

ANTITRUST FOR CONSUMERS AND WORKERS: A FRAMEWORK FOR LABOR MARKET ANALYSIS IN MERGER REVIEW

By: Lauren Sillman *

I. INTRODUCTION

Antitrust traditionally has not been a friend of labor. Twelve of the first thirteen prosecutions under the Sherman Act—the foundational antitrust statute passed in 1890—targeted labor unions.¹ Dismayed by such subversion of the statute’s original purpose, Congress intervened and exempted labor organizing from antitrust enforcement in the Clayton Act of 1914.² Ever since, the relationship between antitrust law and the welfare of workers has largely been one of indifference. Anticompetitive behavior that would have drawn the ire of enforcement agencies if executed in product markets has been tacitly condoned in labor markets. While neglect may be preferable to outright hostility, neither is necessary. The antitrust statutes and economic theory provide a strong basis for using antitrust enforcement to promote more competitive labor markets in the interest of workers.

A détente is especially desirable today in light of the severe stagnation in American wages. In the past thirty-five years, U.S. gross domestic product has all in all grown but the purchasing power of the average worker has barely changed.³ Labor’s share of national income declined precipitously in the 2000s, and in the five years after the Great Recession it was lower than at any point since World War II.⁴ Because most people get most of their income from

* Antitrust Associate, Clifford Chance LLP; J.D., Georgetown University Law Center; B.A., University of Iowa. I would like to thank Professor Steven Salop for his wisdom, support, and guidance.

¹ HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 965 (5th ed. 2016).

² See 15 U.S.C.S. § 17 (LexisNexis, Lexis Advance current through P.L. 116-158).

³ See BUREAU OF ECON. ANALYSIS, U.S. DEP’T OF COM., <https://www.bea.gov> [<https://perma.cc/7LSU-EL9G>]; Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RSCH. CTR., <http://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/> [<https://perma.cc/T6EG-85NK>].

⁴ COUNCIL OF ECONOMIC ADVISERS, *LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES 1* (2016) [hereinafter *LABOR MARKET MONOPSONY BRIEF*]; see also Loukas Karabarounis & Brent Neiman, *The Global Decline of the Labor Share*, 129 Q. J. ECON.

labor, and because those who get most of their income from capital tend to be wealthy, this income shift has dramatic consequences for inequality.

Economists and policymakers have advanced numerous explanations for this troubling trend ranging from the decline of unions, to tighter monetary policy, to increased trade liberalization, and more.⁵ One explanation that has received attention in recent years is an apparent epidemic of market concentration and flagging competition.⁶ A growing body of evidence suggests that over time fewer and fewer firms have come to dominate sectors across the economy.⁷ One study found that from 1982 to 2012, the share of sales by the sectors' top four firms increased in manufacturing, finance, services, utilities, retail trade, and wholesale trade.⁸ Average markups above cost—a manifestation of market power—rose from eighteen percent in 1980 to sixty-seven percent in 2014.⁹ This increase in concentration is due, in part, to a growing wave of mergers. By one count over 325,000 mergers have been announced since 1985.¹⁰ That year, around 2,000 mergers with a value of a little over \$300 billion were announced.¹¹ In 2018, 15,000 mergers occurred—valued at just under two trillion dollars.¹²

The ability of firms to charge prices for their products or services that exceed the competitive level harms workers in their role as consumers, and the reverberating inefficiencies have consequences for wages as well.¹³ Workers are harmed more directly, though by firms with buyer power in labor markets. Instead of enabling firms to charge high prices for the goods or services they sell, buyer power—also known as monopsony power—allows firms to push wages below the level workers would receive in competitive labor markets.

A recent study applied the Herfindahl-Hirschman Index (HHI), which is used to measure market concentration. The Department of Justice (DOJ) and

61, 61–62 (2014).

⁵ See, e.g., Michael W. L. Elsby, Bart Hobijn & Ayşegül Şahin, *The Decline of the U.S. Labor Share*, BROOKINGS PAPERS ON ECON. ACTIVITY, 38–43 (2013).

⁶ *The IMF Adds to a Chorus of Concern About Competition*, THE ECONOMIST (2019) [hereinafter *IMF Competition Concerns*], <https://www.economist.com/finance-and-economics/2019/04/04/the-imf-adds-to-a-chorus-of-concern-about-competition> [<https://perma.cc/W8QL-DWFJ>].

⁷ David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *Concentrating on the Fall of the Labor Share* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23108, 2017).

⁸ From 38% to 43% in manufacturing, from 24% to 35% in finance, from 11% to 15% in services, from 29% to 37% in utilities, from 15% to 30% in retail trade, and from 22% to 28% in wholesale trade. *Id.* This classification is based on four-digit Standard Industrial Classification codes. *Id.*

⁹ Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23687, 2017) (markups weighted by market share of sales among public companies).

¹⁰ *United States - M&A Statistics*, INST. FOR MERGERS, ACQUISITIONS AND ALLS., <https://imaa-institute.org/m-and-a-us-united-states/> [<https://perma.cc/2C28-C5DB>].

¹¹ *Id.*

¹² *Id.*

¹³ See Autor et al., *supra* note 7, at 3; Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421 (2020).

the Federal Trade Commission (FTC) (“the agencies”) used HHI in merger review, and found that at least forty percent of job markets fell into the “highly concentrated” category, making them especially susceptible to anticompetitive behavior by employers.¹⁴ The hiring markets for the twenty-five percent most concentrated occupations in almost every commuting zone in the country have concentration levels nearly tripled the “highly concentrated” threshold.¹⁵ In commuting zones across middle America, the hiring market for nearly every occupation is highly concentrated.¹⁶ As discussed below, a concentrated labor market generally increases the buyer power of participants in that market. Recent research on labor supply elasticity, which is an indicator of vulnerability to employers’ market power, further challenges traditional assumptions of competitiveness in labor markets.¹⁷

Historically, antitrust enforcers have given far less attention to firms’ power as buyers than as sellers and have been particularly hesitant to check their power as buyers of labor. However, the tide may be beginning to change. Federal and state enforcers have begun to challenge anticompetitive labor contracts,¹⁸ and there is a small but growing body of precedent addressing increased buyer power in mergers.¹⁹ In 2016, the Obama Administration’s Council of Economic Advisors issued a report describing the problem of labor market power and encouraging greater attention to the issue by the antitrust enforcement agencies.²⁰ Separately, then-Acting Assistant Attorney General Renata Hesse stated that antitrust enforcement efforts should not only be concerned with the welfare of consumers, but should “also benefit workers, whose wages won’t be driven down by dominant employers with the power to

¹⁴ José A. Azar, Ioana Marinescu, Marshall I. Steinbaum & Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 24395, 2019). There is controversy over the appropriate market definition for labor markets, but at this stage there is little reason to think that the method used in this study is systematically generating overly narrow markets and thereby upward biasing the authors’ concentration estimates.

¹⁵ *Id.* at 13–14 (finding the 75th percentile HHI to be 7,279, where the “highly concentrated” threshold is 2,500).

¹⁶ *See id.* at 32 fig.2.

¹⁷ *See, e.g.,* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 564 (2018). Note that while both the concentration measures and the elasticity measurements in these studies are subject to legitimate criticisms and can be improved upon in particular markets, there is little reason to think that they are, as a general matter, more susceptible to upward bias (i.e., finding market power when there is none) than downward bias (i.e., failing to identify market power when it exists).

¹⁸ *No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute “No-Poach” and Wage-Fixing Agreements*, U.S. DEP’T OF JUST. [hereinafter *No More No-Poach*], <https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements> [<https://perma.cc/PJ82-PVA6>].

¹⁹ *See, e.g.,* Complaint at 7–8, *United States v. Tyson Foods, Inc.*, No. 14-cv-1474, 2014 WL 4249929 (D.D.C. Aug. 27, 2014) (alleging that the acquisition of a competing buyer would harm farmers in the market for the purchase of sows).

²⁰ LABOR MARKET MONOPSONY BRIEF, *supra* note 4.

dictate terms of employment.²¹ Nevertheless, to date, the agencies have never blocked a merger on the basis of harm to workers.

There are many reasons that may account for the dearth of enforcement, including misunderstandings of the relationship between labor and antitrust laws, the momentum of precedent focused on seller-side harms, and the resistance of some to increased antitrust enforcement as a general matter.²² In addition to these practical and ideological impediments, mistaken intuitions about the economics of buyer power create obstacles for enforcement. At first glance it would seem that if firms use their buyer power to lower their costs, downstream customers are ultimately benefitted. Therefore, the consumer welfare standard, which underpins modern antitrust enforcement, would seem to counsel against intervention contrary to buyer power. In most cases, though, this intuition is simply wrong.²³ More competitive labor markets are not just good for workers; they are good for consumers too.

Clarifying the relevant interests at stake is crucial as policy reforms begin in earnest, and there is reason to believe that such reforms are on the horizon. Several politicians have recently advocated for greater antitrust scrutiny of labor markets. For example, in 2017 Senator Amy Klobuchar introduced a bill that would require the enforcement agencies to pay greater attention to buyer power in merger review.²⁴ Senator Elizabeth Warren—who seeks more interventionist antitrust policy on many fronts²⁵—and Senator Cory Booker—who in 2017 sent a letter to the DOJ and FTC citing concern with the failure of the agencies to address labor market power—have also taken up the cause.²⁶

Labor market issues are also garnering increased attention from antitrust scholars.²⁷ In an article published in 2018, C. Scott Hemphill and Nancy Rose argued for more interventionist merger policy directed at various forms of buyer market power.²⁸ The same year, Suresh Naidu, Eric Posner and Glen Weyl published *Antitrust Remedies for Labor Market Power*, a sweeping analysis of the myriad options available to enforcers to promote more

²¹ Renata Hesse, Acting Assistant Att’y Gen. of the Antitrust Div., U.S. Dep’t of Just., And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement, Opening Remarks at 2016 Global Antitrust Enforcement Symposium (Sept. 20, 2016), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening> [<https://perma.cc/4VCQ-GBXE>].

²² See Randy M. Stutz, *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice*, AM. ANTITRUST INST. 2–6 (2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0-1.pdf [<https://perma.cc/5ZJP-T55N>].

²³ See discussion *infra* Section III; ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY IN LAW AND ECONOMICS*, at xiii (2010).

²⁴ S. 1812, 115th Cong. §§ 1–3 (2017).

²⁵ Senator Elizabeth Warren, Reigniting Competition in the American Economy, Keynote Address at New America’s Open Markets Program Event (June 29, 2016).

²⁶ Letter from Senator Cory Booker to DOJ & FTC (Nov. 1, 2017), <https://www.scribd.com/document/363201855/Monopsony-Letter> [<https://perma.cc/LVJ4-5YRS>].

²⁷ See Stutz, *supra* note 22, at 2.

²⁸ See generally C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078 (2018).

competitive labor markets.²⁹ This legal analysis has been spurred by a growing body of empirical work on buyer power in labor markets.³⁰ An array of scholars concluded that labor market power is a problem and one that antitrust institutions should do more to address.

This paper similarly argues that buyer power—and specifically buyer power in labor markets—deserves greater antitrust scrutiny and, to that end, develops a framework for systematically evaluating labor market power in merger analysis. The enthusiasm of some progressive politicians for more interventionist antitrust policy has drawn skepticism from many antitrust practitioners and scholars who worry that reforms will unmoor antitrust policy from its foundational principles and turn antitrust enforcement over to political whims.³¹ At least with respect to labor market power, however, economic theory and empirical evidence support increased enforcement without any reform of the basic legal framework and without deviating from substantial consensus about the proper role for antitrust in the economy.

This paper’s proposal is rooted in the economic theory and empirical evidence of buyer power in labor markets, which is surveyed in Section II. Section III demonstrates why the interests of workers and downstream customers are generally aligned with respect to labor market monopsony and discusses the implications of this finding under several economic welfare standards. Section IV then describes the legal background on balancing benefits and harms in different markets during merger review and discusses the implications for mergers where the interests of workers and customers diverge. On the basis of these core principles, Section V synthesizes a framework for assessing labor market impacts in the course of merger review.

II. ECONOMICS OF MONOPSONY IN THE LABOR MARKET

Monopsony is frequently described as the mirror image of monopoly. Where a monopolist is able to increase the price it receives for a product by reducing output below the competitive level, a monopsonist with market power in a buyers’ market is able to depress the price it pays by reducing the quantity of an input it demands.³² This section will discuss the economics of buyer power generally and with specific implications for labor markets.

A. Harms from Labor Market Monopsony Power

Similar to its monopoly counterpart, monopsony technically exists only where there is a single buyer of a good or service, but “monopsony” is frequently used to refer to a broader conception of buyer power exercised by a

²⁹ See Naidu et al., *supra* note 17.

³⁰ See discussion *infra* Section II.C.

³¹ Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L. REV. 293, 294 (2019).

³² HOVENKAMP, *supra* note 1, at 18, 20 n.25.

firm or firms in less-than-competitive markets.³³ Unless stated otherwise, this paper will use the term in the latter, more colloquial sense. Monopsony power enables one or more buyers to obtain a lower price than would emerge in a market with competition among buyers.³⁴

Consider a poultry processor that purchases chickens from local farmers to process and sell to a national market.³⁵ This is the only processor that is accessible to the farmers, and there are no other alternative purchasers of chickens in the area. In short, the processor has monopsony power.

