

FTC | DOJ December Workshop | Day 2, December 7, 2021

Kelly Signs:

Good morning. And welcome to Making Competition Work. A joint workshop hosted by the Department of Justice and the federal trade commission. This is our second day of this workshop. And today again, we will be exploring how to better promote competition in labor markets. My name is Kelly Signs and I'm the acting director of the FTC's office of policy planning. On behalf of the entire workshop team from the DOJ and the FTC, we're delighted that you're joining us again, today via our live webcast. Before we begin our program, I have a few brief administrative details that I want to cover. First, a video recording and transcript of these proceedings will be available on both the DOJ and FTC websites shortly after this event. Our intent is to create a lasting resource for anyone who's interested in this important topic. Second, as with any virtual event, we may encounter technical issues.

Kelly Signs:

If these occur, we ask for your patience as we work to address them as quickly as possible. We'll also try to keep you informed with any significant delays. Third, we're still accepting comments until December 20th. For information on how to submit a comment online, please visit the FTC's workshop webpage on the FTC website. Finally, please join us on Twitter. Our handle is @FTC and we will be tweeting using the hashtag #labormarkets2021. And now I'm going to turn to Ron Drennan, an economic advisor at the Antitrust division who will introduce our keynote speaker this morning. Take it away, Ron.

Ron Drennan:

Thank you, Kelly. And good morning, everyone. I am honored to introduce today's first speaker, Professor Joseph Stiglitz. This introduction is an easy task, as he is so well known to any student of economics, as well as to a much broader audience engaged in policy debate. Professor Stiglitz is a recipient of the Nobel prize in economics, the John Bates Clark medal, and has been recognized as by Time Magazine as among the most influential people in the world. This sampling of awards recognizes not only the quality of his work, but also its relevance to informing the debate on public policy. He has, for example, served as chief economist to the World Bank, chairman of the president's council of economic advisors, and has founded the Think Tank initiative for policy dialogue. His work has taken on a wide scope of issues ranging all the way from asymmetric information to climate change. For today's purposes, we are fortunate that professor Stiglitz has also directed his talents and attention towards various aspects of labor market competition, including offering thoughts on collusion, fissured markets and the contributions to inequality. So, I am thrilled now to turn things over to Professor Joseph Stiglitz. Professor?

Joseph Stiglitz:

Well, thank you very much for this opportunity to address you. And I wish I could have joined more of your discussion. Over these two days, you seem to cover almost all the aspects and I'll touch on many of them that you'll be touching on in greater depth. One of the issues that I've been concerned about a great deal over the last, actually, my whole career has been about inequality. And one of the major sources of inequality is the imbalance between the market power of corporations and the market power of workers. Now, even in any market, there's a natural imbalance of market power between labor and capital. This sentence that I just gave stands in marked contrast to the prevailing neoliberal view, that all markets are perfectly competitive.

Joseph Stiglitz:

In fact, I think that's been one of the most important changes in economic thinking is the realization, the prevailing view today that all markets are imperfectly competitive and small imperfections can't be ignored. They can add up to have large effects and differences in market power in different markets can have both efficiency and large distributive effects. The discussion today is about competition policy and the ways in which employers restrict competition in the labor market, leading to lower wages for workers, increasing their Monopsony power. I'll say more about that later, but I also want to encourage you to think about markets more broadly, sort of the competitive balance or a balance of market power. In recent years, that balance has shifted. Corporate power has grown, whether measured by concentration or markups.

Joseph Stiglitz:

And of course, that focus on corporate power, it has been the main focus competition policy in FTC. There are changes in the structure of economies, such as network effects, the importance of R&D and the move to the surface sector economy that have facilitated this increase in corporate power. But there are also innovations in the private sector. Innovations in ways that enhance, augment, extend that market power. For instance, contractual arrangements that allow those with market power to amplify their market power. There are also changes in the effectiveness of which in which antitrust laws, competition laws have been implemented and the political commitment to enforcement. And one of the things I welcome today is the commitment of both the FTC and the Biden Administration to have a more effective enforcement of our competition laws.

Joseph Stiglitz:

The result of the failure to note the large changes in the economy and these lack of enforcement has meant there are today large gaps between the changes in the economy and innovations in anti-competitive behavior and what would be necessary to maintain a competitive marketplace. But while all of this has been happening on the corporate sector, just the opposite has been happening in labor markets. Workers power has been eroded, some of the same structural changes in the economy that I mentioned before have worked in the opposite direction in labor markets, for instance, the Gig Economy, which move workers away from concentrated places where they work together, the old style factory.

Joseph Stiglitz:

I know particularly the role of globalization, especially, for unskilled workers, the role of skilled bias, technological change, all of these have undermined the bargaining power of workers. And there's also been innovation and exploitative arrangements. I'll talk about that a little bit later. And again too, there have been changes in implementation and the effectiveness, commitment to enforce the worker job protections, given workers voice through Unions and more broadly, there's a failure of the legal framework to keep up with the changes in our economy. The result of these two forces is that the imbalance, the imbalance between corporate power on the one hand and worker power and the other has increased. And obviously, this has a direct effect on workers.

Joseph Stiglitz:

The increased corporate power relative to workers has increased prices relative to wages. And that lowers the real wage. Here, my focus is not on corporate power itself, but the multiple ways by which competition and labor markets has been reduced and result of that is reduction in the welfare of

workers in our society more broadly. And the obvious question of this workshop has been, what might be done to enhance competition and to protect workers, the consequences of imbalance of market power. One of the sessions in your workshop, a whole government approach is based the kind of framework that I think is necessary, but I'll try to touch on what particularly the Department of Justice and the FTC might do.

Joseph Stiglitz:

I want to begin though, by thinking broadly beyond standard competition and labor law. If we think about the structure of a whole variety of programs; healthcare, retirement program, housing, all these effect workers across firm mobility, their mobility across locations, and thus, their ability to generate competitive man for their services. Having workers locked in with a particular employer, because they're worried about, if they move, will there be a problem of getting health insurance for pre-existing conditions, really undermines competition in the labor market. And that's why Obamacare in many ways was an important act for enhancing competition in the labor market. Portability of pensions is an important part of increasing competition in the labor market. And thinking more broadly about, whether we have a system, where we have a lot large supply of rental property housing, as opposed to owner occupied. If we think about the transaction costs of moving from one place to another, all these affect the degree of competition in the labor market.

Joseph Stiglitz:

I talked earlier about how contract design reduces competition in the corporate market. You see that most very clearly in some of the contract provisions in two sided markets, the American Express case illustrates, but the credit, the more broad credit card, the GDSs, airline reservation, a whole host of things, but contract design has also been important in labor markets. And I'll talk about two examples. One of them is the non-compete clauses. One of the last conversations I had with the late Alan Krueger, one of the greatest labor economists who showed in his work with David Card, that labor markets do not act as if they were fully competitive.

Joseph Stiglitz:

That conversation was about these non-compete clauses in fast food and other industries. Those non-compete clauses had no justification in terms of stealing intellectual property and even in the high tech sector, that's not the main motivation. The main motivation was reducing competition. If when sees that is their function, then one should take active action to restrict the usage of these non-compete clauses. Another example of a clause in a contract clause that has the effect of reducing competition are the arbitration clauses. Including and especially, those that preclude collective action in arbitration. I want to emphasize that much of the agenda of those working to weaken market power is based on exploiting the transaction costs. Recognizing that one worker can't have the resources to bring legal action against an employer, the legal action can only be taken when there's collective action. And that's why we have class action suits, but arbitration clauses and clauses, which preclude in that arbitration collective action, make it effectively impossible for workers to get redress. And that's where the Supreme court has been going, deliberately undermining the worker market power. So those kinds of arbitration clauses embedded in contracts, to me, are an example with these no collective action provisions are exactly the kind of provision which undermines workers bargaining power and results in a less competitive labor market. As we think of course of competitive balance, which is what I've been talking about, we have to think of other forms of collective action and most important of which, is Unions and recognize the myriad ways that some employers have attempted to undermine Unions. The so called right to work

laws are really laws about the right to free ride, the undermined, the ability of Unions to act, to get the revenues that they need to represent workers.

Joseph Stiglitz:

Again, emphasizing a details matter. It's all about transaction costs. I want to put this in a much broader way, we need to think about the theory of bargaining, what can be done to enhance the bargaining power of workers, how we write the rules of the game. So in the standard analysis, where you begin with the presumption that all markets are perfectly competitive, you think about eliminating the frictions in the market, but we know that there are always going to be frictions. We're never going to be able to eliminate all the frictions. We're always in this world with the second best. There's always going to be bargaining power. And so what we are really focused on here is how we write the rules of the game to ensure that there is a balance of market power. Examples are trying to find, make rules that make it easier or harder to join Union easier or harder to get recognized as a Union, easier or harder to win a strike, easier or harder to collect dues.

Joseph Stiglitz:

As I noted earlier, bargaining power is also affected by a host of other variables, for instance, ease of replacing workers, for instance, through international trade, through globalization, with foreign workers, the rules of globalization matter a great deal. One of the areas my own research touched upon and was mentioned in the introduction is asymmetries of information. Asymmetries information are important in areas to aspect of markets, including bargaining, bargaining theory with asymmetries of information marketing different than that, with where those asymmetries do not exist. And here we see a number of provisions in contracts that are, I believe, designed to enhance the imbalance of power. And I think one of the subject of I'm sure your discussion later today will be on exactly that. Demanding that workers keep secret their wage and other contractual information creates and asymmetry information while employers sharing their information with each other and not with workers, also enhances those kinds of asymmetry information, but there are many other examples of these asymmetries.

Joseph Stiglitz:

Provisions in settlements when there's been a grievance talking about non-disclosure and non-disparagement clauses are an attempt by bad employers to keep information about their bad behavior from the market. And that encourages bad behavior leading to a less competitive, a less informed market. There is a public good in having such information available, which individuals in signing these clauses don't take into account that public [good]. I think, one should very seriously consider banning these kinds of clauses as anti-competitive more broadly, or at least circumscribing these clauses, more broadly information can be a powerful tool influencing not only the labor market, but public opinion. That's why corporations resisted even mild disclosure requirements, such as the ratio of median wages to that or the CEO that was part of the Dodd–Frank law.

Joseph Stiglitz:

I think a required disclosure of more information would help create a more competitive labor market. The weapons, they're available to the employers, what they can do to make the life of the worker less pleasant are an important dimension of bargaining power. That's why labor market protections are so important. They affect not only you might say what happens to workers, but they also affect the bargaining power of workers. So there's both a direct and an indirect effect. And the problem is that the employers have learned how to avoid many of the old regulations or undermine those old regulations.

And the old regulations haven't been updated to reflect changes in the market. An example, of course, that's gotten a lot of attention during the Obama Administration. What are the regulations about overtime pay, which over time has applied to increasingly small numbers of workers.

Joseph Stiglitz:

There are new forms of exploitation of workers of you might call abuse of employer power, like split schedule, zero hours, last minute scheduling and regulations that would circumscribe the ability of firms to engage in this are taking away a weapon, an important weapon that worker, that employers use in their bargaining, the threats against workers. Type labor markets are obviously a key determinant of the bargaining power of workers. We've seen that recently in the discussion of employers concerned about the fact of the great resignation that workers are in short supply. And they're not happy about that. That's why macroeconomics is so important. Restoring competitive balance. We require broad changes in the rules of the game, including monetary policy that drive, make sure that we have a tight labor market.

Joseph Stiglitz:

The only time that we've had real inclusion of certain minorities, certain groups that have been excluded from the labor market have been when we had very tight labor market. We need broader changes in the rules, the game, as I said to protect workers against the imbalance that I talked about before, and those rules also change the bargaining power. Those include minimum wages, systems of social protection, and all of these have effects on the balance of bargaining power. Obviously, stricter enforcement and protections, are the protections currently existing, like minimum hours and wage loss I referred to earlier, applying them for instance, to taxi cab drivers, including the phone number of hours that they are on a platform would change the bargaining power and have a real effect on workers welfare.

Joseph Stiglitz:

I think the department of justice and the FTC need to work with the department of labor to redefine workers, not subject to over time. And that would make a difference. So too, for the stricter enforcement of laws, facilitating unionization. To return to the theme that I talked about earlier, those attempting to weaken workers bargaining power in Unions have used subtlety to get their way. What they've done has been tried to change in a variety of ways. Transaction costs. It hasn't been by banning Unions, it's by a death by a thousand slashes. The table has to be turned. One has to increase the transaction costs of those who would attempt to weaken workers bargaining power, making it more costly for them to do that, making them face the threat of government actions, government oversight of their actions that would, and exposure of their bad behavior. If I were to look more narrowly at what the Department of Justice might do without further legislative changes, obviously, we need a lot of legislative changes. That's going to be very difficult to get under the current environment. And so I've focused a lot of my thinking about what can be done without those legislative changes to change the balance of power, make labor markets more competitive. I think at the top of my list, I would think most closely about the contract terms, the non-compete clause that I referred to earlier, the compulsory arbitration clauses that preclude collective class action, the non-disclosure, non-disparagement clauses and so forth. I think I would take the perspective that these provisions undermine competition in the labor market and are therefore illegal under existing law.

Joseph Stiglitz:

I'm not a lawyer, so I leave it to you to figure out how to use existing words in the law. But to me, it's very clear that the effect of these provisions is to undermine competition in labor markets. So in conclusion, let me say, I think there is a rich agenda, a legislative agenda, a regulatory agenda, and an enforcement agenda, a rich agenda I have, trying to create a more competitive labor market, a labor market, where there's a better balance between the market power of firms and the market power of workers. I hope that some of the ideas that I've shared with you today help provide a framework for thinking about what the DOJ and the FTC can do. And I commend you for this undertaking.

Ryan Danks:

(Silence).

Ryan Danks:

Good morning, everyone. Thank you for joining us. I'm Ryan Danks, an attorney with the Antitrust division. I'm here this morning with professor Elena Prager from Northwestern University's Kellogg School of Management, who this year is a visiting scholar at the division's economic analysis group. We are happy to be moderating a panel this morning regarding information sharing among employers. Our discussion will briefly cover the potential harms and benefits to such exchanges, and then consider alternatives to both the legal standards that apply to information exchanges and the guidance that the agencies have provided. Before turning things over to Ellie, to introduce our speakers. I will note that the questions we ask and the comments we make today are our own and do not necessarily reflect the views of the Antitrust division. Ellie?

Elena Prager:

Thank you, Ryan. It's my absolute pleasure to introduce our panel of very thoughtful experts who represent both legal and economic perspectives as former or current practicing attorneys in academics and as some former enforcers. Together, they bring a wealth of expertise on information exchange and other antitrust issues. Let me start by introducing Laura Alexander, who's a former litigator and currently the vice president of policy at the American Antitrust Institute where she does research and advocacy around various antitrust issues, including employer market power. Peter Carstensen is the Miller Chair in Law Emeritus at the University of Wisconsin Law School. Peter has done substantial work on buyer side market power and information exchange among the other topics.

Elena Prager:

Joseph Harrington is an economist and is currently the Harker professor at the Wharton School of the University of Pennsylvania. Joe's research has also spanned a range of antitrust issues, notably cartel's and more recently information exchange. Doug Melamed is a law professor at Stanford Law School. And prior to academia, Doug had a distinguished career in private practice, as well as government, including serving as the acting assistant AG here at the Antitrust division. So welcome back, Doug. Nathan Miller is also a DOJ alum and as a former economist at the division, worked on antitrust issues here and now continues to do so as the Saleh Romeih Associate Professor at the McDonough School of Business at Georgetown University. So these are our wonderful panelists, and without further ado, we will jump right into substantive contact. Or sorry. Content.

Elena Prager:

Now, the agencies, meaning DOJ and FTC, and various market participants, all recognize that many forms of information exchange do not raise antitrust concerns. So I'm going to start with Laura. Laura, can you give us the case for why information exchange can be benign, or perhaps even pro-competitive, so that we wouldn't want to overregulate it?

Laura Alexander:

Sure. Happy to do so. Let me just say, first of all, thank you to DOJ and FTC for organizing this panel, and to you, Ellie and Ryan, for having me. So the free flow of information is incredibly important to well-functioning markets and to various interests of market participants, and to the efficiency of markets overall.

Laura Alexander:

Some particular ways in which information exchanges can be beneficial would include, for example, allowing firms to make more efficient investments, to avoid substantial mismatches between supply and demand, and increasing certainty so that there's more confidence to make investments. Information exchanges can reduce search costs. If you think about Saver, other backend airline pricing devices that allow customers and competitors to readily access each other's information; hospital pricing, similarly, allowing for the exchange of information about the prices that hospitals are charging can enable better searching by patients for good locations for care.

Laura Alexander:

I think that information exchange can also have an academic benefit. It can enable research into market dynamics. It certainly is very important to have detailed information for putting together econometric models, for instance, which you may debate whether those are a net good for society, but information is critical to those understanding market dynamics, and something that's particularly salient, I think, to today's topic is that information exchanges can help promote equity and discourage price discrimination and wage discrimination. For example, Colorado's Equal Pay Equal Work Act, which went into effect on January 1st, requires employers to post wage information with job openings. And as professor Stiglitz highlighted in his keynote, asymmetries and information can have a seriously detrimental effect on both markets and on issues like equality.

Laura Alexander:

But I want to close by noting two important caveats on many of these benefits. One, most of these benefits can be achieved with fairly high level information, the exchange of very detailed information is not necessary to achieve most of these benefits. And also most of these benefits can be maximized and can only be achieved by widely sharing the information among all the participants in the market. And so the case for many of the benefits would not apply, for instance, to exchanges of information only between employers that wasn't shared with employees, or only between suppliers that wasn't shared with buyers. So with those caveats, that would be the case the information exchange can benefit.

Elena Prager:

Thank you, Laura. And we will come back to the question of whom the information is accessible to later on in today's panel, I hope. In the meantime, Laura brought up issues spanning a range of types of markets and industries. So Doug, I wonder if you have anything to add to this discussion, particularly as information exchange applies to labor markets and employment relationships in particular.

Doug Melamed:

Thank you. Yeah, I mean, [inaudible] nicely that the basic benefits of information exchange are, I think, pretty well understood, increased knowledge creates more efficient markets as a general matter. I want to add just two very brief thoughts that go to the question you ask, which is, what might be different or unique about labor markets compared to the product side information sharing that, at least when I was a young lawyer, we focused on? And I think there are two kinds of difference. And of course, whether they matter depends on the nature of the information exchange.

Doug Melamed:

But first of all, employees are part of the production activity of the firm, so information about employees and particularly about what an economist might call terms of trade, and a labor lawyer might call the working conditions and circumstances, affect not only the terms of trade, the way information exchanges about products might affect really only the terms of trade with customers. They also affect the firm's production function. Firms can earn a great deal by what we used to call benchmark, for example, about the HR function in ways that actually affect their production activities and make them more efficient. Second and related to that, employees often possess trade information, and legitimate interest in trade protection implies an additional potential value in certain kinds of information exchanges, respecting again, perhaps employment practices and also information sharing rules when employees are engaged in function, working on behalf of the companies in communicating with outsiders. So I think there are some unique factors to the employment relationship that bear on the question of, under what circumstances information exchanges might be more beneficial or harm?

Elena Prager:

Thank you Doug. Before we get into some of the more detailed substantive issues here, I'd like to set up both sides of this question. So I'm going to turn to Joe next with the following, some forms of information exchange, or at least some types of circumstances, may make information exchange an antitrust concern, unlike the potentially benign or beneficial circumstances that Doug and Laura outlined for us. Can you give us the economic argument for why, or under what circumstances, information exchange can have anti-competitive effects?

Joe Harrington:

Okay, thank you, Ellie. I'd be delighted to do so. And let me kind of focus this in terms of the role of information exchanges with regards to promoting collusion. And to kind of understand the impact that it can have we want to think about the kind of three kind of essential elements to successful collusion, by which I mean, just broadly any sort of restraining of competition. The first one has to do with firms coordinating on some inclusive outcome. You know, you think about where firms right now are competing in some market, whether it's a product market or a labor market, and they have to achieve some mutual understanding that they are either not to compete or to compete less aggressively. And if they get that, they also have to then get some common understanding in terms of exactly how is it that they are going to compete less aggressively.

Joe Harrington:

Is it because is it through limiting wage increases? Or is it through not competing for competitor's employees? So that's the kind of the first element that they need to achieve, some understanding about how is it that they're going to compete less aggressively. With that, let's say, collusive outcome, is the second element, which is they have to monitor for compliance, that is if, for example, the collusive

outcome is to limit wage increases, they need to make sure that firms are abiding by that. And so that's the second element as well as a challenge to collusion. And then the third one is they need to use some form of punishment to kind of incentivize firms to abide by this common understanding. So this means that if the inclusive outcome is, for example, that we're not going to try to attract each other's employees, then if there's evidence that to the contrary, there needs some sort of, kind of retaliation.

Joe Harrington:

It could mean engaging in retaliatory [inaudible] behavior, could mean simply a return to competition. So, successful collusion requires coordinating on some inclusive outcome, monitoring for compliance with that outcome, and then providing some sort of punishment broadly defined, which is really incentivizes firms to comply. And so now we can think about an information exchange, which can potentially kind of contribute to all three of those elements, but particularly the first two, if firms are exchanging, for example, proposed wage increases and even doing so in a manner which is not kind of expressly trying to agree on wage increases, but simply the act of sharing these proposed wage increases, can serve to achieve that kind of understanding to limit wage increases. If they share past wages, well, that's the device for monitoring for compliance with some outcome that could associate with limiting competition in the form of limiting wage increases.

Joe Harrington:

So when you think about information exchange is just really quite essential to delivering the information firms need in order to achieve collusion. And so, when we observe firms exchanging that type of information, we immediately become concerned, and that concern is accentuating when we think about that under competition the exchange of sharing that information, giving that information to competitors, often puts firms at a disadvantage. For one firm to inform another firm about the wages and salaries that they're offering, the benefits they're offering, their hiring practices, potentially provides information to a competitor to compete more effectively in the labor market to attract that firm's employees. And so, given that, the simple act of deciding that we will exchange this information, which typically would be held confidential, it's commercially sensitive, could actually be kind of an act that would help achieve that initial common understanding that we're doing this, not to promote competition, but rather to limit competition. And is that essential role of information in terms of achieving kind of a stable, inclusive arrangement that makes us concerned with information exchange through regards to certain types of information.

Elena Prager:

Thank you, Joe, for that very comprehensive discussion, which actually preempted my question about, how we should understand information exchange as applying to labor markets in particular? Since we are, I think, usually thinking about the impacts of information exchange on product side markets. So I think in the interests of time, we will actually skip that set of questions, and I will actually hand it off to Ryan now to moderate a discussion of the legal standard used in employer information exchange cases. Over to you, Ryan.

Ryan Danks:

Thanks Ellie. So we all know that agreements to exchange information are currently evaluated under the rule of reason, which means that as the Supreme Court put it in Board of Trade, courts must ordinarily consider the facts peculiar to the business to which the restraint is applied, it's conditioned before and after the restraint was imposed, the nature of the restrained in itself, and its effect actual or probable.

Some have suggested, including some of our panelists this morning, that we can truncate the traditional rule of recent analysis for certain types of information exchange agreements by using what is sometimes called, a quick look approach, or applying some sort of presumption. Peter, do you want go ahead and get this started and explain why you think court should only apply a quick look, or some sort of presumption, to information exchange between employers?

