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ANTITRUST AND LABOR MARKETS: A REPLY TO RICHARD EPSTEIN

Eric A. Posner*

In his article, *The Application of Antitrust Law to Labor Markets – Then and Now*, Richard Epstein argues that rather than urge courts and regulators to apply antitrust law to labor markets, reformers who care about labor market competition should try to constrain unions. In this reply, I argue that Epstein’s assumptions about labor market structure are contradicted by mountains of empirical evidence. The anticompetitive behavior of employers causes significant harm to social welfare—both in terms of economic output and equity. Antitrust law is a valuable tool for addressing America’s ailing labor markets.

* Kirkland & Ellis Distinguished Service Professor, University of Chicago Law School. Thanks to Jonathan Masur for helpful comments, and Sima Biondi for excellent research assistance.

A REPLY TO RICHARD EPSTEIN

In his article, *The Application of Antitrust Law to Labor Markets – Then and Now*,¹ Richard Epstein pours cold water on the recent efforts to strengthen antitrust enforcement in labor markets, arguing that reform should focus on curtailing the power of unions rather than enhancing antitrust law. As his fusillade is aimed partly at my recently published book, *How Antitrust Failed Workers*, I write this response to take issue with several of his empirical and normative claims. I also argue that an invigorated antitrust law, focused on labor markets, is more consistent with the classical liberal tenets that Epstein has famously championed than the pro-big business ideological position implicit in Epstein's article. It also has much to offer other ideological strains that are ascendant in American politics, including progressivism and populist conservatism.

Epstein's view of antitrust law reflects the skeptical take associated with the Chicago-school tradition.² He believes that antitrust law should be used sparingly, mainly to counter the worst forms of abuse like price-fixing.³ While he sees a role for antitrust law in blocking mergers that would result in significant market concentration, he believes that markets are generally efficient—they tend to correct themselves because monopoly profits attract entry and technological change disrupts collusion—and that antitrust law is a crude way to correct markets even when they fall short.⁴ In Epstein's view, the real threat to competition comes not from businesses but from workers who organize unions, and politicians who meddle with labor markets.⁵ Epstein believes that unions push

¹ Richard A. Epstein, *The Application of Antitrust Law to Labor Markets – Then and Now*, 15 N.Y.U. J.L. & LIBERTY 327 (2022).

² See ROBERT BORK, *THE ANTITRUST PARADOX* (2d ed. 1993).

³ Epstein, *supra* note 1, at 332-3.

⁴ *Id.* at 336.

⁵ *Id.* at 349-51.

wages above the competitive level, disrupt commerce, squelch growth, and discourage innovation like charter schools.⁶

This view at one time enjoyed a high degree of influence but it is looking worse for wear these days. Numerous studies suggest that market concentration and accompanying price markups increased substantially over the last forty years of Chicago-school dominance of the courts and regulators.⁷ Not all economists blame lax antitrust enforcement.⁸ But there was never much evidence for the Chicago view, and the recent evidence that it has not improved competition, and may have worsened it, has prompted an overdue reassessment of antitrust law.⁹

But my concern here is not antitrust law in general, but its role in countering labor monopsony, as is Epstein's as well. In my book, *How Antitrust Failed Workers*,¹⁰ I argue (1) that labor monopsony, caused by concentration and other frictions, is a real problem for public policy; (2) that antitrust law formally applies to many labor market abuses; (3) that a "litigation gap" prevails, as antitrust law is used in

⁶ *Id.* at 334.

⁷ See e.g., Matias Covarrubias et al., *From Good to Bad Concentration? US Industries over the Past 30 Years*, 34 NAT'L BUREAU OF ECON. RSCH. MACROECON. ANN. 1 (2020); Jan De Loecker et al., *The Rise of Market Power and the Macroeconomic Implications*, 135 Q. J. ECON. 561 (2020); German Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S. 1* (Nat'l Bureau of Econ. Rsch., Working Paper No. 23583, 2017); Gustavo Grullon et al., *Are US Industries Becoming More Concentrated?*, 23 REV. FIN. 697 (2019); Vanessa Alviarez et al., *Global Giants and Local Stars: How Changes in Brand Ownership Affect Competition* (May 8, 2020) (unpublished manuscript) [<https://perma.cc/A5G9-ZJRC>]; Thomas G. Wollmann, *How to Get Away with Merger: Stealth Consolidation and Its Real Effects on US Healthcare* (Nat'l Bureau Econ. Rsch., Working Paper 27274, 2020); Mara Faccio & Luigi Zingales, *Political Determinants of Competition in the Mobile Telecommunication Industry* (Nat'l Bureau Econ. Rsch., Working Paper No. 23041, 2017). For a summary with implications for antitrust law, see Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843 (2020).

