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Recommended Citation

Hiba Hafiz. "Labor's Antitrust Paradox." *University of Chicago Law Review* 86, no.2 (2020): 381-411.

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Labor Antitrust's Paradox

Hiba Hafiz†

Growing inequality, the decline in labor's share of national income, and increasing evidence of labor-market concentration and employer buyer power are all subjects of national attention, eliciting wide-ranging proposals for legal reform. Many proposals hinge on labor-market fixes and empowering workers within and beyond existing work law or through tax-and-transfer schemes. But a recent surge of interest focuses on applying antitrust law in labor markets, or "labor antitrust." These proposals call for more aggressive enforcement by the Department of Justice (DOJ) and Federal Trade Commission (FTC) as well as stronger legal remedies for employer collusion and unlawful monopsony that suppresses workers' wages.

The turn to labor antitrust is driven in part by congressional gridlock and the collapse of labor law as a dominant source of labor market regulation, inviting regulation through other means. Labor antitrust promises an effective attack because agency discretion and judicial enforcement can police labor markets without substantial amendments to existing law, bypassing the current impasse in Congress. Further, unlike labor and employment law, labor antitrust is uniquely positioned to challenge industry-wide wage suppression: suing multiple employers is increasingly challenging in work law as a statutory, doctrinal, and procedural matter.

But current labor-antitrust proposals, while fruitful, are fundamentally limited in two ways. First, echoing a broader antitrust policy crisis, they inherit and reinvigorate debates about the current consumer welfare goal of antitrust. The proposals ignore that, as a theoretical and practical matter, employers' anticompetitive conduct in labor markets does not necessarily harm consumers. As a result, workers' labor-antitrust challenges will face an uphill battle under current law: when consumers are not harmed, labor antitrust can neither effectively police employer buyer power nor fill gaps in labor market regulation left by a retreating labor law. Second, the proposals ignore real synergies between antitrust enforcement and labor regulation that could preempt the rise of employer buyer power and contain its exercise.

This Essay analyzes the limitations of current labor-antitrust proposals and argues for "regulatory sharing" between antitrust and labor law to combat the adverse effects of employer buyer power. It makes three key contributions. First, it frames the new labor antitrust as disrupting a grand regulatory bargain, reinforced by the Chicago School, that separated labor and antitrust regulation to resolve a perceived paradox in serving two masters: workers and consumers. The dominance of the consumer welfare standard resolved that paradox. Second, it explains how scholarly attempts to invigorate labor antitrust fail to overcome this paradox and ignore theoretical and doctrinal roadblocks to maximizing both worker and consumer welfare, leaving worker-plaintiffs vulnerable to failure. Third, it proposes a

† Assistant Professor of Law, Boston College Law School. I am deeply grateful to Eric Posner, Sanjukta Paul, Brian Callaci, and the participants of the Reassessing the Chicago School of Antitrust Law Symposium for their helpful comments and suggestions.

novel restructuring of labor market regulation that integrates antitrust and labor law enforcement to achieve coherent and effective regulation of employer buyer power. It refocuses labor-antitrust claims on consumer welfare ends. In doing so, it also relegates worker welfare considerations to a labor law supplemented and fortified by the creation of substantive presumptions and defenses triggered by labor-antitrust findings as well as labor agency involvement in merger review.

INTRODUCTION

Growing inequality, the decline in labor's share of national income, and increasing evidence of labor-market concentration and employer buyer power are all subjects of national attention, eliciting wide-ranging proposals for legal reform. Many proposals hinge on either labor market fixes, empowering workers within and beyond existing work law, or tax-and-transfer schemes.¹ But a recent surge of interest focuses on applying antitrust law in labor markets, or "labor antitrust." These proposals call for more aggressive enforcement by the Department of Justice (DOJ) and Federal Trade Commission (FTC) as well as stronger legal remedies for employer collusion and unlawful monopsony that suppresses workers' wages.²

The turn to labor antitrust is driven in part by congressional gridlock and the collapse of labor law as a dominant source of labor market regulation, inviting regulation through other means. Labor antitrust promises an effective attack because agency discretion and judicial enforcement can police labor markets without substantial amendments to existing law, bypassing the current impasse in Congress. Further, unlike labor and employment law, labor antitrust is uniquely positioned to challenge industry-wide

¹ See generally, for example, Joseph R. Fishkin and William E. Forbath, *The Anti-Oligarchy Constitution* (forthcoming Harvard 2020) (on file with author) (urging a constitutional critique of inequitable wealth concentration); Kate Andrias, *The New Labor Law*, 126 Yale L J 2 (2016). For tax policy discussions, see, for example, Eric A. Posner and E. Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* 205–49 (Princeton 2018); Thomas Piketty, *Capital in the Twenty-First Century* 471–570 (Harvard 2014) (Arthur Goldhammer, trans); Emmanuel Saez, *Income and Wealth Inequality: Evidence and Policy Implications*, 35 Contemp Econ Pol 7, 18–24 (2017).

² See, for example, Ioana Marinescu and Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Ind L J 1031, 1048–63 (2019) (explaining how courts should evaluate challenges to labor monopsonies under the Clayton Act); Suresh Naidu and Eric A. Posner, *Labor Monopsony and the Limits of the Law* *7–26 (working paper, Jan 13, 2019), archived at <https://perma.cc/52RQ-LK45>; Ioana Marinescu and Eric A. Posner, *Why Has Antitrust Law Failed Workers?* *31–40 (working paper, Mar 10, 2019), archived at <https://perma.cc/GD3B-XJLD>; Suresh Naidu, Eric A. Posner, and Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv L Rev 536, 574–99 (2018).

wage suppression; suing multiple employers is increasingly challenging in work law as a statutory, doctrinal, and procedural matter.

But current labor-antitrust proposals, while fruitful, are fundamentally limited in two ways. First, echoing a broader antitrust policy crisis, they inherit and reinvigorate debates about the current consumer welfare goal of antitrust. The proposals ignore that, as a theoretical and practical matter, employers' anticompetitive conduct in labor markets does not necessarily harm consumers. As a result, workers' labor-antitrust challenges will face an uphill battle under current law: when consumers are not harmed, labor antitrust can neither effectively police employer buyer power nor fill gaps in labor market regulation left by a retreating labor law. Second, the proposals ignore real synergies between antitrust enforcement and labor regulation that could preempt the rise of employer buyer power and contain its exercise.

This Essay analyzes the limitations of current labor-antitrust proposals and argues for *regulatory sharing* between antitrust and labor law to combat the adverse effects of employer buyer power. It makes three key contributions. First, it frames the new labor antitrust as disrupting a grand regulatory bargain, reinforced by the Chicago School, that separated labor and antitrust regulation to resolve a perceived paradox in serving two masters: workers and consumers. The dominance of the consumer welfare standard resolved that paradox. Second, it explains how scholarly attempts to invigorate labor antitrust fail to overcome this paradox and ignore theoretical and doctrinal roadblocks to maximizing *both* worker and consumer welfare, leaving worker-plaintiffs vulnerable to failure. Third, it proposes a novel restructuring of labor market regulation that integrates antitrust and labor law enforcement to achieve coherent and effective regulation of employer buyer power. It refocuses labor-antitrust claims on consumer welfare ends and relegates worker welfare considerations to a labor law supplemented and fortified by the creation of substantive presumptions and defenses triggered by labor-antitrust findings as well as labor agency involvement in merger review.

I. THE RISE OF LABOR ANTITRUST'S PARADOX

A. Identifying the Paradox: Chicago School Approaches

As has been well documented, the Chicago School elevated economic analysis and the consumer welfare standard in antitrust

policy and doctrine.³ But it also established a strict separation between labor and product market regulation, focusing exclusively on worker combinations' anticompetitive effects on consumer prices.⁴ Judge Robert Bork explicitly relegated decisions on how to value collectively bargained wage premiums over maximizing consumer welfare to congressional policy: "We . . . reserve the choice for legislative determination and require the terms of the treaty—between . . . laborers and consumers . . .—to be written down, with the resultant . . . value trade-offs specified in . . . labor-management relations laws."⁵ The legislative mandate "encourag[ing] [] labor union formation to enhance the gains of some workers at the expense of consumers" meant that labor-antitrust regulation exceeded the judicial role:

For some time . . . the federal courts, not perceiving the basic incongruity of the attempt, did try to govern labor-management relations through the Sherman Act. The incongruity lay in the attempt to permit labor unions as cartels fixing the price of labor but to *regulate* their behavior. This was identical with a decision to permit cartelization but to require that the cartel charge only "reasonable" prices, a course the Court refused to take in nonlabor cases. The result . . . was an incoherent body of law. . . .

Courts are the wrong institution for these unstructured interpersonal comparisons both because political choices of this nature should . . . be made by elected and representative institutions, and because the courts do not have the facilities for fact-finding on a broad scale that are available to the legislature. The admission by a court of goals in conflict with consumer welfare into the adjudicative process, therefore, involves a serious usurpation of the legislative function.⁶

Bork's core concerns were administrability and avoiding "rate regulation" to ensure "reasonable" wages; such could not be the

³ See, for example, Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 Harv J L & Pub Pol 449, 450–52 (2008); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U Pa L Rev 925, 928 (1979) (discussing the role of price theory in the Chicago School).

