# THE NEW LABOR ANTITRUST

ERIC A. POSNER*



---

* Kirkland & Ellis Distinguished Service Professor, Arthur and Esther Kane Research Chair, University of Chicago Law School. Thanks to Jacob Goldin, Zach Liscow, Yair Listokin, Jonathan Masur, Richard McAdams, the editor Robby Robertson, Steve Salop, two referees, and participants at workshops at NYU Law School, the University of Chicago Law School and Yale Law School, for helpful comments, and the Russell Baker Scholars Fund for financial support. Thanks also to Ellie Citron and Shivam Saran for excellent research assistance.

## INTRODUCTION

Recent years have seen a surge of litigation against employers for antitrust violations in labor markets, a traditionally rare kind of lawsuit. This litigation has resulted, to an unusual extent, from academic research, which has identified widespread anticompetitive behavior in labor markets and broadly scattered pools of labor-market concentration.

As the cases have made their way through the courts, they have been received with a mix of openness and skepticism. Both the receptive and skeptical courts recognize that antitrust law applies to labor markets as it does to other kinds of markets, such as output or product markets. But the skeptical courts see labor antitrust cases brought by workers as requiring special scrutiny. These courts have applied the rule of reason to labor cases that would be subject to the per se or quick look rule if identical conduct took place in the product market. This can be a death knell, especially in private litigation where burdensome class certification rules interact with complex market definition requirements to create logistical barriers for plaintiffs. Some courts have applied the ancillary restraints doctrine more aggressively in labor antitrust cases than in product-market cases. Several criminal cases against employers have also floundered despite good facts.[1]

Skepticism about labor antitrust is not new, nor is it confined to the courts. A thread of hostility toward labor connects the origins of antitrust law to the present, though the hostility has taken different forms. At the origin, a common view among the judiciary was that workers cartelized labor markets by forming unions:[2] antitrust law's function was to attack such cartels rather than protect workers from buy-side cartelization of labor markets by employers.[3] After the labor exemption was created to protect unions, this hostility shifted as suspicions grew that unions and employers colluded to cartelize product markets (with the unions compensated with a share of the rents). Other judges and academics believed that workers neither benefited from nor sought free labor markets, and thus were not entitled to antitrust protection.[4] Labor

---

[1] *See infra* Part III.C.

[2] *See* Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880–1930*, 66 TEX. L. REV. 919, 933–35 (1988).

[3] *See* Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. CHI. L. REV. 511, 512–13 (2023).

[4] *See infra* Part III.

markets were the domain of labor law, and federal (and state) labor policy envisioned a regulated labor market rather than a free market.

If that was the view once, it has since changed. The dominant conceptual model of labor markets and policy shifted in the 1980s. Union density collapsed, and labor markets were seen not only as competitive but as commodified. No longer a source of dignity or personal value, work was simply a cost that was incurred by people in return for money to be spent on goods and services, which would be the primary source of utility for people in their role as consumers. Because labor markets were thought to be competitive, workers were paid as little or as much as they could be paid consistent with surplus maximization and economic growth; there was little for law to do. Antitrust law would continue to play no role in labor markets, this time because it was unnecessary.

One could see this as progress: antitrust law, once used to target workers, would be locked away in the product market. But that also meant it could not be used affirmatively by workers to protect themselves from anticompetitive conduct by employers. Antitrust claims brought by workers were seen as anomalous, redundant, impractical, or—where they were accepted—relevant only because they were brought in unusual settings, most notably in the case of league sports.[5] As a result, few labor-market cases were brought, and fewer still were successful, leaving the precedent desert that the modern litigation surge has finally begun to fertilize.[6]

This surge in labor antitrust litigation is just a few years old, but its origin can be traced to 2010. In that year, the Department of Justice sued a group of Silicon Valley tech firms, including Apple, Pixar, Adobe, and Google, for agreeing not to "cold call," or solicit, one another's software engineers.[7] This horizontal agreement not to recruit workers was a market-division agreement and per se illegal under product-market precedents. The defendants settled; follow-on private litigation by the employees resulted in a large financial settlement.[8] A recent study estimates that the no-poach agreement reduced salaries by 4.8%.[9]

---

[5] *See generally* Laura Phillips-Sawyer, *Restructuring American Antitrust Law: Institutionalist Economics and the Antitrust Labor Immunity, 1890–1940s*, 90 U. CHI. L. REV. 659 (2023).

[6] *See generally* ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS (2021).

[7] *See* Final Judgment at 2, 5, United States v. Adobe Sys., Inc., No. 10-cv-01629 (D.D.C. Mar. 18, 2011).

[8] Order Granting Plaintiffs' Motion for Final Approval of Class Action Settlement with Defendants Adobe Systems Incorporated, Apple Inc., Google Inc., and Intel Corporation, In re High-Tech Emp. Antitrust Litig., No. 11-cv-02509 (N.D. Cal. Sept. 2, 2015), 2015 WL 5159441, at *3.

[9] *See* Matthew Gibson, *Employer Market Power in Silicon Valley* 4 (IZA Institute of Labor Economics, Discussion Paper No. 14843, 2022), docs.iza.org/dp14843.pdf.

In those days, the big tech companies enjoyed a good reputation and had not yet been ensnared in a succession of antitrust cases and other scandals. Yet an email trail revealed the blatant and unembarrassed conspiring of top executives, including Steve Jobs and Eric Schmidt, some of whom appeared to understand that their behavior was illegal. ("I don't want to create a paper trail over which we can be sued later," Schmidt emailed another executive.[10]) Indeed, horizontal collusion is criminal behavior. The DOJ, however, did not indict the executives but announced that it would prosecute labor-side antitrust infractions in the future. It and the Federal Trade Commission issued a Human Resources Guidance in 2016 in which the two agencies cautioned employers against violating the antitrust laws.[11] In the same year, the White House issued a policy document warning about anticompetitive behavior in labor markets.[12]

Meanwhile, an outpouring of academic literature would both overturn common assumptions about the competitiveness of labor markets and stimulate additional litigation.[13] Before then, economists who focused on antitrust law had mostly assumed that labor markets were competitive and rarely acknowledged that labor markets might be concentrated.[14] While challenges from within the subfield of labor economics were mounted in the 1990s, the new insights only slowly penetrated industrial organization (the field of economics most closely tied to antitrust), which ignored their implications for antitrust-related issues well into the 2010s.[15]

Of most immediate relevance to antitrust, there were three important developments after 2010. First, numerous studies showed that many U.S. labor markets involving tens of millions of workers were highly concentrated.[16] Several of those studies indicated that mergers in concentrated labor markets suppressed wage growth. For example, Elena Prager and Matt Schmitt

---

[10] Jeff Blagdon, *The No-Hire Paper Trail Steve Jobs and Eric Schmidt Didn't Want You to See*, THE VERGE (Jan. 23, 2013), www.theverge.com/2013/1/23/3906310/the-no-hire-paper-trail-steve-jobs-and-eric-schmidt-didnt-want-you-to-see.

[11] *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016), www.justice.gov/atr/file/903511/dl.

[12] *See* Press Release, The White House Off. of the Press Sec'y, Fact Sheet: The Obama Administration Announces New Steps to Spur Competition in the Labor Market and Accelerate Wage Growth (Oct. 25, 2016), obamawhitehouse.archives.gov/the-press-office/2016/10/25/fact-sheet-obama-administration-announces-new-steps-spur-competition.

[13] *See* David Card, *Who Set Your Wage?*, 112 AM. ECON. REV. 1075, 1075, 1082 (2022).

[14] *See id.* at 1075.

[15] For a discussion of this intellectual history, see POSNER, *supra* note 6. David Card provides further discussion. *See* Card, *supra* note 13, at 1076–77.

[16] *See, e.g.*, José Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 LAB. ECON. 101886 (2020). As Card notes, "[o]ne of the most surprising findings in the recent literature is that for many workers in many local markets the number of potential employers is relatively small, particularly when the 'market' is defined by actively searching firms." Card, *supra* note 13, at 1082.

showed that hospital mergers suppressed wage growth for medical professionals (in concentrated labor markets) but not other hospital employees like cafeteria workers (who worked in more competitive labor markets).[17] These studies apparently pushed the DOJ and the FTC to review mergers for their labor-market impacts, which they had never done before (except in some marginal instances),[18] and in 2022, the DOJ successfully blocked a merger based on its labor-market impacts for the first time.[19] In 2023, the agencies issued updated merger guidelines which include a new section on the labor-market impacts of mergers,[20] emphasizing that the analysis of the labor impacts of mergers parallels that of product markets.[21]

Second, a study conducted by Alan Krueger and Orley Ashenfelter showed that 90 out of a sample of 156 of the largest franchises used no-poach clauses in their franchise contracts as of 2016.[22] These franchises employed millions of people; subsequent empirical research would show that the no-poach clauses suppressed wages.[23] In the study's wake, Washington state sued franchises with a significant contact in that state and settled with 239 of them, who

---

[17] *See* Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV 397, 398 (2021); *see also* David Arnold, Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes (Oct. 29, 2021) (unpublished manuscript), darnold199.github.io/madraft.pdf; Efraim Benmelech, Nittai K. Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, 57 J. HUM. RES. S200 (2022); Enas Farag, Alaa Abdelfattah, Chris Compton, Anna Stansbury & Marshall Steinbaum, A Retrospective Analysis of the Acquisition of Target's Pharmacy Business by CVS Health: Labor Market Perspective (Aug. 23, 2024) (unpublished manuscript), marshallsteinbaum.org/wp-content/uploads/2024/09/target_cvs_august_2024.pdf; Marshall Steinbaum, Evaluating the Competitive Effect of the Proposed Kroger-Albertsons Merger in Labor Markets (Nov. 11, 2023) (unpublished manuscript), marshallsteinbaum.org/wp-content/uploads/2024/09/kroger_albertsons_labor.pdf.

[18] *See, e.g.*, United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir. 2017).

[19] *See* United States v. Bertelsmann SE & Co., 646 F. Supp. 3d 1, 56 (D.D.C. 2022).

[20] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, 2023 MERGER GUIDELINES § 2.10 (2023) [hereinafter 2023 MERGER GUIDELINES], www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

[21] The 2010 Horizontal Merger Guidelines took this position, albeit with unnecessary wishy-washy qualifiers: "Nor do the Agencies evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell." U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 12 (2010) [hereinafter 2010 HORIZONTAL MERGER GUIDELINES], www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

[22] Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 J. HUM. RES. S324, S328–29 (2022).

[23] Francine Lafontaine, Saattvic & Margaret Slade, No-Poaching Clauses in Franchise Contracts: Anticompetitive or Efficiency Enhancing? 35 (Sept. 9, 2024) (unpublished manuscript), papers.ssrn.com/abstract=4404155; Brian Callaci, Matthew Gibson, Sergio Pinto, Marshall Steinbaum & Matthew Walsh, The Effect of Franchise No-Poaching Restrictions on Worker Earnings 19 (June 2024) (unpublished manuscript), ssrn.com/abstract=4155577. The two papers use somewhat different methods and datasets and come to slightly different results.

agreed to drop their no-poach clauses.[24] Class actions have also been brought and are pending.[25] Using a corpus of franchise documents scraped from public online depositories, Peter Norlander found that many franchise contracts continue to contain no-poach or no-hire clauses even after the Washington litigation, though the clauses have been narrowed in many instances.[26]

Third, studies conducted by Evan Starr and various coauthors, as well as other teams of scholars, have documented the massive use of covenants not to compete by employers.[27] Noncompetes are traditionally regulated by state common law, which typically regards them as presumptively illegal but permits limited noncompetes for specialized forms of employment. The research shows that noncompetes are ubiquitous. Surveys indicate that 18–46.5% of U.S. private-sector workers—28–60 million people in today's terms—are subject to a noncompete.[28] The research suggests that noncompetes push down wages on average and produce other negative outcomes.[29] A few lawsuits

---

[24] Callaci, Gibson, Pinto, Steinbaum & Walsh, *supra* note 23, at 1.

[25] *See, e.g.*, Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247 (11th Cir. 2022); Conrad v. Jimmy John's Franchise, LLC, No. 18-cv-00133, 2021 WL 3268339 (S.D. Ill. July 30, 2021).

[26] Peter Norlander, New Evidence on Employee Noncompete, No Poach, and No Hire Agreements in the Franchise Sector 2 (May 28, 2024) (unpublished manuscript) ssrn.com/abstract=4342586. Unfortunately, it remains unclear how many franchises continue to use no-poach clauses because of the nature of the data collection; but the number appears sizable.

[27] *See generally* EVAN STARR, THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS: A BRIEF REVIEW OF THE THEORY, EVIDENCE, AND RECENT REFORM EFFORTS (2019), eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf; Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 ILR REV. 783 (2019) [hereinafter Starr, *Consider This*]; Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143 (2022); Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, 57 J. HUM. RES. S349 (2022).

[28] *See, e.g.*, Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 60 (2021); ALEXANDER J.S. COLVIN & HEIDI SHIERHOLZ, NONCOMPETE AGREEMENTS: UBIQUITOUS, HARMFUL TO WAGES AND TO COMPETITION, AND PART OF A GROWING TREND OF EMPLOYERS REQUIRING WORKERS TO SIGN AWAY THEIR RIGHTS 1–2 (2019), files.epi.org/pdf/179414.pdf.

[29] *See, e.g.*, Lipsitz & Starr, *supra* note 27, at 143–44 (finding noncompetes associated with lower earnings for low-wage workers); Balasubramanian et al., *supra* note 27, at S355–57 (finding noncompetes associated with lower earnings for high-tech workers in Hawaii); Matthew S. Johnson, Kurt Lavetti & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31929, 2023), www.nber.org/system/files/working_papers/w31929/w31929.pdf (finding noncompetes associated with lower wages for all workers in all states from 1991 to 2014); Starr, *Consider This*, *supra* note 27, at 791, 814 (2019) (finding noncompetes associated with lower wages for all workers in all states from 1996 to 2008); Axel Gottfries & Gregor Jarosch, Dynamic Monopsony with Large Firms and Noncompetes 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31965, 2023), www.nber.org/papers/w31965 (estimating that the FTC's ban on noncompetes would raise wages by 4%). Some studies find higher earnings, but these studies focus solely on high-income, specialized jobs. *See, e.g.*, Kurt Lavetti et al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RES. 1025, 1064 (2020) (finding noncompetes associated with higher earnings for physicians); Liyan Shi, *Optimal Regulation of*

have been brought against firms that have abused noncompetes on a grand scale—for example, Jimmy John's, which imposed noncompetes on low-skill sandwich makers that prohibited them from taking jobs at fast-food restaurants across much of the continental United States.[30]

The question today is whether the surge in labor antitrust cases spurred by government investigations and academic research will continue or be broken by the adverse rulings and policy skepticism. My purpose in this paper is to identify the various sources of uneasiness—not all of it yet clearly articulated—that appear to lie behind the skepticism. I hope to make progress by sorting out doctrinal confusion, clarifying the issues, and refuting some errors so that the empirical questions and policy choices can be more clearly understood. The sources of skepticism can be divided into two categories: first, skepticism about whether antitrust law is an appropriate body of law for addressing labor-market harms; and second, skepticism about whether labor market power is actually a problem. I argue that both sources of skepticism are mistaken.

The plan is as follows. Part I provides a survey of judicial developments. In Part II, I address arguments that labor antitrust claims should be disregarded or downgraded because they do not comply with the so-called consumer welfare standard, that labor antitrust claims should be recognized only if they are based on behavior that harms consumers, and that labor antitrust claims are redundant with product claims. The theme here is that antitrust law does not, and should not, treat consumer harms as more important than worker harms.

In Part III, I focus on empirical issues. Skeptics have argued that labor antitrust claims should be downgraded because labor markets are not as vulnerable to or as commonly burdened by anticompetitive behavior as product markets are. I argue that labor markets are *more* vulnerable than product markets to anticompetitive behavior and show how courts that have ruled against plaintiffs in labor antitrust cases have blundered, betraying unwarranted skepticism to labor claims.

In Part IV, I reject the related argument that labor harms are better addressed by abutting areas of the law—labor law and employment law—and therefore antitrust law is superfluous to or a poor fit for labor-market failures. In Part V, I identify some practical ways that labor antitrust claims are more difficult to enforce than product-market claims, and I propose some reforms.

---

*Noncompete Contracts*, 91 ECONOMETRICA 425, 427 (2023) (finding noncompetes associated with higher earnings for executives).

[30] *See* Complaint ¶¶ 9–23, People v. Jimmy John's Enters., LLC, No. 2016-CH-07746 (Ill. Cir. Ct. June 8, 2016).

Throughout, I will argue that judicial skepticism and skepticism within antitrust circles reflect outdated assumptions about how labor markets operate or possibly elite bias against workers. There are three such assumptions. First, labor markets are either competitive or cartelized by workers (rather than employers). Second, labor is best modeled as a cost that is compensated by a wage rather than itself a source of utility or personal value. Third, switching costs in labor markets can largely be ignored as they frequently are in product markets. Antitrust doctrine bears the influence of its roots in product-market cases, and courts need to correct its asymmetrical orientation to product markets so that they can address the realities of labor.

These assumptions come in part from the economics of the 1960s and 1970s, which had so much influence on the development of antitrust thinking today, but also from older ways of thinking that reach back to the anti-labor hostility of the early twentieth century. This hostility is reflected in an older "labor antitrust" literature that addressed the scope of antitrust liability of unions.[31] In this literature, unions were seen as cartelizers of markets—both labor and product markets—and hence unions (and their constituent workers) as defendants in antitrust cases.[32] Authors sought to reconcile antitrust law and the legal protections for unions created by the National Labor Relations Act and related laws. The new literature on labor antitrust addresses the scope of liability of employers. Employers are now seen as the potential buyer-side monopsonists or cartelizers of labor markets; the workers (who are today rarely unionized in the private sector) are the plaintiffs and the employers are the defendants. I have inserted "new" before labor antitrust in the title to emphasize this distinction but drop it in the text below.

## I. THE NARROWING OF THE LITIGATION GAP

Labor antitrust cases were as rare as hen's teeth until a few years ago. The Supreme Court recognized that the antitrust laws applied to a wage-fixing/no-poach case in 1926 involving shipowners who conspired to suppress the wages of seamen.[33] But that case was followed by only a handful of other labor antitrust cases in the following decades. The most notable of these cases involved sports leagues where, by necessity, independently owned teams publicly imposed limits on the movement of players between teams and on their

---

[31] *See, e.g.*, Douglas L. Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183 (1980). The literature seems to have expired along with the labor movement sometime in the 1980s.

[32] *Id.* at 1185.

[33] *See* Anderson v. Shipowners Ass'n, 272 U.S. 359, 365 (1926); *see also* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948) ("The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . . 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.").

compensation, thus alerting the world of the existence of restraints of trade.[34] Inexplicably, the Supreme Court invented an antitrust immunity for major league baseball employers,[35] though courts, including the Supreme Court, recognized antitrust claims against teams in other sports leagues.[36] The reports otherwise reveal only a handful of cases involving no-poach agreements, wage fixing, and exchanges of compensation information, and virtually no conventional Section 2 challenges to a dominant employer, that is, a monopsony.[37] Plenty of meaningless antitrust claims were tacked onto employment claims and dismissed.[38] No merger case was adjudicated based on its effects on labor markets.

The infrequency of labor antitrust cases over the first 130 years of antitrust law contrasted sharply with the rest of the antitrust docket. Hundreds of seller-side antitrust cases have been brought every year, including consumer class actions.[39] The DOJ and the FTC have filed a couple dozen challenges to mergers every year, always based on the impact on product markets.[40] The litigation gap between labor antitrust and other kinds of antitrust cases raise a puzzle that I have discussed elsewhere.[41]

In recent years, that gap has begun to narrow.

Starting in 2020, the DOJ brought six criminal cases against people and firms for engaging in no-poaching or wage-fixing in the healthcare and aeronautic industries.[42] The agency secured favorable rulings on its legal theories, with courts agreeing that labor antitrust violations are subject to criminal liability.[43] But most of the cases ground to a halt in 2021 or 2022, with either

---

[34] *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).

[35] *See* Fed. Baseball Club v. Nat'l League, 259 U.S. 200, 208–09 (1922).

[36] *See, e.g.*, NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021).

[37] *See, e.g.*, Todd v. Exxon Corp., 275 F.3d 191, 206 (2d Cir. 2001) (discussing the argument that sharing compensation information constitutes a Section 1 violation); *see also* POSNER, *supra* note 6.

[38] *See* Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 172 (2020).

[39] *See* Reza Rajabiun, *Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States*, 8 J. COMPETITION L. & ECON. 187, 191–93 (2012).

[40] *See* Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001–2020*, 85 ANTITRUST L.J. 1, 23–24 (2023). A partial exception was the *Anthem* case, in which the DOJ drew attention to possible upstream impacts, as the dissent noted. *See* United States v. Anthem, Inc., 855 F.3d 345, 372 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). But the focus was on the product market. *See id.* at 350–52, 357–58 (majority opinion).

[41] *See* POSNER, *supra* note 6.

[42] *See* United States v. Patel, No. 21-cr-220, 2022 WL 17404509 (D. Conn. Dec. 2, 2022); United States v. DaVita, 592 F. Supp. 3d 970 (D. Colo. 2022); United States v. Jindal, No. 20-cr-00358, 2021 WL 5578687 (E.D. Tex. 2021); United States v. Manahe, No. 22-cr-00013, 2022 WL 3161781 (D. Me. Aug. 8, 2022); Plea Agreement, United States v. VDA OC, LLC, No. 21-cr-00098 (D. Nev. Oct. 27, 2022), ECF No. 106; Order Dismissing Indictment, United States v. Surgical Care Affiliates, LLC, No. 21-cr-00011 (N.D. Tex. Nov. 15, 2023), ECF No. 204.

[43] *See Patel*, 2022 WL 17404509, at *1; *Manahe*, 2022 WL 3161781, at *1.

acquittals on the antitrust claims or other adverse rulings.[44] One defendant, a firm, pled guilty.[45] Follow-on civil litigation by affected employees may have more success.

In 2022, the DOJ brought a Section 1 case against poultry-processing companies Cargill, Sanderson, and Wayne Farms for sharing wage information about their employees—including low-wage slaughterhouse employees—and colluding in the setting of wages.[46] The scheme took place over two decades. The defendants collectively employed 90% of poultry-processing employees nationwide.[47] According to the Bureau of Labor Statistics, there were 240,255 poultry plant workers as of June 2020, earning on average $735 per week.[48] By all accounts, most jobs in those plants are exceptionally unpleasant and dangerous.[49] Cargill, Sanderson, and Wayne Farms settled the lawsuit and agreed to extensive monitoring as a condition for merger approval.[50]

In 2023, the FTC sued three companies for imposing noncompetes on their workforces under its Section 5 authority shortly after proposing a rule that banned employment covenants not to compete.[51] That rule is now final.[52]

---

[44] All of the courts accepted the application of criminal liability, which cannot be seriously doubted. For an early discussion, see Rochella T. Davis, *Talent Can't Be Allocated: A Labor Economics Justification for No-Poaching Agreement Criminality in Antitrust Regulation*, 12 BROOK. J. CORP. FIN. & COM. L. 279 (2018). One court granted a motion for judgment of acquittal. *See* United States v. Patel, No. 3:21-cr-220, 2023 WL 3143911, at *10 (D. Conn. Apr. 28, 2023).

[45] Plea Agreement, *VDA OC* (No. 21-cr-00098); Press Release, U.S. Dep't of Just., Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses (Oct. 27, 2022), www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses.

[46] *See* Complaint, United States v. Cargill Meat Sols. Corp., No. 22-cv-01821 (D. Md. July 25, 2022), 2022 WL 3083615.

[47] *See id.* at *1.

