

**TESTIMONY BEFORE THE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE  
ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW**

**UNITED STATES HOUSE OF REPRESENTATIVES**

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*Hearing on Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker*

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My name is Brian Callaci. I am Chief Economist at the Open Markets Institute. I want to thank Chairman Cicilline, Ranking Member Buck, and the other members of the Subcommittee for the opportunity to participate in this hearing.

Many of the issues we're discussing today are as old as the capitalist system itself. In 1776, Adam Smith wrote about employers and workers:

It is not...difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into a compliance with their terms. The masters, being fewer in number, can combine much more easily; and the law, besides, authorizes, or at least does not prohibit their combinations, while it prohibits those of the workmen. We have no acts of parliament against combining to lower the price of work; but many against combining to raise it.<sup>1</sup>

Smith expressed two ideas in this passage. First, he stated the common-sense fact that employers have power over workers. If you've held a job, you know which side of the exchange holds the upper hand. It's more burdensome for a worker to lose a job than for an employer to lose a single worker. When you get a job, it's often a cause for celebration. When you lose a job, it can plunge an entire family into crisis. Second, after describing the baseline power imbalance, Smith blamed Parliament for putting its thumb on the already uneven scales on behalf of employers against workers.<sup>2</sup>

Since Adam Smith's time, our laws have come to recognize the baseline level of employer power in the labor market. Congress made it more difficult for capital to combine against workers and consumers, starting with the 1890 Sherman Antitrust Act. Congress also recognized that the ability to collectively bargain was the best way for workers to gain fair wages in the face of employer power. Accordingly, Congress legislated labor exemptions to the Sherman Antitrust Act with the Clayton, Norris-LaGuardia, and National Labor Relations Acts, allowing workers to legally combine into unions. Congress also legislated specific labor protections to regulate wages and working conditions, including the Fair Labor Standards Act, the Occupational Safety and Health Act, and so on. The purpose of these laws was to balance out that power disparity and put workers on more equal footing.

However, over the past few decades, while attacks on unions and the declining value of the minimum wage have removed key countervailing forces to monopsony power, antitrust jurisprudence and policy have taken us a step backwards towards the conditions that so outraged Adam Smith centuries ago. In particular, antitrust has:

- Looked the other way as large corporations have consolidated buyer, or monopsony, power over both local labor markets and entire supply chains;
- Allowed employers to supercharge their power over employees through restrictive contracts like noncompete clauses, mandatory arbitration, and no-poaching agreements; and
- Facilitated large corporations' efforts to deny their workers employment rights, by sanctioning the use of restrictive contracts to dominate non-employee independent contractors and small business owners, subjecting them to tight corporate control virtually equivalent to that of employees. This has led to the creation of a so-called "gig economy" of workers without rights, and of "fissured workplaces" where workers have some rights, but not against the company that really pulls the strings controlling their working conditions.

To return balance to the economy, Congress should act to make it harder for corporations to merge and abuse their dominant position, ban coercive contracts like noncompetes, expand the antitrust labor exemption to independent contractors, and close the loopholes allowing corporations avoid labor and employment obligations by substituting restrictive contracts for employment relationships.

## 1. Monopsony

Labor market concentration has increased since 1977.<sup>3</sup> The majority of US labor markets are currently highly concentrated according to traditional antitrust criteria. The government's Horizontal Merger Guidelines assess market concentration according to a number called the Herfindahl-Hirschman Index (HHI), calculated as the sum of the squares of the market shares of each firm in the market. According to the guidelines, a market is "moderately concentrated" if the HHI is above 1,500, and "highly concentrated" if above 2,500. Recent research has found that the *average* labor market HHI in the US is 3,953, equivalent to just 2.5 firms hiring at equal market shares. Rural areas are especially likely to have highly concentrated labor markets.<sup>4</sup>

High concentration is associated with lower wages for job postings and lower job quality. On average, a 10 percent increase in concentration is associated with a 0.3 percent to 1.3 percent decrease in wages.<sup>5</sup> Labor market concentration is also associated with violations of labor rights.<sup>6</sup> Unfortunately, antitrust enforcement has all but ignored the effects of decreases in competition on workers. No court has ever blocked a merger because of its effects on labor markets.