⁴ See generally, for example, Thomas J. Campbell, *Labor Law and Economics*, 38 Stan L Rev 991 (1986); Douglas L. Leslie, *Principles of Labor Antitrust*, 66 Va L Rev 1183 (1980); Richard A. Posner, *Some Economics of Labor Law*, 51 U Chi L Rev 988 (1984).

⁵ Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 80 (Basic Books 1978).

⁶ *Id.* at 83 (emphasis added).

antitrust court's task.⁷ Bork likewise relegated distributional decisions to the political branches because these decisions “require[] a choice between two groups of consumers that should be made by the legislature.”⁸

Thus, traditional Chicago School accounts were skeptical of labor-antitrust enforcement, arguing that “[t]he effect of a labor-market restraint on price and output may be as great as that of a business-market restraint; however, the legislative choice to sanction some union acts but not others seems to rest on considerations beyond those of competition and efficiency.”⁹ They concentrated instead on labor market restraints that were “part of a scheme to regulate the product market by controlling prices, outputs, or market allocations.”¹⁰

As a result of these developments, and of the Chicago School's intellectual dominance in modern antitrust, employer monopsony and collusion were, at best, underenforced and underdiscussed. The DOJ and FTC's Horizontal Merger Guidelines from 1968 through 1997 made no reference to mergers that enhance buy-side market power, and when the 2010 Guidelines introduced buy-side effects, there was no mention of whether or how to assess such effects in labor markets.¹¹

B. Regulatory Détente: Antitrust's Labor Exemption

The Chicago School's identification of labor antitrust's paradox echoed a long-standing regulatory détente that placed worker combinations and vertical employer-employee restraints under a separate regime from antitrust law: labor law. Workers partially won antitrust immunity under the Clayton¹² and Norris-LaGuardia¹³ Acts' “statutory” exemption, which protected union conduct during a labor dispute as long as that conduct was peaceful, in the union's own interest, and not combined with nonlabor groups.¹⁴

⁷ See *id.* at 79–88.

⁸ *Id.* at 111.

⁹ Leslie, 66 Va L Rev at 1184 (cited in note 4). See also Campbell, 38 Stan L Rev at 992–94 (cited in note 4); Posner, 51 U Chi L Rev at 989–90 (cited in note 4).

¹⁰ Leslie, 66 Va L Rev at 1185 (cited in note 4).

¹¹ See Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 12 (Aug 19, 2010), archived at <https://perma.cc/E4WS-NMAG>; Naidu, Posner, and Weyl, 132 Harv L Rev at 540 (cited in note 2). See also note 82.

¹² 38 Stat 730 (1914), codified as amended in various sections of Title 15 and Title 29.

¹³ Pub L No 72-65, 47 Stat 70 (1932), codified as amended at 29 USC § 101 et seq.

¹⁴ 15 USC § 17; 29 USC §§ 52, 101, 104, 113.

The exemption was motivated by the view that labor was not a “commodity” whose price should be set by market forces alone.¹⁵ The bifurcation of labor from antitrust regulation was a means of targeting corporate combinations to ensure interfirm competition while protecting *worker* combinations from wage-setting through “prodigal and damaging” competition.¹⁶ For the 1914 Congress, the exemption rejected “the point of view of some economists” that labor, “like potatoes, or steel . . . is offered by the owner in the highest market and sought by the buyer in the lowest market.”¹⁷ It was justified under classical political economy, matured through nineteenth-century American labor republicanism, to protect workers’ liberty and achieve “a higher and *just price* for . . . labor.”¹⁸ Congressional debates on the Norris-LaGuardia Act reiterated this view:

The constantly increasing combinations of wealth have [] built up court-made law which has placed the laborer at the mercy of capital, has denied to him a fair wage and a fair opportunity for freedom of contract. Shall combinations of wealth enslave the workingmen, or shall Congress give the laboring men the right to use their collective strength against the combination of wealth?¹⁹

The 1935 enactment of the National Labor Relations Act²⁰ (NLRA) created a regulatory home for worker combinations. It was the first legislation to explicitly introduce the problem of employer buyer power into labor-market regulation, and its purpose was to prevent the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership” from “depressing wage rates and the purchasing power of wage earners.”²¹ The NLRA justified worker combinations as a countervailing power that, in the words

¹⁵ See 15 USC § 17.

¹⁶ 75 Cong Rec 5425, 5513 (1932) (statement of Rep White).

¹⁷ 51 Cong Rec 14585, 14608 (1914) (statement of Sen Kern).

¹⁸ Id at 14587 (statement of Sen Lewis) (emphasis added). For the history of “free labor,” “the justice price,” and labor republicanism, see Alex Gourevitch, *From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century* 82–86 (Cambridge 2015); William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 Yale J Reg 721, 733–36 (2018).

¹⁹ 75 Cong Rec at 5487 (statement of Rep Sparks) (cited in note 16).

²⁰ Pub L No 74-198, 49 Stat 449, codified as amended at 29 USC § 151 et seq.

²¹ 29 USC § 151.

of its sponsor, Senator Robert Wagner, “match[ed] the huge aggregates of modern capital.”²² But workers’ protected “cartel” activity was presumptively limited to single-firm bargaining units, and strike protections extended almost exclusively to strikes directed against that single-firm employer.²³

This regulatory bargain was a precarious *détente*. The lines between labor and antitrust regulation blurred with the imposition of antitrust liability on worker combinations for: (1) boycotting *other* firms that dealt with their employer during labor disputes; (2) joining with their employers to exclude employers’ non-unionized competitors in downstream markets; and (3) combining as NLRA-exempt workers, like independent contractors.²⁴ Worker liability for the effects of their actions on product markets evolved into a “nonstatutory” labor exemption, in which courts impose liability if they find the NLRA’s labor policy favoring collective bargaining is *outweighed* by antitrust policy favoring free competition in business markets.²⁵ So if NLRA-protected workers act alone—say, by striking—to compel their employer to agree to better wages, they are entitled to antitrust immunity.²⁶ But if workers agree with a “nonlabor party [] to restrain competition in a business market,”²⁷ or compel employers “to impose a certain wage scale on other bargaining units,”²⁸ their behavior falls *outside* the exemption: courts have characterized such behavior as a “restraint on the business market [that] has substantial anticompetitive effects . . . that would not follow naturally from the elimination of competition over wages and working conditions.”²⁹

Antitrust liability was exclusively imposed on *worker* combinations; employers suffered no antitrust liability for employer-employer collusion, labor-market monopsony, or buyer power over nonunionized or unprotected workers. The Supreme Court even said, in *Apex Hosiery Co v Leader*,³⁰ that “an elimination of price

²² Robert Wagner, *The New Responsibilities of Organized Labor*, NY State Federation of Labor Convention Address ¶ 5 (1928), reprinted in 70 Cong Rec 225, 227.

²³ See 29 USC § 159(b); *Dixie Belle Mills, Inc.*, 139 NLRB 629, 630–32 (1962); *J&L Plate, Inc.*, 310 NLRB 429, 429–30 (1993). Multi-employer bargaining units are rare.

²⁴ See, for example, *Connell Construction Co v Plumbers and Steamfitters Local Union No 100*, 421 US 616, 621–23 (1975); *Federal Trade Commission v Superior Court Trial Lawyers Association*, 493 US 411, 422–23 (1990).

²⁵ See *Connell*, 421 US at 622.

²⁶ See, for example, *United States v Hutcheson*, 312 US 219, 233 (1941).

²⁷ *Connell*, 421 US at 622–23.

²⁸ *United Mine Workers of America v Pennington*, 381 US 657, 665 (1965).

²⁹ *Connell*, 421 US at 625.

³⁰ 310 US 469 (1940).

competition based on differences in labor standards” between employers “has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.”³¹ Some scholars interpret *Apex Hosiery* more broadly—as holding that “the Sherman Act . . . would simply not apply to a certain class of restraints. Employers, or employers in combination with unions, would presumably be as free as *unions* acting alone to halt competition grounded in wage differentials.”³²

Commentary in the Warren Court era warned that strategic application of the labor exemption would disrupt the *détente*, wrongly committing “the federal judiciary to the formulation of national labor policy by reaffirming the Sherman Act as an *independent head* of federal jurisdiction in labor disputes.”³³ For example, in evaluating the Court’s application of the Sherman Act to unions’ secondary boycotts—boycotts against nonemployers to pressure direct employers or expand union density—Professor Ralph Winter concluded that a “*per se* ban on secondary boycotts [] cannot be based solely on a desire to maintain competition but necessarily stems from a judicial judgment as to how much power unions should have.”³⁴ He argued that antitrust should stay out of regulating labor markets—even when worker conduct has product-market effects—to preserve collective bargaining as “a *system* of private ordering” in which “radical tampering must be at the price of restrictions on freedom and will necessarily have unpredictable results.”³⁵

C. Disrupting the *Détente*: The New Labor Antitrust

The recent focus of attention on the anticompetitive effects of employer buyer power has prompted calls for aggressive labor-antitrust enforcement and even incorporation of work-law violations into antitrust liability analysis against employers.³⁶ Professors Eric Posner, Glen Weyl, Suresh Naidu, Herbert Hovenkamp, Ioana Marinescu, and Marshall Steinbaum have theorized and

³¹ Id at 503–04.

