

How the Antitrust Agencies Can Help—Instead of Hurt—Workers

Introduction

The Open Markets Institute* and Service Employees International Union** submit this comment to explain how antitrust enforcers, including the Department of Justice (DOJ) and the Federal Trade Commission (FTC), can use antitrust and other competition powers to help workers.

Properly applied, antitrust enforcement helps to ensure a balance of power between workers and employers. Antitrust law establishes that certain actions by employers against their workers, such as hiring cartels, are per se illegal.¹ The case for pro-worker antitrust action is clear. As recent studies have demonstrated, many local labor markets are highly concentrated and characterized by anticompetitive practices on the side of the employer, leading to lower wages and less freedom for workers to find new jobs.

The DOJ and the FTC have largely failed American workers today by allowing a concentration crisis in scores of industries to weaken competition for labor. Instead of actively policing mergers for harms to workers, they have let employer-side concentration reach very high levels. Troublingly, when the FTC and DOJ *have* acted against practices in labor markets, the two agencies often have used antitrust laws to either undermine efforts by employees and states to challenge abusive behavior by employers or actually targeted efforts by workers or professional to work together. The FTC, for instance, has filed numerous complaints against workers for engaging in collective bargaining and other joint action. Furthermore, the FTC has campaigned against state and local occupational licensing rules that can enhance the bargaining power and earnings of workers, professionals, and independent entrepreneurs. The DOJ meanwhile has endorsed legal standards that would empower franchisees to collude against workers.

The DOJ's and FTC's general inactivity against employers and activity against workers reinforce and deepen inequality between the individual and the corporation. The agencies should reorient their enforcement priorities and focus on protecting workers from employers rather than on interfering with the basic rights of workers, professionals, and independent entrepreneurs to organize.²

* The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

** Service Employees International Union (SEIU) unites 2 million diverse members in the United States, Canada, and Puerto Rico. SEIU members working in the healthcare industry, in the public sector, and in property services believe in the power of joining together on the job to win higher wages and benefits and to create better communities while fighting for a more just society and an economy that works for all, not just corporations and the wealthy.

¹ *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235–36 (1948).

² Sandeep Vaheesan, *How Contemporary Antitrust Robs Workers of Power*, LAW & POL. ECON., July 19, 2018, <https://lpeblog.org/2018/07/19/how-contemporary-antitrust-robs-workers-of-power/>.

The DOJ and FTC should take steps today to begin to address the deep power imbalance faced by workers due to employer concentration and abusive contracts. The FTC should use its rulemaking authority to ban non-compete clauses as an unfair method of competition; in March, the FTC received just such a petition for rulemaking filed by the Open Markets Institute and co-signed by the AFL-CIO, SEIU, UFCW, and over 60 other unions, public interest groups, and legal scholars. And both agencies should begin reviewing mergers and other business conduct for their effects on workers as well as advance legal positions through *amicus* briefs that would make sure that workers can meet employers on a more equal basis.

I. Local Labor Markets Have Become Stacked Against Workers

Although antitrust economists generally assume labor markets to be competitive, local labor markets in the United States are, on average, highly concentrated (as defined in the Horizontal Merger Guidelines)³ and have become more concentrated since the late 1970s.⁴ Due to this concentration, many workers have only a handful of prospective employers in the city or county where they live. Labor market concentration is an especially serious problem in rural areas.⁵ Recent empirical research has found that this concentration lowers wages⁶ and has contributed to the multi-decade stagnation in wage growth.⁷ In parts of the country where manufacturers are in direct competition with imports from China, this import competition serves to reinforce the power of local employers who then further drive down local wages.⁸ Concentration can also affect workers further up the supply chain, as powerful buyers squeeze suppliers who in turn seek to reduce costs by holding down wages.⁹

In addition to having structural power, employers also often engage in practices that further tilt the balance of power in their favor. In many industries, employers have colluded to suppress the wages of workers. This can be true even for highly paid employees. For instance, over a multi-year period starting in 2005, Apple, Google, Intel, and other leading tech companies agreed not to recruit, or “poach,” each other’s software engineers and other technical professionals.¹⁰ Steve Jobs

³ José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration* (Nat’l Bureau of Econ. Research, Working Paper No. 24147, 2019), <https://www.nber.org/papers/w24147>.

⁴ Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 24307, 2018), <https://www.nber.org/papers/w24307.pdf>.

