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The Implications of Labor Antitrust for Merger Enforcement

Mark A. Lemley[1]

Antitrust law has long ignored employees. When it thought about them at all, it was mostly in the context of treating labor unions as cartels to be punished,[2] before eventually exempting much union activity from the reach of antitrust, either by statute[3] or by judicial construction.[4] With that, employer-employee relations were largely put aside as something outside the scope of antitrust.[5] This neglect worsened beginning in the 1980s, as antitrust abandoned its focus on efficiency and total welfare in favor of talk

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[1] William H. Neukom Professor, Stanford Law School; partner, Lex Lumina LLP. Thanks to Darren Bush, Daniel Francis, Rose Hagan, Orly Lobel, Doug Melamed, Eric Posner, Steve Salop, and Xiyin Tang for comments on a prior draft. © 2025 Mark A. Lemley.

[2] Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 935 (1988).

[3] 15 U.S.C. § 17 ("Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations. . .; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."); 29 U.S.C. §§ 52, 104, 105, 113.

[4] United States v. Hutcheson, 312 U.S. 219, 232 (1941) (holding that labor unions are exempt from federal antitrust laws to the extent that "a union acts in its self-interest and does not combine with non-labor groups").

[5] True,

of "consumer welfare"[6] and a focus on injury to consumers.[7] Thinking of antitrust as a law meant to protect consumers, rather than a law regulating monopolization or cartelization of markets more generally, has meant that few enforcement actions and very little scholarship focused on the problem of buyers rather than sellers having market power.[8]

That is starting to change. Eric Posner and other scholars have begun to pay attention to how market power affects not just downstream purchasers but upstream sellers.[9] The government in recent administrations has begun enforcement efforts aimed

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[6] *Compare* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) (focusing on consumer welfare alone) *with* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976) (arguing that the proper focus is on total welfare). The consumer welfare consensus that emerged in the 1970s has faced increasing normative and theoretical critique in recent years. *See, e.g.*, Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 164 (2011) ("Whatever good ends the phrase [consumer welfare] may have once served, antitrust law should now lay it to rest."). *But see* Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 94 (2019) (arguing that critiques of the consumer welfare standard should be addressed with "proper application of the consumer welfare principle, not [by] jettisoning it").

[7] *See, e.g.,* McLoughlin v. Cantor Fitzgerald L.P., __ F.4th __ (3d Cir. Dec. 15, 2025) (holding that parties other than consumers and competitors had to take extra steps to show antitrust injury).

[8] There are very few buyer market power cases. A rare exception is Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 317 (2007). The current FTC action against Amazon promises to be another. *See* Press Release, FTC, FTC Sues Amazon for Illegally Maintaining Monopoly Power (Sept. 26, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power; ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS (2010). But even these rare cases generally involve business suppliers, not labor. Ioana Marinescu and Eric Posner assert that as of 2020, "the government has never . . . even evaluated a merger based on its labor market effects."). Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1373 (2020).

[9] Eric A. Posner, *The New Labor Antitrust*, 86 ANTITRUST L.J. 503, 578 (2024) ("Courts should resist the temptation to water down the usual antitrust presumptions or give credence to convenient business rationalizations when plaintiffs are workers and defendants are employers."); Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343 (2020); Hiba Hafiz, *Toward a Progressive Labor Antitrust*, 125 COLUM. L.

at harms to upstream suppliers, not just downstream purchasers, including a pending case against Amazon.[10] It has targeted efforts by competitors to fix wages, just as cartels fix prices.[11] And antitrust plaintiffs have attacked the nefarious (and shockingly widespread) practice of "no-poach" agreements: deals among competing firms not to hire each other's employees.[12] The Biden Administration focused a great deal of attention on labor market issues,[13] and that seems so far to be one of the few Biden

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REV. 319, 326 (2025) ("We have the methods, enforcement strategies, and objectives necessary for tackling and preventing the harms of employer power on worker earnings, working conditions, and income inequality— we have only to operationalize them in our current enforcement infrastructure.").

[10] United States v. Penguin Random House, https://www.justice.gov/archives/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed; Press Release, FTC, FTC Sues Amazon for Illegally Maintaining Monopoly Power (Sept. 26, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power. Many of these cases involve power against upstream suppliers but not employees. For a discussion of non-employee supplier merger cases, see C. Scott Hemphill & Nancy Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 2078 (2018). Other cases, like the FTC's challenge to the Kroger-Albertson's merger, were primarily directed at effects on consumers but also included some employee effects.

[11] *See, e.g.*, Consent Decree, United States v. Cargill Meat Solutions Corp., No. 22-cv-1821 (D. Md. May 17, 2023), https://www.justice.gov/atr/case-document/file/1585821/dl. Wage fixing has long been illegal. *See* Anderson v. Shipowners' Ass'n of Pac. Coast, 272 U.S. 359 (1926) (holding wage fixing illegal).

[12] *See, e.g.*, In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1123 (N.D. Cal. 2012); United States v. Adobe Sys., No. 1:10-cv-01629 (D.D.C. Mar. 18, 2011). For a history of no-poach agreements in the high tech industry, see Eric Posner & Ruth Zheng, *The Silicon Valley No-Poach Conspiracy*, 25-18 COASE-SANDOR INST. FOR L. & ECON. RSCH. PAPER SERIES (2025). For discussion of the ensuing no-poach cases, including surprising judicial resistance to them, see Mark A. Lemley, *Free the Market: How to Save Capitalism from the Capitalists*, 76 HASTINGS L.J. 115, 149 (2024).

[13] Press Release, FTC, FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-department-labor-partner-protect-workers-anticompetitive-unfair-deceptive-practices; Press Release, FTC, FTC Announces Rule Banning Noncompetes (Apr. 23, 2024); Press Release, FTC, FTC and DOJ Jointly Issue Antitrust Guidelines on Business Practices that Impact Workers (Jan. 16, 2025),

policies the Trump Administration will continue.[14] Other countries are also focusing increasing attention on this issue.[15] And the Supreme Court ruled for a class of "employee" plaintiffs – student athletes – in *NCAA v. Alston*.[16]

In this article, I contribute to that renaissance by focusing on the role of labor antitrust in evaluating mergers.[17] I argue that mergers often exacerbate serious monopsony problems in labor markets, that merging companies often take steps to make it harder for employees to exit the market, and that much of what passes for efficiencies in consumer markets often reflects *inefficiencies* in the labor market.[18] I argue that courts and agencies should be more willing to block mergers that weaken labor market competition. Failing that, they should impose conditions on those mergers that reduce the harm they do to workers.

I. Mergers and Labor Markets

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https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-doj-jointly-issue-antitrust-guidelines-business-practices-impact-workers; Thomas W. Joo, *Antitrust Enforcement and Labor Markets Under the Biden Administration*, 53 SW. U. L. REV. 470 (2025).

[14] Gail Slater, Assistant Att'y Gen., Dep't of Just., Assistant Attorney General Gail Slater Delivers First Antitrust Address at University of Notre Dame Law School (Apr. 28, 2025) ("Because the antitrust laws protect labor market competition, any conduct that harms competition for workers can violate not only the spirit but the letter of the antitrust laws.").

[15] For a global survey, see Amanda Athayde & Carolina Arauja Ferreira, *Five Shades of Gray: Antitrust & Labor Market World Tour* (working paper 2025).

[16] 594 U.S. 69 (2021) (referring to the case as involving monopsony in the labor market).

[17] Following Eric Posner, I use the term "labor antitrust" to refer to antitrust issues that affect employees generally, including but not limited to those issues involving labor unions.

[1818] *See* Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 704–05 (7th Cir. 2023) (making this point).

A. Inadequate Merger Enforcement in Consumer Markets

Section 7 of the Clayton Act governs mergers. It prohibits mergers and other acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[19] Read literally, this language is quite broad. It applies to any line of commerce and to any activity that affects commerce. And it does not just target monopolies, but also mergers that would lessen competition even if they do not threaten to create a monopoly per se. The purpose of the statute was to prevent threatened harm before it was too late. As the Supreme Court put it in *Brown Shoe Co. v. United States*, the point of this language was to block mergers "when the trend to a lessening of competition in a line of commerce was still in its incipiency . . . before it gathered momentum."[20]

It hasn't worked out that way.[21] For the past several decades, notwithstanding earlier Supreme Court precedent, merger enforcement has focused primarily on markets that were already extremely concentrated.[22] In fact, during the 1990s and 2000s,

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[19] 15 U.S.C. § 18.

