

**TESTIMONY BEFORE THE COMMITTEE ON THE JUDICIARY,
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LAW**

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Hearing on Antitrust and Economic Opportunity: Competition in Labor Markets

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Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for holding this important hearing on the place of labor markets and workers in antitrust law, and thank you for the opportunity to testify. I am honored to offer my perspective at a moment that is critical both for antitrust law and for workers.

My name is Sanjukta Paul, and I am an Assistant Professor of Law at Wayne State University, where I teach, research and write in the areas of labor, antitrust, and corporations law. My academic research has focused mainly on the intersection of labor and antitrust issues.¹

I. Introduction

Antitrust law has significant implications for workers and labor markets in a number of respects. I understand that this hearing will highlight noncompete and “no-poach” agreements along with the issue of occupational licensing, and will also consider emerging empirical research concerning the power that employers wield over workers.

In addition to these issues, antitrust law affects workers and labor markets in many other ways, through both action and inaction. First, antitrust law currently functions as an obstacle to the collective action of nontraditional workers who find themselves beyond the bounds of labor and employment law. Second, and relatedly, the lax regulation of vertical restraints has contributed to what David Weil has called the fissured workplace, which itself has given rise to the proliferation of work beyond the bounds of

¹ See Sanjukta Paul, “Antitrust as Allocator of Coordination Rights,” 67 UCLA L. REV. (forthcoming 2020); Paul, “Fissuring and the Firm Exemption,” 82 LAW & CONTEMP. PROBS. 65 (2019); Paul, “Recovering Labor Antimonopoly,” 28(3) *New Labor Forum* 34 (2019); Paul, “Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications,” 38 BERKELEY J. EMP. & LAB. L. 233 (2017); Paul, “The Enduring Ambiguities of Antitrust Liability for Worker Collective Action,” 47 LOYOLA UNIV. CHICAGO L. J. 969 (2016). My in-progress book project on the development of antitrust law from working people’s perspective, *Solidarity in the Shadow of Antitrust*, is under contract with Cambridge University Press. Parts of this testimony, particularly Part II, draw upon that project.

employment.² Finally, harms to workers across areas of antitrust, including but not limited to employer cartelization³ and merger review,⁴ are insufficiently scrutinized under the consumer welfare standard as currently applied.

The remainder of this testimony focuses on framing the overall issue of antitrust law's relationship to workers by summarizing the legislative history of this topic, and on antitrust obstacles to the collective action of workers beyond the bounds of employment.

II. Legislative History of the Antitrust Laws as to Labor and Workers

Legislative history arguments have helped to erect some of the keystones of today's antitrust framework. These include the consumer welfare standard itself, and more generally, the idea that Congressional intent supports a judicial methodology reliant on social science experts to not only determine facts (as is the case in many other areas) but also to effectively decide basic questions of law. Legislative history is certainly a helpful guide to the topic of today's hearing: the place of labor markets and workers in antitrust law.

The Sherman Act, of course, is the statutory foundation of antitrust. The statute was a response to a broad social movement focused upon a particular phenomenon: the rise of corporate power, especially as manifested in the legal form of the business trusts.⁵ Those same trusts soon became, in the "great merger movement" of the 1890s, the first industrial mega-corporations.⁶ The farmer-labor coalition that pushed for federal antitrust legislation⁷ was specifically concerned with the concentration of control over the economy in fewer and fewer hands, and with the accompanying disempowerment of

² David Weil, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (Harvard, 2014). The fissured workplace refers to business arrangements involving vertical disintegration, in which "lead firms" are nevertheless able to maintain control over smaller firms and workers in their orbits, while largely disclaiming responsibility over what happens outside their formal firm boundaries.

³ See Ted Tatos, "NCAA Amateurism as an Anticompetitive Tying Restraint," 64(3) *The Antitrust Bulletin* (September 2019). Even when consumer benefits are not expressly invoked, courts seem to apply a leniency to coordination among employers that is difficult to imagine in cases where firms coordinate consumer prices. See, e.g., Brief of Amicus Curiae Open Markets Institute in Support of Plaintiffs-Appellants in *Llacua v. Western Range Association*, Case No. 17-1113 (9th Cir. 2019) (supporting *en banc* review of Circuit's affirmance of district court decision in favor of sheep ranch owners' cartel engaged in wage suppression with regard to shepherds), available at <https://openmarketsinstitute.org/wp-content/uploads/2019/09/OMI-Brief-in-Llacua-v.-WRA-FINAL.pdf>.

⁴ See, e.g., Ioana Marinescu and Herbert J. Hovenkamp, "Anticompetitive Mergers in Labor Markets," 94 *INDIANA LAW JOURNAL* __ (forthcoming 2019).

