

Introduction to the Symposium on Labor Market Power

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Recent empirical work on labor markets reveals that they are beset by frictions, including high levels of concentration and frequent collusion, contrary to the traditional view of labor markets as being perfectly competitive.¹ The implications of this work for law and policy have only begun to be explored. The *University of Chicago Law Review* convened a symposium to bring together scholars from various disciplines and with different subject matter expertise but with a common interest in understanding the regulation of labor markets in light of new empirical results. The papers delivered at the symposium have been published in this symposium issue.

Economists and policymakers have long been influenced by an understanding of the labor market as perfectly competitive. In this model, an infinitely large number of employers compete for workers by offering them wages and amenities. Employers bid up

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¹ On the impact of concentration on labor markets, see, for example, José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, 57 J. HUM. RES. S168, S179 (Supp. 2020), and Efraim Benmelech, Nittai K. Bergman, & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, 57 J. HUM. RES. S200, (Supp. 2020). On collusion, see, for example, Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 J. HUM. RES. S324, S335 (Supp. 2022), and J.J. Prescott, Norman D. Bishara, & Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 462–63 (2016). The literature is vast. For summaries, see generally ERIC POSNER, *HOW ANTITRUST FAILED WORKERS* (2021), and, more recently, Eric A. Posner, *Antitrust and Labor Markets: A Reply to Richard Epstein*, 15 N.Y.U. J.L. & LIBERTY 389 (2022). Much of this literature is discussed in the various conference papers as well.

compensation to the worker's marginal-revenue product, ensuring that work will be done whenever the benefit for the employer exceeds the cost to the worker. There is not much room for the law in this model. Employment regulations, including the minimum wage, raise the cost of employment, and thus reduce output and can end up eliminating jobs of marginally productive workers who would have been able to find work at less than the minimum wage. Labor law regulations enable unions to cartelize labor markets and obtain above-market wages, which benefit union members but hurt consumers and even workers who might otherwise be employable at lower wages. Antitrust law is irrelevant because its market-promoting goal is already achieved.²

This model can be contrasted with the classical model of monopsony, which was formulated in the 1930s by Professor Joan Robinson³ but has roots in the thinking of Adam Smith.⁴ Imagine that only a single employer offers jobs to workers in a particular area. The employer maximizes profits by setting a uniform wage rate such that the marginal revenue product of labor equals the employer's marginal cost. Unlike the employer who operates in a competitive labor market, a monopsonist faces a tradeoff: if it raises wages to attract or retain marginal workers, it must also raise wages for inframarginal workers who are willing to work for less. To minimize the inframarginal costs, the employer refuses to pay the marginal rate and thus to hire the marginal worker. Less employment normally means lower output as well, causing harm to consumers as well as workers. Because shareholders are usually wealthier than workers, monopsony also produces an adverse distributive impact, exacerbating inequality between workers and owners of capital. Monopsony like monopoly thus results in two types of harm—deadweight loss (or loss of economic efficiency) and maldistribution.

² The leading proponent of this view in legal circles is Professor Richard Epstein. See generally Richard A. Epstein, *The Application of Antitrust Law to Labor Markets - Then and Now*, 15 N.Y.U. J.L. & LIBERTY 327 (2022); Richard A. Epstein, *Antitrust Overreach in Labor Markets: A Response to Eric Posner*, 15 N.Y.U. J.L. & LIBERTY 407 (2022); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983).

³ JOAN ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 215–17 (1933).

⁴ ADAM SMITH, *THE WEALTH OF NATIONS* 59 (1776) (“Masters are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labour above their actual rate.”).

Few employment markets feature a single employer, but many of them involve a small number of employers.⁵ Economic theory—and the evidence as well—suggests that when the number of employers is small, employers will compete less vigorously. In this setting of what is sometimes called monopsonistic competition, wages, output, and employment fall between the theoretical extremes of perfect competition and monopsony.

Monopsony and monopsonistic competition (which I will henceforth refer to as monopsony alone) can justify various forms of legal intervention, just as monopoly and oligopoly do. For monopoly and oligopoly, the usual remedies are antitrust law or price regulation. In the case of labor markets, price regulation takes the form of minimum wage and maximum hours laws, along with a range of rules that regulate other aspects of the conditions and amenities of work. Labor law also facilitates the organization of unions, a type of response to anticompetitive behavior that is unique to labor markets; the law does not, except in some unusual cases, encourage “consumer organization” to counter monopolies.⁶ While labor organization has collapsed in the United States, the longtime role of unions in countering employer market power, and employment law in protecting the rights of workers, raises the question of whether antitrust is a necessary or appropriate remedy as well.

