Testimony on Antitrust and Labor Markets
Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker
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Thank you for inviting me to testify on the role of antitrust law in labor markets. I have recently published a book on this topic called *How Antitrust Failed Workers*. As the title suggests, antitrust law could be, and should be, used to improve the wages and working conditions of workers. But for various reasons, government agencies—the Department of Justice and the Federal Trade Commission—and private litigants have rarely used antitrust law to challenge anticompetitive practices by employers against their workers. I will spend a few minutes of your time to explain why, and what can be done about it.

As you all know, antitrust law is used to protect competition in markets. Almost all cases that have gone to court involve product markets—markets for goods and services. When we worry about cartels or monopolists blocking competition in markets for search, social media, telecommunications, or retail sales, we are talking about product markets. But there is another kind of market, the labor market. Large firms—called labor monopsonists rather than monopolists—can also harm competition in labor markets.

When firms monopolize or cartelize product markets, the result is higher prices and less output.[1] As everyone understands, this hurts consumers. When firms monopsonize or cartelize labor markets, the result is lower wages. This result is less well known, but it has been understood at least since Adam Smith.[2] Another effect of labor market cartelization is lower output, just as in the case of product markets. When employers suppress wages, fewer people will work for them. That means that there is less output, which ultimately should result in higher prices for consumers as well.

Cartelization of labor markets and product markets is thus symmetrical. Both undermine economic output, resulting in stagnant economic growth. Both harm people—in their capacity as workers or consumers—and both harm lower-income people more than higher-income people, as lower-income people depend more on their wages and are more price-sensitive. Liberals and conservatives, Democrats and Republicans, should thus be united in thinking that antitrust law should be used to protect labor market competition as well as product market competition.

And, indeed, antitrust law does apply to labor markets. The Supreme Court recognized that it does as early as 1926, when it ruled that sailors in California could bring a claim against ship owners who had fixed their wages.[3] Many courts have since then acknowledged that workers, in

[1] The White House Office of the Press Secretary. "Fact Sheet: The Obama Administration Announces New Steps to Spur Competition in the Labor Market and Accelerate Wage Growth" (October 25, 2016).
[2] Adam Smith, The Wealth of Nations (1776).
[3] Anderson v. Shipowners Assn., 272 U.S. 359 (1926).

theory, can bring an antitrust claim against employers who form labor market cartels or create monopsonies in labor markets.

Yet, while thousands of antitrust cases have been brought over the years, hardly any have addressed labor market cartelization. The Justice Department and the Federal Trade Commission have reviewed thousands of mergers, approving some and rejecting others, but have not even once analyzed the labor market effects of a merger. The famous blockbuster monopoly cases—like Standard Oil, AT&T, and Microsoft—are not matched by famous, or any, monoposony cases. There have been hundreds of successful cases against sellers for fixing prices and agreeing not to compete, while only a handful of cases have been brought against employers for fixing wages and agreeing not to poach each other's workers.

In my book, I call this difference in litigation outcomes for labor-market cases and product-market cases the "litigation gap."[4] And I try to account for it. The explanation has to do with various factors: the historical reliance on labor law to protect workers; a tendency among economists to assume that labor markets are competitive; the difficulty of forming classes of workers for class action cases; and problems of proof that are unique to employment relationships. It has also become clear that worker class actions are much more difficult than consumer class actions. A class action needs a lead plaintiff: a consumer has nothing to lose from adding his or her name to the complaint; workers are terrified of retaliation.[5] And because pricing practices are more public than wages and working conditions, regulators and lawyers can more easily detect antitrust violations that harm consumers than antitrust violations that harm workers.

But there is no basis in antitrust law for treating labor-market cases more skeptically than product-market cases. The law is the same regardless of the type of market it is applied to. Nor is there any reason to think that anticompetitive behavior is less common in labor markets than in product markets. Recent academic work suggests that, if anything, anticompetitive behavior is more common in labor markets.[6] Labor markets are highly concentrated as a result of unreviewed mergers as well as organic growth. Anticompetitive clauses like covenants not to compete are ubiquitous.[7] Things haven't changed much from the late eighteenth century when Adam Smith observed that labor market cartelization was "the natural state of things which nobody ever hears of."[8]

Fortunately, in just the last few years increasing efforts have been made by the FTC, the Justice Department, state attorneys general, and private litigants to ferret out labor market cartels. Let me offer a few examples.