It's not just direct employees who are affected by increasing concentration. Since 1981, concentration across economic sectors has increased.<sup>7</sup> Horizontal concentration has increased the power of large buyers, like Walmart and Amazon, over supply chains.<sup>8</sup> Buyer power not only

squeezes the profits of small businesses upstream from the large buyer,<sup>9</sup> it also reduces the wages of workers at upstream suppliers.<sup>10</sup>

In many instances monopsonistic wage suppression is associated with lower output and higher prices, and would be condemned under a consumer welfare standard. However, that is not always the case. In some cases monopsony leads to a reduction in labor's share without shrinking the size of the overall pie. Antitrust enforcement should expand its focus beyond harm to consumers or output, to take into account effects on workers and suppliers as well.<sup>11</sup>

## **2. Coercive Contracts Imposed on Employees**

Not content with increased monopsony power over workers through concentration, or with decreased worker bargaining power through deunionization and the declining value of the minimum wage, employers have gone further and imposed restrictive contracts on workers that restrict their mobility, creating artificial monopsony power.

A particularly egregious example of these restrictive contracts is what is known as a noncompete clause. These contracts prevent workers from leaving their job for another employer in the same industry. In 2016, eighteen percent of workers were bound by noncompete clauses, and forty percent had been bound by one at some point in their careers. Only ten percent of employees actually negotiated over their noncompete, and one-third were presented with their noncompete after having already accepted their job offer.<sup>12</sup>

These contracts suppress wages. A recent study found that an Oregon law making noncompetes unenforceable for hourly workers raised wages for *all* hourly workers—not just those subject to noncompetes—by two to three percent.<sup>13</sup> Another, more comprehensive study found that stricter enforceability reduced earnings for female and for non-white workers by twice as much as for white male workers.<sup>14</sup> The Open Markets Institute, along with over sixty signatories, has petitioned the Federal Trade Commission to ban these restrictive contracts.<sup>15</sup>

In addition to noncompete clauses, companies impose other types of coercive contracts on workers, including mandatory arbitration agreements, which deny workers access to the courts for redress against their employers, and training repayment agreements, which prohibit workers from leaving their jobs until they have “repaid” their employer for job-training expenses.<sup>16</sup>

## **3. Workplace Fissuring and Misclassification**

In addition to imposing restrictive contracts on employees, businesses have also used restrictive contracts known as vertical restraints to dominate and control non-employee independent contractors and small businesses. Vertical restraints are contractual restrictions imposed by one business on another across levels of competition—for example, an oil company dictating the price an independent gas station franchisee charges for gasoline, or Amazon prescribing the routes and rates for its “independent” delivery companies. A key advantage of vertical restraints is that they allow corporations to maintain the same or nearly the same level of control they would have over direct employees, while avoiding the duties and responsibilities that legally correspond to employment.<sup>17</sup>

Antitrust jurisprudence once condemned attempts by large corporations to control and dictate business decisions to non-employee independent contractors through contract. For example, in *Standard Oil Co. v. United States* in 1949 the Supreme Court, applying the Clayton Act, invalidated contracts between Standard Oil and gas stations that restricted the stations from purchasing and reselling the fuel of Standard Oil's rivals.<sup>18</sup> The protection of independent business autonomy was a major theme in vertical restraint cases of this era, as the courts sought to uphold the right of independent businesses to exercise effective independence.<sup>19</sup> They recognized the inequality in common business relationships between distributors and manufacturers,<sup>20</sup> gas station owners and oil companies,<sup>21</sup> and delivery workers and newspapers,<sup>22</sup> and the potential for economic coercion.

Beginning in 1977, the Supreme Court initiated a fundamental remaking of antitrust rules concerning vertical restraints. The Court relaxed antitrust restrictions on non-price vertical restraints and subsequently rules on price restraints. In *Continental T.V. Inc. v. GTE Sylvania Inc.*, the Court held that territorial and other non-price restraints would no longer be per se illegal, and would instead be evaluated under the rule of reason.<sup>23</sup> The Court subsequently put vertical price restraints under the rule of reason as well. In *State Oil Co. v. Khan*, it overturned the per se rule for maximum vertical price fixing and ruled these contracts are subject to the rule of reason.<sup>24</sup> In *Leegin Creative Leathers Products, Inc. v. PSKS, Inc.*, the rule of reason was extended to minimum vertical price fixing or resale price maintenance.<sup>25</sup> In practice, the rule of reason, with its stringent requirements on showing market power and adverse consumer effects, has functioned as a rule of de facto legality.<sup>26</sup>

