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## Labor Monopsony and Antitrust Enforcement: A Distorting Mirror

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### Recommended Citation

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## **LABOR MONOPSONY AND ANTITRUST ENFORCEMENT: A DISTORTING MIRROR**

*Geoffrey A. Manne, Brian C. Albrecht & Dirk Auer\**

*In recent years, there has been growing interest among economists, lawyers, and policymakers in the concept of monopsony power, particularly in labor markets. This interest has been spurred partially by academic research suggesting that labor market concentration may be more prevalent than previously thought, as well as policy developments signaling a more aggressive approach by antitrust authorities to labor-monopsony issues. Despite this momentum, significant empirical and conceptual challenges remain in using antitrust law to address labor monopsony.*

*On the empirical front, the evidence on the extent and effect of labor monopsony is mixed. While some studies have found evidence of labor market concentration and its effects on wages, these studies often rely on indirect measures that have limited applicability to antitrust cases. More direct estimates of monopsony power are rare and often rely on stylized economic models that may not capture the complexities of real-world labor markets. Moreover, the economics literature has yet to reach a clear consensus on the appropriate framework to assess labor market power in antitrust contexts.*

*Conceptually, there are important differences between monopoly and monopsony that complicate the application of traditional antitrust tools and standards to labor markets. One key difference is that monopsony and monopoly markets do not sit at the same place in the supply chain. This matters because all supply chains end with final consumers, and anti-trust policy must grapple with how to balance effects at different levels of the distribution chain. In evaluating monopsony, authorities must consider the “pass-through” to final product markets, a complication that does not arise in the mirror-image case of monopoly.*

*More broadly, it remains uncertain whether demonstrating and remedying monopsony power is feasible under existing legal standards. While harms to workers can theoretically be cognizable under the*

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*antitrust laws, proving such harms is challenging, especially under the prevailing consumer welfare standard. The consumer welfare standard becomes challenging to apply when a merger may harm workers but benefit consumers downstream. Weighing these cross-market effects raises unresolved questions about the proper balance between consumer and producer surplus. Moreover, the unique features of labor markets—such as the importance of firm-specific investments in human capital—pose challenges for market definition and the assessment of competitive effects. Traditional concentration measures and econometric tools used in product markets may not readily translate to the labor context.*

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#### INTRODUCTION

Market power—traditionally discussed in terms of *monopoly* power on the sell side—has faced increasing scrutiny from the buy-side or *monopsony* perspective. This is especially true regarding labor monopsony, where employers may exert undue control over employees, thereby detrimentally affecting wages and working conditions. This shift in focus reflects a growing concern among economists, lawyers,

and policymakers about the implications of such power dynamics in the labor market. The growing discourse around monopsony power in labor markets has been further marked by a keen interest in applying antitrust laws to combat these concerns.

Recent policy initiatives and enforcement decisions indicate a burgeoning will to leverage antitrust law against perceived labor market power abuses aggressively. In the first half of 2024, the Federal Trade Commission (FTC) enacted a rule banning non-compete agreements for nearly all workers in the United States, justified on grounds that such agreements amount to “unfair methods of competition.”<sup>1</sup> While the non-compete ban contains an extensive discussion of the labor-economics literature on non-competes,<sup>2</sup> the sweeping nature of the ban suggests that policymakers view monopsony power as a pervasive issue affecting most workers, despite the nuances and ambiguity of the literature.<sup>3</sup> The FTC has also brought an enforcement action challenging the proposed Kroger/Albertsons merger, partly predicated on concerns about the combination’s potential to diminish labor competition and exacerbate monopsony power in local labor markets.<sup>4</sup> In particular, the complaint claims that the merger would increase the parties’ leverage in negotiations with local unions over wages, benefits, and working conditions in an asserted “union grocery labor” market—introducing a novel and notably narrow market definition and an untested, contentious theory of harm (reduction in bargaining leverage) particular to labor markets.<sup>5</sup> Meanwhile, at year-end 2023, the FTC and the U.S. Justice Department (DOJ) Antitrust Division published updated merger guidelines that, for the first time, included an expanded discussion of

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1. *See generally* Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912) (available at <https://www.federalregister.gov/documents/2024/05/07/2024-09171/non-compete-clause-rule> [<https://perma.cc/L9RN-B8TW>]). On August 20, 2024, the United States District Court for the Northern District of Texas issued a nationwide preliminary injunction before the rule went into effect. *See* *Ryan, LLC v. FTC*, 746 F. Supp. 3d 369 (N.D. Tex. 2024).

2. Non-Compete Clause Rule, 89 Fed. Reg. at 38372–74.

3. For an extensive review of the non-compete literature relied upon by the FTC and a discussion of the nuances and limitations of that literature, see Scholars of Law & Economics, ICLE, Comments on FTC’s Notice of Proposed Rulemaking Regarding Non-Compete Clause Rule, Matter No. P201200 (Apr. 19, 2023) (available at <https://laweconcenter.org/resources/comments-of-scholars-of-law-economics-and-icle-in-the-matter-of-non-compete-clause-rulemaking> [<https://perma.cc/R5VN-T5YZ>]). Notably, in enjoining the non-compete rule, the court held that, in addition to exceeding the FTC’s authority, the rule is also “based on inconsistent and flawed empirical evidence, fails to consider the positive benefits of non-compete agreements, and disregards the substantial body of evidence supporting these agreements.” *Ryan*, 746 F. Supp. 3d at 388.

4. Complaint ¶ 68, *Kroger Co./Albertsons Cos., Inc.*, FTC Docket No. 9428 (Feb. 26, 2024) (available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/kroger-companyalbertsons-companies-inc-matter> [<https://perma.cc/2TJV-35W6>]) [hereinafter *Kroger/Albertsons Complaint 2024*].

5. *Id.* ¶¶ 63, 70.

monopsony issues.<sup>6</sup> The guidelines discuss the potential labor market implications of mergers in multiple sections and adopt a guideline related explicitly to labor market considerations that calls out the purportedly unique features of labor-monopsony markets “that can exacerbate the competitive effects of a merger.”<sup>7</sup> While the non-compete ban, the Kroger/Albertsons merger challenge, and the 2023 Merger Guidelines are the most prominent and assertive examples, they are far from the only ones.<sup>8</sup>

President Joe Biden explicitly called for greater scrutiny of “monopsony power” in labor markets in his 2021 Executive Order on competition.<sup>9</sup> The U.S. antitrust agencies have similarly been ramping up enforcement and other policy work at the intersection of labor and competition policy. For instance, the DOJ sued to block Penguin Random House’s acquisition of Simon & Schuster, partly based on monopsony concerns regarding the market for top-selling book authors.<sup>10</sup> Under the current leadership, the FTC has brought and settled several enforcement actions alleging that certain non-compete agreements violated

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6. See generally DOJ & FTC, MERGER GUIDELINES 27 (Dec. 18, 2023), <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf> [<https://perma.cc/7L9W-XEY6>] [hereinafter 2023 MERGER GUIDELINES].

7. *Id.* at 26–27.

8. For example, in 2010, the DOJ brought suits against major Silicon Valley employers for entering into anticompetitive “no-poach” agreements to restrict hiring of engineers and programmers from competitor firms. The department alleged in those suits that the agreements amounted to unlawful allocation of the relevant labor market among horizontal competitors. See generally Press Release, DOJ, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010) (available at <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee> [<https://perma.cc/33Y5-7JB3>]). The DOJ also challenged a hospital association’s members agreement to set uniform billing rates for certain nurses as an improper exertion of buyer power in 2007. See Complaint ¶¶ 68–69, *United States v. Arizona Hosp. & Healthcare Ass’n*, No. CV07-1030-PHX (D. Ariz. May 22, 2007). Although both the “no-poach” and nurse wage-setting actions ultimately settled, these cases demonstrated an increasing willingness to extend antitrust scrutiny to labor market effects and to discipline allegedly monopsonistic practices by dominant buyers of labor.

9. Promoting Competition in the American Economy, Exec. Order No. 14036, *in* 86 Fed. Reg. 36987, 36988 (July 14, 2021). That EO also called for a “whole of government” approach to combatting competition issues generally, and the following year the FTC signed a memorandum of understanding with the National Labor Relations Board (NLRB) “regarding information sharing, cross-agency training, and outreach in areas of common regulatory interest.” See Memorandum of Understanding Between FTC and Nat’l Lab. Rels. Bd. [NLRB] Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest (July 19, 2022) (available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ftcnlrb%20mou%2071922.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf) [<https://perma.cc/S3TE-QPZW>]). In 2023, the FTC signed a similar memorandum of understanding with the U.S. Dep’t of Lab [DOL]. See Memorandum of Understanding Between DOL & FTC (Aug. 30, 2023) (available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/23-mou-146\\_oasp\\_and\\_ftc\\_mou\\_final\\_signed.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/23-mou-146_oasp_and_ftc_mou_final_signed.pdf) [<https://perma.cc/R582-KMGN>]).

10. *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 11 (D.D.C. 2022).

the FTC Act's prohibition on "unfair methods of competition."<sup>11</sup> The day after announcing the first three of those settlements, the FTC first proposed what would become its nationwide ban on the use of non-competes via a notice of proposed rulemaking.<sup>12</sup>

Conceptually, the relationship between labor economics and antitrust law has also been the subject of growing academic attention in recent years. Several law review articles have highlighted the historical disconnect between the two fields, lamenting that labor markets have often been overlooked in antitrust analysis.<sup>13</sup> They also point to some areas where labor economics has begun to make inroads into antitrust enforcement, however, and argue that greater attention is warranted.<sup>14</sup>

While the direction and magnitude of policy attention seem clear, this paper argues that they are not supported by empirical and theoretical foundations sufficient to bear the weight of these galvanized efforts. Rather, the debate is far from settled on the economic evidence, analytical tools, and legal standards appropriate for understanding and addressing monopsony power in labor markets as an antitrust concern. In fact, the current state of economic research and antitrust jurisprudence raises more questions than answers about the appropriate framework for assessing labor market power.

Examples of this disconnect are legion. Empirical data concerning the magnitude and impact of labor monopsonies is inconsistent. Evidence on the extent of labor market power is mixed, with studies reaching divergent conclusions depending on the data, methodology, and

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11. See Press Release, FTC, FTC Cracks Down on Companies That Impose Harmful Non-compete Restrictions on Thousands of Workers (Jan. 4, 2023) (available at <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers> [<https://perma.cc/BM4Y-9R5H>]); see also Complaint & Final Decision and Order, Anchor Glass Container Corp., FTC Docket No. C-4793 (June 2, 2023) (available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/2110182-anchor-glass> [<https://perma.cc/GU2T-FCDP>]).

12. See Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

13. See, e.g., Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 571 (2018) ("As far as we know, the DOJ and FTC have never challenged a merger because of its possible anticompetitive effects on labor markets, or even rigorously analyzed the labor market effects of mergers as they do for product market effects. Nor have we found a reported case in which a court found that a merger resulted in illegal labor market concentration."); Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1347 (2020) ("The antitrust laws have rarely been used against employers by private litigants or the government. And when they have been used—whether by private litigants or by the government—they have been used mostly against the most obvious forms of anticompetitive conduct, like no-poaching agreements. Much under-the-radar activity has been unaddressed."); Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. CHI. L. REV. 511, 511 (2023) ("The history of antitrust law and labor has not been pretty.").

14. See, e.g., Hovenkamp, *supra* note 13, at 517 ("Labor market restraints require more attention than they have received in the past.").

markets analyzed. While the Biden administration has been quick to cite economic research on labor market concentration and earnings as motivating factors,<sup>15</sup> the referenced studies provide only indirect evidence of monopsony power and have limited applicability to antitrust cases, while direct estimates of monopsony power are rare and often rely on economic models that have not yet been accepted within antitrust. A more complete analysis of the literature on concentration in labor markets does not support the narrative that labor markets are highly concentrated across vast swathes of the economy. From a theoretical standpoint, the economics literature has yet to reach a clear consensus on the appropriate antitrust framework for labor markets. Moreover, the distinct economics of monopsony contrast with those of monopoly, introducing unresolved complexities into customary modes of antitrust analysis, such as market definition, assessment of efficiencies, and the consumer welfare standard.

The antitrust authorities have ignored these complications in their recent actions. Guideline 10 of the 2023 Merger Guidelines, for example, states that labor markets frequently have unique characteristics that may exacerbate the competitive effects of mergers:

[L]abor markets often exhibit high switching costs and search frictions due to the process of finding, applying, interviewing for, and acclimating to a new job. Switching costs can also arise from investments specific to a type of job or a particular geographic location. Moreover, the individual needs of workers may limit the geographical and work scope of the jobs that are competitive substitutes.<sup>16</sup>

This implies that market attributes like switching costs, search costs, and transportation costs are unique to labor markets. Of course, this is not true. Nor is there any basis for thinking labor markets are even relatively *more* susceptible to such costs. At the same time, the guidelines' statement implies that these labor market costs are borne only by workers, rather than employers—but there is no reason why that should be the case (nor is any given). Indeed, research has found that switching costs do not always make markets less competitive, suggesting that there may not be harms borne by any party at all in some cases.<sup>17</sup>

The guidelines further assert that relevant labor markets “can be relatively narrow” and that “the level of concentration at which competition

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15. See generally U.S. DEP'T OF THE TREAS. [DOT], THE STATE OF LABOR MARKET COMPETITION (Mar. 7, 2022) (available at <https://home.treasury.gov/system/files/136/State-of-Labor-market-Competition-2022.pdf> [<https://perma.cc/FR5A-D5H7>]).

16. 2023 MERGER GUIDELINES, *supra* note 6, at 27.

17. See Jean-Pierre Dubé, Günter J. Hitsch & Peter E. Rossi, *Do Switching Costs Make Markets Less Competitive?*, 46 J. MKTG. RSCH. 435, 435 (2009) (“In the simulations, prices are as much as 18% lower with than without switching costs. More important, equilibrium prices do not increase even in the presence of switching costs that are of the same order of magnitude as product price.”).

concerns arise may be lower in labor markets than in product markets, given the unique features of certain labor markets.”<sup>18</sup> Because these are the merger guidelines and are meant to cover a wide variety of situations, one could read “may” as implying something more than a possibility. Indeed, the guidelines appear to indicate that, following mergers, anticompetitive effects are more of a concern in labor markets than in product markets.

Unfortunately, the models commonly employed in labor economics to support these claims rely on assumptions about worker mobility, employer conduct, and market structure that likely oversimplify real-world dynamics. All models are simplifications, but how important are those simplifications for antitrust? The economic models commonly used to study labor markets have not been subjected to the same level of antitrust scrutiny as those employed in industrial-organization (IO) economics to analyze product markets. Over the past several decades, IO models of imperfect competition have been rigorously adapted and applied to assess the competitive effects of mergers, collusive agreements, and exclusionary practices in antitrust matters. Empirical IO research has frequently focused on questions of direct relevance to antitrust enforcement, and IO economists have often played an active role in developing the analytical tools used by agencies and courts.

In contrast, most labor-economics research has been conducted without an explicit focus on antitrust policy and, until recently, labor economists were rarely involved in antitrust matters. As a result, the key assumptions and implications of labor-economics models have not been fully stress-tested against the evidentiary burdens and legal standards of antitrust cases—at least, not to an extent even approaching that of their IO counterparts. This disconnect poses challenges to the practical application of labor economics to antitrust enforcement, as the models and empirical techniques most familiar to labor economists may not align well with the demands of antitrust law.

But it is not just the economics that is more unsettled than proponents would like; the law is unsettled, too. It is unclear whether demonstrating and remedying monopsony power is feasible under existing legal standards, for example. Harms to labor can indeed be cognizable under the antitrust laws, which prohibit specific exercises of monopsony power and not just monopoly power—something explicitly recognized by the enforcement agencies even during the Obama administration.<sup>19</sup> There

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18. 2023 MERGER GUIDELINES, *supra* note 6, at 27.

19. See DOJ & FTC, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4 (2016) (available at <https://www.justice.gov/atr/file/903511/download> [<https://perma.cc/END9-5FS7>]) (“The DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to

are, however, ambiguities in accurately defining the boundaries of relevant labor markets. And establishing tangible anticompetitive effects on workers as “consumers” of jobs also poses challenges that have not been grappled with by proponents of invigorated antitrust enforcement in labor markets.

For example, the decisions in recent criminal no-poach cases suggest evidentiary complications in proving that such agreements amount to meaningful market allocations that may be inconsistent with a per se rule. Thus, in *United States v. DaVita Inc.*, the judge ruled that no-poach agreements could be an illegal market-allocation agreement, but the jury acquitted the defendants of criminal no-poach charges, finding that the DOJ had failed to prove that the agreements at issue were made with the purpose of allocating the market and ending meaningful competition for employees.<sup>20</sup> The government has faced similar difficulties in other cases.<sup>21</sup>

Outside of per se cases, antitrust becomes even more complicated, of course. Addressing labor market power requires tradeoffs under established antitrust standards, raising unresolved questions about the goals of antitrust enforcement. As Herbert Hovenkamp notes, “it has been explicit from the start that antitrust’s concern is protection from reduced market output and, concurrently, higher prices.”<sup>22</sup> This focus on output and price effects in downstream product markets sits uneasily with concerns about labor market harms, which may not always manifest in higher consumer prices or reduced output in the downstream product market.

