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How Antitrust Failed Workers by Eric A. Posner

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Book Review



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Abstract

IN RECENT YEARS, GROWING ECONOMIC INEQUALITY and anxieties about market power, monopolization, and other such concerns have rejuvenated competition and antitrust law and policy. It is well known that antitrust enhances competition by addressing issues of monopolization, price-fixing arrangements, and cartels, among other anticompetitive practices in markets. This allows dynamic competition to flourish in markets and ensures that consumers are provided with competitive prices and product choices. Although the negative impacts of market concentration are frequently recognized in the context of product markets, its impact on labour markets and the workers therein have largely been unexplored until recently. Professor Eric A. Posner's *How Antitrust Failed Workers* attempts to fill this gap in the scholarship.

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Book Review

***How Antitrust Failed Workers* by
Eric A. Posner¹**MARIA ARABELLA M. ROBLES²

IN RECENT YEARS, GROWING ECONOMIC INEQUALITY and anxieties about market power, monopolization, and other such concerns have rejuvenated competition and antitrust law and policy. It is well known that antitrust enhances competition by addressing issues of monopolization, price-fixing arrangements, and cartels, among other anticompetitive practices in markets. This allows dynamic competition to flourish in markets and ensures that consumers are provided with competitive prices and product choices.³ Although the negative impacts of market concentration are frequently recognized in the context of product markets,⁴ its impact on labour markets and the workers therein have largely been unexplored

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1. (Oxford University Press, 2021) [Posner, *Antitrust Failed Workers*].
 2. Juris Doctor (2022), Osgoode Hall Law School.
 3. See *e.g.* *Competition Act*, RSC 1985, c C-34, s 1.1.
 4. For example, the unprecedented growth of big tech giants like Amazon, Google, and Facebook has evoked suspicion from policymakers across the globe. As such, antitrust enforcement has been at the forefront of President Joe Biden's approach to "fixing" the economy. See White House, Briefing Room Release, "Fact Sheet: Executive Order on Promoting Competition in the American Economy" (9 July 2021), online: <www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy> [perma.cc/4LM6-BXZ9]; Jim Tankersley & Cecilia Kang, "Biden's Antitrust Team Signals a Big Swing at Corporate Titans," *The New York Times* (24 July 2021), online: <www.nytimes.com/2021/07/24/business/biden-antitrust-amazon-google.html> [perma.cc/7LMC-C3M4].

until recently.⁵ Professor Eric A. Posner's *How Antitrust Failed Workers* attempts to fill this gap in the scholarship.

As Kirkland and Ellis Distinguished Service Professor of Law at the University of Chicago, Posner has written countless works in various areas of law, including financial regulation, international law, and constitutional law.⁶ Over the last few years, he has focused his attentions on the role that antitrust could—or should—have with respect to labour and employment. In his efforts to ensure that this largely unexplored area becomes further studied, he has written a number of news articles,⁷ authored academic papers,⁸ and provided testimony before the Subcommittee on Antitrust, Commercial, and Administrative Law of the US House Committee on the Judiciary.⁹ In essence, these discussions all centre around the same proposal to combat the negative effects of market power and concentration in labour markets raised in *How Antitrust Failed Workers*: “[A]ntitrust law should be brought to bear against labor monopsony.”¹⁰

The book provides an interesting approach to fighting economic inequality by focusing its attention on the failure of antitrust enforcement to prevent employers with high market concentration from using their market power to

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5. For example, in June 2022, a new provision was introduced by the Government of Canada within the existing criminal conspiracy provisions of the *Competition Act* to protect workers from agreements between employers that fix wages and restrict job mobility. See *Budget Implementation Act, 2022, No. 1*, SC 2022, c 10, s 257(1); *Competition Act, supra* note 3, s 45(1.1).
 6. See “Eric A Posner” (2022), online: *University of Chicago Law School* <www.law.uchicago.edu/faculty/posner-e> [perma.cc/EE9W-2T5A].
 7. See e.g. Eric Posner, “The Rise of the Labor-Antitrust Movement” (29 November 2021), online: *Competition Policy International* <www.competitionpolicyinternational.com/the-rise-of-the-labor-antitrust-movement> [perma.cc/4B7B-SFCE]; Eric A Posner, “Why the FTC Should Focus on Labor Monopsony,” *Promarket* (5 November 2018), online: *University of Chicago Booth School of Business* <www.promarket.org/2018/11/05/ftc-should-focus-labor-monopsony> [perma.cc/B7BZ-MZH8]; Eric Posner, “Opinion: You Deserve a Bigger Paycheck. Here’s How You Might Get It.,” *The New York Times* (23 September 2021), online: <www.nytimes.com/2021/09/23/opinion/antitrust-workers-employers.html> [perma.cc/A6Z7-ALDA].
 8. See e.g. Suresh Naidu, Eric A Posner & Glen Weyl, “Antitrust Remedies for Labor Market Power” (2018) 132 *Harv L Rev* 536; Ioana Marinescu & Eric A Posner, “Why Has Antitrust Law Failed Workers?” (2020) 105 *Cornell L Rev* 1343; Eric A Posner, “The Antitrust Challenge to Covenants Not to Compete in Employment Contracts” (2020) 83 *Antitrust LJ* 165.
 9. House Committee on the Judiciary, “Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker” (28 September 2021), online (video): *YouTube* <[youtu.be/w8zSjr4JaiQ](https://www.youtube.com/watch?v=w8zSjr4JaiQ)> [perma.cc/PF2X-X7WA].
 10. Posner, *Antitrust Failed Workers, supra* note 1 at 7.