[20] 370 U.S. 294, 317-18 (1962).

[21] For a discussion of the desuetude of the "incipiency" doctrine, and an argument for reviving it, see Peter C. Carstensen & Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of "Redundant" Competitors*, 2018 WIS. L. REV. 783, 842-845. Courts do sometimes still invoke the doctrine, however. *See, e.g.*, Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 423 (5th Cir. 2008); Polypore Int'l, Inc. v. FTC, 686 F.3d 1208, 1213-14 (11th Cir. 2012); Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., 778 F.3d 775, 783 (9th Cir. 2015).

22.*See* Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 235, 245 (Robert Pitofsky ed., 2008) (discussing the lack of antitrust enforcement during the Reagan administration).

the government generally didn't challenge mergers in most cases unless the merger would reduce the market to two, or at most three, competitors.[23] Even when the government did challenge mergers, the effect of decades of influence from Chicago School theories critical of antitrust meant that courts often rejected those challenges.[24] The result was a wave of merger activity that had not been seen in more than a century, since before the enactment of antitrust laws.[25]

The focus of agency efforts also changed. Beginning with the 1982 Merger Guidelines, the agencies tasked with antitrust enforcement began to focus not on the structural concentration of a market but on anticipated effects of a merger on downstream prices to consumers.[26] This is part of a broader focus on "consumer welfare" rather than social welfare that has come to dominate antitrust.[27] The effect of a

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23.*See* John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837, 867 tbl. 5 (2017); Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 REV. INDUS. ORG. 51, 64 (2021); D. Daniel Sokol & Sean P. Sullivan, *The Decline of Coordinated Effects Enforcement and How to Reverse It*, 76 FLA. L. REV. 265, 271–72 (2024).

24.*See* Baker & Shapiro, *supra* note 22, at 235, 240.

25.*See M&A Statistics*, INST. FOR MERGERS, ACQUISITIONS & ALLS., https://imaa-institute.org/mergers-and-acquisitions-statistics/#:~:text=Number%20%26%20Value%20of%20M%26A%20Worldwide,4%25%20to%203.8%20trillion%20USD (last visited Nov. 22, 2024) (showing a dramatic increase in the number of mergers each year since the 1980s); *Number of Merger and Acquisition (M&A) Transactions Worldwide from 1985 to April 2023*, STATISTA (June 3, 2024), https://www.statista.com/statistics/267368/number-of-mergers-and-acquisitions-worldwide-since-2005.

26 Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2012 (2018); Janusz A. Ordover & Robert D. Willig, *The 1982 Department of Justice Merger Guidelines: An Economic Assessment*, 71 CAL. L. REV. 535, 537-539 (1983).

27. *See* Mark Glick & Darren Bush, *Breaking Up Consumer Welfare's Antitrust Policy Monopoly*, 56 SUFFOLK U. L. REV. 201, 203–07 (2023).

focus on consumers is that it is too easy to ignore upstream competitive effects. The agencies also began to give greater credence to defenses that the merger would enhance supply-side efficiency.[28]

Even if a merger met these much stricter standards for challenge, courts and agencies often proved reluctant to actually block mergers, instead imposing a series of divestitures or behavioral remedies while allowing the merger to proceed.[29] This is problematic both because conduct remedies are rarely enforced and have proven ineffective[30] and because it is extremely difficult to unwind an anticompetitive merger after the fact.[31] We have seen several recent examples of cases struggling to undo harm

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[28] Gabriel A. Lozada et al., *The Merger Efficiency Defense: No Legal Basis and a Bad Idea*, 70 ANTITRUST BULL. 77, 77-78 (2025).

[29] *See, e.g.,* United States v. Oracle Corp., 331 F.Supp.2d 1098 at 1111–12 (N.D. Cal. 2004)) (rejecting challenge to merger of the two most significant enterprise software management companies); United States v. Waste Mgmt., Inc., 2021 WL 2349752 (D.D.C. 2021) (accepting Waste Management merger with its largest competitor subject to some divestitures); David A. Balto & Richard G. Parker, *The Evolving Approach to Merger Remedies*, FTC (May 1, 2000) ("During the late 1980s and early 1990s, the FTC began to take a more flexible view of merger relief . . . [increasingly accepting] licensing arrangements . . . supply agreements, and certain forms of behavioral relief, such as firewalls and nondiscrimination provisions."). Other countries, by contrast, are beginning to return to more structural evaluations of mergers. *See* Chris Noonan, *Horizontal Mergers in New Zealand: Drifting Towards Structuralism?*, 26 COMPETITION & CONSUMER L.J. 263, 299 (2019).

[30] John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULL. 979, 998 (2012) ("Considerable empirical evidence establishes a very mixed record for modifying the behavior of regulated firms in many industries, and the frequent distortionary effects of regulatory constraints.").

[31] *See* Noonan, *supra* note 29, at 2 ("Once consummated, a merger is usually impossible to unscramble.").

from the failure to block mergers, including Ticketmaster's acquisition of LiveNation,[32] Google's acquisition of DoubleClick,[33] and Facebook's acquisition of Instagram.[34]n

Agency enforcers in recent years have pushed back on some of these trends,[35] particularly in the Biden Administration, expressing a preference for structural over behavioral remedies and seeking to block mergers where structural remedies wouldn't fully protect competition.[36] It is unclear whether the Trump administration will return to the more permissive approach in place before the 2023 Merger Guidelines.[37] The FTC in particular has criticized the Biden Administration's merger enforcement efforts and has also expressed skepticism of the pre-Biden favoritism towards behavioral

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32 United States v. LiveNation (cite pending case).

33 United States v. Google (E.D. Va. Ad tech case).

34 Cite FTC v. Meta (D.D.C. 2025) (refusing to find Facebook liable after the fact for monopolization based on the acquisition of Instagram, even though the merger could have been blocked when it happened in 2012).

35 *See* D. Bruce Hoffman, *Vertical Merger Enforcement at the FTC,* https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf ("We are aware that conduct remedies that only address the ability to engage in anticompetitive behavior post-merger may not be sufficient to prevent competitive harm because people are smart—they will still have the incentive to engage in that behavior and they may find other ways to act on that incentive. As a result, conduct remedies can require constant monitoring (and the FTC often appoints a monitor to ensure compliance, as we did in the Pepsi and Coke orders) to ensure that employees in the firm do not act on those incentives. That is why we prefer structural remedies").

36 DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (2023), https://www.justice.gov/atr/2023-merger-guidelines.

37 While the Merger Guidelines aren't binding, courts tend to defer to them, and that deference has continued to apply to the 2023 Guidelines. *See* Mahshad Badii¸ *Antitrust's North Star: The Continued and Nameless Judicial Deference Toward the Merger Guidelines*, 77 STAN. L. REV. 1189 (2025).

remedies.[38] So far the Trump administration has challenged fewer mergers than its predecessor, and large mergers are increasing.[39] But the Trump Administration has not withdrawn the 2023 Guidelines, and it has continued many Biden Administration antitrust policies.

The practical effect of this lack of merger enforcement has been that markets are increasingly concentrated. Nearly every industry sector is more concentrated today than it was fifty years ago.[40] We have centralized control over important sectors of the economy in a mere handful of companies.[41] The result has been companies increasing markups and profitability at the expense of consumers.[42]

B. Mergers and Labor Markets

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38 https://www.ftc.gov/system/files/ftc_gov/pdf/synopsys-ansys-ferguson-statement-joined-by-holyoak-meador.pdf.

39 *See* Bryan Koenic, *Dechert Tracks Significant Decline in U.S. Merger Probes*, Law360, Nov. 4, 2025; Dan Novak, *Mega-Mergers Pick Up as Trump Team Eases Barriers*, law.com, Dec. 12, 2025.

40. Nicholas Trachter & Lindsey Li, *Diverging Trends in Market Concentration,* https://www.richmondfed.org/publications/research/economic_brief/2024/eb_24-05 ("Since 1990, an increase in market concentration at the national level has been well documented for nearly all industries"; but noting that the trend does not necessarily extend to local concentration); Yueran Ma, *New Data Shows the Rise of Corporate Concentration in the US in the Past 100 Years*, PROMARKET (Apr. 21, 2022), https://www.promarket.org/2022/04/21/new-data-shows-the-rise-of-corporate-concentration-in-the-us-in-the-past-100-years.