[48] *Counties with Highest Concentrations of Jobs in Poultry and Animal Slaughtering, June 2020*, BUREAU OF LAB. STATS.: TED: THE ECON. DAILY (Feb. 4, 2021), www.bls.gov/opub/ted/2021/counties-with-highest-concentrations-of-jobs-in-poultry-and-animal-slaughtering-june-2020.htm.

[49] *See Poultry Industry Workers*, CTR. FOR DISEASE CONTROL (Apr. 8, 2014), archive.cdc.gov/www_cdc_gov/niosh/topics/poultry/default.html; Jessica Ramsey & Kristin Musolin, *High Prevalence of Carpal Tunnel Syndrome Among Poultry Workers*, CTR. FOR DISEASE CONTROL (Apr. 6, 2015), blogs.cdc.gov/niosh-science-blog/2015/04/06/poultry-workers-cts.

[50] *See* Modified Final Judgment, United States v. Cargill Meat Sols. Corp., No. 22-cv-01821 (D. Md. Apr. 9, 2024), ECF No. 85.

[51] *See* Complaint, Prudential Sec., Inc., FTC Docket No. C-4787 (Feb. 23, 2023); Complaint, O-I Glass, Inc., FTC Docket No. C-4786 (Feb. 21, 2023); Complaint, Ardagh Group S.A., FTC Docket No. C-4785 (Feb. 21, 2023); Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition. The FTC also brought a no-poach case. *See* Complaint, Your Therapy Source, LLC, FTC Docket No. C-4689 (Oct. 26, 2019).

[52] FTC Non-Compete Clause Rule, 16 C.F.R. § 910 (2024); *cf.* ATS Tree Servs., LLC v. FTC, No. CV 24-1743, 2024 WL 3511630, at *19 (E.D. Pa. July 23, 2024) (holding that "Congress properly delegated authority to the FTC" to promulgate the Non-Compete Clause Rule). *But see*

The DOJ successfully challenged the merger of Penguin Random House and Simon and Schuster in 2022 under Section 7 of the Clayton Act based on the impact on the labor market. The agency persuaded a court that the merger, which would have reduced the number of major commercial publishers from five to four, would excessively concentrate the market for top-selling authors.[53] The FTC also opposed a hospital merger in Abilene, Texas, that would have resulted (and did result, as it turns out) in a single corporation controlling 92.6% of the market for registered nurses.[54] In early 2024, the FTC filed a complaint opposing the merger of Kroger and Albertsons, two larger grocery chains, based in part on the impact of labor markets.[55] And later that year, the DOJ sued to block a merger between UnitedHealth and Amedisys, a large home health and hospice server provider, in part on the grounds that the merger would substantially lessen competition in the labor markets for nurses who provide home health care and hospice servers.[56]

There have been about a dozen private Section 1 cases since 2020, mostly involving no-poach or no-hire agreements and a few involving wage-fixing agreements. A partial list includes lingering franchise no-poach cases arising from the Krueger-Ashenfelter study,[57] a case brought by truck drivers against trucking companies who agreed to refrain from poaching drivers who had not paid off (allegedly) excessive training loans,[58] an agreement among two universities not to poach each other's faculty,[59] an agreement among travel nursing agencies not to poach each other's staff,[60] the civil case against the poultry-processing industry mentioned earlier,[61] a no-poach conspiracy involving a construction contractor and three staffing agencies,[62] a no-poach

---

Ryan, LLC v. FTC, No. 24-cv-00986, 2024 WL 3879954, at *14 (N.D. Tex. Aug. 20, 2024) (declaring the rule "unlawful" and setting it aside), *appeal filed*, Notice of Appeal, *Ryan, LLC*, No. 24-cv-00986 (Oct. 18, 2024), ECF. No. 213.

[53] United States v. Bertelsmann SE & Co., 646 F. Supp. 3d 1 (D.D.C. 2022).

[54] Press Release, Fed. Trade Comm'n, Staff Submission to Texas Health and Human Services Commission Regarding the Certificate of Public Advantage Applications of Hendrick Health System and Shannon Health System 37 (Sept. 11, 2020), www.ftc.gov/news-events/news/press-releases/2020/09/ftc-staff-submits-public-comment-texas-opposing-certificate-public-advantage-applications.

[55] *See* Complaint, FTC v. Kroger Co., No. 24-cv-00347 (D. Or. Feb. 26, 2024); *see also* Complaint 20–22, Colorado *ex rel.* Weiser v. The Kroger Co., No. 2024CV30459 (Colo. Dist. Ct. Feb. 14, 2024) (alleging that Kroger and Albertsons also engaged in horizontal collusion by agreeing not to hire one another's workers during labor strikes).

[56] *See* Complaint, United States v. UnitedHealth Grp. Inc. ¶¶ 9, 13 15, 18, 67–70, No. 1:24-cv-03267 (D. Md., Nov. 12, 2024).

[57] Krueger & Ashenfelter, *supra* note 22.

[58] Markson v. CRST Int'l, Inc., No. 17-cv-01261, 2022 WL 790960 (C.D. Cal. Feb. 24, 2022).

[59] Binotti v. Duke Univ., No. 20-cv-470, 2021 WL 5366877 (M.D.N.C. Aug. 30, 2021).

[60] Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102 (9th Cir. 2021).

[61] Jien v. Perdue Farms, Inc., No. 19-cv-2521, 2020 WL 5544183 (D. Md. Sep. 16, 2020); *see also supra* notes 46–50 and accompanying text.

[62] Raoul v. Elite Staffing, Inc., 210 N.E.3d 188 (Ill. 2022).

conspiracy between a department store and luxury brands,[63] and other cases.[64] Some of these cases have settled favorably for plaintiffs or are doing well in court, while others have faltered. I will discuss them in more detail below.

Athletes have brought a number of sports league cases under Section 1 or Section 2. In *NCAA v. Alston*, student athletes challenged restrictions on player compensation.[65] In *House v. NCAA*, student athletes sought damages for use of their name, image, and likeness.[66] In more recent cases, "volunteer" coaches (meaning coaches paid $0 under NCAA rules) have sued for damages,[67] several state attorney generals and the DOJ have challenged transfer restrictions,[68] and students have sued over prize money restrictions.[69] Section 2 lawsuits were brought against Ultimate Fighting Championship (UFC) (a mixed martial arts (MMA) fight promotor)[70] and the Professional Golf Association (PGA) Tour for monopoly (that is, monopsony) maintenance.[71] The UFC allegedly bound elite MMA fighters with exclusive contracts to fight in, promote, and associate themselves with UFC events and (effectively) none others.[72] The PGA Tour allegedly expelled members who agreed to play in tournaments hosted by the startup competitor LIV league, thus preventing that league from gaining the traction needed to challenge the PGA Tour.[73] A similar case was brought against an international swimming league that tried to prevent its members from competing in tournaments sponsored by other organizations.[74]

In addition to the case law, administrative action has tackled labor antitrust. In 2021, President Biden issued an executive order that encouraged agencies to bring labor cases.[75] Subsequently, the DOJ and the FTC updated the merger

---

[63] Giordano v. Saks Inc., 654 F. Supp. 3d 174, 202–03 (E.D.N.Y. 2023), *appeal filed*, No. 23-600 (2nd Cir. Apr. 17, 2023).

[64] *See, e.g.*, Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066, 1073 (D. Colo. 2016) (claims against "organizations that are formally designated by the U.S. Department of State (DOS) as the exclusive entities permitted to recruit and place *au pairs* with host families in the United States under the J-1 Visa program") (footnote omitted). Additional cases are discussed *infra*.

[65] 141 S. Ct. 2141 (2021).

[66] 545 F. Supp. 3d 804 (N.D. Cal. 2021); *see also* Tennessee v. NCAA, No. 24-cv-00033, 2024 WL 464164 (E.D. Tenn. Feb. 6, 2024).

[67] *See, e.g.*, Smart v. NCAA, No. 22-cv-02125 (E.D. Cal. July 27, 2023) (denying motion to dismiss).

[68] *See* Complaint for Injunctive Relief, Ohio v. NCAA, No. 23-cv-00100 (N.D. W. Va. Dec. 7, 2023).

[69] *See* Complaint, Brantmeier v. NCAA, No. 24-cv-00238 (M.D.N.C. Mar. 18, 2024).

[70] *See* Le v. Zuffa, LLC, 216 F. Supp. 3d 1154 (D. Nev. 2016).

[71] *See* Mickelson v. PGA Tour, Inc., No. 22-cv-04486, 2022 WL 3229341 (N.D. Cal. Aug. 10, 2022).

[72] *See Le*, 216 F. Supp. 3d at 1159–60.

[73] *See Mickelson*, 2022 WL 3229341, at *1.

[74] *See* Shields v. Fed'n Internationale de Natation, 649 F. Supp. 3d 904 (N.D. Cal. 2023).

[75] Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021).

guidelines so that they now include a section on labor.[76] They also issued draft Hart-Scott-Rodino rules revisions that would require firms to disclose employment information when they declare an intention to merge,[77] but this "labor screen" was not ultimately adopted.[78] The agencies have also entered memoranda of understanding with the National Labor Relations Board, the Department of Labor, and other agencies that are designed to enhance cooperation among the agencies where the jurisdictions over labor markets overlap.[79]

Outside the United States, a labor antitrust movement has also begun. Over the last several years, investigations and cases have been brought in Europe and Latin America despite less favorable law in some countries.[80] In Canada, the law was amended to permit criminal cases against employers for conspiring not to poach employees.[81] Research on labor markets in foreign countries has found high levels of concentration and anticompetitive practices that resemble those found in U.S. labor markets.[82]

---

[76] *See* 2023 MERGER GUIDELINES, *supra* note 20, § 2.10; *see also id.* §§ 4.3.B, 4.3.D.8.

[77] *See* Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178, 42197–98 (proposed June 29, 2023) (codified in final form at 16 C.F.R. pts. 801 & 803).

[78] *See* Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter Regarding Amendments to the Hart-Scott-Rodino Rules and Premerger Notification Form and Instructions 1 (Oct. 10, 2024), www.ftc.gov/system/files/ftc_gov/pdf/statement-bedoya-khan-slaughter-hsr-rule.pdf; *Final Rule: Premerger Notification; Reporting and Waiting Period Requirements*, FED. TRADE COMM'N (Oct. 7, 2024), www.ftc.gov/legal-library/browse/federal-register-notices/final-rule-premerger-notification-reporting-waiting-requirements. Despite the removal of the labor screen, the agencies "warn[ed] that parties should expect labor questions on every future Second Request." Alexander Okuliar et al., *FTC Adopts Final HSR Rules, Substantially Expanding M&A Filing Requirements for Parties*, MORRISON FOERSTER (Oct. 13, 2024), www.mofo.com/resources/insights/241013-ftc-adopts-final-hsr-rules-substantially.

[79] *See, e.g.*, Memorandum of Understanding Between the U.S. Department of Justice and the National Labor Relations Board (July 26, 2022), www.justice.gov/media/1235251/dl?inline. For discussions, see IOANA MARINESCU & JAKE ROSENFELD, WORKER POWER AND ECONOMIC MOBILITY: A LANDSCAPE REPORT (2022), www.workrisenetwork.org/sites/default/files/2022-08/correctedworker-power-economic-mobility-landscape-report.pdf; Hiba Hafiz & Ioana Marinescu, *Labor Market Regulation and Worker Power*, 90 U. CHI. L. REV. 469 (2023).

[80] *See generally* Eric Posner & Cristina Volpin, *No-Poach Agreements: An Overview of EU and National Case Law*, CONCURRENCES (May 4, 2023), www.concurrences.com/en/bulletin/special-issues/no-poach-agreements/no-poach-agreements-an-overview-of-eu-and-national-case-law.

[81] Competition Act, R.S.C. 1985, c C-34, §§ 45(2)–(3), amended by S.C. 2022, c 10, § 257(1) (Can.).

[82] *See, e.g.*, Filippo Passerini, *Concentration and Mergers: Evidence from Italian Labor Markets* (Univ. of Bologna, Working Paper No. 186, 2023), laboratoriorevelli.it/sites/default/files/documents/papers/wp_186.pdf (finding that mergers in concentrated markets harm workers in Italy); Ioana Marinescu, Ivan Ouss & Louis-Daniel Pape, *Wages, Hires, and Labor Market Concentration*, 184 J. ECON. BEHAV. & ORG. 506 (2021) (discussing concentration and wages in France); Tito Boeri, Andrea Garnero & Lorenzo Luisetto, *Non-Compete Agreements in a Rigid Labour Market: The Case of Italy*, (IZA Inst. of Lab. Econ., Discussion Paper No. 16021, 2023), ssrn.com/abstract=4396108 (examining noncompetes in Italy); David W. Berger, Kyle F. Herkenhoff, Andreas R. Kostøl & Simon Mongey, *An Anatomy of Monopsony: Search Frictions,*

The overall picture is one of halting progress. Cases are being brought but not a large number of cases. I now turn to the scholarly and judicial reception.

## II. CONSUMER WELFARE

Antitrust law is sometimes said to be governed by a "consumer welfare standard," and if that is the case, one might think that consumers are the primary concern of antitrust law. That view could lie beyond hesitation or skepticism about labor antitrust. Part A explains that this view is a misunderstanding of the law, and that it makes no sense on its own terms or on the terms of the economic theory that was initially used to justify the consumer welfare standard. A related, more sophisticated argument is that antitrust law should give priority to consumer welfare because lawsuits that benefit consumers also benefit workers, and there are practical reasons to narrow the scope of liability. Part B rejects this argument as well: antitrust law that limited liability to defendants who harmed consumers would not adequately protect workers. Part C argues that standard antitrust theory would treat consumer and labor claims the same; Part D, however, argues that because people's well-being depends on work in subtle ways that have traditionally escaped antitrust liability, more resources should be committed to labor antitrust than to consumer-side antitrust.

### A. ANTITRUST LIABILITY DOES NOT REQUIRE CONSUMER HARM

Robert Bork famously argued that the goal of antitrust law is "consumer welfare." He actually meant what economists call "total surplus," or allocative efficiency; he did not distinguish consumers from other agents.[83] In various opinions, the Supreme Court has endorsed the consumer welfare standard,

---

*Amenities and Bargaining in Concentrated Markets* (Nat'l Bureau of Econ. Rsch., Working Paper No. 31149, 2023) (Norway), www.nber.org/papers/w31149; Chiara Cazzuffi, Mariana Pereira-López, Irving Rosales & Isidro Soloaga, *Monopsony Power and Labor Income Inequality in Mexico* (Inter-Am. Dev. Bank, Working Paper 1339, 2023), publications.iadb.org/en/monopsony-power-and-labor-income-inequality-mexico (Mexico); Francesco Amodio, Pamela Medina Quispe & Monica Morlacco, *Labor Market Power, Self-Employment, and Development*, (Structural Transformation & Econ. Growth, Working Paper No. 016, 2023) (Peru), steg.cepr.org/publications/labor-market-power-self-employment-and-development; Gregor Jarosch, Jan Sebastian Nimczik & Isaac Sorkin, *Granular Search, Market Structure, and Wages*, REV. ECON. STUD. (forthcoming 2024) (Austria); Julian Alves, Bruno Serra, Jason Greenberg, Yaxin Guo, Ravija Harjai & John Van Reenen, *Labour Market Power: New Evidence on Non-Compete Agreements and the Effects of M&A in the UK* (Ctr. for Econ. Performance, Discussion Paper No. 1976, 2024) (finding that 26% of workers are covered by noncompetes in the United Kingdom). On monopsony in foreign countries generally, see Francesco Amodio, Emanuele Brancati, Peter Brummund, Nicolás de Roux & Michele Di Maio, *Global Labor Market Power* (IZA Inst. of Lab. Econ., Discussion Paper No. 16823, 2024).

[83] ROBERT BORK, THE ANTITRUST PARADOX 66 (1978) ("The Sherman Act was clearly presented and debated as a consumer welfare prescription.").

citing Bork, but typically in dicta and with little explanation.[84] As a result, some commentators have inferred that only consumers can be victims of antitrust liability, and thus workers cannot be, or cannot be if consumers are benefited by the conduct that harms workers, and some courts seem to lean in this direction as well.[85] Even before the advent of Chicago School thinking, some academics claimed that antitrust law regulated "production" or "output," and not inputs such as labor. This view asserted that labor markets were not governed by market principles as a matter of federal policy and were thus not governed by antitrust law.[86] Proponents of that view thus in a roundabout way endorsed the consumer welfare standard before the term entered the antitrust lexicon.

There is no principle in antitrust law that holds that antitrust law protects only consumers or buyers.[87] The Supreme Court has ruled that the antitrust laws apply to anticompetitive behavior by employers in labor markets on several occasions, the first in 1926.[88] And while there were not many labor-market cases until recently, input-market cases were common, and no court has held that buyer-side cartels are immune to antitrust liability if their victims are workers rather than firms.[89] Workers are just sellers of labor. Bork himself did not appear to mean to limit the protection of antitrust law to consumers; he attached the "consumer welfare" label to the efficiency or total surplus standard used by Oliver Williamson in a paper on merger evaluation.[90] That standard does not distinguish impacts on workers and consumers. Nor has the Supreme

---

[84] *See* Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010).

[85] *See* Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. CHI. L. REV. 381 (2020); William Jackson, *No Harm No Foul?: The Remnants of Pure Consumer Harm in Monopsony Cases Under the Sherman Act*, 12 AM. U. BUS. L. REV. 121 (2023); Gregory Day, *Anticompetitive Employment*, 57 AM. BUS. L.J. 487 (2020). For a discussion of courts that have imposed stricter standards in labor cases, see *infra* Part III. For discussions of the consumer welfare standard, see, e.g., Salop, *supra* note 84; Louis Kaplow, *On the Choice of Welfare Standards in Competition Law* (Harvard John M. Olin Ctr. for L., Econ., & Bus., Discussion Paper No. 693, 2011). For a judicial example, see *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2022 WL 2316187 (N.D. Ill. Jun. 28, 2022), *rev'd*, 81 F.4th 699 (7th Cir. 2023), which I will discuss *infra*.

[86] *See* Robert H. Jerry, II & Donald E. Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. REL. L.J. 173, 200–05 (1984) (drawing conclusions based on legislative history and what they call national labor policy).

[87] *See* Herbert Hovenkamp & Fiona Scott Morton, *The Life of Antitrust's Consumer Welfare Model*, PROMARKET (Apr. 10, 2023), www.promarket.org/2023/04/10/the-life-of-antitrusts-consumer-welfare-model.

[88] *See supra* note 33 and accompanying text; *see also* NCAA v. Alston, 141 S. Ct. 2141, 2154 (2021) ("Nor does the NCAA suggest that, to prevail, the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) markets as well as in its buyer-side (or labor) market.").

[89] For some standard Supreme Court statements, see *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), and *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

[90] *See* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968); BORK, *supra* note 83, at 107 (explaining Williamson's graph).

Court (or any other court) ever said that the consumer welfare standard prevents workers or other suppliers from obtaining remedies under antitrust law.

The relevant antitrust statutes do not distinguish among different types of markets.[91] Section 1 of the Sherman Act prohibits unreasonable "restraints of trade," a common law phrase that has been applied to conduct in labor markets (for example, covenants not to compete in employment contracts) as well as to product markets. Section 2 applies to monopolies and, to be fair, does not mention (buyer-side) monopsonies, but the latter term had not been invented yet, while the concept was familiar as far back as Adam Smith.[92] Section 7 of the Clayton Act refers to mergers or acquisitions "in any line of commerce,"[93] which appears to mean, and has been interpreted by the courts to mean, any market of whatever kind.[94] And so from the outset, courts have applied antitrust law to all kinds of markets without distinction.[95] Commentators mostly agree that the consumer welfare standard, whatever it means, is not limited to consumers.[96]

Antitrust theory also makes no distinction among types of markets (input, output, labor, goods, or services).[97] Bork and others who believed that the goal of antitrust law was efficiency would not have had any basis to argue that only product markets should be efficient while labor markets should be cartelized. Indeed, Bork and others writing in the Chicago School tradition criticized unions for cartelizing labor markets.[98] More traditional antitrust theories that insist that the goal of antitrust is competition rather than efficiency, or social welfare or the public interest or some such thing, also provide no reason for distinguishing between labor and product markets or input and output markets—all of them should be competitive or welfare enhancing to the extent possible. Nor would the well-being of consumers count for more than that of workers in any reasonable social-welfare function or conception of the social good. Consumers and workers are all people—all workers are consumers, and

---

[91] The labor exemption in the Clayton Act has been held to apply to all antitrust statutes. *See* Hovenkamp, *supra* note 2.

[92] *See* ADAM SMITH, THE WEALTH OF NATIONS 70–71 (1776). The term was coined by Joan Robinson in JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 215 (1933).

[93] 15 U.S.C. § 18.

[94] *See* Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?*, 43 J. CORP. L. 119, 120 (2017) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)).

[95] *See, e.g.*, Swift & Co. v. United States, 196 U.S. 375 (1905) (recognizing a claim against buyers of meat); *Mandeville Island Farms*, 334 U.S. 219, 235–42 (examining the "restrictive and monopolistic effects" of a purported conspiracy in the sugar beet industry).

[96] *See, e.g.*, Scott C. Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 2078, 2091 (2018); Hovenkamp & Morton, *supra* note 87.

[97] However, there are specialized competition-law regimes for some industries, e.g., banking. *See* Harry First & Spencer Weber Waller, *Bespoke Antitrust*, 68 S. D. L. REV. 468 (2023).

[98] *See, e.g.*, GEORGE J. STIGLER, THE THEORY OF PRICE 207–08 (3d ed. 1966).

nearly all consumers are, were, or will be workers—and the well-being of people counts the same regardless of the particular social or economic role that they play at a particular time. Consumer surplus and producer surplus are dollars that can be used to buy goods or services, or they are the enjoyment of those goods and services, or they are other intrinsic benefits of working or consuming; they do not count more or less depending on whether one obtains those benefits from working or consuming.

There *are* a number of labor antitrust cases in which courts appear to have relieved defendants of antitrust liability for harm to workers (or other input providers) because of benefits to consumers.[99] For example, in *Deslandes v. McDonald's*, which I will discuss below, the district court said that the no-poach clause was not illegal if the harm to workers was offset by lower burger prices.[100] Some of these cases may show an anti-labor bias; some of them may be wrongly decided. But contrary to some commentary,[101] these cases do not all reflect an anti-labor interpretation of the consumer welfare standard. These cases involve the rule of reason, where a court must weigh the harm caused by a restraint of trade against the benefits to competition. The restraint harms workers; the defendant argues, however, that the restraint benefits competition in the product market and should therefore be allowed. Some commentators argue that courts should not recognize this type of "out-of-market" defense because of the difficulty of netting out benefits and costs across markets.[102] Indeed, the court of appeals in *Deslandes* reversed the lower court because, in the words of Judge Easterbrook, "benefits to consumers (increased output)" do not justify "detriments to workers (monopsony pricing)."[103]

The question of whether out-of-market benefits should be counted is different from the question of whether antitrust law is, or should be, biased in favor of consumers and against workers. There is no case that explicitly says that out-of-market benefits can be used only for defendants whose restraints hurt workers and benefit consumers, and not for defendants whose restraints hurt consumers and benefit workers, though perhaps such a view can be read into some opinions. But if so, there is no basis in law for such a view. Either out-of-market benefits should not count in defense of restraints or they should count; in either case, consumers and workers are treated the same.

---

[99] *See generally* Hafiz, *supra* note 85, at 394–98; Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: Rejecting Multi-Market Balancing as a Justification for Anticompetitive Harms to Workers*, 90 U. CHI. L. REV. 273 (2023).

