-competitive restraints that harm workers by making the labor market less competitive by claiming they *might* benefit consumers.[48] Moreover, the *amicus curiae* brief filed by the Attorney General of Washington State points out that franchising networks contain both franchisor-owned and franchisee-owned establishments, rendering a no-poaching agreement binding on franchisees likely to restrain them from hiring retail

43. *Id.*

44. *See* FED. TRADE COMM'N & DEP'T OF JUST., ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016).

45. *Id.*

46. *See* Rachel M. Cohen, *Workers Just Notched a Rare Win in Federal Court*, THE INTERCEPT (January 3, 2019), https://theintercept.com/2019/01/03/nlrb-joint-employer-ruling/ [https://perma.cc/33WE-TM36].

47. *See generally* José Azar et al., *Measuring Labor Market Power Two Ways*, AEA PAPERS & PROCEEDINGS (forthcoming May 2019); Arindrajit Dube et al., *Monopsony in Online Labor Markets*, AER: INSIGHTS (forthcoming June 2019); Douglas A. Webber, *Firm Market Power and the Earnings Distribution*, 35 LAB. ECON., 123-134 (2015).

48. *See* FED. TRADE COMM'N & DEP'T OF JUST, *supra* note 44.

workers employed by franchisors.[49] Altogether, the pending litigation over franchising no-poaching agreements highlights antitrust's tolerance for restraints that bind both franchisees and their workers. This belies recent claims by several antitrust authorities that labor markets and product markets are treated symmetrically under current antitrust jurisprudence and enforcement.[50] They are not.

More recently than the expansion of franchising under permissive antitrust treatment is the advent of the so-called gig economy: the deployment of independent contractor status for workers, not just for the independent businesses who employ them. This makes each individual worker an independent business, and thus denuded of any protections under labor law. However, they can simultaneously be controlled entirely by employer/customers without the protections and stability of the employment relationship enshrined in statute during the New Deal. This is the business model that online labor platforms like Uber, Lyft, Handy, and Care.com have perfected: under the law, workers deal bilaterally with gigs whose employers have none of the standard obligations of employers, while the platform operates the entire labor market to its own benefit—what Sanjukta Paul has called a "for-profit hiring hall."[51] This is enabled by the GPS technology of monitoring workers, the ability of the platform to dictate the terms on which participants will transact, the use of customer ratings as a pretext for de-activation rather than direct supervision, and the immunity of all of this from any regulatory scrutiny or collective bargaining on the part of workers of any sort.

In 2016, an Uber customer filed an antitrust suit against Uber[52] and its CEO in New York claiming that it amounted to a price- and wage-fixing conspiracy among hundreds of thousands of independent businesses—its drivers, for whom Uber determines and dictates the terms on which its drivers are allocated customers and the prices that will be charged to them, including the share earned by the driver.[53] The genesis of the suit was the repeated failed efforts to have drivers classified as employees under state and federal labor regulations. To defeat those suits, Uber claimed to be a software company licensing its service

49. Brief for the Attorney General of Washington as Amicus Curiae, Stigar v. Dough Dough, Inc., No. 2:18-cv-00244-SAB (E.D. Wash. March 11, 2019).

50. *See* C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 7, 2078 (2018); Letter from Federal Trade Commission Acting Chairman Maureen Ohlhausen to Senator Cory Booker (December 1, 2017) (on file with author).

51. Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 2, 233, 233 (2017).

52. The suit was initially filed against just the CEO, Travis Kalanick, as a means to avoid the mandatory arbitration clause that eventually kicked the case out of court, but Uber was later joined as a defendant.

53. Marshall Steinbaum, *Uber's Antitrust Problem*, THE AMERICAN PROSPECT (May 11, 2016), https://prospect.org/article/uber%E2%80%99s-antitrust-problem [https://perma.cc/8SPD-YBJD]; Marshall Steinbaum, *Antitrust Implications of Labor Platforms*, CPI ANTITRUST CHRONICLE (May 2018), https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/CPI-Steinbaum.pdf [https://perma.cc/Y2EY-49CS].

to independent drivers for the ease of contacting potential customers. As such, they did not employ the drivers, nor did Uber directly provide transportation to customers.

If drivers are not employees, so the theory behind the antitrust suit went, then they must be independent businesses, and hence Uber setting the terms on which they transact with customers, including fixing the prices charged to customers, constitutes a violation of the Sherman Act's ban on restraints of trade. In this respect, the plaintiff was helped by the precedent set by the Apple E-books antitrust case, which proceeded against Apple and five book publishers for conspiring to set up an alternative E-books platform to Amazon's.[54] That case was ruled to be a hub-and-spoke conspiracy and thus per se illegal.[55] If Apple and five book publishers is hub-and-spoke, why not Uber and a hundred thousand drivers?[56]

In the end, *Meyer v. Kalanick*, was sent to arbitration rather than litigation thanks to the mandatory arbitration clause included in Uber's terms of service. Therefore, the issue of whether Uber is a price-fixing conspiracy, and whether that price-fixing is horizontal, was never resolved at trial. But Uber did commission at least two economics papers that signal what its antitrust defense would have been: Uber's control over its drivers, including price-fixing, benefits customers because it increases the consumer surplus in the ridesharing market.[57]

This illustrates the core reason why all of these business models that subordinate the interests of workers, franchisees, and suppliers generally to those of dominant buyers obtain immunity from antitrust law as it is currently interpreted: the consumer welfare standard, which holds that the sole metric for assessing harm to competition within the meaning of the antitrust laws is the effect on consumers, and in practice, the effect on prices charged to consumers.[58] If the restrictions operated by Uber, by franchisors, by poultry integrators, and by powerful businesses generally can be shown to benefit consumers, or at least not to harm them, then they are ipso facto immune from antitrust liability.

This constriction of what the antitrust laws prohibit is a far cry from *Richfield Oil*, which contains an overt analysis of power dynamics in the supplier-distributor relationship as the reason why antitrust must lean against such a

54. United States v. Apple, Inc., 952 F. Supp. 2d 638 (2013).

55. *Id.*

56. On the other hand, in the Apple E-books case, the publishers organized among themselves as part of negotiating the entry of Apple's rival e-books platform. Arguably this is not the case with Uber or other ridesharing platforms, or labor platforms generally, in which there is no meaningful agreement among the many gig workers.

57. *See, e.g.*, Peter Cohen et al., *Using Big Data to Estimate Consumer Surplus: The Case of Uber* (Nat'l Bureau of Econ. Res., Working Paper No. 22627, 2016); Jonathan V. Hall et al., Labor Market Equilibration: Evidence from Uber (October 27, 2017) (unpublished manuscript) (on file with authors).

58. Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, ROOSEVELT INSTITUTE (2018), http://rooseveltinstitute.org/wp-content/uploads/2018/09/The-Effective-Competition-Standard-FINAL.pdf [https://perma.cc/W6DX-U6NH].

concentration of power on behalf of the dominant entity.[59] Instead, the attenuated conception of economics that has developed more recently within legal reasoning and jurisprudence—consumer welfare and price effects as the sole criterion of harm to competition—explains much of how the labor market and the economy generally got to where it is today. In particular, how workers and contractors have been prevented from accessing the profits generated by the economy's leading firms through the exercise of unilateral power to dictate the contractual terms. Thanks to that, workers suffer from wage stagnation and a deterioration in job quality, including total control by the entity that is, economically, if not legally, their boss.

Two further aspects of the ridesharing platform business model are worth pointing out here: surveillance and non-linear driver pay structures. In the summer of 2018, a team of company-affiliated economists released yet another paper pointing to Uber's ostensibly efficiency-enhancing business model.[60] The researchers compared the tendency of Uber drivers to shirk by taking longer-distance routes between the same two endpoints to the tendency of New York City taxi drivers to do the same. The meaningful differences between the two groups consisted of routes taken for fares originating at LaGuardia Airport and terminating in Manhattan. The researchers found that Uber drivers tend to shirk less than do taxi drivers, which they attribute to the fact that both Uber itself and the customer in the back seat can monitor the driver in real time using GPS, whereas traditional taxi drivers retain more discretion, and apparently use it to increase their take-home pay at riders' expense. But the ability to monitor employees in real time is part of both the statutory definition of employment and the economic concept of control. According to the paper, Uber's use of monitoring technology to improve the service enjoyed by its customers is exactly the context in which we would recognize that an employment relationship exists and grant rights to the employee.[61] Instead, Uber drivers remain subordinate to Uber, which sets their fares and the share they take home. Taxi drivers, on the other hand, are normally also independent contractors, but they are genuinely more independent in that they are not monitored in real time. And neither they nor the medallion owner (if the driver does not own his own medallion) has discretion to set prices. Instead, fares in the taxi market are regulated.

Uber was also found to be operating a program nicknamed "Hell" that monitored whether drivers were multi-homing (i.e., logging into more than one ridesharing platform simultaneously to choose between competing fares) or single-homing and penalized the ones that were not taking customers on the Uber platform exclusively.[62] More generally, the ridesharing companies operate bonus-

59. Richfield Oil Corp., 99 F. Supp. 280.

60. Meng Liu et al., *Do Digital Platforms Reduce Moral Hazard? The Case of Ubers and Taxis*, (Nat'l Bureau of Econ. Res., Working Paper No. 25015, 2018).

61. *Id.*

62. Ignacio Herrera Anchustegui & Julian Nowag, *Buyer Power in the Big Data and Algorithm Driven World: The Uber & Lyft Example*, COMPETITION POLICY INTERNATIONAL (Sept. 15, 2017), https://www.competitionpolicyinternational.com/buyer-power-in-the-big-data-and-algorithm-driven-

based driver pay policies with a low base rate and a bonus for achieving a certain acceptance rate, or service in a given geographic area.[63] This system effectively requires sole use of a single app and following that app's directions about where and when to work in order to win. While not technically requiring exclusivity on the part of drivers, this pay structure makes it very likely.[64] And while such exclusive dealing (and market division, if there were to be any agreement to engage in similar non-linear bonus-based pay policies between Uber and Lyft) might be thought to implicate antitrust, those companies have seemingly faced no public enforcement since the *Meyer v. Kalanick* case was forced into arbitration.

These instances of increasing control of drivers by ridesharing platforms correspond to the general picture of ride-sharing employment that Alex Rosenblat paints in her recent book *Uberland*.[65] Rosenblat argues that the labor platforms are re-making the terms of employment to their own liking, exercising power over price-setting, quality and terms of service, and all manner of other relevant margins to customers and to workers, while disclaiming all responsibility.[66] Initially, Uber and similar online labor platforms presented themselves as neutral market-makers matching drivers to customers, ameliorating the search frictions inherent in any labor market through the innovative application of new technology.[67] Now, though, the platforms present their contribution to public welfare more as arising directly from their control over the market and its participants, rather than from their neutral facilitation of bilateral transactions. This hybrid business model of total control but no responsibility as an employer is one optimized not only to the erosion of labor protections, but also to the erosion of antitrust's restrictions on vertical restraints. In fact, it is highly reminiscent of the arguments found in the Law and Economics literature validating antitrust's increasing permissiveness toward vertical restraints on the grounds that the concentration and consolidation of power within the economy is economically efficient.[68] However, there's nothing optimal or efficient about it, other than the efficient use of regulatory arbitrage to dominate and extract rents from every other counterparty and stakeholder in the market without having to follow the laws that bind everyone else.

world-the-uber-lyft-example/ [https://perma.cc/FHR7-KJPG].

63. *See* ALEX ROSENBLAT, UBERLAND: HOW ALGORITHMS ARE REWRITING THE RULES OF WORK 138–166 (2018).

64. Julian Nowag, *When Sharing Platforms Fix Sellers' Prices*, 6 J. ANTITRUST ENF'T 3, 382–408 (2018).

65. *See* ROSENBLAT, *supra* note 63.

66. *Id.*

67. See Nicholas Buchholz, Spatial Equilibrium, Search Frictions, and Dynamic Efficiency in the Taxi Industry (July 23, 2018) (unpublished manuscript) (on file with Princeton University) (presenting Uber and similar platforms as reducing search frictions).

68. *See* Telser, *supra* note 26; Overstreet, *supra* note 26; BLAIR & KASERMAN, *supra* note 30.

III
ANTITRUST AND COLLECTIVE BARGAINING IN THE GIG ECONOMY

The erosion of antitrust in the direction of permitting vertical price- and non-price restraints has effectively legalized labor outsourcing, misclassification, and the gig economy. This has resulted in dominant firms having access to a wider range of profitable business models that exert greater power and control over workers than they once did. Fundamentally, this trend within antitrust is in the direction of increasing the power of the economy's most powerful actors.

The flip side of this is that antitrust law has also made it more difficult for less powerful actors to collectively mitigate such power inequities. Sandeep Vaheesan refers to Albert Hirschman to make this point: not only has antitrust made it harder for workers and small businesses to exit in order to exercise countervailing power; it has also prevented them from using voice to do so.[69] All of the mechanisms of concentrated power described in Part II could be categorized as curtailing workers' use of exit strategies to evade the control of their employers. This Part focuses on antitrust's dual opposition to worker voice.

Between the passage of the Sherman Act in 1890 and the Norris-LaGuardia Act in 1932, the federal antitrust enforcers used the former to curtail the collective bargaining activities of militant (and effective) labor organizing. In 1892, the Supreme Court ruled that the Workingmen's Amalgamated Council of New Orleans was illegal coordination by labor groups in violation of the Sherman Act's ban on restraints of trade.[70] In 1894, the Cleveland Administration accused Eugene V. Debs, the head of the American Railway Union, of entering into criminal restraints of trade for organizing the Pullman Strike, including a nationwide boycott of trains carrying Pullman Cars. In fact, as the Supreme Court ultimately ruled on the case, the Sherman Act proved to be unnecessary: the Court held that the government could obtain an injunction against the strike and imprisonment of Debs without any statutory authorization, as it amounted to an exercise of its legitimate law enforcement powers to crush civil unrest.[71]

Likewise, in the 1908 case *Loewe v. Lawlor*, a company that had been targeted by a nationwide boycott on the part of the American Federation of Labor successfully sued the union trying to obtain recognition as its workers' bargaining agent under the Sherman Act.[72] The Supreme Court agreed that such a boycott was an illegal restraint of trade and forced the union and its members to pay treble damages to their employer.[73] These three cases show that the antitrust laws were a potent weapon in the hands of employers seeking to prevent unionization. During the same period, the government struggled half-heartedly to find a way to use the Sherman Act to limit corporate power, but it moved

69. Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, Md. L. Rev. (forthcoming).

70. United States v. Workingmen's Amalgamated Council of New Orleans, 54 U.S. 994 (1892).

71. In re Debs, 158 U.S. 564 (1985).

72. Loewe v. Lawlor, 208 U.S. 274 (1908).

73. *Id.*

decisively, with the full cooperation of the judiciary, to use it to curtail labor power.[74]

The Clayton Act of 1914 included an exemption for labor from the antitrust laws,[75] but courts interpreted it narrowly such that secondary boycotts were still illegal.[76] It was not until the Norris-LaGuardia Act that unions were entirely immunized from antitrust liability. But in the jurisprudence of the so-called labor exemption that developed in the decade or so thereafter, antitrust immunity came to be connected to statutory employment status, like the right to collectively bargain itself.[77] Therefore, in the current era of the erosion of statutory employment, we also have the erosion of the antitrust labor exemption.

The Federal Trade Commission has undertaken a long-running campaign against collective action by associations of professionals who seek to constrain entry, and in some cases, to forbid their members from soliciting business away from fellow members and to set minimum prices for their services. The commission has brought such cases against doctors, church organists, ice-skating instructors, music teachers, and public defenders.[78] This enforcement line has accompanied a push by the agency to reduce state action, meaning the regulatory authority of states or municipalities to displace competition in favor of some other legitimate policy goal, notwithstanding prohibitions in federal law. For example, municipal taxi regulatory regimes, which limit the total number of taxis on the road, impede entry into the taxi business. However, this impediment has the legitimate purpose of preventing market saturation, thereby ensuring that driving a taxi is a viable full-time job. It also hopefully ensures that coverage is universal in both time and space and that a customer unfamiliar with the city can obtain a licensed and qualified professional rather than an unsafe or just unqualified service provider. Some of the FTC's campaign against restrictions on competition in the market for service professionals consisted of attacks on licensing regimes that effectively protect incumbents and limit competition. The FTC's "economic liberty task force" is devoted to this, as was the case the FTC litigated to the Supreme Court in 2015 and won: *North Carolina Board of Dental Examiners*.[79] The ruling held that a state board consisting primarily of members of the profession being regulated could not benefit from the state action exemption.[80]

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74. *See* MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916 (1988).

75. Clayton Antitrust Act, 15 USCS §§1–12 (2006).

76. Duplex Printing Press Co. v. Deering, 254 U.S. 433 (1921).

77. *See* Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016).

78. *See* Sandeep Vaheesan, *How Contemporary Antitrust Robs Workers of Power*, L. & P. ECON. BLOG (July 19, 2018), https://lpeblog.org/2018/07/19/how-contemporary-antitrust-robs-workers-of-power [https://perma.cc/84MQ-Q4XZ].

79. N.C. State Bd. of Dental Exam'rs v. FTC 135 S. Ct. 1101 (2015).

80. *Id.*

Even before the recent campaign against the state action exemption, the FTC involved itself in efforts by independent contractors to organize themselves in response to the trucking deregulation that de-unionized the sector in the late 1970s. Port truckers aspired to bargain collectively against logistics companies that were coordinating trucking services on behalf of powerful wholesalers and retailers and subjected them to low pay, long hours, and thus high turnover. The FTC as well as quasi-public entities like port authorities intervened on behalf of those companies and accused the truckers of violating the Sherman Act during organizing drives in the late 1990s and 2000s.[81] This stance is consonant with the rationale behind trucking and transportation deregulation in the first place: that inefficient suppliers, middlemen, and stakeholders were preventing efficiencies attending to unitary control from being realized in regulated industries. Therefore, competition in the deregulation era would drive down the rents being earned by those insiders. Permitting truckers to bargain collectively as contractors once they had been de-unionized would have sacrificed all those supposed gains. The FTC also dissuaded Ohio from passing a state law that would have allowed independent contractor home health aides to bargain collectively with staffing companies and their clients in 2008.[82]

The logic for these types of enforcement decisions can be found in the consumer welfare standard, just as was the case for vertical restraints imposed by dominant firms: protecting consumers is all that matters, and consumers are protected best when the most efficient firms have sufficient power and discretion to control the market, including at multiple levels of the supply chain, without having to reckon with any other stakeholder. On this reasoning, collective action by port truckers, home health aides, church organists, or gig economy workers is inefficient rent-seeking, and antitrust action against it "protects competition, not competitors." The superior efficiency to be found in, for example, Uber having the power to surveil, direct, and fix prices for its drivers, despite their independent contractor status, would be threatened if drivers had the power to mediate that surveillance or price-setting through any kind of co-determination.

It is against this background of hostility to state and local regulation and collective bargaining that the FTC and the Department of Justice intervened in another antitrust case involving Uber. After the lawsuits alleging employment misclassification against Uber had been sent to arbitration, the Seattle City Council passed an ordinance granting collective bargaining rights to ridesharing drivers who are not employees.[83] The Chamber of Commerce, acting on behalf of Uber, filed an antitrust claim against the city for facilitating a violation of the Sherman Act: collective bargaining over wages and working conditions by non-employee drivers.[84] After the federal district court sided with the city that its

81. *See* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L.REV. (forthcoming 2020).

82. Vaheesan, *supra* note 78.

83. *United States Chamber of Commerce v. City of Seattle*, 274 F. Supp. 3d 1155 (W.D. Wash. 2017).

84. *Id.*

ordinance was covered by the state action exemption,[85] the federal antitrust agencies filed an *amicus* brief in circuit court alleging that the state action exemption was limited to the customer-facing side of the taxi market and thus did not cover anti-competitive regulation of ride-sharing drivers.[86] The Ninth Circuit Court of Appeals overturned the district court,[87] setting up an antitrust trial about whether the ridesharing collective bargaining ordinance was, in fact, anti-competitive. The federal agencies further suggested in their brief that if not covered by the state action exemption, driver collective bargaining is a per se violation of the Sherman Act, a naked restraint with no possible pro-competitive justification.[88]

Rather than fight the case on the merits, Seattle modified the ordinance to remove collective bargaining over wages, in the hope of at least salvaging some version of collective bargaining without running afoul of antitrust laws.[89] But the Chamber has apparently not been satisfied by that significant concession; in renewed filings, it demanded that the ordinance be wholly abandoned, because naming an exclusive bargaining agent for ridesharing drivers amounts to an illegal group boycott against any driver who does not wish to be represented collectively.[90]

At this point, it is clear that the federal agencies are fully behind the use of antitrust laws to undermine worker bargaining power, just as much as they are behind the non-use of the antitrust laws against employer power and control in the fissured workplace. As Sanjukta Paul has pointed out, if the church organist professional organization had, instead of publishing guidelines preventing its members from underbidding one another for gigs, programmed an app to match organists to churches seeking their services, and prevented their members from performing at a church matched to another member via the app, the antitrust authorities would have been just as solicitous of the organists' app as they have been of Uber's price-fixing and market-division business model—provided the organists' app been operated in the interest of a "for-profit hiring hall" like Uber, as opposed to in the interest of the organists themselves.[91] That jurisprudence and disposition of enforcement resources effectively means that Uber drivers or organists as workers are paying a significant price to the unitary

85. *Id.*

86. Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Appellant and in Favor of Reversal, United States Chamber of Commerce v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640) [hereinafter *Brief*].

87. *United States Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018).

88. *Brief*, *supra* note 86.

89. Michelle Baruchman, *Battle Continues Over Pay, Collective Bargaining for Uber, Lyft Drivers in Seattle*, SEATTLE TIMES, December 22, 2018, https://www.seattletimes.com/seattle-news/transportation/battle-continues-over-pay-collective-bargaining-for-uber-lyft-drivers-in-seattle/ [https://perma.cc/XUQ5-RR57]

90. Plaintiff's Motion for Summary Judgment, United States Chamber of Commerce v. City of Seattle, No. 17-cv-00370-RSL (W.D. Wash. March 29, 2019).

91. *See* Sanjukta Paul, *Fissuring and the Firm Exemption* 82 LAW & CONTEMP. PROBS., No. 3, 2019, at 65.

platforms coordinating the labor market in which those workers sell their services for the privilege of restraining trade and avoiding a free-for-all.[92] Should any antitrust case against Uber for price-fixing, exclusion, or market division ever see the light of day after *Meyer v. Kalanick*, it's likely that the agencies would take the view that its restraints are vertical and hence subject to the Rule of Reason (as the DOJ has argued in the litigation over no-poaching clauses in franchising contracts[93]), rather than per se illegal like non-employee driver collective bargaining. As Sandeep Vaheesan has phrased it, antitrust is about "accommodating capital and policing labor."[94]

IV
CONCLUSION: USING ANTITRUST TO RE-BALANCE POWER IN LABOR MARKETS

This paper sets out an important but under-appreciated aspect of the rise in labor market precarity and diminishing worker bargaining power: the erosion of antitrust laws restricting dominant firms' ability to use vertical restraints to control and restrict both less powerful affiliates and the workers who work for them, and the concurrent use of antitrust against any attempt by those workers or independent businessmen or contractors to bargain collectively against such concentrations of power. In ascertaining the causes of contemporary inequality in wealth, income, and social status, especially with respect to the labor market, we cannot overlook the role that antitrust has played.

This contrasts with a recent Economic Policy Institute paper by Heidi Shierholz and Josh Bivens that treats the rise of employer power in labor markets, and the extent to which weakening antitrust has caused that phenomenon, as a less important cause of rising inequality and stagnant wages compared to the erosion of labor law and thus of collective bargaining.[95] Their evidence for the contention that diminishing worker bargaining power matters more than concentrated employer bargaining power is that inequality within the distribution of labor income is a more significant cause of stagnating wages and the growing gap between median worker pay and average worker productivity than is the declining labor share of national income, which is of more recent vintage than either of the first two economic trends.

But we cannot map rising labor income inequality to worker bargaining power and labor law and the declining labor share of income to employer power and antitrust so neatly. As the analysis in Parts II and III show, income inequality

92. *See* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L.REV. (forthcoming 2020).

93. *See* Boris Bershteyn et al., *DOJ Is Trying to Rein In Franchise No-Poach Suits*, LAW360 (February 19, 2019), https://www.law360.com/foodbeverage/articles/1130056/doj-is-trying-to-rein-in-franchise-no-poach-suits [https://perma.cc/73AW-NW22].

94. Vaheesan, *supra* note 69.

95. Josh Bivens & Heidi Shierholz, *What Labor Market Changes Have Generated Inequality and Wage Suppression?*, ECON. POL'Y INST. (December 12, 2018).

is to a large extent caused by rising earnings inequality *between firms*, rather than between workers, reflecting employer power to set wages. This is the result of the legalization of business models like the fissured workplace that allow powerful employers to segregate workers from the profits they earn for their bosses. The point of Part II of this paper is that the fissured workplace is the product of both labor regulation and antitrust. Thus, increasing inequality of power between employers and workers cannot be coherently treated as two separate phenomena: rising employer power, and declining worker power.

That means the solution to unequal bargaining power is not necessarily or not entirely an antitrust solution, but antitrust must play a major part, since it implicates the business models available to the economy's dominant firms. In particular, we should seek, through revived antitrust and labor regulations that both take account of how the economy actually works, and how power is exercised within it, to re-establish the sharp distinction embodied in *Richfield Oil*. Either workers are employees, in which case they can be controlled by their bosses, who in turn owe them statutory protections including the right to bargain collectively, or they are independent businesses, in which case they cannot be coerced by contract or by any other means. Proposals to extend and strengthen labor law tests for statutory employment to take account of gig economy technologies are crucial, but they will be ineffective so long as employers and lead firms retain the strong incentive to push workers outside their protection. The role of antitrust in that context is to create a significant cost to so doing: the potential for treble damages under antitrust liability should a lead firm be caught coordinating and directing the activities of its non-employee subsidiaries and contractors. That is the mechanism that would weigh against employers' incentive to mis-classify.

Putting such an antitrust regime in place entails the abandonment of both the consumer welfare standard and, with it, the Chicago School's jurisprudence of vertical restraints. Instead, any vertical restraint, price or non-price, should be a presumptive violation of the Sherman Act if it is imposed by a firm with market power. And antitrust's definition of market power must, in turn, be expanded beyond the confined market-share-based Sherman Act jurisprudence to instead take account of the many ways economists have of testing for the existence of market power. Firms would be judged to have market power if they:

- Have the power to unilaterally raise prices for their customers or lower them for their suppliers, including workers;
- Wage- or price-discriminate among customers, suppliers, or workers;
- Unilaterally impose non-price, uncompensated contractual provisions on their counterparties, like non-compete agreements in labor contracts;
- Impede or control entry by would-be competitors; or
- Earn profits and/or make payments to their shareholders at a rate in excess of their market cost of capital.

All of these things are economic indicia of market power because they could not be done by any one or more firms acting in concert in the face of competition from rivals—therefore they should be legal indicia of market power as well.[96]

Drilling down on how the antitrust laws should target labor market monopsony in particular, not merely prohibit vertical restraints that enable fissured workplace-style business models, the antitrust authorities should bring a monopsonization suit against an online labor platform like Uber that fixes wages and imposes exclusivity on independent businesses, along the lines of *Meyer v. Kalanick*. If, as would be expected, that case would be adjudicated under the Rule of Reason, despite its economic equivalence to the FTC's per se cases against professional organizations and unions of independent contractors, then Congress should streamline the Rule of Reason for labor monopsony. This should be done along the lines proposed by Ioana Marinescu and Eric Posner, setting out principles to guide market definition that are responsive to measured firm-level labor supply elasticities.[97] In fact, if firms have the unilateral power to dictate wages without causing a significant share of their workforce to leave, then the proper market definition for a monopsonization case may be significantly smaller than the one those authors recommend as a baseline. The point of such a suit is to force Uber to choose one business model or another: either employ the drivers if Uber wants to fix their wages and monitor them on the job, or give up the price-setting and market coordination power that makes the platform such a value proposition for its investors. It cannot be allowed to do both. Meanwhile, workers themselves who are not statutory employees should be protected by antitrust's labor exemption and should be permitted to bargain collectively. However, any such extension of the labor exemption must not also immunize the powerful employer against whom they would seek to bargain. And at the very least, both no-poaching clauses in franchising contracts and non-compete clauses in employment contracts should be illegal per se.[98]

Finally, analysis of labor market impact should be incorporated in the statutory prospective merger review process that federal agencies undertake as a matter of routine, in order to prevent the harmful accumulation of monopsony power in labor markets by merger. The current FTC Chairman, Joseph Simons, said as much in Congressional testimony in the fall of 2018,[99] but to date there is no evidence that any such investigation has taken place. In the recent merger

96. *See* Steinbaum & Stucke, *supra* note 58.

97. Ioana Marinescu & Eric A. Posner, A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony (December 21, 2018) (unpublished manuscript) (on file with the Roosevelt Institute).

98. *See Petition for FTC Rulemaking to Prohibit Worker Non-Compete Clauses*, OPEN MKTS INST. (March 20, 2019), https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf [https://perma.cc/AL4A-MUTV] (petitioning the Federal Trade Commission to undertake an administrative rule-making to make noncompete clauses illegal per se).

99. *Oversight of the Enforcement of the Antitrust Laws: Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the United States Senate. Committee on the Judiciary*, 115th Cong. (October 3, 2018) (statement of Joseph Simons, Chairman of the Federal Trade Commission).

approval for Staples's takeover of its supplier Essendant, the majority of the commission claimed that the merger would have a pro-competitive impact on input markets.[100] Specifically, if the combined firm reduced the price it pays to manufacturer, it would in fact purchase more from them, not less, and hence that price reduction would not be an exercise of buyer power (the majority's opinion says nothing about labor specifically as an input). But the idea that the volume of sales is dispositive about the anti-competitive exercise of monopsony power is not correct. Wilmers finds evidence that dominant retailers and manufacturers impose price reductions on the suppliers over whom they exercise market power, and those suppliers in turn pass those price reductions through to their workers in the form of lower wages.[101] That is an exercise of monopsony power, but it might well be accompanied by greater sales volume from the supplier to the dominant customer.

Altogether, the thesis of this paper is that there is no way to confront the economy's crisis of unequal bargaining power without confronting the role that antitrust has played in getting us there. Antitrust is not a substitute to any of the many other ways that policy ought to be extended to halt and reverse the economy-wide erosion of worker bargaining power behind rising inequality and wage stagnation. But strengthening it is a necessary condition for the success of many of those alternatives, notably, labor law reform and collective bargaining on the part of precariously employed gig economy workers.

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100. Statement of Chairman Joseph J. Simons et al., Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc., FTC File No. 181-0180 (Jan. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf [https://perma.cc/FZ7L-7DVJ].

101. Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AMERICAN SOCIOLOGICAL REVIEW 2, 213–42 (2018).

The Enduring Ambiguities of Antitrust Liability for Worker Collective Action

*Sanjukta M. Paul**

This Article examines the regulation, by antitrust law, of collective action by low-wage workers who are classified as independent contractors, and who therefore presumptively do not receive the benefit of the labor exemption from antitrust law. Such workers find themselves in the position of most workers prior to the New Deal: at once lacking labor protections, yet exposed to antitrust liability for organizing to improve their conditions. I argue that this default rule is the legacy of a problematic history that is taken for granted by the contemporary antitrust framework.

In Part I, I show that the threat of antitrust liability is a powerful constraint upon contemporary independent contractor workers' own ability to take action to address their working conditions. In Part II, I trace the application of antitrust liability to worker collective action to the time before the labor exemption, arguing that pre-New Deal courts imported fundamentally hierarchical and coercive tenets from the common-law tradition into the fledgling antitrust law in order to apply it to contain worker organizing, thereby creating tensions with their own freedom of contract principles. In Part III, I show how the legal framework of the labor exemption reinforced the underlying assumption that antitrust regulates worker collective action, even as it immunized most workers from such liability (so long as they continued to be

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considered employees). In Part IV, I argue that the modern framework for antitrust does not compel the continued application of this default rule, and indeed supplies materials for a fresh, more balanced reconsideration of it.

Ultimately, the situation of these workers is a test of what antitrust fundamentally says about labor, absent a specific exemption. Because that exemption is currently rooted in the New Deal network of labor regulation, antitrust's treatment of labor becomes a baseline for critical conversations about how to reform our current framework of labor regulation—in the same way that it was the baseline for those conversations prior to the New Deal itself. In particular, antitrust functions as an outer limit for any such reform, and also for specific policy proposals to address the increasing prevalence of working relationships outside the bounds of employment.

INTRODUCTION

In the winter of 1999, following a series of strikes at America's ports aimed at improving poor working conditions and low pay, a number of individual truck drivers found themselves served with subpoenas by the U.S. Federal Trade Commission ("FTC"), which was investigating their potential participation in a price-fixing conspiracy.[1] These men, who were working punishing hours yet hardly breaking even, were grassroots leaders in an episode of collective action among low-wage workers that was somewhat unusual for the period. Their participation and leadership in these expressions of solidarity was the basis for the investigation.

1. *See infra* Part I.B (discussing antitrust as a barrier to worker collective action).

In this Article, I examine the origins of the rule that antitrust law largely prohibits collective action by workers who fall outside the bounds of employment, and who therefore presumptively do not receive the benefit of the labor exemption from antitrust law.[2] The threat that organizing for decent wages and working conditions will be prosecuted as price-fixing is a powerful constraint upon such workers' ability to take action to change their circumstances. Antitrust has historically structured the nature and content of labor regulation in this country, and it is currently poised to do so again in a new form. It did so directly and punitively in the Gilded Age. It did so indirectly and somewhat under the surface during the New Deal era. In today's deregulation era, it is of increasing significance in regulating workers who fall outside the bounds of the National Labor Relations Act ("NLRA")[3] (and other employment and labor law), as a limit upon new forms of labor regulation that would bring these nontraditional workers within their scope, and as a potential baseline for labor law reform generally. In contrast to the neoclassical interpretation of antitrust, which holds that the doctrine is justified on economic grounds independent of politics and moral norms, I adopt the perspective that antitrust has essential and irreducible political or normative content. While the neoclassical interpretation has certainly been challenged, it still holds great sway as the official position of most courts and the mainstream of antitrust scholarship. Antitrust's normative content can specifically be seen in its relationship to labor, which has changed over time according to the specific policy project and broader norms that held purchase among decision makers.

Antitrust law had its origins in a republican outlook that viewed emerging concentrations of economic and political power, enabled by the rise of the modern business corporation, as highly problematic. The statute was not, originally, intended to apply to workers' or farmers' collective action. The policy project envisioned by the legislators—breaking up concentrations of economic power—would in fact be *undermined* by preventing cooperation among less-powerful economic actors who were affected by large business combinations.[4]

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2. *See infra* Part III.C.2.

3. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

4. *See infra* Part II.B (discussing the Sherman Act and its relationship to labor).

This original orientation took a sharp turn in the courts, where a different and somewhat competing policy project, that of building the national market society, held greater sway. That project benefited from a compliant and reliable workforce. In order to use antitrust to prevent and punish worker organizing, Gilded Age courts made use of an equivocation in the concept of "free trade," and drew on fundamentally hierarchical and coercive assumptions regarding workers from the common law of labor regulation.[5] In purporting to implement parity between capital and labor under antitrust regulation, the courts actually relied upon status-based normative assumptions regarding workers *qua* workers.[6]

These courts succeeded in making the presumptive illicitness of worker collective action the underlying, default position, against which the "labor exemption" to antitrust law would then be defined in the New Deal era.[7] The law of the labor exemption in fact reified the classicists' application of antitrust to worker collective action. It also temporarily held the rule at bay, in service of the new policy project of the New Deal economy, which involved economic co-governance by business, the state, and organized labor. Meanwhile, antitrust began to consolidate into its contemporary neoclassical economic form, disavowing *direct* consideration of social or moral norms and emphasizing economic efficiency. As evidenced by contemporaneous policy commentary, the labor exemption was viewed by extreme neoclassicists as an unjustified instance of special treatment of labor, a deviation from scientific economic principles.

The deregulation era beginning roughly in the late 1970s began to expose a growing number of workers to antitrust liability, in a reprisal of the Gilded Age version of the antitrust-labor intersection. The body of law—roughly, the neoclassical interpretation of price-fixing—that tentatively comes to apply to these workers, prizes economic efficiency, disavows the social effects (and often even the economic effects) of its antitrust decisions, and certainly disavows moral considerations. To the extent that moral considerations applicable to collective action (such as liberty interests in freedom of association and expression) are enshrined in other areas of law such as the First Amendment, it also keeps those at bay by insisting upon an over-solid distinction between the "economic" and "political"

5. *See infra* Part II.C.3 (discussing early decisions applying the Sherman Act to workers).
6. *See id.*
7. *See infra* Part III (discussing the labor exemption).

spheres (precisely the distinction called into question by—among other things—the history of antitrust's changing application to labor). Yet, although neoclassical price-fixing law *officially* disavows moral and social considerations, it in fact relies upon such "extrinsic" considerations in many respects, often tacitly folded into invocations of "legitimate" competition,[8] and it certainly does so in its relationship to worker collective action.[9] Because how antitrust is to treat labor is, and always has been, a contingent policy decision involving irreducible normative content, I argue that the rule ought to be revisited in light of the specific moral, political, and economic concerns raised by worker collective action in pursuit of a decent livelihood.

The literature has not previously addressed the development of this rule and its conceptual underpinnings through the various relevant areas of law and eras, although naturally many existing areas of scholarship bear upon the account. The issue of antitrust liability and contemporary independent contractor workers has been flagged in the literature on contingent work, but has not been squarely addressed there.[10] In its contemporary form, it has been addressed somewhat more squarely by scholars focused on *trade*, that is, antitrust law and market regulation, particularly as to specific trades or industries.[11] Some relatively recent work in antitrust economics argues that collective action on the part of certain smaller market actors, including small businesses and independent contractors, ought to be permitted;[12] other work in this area sets out the concept of ruinous competition, which may also have

8. *See infra* Part IV.A (exploring the normative content of the price-fixing case law).

9. I specifically argue, in Part IV.B, *infra*, that antitrust imports "extrinsic" normative considerations in the price-fixing doctrine generally, in the operation of what I call the professional privilege, and in the application of, or refusal to apply, First Amendment protection to worker collective action that is not otherwise protected by the labor exemption.

10. *See, e.g.*, Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors,"* 26 BERKELEY J. EMP. & LAB. L. 143 (2005) (noting potential antitrust liability for collective action by independent contractors).

11. The collective economic action of independent contractor physicians in particular has received scholarly attention; the situation is something of a special case, given the complex regulatory structure within which it exists (which may itself create cartel-like benefits). Elizabeth M. Devine, *Physical Unionization: A Prescription for Modern Managed Care*, 4 QUINNIPIAC HEALTH L.J. 39, 40 (2000).

12. *See* Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST L.J. 195, 234 (2001) (proposing a limited countervailing power defense for small players' collective action). This argument relies upon a conception of market power whose status in the price-fixing doctrine is currently somewhat tenuous, but which has the potential to be revived, as further explored in Part IV.B.1, *infra*, and Part IV.B.3, *infra*.

application to independent contractor workers.[13] I bring these insights together with historical considerations regarding the development of both antitrust and pre-New Deal labor regulation.

The bulk of the literature on antitrust and labor generally, meanwhile, dates from during or shortly following the mid-century "normal science" period of the labor exemption,[14] and is largely defined by its assumptions. In particular, much of this literature is built, either expressly or indirectly, upon assumptions regarding labor unions' size and strength (and relatedly, upon the economic significance of collective bargaining), which no longer hold.[15] As a result, the literature is to a great extent focused upon collective bargaining policy and its antitrust implications, rather than upon unilateral worker collective action, and even the collective bargaining discussions tend to be conditioned by the assumption of labor union size and strength.[16]

How antitrust will regulate unilateral worker collective action in the context of *contingent* work is an especially pressing topic, given its uncertain legal status, its increasing significance in the labor market,[17] and the significant constraints it is already placing upon these workers and their movements.[18] This problem cannot be obviated by resolving the "misclassification" issue, familiar from labor and employment law, alone.[19]

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13. *See, e.g.*, KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY & COMMON LAW EVOLUTION 94–98 (2003) (comparing the concept of "ruinous competition" between the Sherman Act and common law); Mark Grady, *Toward a Positive Economic Theory of Antitrust*, 30 ECON. INQUIRY 225 (1992) (discussing the concept of "ruinous competition").

14. *See infra* Part III.C (discussing the "normal science" of the labor exception).

15. *See* Ralph K. Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 16 (1963) ("[U]nions are far more powerful and strategically entrenched today than at the time of *Loewe v. Lawlor*, and collective bargaining is a significant force shaping the economy."); *see also* Randall Marks, *Labor and Antitrust: Striking a Balance without Balancing*, 35 AM. U. L. REV. 699, 701 (1986) (arguing that antitrust does not sufficiently constrain labor). Marks almost exclusively assumes the actions of established labor unions, considers unilateral activity only cursorily, and states "the nonstatutory exemption," which covers collective bargaining, "is most frequently at issue in labor/antitrust cases." *Id.* Even commentators expressing concern about the diminishing reach of the labor exemption tend to operate on this assumption, concerning themselves primarily with specific doctrinal border-fixing issues. Milton Handler & William C. Zifchak, *Collective Bargaining and the Antitrust Law: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 460 (1981).

16. Winter, *supra* note 15; Marks, *supra* note 15; Handler & Zifchak, *supra* note 15; *see also* Elinor Hoffman, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK. L. REV. 1 (1983) (analyzing labor and antitrust policy).

17. *See infra* Part I.C (discussing potential defendants).

18. *See infra* Part I.B (discussing antitrust as a barrier to worker collective action).

19. *See infra* Part I.D (discussing the intersection between labor and employment law).

But the implications of the question are not limited to contingent workers. The situation of these workers is a test of what antitrust fundamentally says about labor, absent a specific exemption. That exemption is currently rooted in the network of affirmative labor legislation. As the functioning of that affirmative framework arguably declines and as discussion of modifying it or replacing it increases, antitrust's treatment of labor may again become the baseline for those critical conversations—in the same way that it was prior to the New Deal itself, when avoiding antitrust's grasp was one of the main aims of the labor movement.[20] The specific assumption that workers' right to organize for economic betterment is an "exemption" to be bargained for, perhaps by giving up other things, has implications far beyond independent contractor workers.

I. THE IMPACT OF ANTITRUST ON CONTEMPORARY INDEPENDENT CONTRACTOR WORKERS

In today's post-New Deal, "deregulation economy,"[21] workers are often and increasingly relegated to labor relationships outside formal employment. Collective action by workers who are classified as independent contractors, and who therefore presumptively do not receive the benefit of the labor exemption from antitrust law, may in theory, and has in scattered instances, drawn antitrust scrutiny. As truck drivers, taxi drivers, home health care workers, artists, and others choose to organize in an effort to improve poor pay and working conditions, we may expect to see this issue addressed in the courts if and when one of these movements gains real power. Regardless, the threat of antitrust liability already exercises profound constraints on these workers' ability to organize. Finally, as policy makers and advocates consider new schemes to organize and regulate work that falls outside the bounds of employment, antitrust may function as a limit on the regulatory possibilities (particularly in cases of local initiatives).

20. The labor movement's primary aim, more precisely, was avoiding the judiciary's repression of worker collective action generally, whether accomplished by antitrust or by other bases for issuing injunctions in particular. WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 128–66 (1991). However, very few of those other bases, many of them explicitly rooted in the older common-law tradition of worker regulation (described in Part II.A.2, *infra*), have survived to the present day, while antitrust has.

21. I adopt this term to describe the economic policy paradigm that began to replace the New Deal framework starting in roughly the late 1970s. I adopt the term for ease of reference, although this set of policies is often characterized not only by the withdrawal of certain types of regulation but by the extension of other sorts of regulation, often aimed at workers.

A. The Struggle for Decent Work and Decent Pay as Price-Fixing

The labor exemption currently immunizes most worker collective action from antitrust liability. Employee status, much discussed in its impact on workers in terms of the *receding* reach of labor and employment law protections, is also the trigger for *extending* the grasp of antitrust regulation of workers' autonomous collective action to better their working conditions. In other words, a phenomenon that is commonly understood as exemplifying deregulation actually *extends* regulation over the conduct of workers even as it withdraws it from the conduct of employers. As a result, individual workers classified as independent contractors may be subject to antitrust prosecution for organizing for decent wages or working conditions under the price-fixing doctrine, regardless of the reasonableness of the wage or the broader social or economic outcome.

Assuming for the moment that the labor exemption does not apply to a given set of independent contractor workers, and that they are not able to prove that they are misclassified employees, the law of price-fixing is likely to govern their concerted action. The modern neoclassical interpretation of antitrust, which mostly still reigns, takes market actors as black boxes: they are just "firms," whether they are massive corporations or a single truck driver.[22]

The relevant cases involving professional workers and "small producers," whose primary business is the selling of their services, are the best predictor of how low-wage independent contractor workers would be treated by antitrust law (and of how "professional" independent contractor workers actually are treated). For the most part, modern courts apply the law of price-fixing to hold that most collective economic action by such actors, particularly if it is aimed at affecting prices or other elements of the bargain and often even if it is not, is illegal price-fixing, unless some specific exception applies.[23] Neither the reasonableness of the rate nor a net social or economic benefit constitute exceptions.[24]

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22. This was not the case in the formative, pre-New Deal period, as described in Part III, *infra.*

23. *See, e.g.*, Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990) (collective action by independent lawyers constituted price-fixing); Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) (collective action by independent dentists); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978); Spence v. Se. Alaska Pilots' Ass'n, 789 F. Supp. 1007, 1010 (D. Alaska 1990) (antitrust analysis involving association representing independent contractor pilots).

24. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 423–24; *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695.

An especially apt illustration of this theory of liability is the Supreme Court's opinion in *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*,[25] both because it is a seminal case with respect to price-fixing generally, and because, of all the post-exemption antitrust cases involving professional workers or small producers, it involves facts that very closely resemble classic labor concerted action in which low- or mid-wage independent contractors might engage. In the 1970s and 80s, the District of Columbia had contracted the representation of indigent defendants in the majority of criminal cases to a panel of private attorneys and paid them only $30 per hour for in-court time and $25 per hour for out-of-court time. The Superior Court Trial Lawyers Association, whose membership was comprised of these panel attorneys, initially tried to persuade the District to raise its members' rates through political delegations and similar efforts. When those efforts were unsuccessful, the attorneys decided they had no choice but to take direct action. They formed a strike committee and agreed to stop taking new panel work until the District agreed to their proposed rate schedule. The strike went off with 90% participation, and the District acceded to increased rates.[26]

The Federal Trade Commission filed a complaint against the association, alleging an agreement in restraint of trade by "refusing to compete for or accept new appointments under the CJA program[;] . . . a conspiracy to fix prices and to conduct a boycott"; and engaging in "unfair methods of competition."[27] Rejecting the administrative law judge's conclusion that the agreement among the lawyers had not caused economic harm, the FTC decided that the agreement had been a "coercive, concerted refusal to deal" and also caused harm ("substantial anticompetitive effects").[28] Accordingly, it entered an order prohibiting any future boycotts: it ordered the lawyers to desist from engaging in any collective withholding of labor in an effort to improve their working conditions. The court of appeal vacated the FTC's cease-and-desist order, holding that the expressive component of the boycott (discussed further in Part IV, *infra*) warranted closer scrutiny, and in particular that it required a consideration of whether the association possessed

25. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 423–24.

26. *Id.* at 416.

27. *Id.* at 418. Suit was brought under Section 5 of the Federal Trade Commission Act, which gives the agency the authority to bring litigation under the Sherman Act. *Id.* at 414 (citing Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45 (2012))).

28. *Id.* at 419–20.

significant market power.[29] The Supreme Court endorsed the court of appeal's analysis that the "respondents' boycott constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act," agreeing that "this constriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price . . . or by agreeing upon an output, which will increase the price offered."[30] It then insisted that per se treatment was indeed appropriate, and that neither the reasonableness of the price set nor lack of market power on the part of small parties can save anticompetitive behavior from sanction.[31] Within the modern antitrust jurisprudence, *Trial Lawyers* is the case whose facts most closely track the sort of worker collective action with which this Article is concerned, and it also represents a certain rigid apex of the Court's neoclassical approach to price-fixing.[32]

Following *Trial Lawyers* and these general principles, a court considering labor organizing activity—for example, a strike for higher wages on the part of non-employee truck drivers, artists or art workers, cab drivers, or even day laborers—may not only deny labor and employment law protections to such workers, but may impose treble damages or criminal penalties on the workers instead. Although the issue has not been presented to an appellate court (or a trial court making a decision of law), *Trial Lawyers* is a reasonable predictor of how it may be decided by a court that chooses to double down on the neoclassical approach rather than reconsider it.

B. An Object Lesson in the Revival of Antitrust as a Bar to Worker Collective Action

The grassroots movement of port truck drivers in the deregulation era, aimed at improving poor pay and working conditions, drew significant antitrust scrutiny that in turn shaped that movement. This example illustrates the significant obstacle antitrust poses to workers classified as independent contractors who organize to improve their pay and working conditions.

Deregulation-era trucking is characterized by what Michael Belzer calls the labor market paradox: perennial shortages of skilled drivers, coupled with rock-bottom wages and poor working conditions.[33]

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29. *Id.* at 420.

30. *Id.* at 423.

31. *Id.* at 423–24; *see also infra* Part IV.B.3 (discussing the First Amendment aspects of the Court's analysis).

32. *See infra* Part IV.B.3 (discussing the First Amendment implications of antitrust law).

33. MICHAEL BELZER, SWEATSHOPS ON WHEELS: WINNERS AND LOSERS IN TRUCKING

Deregulation economic policy has been the apparent cause.[34] Returns on equity in trucking, particularly in the truckload market,[35] were not high to begin with; post-deregulation, one might argue that they are actually below cost in the economic sense.[36] Employers thus often are forced to cut wages below what they would like, and below what they know is required to attract or keep skilled drivers. Drivers in the truckload market, which includes port truck drivers, typically earn pay in the minimum wage range and work extremely long hours.[37]

Port truck drivers in the deregulation era began organizing, both among themselves and in coordination with established labor organizations, as early as the late 1980s, in response to the extremely poor working conditions that ensued from deregulation of the trucking industry. The following decade and a half were marked with numerous

DEREGULATION 151–54 (2000) (defining the labor market paradox).

34. Belzer's description of the labor market effects of deregulation policy can be summarized by saying that numerous established firms quickly went out of business, that many new (non-union) firms entered the market, and that intense price competition forced wages lower and lower. In the early 1980's, in the wake of the Motor Carrier Act, around half of the Class I and Class II general freight carriers, most of them union, went out of business. At the same time, many new non-union carriers registered with the Department of Transportation. But these changes did not happen evenly across the trucking industry. The market largely fractured along TL/LTL ("truckload" and "less-than-truckload") lines, which had not been its prior organizing principle. Surviving firms in the general freight market—the prior biggest carriers—largely shed their TL business, and grew hugely within the LTL sector, taking up the space left by smaller carriers that had left the market. These firms included for example United Parcel Service ("UPS"), which remained union and largely mid-wage. The general freight market consequently concentrated five-fold. Meanwhile, the earlier peripheral TL-only market exploded, seeing the vast majority of the new entrants while also seeing competition, particularly price competition, increase sharply. *Id.* at 41–42.

35. The contrast is to the LTL market (e.g., the UPS and Federal Express ("FedEx")). *Id.* at 202, 204.

36. *Cf. id.* at 202 (suggesting that post-deregulation trucking might be a perfect market in the context of orthodox economic theory, in the sense that profits approach zero). However, it might be more accurate to say that profits typically dip below zero when one considers them not in the accounting sense (net of revenue and out-of-pocket costs), but in the economic sense (net of revenue, out-of-pocket costs, and the opportunity cost of capital). HYLTON, *supra* note 13, at 94–98 (2003). The latter would explain the transitoriness of many port trucking firms, and the niche character of many that have any lasting power at all, enabled by idiosyncratic factors (e.g., special deals, sometimes through family connections, with certain shippers; existence of other operational arms that subsidize the port trucking operations; personal commitment of individual owners or owning families who did well before deregulation). *Id.*

37. As of 2000, average real wages in trucking were back at late 1950's levels. BELZER, *supra* note 33, at 38. But this statistic belies the true decline, for unlike in the late 1950's, when the industry had not yet fractured into TL and LTL sectors and was more centralized, generally speaking, the current market is characterized by very high wage differentials between these two subsectors. *Id.* TL truck drivers, including port truck drivers, thus earn close to minimum wage, if not less. Drivers as a rule also work extremely long hours, raising serious health and safety issues. *Id.* at 152.

strikes over issues relating to pay and working conditions, including but not limited to: the failure to account, in pay rates, for spikes in fuel prices; failure to compensate long periods of waiting at port terminals; and numerous safety issues.[38] The International Brotherhood of Teamsters was intermittently involved in driver organizing during this period, particularly in Los Angeles and Miami, but most of the concerted action was led by independent drivers' organizations.[39]

A number of these actions drew regulatory scrutiny and lawsuits. The United Container Movers Association ("UCMA") was a grassroots, independent drivers' association with some strength, at a minimum, in, Baltimore, Charleston, Seattle, and Savannah. UCMA and its worker leadership found itself as the target of a federal investigation by the Clinton-era Federal Trade Commission, for price-fixing as a result of their organizing toward a union and as a result of work stoppages over low pay and long, uncompensated wait times at ports. The FTC went so far as to serve several drivers, who stated that they were working "18 hours a day for less than the minimum wage just to make the payments on our trucks and put food on the table" with subpoenas to testify as to their role in a possible price-fixing conspiracy.[40] Some time later, the Support Trucking Group, another independent drivers' association based in Miami, engaged in concerted action over low wages, equipment safety issues, and wait time. It, together with numerous individual truck drivers, was hit with lawsuits from multiple entities, including port terminal operators and Miami-Dade County itself.[41]

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38. Interview with Jon Zerolnick, Research Dir., L.A. All. for a New Econ. (Aug. 22, 2014) (interview notes on file with the author); Interview with Jon Zerolnick, Research Dir., L.A. All. for a New Econ. (August 3, 2015) (interview notes on file with the author); *see* RUTH MILLIKEN, L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT 178–84 (2006) (describing the grassroots, self-starting character of port truck driver organizing in the 1980's and 1990's).

39. MILLIKEN, *supra* note 38, 178–84; Interview with John Canham-Clyne, Former Dir., Ports Campaign, Change to Win (May 28, 2014) (interview notes on file with the author); Interview with Michael Manley, Staff Attorney, Int'l Bhd. of Teamsters (January 8, 2015) (interview notes on file with the author).

40. Bill Mongelluzzo, *Operators Seek to Organize*, J. OF COM. (Dec. 1, 1999, 7:00 PM), http://www.joc.com/operators-seek-organize_19991201.html; *see also* Rip Watson, *Container Haulers Seek to Unionize*, J. OF COM. (Sept. 12, 1999, 8:00 PM), http://www.joc.com/container-haulers-seek-unionize_19990912.html; Mark Gordon, *Truckers Union Boss Ordered to Testify* , FLA. TIMES UNION (Dec. 4, 1999), http://jacksonville.com/tu-online/stories/120499/bus_1E1FTC__.html.

41. Complaint for Antitrust Violations at 1–2, Miami-Dade Cty. v. Support Trucking Grp., No. 04-cv-21687, 2004 WL 2868811 (S.D. Fla. 2004) ("This case arises out of a massive conspiracy . . . with the purpose and effect of an attempt to monopolize, to fix prices and to commit other unlawful practices designed to inflate the prices of trucking services provided by

These actions, while they did not go to verdict or result in decisions of law,[42] profoundly shaped the course of organizing in this industry. The constantly looming specter of antitrust liability powerfully structured the strategy that port truck drivers pursued in their attempt to improve their working conditions and to gain a collective voice in the workplace—particularly once the drivers' efforts were coordinated into a comprehensive national campaign.[43] The founding director of that campaign observed: "[The threat of antitrust liability] was one of the three or four major strategic factors in virtually everything that we did. It was part of our checklist. The specter of antitrust liability has significantly suppressed drivers' ability to take collective action to change their economic circumstances."[44] The counsel to the campaign noted that the campaign was extremely cautious about worker collective action on antitrust grounds in its early years, observing: "Apart from the merits and whether damages were recovered, the sheer cost of defending such an action would have been sufficient to shut the campaign down."[45]

More recently, when an independent group of port truck drivers in Oakland, California engaged in an episode of collective action (regarding pay rates, surcharges, and uncompensated wait time), their attorney expressed his view that had the movement gained power, they would be likely to face antitrust scrutiny.[46] One driver spoke of the drivers' aspiration to workers' association regardless of employee status,[47] which antitrust might view as an illegal cartel.

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non-union truckers for the movement of goods into and out of the Port of Miami."); Port of Miami Terminal Operating Co. v. Support Trucking, No. 04-cv-21703, 2004 WL 2868838 (S.D. Fla. 2004); Antillean Marine Shipping Corp. v. Various Indep. Owners & Operators of Indep. Trucking Cos., No. 04-cv-22530, 2004 WL 2875072 (S.D. Fla 2004); Universal Maritime Serv. Corp. v. Support Trucking Grp., Nos. 04-cv-21687, 04-cv-21688, and 04-cv-21703, 2004 WL 2868849 (S.D. Fla. 2004).

42. While it is generally quite difficult to positively determine whether a settlement was reached from docket records alone, a reasonable inference is that the prospect of defending such a lawsuit, which individual low-income or middle-income defendants are not in a position to do, prompted the result desired by plaintiffs in many of these cases: an end to the collective action, and economic capitulation to the plaintiffs' terms.

43. These efforts were largely consolidated into a nationally organized campaign when Change to Win, a coalition of organizing-oriented labor unions, launched its port trucking campaign in 2006. Interview with John Canham-Clyne, *supra* note 39.

44. *Id.*

45. Interview with Michael Manley, *supra* note 39.

46. Interview with Dan Siegel, Partner, Siegel & Yee (December 23, 2013) (interview notes on file with the author).

47. Interview with Frank Adams, Port Truck Driver & Former Comm. Member, Port of Oakland Truckers Ass'n (December 23, 2013) (interview notes on file with the author).

Similarly, the threat of antitrust liability may be a formidable barrier to concerted worker action to improve or change working conditions in other industries with large concentrations of independent contractor workers, including other sectors of the trucking industry. Some such industries that have seen active organizing include taxi drivers,[48] and home health care and child care providers.[49] In both cases, there have been hints of the antitrust law apparatus being deployed against worker organizing, or hints that could it be so deployed. In the case of home health care worker organizing, the FTC has in the past expressly taken a position against a collective bargaining scheme for such workers, noting that it would "require that private parties engage in conduct that normally would be deemed *per se* violations of federal antitrust law, including price fixing between competitors."[50] The threat can also be glimpsed in lawsuits initiated in reaction to grassroots collective action by workers outside formal organizing campaigns. A comprehensive search of antitrust actions filed between 2000 and 2014 revealed additional instances of actual litigation targeting collective action by workers outside formal organizing campaigns, including grassroots actions by low-paid truck drivers in other sub-sectors that were met with antitrust prosecution.[51] Anecdotal evidence—and a reasonable

48. Veena Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities* (2015) (unpublished manuscript) (on file with the Loyola University Chicago School of Law Journal); *see also* BIJU MATHEW, TAXI! CABS AND CAPITALISM IN NEW YORK CITY (2008).

49. *See* Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1391 (2008) (noting the prevalence of the independent contractor form in home health care work and describing active organizing among such workers); Peggie R. Smith, *Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers*, 55 U. KAN. L. REV. 321, 359 (2006) (noting that the recent successful organizing efforts among such workers have been premised on the state action exemption to antitrust law, where the state assumes the role of employer-of-record). The state action exemption, of course, requires the political cooperation of a state entity together with an industry whose structure would allow for such an approach.

50. FTC Staff Comment to the Hon. William J. Seitz Concerning Ohio Exec. Order No. 2007-23S to Establish Collective Bargaining for Home Health Care Workers (Feb. 14, 2008). This is in line with the FTC's general orientation toward health care providers, including doctors. In the case of taxi drivers, while the FTC has not addressed worker organizing directly, it has taken an active interest in the taxi industry generally that, given the agency's general operating principles, may have implications for worker organizing and in particular for any cooperative scheme that resembles collective bargaining.

51. At a minimum, the actions involving workers pursuing concerted action, excluding lawsuits against port truck drivers and driver associations, include: Complaint at 1–2, Siboney Contracting Co. v. Owners Ass'n of Palm Beach & Broward Cty., No. 9:00-cv-08149-ASG (S.D. Fla. 2000) (indicating that the plaintiff was a corporation that "act[ed] as a broker of rock and aggregate materials for a variety of road and building projects, and . . . the [i]ndividual [d]efendants are independent truck owner-operators who are members of the Association and

inference based on the available evidence—suggests that there have been additional threats to sue drawn by such scattered worker actions, beyond what can be found in official court records. The seriousness of the threat is intensified in cases of nontraditional organizing, because some exceptions likely protect workers who are also seeking employee status or who are organizing in concert with an established labor organization that already has a sectoral presence representing employees.[52]

C. Universe of Potential Defendants

Although difficult to measure with precision, independent contractor workers have been estimated at somewhere between 6–7% of the overall work force.[53] The generally accepted view is that this proportion is increasing.[54] Independent contractors are spread widely in the type of work they perform, the amounts they earn, and their educational and class backgrounds. There are independent contractors in almost every trade, including the professional trades, and also in almost every type of manufacturing industry that allows for piecework. For purposes of this Section, I refer to workers as independent contractors when their employers classify them as such—putting aside the question, for the moment, whether this would be the accurate legal classification if tested.

We may view the workers we have in mind as comprising three shades on a spectrum with imprecise and permeable borders. First,

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believed to be leaders of the Association" and alleged a coordinated work stoppage aimed at a 15% pay rate increase due to a spike in fuel prices); Verified Complaint at 3, 10, Horizon Lines of P.R., Inc. v. Asociacion de Camioneros de Arrastre de P.R., Inc., No. 3:05-cv-01801-PG (D.P.R. 2005) (alleging that an independent drivers' association conducted a classic work stoppage to increase rates); Verified Complaint at 1, 3, HN1 Therapy Network of P.R., LLC v. Asociacion Puertoriquena de Fisioterapia, Inc., No. 03:10-cv-1404 (D.P.R. 2010) (identifying a classic group boycott by physical therapists); Verified Complaint at 12, Humana Health Plans of P.R., Inc. v. Juan L. Vilaro, No. 3:12-cv-1445 (D.P.R. 2012) (claiming concerted price-fixing and boycotting by physicians). Numerous instances of lawsuits against small producers who may also be considered workers are excluded from this list.

52. *See infra* Part II.C.2.b (describing legal arguments that may protect some organizing among independent contractor workers from antitrust scrutiny).

53. Peter H. Cappelli & J.R. Keller, *A Study of the Extent and Potential Causes of Alternative Employment Arrangements*, 66 INDUS. & LAB. REL. REV. 874, 890 (2013).

54. Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, *in* THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 31, 35–36 (Annette Bernhardt et al. eds., 2008); *see* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-168R, CONTINGENT WORKFORCE 7 (2015) (noting that despite the difficulties in ascertaining a clear definition of contingent workers, data suggests that there are millions of contingent workers in the market).

there are people who many in ordinary parlance might not even call "workers," but whom I choose to include in this spectrum because their income derives primarily from their personal labor, that is, from services that they personally perform, rather than from other people's labor or from capital investment. Included within this shade of the spectrum are independent doctors, lawyers, engineers, dentists, and other professionals, who are not employed by someone else and who either have their own small storefront or are self-employed on paper but work in, and for, larger facilities. These people typically have some kind of professional degree or certification, earn middle to high incomes, and are members of the professional social class. While they may employ an administrative or support employee, they personally provide the core services performed by their enterprise.[55]

A second set of workers who are often classified as independent contractors, we might dub "soft professionals"—they generally do not have a formal professional degree and may or may not identify with and be considered part of the professional social class, but they have considerable expertise in a relatively specialized field of work, are not as easily individually replaceable as low-wage workers, and generally earn middle incomes. This set of workers may labor in informational technology; in the entertainment industry, particularly pre- and post-production; repair and construction (electricians and plumbers); and the beauty, massage, and personal care industries.

A third sizable set of workers classified as independent contractors have relatively little formal education (or are unable to take advantage of it in the labor market, due to migration across national borders or other factors), may be considered and consider themselves working class, are relatively easily replaceable by employers on an individual level, and earn low wages. Many people in this category work as truck drivers, taxi drivers or drivers for app-based ride-providing services, laborers in building construction, in home healthcare, and as casual or day laborers.[56]

55. This category of workers may receive softer antitrust scrutiny. *See infra* Part IV.B.2. Under this scheme, a lawyer or doctor who is no one's employee could obviously be classified as primarily a worker or primarily a business owner, and the classification would depend upon the number of production (as opposed to administrative) employees she has, and the proportion of the time she spends on (and the income she derives from) core services personally performed by her (engaging in lawyering or doctoring work), versus her ownership over and management of others' income-earning labor (overseeing associates' work, investing assets, etc.). Nothing in the argument of this Article relies upon precisely demarcating that line, although the general factors that would determine its location are useful to have in mind.

56. Plainly, there is overlap at each of these borders. For example, many laboring in the

Finally, small commodity producers who rely in large part on personal labor and lack market power should also be provisionally included in the universe. Of especial historical importance are small farmers, whose livelihoods were greatly affected by the concentrations of economic power that antitrust originally sought to address and who participated in historic alliances with labor organizations to address their economic conditions.[57]

Any type of collective action aimed at improving pay rates or working conditions might expose the groups of workers and economic actors just described[58] to antitrust liability. This rule, I aim to show in the balance of this Article, is a powerful bludgeon with shaky foundations.

D. Intersection with Work Law

It is well known that in the contemporary landscape of labor and employment law, the question "who is an employee?" is an increasingly dominant one, given the growth of "contingent labor" in the workforce and the economy. Contingent labor encompasses the various mechanisms by which the traditional employment relationship, which is to a great extent presupposed by extant work law, is attenuated by the employer of labor: subcontracting, temporary work arrangements, and retaining workers as "independent contractors" rather than employees. Each of these arrangements abridges the reach of work law, but none so completely as the independent contractor arrangement, which purports to nullify the employment relation altogether.[59]

Workers and worker advocates have thus sought to re-establish the reach of extant work law through the use of legal doctrines and strategies whose contention is that although the new work arrangement may not look like the traditional employment relationship in some superficial respects, it is functionally equivalent to employment. Misclassification refers to the contention that despite the nomenclature adopted by the employer, a particular work arrangement meets the legal test for the employer-employee relationship already contained in the

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beauty and personal care industries are low-wage workers, and may earn less than many independent contractor truck drivers.

57. *See infra* Part II.B (discussing origins of antitrust).

58. While this Article often focuses primarily on low-wage workers, many of its conclusions are generalizable to the other groups of workers and economic actors as well. In future work, I will more directly address the various considerations that might apply to regulating collective action among the groups.

59. Zatz, *supra* note 54, at 34–36, 44–45.

law. The central, but not only, factors in this determination relate to the level of control that the putative employer exerts over the work performed and the operations of which the work is a part.[60] Another set of factors applicable under many of the tests for employment status takes into account the "economic realities" of the work relationship, which are mainly indicia of the relative power of the two parties to set the terms and conditions of the work performed.[61] Because employment status is the threshold question for various regulatory schemes, a variety of definitions and tests apply, and a worker might in theory be considered an employee for purposes of a certain statute and a contractor for another.[62]

The misclassification strategy, however, is not sufficient to dispose of the "independent contractor question." There are practical, factual, and doctrinal reasons for this. As an initial matter, there are the extremely significant practical limitations that attend regulatory enforcement as well as private litigation in terms of both resources and delay, which constrain workers' ability to establish employee status even where it is almost certainly the proper legal conclusion.[63] Beyond this, employers possess a great deal of power to unilaterally dictate the very factual conditions that determine whether the worker is legally an employee. Indeed, a typical response to misclassification litigation is for employers to adjust operations and the conditions of work so that employee status is again thrown into question and so that they may continue to classify workers as independent contractors under color of law. This point has been made generally by Noah Zatz;[64] by Julia Tomassetti in the specific context of the FedEx litigation, one of the most significant episodes of

60. *Id.* at 35.

61. *Id.*

62. *Id.*; *see also* Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POLICY J. 187, 187 (1999) (noting that the application of hundreds of statutes and regulations hinge on employee status).

63. *See generally* Scott Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 UC IRVINE L.R. 939, 1130–40 (describing how these obstacles have manifested in a concrete instance, in the port trucking industry). As Cummings notes, "[t]he path was not easy. In an industry of hundreds of small companies, misclassification litigation was necessarily a piecemeal approach"; the strategy was dependent upon private firms willing to take a financial risk on fees, and even a successful case would not compel reclassification. *Id.* at 1131–32. For this and other reasons, misclassification litigation was the campaign's "Plan C." *Id.* at 1134.

64. *See* Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 279, 288–89 (2011) (critiquing the "static view" of misclassification, which ignores both employers' fundamental control over the facts that determine employee status and the role of law in employers' choices).

misclassification litigation in the United States;[65] and by Scott Cummings in the context of the port truck drivers' movement.[66]

Moreover, employer response aside, many low-wage workers may not meet the legal test for employee status even under current conditions. This may turn out to be true in segment of the "gig economy," as Uber, Lyft, and other app-based labor brokering services are sometimes called; even courts are beginning to comment on the potential limitations of the existing legal framework for determining workers' status under changing conditions.[67] These facts are also acknowledged in the academic literature as forming the basis for various proposals that would go beyond the traditional employee and independent contractor distinction.[68] Finally, many non-employee workers have chosen not to contest their independent contractor status despite engaging in organizing activity. Notable examples are groups of taxi drivers[69] and of artists and art handlers.[70] In either case, we are

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65. Julia Tomassetti, *From Hierarchies to Markets: FedEx Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L.R. (forthcoming 2016).

66. Cummings, *supra* note 63, at 1132 (noting that in the context of the port trucking campaign, "[e]ven successful cases . . . often had the effect of simply making companies more stringent about following the independent-contractor rules"). Cummings further states that "industry lawyers conducted trainings . . . [o]ne such update recommended that companies 'DO NOT Use a Driver Handbook that looks like an employee manual,' or require a driver to 'wear a company logo,' 'paint the truck a particular color,' or 'display a company ID card'"). *Id.* at 1138.

67. Judge Chen, in denying Uber's motion for summary judgment in the currently pending, high-profile wage and hour class action brought by its drivers, stated explicitly:

> The application of the traditional test of employment—a test which evolved under an economic model very different from the new "sharing economy"—to Uber's business model creates significant challenges. . . . It may be that the legislature or appellate courts may eventually refine or revise [the *Borello*] test in the context of the new economy. It is conceivable that the legislature would enact rules particular to the new so-called "sharing economy."

O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015).

68. These include proposals to regulate "dependent contractors" or to divorce many of the benefits traditionally associated with employment from that status and to make them available on some other basis instead. Linder, *supra* note 62; *see also* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When it Sees One and Why it Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 301 (2001) (proposing "an approach to statutory coverage based on the character of the transactions between the parties instead of the status of the parties").

69. Dubal, *supra* note 48, at 50–56 (regarding San Francisco taxi workers); Interview with Aaron Chappell, Campaign Manager, Org. Dep't, AFL-CIO (July 17, 2015) (regarding drivers organized with the National Taxi Workers Alliance) (interview notes on file with the author).

70. *See, e.g.*, WORKING ARTISTS & GREATER ECON. (W.A.G.E.), http://www.wageforwork.com (last visited Mar. 22, 2016) (noting the fair-pay certification scheme of W.A.G.E); ART HANDLERS ALL. N.Y., http://www.arthandlersalliance.org/ (last visited Mar. 22, 2016) (noting the organizing efforts of the Art Handlers Alliance of New York); *see also* Interview with Steve Sewell, Art Handlers All. of N.Y. (Oct. 26, 2015) (interview notes on file with the author).

talking about workers who sell their personal labor, earn relatively low pay for that labor, and are price-takers in the market.[71]

Part I.B, *supra*, discussed antitrust liability for *unilateral* worker collective action. In addition, any regulatory scheme that aims to address collective action by such workers in anything but a purely punitive manner, or aims to provide for minimum working standards, will also come up against the outer limits imposed by antitrust. As the organizing efforts of freelancers, independent contractors, and gig economy workers continue to gain momentum, we can expect to see such proposed schemes. Members of the New York City Council have recently stated that they are currently developing this type of regulatory scheme, prompted by the efforts of the Freelancers Union and other organizing groups.[72] The City of Seattle recently enacted an ordinance granting collective bargaining rights to drivers for taxicab, limo, and "transportation network companies" (encompassing Uber, Lyft and other companies in the on-demand sector) who are classified as independent contractors rather than employees.[73] Local regulation, as such schemes are likely to be, will probably face federal preemption lawsuits not only under the "NLRA,"[74] but also under antitrust.[75]

A corollary of the main point of this Article is thus that "fixing" misclassification will not obviate the problem of non-employee workers and antitrust liability, a problem that is likely to become more pressing as freelance work becomes increasingly prevalent. To hope that tinkering at the surface with the current legal classifications of workers can, alone, suffice to solve the problem I am posing, is to ignore the fundamental ways in which the underlying structure of antitrust law's

71. There are many reasons, explored in the balance of this Article, not to expose such workers to antitrust liability for collective action; for the present purpose, I wish to establish simply that "misclassification" does not, as a factual matter, obviate the issue.

72. Samar Khurshid, *City Council Developing New Protections for Workers in 'Gig' Economy*, GOTHAM GAZETTE (Nov. 5, 2015), http://www.gothamgazette.com/index.php/government/5971-city-council-developing-new-protections-for-workers-in-gig-economy.

73. SEATTLE, WASH., MUN. CODE §§ 630.310.110, 6.310.735 (2016), http://clerk.seattle.gov/~legislativeItems/Ordinances/Ord_124968.pdf

74. It is worth noting that any preemption suit under the NLRA—which would have to rely upon the contention that the NLRA embodies the congressional judgment to *deny* organizing rights to non-employees, at least for the most part—would ultimately be parasitic, if not by direct doctrinal path then by conceptual reliance, upon the outer limits set by antitrust, as well. This point should become clearer after considering the argument of Part II, *infra*, and will also be developed further in future work.

75. Indeed, as this Article was going to print, an industry group (the United States Chamber of Commerce, no less) filed a lawsuit challenging the Seattle ordinance on grounds that it is barred by antitrust law and by the NLRA. The complaint leads with the antitrust challenge. Complaint, *Chamber of Commerce v. City of Seattle*, No. 2:16-cv-00322 (W.D. Wash., Mar. 3, 2016).

relationship to labor shapes the current categories in the first place. To be sure, a consideration of that deep relationship ought to lead us eventually to a reconsideration of the current categories. But to *start* by adjusting the boundaries between "employee" and "non-employee"—with the idea that this will *obviate* the need to consider that deeper relationship—will likely only repeat the mistake that led us to the current situation (Part III, *infra*). That deeper relationship between antitrust and workers informs everything from the legal consequences of the current categories, to their definitions and borders, to the existential struggles faced by workers who are left out in the cold by them. To understand it, we must perform some conceptual excavation.

II. OF MARKETS, COMBINATIONS, AND SERVANTS: HOW ANTITRUST LAW CAME TO PUNISH WORKER COLLECTIVE ACTION

The first federal antitrust statute, the Sherman Act, was not originally intended to apply to worker collective action, and was instead aimed at protecting traditional small American enterprise from the massive business conglomerations that arose over the course of the nineteenth century. Gilded Age courts, however, applied the statute to workers' collective action. Their reasoning merits scrutiny as we analyze a policy that has not only shaped American labor history, but also has contemporary reverberations that are likely to only become louder.

Classicism, which dominated the common law at the time of the Act's passage, emphasized freedom of contract and free agency on the part of market actors, in reaction to the social and regulatory containment of markets that had characterized the prior era. But the classicist project, as to antitrust and workers, was specifically designed to *invite* regulation of workers' freely chosen actions and contracts, not to deflect it.

Understood as a component of the larger endeavor by the courts to construct a national market, courts' application of the Sherman Act to worker collective action displayed their willingness to subordinate workers' freedom of action, both political and economic, to that project, which was represented by the notion of "free flow of trade" in the cases. That phrase was often used interchangeably with "freedom of contract," not only in the cases applying the Sherman Act to labor, but also in other areas of law that likewise comprised the project of constructing the national market. Yet the distinction between the two concepts is made evident in the Sherman Act labor cases, because the application of the Act could not be justified on freedom of contract grounds, and instead *required* the justification involving the "free flow of trade."

While classicists argued that the Sherman Act ought to be extended to workers on grounds of parity—because business was already subject to it—the fact is that the will of business owners was never made to bend to the "free flow of trade" in the way that the will of workers was. An act and an omission together accomplished this: the judge-made "corporate exemption," an analogue of which workers never enjoyed, and the relative lack of enforcement of Section 2 of the Act (regulating mergers).

A. Classicist Trade Regulation and Nineteenth-Century Labor Regulation

The Sherman Act regulates trade and, contentiously, labor.[76] The statute itself says nothing explicitly about labor or work, is very general in its pronouncements, and invokes concepts ("restraint of trade") that were in flux and transition at the time of its drafting. The forms of trade and labor regulation extant at the time of the passage of the Act are therefore of some relevance in understanding its meaning.

The defining element of classicist trade regulation[77] of the Gilded Age period was its opposition to the sort of economic regulation that had preceded it. Commercial law and trade regulation once looked very different, often functioning to *contain* markets (rather than police barriers to them).[78] Moreover, commercial and trade regulation largely existed in a mutually reinforcing relation with the collective action of producers (rather than prohibiting it).[79] Indeed, the original ancestors of antitrust law date to a time before markets defined economic life: doctrines such as *forestalling* (prohibiting the buying up of merchandise before it reached the market; for example, buying up crops still in the

76. It regulated labor directly from shortly after its passage until the New Deal. It continued to regulate labor indirectly throughout the New Deal period, and is likely to exert increasing direct *and* indirect effects on workers in our current era.

77. My use of the term "classicism" is drawn from the work of antitrust scholar Herbert Hovenkamp. However, my use of the term herein is somewhat broader and less historically specific: I mean to include the overall approach to economic regulation that had freedom of contract and free trade as its governing ideals, which means I may characterize some decisions and commentary as classicist when Hovenkamp would not do so.

78. Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1021 (1989); *see also* HYLTON, *supra* note 13, at 32 (noting that while today courts aim to enhance competition, "early market interference statutes served largely to suppress competition").