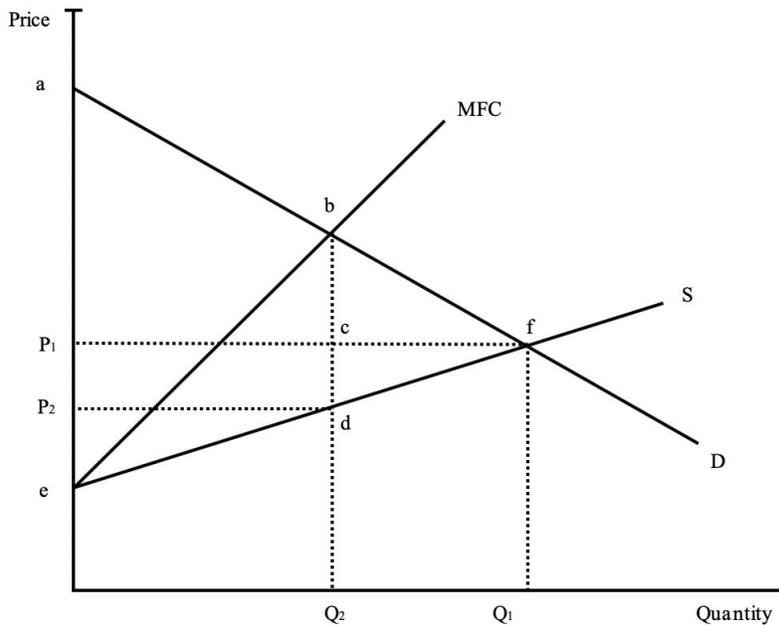


Figure 1: Competitive and Monopsony Conditions Compared³⁶

As shown in Figure 1, the quantity and price of chickens sold in a competitive market is determined by the intersection of supply and demand (f)—farmers sell Q_1 chickens for a price of P_1 . However, in an imperfectly or non-competitive market, a processor recognizes that its purchasing decisions affect price. If the processor is not able to price discriminate then it has an incentive to restrict output.³⁷ To see this, note that as you move along the

³³ See, e.g., ALAN MANNING, *MONOPSONY IN MOTION* 3 (2003).

³⁴ Roger G. Noll, "Buyer Power" and Economic Policy, 72 *ANTITRUST L.J.* 589, 589 (2005).

³⁵ This example is based on Complaint at 1–2, *United States v. George's Foods, LLC*, No. 5:11-CV-00043-gec, 2011 WL 7909307 (W.D. Va. May 10, 2011).

³⁶ Roger D. Blair and Jeffrey L. Harrison, *Monopsony in Law and Economics* 43 (2010).

³⁷ See MANNING, *supra* note 33, at 117–40, for a discussion of why employers are typically

supply curve, an additional price increment is required to induce an additional increment in the supply of chicken. However, that additional increment of price is not just paid for the additional increment of chicken but also chicken that would have been supplied at a lower price. Thus, the marginal factor cost (MFC) of chicken—which includes the price that must be paid to attract additional chicken *and* the additional amount paid for chicken that would otherwise be supplied at a lower price—is higher and more steeply sloping than the supply curve. The processor will only choose to purchase additional chicken up to the point where the marginal value of additional chicken is equal to its MFC (Q_2), and it will pay P_2 , which is the lowest price consistent with the purchase of Q_2 .

While this purchasing strategy is profit maximizing from the perspective of the processor, it has undesirable effects on social welfare. Exercise of monopsony power both disrupts efficient allocation of resources and results in a transfer of wealth from the farmers to the processor. The figures below highlight some of the efficiency and distributional consequences of this scenario.

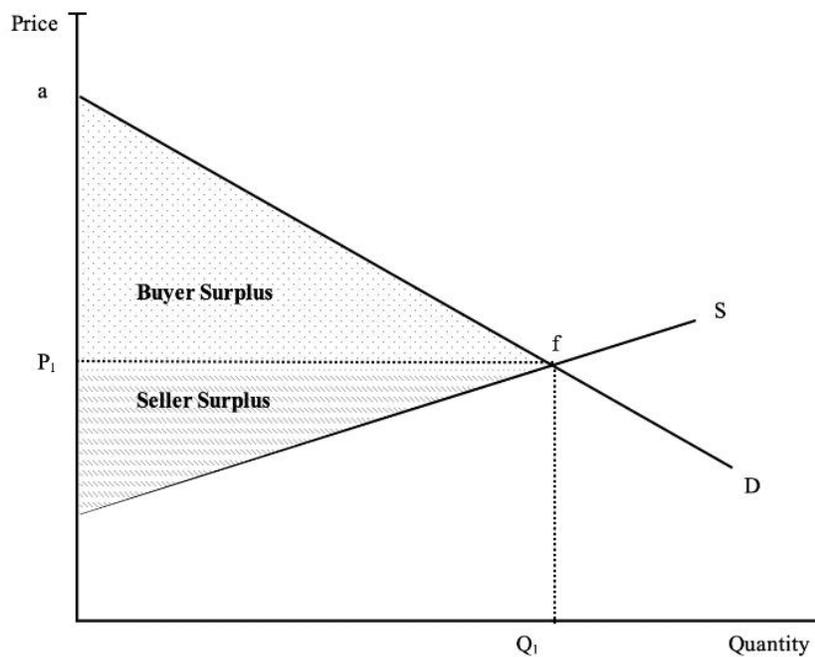


Figure 2: Allocative Efficiency of Competitive Pricing

limited in their ability to price discriminate.

Figure 2 illustrates the allocative efficiency benefits of competitive purchasing. Allocative efficiency results from maximization of preferences through better allocation of the resources at hand. For every purchase up to Q_1 , some processor would have been willing to pay more than P_1 , so it receives some surplus equivalent to the difference between what it would have been willing to pay and what it actually paid. The total surplus received by processors in the market is represented by buyer surplus area. Similarly, there are many farmers who would have been willing to accept less than P_1 , and they likewise receive some surplus from the competitive price. The total allocative efficiency created by sales of Q_1 at P_1 is the sum of buyer and seller surplus.

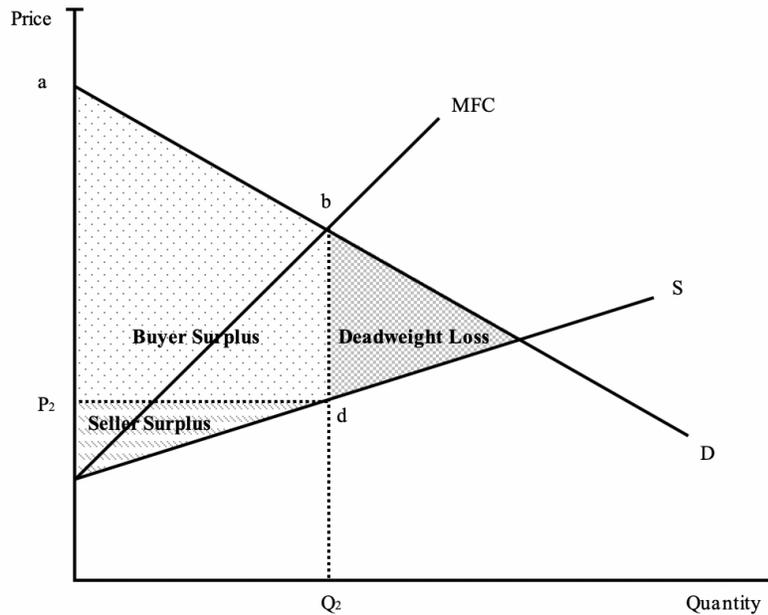


Figure 3: Allocative Inefficiency of Monopsony Pricing

Figure 3 shows the reduction in allocative efficiency that results from monopsony pricing. The output of chickens has fallen to Q_2 . There are farmers who would happily have supplied chickens at P_1 , but at P_2 they just cannot make it work anymore and have to leave the market. The seller surplus they would have gained by participating in the market is lost. The buyer, as well, could have profitably purchased, processed, and sold additional chicken. The buyer surplus that would have been gained through those sales has also been lost. This lost seller and buyer surplus is shown as deadweight loss.

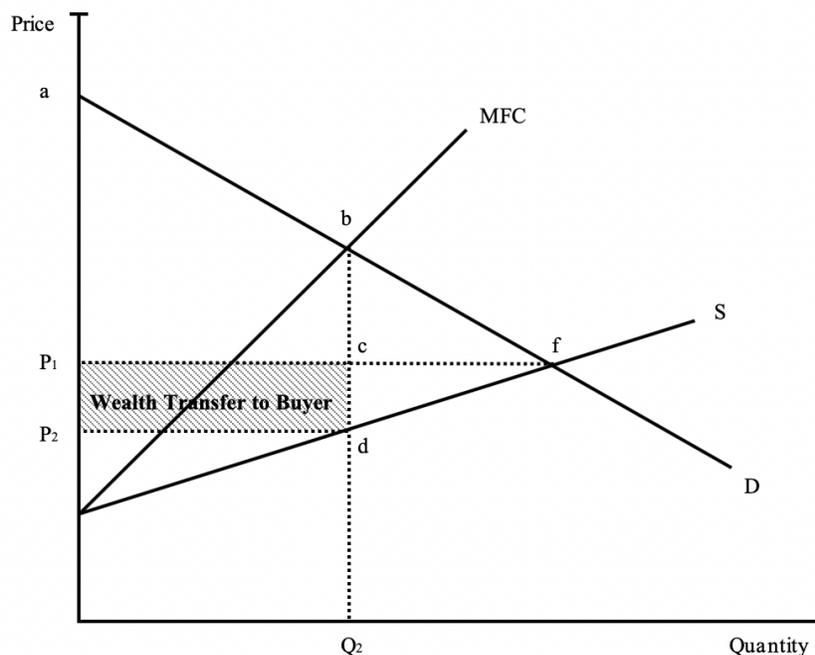


Figure 4: Distributional Effects of Monopsony Pricing

Even for those sellers for whom sale at P_2 remains efficient, the deal is a lot worse than it would have been at P_1 . With respect to these sales, monopsony pricing is simply a transfer of wealth from farmers to the processor. This effect is shown in Figure 4.

Concern about allocative inefficiency, or deadweight loss, is largely uncontroversial regardless of one's preferred economic welfare standard. While most commentators do not view deadweight loss as a trump card or the last word, deadweight loss is generally viewed as undesirable. When a monopolist charges a supra-competitive price or when a monopsonist pays a sub-competitive low price, there is a smaller pie of total surplus to be divided up among the buyer and seller. Note that the consequences extend beyond this market. The farmers and the processor are consumers in other markets, and the deadweight loss also represents lost wealth resulting from lower demand elsewhere in the economy.³⁸

The relevance of the distributional impacts of market power is subject to much more vigorous debate. Modern antitrust policy is not indifferent to the distributional effects of anticompetitive behavior.³⁹ In the context of sell-side

³⁸ Noll, *supra* note 34, at 594.

³⁹ Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 338–47 (2010).

markets, the consumer welfare standard condemns conduct that increases prices paid by consumers—that redistributes wealth away from consumers to monopolists—even though the activity might arguably enhance total welfare. Some commentators, however, view total welfare alone as the proper economic standard for antitrust policy and dismiss the relevance of distributional concerns.⁴⁰ To illustrate the divergence between the two approaches, consider a merger that produces cost savings from more efficient production that exceed the deadweight loss resulting from the merged firm's increased market power and higher prices. Under a total welfare standard, this merger would be desirable. Under a consumer welfare standard, the desirability of the merger would turn on whether the efficiencies created by the merger are likely to result in lower prices for consumers, rather than just increasing the profits of the merged firm.

The most immediate distributional concerns in the case of monopsony are those arising from the transfer of wealth from the input sellers to the buyer.⁴¹ A proponent of a total welfare standard would argue that there is no rigorous way to evaluate this distributional impact, or in one formulation, “it merely reflects a robbing of Peter [the seller] to pay Paul [the buyer], and since Paul might be more deserving than Peter, who knows whether society is worse off as a consequence?”⁴² While it is true that distributional arguments rely on value judgements, it is important to understand just what kind of value judgement. The Peter and Paul articulation obscures the distinction between the desirability of distribution based on status and the desirability of distribution based on conduct. A person might be considered more or less deserving based on their status (whether as a relatively low-income person, as member of a socially-valued profession, or based on some other classification), or it could be that a certain form of conduct is considered a more or less legitimate basis for redistributing wealth between parties. A conduct-based view of distribution might lead to the conclusion that Paul's anticompetitive conduct does not deserve to be rewarded through the extraction of wealth from Peter, whether or not one views Paul as more deserving than Peter as a general matter.

Status-based distributional concerns are difficult to square with antitrust's statutory texts, their legislative history, and case law.⁴³ On the other hand, there is a significant history of and basis for concern about the distributional effects of anticompetitive conduct.⁴⁴ Certainly under current law consumer A,

⁴⁰ See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX* 91 (1993); Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659 (2010).

⁴¹ Monopsony can also have distributional impacts on downstream consumers, as discussed *infra* Section II.C.

⁴² F.M. Scherer, *Antitrust, Efficiency, and Progress*, 62 N.Y.U. L. REV. 998, 998–99 (1987).

⁴³ But see Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 603–11 (2012) (advocating for the consideration of social and political factors in antitrust enforcement); Salop, *supra* note 38, at 338–39.

⁴⁴ Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 69–70 (1982).

who can no longer afford to purchase a cartelized good, and consumer B, who grudgingly pays the higher price, have both suffered antitrust injuries. This approach accords with basic intuitions of justice—one should not be able to profit from proscribed conduct—and is sensible from an economic perspective.

The wealth transfer accomplished through the exercise of monopoly or monopsony power is obviously valuable, and a “profit maximizing firm will be willing to spend substantial resources . . . to acquire or retain it.”⁴⁵ Justice Scalia has characterized the dangling carrot of market power as essential to a free-market system, as a stimulant for the “risk taking that produces innovation and economic growth.”⁴⁶ However, the prospect or possession of market power also encourages rent-seeking behavior.⁴⁷ Chicago School adherents have long lamented the entry barriers imposed through governmental policy; however, incumbents play a significant role in crafting many of the most frustrating barriers, as Judge Posner himself recognized.⁴⁸

In addition to incentivizing inefficient behavior by firms with market power, wealth transfers result in other dynamic costs. Consider the source of the seller surplus that is necessary for monopsony to be profitable. The surplus might derive from differences in productivity among sellers.⁴⁹ For example, one computer programmer may be much more efficient than another. If the programmers were paid equal amounts, she would derive more surplus than her slower peer because she incurred less opportunity cost. She could use her extra time vacationing, learning new skills, or working on an additional project.

On the other hand, the difference between a seller’s short-run costs and their revenue may be necessary to pay off earlier investments.⁵⁰ The wage of a nurse practitioner might exceed the immediate costs of providing her labor—such as the opportunity costs of working elsewhere, of staying home to care for her children, or of leisure. She can use this excess to pay for the earlier investment she made in her education.

Monopsony transfers some of the wealth derived from these forms of surplus from the worker to the employer. A productive worker retains fewer of the benefits of her productivity. A worker who invested in her education finds herself less able to recoup those expenses when monopsony power increases. This issue is especially problematic in markets where employer market power is increasing over time because workers will tend to overinvest in education, or other sunk costs, and find themselves with a lower-than-expected income.

⁴⁵ HOVENKAMP, *supra* note 1, at 677.