[100] *See infra* Part III.F (discussing Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2022 WL 2316187 (N.D. Ill. Jun. 28, 2022), *rev'd*, 81 F.4th 699 (7th Cir. 2023)). I will discuss some other anti-labor results below as well.

[101] *See, e.g.*, Hafiz, *supra* note 85.

[102] *See, e.g.*, Alexander & Salop, *supra* note 99, at 297–305. The courts have (inconsistently) taken this view. *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

[103] Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023).

### B. ANTITRUST LIABILITY FOCUSED ON CONSUMER HARM DOES NOT ADEQUATELY PROTECT WORKERS

A related argument is that antitrust actions brought by consumers (or buyers) suffice to deter firms from engaging in labor harms or to punish firms for doing so. Antitrust law is crude at the best of times, and so the idea here is that the consumer welfare standard is a pragmatic way to prevent redundant or unnecessarily complex litigation—similar to rules like *Illinois Brick* and *Associated General Contractors* (*AGC*), which put limits on the reach of antitrust standing in order to keep litigation within bounds.[104]

Richard Epstein makes this point in the course of arguing that the DOJ and the FTC should not review mergers for their impacts on labor markets. He claims that

> any firm that has high levels of monopsony in labor markets will likely have high levels of monopoly profits in product and service markets. The ability to deal with the product market is far easier, which means that there is no strong case for seeking to include in merger evaluations a detailed examination of the multiple labor markets in which many national and global firms operate.[105]

The picture he has in mind may be, for example, a manufacturer operating factories in many labor markets around the country. If that manufacturer seeks to merge with another, why should the agencies evaluate multiple labor markets rather than the single national market into which the merging parties sell their goods?

This argument is wrong. Agencies already evaluate all relevant markets in which merging parties operate; they are required to by the law, which bans mergers that substantially lessen competition in any market. Manufacturers—and nearly all firms—operate in multiple product markets as well as labor markets. And while Epstein is right that it is often more practical for agencies to focus on a few markets affected by a merger than all markets, it can be more practical to focus on labor markets than on product markets.[106]

The Penguin Random House/Simon & Schuster merger is a case in point.[107] The DOJ argued that the merger violated the Clayton Act because

---

[104] *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 746–47 (1977); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 545–46 (1983).

[105] Richard A. Epstein, *The Application of Antitrust Law to Labor Markets - Then and Now*, 15 N.Y.U. J.L. & LIBERTY 327, 387–88 (2022).

[106] *See* Eric A. Posner, *Antitrust and Labor Markets: A Reply to Richard Epstein*, 15 N.Y.U. J.L. & LIBERTY 389 (2022).

[107] United States v. Bertelsmann SE & Co., 646 F. Supp. 3d 1 (D.D.C 2022).

competition would decline in the labor or input market.[108] Authors would be able to sell manuscripts to four rather than five major commercial sellers, with the Herfindahl-Hirschman Index (HHI) increasing from 2,220 to 3,111.[109] Detailed evidence showed that Penguin and Simon & Schuster frequently bid against each other for authors' books; a merger would have reduced the number of bidders in the auctions, resulting in lower prices for authors.[110] It may well have been the case that the merger would also have reduced output and raised prices in the product market. Paid less by publishers, many authors may have stopped writing books. But if authors are paid a percentage of sales revenues as royalties, then a lower royalty will lead to lower book prices. And the publishers may have been constrained from raising prices by competition from other firms for readers' dollars—say, magazine publishers, online content providers, or other purveyors of information and entertainment. Whether or not that was the case, proof of harm in the labor market—and in just one of several labor markets—sufficed to block the merger.

Herbert Hovenkamp makes an argument that reflects some of Epstein's worries but focuses on the question of the proper standard to use for evaluating antitrust claims.[111] Like Epstein, he acknowledges that antitrust law applies to labor; unlike Epstein, he believes that the application of antitrust law to labor is important and that labor antitrust enforcement has been inadequate.[112] Hovenkamp's worry is that some antitrust commentators, in emphasizing goals other than consumer welfare (or output, his preferred standard), including the interests of workers, may end up hurting workers as well as consumers.[113]

Hovenkamp argues that we should care most about output because workers as well as consumers benefit from output. "The demand for labor is almost entirely derivative of product output."[114] If a seller cartel raises prices and thus reduces demand, fewer goods will be produced for sale and so workers will be employed and paid less. As he argues,

> *all* of labor has a stake in the size of the product market. A practice that results in reduced product output harms labor just as certainly as it harms consumers—and perhaps more to the extent that substitution and monopoly avoidance techniques often work less well in labor markets than in consumer markets.[115]

---

[108] *Id.* at 11, 23.
[109] *Id.* at 37.
[110] *Id.* at 39.
[111] Hovenkamp, *supra* note 3.
[112] *Id.* at 511, 516.
[113] *Id.* at 527.
[114] *Id.* at 520.
[115] *Id.* at 543.

And indeed, a recent study dramatically confirms that DOJ lawsuits—probably all of them challenging product-market conduct—benefited workers by increasing employment and average wages.[116]

But Hovenkamp's dictum gives the misleading impression that one side of the market takes priority over the other. In fact, the product output is derivative of labor as well. The two kinds of market depend on each other and cannot exist without the other; the identity of a party as a "buyer" rather than a "seller" is just an accident of the nature of the consideration that is exchanged. If labor markets become more efficient, output increases, and consumers benefit. Indeed, workers are paid more, and in their capacity as consumers gain more money to spend. Is it possible that collusion by employers that harms employees could benefit consumers? In previous work, I have argued that such cases are likely to be rare.[117] According to the classical model of monopsony, anticompetitive behavior that harms workers will also harm consumers. Wage suppression causes workers to drop out of the market, resulting in lower output (and higher prices). If there is no conflict between worker welfare and consumer welfare, then an output or consumer welfare standard is adequate for labor antitrust.

This view may be too simple. One reason is the practical consideration we saw before: it may turn out that in any particular case a labor market yields evidence more readily than a product market. To define a market, one must examine substitute opportunities for agents; in the Penguin Random House case, it turned out to be easier to assess the practical substitute employment opportunities for authors than the practical substitute consumption opportunities for book readers.[118] The DOJ might have lost the case under an output or consumer welfare standard.

The second problem is less significant but has attracted some discussion. In an influential paper on the sell-side impact of mergers, Nancy Rose and Scott Hemphill observe that under a class of models generally known as Nash, bargaining leverage, or countervailing power models, a merger between buyers that harms sellers can benefit or leave unharmed buyers on the other side of the market—that is, customers of the merging parties.[119] For example, if Walmart and Target merge (or, for that matter, engage in buy-side collusion), they could force down their suppliers' prices and pass on some of the cost savings to consumers (for example, to obtain market share from Amazon). While Hemphill

---

[116] *See* Tania Babina, Simcha Barkai, Jessica Jeffers, Ezra Karger & Ekaterina Vokova, *Antitrust Enforcement Permanently Increases Economic Activity* 3, 5–6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31597, 2023).

[117] *See* POSNER, *supra* note 6.

[118] *See supra* notes 107–10 and accompanying text.

[119] *See* Hemphill & Rose, *supra* note 96, at 2093–94.

and Rose's paper focuses on firms, they note that their analysis applies to mergers between employers as well: such a merger could harm workers and benefit consumers for the same reason.[120] Similarly, in a recent paper on labor antitrust, Douglas Melamed and Steven Salop discuss a model in which the employer and a collectivity of workers (similar to a union) negotiate a wage and the employer retains control over the level of employment.[121] If the workers have bargaining power and the wage starts above the competitive rate, an employer who gains bargaining power may be able to push it down to the competitive rate, resulting in higher output and lower prices for consumers.[122] (If the employer gains too much bargaining power, consumers could eventually be hurt, unless the employees' supply curve is perfectly elastic.[123])

Thus, in bargaining-leverage or countervailing-power models, employer monopsony or collusion that harms workers can benefit consumers or not harm them. And that means that an antitrust standard focused entirely on impacts on consumers could in some cases excuse firms that cause labor harm from antitrust liability.

However, as I will argue in the next Part, the bargaining-leverage model is a poor fit for labor antitrust; and even if there are cases where harms in one market may be offset by benefits in another, that is not a basis for excusing liability under traditional antitrust principles. Output *or* input reductions produce antitrust liability.[124]

### C. LABOR/CONSUMER SYMMETRY

Why shouldn't employers be allowed to collude against workers if collusion benefits consumers, or at least benefits consumers more than workers are harmed?

This isn't the law, but a few comments are in order. If the goal of antitrust law is to deter or punish restraints that reduce competition and cause harm to those who are the subject of the restraint—a common view—then labor and consumer harm should be treated symmetrically. The side of the market on which the victim is located makes no difference. After all, if product-side

---

[120] *See id.* at 2084–85.

[121] *See generally* A. Douglas Melamed & Steven C. Salop, *An Antitrust Exemption for Workers: And Why Worker Bargaining Power Benefits Consumers, Too*, 85 ANTITRUST L.J. 739 (2024).

[122] *See* Steven C. Salop, *Countervailing Exploitative Pricing with Joint Negotiation Entities: An Economic Approach to a Neo-Brandeisian Goal*, 87 ANTITRUST L.J. (forthcoming 2025), ssrn.com/abstract=4948833.

[123] *See* Melamed & Salop, *supra* note 121, at 744–62.

[124] *Cf.* Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023) (reasoning that "benefits to consumers (increased output)" do not justify "detriments to workers (monopsony pricing)").

collusion that harms consumers benefits workers, that would not excuse the defendant from liability. Indeed, collusion between unions and employers to extract rents from consumers is illegal.[125]

The alternative view is that the goal of antitrust law is to advance a broader social goal like efficiency, social welfare, fairness, or the "public interest," however defined.[126] To keep the discussion within bounds, imagine that efficiency is the goal. Efficiency would be indifferent between product-side and labor-side antitrust. Anticompetitive behavior on either side of the market pushes prices (wages) away from the competitive rate, yielding allocative inefficiency.

As noted above, however, economists have frequently discussed bargaining models in which anticompetitive behavior by employers against workers can benefit consumers, producing a net gain. This has led both to doctrinal questions about whether the same legal standards should be applied to labor antitrust and product-market antitrust[127] and to normative questions about whether labor antitrust may be undesirable. Some labor antitrust skepticism may reflect an idea that bargaining models distinguish labor antitrust from product-market antitrust.

If so, this is mistaken. Bargaining models also apply to product-market antitrust. But they are not thought to undermine the legal consensus that monopolies and cartels cause ex post social harm. Bargaining models are most appropriate in narrow conditions where the parties are few in number—either individual firms (or persons), or a small number of them, negotiating with each other—as they assume that the bargainers negotiate prices and quantities.[128] They are used in input markets to analyze monopsony settings in which a large firm like Walmart exercises monopsony power over a small number of suppliers. They are used in output markets to analyze "countervailing power" settings in which (for example) merging entities confront a powerful buyer.[129] They are not appropriate for product-market cases in which a monopolist or cartel sells to a large number of unorganized consumers, or labor-market cases in which a single employer or a cartel buys labor from a large number of unorganized workers. In those markets, the seller or buyer typically sets the price

---

[125] *See infra* Part IV.B.

[126] *See, e.g.*, Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012).

[127] *See* Hemphill & Rose, *supra* note 96.

[128] *See* John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485, 1500–12 (2012). In Melamed & Salop, *supra* note 121, the parties bargain over price and the employer chooses quantity.

[129] *See, e.g.*, David Dranove, Dov Rothman & David Toniatti, *Up or Down? The Price Effects of Mergers of Intermediaries*, 82 ANTITRUST L.J. 643 (2019).

or wage, the counterparty takes or leaves it, and relatively little bargaining takes place.[130]

Accordingly, there is no reason to believe that labor antitrust cases systematically, or even occasionally, reduce consumer welfare or broader measures of social welfare. Nor is there reason to believe that labor-market cases are less likely to be welfare enhancing than product-market cases. The one possible exception is that where workers form unions or professional organizations, they may cause harm that employers (or other buyers) are justified in countering through collusion. I will address this argument in Part IV.B.

### D. HARM TO WORKERS IS DIFFERENT FROM HARM TO CONSUMERS

There are additional reasons for doubting that consumer cases are more important than labor cases. These reasons are related not to the structure of bargaining at the time that the parties match up, but to the fundamental difference between work and consumption.

For millennia, philosophers and religious thinkers have seen work as essential to human flourishing, dignity, meaning, and sociability.[131] The Universal Declaration of Human Rights recognized a right to work, including "just and favourable conditions of work" and "just and favourable remuneration."[132] There is no similar philosophical or religious tradition celebrating a right to consume, which has usually been seen to give rise to dangers of overindulgence, status competition, and addiction. The Universal Declaration merely recognizes a "right to a standard of living adequate for the health and well-being of [human beings], including food, clothing, housing and medical care."[133] Work is inherently valuable; consumption is a means to the end of satisfying basic needs.

Modern economics may see this tradition as backwards. Why should anyone be guaranteed a right to work rather than sufficient money for a life of leisure? Isn't work a cost that people grudgingly incur in order to support

---

[130] *See* Marta Lachowska, Alexandre Mas, Raffaele Saggio & Stephen A. Woodbury, *Wage Posting or Wage Bargaining? A Test Using Dual Jobholders*, 40 J. LAB. ECON. S469 (2022) (providing a recent study in Washington state and discussing the literature). Roger Noll also expresses skepticism about the usefulness of these models for antitrust law. *See* Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589 (2005). He points out that conditions under which the buyer (employer) will pass on benefits to consumers are fragile. *Id.* at 607–10.

[131] For a discussion of the philosophical literature on work, see Michael Cholbi, *Philosophical Approaches to Work and Labor*, STAN. ENCYC. OF PHIL. (Jan. 11, 2022), plato.stanford.edu/entries/work-labor.

[132] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 23 (Dec. 10, 1948).

[133] *Id.* art. 25(1).

themselves as they eagerly await retirement, and isn't consumption the source of utility?

Antitrust seems to take the same stance. Traditional antitrust focuses on harms to consumers, and specifically on overcharges, that is, the extra amount paid by buyers over the price that would have been paid if the anticompetitive behavior had not taken place. Antitrust violators can also harm people by keeping the price constant and saving costs by degrading quality, or by both raising price and degrading quality; thus, courts sometimes speak of harms in terms of quality-adjusted price differences. Antitrust plaintiffs can sue and recover damages for quality harms, but this requires fine-grained information that is rarely available outside of heavily regulated industries like medical care.[134] In most cases, price ($p$) alone determines the measure of damages. Consumers who do not purchase goods because of the price increase virtually never recover damages.[135]

It would seem that for labor antitrust law, the wage or quality-adjusted wage alone should normally be the measure for damages. Economists traditionally see work as pure exchange value—the benefit from work is $w$, the wage, minus $c$, the inherent or opportunity cost of working. Moreover, if consumers who are pushed out of the market cannot recover damages for lost consumer surplus, then workers are not likely to obtain success in recovering damages for job loss caused by antitrust violations.

These two features of antitrust damages, if applied evenhandedly to labor and product markets as they apparently are, will hit workers harder than consumers.

It has been widely documented that labor markets are characterized by downward nominal wage rigidity, meaning that employers are unable to lower nominal wages although they can allow real wages to erode during periods of inflation.[136] The reasons for downward nominal wage rigidity are not fully understood—a leading theory is that employers fear that cutting wages reduces employee morale more than laying off workers does[137]—but the fact of it appears to be uncontroversial.

---

[134] *See* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 19–20 (2016).

[135] *See* Christopher R. Leslie, *Antitrust Damages and Deadweight Loss*, 51 ANTITRUST BULL. 521, 527–28 (2006).

[136] *See* William T. Dickens et al., *How Wages Change: Micro Evidence from the International Wage Flexibility Project*, 21 J. ECON. PERSPS. 195, 196–97, 205 (2007).

[137] Truman Bewley, *Why Not Cut Pay?*, 42 EUR. ECON. REV. 459 (1998). For laboratory evidence identifying an "insult effect" from nominal pay cuts, see Jennifer C. Smith, *Pay Growth, Fairness, and Job Satisfaction: Implications for Nominal and Real Wage Rigidity*, 117 SCAND. J. ECON. 852 (2015).

Because of downward nominal wage rigidity, employers typically cut labor costs by firing workers rather than reducing wages.[138] Consumers can also be pushed out of the market when prices rise, but they are not pushed out in as great numbers as workers are, likely because sellers can exercise moderate price discrimination. But the nub here is that job loss and unemployment cause, in addition to efficiency losses, significant psychological and financial harm to workers, for which there is no parallel on the consumer side.[139] People value their jobs more, or in more complex ways, than they value goods—seeking personal meaning, self-respect, community, and dignity at the workplace. Economists have estimated these losses in monetary terms;[140] but the losses go beyond financial or economic quantities.

Downward nominal wage rigidity may also discourage employers from using labor market power to reduce wages. In this sense, workers may enjoy an advantage over consumers, who will typically put up with higher prices when sellers gain market power. But employers may choose to exercise their labor market power in more subtle ways that are less amenable to antitrust challenge. They can reduce wage growth, as indeed the literature shows.[141] And they can exercise market power by reducing shift flexibility and other sources of autonomy, increasing hours, eliminating telecommuting and training opportunities, and degrading other amenities, which provide a substantial portion of compensation for most workers.[142] It has been widely reported, for example, that after hospital mergers, doctors and nurses are required to

---

[138] The pay equity norm may play a role as well. The classical monopoly and monopsony models assume that the firm cannot price discriminate. That is a simplification, which is typically based on the assumption that firms lack information about counterparties' reservation prices and so bargaining is impractical. But some bargaining is always possible. In the case of workers, employers face significant risks if they violate the pay equity norm, which thus may bolster the assumption that the same wage must be paid to all workers of the same productivity level. *See* Emily Breza, Supreet Kaur & Yogita Shamdasani, *The Morale Effects of Pay Inequality*, 113 Q.J. ECON. 611, 652–53 (2018).

[139] *See* Jonathan S. Masur & Eric A. Posner, *Regulation, Unemployment, and Cost-Benefit Analysis*, 98 VA. L. REV. 579 (2012) (discussing the literature); *see also* Johannes F. Schmieder, Till von Wachter & Jörg Heining, *The Costs of Job Displacement Over the Business Cycle and Its Sources: Evidence from Germany*, 113 AMER. ECON. REV. 1208 (2023) (providing a recent estimate of the losses using German data).

[140] Masur & Posner, *supra* note 139, at 618 (suggesting a rough estimate of $260,000 for an average worker, based on the literature at the time). A paper that surveyed Walmart workers found that "going from the lowest dignity job to the highest dignity job is equivalent to a 20% increase in wages." Aringrajit Dube, Suresh Naidu & Adam D. Reich, *Power and Dignity in the Low-Wage Labor Market: Theory and Evidence from Wal-Mart Workers* 15, 30 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30441, 2022).

[141] *See, e.g.*, Prager & Schmitt, *supra* note 17.

[142] *See* Nicole Maestas et al., *The Value of Working Conditions in the United States and Implications for the Structure of Wages*, 113 AM. ECON. REV. 2007, 2009, 2027 (2023) (estimating the difference between the worst and best jobs in terms of amenities as equal to 55% of the wage for the average worker); Isaac Sorkin, *Ranking Firms Using Revealed Preference*, 133 Q.J. ECON. 1331 (2018) (reaching similar estimates).

work longer hours under worse conditions and with less autonomy while their pay remains constant.[143] Similarly, a recent study found that employers with monopsony power often exercise it by reducing health benefits—offering narrower health plans, for example.[144] This type of quality degradation is difficult to prove in court and to convert to dollar values for the purpose of determining damages. Rigidity does not appear to apply to job conditions and amenities.

To sum up, rigidity differences between labor and product markets mean that workers as a group will suffer less in terms of wages but more in terms of being pushed out of the market. But unemployment is a serious financial and psychological harm worse than price changes likely to occur on the product-market side. And where labor market power is used to reduce compensation, it will be more likely used to reduce nonmonetary aspects that cannot be translated into damages.

This raises a subtle point about the differences between how workers derive utility from work and how consumers derive utility from consumption. Consumers (and also business buyers) typically hand over money and in return receive a good or service that they consume. The employee forms a relationship with the employer (or, more precisely, a group of relationships with various peers and hierarchical superiors and subordinates) and engages in various tasks over a long period of time, forming professional and social bonds with others, receiving and giving training, mentoring and being mentored, being paid in cash and in formal and informal benefits. Because of the practical realities of business organization, most people serve just one employer at a time, while they buy goods and services from countless sellers. This makes them dependent on their employer, and not dependent on any particular seller, with few exceptions (for example, the tenant's dependence on a landlord). The employer may face different levels of competition on the buy side and the sell side and adjust the terms of trade to best exploit its relative bargaining power—as has been claimed of remote coal mines a century ago, which were said to exercise monopsony power over workers through wage and monopoly power through the price of goods sold in company stores.[145] The ways that employers can exploit bargaining power seems far more complex, hidden, and invasive than those available to most sellers other than (perhaps) modern internet platforms that collect and exploit data of their users to set individuated prices that (might) extract maximum rents.

---

[143] *See, e.g.*, Parker Purifoy, *Doctors Move Toward Unionization Amid Post-Pandemic Merger Wave*, BLOOMBERG L. (Aug. 16, 2023), news.bloomberglaw.com/daily-labor-report/doctors-move-toward-unionization-amid-post-pandemic-merger-wave.

[144] Mark K. Meiselbach & Matthew D. Eisenberg, Labor Market Concentration and Employee Health Benefits 3–4 (May 2023) (unpublished manuscript), ssrn.com/abstract=4499203.

[145] The truth appears to have been more complicated. *See* Price V. Fishback, *Did Coal Miners "Owe Their Souls to the Company Store"? Theory and Evidence from the Early 1900s*, 46 J. ECON. HIST. 1011 (1986).

The sociological literature identifies autonomy, coworker relationships, and supervision quality as the three main determinants of worker satisfaction.[146] Yet while people seek these emotionally important goods at the workplace, they often find themselves stuck in a hierarchy that may either be impersonal or leave them dependent on the whims of a superior. The option to exit seems like an important psychological benefit. If it is, then no-poach clauses and noncompetes, which shut the exit door for many employees, may cause exceptional harm. Workers who feel trapped in their jobs experience discontent different in kind from the consumer who lacks options among grocery stores or credit card companies. Labor antitrust could play a role in protecting status, self-esteem, and well-being that goes beyond the usual expectations of antitrust law.

My argument at present is not, however, that courts should try to estimate damages for these harms.[147] It is simpler: that the harms caused by labor antitrust violations are likely worse than the harms caused by ordinary antitrust violations. A cartel that increases product market power is likely to cause more harm, and more hard-to-measure harm, than a cartel that increases an identical amount of labor market power, because rigidities in labor markets and the psychological importance of work magnify the impact of anticompetitive behavior when it takes place in labor markets.

A last point relates to the impact of antitrust law on distributive justice and related values. The impact of antitrust law on income equality is ambiguous, but it does advance wealth equality by transferring resources from (generally wealthy) shareholders to (less wealthy) workers in labor antitrust cases. With respect to income inequality, higher-skilled workers like anesthesiologists usually have fewer choices among employers than lower-skilled workers like sandwich makers, and thus incur more significant wage markdowns. But anesthesiologists may be able to commute farther or travel farther to search for jobs, and they have other advantages that enable them to bargain for higher wages. A study of university faculty found that universities have significant monopsony power over tenure-track faculty, with that power decreasing in rank, down to zero for non-tenure-track faculty.[148] But a broader study of urban employment concentration found that a huge number of nursing assistants, tellers, hairdressers, security guards, massage therapists, and paramedics suffered wage suppression in concentrated markets because of the dominance

---

[146] *See generally, e.g.*, RANDY HODSON, DIGNITY AT WORK (2001); Erik Hurst & Benjamin Wild Pugsley, *What Do Small Businesses Do?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 17041, 2011), www.nber.org/papers/w17041; ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017).