⁵ Azar et al., *supra* note 3, at 11.

⁶ *See id.* at 16 (estimating in one model that “[g]oing from the 25th percentile of market concentration to the 75th percentile of market concentration is associated with a decline in wages . . . of 17%).

⁷ Benmelech et al., *supra* note 4, at 23.

⁸ *Id.* at 23-24.

⁹ Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers’ Wages, 1978 to 2014*, 83 AM. SOC. REV. 213 (2018).

¹⁰ Mark Ames, *Revealed: Apple and Google’s Wage-Fixing Cartel Involved Dozens More Companies, Over One Million Employees*, PANDO, Mar. 22, 2014, <https://pando.com/2014/03/22/revealed-apple-and-googles-wage-fixing-cartel-involved-dozens-more-companies-over-one-million-employees/>.

and Eric Schmidt were among the principal conspirators in this anticompetitive, anti-worker agreement.¹¹ And employers have also colluded against employees performing essential care work. In several cities across the nation, hospitals have been accused of conspiring with each other to hold down the wages of nurses.¹²

Along with these horizontal restraints among employers, nearly 30 million workers are bound by non-compete agreements with their employers.¹³ Non-compete clauses restrict workers from leaving their current employer to join a competitor or establish a competing business for a specified period. While many employers do not enforce non-compete agreements against workers in court, the mere possibility of employers' suing to enforce non-competes can deter workers from seeking new employment or starting new businesses.¹⁴

The Open Markets Institute, joined by the SEIU, AFL-CIO, UFCW, and over 60 other public interest groups and legal scholars, filed a petition in March outlining the harms of non-compete clauses in employment contracts to workers and small businesses. The petition called on the FTC, through rulemaking, to ban non-compete clauses as an unfair method of competition.

Even though the Supreme Court has long held that the antitrust laws apply to buyers of goods and services,¹⁵ such as employers, the antitrust response to the problem of employer power has been acquiescence. When reviewing corporate mergers, the antitrust agencies appear to have *assumed* that the affected labor markets are competitive.¹⁶ As a result, they generally have not examined the labor market effects of mergers and arguably have enabled the consolidation of labor markets.¹⁷ The DOJ and the FTC appear to have never stopped a merger on labor market grounds.¹⁸

The antitrust agencies and courts have consistently held that the antitrust laws protect workers and other sellers from powerful buyers.¹⁹ In practice, however, this protection has been qualified. A recent federal district court in California effectively failed to protect workers and other

¹¹ *Id.*

¹² *E.g.*, *Cason-Merenda v. VHS of Michigan, Inc.*, 296 F.R.D. 528 (E.D. Mich. 2013); *Fleischman v. Albany Medical Center*, No. 06-cv-0765, 2008 U.S. Dist. LEXIS 57188 (N.D.N.Y. July 28, 2008).

¹³ U.S. DEP'T OF TREASURY, *NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS* 6 (2016).

¹⁴ Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOVATION POL'Y & ECON. 39, 49 (2012).

¹⁵ *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946).

¹⁶ Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power* 132 HARV. L. REV. 537, 541-542 (December 2018).

¹⁷ Benmelech et al., *supra* note 4, at 3.

¹⁸ Naidu et al., *supra* note 16, at 542.

¹⁹ *See, e.g.*, U.S. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines*, 32-33 (2010); *Apple Inc. v. Pepper*, 139 S.Ct. 1514, 1525 (2019) ("[S]ome downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a 'common fund[.]'" (citation omitted); *Mandeville Island Farms*, 334 U.S. at 236 ("The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.")).

upstream market participants in a recent case. In *Alston v. NCAA*,²⁰ the district judge held that the harms to college athletes from the National Collegiate Athletic Association’s restraints on player compensation should be balanced against the purported benefits to the viewing public.²¹ This approach permits courts and corporations to justify harms to workers – one trading party a corporation deals with – by balancing them against the benefits to consumers – another trading party. Longstanding antitrust precedents and public policy considerations advise against this sort of unbounded balancing.²²

The DOJ and FTC should use their influence as *amici curiae* to advise courts to reject the *Alston* district court’s improper weighing of harms to workers against benefits to consumers. In employer and other buyer-side cases, the DOJ and the FTC, as well as the courts, should consider only the harms and benefits to the affected workers and sellers.