For example, the consumer welfare standard becomes difficult to apply when a merger may harm workers, but benefit consumers downstream, as when wage reductions for workers accompany consumer benefits (such as lower prices) in downstream product and service markets. Do all mergers that reduce wages for one market of workers “substantially

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fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct.”).

20. See Order Denying Defendant’s Motion to Dismiss & Verdict, *United States v. DaVita Inc.*, No. 21-cr-00229 (D. Colo. Apr. 15, 2022).

21. See, e.g., Ruling and Order on Defendants’ Motions for Judgment of Acquittal, *United States v. Patel*, No. 21-cr-00220 (D. Conn. Apr. 28, 2023) (acquitting all defendants and holding that the evidence did not permit a reasonable jury to conclude there was an agreement to meaningfully allocate the labor market for engineers); *United States v. Manahe*, No. 22-cr-00013 (D. Me. Aug. 8, 2022) (acquitting all defendants of charges of a wage-fixing conspiracy among home-healthcare agencies); *United States’ Motion to Dismiss, United States v. Surgical Care Affiliates, LLC*, No. 21-cr-00011 (N.D. Tex. Nov. 13, 2023) (discussing how the DOJ voluntarily dismissed its indictment of a no-poach conspiracy of senior-level surgical facility employees).

22. Herbert Hovenkamp, *The Slogans and Goals of Antitrust Law*, 25 LEG. & PUB. POL’Y 705, 705 (2023).

lessen competition” in a “line of commerce”?<sup>23</sup> In practice, weighing these cross-market effects raises unresolved questions about the goals of antitrust enforcement. Is the sole focus on final-product consumers, or should producer surplus also be considered? If so, how should we value and compare producer versus consumer harms?

The 2023 Merger Guidelines acknowledge these issues, but sidestep them by simply asserting their irrelevance:

If the merger may substantially lessen competition or tend to create a monopoly in upstream markets, *that loss of competition is not offset by purported benefits in a separate downstream product market*. Because the Clayton Act prohibits mergers that may substantially lessen competition or tend to create a monopoly in *any* line of commerce and in *any* section of the country, *a merger's harm to competition among buyers is not saved by benefits to competition among sellers*.<sup>24</sup>

As we explain below, however, the issue is not so simple, and its resolution cannot be assumed simply by quoting the Clayton Act.<sup>25</sup>

While the guidelines propose treating labor markets similarly to product markets for analytical purposes, the *Kroger/Albertsons* complaint suggests that, in practice, the agency believes that labor markets should be defined more narrowly—for example, *unionized* workers in *very narrow* geographic areas.<sup>26</sup> This approach raises further conceptual issues in market definition, as labor markets may transcend traditional industry and geographic boundaries in complex ways. More work is needed to align labor economics with the realities of antitrust enforcement, and answering these questions may require revisiting foundational assumptions that currently guide antitrust policy. Meanwhile, there is only a scant history of merger enforcement in input markets in general and even less in labor markets.<sup>27</sup> Caution is thus warranted before concluding that antitrust can or should seek to remedy alleged monopsony harms to workers absent the traditional harm to consumers of final goods.

Conventional wisdom holds that monopsony is the “mirror image” of monopoly and that the tools of monopoly analysis can simply be

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23. See 15 U.S.C. § 18 (2018) (“No person shall acquire . . . the whole or any part of the stock . . . of [another] person . . . where in any line of commerce . . . the effect of such acquisition . . . may be substantially to lessen competition . . .”).

24. 2023 MERGER GUIDELINES, *supra* note 6, at 27 (emphasis added).

25. See *infra* Parts III & IV.

26. Kroger/Albertsons Complaint 2024, *supra* note 4, at ¶¶ 8–9.

27. See Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1033 (2019) (“While the use of section 7 to pursue mergers among buyers is well established, there is relatively little case law.”).

ported over (in reverse) to monopsony analysis.<sup>28</sup> Some have argued that “[m]ergers affecting the labor market require some rethinking of [antitrust] policy, although not any altering of its fundamentals.”<sup>29</sup> But if monopsony is the mirror image of monopoly, it is a distorted mirror—particularly when the monopsony market in question is a monopsony labor market. While the economic “fundamentals” undergirding antitrust policy may not change for labor markets, the “rethinking” required to properly assess them entails fundamental changes that have not yet been adequately studied or addressed.

Significant disconnects exist between labor economics and antitrust enforcement, highlighting the need for further research and dialogue between the two fields. While interest is growing, both empirical and conceptual problems prevent labor economics from being readily plugged into antitrust enforcement in the same way that IO theory and empirics have been. It is premature to offer guidelines or impose nationwide bans on labor practices while purporting to synthesize past practice and the state of knowledge when neither is well-established.

The remainder of this paper systematically addresses these issues. Part I examines the empirical literature on labor market power, highlighting the disconnect between economic research and its application to antitrust. We analyze both direct measures of monopsony power and indirect evidence based on concentration metrics, finding that neither firmly supports the narrative of widespread, harmful labor market concentration. Part II explains the conceptual challenges of applying antitrust law to labor markets, including the theoretical differences between monopoly and monopsony, the complications of distinguishing monopsony harms from merger efficiencies, and the difficulties of market definition in labor contexts. Part III confronts the tension between labor monopsony enforcement and the consumer welfare standard, revealing unresolved questions about how to balance competing effects across markets. Finally, Part IV offers a path forward, suggesting an agenda for future research and policy development that acknowledges both the importance of addressing labor market power and the need for clarified analytical frameworks.

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28. See C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 *YALE L.J.* 2078, 2079, 2082 (2018) (“Our central claim is that harm to sellers in an input market is sufficient to support antitrust liability. We show how economic reasoning and case law support the conclusion that lost upstream competition is an actionable harm to the competitive process, and we defend this conclusion against the contrary view that demonstrated harm to the merging firms’ downstream purchasers or final consumers constitutes an essential element of any antitrust claim . . . . Monopsony is the mirror image of monopoly.”).

29. Marinescu & Hovenkamp, *supra* note 27, at 1034.

I. THE MISMATCH BETWEEN THE ECONOMIC LITERATURE AND ANTITRUST-RELEVANT LABOR MARKET POWER

The growing interest in antitrust issues relating to labor markets has, at least in part, been spurred by academic research that purports to find widespread market power in labor markets, thus warranting the need for antitrust scrutiny.<sup>30</sup> The U.S. Treasury Department's report on "The State of Labor Market Competition" explicitly connects the economics research to "a description of Biden Administration actions to improve competition."<sup>31</sup>

Unfortunately, conclusions that the labor-market-power literature supports tougher antitrust enforcement often rely on weak evidence. These claims typically depend on indirect measures of market power, such as concentration figures. Such metrics are sometimes far removed from the needs of antitrust enforcement, which usually requires more direct evidence and analysis of antitrust-relevant markets.<sup>32</sup>

The linkage between labor economics and antitrust is not yet as developed as the one between antitrust law and IO and antitrust economics for output markets. Over the twentieth century, the fields of IO economics and antitrust law evolved considerably. While the two fields are not co-extensive, the mutual influence has been considerable and ongoing, as strong connections have developed between economic theory, empirical study, and legal doctrine. Models of imperfect competition were incorporated into analyses of mergers, collusion, and exclusionary practices.<sup>33</sup> Notably, even the Chicago School, despite

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30. See, e.g., Jose Azar, *Labor Market Concentration*, 57 J. HUM. RES. S167, S197 (Supp. 2022) ("The type of analysis we provide could be used to incorporate labor market concentration concerns as a factor in antitrust analysis.").

31. See U.S. DEP'T OF THE TREAS., *supra* note 15.

32. See, e.g., Azar et al., *supra* note 30, at S174 ("Our baseline measure of market power in a labor market is the Herfindahl–Hirschman index (HHI) . . ."); Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPS. 69, 75–76 (2019) ("Measures of industry concentration based on data from the US Economic Census are simply not very informative for merger analysis because these data are available only at an aggregated level. The modest increases in concentration observed when using these data confirm that the largest firms are responsible for a greater portion of economic activity in many industries, but they tell us very little about concentration in properly defined relevant antitrust markets . . . . Furthermore, it is important to remember that an increase in concentration in a properly defined relevant market does not prove that competition in that market has declined.").

33. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 38 (2005) (citing examples and noting that "post-Chicago theory typically models strategic behavior by use of game theory, with alternatives that reach far beyond the conventional Cournot oligopoly analysis"); see also Edward J. Green & Robert H. Porter, *Noncooperative Collusion Under Imperfect Price Information*, 52 *ECONOMETRICA* 87 (1984); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 *YALE L.J.* 209 (1986).

some scholars' claims to the contrary,<sup>34</sup> made extensive use of models beyond perfect competition as a central part of its approach to anti-trust.<sup>35</sup> Empirical IO research also frequently studied topics directly relevant to antitrust inquiries.<sup>36</sup> This close, co-evolutionary relationship does not yet exist—at least, not to the same extent—between labor economics and antitrust.<sup>37</sup>

While some scholars have worked to integrate labor and antitrust economics more closely, labor economics does not yet have IO's established track record of successfully applying its insights to assess the competitive effects of mergers, restraints, or exclusionary practices. Before that sort of track record can be built, certain limitations—such as, labor research largely developed without a focus on, or involvement in, antitrust policy—must be overcome.

Against this backdrop, this Part reviews the scholarly evidence on labor market power. Section A reviews economic papers that attempt to measure firms' labor market power directly, while Section B reviews papers that rely on such proxies as industry-concentration measures (i.e., indirect evidence of labor market power). Ultimately, we find that these bodies of research say little about the need for tougher antitrust enforcement, largely because their measures of market power fail to indicate that there is an antitrust-relevant problem that is currently unaddressed in labor markets.

#### A. *Direct Evidence: Do Employers Have Significant Labor Market Power?*

How do we measure labor market power? While the bulk of the evidence on labor markets is only indirectly related to market power (if related at all), there have been a few explicit attempts to quantify the extent of labor market power within U.S. markets.

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34. Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1847 (2020) (“Built into Chicago School doctrine was a strong presumption that markets work themselves pure without any assistance from government. By contrast, imperfect competition models gave more equal weight to competitive and noncompetitive explanations for economic behavior.”).

35. See, e.g., Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960); George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964); Howard Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1 (1982).

36. See, e.g., Gregory J. Werden & Luke M. Froeb, *The Effects of Mergers in Differentiated Products Industries: Logit Demand and Merger Policy*, 10 J.L. ECON. & ORG. 407 (1994); Jonathan B. Baker & Timothy F. Bresnahan, *The Gains from Merger or Collusion in Product-Differentiated Industries*, 33 J. INDUS. ECON. 427 (1985).

37. To be clear, this is merely a descriptive claim about the present state of the relationship between labor economics and antitrust, not a normative claim that the two fields should not develop stronger connections.

The most popular way to directly estimate labor market power is through the residual labor-supply elasticity that a firm faces. A labor-supply elasticity measures how responsive the supply of labor is to a change in wages. In the simplest model, a more elastic labor supply means workers have more outside options and employers have less wage-setting power. In the extreme, a perfectly competitive firm faces a perfectly elastic residual supply curve; in the baseline (two-firm) model, if one firm pays \$0.01 less than the other employer, all the employees will leave for the other firm.

Outside of the perfectly competitive case, a firm may have some degree of labor market power, which can be measured by the difference between the wage and the marginal revenue product, known as the wage “markdown.”<sup>38</sup> In the case of perfect competition, the firm is unable to pay wages below the marginal product of labor (i.e., the revenue generated for the firm by an additional worker), and thus the labor markdown of wages is zero. By contrast, the presence of a larger wage markdown because of a lower labor elasticity indicates greater labor market power.<sup>39</sup>

Naidu, Posner, and Weyl summarize estimates of labor-supply elasticity from several studies, finding evidence of substantial market power in some labor markets, but by no means all.<sup>40</sup> Indeed, the underlying papers find residual labor elasticities ranging from 0.1 to 4.2, which would mean that workers are receiving between 9% and 81% of their marginal product, depending on the particular paper’s estimate.<sup>41</sup> While the list of papers estimating labor elasticity is too lengthy to detail in this paper, the upshot for antitrust policy is that low elasticity and thus

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38. This is effectively the labor market equivalent of markups that measure whether firms enjoy market power in the market for goods or services. *See, e.g.*, Naidu et al., *supra* note 13, at 556–57 (“The firm’s absolute markup is the gap between this price and the firm’s cost. The markup equals the difference between the monopoly price and the competitive price, and thus serves as a natural gauge of market power . . . . As in the monopoly case, a monopsonist will not internalize this effect on workers and will choose an ‘absolute markdown’ of wages below the marginal revenue product.”).

39. As we will discuss later, this connection between labor-supply elasticities, marginal products, and wages is more complicated. For example, the markdown could be a mismeasured return to technology, not traditional market power. *See, e.g.*, Ivan Kirov & James Traina, *Labor Market Power and Technological Change in US Manufacturing*, at 42 (Oct. 2022) (available at [https://conference.iza.org/conference\\_files/Macro\\_2022/traina\\_j33031.pdf](https://conference.iza.org/conference_files/Macro_2022/traina_j33031.pdf) [<https://perma.cc/VH9E-8UBW>]) (“The labor [markdown] therefore increases because ‘productivity’ rises, and not because pay falls. This suggests that technological change plays a large role in the rise of the labor [markdown].”).

40. *See* Naidu et al., *supra* note 13, at 560–69.

41. *Id.* at 567; *see also* Douglas O. Staiger, Joanne Spetz & Ciaran S. Phibbs, *Is There Monopsony in the Labor Market? Evidence from a Natural Experiment*, 28 J. LAB. ECON. 211 (2010); Arindrajit Dube, Laura Giuliano & Jonathan Leonard, *Fairness and Frictions: The Impact of Unequal Raises on Quit Behavior*, 109 AM. ECON. REV. 620 (2019).

large labor market power is not universal—nor should we expect it to be; even if average market power is large, not every market is average.<sup>42</sup>

But even if the empirical labor-economics literature unanimously identified a large degree of labor market power, which it does not, it would remain unclear what the implications are for antitrust policy. The crux of the problem is that the literature's estimates of labor elasticities generally rely on assumptions that may not mirror those typically used in antitrust analysis. Applying these estimates to a simple antitrust model of monopsony generates implications that go against the data. For example, a labor-supply elasticity of 0.1 would imply a labor share of income of just 8% in the model described in Naidu, Posner, and Weyl.<sup>43</sup> That is far lower than the actual labor share observed in most countries, which has fallen, but is still closer to 60%, not 8%.<sup>44</sup> This suggests that the connection between the estimate and the model may not be appropriate. Thus, while labor-supply elasticities can provide valuable information about the degree of labor market competition, antitrust practitioners should be wary of applying them mechanically to standard models of product-market competition without considering the unique features and dynamics of labor markets.

There can also be discrepancies between the tools employed to estimate labor-supply elasticities, on the one hand, and the needs of antitrust enforcement, on the other. For instance, a study by Ransom and Sims employs a search model—a standard tool in labor economics, but not a model generally seen in antitrust. The model is based on the idea of “search frictions,” which refers to the time and effort required for workers to find jobs and for employers to fill vacancies.<sup>45</sup> Because of these frictions, workers may accept lower-paying jobs while continuing to search for better opportunities.

This model assumes that, in the long run, the number of workers leaving a job is equal to the number of workers taking a new job. While this “steady state” assumption may hold in many contexts, it is not one typically seen in antitrust analysis of product markets. If the assumption is violated, estimates of labor market power derived from the model could be biased in either direction, depending on the specific imbalance

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42. For one example, Matsudaira uses a natural experiment around the introduction of state minimum-nurse-staffing laws and evidence consistent with perfect competition and zero market power for nurse-aides. High and low market power can exist at the same time. See Jordan D. Matsudaira, *Monopsony in the Low-Wage Labor Market? Evidence from Minimum Nurse Staffing Regulations*, 96 REV. ECON. & STATS. 92 (2014).

43. See Naidu et al., *supra* note 13, at 564–67.

44. Loukas Karabarbounis & Brent Neiman, *The Global Decline of the Labor Share*, 129 Q.J. ECON. 61, 70–71 (2014).

45. See generally Michael R. Ransom & David P. Sims, *Estimating the Firm's Labor Supply Curve in a “New Monopsony” Framework: Schoolteachers in Missouri*, 28 J. LAB. ECON. 331 (2010).

of worker flows. In the realm of antitrust enforcement, this could lead to both false positives and false negatives. It remains to be seen what courts would do when confronted with these new models.

Conversely, other papers attempt to apply the standard Cournot model from antitrust product-market analysis to labor markets.<sup>46</sup> In this approach, the authors take the median Herfindahl-Hirschman Index (HHI), a common measure of market concentration, and divide it by the aggregate labor-supply elasticity to estimate labor market power. But there may be a mismatch here, as well. Indeed, it is unclear whether the Cournot model, where firms commit to hiring a certain number of workers each period, is a realistic representation of labor markets for antitrust purposes because it relies on critical assumptions that may not be present in real-world markets, such as simple wage-posting, monopsony models. In fact, this may explain why search models, despite their flaws, remain the most common approach to assessing labor markets.