³² Theodore J. St. Antoine, Connell: *Antitrust Law at the Expense of Labor Law*, 62 Va L Rev 603, 606 (1976) (emphasis added).

³³ Ralph K. Winter Jr, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 Yale L J 14, 34 (1963) (emphasis added).

³⁴ Id at 36.

³⁵ Id at 68 (emphasis added).

³⁶ See note 2; Ioana Marinescu and Eric A. Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony* *13–16 (Roosevelt Institute Working Paper, 2018), archived at <https://perma.cc/HJK5-A6D7>.

empirically analyzed the effects of employer market power on worker pay, primarily to inform government merger enforcement strategies (and, to a lesser extent, employer restraints and conduct under Sections 1 and 2 of the Sherman Act).³⁷ For the most part, this scholarship prescribes how scrutinized conduct should be deemed anticompetitive under traditional structural industrial organization (IO) models and methods, demonstrating their administrability and easy integration into existing enforcement.³⁸

Government and private enforcers have followed suit, challenging employer collusion on wages, no-poaching agreements, and unlawful monopsonization while announcing incorporation of labor market effects in merger review.³⁹ The DOJ Antitrust Division and the FTC have condemned and announced their intent to criminally prosecute naked wage restraints and horizontal no-poaching agreements as per se unlawful.⁴⁰ And the FTC has conducted hearings to investigate and publicize the problem of anti-competitive conduct in labor markets.⁴¹

But by not seriously contending with theoretical, doctrinal, and factual reasons why worker and consumer welfare are not always aligned, the new labor-antitrust scholarship revives labor antitrust's paradox. Many scholars claim their proposals are

³⁷ See note 2; C. Scott Hemphill and Nancy L. Rose, *Mergers that Harm Sellers*, 127 Yale L J 2078, 2082–85 (2018). See generally Alan B. Krueger and Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion* (The Hamilton Project, Feb 2018), archived at <https://perma.cc/YC7H-49YJ>. For empirical work, see generally Jose A. Azar, et al, *Concentration in US Labor Markets: Evidence from Online Vacancy Data* (National Bureau of Economic Research Working Paper No 24395, Feb 2019), archived at <https://perma.cc/4EQF-C6ZB>; David Berger, Kyle Herkenhoff, and Simon Mongey, *Labor Market Power* (Institute of Labor Economics Discussion Paper No 12276, Apr 2019), archived at <https://perma.cc/NWA8-4LZH>; Arindrajit Dube, et al, *Monopsony in Online Labor Markets* (National Bureau of Economic Research Working Paper No 24416, Mar 2018), archived at <https://perma.cc/2E7T-L7D4>.

³⁸ See Naidu, Posner, and Weyl, 132 Harv L Rev at 539, 542, 584 (cited in note 2). See also Marinescu and Hovenkamp, 94 Ind L J at 1034, 1044 (cited in note 2). See generally Adil Abdela and Marshall Steinbaum, *Labor Market Impact of the Proposed Sprint-T-Mobile Merger* (Economic Policy Institute and Roosevelt Institute, Dec 2018), archived at <https://perma.cc/Q5UC-YZT6>.

³⁹ See *Horizontal Merger Guidelines* at § 12 (cited in note 11).

⁴⁰ Department of Justice and Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* *3 (Oct 2016), archived at <https://perma.cc/DVQ6-LHA3>.

⁴¹ See generally Federal Trade Commission, *Hearing on Competition and Consumer Protection in the 21st Century* (Oct 15–17, 2018), archived at <https://perma.cc/MZ2Y-Z5Y5>; Federal Trade Commission, *Hearing on Competition and Consumer Protection in the 21st Century* (Oct 16, 2018), archived at <https://perma.cc/YK62-XR3K>; Federal Trade Commission, *Hearing on Competition and Consumer Protection in the 21st Century* (Oct 17, 2018), archived at <https://perma.cc/NGP4-YVN2>.

consistent with the consumer welfare standard because, they postulate, employer buyer power harms consumers: it results in reduced labor inputs, reduced labor inputs in turn reduce outputs downstream, and output reduction results in higher prices and deadweight loss that harms consumers.⁴² But theory, doctrine, and the empirical realities of current labor markets undermine this account. Other scholars reject the consumer welfare standard, proposing worker welfare, overall welfare, or broader “public interest” or “effective competition” standards.⁴³ Worker welfare standard proponents argue that, in evaluating employers’ anti-competitive conduct, harm to workers should be sufficient to trigger antitrust liability.⁴⁴ Aggregate welfare proponents would weigh anticompetitive effects in labor markets against efficiencies created in product markets.⁴⁵ Neo-Brandeisians propose an “effective”⁴⁶ or “protection of competition”⁴⁷ standard. Under the effective-competition standard, antitrust policy would protect individuals, consumers, workers, and others throughout the supply chain, but would also focus on preserving opportunities for competitors, promoting individual autonomy and well-being, and

⁴² See, for example, Naidu, Posner, and Weyl, 132 Harv L Rev at 559 (cited in note 2); Marinescu and Hovenkamp, 94 Ind L J at 1062–63 (cited in note 2); Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 Antitrust L J 707, 713–21 (2007).

⁴³ See, for example, Peter C. Carstensen, *Competition Policy and the Control of Buyer Power* 16–37 (Edward Elgar 2017); Marshall Steinbaum and Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust* *29–48 (Roosevelt Institute, Sept 2018), archived at <https://perma.cc/AR68-6XKN>. See also generally Bork, *Antitrust Paradox* (cited in note 5); Jeffrey L. Harrison, *A Socio-Economic Approach to Antitrust: Unpacking Competition, Consumer Surplus, and Allocative Efficiency*, 49 Akron L Rev 409 (2016); Werden, 74 Antitrust L J 707 (cited in note 42).

⁴⁴ See, for example, The White House, *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses* *5 (May 2016), archived at <https://perma.cc/6MH6-D2TH>; Naidu, Posner, and Weyl, 132 Harv L Rev at 586–87 (cited in note 2) (“[M]ergers that trigger scrutiny by reducing labor market competition should be subject to a ‘worker welfare’ standard.”).

⁴⁵ See, for example, Department of the Treasury, Office of Economic Policy, *Non-Compete Contracts: Economic Effects and Policy Implications* *3, 22–23 (Mar 2016), archived at <https://perma.cc/HSF2-XAYJ>; Marinescu and Hovenkamp, 94 Ind L J at 1057–61 (cited in note 2); Hemphill and Rose, 127 Yale L J at 2080–2110 (cited in note 37) (proposing a “trading partner welfare” standard). But see Alan Manning, *Monopsony in Motion: Imperfect Competition in Labor Markets* 63–66 (Princeton 2003) (arguing that monopsony power reduces both consumer and aggregate welfare).

⁴⁶ See, for example, Steinbaum and Stucke, *Effective Competition Standard* at *29 (cited in note 43).

⁴⁷ See, for example, Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* 135–39 (Columbia Global Reports 2018).

de-concentrating private power.⁴⁸ The protection-of-competition test “might [] consider[]” consumer welfare harms, but the ultimate concern would be “distortion or suppression of the competitive process.”⁴⁹

II. PARADOXICAL LIMITATIONS OF THE NEW LABOR ANTITRUST

Worker- and consumer-welfare conflicts can occur as a matter of theory, doctrine, and fact. This Part presents the range of employers' procompetitive justifications of, and defenses to, labor market restraints and the resulting challenges labor antitrust faces under the consumer welfare standard. These challenges limit worker protection against monopsonistic and colluding employers.

A. Conflict Between Consumer and Worker Welfare: Economic Theory

Commentators argue that labor-antitrust enforcement is consistent with the consumer welfare standard under economic theory: when employers exercise their monopsony power by reducing their purchase of labor inputs, that reduces outputs in product markets, raising prices to consumers.⁵⁰ In other words, labor-market restraints that increase monopsony power are bad for workers *and* consumers. While this may be true at least sometimes, it is not always true.

First, commentators concede that prices to consumers will not increase if product markets are competitive or when “reduced sales . . . will be *offset*” by new firms' sales.⁵¹ Second, this account assumes a monopsonist cannot wage discriminate between employees; if it *can*, it can suppress compensation without reducing labor inputs by hiring new workers at different pay rates.⁵² In this case as well, workers would be harmed but consumers not. And

⁴⁸ Steinbaum and Stucke, *Effective Competition Standard* at *29 (cited in note 43).

⁴⁹ Tim Wu, *After Consumer Welfare, Now What? The “Protection of Competition” Standard in Practice* *9 (Competition Policy International, Apr 2018), archived at <https://perma.cc/3G26-63U4>.

⁵⁰ See, for example, Naidu, Posner, and Weyl, 132 Harv L Rev at 559 (cited in note 2).

⁵¹ Id at 559 n 93 (emphasis added). See also *United States v Syufy Enterprises*, 903 F2d 659, 663 (9th Cir 1990) (finding that the defendant exercised monopsony power only against supplier film distributors, not consumer moviegoers).