79. Gary Richardson, *A Tale of Two Theories: Monopolies and Craft Guilds in Medieval England and Modern Imagination*, 23 J. HIST. ECON. THOUGHT 217, 233 (2001) (showing that in some cases the edicts of economic collectives such as guilds were actually continuous with, and even evolved into, local trade regulation).

field), *engrossing* (prohibiting the stockpiling of merchandise in order to raise prices), and *regrating* (prohibiting the buying and reselling of merchandise in the same or neighboring markets after prices rise).[80] Modern commentators, steeped in neoclassicism, may have a tendency to see these doctrines as motivated by an anti-competitive policy.[81] But these policies likely had both anti-competitive and pro-competitive effects. A better description might be that they were motivated by something other than the contemporary idea of competition altogether—which did not, after all, exist yet. They simply defined and regulated trade and markets in the interest of social welfare, and that conception of welfare was not particularly tied to the idea of market competition.[82]

Meanwhile, although the hierarchical and coercive character of labor regulation inherited from the feudal era was a constant both prior to and during the Gilded Age, it is likely that at least in the United States, many *more* working people came under its purview during the Gilded Age.[83] In other words, prior to the transformation in which the national market came to define economic life[84] and the modern business corporation replaced its almost unrecognizable pre-market ancestor,[85] many working people labored outside the context of wage labor, and thus outside master and servant law. Many working people thus

80. HYLTON, *supra* note 13, at 32; Richardson, *supra* note 79, at 218.

81. "The main difference between these early statutes and the Sherman Act is that courts interpret federal antitrust law today as aiming to enhance competition, while the early market interference statutes served largely to suppress competition." HYLTON, *supra* note 13, at 32.

82. *See* Richardson, *supra* note 79, at 230 (recognizing that "trading regulations" functioned to help ensure that economic activity was "in the general interest"); KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 45–58 (2001) (arguing that *all* economic regulation prior to the emergence of market economies was embedded in that particular society's conception of the overall social good, rather than existing in a separate economic sphere in which market competition was the reigning ideal).

83. *See infra* Part II.A.2.

84. *See generally* RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900 (2000) (describing the political construction of the national market).

85. Their ancestor, the guild, combined the activities of both commerce and labor. As a legal category, very early corporations were thus simply one species of the cooperative organizations that economist Gary Richardson calls "occupational cooperatives." Gary Richardson & Michael McBride, *Religion, Longevity, and Cooperation: The Case of the Craft Guild*, 71 J. ECON. BEHAV. & ORG. 172, 174 (2009). In the United States, "[p]rior to the 1840s, the character and organization of American business enterprise was predominantly small-scale," with "relatively low levels of capitalization." CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 17 (1985); *see also* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 13 (1991) (describing the pre-classical American business corporation).

enjoyed a greater level of both legal and economic independence than what became normal in the Gilded Age.[86]

As we shall see, these two streams, classicist trade regulation and feudal labor regulation, converged in the application of the Sherman Act to worker collective action. Meanwhile, the surviving minor strain of republicanism, which had animated the Act in the first place, carried forward echoes of the economic regulation that had preceded both the trade and labor regimes of the Gilded Age.

1. Classicist Trade Regulation

According to the conventional view, the Sherman Act was continuous with the common law of trade regulation. That body of law was primarily concerned removing the vestiges of pre-market trade regulation to the extent that they placed constraints on the activities of market actors.[87] Whether the official ideology of freedom of contract and trade, and individual liberty emphasized in the common law,[88] was the source or the mechanism of that economic policy, it was certainly closely bound up with it. At the same time, I contend that the classicist notion of freedom of trade contained a basic equivocation, between the clear liberty-based concept and a more nebulous concept often denoted by the phrase the "free flow of trade." This notion of "free trade" had nothing to do with any person's freedom, but with the unobstructed free flow of commerce. . This second conception comes into full relief in the cases that apply the Sherman Act to labor,[89] where it actually *trumps* the freedom of contract interests that would seem to militate in favor of permitting the coordinated actions at issue.

In terms of distinguishing the official ideology of the classicists from that of contemporary "neoclassicists," Herbert Hovenkamp points out that the primary concern of classicism was not competition in the contemporary sense, but rather individual liberty for commercial actors—in particular, freedom of contract.[90] Classicism's conception of competition was derivative of the basic idea of liberty from constraints. "For [American classicists] as well as the English classicists,

86. Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 INT'L LAB. & WORKING-CLASS HIST. 59, 62–63 (1995) (stating that in its pre-market forms, the work relationship was not "a single form of relationship but . . . multiple forms of relationship, some of sanctioned abuse and abasement (those old disciplines), some of temporary and shifting attachment, *some of autonomy and self-direction*" (emphasis added)).

87. Hovenkamp, *supra* note 78, at 1026.

88. *Id.* at 1021.

89. *See infra* Part II.B.2.

90. Hovenkamp, *supra* note 78, at 1021.

competition meant both rivalry and freedom from constraints, such as the exclusive privileges so common in the Mercantilist period."[91] For them, and even well into the transition to neoclassicism, "competition referred to a theory about liberty and free choice, not to a description of price/cost relationships."[92]

Price-fixing—the paradigmatic modern anticompetitive activity—was not tortious under the classical common law, much less criminal.[93] One can see why the common law was at best ambivalent: if freely entered, such a contract does not violate individual liberty. "Cartels did not jolt the common lawyer's conscience because no one's freedom was being denied."[94] Further, classicism's particular conception of competition, which included competition between actors in adjacent markets (i.e., vertical competition),[95] made price-fixing more understandable as rational and permissible, self-interested market activity by one market actor (the seller) in *competition* with another (the buyer), to which the other was free to respond.

Similarly, restraints of trade that prevented entry into a market—restraints that the classical common law viewed as the primary enemy of "free trade"—were problematic not because they hurt the consumer or distorted the market by decreasing the "natural" number of participants in a particular market, but because they violated the individual economic liberty of the prospective entrant. "The historical concern of the common law of contracts in restraint of trade was coercion, or the elimination of noncontracting parties' freedom to act."[96] For this reason, the common law was "obsess[ed] with consideration in cases challenging agreements in restraints of trade," such as non-compete clauses.[97]

In short, classicist principles generally favored commercial actors' freedom to compete, including the freedom to *vertically* compete—for sellers to compete with buyers, for example. Nevertheless, as we shall see, classicists affirmatively sought, through the mechanism of the Sherman Act, to curb workers' freedom to vertically compete, that is, to curb their freedom to compete with capital by acting collectively to withhold labor upon condition of better wages or working conditions.

91. *Id.* at 1025 (internal quotation marks omitted).
92. *Id.*
93. *Id.* at 1026–29.
94. *Id.* at 1027.
95. *Id.*
96. *Id.* at 1026.
97. *Id.* at 1027.

To understand this, we require the related but distinct concept of the "free flow of trade," easily mistaken for a synonym of "freedom of trade." The concept itself came into full relief in the Sherman Act labor cases, for that is where it operated *independently* of freedom of contract.

2. Labor Regulation in the Gilded Age

The Sherman Act became the first federal statute regulating labor. The character of the pre-existing regulation of work is relevant to understanding how the Sherman Act came to have that role.

In the late nineteenth century, the employment relation remained within the province of the common-law courts, as the relation between masters and servants had been for hundreds of years, while most other realms of social life were by then the subject of modern statutes created by democratically elected legislators.[98] This meant not only that the new democratic apparatus of lawmaking was mostly kept apart from the workplace, but also that relatively more conservative judges, rather than relatively more progressive legislators, were the lawmakers in this province.[99] The legal constitution of the employment relation at this time was the great exception to classicism's clarion call of economic freedom; it carried over the hierarchy, with its concomitant restraints on individual freedoms, that had been the defining element of feudal society.[100] At the same time, with the ascendancy of wage labor, many more people and many more economic relationships were brought under its purview.[101]

98. *See generally* KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES 79–91 (1991) (discussing the judicial governance of master and servant); *see also id.* at 81 ("[J]udges by their ritual enforcement held up a structure of domination that had existed since time out of mind."); *see also* FORBATH, *supra* note 20, at 6 ("Nowhere else among industrial nations did the judiciary hold such sway over labor relations as in nineteenth- and early-twentieth-century America.").

99. *See* ORREN, *supra* note 98, at 15–16 ("[T]he substance of relations between employers and employees still was under the ultimate jurisdiction of courts, as was the case in the Middle Ages, and . . . the old common-law rules of labor governance had been left standing while other institutions had been changed or dissolved.").

100. *Id.* at 67 (explaining that while commercial interests came unfettered from earlier constraints, labor remained subject to them: indeed, "commercial interests . . . were prospering on the basis of the ancient labor regime still in place" and "workers continued to be governed by quite different precepts, likewise endorsed as beneficial to what one judge" called the "province of workingmen"); *see also id.* at 71–79 ("The order of labor").

101. Tomlins, *supra* note 86, at 63 ("The eventual reduction of these multiple forms [of the working relationship] to a single form was in good part shaped by the deployment in English and American law of generic rules implementing uniform relations of subjection (master/servant) to pertain between those worked and those for whom they worked.").

Karen Orren shows that the employment relation in nineteenth-century America was suffused with substantive rights and obligations that were assigned in part based upon status (as they had been for all sectors of feudal society), and not just based upon the content of freely bargained contracts.[102] Many of these obligations, moreover, abrogated workers' personal freedoms in various ways. The character of employment law in the late nineteenth century thus involved a kind of subordination that co-existed uneasily with the fact that work is "the prototypical voluntary behavior" on liberalism's own principles.[103]

There are numerous examples of these substantive rights and obligations rooted in feudal hierarchy that were still very much alive in nineteenth century American employment law,[104] but the most salient are those limiting workers' freedom to quit and those limiting collective action to improve working conditions.[105] The tort of *enticement* dominated the courts' regulation of workers' collective action, and demonstrates the ancient nature of the judicial regulation of labor well into the nineteenth century: that action had remained more or less constant for the six centuries prior.[106] The basic reasoning was that someone who "enticed" workers (servants) away from their work (or "induce[d] him to leave his master"), in this case for the purpose of holding out for higher wages, was liable for damages to the master.[107] Enticement was often the basis for a charge or complaint of conspiracy, and was on occasion used to prosecute concerted work stoppages aimed at conditions such as non-payment of wages.[108]

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102. *See* ORREN, *supra* note 98, at 68–117.

103. *Id.* at 24.

104. To take just one example, the principle of *quicquid acquietur servo acquietur domino*—whatever is acquired by the servant is acquired by the master—comes down in a direct line from a legal feature of villeinage, that anything acquired by him belonged to his lord. In the United States, it was applied all the way through the late nineteenth century in the "moonlighting" context to allow an employer to recover not only for any *hours* missed (and, of course, to dismiss the worker) but actually to recover wages earned in the second job. This particularly underlines the personal, not abstract or fungible, nature of the employment relationship, at least in the direction of the duty from employee to employer. *Id.* at 78–79.

105. The right to quit, which judges generally formally protected within master-servant law, was greatly circumscribed by the "performance of the entire contract" rule (and its interpretation to allow employers to have almost any reason for discharge) for wages due, together with the long span between pay periods. Although technically, employers also could not end the contract without cause, in practice, courts allowed them almost any cause; whereas whether the servant had just cause to leave was largely determined by the opinion of the master. *Id.* at 84–86.

106. *Id.* at 122–28.

107. *Id.* at 123.

108. *Id.* at 124.

Drawing upon such common-law materials, the evolving law of labor conspiracies came to authorize injunctions against concerted action in the very late nineteenth century, giving rise to the (in)famous "government by injunction."[109] Shifting and variable conceptions of property were instrumental in grounding these labor injunctions.[110] The Sherman Act, once it was applied to worker collective action, became another powerful tool to ground and expand the labor injunction (it also allowed recovery of damages).[111] The common-law bases for injunctions and the old law of labor conspiracies died out as the modern employment relation was born with the New Deal. The Sherman Act, meanwhile, only grew in both practical and symbolic prominence. And while the Act's application to labor seemed to be cut short by the New Deal, in truth it merely went underground, whence it continued to exert influence and send up shoots.

B. The Sherman Act and Its Relationship to Labor

The Sherman Act was not originally intended to apply to the activities of labor unions *qua* labor unions nor to worker collective action.[112]

First, the Act was largely a product of the republicanism that was current among much of the populace, the legislature, and the labor movement in the late nineteenth century; that republicanism was quite inconsistent with the prohibition of workers' collective action to improve their working conditions. Generally speaking, this republicanism supposed that American society promised its members "a basis of real equality" that had "economic and social," not only legal or formal, dimensions.[113] It has been well documented that American public opinion was constellated against the unprecedented concentrations of capital in the post-Civil War era, and that this opinion

109. *See generally* FORBATH, *supra* note 20, at 59–97. The seminal, near-contemporaneous text that documented the use of the labor injunction (and whose authors went on to become two of the architects of the New Deal framework that succeeded it) was Felix Frankfurter and Nathan Greene's THE LABOR INJUNCTION (1930).

110. BENSEL, *supra* note 84, at 342; FORBATH, *supra* note 20, at 85–88.

111. BENSEL, *supra* note 84, at 343.

112. *Cf.* Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 951 (1988) (suggesting that the "consensus view" is that the Act was intended to apply to labor).

113. *See, e.g.*, TOMLINS, *supra* note 85, at 34–35 (1985) (discussing the revolutionary generation's outlook for the future after the newfound liberty and independence brought by the American Revolution).

cut across party lines.[114] President Grover Cleveland had this to say in 1888:

> As we view the achievements of aggregated capital, we discover the existence of trusts, combinations, and monopolies, while the citizen is struggling far in the rear or is trampled to death beneath an iron heel. Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters.[115]

President Benjamin Harrison echoed him shortly afterward.[116] Senator Sherman himself had become an outspoken critic of trusts a few years before.[117] Antitrust was part of the political and legal response to this unprecedented aggregation of economic power.[118] The republican orientation of the Sherman Act was much more concerned with preserving small, traditional industry and business in the face of the new, large enterprises, than it was with consumer protection, which was likely a minor concern at best.[119] It was even less concerned with abstract ideals of free trade. This is evident in the fact that Senator Sherman was not opposed to tariffs, while the late nineteenth century "advocates of free trade" were.[120] This republicanism was inconsistent

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114. Joseph L. Greenslade, *Labor Unions and the Sherman Act: Rethinking Labor's Nonstatutory Exemption*, 22 LOY. L.A. L. REV. 151, 152–54 (1988); Elinor R. Hoffman, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK. L. REV. 1, 9–19 (1983).

115. EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 58 (1978).

116. *Id.* at 60.

117. Notably, the reason we call it anti*trust* regulation is that the law of corporations was still fairly restrictive; trusts were the comparatively unfettered vehicles chosen by early industrialists to conglomerate investment until the corporate form was "liberalized" and became the primary vehicle of raising investment for commercial activity.

118. *See, e.g.*, TOMLINS, *supra* note 85, at 29–30 (characterizing them as mostly "symbolic," and describing how antitrust was part of the contemporaneous "debates over the aggregation of economic power").

119. Werner Troesken, *The Letters of John Sherman and the Origin of Antitrust*, 15 REV. AUSTRIAN ECON. 275, 291 (2002).

> Taken as a whole, the Sherman letters undermine the traditional view that consumers lobbied for, and supported, antitrust because the trusts were increasing prices. All of the letters Sherman received regarding antitrust were from small businesses, and only one of these businesses, the John Deere Company, complained about pools and combinations driving up prices.

Id.

120. *Id.* at 287.

> The belief that reducing tariffs would help solve the trust problem was widely shared by nineteenth century observers and advocates of free trade. . . . During the same period, Democrats in both the house and senate introduced bills that would have eliminated tariff protections in any industry dominated [by] monopolistic trusts. Senator Sherman, however, continued to support high tariffs and opposed using tariff

with punishing worker collective action. In fact, some of the core embodiments of republicanism in the nineteenth century *involved* collective action by workers,[121] in the craft tradition[122] and beyond into the more radical tradition of the Knights of Labor.[123]

Second, in addition to this profound inconsistency with the original animating sentiments behind antitrust, the legislative history expressly supports the conclusion that the Sherman Act was not intended to punish worker collective action. Richard Bensel concludes that "one of the clearest themes in the legislative history was the notable reluctance, even opposition, to including labor unions within the act's scope."[124] Joseph Greenslade cites the many senators who expressed worry that the bill might be applied to prevent "the laborers of the country . . . [from] combin[ing] either for the purposes of putting up the price of their labor or securing for themselves a better position in the world,"[125] to whom Senator Sherman replied: "combinations of workingmen to promote their interests, promote their welfare, and increase their pay . . . are not affected in the slightest degree, nor can they be included in the words or intent of the bill."[126] Legislators' statements during the passage of the later Clayton Act also support this ascription of intent, as they expressed their disbelief that the courts had applied the Sherman Act against combinations of workers.[127] Attorney General Richard Olney, a former railroad lawyer and certainly not an economic radical, called the application of the Sherman Act to "the combination of laborers known as a strike" a "perversion of a law from the real purpose of its authors."[128]

Greenslade also provides a convincing counter-explanation for the main point relied upon by the "consensus view" within antitrust, that the

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reductions to combat the trusts.

Id.

121. William Forbath, *Ambiguities of Free Labor in the Gilded Age*, 1985 WIS. L. REV. 767, 800–12 (describing "labor's anti-capitalist republicanism" as offering a competing interpretation of republican liberty to the narrow interpretation endorsed by Gilded Age, classicist courts).

122. *See generally* TOMLINS, *supra* note 85, at 32–59.

123. ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY 98–102 (2015) ("The Knights were the first post-Civil War labor organization open to nearly all workers, including unskilled, black and women workers . . . ." Labor republicans "were united by their use of republican ideas to criticize wage-labor and to present cooperation as an alternative.").

124. BENSEL, *supra* note 84, at 342–43.

125. Greenslade, *supra* note 114, at 155 n.30.

126. *Id.* at 155 n.33.

127. *Id.* at 160.

128. 1893 ATT'Y GEN. ANN. REP. xxvii–xxviii (internal quotation marks omitted).

Sherman Act was meant to inhibit worker collective action. He points out that a specific amendment exempting labor was considered but not, in the end, adopted. In fact, Sherman did propose such an amendment to his original bill, and the Senate adopted it. However, statements of the consensus view usually leave out the fact that the Judiciary Committee then rewrote the bill, shifting the emphasis from Sherman's original language, which had focused upon effects on consumer prices, to the idea of restraint of trade.[129] When the new bill came out of committee, the same senators who had complained of the possible distortion of the bill to punish "workingmen" were silent, presumably because they did not worry that worker collective action would be considered a restraint of trade.[130]

It would be wrong to read back into these legislators' intent, a century of development in antitrust doctrine and economic theory. Remember that price-fixing was not yet the obvious wrong that it would become with the full transition to neoclassicism. Without express language about consumer prices, it was far from clear what a "restraint of trade" really was; that concept was in massive flux at that time. The fact that the courts went on to define it the way they did cannot be read back into the legislative intent.

Yet the Sherman Act, originally the child of a republicanism that opposed huge conglomerations of capital and sought to protect the small enterprise and artisan of traditional American economic life, soon enough became a weapon against the working people who labored for those new conglomerations. What happened?

C. Parity: A Bridge from Feudal Labor Regulation to Modern Trade Regulation

The classicists took on the application of the Sherman Act to punish worker collective political and economic action as an affirmative project, seeking a kind of parity between capital and labor in the Act's application. To be sure, this doctrinal project must be understood in terms of the larger movement in law (deference to business corporations' decision-making) of which it was a part,[131] and in light of the still-larger policy project that movement served (building the

129. Greenslade, *supra* note 114, at 155–56.

130. *Id.* at 158.

131. *See, e.g.*, TOMLINS, *supra* note 85, at 21–30 (describing the critical role of legal institutions in their "regulation of property rights and promotion of economic development"—and, thus, in bringing about an increasing deference to business corporations' decision making—even and especially against local regulation).

national market society).[132] In this Section, I consider how this broader context informed the basic concepts (of freedom of contract and free trade) employed within the cases. I argue that the doctrinal project was deeply embedded in a sense of social hierarchy between buyers of labor and sellers of labor—a hierarchy anchoring control over workers by those who employed them—which was not cognizable on official freedom of contract principles. The method by which classicists achieved this aim contained a kind of double-speak regarding the ascription of moral and legal agency to working people, which then manifested in the early judicial decisions applying the Sherman Act to worker collective action. Even had classicists not expressly invoked this hierarchical and coercive legal tradition, the context of legal subordination of labor in which the idea of parity operated rendered it problematic, if not paradoxical. I contend that these paradoxes rest ultimately upon an equivocation in the meaning of the "freedom" invoked in the jurisprudence.

1. The Argument from Parity

Recall that classicist principles favored the freedom to compete—including the freedom to vertically compete; that is, for actors in adjacent markets to compete. The fact that classicists sought to curb workers' freedom in this regard, that is, to compete with capital by acting collectively to withhold labor upon condition, thus requires explanation. Before any courts addressed the issue, classicists argued in treatises and other publications that there ought to be parity between capital and labor in respect of their freedom to combine in furtherance of their efforts to vertically compete (with consumers, and with labor on capital's part, and with capital on labor's part).[133] The argument from parity then could be the claim that a particular instance of vertical competition (between sellers of labor and buyers of labor) is unfair, because one side is being subjected to strictures (regarding the ability to exert collective power) that the other is not. In other words, if business is going to be subject to these restrictions, then, out of fairness, labor should be as well. Thus, the classicists were perhaps concerned with horizontal competition only insofar as differential restrictions on

132. *See generally* BENSEL, *supra* note 84, at 289–354 (discussing the construction of the "national market").

133. *See* Hovenkamp, *supra* note 112, at 926–32 (describing the common-law treatise tradition's strong bent toward characterizing the law of combinations as treating "labor combinations more favorably than business combinations" and urging that "the public policy toward labor combinations ought to be the same as the policy concerning cartels").

combinations to limit that competition affected the balance of power between capital and labor in vertical competition. Prominent lawyer Arthur Eddy wrote:

> The object of decisions and laws against combinations being to protect the consumer against maintenance of price at abnormal levels, it would naturally be supposed that both laws and decisions would be directed *impartially against* combinations of both labor and capital; that no discrimination would be made, since a combination of one may affect prices in exactly the same way as a combination of the other; but so far from there being no discrimination, it is well-settled [that labor combinations are legal while capital combinations are not.][134]

Eddy's concern was "fairness" and "impartiality" in the application of a rule, whatever its content, not with furthering the purposes of the rule itself.[135] Lamenting the application of the "strict" rule of consumer protection to capital while it is not applied to labor, he was moved to comment: "The manifest injustice, not to say absurdity, of this condition of things appeals to every fair-minded man."[136]

The assertion of this "unfairness" was arguably made with a presupposition of the very social hierarchy that neutrally applied freedom of contract principles ought to have condemned. In other words, in asserting that antitrust law's failure to punish worker collective action was unfair, classicists betrayed a normative commitment to a hierarchy between workers and employers that should have been anathema to them. Many classicists felt that the balance of power between capital and labor was already tilted in labor's favor. Among the reasons they cited (for the background imbalance of power between capital and labor) was America's supposed labor shortages.[137] But Hovenkamp also describes a more surprising strain that "dominated" classicist thinking about labor: classicists' concern with

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134. ARTHUR EDDY, THE LAW OF COMBINATIONS: CONTRACTS IN RESTRAINT OF TRADE 1331 (1901) (emphasis added).

135. That Eddy, in particular, was not particularly interested in the consumer protection content or purpose of the rule itself is also suggested by, among other things, the fact that he was personally responsible, in his capacity as a corporate lawyer, for organizing the National Carbon Company (out of many previously existing carbon companies), which soon controlled *75% of the worldwide carbon market*, as well as having a key helping hand in the incorporation of several other massive oligopolies. *Big Carbon Firms Combine: Three-Fourths of This Industry in the World Included*, N.Y. TIMES, Jan. 10, 1899, at 1.

136. EDDY, *supra* note 134, at 1331.

137. Hovenkamp, *supra* note 112, at 930.

the relative social mobility between the working and owning classes in the United States (as compared, for example, to Europe).

> Equally important was the perception of easy worker mobility that dominated most nineteenth century thought: any American laborer could save a little money, borrow from others, and become an entrepreneur himself. As treatise writer Theodore Sedgwick observed as early as 1836, New England laborers could "lay up half their wages" and within a few years they could either "settle as farmers in the new states" or "undertake an independent business in the old." On the other hand, "[i]n Europe, the common rule [was], once a servant, always a servant; once a mechanic, always a mechanic; once a tenant, always a tenant . . . ."[138]

Such a "rule" would in fact be a barrier to market entry, a violation of the most fundamental classicist principles. Construing the absence of the rule as an imbalance in labor's favor suggests an underlying commitment to the hierarchical suppression of workers' freedoms as the natural order of things.

Direct reliance upon hierarchy by the classicists aside, there may be enduring reasons to consider the distinctiveness of labor contracts, which might pose problems for a categorical argument from parity. A strong version of this distinctiveness is articulated by theorists from Marx to Polanyi: if labor is a "fictitious commodity" then it is nonsensical to posit an equivalence between its sellers and sellers of actual commodities.[139] However, it is not necessary to embrace the strong version of this critique to see that labor contracts have some distinctive features that might pose problems for a simple-minded argument from parity. The republican tradition, which was associated with the Sherman Act, certainly recognized this distinctiveness. Labor republicans pointed to the hierarchy inherent in labor contracts together with the differentials in both market power and wealth between the parties that came to characterize such contracts, allowing employers to unilaterally set terms.[140] A growing strand of contemporary labor economics recognizes these same dimensions of distinctiveness.[141]

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138. *Id.* at 931.

139. POLANYI, *supra* note 82, at 75 ("Commodities are . . . objects produced for sale on the market . . . . But labor, land, and money are obviously *not* commodities . . . . Labor is only another name for a human activity which goes with life itself, which in its turn is not produced for sale but for entirely different reasons, nor can that activity be detached from the rest of life, be stored or mobilized . . . .").

140. GOUREVITCH, *supra* note 123, at 106–16 (discussing the labor republicans' idea of the distinctiveness of labor contracts: "material domination" grounded in absence of wealth on the

2. Implementing Parity in the Courts

The early wave of antitrust cases that implemented what I have been calling the argument from parity, applying the Sherman Act to regulate and punish worker collective action, relied upon the ambiguity in the meaning of free trade that was mentioned earlier. It is in these cases that the meaning of "free flow of trade" is brought into clear relief, for here (unlike in, for example, the economic due process cases) it operates in logical opposition to freedom of contract rather than in harmony with it. These cases protected the free flow of trade—necessary to the constitution of new markets, particularly the national market—against workers' liberty interests in collective economic and political action with respect to their working conditions and livelihoods.[142] In doing so, they invoked a long tradition of subordinating workers and their interests to their employers' and to other societal interests, expressly relying upon their status as workers to do so, contrary to what freedom of contract would prescribe. This early interpretation of the Sherman Act was also the bridge to the modern, neoclassicist antitrust framework that would take the application of the Act to labor, absent a specific statutory exemption, for granted.

a. The *Workingmen's Amalgamated* Case: Three Ambiguous "Evils"

The story of how the bridge was built begins with a massive general strike in New Orleans that grew primarily out of the desire of drayage drivers ("draymen") and warehouse workers to improve their wages and working conditions.[143] The actions included the coordinated stoppage

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part of workers; market power on the part of employers allowing them to unilaterally set terms, namely long hours and low pay; and the hierarchy and control implied by all the contract "left unsaid," requiring the worker to "passively obey the commands of the employer").

141. *See, e.g.*, ALAN MANNING, MONOPSONY IN MOTION (2003) (focusing especially upon differentials in market power and wealth as creating economic inefficiencies).

142. This Subsection focuses primarily on a close reading of the first published decision to apply the Sherman Act in this way, with the aim of demonstrating the continuity with the earlier tradition of labor regulation as well as the ambiguity in the use of the concept "free trade." It is not the only significant decision from the Gilded Age period to apply the Sherman Act against workers. Some other decisions are discussed, though more briefly, *infra*. Moreover, the same year as *Workingmen's Amalgamated*, see *supra* Part II.C.2.a, another federal district court also applied the Sherman Act to worker collective action. However, in that case, what the court considered the special regulatory and factual situation of the railroads (which were presumed to justify greater judicial intervention in labor disputes, through the device of judicial receivership and on the basis of additional statutes specific to the railroads) played a crucial part in the court's reasoning. Waterhouse v. Comer, 55 F. 149, 154 (S.D. Ga. 1893).

143. United States v. Workingmen's Amalgamated Council of New Orleans, 54 F. 994, 995 (E.D. La. 1893); FORBATH, *supra* note 20, at 71 ("The first application of the Sherman Act to industrial strife occurred in a tumultuous New Orleans longshoremen's strike, which tied up the

of work (the work, primarily, of transporting goods to and from the Port of New Orleans), public demonstrations, attempting to persuade others to join in the stoppage, and finally, the participation of other workers in the city not directly involved in the transportation of these goods.[144]

The relatively brief district court opinion allowed an injunction to be issued against various workers' organizations that had organized the work stoppage and pickets.[145] The opinion hardly reads as if it were deciding a tremendously significant issue of first impression: namely, whether the new Sherman Act should in principle apply to the collective action of workers to improve their working conditions. Rather, it disposes with that issue as if it were a mere preliminary.[146] The decision was significant because not only was it the first decision to apply the Sherman Act to worker collective action, but also because the Supreme Court's seal of approval on that extension of the Act, about a decade and a half later, specifically endorsed it.[147]

The Louisiana district court stated the primary legal question it was deciding was whether the facts before it were "for the purpose of restraining . . . commerce."[148] In support of the court's conclusion that "there can [not] be any question but that the combination of defendants was in restraint of commerce,"[149] we can glimpse three possible wrongs: (1) coercion, such as violence or intimidation, directed by some workers or combinations of workers toward *other workers* with the aim of preventing them from working; (2) the simple fact of "slowing" or "stagnating" commerce, by whatever means and for whatever end; and finally, (3) the individually voluntary and coordinated decisions by numerous workers to cease (or slow) their work, conditioned upon some improvement in the terms and conditions of work for all. Of these, the last is the only one that may plausibly translate into the contemporary antitrust framework: an intentional constriction of supply aimed at influencing price (or at influencing other terms of the bargain, which neoclassicists would consider equivalent to price). Wrongs (1) and (2) played important, possibly dispositive, roles in the *Workingmen's Amalgamated* decision; yet neither can be translated into the

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city's interstate and foreign commerce.").

144. *Workingmen's Amalgamated Council*, 54 F. at 995, 999–1000.

145. *Id.* at 1000.

146. *Id.* at 996.

147. *See* Loewe v. Lawlor, 208 U.S. 274, 310 (1908) (endorsing the extension of the Sherman Act).

148. *Workingmen's Amalgamated Council*, 54 F. at 995.

149. *Id.* at 999.

contemporary framework, and Wrong (3) must be read in the context of both. Further, Wrong (3) itself is put forth not merely as a special instance of the general proposition, "sellers of commodities may not constrict supply in order to influence price," but rather as the specific proposition, "*workers* may not stop working in order to influence wages and working conditions."

In the opinion, Wrongs (1) and (2) are immediately evident in the court's initial statement of the issue. The court first described the decision made by workmen's organizations to "discontinue business" including "transporting goods which were being conveyed from state to state, and to and from foreign countries."[150] When employers attempted to replace the union workers with non-union workers, they were met with "intimidation springing from vast throngs of the union men assembling in the streets, and in some instances by violence" (Wrong (1)).[151] The result was that, by the intentional acts of the defendants, "not a bale of goods constituting the commerce of the country could be moved" (Wrong (2)).[152] The question was, did these facts establish a cause under the statute? If the admittedly "lawful" organizations of workmen "adopt and further unlawful purposes and do unlawful acts . . . the associations themselves become unlawful."[153] So far, so clear. Everything then rode on what the "unlawful purposes" and "unlawful acts" were. The court answered that question as follows: "The evil, as well as the unlawfulness, of the act of the defendants, consists in this: that, until certain demands of theirs were complied with, they endeavored to prevent, and did prevent, everybody from moving the commerce of the country" (Wrong (3)).[154]

The "certain demands," of course, consisted not in ransoms or some other inherently illegal purposes, but in moderately improved working conditions and wages, together with recognition of a collective bargaining representative (demands that, incidentally, would later become state-sanctioned purposes in the New Deal society). It is not academic to note this, because in the law of combinations from which the court was here borrowing, overtly nefarious and illegal aims were often the actual aims of the combinations at hand. In the identification

150. *Id.* at 1000

151. *See id.* (leaving aside the question of what shall count as coercion or intimidation in such circumstances, and granting *arguendo* that at least *some* actions that would legitimately qualify as unlawful harassment or coercion occurred).

152. *Id.*

153. *Id.*

154. *Id.*

of the workers' "certain demands" with "evil," (i.e., Wrong (3)), we see the bridge to neoclassicism. In the "endeavoring to prevent everybody" we see the operation again of Wrong (1), which was probably necessary to justify the result in the classicist period. In the "from moving the commerce of the country," we see Wrong (2), the threat posed by workers' choice not to work.

i. Violence and Coercion Toward Unwilling Third Parties

Beginning with Wrong (1): was the "evil" the courts ascribed to the workers, "prevent[ing]" *others* from "moving the commerce of the country" or refusing to move the commerce of the country themselves? The former does a great deal of work in the opinion. Yet plainly, the defendants did not prevent "everybody" from doing so; plenty of individuals, including the defendants themselves, refused to do so quite voluntarily. The court had before it a voluminous evidentiary record resulting from the parties' vigorous contestation of precisely how significant or extensive the defendants' efforts were in preventing others from moving the commerce of the country. The court of appeal, in affirming the district court, noted that the latter had wide discretion to decide that factual contest as it apparently did,[155] but the district court opinion itself contained no express finding of fact regarding the extent of any violence or coercion directed at willing and able workers. On the contrary, the court acknowledged the vast number of coordinated, voluntary individual decisions by workers that comprised the strike, describing the matter before it as a "gigantic and widespread combination"—implying voluntary decisions to agree—among the workers of New Orleans, spanning a "multitude of separate [workers'] organizations," all aimed at a work stoppage that would get the attention of those who profited from the "whole business of the city," who were also the ones who controlled the economic and material circumstances of the conspirators' lives.[156] Indeed, it is fairly plain that if there had not been widespread agreement among a large number of workers to engage in the action—that is, if there had not been a critical mass of voluntary individual decisions involved in the coordinated action—the City, the employers, and the court would not have bothered with it in the first place. Not even the district court opinion ever really denied this.

155. Workingmen's Amalgamated Council of New Orleans v. United States, 57 F. 85 (5th Cir. 1893) (issuing a single-page, summary affirmance).

156. *Workingmen's Amalgamated Council*, 54 F. at 995.

Yet, it seems that the court also predicated its antitrust analysis to a great extent on the proposition that intimidation "in some instances by violence" of others (employers or third-party workers) became a central means of the collective action, that is, Wrong (1). This idea pervades the opinion. Even after articulating Wrong (3) toward the end of its discussion, the district court chooses to end the opinion by again identifying the central evil at hand as the improper coercion of others, together with the halting of commerce—namely, a repetition of Wrongs (1) and (2), with no mention of the "certain demands," Wrong (3), that allegedly motivated both:

> It is the successful effort of the combination of the defendants to intimidate and overawe others who were at work in conducting or carrying on the commerce of the country, *in which the court finds their error and their violation of the statute*. One of the intended results of their combined action was the forced stagnation of all the commerce which flowed through New Orleans. This intent and combined action are none the less unlawful . . . .[157]

This is striking not only in that this crucial proposition is never truly endorsed by the fact finder. It is remarkable also in that, in order to proscribe such conduct, or combinations of men employing such means, the court had no need to invoke the Sherman Act in the first place. Such combinations would already have been illegal under any interpretation of the common law at the time, and not just as a matter of economic regulation. It seems that the court went out of its way to apply the new statute.

ii. Interrupting Commerce by Refusing to Work

The conception of free trade as "the uninterrupted flow of trade" allowed the court to effectively require workers to work in order to prevent "a restraint of trade," that is, a violation of the Sherman Act. The court's concern with building and protecting the nascent national market is evident in its articulation of this requirement.

In its short decision, the court repeatedly stated that the workers stopped, and intended to stop, commerce by not working: "threatened that . . . all the men . . . would leave work"; "the whole business of the City of New Orleans was paralyzed"; "flow of commerce . . . [was] purposely arrested"; "transportation of the goods and merchandise from the government warehouses to the landings was forcibly stopped"; "enforced a discontinuance of labor in all kinds of business, including

157. *Id.* at 1000 (emphasis added).

the business of transportation of goods and merchandise which were in transit through the city of New Orleans"; "not a bale of goods constituting the commerce of the country could be moved"; "forced stagnation of all the commerce which flowed through New Orleans"; "should the journeymen bakers refuse to work."[158] In most of these instances, the court mentions the interruption of work and commerce as a stand-alone fact, not conditioned upon a demand of improved wages or conditions—demonstrating that it saw it as an evil in itself (not as an evil only if used to influence price).

Indeed, the court at one point actually seemed to reason that "secur[ing] . . . the employment of none but union men" is not in itself the wrong; this, of course, is the potentially monopolistic purpose that a contemporary court (putting aside for a moment the labor exemption) might condemn. Rather, it suggested that the wrong is the *means*—halting work, and thereby commerce—by which that purpose was achieved, putting a primacy on the interruption of commerce by the refusal to work:

> The defendants urge . . . that the combination to secure or compel the employment of none but union men is not in the restraint of commerce. To determine whether the proposition urged as a defense can apply to this case, the case must first be stated . . . . The combination setting out to secure and compel the employment of none but union men in a given business, *as a means to effect this compulsion, finally enforced a discontinuance of labor in all kinds of business*, including the business of transportation of goods and merchandise which were in transit through the city of New Orleans, from state to state, and to and from foreign countries. When the case is thus stated . . . I do not think there can be any question but that the combination of the defendants was in restraint of commerce.[159]

The court very clearly stated that in order to determine whether the defendants' pursuit of "the employment of none but union men" in certain industries was legal, it had to consider the means defendants employed to secure this aim. Because those means consisted in "a discontinuance of labor in all kinds of business"—significant and voluminous business constituting interstate commerce—there could be no question but that the combination was in restraint of commerce. This is a precise inversion of neoclassical antitrust analysis, which would be concerned with the potentially monopolistic end. Instead, it evidences

158. *Id.* at 995–96, 999–1000.
159. *Id.* at 999 (emphasis added).

the old obsession with workers who dare to not work, as one of the greatest social threats around.[160]

In that older line of thinking, workers' status within commerce is as objects, not as agents, and any expression of their agency within that sphere is an affirmative threat. Expression of agency aimed at the purpose of *not working*, thereby threatening commerce, is the most threatening of all. This brings out the fundamental paradox of this notion of parity, which ascribes to workers the status of commercial agents (in the result) as well as objects (in the reasoning).

Once again, as with Wrong (1), the court relied upon the old common-law tradition regulating workers, in order to find a violation of the Sherman Act in their collective action to improve their working conditions. While Wrong (1) demonstrates the logical superfluity of the court's invocation of the new Act, Wrong (2) reveals how the court relied upon the hierarchical and coercive character of the common-law tradition with respect to workers, in doing so.

iii. A Work Stoppage Aimed at Improvement of Working Conditions

And what of the sole "evil" identified by the court that we may translate into a contemporary antitrust framework? As I have argued, it is not possible to interpret the court's holding as consisting only or even primarily in this, for the following reasons. First, the opinion is shot through with repeated invocations of Wrongs (1) and (2). As argued above in the discussion of Wrong (2), the court expressly stated that the evil was the means employed—that is, the cessation of work to interrupt commerce.[161] And, on the heels of its single viable identification of Wrong (3) as an evil in itself, it again returned to its exaggerated focus upon the coercion of third parties—almost as if it felt it immediately had to buoy up insufficiently firm ground. Thus, I do not think there is a viable reading of the opinion in which the court primarily grounds the application of the Sherman Act to worker collective action upon Wrong (3).

However, assuming *arguendo* that Wrong (3) was one of the court's grounds of decision, the justification for it, too, was based upon ancient notions of hierarchy and control. That is because the court's condemnation of workers' conditional work stoppage was in terms that are highly specific to the workers' status as workers, rather than generally as sellers of commodities (of which labor, in the market

160. ORREN, *supra* note 98, at 71–75.

161. *Workingmen's Amalgamated Council*, 54 F. at 999.

society, happens to be one type). For its holding that this conduct is a violation of the Sherman Act, the court relied upon an old state court case applying the common law of labor combinations, whose elements are specific to the acts of workers, not sellers of commodities in general. The court spoke not of price-fixing, constriction of supply, or distortion of price. Instead, it had no sooner mentioned the workers' "certain demands" as comprising an aspect of the "evil" under the statute, than it was quoting a then-sixty-year-old New York criminal case that spoke and reasoned in terms of workers *qua* workers, and whose holding was limited to workers:

> What is meant by "restraint of trade" is well defined by Chief Justice Savage . . . . "Should the journeymen bakers refuse to work unless for *enormous* wages, which the master bakers *could not afford* to pay, should they compel all journeymen in the city to stop work, the whole population must be without bread . . . . Such combinations would be productive of *derangement and confusion*, which certainly must be injurious to trade."[162]

The quote and the case it was taken from are instructive regarding the court's perspective on worker collective action.[163] *People v. Fisher*, upon which the *Workingmen's Amalgamated* district court relied in order to hold that the New Orleans strike was a restraint of trade and thus a violation of antitrust law, had applied the common law of criminal conspiracy to punish an 1833 "conspiracy to raise wages" by the journeymen shoemakers of Geneva, New York.[164] The New York case held that journeymen, who are paid wages by the masters, commit a crime by withholding labor on condition of higher wages—not that sellers commit a crime by combining to inflate prices in the product market. So in applying the argument from parity to extend a piece of commercial regulation to workers on the theory that they are sellers of commodities and thereby subject to that regulation, the court relied upon sixty-year-old precedent regarding workers' combinations, not regarding combinations of merchants. Moreover, every single point of authority, most of them English cases and statutes, collected in *Fisher* regard workers collectively withholding labor to affect wages or

162. *Id.* at 1000 (quoting People v. Fisher, 14 Wend. 9 (N.Y. 1835) (emphasis added)).

163. Note that it also again makes reference to the workers' "refus[al] to work," long-connected with the idea of social "derangement and confusion," in a manner that seems to go beyond the "enormous wages" themselves. Thus, in one of the few passages in the opinion that articulates Wrong (2)—the only one that could make the journey into contemporary antitrust analysis—the long shadow of Wrong (3) again appears. *Fisher*, 14 Wend. at 19.

164. *Id.* at 15.

working conditions.[165] The *Fisher* opinion also invoked statutes regulating workers' combinations dating to the "reign of Edw[ard] VI and Geo[rge] III, which subject workmen conspiring either to reduce the time of labor or to raise their wages, to the punishment of fine and imprisonment," that is, to the repressive, highly status-specific regulation of the eras 1547–1553 and 1760–1820, respectively.[166] Not one point of authority contained in *Fisher* regarded sellers of commodities collectively engaged in constricting supply in order to influence price; all concerned workers.

In other words, *Fisher* reasoned and spoke in terms of what it is appropriate for workers to do and not do, not in terms of what it is appropriate for sellers of commodities to do and not do. This seems to betray a view of workers that is somewhat in tension with the idea that they are simply an instance of the category "seller of a commodity"—for otherwise, why not frame the principle in terms of the latter? The tradition of social control of working people embodied in the common law of employment, which is expressly continued in *Fisher* and invoked as authority in *Workingmen's Amalgamated*, in fact views workers as having a distinct status meriting specific, coercive legal treatment.[167] This may not be surprising in the context of *Fisher*, but should be surprising in the context of *Workingmen's Amalgamated*. After all, that was the decision that purported to extend to workers the free agency applied to men of commerce—to bring parity to how workers and businessmen were treated in the economic regulation of their collective action.[168]

Fisher in fact represented the far end of the spectrum in terms of the American common law's repression of workers. William Forbath identified it as among a "famous handful of cases in the first quarter of the [nineteenth] century [that] seemingly held mere combinations to raise wages criminal. . . . These cases are the basis of the view that American labor law's trajectory over the nineteenth century was one from repression toward relative toleration."[169] The first court to apply

165. *Id.*

166. *Id.*

167. ORREN, *supra* note 98, at 71–75.

168. Not only is the court's reasoning entirely specific to workers *qua* workers, but it expressly reasons from outcomes—the reasonableness of the prices set for labor in the overall social order (a consideration that would not be allowed in the neoclassical framework, wherein the reasonableness or social utility of the prices set is no defense to anticompetitive conduct, as set out further in Part IV, *infra*).

169. FORBATH, *supra* note 20, at 60 n.2.

the Sherman Act to worker collective action aligned itself with the far end of the common law's spectrum of worker "repression," a feudal tradition of ancient vintage that viewed workers as lower in the social order than those for whom they worked, and thereby for many purposes not entitled to free agency over their actions.

The purpose for which the court invoked its age-old power to subordinate workers' economic and political freedom was that of avoiding "derangement and confusion" that would be "injurious to trade."[170] In other words, it was the specific project of constructing a continuous national market and the emerging market society: ensuring that capital could earn a "reasonable" rate of return,[171] enough to ensure continuing development, production, and investment. The judicial project of market construction thus paralleled the economic and physical project of building railroads, factories, and taming new natural resources, and it required abrogating workers' political and economic freedom to accomplish.

b. The Danbury Hatters Case

Loewe v. Lawlor,[172] better known as the Danbury Hatters case, grew out of one of the first union label boycotts, or coordinated "sympathy strikes," and in it, the Supreme Court "confirmed what a majority of lower federal courts"—*Workingmen's Amalgamated* and *United States v. Debs*[173]—"had previously held: "that the Sherman Act applied to

170. United States v. Workingmen's Amalgamated Council of New Orleans, 54 F. 994, 1000 (E.D. La. 1893) (quoting *Fisher*, 14 Wend. at 19).

171. BENSEL, *supra* note 84, at 289–354 ("The Political Construction of the National Market"). Consider the more obvious arm of this judicial market-building enterprise: the *Lochner* line of substantive due process cases, in which "any regulatory act that prevented a person or corporation from earning a reasonable return on invested capital was deemed a constitutional violation." *Id.* at 334. The same courts invoked the same language—"unobstructed" or "free," "flow" or "course," of "trade" or "commerce"—in both lines of cases to signify the same larger project.

172. 208 U.S. 274 (1908).

173. United States v. Debs, 64 F. 724, 729 (N.D. Ill. 1894). *Debs* arose out of the national Pullman strike, "the web of sympathetic boycotts of Pullman cars by the American Railroad Union in response to Pullman's ruthless wage cuts and his intransigent refusal to confer with his employees." FORBATH, *supra* note 20, at 74. To "virtually all of the nation's legal elite, conservative and reformist alike," the strike became a symbol of an anarchic threat posed by industrial unionism. *Id.* The federal judiciary responded with the usual sweeping injunctions, also many times calling in federal troops and presiding over mass arrests, although there was little violence or property damage before the crackdowns. Judge William H. Taft wrote in contemporaneous letters to his wife: "Until they have had much bloodletting, it will not be better" and "They have killed only six of the mob as yet. This is hardly enough to make an impression." *Id.* Debs and other union officers were prosecuted under, inter alia, the Sherman Act; the Supreme Court denied their writ of habeas corpus on alternate grounds, namely Congress's

combinations of workers."[174] As painfully chronicled by William Forbath in his seminal work on the Gilded Age judiciary's effect upon the labor movement, the saga was devastating to the morale of that movement, sucking many of its resources in those key years and robbing it of some of its most successful tactics.[175]

Significant as it was in its impact, Danbury Hatters delved no deeper into the justification for bringing worker collective action under the Sherman Act than had *Workingmen's Amalgamated*.[176] In fact, the Supreme Court largely relied on the reasoning of the Louisiana federal district court on this point, quoting it at length for the proposition that workers were not to be exempted from the Sherman Act.[177] Other than that lengthy excerpt, the only other reasoning the Court offered for its application of the Sherman Act to worker collective action was this assertion: "The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, and that all these efforts failed, so that the act remained as we have it before us."[178] As an inference about legislative intent, this is likely incorrect.[179] It is also incorrect that any such amendments "failed": the only one that was proposed in fact passed, and no amendment was proposed to the rewritten bill (and thus could not have failed).[180] As an assertion that there did not at that time exist an express labor exemption, it is of course true, but that alone does not answer the question whether the Act ought to regulate worker collective action.

The Court also quoted *Workingmen's Amalgamated*'s statement of its central holding (in addition to its statement that the Sherman Act applies to workers), apparently adopting its reasoning for why worker collective action was a restraint of trade under the Sherman Act,[181] and thereby perpetuating its reliance upon the common law's repression of free action by workers *qua* workers.

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authority over interstate commerce, particularly as exercised in various statutes specific to railroads and the carriage of the mails.

174. FORBATH, *supra* note 20, at 92.

175. *Id.* at 92–94.

176. The Court did not rely on any of the reasoning of the district court in *Debs*, simply noting that its affirmance on alternate grounds was not meant to disapprove the lower court's application of the Sherman Act. *Loewe*, 208 U.S. at 298–99.

177. *Id.* at 301–02.

178. *Id.* at 309–10.

179. *See supra* Part II.B.

180. *Id.*

181. *Loewe*, 208 U.S. at 302.

Even more directly, although it refrains from itself articulating its principles in terms that rely upon workers' status *qua* workers, the Danbury Hatters opinion included the following reliance on authority:

> The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that combination imposes; and there is no doubt that (*to quote from the well known work of Chief Justice Erle on Trade Unions*) "at common law every person has individually, and the public also has collectively, a right to require that the course of trade should be kept free from unreasonable obstruction."[182]

This ("the course of trade should be kept free from unreasonable obstruction")[183] is the same concept of free trade employed in *Workingmen's Amalgamated.* Such obstruction includes not only affirmative *acts* of interference, but also, it turns out, the *omissions* of not working, if those omissions are entered into collectively and deliberately. The free flow of national trade had to be protected because building the national market was a priority for the Court.

Again, the project of building the emerging market society met (and relied upon) the status-specific tradition of restrictions upon workers' freedom of action. There was no further elaboration, footnote, or explanation in the opinion regarding the "well known" source mentioned, which was a treatise relating to workers and their organizations, not to sellers of commodities or trade combinations generally. Sir William Erle was at one time Chief Justice of the Court of Common Pleas, and a member of the Commission on Trade Unions created by Parliament to make recommendations to it, and who later authored *The Law Relating to Trade Unions*.[184] Erle seemed to endorse then-current English common-law ideas about what it was proper for workingmen to do vis-à-vis the free flow of trade. For example, deciding whether a group of workers could be convicted under the 1823 Master and Servant Act for willfully absenting themselves from their work in a shipyard, he had in another case written:

> [The statute] was meant to protect persons who had heavy contracts to complete within a certain time, and to give them a summary remedy in case their workmen left them without a reasonable excuse. Under some circumstances a person employed to do a particular job would

182. *Id.* at 294–96 (emphasis added).
183. *Id.*
184. WILLIAM ERLE, THE LAW RELATING TO TRADE UNIONS (1869).

> not be the servant of his employer, but not when the employment is such as in this case.[185]

In other words, that statute was meant to protect commerce from workmen (not working). This is the very theme that pervades the *Workingmen's Amalgamated* opinion. The "free flow of commerce" argument thus justifies curtailing workers' political and economic freedom to organize for betterment of their conditions.

3. The Corporate Exemption

The key move in the foregoing cases—relying upon the ambiguity in the concept "free trade" in order to curtail workers' freedoms for the purpose of constructing the emerging market society—is brought into especial relief when we consider the same courts' and thinkers' attitude toward business corporations. In the Gilded Age, labor collective action was prosecuted far more than businesses' under the Sherman Act.[186] Beyond this, businesses had little need to engage in overt price-fixing, for a combination of the "corporate exemption" and the relative lack of regulation of mergers allowed them to simply collect market power within individual firms.

Classicism actively promoted that central device of business combination, the corporation, as a site of economic and ultimately political power. As previously mentioned, early corporations were quasi-public creatures that operated under a web of constraints for specific state-sanctioned purposes, not legal forms used to collect capital while limiting liability.[187] These constraints were gradually lifted over the course of the nineteenth century, via various changes in the law of corporations that increasingly insulated owners and shareholders from liability while enabling the separation of ownership

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185. Lawrence v. Todd (1863) 143 Eng. Rep. 562, 14 C.B. (N.S.) 554; ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE 19TH CENTURY 145, 151 (2001). In another case, the Chief Justice wrote, in deciding whether a wage statute applied: "We should look at the work done and the position in life of the parties." *Id.* at 145.

186. EDWARD BERMAN, LABOR AND THE SHERMAN ACT 271 (1930) (explaining that the first twenty cases prosecuted under the Act targeted worker collective action to improve working conditions); BENSEL, *supra* note 84, at 342–43.

187. HOVENKAMP, *supra* note 85, at 13–14 (noting that the distinguishing elements of the pre-classical corporation were "not its structure or its ability to assemble capital" but rather its "special contract (charter) with the state, permitting the incorporators to do something that no one else could do"); TOMLINS, *supra* note 85, at 24 (describing the "decline of the corporation as a public body and the appearance, by the end of the second decade of the nineteenth century, of a new archetype: 'the modern business corporation, organized to pursue private ends for individual gain'").

and control.[188] During the Gilded Age, the innovation of additional legal doctrines beyond the law of corporations allowed these new creatures to fully spread their wings: into the industrial production process, into surrounding markets, and into a powerful and enduring role in the polity.[189]

Regarding corporations' legal status as combinations, the justification seemed to draw in part from their prior status as creatures operating in the public interest,[190] eventually evolving into efficiency justifications based on economies of scale and on emerging concepts of scientific management and production.[191] The selective approval of classicists (and their immediate predecessors) for the "co-operation" embodied in business combinations, composed of men of their own class, in contrast to their ambivalence or hostility toward the co-operation of men and women who contributed their physical labor to society, was widely noted at the time.[192] Herbert Hovenkamp has surveyed the comparative treatment of business and labor combinations by Gilded Age theorists and courts, concluding that labor combinations got the short end of the stick for structural reasons rather than due to overt bias.[193] While a fuller exploration will have to be saved for future work, there are considerations that suggest that bias and structure in fact worked together to create this result. Adam Smith (who may be presumed an at least neutral observer) commented upon the selective disapprobation far earlier.[194] That vintage is an indication of the ancient social attitudes

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188. HOVENKAMP, *supra* note 85, at 14–16.

189. TOMLINS, *supra* note 85, at 16–20 (explaining the consolidation of corporate control over industrial production, previously controlled independently by workers or craft organizations); *see id.* at 25–30 (detailing the triumph of corporate decision making over state and local regulation of local markets).

190. TOMLINS, *supra* note 85, at 23.

191. *See, e.g.*, Hovenkamp, *supra* note 112, at 938–40 (discussing contemporaneous commentators' arguments that business combinations result in increased efficiencies, lower overall prices, and better product quality).

192. *See, e.g.*, Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 420 (1922) ("[W]hy should the law be such that if two steel workers plan a certain act which the law regards as tortious, they should be subject to fine and imprisonment; but if, let us say, the United States Steel Corporation plans and executes the self-same action, the criminal law should be unable to touch it?").

193. Hovenkamp, *supra* note 112, at 965 ("Labor combinations received the same treatment. But the unique structure of the labor market—easy entry and no economies of scale—meant that the new law had far harsher impact on labor combinations than seller cartels.").

194. He stated:

> We rarely hear, it has been said, of the combinations of masters, though frequently of those of workmen. But whoever imagines, upon this account, that masters rarely combine, is as ignorant of the world as of the subject. Masters are always and

that contributed to this view. Classicists also seemed to view enhanced business profits as a social good in a way that they did not regard wage premiums. That, of course, is an unprincipled distinction even before introducing normative commitments to workers' welfare.[195] It can even be glimpsed in classicists' sweeping statements that business "cooperation" was necessary for social progress. For example, the same Arthur Eddy who had urged the extension of the Sherman Act to labor organizing had this to say:

> Social progress would be impossible were if not for co-operation and combination; therefore the law encourages and recognizes the formation of—
>
> 1. Partnerships
> 2. Voluntary associations
> 3. Corporations
>
> All of which are combinations in every sense of the term—a corporation being simply the co-operation of two or more individuals in a form of combination prescribed by law.[196]

Yet, in what Hovenkamp calls Eddy's "trite apology" for business combinations, the latter asserted that business combinations "are all in the direction of more for less money," while "labor unions and farmers' organizations are all in the direction of less for more money." It is difficult to read Eddy's use of "more" and "less" here as a non-perspectival view from nowhere. More, his inclusion of farmers' organizations on the side of labor rather than business also suggests a clear identification with a specific economic (and political) class and associated interests, rather than some neutral distinction (assuming

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> everywhere in a sort of tacit, but constant and uniform, combination, not to raise the wages of labour above their actual rate. To violate this combination is everywhere a most unpopular action, and a sort of reproach to a master among his neighbours and equals. We seldom, indeed, hear of this combination, because it is the usual, and, one may say, the natural state of things, which nobody ever hears of. Masters, too, sometimes enter into particular combinations to sink the wages of labour even below this rate. These are always conducted with the utmost silence and secrecy till the moment of execution.

ADAM SMITH, WEALTH OF NATIONS 60 (1776).

195. *See* Hovenkamp, supra note 112, at 940 ("When mainstream American political economists around 1900 viewed business combinations, they saw increased efficiencies from economies of scale, lower overall prices, better product quality, and higher profits."). Note that the inclusion of "profits" in this category is rank hypocrisy even on this outlook's own principles, because its analogue, higher wages, would never be seen as an independent good and in fact would be viewed as an inefficiency. On neoclassical economic theory, too, profits (beyond what is needed to compensate the opportunity cost of capital) are by definition inefficient.

196. EDDY, *supra* note 134, at 1327.

arguendo that there is such a principle that would justify harsher treatment for labor) between sellers of labor and sellers of other commodities.

At any rate, as with prosecuting worker collective action under the Sherman Act, the courts endorsed the classicist outlook on business combinations in their construction of the Act. In *United States v. Joint-Traffic Ass'n*, "the Court . . . directly addressed" the anxiety, raised in an earlier dissent, that the Court's broadening of the common-law rule on price-fixing might "carry the implication that . . . business organizations . . . violated the Sherman Act" in themselves.[197] We might call the Court's removal of this doubt the corporate exemption, to parallel the labor exemption that the courts rejected.

This combination of the corporate exemption with the relative toleration for mergers meant that business had less need to engage in overt price-fixing. While "the government was generally more successful in prosecuting labor unions than industrial combinations [under the Sherman Act]," "[w]ith respect to industry, [the Act] became moribund . . . even as corporate mergers and combinations swept the American economy."[198] Together with the corporate exemption, this meant that large industrial actors' consolidation of market power was largely unregulated: collective action that took place within a business firm was entirely immune, while the relatively permissive attitude toward mergers allowed firms to attain market shares that gave them market power, often of monopolistic magnitudes. Meanwhile, workers' attempts to act collectively in order to improve the terms of their labor for these firms were prohibited and punished by the Act.

The bottom line is that corporations, once legally formed, were simply not treated as combinations anymore at all, but as single units. Not so for workers' combinations, and certainly not so for ad hoc workers' combinations that came together for particular instances of collective action. Indeed, even assuming that a particular workers' organization were considered legal, once it struck, the law viewed the acts as those of individuals in a combination, rather than a single unit (in contrast to the acts of the employer, a business organization).[199]

197. HYLTON, *supra* note 13, at 94; *see* United States v. Joint-Traffic Ass'n, 171 U.S. 505, 567 (1898) ("[T]he formation of corporations for business or manufacturing purposes has never, to our knowledge . . . been regarded in the nature of a contract in restraint of trade or commerce.").

198. BENSEL, *supra* note 84, at 342–43.

199. Still, at least the classicists spoke expressly of the corporation as a combination. In the modern understanding, the concept is so entrenched that the fundamental unit in antitrust analysis

III. THE LABOR EXEMPTION: AN UNSTABLE PARADIGM

The doctrine that the Gilded Age courts had created, applying the Sherman Act to limit and punish worker collective action, went largely underground during the New Deal era. There it was fertilized by the emerging neoclassical consensus in antitrust, and was undisturbed by a deferential labor exemption that built around it instead of uprooting it.

The labor exemption case law was a part of the New Deal paradigm of economic regulation, and also an especially charged symbol of it. Within the New Deal paradigm, the market society that had been constructed during the Gilded Age in large part through cooperation between courts and industry, now expanded to include a place for collective bargaining by workers. Unions left the legal shadows, becoming market actors alongside business firms. This new paradigm, on the one hand, embraced a vision where economic life was governed in tripartite fashion by the state, capital, and organized labor. At the same time, it rarely articulated that vision, much less a set of underlying principles in support of it. This was in contrast to the market framework that it partially displaced, and with which it partially coexisted. The theory behind antitrust policy, by contrast, was increasingly seen as near-scientific and as transcending normative contestation. Together, these factors resulted in a period of "normal science" of the labor exemption.[200]

The law of the labor exemption thus largely ceded ideological primacy to the market framework, even as the results it prescribed staked out a temporary bulwark against that framework's most extreme and violent manifestations: carving out a place for limited economic democracy for a limited number of working people for a limited period of time. At the same time, it perpetuated the idea of "two rival policies"

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is "the firm" (whether a corporation, partnership, or individual). The labor exemption when it appeared at the dawn of the New Deal period only partially equalized this state of affairs, because the parallel system for regulating labor combinations was quite onerous, and continued to essentially impose a tradeoff upon organized labor for allowing the combination in the first place, thus continuing to view it as a combination. In other words, while business corporations may not *combine* to engage in concerted action targeting a competitor or to raise prices, a business corporation on its own is viewed as a single actor, and thus there are *no* restrictions on its conduct paralleling the restrictions contained in the NLRA. *See generally* TOMLINS, *supra* note 85.

200. I use here the notion of "normal science"—coined in THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 5 (1962), and subsequently applied in descriptions of a huge variety of fields (science and otherwise)—to describe the period after a "paradigm shift," when the focus is on implementing and clarifying the new paradigm rather than on basic or first principles.

that were fundamentally opposed. This opposition went hand in hand with an acceptance of the basic premise that the policy of antitrust would in fact prescribe a different result for worker collective action than the law of the labor exemption did. The law of the labor exemption both expressly and implicitly endorsed this premise.

A. The Norris-La Guardia Act

The text, structure, and operation of the labor exemption reinforced both the primacy of antitrust and the supposed separateness of the principles and values upon which labor and trade regulation, respectively, rely. The Norris-La Guardia Act,[201] one of the first pieces of New Deal legislation, although it partially revived and then operated together with the labor provisions of the earlier Clayton Act, came to define the ethos of the labor exemption. The text of the Norris-La Guardia Act does not engage directly with the framework it is modifying, hardly articulates its own principles, and seems to be the product of a conscious decision to so demur.

Unlike the Clayton Act, which was the first legislative attempt at a labor exemption from antitrust,[202] the Norris-La Guardia Act did not grapple directly with trade regulation in subject matter—even with how trade regulation applies to labor—although it had the effect of modifying its reach. Norris-La Guardia is not an antitrust statute. Instead, it is incorporated into Title 29 ("Labor") of the United States Code. By contrast, the Clayton Act was conceived and written as an antitrust statute, was incorporated into Title 15, the antitrust and trade regulation section of the Code, and portions of it dealt with matters other than labor.

201. Act of Mar. 23, 1932, ch. 90, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101–115 (2012)).

202. Act of Oct. 15, 1914, ch. 323, § 1, 38 Stat. 730, 730 (codified as amended at 15 U.S.C. § 12 (2012)). Section 20 of the Clayton Act had limited the availability of injunctions in disputes relating to the terms and conditions of employment. *Id.* § 2, 38 Stat. at 738 (codified as amended at U.S.C. § 52). Those provisions were nearly laid flat by the pre-Roosevelt Supreme Court in *Duplex Printing Co. v. Deering*, which held that the union's objective (a closed shop) and method (secondary boycott) were illegitimate, and thus fell outside the statute (thus also creating an opening for courts to import additional extra-statutory understandings of legitimate objectives and methods back on the part of working people). 254 U.S. 443, 477–78 (1921). *United States v. Hutcheson* (discussed for other purposes, *infra*) revived section 20 by reading the Clayton Act in conjunction with Norris-La Guardia, holding that together they protected the enumerated activities from *both* injunctions and actions for damages. 312 U.S. 210, 211 (1940). Interestingly, *Duplex Printing* on its face did not hold that a strike for higher wages would be an illegitimate activity and thus would not be protected by the labor exemption. This reflects the fact that the courts of this period were still not consistently applying neoclassicist analysis, under which such an action would be classic price-fixing—assuming antitrust applies to labor.

In content, Norris-La Guardia also does not deal directly with the subject matter, provisions, or logic of trade regulation. Its text does not include any reference to antitrust or to the Sherman Act, nor to the subject matter of its provisions.[203] Norris-La Guardia's central edict is the following:

> No court of the United States, as defined in this chapter, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.[204]

The statute then goes on to enumerate acts, involving or growing out of a labor dispute, that a court may not enjoin,[205] and to set out the conditions that shall define "involving or growing out of a labor dispute."[206] Nowhere does it refer to restraints of trade or to monopolies—the central subjects of the Sherman Act—or attempt to redefine them as they relate to labor.[207] Again, by contrast, the Clayton Act famously asserted: "[T]he labor of a human being is not a commodity or an article of commerce."[208] That proposition directly and

203. The only section in which it even approaches the subject matter of antitrust is when it states, derivatively of its central provisions:

> No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an *unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104* of this title.

Act of Mar. 23, 1932, ch. 90, § 5, 47 Stat. at 71 (current version at 29 U.S.C. § 105) (emphasis added). Even this speaks more to common-law conspiracy than antitrust, for the latter is specific about its subject matter—restraint of trade—unlike the common law, which could relate to any illegal act or predicate.

204. *Id.* § 1, 47 Stat. at 70 (codified as amended at 29 U.S.C. § 101).

205. *Id.* § 4, 47 Stat. at 70 (codified as amended at 29 U.S.C. § 104).

206. *Id.* § 13, 47 Stat. at 73 (codified as amended at 29 U.S.C. § 113 (a), (b), and (c)).

207. This is not entirely surprising, in that Norris-La Guardia was aimed not just at antitrust, but more generally at what was then often called the "government by injunction" legislated by Gilded Age courts in the domain of labor. In this, the courts had used antitrust, to be sure, but also the old common-law concepts of conspiracy and property interests of the employer, to justify blanket injunctions against worker collective action. Yet, as to either theory of liability, the Act was equally pragmatic and results-focused in approach. There is simply less reason to comment on its failure to grapple with the property-based common-law bases for liability because those, unlike the Sherman Act, are no longer used (although, as I argued in Part II, *supra*, their vestiges may live in the Sherman Act, and others have argued that their vestiges live in statutory labor regulation as well).

208. Act of Oct. 15, 1914, ch. 323, § 6, 38 Stat. 730, 731 (codified as amended at 15 U.S.C.

forthrightly challenged antitrust law's application to labor, for if labor is not a commodity, then it is nonsensical to speak of restraining trade in it or of fixing prices in it. The Norris-La Guardia Act offered no analogous rationale for its limitations of the effect of antitrust regulation upon labor.

William Forbath described the momentum that fueled the Norris-La Guardia Act in two stages: the first, dominated by the more old-fashioned "rights talk" of the trade unionists, and the second, which resulted in the bill that was actually passed, dominated by the ascendant Progressive architects of the New Deal, notably Felix Frankfurter.[209] Forbath's emphasis is on the degree to which these two approaches were laissez-faire or statist: distrustful of the government's involvement in labor matters (the first, union-dominated phase) or optimistic about its possibilities (the second, Frankfurter-dominated phase). Another difference, implicit in his account, is the extent to which the two approaches met the theory of liability that they challenged head on, in a clash of principles (the first phase), or opted for a more pragmatic, results-oriented approach (the second phase).[210] The approach that won out was the pragmatic, results-oriented statutory text just discussed. Saving the statute from constitutional scrutiny may have been the most pragmatic course at the time,[211] but the manner of doing so also set the tone for the "normal science" period of the statute to follow. Although Norris-La Guardia revived Clayton's labor provision, it imposed the

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§ 17 (2012)). It also stated:

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

Id.

209. More generally, the second version of the legislation was associated with "the men and women who after 1932 became 'New Deal attorneys' and the builders of a 'new American state,'" a community of which Frankfurter was emblematic and, in a basic sense, helped to create. FORBATH, *supra* note 20, at 165.

210. Forbath notes that "the vocabulary of Marx's *Capital* finds a strange echo in the words of 'pure and simple trade unionist' [Andrew] Furuseth," as he testified before Congress: "Now, if you are going to permit this kind of expansion of the word 'property' to cover every human relation, you set up a condition, gentlemen, under which the creator, the human being who through his creative power . . . has created certain property, you make that man fall down on his knees and worship what he himself has produced.'" *Id.* at 161 (internal citations omitted).

211. *Id.* at 164.

cost of replacing its "rights talk" with its own pragmatic ethos. We see this in the labor exemption case law, which displays a general orientation toward effects over principle, and which in turn enabled the implicit primacy of antitrust policy over labor policy.

B. Solidification of the Paradigm

The transitional and foundational cases that came to define the normal science period showed no signs of reviving the rights talk of an earlier wave of challenges to the operation of the market society. Instead, these pivotal, paradigm-solidifying cases largely endorsed the primacy of antitrust, and reinforced the premise that absent a labor exemption, antitrust *would* regulate and often bar worker collective action.

1. *Apex Hosiery*

Apex Hosiery Co. v. Leader,[212] decided by a very different Supreme Court than the one that had decided the key pre-New Deal precedents, came close to being something other than what it was. It is the sole decision that approached the proposition that the Sherman Act, on its own terms, does not apply to a large swath of worker collective action, and that is not an entirely unreasonable reading of the opinion.[213] Yet a closer reading shows that the opinion actually affirmed the default applicability of antitrust law to worker collective action, failing some specific exception, and in so doing ratified its primacy. Moreover, the reasoning for carving out the exception again relied upon the affirmative New Deal labor legislation that had just passed and incorporated its limits.

The Court began by expressly rejecting the proposition that the Sherman Act does not apply to the concerted actions of workers to improve their wages and working conditions. Particularly notable are the grounds it gave for doing so: "On the contrary Congress has repeatedly enacted laws restricting or purporting to curtail the application of the Act to labor organizations and their activities, thus recognizing that to some extent not defined they remain subject to it."[214]

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212. 310 U.S. 469 (1940).

213. *See* Susan Schwochau, *The Labor Exemptions to Antitrust Law: An Overview*, 21 J. LAB. RES. 535, 542 (2000) (stating *Apex Hosiery* "rested not on any statutory labor exemption, but on construction of the Sherman Act itself").

214. *Apex Hosiery*, 310 U.S. at 488.

Here the Court expressly stated the point I have been urging regarding the development of the labor exemption and the default assumptions that it embedded in the law regarding the intersection of trade regulation and labor regulation: that the judicial construction of the Sherman Act in the classicist period, as applying to worker collective action, was actually preserved as the underlying rule even in the New Deal period, although its effects were greatly curtailed.

Having held that the activities of combinations of workers to better their terms of work are by default "subject to" antitrust regulation and prosecution, the Court then went on to hold that the particular acts in front of it were not antitrust violations. Specifically, the Court held that taking labor costs out of price competition was not a violation of the Sherman Act:

> [S]uccessful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.[215]

The opinion then immediately cited the recent New Deal labor legislation, offered in support of the proposition that legislative intent behind the Sherman Act was not to proscribe worker collective action.[216] The Court thus relied upon the affirmative labor legislation recently passed for its conclusion that the effect of worker collective action on price competition—perhaps the core issue—does not render that concerted action barred by antitrust. Sound reasoning or not, this rendered the Court's holding apparently dependent upon that new labor policy, particularly given that it already stated that worker collective action is by default subject to antitrust. Relatedly, and underscoring the same point, instead of overruling or disapproving of *Loewe v. Lawlor*, or any of the other classicist antitrust cases punishing worker collective action, *Apex Hosiery* distinguished them, another tacit endorsement of their basic logic. It distinguished them on the basis that the case before

215. *Id.* at 503–04.

216. *Id.* at 504 n.24 (citing Norris-La Guardia, but also the Wagner Act and the Fair Labor Standards Act).

it did not involve secondary action, which had been prohibited because of the nature of the means rather than the nature of its effects,[217] not because their effects on price competition were economically distinguishable.

All this has two immediate implications. First, it cedes significant ground to the emerging neoclassical antitrust framework by tacitly suggesting that there is no other reason why it ought not to apply—that but for a separately articulated statutory labor policy, there is indeed and ought to be a market for labor in all pertinent respects analogous to the market for products, justifying the same antitrust treatment for concerted action. The Court did not offer a meaningful principled alternative to the neoclassical economic perspective that was coming to define antitrust.

Second, the construction of the relationship between antitrust and one of the key objects of worker collective action was thus expressly limited by the New Deal labor framework's thresholds of applicability: legally, employee status; and many times practically, the existence of a labor organization formed according to a complicated bureaucratic structure that would only become more complex and restrictive as the century wore on. Those limitations are highlighted in today's deregulation economy, in which those thresholds are increasingly absent. Thus, even if the Court's holding can be understood to construct the Sherman Act alone, its statement of that holding plainly limits that construction to limits placed by New Deal labor legislation. Workers who fall outside the category "employee" are the most obvious evidence of the limits that have inhered in the law the entire time, but they may be figurative canaries in the coal mine.

The greatest immediate legacy of *Apex Hosiery*, meanwhile, was its elevation of the distinction between labor markets and product markets (and whether a restraint in the labor market has a "substantial effect" in the product market), in the law of the labor exemption.[218] This suggests a caveat to the reading I have offered, for the distinction between labor markets and product markets and its mention of the Clayton Act together may be read as a suggestion that the Court *did*, to some extent, endorse a basic distinction between the selling of labor and the selling of commodities. Yet in light of the entire opinion, in particular its

217. *Id.* at 505–06.

218. This left future courts to determine how close the connection to the product market must be, for the act by the labor union to be within the ambit of the Sherman Act. Schwochau, *supra* note 213, at 543.

reliance on affirmative labor legislation and its failure to articulate any principle for the distinction, this is best read as a minor strain.

2. *Hutcheson*

That minor strain dissolved into a road not taken with *United States v. Hutcheson*.[219] Even more directly than *Apex Hosiery*, the *Hutcheson* decision relied upon the Norris-La Guardia and Clayton Acts, regarding those together with the Sherman Act as a set of "interlacing statutes."[220] *Hutcheson* read the Clayton Act's proclamation that that certain activities by combinations of workers "shall not be considered or held to be violations of any law" in combination with Norris-La Guardia's list of enumerated activities protected from injunction, essentially expanding that shield to immunize against not only requests for injunctive relief but actions for damages as well. *Hutcheson*'s holding was broad and was a boon to the labor movement. But despite its partial resuscitation of the Clayton Act, it ignored the minor strain in *Apex Hosiery*, and relied expressly on the statutorily defined labor exemption. Instead of focusing on the distinction between the labor market and the product market, it "focused on the activities of labor organizations (due to the language of Clayton) and whether those activities fell within the class of activities exempted by Norris-La Guardia."[221] Because "future cases employed the *Hutcheson* line almost exclusively,"[222] this removed any vestige of the concept that labor is not and ought not be treated as a commodity from the main thrust of the labor exemption case law, and redoubled focus upon construction of a list of exempted activities, for which no real principle had been offered in the statute nor in the decision.

One reason *Hutcheson* had such immediate practical significance is that it removed the uncertainty left in the wake of *Apex Hosiery* regarding secondary actions by workers—"solidarity actions" (without which organized labor likely would not have amassed the political power necessary to pass New Deal labor legislation in the first place).[223] This also may supply the explanation for why *Hutcheson*

219. 312 U.S. 219 (1941).

220. *Id.* at 232.

221. Schwochau, *supra* note 213, at 544; *Hutcheson*, 312 U.S. at 234 (reading the Clayton and Norris-La Guardia Acts together, to hold that the "bounds of a labor dispute" included, and therefore exempted, secondary action).

222. Schwochau, *supra* note 213, at 544 (citing PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (1997)).

223. Despite the draconian character of the official pre-New Deal precedent regarding antitrust and worker collective action, much worker collective action including secondary action

sidestepped the minor strain in *Apex Hosiery* and redoubled the focus on the affirmative statutory basis for an exemption. For *Apex Hosiery* had affirmed the general principle that the Sherman Act applied to worker collective action, relying largely upon the old cases, and then distinguished those cases on the basis that they involved secondary action. Thus, *Hutcheson* had to find some other basis for freeing secondary action from antitrust liability, and without overruling *Apex Hosiery*'s construction of the Sherman Act, it did so by holding that regardless of what the Sherman Act meant, the statutory labor exemption immunized secondary action.

C. The Normal Science of the Labor Exemption

The normal science of the labor exemption framework solidified the suggestions in the foundational case law, largely adopting the relatively contingent threshold conditions of affirmative labor regulation rather than relying upon a principled distinction between labor markets and product markets (or some other principle), to define its boundary with antitrust. This fed grumblings about the special treatment accorded labor. It also led naturally to the result that independent contractor workers were subjected to antitrust liability, even while courts seemed to acknowledge their underlying status as workers.

1. Generally

Because *Hutcheson*, not *Apex Hosiery*, was largely the basis for the normal science of the labor exemption, the exemption was largely defined by the list of exempted activities set out in Norris-La Guardia. The main body of labor exemption case law tended to ignore the minor strain in *Apex Hosiery*, which may have been suggestive of a principled distinction between labor markets and product markets on the Sherman Act's own terms. The normal science of the labor exemption was instead mostly concerned with policing the boundaries of the exempted activities, and of the category of traditional activities of labor unions.