⁴⁶ Verizon Commc’ns Inc. v. Trinko, 540 U.S. 398, 407 (2004).

⁴⁷ HOVENKAMP, *supra* note 1, at 27.

⁴⁸ Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 824 (1975).

⁴⁹ The surplus that arises from “differential productivity or costs per unit among factors of production” is known as Ricardian rent. Noll, *supra* note 34, at 593.

⁵⁰ The surplus derived from the “difference between a supplier’s total revenues and short-run total costs” that is used necessary to recoup investments is known as quasi-rents. *Id.*

Diminished incentives may thus result in decreased work quality and lack of investment in education in the future.

The costs of wealth transfers are also important as the relationship between workers and employers departs from the single, take-it-or-leave-it posted price model presented above. That model is probably a reasonable approximation in many employment contexts.⁵¹ However, wages for some types of workers may be more commonly set through bilateral negotiation.⁵² Consider a dental hygienist negotiating her salary. If there is only one dental practice in her area, she has a lot to lose if negotiations break down. Her potential employer knows this and will drive a hard bargain. If, however, there is another dental practice in town, her bargaining position improves because even if negotiations with this practice fail there is still some probability that she could be hired by the competitor. The existence of a third dental practice would further strengthen her hand, though not by as much. Figure 5 shows value of additional employment options to the dental hygienist.

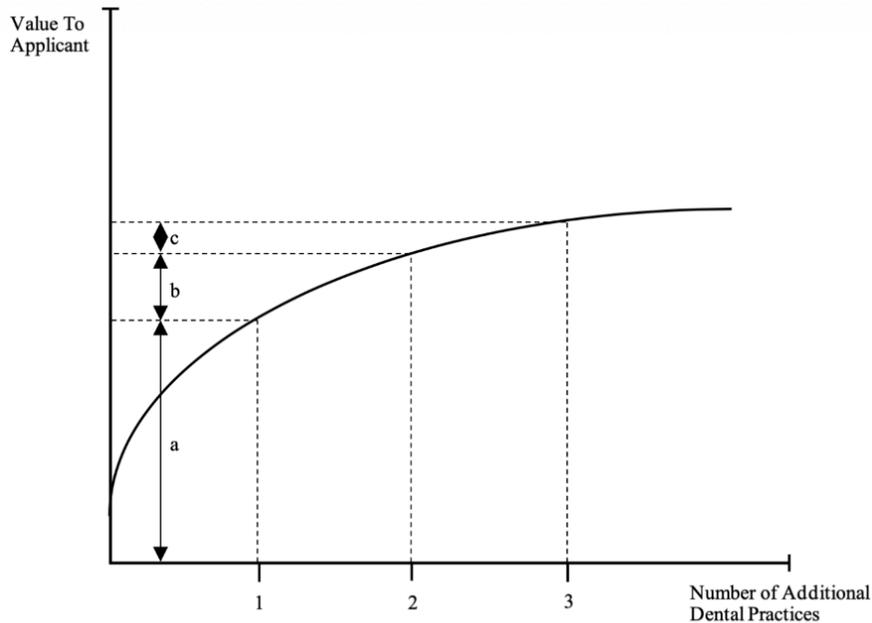


Figure 5: Value of Alternatives in Negotiation

Every additional option decreases the risks or cost of walking away from this negotiation. The salary offer must exceed the hygienist's walk away value to be accepted. A merger that increases the concentration of buyers decreases

⁵¹ MANNING, *supra* note 33, at 5.

⁵² *Id.* at 4–5. This analysis is somewhat different with negotiated contracts, price discrimination, and non-linear prices. *Id.* at 117–21.

the walk away value and thereby creates downward pressure on the hygienist's salary. This effect becomes stronger as the market becomes increasingly concentrated. A four-to-three merger in this market would decrease the hygienist's walk away value by (c), whereas a merger-to-monopsony would decrease her walk away value by (a). In short, bargaining in the shadow of monopsony results in distributive effects resembling those of the single-price monopsonist. These distributive effects produce the same perverse incentives for rent-seeking by the monopsonist and against skills-investment and productivity by the worker.

Note, however, that aggressive bargaining by the dental practice might only result in a wealth transfer; there may not be a reduction in output of dental hygienist services. The number of workers hired by a buyer with market power might be identical to the number hired in a competitive market, so there is no deadweight loss. Nevertheless, the existence of market power enables the buyer to extract wealth from many workers because the outcome of negotiations depends on the viability of each party's alternatives to agreement.⁵³

B. Sources of Labor Market Monopsony Power

As mentioned above, monopsony power refers to the ability of the firm to retain workers while setting wages below the level that would emerge in a competitive market. But where does the firm derive this ability? Labor market power can result from employer concentration; from significant workplace differentiation; from the "search frictions" involved in identifying, applying, and getting hired for positions; and from anticompetitive agreements used by employers to limit competition.

Concentration is a key indicator of market power in buyers' markets, just as it is in sellers' markets.⁵⁴ At the extreme, a single hiring firm in an isolated town has significant leeway to set low wages. People need to work. To avoid uprooting her family, scrambling to sell her house, and breaking ties with loved ones, a worker likely is willing to accept much less return than she contributes to the firm. Add a few more firms and you might expect more competition, resulting in higher wages. But in a market with only a few buyers of labor, the incentives to set anticompetitive wages remain high. To illustrate why, say Firm A is interested in attracting more workers in order to produce more goods and chooses to increase its wage. Some workers—though probably not all for reasons described below—then leave Firms B, C, and D for Firm A. Those firms, needing to restore their workforce, then hike their own wages. Perhaps after some back-and-forth, wages increase and approach the amount of revenue derived from an additional unit of labor. In the end, Firm A will end

⁵³ FED. TRADE COMM'N & U.S. DEP'T OF JUST., HORIZONTAL MERGER GUIDELINES, § 6.2 (2010) [hereinafter MERGER GUIDELINES].

⁵⁴ Concentration and the following sources of labor market power are discussed in LABOR MARKET MONOPSONY BRIEF, *supra* note 4, at 4.

up with around its original labor market share, but it will pay a higher wage. However, if Firm A can anticipate this bidding war, it will never set it off in the first place. The four firms will tacitly settle around a lower wage.

As more firms enter the market, this tacit collusion becomes more difficult to achieve. Firms vary in how productively they can use labor, so the ideal “monopsony wage” varies. With a small number of firms, anticipating and accommodating each other’s preferred wage is simpler, and consensus is easier to achieve. In addition, in a concentrated market, firms can identify a firm that is offering a higher wage more easily and then retaliate by bidding up the wage. Finally, this retaliation is likely more costly to the target firm in a concentrated market. The role of concentration in coping with these “cartel problems”—establishing consensus, detecting cheating when it occurs, and deterring cheating through a credible threat of retaliation—has long been recognized in sellers’ markets, and its effects are equally important in buyers’ markets.⁵⁵

Beyond concentration, other attributes of labor markets help strengthen the hand of employers. Workplaces are often highly differentiated from the perspective of the worker. While on a job-search web page, one entry-level marketing job may look much like another, the alternatives may in fact differ dramatically. These differences might include non-wage benefits such as health or childcare; workplace amenities or opportunities to telework; locations that are convenient in light of a spouse’s job or a child’s school; avenues for advancement within the organization; and many other features. As workers advance in their careers, acquired industry-specific knowledge can also become increasingly valuable, so what were originally broad entry-level job categories may narrow at higher levels.⁵⁶ Just as in product and service markets, differentiation can be an important source of market power because more limited comparability tends to impair the competitive process.

The differentiation among workplaces is exacerbated by the role of “matching” in job markets. In a typical transaction involving sales of differentiated products, the buyer cares about the differences between the products, but the sellers are largely indifferent to who purchases their products as long as the purchaser pays the asking price. Labor markets are different. Not only does a job searcher have to identify a job she likes and that pays a sufficient salary, she has to find an employer who wants her, too. People celebrate when they are hired for a new job, and not when they find their preferred cereal at the grocery store, because the job search and hiring process is challenging.

Employers can further entrench their monopsony power through agreements that restrict the mobility of workers. These agreements may be horizontal—such as no-poaching agreements between competing employers—or vertical—including non-compete agreements made between an employer

⁵⁵ See, e.g., D.K. Osborne, *Cartel Problems*, 66 AM. ECON. REV. 835 (1976).

⁵⁶ See *Todd v. Exxon Corp.*, 275 F.3d 191, 203 (2d Cir. 2001).

and a worker. Each cripple the competitive process and can depress workers' wages. No-poaching agreements are typically nakedly anticompetitive. The justifications for this type of coordination among competitors are weak, and enforcement agencies are starting to challenge such agreements in a variety of sectors.⁵⁷

Non-compete agreements, by contrast, are usually defended as necessary to prevent the disclosure of trade secrets or to encourage investment in training. However, recent research has revealed an astonishing prevalence of these types of agreements in the U.S. economy, with a frequency that seems to far exceed the scope of these rationales.⁵⁸ One study estimated that eighteen percent of workers employed in the U.S. are constrained by a noncompete clause in their employment contract, and non-compete agreements have become increasingly common in low-wage employment.⁵⁹ The sandwich franchise Jimmy Johns recently faced several lawsuits regarding provisions in its employee contracts that forbade its workers from working for its competitors within two years after leaving the company.⁶⁰ As the New York attorney general explained in relation to one of the suits, “[n]oncompete agreements for low-wage workers are unconscionable They limit mobility and opportunity for vulnerable workers and bully them into staying with the threat of being sued. Companies should stop using these agreements for minimum wage employees.”⁶¹ Another study focused on franchise industries found that “[no]-poaching agreements are comparatively less frequent in industries with higher average wages and education levels,” contrary to the view that the agreements are intended to encourage investment in training or to protect trade secrets.⁶²

Finally, that the relative market power of employers vis-à-vis workers has continued to grow in recent decades is also due, in part, to the decline of unions and the erosion of many labor laws.⁶³ A traditional argument for unions and labor law that “[l]abor markets are generally tilted against individual workers simply because workers have only one job to lose, while employers

⁵⁷ *No More No-Poach*, *supra* note 18.

⁵⁸ A 2019 study found that between 27.8% and 46.5% of private sector workers are under a non-compete agreement. Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, ECON. POL'Y INST. (Dec. 10, 2019), <https://www.epi.org/publication/noncompete-agreements/> [<https://perma.cc/W7FT-CLCP>].

⁵⁹ Evan Starr, J.J. Prescott & Norman Bishara, *Non-Competes in the U.S. Labor Force*, UNIV. MICH. L. & ECON. RSCH. PAPER SERIES 1, 5–6 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714 [<https://perma.cc/M45K-PMPE>].

⁶⁰ Sarah Whitten, *Jimmy John's Drops Noncompete Clauses Following Settlement*, CNBC (June 26, 2016, 1:40 PM), <https://www.cnbc.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html> [<https://perma.cc/VE6Y-HPXD>].

⁶¹ *Id.*

⁶² Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24831, 2018).

⁶³ Josh Bivens, Lawrence Mishel & John Schmitt, *It's Not Just Monopoly and Monopsony*, ECON. POL'Y INST. 18 (2018).

typically have access to plenty of workers,” simply cannot be remedied by antitrust policy.⁶⁴ Accordingly, the framework proposed in this paper should not be considered in isolation. Market power and concentration are not a “theory of everything” and the institutional limits of the antitrust agencies should be acknowledged.⁶⁵

C. Empirical Evidence of Labor Market Monopsony Power

The empirical evidence of labor market power falls into three main categories of studies. First, the modern analysis of labor market monopsony was spurred by the literature on the impact of minimum wage laws—most notably a study by David Card and Alan B. Krueger published in 1994.⁶⁶ This study found that an increase in New Jersey’s minimum wage did not result in increased unemployment in a competitive labor market, contrary to predictions, but may have, in fact, slightly boosted employment levels.⁶⁷ This unexpected result prompted many subsequent studies, some critical but many confirming Card and Krueger’s findings.⁶⁸ The minimum wage literature has not produced conclusive answers—minimum wage effects seem to be highly dependent on context—but it appears that minimum wage laws are very often successful in increasing wages without reducing overall employment.⁶⁹

A second category of studies have focused on concentration levels of firms in labor markets. These studies show that many labor markets are highly concentrated and thus susceptible to the exercise of market power.⁷⁰ One influential study calculated HHI levels in labor markets defined by commuting zones⁷¹ and 6-digit Standard Occupational Classification (SOC) categories, which is an index used by the Department of Labor’s Bureau of Labor

⁶⁴ Josh Bivens & Heidi Shierholz, *What Labor Market Changes Have Generated Inequality and Wage Suppression?*, ECON. POL’Y INST. 10 (2018).

⁶⁵ *IMF Competition Concerns*, *supra* note 6.

⁶⁶ See generally David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772 (1994).

⁶⁷ *Id.* at 792.

⁶⁸ See, e.g., David Neumark & William Wascher, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania: Comment*, 90 AM. ECON. REV. 1362, 1391 (2000) (a significant critical analysis); Arindrajit Dube, T. William Lester & Michael Reich, *Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties*, 92 REV. ECON. & STAT. 945, 945–46 (2010) (studies confirming Card and Krueger’s findings).

⁶⁹ See generally DALE BELMAN & PAUL J. WOLFSON, WHAT DOES THE MINIMUM WAGE DO? (2014). See also Arindrajit Dube, T. William Lester & Michael Reich, *Minimum Wage Shocks, Employment Flows, and Labor Market Frictions*, 34 J. LAB. ECON. 663, 664 (2016) (a summary of the minimum wage literature).

⁷⁰ Azar et al., *supra* note 14, at 2.

⁷¹ Commuting zones are area definitions developed by the U.S. Department of Agriculture on the basis of 2000 Census data on commuting patterns in order to capture local economies and labor markets. Commuting zones typically include a cluster of counties. *Commuting Zones and Labor Market Areas*, U.S. DEP’T OF AGRIC. ECON. RSCH. SERV., <https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/> [<https://perma.cc/4YSM-U2TV>].

Statistics.⁷² An example of a labor market under this classification system would be epidemiologists in the Chicago-Naperville-Joliet, Illinois commuting zone. The study found that the average labor market in the United States had an HHI of 4,378, which is well above the Horizontal Merger Guidelines threshold of 2,500 for “highly concentrated” markets.⁷³ By this measure, sixty percent of markets are “highly concentrated.”⁷⁴ As shown in Figure 6, the average HHI for many commuting zones across middle America exceeds the highly concentrated threshold.