II. The DOJ and FTC Advocate Against Practices and Policies that Strengthen Workers’ Bargaining Power

On top of failing to protect workers from powerful employers, the DOJ and the FTC have taken actions that reduce the bargaining power of workers. The FTC—under both Republican and Democratic administrations—has brought numerous cases against professional associations and other worker organizations for seeking to raise incomes through collective action. The FTC has also been an aggressive critic of occupational licensing rules, which can protect consumer health and safety and raise wages. Partnering with the FTC, the DOJ has argued against the ability of ride-hailing drivers to bargain collectively with ride-hailing corporations.

The present anti-worker application of antitrust law bears a troubling resemblance to the deployment of antitrust against labor unions in the decades immediately following the enactment of the Sherman Act.²³ Congress explicitly corrected the judiciary’s erroneous deployment of antitrust law against workers with its passage of the Clayton Act more than a century ago, making sure that collective organizations and actions by workers would not be “illegal combinations or conspiracies in restraint of trade.”²⁴ “The labor of a human being,” the Act declares, “is not a commodity or article of commerce.”

²⁰ *In re Nat’l Collegiate Athletic Assoc. Athletic Grand-In-Aid Cap Antitrust Litig.*, 375 F.Supp.3d 1058, 2019 WL 1747780 (N.D. Cal. 2019).

²¹ *Id.* at 1102. (The Court found that the challenged limits [restricting compensation to college athletes] ... are procompetitive relative to having no limits, to the extent that they help maintain consumer demand for college sports as a distinct product by preventing unlimited cash payments unrelated to education.”)

²² *See, e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596, 612 (1972) (“If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts.”); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978) (“Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint’s impact on competitive conditions.”).

²³ *See generally* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766 (2019).

²⁴ 15 U.S.C. § 17.

Labor laws protect the rights of workers to organize and build power against employers in labor markets.²⁵ Unions are the classic example of workers' collective action. By banding together, individual workers who otherwise lack leverage against employers can exercise power and seek better terms of employment. Much like unions, professional associations can engage in collective action and enhance the bargaining power of their members. During the mid-twentieth century, labor unions empowered workers to strike a more equitable bargain with employers.²⁶ In today's concentrated labor markets, unions and professional associations are even more important, critical to creating a more level playing field between workers and powerful employers.²⁷

The government's antagonism to efforts by workers and professionals to organize is especially unfair to independent contractors and workers who are classified by their employers as independent contractors. While workers classified as employees are entitled to a statutory antitrust exemption,²⁸ workers classified as independent contractors—a growing fraction of the workforce²⁹—do not qualify for this exemption and can be prosecuted under the antitrust laws.³⁰ Rather than recognize this anachronistic gap in labor protections, the FTC, in particular, has exploited it, targeting the collective action of independent contractors. In recent years, the FTC has sued the professional associations of ice-skating coaches,³¹ music teachers,³² organists,³³ and property managers³⁴ for collectively seeking to raise their members' incomes. It has also filed numerous lawsuits against doctors for bargaining collectively with often powerful private insurance companies.³⁵

At times, the DOJ has joined with the FTC in endorsing anti-worker interpretations of antitrust law. In 2017, the DOJ and FTC filed an *amicus* brief opposing the City of Seattle's law granting collective bargaining rights to ride-hailing drivers.³⁶

²⁵ See 29 U.S.C. § 157 (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”).

²⁶ Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 532 (2011).

²⁷ Benmelech et al., *supra* note 4, at 16 (finding that a “negative effect of employer concentration on wages is mitigated for plants that operate in industries with higher unionization rates” and “consistent evidence that the presence of union bargaining power mitigates a negative association between employer concentration and wages.”).

²⁸ *Spence v. Southeastern Alaska Pilots’ Ass’n*, 789 F.Supp. 1007, 1012-13 (D. Alaska 1990).

²⁹ Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015*, 2 (NBER Working Paper No. 22667), <https://www.nber.org/papers/w22667>.

³⁰ *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 145 (1942); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 1032-33 (2016).

³¹ *In re Prof’l Skaters Ass’n*, 2015 FTC LEXIS 46.

³² *In re Music Teachers Nat’l Ass’n*, 2014 FTC LEXIS 68.

³³ *In re Am. Guild of Organists*, 2017 FTC LEXIS 76.

³⁴ *In re Nat’l Ass’n of Residential Property Managers*, 2014 FTC LEXIS 217.