The proliferation of vertical restraints today means that many small firms subject to them operate under contracts where their prices, most of their nonlabor input costs, and their methods of doing business are outside their control, and another, more powerful firm closely surveils their operations and even labor practices.<sup>27</sup> These intrusive contract terms affect wages and working conditions.<sup>28</sup> For example, when McDonald's franchisees complained that franchisor control over their prices squeezed their profits, a franchisee reported that McDonald's told her to "just pay your employees less."<sup>29</sup> Meanwhile two Amazon Delivery Service Partner (DSP) contractors in Portland, Oregon, shut down in June, complaining that Amazon did not allow them to raise wages high enough to attract workers.<sup>30</sup>

Vertical restraints help employers distance themselves from workers by creating what the economist David Weil calls "fissured workplaces." These are workplaces where the economic employer that actually controls wages and working conditions does not employ workers directly, but rather outsources employment to an intermediary like a franchisee or subcontractor.<sup>31</sup> For example, local delivery drivers for Amazon DSPs deliver Amazon packages in Amazon-branded cargo vans along Amazon-dictated routes, at Amazon-dictated rates, surveilled by Amazon's GPS and AI-enabled cameras, with everything down to the drivers' fingernail grooming dictated by Amazon. And yet Amazon has none of the legal responsibilities of an employer. Rather, the drivers' employer—on paper at least—is an "independent" trucking company operating under an exclusive contract with Amazon. Amazon is even able to ensure these drivers remain non-union through a contractual mandate that they be at-will employees. If the workers unionize Amazon

can terminate the contract and find a new contractor—much easier than fighting a union campaign itself.<sup>32</sup>

At the extreme of the fissured workplace are so-called “gig economy” firms like Uber or DoorDash, which control workers through vertical contracts, sophisticated algorithmic management, and digital surveillance methods. Despite this intense control, these companies claim that each worker is not an employee, but actually an entrepreneur running an independent business. These workers lack all employment rights, and risk treble-damage antitrust prosecutions if they try to unionize.

Workers and unions recognized the game being played with restrictive vertical restraints early on. A representative from the International Brotherhood of Teamsters told a congressional subcommittee in 1963 that oil companies were using vertical restraints to create a loophole between antitrust and labor laws. He alleged that oil companies classified franchised retail dealers as independent contractors, denying them collective bargaining rights, while at the same time using vertical restraints to reduce dealers to the functional status of employees.<sup>33</sup> To dealers, franchisees, and independent contractors, vertical restraints functioned as a kind of “legal arbitrage” that put them outside the protection of the laws that should have protected them.<sup>34</sup>

#### **4. Policy Recommendations**

While antitrust prosecutions of monopolists have ground to a virtual halt, antitrust agencies have vigorously pursued independent contractors and self-employed workers for attempts at collective action.<sup>35</sup> Moreover, in recent years, the antitrust agencies have interpreted antitrust laws in ways that exacerbated the control-without-responsibility problem of vertical restraints and workplace fissuring. For example, the Department of Justice endorsed legal standards that would empower corporate franchisors to collude against employees at their franchised locations, arguing that “no-poaching arrangements” should be judged under the rule of reason rather than banned outright.<sup>36</sup> No-poaching agreements are more common for franchises in low-wage and high-turnover industries, and function as tools of monopsony to limit worker mobility.<sup>37</sup> At the same time, the National Labor Relations Board made it easier for franchisor corporations to avoid joint employment duties to employees at franchised establishments.<sup>38</sup> Workers at franchised establishments were allowed to fall through the cracks, prevented from effectively contesting the mechanisms suppressing their wages as employees under the National Labor Relations Act or under the antitrust laws.

Meanwhile, partnering with the FTC, the DOJ argued against the ability of ride-hailing drivers to bargain collectively with ride-hailing corporations<sup>39</sup> while a few years later, the National Labor Relations Board<sup>40</sup> and the Department of Labor made it easier for employers to misclassify drivers as independent contractors.<sup>41</sup> As a result, these misclassified drivers were not only excluded from protection under wage and hour laws, but also prevented from engaging in any concerted activity to improve their working conditions. They currently risk a treble-damage lawsuit should they seek to collectively improve their working conditions.

We live in an age of monopoly. Antitrust has an important role to play in protecting consumers, small businesses, and workers from monopoly power. To return balance to the economy, action

is urgently needed to disperse concentrated power and prevent the abuse of workers. In recent months, Congress and the executive branch have taken important steps in this direction.