Recognizing these limitations, a burgeoning literature attempts to design labor market competition models that better align with the needs and realities of antitrust analysis. But as of yet, there is no silver bullet. Azar, Berry, and Marinescu, for example, combine elements of a static model of imperfect competition (commonly used in IO economics) with a labor market model.<sup>47</sup> This approach aims to capture the dynamics of labor market competition more accurately by considering the differentiation among jobs and workers' preferences.

The authors use data on job vacancies from CareerBuilder.com (a popular online job board) to estimate a model of differentiated jobs and workers' preferences for those jobs. Because of data limitations, however, they only have information on the elasticity of vacancy demand—i.e., the intensity of responses to posted job vacancies—not on actual wages. To overcome this, they assume a simple model where employers post wages and workers choose whether to accept those offers, similar to how firms post prices in the Cournot model of product-market competition. Using this approach, the authors estimate that workers are paid 21% less than their marginal product, suggesting significant labor market power.<sup>48</sup> But their model relies on the same long-run-equilibrium assumption discussed earlier, where the number of workers leaving a job equals the number of workers taking a new job.

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46. See, e.g., Efraim Benmelech, Nittai K. Bergman & Hyunseob Kim, *Strong Employers and Weak Employees, How Does Employer Concentration Affect Wages?*, 57 J. HUM. RES. S200, S236–37 (Supp. 2022); see also David Berger, Kyle Herkenhoff & Simon Mongey, *Labor Market Power*, 112 AM. ECON. REV. 1147 (2022).

47. See generally José A. Azar, Steven T. Berry & Ioana Marinescu, *Estimating Labor Market Power* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30365, 2022).

48. *Id.* at 35.

One final approach uses wage markdowns to estimate labor market power, but this, too, is far from perfect. Yeh, Macaluso, and Hershbein, for example, use data from the U.S. Census Bureau to estimate markdowns in the manufacturing sector.<sup>49</sup> They find that, on average, workers earn about sixty-five cents for every dollar of value they generate for their employer.<sup>50</sup> This would imply a significant degree of labor market power. The researchers also find that markdowns tend to be larger for bigger companies, suggesting that these firms have more power to set wages.<sup>51</sup> Interestingly, they find that markdowns decreased from the late 1970s to the early 2000s, but have increased sharply over the past twenty years.<sup>52</sup> This recent increase in markdowns could indicate a growing problem of labor market power.

Unfortunately, interpreting markdowns as a clear sign of labor market power is not always straightforward, and there are reasons to be skeptical of these results. To see why, imagine two hair salons: Salon A is a basic salon that charges \$20 for a haircut, while Salon B is a luxury salon that charges \$40 for a haircut that the econometrician believes is the same quality. If both salons hire hairdressers who can do one haircut per hour, Salon B might pay only slightly more than Salon A—say \$21 per hour—to attract hairdressers. This means that the hairdressers at Salon B are receiving a wage that is far less than the \$40 value of their marginal product. Superficially, this might look like a sign of labor market power.

But where the price difference is attributable to non-labor factors—such as the salon’s luxury branding, posh environment, and free drinks—the apparent markdown might, in fact, reflect the salon owner’s return on investment, rather than its power to set wages. This is why some economists view markdowns as a “residual”—the leftover value after accounting for other factors.<sup>53</sup> In the real world, we do not know whether an apparent markdown comes from labor market power due to weak competition, or whether it is a return to something the owner contributes that the economist does not see.

In fact, some evidence suggests that a significant portion of markdowns may be just that: a return on technological advances rather than labor market power. Kirov and Traina look at markdowns in U.S.

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49. See generally Chen Yeh, Claudia Macaluso & Brad Hershbein, *Monopsony in the US Labor Market*, 112 AM. ECON. REV. 2099 (2022).

50. *Id.* at 2099.

51. *Id.* at 2114.

52. *Id.* at 2099.

53. See Steven Berry, Presentation at FTC Micro Conference: Market Structure and Competition, Redux 8, 15 (Nov. 2017) (available at [https://www.ftc.gov/system/files/documents/public\\_events/1208143/22\\_-\\_steven\\_berry\\_keynote.pdf](https://www.ftc.gov/system/files/documents/public_events/1208143/22_-_steven_berry_keynote.pdf) [<https://perma.cc/8QYT-74YF>]); see also Brian Albrecht, *Markups as Residuals*, ECON. FORCES 8 (Nov. 17, 2022), [www.economicforces.xyz/p/markups-as-residuals](http://www.economicforces.xyz/p/markups-as-residuals) [<https://perma.cc/E67P-L4C2>].

manufacturing over time and find that workers received the full value of their output in 1972, but only about half in 2014.<sup>54</sup> They argue that this increase in markdowns was driven largely by rapid productivity growth due to technological advancements, not by slower wage growth. The authors find that markdowns were strongly correlated with measures of information technology, management practices, and automation. This suggests that the growing gap between worker pay and productivity might be more about technological change than about employers' bargaining power—a very different issue than the monopsony problem that antitrust law could (potentially) address.

This is not to say that labor economics tools are unsuitable for anti-trust policy or enforcement. Rather, it highlights the need for further research and legal precedent to establish how these tools can be effectively adapted to meet the evidentiary standards and analytical frameworks of antitrust law. While proponents of increased labor-antitrust enforcement may be eager to apply insights from labor economics to antitrust cases, it is crucial to recognize that this translation is not always straightforward and may require careful consideration of the underlying assumptions and their implications for antitrust analysis.

In short, there is a gap between existing direct evidence on labor market power and the needs of antitrust policy and enforcement. Labor economics generally relies on models that are not germane to antitrust enforcers, while the models that are common in antitrust enforcement might not fully capture the dynamics of labor markets. Further research and dialogue between labor economists and antitrust experts is needed to develop a consistent and reliable framework to analyze labor market power in antitrust cases. Until then, the inapt assumptions and limitations of the models presented to antitrust authorities and courts call their predictive value into question.

Ultimately, the direct evidence from labor-elasticity estimates and other measures of labor market power remains limited in scope and varies widely across studies. While these studies provide valuable insights, they are far from conclusive, and do not yet approach the level of evidence and analysis typically relied upon in the IO literature to assess product-market competition. Courts and policymakers are likely to expect a more robust and consistent body of evidence before making significant changes to antitrust enforcement in labor markets. The disputes over direct evidence on labor market power underscore the need for further research and highlight the challenges of applying antitrust tools to labor markets based on the current state of knowledge. Antitrust enforcers should take policy insights gleaned from labor-economics

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54. See Kirov & Traina, *supra* note 39, at 3.

studies with a grain of salt, as they may be of limited use when informing antitrust policy decisions.

*B. Indirect Evidence: Are Labor Markets “Relatively Narrow”?*

The 2023 Merger Guidelines assert that labor markets can be “relatively narrow” and that “the level of concentration at which competition concerns arise may be lower in labor markets than in product markets, given the unique features of certain labor markets.”<sup>55</sup> The academic literature, however, presents a more nuanced picture that casts doubt on some of these claims.

Given the limited direct evidence discussed in the previous Section, as well as the difficulties entailed in collecting and applying it, it is not surprising that many scholars have turned to *indirect* measures of market power to fill the evidentiary gap. There are, however, significant issues with these indirect measures, as they often rely on concentration metrics, such as the HHI, which are more readily available, but considerably less reliable than direct estimates of market power.<sup>56</sup>

While all indirect data sources have limitations, some are more comprehensive and reliable than others. The most comprehensive data are administrative data. While these differ on the levels of concentration, depending on how narrowly the market is defined, they consistently document falling concentration levels in local labor markets, where most job search and hiring occur.<sup>57</sup> These studies have the advantage of comprehensive coverage of employers and workers, but often define labor markets based on industry codes, rather than occupations, which may not fully capture the relevant competitors for specific types of labor.

On the other hand, the administrative data concern all employer establishments.<sup>58</sup> The administrative data directly measure employment levels and shares, instead of being restricted to online vacancies as a

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55. 2023 MERGER GUIDELINES, *supra* note 6.

56. To evaluate concentration, the relevant market must be defined. For labor markets, the relevant market is usually defined as both the job description (e.g., nurse) and the location of the job (e.g., Portland area). Using this, one can calculate some measure of concentration, such as the HHI. Economics papers tend to report HHI as a percentage, instead of as a cardinal number out of 10,000, as used in the Merger Guidelines. For example, an HHI of 1,800 would be written as “0.18.”

57. See, e.g., Kevin Rinz, *Labor Market Concentration, Earnings, and Inequality*, 57 J. HUM. RES. S251 (Supp. 2022); David Autor, Christina Patterson & John Van Reenen, *Local and National Concentration Trends in Jobs and Sales: The Role of Structural Transformation*, 7 (Nat’l Bureau of Econ. Rsch., Working Paper No. 31130, 2023) (“The employment-based HHI fell by 2.3 points, from 33.3 in 1992 to 31.0 in 2017, which stands in contrast to the 3.4-point rise in the sales HHI. Our estimates for local employment concentration echo those of Rinz (2022), who uses the LBD.”).

58. Rinz, *supra* note 57, at S256.

proxy for employment.<sup>59</sup> This distinction matters because employment shares are the natural counterpart of market shares—a cornerstone of antitrust enforcement. Concentration measures based on vacancies will be systematically higher than those based on employment because not all firms will hire in any particular period. Using the most direct comparison available, the governmental microdata finds an average HHI roughly one-tenth as large as that found using vacancy data.<sup>60</sup>

Unfortunately, no dataset is perfect, even the administrative data. For example, many rely on employment data for market definition organized by *establishment* (North American Industry Classification System (NAICS) codes), not by occupation (Standard Occupational Classification (SOC) codes). For example, all Wal-Mart employees at a store are labeled as NAICS 4521 (Department Stores), instead of being broken out by different occupations for different vacancies.<sup>61</sup> That makes their results better interpreted as local industrial-concentration measures, instead of true labor market concentration measures.

For pure concentration measures, this may not matter too much. Berger, Herkenhoff, and Mongey argue that “there is little practical difference in defining a market at the occupation-city level rather than the industry-city level as these two measures are highly correlated.”<sup>62</sup> But at the more granular level of antitrust enforcement, the difference between measures may be significant. In particular, many workers may be able to easily substitute between employers located in different industries. An accountant, for instance, might be just as qualified to work for a bank as for a hotel or a tech company. This cross-industry substitution is obscured by market definition undertaken at the NAICS level.

With these caveats about market definition, what does the administrative data show about concentration? Rinz uses the Longitudinal Business Database, covering nearly all private-sector employers, to estimate labor market concentration from 1976 to 2015.<sup>63</sup> At the beginning and end of the time period studied, unsurprisingly, Rinz finds rural

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59. See Azar et al., *supra* note 30, at S196.

60. Handwerker & Dey directly compare the concentration measures in their data to the twenty-six occupations studied by Azar, Marinescu, and Steinbaum. They find an HHI in the private sector of 0.0383, compared to 0.3157 in Azar, Marinescu, and Steinbaum. See Elizabeth Weber Handwerker & Matthew Dey, *Some Facts About Concentrated Labor Markets in the United States*, 63 INDUS. REL. 132, 135 (2023); Azar et al., *supra* note 30, at S175.

61. A firm may have multiple establishments, and the data allow different NAICS codes for each establishment, so, in some cases and to some extent, different types of workers can be separated out if they work in different locations.

62. Berger et al., *supra* note 46, at 1169 n.33 (citing Elizabeth Weber Handwerker & Matthew Dey, *Megafirms and Monopsonists: Not the Same Employers, Not the Same Workers* (Cambridge, MA: Nat'l Bureau of Econ. Rsch., 2019) (available at [http://papers.nber.org/conf\\_papers/f126652.pdf](http://papers.nber.org/conf_papers/f126652.pdf) [<https://perma.cc/7259-4YAY>])).

63. Rinz, *supra* note 57, at S252.

labor markets to be more concentrated than urban markets.<sup>64</sup> He finds that the average local HHI, defined by commuting zones and four-digit NAICS industries, decreased from 0.16 in 1976 to 0.12 in 2015, indicating a shift toward less-concentrated local markets. Local concentration fell in all population quintiles.<sup>65</sup> By contrast, national HHI increased modestly over the same period, driven by large firms entering more local markets.<sup>66</sup>

Similarly, Lipsius documents falling local concentration from 1976 to 2015, using alternative market definitions based on five-digit NAICS codes and urban areas, rather than commuting zones.<sup>67</sup> Despite these definitional differences, the average local HHI remains consistently low, falling from 0.20 to 0.18.<sup>68</sup> Berger, Herkenhoff, and Mongey further corroborate these findings with a different way of averaging HHI measures across markets.<sup>69</sup> They estimate an average local HHI of 0.17 for the year 2014, with even lower concentration levels when analyzing individual sectors like manufacturing and services. Handwerker and Dey use microdata from the Occupational Employment and Wage Statistics, mapped to the Quarterly Census of Employment and Wages.<sup>70</sup> They find an average HHI that is relatively stable and low.<sup>71</sup> Recent analysis by Thompson uses the same data but defines markets at the MSA-by-industry-group level data for 2023.<sup>72</sup> Thompson finds an average HHI of 0.37. However, when weighted by employment, the average HHI falls to 0.11, consistent with other findings that concentrated markets tend to have smaller workforces. The average local HHI levels documented in these studies are below the 1,800 (or 0.18) threshold associated with highly concentrated markets in the 2023 Merger Guidelines.<sup>73</sup>

Studies using job vacancies rather than employment data tend to find higher market concentration, but this may partly be driven by

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64. *Id.* at S264 (“In both years, the areas that are most concentrated tend to be rural. In particular, the Great Plains region has a relatively large number of highly concentrated commuting zones in both 1976 and 2015. The least concentrated markets tend to be in urban areas.”).

65. Kevin Rinz, Nat’l Bureau of Econ. Rsch., Summer Inst.: Labor Market Concentration, Earnings Inequality, and Earnings Mobility (July 23, 2019) (slides on file with author).

66. Rinz, *supra* note 57, at S253.

67. See Ben Lipsius, *Labor Market Concentration Does Not Explain the Falling Labor Share*, at 10 (Nov. 2018) (available at <https://dx.doi.org/10.2139/ssrn.3279007>).

68. *Id.* at 29.

69. See Berger et al., *supra* note 46.

70. Handwerker & Dey, *supra* note 60.

71. *Id.* at 137.

72. Trent L. Thompson, *Measuring Labor Market Concentration Using the QCEW*, U.S. BUREAU OF LAB. STAT. MONTHLY LAB. REV. (Oct. 2024) (available at <https://www.bls.gov/opub/mlr/2024/article/measuring-labor-market-concentration-using-the-qcew.htm> [<https://perma.cc/RQ7L-29T2>]) (MSA stands for “metropolitan statistical area.”).

73. See 2023 MERGER GUIDELINES, *supra* note 6, at 5.

their omission of job openings that are not published online (or at all). Indeed, the most well-cited papers on labor market concentration use online job postings to measure concentration.<sup>74</sup> These studies can define labor markets more granularly, but they may not capture all employers and job openings, particularly those that are not advertised online. This focus on vacancies rather than employment may not always reflect the actual options available to workers, as not all job vacancies are advertised (online).

While the 2023 Merger Guidelines suggest that labor markets warrant a lower concentration threshold for competition concerns, they do not provide a clear basis for this assertion or specify what that threshold should be. The indirect evidence from local labor market concentration metrics does not support the notion that labor markets are inherently more problematic than product markets from a concentration perspective. Instead, these low and falling concentration levels suggest that many local labor markets are relatively competitive and do not necessarily require a lower concentration threshold for merger analysis. While the guidelines' recognition of labor markets' unique features is important, this acknowledgment should be coupled with a more precise and empirically grounded approach to defining concentration thresholds.

More fundamentally, regardless of the data source used, market-definition issues remain. The variety of concentration estimates stemming from different geographic units and shifting occupational groupings demonstrates the lack of clarity around reasonable market boundaries. Worker mobility also introduces questions about appropriate geographic scope. While some labor markets may be highly concentrated, it does not follow that relevant antitrust labor markets are often relatively narrow. Establishing narrowness, in the antitrust sense, requires specific proof that additional employer options do not provide meaningful competitive discipline against potential wage reductions—something these papers do not do.

The upshot is that antitrust enforcers will need to rely on case-specific evidence, rather than broad claims of high concentration levels and narrow labor markets. Concentration measures have long been considered imperfect indicators of market power in antitrust policy and IO debates.<sup>75</sup> While high concentration may be suggestive of market power,

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74. See, e.g., Azar et al., *supra* note 30; Jose Azar, Iona Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 LAB. ECON. 101886 (2020).

75. See Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1, 1 (1973); see also Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 951 (Richard Schmalensee & Robert Willig eds., 1989); William N. Evans, Luke M. Froeb & Gregory J. Werden, *Endogeneity in the Concentration-Price*

it is not conclusive evidence. Many factors other than concentration can affect wages, such as differences in firm productivity, local labor market conditions (e.g., urban vs. rural), and institutional factors like unionization rates.