Peter Carstensen:

Sure. I will. As an aside say that language Chicago Board of Trade is some of the most pernicious nonsense ever outed. [Randis] himself was a former administrator of a cartel, and the language is designed to immunize himself from criminal liability. But that's, as I say, an aside. Actually, in my view, information exchanges that involve confidential business information exchanged among rivals ought to be, per se, illegal unless there is a joint venture or some kind of transaction that would justify that exchange. That's kind of the ancillary restraint idea, and Doug, nicely referenced the kind of thing you had a joint venture, and you're going to be exchanging information in that joint venture, you're going to have to have some additional understandings about information to be exchanged, and it may be very much confidential information. Well, we don't have one of those considerations involved however.

Peter Carstensen:

The only really plausible function for this kind of exchange it is to restrain competition among the rivals that are sharing that information, and this goes to what Joe was describing a little bit earlier, I don't need to have an overt understanding about specifics if I've got full transparency of what my competitors are doing, because they know I know if they start doing things that deviate from our tacit understanding, I will retaliate. So that becomes the basis, when you think about this as an agreement to exchange information whose function or purpose or goal is to, in and of itself, restrain competition. Now, as Laura and others have laid out, there are possible legitimate justifications for exchanging information. Again, benchmarking kinds of stuff might be useful. So, one could think of that as an affirmative defense, thinking about my initial position as being a presumption of illegality.

Peter Carstensen:

And so the burden would be on the defendant to offer information where it is confidential exchanges of information that go to the core of the competitive function. I think it is unlikely to be justified, but we can, and this is why quick look maybe the better doctrinal language, take a quick look, see if that justification is at all plausible under the circumstances. And then, the debate really is whether the reason for, and function of the exchange, is to limit competition. That is, is it a restraint? Or is it not a restraint in competition because the parties would remain free to take on, and able to take on, and motivated to take on whatever is competitively rational?

Peter Carstensen:

So it's a little bit like the context of a cartel price fixing arrangement, where the argument is, is there collusion to do this? Or is this just a function of the mark? So, I would prefer to think of this as a per se kind of situation, where the question is, what is the function of the information exchange? I can see doctrinally today, if we're going to make changes, think of it as a quick look situation is probably the better option.

Ryan Danks:

Excellent. Thank you, Peter, for leading us off. And I'll just remind the panelists, if anybody wants to chime in any point, please feel free just raise your Zoom hand and I'll make sure we get the conversation to you. But I wanted to follow up that with, to turn it over to Joe, who raised his hand, and so I'll let you go, Joe. Thanks. What do you have to add to that?

Joe Harrington:

Let me lower my hand there. Guess what I would just really like to add with Peter. I mean, first of all, I'm of a similar mind to what Peter expressed, and just to add to this in that, if I look at this from the perspective of price exchanges, where the jurisprudence is kind of more developed, we know that the rule of reason is used there, and it's used there, even for private exchanges of prices, as in the container case, it's used there because as the courts have said, there are pro-competitive rationales for the exchange of prices, and we can extrapolate that to the exchange of wages. And my own belief is that the court is factually wrong here in terms of there being a pro-competitive rationale or a private exchange of prices. And I think as well, a private exchange of wages.

Joe Harrington:

And the two most common pro competitive rationales are, one, it is beneficial to a firm to learn a competitor's prices and wages. And that's absolutely true, but that does not provide a rationale for why a firm would share its prices and wages with a competitor, and that's what an information exchange entails. So for the same reason that it's advantageous for a competitor to learn my prices and wages, they can use that against me. Similarly, I do not want to exchange that with them. And that's all under competition. And so, the fact is there is not a pro-competitive rationale for me sharing my information with others.

Joe Harrington:

And the other one is that, and this is kind of, I think, touched upon in Joseph Stiglitz's keynote address, which is that market efficiency can be enhanced by exchanging this information, but that's an argument for a public exchange, not a private exchange. So the general point here is that the rule of reason is used for private exchange of prices under the presumption that there are pro-competitive rationales, and the fact is I do not believe that that is the case, which leads us more towards that type exchange of information towards a quick look rule would be more appropriate.

Ryan Danks:

And would you apply that quick look rule to all types of information exchange among employers? Or only to those associated with wages and closely related terms of employment?

Joe Harrington:

I'll just say, in my view, I mean, pertains to wages and prices that are very much commercially sensitive information. More broadly I'd have, I mean, I haven't really come to a decision on that, that requires having a careful examination. Peter might have more to say on that.

Ryan Danks:

Go ahead, Peter, if you do. Oh, I think you are muted Peter. Sorry.

Peter Carstensen:

It seems to me that the strength of a quick look, as opposed to a per se, you've exchanged information among rivals, therefore it's illegal is to say, "Okay, rivals, what is your justification for this kind of information exchange?", and that gets us away from the pernicious nonsense of a rule of reason that is this, as you quoted from the evil Chicago Board of Trade case, an open ended inquiry into everything that might possibly be relevant, including the kitchen sink. Rather, you can start focusing in on, "Okay, what's your justification?", because it's presumptively illegal, unless you've got a compelling justification for the exchange. And Laura gave you a good example of intermittent exchanges of older information to benchmark some of your work, and I think Doug referenced that as well, so that there would be cases where once a court says, "Well, wait a minute, no, there appears to be a legitimate justification", then the focus should be not on market structure and other irrelevancies, but rather what evidence supports the claim of the defendant.

Peter Carstensen:

And you could put the burden on the plaintiff here, show us that there is really no justification for that use of information, because at that point, taking a quick look, oh, we see there's an alternative explanation. One of the interesting, very recent, decisions involves the Spot Advertising case that the Justice Department won, got a consent decree on then the private litigation. You look at the way the judge is upholding the plaintiff's class action, what his decision did was to focus strictly, almost exclusively on, what possible legitimate function could this particular exchange of information have had? He found none. Therefore, he sustained the cause of action sort of ignoring whether there was appropriate market power and all these different little markets, etcetera. So that's really where the quick look, I'm not wildly enthusiastic about the label, but president doctrine, that's a good way to focus in on what is the function of this restraint, or this agreement, in this context. Do you have legitimate justification?

Ryan Danks:

Laura? Did you have something you wanted to add?

Laura Alexander:

Yeah, I mean, I just wanted to add sort of the litigant's perspective here, particularly, perhaps the private litigant. Professor Stiglitz mentioned in his talk about the death by a thousand cuts inflicted upon labor unions. So too, with antitrust litigation, particularly with shifting more and more inquiries into the of reason, and then raising the bar at every step in rule of reason inquiries, it's become increasingly more difficult for private plaintiffs to get through the door of court, and to get to discovery, and to ultimately win antitrust cases. And that's, I think, one of the big advantages of both a quick look, and a shifting of presumptions, in that to focus the inquiry, even if you get to the same place that you would've gotten to through a rule of reason inquiry, if you can get there faster, and if you can get there without going down every rabbit hole, then that has a real effect on the ability of enforcers, public and private, to bring cases and to effectively litigate cases. And it also increases the ability, particularly for private plaintiffs, to get past something like a motion to dismiss and get to discovery.

Laura Alexander:

And in conducting discovery in antitrust cases, that's often where the most damning evidence is developed, and where connections to other conspiracies and other agreements arise. The Agro Stats Poultry Wages Case is a great example of that through the discovery in the first of these cases,

information was developed that led to multiple other cases and other related industries involving some of the same players.

Ryan Danks:

Doug, from the perspective of someone who has been both a counselor and a client. Do you have any concerns about moving away from a full rule of reason analysis to some sort of truncated approach along the lines of what Peter and others have been advocating for?

Doug Melamed:

Well, I'm not against some kind of movement away from full rule of reason, which I agree we should, the law general should avoid where we should be confident to do so, but I think they have to be very careful. Let me say this before I answer the question, two comments in response to the reason. First of all, I don't think Peter intended it but I do think he stroked a really devastating blow against the now fashionable moniker, new [inaudible], but leave that aside. And I think Laura's reference to unions, I think reminds us of a really important fact.

Doug Melamed:

My casual learning over the years has taught me that societies have never been happy over a long period of time. Having labor markets be subject to endless competition in the market, whether it's agricultural stories in centuries ago, the labor union movement, or the anti trade reaction in this country, it's quite clear that the [factory] workers requires some insulation from the instability of markets, and so, what we're talking about here, we talked about antitrust solutions, is second best solution, addressing some relatively small problems in the larger context of inequality between land capital and labor.

Doug Melamed:

In response to your question, look, there are benefits and harms potentially to information exchanges. We need to look at the specific facts and the specific market content. I think Peter, or perhaps Joe, said market structure is real. Market Structure is not real. I mean, from my experience as a lawyer, once the American lawyer came on the speed learning how much other firms' partners were making, was an enormous stimulus toward increasing partner compensation, because law firms realized that unless they got with it and tried to increase their compensation, and of course you have all the issues to do, you want competition because now you've got different compensation for different partners based on their productivity and so on, but all those market forces were unleashed in large part because firms came to realize what other firms were doing that they needed to respond with. Same thing with associate compensation in law firm, when a New York firm announce is going to pay a gazillion dollars, everybody has to respond to that.

Doug Melamed:

Why is that working in a pro-competitive way, or an anti competitive way? Well, you might say it's cause it's public. I don't think that's a necessary condition, although it may well be a big plus in that case, but it is because those markets and structure in those markets to not lend themselves to the kind of anti competitive coordination that Joe was talking about, the outset. So structure, I think really is important. So I guess what I'm trying to say is we have to look at the facts, we have to look at the context. That doesn't mean a full blown rule of reason, which by the way, is not sort of how the rule of business applied in an actual litigation in my experience, but it does mean that we should be, after we have

substantial reason to do so, adopting presumptions, maybe quick look kinds of presumptions, for specific kinds of information exchange in specific market conditions, where experience teaches us that we can be reasonably confident that those are likely to be anti-competitive.

Doug Melamed:

And I think they're going to probably be wages and other terms of monetary trade that don't [inaudible], don't implicate the production [inaudible]. In markets are susceptible to some kind of [inaudible] and maybe whether it's public or private would be an important part of that, fashioning that quick look or presumption. But other than that, I think we really have to look at the facts, because information exchanges are not the same as price fixing, and they do have in many instances potentials for pro-competitive [inaudible] .

Ryan Danks:

Okay. Thank you. Nate, do you have anything you'd like to add to this discussion before I turn it over to Ellie?

Nate Miller:

Yeah, sure. Happy to jump in here. Ryan, thanks for getting us organized, Ellie you too. Happy to participate on the panel. I think that that Joe did a really nice job laying out the ways that information exchange can potentially create adverse consequences for workers by facilitating coordination. I, in less optimistic that a per se rule is the way to address the situation. And I think it goes back to just the history of information exchange and how companies use it, and how it's used today in some settings, which is to help facilitate price discovery and ease the transaction costs associated with selling labor or potentially other inputs, and input markets where you have privately negotiated contracts, and search costs and this sort of thing. The government, in the past and to this day, collects information from firms in various industries and disseminates it to those companies to help try to facilitate price discovery and make it easier just to do business.

Nate Miller:

And some examples include the United States geological survey, which collects information on minerals, and for economists out there that would include cement. We all use this for research. The USDA historically has taken the role of collecting information on various markets, including proteins and disseminated it to market participants. Now that, you know, there's an open question as to whether those markets remain competitive, but the point is that there does seem to be this role for information in the market, helping firms make decisions. I think that that role is probably most important when firms tend to be small, which are also those situations in which coordination you might suspect coordinated effects, or occlusion, is less likely to emerge. And to the extent that there's sort of more concern now about information exchange. I wonder if it reflects changes over time, and the number of markets or the prevalence of instances in which we have a sense that [inaudible] power is important.

Nate Miller:

With respect to a per se rule, I want to ask whether it would lead to unintended consequences. For example, there's a website called Glassdoor, in which workers can voluntarily post their own salaries and wages, and some companies internally have Wikipedia pages or Wiki pages in which workers share salary information. And I worry that a per se rule against information sharing would have unintended

consequences for this sort of information sharing, which I don't think is at all really what we have in mind. And so, ultimately it comes

Nate Miller:

... down for me. It seems like this is a rule of reason, sort of analysis. I think actually finding evidence and proving a competitive effect is often to be difficult for reasons that we can go into maybe later, but I think a lot will depend on where we place a safe harbor, or where we place a presumption, because that's going to shape the outcome, or the ability to enforce antitrust laws in this space.

Ryan Danks:

Thanks, Nate. We've got to move on in just a minute, but I do want give Laura and Peter a chance to make any last comments on this subject before we move on to the next. Laura?

Laura Alexander:

Sure, thanks. I'll just say quickly that, at least from my perspective, when we talk about a quick look, or a per se rule, or shifting of burdens, it's largely in the context of private information exchanges, the unintended consequences that Nate mentioned from things like Glassdoor or that the beneficial effects that Doug mentioned from the wide distribution of information about law firm salaries, those are all public exchanges and I think that really does make a big difference in the rule that should apply.

Ryan Danks:

And finally, Peter.

Peter Carstensen:

Yeah, I want to be a little more forceful in saying that I carefully framed my per se around the exchange of confidential business information among business rivals. So this is not an open-ended, any exchange of information. Employees within a company exchange information, that's a very different can of worms. Glassdoor, something else where you've got, not rivals, but employees... A very different story. So it's framing it carefully to identify the class of case where we ought to have a presumption. And so this, in a way, follows up on what Laura just said.

Ryan Danks:

Great. Well, thank you. And thanks everyone for a very interesting back and forth on that. I'm going to now turn it over to Ellie who is going to lead a discussion around the guidance that the agencies provide.

Elena Prager:

Thanks Ryan, and of course, to all our panelists. Let's, for now, set aside this question of legal standards and discuss in particular, the somewhat related issue of safe harbor from antitrust action. Under the current existing guidance from the agencies, there's a safe harbor for certain types of information exchange. And for my fellow non-lawyers in the audience, this means that certain types of information exchange will trigger either reduced or just no antitrust scrutiny at all.

Elena Prager:

What I'd like for our panelists to do is to discuss a little bit, both the existing safe harbor guidelines and the potential amendments that the agencies might make. So per the 2016 guidance for HR

professionals, which is where the guidelines are most clearly articulated, information exchanges may be lawful if they satisfy the following criteria and I'm quoting here now.

Elena Prager:

"One, a neutral third party manages the exchange. Two, the exchange involves information that is relatively old. Three, the information is aggregated to protect the identity of the underlying sources. And four enough sources are aggregated to prevent competitors from linking particular data to an individual source."

Elena Prager:

We will come back, if we have time, to a discussion of some of these criteria in particular, but what I'd actually like to do first is to jump to a question about something that's not in these criteria, but that has been brought up by both Laura and Joe, and alluded to by the other panelists, which is the fact that the current criteria do not include a provision asking whether the exchanged information is available to all market participants or whether the information exchange occurs privately between employers.

Elena Prager:

There is some case law that touches on whether the information is public, but it's not very well developed. So in the labor context, this means that whether employers exchange information only amongst themselves, or they also reveal it to workers and job applicants is not considered as a factor in defining the safe harbor.

Elena Prager:

So I'm going to open up this discussion broadly and ask our panelists, should the safe harbor be amended to explicitly consider who is privy to the exchanged information? And Laura and Joe, since you brought it up, I may start with one of you. Would anyone like to contribute?

Laura Alexander:

Sure, I think it will come as no surprise that I do think that would be an important factor to include in the safe harbor. I think that it's very hard to make the case that there should be a safe harbor applied to private exchanges of information between competitors, about competitively sensitive information that's not shared with the other market participants. And so, I would favor removing those instances from the safe Harbor.

Elena Prager:

Doug, do you want to add?

Doug Melamed:

Yeah, just a couple thoughts. I think there's ambiguity about the word safe harbor. Often lawyers think of it as meaning really safe. You're not... It's legal. And I certainly wouldn't favor having, probably any of these things being safe in that sense, because they're talking about enforcement priorities or risk factors. I think whether the information exchange is private or open to everybody, at least all the market participants is an extremely important factor, but I don't think it's conclusive. I don't think you ought to make too many lines drawn on the basis of that.

Doug Melamed:

One reason is this, the antitrust inquiry is not whether we think the employers have engaged in labor market practices that are fair or address a distribution issue between workers and employers. It is whether the defendants have engaged in conduct that increases their market power. And that is at the core of an antitrust violation. Two elements, there's an [inaudible] conduct, information exchanges might be that, and do increase market power. The latter requires some sensitivity to both the nature of the information exchange and market structure, and so forth.

Doug Melamed:

So if it turns out that employers are exchanging information and not sharing it with employees, let's imagine the hundred biggest law firms got together and exchanged the kind very high level public information that we now know about entry level compensation to associates. I doubt that would create any market power. I doubt it would in sense of facilitating [inaudible] collusion or other consequences that diminish the efficacy of the competitive constraints. And if that's the case, I'm not sure there's an actual violation, whether we are happy with that exchange or not. So I think the way to think on that is, probably it's an important factor, but it's not too much exclusive.

Elena Prager:

Thanks, Doug. I may come back to you, but I see we've got a couple of hands up, so let's go ahead and throw it to Nate. Nate, you are still muted.

Nate Miller:

Three points. One, is that my sense at this point in time is that it makes sense not to have a safe harbor, for reasons that we can come back to later. Two, I agree that that having information shared among all participants is likely to lead to better outcomes, all else equal, than if it's, information is held only by, say the employers. But three, I don't think that that sharing information with employers is enough to avoid the sorts of consequences that Joe laid out.

Nate Miller:

And I think there's a really nice empirical example where this is the case, and I'm going to just describe very briefly, research that's done by David Byrne and Nicholas de Roos, published in a 2019 AER article that looked at what happened. This is going to be a retail gasoline market, but the government collected information on gasoline prices charged at different stations in order to help consumers be more informed about the options they had available to them. And the side consequence of the information dissemination was to allow the firms to start coordinating on prices in a new way, actually to the detriment of consumers. So giving consumers the information in that setting did not deter a collusion, and the information ended up being detrimental anyway. I don't see any reason why the analogy doesn't apply to labor markets as well.

Elena Prager:

Doug, would you like to directly to that, or are you okay?

Doug Melamed:

Yeah, I agree with that. I think that this factor is often a relevant one, often important one. It shouldn't be conclusive as to either [inaudible]

Elena Prager:

Thanks. Let's now go to Peter.

Peter Carstensen:

First, I would point out that what we are talking about is a safe harbor issue, not whether the conduct was legal or not. And when we have asymmetrical information being exchanged, that is, all the employers know what they're paying, the employees are not given that information, that raises some serious concerns.

Peter Carstensen:

Doug might be right, there might be a legitimate justification for keeping that information among the firms, as opposed to sharing it more generally, but it should not be a safe harbor situation just because they passed it through the hands of a third party, et cetera. When it's confidential, that ought to be a basis to take a more critical look. And especially, this goes back to what Joe Stiglitz was talking about in his keynote about asymmetrical information. I'm very suspicious, Doug, when all the big law firms got together, which they used to do back in the day and agreed on what associate wages would be. Never got challenged criminally, but they were exchanging that kind of information, very much to keep me from making as much money as I would've made if I got a job there, but like some others, I'm actually an alumnus of the antitrust division, and that's where I started my career.

Elena Prager:

Thanks, Peter. You're also providing a very nice segue into our next topic of discussion, which is this question of whether the information is collected and disseminated by a third party, as opposed to a direct market participant. One of the four criteria for safe harbor that currently exists, is that the information be collected and disseminated by a so-called neutral third party, such as for example, a trade association.

Elena Prager:

I'll start with Nate here. Nate, can you walk us through what the functional distinction is, or isn't, between a third party and a direct exchange, and in particular, whether a third party disseminator guarantees that information exchange won't lead to the types of collusive outcomes that Joe described in his introductory remarks.

Nate Miller:

I'll take a quick stab. So third parties, potentially, can better the confidentiality of data. Often this is implemented by aggregating data provided by particular firms or employers to a level that the firm level... To the specific data, the firms itself cannot be identified or backward engineered.

Nate Miller:

Thinking about the risk factors that Joe enumerated with respect to information sharing and coordination, this can make it harder to monitor compliance with any sort of wage fixing or price fixing scheme. But to me, it doesn't really make sense to think of the use of a third party provider as part of a safe harbor for information exchange.

Nate Miller:

And just a couple observations on this, first is that the third party doesn't not have to aggregate, although that's sometimes the practice that we see. Two, even aggregate data can be used to support coordination, and indeed in economics, one of our seminal articles on collusion involves the use of aggregate data to support the cartel. This would be the Green Importer, 1984 article. And we have examples of aggregated data, or third party... Maybe should say third parties exchanges, supporting coordination. And Agri Stats is a good example of this. The fuel watch example from Australia applies here. And so just putting that together, to me, whether the information exchange is done by a third party, or whether it's done directly just seems tangential to the antitrust concerns that one might have about antitrust exchange and coordination in labor markets.

Elena Prager:

Thanks, Nate. Doug, I'll throw it to you in a moment, but I'd also like all our panelists to... Sorry, I'd like to encourage all of our panels to comment, both on the particular points that Nate raised, and on your take on the appropriateness of keeping the third party requirement as part of any safe harbor definition that we might have if the agencies were to revise the current guidelines. Go ahead, Doug.

Doug Melamed:

Well, I just wanted to say that I think third party is an important factor. I don't know, it could be conclusive, again, either way, I think these are more complicated questions. But it's an important factor for one reason, in addition to [inaudible], and that is that when a third... But all we know is a third party, let's imagine accounting firm or whatever, trade association gathers data from participating firm, aggregates it, in some way disseminates it, even it doesn't aggregate. One thing we know is that there's no reason you think that firms communicate with one another about those data. And so, we're in a different situation from the one that I think Peter had in mind [inaudible] law firm long time ago. Now we're exchanging information. He said, agreeing on terms of trade.

Doug Melamed:

When firms are exchanging information directly, there is an obvious occasion for the wink and the nod, or whatever you might call it. When they're not communicating directly, a risk factor, the wink and the nod, or the suspicion, maybe they talked about more than just the numbers, goes away in the absence of other evidence. So I think that's another reason why third parties are important. Whether they're enough for a safe harbor, I don't think so, for the reason we said that they're an important factor for that reason as well.

Elena Prager:

Thanks, Doug, And I see Peter nodding his head, so why don't we go to you, and then we'll get to Laura and Joe.

Peter Carstensen:

I agree with Doug that a third party is important if the information exchange being exchanged itself is reasonable. I wonder in this context, whether the government Justice Department abandoned its investigation of Agri Stats back in 2011, 12, because, hey, it's a third party and they're homogenizing the information to some extent, when in fact we now know what they were doing was highly anti-competitive and facilitating cartels. So that it's a useful, maybe even a central condition, but not the

place where you really ought to focus. It's the kind of information being exchanged that, again I stay on my hobby horse here, it should be the most important consideration,

Elena Prager:

Laura.

Laura Alexander:

Yeah, so I agree with Doug and Peter that it does have some relevance, but that it's questionable whether it should be enough to get to a safe harbor. I would just also emphasize the neutral part of third party, which I think is important as far as the probative value of the information being gathered by a third party.

Laura Alexander:

We often see in all kinds of cartel cases and collusion cases, the colluding parties soliciting a third party to help facilitate the collusion. And so, I think it matters quite a bit if the third party has been brought into the information exchange by the market participants. And for trade associations, they are... I think you can often regard them as effectively collections of the competitors.

Laura Alexander:

I think when you're looking at these information exchanges, the key question is, what is the motivation behind the exchange of information? What is its purpose, and is that purpose beneficial to competition? And when it's the participants and the rivals in a market who are facilitating the exchange, whether directly or through a third party, I think that raises additional questions about what the motivation is for the exchange.

Elena Prager:

Thanks for pointing out that additional consideration. Joe, would you close out this portion of the discussion for us?