The July Executive Order on Promoting Competition in the American Economy contains a great many positive components, including the directive to the USDA to consider issuing new rules under the Packers and Stockyards Act to combat buyer power in food supply chains, and the directive to the FTC to consider issuing rules banning non-compete clauses. The FTC should further consider using its Section 5 rulemaking powers to restrict the use of exclusionary contracts and other vertical restraints to control non-employee independent contractors, and to ban misclassification of employees as independent contractors.

Meanwhile, the package of bills that the House Judiciary Committee passed in June, addressed to competition issues posed by dominant tech platforms, are a vitally important start. However, since problems of economic concentration and coercive contracts extend well beyond tech platforms, general antitrust legislation is needed too. Such legislation should explicitly protect workers and suppliers from monopsony power, prevent judges from allowing wage suppression in the name of consumer welfare or balancing worker harms against consumer gains, expand the labor exemption from antitrust laws to independent contractors, and close loopholes allowing corporations to enjoy control without employment responsibilities through vertical restraints.

In particular, Congress should pass legislation to:

- Make it easier to block mergers that create buyer power in labor markets and supply chains, and break up corporations that currently have this power, by setting out clear, bright-line rules and definitions.
- Reduce the incentives to misclassify workers by extending the labor exemption to antitrust laws to all independent contractors.
- Ban noncompete and related coercive contracts.
- Protect the autonomy of small business and prevent corporations from reducing independent contractors to the status of virtual employees by reforming the treatment of vertical restraints under *Leegin*, *State Oil*, and *Sylvania*.
- Clarify definitions of employer and joint employer under labor and employment law to restore rights to workers denied their rights through misclassification and overly restrictive vertical restraints.

Thank you for your time.

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<sup>1</sup> Smith, Adam. *The Wealth of Nations*, Book One, Chapter VIII.

<sup>2</sup> For a thoroughgoing theorization of the role of antitrust in “allocating coordination rights” to powerful actors while denying them to others, see: Paul, Sanjukta. "Antitrust as Allocator of Coordination Rights." *UCLA L. Rev.* 67 (2020): 378.

<sup>3</sup> Benmelech, Efraim, Nittai K. Bergman, and Hyunseob Kim. "Strong employers and weak employees: How does employer concentration affect wages?." *Journal of Human Resources* (2020): 0119-10007R1.

<sup>4</sup> Azar, José, Ioana Marinescu, Marshall Steinbaum, and Bledi Taska. "Concentration in US labor markets: Evidence from online vacancy data." *Labour Economics* 66 (2020): 101886.

<sup>5</sup> Azar, José, Ioana Marinescu, and Marshall Steinbaum. "Labor market concentration." *Journal of Human Resources* (2020): 1218-9914R1.

