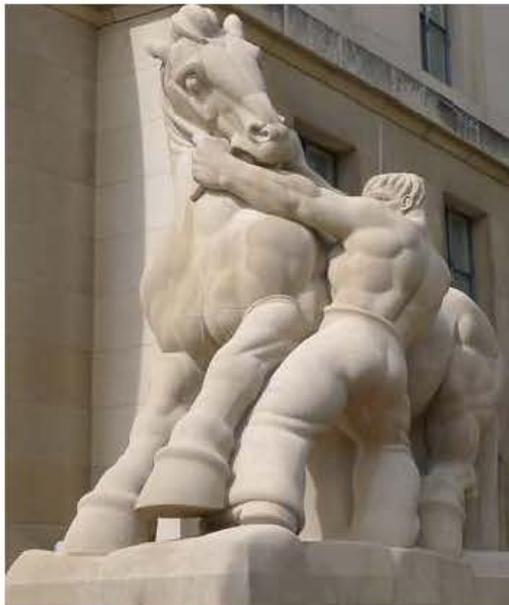


Law and Political Economy

How Contemporary Antitrust Robs Workers of Power

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The political economist Albert Hirschman developed the idea that members of an organization can exercise power in two ways—through exit and voice. Market activity is associated with exit: consumers unhappy with the price or quality of service of their current wireless carrier can switch to a rival carrier offering lower rates or better service. Elections exemplify voice: voters can replace a corrupt or ineffective incumbent officeholder with a challenger promising to make the government work for ordinary people. For workers, both exit (joining a new employer) and voice (making demands of a current employer) are important. Despite the pro-worker aims of the framers of the Sherman and Clayton Acts, antitrust law today is an enemy of both exit and voice for workers.

For more than a generation, antitrust enforcers have permitted labor markets to become highly concentrated and have also interfered with the efforts of a large segment of workers to build collective power.

Through their labor market actions, the Department of Justice (DOJ)

and Federal Trade Commission (FTC) reinforce, rather than tame, corporate power. To create a progressive, pro-worker antitrust, legislators and policymakers must adopt a radically different vision for the field.

Tens of millions of American workers wield little or no power in their place of work. In many parts of the country, workers lack meaningful exit. They face concentrated local labor markets (<https://www.econstor.eu/bitstream/10419/177183/1/dp11379.pdf>) in which only a handful of employers compete (at least theoretically) for their services. In some labor markets, employees have only one actual or prospective employer. In other words, many Americans, at least in their capacity as workers, may experience what we often think of as a relic of a bygone era—the company town. As recent (<https://www.econstor.eu/bitstream/10419/177058/1/dp11254.pdf>) studies (http://www.kellogg.northwestern.edu/faculty/benmelech/html/BenmelechPapers/BBK_2018_January_31.pdf) have shown, employer-side concentration is associated with significantly lower wages. And other research (<http://journals.sagepub.com/doi/abs/10.1177/0003122418762441>) has found that concentration at one level of a supply chain can depress wages further upstream. In addition to concentrated markets, approximately 30 million workers (<https://law.utexas.edu/wp-content/uploads/sites/25/Prescott-Noncompetes.pdf>) are subject

to non-compete clauses, which prevent them from accepting a new job or starting a business in the same line of work. Non-compete clauses, regardless of whether they are enforced, can signal to workers that their choice is either stay at their current job or suffer extended unemployment.

Along with possessing few exit options, most workers cannot assert effective voice in the workplace. Big business's legal and political war on labor's power has severely weakened unions. In contrast to the 1950s when roughly a third of wage and salary workers were unionized, only a small percentage of workers are members of labor unions today—around one in ten among all workers, and one in sixteen among workers in the private sector. This decline in union density explains a significant fraction of the forty-year stagnation in wages and increase in income inequality. Moreover, even if wage gains had kept pace with productivity, the collapse of organized labor means that workers lost say over numerous workplace issues.

While employees can speak up as individuals, this type of voice is no substitute for the collective voice that comes from a democratic union. Given that most individual workers are dispensable and replaceable for their employers, a lone voicing of grievance often can easily be ignored or even invite retaliation from an employer. And, beyond the site of employment, unorganized workers are less able to exercise voice in electoral politics and check the dominant influence of corporations.

