CPI Columns
US & Canada

November 2021

The Rise of the Labor-Antitrust Movement

By Eric A. Posner | University of Chicago

Edited by Justin Stewart-Teitelbaum & Angela Landry

The Rise of the Labor-Antitrust Movement

By Eric A. Posner[1]

Magicians frequently perform tricks by drawing audience members' attention to an unimportant but visually arresting object so that they miss the crucial sleight of hand. This technique is known as misdirection. Something similar is happening in the world of antitrust. While people are distracted by the colorful and exciting crusade against Big Tech, they overlook an even more significant development: the rise of the Labor-Antitrust Movement.

The Labor-Antirust Movement seeks to use antitrust law to improve the functioning of labor markets, so that workers are paid a competitive wage. It is the biggest innovation in antitrust in decades. Yet its roots are as old as antitrust. In The Wealth of Nations, Adam Smith observed that "masters" (employers) have an incentive to cartelize markets just like sellers.[2] Employers suppress the wages of workers by agreeing among themselves to pay below-competitive rates. Smith referred to this behavior as "the natural state of things which nobody ever hears of." That is as true today as when he wrote these words in the late eighteenth century.

The fault does not lie entirely with the law. The common law in Britain and the United States recognized that employer combinations to restrict wages were illegal "restraints of trade." And the U.S. courts would later recognize that they therefore fell under the prohibitions of the Sherman Antitrust Act. Meanwhile, the British economist Joan Robinson coined the word "monopsony" in 1933 to refer to buyers (including employers) who exercise market power,[3] and by the second half of the twentieth century, textbook economics incorporated the insight, formalized by Robinson and her successors, that employers can suppress wages in the same way that sellers can suppress prices — either through domination of markets or collusion with competitors. U.S. courts have used this term, and antitrust cases involving labor markets have made it to the courts.[4] But the courts, antitrust authorities, and even plaintiffs' lawyers have traditionally paid little attention to antitrust violations that harm workers.

There is no justification for this neglect in economic theory. The harms of labor monopsony are the same as those of monopoly. Firms with monopolies have "sell-side" power in the product market: they raise prices by reducing output. A firm may have "buy-side" market power as well: large retailers like Walmart are often thought to exercise monopsony power against their suppliers. When suppliers sell to a dominant buyer, they can be compelled to agree to prices below the competitive rate, resulting in lower supply, and ultimately higher prices for consumers. Workers sell labor rather than goods, but the principle is the same. Employers that are labor monopsonists push down wages by limiting their employment of workers who are willing and able to work for them. Not only do workers suffer; so does the economy generally because fewer employed workers mean less economic output. Many people reflexively assume that labor monopsony must help the economy because it reduces labor costs. This is a confusion. Where labor costs decline because of an increase in the supply of labor (for example, through immigration), economic output will increase. But because the labor monopsonist reduces labor costs by hiring fewer people, output declines. Because of the decline in production, consumers normally pay higher prices for goods and services sold by labor monopsonists. While commentators sometimes argue that only egalitarians should care about labor monopsony, labor monopsony is in fact an equal opportunity villain and should be feared by the right as well as the left, by economic libertarians

---

[1] Eric A. Posner is the Kirkland & Ellis Distinguished Service Professor of Law, Arthur and Esther Kane Research Chair at the University of Chicago.

[2] ADAM SMITH, THE WEALTH OF NATIONS (1776).

[3] JOAN ROBINSON, ECONOMICS OF IMPERFECT COMPETITION (1933).

[4] For a recent example, see *NCAA v. Alston*, 594 U.S. __, 141 S. Ct. 2141, 2152 (2021).

who care about markets and those who focus on the plight of workers.