As Professor Herbert Hovenkamp explains, both mainstream antitrust law and the modern economic interpretation of it comfortably handle worker as well as consumer interests.⁷ The economy is one system. Consumers buy labor directly from workers or from intermediary firms who buy labor from workers. Anticompetitive behavior that disrupts product markets suppresses demand for goods and services and hence the demand for labor, ultimately harming workers. One might add that, under the classical monopsony model, anticompetitive behavior that disrupts labor markets raises the cost of production (by driving workers out of the labor market or into job markets for which

⁵ Azar et al., *supra* note 1, at S177–S179 (demonstrating that labor markets are frequently highly concentrated); Benmelech et al., *supra* note 1 at S202 (same).

⁶ A further exception for agricultural cooperatives was established in the Capper-Volstead Act, Pub. L. No. 67-146, 42 Stat. 388–89 (1922). Farmers were also fragmented and seen as vulnerable, like workers and sole proprietors.

⁷ See generally Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. CHI. L. REV. 511 (2023).

their talents are not suited), which may raise prices or reduce output, harming consumers. Antitrust law helps consumers and workers, regardless of whether it operates in labor markets or product markets. That consumers and workers are mainly the same people further dissipates any sense of contradiction. The only real tensions arise at a practical rather than theoretical level: arranging legal doctrine so that the appropriate party has standing to sue when the harms of anticompetitive behavior reverberate across markets. Professor Hovenkamp's discussion of *Associated General Contractors v. California State Council of Carpenters*⁸ indicates that courts have more work to do in this area.⁹

However, as Laura Alexander and Professor Steven Salop explain, the classical-monopsony result does not hold when the monopsony involves scenarios in which wage rates are achieved by bargaining, either by unions or individual workers. In this situation, anticompetitive behavior in a labor market may benefit consumers on the other side of the market.¹⁰ This bargaining scenario raises a separate point: what should the courts do when anticompetitive conduct harms workers and benefits consumers? Alexander and Salop persuasively argue that courts should find antitrust liability. Antitrust law prohibits anticompetitive behavior that causes harm to market participants that it targets; it doesn't matter whether others are incidentally benefited or not.¹¹ This is a general principle of antitrust law, one that applies to input markets as well as output markets, labor markets as well as product markets.¹² No court has ever said that if anticompetitive behavior harms consumers, the firm should be let off the hook if it shares its wrongful gains with its employees in the form of wage premiums. Why should the rules change if a firm shares rents wrongfully extracted from works with its consumers if the form of price discounts?

⁸ 459 U.S. 519 (1983).

⁹ See Hovenkamp, *supra* note 7, at *28–31.

¹⁰ See generally Laura Alexander and Steven C. Salop, *Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits*, 90 U. CHI. L. REV. 273 (2023).

¹¹ For a helpful discussion of the application of this principle to input markets, see C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 2078, 2106–09 (2018).

¹² See *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (The Sherman Act “does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.”).

Yet the sense of harmony may not fully hold. As Professors Hovenkamp, Matthew Dimick¹³ and Laura Phillips-Sawyer¹⁴ discuss, in its early years antitrust law was used to attack labor organization, not to support workers. While economic and ideological interests played the decisive role in these developments, there was a certain logic behind them as well.¹⁵ Antitrust law prohibits people from forming cartels, and workers are just people who sell labor. Unions are labor cartels that attempt to fix the price of labor. The Sherman Act¹⁶ makes no distinction between large firms and individuals. If the law applies to the former, then it applies to the latter as well. The distinction between employees and independent contractors highlights the potentially anomalous implications of the labor exemption: organization by employees and independent contractors who perform identical tasks risks antitrust liability if the workers are classified as independent contractors but not if they are classified as employees despite the slipperiness of the distinction between these two legal categories.

But workers and firms are not in the same bargaining position. As Professor Cynthia Estlund notes, the power disparity between workers (who are people) and firms (which are organizations of people and are cushioned with a capital stock) undermines the Gilded Age-era logic for treating them the same.¹⁷ Adam Smith himself made this point more than two centuries ago:

A landlord, a farmer, a master manufacturer, a merchant, though they did not employ a single workman, could generally live a year or two upon the stocks which they have already acquired. Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment. In the long-run the workman may be as necessary to

¹³ Matthew Dimick, *Conflict of Laws? Tensions between Antitrust and Labor Law* 90 U. CHI. L. REV. 379, 385–90 (2023).