[147] Estimating damages would be difficult, though perhaps not impossible. *See supra* note 140 and accompanying text.

[148] *See* Austan Goolsbee & Chad Syverson, *Monopsony Power in Higher Education: A Tale of Two Tracks*, 41 J. LAB. ECON. S257, S280–85 (2023).

of large employers in their lines of work.[149] Moreover, there is suggestive but as yet inconclusive research indicating that labor monopsony rather than monopoly is the largest source of both deadweight loss and inequality,[150] and thus antitrust enforcement focused on labor monopsony rather than monopoly could do more to advance both social goals.

Labor antitrust could also make an impact on employment discrimination. A large literature debates whether competition among employers reduces employment discrimination.[151] If it does, then antitrust complements anti-discrimination law by breaking up employer cartels and eroding employer monopsony. Labor antitrust cases that are more attentive to the market positions of different demographic groups could make a difference here.[152] For example, women, on average, commute less far than men. That means that female employees can be harmed more by mergers than comparable male employees because they may have fewer exit options after the merger occurs.[153] Antitrust litigation that disaggregated these effects and blocked mergers that harm either demographic group, rather than the average employee, may well advance equality in pay.

***

Let me sum up. The existing asymmetry in favor of product-market antitrust has no basis in any theoretical, normative, or pragmatic considerations of antitrust law. The law itself does not make consumer (or buyer) harm a requirement of antitrust liability (Part A); nor would such a requirement be consistent with a proper respect for labor antitrust claims (Part B). Moreover, standard theoretical justifications for antitrust liability would give equal weight to labor and consumer cases (Part C)—except that we ought to give more weight to labor cases if we take seriously the differences between work and consumption (Part D).

---

[149] *See* Gregor Schubert, Anna Stansbury & Bledi Taska, Employer Concentration and Outside Options 3, 41 tbl.6 (Jan. 25, 2024) (unpublished manuscript), papers.ssrn.com/abstract=3599454; *see also* Ihsaan Bassier, Arindrajit Dube & Suresh Naidu, *Monopsony in Movers: The Elasticity of Labor Supply to Firm Wage Policies*, 57 J. HUM. RES. S50, S84 (2022) (finding that monopsonistic competition is prevalent even in low-wage, high-turnover sectors).

[150] *See* Berger, Herkenhoff, Kosøl & Mongey, *supra* note 82, at 33. For alternative views, see, e.g., Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020), and Henry S. Farber et al., *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, 136 Q.J. ECON. 1325 (2021) (documenting the role of unions in reducing inequality).

[151] The modern origin of this debate is GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (1971).

[152] *See* Eric A. Posner & Cass R. Sunstein, *Antitrust and Inequality*, 2 AM. J.L. & EQUAL. 190, 199 (2022).

[153] For evidence of this effect from Italy, see Passerini, *supra* note 82, at 5, 29 (finding that mergers in concentrated markets harm women and not men, but on average all workers).

## III. ANTICOMPETITIVE BEHAVIOR IN LABOR MARKETS AND THE JUDICIAL RESPONSE

### A. ARE LABOR MARKETS COMPETITIVE?

One might think that labor antitrust is not needed because employers do not have labor market power. This argument is not about doctrine or theory as in Part II, but about empirics. The view comes in two flavors. The first is simply that labor markets are nearly always competitive. The second is that when labor markets are not competitive, it is because of sell-side misbehavior (by workers) rather than buy-side misbehavior (by employers).[154] The culprits are unions and licensing laws that protect workers from competition. On the first view, anticompetitive behavior by employers does not exist; on the second, it is not the main worry, and if it does exist, such behavior may be a justified way of countering the excessive bargaining power of unions. I will address the second view in Part B.

The dominance of the competitive-market view seems to have two sources.[155] The industrial-organization economists who have heavily influenced antitrust enforcement left labor markets to labor economists and were inclined to assume that markets were competitive until told otherwise. And labor economists initially sought explanations for wage rates in collective bargaining—and then as unions faded, in other salient features of labor markets, such as search and other switching costs, job differentiation, the need to provide training and motivation, and considerations of morale. Labor market power based on a single employer or cartel of employers was thought to exist in only unusual settings—the company towns of old were frequently cited—and in a few specialized occupations like nursing.[156] As empirical methods improved in the 1990s, a debate erupted over whether the minimum wage could raise wages without reducing employment, which was theoretically possible only if employers had buyer-side market power.[157] But proponents of the minimum

---

[154] *See, e.g.*, Epstein, *supra* note 105.

[155] *See* Hiba Hafiz, *Rethinking Breakups*, 71 DUKE L.J. 1491, 1553 (2022); *see also* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 542 (2018).

[156] The limited scope of the literature uneasily coexisted with a large literature on regulation of labor and employment conditions. For a discussion, see Hiba Hafiz, *Towards a Progressive Labor Antitrust*, 125 COLUM. L. REV. (forthcoming 2025). My impression, however, is that mainstream economists who addressed these issues also did not assume that labor markets were concentrated except in limited settings.

[157] *See* David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania: Reply*, 90 AM. ECON. REV. 1397, 1398 (2000). For recent iterations of the debate, compare Doruk Cengiz et al., *Seeing Beyond the Trees: Using Machine Learning to Estimate the Impact of Minimum Wages on Labor Market Outcomes*, 40 J. LAB. ECON. S203 (2022), with David Neumark & Peter Shirley, *Myth or Measurement: What Does the New Minimum Wage Research Say About Minimum Wages and Job Loss in the United States?*, 61 INDUS. RELS. 384 (2022).

wage did not argue that labor market power derived from concentration in the various labor markets or collusion among employers.[158] Other frictions were blamed.

All of this changed with the wave of labor concentration and collusion studies that were released beginning in the late 2010s. These studies have been discussed in numerous places,[159] and so I briefly summarize them here.

TABLE 1: LABOR-MARKET CONCENTRATION, INCLUDING MERGERS

| Study | Employee Type | Market Definition | | Markets or Workers Affected / Impact on Earnings |
|---|---|---|---|---|
| | | Geographic Level | Occupational Level | |
| Azar et al. 2020[160] | All United States (2016) | Commuting Zone | 6-digit SOC Code | 16% of workers work in markets with HHI > 2,500; 7% of workers in markets with HHI between 1,500 and 2,500 |
| Arnold 2021[161] | M&A Firm Workers (1999–2009) | Commuting Zone | 4-digit NAICS code | Among mergers in the top quartile by changes in concentration, those that occur in above-median HHI markets result in a 3.1% reduction in worker earnings, while those in below-median HHI markets result in a 0.8% reduction in worker earnings |

[158] That explanation was recently proposed and tested in José Azar, Emiliano Huet-Vaughn, Ioana Marinescu, Bledi Taska & Till von Wachter, *Minimum Wage Employment Effects and Labor Market Concentration* 3–4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26101, 2019).

[159] *See, e.g.*, POSNER, *supra* note 6; Posner, *supra* note 106. For the most recent work, which confirms the significance of monopsony in U.S. labor markets, see Chen Yeh, Claudia Macaluso & Brad Hershbein, *Monopsony in the US Labor Market*, 112 AM. ECON. REV. 2099 (2022), and David Berger, Kyle Herkenhoff & Simon Mongey, *Labor Market Power*, 112 AM. ECON. REV. 1147 (2022).

[160] Azar et al., *supra* note 16, at 101887–88, 101893.

[161] Arnold, *supra* note 17, at 5, 23.

| Study | Employee Type | Market Definition | | Markets or Workers Affected / Impact on Earnings |
|---|---|---|---|---|
| | | Geographic Level | Occupational Level | |
| Prager & Schmitt 2021[162] | Hospital Industry Workers (1996–2014) | Commuting Zone | 3-digit NAICS code | For mergers in the top quarter of HHI increase, wages decline 4.0% for skilled non-health professionals and 6.8% for nursing and pharmacy workers relative to the counterfactual |
| Azar et al. 2022[163] | 26 Most Common Occupations (2010–2013) | Commuting Zone | 6-digit SOC Code | The average HHI across the 8,000+ labor markets is 3,157<br>The 25th percentile to the 75th percentile increase in labor-market concentration is associated with a 5–17% decline in posted wages |
| Benmelech et al. 2022[164] | Manufacturing Plant Workers (1978–2016) | Commuting Zone | 4-digit NAICS code | HHI increase from one standard deviation below to one standard deviation above the mean level of local HHI reduces wages 9.1–14.4% |
| Berger et al. 2022[165] | U.S. Private Sector Workers (2014) | Commuting Zone | 3-digit NAICS code | Labor market power results in 7.6% welfare losses and 20.9% lower output |

[162] Prager & Schmitt, *supra* note 17, at 402, 405, 411.

[163] José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, 57 J. HUM. RES. S167, S167–68, S171, S173 (2022).

[164] Benmelech, Bergman & Kim, *supra* note 17, at S201–03, S206 n.11.

[165] Berger, Herkenhoff & Mongey, *supra* note 159, at 1147, 1169.

| Study | Employee Type | Market Definition | | Markets or Workers Affected / Impact on Earnings |
|---|---|---|---|---|
| | | Geographic Level | Occupational Level | |
| Rinz 2022[166] | W-2 Workers (1976–2015) | Commuting Zone | 4-digit NAICS code | Median to 75th percentile increase of the employment-weighted local industrial concentration distribution reduces earnings by 10% |
| Schubert et al. 2022[167] | Metropolitan Area Workers (2011–2019) | Metropolitan Statistical Area | 6-digit SOC code | Almost 17% of the 117 million urban workers in the dataset experience wage suppression of 2% or more as a result of employer concentration<br><br>Increase from median to 95th percentile of HHI reduces wages by 10.7 log points in low-mobility occupations and 3 log points in high-mobility ones |
| Berger et al. 2023[168] | M&A Firm Workers (1999–2009) | Commuting Zone | 3-digit NAICS code | Among mergers in the top quartile by changes in concentration, those that occur in above-median HHI markets result in a 4.4% reduction in worker earnings, while those in below-median HHI markets result in a 1.1% reduction in worker earnings |

[166] Kevin Rinz, *Labor Market Concentration, Earnings, and Inequality*, 57 J. HUM. RES. S251, S252–54 (2022).

[167] Schubert, Stansbury & Taska, *supra* note 149, at 3–4.

[168] David W. Berger, Thomas Hasenzagl, Kyle F. Herkenhoff, Simon Mongey & Eric A. Posner, *Merger Guidelines for the Labor Market* 24 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31147, 2023), www.nber.org/papers/w31147.

| Study | Employee Type | Market Definition | | Markets or Workers Affected / Impact on Earnings |
|---|---|---|---|---|
| | | Geographic Level | Occupational Level | |
| Meiselbach & Eisenberg 2023[169] | U.S. Private Sector Workers (2002–2019) | County | 4-digit NAICS Code | 40% of workers work in markets with HHI > 1,500<br>A 10% increase in labor-market concentration results in 1.3% higher employee premiums and narrower plan benefits |
| Qiu & Sojourner 2023[170] | U.S. Private Sector Workers (2000–2017) | Commuting Zone | 3-digit Census Occupation Code | An HHI increase of one standard deviation reduces wages by 8.5% and reduces employment-based health insurance coverage |
| Bagga 2023[171] | U.S. Private Sector Workers (1985–1990; 2012–2017) | Metropolitan Statistical Area | 2-digit NAICS Code | A 13.1% decrease in the number of firms results in a 2.6% decline of employment-to-employment transitions and a .3% decline in wages |
| Farag et al. 2024[172] | Pharmacy Workers (2010–2022) | Commuting Zone | 6-digit NAICS Code | Merger of CVS's and Target's pharmacy businesses resulted in an average salary reduction of 4%, with a 7% decrease for lowest-mobility occupations |

[169] Meiselbach & Eisenberg, *supra* note 144, at 3–4, 9, 20, 30 fig.3.

[170] Yue Qiu & Aaron Sojourner, *Labor-Market Concentration and Labor Compensation*, 76 ILR REV. 475, 476, 489, 495–97 (2023).

[171] Sadhika Bagga, *Firm Market Power, Worker Mobility, and Wages in the US Labor Market*, 41 J. LAB. ECON. S205, S208–09, S239–40 (2023).

[172] Farag, Abdelfattah, Compton, Stansbury & Steinbaum, *supra* note 17, at 3–4, 10, 20–21.

TABLE 2: HORIZONTAL RESTRAINTS

| Study | Employee Type | Impact |
|---|---|---|
| Gibson 2022[173] | Tech Industry Workers (2007) | On average, no-poach agreements reduced salaries at colluding firms—Adobe, Apple, eBay, Google, Intel Intuit, Lucasfilm and Pixar—by 4.8% |
| Krueger & Ashenfelter 2022[174] | Major Franchise Workers (2016) | 58% (90) of the 156 largest franchise chains impose no-poach clauses (NPCs) |
| Callaci et al. 2023[175] | Franchise Workers (2008–2021) | 239 franchise chains imposed NPCs but dropped them after a lawsuit by Washington attorney general (they employed approximately 4.4 million workers[176])<br>The enforcement campaign increased posted annual earnings by 6% and worker-reported earnings by 4% |
| Lafontaine et al. 2023[177] | Restaurant Franchise Workers (2014–2019) | Of the 165 largest chains in the restaurant industry, 80 imposed NPCs<br>Chains that removed NPCs saw wages rise by 5–6% relative to chains that never imposed NPCs |
| Begley et al. 2024[178] | Workers at Publicly Traded Firms (2004–2017) | Flow of employees drops by 18.3% when the firms start to share a director on their boards |
| Sanders 2024[179] | NCAA Student Athletes | Removing wage restrictions could increase NCAA player compensation from $3.6 billion to $7.2 billion annually |

[173] Gibson, *supra* note 9, at 3–4.

[174] Krueger & Ashenfelter, *supra* note 22, at S325–26.

[175] Callaci, Gibson, Pinto, Steinbaum & Walsh, *supra* note 23, at 1, 27.

[176] This figure was supplied by one of the authors, Marshall Steinbaum. The 2017 Economic Census has a supplement that reported 9.6 million "franchise workers" in 2017. *See* Bárbara Zamora-Appel & Nidaal Jubran, *Nearly 300 Industries Offer Franchise Opportunities*, UNITED STATES CENSUS BUREAU (2021), www.census.gov/library/stories/2021/12/franchising-is-more-than-just-fast-food.html. Steinbaum said that he and his coauthors estimated that 45.7% of job ads posted by franchising chains were posted by those that had franchise no-poaches in 2016 and settled with the Washington Attorney General. So, 45.7% * 9.6 million = ~4.4 million workers. This estimate is rough because the 2017 Economic Census is a little out of date and the Washington Attorney General and the authors defined no-poach clauses somewhat differently, among other reasons.

[177] Lafontaine, Saattvic & Slade, *supra* note 23, at 3, 16 tbl.1, 34–35.

[178] Taylor A. Begley, Peter Haslag & Daniel Weagley, Directing the Labor Market: The Impact of Shared Board Members on Employee Flows 1 (Mar. 19, 2024) (unpublished manuscript), ssrn.com/abstract=4530518.

[179] Shane D. Sanders, *Wages, Talent, and Demand for NCAA Sport After the* Alston v. NCAA *Antitrust Cas*e, 25 J. SPORTS ECON. 169, 170 (2024).

TABLE 3: NONCOMPETE AGREEMENTS (NCAs)

| Study | Employee Type | Percentage of Employees Affected |
|---|---|---|
| Krueger & Posner 2018[180] | U.S. Private Sector Workers (2017) | 15.5 % of workers are bound by NCAs |
| Colvin & Shierholz 2019[181] | U.S. Private Sector Workers (2017) | Between 27.8% and 46.5% of employees are bound by NCAs<br>49.4% of firms require at least some employees to enter into an NCA<br>31.8% of firms require all employees to enter into a NCA |
| Starr et al. 2021[182] | U.S. Private Sector Workers (2014) | 18.1% of employees are bound by NCAs |
| Balasubramanian et al. 2024[183] | U.S. Private Sector Workers (2017) | 22.1% of employees are bound by NCAs<br>37% of firms require at least some employees to enter into an NCA<br>29.5% of firms require all employees to enter into an NCA |
| | | **Impact on Earnings** |
| Starr 2019[184] | U.S. Private Sector Workers (1996–2008) | Earnings were 4% lower in average-enforcement states than in nonenforcement states |
| Balasubramanian et al. 2022[185] | Technology Workers (2013–2017) | An NCA ban for technology workers in Hawaii increased mobility by 11% and new-hire wages by 4%<br>Earnings for technology workers were 4.6% lower in average-enforcement states than in nonenforcement states (including Hawaii) after 8 years |

[180] Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*, HAMILTON PROJECT 8 (Feb. 2018), www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf.

[181] Colvin & Shierholz, *supra* note 28, at 2, 4, 10.

[182] Starr, Prescott & Bishara, *supra* note 28, at 60.

[183] Natarajan Balasubramanian, Evan Starr & Shotaro Yamaguchi, Employment Restrictions on Resource Transferability and Value Appropriation from Employees 11–12 (May 16, 2024) (unpublished manuscript), papers.ssrn.com/abstract=3814403.

[184] Starr, *Consider This*, *supra* note 27, at 785.

[185] Balasubramanian et al., *supra* note 27, at S351–52.

| Study | Employee Type | Percentage of Employees Affected |
|---|---|---|
| | | **Impact on Earnings** |
| Lipsitz & Starr 2022[186] | Oregon Hourly and Low-wage Workers (2003–2014) | Banning NCAs for hourly workers increased hourly wages by 2–3% on average<br>Banning NCAs raised monthly job-to-job mobility by 17% |
| Johnson et al. 2023[187] | U.S. Private Sector Workers (1991–2014) | "Moving from the 25th to the 75th percentile in NCA enforceability is associated with an approximately 2% decrease in the average worker's earnings"<br>"Rendering NCAs unenforceable nationwide would increase average earnings among *all* workers by 3.2% to 14.2%" |

Under the 2010 Merger Guidelines, mergers are regarded as dangerously concentrated and are presumptively blocked in markets if they have HHIs of 2,500 or higher;[188] in the 2023 Merger Guidelines, the HHI thresholds were lowered to 1,800, as they had been in some earlier versions.[189] The range of HHIs is bounded by 0 (perfect competition, an infinite number of firms) and 10,000 (a single firm). An HHI of 2,500 is equivalent to four firms with equal market shares of 25% each; 1,800 is six firms with market shares of just under 17% each. Depending on a variety of factors, including entry barriers, for example, a market with four to six firms, or possibly more, will generally be regarded as excessively concentrated, resulting in high prices (if it is a product market) or low wages (if it is a labor market).[190] Table 1 lists a representative selection of studies of the relationship between labor-market concentration and wages.

The studies show that a huge number of labor markets are concentrated at very high levels—levels at which legal intervention frequently occurs in product markets.[191] One prominent study—by José Azar and his coauthors—indicates

---

[186] Lipsitz & Starr, *supra* note 27, at 162.

[187] Johnson, Lavetti & Lipsitz, *supra* note 29, at 3.

[188] *See* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 21, § 5.3. HHI is the sum of the square of the market share of every firm in a market. *Id.*

[189] *See* 2023 MERGER GUIDELINES, *supra* note 20, § 2.1; *see, e.g.*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES § 1.5 (1997), www.justice.gov/archives/atr/1997-merger-guidelines.

[190] See POSNER, *supra* note 6, for further discussion.

[191] *See* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 21, § 5.3; 2023 MERGER GUIDELINES, *supra* note 20, § 2.1.

that 60% of labor markets have HHIs greater than 2,500, and a quarter of labor markets have HHIs greater than 7,200.[192] Approximately 16% of employees work in markets with HHIs greater than 2,500, with another 7% of workers in markets with HHIs between 1,500 and 2,500.[193] Today, there are about 130 million private-sector jobs;[194] under those concentration levels, roughly 20 million people work in concentrated labor markets with HHIs greater than 2,500. Meiselbach and Eisenberg's study, which uses a different data set, indicates that (as of 2018) about 40% of people in the United States work in markets with HHIs above 1,500, or 52 million people in today's terms.[195] While the early studies by Azar et al. and others were criticized for using crude market definitions or failing to establish that a causal connection exists between concentration and wage suppression, succeeding studies using a variety of models, methods, controls, and datasets have confirmed their basic results.[196]

Recent scholarship indicates that mergers of employers in markets with HHIs as low as 1,000 harm workers.[197] The studies collectively show that mergers between large employers are likely to be harmful. Hundreds of such mergers occur every year. Yet it was not until 2022 that a merger was blocked based on its labor-market impacts.[198]

The significance of these studies goes beyond mergers. In antitrust litigation, market share nearly always plays a role in the plaintiff's case. Business activities that are normally regarded as innocent fall under a cloud of antitrust suspicion when conducted by firms with large market shares. If labor-market concentration is widespread, then so are labor-market antitrust violations. And—as I will argue shortly—traditional antitrust assumptions about the market power implications of market shares reflect product-market

---

[192] *See* Azar, et al., *supra* note 16, at 101886, 101890.

[193] *Id.* at 101887.

[194] *See All Employees, Total Private*, FED. RSRV. BANK OF ST. LOUIS (June 7, 2024), fred.stlouisfed.org/series/USPRIV.

[195] *See* Meiselbach & Eisenberg, *supra* note 144, 30 fig.3.

[196] *See* Table 1, *supra*. For example, the Schubert et al. and Berger et al. studies account for worker movement across markets. *See* Schubert, Stansbury & Taska, *supra* note 149; Berger, Herkenhoff & Mongey, *supra* note 159. A paper not included in Table 1, because it uses Norwegian data, defines occupation based on task similarity. *See* Samuel Dodini, Michael F. Lovenheim, Kjell G. Salvanes & Alexander Willén, *Monopsony, Job Tasks, and Labor Market Concentration* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30823, 2023). Berger et al. also find that if larger employers are more productive, which is normally the case, HHI numbers understate the harm caused by labor market power. Schubert et al. find weaker results than the others because their analysis is confined to urban areas where labor markets are more competitive because of the higher density of population and employers. Other papers define labor markets by using worker flows rather than administrative boundaries. *See, e.g.*, Jarosch, Nimczik & Sorkin, *supra* note 82.

[197] *See* Berger, Hasenzagl, Herkenhoff, Mongey & Posner, *supra* note 168.

[198] *See* United States v. Bertelsmann SE & Co., 646 F. Supp. 3d 1 (D.D.C. 2022).

intuitions rather than labor-market realities, where high switching costs magnify employers' market power.[199]

Table 2 lists studies of collusion, and Table 3 lists a small number of studies from the vast literature on noncompetes. Every year in which they were in place, franchise no-poach clauses reduced the wages of the millions workers who worked at the relevant franchises—an estimated 4.4 million in 2017—as well as other workers who were harmed because of the reduction of mobility in the labor market.[200] Franchise no-poach clauses are still in use at many franchises, although the number is unknown.[201] The vast number of noncompetes—binding somewhere between 20 million and 60 million workers—further reduce labor-market competition.[202] The broadest studies show that noncompetes in aggregate reduce worker earnings, although a few studies of specialized occupations—physicians and corporate executives—show an increase.[203] But nearly all studies show that noncompetes harm society by reducing worker mobility, which in turn lowers output, business formation, innovation, and productivity.[204]

How many workers are victimized by illegal anticompetitive behavior is unknown, and there are different ways of thinking about victimhood. The no-poach agreements are likely illegal. Whether noncompetes are illegal depends on the particulars of their use. Concentration is not illegal, but large firms in concentrated markets may act illegally if they engage in various behaviors—acquisitions, exclusive dealing arrangements, predatory hiring—that are lawful otherwise. Examples of possible illegal behavior will be discussed below.