Joe Harrington:

Yes, and I'll be brief. Just to follow up on Laura, Agri Stats is a case where it wasn't the companies coming to Agri Stats, agri Stats, [inaudible] was the entrepreneur here, going out to various industries. And only the point to be made here is that I think almost any potential safe harbor you can come up with, I can come up with a cartel case, in which that safe harbor was respected.

Joe Harrington:

And so from my mind, the discussion ought to really be about presumptions. When is it that the presumption should be on the firms? That is, we have a quick look rule, and when should the presumption be on the plaintiffs, and we should have a rule of reason approach.

Elena Prager:

Would you favor then, Joe, eliminating the safe harbor altogether?

Joe Harrington:

With what we know right now, I would say, yes. Because as I said, we take aggregated information and a third party, we have lots of cases where cartels operate it that way. So I don't think our understanding of collusion is sufficient to be confident in identifying some area where we feel it very unlikely that firms would be able to... Would be ineffective at colluding. That's putting aside the issue about, for example, market structure, which Doug brought up. Obviously in certain markets where, even if they expressly communicated, would be very, very difficult, but that's a separate issue. That's not typically what we're talking about with safe harbors.

Elena Prager:

I'd like to get everyone's take on this to the extent that you would like to comment, and I'll start with Laura.

Laura Alexander:

So, I agree with Joe that I think we're learning through practice and through evolved economic understanding that we actually don't have great confidence in what conditions make an information exchange safe, and so I would favor abandoning the safe harbor. But if we do keep the safe harbor, no matter what the criteria are, I just want to emphasize that I think it's very important to scrutinize whether, in fact, an information exchange satisfies those criteria.

Laura Alexander:

The plaintiffs and poultry wages have alleged that Agri Stats, although they aggregated the information, it could be disaggregated by interested parties who are looking thoughtfully at the data. And I think there are other instances like that where there's a claim that a safe harbor is satisfied, but unless it's really scrutinized, we really don't know even if the criteria are correct, whether they apply to that particular instance.

Elena Prager:

Thank you. I don't want to shut down this discussion just yet, so I'll just check to see whether anyone else would like to comment on potentially abandoning the safe harbor, Doug.

Doug Melamed:

Yeah, and just briefly, I agree with what's been said by Joe and Laura. There shouldn't be safe harbors and there shouldn't be per se rules. By the way, [inaudible] can't [inaudible] either, all it can do is talk about its enforcement activities. And I think what it should do, given the uncertainty of our knowledge, absence better knowledge, is write guidelines that say, here are the factors that tend to be exculpatory. Here are factors that tend to be inculpatory. And then you can go further and say, if you find factors A and B, then the absence of unusual facts, we're not likely to proceed further with investigation. And vice versa, they find factors A and B, we're likely to bring a case in the absence of some good explanation, but I think it should be [inaudible] within safe harbors, or [inaudible].

Elena Prager:

Thanks, Doug. Peter, I will give it to you for just a minute. And then we will hand it over to Ryan to close out the panel altogether.

Peter Carstensen:

Just one strategy that might be relevant here is to go through the business review clearance process for any kind of information exchange, so that there's prior review of what's going on rather than waiting for various kinds of problems to occur. Don't know whether that would work well or not, but it's another thing to think about at least.

Elena Prager:

Thanks. Well that concludes my moderated portion of the panel. Ryan, would you thank our panelists for me and close us out, please?

Ryan Danks:

Sure. Excuse is me. I'd be happy to do that. Thank you to Laura, to Nate, to Doug, to Peter and to Joe for a great discussion over the last hour, and for all of the work you put in to prepare for it. We hope that all of the watchers and listeners online got as much out of this as Ellie and I did. At this point, we're going to break for lunch, and the workshop will resume at 12:45 PM with our afternoon keynote address from Tim Wu. Thank you all very much.

David Lawrence:

Well, thank you. Thank you all for being here and welcome back from lunch. This has been an incredibly interesting and useful couple days, and it's been wonderful to watch, although I think we may save the best for the last, with the incredible afternoon we have lined up for you all.

David Lawrence:

To start that afternoon program, it's my great all honor to introduce professor and special assistant to the president, Tim Wu. Professor Wu has of course long been a thought leader on competition issues as a Columbia University law professor, a prominent public speaker, an enforcer and an author, but he's held very significant stance as a policy leader as well, include currently, as special assistant to the president, working with the National Economic Council on competition issues. And he's played a key role in the development of president Biden's July executive order on promoting competition in the American economy.

David Lawrence:

That executive order, I can say is already having an enormous impact across the federal government and how regulators think about and cooperate with one another on competition issues. And actually just yesterday, I heard someone describe it as a historic document. It's six months old, but I think might not be an exaggeration. So without further ado, I'll pass the mic to special assistant to the president, Tim Wu, so we can hear more.

Tim Wu:

Hi, everybody. That makes me know nervous, having our documents considered historic six months ago, hopefully not dated. But again, a pleasure to be here. Thank you. I only wish we could be in person, but I want to just thank David, also, Jack Millon did a lot of work, others in for organizing this and of course Jonathan Kanter and Lena Khan, chair of the FTC for being the leaders in this area and moving us forward in this workshop.

Tim Wu:

So, I was thinking that people are always saying that times are changing, but there is reason to think that this time they really are, at least in antitrust circles. We are in the midst of what really does seem to be an important, even historic moment for this country's economy. And for the ongoing story of American antitrust. Bruce Ackerman, many of you know is a famous theorist, once wrote about constitutional moments, these moments in American history, where things seem to change. And if you've studied any antitrust history, you'd have to conclude that there are similar moments for antitrust. Antitrust constitutional moments or something. 1912 comes to mind, the late 1930s, when Robert Jackson became the head of the antitrust division, or the early 1980s as turning points.

Tim Wu:

Well, let me say this much, I will say that we live in a time where the president and we in the White House feel an acute popular demand that more be done to control market power, more be done to make the economy feel fair, and where the status quo doesn't have a strong normative hold as it might have in previous times. When it comes to the revitalization of antitrust, where the Justice Department and the FTC have played a natural role, historic roles, we believe there is a democratic imperative at play here. We are in fact, responding to the will of majority in a way that president Theodore Roosevelt first realized was so important when he called upon antitrust as an alternative to the excesses of capitalism and also the excesses of socialism, communism and anarchism. And there is today strong support among American citizens for doing things, even a super majority of American citizens, polls show that 67% of the country believe the federal government should regulate the power of monopolies in order to make our economy more fair and competitive. And it's one of these things on which Democrats and Republicans agree.

Tim Wu:

Now, we say that and talk about the democratic will. It may be that the public may have carefully formed opinions about the definition of labor markets or monopsony power, Though you can be surprised sometimes, but I think, and we think there is a demand that something to be done about an economy that can feel unfair, a sense that there's an imbalance of power between employees and employers and between small suppliers and large businesses. And I think this is true of all of antitrust, that there is a popular will, but I think there's a sense of imbalance that's very acute in the area of labor and competition and labor markets.

Tim Wu:

I will say that the labor side of antitrust is certainly an area where the president has strong personal views. President Biden feels very strongly that it's wrong, for example, for any worker, particularly a low wage worker, not to have the freedom to change jobs, look for a better wage. And these are the views that are reflected in the competition executive order signed on July nine, that David referred to.

Tim Wu:

Let me quote among other things that the order says that the American promise of a broad sustained prosperity depends on an open and competitive economy for workers. A competitive marketplace creates more high quality jobs and the economic freedom to switch jobs and negotiate a higher wage. Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages or better work conditions, and so on.

Tim Wu:

One of the things that the president did, and I think this workshop is very much in the spirit, the president called upon the agencies to, and here I mean Justice and the FTC, to enforce the antitrust laws, to combat the excessive concentration of industry, the abuses of market power and the harmful effects of monopoly and monopsony, especially as these issues arise in labor markets, agricultural markets, internet platform industries, et cetera.

Tim Wu:

So in some ways the workshop is, and I think not in some ways, directly fulfillment of a sense of the president has reasserted the policy of United States is to enforce the antitrust laws vigorously. And this is the spirit, I think, which today is being carried out.

Tim Wu:

So that's a preamble, and I think it's clear the executive order shows that this administration cares about enforcement of the antitrust law in all markets, including labor markets. But I want to spend the rest of my, now remaining eight minutes, talking about where a labor centered approach to antitrust might have an impact. So I first want to make a big point and then discuss four specific areas. Eric Posner, in his new book, which I hope many of you have seen, points out that for whatever reasons, industrial economists, were as recently as the early naughts, just willing to assume that there was perfect competition in labor markets as an input. So, according to these assumptions, if a job with higher wages emerged, there'd be nothing to stop a worker from taking it. And so, by this theory, employers were compelled in a sense by market forces to always be paying a competitive wage.

Tim Wu:

Now, economics has a certain reputation in certain areas for making assumptions that are not always a hundred percent realistic, but this must be among the most harder... Hardest to swallow. Any of us, I think, have experienced the fact that moving for a job is not exactly costless. There are many things that keep us in the jobs that we're at, not to mention information costs, moving costs and many other factors. Brian Callaci, who many of you may know, the labor economist, says we've got it backwards. In fact, the barriers to jobs are what are high, and certainly much greater than for example, changing what hamburger restaurant you go to. So it could be, in fact, that we've got it backwards and that the labor markets are in fact by nature, just much harder, switching costs much harder. And I think this is one of the... As it comes to market power in the relative balance of power, this is a fundamental insight of labor law. In fact, the original union movement was that divided workers are just too powerless against large companies, hence the need to unite and bargain collectively, and I think that this has come across. Good reminder, we've been talking through the unions themselves, through the strategic organizing center, and it's important to remember

Tim Wu:

This basic sense that was sort of embodied in labor law. And in fact, the idea of unions themselves, that there is an imbalance of power here, and you only get the fair outcomes through some kind of equality of arms, some kind of balance of power. That's the big insight or ... Sorry, that's the big observation, or the broader observation. And I want to talk about four specific areas where I think a focus on labor markets might matter.

Tim Wu:

The first is in the review of mergers. I think that we think for too long, merger review did not focus enough on the effects on workers. Or in fact sometimes just treated the ability to lower wages as a form of efficiency. If in a proposed deal business X was buying business Y with maybe even explicit goal of lowering wages, sometimes that merger was not understood to be any competitive. Even though if you talk to the workers whose wages were kept lower, they would feel that it plainly was, as they lost options to switch for a higher job switch jobs. As we said in the competition executive order, when the justice and FTC reconsider the merger guidelines, and even as they consider mergers now, we hope that they take seriously labor markets and the effects of mergers and competitions for job.

Tim Wu:

A second area is in the question of section two cases under the Sherman act. As we said, in the executive order, we hoped that the law will be enforced against both monopolization and monopsonization, which of course is monopolization of buying markets. And if you know, in the facts, we see an employer's excluding a competitor from labor inputs, we think that kind of conduct should be taken seriously.

Tim Wu:

The third thing, a third area I want to highlight and mention is the area of franchises, or other areas where small businesses are carefully controlled by a larger business. And where the owner of the smaller business may be very close to being an employee of the franchise or sort of the umbrella business. One area I think this has become a focus for us, is through our work in agriculture, with the department of agriculture. And here you see pretty starkly how the power and balance can function in many of the markets for raising live stock chicken, in particular. You see that you're not dealing with what you would call a perfect competitive market.

Tim Wu:

And there is an element, not exactly a consumer protection, but a worker protection, or sort of small business protection, protection against deception, protection against discriminatory practices, the kind of things Packers and Stockyards Act was originally concerned with. And it does make sense. Before someone invests their life savings into a business, maybe you should at least get some of the information if you were going to spend the same money on stocks. There's a lot more here. And I think it's worthy of attention.

Tim Wu:

Fourth and finally, I'll close on this final area for attention is so-called Gig Economy. I know the workshop is devoting some attention to this. It's very complex. I think obviously not an easy area, and obviously there's been a lot of interesting stuff going on here, that we would be remiss and feeling to observe something Heba Habib has pointed out and spoken with her about, that misclassification. It needs to be constantly sort of, as understood by labor law, it has a shadow over this area, and influences in this area, misclassification of employees. And that some of the contracts and relationships that may be set up to avoid classifying someone as an employee, should be themselves carefully examined for legality under the enter trust laws. And I think that's a delicate thing and we need to figure these out. But if an employer is setting up an arrangement that violates the Sherman act, and maybe it is in fact an effort to restraint trade, an effort that actually resembles employment.

Tim Wu:

I will leave matters there. I want to, once again, I look forward to this workshop. And I want to conjure back to the spirit that we're in. The antitrust law has retained its relevance over the years; by being dynamic, by having some awareness of where we are and what is changing from a business perspective, but also where the will of the country is. It is, as I said before, a testament to democracy that we have shifts that we do not have one view of how a law should be enforced for all time. That I think it is part of a healthy country, part of a high and healthy dialogue to reconsider whether we've made mistakes, reconsider whether we need to be headed in different directions.

Tim Wu:

IN that spirit, I want to say, thanks again. I look forward to the workshops and the panels of thought.

Jack Mellyn:

Hi everyone. And thank you to Professor Wu for those illuminating remarks we just heard. My name is Jack Mellyn. And I'm an attorney with the US Department of Justice. I am tremendously pleased and honored to be able to moderate this panel today, which features leaders from throughout government, discussing ways that various federal agencies can cooperate to better measure and protect the competitiveness of our labor markets.

Jack Mellyn:

I will give the usual disclaimer for myself and any views expressed during this discussion by myself or the panelists are our own, and do not necessarily represent the views of DOJ or any of the agencies represented here.

Jack Mellyn:

Our panelists today are extraordinarily accomplished, and for a full account of their accomplishments and credentials, I will refer you to the bios published on this event website. But by name and affiliation we have with us today, Sharon Block, associated administrator at the Office of Information and Regulatory Affairs. Ben Harris, Assistant Secretary for Economic Policy at the Department of the Treasury. Heather Boushey, a member of the Council of Economic Advisors. Raj Nayak, Assistant Secretary for Policy at the Department of Labor. And Heidi Shierholz, President of the Economic Policy Institute, former Chief Economist at DOL.

Jack Mellyn:

I want to begin this discussion by asking the members of this panel each for their view on where things stand right now. As you know, and as we just heard from Special Assistant Wu, the president recently issued a far reaching EO, stating that over the past several decades' consolidation has increased the power of corporate employers, which makes it harder to bargain for wages and better work conditions. The EO also states the federal government's inaction has contributed to these problems with workers, farmers, small businesses, and consumers paying a price.

Jack Mellyn:

In response, federal agencies are directed to collaborate in a quote "whole of government approach" to address over concentration monopolization and unfair competition in the American economy.

Jack Mellyn:

Ben, I'll begin with you and, and first congrats on your recent confirmation.

Ben Harris:

Thanks, Jack. I appreciate it. Let me just start by thanking the Department of Justice and the Federal Trade Commission for hosting this critically important event today. It's an honor to be here amongst such distinguished panelists discussing what I think is one of the most important economic issues of our time.

Ben Harris:

I'd like to briefly discuss some economic explanations for wage stagnation, especially at the lower end of the wage scale. Careful followers of the labor market would rightly point to inflation adjusted gains for many occupations with relatively low wages. Yet this phenomenon, while welcome, appears to be driven by pandemic related declines in labor force participation.

Ben Harris:

The goal, of course, is to sustain wage gains in tandem with participation. And to reach that objective, we must understand the roots of long term wage stagnation. The best way to illustrate long term wage trends is to use an example from the late and influential labor economist, Alan Krueger. During a 2018 luncheon at the Kansas City Fed, Alan told a story of a man named Jeffrey [Zuara].

Ben Harris:

In 1991, Zuara started working as a registered nurse at St. John Providence Hospital in Warren, Michigan. And about 12 or 13 years in the job, he had a realization. His pay was far lower than it would've been in a fair market.

Ben Harris:

Economists have traditionally defined three broad explanations for wage stagnation. The first, generally put, is globalization, beginning in the 1970s and accelerating into the 2000s with when China joined the WTO. American workers increasingly competed with workers in foreign labor markets, many of whom would accept lower wages for the same job. Production moved overseas. And for the jobs that remained wages began stagnate.

Ben Harris:

This explanation is validated by the work of economist Autor-Dorn-Hansen, who famously found that increased trade with China cost America 1 million manufacturing jobs. Still, none of this explains the story of Jeffrey Zuara. After all, no American hospital could lower labor costs by outsourcing its nurses to Shanghai.

Ben Harris:

The second explanation is technology, software automation. Another new innovations all drove up the demand for skilled workers who are fluent in technology and drove down the demand for those who weren't. In some cases, automation has eliminated the need for these workers entirely. Again, there is careful and legitimate evidence to support this argument, but not in the case of Jeffrey Zuara. No American hospital has replaces nurses with robots.

Ben Harris:

Which brings up the third argument, institutions that protect worker pay like the federal minimum wage and private sector unions. These have been on the decline for years. Adjusted for inflation, the federal minimum wage is around 45% lower than it was in the late 1960s. And since about that time, the percent of private sector workers belonging to unions has fallen from roughly one in four to 6%. This explanation also has merit, including the case of the Michigan nurses. They weren't unionized after all. But it doesn't capture the entire story.

Ben Harris:

For that we need a fourth argument that captures changes in the relationship between workers and firms. Indeed, what Jeffrey Zuercher realized after a decade at St. John's Providence, was that his hospital had been colluding with others in that area. He had the emails. Executives wanted to prevent their nurses from jumping from one hospital to another for better pay. So, they collaborated to set one regional and artificially low wage rate.

Ben Harris:

If you've ever taken an introductory economics course, you were probably taught that labor markets are perfectly competitive. A worker making \$20 an hour sees the same job opportunity across the street offering \$20 and 10 cents. He puts in as notice and crosses the street to the new job. That's a perfectly competitive model, and it's often a complete fiction. Labor markets don't typically work like this.

Ben Harris:

For one, workers have imperfect information and don't know what a similar job will pay. Or they're bound by a non-compete agreement, and crossing the street with a lawsuit. Or even if companies aren't breaking the law, including to set low wages, they have immense market power to set wages in the first place.

Ben Harris:

Speaking at an event hosted by DOJ and FTC, it's safe to assume we all understand the notion of monopoly. And as labor market competition has emerged as a first order consideration, the notion of monopsony has gained traction in economic and policy circles. And that's ultimately what we're here to discuss today. The imbalance between workers and employers in the labor market. As economists, Alan Manning wrote in his seminal book, "Monopsony in Motion", the relationship between employer and worker is not one of equals well.

Ben Harris:

Let's conclude with this. While this anti-competitive streak can be seen as a harmful aspect of our economy, and it is, our newfound understanding of monopsony power is also a positive development. For years, we've been contending with a series of big and nodding questions. Why are wages low? Why is income equality on the rise?

Ben Harris:

This explanation helps us reframe those questions into a much more tractable one. How do we ensure that when employees negotiate their pay, they do so on more equal footing. That was one rationale behind president Biden's July executive order on competitiveness, which included a series of initiatives

for making sure that wages are more transparent in certain sectors, to curtailing the use of non-compete clauses, to simply studying the impact of limited labor market competition.

Ben Harris:

Ultimately creating a fair economy with better paid workers will require us economic policy makers to do what economists don't usually do, instead of revising our model of a perfectly competitive labor market so that it reflects the real world. We should revise the real world so that it reflects the competition in our textbooks. Thank you.

Jack Mellyn:

Thanks Ben. That was a fantastic kickoff to our discussion. I want to ask, but don't feel bound to answer anything that's not public, but I know treasuries, one of agencies tasked with responding to the EO, including drawing up high level reports on the state of labor market competition. I wondered if you wanted to say any words on what treasury is doing to implement the EO's directives at this stage.

Ben Harris:

Yes. Treasury was tasked with three specific deliverables in the EO, all white papers. One on looking at the alcohol industry and practices around bottling. Another looking at the impact of large tech companies' entrance into the personal finance market. And a third for my office specifically looking at the economic impacts of labor market competition.

Ben Harris:

We're actively drafting all three of those white papers. All three I expect will be released sometime next year, but right now we don't quite have the conclusion spelled out publicly. All I can tell you, Jack, is that we're working hard and you can expect release in 2022.,

Jack Mellyn:

That's fantastic. Thank you, Ben.

Jack Mellyn:

Heather, building on what Ben has said, how should we be thinking about tackling labor market competition, from an economic perspective? Obviously it's the main challenge here, the microeconomic one of assessing the boundaries of various labor markets. Should we be thinking about labor market competition as a macroeconomic issue as a variable affecting economic output or driver of large scale trends like inequality? Or is it about? We'd love to have your views as an economist?

Heather Boushey:

Well, thank you so much. Ben's also an economist. There's a lot of economists on here. Let me just note this is such an honor to be on this terrific panel with such an illustrious group. And the colleagues that I'm here with today, you included are such leaders on these issues. Thank you.

Heather Boushey:

I will get straight to your question about some of the broader economic questions. And basically it sounds like it's micro, macro or both. Let me start where I think Ben really left off. And as he laid out healthy market competition is fundamental to a well-functioning economy in the United States. And

basic economic theory demonstrates that an economy without adequate competition, prices and corporate profits rise while workers' wages decrease.

Heather Boushey:

Now, we're familiar. We're all long familiar with the cost that monopolies imposed on an economy, high prices and cycled innovation. And what we are also seeing is that monopsony, that is the lack of competition in our labor market, is especially harmful to workers. I'm also going to look at the medical profession. Cause one of the best examples of this in the literature is hospital mergers.

Heather Boushey:

As hospitals have merged, not only have consumers faced more limited choices in where to get their medical care; but nurses, doctors, and other health healthcare professionals have had fewer employment options. And this of course, isn't just about healthcare markets. Evidence suggest that a staggering 60% of labor markets are highly concentrated in the United States. Clearly this is a priority for the Biden administration. And it is of course an issue for us at the Council of Economic Advisors.

Heather Boushey:

I sort of think about this in terms of the following questions. How do we define the boundaries of a labor market? How do geography industry and occupation affect the scope of workers options? And how should policy makers decide which workers and firms are participating in the same labor market? These are all of course micro questions with macroeconomic implications. Now, while there's no perfect or simple answer to these questions, the way that we define labor markets will influence whether we consider any market to be monopolistic, monopsonistic. And there are three sources of monopsony power; concentration, as well as frictions and worker preferences. And we need to understand all three in order to address these questions.

Heather Boushey:

First, labor market concentration can give employers an out sized power to set wages. Fewer employers is the basic definition of what it means to have a concentrated market. And the fewer employers that there are any given labor market, the less competition there is to hire any given worker. And the more leeway employers have to deviate from the wage workers would be paid in a competitive labor market has been outlined.

Heather Boushey:

Now while increases in labor market concentration tend to reduce earnings on average, over the last few decades wages have stagnated despite declining local labor market concentration. But this isn't the only form of an obsolete power.

Heather Boushey:

We also must look at what are called labor market friction. And by this, I mean that if searching for a new job is difficult or it's costly, if information about job options isn't readily available, or if workers have to sign something like a non-compete agreement in order to get their job, then their ability to search for, find or accept a new job may be limited. These frictions in the labor market can reduce responsiveness to wage offers from other employers, and reduce worker power.

Heather Boushey:

Finally, understanding the sources of monopsony power ... Hold on here. Sorry. Apologies. My computer has frozen and I'm trying. Apologies. Give me one second here.