¹⁴ Laura Phillips-Sawyer, *Restructuring American Antitrust Law: Institutional Economics and the Antitrust Labor Immunity, 1890-1940s*, 90 U. CHI. L. REV. 659, 693–94 (2023).

¹⁵ See Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 946–47 (1988) (analogizing labor union cartelizing behavior to other cartels in that they create barriers to market entry).

¹⁶ 15 U.S.C. §§ 1–7.

¹⁷ See generally Cynthia Estlund, *Losing Leverage: Employee Replaceability and Labor Market Power*, 90 U. CHI. L. REV. 437 (2023).

his master as his master is to him; but the necessity is not so immediate.¹⁸

Workers' dependence on their wage for subsistence or necessities thus puts them at a disadvantage—they are less “patient” than firms, and differences in patience (or discount factor) translate into payoff differences in standard bargaining models of the type analyzed by Alexander and Salop.¹⁹ Employers can endure work stoppages better than workers can because employers can draw on their capital stock to make ends meet, replace workers who quit, or demand more work from workers who remain. Workers are also hurt by the difficulty of coordinating across large numbers in the face of a hierarchically organized employer. The most natural remedy for workers is labor organization.²⁰ Once joined in a union, workers can counter the employer's bargaining power by aggregating their own (and establishing strike funds, which protect them from the asymmetry identified by Smith). The wage boards explored by Professor César F. Rosado Marzán can be seen in a similar light, though the government plays a more active role in the operation of wage boards than in collective bargaining.²¹

But this is not the only respect in which labor markets differ from product markets. Labor markets exhibit a range of peculiarities that are rare in product markets, including downward nominal wage rigidity, the pay-equity norm, and high switching costs. Professors Jonathan Masur and Eric Posner explore the implications of these frictions for antitrust law and argue that the frictions suggest a stronger role for antitrust law in labor markets

¹⁸ Smith, *supra* note 4, at 59.

¹⁹ See generally Alexander & Salop, *supra* note 10.

²⁰ This is not to say that collective bargaining is free of problems. Unions can prevent wage markdowns but also compel wage markups, which produce efficiency losses just like markdowns. For recent evidence from Europe, where collective bargaining is more common than in the United States, see Leonard Treuren, *Wage Markups and Buyer Power in Intermediate Input Markets* *22–23 (Ku Leuven, Discussion Paper Series No. 22.06, 2022); Leonard Treuren, *Wage Markups and Buyer Power in Intermediate Input Markets* 22–23 (KU Leuven Department of Economics, Discussion Paper Series No. 22.06, 2022); Sabien Dobbelaere, Boris Hirsch, Steffen Mueller, & Georg Neuschaeffer, *Organised Labour, Labour Market Imperfections, and Employer Wage Premia* 32 (IZA – Institute of Labor Economics, Discussion Paper Series No. 13909, 2020). The impact on distribution is ambiguous as price increases could hurt low-income consumers.

²¹ See generally César F. Rosado Marzán, *Quasi Tripartism: Limits of Co-Regulation and Sectoral Bargaining in the United States*, 90 U. CHI. L. REV. 703 (2022).

than in product markets.²² Professors Hiba Hafiz and Ioana Marinescu argue that antitrust law, labor law, and employment law can be used jointly and harmoniously to enhance worker bargaining power.²³ Phillips-Sawyer provides historical support for such reconciliation by arguing that antiunion antitrust enforcement reflected the political and ideological disagreements of the first half of the twentieth century rather than any inherent conflict between labor organization and antitrust law.²⁴

So workers may need both an immunity to antitrust law as cartelizers and the protection of antitrust law from the cartelizing efforts of firms. They need, in short, more generous antitrust protection than firms do from each other, and maybe even more than consumers need from firms.

The labor exemption was eventually grafted onto antitrust law, authorizing workers to form labor cartels (that is, unions) after all. The National Labor Relations Act²⁵ provided further protection and regulation of labor organization. And a whole body of law now known as employment law was developed over the course of the twentieth century. Employment law is an unruly and amorphous body of law that includes the minimum wage and various other compensation regulations, mandates, tax benefits meant to shape the employment relationship, antidiscrimination provisions, accommodations, and much else.²⁶ We can think of antitrust law, labor law, and employment law as addressing market failures in a way that protects workers under three different scenarios: when the labor market is cartelized (antitrust law); when the labor market is dominated by a (legal) monopsonist (labor law); and when the labor market is dominated by a monopsonist and workers are unable to organize (employment law). The laws work in harmony by strengthening workers' bargaining power, for example, as Professor Estlund discusses, their ability to resist termination.²⁷

²² See generally Jonathan Masur and Eric A. Posner, *Horizontal Collusion and Parallel Wage Setting in Labor Markets*, 90 U. CHI. L. REV. 545 (2023).

