AVOIDING A *PIE* IN THE FACE

Henry Walter[1]

* * *

This piece is part of the *University of Chicago Law Review* Symposium 2022: Law and Labor Market Power.

Antitrust law has been here before. About fifty-five years ago, inflation was just beginning to creep up. Political and labor unrest characterized a national dissatisfaction with the status quo. And antitrust enforcers were pressing the law to its edges—and winning. These were just a few of the ingredients that would change U.S. politics over the next two decades. The Great Inflation, the alleged abuses of power by labor-union leaders, and overzealous (or perhaps just overly successful) antitrust enforcement all contributed to the reactionary period that ushered in the Reagan administration and the deregulation movement more broadly. Even though that probusiness movement does not owe its rise entirely to antitrust enforcers who got out over their skis, the perceived overextensions of antitrust law were swept up in the political and economic narratives of the era. Of course, past need not be prologue. But when considering how law should respond to concentrated labor markets, it would be just as unwise to disregard this history as to treat it as fate. This Essay simply offers a word of caution: tread carefully. To the extent that reformers still want to address concentrated labor markets through antitrust law (despite potential signs of reduced concentration), they should proceed mindful of reform's fragile political support and potential backlash.

I. Antitrust and Labor Markets So Far

Using the antitrust laws to protect labor is not a new idea. Although not exactly an *active* protection of labor, the Clayton Act was passed over one hundred years ago to make clear that certain organized labor activities did not violate the antitrust laws. The Act legalized boycotts, strikes, and labor unions. The complex interaction between organized labor and the antitrust laws has been the subject of scholarly interest ever since. The most high-profile disputes between the labor and antitrust laws have come in the context of professional sports. While the Supreme Court has held that collective bargaining in pro sports receives an implicit statutory exemption from the antitrust laws, at least one prominent judge on the D.C. Circuit would've held that "antitrust principles do and should apply to such monopsonistic practices." That was almost thirty years ago.

[1] Henry Walter is a J.D. Candidate at the University of Chicago Law School, Class of 2022.

Never before, though, has the robust application of the antitrust laws to labor markets been more popular or seemed more likely. Look no further than the existence of this Symposium. But that's a reflection of the outside world: President Biden's "Executive Order on Promoting Competition" gave labor markets first billing. Lina Khan—the young and prominent new chairperson of the FTC—has called on Congress to pass legislation to extend the antitrust laws to protect gig workers. DOJ has contended that the antitrust laws would not currently prevent gig workers from unionizing. As antitrust law has come back into vogue in general, several prominent politicians have proposed ambitious antitrust legislation. With this increasing momentum behind antitrust reform, its advocates should reflect on the extent of the political appetite for an antitrust overhaul—particularly with an eye toward recent labor-market developments and the history of the last half-century.

II. Recent Changes in the Labor Market

As Congress and legal academia slowly began to realize and then debate the problem of labor concentration and the applicability of the antitrust laws, conditions on the ground have changed. In the last two years, the labor market has undergone several radical shifts that should cause us to hesitate and reassess our Bayesian priors. Before the COVID-19 pandemic, the labor market was already becoming more concentrated. Then, early in the COVID-19 pandemic, the labor market underwent a shock that looked like it would further concentrate the market. While small employers like restaurants and other retail stores shut down, people turned to online ordering from, namely, Amazon. The structural shift toward online shopping was already underway. But the COVID-19 pandemic was an exogenous shock that accelerated that shift. Particularly during the early pandemic, the growth of Amazon and other online retailers seemed basically unstoppable (although recent analysis suggests that people would like to return to in-person shopping to some extent).

At that point, early in the pandemic, it's not clear what applying the antitrust laws to Amazon as a labor monopsonist would've meant. The root of the problem was and is Amazon's power as a near-monopolist. No matter how vigorously the antitrust laws are enforced to Amazon's practices as a monopsonist, they cannot invent another employer to compete with Amazon short of breaking up Amazon itself. Any other effort under the antitrust laws to try to promote labor competition in Amazon's "company towns" would be either a symbolic gesture or something akin to a court-crafted minimum wage, neither of which is particularly appealing. While applying antitrust laws to labor markets is an important objective of modern antitrust enforcement, it is useful to keep in mind that it is not a workaround to traditional problems of monopoly power.

