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THE APPLICATION OF ANTITRUST LAW TO LABOR MARKETS – THEN AND NOW

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As of late, there has been a concerted push in the Biden administration, backed by prominent academics, to expand the application of antitrust law against major employers who are said to

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exercise monopsony power that reduces aggregate demand and thus leaves too many workers on the sidelines. The effort takes place chiefly in two major areas: stricter attacks on covenants not-to-compete, and more intense review of mergers under the Clayton Act.

This paper begins with an historical account of the law in both areas, from which it concludes that there is no good reason to alter the status quo ante. The modern claims of antitrust violations are said to rest on the traditional consumer welfare standard. But the theoretical and empirical evidence behind these claims is thin. Turnover rates in labor markets are high; labor shortages are now common; wage growth varies by presidential administration that changes, and not antitrust law, which has long been constant. Other labor policies like antidiscrimination laws, paid leave policies, and minimum wage and overtime laws exert a more direct power.

At present, no systematic evidence suggests the current (cautious) acceptance of non-compete clauses allows large numbers of major employers to extract monopsony profits. The only employers with market power work in markets (like hospitals subject to certificates of need), where these formal barriers to entry make these mergers suspect for excessive concentration in product markets, leaving it utterly unwise to pore over concentration ratios in thousands of discrete labor markets. Any concern with monopoly influence in labor markets should seek to weaken the hold of public and private unions, consistent with the consumer welfare standard.

**INTRODUCTION - ANTITRUST IN A STATE OF FLUX**

In this paper I shall examine the way in which well-established antitrust principles should apply to labor markets. In his Executive Order of July 2021, on Promoting Competition in the Economy, President Joseph Biden insists that this new inquiry is part of a comprehensive review of antitrust policy, asking key government officials to prepare within 180 days a report “on the effects of lack of
competition in labor markets."¹ In his accompanying fact sheet, he lays out in simple form the following case:

When there are only a few employers in town, workers have less opportunity to bargain for a higher wage and to demand dignity and respect in the workplace. In fact, research shows that industry consolidation is decreasing advertised wages by as much 17 percent. Tens of millions of Americans—including those working in construction and retail—are required to sign non-compete agreements as a condition of getting a job, which makes it harder for them to switch to better-paying options.²

As will become clear, both these claims are disputable. The 17 percent decrease in salaries from mergers appears to be a distant upper bound, not a common occurrence.³ Most labor markets operate largely on competitive principles, except in certain key cases—hospital markets—where Certificate of Need restrictions may well give major institutions a price advantage in some local markets, where product market concentration is likely in any event to trigger antitrust scrutiny.⁴ Notwithstanding claims that covenants not-to-compete are widespread and corrosive,⁵ the current rule of reason test in this area, which limits the scope of these covenants, and which

¹ THE WHITE HOUSE, Executive Order on Promoting Competition in the American Economy, (July 9, 2021) [https://perma.cc/33FU-CXCB].
² THE WHITE HOUSE, Fact Sheet: Executive Order on Promoting Competition in the American Economy, (July 9, 2021) [https://perma.cc/328C-389R].
⁴ See discussion infra Part IV.
⁵ 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, ECON. POL'Y INST. (Dec. 10, 2019) [https://perma.cc/QL42-W4DX].
contains exceptions needed to protect both customer good will and trade secrets again works well.6

The case for major reform is just not there. Nonetheless, the President’s view on the need to expand the reach of antitrust law is reflected in the remarks of Richard Powers, acting head of the Antitrust Division, who has sought to reinvigorate antitrust enforcement in this field.7 This broad antitrust initiative is also defended in Eric Posner’s recent book, How Antitrust Failed Workers,8 which is part of an extensive movement by progressive economists to ramp up the enforcement of the antitrust laws in product and service markets. At a theoretical level, the argument has been put forward most visibly by Professor Tim Wu in his book, The Curse of Bigness,9 which is a self-conscious effort to revive the neo-Brandeisian view of the economy that sees dangers not just in market concentration but in the very existence of large firms, even in competitive markets, who are said to wield disproportionate influence over our political discourse and activity. In a similar vein, the now-Chairwoman of the FTC, Lina Khan, wrote an influential law student note that tackled head-on the practices of Amazon,10 in an approach that acknowledged that Amazon supplies goods with superior quality at lower prices, but again questions its undue influence on the (political) economy. Both Wu and Khan now hold prominent positions in the Biden Administration—Wu as part of the

6 See discussion infra Part III.
7 “Richard Powers, acting head of the Antitrust Division, said that any effort to hold down wages is “just as irredeemable as agreements to fix product prices and allocate markets, conduct that the division has prosecuted for over 100 years.” Diane Bartz, U.S. Antitrust Official Suggests ‘Competition in Labor Markets a Top Concern,’ REUTERS (October 1, 2021) [https://perma.cc/FRQ3-565B]
8 ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS (2021)
10 Lina M. Khan, Amazon’s Antitrust Paradox, 126 YALE L.J. 564 (2016).
National Economic Council on technology and competition policy, and Khan as the head of the Federal Trade Commission.

They, along with other prominent scholars, have launched two-pronged attack on the antitrust status quo. The first prong insists that the application of antimonopoly principles has been deficient in the oversight of various business transactions, most notably in the area of mergers—including a claim that the state ought to block mergers by large firms with “nascent competitors,” in order to facilitate the independent growth of new powerhouse firms to offset the dominance of a few major tech companies. That viewpoint is now echoed in the legislative arena, as there are multiple bills, including one by Senator Amy Klobuchar, that seek to reduce the burdens the government has to satisfy either to block planned mergers or even undo mergers that have already taken place.

Posner’s claim that antitrust has failed all—or is it only some—workers is the culmination of his collaborative scholarly output in this area. He has previously authored two articles that advance the same claim. The first is co-authored with Suresh Naidu, and Glen Weyl (NPW), with the somewhat neutral title, Antitrust Remedies for Labor Market Power. Two years later, Ioana Marinescu and Posner raised the ante in their article, Why Has Antitrust Law Failed Workers?, which treats the substantive conclusion as a given, and then relies on multiple exhaustive empirical studies that “document statistically the pervasiveness of labor monopsony in the United

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11 Lauren Feiner, Big Tech Critic Tim Wu Joins Biden Administration to Work on Competition Policy, CNBC (Mar. 5, 2021) [https://perma.cc/GS4W-Y3PY].
12 Lina M. Khan, FEDERAL TRADE COMMISSION (last visited Feb. 1, 2022) [https://perma.cc/6SBY-JEX7].
14 Richard A. Epstein, Klobuchar’s Antitrust Blunder, HOOVER INST. (Feb. 8, 2021) [https://perma.cc/9CWL-33WZ].
The term "labor monopsony" is instructive because it indicates that these attacks are made within the confines of the traditional "consumer welfare" model, to beat, as it were, the antitrust skeptics in labor markets at their own game by showing high concentration in many key labor markets. It, thus, accepts the dominance of competitive markets by insisting time and again that current merger review under the antitrust laws fail to take into account the negative impact of mergers on labor markets. In so doing, they do not rely on the earlier expansive Warren Court treatment of antitrust law, which cast a negative view of mergers between minor firms that had little overall impact on general market behavior. In exploring this new frontier, the modern critics rightly concentrate on large-scale horizontal transactions. These standard market division and price fixing arrangements have little efficiency benefit and are thus in general subject to a rule of per se illegality, which erects a powerful presumption that restraints will be treated as illegal, unless some exceptional circumstance requires otherwise.


18 See POSNER, supra note 8, at 7; Marinescu & Posner, supra note 16, at 1391.

19 See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Von's Grocery, 384 U.S. 270 (1966); Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967). For the reaction to this line of cases see, for example, Robert H. Bork & Ward Bowman, The Crisis in Antitrust, 65 COLUM. L. REV. 363 (1965) (reprinted from an earlier article in Fortune with the same title). The article was part of a dialogue with two Columbia Law School Professors. See Harlan M. Blake & William K. Jones, In Defense of Antitrust, 65 COLUM. L. REV. 377 (1965). The entire debate is well worth reading today but, for reasons of space, cannot be dealt with here.

20 See, e.g., United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975) (allowing correspondent bank cooperation to be judged under a rule of reason test).
In contrast, horizontal mergers have both restrictive losses and efficiency gains, so that a rule of reason is commonly used to sort out these transactions, as first articulated by then-Judge William Howard Taft in *Addyston Pipe & Steel Co. v. United States*, which blessed mergers with some “ancillary” benefit—which he did not find in the horizontal division of markets in that case.

Both traditional scholars and the new progressive critics typically rely on the common, if imperfect, method to measure the concentration losses, using the so-called Herfindahl-Hirschman Index (HHI), which measures the change in concentration by looking at the square of the fraction of the market controlled by the dominant (usually) top five firms. As an initial caveat, the HHI often overstates the level of market concentration because it ignores the prospect of new entry into a given market, whether driven by technological innovation or changes in the market or regulatory environment. But, the formula is still an instructive starting point for analysis. In the most extreme case, where a single firm has the entire market, the number is 10,000, or 100 x 100. With two firms of equal strength, that number drops rapidly to 2(50x50) or 5,000—a drop of 50 percent. That numerical exercise tends to lead to a judgment that an HHI of over 2,500 presents some serious dangers. That result is broadly consistent with the standard Cournot duopoly model, which predicts the noncooperative behavior between two firms yields both smaller reduction in outputs and smaller increases in price than hold

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22 175 U.S. 211 (1899).
23 United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898) (“No conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.”).
when there is but a single player in the market. Each additional entrant produces a further movement to the competitive level, such that with three equal firms the index is \(3(33.333)^2 \approx 3,333\). Hence, in all markets the rapid decline in market power starts with two firms, which means that as the costs of prosecution rise as the benefits decline, which reduces the net benefit of antitrust enforcement that is likely to matter most in small labor markets, like the small towns and rural communities to which Posner and others refer, on the artificial assumptions that these areas are typically served by one or at most two firms. Accordingly, much of the difficulty here comes with purported benefits of restrictions in labor markets, most notably in the form of covenants not-to-compete, which generally have been subjected to a rule of reason analysis.

The picture here is further complicated because the labor side of the market often is not competitive. Today, workers are allowed through unionization to cartelize their labor, which they often do as with unionized nurses in rural communities, and with teachers, prison guards, police and firefighters. Teachers’ unions mount ferocious opposition to new entry in the form of charter schools or vouchers, and prison guards, police and firefighters do not have to fear entry. The position of airline pilots is likewise strong because stringent licensing requirements make it exceedingly difficult for any airline to hire replacement workers during a strike. A complete account of this matter therefore requires some look at how the antitrust law was pressed into service by employers against unions until the New Deal era, and in some cases beyond.

In order to link these diverse threads together, Part I of this paper begins with a survey of these early developments and concludes that
the arguments against unionization that were often made, with varying success, during the nineteenth century, remain potent today. At the outset the antitrust law was applied to common law suits brought by employers against unions, but very few to unions against employers, which the two major statutory landmarks were the Clayton Act of 1914 and the National Labor Relations Act of 1935. Part II traces the antitrust law as it applies to labor from its origins in 1711 to the end of the Second World War. In Part III, I look at some of the various regulatory forces that shape labor markets in profound ways, and claim that in many instances these forces are far more important to the operation of labor law than the antitrust laws could ever be. The ebbs and flow of these various schemes is quite profound, and I look to a comparison between labor policies in the Obama and Trump administrations to emphasize those differences. In Part IV, I offer theoretical reasons why the monopsony model does not give an accurate account of most labor markets.