Moreover, there is good evidence that employer concentration does not lead to depressed wages.<sup>76</sup> For example, Kirov and Traina find that rising markdowns (the gap between worker productivity and wages) are more strongly associated with technology-related factors, such as automation and managerial practices, than with employer concentration.<sup>77</sup> Moreover, they caution that:

These results suggest that the workhorse assumptions behind some of the labor market power literature might need reevaluation, particularly work that uses cross-sectional variation to infer trends in labor market power. *Concentration is likely an inappropriate measure of labor market power in this case.*<sup>78</sup>

Their critique underscores the limitations of relying heavily on concentration metrics to assess labor market competition, especially when making claims about trends over time. As Berry, Gaynor, and Scott Morton write:

A main difficulty in [the monopsony power literature] is that most of the existing studies of monopsony and wages follow the structure-conduct-performance paradigm; that is, they argue that greater concentration of employers can be applied to labor markets and then proceed to estimate regressions of wages on measures of concentration. For the same reasons we discussed above, studies like this may provide some interesting descriptions of concentration and wages *but are not ultimately informative about whether monopsony power has grown and is depressing wages.*<sup>79</sup>

This is not to say that indirect evidence of market power is entirely without value. These studies can provide useful background information to guide antitrust policy. Moreover, antitrust law itself often relies on indirect measures of market power, such as concentration ratios and HHIs. In the case of antitrust enforcement, however, these measures are typically

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*Relationship: Causes, Consequences, and Cures*, 41 J. INDUS. ECON. 431 (1993); Berry, *supra* note 53; Nathan Miller, Steven Berry, Fiona Scott Morton, Jonathan Baker, Timothy Bresnahan et al., *On the Misuse of Regressions of Price on the HHI in Merger Review*, 10 J. ANTITRUST ENF'T 248 (2022).

76. Some papers find lower wages in markets with higher employer concentration, but do not differentiate rural from urban labor markets. Rural and urban labor markets can differ significantly in terms of their economic structures, job opportunities, and wage levels. Any regression of wages on concentration is likely picking up something unrelated to concentration directly. See Benmelech et al., *supra* note 46, at S201.

77. Kirov & Traina, *supra* note 39, at 54.

78. *Id.* at 46 (emphasis added).

79. Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSPS. 44, 57 (2019) (available at <http://dx.doi.org/10.13140/RG.2.2.24964.99201>) (emphasis added).

derived from carefully defined relevant markets. Defining the relevant market for labor is a complex task that requires considering such factors as job characteristics, worker skills, worker mobility, and geographic scope. There is currently little consensus among labor economists about the best way to define labor markets for antitrust purposes.

Ultimately, the indirect evidence from concentration metrics does not support the Merger Guidelines' strong claims about ubiquitous labor market narrowness or the need for a lower concentration threshold in merger analysis. While concentration trends are not uniform across all markets and data sources, the weight of the evidence points toward decreasing local concentration and increasing labor market competition over time (if concentration is a proxy for competition). Antitrust authorities should engage with this evidence and provide a stronger empirical basis for their policy recommendations, rather than relying on unsubstantiated assumptions about the inherent narrowness of labor markets.

## II. THE CONCEPTUAL PROBLEMS OF ADDRESSING LABOR MARKET POWER UNDER ANTITRUST LAW

The empirical literature that attempts to measure labor market power remains unsettled and limited, and provides, at best, only indirect evidence of economy-wide monopsony power. But even if robust measures of labor monopsony were available, applying antitrust laws to remedy monopsony power would still face conceptual hurdles. Economic theory indicates important differences between monopoly and monopsony power that complicate simple policy translation.

While antitrust statutes technically apply equally both upstream and downstream,<sup>80</sup> the economics of monopoly versus monopsony raise thorny theoretical issues regarding dynamic efficiency, merger efficiencies, market definition, and more that may differ between the two. Just as the empirical questions remain far from settled, the theory provides little straightforward guidance on how to address these concerns.

U.S. antitrust agencies have nevertheless long sought to reinvigorate anti-monopsony enforcement. Before concluding that labor-monopsony enforcement should be a priority for antitrust enforcers,

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80. The antitrust statutes do not distinguish buy-side and sell-side behavior, besides the partial exception in Section 6 of the Clayton Act, which provides that workers do not violate antitrust laws when they organize unions. See 15 U.S.C. § 17 (“The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof . . .”). In practice, however, it seems the agencies have historically treated labor markets differently. See, e.g., Naidu et al., *supra* note 13.

both the evidentiary limitations *and* conceptual challenges warrant careful consideration by enforcers, scholars, and the courts.

On the surface, it may appear that monopsony is simply “the mirror image of monopoly.”<sup>81</sup> There are, however, several important differences between monopoly and monopsony, as well as several complications that monopsony analysis raises that significantly distinguish it from monopoly analysis. Most fundamental among these, monopsony and monopoly markets do not sit at the same place in the supply chain.<sup>82</sup> This matters because all supply chains end with final consumers. Accordingly, from a policy standpoint, it is essential to decide whether antitrust ultimately seeks to maximize output and welfare at that final level of the distribution chain (albeit indirectly); whether intermediate levels of the distribution chain (e.g., an input market) should be analyzed in isolation; or whether effects in both must be somehow aggregated and balanced.

This has important ramifications for antitrust enforcement against monopsonies. As we explain below, competitive conditions of input markets have salient effects on prices and output in product markets. Given this, any evaluation of monopsony must consider the “pass through” to the final product market. There is, however, no such “mirror image” complication in the consideration of final-product monopoly markets. Along similar lines, treating the assessment of mergers in input markets as the simple mirror image of product-market mergers presents important problems for how authorities address merger efficiencies, as traditional efficiencies and increased buyer power are often two sides of the same coin. Finally, it is unclear how authorities should think about market definition—a cornerstone of modern antitrust policy—in labor markets, in particular.

The upshot is that, while monopsony concerns have become more prevalent in academic and policy discussions, the agencies should be extremely hesitant as they move forward. Some have argued that “[m]ergers affecting the labor market require some rethinking of merger

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81. Roger G. Noll, *Buyer Power and Economic Policy*, 72 ANTITRUST L.J. 589, 589 (2005) (“[B]uyer power arises from monopsony (one buyer) or oligopsony (a few buyers), and is the mirror image of monopoly or oligopoly.”); *id.* at 591 (“Asymmetric treatment of monopoly and monopsony has no basis in economic analysis.”); *see also* *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321 (2007) (“The kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization.”); *Vogel v. Am. Soc’y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (“[M]onopoly and monopsony are symmetrical distortions of competition from an economic standpoint.”).

82. Of course, monopoly markets in intermediate products (i.e., products sold not to end users, but to manufacturers who use them as inputs for products that are, in turn, sold to end users) may indeed sit in the same place in the supply chain as the typical monopsony market. Some, but not all, of the complications associated with monopsony analysis are relevant to these monopoly situations, as well.

policy, although not any altering of its fundamentals.”<sup>83</sup> As we discuss below, however, while the economic “fundamentals” undergirding merger policy may not change for labor market mergers, the “rethinking” required to properly assess such mergers does entail fundamental changes that have not yet been adequately studied or addressed. As many have pointed out, there is only a scant history of merger enforcement in input markets in general, and even less in labor markets.<sup>84</sup> It is premature to offer guidelines that purport to synthesize past practice and the state of knowledge, when neither is well-established.

A. *Theoretical Differences Between Monopoly and Monopsony*

Before getting to the practical differences between a monopoly case and a monopsony case, consider the theoretical differences between identifying monopsony power and monopoly power.<sup>85</sup> Suppose, for now, that a merger either generates efficiency gains or market power, but not both. In a monopoly case, if there are efficiency gains from a merger, the quantity sold in the output market will increase. With sufficient data, the agencies will be able to see (or estimate) the efficiencies directly in the output market. Efficiency gains result in either greater output at lower unit cost, or else product-quality improvements that increase consumer demand. In contrast, if the merger simply enhances monopoly power without efficiency gains, the quantity sold will decrease, either because the merging parties raise prices or quality declines. The empirical implication of the merger is seen directly in the market in question.

The monopsony case is, however, rather more complicated. Ultimately, we can be certain of the effects of monopsony only by looking at the output market, not the input market where the monopsony power is claimed. To see this, consider again a merger that generates either efficiency gains or market (now monopsony) power. A merger that creates monopsony power will necessarily reduce the prices and quantity purchased of inputs like labor and materials. But this same effect (reduced prices and quantities for inputs) would also be observed if the merger enhances efficiency. If there are efficiency gains, the merged entity may purchase fewer of one or more inputs than the parties did pre-merger. For example, if the efficiency gain arises from the elimination

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83. Marinescu & Hovencamp, *supra* note 27, at 1034.

84. *See id.*

85. For purposes of this discussion, “monopoly” refers to any merger (or other conduct) that would increase market power by a seller in a product market, and “monopsony” refers to any merger (or other conduct) that would increase market power by a buyer in an input market (including a labor market).

of redundancies in a hospital merger, the hospital will buy fewer inputs, hire fewer technicians, or purchase fewer medical supplies.

There are scale efficiencies associated with a hospital merger. As work from the FTC's Bureau of Economics explains, there can be scale efficiencies associated with "surgical procedures that exhibit a volume-outcome relationship."<sup>86</sup> Typically, these are high-risk, complex procedures. "By consolidating such procedures at fewer hospitals, or by sending experienced personnel from one hospital to another, a system potentially can reap the benefits of increased scale."<sup>87</sup> That is, reassignment of personnel and/or consolidation of procedures (and attendant personnel) at fewer hospitals can facilitate more efficient and higher quality provision of services, even as it may decrease labor demand in certain geographic markets. This may even reduce the wages of technicians or the price of medical supplies, even if the newly merged hospitals do not exercise any market power to suppress wages.<sup>88</sup>

Decisionmakers cannot simply look at the quantity of inputs purchased in the monopsony case as the flip side of the quantity sold in the monopoly case because the efficiency-enhancing merger can look like the monopsony merger in terms of the level of inputs purchased. The court can only differentiate a merger that generates monopsony power from a merger that increases productive efficiencies by looking at the *output market*. Once we look at the output market, as in a monopoly case, if the merger is efficiency-enhancing, there will be an increase in output-market quantity. If the merger increases monopsony power, by contrast, the firm perceives its marginal cost as higher than before the merger and will reduce output.<sup>89</sup> In short, the assumption that monopsony analysis is simply the mirror image of monopoly analysis does not hold.<sup>90</sup> Therefore, it is impossible to discuss monopsony power coherently without considering the output market.

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86. Keith Brand, Martin Gaynor, Patrick McAlvanah, David Schmidt & Elizabeth Schneirov, *Economics at the FTC: Office Supply Retailers Redux, Health Care Quality Efficiencies Analysis, and Litigation of an Alleged Get Rich Quick Scheme*, 45 REV. INDUS. ORG. 325, 337 (2014).

87. *Id.*

88. Some efficiency-enhancing mergers will be identifiable, of course. For example, if the merger raises quantities and prices for all inputs, that must be efficiency-enhancing. The problem, as always, is with the hard cases.

89. See Hemphill & Rose, *supra* note 28, at 2106 ("An increase in monopsony power increases the firm's perceived marginal cost and reduces output.").

90. In theory, one could force a monopsony model to be identical to a monopoly. The key difference is about the *standard* economic form of these models that economists use. The standard monopoly model looks at one output good at a time, while the standard factor-demand model uses two inputs, which introduces a tradeoff between, say, capital and labor. See SONIA JAFFE, ROBERT MINTON, CASEY B. MULLIGAN & KEVIN M. MURPHY, *CHICAGO PRICE THEORY* ch. 10 (2019). One could generate harm from an efficiency for monopoly (as we show for monopsony) by assuming the merging parties each produce two different outputs, apples and bananas. An efficiency gain could

This crucial conceptual difference in the theoretical understanding of monopsony versus monopoly has important implications for anti-trust enforcement in labor markets. The need to look at output markets to distinguish efficiency-enhancing mergers from monopsonistic ones complicates the analysis and may require a different approach than traditional monopoly cases. Antitrust authorities and courts must carefully consider how a merger affects both output and input markets and weigh potential efficiencies against anticompetitive effects.

This is particularly challenging under the consumer welfare standard, which focuses on output-market effects. The potential for countervailing effects on output and input markets creates difficult tradeoffs for enforcers and courts, who must balance the interests of consumers, workers, and overall economic efficiency.

### B. Monopsony “Harms” or Merger “Efficiencies”?

In real-world cases, mergers will not necessarily be either solely efficiency-enhancing or solely monopsony-generating, but a blend of the two. Any rigorous consideration of merger effects must account for both and make some tradeoffs between them. It is true that, in some cases, there will be output increases alongside labor market increases and, in such scenarios, we can simply look at output.<sup>91</sup> In the standard monopsony models in economics, there is no offsetting effect; harm to sellers of inputs (workers) hurts consumers, as well.<sup>92</sup> This was the case in the recent successful action to block Penguin-Random House from merging with Simon & Schuster.<sup>93</sup> The parties agreed that, if there was harm to the authors, there would be fewer books, thereby harming consumers.<sup>94</sup> There was no need to think about offsetting harms. That is the easy case.

But what about other cases where the effects are not so clear-cut? The question of how guidelines should address monopsony power is inextricably tied to consideration of merger efficiencies—particularly given

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favor apple production and hurt banana consumers. While this sort of substitution among outputs is often realistic, it is not the standard economic way of modeling an output market.

91. Hovenkamp, *supra* note 13, at 529 (“To the extent that such actions lead to higher prices or reduced product output, labor as well as consumers suffer.”).

92. Marinescu & Hovenkamp, *supra* note 27, at 1042 (“The key message from economic theory is that as one moves away from the competitive equilibrium towards a situation of monopsony in the labor market, wages and production both generally tend to decrease.”).

93. See generally *Bertelsmann*, 646 F. Supp. 3d at 1.

94. See *id.* at 23 (“The defendants do not dispute that if advances are significantly decreased, some authors will not be able to write, resulting in fewer books being published, less variety in the marketplace of ideas, and an inevitable loss of intellectual and creative output.”).

the point above that identifying and evaluating monopsony power will often depend on its effects in downstream markets.

This reality raises some thorny problems for monopsony-merger review that have not been well-studied to date:

Admitting the existence of efficiencies gives rise to a subsequent set of difficult questions central to which is “what counts as an efficiency?.” [sic] A good example of why the economics of this is difficult is considering the case in which a horizontal merger leads to increased bargaining power with upstream suppliers. The merger may lead to the merging parties being able to extract necessary inputs at a lower price than they otherwise would be able to. If so, does this merger enhance competition in a possible upstream market? Perhaps not. However, to the extent that the ability to obtain inputs at a lower price leads to an increase in the total output of the industry, then downstream consumers may in fact benefit. Whether the possible increase in the total surplus created by such a scenario should be regarded as offsetting any perceived loss in competition in a more narrowly defined upstream market is a question that warrants more attention than it has attracted to.<sup>95</sup>

With monopoly mergers, plaintiffs must show that a transaction will reduce competition, leading to an output reduction and increased consumer prices. This finding can be rebutted by demonstrating cost-saving or quality-improving efficiencies that lead to lower prices or other forms of increased consumer welfare. In evaluating such mergers, agencies and courts must weigh the upward pricing pressure from reduced competition against the downward pricing pressure associated with increased efficiencies and the potential for improved quality.

As we have explained above, this analysis becomes more complicated when a merger raises monopsony concerns. In a simple model, the monopsony merger would increase market power in the input market (e.g., labor), leading to a lower price paid for the input and a smaller quantity used of the input relative to pre-merger levels. Assuming no change in market power in the final product market, these cost savings would result in lower prices paid by consumers.<sup>96</sup> Should such efficiency effects “count” in evaluating mergers alleged to lessen competition in input markets? It is surely too facile a response to assert that such efficiency effects would be “out of market” and thus irrelevant. If that were

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95. John Asker & Volker Nocke, *Collusion, Mergers, and Related Antitrust Issues*, in 5 *HANDBOOK OF INDUSTRIAL ORGANIZATION* 177, 221–22 (Kate Ho, Ali Hortasçu & Alessandro Lizzeri eds., 2021).

96. *See, e.g.*, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. C 31/5, at 5, 11 (noting that monopsony “may be beneficial for competition” when the monopsonist “lowers input costs without restricting downstream competition or total output, then a proportion of these cost reductions are likely to be passed onto consumers in the form of lower prices”).

the case, the legality of a merger would turn arbitrarily on the choice of input or output market, while flatly ignoring evident and quantifiable effects in an equally affected market. No sensible approach to antitrust would countenance this arbitrariness.<sup>97</sup>

Some would argue these are the types of efficiencies that merger policy is meant to encourage. Others may counter that policy should encourage technological efficiencies, while discouraging efficiencies stemming from the exercise of monopsony power.