But the studies do indicate that harm is widespread. It is highly likely that lawful tacit collusion, which is harmful but not illegal, takes place in concentrated markets—and that the concentration figures understate the reality because the markets are defined too broadly.[205] It is likely that unknown illegal collusion takes place. Studies have found spillover effects: when employers remove workers from the market with noncompetes and no-poach clauses,

---

[199] *See* Tyler Ransom, *Labor Market Frictions and Moving Costs of the Employed and Unemployed*, 57 J. HUM. RES. S137, S164 (2022).

[200] *See supra* notes 175–76 and accompanying text.

[201] *See generally* Norlander, *supra* note 26.

[202] *See supra* note 28–29 and accompanying text.

[203] *See supra* note 29 and accompanying text.

[204] The literature is too vast to cite. A recent, representative article is Balasubramanian et al., *supra* note 27. *See also* Shi, *supra* note 29, at 427 (looking at contracts of corporate executives and arguing that the optimal noncompete would be extremely limited, implying that actual noncompetes are almost always net socially harmful).

[205] *See generally* Jonathan Masur & Eric A. Posner, *Horizontal Collusion and Parallel Wage Setting in Labor Markets*, 90 U. CHI. L. REV. 545 (2023).

workers who are not formally subject to these agreements are harmed.[206] Similarly, when firms merge, the employees of the firms' competitors will be harmed as well as the employees of the merged firm.[207] Consumers are also harmed as workers drop out of the labor market or are misallocated. Cutting the other direction, while large employers in small towns exercise monopsony power to suppress wages, some of these employers may, on net, benefit workers by entering otherwise depressed places; others may, on net, harm workers by crushing labor competition once they arrive.[208] One should also be careful not to add up the numbers across Tables 2 and 3 in order to estimate a total number of workers harmed, because many of the same people are bound by noncompetes and no-poach agreements and also work in concentrated markets.

While the impact of labor monopsony on aggregate indicators of social well-being—like labor's share of output, inequality, and economic growth—is hotly debated, the research indicates that anticompetitive behavior likely occurs with regularity in labor markets and causes widespread harm. And as we will see, many of the recent cases show cavalier attitudes among managers who agree not to poach employees or compete on wages, often by text message or word of mouth. No need for the multinational cloak-and-dagger stuff made famous by the movies.[209]

### B. THE OLD LABOR ANTITRUST: ARE LABOR MARKETS CARTELIZED BY WORKERS?

The second argument about the extent of labor-market competition brings us back to the Old Labor Antitrust. One perhaps surprising way in which labor markets may seem different from product markets is that workers are, after all, sellers, and often very similar to firms, who are usually defendants in antitrust

---

[206] *See* Callaci, Gibson, Pinto, Steinbaum & Walsh, *supra* note 23 (examining no-poach agreements); Evan Starr, Justin Frake & Rajshree Agarwal, *Mobility Constraint Externalities*, 30 ORG. SCI. 961 (2019) (evaluating noncompetes).

[207] *See* Prager & Schmitt, *supra* note 17, at 424 (finding that when hospitals merge in concentrated markets, wage growth declines for all hospitals in those markets).

[208] For an argument that Walmart supercenters have reduced earnings as a result of monopsony power, see generally Justin C. Wiltshire, Walmart Supercenters and Monopsony Power: How a Large, Low-Wage Employer Impacts Local Labor Markets (Dec. 28, 2023) (unpublished manuscript), justinwiltshire.com/walmart-supercenters-and-monopsony-power. Wiltshire argues that supercenters obtain supplies nationally and internationally but replace businesses that draw from local labor markets and that buy supplies from local businesses that draw from local labor markets, driving down local labor demand. He provides evidence that earnings of supercenter employees fall over time, and that supercenters do not reduce employment in response to minimum-wage increases. Supercenters on average employ a large fraction of the local retail workforce (and indeed of the entire local workforce). A recent (but earlier) literature review found no consensus on the impact of Walmart on employment. *See* Richard Volpe & Michael A. Boland, *The Economic Impacts of Walmart Supercenters*, 14 ANN. REV. RES. ECON. 43 (2022).

[209] *See, e.g.*, THE INFORMANT (Warner Bros. 2009) (skip it).

cases. Consumers are virtually never defendants; firms that are buyers are occasionally so but not often. The position of workers is thus more ambiguous than that of consumers. Uber was accused of cartelizing the rideshare market; it was sued both by competing drivers, who argued that Uber suppressed wages,[210] and by passengers, who argued that Uber raised prices.[211] Under the first theory, the drivers were victims; under the second theory, they were coconspirators. If drivers are independent contractors, that is, independent firms, they could conspire to fix prices.[212] Whether drivers are victims or wrongdoers turns on nice doctrinal and empirical questions. Indeed, the blunderbuss per se rule could treat drivers as wrongdoers because they participate in a horizontal price-fixing conspiracy even though all the rents taken from passengers accrue to Uber's shareholders—though the drivers would probably not be named as defendants in real-world litigation.

Consumers could similarly be liable under antitrust law if they participated in buyer cartels, but they hardly ever do; it is logistically too complicated and not worth the costs. Some scholars argue that consumers should be allowed to form cartels, because like most workers, they lack bargaining power and are helpless when sellers are lawful monopolists or can otherwise lawfully charge above-market prices, as through parallel pricing.[213] Workers form unions because they have much more invested in work, and more to gain from organization, than consumers do in any particular good or service. But that ability to form unions gave rise to the unions-as-labor-cartels theory in the Old Labor Antitrust literature, which may underlie the labor antitrust skepticism that prevailed until recently.

The unusual feature of labor, then, is that as a person goes from being an isolated worker in a large workforce controlled by a firm (say, one of dozens of drivers employed by a car-service firm), to a capital-poor laborer who sells services to multiple customers (a rideshare driver), to a capital-richer laborer who does the same (a medallion owner who leases out), to a small group of capital-richer laborers who themselves hire workers (a partnership), and so on, that person gradually, perhaps imperceptibly, transforms herself from a vulnerable individual who is protected from antitrust liability into a potential exploiter of the vulnerable. The reverse does not happen. Consumers rarely

---

[210] *See* Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc., 886 F.3d 332 (3d Cir. 2018).

[211] *See* Meyer v. Kalanick, 174 F. Supp. 3d 817, 820–21 (S.D.N.Y. 2016).

[212] It's a bit more complicated than that. Independent contractors who supply mainly labor can bargain collectively. *See* Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 314 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023).

[213] *See* Peter C. Carstensen, *Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 WM. & MARY BUS. L. REV. 1, 25 (2010); Alan Devlin, *Questioning the Per Se Standard in Cases of Concerted Monopsony*, 3 HASTINGS BUS. L.J. 223, 241–43 (2007); Salop, *supra* note 84, at 342.

transform themselves from victims into exploiters by teaming up into groups and accumulating capital; consumer cooperatives are not unknown but are rarely powerful.[214] This feature of labor markets may play havoc with the intuitions of judges and regulators. They may worry that antitrust law weakens workers' counterparties but not that it weakens consumers' counterparties—which is to say firms who face workers in the first case, and firms who face consumers in the second case. That worry may create the asymmetry—labor skepticism but not consumer skepticism, as I have discussed.

The long history behind the Old Labor Antitrust should be recalled at this point. Senator Sherman feared that the unions-as-labor-cartels theory would be used against unions and sought to include an immunity for unions in his eponymous law, but his efforts were rebuffed.[215] Some labor supporters may have believed that unions would have been protected by the prevailing interpretation of "interstate commerce" because labor organization was typically local. That was not to be. In its early years, antitrust law was interpreted by courts to apply to worker cartels, and in numerous cases the Supreme Court provided the legal basis for injunctions against strikes and for criminal prosecutions of labor.[216] Even after enactment of the labor exemption in the Clayton Act of 1914,[217] the prohibition of labor injunctions in the Norris-LaGuardia Act of 1932,[218] and recognition of the right to organize in the National Labor Relations Act of 1935,[219] antitrust law was sometimes used by courts to stymy union efforts to bargain with industry.[220] Not until the 1940s did the Supreme

---

[214] Agricultural cooperatives are perhaps an exception, but they are really businesses. For some possible consumer exceptions, see Steven C. Salop, Daniel Francis, Lauren Sillman & Michaela Spero, *Rebuilding Platform Antitrust: Moving on from* Ohio v. American Express, 84 ANTITRUST L.J. 883, 922–23 (2022).

[215] *See* Hovenkamp, *supra* note 3, at 512; Ralph K. Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 31 (1963); Theodore J. St. Antoine, Connell: *Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 604 (1976).

[216] *Danbury Hatters* (*Loewe v. Lawlor*, 208 U.S. 274 (1908)) and *Duplex Printing* (*Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921)) are noteworthy examples. For a discussion, see Matthew Dimick, *Conflict of Laws? Tensions Between Antitrust and Labor Law*, 90 U. CHI. L. REV. 379, 383–90 (2023). For an influential but dated account, see generally FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930).

[217] "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." 15 U.S.C. § 17.

[218] *See* 29 U.S.C. § 101–115.

[219] *See* 29 U.S.C. §§ 151–169.

[220] *See* Dimick, *supra* note 216, at 384–88.

Court give unions limited freedom of action to protect their interests in ways that affected product markets.[221]

Even so, unions were still regarded as cartels—anticompetitive cartels—in policy circles. Their supporters argued that unions were necessary for labor peace even if they reduced growth, that they were justified on distributive grounds, or that they advanced noneconomic values. Even among sympathetic economists, the union wage premium was understood to be the result of rent extraction; unions were thought to be beneficial for other reasons, for example, because they imposed productive efficiencies on reluctant employers.[222] Pro-market conservatives in the 1960s attacked this view.[223] They believed that labor markets were naturally competitive as long as workers were not allowed to cartelize them. (They did not explain why employers would not try to cartelize labor markets.) Pro-market conservatives dressed up the old anti-union view with modern economics, focusing on the propositions that (1) unions are sell-side labor cartels whose main purpose is to raise wages above the competitive rate; (2) unions collude with employers to cartelize product markets and raise prices above the competitive rate; and (3) unions produce no offsetting productivity (or other) benefits.[224] Each point was based on an assumption about how labor markets work. Unions must seek to raise wages above the competitive rate because labor markets are normally competitive (from the buy side). Unions may also seek to raise prices to further enrich their members at the expense of consumers. And unions cannot generate productivity gains because, if they did, employers would not resist labor organization.[225] Why employers would resist union organization where unions help them cartelize product markets was not explained.

Still, the view took hold. It reflected the dominant thinking of the time, even outside Chicago, that labor markets were competitive and not a place

---

[221] *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 512–13 (1940); United States v. Hutcheson, 312 U.S. 219, 233 (1941); Phillips-Sawyer, *supra* note 5, at 695–99.

[222] *See generally* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984).

[223] *See, e.g.*, STIGLER, *supra* note 98, at 268–70.

[224] *See, e.g.*, Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 999–1002 (1984); Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1035–36 (1986) (arguing that the law should and does block unions from helping employers cartelize product markets); STIGLER, *supra* note 98; Richard A. Epstein, *The Regulatory Hour: The History, Law and Economics of Minimum Wage and Maximum Hours Legislation*, 12 N.Y.U. J. L. & LIBERTY 477, 494 (2019).

[225] The evidence is actually inconclusive. *See, e.g.*, Erling Barth, Alex Bryson & Harald Dale-Olsen, *Union Density Effects on Productivity and Wages*, 130 ECON. J. 1898, 1924 (2020). Although the paper looks at Norwegian data, it provides a helpful overview of the lengthy empirical debate about whether or not unions increase productivity. A recent high-quality study shows that unions increased productivity in the nursing home sector in the United States. *See* Aaron J. Sojourner, Brigham R. Frandsen, Robert J. Town, David C. Grabowski & Min M. Chen, *Impacts of Unionization on Quality and Productivity: Regression Discontinuity Evidence from Nursing Homes*, 68 ILR REV. 771, 792 (2015).

for antitrust law to protect workers. Even more propitiously, it anticipated, and provided an intellectual rationale for, the collapse of the labor movement in the 1980s. And it may have been boosted by concerns that professionals created cartels as well. Starting in the 1960s, the DOJ and the FTC cracked down on professional organizations that used ethical requirements and other organizational rules to limit competition. These organizations argued that these rules served the public interest and protected professional workers from the large corporations that they (usually) served, corporations that might have underpaid them as well as pressuring them to violate ethical standards.[226] But as lawyers, accountants, and other professionals themselves formed large firms, they could both exercise monopsony power against their (professional) employees and use the ethical rules to reduce competition in the product market.[227] Indeed, there is evidence that the compensation of professional employees is suppressed by firms that are owned and operated by their professional colleagues—law firms being the most notable examples.[228]

But there are quite a few reasons for rejecting the union-cartel theory for labor antitrust skepticism. First, it was never clear—and it remains unclear—that unions actually enable workers to bargain for wages above the competitive rate. The union wage premium is well-documented, but in light of the research on labor monopsony, it is now possible that the premium reduces the wage mark*down* rather than represents a wage mark*up*. Unionization converts a monopsony into a bilateral monopoly in which the negotiated wage may be closer to the competitive rate or could otherwise result in an efficient level of output. I am aware of only one study that directly tests this possibility, albeit using Norwegian data (a labor market very different from the U.S. labor market, with higher union density and a larger public sector). The authors find that union density does mitigate wage reductions from mergers in concentrated labor markets, consistent with the monopsony theory—while it causes modest harm in unconcentrated labor markets.[229] As union density is much lower in the United States, the harm will be commensurately lower as well.

Second, union density in the United States has collapsed since the 1950s, when it was over 30%. Today, it is only 6% in the private sector.[230] And the

---

[226] *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975), expresses some of this ambivalence but ruled against the bar.

[227] *See generally* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 767–68 (1999) (treating a professional association like a normal firm); *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 2008a, LEXIS (database updated May 2024).

[228] *See* Masur & Posner, *supra* note 205, at 571.

[229] *See* Samuel Dodini, Kjell G. Salvanes & Alexander Willén, The Dynamics of Power in Labor Markets: Monopolistic Unions Versus Monopsonistic Employers 24 (IZA Institute of Labor Economics, Discussion Paper No. 15635, 2022).

[230] Stansbury & Summers, *supra* note 150, at 3.

conditions thought to be most propitious for unions—in which firms participate simultaneously in labor-facing oligopsonies and product-facing oligopolies (e.g., the car industry)—have declined as well, in large part because of globalization and technological change. Union bargaining power has accordingly declined as well.[231]

Third, even if unions do enable employers to impose markups in product markets and share those rents with workers, the literature errs in assuming that the efficiency loss outweighs distributional gains. The welfare loss for consumers must be balanced against the welfare gain to workers, which may be considerable. Moreover, enabling employers to collude in response to unions—in effect, to convert a worker-side monopoly into a bilateral monopoly—may create more harm than good. The conditions under which bilateral monopoly produces better outcomes for downstream consumers are narrow and unpredictable.[232]

Finally, antitrust law retains a variety of tools for preventing employers and unions from causing harm through collusion. Where such harms are identifiable, claims against unions are appropriate. I will return to this topic in Part IV.B.

### C. Judicial Skepticism about Horizontal Collusion by Employers

Let us turn to the recent cases. In *United States v. Patel*, a district court granted defendants' motion for judgment of acquittal in a criminal case alleging that defendants, managers of aerospace companies, agreed not to poach employees from one another.[233] The government had argued that the per se rule applied because a no-poach agreement is a market-allocation agreement, and ample precedent established that market-allocation agreements are per se illegal. The court rejected the government's view because the no-poach agreement was not "blanket" but contained exceptions. For example, the defendant Patel's company (Pratt & Whitney) was permitted to hire away engineers from Quest if it obtained the consent of Quest's managers, and on occasion consent was granted.[234] Moreover, the scope of the agreement varied over time. The court concluded that the agreement did not "meaningfully allocate the labor market of engineers," and therefore was not per se illegal.[235]

---

[231] *See, e.g.*, *id.* at 9–10.

[232] *See* Noll, *supra* note 130, at 606–10.

[233] United States v. Patel, No. 3:21-cr-220, 2023 WL 3143911, at *10 (D. Conn. Apr. 28, 2023).

[234] *Id.* at *7.

[235] *Id.* at *9.

What the court describes is actually just a sophisticated rather than simple-minded no-poach arrangement. Firms that collude in product as well as labor markets often use complex arrangements to maximize rents and will renegotiate them to address new developments; they may also have trouble maintaining full-blown cooperation for sustained periods of time and may settle on partial cooperation. An agreement to seek consent before poaching an employee or customer is just an agreement not to poach. Courts normally find liability in such cases, as they should.[236] But the court in *Patel* was following a similarly unfortunate second circuit precedent. In *Bogan v. Hodgkins*, an insurance company sold insurance through a tiered structure of agents. The "General Agents" of the company, who were independent contractors with wide authority, employed various subordinate agents and agreed among themselves not to hire them away from one another or to hire subordinate agents who had been fired for cause.[237] The court of appeals acknowledged that this agreement divided the market but held that the per se rule did not apply because "the Agreement permits transfers, and experienced NML [Northwestern Mutual Life Insurance Company] agents do not comprise the entire set of suppliers of their services. Thus, while the Agreement may constrain General Agents to some degree, it does not allocate the market for agents to any meaningful extent."[238] The court was apparently referring to the fact that consensual transfers were permitted (as would later be the case in *Patel*); moreover, General Agents could hire entry-level agents or experienced agents from other insurance companies if lateral NML hires were unavailable. The court concluded that to prevail, the plaintiff would be required to define a labor market of experienced NML agents, which is not otherwise a part of per se analysis.[239]

Both *Patel* and *Bogan* were botched; the courts effectively suspended the per se rule for naked horizontal labor-market agreements. The question is why. While a possible answer is that these cases reflect a trend since *In re Text Messaging*[240] of judicial reluctance to infer agreements, a more likely answer is that, faced with the unfamiliar labor-market setting, the courts were reluctant to impose the harsh liability regime of antitrust on defendants (criminal liability in *Patel*, treble damages in *Bogan*) without proof of harm. Yet that is how antitrust works.[241] While it is possible that the agreement was

---

[236] *See, e.g.*, United States v. Coop. Theatres of Ohio, Inc., 845 F.2d 1367, 1373 (6th Cir. 1988) (finding market-division agreement among movie theater booking agents).

[237] *See* Bogan v. Hodgkins, 166 F.3d 509, 511 (2d Cir. 1999).

[238] *Id.* at 515.

[239] *Id.* at 516.

[240] In re Text Messaging Antitrust Litig., 782 F.3d 867, 879 (7th Cir. 2015) (holding that the circumstantial evidence did not prove an agreement to restrain trade).

[241] *Bogan* could possibly be distinguished on the ground that, functionally rather than formally, the insurance agents all belonged to the same venture, though the court did not make this argument. *See generally See Bogan*, 166 F.3d 509.

too weak to have that effect, the per se approach reflects an error-cost theory that rejects judicial inquiry into whether this might be the case, based on the assumption that horizontal collusion normally causes economic harm, rarely produces benefits, can be done secretly, and can be easily remedied through judicial intervention.[242]

A similar judicial hesitation may account for another puzzling case. In *Llacua v. Western Range Association*, a class of sheepherders alleged that ranchers colluded through a pair of associations to offer the plaintiffs the lowest wages allowable by the laws of the various states in which the ranches were located. The court thought it unreasonable to infer that the competitors colluded from the fact that all plaintiffs were paid the minimum possible wage based on offers made by associations of competitors, and it affirmed dismissal of the complaint with no opportunity for factfinding—not the usual outcome in product-market cases.[243] Parallel rate setting by competing firms who make offers jointly through an association would normally be sufficient to survive a motion to dismiss. The court also believed that the allegations made no "economic sense": the ranches would not conspire because then the ranches in the high minimum-wage states would put themselves at a competitive disadvantage since they would enable the low-minimum-wage ranches to pay lower wages.[244] This is a non sequitur. The conspiracy would raise the profits of the ranches by enabling them to pay workers less than the competitive wage.[245]

Horizontal collusion is normally the easiest kind of antitrust case to win. The obstacles that the courts placed in front of the plaintiffs in these cases mirror the jury responses to three recent criminal cases.[246] The juries acquitted despite evidence that the defendants had agreed to fix wages or to not poach employees. The evidence of agreement in each case was not sufficient to sway the juries, possibly because the government could not show that the agreements led to harm, even though that is not a requirement of the law.[247] These results may reflect poor case selection by the DOJ but may also reflect

---

[242] *See* AREEDA & HOVENKAMP, *supra* note 227, §§ 1902a, 1902c2.

[243] *See* Llacua v. W. Range Ass'n, 930 F.3d 1161, 1169 (10th Cir. 2019).

[244] *Id.* at 1181.

[245] A subsequent case, based on the same facts but with different plaintiffs and in a different court, survived a motion to dismiss. *See* Alvarado v. W. Range Ass'n, No. 22-cv-00249, 2023 WL 4534624, at *1 (D. Nev. Mar. 21, 2023). The second try benefited from a deposition obtained on remand of a RICO claim in *Llacua*, in which the director of the defendant Western Range Association admitted that, among other things, "all of the WRA's members agreed to offer the same fixed minimum wage." *Id.* at *7.

[246] Juries acquitted the defendants in *United States v. Manahe*, *United States v. DaVita*, and *United States v. Jindal*. *See* Leo Caseria et al., *DOJ Loses Third Consecutive Antitrust Labor Trial*, SHEPPARDMULLIN ANTITRUST L. BLOG (Mar. 24, 2023), www.antitrustlawblog.com/2023/03.

[247] United States v. Manahe, No. 22-cr-00013, 2022 WL 3161781, at *10 (D. Me. Aug. 8, 2022).

puzzling lay intuitions that firms should enjoy more freedom to reduce wages than to raise prices.

### D. THE MISSING NONCOMPETE-EXCLUSIVE DEALING CASES

Covenants not to compete in employment contracts prohibit workers who leave their employer from working for a competitor of that now-former employer or starting a business that competes with the former employer. Noncompetes were defined as restraints of trade under the common law because they restrict competition.[248] They were enforceable only if the employer identified a legitimate interest (like protection of customer lists and other trade secrets) and the scope of the noncompete—in terms of industry definition, geographic area, and duration—was no greater than necessary to protect that interest.[249] Noncompetes were rarely regarded as an antitrust problem despite the explicit limitation on competition because typically a noncompete was understood to be a contract between an employer and a single employee—and the removal of a single worker from the market for a limited time would rarely be regarded as anticompetitive given the presumed availability of many other workers to take her place.[250] Antitrust concerns itself with market-wide impacts—for example, the exclusion of firms whose entry may enhance competition and improve the terms of trade.

But in recent years, it has become clear that, contrary to a widespread if implicit assumption, employers do not always reserve noncompetes for uniquely talented or trusted employees who have been singled out from the rest of the workforce for special treatment and paid to accept a limited restriction on post-termination employment opportunities so that the employer's investments in trade secrets or training are protected. As we have seen, noncompetes are now widespread and frequently imposed on low-skill workers.[251] More to the point, they are frequently imposed on entire workforces. A national survey of 634 private-sector firms conducted in 2017 found that 31.8% of firms imposed noncompetes on their entire workforce.[252] Another survey of a different group of firms from the same year found that 29.5% of firms imposed noncompetes on all of their employees.[253] Employers also frequently use contractual restraints on postemployment activities that are similar to noncompetes in purpose and effect, including nondisclosure,[254]

---

[248] *See* Posner, *supra* note 38, at 166.

[249] *See id.*

[250] *See id.* at 174.