The normal science of the labor exemption was also defined to a great extent by its context, namely a basic economic policy of co-governance by capital, the state, and labor. The trucking industry was an excellent example of this, with the Interstate Commerce Commission ("ICC") effectively setting rates in cooperation with industry and with

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did as a matter of fact take place, sometimes escaping the iron fist of the judiciary and sometimes provoking overt repression; this did in fact contribute to labor's power, both economic and political. FORBATH, *supra* note 20, at 141–47.

the Teamsters, the labor organization that represented a critical mass of truck drivers in the mid-twentieth-century period.[224]

At the same time, the contemporaneous scholarly and policy commentary focused to a great degree upon the labor exemption as a symbol of a basic contest about economic worldviews that the New Deal era had not resolved, consisting as it did of a marriage between the official ideology of the market society with the actual practice of economic life.[225] In a mid-century article that provides a window into this commentary, antitrust scholar Ralph Winter noted the "irrational" primacy of the labor exemption in the contemporaneous "debates over labor policy," describing it (and the potential application of the Sherman Act to labor) as an "emotional symbol" of the clash of policies and perhaps worldviews.[226] This description furnishes a clear contrast with the present day, where the labor exemption has been largely consigned to an arcane specialty practiced by a tiny subset of lawyers and receives little attention from scholars and almost none in the broader policy discourse. This is partly because the juice that was fueling that emotional symbolism was the challenge, however attenuated, that New Deal *practice* posed to official market *ideology*.

If the labor exemption itself had irrational primacy in policy debates in the mid-century period,[227] then the supposed conflict between antitrust policy and labor policy was almost always a presupposition of those debates.[228] That presupposition was harmonious with the position of industry, which was that the conflict was acute and that labor's exemption from it was absolute and unprincipled, resulting in deleterious economic effects of significant magnitude.[229]

224. BELZER, *supra* note 33, at 55.

225. *Id.*

226. Winter, *supra* note 15, at 16.

227. The U.S. 1961–62 Intercollegiate Debate had as its topic: "Resolved: That Labor Organizations Should Be Under the Jurisdiction of Antitrust Legislation." LABOR & ANTI-TRUST LEGISLATION 1 (Harold S. Roberts ed., 1961); *see also* Comment, *The Antitrust Laws and Labor*, 30 FORDHAM L. REV. 759, 759 n. 1 (1962).

228. *See, e.g.*, Bernard D. Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 6 J.L. & ECON. 152, 152 (1963) (positing a tension between national labor policies and the objectives of antitrust laws); *see also* ANTON G.O. SMITSENDONK, TRADE AND LABOR: TWO AMERICAN POLICIES 81–86 (1971) (same).

229. *See, e.g.*, Nat'l Ass'n of Mfrs., *Organized Labor and the Antitrust Laws—Industry's View*, *in* LABOR & ANTI-TRUST LEGISLATION, *supra* note 227, at 71 ("[I]t is a matter of timely information that a double standard exists in the application of the antitrust laws—one under which business monopoly is prohibited, and the other under which union monopolistic practices are freed of restraint.").

2. Normal Science Case Law and "Independent Contractor" Workers

The prior statement, in Part I, that the labor exemption is receding through the mechanism of the independent contractor form, can now be restated as follows: the normal science labor exemption largely has no space for the newly ascendant forms of the labor relationship in the current period of breakdown—forms outside the category "employee." The normal science case law also assumes as a factual matter the centrality and strength of labor organizations engaged in NLRA-based collective bargaining. Both ways, it is primarily focused on border-fixing issues. The border defined by employee status was, as set out *supra*, imported into the labor exemption case law by the reliance upon the larger set of affirmative labor legislation of which Norris-La Guardia was a part. The inevitable implications were then drawn out in the first cases dealing with independent contractor workers and the labor exemption.

Taylor v. Local No. 7[230] made the implications of *Hutcheson* and *Apex Hosiery* for workers outside the category "employee" concrete and explicit.[231] In other words, it manifested the implications of the results-focused reliance upon employee status embodied by Norris-La Guardia and the foundational case law, over the more principled distinction between labor and commodity earlier promised in the Clayton Act. The latter distinction may have saved the conduct punished in *Taylor*, while the former did not. The distinction between the two roads is especially dramatized by the court's recognition, in *Taylor*, of the independent contractors as occupying the social and economic space of *workers*. In this, they retained some of the pre-New Deal consciousness of who workers are apart from the "employee" label even as they apply the new legal demarcation to decide whether workers' collective action will be saved from antitrust.

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230. 353 F.2d 593 (4th Cir. 1965).

231. The U.S. Supreme Court's very brief opinion in *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942), actually preceded *Hutcheson* and just followed *Apex Hosiery*. It held that a fisherman's union (affiliated with the CIO) was an organization of independent businessmen and sellers of commodities, not employees, and moreover, that the employment relationship was not the matrix of the controversy. *Id.* at 147. Thus, the fishermen's collective refusal to sell to a particular dealer was not protected by the labor exemption. *Id.* The fishermen may have been among the earliest casualties of the presumption of antitrust liability solidified by the New Deal labor exemption. I choose to discuss *Taylor* in greater detail for two related reasons. First, it is a clearer illustration of the actual boundary of the labor exemption, because *Columbia River Packers Ass'n* at least involved sellers of a physical commodity rather than the sellers of pure labor or services. Second, *Taylor* demarcates that narrower boundary after the dust had settled from the initial, defining labor exemption decisions, rather than while the ground was shifting.

Taylor applied the framework created by *Hutcheson* in applying the labor exemption to antitrust:

> [I]t is well settled that provisions of the Sherman, Clayton and Norris-La[]Guardia Acts must be considered together in determining the scope of the exemption of union activities from the antitrust provisions; and, in the light of such consideration, the test to be applied in determining whether such activities are exempt is whether they present a case which can be said to involve or grow out of a "labor dispute."[232]

The court went on to adopt the suggestion of *Milk Wagon Drivers*[233] and *Columbia River Packers Ass'n*[234] taken together, that unless *either* the parties stood in the relationship of employer and employee *or* the employment relationship was the "matrix of the controversy," the labor exemption could not protect their conduct from antitrust liability.[235] *Taylor* engaged in a lengthy inquiry about whether the defendant horseshoers were in fact employees or independent contractors, concluding that because they were independent contractors, their concerted action was subject to prosecution.[236]

Taylor thus extends the rule that *Columbia Rivers Packers Ass'n* had formulated for "sellers of commodities" to individuals whom the court itself plainly considers workers. Unlike the earlier Supreme Court case, the *Taylor* court never used such words as "sellers of commodities." Indeed, the term "independent contractor" itself is suggestive of the fact that the individual is primarily selling labor, not some physical fruit of labor. The court certainly spoke as if it considers them workers, importing its social understanding of work:

> Pressures of economic necessity *to work* in order to provide for one's family and to *accommodate the needs of the person* who is paying for

232. *Taylor*, 353 F.2d at 602.

233. Milk Wagon Drivers' Union Local No. 753 v. Lake Valley Farm Prods., Inc., 311 U.S. 91 (1940).

234. 315 U.S. 143.

235. *Taylor*, 353 F.2d at 604–05. *Milk Wagon Drivers* held that disputes in which individuals engage in collective action can be immunized by the labor exemption if the employment relationship is the matrix of the dispute, even where the employment relationship at issue is someone else's—thus effectively protecting secondary action, either in solidarity with other workers or targeting actors who do business with one's employer. *Milk Wagon Drivers*, 311 U.S. at 99–100; *see also* New Negro All. v. Sanitary Grocery Co., 303 U.S. 552, 560 (1938) (using the same reasoning to immunize a consumer boycott, aimed at employment practices, under the labor exemption). Interestingly, this minor strain of jurisprudence, which has not been overruled, preserves an option for non-employee workers that has long since been closed off under the NLRA.

236. *Taylor*, 353 F.2d at 597–600.

> the *services* are applicable to every person engaged in a *trade, calling or profession* for gain and are not relevant considerations in determining whether one is an employee or an independent contractor. It goes without saying that independent contractors, as well as employees, *must work* to support themselves and their families and must *make themselves available* to render *services at such times as they are needed*.[237]

The relevant distinction was at this point definitively not between "labor" and "commodity" (a possibility that the Clayton Act held out), but between workers who are "employees" and "independent contractors" (not even simply between those who are "employees" or not). The court engaged in no discussion of what policy might be served by drawing the demarcation thus, but it certainly does import its own social understanding of how workers are supposed to "accommodate" the "needs" of those they are "serv[ing]," by "making themselves available to them." It clearly identified these "independent contractors" as "persons" engaged in "work," in a "trade, calling, or profession." While one response to the suggestion of this Article may be that it is too difficult to draw the line between non-employees who are workers and those who are not for purposes of antitrust liability, *Taylor* demonstrates both that there is a fairly strong collective intuition (including on the part of conservative, pro-market courts) that such a category exists, and that it is not impossible to determine who is in it.

The normal science case law as to independent contractor workers was generally in accord with *Taylor*,[238] while providing for some exceptions to the general rule that worker collective action was completely barred by antitrust. The exceptions are of limited application to the problem at hand. First, a limited exception, based on *American Federation of Musicians v. Carroll*[239] and its progeny, allows collective bargaining on behalf of independent contractor workers in certain circumstances. The *Carroll* exception applies only where an established labor organization already represents a critical mass of *employees* in the workplace or sector, and is grounded in those *other*

237. *Id.* at 597 (emphases added).

238. *See, e.g.*, L.A. Meat & Provisions Drivers Union, Local 626 v. United States, 371 U.S. 94, 104 (1962) (antitrust barred independent contractor drivers from union membership); Spence v. Se. Alaska Pilots' Ass'n, 789 F. Supp. 1007, 1011 (D. Alaska 1990) (union of independent contractor pilots impermissible under antitrust).

239. 391 U.S. 99 (1968); *see also* H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704 (1981) (allowing collective-bargaining agreements that stage actors and actresses, independent contractors, entered into with major theatrical producers).

workers' statutorily recognized interest in effective bargaining (not in the independent contractor workers' interests). The relevance of *Carroll* is profoundly limited for today's independent contractor workers, in that traditional labor organizations have little density in the industries in which such workers labor. This exception is also aimed at the "nonstatutory," collective bargaining aspect of the exemption, rather than at unilateral worker collective action. The second primary exception, based on the earlier *Milk Wagon Drivers* case, does reach unilateral collective action, but generally only protects independent contractor workers who are organizing specifically toward employee status, not those who are engaging in concerted action to *directly* better their conditions, or for other purposes.[240]

IV. ANTITRUST LIABILITY FOR WORKER COLLECTIVE ACTION: THE VERY IDEA

As we already saw, the New Deal put a fairly abrupt stop to the use of antitrust law to quash *most* collective worker action in the manner that had been opened up by *Workingmen's Amalgamated* and the Danbury Hatters case. But as we also saw, the fundamental proposition that the internal logic of antitrust law required worker collective action to be subject to liability remained in the deep structure of the law, a legacy of those early cases. Modern antitrust law thus directly inherited that proposition from Gilded Age courts, which expressly relied on a specific conception of the social good (one we would not now accept) to justify it. At the same time, the ideology associated with modern antitrust created increasingly rigid divisions between the economic sphere of life and other spheres, notably the social and political spheres. In this final Part, I examine the *maintenance* of this underlying assumption in the present era as one contingent policy decision among many, which together constitute actual markets. Maintaining the underlying rule involves normative commitments: making those explicit will allow us to decide whether they can be improved.

240. *Milk Wagon Drivers*, 311 U.S. at 102–03. The exception is further described in note 235, *supra*. Note, further, that organizing specifically for improved wages and working conditions ought to be within the scope of this exception, so long as employee status is also among the aims (under the test that the dispute must relate to terms and conditions of employment).

A. The Inherent Normative Content of Punishing Worker Collective Action Under Antitrust

The modern justification for punishing worker collective action through antitrust law, no less than the classicist one and no less than a policy of exempting worker collective action, rests on specific normative judgments that are neither politically neutral nor self-evident.[241] The difference is that while the classicists were relatively overt and direct in their appeals to a specific conception of the social good—one which entailed a hierarchical suppression of workers' agency in service of constructing a new market—in modern antitrust law that category of consideration (to say nothing of appeals to social hierarchy specifically) has gone largely underground.

Antitrust law enshrines the ideals of the market society—competition, open markets, and prices that are determined accordingly—and seemingly reinforces the idea of a "singular ideal type of market."[242] At the same time, it embodies the proposition that those ideals require affirmative state action for their realization: state policies that encourage "pro-competitive" conduct by commercial actors and discourage "anti-competitive" conduct.

Antitrust law itself, leaving aside how it plays out in the price-fixing or boycott doctrine or its application to labor, is thus an embodiment of the fact that the market society is not some "natural" or default state of affairs but, on the contrary, the product of an affirmative and often costly set of policy decisions on the part of the state itself.[243] Today, competition is something that courts undertake to promote, and various

241. This argument, which I make here with respect to its relationship to labor, has been widely made with regard to modern antitrust law generally. *See, e.g.*, Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. Rev. 219, 226 (1995) (arguing that "the contemporary debate between antitrust economists demonstrates how efforts to base antitrust policy solely upon economic theory inevitably draw on political assumptions about the marketplace"; that "inconclusive evidence of the efficiency effects of many business practices, and the inability of economic theory to determine which model promises greater efficiency, expose these political assumptions and effectively transform the economics debate into a political one"; and that "antitrust discourse would benefit from the acknowledgment by policymakers that the current economic debate is theoretically and empirically irresolvable, and from their express recognition that the choice between conflicting economic models constitutes a normative ordering of divergent political beliefs").

242. Frank Dobbin & Timothy J. Dowd, *The Market that Antitrust Built: Public Policy, Private Coercion, and Railroad Acquisitions, 1825 to 1922*, 65 AM. SOC. REV. 631, 631 (2000).

243. *Id.* ("In economic sociology, an emergent camp contends that antitrust and other policies actively constitute market characteristics. These sociologists suggest that markets may take a variety of different forms rather than conforming to a singular ideal type, and that antitrust policy contributes to this variety rather than serving merely to correct markets that have strayed from the ideal type.").

policies and practices by private actors are to be evaluated specifically according to whether they promote competition. This is truly a far cry from the original classicist position on markets, according to which almost anything a private actor did in furtherance of interest was, ipso facto, competition. The very idea that competition is a normative ideal separate from what firms actually do in furtherance of their economic self-interest makes space for affirmative state intervention (to bring affairs closer to that normative ideal). To be sure, the classicists had a notion of legitimate and illegitimate competition, but that distinction was drawn on the basis of moral or normative concepts distinct from competition itself. In the neoclassical framework, by contrast, competition itself is the normative benchmark used by antitrust. In other words, the classical framework put bounds on the acts of market actors, but on the basis of conflict between competition and other normative ideals. The neoclassical framework bounds the acts of market actors on the basis of ideal of competition itself. That fact betrays the irreducible normative content of the concept of competition as it is used by contemporary courts, over and above the content of the concept of competition employed by classicist courts.

The law of price-fixing is about preventing restraints on competition, or coordinated conduct that tends to have anti-competitive effects. The reason that I say there is an irreducible normative component in its application is that *some* restraints on competition are always present in a market; they function as the walls within which competition will take place. At the most basic level, these include all sorts of commercial regulation such as the rules defining and legally constituting the entities that will engage in competition, as well as industry-specific regulation. The goal of "maximizing competition" is simply not tenable, as a practical and logical matter, without incorporating some kind of limits. Then it is an unavoidable question *what* those appropriate limits, embodied for example in the scope of the price-fixing law, are. The limits we actually have are arguably as much the result of historical accident as they are of rational economic science. Thus, the logic of price-fixing has an inherent openness or indeterminacy, such that effectively extrinsic normative considerations are necessary to determine the precise circumstances under which concerted action to constrict supply of a given commodity is prohibited by antitrust law. The role these considerations play is rarely overt; courts typically fold them under the concepts of "maximizing competition" or "legitimate competition."

This is particularly so with respect to antitrust's relationship to labor, which was formed under the pressure of normative considerations that would likely not be endorsed openly by today's courts. That relationship raises a set of normative questions no matter how it is constituted—not only if labor is exempted from antitrust prosecution. One can imagine a whole variety of arrangements relating antitrust law to labor—from total subjection of worker collective action to price-fixing, treating each worker as an individual firm, and with no labor exemption whatsoever, on one end; to a complete exemption for workers' organizations with no restrictions, on the other. Any of these arrangements would then simply become background legal facts; they would *constitute* the markets within which economic interactions take place.

B. Doctrinal Fault Lines

In particular cases, courts make judgments about what circumstances define a commodity's market price, and about whether some exception to the centrality of that normative ideal applies. Courts engaging in neoclassical antitrust analysis make affirmative normative judgments—whether overtly or implicitly—that are indispensable to their decision to continue to punish worker collective action by means of antitrust law. In this final Section, I explore the ways in which these normative considerations interact with the malleable logic of price-fixing, within three doctrinal pathways: (1) the wayward meaning of price-fixing itself, particularly in contexts that have direct implications for the regulation of worker collective action; (2) the operation of the "professional privilege" to shield certain types of workers and small producers from antitrust liability for concerted action; and (3) the basis on which First Amendment protection is denied to concerted action by workers unshielded by the labor exemption.

1. The Wayward Meaning of Price-Fixing

"The statement 'price-fixing is *per se* illegal' is easy to say, but it immediately raises the problem of defining price-fixing."[244] While one might make the equivalent remark about any legal rule, it is no accident that the price-fixing doctrine draws it. The meaning of price-fixing, and with it the rule, has taken wide pendulum swings over the course of the twentieth century, and the relative consolidation of a neoclassical consensus in the last quarter of that century has in some sense contained the seed of its own unraveling, opening the latest door for courts to take the broader perspective urged in this Article.

244. HYLTON, *supra* note 13, at 117.

The "per se rule" is that certain activities are violations of the Sherman Act regardless of their actual effects on competition in the market (and to a certain extent regardless of intent). The (modern) rationale is one of judicial and administrative economy: rather than tallying all the market effects in a particular case, some types of conduct are considered likely enough to be anti-competitive that they are deemed violations of the Sherman Act without requiring the plaintiff (or agency) to prove up the anti-competitive effects. As courts consider new varieties of potential violations, more activities are incorporated into the per se rule, while certain categories of conduct (and new categories of conduct) remain subject to the "rule of reason."

The per se rule as to price-fixing itself was a stark departure from the common law, which probably enforced certain agreements that would now be considered criminal price-fixing.[245] The rule was narrowly established early on in the *Trans-Missouri Freight Ass'n* case.[246] In *Standard Oil*, the Supreme Court moved away from the per se rule, and partially reinstated a reasonableness test even for express rate-setting agreements, encompassing considerations such as the purpose, power of the parties, and actual effects of the agreement.[247] In *Chicago Board of Trade*, the Court again rejected the per se rule and made a distinction between restraints that "merely regulate and perhaps thereby promote competition" and those that "may suppress or even destroy competition."[248] This represented a halfway point between the common-law rule (a full-blown rule of reason, where even express restraints of trade could be valid if social benefits outweighed harms) and the per se rule, by creating the category of "regulating and promoting" competition. In its initial form, the rule was probably closer

245. The reason is that not only was price-fixing not a tort or crime under the common law, as already stated in Part II, *supra*, but also that the definition of price-fixing was very different: common-law courts expressly took into account not only whether the resultant prices were reasonable, but whether the competition-restricting agreement's net social effect was positive: whether the "net effect, taking into account possible consumer benefits, is probably harmful to the public." *Id.* at 93. This is in contrast to neoclassical price-fixing cases that expressly disavowed potential offsetting consumer benefits, not to mention potential "non-economic" social benefits.

246. *Id.* at 90–94. *See generally* United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 372–73 (1897) (rejecting the common-law reasonableness standard and refusing to consider the defendants' argument that the prices set were reasonable, apparently implying that contracts in restraint of trade might be reasonable overall).

247. *See generally* Standard Oil Co. v. United States, 221 U.S. 1 (1911) (replacing the per se test with a reasonableness test); HYLTON, *supra* note 13, at 101–02 (discussing the decision in *Standard Oil*).

248. Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); *see also* HYLTON, *supra* note 13, at 104–06 (discussing the decision in *Chicago Board of Trade*).

to the broad common-law rule of reason; it evolved considerably away from that as neoclassicism took greater hold. *Chicago Board of Trade*—unlike some other cases from the period that took the rule further—actually remains good law. The battle has been in applying the rule, in particular regarding the definition of "pro-competitive" and regarding the distinction between regulating competition in a manner that enables it (permissible) and restricts it (impermissible).

Especially instructive is *Appalachian Coals*,[249] which extended *Chicago Board of Trade* almost back to the common-law rule of reason analysis, holding that price-fixing does not intrinsically violate the Sherman Act if the benefits outweigh the harms, and taking a fairly broad view of the category of benefits that may be considered. Although not a labor case, the reasoning and facts of *Appalachian Coals* are of particular relevance to labor markets. The Court's reasoning was that in a market characterized by large, organized buyers that "created monopsonistic conditions on the demand side, depressing market prices," an agreement to reduce or eliminate competition may be permissible.[250] The Court cited several manifestations of "destructive competition" obtaining in the market for bituminous coal prior to the agreement between the sellers, all of them flowing from these monopsonistic conditions.[251] This, of course, is the situation of many labor markets, particularly heightened by destructive competition on the product market side.[252]

This doctrinal uncertainty was connected with and reflected the ideological and policy ambiguity already mentioned regarding the economic vision and policy of the New Deal era. Overall, the market framework seemed to retain the upper hand ideologically, while the active management and containment of markets dominated policy on the ground. For example, initially, the ICC, an agency that engaged in active economic policy-setting,[253] wanted to allow rate agreements in various industries, while the Justice Department wanted to prosecute

249. Appalachian Coals v. United States, 288 U.S. 344 (1933).

250. HYLTON, *supra* note 13, at 108.

251. *Appalachian Coals*, 288 U.S. at 361–64.

252. In fact, the Court noted the "destructive" labor market effects of ruinous competition in the bituminous coal market absent the agreement between the producers, as one of its justifications for allowing the agreement. *Id.* at 364 ("[W]ages to labor have been substantially lessened."). The point I am making here is that the reasoning of *Appalachian Coals* can apply *directly* to labor markets, in addition to sometimes justifying price-fixing in an adjacent commodity market.

253. *See* BELZER, *supra* note 33, at 55 (discussing the ICC).

them under the Sherman Act.[254] The Reed-Bulwinkle Act, enacted in 1948,[255] ended this standoff by legalizing rate agreements among railroads and motor carriers as long as they were approved by the ICC.[256] These industries were early strongholds of organized labor, and this compromise represented the temporary triumph of the tripartite economic governance of markets previously mentioned. De facto rate setting, with a significant role for organized labor, in product markets characterized other key industries as well.[257]

Eventually, of course, this tripartite model of economic governance was dismantled, with the "deregulation" policy that began in the 1970s, culminating in the actual dismantling of the ICC. What Michael Belzer has called "deregulation policy" really consisted of *changing* the state's role in economic governance, reducing its ability to directly engage in economic policy setting in the general interest,[258] leaving it to other means (including directly regulating workers and imposing personal penalties), often to compensate for problems caused by rampant competition, the removal of any role for labor in economic governance, and the decimation of labor standards.[259] For example, in trucking, the state role in the mid-century era was characterized by the ICC's rate setting and other direct engagement in economic policy. These essentially ensured a lack of undercutting among both firms and drivers, with the result that public safety was not a major problem.[260] After

254. HYLTON, *supra* note 13, at 97–98.

255. Reed-Bulwinkle Act of 1948, ch. 491, 62 Stat. 472 (codified as amended at 49 U.S.C. § 10706 (2012)).

256. *See* HYLTON, *supra* note 13, at 98 (discussing the Reed-Bulwinkle Act); *see also* Belzer, *supra* note 33, at 59–61 (discussing the Reed-Bulwinkle Act).

257. *See, e.g.*, THOMAS GEOGHEGAN, *Before the Lean Years*, *in* WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 40, 40–58 (2004) (recounting the United Mine Workers' critical role in coordinating the coal product market).

258. For example, the policy of deregulation in the American trucking industry began in 1977 when the ICC began to loosen the regulations that defined each carrier's pricing. BELZER, *supra* note 33, at 28. Some companies failed; others began the pressure on their workers to cut wages. *Id.* The policy was ratified by Congress, and took root in earnest, with the Motor Carrier Act of 1980, which affirmed the earlier administrative deregulation of interstate trucking by removing regulatory barriers to enter into the market, eliminating indirect routings, and permitting discriminatory pricing (allowing discounts to high-volume customers). *Id.* For the first time since the 1930's, below-cost rates were legal, enabling overt undercutting. *Id.* In 1994, Congress accomplished the deregulation of intrastate trucking as well, ordering states to stop regulating local trucking by enacting the Federal Aviation Administration Authorization Act. Federal Aviation Administration Authorization Act, 49 U.S.C. 14501; *see* BELZER, *supra* note 33, at 28.

259. *See supra* Part I.B, at notes 33–37 (describing the labor market effects of deregulation in trucking).

260. BELZER, *supra* note 33, at 25.

"deregulation," the state's role took the form of a net of safety regulations governing drivers' behavior.[261] Business became the prime actor to directly set economic policy; in the case of trucking, these policy makers were primarily powerful economic actors in adjacent markets, such as retailers, who were increasingly linked to the global supply chain. Thus "deregulation policy" really consisted in a profoundly changed, not eliminated, role of the state in economic life.

The neoclassical turn on the policy level was mirrored in the price-fixing doctrine, so that earlier cases that had extended *Chicago Board of Trade* to allow various forms of cooperative behavior were largely superseded. *Socony* established that lack of market power is not even a defense to price-fixing, much less is market power an element of proof, thus prohibiting much cooperative conduct that might otherwise have been permitted.[262] Thereafter came the rigid apex of the price-fixing doctrine, embodied especially in *Superior Court Trial Lawyers Ass'n* and presaged in *National Society of Professional Engineers*, both decisions involving small producers and both authored by Justice Stevens.[263] These decisions exemplify the post-*Socony* regime, which narrowed and clarified the ruling in *Chicago Board of Trade*.[264] A decade and a half apart, *Trial Lawyers* can be seen as the natural completion of the logic of *Professional Engineers*: taking the willful blinders to relational market power, and to potential social and economic benefits of the concerted action, to a certain principled extreme.

However, a contemporary revival of *Appalachian Coals* for labor markets is made possible by even more recent cases that seem to have again expanded both the scope and the meaning of rule of reason analysis.[265] Thus, in our current moment "there are pressures to expand

261. *Id.* at 67–72.

262. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); *see also* HYLTON, *supra* note 13, at 109 (discussing the *Socony* case).

263. *See* Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990) (refusing to consider social justifications and reasonableness of prices, in considering alleged price-fixing); *see also* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 693–94 (1978) (refusing to consider public safety and other quality or consumer benefits as defense to alleged price-fixing).

264. *See Socony*, 310 U.S. at 211–12 (narrowing the rule of reason so that only effects strictly tied to promoting market competition could be considered).

265. *See* United States v. Brown Univ., 5 F.3d 658, 664 (3d. Cir. 1993) (allowing consideration of quality-enhancement arguments under the rule of reason, indicating a softening of the *National Society of Professional Engineers* approach); *see also* Broad. Music Inc. v. Columbia Broad. Sys., 441 U.S. 1, 22–24 (1979) (allowing an exception to price-fixing for the introduction of a new product).

rule of reason analysis" to justifications beyond strictly promoting market competition.[266] So far, the benefits of any relaxation seem to have flowed mostly to large market actors, with small actors mostly left by the wayside.[267] Some contemporary antitrust commentators, notably Warren Grimes, have argued that we ought to effectively return to the analysis of *Appalachian Coals* by considering relational market power as a basis for allowing concerted action among smaller, less powerful market actors—including, paradigmatically,

> professionals (such as doctors or lawyers) who practice individually or in small groups and must do business with power buyers of their services; small businesses (such as independent pharmacies or bookstore owners) . . . that confront power buyers and sellers; small franchisees . . . ; small farmers . . . ; and any independent contractor that sells services to a power buyer (such as a taxicab driver or a truck owner . . .).[268]

The arc of the price-fixing doctrine demonstrates that it contains no inexorable logic *requiring* the prohibition of collective action by workers or other small economic actors who earn their income primarily through labor, and in fact contains materials to build a different approach.

2. The Professional Privilege

In addition to the pliabilities in the concept of price-fixing just discussed, courts also sometimes invoke the status of sellers as members of one of the traditional professions, either to justify rule of reason rather than per se treatment, or as a consideration among others in the application of the rule of reason. It is thus a privilege rather than an exemption, and its reach is fairly limited, particularly under the influence of neoclassicism—although we may see it expand under the same pressures mentioned relating to the rule of reason. I mention it separately from the other pliabilities described above only because of its likely roots in very early trade regulation, and because the same privilege is not accorded to workers or sellers who lack the social and economic status of the professions. Like all the pliabilities, it represents normative considerations outside neoclassical theory, but this set at once hearkens to animating ideals of pre-market economy trade

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266. HYLTON, *supra* note 13, at 109.

267. Grimes, *supra* note 12, at 221–22.

268. *See id.* at 196–97 (arguing antitrust should allow "countervailing power through the collective action of small buyers or sellers").

regulation,[269] and demonstrates the continuing thread of greater legal privilege within economic regulation accorded to those with greater social and economic status.

The professions have, even in the heyday of neoclassical influence, remained at least partially staked out as a place where courts acknowledge that market forces may not be appropriate to determine all aspects of economic life. It is thus one more way in which the price-fixing doctrine on its own terms admits that market competition need not, and perhaps ought not, govern all of economic life, but, then, reserves the benefit of this restraint largely to socioeconomic elites. For example, in *Goldfarb v. Virginia State Bar*,[270] although the Court rejected the wholesale exclusion of the learned professions from antitrust law (noting that lawyers are vital to commerce), it also treated as obvious the idea that the professions ought to be treated differently from other commercial actors, and perhaps with greater deference. Seemingly limiting its holding (allowing the possibility of antitrust liability) to the facts before it, the Court asserted:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.[271]

This is a very clear statement that the professions ought to be treated differently from other producers or workers in applying the Sherman Act, and that greater deference is due their concerted action. Yet workers outside the professions may also have legitimate claims to a more republican form of regulation of their economic activity. Moreover, considerations relating to the public interest may support those claims, both because of how poor working conditions affect matters such as public safety, and because of the ripple economic and social effects of poverty itself.

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269. *See supra* Part II.A, at notes 79–84 (discussing pre-classicist trade regulation).

270. 421 U.S. 773 (1975).

271. *Id.* at 78 n.17.

In fact, the professional privilege reflects the resilience, even in the face of neoclassicist ideology, of the deep-seated collective intuition that those who are doing the material work of economic life are entitled to a role in governing it and that indeed we all benefit when they do. The guild economy to which the professional privilege hearkens back was certainly organized around that supposition.[272]

Although the neoclassical turn in antitrust doctrine certainly limited the professional privilege, the greater current porousness in the rule of reason offers the possibility of its re-expansion. It is thus relevant both as a point of contrast to the law's treatment of other workers, particularly low-wage workers, and as another doctrinal basis (if mostly by analogy) for excluding worker collective action from antitrust liability, or seriously limiting its scope.

3. First Amendment Protection for Worker Collective Action?: "Economic" and "Political" Protest

The analysis of First Amendment protection for worker collective action (not immunized by the labor exemption) also demonstrates how essentially extrinsic normative considerations enter into antitrust doctrine. In this case, an artificial distinction between the "economic" and the "political" keeps First Amendment protection for a classic workers' boycott at bay.

I have previously described *Trial Lawyers* as an instance of the neoclassical price-fixing logic applied to worker collective action that looms as a serious threat, if not an outright blockade, to much nontraditional worker organizing, particularly on the part of independent contractor workers not affiliated with a traditional labor organization.[273] It is also a prime illustration of how courts may treat a First Amendment defense to antitrust liability for worker collective action. In this case, the court of appeal had reversed the trial court's finding of liability, reasoning that the expressive component of the boycott was protected by the First Amendment to the extent of nullifying the per se treatment, which would otherwise apply to a "classic restraint of trade." The court of appeal had imposed on the

272. *See supra* Part II.A, at notes 79–84 (discussing pre-classicist trade regulation).

273. In the case discussed here, the workers' association did not try to claim softer treatment based on their status in the professions, nor on the basis of the labor exemption (despite using much of the language and strategy of traditional labor collective action in the actual conduct at issue). This is not entirely surprising given the narrowness of the labor exemption as previously described, and the neoclassical tightening of the professional privilege, which would have been at its height.

FTC the requirement of showing "significant market power" on the part of the conspirators. The Supreme Court first agreed with the court of appeal that "this constriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price . . . or by agreeing upon an output, which will increase the price offered."[274] It then rejected both the association's First Amendment argument based on *Claiborne Hardware*, which urged that even if the conduct violated the Sherman Act it was protected as an expressive boycott, and the court of appeal's First Amendment reasoning based on *O'Brien*, which had held that the expressive components of the conduct warranted rule of reason treatment (inviting a consideration of market power and reasonableness of prices).[275]

In distinguishing *Claiborne Hardware*, the Court places "equal respect" and "equal treatment" beyond the market, and reasoned that the First Amendment protects concerted action, including collective refusals to deal, as long as they are aimed at securing such "equal respect" and "equal treatment."[276] "Equality and freedom are preconditions of the free market, and not commodities to be haggled over within it."[277] As if by poetic contrast, the opinion immediately goes on: "The same cannot be said of attorney's fees."[278] The Court dwelled little on the material reality of the lawyers' lives, instead immediately going on to characterize them as "business competitors who stand to profit financially from a lessening of competition in the boycotted market."[279] This account essentially characterized pay for personal labor as "financial profit," a result that is compelling neither on neoclassical economic theory nor on a broader view of human labor. Remember that the conduct specifically being sanctioned here was simply the collective refusal to work: the closest resemblance in perhaps all the price-fixing case law to classic labor concerted action. Indeed, that the lawyers had little else to leverage but their personal labor, which was therefore really all they owned, is evidenced by the fact that that is exactly what they did. Note that it was generally agreed that the fees were reasonable and a better public policy in terms of the defense of indigent clients provided by the lawyers.[280] There is an irony in the

274. Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990).

275. *Id.* at 426–36 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)).

276. *Id.* at 426.

277. *Id.*

278. *Id.*

279. *Id.* at 423.

280. Various court and bar committees that had been convened to study the issue, and likely

fact that the articulation of the apex of the neoclassical logic of price-fixing—which must ultimately ground itself in the idea that markets, defined by self-interested economic action, ought to be the basis for organizing all economic life—would seem to moralize about relatively low-income, low-status attorneys taking action in their economic self-interest.[281]

Secondly, there is a circularity in asserting that equality to which one is "constitutionally entitled"[282] is beyond the reach of the market, in order to answer the question to what is one constitutionally entitled. In fact, the only way to avoid that circularity is to acknowledge that, of course, we are actually discussing two different constitutional questions: whether the *object* of the boycott is constitutionally protected (in the case of *Claiborne Hardware*,[283] by the Fifth and Fourteenth Amendments) and whether the *boycott* is constitutionally protected (by the First Amendment). Certainly, race discrimination is prohibited by the Constitution,[284] while low attorneys' fees, and even poverty wages, are not. But is the rule really that an expressive boycott is entitled to First Amendment protection only if its *object* is constitutionally protected? Clearly, that is not the rule. Perhaps what the Court meant to say instead is that the object of a constitutionally protected boycott cannot be an affirmatively illegitimate one, as defined by antitrust. Note, though, that this too compares apples and oranges: seeking higher attorneys' fees (putting aside for the moment whether they should be characterized as financial profit or pay for labor) is not, as a purpose for action, illegal under the antitrust laws. The conduct *as a whole* must be analyzed under the antitrust laws to make a determination about legitimacy. Put aside even that issue and assume the lawyers' conduct did violate the Sherman Act. To rely upon that alone is simply to eviscerate the constitutional limits on antitrust when it comes to expressive boycotts. One can imagine, in other words, a rule that the

the political branches of the District of Columbia as well, endorsed the higher rates as a policy matter, citing in particular the impact upon the quality of representation. *Id.* at 444–46.

281. It is, perhaps, the smallest whiff of the double standard that the market framework seems to embody when plumbed deeply enough in any one place: freedom and self-interest for the haves, morality and self-denial for the have-nots.

282. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 426.

283. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

284. This is putting aside an issue that the opinion glosses over—that the Constitution does not *literally* guarantee the aims of the *Claiborne Hardware* boycotters, to the extent that the underlying wrongs did not involve state action. Presumably, the Court is relying upon the constitutional *principle* to distinguish between the aims of the two sets of boycotters. However, this issue further highlights the lack of clarity around what that principle is.

First Amendment only protects expressive boycotts that would not otherwise be violations of the antitrust laws. Perhaps all the foregoing complexities serve to avoid stating such a bold rule outright. We will never really know, because the Court dispensed with the *Claiborne Hardware* argument on the basis of what it painted as an extreme contrast between the objects of the two sets of concerted action (constitutionally hallowed on one end, illegal on the other end).

The Court also seemed to rely partially on its relatively offhand, closing statement that *Claiborne Hardware* does not protect *economic* boycotts, distinguishing those from the "peaceful, political activity" involved in the earlier case.[285] But this distinction is not tenable. Boycotts by definition involve an economic act: the collective refusal to buy or sell, in an attempt to influence some specific behavior of the one from whom one has been buying or selling. The two cases are not distinguishable in any salient respect as to their employment of this means. The other points of comparison are the objects of the means employed, and any other means used. As for the latter, the Court conceded that the lawyers engaged in various expressive activity that was political in nature. In the lawyers' case, the Court separated this conduct from the economic boycott;[286] yet, in the civil rights boycotters' case, the Court ran this conduct together with the concerted refusal to buy.[287] As for the purposes of the boycotts, the rule would then have to be that boycotts aimed at bringing economic benefits to the boycotters[288] are not entitled to First Amendment protection. Surely this cannot be the rule, since many of the benefits sought by the boycotters in *Claiborne Hardware* were also economic in nature. To be sure, those economic benefits were grounded in a claim for racial justice, but if that (or some other constitutionally protected value) is the requirement, then we are back at the circular argument just described.

The *Trial Lawyers* Court then turned to the court of appeal's reasoning that even if not protected wholesale, the lawyers' conduct was entitled to a softened rule of reason treatment due to the First Amendment implications.[289] The Court rejected this partially on the

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285. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 428.

286. *See, e.g.*, *id.* at 431 ("[T]his level of expression is not an element of the boycott.").

287. *Id.* at 428.

288. Emphasizing its economic aspects, the Court calls what the lawyers sought variously "attorneys fees," "special advantage," "economic[] advantage," "[financial] profit." *Id.* at 427–28. The idea of "special advantage," again, implies a counterfactual embedded with normative assumptions. *Id.*

289. *Id.* at 429.

basis of the same distinction between the economic and the political that it mentioned in its rejection of the *Claiborne Hardware* argument, but also on the basis of an analysis of the role of market power in price-fixing analysis.[290] The former, as just described, is based upon an artificial and selective separation of the expressive and the economic components of the concerted action, which in turn points up the artificiality of the distinction in the first place. The latter is based on a perhaps exaggerated solidity of the "rule of law" that the lawyers supposedly violated.[291]

Even most theorists who assume that antitrust should strictly implement economic theory would say that refusing to consider market power is not the best implementation of what that theory would prescribe.[292] The Court skirted this conclusion. It certainly relied upon what it characterized as the massive administrative inconvenience of analyzing market power. At the same time, it insisted that "the *per se* rules also reflect a longstanding judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'"[293] The analogy chosen was an odd one:

> The per se rules in antitrust law serve purposes analogous to per se restrictions upon, for example, stunt flying in congested areas or speeding . . . . Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.
>
> . . . Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.[294]

290. *Id.* at 430–36.

291. These points are also made in Justice Brennan's dissent, which endorses the court of appeal's application of the rule of reason, because that is appropriate in cases of expressive boycotts that have both First Amendment and antitrust implications. *Id.* at 437–52 (Brennan, J., dissenting). The dissent reasons that the per se rule is a presumption (almost by definition, some practices banned by it would pass the rule of reason), and that in a First Amendment case, the government cannot apply broad presumptions (that certain categories of speech are harmful) without engaging in a more particularized examination. *Id.* The dissent emphasizes the history of boycotts, and adduces facts specific to this boycott in particular, that show it or them to be in essence a political, rather than or in addition to an economic, tactic to change behavior. *Id.* It emphasizes that the expressive component of an expressive boycott is inseparable from the boycott activity, rejecting the compartmentalization of the majority's analysis (and rejecting the idea that the minimal expression inherent in every boycott is what makes it fall in the expressive category). *Id.*

292. *See, e.g.*, HYLTON, *supra* note 13, at 114 (suggesting that market power should be considered in analyzing antitrust violations).

293. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 433 (majority opinion).

294. *Id.*

But the point is that a group of competitors with insufficient market power don't pose a risk at all, not that the risk is potential but not actual, as it is with obviously and inherently dangerous activity (stunt flying in traffic). It is fairly evident that the lawyers lacked such "relational" market power: the market was characterized by a *single* large, organized buyer. The same idea—monopsony—motivated *Appalachian Coals* but had since been largely abandoned by the courts. The results of this imbalance of market power were depressed rates of pay that no one on the ground seriously thought were fair, sustainable, or good policy.

As the deregulation era marches ever forward, bringing with it the continued growth of nontraditional work, the rigidities and tensions of the approach to worker collective action embodied in *Trial Lawyers* are likely to become more dramatically exposed. If so, we will also be presented with the opportunity to consider that approach afresh.

CONCLUSION

My aim here has been to trace the history of an idea: the application of antitrust liability to worker collective action. The situation of today's independent contractor workers, who face antitrust liability for engaging in collective action aimed at improving wages and working conditions, starkly confronts us with this issue, and with the deeper questions about the relationship between market regulation and labor regulation that it raises.

The suggestion that I have tried to make is simply that we should reevaluate this rule, and that in doing so, we ought to engage in a truly new examination of the values implicated, freed from the default assumptions—largely accidents of history—that have mostly dogged discussions of the matter. Such an examination may include, to be sure, costs that might result from very strong labor combinations in certain markets. But it also must include the benefits that would result from recognizing and honoring the expression of human agency that worker collective action is, as well as the social, economic, and moral value of decent working conditions and decent wages for work.

Nothing in the core logic of modern antitrust law constrains courts or legislatures from such a reconsideration; in fact, the peculiar history of the default rule examined in this Article demands it. In future work, I will further explore the republican origins of the Sherman Act itself as a potential source for developing a set of considerations that might replace the default rule. To clear the space for that work, I hope to have shown that the apparent logical inevitability of the status quo, which would bring the heavy hammer of the Sherman Act down on worker collective action almost without exception, is illusory.

FISSURING AND THE FIRM EXEMPTION

SANJUKTA PAUL*

I
INTRODUCTION: ANTITRUST'S MONOPOLY ON LICENSING ECONOMIC COORDINATION

Workers beyond the bounds of employment and other small players are deprived of coordination rights under fissuring[1] in addition to being subject to the control of relatively large, powerful firms. But this absence of coordination rights is neither an inexorable force of nature as the economy changes, nor is it a free-standing legal fact. Rather, the conditions under which workers and small enterprises are deprived of coordination rights in these business arrangements are instead part of an *overall* allocation of coordination rights—an affirmative policy choice on the part of antitrust law—that *grants* coordination rights to some actors while denying them to others. Indeed, as I argue elsewhere, antitrust law's basic function is to license some forms of economic coordination and bar others.[2] Private parties may not decide by contract whether they will or will not coordinate: they must have public approval to do so. Furthermore, where and how antitrust law has historically drawn, and today does draw, the line between exempt and non-exempt economic arrangements is not in reality outsourced to any external referent: not property law, not corporate law, and not economics. In the 1970's, Robert Bork and others invoked the notion of "efficiency" internal to mainstream economics—thereby borrowing for a particular allocation of coordination rights its prestige—in order to bless unrelated and erroneous ideas about "productive efficiencies," i.e., the virtues of authoritarian hierarchy, which are embodied in the traditional firm and extended under firm fissuring. In truth, coordination rights are allocated on the basis of self-referential criteria internal to antitrust law.[3]

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1. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) (I use the term "fissuring" to refer to fissured *business* structures generally speaking, not only the workplace as such.). *See also* Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOYOLA UNIV. CHICAGO L. J. 969 (2016).

2. Sanjukta M. Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. (forthcoming 2020).

3. *Id.*

This paper now applies that framework to first explain how "lead firms"—as David Weil calls them—in fissured business arrangements take advantage of the expansion of antitrust permission to engage in economic coordination in the form of *control* beyond the firm, as well as the contraction of antitrust permission to engage in coordination in the form of *cooperation* beyond the firm. In the first sense, lead firms—franchisors, firms that make use of individual or small independent contractors, and now many tech platforms—are able to control smaller actors in their orbits without the censure of antitrust law. In the second sense, these firms are protected from any countervailing power that these smaller actors might bring to bear upon their relationships with them. This paper then goes on to show how that lead firms' coordination exceeds or stretches regions of both the deep grammar (in the sense of deeply held assumptions that aren't necessarily expressly articulated) and the surface grammar (in the sense of expressly articulated doctrine) of antitrust law. Moreover, the bar on smaller actors' coordination itself internalizes what I call "the firm exemption," as I show through a close look at the Supreme Court's decision in *FTC v. Superior Court Trial Lawyers Ass'n*, which is perhaps the strongest articulation of that rule.

The price coordination that takes place within a firm is typically—if one digs far enough—putatively justified by the property rights of investors, even though it is not logically derivable from them. Imagine a firm that sells a service: playing the organ for special events, for example. Organists who band together to engage in price coordination or market allocation are denied such coordination rights by antitrust, as indeed a recent prosecution by the FTC confirmed.[4] On the other hand, if investors jointly create a corporation that then hires the same organists, their price-setting (or internal market allocation) activity is deemed untouchable by antitrust. Notably, this is currently also true even if the firm only *contracts* with the organists, even though that arrangement undercuts all the available reasons for the firm exemption in the first place.

Many fissured business arrangements take this disjunction further. Imagine if the same corporation presents itself as a tech platform selling the use of an app to both organists and their customers. In the current regulatory environment, it will be able to engage in price coordination beyond firm boundaries: setting the price of a product it does not even purport to sell, namely organist services. At the same time, the organists themselves are barred from joint price-setting or joint bargaining; they are effectively forced to pay the corporation for use of the license to engage in price coordination that it receives free of charge from the state.

Ride-hailing tech firms like Uber and Lyft, fast-food franchisors, as well as firms that rely primarily upon services provided by independent contractors, all engage in price coordination beyond firm boundaries. Meanwhile, the law prohibits the workers and small enterprises in the orbits of such firms from

4. *See* Am. Guild of Organists, F.T.C. 151 0159 (2017).

engaging in economic coordination, either directly,[5] or by selectively and inconsistently ascribing firm status as between antitrust and other areas of law, notably labor law. In each of these respects, antitrust's affirmative edicts, its omissions, and its latent and softer influences upon policy all combine to extend its underlying express preference for allocating coordination rights to *existing* concentrations of economic power—even as the internal justifications for that preference comes increasingly undone.

II
THE EXPANSION OF COORDINATION RIGHTS IN FISSURED ARRANGEMENTS

Antitrust's fundamental function is to allocate economic coordination rights, demarcating spaces of competition and coordination in economic life.[6] Moreover, the firm exemption creates the paradigm space for coordination chosen by today's antitrust law.[7] Applying this framework to the phenomenon of fissuring, and its legal treatment, we see more clearly both the tensions in the firm exemption and how this exemption has interacted with intentional business decisions aimed at expanding it. The dynamic that has driven this expansion of coordination rights involves four components: (1) developments in antitrust doctrine, notably in the area of vertical restraints but also the single entity doctrine, that have liberalized coordination rights centered in large, powerful firms; (2) the tacit expansion of the deeper-rooted legal concept of the firm and its boundaries within antitrust, i.e., the firm exemption; (3) intentional business practices, such as the replacement of employees with independent contractors, franchising, and "platform" arrangements like Uber's, that have sought to legitimize themselves in the eyes of institutional actors and the public, in turn reinforcing both (1) and (2); and (4) arguments associated with law and economics scholarship about what sorts of business arrangements—and limits upon competition—are "efficiency-enhancing."

Policy debates sometimes proceed as if antitrust law is, or should be, simply an implementation of (4). But in fact, antitrust law tacitly relies upon legal categories at the level of either surface or deep grammar, even when it purports to simply implement economic theory.[8] We see this in the context of fissuring in terms of the reliance upon legal categories furnished by the law of vertical restraints and at a deeper level by the firm exemption. Moreover, it is not even logically possible for antitrust to simply implement the prescriptions of economic theory, given that some prior normative limitations upon competition are both necessary and not themselves derivable from neutral principles. Instead, the administration of competition policy entails initial political and moral choices.

5. Under its current interpretation by the courts, Section 1 of the Sherman Act bars much inter-firm horizontal coordination, including price coordination. *See* 15 USC §1 (1890); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

6. Paul, *supra* note 2.

7. *Id.*

8. Paul, *supra* note 2.

The doctrinal mechanisms of the expanded permission to exert control beyond the firm—what I am calling the legal surface grammar—are the law of vertical restraints and to some extent the single entity doctrine, both of which have been made significantly more permissive since the late 1970's. Meanwhile, the coordination rights granted to small players have been narrowed through an increasingly rigid norm against horizontal coordination beyond firm boundaries.[9]

Yet despite these superficially favorable developments from the perspective of firms experimenting with new business arrangements, a deeper disconnect plagues their antitrust treatment. In today's fissured business arrangements, even the relatively thin putative justifications for this asymmetric allocation of coordination rights, centered in antitrust's firm exemption, have come unmoored from actual conditions. The firm exemption and its expansion in the Borkian revolution are grounded ultimately in arguments about the productive efficiencies that flow from managerial hierarchies and enterprise integration.[10] But these arguments about economies of scale, and about the efficiencies of managerial hierarchies, are centered largely upon the manufacturing context, whereas many of today's fissured business arrangements involve retail or services.[11] Even more, as the rest of this Part shows, insofar as fissured business arrangements are precisely defined by reorganizing intra-firm relations as inter-firm ones, they continue to claim the benefits of antitrust's firm exemption even as—according to their own self-representations—the conditions of its applicability (assuming, *arguendo*, their validity) no longer apply.

A. Franchising

Franchising typifies the dynamic that has driven the expansion of large firms' coordination rights under conditions of business fissuring: an iterative interaction between shifting legal norms and affirmative decisions about structuring business arrangements. Franchisors succeeded in normalizing their business model in the eyes of the public, institutional actors, and the decisional law, relying to a large extent upon arguments that the business arrangement is efficiency-enhancing, ultimately benefiting consumers.[12] However, aspects of the standard franchising

9. *Infra,* part III. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (holding minimum fee schedules for lawyers violated § 1 of the Sherman Act); Nat'l Soc'y of Prof'l Eng'rs v. United States., 435 U.S. 679 (1978) (finding Society's prevention of competitive bidding by members was per se illegal); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (ruling against an agreement among independent trial lawyers to withhold services until compensation for appointments was increased).

10. Paul, *supra* note 2.

11. The literature on operational efficiencies to be realized through concentration and managerial hierarchies was largely based on the manufacturing context. *See, e.g.*, FREDERIC M. SCHERER ET AL., THE ECONOMICS OF MULTI-PLANT OPERATION: AN INTERNATIONAL COMPARISONS STUDY (1975); David B. Audretsch, *Corporate Form and Spatial Form, in* THE OXFORD HANDBOOK OF ECONOMIC GEOGRAPHY 333 (Gordon L. Clark et al. eds., 2000); F.M. Scherer, *The Posnerian Harvest: Separating Wheat from Chaff,* 86 YALE. L.J. 974 (1977).

12. *See* Brian Callaci, *Vertical Power and the Creation of a Fissured Workplace: The Case of Franchising*, 2, 11 (U. Mass. Amherst, Dept. Econ., Working Paper, Sep. 5, 2018) (finding economists and economic historians have largely emphasized franchising as firms' response to "exogenous

business model still outstrip the now-permissive vertical restraints cases, and reveal tensions in the reigning consumer welfare standard.

Overall, by confining antitrust-immunized control relations largely to the space within the firm—and to a few more democratic arrangements outside the firm—mid-century antitrust had historically placed some limits on the unreciprocal control exerted by franchisors over franchisees. Mid-century antitrust took a dim view of control imposed through vertical, contractual restraints, for example by franchisors upon franchisees. Importantly, this view was motivated more by a norm of non-domination than by an idea of realizing ideal competitive prices, or of attaining the lowest possible consumer prices.[13] The Borkian turn in antitrust law that took hold in the 1970s worked to remove these limits on vertical restraints.[14] By doing so, it demonstrated that its fundamental preference for allocating coordination rights is not only *within* firms, but also *by* large, powerful firms (at least so long as that coordination too is in the form of control over less-powerful actors). Around the same period, the Borkian turn expanded antitrust law's concept of the firm itself, to capture parent-subsidiary relationships and other corporate groups, and thus extended antitrust immunity to any coordination between separate corporations within these relationships.[15] The single entity doctrine, as it is called, expressly inscribes the preference for economic coordination in the form of control, preferably grounded in concentrated ownership interests.[16] Franchisors have used and relied upon both of these changes in antitrust law to justify their control over franchisees and at times, franchisees' employees.

Fast-food franchisors coordinate their franchising families various ways. They exert control over key elements of franchisees' supply, labor, and product decisions. Notably, they even exert control over the prices of the products sold

technological changes" by "adopt[ing] more efficient organizational techniques") and 11. *See also, e.g.*, ROBERT BORK, THE ANTITRUST PARADOX 108 (1978) (arguing that vertical restraints imposed by contract are efficient and benefit consumers).

13. *See, e.g.*, Simpson v. Union Oil Co. of Cal., 377 U.S. 13 (1964) (finding vertically imposed maximum prices by oil company on gas station re-sellers was illegal, where the Court's reasoning is based as much upon the freedom of the small dealers, as it is on promoting the competitive price); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (holding that geographical and other restrictions upon franchisees' sale of goods, once franchisees had taken title, violated Section 1). *See also* United States. v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951) (holding vertical restrictions on gas station operators by the oil company were impermissible, and reasoning that gas station operators were tenants, not employees, and thus principles of subordination inherent in hierarchical vertical coordination were inappropriate). *See also* Marshall Steinbaum, *Antitrust, the Gig Economy and Labor Market Power*, 82 LAW & CONTEMP. PROBS. No. 3, at 45 2019.

14. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (expanding the permission of geographical market allocation restraints placed by franchisors upon franchisees); State Oil Co. v. Khan, 522 U.S. 3 (1997) (legalizing maximum price restraints by powerful firms upon small re-sellers); Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (permitting minimum price restraints upon re-sellers).

15. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984) (holding parent company and subsidiary incapable of conspiring with each other for purposes of § 1 of the Sherman Act). *See also* Paul, *supra* note 2.

16. *Id.*; Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191–92, 200-01 (2010).

by franchisee firms, typically in the direction of driving them down. One McDonald's franchisee noted that "participation in deals and pricing is voluntary only in theory," and that on an occasion when its coffee price was a nickel over the franchisor-advertised sale price, "the head of the McDonald's region came in and he said: 'You are over. You can't do this.'"[17] Some other franchisors even more straightforwardly set the prices charged by franchisee firms; for example, janitorial franchisors often directly bargain contracts with customers on franchisees' behalf.[18] Burger King, like McDonald's, exerts the same downward pressure on its franchisees' prices through its "Value Menu."[19]

Franchisors have also placed limits upon worker mobility within franchise "families" through so-called no-poaching provisions placed into franchisee contracts. In the past, franchisors have successfully claimed immunity for these controls under *Copperweld*, or the single entity doctrine, thereby claiming that franchisees are effectively extensions of the franchisor itself.[20] Such provisions have recently come in for new criticism, and have been challenged by workers in a number of pending cases.[21] In the current disputes, some franchisors have again raised the single entity defense, but thus far a judge has not ratified it. To expressly ratify this theory would be to make explicit the selective application of firm status to franchise "families" as between antitrust and labor law. Franchisees themselves are denied coordination rights by antitrust law,[22] further cementing franchisors' power. Meanwhile, franchisees' *employees*' fight for coordination rights, for example in the form of unionization, has also been frustrated by franchisors' position that they are completely separate from franchisees, which would require workers to separately unionize numerous small franchisees. In short, franchisors have thus far been permitted to disclaim affiliation with

17. Jana Kasperkevic, *McDonald's franchise owners: what they really think about the fight for $15*, THE GUARDIAN, Apr. 14, 2015.

18. WEIL, *supra* note 1.

19. Burger King Corp. v. E-Z Eating 8th Corp., No. 07-20181, 2008 WL 11330723 (S.D. Fla., May 22, 2008) (documenting an order on motion for summary judgment in lawsuit by franchisor Burger King Corporation against franchisees for breach of contract, on the ground that they shut down prior to the contract's expiration. Franchisees counter-claimed that they were operating under "extreme losses" due to franchisor's imposition of the "Value Menu"). *See also* Burger King Corp. v. E-Z Eating, 572 F.3d 1306 (11th Cir. 2009) (upholding summary judgment for Burger King Corporation on the ground that its imposition of the Value Menu on franchisors did not violate the implied covenant of good faith and fair dealing).

20. *See* Williams v. I.B. Fischer Nevada, 999 F.2d 445 (9th Cir. 1993) (dismissing former employee's claim that "no-switching" provision in franchising agreement violated Sherman Act, on the basis that franchisor and franchisee cannot conspire under *Copperweld*).

21. A number of plaintiffs have recently challenged coordination within franchise families that limits the hiring of former employees. *See, e.g.*, DesLandes v. McDonald's USA, LLC, No. 17-cv-04857, 2018 WL 3105955 (N.D. Ill. June 25, 2018); Ion v. Pizza Hut, LLC., No. 4:17-cv-00788 (E.D. Tex., dismissed July 16, 2018); Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786 (S.D. Ill. 2018). Meanwhile, franchisors continue to disclaim single entity status for purpose of labor regulation, whether of wages or collective bargaining. *See, e.g.*, Salazar v. McDonald's Corp., No. 14-CV-02096-RS, 2016 US Dist. LEXIS 10876 (N.D. Cal. Aug. 16, 2016) (arising under the California Labor Code); McDonald's USA, LLC, 363 N.L.R.B. 144 (2016) (dealing with a complaint arising under the National Labor Relations Act).

22. The legal basis for denying franchisees coordination rights is discussed in Part III, infra.

franchisee firms altogether under labor law, even as they frequently claim that franchisees are extensions of the firm under antitrust, in both cases cementing their exclusive coordination rights in the overall arrangement.

The pending no-poach cases also illustrate the operation of the law of vertical restraints and franchisors' attempts to stretch its limits. To see this, note first that even franchisors' control over franchisee product pricing decisions ought to be uncertain territory. As noted, franchisors exert control over consumer prices charged by franchisees, in addition to aspects of their dealings with suppliers and workers. Even under the existing law's profound preference for vertical control over horizontal coordination, franchisors' control over franchisee pricing—which in turn has direct, negative implications for franchisees' labor relationships and workers' wages[23]—does not obviously fit within the parameters of legal vertical restraints. The paradigm cases, from *GTE Sylvania* (geographic market allocation) to *Khan* (maximum prices) to *Leegin* (minimum prices), all deal with *re-sale* of a product sold by the actor seeking to impose the restraint. Franchisors do not sell hamburgers to franchisees, who then re-sell them. This problem is not necessarily resolved by extending the principles of these cases to intangible property—such as the franchise brand—which are covered.[24]

There is, in any event, no credible argument for extending these precedents to *labor-facing* restraints imposed by franchisors upon franchisees. Franchisors do not hire out workers to franchisees. No proprietary technology licensed by franchisors to franchisees is implicated in those relationships. Yet the Department of Justice chose to file a brief in these pending cases effectively supporting franchisors' position and suggesting that no-poach agreements limiting mobility among some of the lowest-wage, most vulnerable workers have legally cognizable benefits.[25] This is notable in part because it dramatizes the tensions in antitrust law's current governing normative framework. The DOJ brief purports to treat labor market restraints symmetrically with product market restraints. But this is belied by their own arguments about the putative countervailing efficiencies of no-poach agreements, which are framed purely in terms of *consumer* benefits, namely lower prices. This points up a basic tension within the existing legal framework, which simultaneously claims to treat worker welfare equally with consumer welfare, but which only admits evidence of countervailing benefits to *consumers*, primarily price benefits, when evaluating forms of permitted coordination. In short, the DOJ's briefs supporting

23. *See, e.g.*, Lydia DePillis, *McDonald's franchisee says the company told her "just pay your employees less*," WASH. POST, Aug. 4, 2014.

24. The Department of Justice's *Antitrust Guidelines for the Licensing of Intellectual Property* do extend the principles of resale price maintenance to intangible technologies, but even if hamburgers could be said to qualify as incorporating a "licensed technology," these guidelines refer to price *maintenance* and not maximum prices required by franchisors. DOJ & FTC, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 5.2 (Jan. 12, 2017), https://www.justice.gov/atr/IPguidelines/download [https://perma.cc/4T6Y-YBVM].

25. Corrected Statement of Interest of the United States of America, Harris v. CJ Star, LLC, No. 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019), ECF No. 38.

franchisors' position in the pending cases brought by fast food workers to invalidate employee no-poach agreements imposed by franchisors upon franchisees stretch existing tendencies in the law to favor control by powerful firms, which is presumed to confer consumer benefits.

In effect, the DOJ's brief seeks to enshrine in the official, surface grammar of the law what has heretofore been only a tacit expansion at the level of its deeper grammar, where the firm exemption partially resides. That tacit expansion of the borders of the firm exemption has been achieved through decades of creating facts on the ground by naturalizing franchisors' business model, and through economic arguments that these arrangements are efficiency-enhancing because of lower consumer prices.

B. Ride-Hailing Firms

In his account of the political economy of franchising in its critical decades of regulatory change, Brian Callaci has noted that franchisors' endeavor to "persuade regulators, legislators, and courts that their business form was sui generis and should not be regulated according to existing conceptions" will "be familiar to observers of twenty-first century gig economy firms."[26] The ride-hailing apps represent the forward prow of "platform" arrangements that are, by all accounts, popping up throughout the service sector. These firms set the price of rides. They also contend that that those rides are sold by independent businesses—drivers—not by the firms. Therefore, these firms facilitate horizontal price coordination among sellers beyond firm boundaries, leading at least one district court judge to recognize a cognizable claim for a per se violation of Section 1 of the Sherman Act.[27] Overall, the Uber problem is a more brazen version of the franchising problem, and it creates a more obvious conflict under existing antitrust law. Still, it is basically continuous with franchising—a fact that could either lead us to revisit the asymmetric allocation of coordination rights in franchising, or to bless the even more starkly asymmetric allocation of coordination rights in the ride-hailing sector. The current antitrust authorities have signaled their preference for the latter. Meanwhile, the antitrust implications of platform labor/services arrangements remain far less fully explored than, for example, their labor and employment law implications.[28]

26. Brian Callaci, *Vertical Dis-Integration and the Creation of a New Business Form: Franchising 1960-1980*, 10 (Washington Center for Equitable Growth Working Paper Series, 2018).

27. *See, e.g.*, Meyer v. Kalanick, No. 15-9796, 174 F. Supp. 3d 817 (S.D.N.Y. 2016). Uber's subsequent successful motion to compel arbitration in this dispute with riders prevents us from seeing this legal contest unfold.

28. A few exceptions include Marshall Steinbaum, *supra* note 13, Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINN. L. REV. 1323 (2016); Sanjukta Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and its Implication*, BJELL 2017; Mark Anderson & Max Huffman, *The Sharing Economy Meets the Sherman Act: Is Uber a Firm, a Cartel, or Something in Between?*, 2017 COLUM. BUS. L. REV. 859 (2017). Huffman and Anderson acknowledge that Uber has an antitrust problem. Without taking a definitive position on whether Uber would be subject to the per se rule or the rule of reason under current law, they argue that its business model ought to be permitted as a policy matter, and propose changes to antitrust to accommodate it: namely a liberalization of the

What public debate there has been on the antitrust implications of the ride-hailing firms' pricing practices has focused to a large extent on algorithmic pricing.[29] Algorithmic pricing is certainly an interesting and important topic in itself, but the immediate antitrust questions relating to Uber and similar firms do not stem from the fact that they set prices for ride services through an algorithm. Rather, they stem from the fact that Uber sets prices for ride services in the first place. Similarly, there are a slew of articles on the "efficiencies" brought about by Uber. Deeper normative questions aside for the moment, these are not in themselves legal justifications for Uber's coordination; they must fit within existing legal categories that, in effect, condition the justificatory power of such putative benefits. This conditioning role for legal categories is non-optional: arguments about efficiency are not free-standing but ultimately themselves presuppose legal categories—notably, the firm exemption—for organizing coordination.

These firms have even more obvious problems than franchising in the surface structure of existing antitrust law. A ride-hailing tech platform cannot straightforwardly argue that its relationship to its drivers constitutes a single entity for antitrust purposes, as this is inconsistent with its claim that drivers are its consumers, and is also inconsistent with its defense in employment cases alleging that drivers are really employees. In the employee misclassification cases, these firms argue they lack control over drivers and engage in little or no top-down coordination.[30] Since ownership is already dispersed in terms of the primary relevant physical capital (vehicles), top-down coordination simply *is* the only other factor the firms have available to argue under *Copperweld*. Uber's ability to immunize its coordination under the *Copperweld* line of cases is doubtful; its ability to do so and to maintain its defense in the employee misclassification cases is virtually impossible.

Moreover, Uber and similar firms are unlikely to succeed in showing that their price coordination constitutes a permissible vertical restraint if current law is interpreted fairly. The paradigm cases that liberalized the law of vertical restraints never immunized price restraints *as far removed* from the transaction that Uber claims to have with its drivers. Uber and similar firms say that they license the use of software to drivers, which facilitates drivers' transactions with riders. But the price restraints Uber places on drivers relate to the *rides themselves*. As Judge Rakoff pointed out in rejecting Uber's argument of

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Copperweld defense that would allow for the consideration of degrees of integration and risk-sharing, rather than a binary decision on single entity status. To the extent that they argue that rule of reason treatment is not foreclosed for Uber, however, Anderson and Huffman's position also generally supports drivers' own coordination, although they do not directly address it. Other commentators, many of them economists, also argue that Uber confers consumer benefits without making it clear what the legal relevance of those benefits is, given the nature of Uber's business model. *See, e.g.*, Judd Cramer & Alan Krueger, *Disruptive Change in the Taxi Business: The Case of Uber*, 106 AM. ECON. REV. 177 (2016).

29. *See, e.g.*, Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINN. L. REV. 1323 (2016).

30. *See, e.g.*, O'Connor v. Uber Tech.'s., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

verticality and denying its motion to dismiss the Section 1 lawsuit brought against it by consumers, drivers are not re-selling ride services sold to them by Uber, which is the classic re-sale justifying vertical restraints under existing case-law.[31] *GTE Sylvania* involved the re-sale of TV's, where the TV market was the subject of the restraint at issue. *State Oil Co. v. Khan* involved the re-sale of gas and oil, where the prices of those commodities were the subject of the restraint at issue. *Leegin* involved the re-sale of clothing, whose prices were the subject of the restraint at issue. None involved price restraints on commodities (here, ride services) that were themselves unrelated to the commodity (here, use of the app) sold by the restraining firm (Uber) to the purchaser-firm (drivers). It is true that both maximum and minimum price restraints can now relate to an intangible product, like the app, but that does not change the structure of the transactions and relationships at issue: drivers are not re-selling the use of the app to riders.[32] Nor can it be plausibly argued that what they are selling to riders is a "product incorporating the licensed technology."[33] And indeed, the few law review articles that do consider the Section 1 implications of Uber's pricing practices in any detail do not take seriously the possibility that Uber's price coordination constitutes a permissible vertical restraint, although they may advocate other legal reforms that would permit it.[34]

The problem here is that the many efficiencies claimed for Uber are not legally salient unless Uber shows that its pricing practices fall within the existing law of vertical restraints. Putting that problem aside for the moment, the efficiencies claimed for Uber fall roughly into two categories: (1) the app works well, reducing transaction costs of driver-rider bargains; or, less frequently articulated, (2) Uber avoids the responsibilities of employment and the business risks of vehicle ownership, thereby reducing costs.[35] The second of these contentions is transparently question-begging.

As to (1), let's indeed assume that the app works very well in achieving the functional goal of matching drivers and riders in time and space, which is the essence of the claim. The problem is that this is neither here nor there with respect to the legal question. The issue is not whether the app is a great invention. There have been a great many great inventions; and while there may at times be something *specific* about a particular invention that forms the basis for a particular legal right, the greatness of an invention does not itself create a generic entitlement to selectively preferential legal treatment. The claim would have to

31. *See* Ord. on Motion to Dismiss, Meyer, 174 F. Supp. 3d 817.

32. Note that this argument does not necessarily imply acceptance of the "hub and spoke theory" endorsed by Judge Rakoff in his order denying Uber's motion to dismiss. The hub and spoke theory is an exception to the applicability of the rule of reason for vertical restraints, but a) implies that the vertical arrangement comes within the existing principles justifying the rule of reason in the first place, and b) requires agreement among the "spokes" (here, drivers), which is unlikely to be met.

33. ANTITRUST GUIDELINES, *supra* note 24.

34. Mark Anderson & Max Huffman, *The Sharing Economy Meets the Sherman Act: Is Uber a Firm, a Cartel, or Something in Between?*, 2017 COLUM. BUS. L. REV. 859 (2017).

35. Anderson & Huffman, *supra* note 34.

be that the price coordination activity *itself* generates operational efficiencies. But there is no argument for that. The app could match riders in space and time without setting prices, and that would exhaust all the efficiencies have been claimed for it.[36]

The price coordination activity performed by the apps might be valuable for a completely different reason, namely that it performs a market stabilization function. Market stabilization largely isn't recognized as a good in the current antitrust framework, at least not officially. And of course, a drivers' union would perform market stabilization functions as well, as indeed unions, trade associations, and other organizations can do more generally.[37] But again, this can't be the reason to permit Uber's price coordination without also justifying Uber drivers' collective bargaining, or for that matter, without also justifying a cartel of drivers who own their own vehicles and simply share an app that performs a price coordination function. This is a basic and deep tension in the law and in antitrust thinking, because on some level antitrust actors do seem to acknowledge the need for market stabilization when thinking about some specific cases, but the official principles do not. This leads then to the selective application of antitrust rules in favor of large, powerful actors' coordination and against small players'. It creeps in even to Anderson and Huffman's argument, as they acknowledge that price coordination is not relevant to the official efficiency defenses, but that drivers are unlikely to participate without it.[38]

Related to the market stabilization issue, Anderson and Huffman at times describe the resultant efficiencies in terms of Uber's enhanced business revenue, which in turn passes benefits on to consumers.[39] Not only is there no good principle, however, to define enhanced business revenue as a social benefit to be weighed in favor of coordination, while refusing to consider the benefits of reasonable wages in the same manner, but also the firms foreclose the use of that argument by also defining drivers as themselves businesses. By this logic, anything that drivers do to enhance *their* business revenue is also an efficiency to be weighed against any losses from coordination.

Finally, Uber has a better chance of avoiding per se treatment under the principles articulated in a minor strain of Section 1 case law that is more tolerant to horizontal coordination beyond firm boundaries—but it has a better chance precisely to the extent that drivers' own coordination would *also* not be subject to the per se rule under them. For example, *Appalachian Coals* would directly militate in favor of permitting drivers' coordination because it straightforwardly acknowledges market stabilization in the face of destructive competition as a legitimate criterion for antitrust decision-making.[40]

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36. To their credit, Anderson and Huffman acknowledge this point.
37. *See, e.g.*, FREDERIC S. LEE, MICROECONOMICS: A HETERODOX APPROACH (2017).
38. Anderson & Huffman, *supra* note 34.
39. *Id.*
40. *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

However, if the DOJ's position in the pending franchising no-poach cases succeeds in expanding the law of vertical restraints to become even more permissive, this would have favorable implications for Uber's ability to argue that the price restraints it places on drivers are in fact permissible vertical restraints. It would also even further crystallize the preference for economic coordination imposed by a large, powerful actor—even when functionally indistinguishable from voluntary coordination by many smaller actors—on the part of the current antitrust paradigm.

C. Independent Contractor Firms

Finally, these anomalies in antitrust treatment of various forms of coordination extend to an older form of business fissuring: namely firms that rely principally upon independent contractors, and which then sell a commodity that in substantial part comprises those services. These firms' right to engage in price coordination has not been seriously questioned under antitrust, though their structure departs from the conventional justification for the firm exemption.

Antitrust's firm exemption relies ultimately upon an internal organization based on command rather than contract.[41] This command is derived from the relationship of agency—in other words, employment. And indeed, under the positive law, the very thing that defined an independent contractor is that she's not an agent of the firm.[42] But without her agency, what "firm-ness" is left? Even after recasting almost all of its prior employment relationships as commercial contracts, such a firm retains the privileges of the firm exemption.

To take an example, many trucking firms in the United States today fit the template I just gave: they buy truck-driving services from individuals whom they characterize as independent contractors, and they sell trucking services to their customers. They typically have a few administrative employees, but their core product is not only made by independent contractors, it *is* the very service performed by those individuals. Other than obtaining contracts with customers and bargaining those contracts, such a firm usually does not do much else. It has no other production facilities, and according to its own self-characterization, it does not extensively monitor drivers' provision of services.

Now consider the antitrust treatment of such a firm. The trucking firm gets to set the prices it charges its customers for trucking services. That seems natural enough. But is it? Functionally, this is a form of price coordination: the firm is setting the prices for the services performed by all, say, twenty drivers. Imagine that in this particular market for trucking services, there are four other firms of twenty drivers each. Now suppose that instead of working for the first firm, these same twenty drivers begin working directly for customers, but form a bargaining unit for the purpose of negotiating their contracts with customers. They agree internally upon rates and they do not deviate from rates set by their designated

41. *See* Paul, *supra* note 2.

42. *See, e.g.*, FedEx Home Delivery v. Nat'l Labor Relations Bd., 563 F.3d 492 (D.C. Cir. 2009).

bargaining agent. Without changing much, if anything at all, about the tangible economic activity that is taking place, we have moved from a situation in which the right to coordinate prices is uncontested for antitrust purposes, to one that courts and federal competition authorities would undoubtedly label a "garden variety price-fixing ring."[43] Note that between these examples, there is no difference in effects on third parties, whether they are customers, suppliers or rival firms or associations. Indeed, Bork himself acknowledged that there is no such difference in market effects between firms and cartels, until one brings in the putative efficiencies and thus consumer benefits of the firm's internal agency relationships.[44] Having removed those agency relationships from the organization of the production or service in question by transforming them into contracts, however, the justification for favorable antitrust treatment also disappears.

Two responses are possible: (1) that the trucking firm contributes benefits from integration that are not sufficient for the employment relationship, but that are sufficient to justify preferential antitrust treatment; and (2) that the truck drivers, if they wish to avail themselves of that preferential treatment, have the same legal right to achieve this beneficial integration as the owner of the trucking firm does. As to objection (1), it is not at all clear that this needle can be threaded. Many trucking firms in fact contribute very little functional integration other than bargaining customer contracts. To the extent they do more, they very likely are misclassifying drivers as contractors. There is also no basis not to consider the many other benefits that the truck drivers might claim for their economic arrangement, not least of them the ability to earn a reasonable rate and stabilize the market, which would tend to have effects upon operations as well. The binary distinction between bargaining integration and productive integration is moreover both false and self-fulfilling: if drivers were able to form a bargaining unit, they very well might use the increased revenue to make upgrades and investments, just as the firm would—perhaps even in a way that was integrated across the group.

As to objection (2), simple incorporation will not protect the truck drivers. An incorporated firm of truck drivers who own their own trucks—just as they do in the independent contractor-based trucking firm—and who rotate bargaining responsibilities with customers would not be immunized from Section 1 liability the way that the trucking firm automatically is.[45] A decision-maker is likely to find that this arrangement is simply an incorporated cartel. In that event, the drivers might not even have the opportunity to prove up benefits from coordination, because the per se rule would likely apply. Yet if the same drivers subordinate themselves to an owner and a manager, precisely the same price coordination in precisely the same market is automatically immunized. This

43. ROBERT BORK, THE ANTITRUST PARADOX 108 (1978).

44. *See, e.g., id.* at 264 ("Both internal growth and horizontal merger eliminate rivalry, and they do so more permanently than do cartel arrangements. Prices are fixed and markets allocated within firms.").

45. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191–92, 200-01 (2010).

simple example makes the point stark, because it is very unlikely that a court would ever look for *more* functional integration in the case where there is a separate owner and a manager—even if they are not doing anything particularly useful or socially productive. Thanks to the firm exemption, together with the per se rule against horizontal coordination beyond firm boundaries, our system paradoxically rewards an arrangement in which there is a boss to profit from the drivers' labor, while denying the individuals who perform the work the privilege to coordinate prices.

III

THE CONTRACTION OF COORDINATION RIGHTS IN FISSURED ARRANGEMENTS

In each of the fissured business arrangements discussed above, the expansion of coordination rights beyond the traditional boundaries of the firm exemption for the more powerful actor is accompanied by a contraction of coordination rights for the less powerful ones in its orbit. Antitrust denies to franchisees any rights to engage in economic coordination, either as to their own price-setting or as to their bargains with the powerful franchisor firms. Franchisors' control over franchisees is thus underwritten by not one but two antitrust rules: the allocation of coordination rights to franchisors, and the denial of coordination rights to franchisees. Uber and similar firms, meanwhile, insist that their drivers have no right to coordinate under antitrust; and thus far, the law has denied them that right. Indeed, Uber has argued that the per se rule bars drivers' coordination and that a local ordinance authorizing collective bargaining among drivers is therefore subject to federal preemption by the Sherman Act.[46] And independent contractor truck drivers have been sued by trucking firms when they engaged in concerted action to improve their positions; the law has also largely assumed that they lack coordination rights.[47]

If franchisees were able to bring countervailing power to bear in their bargains with franchisors, the result might not only be an ability to bargain more meaningfully with their own employees,[48] but also bargaining over joint responsibility for those employment relationships themselves. Uber drivers who formed a union and bargained their contracts with Uber might, building on these connections, put themselves in a position to launch an app of their own. Assuming it could pass muster under an unreformed firm exemption in the first place,[49] this possibility has little practical chance of coming organically into fruition without, at a minimum, the initial integration created by a bargaining

46. Chamber of Commerce of the United States v. City of Seattle, 890 F.3d 769 (9th Cir. 2018).

47. Paul, *supra* note 1.

48. *See, e.g.*, Lydia DePillis, *McDonald's Franchisee Says the Company Just Told her "Just Pay Your Employees Less,"* WASH. POST (Aug. 4, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/08/04/first-person-kathryn-slater-carter-the-franchise-owner-taking-on-mcdonalds/?noredirect=on&utm_term=.85a5d857adca [https://outline.com/UBtDhH].

49. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191–92, 200-01 (2010). *See also* Paul, *supra* note 2.

agency or a union.[50] This would be the case even putting aside the structural disadvantages a driver-owned business would continue to face in competition with the platforms, given the latter's relationships to the financial markets.[51] Similar possibilities attend organizing by independent contractor workers.

