The Evolving Antitrust Treatment of Labor-Market Restraints:
From Theory to Practice

July 31, 2018

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OVERVIEW

This paper explores the role of antitrust law in protecting workers by policing mergers and conduct that have anticompetitive effects in labor markets. After reviewing the antitrust treatment of buyer power in labor markets, the paper catalogues and summarizes recent literature on the intersection of antitrust and labor policy. The paper concludes by exploring emerging themes and questions from the recent literature and making recommendations to facilitate the translation of new insights into effective antitrust enforcement.

AAI will continue to track the growth and development of modern thinking on what antitrust can do to protect workers and integrate new insights into its competition advocacy. For an encapsulation of AAI's views, see Diana Moss, *Antitrust and Inequality: What Antitrust Can and Should Do to Protect Workers*, Am. Antitrust Inst. (Apr. 2017).

BACKGROUND

I. Growing Interest in Combatting Buyer Power in Labor Markets

The antitrust laws protect against mergers and conduct that harm all forms of competition. This includes the competition that affords the best prices as well as the competition that affords the best quality, choice, and innovation. It includes the competition that occurs between sellers as well as the competition that occurs between buyers. But the competition that occurs between buyers, whether of the price or non-price variety, has historically received less attention from scholars and enforcers than the competition that occurs between sellers.

In recent years, this dynamic has begun to change. With mounting macroeconomic evidence of increased concentration and higher markups, and large firms occupying several important, "winner-

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takes-most" markets, the threat of buyer-side abuses has become more pronounced.[1] In particular, experts and enforcers have been paying closer attention to the effects of market power and excessive bargaining leverage on the buyer side of the labor market, which implicates competition among employers to hire and retain workers. When workers are at the mercy of powerful employers to earn a living, those employers often have the ability and incentive to depress wages or diminish the quality of non-wage terms of hiring and employment.

II. Grappling with Past Inattention to Labor-Market Effects

Historically, the antitrust laws have rarely been invoked to target employer restraints on the basis of anticompetitive labor-market effects. But it is not clear why. Several explanations are possible, ranging from the theoretical to the practical.

A. Cognitive Dissonance Owing to the Labor Antitrust Exemptions

One explanation is a belief held by conservative scholars that labor and antitrust policy should be kept separate because they are conceptually distinct and pose a choice among competing values.[2] It is sometimes highlighted, for example, that the statutory and non-statutory labor exemptions combine to shield collusive behavior on both sides of labor negotiations.[3] Moreover, the higher wages resulting from the collective bargaining process can theoretically harm downstream product-market competition by raising marginal costs and reducing output.[4]

To be sure, the labor exemption is strong evidence that *collective bargaining* restraints in labor markets pose a choice among competing values. In exempting labor and management from antitrust scrutiny during lawful collective bargaining, Congress chose to elevate the national interest in fair wages and working conditions above the national interest in promoting competition among workers. But the "competing values" theory does not explain the relative scarcity of enforcement actions against anticompetitive employer restraints *outside* the collective bargaining context. When it does not interfere with the lawful activities of labor organizations, policing buyer restraints in labor markets can help protect workers from substandard wages and consumers from artificially high prices.[5] It can

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[1] *See, e.g.*, Federico Diez, Daniel Leigh & Suchanan Tambunlertchai, *Global Market Power and Its Macroeconomic Implications*, International Monetary Fund Working Paper No. 18/137 (June 15, 2018); Jan De Loecker & Jan Eekhout, *The Rise of Market Power and the Macroeconomic Implications*, NBER Working Paper No. 23687 (Aug. 2017); David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, NBER Working Paper No. 23396 (May 2017); Simcha Barkai, *Declining Labor and Capital Shares*, Univ. of Chicago Stigler Center for the Study of the Economy and the State New Working Paper Series No. 2 (Nov. 2016).

[2] *See, e.g.*, Robert H. Jerry & Donald E. Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 Indus. Rel. L.J. 173 (1984).

[3] Collective acts of labor organizations are protected by Section 6 of the Clayton Act. Collective acts of multi-employer bargaining units are shielded by the "non-statutory" labor exemption. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 238 (1996); IA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 257b, at 227 (2d. ed. 2000).

[4] *See* Douglas L. Leslie, *Principles of Labor Antitrust*, 66 Va. L. Rev. 1183, 1185-88 (1980).

[5] Although the exercise of buyer power upstream has the effect of lowering the powerful buyer's input costs, it nonetheless harms consumers because the lower input costs typically induce the powerful buyer to purchase a smaller quantity of inputs, which has the effect of raising the powerful buyer's marginal production costs and in turn raising prices downstream. *See* Alan Devlin, *Questioning the Per Se Standard in Cases of Concerted Monopsony*, 3 Hastings Bus. L.J. 223, 230-232 (2007). The powerful buyer still profits significantly in the bargain. *See* Peter C. Carstensen, Competition Policy and the Control of Buyer Power 40-43, n.5 (2017) (noting application of this principle to employment and agricultural

thus serve the interests underlying both labor and antitrust policy, thereby amplifying the societal benefits of enforcement.

Conservative scholars also sometimes argue that restraints having only labor-market effects are insufficiently "commercial" to fall within the ambit of the antitrust laws. In the past, for example, conservative scholars have over-read the first sentence of Section 6 of the Clayton Act, which provides that the "the labor of a human being is not a commodity or article of commerce." Because many of the Clayton Act's prohibitions are limited to "any person engaged in commerce,"[6] such scholars maintain that "employer restraints in labor markets are illegal, if at all, because of their intended or actual product market consequences rather than because of their labor consequences."[7]

But this argument is defeated by longstanding case law and is contrary to the legislative intent of Section 6. Twelve years after Section 6 was enacted, the Supreme Court in *Anderson v. Shipowners' Ass'n of Pacific Coast* held unequivocally that the antitrust laws apply to wage-fixing conspiracies and that an inquiry into whether such conspiracies have additional commercial effects beyond their employment effects is unnecessary.[8] Moreover, courts have not developed a labor exemption that is "symmetrical" in permitting both workers and employers to engage in conduct that violates the antitrust laws. Instead, courts read the second sentence of Section 6, which articulates an exemption only for workers, as limiting rather than expanding upon the first sentence.[9] This is consistent with the view of Section 6 as a "'one-way street,' protecting labor unions but not protecting employers."[10] To hold otherwise, courts would have to ignore congressional intent, which was to protect workers

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commodities in particular and discussing exacerbating effects of all-or-nothing strategies whereby powerful buyers can "extract the same quantity of output that would have been produced at a competitive price without paying that price").

6 Notably, however, Section 7 of the Clayton Act differs in that it applies to "person[s] engaged in commerce or any activity affecting commerce." *Compare* 15 U.S.C. § 17, *with, e.g.*, 15 U.S.C. §§ 13(a), (c)-(f), 14; *see also infra* note 8.

7 Jerry & Knebel, *supra* note 2, at 174 (arguing antitrust laws do not apply to "concerted employer conduct whose purpose or effect is to restrain only the labor market").

8 272 U.S. at 363 ("It is not important, therefore, to inquire whether, as contended by respondents, the object of the combination was merely to regulate employment of men, and not to restrain commerce."); *see also* Eichorn v. AT&T Corp., 248 F.3d 131, 140–41 (3d Cir. 2001) ("[E]mployees may challenge antitrust violations that are premised on restraining the employment market."); Roman v. Cessna Aircraft Co., 55 F.3d 542, 544-45 (10th Cir. 1995) ("Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services."); Areeda & Hovenkamp, *supra* note 3, ¶ 352, at 430 ("Antitrust addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there."). The question is also moot insofar as hiring and employment are a form of "trade." The Sherman Act applies to restraints of "trade or commerce," and "trade" has been defined broadly to include employment. *See* United States v. National Assoc. of Real Estate Boards, 339 U.S. 485, 489 (1950) (defining "trade" under the Sherman Act as "equivalent to occupation, employment, or business, whether manual or mercantile"). The Clayton Act applies to mergers that may substantially lessen competition "in any activity affecting commerce," and trade is undoubtedly such an activity. *Cf. Anderson*, 272 U.S. at 364 (restraint on the employment of seamen was a "direct and primary" interference with ocean-shipping commerce insofar as it involved an activity "affecting such commerce").