After the negative shock to labor markets came an even more shocking rebound. After a historic ten-point jump in the unemployment rate in the first month of the pandemic, the unemployment rate has fallen consistently over the last two years. Jobless claims are now at their lowest in the last fifty-plus years. Although some of the employment recovery early in the pandemic can be explained by employees merely rejoining businesses that had temporarily closed, that cannot explain the steady and precipitous changes over the last year.

The decrease in unemployment has, paradoxically, been accompanied by an increase in quitting. Forty-seven million U.S. workers voluntarily quit their jobs in 2021. The so-called Great Resignation has substantially tightened the labor market, leading to wage increases and displacing the focus on the much-maligned wage stagnation that has characterized the past several years. These wage increases have been accompanied (and lessened, in real terms) by the first substantial inflation in fifty years.

The Great Resignation has not been a typical labor movement. Abstractly, workers simply face a collective-action problem. Workers are diffuse while capital is not. In an era of decreasing formal labor organization, the Great Resignation served as a rallying cry to facilitate informal coordination among workers. Even social media played a part in facilitating workers' coordination. Just as a union might (much more efficiently) force employers to respond to coordinated labor demands, so too has the Great Resignation forced employers to respond to workers' collective mobilization.

We don't yet understand the full scope of the Great Resignation or its implications for labor policy and the antitrust laws. While it could be a flash in the pan driven by pandemic-related malaise, many have speculated that it has more to do with a "radical rethinking" of work. Millennials and Generation Z simply have different fundamental values, the argument goes, and those shifting cultural norms are reflected in a reduced attachment to jobs. Of course, other explanations abound. Labor-force participation has been decreasing for years—for reasons from lack of opportunity to video games. Others have noted that we should hesitate to celebrate the Great Resignation as purely representing labor's freedom of movement; many of those quitting their jobs have been women who have been forced into childcare roles during the pandemic. Still others have offered a more prosaic explanation: the Baby Boomer generation is retiring, and the Great Resignation is just an acceleration of the consistent increase in quit rates over the last ten years.

Given that the labor market is potentially becoming less concentrated—or that its trajectory is at least uncertain—reformers should reevaluate whether the purported benefits of applying antitrust law to labor markets is as great today as it was two or more years ago. In addition to its reduced or uncertain benefits, the costs of an antitrust extension could be substantial—and potentially increasing.

III. A Fragile Consensus and Historical Backlash: Reasons to Venture Cautiously

At least one prominent commentator has suggested that the Great Resignation and other economic changes over the last two years go to show that the antitrust laws should not be applied to labor markets at all. The Great Resignation is just new evidence, he contends, for the traditional observation that labor markets are distinct from product markets and should be treated as such. The labor laws themselves are sufficiently protective of labor such that one need not bring the antitrust laws into the labor-capital mix.

But the rollercoaster of the last two years is no reason to write off the antitrust laws' applicability to labor markets. The analysis prior to March 2020 was based largely on long-term trends and structural observations regarding labor-market concentration. It would be unduly shortsighted to disregard those findings based largely on a trend that we don't yet fully understand. That's not to say that nothing has changed. The assumptions that informed judgments about the speed and scope of antitrust enforcement in labor markets should be updated with these developments.

With these recent developments in mind, the limited guidance offered here is that no matter how the law is reshaped to respond to concentrated labor markets, reformers should go slowly. To the extent that antitrust enforcers want to tackle labor monopsony, they should learn the lessons of history and carefully monitor their political mandate.

Bringing cases is neither a necessary approach nor one that is likely to be successful. President Biden's Executive Order on Promoting Competition alone has moved markets by signaling that antitrust enforcement will be broader and more vigorous. Among other things, the order directs agencies to focus enforcement efforts on labor markets. Bringing actual test cases comes with substantially more risk. Most prominently, the antitrust complaint against Facebook brought by the FTC and many state Attorneys General was dismissed. More generally, though, the federal courts have come out of the Trump years well stocked with conservative judges, and it is difficult to imagine many jurisdictions in which antitrust enforcers could feel confident bringing an innovative theory of antitrust harm without first knowing what district court judge or circuit court panel they would get. There is no reason to believe that the Supreme Court would be any more favorable, should the Court decide to hear such a case. To the extent that employers have begun to respond to the potential applicability of antitrust law to labor markets, that should be counted as a win. A major test case runs the risk of letting Schrodinger's cat out of the bag. Losing that case would reverse any progress made (and then some) by making it clear that employers need not fear the antitrust laws, at least with regard to labor-market concentration.

