American University Business Law Review

Volume 12 | Issue 1 Article 3

2023

No Harm No Foul?: The Remnants of Pure Consumer Harm in Monopsony Cases under the Sherman Act

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Recommended Citation
Jackson, William "No Harm No Foul?: The Remnants of Pure Consumer Harm in Monopsony Cases under the Sherman Act," American University Business Law Review, Vol. 12, No. 1 (2023) .
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NO HARM NO FOUL?: THE REMNANTS OF PURE CONSUMER HARM IN MONOPSONY CASES UNDER THE SHERMAN ACT

WILLIAM JACKSON*

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I. INTRODUCTION

Monopsonies are often seen as the "mirror image" of monopolies, where a single buyer controls a market rather than a single seller.[1] This mirror-image interpretation has guided the jurisprudence of monopsony claims under the Sherman Act.[2] While they share many theoretical similarities,

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1. Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1514 (2013).

2. *See id.* (discussing the evolution of monopsony jurisprudence following the Supreme Court's holding in *Weyerhaeuser*); *see also* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007).

monopsonies and monopolies can have different effects in practice, especially concerning the prices consumer pay.[3]

These practical differences between monopolies and monopsonies hold serious implications for the application of the antitrust laws, namely the Sherman Act, and subsequently the plaintiffs seeking relief from anticompetitive conduct.[4] Current precedent in monopsony cases have frequently confused the lower courts' attempts to apply the Sherman Act to monopsony issues, generally providing a high burden to overcome for small sellers facing large, powerful buyers.[5] At the end of the day, this burden results in employees, service providers, and other manufacturers of raw materials having to abide by higher prices and poor conditions–outcomes that the antitrust laws were designed to prevent.[6]

Some economists and antitrust scholars have labeled monopsony "the new monopoly" to emphasize the impact that undue buyer power is having on the modern American economy.[7] Similar to how Congress targeted monopolies by passing the Sherman Act and other antitrust laws, as well as the U.S. Supreme Court's subsequent enforcement of those laws last century, these scholars suggest that monopsonies are due for a similar reckoning–beyond the scope of monopsony under these laws as they currently exist.[8] Despite the call for new, monopsony-specific laws, the current text of the Sherman Act and judicial interpretation leave plenty of room for a course correction to more effectively target buyer power.[9] By recognizing the practical difference between monopsonies and monopolies and enforcing the Sherman Act's core goal of protecting competition, courts can level the playing field for the workers and other plaintiffs who have been largely barred from relief

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3. *See* Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 606 (2005) (discussing how welfare justifications for allowing buyer power are rarely passed on to consumers in practice); Roman Inderst & Christian Wey, *Buyer Power and Supplier Incentives*, 51 EUR. ECON. REV. 647 (2007) (measuring the differences in prices paid by consumers in monopoly versus monopsony scenarios).

4. *See* Stucke, *supra* note 1, at 1514–15.

5. *See id.* at 1544–45; *see also Weyerhaeuser Co.*, 549 U.S. at 320–21.

6. *See* Stucke, *supra* note 1, at 1544.

7. *See, e.g.*, Debbie Feinstein & Albert Tseng, *Buyer Power: Is Monopsony the New Monopoly?*, 2019 A.B.A. SEC. ANTITRUST L. 12, 12 (noting that antitrust agencies are paying greater attention to monopsony issues); Roger D. Blair & Kelsey A. Clemons, *Is Monopsony the New Monopoly? Yes!*, 34 ANTITRUST 84, 88 (2019) (explaining that a monopsonist's profit maximization subsequently leads to decreased supply and higher consumer prices).

8. *See generally* Feinstein & Tseng, *supra* note 7 (tracking the FTC's recent investigations of mergers between firms with substantial buyer power).

9. *See generally* Blair & Clemons, *supra* note 7 (describing how monopsony results in a decrease in total surplus, which can serve as evidence of harming competition under the Sherman Act).

for anticompetitive buying practices.[10]

Part II of this Comment discusses the contested development of the consumer harm standard under the antitrust laws, the economic underpinnings of monopsonies as opposed to traditional monopolies, and the problems that courts have faced (or more frequently ignored) when deciding monopsony cases under the Sherman Act. Part III analyzes how courts that have abandoned a strict requirement of consumer harm are better able to conform with the true purpose of the Sherman Act. Part IV recommends that the U.S. Supreme Court must formally disavow the consumer harm standard in monopsony cases, or Congress must amend the Sherman Act to account for the fundamental differences between monopolies and monopsonies to better protect workers and small suppliers.

II. CONFLICTING VIEWS OF CONSUMER HARM FOR MONOPSONY CASES

To understand the conflict underlying the role of consumer harm in monopsony cases under the Sherman Act, one must understand both the economic underpinnings of monopsony and the development of the interpretation of the Sherman Act's purpose. While courts have attempted to align legal interpretations of monopsony with economic theory, the apparent consistency with traditional monopoly cases does not quite line up in practice.[11] Furthermore, despite the lower courts' struggles with this inconsistency, the Supreme Court has failed to adjust, or at least to clarify, how to address the problems with the mirror-image approach to these cases.[12]

A. Monopsony in Theory and Practice

Pure monopsonies occur when a single buyer dominates a market, as opposed to monopolies, which occur when a single seller dominates a market.[13] While pure monopsonies are rare, oligopsony scenarios, where a

10. *See* Stucke, *supra* note 1, at 1531–32 (discussing the high burden of proof faced by monopsony plaintiffs due to the difficulties of showing direct evidence of anticompetitive harm in labor and other input markets).

11. *See id.* at 1514 (stating that "developing the legal standards for evaluating monopsonization claims will be more complex than simply mirroring the monopolization standards").

12. *See id*. at 1550–51 (critiquing the Chicago school consumer welfare prescription previously used by courts assessing monopsony cases).