suppress wages. It provides a thorough exploration of the intersection of two distinct areas of law: antitrust and labour and employment. Posner highlights the unexplainable failure of regulators, economists, and experts alike to apply well-known antitrust legal frameworks to labour markets, despite recognition by leading historic economists that there is no difference between the economic harm of product market power and labour market power.¹¹ At the book's outset, however, Posner provides readers with a primer on antitrust concepts and makes it clear that market power is exerted differently by dominant firms in the two kinds of markets. To distinguish the concept of "monopoly" present in product markets, the term "monopsony" is used to identify the phenomenon in labour markets.¹²

The word "monopsony" was coined by British economist Joan Robinson and refers to a single buyer with a lot of bargaining power within a market.¹³ As such, where dominant monopoly sellers can control the prices that consumers must pay for products, monopsonies use their market power to suppress the amount they are willing to pay (*i.e.*, wages) to *buy* a product (*i.e.*, the labour of workers).¹⁴ Considering the parallels between monopolies in product markets and monopsonies in labour markets and the absence of a distinction between these two concepts in antitrust legislation, it is apt for Posner to question why antitrust has not been used to combat the stagnation of wages. In the introduction to the book, he considers several possible answers to the question of inconsistency between product and labour market antitrust, including the emphasis of traditional legal theory on product markets, the recently refuted assumption that labour markets are competitive, and the difficulty of antitrust enforcement and litigation.¹⁵

The remainder of the book addresses the reasons why antitrust law has yet to be used for labour market concentration, as well as how the existing legal frameworks can be reworked to deal with labour issues and protect workers more effectively. To achieve this, the book is divided into nine chapters, which are categorized into three distinct parts.¹⁶

11. *Ibid* at 3-4, 11-12, citing Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (W Strahan & T Cadell, 1776) at 82-85.

12. Posner, *Antitrust Failed Workers*, *supra* note 1 at 1, 7-8, 11.

13. *Ibid* at 11, citing Joan Robinson, *The Economics of Imperfect Competition*, 2nd ed (St Martin's Press, 1933).

14. Note that whether a monopoly or monopsony exists depends on the parameters by which the market is defined, which is beyond the scope of this review.

15. Posner, *Antitrust Failed Workers*, *supra* note 1 at 3-4.

16. *Ibid* at v-vii.

Part one of the book focuses on the current landscape with respect to how labour monopsony has manifested in the United States, as well as how current antitrust laws and enforcement have failed to capture labour market concentration. Posner introduces the concept of monopsony and discusses the main sources of monopsony power in labour markets in the first chapter.¹⁷ As evidence to support the existence of labour market power, he uses empirical data to demonstrate that “residual labor market elasticities are extremely low” which in turn allows employers to pay workers significantly less than a competitive rate.¹⁸ In this application of economic theory, Posner makes an admirable effort to communicate complex economic concepts in a way that can be thoroughly understood by readers who may not have a background in economics. The rationale for the lack of competition in labour markets helps to prepare the reader for the second chapter, which argues that although antitrust law is meant to challenge anticompetitive behaviour in markets, antitrust enforcement and litigation with respect to the anticompetitive behaviour of employers is rare.