[251] *See, e.g.*, Starr, Prescott & Bishara, *supra* note 28, at 60, 64.

[252] *See* COLVIN & SHIERHOLZ, *supra* note 28, at 10.

[253] Balasubramanian, Starr & Yamaguchi, *supra* note 183, at 12.

[254] *See generally* Camilla A. Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements That Act Like Noncompetes*, 133 YALE L.J. 669 (2024).

nonsolicitation, nonrecruitment, forfeiture-for-competition,[255] and onerous training-repayment clauses.[256]

Anecdotal evidence indicates that in such firms, noncompetes are boilerplate in employment contracts.[257] In some cases, they are uniform across job types, from security guards to the CEO. The FTC recently sued three such firms. A Michigan company called Prudential hired out security guards to various businesses. It imposed noncompetes on all 1,500 of its employees. The noncompetes extended over a 100-mile radius. Even though the noncompetes were held unenforceable by a state court, Prudential required employees to sign the noncompetes and apparently threatened to enforce them against departing employees. The FTC also sued O-I Glass and Adragh Group, the two largest manufacturers of glass containers in the United States. According to the FTC, the market is concentrated and the two defendants subjected their workers to one- or two-year noncompetes for the entire United States to prevent other firms from obtaining the skilled labor necessary to enter the industry. All three defendants settled.[258]

Boilerplate noncompetes in "mass" employment contracts, unlike traditional one-to-one negotiated worker-specific noncompetes, raise significant antitrust questions. A noncompete is an exclusive dealing contract: the worker promises to supply labor to the employer and no one else during the term of employment and the postemployment exclusivity period. A large employer who employs a significant share of the labor market is thus in the same position as a large manufacturer or distributor who enters an exclusive dealing arrangement with one or more suppliers. Exclusive dealing arrangements where the supplier is a business rather than a group of employees have been successfully challenged under Sections 1 and 2 of the Sherman Act because the buyer can deprive rivals or potential entrants of the supplies that they need to compete with it.[259] The same logic applies to the employer who locks in most workers in a labor market.

The case of *Beck v. Pickert* illustrates this theory. According to the plaintiffs' allegations, Renown is the only trauma center and major surgical center

---

[255] *See* Cantor Fitzgerald, L.P. v. Ainslie, 312 A.3d 674, 677 (Del. 2024).

[256] *See generally* Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723 (2021); Cynthia Estlund, *Technology, Employee Replacement, and the Future of Work*, 79 N.Y.U. ANN. SURV. AM. L. 201 (2023).

[257] And some data supports this. *See* Norlander, *supra* note 26, at 11. Norlander finds that franchise agreements frequently include a clause requiring franchisees to subject their employees to noncompetes.

[258] Decision and Order, Prudential Sec., Inc., FTC Docket No. C-4787 (Feb. 23, 2023); Decision and Order, O-I Glass, Inc., FTC Docket No. C-4786 (Feb. 21, 2023); Decision and Order, Ardagh Group, FTC Docket No. C-4785 (Feb. 21, 2023).

[259] *See, e.g.*, CollegeNet, Inc. v. Common Application, Inc., 355 F. Supp. 3d 926, 951–53 (D. Or. 2018); McWane, Inc. v. FTC, 783 F.3d 814, 837 (11th Cir. 2015).

in northern Nevada.[260] A company called Pickert, which employed two-thirds of anesthesiologists in the area, supplied Renown with its anesthesiologists.[261] When Pickert was unable to supply them in the numbers required by contract, Renown noticed Pickert of its intent to terminate the contract.[262] The anesthesiologists thus quit Pickert and sought employment directly with Renown.[263] But they were bound by two-year noncompetes with Pickert, whose geographic scope extended 25 miles from Renown and from any other facility at which they worked.[264] The anesthesiologists then sued Pickert to prevent it from enforcing those noncompetes, which would have prevented them from working for Renown or anywhere nearby.[265]

Pickert's noncompetes pose an antitrust problem. Once enough anesthesiologists were tied to Pickert, it would have become impossible for another firm such as a hospital or clinic to enter the market and offer competing surgical services. That means that Pickert could both suppress the compensation of anesthesiologists in the labor market (on the buy side) and raise prices on anesthesiology services in the product market (on the sell side), leading to lower output of medical services or degraded quality for patients—which may well have frustrated Renown. Even far-sighted, sophisticated anesthesiologists might agree to such noncompetes in return for a share of the rents, with the losses externalized on the portion of the labor force that does not sign up, patients, and firms that are kept out of the market. Note that the antitrust analysis, unlike the common law analysis, requires an assessment of the impact of noncompetes on the labor market as a whole, or what is known in antitrust jargon as "foreclosure." That is why a noncompete that might survive common law review could violate antitrust law.

A related example is the case of *Choker v. Pet Emergency Clinic*. National Veterinary Associates (NVA) is a vast private equity-funded global pet healthcare organization that buys up local veterinary practices and, in this case, sought to buy Pet Emergency Clinic (PEC), an emergency veterinary clinic in Spokane, Washington.[266] PEC, which was owned by over 50 local vets, was the only emergency clinic in the area. The complaint alleged that NVA sought to buy PEC and require its veterinarian shareholders, who also

---

[260] Statement of Interest of the United States at 2, Beck v. Pickert Med. Grp., No. CV21-02092 (2d Jud. Dist. Nev. Feb. 25, 2022), www.justice.gov/atr/case-document/file/1477091/dl.

[261] *Id.*

[262] *Id.* at 3.

[263] *Id.* at 7.

[264] *Id.* at 3.

[265] *Id.*

[266] *See* Choker v. Pet Emergency Clinic, P.S., No. 20-cv-00417, 2022 WL 3129569, at *2 (E.D. Wash. Aug. 4, 2022).

owned other practices in the area, to refer all their customers to PEC.[267] As part of the scheme, PEC's shareholders and employees would be required to sign 25-mile, five-year noncompetes that prohibited them from working for or establishing their own emergency veterinary practices.[268] The plaintiffs refused and their employment was terminated. They sued under Sections 1 and 2.[269] Like in *Beck*, the theory was that the noncompetes would make it impossible for another firm to enter the market. A competitor would not be able to hire enough local vets to set up a competing emergency clinic—it would be required to hire vets five years ahead of employing their services (if that is permitted by the noncompetes[270]) or pay vets to move from out of state (and compensate them for the cost of acquiring a Washington license)—ensuring that NVA will enjoy a monopoly on care (as well as a monopsony on vets).[271]

Finally, the Service Employees International Union (SEIU) recently filed a complaint with the DOJ alleging that the University of Pittsburgh Medical Center (UPMC) used noncompetes, among other restraints, to maintain monopsonies over medical labor markets in Pennsylvania.[272] UPMC, the 18th largest hospital organization in the United States, employs 92,000 workers and earns annual revenues of $26 billion.[273] The complaint alleges that UPMC has, through numerous acquisitions of competing hospitals, obtained product-market shares as high as 80–100% in various cities (55% in Pittsburgh), which likely translates into high labor-market shares for various medical positions.[274] Noncompetes bind all employed doctors, preventing other hospitals from expanding or entering UPMC's markets; UPMC allegedly also has adopted a policy of refusing to rehire employees who depart in order to deter employees from rotating among jobs.[275] SEIU also repeats allegations from earlier

---

[267] *Id.* at *2.

[268] *Id.* at *1.

[269] *Id.* at *1, 3.

[270] Employers often write noncompetes so that they prohibit employees from negotiating with future employers while still employed. That would mean that an entrant could not even contact workers to determine whether they might be willing to resign from their employers and take a position with the entrant if it enters the market.

[271] The court dismissed the complaint because it did not think employees could suffer antitrust injury from loss of a job; this was plainly a misreading of an earlier Ninth Circuit precedent that denied standing to an employee whose injury was too indirect under the *AGC* test. *Choker*, 2022 WL 3129569, at *1—5 (relying on Vinci v. Waste Mgmt., 80 F.3d 1372 (9th Cir. 1994)).

[272] SEIU Healthcare Pa. Strategic Org. Ctr., Complaint to the Dept. of Just. Against Univ. of Pitt. Med. Ctr. Regarding Potential Attempted and Actual Monopolization and Monopsonization in Violation of Section 2 of the Sherman Act (May 18, 2023) [hereinafter SEIU Complaint to DOJ], thesoc.org/wp-content/uploads/2023/05/COMPLAINT_5.17_redacted.pdf; *see also* Class Action Complaint, Ross v. Univ. of Pittsburgh Med. Ctr., No. 24-cv-00016 (W.D. Pa. Jan. 18, 2024) (making similar allegations).

[273] SEIU Complaint to DOJ, *supra* note 272, at 1.

[274] *See id.* at 5.

[275] *See id.* at 2.

litigation that UPMC undermines competitors by raiding competing hospitals for whole cohorts of employees, like anesthesiologists, without having sufficient work for them—an example of predatory hiring—and reducing the capacity of hospitals it buys.[276]

These six examples are all of recent vintage, and perhaps there are many more abuses of noncompetes for anticompetitive purposes. That may help explain empirical research finding that states that strictly regulate noncompetes enjoy higher levels of labor mobility, employee earnings, product-market competition (and hence lower prices), and innovation and entrepreneurship (as measured by patent issuance and similar proxies) than states that laxly regulate them.[277] The common law (and statutory bans in states like California) is doing some work in deterring overuse of noncompetes in some states, but more antitrust cases should be brought if firm-wide noncompetes are as common as the research indicates. Why aren't they?

One possible explanation is that the cases would fail on the merits. To prevail, plaintiffs would be required not only to show that the employers' noncompetes prevented rivals from entering a market or achieving sufficient scale within the market to challenge it. They would also be required to defeat the employers' proffered business justifications, which would typically be that the noncompetes are necessary to protect their investment in general human capital. While such cases are hard to win, employers who monopsonize labor markets and impose noncompetes on all employees of a particular occupation, as alleged in the cases discussed above, should satisfy the first requirement. The empirical literature on noncompetes suggests that arguments that noncompetes are necessary to protect investments in general human capital are exaggerated.[278] Most firms do not train people that much, and ordinary frictions protect much of their investment. But plaintiffs could not prevail by relying on the literature; instead, a court would evaluate the evidence in the particular case.

The FTC did not start looking for these cases until very recently, and it now hopes to bazooka them with its rule banning nearly all noncompetes.[279] As for private actions, to bring such a case, plaintiffs' lawyers would need to know that entire workforces are bound by noncompetes. But employment contracts are not public information; they are frequently confidential, indeed festooned with nondisclosure clauses. Perhaps lawyers can learn about noncompetes by interviewing multiple employees, but only a public scandal or government investigation would justify the investment of resources necessary to collect the

---

[276] *See id.* at 36; W. Penn Allegheny Health Sys. v. UPMC, 627 F.3d 85, 95 (3d Cir. 2010).
[277] *See supra* note 204 and accompanying text.
[278] For a discussion, see Posner, *supra* note 38.
[279] *See* 16 C.F.R. § 910 (2024).

requisite information. By contrast, exclusive dealing arrangements in supply contracts are more broadly known probably because firms are less nervous about talking about their contracts among each other and with lawyers than employees are.

### E. The Missing Labor-Market Intermediary Cases

Many markets are created by private actors who bring together buyers and sellers to meet on an exchange or (in today's parlance) a platform. Exchanges, platforms, and similar intermediaries are rich sources of antitrust controversy because the market maker is often a natural monopolist who benefits buyers by maximizing the number of sellers and sellers by maximizing the number of buyers. The intermediary can use its market power to favor itself in traditional ways (like taking a large cut) or more subtle ways, for example, by participating as a trader and preferring itself. The rule of reason arose as courts realized that the intermediary needs to restrain trade in order to make the market but may abuse that freedom unless constrained by antitrust liability.[280]

Countless antitrust cases involving exchanges and other platforms have filled the books, with the big tech cases involving app stores[281] and advertising auctions[282] only the latest entries. But the job market equivalents are nowhere to be seen. There is a rich but largely unexplored world of job market intermediaries—hiring halls, headhunters, staffing agencies, job fairs, professional organizations that monitor recruitment, universities, and, in recent years, online services like LinkedIn and Glassdoor. There has been some anecdotal evidence of abuses[283] but no systematic investigation of anticompetitive behavior in any of these settings despite the abundance of opportunities to exploit labor market power.

There is, however, suggestive evidence that intermediaries who match workers to employers, or who otherwise facilitate matching by aggregating payroll information from employers and sharing it among them, may violate the antitrust law. Several of the recent cases involve staffing agencies who match workers with employers and as a condition impose no-poach clauses.

---

[280] *See* Chi. Bd. of Trade v. United States, 246 U.S. 231, 238–39 (1918).

[281] *See* Apple, Inc. v. Pepper, 139 S. Ct. 1514 (2019).

[282] *See* Complaint, United States v. Google LLC, No. 23-cv-00108 (E.D. Va. Jan. 24, 2023).

[283] *See, e.g.*, Jonathan F. Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. 1 (2024) (discussing placement services). Uber and other rideshare platforms, intermediaries who link drivers and passengers, may evidence these abuses. For a challenge to Uber's algorithm for linking drivers and passengers, see Meyer v. Kalanick, 174 F. Supp. 3d 817 (S.D.N.Y. 2016). The case was subsequently dismissed because of an arbitration clause. *See* Meyer v. Kalanick, 291 F. Supp. 3d 526, 536 (S.D.N.Y. 2018). For an argument that rideshare platforms' reliance on resale price maintenance violates Section 2, see Christopher L. Peterson & Marshall Steinbaum, *Coercive Rideshare Practices*, 90 U. CHI. L. REV. 623, 637–42 (2023).

In *Aya v. AMN*, a travel-nursing-services provider, the plaintiff, supplied nurses to a hospital staffing agency, the defendant, which in turn assigned them to its client, a hospital.[284] As part of the subcontract, the plaintiff agreed not to poach employees from the defendant for an unlimited duration.[285] The case turned on whether the restraint should be evaluated under the rule of reason because it was ancillary to a venture or whether it was per se illegal because it was excessively broad.[286] In another possible example of labor antitrust skepticism (or possibly, just confusion), the court wrongly denied per se illegality even though the unlimited duration was plainly unnecessary to protect the defendant's otherwise legitimate need to protect its investment in recruiting nurses willing and able to travel. The plaintiff thus lost because it could not prove that customers (the hospitals) were harmed by the restraint (the actual question should have been whether the nurses and other employees were harmed by the restraint).[287] The court also wrongly accepted the defendant's argument that the no-poach clause protected it from free riding. The clause was overbroad on that theory, as it prevented the poaching of nurses who were not involved in the transaction between the two parties.[288]

In a simpler case, a court had less trouble. In *Raoul v. Elite Staffing*, a general contractor helped three staffing agencies enforce no-poach agreements at a construction site.[289] As the staffing agencies competed with one another and the contractor facilitated the restraint, the court held that the per se rule could apply to all four defendants under Illinois antitrust law.[290] In *Jien v. Perdue*, the plaintiffs argued that poultry-processing companies shared wage information through an intermediary and used that information to fix wages of poultry plant workers. That complaint has survived several motions to dismiss.[291]

An example of particular interest is an older case from 2004, *Jung v. Association of American Medical Colleges*.[292] Medical residents sued the American Medical Association and various other organizations and institutions that maintained the National Resident Matching Program (NRMP), arguing that the defendants conspired to fix the compensation of residents hired by hospitals.

---

[284] *See* Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1106 (9th Cir. 2021).

[285] *See id.* at 1106, 1110.

[286] *See id.* at 1108–11.

[287] *See id.* at 1110.

[288] Alexander & Salop, *supra* note 99, at 314–16.

[289] *See* Raoul v. Elite Staffing, Inc., 210 N.E.3d 188, 191 (Ill. App. Ct. 2022).

[290] *See id.* at 192–98.

[291] *See* Jien v. Perdue Farms, Inc., 2022 WL 2818950 (D. Md. July 19, 2022). Some of the employers have settled. *See* Katie Arcieri, *JBS, Tyson Ink $127 Million Settlement in Wage Collusion Suit*, BLOOMBERG L. (Mar. 11, 2024), news.bloomberglaw.com/antitrust/jbs-tyson-ink-127-million-settlement-in-wage-collusion-suit.

[292] Jung v. Ass'n of Am. Med. Colls., 300 F. Supp. 2d 119 (D.D.C. 2004).

Under a centralized system, residents and hospitals listed their preferences for employers and employees and were matched with each other. Compensation information was shared, and residents and hospitals were forbidden to negotiate deals outside the system. As a result, "medical resident salaries [were] stabilized at artificially low rates for more than 30 years, notwithstanding differences between programs in program prestige, geographic location, resident merit and year of employment."[293] An economist was brought in to tweak the matching algorithms in order to deter unraveling, which to all appearances was the inevitable cheating on a labor-market cartel.[294] After a court denied the motion to dismiss, the hospital industry persuaded Congress to grant an antitrust immunity for graduate medical education programs, and the case was dismissed as moot.[295]

Congress was apparently persuaded that the NRMP was an efficient means for matching residents with hospitals, but that was no more justification for an immunity than in any other intermediation.[296] Even if the scheme was not per se illegal, the restraint would have been justified only in the unlikely case that it caused substantial benefits reflected in, for example, higher rather than lower wages for doctors. The enactment of this law may reflect once again misunderstanding or skepticism about the risks of labor monopsony.

A last example comes from the development of salary benchmarking tools by data aggregators. A recent study looks at the impact of one such tool offered by a firm that provided payroll services to employers that collectively employed more than 20 million workers. Employers could use the tool to find out what other firms paid employees in fine-grained job categories. The study found that introduction of the tool reduced dispersion of compensation but increased the average and increased retention.[297] While the effect found by this study was apparently procompetitive, as the tool seemed to enable employers to reduce uncertainty without also (as of yet) facilitating coordination, a pre-digital-age salary benchmark used to coordinate salaries was deemed a potential antitrust violation in *Todd v. Exxon*, where the defendants coordinated on the salaries offered by one of the participating conspirators, Chevron.[298] Sophisticated algorithmic tools for determining prices in product markets have long been used and have generated considerable anxiety

---

[293] *Id.* at 162.

[294] *See* George L. Priest, *Timing "Disturbances" in Labor Market Contracting: Roth's Findings and the Effects of Labor Market Monopsony*, 28 J. LAB. ECON. 447, 468 n.19 (2010).

[295] Jung v. Ass'n of Am. Med. Colleges, 339 F. Supp. 2d 26, 39 (D.D.C. 2004), *aff'd*, 184 F. App'x 9 (D.C. Cir. 2006).

[296] *See generally* Priest, *supra* note 294.

[297] Zoe B. Cullen, Shengwu Li & Ricardo Perez-Truglia, *What's My Employee Worth? The Effects of Salary Benchmarking* 39–40 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30570, 2024), www.nber.org/papers/w30570.

[298] *See* Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001).

for antitrust theory[299] and in litigation.[300] The labor-market versions should as well.

### F. PUTATIVE ANCILLARY RESTRAINTS IN LABOR MARKETS

No-poach agreements frequently bind employers who participate in broader ventures. The wave of litigation spurred by the Krueger and Ashenfelter paper on franchises[301] brought attention to one such class of cases: the franchise no-poach. Dozens of franchise agreements contained no-poach clauses that prohibited franchisees from hiring employees of other franchisees. In *Deslandes v. McDonald's*, for example, the franchise agreement prohibited McDonald's restaurants (mostly owned by franchisees but some also owned by the McDonald's corporate entity) from hiring one another's employees or former employees.[302] At least 14 state attorneys general compelled many of the firms identified by Krueger and Ashenfelter to remove the clauses,[303] while employees have brought class actions seeking damages.

One of the main issues in *Deslandes* was whether the per se, quick look, or rule of reason should apply to the no-poach clauses.[304] The plaintiffs argued that the per se rule should apply because the no-poach clauses are horizontal restraints between competitors—the restaurants that draw workers from common labor markets. The defendants argued that the rule of reason should apply because no-poach clauses are ancillary restraints—that is, subordinate, and reasonably necessary, to a procompetitive burger-selling venture. Under the rule of reason, the plaintiffs would be required to define thousands of local labor markets around the country and prove the impact of the clauses on wages—and only if they could afford and overcome the additional logistical burdens of defining thousands of classes. The district court initially held that the plaintiff stated a claim for a restraint that might be unlawful under quick look analysis because of the obviously anticompetitive impact of a no-poach clause but reversed itself because of the judicial lack of familiarity with franchise no-poach agreements and applied the rule of reason, which defeated class certification.[305]

---

[299] *See generally* Michal S. Gal & Daniel L. Rubinfeld, *Algorithms, AI, and Mergers*, 85 ANTITRUST L.J. 683 (2024).

[300] Heather Vogell, *Department of Justice Opens Investigation into Real Estate Tech Company Accused of Collusion with Landlords*, PROPUBLICA (Nov. 23, 2022), www.propublica.org/article/yieldstar-realpage-rent-doj-investigation-antitrust.

[301] Krueger & Ashenfelter, *supra* note 22.

[302] Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 702 (7th Cir. 2023).

[303] *See* Krueger & Ashenfelter, *supra* note 22, at S339.

[304] *See Deslandes*, 81 F.4th at 702–03; Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2021 WL 3187668, at *3–7 (N.D. Ill. July 28, 2021).

[305] *Deslandes*, 2021 WL 3187668, at *4–7.

The district court's argument was unfortunate; it again betrayed some combination of hostility, skepticism, or indifference to labor antitrust. The court said that it was possible that the no-poach clause protected franchisees' investment in training their employees, thus keeping down labor costs and the price of burgers.[306] This argument is a classic "out-of-market" justification which is frowned upon in antitrust law.[307] As the court had itself said in an earlier opinion, the restraint could be justified if it benefited those whom it burdened in the same market—the employees. That was possible if the restraint made possible training that in turn resulted in higher wages, but that was an argument that could only be made in defense and thus could not be a basis for dismissing the complaint.[308] The court of appeals reversed on these grounds.[309]

The district court also doubted that the no-poach clause could cause harm. Fast-food franchises often cluster in dense urban areas where low-skill employment opportunities abound. The no-poach clause may deprive McDonald's employees only of a small number of options. "It is undisputed that, within three miles of Deslandes's home were two McDonald's restaurants and between 42 and 50 other quick-serve restaurants. Within ten miles of Deslandes's home were 517 quick-serve restaurants."[310] But market size is an empirical question that should be left for factfinding. Commuting is idiosyncratic: it can depend on the location of bus and subway lines, childcare, parking. So are job opportunities: McDonald's-specific skills may not be transferable to other restaurants; other restaurants may not even have openings. Deslandes, the lead plaintiff in the class action against McDonald's, ended up at a Home Depot earning a lower wage, perhaps because the skills she learned in the McDonald's kitchen did not serve her well in a home improvement store. The empirical literature indicates that franchise no-poaches do suppress wages, as the elimination of them by the Washington attorney general litigation pushed wages up by 4–6%.[311] That indicates that employees could not easily find jobs outside of the franchise within which they worked. Unfortunately, the court of appeals agreed with the district court on this issue.[312]

The district court also botched the ancillary restraint doctrine. A restraint is deemed ancillary only if it is "reasonably necessary" to the procompetitive venture; otherwise, firms can easily create a spurious venture to rationalize

---

[306] *Id.* at *9–10.

[307] *See* Alexander & Salop, *supra* note 99, at 294–97.

[308] *Id.*

[309] Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 704–05 (7th Cir. 2023).

[310] Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2022 WL 2316187, at *6 (June 28, 2022).

[311] Callaci, Gibson, Pinto, Steinbaum & Walsh, *supra* note 23, at 2, 14, 19; Lafontaine, Saattvic & Slade, *supra* note 23, at 34–35.