³⁵ *E.g.*, *In re Praxedes E. Alvarez Santiago*, 2013 FTC LEXIS 66; *In re M. Catherine Higgins*, 149 F.T.C. 1114 (2010) *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

³⁶ Brief for the United States et al. as Amici Curiae In Support of Appellant and In Favor of Reversal, *Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (2017), (No. 17-35640).

The DOJ has also independently advocated for antitrust standards that would protect certain employers’ ability to collude against their workers. In three cases in which franchise agreements prohibited franchisees from recruiting each other’s employees, the Justice Department argued that these “no-poaching arrangements” should be judged under the rule of reason.³⁷ The rule of reason makes successfully challenging potentially anticompetitive conduct difficult, especially as compared to per se illegality.³⁸ If the franchise owners agreed not to hire each others’ workers on their own, outside of their franchise contract, that would be per se illegal. Although no-poach agreements have the same effect on workers, whether done directly between franchisees or indirectly through a franchise agreement, the DOJ’s more tolerant position toward certain no-poach agreements gives employers in fast food and other franchised contexts more freedom to collude against their workers.

Like collective bargaining, labor market policies such as occupational licensing can promote the welfare of workers. Licensing rules condition entry into a particular labor market on the completion of specified educational and training requirements. Along with protecting consumers from unqualified and fraudulent service providers, licensure—by restricting entry—can bolster the wages of licensed professionals. To be sure, overly strict licensing can harm citizens charged overly high prices, and qualified individuals who are prevented from receiving a license. But the wage premium of licensure benefits many workers and is comparable in magnitude to the premium from unionization.³⁹ On top of these positive wage effects, licensing may mitigate gender and racial discrimination in labor markets.⁴⁰ Thus, licensing protects consumers and also raises wages and stabilizes employment for licensed professionals.⁴¹

³⁷ Corrected Statement of Interest of the United States, *Harris v. CJ Star, LLC*, 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019); Corrected Statement of Interest of the United States, *Richmond v. Bergey Pullman Inc.*, 2:18-cv-00246 (E.D. Wash. Mar. 8, 2019); Corrected Statement of Interest of the United States, *Stigar v. Dough Dough, Inc.*, 2:18-cv-00244 (E.D. Wash. Mar. 8, 2019).

³⁸ See Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 101 (2009); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009) (finding that from February 1999 to May 5, 2009, “plaintiffs almost never win under the rule of reason. In 221 of 222 cases ..., the defendant won.”); Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. REV. 1265, 1268 (2006) (finding that 84% of rule of reason cases do not meet the standard’s first requirement of showing “a significant anticompetitive effect resulting from the restraint.”).

³⁹ Maury Gittleman & Morris M. Kleiner, *Wage Effects of Unionization and Occupational Licensing Coverage in the United States*, 69 ILR REV. 142, 168-70 (2016) (finding wage premia in both unionized and licensed labor markets but higher wage premia for unionized segments).

⁴⁰ Peter Blair & Bobby Chung, *Job Market Signaling Through Occupational Licensing* (2017) (“In the presence of occupational licensing, we find evidence that firms rely less on observable characteristics such as race and gender in determining employee wages. As a result, licensed minorities and women experience smaller wage gaps than their unlicensed peers.”).

, <https://ideas.repec.org/p/hka/wpaper/2017-50.html>.

⁴¹ See generally Sandeep Vaheesan & Frank Pasquale, *The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy*, 14 ANN. REV. L. & SOC. SCI. 309 (2018). One of occupational licensing’s main strengths – the ability of a society to set ground rules and floors on wages and benefits for an entire industry – resembles the value of proposals to institute sectoral bargaining in industries. Sectoral bargaining, also known as “sectoral organizing,” would allow employers and workers to come together and bargain for minimum work and compensation standards on behalf of an entire industry.

As part of its “competition advocacy,” the FTC in recent decades has been a consistent opponent of all occupational licensing regulations. The FTC’s campaign rests on questionable assumptions and a thin empirical record.⁴² Reflecting a bipartisan consensus, the FTC has argued that licensing should aim only to protect consumers and so should be narrowly drawn to advance this objective.⁴³ The Commission has either ignored or disparaged the benefits to workers from licensing. In a 2014 letter concerning the City of Chicago’s proposed ordinance to govern ride-sharing services, FTC staff contended that regulatory objectives besides consumer protection and safety are somehow illegitimate.⁴⁴

Conclusion

In recent decades, antitrust authorities have failed workers, professionals, and independent entrepreneurs. Empirical research has found that the employer-side concentration in labor markets significantly lowers wages. The DOJ and the FTC have done little to stem this tide of rising concentration in labor markets. Instead, the FTC has brought enforcement actions against professionals and other workers for engaging in collective conduct, such as joint bargaining. The FTC has also been a consistent critic of occupational licensing rules that can raise wages and address gender and racial discrimination in labor markets. Through this enforcement and advocacy campaign, the Commission has frustrated workers’ efforts to build power and deepened disparities in bargaining power between the worker and the employer.