13. Julie Young, *Monopsony*, INVESTOPEDIA, https://www.investopedia.com/terms/m/monopsony.asp (last updated Nov. 21, 2020) ("A monopsony is a market condition in which there is only one buyer, the monopsonist. Like a monopoly, a monopsony also has imperfect market conditions. The difference between a monopoly and monopsony is primarily in the difference between the controlling entities. A single buyer dominates a monopsonized market while an individual seller controls a monopolized market.").

few buyers dominate a market, occur more frequently.[14] For simplicity, consider "monopsony" to account for both pure monopsonies and oligopsonies since both present similar anticompetitive effects and are treated similarly under the antitrust laws.[15] Monopsony power permits a buyer in a market to lower prices below the competitive equilibrium.[16]

Typically, monopsonies exist in one of two types of markets.[17] First, monopsonies exist in input markets, where small sellers must sell their goods to an intermediary that sells the final product in the consumer-facing market.[18] For example, a grocery chain may purchase produce from farmers in order to resell the produce in its grocery stores.[19] Second, monopsonies exist in labor markets, where an employer has the power to hold down wages for employees or impose other anticompetitive measures, such as non-compete clauses or no-poaching agreements.[20]

While monopolistic behavior typically translates directly to higher prices being paid by consumers, monopsonistic behavior does not usually produce significant price effects in the consumer-facing market.[21] The monopsonist

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14. *See id*.

15. *See* Stucke, *supra* note 1, at 1513–14 (describing how the Supreme Court has treated monopsony cases as the "mirror image" of monopoly cases and is thus subject to the same legal standards); *see also* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 321 (2007); Khan v. State Oil Co., 93 F.3d 1358, 1361 (7th Cir. 1996) ("[M]onopsony pricing . . . is analytically the same as monopoly or cartel pricing and [is] so treated by the law."); Vogel v. Am. Soc. of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984) ("[M]onopoly and monopsony are symmetrical distortions of competition from an economic standpoint."); John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding*, 72 ANTITRUST L.J. 625, 653 (2005) (describing monopsony as the "mirror image" of monopoly).

16. *See* Young, *supra* note 13.

17. *See id.*

18. *See id.*

19. *See* U.S. DEP'T OF JUST. COMPETITION AND AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD 8 (2012); John Freebairn, *Effects of Supermarket Monopsony Pricing on Agriculture*, 62 AUSTL. J. OF AGRIC. & RES. ECON. 548, 549–51 (2018).

20. *See* Suresh Naidu et al., *More and More Companies Have Monopoly Power over Workers' Wages. That's Killing the Economy*, VOX (Apr. 6, 2018, 9:50 AM), https://www.vox.com/the-big-idea/2018/4/6/17204808/wages-employers-workers-monopsony-growth-stagnation-inequality (describing a no-poaching dispute between Jimmy John's corporate management with employees that prevented employees from taking jobs with competing sandwich shop chains); *see also* Young, *supra* note 13.

21. Adam Hayes, *Monopoly*, INVESTOPEDIA, https://www.investopedia.com/terms/m/monopoly.asp (last updated Sept. 1, 2021); *see* Stucke, *supra* note 1, at 1525–29 (describing how industries prone to monopolistic practices, such as meatpacking, tend to have inelastic products, so the depressed prices

swallows any additional profits generated by the depressed input prices.[22] Despite minimal price effects, monopsonistic behavior has a harmful impact on participants in input markets.[23] In labor markets, these effects include depressed wages, restrictions on employee competition, and unfair working conditions.[24] The fact that these anti-competitive practices face input markets rather than consumer-facing markets has confused antitrust analysis.[25]

B. Role of Consumer Harm Under the Sherman Act

The actual language of the Sherman Act is plain and broad, intentionally leaving room for judicial interpretation to determine the law's scope.[26] Courts have struggled with setting the boundaries of the Sherman Act.[27] The dominant modern view, promoted by the Chicago School of antitrust thought (spearheaded by Judge Robert Bork), favors "consumer welfare" as the primary goal of the Sherman Act (and the antitrust laws generally).[28] While

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in the input market does not translate to increased supply in the final product market).

22. *See* Stucke, *supra* note 1, at 1525–29.

23. *See* David Weil, *Why We Should Worry About Monopsony*, INST. FOR NEW ECON. THINKING (Sept. 2, 2018), https://www.ineteconomics.org/perspectives/blog/why-we-should-worry-about-monopsony; *see also* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2017) (describing how monopsony power has generated a functional imbalance between employees and employers both inside offices as well as in politics).

24. *See* Naidu et al., *supra* note 20; Eric Schlosser, *America's Slaughterhouses Aren't Just Killing Animals*, THE ATLANTIC (May 12, 2020), https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpeacking-coronavirus/611437/ (describing the poor, sometimes deadly, conditions faced by employees of the meatpacking industry).

25. *See* Gregory Day, *Anticompetitive Employment*, 57 AM. BUS. L.J. 487, 509–11 (2020) (suggesting that courts have been frequently confused about the correct standard to assess whether an antitrust injury has occurred in monopsony cases).

26. *See* 15 U.S.C. §§ 1–2 (outlawing "every contract, combination . . . or conspiracy, in restraint of trade," and monopolization, attempted monopolization, or conspiracy or combination to monopolize); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897) ("Looking simply at the history of the bill from the time it was introduced in the [S]enate until it was finally passed, . . . [W]e are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein."); *see also* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

27. *See* Bork, *supra* note 26, at 35 (emphasizing the statute's intentional vagueness to allow for judicial deference in light of prevailing economic theories).