But this raises another complication: How do agencies and courts distinguish “good” efficiencies from “bad”? Is reducing the number of executives procompetitive or anticompetitive? Is it procompetitive or anticompetitive to shut down a factory or healthcare facility made redundant post-merger? Trying to answer these questions places agencies and courts in the position of second-guessing not just the effects of business decisions, but also the *intent* of those decisions. To a first approximation, the observed outcomes are identical. But intent is far from dispositive in determining the competitive effects of business conduct, and it may be misleading.<sup>98</sup> Even worse, it can create a Catch-22 where an efficiencies *defense* in the product market is turned into an efficiencies *offense* in the input market—e.g., a hyper-efficient merged entity may outcompete rivals in the product market, possibly leading to monopsony in the input market. In ambiguous cases, this means the outcome may depend on whether it is challenged on the input or output side of the market. It even implies that overcoming a challenge by successfully identifying efficiencies in one case creates the predicate for a challenge based on effects on the other side of the market.

Hemphill and Rose argue that “harm to input markets suffices to establish an antitrust violation.”<sup>99</sup> But surely, this cannot be a general

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97. *But see Bertelsmann*, 646 F. Supp. 3d at 28 (“Thus, even if alternative submarkets exist at other advance levels, or if there are broader markets that might be analyzed, the viability of such additional markets does not render the one identified by the government unusable.”). Of course, in that case, the parties (and the court) *did* identify downstream harms. *See id.* at 23.

98. *See* Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609, 619 (2005).

99. Hemphill & Rose, *supra* note 28, at 2100. The authors make a useful distinction between mergers that generate classical monopsony and those that increase buyer leverage. As explained below, however, increased buyer bargaining leverage is just a transfer from sellers to buyers. If it truly has no effect on output, as supposed for Hemphill & Rose, it is not anticompetitive. If antitrust is to weigh in on splitting the surplus and conclude that a merger that leads to more of the surplus going to the buyer is anticompetitive, the courts would be implicitly saying that either the division before the merger was optimal or that more surplus going to sellers is always better. While people may have an intuition that more surplus going to sellers of labor (i.e., workers) is better, do we have the same intuition for all types of sellers? Moreover, would we be willing to apply the same logic to mergers to monopoly? If so, and mergers that increase buyer leverage are bad and

principle, at least not if markdowns are seen as a form of anticompetitive harm. To see why, consider a merger that has no effect on either monopoly or monopsony power; it solely improves the merging parties' technology by removing redundancies. For example, suppose the merged firms require fewer janitors. When redundancies are eliminated, the merged entity operates more efficiently, lowering its costs for janitorial services. This allows the merged firm to offer lower prices to downstream consumers. Because consumers benefit from lower prices and the merged firm benefits from streamlined (less costly) operations, this merger also increases total welfare. But proponents of the Hemphill and Rose view would likely call it an antitrust violation because it harms the input market for janitors. Fewer janitors will be hired, and janitors' wages may fall even if monopsony power is not pushing down wages.

This likely explains why Marinescu and Hovenkamp recognize that assessing a monopsony claim requires looking at both input and output markets:

To have a chance of succeeding, *an efficiency case for a merger affecting a labor market must show that post-merger reorganization will decrease the need for workers and will not lower total production. Both of these requirements are essential.* A merger that decreases the need for workers may represent nothing more than an exercise of monopsony power, but in that case, *ceteris paribus*, it will also reduce production. By contrast, a merger that eliminates duplication can also reduce the need for workers, but production will not go down. Indeed, it should go up to the extent that the post-merger firm has lower costs.<sup>100</sup>

The complications only multiply once we move beyond a classical, wage-posting monopsony. For example, many labor market models include some form of wage bargaining.<sup>101</sup> Labor economists believe this captures important aspects of labor markets that are not purely about wage-posting.<sup>102</sup> With bargaining—as compared to classical monopsony—when firms achieve more product-market power, they generate higher profits and, therefore, more potential surplus to be split between employers and employees.<sup>103</sup> Workers (at least those who keep

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mergers that increase seller leverage are bad (again, with no effect on output), are we concluding all mergers are bad, full stop?

100. Marinescu & Hovenkamp, *supra* note 27, at 1040 (emphasis added).

101. Such bargaining models have been awarded Nobel prizes. *See, e.g.*, Peter Diamond, *Wage Determination and Efficiency in Search Equilibrium*, 49 *REV. ECON. STUD.* 217 (1982); CHRISTOPHER A. PISSARIDES, *EQUILIBRIUM UNEMPLOYMENT THEORY* (2017).

102. *See, e.g.*, Richard Rogerson, Robert Shimer & Randall Wright, *Search-Theoretic Models of the Labor Market: A Survey*, 43 *J. ECON. LIT.* 959, 961 (2005) (“Bargaining is one of the more popular approaches to wage determination in the literature . . .”).

103. *See, e.g.*, John Van Reenan, *Labor Market Power, Product Market Power and the Wage Structure: A Note* 224, at 4 (Program on Innovation and Diffusion, Working Paper No. 085 2024)

their jobs), may welcome greater monopoly power, as they are able to extract higher wage rents, which would not be the case for a firm earning thin or no margins in an extremely competitive product market. Consequently, this generates the opposite implication at the firm level: More product market power puts upward, not downward, pressure on wages. Yet, presumably, no one would argue that courts should allow mergers simply because they raise wages. But then the reverse should also be true: Courts should not block mergers simply because they lower wages.

Far from being a theoretical curiosity, bargaining is of first-order importance when we are thinking about unions and labor markets. In its *Kroger/Albertsons* complaint, for example, the FTC defines the relevant labor market as “union grocery labor” and alleges that the merger would harm competition specifically for these workers.<sup>104</sup> But through their collective-bargaining agreements, unions exercise monopoly power in labor negotiations that likely counterbalances any attempted exercise of monopsony power by the merged firm.<sup>105</sup> If there is no increase in monopsony power, but there is an increase in monopoly power, the union will bargain to split that profit and increase wages.

How likely is this outcome? One local union endorsed the merger and divestiture package, arguing that “[e]mployees of Kroger and C&S [Wholesale Grocers, LLC] will be better off than employees of other potential buyers.”<sup>106</sup> Of course, it is possible that most unions do not believe wages will increase; after all, delegates of the United Food and Commercial Workers Union unanimously voted to oppose the merger.<sup>107</sup> And yet, rather than citing concern over monopsony power or lower wages, the union delegates’ stated reason for their opposition was lack

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(available at <https://poid.lse.ac.uk/PUBLICATIONS/abstract.asp?index=10529> [<https://perma.cc/8BHW-S3GW>]) (“Here, when firms achieve more product market power there are higher profits and therefore more of a potential surplus to be split between employers and employees. Workers (at least those who keep their jobs), may welcome greater monopoly power as they are able to extract higher wage rents, which would not be the case for a firm earning thin or no margins in an extremely competitive product market. Consequently, this generates the opposite implication at the firm level - more product market power generates higher, not lower, wages.”).

104. *Kroger/Albertsons Complaint 2024*, *supra* note 4, at ¶ 63 (“Union grocery labor is a relevant market in which to analyze the probable effects of the proposed acquisition.”).

105. Indeed, increased bargaining power is the purpose of a union. Whether the coordination leads to equivalent, lesser, or greater bargaining power than that of employers in each case depends on many specifics. But the whole point of both the union and the labor antitrust exemption is to facilitate the exercise of this increased bargaining power on the labor side.

106. Lynn Petrak, *Local Union Supports Kroger-Albertsons Merger*, *PROGRESSIVE GROCER* (Feb. 20, 2024) (available at <https://progressivegrocer.com/local-union-supports-kroger-albertsons-merger> [<https://perma.cc/D3XJ-2685>]).

107. Press Release, United Food & Commercial Workers, *America’s Largest Union of Essential Grocery Workers Announces Opposition to Kroger and Albertsons Merger* (May 5, 2023), <https://www.ufcw.org/press-releases/americas-largest-union-of-essential-grocery-workers-announces-opposition-to-kroger-and-albertsons-merger> [<https://perma.cc/TYA8-G65L>].

of transparency.<sup>108</sup> The point is not to draw a conclusion about this particular merger's likely effects on wages; it is to point out the complex tradeoffs inherent in applying antitrust principles to labor markets.

And there are further complications. When dynamic effects are taken into account, for example, even apparent harms confined to the seller side of an input market may turn into benefits:

[T]he presence of larger buyers can make it more profitable for a supplier to reduce marginal cost (or, likewise, to increase quality). This result stands in stark contrast to an often expressed view whereby the exercise of buyer power would stifle suppliers' investment incentives. In a model with bilateral negotiations, a supplier can extract more of the incremental profits from an investment if it faces more powerful buyers, though the supplier's total profits decline. Furthermore, the presence of more powerful buyers creates additional incentives to lower marginal cost as this reduces the value of buyers' alternative supply options.<sup>109</sup>

Of course, none of this is to say that creation of monopsony power should categorically be excluded from the scope of antitrust enforcement. But it is quite apparent that this sort of enforcement raises complicated tradeoffs that are elided or underappreciated in the current discourse and manifestly underexplored in the law.<sup>110</sup>

### C. *Determining the Relevant Market for Labor*

Even in the most basic monopoly cases, agencies and courts face enormous challenges in accurately identifying relevant markets. These challenges are multiplied in input markets—especially labor markets—in which monopsony is alleged. Many inputs are highly substitutable across a wide range of industries, firms, and geographies. For example, changes in technology—such as the development of PEX tubing and quick-connect fittings—allow laborers and carpenters to perform work previously done exclusively by plumbers. Technological changes have also expanded the relevant market in skilled labor. Remote work during the COVID-19 pandemic, for example, demonstrates that many skilled workers are not bound by geography and compete in national—if not international—labor markets.

When Whole Foods attempted to acquire Wild Oats, the FTC defined (and the court accepted) the relevant market as “premium natural and organic supermarkets,” as a way to exclude larger firms, such as

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108. *Id.*

109. Roman Inderst & Christian Wey, *Countervailing Power and Dynamic Efficiency*, 9 J. EUR. ECON. ASS'N 702, 715 (2011).

110. For further discussion of the problems of reconciling upstream and downstream market effects when labor markets are considered, see *infra* Part III.

Walmart and Kroger, from the relevant product market.<sup>111</sup> But even if one were to accept the FTC's product-market definition, it is unlikely that anyone would consider *employment* at a "premium natural and organic supermarket" as a distinct input market.<sup>112</sup> Even the narrowest industries considered in the economics literature would never be defined that narrowly. This is because the skillset required to work at Whole Foods overlaps considerably with the skillset demanded by myriad other retailers and employers, and *virtually completely* overlaps with the skillset needed to work at Kroger or another grocer.

As noted above, the FTC's complaint in *Kroger/Albertsons* defines the relevant labor market as "union grocery labor" in "local CBA areas" (i.e., the geographic areas covered by each collective-bargaining agreement's jurisdiction).<sup>113</sup> While the alleged product-market definition aligns with the FTC's approach in past supermarket mergers, the labor market definition is novel and does not appear to be supported by precedent.<sup>114</sup> By focusing on unionized workers in specific localized areas, the FTC is implicitly arguing that the merger's potential anticompetitive effects on labor are limited to these narrow categories of workers.

This approach to labor market definition diverges from much of the economic literature on labor monopsony, which often defines markets based on industry or occupation codes that may not capture the full scope of competition for workers.<sup>115</sup> The FTC's narrow market definition may reflect the practical challenges of bringing a labor-monopsony case under existing antitrust frameworks. But it also risks overlooking the fluid and dynamic nature of labor markets, where workers may have employment options across different industries, occupations, and geographies.<sup>116</sup>

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111. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1032 (D.C. Cir. 2008); see also Geoffrey Manne, *Premium, Natural, and Organic Bullsh\*t*, TRUTH ON THE MKT. (June 6, 2007), <https://truthonthemarket.com/2007/06/06/premium-natural-and-organic-bullst> [<https://perma.cc/WXJ9-YZ64>] ("In other words, there is a serious risk of conflating a 'market' for business purposes with an actual antitrust-relevant market.").

112. Unsurprisingly, there is no SOC code that corresponds to such a market definition, and the FTC did not allege it. See *Occupational Employment and Wage Statistics, May 2023 Occupation Profiles*, U.S. BUREAU OF LAB. STATS. (May 2023), [https://www.bls.gov/oes/current/oes\\_stru.htm#41-0000](https://www.bls.gov/oes/current/oes_stru.htm#41-0000) [<https://perma.cc/3VKE-DUYV>].

113. *Kroger/Albertsons Complaint 2024*, *supra* note 4, at ¶¶ 63, 66–67.

114. See Brian Albrecht, Dirk Auer, Eric Fruits & Geoffrey A. Manne, *Food-Retail Competition, Antitrust Law, and the Kroger/Albertsons Merger*, INT'L CTR. L. & ECON. (Oct. 17, 2023), <https://laweconcenter.org/resources/food-retail-competition-antitrust-law-and-the-kroger-albertsons-merger> [<https://perma.cc/DK7L-Z2BJ>].

115. See generally *supra* Section II.A.

116. See, e.g., Amos Golan, Julia Lane & Erika McEntarfer, *The Dynamics of Worker Reallocation Within and Across Industries*, 74 *ECONOMICA* 1, 11 (2007) ("About 27% of workers who had previously exhibited a substantial degree of attachment to their employer reallocate in a given year. About two-thirds of this reallocation is job-to-job reallocation, split roughly evenly between, within and across broadly defined industries.).

We can see the difficulty with pursuing a labor-monopsony case by recognizing that the usual antitrust tools—such as merger simulation—cannot be easily applied to the labor market. Unlike the DOJ’s recent success in blocking Penguin-Random House from merging with Simon & Schuster on grounds that the merger would hurt authors with advances above \$250,000,<sup>117</sup> the labor market for most employees is much larger than the two merging companies. This fact alone likely renders the DOJ’s successful challenge in that case more of an aberration than a model for future labor market enforcement actions, as is sometimes claimed.<sup>118</sup>

Indeed, the relevant market often cannot be narrowed down to even a handful of readily identifiable companies. For the vast majority of workers, a great number of potential employers would remain following a merger. This “potential competition”—the range of feasible employers that present an outside option to the merged companies’ present employees—limits the merged firm’s ability to exercise monopsony power in its labor negotiations. While we are not aware of publicly available data that would more comprehensively illustrate worker flows among different companies (and industries), such flows of retail workers into and out of roughly adjacent labor markets make intuitive sense. As economist Kevin Murphy has explained:

If you look at where people go when they leave a firm or where people come from when they go to the firm, often very diffuse. People go many, many different places.

If you look at employer data and you ask where do people go when they leave, often you’ll find no more than 5 percent of them go to any one firm, that they go all over the place. And some go in the same industry. Some go in other industries. Some change occupations. Some don’t.

You look at plant closings, where people go. Again, not so often a big concentration of where they go to. If you look at data on where people are hired from, you see much the same patterns. That’s kind of a much more diffuse nature.<sup>119</sup>

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117. See *Bertelsmann*, 646 F. Supp. 3d at 25–27.

118. See, e.g., Press Release, Antitrust Div., DOJ, Justice Department Obtains Permanent Injunction Blocking Penguin Random House’s Proposed Acquisition of Simon & Schuster (Oct. 31, 2022), <https://www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed> [<https://perma.cc/LFR2-C39H>] (“The decision is also a victory for workers more broadly,” said AAG Kanter. “It reaffirms that the antitrust laws protect competition for the acquisition of goods and services from workers.”). Notably, both the complaint and the court’s decision also noted (rightly or wrongly) downstream effects in the product market. See *id.* at 24–25.

119. Kevin Murphy, Panel 1: Approaching Labor Market Definition at the Public Workshop Held by the Antitrust Div. of the DOJ: Competition in Labor Markets, at 19 (Sept. 23, 2019) (transcript of proceedings available at <https://www.justice.gov/atr/page/file/1209071/download> [<https://perma.cc/5EPV-X75T>]).

In any particular merger — such as between Kroger and Albertsons — an overwhelming majority of Kroger workers' next best option (i.e., what they would do if a store closed) will not be an Albertsons store, but something completely outside of the market for grocery store labor (or even outside the retail-food industry more broadly). Where that is the case, the merger would not take away those workers' next best option, and the merger cannot be said to increase labor-monopsony power to the extent necessary to justify blocking it.<sup>120</sup>

Fundamentally, the labor economics literature has offered little guidance to date on how to define markets in labor cases. As explained above, concentration varies greatly, depending on the exact definition of the relevant market, especially the geographic market.<sup>121</sup> It is virtually impossible to know what outside options to include in the relevant market, and it may not always be possible to identify even where such potential employers are located (e.g., Are commuting zones better proxies for the relevant geographic labor market than metropolitan areas?). These market-definition issues are far more acute in monopsony cases than in traditional monopoly cases, both because the intrinsic question of substitutes is more complicated and because there is far less precedent to guide parties and enforcers.

#### D. Labor Markets Are Not Spot Markets

The Merger Guidelines stress that labor markets are not simple spot markets where each side calls out a price and the two make an exchange when bid/ask prices align. As the guidelines state, “labor markets often exhibit high switching costs and search frictions due to the process of finding, applying, interviewing for, and acclimating to a new job.”<sup>122</sup> Moreover, “finding a job requires the worker and the employer to agree to the match. Even within a given salary and skill range, employers often have specific demands for the experience, skills, availability, and other attributes they desire in their employees.”<sup>123</sup>

The typical employment contract is often more complicated than the typical end-user purchase agreement. Employment contracts are, indeed, not spot contracts, and thus contain a temporal dimension often absent from the product markets at-issue in monopoly cases. The

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120. See Albrecht et al., *supra* note 114.