Thereafter, I apply this general approach to the contemporary scene. The modern movement to stricter antitrust enforcement started gently in the Obama Administration, grew during a populist Trump era,27 and is now growing with increasing fury in the Biden administration. At this time, it became increasingly common to charge that many (but by no means all) labor markets are characterized by heavy monopsony powers that can be measured by same techniques that are used to deal with product markets. To evaluate this claim, one must first identify the explicit contractual provisions (going back to Mitchel v. Reynolds28) that operate in restraint of trade, and thus are subject, at low administrative cost no less, to invalidation on facial grounds without the need for labor-intensive inquiries of the sort that are routine in connection with Hart-Scott-Rodino (HSR) reviews of mergers today. The second potential application of the antitrust laws to employment markets is

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27 See, e.g., Steven Overly & Josh Gerstein, Trump Administration Sues to Block AT&T-Time Warner Merger, POLITICO (Nov. 20, 2017) [https://perma.cc/X2NH-UG2N].
resource-intensive because it tries to break with what has been a uniform practice until this present day of never seeking to challenge a merger on the ground that it leads to undue level of concentration in certain geographical and occupational markets that can be studied and reviewed in the same way as mergers are today.

In my view, this two-pronged attack on employment markets deserves a split verdict. The facial attacks on particular clauses on labor matters may in some cases bear fruit and in some not. Many arguments against these transactions have the common feature of ignoring the efficiency justifications that would matter under a rule of reason approach. The effort to use per se rules in this area is as much a mistake today as it was in Mitchell over 300 years ago. As for the effort to apply HSR to labor markets in mergers, it might succeed in some few cases, but in most cases the game will not be worth the candle. Localized markets are too small. Other powerful regulatory schemes protect some but not all workers; rich subsidy programs often dim the willingness to work so that many high-paid jobs go begging, in part because of COVID; complex market structures using independent contractors; the prospect of new entry (especially as geographical limits are in some instance breaking down) make any straightforward analysis of market difficult to achieve; and a widely perceived labor shortage has encouraged unions to flex their bargaining power by staging strikes that could easily interfere with market production, especially as it is widely acknowledged that fragile supply changes in both the national and global economy pose a serious threat to the economic order.

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29 See, e.g., Paul Davidson, Breaking Down the Big US labor Shortage: Crunch Could Partly Ease This Fall but Much of It Could Take Years to Fix, USA TODAY (Sept. 7, 2021) [https://perma.cc/7WLV-QPZB].

30 See, e.g., Bob Tita, Deere Workers Go On Strike for First Time in 35 Years, THE WALL ST. J. (October 14, 2021) [https://perma.cc/HL94-RVLP].
I. THE EARLY EVOLUTION OF ANTITRUST LAW IN LABOR MARKETS

The early case of *Mitchel v. Reynolds* arose out of a dispute between two bakers. Mitchel had taken a lease of the premises owned by Reynolds, who had previously operated a bakeshop at that location. Reynolds had given Mitchel a bond for £50 that could be enforced if Reynolds were to open a rival bakeshop in the same neighborhood within five years, which he did. When Mitchel sued on the bond, Reynolds defended on the ground that the contract was unenforceable as a contract in restraint of trade because it prevented Reynolds from plying his trade as a baker, with this famous passage:

> that wherever a sufficient consideration appears to make it a proper and an useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by and by.\(^{31}\)

*Mitchel* reads like a modern rule of reason case, even if its logic does get a bit fuzzy. The opinion offers no definition of what counts as a fair trader, for the explanation offered is not quite equal to the challenge. The general restraints are far too broad, but if they benefit neither party, why would anyone enter into them? Or stated otherwise, if the restriction were to apply to places where Reynolds did not do business, why would he insist on a lose/lose contract, when Mitchel moving to another town would only reduce the number of potential local competitors by one? Does this transaction protect the fair contractor? Initially, this case does not impose restraints on the activities of a former employee, where it is possible

to identify strong trade-offs. The former employee may well have learned trade secrets on the job or gained acquaintance with customers whom he could solicit thereafter. The tradeoff is therefore that the removal of all restraints on ex post conduct would reduce the likelihood that a fellow entrepreneur or prospective employee would be offered a position in the first place. In these cases, it is quite possible that a strong restrictive covenant would work to the mutual benefit of the parties, if the consideration given to the employee were large enough to compensate for his lost opportunities.

That point, however, is not sufficient to ensure that none of these contracts acts in restraint of trade. One competitor may offer a large sum to keep a competitor out of the market, and even though that contract is for the mutual gain between the parties, it imposes negative effects on third parties, so that a rule of reason analysis has to apply, which is exactly what happens today in the patent dispute settlements where a challenger is given a payment to stay out of the market for a given period.\textsuperscript{32} Mitchel offers no analysis of why the restriction had to be this long, given that the usual employer interests are not (obviously) presented in the case, and my guess is that the same fact pattern today would either void the covenant, or reduce its duration. But in other cases of this sort, the law tends to disfavor these agreements.\textsuperscript{33} Typically, the key variables tend to be three. The

\textsuperscript{32} See FTC v. Actavis, Inc., 570 U.S. 136 (2013), where straight cash payments looked like a division of the market, but payments in which the \textit{duration} of the patent protection varies with the strength of the patentee position precisely because there is no cash division. \textit{See In re Humira (Adalimumab) Antitrust Litig.}, 465 F. Supp. 3d 811 (N.D. Ill. 2020) (upholding such payments); \textit{see also FTC v. AbbVie Inc.}, 976 F.3d 327 (3d Cir. 2020).

\textsuperscript{33} See, for example, \textit{Omniplex World Services Corp. v. U.S. Investigations Services, Inc.}, which explained the reasoning as follows:

A non-competition agreement between an employer and an employee will be enforced if the contract is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy. Because such restrictive covenants are disfavored restraints on trade, the employer bears the burden of proof and any ambiguities in the contract will be construed in
first is duration, and in this context, five years turns out to be a long
time, given that the norm with employment contracts is usually one
year, unless some special circumstances apply. Next, there is the
question of product line, which here favors Mitchel, since the case
does not involve new product lines that were not prepared or
marketed by Reynolds. Last, there is the question of geographical
extension, which again favors Mitchel, because it looks as though the
two shops were close enough together that the customers could as
easily access the one as the other. There is a great advantage in
having, at least in employment contracts, workable presumptions for
routine cases, where these covenants are commonly demanded, not
through collusion among employers, but by independent parties
each making its own business decision.

In dealing with covenants of this sort, it is important to note
that they are not sprawling affairs. The remedy in Mitchel was a
liquidated damage clause, which can be enforced without much ado.
There is no need to define the relevant market because it can be
assumed that the two parties are the only relevant persons in the
trade, so deals structured as in Mitchel place no real strain on the
institutional capabilities of the court.34

The next major case, the Philadelphia Cordwainers Case
(Commonwealth v. Pullis), involved a criminal indictment against the

favor of the employee. Each non-competition agreement must be evaluated
on its own merits, balancing the provisions of the contract with the
circumstances of the businesses and employees involved. Whether the
covenant not to compete is enforceable is a question of law which we
review de novo.


34 The same is true, incidentally, in connection with the first rate regulation case,
Allnutt v. Inglis, (1810) 104 Eng. Rep. 206 (KB), where it was held that a tax-exempt
customs house could not charge more than the regular market rate for similar services
in the nearby market—a price differential that is easily calculated. Allnutt was of
exceptional importance because its use of the elusive phrase “virtual monopoly” was
carried over into American law in Munn v. Illinois, 94 U.S. 113 (1876). For a general
discussion, see Richard A. Epstein, Principles for a Free Society: Reconciling
cordwainers, who were craftsmen who made new shoes out of new leather. These men sought to cartelize the local market by setting up minimum rates for work among members, which were set higher than the traditional fees. Recorder Levy drew the modern distinction between independent decisions individually made, which are the hallmark of a competitive market, and collective decisions that are "bound down by ... agreement" between parties "and pledged by mutual engagements," solely for their mutual advantage, i.e., without religious or charitable motivations. Politically, the cordwainers never marched under a cartelization banner, but claimed democratic legitimacy for their collective actions. Unfortunately, that argument proves too much, for all individual transactions in cartel-like conditions are for the mutual advantage of both sides, so that if this privilege were granted in product markets, the entire category of contracts in restraint of trade would become empty. The antitrust law, therefore, can never accept the mutual gains to the contracting parties as a justification for cartel pricing above competitive levels.

Nonetheless, at the end of the day, Philadelphia Cordwainers was a solid victory for the cartel, whose members were fined $8.00 each plus cost, a comparative slap on the wrist. Nor did the Court issue any injunction against the continuation of the cartel practices, which is standard fare with business cartels. The perceived difference between business and labor cartels is not hard to detect. By the next major criminal prosecution in 1840 in Commonwealth v. Hunt, Chief Justice Lemuel Shaw concluded that labor cartels were made for "useful and honorable purposes," only to end with this rousing cheer because "we cannot perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner

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37 Nelles, supra note 35.
as best to subserve their own interests." But even Shaw thought that there were limits to the exercise of that power, when he wrote that criminal prosecutions would be permissible in dangerous holdout situations, where workers in unison agree to breach their contracts for partisan advantage. Thus:

If a large number of men, engaged for a certain time, should combine together to violate their contract, and quit their employment together, it would present a very different question. Suppose a farmer, employing a large number of men, engaged for the year, at fair monthly wages, and suppose that just at the moment that his crops were ready to harvest, they should all combine to quit his service, unless he would advance their wages, at a time when other laborers could not be obtained. It would surely be a conspiracy to do an unlawful act, though of such a character, that if done by an individual, it would lay the foundation of a civil action only, and not of a criminal prosecution. It would be a case very different from that stated in this count.

This passage explicitly knocked out criminal action against labor cartels. In practice, it necessarily knocked out any civil action against the members of the organization as well, so that the only consequence in case of labor contracts was that the agreement was regarded as “void,” and, thus, not legally enforceable by the parties to it, which meant that the arrangement was subject to a systematic risk of decay, albeit at an uncertain rate.

40 Id. at 129–30.
41 Id. at 131.
42 See, for example, United States v. Addyston Pipe & Steel Co., finding that the territorial division in that case was illegal because it was not “ancillary” to some legitimate purpose:
Contracts that were unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for
In the aftermath of the aforementioned key judicial decisions, legislative action was taken both in England, with the Trade Disputes Act of 1906, and the United States, with the passage of the Sherman Act and the Clayton Act. The English statute contained three key provisions. By the first, it refused to allow for the enforcement of any labor contract, on the dubious assumption that there was no intention to create legal relations. By the second, it held that actions legal if done by one person were legal if done by many in concert. Hence, that provision overrode the critical distinction articulated in the Cordwainers Case and protected actions like secondary boycotts directed against third parties. By its third key provision, the statute refused to allow actions for the inducement of breach of contract, a tort that had its origins in England in the famous case of Lumley v. Gye. In that case, one opera impresario was allowed to sue his rival who had induced his lead singer, the great Johanna Wagner, to abandon her contracts for performances at Queen’s Theatre in order to perform at Covent Garden.

