

# CONFERENCE ESSAY: WHAT IS PRO-WORKER ANTITRUST POLICY?

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Why have this conference on labor and antitrust policy now? A lot of attention is being paid to the Biden Administration's implementation of the Infrastructure Investment and Jobs Act and its labor provisions, which leads us to look broadly at the administration's whole-of-government approach to improving workers' lives.

For example, the Federal Trade Commission (FTC) has taken a pro-worker leap by exposing non-compete clauses for creating undue market power. And, in a possible signal of a pro-worker turn in merger review at the Department of Justice and the FTC, some recent cases have consulted worker representatives and considered fair market functioning, not just lower prices. The two agencies are working on refreshed merger guidelines that harken back to the statutory intent of the Clayton Act to place effective limits on corporate consolidation.

There is much potential for a progressive and productive use of government regulatory power to lift-up the status of working families. This conference will address what robust pro-worker antitrust enforcement and policymaking can look like.

As regulators look to rebalance the scales of power, Marshall Steinbaum in The Sling encourages merger reviewers to consider that pathways to and protections for collective bargaining represent a highly effective remedy for undue monopsony corporate power. Another principle the agencies should revisit is already written into merger law: Section 7 of the Clayton Act states that "the labor of a human being is not a commodity or article of commerce." While this breakthrough recognition in 1914 exempted workers' collective action from antitrust laws against coordination and helped limit strike-breaking court injunctions, over time the principle has been weakened and often ignored in merger review.

Beyond mergers, how can government remedy the decades of laissez-faire antitrust nonenforcement that has allowed large corporations to dominate small businesses, misclassify workers as independent contractors, and outsource core operations to lower-wage non-union vendors? During this conference, we will consider which tools are available to empower workers to form unions and how rulemaking and enforcement can be used to fight unfair methods of competition.

## **Big can be better if workers have countervailing power**

The economics of large firms are straightforward. Super firms in capital intensive industries generally develop because scale economies compound large firms' innovative advantage. A permissive regulatory environment also enables these firms to grow to superscale through acquisitions and power over suppliers. Without a countervailing power such as a union of workers

that can exert economic power through a strike, the tendency of super firms — natural monopolies and oligopolistic firms — is to raise profits and manager salaries, buyback shares, and sit on idle cash. There is only a theoretical free market path for workers in such firms to share the fruits of the profits they produce, while evidence suggests that the growing dominance of super firms leaves workers with few outside options or other recourse, forcing them to accept lower pay for their productivity.

Large firms can be beneficial. A positive aspect of a large vertically integrated oligopoly is much more responsibility for the supply chain, argues Nelson Lichtenstein in [Two Cheers for Vertical Integration](#). Firms that outsource have divested themselves of the responsibility to monitor health and safety problems and other forms of worker exploitation and abuse.

Supporting workers' unions in concentrated sectors so that collective bargaining with major employers sets a sectoral floor for wages and other basic terms of employment would remove firms' incentives to compete for the lowest pay and level of working conditions. Without labor regulation that supports robust collective bargaining, the fruits of big firms' size will not be shared by most of society.

## **Addressing the challenges of small firms — unions and regulation can improve jobs**

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There isn't just one path for workers to raise wages, as Brian Callaci reminds us. Workers should not just "wait for your industry to consolidate, and then bargain over the profits." Many industries have limited economies of scale and unions had great success in improving pay and working conditions during the twentieth century. Truck drivers and warehouse workers, clothing and textile workers, construction workers, mine workers, and even janitors worked for uncoordinated small businesses in dysfunctional sectors. These markets were monopolistically competitive and each employer had low profits and relied on casual labor.

Organizing success came because the Teamsters, for example, organized both the workers and employers in the warehouse and trucking industries. In the 1960s, truck drivers made UAW wages despite the decentralized market structure because of the ability of the Teamsters to take wages out of competition and negotiate with employers through the machinery of the Interstate Commerce Commission. There are many paths for unions to share and create economic rents and productivity outside of vertically integrated oligopolies and collective bargaining. But, as Sandeep Vaheesan notes, "right now, we seem to have the worst of both [worlds]: very large firms that wield awesome power and dominate their small firm satellites."

## **Industrial policy doesn't work without industrial relations**

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An industrial policy needs industrial relations. Teresa Ghilarducci and Rick McGahey's essay in the Boston Review, [What About Workers?](#), reaches back to John Kenneth Galbraith's vision of a postwar U.S. economy that embedded "countervailing power" institutions in the form of unions and collective bargaining. Ghilarducci and McGahey argue that industrial policy without worker voice and power won't maintain the innovation that comes from oligopoly rents and the worker prosperity that comes from sharing those rents. The main drag to long-term sustainable economic growth is a sluggish multiplier — a dollar of spending yields low stimulus to the

economy — and low marginal propensity to consume, caused by unproductive capitalist spending, wasteful and seemingly vanity-driven mergers and acquisitions, and huge profits going to corporations that use excess cash to buy back stock. Without higher union coverage across U.S. industries, you get both negative forces in spades.

Brian Callaci and Sandeep Vaheesan’s [Slate article](#), based on their recently published work in the Cornell Law Review Online, argues that the Biden administration, specifically the antitrust and labor agencies, could use its authority to rein in the abuse of independent contractor and franchise rules to protect people who should be classified as workers and be covered by worker protection. A recent [request for comment](#) from the FTC on franchisors exerting control over franchisees and workers signals promising attention to the harm of business models that exploit weakened antitrust laws to enable corporate control of workers’ terms and conditions *without* any legal responsibility. We hope that conferees engage in a robust conversation as to the value of boosting worker power directly as a pathway to improving the functioning of fragmented or franchised industries.

Yet another element of a pro-worker antitrust policy would be sectoral bargaining structures and encouragements. David Madland explores the legal and political moves [enabling a breakthrough](#) for sectoral bargaining in the E.U. and how sectoral bargaining could work in the U.S. Given its broader scope, sectoral bargaining could provide institutional support for workers’ exercise of collective power and provide a much-needed supplement to the limited firm-centric labor relations regime in the U.S, which was designed for large, vertically integrated corporations.

## **Workers at the table can help rebalance the economy**

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As we consider how workers can enforce antitrust remedies, the merger arena is particularly ripe. Communications Workers of America President Chris Shelton argues in [the Hill](#) that “labor considerations have for too long been absent from antitrust decisions even though the potential harms to workers as the result of mergers are evident.” He notes that the Microsoft/Activision deal presents an opportunity for change. Microsoft — aware of the FTC’s pro-worker concern — negotiated an unprecedented labor [neutrality agreement](#), which, if the merger is approved, would prevent potential monopsony harms by allowing workers at Activision to freely make a choice about union representation.

In this conference we hope to create a community of pro-labor progressives with different points of view. Ultimately, we share the same goals of creating market governance institutions and rules appropriate to a democratic country. Given this goal, we hope to explore how today’s regulators and policymakers can address power imbalances in markets and grant workers their rightful place at the antitrust table.