⁵ Paul, "Recovering Labor Antimonopoly," *supra* note 1.

⁶ Naomi R. Lamoreaux, *The Great Merger Movement in American Business, 1895-1904* (Cambridge, 1985).

⁷ See, e.g., Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877-1917*, at 268 (Chicago, 1999) (writing that the "agitation" that led to the Sherman Act "was clearly rooted in the political crusades of the Grange, the Farmers' Alliance, and the Antimonopoly, Greenback, and Union Labor Parties of the 1870's and 1880's," all of which themselves represented arms of the farmer-labor antimonopoly movement).

many American working people who had previously enjoyed a level of autonomy and control over their economic lives.⁸

Legislators, like the political coalition to which they were responding, were concerned mainly with dispersing control over the economy—or if you will, with dispersing economic coordination rights—rather than with the lowest possible consumer prices or even with competition for competition’s sake. Senator Sherman himself was a Republican. That party’s platform, in the year immediately preceding the introduction of the legislation that eventually became the Sherman Act, included an antitrust plank entitled, “COMBINATIONS OF CAPITAL,” which declared the party’s opposition to “all combinations of capital, organized in trusts or otherwise, to control arbitrarily the condition of trade among our citizens...”⁹ It also explicitly targeted “all schemes to oppress the people.” That last clause specifically related to “the people” qua producers, not just qua consumers: it sought to prevent “undue charges on their supplies, or [] unjust rates for the transportation of their products...”¹⁰

This sentiment was echoed on the Senate floor. For example, Senator George, a key figure in the shaping of the law, stated that he was “extremely anxious” that Congress pass a law to “put an end forever to the practice, now becoming too common, of large corporations, and of single persons too, of large wealth, so arranging that they dictate to the people of this country what they shall pay when they purchase and what they shall receive when they sell.”¹¹ His emphasis was certainly not on the lowest possible prices in all cases: in fact, he specifically identified the lowering of suppliers’ prices as one of the harms to be addressed by legislation—a fact that should make us think of small businesses and gig economy workers today. Senators spoke of the “commercial monsters called trusts” whose growth “in the last few years has been appalling.”¹² The trusts’ success was “an example of evil that has excited the greed and conscienceless rapacity of commercial sharks.” These included specifically the steel trust, “the iniquities of the Standard Oil Company,” the “long, felonious fingers” of the sugar trust, and more.¹³ Importantly, each of these trusts was far more akin to what we would now call a single firm than to an association of firms, with coordination concentrated in a single board of trustees and grounded in the trustees’ controlling interest in each formally separate corporation. (In just a few more years, these trusts would take the final step and become single corporations, eliminating the formal trust mechanism.)

The Standard Oil Trust surfaced as a frequent example; Sherman after all represented Ohio, where John D. Rockefeller’s empire had begun, and he in particular discussed the company at length. His comments make it very clear that he was primarily concerned with the *concentration of economic coordination rights* in too-few hands, and not with low prices or even with competition as such. He said:

⁸ Paul, “Recovering Labor Antimonopoly,” *supra* note 1.

⁹ Thomas Hudson McKee, *The National Conventions and Platforms of all Political Parties 1789-1905* (1906) (Republican Party platform of June 19, 1888; emphasis added).

¹⁰ *Id.*

¹¹ Earl W. Kintner, *Legislative History of the Federal Antitrust Laws and Related Statutes*, Part I, p. 77 (1978) (20 Cong. Rec. 1458, Feb. 4, 1889).

¹² Kintner at 76.

¹³ *Id.* at 76-77.

I do not wish to single out the Standard Oil Company, which is a great and powerful corporation, composed in great part of the citizens of my own state, and some of the very best men I know of. Still, they are controlling and can control the market as absolutely as they choose to do it; it is a question of their will. *The point for us is to consider whether...it is safe in this country to leave the production of property, the transportation of our whole country, to depend on the will of a few men sitting at their council board ...*¹⁴

Unfortunately, antitrust law today has inverted this emphasis, treating economic coordination that takes place within large, powerful corporations with deference, while making the cooperation of small players, including workers beyond the bounds of employment, an enforcement priority.¹⁵

At one point, Sherman read into the record an excerpt from a prior speech by George, with the specific purpose of expressing the central meaning of the legislation:¹⁶

The trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the cost of the necessities of life and business and they decrease the cost of raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. The aggregate to themselves great, enormous wealth by extortion which make[s] the people poor. Then making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States ... till they are fast producing that condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command.¹⁷

Again, Sherman's central statement of statutory purpose specifically expressed the depression of prices, not only the inflation of prices, as one of the harms to be addressed by the statute. Moreover, the metric by which we are to locate the harm is also supplied in this passage: the ultimate goal of the statute is to target the aggregation of wealth and power, which "makes the people poor." Thus, a powerful firm or group of firms that are depressing suppliers' prices (which may in turn depress their workers' wages) is an antitrust harm.