It is important to understand the powerful destabilization of labor relations that was wrought by this statute, which led to a consistent decline in the performance of labor markets until the entire issue came to head in the early days of Margaret Thatcher’s rise as Prime Minister. The want of any enforceable labor contracts under the first key provision made employers vulnerable to constant wildcat strikes and worse—which could not happen under the American National Labor Relations Act (NLRA), under which the Supreme Court held that injunctive relief could be granted to employers against a union’s breach of a labor contract. The NLRA system remains far inferior to a competitive solution because it

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85 F. 271, 279 (6th Cir. 1898).
43 6 Edw. 7 c. 47.
creates enormous rigidities when it comes to re-contracting. But, its overregulated regime was less vulnerable to catastrophic failure than the English system.\textsuperscript{46}

The Trade Disputes Act legalized a collective refusal to deal, which imported enormous leverage over firms. The contrast to the position within the antitrust laws, where such conduct is per se illegal, should be clear. And, the differences are even greater because of the power that unions have to engage in picketing, which can, of course, in some contexts generate threats to use force.\textsuperscript{47}

The third element on inducement of breach of contract played a very large role in labor disputes. Recall that in \textit{Lumley v. Gye} and its sister case of \textit{Lumley v. Wagner},\textsuperscript{48} the disappointed impresario could not make Miss Wagner sign for his company, but it could enjoin her from singing for a rival.\textsuperscript{49} It is, therefore, fair to ask what additional gain comes from allowing a second injunction that is largely duplicative of the first. But, the situation changes in labor disputes when the multiple parties in breach are individual workers who go out on strike at the last moment—the situation that Chief Justice Shaw viewed as giving rise to tort liability. Shaw’s views on the tort of inducement of breach contract came to a head in the 1917 case \textit{Hitchman Coal and Coke Co v. Mitchell},\textsuperscript{50} where after considerable periods of labor unrest a group of workers came to Hitchman Coal and offered to work, while agreeing not to join any union so long as

\textsuperscript{46} One notable illustration of the business breakdown under the NLRB was the “strike wave” at the end of World War II when the provisions of the War Labor Act were no longer in effect and unions could hold out for substantial wage increases. Both the Labor-Management Act of 1947, commonly known as Taft-Hartley Act, and the Labor-Management Reporting and Disclosure Act of 1959, the Landrum-Griffin Act, were passed by a Republican Congress that sought to limit union power under the earlier regime.

\textsuperscript{47} See Vegalahn v. Guntner, 44 N.E. 1077 (Mass. 1896), for a heated historical dispute over the picketing issue.

\textsuperscript{48} (1852) 42 Eng. Rep. 687.

\textsuperscript{49} Id.; see also \textit{Lumley}, 118 Eng. Rep. 749.

they were paid union wages. The deal worked for both sides because it cut out the costs of dealing with a middleman (which would today be an unfair labor practice under the NLRA) and improved labor stability. But when these workers quit the job, the only viable action was not against these multitude of workers, but after the union that induced them all to walk off in unison in violation of their contract, which Pitney allowed, provoking thereby a huge row to end the use of the labor injunction.\textsuperscript{51}

It is worth noting that these post-employment restrictions should be subject to a rule of reason analysis as a restraint of trade. That analysis might have had some traction if the employer sought to restrict membership in a union for, say, one year after an employee’s contract of employment had ended. But for Hitchman, the deal made sense when limited to the period of employment where it could reduce the odds that the workers would go out on strike after the coal had been removed from the seams, but not taken to the surface. Given the strictures that Shaw put on the potential of the practice, the reasonableness of the constraint would be sure to be upheld at common law.

The same issues of employment contracts that led to the passage of the English Trade Disputes Act exerted a similar force in the United States. The Court’s initial foray into labor relations came in the explosive decision in \textit{Loewe v. Lawlor.}\textsuperscript{52} There, a unanimous Supreme Court, speaking through Justice Holmes, held that a secondary boycott of hat makers in Danbury, Connecticut was an activity that involved interstate commerce (even before the expansive view of the commerce clause that marked the New Deal revolution) because of the movement of goods from their places of manufacture to distributors and consumers throughout the United States.

\textsuperscript{51} See Felix Frankfurter & Nathaniel Greene, \textit{The Labor Injunction} (1930) (helping secure the passage of the Norris LaGuardia Act of 1932, which limited the circumstances in which federal courts could issue those injunctions).

\textsuperscript{52} 208 U.S. 274 (1908).
States. Holmes then addressed the issue of legislative intent, and concluded that it supported the textual language:

I think the Congressional debates show that the statute had its origin in the evils of massed capital; but, when the Congress came to formulating the prohibition, which is the yardstick for measuring the complainant's right to the injunction, it expressed it in these words: 'Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal.' The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them.53

It should be noted that this lawsuit was for the secondary boycott, not for insisting on negotiating a collective agreement with the employer. But, the language was susceptible of covering both arrangements and, thus, of undermining the accommodation that had taken hold since Commonwealth v. Hunt. Whatever its original reach, Loewe quickly gave rise to political pressure to limit its scope—a matter that took great prominence in the 1912 election, where Taft lost to Wilson, when the progressive Teddy Roosevelt ran on a third-party ticket. At this point, the passage of the Clayton Act made official the split policy between labor and firm activity. On the firm side, Section 7 of the Clayton Act expanded the federal control over mergers by declaring that stock and, after amendment in 1950, asset transactions should be limited where "the effect of such acquisition may be substantially to lessen competition, or to create a

53 Id. at 301-02.
monopoly." The obvious concern with this provision—that remains with us today—is how far back can one look if the statutory prohibition kicks in with respect to acquisitions that may substantially lessen competition. In any event, the provision leaves much in the hand of key government officials to sort out.

The combined effect of Sections 6 and 20 of the Clayton Act makes it clear that different standards apply in labor cases. Section 6 reads:

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.

That section was in turn complemented by Section 20, which limited the power of the federal government to issue injunctions in any labor dispute "unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law." In the end, the major effect of these provisions was to allow workers to form unions but not to engage in the secondary boycotts that were ruled illegal in Loewe. Thus, no less a figure than William Howard Taft

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55 Id. § 17. Note the phrase here has been picked up elsewhere. See INT’L LABOUR ORG., International Labour Organization Declaration of Philadelphia (1944) [https://perma.cc/3N45-PEFR] (opening with its endorsement of the fundamental principle that "labor is not a commodity" without saying what labor is).
56 29 U.S.C § 52.
insisted, after he lost the Presidency, that the Clayton Act provisions had "slight practical importance." But, that soothing reading leaves unexplained the huge political battle over Section 6. I think that the best explanation was that labor backers wanted Section 6 to forestall the possibility that Loewe might be read to make all collective actions of unions, like collective actions of business cartels illegal where no unfair labor practices exist. Indeed, in 1907, prior to the decision in Loewe, the Ohio Court of Common Pleas of Cuyahoga County took exactly that position in the leading case of Kealey v. Faulkner. In that case, a dispute between two factions of the Amalgamed Window Glass Workers of America, the court had ordered that the union be dissolved.

The harder question was whether Section 6 and Section 20 also overturned Loewe v. Lawlor by granting unions freedom to engage in secondary boycotts. A divided Supreme Court resolved the question in Duplex Printing Press Co. v. Deering in a strong opinion by Justice Mahlon Pitney, in which the broad dissent of Justice Brandeis reverted to a familiar theme by claiming that union self-interest meant that the union activity was protected because it was done "not maliciously, but in self-defense," which necessarily erodes the line between collective bargaining and secondary boycotts. At this point, it is worth noting, as Professor Daniel Ernst documents, that the key opposition to Section 6 was the American Anti-Boycott Association (AABA), whose Daniel Davenport had resisted union boycotts, but not collective bargaining as such. His interpretation was backed by none other than William Howard Taft in the years

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57 See William Howard Taft, The Anti-Trust Act and the Supreme Court (1914), written when Taft was no longer president.
58 7 Ohio N.P. (n.s.) 49 (Ct. C.P. Cuyahoga Cty. 1907).
59 254 U.S. 443 (1921).
60 Id. at 480-81.
between his presidency and his service on the Supreme Court, when he voted with Pitney's majority in *Duplex*. Ernst concluded

the AFL gambled that it could win from the courts what it could not from the Congress. If the labor leaders' gamble lost in the Supreme Court (by only a two-vote margin in *Deering*), it was a gamble in which, given the political alignments of the day, they had little to lose and much to gain.

In a parallel development, the United States Supreme Court held, correctly in my view, that the constitutional protection of liberty of contract meant that neither the federal government nor the states could compel an employer to enter into a collective bargaining agreement against its will. Hence, although much union organizing was exempt from the antitrust laws, unions had no way to force an employer to come to the bargaining table. Unions during that period could continue to engage in various activities outside the courts to impose their will on companies, but these activities were of uncertain effect altogether. In 1932, the Norris-LaGuardia Act picked up where Section 20 of the Clayton Act left off, by restricting the power of federal courts to issue injunctions in labor disputes. In 1937, in *NLRB v. Jones & Laughlin Steel Corp.*, the Supreme Court upheld the National Labor Relations Act after it had been struck down by three separate circuit courts and imposed on an employer an affirmative

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62 Id. at 1165-66. Taft was no antitrust slouch and between his presidency and his appointment as Chief Justice to the Supreme Court, he turned author. See WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT (1914).
63 Ernst, supra note 61, at 1167.
65 See Adair v. United States, 208 U.S. 161 (1908) (federal system for railroads, per Harlan, J.); Coppage v. Kansas, 236 U.S. 1 (1915) (state regulations, per Pitney, J.)
67 301 U.S. 1 (1937).
68 See Fruehauf Trailer Co. v. NLRB, 85 F.2d 391 (6th Cir. 1936), rev'd, 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 85 F.2d 1 (2d Cir. 1936), rev'd,
duty to bargain in good faith with the exclusive bargaining agent chosen by a union election. No longer could a firm that was unhappy with union demands seek to do business with its workers directly or with third parties. Later, the Fair Labor Standards Act of 1938 (FLSA) allowed the government to adopt minimum wage and overtime regulation. The long-term aspirations of the labor movement that were unattainable in 1914 were enacted into law during the New Deal.

There is no way to justify these complex rules as principled deviations from a competitive policy. In theory, the commitment of the new generation of antitrust theorists to apply the general consumer welfare standard to both management and labor should lead them to seek to undo all of these arrangements on the ground that they impose entry barriers and other restrictions in restraint of trade. But in practice, their commitment is more to workers as a class than it is to the ideal of a competitive market. Nothing about competitive markets, for example, explains why workers should receive time-and-a-half for any hour over forty hours per week. Yet, Posner at no point discusses the deeply anticompetitive features of this act, which deeply distort labor markets while posing major administrative problems. Nor do Posner and his coauthors take any firm stand against the organization and protection of labor unions.
which do have a strong measure of monopoly power that has resulted in oft-document wage premiums and job benefits.\textsuperscript{73}

Unions sought and finally obtained—with the National Labor Relations Act of 1935—formal legal recognition by the government and the right to strike and bargain collectively. Labor organization offered an alternative to antitrust law: rather than break apart employers into competitive buyers of labor, unions bring together workers so that their aggregated bargaining power could counter the bargaining power of the large employer.\textsuperscript{74}

Yet, if their bedrock position is anti-monopoly, then they should applaud the decline in union power on the grounds that competitive markets are distorted by union activity. They neither do so, nor do they note the shortfall in the unionization strategy. The first best solution is to break up any management monopoly in order to return to a competitive situation. The NLRA solution, however, goes overboard in at least two critical ways. First, it assumes that all the employers who are subject to the Act have some degree of monopoly power, which is a wild over-exaggeration in an industry where even small firms and small bargaining units within larger firms are subject to these statutory duties.\textsuperscript{75} Second, even for firms thought to possess that kind of power, unions exacerbate the situation by creating a second level of monopoly power that often clashes with the first, thereby increasing the likelihood of strikes and other activities with negative third-party effects. The defense of labor here seems to rest more on distributional grounds that workers as a class are entitled to

\textsuperscript{73} See Richard Freeman & James Medoff, What Do Unions Do? 6 (1984) ("Most, if not all, unions have monopoly power, which they can use to raise wages above competitive levels.").