⁸ David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON. 645 (2020). For a discussion, see Filippo Lancieri et al., *The Political Economy of the Decline of Antitrust Enforcement in the United States* (working paper, 2021).

⁹ See, e.g., Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L. J. INDUS. ORG. 714 (2018).

¹⁰ ERIC POSNER, *HOW ANTITRUST FAILED WORKERS* (2021).

product markets vastly more often, and with vastly more success, than in labor markets; (4) that this litigation gap cannot be justified by differences between labor markets and product markets; and (5) that therefore regulators and courts should use antitrust law to address labor monopsony, and Congress should consider reforms.

Epstein does not contest (2) or (3), so I will not repeat the arguments here. Let me then focus on the other claims.

I. IS LABOR MONOPSONY A REAL PROBLEM?

At one time, many economists believed that labor markets were competitive, or anyway competitive enough that government intervention was rarely warranted.¹¹ That view has lost favor. Study after study has provided evidence of labor monopsony, including studies that show that employees are not sensitive to wage changes, that minimum wage laws do not usually result in disemployment, that higher levels of concentration are associated with lower wages, that wages are dispersed rather than uniform for workers of equal productivity, and that mergers that concentrate labor markets reduce wages.¹² A recent meta-analysis, published after my book, looks at 1,320 estimates of firm-level labor elasticity in 53 studies, and finds, after controlling for a range of factors including publication bias, that “the literature provides strong evidence for monopsonistic

¹¹ Orley C. Ashenfelter et al., *Monopsony in the Labor Market: New Empirical Results and New Public Policies* 1 (Nat’l Bureau Econ. Rsch., Working Paper No. 29522, 2021) (describing the conventional wisdom).

¹² For a discussion with citations, see POSNER, *supra* note 10 at 11-29. See also Kevin Rinz, *Labor Market Concentration, Earnings, and Inequality*, J. HUM. RES. (Oct. 12, 2020) (forthcoming) [<https://perma.cc/G9U4-VCY2>] for a concise and up-to-date summary; Alan Manning, *Monopsony in Labor Markets: A Review*, 74 ILR REV. 3 (2021). See also José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, J. HUM. RES. (May 12, 2020) (forthcoming) [<https://perma.cc/QVR2-XVB9>].

competition and implies sizable markdowns in wages.”¹³ While the authors’ estimate of firm-level labor elasticity is higher than that of many of the studies they evaluate, their estimate reflects market-wide conditions, meaning that some markets will exhibit even lower elasticities while others are reasonably competitive. In an even more recent address, the Nobel prize-winning labor economist David Card argued that the “the time has come to recognize that many – or even most – firms have some wage-setting power.”¹⁴

Not all labor market frictions can be addressed by antitrust law, which is more concerned with concentration than with other frictions like search costs and job differentiation. But here the studies of Azar et al., Benmelech et al, and Rinz, leave little doubt that extremely high levels of concentration are common.¹⁵ Azar et al., for example, estimate that 60% of labor markets are characterized by HHIs higher than 2,500, and a quarter of labor markets have HHIs higher than an eye-watering 7,200.¹⁶ HHI refers to the Herfindahl-Hirschman Index, a standard measure of market concentration that ranges from 0 to 10,000. Under the Department of Justice and Federal Trade Commission Merger Guidelines, a market with HHI of 2,500 or higher is regarded as “highly concentrated,” and mergers that take place in such markets are presumptively illegal.¹⁷ The high levels of HHIs for labor markets suggest that mergers will often suppress

¹³ Anna Sokolova & Todd Sorensen, *Monopsony in Labor Markets: A Meta-Analysis*, 74 ILR REV. 27, 51 (2021); Gregor Schubert, Anna Stansbury & Bledi Taska, *Employer Concentration and Outside Options* 1 (Wash. Ctr. Equitable Growth, Working Paper, 2021).