Heather Boushey:

Understanding the sources of monopsony power demands that we understand the role of workers' preferences. The input that drive workers to make choices about where they work go beyond the prospect of potential earnings. For instance, some workers prefer shorter commutes, while others really enjoy working from home. Research also shows that demand for family friendly workplace policies and amenities has grown over time, particularly for workers with care responsibilities. And these preferences about work amenities limit the set of opportunities employees would consider. Now, all of these three sources interact. Sometimes monopsony power can arrive from concentration within a worker set of options, for example. Sometimes a worker has fewer options within the ecosystem that she's operating in, because there are a few firms that could employ her, limited information or employment options that don't meet her preferences.

Heather Boushey:

This also means that the worker's current employer has even greater wage setting power. It's also clear that harm to workers arises most directly from those lack of options. And we see an amplification of these effects when that concentration trickles all the way down. As much as we to think about this in the context of a single worker in her job options, as you mentioned Jack at the beginning, we also have to think about this as a macroeconomic issue, that affects our economic on larger scale.

Heather Boushey:

I would argue that monopsony is a macroeconomic issue. When there's a lack of competition in our labor market, there's also a misallocation of talent. And we've seen a lot of evidence in recent years about how that can drag down our macroeconomic indicators, like growth and productivity.

Heather Boushey:

Engaging our current workforce as effectively and productively as possible, hinges on ensuring competition in our labor markets, because it helps people put their skills to the best possible use.

Heather Boushey:

Now on the policy side, there's no one single bullet or a single policy solution to reducing labor market concentration. But there's a wide variety of policies tailored to address specific issues that can collectively make labor markets more competitive. And that's what we're discussing here today.

Heather Boushey:

Merger review as our Department of Justice and FTC colleagues know well, is a critical policy lever in mitigating the negative labor market consequences of firm concentration. Research has shown that earnings fall for workers and mergers, causing significant increases in local labor market concentration. And the Department of Justice's recent action against a merger that would've combined Penguin Random House and Simon and Schuster, two of the largest publishing companies, is an important step towards reducing concentration. And the case is focused on the merger's effects on authors, signals a shift towards considering workers rather than just consumers.

Heather Boushey:

Firms can also exert market power by limiting an employee's ability to change jobs through non-compete agreements. These agreements inhibit labor mobility and as a result, reduce wages for workers.

Heather Boushey:

Finally, investments in physical and human infrastructure can expand access to amenities that may increase competition in labor market. For example, investments in transportation infrastructure and expanded high speed broadband analog options for workers that prefer shorter commutes, or prefer working it from home. Or if a worker with care responsibilities can rely on accessible, affordable childcare or elder care, they're setting employment options could widen.

Heather Boushey:

Notably, these are the policies that we're investing into the president's Build Back Better agenda. Reducing concentration in our labor markets fundamentally means addressing power imbalances between workers and their employers. It's an important priority of this administration. And I look forward to discussing all of with you, and with all of you on this panel. And thank you.

Heather Boushey:

And with that, I'd like to pass it back over to you, Jack.

Jack Mellyn:

Thanks Heather. Those are some incredibly interesting points, which I think we'll return to later in the discussion. Especially about the difference between labor market concentration, and labor market power, which I think is a thread I've heard now from a number of speakers throughout these two days.

Jack Mellyn:

But I want to turn now to Sharon, because I think we've heard a really good high level view from both Heather and Ben, about some of the problems are. And I just wanted to ask your view on some potential solutions. Cause I know the president's EO calls out regulation both as a potential tool, but also as a potential stumbling block with respect to [inaudible] competition.

Jack Mellyn:

If you can, I would love to hear your thoughts on how we should address the relationship between industry specific regulations, which will necessarily take into account equities other than competition, by its nature, and protecting competition in labor markets. And if you could share with us some of the work that OIRA is doing in the space.

Sharon Block:

Sure. Thank you, Jack. And thanks for including me on this amazing panel. I'm sure everybody can understand why I enjoy my job, because I get to work with these amazing people. And I particularly appreciate you including OIRA. We don't get out a lot. We are very much a behind the scenes' kind of organization. But what I'd love to do sort of in answer to your question is just pull back the curtain a little bit, and share how at OIRA we're working with the whole of government. That is one of the really exciting aspects of being at OIRA, is that we literally touch every part of the federal government.

Independent agencies, not quite as much, but generally we sit at this place where we actively engage with policy makers across the executive branch.

Sharon Block:

And if we can find ways to lift up these issues and these concerns, we can really help agencies across the government implement the president's vision that Tim so eloquently shared at the outset.

Sharon Block:

Consistent with the president's directive to OMV, in the competition executive order, OIRA's developing guidance to help agencies identify the kinds of regulatory interventions that are likely to increase competition, or that are impediments to competition. We're looking at both sides, both the positive and those places where policy makers may have overlooked adverse effects on market power that should be evaluated in where we spend most of our time, which is looking at regulations, regulatory impact analysis.

Sharon Block:

And a key challenge we face is equipping agencies that don't traditionally think about competition policy, and that have limited capacity. And there are ... We deal with agencies that have few or some that have no economists on staff. Helping them to find ways to do this kind of market power analysis. And that's why we've so enjoyed our engagement with DOJ, who's really turning out to be a very valuable partner in our work, as we're working together to develop a competition 101 briefing to share with agencies.

Sharon Block:

Bolstering agencies' analytic capabilities is an important way to identify those leverage points to be able to implement the kinds of policies that Ben and Heather and I'm sure Raj and Heidi will also address.

Sharon Block:

First, agencies need more capacity just to be able to measure monopsony power. This is not something that most agencies have traditionally built up, capacity to do. We need to help them be able to measure the impact of their regulations on the elasticity of labor supply, turnover rates, mobility rates. And as maybe be able to talk about a little bit more later, we also think it's going to be important for them to do those kinds of analyses with a distributional lens.

Sharon Block:

One of our roles, OIRA's role is to act as a clearing house for inter-agency review of proposed regulations. The inter-agency process, when it comes at the tail end of the rule making process, is really important for spotting red flags, potential implementation challenges. But it's not always the best timing for introducing a big new sort of analytical demand. And we are thinking about how we can use our [inaudible] OIRA to play a more proactive role in facilitating front and inner agency coordination around issues like analysis of labor market, competition impacts. Where we think we can help agencies address labor market competition together, we can help them share data, instances of employer market power outside of their particular enforcement purview, but where they're having that visibility. And best practices for reaching underserved communities who may have that those insights.

Sharon Block:

The White House competition council, which Jim is so involved in, sort of a high level forum for that kind of policy coordination, but we think we can serve as an intermediary for dialogue at many different levels.

Sharon Block:

Our desk officers often see more than one agent. They cover more than one agency. They have an amazing tradition of working together, of sharing their insights. And they can either connect staffers at the agencies. They can sort of see, spot these patterns where maybe then there can be more information exchanged. And it can lead to informal or formal discussions on topics related to the analysis of competition impacts.

Sharon Block:

Because regulations to improve competition in a given industry can sometimes preempt antitrust suits, OIRA also can play a role in coordinating between agencies and DOJ, to make sure that again, as across the government, we're looking at what are the best levers, what are the best tools that we're doing that in a thoughtful

Sharon Block:

The last role that I want to flag that OIRA can play, which I think in the analysis of labor market competition is particularly important, is trying to help facilitate greater stakeholder engagement to address these issues. As Ben talked about with one of the most, I think impactful cases around monopsony power inclusion came from workers, raising up their concerns. This issue spotting the pattern spotting to a union that helped them facilitate the litigation. We think in recognizing that data that agencies need in this space, that stakeholders play a really important role too. And so part of our work in this space of implementing the executive orders, also encouraging agencies to gather data from stakeholders that can inform policy designs. And this is important, because again, this is the policy design side is where those regulations are most malleable.

Sharon Block:

So before they come to us and things are relatively set, we also see our stewardship of the unified regulatory agenda as another important place where stakeholder, OIRA's facilitation of stakeholder engagement can be really helpful. The regulatory agenda which hopefully will be coming out soon to the fall, a little plug. Gives us the ability to look across the entire federal government. And again, we can help and stakeholders can help spot those patterns where there are impacts on competition that may be problematic in the labor markets. And so we are planning to work with agencies to develop new tools for stakeholder engagement. We're particularly interested in making sure that we have channels for groups that may not be as comfortable with government processes. So the less well connected and maybe the less well resourced, encouraging agencies to do more direct outreach in the field. Maybe even looking at like complaint violation data to help us spot problems and then help them solve them.

Sharon Block:

And we see this part of the work as very much connected to the president's equity executive order, which again is directing agencies to listen more to the communities who think the kinds of issues that Heather was talking about and what is important to individual workers, better stakeholder engagement in the regulatory process can help surface those objectives and see how our regulations are intersecting

with what workers really want from the regulations that we've moved forward. So we are very excited to be part of the president's competition agenda and in helping these amazing policy makers actually effectuate these policies in the best way we can.

Jack Mellyn:

Thank you, Sharon. That is fantastic and really, really interesting. I'm going to turn to Raj now. Raj, department of labor has been a leader already. I think it's fair to say over the past several administrations in terms of collaborating with other federal agencies, including DOJ on issues, such as worker safety or misclassification. If my ears don't deceive me, I think I heard Sharon put another, at least half dozen items on your agenda for the next year, which is fantastic. But I want to ask in a very practical sense, because I think we've heard again and again in this workshop about the sort of complementarity or potential complementarity between antitrust and labor law enforcement in terms of protecting workers. I guess the question to you would be in your view, what lessons should DOJ and DOL learn from coordination efforts in the recent past on labor market matters and what can we do to better coordinate going forward?

Raj Nayak:

Thank you, Jack. And thanks again for having me on a panel with some of my favorite people it's really exciting to be here. So this is a great question, as you suggested, DOL does have a long history of coordinating with other federal agencies, when agencies have complimentary enforcement authorities. So there isn't anything new to the general idea of coordination. And there are a lot of lessons we should learn. For folks who don't know as well, taking a step back DOL has a lot of agencies they're centrally involved in the enforcement of core employment rights. So most relevant, the wage and hour division enforces the fairly standards act, which is the federal minimum wage law, the family medical leave act and a few other related workplace protections, OSHA enforces of course, basic safety and health protections for most workers under the occupational safety and health act.

Raj Nayak:

And MSHA does the same for mine workers. Our employee benefit security administration protects retirement savers under ORISSA. We have OCCP that enforce equal employment opportunity laws for government contractors and subcontractors. And then we also have the office of the solicitor, which represents all these agencies in litigation, both before ALJs and unlike some agencies in the federal trial courts and the US courts of appeals and under many of our statutes. So we have a really robust enforcement arm there. Each of these agencies has its own history of coordination with other government enforcement agencies. So, MSHA and the solicitor's office work really closely with DOJ to aid in the prosecution of folks connected with MASI energy after the 2010 Upper Big Branch mine disaster. OSHA the solicitor also coordinated with DOJ's environmental and natural resource divisions, environmental crime section regularly. And as Jack mentioned, wage now in the solicitor's office, coordinated both with the IRS and numerous state labor departments and pursuing misclassification cases.

Raj Nayak:

So with all of those kinds of efforts in the background, I feel like the less we've learned are maybe [inaudible] pointed out 3. One is just on the authority front, the department's role in any kind of coordinated enforcement action is really to ensure that employers are complying with laws that DOL enforces. There are definitely laws that DOL enforces though that are relevant to antitrust

considerations. As you've mentioned, Professor Hefe, you've mentioned a couple times has noted the wage in hour violations, violations of health and safety standards and violations of anti discrimination law can all inform the significance of concentration levels when evaluating mergers labor market effects. The second idea is really in thinking about agreements. It is really helpful to establish some sort of formal agreement where agencies can set out their respective legal authorities, commitments and limitations.

Raj Nayak:

This could be a formal memorandum of understanding that's negotiated by the solicitor, wage hour, ETA, OSHA, whoever the relevant agency is. We work on many of these, my office is a sucker for policy, work with these agencies on many of these in the Obama administration, both with the IRS and state AG's and labor departments on misclassification, for example. But it could also just be a joint prosecution agreement that's then for a particular investigation just to maintain the privileges there. But the third lesson I think we learned, and I think we learn everyday is really about relationships. Really the most important part of these efforts is building those relationships between agencies and that can be at the kind of non-career leadership level, that can be among career enforcement folks who know and understand what each other do and know who to call when they come up with a case, which might be a good candidate.

Raj Nayak:

And that's the work that to me, at least those are relationships that kind of persist through administrations. They develop kind of the groove of what's a good case to coordinate on and where should we be working together? And so from my perspective, building those relationships among folks who are doing the enforcement is really key. As we move into thinking about collaboration in the space, it is worth mentioning one notable area that we are going to collaborate on here for sure, which is the DOL has some new authority in this space, OSHA enforces the new criminal antitrust anti retaliation act, which I'm sure many of better than I, was an act in 2020 to protect employees, contractors, subcontractors, through agents of employers who report criminal violations of antitrust laws or state proceedings around those laws.

Raj Nayak:

This sort of work isn't new for OSHA, which is the agency that enforces now 25 [inaudible] protection laws with a variety of requirements and remedies. OSHA's learned over time, what works well. And if you talk to OSHA, they'll also say it's building those relationships. It's working with the agency that enforces the underlying law. So OSHA now is working closely with DOJ's antitrust division to cross train make sure that we understand each other's respective authorities to develop materials and resources and just to share information about how we can work together on this law. So I think there's some exciting work ahead.

Jack Mellyn:

That's fantastic. Thank you, Raj. Heidi, I'm going to turn to you and I want to say so in addition to having served as chief economist for DL in the past, you also have the distinction on this panel of working on the outside of government currently, and having testified in front of Congress multiple times on behalf of workers' interests. So we've heard an enormous number of exciting projects and suggestions from the four panelists who preceded you. But I want to get your take specifically as a worker advocate and ask what are the key obstacles workers face in achieving a fair return for their work right now in the market.

And what can government be doing in particular? Is there anything government can be doing that you haven't heard from the four panelists who just proceeded you?

Heidi Shierholz:

Wait am I off mute? I am off mute. Okay. Thank you, Jack. And thank you so much for including me. This is such a crucial discussion, and it's a real honor to be here. And I have to say that as an economist, I love so much hearing my lawyer friends. And I'm looking at you Sharon Block saying elasticity of labor supply. It just makes me so happy. So in thinking about this EO in which federal agencies are directed to collaborate, to address weak competition in the US economy, one key thing that I think we need to do to effectively address it, is to make sure that we are not defining weak competition too narrowly, and as a result, actually missing some incredibly important ways to promote competition. So I think in particular, we should make sure we do not equate low competition exclusively with over concentration because low competition can take many other forms in that.

Heidi Shierholz:

And I know Heather talked about this and I just want to say a few more words, like taking a couple steps back. The mark of a competitive labor market is when any worker who is not paid or treated fairly can pretty quickly find another job where they are paid fairly because there's actual competition for workers and another firm will make them a fair offer and scoop them up. The mark of a labor market with low competition is the opposite, workers don't have good options. So they have very little power. If they're not being paid fairly, it's like, that's just tough because their outside options are nonexistent or they're no better than the job that they're in. You can immediately see how high concentration is the classic case of a labor market with low competition. If there's a limited number of employers, then workers will clearly be unlikely to be able to easily find a different decent job if they're being treated unfairly.

Heidi Shierholz:

So that means that the efforts to keep labor markets from becoming highly concentrated are extremely important. And that has appropriately in my view, gotten a lot of attention, that's really good. Another thing that has also gotten a lot of focus is non-compete agreements, which reduce competition by explicitly limiting a worker's ability to take another job. So banning non-competes is an important step towards promoting competition. Another thing that we could consider is temporary guest worker visas, where the visa holder is tied to one employer, it's another example of a structure that just cuts off labor market competition at the knees that should be permanently abandoned. But then we can go further, like consider the situation where you live in a neighborhood that doesn't have good public transportation options. There may be many firms in the broader area, but you are very limited in the firms you can actually get to.

Heidi Shierholz:

So even though there's not a huge amount of concentration by standard measures, there is low competition for your labor and that hurts your wages. So public transportation policy can be crucial for promoting labor market competition. Say there are many firms in your area, but you have health and safety concerns about COVID and can only work at a firm that has a vaccine mandate. The current lack of a national vaccine mandate reduces competition for you as a worker, because there are a limited number of firms who have their own vaccine mandate. So there are a limited number of firms where you can work. So a national vaccine mandate means you don't have to suffer the negative consequences of that low competition. Or say there are many firms in your area, but not that many that provide paid

sick days, which is something you need, because you have young children who are sort of operating as petri dishes in your life.

Heidi Shierholz:

That means there is less competition for your labor because there are fewer firms you can work at. And so policies like mandated paid sick leave mean you don't have to suffer the negative effects of that low competition. Another key one is say, you are person of color or a woman of any race due to discrimination in the labor market. There is less competition for your labor on average, than there is for a white person or a man. And that means things like EEOC initiatives that reduce discrimination, also advanced labor market competition, and like, et cetera, et cetera, et cetera, we could go on and on. There are just endless examples. And I think that we should all sort of recognize through this, that low competition really is a sort of ever present backdrop in a huge part of our labor market, even in places where there's not a huge amount of firm concentration as typically measured.

Heidi Shierholz:

So I would just say that it's really important to take an expansive view of low competition when we're developing a framework for thinking about how to promote competition. And then I just want to say one more broad thing, there is very good evidence that unions counteract the negative effects of labor market concentration on wages. Unions boost wages and working conditions and as a result, they provide some protection to workers from uncompetitive labor markets, even though the workers outside options may not be that strong. And so that means policies that support unions and collective bargaining are a crucial way for thinking about how we counteract the effects of low competition in the labor market. And then similarly raising the minimum wage helps counteract the effects of weak competition by setting a floor below which employers can't set wages, no matter how little they have to compete for workers, thinking about the minimum wage in this context makes me think of all the time that policy makers say they need to hold back from making labor standards like the minimum wage too strong, because it will hurt the low wage rural areas.

Heidi Shierholz:

What research shows is that wages are low in rural areas in part because of a lack of competition, rural workers are less likely to have good outside options. So in that vein, a national \$15 minimum wage is an important way to help counteract the negative effects of weak labor market competition for low wage workers, at least in normal times. So I'll just end there by saying that I think we should make sure that we are not defining weak competition too narrowly. And as a result, actually missing some very important ways to promote competition or to counteract the negative effects of weak competition. And with that, I'll pass it back to you, Jack.

Jack Mellyn:

Thank you, Heidi. So that's a fantastic pivot to the next topic I was going to raise anyway, which is something that now you have raised and Heather has raised and professor Scott Morton raised yesterday. And what I'm hearing from all of you, if I understand correctly is that labor markets are not necessarily like product and service markets. And what I mean by that is that we and the antitrust agencies are very used to, when we think about a product or a service counting heads, looking at the number of firms involved, the concentration ratios and saying are there enough firms here to provide or not provide a competitive outcome?

Jack Mellyn:

But if I'm understanding you correctly, it sounds like Heather you're saying the screens for labor markets should be somewhat different. And that when we think about the low hanging fruit, we should really be thinking about first and foremost, what I might call friction, creating practices or friction creating employee practices or features of the market, not at the expense of thinking about concentration, but as a higher priority target than we might otherwise in a product market where shoppers can sort of go to the shelf and pick from a range of firms, is that right and if so, what are the practical implications?

Heather Boushey:

Well, people are not the same as goods. And so I think that's one of the underlying premises here that makes it a little bit challenging. So let me start by noting that I think... So this is a very exciting area of research, it's so exciting to see it being moved into the policy space, but certainly academics have not created the same kinds of bright lines when it comes to the monopsony side, the labor power side as we have on the product market side. And I think there's pros and cons to that. I think it probably will never be appropriate to have the same kind of bright lines because as you've noted, as Heidi just finish saying, there's so many different axes upon which we need to be looking at what it means to have a competitive labor market that's just different than just looking at wages, even as the wages are a very important piece of the puzzle.

Heather Boushey:

The second thing I wanted to note on this question is that, having said that we do know that research does suggest that mergers that lead to large increases in local labor market concentration do have adverse effects on workers. So I don't want us to lose sight of that, that there is this what I would call for the purpose of this discussion, kind of the bread and butter competition issue that doesn't go away. I think that is something that should be a part of our toolbox. And I think that the publishing DOJ case is a good example of that. But I think that we do need to find these other mechanisms to look at these other aspects of the question as you just noted. And I mean, I think both Heidi and I have noted that, so we can get onto other questions, but I do think that finding ways for those folks who are looking at mergers to evaluate these broader labor market implications is just the most important next step. And I think that part of what you're hinting at is that our policies around competition are when we see the number of firms getting smaller, right? So it's about mergers, but I think one of the issues that we're bringing up here is that there may be longstanding issues in these labor markets that we also need to consider as a part of our overall policy toolkit. So I was excited that idea brought up as well. The issues, you look at a lot of the things that we're doing and build back better, and these are going to help create a more competitive labor market. So kind of connecting the dots there either intellectually, or just understanding that these are also labor market competition policies alongside the tools that the enforcers have, I think is an important piece of the puzzle.

Jack Mellyn:

Ben, if I heard you correctly earlier, you mentioned, I think one aspect of the general phenomenon that Heather and Heidi are talking about, which is in relation to the information asymmetries. One of the friction creating features of a market can be either obviously inappropriate information sharing among employers, which we talked about earlier today, but also a lack of wage transparency for workers. And I know that's a subject you've written a bit about. Do you want to say a little bit about that?

Ben Harris:

Sure. Just a few quick thoughts on wage transparency. And let me start by saying, I'm an economist, like every other economist I'm influenced by data, but I'm also a person. And so, one experience that helped inform my view around wage transparency was in 2006, I was a staffer on Capitol hill, the economist for the house budget committee. And there was a company called Legastorm. And in 2006, Legastorm went and found all the staffer's data and released it all on one day. So you wake up and you go from no one knowing what anyone made, to everyone knowing what everyone made. And I looked at this data and I saw by my own assessment, I was underpaid. And so I marched in to my chief of staff's office and I got a 50% raise because the discrepancy was so big between... Now 50% is probably unique, but it just sort of hammered home the power of information in the case wages.

Ben Harris:

And I think that when we talk about competitive labor markets information is an underappreciated part of competitive labor markets. I think that we talked about wage clues, tasks at wage exclusion, information plays a massive role, not just asymmetry with the lack of information that workers have to know they're being included against in the first place, but even more fundamentally. I mean, Heidi talked about the classic case of the worker who knows she's underpaid. And she goes to a new employer, but that requires knowing you're under underpaid in the first place, right? And every economics textbook, they lay out the case of a competitive labor market. And there's this assumption with a lot of hand waving that workers know the distribution of wages, workers often don't know the distribution of wages. And so I see it as a fairly fundamental aspect of competitive labor markets and even of competitive markets more generally fortunately we have policy remedies to help make wages more transparent. But I see it as one of those critical issues when we're talking about labor market competition.

Jack Mellyn:

So Raj I'm going to turn to you in the solutions department here. We've heard something about what antitrust agencies can do, but we've also heard that there are a lot of features of labor markets that make them less competitive, that are outside of antitrust law or that lie in other bodies of law. So as DOLs representative here, I'll just ask you do you feel like your agency has the tools it needs to tackle your piece of the pie or is there more that Congress can or should do?

Raj Nayak:

I guess I should unmute myself to start. No, I think Jack that's a really good question. I mean, I feel like again, as I was saying earlier, in the short term, the touchstone we have is kind of the laws we have on the books. And while we don't have laws that are framed exactly as pro-competitive, as I was mentioning earlier with the solicitor's office, we do have one really important tool. We have these kind of important work and protections that really need to be, I mean as Heidi was putting it to standardized working conditions across employers, right? To help workers better compare job opportunities and really to kind of decrease the kind of search friction that arises when employers use their monopsony power. Employment practices that erode those core protections, also bolster anti-competitive behavior.