The DOJ and the FTC must reorient their labor market enforcement and advocacy. Toward this end, the sibling agencies must address labor market concentration and practices on the employer side and respect practices and policies that permit workers to organize to build power on the job.

There are at least six choices the DOJ and the FTC should make now, without additional statutory authority:

⁴² *Id.*

⁴³ *E.g.*, Letter from Tara Isa Koslov, Ginger Jin, & Tad Lipsky, Fed. Trade Comm’n, to Suzanne Geist, Nebraska Senate 7 (Mar. 15, 2017), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comments-nebraska-state-senate-regarding-number-proposed-senate-bills-would-loosen-or/neb_ol_letter_to_senator_geist.pdf; Letter from Susan S. DeSanti, Joseph Farrell & Richard A. Feinstein, Fed. Trade Comm’n, to Loris Jones, Texas Board of Veterinary Med. Examiners 4 (Aug. 20, 2010), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-texas-board-veterinary-medical-examiners-concerning-rule-573.17-regarding-animal-teeth-floating/100910texasteethfloating.pdf.

⁴⁴ *See* Letter from Andrew I. Gavil, Deborah L. Feinstein & Martin S. Gaynor, Fed. Trade Comm’n, to Brendan Reilly, Chicago City Council 4 (Apr. 15, 2014), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf (“Any restrictions on competition that are implemented should be no broader than necessary to address legitimate subjects of regulation, such as safety and consumer protection, and narrowly crafted to minimize any potential anticompetitive impact.”).

1. When evaluating a proposed merger, the FTC and DOJ should evaluate the potential effects on wages and other terms of employment from the merger and, when necessary, go to court to block mergers that threaten to reduce competition in labor markets.
2. The FTC should use its authority under Section 5 of the FTC Act⁴⁵ to prohibit non-compete agreements that impair worker mobility and depress wages.
3. The DOJ and the FTC should use their full remedial authority when addressing anticompetitive conduct by employers. For instance, they should be prepared to disgorge the ill-gotten gains of employers who have engaged in anticompetitive practices that depressed workers' wages. And DOJ should criminally prosecute wage-fixing among employers.
4. The DOJ and FTC should seek to minimize the use of rule of reason analyses when judging business practices wherever possible. Instead, they should advocate for presumptions and per se rules to prevent wealthy corporations from manipulating litigation in their favor.⁴⁶ To the extent the rule of reason is applied, both agencies should examine only a practice's harms and benefits to workers, and not consider gains to other groups, and call on courts to do the same.
5. The DOJ and the FTC should respect the right of all workers, regardless of federal labor law classification, to organize and build power through collective action. Workers classified (or misclassified)⁴⁷ as independent contractors should not be investigated or sued for attempting to build bargaining power.
6. The FTC should immediately suspend its anti-licensing campaign. Not only is this campaign outside the purview of the FTC's mission and expertise, it is contrary to the interests of workers and professionals.

The DOJ and the FTC can and should become a champion of the interests of American workers. This, however, will require a fundamental change in agency priorities and the adoption of an enforcement philosophy that both challenges the power of employers and respects the right of workers and independent entrepreneurs to organize.

⁴⁵ Section 5 prohibits, among other things, "unfair methods of competition." 15 U.S.C. § 45. The Supreme Court has stated that "the Federal Trade Commission does *not* arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (emphasis added).

⁴⁶ See Open Markets Institute, *Restoring Antimonopoly Through Bright-Line Rules*, PROMARKET, Apr. 26, 2019, <https://promarket.org/restoring-antimonopoly-through-bright-line-rules/>

⁴⁷ Danny Vinik, *The Real Future of Work*, POLITICO, Jan. 4, 2018, <https://www.politico.com/magazine/story/2018/01/04/future-work-independent-contractors-alternative-work-arrangements-216212>.