The symmetrical harm of monopoly and labor monopsony, which is well established in economic theory, underlines a major historical puzzle: the neglect of labor markets by antitrust law throughout its long history. In the United States, only a handful of labor-antitrust cases have been brought over 130 years, even though there is no doubt that the law formally applies to labor markets. The latter point was made by the Supreme Court in 1926, in a case involving a cartel of ship owners who fixed the wages of sailors through an organization they established for hiring them.[5] But even after that case, workers rarely sued employers for antitrust violations, and were even more rarely successful. Many antitrust claims were tacked onto run-of-the-mill employment disputes and were summarily dismissed. A few hospitals were caught fixing wages. A handful of successful cases involved sports leagues, where teams agreed on limits to compensation. In an unusual exception to Adam Smith's observation about the invisibility of wage-fixing, the teams could not as a practical matter conceal these rules, and that exposed them to litigation.[6]

But in the past ten to twenty years, a gradual reassessment of labor-antitrust has taken place. If a turning point needs to be found, a useful year is 2010, when the Department of Justice Antitrust Division sued Google, Apple, and other top Silicon Valley tech firms for agreeing not to solicit each other's software engineers.[7] The defendants settled with the government and agreed in a follow-on class action to pay victims more than $400 million. The collusion was blatant and occurred at the instigation of CEOs like Apple's Steve Jobs. If the conspirators had fixed prices rather than wages, they would probably have gone to jail. But perhaps because of the prominence of the defendants, or because of the unusual nature of labor-side collusion, the penalty was merely an agreement not to collude again.

Still, the case spurred further official action. In 2016, the Antitrust Division and the Federal Trade Commission issued a joint guidance document warning companies that labor market colluders henceforth would face criminal penalties.[8] That same year, the Obama White House issued a statement about the dangers of labor market collusion and labor monopsony, indicating that these types of antitrust violations would become a priority for antitrust enforcement and reform.[9] The Antitrust Division subsequently launched several criminal investigations and has so far brought three criminal indictments, the first just this year.[10]

Meanwhile, a quiet revolution took place in the field of labor economics. Although economists knew their Smith and Robinson, and understood that labor markets can be cartelized, research was oriented toward other matters, such as the role of unions in labor markets. With a few notable exceptions, economists tended to assume that labor markets were highly competitive.

British economist Alan Manning, who wrote an influential book on labor monopsony in 2003,[11] is one such exception. Manning's insights had to await empirical validation, and the necessary data would not become available for many years. Finally, in 2017, a paper arrived that reported results of a survey of labor markets across the United States, based on a new

---

[5] See *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926).
[6] See Eric A. Posner, How Antitrust Failed Workers 30-34 (2021).
[7] See Complaint at 4–5, *United States v. Adobe Sys.*, No. 10-cv-1629 (D.D.C. Sept. 24, 2010).
[8] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (2016), https://www.justice.gov/atr/file/903511/download.
[9] Press Release, White House, Fact Sheet: The Obama Administration Announces New Steps to Spur Competition in the Labor Market and Accelerate Wage Growth (Oct. 25, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/10/25/fact-sheet-obama-administration-announces-new-steps-spur-competition.
[10] See Indictment at 3, *United States v. Surgical Care Affiliates, LLC*, No. 3:21-cr-00011 (N.D. Tex. Jan 5, 2021).
[11] Alan Manning, Monopsony in Motion (2003).

dataset (the paper was published in 2020).[12] The authors found that more than 60 percent of labor markets exceeded levels of concentration that set off alarm bells under American merger law.[13] Later that year, another paper found similar numbers using a different dataset.[14] The significance of these papers lay in their demonstration that concentration in labor markets was not anomalous but ubiquitous, not a theoretical curiosity but a major problem for public policy. Since then, numerous papers have confirmed that U.S. labor markets are extremely concentrated. A meta-analysis by Sokolova & Sorenson, published in 2021, identified 53 studies on monopsony of labor markets, and found a statistically significant negative correlation between concentration and wages.[15]

It is possible that a negative correlation between concentration and wages could arise if larger firms employ workers more productively than smaller firms do. If so, concentration would not be an antitrust problem. A number of papers have tackled this ambiguity. In a study of hospital mergers, for example, Prager & Schmitt found that when hospital mergers substantially increased labor market concentration, wage growth declined for employees whose skills were tied to the medical profession (e.g. nurses) but not for those with options to work at other kinds of employers (e.g. cafeteria workers), as one would predict.[16] Because these patterns occurred after mergers concentrated health-related labor markets, they went some distance to showing that causation moves from concentration to wages. But even if productivity differences account for some of the empirical results in the studies, the issue can be directly addressed in antitrust litigation.