41. *See id.*

42. *See* Jan de Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561, 562 (2020) (finding a rise in aggregate firm markups (the extent to which price exceeds cost) from 21% in 1980 to 61% in 2016).

But the effects aren't limited to consumers. Increased concentration can also reduce wages and money paid to suppliers.[43] In part, that is because of bargaining inequality.[44] While economists traditionally took the position that labor markets were competitive,[45] there is increasing reason to think that isn't true.[46] Labor unions have declined to a vanishingly small part (6 percent) of the private U.S. workforce[47] while at the same time, corporate concentration is higher than at any time in recent memory.[48] Non-unionized employees have fewer options in a more concentrated market, which makes it harder to negotiate better wages or to demand raises.

In general, labor mobility is more constrained than consumer mobility is.[49] It is much easier for consumers to change what toaster they buy in response to a change in

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43 *See* Herbert Hovenkamp, *The Structure of Merger Law*, NOTRE DAME L. REV. (forthcoming 2025) (manuscript at 57), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4851593 ("[A] merger that limits output in a product market can harm labor as well as consumers."); Luke Herrine, *Regulating Cutthroat Business*, 103 N.C. L. Rev. 1573, 1620-24 (2025) (documenting the difficulties that concentration in the meatpacking industries impose on farmers and workers).

44 Japan recently imposed liability on a downstream purchaser that used bargaining power to force suppliers to provide unpaid overtime. *See Japanese retailer Lopia's antitrust probe concludes as JFTC approves remedy measures*, MLEX, https://www.mlex.com/mlex/antitrust/articles/2425531 (Dec. 25, 2025).

45 *See* Clark Kerr, *Lavor Markets: Their Character and Consequences*, 40 Am. Econ. Rev. 278, 280 (1950); J.R. Hicks, THE THEORY OF WAGES 7-9 (2d ed. 1963).

46 *See* Suresh Naidu & Arindrajit Dube, *Monopsony Power in Labor Markets,* https://www.nber.org/reporter/2024number1/monopsony-power-labor-markets

47.Kerry Ferrell, *Union Membership, Activity, and Compensation in 2022*, U.S. BUREAU OF LAB. STAT. (July 2023), https://www.bls.gov/spotlight/2023/union-membership-activity-and-compensation-in-2022/home.htm.

48.*See supra* Subpart.I.A.

49 *See* Richard T. Ely, THE PAST AND THE PRESENT OF POLITICAL ECONOMY 12 (1884) (criticizing the notion that "capital and labor move with perfect ease from place to place").

price than it is for workers to just change jobs in response to a small change in labor conditions.[50] Switching jobs is a very big deal in someone's life. And it requires a lot more work; stores don't make you go through several rounds of interviews before they will sell you a toaster. Further, regularly switching jobs can signal that there is something wrong with the employee, making it harder for them to get a new job in the future.

Switching jobs also means changing cities in many instances, either because the job is a specialized one or because workers in a small town may have only one factory or store or hospital that could employ them. Changing cities is a big deal. It can mean selling a house, taking kids out of school, losing friends, and forcing a spouse to find a new job as well. Most employees can't or won't do that in response to a small change in wages.

And one important class of employees – non-citizens – may be even more explicitly locked into their jobs. For workers on an H-1B visa , leaving a job may mean losing the thing that allows you to stay in the country at all.[51] And immigrants not

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[50] While the traditional antitrust measures speak of price, changes in quality – or products or of working conditions – also matter. Douglas H. Ginsburg, *Nonprice Competition*, 38 ANTITRUST BULL. 83, 107 (1993). This is particularly significant in the labor market, where a firm that is unwilling or unable to reduce wages might increase hours, decrease perks, or not give raises. Economically, these are equivalent to reducing wages.

[51] USCIS, *H-1B Specialty Occupations* (last accessed Oct. 28, 2025), https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations (" If you are laid off, fired, quit, or otherwise cease employment with your previous employer, you may have up to 60 consecutive days or until the end of your authorized validity period, whichever is shorter, to find new employment, change status, or depart the country.").

working legally, or who overstayed a visa, may be afraid to leave a job because they can't fill out the paperwork to get a new one.[52]

The result of all of this is that labor markets are much less competitive than they might appear,[53] and reducing options for employees reduces that competition even further. Mergers that harm workers by eliminating competition for their labor are well within the statutory reach of the Clayton Act, because reducing competition for labor harms welfare just as much as (indeed, perhaps more than) reducing competition to buy products.[54] While antitrust normally focuses on the risk of hurting consumers by exercising monopoly power downstream, a parallel economic theory worries about "monopsony," or the exercise of buyer market power against employees and suppliers.[55] Just as a monopoly can reduce output and raise prices for consumers, a

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[52] Grimes identifies a number of industries today in which employees have no real mobility. Grimes, *supra* note 65, at 431-49.

[53] Economic evidence suggests that many labor markets are quite concentrated. *See, e.g.*, Jose A. Azar et al., *Concentration in US Labor Markets: Evidence From Online Vacancy Data*, 66 LAB. ECON. (2020), available at https://www.sciencedirect.com/science/article/pii/S0927537120300907 (finding that 60% of labor markets are highly concentrated); David Card, *Who Set Your Wage?*, 112 Am. Econ. Rev. 1075 (2022).

[54] Portions of this paragraph are adapted from Lemley, *supra* note 12, at 146.

While 15 U.S.C. §17 says that "the labor of a human being is not a commodity or article of commerce," that section is designed to create an exemption for employees to bargain together in labor unions. It has never been understood to exempt companies from liability for anticompetitive acts in the labor market. *See* Anderson v. Shipowners' Ass'n of Pac. Coast, 272 U.S. 359, 362 (1926) (finding the antitrust laws apply "in respect of the employment of seamen").

55. *See* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 549–53 (2018) (discussing the intellectual history of monopsony); ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS 1 (2010).

monopsony can reduce demand for labor and lower wages below the market-clearing price.[56] The effects largely parallel those with monopoly.

Monopsony is inefficient because it reduces production and employs fewer people at lower wages than would be justified by market demand. While a monopsonist drives wages down, because it has market power, it doesn't necessarily pass those lower wages on in the form of lower prices to consumers, as a competitive firm might.[57] Rather, the monopsonist generally takes much of the "savings" as profit, just as a monopolist does when it reduces output and raises prices.[58]

In fact, things are even worse than that. A firm with monopsony power will act as if its marginal costs are higher, not lower, in the downstream market, because it treats the relevant input price as the higher monopsony profit it obtains in the labor

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56. *See* Naidu, Posner & Weyl, *supra* note 55, at 556 (2018) (discussing the intellectual history of monopsony).

57. *See* Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting Out-of-Market Benefits*, 90 U. CHI. L. REV. 273, 281 (2023) ("The classical monopsonist realizes that if it restricts the number of workers it hires, it will be able to pay less to those fewer hired workers, and it calculates its marginal cost of labor based on this assumption. As a result, it maximizes profits by setting a lower wage and hiring fewer workers.").

58. *See id.*

A monopsonist that nonetheless sells into a fully competitive market may pass through some of the savings to consumers by using its lower input costs to lower prices in the downstream market. But many labor monopsonists likely have at least some constrained power in the downstream market. Labor monopsonists face a steeper marginal cost curve than the supply curve for labor, for the same reasons traditional monopolists face a steeper marginal revenue curve. And even if that isn't true (say, a grain miller that is the only plausible buyer for farmers in an isolated geographic reason), passing on the savings from distorting the upstream market to a different market is not (and should not be) a defense in antitrust law to a challenge to harm in the upstream market. *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007). It is better thought of as sharing the monopoly rents, which is not welfare-enhancing.

market, not the competitive price for labor. As a result, while wages go down, the firm makes business decisions as if its costs have gone up, reducing labor inputs and therefore reducing downstream output.[59] This has real personal as well as economic consequences for wages and working conditions.[60]

None of this is to say that all employers are monopsonists; far from it. The price elasticity of labor is complicated, and depends on a number of factors, including geographic mobility, the possibility of working from home, and the training needed to switch fields. But we cannot simply assume that employers don't exercise power over labor markets because workers can always switch jobs. That is often untrue, and at the very least always involves significant switching costs. There is, therefore, good reason to take labor market antitrust more seriously than we historically have done. Other scholars have begun that process for section 1 and section 2 claims. In this paper, I focus on mergers evaluated under section 7 of the Clayton Act.