Antitrust enforcers have allowed labor markets to grow more concentrated across the country. Just as labor law has been rewritten to cripple labor organizing, the executive branch and courts have remade antitrust to be much friendlier to capital over the past four decades. Influenced by the writings of Robert Bork, the Supreme Court has held that the antitrust laws are a "consumer welfare prescription." Although the Supreme Court and the antitrust agencies counterintuitively state that consumer welfare accounts for harms to workers and other sellers of services, the DOJ and the FTC focus their enforcement on mergers and practices harmful to consumers. In developing enforcement priorities, the federal antitrust agencies have relied on simplistic economic theory. Instead of directing their economists to study the structure of labor markets, the DOJ and the FTC have adopted an Econ 101 view of the world and *assumed* that labor markets are generally competitive on the employer side. Embracing this fiction, the agencies have never stopped a merger on labor market grounds. Due to antitrust inaction (and other factors), labor market concentration has increased since the late 1970s.

On top of not protecting workers' exit options, the FTC, under both Democratic and Republican administrations, has prosecuted numerous professional associations and other worker collectives for asserting voice. A worker's legal freedom to organize is contingent on his or her classification under federal labor law. Under federal law, workers who are classified as employees are entitled to an antitrust exemption and can bargain collectively. In contrast, workers who are classified as independent contractors cannot claim this exemption.

Exploiting this gap in the law, the FTC has filed many lawsuits against associations of independent contractors for "restraint of trade." As I describe in a [forthcoming](https://ssrn.com/abstract=3046302) (<https://ssrn.com/abstract=3046302>) article, targets of the FTC's anti-worker enforcement include doctors, ice skating coaches, music teachers, organists, and public defenders who aimed to raise their incomes through collective bargaining or codes of ethics that restrained competition among members. In light of these enforcement actions, antitrust is a real threat to the 20 million and growing workers classified, or misclassified, as independent contractors. Given the costs of defending against antitrust investigations and lawsuits and the potential for crippling damages, antitrust looms over efforts by all independent contractors to develop collective voice as workers.

The FTC has also advocated against state efforts to grant collective bargaining rights to discrete groups of workers. For instance, in 2008, the FTC criticized an Ohio executive order that granted collective bargaining rights to home health aides, who perform critical care work. These workers are disproportionately poor women of color and stood to gain a great deal from collective bargaining. The FTC, however, deemed horizontal coordination between home health aides on wages as illegal "price fixing."

The recent history of antitrust and labor reveals multiple themes. First, it illustrates how “laissez-faire is planned” through extensive state action. Much like current judicial interpretations of, for example, the First Amendment, Federal Arbitration Act, and Federal Rules of Civil Procedure, the current application of antitrust maintains and strengthens the power of capital. Antitrust enforcers have both failed to protect workers against employer power and thwarted independent contractors’ efforts to build collective power. By accommodating capital and policing labor, antitrust has robbed workers of both exit and voice. Far from being unexpected or unintended, antitrust law’s part indifference, part hostility toward workers is another predictable result of the close nexus between big business and the community of antitrust specialists.

Second, the progressive degradation of antitrust law means that only wholesale change can recover antitrust’s role in protecting worker liberty – and overthrow the current deference to big business power. Both increasing enforcement of existing anti-merger and anti-monopoly laws and enacting new laws and regulations are important. More broadly though, a philosophical transformation of antitrust is necessary. Attempting to apply the prevailing consumer welfare model in a pro-worker fashion (as a leading scholar (https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2967&context=faculty_scholarship) has suggested) is likely to be futile and introduce only greater incoherence to the field. Under present interpretations, “collusion is the supreme evil of antitrust,” including when the “Lilliputians” (https://www.jstor.org/stable/40843515?seq=1#page_scan_tab_contents) of the U.S. economy band together in solidarity. Whereas independent contractors’ horizontal coordination is categorically illegal, the Supreme Court and many in antitrust circles, relying on incomplete and questionable theory, believe that the prospect of monopoly “induces risk taking that produces innovation and economic growth.”

An antitrust enforcer anchored in consumer welfare is an antitrust enforcer anchored in anti-labor. It will continue to see no contradiction in prosecuting employers for colluding against workers one day and suing independent workers for collective bargaining the next. A durable progressive antitrust must invert the prevailing ideology and permit cooperation among workers (and the powerless in general) and condemn the consolidation and monopolization of capital by “the economic royalists.”

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2 responses

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