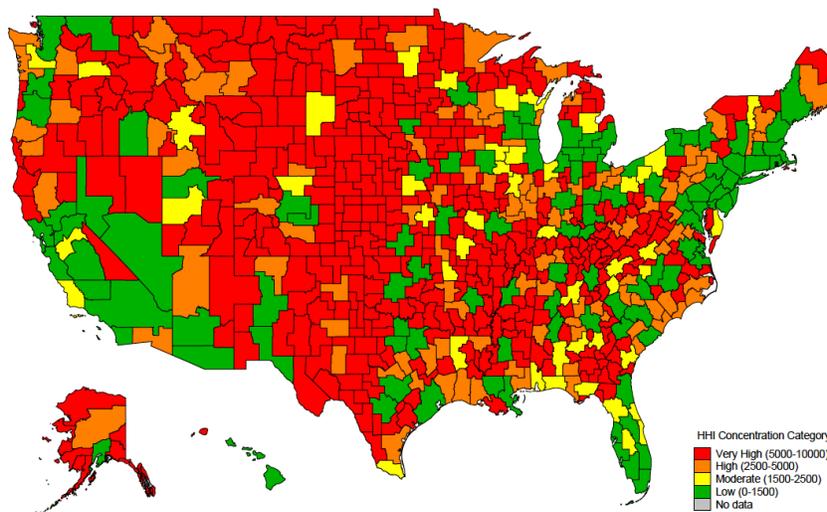


Figure 6: Map of HHI Concentration⁷⁵

Further, as shown in Figure 7, in the vast majority of commuting zones in the country, at least a quarter of job markets are highly concentrated. This study’s findings have been confirmed by other authors using different data sets and market definition techniques.⁷⁶

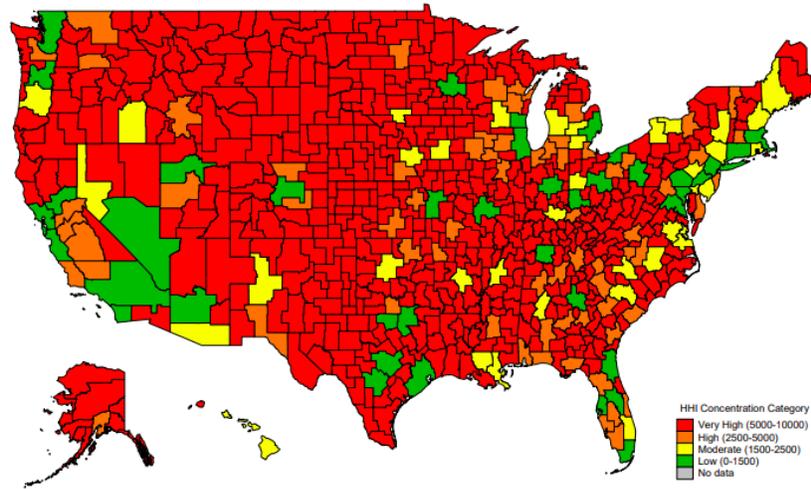
⁷² 2018 *Standard Occupational Classification System*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/soc/2018/major_groups.htm [<https://perma.cc/8QZP-KC3U>]. See Azar et al., *supra* note 14, at 10–13, for justification of the use of SOC categories.

⁷³ Azar et al., *supra* note 14, at 2.

⁷⁴ *Id.*

⁷⁵ Azar et al., *supra* note 14, at 32 fig.3.

⁷⁶ See Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 3–4 (Nat’l Bureau of Econ. Rsch., Working Paper No. 24307, 2018).



(D) 4th Quartile

Figure 7: Example of high HHI concentration in the marker⁷⁷

Beyond establishing the fact of concentration, these studies have also attempted to demonstrate a causal relationship between increased concentration and depressed wages. This relationship is difficult to isolate because there are a number of factors that may be correlated with concentration but impact wages through other means. For example, concentration levels are typically high in rural areas, but the divergence between rural and urban wages is almost certainly due to additional factors beyond employer concentration, including “brain drain,” the declining role of the agricultural sector, and many other challenges.⁷⁸ Econometricians have devised creative identification strategies and their results lend support to the economic theory on the relationship between concentration and depressed wages.⁷⁹

Another category of studies makes use of diverse identification strategies to estimate average firm-level labor supply elasticities. In a competitive market, the elasticity of labor supply to a firm should “tend towards infinity,”

⁷⁷ Azar et al., *supra* note 14, at 32 fig.2.

⁷⁸ See *Rural America at a Glance*, U.S. DEP’T AGRIC. ECON. RSCH. SERV. 1 (2019), <https://www.ers.usda.gov/webdocs/publications/95341/eib-212.pdf?v=5832> [<https://perma.cc/B54B-5GN8>].

⁷⁹ See, e.g., José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 24147, 2019) (finding that going from the 25th percentile of market concentration to the 75th percentile of market concentration is associated with a 17% decrease in wages); Benmelech et al., *supra* note 75, at 3–4 (showing negative impact of concentration on wages that has increased over time and that becomes stronger as markets become more concentrated).

but empirical analysis has generated much smaller estimates.⁸⁰ Some of these studies have considered particular markets, while others have generated average elasticity estimates across many job categories and geographies.⁸¹ Nursing markets have been a frequent subject of analysis as a result of antitrust litigation against hospitals, but the findings are mixed.⁸² For example, a study of the markets for registered nurses across the U.S. showed very low elasticities and significant concentration effects,⁸³ while a study of the markets for relatively low-skilled nurse aides in California suggested higher elasticities and more competitive markets.⁸⁴ A similar study examined the market for school teachers in Missouri and found low elasticities, especially in more rural areas.⁸⁵ Troublingly low elasticities also turn up in markets that one might intuitively expect to be competitive. These include online labor markets, where a recent study found elasticities of well below 1.⁸⁶ A study of firms that are built around innovation also found surprisingly low elasticities.⁸⁷

In a more sweeping analysis, Douglas A. Webber showed that labor supply elasticities are strikingly low in sectors across the economy, though there is significant variability across markets and firms.⁸⁸ This study also found that the downward wage effects of low elasticities were particularly pronounced in the lower half of the earnings distribution.⁸⁹ In other words, low income people appear to bear more of the burden of labor market power. In a subsequent study, Webber found that differences in the average labor supply elasticities of men and women—where on average women have significantly lower elasticities than men—may help explain some of the gender-based wage gap.⁹⁰

⁸⁰ Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1042 (2019).

⁸¹ See Naidu et al., *supra* note 17, at 567–68, for a helpful synthesis of empirical elasticity estimates.

⁸² *Id.* at 560 n.97.

⁸³ Barry T. Hirsch & Edward J. Schumacher, *Classic or New Monopsony? Searching for Evidence in Nursing Labor Markets*, 24 J. HEALTH ECON. 969, 987 (2005); *see also* Douglas O. Staiger, Joanne Spetz & Ciaran S. Phibbs, *Is There Monopsony in the Labor Market? Evidence from a Natural Experiment*, 28 J. LAB. ECON. 211, 213 (2010) (finding an elasticity of 0.1 in the market for registered nurses).

⁸⁴ Jordan D. Matsudaira, *Monopsony in the Low-Wage Labor Market? Evidence from Minimum Nurse Staffing Regulations*, 96 REV. ECON. & STAT. 92, 100 (2014).

⁸⁵ Michael R. Ransom & David P. Sims, *Estimating the Firm's Labor Supply Curve in a "New Monopsony" Framework: Schoolteachers in Missouri*, 28 J. LAB. ECON. 331, 347 tbl.4 (2010).

⁸⁶ Arindrajit Dube, Jeff Jacobs, Suresh Naidu & Siddharth Suri, *Monopsony in Online Labor Markets 2–3* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24416, 2018).

⁸⁷ Patrick Kline, Neviana Petkova, Heidi Williams & Owen Zidar, *Who Profits from Patents? Rent-Sharing at Innovative Firms 27* (Inst. for Rsch. on Lab. & Emp., Working Paper No. 107-17, 2017), <http://irle.berkeley.edu/files/2017/Who-Profits-from-Patents.pdf> [<https://perma.cc/4QYX-2K53>].

⁸⁸ Douglas A. Webber, *Firm Market Power and the Earnings Distribution*, 35 LAB. ECON. 123, 128–29 (2015).

⁸⁹ *Id.* at 130.

⁹⁰ Douglas A. Webber, *Firm-Level Monopsony and the Gender Pay Gap*, 55 INDUS. RELS. 323,

Each empirical analysis in this admittedly incomplete survey is susceptible to criticism. Like product or service markets, labor markets are not conducive to precise definition. Workers in some occupations may be more willing to move for a job than others. Workers may also be able to move fairly readily across some job categories, while others should probably be broken down into sub-categories to more accurately reflect competitive conditions. With respect to elasticity estimates, each study struggles with endogeneity problems and the many creative empirical strategies have produced, at most, an impressionistic picture. No one study can claim to have precisely quantified the problem of labor market power. Nevertheless, the resilience of the basic finding of less-than-competitive labor markets across a diverse array of empirical methodologies is certainly a reason for concern and further analysis.

III. IMPACT OF LABOR MONOPSONY POWER ON DOWNSTREAM PURCHASERS

Over the past several decades a fundamentally economic approach has become entrenched in antitrust policy, and the prevailing economic welfare standard has been the consumer welfare standard.⁹¹ According to this standard, a merger between competing sellers that is likely to result in higher prices for consumers is undesirable and should be blocked. However, the meaning and implications of this standard are less straightforward when applied to a merger between buyers of labor. Who are the consumers? Whose welfare should be determinative when evaluating these mergers?

Take the basic example of a merger-to-monopsony of Firms A and B, who each produce widgets. Firm A produces widgets using labor and patented technology X. Firm B produces widgets using labor and patented technology Y. The firms sell widgets directly to consumers. A merger would allow the firms to combine their patents to produce a more efficient technology Z. Under the total welfare standard, the question is whether the increase in productive efficiency from the development of technology Z is greater than the loss in allocative efficiency arising from increased market power.⁹² If the consumer welfare standard is taken to mean the welfare of widget purchasers, the question is whether the merger will result in a net price increase for those customers. On the other hand, if the consumer welfare standard is interpreted as the welfare of those most directly affected by the increase in market

337 (2016).

⁹¹ PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION*, ¶ 114b (2018); *see also* RICHARD A. POSNER, *ANTITRUST LAW*, at ix (2d ed. 2001) (“Almost everyone professionally involved in antitrust today—whether as litigator, prosecutor, judge, academic, or informed observer—not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory that should be used to determine the consistency of specific business practices with that goal.”).

⁹² I am assuming that for some reason the firms cannot simply cross-license their patents, so this efficiency is merger-specific. *See* MERGER GUIDELINES, *supra* note 52, at § 10.

power—which in the case of labor market power is the workers—the question is whether the workers will receive a lower wage as a result of the merger.

The current status of the law appears to favor the latter interpretation. In the most recent of the very few buyer-side cases decided by the Supreme Court, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, the Court focused on the upstream market and did not attempt to trace harms downstream.⁹³ However, the issue in *Weyerhaeuser* was input foreclosure rather than monopsony, so the implications of the decision are contestable.⁹⁴ That said, in the aftermath of the decision, several lower courts considering monopsonization claims have not required proof of higher prices for downstream customers.⁹⁵ For example, in *West Penn Allegheny Health System, Inc. v. UPMC*, a conspiracy case involving a health insurer, the Third Circuit considered the alleged depressed reimbursement rates paid to a hospital resulting from the insurer's monopsony power and found it was a cognizable antitrust injury.⁹⁶ Importantly, the court also stated that a defense based on the ability to pass on to downstream customers the cost savings derived from the exercise of monopsony power was not cognizable.⁹⁷ The court quoted the Ninth Circuit, which in *Knevelbaard Dairies v. Kraft Foods, Inc.* said, “[t]he Supreme Court’s references to the goals of achieving ‘the lowest prices, the highest quality and the greatest material progress,’ and of ‘assur[ing] customers the benefits of price competition’ do not mean that conspiracies among buyers to depress acquisition prices are tolerated.”⁹⁸ Note that, unlike in *Knevelbaard*, the insurer in *West Penn* was not setting low prices as part of a price-fixing agreement with other buyers—conduct that typically draws heightened scrutiny—but was instead unilaterally exercising its monopsony power.

Todd v. Exxon Corp. is a Second Circuit case concerning information exchanges between oil and petrochemical firms about compensation paid to nonunion managerial, professional, and technical employees that allegedly enabled the firms to depress the salaries for these employees.⁹⁹ When assessing the anticompetitive impacts of the conduct, then-Judge Sotomayor focused on the employees’ salary levels and made no mention of downstream impacts.¹⁰⁰ Similarly, when construing a statute based on federal antitrust law, the Ninth Circuit focused its analysis on depressed wages payed to agricultural laborers in Washington and never discussed the consequences for downstream customers.¹⁰¹

⁹³ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320–21 (2007).

⁹⁴ *Id.* at 320.

⁹⁵ *See, e.g.*, *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 102 (3d Cir. 2010).

⁹⁶ *Id.* at 104.

⁹⁷ *Id.* at 105.

⁹⁸ *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) (citations omitted).

⁹⁹ *Todd v. Exxon Corp.*, 275 F.3d 191, 195 (2d Cir. 2001).

¹⁰⁰ *Id.* at 213–14.

¹⁰¹ *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1166 (9th Cir. 2002).

