Antitrust and the Reallocation of Economic Coordination Rights

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Labor, Technology, and Growth: Toward a Gini-Negative Solution

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Recent interpretations of economic polarization in the United States have identified two phenomena: the failure of labor law, including the divergence between its presupposition of the traditional, vertically integrated firm and the inter-firm structures of economic control that abound in today's markets (Weil 2014), on the one hand, and the reduction in economy-wide competitive pressure acts as a force to discipline the amount of profit firms enjoying market power can extract from their counterparties (Steinbaum, Bernstein, and Sturm 2018; Steinbaum and Stucke 2020), on the other. Antitrust law, in particular the erosion of antitrust enforcement under the consumer welfare standard, plays an obvious role in the second factor, but it also plays an essential, less commonly recognized role in the first factor. Economic research in both areas should be interpreted in light of the following point about the legal foundations of the economy: Antitrust law, most fundamentally, allocates economic coordination rights; by doing so, it determines the forms of economic coordination, whether they are intra-firm or inter-firm, that are possible in the first place (Paul 2020). Both scholars and policy-makers interested in augmenting worker power in the era of the Fissured Workplace and those interested in restoring and reinvigorating antitrust enforcement should consider the recommendations herein. The two programs are mutually reinforcing.

Thus far, however, normative policy debates about each phenomenon have largely proceeded along separate tracks, giving rise to an implication of internal contradiction: large firms are getting larger, more powerful, and especially more vertically integrated under an antitrust enforcement regime that invites these developments,[1] but on the other hand, firms are becoming vertically dis-integrated when it comes to their legal relation to the workers who operate under their economic control (Lichtenstein 2017). This ostensible contradiction also invites opposing attitudes toward the norm "competition": either something desirable from which the economy has deviated, or something to which workers have been unjustly subjected (from abroad, from technological substitution, or from immigrants, among other possible sources).

We do not view these trends as conflicting, however. We consider them to be two sides of the same coin: an antitrust policy (nested within a larger policy matrix) that allocates economic coordination rights in a way that encourages the vertical domination of workers and other less-powerful counterparties on efficiency grounds, at the same time that horizontal coordination among such smaller actors (whether through unionization and collective bargaining, cooperatives, or other structures of 'loose coordination' that preserve economic autonomy for its members while allowing their countervailing economic power to be brought to bear) is viewed as inefficient and harmful to aggregate welfare. We therefore propose the reorientation, even reversal, of antitrust policy's recent disposition: vertical coordination ought to be the "supreme evil" of antitrust, while a horizontal allocation of coordination rights should not be penalized, and depending on the circumstances, explicitly encouraged.

Viewed through this lens, reforming and reviving antitrust law would not be about "preserving" or "restoring" an abstract concept of competition, whose desirability is taken for granted and whose

[1] Telecommunications and healthcare are two major sectors that have indisputably become more vertically integrated. That has also been the case in less formal ways, such as documented by Wilmers (2018).

existence is theorized to occur "naturally," but rather re-allocating coordination rights. This schema recognizes that coordination is not inherently good or bad (nor is competition), and that the disposition of law cannot but assign the right to coordinate—the question being, to whom?

For example, antitrust law bestows the right to engage in economic coordination upon associations that that it deems sufficiently integrated and defined by top-down control, certainly including traditionally organized business firms. Antitrust's "firm exemption" means that economic coordination that takes place within the boundaries of such associations—which are not necessarily coextensive with the boundaries supplied by corporate law—is immune from liability, while multilateral conduct that transpires across such boundaries is at risk (Paul 2020). This immediately disadvantages small firms, individual service providers, or workers beyond the bounds of employment, all of whom are barred from looser coordination that might permit them to earn sustainable returns and ultimately to sustain their independence.

The revolution in antitrust jurisprudence that began with *Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977) in effect extended this firm exemption to affiliated supplier-distributor or manufacturing-retail networks (Callaci 2020). While theorized in terms of operational efficiencies, this extension of economic coordination rights did not predicate those rights upon the responsibility—across labor, safety, and general torts—associated with firm-based coordination rights.

The Coasian theory of the firm purports to provide a theoretical welfare rationale for the firm exemption: the firm's boundaries are set at exactly the place within which it is "efficient" to enjoy coordination rights and exercise control. Efficiency is herein interpreted as an abstract characteristic of the process of economic production, of combining inputs into outputs, independent of the diverse mechanisms that actually bring about or condition economic production. Moreover, even when applied to the traditionally organized firm itself, this is largely a just-so story to explain a pre-existing allocation of coordination rights. It also ignores motivations to "make or buy" provided by the law itself, assuming that these decisions are the product of calculations about independently existing operational efficiency.