28. *See* ROBERT H. BORK, THE ANTITRUST PARADOX (1978); *see also* Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835 (2014) (detailing how consumer welfare overwhelmed other antitrust philosophies, like industrial organization, to dominate judicial interpretation of the Sherman Act).

the term "consumer welfare" facially appears to protect consumers, the term's true meaning reflects the maximization of aggregate surplus in a market for both consumers and producers.[29] Following this line of scholarship, the Supreme Court largely adopted consumer welfare as the primary purpose of the antitrust laws.[30] However, given the term's economic complexity, which differentiates from its facial meaning, both the Supreme Court and the lower courts have frequently applied a more literal meaning.[31] Accordingly, courts have occasionally contorted the goals of consumer welfare into what constitutes an antitrust injury under Sections 1 and 2 of the Sherman Act, requiring a showing of consumer harm.[32]

The antitrust injury doctrine was established in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[33] in which the Supreme Court emphasized that a plaintiff's injuries must go above and beyond being simply harmed by the defendant's economic conduct.[34] Rather, the defendant's conduct must harm

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29. *See* Crane, *supra* note 28, at 845–47 (discussing how Bork used the term "consumer welfare" as a Trojan horse for infusing antitrust interpretation with neoclassical values of economic efficiency).

30. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing ROBERT BORK, THE ANTITRUST PARADOX 66 (1978)) ("Respondents engage in speculation in arguing that the substitution of the terms 'business or property' for the broader language originally proposed by Senator Sherman was clearly intended to exclude pecuniary injuries suffered by those who purchase goods and services at retail for personal use. None of the subsequent floor debates reflect any such intent. On the contrary, they suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.'").

31. *See, e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224–25 (1993) (citing Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 331 (1990)) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."); Atl. Richfield Co., 495 U.S.at 340 (applying *Brooke Group*'s consumer-facing price analysis to vertical restraints); *Reiter*, 442 U.S. at 343 (clarifying the antitrust injury doctrine's relationship to consumers); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 321 (2007); *see also* Kirkwood, supra note *15*, at 635 (contrasting the Sherman Act with the Robinson Patman Act and noting that, unlike the framers of the Robinson Patman Act, the framers of the Sherman Act "intended to proscribe only conduct that threatens consumer welfare"); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 212–14 (1986) (arguing for an approach to anticompetitive exclusion that is consistent with the prevailing view that antitrust is concerned with preserving competition and preventing harm to consumers).

32. *See* Crane, *supra* note 28, at 848–51 (providing, for example, that some courts have required strict price increases as a showing of consumer harm to meet the antitrust injury requirement); C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 2078, 2087–88 (2018).

33. 429 U.S. 477 (1977) (arguing that some courts have construed the antitrust injury requirement to require showing end-consumer harm, creating difficulties for anticompetitive conduct found solely in input markets).

34. *Id.* at 489 ("Plaintiffs must prove *antitrust* injury, which is to say injury of the

competition overall—not just a single competitor.[35] Without showing such injury, a plaintiff will fail to state a plausible claim, and the lawsuit will be vulnerable to a motion to dismiss.[36] Usually, harm to competition occurs in the form of price effects or output effects, which are considered sufficient to prove that the defendant had market power that harmed the plaintiff.[37] However, evidence of such effects can be difficult to show in a complaint, creating hardship for private antitrust plaintiffs seeking relief under the Sherman Act.[38]

C. Moving to Monopsony

The Supreme Court has addressed monopsony issues in antitrust cases since the inception of the Sherman Act; whether the antitrust laws apply to these cases has never been in doubt.[39] However, these early opinions frequently did not address the fact that monopsonies differed from monopolies in any meaningful way, classifying them all as "monopolies."[40] In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,[41] the Supreme Court held that monopsony claims should be treated the same as monopoly claims under the Sherman Act, given their theoretical similarities.[42] Analogously, a monopsonization claim under Section 2 must make two showings.[43] First, the plaintiff must show the possession of buyer power in the relevant market.[44] Second, the plaintiff must show an attempt

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type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.").

35. *See id.*

36. *See id.*; *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 554 (2007).

37. *See* Proof of "Antitrust Injury", 11 Federal Antitrust Law § 78.6 (2021).

38. *See* William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1242–43 (1989).

39. *See*, *e.g.*, Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 219 (1948) (answering the question whether uniform prices set by sugar beet refiners with buyer power against local beet farmers violated the Sherman Act).

40. *See id.* at 240 (classifying the refiners' monopsony over beet prices as a "monopoly").

41. 549 U.S. 312 (2007).

42. *Id.* at 322 ("The kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization.").

43. *See id.*; Jay M. Zitter, Annotation, *What Constitutes Monopsony Within Meaning of § 2 of Sherman Act (15 U.S.C.A. § 2)*, 49 A.L.R. Fed. 2d 515 (2010).

44. *See* Zitter, *supra* note 43.

to acquire or maintain that power.[45]

The per se standard of analysis has seldom been applied to monopsony cases; the rule of reason analysis has been the standard for monopsony cases.[46] The rule of reason follows a burden-shifting framework that allows anticompetitive effects to be rebutted by a defendant by showing a sufficient procompetitive justification for the restraint under consideration.[47] Rule of reason analysis also opens the door for consideration of ancillary restraints, a framework through which a court may deem an otherwise anticompetitive practice permissible under the Sherman Act if the restraint demonstrates sufficient procompetitive effects.[48] This combination of factors has complicated the analysis of monopsony cases, given the aforementioned theoretical differences between monopolies and monopsonies.[49] Anticompetitive effects are typically measured through increased market prices in the consumer-facing market under the consumer welfare standard, so suppressing prices in an input market is unlikely to meet that evidentiary bar.[50] To further complicate matters, employers have significant discretion in labor markets to impose restrictions on wages on a case-by-case basis.[51] As a result, some individuals are harmed, but individual harms are

45. *See id.*

46. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2157 (2021) (holding that rule of reason analysis was appropriate in a monopsony case, even where the anticompetitive practice met the textbook definition of price fixing).

47. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) ("[T]he plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. . . . If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. . . . If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.").

48. *See* Brown v. Pro Football, Inc., 50 F.3d 1041, 1056–57, 1061 (D.C. Cir. 1995); N. Jackson Pharmacy, Inc. v. Caremark Rx, Inc., 385 F. Supp. 2d 740, 747 (N.D. Ill. 2005); ANTITRUST BASICS, L. J. PRESS § 1.03 (2021) ("Under the [ancillary restraints] doctrine, the courts must determine whether the nonventure restriction is a naked restraint on trade, and, therefore, illegal, or whether the restriction is one that is ancillary to the legitimate purpose of the business . . . . [A]n ancillary restraint of trade may violate the antitrust laws if the ancillary restraint does not survive a rule-of-reason analysis.").