9 Areeda & Hovenkamp, *supra* note 3, ¶ 257a, at 224-45 ("that is, labor is 'not an article of commerce' *only* when it is being sold by a labor organization not having capital stock, etc.").

10 James M. Altman*, Antitrust: A New Tool for Organized Labor?*, 131 U. Penn. L. Rev. 127, 147 (1982); *see* Areeda & Hovenkamp, *supra* note 3, ¶ 257a, at 25 ("In passing §6 of the Clayton Act, Congress was clearly taking sides with labor and against management by permitting laborers to cartelize their side of the labor market but not permitting management to cartelize its side.").

in response to misguided applications of the antitrust laws targeting unions.[11] Indeed, to use Section 6 to shield employers who harm workers arguably would be a similar kind of perversion that prompted the provision's inclusion in the Clayton Act in the first place.[12]

B. Mistaken, Hyper-Literal Interpretations of the "Consumer Welfare" Standard

A second theory to explain antitrust's past inattention to labor-market effects is that its traditional reference point of consumer welfare necessarily focuses scholars' and enforcers' attention on the seller side of the market rather than the buyer side. To be sure, a "consumer" is commonly understood as an end-purchaser of goods or services for personal use. And the welfare of end-purchaser consumers was a primary concern of Congress in enacting the antitrust laws.[13] But "consumer welfare" is not akin to statutory language subject to strict construction. Rather, it is a term of art. It serves as a conceptual shorthand for the idea that antitrust protects the beneficial effects of competition in the economy, which are enjoyed by consumers, intermediate purchasers, and input suppliers (among others).[14]

Thus, courts and enforcers have always recognized that the antitrust laws prohibit anticompetitive market distortions that harm intermediate purchasers in a supply chain even if a price effect is not traced through to final consumers.[15] Likewise, the laws have always applied to competitive

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[11] *See* Areeda & Hovenkamp, *supra* note 3, ¶ 257a, at 25 (citing and discussing legislative history, H.R. No. 627 63d Cong., 2d Sess. (1914)); *see also* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages* (forthcoming in Maryland L. Rev).

[12] *See* Altman, *supra* note 10, at 142-56; Devlin, *supra* note 5, at 237, n.52. To give the reading advanced by Jerry & Knebel, *supra* note 2, courts would also have to take the dubious step of construing the first sentence of Section 6 as an implied repeal that altogether exempts large swaths of employment-related conduct from antitrust scrutiny. Such implied repeals of the antitrust laws are strongly disfavored. United States v. Phila. Nat'l Bank, 374 U.S. 321, 350 (1963); *see also* Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975) (holding that "[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act," and finding no support "for the proposition that Congress intended any such sweeping exclusion").

[13] *See* John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 Fordham L. Rev. 2425, 2429 (2013); Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L. Rev 65, 93-96 (1982).

[14] *See The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?, Hearing Before the Subcomm. on Antitrust, Competition and Consumer Rights of the H. Comm. on the Judiciary*, 115th Cong. (2017) (testimony of Diana Moss, President, American Antitrust Institute) [hereinafter "Moss Testimony"]; *see also id.* (opening statement of Carl Shapiro, Professor of Business and Economics, Haas School of Business, U. Cal Berkeley) (the consumer-welfare standard "means that a business practice is judged to be anticompetitive if it disrupts the competitive process and harms trading parties on the other side of the market"); *accord* C. Scott Hemphill & Nancy L. Rose., *Mergers that Harm Sellers*, 127 Yale L.J. 2078 (2018); Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 Antitrust L.J. 707 (2007); Devlin, *supra* note 5, at 240-43.

[15] *See, e.g.,* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 461 (1986) (agreement among dentists that harmed insurers violated antitrust laws where it "disrupt[ed] the proper functioning of the price-setting mechanism" notwithstanding absence of proof it resulted in higher prices); *see also* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (vesting intermediate purchasers with right to recover for harm to competition regardless of whether harm is passed on to end-consumers); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) (holding defendants liable for harming competition regardless of whether pass-on occurs). Indeed, while it is often repeated that the antitrust laws "protect competition, not competitors," the laws also protect the lost profits of rivals who are injured by market distortions, without regard to corresponding price effects on consumers. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 119 (1969) (antitrust damages for excluded rival may be measured based on the rival's "smaller share of the market than it would have had" absent the anticompetitive conduct).

distortions on the buyer side of the market even if a harmful output effect is not traced through to a price or output effect in the downstream consumer-product market.[16]

The term "consumer welfare" has at times been subjected to misuse or misperception. Perhaps most famously, Robert Bork's *The Antitrust Paradox* engendered long-lasting confusion by conflating the concepts of consumer welfare and total welfare.[17] More recently, modern critics have argued that the consumer welfare standard is so intertwined with Professor Bork's vision as to be incapable of reaching beyond short-run consumer price effects to address long-run, dynamic, upstream, or non-price effects.[18] While this is a valid descriptive critique of the consumer welfare standard as misapplied during a long era of lax antitrust enforcement, it is demonstrably incorrect as a critique of the standard on its merits. As case law and the federal agencies' enforcement records can attest, the standard alone does not (and never has) stood in the way of enforcement actions against employer restraints in the labor market, or other buy-side restraints.[19]

C. Taking the Legal and Evidentiary Path of Least Resistance

Other possible explanations for antitrust scholars' and enforcers' inadequate focus on the buy side are more innocent, if still not justifiable. Perhaps the sell side is simply where the disproportionate amount of harmful effects from anticompetitive conduct are most readily observable, whereas effects on the buy side may be more insidious.[20] Or, perhaps public and private enforcers have been dissuaded by the challenges and costs of litigating buy-side restraints. They may view sell-side restraints, by comparison, as low-hanging fruit.[21]

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[16] *See, e.g.,* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 324-25 (2007) ("Even if output prices remain constant, a predatory bidder can use its power as the predominant buyer of inputs to force down input prices and capture monopsony profits."); Hemphill & Rose, *supra* note 14, at 2087-92 (citing and discussing "numerous cases [that] are premised on input market effects alone, particularly when output market harms may be comparatively difficult to measure or demonstrate," but also where "immediate harm to the output market may be attenuated or absent"); Moss Testimony, *supra* note 14, at 6-8 (discussing further examples).

[17] *E.g.,* Robert Bork, The Antitrust Paradox 90-91, 372-74 (1978); *see* Barak Orbach, *How Antitrust Lost Its Goal*, 81 Fordham L. Rev. 2253, 2254-56 (2013) ("For Bork, 'consumer welfare' meant 'allocative efficiency'"); Steven C. Salop *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336, 336-38 (2010) (discussing Bork's terminology); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 Notre Dame L. Rev. 191, 197-201 (2008) (same).

[18] *See, e.g.*, Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice* 4, CPI Antitrust Chron. (April 2018) (describing characterizations of consumer welfare standard as "inherently too restrictive and static to faithfully execute the law's intent").

[19] *See supra* notes 8-12 and accompanying text; *supra* note 16; *infra* note 28.

[20] *See* Carstensen, *supra* note 5, at 1 ("abuse of buyer power is often more embedded in the market process" and may lead to lower input prices "that can take on a superficial, pro-consumer character, making its harmful characteristics less visible"); *cf.* A. Douglas Melamed & Nicolas Petit, *Before "After Consumer Welfare" – A Response to Professor Wu* 4, CPI North Am. Column (July 2018) ("[L]ike others, antitrust lawyers and economists may look for the lost keys under the lamppost because that is where the search is easiest.").