Labor market concentration can occur either naturally (as competitors drop out because of their higher costs) or through deliberate behavior that may be anticompetitive and illegal (such as mergers). Antitrust violations can take other forms, of course, and growing evidence suggests that abuse is common. Starr, Prescott, and Bishara found that almost 40 percent of American workers have at one time or another been bound by covenants not to compete, which are associated with lower wages.[17] Moreover, millions of low-skill, low-income workers are bound by noncompetes that are likely unenforceable but operate through an in terrorem effect, enabling bosses to threaten workers with unemployment if the workers announce their plans to quit and move to a competitor. Krueger & Ashenfelter found that 58 percent of large franchises subjected franchise employees to no-poaching agreements, preventing employees from moving from one venue to another within a franchise.[18] Anecdotal evidence and suggestive work indicate that parallelism and possibly collusion are common in many professions, including law[19] and finance.

Some of the academic work has spurred legal developments. Krueger & Ashenfelter's paper launched a wave of lawsuits against franchises by state attorneys general and affected

[12] José Azar, Ioana Marinescu, & Marshall Steinbaum, *Labor Market Concentration*, J. HUM. RES. (2020), http://jhr.uwpress.org/content/early/2020/05/04/jhr.monopsony.1218-9914R1.full.pdf+html.
[13] See *id.* at 9, 30 (mean HHI in nearly every category above 2500 or "highly concentrated" according to DOJ and FTC merger guidelines).
[14] See Efraim Benmelech, Nittai K. Bergman, & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, J. HUM. RES. (2020), http://jhr.uwpress.org/content/early/2020/05/04/jhr.monopsony.1218-9914R1.full.pdf+html.
[15] Anna Sokolova & Todd Sorensen*, Monopsony in Labor Markets: A Meta-Analysis*, 74 ILR REV. 27 (2021).
[16] Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence From Hospitals*, 111 AM. ECON. REV. 397, 398 (2021).
[17] Evan Starr, J.J. Prescott, & Norman Bishara, *Noncompetes in the U.S. Labor Force*, J. L. & ECON. (forthcoming 2021). See also Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements* 3, MGMT. SCI. ARTICLES IN ADVANCE (2021), https://pubsonline.informs.org/doi/10.1287/mnsc.2020.3918.
[18] Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 1, 26 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24831, 2018).
[19] See Ryan Boone, Essays on Labor Demand with Market Imperfections 3 (2021) (Ph.D. dissertation, UCLA) ("The market for BigLaw associates has almost always involved collusion.").

workers.[20] Most franchises settled the state suits by agreeing to abandon their no-poaching agreements, and are now facing follow-on private litigation. An FTC filing in a state proceeding on a hospital merger drew on the empirical work on labor monopsony.[21] Other cases arose independently. Duke University and the University of North Carolina recently settled a case challenging a no-poaching agreement aimed at university faculty.[22] And a major price-fixing case against large chicken processors led to a wage-fixing case against them when plaintiffs' lawyers asserted that the organizations the defendants allegedly used to fix prices were also used to fix wages.[23]

The labor antitrust movement germinated among academics but it has had a surprising and growing impact on public policy. The 2016 White House statement on labor monopsony was followed by an announcement in 2018 by Trump appointee Makan Delrahim, the Assistant Attorney General for the Antitrust Division, stated that the Division had begun criminal investigations of employers who engaged in labor market collusion.[24] Earlier this year, Senator Amy Klobuchar proposed a major antitrust reform bill that tellingly adds the word "monopsony" to the antitrust statutes, likely to encourage antitrust authorities to take labor monopsony (as well as other forms of monopsony) more seriously than they had in the past.[25] Congressional committees have separately convened hearings on antitrust and labor markets. The Department of Justice and the Federal Trade Commission will hold hearings on labor monopsony and antitrust law in December.

Among all this activity, the most significant was President Biden's executive order, "Promoting Competition in the American Economy," issued in July 2021.[26] This blockbuster order drew public attention because of its forceful language attacking Big Tech, but its most consequential effect may be on labor monopsony. Noting that "[f]or workers, a competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage," the order singles out labor markets as a focus for antitrust authorities—the first time any U.S. president has publicly taken a stand against labor monopsony. Noting that federal "inaction" has contributed to labor market consolidation, the order goes on to assert that "[c]onsolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions." The order also directs various agencies to study and address anticompetitive labor market practices, including the overuse of covenants not to compete.