⁵² See Naidu, Posner, and Weyl, 132 Harv L Rev at 558 (cited in note 2) (“[W]aste created by monopsony . . . depends on the inability of firms to pay [] different rates to different workers. . . . But employers cannot practice wage discrimination very effectively.”); Roger D. Blair and Jeffrey L. Harrison, *Monopsony in Law and Economics* 41–48 (Cambridge 2010).

wage discrimination is not merely a theoretical concern. While employers are restrained by having “little information about workers’ outside options and are deterred by powerful pay fairness norms,” they nevertheless exploit a wide set of tools for expansive wage discrimination schemes: they obviate pay fairness and information asymmetries by hiring subcontracted, outsourced, and temporary workers.⁵³ And employers have succeeded in imposing significant technological monitoring to reduce pay and work law compliance costs.⁵⁴ The prevalence of wage discrimination has only increased as workplace fissuring has advanced.⁵⁵ Finally, even when reduced labor inputs *in fact* reduce outputs in product markets, courts still credit cognizable economic efficiencies.

B. Labor Antitrust’s Paradox: Government Enforcement and Antitrust Doctrine

Agency and court reliance on the consumer welfare standard in labor antitrust and monopsony cases reveals limitations on labor antitrust’s ability to effectively regulate employer conduct that harms workers.

First, the agencies have argued that employers’ labor market restraints that harm workers may not always harm consumers. In the franchising context, the DOJ has moved away from *per se* challenges to franchisors’ use of no-poaching provisions in franchisee agreements, contending that a more extensive rule-of-reason analysis is required to consider procompetitive benefits of these restraints on consumers—even a “quick-look” analysis is inappropriate.⁵⁶ While the DOJ and FTC stated in their Guidance to Human Resource Professionals that no defenses will be considered in *per se* wage-fixing and no-poaching cases, defenses may be considered when reviewing the use of noncompete clauses or

⁵³ Naidu, Posner, and Weyl, 132 Harv L Rev at 558 (cited in note 2).

⁵⁴ See generally, for example, David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard 2014); Alan B. Krueger, *Reflections on Dwindling Worker Bargaining Power* (Princeton University and National Bureau of Economic Research Luncheon Address, 2018), archived at <https://perma.cc/8N4C-WEEP>; Arindrajit Dube and Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards*, 63 *Indust Labor Rel Rev* 287 (2010); Brian Callaci, *Vertical Power and the Creation of a Fissured Workplace: The Case of Franchising* (University of Massachusetts Amherst Working Paper, Sept 5, 2018), archived at <https://perma.cc/9QMA-EGFU>.

⁵⁵ See Weil, *Fissured Workplace* at 87–92 (cited in note 54).

⁵⁶ See Bryan Koenig, *Can No-Poach Class Actions Beat the Rule of Reason?* (Law360, Jan 30, 2019), online at <https://www.law360.com/articles/1123789> (visited Sept 4, 2019) (Perma archive unavailable).

information-sharing.⁵⁷ And in congressional testimony, FTC Chair Joseph Simons left open the possibility that, when the FTC evaluates “potential anticompetitive impacts on labor” in merger reviews, those impacts would be weighed against merger-specific efficiencies.⁵⁸ When asked whether “the ‘consumer welfare’ standard accounts for labor market concerns,” he responded elusively: “Yes. Antitrust enforcement protects the competitive process, which benefits consumers, in labor markets as it does for other markets.”⁵⁹

Workers also face obstacles when confronting the consumer welfare standard in the courts. While employers’ horizontal wage-fixing is per se unlawful,⁶⁰ all other labor market restraints are subject to case-by-case analysis in which courts consider procompetitive or legitimate business justifications.⁶¹ While most courts find that workers can sufficiently allege antitrust injury for wage-fixing or no-poaching agreements,⁶² courts have not rejected employer defenses that alleged restraints benefit consumers under

⁵⁷ See *Antitrust Guidance for Human Resource Professionals* at *3–4 (cited in note 40); *Questions for Joseph Simons, Chairman, Federal Trade Commission, Before the Senate Committee on the Judiciary*, 115th Cong, 2d Sess 35 (2018) (*Antitrust Enforcement Hearing*) (“[N]arrowly tailored noncompete clauses can benefit competition.”).

⁵⁸ See *Antitrust Enforcement Hearing* at 31 (cited in note 57).

⁵⁹ *Id.* at 24.

⁶⁰ See, for example, *United States v Trenton Potteries Co*, 273 US 392, 398 (1927); *United States v Socony-Vacuum Oil Co*, 310 US 150, 216 (1940).

⁶¹ See, for example, *O’Bannon v National Collegiate Athletic Association*, 802 F3d 1049, 1069 (9th Cir 2015) (applying rule of reason to NCAA decision not to compensate student-athletes); *Todd v Exxon Corp*, 275 F3d 191, 198, 214–15 (2d Cir 2001) (reversing district court’s dismissal and holding employers’ horizontal conspiracy to exchange salary information subject to rule of reason); *Eichorn v AT&T Corp*, 248 F3d 131, 143–44 (3d Cir 2001) (holding no-hire agreements subject to rule of reason); *Butler v Jimmy John’s Franchise, LLC*, 331 F Supp 3d 786, 797 (SD Ill 2018) (refusing to decide at motion to dismiss whether franchisees’ no-poaching agreements should be subject to the per se rule, quick look analysis, or the rule of reason); *Deslandes v McDonald’s USA, LLC*, 2018 WL 3105955, *7–8 (ND Ill) (reviewing franchisee no-poaching agreement under “quick look” but suggesting later-stage evidence may require rule of reason); *In re Animation Workers Antitrust Litigation*, 123 F Supp 3d 1175, 1214 (ND Cal 2015) (denying motion to dismiss and holding employers’ information-sharing/no-solicitation agreements subject to per se rule); *United States v eBay, Inc*, 968 F Supp 2d 1030, 1039–40 (ND Cal 2013) (refusing to decide on motion to dismiss whether employers’ no-solicitation/no-hire agreements should be subject to the per se rule, quick look analysis, or the rule of reason); *In re High-Tech Employee Antitrust Litigation*, 856 F Supp 2d 1103, 1122 (ND Cal 2012) (refusing to decide on motion to dismiss whether employers’ “no-cold calling” agreements should be subject to the per se rule or the rule of reason); *Fleischman v Albany Medical Center*, 728 F Supp 2d 130, 157–58, 162 (NDNY 2010) (holding wage-fixing agreements subject to the per se rule but information exchanges subject to the rule of reason). Most cases were resolved before summary judgment.

⁶² See, for example, *Butler*, 331 F Supp 3d at 793–94.

quick-look or rule-of-reason analyses.⁶³ And in traditional product-market monopsony cases, consumer welfare benefits “entirely trump harm to input sellers.”⁶⁴ Thus, case law on employer restraints suggests workers will face challenges in two categories of cases: when buyer restraints on inputs (1) harm direct sellers—workers—but benefit consumers in downstream markets, or (2) benefit direct sellers but harm consumers in downstream markets.

1. Harming workers, benefiting consumers.

Courts and the antitrust agencies have credited consumer welfare benefits in a range of input restraints by employers (and other buyers), whether they be horizontal competitors, counterparties in vertical agreements, monopsonists, or merging firms. While courts have held that procompetitive benefits can outweigh harms to sellers, this remains an unsettled area of law.

First, courts have recognized consumer benefits from horizontal agreements between employers *not* governed by the *per se* rule—agreements reviewed under the ancillary restraints doctrine—demonstrating reluctance to condemn conduct that clearly harms workers. For example, in *O’Bannon v National Collegiate Athletic Association*,⁶⁵ defendant NCAA established amateurism rules that prohibited member universities from compensating student-athletes beyond grant-in-aid scholarships.⁶⁶ Student-athletes sued, alleging the rules, by preventing compensation for use of their name, image, and likeness (NIL), violated Section 1 of the Sherman Act.⁶⁷ Although the student-athletes won at trial, the Ninth Circuit reversed in part on the ground that, while the rule of reason required the NCAA to permit schools to compensate student-athletes up to their cost of attendance, it did not require cash compensation for their NIL untethered to education expenses.⁶⁸ The court was persuaded by the NCAA’s procompetitive justifications for the amateurism rules—increasing consumer

⁶³ See note 72. Recent case law suggests courts will apply traditional rule-of-reason burden shifting to labor-antitrust cases. See, for example, *O’Bannon*, 802 F3d at 1070.

⁶⁴ Laura Alexander, *Monopsony and the Consumer Harm Standard*, 95 Georgetown L J 1611, 1627 (2007). For uncertainty in a prominent labor monopsony case, see *Le v Zuffa, LLC*, 216 F Supp 3d 1154, 1163 (D Nev 2016) (“[R]eduction of competition does not invoke the Sherman Act until it harms consumer welfare.”), quoting *Rebel Oil Co v Atlantic Richfield Co*, 51 F3d 1421, 1433 (9th Cir 1995).

⁶⁵ 802 F3d 1049 (9th Cir 2015).

⁶⁶ *Id.* at 1054–55.

⁶⁷ 15 USC §§ 1–7.

⁶⁸ See *O’Bannon*, 802 F3d at 1079.

(fan) demand for college sports—and the need to integrate academics and athletics to improve education quality.⁶⁹ While the Ninth Circuit found the rules had anticompetitive effects—preventing colleges from competing for recruits through compensation—it concluded that the rules “serve[d] the [] procompetitive purposes identified.”⁷⁰ The court thus viewed the benefits of the NCAA’s marketing college sports to downstream consumers as trumping harms to student-athletes.