[21] Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power* 6 (U. of Chicago Coase-Sandor Inst. for Law & Econ. Research Paper No. 850, U of Chicago, Public Law Working Paper No. 665, Feb. 24, 2018) (forthcoming in Harvard L. Rev.) (discussing challenges for private plaintiffs in satisfying Rule 23 in employment cases); White House Council of Economic Advisors, Labor Market Monopsony: Trends, Consequences and Policy Responses 4 (Issue Brief, Oct. 2016) (dearth of labor-driven merger challenges may reflect fact that such mergers likely also raise product-market concerns that courts are more accustomed to adjudicating).

Finally, in labor markets in particular, perhaps there is simply a prevailing misperception that market power is unattainable because "there are a lot of jobs out there,"[22] or that it is rendered benign by the protections afforded from labor and employment law.[23] Indeed, evidence that labor markets are no longer competitive,[24] and the implications of sustained assaults on traditional worker protections,[25] have come into sharper focus only relatively recently.

III. Asking New Questions and Seeking New Answers

Whatever the explanation for past inattention to the competitive effects of employer restraints in labor markets, the status quo has shifted. Over the last several years, in an initiative begun by the Obama Administration and continued during the Trump Administration, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have moved to criminalize naked no-poaching and no-hiring agreements among competing employers.[26] At the same time, state enforcers and the private plaintiffs' antitrust bar have focused resources and enforcement efforts on collusive buyer restraints harming workers, including employees or individual sellers in the agricultural, nursing, high-tech, fast-food, and other sectors.[27] And in merger cases, the government has advanced theories of harm predicated on depressed input prices paid to small sellers of products and services,[28] although not yet on depressed wages.

In addition to these important developments, scholars and policy experts have been exploring the nature and extent of labor-market power, as well as possible solutions. The next section reviews and summarizes this recent scholarly literature.[29] It begins in late 2016, which marked the most

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[22] Ioanna Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets* 9 (Penn Law: Legal Scholarship Repository, Faculty Scholarship, Feb. 2018).

[23] *See* Naidu et al., *supra* note 21, at 5.

[24] *Id.* at 17-23 (discussing development of empirical research questioning the competiveness of labor markets over the last two decades).

[25] *See, e.g.*, Celine McNicholas, Zane Mokhiber & Marni von Wilpert, *Janus* and fair share fees: The organizations financing the attack on unions' ability to represent workers, Econ. Policy Inst. (Feb. 21, 2018) (chronicling sustained legal and legislative attacks on worker rights over the last decade); *see also* White House Council of Economic Advisors, *supra* note 21, at 12-13 (noting union membership dropped from 25% to 10% of total employment in the U.S. from 1955 to 2015, and it is now even lower in the private sector, at less than 7%).

[26] Dep't of Justice Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals 4 (2016).

[27] Ten states and the District of Columbia recently launched an investigation of no-poaching contracts in the franchise sector. Jeff Stein, *States launch investigation targeting fast-food hiring practices*, Wash. Post (July 9, 2018). Private plaintiffs have brought numerous class actions. *See, e.g.*, Carruth v. Knorr-Bremse, No. 2:18-CV-00469-CRE (W.D. Pa. April 18, 2018) (rail equipment employees); In re Broiler Chicken Grower Litig., No. 6:17-CV-00033-RJS (E.D. Okla. Sept. 1, 2017) (chicken growers); Deslandes v. McDonald's USA, LLC, No. 1:17-cv-04857, (June 28, 2017) (McDonalds employees); Bautista v. Carl Karcher Enters., LLC, No. BC649777 (Cal. Super. Feb. 8, 2017) (Carl's Jr. employees); Seaman v. Duke University, No. 1:15-CV-462 (M.D.N.C. filed June 9, 2015) (university faculty); In re High-Tech Employee Antitrust Litig, 856 F.Supp.2d 1103 (N.D. Cal. 2012) (high-tech employees); Fleischman v. Albany Medical Center, No. 06-CV-0765 (Sept. 7, 2006) (nurses).

[28] *See, e.g.*, Complaint at 26-27, United States v. Anthem, Inc., No. 1:16-CV-01493 (D.D.C. July 21, 2016); Complaint at 3-4, United States v. JBS S.A., No. 08-CV-5992 (N.D. Ill Oct. 20, 2008).

[29] This survey is limited to only a subset of recent articles that address anticompetitive labor-market effects specifically. It does not purport to be comprehensive, and it does not incorporate other important recent work devoted to the broader subject of buyer power, *see e.g.*, Carstensen, *supra* note 5; Hemphill & Rose, *supra* note 14, or the impact of concentration and declining competition on labor's share of gross domestic product, *see supra* note 1.

significant executive branch foray into labor-market power issues when the Obama Administration published a significant report[30] and began the aforementioned criminalization initiative. This literature review provides brief summaries to help track and connect the continuing growth, development, and evolution of modern thinking on the role of antitrust (and other competition policy tools) in labor markets.[31]

REVIEW OF RECENT LITERATURE ON LABOR-MARKET COMPETITION

White House Council of Economic Advisors, Labor Market Monopsony: Trends, Consequences and Policy Responses (Issue Brief, Oct. 2016).

In this Issue Brief ("brief"), the White House Council of Economic Advisors begins by identifying a long-term macroeconomic trend of slow wage growth and rising inequality in the United States. The brief attributes this development partly to the fact that the share of income accruing to labor has been falling since the 1970s and in a state of accelerated decline over the last 15 years. The brief posits that a general reduction in competition among firms has contributed to this inequity by shifting the balance of bargaining power towards employers. The brief then reviews the economic theory of labor-market monopsony and its harmful distributive and efficiency effects. It also identifies and discusses sources of labor-market monopsony power in the United States, citing (1) market concentration, (2) employer collusion, (3) employer use of non-compete clauses, (4) search costs and "frictions," and (5) regulatory barriers to worker mobility.

The brief then reviews evidence of monopsony power manifesting in the U.S. economy. Examples offered include court cases alleging employer collusion, as well as surveys suggesting 18% of the U.S. labor force is subject to non-compete agreements (including low-wage workers unlikely to possess trade secrets). The brief also points to empirical research suggesting both that minimum-wage increases have not been accompanied by job loss (as would be expected in a competitive labor market) and that worker "quit rates" are insensitive to wage changes (as would not be expected in a competitive labor market).

The brief concludes by recommending a variety of salutary measures. In the antitrust domain, it recommends stepped-up enforcement, along with whistleblower protections for employees who report antitrust violations. It also argues for legislative and regulatory reform to curb unnecessary non-compete agreements, strengthen minimum wage laws and collective bargaining rights, modernize overtime regulations, reform occupational licensing and land-use regimes, and increase availability of non-employer-based health insurance. Finally, it suggests several employer-centric policies, such as requiring better information-transparency policies for employees, support for equal pay rules, and support for improved leave policies.

Alan B. Krueger & Orley Ashenfelter, Theory and Evidence on Employer Collusion in the Franchise Sector (Working Paper No. 614, Princeton Univ. Industrial Relations Section, Sept. 2017).

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[30] *See* White House Council of Economic Advisors, *supra* note 21.

[31] Individual works are listed in chronological order. For simplicity and readability, neither quotation marks nor pin cites are used in the brief summaries included with each article.

Krueger & Ashenfelter examine the 2016 franchise contracts of 156 of the largest franchise chains in the United States to determine the prevalence of no-poaching agreements in the sector. They find that 58% of major franchise chains include no-poaching agreements in their franchise contracts. They then present three theoretical models that may be useful in helping to predict the utilization of such agreements based on firm and industry characteristics.

Under the first model, "franchisor-level oligopsony," all franchisees in a chain coordinate or collude to impose no-poaching agreements in order to reduce competition in their labor market and decrease the likelihood of a worker departing for another franchisee's job offer. Under the second model, "dynamic monopsony," individual franchisees use no-poaching agreements to reduce labor supply elasticity by preventing job offers from franchisees in the same chain. Under the third model, franchisees use no-poaching agreements to shift the division of the net return on investment in employee training. In other words, no-poaching agreements theoretically can enable employers to reduce worker bargaining power over any net surplus created from the employment relationship, including from training. Once this occurs, the employer can capture more of that surplus.