Fed Trade Comm'n v. Superior Ct. Trial Lawyers Ass'n is the Court's strongest articulation of the rule against horizontal coordination beyond firm boundaries, and it clearly articulates antitrust's current preferred and disfavored forms of coordination. In particular, the opinion shows that the antitrust norms that the Court applied internalize deference to coordination within firms, singling out coordination among individual or small service-providers' coordination for censure while ignoring other forms of coordination. Like the current antitrust paradigm more generally, the Court *selectively* applied a putatively general norm in favor of competition and against coordination. The Court also then *extended* antitrust's conventional allocation of coordination rights—privileging large, powerful business firms as the primary mechanism of market coordination—into the First Amendment law of expressive boycotts itself, relying upon that particular antitrust logic in order to decide the boycotts that are and are not protected by the First Amendment.

A. The Court's Antitrust Analysis

Trial Lawyers applied the per se rule against horizontal price coordination beyond firm boundaries to concerted action by individual service-providers and micro-enterprises.[52] Section 1 of the Sherman Act prohibits contracts and conspiracies "in restraint of trade."[53] Judicial construction of Section 1 prohibits agreements that *unreasonably* restrain trade, and pronounces certain sorts of agreements unreasonable per se. Once so categorized, such agreements need not, indeed cannot, be re-examined for reasonability by future courts. Horizontal price coordination beyond firm boundaries, otherwise known as price-fixing, is currently considered per se unreasonable. Each of the decision-makers in the *Trial Lawyers* case, from the ALJ to the Supreme Court, agreed that the lawyers' boycott was a "classic restraint of trade within the meaning of Section 1 of the Sherman Act."[54] Upon the finding of such coordination, a fact-finder is neither required nor permitted to consider any other factors—for example, whether the

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50. *See, e.g.*, Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy*, PENN STATE L. REV. (forthcoming 2019) (making this point).

51. Uber and similar firms have relied massively on venture capital funding. A producers' cooperative by its nature would not seek such funding—and would likely not be able to borrow on favorable terms either, as a result. This in turn would affect its ability to compete with a firm like Uber, which consistently loses money, apparently in service of a future operational pay-off (and in service of a payoff in terms of share value once it goes public, in the meanwhile).

52. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

53. Sherman Act, 15 U.S.C. § 1 (1890).

54. *Id.*

resultant prices were reasonable or whether countervailing benefits flowed from the coordination.[55]

The Court also noted that concerted reduction or stoppage in the sale of a commodity, which the lawyers' strike constituted, is similarly prohibited per se.[56] More generally, concerted withholding of supply—of labor or services—is of course the very essence of a labor strike, and relatedly is one of the few forms of economic leverage available to those who own little or no capital.[57] While antitrust would thus condemn a labor strike absent the labor exemption, and does condemn strikes beyond the bounds of the exemption, it is worth noting that the antitrust notion of harm from "reduced output" fails to accurately capture the mechanism by which a strike or boycott in fact works. According to current conventional antitrust theory, reduced output is an antitrust harm in itself (because it is by definition economically inefficient, which also usually means that it automatically results in increased prices), not because it increases the bargaining power of the seller to extract desired changes to the contract/relationship in question (such as a higher price or wage).

But the latter, not the former, is how a strike or boycott actually works. Wages are not increased following a strike because workers reduced their labor supply, which automatically increased the price of labor. Instead, wages go up after a successful strike because the business is economically harmed by the work stoppage in specific ways, which in turn gives workers bargaining power to effect desired changes to the contract. These two mechanisms—the real one, and the theoretical one—are far apart. Strikes work because of specific business harms that result from reduced operations. They are mediated through human volition at the bargaining table, not through the supposedly impersonal workings of market price.[58]

In applying the per se rule against the lawyers' strike, the Court adopted the antitrust vision in which markets are coordinated mainly through the mechanism of the firm, while other forms of coordination are prohibited or disfavored.[59] The fact that the coordinating mechanism in this case is a public entity rather than a putatively profit-maximizing business firm simply highlights the depth at which these underlying assumptions are rooted, as further discussed below. To support the centrality of the blanket prohibition upon horizontal coordination beyond firm boundaries to the overall allocation of coordination rights under antitrust, the Court approvingly quoted Robert Bork's statement that permission to prove

55. *Id.* at 435. *See also* Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679 (1978).

56. Superior Court Trial Lawyers Ass'n, 493 U.S. at 423 ("This constriction of supply is the essence of price-fixing, whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered.") (quoting the Court of Appeals).

57. Of course, this point is limited by the lack of protection for economic strikes under the NLRA. Still, an economic strike is *permitted* under labor law, if not protected.

58. For an alternate view, see LEE *supra* note 37; NEIL FLIGSTEIN, THE ARCHITECTURE OF MARKETS (2001).

59. Paul, *supra* note 2.

lack of economic power in cases of horizontal price coordination would be administratively unworkable, introducing complexities of market definition into such cases.[60]

The Court also characterized the per se rule against horizontal price coordination as something more fundamental, from a normative standpoint, than a mere rule of administrative simplicity or convenience. In so doing, the Court made a conceptual error. Analogizing horizontal price coordination to inherently dangerous activities like stunt flying in congested areas, each instance of which poses some threat to physical safety, it reasoned that each instance of price coordination poses "some threat to the free market."[61] To support this assertion, the Court again cited Bork, this time for the proposition that no one will engage in price coordination unless it has the power to affect market prices.

The Court of Appeals had taken the position that the First Amendment ought to protect the strike (as discussed in the next section) absent a showing that the lawyers had market power. But the deeper problem is not that price coordination is not anti-competitive—a basically question-begging term absent further specification of the inevitable limits upon competition—or that the price coordination of small actors will not affect market prices. In fact, the lawyers did collectively have market power in the narrow sense: their coordination had the ability to affect prices. As we can see from the record, absent intervention by the competition authorities, it was poised to do just that. The problem is not that the lawyers did not have an opportunity to prove a lack of market power, but that market power, in the narrow sense recognized by the antitrust paradigm of Bork and *Trial Lawyers*, is an insufficient criterion of permitting coordination.

The actual problem is that affecting prices always assumes a normative baseline that the conventional antitrust paradigm leaves obscure but that is fundamentally influenced by intra-firm coordination. Here that baseline was set by the District's own coordination of the market for legal services for indigent criminal defendants. The Court described the normative base-line effectively in temporal terms: the state of affairs "[p]rior to the boycott."[62] That description holds constant everything other than the lawyers' own coordination, as a matter of the legally relevant possible worlds, when there is no good reason to do so. To wit, the market might have been organized in any number of other ways: there may have been, say, a few large law firms bargaining with the District, or there may have been more than one buyer for the lawyers' services. The particular normative baseline adopted by the Court amounts to a preference for determining prices through coordination that takes place within firm or enterprise boundaries, while frowning upon effects upon prices by means of coordination by smaller actors acting outside firm boundaries. This is a policy choice about structuring markets in a particular way. Moving reality away from that baseline, as the lawyers' boycott almost did, does not pose an inherent

60. Superior Court Trial Lawyers Ass'n, 493 U.S. at 430–31.

61. *Id.* at 434.

62. *Id.* at 422.

economic harm or threat, in the manner that, for example, stunt flying in congested areas poses an inherent threat to physical safety. It simply moves toward a different market order, and a different allocation of coordination rights.

In the market at issue, the Court assumed that the coordination that was *already* occurring was an appropriate part of the normative baseline against which any other scenario would be compared. The District, as the sole buyer of legal services for indigent criminal defendants, directly coordinated the market for those services, setting the hourly rates by legislation and coordinating the market along various other dimensions as well. Yet the Court chose to entirely disregard this coordination activity by the only buyer, while singling out the economic coordination of the individual providers of legal services for censure. Patterns of market coordination arise for all sorts of reasons,[63] buyer power being one species.[64] In all of them, public power is present to some degree or other, whether through background law or in some more active form. In short, there is no good reason to privilege the pre-strike rates paid to the lawyers as the normative or "competitive" ideal. Why, then, did the Court reach this conclusion?

At the deepest level, the market order presupposed by the Court's analytic framework does not privilege competition as such; rather, it privileges *firms*, and by extension enterprises, as the locus for the coordination of markets. The Court's opinion extends to the District the same immunity for intra-enterprise economic coordination that it has long done for business entities. And it does so because it assumes the District is acting as an ordinary firm, not because it assumes it is acting as a government would. Indeed, the Court must assume the District is acting as a firm, because otherwise the primary premise of its argument—that the economically and socially appropriate rates must be set by competition, which it further glosses as requiring policing from interference of sellers' collective action—would become incoherent.

Firms are primary in the consensus analytic framework generally adopted by the courts for evaluating economic policy, and their halo sometimes extends to governmental entities when those entities are seen to behave sufficiently like business firms. This is evident in the various market participant doctrines that pepper the landscape of American law, including antitrust law itself. Often, governmental entities are permitted to engage in market coordination only if they can show that they are market actors: i.e., that that they are sufficiently firm-like in that market.[65] Assuming for the moment that it coherently delineates some set of attributes, this sort of criterion of course privileges firm-based economic coordination over, for example, direct public coordination of a market. While the

63. *See* LEE, *supra* note 37; FLIGSTEIN, *supra* note 58.

64. For one account of buyer power, see Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AM. SOC. REV. 213, 213 2018.

65. Market participant exception to federal preemption under the FAAAA; market actor exemption to federal preemption in case of federal deregulation legislation; market participant exception to the dormant commerce clause doctrine.

Court was not expressly evaluating the applicability of a market participant exception in *Trial Lawyers*, it effectively assumed that the District was acting as a firm would, and that therefore the lawyers' rates ought to be set by competition. The court could have assumed that the District was acting in a public capacity by coordinating a market or engaging in economic policy-making, and that that policy should be given deference for that reason. However, the Court gave *carte blanche* to the District's coordination while censuring individual sellers' based on an assumption that the District was acting as a firm would. Again, to say otherwise would contradict the Court's repeated invocation of competitive rates.

B. Extending Antitrust's Allocation of Coordination Rights to the First Amendment

The Court then incorporated its preferred allocation of economic coordination rights, determined under antitrust, into its construction of the First Amendment law of expressive boycotts. The Court was principally concerned with the applicability of *NAACP v. Claiborne Hardware*,[66] which also involved a boycott. The Court's rejection of the application of *Claiborne Hardware* to the lawyers' boycott revolved around the fundamental distinction it drew between the aims of the two boycotts: "special" advantage in the market (sought by the lawyers' boycott), and "equality and freedom" that the Court agreed were "preconditions of the free market" (sought by the *Claiborne Hardware* boycott).[67] Many have queried and pointed out the problem with putting "labor subordination" in a different constitutional category than "racial subordination."[68] Additionally, the characterization of the lawyers' boycott as special market advantage—in contrast to a precondition of the free market—relies upon the particular allocation of coordination rights that antitrust has chosen to espouse. As discussed in the preceding section, collective action among the lawyers would be no more a "special" market advantage than other forms of coordination that the Court permits.

Thus, the purpose of the boycott was also defined as a *private* advantage from the outset.[69] This is in contrast to the Court's placement of consumer welfare in its normative framework as, effectively, a *public* value. But after all, consumer benefit is also simply a benefit to a particular set of actors in the market, yet the Court emphasized only the absence of public value in benefits to producers.[70] Whether one considers the situation specifically in terms of labor subordination

66. NAACP v. Claiborne Hardware, 458 U.S. 558 (1982).

67. Superior Court Trial Lawyers Ass'n, 493 U.S. at 426. *See* NAACP v. Claiborne Hardware, 458 U.S. 558 (1982).

68. Catherine L. Fisk, *A Progressive Labor Vision of The First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2088 (2018); *see also* Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. UNIV. CHIC. L. J. 969 (2016).

69. Superior Court Trial Lawyers Ass'n, 493 U.S. at 427 (focusing on the fact that the objective of the boycott was to create an economic benefit to the lawyers, the sellers/producers in this market, to distinguish it from the public purposes implicated by *Claiborne Hardware*).

70. *Id.* at 424.

or not, it is plausible to consider a producer-oriented norm like making a reasonable living, fair competition, or fair rates as a public value to be considered along with others, including consumer welfare.[71] However one ultimately decides to value these considerations, the evaluation should not begin by placing one consideration in the category of public value and the other in the category of private value. In this and other ways, the *Trial Lawyers* opinion epitomizes the antitrust reasoning that dominates today, so far as ordering producers' and workers' interests are concerned.

Importantly, this ordering is a judgment the Court imported into its construction of the First Amendment. Both the majority and the dissent in *Trial Lawyers* limited the First Amendment's reach in the case of boycotts to the *political* rather than the economic, while reaching different conclusions regarding which side the lawyers' boycott fell on.[72] The majority's application of this distinction relied upon reading Chicago School antitrust's allocation of coordination rights into the First Amendment law of expressive boycotts, in that an unprotected economic boycott was defined in terms of "special" market advantage. In other words, the Court held that economic boycotts for reasonable rates by service-providers or small producers were unprotected by the First Amendment specifically because they seek "special advantage," a concept that requires the normative framework of Chicago School antitrust and the firm exemption.[73] Special market advantage is defined by a normative benchmark constituted by antitrust's preferred and disfavored coordination mechanisms (firm-based and horizontal, respectively). The holding thus incorporates the conventional antitrust understanding that coordination outside business firms is special and usually disfavored—but it is now also a holding about what the First Amendment protects, not only about what is not permitted under antitrust. Thus, *Trial Lawyers*, the purest expression of the Court's rule against horizontal coordination beyond firm boundaries, is itself an object lesson in the firm exemption, and it also extends this allocation of coordination rights to the First Amendment.[74]

71. Indeed, such an idea of fairness, including the idea of fair price, has its own antitrust tradition, even if it has been largely submerged.

72. *Id.* at 428 ("Only after recognizing the well-settled validity of prohibitions against various economic boycotts did we conclude in Claiborne Hardware that 'peaceful, political activity such as that found in the [Mississippi] boycott' are entitled to constitutional protection.") The dissent, while reaching a different conclusion, largely accepted this framework as well. *Id.* at 437 (referring to the lawyers' action as an "expressive political boycott"); *Id.* at 446 ("the facts at the very least do not exclude the possibility that the SCTLA succeeded due to political rather than economic power.").

73. *Id.* at 426.

74. The Court also rejected the Court of Appeals' holding, applying *O'Brien*, that antitrust rules be applied "prudently and with sensitivity" to First Amendment interests. The Court of Appeals had held that in the context of an expressive boycott such as the lawyers' action, this requirement entailed express consideration of market power and barred application of the per se rule. Superior Court Trial Lawyers Ass'n v. FTC, 856 F.2d 226, 233-34 (D.C. Cir.). The Court rejected this approach, holding that the integrity of the per se rule against horizontal coordination beyond firm boundaries was a more important thing to protect than the expressive content of the boycott. Superior Court Trial Lawyers Ass'n, 493 U.S. at 430. In this instance, the Court essentially abrogated First Amendment interests in favor of (its

IV
TOWARD A RE-ALLOCATION OF COORDINATION RIGHTS

Contemporary fissured business arrangements distill the preference for top-down, hierarchical control of smaller players by more powerful firms that is already present in today's antitrust framework, while often pushing beyond the boundaries set by the current expression of that framework in the surface structure of the law. They call out for a re-allocation of coordination rights under antitrust law. What criteria are available to effect this re-allocation, and on what basis should it be achieved?

Our current framework recognizes one other relevant source of coordination rights, beyond the firm, and that of course is based in labor law. The labor exemption to antitrust essentially permits economic coordination that antitrust would otherwise condemn where individuals engaged in the performance of labor or services are sufficiently subject to the power and control of a firm, and lack significant power and control—including relevant ownership rights—of their own.[75] From this perspective, the labor exemption has always—or at least, long—been a limited qualification of the firm exemption, and it has been in a basic way dependent upon it. The limited qualification represented by the labor exemption is underlined by the fact that the collective power of labor—even if it were fully realized—cannot legally be brought to bear to contest basic *firm* or capital decisions, an outcome that Karl Klare and others have shown was not intrinsic to the Wagner Act itself, but was instead imposed by a contingent turn in the decisional law.[76] Given this basic derivative relationship of the labor exemption to the firm exemption, it is then no wonder that the superficial undoing of the firm has further undone the labor exemption.

How might we conceive of a new allocation of economic coordination rights that would avoid some of these problems, which have undermined the New Deal order almost beyond recognition? Attempts to broaden the labor exemption or to create new worker exemptions while retaining or copying its basic structure are unlikely to be sufficient. Fissured business structures show that the firm, which was never a platonic ideal to start with, will continue to change and mutate—partly of course in response to the law's own allocation of coordination rights. Imagine if all workers or individual service-providers currently classified as independent contractors gained coordination rights. What would stop many firms who currently use independent contractors from moving to a system of contracting with, say, two to three person "firms" of workers—firms that are conveniently incorporated by signing ready-made forms in the company's office upon hiring? These groups of workers would of course lack coordination rights in their bargaining with the firm that retains their services, and their intra-firm

interpretation of) antitrust, rather than overtly rewriting the First Amendment in the image of Chicago School's antitrust allocation of coordination rights.

75. This is true whether "independent contractors" are covered by the labor exemption or not.

76. Karl Klare, *The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

coordination rights would be negligible. The law should not allocate coordination rights to working people on the condition of particular business structuring decisions made by others. But such decisions are the inevitable response to small-bore redefinitions of the labor exemption, as fissuring itself teaches us.

Instead, we might consider allocating coordination rights on the basis of *power* and *social benefit*. Importantly, to guide the application of these concepts, we must first discard the ideal-state competitive order as the default normative framework for antitrust and for economic regulation more generally. This is not to say that *competition* as a social process, referring to healthy business rivalry, is not important to antitrust law: it is, and ought to be balanced with appropriate and socially beneficial coordination. However, once we realize that the ideal-state concept of competition that is currently presumed to form the basis for antitrust law is contributing very little—except as a smokescreen for other normative choices—then we need no longer view economic coordination as a special exception to the order of things. Thus, we need not look for conditions of deprivation, or powerlessness, as constituting the sole basis—aside from the firm exemption—for the appropriate exercise of coordination rights because they are an exception to an otherwise perfect order. That is what our current framework does, and it is also the assumption on which even the most ambitious reform proposals proceed.[77]

Instead, once coordination is no longer a special exception to the ideal-state competitive order, we may think of allocating coordination rights not only in order to contest existing power over someone—in other words, to contest conditions of domination—but more broadly and positively, to allocate coordination rights *in order to* confer a social benefit and *so long as* the coordination does not result in power over someone else. In this vision, power would be a *constraint* upon coordination rather than the criterion of its permission. So, truck drivers would be able to engage in direct price coordination among each other, so long as that coordination did not result in the undue exercise of power over some other group of people: other truck drivers or customers, for example.[78] They would not have to show that someone *else* has power over them—whether through prices, or something else—in order to engage in coordination. Indeed, within such a framework, each of the groups discussed in Part II—franchisees, Uber drivers, and independent contractors—would quite plainly be allocated coordination rights. The precise scope of those rights should be determined in order to ensure that undue power over other groups does not result. Moreover, the availability of those rights would largely not depend upon unilateral decisions made by the lead firms in any of these arrangements in defining their relationships with workers, franchisees, or others

77. *See* Alan Bogg & Cynthia Estlund, *Freedom of Association and the Right to Contest: Getting Back to Basics*, *in* VOICES AT WORK (Tonia Novitz & Alan Bogg, eds. 2014).

78. Such determinations ought to be informed by empirical study of the particular market or sector in which the coordination takes place, including any relevant power dynamics and including the effects of the coordination in question upon workers, consumers, and the broader community.

in their orbit. Thus, small players' coordination rights would be more secure than those allocated by a broadened labor exemption or other new exemption.

Conversely, on this alternative approach to the allocation of coordination rights, antitrust law would not permit powerful firms like Uber and McDonald's to exert control over small, less-powerful players like drivers and franchisees. However, rather than prohibiting this coordination on the ground that it facilitates horizontal coordination that is presumptively bad, antitrust law ought to take the view that it is impermissible because it unduly exacerbates power imbalances and domination, and confers no social benefit that would not be better realized through more democratic forms of coordination.

In both directions, a conscious re-allocation of coordination rights would work toward balancing undue asymmetries of power rather than exacerbating them, as the current antitrust framework does, particularly in the context of fissured business arrangements. In order to do so, it would also recognize that the current framework makes normative choices about allocating coordination rights that cannot be derived from putatively neutral principles supplied by the competitive ideal.

ANNUAL REVIEWS

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The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy

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Abstract

Elite economists and lawyers contend that occupational licensure raises consumer prices and unemployment. Billed as a bipartisan boost to market competition, this technocratic policy agenda rests on thin empirical foundations. Studies of the wage effects of licensing rarely couple this analysis of its putative costs with convincing analysis of the benefits of the professional or vocational education validated via licensure. While some licensing rules may be onerous and excessive, licensing rules are inadequate or underenforced in other labor markets. Furthermore, by limiting labor market entry, occupational licensing rules, like minimum wage and labor laws, can help stabilize working- and middle-class wages. Although current antitrust law provides an ideological framework for technocratic attacks on licensing, it is fundamentally unsuited for evaluation of labor markets. Contemporary antitrust law's arcane concept of efficiency reflects neither the legislative objectives animating the antitrust statutes nor popular understanding of what competition policy should do.

1. INTRODUCTION

The market is not a natural or organic entity. Markets cannot and do not exist apart from the state. The state defines and enforces the foundational feature of a market economy: property rights. In any modern, complex economy, transactions require conventions and laws to be successfully and reliably consummated. Questions of interpretation and enforcement of contracts inevitably arise and require the decision making of a court or another entity that exercises coercive authority. Property and contract law show that it is nonsensical to speak of state interference in the market when state action begets and supports market activity in the first place.

Contemporary social orders are not just dependent on common law doctrines such as trespass, alienability of property, and negligence. They also rely on laws concerning copyright, patent, trademark, and corporate governance and the management of monetary policy by the Federal Reserve. Administrative agencies govern entire sectors of the economy. In short, the production and distribution of wealth are the result of conscious political decisions by the state, not preordained outcomes (Hale 1952, McCluskey 2012).

Sadly, these basic points are frequently forgotten among both policy makers and practicing lawyers. Some aspects of law are treated as natural and unquestionable (e.g., tort and contract), whereas others are persistently painted as a statist incursion into Edenic laissez-faire (e.g., labor law and consumer protections). Even more troublingly, certain areas of law have come to not merely reflect but exemplify this one-sidedness. Over the past several decades, American antitrust law in particular has come to embody this ideology, naturalizing certain forms of state action and casting a suspicious eye toward others.

In recent decades, neoliberal technocrats have exploited the broad language of antitrust statutes to undermine the power of professionals and associations of workers, even as they treat some of the most powerful firms ever to exist—and those firms' collusion against workers—with kid gloves (Pasquale 2010b, Vaheesan 2018, Whitney 2015). This bias in antitrust law reflects a larger cultural tilt in the United States toward consumer interests and away from those of producers (or, at least, the interests of productive workers at firms, as opposed to rentiers and capital generally) (Whitman 2007).[1] Chicago School teachings have made an esoteric, mathematically defined account of consumer welfare the defining inquiry in antitrust. It is troubling enough that crabbed interpretations of monopolization and merger doctrine have acted as a shield to permit extraordinary levels of concentration in major US industries (*Economist* 2016, Pasquale 2013b). On top of this deferential posture toward large businesses, the Federal Trade Commission (FTC) and Department of Justice (DOJ) use antitrust law as a sword to challenge professions and worker associations that go too far in establishing standards of fair conduct, stable employment, and quality service in their fields. Reminiscent of President Trump's executive order directing federal agencies to repeal two regulations for every new regulation they issue, a leading antitrust scholar has even called on the FTC to attack local regulations governing Uber in exchange for prohibiting the company from deceiving riders about its privacy and data security policies (Crane 2017). Having largely ignored workers in their hearings on the gig economy (Scholz & Pasquale 2015), the FTC agreed with this scholar and sided with the US Chamber of Commerce in an amicus brief challenging Seattle's efforts to boost drivers' bargaining power vis-à-vis powerful platforms (Fed. Trade Comm. 2017).

Even as these initiatives, aimed at labor ranging from dentistry to ice skating coaching, may sometimes deter anticompetitive activity that hurts consumers, they can stifle beneficial

[1]Note, however, that there is no necessary tension between the interests of labor and consumers along several axes. For example, consumers prefer well-trained doctors and plumbers, and those laborers who are well-trained do not want to face unfair competition from fly-by-night operators who have not sufficiently invested in the skills necessary to do these jobs well.

collective action by workers. They signal a general disapproval of workers acting in concert and may undermine one of the few tools of self-assertion that workers can now brandish against powerful firms (ranging from digital labor platforms, like Uber or Amazon's mTurk, to an increasingly concentrated health care industry). Most problematically, current antitrust doctrine does not take into account the societal value of occupational licensure or professional standards. Instead, it reflects mainstream economics' bias against occupational licensure and a more general belief that government is the principal obstacle to competitive markets (Vaheesan 2015).

This article exposes weaknesses in the mainstream case against occupational licensure and worker self-organization (Section 2). Antitrust law has failed to grapple with the thin empirical case against occupational self-governance (Section 3). Therefore, antitrust law must evolve toward a new position of respect for and openness to democratic governance within professions and occupations themselves, as well as laws recognizing that self-governance (Section 4).

2. THE UNEASY CASE AGAINST OCCUPATIONAL LICENSURE

During the *trentes glorieuses*, labor's share of income relative to capital increased in the United States, thanks to favorable terms of globalization and legal protections for both unions and professions, among other factors (Pasquale 2014, Piketty 2014). Consumer protection and disclosure laws also complicated the lives of firm managers. These progressive measures proved vulnerable to attack, however. Just as the Taft-Hartley Act of 1947 marked a backlash against labor's gains in the 1930s, the 1970s would see a variety of efforts to roll back what was perceived as a regulatory juggernaut of the 1960s.

The Powell memo outlined several initiatives to combat what its author perceived as undue liberal influence in universities, labor movements, and civil society generally (MacLean 2017, Powell 1971). Regulators also came under attack. Those suspicious of the administrative state offered critical perspectives on the motives and results of licensing boards that controlled access to certain types of jobs. Gellhorn (1976, pp. 16–18) complained,

> Occupational licensing has typically brought higher status for the producer of services at the price of higher costs to the consumer; it has reduced competition; it has narrowed opportunity for aspiring youth by increasing the costs of entry into a desired occupational career; it has artificially segmented skills so that needed services, like health care, are increasingly difficult to supply economically; it has fostered the view that unethical practices will prevail unless those entrenched in a profession are assured of high incomes; and it has caused a proliferation of official administrative bodies, most of them staffed by persons drawn from and devoted to furthering the interests of the licensed occupations themselves.

Gellhorn's laundry list of objections is a hodgepodge of cynical public choice modeling and crabbed rejection of modernity. Its economic foundations are shaky. One wonders, for instance, what Adam Smith would make of a thinker dismissing the division of labor into expert health professions as artificial segmentation of skills. To be sure, at this point in the development of integrated delivery systems, there is more demand for the coordination of care—but that is coordination of the very types of specialized experts (from physician assistants to respiratory therapists) that are now cornerstones of contemporary health systems.

Nevertheless, Gellhorn's critique has blossomed into think-tank position papers and economic research. The American Enterprise Institute now laments the "terrible economic burden of occupational licensing" (Pethokoukis 2014). Technocratic liberals join the dirge and often put the dismantling of many occupational licensure requirements at the very top of a proposed bipartisan agenda to promote economic growth (along with cuts to entitlements and health care spending).

A rough typology of complaints against occupational licensure would include the following: It raises prices for consumers without commensurate increases in quality and blocks out would-be competitors who cannot or will not undergo requisite training and tests. However, each of these objections is not sufficiently theorized, justified, or empirically grounded to support the types of interventions now routinely pursued by the FTC and DOJ. Commentators all too often extrapolate from horror stories to make claims about the entirety of licensing, peddling anecdata disconnected from the complex and variegated reality of contemporary labor practices.

2.1. Price and Quality

In the basic case against occupational licensure, the focus is on the higher prices arising from these regulations. There is a presumption that the price increase in, say, medical or legal services, owing to the training and testing of licensed professionals in such fields, is not worth the wedge of price increase attributable to the cost of such training and testing. But there is little awareness of the real potential for consumers to capture that wedge of price. For example, if training requirements for nurses declined, perhaps hospitals would pay them lower starting salaries because they would not be burdened by the high student loan payments necessary to finance their training. But it is by no means clear that patients would see their bills fall. Instead, managers and shareholders may simply pocket the reduced wage—resulting in a hat trick of declining quality of labor, rising inequality, and less resources for the types of professional schools whose research advances nursing practice.

A more advanced version of the higher-price-without-greater-quality case depends on the rise of big data and forms of popular assessment to empower consumers to make their own judgments as to price/quality trade-offs. Herzlinger proposes ratings for drugs, rather than Food and Drug Administration approval or nonapproval decisions; a similar regime could rate doctors or lawyers, displacing extant licensing of such professionals (Pasquale 2010c, 2013a). According to the usual economic logic, such tiered rating (rather than all-or-nothing licensure) of medical and legal professionals would expand access in both fields.

However, this perspective ignores the serious limitations of these reputational systems, especially in the context of complex products and services. It presumes that consumers—or at least a critical mass of consumers—always have the time, interest, and ability to engage in comparison shopping and distinguish qualified providers from incompetent ones. Empirical evidence from several markets undercuts this assumption (Flannery & Samolyk 2005, Mehrotra et al. 2017). Even when consumers do comparison shop, they often focus on one or a few product or service dimensions, not the entire universe of relevant terms and features (Ausubel 1991, Korobkin 2003). Moreover, reliance on reputational screening without funding extensive monitoring and regulation of such screening is an open invitation to fraud and abuse. It is easy to game rating and ranking systems (Reagle 2015). There is widespread public funding for medicine, or contingent or state funding for legal services. The United States has developed several redistributive mechanisms to fund health care, ranging from the Medicare payroll tax to general funds derived from progressive income taxation. Fly-by-night operations can easily take advantage of such funds.

There is also a question concerning how providers would earn their first-star ratings or other indicia of quality. Perhaps those looking for experience would be a cheap option for the poor and disadvantaged. But creating such second-rate options for the poor undermines the unitary standard of care now underwritten by communal funding sources. Even if tiering and low-cost options would reduce the cost of care in many instances, there is no guarantee that this reduced cost would actually increase the real incomes of poor or middle-class persons. Instead, it may simply result in reduced health care subsidies from employers or reduced state support. Moreover, those who would undermine extant institutions of medical or legal training rarely account for the value of the research generated by such institutions.

Opponents of occupational licensure have an unfortunate tendency to treat the most marginal or extreme cases of inappropriate or excessive licensing requirements as paradigmatic of the entire field. Parades of horribles quickly emerge: S. David Young (2002) complains about licensure of "falconers, ferret breeders, and palm readers"; Gellhorn (1976) marvels at the need to license "beekeepers and taxidermists"; cosmetologists and florists are a frequent go-to example for libertarian litigators [*Vong v. Aune* (2014); Slivinski 2015]. We obviously cannot comprehensively demonstrate the wisdom of training requirements in each of these diverse areas of human occupation (though at least in the case of beekeepers, the risk of disastrous mismanagement of stinging insects suggests some regulation is wise). But they are scarcely reflective of the hundreds of occupations now licensed by some jurisdictions in the United States (and certainly not of the 65 occupations required to be licensed in all 50 states).

Reflexive incredulity toward licensing requirements in certain fields is presumptuous, often reflecting an elitist, antiworker outlook. It is also frequently hypocritical: Often the same commentators who would generalize from a critique of ferret breeder training to a deregulatory labor policy in general would impose evidentiary strictures akin to the Data Quality Act on regulators before they expanded the scope of their authority. Critics should demonstrate humility before upsetting arrangements that have long governed these fields (Browne 1993). As Law & Kim (2005, p. 723) have observed, "The evidence from the Progressive Era suggests that regulation arose to improve markets as specialization and advances in knowledge made it increasingly difficult for consumers to judge the quality of professional services."

2.2. Restrictions on Entry

Once one moves beyond the easy cases of libertarian outrage at licensure, the uneasiness of the wholesale case against licensure becomes clear. For example, many occupations govern decisions that have sizable and long-term consequences for those who do not directly engage in the economic transaction giving rise to the decision. For example, a thrifty apartment owner may find an unlicensed plumber to install pipes. If the pipes later leak thanks to the cheap plumber's lack of expertise, it is not merely the apartment owner who suffers—neighbors and the entire building may be stricken with mold, structural damage, or worse. Similarly, granting prescribing authority to unlicensed medical professionals may create cheap options for the uninsured—but increases the risk of pill mills and other accoutrements of opioid epidemics.

Opponents of occupational licensing also rarely acknowledge that many professions do not require enough training before permitting relatively young and inexperienced individuals to take on enormous responsibility. One criminal justice expert argues that the current crisis of police shootings would be a far less widespread problem if officers had better training (Haberfeld 2016). Kuttner (2008) has argued that elder care in the United States is, at present, abysmal in many nursing homes—and that more professionalized home health aides would provide much better care. Tragically, extant licensing laws are all too often underenforced even in very sensitive areas. Over a 10-year period, there were 43 deaths in unlicensed Virginia day care facilities (Falls & Brittain 2014). The extreme vulnerabilities of ordinary citizens in each of these all-too-human experiences—being arrested, or being cared for during old or very young age—commend more regulation of personnel in these fields, not less (Butler 2017, Commit. Sci. Child. Birth Age 8 2015).

Excess consumerism also skews scholarly perspectives here. Although the harms of purchasing flowers from an unlicensed florist are not easy to fathom, consumer protection is not the sole goal or benefit of occupational licensing. A decision by the state to assure certain standards of quality in the provision of services like these is not entirely different in kind from a decision to decree a minimum wage or mandate closed shops as a way to promote unions. Each regulation necessarily stops certain kinds of competition and shrinks a market relative to a less regulated benchmark.

Occupational licensing establishes what Freidson (1986) called "market shelters." With these market shelters limiting entry, employers cannot draw on a large reserve army of unemployed individuals. By conferring greater bargaining power on workers, occupational regulations can raise wages and promote more stable employment. As history and more recent experience have shown, unfettered competition between workers in labor markets can be harmful. It can lead to below-subsistence-level wages and unstable employment arrangements that harm individual workers, families, and entire communities. As with unionization and minimum wage laws, occupational licensing can grant workers greater power vis-à-vis employers and thereby has the potential to enhance the welfare of workers. Empirical research has found that licensing yields higher wages for workers (Gittleman & Kleiner 2016). It is arguably no coincidence that, as unionization rates have declined in the United States, the percentage of the workforce seeking licensure has increased (Kleiner & Krueger 2010). Licensing may also mitigate the effects of persistent gender and racial discrimination in the labor market and reduce wage disparities between African Americans and whites and women and men (Blair & Chung 2017).[2]

3. THE EXISTING ANTITRUST PARADIGM CANNOT ACCURATELY OR FAIRLY EVALUATE OCCUPATIONAL AND PROFESSIONAL REGULATIONS

Although antitrust law has informed and inspired the intellectual and legal attacks on occupational licensing [*Goldfarb v. Virginia State Bar* (1975); Edlin & Haw 2014], the current intellectual frame of antitrust cannot account for the myriad objectives of occupational regulations. Antitrust law today seeks to promote a very particular and arcane form of efficiency: allocative efficiency (Stucke 2008). This goal seeks to minimize the so-called deadweight loss from noncompetitive pricing. The efficiency framework is untethered from the goals that Congress expressed when it enacted the antitrust laws. Unlike the vision expressed by the drafters of the Sherman, Clayton, and FTC Acts, antitrust's present efficiency paradigm disregards power dynamics in the economy and society (Orbach 2013). The neoclassical model omits the critical role of state institutions in enabling market activity in the first place and uses a perfectly competitive marketplace, which does not exist outside textbooks, as its default. Even from a strictly consumerist perspective, the efficiency model does not protect the full range of consumer interests and prizes short-term price competition over other considerations, such as quality and safety (Pasquale 2006, 2013c). Owing to their narrow focus, in particular on short-term consumer prices, the efficiency-minded antitrust agencies have launched misguided attacks on occupational licensing.

3.1. The Current Antitrust Framework Fails to Account for the Pluralistic Goals of Occupational and Professional Regulations

Notwithstanding some intellectual disagreements over whether short-term consumer interests should be accorded importance within the analytical framework, the extant antitrust regime prizes

[2] Of course, licenses do not always help licensed workers. Sometimes they require credentialization that is overpriced. Obtaining licenses may also require workers to finance costly education and training through student loans and create unsustainable debt burdens (Consum. Financ. Prot. Bur. 2017). However, the answer to these problems may just as readily come in the form of better regulation and public financing of professional or vocational education than in abolishing licenses altogether. The balance between these approaches should be a critical focus of future social scientific research in the area.

economic efficiency. This technical concept of economic efficiency is derived from the neoclassical model and built on a pyramid of deductive reasoning. It is centered on a person's willingness and ability to pay for something. It does not consider a person's needs apart from his or her ability to meet these needs. For example, an ill person's desire to obtain lifesaving health care is not recognized in this framework unless she has the means to purchase health care (Pasquale 2010a).

The principal or exclusive social harm under this framework is so-called deadweight loss, in which some mutually beneficial market transactions do not occur owing to some institutional impediment. Concerns about distribution and even longer-term economic efficiency are either treated as secondary or dismissed. So-called noneconomic desires, such as preserving a particular industrial structure, maintaining the viability of local businesses, and protecting the living standards of workers, are deemed outside the scope of antitrust law. The FTC has, on occasion, gone further and implied these goals are even illegitimate for democratic governments to pursue (Gavil et al. 2014).

The efficiency fixation does not reflect the congressional goals of the antitrust laws. The sponsors of the antitrust laws had a broad vision for the new laws and sought to curtail concentrated private power and its many ill effects. Economists had barely begun to specify the concept of economic efficiency when Congress passed the principal antitrust statutes in the late nineteenth and early twentieth centuries (Carstensen 1983).

Even leaving aside the legislative histories of the antitrust laws, the case for sacrificing popular social goals in the name of an arcane definition of efficiency is unpersuasive. Davies (2014) has acidly remarked on the extreme manipulability of the type of aggregative analysis characteristic of contemporary antitrust economics. The concept of allocative efficiency prioritizes wealth maximization, leaving redistribution to be pursued later, if at all, via taxes and transfers (Kaplow & Shavell 2000). This work largely ignores or discounts the possibility that unequal wealth attained under optimal substantive legal rules may be devoted to blocking political processes necessary to redistribute it (Kaplow & Shavell 1994). In a climate of nearly two decades of intensifying gridlock, it is a recipe for favoring those able to take advantage of extant antitrust exemptions (like the *Noerr–Pennington* doctrine and other broad conceptions of protected speech) to further entrench their own power relative to those less advantageously positioned [*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* (1961); *United Mine Workers v. Pennington* (1965); see also *Citizens United v. Federal Election Commission* (2010)].

The goals of public policy are not cast in stone, nor can they be removed from the realm of politics. Rather, they are contestable and intertwined with moral and political judgments (Rahman 2016). Despite the claims of its proponents, efficiency is not a value-neutral concept. Efficiency maximization is laden with implicit political judgments on the role of the state, the existing distribution of wealth, and human behavior. Specifically, it demands that the state vigorously enforce rights of property and contracts and assumes that the existing distribution of wealth is somehow just or at least the result of neutral processes and that human behavior is motivated primarily or exclusively by self-interest (Flynn 1988). On the whole, the efficiency ideology tilts heavily in a conservative direction and is loath to upset the status quo (Hovenkamp 1985).

Antitrust law need not be entirely focused on consumer welfare, especially given changes in the balance of power between very large firms and workers. Over the past two generations, tens of millions of Americans have experienced stagnant wages and precarious employment (Gould 2016, Kalleberg 2009). In this context, concerns about jobs and income are entirely valid and have become central to political debates. In the absence of stable, well-paying jobs, Americans are increasingly facing lives of material deprivation and chronic uncertainty. These afflictions are bad enough on their own, but they also threaten dire macroeconomic consequences, as individuals subject to constant fear of losing a livelihood resist making rational investments in education or the types of consumption they would normally enjoy. For mainstream economists and antitrust lawyers to condemn occupational licensing on the grounds that it raises wages and generally helps workers is to elevate the preferences of one class of technocrats over democratic choices.

3.2. The Current Antitrust Framework Fails to Consider Power in the US Political Economy

The efficiency model at the heart of current antitrust law also ignores power dynamics in American society in two critical ways. First, it submerges and naturalizes the essential role of state institutions in establishing and maintaining a market economy. Second, it relies on a model of perfect competition that disregards the power disparities that characterize the US economy and have characterized it for centuries.

The neoclassical model at the heart of antitrust law fails to acknowledge the important role of the state and public institutions in allowing markets to emerge and flourish. Legislatures, administrative agencies, and courts establish and enforce, among other things, property, contracts, and corporate charters that undergird a modern economy. Neoclassical conceptions of the economy submerge this essential state action and imply that the state is an exogenous, rather than a constitutive, force in a market economy.

The dominant, technocratic approach to antitrust law uses perfect competition as its intellectual starting point. Under this stylized model, no party—consumer, firm, or worker—has power to influence prices or other quantities in the market. Everyone sells a commodified good or service at the competitive price, no higher and no lower. This conception of the market is the successor to Adam Smith's idealized view of a market in which all participants are equals and answer to no authority except the invisible hand of collective decisions by buyers and sellers. The model of perfect competition has been at the heart of many defenses of existing economic arrangements in the United States and of capitalism generally.

Even when monopoly or oligopoly cannot be denied, the defenders of efficiency have a ready-made response. They assume that market entry is easy and so all markets are contestable by firms waiting on the sidelines. In this view, monopoly and oligopoly are fleeting phenomena soon defeated by new firms pursuing profit opportunities (e.g., Easterbrook 1984).

Although this model is simple and appealing in imagining a system in which no single actor or even group of actors exercises power over others, it is detached from contemporary political economy. Perfect competition is an ideal that is, for all intents and purposes, not seen in the US economy. Power abounds, systematically elevating the bargaining position of some and reducing that of others (Hale 1952, McCluskey 2012). The example of perfect competition often cited in textbooks and by economists—agriculture—is far from competitive, let alone perfectly competitive. The highly concentrated agricultural processing sector (Hendrickson & Heffernan 2007) dictates the terms on which American farmers can sell their products. Free entry and contestable markets, so frequently assumed in theory, are rarely witnessed in practice.

Most sectors of the economy are monopolistic or oligopolistic, with product differentiation being a defining characteristic of modern commerce. Industries ranging from airlines to pharmaceuticals to telecom are dominated by a small number of corporations (Porter 2016). Moreover, despite claims of new competition and openness in the economy, the technology sector appears to be the antithesis of vigorous competition. Five large platforms dominate this new economy (Manjoo 2016), and two companies have a 70% share in the national broadband market (Farivar 2016).

In this world of monopoly and oligopoly power, some actors have great power, whereas others have very little. A monopoly provider of a service has great power over its consumers as well as entrants that could threaten its dominance. Given the declining labor share of output over decades, it is now clear that capital has a great deal of power in both its purchasing and selling decisions and that workers and consumers have comparatively little power. To gloss over the power disparity between monopolistic and oligopolistic corporations and individual workers and consumers is to elevate the barren formalism of microeconomics over social realities.

The power of concentrated capital extends beyond the confines of the market sphere. The microeconomic concept of market power captures only one aspect of the power exercised by concentrated capital. Large corporations have the ability to shape the long-term development of their industry by determining who gets to participate in their market and on what terms. Further, they wield disproportionate political power in the ostensibly democratic United States (Gilens & Page 2014). Large businesses can also manipulate the media and the ideology of society. For example, they can fund trade associations, think tanks, and academics to influence the terms of popular debate and foster ideologies supportive of their interests (Kocieniewski 2013, Lipton & Williams 2016). Corporate power, understood in its entirety, implicates political economy generally. Narrow focus on short-term prices will never manage to address this fundamental concern of the Sherman Act.

Occupational and professional licensing regimes are established against the backdrop of extensive market-enabling state action and power disparities. They are not imposed on an anarchic or egalitarian marketplace. Rather, they are a layer of state action that structures markets, much like property and tort law. As with these common law fields, occupational and professional regulations shift legal entitlements and shape marketplace outcomes. They have the capacity to redress disparities in power. They can confer and amplify organizational force to atomized groups of workers. Licensed workers, possessing greater organizational coherence and unity than their unlicensed peers, can exercise greater power in labor markets and also assert a collective voice in the political system. In doing so, they can create more equal—or at least less unequal—power relations between labor and capital.

3.3. Antitrust Law's Intellectual Foundation and Analytical Framework Fail to Protect Consumers

Although the efficiency model can be reconciled to an extent with the consumer protection aspect of occupational licensing, it does not consider the full range of consumer interests. Its horizon does not extend beyond the short term. The neoclassical paradigm, most familiarly expressed in supply-and-demand diagrams, is a static view of a market. Per this understanding, short-term market failures are valid grounds for state intervention. Yet, markets do not exist at a single point in time. The present efficiency model fails to account for dynamic changes that can have far greater impact on consumers—for better or for worse—than static changes. In practice, the efficiency model can capture the static cost of a regulation but not its dynamic benefit. Antitrust law does have an analytical framework, the rule of reason, for balancing the benefits and costs of a particular public policy. Yet, because of its emphasis on quantifiable effects, it is incapable of balancing the full range of benefits and costs.

The efficiency paradigm does recognize the possibility of market failures that warrant state action and thereby does acknowledge a limited role for occupation and professional regulations. In the textbook model, asymmetric information is a defining characteristic of some markets, especially those for complex services. Consumers lack the sufficient information to make fully informed decisions. For example, owing to information asymmetries, consumers may not be able to tell a reputable medical practitioner from a quack seeking to make easy money (Akerlof 1970). Beyond paying for worthless service, consumers may suffer grievous harm because they cannot distinguish capable from incapable practitioners. The efficiency frame of contemporary antitrust deems such asymmetric information between consumers and service providers to be a market failure that warrants public action.

Licensing can correct for this asymmetric information between consumers and providers. It can establish and impose educational and other training requirements for individuals seeking to offer a particular service. Occupational regulations screen market participants and ensure that only qualified professionals can legally serve the public. Such regulations establish an entry barrier against incompetent and unqualified practitioners. Under such a licensing system, consumers are relieved of the burden of trying to distinguish competent practitioners from those who are not. Much like product standards, licensing rules can serve as a "market-stabilizing device. . .in industries characterized by complex or highly technical products, where product quality is otherwise difficult to ascertain" (Fed. Trade Comm. 1983, p. 43).

Although it supposedly protects consumer interests, the current antitrust framework protects consumers in a limited way. The efficiency model does not account for dynamic benefits from regulations, occupational or otherwise. For example, occupational regulations can raise wages and draw more skilled and diligent individuals into a field over a longer time horizon (Shapiro 1986). This can translate to superior quality and enhanced public safety. In other words, occupational licensing can reduce price competition today in exchange for higher levels of quality and safety in the future. Because of its static orientation, however, the efficiency frame does not capture these dynamic benefits. Instead, the efficiency lens sees only the short-term loss of price competition.

Antitrust law's rule of reason, superficially sophisticated, is not capable of evaluating the benefits and costs of occupational regulation. As with other prevailing forms of cost-benefit analysis, the rule of reason is comparatively good at measuring short-term and quantifiable costs and benefits and deficient in, or even incapable of, measuring longer-term and more qualitative benefits and costs (Allensworth 2016). In antitrust cases against mergers or monopolies, the rule of reason means that the plaintiff loses unless it can show actual or likely short-term price effects from the defendant's conduct (Stucke 2009). Dynamic and other more qualitative harms from, for example, a merger or monopoly are either discounted or disregarded.

The defects of the rule of reason become apparent in the context of public interest regulation. The costs of public interest regulation, including those governing occupational and professional licensing, tend to be quantifiable and incurred in the short run, whereas the benefits are more qualitative and more likely to accrue over a longer time horizon.[3] Applying a rule of reason framework often means emphasizing the costs and discounting or ignoring the benefits. In the context of occupational regulations, a restriction on entry into a particular profession can raise prices in the short term but also improve the quality of service in the longer term. Given its bias in favor of quantifiable items, the rule of reason is likely to identify and condemn the short-term loss of price competition and overlook any offsetting improvements to service quality over the long term. In practice, the rule of reason is biased against policies that have static, short-run costs and dynamic, long-run benefits. When forced to choose between a benefit that is not quantifiable and a cost that is, the rule of reason champions the quantifiable and slights the unquantifiable.

3.4. The Existing Antitrust Paradigm's Narrow Lens Leads to Misguided Attacks on Occupational Licensing and Worker Collective Action

The shift in antitrust philosophy from political economy to narrow microeconomics has brought occupational and professional regulations, as well as collective action by workers, into the

[3] For example, cost-benefit analysis in the environmental context generally discounts longer-term benefits (Driesen 2006, Kysar 2010).

enforcers' crosshairs. The efficiency paradigm has led to collusion becoming the primary focus of antitrust enforcement, especially public enforcement. Without drawing distinctions between labor and capital, the antitrust agencies have made policing collective action by workers a focus of their enforcement and competition advocacy efforts. In doing so, they have insisted on viewing occupational and professional licensing within the narrow lens of their efficiency framework rather than considering larger public policies.

Under the efficiency framework, collusion has become the "supreme evil of antitrust" [*Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko* (2004)]. Conduct such as horizontal price fixing between rivals is seen as almost always generating deadweight losses and no offsetting efficiency benefits. Today, collusion is subject to aggressive prosecution, with the DOJ's Antitrust Division focusing many of its resources on the criminal prosecution of individuals and companies involved in price fixing and bid rigging (First & Waller 2013). As collusion has moved to the center of the enforcement agenda, other forms of anticompetitive behavior have receded in importance. In elevating collusion to the rank of most serious antitrust offense, the antitrust agencies have neglected historical concerns about the concentration of private power. Over the past several decades, they have made merger and monopoly cases a lower priority. For example, the DOJ filed just one monopolization suit between 2007 and 2016 (US Dep. Justice Antitrust Div. 2018).

With their collusion-centric enforcement philosophy and focus on eliminating restraints on horizontal price competition, the enforcement agencies, in particular the FTC, have made occupational and professional regulations a major priority (Fed. Trade Comm. 2016, United States 2016). Regulation of the occupations and professions often involves restrictions on entry and the establishment of price floors and supervision requirements. Because these regulations are often instigated at the behest of practitioners and impede full price competition, the antitrust agencies have been active participants in the campaign against them. They have called for a retrenchment of occupational regulations and argued that they should be limited to measures that protect consumers.

In addition to public advocacy against occupational regulations, the agencies have targeted private trade restraints among workers. They have brought enforcement actions against professional associations that adopted ethical codes and other rules that limited price competition among their members. In recent years, for instance, the FTC brought enforcement actions against professional associations representing music teachers and ice skating teachers for prohibiting their members from soliciting each other's clients [*In re Music Teachers National. Ass'n.* (2014), *In re Professional Skaters Ass'n.* (2015)]. For the antitrust agencies, collusion is collusion and should be subject to similar punishments, whether practiced by middle-class workers seeking to establish some features of a market shelter or by the world's largest tech companies striving to suppress wages (Green 2015). Even collective action by workers to challenge powerful employers over low wages and unsafe working conditions is suspect [*FTC v. Superior Court Trial Lawyers Ass'n.* (1990); Paul 2016].

These advocacy and enforcement efforts are misguided because they insist on viewing professional and occupational licensing through the framework of allocative efficiency. This technocratic concept is the proper goal of neither the antitrust laws in particular nor public policy in general. Occupational and professional regulations advance myriad goals. They can protect consumers in the short and long run and promote stable employment with livable wages. Antitrust enforcers, in joining the chorus against occupational and professional regulations, disregard these other public policy aims and demand that legislators and regulators conform to their efficiency ideology.

4. HOW ANTITRUST AGENCIES AND COURTS SHOULD RESPECT THE OBJECTIVES OF OCCUPATIONAL AND PROFESSIONAL REGULATIONS IN THE NEAR TERM

Notwithstanding the narrow and inadequate efficiency paradigm of contemporary antitrust law, the federal antitrust agencies and the courts can still respect the objectives for occupational and professional regulations and preserve sufficient policy space for them. They can take two steps to ensure that occupational regulations are less likely to be subject to antitrust interference. First, the DOJ and FTC, in exercising prosecutorial discretion, should recognize that labor is not just another commodity. Second, the agencies and the courts should maintain a state action immunity that gives states and municipalities freedom to enact and preserve occupational licensing without fear of antitrust liability.

4.1. The Spirit of the Clayton Act's Labor Exemption Should, at a Minimum, Inform the Exercise of Prosecutorial Discretion

The federal antitrust agencies should accord much lower priority to policing occupational regulation than they currently do. The current efficiency framework is not up to the task of evaluating occupational licensing regimes, even from a strict consumerist perspective. The efficiency ideology can offer only a partial understanding of the purposes and effects of occupational regulations. At best, it can provide some protection for consumers. At worst, this paradigm simplistically condemns occupational regulations as "publicly-approved cartels" (Boswell 2013, p. 132) and ignores their social benefits.

This exercise of prosecutorial discretion makes sense from a resource perspective. The agencies recognize that they cannot bring every case or opine on every matter that implicates competition policy. These capacity limitations are most acute during times of fiscal austerity, such as the present (Lipman 2013). In light of these constraints, the DOJ and FTC should place a much lower priority on policing occupational regulations and collective action by workers. These freed up resources can be devoted to areas that have been neglected in recent years and decades, such as merger and monopolization matters. Even from a purely consumerist perspective, challenging an anticompetitive merger in food retailing or health insurance is sure to produce greater consumer savings than bringing a case against ice skating coaches for not soliciting each other's students.

A reduced focus on occupational regulation would promote the congressional spirit behind the Sherman and Clayton Acts. When the Sherman Act was being debated in 1890, a recurring concern was that courts would apply it to labor unions and other worker collectives on the basis that this joint action represented a "restraint of trade" (Greenslade 1988, p. 166). The principal sponsors of the bill were intent on controlling the power of capital, not policing the activities of labor (Greenslade 1988, Paul 2016). Notwithstanding this understanding in Congress, the courts applied the Sherman Act to labor activities in subsequent years [*Loewe v. Lawlor* (1908)]. Congress responded with the Clayton Act in 1914 (15 U.S.C. § 12) and the Norris–La Guardia Act in 1932 (29 U.S.C. § 101) to create space for collective labor activities. The Clayton Act's labor exemption used expansive language, stating that "the labor of a human being is not a commodity or article of commerce."

A reduced focus on occupational regulation would further the original vision of the Sherman and Clayton Acts. Occupational regulations can, in part, protect the interests of workers and promote higher wages and stable employment. Over the past century, the courts have construed the labor exemption narrowly and, in large measure, limited it to workers deemed employees under federal law, thereby excluding workers classified as independent contractors. This narrow understanding is antiquated, a holdover from a different era when stable, centralized workplaces were the norm. Such work is in secular decline, replaced by a "fissured workplace," with independent contractor status becoming a new norm (Weil 2014). A broad understanding of the labor exemption would acknowledge changes in the labor market and recognize that those who depend on their labor for a living are workers entitled to antitrust immunity, notwithstanding legal formalities and labels (Paul 2018).

4.2. The State Action Immunity Should Not Be Made More Restrictive

The courts should not make the test for the state action immunity more restrictive. This immunity provides states with the flexibility to advance important public policies without running afoul of the antitrust laws. In the context of occupational licensing, the state action doctrine gives states and municipalities the freedom to establish regulations to protect consumers, improve wages and employment, and advance other public objectives.

The state action immunity reconciles the federal antitrust laws with state and local political authority. The Supreme Court has held that state action is immune from the antitrust laws. For instance, a state cannot be held liable for passing a law that restricts competition in a market [*Parker v. Brown* (1943)]. Private actors are entitled to the state action immunity if they can show that they are (*a*) acting pursuant to clearly articulated and affirmatively expressed state policy and (*b*) subject to active supervision by the state [*California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.* (1980)]. This doctrine represents a sensible balance between upholding the federal antitrust laws, respecting state and local policy-making powers, and protecting against the capture of these governmental units by private interests.

The Supreme Court in *North Carolina State Board of Dental Examiners v. FTC* (2015) clarified the application of the state action doctrine to regulatory bodies composed of private actors. The Court held that if a state agency is "controlled by active market participants," such as the dentists in the case, it would have to be actively supervised by a state entity. The Court noted that an agency controlled by active market participants is similar to a private trade association, except that the former acts under the color of state authority. According to the Court, in the absence of the active supervision requirement, powerful private actors could use state power to advance their own interests, rather than a broader public interest or state policy.

For state bodies controlled by active market participants, an important outstanding issue that the Court did not resolve was what qualifies as active supervision. It stated that "day-to-day involvement in an agency's operations or micromanagement of its every decision" is not required. It offered some guidance and stated that a supervising state actor "must review the substance of the anticompetitive decision. . .and have the power to veto or modify a particular decision." Unrealized potential for review is not sufficient.

In several areas across the United States, occupational licensing bodies are controlled by active market participants. This choice is logical because active market participants are likely to have the expertise to serve as competent regulators of their field. As the Supreme Court noted, though, these arrangements raise the risk of private interests being elevated over public goals. The Supreme Court's formulation of the active supervision requirement serves as a reasonable check against this threat, without imposing onerous burdens on states. To preserve occupational regulations, the active supervision requirement should not be made more restrictive. The Court's current guidance on this requirement should be preserved rather than made more prescriptive.

To insist on more robust state oversight would create risks for occupational licensing regimes and may even undermine the stated purposes of the Court. States could be compelled to establish "day-to-day supervision" of agencies controlled by active market participants or to replace active market participants with full-time officials. Retaining full-time government employees to oversee or staff these agencies may open entities like medical boards to even more political interference. If the state action doctrine is interpreted to demand such changes in the context of agencies controlled by active market participants, states may be forced to curtail or eliminate occupational licensure programs that advance important state policies.

5. CONCLUSION

Encouraged by the Trump administration's general anti-intellectualism and antilabor tendencies, FTC technocrats have recently stepped up their attacks on occupational licensing regimes with a so-called Economic Liberty Task Force. The resonance of "economic liberty" with Lochner-era conceptions of economic substantive due process is not accidental. The technocrats have criticized regulation for raising consumer prices and supposedly failing to generate sufficient compensating health, safety, and other consumer benefits. But they have done little to quantify, or even study, such benefits. Thus, their criticisms reflect an unduly narrow view of both consumer interests and the public interest.

From a labor market perspective, future research should focus on two large classes of occupational licensing rules. Where there are clear safety and quality rationales for licensure, as in health care and education, any agenda to relax those licensing restrictions should research exactly how quality and safety can be maintained without licensure. In other areas, where quality and safety are not so salient, the wage effects of removing licensing restrictions should be a key concern of policy makers. If the end result of relaxing licensing restrictions in, say, hair styling would simply be to reduce the median wage in the occupation while slightly raising the number of hours worked in it, this would do little to ensure inclusive prosperity among hairdressers.

From a consumer protection perspective, the research agenda in occupational licensing needs to become more balanced. The academic and advocacy work here is almost exclusively focused on excess licensing, and excess enforcement of extant licensing. However, many occupational licensing rules are too permissive and underenforced. Consumers may suffer serious harm, including grievous injury and death, because existing occupational licensing regimes are too weak. Moreover, occupational licensing is not intended to benefit consumers alone. By restricting entry, occupational and professional regulations establish market shelters that enhance the bargaining power of workers, raising wages and improving worker welfare. They function much as federal labor and minimum wage laws do and help establish floors on labor market standards.

Although many critics of occupational licensing have applied its framework, antitrust law, as presently interpreted, is not capable of fairly or fully evaluating occupational regulations. Under the efficiency objective of contemporary antitrust, goals aside from short-term wealth maximization are trivialized. For example, distributional fairness, protection of workers, and preservation of a democratic political economy are either neglected or dismissed. But efficiency is neither apolitical nor value free. Furthermore, the efficiency model assumes away power, disregarding the role of market-enabling state action and the supremacy of capital in modern society.

Even from a consumerist view, the efficiency paradigm protects only a subset of consumer interests, principally short-term price competition, and fails to fully consider other measures, such as quality and safety. Rather than promoting a broad understanding of the public good, efficiency-oriented antitrust authorities have launched misguided attacks on occupational licensing and worker collective action. Antitrust authorities in both the Clinton and Obama administrations continued the Bush (*père et fils*) trend to shirk their responsibility to monitor and contain the monopolizing impulses of massive firms (Khan & Vaheesan 2017)—especially in the technology and finance sectors. This trend has been particularly troubling given the mounting evidence that information markets are being systematically distorted by large firms (Ezrachi & Stucke 2016, Patterson 2016, Stucke & Grunes 2016).

Top economic officials in both the Obama and Trump administrations have said that they want to assure workers good jobs at good wages. But the assertion rings hollow when they set out to undermine one of the key institutions offering some kind of stability in labor markets racked by precarity and disruption. Unions, professional associations, and licensure requirements are mutually supportive in reinforcing policies designed to give workers some autonomy and self-determination in defining the terms of their employment. Undermining one tends to undermine the other.

Occupational licensing is just as much a matter of politics as it is of economics. Especially given persistent bias and opacity in the economic analysis of mergers, antitrust loses little if any scientific validity once it concedes the dually politico-economic nature of competition policy (Eisinger & Elliott 2016). In properly politico-economic questions, both the ends and the means are open to debate, not dictated by a technocratic quest for a perfected labor market (McCluskey et al. 2016).

Admittedly, existing occupational regulations can and should be improved. For example, they sometimes impede the full participation of former prisoners and immigrants in American economic life. The critical point is that occupational licensing implicates multiple, and sometimes competing, public policy goals, including protecting consumers and enhancing the bargaining power of workers. Licensure—part consumer protection, part labor law—calls for legislative-type determinations that reflect a broad and multifaceted conception of the public interest, not limited by esoteric formulations of efficiency that have by now lost whatever patina of legitimacy they once had. Antitrust practitioners who insist on reducing every public policy decision to efficiency enhancing or efficiency reducing cannot account for the pluralistic objectives of occupational licensing in particular and public policy in general. Given its intellectual narrowness, the framework of contemporary antitrust law provides a warped view of occupational and professional licensing regimes.

DISCLOSURE STATEMENT

This work reflects the views of the authors alone and not necessarily those of the Consumer Financial Protection Bureau or the United States. The authors are not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

LITERATURE CITED

Akerlof GA. 1970. The market for "lemons": quality, uncertainty and the market mechanism. *Q. J. Econ.* 84:488–500

Allensworth RH. 2016. The commensurability myth in antitrust. *Vanderbilt Law Rev.* 69:1–70

Ausubel LM. 1991. The failure of competition in the credit card market. *Am. Econ. Rev.* 81:50–81

Blair P, Chung B. 2017. *Occupational licensing reduces racial and gender wage gaps: evidence from the survey of income and program participation*. Work. Pap. 2017-50, Hum. Cap. Econ. Opport. Work. Group, Chicago, IL

Boswell J. 2013. *Community and the Economy*. New York: Routledge

Browne S. 1993. *Edmund Burke and the Discourse of Virtue*. Tuscaloosa: Univ. Ala. Press

Butler P. 2017. *Chokehold*. New York: New Press

California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)

Carstensen PC. 1983. Antitrust law and the paradigm of industrial organization. *U.C. Davis Law Rev.* 16:487–526

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)

Commit. Sci. Child. Birth Age 8. 2015. *Transforming the Workforce for Children Birth Through Age 8: A Unifying Foundation*. Washington, DC: Natl. Acad. Sci. Press

Consum. Financ. Prot. Bur. 2017. *Staying on Track While Giving Back*. Washington, DC: Consum. Financ. Prot.

Crane DA (@DanielDanCrane). 2017. "2-way street: @Uber should honor privacy & security promises. @FTC shld exert muscle to break regulatory barriers for @Uber, @Lyft et al." Twitter, Aug. 15. **https://twitter.com/DanielDancrane/status/897465205365624832**

Davies W. 2014. *Limits of Neoliberalism: Authority, Sovereignty, and the Logic of Competition*. Thousand Oaks, CA: Sage

Driesen DM. 2006. Is cost-benefit analysis neutral? *Univ. Colo. Law Rev.* 77:335–404

Easterbrook F. 1984. Limits of antitrust. *Tex. Law Rev.* 63:1–40

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)

Economist. 2016. Too much of a good thing. *The Economist*, March 26. **http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing**

Edlin E, Haw R. 2014. Cartels by another name: Should licensed occupations face antitrust scrutiny? *Univ. Pa. Law Rev.* 162:1093–164

Eisinger J, Elliott J. 2016. These professors make more than a thousand bucks an hour peddling mega-mergers. *ProPublica*, Nov. 16

Ezrachi A, Stucke ME. 2016. *Virtual Competition*. Cambridge, MA: Harvard Univ. Press

Falls DS, Brittain A. 2014. In Virginia, thousands of day-care providers receive no oversight. *Washington Post*, Aug. 30

Farivar C. 2016. DOJ, FCC, chairman ok Charter/Time Warner cable deal, with a few caveats. *Ars Technica*, April 25. **http://arstechnica.com/tech-policy/2016/04/doj-fcc-chairman-ok-chartertime-warner-cable-deal-with-a-few-caveats/**

Fed. Trade Comm. 1983. *Standards and Certification: Final Staff Report*. Washington, DC: Fed. Trade Comm.

Fed. Trade Comm. 2016. *FTC staff supports Department of Veterans Affairs proposed rule to grant full practice authority to advanced practice registered nurses*. News Release, July 25. **https://www.ftc.gov/news-events/press-releases/2016/07/ftc-staff-supports-department-veterans-affairs-proposed-rule**

Fed. Trade Comm. 2017. *FTC files amicus brief in appeals court case involving for-hire drivers in Seattle*. Press Release, Nov. 6. **https://www.ftc.gov/news-events/press-releases/2017/11/ftc-files-amicus-brief-appeals-court-case-involving-hire-drivers**

First A, Waller SW. 2013. Antitrust's democracy deficit. *Fordham Law Rev.* 81:2543–74

Flannery M, Samolyk K. 2005. *Payday lending: Do the costs justify the price?* Work. Pap. 2005-09, Fed. Depos. Insur. Corp., Cent. Financ. Res., Washington, DC

Flynn JJ. 1988. The Reagan administration's antitrust policy, original intent and the legislative history of the Sherman Act. *Antitrust Bull.* 33:259–308

Freidson E. 1986. *Professional Powers: A Study of the Institutionalization of Formal Knowledge*. Chicago: Univ. Chicago Press

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

Gavil AI, Feinstein DL, Gaynor MS. 2014. *FTC staff comment to the Honorable Brendan Reilly concerning Chicago proposed ordinance O2014-1367*. Public Lett., April 15. **https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf**

Gellhorn W. 1976. The abuse of occupational licensing. *Univ. Chicago Law Rev.* 44:6–27

Gilens M, Page BI. 2014. Testing theories of American politics: elites, interest groups, and average citizens. *Perspect. Politics* 12:564–81

Gittleman M, Kleiner MM. 2016. Wage effects of unionization and occupational licensing coverage in the United States. *ILR Rev.* 69:142–72

Goldfarb v. Va. State Bar, 421 U.S. 773 (1975)

Gould E. 2016. *Wage inequality continued its 35-year rise in 2015*. EPI Briefing Pap. 421, Econ. Policy Inst., Washington, DC

Green G. 2015. Unflattering resemblance. *Competition Matters Blog*, Jan. 13. **https://www.ftc.gov/news-events/blogs/competition-matters/2015/01/unflattering-resemblance**

Greenslade JL. 1988. Labor unions and the Sherman Act: rethinking labor's nonstatutory exemption. *Loyola LA Law Rev.* 22:151–216

Haberfeld M. 2016. Not everybody is an expert on policing. *Zócalo*, July 15. **http://www.zocalopublicsquare.org/2016/07/15/not-everybody-expert-policing/ideas/nexus/**

Hale R. 1952. *Freedom Through Law: Public Control of Private Governing Power*. New York: Columbia Univ. Press

Hendrickson M, Heffernan W. 2007. *Concentration of agricultural markets: April 2007*. Rep., Food Circles Netw. Proj., Univ. Miss., Columbia, MO. **http://www.foodcircles.missouri.edu/07contable.pdf**

Hovenkamp H. 1985. Antitrust policy after Chicago. *Mich. Law Rev.* 84:213–84

In re Music Teachers Nat'l. Ass'n., F.T.C. no. 131-0118 (2014). **https://www.ftc.gov/enforcement/cases-proceedings/131-0118/music-teachers-national-association-inc-matter**

In re Professional Skaters Ass'n., F.T.C. no. 131-0168 (2015). **https://www.ftc.gov/enforcement/cases-proceedings/131-0168/professional-skaters-association-inc-matter**

Kalleberg A. 2009. Precarious work, insecure workers: employment relations in transition. *Am. Sociol. Rev.* 74:1–22

Kaplow L, Shavell S. 1994. Why the legal system is less efficient than the income tax in redistributing income. *J. Legal Stud.* 23:667–82

Kaplow L, Shavell S. 2000. Should legal rules favor the poor? Clarifying the role of legal rules and the income tax in redistributing income. *J. Legal Stud.* 29:821–36

Khan L, Vaheesan S. 2017. Market power and inequality: the antitrust counterrevolution and its discontents. *Harvard Law Policy Rev.* 11:235–94

Kleiner MM, Krueger AB. 2010. The prevalence and effects of occupational licensing. *Br. J. Ind. Relat.* 48:676–87

Kocieniewski D. 2013. Academics who defend Wall Street reap reward. *New York Times*, Dec. 27. **https://www.nytimes.com/2013/12/28/business/academics-who-defend-wall-st-reap-reward.html**

Korobkin RB. 2003. Bounded rationality, standard form contracts, and unconscionability. *Univ. Chicago Law Rev.* 70:1203–95

Kuttner R. 2008. Good jobs for Americans who help Americans. *The American Prospect*, April 18. **http://prospect.org/article/good-jobs-americans-who-help-americans**

Kysar D. 2010. *Regulating from Nowhere*. New Haven, CT: Yale Univ. Press

Law M, Kim S. 2005. Specialization and regulation: the rise of professionals and the emergence of occupational licensing regulation. *J. Econ. Hist.* 65(3):723–56

Lipman M. 2013. DOJ's antitrust plans unclear amid looming office closures. *Law 360*, Jan. 15. **http://www.law360.com/articles/406994/doj-s-antitrust-plans-unclear-amid-looming-office-closures**

Lipton E, Williams B. 2016. Scholarship or business? Think tanks blur the line. *New York Times*, Aug. 8, p. A1

Loewe v. Lawlor, 208 U.S. 274 (1908)

MacLean N. 2017. *Democracy in Chains*. New York: Random House

Manjoo F. 2016. Tech's "frightful 5" will dominate digital life for foreseeable future. *New York Times*, Jan. 20. **https://www.nytimes.com/2016/01/21/technology/techs-frightful-5-will-dominate-digital-life-for-foreseeable-future.html**

McCluskey MT. 2012. How the "unintended consequences" story promotes unjust intent and impact. *Berkeley Law Raza Law J.* 22:21–50

McCluskey MT, Pasquale F, Taub J. 2016. Law and economics: contemporary approaches. *Yale Law Policy Rev.* 35(1):297–308

Mehrotra A, Dean KM, Sinaiko AD, Sood N. 2017. Americans support price shopping for health care, but few actually seek out price information. *Health Aff.* 36:1392–400

North Carolina State Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015)

Orbach B. 2013. How antitrust lost its goal. *Fordham Law Rev.* 81:2253–78

Parker v. Brown, 317 U.S. 341 (1943)

Pasquale F. 2006. Toward an ecology of intellectual property: lessons from environmental economics for valuing copyright's commons. *Yale J. Law Technol.* 8:78–135

Pasquale F. 2010a. Access to medicine in an era of fractal inequality. *Ann. Health Law* 19:269–310

Pasquale F. 2010b. Dominant search engines: an essential cultural and political facility. In *The Next Digital Decade: Essays on the Future of the Internet*, ed. B Szoka, A Marcus, pp. 401–18. Washington, DC: TechFreedom

Pasquale F. 2010c. Reputation regulation: disclosure and the challenge of clandestinely commensurating computing. In *The Offensive Internet: Privacy, Speech, and Reputation*, ed. S Levmore, MC Nussbaum, pp. 107–23. Cambridge, MA: Harvard Univ. Press

Pasquale F. 2013a. Grand bargains for big data: the emerging law of health information. *Md. Law Rev.* 72:682–772

Pasquale F. 2013b. *Paradoxes of digital antitrust. Harvard J. Law Technol. Occas. Pap. Ser.* 2013:1–20. **http://digitalcommons.law.umaryland.edu/fac_pubs/1433/**

Pasquale F. 2013c. Privacy, antitrust, and power. *George Mason Law Rev.* 20:1009–24

Pasquale F. 2014. Capital's offense: law's entrenchment of inequality. *b20*, Oct. 1. **https://www.boundary2.org/2014/10/capitals-offense-laws-entrenchment-of-inequality/**

Patterson M. 2016. *Antitrust Law in the New Economy: Google, Yelp, LIBOR, and the Control of Information.* Cambridge, MA: Harvard Univ. Press

Paul SM. 2016. The enduring ambiguities of antitrust liability for worker collective action. *Loyola Univ. Chicago Law J.* 37:969–1048

Paul SM. 2018. *Solidarity in the Shadow of Antitrust*. Cambridge, UK: Cambridge Univ. Press. In press

Pethokoukis J. 2014. The terrible economic burden of occupational licensing. *American Enterprise Institute Ideas*, April 21. **https://www.aei.org/publication/the-terrible-economic-burden-of-occupational-licensing/**

Piketty T. 2014. *Capital in the Twenty-First Century, transl.* A Goldhammer. Cambridge, MA: Harvard Univ. Press

Porter E. 2016. With competition in tatters, the rip of inequality widens. *New York Times*, July 12. **http://www.nytimes.com/2016/07/13/business/economy/antitrust-competition-inequality.html**

Powell L. 1971. *Memorandum to Eugene Sydnor: attack on American free enterprise system.* Memorandum, Aug. 23. **http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf**

Rahman S. 2016. *Democracy Against Domination*. New York: Oxford Univ. Press

Reagle J. 2015. *Reading the Comments*. Cambridge, MA: MIT Press

Scholz T, Pasquale F. 2015. Serfing the web: On-demand workers deserve a place at the table. *The Nation*, July 16. **https://www.thenation.com/article/serfing-the-web-on-demand-workers-deserve-a-place-at-the-table/**

Shapiro C. 1986. Investment, moral hazard, and occupational licensing. *Rev. Econ. Stud.* 53:843–62

Slivinski S. 2015. Bootstraps tangled in red tape. *Goldwater Institute*, Feb. 10. **https://goldwaterinstitute.org/article/bootstraps-tangled-in-red-tape/**

Stucke ME. 2008. Better competition advocacy. *St. John's Law Rev.* 82:951–1036

Stucke ME. 2009. Does the rule of reason violate the rule of law? *U.C. Davis Law Rev.* 42:1375–490

Stucke ME, Grunes A. 2016. *Big Data and Competition Policy*. Oxford: Oxford Univ. Press

United Mine Workers v. Pennington, 381 U.S. 657 (1965)

United States. 2016. *Disruptive innovations in legal services*. Submission to Organ. Econ. Co-op. Dev., May 30. **https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/1606disruptive_innovation-us.pdf**

US Dep. Justice Antitrust Div. 2018. *Workload Statistics, FY 2007–2016*. Washington, DC: US Dep. Justice. **https://www.justice.gov/atr/file/788426/download**

Vaheesan S. 2015. What iron pipefittings can teach us about public and private power in the market. *Indiana Law J. Supp.* 91:15–23

Vaheesan S. 2018. Accommodating capital and policing labor: antitrust in the two gilded ages. *Md. Law Rev.* 78:In press. **https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046302**

Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004)

Vong v. Aune, 328 P.3d 1057 (Ariz. App. 2014)
Weil D. 2014. *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*. Cambridge, MA: Harvard Univ. Press
Whitman JQ. 2007. Consumerism versus producerism: a study in comparative law. *Yale Law J.* 117:340–407
Whitney L. 2015. Apple, Google, others settle antipoaching lawsuit for $415 million. *C/Net News*, Sept. 3. **https://www.cnet.com/news/apple-google-others-settle-anti-poaching-lawsuit-for-415-million/**
Young SD. 2002. Occupational licensing. In *The Concise Encyclopedia of Economics*, ed. DR Henderson. Carmel, IN: Lib. Fund. **http://www.econlib.org/library/Enc1/OccupationalLicensing.html**

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Statement for the Congressional Record

National Council of State Boards of Nursing

United States House of Representatives

Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law

Antitrust and Economic Opportunity: Competition in Labor Markets

November 8, 2019

Thank you for the opportunity to provide input on the House Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law: *Antitrust and Economic Opportunity: Competition in Labor Markers.* The National Council of State Boards of Nursing (NCSBN) appreciates the opportunity to provide our position on occupational licensing, the importance of labor mobility and other issues facing American workers.

NCSBN is an independent, non-profit association comprising 59 boards of nursing (BONs) from across the U.S., the District of Columbia and four U.S. territories. BONs are responsible for protecting the public through regulation of licensure, nursing practice, and discipline of the 4.9 million registered nurses (RNs), licensed practical/vocational (LPN/VNs), and advanced practice registered nurses (APRNs) in the U.S. with active licenses.

The primary responsibilities of a state licensing board are regulating, overseeing, and enforcing the practice of that profession throughout a state as dictated by the state's practice act with the goal of protecting the public. Depending on the profession, the danger an unsafe professional may pose to the public varies greatly. For health care professionals, such as nurses, this danger is especially high. The exposure to the public at the most vulnerable of times makes the importance of ensuring nurses are competent and safe providers all the more important.

The Role of State-Based Licensing in Protecting the Public
State licensing boards vary in size, organization, membership, and structure. Practice acts are drafted at the state level and are specific to each profession, and thus vary greatly between one profession to the next in their charges and processes. A one-size-fits-all approach to streamline state licensing board operations across professions at the federal level is unrealistic and if imposed, could pose a danger to public protection.