Raj Nayak:

And that's where, from my perspective, it's the labor law enforcement that's so important, but one of the giant obstacles is Supreme court case law in recent years is really driven more employers to adopt mandatory arbitration for provisions class action waivers. And as a practical matter, that means it's

harder for workers to seek remedies for their employer's employment law violations. If you're a worker and you're not getting paid the minimum wage or a million obstacles already, you may not know what the minimum wage is. This is a little bit of what Ben was saying or that you're being underpaid. And even if you do, it seems like you may not be able to want to take the risk of getting fired or getting demoted. Immigrant workers might risk even more than that. And so once you're willing to take action, who do you tell?

Raj Nayak:

You have to find a lawyer who would take the case. We want workers to know the department of labor is a resource here, but it's a resource for another reason. That as more employers are asking workers to sign mandatory arbitration clauses, many of which bar class arbitrations. This means a lot of workers can't actually find representation, but again, because of the power of the federal government there is this concept back to the 2001 EOC versus waffle house case saying that federal agencies are not bound by arbitration agreements. And just this year, we had a federal judge in the east [inaudible] of New York. Once again, rule the private arbitration agreements, don't find the secretary of labor from bringing enforcement actions on behalf of the solicitor from bringing actions on behalf of the secretary.

Raj Nayak:

So this is a place where the department of labor under our existing enforcement authorities can step in and take on employers who might be trying to evade enforcement with arbitration agreements, where agencies investigating this solicitor, ultimately filing cases on behalf of the secretary, not on behalf of named workers. And in fact, this solicitor is prioritizing these cases, particularly forced arbitration cases. When thinking about the agency's enforcement resources, DOL is always trying to determine where we can invest our limited enforcement resources have largest impact and pursuing industries where workers in large numbers are subject to force arbitration, as well as those individual cases can have a major impact on protecting vulnerable workers.

Jack Mellyn:

That's great, Raj. So it brings up a question then and pardon the question, but I'm here for DOJ and my colleagues at the FTC. I'll ask you and I'll also ask Sharon, because I know she has the bird's eye view. What could we, as the antitrust agencies be doing to be more helpful to our peer agencies, as they try to sort of get up the curb and tackle these problems, what's the lowest hanging fruit for us?

Raj Nayak:

I mean, one thing that you're already doing, which we appreciate is really that kind of training and collaboration. Right? I think that I'll be honest. I get lost in section one and section two, and there might be some people that probably who really need to understand the difference between section one and section two. But I think that minimum baseline, there's some ways where if we can tackle and say like here's some rules of thumb for things that we could be looking at again DOL not trying to enforce your laws in any way, but we can be good partners in helping to assess cases that might be good for referrals and vice versa.

Raj Nayak:

I think this is something even within the department, OSHA and Wage hour do a really good job of connecting with each other and saying when you're a Wage hour investigator, if you see someone over six feet without fall protection, you don't go off and like try to do investigation yourself, but that's time

to call OSHA and vice versa. So I think that establishing those relationships, having some formal liaisons and having that basic level of training so that we can identify places where it's not just a wage and hour violation or an OSHA problem, but there might be something that might be of interest to you, I think would be really important.

Jack Mellyn:

[crosstalk]

Sharon Block:

So, I'd see our role in OIRA are really, we've got sort of two tracks of work that we do coming out of the executive order. One is helping the agencies who are named in the executive order, there's 72 different actions, a number of which are regulatory actions that have as their sort of explicit purpose to address competition issues. But when you think about the vast array of regulations that come through OIRA, the other track of worker channel of work is helping agencies identify the competition impacts in almost anything that they do so that when they are addressing other statutory purposes, sort of like some of the things that Heidi was phrasing, they're making choices that are either maximizing competition, or the sort of two sides sort of encouraging competition or removing barriers to competition. It comes back to just that lack of expertise in most agencies. Because now you're talking about agencies who have just no connection, maybe in their expertise to competition, but our competition agencies like DOJ, like FTC, lending their analytical capabilities to help us educate, train, or even just take that extra look when we put regulations through the inter-agency process to bring that competition lens, even if it isn't obvious on the face of it, that this is a competition regulation, I think is really important.

Jack Mellyn:

Thank you Sharon. Cognizant that our time here is limited. I wanted to give the last question to Heidi, which I guess is this, this has been a tremendously heartening panel for me at least, just to see the array of talent and resources that are being directed with this problem. I think it's extraordinarily heartening and it gives me sort of great hope, but I also know the limiting factor is always prioritization, time, resources, attention. So I wanted to ask Heidi, if you have any views coming from the perspective of having represented workers for many years, what are the highest priority, highest leverage activities that we can be doing or should be thinking about leading this workshop, especially keeping in mind, addressing the needs of group, including workers of color who may be disproportionately affected by bad employer practices?

Heidi Shierholz:

This is a really good question, and I won't try to tackle it in its totality. But one thing that I think is important on this broad topic of prioritization and Sharon brought this up in her opening comments. It gets at that old thing that goes something like, you only address what you can measure, like product prices are pretty easy to measure, but we know there are lots of ways big firms leverage their market power that isn't necessarily to charge their customers higher prices like Amazon and Walmart, but to squeeze their own workers, to squeeze their contract workers, to squeeze workers and supplier firms.

Heidi Shierholz:

And I think one thing that feels really important in setting priorities is to get a good measure of the degree, to which decisions of lead firms ripple out and ripple back to harm workers who aren't their direct employees, which means we need to figure out how to better measure Fishing in the labor

market and its impact. So this could be a moment to call for agencies to start collecting better data, measuring labor market Fishing for example. But basically the point I want to make is that when we're thinking about how we're going to be setting these per priorities to really think about

Heidi Shierholz:

... the data gaps and how that fill them to be just a super important part of this process.

Jack Mellyn:

Any other thoughts on that from anyone else before we close up? Wonderful. All right. Well, that brings us to the end of our time today, but I want to thank all of our panelists for an outstanding discussion and for taking the time to be here with us today. We really appreciate it. Well then, thanks to all. (silence)

Andrew Schupanitz:

So, welcome everyone to this digital Fireside Chat: Worker Bargaining and the Antitrust Laws- 19th Century through the Present. My name's Andrew Schupanitz. I'm a trial attorney in the Antitrust Division, San Francisco Office. It is my great privilege to be joined by two scholars who have written extensively on the intersection between antitrust law, in labor law and labor issues. Particularly, on the history of that intersection and the contemporary principles and ambiguities and tensions that come out of it. Herbert Hovenkamp is the James G. Dinan Professor at the University of Pennsylvania Law School and the Wharton School. Sanjukta Paul is Assistant Professor of Law at Wayne State University.

Andrew Schupanitz:

I will also give the requisite disclaimer here that the views express during this panel by myself and by our panelists, our own views and do not necessarily represent the views of our employers. So, to start, given the enormous temporal breadth of this panel, we're talking about roughly 150 years of antitrust in labor history. In an effort to make our chat, if not comprehensive, at least comprehensible, I've asked both of our panelists to give some opening remarks that I think will help tee up our discussion and also highlight some important events and themes that we can find in that long history. So with that, Herb, I will turn it over to you.

Herbert Hovenkamp:

Hey. Thank you, Andy and Sanjukta. I'm very pleased to be here today. I'm going to open up by talking a little bit about exactly what the position with respect to labor was. Both at the time, the Sherman Act just passed and of the framers of the Sherman Act. Now, we've got a very detailed history of the debates on the Sherman Act. In congress at large, we don't have very much of anything with respect to the proceedings of the Judiciary Committee, where the Sherman Act was actually drafted. The legislative history that's been ablely collected by Earl Kintner and published, reveals that at least a half dozen and perhaps a few more people expressed concern that the antitrust laws provide some coverage for labor unions for some labor protection. The scope, that's a little different issue.

Herbert Hovenkamp:

There was however, also a very strong alternative position, which is the one that was represented mainly by Senator George Edmunds who happened to chair of the Judiciary Committee, which was that combinations of capital and combinations of labor should be treated symmetrically. Basically, what happened was John Sherman himself favored a labor immunity and actually drafted the text of a labor immunity. But when the Judiciary Committee took over the thing that emerged from the Judiciary

Committee, and we think this is mainly due to Senator Edmunds himself. Edmunds, by the way, was a Republican from Vermont. We got pretty much the Sherman Act that we currently have it without any mention of any kind of labor immunity at all. I think it's fair to say that under the standards we use for legislative for statutory interpretation today, whether it be either a narrowly focused Scalia like approach that looks exclusively at the text, or if it's an approach that looks more broadly at the legislative history, there really never was a labor immunity that was part of the Sherman Act.

Herbert Hovenkamp:

Now, several progressives tried to make it so. Most importantly Alpheus Mason who's BRANDEIS first biographer tried to go through the Sherman Acts legislative history and come up with an argument. It's not very convincing, but that's where it set. Then what happens after the Sherman Act was passed? Well, we know what happens as a matter of judicial history. The Sherman Act became a massive strike breaking tools. It was used many times during its early years to break up strikes. I think that was so because of two reasons. Number one, there was a viable debate at the time the Sherman Act was passed over what you might call the torque theory of labor combinations. Chief Justice Lemuel Shaw, the Supreme Judicial Court of Massachusetts had held in Commonwealth versus Hunt back in the 1840s that labor combinations were legal as long as they did not involve concerted refusals to deal directed at third parties. That is to say if a group of workers got together and withheld their labor and did know more than that, they would be immune.

Herbert Hovenkamp:

But as soon as they directed force, violence, coercion, or some kind of exclusion at third parties, then they were in violation of the common-law rule. Well, the Sherman Act pretty much unquestionably took rejected. Judge Lemuel Shaw's approach and held at a mere combination to fix prices was illegal, and of course that's what the Supreme Court held in both the Trans-Missouri and Joint Traffic cartel cases. The other thing that made the Sherman Act so deadly against labor in its early years was the inclusion of what is today the two equity provisions. The one that applies to government requests for an injunction that's 15 U.S.C. 25 and private requests for an injunction 15 U.S.C. 26. Both of them permitted injunctions, the public one in particular, very broadly against labor combinations.

Herbert Hovenkamp:

And so, that turned out to be a very deadly combination because it enabled the courts to issue injunctions against strikes that offered really no more than collusion. There was a lot of progressives grossing about that. I think you can see it strongly if you look at the presidings of the Chicago Conference on Trust in 1899. That was a very multidisciplinary collection of participants. It's a very important book that gives us a snapshot of what people were thinking about antitrust from a wide variety of disciplines, just at the turn of the century. Couple of things that it emphasizes: one is that, of all of the tools available to deal with the Trust, the Sherman Act was widely perceived as not the most important one.

Herbert Hovenkamp:

In fact, more attention was paid in the Chicago Conference to modifications in corporate law and particularly the possibility of a national incorporation provision. There was also a lot of talk relating the tariff to the rise of the Trust. There were several representatives of labor union, Samuel Gompers was there, several representatives of the Knights of Labor were there. They uniformly lamented the fact that the Sherman Act was not very effective against labor. Basically, in control of mainly progressive

intellectuals, principally economists during the next years leading up to the Clayton Act, from that point on, we developed all of the major tools that we use for antitrust enforcement today. Things like partial equilibrium analysis, which gave us the early use of census data to measure industrial concentration already at the turn of the 20th century, the rise of the relevant market, which is an idea that comes straight out of partial equilibrium analysis. The use of barriers to entry, which were invented in the legal system long before they became prominent in economics.

Herbert Hovenkamp:

What is characteristic of that period however, is that in fact, the vast majority of the attention was given to product markets or sell-side service markets and not to labor markets as such. We developed antitrust policy almost exclusively with respect to output markets, whether they be products or services. The other thing that I think is not worthy during this time is that when labor did appear, it almost always appeared as the perpetrator rather than as the victim of antitrust violations. That is to say, the context of the debate over an immunity was whether antitrust could be brought to bear against labor unions or other forms of labor organizing. The whole idea that antitrust thought to be used in order to affirmatively protect labor against abuses by producers of products was simply not very prominent.

Herbert Hovenkamp:

Then of course, after the new deal we get a reaction, a lot of right word movement beginning already in the 1940s and through the 50s and 60s. And then finally more recently, a lot of studying that looks at the current situation and decides: number one, labor participation rates have declined precipitously. Returns to labor have not kept up with the returns to capital, labor is a whole lot less powerful. And the result has been a fairly dramatic turn just really in the last 10 or 15 years or so to seeing labor more as the victim of antitrust violations, rather than as the perpetrator. I think I'll stop there and we can move on. Thank you.

Andrew Schupanitz:

Great. Thank you for that. Sanjukta, I'll turn it to you next.

Sanjukta Paul:

Thank you very much, Andy and Herb, for the introduction and for those opening remarks. If everyone can hear me okay, I'll go ahead. So, I actually just want to situate this discussion a little bit in this overall workshop. This workshop over these two days deals with how the subject matter of antitrust law and potentially also the consumer protection aspects of the FTC's mission intersect with a number of issues: workers as a constituency for antitrust law, with labor institutions and their broader social and economic goals, labor law, and its goals, and other forms of social and economic coordination among workers outside of traditional labor unions. Finally, it also intersects with various other forms of economic coordination that affect workers either directly or indirectly, whether those are particular contractual terms, imposed by dominant firms upon workers themselves, or upon their direct employers or buyers.

Sanjukta Paul:

And so, I want to just situate, I think what I think it's we're talking about. I think that looking at some of the foundational history of this labor antitrust intersection may help us to reframe some of the issues that we're facing today. So maybe we can get to that in the discussion. So I'm going to talk, I think, in a little bit of detail over, I think part of what Herb covered in his remarks, maybe not the full range of what he talked about. So, I want to start with actually what I call the labor, anti-monopoly constellation of the

mid to late 19th century. This has been extensively written about by historians, labor historians, and other economic, and legal historians. This really centered around the Knights of Labor, which was the organization that was the precursor to the American Federation of Labor, both in the sense that it was the foremost national labor organization of its time until the AFLs planted it and in terms of political significance.

Sanjukta Paul:

Interestingly, of course, while all institutions of this time had serious limitations and disrespect the Knights of Labor had chapters and arms that were engaged both in serious cross racial organizing and in organizing across a variety of types of work and sectors. The AFL on the other hand headed famously by Sam Gompers for many decades is well known for its much narrower craft vision of labor organizing, which by default excluded not only most racial minorities, but disproportionately also recent immigrants from Europe to the extent of those immigrants disproportionately entered less specialized work as well. There's a major difference in philosophy that may also have defined the different, or may also intersect with the different attitudes of these two phases of the labor movement toward anti-monopoly and antitrust. So the Knights also famously in their heyday as opposed to the late 1890s, which when they were not in their heyday at all. The Knights of Labor were still around, but they were vestigial at that point in their heyday.

Sanjukta Paul:

In the 1880s, the Knights famously engaged in alliances with various farmers organizations who were at the center of the anti-monopoly coalition. This farmer-labor coalition was instrumental in the passage of federal antitrust legislation. Historians generally agree and was seen as such by legislators. You look through legislative record which repeated remarks by legislators speaking of these farmers and workers sending their voices up to the congress to pass this legislation. So workers were part of the constituency in the eyes of legislators. This farmer-labor coalition also viewed what it saw as emerging concentrated economic power as a threat to workers and other small producers because it's supplanted traditional forms of economic coordination as local markets broke down and were supplanted by coordination structures that were at once geographically broader, and for the most part, more concentrated and often more extractive. I'm making generalizations here, but this is how this coalition I think viewed the situation. As Senator Sherman put it at one point, the legislation ultimately aimed at the problem of leaving commerce to a few men sitting at their council board, who's referring there to Standard Oil.

Sanjukta Paul:

So really these concentrations of economic power or you might say economic coordination rates. Conversely, as the founder of The Grange, one of the first farmer's organizations noted. This farmer-labor coalition used both cooperation and down with monopoly as its foundational watch words. So what does this tell us? This immediately tells us that there was an influential strand of anti-monopoly thought in the 19th century a key one for the passage of antitrust legislation in which workers saw anti-monopoly as a tool to be used on behalf of workers. Indeed, the farmer-labor coalition was arguably seen as the primary distinctive constituency for legislation. It can be easy to overlook this because as the American Federation of Labor replaced the Knights as the foremost national labor organization, right around and after the Sherman Act was passed, and just as the judiciary was starting to use the new legislation against workers, as well as Herb mentioned, Sam Gompers, the leader of this organization indeed cultivated a very skeptical stance toward antitrust law and actually eventually joined with big business at the Chicago Conference on Trust.

Sanjukta Paul:

Notably, there was a lot of grassroots backlash to gone participation in the Chicago Conference on Trust in the way that he did and in coalition with big business and notably among member unions, and particularly among the Western miners who were dealing even then with increasingly concentrated mine ownership in states like Colorado, often by Eastern Financiers and witnessing what their influence among local officials did in terms of brutally breaking local strikes. The famous labor historian Philip Bonner relates that the AFL speeches that Gompers made or engineered at the Chicago Trust Conference were met with widespread indignation, given that AFL affiliates were engaged in a life and death struggle with the Trust in the same mass production industries. And that quote members were furious, denouncing Gompers and for whitewashing the combines that were destroying their unions. So I could go on there, but there's some really brutal stories about what was going on in the Western mines at that point.

Sanjukta Paul:

This is historically interesting in itself, but it's also important because the earlier Knights of Labor phase of the labor movement also forms the primary political background as far as labor is concerned to the actual legislative deliberations. So if I have a moment, I want to talk about those legislative deliberations and the issue of exemptions. In *Loewe v. Lawlor*, the infamous in the labor movement, Danbury Hatters' Case where the Supreme Court gratified the use of the Sherman Act to break strikes and boycotts. The Supreme Court effectively got the legislative history wrong. It said quote the act made no distinction between classes. It provided that every contract combination or conspiracy and restraint of trade was illegal. The records of congress showed that several efforts were made to exempt by legislation, organizations of farmers, and laborers from the operation of the Act and that all these efforts failed so that the Act remained as we have it before us.

Sanjukta Paul:

Now, certainly there's question about statutory interpretation that we can debate, but in terms of the legislative history, this is a very misleading statement I would say. A farmer-labor exemption amendment was indeed adopted. One time that an amendment was actually considered in the Senate, it was adopted to an earlier version of the bill that becomes very important. No such exemption was ever considered and rejected. That's an important fact that the Supreme Court just leaves out this history that then becomes conventional and shapes really even academic histories of this I think subsequently. The discussion on the earlier amendment that was adopted shows strong and nearly unanimous agreement that not only labor coordination, but even coordination among small producers was not within the ambit of the directive that the legislators were looking to adopt, at least as far as we can tell what they wanted to do. Only one senator, Senator Edmunds raised any doubt about this amendment, and he was overruled. The discussion on this was straightforward and it was strongly worded. There was no hedging. There was no balancing with even effects on consumers. It was really quite as strong as you get in terms of a policy statement. What then happened is that this original version of the bill that they had adopted the amendment to, which had led language about raising cost to consumers in the bill, it was completely rewritten. Why was it rewritten? It was rewritten in response to a speech given by one, Senator Platt. That Platt speech went even further than the earlier senator statements in favor of a labor and farmer exemption. And it said that that exemption basically didn't go far enough, that the bill must be sure to avoid penalizing any traditional small producer coordination, that this is a countervailing power to the concentrated economic power basically.

Sanjukta Paul:

It's pretty widely agreed when you look at the sources that Platt intervention is what led to the rewriting of Sherman's bill. In fact, Sherman's biography, one of them says that he remained bitter at senator Platt for years afterward because that's what caused the bill to get transferred to the Judiciary Committee from Sherman's Committee. So this is an important causal link here. It's important to look at the content of Platt speech. Platt not only advocated going further than the earlier statements about small producer coordination, but he also advocated notions of just price and fair dealing that were very much part of I would call this moral economy tradition that the farmer-labor coalition was drying upon. So as have argued at greater length in a recent paper, the evidence from the legislative record including subsequent developments as a Senate Conference with the House shows that legislators understood the rewriting of the bill to obviate any need for an express exemption.

Sanjukta Paul:

So again, it's after Platt speech that the bill completely gets rewritten. The old bill that the exemption was appended to goes away. There's now we get the new bill, the one that's familiar to us that uses the common-law restraint of trade language. As I argue at greater length in the paper, senators thought that taking out that earlier language about raising the cost to consumers, obviated any need for an exemption. Now, part of the background that may make this conclusion more legible to modern readers is that the common-law attitude to under the restraint of trade line of law to horizontal coordination beyond farm boundaries or cartel conduct, if it was among ordinary small producers was very permissive. I also argue that at length in the paper I referenced. I want to mention the common-law Labor Conspiracy Cases here, which were a distinct line of cases in the common-law from the restraint of trade cases.

Sanjukta Paul:

If you look at the pre-enactment common-law, these are not cases that are citing each other. They're really separate lines of cases, and they only get folded into each other post-enactment by judges applying federal antitrust law to workers. They are not connected before. Notably, in *Commonwealth v. Hunt*, which Professor Hovenkamp mentioned, which takes a pretty permissive attitude toward labor historians view that as a pretty permissive attitude actually towards most labor concerted action. Actually common-law courts got much more punitive after the civil war. *Commonwealth v. Hunt* was 1840. First civil war, the common-law courts get more punitive even before the Sherman Act is passed. It's not based on a price fixing logic at all. It's not citing restraint of trade cases at all. Indeed, it wouldn't have made any sense for them to do so because the restraint of trade cases at time were totally permissive of horizontal coordination among small producers.

Sanjukta Paul:

So those are not the cases they're citing. Instead, the pre-Civil war cases, pre-*Commonwealth v. Hunt* and up to *Commonwealth v. Hunt* are citing English labor conspiracy cases that rely on 18th century, essentially feudal labor regulation. There was a debate in those early cases, whether that even applies in the early Republic. The defense council, and many judges were up there saying that this feudalistic society, and these specific stricter on labor coordination that has nothing to do with just had this revolution. This doesn't even apply here. Eventually, in *Commonwealth v. Hunt*, it's fairly permissive but says that this conspiracy doctrine does apply in diluted form. When courts take that up post-civil war, they're not applying price fixing logic. This has really nothing to do with antitrust. They're now applying property logic and specifically an emerging notion of what I would call the firm exemption. We can talk

about that more in the discussion, but specifically a particular vision of how intra-firm organization should proceed, that workers are subordinated within the emerging firm to the owners because they don't own a stake in the company that they should not be able to influence the business decisions of firms. So we can talk more about that, but it has nothing to do with the price fixing logic. They don't cite the restraint of trade cases. I'm sure we'll talk more about what happened afterward, but this is where we stand at the point of passage.

Andrew Schupanitz:

Great. Thank you both for those opening remarks. I think there's a lot of issues that we've teed up. So we'll try to get to as many as we can. I think a good chunk of the discussion, we'll focus on the new deal mid-century period, where a lot of stuff is happening in terms of labor exemptions, post-Clayton Act, and some of the Seminole cases interpreting labor exemptions, and the toolkit that Herb mentioned in his opening remarks. But I do want to talk a bit about the early period. I think Sanjukta, your opening remark teed this up nicely. Herb's written about the conspiracy theory of labor organization in the 19th century, he mentioned in his remarks as well, and how courts pre-Sherman Act decline to apply that consumption to simple non-violent combinations of workers seeking to bargain collectively. Similarly, Sanjukta, in your opening remarks, you highlighted the role of labor anti-monopoly, labor's influence on legislation.