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- <sup>7</sup> Autor, David, David Dorn, Lawrence F. Katz, Christina Patterson, and John Van Reenen. "The fall of the labor share and the rise of superstar firms." *The Quarterly Journal of Economics* 135, no. 2 (2020): 645-709.
- <sup>8</sup> Lichtenstein, Nelson. *The Retail Revolution: How Wal-Mart Created a Brave New World of Business*. Picador, New York (2010).
- <sup>9</sup> Gosman, Martin L., and Mark J. Kohlbeck. "Effects of the existence and identity of major customers on supplier profitability: Is Wal-Mart different?." *Journal of Management Accounting Research* 21, no. 1 (2009): 179-201; Kim, Yoon Hee. "The effects of major customer networks on supplier profitability." *Journal of Supply Chain Management* 53, no. 1 (2017): 26-40.
- <sup>10</sup> Wilmers, Nathan. "Wage stagnation and buyer power: How buyer-supplier relations affect US workers' wages, 1978 to 2014." *American Sociological Review* 83, no. 2 (2018): 213-242.
- <sup>11</sup> Hemphill, C. Scott, and Nancy L. Rose. "Mergers that harm sellers." *Yale LJ* 127 (2017): 2078.
- <sup>12</sup> Starr, E., J. J. Prescott, and N. Bishara. Noncompetes in the us labor force. *Journal of Law and Economics*, Forthcoming.
- <sup>13</sup> Lipsitz, Michael, and Evan Starr. "Low-wage workers and the enforceability of noncompete agreements." *Management Science*, (2021).
- <sup>14</sup> Johnson, Matthew S., Kurt Lavetti, and Michael Lipsitz. "The labor market effects of legal restrictions on worker mobility." (2020). Available at [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=3455381](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3455381)
- <sup>15</sup> <https://www.openmarketsinstitute.org/publications/open-markets-afl-cio-seiu-60-signatories-demand-ftc-ban-worker-non-compete-clauses>
- <sup>16</sup> Harris, Jonathan F. "Unconscionability in Contracting for Worker Training." *Ala. L. Rev.* 72 (2020): 723.
- <sup>17</sup> Callaci, Brian. "Control without responsibility: The legal creation of franchising, 1960–1980." *Enterprise & Society* 22, no. 1 (2021): 156-182.
- <sup>18</sup> 337 U.S. 293, 314 (1949).
- <sup>19</sup> See, e.g., *Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1964) ("If the 'consignment' agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignees, and, in any event, to sell at competitive prices.").
- <sup>20</sup> *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).
- <sup>21</sup> *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968)..
- <sup>22</sup> *Albrecht v. Herald Co.*, 390 U.S. 145, 152 (1968).
- <sup>23</sup> 433 U.S. 36 (1977).
- <sup>24</sup> 522 U.S. 3 (1997).
- <sup>25</sup> 551 U.S. 877 (2007).
- <sup>26</sup> See Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 837 (2009) ("In the first decade of the twenty-first century, courts have continued their use of a burden-shifting framework in applying the rule of reason. They almost never balance. And they dispose of 97% of rule of reason cases on the grounds that the plaintiff cannot show an anticompetitive effect.")
- <sup>27</sup> Dubal, Veena B. "Winning the battle, losing the war: assessing the impact of misclassification litigation on workers in the gig economy." *Wis. L. Rev.* (2017): 739; Steinbaum, Marshall. "Antitrust, the gig economy, and labor market power." *Law & Contemp. Probs.* 82 (2019): 45.
- <sup>28</sup> Callaci, Brian. 2021. "What do franchisees do? vertical restraints as workplace fissuring and labor discipline devices." *Journal of Law & Political Economy*, 1(3):397-444.
- <sup>29</sup> <https://www.washingtonpost.com/news/storyline/wp/2014/08/04/first-person-kathryn-slater-carter-the-franchise-owner-taking-on-mcdonalds/>
- <sup>30</sup> <https://www.vice.com/en/article/v7ez5x/amazon-delivery-companies-revolt-against-amazon-shut-down>
- <sup>31</sup> Weil, David. *The fissured workplace*. Harvard University Press, (2014).
- <sup>32</sup> <https://www.bloomberg.com/news/articles/2021-05-05/amazon-work-rules-govern-tweets-body-odor-of-contract-drivers?sref=ZvMMMOkz>
- <sup>33</sup> *H.R. Rep. No. 1943. Impact Upon Small Business of Dual Distribution and Related Vertical Integration*, 88th Congress, 1963, p. 83.
- <sup>34</sup> Tomasetti, Julia. 2016. "Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology." *Hofstra Law Review* 34(1):1-78.
- <sup>35</sup> Vaheesan, Sandeep. "Accommodating capital and policing labor: Antitrust in the two gilded ages." *Md. L. Rev.* 78 (2018): 766.

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<sup>36</sup> Corrected Statement of Interest of the United States, *Harris v. CJ Star, LLC*, 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019); Corrected Statement of Interest of the United States, *Richmond v. Bergey Pullman Inc.*, 2:18-cv-00246 (E.D. Wash. Mar. 8, 2019); Corrected Statement of Interest of the United States, *Stigar v. Dough Dough, Inc.*, 2:18-cv-00244 (E.D. Wash. Mar. 8, 2019)

<sup>37</sup> Krueger, Alan B., and Orley Ashenfelter. *Theory and evidence on employer collusion in the franchise sector*. No. w24831. National Bureau of Economic Research, 2018.

<sup>38</sup> <https://www.nlr.gov/news-outreach/news-story/nlr-issues-joint-employer-final-rule>

<sup>39</sup> Brief for the United States et al. as Amici Curiae In Support of Appellant and In Favor of Reversal, *Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (2017), (No. 17-35640).

<sup>40</sup> <https://www.nlr.gov/news-outreach/news-story/nlr-returns-to-long-standing-independent-contractor-standard>

<sup>41</sup> <https://www.dol.gov/newsroom/releases/whd/whd20210106>