\textsuperscript{74} Posner, supra note 8, at 13.

\textsuperscript{75} See, e.g., N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969) (an epic organizational fight over a bargaining unit with 49 employees, involving the discharge of two employees); see also N.L.R.B. v. Gissel Packing Co., 398 F.2d 336, 337 (1st Cir. 1968).
a larger share of the economic pie. But, even that rationale is strained, given that advances for union workers shrink the total number of jobs available, and, thus, reduce the welfare of those workers excluded from the industry. None of this is a surprise in the current political climate, where “good union jobs” are the coin of the realm. But as becomes clear in the next section, this attitude leads to overregulation of labor markets, which will only be made worse by the aggressive and novel application of antitrust law to workers. But, what is wholly missing in Posner and others in his camp is their call for the repeal of the NLRA (and of course the FLSA), not any half-hearted endorsement of the statute.

II. THE MODERN CASE FOR HEIGHTENED SCRUTINY

In dealing with the modern assertions about the dominance of antitrust law, it is important to note the initial intellectual move that clouds the entire enterprise. Thus, in his book, Posner starts in this fashion:

In the United States, and much of the Western world, economic growth has slowed, inequality has risen, and wages have stagnated. Academic research has identified several possible causes, ranging from major structural shifts in the economy to public policy failure. One cause that has received increasing attention from economists is labor market power, the ability of employers to set wages below workers’ marginal revenue product. New evidence suggests that many labor markets around the country are not competitive but instead exhibit considerable market power enjoyed by employers, who use their market power to suppress wages.\textsuperscript{76}

\textsuperscript{76} \textit{Posner, supra} note 8, at 1. A similar passage is found in Naidu, Posner & Weyl, \textit{supra} note 15, at 537.
The first sentence makes a striking claim that declining economic growth rates and rising inequality are givens and then immediately turns to the claim that “one cause” of both of these retrograde claims is the abuse of monopsony power—without mentioning what other causes there might be and how the full set of causes works together. It is agreed upon by all parties that antitrust law has paid no attention to labor markets in evaluating mergers under federal law. Indeed, the antitrust inquiries into labor law are confined to cases of overt cartelization but have never, to the theorists’ knowledge (or mine), been used to challenge any merger on the grounds of anticompetitive effects on labor markets.77 So, a uniform practice of that sort cannot explain the many variations observed in growth rates or income inequality. At this point, there are two notable issues. The first is the want of documentation of either the declining economic growth rate or rising inequality. There are no identifiable time periods for which these claims are asserted, and there is no mention of the possibility that both economic growth and inequality may exhibit cyclical properties that require two or more causes to explain the movements in both directions.

Indeed, a cursory review of some of the salient facts demonstrates that they are inconsistent with the monopsony model. To show how these other factors matter, I shall content myself with some limited observations about the contrast of policies between the Obama years and the Trump years, stopping the analysis of the latter as of March 2020, before the halting responses to COVID-19 swamped everything else. I realize that this comparison is in many ways flawed because Trump himself was no classical liberal. He believed in economic protectionism and refused to join the Trans-Pacific Partnership—points on which there was much bipartisan support, given that organized labor took exactly the same position. It is therefore clear that any overall comparison of the Obama-Trump performance does not offer a sharp contrast on all relevant issues,

77 Naidu, Posner & Weyl, supra note 15, at 571.
such that we should expect the record to be somewhat muddied—as it in fact is.78 But notwithstanding the many similarities, there are key differences that are especially relevant to any question of overall economic growth and the performance of labor markets. Under the classical liberal position, one key determinant of economic growth as the extent to which competitive markets are allowed to operate free from heavy government regulation, including over-enforcement of the antitrust laws. At the end of the day, the confident judgment is that Trump’s more deregulatory stance had to be preferable to Obama’s more interventionist mode. All the familiar cautionary notes apply because political transitions do not operate like on-off switches. But even so, there was a powerful change in course which prompted this bold prediction from Paul Krugman, made just after the 2016 election, which in retrospect looks weirdly out of date: “Now comes the mother of all adverse effects—and what it brings with it is a regime that will be ignorant of economic policy and hostile to any effort to make it work,” Krugman wrote. “So we are very probably looking at a global recession, with no end in sight. I suppose we could get lucky somehow. But on economics, as on everything else, a terrible thing has just happened.”79 And that terrible thing was on some domestic issues a halting revival of laissez-faire economics.

Now look at some of the general numbers that belie any claim of a declining growth rate and rising inequality. Stock growth during the 807 trading days before Trump’s election victory in November 2016 was 31% versus a 56% increase in the 807 after the election—off a higher base.80 Next comes matters of distributional concerns. Does any form of market liberalization create a greater concentration of wealth? One rough measure of that concentration is

79 Paul Krugman, What Happened on Election Day, NEW YORK TIMES (Nov. 9, 2016) [https://perma.cc/4NXE-4L9Q].
80 Maxim Lott, The Trump Economy, Three Years In: What the Numbers Say, YAHOO FIN. (Jan. 20, 2020) [https://perma.cc/563T-6CA5].
the Gini coefficient, which can range from zero to one—where the former number means a perfect equality of wealth (that never happens) and one means that all the wealth is in the hands of one individual (which never happens either). The overall progression starts at around 0.43 in 1990, jumps to about 0.46 at the end of the Clinton administration, where it levels during Bush 43, until it picks up to about 0.48 during the Obama years where it again levels off under Trump. I think that very little should be made of the more rapid growth in Democratic years, but it is a cautionary tale of the unintended consequences of strongly redistributive policies. It is important, moreover, not to put too much weight on this index, which only measures wealth differences, and not wealth aggregates. It is always possible to reduce the Gini coefficient by having more rapid declines in wealth for rich people than for poor ones. So, an improvement in the Gini coefficient is consistent with a Pareto-inferior situation, in which everyone is made worse off by government policies. A look at the overall income figures avoids that peril, and here the numbers indicate ups and downs, with the most rapid ups in 2018 (when the Gini coefficient ticked upward) in the aftermath of the Trump tax cuts. You can draw your own inferences on causation. In my view, the Trump corporate tax cuts freed up more capital for investment, which in turn drove up real wages—all without the slightest influence of antitrust law in labor markets.

It is of course possible to protest that these averages conceal a greater rise at the top than at the bottom, where the argument is that the greater share of the wealth accrues to the top 1% of the population, which has surely increased over the past three decades—although there is a disagreement as to how much. But, the difficulty

81 For contrasting views, see Emmanuel Saez & Gabriel Zucman, Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data, 131 Q.J. ECON. 519 (2016), claiming that the share of income held by the top 1% has soared from 24% of the total share in 1980 to 42% today, a figure criticized as being overstated by a factor of two in Phillip Magness, New Evidence that Soaring Inequality Is a Myth, AM. INST. ECON. RES. (June 14, 2019) [https://perma.cc/2MTK-FZGD].
for these purposes is that top 1% covers a huge range of income, from $538,926, hardly a munificent sum in New York City or San Francisco, to billions of dollars at the very top. Much of the income at the bottom level of this top 1% range is earned income in a wide variety of businesses and professions. It is much closer in form and dollar figures to the income in the top 5% as opposed to the top 0.01%, where most of the wealth comes from investment income, often via successful public offerings from founder stock. It is much easier to think of the policy issues in terms of taxation and not the antitrust law as applied to labor, whether it be a heightened capital gains tax, a wealth tax, or higher estate tax.

The situation at the bottom between Obama and Trump is, if anything, more instructive about the difference between classical liberal and progressive policies. Here again, Krugman-like pessimism seems peculiarly out of place. Wage levels at the bottom increased more rapidly than at the top, which meant that minority workers did especially well under Trump. They certainly did better than they did under Obama, which hardly sounds like an exercise in monopsony power against the downtrodden.82 This trend is further substantiated by observing the changes to median household income—reported below in Table 1 from the year 1990 to the year 2019—that occurred during the two administrations.83

82 See Editorial Board, The Higher Wages of Growth, Before The Pandemic, Income Growth Soared and Poverty Fell to the Lowest Rate Since 1959, WALL STREET J. (Sept. 16, 2020) [https://perma.cc/F4JZ-PUBS].
83 Id. As the article further explains, Real median U.S. household income last year rose by $4,379 to $68,709. In dollar amounts, this is nearly 50% more than during the eight years of Barack Obama’s Presidency. The wealthy last year benefited from a roaring stock market, as they did during most of the Obama years. But lower and middle-income folks were also finally sharing more in the country’s growing wealth. Notably, median household incomes increased more among Hispanics (7.1%), blacks (7.9%), Asians (10.6%) and foreign-born workers (8.5%) versus whites (5.7%) and native-born Americans (6.2%). One reason is more Americans with lower education levels were working.

Id.
Table 1: Median Household Income in the United States from 1990 to 2019

<table>
<thead>
<tr>
<th>Year</th>
<th>Median Income (2019 U.S. Dollars)</th>
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<tbody>
<tr>
<td>2019</td>
<td>68,703</td>
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<tr>
<td>2018</td>
<td>64,324</td>
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<tr>
<td>2017</td>
<td>62,626</td>
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<tr>
<td>2016</td>
<td>60,309</td>
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<tr>
<td>2015</td>
<td>58,476</td>
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<td>2014</td>
<td>55,613</td>
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<tr>
<td>2013</td>
<td>56,479</td>
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<tr>
<td>2012</td>
<td>54,569</td>
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<tr>
<td>2011</td>
<td>54,673</td>
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<tr>
<td>2010</td>
<td>55,520</td>
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<tr>
<td>2009</td>
<td>57,010</td>
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<td>2008</td>
<td>57,412</td>
</tr>
<tr>
<td>2007</td>
<td>59,534</td>
</tr>
</tbody>
</table>

84 STATISTICA RES. DEPT., Median Household Income in the United States 1990 to 2019 (Jan. 20, 2021) [https://perma.cc/17E7-95V6].
To a classical liberal, moreover, the result is no surprise. Various regulatory and tax burdens tend to rise more slowly than income, so that these increased burdens in the Obama years hurt poorer workers more than rich ones, by taking a larger chunk of their disposable income.
income and yielding a higher percentage wage increase. Fortunately, the reverse is also true, so that any form of market liberalization will give a larger stimulus at the bottom than at the top, which again shows just how much tax and labor policy will influence employment levels and wages on a day-to-day basis. Put otherwise, macroeconomic variables such as total money supply are not the relevant drivers of labor markets. It is the direct forms of subsidy and regulation that have unmediated effects. Increased antitrust enforcement is an occasional occurrence and its anticipated effects should be far smaller.

NPW take a skeptical view of this issue, for they tend to regard workers at all levels as a beaten down group with no collective powers. At one point they write: "Union activity has collapsed in the United States because of deregulation, foreign competition, aggressive anti-union tactics by employers, and a chilly legal environment."\(^{85}\) None of that applies of course to public unions, whose influence remains powerful among teachers, police and firefighters, prison guards, and nurses. Even against private employers, though, strong union movements could easily cost jobs by shutting down firms, which has been the fate of many workers in such industries as automobiles and steel, where membership has shrunk precisely because unions overplayed their hand.\(^{86}\) But today, it would be foolish to ignore a risk that now looms now large given labor shortages have induced more aggressive union action and given the chronic shortages in labor markets, already noted.