The agencies have likewise focused on upstream impacts and have not attempted to trace downstream harm. In 2011, the DOJ challenged George's Foods' acquisition of a competing Tyson chicken processing plant on the basis of monopsony power in the market for purchasing chickens from local farmers and did not attempt to show harm to downstream customers.¹⁰² The case was ultimately settled through a consent decree, so the issue was not litigated.¹⁰³ Nevertheless, it appears to reflect the position of the agencies. In 2012, the FTC began a merger review by considering the likely effects in the downstream market.¹⁰⁴ When the agency concluded that anticompetitive effects in the downstream market were unlikely, it proceeded to review for monopsony in the upstream market, suggesting that the agency viewed upstream harm as potentially sufficient to block a merger on its own.¹⁰⁵ The same year, then-Acting Assistant Attorney General for Antitrust Sharis Pozen explained: “[s]pecifically, the antitrust laws proscribe mergers that reduce buy-side competition, agreements among buyers that unreasonably restrain competition, and exclusionary conduct enabling the acquisition or maintenance of monopsony power (without being limited by a requirement of showing downstream effects).”¹⁰⁶

This position can also be inferred from the 2010 Horizontal Merger Guidelines, which state that the agencies do not “evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell.”¹⁰⁷ However, like most of the Merger Guidelines' brief treatment of mergers of competing buyers, this language is ambiguous. In the overall introductory section, the Merger Guidelines state that with respect to mergers of competing sellers, “[a] merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.”¹⁰⁸ With respect to mergers of competing buyers, by contrast, the Merger Guidelines simply state that the agencies “employ an analogous framework.”¹⁰⁹

The ambiguity is exacerbated by some conflicting precedent in lower courts that have given downstream impacts significant weight in their analysis. For example, in 1984, then-Judge Breyer cautioned courts against hastily

¹⁰² Complaint at 1–2, *United States v. George's Foods, LLC*, No. 5:11-cv-00043-gec, 2011 WL 2445076 (W.D. Va. May 10, 2011).

¹⁰³ Final Judgment at 1, *George's Foods*, 2011 WL 2445076 (No. 5:11-cv-00043-gec), available at <https://www.justice.gov/atr/case-document/file/497356/download>.

¹⁰⁴ John D. Shively, *When Does Buyer Power Become Monopsony Pricing?*, 27 ANTITRUST 87, 89 (2012).

¹⁰⁵ *Id.* at 89–90.

¹⁰⁶ Sharis A. Pozen, *Agriculture and Antitrust: Dispatches and Learning from the Workshops on Competition in Agriculture*, 26 ANTITRUST 8, 9 (2012).

¹⁰⁷ MERGER GUIDELINES, *supra* note 52, at § 12.

¹⁰⁸ *Id.* at § 1.

¹⁰⁹ *Id.*

condemning conduct that will result in lower prices for consumers when the First Circuit upheld a reimbursement arrangement that allegedly resulted in lower reimbursement rates to physicians.¹¹⁰ Judge Breyer was hesitant to increase “judicial supervision of the buyer/seller price bargain,” in line with traditional resistance of courts to engage in price setting.¹¹¹ More recently, then-Judge Kavanaugh argued in dissent for making harm to downstream customers determinative in cases involving upstream buyer power.¹¹²

To resolve these competing views, I argue that practices impacting labor market power should be primarily evaluated on the basis of harm to workers. However, even if one concludes that the focus should be on downstream customers, increased buyer power is still generally undesirable. A common, mistaken intuition is that monopsony should usually result in lower prices for downstream customers.¹¹³ After all, firms often have an incentive to pass on lower costs to customers, and monopsony allows the firm to achieve lower costs.¹¹⁴ The flaws in this syllogism are discussed in detail below, but to summarize, monopsony will usually not result in lower prices for customers.

This fact does not mean that the choice between a customer welfare standard and a trading partner welfare standard is inconsequential. The choice may be outcome determinative for two reasons: first, there may be actual divergence in the interests of workers and customers, and second, the customer welfare standard may impose greater evidentiary costs, resulting in under-deterrence relative to the trading partner welfare standard. The next subsection will review the lessons of economic theory on the downstream impacts of monopsony power in order to clarify where the interests of workers and customers are aligned and where they diverge. The following subsection then considers the showings that would be required to establish a *prima facie* case under each of the competing welfare standards—total welfare, customer welfare, and trading partner welfare—to block a merger.

¹¹⁰ *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 930–31 (1st Cir. 1984) (“Of course, a buyer, as well as a seller, can possess significant market power; and courts have held that *agreements* to fix prices—whether maximum or minimum—are unlawful. Nonetheless, the Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too *high*, not too low.” (citations omitted)).

¹¹¹ *Id.* at 931; *see also* *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398–99 (1927).

¹¹² *United States v. Anthem, Inc.*, 855 F.3d 345, 377–78 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

¹¹³ Mark V. Pauly, *Monopsony Power in Health Insurance: Thinking Straight While Standing on Your Head*, 6 J. HEALTH ECON. 73, 73–74 (1987); *see also* Peter J. Hammer & William M. Sage, *Monopsony as an Agency and Regulatory Problem in Health Care*, 71 ANTITRUST L.J. 949, 963–64 (2004) (discussing the implications of this erroneous or overly simplistic intuition in health insurance cases).

¹¹⁴ *See* Clayton J. Masterman, Note, *The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law*, 69 VAND. L. REV. 1387, 1402–03 (2016), for an example of this reasoning.

A. *Nature of the Impacts*

Now back to our troublesome syllogism. To rephrase:

Monopsony results in lower costs for producers.

Lower costs for producers result in lower prices for consumers.

Therefore, antitrust should not bother with monopsony.

Or take an example from case law. In a suit concerning buyer collusion among film exhibitors bidding for films offered by distributors, the Sixth Circuit concluded that the collusive practices “may simply lower prices paid by exhibitors to distributors,” which “may lower prices to moviegoers at the box office and may serve rather than undermine consumer welfare.”¹¹⁵ As discussed below, there are some types of cases where this may be true, but typically, it will not be.¹¹⁶

The key problem with this reasoning, applied as a general matter, is that a monopsonist reduces costs by restricting inputs. Those cost reductions are unlikely to be passed on to customers. Consider again the merger between Firm A and B but ignore technology Z for the moment. Assume that both before and after the merger, each widget is most efficiently produced using one hour of labor. Any less and there are likely to be mistakes resulting in diminished quality. Anymore, and the additional increment of quality is not worth the cost of extra labor. If the merged firm restricts hiring, it cannot maintain the original output level. Either fewer widgets are produced, or the same number are produced, but they are of inferior quality.

If the downstream market for widgets is competitive, the merged firm will have no incentive to lower its price below the prevailing level, in spite of its lower costs.¹¹⁷ If a firm lowers its costs by developing more efficient production processes, it may want to lower its price in order to expand its market share. However, the merged firm reduced its costs by restricting its inputs, so it cannot expand its market share. Reducing its price would, therefore, be an irrational give-away to customers. The firm will set prices at the market level, and the market level will stay constant as long as other

¹¹⁵ *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313, 316–17 (6th Cir. 1989).

¹¹⁶ See discussion *infra* Section III.B. Dicta in *Balmoral* suggests that the buyer power at issue may have been used to countervail the preexisting market power of distributors and producers, so it may, in fact, have been a case where buyer power can result in lower prices for consumers. *Balmoral*, 885 F.2d at 316–17.

¹¹⁷ Some courts have mistakenly assumed that buyer power can only produce harm to downstream customers if the buyer has market power in the downstream market. See *Addamax Corp. v. Open Software Found., Inc.*, 888 F. Supp. 274, 280 (D. Mass. 1995) (stating that courts will find antitrust injury “when lower prices input prices do not produce lower prices to consumers . . . [which occurs when] the colluding buyers possess market power on a downstream market” (citations omitted)).

producers are as efficient as the monopsonist and have the excess capacity to make up the lost output at a marginal cost below the market price. If other producers are not as efficient or do not have excess capacity to make up for the lost output, the market price will increase.¹¹⁸

Note that this discussion of immediate price effects does not capture the full harm imposed by monopsony, even where the downstream market is competitive. As the Tenth Circuit explained:

[T]here is a dead-weight loss associated with imposition of monopsony pricing restraints. Some producers will either produce less or cease production altogether, resulting in less-than-optimal output of the product or service, and over the long run higher consumer prices, reduced product quality, or substitution of less efficient alternative products. So, even proceeding from the premise that antitrust laws aim only at protecting consumers, monopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumers.¹¹⁹

In a non-competitive downstream market, not only will monopsony fail to result in a lower price for customers, it will likely result in a higher price. Even though a monopsonist can demand a lower price for inputs, monopsony results in higher *marginal* costs for those inputs.¹²⁰ Recall that the marginal factor cost of labor for a monopsonist includes the price that must be paid to attract additional labor and the additional amount paid for labor that would otherwise be supplied at a lower price.¹²¹ This increased marginal cost decreases the profit-maximizing output in the downstream market.

Will monopsony power ever result in decreased customer prices? One plausible scenario is that monopsony power may be used to offset countervailing market power. To illustrate, consider a monopolist input manufacturer that sells to each firm in a proposed merger. The increased buyer power that would result from the merger can be used to move the input price closer to a competitive level. Because the input producer was previously charging a supra-competitive price, the price reduction is not likely to result in reduced output. In this scenario, the monopsonist may very well pass on some portion of the lower costs in the form of lower prices to consumers.

¹¹⁸ *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1158 (5th Cir. 1979) (“Both types of price-fixing are attended by restrictions in industry output and the consequent reallocation of resources to less valuable uses.”).

¹¹⁹ *Telecor Commc’ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1135 (10th Cir. 2002) (citations omitted); *see also* *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1061 (D.C. Cir. 1995) (“So, even proceeding from the premise that antitrust laws aim only at protecting consumers, monopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumers.”).

¹²⁰ Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 302–03 (1991).

¹²¹ *See supra* Section II.A.

However, this scenario is likely unimportant in the context of labor monopsony. An individual worker is unlikely to have significant market power alone. Workers can acquire market power by organizing in a labor union, but for policy reasons, labor union activity is excluded from antitrust scrutiny.¹²² Combatting specifically sanctioned union activity is not a legitimate basis to justify increased market power. Workers might collude informally—perhaps through professional organizations¹²³—but such collusion should be addressed directly, rather than used as a justification for even more market power in the industry.¹²⁴

To summarize, economic theory predicts that monopsony is likely to result in higher prices for customers if the monopsonist also has market power downstream. If the downstream market is competitive, monopsony may result in higher prices or constant prices, but it is unlikely to result in lower prices. Buyer power can result in lower prices for consumers when it is used to offset the preexisting market power of upstream sellers, but this scenario is unlikely to be relevant in the context of labor markets. The next subsection discusses the implications of this theory under the available welfare standards.

B. Relevance of Downstream Impacts Under Different Economic Welfare Standards

i. Total Welfare Standard

The total welfare standard is primarily concerned with allocative efficiency losses. According to this standard, conduct is only condemned if “it decreases the sum of the welfare of consumers (i.e., buyers) plus producers (i.e., sellers plus competitors).”¹²⁵ Some proponents of this standard primarily focus on output reductions.¹²⁶ If the demand curve is downward sloping, prices will not rise, and the total welfare standard will point in the same direction as a customer welfare standard. However, if the total welfare standard is understood as the sum of producer and consumer surplus, this would suggest that higher prices for consumers that accrue to firms through higher profits are not necessarily considered undesirable. To illustrate the latter, with respect to the merger of Firms A and B, as long as the extra efficiency resulting from the creation of Technology Z exceeds the deadweight loss resulting from the combined firm’s enhanced market power, the merger should be allowed to go ahead, even if the firm decreases wages or increases prices.

¹²² See 15 U.S.C.S. § 17 (LexisNexis, Lexis Advance current through P.L. 116-182).

¹²³ See, e.g., Nat’l Soc’y of Pro. Eng’rs v. United States, 435 U.S. 679, 682–83 (1978).

¹²⁴ See Walter Adams, *Competition, Monopoly and Countervailing Power*, 67 Q.J. ECON. 469, 475–6 (1953).

¹²⁵ Salop, *supra* note 38, at 336.

¹²⁶ Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

ii. Customer Welfare

The focus of the customer welfare standard is the effect on final customers. The implications of this standard for evaluating conduct in product markets are familiar. When reviewing a merger of competing sellers or evaluating exclusionary conduct by a producer, the question is whether the conduct will increase prices for consumers.¹²⁷ Application of this standard to monopsony implies consideration of two distinct markets: the input market, because that is where the monopsonistic conduct is taking place, and the downstream market, where customers are purchasing products or services. In the merger of A and B, the government would have to show that downstream customers are likely to face higher prices for widgets to establish a *prima facie* case. As discussed above, when the downstream market is itself non-competitive, monopsony is likely to result in higher prices for customers, but where this is the case, a showing of monopsony is likely unnecessary to block the merger. If the downstream market is competitive, the demonstrable price effects are likely smaller, if not negligible. Other firms may increase their output of widgets to compensate for the reduced output of the merged firm. If these firms have sufficient excess capacity and are not markedly less efficient than Firms A or B, then the market price for widgets may not change significantly.

Note that even in this scenario the interests of workers and customers point in the same direction in the long run. Low monopsony wages may, for example, discourage people from training to become widget producers, which may eventually reduce output at the market level and result in higher prices for customers. In any event, the exercise of monopsony power itself will not benefit customers. However, because there are likely to be high evidentiary costs in satisfying the burden to show the long-run effects on customers, the merger may still proceed.

The customer welfare standard also comes into play with respect to the evaluation of efficiencies. While monopsony itself does not benefit customers, a merger that results in monopsony may benefit customers if it also generates efficiencies that result in lower prices. Even if the merger of Firm A and B results in monopsony power that would allow the merged firm to depress wages to its workers, if the creation of Technology Z so increases efficiency that the firm will have an incentive to decrease prices for consumers, the merger should go forward. To summarize, under the customer welfare standard, a plaintiff would be required to show upward pricing pressure in the downstream market resulting from monopsony power in the upstream market to establish a *prima facie* case. The defendant could then rebut the *prima facie* case by showing that the merger creates efficiencies sufficient to offset this upward pricing pressure.

¹²⁷ The harm may “also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation.” MERGER GUIDELINES, *supra* note 52, at § 1.

iii. Trading Partner Welfare

In the evaluation of monopsony, several commentators have argued that a standard based on trading partner welfare is a more appropriate translation of the consumer welfare standard in upstream markets than a standard based on customer welfare.¹²⁸ In a recent article, Herbert Hovenkamp and Carl Shapiro explained, “[a]s we use this term, applying the ‘consumer welfare’ standard means that a merger is judged to be anticompetitive if it disrupts the competitive process and harms trading parties on the other side of the market.”¹²⁹ Suresh Naidu, Eric A. Posner, and Glen Weyl have also argued “[b]y analogy to the ‘consumer welfare’ standard, we believe that mergers that trigger scrutiny by reducing labor market competition should be subject to a ‘worker welfare’ standard.”¹³⁰ A trading partner standard focuses on the market in which the allegedly anticompetitive conduct takes place and is concerned with the impact on parties on the other side of that market. In a case alleging monopolization of a product market, the relevant trading partners would, in fact, be the consumers of that product; but in a case alleging monopsony in a labor market, the relevant trading partners are workers.