¹⁴ David Card, *Who Set Your Wages?* 1 (Jan. 2022) (unpublished) [<https://perma.cc/JQ2M-YSWC>].

¹⁵ Azar, *supra* note 12; Efraim Benmelech, Nittai K. Bergman, & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, J. HUM. RES. (Dec. 14, 2020) (forthcoming) [<https://perma.cc/UY5J-E55Y>]; Rinz, *supra* note 12.

¹⁶ POSNER, *supra* note 10, at 26.

¹⁷ U.S. DEP’T. OF JUST. & FTC, MERGER GUIDELINES §5.3 (2010).

wages, and that is indeed the findings of three recent studies.¹⁸ A nice real-world illustration is a recent hospital merger in Abilene, Texas, involving a hospital with 70.1% of the market of registered nurses and a hospital with 22.4% of the market of registered nurses. The Texas Health and Human Services Commission granted a certificate of public advantage to the merged hospital system even though it would result in single-firm control of 92.6% of the market of registered nurses, as the FTC pointed out in a public comment opposing the merger.¹⁹ Or, in terms of HHI, an already absurdly concentrated market (HHI north of 5,300) was taken to a near black-hole level of concentration of more than 8,500.

Epstein does not cite academic work that provides evidence that labor markets are competitive.²⁰ He simply asserts without citation that “[m]ost labor markets operate largely on competitive principles”²¹ except where unions exist and laws intervene to protect workers. He repeats the Chicago-school canard that when monopoly rents exist, “savvy entrepreneurs” will enter the market in order to capture a portion of them,²² ignoring decades of literature that shows

¹⁸ David Arnold, *Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes* (Oct. 27, 2019) (unpublished manuscript) [<https://perma.cc/N7FM-BALB>]; Benmelech et al., *supra* note 15; Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397 (2021).

¹⁹ FTC, 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) [<https://perma.cc/WX2H-EUM8>].

²⁰ He could have; there are some studies that estimate relatively high elasticities. See Sokolova & Sorensen, *supra* note 13. But Sokolova and Sorensen’s meta-analysis indicates that fairly low elasticities prevail. It is important to keep in mind that from an antitrust standpoint, the relevant issue is not the median or mean elasticity, which offers a general picture of labor markets but masks the distribution. It is clear that in many labor markets, elasticities are quite low, and if labor markets with high elasticities also prevail, that in no way offsets the problem.

²¹ See also *id.* at 711, 742-43, 765-66.

²² Epstein, *supra* note 1, at 362.

how incumbents can block or buy out those potential entrants.²³ The only empirical evidence he cites are turnover rates and the existence of a “labor shortage” in the middle of a pandemic.²⁴ But turnover rates in isolation do not indicate the presence of labor market competition.²⁵ Moreover, while Epstein insists that turnover rates are “high,” he does not provide any basis for thinking that the numbers are high rather than low.²⁶

²³ See, e.g., Steven Salop & David Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983); Hovenkamp & Scott Morton, *supra* note 7.

²⁴ Epstein, *supra* note 1, at 359-61.

²⁵ See Venkataraman Bhaskar et al., *Oligopsony and Monopsonistic Competition in Labor Markets*, 16 J. ECON. PERSP. 155, 158 (2002) (“Some economists doubt the importance of labor market imperfections because of high levels of labor turnover, which seems to imply an active and flexible labor market. But, it is not the level of labor turnover that is important; it is the sensitivity to the wage.”). Epstein also acknowledges the existence of wage dispersion, which economists agree is evidence against competitive labor markets. Bhaskar et al., *supra*, at 156 (“The existence of substantial wage dispersion among workers of very similar quality suggests that labor market imperfections are important and inevitably give employers some oligopsony power”).