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[4] Eric A. Posner, How Antitrust Failed Workers (Oxford, 2021).
[5] Congress recognized this risk in 2019, and sought to address it by enacting a law protecting workers from retaliation in the Criminal Antitrust Anti-Retaliation Act of 2020.
[6] José Azar, Ioana Marinescu, and Marshall Steinbaum. "Labor market concentration." *Journal of Human Resources* (2020); Efraim Benmelech, Nittai K. Bergman, and Hyunseob Kim. "Strong employers and weak employees: How does employer concentration affect wages?" *Journal of Human Resources* (2020); Anna Sokolova and Todd Sorensen. "Monopsony in labor markets: A meta-analysis." *ILR Review* 74, no. 1 (2021).
[7] Michael Lipsitz and Evan Starr. "Low-wage workers and the enforceability of noncompete agreements." *Management Science* (2021).
[8] Adam Smith, The Wealth of Nations (1776).

In 2010, the Justice Department sued and settled a case with large tech companies including Apple and Google.[9] According to the complaint, these companies agreed not to hire away one another's software engineers.[10] This is called a no-poaching agreement. It is analogous to an agreement among sellers not to poach each other's customers, which is a criminal act. But rather than prosecute Steve Jobs and the other tech CEOs, the Justice Department dropped its case in return for a promise by the techcompanies to stop the no-poaching arrangement. This was not even a slap on the wrist, but subsequent private litigation secured a settlement of over $400 million representing lost wages.[11]

In 2016, Jimmy John's, the sandwich chain, settled lawsuits brought by a pair of state attorneys general over its use of covenants not to compete.[12] Low-skill sandwich makers were required as a condition of employment to agree not to work for any other sandwich shops within three miles of a Jimmy John's franchise for two years after leaving employment with the Jimmy John's restaurant that they worked for. Because thousands of Jimmy John's locations are scattered across the United States, the effect of the clause was to prevent former employees for working for any sandwich restaurant virtually anywhere in the United States.

This abuse of the covenant not to compete to reduce the employment options of low-skill workers is extremely common in the United States, according to the research of economist Evan Starr and his coauthors.[13] A covenant not to compete, as its name suggests, is an anticompetitive agreement, one that prevents employers from competing for workers. The common law tolerated noncompetes in narrow circumstances, for example, when workers were given access to trade secrets. But Jimmy John's use of noncompetes had no justification and simply intimidated workers, who could not afford lawyers to challenge the noncompetes under the common law, preventing them from moving to better jobs, and restricting labor markets around the country.

Meanwhile, in 2018, the economists Alan Krueger and Orley Ashenfelter released a study that reported that 58% of large, brand-name franchises, including McDonald's and Burger King, for example, incorporated no-poach clauses in the franchise contracts.[14] This meant that a worker at one McDonald's restaurant could not quit and go to work for another McDonald's restaurant that offered higher pay and more generous benefits. The different restaurants in a franchise are independent companies, and so a no-poach clause, even if administered by the franchisor, is effectively a horizontal agreement to restrict competition for labor—a clear violation of the antitrust laws. In response to state attorney general lawsuits, most franchises have dropped these clauses. But follow-on private litigation for lost wages has been met with pretty significant hostility from the courts and even the Justice Department, which has intervened to express opposition to per se treatment of no-poach clauses when they are used in vertical relationships.

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[9] David Streitfeld. "Tech Giants Settle Antitrust Hiring Suit." *The New York Times* (April 24, 2014).
[10] U.S. Department of Justice. "Complaint, US v. Adobe Systems Inc., et al." (2010)
[11] David Streitfeld. "Bigger Settlement Said to Be Reached in Silicon Valley Antitrust Case." *The New York Times* (January 14, 2015).
[12] Daniel Wiessner. "Jimmy John's settles Illinois lawsuit over non-compete agreements." *Reuters* (December 7, 2016).
[13] Evan Starr, James J. Prescott, and Norman Bishara. "Noncompete agreements in the us labor force." Journal of Law and Economics, forthcoming (2020).
[14] Alan B. Krueger and Orley Ashenfelter. "Theory and evidence on employer collusion in the franchise sector." No. w24831. National Bureau of Economic Research (2018).