49. *See* Day, *supra* note 25, at 507–08.

50. *See id.* at 509–10 (providing, forexample, that "[i]f a software company depresses the wages of custodians, the act would unlikely affect salaries throughout the greater labor market.").

51. *See id.* at 514–15 (explaining that some courts give significant deference to employers "pursuant to the theory that a cartel aiming to suppress mobility or wages is permissible so long as the employer had an ulterior goal based on efficiencies").

traditionally insufficient to show antitrust injury.[52] The lower courts have struggled to reconcile these conflicting interests.[53]

One coalition of courts has continued to apply a strict consumer harm standard in monopsony cases, including courts in the Fourth and Ninth Circuits.[54] In *Aya Healthcare Services v. AMN Healthcare*,[55] the court dismissed a claim against a healthcare buyer because the complaint did not allege harm against the consumer.[56] The court emphasized that the "[p]laintiffs [did] not allege that prices increased from $X to $Y amount as a result of the alleged conduct" and therefore failed to state an antitrust injury.[57] Similarly, in *Petrie v. Virginia Board of Medicine*,[58] the Fourth Circuit ruled against a chiropractor whose services were restricted on the grounds that she could not point to harmful effects on the consumer market overall, which is a requirement under Section 1 of the Sherman Act.[59] In *Jemsek v. North Carolina Medical Board*,[60] the court similarly ruled against a physician whose services were restricted for failure to provide evidence of an anticompetitive effect.[61]

The other coalition has abandoned the consumer harm standard in monopsony cases, including courts in the Third and Sixth Circuits.[62] In *Ogden v. Little Caesar Enterprises, Inc.*,[63] the U.S. District Court for the Eastern District of Michigan held against an employee under Section 1 of the Sherman Act who argued that the employer's no-poaching clause constituted anti-competitive collusion.[64] Similarly, in *Eichhorn v. AT&T Corp.*,[65] the

52. *See id.*; Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) ("Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.").

53. *See* Day, *supra* note 25, at 515 (discussing the inconsistencies among courts in imposing liability on labor cartels).

54. *See*, *e.g.*, Petrie v. Va. Bd. of Med., 648 F. App'x 352 (4th Cir. 2016); Aya Healthcare Servs. v. AMN Healthcare, No. 17cv205-MMA, 2017 U.S. Dist. LEXIS 201993 (S.D. Cal. Dec. 6, 2017).

55. 2017 U.S. Dist. LEXIS 201993.

56. *See id.* at *20.

57. *Id.* at *15.

58. 648 F. App'x 352 (4th Cir. 2016).

59. *See id.* at 356.

60. No. 5:16-CV-59-D, 2017 U.S. Dist. LEXIS 23570 (E.D.N.C. Feb. 21, 2017).

61. *Id.* at *23–24.

62. *See* Day, *supra* note 25, at 510–11.

63. 393 F. Supp. 3d 622 (E.D. Mich. 2019).

64. *Id.* at 627.

65. 248 F.3d 131 (3d Cir. 2001).

Third Circuit sided against AT&T employees contesting a no-hire agreement because the agreement did not have anticompetitive effects on the wages for the labor market.[66]

D. NCAA v. Alston

Monopsony once again reached the Supreme Court over a decade after the Court's decision in *Weyerhaeuser* in its opinion in *NCAA v. Alston*.[67] The Court held against the NCAA as a monopsonist in the market for student-athletes under Section 1 of the Sherman Act, striking down restraints on compensation for athletes.[68] The Court still reckoned with the effects on consumer demand in evaluating whether the NCAA's restraints were unreasonable using a rule of reason analysis.[69] Notably, the Court did not require a showing that the NCAA's conduct directly harmed consumers in order for the restrictions to be unreasonably anticompetitive.[70] However, this issue was uncontested by the parties, therefore the Court's formal stance on consumer harm remains unclear.[71]

In a concurring opinion, Justice Brett Kavanaugh argued that the holding should be extended to remove other restrictions imposed by the NCAA that were not at issue in the case.[72] Rather than focusing on the consumer side like the majority, Kavanaugh substantively considered the effects of the NCAA's price-fixing labor on the student-athletes.[73] Since the student-athletes faced artificially depressed compensation relative to their skills, they were harmed such that the NCAA's restrictions were unreasonable.[74] The district court defined the relevant market as the "college education market,"

66. *Id.* at 145–46 (applying the ancillary restraints doctrine to non-compete agreements and determining that the effects in the labor market were insufficient for the restraint to be unreasonable).

67. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

68. *Id.* at 2154, 2166.

69. *Id.*

70. *Id.* at 2154 (highlighting that whether the NCAA's restrictions in fact decreased student athletes' compensation was not in dispute).

71. *Id.* at 2154–55 ("[The parties] do not contest that the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market . . . . Nor does the NCAA suggest that, to prevail the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) market . . . . With these matters taken as given, we express no views on them.").

72. *Id.* at 2167 (Kavanaugh, J., concurring).

73. *Id.* (finding issue with the majority opinion, which primarily focused on the NCAA's offered procompetitive effects to determine whether the restraint was, in fact, unreasonable).

74. *Id.* (disagreeing with the NCAA's "incorporati[on] [of] price-fixed labor into the definition of the [amateur college sports] product").

apparently analyzing the anticompetitive effects on student-athletes rather than consumers, which the Supreme Court affirmed.[75]

As demonstrated through the lower courts' struggle to decide monopsony cases consistently with *Weyerhaeuser*, the current state of the law is murky.[76] A more rigid analytical framework that considers the practical inconsistencies between monopolies and monopsonies must be applied to clear the waters.