Courts and enforcement agencies have also taken employers’ procompetitive justifications seriously in vertical franchise agreements.⁷¹ When fast-food franchisors like McDonald’s required franchisees to include no-poach and noncompete provisions in employment contracts, the DOJ and state attorneys general sued.⁷² While most cases settled and franchisors agreed to remove the relevant provisions, the DOJ clearly signaled it would not view their use as per se unlawful. Instead, in a Statement of Interest submitted in ongoing litigation, it said no-poach provisions “between labor-market competitors . . . are per se unlawful . . . unless they are *reasonably necessary* to a separate, legitimate business transaction or collaboration between the companies, in which case the rule of reason applies. The rule of reason also applies to no-poach agreements between non-competitors.”⁷³ Even a quick-look analysis was not enough. Further, the DOJ stated that “[m]ost franchisor-franchisee restraints are subject to the rule of reason” as vertical restraints, and hub-and-spoke franchise conspiracies—in which a franchisor coordinates agreements between franchisees—were subject to rule-of-reason analysis under the ancillary restraints doctrine.⁷⁴

What procompetitive consumer benefits could employers raise to trump anticompetitive worker harm? Employers’ vertical agreements, the DOJ argued, while restraining intrabrand competition, may benefit *interbrand* competition “by allowing the

⁶⁹ See *id.* at 1058–60.

⁷⁰ *Id.* at 1073.

⁷¹ See, for example, *Deslandes*, 2018 WL 3105955 at *7 (holding per se rule inapplicable because horizontal restraint “*ancillary* to franchise agreements” and ancillary “no-hire agreements . . . can have procompetitive effects”) (emphasis added), citing *Eichorn*, 248 F3d at 144.

⁷² See, for example, Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue* (NY Times, Sept 27, 2017), archived at <https://perma.cc/2BXB-2EL5>.

⁷³ Corrected Statement of Interest of the United States of America, *Stigar v Dough Dough, Inc.*, No 2:18-cv-00244, *8–9 (ED Wash filed Mar 8, 2019) (Stigar Statement of Interest), available at <https://perma.cc/3VYS-56GF> (emphasis added).

⁷⁴ See *id.* at *11, 13.

manufacturer to achieve certain efficiencies in the distribution of his products' and . . . 'to compete more effectively against other manufacturers.'"⁷⁵ Further, under ancillary-restraints doctrine, they may be reasonably necessary to legitimate franchise collaboration.⁷⁶ Outside employment restraints, traditional antitrust justifications for exclusive dealing focus on additional efficiencies: preventing free-riding and hold-up problems; incentivizing promotional efforts, training, and employee assistance; enabling long-term planning; allocating limited resources; preserving confidentiality; and overcoming branding and reputation imbalances.⁷⁷ The Government's position is consistent with allowing no-poach and noncompete provisions if included in joint venture or merger agreements. Thus, the courts and the DOJ have moved away from applying the per se rule to anything but naked employer wage-fixing, and their evaluation of defenses credited in ancillary restraints and vertical agreements cases does not bode well for labor-antitrust advocates.

Courts have also refused to hold monopsonists liable under Section 2 of the Sherman Act for harm to upstream sellers without convincing proof of consumer harm. For example, in a foundational monopsony case—*Weyerhaeuser Co v Ross-Simmons Hardwood Lumber Co*⁷⁸—the Supreme Court found no violation when a plaintiff did not show a dangerous probability that monopsonist Weyerhaeuser could recoup from alleged predatory bidding on a key input by raising prices downstream.⁷⁹ Importantly, the Court viewed predatory bidding as presenting "less of a direct threat of consumer harm than predatory pricing. . . . [Because it] could succeed with little or no effect on consumer prices[] a predatory bidder does not necessarily rely on raising prices in the output market to recoup its losses."⁸⁰ The Court thus implicitly rejected the premise that exercising monopsony power necessarily harms downstream consumers as well as monopsonist suppliers.

⁷⁵ Id at *12, 16–17, quoting *Continental T.V., Inc v GTE Sylvania, Inc*, 433 US 36, 54–55 (1977).

⁷⁶ See Stigar Statement of Interest at *16 (cited in note 73).

⁷⁷ See Bork, *Antitrust Paradox* at 299–309 (cited in note 5).

⁷⁸ 549 US 312 (2007).

⁷⁹ See id at 325–26.

⁸⁰ Id at 324.

Subsequent monopsony cases also require worker plaintiffs to allege consumer welfare harms to survive a motion to dismiss, even when worker harm from wage suppression is clearly alleged.⁸¹

Finally, courts have prioritized consumer over worker welfare in merger review, and while the agencies have signaled their commitment to reviewing labor-market effects in future reviews, they have traditionally viewed reduced labor costs as merger-specific efficiencies.⁸² While some argue the consumer welfare standard is inadequate to prevent anticompetitive harms from mergers in labor markets, most presume that mergers that increase monopsony power, leading to labor input reduction, will reduce outputs and harm consumers.⁸³ The case law has not supported that presumption. First, courts have upheld no-poaching and noncompete agreements executed in mergers when employers showed they were conducive to increasing output, quality control, protecting competitively sensitive information, incentivizing training and assistance, or preventing free riding.⁸⁴ In *Eichorn v AT&T Corp.*,⁸⁵ the Third Circuit found a no-hire agreement precluding a purchasing target's employees from seeking employment at AT&T affiliates was not "executed for the improper purpose of restraining trade and the cost of labor" but was intended

⁸¹ See, for example, *Zuffa*, 216 F Supp 3d at 1163. Employers elsewhere deployed *Ohio v American Express Co*, 138 S Ct 2274 (2018) (*AmEx*), as precedent for the proposition that it is plaintiffs' burden to demonstrate employer market power in both labor and product markets. See *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, 2018 WL 4241981, *3 (ND Cal) (rejecting employers' argument that *AmEx* required reevaluation of prior market definition); Defendant Zuffa LLC's Motion for Summary Judgment, *Le v Zuffa LLC*, No 2:15-cv-01045, *16 (D Nev filed July 30, 2018) (citing *AmEx* in challenge to plaintiffs' market definition).

⁸² See, for example, Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § V.1.A (1982), archived at <https://perma.cc/A3TD-XZE2>; Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 3.5 (1984), archived at <https://perma.cc/N5ML-8QAJ>; Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 4 (1992), archived at <https://perma.cc/3UE5-G2ZA>; Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 4 (1997), archived at <https://perma.cc/MXZ6-5UUT>; *Horizontal Merger Guidelines* at *29–31 (cited in note 11); David Scheffman, Malcolm Coate, and Louis Silvia, *20 Years of Merger Guidelines Enforcement at the FTC: an Economic Perspective* 47–48 (2002). For the FTC's new stance, see *Antitrust Enforcement Hearing* at 31 (cited in note 57).

⁸³ Compare, for example, Abdela and Steinbaum, *Labor Market Impact of the Proposed Sprint-T-Mobile Merger* at *21 (cited in note 38), with Marinescu and Hovenkamp, 94 Ind L J at 1038–40 (cited in note 2).

⁸⁴ See, for example, *Eichorn*, 248 F3d at 146 (approving a no-hire arrangement because its "primary purpose" was "to ensure . . . the purchaser of [a subsidiary] could retain the skilled services of [its] employees").

⁸⁵ 248 F3d 131 (3d Cir 2001).

“to ensure the successful sale” of the merging party, which “required workforce continuity”: “Any restraint . . . was incidental to the effective sale.”⁸⁶ The court cited a long history, dating from the 1899 *Addyston Pipe & Steel Co v United States*⁸⁷ decision, of “recogniz[ing] that covenants not to compete are not violations of § 1 of the Sherman Act,” characterizing them as “ancillary restraints.”⁸⁸ Other courts are in accord.⁸⁹ Finally, while the Merger Guidelines state that benefits premised on reductions in competition are not cognizable, the FTC has argued in court that lower input prices passed through to consumers as decreased prices are procompetitive.⁹⁰

2. Benefiting workers, harming consumers.

Courts also find that when labor market restraints benefit workers and not consumers, the consumer welfare standard trumps and the restraint violates the antitrust laws. Courts have not only established carve-outs from the application of per se illegality to worker combinations, but they also generously apply the rule of reason to favor consumers over workers, particularly in the context of independent contractor organizing and professional associations.⁹¹ For example, in *National Society of Professional Engineers v United States*,⁹² the Supreme Court held that the Society’s amendment to its canon of ethics prohibiting engineers from submitting competitive bids to ensure competition on quality violated Section 1.⁹³ Even though the petitioners justified the restraint as a public safety benefit to consumers, the Court held it unreasonable because it “prevent[ed] [] customers from making price comparisons.”⁹⁴ Similarly, when a dentists’ association restricted advertisements about the quality of dental services, the Supreme Court held a more searching rule-of-reason inquiry was

⁸⁶ Id at 146.

⁸⁷ 175 US 211 (1899).

⁸⁸ *Eichorn*, 248 F3d at 145.

⁸⁹ See, for example, *United States v Empire Gas Corp*, 537 F2d 296, 308 (8th Cir 1976); *Lektro-Vend Corp v Vendo Corp*, 500 F Supp 332, 351 (ND Ill 1980).