No-poaching agreements occur outside of franchises, of course, as the tech scandal showed. More recently, Duke University and the University of North Carolina settled a case challenging a no-poaching agreement aimed at university faculty.[15] The agreement came to light only because a recruiter from one of the universities inadvertently disclosed to an applicant from the other university that he could not hire her despite her qualifications because of the deal made between the two universities. Needless to say, most organizations that enter illegal agreements will be more careful about revealing their existence to job applicants.

More conventional types of wage-fixing have also been identified. In 2019, workers at major meat-processing companies, including Tyson and Perdue, sued them for wage-fixing, based on allegations that the companies and others as well exchanged wage information through an organization.[16] An important feature of this case was that the wage-fixing claim grew out of an earlier price-fixing claim. Plaintiffs' lawyers were able to detect the price-fixing because prices are public, and suspicious pricing patterns were publicly available. Wages, by contrast, tend to be private or at least difficult to learn about. The wage-fixing claim was brought only after discovery in the price-fixing case revealed that the organization that the defendants allegedly established for price-fixing was also used for wage-fixing.[17]

Another area of concerns is mergers. Several studies have found that when companies merge operations in concentrated labor markets, wages decline.[18] Last year, the FTC, to its credit, submitted a comment on the proposed merger of two hospitals in Texas in which it analyzed the labor market effects of the merger. It noted that the merger would result in a hospital system that employed 96.2% of registered nurses in the relevant labor market area, which would normally result in an extreme suppression of wages.[19] Texas nonetheless approved the merger under state law. Mergers of hospitals in many other parts of the country have resulted in highly concentrated markets for medical professionals.

Finally, the Justice Department has begun to bring criminal indictments. In the last year, it has indicted executives at several health care companies for agreeing not to poach each other's senior employees.[20] This is a long time coming. In product-side antitrust cases, the Justice Department routinely indicts executives who knowingly agree to fix prices or divide markets. The year 2020, 130 years after enactment of the Sherman Act, marked the first time that the Justice Department has indicted any executives for criminal labor-side violations of antitrust law.

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[15] Brent Kendall, "Duke University Moves to Settle No-Poach Case for $54.5 Million." *Wall Street Journal* (May 20, 2019).
[16] David Yaffe-Bellany. "Why Chicken Producers Are Under Investigation for Price Fixing." *NY Times* (June 25, 2019).
[17] Claire Kelloway, "Judge Affirms Poultry Worker Wage-Fixing Claims But Demands More Details for Largest Offenders." *Food and Power* (September 23, 2020).
[18] Elena Prager and Matt Schmitt. "Employer consolidation and wages: Evidence from hospitals." *American Economic Review* 111, no. 2 (2021).
[19] Federal Trade Commission. "Submission to Texas Health and Human Services Commission Regarding the Certificate of Public Advantage Applications of Hendrick Health System and Shannon Health System" (2020).
[20] U.S. Department of Justice. "DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry." (July 15, 2021).

Let me conclude. While antitrust law prohibits cartelization of labor markets, there remains a large gap between the potential of the law and its accomplishments. A major question remains as to whether the courts will be receptive to these cases. I've read the cases from the last few years, and I can't say I am terribly optimistic. The courts have little guidance, and often seem skeptical or even hostile. Legislation that more clearly laid out the elements of labor-side antitrust claims would help push the courts in a positive direction.

What kind of legislation? In my book and elsewhere, I have laid out a number of proposals. I will not repeat them all here. But there are various ways, some simple and others more complex, to strengthen antitrust enforcement in labor markets. More money and direction for the FTC and the DOJ would be a good start. These agencies should be sure to employ labor economists as well as traditional experts in antitrust economics. And Congress can facilitate private litigation by easing the rules for class actions, identifying presumptive anticompetitive actions like noncompetes, and incorporating into merger review the requirement that agencies take into account the labor market effects of mergers.