²⁶ In his Response, Epstein takes issue with my reliance on various studies, like those of Arnold, Azar et al., and Rinz. Richard A. Epstein, *Antitrust Overreach in Labor Markets: A Response to Eric Posner*, 15 N.Y.U. J.L. & LIBERTY 407, 418-26 (2022) [hereinafter Epstein, *Response*]. Epstein is right that each of these studies relies on contestable assumptions that are necessitated by data limitations. But that is true for all studies. The significance of the empirical literature for lawyers and policymakers is that authors who use different data and methods produce the same result: strong evidence of significant labor market power and/or labor market concentration in thousands of markets (however they are approximated or proxied) across the United States. There are now dozens of such studies (see the citations in Sokolova, *supra* note 13, and Schubert et al., *supra* note 13; Gregor Jarosch et al., *Granular Search, Market Structure, and Wages* (Jan. 2021) (unpublished); José Azar et al., *Estimating Labor Market Power* (Sept. 18, 2019) (unpublished), and I am unaware of a single study that contradicts them. Epstein is right if his claim is only that the evidence of a causal impact running from concentration to wage suppression remains contestable. The Prager and Schmitt study offer the best evidence of causation, but it is a study only of hospitals, and perhaps hospital markets are different from all others, though I see no reason to think this is the case. Epstein speculates that studies define labor markets are defined too narrowly because many workers move. But the evidence indicates that most workers do not move to find new jobs, but are tied to locations by personal attachments, including a spouse’s job, the children’s school, and so on. See Ioana

As for the current labor shortage, many factors are involved, but it is fully consistent with monopsonistic labor markets. Businesses have faced a spike in demand since the pandemic downturn.²⁷ In a competitive labor market, they would raise wages to attract additional workers so as to ramp up production. Instead, they have kept wages low or raised them only a small amount, which is the profit-maximizing strategy for labor monopsonists who accept reductions in output relative to the competitive ideal in order to minimize labor costs.²⁸

Epstein also argues that the labor monopsony theory is inconsistent with the economic good times that we had supposedly been enjoying until the pandemic brought an end to the party.²⁹ He points to high stock market returns, but the high stock returns over a handful of years can mean lots of things, and certainly do not refute the labor monopsony hypothesis. Labor monopsony causes a transfer of wealth from labor to capital, and thus *should* lead to higher

Marinescu & Roland Rathelot, *Mismatch Unemployment and the Geography of Job Search*, 10 AM. ECON. J.: MACROECON. 42 (2018). It is much more likely, in fact, that the commuting zone is too broad a labor market area, and thus the studies understate rather than overstate the degree of market power. (Even as I write, additional studies are pouring forth that confirm the central empirical findings of the earlier studies while using ever-more sophisticated methods and granular data. See, e.g., Nina Roussille & Benjamin Scuderi, *Bidding for Talent, Equilibrium Wage Dispersion on a High-Wage Online Job Board* 4 (Jan., 2022) (“we are able to resoundingly reject the perfect competition model against all possible imperfect competition alternatives”).

²⁷ Marc Labonte & Lida R. Weinstock, *Labor Market Tightness and the Economic Recovery, Part 1*, CONG. RSCH. SERV. (2021).

²⁸ This is textbook labor economics. See, e.g., Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018) at 556. In his Response to my Reply, Epstein elaborates on his claims about the pandemic-induced turmoil in labor markets, but I do not understand the bearing of his discussion on my claims. I have never alleged “a grand cartel scheme.” Epstein, *Response, supra* note 26, at 412-14. In my book and other writing, I recognize that the empirical literature shows enormous variation in labor markets: some are close to competitive, while others are extremely concentrated. The evidence on cartels (that is, explicit forms of collusion) is mostly anecdotal, as it is for product markets. But that evidence is accumulating, as more cases are brought.

²⁹ Epstein, *supra* note 1, at 354.

stock market returns, which mostly accrue to the wealthy at the expense of workers in monopsonized markets. Epstein also cites household income figures, which were rising before the pandemic struck.³⁰ But taken in isolation, they also tell us nothing. Labor monopsonists choose the wage where marginal revenue product equals marginal cost. Rising worker productivity over time will thus result in higher wages over time even if all employers are monopsonists. Whether household income is rising, falling, or steady, it is lower in a labor market characterized by monopsony or monopsonistic competition than it would be in a competitive labor market. In any event, the consensus view is that over several decades labor's share of income has dropped steadily, though not necessarily because of a rise in labor monopsony; more likely, the decline of union density is the culprit.³¹ Economic growth has also stagnated over the last few decades, consistent again with monopsony (as well as monopoly), which lowers output.³²

II. IS THE LITIGATION GAP JUSTIFIED?

While Epstein does not address this question directly, he plainly believes that the litigation gap does not imply antitrust

³⁰ *Id.* at 356-58.