Posner notes specifically that “the statutes do not distinguish sell-side and buy-side anticompetitive behavior, and buy-side anticompetitive behavior produces the same type of harm as sell-side anticompetitive behavior.”¹⁹ Nonetheless, while Posner notes that courts agree that anticompetitive behaviour in labour markets would still violate antitrust laws,²⁰ there is a significant “litigation gap” when comparing labour market litigation and product market litigation.²¹ This gap is attributed to a number of possibilities, including but not limited to the economic theory that firms monopolize more than they monopsonize; the data limitations that have led economists to believe, until

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17. *Ibid* at 14-20 (describing the sources of power as search frictions, job differentiation, and labour market concentration due to economies of scale, network effects, and other such factors).
 18. *Ibid* at 24-28. Note that “elasticity” is an economic term referring to the sensitivity that an economic variable has to changes in another variable. In the labour market context, elasticity is the sensitivity that workers have with respect to wage changes. High elasticity means that workers would all quit at even the slightest decrease in wages, whereas low elasticities mean that workers are not as sensitive to these changes (*ibid* at 21).
 19. *Ibid* at 31.
 20. Note that section 6 of the *Clayton Act* specifically provides that unions—a “form of labor cartel”—are exempted. See *ibid* at 31-32; *Clayton Act*, 15 USC § 17 (1914). Further, in the comparator class of product market litigation, Posner provided as an example Walmart, which is a large retailer that possesses a substantial amount of product market power so as to give it the ability to suppress the prices that it is willing to pay to wholesalers. See Posner, *Antitrust Failed Workers*, *supra* note 1 at 31.
 21. *Ibid* at 34.

recently, that labour markets are competitive; the legal uncertainty and lack of jurisprudence that make labour monopsony litigation more risky; the lack of government antitrust investigation and enforcement; the absence and difficulty of class actions due to the individualized nature of work; and the existence of a traditional legal approach to protecting workers “outside” of antitrust through labour and employment law.²²

Part two discusses legal reform by providing four chapters on anticompetitive behaviours or conduct that exist in labour markets and how laws can be reformed to address each issue. Chapter three focuses on the presence of collusion in labour markets, providing various examples wherein employers have made agreements to restrain competition contrary to section 1 of the *Sherman Act*.²³ The author pays special attention to no-poaching agreements, including the use of McDonald’s as an example, where low-skilled workers were subject to such agreements, thus limiting their job mobility.²⁴ The next chapter then examines labour markets wherein actual monopsonies already exist (*i.e.*, markets that actually contain only one or a few employers). Posner makes a point to clarify that monopsonies themselves are not prohibited, so long as they were not obtained through anticompetitive means.²⁵ In determining the existence of such monopsonies, Posner stresses the importance of market definition, particularly with respect to specifying the relevant job type and geographic scope of the labour market.²⁶ As such, part of his proposal for reform is ensuring that courts

22. *Ibid* at 34-41.

23. 15 USC § 1 (1980) (prohibiting combinations and conspiracies in restraint of trade) [*Sherman Act*].

24. Posner, *Antitrust Failed Workers*, *supra* note 1 at 56-59. Of the numerous examples provided in the chapter, the most salient was the Silicon Valley case, where several firms such as Apple and Google were determined to be in violation of antitrust laws due to express “no-poaching agreements” wherein the CEOs of each company made express promises not to solicit the employees of the others. See *ibid* at 49-50.

25. *Ibid* at 62.

26. *Ibid* at 64-68. It is important to note that the effectiveness of tools and approaches used by antitrust continue to be in debate, but that debate falls outside the scope of this book and this review.

and regulators understand that “labor markets are often narrow—much narrower than product markets.”²⁷

The fifth and sixth chapters involve firm conduct that seemingly falls within the ordinary business of corporations yet could—and in some instances *should*—attract scrutiny. Chapter five deals exclusively with mergers and the process of merger review available to the Federal Trade Commission and the Department of Justice.²⁸ The crux of Posner’s argument in this chapter is that, because mergers increase market concentration, merger review guidelines should not only account for a merger’s impact on product markets, but also its impact on labour markets.²⁹ Following this, chapter six is focused on the common use of noncompete clauses in employee contracts.³⁰ As an example, Posner points to Jimmy John’s franchises’ use of noncompete clauses that “barred employees from working for *any sandwich shop* within three miles of *any Jimmy John’s franchise* for two years,” effectively limiting ex-employees so that they are only able to work at sandwich shop stores in a small number of areas.³¹ Posner argues that because section 1 of the *Sherman Act* applies to *any* contract in restraint of trade,³² employment contracts should be litigated under a “more sensitive use of the rule of reason” to account for the inherent imbalance in instances where a single employee seeks to challenge the anticompetitive effects of a noncompete clause.³³