The Nurse Licensure Compact: Enhancing License Portability and Public Protection
For years, NCSBN has strived to offer nurses the opportunity to practice safely and competently across state lines without undue licensure burdens. One way that we have worked to facilitate interstate mobility of nurses is through the Nurse Licensure Compact

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(NLC), an interstate compact that allows a nurse to have one multistate license, in his or her state of residency that grants the privilege to practice in other NLC participating states both physically and electronically. Currently, 34 states have passed legislation to officially join the NLC and the effort continues to add more states moving forward. There are also efforts to move forward with a compact to allow advanced practice registered nurses (APRNs) to have similar mobility.

NCSBN has also championed full practice authority for APRNs through *The Consensus Model for APRN Regulation*. NCSBN, along with numerous other nursing associations that represent APRNs, created the APRN Consensus Model over 10 years ago to achieve the goal of standardizing advanced practice nursing and implementing best available evidence to secure quality service provision. The APRN Consensus Model not only seeks to reduce the regulatory burden facing practitioners and patients, but also plays an important role in standardizing the regulation of APRNs from state to state, a key component to improving license portability across state lines.

Concerns with the Restoring Board Immunity (RBI) Act

NCSBN recognizes the importance of compliance with the Supreme Court's decision in *North Carolina State Board of Dental Examiners* and for states to assess and create processes for active supervision where needed. The methods proposed in bills like the RBI Act, which was originally introduced in the 115th Congress, raise questions and concerns for BONs. Notably, many states already have systems in place to review licensing board rulemaking, with some states taking additional measures following the Supreme Court decision in that case. There is no clear path for a state to either opt in or opt out of the two separate frameworks proposed in the RBI Act.

Through the bill's Active Supervision and Periodic Review framework, a state would be required to establish a State Office of Supervision of Occupational Boards that are tasked with reviewing regular daily board operations. Creation of such an entity would almost certainly slow down the operations of state licensing boards and create hurdles to the delivery of their services, including expedient issuance of licenses and, perhaps more troubling, disciplinary action against those licensees that may have harmed consumers.

Also of concern, the bill's Judicial Review framework creates a more burdensome intermediate scrutiny standard. Many BONs currently defend the merits of their decisions in court when necessary. If this framework is implemented, it could create legal difficulty for those state licensing boards who are currently operating appropriately and well within the boundaries of the *North Carolina Board of Dental Examiners* decision.

While we recognize BONs are not the target of the RBI Act, the impact on them would be the same as other occupational licensing boards. Ultimately, if the RBI Act were to become law, it has the potential to damage over 100 years of jurisprudence in administrative law, regardless of whether a state or individual board in a state chooses to adopt its framework. NCSBN encourage Congress to continue allowing states to address regulatory issues raised by this Supreme Court decision individually at the state level.

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Student Loan Default and Licensing

NCSBN promotes evidence-based policies that protect the public from harm, while striving to reduce the burden of government. There is no evidence that removing a nurse's professional license due to student loan default hinders his or her ability to provide safe, competent care to patients. Therefore, states should not require a license to be revoked when a licensee defaults on a student loan.

Unfortunately, many state boards of nursing are required by statute to recognize student loan default as grounds for discipline or license revocation. NCSBN supports repealing all state laws and regulations permitting student loan default to be grounds for discipline. Additionally, NCSBN supports the Protecting Job Opportunities for Borrowers (JOBs) Act (H.R. 3689, S. 609), which would prohibit states from taking disciplinary action against someone's license as a result of defaulting on a student loan. Safe and competent nurses should be allowed to continue practicing regardless of their student loan status.

Conclusion

NCSBN appreciates the opportunity to share our perspective and expertise with the Subcommittee on this important matter. If you have any questions or would like any additional information, please do not hesitate to contact us. Elliot Vice, NCSBN's Director of Government Affairs, can be reached at evice@ncsbn.org and 202-624-7781. We look forward to continuing the dialogue with the Subcommittee on these important issues.

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Where Are The No-Poach Prosecutions DOJ Promised?

By **Bryan Koenig**

Law360 (October 3, 2019, 6:26 PM EDT) -- The U.S. Department of Justice wants everyone to know it's still serious about prosecuting companies and executives who agree to fix wages or keep employees from seeking other jobs and better pay with the competition.

The department issued a guidance, alongside the Federal Trade Commission, in October 2016 warning that wage-fixing and so-called no-poach arrangements between competitors made or continued after that date could face criminal prosecution. And DOJ Antitrust Division chief Makan Delrahim, who became assistant attorney general in September 2017, has repeatedly underscored for much of his tenure that criminal no-poach prosecution "remains a high priority." He even said in January 2018 that the division had a handful of criminal cases in the works.

"In the coming couple of months you will see some announcements, and to be honest with you, I've been shocked about how many of these there are, but they're real," Delrahim **said at the time**.

But for all its talk of putting executives behind bars, the agency hasn't brought a single criminal no-poach case in the nearly three years since the guidance.

While the agency is known to be conducting active criminal investigations in the space, some former Antitrust Division prosecutors doubt that any prosecutions will materialize.

"You have DOJ all along the way on record noting that they have ... a multitude of alleged self-reports of no-poach conduct. And yet they've not brought a single criminal case. And I think more tellingly, no other antitrust enforcer has fallen in line with them to criminalize the conduct. So it certainly raises the question why," said Simpson Thacher & Bartlett LLP global antitrust and trade regulation practice co-chair John Terzaken, a former criminal enforcement director of the Antitrust Division.

The DOJ may be hesitant to pursue a case, according to experts, because of how difficult it will be to win in front of judges and juries who've never seen these cases pursued criminally. DOJ investigations can take years, they say, and the division is likely waiting for the perfect set of facts for a case it has confidence it can win. In the meantime, it may be using the threat alone of criminal prosecution to cajole corporate compliance.

The threat of criminal prosecution itself represents a major shift for the department, according to Anna Pletcher, an O'Melveny & Myers LLP partner who recently joined the firm after a lengthy stint with the Antitrust Division, including as an assistant chief in its San Francisco office.

"It is unusual for the DOJ to prosecute a particular type of behavior civilly, and then reverse course and prosecute it criminally," Pletcher told Law360. "Frequently, we see it go in the opposite direction, where there is conduct that may be considered criminal before, but then the scope of criminal behavior has been narrowed."

A Shift in Tone

The DOJ itself may be trying to rejigger expectations in its criminal no-poach enforcement, according to Eric M. Meiring, a partner with Winston & Strawn LLP and former acting chief of the Antitrust Division, who pointed out an apparent change in Delrahim's tone the last time the antitrust chief discussed the prospect, at a department workshop last week on competition in labor markets. According to Meiring, Delrahim no longer appears to be describing criminal prosecution as imminent.

At the workshop, Delrahim said, according to his prepared remarks, "While we cannot comment on the status or the timing of our criminal no-poach and wage-fixing investigations, I want to reaffirm that criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division."

"As former Attorney General Robert Jackson observed, justice is neither automatic nor blind," Delrahim continued. "The success of the department in this initiative is not based on quantitative metrics, but on the qualitative performance of our investigative work. That is especially true in matters implicating an individual's liberty interest."

Meiring honed in on the last two sentences, especially Delrahim's admonition not to judge the DOJ on its "quantitative metrics," and his assertions of "an individual's liberty interest."

"I think he's trying to be more circumspect," Meiring told Law360.

The reference to personal liberty, according to Meiring, may be an allusion to the seriousness of putting someone behind bars and the desire for a clear-cut case where that appears to be the logical outcome for prosecutors, judges and jurors.

Delrahim was far less circumspect in prepared remarks delivered as part of a Senate oversight hearing in early October 2018, just over a year into his tenure, and two years after the no-poach guidance was issued.

"As a matter of prosecutorial discretion, the division will pursue no-poach agreements terminated before October 2016 through civil actions," Delrahim said at the time. "Defendants should anticipate potential criminal enforcement actions for any such naked no-poach agreements we uncover that post-date our October 2016 guidance, although we reserve discretion as appropriate in making our ultimate determinations."

Asked if any no-poach cases are on their way, a DOJ spokesperson referred Law360 to Delrahim's comments at the workshop last week.

Not everyone thinks Delrahim has set aside plans for criminal prosecution. Mark L. Krotoski, a partner with Morgan Lewis & Bockius LLP and former assistant chief in the division's National Criminal Enforcement Section, notes that the threats of criminal prosecution are coming from the very top.

"You have to take that very seriously," said Krotoski, who argued that investigations like this can be very complicated and time-consuming.

Krotoski also said that Delrahim's continued assertions of criminal cases as a priority "remains as strong a statement as you will see."

Nor did Krotoski read in Delrahim's tonal shift any effort to tamp down on expectations. Instead, he said that explaining the difference between qualitative and quantitative results "is common for every prosecuting office," which may bring a single big case instead of multiple smaller ones, for example.

A Perfect Case, Or None at All

Experts say the DOJ's discretion may be driven by the difficulty both in finding illegal no-poach deals, and in successfully prosecuting them. The DOJ, they say, may be waiting for just the right case to bring.

"If the DOJ brings a criminal case, they will want to make sure that it's a solid per se violation of the antitrust laws. That also makes sense. When you're looking to impose such harsh sanctions, that's criminal fines and jail time, you want to make sure that your case is a very solid per se violation," Pletcher said.

Anti-competitive arrangements made between competitors are inherently difficult to find, experts note, in part because they often are not written down. From the outside, they look like legitimate business conduct, which is why the DOJ relies so heavily on its leniency program granting protections from criminal prosecution and follow-on private litigation for entities who disclose malfeasance. As a result, the DOJ may need a co-conspirator to inform them of a blatant antitrust violation.

However, even if no-poach prosecutions would be hard to win, Eric Grannon, a partner with White & Case LLP and former division counsel, argues that likely wouldn't dissuade the DOJ.

"The division has brought many cases before juries that other prosecutors might have thought were too thin to prosecute criminally," Grannon said.

Another complicating factor is that antitrust investigations often take a long time — Meiring estimates three to five years. That means, he said, if the clock started ticking when the agencies issued their guidance, that would put enforcers "right in the middle" of an investigation life cycle.

"You could be seeing a wave of these things in the next year or two," Meiring said.

Short of bringing cases, Meiring says the best deterrent is likely what the DOJ is doing: public warnings and advocacy in court briefs, including civil enforcement **against major rail equipment suppliers** and amicus filings in follow-on litigation to that case, as well as **support for a case** against Duke University.

"It could change people's actions just believing that there is resolve in the Antitrust Division to bring these cases criminally," Meiring said.

At the same time, the DOJ has argued that **a harder-to-prove legal standard** should be applied to cases against no-poach deals inked under franchise agreements for fast food chains and other businesses.

Just a Warning?

Terzaken suggests that even if the DOJ doesn't bring a criminal case, Delrahim may be continuing to call the prospect a priority as a warning to industry. There's value, Terzaken said, in "continuing to rattle the saber in the business community to make sure people are sitting up and paying attention."

"Much of the value they may derive from this is helping to shape the compliance community," Terzaken said.

There's no threat quite like the prospect of jail time, according to Terzaken, and the mere possibility may be enough to drive corporate compliance efforts focused purely on staying on the DOJ's good side.

"Because people themselves are going to try to draw very bright lines," Terzaken said.

Meiring argues, however, that threats only go so far.

"It has an effect," Meiring said. But it's not as strong "as putting someone in jail."

Grannon says that it's likely no cases have materialized precisely because employers seem to have gotten the message. In particular, he points to the "emphatic nature" of division front office promises of criminal prosecution.

"I think they would be more than happy to bring a case if they had one," Grannon said.

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Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages

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ACCOMMODATING CAPITAL AND POLICING LABOR: ANTITRUST IN THE TWO GILDED AGES

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ABSTRACT

In enacting the antitrust laws, Congress sought to prevent big businesses from maintaining and augmenting their power through collusion, mergers, and exclusionary and predatory practices and also aimed to preserve the ability of workers to act in concert. At times, the antitrust laws have benefited ordinary Americans. Antitrust achievements include the restructuring of the oil industry in 1911, the creation of competitive market structures in the mid-twentieth century, and the termination of AT&T's telecommunications monopoly in 1984.

Yet, the history of antitrust in the United States is not one of uninterrupted successes. Over two forty-year periods, the executive branch and federal courts, in enforcing and interpreting the antitrust laws, have failed to advance Congress's vision and indeed inverted congressional intent. During the original and current Gilded Ages, the antitrust laws were and are used to protect the power of large-scale business and also to limit the autonomy of workers to organize and demand higher wages and better working conditions. Through this anti-labor application, the federal government has employed antitrust to aid big business, rather than restrain its power.

Despite this history of accommodating capital and policing labor, the antitrust laws can still be reinterpreted and redeemed. Congressional, executive, and judicial action can remake these laws to control the power of large corporations and also protect the freedom of all workers to organize for higher wages and better working conditions. A renewal of antitrust, in accordance with the expressed purposes of Congress, would help remedy the inequities of the New Gilded Age and create a more just society.

* Legal Director, Open Markets Institute. The author thanks Brandon Becker, Ben Cady, Mike Chornesky, Bill Curran, Ben Douglas, Amanda Jaret, Richard John, Christopher Leslie, Steve McIntyre, Michael Oswalt, Frank Pasquale, Sanjukta Paul, Ganesh Sitaraman, Maurice Stucke, Ramsi Woodcock, and participants at the University of California, Irvine School of Law's Antitrust Scholars Roundtable for their thoughtful feedback and valuable suggestions on earlier drafts of this Article.

INTRODUCTION

> *[A]s legislators we may constitutionally, properly, and wisely allow laborers to make associations, combinations, contracts, [and] agreements for the sake of maintaining and advancing their wages, in regard to which, as a rule, their contracts are to be made with large corporations who are themselves but an association or combination or aggregation of capital on the other side.*—Senator George Hoar[1]

> *[H]istory shows that the victories won under [the Sherman Act] have been the suits against labor organizations, while great trusts and monopolies have grown and flourished.*—Representative M. Clyde Kelly[2]

The federal antitrust laws—the Sherman,[3] Clayton,[4] and Federal Trade Commission Acts[5]—have a complicated history. The enforcement of these laws has produced some landmark successes and delivered important benefits to the public. Federal antitrust enforcement restructured the oil refining industry in 1911,[6] helped create decentralized market structures in the mid-twentieth century,[7] and ended AT&T's stranglehold over the telecommunications industry in 1984.[8] Yet, at other times, the federal antitrust agencies and courts, in enforcing and interpreting the antitrust laws, failed to advance Congress's vision and indeed inverted its intent. During the first forty years following the Sherman Act's passage, and again over the past four decades, these laws were and have been generally applied and interpreted to structure markets to privilege monopolistic and oligopolistic businesses and to curtail the liberty of workers.[9]

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1. 21 CONG. REC. 2728 (1890).
2. 51 CONG. REC. 9087 (1914).
3. Sherman Act, 15 U.S.C. §§ 1–7 (2012).
4. Clayton Act, 15 U.S.C. §§ 12–27 (2012).
5. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2012).
6. Standard Oil Co. v. United States, 221 U.S. 1 (1911).
7. William G. Shepherd, *Causes of Increased Competition in the U.S. Economy, 1939–1980*, 64 REV. ECON. & STAT. 613, 626 (1982).
8. United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 226–34 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).
9. Contrary to libertarian and neoclassical accounts of a "free market" economy, state action is a precondition for markets and determines who has power and wealth in a society, most fundamentally, through the enforcement of property rights and contracts. Those with a large holding of property, or, say, a monopoly on an essential form of property, wield a great deal of coercive power over others. Those with little or no property have little or no coercive power. The question is not whether the state acts or does not act, but to whose benefit it acts. Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 305–07 (1973). The Supreme Court has in the past recognized the fact that state action

In enacting the principal antitrust laws, Congress aimed to check the power of large-scale capital and protect concerted labor action from federal interference. The framers of the antitrust laws understood corporate power broadly. Congress passed the antitrust laws to protect consumers and producers from powerful corporate sellers and buyers, maintain markets open to all comers, and defend the American political system against corporate capture.[10] At the same time, they did not want these new laws to be employed against collectives of workers. The legislative histories of both the Sherman and the Clayton Acts indicate that Congress intended these statutes to control the power of capital, not labor.[11] Indeed, a common view in Congress was that the antitrust laws and labor unions would serve complementary functions and together limit the power of monopolies and trusts.[12]

During the decades following the passage of the Sherman Act, overlapping with the original Gilded Age,[13] the government failed to control the

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controls the scope of property rights and enables contract law. In a 1971 decision holding that welfare recipients were entitled to due process before loss of benefits, the Court noted that welfare benefits could be considered a form of property and that "[m]uch of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property." Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970). Earlier, in finding the enforcement of racially restrictive covenants in housing to be in violation of the Fourteenth Amendment, the Court wrote,

> These are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.

Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

10. John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 304–05 (1988); Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 314–15 (1991).

11. Louis B. Boudin, *The Sherman Act and Labor Disputes: I*, 39 COLUM. L. REV. 1283, 1287 n.14 (1939).

12. For instance, one member of Congress called for "counter combinations among the people" to challenge the power of large corporations. 21 CONG. REC. 2565 (1890) (statement of Sen. Stewart).

13. The Gilded Age is conventionally thought to have ended around the turn of the twentieth century with the rise of the Populist and Progressive movements. The historical evidence suggests, however, that the New Deal era lasting from the 1930s through the 1970s was a "long exception" or an "interregnum between Gilded Ages." Jefferson Cowie & Nick Salvatore, *The Long Exception: Rethinking the Place of the New Deal in American History*, 74 INT'L LABOR & WORKING-CLASS HIST. 3, 5 (2008); Paul Krugman, *Introducing This Blog*, N.Y. TIMES: THE CONSCIENCE OF A LIBERAL (Sept. 18, 2007, 11:45 PM), https://krugman.blogs.nytimes.com/2007/09/18/introducing-this-blog/; *see also* Sarah Jones, *Lessons from the Gilded Age*, NEW REPUBLIC (June 13, 2018), https://newrepublic.com/article/149005/lessons-gilded-age ("America is in a new Gilded Age, or so the headlines say. 'It's Beginning to Look a Lot Like the Gilded Age,' *Bloomberg* warned in February, noting that the late nineteenth century 'was a time of exploding economic inequality, stagnant living standards, growing concern about monopolies, devastating financial crises . . . brazen political corruption, frequent pronouncements that the American republic was doomed, and seemingly unending turmoil over race and national identity.'" (alterations in original) (quoting Justin Fox, *It's Beginning to Look a Lot Like the Gilded Age*, BLOOMBERG (Feb. 7, 2018), https://www.bloomberg.com/opinion/articles/2018-02-07/it-s-beginning-to-look-a-lot-like-the-gilded-age)).

growth of monopolies and oligopolies and instead used the antitrust laws to limit the activities of labor unions. Although the United States Supreme Court established strict rules against price fixing,[14] it limited the ability of the government to challenge corporate mergers.[15] This combination of a prohibition on price fixing and a tolerance of consolidation contributed to the first wave of mergers in American history.[16] Instead of helping move the United States toward a less concentrated industrial structure, the antitrust laws accelerated the rise of monopolies and oligopolies. Although the administrations of Theodore Roosevelt, William Howard Taft, and Woodrow Wilson launched a vigorous anti-monopoly campaign, these efforts, at most, undid only a part of the consolidation that resulted from the merger mania between 1897 and 1904. During this same time, even as the Supreme Court permitted economy-wide consolidation, it applied the antitrust laws to restrict the activities of labor unions.[17] The Department of Justice ("DOJ") and the federal courts used the antitrust laws to discipline workers and to limit the ability of unions to apply pressure against hostile employers through secondary boycotts and strikes.[18] In the words of economic historian Richard White, the Sherman Act was "aimed at capital but hit labor."[19]

Breaking with the mid-twentieth century approach to antitrust, the federal courts and antitrust enforcers, since the late 1970s, have once again interpreted—indeed reinterpreted—antitrust law to expand the autonomy of big capital and restrict the freedom of workers. The executive branch and judiciary have minimized concerns about the power of corporations. They have replaced congressional (and once-judicially validated) economic and political objectives with an "efficiency" or "consumer welfare"[20] goal. In the area of mergers, the Court has taken a generally hands-off approach, meaning that

14. United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897).

15. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

16. "The years following the *Knight* decision [one of the first significant cases tried under the Sherman Act] witnessed the greatest consolidation movement in the nation's history, and most states proved economically impotent against the new, giant corporations operating in national and even world markets." NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904, at 166 (1985).

17. Loewe v. Lawlor, 208 U.S. 274 (1908).

18. *See infra* Section II.B.

19. RICHARD WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA 384 (2011).

20. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting ROBERT BORK, THE ANTITRUST PARADOX 66 (1978))); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (2010) ("Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers."). Although the distinction between consumer welfare and economic efficiency is not important to the thesis of this Article, a review of the case law shows that consumer welfare is the goal of contemporary law. John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192 (2008).

the federal antitrust agencies have become the principal policymakers and used their power to handicap their *own* ability to stop mergers.[21] Except for horizontal mergers in highly concentrated markets that threaten to leave a market with four or fewer players, the DOJ and the Federal Trade Commission ("FTC") today generally do not stop or even remedy most horizontal mergers.[22] This lax approach to mergers has yielded multiple waves of consolidation across the economy and contributed to a highly concentrated industrial structure. Along with the agencies' permissive approach to mergers, the Supreme Court has narrowed the scope of anti-monopoly law and restricted the ability of plaintiffs to challenge predatory pricing[23] and refusals to deal.[24] The federal antitrust agencies have done little to resist this doctrinal retrenchment and have not brought a significant anti-monopoly case arguably since the lawsuit against Microsoft in 1998.[25]

This general deference toward large businesses has been paired with vigilance toward collective action by labor. The federal antitrust agencies, especially the FTC, repeatedly challenged union-like organization by workers and professionals. The FTC also consistently called on states to scale back occupational licensing rules that can help consumers and workers. With this pro-capital, anti-labor orientation, the antitrust laws in the new Gilded Age resemble antitrust in the original Gilded Age.[26] Laws intended to challenge the privileges of monopoly and preserve space for workers to organize are once again being used to preserve the existing power structure and undermine attempts by labor to strike a more equitable bargain with capital.[27]

Through congressional, executive, and judicial action, the antitrust laws can be reinterpreted to honor their original legislative intent and to create a more just and equitable society. This reinterpretation and revival of antitrust law would neither be easy nor be immediate. It would require new legislation and a radical change in personnel both at the federal antitrust agencies and on the federal bench and the erasure of decades of accumulated pro-monop-

21. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, § 4 ("The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.").

22. John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837, 855 (2017).

23. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).

24. Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

25. Press Release, Dep't of Justice, Justice Department Files Antitrust Suit against Microsoft for Unlawfully Monopolizing Computer Software Markets (May 18, 1998), https://www.justice.gov/archive/atr/public/press_releases/1998/1764.htm.

26. *See infra* Part IV.

27. Frank Pasquale, *When Antitrust Becomes Pro-Trust: The Digital Deformation of U.S. Competition Policy*, CPI ANTITRUST CHRON., May 2017, at 4–5.

oly and pro-oligopoly precedent. Yet, the conservative coup against the historical understanding of the antitrust laws beginning in the 1970s[28] reveals the malleability of these statutes. At a minimum, the antitrust agencies and courts should reorient the antitrust laws to advance the congressional intent expressed in the Sherman, Clayton, and FTC Acts. The Congresses that passed these statutes sought to limit the power of large-scale capital over consumers and producers, competitors, and citizens and, at the same time, were near-unanimous in stating that these laws should not interfere with the joint action of workers. The federal antitrust agencies and the courts should rediscover these legislative histories. In this current era of deep economic and political inequality, the policy objectives expressed by Congress in 1890 and 1914 remain as important as ever to ordinary Americans. Persisting with the current antitrust paradigm would only uphold an unjust and increasingly unpopular status quo.

Part I will lay out the legislative vision for the antitrust laws, showing that the framers of these statutes sought to control the power of large businesses[29] and to protect the freedom of workers and their right of collective action.[30] Part II will turn to administration and interpretation of the antitrust law from 1890 to the 1930s and examine how the executive branch and courts defanged the new laws against big business and weaponized it against workers during this period.[31] Part III will review antitrust over the past four decades—the Second Gilded Age—and describe the troubling pro-business,[32] anti-worker application and interpretation of the antitrust statutes over this period.[33] Part IV will explain how antitrust law can still be remade in accordance with the original congressional vision and become a powerful instrument to create a more equitable society.[34]

I. THE ANTI-MONOPOLY, PRO-WORKER VISION UNDERLYING U.S. ANTITRUST LAW

The Congresses that enacted the antitrust laws had an expansive vision to curtail the power of concentrated capital in American society. These laws were passed against the backdrop of growing public fears about large corporations, which emerged in the new national market in the decades after the

28. The decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), was key in this transformation and retrenchment of antitrust law. *Id.*; *see also* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1152 (1981).

29. *See infra* Section I.A.

30. *See infra* Section I.B.

31. *See infra* Sections II.A–B.

32. *See infra* Section III.A.

33. *See infra* Section III.B.

34. *See infra* Sections IV.A–B.

Civil War.[35] Americans recognized the totalizing power of these corporate titans. They believed these new giants threatened ordinary Americans' interests in their capacity as consumers, workers, farmers, entrepreneurs, and citizens.[36]

The legislative histories of the antitrust laws can and should inform their interpretation. Despite the late Justice Scalia's strident advocacy against the use of legislative history in statutory interpretation, courts, including the Supreme Court, continue to consult legislative history when interpreting ambiguously phrased statutes.[37] Even under Justice Scalia's philosophy of selectively looking to the historical record for guidance,[38] open-ended statutes such as the Sherman Act—more akin to broad constitutional provisions than to a detailed and precisely drafted federal statute[39]—arguably should be interpreted in light of congressional purposes.

A review of the legislative histories of the three principal antitrust statutes reveals a broad understanding of corporate power. Congress in the late nineteenth and early twentieth centuries recognized that this power manifested itself in several ways. The members of Congress who drafted the antitrust laws had a rich understanding of the power of monopoly and oligopoly and believed that such businesses exercised authority akin to private governments.[40] Ohio Senator John Sherman described the trusts and monopolies as

35. James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 283–84 (1989).

36. *See also* WILLIAM CRONON, NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST 246–47, 334 (1991); HANS B. THORELLI, FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 138–49 (1955); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1226–28 (1987). *See generally* LAWRENCE GOODWYN, THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA (1978).

37. David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1739–40 (2010).

38. Justice Scalia's use of the debating and drafting record was not consistent. He consulted and championed the use of these records in constitutional interpretation but denounced their use in statutory interpretation. William N. Eskridge Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1306–07 (1998).

39. The key substantive provisions of the three main antitrust statutes are phrased in sweeping terms. The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade" and "monopoliz[ation] or attempt[s] to monopolize." 15 U.S.C. §§ 1–2 (2012). The FTC Act outlaws "[u]nfair methods of competition." *Id.* § 45. The Clayton Act prohibits mergers and acquisitions whose effects "may be substantially to lessen competition, or to tend to create a monopoly." *Id.* § 18. The Supreme Court once described the antitrust laws as "the Magna Carta of free enterprise." United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); *see also* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933) ("As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

40. K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 72 (2016).

exercising a "kingly prerogative, inconsistent with our form of government."[41] More than fixating on a particular material effect of big business,[42] many leading members of Congress spoke out against these new corporate behemoths because they could, and did, exercise unaccountable power over Americans.[43] Although prices were generally falling in the United States in the late nineteenth and early twentieth centuries, members of Congress denounced the *power* of corporations to raise prices above competitive levels and capture wealth from the consuming public.[44] And for these Congresses, higher consumer prices were an important—but *not* the only—manifestation of monopoly and oligopoly power in the American political economy. The drafters of the antitrust laws held that dominant and other powerful corporations threatened the freedom and viability of competitors and the preservation of democratic institutions.

As Congress sought to curtail the power of large businesses, it aimed to preserve freedom of action for workers and their representative organizations. Workers, unions, and their congressional supporters were concerned that the antitrust laws would be used against collective action by labor. The legislative history of the Sherman Act suggests a congressional desire to exempt labor from the new law's ambit. After a series of court decisions hostile to workers, Congress enacted an express exemption for labor in the Clayton Act. This exemption states that "labor of a human being is not a commodity or article of commerce."[45] The legislative history of the Sherman Act indicates that many members of Congress viewed labor organizing not as a target of antitrust enforcement but as a complement to antitrust enforcement—both essential to controlling the power of big businesses.

A. Curtail the Power of Concentrated Capital

In passing the three principal antitrust statutes, the respective Congresses expressed deep concerns about the power of concentrated capital. The legislative histories of the Sherman, Clayton, and FTC Acts reveal an expansive understanding of corporate power. The members of the Con-

41. 21 CONG. REC. 2457 (1890).

42. Notably, the economics profession was either indifferent toward or opposed to the passage of an antitrust law. THORELLI, *supra* note 36, at 120–21.

43. Senator Edmunds stated that, notwithstanding the possible material benefits of some trusts, these concentrations of power would "come to be tyrannies, grinding tyrannies, that have sometimes in other countries produced riots, just riots in the moral sense." 21 CONG. REC. 2726 (1890). One member of Congress in the debates preceding the enactment of the Clayton Act captured this power succinctly. While he conceded that the trusts could be operated for the public benefit, he characterized this view as naïve because unchecked private power "affords too great a temptation to frail humanity." 51 CONG. REC. 9186 (1914) (statement of Rep. Helvering).

44. Robert H Lande, *Wealth Transfers as the Original and Primary Concern: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 101 (1982).

45. 15 U.S.C. § 17 (2012).

gresses that debated, drafted, and passed the antitrust statutes were not concerned with just one aspect of corporate power. Representatives and senators warned of the power of corporations to control American society in myriad ways. The congressmen feared private autocracy threatened the interests of Americans as consumers, farmers, workers, business proprietors, and citizens.[46] The antitrust statutes were Congress's efforts to protect ordinary Americans from the power of the new corporate giants that defined the political economy of the United States.

1. *Protect Consumers, Producers, and Consumers from the Power of Large Corporations*

As Robert Lande shows in painstaking detail, the members of Congress that drafted the three primary antitrust statutes condemned monopolies and trusts for capturing wealth from American consumers, farmers, and other producers.[47] The corporate giants of the day used their power to raise prices to consumers and depress prices paid to farmers and workers, impoverishing ordinary Americans. In the debate leading up to the passage of the Sherman Act, Senator James George denounced the higher prices from monopoly as "extortion which makes the people poor."[48] The private taxes collected by monopolies and cartels were a moral outrage akin to robbery,[49] not an academic concern about "deadweight loss[es]" for economists to contemplate in seclusion.[50]

Large corporations' power to depress prices to producers, especially farmers, was another recurring theme. Representative Heard, for instance, stated that the corporate titans of the day have "stolen untold millions from the people."[51] Congressman Taylor recognized that the trusts exercised great power as both sellers and buyers and condemned the beef trust for "rob[bing] the farmer on the one hand and the consumer on the other."[52] For Congressman Bland, the beef trust was a principal enemy of the farmer. He asserted that "there is no trust in this country that today is robbing the farmers of the great West and Northwest of more millions of their hard-earned money than this so-called Big Four beef trust of Chicago."[53] This congressional interest in the impact of trusts on farmers is not surprising. Farmers, acting collectively through organizations such as the Farmers' Alliance, were among the

46. *See, e.g.*, Flynn, *supra* note 10, at 304–05; Peritz, *supra* note 10, at, 314–15.

47. Lande, *supra* note 44, at 82–142.

48. 21 CONG. REC. 1768 (1890).

49. *Id.* at 2614 (statement of Rep. Coke).

50. Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 373 (1993).

51. 21 CONG. REC. 4101 (1890).

52. *Id.* at 4098.

53. *Id.* at 4099.

leading supporters of anti-monopoly legislation in the late nineteenth century.[54]

In the debates in 1914 in the run-up to the passage of the FTC and Clayton Acts, the theme of corporate theft from consumers and producers was once again at the forefront. The principal Senate sponsor of the FTC Act expressed concern about "unreasonable and extortionate prices."[55] Another Senator stated that monopolies and trusts "mulct the people out of hundreds of millions of dollars each year"[56] and characterized monopoly and oligopoly pricing as robbery.[57] One Congressman sought to "secure the people from unjust tribute levied by monopolistic corporations."[58] In the debates preceding the enactment of the Clayton Act, Senators Cummins and Thompson spoke of "protecting the people against the rapacity and the avarice of monopoly"[59] and the "extortion practiced by the trust,"[60] respectively. Representative Morgan endorsed the creation of the FTC because it would limit corporate "power to arbitrarily control prices and thus exact unjust profits from the people."[61]

Just as they were concerned with protecting consumers and producers from the power of the trusts, the Congresses that enacted the antitrust statutes were committed to protecting small businesses and other competitors from the power of large-scale capital. Senator Sherman declared, "It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances."[62] He deemed this right to be "industrial liberty" and the foundation of equality in American society.[63] Senator George held that, without congressional action, capitalist power would "at some not very distant day . . . crush out all small men, all small capitalists, all small enterprises."[64] He rhetorically asked: "Is production, is trade, to be taken away from the great mass of the people and concentrated in the hands of a few men . . . ?"[65] Representative Mason went further than most of his colleagues and argued that preserving opportunities for small businesses should receive precedence

54. CRONON, *supra* note 36, at 343; Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 ECON. INQUIRY 242, 256 (1992).

55. *Federal Trade Commission: Hearing on S.B. 2941 Before the S. Comm. on Interstate Commerce*, 62d Cong. 25 (1914) (statement of Sen. Newan, S. Comm. on Interstate Commerce).

56. 51 CONG. REC. 13223 (1914).

57. *Id.*

58. *Id.* at 8854.

59. *Id.* at 14256.

60. *Id.* at 14223.

61. *Id.* at 9265.

62. 21 CONG. REC. 2457 (1890).

63. *Id.*

64. *Id.* at 2598.

65. *Id.*

over consumer interests.[66] He believed the theoretical efficiencies of large-scale enterprise could come at too high a price:

> Some say that the trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to 1 cent a barrel it would not right the wrong done to the people of this country by the "trusts" which have destroyed legitimate competition and driven honest men from legitimate business enterprises.[67]

When they debated the FTC and Clayton Act nearly a quarter-century later, members of Congress once again took an interest in the protection of competitive opportunities for small enterprises. For Senator Reed, an objective of the FTC Act was to "keep the highways of opportunity unobstructed . . . so that all may have a fair chance to gain a livelihood and to embark in business."[68] A Senate colleague aimed to preserve open and equal market opportunities for all participants.[69] Senator Lane described the existential threat of large enterprises to small businesses, stating that without comprehensive federal legislation "every small and honorable dealer may be put to intentional and infinite annoyance or driven out of business by his larger or more crafty rival."[70] Senator Cummins, albeit expressing somewhat contradictory sentiments, wanted to preserve the domain of "individual initiative" against "the power of the corporation."[71] Policing unfair practices in the marketplace was another important theme. Congressman Stevens spoke for the need to protect "healthful competition"[72] from threatening business practices. Sounding a similar note, Senator Newlands condemned market practices "against public morals" that inflicted harm on competitors.[73] Another Senator held that "oppression or advantage obtained by deception or questionable means is the distinguishing characteristic of 'unfair competition.'"[74]

The debates culminating in the passage of the Clayton Act also featured the preservation of opportunities for all comers. The protection of small business from overweening private power was an expressed goal. Representative Nelson lamented the disappearance of small business in a wave of consolidation.[75] A House colleague condemned large enterprises' quest for "industrial domination."[76] In endorsing the 1950 amendments to the Clayton Act (also

66. Lande, *supra* note 44, at 102.
67. 21 CONG. REC. 4100 (1890).
68. 51 CONG. REC. 13231 (1914).
69. *Id.* at 14791–92 (statement of Sen. Burton).
70. *Id.* at 13223.
71. *Id.* at 12742.
72. *Id.* at 14937.
73. *Id.* at 11112.
74. Lande, *supra* note 44, at 110 n.171 (quoting 51 CONG. REC. 12248 (1914)).
75. 51 CONG. REC. 9167 (1914).
76. *Id.* at 9086.

known as the Celler-Kefauver Antimerger Act),[77] Congressman Bennett stated that it would "preserve the chances of the average man to make a place for himself in business."[78]

2. Preventing Capitalist Takeover of Political Institutions

While coercion in the marketplace was an animating theme in the legislative debates, the Congresses that passed the antitrust laws viewed concentrated corporate power as a threat to the American political system itself. Private capture and even displacement of government is an important theme in the legislative debates leading up to the passage of the landmark antitrust statutes. The representatives and senators debating and drafting the bills signaled the threat of private dictatorship. They spoke of the threat to democratic institutions in American society and even warned of corporate autocracy.

Corporate control of political decisions was an important theme in the debate over the Sherman Act. The specter of corporate capture of the state loomed large. Senator Hoar deemed the monopolies of the late nineteenth century to be "a menace to republican institutions themselves."[79] In light of the power of these new corporate behemoths to control state governments, a Senate colleague called for a strong federal check on this private power.[80] Senator Sherman went even further and described the possibility of monopolies and trusts assuming control of key public decisions and displacing government. He did not mince words on the connection between private power and dictatorship. He explicitly stated, "If we would not submit to an emperor[,] we should not submit to an autocrat of trade."[81] Identifying the capital of private autocracy, he asked his Senate colleagues to "consider . . . whether, on the whole, it is safe in this country to leave the production of property, the transportation of our whole country, to depend upon the will of a few men sitting at their council board in the city of New York."[82] A colleague echoed the profound threat to the public of a few individuals making decisions that affected the entire nation.[83]

77. Celler-Kefauver Antimerger Act, ch. 1184, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. §§ 18, 21 (2012)).

78. 95 CONG. REC. 11506 (1949) (remarks of Rep. Bennett).

79. 21 CONG. REC. 3146 (1890).

80. *See id.* at 2460 ("These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.").

81. *Id.* at 2457.

82. *Id.* at 2570.

83. *Id.* at 2598 (statement of Sen. George).

As with the debates over the Sherman Act, the theme of private assumption of governmental powers was central in the debates over the FTC and Clayton Acts. Echoing Senator Sherman's comments from a quarter-century earlier, Senator Cummins warned that material benefits of large-scale enterprise would come at too great a price "if it involves the surrender of the individual, the subjugation of a great mass of people to a single master mind."[84] In endorsing the FTC Act, Congressman Stevens stated that the growth of trusts and monopolies had created among Americans "a very just apprehension that this wealth, and power growing out of it, may be not only used to the detriment but also may be a potential source of injury and oppression."[85] Deeming the Sherman Act to be a failure, Senator Newlands contended that corporate giants were so embedded in the American political economy that few dared to challenge their prerogatives.[86] Senator Kenyon posed the choice before his colleagues starkly as between government taming private monopoly or private monopoly taking over the government.[87]

The congressional discussion over the Clayton Act also revealed grave worries about private usurpation of government authority and featured especially evocative and rich rhetoric. Representative Kelly spoke of monopoly as "the invisible government which has controlled the visible Government in this Nation for many years."[88] The Congressman additionally denounced the monopolies' capture of government and their conversion of democratic institutions into servants of big capital:

> Great combinations of capital for many years have flaunted their power in the face of the citizenship, they have forced their corrupt way into politics and government, they have dictated the making of laws or scorned the laws they did not like, they have prevented the free and just administration of law. In doing this they have become a menace to free institutions, and must be dealt with in patriotic spirit, without fear or favor.[89]

Representative Nelson even offered a conservative case for the Clayton Act's anti-merger provision, presenting the choice as one between decentralized markets or eventual public ownership of corporations. If the trend toward monopoly continued, Nelson stated the people would select "public ownership of trusts for the benefit of all" over "the private ownership of the trusts for the privilege of the few."[90] For Nelson, this would be "the final

84. 51 CONG. REC. 12742 (1914).

85. *Id.* at 8850.

86. S. REP. NO. 62-1326, at 19 (1914) ("[W]e find that the trusts are more powerful to-day than when the antitrust act was passed, and that evils have grown up so interwoven with the general business of the country as to make men tremble at the consequence of their disruption.").

87. 51 CONG. REC. 13158 (1914).

88. *Id.* at 9087.

89. *Id.* at 9086.

90. *Id.* at 9167.

triumph of socialism in this country."[91] For Senator Borah, capitalist control of the state would trigger a powerful reaction and culminate in political and social chaos. Without a new antitrust law to fill major gaps in the Sherman Act and to impose real checks on the power of monopolies and trusts, he painted a Hobbesian future in which unlimited business power would "divide our people into classes, breed discontent and hatred, and in the end riot, bloodshed, and French revolutions."[92]

When the Clayton Act was amended in 1950,[93] representatives and senators stressed the connection between concentrated industrial structures and the rise of totalitarianism.[94] They believed that decentralization was critical to protecting democracy in the United States and toward that end strengthened the Clayton Act's anti-merger provision.[95] Several members of Congress argued that economic autocracy and political autocracy were intimately intertwined.[96] Congressman Celler drew a causal chain from the rise of the trusts in Germany to Hitler's ascension to power and ultimately to World War II.[97]

B. Protect Workers' Ability to Undertake Collective Action

The Congresses that debated the Sherman and Clayton Acts sought to preserve freedom for workers and farmers to engage in collective action. In enacting the antitrust laws, the legislative focus was on limiting the power of big business, not interfering with the freedom of workers to organize to raise wages and improve their working conditions. The members of Congress who drafted the Sherman and Clayton Acts took pains to ensure these new laws would police capital and accommodate labor. For many members of Congress, the new federal antitrust laws and labor organizing were two methods

91. *Id.*

92. *Id.* at 15955.

93. *See supra* note 77 and accompanying text.

94. Lande, *supra* note 44, at 137–38.

95. *See, e.g.*, 96 CONG. REC. 16452 (1950) (remarks of Sen. Kefauver) ("I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of a very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.").

96. *Id.* at 16446 (remarks of Sen. O'Mahoney); *id.* at 16503–04 (remarks of Sen. Aiken).

97. 95 CONG. REC. 11486 (1949).

by which to protect millions of ordinary Americans against the power of concentrated capital.[98] In the words of one Senator, "counter combinations among the people" were necessary to control the trusts.[99]

In the lead-up to the passage of the Sherman Act, several members of Congress feared that the new law would be applied against organizations that represented workers and farmers. The first draft of the bill that would become the Sherman Act prohibited "all arrangements, trusts, or combinations between such citizens or corporations, made with a view or which tend to advance the cost to the consumer of any such articles."[100] Labor unions (and agricultural cooperatives) employed collective action to raise workers' wages and farmers' incomes and thereby could sometimes raise prices for consumers.[101] Under Senator Sherman's original bill, the federal government and other plaintiffs could challenge collectives of workers.[102]

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98. For example, Senator Teller in the debate over the Sherman Act wanted to control trusts and also preserve for "the laborers of the country the opportunity to combine either for the purpose of putting up the price of their labor or securing to themselves a better position in the world." 21 CONG. REC. 2561 (1890). Senator Hoar said,

> [A]s legislators we may constitutionally, properly, and wisely allow laborers to make associations, combinations, contracts, agreements for the sake of maintaining and advancing their wages, in regard to which, as a rule, their contracts are to be made with large corporations who are themselves but an association or combination or aggregation of capital on the other side.

Id. at 2728. He contrasted combinations of works with combinations of capital that "extort from the community, monopolize, segregate, and apply to individual use, for the purposes of individual greed." *Id.* Senator Edmunds, who did not support an exemption for labor, nonetheless said,

> [I]f capital and plants and manufacturing industries organize to regulate and so to repress and diminish, if you please, below what it ought to be, the price of all the labor everywhere that is engaged in that kind of business, labor must organize to defend itself on the other side.

Id. at 2727. For more context, see Louis B. Boudin, *The Sherman Act and Labor Disputes: I*, 39 COLUM. L. REV. 1283, 1287 n.14 (1939).

99. 21 CONG. REC. 2565 (statement of Sen. Stewart). This idea is what John Kenneth Galbraith later described as "countervailing power" against existing concentrations of power in the economy. JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 110–14 (1952).

100. 21 CONG. REC. at 2455.

101. During the debates preceding the passage of the Sherman Act,

> Senator Edmunds expressed the view that if a law was to be passed condemning all agreements or combinations which tended to raise the price of commodities, neither labor nor farmer organizations ought to be excluded, since the raising of wages and the raising of prices of farm products by agreement or combination tended as much to raise the prices of commodities as did similar agreements or combinations of any other class.

Boudin, *supra* note 98, at 1289.

102. William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 250 (1956).

Although Senator Sherman insisted that his bill would not affect the activities of labor unions,[103] many of his colleagues were not assuaged by his assurances. They feared that absent an exemption the bill would apply to labor organizations. The senators who spoke on this issue overwhelmingly opposed applying the antitrust laws to labor collectives.[104] Senator Hoar distinguished between collectives of labor and collectives of capital (corporations, including trusts and monopolies). He deemed the former to be "lawful, wise, and profitable, [and] absolutely essential to the existence of the commonwealth itself," and the latter as instruments of "purposes of individual greed."[105] Senator Edmunds, the one member who opposed the exemption, argued that the bill would deconcentrate markets and establish parity between capital and labor.[106] In Senator Edmunds' future world of equality between labor and capital, unions would be unnecessary.[107] In light of the widely held concern that labor would be targeted, Senator Sherman introduced an exemption for farm and labor organizations to address his colleagues' concerns.[108]

When reviewing the bill with the farm and labor exemption and other amendments, the Senate Judiciary Committee adopted another bill entirely. This new bill made no mention of higher consumer prices and instead prohibited restraints of trade.[109] It also did not include any express exemption for labor unions and agricultural cooperatives.[110] Yet, the critics of Senator Sherman's earlier bill did not voice any concerns that this bill could be interpreted to restrict the collective actions of workers.[111] These champions of labor, including Senator Hoar, supported the new bill and helped shepherd it through the Senate and enact the Sherman Act.[112]

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103. Senator Sherman stated that "combinations of workingmen to promote their interest, promote their welfare, and increase their pay . . . are not affected in the slightest degree, nor can they be included in the words or intent of the bill." 21 CONG. REC. 2562 (1890).

104. Boudin, *supra* note 98, at 1287 n.14.

105. 21 CONG. REC. 2728 (1890).

106. Boudin, *supra* note 98, at 1287 n.14.

107. *See id.* ("In the course of the debate every senator who spoke on the subject, with the exception of Senator Edmunds, expressed himself as opposed to the application of the proposed law to labor unions or farmers' organizations, and expressed the belief that the entire Senate concurred in that view. Senator Edmunds was the only one to dissent, apparently being of the belief that if the proposed law would succeed in preventing the organization of trusts, labor organizations would become unnecessary.").

108. 21 CONG. REC. 2611–12 (1890); *see also* Joseph L. Greenslade, *Labor Unions and the Sherman Act: Rethinking Labor's Nonstatutory Exemption*, 22 LOY. L.A. L. REV. 151, 155–56 (1988).

109. *See* Greenslade, *supra* note 108, at 160 ("[T]he Judiciary Committee's bill focused on conduct that restrained trade.").

110. Boudin, *supra* note 98, at 1287 n.14.

111. *Id.*

112. Greenslade, *supra* note 108, at 158–59.

While evidently not the view of some scholars,[113] the most logical interpretation of the Sherman Act's legislative history is that Congress did *not* intend the law to reach the activities of labor unions and agricultural cooperatives.[114] Senator Sherman's initial bill focused on joint activities between "citizens or corporations" that raised prices to consumers.[115] This language provoked strong reactions from senators who wanted to protect labor and farmer organizations from antitrust attack.[116] Once the bill's language was revised and made no reference to consumer prices, however, the pro-labor senators no longer raised the threats to labor unions.[117] Barring some unanticipated and unrecorded change in their attitude toward unions, at least one of these senators would have presumably demanded an exemption for labor unions, as they had for the earlier bill, if they feared an antitrust threat to unions. Instead, they supported the new bill without further amendment.[118] Many years later, Samuel Gompers, the President of the American Federation of Labor and admittedly not a neutral source, stated, "We know the Sherman law was intended by Congress to punish illegal trusts and not the labor unions, for we had various conferences with members of Congress while the Sherman Act was pending, and remember clearly that such a determination was stated again and again."[119]

In 1914, Congress unambiguously voiced its views on the application of antitrust to labor unions by establishing an express exemption in the Clayton Act. Reacting to judicial application of the Sherman Act to the activities of labor unions,[120] Congress sought to undo this court interpretation and restore workers' full freedom to engage in collective action. Section 6 of the Clayton Act is phrased in broad terms, declaring that "[t]he labor of a human being is not a commodity or article of commerce."[121] After a protracted struggle to pressure Congress to overturn the judiciary's anti-labor interpretation of the Sherman Act,[122] organized labor and its supporters in Congress believed they had won a great victory, hailing the Clayton Act's exemption for labor as its Magna Carta.[123] The statute's plain meaning does not legalize

113. Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880–1930*, 66 TEX. L. REV. 919, 951 (1988).

114. Greenslade, *supra* note 108, at 160; THORELLI, *supra* note 36, at 231–32.

115. 21 CONG REC. 2455 (1890).

116. Boudin, *supra* note 98, at 1287 n.14.

117. *Id.*

118. Greenslade, *supra* note 108, at 158–59.

119. EDWARD BERMAN, LABOR AND THE SHERMAN ACT 5 (1930) (quoting Samuel Gompers, *The Hatters' Case. The Sherman Law—Amend It or End It.*, 17 AM. FEDERATIONIST 197, 202 (1910)).

120. Louis B. Boudin, *Organized Labor and the Clayton Act: Part I*, 29 VA. L. REV. 272, 273–74 (1942); *see infra* Section II.B.

121. 15 U.S.C. § 17 (2012).

122. *See infra* Part II.B.

123. Boudin, *supra* note 120, at 306–09.

all union activity but does withdraw all union activity, including secondary actions, from the purview of the antitrust laws.[124]

The legislative history of the Clayton Act is full of denunciations of the federal courts for applying the Sherman Act to the activities of labor unions. This judicial interpretation of the Sherman Act was considered a perversion of the statute. Representative Madden declared that the Senate that passed the Sherman Act "clearly and unequivocally stated that its provisions would not cover" labor unions.[125] Senator Ashurst held that the courts, by resorting to "strained and harsh constructions," overrode the intent of the framers of the Sherman Act to protect labor unions.[126] Stressing that the Sherman Act was intended to control the power of large corporate enterprise, Senator Williams declared:

> A statute which was passed avowedly and without question to check the operation of the tyranny of the combined money power of the country as being a menace to free institutions was construed by the Federal judiciary so as to operate against the freedom and liberty of men engaged in hiring their labor.[127]

Tracing the arc of American history in the nineteenth century, Congressman Buchanan condemned the Supreme Court for holding that labor is a "commodity or an article of commerce" in this country and undoing not only what Congress had intended but also what the Civil War had conclusively resolved.[128]

II. ANTITRUST DURING THE FIRST GILDED AGE: 1890–1930S

Despite Congress's intent to police capital and accommodate labor through the Sherman Act, the executive branch and the courts inverted this legislative purpose. In the 1890s, the first decade of the Sherman Act, the Supreme Court made two critical choices: The proscription of price fixing and the acceptance of consolidation contributed to an unprecedented merger wave. These two decisions transformed the structure of American industry between 1896 and 1904. This tolerance of mergers was accompanied by executive and judicial hostility toward collective action by workers. Most of the early Sherman Act prosecutions targeted labor rather than business. The Supreme Court interpreted the Sherman Act to proscribe secondary boycotts and strikes by workers and continued to follow this interpretation even after

124. Louis B. Boudin, *Organized Labor and the Clayton Act: Part II*, 29 VA. L. REV. 395, 410 (1943); *see also* Joseph Kovener, *The Legislative History of Section 6 of the Clayton Act*, 47 COLUM. L. REV. 749 (1947).

125. 51 CONG. REC. 9087 (1914).

126. *Id.* at 13663.

127. *Id.* at 14588.

128. *Id.* at 16337.

Congress established an antitrust exemption for labor unions. Multiple presidential administrations and federal courts warped a law intended to tame the power of capital, converting it to tame the power of labor and create a more pliant workforce to the benefit of capital.

A. A Failure to Check the Growth of Trusts

In a series of decisions, the early judicial interpretation of the antitrust laws produced a major dichotomy. First, the Court held in the 1895 decision *United States v. E.C. Knight Co.*[129] that Congress did not have the constitutional authority to restrict mergers in manufacturing and mining and so the Sherman Act could not be used to challenge mergers in these sectors.[130] In establishing a distinction between interstate commerce (which Congress could regulate) and production (which Congress could not regulate),[131] the Court crippled the ability of the government to stop or undo anticompetitive mergers using the Sherman Act.[132] Second, the Supreme Court, in a trio of decisions between 1897 and 1899, adopted a strict ban on overt price fixing between competitors.[133] The Court refused to entertain defenses to horizontal price fixing or consider the "reasonableness" of the collusive prices.[134] It established a per se ban on the practice that persists to this day.[135]

These judicial interpretations of the Sherman Act encouraged businesses to grow and achieve monopoly and oligopoly through mergers.[136]

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129. 156 U.S. 1 (1895).

130. *Id.* at 17. The Court stated that citizens should look to state governments for protection from corporate consolidation. *Id.* at 16–17.

131. *See id.* at 13 ("The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.").

132. Samuel R. Reid, *Antitrust and the "Merger-Wave" Phenomenon: A Failure of Public Policy*, 3 ANTITRUST L. & ECON. REV. 25, 28–29 (1969).

133. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899).

134. *Trans-Mo. Freight Ass'n*, 166 U.S. at 331–32.

135. *Joint Traffic Ass'n*, 171 U.S. at 577. During the depths of the Great Depression, the Supreme Court softened the ban on horizontal price fixing for distressed industries. *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933). The Court restored the per se ban on horizontal collusion in 1940. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

136. Naomi Lamoreaux explained:

> The Court [in *E.C. Knight*] returned responsibility for oversight of large corporations to the states, but events were not to permit matters to rest there. The years following the *Knight* decision witnessed the greatest consolidation movement in the nation's history,

Corporations that previously sought to stabilize market prices through collusion abandoned this strategy. Under the judiciary's reading of the Sherman Act, competitors that organized pools (a common price-fixing arrangement that did not involve the integration of business operations) would violate the Sherman Act.[137] The *E.C. Knight* decision, however, granted businesses broad freedom to merge with competitors.[138] Instead of price fixing, many firms tried to achieve market stabilization through mergers with, and acquisitions of, rivals.[139] At least outside of sectors that directly involved interstate commerce as the concept was then interpreted by the courts (such as railroads), businesses could merge with some confidence that these consolidations would be beyond the reach of the Sherman Act.[140] The Court blocked one channel (price fixing) by which businesses could obtain market power but opened the flood gates on another channel (mergers) by which businesses could achieve a similar end. Indeed, mergers, by bringing different businesses under common control, are a more potent method of raising and stabilizing prices than collusive arrangements, which can be susceptible to cheating by participants.[141]

In a cruel irony to the congressional framers and public supporters of the Sherman Act, the first fifteen years of this new law intended to curb the power of trusts and monopolies witnessed the emergence of concentrated markets across the economy. In the late 1890s and early 1900s, the United States saw its first major merger wave, with hundreds of firms merging with their rivals.[142] In 1899 alone, 1208 mergers occurred in the manufacturing

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> and most states proved economically impotent against the new, giant corporations operating in national and even world markets.

LAMOREAUX, *supra* note 16, at 166.

137. WHITE, *supra* note 19, at 175.

138. William Letwin, *The First Decade of the Sherman Act: Judicial Interpretation*, 68 YALE L.J. 900, 917 (1959); *see also* George Bittlingmayer, *Did Antitrust Policy Cause the Great Merger Wave?*, 28 J. L. & ECON. 77, 86–87 (1985) ("*E.C. Knight* made merger legal, at least in the minds of many lawyers . . . .").

139. Bittlingmayer, *supra* note 138, at 116–17; *see, e.g.*, 2 SIMON N. WHITNEY, ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES 7 (1958) ("Three months after Judge Taft's decree enjoining the pool, the four Tennessee and Alabama companies consolidated to form the American Pipe and Foundry Company. Nine months later, in March 1899, the merger was extended, under the name United States Cast Iron Pipe and Foundry Company, to take in the two remaining defendants and five firms in the northeastern states, thus including 75 percent of the entire industry."(footnote omitted)).

140. Donald J. Smythe, *The Supreme Court and the Trusts: Antitrust and the Foundations of Modern American Business Regulation from* Knight *to* Swift, 39 U.C. DAVIS L. REV. 85, 99 (2005).

141. LAMOREAUX, *supra* note 16, at 87, 100; Rudolph J. Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285, 321 n.182 (1989).

142. WALTER ADAMS & JAMES W. BROCK, THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY 144 (2d ed. 2004).

and mining sectors.[143] Just two years earlier, in 1897, only sixty-nine mergers had occurred in these two fields.[144] Writing in 1901, two prominent economists, with a touch of hyperbole, described the nature of the change in the political economic landscape of the country: "If the carboniferous age had returned and the earth had repeopled itself with dinosaurs, the change made in animal life would have scarcely seemed greater than that which has been made in the business world by these monster-like corporations."[145]

Congress's attempt to control mergers through the Clayton Act in 1914 proved unsuccessful. The new law had a major limitation.[146] It prohibited acquisitions of corporate stock that could be anticompetitive but permitted asset acquisitions with similar effects.[147] On top of this legislative "asset loophole," the Supreme Court added a judicial gloss that further handicapped the government's power to enforce anti-merger law. In *FTC v. Western Meat Co.*,[148] the Court held the government could not undo a stock acquisition after the acquiring company had assumed ownership of the acquiree's physical assets.[149] This neutered anti-merger law predictably failed to control the corporate consolidation movement. In the 1920s, the number of mergers in manufacturing and mining annually never fell below 200 and hit a high of 1245, exceeding the earlier annual high of 1208 in 1899.[150] And in many years between 1914 and 1950, the federal antitrust agencies, including the newly created FTC, did not bring suit to stop a single merger.[151]

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143. Reid, *supra* note 132, at 27.

144. *Id.*

145. JOHN BATES CLARK & JOHN MAURICE CLARK, THE CONTROL OF TRUSTS 15 (1912). One scholar has argued that different treatment of collusive arrangements in the United States and United Kingdom—prohibition in the former, tolerance in the latter—explains the greater persistence of smaller firms and decentralized industrial structures in the United Kingdom. *See generally* TONY FREYER, REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA, 1880–1990 (1992); Tony Freyer, *The Sherman Antitrust Act, Comparative Business Structure, and the Rule of Reason: America and Great Britain, 1880–1920*, 74 IOWA L. REV. 991 (1989).

146. Section 7 of the Clayton Act, which governs mergers, originally read:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

Clayton Act, ch. 323, § 7, 38 Stat. 731–32 (1914) (current version at 15 U.S.C. § 18 (2012)). Congress amended the Clayton Act to cover asset acquisitions and all types of mergers. Act of December 29, 1950, ch. 1184, § 7, 64 Stat. 1125 (1980).

147. *See* Milton Handler & Stanley D. Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 652–53 (1961) (discussing the "assets loophole" in the original Clayton Act).

148. 272 U.S. 554 (1926).

149. *Id.* at 563.

150. Reid, *supra* note 132, at 27.

151. *Id.*

This early era, however, did see some major victories on the monopoly front. Given the creation of monopolies in a number of key industries, the public clamored for government action.[152] The administrations of Theodore Roosevelt and especially of William Howard Taft and of Woodrow Wilson initiated a number of major monopolization suits.[153] Targets of these cases included American Tobacco, International Harvester, Standard Oil, Swift, and U.S. Steel.[154] In *Standard Oil Co. v. United States*[155] and *United States v. American Tobacco*,[156] the Supreme Court ordered the breakup of the monopolist in oil refining and the oligopolists in tobacco into smaller entities.[157] This anti-monopoly campaign continued through 1920 when legal and political changes brought it to an end. The Supreme Court held in *United States v. United States Steel Co.*,[158] that the steel giant's growth through a series of acquisitions did not violate the Sherman Act in the absence of particular acts that excluded rivals.[159] And with the election of conservative Republican President Warren Harding in 1920, the government showed little interest in anti-monopoly and antitrust enforcement in general.[160]

Notwithstanding the significant government monopolization victories between 1904 and 1920, the merger wave had an enduring impact on the industrial structure of the United States. A number of today's corporate giants emerged during this period. General Electric was the product of eight firms with a combined market share of ninety percent, Du Pont of sixty-four firms with approximately seventy percent of the market, and U.S. Steel of 180 firms with sixty-five to eighty percent market share.[161] The economist Jesse Markham, in a measured 1950 study, found that the effects of the turn of the century merger wave were still clear decades later.[162] He concluded that the merger wave between 1896 and 1904 "left an imprint on the structure of the

152. *See generally* George Bittlingmayer, *Antitrust and Business Activity: The First Quarter Century*, 70 BUS. HIST. REV. 363 (1996).

153. William S. Comanor & Frederic M. Scherer, *Rewriting History: The Early Sherman Act Monopolization Cases*, 2 INT'L J. ECON. BUS. 263, 264 (1995).

154. John J. Flynn, *Monopolization Under the Sherman Act: The Third Wave and Beyond*, 26 ANTITRUST BULL. 1, 4 (1981).

155. 221 U.S. 1 (1911).

156. 221 U.S. 106 (1911).

157. Peter C. Carstensen, *Remedies for Monopolization from* Standard Oil *to* Microsoft *and* Intel*: The Changing Nature of Monopoly Law from Elimination of Market Power to Regulation of Its Use*, 85 S. CAL. L. REV. 815, 824 (2011). For a critical take on the effectiveness of these structural remedies, see Walter Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1, 2 (1951).

158. 251 U.S. 417 (1920).

159. *Id.* at 451; Flynn, *supra* note 154, at 7–8.

160. William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1122 (1989).

161. ADAMS & BROCK, *supra* note 142, at 23.

162. Jesse W. Markham, *Survey of the Evidence and Findings on Mergers*, *in* BUSINESS CONCENTRATION AND PRICE POLICY 141, 180 (1955).

American economy that fifty years have not yet erased."[163] Ralph Nelson went further and wrote that the merger wave at the turn of the twentieth century "laid the foundation for the industrial structure that has characterized most of American industry in the twentieth century."[164]

B. Frustration of Collective Action by Workers

Despite the pro-labor statements in the legislative history of the Sherman Act, the DOJ and the courts interpreted the new antitrust law to reach and limit collective action by workers. Almost as soon as the Sherman Act became the law of the land, it was used against workers. Over the first four decades of the new antitrust statute, the Supreme Court used the Sherman Act to deprive workers of two powerful organizing tools: the secondary boycott and strike.[165] Through these secondary actions, labor could apply pressure on anti-union employers and organize an entire industry.[166] Unless an entire industry was organized, union employers would face higher labor costs and remain at a competitive disadvantage vis-à-vis non-union rivals.[167] Even after Congress enacted the statutory labor exemption in the Clayton Act, the Court continued to apply the Sherman Act against secondary action.

The anti-labor potential of the Sherman Act became clear in its early years. Between 1890 and 1897, a majority of successful prosecutions targeted labor rather than capital.[168] In the second case brought under the Sherman Act, the government targeted the workers who participated in the general strike in New Orleans in 1892, which originated in a dispute between longshoremen and their employers.[169] The government characterized the strike as a "gigantic and widespread combination of the members of a multitude of

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163. *Id.*

164. RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY 5 (1959).

165. If the workers at Manufacturer A go on strike due to discontent over wages, the strike is deemed a primary strike. If the workers at Retailer B, a firm that purchases goods from Manufacturer A, go on strike to pressure Retailer B not to do business with Manufacturer A, the strike is a secondary strike. If the consumers of Retailer B refuse to purchase goods from Retailer B to increase pressure on Retailer B not to carry the products of Manufacturer A, this action is a secondary boycott. *See* Robert M. Schwartz, *Secondary Targets Can Be Union's Primary Focus*, LABOR NOTES (June 20, 2012), http://www.labornotes.org/2012/06/secondary-targets-can-be-unions-primary-focus?language=en.

166. DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM 71–72 (1995).

167. *Id.* at 196.

168. Hovenkamp, *supra* note 113, at 950. As Herbert Hovenkamp notes though, "These numbers may overstate the antilabor bias of early Sherman Act prosecutions because ten of the twelve labor conspiracy cases arose from the great Pullman sleeping coach strike led by Eugene Debs, which crippled the American railroad network in 1894." *Id.* For a review of Sherman Act prosecutions in the 1890s, see generally William Letwin, *The First Decade of the Sherman Act: Early Administration*, 68 YALE L.J. 464 (1959).

169. United States v. Workingmen's Amalgamated Council of New Orleans, 54 F. 994, 995 (C.C.E.D. La. 1893); Boudin, *supra* note 98, at 1293.

separate organizations for the purpose of restraining the commerce among the several states and with foreign countries."[170] The District Court for the Eastern District of Louisiana held that the Sherman Act applied to "combinations of labor, as well as of capital."[171] Although the strike had ended by the time the court heard the case, it granted the government's request for injunctive relief and enjoined similar labor action in the future.[172]

The most famous use of the Sherman Act against labor in the early years was against the nationwide railroad strikes stemming from the labor dispute between the Pullman Company, a monopoly in the manufacture of sleeping cars, and its employees.[173] Workers at the Pullman company town in Illinois, where the eponymous luxury sleeping cars were manufactured, went on strike over a reduction in their wages.[174] Rail workers across the country staged a secondary strike, with the aim of pressuring their employers to stop hauling Pullman cars.[175] Even as many state and local officials across the country adopted a laissez-faire posture and declined to interfere in the dispute between workers and railroads unless violence occurred, the DOJ, headed by a corporate attorney who had counseled railroads, intervened on the side of capital.[176] The government brought an action against the workers, using the Sherman and Interstate Commerce Acts, to end the Pullman strike.[177] The Supreme Court ruled in favor of the government and against the striking workers and union leaders, relying on the general commerce clause powers of the federal government rather than the Sherman Act, to reach its holding.[178]

The Supreme Court made its first major pronouncement on the Sherman Act and labor in 1908.[179] In *Loewe v. Lawlor*,[180] the Court decided whether the Sherman Act prohibited secondary boycotts undertaken as part of a campaign to organize workers at a hat manufacturer in Connecticut.[181] The Court, quoting a common law treatise on trade unions, stated that "every person has individually, and the public also has collectively, a right to require that the course of trade should be kept free from unreasonable obstruction."[182]

170. *Workingmen's Amalgamated Council of New Orleans*, 54 F. at 995.
171. *Id.* at 996.
172. *Id.* at 1000.
173. THORELLI, *supra* note 36, at 394.
174. WHITE, *supra* note 19, at 418–19, 430.
175. *Id.* at 430.
176. *Id.* at 417–18, 441.
177. United States v. Debs, 64 F. 724 (C.C.N.D. Ill. 1894); Letwin, *supra* note 168, at 481–85.
178. *In re* Debs, 158 U.S. 564, 599–600 (1895).
179. Hovenkamp, *supra* note 113, at 951.
180. 208 U.S. 274 (1908).
181. *Id.* at 283–85.
182. *Id.* at 295–96.

After reviewing the legislative history of the Sherman Act, the Court concluded that attempts to exempt labor and farmer organizations from the bill had failed, and thereby labor activities that affected interstate commerce were subject to the Sherman Act.[183] Because the union-instigated secondary boycotts and strikes had "restrain[ed] and destroy[ed] interstate trade and commerce"[184] of the manufacturer, the Court held that the union and its members could be held liable under the Sherman Act.[185] Affirming this ruling in *Gompers v. Buck Stove & Range Co.*,[186] the Court wrote: "[T]he principle announced by the court [in *Loewe*] was general. It covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor . . . ."[187]

Even after Congress enacted an express exemption for labor in the Clayton Act,[188] the Supreme Court continued to apply the Sherman Act to restrain the freedom of labor organizations. The Court in *Duplex Printing Press Co. v. Deering*[189] construed the Clayton Act's labor exemption narrowly. According to the majority, the Clayton Act restricted the federal judiciary's equity power only over the employees directly involved in a labor dispute,[190] not over secondary boycotts and strikes. The Court stated that Congress sought to give legal protection to "particular industrial controversies, not a general class war."[191] For the Court, the secondary action entailed "a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him against his will into a concerted plan to inflict damage upon another employer who is in dispute with his employees."[192] Prosecutions of labor activities also continued apace and actually increased after Congress enacted the exemption for labor. Nearly eighty percent of the antitrust cases against labor between 1890 and 1929 were brought *after* the passage of the Clayton Act and its labor exemption in 1914.[193]

Although strikes could impede interstate commerce, the Court held in *United Leather Workers International Union v. Herkert & Meisel Trunk*

183. *Id.* at 301–02.
184. *Id.* at 308.
185. *Id.* at 308–09.
186. 221 U.S. 418 (1911).
187. *Id.* at 438.
188. 15 U.S.C. § 17 (2012).
189. 254 U.S. 443 (1921).
190. *Id.* at 470.
191. *Id.* at 472.
192. *Id.* at 474. The Court affirmed this principle in *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, 48 (1927).
193. Allen G. Siegel et al., *The Antitrust Exemption for Labor—Magna Carta or Carte Blanche?*, 13 DUQ. L. REV. 411, 427 n.59 (1975).

Co.[194] that this is "an indirect and remote obstruction to that commerce."[195] The Court concluded that Congress did not intend the Sherman Act to reach primary labor disputes that incidentally restrained interstate commerce.[196] A few years earlier, the Court had indeed stated that unions were essential for the welfare of workers in a capitalist society.[197]

Nonetheless, some courts even outlawed primary strikes and picketing under the Sherman Act. In the wake of *Herkert & Meisel*, the District Court for the Eastern District of Pennsylvania in *Alco-Zander Co. v. Amalgamated Clothing Workers of America*[198] prohibited primary strikes under the Sherman Act, drawing on common law precedent that prohibited third parties from inducing workers to leave their jobs.[199] The judge found that the strikes in nonunionized textile mills in Philadelphia were intended to help principally unionized mills in New York City, and that aiding workers in Philadelphia was "at best a secondary and remote" motive.[200] On this basis, the judge concluded the strike was an improper restraint of commerce and illegal under the Sherman Act.[201] Under the rationale of the decision, workers arguably could not organize any new firm or region of the country: unionizing new workplaces would reduce or eliminate wage disparities across firms and thereby benefit already unionized workers and firms in an industry. At least two courts held that the Clayton Act's labor exemption provided no protection for labor unions and ruled that *any* collective labor activity that restrained interstate commerce violated the Sherman Act.[202]

The courts' anti-labor interpretation of the antitrust laws, contrary to the wishes of Congress, reflected a broader trend in the Gilded Age in which the judiciary overrode state and local decisions concerning the rights of workers.[203] The courts issued sweeping injunctions against labor activities and

194. 265 U.S. 457 (1924).

195. *Id.* at 471.

196. *Id.*

197. *See* Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921) ("Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer.").

198. 35 F.2d 203 (E.D. Pa. 1929).

199. *Id.* at 206.

200. *Id.* at 205.

201. *Id.* at 208.

202. *E.g.*, Quinlivan v. Dail-Overland Co., 274 F. 56, 65–66 (6th Cir. 1921); United States v. Ry. Employes' Dep't, 286 F. 228, 233 (N.D. Ill. 1923).

203. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 75, 101 (1991). Many elites had no qualms about using state violence to discipline labor. William

jailed union leaders and members for defying them, leading to the epithet "government by injunction."[204] The federal government did not adopt a laissez-faire approach to the contest between labor and capital but instead employed its coercive power to aid the interests of capital.[205] As Sven Beckert writes of New York's nineteenth century capitalist class:

> Loudly proclaiming the need for "less government," they simultaneously embraced greater state activism—ranging from the use of the military and policing power of the state to quell domestic dissent to the restriction of such fundamental rights as the freedom of movement, by successfully advocating the passage of antitramping legislation in New York State.[206]

State action against workers in the United States was exceptionally violent and succeeded in eroding the power of American labor.[207]

III. ANTITRUST IN THE NEW GILDED AGE: THE LATE 1970S TO THE PRESENT

In the latter part of the twentieth century and early twenty-first century, the executive and judicial choices to embrace consumer welfare antitrust have restored the antitrust law of the first Gilded Age to a troubling degree. Over the forty-year period from the New Deal in the late 1930s until the 1970s, the Court interpreted the antitrust laws to serve as a check on the power of capital. In the mid-twentieth century, the Supreme Court acknowledged the congressionally expressed values of competitively priced goods,[208]

Forbath quotes the views of then-Judge William Howard Taft. In a letter to his wife, Taft commented on the killing of striking Pullman workers, writing that "[Federal marshals and troops] have killed only six of the mob as yet. This is hardly enough to make an impression." *Id.* at 75; *see also* Matthew Dessem, *Happy Labor Day Weekend! In 1897: The* New York Times *Argued Police Should Open Fire on Striking Workers!*, SLATE (Sept. 2, 2017), http://www.slate.com/blogs/browbeat/2017/09/02/read_the_new_york_times_lattimore_massacre_editorial_from_1897.html.

204. FORBATH, *supra* note 203, at 59, 101–09.

205. For a history of the business-backed anti-union litigation campaign in the early twentieth century, see generally ERNST, *supra* note 166.

206. SVEN BECKERT, THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850–1896, at 303–04 (2001).

207. *See id.* at 296–97 ("As America was 'becoming a mighty armed camp, with enormous armories,' military force played a major role in challenging the collective action of workers. During the 1890s, American strikers were killed at a rate of 2 per 100,000 and injured at a rate of 140 per 100,000, contrasting with France's rate of no killings and only 3 injuries per 100,000. Arrest rates diverged in a similarly dramatic fashion: It was ten times more likely that a striker would get arrested in Illinois than in France. The cumulative results of such an embrace of violence were dramatic: As Richard Oestreicher has pointed out, '[a]t the beginning of the era has of mass production, the American labor movement was among the strongest in the world.' By the 1920s, however, American unions had become considerably weaker than their counterparts abroad." (footnotes omitted)).

208. *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940).

autonomy for small businesses,[209] and decentralization of economic power.[210] Recognizing that powerful private entities exercise quasi-governmental power, the Supreme Court imposed antitrust duties and restrictions on this corporate regulatory authority.[211] During this era, antitrust law placed significant limits on the prerogatives of big business, especially in the areas of mergers[212] and monopolistic conduct.[213] At the same time, antitrust law carved out a large space for workers to act collectively,[214] though this freedom granted to labor did not extend to workers outside of conventional employment arrangements.[215]

Since the late 1970s, the federal courts, the DOJ, and the FTC, informed by former Solicitor General Robert Bork's fallacious analysis of the legislative history of the Sherman Act,[216] have reoriented antitrust law away from broad political economy and toward narrow microeconomics.[217] They have renounced the congressional goals of the antitrust laws and held that the only appropriate objective is the promotion of economic efficiency or consumer welfare.[218] In implementing this model of antitrust, the federal antitrust agen-

209. *E.g.*, Simpson v. Union Oil Co., 377 U.S. 13, 20–21 (1964); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959).

210. *E.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 274 (1966); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

211. *E.g.*, Silver v. N.Y. Stock Exch., 373 U.S. 341, 366 (1963); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 465 (1941).

212. *E.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 364 (1963).

213. *E.g.*, Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951); Am. Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

214. The Norris-LaGuardia Act deprives the federal court of equitable jurisdiction over non-violent labor disputes. 29 U.S.C. § 52 (2012); *see, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 512 (1940) ("These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers.'").

215. *See, e.g.*, Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145 (1942) (holding that organized fishermen were not entitled to antitrust immunity because "a dispute among businessmen over the terms of a contract for the sale of fish is something different from a 'controversy concerning terms or conditions of employment, or concerning the association . . . of persons . . . seeking to arrange terms or conditions of employment'" (alterations in original)).

216. James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263, 278–81 (1991).

217. The retrenchment of antitrust law is part of a larger big business-led project, spanning much of the world, of overturning the social democratic capitalism of the post-World War II era. *See generally* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005).

218. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting ROBERT BORK, THE ANTITRUST

cies and courts have adopted the desirability of corporate freedom as an article of faith, influenced by hypotheses developed and promoted by thinkers associated with the University of Chicago.[219] Built on "an oversimplified economics that often rests on unfounded or disproven assumptions,"[220] antitrust law today views most types of business conduct as positive or neutral. Outside of express price fixing and market allocation with rivals, businesses have expansive autonomy to control and dominate markets.

In contrast to the deference to accumulation and exercise of corporate power, antitrust proscribes collective action by workers who are classified as independent contractors, instead of employees, under federal law. In a period of high inequality[221] and precarity for millions of Americans,[222] which has been dubbed the "new Gilded Age,"[223] antitrust law increasingly resembles antitrust law in the original Gilded Age and reinforces—rather than remedies—structural inequalities in American society. Federal enforcers and the courts are once again using and interpreting antitrust law not to tame the power of capital, but to tame the power of workers for the benefit of capital. And as the fraction of workers not entitled to the antitrust exemption grows, antitrust enforcers can target an ever-larger segment of American labor.

PARADOX 66 (1978))); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, § 1 ("Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers."). Although the distinction between consumer welfare and economic efficiency is not important to the thesis of this article, a review of the case law shows that consumer welfare is the goal of contemporary law. Kirkwood & Lande, *supra* note 20, at 192.

219. For two influential articles articulating "Chicago School" hypotheses on business behavior, see Frank H. Easterbrook, *Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) and Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

220. Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 917, 939 (2014).

221. *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., Harvard University Press 2013).

222. *See* GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS 35 (2011) ("In the United States, the Bureau of Labour Statistics estimated in mid-2009 that over 30 million people were in part-time jobs 'of necessity', more than twice as many as the number counted as unemployed, which made for an adjusted unemployment rate of 18.7 per cent. A vast proportion of those jobs will remain part-time and low paid even if the economy picks up."); *see also* BD. OF GOVERNORS OF FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2016, at 2 (2017) ("Forty-four percent of adults say they either could not cover an emergency expense costing $400, or would cover it by selling something or borrowing money, which has continued to improve from the 50 percent who were ill-prepared for this magnitude of expense when first asked in 2013.").

223. *See* Jefferson Cowie, *America May Never Have Another New Deal*, NEW REPUBLIC (Mar. 15, 2016), https://newrepublic.com/article/131401/america-may-never-another-new-deal ("The return of nineteenth-century-style plutocracy, crony capitalism, and shocking levels of inequality—disparities that continued even after the excitement of Obama's presidency—suggest a conscious, confident, and powerful ruling class that has largely separated itself from the concerns of the nation's working people.").