At least when applied to the firm, this allocation of coordination rights is accompanied by the *responsibility* for economic coordination thus undertaken. That responsibility is ensured by traditional agency law, present even when Coase was first writing, and soon also by the New Deal scheme of rights and responsibilities. The economic-theoretical justifications for the legalization of vertical restraints in antitrust then relies on the extension of a Coasian logic to business conduct so immunized: networks of affiliates directed by a dominant firm are so constructed to realize efficiencies in production that consist in the pitting of smaller, dominated counter-parties against one another and thereby extracting more labor from them at lower prices or wages (Blair and Kaserman 1983; Blair and Lafontaine 2005). When extended in this way, of course, the accompanying legal responsibility—and countervailing coordination rights supplied by labor law—are missing from the economic coordination rights enjoyed by dominant firms.

The contemporary gig economy labor platform represents the apotheosis of this logic, and its existence could not have come about absent the retraction of both labor law such that its workers are not protected by labor regulations, as well as of antitrust, since notwithstanding that non-employed status, they can still be told what to do (Steinbaum 2019a; 2019b; Paul 2019). Where there was once a sharp boundary demarcating the terrain of labor law and antitrust, the boundary of the firm, there's now a gray area within which neither apply. Gig economy labor platforms exist in that legal gray area.

Efforts like California's AB-5 go part of the way toward restoring the earlier equilibrium, by expanding the sphere of labor regulation to include the gig economy (should the law, in fact, be enforced). But trench warfare over the question of who counts as an employee will only ever get part of the way to a just and egalitarian solution. Provided that's the only policy lever at play, would-be employers will fight against and undermine it through every means at their disposal, including inventing new mechanisms of evasion, just as the fissuring itself did. Moreover, even if successful and perfectly enforced, bringing workers back into the sphere of labor regulation—thus guaranteeing substantive minima in wages/working conditions and countervailing coordination rights—does nothing to address the other aspects of fissuring, namely drawing in firm boundaries through mechanisms like sub-contracting and franchising. Workers who are deemed employees of small, atomized, powerless entities with no power to actually raise their wages or bargain over working conditions have won a pyrrhic victory. The re-invigoration of the antitrust jurisprudence of vertical restraints must be part of any pro-worker agenda for economic justice, because it would put pressure upon lead firms to re-expand their firm boundaries to more appropriately track the control they exercise. And should they choose not to do that, expanding horizontal coordination rights of small players under antitrust law would not only permit Uber drivers to collectively bargain in their dealings with Uber, for example, but it would also permit franchisees and other direct employers to bargain with powerful lead firms and thereby have a mechanism for raising wages. At present, such small firms face only downward pressure upon wages from lead firms, with no ability to push back and no countervailing pressure from workers, thanks to the impotence of labor law.

(An additional concern is the many other elements of employment status that have come into existence under policies that seek to encourage labor supply on the formal market. For example, access to health insurance for many working-age adults hinges on remaining statutorily employed, as does eligibility for the Earned Income Tax Credit and, in a growing number of states, SNAP. One reason these fights over employment status such as AB-5 take on such a significance is that what's being argued over carries a much greater economic significance than it should. Thus, a further agenda item is the de-linking of program eligibility and access to health insurance from employment, which would in turn reduce employers' monopsony power over their employed workforce by making workers less dependent on any one particular job or employer.)

Moreover, attempts by gig economy workers to organize against domination by powerful platforms and counterparties have brought on themselves the antitrust scrutiny that ought to be focused on the dominant players previously described (*Chamber of Commerce v. City of Seattle* 2019*)*. Antitrust agencies and courts have proven willing to adopt the view that non-employed workers do not benefit from antitrust's "labor exemption," and therefore any mutual coordination they undertake, or efforts by public authorities to enable that coordination, violate Section 1 of the Sherman Act. That recalls the rightly-derided early history of antitrust enforcement, when dominant industrial "trusts" were excused from the purview of the law, but workers undertaking collective action in service of collective bargaining *against* those trusts were subjected to judicial harassment (*Loewe v. Lawlor* 1908). In service to the ultimate aim of re-allocating coordination rights from powerful to less-powerful parties and favoring horizontal coordination over vertical domination, then, we recommend a new antitrust exemption for all small players, to cover non-employed workers and small producers. A model for this already exists in Australia, exempting small undertakings from prohibitions on horizontal coordination.

In conclusion, protecting workers' interests in the economy requires confronting the question of who does and should have the power to coordinate economic production. The existing antitrust framework idealizes perfect competition and (ostensibly) penalizes deviations from it. Thus, insofar as there may be a labor-

oriented component of any antitrust reform program, that component has been theorized as fitting within the framework of remedying "market failure," of restoring competition, and of enhancing efficiency. All of these concepts have proven too mutable to guide any consistent or prudential policy, and they serve to mask what's really going on in the allocation of coordination rights. Whether the domination of disempowered workers on the part of powerful firms counts as a market failure or not, it represents a policy failure that should be confronted by reallocating coordination rights in a manner diametrically opposed to the existing ideological structure within which antitrust policy is debated and theorized.

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