⁹⁰ See *Horizontal Merger Guidelines* at *29–31 (cited in note 11); Statement of the Federal Trade Commission, *In re Caremark Rx Inc/AdvancePCS*, File No 031 0239, *2–3 (Feb 11, 2014), archived at <https://perma.cc/4SWD-GQYQ>; Hemphill and Rose, 127 Yale L J at 2105–09 (cited in note 37).

⁹¹ See Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 Loyola U Chi L J 969, 1030–33 (2016) (collecting cases).

⁹² 435 US 679 (1978).

⁹³ See id at 694–95.

⁹⁴ Id at 695.

required to determine whether the restriction harmed consumers.⁹⁵ The Court distinguished professional association's restraints from business restraints because of "[t]he public service aspect, and other features of the professions," but the ultimate question was whether any harm to competition would "be outweighed by gains to consumer information."⁹⁶ Along with precedent subjecting information-sharing agreements to the rule of reason, this case law would condemn and (at least) chill independent contractors from forming joint ventures to share wage and benefit information by subjecting such joint ventures to searching inquiry about consumer harms.⁹⁷

Workers thus confront roadblocks in labor-antitrust enforcement, in part because antitrust is a double-edged sword that stops workers from coordinating.⁹⁸ Workers will have to convince agencies and the courts to adopt a kind of selective enforcement in cases eliciting procompetitive benefits from labor market restraints: If and when workers suffer from such a restraint but consumers benefit, labor antitrust should still find employers liable. But when workers benefit and consumers lose from a restraint, labor antitrust should look the other way. At the outer limit, when workers or independent contractors achieve industry-wide agreements for higher pay and wealth-transferring profit-sharing arrangements, labor-antitrust enforcement will not benefit them. But there is no defined limit within the literature or current doctrine for when enforcement should be abandoned.

C. Regulatory Arbitrage in Labor Markets

A second roadblock workers face is employers' *Copperweld* immunity defense from antitrust enforcement, which bars antitrust claims when firms are viewed as members of a single corporate family (the "single-firm defense").⁹⁹ Employers can claim immunity even when they are deemed separate "employers" under

⁹⁵ See *California Dental Association v Federal Trade Commission*, 526 US 756, 759, 781 (1999).

⁹⁶ *Id.* at 775, 771 n 10, quoting *Goldfarb v Virginia State Bar*, 421 US 773, 788–89 & n 17 (1975).

⁹⁷ For information-sharing agreements and the rule of reason, see, for example, *United States v Citizens & Southern National Bank*, 422 US 86, 112–13, 143 (1975).

⁹⁸ See note 81; Hiba Hafiz, *Picketing in the New Economy*, 39 *Cardozo L Rev* 1845, 1882–92 (2018).

⁹⁹ See *Copperweld Corp v Independence Tube Corp*, 467 US 752, 767–69 (1984).

labor law, a form of regulatory arbitrage.¹⁰⁰ Since the statutory ban on hiring economists at the National Labor Relations Board (NLRB), labor policy and doctrinal developments have evolved through judges' common-law elucidations of master-servant control rather than through social-scientific understandings of employers' power over price.¹⁰¹ Thus, if employers collude or vertically restrain labor-market competition on wages, that has no impact on agencies' or courts' determination of whether the colluding or restraining party counts as a "joint employer" with duties and obligations to collectively bargain under labor law. Employers have used vertical disintegration—outsourcing, subcontracting, franchising, and other arrangements—to immunize themselves from collective-bargaining obligations, liability, and compliance costs as "joint employers." And labor law has prohibited workers from striking and otherwise challenging entities that do not directly employ them, even if they have economic power to set their wages and determine their working conditions. Combined, employers' immunity—and the corporate structures and collusion that facilitate it—cost workers in lower pay and increased coordination burdens when they seek to challenge multi-employer or industry-wide wage suppression.

Employers are on the hook for both labor and antitrust violations only if a monopsonist or indirect employer is found to artificially suppress workers' wages and also meets the joint-employer requirements under labor law. While the NLRA provides no clear definition of "employer," the Board has interpreted the scope of "employer" based on a "right to control" the means or manner of an employee's work and terms of employment. Under the current *Browning-Ferris* joint-employer test, "employer" status extends to those that "share or codetermine those matters governing the essential terms and conditions of employment" with direct employers and does not require the exercise of direct control; "control exercised indirectly—such as through an intermediary" may be

¹⁰⁰ See, for example, Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L Rev *17–24 (forthcoming 2020) (on file with author). See generally, for example, Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L & Contemp Probs 45 (2019).

¹⁰¹ See Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 Wis L Rev 1115, 1119–40; Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 Emory L J 1469, 1475 n 23 (2015); Catherine L. Fisk and Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 Duke L J 2013, 2045–49 (2009).

enough.¹⁰² The NLRB recently issued a proposed rule that would require putative joint employers to “possess and actually exercise substantial direct and immediate control over the employees’ essential terms and conditions of employment in a manner that is not limited and routine,” but the rule is not yet final.¹⁰³ While the NLRB or the courts may extend joint-employer status to colluding employers or franchisors that impose no-poaching or noncompete agreements under the *Browning-Ferris* test, no case law has explicitly addressed joint-employer status in those settings and existing case law has not been promising. Even when building owners, managers, and maintenance contractors formed a trade association with subcontracted janitorial firms to strategize against janitors’ unionization and contributed to a joint strike fund to help janitorial firms ride out strikes, they were not deemed “joint employers.”¹⁰⁴

Employers can thus evade *both* labor and antitrust liability in a number of ways. First, independent contractors, domestic workers, and agricultural workers are excluded from the NLRA’s coverage, so any employer restraints in their labor markets not found to violate the antitrust laws will leave those workers doubly unprotected. Second, for NLRA-protected workers, the NLRB or the courts could find that—under either the current *Browning-Ferris* test or the NLRB’s new proposed definition—colluding or conspiring employers are not joint employers under labor law, and those employers could also be off the hook under antitrust law if: (1) they are vindicated through a single-firm defense, or (2) they are deemed separate firms but their agreement survives quick-look or rule-of-reason analysis.

On the joint-employer determination, because labor law’s control test is orthogonal to the elements of Section 1, the NLRB and the courts do not focus on power over price. Instead, while determining worker pay, tenure, benefits, and the method of payment are *indicia* of control, the analysis is broader, considering: the ultimate authority to hire, fire, discipline, direct work, inspect

¹⁰² *Browning-Ferris Industries of California, Inc.*, 362 NLRB 1599, 1600 (2015). See also *Browning-Ferris Industries of California, Inc v NLRB*, 911 F3d 1195, 1216–22 (DC Cir 2018).

¹⁰³ NLRB, Notice of Proposed Rulemaking, The Standard for Determining Joint-Employer Status, 83 Fed Reg 46681, 46686 (2018).

¹⁰⁴ See *Service Employees International Union, Local 525, AFL-CIO, and General Maintenance Services Co.*, 329 NLRB 638, 638–42 (1999).

and monitor work, and control scheduling and the number of employees.¹⁰⁵ The Board and the courts have rejected joint-employer claims in a range of settings in the fissured economy, including when, for example, overseas plaintiffs claimed Wal-Mart was a joint employer with local employers it contracted with for goods production, but Wal-Mart only contracted with those factories regarding prices, product quality, and materials used.¹⁰⁶ They have also rejected cost-plus arrangements as automatically rendering contracting clients “employers” of vendors’ employees.¹⁰⁷ Franchisors have been successful in defeating joint-employer claims by franchisees’ employees, but the new *Browning-Ferris* test has rarely been applied due to appeals and the Trump NLRB’s proposed rulemaking.¹⁰⁸

The same firms that escape labor-law obligations could rely on the *Copperweld*, or single-firm, defense to claim they are unable to “conspire” on labor-market restraints because they are a single entity. *Copperweld* is traditionally applied to agreements between parents and wholly or partially owned subsidiaries, but it has also “been extended to insulate some coordination between franchisors and franchisees, on the ground that franchisors exercise control over franchisees and they share common economic goals.”¹⁰⁹ When firms fail in asserting a *Copperweld* defense, they may, as discussed above, rely on a range of procompetitive justifications under the rule of reason to evade antitrust liability. Because the types of restraints that dominate the fissured workplace are vertical restraints necessary for indirect employers’ ability to control workers, workers will remain most vulnerable in these settings.

D. Limitations of New Labor-Antitrust Scholarship

In sum, workers seeking to use antitrust law to challenge employer buyer power in the new era of labor antitrust will face difficulties. At the same time, they will expose themselves to potential antitrust liability if they seek to coordinate to counter that

¹⁰⁵ See *Browning-Ferris*, 362 NLRB at 1611–12; Restatement (Second) of Agency § 220(2) (1958).

¹⁰⁶ See, for example, *Doe I v Wal-Mart Stores, Inc.*, 572 F3d 677, 683 (9th Cir 2009).

¹⁰⁷ See, for example, *Pulitzer Publishing Co v NLRB*, 618 F2d 1275, 1279 (8th Cir 1980).

¹⁰⁸ See Robert Lafolla, *Joint Employment Test’s Bark May Be Worse Than Its Bite* (Bloomberg Law, Oct 2, 2018), archived at <https://perma.cc/87WL-4H6W>; Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 Geo Wash L Rev 907, 932–39 (2018) (collecting cases).