A. Acceptance of Monopoly and Oligopoly

The Supreme Court and the federal antitrust agencies have transformed antitrust and, in large measure, neutralized the ability of these laws to control corporate power. The Supreme Court has generally stood aside on the issue of mergers. Here, the federal antitrust agencies have become the principal policymakers and published merger guidelines that have become increasingly tolerant of corporate consolidation. In the name of advancing the ahistorical goal of consumer welfare,[224] the Supreme Court and lower courts have rewritten precedent on monopolization to favor large corporations. The agencies and courts still view horizontal price fixing and other forms of collusion between rivals with hostility and stress the need to police this "supreme evil of antitrust."[225] Yet even here the results are underwhelming. An examination of the anti-collusion program reveals a campaign that inadequately deters price fixing, often treats large corporate colluders with leniency, and devotes resources to secondary or otherwise trivial matters.

1. Mostly Quiet on Mergers and Monopolies

In the area of mergers, the federal antitrust agencies have, in large measure, displaced the courts as the principal makers of policy. The Supreme Court last heard and decided a merger challenge on the merits more than forty years ago[226] and has not formally overruled strict merger precedents from the 1960s.[227] The DOJ and FTC have published a series of guidelines on how they analyze horizontal mergers and when they are likely to challenge such mergers.[228] Over time, the agencies have become increasingly tolerant of corporate consolidation because of a belief that mergers can produce productive efficiencies that benefit consumers and society.[229] In the most recent

224. Among other deficiencies, the language of consumer welfare ignores how sellers were and still are entitled to antitrust protection from powerful buyers. Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235–36 (1948); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007).

225. Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

226. United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

227. *See, e.g.*, Polypore Int'l Inc. v. FTC, 686 F.3d 1208, 1216 (11th Cir. 2012) ("[W]e see no error resulting from the Commission's application of the *Philadelphia National* presumption to find that Polypore had illegally acquired Microporous, thus substantially lessening competition."). In *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), the Supreme Court ruled that a horizontal merger that creates an entity with a market share of thirty percent is presumptively illegal. *Id.* at 364. Some appellate courts, however, have held that the *Philadelphia National Bank* precedent no longer carries the weight it once did. *E.g.*, United States v. Baker Hughes, Inc., 908 F.2d 981, 990–91 (D.C. Cir. 1990).

228. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1997); U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (1982).

229. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, § 10 ("[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus

guidelines issued in 2010, the agencies moved further away from presumptions of illegality for mergers in concentrated markets.[230] They embrace an analytical approach that calls for a showing of anticompetitive effects.[231] In other words, the agencies have progressively restricted their own ability to stop mergers. While not bound to adopt these guidelines, the courts have often given great weight to the agencies' analytical framework.[232]

In practice, the antitrust agencies today challenge only horizontal mergers in highly concentrated markets. The FTC's merger record is revealing. Fifteen or twenty years ago, the FTC frequently challenged mergers that reduced the number of competitors in a market from eight to seven or seven to six.[233] It, however, has rarely challenged these mergers in recent years, taking action only when a merger is poised to reduce the number of market participants to four or fewer.[234] And even when the FTC takes action against a merger, it often does not seek to challenge and stop the merger in court.[235] In an effort to remedy the predicted harms of horizontal mergers in concentrated markets, both the FTC and the DOJ often permit these consolidations to proceed on the condition that the merging parties agree to divest assets in the market in which they compete head-to-head or agree to behavioral duties and restrictions.[236] Remarkably, the agencies fail to enforce their own merger

enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."). *But see* Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 24 (Nat'l Bureau of Econ. Research, Working Paper No. 22750, 2016), https://www.nber.org/papers/w22750.pdf ("[W]e find little evidence for plant- or firm-level productivity effects from [merger and acquisition] activity on average, nor for other efficiency gains often cited as possible from [merger and acquisition] activity, including reallocation of activity across plants or scale efficiencies in non-productive units of the firm.").

230. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, § 4 ("The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.").

231. Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 707–08, 721 (2010).

232. *See, e.g.*, FTC v. H.J. Heinz Co., 246 F.3d 708, 716 (D.C. Cir. 2001) (applying the *Horizontal Merger Guidelines* in a merger challenge). Hillary Greene has carefully documented and analyzed the influence of the Merger Guidelines on judicial decision-making. Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 775 (2006).

233. Kwoka, *supra* note 22, at 855.

234. *Id.*

235. *E.g.*, Press Release, Fed. Trade Comm'n, FTC Requires Fresenius Medical Care AG & KGaA and NxStage Medical, Inc. to Divest Bloodline Tubing Assets to B. Braun Medical, Inc. as a Condition of Merger (Feb. 19, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftc-requires-fresenius-medical-care-ag-kgaa-nxstage-medical-inc.

236. *See* ADAMS & BROCK, *supra* note 142, at 196–99 (criticizing the agencies' narrow analytical framework and "consultant" role in facilitating corporate consolidation).

guidelines, especially the concentration thresholds that should trigger presumptions of illegality.[237]

The agencies have taken a hands-off approach to vertical mergers since the Clinton administration.[238] On the rare occasions they are concerned with the competitive effects of a vertical consolidation, the DOJ and FTC generally do not seek to enjoin these deals in court.[239] In 2010 and 2011, the DOJ permitted three large vertical mergers that had serious anticompetitive potential to proceed on the condition that the new vertically integrated companies agree to behavioral duties and restrictions.[240] In one of these cases, the DOJ found that the merger had no offsetting consumer benefits and yet chose not to stop the consolidation in court.[241]

Along with the agencies' tolerance of corporate consolidation, the Supreme Court curtailed the reach of anti-monopoly law and granted expansive freedom to monopolies and other dominant businesses. The Court has repeatedly cited concerns about deterring "pro-competitive" behavior (defined as conduct that advances a particular conception of economic efficiency) in limiting the ability of the government and other plaintiffs to challenge monopolies.[242] The Supreme Court has neutered anti-monopoly doctrine in two areas in particular: predatory pricing and refusals to deal.

The Court practically eliminated predatory pricing as a cause of action and granted large corporations the power to acquire and maintain market dominance through temporary below-cost pricing. The Court initiated this

237. John Kwoka, *Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice* 19–28 (Oct. 9, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Kwoka-Reviving-Merger-Control-October-2018.pdf.

238. Steven C. Salop & Daniel P. Culley, *Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. ANTITRUST ENFORCEMENT 1, 4 (2015). The Trump administration's attempt to stop AT&T's acquisition of Time Warner was the first time the government tried to block a vertical merger in court in nearly forty years. United States v. AT&T Inc., 310 F. Supp. 3d 161, 165 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019); Fruehauf Corp. v. FTC, 603 F.2d 345 (2d Cir. 1979).

239. *See generally* Salop & Culley, *supra* note 238, app.

240. United States v. Comcast Corp., 808 F. Supp. 2d 145, 149–50 (D.D.C. 2011); United States v. Ticketmaster Entm't, Inc., No. 1:10-cv-00139, 2010 U.S. Dist. LEXIS 88626 (D.D.C. July 30, 2010).

241. Competitive Impact Statement at 29–30, *Comcast Corp.*, 808 F. Supp. 2d 145 (No. 1:11-cv-00106).

242. *See, e.g.*, Pac Bell. Tel. Co. v. Linkline Commuc'ns, Inc., 555 U.S. 438, 451 (2009) ("To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low.").

shift in a pair of decisions in the mid-1980s that cast doubt on whether predatory pricing occurs.[243] In one of these decisions, *Matsushita Electric Industries Co. v. Zenith Radio Corp.*,[244] the Court ignored the historical and empirical record on predation[245] and instead drew on simplistic theoretical literature, stating "that predatory pricing schemes are rarely tried, and even more rarely successful."[246] In addition to asserting that predatory pricing is not a real threat to competitive markets, the Court expressed a concern that the threat of predatory pricing lawsuits alone could discourage price discounting.[247]

Operating with these assumptions, the Court subsequently established a legal standard very favorable to actual and would-be predators. To establish predatory pricing, a plaintiff (government or private) must first show the defendant engaged in below-cost pricing and the defendant would likely recoup the upfront losses through higher prices in the future.[248] The second prong, recoupment, imposes especially high burdens on plaintiffs.[249] Under the recoupment requirement, plaintiffs have one of two options: either wait until the defendant has eliminated its rivals and preserved or acquired monopoly power or offer speculative stories on future recoupment to judges who have been directed to examine predatory pricing allegations with great skepticism.[250] In 2007, the Supreme Court, in a rare instance of looking at upstream effects, held that the restrictive two-part test announced in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[251] should apply to claims alleging predatory bidding practices in which monopsonies (single dominant buyers in a market) inflate purchase prices to weaken or eliminate rival buyers.[252]

243. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 119 n.15 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

244. 475 U.S. 574 (1986).

245. Richard O. Zerbe, Jr. & Donald S. Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655, 715 (1982).

246. *Matsushita*, 475 U.S. at 589.

247. *Id.* at 594.

248. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).

249. Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1720 (2013).

250. *See id.* at 1760 ("The recoupment requirement creates false negatives, in part, because courts are not adept at predicting recoupment. Reliance on recoupment leads courts to incorrectly conclude that predation has not taken place. In the hands of judges unversed in the mechanics of competition and predation, recoupment presents an impossible-to-satisfy element in some courtrooms.").

251. 509 U.S. 209 (1993).

252. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 325–26 (2007).

In addition to its general deficiencies, the *Brooke Group* test is especially ill-suited for business with buyer-side power. [253]

Much as they have freedom to engage in predatory pricing, dominant firms have broad discretion to preserve their market power by refusing to grant access to essential assets to rivals.[254] Over the past fifteen years, the Court has curtailed refusal-to-deal claims against monopolists. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[255] the Court held that the respondent's refusal-to-deal claim had to be resolved through the regulatory system, not antitrust litigation.[256] While arguably a narrow holding confined to industries subject to public utility regulation, the Court's decision limited the reach of an earlier decision that had upheld refusal-to-deal liability for a dominant firm.[257] The Court also adopted a Schumpeterian perspective[258] in which monopoly—and the prospect of monopoly—is the lifeblood of a capitalist system. It wrote that "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place."[259] This language flatly contradicts the legislative history of the Sherman Act. Congress condemned monopoly for its economic and political effects and, contrary to Justice Scalia's dictum, did not view it as the source of capitalism's salvation.[260]

Since *Trinko*, the Court appears to have only grown more hostile to refusal-to-deal allegations. In *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*,[261] the Court applied the reasoning of *Trinko* to dismiss a price squeeze claim against a regulated internet service provider.[262] If anything,

253. Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1533 (2013) (observing that buyers can wield tremendous power over sellers at market shares well below the conventional monopoly share threshold).

254. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610–11 (1985) ("Although Ski Co.'s pattern of conduct may not have been as 'bold, relentless, and predatory' as the publisher's actions in *Lorain Journal*, the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival. The sale of its 3-area, 6-day ticket, particularly when it was discounted below the daily ticket price, deterred the ticket holders from skiing at Highlands. The refusal to accept the Adventure Pack coupons in exchange for daily tickets was apparently motivated entirely by a decision to avoid providing any benefit to Highlands even though accepting the coupons would have entailed no cost to Ski Co. itself, would have provided it with immediate benefits, and would have satisfied its potential customers. Thus the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." (footnotes omitted) (quoting Lorain Journal Co. v. United States, 342 U.S. 143, 149 (1951))).

255. 540 U.S. 398 (2004).

256. *Id.* at 413–14.

257. *See id.* at 409 ("*Aspen Skiing* is at or near the outer boundary of § 2 liability.").

258. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 825 (1942).

259. *Trinko*, 540 U.S. at 407.

260. *See supra* Section I.A.

261. 555 U.S. 438 (2009).

262. *Id.* at 457.

the Court today may be even more hostile to refusal-to-deal claims than it was in 2007. As a judge on the United States Court of Appeals for the Tenth Circuit, Justice Neil Gorsuch, one of President Trump's two additions to the Court,[263] extended the logic of *Trinko* and held that refusal-to-deal claims would be recognized under only very exceptional circumstances.[264]

Along with the Court's retrenchment of monopoly law in two important areas, the federal antitrust agencies, in particular the DOJ, have scaled back their monopoly enforcement efforts. The DOJ has practically suspended anti-monopoly enforcement over the past twenty years, filing just one pure monopoly case since 2000[265] which settled.[266] The DOJ's most notable anti-monopoly action during the Obama years may have been non-action through the closing of a lengthy investigation into Monsanto's seed distribution practices[267] and the decision against bringing a monopolization claim against Amazon over its e-book pricing strategy.[268] As Chart 1 indicates, the DOJ's neglect of monopoly matters is not new, dating back to the early 1980s and being consistent across administrations except for a brief upsurge in investigations in the 1990s.

263. Julie Hirschfeld Davis, *Neil Gorsuch Is Sworn in as Supreme Court Justice*, N.Y. TIMES (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/us/politics/neil-gorsuch-supreme-court.html?_r=0.

264. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1076 (10th Cir. 2013) (holding that a plaintiff seeking to establish a refusal-to-deal claim must show that a monopolist "sacrifice[d] short-term profits").

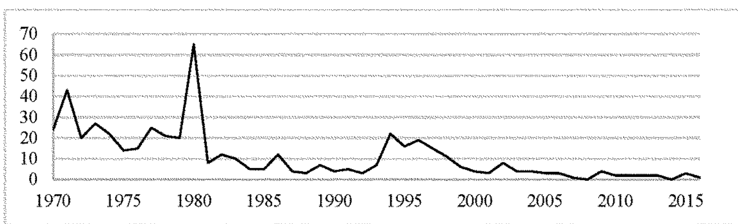
265. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION: WORKLOAD STATISTICS: FY 2008–2017, at 5 (2017), https://www.justice.gov/atr/file/788426/download [hereinafter U.S. DEP'T OF JUSTICE, 2008–2017 ANTITRUST WORKLOAD STATISTICS] ; U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION: WORKLOAD STATISTICS: FY 2000–2009, at 6 (2010), https://www.justice.gov/atr/public/281484.pdf [hereinafter U.S. DEP'T OF JUSTICE, 2000–2009 ANTITRUST WORKLOAD STATISTICS].

266. Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Texas Hospital Prohibiting Anticompetitive Contracts with Health Insurers (Feb. 25, 2011), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-texas-hospital-prohibiting-anticompetitive-contracts.

267. Ian Berry & David Kesmodel, *U.S. Closes Antitrust Investigation into Seed Industry, Monsanto*, WALL ST. J. (Nov. 16, 2012), https://www.wsj.com/articles/SB10001424127887324735104578123631878019070; Tom Philpott, *DOJ Mysteriously Quits Monsanto Antitrust Investigation*, MOTHER JONES (Dec. 1, 2012), http://www.motherjones.com/food/2012/12/dojs-monsantoseed-industry-investigation-ends-thud/.

268. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 756–62 (2017).

CHART 1: **DOJ** MONOPOLY INVESTIGATIONS INITIATED BY YEAR[269]



Over the past decade, the FTC has filed cases against monopolists, with a focus on parties that engaged in anticompetitive exclusive dealing[270] and abusive patent enforcement.[271] Yet, many of these cases have involved monopolists of lesser consequence.[272] And like the DOJ, the FTC's most newsworthy act on the monopolization front was arguably an act of omission. In early 2013, the FTC rejected the recommendation of its legal staff and closed its two-year investigation into Google's search practices with highly unusual "non-binding commitments" that did not include any enforceable conditions.[273]

Unfavorable precedent can explain only a part of the agencies' lethargy in the monopolization realm. Pro-defendant precedents such as *Brooke Group* and *Trinko* loom large. Yet, these cases do not represent the entire universe of anti-monopoly law. Monopoly precedent is not uniformly hostile to enforcers, in particular for exclusive dealing and loyalty rebate claims.

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269. *Division Operations*, DEP'T OF JUSTICE, https://www.justice.gov/atr/division-operations (last visited Jan. 14, 2019).

270. *E.g.*, McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015); *In re* Intel Corp., No. 9341, 2010 F.T.C. LEXIS 82 (Oct. 29, 2010).

271. *E.g.*, *In re* Motorola Mobility LLC, No. C-4410, 2013 F.T.C. LEXIS 96 (July 23, 2013); *In re* Robert Bosch GmbH, No. C-4377, 2013 F.T.C. LEXIS 59 (Apr. 23, 2013).

272. *See, e.g.*, *In re* IDEXX Laboratories, Inc., No. C-4383, 2013 F.T.C. LEXIS 11, at *6 (Feb. 11, 2013) (settling allegations that manufacturer of pet diagnostic products improperly required exclusivity from distributors); *In re* Pool Corp., No. C-4345, 2012 F.T.C. LEXIS 8, at *8–9 (Jan. 10, 2012) (settling allegations that distributor of pool products used exclusive dealing with manufacturers to foreclose other distributors).

273. *In re* Google Inc., No. 111-0163, 2013 F.T.C. LEXIS 2, at *22–24 (Jan. 3, 2013). A memo drafted by the FTC's Bureau of Competition recommended that the Commission sue Google for anticompetitive practices including search bias and impeded advertisers from working with rival search engines. *See* Brody Mullins et al., *Inside the U.S. Antitrust Probe of Google*, WALL ST. J. (Mar. 19, 2015), www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274. Commissioner Rosch criticized his fellow commissioners for accepting a non-binding settlement. *Google*, 2013 F.T.C. LEXIS 2, at *22–23. For a critical take on the FTC's public explanation on why it chose not to sue Google, see generally Frank Pasquale, *Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias*, Occasional Paper Series, HARV. J.L. & TECH. (2013).

Plaintiffs have achieved victories in court on monopolization claims,[274] including in a predatory pricing claim a decade after *Brooke Group*.[275]

Instead of resisting the judicial retrenchment of anti-monopoly law, the federal antitrust agencies have on occasion supported expanding the autonomy of monopolists and other dominant firms. During the George W. Bush administration, the DOJ and FTC filed several amicus briefs that called on the courts to weaken anti-monopoly precedent.[276] For a time, the DOJ even served as Microsoft's international advocate, criticizing anti-monopoly actions against the software company by the European Union[277] and the Korean Fair Trade Commission.[278] In the final months of the second term of George W. Bush's presidency, the DOJ put out a report of Section 2 of the Sherman Act that called for further retrenchment of anti-monopoly law.[279] This report recommended relaxing existing Supreme Court anti-monopoly precedent, including in the areas of exclusive dealing[280] and predatory pricing[281] and called for de facto legality for unilateral refusals-to-deal.[282] A three-commissioner majority at the FTC declined to join the report and issued a scathing repudiation of it.[283] They described the report as "chiefly concerned with firms that enjoy monopoly or near-monopoly power, and prescrib[ing] a legal regime that places these firms' interests ahead of the interests of consumers."[284] To its credit, the Obama administration DOJ quickly withdrew this pro-monopoly report in 2009.[285] Despite this ostensible philosophical shift,

274. *E.g.*, *McWane*, 783 F.3d at 842; ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 303 (3d Cir. 2012); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 315 (3d Cir. 2007).

275. Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 953 (6th Cir. 2005).

276. *E.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners, Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009) (No. 07-512); Brief for United States & FTC Supporting Petitioner, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682).

277. Press Release, U.S. Dep't of Justice, Assistant Attorney General for Antitrust, Thomas O' Barnett, Issues a Statement on European Microsoft Decision (Sept. 17, 2007), https://www.justice.gov/archive/atr/public/press_releases/2007/226070.pdf.

278. Press Release, U.S. Dep't of Justice, Statement of Deputy Assistant Attorney General J. Bruce McDonald Regarding Korean Fair Trade Commission's Decision in Its Microsoft Case (Dec. 7, 2005), https://www.justice.gov/archive/atr/public/press_releases/2005/213562.pdf.

279. U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), https://www.justice.gov/atr/public/reports/236681.pdf.

280. *Id.* at 140.

281. *Id.* at 73.

282. *Id.* at 129.

283. Press Release, Fed. Trade Comm'n, Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmt.pdf.

284. *Id.* at 1.

285. Press Release, Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law.

the DOJ's actual monopoly enforcement record represented continuity from the Bush years.[286]

2. The Underwhelming Campaign Against Corporate Collusion

The Supreme Court and the federal agencies continue to treat (overt) collusion, which the Court has described as the "supreme evil of antitrust,"[287] as a serious antitrust offense. Price fixing and other forms of horizontal collusion remain per se illegal.[288] The antitrust agencies prioritize the prosecution of collusion.[289] The DOJ views the criminal prosecution of cartels and cartel participants as the core of its antitrust mission.[290] For cartel activity, the DOJ collected corporate fines of $985 million in 2015 and $450 million in 2016.[291] In those two years, the DOJ had twelve and twenty-two individuals, respectively, sentenced to prison.[292] The DOJ has sent a number of managers and executives to prison for their involvement in the auto parts[293]

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286. U.S. DEP'T OF JUSTICE, 2008–2017 ANTITRUST WORKLOAD STATISTICS, *supra* note 265, at 5.

287. Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). This is an empirically suspect assertion even from a consumer welfare perspective. Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 505–09.

288. Nynex Corp. v. Discon, Inc., 525 U.S. 128, 133–34 (1998). Even for collusion-like conduct though, the courts do not consistently apply the per se rule or even a strong presumption of illegality. *See, e.g.*, FTC v. Actavis, Inc., 570 U.S. 136, 156 (2013) (holding that an agreement between branded and generic drug makers that resembles market allocation should be analyzed under the rule of reason); California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1139 (9th Cir. 2011) (concluding that a revenue sharing agreement between competing supermarkets should be evaluated under the rule of reason).

289. Consider the DOJ's workload numbers from 2016. The DOJ initiated twenty-three grand jury investigations and filed fifty-one criminal cases. U.S. DEP'T OF JUSTICE, 2008–2017 ANTITRUST WORKLOAD STATISTICS, *supra* note 265, at 4. Because only collusion is subject to criminal enforcement today, all these cases presumably involved collusion. In contrast, the DOJ filed fifteen merger challenges and zero monopoly complaints. *Id.* at 4–5. The numbers from 2007 during the George W. Bush administration reflect a similar breakdown, albeit with fewer merger challenges. *See generally* U.S. DEP'T OF JUSTICE, 2000–2009 ANTITRUST WORKLOAD STATISTICS, *supra* note 265.

290. *E.g.*, Bill Baer, Assistant Att'y Gen., Dep't of Justice Antitrust Div., Prosecuting Antitrust Crimes, Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium (Sept. 10, 2014), https://www.justice.gov/atr/file/517741/download; Thomas O. Barnett, Assistant Att'y Gen., Dep't of Justice Antitrust Div., Perspectives on Cartel Enforcement in the United States and Brazil, Address at the Universidade de São Paolo (Apr. 28, 2008), https://www.justice.gov/atr/file/519601/download.

291. U.S. DEP'T OF JUSTICE, 2008–2017 ANTITRUST WORKLOAD STATISTICS, *supra* note 265, at 11.

292. *Id.* at 12.

293. Nick Bunkley, *Japanese Auto Suppliers Are Fined, and Executives Agree to Prison, in a Price-Fixing Case*, N.Y. TIMES (Jan. 30, 2012), http://www.nytimes.com/2012/01/31/business/japanese-auto-suppliers-fined-in-us-price-fixing-case.html.

and liquid crystal display[294] cartels and indicted the late Aubrey McClendon, the CEO of Chesapeake Energy, over collusion in the acquisition of natural gas leases.[295]

Notwithstanding the rhetorical commitment and headline numbers, the anti-collusion enforcement program is still far from satisfactory.[296] When they target collusion, the agencies often impose inadequate penalties on offending corporations and individuals. The prison sentences are short compared to those for offenses inflicting much less harm on the public,[297] and the fines are often a small fraction of the offenders' annual revenues and profits.[298] John Connor and Robert Lande found that the overall cartel enforcement program, including both government prosecutions and private lawsuits, fails to adequately deter collusion.[299] Their research shows that private damages and public penalties are "only 9% to 21% as large as it should be to protect potential victims of cartelization optimally."[300] From the perspective of optimal deterrence, in the area of cartels, "[corporate] crime pays"[301] and

294. Press Release, Dep't of Justice, Au Optronics Corporation Executive Sentenced for Role in LCD Price-Fixing Conspiracy (Apr. 29, 2013), https://www.justice.gov/opa/pr/au-optronics-corporation-executive-sentenced-role-lcd-price-fixing-conspiracy.

295. Press Release, Dep't of Justice, Former CEO Indicted for Masterminding Conspiracy Not to Compete for Oil and Natural Gas Leases (Mar. 1, 2016), https://www.justice.gov/opa/pr/former-ceo-indicted-masterminding-conspiracy-not-compete-oil-and-natural-gas-leases.

296. A basic contradiction lies at the heart of public antitrust enforcement in the United States. The federal antitrust agencies have permitted markets to become much more concentrated. In highly concentrated markets, oligopolistic firms recognize their mutual interdependence and often collude tacitly to maximize collective profits over time. The antitrust laws cannot effectively police this type of tacit collusion or coordination. The antitrust agencies, through their feeble merger enforcement policy, have allowed markets to become much more vulnerable to collusion. While allowing the creation of market structures conducive to collusion, the agencies continue to emphasize prosecutions of explicit collusion between rivals. Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 ANTITRUST BULL. 143, 161 (1993).

297. The average prison term for an individual antitrust violator sentenced in 2016 was under one year and never higher than 923 days (less than three years) in each year since 2007. U.S. DEP'T OF JUSTICE, 2008–2017 ANTITRUST WORKLOAD STATISTICS, *supra* note 265, at 12. These sentences are mild compared to the often-draconian sentences imposed on ordinary Americans, especially on poor people of color. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

298. Consider the successful prosecution of the lysine cartel that ran from 1992 to 1995. ADM, a principal conspirator, had net sales of $12.7 billion in 1995 alone. John M. Connor, *The Global Lysine Price-Fixing Conspiracy of 1992–1995*, 19 REV. AGRIC. ECON. 412, 413 (1997). ADM pled guilty and paid a $70 million fine to DOJ for its involvement, and all the participants paid a civil settlement of $66 million. John M. Connor, *"Our Customers Are Our Enemies": The Lysine Cartel of 1992–1995*, 18 REV. INDUS. ORG. 5, 14, 20 (2001). In short, ADM paid a small fraction of one year's revenues for its involvement in a multi-year criminal conspiracy.

299. John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 430 (2012).

300. *Id.* at 430.

301. *Id.* at 479.

"the 'cluster bombs' that constitute the current anti-cartel sanctions have been duds."[302]

The DOJ's cartel enforcement program has often taken a relatively lenient approach toward large corporations. Consider the DOJ's enforcement efforts against collusion in financial markets. In a series of cases targeting collusion in the municipal bond market and the setting of the London Interbank Offered Rate ("LIBOR"), the DOJ frequently entered into deferred or non-prosecution agreements with the banks instead of pursuing indictments.[303] Under these agreements, corporate defendants avoid prosecution typically on the condition that they pay a fine, improve internal compliance processes, and agree not to repeat the illegal acts in the future.[304] Highlighting the inadequate deterrence value of these agreements, the DOJ found in 2015 that two banks breached earlier deferred prosecution agreements and engaged in collusion.[305]

This leniency seems to extend to collusion by large actors in non-financial sectors. For instance, the DOJ declined to criminally prosecute several leading Silicon Valley executives for conspiring not to recruit each other's employees and thereby suppressing the wages of software engineers and other professionals in the tech sector.[306] The late Steve Jobs, the principal instigator of the conspiracy, threatened to instigate patent litigation and other

302. *Id.*

303. Press Release, U.S. Dep't of Justice, UBS AG Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay $160 Million to Federal and State Agencies (May 4, 2011), https://www.justice.gov/opa/pr/ubs-ag-admits-anticompetitive-conduct-former-employees-municipal-bond-investments-market-and; Press Release, U.S. Department of Justice, JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay $228 Million to Federal and State Agencies (July 7, 2011), https://www.justice.gov/opa/pr/jpmorgan-chase-admits-anticompetitive-conduct-former-employees-municipal-bond-investments; Press Release, U.S. Dep't of Justice, Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR (Apr. 23, 2015), https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation; Press Release, U.S. Dep't of Justice, Rabobank Admits Wrongdoing in Libor Investigation, Agrees to Pay $3225 Criminal Penalty (Oct. 29, 2013), https://www.justice.gov/opa/pr/rabobank-admits-wrongdoing-libor-investigation-agrees-pay-325-million-criminal-penalty.

304. PUB. CITIZEN, JUSTICE DEFERRED: THE USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS IN THE AGE OF "TOO BIG TO JAIL" 5 (2014), https://www.citizen.org/sites/default/files/justice-deferred-too-big-to-jail-report.pdf.

305. Press Release, Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas. For the history and ineffectiveness of corporate deferred and non-prosecution agreements, see BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014).

306. United States v. Adobe Sys., Inc., No. 10 cv 1629, 2011 U.S. Dist. LEXIS 83756 (D.D.C. Mar. 18, 2011). In October 2016, the DOJ and FTC put out guidance stating that this type of collusion could be subject to criminal prosecution. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016), https://www.justice.gov/atr/file/903511/download.

legal attacks on tech companies that did not abide by the "no-poaching" agreement for skilled professionals.[307] Google fired a human resources official who breached this agreement and sought to recruit an Apple employee.[308] Although this conspiracy was a per se violation, the DOJ held off on pursuing a criminal case and entered into a civil settlement with Apple, Google, and Intel, among others.[309] This settlement required no admission of guilt from the companies and only mandated that they not engage in collusive wage suppression for a fixed period of time.[310] Neither the government complaint nor the settlement named the individual wrongdoers, suggesting the DOJ was not even willing to shame Jobs and his fellow conspirators.[311] It took a private class action on behalf of workers hurt by the wage suppression pact to reveal the identities of the elite conspirators.[312] In a recent case against a no-poach agreement between two rail equipment manufacturers, the DOJ once again accepted a civil settlement.[313] Along with this general leniency toward large businesses and their executives, the DOJ appears to be more forgiving toward companies that engage in comparatively sophisticated forms of collusion-like restraints.[314]

307. Mark Ames, *Revealed: Apple and Google's Wage-Fixing Cartel Involved Dozens More Companies, Over One Million Employees*, PANDO (Mar. 22, 2014), https://pando.com/2014/03/22/revealed-apple-and-googles-wage-fixing-cartel-involved-dozens-more-companies-over-one-million-employees/. Mark Ames, *Steve Jobs Threatened Palm's CEO, Plainly and Directly, Court Documents Reveal*, PANDO (Feb. 19, 2014), https://pando.com/2014/02/19/court-documents-reveal-steve-jobs-blistering-threat-to-ceo-who-wouldnt-join-wage-fixing-cartel/ [hereinafter Ames, *Steve Jobs Threatened*].

308. Robert Faturechi, *Apple, Google Agree to Settle Antitrust Class Action, Lawyer's Office Says*, L.A. TIMES (Apr. 24, 2014), http://www.latimes.com/business/technology/la-fi-tn-apple-google-agree-to-settle-antitrust-class-action-lawyers-office-says-20140424-story.html.

309. *Adobe*, 2011 U.S. Dist. LEXIS 83756, at *4; Ames, *Steve Jobs Threatened*, *supra* note 307.

310. *Adobe*, 2011 U.S. Dist. LEXIS 83756, at *1, 4–5, 12.

311. *Id.* at *4.

312. *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1111–12 (N.D. Cal. 2012); David Streitfeld, *Engineers Allege Hiring Collusion in Silicon Valley*, N.Y. TIMES (Feb. 28, 2014), https://www.nytimes.com/2014/03/01/technology/engineers-allege-hiring-collusion-in-silicon-valley.html.

313. Press Release, Dep't of Justice, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 3, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

314. Consider the KeySpan-Morgan Stanley matter. In 2011, DOJ uncovered a collusive financial swap agreement between KeySpan, a large power generator in New York City, and a rival generator, using Morgan Stanley as an intermediary. The DOJ did not pursue a criminal prosecution and instead settled the civil complaint by requiring KeySpan to disgorge less than twenty-five percent of its estimated profits from the illegal conspiracy. United States v. Keyspan Corp., 763 F. Supp. 2d 633, 636–27, 642 (S.D.N.Y. 2011); *see also* N.Y. State Pub. Serv. Comm'n, Comment Letter on Proposed Final Judgment in *United States v. Keyspan Corp.* 11 (Apr. 30, 2010), https://www.justice.gov/atr/cases/f259700/259704-5.pdf ("KeySpan's ill-gotten gains far exceeded the $12 million payment DOJ is seeking. DOJ alleges the KeySpan Swap was effective from January 16, 2006 until March, 2008. Under the swap agreement, if the market price for capacity exceeded $7.57 per kW-month, the financial services company . . . would pay KeySpan the difference

At the same time as it practices leniency with American corporate giants, the DOJ has brought a number of criminal actions against small-time price fixers.[315] It successfully prosecuted a number of individuals for rigging the auctions for foreclosed homes in Alabama, California, and Georgia[316] and obtained prison sentences and fines for conspirators.[317] At these auctions, banks and other financial institutions sell foreclosed homes and recover the amount outstanding on the mortgage of the defaulting homeowners.[318] The DOJ admitted the principal victims of this type of collusion are financial institutions and other investors, not distressed homeowners.[319] In its anti-cartel activities in the financial sector, the DOJ conformed to a disappointing pattern seen in other areas: treat banks that cheat the public gently, punish those who cheat the banks harshly.[320]

The DOJ brought a number of other criminal cartel cases of dubious public value. The DOJ targeted collusion in the obscure market for heir location services, which "identify people who may be entitled to an inheritance from the estate of a relative who died without a will."[321] Over the past decade, other cartel cases involved ready-mix cement makers in Northern

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between the market price and $7.57, times 1800 MW." (footnote omitted) (citing 75 Fed. Reg. 9950 (Mar. 4, 2010))

315. *Prosecuting Collusion and Fraud at Real Estate Foreclosure Auctions: Division Update Spring 2016*, DEP'T OF JUSTICE (Apr. 8, 2016), https://www.justice.gov/atr/division-operations/division-update-2016/real-estate-foreclosure-auctions [hereinafter *Division Update*].

316. *E.g.*, Press Release, Dep't of Justice, Georgia Real Estate Investor Convicted of Bid Rigging and Bank Fraud at Public Foreclosure Auctions (June 16, 2017), https://www.justice.gov/opa/pr/georgia-real-estate-investor-convicted-bid-rigging-and-bank-fraud-public-foreclosure-auctions; Press Release, Dep't of Justice, Northern California Real Estate Investor Convicted of Rigging Bids at Public Foreclosure Auctions (Apr. 18, 2017), https://www.justice.gov/opa/pr/northern-california-real-estate-investor-convicted-rigging-bids-public-foreclosure-auctions; Press Release, Dep't of Justice, Alabama Real Estate Investor Sentenced for Bid Rigging and Fraud at Public Foreclosure Auctions (Apr. 13, 2017), https://www.justice.gov/opa/pr/alabama-real-estate-investor-sentenced-bid-rigging-and-fraud-public-foreclosure-auctions.

317. *E.g.*, Press Release, Dep't of Justice, Northern California Real Estate Investor Sentenced to Prison for Rigging Bids at Public Foreclosure Auctions (July 26, 2017), https://www.justice.gov/opa/pr/northern-california-real-estate-investor-sentenced-prison-rigging-bids-public-foreclosure.

318. *Division Update*, *supra* note 315.

319. *See* Press Release, Dep't of Justice, Two Georgia Real Estate Investors Plead Guilty to Rigging Bids at Public Home Foreclosure Auctions (Jan. 4, 2016), https://www.justice.gov/opa/pr/two-georgia-real-estate-investors-plead-guilty-rigging-bids-public-home-foreclosure-auctions ("[T]he purpose of the conspiracies was to suppress and restrain competition and divert money to the conspirators that otherwise would have gone to pay off the mortgage and other holders of debt secured by the properties and, in some cases, the defaulting homeowner.").

320. DAVID DAYEN, CHAIN OF TITLE: HOW THREE ORDINARY AMERICANS UNCOVERED WALL STREET'S GREAT FORECLOSURE FRAUD 240 (2016); David Dayen, *Big Bank Punishment Don't Fit Their Crimes*, AM. PROSPECT (Oct. 22, 2013), http://prospect.org/article/big-bank-punishments-dont-fit-their-crimes.

321. Press Release, Dep't of Justice, First Charges Brought in Investigation of Collusion Among Heir Location Services Firms (Dec. 23, 2015), https://www.justice.gov/opa/pr/first-charges-brought-investigation-collusion-among-heir-location-services-firms.

Iowa,[322] gasoline stations in a town in Oklahoma,[323] online sellers of lanyards and wristbands,[324] third-party retailers of wall posters on Amazon,[325] and sellers of packaged ice in Cincinnati and Minneapolis.[326]

While expressing the strongest condemnation of collusion, the Supreme Court weakened private enforcement and thereby helped undermine cartel deterrence efforts.[327] Over the past forty years, the Court raised the procedural barriers for private plaintiffs, in particular class action plaintiffs.[328] The Court reinterpreted the Federal Rules of Civil Procedure to allow defendants to get cases dismissed more easily, whether at the pleadings[329] or summary judgment stage.[330] Along with rewriting pleading standards in a business-friendly manner, the Court raised the burden for certifying classes[331] and re-

322. Press Release, Dep't of Justice, Iowa Company Pleads Guilty to Participating in Ready-Mix Concrete Price-Fixing and Bid-Rigging Conspiracy (Aug. 24, 2011), https://www.justice.gov/opa/pr/iowa-company-pleads-guilty-participating-ready-mix-concrete-price-fixing-and-bid-rigging.

323. Press Release, Dep't of Justice, Convenience Store Company and Individual Charged with Retail Gasoline Price Fixing in Oklahoma (Sept. 19, 2008), https://www.justice.gov/archive/opa/pr/2008/September/08-at-838.html.

324. Press Release, Dep't of Justice, E-Commerce Company and Top Executive Agree to Plead Guilty to Price-Fixing Conspiracy for Customized Promotional Products (Aug. 7, 2017), https://www.justice.gov/opa/pr/e-commerce-company-and-top-executive-agree-plead-guilty-price-fixing-conspiracy-customized.

325. Press Release, Dep't of Justice, Online Retailer Pleads Guilty for Fixing Prices of Wall Posters (Aug. 11, 2016), https://www.justice.gov/opa/pr/online-retailer-pleads-guilty-fixing-prices-wall-posters.

326. Press Release, Dep't of Justice, Cincinnati Packaged-Ice Manufacturer Sentenced to Pay $9 Million for Its Role in a Customer and Territory Allocation Conspiracy (Mar. 2, 2010), https://www.justice.gov/opa/pr/cincinnati-packaged-ice-manufacturer-sentenced-pay-9-million-its-role-customer-and-territory; Press Release, Dep't of Justice, Minneapolis Packaged-Ice Company Agrees to Plead Guilty to Customer Allocation Conspiracy (Oct. 13, 2009), https://www.justice.gov/opa/pr/minneapolis-packaged-ice-company-agrees-plead-guilty-customer-allocation-conspiracy.

327. *See* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269, 1272, 1285 (2013) (finding that private enforcement likely deters more anticompetitive behavior than the DOJ's anti-cartel enforcement activities).

328. Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U. N.H. L. REV. 303, 323–37 (2016).

329. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007) (ruling that a plaintiff's pleading must be plausible on its face and rise above a speculative level).

330. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (granting summary judgment for defendants because there is no plausible motive for predatory price fixing); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) (finding summary judgment for defendants because there is no plausible motive for price fixing); Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986) (ruling that the non-movant must show there is a genuine dispute of material fact to avoid summary judgment).

331. Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013); Wal-Mart Stores, Inc. v. Dukes, 564 US. 338, 349–50 (2011).

quired the enforcement of mandatory arbitration clauses in nearly all instances, including those that deprive injured parties of the right to litigate on a collective basis through class actions.[332] Class actions are often the only means of seeking redress for illegal conduct, such as a price-fixing conspiracy, that inflicts small harm on a large number of individuals.[333] In antitrust actions, the Court also limited consumer standing to direct purchasers, meaning consumers more than one level removed from an antitrust violator cannot obtain damages under federal antitrust law.[334]

B. *Workers in the Antitrust Crosshairs*

1. *Enforcement Actions Against Workers' Collective Action*

Even as the courts and agencies relaxed antitrust doctrine concerning corporate mergers and monopolies and presided over dramatic increases in market concentration, they continue to police the collective action of workers. The agencies and courts mechanically apply the logic that horizontal coordination among independent economic actors is the "supreme evil of antitrust"[335] and employed antitrust against the efforts of workers and other small players to build power through joint action.[336] While the courts do recognize the statutory exemption in the Clayton Act for organized labor,[337] this exemption protects only workers who have, or are seeking, employee status.[338] Given employers' increasing classification—and misclassification[339]—of workers as independent contractors across the economy,[340] the

332. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010).

333. *See* CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY § 5.2.1, at 9–10 (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (finding that consumers in financial services markets rarely file individual arbitration claims for amounts of less than $1,000).

334. Ill. Brick Co. v. Illinois, 431 U.S. 720, 728–29 (1977).

335. Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

336. Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST L.J. 195, 196 (2001).

337. Brown v. Pro Football, Inc., 518 U.S. 231, 236–37 (1996).

338. *E.g.*, Spence v. Se. Alaska Pilots' Ass'n, 789 F. Supp. 1007, 1012–13 (D. Alaska 1990); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 1032–33 (2016).

339. *See* Danny Vinik, *The Real Future of Work*, POLITICO MAG., Jan.–Feb. 2018, https://www.politico.com/magazine/story/2018/01/04/future-work-independent-contractors-alternative-work-arrangements-216212 ("[S]tate-level audits indicate that about 10 percent to 30 percent of American workers are currently misclassified. There are also some indications that misclassification is becoming more widespread.").

340. *See* Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Arrangements in the United States, 1995–2015*, at 2 (Nat'l Bureau of Econ. Research, Working Paper No.

Clayton Act's exemption for labor, as currently interpreted, provides many workers with no protection from antitrust investigations and lawsuits.

The Supreme Court and lower courts held that workers who are not employees under the National Labor Relations Act[341] can be liable for collusive conduct under the antitrust laws. Consider the case *FTC v. Superior Court Trial Lawyers Ass'n.*[342] A group of public defenders believed the District of Columbia underpaid them for their services and organized a boycott of the city's public defender service.[343] Through this boycott, the public defenders obtained an increase in their hourly rates from the city council.[344] The FTC brought an enforcement action against the attorneys, alleging they engaged in a group boycott and price fixing, in violation of Section 1 of the Sherman Act.[345] The Supreme Court ruled in favor of the FTC, holding that the public defenders committed a per se violation.[346] While the lawyers' action resembled a strike, the Court did not even address whether the lawyers were protected by the Clayton Act's labor exemption, likely because the lawyers were independent contractors.[347]

While they appear to ignore labor market practices and structures that hurt workers,[348] the federal antitrust agencies, especially the FTC, have made policing collusion between workers a priority. The FTC brought a number

22667, 2016) (finding "that the percentage of workers engaged in alternative work arrangements—defined as temporary help agency workers, on-call workers, contract company workers, and independent contractors or freelancers—rose from 10.7 percent in February 2005 to 15.8 percent in late 2015"). Remarkably, Katz and Krueger find that ninety-four percent of the net employment growth in the U.S. economy between 2005 and 2015 happened in these alternative work arrangements. *Id.* at 7. For the growth of outsourcing of previously core business functions and the rise of alternative labor arrangements, see generally DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

341. 29 U.S.C. §§ 151–169 (2012).

342. 493 U.S. 411 (1990).

343. *Id.* at 416–18.

344. *Id.* at 418.

345. *Id.* at 418–19.

346. *Id.* at 436.

347. Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1563 (2018).

348. *See supra* Section III.A (discussing DOJ's slap on the wrist remedy against tech giants that colluded against workers); *see also* Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 542 (2018) ("Relying, we suspect, on the traditional assumption of economists that labor markets are competitive, the agencies have never blocked a merger because of its effect on labor markets—or, even, as far as we know, given the labor market effects of a potential merger more than cursory attention."); Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue*, N.Y. TIMES (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html ("Some of fast-food's biggest names, including Burger King, Carl's Jr., Pizza Hut and, until recently, McDonald's, prohibited franchisees from hiring workers away from one another, preventing, for example, one Pizza Hut from hiring employees from another."); José Azar et al., *Labor Market Concentration* 13 (Nat'l Bureau of Econ. Research, Working Paper No. 24147, 2017) ("We find that higher labor market concentration is associated with significantly lower real wages.").

of actions against professionals who undertook conduct that limited competition and downward pressure on incomes. The FTC has gone after practices that resemble strike-like conduct. In two actions, the FTC alleged that physicians groups in Modesto, California and Boulder, Colorado "refuse[d], and threaten[ed] to refuse, to deal with insurance providers, unless they raised the fees paid to the groups' doctors."[349] Over the past few decades, the FTC brought numerous cases against doctors across the country who engaged in collective bargaining or similar activity with private and public payors.[350] Of the seven cases the FTC has litigated before the Supreme Court since 1986, three involved dentists and another involved public defenders.[351] While this figure does not necessarily reflect the agency's overall enforcement activities, it calls for a critical examination of the agency's priorities. The DOJ brought multiple similar actions against medical professionals who acted in concert.[352] To put this enforcement activity in perspective, the DOJ since the year 2000 filed more cases against chiropractors for collective bargaining than against monopolists for exclusionary conduct.[353]

While doctors generally earn six-figure salaries and enjoy high status in the United States,[354] they, like many other workers, often face powerful corporate buyers for their services—namely private insurance companies—and typically possess little bargaining power as individual practitioners.[355] Yet, the antitrust actions against doctors ignored the power of the insurers. The United States Court of Appeals for the Fifth Circuit, in affirming an FTC

349. Press Release, Fed. Trade Comm'n, FTC Settles Price-Fixing Charges Against Two Separate Doctors' Groups (Dec. 24, 2008), https://www.ftc.gov/news-events/press-releases/2008/12/ftc-settles-price-fixing-charges-against-two-separate-doctors.

350. *E.g.*, N. Tex. Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008); *In re* Santiago, 155 F.T.C. 874 (2013); *In re* Higgins, 149 F.T.C. 1114 (2010); *In re* Conn. Chiropractic Ass'n, 145 F.T.C. 163 (2008); *In re* Me. Health Alliance, 136 F.T.C. 616 (2003).

351. The three cases involving dentists are *North Carolina Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015), *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). The case concerning public defenders is *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

352. Press Release, U.S. Dep't of Justice, Idaho Orthopedists Charged with Engaging in Group Boycotts and Denying Medical Care to Injured Workers (May 28, 2010), https://www.justice.gov/opa/pr/idaho-orthopedists-charged-engaging-group-boycotts-and-denying-medical-care-injured-workers; United States v. Chiropractic Assocs., Ltd., No. CV 13-04030-LLP, 2013 U.S. Dist. LEXIS 141345 (D.S.D. Sept. 3, 2013); United States v. Okla. State Chiropractic Indep. Physicians Ass'n, No. 13-CV-21-TCK-TLW, 2013 U.S. Dist. LEXIS 90485 (N.D. Okla. May 21, 2013)

353. *Compare, e.g.*, *Chiropractic Assocs.*, Ltd., 2013 U.S. Dist. LEXIS 141345, *and Okla. State Chiropractic Indep. Physicians Ass'n*, 2013 U.S. Dist. LEXIS 90485, *with* U.S. DEP'T OF JUSTICE, 2008–2017 ANTITRUST WORKLOAD STATISTICS, *supra* note 265, at 5, *and* .S. DEP'T OF JUSTICE, 2000–2009 ANTITRUST WORKLOAD STATISTICS, *supra* note 265, at 6 (showing a total of one Sherman Act monopoly complaint filed in court from 2000 to 2017).

354. Elisabeth Rosenthal, *Medicine's Top Earners Are Not the M.D.s*, N.Y. TIMES (May 17, 2014), https://www.nytimes.com/2014/05/18/sunday-review/doctors-salaries-are-not-the-big-cost.html.

355. John B. Kirkwood, *Buyer Power and Healthcare Prices*, 91 WASH. L. REV. 253, 284–85 (2016).

order against a group of physicians in the Fort Worth area, showed this disregard for buyer-side power. The court did not consider whether the insurers had the capacity to depress payments to physicians and upheld the FTC's decision, in part, because the physicians' group "us[ed] collective bargaining power to demand higher fees for physicians who are already under contract with a payor."[356]

These antitrust enforcement activities against workers and small proprietors have not been restricted to medical professionals or other well-heeled professionals. These actions run the gamut of occupations. The FTC brought enforcement actions against animal breeders,[357] electricians,[358] ice skating teachers,[359] managers of commercial and residential properties,[360] music teachers,[361] organists,[362] and public defenders (again)[363] for adopting codes of ethics that restrained direct competition in an effort to maintain or raise members' incomes and promote a shared identity among members.[364] FTC investigations sweep even more broadly than enforcement actions would suggest. For instance, the FTC investigated truck drivers at several ports for seeking to organize for higher wages, reduced hours, and improved working

356. N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 369 (5th Cir. 2008).

357. *In re* Nat'l Ass'n of Animal Breeders, Inc., No. C-4558, 2015 F.T.C. LEXIS 267 (Nov. 2, 2015).

358. *In re* Prof'l Lighting & Sign Mgmt. Cos., Inc., 159 F.T.C. 261 (2015).

359. *In re* Prof'l Skaters Ass'n, 159 F.T.C. 758 (2015).

360. *In re* Nat'l Ass'n of Residential Prop. Managers, Inc., No. C-4490, 2014 F.T.C. LEXIS 217 (Oct. 1, 2014).

361. *In re* Music Teachers Nat'l Ass'n, Inc., No. C-4448, 2014 F.T.C. LEXIS 68 (Apr. 3, 2014); *In re* Nat'l Ass'n of Teachers of Singing, Inc., No. C-4491, 2014 F.T.C. LEXIS 218 (Oct. 1, 2014).

362. *In re* Am. Guild of Organists, No. C-4617, 2017 F.T.C. LEXIS 76 (May 26, 2017).

363. *In re* Lewis, 138 F.T.C. 213 (2004).

364. Some of these occupations appear to provide very modest remuneration for workers. *See, e.g.*, William Peek, Comment on *In re* Am. Guild of Organists (May 2, 2017), https://www.ftc.gov/system/files/documents/public_comments/2017/05/00013-140686.pdf ("Church organists are often highly skilled, highly trained musicians. A quick perusal of the church jobs listed on the AGO website reveals that the majority require a minimum of a Bachelor's degree in music, and many require a Masters and more. Yet that same perusal reveals that the salaries that are offered are very modest; most less than $20,000 per year."). And some of the challenged rules have social value in promoting occupational camaraderie and collective identity among members of the professional associations. *See, e.g.*, Paula Neihouse Moseman, Comment on Proposed Consent Agreement *In re* Music Teachers Nat'l Ass'n, Inc. (Jan. 16, 2014), https://www.ftc.gov/policy/public-comments/comment-00233-5 ("The provision in the MTNA Code of Ethics is simply a statement to encourage teachers to maintain a high level of professionalism. It is common courtesy to not actively try to steal another teacher's students away from their studio. It has absolutely nothing to do with discouraging competition! Private music teachers are always in demand and the consumer searching for a teacher makes their choice based on a number of factors. If they don't like one teacher, there are always many more available.").

conditions.[365] And private employers and purchasers of labor services can also use antitrust to discipline workers.[366]

A January 2015 blog post revealed the FTC's attitude toward concerted action by professionals. In this post, an FTC official put professionals and other independent contractors on notice that the FTC would take action against them in the future for collective action that did not produce offsetting consumer benefits.[367] This post elided any differences between large businesses and workers and stated they are both "subject to the same antitrust rules of the road,"[368] in effect adopting the position that antitrust applies equally to "a combination of all the great industrial enterprises" and "a combination of maidservants."[369]

The antitrust threat to labor today is arguably even greater than it was during the first Gilded Age. A century ago, workers engaging in secondary actions to advance organizing campaigns violated federal antitrust law. In general, however, workers could undertake primary actions to unionize a workplace.[370] Today, however, professionals and other independent contractors cannot engage in primary action and face judicial condemnation for bargaining collectively with purchasers of their services.[371]

2. *Advocacy Against State and Local Policies That Can Help Workers*

Along with their enforcement activities, the agencies advocated against collective bargaining rights at the state and local level. They wrote amicus briefs and comment letters urging state legislators not to grant collective bargaining rights to medical professionals.[372] In November 2017, the DOJ and

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365. Paul, *supra* note 338, at 981.

366. *See, e.g.*, Michael Paulson, *Theater Producers Accuse Casting Directors of Forming Illegal Cartel*, N.Y. TIMES (Dec. 5, 2017), https://www.nytimes.com/2017/12/05/theater/producers-lawsuit-casting-directors.html ("The producers and casting directors have been at odds for more than a year, as the casting directors have sought the right to collectively bargain as part of an effort, they say, to win health care and pension benefits. They have sought representation from Teamsters Local 817, which already represents casting directors in film and television. . . . The producers have argued that casting directors are independent contractors, not production employees, and therefore do not have the right to bargain collectively as a union.").

367. Geoffrey Green, *Unflattering Resemblance*, FED. TRADE COMM'N (Jan. 13, 2015), https://www.ftc.gov/news-events/blogs/competition-matters/2015/01/unflattering-resemblance.

368. *Id.*

369. Int'l Harvester Co. v. Missouri, 234 U.S. 199, 213 (1914).

370. United Leather Workers, 265 U.S. 457, 471 (1924).

371. Green, *supra* note 367.

372. *E.g.*, Press Release, Fed. Trade Comm'n, FTC Staff Opposes Alaska Proposal to Allow Physician Collective Bargaining (Jan. 31, 2002), https://www.ftc.gov/news-events/press-releases/2002/01/ftc-staff-opposes-alaska-proposal-allow-physician-collective; Press Release, Fed. Trade Comm'n, FTC Staff Opposes Washington State Proposal to Allow Physician Collective Bargaining (Feb. 14, 2002), https://www.ftc.gov/news-events/press-releases/2002/02/ftc-staff-opposes-washington-state-proposal-allow-physician.

FTC filed a brief that, while formally about the scope of the state action doctrine,[373] attacked the City of Seattle's ordinance granting collective bargaining rights to Uber and other cab drivers.[374] In 2008, the FTC wrote a letter to an Indiana legislator regarding a bill to grant collective bargaining rights to home health workers.[375] Home care providers offer critical care to the ill and are disproportionately women of color and notoriously underpaid and overworked.[376] In an article on this important and exploited group of workers, Vann R. Newkirk II, a staff writer at *The Atlantic*, described their plight:

> Home-care workers are not . . . afforded wages or protections commensurate with their importance, with over a quarter living under the poverty line and more than half reliant on public assistance. That economic vulnerability is especially notable because of just who tends to work in home care: Women of color are the largest demographic group within the home-care workforce. Their vulnerability reflects a long history of exploitation of women of color working in-home jobs, and highlights a growing inequality in the health-care workforce, even as health coverage expands to more and more Americans.[377]

Notwithstanding these economic and social realities, the FTC expressed opposition to the Ohio bill on competition policy grounds and stated that the proposed collective bargaining rights could violate federal antitrust law.[378]

373. Brief for the United States & Fed. Trade Comm'n as Amici Curiae in Support of Appellant & in Favor of Reversal, Chamber of Commerce v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640), 2017 WL 5166667.

374. Marshall Steinbaum, *The Feds Side Against Alt-Labor*, ROOSEVELT INST.: NEXT NEW DEAL (Nov. 16, 2017), http://rooseveltinstitute.org/feds-side-against-alt-labor/.

375. Letter from Maureen K. Ohlhausen et al., Fed. Trade Comm'n, to William J. Seitz, Ohio Senate 4–5 (Feb. 14, 2008), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.william-j.seitz-concerning-ohio-executive-order-2007-23s-establish-collective-bargaining-home-health-care/v080001homecare.pdf.

376. Vann R. Newkirk II, *The Forgotten Providers*, ATLANTIC (Sept. 29, 2016), https://www.theatlantic.com/politics/archive/2016/09/home-health-care-workers-wages/502016/.

377. *Id.*

378. Letter from Maureen K. Ohlhausen et al. to William J. Seitz, *supra* note 375, at 7. The FTC has also repeatedly opposed antitrust exemptions that would allow independent pharmacies to negotiate collectively with private health insurers. *E.g.*, *Hearing on H.R. 1946 Before the Subcomm. on Intellectual Prop., Competition & the Internet of the H. Comm. of the Judiciary*, 112th Cong. (2012) (statement of Richard Feinstein, Dir. of the Bureau of Competition, Fed. Trade Comm'n), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-h.r.1946-preserving-our-hometown-independent-pharmacies-act-2011/120329pharmacytestimony.pdf; *Antitrust Enforcement in the Health Care Industry: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Richard Feinstein, Dir. of the Bureau of Competition, Fed. Trade Comm'n), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-antitrust-enforcement-health-care-industry/101201antitrust-healthcare.pdf; *The Importance of Competition and Antitrust Enforcement to Lower-Cost, Higher-Quality Health Care: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety & Ins. of the Comm. on Commerce, Sci. & Transp.*, 11th Cong. (2009) (statement of Richard Feinstein, Dir. of

The antitrust agencies, especially the FTC, also devoted considerable advocacy resources against occupational licensing regulations at the state and local level. According to a former FTC official, the agency submitted "hundreds of comments and amicus curiae briefs" on occupational licensing issues to state and local governmental bodies from the 1970s to the present day.[379] In its general competition advocacy, the FTC subscribes to questionable or false assumptions about the state, markets, and antitrust law.[380] Among these assumptions, the FTC supposes that markets exist apart from and pre-exist the state—rather than arise from extensive state action.[381] In its advocacy concerning occupational licensing, the FTC has treated occupational licensing as an artificial imposition instead of as market-structuring rules akin to property, contract, and tort rules.[382]

Licensing can protect consumer health and safety[383] and also yield important benefits for workers, such as higher wages.[384] The percentage of workers subject to licensing increased at the same time as the percentage of workers in a union declined.[385] Although it would be mistaken to infer a causal connection between the two trends, these developments suggest that the expansion of occupational licensing may function for workers as an imperfect substitute to unionization.[386] Licensing may also mitigate the effects of gender and racial discrimination in the labor market.[387] In light of its implication of myriad public interests, occupational licensure is an example of

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the Bureau of Competition, Fed. Trade Comm'n), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-importance-competition-and-antitrust-enforcement-lower/090716healthcaretestimony.pdf.

379. *Competition and the Potential Costs and Benefits of Professional Licensure: Hearing Before the H. Comm. on Small Bus.*, 113th Cong. 9 (2014) (statement of Andrew Gavil, Dir. Of the Office of Policy Planning, Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf (footnote omitted).

380. Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951, 955–87 (2008).

381. *Id.* at 954. *See generally* Sandeep Vaheesan & Frank Pasquale, *The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy*, 14 ANN. REV. L. & SOC. SCI. 309 (2018).

382. Vaheesan & Pasquale, *supra* note 381, at 317.

383. WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 11 (2016).

384. *See id.* at 14 ("Estimates that account for differences in education, training, and experience find that licensing results in 10 percent to 15 percent higher wages for licensed workers relative to unlicensed workers.").

385. Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676, 678–79 (2010).

386. *See* Maury Gittleman & Morris M. Kleiner, *Wage Effects of Unionization and Occupational Licensing Coverage in the United States*, 69 ILR REV. 142, 169–70 (2016) (finding wage premia in both unionized and licensed labor markets but higher wage premia for unionized segments).

387. Peter Q. Blair & Bobby W. Chung, *Occupational Licensing Reduces Racial and Gender Wage Gaps: Evidence from the Survey of Income and Program Participation* 36 (Univ. of Chicago, Working Paper No. 2017-050, 2017), https://ideas.repec.org/p/hka/wpaper/2017-50.html.

policy that requires moral and political judgments and should not be cabined in a narrow technocratic frame.[388]

Rather than acknowledging the nuances of licensing, the FTC adopts an almost categorical position, treating licensing as a general economic menace and calling on states to evaluate licensing rules solely through the prism of consumer welfare and consumer protection.[389] To be sure, occupational licensing today is not perfect nor above criticism. It should be subject to careful examination and reformed as appropriate.[390] The FTC, however, defines the *legitimate* purposes of occupational regulation narrowly and appears to believe that the appropriate scope of democratic policymaking is limited. In a letter exemplifying this economistic ideology, the FTC wrote to a Chicago alderman concerning a taxicab regulation under consideration in the city that "[a]ny restrictions on competition that are implemented should be no broader than necessary to address *legitimate subjects of regulation, such as safety and consumer protection*, and narrowly crafted to minimize any potential anticompetitive impact."[391]

IV. HOW REMAKING ANTITRUST LAW COULD HELP END THE NEW GILDED AGE

Congress, the antitrust agencies, and federal courts should restore the original anti-monopoly, pro-worker vision for the antitrust laws. For much of their history, these laws had a pro-capital, anti-worker orientation. Notwithstanding this record, these laws can be reoriented to police capital and accommodate labor in accord with the intent of Congress. In passing these laws, Congress aimed to curtail the power of capital and also preserve space for workers to organize.[392] The antitrust agencies and federal courts should

388. *See* RAHMAN, *supra* note 40, at 99 ("The analysis of complex multifaceted problems necessarily entails value judgments of some kind—particularly in the case of political problems which are generally ill formed, with tremendous uncertainty and no single optimal solution. In these settings, technocratic judgment cannot fully determine the all-things-considered 'best' public policy.").

389. *See, e.g.*, Letter from Susan S. DeSanti et al., Fed. Trade Comm'n, to Loris Jones, Tex. Bd. of Veterinary Med. Exam'rs 4 (Aug. 20, 2010), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-texas-board-veterinary-medical-examiners-concerning-rule-573.17-regarding-animal-teeth-floating/100910texasteethfloating.pdf ("The proposed rule would modify existing Texas regulations to effectively prohibit non-veterinarians from providing specific and commonly-available forms of horse floating, absent veterinarian supervision. If enacted, the rule appears likely to significantly restrict competition without providing any countervailing benefit, thereby harming consumers.").

390. *E.g.*, Alexia Elejalde-Ruiz, *New Illinois Laws Loosen Employment Restrictions for Ex-Offenders*, CHI. TRIB. (Jan. 17, 2017), http://www.chicagotribune.com/business/ct-illinois-laws-criminal-records-118-biz-20170117-story.html.

391. Letter from Andrew I. Gavil et al., Fed. Trade Comm'n, to Brendan Reilly, Chi. City Council 4 (Apr. 15, 2014), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf (emphasis added).

392. *See supra* Part I.

reject the ahistorical and deficient efficiency paradigm and embrace the political economy framework of the sponsors of the antitrust laws. Specifically, they need to reinterpret antitrust to restore competitive market structures and limit the power of large businesses over consumers, producers, rivals, and citizens. Along with imposing checks on the power of large businesses, Congress, the agencies, and the courts must preserve freedom of action for workers acting in concert.

New statutes and executive and judicial reinterpretation of antitrust law, in accord with congressional intent, would help remedy many economic and political injustices in the United States today. Monopoly and oligopoly appear to contribute to a host of societal ills. These include increased inequality,[393] diminished income for workers[394] and other producers,[395] and declining business formation.[396] At the same time, protecting workers' collective action against antitrust challenges would create more space for workers to organize and claim a fairer share of income and wealth.[397] Restoring antitrust law to its original goals would likely produce a more just and equitable society. Although no means a panacea for what ails the United States, antitrust law should be part of a broader social democratic agenda that reduces the yawning inequalities in wealth and power today.[398]

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393. A large fraction of monopoly and oligopoly profits likely accrue to the most affluent segment of society. In 2012, the top 0.1% of the wealth distribution captured 33% of capital income, defined to include "dividends, taxable interest, rents, estate and trust income, the profits of S-corporations, sole proprietorships and partnerships." Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Data*, 131 Q. J. ECON. 519, 530 (2016); *see also* William S. Comanor & Robert H. Smiley, *Monopoly and the Distribution of Wealth*, 89 Q. J. ECON. 177, 189–93 (1975) (estimating monopoly's contribution to income inequality in the 1960s). *See generally* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017) (discussing economic and political connections between market power and inequality).

394. Azar et al., *supra* note 348, at 12; Simcha Barkai, Declining Labor and Capital Shares 26 (2016) (unpublished Ph.D. dissertation, University of Chicago), https://www.gsb.stanford.edu/sites/gsb/files/jmp_simcha-barkai.pdf.

395. Ariel Ezrachi & Maurice Stucke, *The E-Scraper and E-Monopsony*, AUTHORS GUILD (Apr. 12, 2017), https://www.authorsguild.org/industry-advocacy/law-profs-antitrust-enforcers-rein-super-platforms-look-upstream/ (correlating the decline in average income for authors to the growing monopsony power of Amazon over book publishers); DARCY TAJ & EMILY KERR, FED. RESERVE BANK OF DALL., GO FIGURE: WHAT'S DRIVING WIDE GAP BETWEEN CATTLE AND BEEF PRICES? (2017), https://www.dallasfed.org/~/media/documents/research/swe/2017/swe1702f.pdf (identifying a possible connection between increased concentration in meatpacking and food retailing and growing spread between beef prices paid by consumers pay and cattle prices paid to ranchers).

396. Stacy Mitchell, *The View from the Shop—Antitrust and the Decline of America's Independent Businesses*, 61 ANTITRUST BULL. 498, 502 (2016) (noting growth in the political power of large businesses and the decrease in small business formation).

397. For an examination of the relationship between labor organization and inequality, see Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 532 (2011) (finding that the decline of unions explains between one-fifth to one-third of the increase in wage inequality).

398. *See generally* ANTHONY B. ATKINSON, INEQUALITY: WHAT CAN BE DONE? (2015).

Reinterpreting and reviving antitrust law will require new legislation from Congress,[399] a radical remaking of the federal antitrust agencies and the courts, or some combination of both. Congress, the DOJ, the FTC, and the courts would have to undo a thick accretion of pro-business, anti-worker case law and guidelines.[400] The current Supreme Court and the Trump administration are, if anything, likely to entrench the consumer welfare antitrust that failed consumers and workers, to continue to tolerate the abuses of monopolies and monopsonies, and to deploy antitrust against the powerless.[401] Yet, administrations and the composition of the Supreme Court are not destined to remain the same.

Already signs of progress are clear. Along with bills on strengthening antitrust in Congress, a number of members of Congress and candidates for Congress are making antitrust a centerpiece of their agenda.[402] At least on the Democratic side, antitrust and anti-monopoly appear likely to be important themes in the contest to be the party's presidential nominee in 2020. And if and when an administration committed to the revival of antitrust and control of corporate power is elected, it would have an opportunity to pursue a different course on antitrust through both appointments to the federal antitrust agencies and to the judiciary. In relying on the executive branch and the courts, the conservative reinterpretation—and retrenchment—of antitrust

399. *See* Chuck Schumer, *A Better Deal for American Workers*, N.Y. TIMES (July 24, 2017), https://www.nytimes.com/2017/07/24/opinion/chuck-schumer-employment-democrats.html ("We are going to fight to allow regulators to break up big companies if they're hurting consumers and to make it harder for companies to merge if it reduces competition."). In the fall of 2017, Senator Amy Klobuchar and nine Democratic co-sponsors introduced a bill to strengthen the Clayton Act's merger provisions. Press Release, Senator Amy Klobuchar, Klobuchar, Senators Introduce Legislation to Modernize Antitrust Enforcement (Sept. 14, 2017), https://www.klobuchar.senate.gov/public/index.cfm/2017/9/klobuchar-senators-introduce-legislation-to-modernize-antitrust-enforcement.

400. *See supra* Part III.

401. Sandeep Vaheesan, *Corporations Have a Friend in Judge Kavanaugh*, HILL (Aug. 29, 2018), https://thehill.com/opinion/finance/404167-corporations-have-a-friend-in-judge-kavanaugh; Sandeep Vaheesan, *Neil Gorsuch's Alarming Views on Antitrust and Monopoly*, WASH. MONTHLY (Mar. 17, 2017), http://washingtonmonthly.com/2017/03/17/neil-gorsuchs-alarming-views-on-antitrust-and-monopoly/; Cecilia Kang, *How Trump's Pick for Top Antitrust Cop May Shape Competition*, N.Y. TIMES (Apr. 25, 2017), https://www.nytimes.com/2017/04/25/technology/how-trumps-pick-for-top-antitrust-cop-may-shape-competition.html/; Brian Fung, *Trump Names Maureen Ohlhausen as Acting FTC Chairwoman*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/01/25/trump-names-maureen-ohlhausen-as-acting-ftc-chairwoman/?utm_term=.46441ca17764.

402. *E.g.*, Senator Elizabeth Warren, Keynote Remarks at New America's Open Markets Program Event: Reigniting Competition in the American Economy (June 29, 2016), http://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf; Matthew Yglesias, *Booker Calls on Antitrust Regulators to Start Paying Attention to Workers*, VOX (Nov. 1, 2017), http://www.vox.com/policy-and-politics/2017/11/1/16571992/booker-antitrust-letter; David Dayen, *Anti-Monopoly Candidates Are Testing a New Politics in the Midterms*, INTERCEPT (Oct. 1, 2017), http://theintercept.com/2017/10/01/anti-monopoly-candidates-are-testing-a-new-politics-in-the-midterms/.

offers one model for reviving the field.[403] And even in the near term, litigation can yield important advances. Some lower courts appear receptive to reinvigorating or at least honoring mid-century precedents the Supreme Court has not overruled.[404]

A. Confronting the Power of Capital

A reinterpretation of the antitrust laws needs to be founded on the political economy embodied in the legislative histories of the principal antitrust laws. The Congresses that enacted these statutes were not concerned with narrow economics or some abstract notion of competition. Instead, they sought to control the power of the new monopolies and trusts that dominated the American political economy. They had a broad conception of the power of large-scale enterprise and considered—and condemned—the trusts' power over consumers, producers, competitors, and citizens.[405] A review of the legislative histories reveals economic and political ideas that are consonant with popular concerns about corporate power today.[406]

Permissive merger and monopoly policy resulted in a highly concentrated industrial structure.[407] Numerous sectors across the economy became

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403. Consider the conservative Supreme Court's weakening of antitrust precedent on vertical restraints over four decades. The Court overturned the per se rule for territorial and other non-price restraints in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). In the 1980s, it undermined the effectiveness of the long-standing per se rule against resale price maintenance in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). In 2007, thirty years after *Sylvania*, the Court overruled the nearly-century old per se ban on resale price maintenance. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 882 (2007).

404. *See, e.g.*, FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347–48 (3d Cir. 2016) (citing *Brown Shoe Co. v. United States*, *United States v. Philadelphia National Bank*, and *FTC v. Procter & Gamble* for the proposition that the Supreme Court has not adopted an efficiencies defense for otherwise illegal mergers and that Congress supported decentralized market structure even at the cost of some merger-related efficiencies). Nonetheless, the antitrust agencies in their guidelines have recognized an efficiencies defense. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, § 10 ("[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets.").

405. *See supra* Section I.A.

406. *See, e.g.*, Ryan Cooper, *Google Is a Monopoly—and It's Crushing the Internet*, WEEK (Apr. 21, 2017), http://theweek.com/articles/693488/google-monopoly—crushing-internet; Lina M. Khan, *Amazon Bites Off Even More Monopoly Power*, N.Y. TIMES (June 21, 2017), https://www.nytimes.com/2017/06/21/opinion/amazon-whole-foods-jeff-bezos.html.

407. COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 7 (2016); *Riding the Wave*, ECONOMIST (Oct. 3, 2013), http://www.economist.com/news/business/21587207-corporate-dealmakers-should-heed-lessons-past-merger-waves-riding-wave.

more concentrated over the past two decades.[408] A few examples are illustrative. In the airline industry, the number of major carriers declined from nine to four since 2005.[409] Two duopolies dominate railroads—one east of the Mississippi and one west of it.[410] The wireless industry has four major players,[411] with AT&T and Verizon accounting for approximately seventy percent of market share by revenue.[412] In agriculture, concentration increased dramatically in markets throughout the supply chain, starting with inputs such as fertilizer and seeds through processing of farmers' crops, livestock, and poultry and food retailing.[413] Most local labor markets in the United States, and in rural areas in particular, are highly concentrated (as defined by the *Horizontal Merger Guidelines*)[414] and have become more concentrated since the 1970s.[415]

Consumer welfare antitrust failed even on consumer welfare grounds. In metropolitan areas across the country, hospital mergers created highly concentrated markets for hospital services and contributed to higher costs in health care.[416] John Kwoka has shown that the antitrust agencies often failed to challenge mergers that had subsequent anticompetitive effects (higher short-term consumer prices).[417] Furthermore, Kwoka found that merger remedies, especially behavioral remedies, often failed to preserve competition.[418]

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408. COUNCIL OF ECON. ADVISERS, *supra* note 407, at 4.

409. *A Lack of Competition Explains the Flaws in American Aviation*, ECONOMIST (Apr. 22, 2017), https://www.economist.com/leaders/2017/04/22/a-lack-of-competition-explains-the-flaws-in-american-aviation; Dominic Rushe, *American and US Airways Officially Merge to Create World's Biggest Airline*, GUARDIAN (Dec. 9, 2013), https://www.theguardian.com/business/2013/dec/09/american-us-airways-merge-worlds-biggest-airlines.

410. *Doing the Locomotion*, ECONOMIST (Feb. 11, 2016), https://www.economist.com/business/2016/02/11/doing-the-locomotion.

411. FED. COMMC'NS COMM'N, DA 16-1061, ANNUAL REPORT & ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO MOBILE WIRELESS, INCLUDING COMMERCIAL MOBILE SERVICES 5 (2016), https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1061A1.pdf.

412. *Id.* at 14.

413. Diana L. Moss & C. Robert Taylor, *Short Ends of the Stick: The Plight of Growers and Consumers in Concentrated Agricultural Supply Chains*, 2014 WIS. L. REV. 337, 341–44 (2014).

414. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, § 5.3.

415. Azar et al., *supra* note 348, at 9–10, http://www.marinescu.eu/AzarMarinescuSteinbaum.pdf; Efraim Benmelech et al., Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages? 3 (2018) (unpublished manuscript), https://www.kellogg.northwestern.edu/faculty/benmelech/html/BenmelechPapers/BBK_2018_January_31.pdf.

416. Martin Gaynor et al., *The Industrial Organization of Health-Care Markets*, 53 J. ECON. LITERATURE 235, 238–39, 259–61 (2015); *see* Gerard F. Anderson et al., *It's the Prices, Stupid: Why the United States Is So Different from Other Countries*, 22 HEALTH AFF. 89, 103 (2003) (finding that higher health care spending in the United States is due to higher unit prices for services rather than higher utilization of services).

417. *See* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 110–11 (2015).

418. *Id.* at 120.

Other research has also shown that increased market concentration contributes to higher consumer prices.[419]

The failures of consumer welfare antitrust become even clearer when a broader set of economic and political interests are examined. Higher consumer prices are one manifestation of business power but only one and arguably not the most important one. Concentration in labor and product markets contributes to lower wages.[420] Just from a consumer angle, dominant online platforms, with their huge troves of user data and lack of effective competition, pose serious threats to personal privacy.[421] Companies that control infrastructure that support a range of activity, whether they are the electric grid or a search engine monopoly, have the power to shape large swaths of the economy over time.[422]

The economic power of large business can also translate into great political power.[423] Empirical research found that big business exercises disproportionate influence over the political system.[424] John Browne, the former CEO of oil and gas giant BP, explained the nexus between economic power and political power. In an interview with *The Wall Street Journal* in 2003, he described how BP's size gives it political power:

> We do get the seat at the table because of our scope and scale. Whether we are the second or the third largest (oil) company is of very little import, but we're certainly up there and we operate in places which are important to the United States government, and the United States government is important to us. . . . We have large numbers of employees in the United States. That's very important in a political system. And they are highly concentrated. So we

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419. Blonigen & Pierce, *supra* note 229, at 24; Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* 14, 16, 32 (Nat'l Bureau of Econ. Research, Working Paper No. 23687, 2017); Gustavo Grullon et al., Are U.S. Industries Becoming More Concentrated? 41 (Oct. 2016) (unpublished manuscript), https://finance.eller.arizona.edu/sites/finance/files/grullon_11.4.16.pdf.

420. Azar et al., *supra* note 348, at 2; Barkai, *supra* note 394, at 38–39.

421. Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009, 1022–24 (2013).

422. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973) ("The record makes abundantly clear that Otter Tail used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws. The District Court determined that Otter Tail has 'a strategic dominance in the transmission of power in most of its service area' and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply." (citing United States v. Griffith, 334 U.S. 100, 107 (1948))). *See generally* K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1647, 1656, 1666–69 (2018).

423. Luigi Zingales, *Towards a Political Theory of the Firm*, 31 J. ECON. PERSP. 113, 122–25 (2017).

424. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565 (2014).

> have a very significant presence in Texas, Illinois, Alaska, California. These are important because our employees are voters.[425]

Economic power extends beyond influence over politicians, regulators, and other public officials. Comcast and Google illustrate this hegemonic power. These giants use their power and wealth to shape the terms of debate through financial support for academics and non-profit organizations, including organizations with otherwise progressive reputations.[426] In their funding of academics and think tanks, these companies are representative of large-scale capital, rather than outliers. Large businesses outside telecommunications and technology also use their wealth and power to manipulate the parameters of public discussion,[427] including by attempting to discipline critical voices.[428]

Current legal standards fail to provide a check on the prerogatives of large businesses and do not even protect consumers from the burden of monopoly and oligopoly. Antitrust legal standards, such as the rule of reason and the analytically comparable *Horizontal Merger Guidelines*, impose onerous burdens on plaintiffs challenging anticompetitive conduct and call for complicated, speculative inquiries into whether a business practice or merger

425. *BP Won't Abandon Driving Force*, WALL ST. J. (Nov. 25, 2003), https://www.wsj.com/articles/SB106970996323058900 (interviewing John Browne, CEO, BP).

426. *E.g.*, Brody Mullins & Jack Nicas, *Paying Professors: Inside Google's Academic Influence Campaign*, WALL ST. J. (July 14, 2017), https://www.wsj.com/articles/paying-professors-inside-googles-academic-influence-campaign-1499785286; David Dayen, *Google's Insidious Shadow Lobbying: How the Internet Giant Is Bankrolling Friendly Academics—and Skirting Federal Investigations*, SALON (Nov. 24, 2015), http://www.salon.com/2015/11/24/googles_insidious_shadow_lobbying_how_the_internet_giant_is_bankrolling_friendly_academics_and_skirting_federal_investigations/; Lee Fang, *Civil Rights Groups, Funded by Telecoms, Back Donald Trump's Plan to Kill Net Neutrality*, INTERCEPT (Feb. 13, 2017), https://theintercept.com/2017/02/13/naacp-trump-netneutrality/; Tom Hamburger & Matea Gold, *Google, Once Disdainful of Lobbying, Now a Master of Washington Influence*, WASH. POST (Apr. 12, 2014), https://www.washingtonpost.com/politics/how-google-is-transforming-power-and-politicsgoogle-once-disdainful-of-lobbying-now-a-master-of-washington-influence/2014/04/12/51648b92-b4d3-11e3-8cb6-284052554d74_story.html?utm_term=.581d579f17af.