121. See *supra* Section I.B (“More fundamentally, regardless of the data source used, market-definition issues remain. The variety of concentration estimates stemming from different geographic units and shifting occupational groupings demonstrates the lack of clarity around reasonable market boundaries.”).

122. 2023 MERGER GUIDELINES, *supra* note 6, at 27.

123. *Id.*

terms of employment contracts are also rarely purely monetary, and the value of any given employment contract (and especially of aggregated “employment data”) may not be reflected in the nominal “price” (i.e., wage) of the agreement. Various benefits, deferred compensation, location, start date, moving costs and the like can dramatically complicate identifying the value of employment contracts. Complicating matters further is that the value of these terms to any given employee may vary widely, as peoples’ preferences for employment terms are significantly idiosyncratic. All of this makes the analysis of observable employment terms inordinately complicated and assessments of market power fraught with error.

There are, however, additional relevant aspects of labor markets that distinguish them from spot markets and that warrant consideration in antitrust analysis. One crucial factor is that employment relationships frequently involve mutual investments by both parties that develop over time. Employers often make substantial investments to build workers’ firm-specific skills through training, knowledge sharing, and opportunities to form client relationships.<sup>124</sup> Some of these skills are general and portable across firms, while others are firm-specific and have limited value to other employers.

Firm-specific investments can increase workers’ productivity at their current firms but also make it more costly for them to switch jobs, potentially giving employers some labor market power. This “lock in” effect exists because the worker’s current role is more valuable due to firm-specific investments and, in some cases, this increased value cannot be ported to a new employer.

In other cases, however, employers can and do invest in training that provides workers with general—and thus transferable—skills.<sup>125</sup> In such examples, there is a risk that those workers will leave for a competitor before the employer can fully recoup its investment. A higher wage may be justified for a subsequent employer, as the employee comes with the added value provided by the former employer (e.g., training, knowledge of competitively valuable information, relationships with potential customers). This “holdup” problem can lead firms to underinvest in worker training, even when such training would be socially beneficial.

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124. For a recent summary, see Carl Sanders & Christopher Taber, *Life-Cycle Wage Growth and Heterogeneous Human Capital*, 4 ANN. REV. ECON. 399 (2012).

125. See, e.g., Edward Lazear, *Firm-Specific Human Capital: A Skill-Weights Approach*, 117 J. POL. ECON. 914, 933 (2009) (noting that “no skills need be truly ‘firm specific’ in the sense of there being no other firm at which they have value. On the contrary, the skills appear to be general because in isolation they are used at a number of firms in the market. But the weights differ by firm”); see also Jesper Bagger, François Fontaine, Fabien Postel-Vinay & Jean-Marc Robin, *Tenure, Experience, Human Capital, and Wages: A Tractable Equilibrium Search Model of Wage Dynamics*, 104 AM. ECON. REV. 1551 (2014).

To mitigate this risk, firms and workers may seek contractual solutions that incentivize workers to stay long enough for the firm to earn a return on its investment. These arrangements could include promises of future wage increases, promotions, or other benefits that are contingent on the worker remaining with the firm. In turn, these contractual mechanisms create a new problem: Once the investment is made and the worker has acquired valuable skills, they may be “locked in” to their current employer through the implicit or explicit promise of future wage gains or other benefits.

Of course, to the extent these arrangements give firms some ex-post market power, they are accompanied by terms implicitly or explicitly sharing the benefits with employees. But if a merger enhances employers’ ability to make such productivity-enhancing investments, it could simultaneously increase labor market power while generating efficiencies, which may be shared with employees in ways that are difficult to identify or to value. Assessing the competitive effects of such a merger requires identifying and weighing these competing effects, which may be extremely difficult.

The FTC’s complaint against the proposed Kroger/Albertsons merger provides a concrete example of how antitrust enforcers must grapple with these issues in practice.<sup>126</sup> In defining the relevant labor markets, the FTC focuses on “union grocery labor” in “local CBA areas” (i.e., the geographic areas covered by each collective-bargaining agreement’s jurisdiction).<sup>127</sup> By narrowing the market to unionized workers covered by specific CBAs, the FTC appears to be making a form of lock-in argument. The complaint alleges that “[u]nion grocery workers can move between grocery employers covered by their union while retaining their pension and healthcare benefits, as well as other valuable workplace benefits and protections provided by the CBAs. If a union grocery worker leaves for a non-union employer, however, the worker will lose any non-vested CBA benefits and protections.”<sup>128</sup> In other words, the CBA-specific benefits function similarly to firm-specific investments in tying workers to a particular set of employers, or a contractual solution to the holdup problem involving promised future benefits, potentially giving those employers monopsony power.

From an antitrust perspective, assessing such a merger’s effect on firm-specific investments is complex. Will the merger increase or decrease employers’ incentive to provide worker training? How should antitrust balance potential productivity gains against increased labor market

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126. See generally Kroger/Albertsons Complaint 2024, *supra* note 4.

127. *Id.* ¶ 63.

128. *Id.*

power over workers? Efficiency arguments by merging parties should be met with appropriate skepticism, but such investments may be more than a rounding error in calculating overall effects. Indeed, the concept of firms investing in building worker skills is more than just a theoretical curiosity; there is clear empirical evidence that these investments occur, affect human capital, and have effects on wages.<sup>129</sup> These dynamic investment effects are first-order factors in labor markets, but are not easily captured in a static monopsony framework. Further study on these tradeoffs within merger analysis is essential.

The complications caused by the importance of investment in workers show up in antitrust contexts beyond merger enforcement, such as the FTC's non-compete rulemaking.<sup>130</sup> The FTC recognized as much, noting that “[t]here is some empirical evidence that non-competes increase investment in human capital of workers, capital investment, and R&D investment,”<sup>131</sup> and citing numerous studies indicating such effects.<sup>132</sup> The Commission adopted a rule banning all non-compete agreements outright despite this recognition.

All of this makes the simple monopsony model challenging to apply and map to the actual competition that occurs in the market. For example, to estimate labor-supply elasticities, many papers take a traditional monopsony model that assumes a spot market where the buyer sets a price and lets as many people buy as are willing.<sup>133</sup> Such analysis can be

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129. See, e.g., Robert Topel, *Specific Capital, Mobility, and Wages: Wages Rise with Job Seniority*, 99 J. POL. ECON. 145 (1991).

130. See Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38422 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910); see also Scholars of Law & Economics, *supra* note 3, at 29.

131. Non-Compete Clause Rule, 89 Fed. Reg. at 38422.

132. See *id.* at 283–86 (citing Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 ILR REV. 783 (2019) (available at <https://doi.org/10.1177/0019793919826060>) (finding that moving from mean Non-Compete Agreement enforceability to no Non-Compete Agreement enforceability would decrease the number of workers receiving training by 14.7% in occupations that use Non-Compete Agreements at a relatively high rate)); Jessica S. Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship*, 37 REV. OF FIN. STUD. 1, 28 (2024) (available at <https://doi.org/10.1093/rfs/hhad054>) (finding that knowledge-intensive firms invest 34% to 39% more in capital equipment following increases in the enforceability of NCAs); Matthew S. Johnson, Michael Lipsitz & Alison Pei, *Innovation and the Enforceability of Non-Compete Agreements* (Nat'l Bureau of Econ. Rsch., Working Paper No. 31487, 2023), <http://www.nber.org/papers/w31487> [<https://perma.cc/CRG5-6YEP>] (finding that greater non-compete enforceability increases R&D expenditure). At least one more study finding similar results was previously cited in the proposed Non-Compete Clause Rule but not included in the final rule. See Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. HUM. RES. 689 (May 12, 2020) (available at <https://doi.org/10.3368/jhr.57.3.0619-10274R2>) (finding that hair salons that use NCAs train their employees at a higher rate and invest in customer attraction with digital coupons at a higher rate, both by eleven percentage points); Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3505 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

133. See generally Naidu et al., *supra* note 13.

informative but may say little about the competitive effects of various practices in real-world antitrust markets.

The point is not to establish the proper model of human capital formation. Instead, it is simply to point out that human capital development is of first-order importance in labor markets. How should antitrust treat it? Contrary to the impression from the Merger Guidelines, not every feature of the labor market points toward a need for more enforcement.

### III. THE UNDERAPPRECIATED DIFFICULTIES IN RECONCILING MONOPSONY CONCERNS WITH THE CONSUMER WELFARE STANDARD

As discussed in the previous Sections, using antitrust enforcement to thwart potential monopsony harms is a task full of evidentiary difficulties and complex, poorly understood tradeoffs. Perhaps more problematically, it is also unclear whether (and, if so, how) such an endeavor is consistent with the consumer welfare standard—the lodestar of antitrust enforcement, at least as it is currently understood and implemented by courts.<sup>134</sup>

Marinescu and Hovenkamp assert that:

Properly defined, the consumer welfare standard applies in exactly the same way to monopsony. Its goal is high output, which comes from the elimination of monopoly power in the purchasing market. . . . [W]hen consumer welfare is properly defined as targeting monopolistic restrictions on output, it is well suited to address anticompetitive consequences on both the selling and the buying side of markets, and those that affect labor as well as the ones that affect products. In cases where output does not decrease, the anticompetitive harm to trading partners can also be invoked.<sup>135</sup>

And Hemphill and Rose state that:

Overall, then, a trading partner welfare approach accords well with the case law and economic reasoning, and under this approach, a merger that results in increased classical monopsony power may be condemned on account of harm to the input market.<sup>136</sup>

But this is far from self-evident, and this reasoning has at least two problems.

To start, the assertion that harm to input providers that does not result in reduced product output is actionable is based on a tenuous assertion

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134. See *supra* Section I.B.

135. Marinescu & Hovenkamp, *supra* note 27, at 1062–63; see also Hovenkamp, *supra* note 13, at 521 (“A practice that reduces product-market production will injure workers just as it injures consumers.”); Noll, *supra* note 80, at 613 (“[M]onopsony harms consumers because the distortions it creates in an input market reduce efficiency in final goods markets.”).

136. Hemphill & Rose, *supra* note 28, at 2092.

that a mere pecuniary transfer is sufficient to establish anticompetitive harm.<sup>137</sup> This is problematic because such “harms” *benefit* consumers in the baseline model. In the extreme example, all the benefits of a better negotiating position are passed on to consumers, and the firm is more of a direct intermediary trading on behalf of consumers rather than a monopolistic reseller.<sup>138</sup>

The primary justification for ignoring these cross-market effects (as with all market-definition exercises) is primarily pragmatic (although it is rather weakened in light of modern analytical methods).<sup>139</sup> But these cross-market effects are inextricably linked and hardly beyond calculation, particularly in the context of inputs to a specific output market. As the enforcement agencies have previously recognized, “[i]nextricably linked out-of-market efficiencies, however, can cause the Agencies, in their discretion, not to challenge mergers that would be challenged absent the efficiencies.”<sup>140</sup>

The assertion that pecuniary transfers of bargaining power are actionable is also inconsistent with the fundamental basis for antitrust

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137. As Marinescu & Hovenkamp note, “[i]n this case, there is merely a transfer away from workers and towards the merging firms. Yet . . . such a transfer is a harm for antitrust law as it results from a reduction in competition.” Marinescu & Hovenkamp, *supra* note 27, at 1063 (citing Hemphill & Rose, *supra* note 28, at 2104–05).

138. See, e.g., *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984); see also Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 342–43 (2010) (“However, Judge Breyer treated Blue Cross essentially as an agent for the customers it insured, rather than as an intermediary firm that purchased inputs and sold outputs as a monopolistic reseller. The court apparently assumed (perhaps wrongfully) that Blue Cross would pass on its lower input costs to its customers in the form of lower insurance premiums.”).

139. See Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market*, in 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE—LIBER AMICORUM 10 (Nicolas Charbit & Elisa Ramundo eds., 2014) (“Despite the incorporation of efficiencies analysis into modern merger evaluation, and the advances in economics that allow efficiencies to be identified and calculated more accurately than at the time of *Philadelphia National Bank*, antitrust doctrine in the United States still supports a regime that fails to take into account efficiencies arising outside of the relevant market.”).

140. DOJ & FTC, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 57 (2006); see also Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?*, 43 J. CORP. L. 119, 121 (2017) (“Since 1997, however, the Horizontal Merger Guidelines have asserted the inextricably linked exception.”); DOJ & FTC, HORIZONTAL MERGER GUIDELINES, § 10, n.14 (2010) (“In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall.”).

enforcement, which seeks to mitigate *deadweight loss*, but not mere pecuniary transfers that do not result in *anticompetitive* effects.<sup>141</sup>

Second, whether the consumer welfare standard applies to input markets is unclear. At its heart, the consumer welfare standard focuses on the effects that an incipient monopolist's behavior may have on *consumers*. Courts have extended this welfare calculation to all direct purchasers affected by anticompetitive behavior. Less clear is whether courts have consistently extended (or would extend) this notion of anticompetitive harm to all "trading partners" in input markets.<sup>142</sup> This goes to the very heart of the consumer welfare standard:

[I]f only consumers matter, then a buying cartel should be perfectly legal and indeed should be encouraged. Monopsony power would not matter in antitrust cases, because the fact that sellers are harmed is irrelevant under a consumer surplus standard. I know of no proponent of the consumer surplus standard who endorses buyer cartels, or who believes that monopsony is not harmful. Instead, proponents of a consumer surplus rule tend to argue that buyer cartels and monopsony are exceptions to the otherwise sensible rule of maximizing consumer surplus. However, the need for these exceptions illustrates the lack of a coherent logic for the consumer surplus standard.<sup>143</sup>

Other scholars appear too ready to accept that there is a "coherent logic" to the consumer welfare standard that unquestionably contemplates upstream trading-partner welfare because their interests align with those of consumers:

A useful definition of "consumer welfare" is that antitrust should be driven by concerns for trading partners, including intermediate and final purchasers, and also sellers, including sellers of their labor. These all benefit from high output, high quality, competitive prices, and unrestrained innovation. Higher output and lower prices are good indicators of competitive benefit, and there is little practical

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141. See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977) ("Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects."); see also ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 110 (1978) ("Those who continue to buy after a monopoly is formed pay more for the same output, and that shifts income from them to the monopoly and its owners, who are also consumers. This is not dead-weight loss due to restriction of output but merely a shift in income between two classes of consumers. The consumer welfare model, which views consumers collectively, does not take this income effect into account.").

142. See, e.g., Herbert Hovenkamp & Fiona Scott Morton, *The Life of Antitrust's Consumer Welfare Model*, *PROMARKET* (Apr. 10, 2023), <https://www.promarket.org/2023/04/10/the-life-of-antitrusts-consumer-welfare-model/> [<https://perma.cc/W8F6-83ZX>] ("A useful definition of 'consumer welfare' is that antitrust should be driven by concerns for trading partners . . .").

143. Dennis Carlton, *Does Antitrust Need to Be Modernized?*, 21 *J. ECON. PERSPS.* 155, 158 (2007).

difference between the way courts talk about antitrust harm and the idea of “consumer welfare.”<sup>144</sup>

Melamed offers an alternative framework that warrants consideration. He argues that antitrust law fundamentally prohibits “private, anticompetitive conduct that results in more market power than would otherwise exist.”<sup>145</sup> Under this view, the key question is not just whether conduct harms workers or reduces wages, but whether it does so by reducing “the competitive efficacy of actual and potential rivals.”<sup>146</sup> This distinction helps explain why efficiency-enhancing mergers that reduce labor demand may not violate antitrust law even if they lower wages: The harm comes from increased productivity rather than reduced competition.

While this framework provides a coherent approach to analyzing monopsony (and monopoly) power, it does not fully resolve the tension between upstream and downstream effects. The concept of “increased market power” needs precise definition when evaluating competitive effects. If we define market power as the increased ability to profitably raise prices or take other actions that harm customers, then we must still determine who is considered a customer for this analysis. When conduct simultaneously produces opposite effects in different markets (e.g., harming workers but benefiting end consumers), we need a framework to determine whether harm “to any customers,” “to all customers on net,” or some other standard should trigger antitrust liability. Even with Melamed’s framework, we still face the challenge of distinguishing anticompetitive conduct from efficient conduct that happens to reduce input demand when identifying “harm to competition” in input markets.

As noted, the coincidence of interest between upstream and downstream customers is far from complete, and lower wages could be consistent with both efficiency and monopsony.<sup>147</sup> Or, as one court noted: “The problem with this type of monopsony power, then, is that

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144. Hovenkamp & Scott Morton, *supra* note 142.

145. A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269, 271–72 (2020) (explaining that antitrust law is “about protecting the competitive process in order to promote economic welfare” and that market power means “the ability profitably to increase price or otherwise disadvantage trading partners through a reduction in the competitive efficacy of actual and potential rivals”).