II. Taking Labor Markets Seriously in Merger Review

What would merger enforcement look like if courts and agencies took monopsony and labor markets more seriously? I think merger analysis would have to change in at least three ways.

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59. *See* BLAIR & HARRISON, *supra* note 55, at 48.

60 *See* Bedoya & Sanchez, *supra* note __, at 1-2; Tyson J. Williams, *Hipster Antitrust and Labor Monopsony: Why the Federal Trade Commission Should Throw a Punch at the UFC*, 110 Iowa L. Rev. 1949 (2025).

A. Labor Market Competition and Barriers to Exit

First, courts would need to focus attention on the practical realities of competition for labor. In consumer-focused merger cases we normally measure market share and barriers to entry in deciding whether a company has market power. Market share matters because the presence of competitors constrains pricing behavior. If there are many competitors, the assumption is that if the putative monopolist raises its price consumers will just switch to one of the competitors. In consumer markets, a company is not constrained by an existing company making similar products if it could profitably execute a "small but significant and nontransitory increase in price" (SSNIP).[61] That is, if a company currently pricing at a competitive level can increase its price by 5% or so without its customers deserting it for the putative competitor, the supposed competitor is not a real constraint on market power and therefore doesn't belong in the market.[62]

Even if there are not significant competitors right now, a monopolist might be constrained if entry into the market was easy, so that raising prices would attract new competition. Accordingly, antitrust also asks whether there are significant barriers to entry by new competitors who could impose similar price discipline.[63]

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[61] DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1997), https://www.justice.gov/atr/horizontal-merger-guidelines-0.

[62] Market definition has taken on a life of its own, but it is in fact hopelessly intertwined with market power. Louis Kaplow has sensibly suggested eliminating the distinction. Louis Kaplow, *Why Ever Define Markets?*, 124 Harv. L. Rev. 437 (2010).

[63] Richard Schmalensee, *Sunk Cost and Antitrust Barriers to Entry*, 94 AM. ECON. REV. 471, 472 (2004) ("[I]n monopolization cases, a finding of entry barriers is generally necessary to establish that a high market share actually confers monopoly power."); SECTION OF ANTITRUST LAW, AM. BAR ASS'N, MARKET POWER HANDBOOK: COMPETITION LAW AND ECONOMIC FOUNDATIONS 120 (2005) ("The existence or absence of barriers to entry is a critical market characteristic that is

In labor markets, where the risk is monopsony power rather than monopoly power, the right questions are somewhat but not entirely analogous. A monopsonist traditionally lowers input prices (here, wages), reducing the amount of labor it consumes.[64] The analogous question to market share would be whether a small change in wages will cause enough employees to desert the putative monopsonist for competing employers that reducing wages would be unprofitable for the firm. A SSNIP test could be used here too.

But as Warren Grimes has ably pointed out, the analogy is not exact.[65] Consumers buy many products and don't spend much of their income on any one purchase. But most workers have only one job, and it is one in which they have made a substantial investment. Further, workers need a job. Most workers can't just quit, because most Americans have very little money saved.[66] They will put up with a fair bit before pulling the trigger to quit a job, particularly without an alternative lined up. And that's especially true if the economy isn't booming. In economic terms, their labor

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inevitably considered in one form or another in every market and market power analysis."). For a discussion of potential competition in merger analysis, see Herbert Hovenkamp, *Potential Competition*, 86 ANTITRUST L.J. 805 (2025).

[64] BLAIR & HARRISON, *supra* note 55, at 44-48.

[65] Warren Grimes, *Correcting Antitrust Monopsony Theory and Addressing Anticompetitive Conduct in Low-Skill Labor Markets*, 64 SANTA CLARA L. REV. 417, 424 (2024).

[66] According to one estimate, as of 2025, 40% of Americans have $250 or less in their bank account, with 18% having nothing saved. Gabrielle Olya, *How Much Americans Are Putting Toward Savings Each Paycheck*, NASDAQ (Feb. 19, 2025, at 07:00 EST) https://www.nasdaq.com/articles/how-much-americans-are-putting-toward-savings-each-paycheck.

market supply is inelastic.[67] So it doesn't follow that employees will be able to switch jobs just because there are other potential employers in a field. That means that many firms have power in the labor market as to their existing employees even if they don't have a high share of the market for any given job description.

The realities I discussed in the last section give employers significant power over price and other working conditions. But there is more. A more explicit constraint on labor market competition is what I call "barriers to exit." You can think of these as analogous to barriers to entry in consumer product markets, but here, the analogous question is how easy it is for an employee to leave their job and take a new one.

Firms can and do impose additional barriers to exit by their employees in an effort to prevent wage competition.[68] Most notably, companies regularly enter into contracts designed to prevent employees from changing jobs. More than 20 percent of the American workforce are subject to noncompete agreements that literally prevent them from quitting their job and going to work for a competitor, generally for a period of one or two years.[69] Many noncompetes even bind low-wage employees, such as Jimmy John's sandwich makers, who aren't developing or using trade secrets.[70] Noncompetes

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[67] Grimes, *supra* note 65, at 419-20.

[68] For a discussion of vertical foreclosure in labor markets, including some discussion of efforts to reduce employee mobility, see Eric A. Posner, *Antitrust Analysis of Vertical Restraints in Labor Markets*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5669310 (working paper 2025).

69. *Non-Compete Clause Rulemaking*, FTC (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

70. *See* Sandeep Vaheesan & Matthew Jinoo Buck, *Non-Competes and Other Contracts of Dispossession*, 2022 MICH. ST. L. REV. 113, 122 (2022) ("The sandwich chain Jimmy John's included a broad non-compete clause in the hiring packet given to store employees.").

are sometimes enforceable even if the employee doesn't leave voluntarily; in some states, a company can fire an employee and still prevent them from taking another job.[71]

While California and an increasing number of states refuse to enforce noncompetes,[72] many other states do enforce them.[73] While in theory those states will enforce only "reasonable" restrictions on competition, those restrictions aren't compatible with the way work actually happens. Requiring an employee to move out of state to change a job significantly increases the cost of switching, and so it means that employees are less likely to quit in response to a worsening of their working conditions. Nor is the fact that you could take another job two years from now likely to be much comfort to the overwhelming majority of Americans who live paycheck to paycheck.[74]

71.*See* Kenneth J. Vanko, "*You're Fired! And Don't Forget Your Non-Compete": The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1, 1–2 (2002) (discussing the different approaches different states have towards the enforceability of noncompetes in the case of termination).

72.*See* Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937, 953-54 (2008).

73.*See* 1 PETER S. MENELL, MARK A. LEMLEY, ROBERT P. MERGES & SHYAMKRISHNA BALGANESH, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 134 (2023).

The Biden Administration had proposed to ban noncompetes altogether. Unfortunately, the Trump Administration withdrew that proposal in 2025. Tal Marnin, Robin Melman & Kathryn Jordan Mims, *Update: FTC Abandons Non-Compete Rule and Simultaneously Initiates FTC Noncompete Enforcement Action*, WHITE & CASE (Sept. 5, 2025), https://www.whitecase.com/insight-alert/update-ftc-abandons-non-compete-rule-and-simultaneously-initiates-targeted-ftc.

74 PNC BANK, 2025 FINANCIAL WELLNESS IN THE WORKPLACE REPORT: WHAT TODAY'S WORKERS VALUE MOST, ACROSS GENERATIONS 6 (2025), https://www.pnc.com/content/dam/pnc-com/pdf/corporateandinstitutional/organizational-financial-wellness/organizational-financial-wellness-workplace-report.pdf (reporting that "67% of U.S. workers surveyed say they are living paycheck to paycheck.").