Andrew Schupanitz:

So I guess the question here is, given this pre-Sherman Act history, how is it that post-enactment, the Sherman Act to quote Herb effectively brings the conspiracy theory into the courts? Why was this early period in roughly 1890 to 1930 marked by such? Again, I'm putting Herb here in transcendent judicial hostility toward labor activities. I think a related question is, to what extent or in what ways does this early period of hostility then affect the subsequent new deal mid-century period where lawyers and economists and courts are developing the toolbox of modern antitrust concepts that we know today? And so, I think maybe I'll start with Sanjukta on this, and then we can hear from Herb.

Sanjukta Paul:

Sorry, I was muted there. So, would you like me to speak to why the courts did what they did in post-enactment or?

Andrew Schupanitz:

Yes.

Sanjukta Paul:

Okay. I'm not sure I can answer why they did what they did because that's beyond my powers. I mean, I can speak to what they did. There was an early case in 1893 that actually was very influential and was cited by the Supreme Court at length in *Loewe v. Lawlor* where really, I think a lot of this initial synthetic work gets done by the federal judiciary, which I would characterize as essentially uploading common-law labor conspiracy, and a fairly punitive strand within that into federal antitrust law. What I tried to tee up in my remarks, and what I would argue is that there was not only nothing inevitable about this.

Sanjukta Paul:

I mean, you can explain it politically, perhaps in terms of the makeup of the federal judiciary and broader political goals. It's a little bit beyond what I'm doing in reading these cases in the legislative

history and putting it all together. But as a matter of how law develops and not exactly legal precedent, because this is inherently synthetic when you have a new enactment and you have new interpretations, but in terms of anything that would follow from a natural logic of how to extend the precedent for the Sherman Act into affirmative interpretation of the new statute, I think this was unexpected. I mean, it's very interesting to look at what they're doing. We now, and to juxtapose it with how we're framing the question there, we frame the question as, is there a general rule? There's this general rule, we usually characterize it as the general rule against price fixing, and should labor have an exemption or not?

Sanjukta Paul:

This is not how these courts that actually brought labor coordination within the ambit of the statute in the first place. This is not how they looked at it at all. Even post-enactment, we have working men's amalgamated, and then later *Loewe v. Lawlor* citing the pre-enactment common-law labor conspiracy cases, not the restraint of trade cases for the most part dealing with price fixing because again, we find when we look at that line of cases, that it was very permissive where horizontal between small producers was concerned. So, if you were actually just applying the pre-enactment restraint of trade case law, which to be fair as Herb pointed out what that rule also changed post-enactment.

Sanjukta Paul:

Even when applied to firms and intra-firm coordination, but if the courts were simply applying the pre-enactment restraint of trade case law to workers and extending it, then you get the opposite result to what actually happened. That's not what they did. They essentially uploaded the labor conspiracy cases, which again, we can trace back to basically feudal labor regulation. It's very class specific. It's ironic that the Supreme Court in *Loewe v. Lawlor* says that we don't have a class exemption here. Well, the original legal sources for the courts actually used. Could they have used a different logic? Perhaps, but the logic they actually used to break strikes and boycotts under the Sherman Act can be traced straight back to feudal labor regulation not back to the restraint of trade cases law, and its [inaudible]

Andrew Schupanitz:

I guess Herb will turn to you for your response to that question or to Sanjukta's remark.

Herbert Hovenkamp:

I mean, what Sanjukta is saying reflects the progressive position, they wanted desperately for there to be some immunity or opening in the Sherman Act to permit labor organizing. Home-skilled that of pretty decisive ways, simply by observing that the section one includes three words that covered quite different things. Contracts, according to homes, covered mainly non-competition agreements. He was probably for focusing mainly on product market, non- competition agreements, combinations, which of course was used heavily prior to the passage of the Clayton Act to reach mergers, such as in the Northern Securities case in 1904 and then conspiracies in restraint to trade, which was used to reach a lot of conspiratorial activity, including labor activity. One of the problems you face when you try to interpret the Sherman Act so as to include some provision for eliminating coverage of labor.

Herbert Hovenkamp:

The statute was passed virtually unanimously. There was one dissenter who was basically a railroad executive who was worried about coverage of the railroads in the Sherman Act. We have a very broadly worded statute. Yes, it did not parrot the common law, perhaps as precisely as one might wish, but like I say, under all of the criteria for statutory interpreter that we currently use, I think it's very hard to come

up with an argument that Congress really intended to create a labor immunity. Now that's clearly not true of Section 6 of the Clayton Act. When the Clayton act was passed in 1914, by that point things had changed and now Congress was ready to embrace a labor immunity, and that of course raises the question that maybe we want to get to next, which is why they chose the language that they did when they created the Section 6 labor immunity?

Andrew Schupanitz:

Yeah, we can turn to that next, but I do want to give - Sanjukta I don't know if you have any further response to that, otherwise we can turn to post Clayton Act history.

Sanjukta Paul:

I mean, I don't want to belabor this too much because I feel we've both set out our positions, but I would maybe just take a step back and say one thing, which is that, I'm trying to truly honestly describe the history as I best understand it in terms of what happened. I'm not however saying that labor coordination as a normative matter, we haven't really gotten to the normative issues here right.? But I don't think what follows from this is that labor coordination shouldn't be regulated at all, isn't appropriately subject to law. I don't think that, and I don't think capital P progressives thought that at the time. And I actually don't think people in the labor movement think that now, the thing is we have an area of law that regulates labor coordination, it's called labor law, and it has extensive reporting requirements for labor [inaudible] extends for how labor unions are to be constituted and recognized, internal democracy within those organizations. Certainly we could talk about reforming and improving those procedures.

Sanjukta Paul:

I would argue that they're far more extensive than for the parallel, what I would call the firm exemption, insofar as there's no incorporation as of right for labor unions and labor unions under labor law are fundamentally subordinated to firms actually. So this is actually something that's baked into the new deal compact as well. But I think all I want to do taking a step back maybe from the historical discussion we've been having is to say that the normative payoff for this, I don't think is necessarily, just let labor coordination and labor institutions run a muck with no role for the public, I don't think that's the position. I think it's clarifying what the Anti-monopoly context and the real directive that legislators thought they were enacting.

Sanjukta Paul:

Even if, by the way, we can say that the tactics they chose to do it, weren't the best. Maybe we have to remember that when they were drafting, they were facing a very different federal judiciary as you asked the "why question" about that for potentially hostile, increasingly hostile judiciary and one that viewed Congress's Commerce Clause power as much more limited than the modern Commerce Clause, the modern control of the Commerce Clause power, so they had to be kind of vague arguably, I think we can cut them a little slack there. But I still think the history is quite informative for us, because I think that these ideas that were behind what they were trying to do can inform some of the debates we're having now about how to reform or improve Antitrust law to be more responsive to this very important constituency.

Andrew Schupanitz:

Great, and I think that tees up actually the next piece of our discussion on statutory, Non-Statutory Labor Exemptions. Herb I think your last comment started to get into this, but I was wondering maybe this goes back to my previous question and I'm hoping you can sketch out for us. You mentioned Clayton Act Section 6, so I'm just wondering if you could maybe briefly talk about how the Clayton Act is a response to this earlier period of judicial hostility.

Herbert Hovenkamp:

Sure. There's a lot of things we don't know about Section 6 because the legislative history is not very elaborate, and the one thing it does not do is what... If we were to do immunity today, what we would be more likely to do and that is, distinguish between employees and employers. What it really does is it speaks of the first important sentence in Section 6 is, "the labor of a human being is not a commodity or article of commerce." Why? Well, for one thing, one thing that became clear by the time of the Clayton Act was that much of the focus on products was really a focus with services, right? The two most of important early Antitrust decisions on the merits had to do with freight rate price fixing and rates of course are services rather than products. Notwithstanding that, the Clayton Act itself was dominated by a concern with commodities.

Herbert Hovenkamp:

And that applies to... There's three substantive sections of the Clayton act, two, three, and seven. Two is price discrimination, three is tying an exclusive dealing and seven is mergers two and three are both limited by their terms to goods wears commodities that is tangible things and they don't cover services and indeed that's been a very serious limitation with respect to coverage of the Clayton Act against tying an exclusive dealing. There are a large number of cases that involve exclusive dealing and tying in which the Supreme Court has basically said, "We need to use the Sherman Act because of Clayton Act doesn't apply to this - this is a service rather than a commodity." Same thing really applies to price discrimination, which is actually more prevalent and probably more potentially harming when we're talking about service discrimination, because you don't have the opportunities for arbitrage and so on than it does to product market discrimination.

Herbert Hovenkamp:

I think, however, the source of the concern, the rewriting what you might say of Section 6 to speak about employment rather than the labor of a human being was important to save Section 6 from a very important textual error. And that is that there is enough thing in it that distinguishes buyers of labor from sellers of labor. I mean, if you look at the language of the statute, "The labor of a human being is not a commodity" et cetera, for purposes of the Antitrust laws. Well, Justice Department just now got a rejection of a motion to dismiss in a criminal wage-fixing case. Congratulations, I'm glad you did, but what about the argument under Section 6 literally that wage-fixing is not covered by Section 6 of the Clayton Act, because the labor of a human being is not a commodity or article of commerce.

Herbert Hovenkamp:

That is it belongs, that there's nothing in that statement that suggests that it applies only to sellers of labor, that is workers, it appears to apply to buyers as well. I can see a justice at some few time, like Justice Kavanaugh, for example, who's a hyper literalist when it comes to the statutes of saying, "Well, how can wage-fixing even be covered by the Sherman Act? Because Section 6 of the Clayton Act says that labor is not a commodity or an article of commerce." I hope that doesn't happen, but it could.

Herbert Hovenkamp:

But the way that the subsequent law adapted was by looking not at the literal language of the statute, but rather as by creating a protected class that really not covered by the literal language of the statute and that is employees. And so all of the subsequent interpretation of the provision focuses on who is an employee as opposed to an entrepreneur, and of course that has led us into other kinds of unforeseen difficulties, unforeseen at the time, which that the Uber driver considered by Uber to be self-employed is not an employee and with all of the ramifications that it has.

Sanjukta Paul:

Yeah. Just wanted to comment on that. First of all, so I agree with Herb completely, that Section 6 of the Clayton Act is too broad. So no objection for me that this labor of a human being language is too broad and actually not that helpful because in fact, labor is bought and sold as a commodity. In fact, I would argue that ultimately what we're trying to do and what we should aim to do in the Antitrust Reform project and part of this discussion that's ongoing and unfolding is to look for fairness, fair price, fair competition, fair practices in governing those markets and in governing labor markets on the broader markets that they're part of, rather than this very broad language... Clayton Act, the labor exemption portion of the Clayton Act came up in a very different context from the Sherman Act.

Sanjukta Paul:

At this point, the industrial structure of the US was very different, right? We've had The Great Merger Movement of the 1890s enabled in part by some of the judicial responses that we talked about in both directions, in helping to subdue and to basically engage in labor discipline of these emerging mega firms, the big steel firms particularly to start with. Importantly, connecting this with earlier discussion a little bit the modern form of the employment relationship doesn't really take shape until around this time as well, that earlier labor Anti-monopoly strand had aspirations beyond just fair wages. They had aspirations to some form of co-governance, they weren't objecting to technological progress, but they wanted at one point the Knights of Labor advocated co-governance of the factories that became increasingly impossible as firms like U.S. Steel really cemented their power with much more difficult to organize these extremely large powerful firms that really took hold in the 1890s and then were the industrial structure.

Sanjukta Paul:

And now there was a constituency against a labor exemption when the Clayton Act is being debated in a way that there really wasn't in the same way in 1880, 90, 1890, [inaudible] I would argue. But the thing I wanted to say is, don't think it's about a broad interpretation of Section 6, right? So Section 6, I think we can agree that this is actually not that helpful, or at least we in this discussion agree. And then I think the next panel is actually going to discuss what some concrete reform proposals might be. But the way the courts reacted to that, I think was not as innocent as just creating this employee, non-employee distinction, that's not really what they did. In the period... From the passage of Section 6, through the actual new deal development, that's when we get the employee classification as the important one, the courts don't start.

Sanjukta Paul:

What the courts do is that they come up with a reason to essentially eviscerate both labor exemption provisions of the Clayton Act, and to again import what I would call the quite moralistic of the common law labor conspiracy cases, nothing really to do with employer independent contractor at all, but it was

centered much more on secondary strikes, those old ideas of property, property rights of the firm owner, whether this is an undue interference with the property rights of the owners of the firm, that's what was going on, and Duplex printing and those other key cases, post Clayton Act that then eviscerates the labor exemption. We do then get the employee, non-employee distinction, because those terms are used in key new deal enactments, particularly in the Wagner Act. And then we get the National Labor Relations Board and the courts initially incidentally interpreting that very broadly, much more broadly than what's conventional today, and then we get the problems that Herb referred to, but that happens a little bit later.

Andrew Schupanitz:

And Herb I wonder if you have a response to here, I read your earlier remarks to say essentially that the reading or the reliance on employee status rather than as Section 6, expressly indicates labor versus sellers of commodities. This is that this is a ad hoc fix to save the statute. So I wonder how you would respond to Sanjukta just reading that this is that this is a more normative or even moralistic project by the courts in reading that into it.

Herbert Hovenkamp:

Well, I don't disagree with Sanjukta's interpretation, but the problem is there are other people who do, and I mean, if you read literally the language of Section 6 all by itself, it basically says that, "The labor of a human being is not a commodity or an article of commerce." Okay, well we know clearly as a result of more than a century of Sherman Act litigation, that the statute applies equally to buyers and sellers. And as a result, it invites the interpretation that labor is not subject to price fixing by employees as in a labor strike, but it's not subject to price fixing by employers either because that distinction isn't made in the literal language of the statute. So yes, subsequent new deal legislation rightfully begins focusing on employees rather than on the particular thing that they are selling, but the fact is that the literal language of Section 6, appears to apply to purchasers of labor as much as it applies to sellers of labor.

Andrew Schupanitz:

So we've talked quite a bit about Clayton Act, Section 6, but I don't want to discuss it to the exclusion of other labor exemptions. So Sanjukta you've written about different approaches of the Clayton Act versus The Norris-LaGuardia Act towards the labor Antitrust relationship and how the latter enabled a implicit primacy of Antitrust policy over labor policy. So I'm wondering if you could just maybe flesh that out a bit for the audience and walk us through those different approaches.

Sanjukta Paul:

Okay, so I think maybe we're moving to the mid-century period a little bit here, and so what I would say maybe in response to that question is that broadening from the labor exemption a little bit, because I think the relationship between labor and Antitrust is a lot deeper than that, and I want to at least touch on that before this panel's over. I do think that in... I'm not sure I would now attribute that to the Norris-LaGuardia Act, frankly, I mean I think I was a thought I had eight years ago or something, but I would say that there has been a tacit presumption, almost like a background presumption that in a way, labor law is the junior partner of antitrust law, even though they're both federal statutes, right? And so there's no obvious reason why one should have primacy.

Sanjukta Paul:

And I think that's one of these background, almost one of these like pre-analytic principles that we maybe have in our minds, and I think that has become... I would perhaps today attribute that more to the fact that particularly since the 19 [inaudible]... Obviously these developments began before, but particularly since the 1970s, there's this idea that there's a science to Antitrust law that it's independent of law to some extent that we can get neutral results from economists about what would conduce toward perfect competition, even if you can't have perfect competition. And that this provides an objective benchmark. And that, that I think has contributed to this idea that labor law is a junior partner to Antitrust law and I think we really have to discourage that because I think one of the opportunities in this moment of rethinking, really thinking about law in markets more broadly is that there isn't such a neutral benchmark actually, right?

Sanjukta Paul:

I think that's a lot of what a lot of the critical work that's been coming out in the last few years has argued, and I would issue a little bit of a warning about reform proposals that actually attempt to now extend to labor law, even if the goal is to do this in a progressive political direction and in the short term, perhaps aid workers and labor institution to basically import these punitively scientific idea into labor law, which just furthers this idea that labor law is the junior partner of antitrust law. In fact, Senator Wagner, others who... Brandis was a strong supporter of labor law. These folks had really broad conceptions of industrial democracy and of workers having a say in the enterprises to which they contribute their labor. That doesn't have to be derived from some idealized notion of perfect competition, it's a fundamental normative directive that's actually in the law.

Sanjukta Paul:

And I really hope we don't lose that in this reform moment, as I think people are excited about extending antitrust law to labor markets in this affirmative sense to help workers. I hope we don't lose sight of those quite strong normative directives that exist in labor law and that if they were taken serious, could improve labor law quite a bit without importing those ideas. So I don't know if that answers your question.

Andrew Schupanitz:

Yeah, and I guess Herb I'll invite your response either to what's [inaudible] dimension about labor law as the junior partner in relation to Antitrust and the role of the 1970s and the scientific conception of Antitrust. Maybe there's something to be said there for the increasing role of economics. And also the second part of her comments, the warning for reformers in contemporary, looking at contemporary issues of Antitrust and labor law.

Herbert Hovenkamp:

Yeah, just a couple of points. I think I pretty much agree with everything Sanjukta had said. The history of legislative attempts to create Antitrust immunities for labor has been full of badly drafted statutes that the Supreme Court has struggled to interpret or repair. So as a result today, the vast majority of labor Antitrust cases invoke something called the Non-Statutory Labor immunity, well what does that mean exactly? Well, it means that it's an immunity that arises in the text of Collective bargaining over wages hours and working conditions. And we call it Non-Statutory because it's not expressed in the statutes, and so the Supreme court has had to fashion it, and they have fashioned a great deal without very much benefits from Congress.

Herbert Hovenkamp:

Now the other thing I would say about it is that one consequence of the Non-Statutory immunity is that as long as we're talking about unionized labor and is something that's arguably covered by a collective bargaining agreement, Antitrust liability today is really not all that common. The great majority of cases find the immunity. And as a result, labor law, rather than Antitrust law ends up controlling.

Andrew Schupanitz:

Sanjukta any further response there?

Sanjukta Paul:

I think yeah, not necessarily a response, I didn't disagree with any of that. I think I would just note, and I want to maybe get it in, but I think Antitrust law still has this effect on the scope of labor coordination. I think that's quite significant, and maybe as part of a segway to the next panel, I would mention that mid-century Antitrust law, I think did play a role. It was not a panacea, I don't think we should just try to restore mid-century Antitrust law.

Sanjukta Paul:

I think that some of the criticisms that it could have been clearer in what the goals are - are correct, and we should try to be clearer this time around, but that said, it played a role in upholding the new deal... I mean, it did these other good things, right? So I'm not going to mention those, but from a labor perspective, I think it played a role in upholding the new deal compact, whether judges really aware of this or not. And the way that it did that was that it had not just competition, but domination, Anti-Domination as an explicit goal of law, and you see this in the vertical restraints cases, you also see it in the Monopolization cases.

Sanjukta Paul:

What this had the effect of doing is retraining domination or control beyond firm boundaries, right? And I believe at least I've quoted Professor Hovenkamp on this, that it would make some of those mid-century precedents would make some of today's franchising agreements, for example, and certainly the gig economy of today impossible, because what do those business models rely on? They rely upon control, even extending sometimes to price setting, meaning the setting of prices of the other firms, the prices that other firms set to its consumers, right? Whether that other firm is franchisees or Uber drivers, considering them for a moment as a separate enterprise, which of course is a matter of debate that will be taken up in the next panel.

Sanjukta Paul:

The even... Taking for the purpose of argument, that these are independent enterprises and not conceding that, there is a lot of economic control beyond firm boundaries that's being exerted through these contracts, right? And this is important in franchising as well, because why, because franchising, I mean, we could talk about whether the franchisees are employees or not. There was case about that, that the FTC actually just filed an Amicus brief in or yesterday, or at least I saw the brief yesterday and I thought it was great, right? The franchisees themselves are arguing that they're employees, but beyond that, the workers of the franchisees.

Sanjukta Paul:

Labor organizers will tell you, this is the hardest organizing problem, when you have all these franchisees and atomized workers, right? And you can't so far any attempt to find a joint employer finding under a labor law has been resisted quickly to wrap up if these business models aren't possible, right? Without the permissive Antitrust law we've had since the 1970s, what mid-century Antitrust law did, it's confined domination to the boundaries of the firm, precisely where Countervailing Coordination Rights in the form of labor law were available to counterparty.

Andrew Schupanitz:

Well, I'll thank you for getting that in before we hit time, because it is a very important topic and sadly, we don't have enough time to go into the history and really get into it, but I think at the very least we've teed up the discussion for the next panel. So since we are at time, I think all that's left is for me to thank everyone for watching and to thank both of you for your time and the outstanding discussion today, we really appreciate it, and I hope this has been as illuminating for the audience as it has been for me.

Andrew Schupanitz:

So we're going to take a brief break and then we'll be back with our final panel of the workshop, "Collective Bargaining in the Gig Economy". So thank you both again.

Eric Dunn:

Thank you everyone for joining us for the last panel focused on Collective bargaining in what sometimes called the gig economy. I'm going to start things off by giving you a brief overview of the panel and then I'll introduce our panelists and really just try to let them do the talking. At the outset I want to remind members of the audience, well we're not accepting audience questions, you can submit public comments on these issues to [regulations.gov](https://www.regulations.gov), which is linked on the event page for the FTC's website. I also want to emphasize that the views of the panelists here do not necessarily represent the views of their employers, their clients, the Federal Trade Commission, or the Department of Justice.

Eric Dunn:

All right, so let's get to the substance. This panel is focused on workers who are sometimes classified as employees, sometimes as independent contractors and sometimes as gig workers. And our discussion will focus on how labor laws and Antitrust laws intersect in this area, particularly when it comes to Collective bargaining by gig workers. The group we've assembled today includes labor and Antitrust experts, economists, private sector, public sector, and public interest lawyers, and people who have worn many of those hats. I'm going to quickly walk through our speakers, but I would encourage everyone listening to visit the FTC's event page and review the impressive bios for each of our panelists. So first we have Marshall Steinbaum who is an economist at the university of Utah. We have Sandeep Vaheesan the legal director at the Open Markets Institute. We have Gail Levine, a partner at Mayer Brown, Jen Abruzzo, the general council at the NLRB and John Taladay, a partner at Baker Botts.

Eric Dunn:

So before we started on the discussion, I think it would be helpful to give the audience a baseline understanding about what we mean when we talk about the difference between employees and independent contractors from a labor perspective and where gig workers might fit into that. And so Jen, I'm hoping maybe you could start off the discussion right there.

Jennifer Abruzzo:

Sure., So thanks Eric, and first I just want to provide some context. So during the great depression, Congress enacted the NLRA, which is also called the Wagner act because it recognized that the inequality of bargaining power between employees and employers substantially burdens the flow of commerce by depressing wage rates and the purchasing power of wage earners, and specifically section one of the statute. The policy of the U.S. was declared in that, "it is to eliminate the causes of certain substantial obstructions to the free flow of commerce, such as strikes by encouraging the practice and procedure of Collective Bargaining through representatives of freely chosen and by protecting the exercise of workers of the full freedom of association, which includes union organizing and engaging in other collective action to improve their working conditions." So the labor exemption to Antitrust law is a crucial component of the Collective Bargaining protections that most private sector workers in our country enjoy under the NLRA.