Krueger & Ashenfelter draw two additional observations from their research. First, franchise companies in industries with high labor turnover are more likely to impose no-poaching agreements than are those in low-turnover industries. Second, no-poaching agreements are comparatively *less* frequent in franchise industries with *higher* average wages and education levels, contrary to models that view no-poach agreements as a mechanism to encourage training investment or to protect intellectual property.

The authors conclude that the prevalence of no-poaching agreements in franchise contracts suggests many employers in the sector seek to restrict competition in the labor market, and that such agreements may have the effect of limiting employees' job opportunities. They posit that the prevalence or effectiveness of such agreements may help explain a recent puzzle in the U.S. job market: Unemployment has reached a 16-year low and job openings are at an all-time high, yet wage growth has remained surprisingly sluggish.

Evan Starr, J.J. Prescott & Norman Bishara, Noncompetes in the U.S. Labor Force, U. Mich. Law & Econ. Research Paper No. 18-013 (Dec. 2017).

Starr, Prescott and Bishara examine how pervasive non-compete provisions in employee agreements can inform our understanding of monopsony power in labor markets. The authors individually consider non-competes (1) as evidence of monopsony power, (2) as a tool to accomplish monopsonization, and (3) as a form of monopsony exploitation. They surveyed 11,505 labor force participants and found that one in five were bound by non-competes in 2014, and nearly 40% had signed at least one non-compete in the past.

Starr, Prescott and Bishara also document several troublesome trends. They find non-competes are more likely to be found in high-skill, high-paying jobs, but they are also surprisingly common in low-skill, low-paying jobs. In addition, less than 10% of employees negotiate over their non-competes, and roughly one-third of non-competes are signed after applicants have already accepted their job offers. Nearly two-thirds of applicants had no alternative employment opportunities at the time when their employer asked them to accept a non-compete. And in contrast to the literature suggesting procompetitive justifications for non-competes, those employees who accepted non-competes without negotiation or alternative employment opportunities reportedly received no offsetting wage or training benefits and were comparatively dissatisfied overall with their employment.

Among other things, Starr, Prescott and Bishara conclude that their survey results suggest firms have substantial wage-setting power and that the presence of a minority of "term-conscious" candidates does not have the effect of disciplining contract terms imposed across all candidates. Non-competes thus allow firms to transfer temporary monopsony power (i.e., the temporary power a firm has over an employee who lacks an outside employment option) into long-term monopsony power over the workers bound by them. They also conclude that non-compete provisions may exacerbate market frictions by further reducing the elasticity of labor supply, and that the provisions allow employers to exploit existing frictions and generate new frictions from which the employer can profit at the expense of the employee.

In closing, the authors encourage states to consider implementing policies that reduce the use of non-competes. Notably, this includes states where non-competes are unenforceable in court, because some employers still use them despite their invalidity. More broadly, the authors encourage policies that promote labor-market competition and information-transparency for employees.

Jose Azar, Ioana Marinescu, & Marshall Steinbaum, Labor Market Concentration, NBER Working Paper No. 24147 (Dec. 2017).

Azar, Marinescu & Steinbaum set out to directly quantify the level of labor market concentration across a wide range of occupations and to examine the relationship between concentration and wages. Using data from CareerBuilder.com, they define occupational markets using the Bureau of Labor Statistics Standard Occupational Classification (SOC) System. They define relevant geographic markets using commuting zones developed by the U.S. Department of Agriculture (USDA) using data from the 2000 Census. They measure market power in an occupational-geographic market by calculating HHIs based on the share of vacancies of all the firms that post vacancies on CareerBuilder for a given time period in each of 26 SOC 6-digit occupations.[32] They also calculate HHIs based on shares of applications at CareerBuilder.[33]

Azar, Marinescu & Steinbaum conclude that, using either measurement, local labor markets defined according to the selected criteria are highly concentrated on average based on the HHI thresholds used by the federal antitrust agencies in the 2010 Horizontal Merger Guidelines.[34]

Using a regression analysis, the authors also find that higher labor market concentration is associated with significantly lower real wages. Among other things, they show that movement from the 25th to the 75th percentile in concentration is associated with a 17% decline in posted wages. They recommend continued attention to the competitive effects of concentration in labor markets and exploring the use of their analysis to incorporate labor-market concentration concerns as a factor in antitrust analysis.

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[32] Six-digit SOC codes are the most detailed occupational classifications used by the Bureau of Labor Statistics. Bureau of Labor Statistics, 2010 Standard Occupational Classification (SOC) User Guide (Feb. 2010), *available at* https://www.bls.gov/soc/soc_2010_user_guide.pdf.

[33] They determine shares based on "Expressions of Interest" by job seekers, such as clicks on the "Apply now" button.

[34] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (2010) [hereinafter "Horizontal Merger Guidelines"].

[Efraim Benmelech, Nittai Bergman & Hyunseob Kim, Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?, NBER Working Paper No. 24307 (Feb. 2018)].

Benmelech, Bergman and Kim also examine how monopsony power in local labor markets affects wage behavior. They focus on the ability of monopsonist employers in the corporate sector to exploit their labor-market power to reduce wages. The authors use micro-level Census data for the U.S. manufacturing sector covering the period from 1977-2009, including plant-level data obtained from the U.S. Census Bureau and the Longitudinal Business Database. They calculate HHIs to measure firm employment concentration by industry, county, and year.

Among other things, Benmelech, Bergman and Kim find that local-level employer concentration has increased considerably over time. They find that HHI increased 5.8% from the subsample period 1977-81 to the subsample period 2002-09. They also find a negative relationship between the local-level HHI measures of employer concentration and wages. This suggests employers operating in areas with more concentrated labor markets are able to exploit monopsony power to reduce employee wages. Moreover, they find that the negative relationship between employer concentration and wages doubled in magnitude from 1977-2009, which is strongly consistent with a secular decline in worker bargaining power during that time. Meanwhile, the negative relationship is significantly weaker among plants in industries with high unionization rates. And the link between wage growth and productivity growth is significantly larger when local-level employer concentration is small.[35]

[Ioanna Marinescu & Herbert Hovenkamp, Anticompetitive Mergers in Labor Markets, Penn Law: Legal Scholarship Repository, Faculty Scholarship (Feb. 2018)].

Marinescu and Hovenkamp examine the "staggering implications" of applying antitrust merger law to labor markets, offering the first reasonably comprehensive and empirically based legal-economic assessment of mergers that facilitate anticompetitive wage and salary suppression. They begin by examining the doctrinal requirements and statutory language of Section 7 of the Clayton Act, observing that the Act's merger provision unambiguously applies to anticompetitive mergers by both buyers and sellers. They then provide a detailed explanation of the economic theory of monopsony in input markets and its effects. They show that monopsony in input markets produces the same allocative inefficiency and deadweight loss that is produced when a monopolist reduces output in a product market. And they explain that as labor markets move away from competitive equilibrium toward monopsony, wages and production both generally tend to decrease.

Marinescu and Hovenkamp also address practical considerations relating to merger enforcement. They argue that HHIs based on U.S. vacancy data can be used to make a labor-based prima facie case against a horizontal merger. However, they acknowledge several market-definition challenges. For example, there may be difficulties in applying a SSNRW test ("small but significant and non-transitory reduction in wages") analogous to a SSNIP test. And there may be further difficulties in identifying horizontal rivals and computing concentration levels.

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[35] The authors also find that a rise in industry-level import competition from China is associated with increased employer concentration in local labor markets.

Although the authors conclude that 6-digit SOC occupations are typically too broad to constitute an antitrust relevant market, they argue that such occupations may constitute a reasonable and perhaps conservative presumptive definition of a relevant labor market insofar as SOC-based measurements may underestimate labor-market concentration. They note further that no-poaching agreements between horizontal rivals can serve as direct evidence of market power that obviates the need for market definition.[36] And they note that vertical non-compete agreements between employers and employees can have horizontal effects if multiple employers in a labor market use them, and that such effects could be relevant to merger analysis as an exacerbating factor in assessing potential competitive harm.