III. CONFLICTING CONSUMER HARM

Courts upholding the consumer harm standard in monopsony cases have maintained that the purpose behind antitrust is to act as a shield for consumers.[77] These cases generally display one or both of the following characteristics: (i) a mismatch between the defined market and the non-competitive practice at issue, or (ii) a definition of the relevant antitrust injury that does not match the previously defined market.[78]

A. Mismatching Markets

Monopsony cases implementing the consumer harm standard tend to confuse input and output markets.[79] In *Jemsek*, the court held that the plaintiff failed to sufficiently allege an antitrust claim because she failed to allege a valid market.[80] The plaintiff did define a market, though, specifically the market between chiropractors and medical practitioners where the two sides compete as buyers of certain medical services.[81] However, the court did not accept this as a valid market to allege an antitrust claim, expressing that it did not see where the consumer fit into the market as defined in the complaint.[82] This misconception might derive from an economic misconception that markets generally reflect towards

75. *Id.* at 2151–52.

76. *See*, *e.g.*, *Alston*, 141 S. Ct. at 2141; Eichhorn v. AT&T Corp., 248 F.3d 131 (3d Cir. 2001); Ogden v. Little Caesar Enters., 393 F. Supp. 3d 622 (E.D. Mich. 2019); Jemsek v. N.C. Med. Bd., No. 5:16-CV-59-D, 2017 U.S. Dist. LEXIS 23570 (E.D.N.C. Feb. 21, 2017).

77. *See* Day, *supra* note 25, at 510 ("[B]ecause 'anticompetitive conduct in labor markets does not necessarily harm consumers,' workers 'will face an uphill battle under current law.'").

78. *See Alston*, 141 S. Ct. at 2141; *Eichhorn*, 248 F.3d at 131; *Ogden*, 393 F. Supp. 3d at 622; *Jemsek*, 2017 U.S. Dist. LEXIS 23570.

79. *See*, *e.g.*, *Jemsek*, 2017 U.S. Dist. LEXIS 23570, at *39.

80. *Id.*

81. *Id.* at *36–37.

82. *Id.* at *37–38.

consumers—not sellers.[83]

B. Inconsistent Injuries

Furthermore, these courts tend to narrowly define an antitrust injury for the alleged market, even where that market is narrowly defined if the plaintiff does not show a sufficiently broad effect.[84] In *Aya Healthcare Services, Inc.*, the plaintiff alleged evidence of price increases for consumers in its complaint.[85] The court rejected the complaint's evidence for failing to show concrete price increases outside anecdotal allegations.[86] The court's decision seemingly ignores the concrete no-poaching restraints and other collusive agreements among competitors.[87] On appeal in the Ninth Circuit, the court similarly rejected the allegations regarding labor constraints and collusion as circumstantial, affirming the district court's finding that the plaintiff failed to show antitrust injury.[88] Requiring quantitative showings of price increases places a high burden on plaintiffs to monopsony claims since, as previously discussed, anticompetitive practices in labor markets rarely translate to increased prices.[89]

Courts that have abandoned the consumer harm standard in monopsony cases have recognized the antitrust laws' purpose of the promotion of competition rather than strictly protecting consumers.[90] Their reasoning emphasizes the harms anticompetitive practices can have, other than against the consumer.[91] In *Ogden*, although the court held against the plaintiff on other grounds, it recognized that a no-poaching agreement can be sufficient

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83. *See* Day, *supra* note 25, at 507 ("[M]odern antitrust prioritizes consumers. When exclusionary conduct affects competition, the analysis tends to scrutinize whether consumers incurred higher prices.").

84. Aya Healthcare Servs. v. AMN Healthcare, No. 17cv205-MMA, 2017 U.S. Dist. LEXIS 201993, at *7–8 (S.D. Cal. Dec. 6, 2017).

85. *Id.* at *16.

86. *Id.* at *16–18.

87. *See id.*

88. Aya Healthcare Servs. v. AMN Healthcare, Inc., 9 F.4th 1102, 1113 (describing the plaintiff's offered evidence regarding labor constraints as "a far cry from the evidence of consumer preference, supracompetetive prices, and lower quality services that constitutes indirect evidence of harm to competition").

89. *Aya Healthcare Servs.*, 2017 U.S. Dist. LEXIS 201993, at *18–19; *see* Stucke, *supra* note 1, at 1531 (discussing the high burden of proof faced by monopsony plaintiffs due to the difficulties of showing direct evidence of anticompetitive harm in input markets).

90. *See id.* at *15–17; *see also* Day, *supra* note 25, at 508 (discussing the historical development of the antitrust laws as a remedy for competition, rather than competitors).

91. *See* Day, *supra* note 25, at 521 (citing non-price anticompetitive outcomes, including wage deflation, in labor markets).

for an antitrust injury without showing price increases, as the court required in *Aya Healthcare Servs*.[92] Interestingly, the Third Circuit in *Eichorn* still defined its market relative to the products facing consumers.[93] However, the court recognized the anticompetitive effects, particularly the no-hire agreement, relative to the impact on the employees and evaluated whether the plaintiffs had shown a sufficient antitrust injury, albeit not a sufficient one to win the case.[94]

C. Implied Abandonment?

In *NCAA v. Alston*, the Court did not require the plaintiff to provide evidence of direct consumer harm, but its basis for doing so is unclear.[95] The Court accepted that the NCAA did not contest that the plaintiffs must show harm to consumers directly.[96] Instead, the Court seemingly adopted the interpretation of the Sherman Act of *Mandeville Island Farms v. American Crystal Sugar Co.*,[97] which expanded the range of groups the Sherman Act was intended to protect.[98] Rather than limiting the protections offered by the Sherman Act to a specific group, the Court in *Mandeville Island Farms* affirmed the Sherman Act to be a protector of competition.[99] The Court's reasoning in *Mandeville Island Farms* differs significantly from the Chicago School's favored consumer welfare purpose.[100] *Mandeville Island Farms* emphasizes that courts should not read so far into anticompetitive outcomes, but rather should be focusing on the anticompetitive practices or restraints themselves.[101] Subsequent Supreme Court opinions on antitrust issues

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92. *See Aya Healthcare Servs.*, 2017 U.S. Dist. LEXIS 201993, at *X; Ogden v. Little Caesar Enters., 393 F. Supp. 3d 622, 630, 634–35 (E.D. Mich. 2019).