From a review of the legislative record as a whole, it is also evident that legislators manifestly did not intend to target collective action, joint price-setting, or collective bargaining among workers or small producers by means of the Sherman Act.¹⁸

¹⁴ 21 Cong. Rec. 2570 (March 21, 1890) (emphasis added).

¹⁵ Paul, "Antitrust as Allocator," *supra* note 1.

¹⁶ Sherman introduced the quotation by asking: "How is such a law to be construed? Liberally with a view to promote its objects. What are the evils complained of? They are well depicted by the Senator from Mississippi in this language, and I will read it as my own with quotation marks..." 21 Cong. Rec. 2461 (March 21, 1890).

¹⁷ *Id.*; quoting statement originally made by George (21 Cong. Rec. 1768 (February 27, 1890)).

¹⁸ Other scholars who have made a direct study of the issue have come to the same conclusion. See, e.g., Edward Berman, *Labor and the Sherman Act* (Harper & Brothers, 1930); Louis Boudin, "The Sherman Act and Labor Disputes," 39 COLUMBIA L. REV. 1283 (1939); Joseph L. Greenslade, "Labor Unions and the Sherman Act: Rethinking Labor's Nonstatutory Exemption," 22 LOY. L.A. L. REV. 151 (1988).

Legislators made repeated express statements to this effect, with little debate or disagreement.¹⁹ The only issue relating to this topic that was seriously debated was how great a risk a *judicial* interpretation of the statute targeting workers' collective action was—with some, like Sherman, expressing incredulity that the courts would invert the purpose of the statute so—and whether this risk required re-writing the bill altogether. That is what eventually happened: the bill was sent back to committee in large part for the reason of avoiding a judicial interpretation under which workers and small producers, the very people the statute was meant to help, would be further disempowered by it.

The courts nevertheless interpreted the statute in just the way Congress had sought to avoid, turning it into a weapon against working people's collective action during an era when such action was one of the few, limited checks upon sweatshop labor (entailing low wages, dismally poor working conditions, and widespread workplace injuries), child labor, and the general dispensability of workers' lives. The Supreme Court's brief discussion of the legislative history of the Sherman Act made a critical error, ignoring all of legislators' express statements and instead relying upon the absence of a farmer-labor exemption amendment.²⁰ The absence of an amendment sheds no light on legislative intent, however, because the record shows that legislators re-wrote the bill—which they saw as aimed at rising corporate power and aggregations of wealth—precisely to address this issue, and that they believed they had obviated the need for any such amendment. The legislative history of the statute shows that even absent an express “labor exemption,”²¹ the statute was not intended to proscribe coordination among workers or small producers. Nevertheless, antitrust law's relationship to workers has been shaped by these *Lochner*-era opinions at a deep level ever since.²² It is time for Congress to consider this relationship anew.

A final note. Legislators invoked the common law of restraint of trade in the text of Section 1 of the Act, and courts continued to invoke the common law tradition for quite some time when applying the statute. At common law, the classic restraint of trade was a non-compete clause or agreement: indeed, preventing or at least limiting such

¹⁹ For example, Senator George, a key figure in the crafting of the statute, stated (regarding an earlier version of the bill) that prohibiting combinations designed or tending to “prevent free and full competition” could have the unintended consequence of “bringing under the punitive provisions of the bill” the “most innocent and necessary arrangements” of the very “farmers and laborers of the country who are sending their voices to the Congress ... asking, pleading, imploring us to take action to put down trusts.” Kintner, *supra* note 8, at 78. Senator Hoar echoed this sentiment later in the deliberations: “The laborer who is engaged lawfully and usefully and accomplishing his purpose in whole or in part in endeavoring to raise the standard of wages is engaged in an occupation the success of which makes republican government itself possible and without which the Republic can not in substance, however it may nominally do in form, continue to exist.” 21 Cong. Rec. 2728.

²⁰ *Loewe v. Lawlor*, 208 U.S. 274 (1908).

²¹ Congress subsequently addressed the courts' targeting of labor under the Sherman Act by expressly enacting a “labor exemption” in the Clayton Act of 1914; yet the courts largely rendered that too a dead letter. Only after the Norris La Guardia Act was passed, New Deal-era court decisions created the modern law of the labor exemption. See generally Paul, “Enduring Ambiguities,” *supra* note 1.