³¹ Henry Farber et al., *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, 136 Q. J. ECON. 1325 (2021) (showing evidence of positive correlation between union density and income equality); see also Anna Stansbury & Larry H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* (Nat'l Bureau Econ. Rsch, Working Paper No. 27193, 2020). On the decline of labor's share, see Autor et al., *supra* note 8, at 646 ("there is a general consensus that the fall is real and significant").

³² All that said, in contrast to the evidence on product market monopoly, there is no direct evidence that labor market concentration has increased, although there has been a big jump in the use of covenants not to compete, and other anticompetitive practices may also be on the rise. See, e.g., Rinz, *supra* note 9; David W. Berger et al., *Labor Market Power* (Nat'l Bureau of Econ. Research, Working Paper No. 25719, 2019); Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers From Monopsony and Collusion*, HAMILTON PROJECT (2018). The motivation for the labor-antitrust agenda is the high level of monopsony, which has apparently existed for quite a long time, and not necessarily any increase in labor monopsony in recent years.

underenforcement in labor markets. Epstein surveys the legal landscape and argues that antitrust litigation aimed at horizontal collusion in labor markets may be justified but he appears to be skeptical that such collusion is common; that antitrust litigation aimed at covenants not to compete is unnecessary because common law regulation is sufficient; and that review of mergers for labor market effects may be justified but is usually unnecessary as product-side review will normally catch mergers that produce adverse labor-market effects.³³ The overall impression, then, is that the status quo is sufficient.

The frequency with which collusion takes place in labor markets is an open question. Conspirators do not announce their conspiracies; conspiracies must be uncovered through painstaking investigation, often with the help of whistleblowers. For a long time, some economists and lawyers were skeptical that product market collusion took place with any frequency.³⁴ But after investigative resources were ramped up, numerous conspiracies—many of them complex, and international—came to light.³⁵ There is a good theoretical reason to believe that labor market collusion is common: because rational profit-maximizing CEOs know that the government criminally enforces the antitrust laws in product markets while mostly ignoring labor markets, and money is money whether it comes from labor market rents or product market rents, they ought to exploit labor markets rather than product markets on the margin. Since the Justice Department announced that it would begin criminal investigations of labor market collusion in 2016, it has brought four indictments, all

³³ Epstein, *supra* note 1, at 385.

³⁴ Bork, *supra* note 2. For a discussion, see Hovenkamp & Scott Morton, *supra* note 7.

³⁵ Margaret C. Levenstein & Valerie Y. Suslow, *Breaking Up Is Hard to Do: Determinants of Cartel Duration*, 54 J.L. & ECON. 455 (2011).

just in the last year.³⁶ The Krueger and Ashenfelter analysis of franchise no-poach agreements shows that they were extremely common, used by 58% of major franchise brands, who collectively employed many millions of workers.³⁷ A number of private actions have also been brought in recent years.³⁸ The evidence thus suggests that labor market collusion is occurring, but we will have to wait before we know the magnitude of the problem.

With respect to covenants not to compete, several studies indicate that they do suppress wages, contrary to Epstein's claims.³⁹ How is this possible in light of common law regulation? The answer is that common law regulation varies across states, and in some states it is quite light. Moreover, common law regulation does not address market-wide impacts as antitrust law does, and so will tolerate non-compete agreements that cartelize labor markets but that do not cause significant harm to the worker in question. And most importantly, common law sanctions are exceedingly weak—nonenforcement, while in some states courts will merely whittle

³⁶ U.S. DEP'T OF JUST. ANTITRUST DIV. & FTC, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016); Valerie Bauman, Siri Bulusu & Erin Mulvaney, *Labor Cases Turn Criminal as DOJ Defines New Antitrust Approach*, BLOOMBERG LAW (Jan. 3, 2022) [<https://perma.cc/85UX-G5EX>].

³⁷ Alan B. Krueger & Orley Ashenfelter, *Theory and evidence on employer collusion in the franchise sector*, J. HUM. RES. 1019 (2021).