146. *Id.*

147. See also Hemphill & Rose, *supra* note 28, at 2106. Hemphill and Rose distinguish monopsony power from increased buyer leverage, which does not result in a deadweight loss but is simply a redistribution from sellers to buyers. Leverage will be partially passed through to consumers as lower prices. Standard monopsony increases in bargaining power will not generate lower prices, because “[a]n increase in monopsony power increases the firm’s perceived marginal cost and reduces output. Far from lowering output prices, the increased monopsony power raises price in output markets (if the firm faces downward sloping demand for its output) or else leaves it unchanged.” *Id.*

ultimately it can injure consumers by forcing up the price of the end product. *Where the risk of that happening is slight or nonexistent, however, monopsony power per se does not create an antitrust concern.*<sup>148</sup>

In closing its investigation of a merger between two pharmacy benefit managers, the FTC summarized: “As a general matter, transactions that allow firms to reduce the costs of input products have a high likelihood of benefitting consumers, since lower costs create incentives to lower prices.”<sup>149</sup> “Higher output and lower prices [may be] good indicators of competitive benefit,” as Hovenkamp and Scott Morton put it,<sup>150</sup> but it seems problematic to say they reflect a competitive benefit to workers if they result from lower wages.

This raises an obvious question: Can the consumer welfare standard (and antitrust authorities and courts) reach a finding of anticompetitive harm if *consumers* (at least, in the narrow market under investigation) are ultimately charged lower prices?<sup>151</sup> Consider Salop’s explanation of Judge (later Justice) Breyer’s opinion in *Kartell v. Blue Shield of Mass., Inc.*, which analyzed a buyer-side “cartel” that was “consistent with the true consumer welfare standard”:

Buyer-side cartels generally are inefficient and reduce aggregate economic welfare because they reduce output below the competitive level . . . . However, a buyer-side cartel, comprised of *final consumers* generally would raise true consumer welfare (i.e., consumer surplus) because gains accrued from the lower prices would outweigh the losses from the associated output reduction, even though the conduct inherently reduces total welfare (i.e., total surplus). . . .

. . . Judge Breyer treated Blue Cross essentially as an *agent* for the customers it insured, rather than as an intermediary firm that purchased inputs and sold outputs as a monopolistic reseller. The court apparently assumed (perhaps wrongfully) that Blue Cross would pass on its lower input costs to its customers in the form of lower insurance premiums.

In permitting Blue Cross to achieve and exercise monopsony power by aggregating the underlying consumer demands for medical care—i.e.,

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148. *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1203 (W.D.N.Y. 1995) (emphasis added).

149. FTC, File No. 111-0210, Statement of the Federal Trade Commission Concerning the Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc., at 7 (Apr. 2, 2012) (available at [https://www.ftc.gov/sites/default/files/documents/closing\\_letters/proposed-acquisition-medco-health-solutions-inc.express-scripts-inc./120402expressmedcostatement.pdf](https://www.ftc.gov/sites/default/files/documents/closing_letters/proposed-acquisition-medco-health-solutions-inc.express-scripts-inc./120402expressmedcostatement.pdf) [<https://perma.cc/S2RK-3P87>]).

150. Hovenkamp & Scott Morton, *supra* note 142.

151. See Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1541 (2013) (“The issue then is whether courts and agencies should reconcile abuse of monopsony power claims with a consumer welfare objective. Must plaintiffs prove not only that the defendant willfully maintained its monopsony, but also that its conduct ultimately harmed downstream consumers?”).

permitting Blue Cross to act as the agent for final consumers—the *Kartell* court implicitly opted for the true consumer welfare standard. Blue Cross’s assumed monopsony conduct on behalf of its subscribers would thus lead to higher welfare for its subscribers despite reduced efficiency and lower aggregate economic welfare. Thus, this result represents a clear (if only implicit) judicial preference for the true consumer welfare standard rather than the aggregate economic welfare standard.<sup>152</sup>

By this logic, the relevant “consumer” welfare in antitrust analysis—including that of mergers that increase *either* monopoly or monopsony power—is the *literal* consumer: the final product’s end-user. But this contrasts quite sharply with the standard mode of analysis in monopsony cases as the mirror image of monopoly, in which the merging parties’ trading partner (whether upstream or downstream) is the relevant locus of welfare analysis.

Indeed, extended to potential cases, this mode of analysis raises a distinct problem for antitrust enforcers. Consider a hypothetical case against Kroger/Albertsons that did not mention the product market and in which the merger was alleged to increase monopsony power but not monopoly power. Should such a challenge fail regardless of the effect on input providers because Kroger can be considered “an *agent* for the customers it [sells to]”?<sup>153</sup> There is, as Salop seems to suggest,<sup>154</sup> some merit in such an approach, but it is certainly not how similar cases have been evaluated in the past.

The rule of reason offers a potential framework for addressing the tradeoffs between effects in different markets. While not designed specifically for monopsony cases, this doctrine provides courts with flexibility to consider various competitive effects in related markets and arguably contemplates some balancing of effects across markets.<sup>155</sup>

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152. Salop, *supra* note 138, at 336–37 (“Efficiency benefits count under the true consumer welfare standard, but only if there is evidence that enough of the efficiency benefits pass through to consumers so that consumers (i.e., the buyers) would directly benefit on balance from the conduct.”).

153. *Id.*

154. It is worth noting that, although the analogy between Blue Cross and Kroger here seems quite apt and powerful, there can be little doubt that Salop would not condone this mode of analysis in a case against Kroger. Whether (if correct) that is a function of one person’s idiosyncratic preferences or an expression of the complication inherent in assessing consumer welfare in monopsony cases is uncertain.

155. See Werden, *supra* note 140, at 129 (“Critically, the balancing required by the rule of reason is neither quantitative nor precise. In *California Dental Association*, the Supreme Court described a court’s task as reaching a ‘conclusion about the principal tendency of a restriction’ on competition. If a restraint suppresses competition in one market and promotes competition in a related market, the *Chicago Board of Trade* and *Sylvania* statements of the rule of reason can be read to hold that legality turns on which effect predominates in a qualitative sense.”) (quoting *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 781 (1999)). The referenced language from *Chicago Board of Trade* and *Sylvania* is: “[T]he true test for legality is whether the restraint imposed is such as merely regulates

The U.S. Supreme Court in *NCAA v. Alston* highlights this dynamic in a case involving labor market monopsony, no less. Despite the NCAA's undisputed monopsony power in the "market for athletic services" (an upstream labor market), the Court considered its proffered procompetitive justification of preserving amateurism in college sports—an effect avowedly in the downstream, output market.<sup>156</sup>

The court noted that the NCAA's only remaining defense was an argument that its rules preserve amateurism, which in turn provides consumers with a unique product—amateur college sports as distinct from professional sports. The NCAA acknowledged that this claimed benefit accrues to consumers in the downstream market rather than to student-athletes in the upstream labor market. However, the NCAA argued that the district court still needed to consider the procompetitive benefits to consumers when analyzing the restraints on competition in the labor market. The district court agreed to assess the NCAA's conduct in the labor market in light of the alleged benefits in the consumer market.<sup>157</sup>

Tellingly, the district court's rejection of the NCAA's procompetitive justification turned on the lack of connection between it and the challenged conduct in the input market. "As the court put it, the evidence failed 'to establish that the challenged compensation rules, in and of themselves, have any direct connection to consumer demand.'"<sup>158</sup> The plain implication is that where restraints in one market are sufficiently connected to benefits in another market, those benefits will be considered—and may turn out to justify—the challenged restraints.<sup>159</sup>

So, in essence, even though the case centered on monopsony power and harm to workers (student-athletes) in the upstream market, the court was willing to consider the NCAA's arguments about offsetting benefits to consumers in the downstream product market. This illustrates how courts may sometimes look at cross-market effects, weighing

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and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T.V. v. GTE Sylvania*, 433 U.S. 36, 49 (1977).

156. *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 85–87 (2021).

157. *Id.* at 81–83.

158. *Id.*

159. To be clear, the legal process for evaluating this tradeoff is not a strict balancing, but a "less-restrictive alternative" test—exactly as the Court laid out and applied in *Amex*. *See id.* at 99–101 ("The court then proceeded to what corresponds to the third step of the *American Express* framework, where it required the student-athletes 'to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules.'").

upstream harms against downstream benefits, when evaluating antitrust claims related to labor markets and monopsony power.

There is perhaps no easy answer to the difficulty of assessing harm in upstream markets when downstream markets benefit. At first blush, excluding deadweight losses that stem from monopsony power (or, at least, forcing plaintiffs to show that downstream purchasers are also harmed) seems like legalistic reasoning largely incompatible with the welfarist ancestry of the consumer welfare standard.<sup>160</sup> Indeed, the consumer welfare standard is largely premised on the assumption that increased output is desirable and deadweight losses are harmful to society, regardless of their second-order effects.

There is no tension here when output and labor both benefit from an action; sometimes, output reduction goes directly with labor harms.<sup>161</sup> But what about the cases that are not so neat? It seems odd to depart from this focus on output as the lodestar of antitrust analysis just because a supplier, rather than a consumer, is being harmed.

Faced with what may be intractable economic questions, antitrust courts have, for the sake of administrability, often decided to limit antitrust analysis to what economics generally refer to as partial-equilibrium analysis.<sup>162</sup> This largely explains why only direct purchasers can claim antitrust damages.<sup>163</sup> Perhaps it also explains why the Court in *Ohio v. American Express* chose to ignore potential harm to cash purchasers in

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160. See, e.g., Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 735 (2007) (“Predatory pricing that excludes competitors and results in monopsony is condemned by the Sherman Act, just as the Act condemns predatory pricing that excludes competitors and obtains a monopoly. . . . Protecting consumer welfare is the principal goal of the Sherman Act, but it is only a goal: The Sherman Act protects the people by protecting the competitive process. The competitive process could not be undermined any more clearly than it is when competing buyers conspire to eliminate the competition among themselves, and it matters not one whit under the Sherman Act whether the conspiracy threatens the welfare of conspirators’ customers or the welfare of end users. It is enough that the conspiracy threatens the welfare of the trading partners exploited by the conspiracy. Harm to them implies harm to people protected by the Sherman Act.”); see also Stucke, *supra* note 151, at 1547 (“[A] consumer welfare screen produces anomalous results. If the U.S. courts required the plaintiff to prove consumer harm in cases involving buyer power, otherwise per se illegal and criminally prosecuted behavior would become per se legal. A bid-rigging cartel composed of ultimate buyers, for example, would be per se legal, while its counterpart sellers, if they colluded, would be incarcerated and fined. Not surprisingly the United States does not distinguish between buyer and seller cartels; it actively prosecutes buyer cartels without considering their impact on consumer welfare.”).

161. See discussion *supra* notes 11 & 92.

162. See, e.g., Sean P. Sullivan, *Modular Market Definition*, 55 U.C. DAVIS L. REV. 1091, 1118 (2021) (“One traditional purpose of market definition has been to act like a microscope trained upon a specific area of concern. The full, interconnected web of commerce—of all possible products and technologies and consumptive uses and trading partners—is simply too big and too overwhelming to provide useful context for antitrust analysis.”).

163. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 731–32 (1977) (“The principal basis for the decision in *Hanover Shoe* was the Court’s perception of the uncertainties and difficulties in analyzing price and output put decisions . . . and of the costs to the judicial system and the efficient enforcement of

limiting the market to the “market for credit-card transactions,” even though the district court found that Amex’s conduct would increase retail prices for cash consumers.<sup>164</sup>

But much to some commentators’ chagrin,<sup>165</sup> the Court in *American Express* did take account of cross-market effects—in that case, by combining both sides of a two-sided market into a single market—and noted that failing to do so would lead to error.<sup>166</sup> While the Court limited its holding to two-sided, “simultaneous transaction” markets,<sup>167</sup> it is difficult to escape the realization that the logic of the holding—and the arbitrariness of considering effects on one side in isolation—would apply as well to the analysis of upstream and downstream trading partners:

Absent consideration of both sides of a platform, the analysis will arbitrarily include and exclude various sets of users and transactions, and incorrectly assess the extent and consequences of market power. Indeed, evidence of a price effect on only one side of a two-sided platform can be consistent with either neutral, anticompetitive, or procompetitive conduct. Only when output is defined to incorporate the two-sidedness of the product, and where price and quality are assessed on both sides of a sufficiently interrelated two-sided platform, is it even possible to distinguish between procompetitive and anticompetitive effects.<sup>168</sup>

The upshot is that, with some notable exceptions (such as the case of two-sided markets in *American Express*), courts have been reluctant to analyze competitive effects in adjacent markets. Alas, it is unclear where that line is appropriately drawn or whether it has been drawn somewhat arbitrarily in the past.

the antitrust laws of attempting to reconstruct those decisions in the courtroom.”); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 493 (1968).

164. *Ohio v. Am. Express Co.*, 585 U.S. 529, 547 (2018) (“Accordingly, we will analyze the two-sided market for credit-card transactions as a whole to determine whether the plaintiffs have shown that Amex’s anti-steering provisions have anticompetitive effects.”); *see also* *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 216–17 (E.D.N.Y. 2015) (“Merchants facing increased credit card acceptance costs will pass most, if not all, of their additional costs along to their customers in the form of higher retail prices . . . [C]ustomers who do not carry or qualify for an Amex card are nonetheless subject to higher retail prices at the merchant, but do not receive any of the premium rewards or other benefits conferred by American Express on the cardholder side of its platform . . . Thus, in the most extreme case, a lower-income shopper who pays for his or her groceries with cash . . . is subsidizing, for example, the cost of the premium rewards conferred by American Express on its relatively small, affluent cardholder base in the form of higher retail prices.”).

165. *See, e.g.*, Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 *YALE L.J.* 2142 (2018).

166. *See Am. Express Co.*, 585 U.S. at 546 (“For all these reasons, ‘[i]n two-sided transaction markets, only one market should be defined.’ . . . Any other analysis would lead to ‘mistaken inferences’ of the kind that could ‘chill the very conduct the antitrust laws are designed to protect.’”) (citations omitted).

167. *See, e.g., id.* at 544–46.

168. Geoffrey A. Manne, *In Defense of the Supreme Court’s “Single Market” Definition in Ohio v. American Express*, 7 *J. ANTITRUST ENF’T* 104, 110 (2019).

What might seem like an arbitrary decision appears more reasonable, of course, when one considers the sheer complexity of the task at hand. Economic behavior will often have second-order effects that run in an opposite direction to its first-order or “partial equilibrium” ones. A coal monopoly may cause buyers to opt for cleaner energy sources; a conservation cartel may maximize the long-term value of scarce resources.<sup>169</sup> Yet surely there are cases where out-of-market effects are “inextricably linked” to in-market effects and where extending the analysis would not create insurmountable burdens. A practical approach—and one consistent with the broad scope of the rule of reason—would at least consider out-of-market effects when they are a direct and identifiable consequence of conduct challenged in a separate market.

The question is further complicated in merger cases where the Clayton Act’s “any line of commerce” language seems to limit merger analysis to a single market and where the Court’s holding in *United States v. Philadelphia National Bank* reiterates this apparent constraint.<sup>170</sup> But those legal rules do not address the economic propriety of so limiting merger analysis, and neither is predicated on the complexity of undertaking the requisite economic analysis. Indeed, whatever the merits of such an approach at the time *Philadelphia National Bank* was decided, both the law and the economics have moved past them:

Despite the incorporation of efficiencies analysis into modern merger evaluation, and the advances in economics that allow efficiencies to be identified and calculated more accurately than at the time of *Philadelphia National Bank*, antitrust doctrine in the United States still supports a regime that fails to take into account efficiencies arising outside of the relevant market. Only a handful of federal court cases since *Philadelphia National Bank* raise the issue of out-of-market efficiencies, and those that address the merits quickly dispatch such efficiencies as being precluded by the Supreme Court precedent. In light of the advances in the ability to identify and measure efficiency benefits, the federal courts should update antitrust doctrine to support a serious and committed treatment of out-of-market efficiencies in merger analysis.<sup>171</sup>

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169. See Jonathan H. Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3, 78 (2004) (“The purported aim of antitrust law is to improve consumer welfare by proscribing actions and arrangements that reduce output and increase prices. Conservation aims to improve human welfare by maximizing the long-term productive use of natural resources, an aim that often requires limiting consumption to sustainable levels. While such conservation measures might increase prices in the short run, when successful they enhance consumer welfare by increasing long-term production and ensuring the availability of valued resources over time.”).

170. See Clayton Act, 15 U.S.C. § 18 (2018); *United States v. Phila. Nat’l Bank*, 374 U.S. 321 (1963); see also Daniel A. Crane, *Balancing Effects Across Markets*, 80 ANTITRUST L.J. 397, 397 (2015) (noting that *Philadelphia National Bank* is usually read to hold that “it is improper to weigh a merger’s procompetitive effects in one market against the merger’s anticompetitive effects in another.”); see also 2023 MERGER GUIDELINES, *supra* note 6, at 27.