The authors conclude with a discussion of claimed efficiencies defenses. They note that purchasing discounts and economies of scale are likely absent in the hiring context.[37] And any existing, cognizable efficiencies will not offset a merger's anticompetitive labor-market effects unless the post-merger reorganization would decrease the need for workers without also lowering total production output. They also opine that the consumer welfare standard is fully capable of adequately addressing monopsony cases, because the standard would ignore tradeoffs among product market and labor market effects, subject only to the Guidelines caveat about inextricably linked and disproportionate effects.[38]

Ultimately, the authors believe mergers affecting the labor market require some rethinking of merger policy but not any altering of its fundamentals. They do not recommend any significant changes in the economic analysis currently applied to mergers.

Alan B. Krueger & Eric A. Posner, A Proposal for Protecting Low-Income Workers from Monopsony and Collusion, The Hamilton Project (Feb. 2018).

Krueger & Posner propose to go beyond existing levels of antitrust intervention to combat the problem of monopsonization and collusion in labor markets. Mindful that antitrust conduct cases are brought on an ad hoc basis and are subject to limitations associated with difficult burdens of proof, high costs, and resource constraints, they propose three reforms. First, they argue that the Horizontal Merger Guidelines should be revised to explicitly account for the omission of mergers that enhance market power in labor markets, as opposed to other input markets. To that end, they also recommend expanding the resources of the Antitrust Division, with special attention to allowing the Division to hire labor-market economists.

Second, Krueger & Posner encourage states to pass laws, modeled on an Illinois law, that flatly ban non-competes for workers earning less than $13 per hour. They believe non-competes should be uniformly unenforceable and banned if they govern a worker who earns less than the median wage in her state. Moreover, they encourage states to pass laws that require firms to delete non-competes from employment contracts where they are legally unenforceable, under threat of penalty for

[36] *See* Horizontal Merger Guidelines, *supra* note 34, § 4.

[37] *See id.* § 12 (discussing reduced transaction costs, volume discounts, and scale economies in mergers of competing buyers).

[38] The Horizontal Merger Guidelines provide that the agencies will challenge a merger that is anticompetitive in any relevant market, without regard to efficiencies in a different relevant market. The one caveat is that they may consider out-of-market efficiencies that are inextricably linked with the relevant market when the efficiencies are great and the likely anticompetitive effect in the relevant market is small. *Id.* § 10, at 30, n.14.

misleading workers into believing they are bound by a non-compete. Finally, they propose a per se rule against no-poaching agreements regardless of context, including specifically with regard to the use of no-poaching provisions in franchise agreements.

Jose Azar, Ioana Marinescu, Marshall Steinbaum, & Bledi Taska, Concentration in US Labor Markets: Evidence from Online Vacancy Data, NBER Working Paper No. 24395 (Mar. 2018).

Building on previous work that defined relevant antitrust labor markets using 6-digit SOC codes and USDA commuting zones, Azar, Marinescu, Steinbaum and Taska set out to systematically measure labor market concentration in the United States. Among other things, the authors provide a detailed discussion of market definition in the labor-market context, including with respect to the "'smallest market' principle" discussed in the Commentary to the Horizontal Merger Guidelines.[39] For purposes of applying a Hypothetical Monopsonist Test (HMT), they assume a candidate market is too broad if the actual labor demand elasticity is less than the "critical elasticity." Critical elasticity analysis, akin to critical loss analysis in product markets, identifies the point at which it becomes unprofitable for a hypothetical monopsonist employer to decrease wages by five percent. The authors explain that a candidate market is too broad if the actual labor demand elasticity is less than the critical elasticity.

They note that, within a 6-digit SOC, the wage elasticity of job applications is negative, and thus the 6-digit SOC is typically too broad a candidate market for purposes of applying the SSNRW test. However, the elasticity of labor supply measured according to job titles (as opposed to vacancies), and even measured at the individual firm level, is positive, suggesting that each of these could be viable antitrust candidate markets. Although the authors believe that measuring HHIs according to job titles is likely most accurate for purposes of applying the HMT, they opt to rely on the 6-digit SOC codes as a conservative baseline.

Using a dataset covering the near-universe of online U.S. vacancy postings in 2016, the authors show, among other things, that the average HHI in labor markets defined according to their baseline 6-digit SOC codes is almost 4,000, and a majority (54%) of such markets are highly concentrated under the thresholds established in the Horizontal Merger Guidelines. Measured according to standardized job titles, rather than 6-digit SOC codes, 72% of labor markets are highly concentrated under the Guidelines. The authors conclude that the evidence suggests employers have market power in many U.S. labor markets, that the anticompetitive effects of this power could be important, and that analyses like theirs can be used to incorporate labor market concentration concerns as a factor in merger review.

Suresh Naidu, Eric A. Posner & E. Glen Weyl, Antitrust Remedies for Labor Market Power (U. of Chicago Coase-Sandor Inst. for Law & Econ. Research Paper No. 850, U of Chicago, Public Law Working Paper No. 665, Feb. 24, 2018) (forthcoming in Harvard L. Rev.).

Naidu, Posner and Weyl provide a comprehensive treatment of the economics, law, and policy of antitrust and labor-market power. They seek to diagnose the causes of past inattention to labor-

[39] *See* U.S. Dep't of Justice Antitrust Div. & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines 6-9 (2006).

market effects by antitrust enforcers and propose analytic methods for evaluating labor-market power in antitrust contexts going forward. They focus primarily on mergers but give attention to conduct offenses as well. They define labor-market power as a single or small number of employers hiring from a pool of workers of a certain skill level within the geographic area in which workers commute.

The authors posit that past inattention to labor-market power may be attributable to a variety of causes. One possible cause is a laser-like focus on consumer welfare, which may have led to a natural shift favoring product-market analysis over labor-market analysis. A second possible cause is deference to economic assumptions that labor markets are reasonably competitive, which have been cast into doubt only recently. A third possible cause is an unspoken legal assumption that traditional approaches to protecting workers "outside" antitrust law (via labor and employment law) were sufficient. A fourth possible cause is the comparative difficulty of using private antitrust litigation to challenge labor-market restraints relative to product-market restraints, because, among other reasons, worker class actions are more difficult to certify under Rule 23 for want of commonality.

Because the consensus around the competitiveness of labor markets has been thrown into doubt, and in light of empirical evidence of pervasive concentration and monopsonistic practices (such as unjustified no-poaching and non-compete provisions in employment agreements), the authors propose a variety of new approaches. They call upon the federal antitrust agencies to update the Horizontal Merger Guidelines to provide a detailed framework for evaluating the effects of a merger on labor markets. Specifically, they suggest the agencies should consider coordinated and unilateral effects theories much as they do in product markets. Enforcers would either define labor markets and measure concentration to employ a structural presumption, or they would calculate Downward Wage Pressure to measure the tendency of workers to quit one merging firm as a result of an incremental decrease in wages to join the other merging firm. Where appropriate, the authors suggest this analysis should precipitate a more fulsome merger simulation to ascertain labor-market effects.

The authors also recommend similar application of product-market antitrust concepts to labor markets in the context of covenants not to compete (analogous to exclusive dealing), suppressed supplier wages dictated by powerful buyers (analogous to resale price maintenance), predatory hiring (analogous to predatory pricing), and with respect to vertical foreclosure.

The authors conclude that the economic analysis of product markets regularly deployed in the scrutiny of mergers can easily be applied to the labor market. They note further that more severe corrective action may be necessary given the highly concentrated state of labor markets. They believe antitrust investigators may need to consider whether some firms have achieved such powerful monopsonies that they should be broken up.

Marshall Steinbaum, A Missing Link: The Role of Antitrust Law in Rectifying Employer Power in Our High Profit, Low-Wage Economy, Roosevelt Inst. Issue Brief (April 2018).

Steinbaum argues that there is direct and indirect evidence that employer market power is a missing link in the way we understand and explain today's "high-profit, low-wage economy." After reviewing evidence of increased concentration in the economy and its effects in labor markets (and beyond), he argues that federal antitrust law has been inadequately applied and that incremental steps toward course correction are insufficient.