427. Eric Lipton & Brooke Williams, *How Think Tanks Amplify Corporate America's Influence*, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/us/politics/think-tanks-research-and-corporate-lobbying.html. The fossil fuel and tobacco industries, in particular, have a notorious history of funding research to discredit evidence that the burning of fossil fuels contributes to climate change and that cigarette smoking contributes to a host of serious illnesses, respectively. Coral Davenport & Eric Lipton, *How G.O.P. Leaders Came to View Climate Change as Fake Science*, N.Y. TIMES (June 3, 2017), https://www.nytimes.com/2017/06/03/us/politics/republican-leaders-climate-change.html; David Heath, *Contesting the Science of Smoking*, ATLANTIC (May 4, 2016), https://www.theatlantic.com/politics/archive/2016/05/low-tar-cigarettes/481116/.

428. *E.g.*, Kenneth P. Vogel, *Google Critic Ousted from Think Tank Funded by the Tech Giant*, N.Y. TIMES (Aug. 30, 2017), https://www.nytimes.com/2017/08/30/us/politics/eric-schmidt-google-new-america.html?mcubz=1.

led to or will likely lead to consumer harm in the near term.[429] These standards ensure plaintiffs rarely win and help protect monopolistic and oligopolistic domination of markets.[430] Largely quantitative analysis, likely defective even for the consumer welfare standard,[431] cannot do justice to the qualitative manifestations of business power identified in the legislative histories of the Sherman, Clayton, and FTC Acts.[432] These standards cannot protect the open markets or the American political system from private business power. And these standards, by elevating complexity over simplicity, favor well-heeled interests who can afford to retain the most expensive lawyers and consultants—the monopolies and oligopolies themselves.[433]

To limit the power of large corporations, Congress, the antitrust agencies, and the courts must embrace clear rules and presumptions and reject the prevailing rule of reason approach. The Supreme Court once recognized the importance of rules in antitrust law and the unworkability of complicated standards.[434] For antitrust enforcement to be effective and efficient, per se rules and presumptions of illegality must become the default in antitrust law.[435] At present, rules are the norm only for price fixing and similar forms of horizontal collusion.[436] Per se rules or presumptions of illegality should govern a range of conduct that threatens structurally competitive markets. Conduct that carries this competitive threat includes horizontal and vertical mergers in concentrated markets and predatory pricing, exclusive dealing, and tying by monopolists and near-monopolists. Under these presumptions, certain firm conduct would be illegal unless the business could present credible business justifications.

429. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1385–86, 1466 (2009).

430. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 837 (2009).

431. Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 17–22 (2016).

432. *See supra* Section I.A.

433. *See* Stucke, *supra* note 429, at 1461.

434. United States v. Topco Assocs., 405 U.S. 596, 611–12 (1972).

435. *See* Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per se Rules vs Rule of Reason"*, 2 J. COMPETITION L. & ECON. 215, 220 (2006); *see also* Stucke, *supra* note 429, at 1460–65. Maurice Stucke writes:

> Rule-of-reason litigation . . . is a crusade, enlisting legions of economists, lawyers, and paralegals. It is unclear how many private litigants (even with the prospect of trebled damages) will incur the "litany of costs" and risks associated with suing companies with market power by embarking on such a crusade—especially if their chance of prevailing is less than one in three.

Id. at 1461.

436. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886 (2007).

B. Recognizing Labor Is Not Just Another Commodity

The antitrust laws also need to be reinterpreted to preserve the rights of workers to engage in collective action. The present interpretation of the statutory exemption is far too narrow and only protects workers with employee status under federal law.[437] Workers of all types face serious obstacles when they seek to establish a collective voice by forming a union. For workers without employee status under federal law, they face the additional threat of antitrust liability. Even as antitrust law permits monopolies and oligopolies to dominate the economy, it is used to thwart the efforts of many American workers to build countervailing power. In contrast to present administration and interpretation of the antitrust laws, the Congresses that passed both the Sherman and Clayton Acts sought to protect workers from antitrust attacks. The sponsors of these statutes viewed the new laws and labor organizing as complements in challenging and controlling the power of large-scale businesses. They made clear distinctions between capital and labor and did not conceive of the antitrust laws as prescriptions for maximizing competition categorically across American society. In their approach toward labor, the framers of the antitrust statutes wanted workers to have the freedom to act in a collective capacity.[438]

The present, restrictive interpretation of the statutory antitrust exemption creates a significant legal threat to the organizing efforts of a large fraction of workers. While the exemption protects workers who are employees under federal labor law, it does *not* protect workers without employee status under federal labor law—workers classified as independent contractors may face antitrust liability for engaging in collective action.[439] Given that nearly nine percent of workers are now classified or misclassified as independent contractors,[440] this threat is not merely an academic one. Antitrust law may help deter millions of workers from organizing for higher wages and better working conditions. The rise of precarious employment arrangements could arguably make these "alt-labor" organizing activities as important as traditional labor organizing in the coming years.[441] A critical segment of labor organizing is now focused on workers outside of conventional employee-employer relationships.[442]

437. L.A. Meat & Provisions Drivers Union v. United States, 371 U.S. 94, 104 (1962).

438. *See supra* Section I.B.

439. Paul, *supra* note 338, at 981. *E.g.*, Spence v. Se. Alaska Pilots' Ass'n, 789 F. Supp. 1007, 1013 (D. Alaska 1990) (holding that marine pilots are not "employees" and, therefore, not entitled to antitrust exemption).

440. Katz & Krueger, *supra* note 340, at 8.

441. Josh Eidelson, *Alt-Labor*, AM. PROSPECT (Jan. 29, 2013), http://prospect.org/article/alt-labor.

442. *See* Michael M. Oswalt, *The Right to Improvise in Low-Wage Work*, 38 CARDOZO L. REV. 959, 983–86 (2017).

Congress or the Supreme Court should revisit the statutory exemption and extend it to cover not just workers in traditional employee-employer arrangements but workers of all types.[443] Workers, regardless of formal legal label and unlike capitalists, face "[p]ressures of economic necessity to work in order to provide for one's family and to accommodate the needs of the person who is paying for the services are applicable to every person engaged in a trade, calling or profession."[444] They "must work to support themselves and their families and must make themselves available to render services at such times as they are needed."[445] It is long past due for the federal antitrust agencies and the courts to recognize the qualitative difference between home health care workers banding together to demand a living wage and corporate mergers that seek to enhance market control and bolster profits. All those who labor for a living should be entitled to the antitrust exemption, not only those workers who are "employees" under federal law.[446]

While congressional or judicial expansion of the labor exemption may not happen in the near term, the federal antitrust agencies, in the meantime, should reconsider their current enforcement priorities. They should stop investigating the concerted activity of workers, professionals, and other small players and bringing enforcement actions against them. This proposition should not be controversial. At a time of agency budget cuts[447] and monopolies and oligopolies in a number of sectors,[448] the antitrust agencies cannot justify using public money to bring enforcement actions against music teachers and organists. Even under the existing antitrust paradigm centered on consumer welfare, the music teachers' restrictive code of ethics does not seem like a major threat to consumer interests.[449] Assuming that preserving low consumer prices in the short run is the exclusive or primary goal of antitrust law, limits on price competition between music teachers appears inconsequential in the larger universe of anticompetitive conduct.

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443. Catherine L. Fisk, *Hollywood Writers and the Gig Economy*, 2017 U. CHI. LEGAL F. 177, 177–79 (2017).

444. Taylor v. Local No.7, Int'l Union of Journeymen Horseshoers, 353 F.2d 593, 597 (4th Cir. 1965).

445. *Id.*

446. Justice William O. Douglas explained how nominal independent contractors are often economically more similar to workers than they are to entrepreneurs and contended that economic realities should trump formal labels in determining whether these contractors were entitled to antitrust immunity. L.A. Meat & Provisions Drivers Union v. United States, 371 U.S. 94, 108–09 (1962) (Douglas, J., dissenting).

447. *E.g.*, Alexei Alexis, *FTC Budget Would Shrink Under Trump Plan*, BLOOMBERG BNA (May 24, 2017), https://www.bna.com/ftc-budget-shrink-n73014451436/.

448. *Too Much of a Good Thing*, ECONOMIST (Mar. 26, 2016), http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing.

449. *In re* Music Teachers Nat'l Ass'n, Inc., No. C-4448, 2014 F.T.C. LEXIS 68 (Apr. 3, 2014); *In re* Nat'l Ass'n of Teachers of Singing, Inc., No. C-4491, 2014 F.T.C. LEXIS 218 (Oct. 1, 2014).

The agencies should also reevaluate their competition advocacy priorities and terminate their advocacy against occupational licensing. The present focus on occupational licensing is misguided. While hardly perfect or immune from criticism, occupational licensing can have myriad benefits. Occupational licensing rules can protect consumer health and safety and also raise the wages of workers.[450] In insisting on analyzing occupational licensing through the lens of consumer welfare, the FTC acknowledged only the protection of consumers. It ignored the other policy goals frequently animating licensing statutes and regulations. Incredibly, the FTC has not merely offered a consumer welfare angle on these regulations; it has deemed considerations besides the protection of consumer interests to be illegitimate.[451] Given the forty-year stagnation in wages for ordinary Americans,[452] the FTC's monomaniacal fixation on (short-term) consumer interests and dismissiveness toward the welfare of workers is untenable. In attacking occupational licensing, the FTC strayed far outside its purview and demanded that states and municipalities conform to its narrow ideology. While the FTC is chasing the phantom menace of a "guilded" age, it may actually be promoting a new Gilded Age.[453]

V. CONCLUSION

In enacting the principal antitrust laws, Congress aimed to curtail the power of large-scale capital and also protect labor unions from federal interference. The framers of the antitrust laws understood corporate power broadly. These representatives and senators were not concerned with just one manifestation of this power, such as higher prices for consumers; they sought to protect Americans in their capacity as consumers, producers, businesses, and citizens from the power of the monopolies and trusts. Notwithstanding their great promise, the antitrust laws have a mixed record. At times, the antitrust laws have been applied to control corporate consolidation and

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450. *See generally* Vaheesan & Pasquale, *supra* note 381, at 314, 317–18.

451. *See, e.g.*, Letter from Andrew I. Gavil et al. to Brendan Reilly, *supra* note 391, at 4 ("Any restrictions on competition that are implemented should be no broader than necessary to address legitimate subjects of regulation, such as safety and consumer protection, and narrowly crafted to minimize any potential anticompetitive impact."); Letter from Tara Isa Koslov et al., Fed. Trade Comm'n, to Suzanne Geist, Neb. Senate 7 (Mar. 15, 2017), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comments-nebraska-state-senate-regarding-number-proposed-senate-bills-would-loosen-or/neb_ol_letter_to_senator_geist.pdf ("[T]he purported consumer protection benefits of licensing may not justify the costs. Reductions in competition caused by licensing can also cause quality, choice, and access to decline.").

452. Scott Horsley, *Despite an Economy on the Rise, American Paychecks Remain Stuck*, NPR (May 26, 2015), http://www.npr.org/sections/itsallpolitics/2015/05/26/408555544/despite-economic-climb-american-paychecks-remain-stuck.

453. The author credits Frank Pasquale for this line. Instead of using their statutory powers against big corporations, the antitrust agencies, especially the FTC, target state and local occupational licensing rules, or so-called modern guilds.

even break up durable monopolies. For much of the mid-twentieth century, the antitrust laws served as a powerful check on mergers and monopolies. At other periods in their history though, the antitrust laws failed to check the growth of corporate power and instead were used to thwart collective action by workers. In the first Gilded Age and the new Gilded Age in which we live, the antitrust laws have generally respected the prerogatives of monopolistic and oligopolistic businesses and often curtailed the liberty of workers.

Despite their recent history, the antitrust laws can play an important role in addressing the staggering inequality in American society today. These laws can and should be reinterpreted to curtail the power of capital and preserve the freedom of workers to act collectively. Strong federal checks are necessary to maintain and restore competitive market structures and protect Americans from corporate domination of markets, politics, and society. So long as Congress, the federal antitrust agencies, and the courts acquiesce to or follow the antitrust status quo, they will accept and enable the supremacy of concentrated capital and also subvert the efforts of workers to build countervailing economic and political power. The history of antitrust law, however, shows that an animating vision and determined political action can restore "the Magna Carta of free enterprise"[454] and redistribute power and wealth from the "economic royalists"[455] to ordinary Americans.

454. United States v. Topco Assoc., 405 U.S. 596, 610 (1972).

455. Acceptance of the Renomination for the Presidency, 5 PUB. PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT 234 (June 27, 1936).

No. 17-1113

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

RAFAEL DE LA CRUS, LEOVEGILDO VILCHEZ GUERRA, LIBER VILCHEZ GUERRA, ESLIPER HUAMAN, AND RODOLFO LLACUA, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

WESTERN RANGE ASSOCIATION, MOUNTAIN PLAINS AGRICULTURAL SERVICE, MARTIN AUZA SHEEP CORPORATION, NOTTINGHAM LAND AND LIVESTOCK, LLLP, TWO BAR SHEEP CORPORATIONS, LLC, CUNNINGHAM SHEEP COMPANY, AND DENNIS RICHINS, DBA DENNIS RICHINS LIVESTOCK

Defendants-Appellees.

Plaintiffs-Appellants' Petition for Panel Rehearing and *En Banc* Review

Brief of Amicus Curiae Open Markets Institute in Support of Plaintiffs-Appellants' Petition for Panel Rehearing and *En Banc* Review

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Pursuant to Fed. R. App. P. 26.1, the Open Markets Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public. The Open Markets Institute has moved for leave to file this amicus curiae brief in support of Plaintiffs-Appellants.

SUMMARY OF ARGUMENT

The Sherman Act protects sellers of goods and services (including workers, who sell labor) from powerful purchasers. Under well-established precedent, collusion among horizontal rivals, whether sellers or buyers, is illegal, regardless of the vehicle through which the collusion is implemented. Accordingly, the Supreme Court has outlawed employers' efforts to suppress wages through concerted action. By ignoring decades of Supreme Court precedent, this Court's decision undercuts the Sherman Act's protection of workers and other sellers and

[1] No counsel for any party authored this brief in whole or part. Apart from amicus curiae, no person contributed money intended to fund the brief's preparation and submission.

threatens to legalize employer cartels—indeed all cartels—conducted through a joint venture.

The Plaintiffs-Appellants, who are shepherds from Peru and came to the United States on temporary agricultural visas, perform essential work for the multimillion-dollar American sheep ranching industry. They allege that they are the victims of an employer cartel orchestrated by sheep ranchers and their associations (the Defendants-Appellees). Using the Western Range Association and Mountain Plains Agricultural Services, sheep ranchers in several Western states collusively suppressed wage offers made to the Plaintiffs-Appellants. The Defendants-Appellees, through this cartelistic conduct, robbed the shepherds of an opportunity to earn competitive wages for their demanding and skilled work.

The protection of sellers, including workers, has been a consistent purpose of the Sherman Act. Workers and other sellers have a right to participate in markets free of trade restraints. *Radovich v. National Football League*, 352 U.S. 445, 453-54 (1957); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007); *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019). In accordance with Supreme Court precedent, this Court has stated that "[m]onopsonistic practices by buyers are included within the practices prohibited by the Sherman Act." *Campfield v. State Farm Mutual Automobile Insurance Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008).

The prohibition on horizontal collusion has been a defining feature of Sherman Act jurisprudence. It dates to the Sherman Act's early years. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 341-42 (1897). Price fixing, market allocation, and similar limits on horizontal competition between independent firms are per se illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *United States v. Sealy, Inc.*, 388 U.S. 350, 357-58 (1967); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam). Importantly, function trumps form: collusion done through a corporation or other special association composed of competitors is still illegal. *American Needle, Inc. v. National Football League*, 560 U.S. 183, 191 (2010).

Under the Sherman Act, workers and other sellers are entitled to participate in a market free from collusive practices by buyers of their goods and services. Under the Sherman Act, "a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers." *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.). This protection against collusion is essential for all workers, including low-wage workers, seeking fair wages. *See Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998) ("[A buyer-side] cartel ultimately robs the suppliers of the normal fruits of their enterprises.").

In affirming the district court's ruling in favor of the defendants, this Court opened the door to legalizing employer cartels—and potentially all cartels—that are implemented through a joint venture. In defiance of the Supreme Court directive that "the machinery employed by a combination for price-fixing is immaterial," *Socony*, 310 U.S. at 223, this Court elevated form over function and ignored the ongoing agreement to delegate wage-setting authority to the ranchers' associations. The Court's decision gives competing employers and all rival firms a playbook for evading the Sherman Act's ban on collusion among competitors.

ARGUMENT

I. The Sherman Act Prohibits Employer and Other Buyer-Side Cartels

The Sherman Act protects workers and other sellers of goods and services from buyers' restraints of trade.[2] Price-fixing and other collusion among rivals is a restraint of trade under the Sherman Act and illegal irrespective of how it is implemented. Given the Sherman Act's protection of sellers, the courts have applied this rule against horizontal collusion to buyers, such as employers, and given workers and other sellers the right to participate in fair, competitive markets.

[2] The protection of sellers from trusts and monopolies was an important theme in the congressional debates leading up to the passage of the Sherman Act. Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 Antitrust L.J. 707, 714 (2007). For example, Senator Sherman condemned the trusts for their power over both buyers and sellers and stated "[t]hey regulate prices at their will, depress the price of what they buy and increase the price of what they sell." 21 Cong. Rec. 2461 (1890).

A. The Sherman Act Protects Workers and Other Sellers from Restraints of Trade

Since the early years of the Sherman Act, the Supreme Court has held that the law protects sellers from restraints of trade. In *Swift & Co. v. United States*, 196 U.S. 372 (1905), the Supreme Court affirmed a district court decision and injunction against stockyard owners that had collusively suppressed the price of cattle paid to ranchers. The Court in a subsequent buyer-side price-fixing case affirmed that the Sherman Act protects purchasers and sellers, among others. *See Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers."). It stated, "The Act is comprehensive in its terms and coverage, protecting *all who are made victims* of the forbidden practices by whomever they may be perpetrated." *Id.* (emphasis added).

The protection of sellers has been a consistent purpose of the Sherman Act. For instance, the Supreme Court held that a football player-coach who alleged a group boycott of his services had the right to take his claim to trial. *Radovich v. National Football League*, 352 U.S. 445, 453-54 (1957). More recently, the Court in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* treated buyer-side power as symmetric with seller-side power. *See* 549 U.S. 312, 320 (2007) ("Monopsony power is market power on the buy side of the market. As such, a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.'" (citation omitted)).

In a decision from earlier this year, the Supreme Court held that a monopolistic intermediary inflicts *distinct* injuries on purchasers and sellers. It held that both classes have the right to recover antitrust damages from the monopolist. *See Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019) ("[S]ome downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a 'common fund[.]') (citation omitted).

This Court, in accordance with Supreme Court precedent, has held the Sherman Act protects workers and other sellers. It has stated that "[m]onopsonistic practices by buyers are included within the practices prohibited by the Sherman Act." *Campfield v. State Farm Mutual Automobile Insurance Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008). This protection is not conditioned on consumer injury: buyer-side anticompetitive conduct injuring sellers is actionable even in the absence of harm to consumers. *Telecor Communications, Inc. v. Southwestern Bell Telephone Co.*, 305 F.3d 1124, 1133-34 (10th Cir. 2002); *Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998).

B. Collusion by Employers and Other Purchasers Is Illegal

Given the Sherman Act's protection of sellers, the Supreme Court and this Court have prohibited collusive conduct among employers and other buyers of goods and services. Importantly, this ban applies regardless of the form through which the collusive conduct is implemented. Whether done through a special association or other means, collusion among employers and other buyers is illegal under the Sherman Act.

The prohibition on horizontal collusion has been a defining feature of Sherman Act jurisprudence. It dates to the Sherman Act's early years. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 341-42 (1897). Price fixing, market allocation, and similar limits on horizontal competition between independent firms are per se illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *United States v. Sealy, Inc.*, 388 U.S. 350, 357-58 (1967). This prohibition has been consistently affirmed over the history of the Sherman Act. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam).

Collusion done through a corporation or other special association of competitors is still illegal. This elevation of function over form is a longstanding rule. In 2010, the Supreme Court wrote, "[W]e have repeatedly found instances in which members of a legally single entity violated § 1 [of the Sherman Act] when the entity was controlled by a group of competitors and served, in essence as a vehicle for ongoing concerted activity." *American Needle, Inc. v. National Football League*, 560 U.S. 183, 191 (2010). Regardless of form, what triggers suspicion under the Sherman Act is "depriv[ing] the market place of independent centers of decisionmaking." *Id.* at 190. The Court has admonished attempts to launder collusion among competitors through special forms or labels. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609 (1972). *See also Timken*, 341 U.S. at 598 ("Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled.").

Under the Sherman Act, workers and other sellers are entitled to participate in a market free from collusive practices by buyers of their goods and services, including employers. Under the Sherman Act, "a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers." *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.). The Supreme Court has condemned employer associations that served as vehicles for collusion against workers. *Anderson v. Shipowners' Association of Pacific Coast*, 272 U.S. 359, 362, 365 (1926). This Court has also held that collusion among otherwise competing employers in an association is illegal. *Law*, 134 F.3d at 1020, 1024. This protection against collusion is essential for all workers, including low-wage workers, seeking fair wages. *See id.* at 1022 ("[A buyer-side] cartel ultimately robs the suppliers of the normal fruits of their enterprises."); Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536, 597-98 (2018) (summarizing allegations of employer collusion against high-tech professionals, nurses, and fast food workers).

II. The Panel's Decision Legalizes Employer Cartels—and Cartels in General—Through Joint Ventures

In affirming the district court's ruling in favor of the defendants, this Court defied precedent and legalized employer cartels—and possibly all cartels—that are done through a competitor association or other joint venture. In defiance of the Supreme Court directive that "the machinery employed by a combination for price-fixing is immaterial," *Socony*, 310 U.S. at 223, the Court elevated form over function and ignored the ongoing agreement to delegate wage-setting authority to the ranchers' associations. The Court's decision grants competing employers and other rival firms a playbook for evading the Sherman Act's ban on competitor collusion. All they need to do is form a competitor association and set wages or other terms by hiring as a group.[3]

[3] The Court also adopted an erroneous rule that only *enforceable* collusion implemented through an association is illegal. This standard is plainly contrary to Sherman Act precedent. Price-fixing arrangements are illegal even in the absence

The Plaintiffs-Appellants' complaint attacks the delegation of wage-setting authority to entities "controlled by a group of competitors and served, in essence as a vehicle for ongoing concerted activity." *American Needle*, 560 U.S. at 191. Critically, the complaint does not challenge the associations themselves as walking conspiracies, as this Court suggested. Instead, it challenges *specific* conduct on behalf of otherwise competing ranch-employers—the joint setting of all initial wage offers to Plaintiffs-Appellants. The Supreme Court has struck down *particular* restraints adopted by associations of competitors, while recognizing that the associations *in general* are not violations of the Sherman Act. *Associated Press v. United States*, 326 U.S. 1, 18-19 (1945); *Sealy*, 388 U.S. at 356-58; *Topco*, 405 U.S. at 611-12.

This Court flouted Supreme Court precedent on the Sherman Act and elevated "formalistic distinctions" over "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *American*

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of an enforcement mechanism and even if parties fail to honor the terms of their collusive scheme. *Socony*, 310 U.S. at 224 n.59; *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969). *See also Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980) ("[W]hen a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful per se."); *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 656 (7th Cir. 2002) (Posner, J.) ("An agreement to fix list prices is . . . a per se violation of the Sherman Act even if most or for that matter all transactions occur at lower prices.").

Needle, 560 U.S. at 191. This Court held that Plaintiffs-Appellants must, at the pleading stage, allege facts indicating an agreement among competitors, *beyond* the existence of a "vehicle for ongoing concerted activity." *Id.* This is incorrect. The Supreme Court has held that "an instrumentality" of competitors is an agreement under the Sherman Act. *Sealy*, 388 U.S. at 354, 356-58. *See also Topco*, 405 U.S. at 609 (similar fact pattern).

The Court's decision gives employers and all competitors a playbook for colluding against workers and other market participants. For example, employers can establish an association for engaging in coordinated activity and delegate joint wage setting power to it. Under this Court's holding, this collusive conduct is legal so long as the association does not have an enforcement mechanism against defecting members. By qualifying the prohibition on horizontal collusion in this fashion, this Court threatens to deprive workers, suppliers, and consumers of a fair marketplace free of collusive practices.

CONCLUSION

This Court's decision subverts the Sherman Act's protection of workers against employer collusion, as well as its protection of consumers and businesses against collusion in all markets. Accordingly, this Court should grant the Plaintiffs-Appellants petition and order either panel rehearing or *en banc* review.

DATED: SEPTEMBER 13, 2019

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit Rule 29(b) because the brief contains 2,577 words, excluding the parts of the brief exempted by Fed. R. App. 32(f).
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Dated: September 13, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

/s/ Brian Gonzales
Brian Gonzales

Counsel for Open Markets Institute

Dated: September 13, 2019

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How the Antitrust Agencies Can Help—Instead of Hurt—Workers

Introduction

The Open Markets Institute* and Service Employees International Union** submit this comment to explain how antitrust enforcers, including the Department of Justice (DOJ) and the Federal Trade Commission (FTC), can use antitrust and other competition powers to help workers.

Properly applied, antitrust enforcement helps to ensure a balance of power between workers and employers. Antitrust law establishes that certain actions by employers against their workers, such as hiring cartels, are per se illegal.[1] The case for pro-worker antitrust action is clear. As recent studies have demonstrated, many local labor markets are highly concentrated and characterized by anticompetitive practices on the side of the employer, leading to lower wages and less freedom for workers to find new jobs.

The DOJ and the FTC have largely failed American workers today by allowing a concentration crisis in scores of industries to weaken competition for labor. Instead of actively policing mergers for harms to workers, they have let employer-side concentration reach very high levels. Troublingly, when the FTC and DOJ *have* acted against practices in labor markets, the two agencies often have used antitrust laws to either undermine efforts by employees and states to challenge abusive behavior by employers or actually targeted efforts by workers or professional to work together. The FTC, for instance, has filed numerous complaints against workers for engaging in collective bargaining and other joint action. Furthermore, the FTC has campaigned against state and local occupational licensing rules that can enhance the bargaining power and earnings of workers, professionals, and independent entrepreneurs. The DOJ meanwhile has endorsed legal standards that would empower franchisees to collude against workers.

The DOJ's and FTC's general inactivity against employers and activity against workers reinforce and deepen inequality between the individual and the corporation. The agencies should reorient their enforcement priorities and focus on protecting workers from employers rather than on interfering with the basic rights of workers, professionals, and independent entrepreneurs to organize.[2]

* The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

** Service Employees International Union (SEIU) unites 2 million diverse members in the United States, Canada, and Puerto Rico. SEIU members working in the healthcare industry, in the public sector, and in property services believe in the power of joining together on the job to win higher wages and benefits and to create better communities while fighting for a more just society and an economy that works for all, not just corporations and the wealthy.

[1] Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235–36 (1948).

[2] Sandeep Vaheesan, *How Contemporary Antitrust Robs Workers of Power*, LAW & POL. ECON., July 19, 2018, https://lpeblog.org/2018/07/19/how-contemporary-antitrust-robs-workers-of-power/.

The DOJ and FTC should take steps today to begin to address the deep power imbalance faced by workers due to employer concentration and abusive contracts. The FTC should use its rulemaking authority to ban non-compete clauses as an unfair method of competition; in March, the FTC received just such a petition for rulemaking filed by the Open Markets Institute and co-signed by the AFL-CIO, SEIU, UFCW, and over 60 other unions, public interest groups, and legal scholars. And both agencies should begin reviewing mergers and other business conduct for their effects on workers as well as advance legal positions through *amicus* briefs that would make sure that workers can meet employers on a more equal basis.

I. Local Labor Markets Have Become Stacked Against Workers

Although antitrust economists generally assume labor markets to be competitive, local labor markets in the United States are, on average, highly concentrated (as defined in the Horizontal Merger Guidelines)[3] and have become more concentrated since the late 1970s.[4] Due to this concentration, many workers have only a handful of prospective employers in the city or county where they live. Labor market concentration is an especially serious problem in rural areas.[5] Recent empirical research has found that this concentration lowers wages[6] and has contributed to the multi-decade stagnation in wage growth.[7] In parts of the country where manufacturers are in direct competition with imports from China, this import competition serves to reinforce the power of local employers who then further drive down local wages.[8] Concentration can also affect workers further up the supply chain, as powerful buyers squeeze suppliers who in turn seek to reduce costs by holding down wages.[9]

In addition to having structural power, employers also often engage in practices that further tilt the balance of power in their favor. In many industries, employers have colluded to suppress the wages of workers. This can be true even for highly paid employees. For instance, over a multi-year period starting in 2005, Apple, Google, Intel, and other leading tech companies agreed not to recruit, or "poach," each other's software engineers and other technical professionals.[10] Steve Jobs

[3] José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration* (Nat'l Bureau of Econ. Research, Working Paper No. 24147, 2019), https://www.nber.org/papers/w24147.
[4] Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 24307, 2018), https://www.nber.org/papers/w24307.pdf.
[5] Azar et al., *supra* note 3, at 11.
[6] *See id.* at 16 (estimating in one model that "[g]oing from the 25th percentile of market concentration to the 75th percentile of market concentration is associated with a decline in wages . . . of 17%).
[7] Benmelech et al., *supra* note 4, at 23.
[8] *Id.* at 23-24.
[9] Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AM. SOC. REV. 213 (2018).
[10] Mark Ames, *Revealed: Apple and Google's Wage-Fixing Cartel Involved Dozens More Companies, Over One Million Employees*, PANDO, Mar. 22, 2014, https://pando.com/2014/03/22/revealed-apple-and-googles-wage-fixing-cartel-involved-dozens-more-companies-over-one-million-employees/.

and Eric Schmidt were among the principal conspirators in this anticompetitive, anti-worker agreement.[11] And employers have also colluded against employees performing essential care work. In several cities across the nation, hospitals have been accused of conspiring with each other to hold down the wages of nurses.[12]

Along with these horizontal restraints among employers, nearly 30 million workers are bound by non-compete agreements with their employers.[13] Non-compete clauses restrict workers from leaving their current employer to join a competitor or establish a competing business for a specified period. While many employers do not enforce non-compete agreements against workers in court, the mere possibility of employers' suing to enforce non-competes can deter workers from seeking new employment or starting new businesses.[14]

The Open Markets Institute, joined by the SEIU, AFL-CIO, UFCW, and over 60 other public interest groups and legal scholars, filed a petition in March outlining the harms of non-compete clauses in employment contracts to workers and small businesses. The petition called on the FTC, through rulemaking, to ban non-compete clauses as an unfair method of competition.

Even though the Supreme Court has long held that the antitrust laws apply to buyers of goods and services,[15] such as employers, the antitrust response to the problem of employer power has been acquiescence. When reviewing corporate mergers, the antitrust agencies appear to have *assumed* that the affected labor markets are competitive.[16] As a result, they generally have not examined the labor market effects of mergers and arguably have enabled the consolidation of labor markets.[17] The DOJ and the FTC appear to have never stopped a merger on labor market grounds.[18]

The antitrust agencies and courts have consistently held that the antitrust laws protect workers and other sellers from powerful buyers.[19] In practice, however, this protection has been qualified. A recent federal district court in California effectively failed to protect workers and other

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[11] *Id.*
[12] *E.g.*, Cason-Merenda v. VHS of Michigan, Inc., 296 F.R.D. 528 (E.D. Mich. 2013); Fleischman v. Albany Medical Center, No. 06-cv-0765, 2008 U.S. Dist. LEXIS 57188 (N.D.N.Y. July 28, 2008).
[13] U.S. DEP'T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 6 (2016).
[14] Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOVATION POL'Y & ECON. 39, 49 (2012).
[15] Am. Tobacco Co. v. United States, 328 U.S. 781 (1946).
[16] Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power* 132 HARV. L. REV. 537, 541-542 (December 2018).
[17] Benmelech et al., *supra* note 4, at 3.
[18] Naidu et al., *supra* note 16, at 542.
[19] *See, e.g.*, U.S. Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines, 32-33 (2010); *Apple Inc. v. Pepper*, 139 S.Ct. 1514, 1525 (2019) ("[S]ome downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a 'common fund[.]'") (citation omitted); *Mandeville Island Farms*, 334 U.S. at 236 ("The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.")..

upstream market participants in a recent case. In *Alston v. NCAA*,[20] the district judge held that the harms to college athletes from the National Collegiate Athletic Association's restraints on player compensation should be balanced against the purported benefits to the viewing public.[21] This approach permits courts and corporations to justify harms to workers – one trading party a corporation deals with – by balancing them against the benefits to consumers – another trading party. Longstanding antitrust precedents and public policy considerations advise against this sort of unbounded balancing.[22]

The DOJ and FTC should use their influence as *amici curiae* to advise courts to reject the *Alston* district court's improper weighing of harms to workers against benefits to consumers. In employer and other buyer-side cases, the DOJ and the FTC, as well as the courts, should consider only the harms and benefits to the affected workers and sellers.

II. The DOJ and FTC Advocate Against Practices and Policies that Strengthen Workers' Bargaining Power

On top of failing to protect workers from powerful employers, the DOJ and the FTC have taken actions that reduce the bargaining power of workers. The FTC—under both Republican and Democratic administrations—has brought numerous cases against professional associations and other worker organizations for seeking to raise incomes through collective action. The FTC has also been an aggressive critic of occupational licensing rules, which can protect consumer health and safety and raise wages. Partnering with the FTC, the DOJ has argued against the ability of ride-hailing drivers to bargain collectively with ride-hailing corporations.

The present anti-worker application of antitrust law bears a troubling resemblance to the deployment of antitrust against labor unions in the decades immediately following the enactment of the Sherman Act.[23] Congress explicitly corrected the judiciary's erroneous deployment of antitrust law against workers with its passage of the Clayton Act more than a century ago, making sure that collective organizations and actions by workers would not be "illegal combinations or conspiracies in restraint of trade."[24] "The labor of a human being," the Act declares, "is not a commodity or article of commerce."

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[20] *In re Nat'l Collegiate Athletic Assoc. Athletic Grand-In-Aid Cap Antitrust Litig.*, 375 F.Supp.3d 1058, 2019 WL 1747780 (N.D. Cal. 2019).

[21] *Id.* at 1102. (The Court found that the challenged limits [restricting compensation to college athletes] … are procompetitive relative to having no limits, to the extent that they help maintain consumer demand for college sports as a distinct product by preventing unlimited cash payments unrelated to education.")

[22] *See, e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596, 612 (1972) ("If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts."); *National Society of Professional Engineers v. United States,* 435 U.S. 679, 688 (1978) ("Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.").

[23] *See generally* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766 (2019).

[24] 15 U.S.C. § 17.

Labor laws protect the rights of workers to organize and build power against employers in labor markets.[25] Unions are the classic example of workers' collective action. By banding together, individual workers who otherwise lack leverage against employers can exercise power and seek better terms of employment. Much like unions, professional associations can engage in collective action and enhance the bargaining power of their members. During the mid-twentieth century, labor unions empowered workers to strike a more equitable bargain with employers.[26] In today's concentrated labor markets, unions and professional associations are even more important, critical to creating a more level playing field between workers and powerful employers.[27]

The government's antagonism to efforts by workers and professionals to organize is especially unfair to independent contractors and workers who are classified by their employers as independent contractors. While workers classified as employees are entitled to a statutory antitrust exemption,[28] workers classified as independent contractors—a growing fraction of the workforce[29]—do not qualify for this exemption and can be prosecuted under the antitrust laws.[30] Rather than recognize this anachronistic gap in labor protections, the FTC, in particular, has exploited it, targeting the collective action of independent contractors. In recent years, the FTC has sued the professional associations of ice-skating coaches,[31] music teachers,[32] organists,[33] and property managers[34] for collectively seeking to raise their members' incomes. It has also filed numerous lawsuits against doctors for bargaining collectively with often powerful private insurance companies.[35]

At times, the DOJ has joined with the FTC in endorsing anti-worker interpretations of antitrust law. In 2017, the DOJ and FTC filed an *amicus* brief opposing the City of Seattle's law granting collective bargaining rights to ride-hailing drivers.[36]

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[25] *See* 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .").
[26] Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 532 (2011).
[27] Benmelech et al., *supra* note 4, at 16 (finding that a "negative effect of employer concentration on wages is mitigated for plants that operate in industries with higher unionization rates" and "consistent evidence that the presence of union bargaining power mitigates a negative association between employer concentration and wages.").
[28] Spence v. Southeastern Alaska Pilots' Ass'n, 789 F.Supp. 1007, 1012-13 (D. Alaska 1990).
[29] Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015*, 2 (NBER Working Paper No. 22667), https://www.nber.org/papers/w22667.
[30] Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145 (1942); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 1032-33 (2016).
[31] In re Prof'l Skaters Ass'n, 2015 FTC LEXIS 46.
[32] In re Music Teachers Nat'l Ass'n, 2014 FTC LEXIS 68.
[33] In re Am. Guild of Organists, 2017 FTC LEXIS 76.
[34] In re Nat'l Ass'n of Residential Property Managers, 2014 FTC LEXIS 217.
[35] *E.g.*, In re Praxedes E. Alvarez Santiago, 2013 FTC LEXIS 66; In re M. Catherine Higgins, 149 F.T.C. 1114 (2010) N. Tex. Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008).
[36] Brief for the United States et al. as Amici Curiae In Support of Appellant and In Favor of Reversal, *Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (2017), (No. 17-35640).

The DOJ has also independently advocated for antitrust standards that would protect certain employers' ability to collude against their workers. In three cases in which franchise agreements prohibited franchisees from recruiting each other's employees, the Justice Department argued that these "no-poaching arrangements" should be judged under the rule of reason.[37] The rule of reason makes successfully challenging potentially anticompetitive conduct difficult, especially as compared to per se illegality.[38] If the franchise owners agreed not to hire each others' workers on their own, outside of their franchise contract, that would be per se illegal. Although no-poach agreements have the same effect on workers, whether done directly between franchisees or indirectly through a franchise agreement, the DOJ's more tolerant position toward certain no-poach agreements gives employers in fast food and other franchised contexts more freedom to collude against their workers.

Like collective bargaining, labor market policies such as occupational licensing can promote the welfare of workers. Licensing rules condition entry into a particular labor market on the completion of specified educational and training requirements. Along with protecting consumers from unqualified and fraudulent service providers, licensure—by restricting entry—can bolster the wages of licensed professionals. To be sure, overly strict licensing can harm citizens charged overly high prices, and qualified individuals who are prevented from receiving a license. But the wage premium of licensure benefits many workers and is comparable in magnitude to the premium from unionization.[39] On top of these positive wage effects, licensing may mitigate gender and racial discrimination in labor markets.[40] Thus, licensing protects consumers and also raises wages and stabilizes employment for licensed professionals.[41]

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[37] Corrected Statement of Interest of the United States, Harris v. CJ Star, LLC, 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019); Corrected Statement of Interest of the United States, Richmond v. Bergey Pullman Inc., 2:18-cv-00246 (E.D. Wash. Mar. 8, 2019); Corrected Statement of Interest of the United States, Stigar v. Dough Dough, Inc., 2:18-cv-00244 (E.D. Wash. Mar. 8, 2019).

[38] *See* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 101 (2009); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009) (finding that from February 1999 to May 5, 2009, "plaintiffs almost never win under the rule of reason. In 221 of 222 cases …, the defendant won.); Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. REV. 1265, 1268 (2006) (finding that 84% of rule of reason cases do not meet the standard's first requirement of showing "a significant anticompetitive effect resulting from the restraint.").

[39] Maury Gittleman & Morris M. Kleiner, *Wage Effects of Unionization and Occupational Licensing Coverage in the United States*, 69 ILR REV. 142, 168-70 (2016) (finding wage premia in both unionized and licensed labor markets but higher wage premia for unionized segments).

[40] Peter Blair & Bobby Chung, *Job Market Signaling Through Occupational Licensing* (2017) ("In the presence of occupational licensing, we find evidence that firms rely less on observable characteristics such as race and gender in determining employee wages. As a result, licensed minorities and women experience smaller wage gaps than their unlicensed peers.").
, https://ideas.repec.org/p/hka/wpaper/2017-50.html.

[41] *See generally* Sandeep Vaheesan & Frank Pasquale, *The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy*, 14 ANN. REV. L. & SOC. SCIS. 309 (2018). One of occupational licensing's main strengths – the ability of a society to set ground rules and floors on wages and benefits for an entire industry – resembles the value of proposals to institute sectoral bargaining in industries. Sectoral bargaining, also known as "sectoral organizing," would allow employers and workers to come together and bargain for minimum work and compensation standards on behalf of an entire industry.

As part of its "competition advocacy," the FTC in recent decades has been a consistent opponent of all occupational licensing regulations. The FTC's campaign rests on questionable assumptions and a thin empirical record.[42] Reflecting a bipartisan consensus, the FTC has argued that licensing should aim only to protect consumers and so should be narrowly drawn to advance this objective.[43] The Commission has either ignored or disparaged the benefits to workers from licensing. In a 2014 letter concerning the City of Chicago's proposed ordinance to govern ride-sharing services, FTC staff contended that regulatory objectives besides consumer protection and safety are somehow illegitimate.[44]

Conclusion

In recent decades, antitrust authorities have failed workers, professionals, and independent entrepreneurs. Empirical research has found that the employer-side concentration in labor markets significantly lowers wages. The DOJ and the FTC have done little to stem this tide of rising concentration in labor markets. Instead, the FTC has brought enforcement actions against professionals and other workers for engaging in collective conduct, such as joint bargaining. The FTC has also been a consistent critic of occupational licensing rules that can raise wages and address gender and racial discrimination in labor markets. Through this enforcement and advocacy campaign, the Commission has frustrated workers' efforts to build power and deepened disparities in bargaining power between the worker and the employer.

The DOJ and the FTC must reorient their labor market enforcement and advocacy. Toward this end, the sibling agencies must address labor market concentration and practices on the employer side and respect practices and policies that permit workers to organize to build power on the job.

There are at least six choices the DOJ and the FTC should make now, without additional statutory authority:

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[42] *Id.*

[43] *E.g.*, Letter from Tara Isa Koslov, Ginger Jin, & Tad Lipsky, Fed. Trade Comm'n, to Suzanne Geist, Nebraska Senate 7 (Mar. 15, 2017), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comments-nebraska-state-senate-regarding-number-proposed-senate-bills-would-loosen-or/neb_ol_letter_to_senator_geist.pdf; Letter from Susan S. DeSanti, Joseph Farrell & Richard A. Feinstein, Fed. Trade Comm'n, to Loris Jones, Texas Board of Veterinary Med. Examiners 4 (Aug. 20, 2010), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-texas-board-veterinary-medical-examiners-concerning-rule-573.17-regarding-animal-teeth-floating/100910texasteethfloating.pdf.

[44] *See* Letter from Andrew I. Gavil, Deborah L. Feinstein & Martin S. Gaynor, Fed. Trade Comm'n, to Brendan Reilly, Chicago City Council 4 (Apr. 15, 2014), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf ("Any restrictions on competition that are implemented should be no broader than necessary to address legitimate subjects of regulation, such as safety and consumer protection, and narrowly crafted to minimize any potential anticompetitive impact.").

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1. When evaluating a proposed merger, the FTC and DOJ should evaluate the potential effects on wages and other terms of employment from the merger and, when necessary, go to court to block mergers that threaten to reduce competition in labor markets.

2. The FTC should use its authority under Section 5 of the FTC Act[45] to prohibit non-compete agreements that impair worker mobility and depress wages.

3. The DOJ and the FTC should use their full remedial authority when addressing anticompetitive conduct by employers. For instance, they should be prepared to disgorge the ill-gotten gains of employers who have engaged in anticompetitive practices that depressed workers' wages. And DOJ should criminally prosecute wage-fixing among employers.

4. The DOJ and FTC should seek to minimize the use of rule of reason analyses when judging business practices wherever possible. Instead, they should advocate for presumptions and per se rules to prevent wealthy corporations from manipulating litigation in their favor.[46] To the extent the rule of reason is applied, both agencies should examine only a practice's harms and benefits to workers, and not consider gains to other groups, and call on courts to do the same.

5. The DOJ and the FTC should respect the right of all workers, regardless of federal labor law classification, to organize and build power through collective action. Workers classified (or misclassified)[47] as independent contractors should not be investigated or sued for attempting to build bargaining power.

6. The FTC should immediately suspend its anti-licensing campaign. Not only is this campaign outside the purview of the FTC's mission and expertise, it is contrary to the interests of workers and professionals.

The DOJ and the FTC can and should become a champion of the interests of American workers. This, however, will require a fundamental change in agency priorities and the adoption of an enforcement philosophy that both challenges the power of employers and respects the right of workers and independent entrepreneurs to organize.

[45] Section 5 prohibits, among other things, "unfair methods of competition." 15 U.S.C. § 45. The Supreme Court has stated that "the Federal Trade Commission does *not* arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (emphasis added).
[46] *See* Open Markets Institute, *Restoring Antimonopoly Through Bright-Line Rules*, PROMARKET, Apr. 26, 2019, https://promarket.org/restoring-antimonopoly-through-bright-line-rules/
[47] Danny Vinik, *The Real Future of Work*, POLITICO, Jan. 4, 2018, https://www.politico.com/magazine/story/2018/01/04/future-work-independent-contractors-alternative-work-arrangements-216212.

BEFORE THE
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Re: Petition for Rulemaking to Prohibit Worker Non-Compete Clauses

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PETITION FOR RULEMAKING

BY

OPEN MARKETS INSTITUTE, AFL-CIO, ARTIST RIGHTS ALLIANCE, CENTER FOR POPULAR DEMOCRACY, COWORKER.ORG, DEMAND PROGRESS EDUCATION FUND, ECONOMIC POLICY INSTITUTE, EIG, INSTITUTE FOR LOCAL SELF-RELIANCE, LAKE RESEARCH PARTNERS, MAKE THE ROAD NEW YORK, NATIONAL EMPLOYMENT LAW PROJECT, ORGANIZATION UNITED FOR RESPECT, PUBLIC CITIZEN, REVOLVING DOOR PROJECT, ROOSEVELT INSTITUTE, SERVICE EMPLOYEES INTERNATIONAL UNION, TOWARDS JUSTICE, UFCW, AND UNITE HERE

AND IN THEIR INDIVIDUAL CAPACITIES

ALAN HYDE, AMY KASTELY, ANN C. MCGINLEY, ARIANA R. LEVINSON, BARBARA BUCHOLTZ, BEN TEMPLIN, CAROL CHOMSKY, CATHERINE FISK, CHARLOTTE GARDEN, CHRIS ODINET, CHRYSTIN ONDERSMA, COLIN P. MARKS, CYNTHIA HO, DALIÉ JIMÉNEZ, EDWARD JANGER, EILEEN APPELBAUM, FRANK PASQUALE, HENRY DRUMMONDS, JANE FLANAGAN, JEFFREY W. STEMPEL, JOAN VOGEL, KAREN CROSS, KATHLEEN ENGEL, LAUREN E. WILLIS, MARTHA T. MCCLUSKEY, MEREDITH A. MUNRO, NANCY MODESITT, NICOLAS CORNELL ,ORLY LOBEL, PAMELA FOOHEY, PAUL SECUNDA, RACHEL ARNOW-RICHMAN, RICK BALES, RICHARD CARLSON, ROBERT H. LANDE, RUBEN J. GARCIA, SANJUKTA PAUL, SARA STERNBERG GREENE, SHAUHIN TALESH, SPENCER WEBER WALLER, SUSAN BLOCK-LIEB, TODD RAKOFF, V.B. DUBAL, VIVA R. MOFFAT, WILLIAM S. DODGE, AND YVETTE LIEBESMAN

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Petition for Rulemaking

The Open Markets Institute, 19 labor and public interest organizations, and 46 individual advocates and scholars submit this petition pursuant to the Administrative Procedure Act and the Federal Trade Commission Act, 15 U.S.C. § 45 to request the Federal Trade Commission ("FTC") to initiate a rulemaking to prohibit employers from presenting a non-compete clause to a worker (regardless of whether the worker is classified as an "employee" or an "independent contractor"), conditioning employment or the purchase of a worker's labor on the worker's acceptance of a non-compete clause, or enforcing, or threatening to enforce, a non-compete clause against a worker. Under this rule, the FTC could bring enforcement actions against employers and purchasers of labor services (collectively hereafter "employers") who engage in any of the described conduct.

Introduction

Employers have deprived tens of millions of workers of their freedom to leave their current job to accept employment with another firm or to pursue a business opportunity. They have done so through non-compete clauses (hereafter "non-compete clauses," "non-competes," "non-compete conditions," "non-compete contracts," and "non-compete requirements" will be used interchangeably). Non-competes require workers, *following separation* from their current employer, to refrain from accepting employment in a similar line of work or establishing a competing business for a specified period in a certain geographic area. For instance, a home health aide's employer required him to sign a non-compete clause that prohibited him from working for another home health firm or starting his own firm in the county where he lives for two years after he left his current employer.[1] Approximately 30 million workers,[2] across a wide range of fields and occupations including camp counselors, engineers, fast food workers, hair stylists, investment managers, and yoga instructors,[3] are bound by non-compete clauses.

In labor markets, employers typically have the power to impose non-compete clauses on workers. Workers, who often depend on wages to subsist, are usually at a significant disadvantage in their relationship with employers. In any local or regional labor market in which large numbers of workers are unemployed or underemployed, individual workers are in an especially weak position to negotiate their terms of employment. Only a small fraction of private sector workers belong to a union and can assert collective voice. Compounding these disadvantages of workers, most local labor markets in the United States are highly concentrated on the employer side. As a result, many millions of workers see little or no competition for their services among employers.

Even when employers do compete for their services, workers are likely to focus on bargaining over wages and benefits, *not* contingent terms such as non-compete clauses. Employers generally present non-compete clauses to workers as standard form documents on a take it-or-leave it basis. When a worker does notice the clause, he or she may be loath to question or challenge a document that is presented on a take-it-or-leave it basis, out of fear that the employer might rescind the job offer. Taken together, these factors indicate that non-compete clauses operate as contracts of adhesion.

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[1] Sophie Quinton, *These Days, Even Janitors Are Being Required to Sign Non-Compete Clauses*, U.S.A. TODAY, May 27, 2017, https://www.usatoday.com/story/money/2017/05/27/noncompete-clauses-jobs-workplace/348384001/.
[2] U.S. DEP'T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 6 (2016).
[3] Rachel Abrams, *'No Poach' Deals for Fast-Food Workers Face Scrutiny by States*, N.Y. TIMES, July 9, 2018, https://www.nytimes.com/2018/07/09/business/no-poach-fast-food-wages.html; Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES, June 8, 2014, https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html.

Non-compete clauses inflict significant harms on workers. Non-competes bind workers to their current employers and reduce their mobility. Even when employers do not or cannot enforce non-competes, workers subject to a non-compete clause may be deterred from leaving their current job. Because most private-sector workers do not belong to a labor union and lack effective voice on the job, the threat of leaving for another job is often the only source of leverage for many workers. By restricting exit, non-competes rob workers of this power. Research generally finds that non-compete clauses depress wages and wage growth and deter the formation of new firms. The adverse effects on workers extend beyond wages and firm creation rates. Workers subject to non-compete clauses may be compelled to remain in discriminatory, hostile, or unsafe work environments.

Non-competes can also impair product market competition. In a highly concentrated market, monopolists and other powerful firms can use non-compete clauses to deprive rivals of essential workers and thereby impede their ability to compete. Through this strategic use of non-competes, dominant firms can weaken and exclude rivals and maintain market power. Even in the absence of exclusionary intent, non-competes can favor incumbent large firms over small or new entrants. Relative to small firms, larger firms are more likely to be able and willing to take the legal risk of recruiting and hiring workers bound by non-competes.

While they inflict real harms on workers and society, non-competes do not have a credible justification. Employers and their representatives argue that non-competes allow employers to protect intangible investments, such as trade secrets and employee training, from "free riding" by rival firms. If employers are unable to protect against this type of free riding, they will underinvest in intangibles, according to this story. But this rationale does not stand up to scrutiny. First, it assumes that the broad dissemination of information and knowledge is generally bad for society. Second, even if used to prevent workers from sharing information, non-compete clauses are a flawed method of defending against free riding. They are too broad because they deprive workers of the freedom to use their full experience, knowledge, and skills. At the same time, they are also too narrow because they provide only porous protection to intangibles. Third, employers, insofar as they need to protect their investment in intangibles, have several less restrictive alternatives, such as trade secret law, improved employee retention policies, and employment contracts.

The FTC should initiate a rulemaking to prohibit employers from presenting non-compete clauses as a condition of employment or other work agreement or enforcing or threatening to enforce a non-compete against workers. The FTC has expansive authority to interpret the FTC Act's prohibition on "unfair methods of competition"[4] and has the power to write competition regulations under the Administrative Procedure Act.[5] Given that non-compete clauses inflict real harms on workers and competition and offer no credible offsetting benefits to society, they arguably should be presumptively illegal under the Sherman Act.[6] Using its broader legal authority under Section 5 of the FTC Act, the FTC should hold these clauses to be an unfair method of competition. Even if employers do not or cannot enforce non-competes, these clauses

[4] 15 U.S.C. § 45. *See* FTC v. Ind. Fed. of Dentists, 476 U.S. 447, 454 (1986) (internal citations omitted) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons[.]"); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (emphasis added) ("[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does *not* arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.").

[5] The Magnuson-Moss Warranty Act imposes special procedures on FTC rules on unfair or deceptive acts and practices but it does not apply to rules on unfair methods of competition. 15 U.S.C. § 57a(a)(2). As a result, FTC rules on unfair methods of competition are governed by the Administrative Procedure Act's general notice-and-comment requirements for rulemakings. *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

[6] In re Polygram Holding, Inc., 136 FTC 310, 344 (2003), pet'n denied Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005) ("A plaintiff may avoid full rule of reason analysis, including the pleading and proof of market power, if it demonstrates that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition.").

still chill worker mobility and bind employees to their current employer. Accordingly, the FTC should write a rule holding that the use or enforcement of non-compete clauses is a per se violation of Section 5 of the FTC Act and that employers presenting, enforcing, or otherwise using non-competes with workers are subject to FTC enforcement action.

I. Overview of Non-Compete Clauses

Non-compete clauses restrict a worker from competing, or working for a firm competing, with his or her former employer for a specified time.[7] In concrete terms, they restrict a worker from accepting employment or starting a business (1) in a line of work or industry, (2) in a geographic area, and (3) for a period of time following his or her departure or other separation from his or her current employer. Employers, in the first instance, draft the occupational (or industrial), geographic, and temporal scope of the non-compete contract. For example, an accountant bound by a non-compete may be prohibited from working as an accountant for another firm, starting her own accounting firm for a year following separation from her current firm, or even working in a *non-accounting* role at another accounting firm. When a worker leaves a current job in violation of a non-compete clause or expresses an interest in doing so, the employer can bring, or threaten to bring, legal action against the employee for breach of contract.

State law is the principal authority governing non-compete clauses today. States differ greatly in their treatment of non-competes. A few states, notably California, prohibit the enforcement of non-compete clauses against all workers. Other states bar the enforcement of non-compete clauses against certain classes of workers. Most states generally permit employers to enforce non-compete clauses against workers. In these states, courts apply a "reasonableness" test to decide the enforceability of non-competes.

[7] Non-competes that are used as part of a sale or transfer of a business are distinguishable from worker non-competes and are not addressed in this petition.

A. The Ubiquity of Non-Compete Clauses in Today's Labor Markets

Millions of workers are subject to non-compete requirements. While traditionally associated with highly paid corporate executives, non-competes today are found across a wide range of fields and types of work. A recent study estimated that nearly 30 million American workers, or approximately one-in-every-five, are bound by non-competes with their present employers.[8] Almost 60 million workers, or approximately two out of five, have been bound by a non-compete at *some* point in their careers.[9] In general, workers with higher earnings and more education are more likely to be subject to a non-compete clause. Among architects and engineers in the manufacturing sector, approximately 50% of workers are bound by a non-compete.[10] Another study found that 70% of the reviewed firms used non-compete contracts with their top executives.[11]

But other workers are by no means exempt from non-competes. Among workers without a bachelor's degree and earning less than $40,000 per year, approximately 12% are working under a non-compete clause.[12] To illustrate how ubiquitous non-compete clauses are today: they have been imposed on, among others, arborists, fast food workers, drilling rig operators, factory managers, journalists, and teachers.[13] Firms have also imposed non-competes on independent contractors whose services they have retained.[14]

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[8] Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force* 14 (2018).
[9] *Id.*
[10] *Id.* at 48.
[11] Mark J. Garmaise, *Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J. L. ECON. & ORG. 376, 396 (2011).
[12] Starr et al., *supra* note 8, at 2-3.
[13] Abrams, *supra* note 3; Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N.Y. TIMES, May 13, 2017, https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html; Aruna Viswanatha, *Noncompete Agreements Hobble Junior Employees*, WALL ST. J., Feb. 2, 2016, https://www.wsj.com/articles/noncompete-agreements-hobble-junior-employees-1454441651; Rachel Cohen, *Fining Teachers for Switching Schools*, AM. PROSPECT, Nov. 3, 2016, http://prospect.org/article/fining-teachers-switching-schools.
[14] *See, e.g.*, Ag Spectrum Co. v. Elder, 865 F.3d 1088, 1093 (8th Cir. 2017) (refusing to enforce an agricultural supply firm's non-compete against a salesperson classified as an independent contractor); John Howley, *Justice for Janitors: The Challenge of Organizing in Contract Services*, 15 LAB. RES. REV. 60, 71 (1990) (janitors classified as

A few examples illustrate the ubiquity of non-compete clauses and the expansive scope of non-competes. Until through at least March 2015,[15] Amazon required temporary warehouse workers to assent to very broad non-compete clauses. [16] After leaving Amazon, workers subject to this clause could not work for a period of 18 months for another company that "engage[s] in or support[s] the development, manufacture, marketing, or sale of any product or service that competes with any product or service sold, offered, or otherwise provided by Amazon, or intended to be sold, offered, or otherwise provided by Amazon in the future."[17] Since Amazon bills itself as "the everything store" and accordingly sells a wide variety of products, this non-compete appeared to prohibit workers from a very broad set of employment options across the United States (and potentially around the world as well). The company conditioned severance pay on an employee affirming his or her commitment to honoring the non-compete clause.[18]

The sandwich chain Jimmy John's has included[19] a broad non-compete clause in the hiring packet given to store employees.[20] Under these clauses, Jimmy John's workers could not work for a competing restaurant, defined as "any business which derives more than ten percent (10%) of its revenue from selling submarine, hero-type, deli-style, pita, and/or wrapped or rolled

"independent contractors were made to non-competes). For a history of the legal development of the "independent contractor" worker identity, see Veena B. Dubal, *Wage Slave or Entrepreneur: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65 (2017).

[15] Lauren C. Williams, *Amazon Gets Rid of Strict Non-Compete Clause for Contract and Temporary Employees*, THINKPROGRESS, Mar. 30, 2015, https://thinkprogress.org/amazon-gets-rid-of-strict-non-compete-clause-for-contract-and-temporary-employees-f7b12b94cfa9/.

[16] Spencer Woodman, *Exclusive: Amazon Makes Even Temporary Warehouse Workers Sign 18-Month Non-Competes*, VERGE, Mar. 26, 2015, https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts.

[17] *Id.*

[18] *Id.*

[19] Jimmy John's entered into settlements with the Illinois and New York attorneys general and committed to drop and not enforce non-competes against hourly employees in these states. It is unclear whether Jimmy John's continues to use non-competes in other states. Samantha Bomkamp, *Jimmy John's Agrees to Pay $100,000 to Illinois AG Over Noncompete Contracts*, CHI. TRIB., Dec. 7, 2016, http://www.chicagotribune.com/business/ct-jimmy-johns-settlement-1208-biz-20161207-story.html.

[20] Aruna Viswanatha, *Sandwich Chain Jimmy John's to Drop Noncompete Clauses from Hiring Packets*, WALL ST. J., June 21, 2016, https://www.wsj.com/articles/sandwich-chain-jimmy-johns-to-drop-noncompete-clauses-from-hiring-packets-1466557202.

sandwiches and which is located within three (3) miles of" *any* Jimmy John's location.[21] A lawsuit brought by the Illinois Attorney General against Jimmy John's alleged that this restriction had a term for two years following an employee leaving Jimmy John's.[22] Because Jimmy John's is a national chain with nearly 2,000 locations, the non-compete clauses potentially prohibited Jimmy John's employees from working at a wide range of fast food restaurants across much of the United States.[23]

The non-compete clause of payday lender Check Into Cash is another example of the expansive scope of non-competes. The Illinois Attorney General alleged that Check Into Cash required all storefront employees, including low-wage employees, to accept a non-compete clause that prohibited them from working for a wide range of "rivals" within 15 miles of any Check Into Cash location for one after leaving. [24] According to the Attorney General, Check Into Cash's non-compete prohibited employment at not only payday lenders, title lenders, and pawn shops but possibly also "retail stores or auto dealerships that extend credit on an incidental basis or entities like Western Union or the U.S. postal service that transmit money."[25]

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[21] Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFINGTON POST, Oct. 13, 2014, https://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html.

[22] Daniel Wiessner, *Jimmy John's Settles Illinois Lawsuit Over Non-Compete Agreements*, REUTERS, Dec. 7, 2016, https://www.reuters.com/article/us-jimmyjohns-settlement/jimmy-johns-settles-illinois-lawsuit-over-non-compete-agreements-idUSKBN13W2JA.

[23] Viswanatha, *supra* note 20. For Jimmy John's workers, non-compete contracts were not the only barrier to labor market mobility. Previously, franchisees, under their agreement with Jimmy John's, were prohibited from hiring workers who worked for other Jimmy John's franchisees. *See* Rachel Abrams, *7 Fast-Food Chains to End 'No Poach' Deals That Lock Down Low-Wage Workers*, N.Y. TIMES, July 12, 2018, https://www.nytimes.com/2018/07/12/business/fast-food-wages-no-poach-deal.html.

[24] Press Release, Ill. Att'y Gen., Attorney General Madigan Reaches Settlement with National Payday Lender for Imposing Unlawful Non-Compete Agreements (Jan. 7, 2019), http://illinoisattorneygeneral.gov/pressroom/2019_01/20190107b.html.

[25] *Id.*

B. *Law Governing Non-Compete Clauses*

Non-compete clauses are principally governed by state law today.[26] State law treatment of these clauses varies greatly and is complicated and muddled. An Ohio court described this patchwork of state law as "a sea – vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long."[27] Despite this welter of state law, states can be categorized as not enforcing non-competes for all workers, not enforcing non-competes for certain classes of workers, or permitting enforcement of non-compete clauses to varying degrees.[28] Only a few states categorically do *not* enforce non-compete clauses, while most states generally enforce them. Notwithstanding the law of the state where an employee resides, some employers have attempted to use "choice of law" provisions to import state law more favorable to the use and enforcement of non-compete contracts.[29]

In California,[30] North Dakota,[31] and Oklahoma,[32] state law prohibits judicial enforcement of non-compete clauses. Employers in these states do not necessarily violate the law by conditioning employment on employee assenting to a non-compete clause. They, however, cannot enforce non-competes in court.[33] If an employee departs for another job or starts a

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[26] The case law on non-competes dates back centuries and includes some of the earliest decisions on restraints of trade. *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (Q.B. 1711). At the federal level, employees can challenge non-compete clauses as an unreasonable non-price vertical restraint under the Sherman Act. *E.g.*, *Butler v. Jimmy John's Franchise, LLC*, 2018 WL 3631577 (S.D. Ill. 2018).
[27] Arthur Murray Dance Studios of Cleveland v. Witter, 105 N.E.2d 685, 687 (Ohio Ct. C.P. 1952).
[28] One business scholar has developed an index to capture how strongly or weakly a state enforces non-compete clauses. Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751 (2011).
[29] Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 952-53 (2012).
[30] Cal. Bus. & Prof. Code § 16600.
[31] N.D. Cent. Code § 9-08-06.
[32] OK Stat. § 15-219A. Oklahoma law prohibits the enforcement of non-compete clauses so long as employees do not poach customers from their former employer.
[33] For example, California law holds that "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code § 16600.

business in violation of a non-compete clause, employers in these states generally cannot go to court and seek to enforce this contract and obtain remedies.[34]

Other states bar enforcement of non-compete clauses for certain classes of workers. For example, Illinois law prohibits employers from requiring workers making less than $13 per hour to assent to non-compete clauses.[35] In 2015, Hawaii enacted a law that restricts the enforcement of non-competes against information technology professionals.[36] Several states have barred the enforcement of non-compete clauses against physicians.[37]

Most states, including states that have limited prohibitions or restrictions, allow the enforcement of non-compete clauses. Courts in these states determine the legality of non-compete clauses using a "reasonableness" framework. While the precise formulation of this reasonableness standard varies, many states have adopted the analytical test in the Restatement (Second) of Contracts.[38] Under the Restatement's test, a non-compete clause ancillary to a valid agreement is "*unreasonably* in restraint of trade if (1) the restraint is greater than is needed to protect the business and goodwill of the employer; or (2) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public."[39]

The test in the Second Restatement raises several legal issues for courts to decide.[40] First, courts decide whether a valid agreement, to which the non-compete clause is ancillary, exists. If

[34] *See, e.g.*, Edwards v. Arthur Andersen LLP, 44 Cal.4th 937, 955 (2008) ("Noncompetition agreements are invalid under section 16600 in California, even if narrowly drawn, unless they fall within the applicable statutory exceptions of sections 16601, 16602, or 16602.5.").
[35] 820 ILCS 90.
[36] Haw. Rev. Stat. § 480-4.
[37] *E.g.*, RSA 239:31-a (New Hampshire); N.M.S.A. §§ 24-1I-1-5; Tex. Bus. & Com. Code §§ 15.50-52.
[38] Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 677-678 (2008). *E.g.*, Summits 7, Inc. v. Kelly, 178 Vt. 396, 399 (2005); BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 388-89 (1999).
[39] RESTATEMENT (SECOND) OF CONTRACTS § 188(1) (1981) (emphasis added).
[40] One court has stated that determining the enforceability of a non-compete clause requires answering *41* distinct questions. *Arthur Murray*, 105 N.E.2d at 695-99.

a non-compete clause is not ancillary to a valid agreement, it is per se illegal.[41] Courts have taken two general approaches to what constitutes a "valid agreement" in the employment relationship.[42] Some state courts hold that continued at-will employment is a valid agreement, to which a non-compete clause can be ancillary.[43] In an at-will employment arrangement, either the employer or the employee can end the relationship for practically any or no reason at all.[44] Courts in other states hold that the promise of continued at-will is not a valid agreement because the employer has not bound itself in any way and retains the option to terminate the employee immediately without cause.[45] In these states, an employer must bind itself in a tangible way in exchange for the employee assenting to a non-compete clause. Under this stricter approach, employers who agree to terminate workers only for "just cause" have likely created a valid agreement to which a non-compete clause can be ancillary.[46]

Second, for non-compete clauses that are ancillary to a valid agreement, courts determine whether the scope of the non-compete is appropriately tailored to protect the employer's legitimate interests. State law varies on what qualifies as a legitimate interest. A business's legitimate interests can include customer relationships, trade secrets, and other intangibles.[47]

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[41] *E.g.*, Freiburger v. J-U-B Engineers, Inc., 141 Idaho 415, 419-20 (2005).
[42] Tracy L. Staidl, *The Enforceability of Noncompetition Agreements When Employment Is At-Will: Reformulating the Analysis*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 95, 104-05 (1998).
[43] *See, e.g.*, *Summits 7*, 178 Vt. at 404 ("A noncompetition agreement presented to an employee at any time during the employment relationship is ancillary to that relationship and thus requires no additional consideration other than continued employment.").
[44] Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEG. HIST. 118 (1976).
[45] *E.g.*, Rogers v. Runfola & Assoc., Inc., 565 N.E.2d 540, 542 (Ohio 1991).
[46] For instance, state law in Texas previously held that "[a]n 'employment-at-will' relationship is not binding upon either the employee or the employer. Either may terminate the relationship at any time. Thus, an employment-at-will relationship, although valid, is not an otherwise enforceable agreement." *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830, 832-33 (Tex. 1991), superseded by statute as stated in *Alex Sheshunoff Mgmt Servs. L.P. v. Johnson*, 209 S.W.3d 644, 653 (Tex. 2006).
[47] Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 393 (2006). For an analysis of legitimate interests in the context of media employees, see Cathy Packer & Johanna Cleary, *Rediscovering the Public Interest: An Analysis of the Common Law Governing Post-Employment Non-Compete Contracts for Media Employees*, 24 CARDOZO ARTS & ENT. L.J. 1073, 1095-1105 (2006).

Notably, restraining competition is *not* a legitimate business interest.[48] When deciding whether a non-compete clause's scope is acceptable, courts analyze whether the covered activity, space, or time of the non-compete is overbroad and beyond what is necessary to protect the employer's legitimate interests.[49]

Third, courts examine the offsetting harms to the bound employees and the public. They examine whether the employee has reasonable alternative employment options that are not proscribed by the non-compete clause. On occasion, courts have deemed jobs with significantly lower wages or located at a great distance from the employee's residence not to be reasonable alternatives.[50] Courts also sometimes examine the effect of enforcing the non-compete clause on broader market competition. Specifically, they consider whether enforcement of the non-compete would deprive rivals of skilled labor and impair their ability to compete.[51]

States that permit the enforcement of non-compete clauses take one of three approaches to non-competes that violate their reasonableness test.[52] A few states follow the so-called "red pencil" doctrine. Under this doctrine, courts deem a noncompete clause with any overbroad provision to be unenforceable in its entirety.[53] Other states apply the "blue pencil" doctrine. In blue pencil states, courts strike any overbroad provisions and, if the remaining non-compete is

[48] *See, e.g.*, Marsh USA Inc. v. Cook, 354 S.W.3d 764, 770 (Tex. 2011) (internal citations omitted) ("Where the object of both parties in making such a contract is merely to restrain competition, and enhance or maintain prices, there is no primary and lawful purpose of the relationship to justify or excuse the restraint.").
[49] *E.g.*, Golden Rd. Motor Inn Inc. v. Islam, 376 P.3d 151, 155-56 (Nev. 2016). *See also* Pivateau, *supra* note 38, at 677-81.
[50] *E.g.*, Marinelli v. Medco Health Solutions, Inc., 951 F.Supp.2d 303, 320-21 (D. Conn. 2013); Bennett v. Storz Broadcasting Co., 270 Minn. 525, 537 (1965).
[51] *E.g.*, Weissman v. Transcon. Printing U.S.A., Inc. 205 F.Supp.2d 415, 426-27 (E.D. Pa. 2002). Some courts have also stated that the public interest analysis includes determining whether enforcing the non-compete clause would compel the unemployed worker to seek public assistance. *E.g.*, Basicomputer Corp. v. Scott, 791 F.Supp. 1280, 1291 (N.D. Ohio 1991).
[52] WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 11 (2016).
[53] *E.g.*, Star Direct, Inc. v. Dal Pra, 319 Wis.2d 274, 313 (2009); Ward v. Process Control Corp., 247 Ga. 583, 584 (1981).

still valid, enforce this revised version of the non-compete clause.[54] Finally, in another group of states ("reformation states"), courts rewrite overbroad non-compete clauses and enforce the "reformed" clause.[55] The red pencil doctrine promotes careful drafting by employers because overbroad non-competes will be held as categorically unenforceable. In contrast, the blue pencil doctrine and reformation permit, and even may encourage, employers to draft overbroad non-compete clauses.[56]

II. Employers Can Generally Impose Non-Compete Clauses on Workers

Non-compete clauses function as contracts of adhesion instead of products of free bargaining between employees and employers. In general, the employee-employer relationship is defined by inequality. Tens of millions of Americans generally have nothing to sell but their labor and skills and so must work to subsist. Even in this nominally full employment economy, millions of Americans are unemployed or underemployed so competition among workers is intense in many labor markets. Since less than one-in-ten private sector workers belongs to a union, most workers have no means of asserting collective voice against their employer and must engage with their employer on an individual basis. To compound the weak position of workers, the employer side of most local labor markets is highly concentrated. This limits employment options for millions of workers and restricts their ability to bargain for better terms of employment.

Competition for workers, to the extent it exists, cannot be counted on to police the terms of employment. In situations in which employers do compete to hire employees, bargaining and

[54] *E.g.*, Valley Med. Specialists v. Farber, 982 P.2d 1277, 1286 (Ariz. 1999); Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 915 (W. Va. 1982).
[55] *E.g.*, Hillard v. Medtronic. Inc., 910 F. Supp. 173, 177 (M.D. Pa. 1995).
[56] Pivateau, *supra* note 38, at 689-91. *See also* White House, *supra* note 52, at 11 ("[S]ome states [under the red pencil doctrine] provide disincentives for employers to write non-compete contracts that are unenforceable by refusing to enforce and making void a non-compete contract that contains any unenforceable provisions.").

competition are likely to focus on salient features such as wages and benefits. In contrast, competition and bargaining are not likely to occur over terms contingent on future events such as non-compete clauses.

A. The Employee-Employer Relationship Is Defined Generally by Unequal Bargaining Power

Individual workers generally enter employment relationships in a highly unequal position relative to their employers. Most workers do not have significant sources of non-wage income and must work to meet their basic needs. Competition among workers is generally intense, with millions of workers on standby due to unemployment or underemployment. Other features of American labor markets strengthen employers and weaken workers. The default rule of at-will employment, low rates of unionization, and employer-side concentration in many local labor markets further disempower workers.

A large fraction of workers have only their labor to sell and have no other significant source of income.[57] According to a survey conducted by the Federal Reserve Board of Governors, only 19% of individuals between 30 and 39 and 26% of individuals between 40 and 49 receive *any* income from interest, dividends, or rental property.[58] Furthermore, many Americans do not have the savings to meet a modest emergency expense. In 2017, 41% of Americans stated that they couldn't afford a $400 emergency expense without borrowing or selling assets (down from 50% in 2013).[59] A 2014 survey found that more than 60% of Americans did not have the savings to pay a $1,000 emergency medical expense.[60] And even in

[57] *See Arthur Murray*, 105 N.E.2d at 704 ("The average, individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and in no position to object to boiler plate restrictive covenants placed before him to sign. To him, the right to work and support his family is the most important right he possesses. His individual bargaining power is seldom equal to that of his employer.").

[58] BD. OF GOV. OF THE FED. RES. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017 12 (2018).

[59] *Id.* at 21.

[60] Neal Gabler, *The Secret Shame of Middle-Class Americans*, ATLANTIC (2016).

the absence of an emergency expense, more than 20% of Americans are unable to pay in full their monthly obligations on, among other items, housing, utilities, or credit cards.[61]

In the United States, the default of at-will employment further tilts the balance of power in favor of employers. Employers can dismiss workers for any reason, or no reason at all, under the prevailing at-will employment regime.[62] Statutes such as the Civil Rights Act and National Labor Relations Act have qualified the rights of employers to terminate workers. For example, employers cannot dismiss workers based on race or gender or for labor organizing activities.[63] Nonetheless, under at-will employment, employers have broad discretion to dismiss workers or modify the terms of employment. Given the at-will employment rule, employers have the freedom to condition new or continued employment on the acceptance of their terms.[64]

While the corollary to at-will *termination* for employers is at-will *resignation* for workers, this does not necessarily create functional equality between workers and employers. Except arguably for the very smallest firms, an individual worker is much more dependent on the employment relationship than the employer. The employer has other employees and can hire new employees or use other employees to make up for one worker's rejection of a job offer or resignation. Many workers, however, depend on one job for most, or all, of their income. In the words of Samuel Issacharoff, "the hiring stage is most like a first date between a polygamist [the employer] and a monogamist [the employee]."[65]

The structure of labor markets weakens the position of workers and strengthens the position of employers. In most labor markets, workers compete aggressively against each other.

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[61] BD. OF GOVERNORS, *supra* note 58, at 22.
[62] *See generally* Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000).
[63] 42 U.S.C.A. § 2000a; 29 U.S.C.A. § 158.
[64] Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 431 (2016).
[65] Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1795 (1996).

Even in an economy considered to be at full employment, millions of Americans are involuntarily unemployed or underemployed.[66] With the rise of gig platforms, some employers and other purchasers of labor participate in a global labor pool and can hire from anywhere in the world.[67] Geographic markets are, in effect, worldwide for *purchasers* of certain types of labor. This vigorous competition among workers can lead to an erosion in wages and labor market standards. While certain employers can hire from anywhere in the world, the labor market's geographic scope for workers is typically narrower, with workers generally looking for employment near their place of residence.[68]

Low union density also limits the bargaining power of workers. Through unionization, workers band together and exercise collective power in negotiating with employers. Whereas an individual worker is typically dispensable and wields little power against an employer, a group of workers can exercise significant power, including by threatening to strike and disrupt the employer's business. Through unions, workers can obtain, for instance, higher wages[69] and greater job security.[70] While unions once represented nearly a third of American workers, only 10.5% of all workers belonged to a union in 2018.[71] In the private sector, fewer than 7% of

[66] Broader unemployment measures and labor force participation rates indicate that the U.S. economy is still far from true full employment. *See* Bureau of Labor Stats., Table A-15. Alternative Measures of Labor Underutilization, https://www.bls.gov/news.release/empsit.t15.htm; Bureau of Labor Stats., Labor Force Statistics from the Current Population Survey, https://data.bls.gov/timeseries/LNS12300000.

[67] Alana Semuels, *The Online Gig Economy's 'Race to the Bottom'*, ATLANTIC, Aug. 31, 2018, https://www.theatlantic.com/technology/archive/2018/08/fiverr-online-gig-economy/569083/.

[68] *See* Ioana Marinescu & Roland Rathelot, *Mismatch Unemployment and the Geography of Job Search* 2 (2014), http://www.sole-jole.org/15260.pdf ("Documenting the geography of job search, we find that job seekers are more likely to apply to jobs closer to home: for example, a job seeker is 50% as likely to apply to a vacancy that is 25 miles away relative to a vacancy that is in the job seekers' own zip code. Still, we find that 16% of applications are to out-of-state vacancies."). Notably, on online job platforms, workers display a great deal of inertia in switching between employers. *See* Arindrajit Dube et al., *Monopsony in Online Labor Markets* 14-15 (Nat'l Bureau of Econ. Res. Working Paper No. 24,416, Mar. 2018), https://www.nber.org/papers/w24416 (finding low elasticity of labor supply among workers on Amazon's MTurk platform).

[69] *E.g.*, Henry Farber et al., Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data 43 (2018), http://tuvalu.santafe.edu/~snaidu/papers/union_sub3.pdf.