93. Eichhorn v. AT&T Corp*.,* 248 F.3d 131, 147 (3d Cir. 2001) ("As we recently stated, '[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'").

94. *Id.* at 146–47.

95. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2154–55 (2021).

96. *Id.*

97. 334 U.S. 219 (1948).

98. *Id.* at 236 ("The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these . . . . The [Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.").

99. *See id.*

100. *Compare id.* (emphasizing anticompetitive restraints), *with* BORK, *supra* note 28 (emphasizing anticompetitive outcomes).

101. *See Mandeville Island Farms*, 334 U.S. at 242–43 (holding a case of monopsony price-fixing as per se illegal, and maintaining that antitrust goals were to protect competition, not competitors); BORK, *supra* note 26, at 7, 11 (arguing that "consumer

largely avoided the restraint-focused reasoning of *Mandeville Island Farms*, especially after the Chicago School went mainstream in the late 1970s.[102] Use of the per se rule grew even more limited, tending to emphasize anticompetitive effects over declaring certain conduct to be *per se* illegal.[103]

The Supreme Court's tacit acceptance of the issues before it, without having felt obligated to remand with the requirement of direct consumer harm, suggests that the Court would side with the Third and Tenth Circuits, abandoning the consumer harm standard in monopsony cases for a more flexible approach.[104] Movement away from the Chicago School of thought[105] has been discussed among antitrust practitioners and scholars alike.[106] As argued by Justice Gorsuch, writing for the majority:

> Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. Judges must also be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to "set sail on a sea of doubt."[107]

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welfare" should be the primary concern under antitrust analysis).

102. *See*, *e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978) (expanding the application of an effects-focused rule of reason analysis for claims under Section 1 of the Sherman Act).

103. *See*, *e.g.*, Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313, 316 (6th Cir. 1989) ("[T]he Court said that application of the *per se* rule turns on whether the practice facially appears, always or almost always, to tend to restrict competition and decrease output or rather to increase efficiency and competition . . . . *Per se* analysis should not be extended 'to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious . . . .' That is the situation we have here."); Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) (quoting Nat'l Soc'y of Pro. Eng'rs, 435 U.S. at 692 ("Per se liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'")); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985) ("This *per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive.").

104. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2167 (Kavanaugh, J., concurring) (introducing the "ordinary 'rule of reason' scrutiny" term).

105. *See generally* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979) (describing the "Chicago School" and its rivalry with the "Harvard School"); George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & ECON. S1, S1–S2 (2014) (detailing the Chicago School's impact on antitrust).

106. *See* Posner, *supra* note 105, at 926; Priest, *supra* note 105, at S2.

107. *Alston,* 141 S. Ct. at 2166 (quoting United States v. Addyston Pipe & Steel Co.,

While paying homage to the concept of consumer welfare, the emphasis on market realities suggests a holistic use of the rule of reason in line with the reasoning of post-Chicago thought, focusing on the unfairness suffered by the players as opposed to the purported benefits gained by consumers.[108]

On the other hand, the Supreme Court's tacit acknowledgment of the issue in *Alston* may reflect simple ambivalence rather than acceptance.[109] Recognizing the ambivalence of the issue and the potential for legislative action on the issue, the Court may have desired to allow for Congressional input.[110] The language in *Alston* expresses sympathy for the position that the Court's hands are largely tied by precedent under the Sherman Act as it is currently written.[111] As stated by the Court, stitching together prior cases on the matter:

> "[R]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." After all, even "[u]nder the best of circumstances," applying the antitrust laws "can be difficult" — and mistaken condemnations of legitimate business arrangements "are especially costly, because they chill the very' procompetitive conduct the antitrust laws are designed to protect." Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. To know that the Sherman Act prohibits only *unreasonable* restraints of trade is thus to know that attempts to "[measure] small deviations is not an appropriate antitrust function."[112]

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85 F. 271, 284 (6th Cir. 1898)).

108. *See* Priest, *supra* note 105, at S8–S9; *see also* Warren Grimes, *Breaking Out of Consumer Welfare Jail: Addressing the Supreme Court's Failure to Protect the Competitive Process*, 16 RUTGERS BUS. L. REV. 49 (2020) (discussing the role of non-price preferences in the competitive process and differentiating these from the price-focused standards advocated by the Chicago School).

109. *See Alston*, 141 S. Ct. at 2161.

110. *See* David McCabe & Steve Lohr, *Congress Faces Renewed Pressure to 'Modernize Our Antitrust Laws'*, THE N.Y. TIMES (June 29, 2021), https://www.nytimes.com/2021/06/29/technology/facebook-google-antitrust-tech.html (discussing the desire by many members of Congress to update the antitrust laws to combat specific Big Tech anticompetitive practices that have avoided scrutiny under the current laws); *see also Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring) ("If it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions undoubtedly ensue . . . . Legislation would be one option.").

111. *See Alston*, 141 S. Ct. at 2161; *see also* Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & BUS. 369 (2016).

112. *Alston*, 141 S. Ct. at 2161 (internal citations omitted) (quoting Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (Cal. 1983); Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004)).