Some countries enforce noncompetes subject to a "garden leave" provision that requires the former employer to continue to pay the worker during the period of the noncompete. PETER S. MENELL ET AL., *supra* note 73, at 138. That reduces the cost considerably, but it is not an effective substitute for taking a new job in many circumstances. A lawyer or software engineer who must

The result is depressed wages and reduced employee mobility.[75] Furthermore, an alarming number of employees are required to sign noncompetes even in states where they are illegal.[76] Employees may not know they are illegal or may not have the time and money to challenge them, so these illegal contracts still deter people from changing jobs.[77]

Noncompetes aren't the only way firms impose barriers to exit on employees. They frequently require employees to sign nonsolicitation agreements that prevent them from hiring their fellow employees or working for the clients they had at a former firm.[78] That makes it harder for those who want to leave to start companies (who can't hire employees for their new venture) and for salespeople (who must give up all their client contacts). Some firms even impose "stay or pay" clauses that require employees

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sit idle for two years is likely to find they are much less marketable after that period because clients and technology have left them behind. And the period of enforced idleness means that employees can't accept a job directly; they must quit their existing job and hope they can find one two years down the road.

75. *See* MARK A. LEMLEY & ORLY LOBEL, SUPPORTING TALENT MOBILITY AND ENHANCING HUMAN CAPITAL: BANNING NONCOMPETE AGREEMENTS TO CREATE COMPETITIVE JOB MARKETS 2 (2021), https://fas.org/wp-content/uploads/2021/01/Microsoft-Word-Supporting-Talent-Mobi...mpetitive-Job-Markets_LobelLemley.pdf; EVAN STARR, ECON. INNOVATION GRP., THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS 6–11 (2019), https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf (collecting studies).

76. *See* Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L., ECON. & ORG. 633, 634 (2020).

77. *Id.* at 665 ("[A] noncompete is associated with both a longer tenure and a reduced propensity to leave for a competitor even when the noncompete in question is unenforceable under state law.").

78. *See* PETER S. MENELL ET AL., *supra* note 73, at 125–27. Even states like California that ban noncompetes allow at least some nonsolicitation agreements. *See, e.g.*, Blue Mountain Enters. v. Owen, 74 Cal. App. 5th 537, 551-52 (2022) (allowing for enforcement of a nonsolicitation agreement under the sale of business exception.").

to pay tens of thousands of dollars in order to leave their jobs—a particularly noxious form of exit tax.[79] Many employees (even in states that ban noncompetes) are also subject to nondisclosure agreements (NDAs) designed to prevent the loss of trade secrets.[80] While NDAs are sometimes justifiable as ways to prevent misappropriation of trade secrets, Camilla Hrdy and Christopher Seaman have shown that many of those NDAs actually reach far beyond trade secrets, precluding the disclosure of any information about the employer.[81]

Most outrageously, a large number of companies (including most of the major tech companies) entered into a series of no-poach agreements in which they promised not to hire each other's employees.[82] Those agreements are unquestionably illegal per se under any rational antitrust system; they are agreements not to compete in the labor market.[83] Indeed, they are likely criminal.[84] But that didn't stop people like Steve Jobs

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79. *See* Robin Kaiser-Schatzlein, *Pay Thousands to Quit Your Job? Some Employers Say So.*, N.Y. TIMES (Nov. 20, 2023), https://www.nytimes.com/2023/11/20/magazine/stay-pay-employer-contract.html.

80. Camilla A. Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements That Act Like Noncompetes*, 133 YALE L.J. 669, 683 (2024) ("Confidentiality agreements are extremely common in the workplace. While comprehensive data is lacking and usage varies by industry, it is assumed confidentiality agreements 'are widely and increasingly used in employment contracts of all types.'").

81. *See id.* at 681.

82. *See* Tom Krazit, *DOJ Settles No-recruit Claims Against Tech Companies*, CNET (Sept. 24, 2010, 1:59 PM PDT), https://www.cnet.com/culture/doj-settles-no-recruit-claims-against-tech-companies.

83. *Cf.* Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 704–05 (7th Cir. 2023) (reversing dismissal of per se claim in franchise no-poach agreement); United States v. Adobe Sys., Inc., 2011 WL 10883994 (D.D.C. Mar. 18, 2011) (barring no-poach agreements among tech companies).

84. *See* Cooper Spinelli & Eric A. Tate, *No-Poach Case Alert: DOJ's No-Poach Strategy Dealt Another Blow as Court Tosses Case Before It Reaches Jury*, JDSUPRA (May 12, 2023),

and other highly-placed tech executives from deciding that they didn't want to face competition for their employees.[85] After all, if employees could change jobs at will, they could negotiate higher salaries. While the antitrust agencies have started cracking down on no-poach agreements, courts have been surprisingly resistant to enforcing the law,[86] and enforcing the law doesn't seem to have stopped the practice.[87]

The practical effect of all of this is that barriers to exit in the labor market are extremely high, and companies go to significant lengths to prevent labor market competition. When coupled with the inelastic nature of labor supply and the fact that making a switch is an enormous decision, it is likely that a large number of merging firms either already have or have a dangerous probability of acquiring power to reduce competition in the labor market. Mergers that might seem innocuous in consumer markets may well be problematic in labor markets.

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https://www.jdsupra.com/legalnews/no-poach-case-alert-doj-s-no-poach-3641250/ (listing several cases in which the Department of Justice has brought criminal charges in connection with no-poach agreements).

85. Alex Wilhelm & Sarah Buhr, *Apple, Google, Other Silicon Valley Tech Giants Ordered to Pay $415M in No-Poaching Suit*, TECHCRUNCH (Sept. 3, 2015, 10:02 AM PDT), https://techcrunch.com/2015/09/03/apple-google-other-silicon-valley-tech-giants-ordered-to-pay-415m-in-no-poaching-suit.

86. Matt Modell & Harlan Rosenson, *DOJ Suffers Historic Defeat in its Fourth Failed Criminal No-Poach Prosecution but Shows No Sign of Letting Up Enforcement*, NAT'L L.J. (May 24, 2023, 9:00 AM), https://www.law.com/nationallawjournal/2023/05/24/doj-suffers-historic-defeat-in-its-fourth-failed-criminal-no-poach-prosecution-but-shows-no-sign-of-letting-up-enforcement; Bryan Koenig, *DOJ Abandons Last Remaining No-Poach Prosecution*, LAW360 (Nov. 14, 2023, 6:10 PM EST), https://www.law360.com/articles/1766482/doj-abandons-last-remaining-no-poach-prosecution. For a discussion of the case law, see Eric A. Posner & Sarah Roberts, *No-Poach Antitrust Litigation in the United States* (U. Chi. Coase-Sandor Inst. L. & Econ., Working Paper No. 933, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4620378.

87. *See* Rochella Davis et al., *No-poach agreements – Closing the Enforcement Gap*, 4 CONCURRENCES: COMPETITION L. REV. 2–4 (2023).

B. Labor Unions and Countervailing Power

An additional factor to consider in evaluating the effect of mergers on labor markets is whether the employees themselves can coordinate negotiation, generally through a labor union. As we have seen, individual employees have very little negotiating power against corporations in practice. Unions were designed to create a source of countervailing power, allowing employees to bargain as a group so that the negotiation over wages is one to one rather than one to many.[88] Non-unionized employees have fewer options in a more concentrated market, which makes it harder to negotiate better wages or to demand raises. The effects of countervailing power on market prices are complex and unclear,[89] but a plausible result is that the parties will split the bargaining surplus.[90] If that happens when a union bargains with a monopsonist, it would mean that rather than artificially depressing wages, labor

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[88] Susan Hayter, *Unions and Collective Bargaining*, *in* LABOUR MARKETS, INSTITUTIONS AND INEQUALITY: BUILDING JUST SOCIETIES IN THE 21ST CENTURY 95, 95 (Janine Berg ed., 2015) ("[U]nions can use collective bargaining to balance the unequal relationship between an employer and employee and negotiate a fair share of the gains."); U.S. DEP'T TREASURY, LABOR UNIONS AND THE MIDDLE CLASS 5 (2023).

[89] *Compare* Z. Chen, *Dominant retailers and the countervailing-power hypothesis*, 34 RAND J. ECON. 612 (2003) (finding that countervailing power lowers consumer prices) *with* Charalambos Christou & Konstantinos G. Papadopoulos, *The countervailing power hypothesis in the dominant firm-competitive fringe model*, 126 ECON. LETTERS 110 (2015) (finding that countervailing power does not lead to lower consumer prices). For a good early discussion of the tradeoffs in the context of labor antitrust, see Robert H. Lande & Richard O. Zerbe, *Reducing Unions' Monopoly Power: Costs and Benefits*, 28 J. L. ECON. 297 (1985).