The recent actions are only the last chapter in a constant evolution of labor markets, which are evolving in several directions, all of which tend to increase the relevant scope of geographical markets. Right now, telecommuting plays a large role for many upper division firms, whose workers are so widely distributed that geographical constraints are weakly defined by time zones rather

\(^{85}\) Naidu, Posner & Weyl, \(supra\) note 15, at 542.

\(^{86}\) See Richard A. Epstein, Labor Unions: Saviors or Scourges?, 41 \textit{CAPITAL UNIV. L. REV.} 1, 28 (2013).
than by metropolitan area. Second, the emergence of highly sophisticated job matching programs expand the scope of both geographical and service markets and thus again increase the scope of options for both employers and employees alike. Both of these elements cut against the monopsony model.

These developments, among others, are reflected by the general turnover figures. On this regard, it is important to realize that net changes in jobs—say, 900,000 new jobs created in a good month—systematically understates the dynamism in labor markets. The correct measure is to add the sum of quits to the sum of hires. Right now, the evidence shows that quit rates are higher than dismissal rates, so that there is now a record number of vacancies in the job market, which is attributable in part to the decision of the Biden administration to offer $300 no-questions-asked grants to a large segment of the work force. Anyhow, one recent BLS release shows the imbalance:

In June [2021], the quits level and rate increased to 3.9 million (+239,000) and 2.7 percent, respectively. Quits increased in professional and business services (+72,000); durable goods manufacturing (+47,000); and state and local government, excluding education (+33,000). Quits decreased in state and local government education (-26,000).

In June, the number of layoffs and discharges was little changed at 1.3 million, a series low. The rate was unchanged at 0.9 percent, matching last month's series low. Layoffs and discharges were little changed in all four regions.87

These ratios are not immutable, of course, for in bad times the layoffs can be twice the hires, while in good times the reverse ratio holds true. In addition, the rate of turnover within firms is higher than would be expected if there were strong monopsony power.

Thus, it is instructive to look at the employee turnover statistics at the firm level. If firms had dominant power, workers would be desperate to hang on to the jobs that they have. But, the story is otherwise. The two major takeaways are that voluntary turnover among workers is high and that a top priority for firms is to reduce turnover at all levels. Thus, total turnover levels are around 18% of a workforce per annum, which means that large companies are always in the process of replacement of the current workforce. Of that figure, about one-third or 6% is attributable to reduction in force or to termination for poor performance, both of which are costly for a firm. The other two-thirds or 12% of the workforce are from voluntary quits, usually of individuals whom the firm wishes to retain. As one might expect, the turnover rates are highest among younger workers, chiefly in the service industries. These rates are lower for senior workers and for those in professional positions. The former phenomenon occurs because the shorter time horizons for older workers makes it more difficult to recoup the front-end investments that both sides have to make in new jobs. The latter phenomenon occurs because the higher the professional status attainable the more asset specificity of the skills. This turnover rate is not a sign of monopsony power, but in some instances reflects a bilateral monopoly situation, similar in kind to that which arises on the renewal of a residential or business lease. But either way, the cost of finding a replacement is never cheap and, in some cases, can run to twice annual salary.

In light of these basic figures, we should expect that both sides will try to find ways to extricate themselves from these problems. Firms begin by coaching managers on how to relate to workers to avoid quits attributable to bad morale or a breakdown in communications. They hope to develop a job esprit so that when workers do leave they help to recruit their replacement. It takes a

88 Marc Holliday, 50 Employee Turnover Statistics to Know Today, ORACLE NETSUITE (Jan. 5, 2021) [https://perma.cc/BK8T-BCDY].
very short time in a managerial position to realize that culture and morale are the start of successful firms no matter the market environment in which they work.

Firms can expand the pool of available workers by investing in training programs that can expand the pool of available talent. They can offer signing bonuses, various perks, or better benefit packages. This hardly sounds like a system in which exploited workers are driven back to subsistence wages. Workers can enroll in a bewildering array of training programs to advance within their chosen field or to shift fields altogether. Overall, the movement levels are high in good times and in bad, which suggests that labor markets are typically competitive and more dynamic that the monopsony market model predicts. In this world, a prediction that employers can depress wages by as much as 17 percent, as the Biden executive order claims, looks like sheer fantasy, for it presupposes that such large gaps go unnoticed in labor markets, when the far more likely account is that there will be a group of savvy entrepreneurs who can sniff out these profits opportunities.

The simplest explanation for the decline in union power is that, notwithstanding the legal protections, unions cannot deliver for their members durable benefits that exceed their private costs of unionization. The firm that is unionized risks losing out to competitors. The workers within the unions are barred from moving

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89 On this point, see, for example, Don Boudreaux, *Assertions are Cheap*, CAFÉ HAYEK (Sept. 27, 2021) [https://perma.cc/NHG7-HXHM] (criticizing Posner’s New York Times Op Ed., *You Deserve a Bigger Paycheck*, N.Y. TIMES, September 24 at A23, whose title overstates the extent of “wage suppression and inequality caused by the power of employers in labor markets.”). Boudreaux writes:

To back his assertion, Prof. Posner refers to “academic research on labor markets” that allegedly shows that “millions of Americans are paid thousands or even tens of thousands of dollars less than they should be paid.” Well, I can point to academic research on labor markets that shows the opposite, namely, that growth in worker pay has kept pace with growth in worker productivity. This finding is inconsistent with the prevalence of monopsony power.

Boudreaux, *supra*. 
up within the firm. The internal governance structure gives disproportionate power to senior workers, which makes new entrants leery to join these firms. Nonetheless, there is a determined point of view that downplays the monopoly power of unions and treats them as the best institution in the best of all possible worlds. An early study from the Economic Policy Institute takes the Panglossian view that explains "How Unions Help All Workers." The source of that optimism is a set of well-accepted numbers that states: "Unions raise wages of unionized workers by roughly 20% and raise compensation, including both wages and benefits, by about 28%." That number is highly instructive because it explains why successful unions can attract workers—by delivering net benefits in excess of their costs to union members. But, after that the argument gets far murkier: "Unions reduce wage inequality because they raise wages more for low- and middle-wage workers than for higher-wage workers, more for blue-collar than for white-collar workers, and more for workers who do not have a college degree." Within a static model, this so-called distributional improvement must take into account the net reduction in workers in that field and the parallel reduction in other nonunionized workers that work in complementary fields, so that the distributional effects on workers are far muddier than this brief conclusion assumes. In addition, premium wages will lead to higher consumer prices, so that the unionized worker now has to pay more for goods. There is a negative correlation between worker benefits and social benefits, which hits non-union workers who do not get higher wages and benefits but pay higher prices. The wage increases are equally hard on company shareholders, who see reduced profits.

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91 Lawrence Mishel & Matthew Walters, How Unions Help All Workers, ECON. POL'Y INST. (2003) [https://perma.cc/J3KS-RHH7].
92 Id. at 1.
93 Id.
without sharing in the union gains. Under the static model, then, unions reduce overall social welfare, just like any other monopolist. The outcomes look even worse under a dynamic model because these large wage differentials are not sustainable in global competitive markets, so that the share of unionized workers drops dramatically, as new non-unionized competitors, both domestic and foreign, chip away at the dominant position that the share of unionized workers drops dramatically. General Motors had nearly 400,000 workers in 1970, but only 243,000 workers in 2008 when it went through bankruptcy reorganization. That case offers a microcosm of the long-term decline of union labor in the workforce from about 35% in 1954 to a little over 6% today. Those figures show that the Panglossian labor union model is not sustainable, so why should writers who are so intent at finding that monopsony power by firms who have no legal protections ignore union power backed by government force?

This pessimistic critique of the union influence is not just a matter of economic theory. It is also borne out by looking at the striking difference between the Obama administration, with its strongly pro-union polices, and the Trump administration policies that tended in the opposite direction. Nor need we only look at national policies, for there is much evidence to support the proposition that Right-to-Work (RTW) states have more robust job growth than states that ignore that option. All this evidence helps explain why labor migration is out of high-tax and high-regulated states into those

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94 Todd Seibt, Painful Numbers Behind the UAW-GM Decline, MLive (April 5, 2019) [https://perma.cc/8T72-FF2G].
95 Reuters Staff, Factbox: Key Facts about General Motors, Reuters (May 29, 2009) [https://perma.cc/7Q2Q-JMW6].
97 See Sean P. Redmond, Right-to-Work Law: The Economic Evidence (2018 Update), U.S. Chamber of Commerce (May 11, 2018) [https://perma.cc/QY3J-EUVS] (noting more rapid growth between 2001 and 2016 in private-sector employment for RTW states: 27% for RTW states compared to 15% in non-RTW states; 0.4% lower unemployment in RTW states; 38% growth in output in RTW states compared to 29% for non-RTW states).
which are not. As the following graphic indicates, people vote with their feet, notwithstanding the high private costs of picking up and moving out.\textsuperscript{98}

\begin{center}
\textbf{Where Did Americans Move in 2020?}

\textit{State Migration Patterns, from Most Inbound to Most Outbound, 2020}
\end{center}

That surge also explains why both Volkswagen\textsuperscript{99} and Amazon\textsuperscript{100} were able to survive unionization drives in southern states. Again, an increase in competitive forces supplies the answer.

The poor performance of pro-union policies at the national and state level is likely to repeat itself in the Biden administration, which

\begin{itemize}
  \item \textsuperscript{98} Janelle Cammenga, \textit{Where Did Americans Move in 2020?}, TAX FOUND. (Jan. 13, 2021) [https://perma.cc/B9CC-AY8P].
  \item \textsuperscript{99} Bobby Allyn, \textit{Tennessee Workers Reject Union at Volkswagen Plant—Again}, NPR (June 15, 2019) [https://perma.cc/PYA4-FR3R].
  \item \textsuperscript{100} Alina Selyukh, \textit{It’s a No: Amazon Warehouse Workers Vote Against Unionizing in Historic Election}, NPR (Apr. 9, 2021) [https://perma.cc/B4UG-ZAGG].
\end{itemize}
preaches that “[i]t has never been more important for us to invest in strengthening our infrastructure and competitiveness, and in creating the good-paying, union jobs of the future.”  

Biden shows not the slightest awareness of the mortal tension between his first two objectives and the last, which is only compounded when that same White House Report states as its policy objective: “[To c]reate good-quality jobs that pay prevailing wages in safe and healthy workplaces while ensuring workers have a free and fair choice to organize, join a union, and bargain collectively with their employers.”  

“Prevailing wages” are union wages, so this passage should be read as an endorsement of the 1931 Davis-Bacon legislation\(^\text{103}\) that was intended to prevent southern black workers from competing for government jobs in the North.  

Today, the Biden administration supports the PRO Act—Protecting the Right to Organize Act of 2021,\(^\text{105}\) a strong labor piece of regulation. Here is not the place to argue the merits of the bill, save to mention that it is intended to strengthen the monopoly position of workers. The forces on both sides of this struggle commit enormous resources towards its resolution because they well know that the choice of rules really matters. Yet, the writers who are strong in applying the antitrust laws against employers are strangely quiet when it comes to curbing the monopoly power of public and private unions.

These general observations are reinforced by a brief look at some mishaps that arise when either the federal or state governments directly regulate labor markets. For those who are concerned about monopoly power, the HHI for government actions is a perfect 10,000 because the regulations themselves are intended to preclude various

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\(^{101}\) The White House, Fact Sheet: The American Jobs Plan (Mar. 21, 2021) [https://perma.cc/C3XN-KAXX].  