In Europe as well, some moves have recently been made to address labor monopsony, with leadership coming from the Portuguese

---

[20] See Brian Forgas et al., Am. Bar Ass'n, Anti-Poaching Issues in Franchising 24–42 (2019), https://www.americanbar.org/content/dam/aba/events/franchising/2019_annual_meeting/w18.pdf (listing and describing a variety of state attorney general actions and private actions).

[21] Press Release, Fed. Trade Comm'n, FTC Staff Submits Public Comment in Texas Opposing Certificate of Public Advantage Applications (September 14, 2020), https://www.ftc.gov/news-events/press-releases/2020/09/ftc-staff-submits-public-comment-texas-opposing-certificate.

[22] As to Duke University, see Brent Kendall, *Duke University Moves to Settle No-Poach Case for $54.5 Million*, WALL ST. J. (May 20, 2019), https://www.wsj.com/articles/duke-university-agrees-to-54-5-million-settlement-in-no-poach-case-11558392798.

[23] See Mike Leonard, *Tyson, Pilgrim's, Hormel to Face Poultry Worker Wage-Fixing Suit*, BLOOMBERG L. (Mar. 11, 2021), https://news.bloomberglaw.com/antitrust/tyson-pilgrims-hormel-to-face-poultry-worker-wage-fixing-suit.

[24] *Oversight of the Enforcement of the Antitrust Laws: Hearings before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 115th Cong. (2018) (prepared testimony of Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice Antitrust Div.).

[25] See Bill Baer, *How Senator Klobuchar's Proposals Will Move the Antitrust Debate Forward*, BROOKINGS INST.: TECHTANK (February 8, 2021), https://www.brookings.edu/blog/techtank/2021/02/08/how-senator-klobuchars-proposals-will-move-the-antitrust-debate-forward/.

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

Competition Authority.[27] The OECD has also begun an inquiry into the matter.[28]

In the United States, the major question is how receptive courts will be to the labor-antitrust movement. Biden's executive order will affect enforcement priorities but does not bind courts. While momentum is growing for Congress to amend antitrust laws so that they are more receptive to claims by employees, Congress usually moves slowly. That means that if the labor-antitrust movement is to make progress soon, it will need to draw on existing law.

Although antitrust law does apply in principle to labor markets, courts so far have reacted to claims with uncertainty and sometimes hostility.[29] One problem is that there are few judicial precedents, and so judges must grapple with many concepts and issues for the first time. Labor markets are similar to product markets, but they are more complicated because relationships between employers and employees are often highly individualized. The source of employers' bargaining power is also more complex: search costs and other frictions play a larger role in constraining employees than consumers. Some judges seem to think that any business practice that reduces labor costs must be socially desirable. Attempts to cobble together classes of workers for class action lawsuits have run afoul of procedural requirements that were developed for the simpler case of consumer class actions, which are also larger and so more likely to justify the risk and cost of litigation. The recent wave of cases has become bogged down by doctrinal puzzles, as courts have spent far too much time trying to decide whether noncompetes and no-poaching agreements are vertical or ancillary restraints, or subject to the rule of reason or quick look, rather than trying to understand the underlying economics and appreciating the difficulties of proof faced by workers.[30]

Whether and how these problems will be worked out remains to be seen. In the United States, the Antitrust Division and the FTC benefit from large staffs of economists and enjoy credibility before courts. If they can move quickly to revise merger and human resources guidelines to address labor-antitrust issues with more clarity, they may have a positive influence on the development of the law.

---

[27] See Press Release, Autoridad da Concorrência [Competition Authority], AdC Warns Companies on Anti-Competitive Agreements in the Labor Market (June 6, 2021), https://www.concorrencia.pt/en/articles/adc-warns-companies-anti-competitive-agreements-labor-market.

[28] Eric Posner & Cristina Volpin, *Labor Monopsony and European Competition Law*, CONCURRENCES No. 4-2020, at 5.

[29] See, e.g. *Llacua v. W. Range Ass'n*, 930 F.3d 1161 (10th Cir. 2019) (affirming dismissal of wage-fixing plaintiffs' claims); *Deslandes v. McDonald's USA, LLC*, No. 1:17-cv-04857, 2021 WL 3187668 (N.D. Ill. July 28, 2021) (denying certification of putative noncompete plaintiff class).

[30] See ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS (2021).