²² Robert Bork and others effectively built upon these and other *Lochner*-era decisions in the 1970s remaking of antitrust law. Paul, “Antitrust as Allocator,” *supra* note 1. Meanwhile, the “labor exemption,” intended to make space for countervailing collective action by workers, has not fared very well in these last decades.

contracts was the *origin* of the restraint of trade doctrine.²³ (Price-fixing agreements were secondary—only conditionally prohibited at common law, and even then only in the age of the trusts and not before.²⁴) The freedom to pursue one’s livelihood was a primary value with which the common law doctrine was concerned. Together with the pro-worker aims that animated the passage of the Sherman Act, this may suggest to the committee that regulating noncompete agreements with workers’ welfare in mind should be one of its concerns—and that speculative consumer benefits must not be allowed to justify harms to workers from such agreements.²⁵ This is especially so when noncompete agreements are imposed by more powerful parties, such as national or international fast-food franchisors, upon much weaker parties, such as low-wage workers—precisely the sort of unfair bargain that Senators George, Sherman, and their colleagues had in mind when they crafted the first antitrust law.

III. Labor and Antitrust in Today’s Fissured Workplace

Fast-forwarding to today’s labor market, this original, “worker welfare” legislative purpose has been inverted. In the so-called gig economy, dominant firms like Uber and Lyft are able to fix prices across thousands of supposedly independent businesses, while antitrust law functions to prevent individual workers from engaging even in collective bargaining to improve their pay and working conditions. And that is only the tip of the iceberg.

Both in the so-called gig economy and in the fissured workplace more broadly, more powerful firms are able to coordinate the activities of smaller players in their orbits, often up to and including prices. This is true when Uber, for example, sets the prices charged by the very drivers the firm insists are independent businesses, and it is also true when franchisors control their franchisees’ business decisions.²⁶ Antitrust law’s lax attitude toward vertical restraints since the 1970s has allowed this sort of control, exerted by powerful firms beyond their firm boundaries, to expand and proliferate. Indeed, Uber’s and similar firms’ price-setting as to ride services—services they insist they do not sell—tests the bounds even of existing law. Uber claims that it is a two-sided platform that mediates between riders and drivers. A classic vertical restraint, however, is one in which the restraining firm sells a commodity that is then re-sold by the restrained firm.²⁷ Uber thus stretches the limits of the current law, but precisely in the direction of

²³ See, e.g., Hans B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (1955).

²⁴ Thorelli, *id.*; John C. Peppin, “Price-Fixing Agreements under the Sherman Anti-Trust Act,” 28 CAL. L. REV. 297, 350 (1940).

²⁵ Because noncompete agreements were in any case generally disfavored by state courts during the early decades of the Sherman Act, federal courts did not usually have occasion to address the issue squarely at this time.

²⁶ This argument in this Part is set out in greater detail in Sanjukta Paul, “Fissuring and the Firm Exemption,” *supra* note 1 (attached).

²⁷ “The paradigm cases that liberalized the law of vertical restraints never immunized price restraints *as far removed* from the transaction that Uber claims to have with its drivers. Uber and similar firms say that they license the use of software to drivers, which facilitates drivers’ transactions with riders. But the price restraints Uber places on drivers relate to the *rides themselves* ... *GTE Sylvania* involved the re-sale of TV’s, where the TV market was the subject of the restraint at issue. *State Oil Co. v. Khan* involved the re-sale of gas and oil, where the prices of those commodities were the subject of the restraint at issue. *Leegin*

the law’s underlying tendency to reward economic coordination in the form of control by more powerful actors over less-powerful ones.

Relatedly, although Uber’s and similar firms’ price coordination pushes beyond the limits of existing law, the turn toward laxness in the law of vertical restraints is what has helped to bring about the fissured workplace in the first instance. Economist Brian Callaci has shown that the ability to impose vertical restraints upon franchisees is critical to the franchising business model and that the liberalization of this area of antitrust law has therefore been critical in enabling it.²⁸ In particular, powerful franchisor firms exert control beyond firm boundaries while largely escaping responsibility for its consequences. As he notes, franchisors’ endeavor to “persuade regulators, legislators, and courts that their business form was *sui generis* and should not be regulated according to existing conceptions” will “be familiar to observers of twenty-first century gig economy firms.”²⁹ Importantly, the economic arguments for loosening vertical restraints have generally been premised upon (hypothetical) benefits to consumers—without considering effects upon workers, franchisees, or other smaller actors in the orbits of dominant firms.³⁰ The Department of Justice Antitrust Division engaged in this style of reasoning when it recently filed a brief in favor of franchisors in pending cases involving “no-poach” agreements, pointing to speculative consumer benefits as legitimate justifications for restraints upon competition in *labor* markets.³¹