Even winning a test case would not necessarily be a boon for labor markets in the long term. The Chicago School of Antitrust, pioneered by Robert Bork and others, was founded in part on caricatures of cases at the fringe of antitrust enforcement. In his seminal work, *The Antitrust Paradox*, Bork wryly notes that the "connoisseur of bad antitrust opinions must" be acquainted with *Utah Pie v. Continental Baking Co.* (1967), *United States v. Von's Grocery* (1966), and many others. Even the captions in these cases smack of antitrust enforcement run amok, and the facts are not much better. In *Utah Pie*, the Court dealt with monopolization and predatory-pricing claims in Salt Lake City's frozen-pie market. In *Von's Grocery*, the Court blocked a merger between two grocery-store chains that, together, would have made up about 7.5 percent of the grocery sales in the Los Angeles market. The cases were also decided within about a year of each other. This is not to say that these cases were necessarily wrongly decided. Rather, these decisions toward the margins of antitrust law were fodder for a conservative, deregulatory movement that more than wiped out whatever gains to competition these cases provided.

The timing of these decisions was also less than propitious. The opinions were issued in the mid-to-late 1960s, just as the Great Inflation began and the culture wars accelerated. Of course, these esoteric-if-misguided antitrust opinions had little to do with either of those phenomena. But as these macroeconomic and social trends turned a substantial portion of the public against government generally, antitrust enforcement was swept up in the reaction to regulation.

Antitrust enforcement today is in an optimistic yet fragile position. Big tech has served as a useful bogeyman to form a tenuous political consensus that has held for the last few years. For the right, antitrust enforcement against the tech giants presents an opportunity to stick it to California upstarts who have exercised their power to censor conservative voices. For the left, antitrust enforcement makes it possible to go after big business and partly make good on its persistent refrain to "make the economy work for everyone." The difficulty in reconciling these different starting points for justifying antitrust enforcement is surely one of the reasons that legislation has not emerged despite a seeming agreement on endpoint. (The probability of passage for any of the aforementioned proposed legislation looks increasingly unlikely.) Playing too far into one justification or the other can easily turn the other side away. An antitrust enforcement policy that focuses too heavily on labor could quickly make antitrust into a political lightning rod, permitting Republicans to fall back on the tried-and-true line that the left is overburdening U.S. businesses with needless regulation. The Reagan-era-style deregulatory redux is never very far away.

Of course, there is little risk that antitrust law and policy, as currently conceived, will become *too* friendly to labor. Indeed, part of the point of this Symposium is to advertise that the antitrust laws can and should be applied to labor markets *at all*. Additionally, the prospect of a negative reaction to progress could always be used to justify the status quo. What distinguishes antitrust enforcement, though, is the historical experience of marginal progress being vastly overwhelmed by backlash.

In general, judge-made law and legislation are lagging indicators. This is especially true in the context of antitrust law. Before judges, legislators, and academics realize that there is a serious problem of market concentration, it must have been bubbling up for some time. And once they realize the problem, the judicial and legislative processes are slow and costly. None of this is news. But it is helpful to keep in mind that both political and economic markets have natural cycles. Once the legal-political pendulum has swung fully to one side, the economic pendulum is often already swinging in the opposite direction. Of course, the premise of antitrust law is that market concentration is not a pendulum—it is a snowball that gains momentum absent government intervention. But particularly in the dynamic market between labor and employers, the facts on the ground should sometimes lead us to question the strength of that assumption. With labor on the move and inflation on the rise, perhaps the best approach is to go slowly, if at all. Picking the low-hanging fruit and vaguely threatening to climb a bit further up the tree—as unsatisfying as that may be—is the approach most likely to be effective today without risking the collapse of a limited antitrust consensus.

* * *

Henry Walter is a J.D. Candidate at the University of Chicago Law School, Class of 2022.