[90] *See generally*, John F. Nash, Jr., *The Bargaining Problem*, 18 ECONOMETRICA 155 (1950). For studies applying Nash equilibrium modeling to union negotiations, see Nicholas P. Lawson, *Is Collective Bargaining Pareto Efficient?*, 32 J. LABOR RSCH. 282, 288 n.14 (2011).

bargaining would bring them closer to a competitive level. In so doing, they should presumably also increase hiring – a result that may sound counterintuitive but which flows from the artificial reduction in output that comes with lower-than-market monopsony wages.[91]

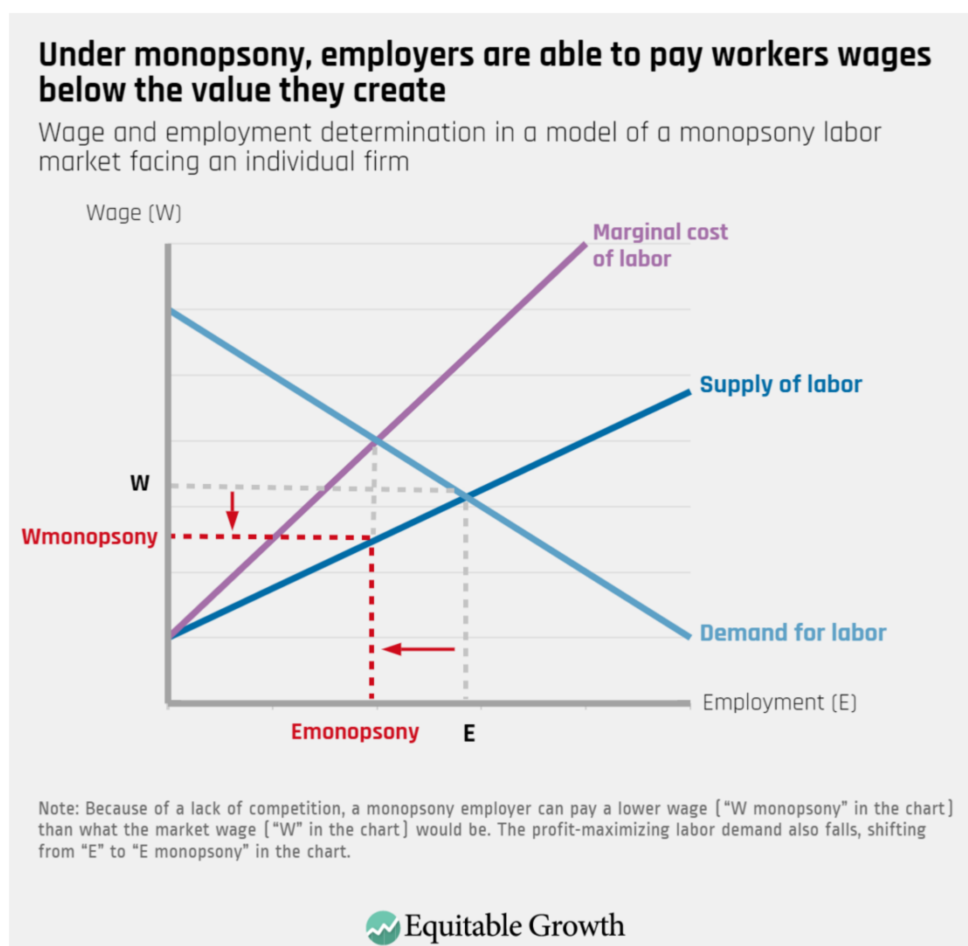

Figure 1[92]

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[91] *See* Steven C. Salop, *The Reasonable Competitive Conduct Standard for Antitrust*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4419656 (making a similar point); A. Douglas Melamed & Steven C. Salop, *An Antitrust Exemption for Workers: And Why Worker Bargaining Power Benefits Consumers Too*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4336770 (working paper 2025).

[92] Carmen Sanchez Cumming, *Understanding the Economics of Monopsony: How Labor Markets Work Under Imperfect Conditions*, WASH. CTR. EQUITABLE GROWTH (Apr. 6, 2022),

In Figure 1, worker output declines as wages decline under monopsony. It is still profitable for the company to cut output because by reducing wages they capture a much higher value of the work that does happen.[93] If a union brings countervailing power, the likely result would be to bargain wages higher, back to W in Figure 1. If the wages rise back to the competitive level under bargaining, more people are willing to work, and the employer has an incentive to expand output, hiring more people, to maximize revenue under the bargained price. As an aside, the fact that monopsony causes labor output as well as wages to decline may also explain the otherwise surprising result that minimum wage statutes do not reduce employment, as people often fear.[94] If market wages were already depressed below the competitive level, reducing labor output, a minimum wage set at or near the true competitive price would both increase wages *and* increase hiring.

As unions have shrunk to only 6% of the private workforce, and as employers increasingly avoid minimum wages and other employee benefits by using independent

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https://equitablegrowth.org/understanding-the-economics-of-monopsony-how-labor-markets-work-under-imperfect-competition/.

[93] For a more detailed economic analysis of this point, see A. Douglas Melamed & Steven J. Salop, 85 ANTITRUST L.J. 739 (2025).

[94] Justin C. Wiltshire, Carl McPherson & Michael Reich, *Minimum Wage Effects and Monopsony Explanations* 36 (IRLE, Working Paper No. 105-23, 2023), https://irle.berkeley.edu/wp-content/uploads/2023/09/Minimum-Wage-Effects-and-Monopsony-Explanations.pdf ("In settings where employers possess wage-setting power, the monopsony model predicts that minimum wage increases up to an as yet undetermined level will increase employment; increases beyond that level could decrease employment."); José Azar & Ioana Marinescu, *Monopsony Power in the Labor Market: From Theory to* Policy, 16 ANN. REV. ECON. 491, 510 (2024) ("[W]hen the minimum wage increases while staying below the competitive level, employment increases in a monopsonistic labor market.").

contractors, the result is, not surprisingly, that wages have stagnated over the past forty years in real terms even as worker productivity and the return on capital has grown.[95]

Unions, then, can serve as an important check on monopsony power in the labor market. We need more of them. And we should probably allow similar collectives for workers in the gig economy and other independent contractors who face concentrated buyers for their services.[96] Xiyin Tang argues that content creators increasingly fall in that category. They aren't employed by platforms, but they are in effect working for the

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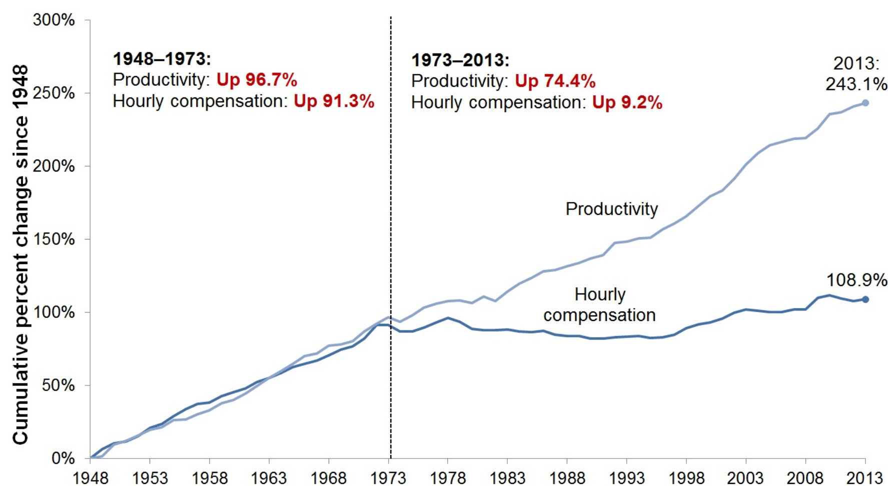
95.LAWRENCE MISHEL, ELISE GOULD & JOSH BIVENS, ECON. POL'Y INSTIT., WAGE STAGNATION IN NINE CHARTS 4 fig.2 (2015);



see also Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement in the United States*, 85 ANTITRUST L.J. 441, 500 (2023) ("While median earnings of male full-time workers in the United States grew 36% in real terms from 1960–1980, they did not change at all from 1980–2016"; that was not true for workers in other western countries).