First, Steinbaum argues that current merger review is inadequate and incomplete because it fails on a number of fronts. For example, it fails to include economic analysis of competitive effects in labor markets, fails to adequately account for the industry-wide effects of concentration, and fails to distinguish among economic differences between wage-setting in labor markets and price-setting in product markets. Second, he argues that enforcers have been inattentive to monopsony owing in part to the consumer welfare standard and an enforcement paradigm that inappropriately prioritizes efficiency over structural conditions in the economy. Third, he argues that Supreme Court decisions enshrining a permissive approach toward vertical restraints, conscious parallelism, and employer mandatory arbitration provisions have facilitated employer exploitation of market power.

In response, Steinbaum advocates for an aggressive, multi-pronged agenda to prevent further harms. He calls for (1) expanding merger review to include analyses of merger effects in labor markets; (2) improved resources for federal antitrust agencies, including access to labor-market datasets maintained by other federal agencies and the ability to supplement existing staff with labor economists; (3) amending federal antitrust statutes to expressly specify that they reach monopsony; and (4) banning non-compete agreements, no-poaching agreements, mandatory arbitration in employment contracts, and other similar competitive restraints in the labor market.

ANALYSIS: EMERGING THEMES AND QUESTIONS FROM THE LITERATURE

The previous section at best provides only a partial snapshot of a rapid evolutionary process. New information and fresh insights into the role of antitrust law in protecting and promoting the competitiveness of U.S. labor markets are sure to emerge. Nevertheless, it is already very clear that antitrust enforcers and practitioners need to be paying closer attention.

The remainder of this paper explores how to transform new information and insights from the recent literature into actual antitrust enforcement. It identifies emerging themes from the literature and assesses the forthcoming challenges for antitrust practitioners. It concludes with recommendations for policymakers and enforcers.

I. Mergers

For antitrust advocates, perhaps the most intriguing theme in the literature is the chorus of calls for enforcers to account for labor-market effects in merger analysis under Section 7 of the Clayton Act. Several of the articles help lay the foundation for this accounting, beginning with analytical concepts that mirror product-market merger concepts. Examples include the "hypothetical monopsonist test," a "SSNRW," "critical labor-demand elasticity," and "downward wage pressure." However, it remains to be seen how neatly these mirroring concepts map onto live litigation fact patterns, which can get messy. These concepts have not yet been applied and tested against actual mergers that threaten (or, if already consummated, have had) anticompetitive labor-market effects.

A. Measuring and Predicting Substitution

One important question is how to incorporate the unique characteristics of labor markets into supply-side and demand-side substitution analysis, which are key determinants of market definition and competitive effects analysis, respectively.[40] In general, substitution analysis will be complicated by the bilateral nature of employment transactions, which often involve "two-sided matching."[41] In an ordinary retail transaction, for example, a consumer can typically choose to buy the same product on better terms at a different store, and the seller is often indifferent to the personal characteristics of the customer (other than ability to pay). But in the employment context, a worker requires a job offer before she can sell the same labor on better terms to a different employer, and the employer usually cares very much about the personal characteristics of her employees. Two-sided matching thus complicates substitution analysis.[42]

On the supply side, "frictions" in labor markets may pose novel analytical challenges for market-definition in particular. The process of evaluating employees' ability to discipline a hypothetical monopsonist by switching jobs seems apt to be far more complex and idiosyncratic than the process of evaluating customers' ability to discipline a hypothetical monopolist by switching to other goods, services, or suppliers of other inputs.[43] For example, some employees with medical complications, who are dependent on employer health insurance, may be constrained in switching jobs even when another viable employer offers otherwise superior wage and non-wage terms of employment.[44]

If "frictions" and "two-sided matching" in labor markets significantly limit the ambit of a given worker's substitutable job opportunities, then this suggests the creative approach by Azar et al. of defining markets using SOC codes and USDA commuting data may, as the authors note, yield overly broad candidate markets. Of course, actual relevant antitrust labor markets could be still broader than these markets, or they could be significantly narrower (as we might suspect). The BLS SOC classifications are not designed, and cannot be presumed, to tell us anything instructive about

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[40] In seller-power cases, market-definition focuses solely on demand substitution factors, and supply-side substitution comes into play in the identification of market participants, the measurement of market shares, and the analysis of competitive effects and entry. Horizontal Merger Guidelines, *supra* note 34, § 4; *see* Jonathan Baker, *Market Definition: An Analytical Overview*, 74 Antitrust L.J. 129, 132-138 (2007). However, in buyer-power cases, this analysis is reversed. *Id.* § 12; Baker, *supra*, at 133, n.26. Thus, a relevant labor market should be defined according to the affected employees' ability to defeat a wage decrease by switching employers. The behavior of rival employers in response to a SSNRW would come into play in identifying buyer-participants in the relevant labor market, measuring shares in that market, and analyzing competitive effects and entry.

[41] Alvin E. Roth & Marilda Sotomayor, Two-Sided Matching 486-492, *in* Handbook of Game Theory Vol. I (1992) (describing labor markets that function as "two-sided matching markets" in which "any pair of agents on opposite sides of the market may be matched to one another if they both agree, and any agent is free to remain unmatched").

[42] The Supreme Court recently held in *Ohio v. American Express* that, in rule-of-reason conduct cases that involve "two-sided transaction platforms, like the credit card market," where the "platforms facilitate a single, simultaneous transaction between participants" and "exhibit more pronounced indirect network effects and interconnected pricing and demand," only one market for "transactions" should be defined. __ U.S. __, 2018 WL 3096305, at *10-15 (2018). It is unlikely that the decision has any relevance for the analysis of the labor-market effects of mergers, except perhaps by extension when the merging parties operate a platform, such as Uber, that matches workers with *consumers* in particular transactions.

[43] *Cf.* Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Standard Imperiled?* (Penn Law: Legal Scholarship Repository, Faculty Scholarship, June 2018) (noting that competitive effects analysis in labor markets may present "very significant measurement problems" that are "more empirical than conceptual").

[44] *See* White House Counsel of Economic Advisors, *supra* note 21, at 6-7 (discussing "job lock" arising from employer provided health insurance). Other labor-market frictions that may have important implications for market definition include the costs of moving, commuting, and searching for another job and the restrictions created by occupational licensing laws and land-use policies. *Id.* at 5-7; Jason Furman, Chairman, Council of Economic Advisers, Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth 13, Remarks prepared for the Searle Center Conference on Antitrust Economics and Competition Policy (Sept. 16, 2016).

the firms that compete to hire a given set of workers. Or, put another way, they do not necessarily denote a "competitive arena within which significant anticompetitive effects are possible."[45] But the fact that a majority of such seemingly broad markets are highly concentrated, and that increased concentration in these markets corresponds with harmful wage effects,[46] foreshadows the serious risks of further inattention to labor-market competition in merger analysis and otherwise.

In some instances, direct evidence of anticompetitive effects can serve as a "work-around" to market-definition challenges. It is well accepted that direct proof of market power through effects evidence is superior to, and obviates the need for, indirect proof of market power through market definition.[47] And as Marinescu & Hovenkamp note, a no-poaching agreement between firms would be strong direct evidence of labor-market power.

Policing mergers among labor-market rivals who have previously been parties to a no-poaching agreement therefore may be a good place to begin enforcement. Indeed, the recently revealed no-poaching agreement between rail equipment suppliers, which has the ignominious distinction of being the first naked no-poaching case to settle following publication of the antitrust agencies' HR Guidance, as well as the first post-Guidance case to be the subject of a follow-on private action, was discovered during a merger review involving two members of the conspiracy.[48] The DOJ should consider whether that now-consummated merger should be subject to retroactive challenge under Section 7 for tending to substantially lessen buyer competition in the labor market.