\(^{102}\) Id.  


forms of private action that might soften the scope of the government intervention. They in effect introduce a variety of control over wages and terms that would be per se illegal if formed by voluntary agreement.

The first concern involves efforts by the Obama administration to expand the reach of labor law by invoking a broad definition of “employer” under the NLRA so as to create a new type of “joint employment” relationship whenever a given company contracts out some of its work to an independent business. The traditional rule, as announced in NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.,\(^{106}\) was that the NLRA only reaches employers who hire their own workers and subject those workers to direct management control. Other employers that used these workers on a short-term basis were not caught by the definition. When the Obama NLRB revisited the issue in 2015 in Browning-Ferris Industries of California, Inc. (Browning-Ferris II),\(^{107}\) it reversed course and for the first time held that a so-called joint employer (i.e., one with limited responsibilities) could be treated as an employer under the Act even if it had not exercised any “any direct and immediate control” of the terms and conditions of employment for workers with other full-time employers. It takes little imagination to see that complex business arrangements could spew forth a huge number of these transitory joint relationships. That one ruling would have allowed any union to have two (or more) unionization targets, thereby expands the potential scope of the statute. The Trump administration put an end to that maneuver in February 2020 by restoring the original rule that the only time the joint employer rule applies is when two employers share equal direct control over a given employee.\(^{108}\) In July 2021, the

\(^{106}\) 691 F.2d 1117, 1122–23 (3d Cir. 1982).
\(^{107}\) 362 NLRB 1599 (2015).
\(^{108}\) NLRB, NLRB Issues Joint-Employer Final Rule (Feb. 25, 2020) [https://perma.cc/WTS3-D3MP].
Biden administration announced that it intends to rescind the original rule in restoration of the 2015 rule.\textsuperscript{109}

In a related development, the Obama NLRB took the position that a franchisor such as McDonald’s could be held liable under the NLRA, in some undefined set of particular circumstances, for any unfair labor practice committed by any one of its thousands of franchisees.\textsuperscript{110} It is well understood that for franchising to work there must be precise division of control between the franchisor and the franchisee. The former has to guarantee uniform quality in order to support the brand. The same Big Mac has to be for sale everywhere to get customers to come to new locations while traveling, for example. But, the latter has to have the power to hire and fire workers in order to maintain control over the workshop. Those incentives only work if the franchisee makes an extensive equity investment in the firm. But, it was not clear whether this long-term stable relationship could survive if the new form of vicarious liability was in place such that McDonald’s or other franchisors could be found guilty of unfair labor practices because of actions by the franchisee. A franchisor could stand back from controlling labor issues, only to face an onslaught of suits that it would be ill-equipped to defend. Or it could intervene, at which point its franchisees lose the direct control over day-to-day operations that makes the model such a success. The reach of these arrangements was extensive: when the rule was announced in 2015, franchisors had about 750,000 outlets, employing 8.1 million workers and generating about $770 billion per year, all of which could be put at risk by a change in approach.\textsuperscript{111} The rejection of the dominant model would have put an entire industry


\textsuperscript{110} For a discussion, see Richard A. Epstein, McDonald’s v. NLRB, HOOVER INST. (Feb. 9, 2015) [https://perma.cc/T8Q5-USQT].

\textsuperscript{111} Id.
to the unhappy choice of deciding which inferior choice should be followed.

A third similar initiative under the NLRB was the ill-conceived effort of the Obama administration to classify all graduate research assistants (especially in the hard sciences) as employees subject to both the NLRA and the FLSA. The model does not work anywhere. Graduate teaching assistants are not employees of their research supervisors for their advanced degrees. And for the physical sciences, it is impossible to separate out graduate studies from instructional duties for the purpose of computing overtime payments. Nonetheless, in August 2016, the three member Democratic majority in Trustees of Columbia University v. Graduate Workers of Columbia-GWC, in yet another board flip-flop, held that graduate students counted as employees under Section 2(3) of the NLRA which provides, most unhelpfully, that “the term ‘employee’ shall include any employee,” subject to a list of important but irrelevant statutory exceptions.112 At the time, Yale University President Peter Salovey observed that he had “long been concerned that this relationship would become less productive and rewarding under a formal collective bargaining regime, in which professors would be ‘supervisors’ of their graduate student ‘employees.’”113 Indeed, Yale filed an amicus brief to voice its concerns.114


113 NLRB Rules that Graduate Students are Employees, YALENEWS (Aug. 23, 2016) [https://perma.cc/L9VU-F9YG]. For my critique, see Richard A. Epstein, Obama’s Labor Market Mischief, HOOVER INST. (Nov. 28, 2016) [https://perma.cc/PN2B-UNS2].

114 Brief of Amici Curiae Brown University et al., The Trs. of Columbia Univ. in the City of N.Y. & Graduate Workers of Columbia-GWC, UAW, 364 NLRB No. 90 (2016). For a discussion of this brief on behalf of a consortium of major research institutions and a parallel brief by the American Association of University Professors, see Richard A. Epstein, Graduate Students as Protected “Employees”, HOOVER INST. (Aug. 29, 2016) [https://perma.cc/3Z6A-CGCO].
The same definitional issue took place in connection with the FLSA when in May 2016 the Department of Labor issued a rule that provided that executive, administrative, and professional employees would be exempt from the overtime regulations only if their wages were above $921 per week, or $47,892 per year, up from the earlier figure of $455 per week, or $23,660 per year. The difference between the two numbers implicated huge numbers of graduate research fellows, which could have turned the entire area into a reporting nightmare save for the fact that a federal judge enjoined the overtime rule in November 2016. The Trump administration subsequently declined to renew the earlier Obama-era interpretation and instead ultimately raised the figure to $35,568 annually, thereby taking much of the sting out of the Obama administration approach.

The FLSA has also been a huge source of contention in dealing with the position of so-called EAP (executive, administrative and professional workers), who are in general exempt from the overtime regulations. As a matter of ordinary English, police sergeants and lieutenants fall into that category because of their oversight of inferior employees. Nonetheless, in the famous decision in Auer v. Robbins, Justice Scalia deferred to an agency interpretation that excluded these workers from the class because their salaries could be docked for various infractions of their employment contracts. The Auer deference has largely been eviscerated in the subsequent decision of Kisor v. Wilkie. For these purposes, what matters is that Auer deference is consistent with an administrative flip-flop between

118 519 U.S. 452 (1997).
119 139 S. Ct. 2400 (2019).
Democratic and Republican administrations that clearly has a huge effect on large number of employees in both the public and private sectors.\textsuperscript{120}

The classification of employees is perhaps most important when drawing a distinction between employees and independent contractors. That line is easy to draw when one firm hires another firm to do specialized work, which is then the sole employer of its workers. But, the line becomes difficult to draw when one firm claims that the individual workers whom it hires should be treated as independent contractors, especially when some of them do work similar to that of full-time employees. The law has developed a full array of tests to determine whether a given worker is his or her own boss, often turning of the locus of decision-making powers on given tasks.\textsuperscript{121} That issue came to the fore in \textit{Dynamex Operations West, Inc. v. Superior Court of Los Angeles County},\textsuperscript{122} where the California Supreme Court noted the high stakes that turned on this classification:

[[I]f a worker should properly be classified as an employee, the hiring business bears the responsibility of paying federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker's compensation insurance, and, most relevant for the present case, complying with numerous state and federal statutes and regulations governing the wages, hours, and working conditions of employees.\textsuperscript{123}]

The court held that this matter could not be left to the parties to resolve as a contractual issue, given the regulatory overlay. It then

\textsuperscript{120} For a more detailed discussion, see \textit{Richard A. Epstein, The Dubious Morality of Modern Administrative Law} 131–37 (2020).

\textsuperscript{121} For some measure of the complexities in the ride sharing business, see \textit{Saleem v. Corp. Transp. Grp, Ltd.}, 854 F.3d 131 (2d Cir. 2017).

\textsuperscript{122} 416 P.3d 1 (Cal. 2018).

\textsuperscript{123} \textit{Id.} at 5.
adopted the so-called “ABC test,” which limited independent contractors to cases that satisfied three conditions:

(a) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity’s business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.\(^\text{124}\)

Virtually all workers within the gig economy are employees under the *Dynamex* test given the control that the major firm has to exert over workers to assure the quality control necessary for brand protection. At this point, the ongoing controversy concerns whether that test is sustainable. In 2019, California passed Assembly Bill 5, which first incorporated the ABC test subject to an extensive and exhaustive list of exemptions for particular professions, including physicians, attorneys, and accountants.\(^\text{125}\) Uber and Lyft, among others, claimed that they were tech-matching services and not employers, which in turn led to a wide range of cases on both sides of the matter. The reports of market dislocations in many professions, like translators and court reporters, filled the press and in turn led to passage of a referendum in California that cut back on the scope of Assembly Bill 5. Here is not the place to go into detail as to how this interference with contractual freedom led to dubious results. But, it is important to note that this issue has remained front page news thereafter, given the overreach of the original legislation. Thus, Assembly Bill 2257 backtracked further from the ABC test by adding

\(^{124}\) *Id.* at 34.

in yet another set of job categories exempt from the rule. Two months later, voters passed Proposition 22, which contained a provision championed by Uber, Lyft, and Door Dash that in effect reversed *Dynamex* for the very class of ride services and delivery apps that were covered in the original decision. Clearly, these decisions have huge impacts on the operation of these critical labor markets. But, I see no evidence that an antitrust inquiry should be launched to ask whether these dominant industry players commit antitrust violations with their workers in a market in which labor mobility is at its height, given that workers work for two or more of these companies at any given time.

### III. THE ANTITRUST LAWS AND LABOR MARKETS TODAY

The first order of business for anyone who believes in competition in labor markets—and not redistribution of wealth to workers—should be a repeal of the many labor statutes that protect market cartelization or segmentation that if not immunized by statute would count as per se violations of the antitrust law. It should, therefore, be incumbent on the writers who support antitrust reform to do so.

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127 Sara Ashley O’Brien, *Prop 22 Passes in California, Exempting Uber and Lyft from Classifying Drivers as Employees*, CNN Bus. (Nov. 4, 2020) [https://perma.cc/6V5P-8E2Q]. Prop 22 was held unconstitutional in August, 2021 in *Castellanos v. California*, No. RG21088725, 2021 Cal. Super. LEXIS 7285 (Aug. 20, 2021) [https://perma.cc/8MVP-GGB5], on the grounds that under California law the initiative failed because it contained a provision that purported to insulate it from legislative revision, which is not allowable under article XIV, section 4 of the California Constitution:

> The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers’ compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party.

*CAL. CONST.* art. XIV, § 4.
to speak out against these various rules and call for their repeal, unless they could supply some special efficiency justification for these practices, which are hard to come by.

Thus, to give but one example, it has often been said that unions facilitate communications between firms and their workers. But, the claim ignores the fact that union members have no right to speak directly with employers, unless the union approves of the exchange, such that this artificial barrier blocks much needed communication. There is, of course, often a need for collective communication between the firm and its workers. Historically, company unions—which did not have the power to strike—served that particular role, but their influence has been sharply diminished since the NLRA declared that working with a company union would constitute an unfair labor practice.\textsuperscript{128}

These other factors, of course, do not have any effect on the analysis of various practices that explicitly seek to divide markets in ways contrary to the antitrust law. Defenders of using the antitrust law in labor markets start their exploration into this topic by noting several well-publicized actions to thwart this form of express market division by the use of covenants not-to-compete. They note that over ten years ago the Justice Department was able to secure a major financial settlement for $415 million from several major tech companies like Google and Apple, which had agreed among themselves not to steal each other’s employees.\textsuperscript{129} Here, there is no doubt that the agreement looks to be in restraint of trade, which in turn invites a rule of reason analysis to see if there is some explanation for these restraints. In some cases, the protection of key trade secrets (with uncertain depreciation rates) might make the restriction justifiable, and if it does, we should expect that employees will receive some sort of wage premium or collateral benefit up front.