²³ See generally Hiba Hafiz and Ioana Marinescu, *Labor Market Regulation and Worker Power*, 90 U. CHI. L. REV. 469 (2023).

²⁴ See generally Phillips-Sawyer, *supra* note 14.

²⁵ 29 U.S.C. §§ 151–166.

²⁶ A further interesting and often overlooked protection or advantage for workers is the existence of employment opportunities in government and nonprofits. By contrast, consumers who purchase ordinary goods and services are rarely able to patronize government entities or nonprofits if they are unhappy with the offerings of commercial sellers, aside from a handful of exceptions such as education and health care.

²⁷ Estlund, *supra* note 17, at 453–54.

But an argument can be made that the differing legal regimes interfere with, rather than complement, each other. The starting point here is again the history of antagonism between labor unions and antitrust enforcers, which might be seen as a mere historical accident but could also reflect deeper forces. As Dimick points out, unions do not necessarily seek the same thing as employers do, contrary to a possible assumption that unions and employers share the goal of maximizing profits even while disagreeing on how those profits should be allocated among shareholders and workers.²⁸ The governance structure of unions (or, alternatively, their function in aggregating bargaining power against the employer's incentive to fire troublemakers) may result in a greater emphasis on employment security than wages, for example. Even more important, unions may actually prefer employers to be cartelized: cartelization can facilitate bargaining and enable firms to extract rents from consumers that can be shared between employers and workers; it may also facilitate efficient arrangements between industry and labor that take account of spillovers across firms or even industries; and it may actually stabilize unions themselves. Unions provide a variety of benefits to their members beyond the aggregation of bargaining power. And unions may worry that if antitrust law is vigorously enforced in labor markets, workers will at the margin lose their individual incentive to join unions even when union organization remains in their collective interest.

The same tensions exist between labor organization and employment law. Dimick shows that, in Germany, strong unions opposed the statutory minimum wage, possibly because they feared that strong employment protections would undermine the incentive to join unions. Even in the U.S., there is a long history of union opposition to employment law.²⁹ Employment protections that are appealing in the abstract may be less appealing to a particular unionized workforce that would be willing to give them up in return for something they care about more: this is the respect in which employment law may undermine rather than advance the interests of unionized workers. But the minimum wage and related employment protections may also be seen as necessary when unions lose power. Indeed, while Professor Satoshi Araki and OECD research fellows Andrea Bassanini, Andrew Green,

²⁸ Dimick, *supra* note 13, at 421.

²⁹ WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 30–31 (1991).

Luca Marcolin, and Cristina Volpin find that labor concentration can push down wages even in heavily unionized European countries (and hence that labor antitrust has a role to play in those countries)³⁰ an argument can be made that labor antitrust is most urgently needed where labor organization is weak.³¹

And we can round out the story by pointing out a similar tension between employment law and antitrust law. If antitrust law can promote competitive labor markets, then employers will be compelled to offer the best package of wages and work conditions. Employment law in that setting is at best unnecessary, and at worst can force employers to supply amenities that workers do not want and pass on the cost in the form of lower wages. But, again, if antitrust law falls short, as it will often do when labor markets are too small to support multiple employers, where workers lack bargaining power, or where other frictions hamper labor markets, employment law plays an important role in not just protecting workers but achieving outcomes that would (or might) be delivered by a more competitive market.

A final angle, explored by Alexander and Salop, Professors Christopher L. Peterson and Marshall Steinbaum,³² and Professor Sanjukta Paul,³³ is the role of antitrust law when the boundaries of the firm are blurred. Rideshare firms have avoided the burdens of employment and labor law by classifying drivers as independent contractors rather than as employees. That is because both employment and labor law control the relationships of employers and employees, not the relationships of independent firms. But as the authors indicate, modern technology facilitates arrangements in which entrepreneurs can exert control over independent contractors in the same way that they control employees. Antitrust law and consumer protection law need to account for these changes. Professor Paul goes further, arguing that antitrust law's traditional tolerance for coordination within firms—the “firm exemption,” as she calls it—enables anticompetitive and other harms against employees³⁴ (one should add, at least as long

³⁰ See generally Satoshi Araki, Andrea Bassanini, Andrew Green, Luca Marcolin, & Cristina Volpin, *Labor Market Concentration and Competition Policy Across the Atlantic* 90 U. CHI. L. REV. 339 (2023).