B. Subject Matter Jurisdiction and Efficiency Defenses

Another consideration is that we have yet to see whether merging parties will raise any novel defenses against merger challenges predicated on labor-market effects. Arguments that a merger's labor-market effects are beyond the subject matter jurisdiction of the antitrust laws, whether because they do not translate to downstream product-market effects or because labor is not "commerce," are meritless for the reasons explained in the Background section of this paper.[49] Moreover, the Horizontal Merger Guidelines already preempt these defenses, because the Guidelines explicitly provide that mergers illegally enhance buyer power if they cause a transfer of wealth from small producers to large purchasers and inefficiently reduce supply, "even if the merger will not lead to any increase in the price charged by the merged firm for its output."[50] Nevertheless, merging parties can be expected to pursue these arguments in the hope of finding the occasional sympathetic ear,[51] and it is important that courts understand why they are erroneous and reject them.

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45 U.S. Dep't of Justice Antitrust Div. & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines, *supra* note 39, at 6.

46 *But see* Josh Bivens, Lawrence Mishel & John Schmitt, It's not just monopoly and monopsony: How market power has affected American wages, Econ Pol'y Inst. (April 2018) (questioning whether "trends in market concentration have been a dominant driver of the most significant trends in American wages in recent years" and hypothesizing that "other models and concepts of power in labor markets" better explain these trends).

47 *See, e.g.*, FTC v. Indiana Fed'n of Dentists, 476 U. S. 447, 450-51 (1986); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 644-45 (1980); *but cf. American Express Co.*, 2018 WL 3096305, at *8 n.7 (requiring market definition in vertical conduct cases notwithstanding direct-effects evidence). *See also* Baker, *supra* note 40, at 131.

48 *See* Diane Bartz, *Knorr, Wabtec agree to end pacts not to poach workers – U.S. Justice Dept*, Reuters (April 3, 2018).

49 *See supra* Background, Part II; notes 4-12 and accompanying text.

50 Horizontal Merger Guidelines, *supra* note 34, § 12 (example 24).

51 *See, e.g.,* United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (suggesting that mergers that lead to monopsony should be illegal because of their downstream effects); *cf.* Taterka v. Wisconsin Tel. Co.

Of course, merging parties may separately try to argue that increased bargaining leverage that reduces the upstream cost of labor inputs constitutes a merger "efficiency." However, the exploitation of market power upstream is not a cognizable efficiency.[52] And this is true even if cost reductions are passed on to consumers, which is the exception rather than the rule.[53] Moreover, crediting exploitative wage reductions as a merger efficiency would be contrary to labor policy, and refusing to do so *would* be consistent with the Clayton Act's pronouncement that "the labor of a human being is not an article of commerce," for the same reason that shielding employer restraints outside the collective-bargaining context is *not* consistent with that pronouncement.[54]

C. Remedies

Finally, it remains to be seen how enforcers and parties will address the question of remedy. Divestitures in mergers that threaten only anticompetitive labor-market effects may be more difficult to negotiate than in mergers that threaten anticompetitive product-market effects, because the necessary labor-market divestitures in any given transaction may undermine, or alter in unexpected ways, the business rationale for the merger. This is because merging parties that compete as buyers in labor markets may not compete as sellers in *any* downstream relevant product market at all.[55] Or, merging parties may compete in an unconcentrated, national geographic market on the product side but a concentrated, local geographic market on the labor side. Although these scenarios may raise policy questions, they should not be a barrier to enforcement because the Merger Guidelines recognize that "out-of-market" efficiencies cannot save an anticompetitive merger, except in rare circumstances.[56]

While there are no obvious obstacles to using behavioral remedies as an alternative to structural remedies in labor-market cases, such remedies generally tend to fail in resolving the competitive problems caused by a merger.[57] And many of the criticisms of behavioral remedies applied to product markets appear to also apply in the labor-market context.[58] Enforcers should keep an open mind, however, and perhaps explore hybrid structural-behavioral remedies that, where

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394 F. Supp. 862, 865 (E.D. Wisc. 1975) (holding that trade or commerce was not affected as a matter of law where a telephone switchman alleged a no-hiring agreement between the Bell system companies); *but see* Areeda & Hovenkamp, *supra* note 3, ¶ 257a, at 227 (explaining why this was not correct and noting that complaint was deficient on other grounds).

[52] *Anthem*, 855 F.3d at 362-63; Horizontal Merger Guidelines, *supra* note 34, § 10.

[53] *See* Devlin, *supra* note 5, at 224 ("economics can show that such cost-reductions will rarely be passed onto consumers"); Roger Noll, *"Buyer Power" and Economic Policy*, 72 Antitrust L.J. 589, 596, 606-612 (2005).

[54] *See supra* notes 8-11 and accompanying text (discussing labor exemption as a "one-way street").

[55] *Cf., e.g.*, Competitive Impact Statement at 2-5, United States v. Adobe Systems, Inc., No. 1:10-CV-01629 (D.D.C. Sept. 24, 2010) (explaining disruption of competitive forces for employee talent caused by bilateral no-poaching agreements among high-tech firms that compete as buyers in the hiring market, some of which do not obviously compete as rivals in any downstream market).

[56] *See supra* note 37 (discussing inextricably linked out-of-market efficiencies).

[57] *See* John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 Antitrust Bull. 979, 994, 1010 (2012).

[58] *See id.*; Makan Delrahim, Asst. Att'y Gen., Antitrust Div., Dept. of Justice, Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2007) (explaining philosophical opposition to behavioral remedies on grounds that they contravene antitrust's "fundamental choice in the relationship between government and the economy").

circumstances allow, draw upon the benefits of labor law, such as requiring the merged firm to recognize a union and participate in collective bargaining as a condition of clearance. But if divestiture remedies prove too difficult and behavioral or hybrid remedies too ineffective, it may be that mergers threatening anticompetitive labor-market effects will have to be altogether blocked rather than cured more often than mergers threatening anticompetitive product-market effects.

II. No-Poach Agreements

Another theme in the literature is that employer collusion via no-poaching agreements is an empirically serious problem that is causing significant harm to workers. Naked, horizontal no-poaching agreements between rival firms present an open-and-shut antitrust case. The Antitrust Division can prosecute them criminally and invoke the per se rule,[59] and private class actions, provided they survive preliminary motions practice and class certification, can afford victim compensation and deterrence.

In the long run, the DOJ's and FTC's mere act of issuing HR Guidance could have enormous salutary benefits in curbing naked no-poaching agreements simply by putting the human resources community on notice as to what's at stake and helping to activate state and private enforcers. In the short run, it is important that the DOJ stand by its commitment to criminally prosecute companies and individuals who participate in such agreements, and that state and private enforcers bring civil cases, in order to strengthen deterrence and compensate the injured.

Krueger & Ashenfelter's finding that 58% of major franchise chains include no-poaching agreements in franchisor/franchisee contracts poses a more difficult challenge. First, franchisor/franchisee no-poaching agreements are vertical, and they would thus have to be construed as a hub-and-spoke conspiracy to earn per se treatment in court. Second, defendants can try to argue that the restraints are ancillary to a legitimate integration, and hence procompetitive.

When dominant franchisors establish no-poaching commitments from franchisees throughout an industry, these vertical agreements have the potential for substantial, harmful, horizontal effects. At the same time, when no-poach franchise agreements cover low-skilled, low-wage workers in high-turnover industries, and when they are nonetheless imposed in states that do not enforce them based on equitable contract principles, it seems especially dubious that they are motivated by (or have) any efficiency enhancing characteristics. However, unless the arrangement amounts to a hub-and-spoke conspiracy, an antitrust challenge likely would have to be won under the rule of reason, which is notoriously difficult for plaintiffs.[60] Moreover, franchises could plausibly pursue a strategy of conscious parallelism, in which they mutually, but unilaterally, choose not to hire another firm's employees without any express or tacit agreement, which is not prosecutable.

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[59] *But see* John M. Talladay & Vishal Mehta, *Criminalization of wage-fixing and no-poaching agreements*, Comp. Pol'y Int'l (June 2017) (arguing that DOJ is unjustified in invoking the per se rule and pursuing criminal charges for naked wage-fixing and no-poaching agreements).

[60] Richard Posner has described the rule of reason as "little more than a euphemism for non-liability." Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1, 14 (1977). Michael Carrier found that defendants won 221 out of 222 rule-of-reason cases that reached final judgment from 1999-2009. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 829 (2009).