There are two distinct justifications for this standard. The first is that there is no legitimate basis for privileging the downstream customers’ interests at the expense of the worker’s interest. The second is that the interests of trading partners and downstream customers are generally aligned with respect to monopsony resulting in output reduction, but a trading partner standard is preferable to a customer welfare standard from a decision-theoretic perspective.

The first justification reflects agnosticism about whose interests antitrust policy ought to protect. Under this view, antitrust is about protecting the competitive process and does so by considering the impact of conduct on those who trade with the allegedly anticompetitive actor. The vast majority of cases in the history of antitrust have dealt with conduct by sellers, so the term “consumer welfare” naturally emerged.¹³¹ In the context of monopsony, however, focus on downstream customers at the expense of workers is misplaced. As economist Roger Noll explained, “the only basis for differential treatment is to place a different social value on the welfare of competitors in upstream markets and buyers in downstream markets.”¹³² In our economy where most people get most of their income from work, intentional indifference to the welfare of workers seems unwise.

The second justification for the trading partner standard relates to the evidentiary burdens of merger review and litigation. Decision theory has been

¹²⁸ See, e.g., Hemphill & Rose, *supra* note 28, at 2080.

¹²⁹ Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2000–01 (2018).

¹³⁰ Naidu et al., *supra* note 17, at 586–87.

¹³¹ Hemphill & Rose, *supra* note 28, at 2091.

¹³² Noll, *supra* note 34, at 591.

a useful framework for evaluating the role of antitrust rules in helping judges and agencies make decisions on the basis of imperfect information.¹³³ If a certain behavior is likely to be anticompetitive as a general matter, judges may develop a presumption that the behavior is illegal without requiring the plaintiff to prove the actual harmful effects in every individual case. This is desirable because more thorough judicial analysis may impose inhibitory high evidentiary costs, and therefore anticompetitive behavior will go unchecked.¹³⁴ If there are situations where the presumptively illegal behavior is not anticompetitive, and there is some form of evidence that is fairly reliable in identifying these situations, a rebuttable presumption might be preferable. A rebuttable presumption would be desirable if, with respect to the category of cases as a whole, the costs of acquiring and presenting this additional evidence are less than the value of the increased accuracy. If, on the other hand, the improvement in accuracy is not sufficient to offset the increased evidentiary costs, the presumption should be irrebuttable even though this may result in an inaccurate result in rare cases.

As mentioned in the previous section, even where customer and worker interests are aligned, the customer welfare standard imposes higher evidentiary costs on the plaintiff.¹³⁵ Where theory and experience suggest that the standards would produce similar conclusions in most cases, the standard that entails less costly analysis—a trading partner welfare standard—is desirable. In other words, “[t]he trading partner welfare perspective reflects an implicit judgment that a fine-grained search for case-specific exceptions carries an unacceptable risk of false negatives.”¹³⁶ The rare cases where the trading partner welfare standard fails to promote customer welfare can be tolerated so long as, on the whole, the standard is good for customers.

Most proponents of a trading partner welfare standard have not been explicit about which justification they rely on, and both probably play a role.¹³⁷ It is important to recognize, however, that the justifications can produce conflicting analyses for certain types of cases. Take the example of negotiations between the dental hygienist and the dental practice. A merger that increases the bargaining leverage of the dental practice and thereby results in a lower wage for the hygienist is undesirable if the concern really is with the welfare of workers. If the trading partner welfare standard is actually intended to serve as a lower-cost proxy for customer welfare, it may result in “error” in situations where bargaining leverage is used to lower input prices without reducing output and thereby reduce prices for the dental practice’s customers.

¹³³ See, e.g., C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41, 43–52 (1999); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 9–10 (1984).

¹³⁴ These presumptions go both ways—antitrust law also includes presumptions that certain classes of conduct are pro-competitive.

¹³⁵ See Hemphill & Rose, *supra* note 28, at 2092.

¹³⁶ *Id.*

¹³⁷ For an example of an article invoking both justifications, see Hemphill & Rose, *supra* note 28.

If the situations where harm to workers will benefit customers are readily identifiable, it may be desirable to make the presumption of illegality based on trading partner harm rebuttable upon a showing of benefits to customers.

The framework described in this article is based on the premise that customer welfare is not inherently more important than worker welfare and that there is no reason to privilege an increment of benefit to customers at the expense of identical increment of harm to workers. In the case of bargaining leverage in the labor market, the harm to workers is likely to exceed the benefits to customers because the employer is unlikely to pass on one hundred percent of the cost savings to customers. Therefore, a merger that increases bargaining leverage should be blocked if the focus is solely on the increased upstream market power.

IV. BALANCING ACROSS MARKETS—UPSTREAM HARMS AND DOWNSTREAM BENEFITS

Of course, a merger does not just affect one market. Even the simplest firm operates in at least one input market and at least one output market. Mergers will commonly produce different competitive consequences in different markets—spurring competition in one while enhancing market power in another. This section discusses how antitrust law currently evaluates effects across markets and considers cross-market issues related to labor market analysis.

A. *State of the Law*

There is a strong presumption against balancing harms and benefits across markets. The text of the Clayton Act condemns mergers where “in any line of commerce or . . . in any section of the country, the effect . . . may be substantially to lessen competition . . .”¹³⁸ The Supreme Court held this to mean that efficiencies and price reductions in one market cannot be invoked to offset increased market power and price increases in another.¹³⁹ The modern rationale for this principle, aside from its statutory and precedential authority, is that cross-market balancing puts the agencies in the difficult position of favoring one group of consumers or workers over another. Another reason is that evaluating a merger’s net welfare consequences across multiple markets requires very complicated and often highly speculative analysis.¹⁴⁰

While courts have followed this principle to reject efficiency arguments

¹³⁸ 15 U.S.C.S. § 18 (LexisNexis, Lexis Advance current through P.L. 116-158).

¹³⁹ See *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 370 (1963). The Merger Guidelines reflect this principle and explain that “[t]he Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in *any* relevant market.” MERGER GUIDELINES, *supra* note 52, at § 10 (emphasis added).

¹⁴⁰ Herbert J. Hovenkamp, *Distributive Justice and Consumer Welfare in Antitrust*, Faculty Scholarship at Penn Law 4 (2011); AREEDA & HOVENKAMP, *supra* note 90, at ¶ 970–76.

outside the relevant market,¹⁴¹ effects in other markets are not entirely irrelevant. Cross-market analysis is important in crafting remedies. For example, the efficiencies generated by a potential merger may be achievable through a partial merger that avoids increasing market power in the unmerged divisions, or alternatively, anticompetitive concerns could be addressed through divestiture. Sometimes, however, divestiture is not a feasible option. The Merger Guidelines contemplate this scenario and explain:

The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall.¹⁴²

Thus, where efficiencies in one market are 1) inextricably linked with and 2) substantial relative to the anticompetitive harm in another market, the agencies may use their prosecutorial discretion to decline to challenge the merger. Daniel A. Crane has noted that the principle against cross-market balancing in combination with the exception for evaluating efficiencies that are inextricably linked and substantial does and should operate as a rebuttable presumption against cross-market balancing.¹⁴³ Under this view, the principle does not stand for the proposition that the effects in other markets are unimportant or irrelevant, but rather for the prediction that, in most cases, fine-grained analysis across markets will not result in an improvement in accuracy sufficient to justify the additional evidentiary costs.

B. Application to Mergers that Affect Labor Markets

The same considerations that underpin the principle against cross-market balancing support using a trading partner welfare standard to evaluate anticompetitive behavior in labor markets. Like the limit on cross-market balancing, the trading partner welfare standard reflects resistance to favoring one group of consumers or workers over another and a prediction that the attempt to net out costs and benefits across different markets is usually very complicated and not worth its cost.

¹⁴¹ See, e.g., *Miss. River Corp. v. FTC*, 454 F.2d 1083, 1089–90 (8th Cir. 1972); Daniel A. Crane, *Balancing Effects Across Markets*, 80 ANTITRUST L.J. 397, 399–400 (2015).

¹⁴² MERGER GUIDELINES, *supra* note 52, at § 10 n.14.

¹⁴³ Crane, *supra* note 140, at 397.

This suggests that the inquiry, when evaluating labor market impacts, should typically be limited to the labor market itself and should focus on harm to workers. If the merger is likely to result in increased market power that harms workers, the merger should be blocked or remedies such as divestiture should be considered. A few words of caution are worthwhile, however. The framework described in this article relates to harm to workers arising from the increased power of employers as a result of mergers, but mergers can result in harm to some workers that has nothing to do with increased labor market power. A merger may, for example, be undesirable for a redundant accountant or for a worker whose job is eliminated due to the development of a more efficient technology.¹⁴⁴ While no less painful from the perspective of a worker, these harms do not arise from market power and do not provide a basis for challenging a merger under this framework.

If a merger is likely to increase the merged firm's labor market power, but is also likely to result in inextricably linked and substantial efficiencies such that downstream customers are likely to be benefited significantly more than workers are likely to be harmed, the agencies should use their prosecutorial discretion to decline to bring a case. It is important to recognize that the exercise of prosecutorial discretion does not apply in cases brought by private plaintiffs. Section 4 of the Clayton Act would authorize workers to bring claims independently from the antitrust agencies.¹⁴⁵ The Clayton Act authorizes courts to impose either damages or injunctive remedies. As with all equitable remedies, courts should only impose injunctions if they are in the public interest. Where a merger is likely to produce substantial efficiencies, there is a strong argument that enjoining it would not be in the public interest. The merged firm would still be liable for treble damages for the depressed wages of the workers, but if the merger's efficiencies are significant relative to the harms from increased market power, the merged firm would generally have an incentive to settle with the workers. Of course, if Congress determines that private suits by workers are preventing desirable mergers, it would be free to modify the statutory framework.

V. FRAMEWORK OF PROPOSED MERGER REVIEW

This section provides a framework for analyzing mergers that have potential impacts in labor markets. Often, mergers that produce market power in labor markets will also produce market power in product or service markets downstream. The theory and empirical evidence of an agency experience with market power in seller's markets is much more fully developed than with market power in labor markets. Accordingly, at least for the time being, analysis should begin with the impacts in downstream markets, and agencies should only review labor market impacts if downstream effects are insufficient to block the merger alone. To this end, Section V.A describes the order of

¹⁴⁴ See Hemphill & Rose, *supra* note 28, at 2081.

¹⁴⁵ 15 U.S.C.S. § 15(a) (LexisNexis, Lexis Advance current through P.L. 116-158).

analysis of impacts in product or service and labor markets for different categories of mergers. Section V.B then describes tools that are available when evaluating labor market impacts. This section is intended to be a synthesis of techniques proposed by others, organized around two basic categories of anticompetitive effects—coordinated effects and unilateral effects.

This framework aligns with the processes described in the Merger Guidelines, in large part because the section on buyer power, like other sections in the Merger Guidelines, is extremely vague. The Merger Guidelines summarize the analysis of monopsony power as using “essentially the [same] framework” as that used to evaluate monopoly power and include a few guiding principles related to the definition of markets as well as to output and price effects.¹⁴⁶ The analysis described below conforms with these basic principles, so agencies can thus implement this framework immediately. However, the Merger Guidelines should eventually be amended to explicitly account for the distinct features of labor market analysis, to systematize review, and to increase predictability for firms contemplating mergers.

A. *Order of Analysis*

When evaluating a merger with plausible anticompetitive consequences for one or more labor markets, the agencies should first consider the effects of the merger in sellers’ markets and should only evaluate labor market impacts if the downstream impacts are insufficient to block the merger alone. The process of analysis will vary across four basic categories of mergers. In Category A, the merger will result in a Highly Concentrated downstream market and will increase the HHI in that market by more than two hundred. The merger is presumptively illegal, and labor market effects should only be analyzed if the merging firms successfully rebut the presumption. In Category B, either the increase in concentration or other factors raise significant concerns about increased market power in a downstream market, but the evidence is such that the decision to block the merger could go either way. Labor market impacts may be used to tip the balance in Category B cases.

In Category C, if the merger does not pose a significant risk of downstream market power, the agencies should consider labor market impacts using the process described in the next subsection. If the merger is likely to increase buyer side market power in a labor market and will only produce standard efficiencies, the merger should be blocked. In Category D, however, if, as a result of efficiencies, the merger will result in lower prices for customers, labor market buyer power should still create a presumption of illegality. However, in both categories C and D, enforcers should consider remedies short of blocking the merger.¹⁴⁷ These may include divestitures or

¹⁴⁶ MERGER GUIDELINES, *supra* note 52, at § 12.

¹⁴⁷ Herbert J. Hovenkamp, *Merger Policy and the 2010 Merger Guidelines*, Faculty Scholarship at Penn Law 20 (2011) (“‘[S]ubstantial’ means that the efficiencies be great enough to warrant the inference that post-merger prices will be no higher than pre-merger levels, with the burden of

behavioral remedies. For example, in the consent decree in *United States v. George's Foods*, the defendant committed to several investments for expansion of the chicken processing plant to increase output, which would result in increased demand from the farmers to counteract the potential for buyer power.¹⁴⁸ In short, if efficiencies are inextricably linked to and substantially exceed the harms from increased labor market power, agencies should use their prosecutorial discretion to allow the merger to go ahead while seeking to limit the harms from the resultant monopsony.¹⁴⁹

In determining whether the merger will generate substantial efficiencies that will lead to lower prices for downstream customers, increased labor market buyer-side power itself should not be considered an efficiency. In *United States v. Anthem*, Circuit Judge Millett noted, “securing a product at a lower cost due to increased bargaining power is not a procompetitive efficiency when doing so simply transfers income from supplier to purchaser without any resource savings.”¹⁵⁰ The development of technology Z in the merger of Firms A and B is a classic example of merger-generated efficiencies. Because of the combination, the merged firm will be able to produce more widgets, at a lower cost. Society as a whole is benefited because the improved production process saves resources that can then be deployed elsewhere in the economy. When, on the other hand, a merged firm is able to impose a lower wage on its workers as a mere function of its increased market power, there is no such resource savings.