¹⁰⁹ Paul, 67 UCLA L Rev at *45 (cited in note 100).

power. Each of these challenges stems from the courts' inevitable reckoning with the consumer welfare standard. With employer competitors increasingly aware of crackdowns on naked wage-fixing and successfully focusing courts' attention on downstream effects by categorizing labor-market restraints as ancillary, the relevance of the *per se* rule to labor market restraints will likely recede further over time.

And current proposals to jettison the consumer welfare standard in labor antitrust fail to overcome labor antitrust's paradox. The proposed effective competition standard—while placing the burden in merger reviews on the merging parties to prove their transaction will not harm competition and mandating antitrust enforcers to peruse upstream harms¹¹⁰—does not resolve the question of how to weigh harms to workers and consumers if they conflict. The “protection of competition” standard fares no better. While it may draw courts' and enforcers' attention to “protecting the competitive process, as opposed to trying to achieve welfare outcomes that judges and enforcers are ill-equipped to measure,” it does not resolve the question of how to handle harms to labor market competition that do not result in harm to competition downstream.¹¹¹ This is particularly tricky in fissured workplaces where employer wage discrimination may or may not harm the competitive process—far from “suppress[ing] or even destroy[ing] competition” in labor markets, fissured employment may make labor markets more competitive while nevertheless harming workers.¹¹²

These intractable challenges suggest an alternative solution to protecting workers while maintaining the coherence and integrity of antitrust law: regulatory sharing. Regulatory sharing would supplement existing labor law by creating an additional system of substantive presumptions and affirmative defenses workers can deploy under labor law when employer buyer power or anticompetitive conduct is demonstrated in antitrust investigations, enforcement actions, or private litigation. Such a solution is necessary to concentrate antitrust enforcement on consumer harm from employers' labor-market restraints while also

¹¹⁰ See Abdela and Steinbaum, *Labor Market Impact of the Proposed Sprint–T-Mobile Merger* at *21 (cited in note 38); Steinbaum and Stucke, *Effective Competition Standard* at *29–40 (cited in note 43).

¹¹¹ Wu, *After Consumer Welfare* at *2 (cited in note 49).

¹¹² *Id.*, quoting *Chicago Board of Trade v United States*, 246 US 231, 238 (1918).

strengthening labor-law protections and the role of administrative agencies and expertise in enforcing them. Regulatory sharing would prevent arbitrage between regulatory regimes that employers exploit to avoid liability and establish a firm role for labor agencies in merger review.

III. PROPOSAL FOR REGULATORY SHARING

Workers facing labor antitrust's limitations and regulatory arbitrage would dramatically benefit from a structural approach of mutually reinforcing regulatory regimes under labor and antitrust law. Separate but integrated labor-market regulation under the two regimes is an ideal solution to labor antitrust's paradox. Regulatory sharing could also revive critical labor market institutions necessary for sustained checks on employer buyer power that may reduce costly antitrust enforcement.

A. Consumer Welfare / Worker Welfare

To overcome conflicts between competing welfare standards and administrability challenges of non-welfare-based antitrust approaches, this Essay proposes a system of regulatory sharing in which antitrust agency enforcement and labor-antitrust adjudication would concentrate on consumer welfare effects when worker and consumer welfare *conflict*; but antitrust agency investigations, as well as agency and judicial findings, would trigger substantive presumptions and defenses under labor law as a supplement to existing protections. It also proposes integrating labor agencies into the antitrust agencies' merger review.

Separate but joint enforcement has two main advantages. First, it preserves coherence in both the antitrust and labor regulatory regimes: regulated parties and the courts would be clear on the standards governing antitrust liability, and those standards would be more administrable and predictable. Second, while antitrust regulation would concentrate on maximizing output to benefit consumers when worker and consumer welfare conflict, labor regulation would step in to achieve the separate but clear NLRA policy goals: equal bargaining power between employers and employees to ensure against employee-employer wealth

transfers and establish countervailing power from the “shop floor” that strengthens workers’ voices and participation.¹¹³

B. Regulatory Sharing Between Antitrust and Labor Law

Regulatory sharing between antitrust and labor law is necessary to ensure against employer arbitrage enabled by antitrust law’s ambiguous welfare standards and the judiciary’s historical favoring of consumer welfare over worker welfare. Establishing a network of labor antitrust triggers for labor rights enforcement, shared merger enforcement between the antitrust and labor agencies, and substantive law presumptions and affirmative defenses under labor law generated by labor-antitrust findings avoids the pitfalls of underenforcement in labor-market regulation.

1. Labor antitrust triggers and shared merger enforcement.

Labor-antitrust actions should apply a consumer welfare standard to determine antitrust liability. Yet when a court finds employers’ conduct beneficial to consumers but harmful to workers in either Section 1 or Section 2 cases, that would trigger a “red flag” establishing substantive legal presumptions and affirmative defenses to workers under labor law.¹¹⁴ If plaintiff-enforcers make a prima facie showing of employers’ unlawful agreements or monopsony power, or power to set wages, this would also trigger a “red flag.” The red flag would issue before defendants have an opportunity to rebut “by showing . . . no control over wages,” as others propose,¹¹⁵ because labor markets are naturally monopsonistic and such a rebuttal should not be relevant for labor-law inquiries. It will likely be difficult and costly for plaintiffs to disaggregate employers’ market power from search frictions, information asymmetries, job differentiation, heterogeneous tastes, job-lock, and other market failures that favor employers’ leverage over

¹¹³ On the value of worker voice, see generally, for example, Richard B. Freeman, *The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits, and Separations*, 44 Q J Econ 643 (1980).

¹¹⁴ I develop a proposal for antitrust and labor interagency coordination through information-sharing and enforcement in Hiba Hafiz, *Structural Labor Regulation* (unpublished manuscript, 2019) (on file with author).

¹¹⁵ Marinescu and Posner, *Proposal to Enhance Antitrust Protection* at *12 (cited in note 36).

workers.¹¹⁶ Thus, while an employer may avoid *antitrust* liability by rebutting evidence of its monopsony power, the *source* of that power is less relevant in the labor and employment context; if it exists, workers should be entitled to substantive labor-law presumptions and affirmative defenses.

If employers' monopsony power is sufficiently alleged in a Section 2 antitrust case, plaintiff antitrust enforcers would then need to show anticompetitive conduct: unlawful acquisition or maintenance of monopsony power (through mergers-to-monopsony, wage-fixing agreements, no-poaching agreements, or other forms of exclusionary conduct and foreclosure), attempted monopsonization, or conspiracy to monopsonize. Other scholars suggest that liability-triggering conduct under antitrust law should extend beyond those traditionally associated with reducing competition to also include work law violations: the use of broad noncompete clauses or class-action waivers in employment contracts, unfair labor practices under the NLRA, independent-contractor misclassification, and restrictive wage transparency policies.¹¹⁷ However, there are a number of reasons to relegate consideration of this kind of activity to labor agencies when worker and consumer welfare conflict. First, not all such conduct is harmful to labor-market competition per se, but is instead more indicative of employers' monopsony power (and, concomitantly, workers' relative bargaining leverage) and should be analyzed as such, contributing to the issuance of that first-stage monopsony power "red flag." Second, labor agencies have more expertise, data, and remedial mechanisms to assess impacts of employment terms and deploy shop-floor solutions, most certainly in tandem with antitrust enforcement; inviting antitrust agencies and courts to determine "reasonable terms of employment" without labor agencies' expertise may not be smart labor policy. Thus, any work-law violations should be evidence workers can use to justify the applicability of substantive presumptions and defenses in relevant adjudications under labor law discussed below.

Antitrust and labor agencies could also conduct joint merger review. Under the 2010 Merger Guidelines, antitrust agencies must review the impacts of a proposed merger on labor-market

¹¹⁶ See, for example, Berger, Herkenhoff, and Mongey, *Labor Market Power* at *2 (cited in note 37) (finding substantial employer monopsony power even in unconcentrated labor markets).

¹¹⁷ See Marinescu and Posner, *Proposal to Enhance Antitrust Protection* at *14 (cited in note 36).

concentration.¹¹⁸ Under a structural approach to labor-market regulation, if the antitrust agencies identify and categorize post-merger labor-market concentration levels as “moderately” or “highly concentrated,”¹¹⁹ that data ought to be shared with the NLRB and the Department of Labor, and their sign-off would be required.¹²⁰ Concurrent jurisdiction over merger review is not uncommon. In fact, interagency jurisdiction and/or cooperation on merger review in the telecommunications, energy, railroad, banking, shipping, airline, and agricultural industries spans the spectrum of more and less aggressive intervention authority by agencies outside the DOJ and FTC.¹²¹

Labor agencies could provide critical data on and analysis of exacerbating factors that affect the significance of given concentration levels when evaluating a merger’s labor-market effects. The agencies could provide data and analysis of: industry-wide wage rates in the relevant market, including any changes resulting from prior mergers; the use of noncompete or nonsolicitation clauses in the industry; union density; the existence of salary transparency provisions in collective bargaining agreements in the industry; contractual restrictions on wage transparency; records of enforcement actions in the industry for labor and employment violations (including unfair labor practices, wage-and-hour violations, violations of health and safety standards, violations of antidiscrimination law); internal and external labor-market statistics (how much firms rely on employees or contracted-for labor inputs through subcontracting, temporary agencies, and independent contractors, and assessment of any wage discrimination); history of misclassification actions for misclassifying employees as independent contractors; and the use of class-action waivers in employment contracts. This information is critical for revealing merged employers’ ability to profitably reduce workers’ wages and would more accurately assess the impacts of post-merger concentration.