Therefore, in the short run, state or federal legislative solutions, such as the blanket bans proposed by Krueger & Ashenfelter and Starr et al., may be a superior competition policy tool to antitrust suits. Negotiated voluntary commitments, like those recently achieved by Washington Attorney General Bob Ferguson, who was able to extract commitments from seven fast-food chains to discontinue no-poaching policies without protracted litigation, also can be beneficial.[61] Still, individual ad hoc agreements will not provide uniformity across industries. And insofar as the franchises get off the hook without any penalty, such commitments do not appear to provide substantial deterrence or compensation.

III. Non-Compete Agreements

Unlike no-poaching or wage-fixing agreements, traditional non-compete agreements (between employers and employees) have rarely amounted to antitrust violations in the past. They are likewise vertical, and employers typically defend them as ancillary and efficiency enhancing. They often cite (1) the protection of trade secrets, customer relationships and goodwill, (2) promotion of investment in employee training and education, and (3) protection against the business risk posed by a high-skilled employee's unique knowledge. Moreover, it is unlikely on average that a non-compete agreement between an employer and a single employee may pose a demonstrable threat to market-wide competition.

However, the pervasive use of non-compete agreements in concentrated labor markets, particularly where they are imposed upon low-skill, low-wage workers who lack alternatives, should cast these agreements in an entirely new competitive light. But again, given the practical difficulty of prosecuting antitrust rule-of-reason cases against vertical and putatively ancillary agreements, legislative or other contract-based solutions may be the superior short-run competition policy response, as the literature seems to recognize.[62]

IV. Adapting the Administration of the Antitrust Laws to Buyer Competition in Labor Markets

Another clear theme to emerge from the literature is the need for the federal antitrust agencies to assume a leadership role in policing employer restraints that have anticompetitive labor-market effects. There is widespread agreement among authors, for example, that the FTC and DOJ should hire labor economists, and that Congress should increase the resources available to the agencies accordingly. This would be an unmitigated good and serve as a necessary and appropriate first step.

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[61] *See* Gene Johnson, *7 fast-food chains agree to end 'no-poaching' policies*, Wash. Post (July 12, 2018).

[62] Although not discussed in depth in the new labor-antitrust literature, firms also sometimes enter into temporary non-compete agreements with each other (as opposed to with employees) that may include employment-related components. In particular, in crafting merger and joint venture agreements, firms may include a non-solicitation provision to protect against, for example, the putative merger or venture partner learning about and targeting key employees during the due diligence process. And in franchise contracts, the franchisor may extract a commitment from the franchisee-owner not to open or work for a rival franchise if the franchise contract terminates. Although horizontal, these agreements have historically been upheld as ancillary if they are reasonable in length and scope. *See, e.g.,* Eichorn v. AT&T Corp., 248 F.3d 131, 146 (3d Cir. 2001) (primary purpose of no-hire agreement was to facilitate business sale and eight-month restriction on re-employment with seller's affiliates was reasonable); Dep't of Justice Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals, *supra* note 26, at 3 (discussing legitimate joint ventures).

Another common refrain in the literature is that the agencies should revise the Horizontal Merger Guidelines to explicitly incorporate labor-market effects in merger analysis. However, insofar as a merger has never before been challenged on the basis of labor-market effects, revising the Guidelines may be putting the cart before the horse. Notwithstanding their persuasive precedential value in court, "The Guidelines serve the important purpose of providing broad transparency to businesses and the antitrust bar as to how the Agencies approach merger review."[63] In other words, they are intended to be not only prescriptive but *descriptive* of the agencies' actual (as opposed to aspirational) enforcement intentions and capabilities.

To be sure, once the agencies are sufficiently armed with the legal and economic tools needed to start bringing labor-market merger cases, a Guidelines update will be necessary. But in the meantime, perhaps the DOJ's Economic Analysis Group (EAG) and the FTC's Bureau of Economics could advance the cause by allocating resources to produce an Economic Report, Issue Paper, Working Paper, or Discussion Paper exploring the institutional steps necessary to quickly and effectively ramp up enforcement to protect labor-market competition (in merger review and otherwise). The FTC Office of Policy Planning should also consider a workshop and report.

Finally, there is disagreement in the literature as to whether the agencies are capable of effectively enforcing the antitrust laws against employer-based labor-market restraints under the consumer welfare standard. To be sure, the emerging evidence of substantial increases in labor-market concentration, coupled with near-complete inattention to labor-market effects in merger analysis historically, helps validate the progressive critique of conservative antitrust policy as too myopic. But AAI believes the solution lies in reversing an era's worth of the consumer welfare standard's misapplication under this policy, not in changing the goals of antitrust law.[64]

CONCLUSION

Many antitrust experts feel strongly that so-called "non-competition" factors must not be factored into antitrust analysis. But there should be no serious doubt as to the propriety of enforcing the existing laws under the existing framework against mergers and conduct that harm buyer competition for workers. This is unquestionably a "competition issue."

If anything, antitrust enforcement against anticompetitive employer restraints in labor markets may be uniquely valuable insofar as it is synergistic. It can serve the goals of competition and labor policy in a single stroke, and thereby afford added societal value in an era when both policies are badly in need of a boost.[65]

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[63] Christine A. Varney, Ass't Attorney Gen., Dept. of Justice Antitrust Div., Remarks at Third Annual Georgetown Global Antitrust Enforcement Symposium 2 (Sept. 22, 2009).

[64] *See* Diana Moss, A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward, Am. Antitrust Inst. (Sept. 28, 2016).

[65] *See* Naidu et al., *supra* note 21, at 5 (discussing importance of antitrust protections in light of erosion of labor and employment protections); *cf.* Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 Georgetown L.J. Online 1, 19 (2015) (noting that antitrust agencies can combat wealth inequality in society by exercising prosecutorial discretion to focus enforcement on monopsony power exercised against workers and small businesses).

AAI believes the time has come for the antitrust community to ramp up its attention to employer mergers and conduct that have anticompetitive labor-market effects. We make the following recommendations:

- **Before real progress can be made in policing mergers on the basis of anticompetitive labor-market effects, practitioners of antitrust merger law – including antitrust lawyers and economists – must begin to identify and resolve the practical challenges associated with litigating and remedying actual merger fact patterns.**

- **If enforcers are not yet able to adequately measure and predict employee substitution in labor markets, enforcers may wish to begin by focusing on employer mergers among labor-market rivals which have previously been parties to a no-poaching agreement, or where there is other direct evidence that a transaction threatens to create or enhance buyer labor-market power.**

- **Although the Clayton Act declares that "the labor of a human being is not a commodity or article of commerce," this language is designed to protect worker restraints, not employer restraints. Enforcers should not be concerned that the labor exemption or the "affecting commerce" requirement prevent merger enforcement on the basis of anticompetitive labor-market effects, notwithstanding an absence of, or inability to prove, downstream product-market harms.**

- **The Antitrust Division should continue to aggressively pursue criminal prosecutions to deter naked no-poaching and wage-fixing agreements, and the plaintiffs' antitrust bar and state attorneys' general should continue to seek deterrence and compensation for victims through investigations and civil suits, including treble damages class actions.**

- **Given the practical difficulties of challenging vertical and putatively ancillary no-poaching and employee non-compete agreements, policy advocates should support state or federal legislative reform as a matter of sound competition policy, particularly when such agreements are imposed on low-skill, low-wage workers in concentrated, high-turnover industries.**

- **The FTC and DOJ should hire in-house labor economists, and Congress should increase the resources available to the agencies accordingly.**

- **The agencies should assimilate the new labor-antitrust literature, conduct their own policy studies on the connection between labor and product market concentration and wages, and update the Horizontal Merger Guidelines once they are institutionally prepared to police mergers on the basis of threatened anticompetitive labor-market effects.**

- **Effective policing of mergers and conduct on the basis of anticompetitive labor-market effects does not require legislative reform or eliminating the consumer welfare standard.**