[96] Melamed & Salop, *supra* note __; Grimes, *supra* note 65, at 456-64; Sandeep Vaheesan, *A Revival of Nondomination in Antitrust Law*, 93 GEO. WASH. L. REV. 610, 641-43 (2025) (arguing that companies use independent contractors to avoid legal restrictions). For an argument that the labor exemption should be expanded to reach gig worker collectives, see Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. Davis L. Rev. 1543, 1558-59 (2018). One interesting application of this idea is *Confederacion Hipica de Puerto Rico v. Confederacion de Jinietes Pueroriquenos, Inc.*, 30 F.4th 306 (1st Cir. 2022) (holding that non-union labor organization fell within the statutory labor exemption from antitrust liability).

platforms (or, increasingly, AI companies) without the protections we normally afford to workers.[97] And many content markets, notably music, are quite concentrated, with a few labels controlling much of the market.[98]

Courts and agencies can and should take this fact into account when evaluating a merger. Mergers between two unionized companies may have less of an effect on wages because of countervailing power. Mergers between two non-union companies, by contrast, are likely to worsen the labor monopsony bargaining problem, so agencies should be more willing to challenge them. And we should be particularly concerned about a non-union company buying a unionized one. If the company intends to break the union, it will significantly worsen the monopsony problem.

C. "Efficiencies" in Labor Markets

Finally, the economics I discussed in the last section suggest that we need to rethink many claims of efficiencies used to justify mergers. The Chicago School's theory posited that mergers could bring efficiency benefits and so courts and agencies should

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[97] Xiyin Tang, *Creative Labor and Platform Capitalism*, 73 UCLA L. REV. (forthcoming 2026) (manuscript at 38-41). *See also* Noti-Victor & Tang, *supra* note __ (noting ASCAP and BMI as examples of supplier collectives that create countervailing power).

[98] *See* Michael L. Menna, *The Fringe Musician, the 360 Deal, and a New Look at Copyright and Competition in Music*, 32 J. INTELL. PROP. L. 62 (2025).

be less willing to challenge them.[99] And occasionally that is true.[100] But economic evidence suggests that the claimed efficiencies of mergers almost never materialize.[101] So there is good reason to be skeptical of efficiency claims generally.[102]

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99. *See* Lancieri et al., *supra* note 95, at 442–43 ("[Chicago School] scholars argued that antitrust should be based on economic principles of price theory and industrial organization, with emphasis on maximizing efficiency or consumer welfare. Drawing on those principles, they argued that antitrust law and enforcement should be narrowed.").

100. Mark Glick, Gabriel A. Lozada & Darren Bush, *Why Economists Should Support Populist Antitrust Goals*, 2023 UTAH L. REV. 769, 770–73; Herbert Hovenkamp, *The Future of Antitrust Populism*, 77 FLA. L. REV. 417, 450-52 (2025).

101. JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 12–13 (2014); Orley Ashenfelter, Daniel Hosken & Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & ECON. S67, S67–68 (2014); Lancieri et al., *supra* note 95, at 501–02 ("Merger studies uniformly find that consummated mergers have resulted in higher prices and/or that they failed to generate the assumed efficiencies."); Bruce A. Blonigen & Justin R. Pierce, *Mergers May Be Profitable, but Are They Good for the Economy?*, HARV. BUS. REV. (Nov. 15, 2016), https://hbr.org/2016/11/mergers-may-be-profitable-but-are-they-good-for-the-economy; Sangjun Cho & Chune Young Chung, *Review of the Literature on Merger Waves*, 15 J. RISK FIN. MGMT. 432, 436 (2022), https://www.mdpi.com/1911-8074/15/10/432 ("[M]any studies support the view that takeovers generally do not create significant value for merged firms' shareholders in the long run."); Chris Sagers, *Why Do Corporations Merge and Why Should Law Care?*, 56 U. MICH. J.L. REFORM 291, 291 (2023) ("Generations of researchers have failed to find evidence that merger and acquisition activity generates any lasting benefits for the combining firms' owners or anyone else."); Darren Bush, Mark Glick & Gabriel A. Lozada, *The Horizontal Merger Efficiency Fallacy*, 96 TEMPLE L. REV. 571, 619-27 (2024) (evaluating all the empirical work on the question and concluding that "the literature suggests that most studied mergers result in competitive harm, usually in the form of higher prices or reductions in quantity, quality, and R&D."). For a detailed discussion of efficiencies in mergers, see generally, Louis Kaplow, *Efficiencies in Merger Analysis*, 83 ANTITRUST L.J. 557 (2021). *But see* Carl Shapiro & Ali Yurukoglu, *Trends in Competition in the United States: What Does the Evidence Show?* 36-37 (Nat'l Bur. Econ. Rsch., Working Paper No. 32762, 2024), https://www.nber.org/system/files/working_papers/w32762/w32762.pdf (arguing that the merger evidence doesn't actually reflect increasing concentration); Hovenkamp, *supra* note __, at 451 (arguing that "mergers improve price or performance a significant percentage of the time."). .

102 *See, e.g.*, David J. Ravenscraft & F.M. Scherer, *The Profitability of Mergers*, 7 INT'L J. INDUS. ORG. 101 (1989); Christian Tuch & Noel O'Sullivan, *The Impact of Acquisitions on Firm Performance: A Review of the Evidence*, 9 INT'L J. MGMT. REVS. 141 (2007); Clayton M. Christensen, Richard Alton, Curtis Rising & Andrew Waldeck, *The Big Idea: The New M&A Playbook*, HARV.

Focusing on the labor market offers an important new reason to doubt efficiency claims. Many of the supposed efficiencies a merger creates in the downstream product market really reflect the creation of monopsony power in the labor market that allows the merged firm to underpay workers and capture the resulting profit.[103] It is true that a merger to monopsony reduces the costs of the merged firm by reducing how much the firm has to pay workers. That may sometimes result in a reduction in prices or offset what would otherwise be a price increase.[104] But that reduction in cost isn't an efficiency in an economic sense. To the contrary, it reflects *inefficiency* that results from reducing competition in the labor market. The merged firm pays less in labor costs, but not because it is more efficient. It pays less because it can now pay workers who don't have good alternatives less than a competitive wage and hire fewer of them. And it results in reduced output. The tendency to treat reduced labor costs as a social gain rather than an economic harm means that too often merger law not only doesn't stop efforts to create labor or supplier monopsonies; it affirmatively encourages them.

To be sure, there are other kinds of legitimate productive efficiencies. And there are some circumstances in which a merger might eliminate truly redundant jobs,. But they generally involve circumstances in which two merging firms must each hire an

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BUS. REV., March 2011, at 89; John Kwoka & Shawn Kilpatrick, *Nonprice Effects of Mergers: Issues and Evidence*, 63 ANTITRUST BULL. 169, 179-80 (2018).

103. *See* Alexander & Salop, *supra* note 57, 308-09; Glick, Lozada & Bush, *supra* note 100, at 792-96. For a general proof of this point in monopsony cases, not limited to labor markets, see Hemphill & Rose, *supra* note __.

104 Hovenkamp, *supra* note __, at 451, 456 (citing evidence suggesting that in concentrated markets a quarter of mergers lead to lower prices and many others don't increase prices).

employee for certain positions even though one person could do both jobs. That is rare, because it assumes firms don't hire efficiently to the scale of their business. That is sometimes true, but it is unlikely to be a major driver of cost savings. For the most part, labor savings aren't efficiencies, they are *inefficiencies*. And they should not be used to justify a merger.

III. Conditioning Mergers to Restrict Labor Monopsony

I have argued elsewhere that we should reject outright many more mergers than we do today.[105] And adding the effects of mergers on the labor market increases the number of mergers that should be blocked and the harm those mergers cause. The effects of mergers on the labor market, coupled with the reasons to be skeptical of most efficiencies claims, mean that we should be blocking more mergers that affect competition in labor markets. And occasionally courts have proven willing to do so.[106]

Unfortunately, blocking mergers seems unlikely to happen in most cases. Agencies tend to look for compromises, requiring merger conditions or small, targeted

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105 Lemley, *supra* note 12, at 123-26; Carstensen & Landen, *supra* note 21, at 844-45; Glick & Bush, *supra* note 27, at 233-34; Robert Lande & Sundeep Vaheesan, *Preventing the Curse of Bigness Through Conglomerate Merger Legislation*, 52 ARIZ. ST. L.J. 75, 115-16 (2020).