³⁸ Eric A. Posner, *The Rise of the Labor-Antitrust Movement*, COMPETITION POL'Y. INT'L. (Nov. 29, 2021) [<https://perma.cc/88BG-MWW6>].

³⁹ Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, J. HUM. RES. (May 12, 2020) (forthcoming) [<https://perma.cc/Y49Q-BRUP>]; Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143 (2021); Matthew S. Johnson, et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* (October 12, 2021) (unpublished) [<https://perma.cc/LJ67-3D2X>]. In his Response, Epstein seems to suggest that noncompetes are used only by franchises. Epstein, *Response*, *supra* note 26, at 415-16. Most of the challenges to the franchises are based on no-poaching agreements, not non-competes. The literature cited above refers to true noncompetes—that is, terms in contracts between employers and employees, not between one employer and another employer. A noncompete bars a former worker from taking a position with *any* employer in the specified industry.

down an overbroad noncompete to an acceptable size.⁴⁰ Employers are clearly not intimidated by the law. Statistics showing that a vast number of low-skill workers are subject to non-competes, which are almost certainly not enforceable, along with evidence that the wages of those workers are suppressed in states with high levels of noncompete enforcement, indicating that the non-competes operate through an in terrorem effect.⁴¹ Only highly compensated employees can afford lawyers to contest non-competes in court, and so everyone else doesn't.

Nor is it correct that blocking mergers that cause excessive product-market concentration will necessarily, or even usually, address concerns about labor market concentration. Product markets and labor markets are different markets. They are rarely coextensive in area: labor markets are almost always local; product markets are frequently national or international. And even when they are coextensive, merger defenses will rarely be the same for product markets and labor markets. Product market concentration that may be acceptable because the merged firm obtains economies of scale in production may nonetheless be unacceptable because no efficiencies justify labor market concentration.

Epstein is correct that labor markets are generally smaller than product markets, and that therefore review of labor market effects will often be more administratively burdensome than review of product market effects. But the government already reviews mergers for their product market effects in local markets – as it must, if it is to estimate the impact of a merger of national chains that operate drug stores, restaurants, and other venues that serve local markets.⁴² The

⁴⁰ For a list of states with the so-called blue pencil rule, see Russell Beck, *Employee Noncompetes: A State-by-State Survey*, FAIR COMPETITION L. (June 27, 2021) [<https://perma.cc/T74Q-XX97>].

⁴¹ I discuss the literature, with citations, in POSNER, *supra* note 10, at 91.

⁴² See, e.g., Michael J. de la Merced & Chad Bray, *Walgreens Calls Off Deal to Buy Rite Aid*, N.Y. TIMES (June 29, 2017) [<https://perma.cc/C5U9-JF54>].

government also reviews many hospital mergers even though they impact local product markets.⁴³ When mergers affect multiple product markets, as they often do, the government analyzes every impact in every product market that is substantially affected; why should it not look at labor markets, where harms and impacts can be greater?

III. DOES ANTITRUST LAW NEED REFORM TO ADDRESS LABOR MONOPSONY?

Epstein says no, and argues instead that reformers should oppose unions and licensing laws. My view is that antitrust law does not necessarily need *legislative* reform. The law is capacious enough already to address labor market abuses. Contrary to the views of some, the consumer welfare standard in antitrust law does not block claims by workers.⁴⁴ Nor must workers who bring claims to block mergers and other practices prove that a remedy will benefit consumers.

But only if regulators and courts take the right steps to enforce the law. I am more optimistic about the regulators than the courts. Regulators have shown a willingness to rethink legal interpretations and regulatory priorities in light of the new wisdom.⁴⁵ The DOJ and the FTC can revise the Merger Guidelines so that they incorporate the labor market effects of mergers; they can also bring cases to

⁴³ For a discussion, see Erwin A. Blackstone & Joseph P. Fuhr, Jr., *An Antitrust Analysis of Non-Profit Hospital Mergers*, 8 REV. INDUS. ORG. 473 (1992).

⁴⁴ As demonstrated by the numerous cases in which claims by workers have been recognized. See, e.g., *National Collegiate Athletic Association v. Alston*, 141 S. Ct. 2141 (2021).