³¹ See *supra* note 20.

³² See generally Christopher L. Peterson & Marshall Steinbaum, *Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy*, 90 U. CHI. L. REV. 623 (2023).

³³ Sanjukta Paul, *On Firms*, 90 U. CHI. L. REV. 579, 583 (2023).

³⁴ *Id.* at 583–84.

as the firm is not itself the result of a merger that violates Section 7 of the Clayton Act³⁵). As Professor Hovenkamp has observed, the law's solicitude toward corporations—which are run by horizontal combinations of capitalists—contrasted dramatically in the early years of antitrust law with its hostility to unions, which are horizontal combinations of laborers.³⁶ While both firms and unions are aggregations, only unions were aggregations susceptible to antitrust liability for internal coordination. Firms were units, immune to antitrust liability because a single entity cannot coordinate with itself.

Alexander and Salop suggest this asymmetry may still prevail. While workers can form unions, if they do not, and instead remain independent contractors and attempt to set prices, they may be classified as cartels and punished accordingly.³⁷ From one angle, this seems to make sense. If rideshare drivers—to use their example (and assuming that rideshare drivers are properly classified as independent contractors rather than employees)—are permitted to fix prices through a worker's association, why shouldn't lawyers, doctors, or accountants? If professionals and other skilled workers are exempted from the antitrust laws, we might expect them to overcharge consumers rather than merely prevent themselves from being underpaid by them. From another angle, however, it does not. Professionals as well as many skilled workers like plumbers and carpenters can avoid antitrust liability by forming partnerships and other firm-like entities, with the law presuming (possibly wrongly) that the efficiency gains from these arrangements justify the market-power risks. A worker-owned firm is still a firm and enjoys the firm exemption. It may well be impractical for rideshare drivers to convert a union-like association into an organization that the law would recognize as a firm or at least a lawful joint venture, and yet they need such an association to protect themselves from the superior bargaining power of a counterparty. One court has broken this logjam by declaring that an association of independent contractors is entitled to the labor exemption as long as it is supplying "labor,"³⁸ but this

³⁵ Pub. L. No. 63-212, 38 Stat. 730 (codified at 15 U.S.C. §§ 12–27 and 29 U.S.C. §§ 53–54).

³⁶ For a historical discussion of this asymmetry, see Hovenkamp, *supra* note 15, at 958–59.

³⁷ Alexander & Salop, *supra* note 10, at 331–35.

³⁸ *Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 314–15 (1st Cir. 2022) (defining the dispute not as between contractor or employee status but as "compensation for . . . labor").

case risks extending the labor exemption to many traditional cartels. A useful comparison is the Capper-Volstead Act,³⁹ which grants an antitrust exemption to certain agricultural cooperatives, enabling them to fix prices. The Act was intended to help small farmers aggregate their bargaining power against large buyers.⁴⁰ Today, the farmers that benefit from the Act are often huge businesses, but the buyers are also even larger than they were when the law was enacted in 1922. Should workers who can't unionize because they are not employees or for other reasons be given a similar exemption? That may be an implication of these authors' work.⁴¹

Most people spend most of their lives and a good portion of their days at work. When employers obtain significant labor market power, the harms to workers will be much more significant and direct than those that occur when firms cartelize markets in flat-screen TVs, vitamins, and soybeans. Workers are not only paid less, preventing them from buying the things they need. They are also likely to suffer from worse working conditions that may interfere with other aspects of their life. And because people derive status, a sense of meaning, important personal relationships, and mental health benefits from work, the harms caused by labor market power may reverberate in ways that are not captured in traditional legal analysis. The authors featured in this symposium issue offer new perspectives for pushing that analysis forward.

³⁹ Pub. L. No. 67-146, 42 Stat. 388–89 (1922).

⁴⁰ See *supra* note 6.

⁴¹ For an insightful recent discussion, see A. Douglas Melamed & Steven C. Salop, *An Antitrust Exemption for Workers: And Why Worker Bargaining Power Benefits Consumers, Too* (2023) (unpublished manuscript) (on file with author).