

An Antitrust Agenda for Re-Balancing Labor Market Power
Public Comment
Department of Justice Antitrust Division
Public Workshop on Competition in Labor Markets
September 2019

The Antitrust Division’s workshop on competition in labor markets highlights and reflects the growing body of research and analysis showing that labor markets deviate fundamentally from the theoretical construct of perfect competition. In fact, employers typically exercise power over workers. That fact is reflected in the growing body of empirical research on labor market monopsony,¹ and is also the combined effect of decades-long trends in antitrust, labor, and corporate law, which taken together disfavor collective bargaining among workers while permitting or encouraging concentrated control over workers within firms and markets.² The power imbalance has been getting worse for decades.³

In particular, antitrust law has greatly withdrawn its reach in regulating the conduct of powerful business firms, even while it has extended its grasp in constraining the coordination of workers and small producers who are beyond the bounds of labor law. In fact, under-enforcement of antitrust law, particularly in the area of vertical restraints, has been a central component of the legal environment that has made the changing business structures that constitute the fissured workplace and the gig economy possible in the first place.⁴ These business structures have further undermined worker bargaining power, and by that means, have made workers worse-off. Withdrawing employment status from a large segment of the working population has also made antitrust *more* relevant in governing the status of workers on the job, since it places more workers outside the conventionally accepted boundaries of antitrust’s labor exemption⁵ and treats relations between workers and their bosses analogously to antitrust’s treatment of firms at distinct supply chain segments.⁶

¹ Arindrajit Dube et al., “Monopsony in Online Labor Markets,” *American Economic Review: Insights* 1, no. 1 (2019); Arindrajit Dube, Alan Manning, and Suresh Naidu, “Monopsony and Employer Mis-Optimization Account for Round Number Bunching in the Wage Distribution,” 2017; Douglas A. Webber, “Firm Market Power and the Earnings Distribution,” *Labour Economics* 35 (2015): 123–34; Jae Song et al., “Firming Up Inequality,” *Quarterly Journal of Economics* 134, no. 1 (2019): 1–50; Daniel Berger, Kyle Herkenhoff, and Simon Mongey, “Labor Market Power” (Working Paper, 2019). This body of work is well-summarized by Christina Volpin and Christopher Pike, “Competition Concerns in Labour Markets,” Background Note (Paris: Organization for Economic Cooperation and Development, 2019), [https://one.oecd.org/document/DAF/COMP\(2019\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2019)2/en/pdf).

² See, e.g., Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. (forthcoming 2020); Kate Andrias, *The New Labor Law*, 126 YALE L. J. 2 (2016); Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C.L. Rev. 283 (1998).

³ Josh Bivens and Heidi Shierholz, “What Labor Market Changes Have Generated Inequality and Wage Suppression?” (Economic Policy Institute, December 12, 2018).

⁴ Brian Callaci, *The Historical and Legal Creation of a Fissured Workplace: The Case of Franchising* (dissertation, U Mass.-Amherst Dept. of Economics, 2018); Marshall Steinbaum, “Antitrust, the Gig Economy, and Labor Market Power,” *Law and Contemporary Problems* 82, no. 2 (2019): 45–64; Sanjukta Paul, “Fissuring and the Firm Exemption,” 82(2) *Law & Contemporary Problems* 65 (2019). David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014).

⁵ Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 Loy. Univ. Chi. L. J. 969 (2016); Sandeep Vaheesan, “Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages,” 78 Maryland Law Review 766 (2019).

⁶ Whether fissured relationships with non-employee workers are considered horizontal or vertical is a matter of ongoing controversy in the antitrust caselaw that is currently developing. Boris Bershteyn et al., “DOJ Is Trying to Rein In Franchise No-Poach Suits,” *Law360* (blog), February 19, 2019,

Underlying the shifts in antitrust law in recent decades has been a doctrinal and philosophical commitment to the consumer welfare standard, which is inherently hostile to worker and small producer interests.⁷ It is also contrary to the original intent of antitrust law.⁸ Antitrust law (along with a revived labor law) has a role to play in rectifying the labor market's imbalance of power. We know that because we've seen the opposite: antitrust law used to make that imbalance worse.

As an agenda to reverse this dire trend, we propose the following:

- Broad immunity from antitrust liability for non-employee workers, covering collective bargaining, unilateral collective action, and worker cooperatives. Enacting such reform should not be taken to prejudice any other desirable reforms to antitrust's allocation of coordination rights—e.g., immunities for small and medium sized business for certain forms of coordination,⁹ or immunities for coordination in the public interest.¹⁰
- Labor market impact incorporated as a routine function in merger review, and merger challenges premised on harm to competition in labor markets recognized.
- Antitrust scrutiny of vertical restraints restored to pre-1970s levels and further clarified, likely resulting in the illegality of many business practices constitutive of the fissured workplace.
- An administrative ban on noncompete clauses, without exception, save for workers who enjoy equity ownership of their employer as part of their employment.
- Criminal liability for wage-fixing and no-poaching agreements, including in franchising contracts.
- Labor market monopsonization—the control of a labor market by an employer with market power—should be considered a violation of the Sherman Act. Unilateral conduct that reduces competition in labor markets, including but not limited to outright monopsonization, resulting in reductions in employment, wages, or both, should be the target of public antitrust enforcement.
- Restore and clarify the notion of *fair competition* as fundamental to antitrust law. This might be aided by sector-specific guidance from the Federal Trade Commission. Violations of labor and employment law should be treated by the agencies as unfair competition.

<https://www.law360.com/foodbeverage/articles/1130056/doj-is-trying-to-rein-in-franchise-no-poach-suits>; Marshall Steinbaum, "Uber's Antitrust Problem," *The American Prospect*, May 11, 2016.

⁷ Marshall Steinbaum and Maurice E. Stucke, "The Effective Competition Standard: A New Standard for Antitrust," *University of Chicago Law Review*, Symposium on the Chicago School of Antitrust, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3293187.

⁸ As the legislative record shows, legislators did not conceive of the Sherman Act in terms of promoting consumer welfare or low consumer prices at any cost. On the contrary, they were concerned with both harmfully high *and* harmfully low prices, with the interests of the "ordinary citizens" in the face of growing corporate power as their central concern. A key figure in the crafting of the Act, Senator George, had this to say of the trusts, the primary targets of the Act and the giant corporations of their day: "They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business and they decrease the cost of raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. The aggregate to themselves great, enormous wealth by extortion which make[s] the people poor. Then making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States ... till they are fast producing that condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command." 21 Cong. Rec. 1768 (February 27, 1890). See also Paul, "Antitrust as Allocator."

⁹ Australian Competition & Consumer Commission, "Small business collective bargaining guidelines" (December 20, 2018), <https://www.accc.gov.au/publications/small-business-collective-bargaining-guidelines>.

¹⁰ An example would be coordination among clothing brands or other sellers in order to raise the rates paid to suppliers in the Global South and thus to eradicate sweatshop labor and replace it with living-wage work on a global scale.

Some of these proposals are fully within the power of public antitrust enforcement agencies to undertake unilaterally. Others, such as deference to horizontal coordination by non-employee workers to rebalance power in labor markets, would take the form of enforcers redirecting their resources elsewhere. Finally, given hostile case-law, we call on Congress to legislate in order to restore to antitrust law the power-rebalancing aims that once characterized it.

Sanjukta Paul
Assistant Professor of Law
Wayne State University

Marshall Steinbaum
Assistant Professor of Economics
University of Utah