⁴⁵ Both the FTC and the DOJ have held hearings on labor monopsony; see U.S. DEP'T OF JUST., *Public Workshop on Promoting Competition in Labor Markets* (Dec. 2, 2021) [<https://perma.cc/S6TE-3S2V>]; *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, Federal Trade Commission (2020) (Hearing transcript) [<https://perma.cc/RBJ6-GVBM>]; *Monopsony and the State of U.S. Antitrust Law*, Federal Trade Commission (2018) (Hearing transcript) at 7 [<https://perma.cc/6QXW-ZXLR>]. Both agencies have been involved in labor market antitrust litigation.

advance the law (and, indeed already have). The courts have the unenviable task of using the pinched interpretations of antitrust law by the Supreme Court to address a new set of practices with which they have little experience. To set them in the right direction, legislative reform may well be necessary. A good starting point would be legislation that explicitly applied existing antitrust principles to labor markets, provided standards for evaluating market power in labor markets, and put limits on common labor-market abuses like noncompetes.⁴⁶

Epstein argues that reforms should focus on labor law rather than antitrust law; he argues that labor organization causes grievous harm.⁴⁷ My interest is antitrust law, and so I will not attempt to refute him. But his focus on unions seems odd at the present moment. The massive decline of union density in the United States from the 1950s to the present, and the fact that this decline coincides with slowing GDP growth, increasing inequality, and a decline in labor's share of income,⁴⁸ suggests that a further battering of labor organization should not be at the top of the list even for libertarians if they are concerned about the health of the economy and the strength of the social fabric. Moreover, there is no evidence, as far as I am aware, that the union wage premium results in wages above the competitive rate,⁴⁹ while several studies in the recent literature on labor

⁴⁶ See Ioana Marinescu & Eric Posner, *Why has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343 (2019), for a proposal.

⁴⁷ Epstein, *supra* note 1, at 374 and 363-65.

⁴⁸ Farber, *supra* note 25; Summers, *supra* note 25.

⁴⁹ There is a surprisingly sparse literature on the relationship between the union wage premium and the competitive wage rate. While most economists agree that unions raise wages for their members, there are few high-quality studies that show their impact on productivity, employment, and other measures of their contribution to social value. I am aware of no study that tries to compare the union wage rate and the hypothetical competitive rate for any particular labor market. For a recent study that uses (arguably) exogenous variation in the magnitude of the tax subsidy for unions under Norwegian law, see Erling Barth, Alex Bryson, & Harald Dale-Olsen,

monopsony finds that unionized workforces are less likely to be harmed by mergers than unorganized workers.⁵⁰ Given the prevalence of labor monopsony, the wage premium more likely pushes wages toward but not above the competitive rate, thus enhancing rather than reducing the efficiency of labor markets.

Labor monopsony *is* a problem, one that has received little attention from policymakers, legal academics, and even economists until recently. The problem is a difficult one, requiring different forms of legal intervention. Antitrust is not a panacea. But it is part of the solution. And it is an approach—rare in modern times—that should appeal to a broad range of ideological or political persuasions.

Start with the progressives. They are concerned about the political and economic power of big business; inequality; and the exploitation of labor. Labor-side antitrust should appeal to them because it offers a tool against those big businesses that benefit from labor market power. It should push up wages at the expense of capital and it should therefore reduce inequality because most people depend on their wages for their income and few outside the upper middle-class and the wealthy invest in the stock market. While some progressives are skeptical about markets, and thus a bit alarmed that antitrust law helps workers by improving labor markets,⁵¹ most progressives seem to acknowledge that labor-side antitrust advances their values and policy goals.

Conservatives in the Trump years have exhibited a new concern about big business, which they accuse of imposing liberal values on workers and consumers, and about the plight of working-class and rural workers who have not benefited from economic growth for years. As conservatives are reluctant to endorse an expansion of the

Union Density Effects on Productivity and Wages, 130 THE ECON J. 1898 (2020). The authors find that increased union density results in higher wages and productivity. But Norway's labor market is different from the United States', and so the results may not carry over, *id.* at 1902.

⁵⁰ See, e.g., Prager & Schmitt, *supra* note 18; Benmelech et al., *supra* note 15.