At the same time, the court expresses significant deference in line with its previous jurisprudence surrounding the application of the rule of reason.[113]

Justice Kavanaugh's concurrence reflects the reasoning found in those cases of the Third and Sixth Circuits.[114] Like in those cases, Justice Kavanaugh reasons that procompetitive outcomes are often used as shields against antitrust enforcement when consumer harm is used as the relevant standard.[115] He goes further than the majority opinion, decrying the behavior of universities that spend the money earned as a result of their student athletes' labor on things that have little to no bearing on creating positive outcomes for consumers, such as "[c]ollege presidents, athletic directors, coaches, conference commissioners, and NCAA executives tak[ing] in six- and seven-figure salaries."[116] This language seems to suggest that Justice Kavanaugh believes that pro-competitive justifications are, at least in this case, a shield for NCAA executives and other higher-ups in collegiate athletics to protect exorbitant profits and high salaries.[117] This line of reasoning harkens back to early antitrust cases decided by the Supreme Court, through which the Court asserted that increasing or maintaining profits is not a real procompetitive justification to counteract an anticompetitive restraint.[118]

Given these considerations, the role of *Alston* and its application to monopsonistic restraints generally remains unclear.[119] While its reasoning could be extended to consider non-educational restraints, the Court

113. *See*, *e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284–85 (2018) (noting that the plaintiffs, having relied exclusively on direct evidence of anticompetitive effects, did not have sufficient evidence to carry their burden).

114. *See Alston*, 141 S. Ct. at 2166–69 (Kavanaugh, J., concurring); Eichhorn v. AT&T Corp., 248 F.3d 131, X (3d Cir. 2001); Ogden v. Little Caesar Enters., Inc., 393 F. Supp. 3d 622, X (E.D. Mich. 2019) (holding that procompetitive outcomes in the consumer-facing market often overwhelm private plaintiffs suing for labor market anticompetitive harm).

115. *See Alston*, 141 S. Ct. at 2166–69 (Kavanaugh, J., concurring) (reasoning that anticompetitive harm is anticompetitive harm regardless of procompetitive rationales and suggesting that weighing whether certain harms are less significant than others violates the primary purpose of the Sherman Act to protect competition).

116. *Id.* at 2168 (emphasizing the racial inequities generated by the revenue of college athletic programs).

117. *See id.*

118. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978); *see also* Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect,* 70 ANTITRUST L.J. 371, 372–73 (noting an alternative to the microeconomic model that focuses on the market mechanism, rather than simply effects, and distinguishing this from a protectionist model designed to benefit small, inefficient firms).

119. *See Alston*, 141 S. Ct. at 2161.

seemingly refused to go in that direction.[120]

D. Section 1 Versus Section 2 Monopsony Cases

Although the Sherman Act prescribes different causes of action between Section 1, relating to multilateral agreements among competitors, and Section 2, pertaining to unilateral action to obtain monopoly/monopsony power, courts have often conflated these claims.[121] Further complicating the analysis of the relevant standard for a respective claim under one of these causes of action, the number of Section 1 claims significantly outnumbers those under Section 2.[122] Given the fraction of antitrust claims that are monopsony claims relative to monopoly claims, the number of opinions on Section 2 monopsonization claims is small.[123] Accordingly, there has been little to no guidance from higher courts, including the Supreme Court, that addresses the differences in standards between Section 1 agreements among buyers with market power and Section 2 monopsonization.[124] Given the prevalence of monopsonies in labor markets, where firms rarely conduct bilateral agreements and rely instead on unilateral employment contracts and hiring practices, the lack of Section 2 monopsonization jurisprudence creates difficulties for individual plaintiffs attempting to overcome the antitrust

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120. *See* Matt Marx et al., *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875, 883–85 (2009) (examining the Michigan Antitrust Reform Act's effects on non-competes in Michigan); *see also* Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 527 (2016) (reviewing research on Michigan's evolving enforcement of noncompete agreements). *But see* Ashley Jo Zaccagnini, *Time's Up: A Call to Eradicate NCAA Monopsony Through Federal Legislation*, 74 SMU L. REV. F. 55, 75 (2021) (arguing that the NCAA's monopsony power cannot be sufficiently resolved through the antitrust laws and that Congress must take specific action to fill in the gaps that the Sherman Act cannot).

121. *See* 15 U.S.C. §§ 1–2; *see also* Day, *supra* note 25, at X; *e.g.*, FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 422 (1990) ("[R]espondents' boycott 'constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act.' . . . As such, it also violated the prohibition against unfair methods of competition in § 5 of the FTC Act."); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 290 (1985) ("This Court has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act."); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 694–95 (1978) ("The Sherman Act does not require competitive bidding; it prohibits unreasonable restraints on competition.").

122. *See* DEP'T OF JUST., ANTITRUST DIV., DEP'T OF JUST. ANTITRUST DIVISION WORKLOAD STATISTICS (stating that the Antitrust Division pursued fifty-six possible Section 1 violations in 2019 but only two Section 2 violations).

123. *See id.*

124. *See id.*

injury requirement.[125]

IV. HARM AND FOUL

The use of a pure consumer harm standard in monopsony cases creates an unreasonably high bar for plaintiffs who have been affected by anticompetitive actions by buyers that do not meet the traditional definition of an antitrust injury.[126] This is especially true in the case of employees and employers.[127] The United States has reached a crossroads in terms of buyer power that the antitrust laws must be updated to address.[128] As economic studies have proven, monopsonies do not always translate to higher prices paid by consumers; they frequently lead to the opposite.[129] Using the ancillary restraints approach to justify anticompetitive restraints that lead to procompetitive effects for consumers can lead to adverse effects for workers and other small producers.[130] As in *Aya Healthcare Services* and *Petrie*, courts consistently rule against employee plaintiffs by adopting an ancillary restraints approach in their rule of reason analyses.[131] Defendant entities can quickly respond to such complaints with the argument that the restriction is beneficial to the consumer, where the harmed worker has the burden to prove otherwise.[132]

Meanwhile, influential buyers continue to grow in their market power, allowing the subjugation of workers who struggle to make ends meet.[133] For

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125. *See* Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 134–35 (2008) (describing the leverage gained by employers over employees in the non-compete arena).

126. *See* Naidu, et al., *supra* note 20; Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, X (2018).

127. *See* Day, *supra* note 25, at 505 (arguing that employers have experienced disproportionate leniency under the Sherman Act, due to both judicial interpretation and inaction by the FTC and DOJ).

128. *See* Naidu et al., *supra* note 20.