Jennifer Abruzzo:

And as you likely know, there's pending legislations specifically the PRO Act which change statutory coverage to include the ABC test for employee status. Currently, the NLRA as it stands, does not have jurisdiction over any individual that has the status of independent contractor. And as to the standard for distinguishing between employees and independent contractors, labor and employment agencies differ. The NLRB uses the common law test to determine independent contractor status, which is multi-factored, and until a few years ago, no one factor was dispositive. So those factors include extent of control that the employer

Jennifer Abruzzo:

There are exercises over the details of the work of the worker, whether the individual is engaged in a distinct occupation business, whether the local occupation is typically done by a specialist without supervision, whether the employer provides instrumentality, tools or the place of work, the length of time of the employment, the method of payment, whether the work is part of the regular business of the employer, whether the parties believe, themselves, that they're creating an employer-employee relationship, and whether the employer is in the same business or not. The DOL's wage in our division, for example, though uses a different test. It's the economic realities test, which includes some of the same factors, which I just mentioned, but also focuses on the dependency of the business, which the worker serves. In addition to the differing standards, which I just mentioned, the current NLRB precedent is very problematic, in my opinion.

Jennifer Abruzzo:

Specifically, in 2019, the Trump board issued a decision in SuperShuttle, which exceeds the common law multifactor independent contractor test by making entrepreneurial opportunity for gain or loss a super factor. The board there found that the drivers, because they had the potential freedom to work whenever or wherever they wanted, this provided them with significant entrepreneurial opportunity, even though in fact, they performed no work for any other entities. That same test expands to who is considered an independent contractor and has been applied to deny statutory protections to many others, including in the gig economy.

Jennifer Abruzzo:

While there's increased prominence of the independent classification due to the gig economy, these issues also resonate in other workplaces where there's flexible and nontraditional working

arrangements as well. Now, the current NLRB case law by expanding who's considered an independent contractor, reduces the number of individuals who are afforded protections under our act and that chills workers from organizing and from engaging in collective actions to improve their life as employees because they won't be protected.

Jennifer Abruzzo:

I'm going to be asking the board to revisit this precedent, as I believe that our statute must be read broadly and must protect as many individuals as possible. Relatedly, I'll just say that the further consequences for an expanded pool of those that are now considered independent contractors or who are misclassified as independent contractors, which I'll talk about later, those who engage in some collective action to improve their lives as employees is at risk of being prosecuted under antitrust law as well, which is a real powerful constraint upon the right to organize and act collectively.

Jennifer Abruzzo:

This isn't a theoretical threat. It's a real one. We know that the FTC has engaged in antitrust enforcement activities against, for example, teachers, musicians, public defenders for what I would consider to be protected organizing activity under the NLRA, if in fact, those workers were by definition statutory employees. I'll stop there. I hope I provided some context and I'll discuss misclassification a little later in this session.

Eric Dunn:

Great, thanks Jen. That was really helpful. I think for the antitrust lawyers in the room, we've covered the labor perspective and now I want to shift gears and talk more about the antitrust perspective. Gail, can you help us understand the potential significance from an antitrust perspective of being classified as an employee or as an independent contractor? Jen touched on it, but I think it would be helpful to expand it.

Gail Levine:

There. Sure. Yeah. I'll take a leaf from Jen's book and give the historical perspective too, which I thought was really helpful in the exposition of it all. In the early days of the Sherman Act, the courts had held that the Sherman Act made it illegal for workers to organize collectively in ways that eliminated competition among them. But then in 1914 and 1932, the Clayton Act and the Nari LaGuardia Act were passed by Congress. In broad terms, those acts have the effect of carving out labor from the antitrust laws in this particular regard. Fast forward to the last few decades where it's been understood that labor activity, union labor activity is generally exempt from antitrust challenge on Section one grounds, Sherman Act grounds, but that collective action among independent contractors can be an antitrust violation.

Gail Levine:

Let me just give you a couple of examples of where the agencies have made this point. The Federal Trade Commission sued the Superior Court Trial Lawyers Association and argued before the Supreme court on this point in 1990. The criminal defense attorneys in the superior court of DC, I believe, had organized a collective refusal to accept court-appointed cases unless and until the DC governments would raise their compensation rates and the Supreme Court held that could be deemed price-fixing, a per se violation of the antitrust laws.

Gail Levine:

In 1999, the Federal Trade Commission chairman, Patovsky, testified before Congress in opposition to a bill that would have let independent doctors negotiate collectively on fees. In his testimony, he said, "Physicians who are employees, like of a hospital, they're covered by the labor exemption under current law because they're employees of their hospital". But the labor exemption is, and here I'm quoting from him "Is limited to the employer-employee context and it does not protect combinations of independent business people."

Gail Levine:

This is very much in line with cases the FTC and DOJ have brought against independent physicians and other medical professionals for their efforts to collectively act in ways that would fix prices. Most recently, the Justice Department and the Federal Trade Commission filed a joint Amicus brief in 2017 in the Seattle driver's case where they said in their brief, antitrust law forbids independent contractors from collectively negotiating the terms of their engagement. For example, jointly setting fees is price fixing, which is at the very core of the harms the antitrust laws seek to address.

Gail Levine:

That was done over no dissenting voice, even at the votes, even at the FTC. In light of that history and that hundred-year-old history and also more modern history, it's really interesting to see what the FTC leadership is now saying on this question. In 2019, we saw commissioner Chopra. He was a commissioner of the Federal Trade Commission at that time, write in a letter to the Justice Department saying, "Congress should extend the antitrust labor exemption to cover certain gig economy workers."

Gail Levine:

Behind that advocacy was his observation that unlike employees, gig economy workers can't collectively bargain without the risk of committing an antitrust violation. The next year Commissioner Slaughter wrote her letter to the labor departments that she believed that even properly classified independent contractors and here I'll quote from her letter "Should get the benefit of the labor exemption in order to organize against unfair labor practices and to seek better wages, terms of employment and working conditions".

Gail Levine:

Just this year, just indeed a few months ago, chair Khan Federal Trade Commission chair Khan in her letter to Congress acknowledged that collective action by non-employees is susceptible to prosecution under the antitrust laws. Her letter seems to be signaling in a really interesting way that this is not where she wants to put the agency's resources. She's suggesting that in a private action, challenging that kind of context, the federal agencies might provide guidance to the courts, perhaps an Amicus brief explaining to them what the Clayton Act was designed to do.

Gail Levine:

I think the bottom line of all this history is that things are changing and watch this space.

Eric Dunn:

Great, Gail. Thanks for that background, Sandeep, I'd love to get your perspective here. We've heard the labor perspective, the antitrust perspective, and to the extent antitrust is distinguishing between how it

thinks about collective bargaining by employees and other kinds of workers, I guess the simple question is, should it make such a distinction?

Sandeep Vaheesan:

The short answer is no, but I think before I get into the details of that, it's useful to really expose a myth that informs discussions around the labor exemption. I think that myth is that antitrust law prohibits coordination in general, but the labor exemption is some type of sensation and indefensible from any principled perspective. I think that's simply not true.

Sandeep Vaheesan:

Economic activity is collective in one form or another and really a question for antitrust policy makers in courts is who gets to coordinate the economy? Who sets rules in the marketplace, including on price and other terms and who makes decisions within firms? The present antitrust law grants the power to manage collective activity to some and withholds it from others.

Sandeep Vaheesan:

On the one hand, large corporations get to coordinate. For example, the board and officers of Exxon directed tens of thousands of workers and manage billions of dollars in assets every day, broadly free from antitrust scrutiny. Thanks to decisions like Copperweld and Duggar, a corporation consisting of many subsidiaries and divisions can operate as a single entity, broadly free of antitrust scrutiny and the familiar principle from section two case law, monopoly power alone is not unlawful. Firms can charge as much as high price as "The market can bear".

Sandeep Vaheesan:

Furthermore, they can also use contracts to control parties' outside firm boundaries. Exxon can tell its gas stations they cannot sell Exxon brand gasoline and diesel at below a certain price. This is what the professor [inaudible] spoke on the previous panel referred to as the firm exemption. Coordination is allowed by certain actors, principally financiers and executives, but it's withheld from other individual workers and small firms cannot coordinate without a formal exemption from antitrust law.

Sandeep Vaheesan:

The question going forward is who gets to coordinate, not whether coordination is allowed. Turning to the specific question, the relevant statute, section six of the Clayton Act is not distinguished between employees and independent contractors. This law was passed, not so much legalized primary strikes and boycotts by unions, but to permit secondary strikes and boycotts by unions. Contrary to what Gail said, a group of workers striking their employer was never prosecuted under federal antitrust law and section six says labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust law shall be construed to forbid the existence and operation of labor, agricultural, horticulture or organizations. I won't quote the statute any further, but that gives you a sense of how broad it was. It doesn't distinguish between employees and independent contractors. That language is simply not there. It has this very broad statement about the labor of a human being is not a commodity or article of commerce.

Sandeep Vaheesan:

This distinction is something that was established by judicial interpretations of this broad language. Subsequently, the plain text draws no separation between employees who have the right to organize

and independent contractors who don't. Textbook reading would say, "Workers should have the right to unionize regardless of whether they're employees or not".

Sandeep Vaheesan:

I think the gig economy has attracted a lot of attention because it really exposes the contradictions here. The platforms exercise employment like control, but then by misclassifying their workers, deny them the right to organize, among other rights and privileges that come with employment.

Sandeep Vaheesan:

I think we should be thinking more broadly about the labor exemption going forward. Workers, regardless of classification should have the right to organize and challenge their subordinate status and establish more equitable work arrangements.

Sandeep Vaheesan:

I'll quickly wrap by saying, I don't think we should simply think about this as tailoring the edges of the labor exemption. We should think about subordination in the economy more broadly. It is true workers are among the principle subordinated group in today's economy, but they're certainly not the only ones. We can think of other examples, such as Amazon sellers, fast food franchisees, even some relatively large suppliers of Walmart.

Sandeep Vaheesan:

We actually have an interesting example in Congress, representative Ted Deutch introduced a bill called Protecting Working Musicians Act, which would allow a segment of low and medium income independent musicians to bargain collectively with platforms such as Spotify and Amazon. These are workers who operate outside traditional employment arrangements, but are still subject to domination by powerful intermediaries.

Sandeep Vaheesan:

I'll also wrap by saying Congress was aware of this issue when it passed section six. The language I quoted, for not only labor organizations, but also agricultural and horticultural organizations. Congress recognized that there was extensive domination and depression in the agricultural economy, and this was not a problem limited to labor markets.

Sandeep Vaheesan:

I think going forward, Congress and the agency should think beyond broadening the scope of the labor exemption and look to address profound imbalances in power, not just in labor markets, but in other markets involving and affecting workers, farmers, franchisees, Amazon sellers, just to offer a few examples.

Sandeep Vaheesan:

I think broadening the labor exemption is a necessary step going forward, but it's by no means sufficient to address the deep inequalities of that exist in our economy today.

Eric Dunn:

Yeah, that's really interesting. I want to just ask a quick follow-up question because you mentioned a point that I thought was fascinating, thinking about antitrust as who gets to coordinate policy judgment. I wonder, you touched on this a little bit, but from your perspective, what are the factors that should be considered as we think about who gets to coordinate? Is it leveraged? Is it thinking practically about where people sit in the supply chain or negotiating leverage? I'm just curious from your perspective, what do you think about what drives that policy?

Sandeep Vaheesan:

Yeah, I think a guiding principle going forward should be democratizing that authority, that firm governance and market governance, power, because right now, thanks to antitrust law, as well as other areas of law, including corporate law and labor law, that decision-making power is monopolized by a relatively small segment of the population. For example, shareholders and individuals who sit on the boards of corporations and serve as their officers.

Sandeep Vaheesan:

I think we should think about distributing that governance power to workers, all firms consumers. I don't have a simple tippy answer to offer here, but I think we should think about democracy as a robust principle and start thinking through the details of how we implement economic democracy across sectors.

Eric Dunn:

Great. That's really helpful. Marshall, I wonder if you could chime in. I'd love to hear your perspective on the distinction between employees and independent contractors or other kinds of workers and how that maps onto the way antitrust might think about collective bargaining by those kinds of workers.

Marshall Steinbaum:

Yeah. I broadly agree with everything that Sandeep just said and his indication of the coordination rights and who gets to wield them, which professor [inaudible] work. I want to narrow my focus a little bit just here, because I think there's a way forward on the narrow issue of gig workers and their collective bargaining. For example, in the case that Gail previously described regarding collective wage setting and other labor standards that was undertaken by the city of Seattle a couple of years ago.

Marshall Steinbaum:

It seems to me like there's basically, as Gail said, previous and current commissioners of the FTC have asked Congress to legislate on this matter to essentially expand the labor exemption to workers classified as an independent contractors, as in that case. It seems to me, that is not necessary in the following way. The FTC, turns out does have the definition of employment.

Marshall Steinbaum:

I didn't know this until fairly recently. Jennifer previously characterized these different definitions across agencies and enforcers and the FTC has one and the FTC could change that. The FTC could adopt an ABC test for employment status that would classify most gig workers that are the subject of the contemporary debates over misclassification.

Marshall Steinbaum:

This ABC test would likely classify them as employees and then take the position that the antitrust exemption extends as far as misclassified employees. I don't see why misclassified employees should be denied further rights by the illegal behavior of their punitive employers. Given that two-step process, I don't think that a solution to gig worker collective bargaining necessarily requires legislation.

Eric Dunn:

Can I just drill down on that? Is the suggestion that the agencies would be constraining the way that they enforce the antitrust laws by saying here's how we're going to think about employees or independent contractors or something in between?

Marshall Steinbaum:

I don't want to say anything about what the implications would be for other aspects of the agency enforcement agenda, because I don't know fully what it is, but I am saying that there is some ability. For example, I'm not exactly sure, frankly, since I don't study this area, exactly how the NLRB came to the definition of employment that Jennifer previously characterized, that is what the ProAct legislates about. I suspect that the FTC did not arrive at its definition of employment through legislation and consequently as a liberty to redefine employment and should do so.

Eric Dunn:

Got it. Thank you. That's helpful. So John, I'd like to bring you into the discussion. Folks have proposed expanding the labor exemption or altering the way that antitrust enforcement agencies think about who is an employee. I wonder if you agree with that perspective or what your thoughts are.

John Taladay:

Thanks, Eric. Well, I guess the answer is we need to really think about what we're talking about here. I want to start with a fundamental principle of antitrust, which I think would all agree on, which is that price fixing is bad and we want and expect the antitrust laws to prevent sellers of goods and services conspiring to fix prices. That's a fundamental principle that we know harms consumers. You don't have to ask the question about whether price fixing harms consumers. It does. It always does. Under that designation, we deem it to be per se and with naked price fixing, it's a criminal offense, right?

John Taladay:

That's the golden rule of competition law. We're talking now about when and where and how we tweak that. We have to be very careful because we don't want to break the golden rule. Now, one thing I would like to emphasize is that the antitrust laws are very sensitive to coordination among sellers of this.

John Taladay:

They are less sensitive coordination among purchasers of goods and services. I think for example, about buying [inaudible 00:19:57. We generally think of those as being a good thing because they can often reduce input costs, reduce prices and that's good for consumers. There's more sensitivity to coordination among sellers than among partners for good reason. The reason is that the reduction of input costs is generally considered to be a good thing. Not always, but in any case, it's not always a bad thing and it's not always hard for consumers.

John Taladay:

We don't consider it to be per se, unlawful in the same way we consider price fixing to be per se. If you follow the basic industrial organization, economics of this, you, you know why, right. There are two key principles underlying. One is that the reduction of variable input costs can be expected to directly reduce output prices to consumers and conversely, an increase in the variable input costs will raise prices to consumers and labor can be fixed.

John Taladay:

It can be variable, but it's often variable, especially when we're talking about some of these gig worker examples. We're talking about something that is almost certainly a variable cost.

John Taladay:

The second economic principle is that unlike price-fixing, sorry, when you suppress the in-book costs, it only becomes a competitive problem in an economic sense. When the reduction of input prices is driven down to a level below the volume of inputs that would allow a competitive output, in other words, it's only when the prices get so low that there aren't enough inputs to get a competitive level of outputs that economics would say that the suppression of input prices is a bad thing.

John Taladay:

Up to that point, it's generally considered over competitive. Okay, that's the background. Now we're asking the key question. Should gig workers be able to coordinate in setting the terms of their services as sellers of their services to platforms? The starting point, I think has to be that the antitrust laws, absent an exemption, would consider that like they do price-fixing and generally to be a bad thing and generally something we should prohibit.

John Taladay:

That doesn't mean there shouldn't be an exemption. Maybe there should be an exemption. But if we were talking about independent contractors and think about gas stations, gas stations who are independently owned, selling gasoline to Uber. If they got together to coordinate their prices to Uber, would we say that's a good thing? No, we'd say it's price fixed, right? It has the same kind of impact on cost structure that we're talking about here.

John Taladay:

The intuitive reason that we think that gig workers might be different and should be treated differently, is that like consumers, they're people, right? They're people too and we can empathize for that. It's easy to sympathize with a poorly paid food delivery driver or a ride-share driver, especially when they work for a large platform company that we presume has large profits and is taking the lion share of the profit.

John Taladay:

As we discuss this, let's think about two points and remain clear on those two points. First, if there's going to be an exemption for big workers, and if it doesn't fit within the existing exemptions, it needs to be legislatively. And I don't agree with Marshall that the FTC can simply re-designate the classification of employees to fix the problem because it's the courts that interpret the antitrust laws. It's not definitions created by the FTC.

John Taladay:

The second point is we should recognize that the likely input of the exemption will be an adverse precedence. It shouldn't come to any surprise to anyone, but if your Uber driver increases the cost to Uber, you're going to pay more for your ride.

John Taladay:

That's a purely variable cost and the changes are going to pass right through the consumer, the economics. Now that might be a good and worthwhile trade-off for us to make in societal stem. I think it's a legitimate point for us to discuss as a society. That's for our legislatures, of course, to determine when to make those trade-offs. That's the job of the legislative branch, not of the executive branch in this case.

John Taladay:

I just think we need to be clear on the decision we're making when we talk about doing this and the implications it will have against [inaudible].

Eric Dunn:

Thanks, John. Gail, we've heard different perspectives here and maybe I wonder if you could touch on what a middle ground approach might look like, whether that's addressing misclassification or an approach that doesn't require us for rethinking the antitrust laws.

Gail Levine:

Sure. Look, I don't know that there's a perfect solution, but if you're looking for a middle ground solution, one interesting proposal that aims to whether it succeeds or not is a separate question. One proposal that I've read recently that aims to reach for a middle ground is the one by professor Marino Lao. She's an alum of the FTC and an academic. She has a proposal that came out a couple of years ago in a paper she wrote that her proposal goes along with these lines. Could we, through legislation or through judicial interpretation, arrange for the statutory antitrust labor exemption to be expanded, to cover gig economy workers, like drivers, she proposes.

Gail Levine:

In her piece, she wrestles with one of the biggest practical implications of the proposal of the argument, which is what does this mean for other independent contractors? Take doctors, for example, take physicians, can physicians unionize in a sense, in a colloquial sense, in the sense that they could bargain collectively against health plans using the same arguments that would let gig workers act collectively under her proposal?

Gail Levine:

Can doctors band together to demand 10, 20% increase in the fees they get, as chairman Patovsky asked in that 1999 testimony in front of Congress?

Gail Levine:

Her answer to that good question is no, for some very practical reasons and her calculus professor Lao reckons that collective action by independent physicians would raise healthcare costs, not just for healthcare plans, but for, in the end patients too.

Gail Levine:

Conversely, she argues that collective action by drivers would raise costs for the platforms, but not so much for the riders and given the difference between the healthcare cost increases and the writing cost increases, she suspects that the effect of the higher physician fees is likely to be magnitudes of order larger than any increase within the Uber costs context, even if there's a complete pass through.

Gail Levine:

Considerations like that, really concrete, practical considerations like that lead professor Lao to conclude that extending the antitrust exemption to independent physicians, bargaining with health plans would be a poor policy choice, in her language to quote her.

Gail Levine:

I think that helps capture one of the toughest challenges with an argument like this. It's going to require policy choices. Line drawing is hard. It's not impossible. It's can be done, but it's never easy, right? It's going to be really hard in a setting like this, where there's a lot of nuance and a lot of important considerations that need to be given proper weight. Line drawing, by the way, is hard in the best of circumstances for a lawmaker, even harder for courts who may feel that they don't have the guidance they would want as they try to make these policy choices, which makes it even harder to do a solution like this through traditional interpretation, as opposed to legislation.

Gail Levine:

Look, in fairness, even professor Lao, who put forward this proposal recognizes this is no perfect solution, right? She's quite candid about that. I think that underscores a larger point here, which is these are hard questions and it's possible that we're going to have to hard questions as we wrestle with this debate.

Eric Dunn:

Great, thanks, Gail. Marshall, you were part of the initial part of this conversation. I would like to bring you back in, maybe for a little bit of a rebuttal.

Marshall Steinbaum:

Yes, I think we need to resist this idea that you can have too much coordination of small players because that will increase prices to consumers. For example, doctors already have the ability to bargain collectively and raise healthcare prices. It's called hospitals or giant group practices.

Marshall Steinbaum:

I think if we implemented an exemption from antitrust that favors small producers, you would actually de-concentrate the healthcare sector and reduce prices paid by patients, employers, healthcare plans that we all know are a giant problem in the economy.

Marshall Steinbaum:

I think it's wrong to take as a starting point that you have a bunch of atomized, independent doctors providing services and if we let them band together, oh my God, your healthcare bill is going to go up. The healthcare bill is already high and it's because they are allowed to bargain collectively by joining giant corporations.

Marshall Steinbaum:

It's the workers who are disallowed, in most cases in the economy from collectively bargaining. I think that proposals to expand or exempt a broader set of collective behavior from antitrust, as I said, would de-concentrate the healthcare industry and in general, disperse power in the economy, I would say, as John Marshall said in the panel yesterday from at the labor union's perspective, there's a concern here about defacto creating a third employment category.

Marshall Steinbaum:

That is, indeed, a very major concern. It's why the proposal I enunciated earlier in this panel, I think avoids that by exactly using the employment status to effectuate an antitrust exemption.

Marshall Steinbaum:

We need to be mindful of that in how we craft a larger exemption that de-concentrates economic power in the economy. By and large, I just totally do not agree with what Gail said about the dangers and needing to balance the harms to consumers against the benefits to small producers or something like that.

Eric Dunn:

Sandeep, do you want to jump in here?

Sandeep Vaheesan:

Yeah, just to build on what Marshall said, John recited, the familiar antitrust line that price-fixing is the supreme evil of antitrust. I don't know if you said that as such, but he was expressing that sentiment.

Sandeep Vaheesan:

I think the unstated assumption in that anti price-fixing rhetoric is apart from these notorious price fixers, there is perfect competition and price equals marginal cost across the economy but what's really happening is antitrust is allowing certain entities to exercise pricing power.

Sandeep Vaheesan:

I'm really glad John mentioned the example of corner gas stations accused of price fixing. Yes, under current antitrust law, two competing gas stations cannot coordinate on price, but what they can do is they can combine and become a single entity and exercise the pricing power using the privileges of corporate ownership, as well as the privileges that come with property rates.

Sandeep Vaheesan:

They can't price fix, but they can merge and exercise even greater pricing power than they would have as independent coordinating rivals. That's an example of the way in which antitrust allocates pricing power to certain entities. General tolerance of mergers and acquisitions, including horizontal mergers and acquisitions.

Sandeep Vaheesan:

Uber offers another example. Uber says, "Our drivers are independent contractors. They exist outside of firm boundaries. We don't owe them the duties that come with employment." At the same time, Uber says, "We will set their fares, We will set their take-home pay. We will dictate their routes using vertical

restraints." Uber's trying to have its cake and eat it too, saying that these workers are not employees, but we will control them as though they were employees and exercise pricing power, the pricing power meaning in this context, a small group of venture capitalists and executives in the San Francisco bay area get to decide the price of rides around the world.