[312] *Deslandes*, 81 F.4th at 702–03.

horizontal collusion.[313] The training theory assumes that firms will free ride: if one McDonald's restaurant trains a worker, that worker would move to another McDonald's restaurant to obtain a higher wage, with the result that the first restaurant would not recover the training cost. (Note that this theory assumes that restaurants in other fast-food franchises are not substitute employers, contrary to the court's assumption in its market definition analysis; if they were substitutes, the franchise-only no-poach clause would fail to protect the training investment, as McDonald's employees would take their skills to Wendy's or Burger King.) The free-rider theory fails because the franchise structure internalizes benefits that the various franchisees perform for one another. The franchise contract could simply require franchisees who poach employees from other franchisees to compensate the latter for their training costs; the compensation scheme could be built directly into the royalty schedule, with debts or credits applied to royalty liabilities depending on whether franchisees contributed to franchise-wide training on net.

Another court applied the rule of reason to a no-poach agreement in an even less appropriate factual setting. Saks Fifth Avenue sells various luxury brands, including Loro Piana and Gucci, in its stores around the country, and it trains its employees so that they are knowledgeable about those brands. The plaintiffs in *Giordano v. Saks* were employees who alleged that the brands entered no-hire agreements with Saks under which they agreed not to solicit Saks employees or hire them within six months of leaving Saks.[314] The court held that the no-hire agreements were subject to the rule of reason, rather than per se or quick look treatment, because "the challenged restraints . . . allow Saks stores to exist and the Brand Defendants to sell their products through a nationwide retailer."[315] In this exceedingly conclusory statement (the court says nothing more on the subject), the court ignores the issue of whether the restraints are reasonable—that is, no stricter than necessary to achieve the alleged benefit.

Because no-poach agreements, unlike noncompetes, are between firms and thus are concealed from workers or job applicants, employees cannot even theoretically demand a premium at the time they accept employment to compensate them for the lost exit option. Employees may also never learn of a no-poach agreement; they must rely on the kindness of a competing employer who informs them why they are not accepted despite their qualifications. Otherwise, the reasons for rejection are lost in the everyday noise of job market churn; most job applications end in disappointment. In analogous

---

[313] *See, e.g.*, Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1109 (9th Cir. 2021).

[314] Giordano v. Saks Inc., 654 F. Supp. 3d 174, 184–85 (E.D.N.Y. 2023), *appeal filed*, No. 23-600 (2nd Cir. Apr. 17, 2023).

[315] *Id.* at 202–03.

product-market settings, it is more likely that consumers (or journalists, researchers, or lawyers) will discover market divisions, just because suspicions will be raised by patterns of repeated denial of service to customers by firms that normally will be eager to sell. Here, again, the relatively favorable judicial treatment of product-market cases seems exactly backwards.

### G. *Alston* and the Quick Look

The quick look standard arose because of dissatisfaction with the methodological straitjacket in antitrust analysis created by the per se/rule of reason distinction. A large class of cases existed in which the restraint at issue was clearly anticompetitive in isolation but a procompetitive effect was not out of the question. For these cases, the per se rule would require liability, and the rule of reason would frequently protect anticompetitive behavior because of the practical difficulty of proving market power. The doctrinal solution was to classify these cases as "quick look" cases and allow plaintiffs to survive a motion to dismiss and (if a class action) achieve class certification without proving market power (which would be required by the rule of reason) while allowing the defendant to rebut with a competitive justification (which would be prohibited by the per se rule).[316]

But the introduction of quick look review created, or actually multiplied, line-drawing problems. Quick look review takes place in a twilight area where restraints are not so egregious that per se illegality applies but not so reasonable that the rule of reason applies. The recurrent question is thus whether the restraint is egregious but not too egregious—a question that is so hard to answer that courts often cover their bases by applying, in sequence, quick look review and the rule of reason rule to the same restraint (and invariably find the same outcome).[317]

The Supreme Court tried to provide guidance. In *California Dental Association v. FTC*, it weirdly said that quick look review should be applied when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets," or (less weirdly) when "the great likelihood of anticompetitive effects can be easily ascertained."[318] Lower courts have suggested a sliding scale. The impulse is understandable, the practical value questionable.

---

[316] At least according to some courts; others refer to a generic sliding scale. For a helpful discussion, see Christopher R. Leslie, *Disapproval of Quick-Look Approval: Antitrust After* NCAA v. Alston, 100 Wash. U. L. Rev. 1 (2022).

[317] *See, e.g.,* N.C. State Bd. of Dental Examiners v. FTC, 717 F.3d 359, 374 (4th Cir. 2013), *aff'd*, 574 U.S. 494 (2015).

[318] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

More quick-look confusion resulted from a recent Supreme Court case that favored a labor antitrust claim. In *NCAA v. Alston*, the Court rejected the NCAA's argument that restraints on competition for student athletes are protected from ordinary antitrust scrutiny. In passing, the Court repeated a dictum that courts should apply the rule of reason, rather than quick look review, to evaluate a restraint "until we have amassed 'considerable experience with the type of restraint at issue' and 'can predict with confidence that it would be invalidated in all or almost all instances.'"[319] The Court was actually rejecting the NCAA's argument that restraints on compensation of student athletes should be approved with a quick look.[320] The NCAA's argument was exceedingly weak, and so the *Alston* opinion was hardly notable, except that it reaffirmed yet again the application of antitrust law to employers and contained some strong pro-worker language in Justice Kavanaugh's concurrence.[321]

But several labor-skeptical lower courts, including the *Deslandes* and *Giordano* courts, cited *Alston* to deny quick look review of challenges to restraints in labor markets that are identical to product-market restraints that have been struck down under quick look review.[322] This interpretation of the *Alston* dictum would confine labor cases to the antitrust minor league, where labor claims are given less favorable doctrinal treatment than product-market claims.

The Court's formulation in *Alston*—"until we have amassed 'considerable experience with the type of restraint at issue' and 'can predict with confidence that it would be invalidated in all or almost all instances'"[323]—is actually taken from a discussion of the conditions under which the per se rule is applied in *Leegin*.[324] The *Alston* Court executes this maneuver by citing *Leegin*'s statement as if it were referring to "these condemnatory tools" (both quick look and per se) rather than the per se rule alone. The upshot is that the lower courts are liable to think that quick look should be applied as rarely as the per se rule is applied, only after vast judicial experience is accumulated to

---

[319] NCAA v. Alston, 141 S. Ct. 2141, 2156 (2021) (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886–87 (2007)).

[320] *See id.* As Christopher Leslie explains, this was a reversal of traditional quick look analysis. *See* Leslie, *supra* note 316, at 19–22.

[321] *See Alston*, 141 S. Ct. at 2167–68 (Kavanaugh, J., concurring) ("Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.").

[322] *See, e.g.*, Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2022 WL 2316187, at *4 (N.D. Ill. June 28, 2022); Giordano v. Saks Inc., 654 F. Supp. 3d 174, at 203 (E.D.N.Y. 2023); *see also* Conrad v. Jimmy John's Franchise, LLC, No. 18-cv-00133, 2021 WL 3268339, at *10 (S.D. Ill. July 30, 2021).

[323] *Alston*, 141 S. Ct. at 2156 (quoting *Leegin*, 551 U.S. at 886–87).

[324] *Leegin*, 551 U.S. at 886–87.

show that a restraint is harmful—presumably harmful enough to do without the market definition requirement but not so harmful as to be per se illegal.

Whether lower courts take *Alston* so literally remains to be seen.[325] But in some of the labor cases, the damage has already been done. The history of inadequate labor antitrust enforcement has left a dearth of cases, and so under the rule of *Alston* as interpreted by *Deslandes* and *Giordano*, that dearth will be further reinforced: underenforcement becomes a doctrinal basis for continued underenforcement. This is a perverse result, to say the least.

The best response to this argument is that labor-side restraints do not differ from product-side cases by virtue of their location in labor markets.[326] A no-poach agreement is a market-division agreement like an agreement not to poach customers in the product market. As a market-division agreement in product markets is per se illegal,[327] so should an agreement not to poach workers. If a venture incorporating restraints in the product market that enables new products is subject to the quick look, then a similar labor-market restraint should be as well.

There are at least three arguments for this position. First, doctrinally, this is already the law: antitrust law applies to all markets in the same way.[328] Second, and reinforcing this point, there is precedent for applying the per se rule to naked horizontal restraints in buy-side cases involving corporate suppliers of goods and services, including individuals who are independent contractors. There is no doctrinal basis for distinguishing employees. Third, as I have argued, there are no relevant differences between labor markets and product markets that would justify treating labor-market claims with greater scrutiny. The Court in *Alston* suggests that it is this economic understanding, not judicial experience (or not solely judicial experience), that should determine whether a "condemnatory tool" should be used,[329] a comment missed by the lower courts that have refused to apply quick look review. And economic theory as well as the empirical economic literature provide no basis for thinking that market-division agreements would be harmful in product markets but beneficial in labor markets.[330] The Court's language may provide an opening

---

[325] Not all have. *See, e.g.*, United States v. Manahe, No. 22-cr-00013, 2022 WL 3161781, at *7 (D. Me. Aug. 8, 2022) (limiting *Alston* to sports leagues and franchises).

[326] *See id.* at *7–8.

[327] *See* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

[328] *See* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 229 (1948).

[329] *See* NCAA v. Alston, 141 S. Ct. 2141, 2156 (2021) (citing Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 975 (1986) ("[It can take] economists years, sometimes decades, to understand why certain business practices work [and] determine whether they work because of increased efficiency or exclusion.")).

[330] *See supra* Table 2 and accompanying citations.

for using the economic literature to persuade the skeptical courts that their skepticism is unwarranted.

### H. MARKET SHARE AND MARKET POWER

A major difference between labor and product markets—switching costs—cuts in favor of stronger antitrust enforcement in labor markets than in product markets.[331] In product markets, concentration is generally regarded as the main source of market power. To prevail in a Section 2 case, the plaintiff must normally show that the defendant has a market share over 50%, a figure that evolved over the years in product-market cases.[332] Judges, following economic wisdom, agree that firms with this market share, assuming entry barriers, will normally be able to profitably charge prices above marginal cost. But in labor markets, the main source of market power is the switching costs of employees (along with job differentiation).[333] That implies that a firm with a relatively low market share in the labor market may have as much power over wages as a firm with a higher market share in the product market may have over prices. Thus, the market-share thresholds embodied in product-market precedent may be too high for labor-market cases and may have deterred plaintiffs from bringing Section 2 cases against employers with significant labor market power.

Contrary to myth,[334] people do not easily move from job to job, or from city to city, in search of employment. Studies show that people are extremely reluctant to pull up roots and leave their communities to escape even lasting economic blight; nor are they quick to move to boom towns. The psychological costs of leaving friends and family are even greater than the financial costs of renting U-Hauls or hiring movers.[335] Labor markets are characterized

---

[331] For some initial thoughts on this topic, see Masur & Posner, *supra* note 205.

[332] *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (holding that, while a 90 percent market share definitely is enough to constitute monopolization, "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent [sic] is not") (Hand, J.); Byars v. Bluff City News Co., 609 F.2d 843, 850 (6th Cir. 1979) ("The Supreme Court expressly approved Judge Hand's views in American Tobacco Co. v. United States, 328 U.S. 781, 813–14 (1946), and ever since market share has been the critical factor in § 2 antitrust cases.") (citation cleaned up).

[333] *See* Berger, Herkenhoff & Mongey, *supra* note 159.

[334] For recent iterations, see Richard A. Epstein, *Antitrust Overreach in Labor Markets: A Response to Eric Posner*, 15 N.Y.U. J.L. & LIBERTY 407 (2022), and Diana Furchtgott-Roth, *Antitrust and Modern U.S. Labor Markets: An Economics Perspective*, HARV. J.L. & PUB. POL'Y: PER CURIAM, Summer 2022. Both authors rely on turnover data, which give a misleading impression of workers' freedom to move. Elasticities are the proper measure. *See* V. Bhaskar, Alan Manning & Ted To, *Oligopsony and Monopsonistic Competition in Labor Markets*, 16 J. ECON. PERSPS. 155, 158 (2002).

[335] See Ransom, *supra* note 199, at S151, S157, who estimates the present value of switching for the average person to be an astounding $400,000, which would require a permanent salary increase of 30% to be worthwhile. Most of this cost is psychological and is derived from the

by two-sided matching, which creates frictions not present in most product markets: employers usually care about characteristics of employees, and employees of employers; in product markets, sellers rarely care about characteristics of consumers. There also seems to be extreme levels of parallel wage setting and possibly implicit no-poaching arrangements, or rather de facto versions of no-poaching as a result of high search costs and job differentiation (which refers to differences in the amenities and conditions of otherwise identical occupations). Many labor markets for professionals, including markets for junior elite lawyers, physicians, investment bankers, and accountants, are characterized by near-lockstep compensation over broad geographic areas where productivity levels are highly variable.[336] If workers are unable to overcome the burdens of moving their households, the employers enjoy local monopsonies and do not need to bother to engage in horizontal collusion—one of the most common kinds of product-market antitrust violations.

There is a related point, relating perhaps to an intellectual prejudice, that low-skill workers are fungible and hence cannot be victims of labor market power.[337] If an employer lowers its employees' wages, one might think that those employees will simply take an identical job from another employer at the original (competitive) wage. But while elasticities are higher for people with fewer specialized, job-specific skills, it does not follow that they can easily move from job to job. A recent study finds that mergers of retail pharmacies in Brazil harm salespeople more than pharmacists:

> The finding that wages of salespeople fall suggests that the preconceived idea that low-skill workers have greater outside options is inaccurate; salespeople working at drugstores may have some degree of firm- or industry-specific human capital or stronger preferences to work at a drugstore. To assess this, I analyze data on mobility and show that 24% of salespeople employed in drugstores move to

---

weak relationship between the choice to move and the salary differential: people who move generally do not move to obtain a higher-paying job. Thus, the threat to move does not discipline employers. *See also* Alexander W. Bartik, Moving Costs and Worker Adjustment to Changes in Labor Demand: Evidence from Longitudinal Census Data 2–3 (Oct. 1, 2018) (unpublished manuscript), www.alexbartik.com/s/Bartik_2018_movingcosts.pdf (finding similar estimates in the context of "the China shock" and the "fracking boom" on selected localities). In contrast, the conventional wisdom rejects the use of commuting zones to define labor-market areas. *See, e.g.*, Epstein, *supra* note 334, at 422 ("Many people who change jobs also decide consciously to move far distances."); Furchgott-Roth, *supra* note 334, at 7 (relying on raw state migration data from the census, which does not disaggregate the portion of people who moved for work from those who moved for other reasons such as, for example, retirement).

[336] *See* Masur & Posner, *supra* note 205, at 567–76 (discussing studies of these sectors); *see also* RYAN BOONE, *Tacit Collusion in Labor Markets: The Case of BigLaw*, *in* ESSAYS ON LABOR DEMAND WITH MARKET IMPERFECTIONS 1 (2021) (PhD dissertation, University of California, Los Angeles), scholarship.org/uc/item/7p70s7w2 (discussing the law market).

[337] *See* Epstein, *supra* note 105, at 383–86.

> another drugstore when they switch jobs. If they were moving randomly across jobs with the same occupation title, this number should be closer to 5%. Labor markets for low-skilled workers might be finer and more concentrated than they appear to be.[338]

Meanwhile, Brazilian pharmacists (incumbent pharmacists, that is) are protected by unions. So, it is not just highly skilled workers who are subject to labor market power; low-skilled workers are as well.

The gig economy, however, does represent a kind of labor market in which firms standardize work tasks (typically with computer technology), so that workers are indeed interchangeable from the standpoint of those who immediately benefit from their labor (passengers, in the case of ridesharing). Problems can still arise if labor sellers and buyers are matched on platforms that are owned by monopolists who now exercise seller-side (rather than buyer-side) market power over both groups as suppliers of the matching algorithm or app.

Search costs are also high in labor markets and contribute to stickiness. Information about other jobs is not as widely available to employees as information about goods and services in product markets. Employees are isolated within the firm, and employers know this.[339] Most jobs are highly complex, defined not just by wage and benefits but the nature of tasks, the scope of responsibilities, relationships with colleagues, and so on—information about all of which can require a vast amount of time to gather. Even the salaries of existing colleagues can be difficult to obtain because of a taboo against sharing salary information.[340] These information costs give employers market power over their workers, possibly reducing the incentives to obtain market power through illegal means like no-poach agreements.

Job differentiation poses yet another conundrum. Product-market differentiation has been widely discussed in the antitrust literature.[341] Neither bad nor good, the phenomenon refers to slight modification of goods to make them more attractive to consumers but also less substitutable with other brands,

---

[338] Tomas Guanziroli, Does Labor Market Concentration Decrease Wages? Evidence from a Retail Pharmacy Merger 4 (Mar. 18, 2022) (unpublished manuscript) (footnote omitted), conference.iza.org/conference_files/LaborMarkets_2022/guanziroli_t32516.pdf. For additional evidence, see Evan K. Rose & Yotam Shem-Tov, *How Replaceable Is a Low-Wage Job?* (Nat'l Bureau of Econ. Resch., Working Paper No. 31447, 2023), www.nber.org/papers/w31447.

[339] *See* TRUMAN F. BEWLEY, WHY WAGES DON'T FALL DURING A RECESSION 87–95 (1999).

[340] *See* Zoë B. Cullen & Ricardo Perez-Truglia, *The Salary Taboo: Privacy Norms and the Diffusion of Information*, 222 J. PUB. ECON. 1 (2023); BEWLEY, *supra* note 339, at 81 (discussing how employees find out about equity norm violations).

[341] *See, e.g.*, Jonathan B. Baker, *Product Differentiation Through Space and Time: Some Antitrust Policy Issues*, 42 ANTITRUST BULL. 177 (1997).

reducing competition and hence increasing markups. Still, identical or easily comparable near-identical goods and services—"commodities"—are ubiquitous. Jobs are much more differentiated. A lawyer's job is characterized not just by a group of ever-changing tasks, but relationships with colleagues and clients, its location, seniority, benefits, amenities like childcare, and so on. As workers disseminate to employers who offer them their best package of wages, benefits, conditions, amenities, and other attributes, the workers confront greater levels of labor market power. Indeed, a job may shape itself around the employee's investment in the firm's unique conditions; these firm-specific investments are not transferable to other firms, giving the employer additional market power.[342] Job differentiation and search costs interact, as differentiated jobs are hard to compare—wage differences may reflect hard-to-observe differences in conditions and amenities.[343] Like search costs, job differentiation enables employers to extract rents, reducing the need to violate antitrust law to do so.

Empirical work supports the case for greater antitrust enforcement in labor markets than in product markets. An example comes from merger evaluation. Recall that, under the 2010 Merger Guidelines, horizontal mergers in markets with HHIs of 2,500 or more triggered heightened scrutiny by the DOJ and the FTC; the threshold was later reduced to 1,800 in the 2023 Merger Guidelines.[344] The various HHI thresholds could be derived from empirical analysis of product markets based on models that related market structure to price effects.[345] As attention was drawn to the labor-market impacts of mergers, questions arose as to whether these HHI thresholds should also be used to trigger scrutiny of mergers based on their expected impact on wages. A recent paper by David Berger, Kyle Herkenhoff, and Simon Mongey provides a framework for answering this question. In their general equilibrium model of the economy, firms in various markets and of varying levels of productivity compete for workers who incur costs to move across markets and switch jobs within markets.[346] The model captures an important dynamic in labor markets, which is that small firms compete more locally for labor while large firms compete within and across markets; this means that small firms pay near-competitive wages while large firms pay less competitive but higher wages because they are more productive. The model accounts for employment

---

[342] For a discussion and citations to literature, see Eric A. Posner, *The Economic Basis of the Independent Contractor/Employee Distinction*, 100 TEX. L. REV. 353 (2021). *See also* BEWLEY, *supra* note 339, at 99 (illustrating effects of job differentiation).

[343] *See* BEWLEY, *supra* note 339, at 97.

[344] *See* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 21, § 5.3; 2023 MERGER GUIDELINES, *supra* note 20, § 2.1.

[345] For a discussion and analysis, see Volker Nocke & Michael D. Whinston, *Concentration Thresholds for Horizontal Mergers*, 112 AM. ECON. REV. 1915 (2022).

[346] *See* Berger, Herkenhoff & Mongey, *supra* note 159.

and wage responses to government policies in concentrated markets and is consistent with findings on the wage and employment costs of mergers in concentrated markets.[347]

This model can thus be used to estimate labor-market HHI screens for mergers.[348] Mergers cause harms in labor markets by increasing labor market power, which enables firms to suppress wages, causing some workers to drop out of the labor markets and others to be misallocated to labor markets where they are employed less productively. But larger firms tend to employ workers more productively—for example, by organizing them into larger teams, allocating them to more productive plants, or matching them with more productive capital. Empirical research suggests that the labor efficiency gains from mergers is on the order of two percent or less.[349] If this estimate is correct, and the normative framework of the Merger Guidelines is followed, then a merger producing deadweight loss less than two percent should be approved. Calculations show that while the 1,800 threshold is superior to the 2,500 threshold for labor-market impacts, a much lower threshold—as low as 1,000, for example—would produce welfare gains. Because labor markets are narrower than product markets, the average merger causes more harm to labor markets than to product markets.

There is thus the possibility that labor markets are more, rather than less, susceptible than product markets to anticompetitive behavior of the sort that antitrust law is designed to block.[350] Adam Smith famously said that collusion in labor markets was ubiquitous, but he believed that collusion was ubiquitous in product markets as well.[351] What is interesting is that he assumed that labor-market collusion took the form of wage fixing, mirroring the practice of price fixing in product markets. But in modern America, it increasingly looks as if, while price fixing is common in product markets, the preferred form of labor-market collusion is no-poaching—along with the overuse of noncompetes. No-poaching, a form of market division, is a more severe form of anticompetitive behavior than wage or price fixing because it shuts down all forms of

---

[347] *See* Arnold, *supra* note 17.

[348] *See* Berger, Hasenzagl, Herkenhoff, Mongey & Posner, *supra* note 197.

[349] See industry-specific studies such as Orley C. Ashenfelter, Daniel S. Hosken & Matthew C. Weinberg, *Efficiencies Brewed: Pricing and Consolidation in the US Beer Industry*, 46 RAND J. ECON. 328, 352 (2015), and Céline Bonnet & Jan Philip Schain, *An Empirical Analysis of Mergers: Efficiency Gains and Impact on Consumer Prices*, 16 J. COMPETITION L. & ECON. 1, 21 (2020). For skepticism about merger-generated efficiencies, see Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting it Right*, 168 U. PA. L. REV. 1941, 1961–67 (2020).

[350] For a discussion, see Masur & Posner, *supra* note 205.

[351] *See* Smith, *supra* note 92, at 70–71, 111.

competition, while wage and price fixing allow quality competition.[352] Labor markets may lend themselves to market division, as employers frequently take the initiative to solicit workers and so can easily police one another, whereas in product markets, customers more frequently shop around, so attempts to divide markets would require sellers to frequently turn down business, raising suspicions. If this is true, antitrust law may be more, rather than less, urgently needed for policing labor markets than product markets.

## IV. THE RELEVANCE OF ABUTTING AREAS OF THE LAW

### A. BACKGROUND

Antitrust law, labor law, and employment law are three different bodies of law. Antitrust law promotes competitive markets. Labor law supports and regulates union organization and collective bargaining. Employment law protects employed workers in various ways; for example, it guarantees a minimum wage, prohibits discrimination on the basis of sex and race, and mandates accommodations for disabled workers. The laws need not be, and generally are interpreted not to be, in conflict. Even before Congress enacted the National Labor Relations Act,[353] the labor exemption in the Clayton Act gave workers antitrust immunity so that they could organize and collectively bargain with employers.[354] Courts subsequently created the nonstatutory labor exemption for unions when collective bargaining agreements created protections for workers, like maximum hours, that limited output.[355] Employment law protections complement rather than interfere with antitrust law by giving workers additional entitlements.