[70] Summers, *supra* note 62, at 77.

[71] Bureau of Labor Stats., Union Members Summary, https://www.bls.gov/news.release/union2.nr0.htm.

workers are members of a union today.[72] Furthermore, an important segment of the labor force—independent contractors[73]—is not protected by federal labor law and may face antitrust investigations and lawsuits if they attempt to bargain collectively and engage in other concerted activity.[74] Because most workers are not represented by a union, they meet employers on an individual, not a collective, basis.

On the employer side, most local labor markets are highly concentrated, as defined by the Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines.[75] Labor markets in smaller cities and rural areas are most likely to be concentrated.[76] In a significant number of labor markets, workers have only one actual or prospective employer—a true monopsony.[77] Because of this concentration among employers, millions of American workers have only one or a few employment options.[78]

Long-term and recent wage trends are consistent with the general powerlessness of American workers and the structural advantage enjoyed by employers. Median worker productivity has risen greatly since the late 1970s. During the same time, however, median wages have stagnated. Between 1973 and 2017, median worker productivity increased by 77.4%,

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[72] *Id.*
[73] Lauren Weber, *The Second-Class Office Workers*, WALL ST. J., Sep. 14, 2017, https://www.wsj.com/articles/the-contractors-life-overlooked-ground-down-and-stuck-1505400087.
[74] *See, e.g.*, FTC v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 436 (1990) (holding that lawyers' boycott of Washington, D.C. public defender service is per se illegal). *See generally* Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016).
[75] José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* 1 (2018), https://www.econstor.eu/bitstream/10419/177183/1/dp11379.pdf. Other research has found that employer-side concentration in local labor markets has increased since the 1970s. Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 3 (2018), https://www.kellogg.northwestern.edu/faculty/benmelech/html/BenmelechPapers/BBK_2018_January_31.pdf.
[76] Azar et al, *supra* note 75, at 12.
[77] José Azar, Ioana E. Marinescu & Marshall Steinbaum, Labor Market Concentration A.2 (2017), https://www.econstor.eu/bitstream/10419/177058/1/dp11254.pdf. This employer-side concentration depresses wages. *See id.* at 2 ("Going from the 25th to the 75th level of concentration decreases posted wages by 17% in the baseline IV specification, and by 5% in the baseline OLS specifications.").
[78] *See* Azar et al, *supra* note 75, at 2 ("When we weight markets by [Bureau of Labor Statistics'] total employment, we find that 17 percent of workers work in highly concentrated labor markets[.]").

while hourly pay of the typical worker rose by 12.4%.[79] In other words, workers have received just a small share of the rewards from their increased productivity. Even in this current period of nominally full employment, median wages have only grown modestly.[80]

Against this background of weak employees and strong employers, workers are unlikely to be able to avoid non-compete clauses. Due to their economic situation and the structure of labor markets in the United States, most workers have little leverage in the hiring context. Consequently, they typically must accept the terms of employment presented to them by employers. Indeed, workers' initial and continued employment generally are contingent on their acceptance of the employer's terms. Under these circumstances, most workers must acquiesce to an employer's insistence on a non-compete clause.

B. Workers Are Unlikely to Bargain Over Non-Compete Clauses

Even for individual workers who have some power, competition and bargaining are not likely to discipline employers' use of non-compete clauses. Insofar as workers can and do negotiate individually over terms, this bargaining is likely to center on the immediate terms of employment such as hours, wages, and benefits. In contrast, however, workers are much less likely to be aware, or take notice, of other employment terms, especially those contingent on a future event such as resignation or termination from a job. Given these biases, any competition among employers for workers likely focuses on the most salient dimensions of employment, such as wages and benefits, and not on less salient terms such as non-compete clauses.

Behavioral research has examined how individuals make decisions in general and in the face of uncertainty in particular. Whether as consumers or employees, individuals have limited

[79] Econ. Pol'y Inst., The Productivity-Pay Gap (2018), https://www.epi.org/productivity-pay-gap/.
[80] Ernie Tedeschi, *Unemployment Looks Like 2000 Again. But Wage Growth Doesn't.*, N.Y. TIMES UPSHOT, Oct. 22, 2018, https://www.nytimes.com/2018/10/22/upshot/mystery-slow-wage-growth-economy.html.

time and interest to evaluate all the terms in an economic relationship or transaction. Studies have found that individuals when shopping or bargaining for a product or service focus on certain terms and neglect other terms.[81] Due to this "bounded rationality," in which individuals do not consider the full universe of terms, bargaining and competition are likely to center on the salient terms and be weak or non-existent for the non-salient terms.[82]

Empirical research has documented bounded rationality in several areas. In a modern economy, individuals engage in many economic transactions, each with its own set of price and non-price attributes. Given this informational overload, individuals are likely to simplify their decision-making by focusing on a few salient terms in each transaction. In the context of most consumer contracts:

> [T]he close reading and comparison needed to make an intelligent choice among alternative forms seems grossly arduous. Moreover, many of the terms concern risks that in any individual transaction are unlikely to eventuate. It is notoriously difficult for most people, who lack legal advice and broad experience concerning the particular transaction type, to appraise these sorts of contingencies.[83]

For example, a survey by the Consumer Financial Protection Bureau found that customers looking for a credit card showed most interest in a card's fees, interest rate, and rewards and the reputation of the issuer.[84] In contrast, they were generally either uninterested in

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[81] Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).
[82] For example, considering just one common term, one study estimated that "reading privacy policies carries cost in time of approximately 201 hours a year, worth about $3,534 annually per American Internet user." Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 ISJLP 543, 565 (2008).
[83] Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1226 (1983).
[84] CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY § 3.4.1 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

or unaware of whether account-related disputes with the card issuer would be subject to mandatory arbitration.[85]

The FTC has implicitly recognized the effects of bounded rationality in its consumer protection rulemaking. In the Credit Practices Rule, the FTC prohibited certain default remedies in credit contracts, including confessions of judgment and taking a security interest in a borrower's existing household goods, as an "unfair act or practice."[86] The FTC reasoned that competition cannot be expected to restrain creditors' use of these remedies and so consumers could not reasonably avoid these remedies. The FTC stated that "[b]ecause remedies are relevant only in the event of default, and default is relatively infrequent, consumers reasonably concentrate their search on such factors as interest rates and payment terms."[87] The FTC concluded that in the market for consumer credit competition disciplined lenders on certain loan terms, but not on others such as a creditor's remedies in the event of a borrower's delinquency or default.

Given the boundaries on human rationality, workers likely focus on immediate terms of employment and devote little, if any, attention to contingent terms. As Cynthia Estlund has written, "Arbitration and non-compete agreements constrain employees only in a fairly remote and uncertain future event; and we may expect employees to overdiscount the likelihood of these events or the importance of the rights at stake."[88]

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[85] *Id.* Research indicates that competition in the credit card market is heavily driven by behavioral biases. Despite a very large number of credit card issuers, interest rates on balances are "sticky" and insensitive to underlying changes in interest rates. The failure of competition to lower interest rates suggests that, when shopping for cards, "many consumers are insensitive to interest-rate differentials because they believe they will pay within the grace period (although they repeatedly fail to do so)." Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50, 75-76 (1991).
[86] 16 C.F.R. § 444.2.
[87] Credit Practices, 49 FED. REG. 7740, 7744 (Mar. 1, 1984).
[88] Estlund, *supra* note 47, at 413.

Considering these behavioral limitations, bargaining and competition cannot be expected to discipline employers' use of non-compete clauses with their workers. In the context of non-competes, the Treasury Department described the potential effect of behavioral biases in a 2016 report:

> [W]orkers do not pay attention to non-compete contracts and do not realize how much bargaining power and future employment flexibility they are foregoing. Only later, when workers consider exiting a firm, do they become aware of the existence and/or implications of the non-compete agreement.[89]

To the degree workers can and do bargain with employers and "shop around" for the best job, they are unlikely to focus on the existence of a non-compete clause. Even when they have some power at the hiring stage, workers are still likely vulnerable to employers using non-compete clauses to restrain their future mobility in labor markets.

C. Given These Power and Behavioral Dynamics in Labor Markets, Non-Compete Clauses Function as Contracts of Adhesion

Non-compete clauses function as contracts of adhesion. Todd Rakoff, in his seminal article on the topic, defined contracts of adhesion as documents that are drafted as standard forms by one party and presented to the other party on a take it-or-leave it basis.[90] Through contracts of

[89] U.S. DEP'T OF TREASURY, *supra* note 2, at 9.

[90] Rakoff, *supra* note 83, at 1177. He also provides a more precise seven-part definition. He defines a contract of adhesion as follows: "(1) The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract. (2) The form has been drafted by, or on behalf of, one party to the transaction. (3) The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine. (4) The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent. (5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent. (6) The adhering party enters into few transactions of the type represented by the form - few, at least, in comparison with the drafting party. (7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money." *Id.*

adhesion, corporations can reallocate legal rights and duties and structure legal environments to their own advantage. Due to power dynamics in labor markets and behavioral biases among workers, market competition is unlikely to discipline employers' use of non-compete requirements. Scholars studying non-compete clauses have written that "a reasonable interpretation of the data is that non-competes are typically a take-it-or-leave-it proposition."[91] Non-competes can be included in an employment agreement or tucked inside an employee handbook (along with many other documents) whose unqualified acceptance is a condition of employment.[92] In practice, non-compete clauses bear a close resemblance to mandatory arbitration clauses in that they deprive workers of future rights contingent on certain events. Instead of "memorializ[ing] a negotiated set of terms," employers use non-competes "to extract waivers of rights, thus realigning statutory and default rules to better reflect employers' interests."[93]

Employees generally lack bargaining power and so they have little choice to accept terms of employment, such as non-compete clauses. Most workers are at a systematic power disadvantage relative to employers. First, they depend on labor income to subsist and often have limited resources. Second, most workers do not belong to a union and cannot exercise collective voice in negotiating with employers. Third, many workers today are in highly concentrated local labor markets and so have only a small set of potential employers.

Some employers further tilt the power imbalance in their favor by delaying presentation of the non-compete clause to workers. They withhold the non-compete until after a worker has

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[91] Starr et al., *supra* note 8, at 20.
[92] Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL'Y J. 313, 318, 345 (2007).
[93] Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 639 (2007).

accepted an offer of employment or commenced employment. At this stage, workers have rejected potential alternative employment opportunities and their continued employment (in a world of at-will employment) is often contingent on their acceptance of the non-compete.[94] One survey found that 70% of respondents were "asked to sign the non-compete *after* accepting the offer."[95] Like shrink wrap standard form contracts whose terms the consumer can only learn of after purchasing and opening a product, workers learn of these non-competes only after they have committed to a job, or even begun employment, with a company.[96]

Market competition cannot be expected to discipline employers' use of non-compete clauses. Behavioral biases ensure that competition among employers in recruiting workers, when and where it does exist, is not likely to constrain the use of non-compete clauses. To the extent workers face competition for their services and can negotiate terms of employment, their bargaining is likely to focus on wages, benefits, hours, and other non-contingent aspects of the employment relationship. In contrast, they are likely to discount or ignore contingent terms such as non-compete clauses that may affect them in the future. Due to these biases, competition among employers is likely to focus on wages and benefits and not on contingent terms such as non-compete clauses.

Because non-compete clauses function as contracts of adhesion in an environment characterized by power disparities and behavioral biases, employers have broad power to impose these restrictive agreements on workers. The conditions of contractual formation are very different from the textbook theory of contract in which bargaining and negotiation are

[94] Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOV. POL'Y & ECON. 39, 49 (2012).
[95] *Id.* (emphasis added).
[96] Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 977-80.

preconditions of reaching agreement.[97] Contracts of adhesion permit standardization and obviate the need for costly and time-consuming individual bargaining. They, however, create significant risks for consumers and workers. Under a legal system that generally enforces these terms, the drafting party has great power to reassign legal duties and rights in its own favor and against the receiving party.[98] Employers can use non-compete clauses to restrict the mobility of their workers, often without assuming any legal duty or responsibility in return.

Empirical research supports treating non-compete clauses as contracts of adhesion. Most workers read and sign the non-compete condition without attempting to bargain or negotiate. In a representative survey of workers, only approximately 10% of individuals presented with a non-compete sought to modify the terms of the non-compete or request benefits in exchange for signing it.[99] Fewer than one in five consulted a lawyer over the non-compete clause, and this consultation of a lawyer is strongly correlated with efforts to negotiate around the non-compete clause.[100] Most workers believed that their hiring was contingent on their signing the non-compete.[101] Only 11% of workers thought they would still be hired if they refused to sign the non-compete clause.[102]

Other evidence suggests that even highly educated, highly-paid workers do not bargain over, or attempt to resist, employers' non-compete clauses. A study of automated speech recognition experts found that, across age and tenure groups, at least 85% of study participants agreed to a non-compete clause, with the figure at or above 94% for the youngest and least

[97] MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 3-18 (2013).
[98] *Id.* at 33-34.
[99] Starr et al., *supra* note 8, at 18-19.
[100] *Id.* at 19.
[101] *Id.*
[102] *Id.*

experienced workers.[103] In other words, regardless of age or experience, most study participants accepted non-compete clauses. When presented with a non-compete clause before starting employment, fewer than one in six in the sample group asked a lawyer to review the non-compete.[104] This figure fell to fewer than one in twenty when employers presented the non-compete on the first day of work.[105] And not a single worker in the study group bargained over a non-compete.[106]

Non-compete clauses are analogous to arbitration clauses in the employee-employer relationship. Like arbitration clauses, non-competes are contingent on the occurrence of a future event (resignation or termination in the case of non-competes and a legal dispute in the case of arbitration agreements). Employees are unlikely to be able to resist non-compete and arbitration clauses during the hiring process. And to the extent certain workers do have bargaining power and face competition for their services, bargaining and competition are likely to center on wages, benefits, and hours, as opposed to contingent terms such as non-compete and arbitration clauses.

III. Harms to Workers from Non-Compete Clauses

Non-compete clauses deprive workers of labor market mobility. Employers can file suit to enforce non-competes against workers who accept new employment and seek damages and injunctive relief. Most workers bound by a non-compete face three options: 1) stay with their current employer, 2) find employment in a line of work or a geographic area that is outside the scope of the non-compete, or 3) accept unemployment until the non-compete expires.[107] Workers subject to non-compete clauses may be forced to choose between potentially three unattractive

[103] Matt Marx, *The Firms Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 708 (2011).
[104] *Id.* at 706.
[105] *Id.*
[106] Marx & Fleming, *supra* note 94, at 51.
[107] *Id.* at 47-50.

alternatives. Even when employers do not, or cannot, enforce non-compete clauses, these restraints can discourage workers from seeking new employment and pursuing business opportunities. In practice, non-competes amount to workers "bartering away [their] personal freedom"[108] for present employment.

By restricting workers' freedom to leave, non-compete clauses have material effects on the welfare of workers. Because they limit competition for workers among employers, non-competes have a negative effect on wages. Furthermore, they close off potential entrepreneurial opportunities and reduce new business creation. Importantly, the negative effects of non-competes extend beyond reduced wages and business formation. Non-competes can also compel workers to stay in a job where they are subject to gender or racial discrimination, sexual harassment, or other forms of mistreatment on the job or exposed to threats to their health and safety.

A. Impaired Job Mobility

Workers subject to a non-compete clause face substantially reduced labor market mobility. Under a non-compete clause, workers confront the choice of staying with their current employer, pursuing work outside the scope of the non-compete clause, or choosing unemployment. Workers who have independent sources of income (for example, an inheritance or sizable business investments) may be able to withstand a significant period of unemployment and "wait out" a non-compete clause.[109] Most workers, however, do not have significant non-wage sources of income.[110] When bound by a non-compete clause, they typically have to stay

[108] Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 650 (1960).
[109] For example, apparently to comply with his non-compete agreement with Microsoft, tech executive Vic Gundotra took a year off before moving to Google. He used the sabbatical for "philanthropic pursuits." Ben Romano, *Microsoft Loses Another to Google*, SEATTLE TIMES, June 29, 2006, https://blogs.seattletimes.com/microsoftpri0/2006/06/29/microsoft_loses_another_to_google/.
[110] BD. OF GOVERNORS, *supra* note 58, at 12.

with their current employer or enter a new line of work or industry or move to a place outside the scope of the non-compete. Women may experience the restrictive effects of non-competes in an especially acute way because they often have less geographic and occupational flexibility than men.[111]

A worker bound by a non-compete clause runs serious risks in pursuing an employment or entrepreneurial opportunity in violation of the non-compete. Her current employer may threaten to file suit to enforce the non-compete and seek damages for breach of contract and an injunction prohibiting the worker from pursuing employment or business in violation of the non-compete.[112] In some states, employers can enforce non-competes even against workers who have been terminated.[113] In addition to suing the worker, her current employer may threaten her new employer for tortious interference of employment.[114] When informed of the existence of a non-compete clause, a prospective employer may terminate the bound worker, or withdraw the offer of employment, to mitigate its own legal risk.[115]

Apart from being enforced in courts, the mere existence of a non-compete can deter workers from pursuing alternative opportunities. Employers appear to use non-competes to

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[111] *See* Orly Lobel, Opinion, *Companies Compete but Won't Let Their Workers Do the Same*, N.Y. TIMES, May 4, 2017, https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html ("[W]hile noncompete restrictions impose hardships on every worker, for women these restrictions tend to be compounded with other mobility constraints, including the need to coordinate dual careers, family geographical ties and job market re-entry after family leave.").

[112] *See, e.g.*, C&W Facility Servs., Inc. v. Mercado 2018 WL 4854630, *4 (D. Mass. Oct. 5, 2018) (granting preliminary injunction to janitorial services company seeking to enforce non-compete contract against former employee).

[113] Kenneth J. Vanko, *"You're Fired! And Don't Forget Your Non-Compete": The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1 (2002). Florida law takes a particularly absolutist approach to the enforcement of non-competes clauses against workers. *See Twenty Four Collection, Inc. v. Keller*, 389 So.2d 1062, 1063 (Fla Dist. Ct. App. 1980) ("[I]t is established law that a court is not empowered to refuse to give effect to such a contract on the basis of a finding, as was the case below, that enforcement of its terms would produce an 'unjust result' in the form of an overly burdensome effect upon the employee.").

[114] *E.g.*, Automated Concepts Inc. v. Weaver, 2000 WL 1134541 at *5-7 (N.D. Ill. Aug. 9, 2000).

[115] *See, e.g.*, Viswanathan, *supra* note 13 ("Within weeks, . . . Thomson Reuters asked Ms. Russell-Kraft to leave. Her previous employer, Law360, also in New York, had sent a letter to the company citing a noncompete agreement she signed when she started at the newswire as a 25-year-old, her first full-time job in journalism.").

discourage workers from departing in general and do not necessarily file suit to enforce the restriction against many (or in some cases *any*) employees. Harlan Blake wrote, "For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors."[116]

Even in states where non-compete clauses are unenforceable, workers are subject to non-competes at roughly the same rate as workers in states where non-competes are enforceable. Although they cannot enforce non-competes in court in these states, many employers still condition employment on worker acceptance of non-compete clauses. Indeed, the relevant law appears to have minimal effects on employers' use of non-compete restrictions. In California and North Dakota (two of the three states where non-competes are unenforceable), approximately 19% of workers are under a non-compete requirement—the same figure as for workers in states where non-competes are most likely to be enforced.[117] When looking at only single-state firms, which are most likely to tailor their practices to conform to relevant state law, "the incidence of noncompetes in [California and North Dakota] is 14%, only slightly less than the 16.5% incidence level . . . in the highest enforcing states."[118]

The chilling effect of non-competes on worker mobility appears to be very real. Interviews with automated speech recognition professionals found that these workers generally complied with non-competes even without actual litigation by their employer.[119] Of the workers

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[116] Blake, *supra* note 108, at 682.
[117] Starr et al., *supra* note 8, at 16.
[118] *Id.*
[119] *See* Marx, *supra* note 103, at 707 ("[F]irms strategically manage the process of obtaining signatures, waiting to present the non-compete until an employee's bargaining power is minimized. Firms appear to accomplish these outcomes with minimal expenditure. Only one informant reported being formally sued and taken to court by an ex-employer; for the others, merely the threat of litigation sufficed to exert a chilling effect on their career plans.").

who temporarily left their field of expertise due to a non-compete, *none* did so because they were sued by their employer.[120] They undertook this dramatic occupational change "on the expectation of what might happen if they refused to act in accordance with the employment agreement they had signed."[121]

Some employers use non-compete contracts regardless of whether they can or will enforce them through legal action. For instance, although it insisted on a broad non-compete clause with storefront employees, Jimmy John's asserted that it had *never* enforced a non-compete clause against an hourly worker.[122] According to a legal services attorney who has represented workers bound by non-competes, "most workers obey initial threats [over non-competes] rather than going to court over them . . . [and] 'there are people who have been affected by this, and it doesn't even occur to them to get a lawyer.'" [123] Taken together, this evidence suggests that employers use non-compete clauses to discourage workers from seeking, or even exploring, alternative work and business opportunities. This chilling effect on worker mobility is not necessarily captured in litigation and may be the most significant consequence of non-compete clauses.[124]

Empirical evidence shows that non-competes do reduce labor market mobility. The latest research finds that workers "bound by non-competes have . . . 11% longer [job] tenures."[125] This

[120] Marx & Fleming, *supra* note 94, at 49.
[121] *Id.*
[122] Wiessner, *supra* note 22.
[123] Quinton, *supra* note 1.
[124] Arnow-Richman, *supra* note 96, at 981-82. One commentator has described "the pervasive use of noncompetes in Massachusetts is part of the dark matter of the legal landscape in the state. You know it's there, exerting some gravitational force, but you can't see it or measure it. You never really know how many employees didn't move to another job, didn't start their own companies, and didn't take the risk of challenging their noncompete agreements in court." Lee Gesmer, *Why Has Silicon Valley Outperform Boston/Route 128 as a High Tech Hub?*, MASS LAW BLOG, Dec. 6, 2007, https://masslawblog.com/noncompete-agreements/why-has-silicon-valley-outperformed-boston-route-128-as-a-high-tech-hub/.
[125] Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes and Employee Mobility* 3 (2019).

negative effect on job mobility is largely insensitive to the degree of non-compete enforceability in a state.[126] Notably, even workers not bound by non-competes appear to be adversely affected the existence of non-competes. Given the lack of transparency over who is bound by non-competes in a labor market, non-competes can increase employers' costs of recruiting and hiring and impede job market mobility for workers not subject to non-competes.[127] In labor markets with a higher incidence of non-competes and in states that favor enforcement of non-competes, *all* workers receive fewer job offers and have longer job tenures.[128]

Other research finds that workers do stay with their current employer longer when they work in the shadow of a non-compete condition and that job tenure is longer in states where non-competes are more likely to be enforced. After Michigan rewrote its antitrust law and –made non-competes inadvertently easier to enforce in court – inventors (excluding inventors in the then-turbulent auto industry) experienced an 8.1% reduction in mobility relative to peers in other states,[129] while inventors with firm-specific knowledge and skills saw a 15.4% decline in mobility.[130] Another study found that workers in the computer industry in California, where non-competes are unenforceable, had greater job mobility than their peers in other states, where non-competes are (to varying degrees) enforceable.[131] This finding was supported in another study on tech sector workers.[132]

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[126] *Id.*
[127] Evan Starr, Justin Frake & Rajshree Agarwal, *Mobility Constraint Externalities* 6-7 (2018).
[128] *Id.* at 26.
[129] Matt Marx, Deborah Strumsky & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875, 887 (2009).
[130] *Id.*
[131] Bruce Fallick, Charles A. Fleischman & James B. Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster*, 88 REV. ECON. & STATS. 472, 481 (2006).
[132] *See* Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers* 30 (Ross School of Business Working Paper No. 1339, Jan. 2017), ("We find that stricter [non-compete] enforceability is associated with longer job spells[.]").

Impairment of job mobility extends to workers at the very top of the income distribution. Chief executive officers have longer tenures and are less likely to switch firms in states where non-compete clauses are more likely to be enforceable in court.[133]

Alternatively, workers subject to non-compete clauses sometimes escape them through a temporary but costly "career detour"[134] or relocation. First, they can find a job in another line of work in which they cannot necessarily put their skills to full use. One study found that workers bound by non-competes reported more than a 50% higher probability of leaving for a firm in a different industry, relative to workers who were not subject to non-competes.[135] A survey of automated speech recognition professionals found that nearly one-third of workers subject to a non-compete left their field of expertise until their non-compete expired.[136] In one arguably extreme case, a survey respondent, despite having a PhD and 20 years of experience, accepted a data entry job to comply with the prohibitions in the non-compete clause.[137] This "detour" can be costly: workers who leave their field of specialization can experience "reduced compensation, atrophy of their skills, and estrangement from their professional networks."[138]

Second, some bound workers can relocate to another state or even country where they can work without fear of violating the non-compete clause. Due to the change in Michigan law under which non-competes became enforceable, the state saw an exodus of knowledge workers, an effect that was especially pronounced among those likely to engage in collaborative

[133] Mark J. Garmaise, *Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J. L. ECON. & ORG. 376, 400 (2011).
[134] Marx, *supra* note 103, at 696.
[135] Starr, Prescott & Bishara, *supra* note 125, at 3.
[136] Marx, *supra* note 103, at 705.
[137] Marx & Fleming, *supra* note 94, at 49.
[138] *Id.* at 48.

projects.[139] Relocation entails its own costs and challenges for workers, including uprooting one's family, severing existing familial and social ties, and starting afresh in a new place.

The loss of exit opportunities is particularly harmful in present-day labor markets. Due to workers' general lack of power in the workplace, their freedom to leave for another employer or pursue a business opportunity is critical today. Most workers are not members of a union. In the private sector, less than 7% of workers are represented by a union.[140] Furthermore, the Supreme Court has granted employers the right to use mandatory arbitration clauses to block employees' class action lawsuits alleging violation of employment, labor, and other laws governing the workplace.[141] Because of the low rate of unionization in the private sector and the neutering of collective litigation methods, workers have little ability to act collectively to address shared grievances in the workplace. In general, they can only make claims as individual employees, which carries serious risk of retaliation and even termination. Exit provides a degree of leverage for otherwise disempowered workers, providing *some* freedom to leave unsatisfactory jobs and find better employment.[142] Given the limited role of voice in the contemporary workplace, employer deprivation of workers' freedom to exit through non-compete clauses is especially harmful.

B. Effects of Reduced Job Mobility

By impairing labor market mobility and binding workers to their present employer, non-compete clauses inflict material harms on workers. Empirical studies have found that stronger enforcement of non-compete clauses is associated with lower wages and lower wage growth over

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[139] Matt Marx, Jasjit Singh & Lee Fleming, *Regional Disadvantage? Employee Non-Compete Agreements and Brain Drain*, 44 RES. POL'Y 394, 403 (2015). *See also* Balasubramanian et al., *supra* note 132, at 30 ("We find that stricter [non-compete] enforceability is associated with . . . a greater likelihood of leaving the state[.]").
[140] Bureau of Labor Stats., Union Members Summary, https://www.bls.gov/news.release/union2.nr0.htm.
[141] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).
[142] ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

time. Research has also found that stronger enforcement depresses the formation of new businesses. The adverse effects of non-competes likely extend beyond quantifiable measures such as wage levels, wage growth, and new firm creation. Given the ubiquity of harassment and discrimination at the workplace and unsafe job conditions, non-competes may also force workers to stay in hostile or dangerous work environments.

In a 2016 report, the Treasury Department concluded that increased enforcement of non-competes is associated with both lower wages and lower wage growth over time. By extrapolating from existing research on non-competes, it estimated that "maximal enforcement" states slow wage growth over time, especially older workers' wage growth, relative to "minimal enforcement states." The difference in wages between the two categories of states was "5 percent at age 25 and 10 percent at age 50."[143]

Another study found that "wages are 4% lower in an average enforcing state relative to a non-enforcing state."[144] This wage depression was stronger among workers without a graduate-level degree and workers with long tenures at their present job.[145] Looking exclusively at tech workers: In states that are more likely to enforce non-compete clauses, initial wages and wage growth over time were found to be lower, relative to states that are less likely to enforce non-competes.[146] When widely used in a labor market, non-competes introduce costs and uncertainty into hiring and can depress job market mobility—and thereby wages—for all workers, not only those directly bound by them. Two factors—a higher incidence of non-competes and state law

[143] U.S. DEP'T OF TREASURY, *supra* note 2, at 20.
[144] Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete* 17 (2018).
[145] *Id.* at 27.
[146] Balasubramanian et al., *supra* note 132, at 30.

favoring the enforcement of non-competes—appear to depress wages for *all* workers, not only those bound by non-competes.[147]

Even among elite workers who have power in the labor market and could reasonably bargain over terms of employment, non-compete contracts may depress incomes. An analysis that looked exclusively at the effects of non-competes on chief executive officers found that stronger state-level enforcement of non-competes reduces the growth rate of compensation by 8.2%.[148]

While empirical studies generally find that non-competes depress wages, the research does not categorically find this relationship. Two studies have found evidence of a compensating wage premium for workers who accept non-compete clauses. In one study, physicians in group practices that used non-compete clauses had higher incomes and income growth over time than their peers in groups that did not use non-competes.[149] Looking at all workers, another analysis found a 10% wage premium for workers who receive a non-compete *before* they accept a job offer.[150]

Non-compete clauses also appear to discourage workers from pursuing business opportunities and establishing new businesses. Workers subject to non-competes are often restricted from starting a business in competition with, or in the same line of business, as their current employer. One study of the biotechnology industry examined the rate of new firm creation after firms were acquired or made an initial public offering.[151] (After either event, employees usually receive a significant amount of money that they can use to start their own

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[147] Starr, Frake & Agarwal, *supra* note 128, at 26.
[148] Garmaise, *supra* note 11, at 402.
[149] Kurt Lavetti, Carol Simon & William D. White, *Buying Loyalty: Theory and Evidence from Physicians* 33-34 (2012).
[150] Starr et al., *supra* note 8, at 3.
[151] Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Geographic Distribution of Entrepreneurial Activity*, 48 ADMIN. SCI. Q. 175 (2003).

firm.) Examining startup activity after acquisitions or initial public offerings of biotechnology firms, the study found that the rate of new biotech startups is higher in states that do not enforce non-competes relative to states that do enforce non-compete contracts.[152]

Strong enforcement of non-competes also frustrates the ability of venture capital to support startup businesses. An increase in the supply of venture capital funding increases the number of new firms most in states that are less likely to enforce, or do not enforce, non-compete clauses.[153]

Non-compete clauses, by deterring and preventing workers from switching jobs, can bind workers to discriminatory and hostile work environments. Discrimination in the workplace is pervasive. Discrimination at work can include denials of promotions and raises, inferior assignments, and reduced visibility because of an individual's race or gender. For example, 57% of African Americans have reported being denied equal treatment on pay or promotions due to their race.[154] Studies have found a similar incidence of discrimination toward women in the workplace. Forty-two percent of women have reported being denied promotions, paid less for the same work that male coworkers perform, and given less rewarding assignments due to their gender.[155] Furthermore, hostile work environments are also common. For instance, 35% of

[152] *Id.* at 197.
[153] Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth* 57 MGMT. SCI. 425 (2011). Strong enforcement of non-compete clauses also can encourage prospective entrepreneurs to relocate to other states. As discussed earlier, in 1985, the Michigan legislature revised the state's antitrust law and unwittingly made non-compete clauses easier to enforce in court. Examining this legal change, a study found that the more employer-friendly approach to non-compete encouraged skilled technical workers, who may be especially capable of and interested in starting businesses, to leave the state. Marx, Singh & Fleming, *supra* note 139, at 403.
[154] NPR ET AL., DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF AFRICAN AMERICANS 6 (2017), https://www.npr.org/assets/img/2017/10/23/discriminationpoll-african-americans.pdf.
[155] Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today's Working Women*, PEW RESEARCH CTR., Dec. 14, 2017, http://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/.

women have experienced sexual harassment in the workplace.[156] By restricting job switching, non-compete clauses can lock workers into discriminatory or hostile work environments.

The freedom to leave is especially critical for victims of discrimination, harassment, and other mistreatment who are lower on the firm hierarchy. These workers generally have few legal protections on the job and no feasible path for seeking redress for the mistreatment they suffer.[157] For example, many women who are victims of sexual harassment may believe they have no option but to leave their current employer.[158] In one study, "[t]argets of sexual harassment were 6.5 times as likely as nontargets to change jobs" during the study period.[159]

Non-competes can also force workers to remain at jobs with unsafe or dangerous working conditions. In 2017 in the United States, 5,147 workers died from traumatic injuries on the job, which means that fatal job injuries occurred at a rate of 3.5 per 100,000 workers.[160] In 2017, private sector employers reported 2.8 million cases of workplace injury or illness, or a rate 2.8 cases per 100 full-time workers.[161] And unhealthy workplaces can inflict lasting harms on workers: exposure to toxins on the job is "responsible for more than 50,000 deaths and 190,000 illnesses each year, including cancers and other lung, kidney, skin, heart, stomach, brain, nerve

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[156] *11/22: More than One in Three Women Report Sexual Harassment in the Workplace*, MARIST POLL, Nov. 22, 2017, http://maristpoll.marist.edu/1122-more-than-one-in-three-women-report-sexual-harassment-in-the-workplace/#sthash.5qBGru84.dpbs.
[157] Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J. FORUM 85, 89-90 (2018).
[158] Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Cost of Sexual Harassment*, GENDER & SOC., June 7, 2017, https://gendersociety.wordpress.com/2017/06/07/the-cost-of-sexual-harassment/.
[159] Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOC. 333, 344 (2017).
[160] Press Release, Bur. Lab. Stats., Census of Fatal Occupational Injuries Summary (Dec. 18, 2018), https://www.bls.gov/news.release/cfoi.nr0.htm.
[161] Press Release, Bur. Lab. Stats., Employer-Reported Workplace Injury and Illnesses, 2017 (Nov. 8, 2018), https://www.bls.gov/news.release/osh.nr0.htm.

and reproductive disease."[162] These figures likely undercount the incidence of death, injury, and illness on the job.[163] The threat of dangerous, unsafe, and unhealthy working conditions is real.[164] When workers want to leave for comparatively safer or healthier work environments, non-competes can bar them from finding jobs with employers that provide safer work environments.

IV. Monopolistic and Oligopolistic Businesses Can Use Non-Compete Clauses to Exclude or Limit Product Market Competition

On top of the direct harms to workers, non-compete clauses can protect dominant incumbents against competition in product and labor markets. Incumbents can use non-compete clauses to tie up scarce labor and thereby deprive current and would-be rivals of essential workers. Furthermore, non-competes can favor large incumbents over small rivals. Workers subject to non-competes may be more likely to move to large firms relative to small firms because larger firms are more able and willing to tolerate the risk of, and defend against, lawsuits. Conversely, workers restricted by non-competes may be *less* likely to move to small firms over bigger ones for the same reason. In short, non-competes can serve as an entry barrier, which helps maintain concentrated product and labor markets, and hinder the creation and growth of small businesses.

Dominant corporations can use non-compete clauses with workers to marginalize and exclude existing and potential rivals. In markets in which firms are dependent on highly specialized or otherwise scarce labor, a monopolist can deprive rivals of essential workers and hobble their ability to compete. For instance, a monopolistic hospital can use non-competes to

[162] AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 40 (2018).
[163] *Id. at* 12-13.
[164] *Id.* at 8.

deprive a rival hospital of physicians.[165] Under these circumstances, the non-compete functions as a de facto exclusive dealing contract with physicians and starves rival hospitals of an essential "input" (physicians), which could violate the Sherman or Clayton Acts.[166] In a field such as medicine in which long-term relationships between providers and patients are important, the use of non-competes by powerful incumbents can be particularly damaging to rivals and patients.[167]

Firms with market power can use also non-competes to block an important source of potential competition: their own employees. In many fields, employees have the skills and experience to start firms and compete with their current employers. For example, an entrepreneurial doctor may be well positioned to leave a hospital or group practice and establish her own independent practice.[168] Through non-compete clauses, incumbent firms can and do "frequently discourage" employees from breaking out and starting rival firms.[169]

The use and enforcement of non-competes, in general, can favor larger incumbent firms over smaller, emerging firms. Workers bound by non-competes may believe large firms are a safer destination than smaller firms. Relative to small firms, larger firms may be better equipped to buy out non-compete clauses and defend themselves and the affected employees against

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[165] *See, e.g.*, BRFHH Shreveport LLC v. Willis Knighton Med. Ctr., 176 F.Supp.3d 606, 625 (W.D. La. 2016) ("Vantage also asserts that its allegations of Willis-Knighton's non-compete agreements with its physicians and its control of physician referrals are anticompetitive under section 2 of the Sherman Act."). Warren Greenberg, *Marshfield Clinic, Physician Networks, and the Exercise of Monopoly Power*, 33 HSR: HEALTH SERVS. RES. 1461, 1470 (1998) ("The Marshfield Clinic also enforced a non-compete clause with physicians who were formerly employed by Marshfield. Such physicians could not practice within 30 miles of Marshfield for three years after termination from the Clinic, resulting in less competition to the Marshfield Clinic."). *See generally* Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. 371 (2017); Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013).

[166] *See, e.g.*, McWane, Inc. v. FTC, 783 F.3d 814, 842 (11th Cir. 2015) (affirming FTC's decision that McWane engaged in illegal exclusive dealing). For antitrust framework on exclusive dealing arrangements, see *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

[167] Michelle Andrews, *Did Your Doctor Disappear Without a Word? A Noncompete Clause Could Be the Reason*, N.Y. TIMES, Mar. 15, 2019, https://www.nytimes.com/2019/03/15/business/physician-non-compete-clause.html.

[168] *Id.*

[169] Steven Klepper & Peter Thompson, *Disagreements and Intra-industry Spinoffs*, 28 INT'L J. INDUS. ORG. 526, 531 (2010).

lawsuits seeking to enforce non-competes.[170] In the course of her research on non-competes, Orly Lobel found that employees bound by non-competes often preferred to minimize the legal risks of departure "by going to an established competitor that has the resources to protect and indemnify them in the case of legal liability." [171] After Michigan permitted the enforcement of non-competes in the mid-1980s, inventors in that state who changed jobs "were considerably more likely to join larger firms."[172]

The combined effect of non-compete clauses can be to protect monopolistic and oligopolistic market structures. Dominant and near-dominant firms can employ non-competes as exclusive dealing clauses that deny key workers to actual and would-be rivals. Furthermore, the use of non-competes can favor large firms over small firms, who may be less able or willing to litigate potential lawsuits arising from these contractual restrictions.

V. The General Justification for Non-Compete Clauses Does Not Stand Up to Scrutiny

The general justification for non-compete clauses is unpersuasive on closer examination and should be treated with skepticism. The case for non-compete clauses presumes a need for employers to protect their investment in intangibles through a quasi-property right. These intangibles include trade secrets, customer lists, and employee training. In the absence of non-competes, proponents argue, the free movement of workers from one employer to another allows rival companies to "free ride" on the investment in intangibles made by the first employer.[173]

[170] Marx, *supra* note 103, at 709. As an illustration of how the litigation process favors larger, established firms over new entrants and small firms, smaller biotechnology firms with higher relative costs of litigation appear less likely to patent a new invention in the same subclass as rivals. Josh Lerner, *Patenting in the Shadow of Competitors*, 38 J. L. & ECON. 463, 489-91 (1995). *See id.* at 472 ("In general, small firms believed that their patents were infringed more frequently, but were considerably less likely to litigate these infringements.").
[171] ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 202 (2013).
[172] Marx & Fleming, *supra* note 94, at 52.
[173] *See, e.g.*, Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 691 (1980) ("It is often impossible to determine whether a former employee who has to work for a competitor has taken trade secret information, and whether he has disclosed that information to his new employer. The former

This justification mistakenly ignores how the dissemination and sharing of information can often benefit society. For example, copyright and patent law, while creating a property right over intangibles, recognize this logic and accordingly limit the scope of protection. Through non-competes, employers effectively expand intellectual property protection and disrupt the balance that Congress has attempted to strike.

Insofar as employers do need to protect their investment in intangibles, non-compete clauses are an overbroad and yet also ineffective tool. In the name of protecting an employer's discrete investment, non-compete clauses restrict an individual's job mobility and freedom to use his or her full experience, knowledge, and skills. Yet, non-competes do not protect the intangible itself and do not restrict employees from sharing it with rivals and other third parties. In lieu of non-compete contracts, employers have less restrictive methods of protecting their intangibles. These include trade secret law, improved employee retention policies, and employment contracts. Employers can use these legal tools to protect their intangibles against free riding without imposing a one-sided labor market restraint on workers.

A. The Justification for Non-Compete Clauses Rests on a Questionable Premise

While the justification for non-competes presumes that free riding is categorically bad, this story is, at best, incomplete and, at worst, specious. The sharing of information among individuals and firms is often desirable for society and should not be indiscriminately restricted through restraints such as non-competes. Moreover, the neoclassical economic theory that provides the justification for non-competes offers only qualified support for the use of non-competes.

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employee may give the information to the new firm without disclosing its confidentiality and represent the information as his own to impress the new firm value. A restrictive covenant keeps the ex-employee away from the competitor.").

Even accepting that firms principally use non-competes to protect their intangibles, information sharing is not a categorical "evil" that state action should police at any cost. What is disparaged as free riding often is the broad dissemination of knowledge that contributes to economic growth and innovation.[174] This sharing can contribute to the growth of new firms and new industries as workers are free to combine their knowledge with knowledge possessed by other workers and firms.[175] Excess protection for knowledge directly through intellectual property or indirectly through contractual restraints such as non-compete clauses can frustrate this iterative dynamic.[176]

Non-competes appear to discourage the socially desirable dissemination and sharing of knowledge and other intangible assets. In a widely-cited article, Ronald Gilson, building on the work of urban planning scholar AnnaLee Saxenian,[177] examined the decline of the Route 128 corridor in Boston as a tech hub and the parallel rise of Silicon Valley in California.[178] He suggests that the differential treatment of non-compete clauses in the two states is a powerful explanatory factor. Until recently, Massachusetts law generally supported the enforcement of non-competes,[179] whereas California law has long held that non-competes are unenforceable in

[174] Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 100 COLUM. L. REV. 101, 111-14 (2006). For a summary of the economic and legal literature casting doubt on the free riding theory, see Alan Hyde, *Intellectual Property Justifications for Restricting Employee Mobility: A Critical Appraisal in Light of the Economic Evidence*, IN RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 357 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).
[175] *See generally* LOBEL, *supra* note 171.
[176] *Id.* at 76-97. Intellectual property protections, such as copyrights and patents, are likely already overprotective. James Boyle has written that recent expansions of intellectual property protection have not had a sound empirical basis and described policymaking in this area as "an evidence-free zone." JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 205-29 (2008).
[177] ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1996).
[178] Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants not to Compete*, 74 N.Y.U. L. REV. 575 (1999).
[179] Mass. Gen. Laws. C. 149 § 186. Bob Salsberg, *'Garden' Clause in New Law Requires Pay During Noncompete*, WBUR, Sep. 30, 2018, http://www.wbur.org/news/2018/09/30/garden-clause-new-law-requires-pay-during-noncompete.

court.[180] Gilson contends that California law's hostility toward non-compete clauses promoted the sharing of information and knowledge and fostered the creation of new businesses.[181] He argues that, in contrast, the relatively pro-enforcement orientation of Massachusetts law hindered the dissemination of knowledge and frustrated the creation of new firms in the technology sector.[182]

Gilson's theory is supported by other research. Relatively easy labor mobility across firms promotes innovation and invention.[183] Even for firms themselves, too little employee turnover can create an insular ethos resistant to new ideas and thereby become an impediment to innovative activity.[184]

The neoclassical economic theory on which proponents of non-competes rely offers only qualified support for the free riding arguments. This theory holds that employers should be allowed to recover just enough on their investment to ensure that they invest in the future.[185] Permitting an employer to recover a *sufficient* amount is very different from allowing the employer to recover the *maximal* amount from their investment. If an employer can recoup its investment in job training within six months of a worker joining, society has no interest in ensuring that the worker stays with the employer indefinitely so that the employer can extract a maximal return on the training. Indeed, if the employer has recouped its investment in training or

[180] Cal. Bus. & Prof. Code § 16600.
[181] *See generally* Gilson, *supra* note 178.
[182] *Id.* at 602-13.
[183] *See, e.g.*, LOBEL, *supra* note 175, at 40 ("[L]ocalities with dense connections between innovators, knowledge flows, and human capital enjoy dramatically more innovation than smaller, protective, and more isolated settings."); Marx, Singh & Fleming, *supra* note 139, at 403 (finding that strong enforcement of non-competes encouraged out-migration of "workers who are more collaborative and whose work is more impactful, stripping enforcing states of some of their most valuable knowledge workers."); Lee Fleming & Koen Frenken, *The Evolution of Inventor Networks in the Silicon Valley and Boston Regions*, 10 ADV. COMPLEX SYS. 53 (2007).
[184] *See* LOBEL, *supra* note 175, at 129 ("Pathologies of groupthink—whereby cohesive groups overlook important alternatives because of their desire for consensus and conformity—and [not invented here] mentalities are exaggerated when companies are overly stable.").
[185] Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1046-50 (2005)

other intangible during the worker's tenure, it has no basis for restraining the worker for a single day *after* he or she leaves.

Importantly, non-competes can *discourage* certain forms of investment in intangibles. While non-competes can stimulate employer investment in the training of workers, these contracts can simultaneously discourage self-training by bound workers.[186] Deprived of the freedom to leave, these workers may be less likely to invest in training and other self-improvement because they have less power to obtain higher salaries and wages at their current firm or elsewhere.[187]

The laws governing the protection of intangibles already reflect the risk of overprotection of intangibles. For instance, state law holds that non-competes with an unlimited duration are generally unenforceable.[188] Moreover, intellectual property law in the United States incorporates this consideration too. It aims to provide adequate incentive to creators and inventors, not maximal incentive. Accordingly, copyright and patent laws include a term limit on protection and include several important exceptions to the scope of protection. For instance, copyright protects the expression of an idea, but does not protect the idea itself.[189]

Non-competes enable employers to circumvent the boundaries of intellectual property law. Copyright, patent, and trade secret law have important limitations on their respective scopes of protection. By imposing non-competes on workers, employers can do "an end run around

[186] LOBEL, *supra* note 175, at 178.
[187] *Id.*
[188] Pivateau, *supra* note 38, at 680. Harlan Blake wrote, "Every postemployment restraint, for whatever reason imposed, has inevitable effects which in some degree oppose commonly shared community values. In view of our feeling that a man should not be able to barter away his personal freedom, even this small degree of servitude is distasteful." Blake, *supra* note 108, at 650. A non-compete in perpetuity could, in effect, compel the worker to remain with her present employer indefinitely and would raise serious 13th Amendment concerns. *See* U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").
[189] Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 556 (1985).

these [intellectual property] regimes."[190] Employers can overprotect intangible investments and upset the balance that the federal government and the states have tried to strike in copyright, patent, and trade secret laws. Through non-competes, employers can prevent what, from their perspective, is free riding detrimental to their profits, but, for the public, amounts to beneficial cooperation and sharing of information and knowledge.

B. Non-Competes Are a Flawed Means of Protecting Against Free Riding

Even for the purpose of preventing free riding, non-competes are an ineffective tool. They are overbroad means of protecting against improper appropriation. They are unlike copyright and patent, which protect a specific creative work, invention, or process. Non-competes do not directly control, or protect, intangible assets. Instead, non-competes restrict the possessor of the intangible—the worker. As one scholar of intellectual property has written, "noncompetes regulate the *inputs* to creation and invention, whereas IP rights regulate the inventive or creative *outputs*."[191] Non-competes restrain workers' labor market freedom without providing effective protection to the intangible at issue. Accordingly, they are too broad and too narrow.[192]

Although some employers may use non-competes to protect trade secrets or customer lists, a fundamental mismatch still exists between that justification and the operation of non-compete clauses. To protect, for example, a trade secret or customer list, employers restrain the labor market freedom of workers and their ability to earn a living. Non-competes prevent workers from using their *full* set of experience, knowledge, and skills at another employer in

[190] Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 879 (2010).
[191] *Id.* at 914 (emphasis in original).
[192] *Id.*

order to protect an employer's *discrete* intangible.[193] To prevent a highly specific threat (rival free-riding on the employers' investment in an intangible), non-competes lock workers into their current job, inflicting harms on the bound workers themselves as well as broader society. While human beings cannot be separated from their experience, knowledge, and skills, non-competes strip workers of the freedom to *use* their talents, many of which they acquired or developed on their own and not from employers or any single employer. Through non-competes, employers "convert general training into firm-specific human capital by denying workers the opportunity to apply those skills outside the firm."[194]

At the same time, non-compete clauses are not effective at protecting firms' investments in intangibles. Copyright and patent law operate against the entire world and grant the owner a cause of action against any and all parties who infringe their intellectual property. In contrast, non-compete clauses are a creation of contract and operate only against the bound employee, and potentially an employer who recruits this worker.[195] Accordingly, non-competes bind an employee who possess an intangible to his or her employer but do not protect the intangible itself. Even when bound by a non-compete clause, an employee can still covertly disclose a customer list or trade secret to a rival company or another third party. A non-compete clause does little or nothing to address this threat.

C. Employers Have Less Restrictive Alternatives to Protect Intangible Interests

[193] *See* LOBEL, *supra* note 175, at 37 ("At their most dangerous, human capital controls such as noncompete agreements temporarily prevent workers who have trained and labored in a specific field with a specific set of knowledge from using their expertise in pursuing their passions and perhaps also from earning a living."); Viva R. Moffat, *Human Capital as Intellectual Property? Non-Competes and the Limits of IP Protection*, 50 AKRON L. REV. 903, 928 (2016) ("By limiting the employment possibilities for employees, non-competes seek to control not only the output of human ingenuity and creativity, but also the source of it—the human capital itself.").

[194] Marx, *supra* note 103 , at 698.

[195] *See* Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 980 (2012) ("[Non-competes] are too narrow because they operate only between an employer and an employee and thus do not protect the intellectual property against the world.").

To the extent they need to protect intangibles against socially harmful free riding, employers have a range of less restrictive means of achieving this objective. Indeed, employers have a vast array of tools in their legal arsenal through which to assert quasi-property rights over intangibles. Even apart from non-competes, Orly Lobel has argued that "human capital controls have wildly expanded and are widespread in almost every industry."[196] Employers can protect their intangibles through trade secret law and non-disclosure agreements that prevent employees and former employees from sharing or publicizing protected information. In addition to these legal protections for intangibles, employers concerned about the loss of valuable intangibles due to employee departure can improve their retention policies or offer workers employment contracts. These methods allow employers to protect intangibles without imposing a broad one-sided restraint on workers' mobility.

Trade secret law gives businesses the power to protect intangibles that may not be eligible for copyright or patent protection. Employers can use trade secret law to prohibit both current and former employees from divulging valuable information to competitors and the public. Trade secrets are defined as information that derives its value from being unknown or unascertainable to the public and that is subject to reasonable efforts to maintain its secrecy.[197] Misappropriation of trade secrets, whether through espionage or breach of a contractual or common law duty with an employer, is actionable.[198] The Economic Espionage Act (amended and strengthened several times in the past five years) makes misappropriation of trade secrets a federal crime.[199] In some states, courts can enjoin workers possessing trade secrets from working

[196] Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 797 (2015).
[197] UNIF. TRADE SECRETS ACT § 1(4) (amended 1985). Nearly all states have adopted the Uniform Trade Secrets Act or some modification of it. H.R. REP. NO. 114-529, at 4 (2016).
[198] *Id.* at §§ 1(1) & (2).
[199] 18 U.S.C. § 1839.

for a rival or starting a competing business when they determine that the workers will inevitably disclose the trade secret.[200] Under this "inevitable disclosure" doctrine, courts can impose an extraordinary "non-compete remedy" on a worker to protect his or her employer's intangibles.[201] Trade secret law grants employers a potent tool with which to protect valuable intangibles.

Employers can also condition employment on employees' signing non-disclosure agreements. Through a non-disclosure requirement, employers can convert statutory duties under state trade secret law into contractual duties. Employees bound by a non-disclosure condition are prohibited from divulging or publicizing information listed in the contract.[202] Today, non-disclosure clauses often prohibit the sharing of a long list of information including "any other information not generally known to the public which, if misused or disclosed, could reasonably be expected to adversely affect Company's business."[203] Non-disclosure agreements do restrict employee's freedom to communicate to new employers and colleagues but are less restrictive than non-competes.

For employers who find these legal tools are inadequate for protecting their intangible investments and believe preventing employee departure is still essential, they have multiple options that are superior to non-compete clauses. Employers can retain workers, and ensure their commitment and loyalty, through higher wages and salaries, more generous benefits, and fair treatment. This dynamic is an important pro-worker element of the more fluid employee-employer relationship in the United States today.[204] Indeed, this threat of exit is an important

[200] Eleanore R. Godfrey, *Inevitable Disclosure of Trade Secrets: Employee Mobility v. Employer's Rights*, 3 J. HIGH TECH. L. 161 (2004).
[201] *E.g.*, PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995).
[202] Orly Lobel: *Enforceability TBD: From Status to Contract in Intellectual Property Law*, 96 B.U. L. REV. 869, 874 (2016).
[203] *Id.* at 874-76.
[204] Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 733-37 (2002).

source of power for at least some workers in the contemporary workplace.[205] Employers can retain workers, who may otherwise leave and accept employment with another company, through raises and promotions.

In lieu of non-compete clauses, employers can also offer employment contracts to workers entrusted with important information. Employment contracts depart from the default rule of at-will employment and offer guaranteed employment to workers for a term.[206] They bind both the employer and the employee to commit to maintaining the relationship for a fixed period and limit the ability of both sides to end the contract before the completion of the term. And unlike non-compete clauses, employment contracts do not restrain a worker from finding employment *after* he or she has departed or otherwise left.

Employment contracts also serve an important channeling function. Because non-competes are often one-sided obligations, employers can use them as a matter of course without considering whether they are necessary to protect intangibles.[207] In contrast to non-compete clauses often under which only the worker is bound, both the employer and the employee make a binding commitment in an employment contract. By retaining workers through term contracts, employers are required to deliberate on the importance of the intangibles involved. If employers seeking to protect intangibles cannot rely on non-competes and have to offer employment contracts and bind themselves, they are compelled to identify and evaluate the significance of the intangibles at stake and determine an employment term that is just long enough to recoup their investment in the intangibles.

[205] Arnow-Richman, *supra* note 96, at 983-84.
[206] *See, e.g.*, Luteran v. Loral Fairchild Corp., 455 Pa. Super. 364, 370, 688 A.2d 211 (1997). ("In order to rebut the presumption of at-will employment, a party must establish one of the following: (1) an agreement for a definite duration; (2) an agreement specifying that the employee will be discharged for just cause only; (3) sufficient additional consideration or (4) an applicable recognized public policy exception.").
[207] Staidl, *supra* note 42, at 119.

VI. The FTC Should Prohibit Non-Compete Clauses as an Unfair Method of Competition

Through a rulemaking, the FTC should declare worker non-compete clauses to be an unfair method of competition and classify them as per se illegal under the FTC Act. Non-competes, in general, function as contracts of adhesion that impair labor market mobility. Even if an employer does not intend to, or cannot enforce, them in state court, non-competes can deter workers from leaving a job and chill labor market mobility. By binding workers to their current employer, non-competes reduce wages, depress business formation, and lock workers into discriminatory, hostile, or unsafe workplaces. On top of these harms to workers, dominant firms and other powerful incumbents can also use non-competes to deprive rivals and new entrants of specialized workers and exclude these competitors from the market. In contrast to these real harms, the business justifications for non-compete clauses are fallacious. Businesses can protect their investment in intangibles in more effective ways that are also less restrictive for workers, including trade secret law, non-disclosure agreements, and employment contracts.

The FTC has broad authority to interpret "unfair methods of competition"[208] and should use this authority to prohibit non-competes. To deter employers' use of non-competes, the FTC should prohibit them as an unfair method of competition and not merely hold them to be unenforceable in court. Under the requested rule, an employer who presents, enforcers, or otherwise uses worker non-competes would be liable under the FTC Act.

Tens of millions of workers are subject to non-compete clauses in the workplace today. Due to disparities in bargaining power and behavioral biases among workers, employers can generally condition employment on an employee's acceptance of a non-compete clause. Non-

[208] 15 U.S.C. § 45.

competes in the workplace function as contracts of adhesion. Even in states where they are unenforceable, non-competes clauses discourage worker mobility and lock workers into their current jobs. For workers, non-competes depress wages, frustrate their ability to start new businesses, and compel them to remain in discriminatory and hostile work environments. In addition to harming workers, firms with market power can use non-competes to exclude rivals. Through worker non-competes, incumbent firms can control the supply of labor and deprive rivals and new entrants of the workers that they need to grow and compete. Furthermore, non-competes can divert workers to larger firms and hinder the growth and entry of small and new firms.

The business justifications for employer use of non-compete clauses do not stand up to scrutiny. The underlying assumption is that employers need to guard their investment in intangibles (for example, customer lists, trade secrets, and training) against free riding by rivals and others. What is disparaged as free riding is often beneficial sharing of information and knowledge among workers and across firms. While firms have a motive to defend against perceived free riding by competitors, their private incentive to protect intangibles can conflict with the public interest in allowing the free dissemination and sharing of information and knowledge. Furthermore, non-competes are a flawed means of protecting against free riding. They are too broad and too narrow—binding a worker to his or her current employer and preventing full freedom to use his or her skills and yet failing to truly protect the relevant intangible. Employers have alternative and less restrictive methods of protecting their intangibles. They can use trade secret law and non-disclosure agreements to protect customer lists and trade secrets, and training, offering promotions, raises, and job contracts to retain employees.

The FTC has expansive authority to interpret the FTC Act's prohibition on unfair methods of competition.[209] Congress intended the FTC to be an expert policymaker on antitrust and delegated authority to the Commission to identify and restrict unfair methods of competition over time.[210] The Supreme Court has affirmed this congressional grant of policymaking power to the FTC, declaring the Commission, in defining "the congressionally-mandated standard of fairness," can "like a court of equity, consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[211] Furthermore, modern administrative law grants agencies, such as the FTC, the authority to interpret broad, open-ended statutes such as the FTC Act.[212]

The FTC Act authorizes the FTC to outlaw practices beyond those that are reasonably certain to reduce competition or create a monopoly. Congress enacted the FTC Act and created the Commission to stop anticompetitive practices in their "incipiency."[213] The Supreme Court has stated that "Congress enacted § 5 of the Federal Trade Commission Act to combat in their

[209] *See generally* Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645 (2017).
[210] *See* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 237 (1980) ("The judicial decisions which have reviewed [the FTC Act's] legislative history confirm that the Commission has, as it must have, considerable flexibility in determining which particular acts or practices will constitute 'unfair methods of competition.'").
[211] *Sperry & Hutchinson*, 405 U.S. at 244. *See also Ind. Fed. Of Dentists*, 476 U.S. at 454 ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons[.]").
[212] Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). *See* Justin (Gus) Hurwitz, Chevron *and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 263-64 (2014) ("[F]irst, . . . the breadth of [Section 5] constructions likely to be considered permissible is very large; and second, . . . the proper forum in which to challenge such interpretations is not before the Article III courts. Given the breadth of the statute, once the matter has reached that point, there is great weight in favor of the FTC's position receiving *Chevron* deference.").
[213] *See generally* A. Everette MacIntyre & Joachim J. Volhard, *The Federal Trade Commission and Incipient Unfairness*, 41 GEO. WASH. L. REV. 407 (1973). *See also* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 74 (2003) ("[The principal Congressional supporters] of the FTC Act wanted a new agency that would prosecute if the Department faltered, enforcing a flexible new standard that could reach where the Sherman Act might not.").

incipiency trade practices that exhibit a strong potential for stifling competition."[214] The principal Senate sponsor of the FTC Act wanted the FTC to become the "social machinery which will protect the individual from oppression and wrong."[215] A Senate colleague echoed this statement, stating "no one here—I can speak with confidence for the entire Senate—would put one obstacle in the way of punishing dishonesty, of preventing oppression, of prohibiting exactions."[216]

Considering the documented harms and unconvincing business justifications for non-competes, the FTC should hold worker non-compete clauses to be an unfair method of competition and categorize them as per se illegal. For the reasons presented, non-competes are competitively suspect. Under existing Sherman Act precedent, non-competes arguably should trigger a strong presumption of illegality because they hurt competition for workers and can impair product market competition and rest on dubious justifications.[217] Section 5's unfair methods of competition prong is expressly broader than the Sherman and Clayton Acts.[218] Accordingly, the FTC has the authority to go further and classify non-competes as per se illegal.

In exercising its Section 5 authority, the FTC's competition rule should make the presentation or the enforcement of non-competes illegal. Prohibiting non-compete clauses, as

[214] FTC v. Texaco Inc., 393 U.S. 223, 225 (1968).
[215] 51 CONG. REC. 11,109 (1914) (statement of Sen. Newlands).
[216] *Id.* at 14,782 (statement of Sen. Burton).
[217] In re Polygram Holding, Inc., 136 FTC 310, 344 (2003), pet'n denied Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005) ("A plaintiff may avoid full rule of reason analysis, including the pleading and proof of market power, if it demonstrates that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition.").
[218] *See Ind. Fed. of Dentists*, 476 U.S. at 454 ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons[.]"). For example, the FTC has held that Section 5 reaches invitations to collude, which may fall outside the Sherman Act's prohibition on "restraints of trade." *See, e.g.*, In re Drug Testing Compliance Group, LLC, 2015 WL 9254882, *8 (FTC 2015) ("Mr. Crossett's communication to Competitor A is an attempt to arrange a customer allocation agreement between the two companies. The invitation, if accepted, would be a per se violation of the Sherman Act. The Commission has long held that invitations to collude violate Section 5 of the FTC Act[.]").

opposed to making them only unenforceable in court, is essential. Regardless of whether they are enforceable in state court today, many employers condition employment on workers acquiescing to a non-compete provision. For instance, California law bars the enforcement of non-competes.[219] Nonetheless, nearly one-in-five workers in California is subject to a non-compete clause.[220] The mere existence of non-compete contracts, even when legally not binding, still inflicts real harms on workers. Under the requested rule, employers who use non-competes would violate the FTC Act and be subject to FTC enforcement actions.

VII. Conclusion

Through non-compete clauses, employers have deprived tens of millions of workers of the freedom to leave their current job to accept a new job or start a business. Non-competes prohibit workers, following separation from an employer, from seeking employment in a similar line of work or industry or establishing a competing business for a specified period in a geographic area. Approximately 30 million workers, across a wide range of fields and occupations including accountants, engineers, and fast food workers, are bound by non-compete clauses.

In labor markets, employers generally have the power to impose non-compete clauses on workers to the detriment of workers. Due to workers' dependence on wages and lack of union representation and concentration among employers in local labor markets, the employee-employer relationship is defined by inequality. Even when they have employers competing for their services, workers are likely to bargain about wages and benefits, not contingent terms such as non-compete clauses. These factors taken together indicate that non-compete clauses function

[219] Cal. Bus. & Prof. Code § 16600.
[220] Starr et al., *supra* note 8, at 16.

as contracts of adhesion. Employers present non-competes clauses to workers as a standard form contract on a take it-or-leave it basis.

By restricting labor market mobility, non-compete clauses inflict significant harms on workers and the broader public. Non-compete clauses bind workers to their current employers and thereby depress wages and wage growth and deter the formation of new firms. The effects extend beyond wages and firm creation rates. Due to non-competes, many workers may, in effect, be compelled to remain in discriminatory, hostile, or dangerous work environments.

Non-compete clauses also can impair product market competition and help protect monopolistic and oligopolistic market structures. In concentrated markets, dominant incumbent firms can use non-compete clauses as a way of depriving rivals and new entrants of essential workers and limit the growth of actual and would-be competitors. Even in the absence of any exclusionary intent, non-competes can direct workers toward larger existing firms and away from smaller firms and new entrants.

While the harms from non-compete clauses are real, their justifications are unpersuasive. Employers and their representatives justify worker non-compete clauses as a method of protecting their intangible investments, such as trade secrets and employee training, from free riding by rival firms. If they were unable to protect against this type of free riding, they would underinvest in intangibles, according to this theory. This rationale does not stand up to scrutiny and depends on a series of questionable, if not false assumptions. Insofar as employers should be permitted to protect intangibles, they have several less restrictive and more appropriately tailored alternatives to non-compete clauses.

The FTC should initiate a rulemaking to prohibit employers from presenting non-compete clauses as a condition of employment. The FTC has expansive authority to interpret the

FTC Act's prohibition on "unfair methods of competition." Given that non-compete clauses inflict real harms on workers and competition and rest on unpersuasive theoretical justifications, the FTC should hold these clauses to be an unfair method of competition. Accordingly, the FTC should hold these clauses to be a per se violation of Section 5 of the FTC Act. Under this rule, employers who use non-competes with their workers would violate federal law and face legal liability under the FTC Act.

Certification

The undersigned certifies, that, to the best knowledge and belief of the undersigned, this petition includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner, including information that is unfavorable to the petition.

Organizational Petitioners

The **Open Markets Institute (OMI)** is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

The **AFL-CIO** is a democratically governed federation of 55 unions representing 12.5 million working people.

The **Artist Rights Alliance (ARA)** is an artist-run non-profit advocacy group representing creators in the digital landscape. ARA's work is significant to anyone who creates and makes a living from their creations. ARA's objectives are two-fold: First, economic justice for musicians and music creators in the digital domain. Second, ensuring that the current and future generations of creators retain the rights needed to create and benefit from the use of their work and efforts. ARA has grown into a national organization based on representation, advocacy, and mobilization for sustainable careers in the digital age.

The **Center for Popular Democracy (CPD)** works to create equity, opportunity and a dynamic democracy in partnership with high-impact base-building organizations, organizing alliances, and progressive unions. CPD strengthens our collective capacity to envision and win an innovative pro-worker, pro-immigrant, racial and economic justice agenda.

coworker.org is a digital lab dedicated to supporting worker voice through our platform, trainings, and building networks of workers to improve their jobs.

The **Demand Progress Education Fund** educates its two million members and the general public about matters pertaining to the democratic nature of our nation's communications infrastructure and governance structures, and the impacts of corporate power over our economy and democracy.

The **Economic Policy Institute (EPI)** is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI's mission is to inform and empower individuals to seek solutions that ensure broadly shared prosperity and opportunity. EPI believes every working person deserves a good job with fair pay, affordable health care, and retirement security. To achieve this goal, EPI conducts research and analysis on the economic status of working America. EPI proposes public policies that protect and improve the economic conditions of low- and middle-income workers and assesses policies with respect to how they affect those workers.

EIG is a bipartisan public policy organization, combining innovative research and data-driven advocacy to address America's most pressing economic challenges and advance solutions that empower entrepreneurs and investors to forge a more dynamic economy.

The **Institute for Local Self-Reliance (ILSR)** is a national research and advocacy organization that challenges concentrated economic and political power, and instead champions an approach in which ownership is broadly distributed, institutions are humanly scaled, and decision-making is accountable to communities.

Lake Research Partners is a national leader in public opinion research and strategy for Democratic and progressive candidates, causes, and campaigns.

Make the Road New York is a democratic, community-based membership organization representing more than 23,000 working class and immigrant families throughout New York City, Long Island, and Westchester, New York.

The **National Employment Law Project (NELP)** is a nonprofit organization with more than 45 years of experience advocating for the employment and labor rights of low wage and unemployed workers. NELP seeks to ensure that all employees receive the full protection of employment and labor laws, and that employers are not rewarded for skirting those basic rights. NELP promotes policies at the federal, state, and local level to protect workers' rights and has litigated and participated as amicus in numerous cases in the federal appellate courts and the U.S. Supreme Court.

Organization United for Respect (OUR) is a national organization working to reshape the economy so that all can live free, full lives with their families and loved ones.

Public Citizen was founded 46 years ago and serves as the people's voice in the nation's capital. It identifies excessive corporate power as the most serious threat to the values and policy objectives we most treasure: justice, health and safety, ecological sustainability, a functioning democracy, freedom, and equality. Public Citizen has delved into an array of areas, but its work on each issue shares an overarching goal: To ensure that all citizens are represented in the halls of power. Public Citizen carries out an advocacy agenda through divisions with specialized and extraordinary expertise. Its Health Research Group is recognized as the leading campaigner for pharmaceutical safety. Its Litigation Group operates the preeminent public interest Supreme Court practice. Its Global Trade Watch is recognized as a leading force for fair trade. Its Energy Project combines consumer and environmental advocacy for a sustainable future. Its Congress Watch project runs cutting-edge advocacy campaigns on a diverse array of issues, from worker safety to clean government. Moreover, Public Citizen's Austin office has helped turn Texas into a world-leading wind energy producer.

The **Revolving Door Project** is a nonpartisan effort to educate civil society in order to counteract the advantage that Wall Street and corporate America have in how the executive branch writes the rules of the economy. It does this by alerting and educating the media and activists when hard working people are being taken advantage of and by whom. If the executive branch is to write rules that structure the economy away from rent extraction and in the direction of greater economic equality, public-interest minded people must hold key executive branch positions.

The **Roosevelt Institute**, a New York-based think tank, promotes bold policy reforms that would redefine the American economy and democracy. With a focus on curbing corporate power and reclaiming public power, Roosevelt is helping people understand that the economy is shaped by choices—via institutions and the rules that structure markets—while also exploring the economics of race and gender and the changing 21st-century economy. Roosevelt is armed with a transformative vision for the future, working to move the country toward a new economic and political system: one built by many for the good of all.

Service Employees International Union (SEIU) unites 2 million diverse members in the United States, Canada, and Puerto Rico. SEIU members working in the healthcare industry, in the public sector, and in property services believe in the power of joining together on the job to win higher wages and benefits and to create better communities while fighting for a more just society and an economy that works for all, not just corporations and the wealthy.

Towards Justice is a Denver-based non-profit law firm that represents workers in attacking systemic abuses in the labor market through impact litigation, strategic policy advocacy, and capacity building. Towards Justice is particularly interested in attacking anti-competitive practices in the labor market that undermine worker power.

The **UFCW** is the largest private sector union in the United States, representing 1.3 million professionals and their families in grocery stores, meatpacking, food processing, retail shops and other industries. Its members help put food on our nation's tables and serve customers in all 50 states, Canada and Puerto Rico

UNITE HERE is a labor union that represents 270,000 working people across Canada and the United States. Its members work in the hotel, gaming, food service, manufacturing, textile, distribution, laundry, transportation, and airport industries. Its membership is diverse. Its members are predominantly women and people of color, and hail from all corners of the planet. Together, members are building a movement to enable people of all backgrounds to achieve greater equality and opportunity.

Individual Petitioners

Individual petitioners' institutional and other organizational affiliations are provided solely for identification purposes.

Alan Hyde is Distinguished Professor and Sidney Reitman Scholar at Rutgers Law School. He has been a visiting professor at Yale, Columbia, NYU, Toronto, Michigan, Cornell, Fordham, Cardozo, and Brooklyn law schools. He is the author of Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market (2003), an early analysis of the short job tenures typical of high technology in California and their benefit for startup firms, knowledge diffusion, and technical innovation. He lectures and publishes frequently on intellectual property issues in employment, in the US and around the world. He is a member of the American Law Institute and helped shape the chapter on non-competes in the new Restatement of Employment Law.

Amy Kastely is a senior professor of law at St. Mary's University Law School and a member of the bar in Texas and New Mexico. She is a nationally recognized authority on contract law, having co-authored a widely-known text entitled Contracting Law. She also has written numerous articles exploring how law is shaped by narratives of race, gender, class, and other systems of subordination. She served as lead counsel in *Esperanza et al. v. City of San Antonio*, the first case recognizing the importance of cultural rights in public arts funding. In addition, she has represented the Esperanza and numerous community coalitions in litigation and organizing projects involving a broad spectrum of important issues, including protection of the Edward's Aquifer; the right of communities to use public streets, sidewalks, and parks for cultural events and political expression; racial bias in San Antonio's historic preservation practices; and the public's right to witness government deliberations and to hold government officials accountable to democratic values.

Ann C. McGinley is William S. Boyd Professor of Law at the University of Nevada, Las Vegas, Boyd School of Law. The co-director of the Workplace Law Program, McGinley has published three books and more than sixty law review articles and book chapters. Her most recent book is Masculinity at Work: Employment Discrimination Through a Different Lens (NYU Press, 2016). McGinley has published articles about gender effects on lawyers' workplace conditions and continues to research this topic; she is the editor of the upcoming Feminist Judgments: Rewritten Opinions in Employment Discrimination Law (Cambridge University Press, forthcoming 2020). Professor McGinley has lectured at many universities in the United States and abroad and is a Visiting Foreign Professor at Universidad Adolfo Ibañez in Santiago, Chile where she lectures annually in Spanish about U.S. sexual harassment law. She currently serves on Nevada's Task Force on Sexual Harassment and Discrimination Law and Policy.

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Barbara Bucholtz is professor of law at the University of Tulsa College of Law. She received her J.D. from Valparaiso University of Law and her LL.M. in environmental law from George Washington University (with highest honors). Prior to joining the Tulsa law faculty, she practiced corporate law, business litigation, class action litigation, and estate planning in the Chicago area and in Tulsa. She is a former law clerk for the Northern District of Oklahoma. She serves on the boards of several organizations in the business and the nonprofit sectors. Her teaching interests include contracts, sales, international private law, comparative corporate law, corporate law, securities law, international trade, American legal history and jurisprudence, the law of nonprofit organizations, and legal analysis and writing. She writes and speaks on topics that include international trade agreements, environmental law, and nonprofit associations.

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Frank Pasquale has researched and written extensively on law and political economy. He edited a special issue of Critical Analysis of Law, entitled New Economic Analysis of Law. He is the author of The Black Box Society (Harvard University Press, 2015), which develops a social theory of reputation, search, and finance, and has been translated into Chinese, Korean, French, and Serbian. The book offered critical legal commentary on algorithmic approaches to profiling, and recommended law & policy to improve the information economy. He has served on the NSF-sponsored Council on Big Data, Ethics, & Society, and has co-authored a casebook on administrative law and co-authored and authored over 50 scholarly articles.

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Karen Cross, as Associate Dean for Administration at John Marshall, develops law school policies and assists with the law school's pending acquisition by the University of Illinois at Chicago. She recently returned to the law school after taking leave to work in central administration on Northwestern University's Evanston campus. As a law student, Karen served as editor of the Harvard Civil Rights-Civil Liberties Law Review. After law school, she conducted research as a Fulbright scholar in former Yugoslavia and worked as an associate with Cleary, Gottlieb, Steen & Hamilton in New York. Since joining the John Marshall faculty, Professor Cross has taught at the Catholic University of Portugal in Lisbon, the University of San Diego's summer program in Moscow, the Central European University in Budapest, and the MBA program for Executives and International Managers at UIC. Her teaching and scholarship focuses on contract law, international economic law, arbitration, and higher education law and policy. She is a contributor to Kluwer Arbitration Blog and ASIL Insights, and her scholarship has appeared in the Journal of Collective Bargaining in the Academy (refereed), Journal of

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Pamela Foohey is an associate professor at the Indiana University Maurer School of Law since 2014. Her research centers on bankruptcy, commercial law, and consumer law. Her work primarily involves empirical studies of bankruptcy and related parts of the legal system, combining quantitative and qualitative, interview-based research. Her work in business bankruptcy focuses on non-profit entities. She also is a co-investigator on the Consumer Bankruptcy Project, a long-term research project studying persons who file bankruptcy which has been the leading empirical study of consumer bankruptcy for the past 35 years. The results of her research have been featured in top media outlets, including The New York Times, NPR, Bloomberg, and the Washington Post.

Paul Secunda is professor of law at Marquette University Law School. He teaches employee benefits law, labor law, employment discrimination law, employment law, education law, civil procedure, and trusts and estates. He is also the founder and former faculty advisor of the Marquette Benefits and Social Welfare Law Review, which began publication in 2015. Professor Secunda is the faculty advisor for the student-run Marquette University Labor and Employment Law Society (LELS).

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Rick Bales is a faculty member at of Ohio Northern University Pettit College of Law (though he will be visiting at Akron 2018-19). He has published more than eighty scholarly articles and authored or co-authored five books on employment arbitration, alternative dispute resolution in the workplace, employment law, labor law, and arbitration law. He has spoken widely on topics pertaining to innovative ways of teaching employment and labor law courses. Recent presentations have been in Berlin, Brisbane, Cartagena, Dhaka, Hanoi, Hong Kong, Manila, Milan, Moscow, Paris, Phnom Penh, Prato (Italy), Saigon, Siem Reap, and Yangon. He has twice been selected as a Fulbright Specialist, once each to Kuala Lumpur and Jakarta. He was Dean of ONU Law from 2013-16. Before coming to ONU, he was a faculty member at NKU Chase College of Law, where he was the Director of the Advocacy Center and he was Associate Dean of Faculty Development. Before that, he taught at the University of Montana Law School, Southern Methodist University Law School, and University of Houston Law School, and he litigated employment cases for Baker Botts and Baker Hostetler. He received his law degree from Cornell Law School and his B.A. from Trinity University.

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Sara Sternberg Greene studies consumer law, bankruptcy, poverty law, access to justice and tax. Broadly concerned in her scholarship with the relationship between law and inequality, she has recently focused on the role of the law in perpetuating and exacerbating poverty and inequality. Her work has been published or is forthcoming in the New York University Law Review, the Duke Law Journal, the Minnesota Law Review, and the American Bankruptcy Law Journal, among others. She has presented her Access to Justice research at the Department of Justice to the White House Legal Aid Interagency Roundtable, and along with others, integrated her research on the Earned Income Tax Credit into a federal policy proposal, The Rainy Day EITC: A Reform to Boost Financial Security by Helping Low Wage Workers Build Emergency Savings. Senators Cory Booker (D-NJ) and Jerry Moran (R-KS) adopted the proposal and are co-sponsors of a bipartisan bill proposing the Refund to Rainy Day Savings Act. She received her BA in 2002 from Yale University (magna cum laude and with distinction). She received her JD in 2005 from Yale Law School, where she received the Stephen J. Massey Prize for excellence in advocacy and served as notes editor for the Yale Law Journal and articles editor for the Yale Law and Policy Review. After clerking for Judge Richard Cudahy on the United States Court of Appeals for the Seventh Circuit, she focused on housing law and tax credit matters at the law firm Klein Hornig in Boston before beginning a Ph.D. program. She received her Ph.D. in social policy and sociology from Harvard University in 2014.

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Yvette Liebesman is a professor of law at Saint Louis University School of Law, where she is also advisor for the Intellectual Property Law concentration. Her research interests include examining restraints on an individual's Right of Publicity. Her article When Selling Your Personal Name Mark Extends to Selling Your Soul was published in the Temple Law Review.