The position of then-Judge Kavanaugh, is more difficult to discern from his dissent in *Anthem*.¹⁵¹ While he agreed that “the exercise of monopsony power to temporarily reduce consumer prices does not qualify as an efficiency that can justify an otherwise anti-competitive merger,”¹⁵² he based almost his entire favorable analysis of the merger’s efficiency on Anthem-Cigna’s enhanced bargaining power.¹⁵³ If by “the exercise of monopsony power,” Judge Kavanaugh meant the exercise of classical monopsony power, which entails a restriction in output, then consumer prices would not be reduced and his comment is irrelevant. However, he described monopsony power as “a scenario in which Anthem-Cigna would be able to wield its enhanced negotiating power to unlawfully push healthcare providers to accept rates that are below competitive levels,” which is broader than classical monopsony.¹⁵⁴

proof on the defendant.”).

¹⁴⁸ Final Judgement at 3, *United States v. George's Foods, LLC*, No. 5:11-CV-00043-gec, 2011 WL 7909307 (W.D. Va. Nov. 4, 2011), available at <https://www.justice.gov/atr/case-document/file/497356/download> [perma.cc/FZ5Q-MQXX].

¹⁴⁹ MERGER GUIDELINES, *supra* note 52, at § 10 n.14.

¹⁵⁰ *United States v. Anthem, Inc.*, 855 F.3d 345, 371 (D.C. Cir. 2017) (Millett, J., concurring) (internal quotations omitted).

¹⁵¹ *See generally id.* (Kavanaugh, J., dissenting).

¹⁵² *Id.* at 377.

¹⁵³ *Id.* at 374–75.

¹⁵⁴ *Id.* at 377.

It is not entirely clear how he distinguishes this understanding of monopsony from the enhanced bargaining leverage that he views as desirable, but it seems to turn on whether the negotiated rates are “below competitive levels,” the implication being that eventually these low rates will result in “reductions in output or service.”¹⁵⁵ Thus, whether this enhanced bargaining leverage is considered a cognizable efficiency that can justify an otherwise anticompetitive merger or it is considered an unlawful exercise of monopsony that is sufficient to block a merger in and of itself would seem to turn on whether the low negotiated rates fall above or below some threshold that the reviewing judge considers “competitive.” Courts have long refused to base antitrust liability on the reasonableness of prices because they are ill-equipped to make those kinds of determinations.¹⁵⁶ Fortunately, in this context, there is no need for them to do so. There is no economic basis for treating a simple wealth transfer as an efficiency.

Finally, as always, the efficiencies must be verifiable, merger-specific, and sufficient to prevent a price increase, with the burden of proof on the defendant. Judge Posner has cautioned that efficiencies often pose intractable measurement problems,¹⁵⁷ and, as Hovenkamp explained, while “[o]ur knowledge that mergers can produce both economies and monopoly pricing is fairly secure . . . quantifying either of those in a particular merger case is impossible.”¹⁵⁸ When the question is of the net harms from increased market power and benefits from increased efficiencies for participants in a single market, the uncertainty might be considered more tolerable. However, when the decisionmaker is fairly certain that workers in one market will be harmed and is determining whether that harm is justified by benefits to consumers in another market, the Guidelines’ criteria are especially important to satisfy.

B. Analyzing Labor Market Power

If the agencies proceed to evaluate labor market impacts because downstream impacts are insufficient to block the merger, the analysis can and should mirror the analysis conducted for product or services markets.¹⁵⁹ Just as in sellers’ markets, there are two core theories of harm: coordinated effects and unilateral effects. These two theories are the basic “stories” that explain why a merger is likely to be anticompetitive. In determining whether these theories are, in fact, applicable to a particular merger, agencies make use of several different concepts, including market definition, entry, efficiency, etc. This section begins by describing the basic theories of harm in the context of labor markets. It then discusses market definition in the context of labor markets, as well as the role of entry and efficiencies.

¹⁵⁵ *Id.* at 378.

¹⁵⁶ *See, e.g.,* *United States v. Trenton Potteries Co.*, 273 U.S. 392, 399 (1927).

¹⁵⁷ *See* POSNER, *supra* note 90, at 129.

¹⁵⁸ HOVENKAMP, *supra* note 1, at 554.

¹⁵⁹ MERGER GUIDELINES, *supra* note 52, at § 12.

i. Theories of Harm

The Merger Guidelines distinguish two categories of anticompetitive harm that may result from mergers—coordinated and unilateral.¹⁶⁰ The narrative represented by each shape how certain types of evidence are framed and interpreted.¹⁶¹ Under the coordinated theory, a merger is anticompetitive because it increases the likelihood that firms in the market will collude, whether tacitly or expressly, to set lower wages in concert. Under the unilateral theory, a merger is anticompetitive because it enhances the ability of the merged firm to profitably set low wages, whether or not other firms do as well. Note, however, that these theories should not be understood as mutually exclusive. Often, features of the merger or of the market will be conducive to both coordinated and unilateral anticompetitive conduct.

1. Coordinated Effects

Until relatively recently, the agencies were predominately concerned with coordinated effects.¹⁶² The incentives of firms to coordinate can be strong and have long been recognized. In 1776, Adam Smith warned, “[m]asters are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labour above their actual rate.”¹⁶³ The goal of collusion, whether through expressed or tacit agreement, is to avoid bidding up wages and settle on a low wage below the competitive level.

In order to successfully coordinate, however, firms must overcome several “cartel problems” to reach a consensus on a low wage rate. Differences in how productively each firm can deploy labor, in their preferred balance between wages and other employee benefits, and in any number of other firm-level differences can have a significant impact on each firm’s preferred wage level. In addition, because express collusion is illegal, the information costs in coming to consensus can be substantial. Once the firms come to consensus, it is also necessary to detect and deter deviations from that consensus. A firm might want to hire more workers, but the low consensus wage is insufficient to attract the desired number. This firm might, therefore, attempt to defect on the agreement and pay a higher wage. If more than one firm deploys this strategy, the consensus wage is going to be highly unstable and will probably be bid up to a competitive level. Accordingly, to be successful, an employer cartel must be equipped to detect, deter, and punish deviations from the consensus wage.

The feasibility of overcoming these “cartel problems” varies depending on the market and forms the central inquiry in evaluating coordinated effects. Under this rubric, the agencies will likely challenge a merger if: “(1) the

¹⁶⁰ *Id.* at §§ 6–7.

¹⁶¹ *Id.*

¹⁶² Thomas J. Burton, *Unilateral Effects Analysis in Assessing Anti-Competitive Mergers: The Judicially Approved New Approach to Challenging Mergers*, 43 ST. LOUIS L.J. 1481, 1482–83 (1999).

¹⁶³ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 28 (1952).

merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct . . . ; and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability.”¹⁶⁴ Concentration makes establishing consensus easier because fewer participants are involved. It decreases the costs of monitoring for deviations from the consensus wage, and strengthens deterrence because the threat of retaliation by a large firm is much greater than the threat from a small firm. Techniques for evaluating concentration in labor markets are also relevant under a unilateral effects theory, so they will be discussed separately below.

In determining whether a market is vulnerable to coordination and whether the merger will enhance that vulnerability, the agencies will consider the particular features of the market, including: whether there is a history of collusion; whether wages are transparent, making monitoring easier; whether there are “maverick employers” in the market who might thwart collusion by offering high wages or innovative benefits; whether the relevant workers are likely to be relatively vulnerable or powerful in the face of attempted collusion; whether entry by other firms is likely; etc.¹⁶⁵ Like concentration, entry is also important in the evaluation of unilateral effects, so it will be discussed separately. With respect to a history of collusion in the market, a number of so-called “no-poach” agreements have come to light recently, particularly in the high-tech sector.¹⁶⁶ These patently anticompetitive agreements among competing firms to not compete for each other’s workers are very strong evidence that those markets are vulnerable to collusion because collusion has already occurred.

2. *Unilateral Effects*

The economic theory underpinning unilateral effects is relatively new compared to coordinated effects.¹⁶⁷ To illustrate the basic idea behind the unilateral effects theory, consider a scenario involving sellers with differentiated products in downstream markets. In some cases, a merger will allow the merged firm to raise prices regardless of the behavior of other firms in the market. In the pre-merger world, if one of the firms had raised the price of its product, some of its sales would have been lost to the other merging firm. After the merger, the merged firm is able to recapture some of the sales lost due to the price rise because they are simply diverted to the merger partner’s product. If the ratio of the total sales lost by the first firm relative to those that are recaptured by the second is high enough, the price increase will be profitable even though it would not have been profitable prior to the merger.

The same principles apply in labor markets. Consider a labor market with

¹⁶⁴ MERGER GUIDELINES, *supra* note 52, at § 7.1.

¹⁶⁵ *Id.* at § 7.2.

¹⁶⁶ *No More No-Poach*, *supra* note 18.

¹⁶⁷ Janusz A. Ordover, *Coordinated Effects in Merger Analysis: An Introduction*, 2007 COLUM. BUS. L. REV. 411, 412 (2007).

six firms, A through F, who—in the premerger world—all hire similar workers to make the same products.¹⁶⁸ The competitive wage is \$2 per unit, the firms can sell the units for \$3 each, and the firm employs 100 workers who each make one unit per period. The firm thus makes \$100 in profits per period. If Firm A attempted to depress its wage to \$1.90 per unit and its own elasticity of the labor supply is 2, then the firm will lose 20 workers. Even though, at a constant sales price of \$3, the profit per unit will go up, this wage cut will not be profitable because the firm will only make 80 units. The total profits per period would fall to \$88.

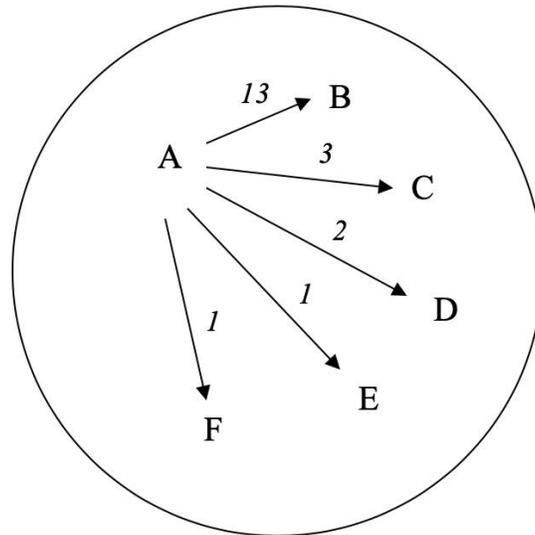


Figure 8: Worker Diversion in Response to a Wage Cut

However, those 20 workers must go somewhere. Assume that of those 20, 13 would go to Firm B, 3 to Firm C, 2 to Firm D, 2 to Firm E, and 1 to Firm F (See Figure 8 above). If Firms A and B merged, the wage cut for the workers at A, now a division of the merged firm, would be profitable because a sufficient number of the departing workers resulting from the wage cut are recaptured by Firm B, which can use them to produce more units.

This example is simplistic, but it helps to illustrate that unilateral effects are a function of the portion of workers who will divert to other merging firm in the event of a wage cut (the “diversion ratio”).¹⁶⁹ Where the diversion ratios between the merging firms is fairly high, concerns about unilateral effects are heightened. Therefore, analogous to downstream markets, unilateral effects analysis will involve an evaluation of these figures to calculate “downward

¹⁶⁸ Example adapted from HOVENKAMP, *supra* note 1, at 692–93.

¹⁶⁹ See Hemphill & Rose, *supra* note 28, at 2086; Naidu et al., *supra* note 17, at 579.

wage pressure.¹⁷⁰ In addition, the extent to which the marginal factor cost of labor¹⁷¹—exceeds the wage, which reflects the incentives of the firm to restrict hiring, is also a function of the elasticity of the labor supply curve facing the merger partner.¹⁷² Accordingly, low labor supply elasticity should trigger special attention.

ii. Familiar Concepts in a Labor Market Context

This section considers the labor market translations of several concepts used by the agencies to analyze downstream markets and described in the Merger Guidelines. Many of these concepts are relevant to both coordinated and unilateral effects analysis, so the discussion will also highlight how these techniques are used to evaluate these alternative theories.

1. Market Definition

Market definition and concentration analysis, which is described below, play a role in almost every merger analysis even though market definition is not strictly necessary in the analysis of unilateral effects. This is because merger analysis deploys a “structural presumption,” where mergers that result in highly concentrated markets are presumptively illegal, subject to rebuttal.¹⁷³ Determining the applicability of the structural presumption requires a defined market.

A downstream market will have a product or service dimension and a geographic dimension, for example office supply sales in a metropolitan area or digital tax filing services in a national market.¹⁷⁴ Labor markets likewise have a geographical dimension. Instead of a product or service category, however, the other dimension is the job type, or what this paper refers to as occupation. Agencies use a conceptual technique called the “hypothetical monopolist test” to evaluate potential market definitions.¹⁷⁵ Under this test, the decisionmaker asks: if the provisional market were controlled by a single monopolist, would the monopolist be able to implement a small but significant and non-transitory increase in price, termed a “SSNIP”, or would the increase in price cause enough purchasers to turn to other sellers that a SSNIP would be unprofitable? If the hypothetical monopolist would not be able to implement a SSNIP, the market is defined too narrowly. The appropriate market is the smallest market in which a SSNIP would be profitable.

The agencies can deploy an analogous hypothetical *monopsonist* test when evaluating provisional labor market definitions. Under this test, the

¹⁷⁰ Naidu et al., *supra* note 17, at 579–80.

¹⁷¹ This includes the wage that must be paid to attract additional workers and the additional amount paid for labor that would otherwise be supplied at a lower price.

¹⁷² See Manning, *supra* note 33, at 32–33; Michael Keane & Richard Rogerson, *Reconciling Micro and Macro Labor Supply Elasticities: A Structural Perspective*, 7 ANN. REV. ECON. 89, 95–99 (2015).

¹⁷³ MERGER GUIDELINES, *supra* note 52, at § 5.3.

¹⁷⁴ See *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1069 (D.D.C. 1997); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 43–44 (D.D.C. 2011).

¹⁷⁵ MERGER GUIDELINES, *supra* note 52, at § 4.1.

question is whether the monopsonist would be able to implement a “small but significant and non-transitory” decrease in wages (SSNDW).¹⁷⁶ Under this test, computer occupations in the Bay Area may be an over-inclusive market definition, at least along the occupational dimension. The SOC job category “computer occupations” includes computer programmers, software developers, web designers, etc. that are likely not perceived as reasonable alternatives from the perspective of a worker. A hypothetical monopsonist could likely implement a SSNDW in the more narrowly defined market of software developers in the same area. However, depending on the profession, the occupational or geographic market may also be too narrow. For example, software companies elsewhere in California, and potentially those further afield, may compete with Bay Area firms in hiring.