After these conduct-specific chapters, part three acknowledges the limits of using antitrust by conceding that much of what leads to the labour market

27. *Ibid* at 74-75 (proposing also that labour markets also require different approaches to the calculation of market power as well as the types of anticompetitive behaviours that give rise to a cause of action). Here, the narrowness of markets refers to how product markets may encapsulate a wider geographic area and span across categories of products, whereas labour markets are much more limited both in geography and singular categories. For example, consider that nurses in rural areas employ a particular set of skills, and the difficulty of relocation limits them to a smaller geographic area when considering where to work.
28. *Ibid* at 76 (explaining that “[w]hen large firms agree to merge, they are required by law to inform these agencies ahead of the merger. The agencies then review the merger proposal and either block it or allow the merger to proceed”).
29. See “Mergers” in Posner, *Antitrust Failed Workers*, *supra* note 1, 76.
30. See “Noncompetes” in Posner, *Antitrust Failed Workers*, *supra* note 1, 91. To clarify, noncompete clauses are “clauses in employment contracts that forbid workers to work for competitors of their former employer for a certain period of time and over a defined geographic area” (*ibid* at 91).
31. *Ibid* at 91 [emphasis added] (noting that there were thousands of Jimmy John’s locations, including in many urban areas, so ex-employees were often precluded from working in the sandwich shop industry even if they moved cities).
32. See *Sherman Act*, *supra* note 23, s 1.
33. Posner, *Antitrust Failed Workers*, *supra* note 1 at 108-109.

power is attributable to search costs and job differentiation.³⁴ As both are natural occurrences, they do not fall within the scope of the anticompetitive behaviour that is captured by antitrust. In the face of this limit, Posner argues that strengthening labour and employment law (*e.g.*, regulating wages, providing more support for unions, increasing legislated job protection, et cetera) will better be able to limit the ability of labour monopsonies to exert their market power.³⁵ To exemplify the importance that antitrust and labour and employment law come together to address labour monopsony, Posner concludes part three with a lengthy discussion of the gig economy. In this timely example, he demonstrates that although antitrust can be used to protect employees, workers classified as independent contractors may not be able to reap such benefits and thus those workers must turn to labour and employment law for protection.³⁶

Overall, *How Antitrust Failed Workers* is successful in providing a methodical analysis of a largely unexplored intersection of two distinct legal areas in a way that is mostly free from legalese. Posner's use of examples helps to make the subject matter more approachable and relatable to a broader audience. For instance, the careful depiction and numerous examples of how anticompetitive conduct by employers affects low-wage workers demonstrate the gravitas of the labour monopsony issue in a way that can be understood by the very workers who hold these jobs.³⁷ Where the book's main objective is to draw the attention of courts, regulators, legal academics, workers, and worker advocates to a largely neglected issue, this book is effective. Posner provides a thoughtful yet feasible approach to addressing income inequality that plays within the bounds of existing legal frameworks.

In attempting to explain the gap between product and labour market antitrust, Posner offers numerous ways in which antitrust can—and should—be applied to curb the harmful effects of market concentration in labour markets. In doing so, he provides a comprehensive overview of the theory of monopsony power as it manifests in such markets in a way that appeals to both academics as well as

34. *Ibid* at 118-20. Search costs refer to the difficulty of finding a job, which gives employers considerable power over employees who will otherwise have to incur those search costs if they leave. Job differentiation refers to the ability employers have to differentiate and define the parameters of jobs, thus allowing them to manipulate the comparability of jobs within a particular labour “market” for the purposes of antitrust legislation.

35. See “Employment and Labor Law: Old and New Directions” in Posner, *Antitrust Failed Workers*, *supra* note 1, 122.

36. See “The Gig Economy and Independent Contractors” in Posner, *Antitrust Failed Workers*, *supra* note 1, 136.

37. See *e.g.* Posner, *Antitrust Failed Workers*, *supra* note 1 at 7, 26, 58, 104-105.

those who may be unfamiliar with either antitrust law or labour and employment law. For policymakers and regulators, *How Antitrust Failed Workers* articulates a perspective—that has recently been embraced to some extent by the Government of Canada³⁸—with which to evaluate and address the economic inequality that proliferates as a result of market concentration. In turn, economists are asked to reimagine long-standing beliefs and assumptions about the competitiveness of labour markets. This book's novel approach is an extremely timely contribution to both antitrust and labour and employment literature and is sure to draw a broad audience.

38. See *Budget Implementation Act 2022, No. 1*, *supra* note 5.