¹¹⁸ See *Horizontal Merger Guidelines* at § 12 (cited in note 11).

¹¹⁹ *Id.* at § 5.3.

¹²⁰ This regulatory convergence could occur through Memoranda of Understanding. For more detail on this proposal, see generally Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 95 *Chi Kent L Rev* (forthcoming 2019) (on file with author).

¹²¹ See, for example, Communications Act of 1934, 47 USC §§ 214, 310(d); Federal Power Act, 16 USC § 824(a)–(b) (1920); ICC Termination Act of 1995, 49 USC §§ 1321–28; 49 CFR § 1180 (Surface Transportation Board railroad merger regulations); Bank Holding Company Act of 1956, 12 USC § 1842(a); Federal Deposit Insurance Act, 12 USC § 1828(c) (1950); Ocean Shipping Reform Act of 1998, 46 USC § 1701 et seq.

Efficiency defenses would also be independently reviewed: the antitrust agencies would focus on consumer welfare effects while the labor agencies would focus on worker welfare effects. Worker welfare effects would be assessed based on a broader set of criteria incorporating the expertise of labor economists, behavioral economists, sociologists of work, and human resources and psychological experts within the labor agencies to better evaluate how estimated post-merger compensation would match their assessment of productivity-maximizing wages. These experts could compare how post-merger compensation accords with: (1) internal labor-market wages and life-cycle earnings within a firm; (2) union premiums within the industry; (3) fairness expectation effects; and (4) merger-specific workplace realities and productivity effects.¹²² This analysis would be integrated into evaluating post-merger effects on workers' bargaining leverage against their merged employer.¹²³ Finally, labor agency macroeconomic experts could estimate the impact of post-merger concentration on labor's share of income within the relevant sector.

Labor and antitrust agency approval would tolerate differences in agency standards for evaluating mergers, on whom burdens of proof fall, and proper applicable procedures, much like concurrent merger review in other jointly regulated industries. While the DOJ would focus on the merger's competitive effects, the labor agencies could apply a broader "public interest" standard. Likewise, while the DOJ would bear the burden of proof for establishing that a merger should be blocked,¹²⁴ the merging parties would bear the burden of establishing that the labor agencies should approve the merger.¹²⁵ The labor agencies, like the FCC, would assess whether the proposed merger accords with work law and agency rules and whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of work law, including ensuring equal bargaining

¹²² For robust economic analysis, Congress would need to repeal the current ban on NLRB economist hiring: 29 USC § 154(a). See Hafiz, 2017 *Wis L Rev* at 1119–29 (cited in note 101).

¹²³ For buy-side harms on bargaining leverage, see Hemphill and Rose, 127 *Yale L J* at 2093–2105 (cited in note 37).

¹²⁴ See, for example, *Federal Trade Commission v H.J. Heinz Co.*, 246 F3d 708, 715 (DC Cir 2001).

¹²⁵ The Communications Act places the burden on FCC merger applicants to prove by a preponderance of the evidence that the proposed merger serves the "public interest, convenience, and necessity." 47 USC § 310(d).

power between employers and employees. They would also employ a balancing test weighing any public-interest harms of the merger against potential public-interest benefits.¹²⁶ Finally, like the FCC and Federal Energy Regulation Commission, the labor agencies could condition mergers on appropriate remedies to meet a public-interest standard, including structural or behavioral remedies.¹²⁷

2. Substantive law integration: antitrust and labor law.

While worker welfare cannot be a coherent goal of antitrust when it conflicts with consumer welfare, Congress has mandated worker protections under other laws. And labor law should be deeply informed by labor-antitrust enforcement: to tailor rights and remedies to the structural realities of labor markets; to deter unlawful employer monopsony and collusion; and to reinforce the remedial effects of labor-antitrust enforcement. Thus, as a supplement to existing work-law enforcement, this Section outlines a system of legal presumptions and affirmative defenses that could be integrated into work law cases based on labor-antitrust investigations and enforcement. A single system can prevent regulatory arbitrage and limit the creation of buyer power in the first instance. This is a tremendous benefit over ex post regulation when considering enforcement costs and the costs of employer buyer power in labor markets and the larger economy.¹²⁸ A more unified approach to labor-market regulation could allow for cross-pollination between substantive rules and adapt remedies to coordinate achievement of regulatory goals.

As discussed above, “red flags” punctuating developments in labor-antitrust investigations and enforcement would trigger substantive presumptions and affirmative defenses under the NLRA that would supplement existing labor-law protections.

¹²⁶ For an FCC analog, see, for example, *In the Matter of Applications of AT&T Inc and DIRECTV*, 30 FCC 9131, 9134–35 (2015).

¹²⁷ See, for example, *MPS Merchant Services, Inc v Federal Energy Regulation Commission*, 836 F3d 1155, 1165 (9th Cir 2016); Federal Energy Regulatory Commission, Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act, 61 Fed Reg 68595, 68610 (1996).

¹²⁸ See, for example, Carstensen, *Competition Policy* at 274 (cited in note 43).

Because organized workers are a countervailing power to monopsonistic employers,¹²⁹ when a court finds employers either have monopsony power to artificially suppress wages or have reached agreements restraining labor-market inputs, workers would be entitled to these presumptions and defenses. First, when such findings are made, workers should be entitled to a default rule of union bargaining,¹³⁰ or if a union is in place, a Board order to mandate collective bargaining under *NLRB v Gissel Packing Co.*¹³¹ If workers have formed a union and their employers refuse to bargain in good faith, workers should also be entitled to a *Gissel* bargaining order and protections to engage in concerted activity under the NLRA.¹³² Analysis of whether an employer is bargaining in good faith could be informed by the employer's buyer power and social-scientific data on industry-specific, productivity-maximizing wages. Similarly, analysis of, and remedial options for, whether employers commit unfair labor practices that infringe workers' right to organize, bargain collectively, and strike could be informed by monopsony-power determinations and the scope of worker's outside options.

Substantive labor-law presumptions and defenses could also extend to workers' right to engage in concerted activity against colluding employers by classifying those employers as joint employers with obligations to collectively bargain with workers. When employers have monopsony power within labor supply chains or reach wage-fixing, no-poaching agreements, or noncompete agreements enabling their exercise of buyer power over workers' wages, workers should be entitled to a rebuttable presumption of entitlement to a multifirm or sectoral bargaining unit obligating sectoral bargaining. In such cases, bargaining unit definitions should expand to encompass employers with buyer power to the extent workers' concerted activity against a single employer would be ineffective. Because joint ownership among

¹²⁹ See Efraim Benmelech, Nittai Bergman, and Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* *4 (National Bureau of Economic Research Working Paper No 24307, Feb 2018), archived at <https://perma.cc/24TD-3EVD>.

¹³⁰ For establishing a union default rule, see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 Colum L Rev 753, 932–33 (1994). See also generally Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 Harv L Rev 655 (2010).

¹³¹ 395 US 575, 610–16 (1969).

¹³² 29 USC §§ 157, 158(a)(5), 158(d).

employers offers deeper pockets to maintain insurmountable leverage over workers, making it nearly impossible for workers to successfully engage in concerted activity, the same presumption should apply to ensure restoration of equal bargaining power.¹³³ Further, NLRA-protected workers should be entitled to affirmative defenses for engaging in self-help and concerted activity that is currently prohibited, highly regulated, or subject to steep penalties, including secondary boycotts and strikes against monopsonistic or collusive employers. Additionally, employer buyer power should be integrated into the NLRB's analysis of whether to classify independent contractors as employees. To the extent buyer power is shown, independent contractors should be eligible for a rebuttable presumption of immunity from antitrust liability under the labor exemption to the antitrust laws to the extent they coordinate to demand higher wages and better working conditions.¹³⁴

CONCLUSION

The critical turn in current antitrust policy and scholarship toward the problem of labor-market concentration, the natural asymmetries of power between employers and employees, and the broader wealth transfer and inequality effects of lax enforcement are motivated not only by the failures of the Chicago School's past assumptions, but also by a systemic collapse of labor and employment regulation more broadly. Sustainable solutions to the inefficiencies that pervade labor markets, and the democratic and political economy effects of enfeebled labor-market institutions and worker protections, ought to be one and the same. Integrating labor antitrust into labor-law enforcement is a crucial supplement to both its protections and its administrative deployment, offering a key intervention in the right direction.

¹³³ On horizontal shareholding, see generally José Azar, Martin C. Schmalz, and Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J Fin 1513 (2018); Fiona Scott Morton and Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 Yale L J 2026 (2018). For anecdotal evidence of horizontal shareholding impacting union decisions to strike, see Suresh Naidu (@snaidun), (Twitter, June 16, 2018), archived at <https://perma.cc/TF5U-W262>.

¹³⁴ Without the exemption, independent contractors are subject to treble damages for concerted refusal to deal with their "employer." See generally, for example, Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 Berkeley J Empl & Labor L 233 (2017) (collecting cases).