Sandeep Vaheesan:

At the same of time, that antitrust permits that, it says no. If a group of Uber drivers here in Washington, DC come together and try to raise their rates by 5%, that is per se, illegal price-fixing, potentially even subject to criminal prosecution.

Sandeep Vaheesan:

Last but not least, Marshall mentioned this issue of how the FTC defines employment, the types of cases it brings, the FTC and DOJ always exercised prosecutorial discretion. The FTC hasn't enforced their Robinson-Patman Act in decades. The department of justice went more than 20 years without a single monopolization

Sandeep Vaheesan:

And sued in court. So I think on the flip side, they could exercise their prosecutorial discretion much more fair and equitable ways. For example, by putting out enforcement guidelines saying that we will not challenge coordination among certain classes of workers, among certain classes of small producers facing powerful counterparties. So they're exercising prosecutorial discretion as we speak. We simply want them to exercise prosecutorial discretion in a different manner.

Eric Dunn:

And John, do you want the last word on this topic before we shift gears?

John Taladay:

I will only make one comment, which is, I think it's not correct to say that if two gas stations merged in a way that allow increased prices that would be perfectly okay. [Because] that would be illegal under section seven. Maybe we're not [inaudible] of the claim act. Maybe we're not very good at catching those mergers, but [subject] to interstate commerce requirement [inaudible].

Eric Dunn:

All right. So we focused a lot of the discussion so far on employees, but what about employers. Sandeep, I know this is an area you've given a lot of thought, and maybe you can start off the discussion here.

Sandeep Vaheesan:

Sure. So, I talked about one important myth informing antitrust today. So I think a second important myth is that antitrust protects, and promotes all forms of competition. So there's this familiar line from court decisions, including Supreme court decisions, which says that the Sherman act was enacted for the protection of competition, not competitors. I would argue it's a silly line because if you take that line literally, a firm is entitled to use industrial sabotage against its survivals, and that rival would have no recourse under the antitrust law.

Sandeep Vaheesan:

Careful evaluation of course... Case law actually reveals is, antitrust law permits certain types of competition, and restricts other methods of competition. So for example, section two of the Sherman restricts monopolist, and using exclusive dealing, refusals to deal and below cost pricing to obtain or maintain a monopoly. So obviously these restrictions are not as stringent as they once were, but they still limit competitive methods, that monopolists and near monopolists can use.

Sandeep Vaheesan:

And importantly, antitrust has long restricted the use of generally prohibited practices such as deception and property destruction. So there's a case in the early thousands called Conwood versus US tobacco. In which a six circuit affirmed then finding a monopolization against the dominant nature of smokeless tobacco for engaging in other practices, stealing and destroying the display racks of a smaller smokeless tobacco company.

Sandeep Vaheesan:

So antitrust, even now reinforces generally applicable laws and norms. So looking at the gig economy, one important method of competition for firms like Uber, Lyft and DoorDash has been misclassification of their workers, saying that they are independent contractors and not employees. And so why is misclassification an unfair method of competition. Through this competitive tactic, firms lower their labor costs, and obtain an advantage of arrivals that faithfully and diligently comply with federal and state labor and employment law.

Sandeep Vaheesan:

This is in competition on the merits to use a familiar antitrust term of art. It is competition through law breaking. And some of this could already be challenged under section two of the Sherman act, but section two at present has fairly high standards of proof. Section two cases are not easy for plaintiffs, including the government to win, but fortunately there is a simpler, and easier path out there, and that is the FTC act, section five, which prohibits among other things, unfair methods of competition.

Sandeep Vaheesan:

And I think it's worth emphasizing how broad the substantive prohibition is. So now I'll briefly quote this 1986 decision called FTC versus Indiana Federation of Dentists, case from quote and quote, the modern era, this is not a case in the fifties and sixties, is a case that antitrust practitioners in the mainstream still take very seriously.

Sandeep Vaheesan:

The court said. 'The standard of fairness under the FTC act is by necessity an elusive one and compassing not only practices that violate the Sherman act, and the other antitrust laws, but also practices that the commission determines are against public policy for other reasons.' So the court's clear, the FTC act is broader in scope than Sherman and Clayton. FTC can reach conduct that doesn't necessarily run a vow of section one, two or seven. And I think the moment is ripe for the FTC to go after misclassification as an unfair method of competitions.

Sandeep Vaheesan:

So I was delighted to see the FTC under Chair Khan in early July rescind the 2015 section five statement that read the FTC's unfair methods of competition power rather narrowly, and almost [autonomously] with Sherman and Clayton, except for some maybe marginal differences, and I was expecting a flurry of activity after the rescission of that statement, both on the enforcement and policy making side, that hasn't happened yet.

Sandeep Vaheesan:

We still have a few weeks left in 2021, and I remain cautiously optimistic that the FTC will use this power more fully in the new year. I'll just wrap by saying, I think misclassification is a worthy FTC target for two reasons. It sends a specific message to not only firms in the gig economy, but many other sectors that, misclassification will not be tolerated. If you exercise employment like control over workers, you must comply with the duties that come with being an employer. I think it also sends an important general message. Law breaking will not be tolerated as a competitive strategy going forward.

Sandeep Vaheesan:

And I hope the FEC brings a case like this early in the new year, as part of reviving and to implement the competition power, and seeking to channel business strategy away from unfortunately familiar examples such as the abuse of monopoly power, the reliance on privilege access to financing and yes to general prohibited practices, and toward more socially beneficial things like investment innovation and the pursuit of operational efficiencies.

Eric Dunn:

Marshall, do you want to jump in here and add anything?

Marshall Steinbaum:

Sure. Yes. I was delighted to have John bring up the subject of gas stations, because they're one of my favorite things to talk about in antitrust, and in particular, the case US Richfield oil from 1951, which concerns the resale price maintenance and exclusive dealing of contracts that a dominant oil refinery imposed on gas stations.

Marshall Steinbaum:

And in the ruling on that case, the judge said very explicitly, these gas station proprietors are not employees. They are independent business men, in the lingo of that era, and therefore they have the right to operate independently of these coercive contracts employed by the dominant oil refiner. That exact jurisprudence is at the heart of... Or I should say there be a repealing, the overturning of that jurisprudence is at the heart of the gig economy. And also explains why... The example that John was mentioning where you have two gas stations on opposite corners agreeing to fix prices, that's illegal.

Marshall Steinbaum:

They decide to merge, or maybe we do catch that under our merger review process, but they just both decide to affiliate with the same oil refiner, and fixed prices that way. Almost no question. They're not going to be targeted by existing antitrust law, and that goes very strongly in the case of the gig economy as well. You have a business model that depends almost entirely on the vertical restraints that a dominant platform imposes on supposedly independent contractors operating on their platform that

are engaging in bilateral commerce with customers to which the platform's not a party. Oh, but the platform actually sets prices for that commerce. And it does so in such a way that the drivers not employ steering methods in order to direct customers to platforms that take a lower share of what they pay by charging lower prices.

Marshall Steinbaum:

So in the... But [for a] world, Uber drivers or any drivers for any ride share platform, would be able to set lower prices on platforms that have a lower take rate, and thus enhance platform competition in the ride share market. Recently, there was an antitrust claim by a sidecar former competitor of Uber that entered the market in California, and their business strategy was basically to offer better terms to drivers.

Marshall Steinbaum:

Uber drove them out of the market using predatory pricing, using tortious interference, they submitted all sorts of fraudulent ride requests to the platform in order to prevent sidecar from servicing their customers. That succeeded, that strategy by... That monopolization strategy by Uber succeeded in gaining control of the market. The motion, or the antitrust claim by sidecar, survived the motion to dismiss, and now that case has been settled, but that speaks to the counterfactual of healthy platform competition, and the degree to which the vertical restraints that have been immunized from antitrust liability by the current antitrust regime are behind that absence of platform competition.

Marshall Steinbaum:

So, as I said, direct price fixing, I mean, John himself said, the Supreme evil basically at antitrust is price fixing well, [richer] companies do it all the time. That also pertains to non-linear bonus based pay. So these are basically incentives for the drivers to accept as many rides as possible from a given platform. And then they get a lump sum, but that reduces their labor supply elasticity, this would be the platform on any one ride that can push down, pay and force them to accept rides that are less advantageous to them.

Marshall Steinbaum:

There's minimum acceptance rates. So all of what I'm saying is basically the sort of propaganda that you hear from gig economy labor platforms is, 'Oh, the drivers love flexibility. So they shouldn't be employees.' Well, the platforms do not provide flexibility. What they provide is control in the absence of fulfilling their obligations as employers, I should also mention, I was very glad to hear Chair Khan on her opening remarks yesterday, refer to UDAP claims unfair and deceptive acts and practices as potentials, having got competitive significance.

Marshall Steinbaum:

And she referred to the gig economy where, as we've seen over and over again, including in the sidecar example, I previously referred to, you've got a deception and unfair practices used to monopolize a market. And then you just basically sit back and cash out. And so those UDAP claims essentially are components of the monopolization of the market. That's also the case. I mean, even on going now in the gig economy, again to speak to this actual absence of flexibility and autonomy on the part of drivers.

Marshall Steinbaum:

They don't get told the destinations of the ride before they accept them. They don't get told the fair they're going to be paid before they accept or reject them. The premise of the idea that the drivers are correctly classified as independent contract, is that they have the autonomy to accept or reject the rides that are offered to them on the platform. And that is just functionally, not the case in practice.

Marshall Steinbaum:

So in summary, I would say that a crucial component of closing the sort of gray area that writes a broad boundary of the firm when it comes to antitrust through the use of vertical restraints, versus a narrow drawing of firm boundaries when it comes to labor law and obligations, as well as sectoral regulation. That gray area of basically the absence of any part source of liability from all of these areas of law is what enables the gig economy to exist. And a crucial component of improving the livelihood of workers within the gig economy is to close down that gray area. And that should be an enforcement priority of the federal agencies and particular, the agencies that have experienced litigating the Sherman act to partly address of gig economy work, and its substandard aspects.

Eric Dunn:

Okay. So Jen, Marshall went through a variety of different practices that raise antitrust concerns, and he touched on misclassification in particular, and I wonder if you could share your perspective from the labor law point of view.

Jennifer Abruzzo:

Yeah, sure, and Sandeep actually touched on the main issue, which is the competitive advantage of low road employers that engage in unlawful activities. Right? So, but just a tiny bit of context, and I know we're running out of time, so I'll try to be brief. While the NLRB, and me personally want to partner with the various agencies in any way that we can, the NLRB doesn't have any independent investigatory authority. We can only investigate, litigate and enforce statutory protections, if a charge is actually filed by a member of the public.

Jennifer Abruzzo:

So, it's just something to keep in mind. And I already spoke to the ways I'm working through the problems of misclassification when I talked about the super shuttle case, and trying to have the board reconsider the expansion of the independent contractor test. But another thing that I'm doing is I'm getting the board members to... Or I'm going to attempt to get the board members to find that the act misclassifying workers as independent contractors themselves, whether intentional, or not is a standalone violation of the NLRA, and the Trump board a couple years ago in a case called [Velox], made the decision that... We brought that standalone violation to them then, and they said that, 'An employer's communication to workers that they're classified as independent contractors, doesn't expressly prohibit them from engaging in collective activity. And doesn't expressly threaten them with adverse consequences.'

Jennifer Abruzzo:

And the board was focused on protecting the power of employers, to structure their working relationships to their benefit, including avoiding legal obligations to their workers. Despite the fact that, as I mentioned earlier, the NLRA was actually enacted because employers had too much power, and they were trying to level... Congress was trying to equalize that power.

Jennifer Abruzzo:

So it's my opinion that misclassifying employees in that way, whether intentional or not an employer is inherently interfering with restraining, and threatening employees with termination or other adverse action, if they exercise the right to organize and act collectively, or at the very least is messaging to them that they have no statutory protection at all.

Jennifer Abruzzo:

And it would be futile for them to engage in any sort of collective actions, and this is particularly pertinent in the labor context, and under the NLRA a because the NLRA expressly excludes independent contractors from its coverage, and relatedly, in addition to the fact that those that are misclassified deliberately or not, will believe that they have no rights to protections under the NLRA. At least the misclassification also means that they're being told that they may be prosecuted under antitrust laws.

Jennifer Abruzzo:

And all of that, again is a direct interference with the workers' rights that Congress has tasked me to protect. And I will just say that this standalone violation that I feel is appropriate goes well beyond gig workers. I issued a memo recently saying that, I believe that certain players at academic institutions also formally known as student athletes are statutory employees under the common law.

Jennifer Abruzzo:

And I also said that if the facts showed that the NCAA, or any conferences controlled some of the working conditions of these players, that they should be considered joint employers. And I also said in that memo, that if any of those entities, led these players to believe by word or by deed, that they didn't have statutory protections, I'd consider pursuing a standalone violation.

Jennifer Abruzzo:

So in addition to what everyone else has said, I too was very pleased to hear that Chair Khan is considering working with DOJ to provide guidance on how the Clayton act is designed to exempt worker, organizing activities, romantic trust laws, and to hear discussions about enforcement with respect to, for example, no poach and non-compete agreements, which I think also undermine the ability of workers to exercise their right to resign, for example, either individually or collectively to improve of their working conditions, or for mutual aid.

Jennifer Abruzzo:

And as I started this segment, I do welcome the opportunity to lend our expertise to the FTC as it investigates potentially unlawful mergers, or conduct that harms workers, including the vertical restraints, particularly in the joint employer and franchise situations, to turn it back.

Eric Dunn:

Thanks Jen. So John, you've heard a couple different perspectives on practices by employers that might raise concern under the antitrusts and the labor laws. And I wonder if you could share your perspective? From a practical point of view and also, from the private sector, what issues you see there.

John Taladay:

Yeah. Thanks Eric. I was glad to hear Jen talk about the NLRB approach to this, because I do think it's an appropriate issue to be considered under the labor laws. I think it takes a lot of distortion of the issue to turn it into a competition issue, especially if you're talking about designating this as some sort of per se, unlawful offense by unilateral actor.

John Taladay:

Because there, the questions have to be is the company dominant? And does the action actually preserve or extend the monopoly by excluding competitors? Right? So when you talk about [Khan] or Indiana Federation of Dentists, both of those actions were targeted directly against [their companies], and both of them came without any legitimate business objective for justification. Here, we're talking about something that's really quite different. And let's remind ourselves again, that these are buyers of goods and services. And let's remind ourselves that even coordination among buyers of goods and services are generally treated as rule of reason. Right?

John Taladay:

And this is going much further. It's saying that a unilateral action, would be to misclassify would be unlawful, but as Sandeep said, even unilateral actions to charge monopoly prices, which we know directly affect consumers adversely, are beyond the scope of the [antitrust] law and why? Because they're not exclusionary abuses, they're exploitive abuses.

John Taladay:

And the antitrust laws in the United States as we know, don't cover exploitative... Purely exploited abuses. And that's really where we are now. If you want to try and change the antitrust laws to do that, there are initiatives to do that, but it's certainly not where we are. So when we talk about misclassifications, does it make sense? Well, keep in mind again, the effect that everyone is concerned about is the depression of wages of the gig [work]. Again, a legitimate concern, but it also has a direct impact on consumer pricing. And to me that means you've got to at least evaluate whether that is legitimate justification or what they're doing.

John Taladay:

If it's unlawful under the labor laws, it should be prosecuted under the [inaudible], but to convert it to a per se offense, I think is way beyond the scope of where competition laws are. And while guidance from agencies can be helpful. Again, they do not interpret the antitrust laws us. We're going to just rid ourselves of this inconvenient principle of *res judicata* and ignore a hundred plus years of jurisprudence. I think we at least have to acknowledge where the competition laws are and how they interpret. So I think we're way beyond the way the antitrust laws could consider this classification [as it perceives].

Eric Dunn:

All right, John, thanks. I want to take the discussion back in the time we have to thinking about the potential friction between antitrust, and collective bargaining by gig workers and maybe just sort of touch on some practical solutions, and policy solutions to that friction and Marshall. I wonder if you could start the conversation and talk about what you see as potential solutions.

Marshall Steinbaum:

Actually, I think I'll take this opportunity to pass it to Sandeep if that's okay. I articulated already my view that the FTC does not need active Congress in order to exempt misclassified employees from antitrust liability.

Eric Dunn:

Okay. Sandeep take us away.

Sandeep Vaheesan:

Oh, thank you, Marshall. So yeah, I echo what Marshall said. You know, I think the misclassification problem will address the labor exemption problem. Because if workers are properly classified as employees, when they're subject to employment like control, they have the rights that come with employment, including the right to organize under the national labor relations act.

Sandeep Vaheesan:

And as Marshall said, in the meantime, the FTC can take concrete steps, including adopting different employment tests, and exercising its prosecutor discretion. Not to go after organizing by small players, instead using its resources, and literally limited resources to challenge and remedy existing inequalities rather than deepened, and perpetuate them. But thinking more broadly, we should also look at bonafide, independent contractors and small and medium size enterprises facing powerful counterparties. They're in similar positions of subordination as tens of millions of workers.

Sandeep Vaheesan:

Like how do we allow them to engage in concerted action, and exercise effective market governance? And I'm going to quickly talk about two models. So one is turning a hundred years old next year, and that's the Capper-Volstead act, which Congress passed in 1922. And it authorized extensive coordination among farmers and ranchers in the sale of crops and livestock, as well as the processing of crops and livestock.

Sandeep Vaheesan:

It really... It's a simple statute. It says persons engaged in the production of agricultural products as farmers, planters, ranch men, dairymen, [and] food growers, may act together in associations and collectively processing, preparing for market handling and marketing and interstate commerce and foreign commerce, such products of person, so engaged.

Sandeep Vaheesan:

And it also establishes oversight of their coordination by the secretary of agriculture. So I think it's a good model. It says, 'These defined and individuals, or entities can engage in concerted action, including collective marketing subject to oversight by the secretary of agriculture.'

Sandeep Vaheesan:

But it says they can engage in coordination of sellers, but not as buyers. So for example, the same group of farmers in a Capper-Volstead and cooperative do not have the right to fix wages for their workers. And it's been extraordinarily successful. Food and agriculture is an area where cooperatives have acquired significant market position, where they have a significant market presence. Many of the brands

we see on supermarket shelves, things like, Land O Lakes, Sun Made, these are all products of cooperative entities.

Sandeep Vaheesan:

So thanks to the [central] love. There's been a shift in power away from [financial] dominated corporations, toward a small producer run and manage cooperatives. Now there have been issues with cooperative governance, some cooperatives have been plagued by mismanagement and corruption, but others have actually done quite well and been run on fairly democratic lines. So I think this is a model we should look to generalize to other sectors of the economy to ensure that small producers, including bonafide independent contractors have the right to engage in market and firm governance.

Sandeep Vaheesan:

So I think that's a pretty good model for us to build on. I think the second is actually a fairly new one. So early this year, the Australian Competition Consumer Commission, enacted an exemption that allows small businesses defined as those with an annual turnover of less than 10 million Australian dollars, as well as franchisees to engage in collective bargaining. So under this exemption, McDonald's franchisees can collectively bargain the McDonald's international over the terms of their franchise agreements.

Sandeep Vaheesan:

There are some important limitations on this exemption that, they're not allowed to engage in group boycotts, so arguably their most important economic weapon is withheld from them. There's also no anti-retaliation provision. So McDonald's is still free to take action against franchisees that undertake concerted activity. This exemption only took effect earlier this year. Thus far there's been limited uptake on it, but I think, it's a promising model, and it shows that sister antitrust authorities abroad are taking the idea of coordination among small producers seriously.

Sandeep Vaheesan:

And I think our antitrust regulators in Congress should be thinking along these lines, more expansively, allowing small producers to engage in concerted activity instead of simply trying to tweak the labor exemption around the edges. And I think this is really critical if we are to confront the monopoly on decision making that exists in today's economy, where Uber has the power, and prerogative prices for millions of drivers, but those drivers, or even a small subset of those drivers do not have that same right and authority.

Eric Dunn:

All right. Thank you Sandeep. This has been a really interesting discussion. There's a lot of other points we could get to I'm sensitive at the time as we come to a close here. So I'll just end this discussion by everyone for participating. This is really enlightening. It's really... These discussions are always great when different perspectives are in conversation with each other. And I think we really accomplished that today, and got really a lot of different proposals and ways of thinking to interact. So really appreciate your perspectives for everyone watching. Thank you for tuning in, and I think I'll turn it over. The next... Good thing we have in the workshop is Karina Lubell, the Assistant Chief of the Competition Policy and Advocacy Section, giving closing remarks. Thank you.

Karina Lubell:

Good afternoon I'm Karina Lubell, an assistant chief in the anti trust division Competition Policy and Advocacy Section. Although we haven't figured out how to provide virtual refreshments after the workshop, I recognize that my comments are probably the only thing standing between you and the rest of your afternoon, so I promise to be brief.

Karina Lubell:

During the workshops opening remarks by assistant attorney general Cantor and FTC Chair Khan, we heard about the importance of competitive labor markets to each agency's mission, and how timely and critical it's for us to be examining these issues today. Particularly in light of president Bidens' executive order on competition. Experts discussed the growing prevalence of employer side market power, the challenges involved in proving antitrust harm to employees in litigation setting, and the strengths and weaknesses of antitrust of the tool for red addressing imbalances and bargaining power between employers and employees.

Karina Lubell:

We also were heard voices in labor, who described how lack of competition can hurt workers through monopoly power and other [extremes]. We described the role that collective bargaining can play in countering monopoly power, but also how unfair and deceptive practices. Worker misclassification and [inaudible] and the obstacles to collective bargaining.

Karina Lubell:

And to round of the day, yesterday we learned about central harms from non competes and other vertical restrictions, especially for low income and other workers who are ill positioned to negotiate such provisions or later challenged them in court. Today was another full day with keynotes by both Columbia university professor [Jeffrey Sachs] and special assistant to the president, Tim Wu who respectively highlighted the importance of having a legal framework to keep up with the evolution of our economy and describe the labor centered approach to antitrust.

Karina Lubell:

Both speakers [pointed] the benefits of a whole of government approach, to addressing labor issues? Today's panels, convened leaders from multiple executive agencies, and the labor community to discuss ways to protect labor competition, including through inter-agency collaboration, joint enforcement, and greater attention to competition equities in the regulatory review process.

Karina Lubell:

Panelists also discussed information sharing among competitors and whether employers have the guidance they need, when it comes to sharing confidential information. We heard an interesting historical perspective on competition enforcement in labor markets. And we just heard experts in antitrust and labor discuss how both areas of law think about collective organizing like gig worker.

Karina Lubell:

And offered views on ways this kind organizing might be supported, from addressing misclassification, to broadening antitrust statutory labor exemption, or pursuing state level reform. Needless to say these discussions have given our agencies a lot of food for thought. I'll like to thank our panelists and speakers

and moderators for engaging with us in this dialogue and ensuring that our understanding of competition analysis, and labor markets is cutting edge, and that we are using the right tools to achieve vibrant labor markets that benefit all Americans. The workshop would've never come together without proper planning and persistence of lawyers and economists at both agencies in particular, I'd like highlight the incredible effort undertaken by division attorney [Jack Lawine] and paralegal [Mashhad Ebadi] in pulling this workshop together.

Karina Lubell:

Just one final reminder, I know you've heard it throughout the day. Public comments are still welcome, and they may be submitted online through December 20th. Thank you to our audience for joining us during the past two days, as we explored the best means to promote competitive labor markets, and support worker mobility, this concludes our workshop, promoting competition and labor. Thank you and good afternoon.