171. Rybnicek & Wright, *supra* note 139, at 10.

In part reflecting this change in approach, the Court in *United States v. Baker Hughes* held that “[t]he Supreme Court has adopted a totality-of-the-circumstances approach to the statute [Section 7], weighing a variety of factors to determine the effects of particular transactions on competition.”<sup>172</sup> And lower courts have been increasingly willing to consider efficiencies in evaluating the application of Section 7 to proposed mergers.<sup>173</sup> It is even arguable that the district court in *New York v. Deutsche Telekom* (reviewing the T-Mobile/Spring merger) credited out-of-market efficiencies in approving the merger.<sup>174</sup>

Moreover, as with virtually all legislative language, the Clayton Act’s language is not as straightforward as some make it out to be. The phrase “in any line of commerce” does not inherently constrain the permissible zone of analysis to only a *single* “line of commerce,” nor does it preclude consideration of effects in another. Instead, the phrase’s most obvious meaning is to indicate that no area of commercial activity is exempted from the Clayton Act, not to limit the relevant scope of its enforcement. Indeed, using the word “line” to refer to the indicated area rather than “market” indicates general categories of business that are to be included in the law’s prescriptions rather than specific markets for identifying effects.

In other words, “it is plain that Section 7 does not limit the range of ‘lines of commerce’ that can trigger a merger’s prohibition.”<sup>175</sup> But it is by no means clear that Section 7 prescribes liability when a merger “lessen[s] competition” in a single *market*, regardless of whether it may

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172. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990).

173. *See, e.g., Saint Alphonsus Med. Ctr.-Nampa v. St. Luke’s Health Sys.*, 778 F.3d 775, 790 (9th Cir. 2015) (“[A] defendant can rebut a prima facie case with evidence that the proposed merger will create a more efficient combined entity and thus increase competition.”); *FTC v. Tenet Health Care*, 186 F.3d 1045, 1054–55 (8th Cir. 1999) (“[Courts should consider] evidence of enhanced efficiency in the context of the competitive effects of the merger . . . [as] the merged entity may well enhance competition.”).

174. Although its decision was not limited to the acceptance of “innovation” effects, the court rejected the contention that such “efficiencies” would not accrue to consumers in the relevant market, instead accepting that innovation itself was a cognizable efficiency. *See New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 215–16 (S.D.N.Y. 2020) (“Scott Morton stated that because these speeds are far beyond the levels that consumers now require, and because the value of speed to consumers diminishes the more that speeds exceed the level that consumers can practically use, there is no reliable way to determine how consumers would value speeds higher than roughly 250 mbps . . . . This argument is too limiting. The same may have been said about airplane speeds and pilotless flying machines in 1920. It unduly discounts the rate at which technological innovation, new products, and consumer applications develop to take advantage of enhanced capabilities, and the extent to which this merger might specifically help accelerate that process.”).

175. Basel J. Musharbash & Daniel A. Hanley, *Toward a Merger Enforcement Policy That Enforces the Law: The Original Meaning and Purpose of Section 7 of the Clayton Act* 69 (Aug. 1, 2024) (unpublished manuscript) (available at <https://dx.doi.org/10.2139/ssrn.4745310>).

enhance competition elsewhere in the same “line of commerce.”<sup>176</sup> As the Court suggested in *American Express*, the relevant “line of commerce” may incorporate distinct markets that need not exist on the same side of a given transaction. Indeed, modern “business ecosystem” theories suggest that conglomerate businesses with widely different “markets,” interrelated by an overarching business model that “inextricably links” them, may constitute something like a single “line of commerce,” despite the superficial distinctions between the components that comprise them.<sup>177</sup>

This interpretation is also consistent with historical usage of the term, by which “line of commerce” is used to designate a broad, aggregated category of business activities rather than a narrowly defined market segment. For example, in the district court opinion in the *Standard Stations* case, the Clayton Act’s “line of commerce” language is invoked to underscore that antitrust scrutiny extends to integrated commercial operations that affect entire supply chains, not merely isolated segments.<sup>178</sup> Similarly, in the legislative history surrounding passage of

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176. Indeed, as Musharbash and Hanley go on to note, the phrase “in any line of commerce” does not map onto the traditional conception of market definition used in merger analysis and defined by substitutability of products:

[A] “line of commerce” is a category of business occupation which is defined by characteristics that separate or distinguish it from other categories of business occupation. Under this definition, the fact that a group of business occupations offer substitute products from the perspective of consumers certainly could, at least in theory, qualify them as a “line” of commerce, but nothing in the phrase signifies that such substitutability is the *only* permissible basis for identifying a line of commerce. Indeed, using other characteristics that reasonably distinguish one business occupation from another—such as distinct products or services, peculiar know-how and operations, or divergent supply chains and distribution channels—to identify a line of commerce would be more consistent with the phrase’s textual import. For the word line was ordinarily used to identify, with varying degrees of generality, the type of business a party was engaged in, not the markets it sold to or participated in.

*Id.* at 70.

177. See, e.g., Viktoria H.S.E. Robertson, *Antitrust Market Definition for Digital Ecosystems*, 2 CONCURRENTS 3, 5 (2021) (available at <https://ssrn.com/abstract=3844551>) (“However, the picture would not be complete without also considering the macro level of the digital ecosystem, which is needed in order to understand the various competitive constraints (or the absence of such constraints) that are at work. The difficulty for market definition is to account for the various layers of competition that are present in the market realities of digital ecosystems in order to allow for the substantive analysis of a specific market behaviour or concentration. The challenge lies in providing an approach that does justice to the complexity of these markets, but without unnecessarily adding to that complexity.”).

178. *United States v. Standard Oil Co. of Cal.*, 78 F. Supp. 850, 864 (S.D. Cal. 1948), *aff’d*, 337 U.S. 293 (1949) (“The phrase ‘line of commerce’ in the Clayton Act is to be given a broad and not a narrow meaning. It should be interpreted, not with relation to a particular outlet, but with relation to the entire ‘picture’—if one may be permitted to use the best colloquial equivalent to the German word *gestalt* (configuration) . . . For this reason, I take the words ‘in any line of commerce’ to mean a complete line of activity, not a *small* segment.”) (emphasis in original).

the 1908 Federal Employers' Liability Act,<sup>179</sup> the phrase was used to refer to the totality of activities constituting the "management and operation of the business of a common carrier"<sup>180</sup> covered under that act.<sup>181</sup> These usages reveal a legal interpretation by which "line of commerce" captures the economically significant and broadly aggregated operations of a business, not conduct limited to a single, specific "market."

The question remains whether antitrust law has a comparative advantage in dealing with more "systemic" issues (like worker welfare, environmental effects, or even the "amateurism" offered by the NCAA in *Alston*) or whether other legal frameworks are better adapted. Put differently, antitrust law's main strength might be that it is primarily a consumer-oriented body of law that focuses on a single tractable problem: the prices consumers and other direct purchasers pay for goods. If that is true, then other bodies of law (such as labor and environmental laws) may be better suited to deal with broader harms. Indeed, in each of these fields, a massive regulatory apparatus exists specifically designed to implement government standards. Under current law, where antitrust law and a regulatory regime conflict, antitrust must give way.<sup>182</sup>

We do not purport to have a satisfactory answer to this complicated question. In fact, it is fair to say that one probably does not exist.<sup>183</sup> Antitrust law can either depart from its welfarist underpinnings—a significant loss for its economic consistency—or it can follow those principles toward complex problems that may ultimately impair its

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179. Federal Employers' Liability Act, ch. 149, § 1, 35 Stat. 65 (1908) (codified at 45 U.S.C. § 51).

180. *Id.* § 7, 35 Stat. 66 (1908) (codified at 45 U.S.C. § 57).

181. 60 CONG. REC. H4427 (daily ed. Apr. 6, 1908) (statement of Rep. Sterling) ("Mr. Speaker, the bill under consideration is what is known as the employer's liability bill. It relates to common carriers by railroads engaged in interstate commerce . . . . The first two sections of the bill abolish the doctrine of fellow-servant in this *line of commerce*." (emphasis added)).

182. *See Credit Suisse Sec. (USA) v. Billing*, 551 U.S. 264, 267, 285 (2007) (holding that where "(1) an area of conduct [is] squarely within the heartland of . . . regulations; (2) [there is] clear and adequate . . . authority to regulate; (3) [there is] active and ongoing agency regulation; and (4) [there is] a serious conflict between the antitrust and regulatory regimes . . . , [such] laws are 'clearly incompatible' with the application of the antitrust laws . . . [,]" thus "implicitly precluding the application of the antitrust laws to the conduct alleged"); *see also Phila. Nat'l Bank*, 374 U.S. at 373–74 (Harlan, J., dissenting) ("Sweeping aside the 'design fashioned in the Bank Merger Act' as 'predicated upon uncertainty as to the scope of § 7' of the Clayton Act, . . . the Court today holds § 7 to be applicable to bank mergers and concludes that it has been violated in this case. I respectfully submit that this holding, which sanctions a remedy regarded by Congress as inimical to the best interests of the banking industry and the public, and which will in large measure serve to frustrate the objectives of the Bank Merger Act, finds no justification in either the terms of the 1950 amendment of the Clayton Act or the history of the statute.").

183. *See Stucke*, *supra* note 151, at 1549 ("[I]t is illogical to advocate a consumer welfare screen given the current disagreement over what consumer welfare means, whether the agencies examine effects on either or both of the direct customers and the final consumers, and how consumer welfare is promoted.").

administrability. At this juncture, it is not clear there is a compromise that would enable enforcers to thread the needle to solve this complex conundrum. And if such a solution exists, it has yet to be articulated in a convincing manner that may lead to actionable insights for enforcers or courts. But it is crucial to note that some cross-market analysis may be unavoidable under a welfarist approach if antitrust is going to continue to attempt to address potential harms in upstream markets, including labor markets.

Given all of this, the FTC's and DOJ's update of their Merger Guidelines to address monopsony harms, while important, also appears to be premature, compared to the state of the economic literature, and potentially unactionable (or, at least, incoherent as stated) under the consumer welfare standard. This is not to say the antitrust policy world should simply ignore monopsony harms, but rather that more research, discussion, and caselaw are needed before definitive guidelines can be written. Ultimately, it may well be that legislative change is required before any such guidelines are enforceable by the courts.

#### IV. A PATH FORWARD: AN AGENDA FOR ANTITRUST AND LABOR MARKETS

The previous Parts have highlighted the empirical and conceptual challenges that complicate the application of antitrust law to labor monopsony. While the growing interest in this area presents opportunities for research and policy innovation, it is essential to approach these issues with a mix of enthusiasm and skepticism. The current state of economic knowledge and antitrust doctrine suggests that we are not yet ready for a significant expansion of enforcement in labor markets. This, however, does not mean that antitrust has no role to play or that the status quo is optimal. Rather, it suggests the need for a thoughtful and incremental approach that prioritizes the development of better analytical tools, evidence-based policymaking, and interdisciplinary collaboration.

The recent FTC complaint against the proposed Kroger/Albertsons merger underscores the importance of the issues raised in this paper and the ongoing challenges that antitrust authorities face when assessing labor market effects in merger cases.<sup>184</sup> While the complaint reflects an increased focus on labor issues in merger enforcement, it also highlights the complexities of defining markets, assessing competitive effects, and weighing efficiency claims in this context. The *Kroger/Albertsons* case provides a real-world example of how the FTC is grappling with these

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184. See generally *Kroger/Albertsons Complaint 2024*, *supra* note 4.

issues in practice. It also raises questions about the rigor of its proposed market definitions, the sufficiency of evidence required, and the theories of harm proposed.

Perhaps most notably, although the complaint proposes two distinct markets, one on either side of the supermarket business (“union grocery labor” on the one hand and “the retail sale of food and other grocery products” on the other), it fails to note that both are simultaneously intrinsic to the operation of supermarkets. It also fails to suggest how a court should respond if harm is found in one market but not the other. Of course, as noted, the complaint does not even contemplate that its alleged theory of harm in the labor market could produce procompetitive effects in the retail market.<sup>185</sup>

As labor market concerns continue to arise in antitrust cases, the FTC and other enforcers will need to develop more robust analytical frameworks and evidentiary standards to support their claims, and courts and policymakers will need to provide more precise guidance on how labor market harms should be assessed under existing legal standards. While the FTC’s increased focus on labor issues is noteworthy, the *Kroger/Albertsons* complaint also demonstrates that the agency’s approach needs to be further refined and clarified.

One key priority should be to develop more direct, antitrust-relevant measures of labor market power. While some recent studies have proposed measures such as labor-supply elasticity<sup>186</sup> and wage markdowns,<sup>187</sup> these tools have yet to be widely validated in antitrust contexts. Moreover, as discussed earlier, these measures may be sensitive to assumptions about the nature of competition.<sup>188</sup> Further refinement and testing of these measures is needed, focusing on their robustness and applicability to antitrust cases.

In addition, scholars should continue to study the effects of specific mergers and practices on labor market outcomes, using more sophisticated research designs that can isolate causal impacts. While some recent studies have taken steps in this direction,<sup>189</sup> much more work is needed to build a body of evidence that can inform antitrust enforcement. In particular, studies that can disentangle the effects of labor market concentration from other factors, such as firm-specific investments and productivity differences, would be valuable.

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185. See *supra* notes 138–141 and accompanying text.

186. See, e.g., Naidu et al., *supra* note 13, at 557.

187. See, e.g., Yeh et al., *supra* note 49; Kirov & Traina, *supra* note 39.

188. See Yeh et al., *supra* note 49.

189. See, e.g., David Arnold, Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes (Apr. 2, 2021) (unpublished manuscript) (available at <https://darnold199.github.io/madraft.pdf> [<https://perma.cc/7QPU-CFKQ>]).

Scholars and policymakers should also continue to refine models of dynamic competition and firm-specific investments in labor markets, with an eye toward their implications for antitrust enforcement. As discussed earlier, standard static models of monopsony may only partially capture the complexities of labor market competition, such as the role of search frictions, bargaining, and human capital investments. Some recent papers have started incorporating these features, but more work is needed to develop tractable models to guide enforcement decisions. It remains to be seen to what extent the FTC's lock-in argument in the *Kroger/Albertsons* complaint will be supported with such models.<sup>190</sup>

Another key priority should be to clarify the goals and legal standards for antitrust enforcement in labor markets. The consumer welfare standard, which has long guided antitrust policy, becomes difficult to apply when a merger or practice may harm workers but benefit consumers.<sup>191</sup> While some have argued for a “worker-welfare standard” that would prioritize the interests of workers,<sup>192</sup> it is unclear whether this would be consistent with the goals of antitrust law nor how it would be reconciled with simultaneous findings of countervailing consumer effects.<sup>193</sup> Policymakers, courts, and scholars should continue to grapple with these normative questions and work toward developing a coherent and administrable framework for weighing labor market effects in antitrust cases.

Finally, it is important to foster dialogue and collaboration between antitrust and labor experts to develop a shared understanding of the issues at stake. Economists, lawyers, and policymakers approaching these issues from different perspectives must find common ground and a common language to assess concerns about labor market power.

While these challenges are significant, there are reasons for cautious optimism. The increased attention to labor market power from scholars, policymakers, and the public has created a unique opportunity to reexamine long-held assumptions and explore new approaches. By pursuing an agenda that emphasizes empirical rigor, legal clarity, and interdisciplinary collaboration, we can make progress toward more competitive labor markets. This will not happen overnight, just as the development of the consumer welfare standard and the integration of antitrust with

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190. See *Kroger/Albertsons Complaint 2024*, *supra* note 4, at ¶ 63.

191. See *supra* Part III.

192. See, e.g., Hovenkamp, *supra* note 13, at 543 (“Consumer welfare—when it is properly defined—and worker welfare travel in tandem. When a practice harms consumers by raising prices and reducing output, it harms labor as well. There is no a priori reason for thinking that worker harm is less severe than consumer harm. A properly designed antitrust policy must focus on both sets of interests.”).

193. See *supra* Part III.

economic theory did not happen overnight. By staying focused on the ultimate goal of promoting the welfare of both workers and consumers and being willing to adapt to new evidence and insights, we can move closer to an antitrust regime that is suited to the realities of the modern labor market.

#### CONCLUSION

Significant challenges remain in applying antitrust law to address labor monopsony concerns. Despite growing academic and policy interest in this area, substantial gaps exist in both the empirical foundation and conceptual framework necessary for effective enforcement. The evidence on labor market concentration remains mixed and methodologically limited, while the theoretical distinctions between monopsony and monopoly introduce complications that standard antitrust tools are ill-equipped to address at the moment. Unique features of labor markets—such as the importance of firm-specific investments in human capital—pose challenges for market definition and the assessment of competitive effects.

Most problematically, the consumer welfare standard—the cornerstone of modern antitrust law—can become fundamentally strained when addressing monopsony. When a merger potentially reduces wages but benefits consumers through lower prices, courts and enforcers lack clear principles for resolving this tension. Neither ignoring upstream harms nor disregarding downstream benefits provides a satisfactory solution under current doctrine.

Given that these complex tradeoffs still lack anything approaching a definitive resolution in research or precedent, antitrust authorities would best serve the integrity of enforcement standards by exercising restraint. Disregarding difficult tradeoffs and applying questionable theories prematurely or overzealously risk harming competition, creating inconsistent precedents, and fostering unpredictable business environments—all without necessarily even improving worker welfare. This is not an argument against addressing labor market power entirely through uncertain means, as further co-evolution of economic and legal understanding may resolve some quandaries. It is, however, an argument that threading the needle to expand prohibitions into input markets requires a cautious, studious approach—especially when they conflict with the consumer interests that antitrust ultimately aims to safeguard.