106 United States v. Penguin Books, *supra* note __. For an argument that the challenge may not ultimately help prevent competition, see Jacob Noti-Victor & Xiyin Tang, *Antitrust Regulation of Copyright Markets*

101 WASH. U. L. REV. 851 (2024).

divestitures.[107] And the ability of companies to make those promises makes it harder to block the merger altogether.[108]

Given that fact, I suggest some useful ways we could incorporate the lessons of labor antitrust in designing merger conditions even if agencies are determined to allow the merger despite its competitive harms. They largely track the problems I identified above.

First, agencies and courts should always include labor markets in their evaluations of merger effects. Unlike rule of reason cases, mergers can be condemned under existing law if they are anticompetitive in some markets without balancing potentially offsetting benefits in other markets.[109] Recognizing that labor markets are always relevant markets in merger cases opens the door to blocking mergers that

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[107] *See* sources cited supra note 29. Even the FTC, which has emphasized the problems with behavioral remedies, has indicated that it is more open to settlements that prevent mergers to happen with divestitures. *See* Ferguson, *supra* note __.

[108] Steven C. Salop & Jennifer E. Sturiale, *Fixing "Litigating the Fix"*, 85 ANTITRUST L.J. 619 (2024); John Kwoka & Spencer Weber Waller, *Fix It or Forget It: A "No Remedies" Policy for Merger Enforcement*, 2021 CPI ANTITRUST CHRON. 2. *See generally* David Gelfand & Leah Brannon, *A Primer on Litigating the Fix*, 31 ANTITRUST 10 (2016).

One modestly encouraging sign that the Trump administration might not follow this approach came in FTC Chair Andrew Ferguson's September 2025 comments suggesting that the agency is thinking of taking action against post-complaint proposed modifications to mergers. *See* Bryan Koenig, *FTC Chair Pledges 'Action' Against Late Merger Fixes*, Law360, Sept. 16, 2025. But his proposed solution seemed to be to impose conditions earlier in the process, not to block the merger altogether. *Id*.

[109] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963); United States v. JetBlue Airways Corp., 712 F. Supp. 3d 109 (D. Mas. 2024); Herbert Hovenkamp, Federal Antitrust Policy § 12.2b5 (7th ed. 2024). *Cf.* Ilana Kowarski, *Divestitures must eliminate all 'merger-to-monopoly overlaps,' US FTC official says*, MLex, Sept. 15, 2025 (stating Trump administration policy that applies that doctrine at least in part).

reduce labor market competition even if they might be unobjectionable in product markets.[110]

Second, the agencies should condition merger approval on companies agreeing not to impose or enforce noncompetes and nonsolicitation agreements. While the FTC had banned noncompetes in the Biden Administration, the Trump FTC has unfortunately withdrawn that ban rather than defend it in court.[111] Nonetheless, the FTC has indicated that it does intend to target noncompetes in individual cases.[112] Mergers that reduce competition are a particularly important place to do so. Mergers between competitors reduce labor competition at the same time that they may cause people to leave their jobs, whether the company is firing employees in the name of "efficiency" or whether the merger encourages employees who don't want to work for the acquirer to look elsewhere for a job. Making it impossible for employees to leave voluntarily or to take another job after they have been fired seems particularly

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[110] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 317 (2007); Telecorr Comm'ns v. Sw. Bell Tel. Co., 305 F.3d 1124, 1133-34 (10th Cir. 2002) (antitrust law prohibits anticompetitive conduct by monopsonists "even when the anti-competitive activity does not harm end users"); Joo, *supra* note __, at 487-88.

[111] Marnin, Melman & Mims, *supra* note 73.

[112] *See, e.g.*, *U.S. FTC Orders Pet Cremation Company to Stop Enforcing Noncompetes*, MLEX (Sept. 4, 2025) https://www.mlex.com/mlex/energy/articles/2384376/us-ftc-orders-pet-cremation-company-to-stop-enforcing-noncompetes; FTC, *Federal Trade Commission Issues Request for Information on Employee Noncompete Agreements*, (Sept. 4, 2025) https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-issues-request-information-employee-noncompete-agreements ("While noncompete agreements can serve valid purposes in some circumstances, available evidence indicates that they are often subject to abuse."). For an explanation of why the ban was legal, see Jonathan F. Harris, *History Absolves the FTC: A Defense of the Rule on Non-Competes and Functional Non-Competes* (working paper 2025).

problematic when the merger itself creates the need for the job change. The same is true of nonsolicitation agreements; an employee who needs to find a new job may also need to call on their existing client contacts in order to be effective in that new job. Other departing employees may want to start a new company, and doing so requires recruiting employees. Recruiting others who want to leave rather than work for the merged firm seems a particularly valuable way to do so.[113] Enforcement agencies can mitigate the harm mergers do to employee mobility (and thus employee bargaining power) by making sure the merging firms aren't imposing barriers to exit on the very employees the merger drives out.

Third, courts and agencies evaluating the labor effects of a merger should ensure that the effect of the merger isn't to undermine unions or other workers' collectives.[114] Those collectives become even more important as employer-side bargaining power increases with market concentration,[115] and breaking a union is likely to not only reduce

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[113] Those employees are not, of course, entitled to take the employer's trade secrets. And the more people who are hired from a single firm, the greater the risk of trade secret misappropriation is. But that should be resolved on a case-by-case basis as a matter of trade secret law, not by banning solicitation altogether. And if an entire group wants to leave a merging firm, it is often because the firm is canceling the project or eliminating the division altogether, in which case there is a reasonable argument that it is abandoning any interest in those secrets. *See* Camilla A. Hrdy & Mark A. Lemley, *Abandoning Trade Secrets*, 73 STAN. L. REV. 1, 30-31 (2021).

[114] The effort to undermine unions played a subsidiary role in the successful challenge of the Kroger-Albertson's merger. *See* https://labornotes.org/2024/12/ufcw-locals-block-kroger-albertsons-mega-merger.

[115] *See* Alvaro M. Bedoya & Catherine M. Sanchez, *"Commanding the Price of Labor": Confronting the Human Cost of Labor Monopsony*, 56 LOY. UNIV. CHI. L. REV. 1 (2024).

wages but also reduce output.[116] Agencies should be particularly concerned about mergers in which a non-union company buys a unionized one, because there is a significant risk that the result will be to deprive the employees of the acquired firm of union representation. They could approve such mergers only on condition that the merged firm preserve or expand union representation.[117] And they could give extra scrutiny to mergers among non-union firms.

Finally, agencies evaluating claims of efficiencies from a merger need to be careful to distinguish between productive efficiencies in the use of capital and corporate value that comes from reducing wages below the competitive price. Recognizing that suppressing wages is an *inefficiency* in the labor market rather than simply a cost reduction in the consumer market should cause them to reject many proposed mergers. For the ones that are approved despite the fact that they could be challenged, agencies might consider requiring the merged firm to agree not to cut wages or jobs in appropriate circumstances.

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[116] For a strong argument that a company acts anticompetitively by breaking a union or misclassifying employees as independent contractors, see Sandeep Vaheesan, *Lawbreaking as a Method of Competition* at 50 (working paper 2025). *See also* Kenneth A. Bamberger & Orly Lovel, *Platform Market Power*, 32 Berkeley Tech. L.J. 1051 (2017).

[117] Microsoft promised to remain neutral on unionization of video game worker employees as part of its effort to seek approval of its merger of Activision, for instance. https://finance.yahoo.com/news/microsoft-union-ally-pushes-ftc-153014852.html. Eric Posner has argued that unions should have a veto over mergers that affect union representation. *See* Eric Posner, *Should Unions Play a Role in Merger Review?*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4840717. I wouldn't go that far, because the role of the union is only one factor to consider, and because unions sometimes hold up projects unfairly. *See* Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 CALIF. L. REV. 757 (1992). But it should certainly be a factor to consider.

Conclusion

Courts and agencies can no longer afford to ignore the role of labor markets in evaluating mergers. Understanding the economics of monopsony and the facts of labor markets should make us much more skeptical of the economic benefits of mergers generally. It also helps us to identify mergers that cause particular harm to workers. And it gives the agencies tools to try to mitigate those harms – not merely by banning the mergers, but by protecting labor unions and banning noncompetes, nonsolicitation clauses, and other barriers to exit.