But this harmonious picture has been challenged from time to time. An argument in older debates which continues to receive attention is that labor antitrust is unnecessary or even perverse because labor is regulated by a special legal regime with its own policy goals.[356] One view is that national labor policy, as embodied in federal employment and labor law, seeks to cartelize labor markets, whereas antitrust law, if applied to labor markets, would try to atomize them. The two bodies of law conflict, and antitrust law must yield.[357] A different view is that both bodies of law seek to advance competitive markets, but antitrust law is not necessary or useful for protecting

---

[352] *See* DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11, at 4 (explaining that no-poach agreements are as illegal as price fixing).

[353] 29 U.S.C. §§ 151–169.

[354] 15 U.S.C. § 17.

[355] *See* Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100, 421 U.S. 616, 637 (1975).

[356] *See, e.g.*, Hafiz, *supra* note 85, at 385–91.

[357] *See* Jerry & Knebel, *supra* note 86.

workers. Employment law and labor law are better matched to the needs of workers, while antitrust law is a poor fit. I argue below that neither labor law nor employment law renders labor antitrust unnecessary or perverse.

### B. LABOR LAW

In Part III.B., I discussed hostility against unions during the first half century of antitrust law. This history has left a lingering skepticism about antitrust law in labor circles.[358] Their distrust of antitrust is apparent in their reluctance to use what should be a powerful weapon against employers who refuse to recognize unions or bargain with them, though in recent years some unions have made sporadic efforts to bring antitrust cases.[359]

The argument that labor antitrust would undermine unions or labor law seems to be based on the notion that antitrust law—which promotes competition—is in tension with labor law, which endorses the elimination of competition among workers through their organization of unions.[360] But unions are no more anomalous than firms, which also reduce competition among their teams of capitalists and workers.[361] Unions remain available to workers as a tool that they can use when competition fails and workers face legal monopsonies, illegal but undetected cartels, or legal but anticompetitive coordination.[362] Unions enable workers to bargain for wages that may be nearer to the competitive rate. Antitrust law can be used by workers or unions to challenge the remaining forms of anticompetitive behavior. Unions have increasingly played a role in challenging (or supporting) mergers.[363] In this respect, workers are

---

[358] *See* Kate Andrias, *Beyond the Labor Exemption: Labor's Antimonopoly Vision and the Fight for Greater Democracy*, *in* ANTIMONOPOLY & AM. DEMOCRACY (Daniel A. Crane & William J. Novak eds., 2023); Dimick, *supra* note 216; *see also* Winter, *supra* note 215, at 15 ("[T]he Sherman Act, in the labor context, is a symbol which arouses great emotion, if not passion.").

[359] *See* SEIU Complaint to DOJ, *supra* note 272; *see also* Hafiz, *supra* note 155 (discussing earlier union initiatives in antitrust enforcement).

[360] The objective function of unions is the subject of considerable debate and research; they may not actually seek to raise wages; they may, for example, be more concerned about job security, the dignity of workers, the distribution of pay, or something else. For a helpful discussion of the literature, see Dimick, *supra* note 216, at 407–14.

[361] *See* Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 L. & CONTEMP. PROBS. 65 (2019); *see also* Melamed & Salop, *supra* note 121, at 778.

[362] For evidence that union organization reduces adverse effects of mergers on wages, see Prager & Schmitt, *supra* note 17; Sylvia A. Allegretto & Dave Graham-Squire, *Monopsony in Professional Labor Markets: Hospital System Concentration and Nurse Wages* (Inst. for New Econ. Thinking, Working Paper No. 197, 2023); Guanziroli, *supra* note 338; Benmelech, Bergman & Kim, *supra* note 17.

[363] Noam Scheiber and Karen Weise, *Microsoft Pledges Neutrality in Union Campaigns at Activision*, N.Y. TIMES (Jun. 13, 2022), www.nytimes.com/2022/06/13/business/economy/microsoft-activision-union.html; Dan Papscun, *Kroger Deal Will Harm Workers, State Treasurers Tell FTC*, BLOOMBERG (Aug. 23, 2023), news.bloomberglaw.com/antitrust/kroger-grocery-deal-will-harm-workers-state-treasurers-tell-ftc.

better off than consumers, who are unable to form comparably powerful consumer unions. The availability of unions—or related institutionalized forms of worker cooperation[364]—as an alternative tool for challenging monopsony power may explain why labor antitrust cases were rare when unions were common. But such an explanation is not available today.

One could worry that if workers can bring antitrust claims against employers, they will not bother to organize unions. But this worry seems far-fetched. Antitrust law does not protect workers from labor market power that employers enjoy as a result of ordinary frictions such as search costs and job differentiation or as a result of (legal but harmful) parallel conduct. These sources contribute more to employers' market power than concentration does.[365] Union organization remains the most potent method for opposing employer market power that is not due to concentration. Complementarity of union organization and antitrust enforcement is on display in the recent challenge to the Kroger/Albertsons merger, which is based in part on allegations that the two firms colluded to weaken union strike actions.[366]

Antitrust law does conflict with union organization when unions collude with employers to cartelize labor markets; at that point, the labor exemptions cease to protect workers. A more radical complaint, then, is that antitrust law advances competitive markets when workers do better in a cartelized system.

The starting point for this argument is that labor unions offer benefits to workers that lie outside the standard economic framework—including psychological or political benefits (including union involvement in promoting workplace regulation), practical benefits such as institutional support or mutual aid, or a more equitable system of compensation and conditions of work.[367] To advance these goals, unions may be justified in preferring to bargain with a single monopsonistic employer to one of multiple competing employers, or a single employer who has power in the product market. While the monopsonist has more labor market power, it cannot avoid wage concessions by pleading that it will be put out of business if its labor costs increase more than its competitors' do. Single monopsonistic employers or cartelized employers and large unions may also stabilize industries, resulting in greater job security. Unions may also believe that they can obtain more members, more quickly, if firms they bargain with have many employees than if firms

---

[364] For an interesting proposal, see Melamed & Salop, *supra* note 121 (proposing joint negotiating entities, a weaker form of union).

[365] *See* Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of the Law*, 57 J. HUM. RES. S284 (Supp. 2022).

[366] *See supra* note 55.

[367] See Dimick, *supra* note 216, for a helpful discussion. For a recent argument in this vein, see Brian Callaci, *Competition Is Not the Cure*, BOS. REV. (Nov. 23, 2021), www.bostonreview.net/articles/competition-is-not-the-cure.

have few employees, thus leading to a preference for larger and more stable firms. A more ambitious labor law that facilitated sectoral bargaining, constrained employer abuses, and (with presumably weaker antitrust enforcement against unions) gave workers greater power to control product markets and exercise political influence would enable unions to advance the interests of workers more effectively than any version of antitrust law.[368] At a more practical level, workers may have stronger incentives to join unions and maintain union discipline if employers are monopsonies than if employers compete with each other. The relevance of antitrust law for labor markets in this vision is minimal or, at best, ambiguous.

One can also make this point in a simple way using the Nash bargaining model discussed in Part II.C. Imagine that a union and employer are in a bilateral monopoly and engage in Nash bargaining. They divide the surplus according to relative bargaining power. The surplus will be an increasing function of the seller's profits. The union will in effect give the employer a share of the workers' surplus and in return be given a right to half of the profits.

Now imagine that at time 1, the employer is in a relatively competitive market. Its profits are low. At time 2, it colludes with other sellers on the product side or obtains product market power in other ways. Output in the product market declines, prices for consumers go up, and profits increase. The union's one-half share of the profits grows in value, and workers benefit.

So lower output benefits labor because profits are higher and profits are split; higher output hurts labor because employment is lower. An exceedingly pro-worker antitrust authority might allow a merger between employers that concentrates the product market, raises prices, and benefits workers.

If one thinks that unions offer special benefits to workers and that workers will not join unions unless they can expect rents at the expense of consumers, a possible argument could be made that antitrust law should allow rents to be transferred from consumers to workers even though in normal economic models there is a net social loss, even a net economic loss (excluding the special benefits of unions) to ordinary consumer/workers, as opposed to the investors who benefit from monopolized markets.

Whatever the merits of this view,[369] it is quite unlikely that labor antitrust is the obstacle to its vindication. Union density in the private sector today

---

[368] This ideal motivated some of the more radical American unions; for a discussion, see Andrias, *supra* note 358.

[369] There is remarkably little empirical evidence bearing on these questions. A very recent paper, using Norwegian data, offers a mixed picture. An arguably exogenous subsidy for union membership resulted in a net welfare improvement for the average unionized worker but also reduced employment for nonunionized workers. It also failed to transfer wealth from shareholders, as businesses passed costs on to consumers as higher prices, and it favored larger firms

is minuscule, at six percent, following a long decline from over a high of 30% in the 1950s. And union decline is not just a phenomenon of the United States—it is general to the developed world, perhaps reflecting trends that cannot easily be reversed by policy.[370] The stirrings of the labor movement in the United States the last few years have not changed the trend.[371] Sophisticated anti-organization strategies developed by employers, political hostility to unions despite their current popularity among the public, hostility from the Supreme Court,[372] foreign competition, and the rise of the gig economy have devastated the labor movement, and none of these obstacles will be overcome anytime soon.[373] Labor law would need to be vastly strengthened before the largely symbolic concerns about antitrust law would be worth addressing. Both labor organization and labor antitrust are too weak to hurt each other.

### C. EMPLOYMENT LAW

Another argument is that employment law renders labor antitrust unnecessary, superfluous, or noxious. Employment law directly regulates the terms of employment and does not necessarily aim for competitive outcomes. By contrast, antitrust law regulates market structure and hence creates the conditions, in the ideal case, in which employer and worker reach the competitive package of wages and benefits. So, a minimum-wage law may exceed or fall short of the competitive wage. Antidiscrimination law and accommodation mandates can protect and redistribute to vulnerable groups.[374] Equal pay law may mandate equal pay where competitive labor markets would not. Some

---

at the expense of smaller firms. But the subsidy improved efficiency by drawing people into the workforce as a result of higher wages. *See* Samuel Dodini, Anna Stansbury & Alexander Willén, How Do Firms Respond to Unions? (Dec. 22, 2023) (unpublished manuscript), ssrn.com/abstract=4682782.

[370] *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, NEGOTIATING OUR WAY UP: COLLECTIVE BARGAINING IN A CHANGING WORLD OF WORK 128–35 (2019).

[371] *See* News Release, Bureau of Lab. Stat., Union Members — 2023 (Jan. 23, 2024), www.bls.gov/news.release/pdf/union2.pdf.

[372] *See, e.g.*, Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 143 S. Ct. 1404 (2023) (holding that the National Labor Relations Act does not preclude employers from bringing tort suits against their employees for damage incurred during a union strike); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (holding that a state regulation authorizing labor unions to access an employer's property for some period of time, with the intent to solicit support for unionizing, constitutes a per se physical taking where just compensation is required); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019) (holding that an ambiguous arbitration clause in workers' contracts does not mean that the employer agreed to submit to class arbitration under the Federal Arbitration Act); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (holding that compelled payment of dues to unions by nonmembers violates the First Amendment).

[373] For a recent perspective, see Suresh Naidu, *Is There Any Future for a US Labor Movement?*, 36 J. ECON. PERSPS. 3 (2022). Some legal scholars are more optimistic. *See, e.g.*, Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016).

[374] *See* Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000).

commentators argue that employment law, along with labor law, reflects a national labor policy that is opposed to competition, and hence antitrust.[375]

The argument echoes the Old Labor Antitrust view that labor markets are protected from competition and makes no more sense than it. Some employment laws, like minimum-wage laws, work hand in hand with antitrust law to counter employers' labor market power. Other employment laws create and rearrange endowments but otherwise allow the labor market to operate. If there is one theme in employment law, it is to protect workers from employers, so it is hard to imagine that it would welcome buy-side cartelization that extracts rents from workers.

## V. ENFORCEMENT ISSUES

### A. COMPLEXITY

Antitrust litigation is complex and expensive. Plaintiffs typically challenge business conduct that produces benefits as well as costs and that affects countless agents in different ways in numerous different markets. This complexity interferes with both assessments of liability and attempts to trace causal pathways and to measure harms.

The law addresses these problems in several ways. The per se rule greatly reduces the burdens on plaintiffs for a limited class of business behaviors deemed inherently anticompetitive. The courts use standing rules to eliminate claims that are "duplicative," "remote," or "abstract."[376] But the cost of antitrust litigation is still high, so cases are brought mainly by corporations, the government, or classes of persons financed by plaintiffs' lawyers or their funders.

All of these rules and practices have created less favorable conditions for labor cases than for other types of antitrust cases. As we have seen, judicial unfamiliarity with labor cases has led courts to shy away from per se and quick look in labor cases. Standing doctrine appears to be a problem for labor as well. *AGC* is the leading case on antitrust standing, interesting also because the plaintiff was a union.[377] The union alleged that a group of building

---

[375] *See* Jerry & Knebel, *supra* note 86, at 253. Words to that effect can be found in the cases. *See, e.g.*, Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 539–40 (1983).

[376] *See, e.g.,* Walton v. Eaton Corp., 563 F.2d 66, 70–71 (3d Cir. 1977); *Associated Gen. Contractors*, 459 U.S. at 540–43 (explaining that claims alleging remote causation or using abstract theories should not be allowed).

[377] *See Associated Gen. Contractors*, 459 U.S. at 521.

contractors conspired to avoid hiring subcontractors who were members of the union and to pressure landowners and other contractors not to hire the unionized subcontractors as well.[378] The Supreme Court held that the union lacked antitrust standing to bring the case for a number of reasons. One reason was the indirectness of the causal chain from the antitrust violation (the conspiracy) to the injury (to the union), which would interfere with the calculation of damages. The Court said that the excluded subcontractors rather than the union should be the plaintiffs; the Court also said that it would be difficult to determine how many of the coerced firms were actually compelled to avoid union labor, the extent to which they passed on the harm to employees rather than absorbed it themselves, and the nature of the harm to the employees (e.g., lost wages or layoffs).[379]

As Herbert Hovenkamp points out, these problems of determining harm are common in product-market cases and are rarely a reason for dismissing them.[380] The *AGC* Court's standing argument seemed to be intertwined with its skepticism that labor-market competition is an appropriate policy goal. The doctrine limits standing to entities that suffer an injury that "was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws."[381] The Court held that the union was not such an entity because "a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals."[382] But while, as we have seen, unions may under certain conditions see advantages in reducing competition among employers (for example, when employers compete in concentrated product markets),[383] and under certain conditions of monopolistic competition, unions (and workers) benefit from concentration;[384] in general conditions, unions will be in a stronger bargaining position when employers compete for union members. Obtaining a competitive advantage over rivals can involve raising wages (to poach their rivals' workers) rather than reducing them. The union plainly was harmed by

---

[378] *Id.* at 522.

[379] *Id.* at 545.

[380] *See* Hovenkamp, *supra* note 3, at 540.

[381] *See Associated Gen. Contractors*, 459 U.S at 538 (quoting Blue Shield of Va. v. McCready, 457 U.S. 465, 483 (1982)).

[382] *Id.* at 539.

[383] *See* Melamed & Salop, *supra* note 121, at 757. The *AGC* Court cited *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), which held that a collective-bargaining agreement between a union and a multiemployer bargaining agreement resulting in wages that some competing employers could not afford did not violate the antitrust laws. *Associated Gen. Contractors*, 459 U.S. at 539, n.41.

[384] For a discussion, see Dimick, *supra* note 216, at 412–17.

an employer cartel, and its "labor-market interests" coincided with antitrust policy.

Indeed, antitrust law does not normally care about the market power or goals of plaintiffs. If a firm with a lawful monopoly sues a cartel for antitrust violations, its claim is not defeated because the plaintiff seeks to charge a monopoly price rather than open up a competitive market. *AGC* was a case of labor skepticism disguised as a case about proximate causation.

A related problem concerns the complexity of occupational roles. In consumer class actions, the consumers are interchangeable from the seller's standpoint: they all identically hand over money in return for a good or service. In some cases, the return product may vary in small ways; some consumers may receive loyalty or volume discounts, others may have consumed goods or services for a longer period of time. But in most cases, a large class can be created, and differences can be handled with algorithms or compromises in damages calculations. By contrast, in labor antitrust cases, employers often impose restraints on workers who are quite different from one another—workers who, for example, possess different skills, belong to different job categories, and have different levels of experience and seniority. Many workers bargain for different compensation packages. In cases involving athletes and artists, a portion of compensation may take the form of intellectual property rights that vary among workers.[385] This variation may defeat class certification or require expensive balkanization into subclasses, each requiring separate litigation paths.[386]

Complexity in labor antitrust enforcement may account for the original litigation gap and its persistence despite progress. It gives firms a stronger legal position when they buy labor than when they sell goods and services. The natural consequence for profit-maximizing firms would be to illegally exploit labor market power rather than product-market power, all else equal. This may account for the ubiquity of noncompetes and possibly no-poach agreements. Legal reform may be necessary to correct this imbalance; as a first step, the DOJ and the FTC, which are not subject to many of the procedural hurdles that private litigants face, should put more resources into labor antitrust.

### B. DETECTION

Individuals rarely know that they are victims of antitrust violations. Most consumer cases are brought by plaintiffs' lawyers who learn about violations from their own research, government investigations, academic studies, or

---

[385] *See, e.g.*, Le v. Zuffa, No. 15-cv-01045, 2023 WL 5085064, at *46 (D. Nev. Aug. 9, 2023) (denying certification for IP-based class).

[386] For a discussion, see POSNER, *supra* note 6.

journalistic reporting. Government and private investigations take advantage of the public nature of pricing. To attract consumers, firms must tell them how much their goods and services cost. Investors and financial analysts keep tabs on product markets, firms' market shares, the impact of mergers on market shares, and other activities that are relevant to antitrust cases. The government and economic organizations have long compiled data of general interest for these market actors, and this data can also be used in antitrust analysis.

Government data is less helpful for labor antitrust than for product antitrust. An antitrust case usually requires an allegation that the defendant or defendants possess market power, which is usually based on market share. Many large sellers publicize this information; it can also be derived from public sources, including industry and government reports. Investigators and lawyers can use these sources to draft a complaint. Labor market shares are more difficult to determine. Academic studies often rely on government-supplied SOC codes to define occupations,[387] and commuting zones to define geographic markets.[388] But these coding systems were not intended to measure labor market power, and they are too crude for litigation. The definitions sweep in too many people who are not regarded as substitutes by employers while excluding people who do cross the normal lines of occupation or geographic boundaries.[389] High-quality studies rely on confidential data or limited markets where regulation requires firms to disclose fine-grained data.

Similarly, wage data is not as available as pricing data. Indeed, salaries and other forms of compensation are typically confidential, and compensation is often more complex than prices—involving a range of kinds of compensation (deferred, for example) and including in-kind (benefits and amenities) as well as cash. As a result, it can be more difficult for investigators to determine the actual level of compensation.[390] The boundaries of labor markets are not as clearly publicized as the boundaries of product markets, which can often be assumed to be nationwide or are identified in marketing materials. Labor-market boundaries may be known to executives in a firm or defined in internal materials that can be obtained only with subpoenas. The identities of competitors are also often less clear in labor markets than in product markets. Again, the reason seems to be that firms distribute advertising and market materials

---

[387] *See Standard Occupational Classification*, U.S. BUREAU OF LAB. STAT., www.bls.gov/soc; *Occupational Employment and Wage Statistics*, U.S. BUREAU OF LAB. STAT., www.bls.gov/oes/current/oes_stru.htm.

[388] *See Commuting Zones and Labor Market Areas*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV., www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas.

[389] *See supra* Part III.A.

[390] *See, e.g.*, H. Claire Brown, *A Job with a Fair Salary? What Pay Transparency Laws Are Revealing*, N.Y. TIMES (June 20, 2023), www.nytimes.com/2023/06/20/business/job-search-salary-ranges.html (explaining how wide salary bands defeat the purpose of transparency laws).

more broadly when they try to reach customers than when they try to reach job applicants, hindering efforts by investigators to obtain evidence of collusion and other forms of anticompetitive conduct.

Another problem for labor antitrust is the difficulty of bringing a class action, an important legal form for motivating private lawyers to search out antitrust harms. The geographic scope of markets for consumer goods and many services is usually large because goods and services can be transported vast distances by truck, plane, or wire. By contrast, most labor markets are local,[391] which limits the feasibility of class actions. In *Deslandes*, for example, the plaintiffs argued that a nationwide class should be certified because the no-poach clause was uniformly imposed on all McDonald's restaurants around the country.[392] The legality of the clause was the common and predominant issue for litigation.[393] Holding that the rule of reason applied, the court said that the plaintiffs could at best ask to certify hundreds of local classes because the labor markets were local.[394] Employees live within a few miles of the franchisees, and each restaurant faces different local competitors—Wendy's and Burger King in the northern Kentucky region, theme parks and Walmarts as well as other quick service restaurants in Orlando.[395] Smaller classes increase costs and reduce recoveries for lawyers, thus reducing the financial attractiveness of labor antitrust relative to other kinds of litigation.

The route forward is simple. The government agencies should steer resources from product to labor cases. Class action reform may also be warranted.

## CONCLUSION

Labor antitrust cases are finally making their way through the legal system, but in lower numbers than they should be. There are missing noncompete cases and missing labor intermediary cases, far too few merger challenges, and hardly any cases against colluders. One reason for this dearth of litigation is surely the cases' novelty, their complexity, and the logistical challenges they pose. Labor antitrust violations are harder to identify than product-market

---

[391] *See* Alan Manning & Barbara Petrongolo, *How Local Are Labor Markets? Evidence from a Spatial Job Search Model*, 107 AM. ECON. REV. 2877, 2905 (2017); Ioana Marinescu & Roland Rathelot, *Mismatch Unemployment and the Geography of Job Search*, 10 AM. ECON. J.: MACROECONOMICS 42, 46–51 (2018).

[392] Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2021 WL 3187668, at *1–2 (N.D. Ill. July 28, 2021).

[393] *Id.* at *3.

[394] *Id.* at *11–12. The Seventh Circuit opined, however, that "[t]he [district] court may think it wise to reconsider [its denial of class certification] in light of the need for a remand and the analysis in this opinion." Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 705 (7th Cir. 2023).

[395] *Deslandes*, 2021 WL 3187668, at *12.

violations are. Labor cases are less lucrative and more difficult to manage than their product-market counterparts, and they are riskier to bring because of the thin precedential record. Courts cannot be faulted for these problems, but government agencies could pick up the slack by reallocating resources to labor-market investigations and enforcement.

Courts—or some courts—*can* be faulted for their labor skepticism. The empirical literature suggests that antitrust violations are common in labor markets and that harm from these violations is significant. Ratcheting up legal standards for labor antitrust cases deters plaintiffs from bringing them, preventing the learning process that, under *Alston*, is supposed to enable antitrust to evolve. Those higher legal standards are also wrong on their own terms. The longstanding neglect of labor antitrust and the evidence of significant employer market power suggest that labor-market violations are more common than product-market violations. In light of the central role of work in people's lives, antitrust enforcers should be more attentive to labor markets than to product markets. Courts should resist the temptation to water down the usual antitrust presumptions or give credence to convenient business rationalizations when plaintiffs are workers and defendants are employers.

Skepticism is a natural response to new legal claims that depend on novel empirical work. But the theoretical basis for these claims is centuries old, the law itself has recognized labor claims for more than a century, and the empirical evidence of antitrust harms in labor markets, while new, is strong. The skepticism of judges and commentators flows from a receding but still persistent set of ideas that valorizes work but denigrates workers.