And yet, the least powerful actors in the gig economy and the fissured workplace, namely individual workers and entrepreneurs, receive no such special consideration from antitrust institutions today. Even their attempts to engage in collective bargaining in order to receive a fair share of the revenues they generate have so far met with prohibitive antitrust obstacles. For example, the City of Seattle’s enactment of a collective bargaining ordinance covering rideshare drivers was met with a Sherman Act preemption lawsuit brought by the U.S. Chamber of Commerce, in which the Department of Justice and the Federal Trade Commission filed a brief in favor of the Chamber and against workers.³² Rideshare drivers currently do not enjoy collective bargaining rights in Seattle or anywhere else in this country, and neither do other gig economy workers.

involved the re-sale of clothing, whose prices were the subject of the restraint at issue. None involved price restraints on commodities (here, ride services) that were themselves unrelated to the commodity (here, use of the app) sold by the restraining firm (Uber) to the purchaser-firm (drivers).” Paul, “Fissuring,” at 73-74.

²⁸ Brian Callaci, “Vertical Power and the Creation of a Fissured Workplace: The Case of Franchising” (U. Mass. Amherst, Dept. Econ., Working Paper, Sep. 5, 2018).

²⁹ Brian Callaci, “Vertical Dis-Integration and the Creation of a New Business Form: Franchising 1960-1980,” 10 (Washington Center for Equitable Growth Working Paper Series, 2018).

³⁰ See, e.g., Roger D. Blair & David L. Kaserman, *Law and Economics of Vertical Integration and Control* (1983); Marshall Steinbaum, “Antitrust, the Gig Economy and Labor Market Power,” 82 *LAW & CONTEMP. PROBS.* 45, 49-50 (2019) (discussing economists’ arguments for the efficiency of vertical restraints, including Blair & Kaserman).

³¹ Corrected Statement of Interest of the United States of America, *Harris v. CJ Star, LLC*, No. 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019), ECF No. 38; Paul, “Fissuring,” at 71-72 (discussing no-poach cases).

³² Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Appellant and in Favor of Reversal, *United States Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640). See also Steinbaum, “Antitrust, the Gig Economy and Labor Market Power,” at 59-60.

These antitrust obstacles to organizing and collective action by workers are not limited to the app-based rideshare sector. Antitrust law serves as an obstacle to collective action among a wide variety of workers who currently do not fall within the bounds of labor and employment law, and whose ranks are only swelling. The FTC itself has engaged in investigations and enforcement actions targeting workers and independent professionals for engaging in collective action to better or maintain their circumstances, from truck drivers to church organists.³³ And this is only the tip of the iceberg, because private lawsuits, informal demands, and the fear of prosecution keep most such collective action entirely at bay. Work outside the traditional employment relationship continues to proliferate. It is perverse for antitrust law to pose obstacles to such workers' collective bargaining, which is necessary to balance the power of the firms that retain them and that unilaterally determine the terms of any resultant contracts.

While this is in part a story about the failures of labor law, and while labor law reform is also necessary, it is not a problem that antitrust law can afford to outsource or ignore. Indeed, the fact is that antitrust law's current bias against democratic cooperation—including coordination among workers—and in favor of top-down corporate control has contributed to the institutional weakness and perceived illegitimacy of workers' collective action rights more generally, even when grounded in labor law.³⁴

IV. Conclusion

Given the original purposes of antitrust law, its current stance toward workers is perverse. It should do more to restrain the control exerted by powerful firms, from franchisors to rideshare platforms to trucking companies, over workers and small players. At the same time, it should not impose obstacles upon workers' attempts to engage in collective bargaining or other collective action in order to better their conditions, by balancing the bargaining power of more powerful contracting parties. And in navigating these and all other issues arising under antitrust law, decision-makers should not justify harms to workers by means of often-speculative benefits to consumers.

Thank you for the opportunity to testify.

³³ See, e.g., *In the Matter of American Guild of Organists* (FTC Case No. 151-0159, 2017), *In the Matter of Music Teachers National Association, Inc.* (FTC Case No. 131-0118, 2014); *In the Matter of Professional Skaters Association, Inc.* (FTC Case No. 131-0168, 2014); Paul, "Enduring Ambiguities," *supra* note 1 (discussing antitrust law's effects on port truck drivers' movement for decent pay and working conditions over a period of decades); Sandeep Vaheesan, "Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages," 78 MD. L. REV. 766 (2019).

³⁴ See Paul, "Antitrust as Allocator," *supra* note 1.