\textsuperscript{129} See Lance Whitney, \textit{Apple, Google, Others Settle Antipoaching Lawsuit for $415 Million}, CNET (Sept. 3, 2015) [https://perma.cc/TY2J-M8UK].
to offset those additional burdens. These adjustments are easy to postulate, likely to occur, and hard to prove. Nor should we expect employment contracts to be the only method employers use to protect these secrets. Self-help arrangements are also possible, so firms devise internal classifications for trade secrets and for the most valuable of these take steps to divide and limit access so as to reduce the risk of theft or leakage, such that the loss of one piece of a formula has less of a chance of revealing the entirety of the trade secret. But here again, it is hard to generalize. In many areas, even knowing a single piece of information could make it easier for outsiders to infer the overall structure of research or operations from some apparently random piece of information. That is certainly the way in which criminal and military interrogation works with hostile targets. But, it is even easier to obtain relevant information from new receptive employees or other sources who have every reason to share information with the new employer, not to conceal it.

That leaves open the issue of what happens if many firms in a competitive market independently decide to adopt a similar set of restrictions on labor mobility. Given the analysis in Mitchel, it appears as though these restrictions should also be subject to a rule of reason analysis, with the balance tipped perhaps more in favor of the individual employer, as it is under current law. The situation is still more complex because it could easily be that cases of this sort raise (at least in part) a classic prisoner’s dilemma game. All firms would be better off if they could freely poach, especially since high turnover rates are very much a part of the innovation world—which incidentally counts as evidence against the supposed immobility of labor in a market characterized by new entry and frequent exit. At this point, a public law that imposes additional restraints on the ability of individual firms to impose these restrictions could easily make sense—at least if some allowance is made for certain key cases

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130 See supra notes 31-34, 48-53.
in which the trade secret issue looms large. What is critical to note in this case is that the poaching cases give no reason whatsoever to change the basic framework that is used to govern activities in product markets.

The situation at the bottom end of the market also bears some notice. Marinescu and Posner note the highly publicized revelation that Jimmy John’s, a sandwich chain, required its low-wage employees to sign covenants not-to-compete. That firm was not alone, for they cite a study that shows that about 53.3% of major franchisors required their workers to sign no poaching agreements in 2016—up from 35.6% in 1996. Those same results are found in the paper by Colvin and Shierholz, which note their wide use at all levels of the market. They also refer to work that indicates that “being bound by a noncompete is associated with an 11% decrease in turnover time.” But the point is neither here or there without some strong account as to whether that decrease improves or hurts company performance. Given the obvious costs of high turnover to firms, the more likely explanation is that the situation represents a social improvement and argument for keeping the current law in place. Put otherwise, it looks as if the widespread use of these agreements is evidence of their value and not evidence of some restrictive consequence in a few cases. And, if it is said that both efficiency and restrictive effects are at issue, it is clearly not worth the blunt instrument of antitrust law to disentangle them. There have been vast swings in labor markets over recent years, and, all the while, the law of non-competes has been relatively stable. It is doubtful that their use has been the source of any significant dislocation.

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131 See generally Ronald J. Gilson, The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 138, and Covenants Not-to-Compete, 74 N.Y.U. L. Rev. 575 (1999) (noting that Silicon Valley growth relative to Route 138 in Massachusetts was at least partially attributable to the higher levels of labor mobility).
132 Naidu, Posner & Weyl, supra note 15, at 545.
133 Colvin & Shierholz, supra note 5.
134 Id.
That conclusion can be strengthened by taking a look at the specifics of these covenants in light of the context in which they arise. One example comes from McDonald’s, whose agreement with its franchisees (not the employees) is intended to prevent them from poaching each other’s employees:

*Interference With Employment Relations of Others.* During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald’s, any of its subsidiaries, or by any person who is at the time operating a McDonald’s restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph [] shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months.135

Before asking about the validity of these restrictions, it is useful to ask why McDonald’s would opt to incur these costs. The simple answer appears to be that the labor markets are sufficiently competitive that a modest bidding war among rival franchisees of the same franchisor could increase their overall cost of doing business, and thus work to the disadvantage of McDonald’s in its complex oversight of multiple franchisee relationships. Recall that in *Continental T.V., Inc., v. GTE Sylvania, Inc.*136 the United States Supreme Court held that a rule of reason applied when a manufacturer limited the number of franchisees that it would license in any given area and instructed them to sell products only for those locations for which they had obtained a franchise. If a franchisor can impose vertical restraints on its franchisee resellers subject to the rule of reason, it should be able to impose similar vertical limitations on

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135 Posner, supra note 8, at 56-59. See also Marinescu & Posner, supra note 16, at 1385 n.205 (quoting Deslandes v. McDonald’s USA, LLC, No. 17 C 4857, 2018 WL 3105955, at *6 (N.D. Ill. June 25, 2018)).

these franchises with respect to their employees. Thus, suppose that all outlets were owned by McDonald’s itself an inefficient solution, given the need to incentivize on-site owners to manage the business. Without question, McDonald’s could impose these restrictions on its own employees. There seems therefore little reason to say that once McDonald’s resorts to a franchise model, it has to tolerate competition among its franchisees that will reduce the overall efficiency of the operation, given that it could achieve the same result if they adopted an inefficient form of vertical integration. Posner recognizes the force of this argument, but then insists that ordinary frictions in job turnover are sufficient to protect employers on the ground that they make little investment in these employees. But, the extent of these investments may well be substantial, and the non-compete could well induce higher levels of training. Indeed, the large number of employees covered suggests that McDonald’s is more concerned about turnover than with any loss of information. It is also not clear that the carrot in this case works better than the stick. McDonald’s could also offer bonuses at the end of year or educational allowances to workers that take the form of tuition guarantees. The worker pays the fee and the company picks up some fraction of it for each year that the worker remains. None of these devices are perfect, but alone or in combination, they suggest that the rule of reason analysis may be close and that, as a general rule, it is best to engage in costly antitrust litigation and enforcement only in clear cases, not in those where the crosscurrents are sufficiently powerful that a rule of per se illegality looks like overkill.

It is, of course, an entirely different situation to restrict their movement to different firms outside the McDonald’s system, which this clause does not do. A departure outside of the McDonald’s family will in most cases require the sacrifice of some firm-specific techniques and a loss of seniority and other privileges associated with the older job, which make it less likely that any worker will opt

137 Posner, supra note 8, at 58-59.
for this choice in the absence of any change in personal circumstances.

Finally, it is always possible to waive these conditions in certain circumstances, if for example one outlet was short of workers when a nearby outlet faces a decline in business. It would be useful, therefore, to examine empirically how and when these waivers are given and their terms and conditions, including such key matters as whether transfer fees are paid or whether the releases tend to be individual or reciprocal. Note too that this provision has a six-month tail, in contrast to the nonunion (or yellow-dog) pledges in *Hitchman Coal*, which lasted only so long as workers remained in the mine operator’s employ. That distinction makes sense because the risk in the coal case was that all workers would walk off the job in unison, but in the franchisee case the risk is that a worker will quit, take a short vacation, and then work for another franchisee, rendering the labor restriction provision totally ineffective.

### IV. IMPLICIT RESTRICTIONS

The far harder question comes with respect to practices that are said to violate the antitrust laws because their practical effects create some form of monopoly power. The initial difficulty with these approaches is that the position does not consider the differences in form and operation between the two sides of the market. Put otherwise, the standard HHI approach does not resonate here. Quite simply, labor market power is not a “mirror image” of product market power. Thus, NPW start with an illustration of how it is that a few gasoline companies in a given town could collude to raise prices on a single commodity, gasoline. Whether that is true is an open issue given that by definition drivers are mobile and, thus, have a wide range of location at which to make their purchases. Thus, in Chicago, it is a common practice for frequent consumers of gasoline, e.g., taxi cabs, to cross state lines to take advantage of the lower tax

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rates in Indiana or simply to travel to the western suburbs to refuel. (I happily plead guilty to the practice.) So even on the product side, matters are questionable. But even if we grant this premise, there is basically only one standardized commodity sold directly to consumers that is at issue.

Yet, now consider the supposedly mirror image case:

For example, imagine the gas stations employ specialist maintenance workers who monitor the gas pumping equipment. If only a few gas stations exist in that area, and no other firms (for example, oil refineries) hire from this pool of workers, then the labor market is concentrated, and the employers have market power in the labor market. To minimize labor costs, the employers will hold wages down below what the workers would be paid in a competitive labor market — their marginal revenue product. Thus, some people qualified to work will refuse to do so, but the employers gain more from wage savings than they lose from having a more limited pool of workers from which to hire.\(^\text{139}\)

To start, just ask this question: how many specialists workers are there in this industry? If their number is small, they may be able to organize an informal cartel. At that point, they may well have the advantage, for they only need tend to one particular service or commodity. The gasoline stations, in contrast, must operate in many different labor markets at any given time and, thus, are likely to have greater difficulty in focusing on an issue that may be one percent of their costs, even if it is 100 percent of the revenue on the other side.

Worse still, this model works from an implicit assumption that the gasoline stations enter into an employment relationship with individual workers to discharge all their business functions. But in many cases, the real business decision is whether the gasoline station should hire these workers or contract out the entire business to a

\(^{139}\) Id. at 539.
specialist firm. In most cases, subcontracting with an independent firm will be the preferred solution. It could take a team of different specialists to deal with the gas pumping equipment, and it becomes prohibitively expensive to hire specialists who have to remain idle 99 percent of the time or undertake other work that does not take advantage of their distinctive skills. So, the sensible arrangement is for an independent contractor to service multiple services stations, as well as other kinds of clients with similar equipment, so that these workers can be kept in productive use, if possible, throughout the workday. It is equally likely that these firms will not be able to obtain sufficient business by dealing with a few stations in a single town, so they will work from a central location and take care of gas stations within, say, a 50-mile radius of their home base or franchise out to cover wider territories. As that geographical network spreads, it is likely that more than a single firm will fill that niche. At this point, the organization of the labor market involves far smaller revenue amounts and a far larger number of transactions, with a highly complicated structure and no clear idea of what should be done to figure out what happens. There are good reasons to stress the product market, gasoline, and not the service market for a wide array of different workers.