It is important to keep in mind that in refining the labor market definition, the relevant question is the alternatives available to the worker. To a lawyer who has many years of experience working in immigration law, a position working on corporate transactions is probably not a meaningful alternative. The availability of that position likely will not prevent her current firm from implementing a SSNDW. As this example illustrates, labor market definition, like product or service market definition, can be idiosyncratic. Issues like educational and licensing requirements, the relative importance of specific training, the feasibility of flexible working arrangements like teleworking, and many other features can be highly significant. As they have with product markets, the agencies will gain experience defining labor markets as more cases arise.

The market definition used by Azar et. al—defined by 6-digit Standard Occupational Classification and commuting zones—is a good starting point that can be revised upward or downward on the basis of other factors in the merger at hand.¹⁷⁷ For example, this technique would group all lawyers in a commuting zone into one market, which is probably too broad. This could potentially be narrowed using job categories from an online hiring platform or human resources data from the merging firms. On the other hand, the SOC category may be too narrow. For example, executive secretaries, legal secretaries, medical secretaries, and other secretaries have different 6-digit codes.¹⁷⁸ At higher levels, these may be appropriate separate markets, but from the perspective of an entry-level worker, they might be considered reasonably interchangeable. Market definitions should be revised accordingly.

A few more points on market definition in labor markets are important to mention. First, while the hypothetical monopsonist can be a very helpful conceptual tool, market definition can also be proved through direct

¹⁷⁶ Naidu et al., *supra* note 17, at 574.

¹⁷⁷ Azar et al., *supra* note 14, at 9–13.

¹⁷⁸ 2018 *Standard Occupational Classification System*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/soc/2018/major_groups.htm [perma.cc/KTU-4P35].

evidence.¹⁷⁹ As the Merger Guidelines explain, “[e]vidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects.”¹⁸⁰ A history of collusion in a candidate market where employers have successfully depressed wages, limited benefits, or otherwise harmed workers is very strong evidence that the market definition is appropriate.¹⁸¹ Thus, the firms who were parties to no-poaching agreements would seem to form a good candidate market.¹⁸² For similar reasons, restrictions in non-compete agreements can also serve as good evidence for market definition. If one employer feels the need to include another in a non-compete agreement, it is likely because the other is a competitor in the same labor market. Non-competes have become extremely prevalent, and they should be considered in the process of market definition.¹⁸³

Finally, market definition in and of itself should not be viewed as an end, and market definition mechanisms “are, at best, rough approximations of reality.”¹⁸⁴ It is only useful to the extent that it illuminates a merger’s anticompetitive effects. Market definition and concentration are relevant to coordinated effects analysis because it is important to know who the most important competitors are and whether collusion among them is likely. Market definition and concentration are relevant to unilateral effects analysis because in a market with many competitors, the elasticity of labor supply to individual firms is likely to be relatively high and the diversion ratios between potential merging partners are likely to be relatively low compared to the same parameters in a concentrated market. Ultimately, for both coordinated and unilateral effects analyses, market definition and concentration should be interpreted in light of the other available evidence.

2. Concentration

Once the market has been defined, a similar caveat applies to evaluating concentration levels within that market because “there is no such thing as an ‘optimal’ index of concentration, both because different industries behave differently as well as because no obvious widely accepted normative judgements exist to guarantee its optimality.”¹⁸⁵ In the history of antitrust, different indices have been used to measure concentration levels, but currently the Herfindahl-Hirschman Index is the most popular.¹⁸⁶ This index is calculated by adding up the squared shares of all participants in the market.¹⁸⁷

¹⁷⁹ See *Todd v. Exxon Corp.*, 275 F.3d 191, 205–06 (2d Cir. 2001).

¹⁸⁰ MERGER GUIDELINES, *supra* note 52, at § 4.

¹⁸¹ See *id.* at § 7.2.

¹⁸² See *Azar et al.*, *supra* note 14, at 21 (explaining how language from no-poaching agreements led to an increase in antitrust cases).

¹⁸³ See *Starr et al.*, *supra* note 58, at 9.

¹⁸⁴ HOVENKAMP, *supra* note 1, at 707.

¹⁸⁵ Mari-Paule Donsimoni, Paul Geroski & Alexis Jacquemin, *Concentration Indices and Market Power: Two Views*, 32 J. INDUS. ECON. 419, 428 (1984).

¹⁸⁶ MERGER GUIDELINES, *supra* note 52, at § 5.3.

¹⁸⁷ *Id.*

Thus, a market with four participants with respective shares of forty-five percent, twenty-five percent, twenty percent, and ten percent would have an HHI of 3150.¹⁸⁸ The Merger Guidelines classify a market with an HHI below 1500 as “unconcentrated,” a market with an HHI between 1500 and 2500 as “moderately concentrated,” and a market with an HHI above 2500 as “highly concentrated.” These classifications are important because they trigger different levels of review. A merger resulting in an unconcentrated market or in a change of HHI less than 100 will usually result in no further scrutiny. The agencies will typically further scrutinize a merger resulting in a change in HHI greater than 100 that results in a moderately or highly concentrated market, and a merger that will change the HHI by more than 200 and will result in a highly concentrated market is presumptively illegal.¹⁸⁹

The latter presumption is known as the “structural presumption,” and it traces its origins to *United States v. Philadelphia National Bank*, which was decided in 1963.¹⁹⁰ As Justice Brennan explained, a prediction of the anticompetitive consequences of a merger:

is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. And so in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.¹⁹¹

The structural presumption may result in some false positives—decisions to block a merger that would not have been anticompetitive—but it is justified on the assumption that an alternative requiring a more fulsome analysis by the agencies in order to establish a prima facie case would result in even more false negatives—decisions to allow an anticompetitive merger to go ahead.¹⁹²

¹⁸⁸ $45^2 + 25^2 + 20^2 + 10^2 = 3150$.

¹⁸⁹ MERGER GUIDELINES, *supra* note 52, at § 5.3.

¹⁹⁰ *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362–63 (1963).

¹⁹¹ *Id.* (internal citations omitted).

¹⁹² Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269, 271 (2015).

Many respected commentators assert that this assumption is well founded.¹⁹³ Regardless, the structural presumption is deeply rooted in merger analysis in downstream markets and should apply with equal force in labor markets.

The question of the appropriate HHI threshold to trigger the presumption is a separate matter, however. As noted, even across different product markets, the “optimal” concentration threshold varies. The current HHI levels in the Merger Guidelines are thus intended as a rough gauge that should be a reasonable predictor in most cases. In moving the locus of analysis from downstream markets to labor markets, though, there is little reason to think that the current HHI levels are appropriate even as a rough approximation.¹⁹⁴ Unfortunately, there is probably not enough empirical analysis on this issue to develop a more rigorous threshold at this time. Accordingly, the agencies could provisionally begin with existing levels but should generate more data and consider the viability of the thresholds over time.

3. *Entry by Competitive Employers*

In rebutting the structural presumption and in conducting a more thorough review of coordinated and unilateral effects theories, the feasibility of entry by new competitors is very important. With respect to a coordinated effects theory, cartel behavior creates opportunity for new entrants. In product markets, when the firms charge supra-competitive prices, they leave the door open for entrants charging less to capture market share. Likewise, in a labor market, collusion on sub-competitive wages can encourage entry by new employers who aim to entice good workers with higher wages. The possibility of entry can discourage collusion in the first place, and actual entry can destabilize preexisting collusive activity. With respect to a unilateral effects theory, entry can inhibit the ability of the merger firm to effectuate a SSNIP or a SSNWD for similar reasons.

Where conditions in the market make entry likely, anticompetitive concerns are lessened, and where there are barriers to entry, anticompetitive concerns are more acute. For these reasons, Judge Kozinski upheld a district court’s determination that ease of entry into the Las Vegas first-run movie theater market undermined the government’s claims for monopsonization under Section 2 of the Sherman Act and Section 7 of the Clayton Act.¹⁹⁵

In the analysis of entry, the Merger Guidelines focus on whether entry by a competitor is “*timely, likely, and sufficient* in its magnitude, character, and scope to deter or counteract the competitive effects of concern.”¹⁹⁶ In assessing likelihood of entry, the agencies focus on whether entry would be profitable,

¹⁹³ See, e.g., Hovenkamp & Shapiro, *supra* note 128, at 1997.

¹⁹⁴ *Id.* at 2014–16.

¹⁹⁵ U.S. v. Syufy Enters., 903 F.2d 659, 673 (9th Cir. 1990). Judge Quackenbush cautioned in concurrence that barriers to entry should be interpreted in light of the size and durability of the monopsonist’s market share and their ability to control price. *Id.* at 673–74 (Quackenbush, J., concurring).

¹⁹⁶ MERGER GUIDELINES, *supra* note 52, at § 9 (emphasis added).

“accounting for the assets, capabilities, and capital needed and the risks involved, including the need for the entrant to incur costs that would not be recovered if the entrant later exits.”¹⁹⁷ Entry is sufficient if it will occur on a large enough scale to “deter or counteract the competitive effects of concern.”¹⁹⁸ The relevant entrant for the purposes of labor market analysis is an employer who would be a meaningful alternative from the perspective of the worker. The analysis of whether that entry is timely, likely, and sufficient will be similar to the analysis conducted for downstream markets.

4. *Efficiencies*

In the proposed framework, efficiencies arise in two distinct ways. As discussed above, substantial and inextricably linked efficiencies that will result in lower prices for downstream customers may be a basis for allowing a merger to go forward in spite of harm to workers.¹⁹⁹ On the other hand, efficiencies can also be a basis for finding that harm to workers is itself unlikely. The idea here is that while the merger will increase market power in the labor market—and thereby create some downward wage pressure—the efficiencies generated by the merger will increase demand for labor—creating upward wage pressure.²⁰⁰ In other words, “while all firms have an incentive to restrict employment and depress wages below their competitive levels, more productive firms (with better technology, for example) will choose to hire more labor—and will pay higher wages to do so.”²⁰¹

To illustrate, consider the merger of A and B and the development of Technology Z. Say that before the merger, A and B had the same marginal costs as other producers of widgets and they each had a market share of ten percent in the widget market. If Technology Z still requires about the same amount of labor per widget but uses dramatically less electricity than Technology X or Y or the comparable technologies of other competitors, then this merger might very well result in increased wages for workers. The merged firm has lower costs and therefore has an incentive to increase output and capture market share. To increase output, the merged firm needs to hire more workers. Depending on the size of the efficiencies and other conditions impacting the incentives of the merged firm to increase hiring, this increased demand may offset the downward wage pressure sufficiently to rebut an expectation of harm to workers.

This example illustrates a few issues to consider when evaluating a rebuttal based on efficiencies. First, the example assumed that the new technology still required a similar amount of labor per unit of output. Of

¹⁹⁷ *Id.* at § 9.2.

¹⁹⁸ *Id.* at § 9.3.

¹⁹⁹ *See supra* Section IV.

²⁰⁰ LABOR MARKET MONOPSONY BRIEF, *supra* note 4, at 3.

²⁰¹ *Id.*; *see also* Naidu et al., *supra* note 17, at 586 (“Just as product cost may fall with an efficiency-enhancing merger, labor productivity may increase The increase in labor market productivity may cause labor demand to increase or decrease, depending on the structure of the product market.”).

course, new technologies often require less labor. This can result in cost savings that are passed on to customers at lower prices; however, the inquiry at this stage in the analysis is not about the welfare of customers, but rather concerns whether merger-generated efficiencies rebut a plaintiff's claim that the merger will harm workers. Obviously, if the efficiencies reduce the need for workers, they will be insufficient to rebut the claim that the merger will harm workers. Related to this point, it is also important to recognize that a merger can result in job losses that do not flow from increased labor market power if the merger increases efficiency and reduces the firm's need for workers while the relevant labor market remains competitive. Finally, the benefits in the labor market in the example also depend on the expansion of output. If there is reason to believe that the firm will not respond to cost savings by expanding output, but instead retain those savings as profit, then the efficiencies will not offset the downward wage pressure from increased labor market power.

VI. CONCLUSION

Though not a theory of everything, there is significant evidence to suggest that increased market power has contributed to the erosion of worker welfare in recent decades. As this article has discussed, the conflict between the interests of workers and the interests of customers is usually overblown. Both consumers' prices and workers' wages are typically negatively impacted by firms' market power in labor markets. The tools of antitrust law should be used to combat labor market power along with its traditional role combatting market power in downstream product and service markets, and this article has provided a framework to do so in the context of merger analysis.

It is important to acknowledge, however, that the increased power of employers is only one part of the story of the shrinking labor share of U.S. income. The decline in workers' bargaining power is just as, if not more, important. The portion of workers who are members of unions has fallen from twenty-four percent in 1973 to a little over ten percent in 2017, and many labor law protections have been eroded in recent years.²⁰² For example, just last year in *Janus v. American Federation of State, County, and Municipal Employees*, the U.S. Supreme Court overruled precedent to place greater limitations on public-sector unions.²⁰³ There is some evidence to suggest that the decline in unions may have also contributed to the stagnation in the wages of non-union employees.²⁰⁴ Of course, the politics and economics of unions are complex and

²⁰² Josh Bivens & Heidi Shierholz, Fair Competition in Labor Markets Requires a Policy Maker's Thumb on the Worker Side of the Scale 5 (June 4, 2018) (unnumbered working paper), available at https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_bivens_shierholz_june_13_2018.pdf. [perma.cc/W9LT-MVWH].

²⁰³ See *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2486 (2018).

²⁰⁴ See Jake Rosenfeld, Patrick Denice & Jennifer Laird, *Union Decline Lowers Wages of Nonunion Workers*, ECON. POL'Y INST. (Aug. 30, 2016), <https://www.epi.org/publication/union-decline-lowers-wages-of-nonunion-workers-the-overlooked-reason-why-wages-are-stuck-and->

contestable, and this article does not attempt to enter into the debate. It is important to caution, however, that the framework proposed in this article must be considered within a context of broader labor market reforms. The tools of antitrust are not a panacea for all of these issues, and labor analysis in merger review should remain carefully focused on the question of whether a merger will enable the merged firm to be able to depress the wages of its employees due to enhanced market power.