⁵¹ Brian Callaci, *Competition Is Not the Cure*, BOSTON REV. (November 23, 2021) [<https://perma.cc/9CHW-H4WD>].

social safety net and more progressive taxes, they should at least insist that antitrust law be used to protect workers as well as consumers. That labor-side antitrust enforcement should also increase output and unchain market forces should also please the remnants of the free-market wing of the Republican Party.

And that brings us to the classical liberals. Adam Smith, the classical liberal *par excellence*, displayed an attitude toward labor markets that is like night and day compared with Epstein's:

We rarely hear, it has been said, of the combinations of masters [employers], though frequently of those of workmen. But whoever imagines, upon this account, that masters rarely combine, is as ignorant of the world as of the subject. Masters are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labour above their actual rate. To violate this combination is everywhere a most unpopular action, and a sort of reproach to a master among his neighbours and equals. We seldom, indeed, hear of this combination, because it is the usual, and one may say, the natural state of things, which nobody ever hears of. Masters, too, sometimes enter into particular combinations to sink the wages of labour even below this rate. These are always conducted with the utmost silence and secrecy, till the moment of execution, and when the workmen yield, as they sometimes do, without resistance, though severely felt by them, they are never heard of by other people.⁵²

This remarkable passage illustrates three propositions that modern libertarians have either forgotten or rejected: that employers "naturally" seek to combine in order to suppress wages; that this

⁵² ADAM SMITH, WEALTH OF NATIONS 35 (4d ed., 1786).

behavior is common rather than rare; and that no one ever talks about it despite the powerful interests and norms that bind employers.

Smith embraced the free market, but recognized markets that are monopolized or cartelized are not free but are controlled by private actors. After Smith's time, the antitrust laws were developed to counter private market power in the spirit of Smith's work. A century later, Smith's insights were corrupted by conservative economists who insisted that markets self-correct—a view that has curdled into a pro-big business “corporatocratic” view, and that with every passing year becomes harder to sustain.⁵³ Libertarians like Epstein should revive Smithian principles and endorse stronger antitrust laws to protect markets of all kinds, including labor markets. (And even in the unlikely event that Epstein were correct that “over-enforcement” of antitrust law occurs in some economic sectors, that cannot be a concern for the application of antitrust law to labor markets, as the history of underenforcement, bordering on non-enforcement, is more than a century old, and has only barely diminished in the last few years of ramped-up activity.)

The idea that labor-side antitrust law could appeal to today's warring political factions might seem like a fantasy, but developments over the last decade indicate that this agenda may have legs. While Obama-era antitrust policy was relatively restrained, it was the Obama Justice Department that sued the Silicon Valley tech companies who agreed not to poach each other's programmers⁵⁴ and issued the first guidance document warning firms against no-poaching agreements;⁵⁵ and it was the Obama White House that first declared that labor monopsony was an antitrust problem.⁵⁶ One might have expected the populist-

⁵³ Hovenkamp & Scott Morton, *supra* note 7; Lancieri et al., *supra* note 8.

⁵⁴ *United States v. Adobe Sys., Inc.*, 2011 WL 10883994 (D.D.C. 2011).

⁵⁵ U.S. Dep't of Just. Antitrust Div. & FTC, *supra* note 36.

⁵⁶ 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).

conservative Trump administration to curb this agenda, but the Antitrust Division under Trump issued the first criminal indictments of executives for committing labor-side antitrust violations.⁵⁷ And now the Biden administration, under the influence of progressives, has announced that labor-side antitrust will be an enforcement priority.⁵⁸ Meanwhile, numerous state Attorneys General have collaborated in litigation challenging the labor market abuses of employers and scored important victories.⁵⁹ Labor-side antitrust law is firmly based on theory and evidence, enough to appeal to policymakers from across the political spectrum. Epstein should join others in supporting it.

⁵⁷ Alex Malyshev & Jeffrey S. Boxer, *With DOJ's focus on wage fixing and no poach agreements, non-compete and antitrust laws collide*, REUTERS (Aug. 23, 2021) [<https://perma.cc/WBL2-8BB3>].

⁵⁸ Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 9, 2021).

⁵⁹ See, e.g., Brian Forgas et al., *Anti-Poaching Issues in Franchising*, AM. BAR ASS'N, 24-42 (2019) [<https://perma.cc/C2LX-Q42M>].