A similar analysis applies to yet another of NPW’s examples. They write, “Imagine that a small town has four large firms that manufacture widgets for the national market.” But, it is very hard to imagine this story. First of all, widgets may be manufactured at other locations, so we don’t know the fraction of the product market they hold. Second, there is nothing that says that one small town can sustain four large factories, without drawing workers from outside. Third, there is no reason to assume that the four firms that make identical, or more likely, similar products, or that they necessarily use the same techniques for fabrication. Some firms could have better locations than others, a different set of trade secrets, newer or older
equipment from distinct brands, diverse subcontracting policies, or individualized loading docks and physical plants. It would be a mistake therefore to assume that they all seek the same proportion of labor for the same tasks. And, once there is some differentiation between firms, the labor market looks more fragmented, such that it is unclear which forms of labor should be included in the relevant market. Given that fragmentation, it is hardly likely that the monopsony power is possessed by a single firm. But, once there are two or more firms that work independently in a given labor space, the level of monopsony power starts to shrink dramatically, just as the levels of industry concentration shrink dramatically under the HHI with the movement from 1 to 2 firms in a given space.\footnote{George J. Stigler, \textit{Monopoly}, ECONLIB (last visited Jan. 16, 2022) [https://perma.cc/L4BE-Q9V3] (summarizing Reuben Kessel, \textit{A Study of Competition in the Tax-Exempt Bond Market}," 79 \textit{J. Pol. Econ.} 706 (1971)). Kessel’s study notes the rapid rate of decline in underwriting commissions as a function of number of entrants:}

<table>
<thead>
<tr>
<th>Number of Bidders</th>
<th>Underwriting Spread</th>
</tr>
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<tbody>
<tr>
<td>1</td>
<td>$15.74</td>
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<tr>
<td>2</td>
<td>$12.64</td>
</tr>
<tr>
<td>3</td>
<td>$12.56</td>
</tr>
<tr>
<td>6</td>
<td>$10.71</td>
</tr>
<tr>
<td>10</td>
<td>$10.23</td>
</tr>
</tbody>
</table>

Although it does not affect the macro-trend Stigler identifies, it is important to note that in transcribing the table from Kessel’s article, Stigler uniformly added ten dollars to each of the calculated underwriting spread values. \textit{Compare id. with Kessel, supra}, at 723.
internal production, and it is unlikely that they could increase the leverage over the firm, for by making the job distinctive, it not only increases the leverage of the firm over the worker but that of the worker over the firm, so that this is hardly a risk-free strategy. It seems highly unlikely that any merger inquiry could isolate some pure form of local monopsony.

In light of these different patterns in labor markets, it becomes necessary in principle to consider a number of different remedial strategies. The first point is whether the concern with monopsony should trigger any antitrust inquiry of firms wholly apart from pending merger activity. The answer to that question is generally "no" when dealing with monopoly concerns in product markets. Indeed, there is serious resistance to the proposition that such reviews should take place in product markets retrospectively, even for deals that have received approval under the Hart-Scott-Rodino framework. Ordinary transactions for products below that threshold escape so much as the suggestion of an administrative review, and the same is true for transactions involving labor. There is just too much new input into the system to look at literally thousands of companies whose labor forces come from thousands of different markets. It will not happen.

Hence, the action, if it occurs, will take place in future transactions, where size considerations will again swamp everything else. The typical merger between two companies in the oil business can be addressed with respect to the billions of gallons of gasoline sold each year. The merger between rival banks can look at total deposits, loans, or some other broad indicator. It is then possible to attach certain conditions to a merger, including divestures in certain submarkets where the concentration of the two firms exceeds some permissible threshold. But, for many global or national chains there must be thousands of small labor markets in each geographical center at home or abroad that would require a detailed analysis to decide whether wages per worker are off by a couple of thousand dollars per year. If there are grounds to object on the product side, as there will be in cases of high concentration in local markets, who would worry about the labor side when there are already grounds to set aside the merger? And, if there are sufficient efficiencies on the
product side, who would want to derail a transaction because of some modest imperfection in dozens of labor markets out of the thousands of labor markets that are impacted? The efficiency gains from the transaction are too large; any effort to micromanage the labor markets will hurt shareholders and customers of the firm, as well as workers in markets that might expand in virtue of the merger.

A related question is how the case for antitrust enforcement varies with the types of workers who are involved. At the bottom end of the market, hotel clerks, janitors, and waiters usually have a higher degree of mobility because their skills are not firm, or even industry, specific. And if they have signed various restrictive covenants, chances are that they have received a wage premium, so as with all rule of reason analyses the focus should be on opportunities denied to third parties from competition, not the position of the worker. And at higher levels, the geographical markets expand to offset some of the supposed losses that take place because of specialization in service markets. It may also be the case that many workers are subject to various kinds of licensing restrictions, but here the answer comes in two parts. First, if these are state-level limitations imposed on national markets, as with telemedicine, we can get rid of the restrictions without resorting to the antitrust laws. Second, if the licenses are in place, it is hard in the abstract to decide where the advantage lies. It may well be that the workers will find it difficult to get other jobs, but by the same token the firm will find it more difficult to attract replacement workers if they must find licensed individuals to do the job. Thus, in the airline industry, pilots are licensed by kind of craft, which means that easy substitution is not available—which probably accounts for the strong position of striking pilot unions.

So, what are the obvious cases to which the new approach might yield a positive set of results? NPW provide two cases that they think fit the bill, but both of these yield the same result with the traditional theory. First, there is the situation in which it is observed that firms in the same industry never hire workers away from each
other. But, the traditional approach handles that for it is certainly sensible to infer that a common form of competition has been suppressed by agreement when the usual rates of turnover do not apply. It is common in antitrust law to draw those inferences. Note, however, that the same pattern cannot emerge in product markets, for there is no way that gasoline stations, for example, could enter into non-poaching agreements when they have no control over who will come to their stations. The second illustration is where a merger of three hospitals in a given area reduces the opportunities for nurses. But again, two points matter. The first is that this level of increase in the service market will certainly attract attention as an ordinary three-to-two merger in the product market. And second, the position of unionized nurses is more complex insofar as there are elaborate rules that deal with the obligations of successor employees that could easily give the nurses some leverage over the basic situation.

Thus far, I have developed the argument solely by appealing to common sense notions of economic theory. There are many economic studies purporting to address this question, usually by taking a 30,000-foot view of the matter and concluding, without much differentiation, that these substantial pockets of monopoly power can persist for long periods of time. But in this regard, it is far more instructive to disaggregate the various groups of workers within a single classification. Any apparent persistence at this level is a puzzle given that there are in general no formal barriers to entry, such that the existence of these supranormal profits could not be a state secret, which makes it highly doubtful that these barriers work

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143 See id. at 591-95.
144 Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 213-14 (1964) (holding that employer decisions to contract out the work of employees in an existing bargaining unit is subject to collective bargaining under the National Labor Relations Act).
in all, or even most, markets. It is much more plausible for these theories to work in markets that do have barriers to entry, of which hospitals are one, given that new entry into a market requires a certificate of convenience and necessity (CON) in most states.\footnote{See Nat'l Conf. of State Legislatures, CON = Certificate of Need State Laws (Dec. 1, 2019) [https://perma.cc/3MLC-WRTR?type=image]. Here is the purported theory:

The basic assumption underlying CON regulation is that excess health care facility capacity results in health care price inflation. Price inflation can occur when a hospital cannot fill its beds and fixed costs must be met through higher charges for the beds that are used. Larger institutions generally have larger costs, so hospitals and other health facilities may raise prices in order to pay for new, underused medical services or empty beds.}

Fortunately, there is a recent econometric study by Elena Prager and Matt Schmitt that does an extensive study of market concentration and mergers in hospital markets without once mentioning the role that certificates of need might play in the analysis.\footnote{Elana Prager & Matt Schmitt, Employer Consolidation and Wages: Evidence from Hospitals, 111 Am. Econ. Rev. 397 (2021). Posner comments briefly on the study in his New York Times editorial, You Deserve a Bigger Paycheck, supra note 89, without analyzing their findings.} In their study of mergers that take place in hospital markets, the firms are large enough to matter and the levels of concentration in local market often quite high. One great virtue of their study is that it disaggregates employees into three classes: unskilled workers at low level jobs with little specific capital; skilled nonmedical workers such as HR specialists that do not have unique medical skills; and the skilled high-level professionals like nurses or pharmacists who do have specific skills and, in many cases, limited mobility.\footnote{Prager & Schmitt, supra note 147, at 398.} As they summarize their findings:

For unskilled workers, we do not find evidence of differences in wage growth post-merger, irrespective of the change in employer concentration induced by the merger.

\footnote{Id. Whatever this is, it does not sound like monopsony behavior, where excessive capacity is a simple waste. But a barrier to entry will raise price, given that existing firms do not have to create excessive capacity.}
For the two categories of skilled workers, we find evidence of reduced wage growth, but only in cases where the concentration increase induced by the merger is large.\textsuperscript{149}

Their results square with the general theory, as there is little evidence of any monopsony power with low wage workers, some in the second, and more in the third, but only in those cases where the firms in the local market are highly concentrated—and, I should add, where the CON limits the prospect of new entry. They also find, consistent with general theory, that if nurses are members of professional unions, as is often the case, their market power can stem the wage losses associated with any merger.\textsuperscript{150}

At no point do Prager and Schmitt seek to work through the administrative and legal implications of applying this general framework to a particular merger case, where it is virtually certain that litigants on all sides of the transactions are likely to point to some distinctive feature that purports to explain why this case is more (or less) prone to wage reduction than the average case in the field. And in a sense, it is all unnecessary. Once it is clear that there is high concentration in the labor market, it follows that there is also high concentration in the product and service market, as noted, at which point the marginal benefit of conducting the labor-side analysis is minimal, given that there is an evident need to address the product side of the market, yielding a highly correlated result. Indeed, the entire situation would be much improved by the repeal of the CON statutes, which block new entry in both product and labor markets.

CONCLUSION

There are a set of rich ironies in addressing the question of whether, and if so how, the antitrust laws should apply to employers. The first of these is historical. The early applications of the antitrust

\textsuperscript{149} Id.
\textsuperscript{150} Id. at 419-21.
laws targeted the efforts of unions, especially through secondary
boycotts, to use economic pressure in order to secure their economic
objectives. But, the legal response was not to condemn these as illegal
activities. Instead, it took the position that unions could engage in a
collective refusal to deal with an employer, even if they could not use
various tactics that went beyond their refusal to deal, most notably
the secondary boycott and the strategic withdrawal of services at
critical times during the life of the contract. The New Deal response
was not to attack that use of monopoly power but to solidify it by
adding protections in the form of an exclusive right to represent
workers that required employers to negotiate in good faith with the
union as their exclusive representative if selected by a majority of the
workers.

The progressive economists who prize competition should join
with classical liberals in seeking to remove the legal underpinnings
of union monopoly power. Instead, they sidestep that conclusion and
insist that the antitrust laws should turn their attention to employers
and their actions that limit workers choices. There is much merit in
the first part of that program that applies existing law to various
covenants not-to-compete in labor markets. It is sound, but, in its
basic outline, it is similar to the traditional position that it is relatively
easy to apply antitrust laws to explicit contractual provisions.

It is, however, a very different question as to whether the
antitrust law can sensibly be applied to claims, especially in the
context of mergers, that employers wield some monopsony power
that should be countered by the government in the course of its
review. There are, in principle, reasons to doubt that these pockets of
power will escape the attention of new entrants who can bid up the
wages of workers. But even if the forces of new entry are halting,
there is little reason to think that this source of power applies to low
level workers whose broad but limited skill sets allow them to shift
jobs across different industrial categories. And for those jobs that do
have some special licensing requirements, it is just not clear who
benefits from the restriction: is it the workers, who are not at risk
from new entry by unlicensed competitors, or is it firms that know
these workers must sacrifice real income if they do not continue to
use their licensed skills? But in the face of all this uncertainty, 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.

So, the message again is to keep it simple and go after the low-hanging fruit. And in so doing, we reject the explicit premise of Posner’s book *How Antitrust Failed Workers*. For the most part, antitrust law does not touch workers' lives, which are heavily influenced by direct forms of regulation whose consequences are often too clear. It is just not the case that some novel expansion of the antitrust laws would help the position of workers. On the strength of the current evidence, we should not even attempt any major changes in antitrust practice. In the end, therefore, the standard rule that ignores labor markets in antitrust is the best result in a second-best world.