129. *See id.*; Day, *supra* note 25, at 508 (explaining how monopolies and monopsonies differ with respect to the impact they have on consumers' buying power).

130. *See* Day, *supra* note 25, at 520–21 (attributing negative labor market effects to the restraints that may generate procompetitive outcomes in the consumer-facing market).

131. *See, e.g.*, Aya Healthcare Servs. v. AMN Healthcare, No. 17cv205-MMA, 2017 U.S. Dist. LEXIS 201993, at *16–17 (S.D. Cal. Dec. 6, 2017); Petrie v. Va. Bd. of Med., 648 F. App'x 352, 356 (4th Cir. 2016).

132. *See Aya Healthcare Servs.*, 2017 U.S. Dist. LEXIS 201993, at *16–17; *Petrie*, 648 F. App'x at 356.

133. *See* Mark Paul & Mark Stelzner, *Rethinking Collective Action and U.S. Labor Laws in a Monopsonistic Economy*, WASH. CTR. FOR EQUITABLE GROWTH (Dec. 20, 2018), https://equitablegrowth.org/rethinking-collective-action-and-u-s-labor-laws-in-a-

example, certain delivery and transportation apps such as Uber, DoorDash, and platforms that enlist workers through a gig model have pushed hard to avoid providing benefits and complying with other labor regulations.[134] Generally, these companies classify their workers as contractors to avoid such regulation.[135] Arguably collusive in the labor market, these companies have argued that requiring their workers to have full employment status would lead to higher prices passed on to consumers.[136] Under an ancillary restraints model, it is not difficult to see how these procompetitive effects could be seen as outweighing the harm on the laborers by lowering the costs faced by consumers, increased supply of rides, and similar justifications.[137] Similarly, other technology companies, including Apple and Google, have allegedly fixed the wages of millions of employees.[138]

Analysts have argued that Amazon has gained both monopoly and monopsony power over the last decade.[139] On the monopsony side, this

monopsonistic-economy/.

134. *See* Dara Kerr, *Uber and Lyft Experiment with Labor Practices Amid Driver Shortage*, THE MARKUP (June 1, 2021, 8:00 AM), https://themarkup.org/news/2021/06/01/uber-and-lyft-experiment-with-labor-practices-amid-driver-shortage (describing how rideshare companies have been able to avoid increasing wages for drivers, despite a significant decrease in labor supply due to the Covid-19 pandemic); *see also* Mark Anderson & Max Huffman, *Labor Organization in Ride-Sharing–Unionization or Cartelization?*, 23 VAND. J. ENT. & TECH. L. 715 (2021).

135. *See* Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, THE N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html (detailing how the ballot measure that would require drivers to be hired employees was rejected by California voters). *But see* Wilfred Chan, *The Workers Who Sued Uber and Won*, DISSENT MAGAZINE (May 5, 2021), https://www.dissentmagazine.org/online_articles/the-workers-who-sued-uber-and-won (detailing how the U.K. Supreme Court ruled in favor of Uber drivers suing for employment status and protections such as minimum wage and paid annual leave).

136. *See* Andrew Wallender, *Uber's Worker Business Model May Harm Competition, Judge Says*, BLOOMBERG L. (June 21, 2019, 2:58 PM), https://news.bloomberglaw.com/daily-labor-report/ubers-worker-business-model-may-harm-competition-judge-says; *see also* Diva Limousine, Ltd. v. Uber Techs., Inc., 392 F. Supp. 3d 1074, X (N.D. Cal. 2019) (holding that Uber's contractor model for workers likely violates both state and federal antitrust laws).

137. *See Diva Limousine*, 392 F. Supp. 3d at 1081 (discussing the procompetitive effects of the existing contractor employment model used by Uber and other ride-share companies).

138. *See* Mark Ames, *Revealed: Apple and Google's Wage-Fixing Cartel Involved Dozens More Companies, Over One Million Employees*, PANDO (Mar. 25, 2014), https://pando.com/2014/03/22/revealed-apple-and-googles-wage-fixing-cartel-involved-dozens-more-companies-over-one-million-employees/ (detailing how a secretive wage fixing cartel became public).

139. *See*, *e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (analyzing Amazon's dominance in a wide range of sectors and the potential harms that

includes Amazon's role as a buyer both of labor and as a middleman for buying and reselling other companies' products.[140] Amazon employees have decried poor labor conditions for years.[141] However, it is possible that courts using the consumer harm standard, coupled with the doctrine of ancillary restraints, would not impose antitrust liability should a suit be brought under the Sherman Act.[142] Amazon can offer a rebuttal that there are procompetitive justifications for these practices, as they allow benefits to flow to consumers in the form of rapid delivery and low prices.[143] Similarly, Amazon's influence with consumers also enables the company to put significant pressure on its suppliers, forcing them to carry more of the costs so that Amazon can resell at a low price.[144] Therefore, an individual or class plaintiff going after Amazon on monopsony grounds stands little chance under the current state of Sherman Act jurisprudence.[145]

Several pathways to combating the problem of growing buyer power in the modern economy exist.[146] However, among these solutions must be an explicit rejection of the consumer harm standard in monopsony cases; the Supreme Court must make a firm stance on this issue.[147] While the Court's reasoning in *Alston* opens the door for monopsony analysis without consumer harm, it fails to explicitly replace the standard.[148] The Court must grant certiorari to a monopsony case that would allow it to reaffirm the actual goals of the antitrust laws hidden amongst the Chicago School's confusion and formally reject a requirement of showing consumer harm for antitrust

may result from it).

140. *See id.*

141. *See* Annie Palmer, *Amazon Warehouse Workers Injured at Higher Rates than Those at Rival Companies, Study Finds*, CNBC (June 1, 2021, 11:11 AM), https://www.cnbc.com/2021/06/01/study-amazon-workers-injured-at-higher-rates-than-rival-companies.html; Danielle Abril, *Amazon Workers Can Still Fight for Better Conditions, Even if Union Efforts Fail. Here's How.*, FORTUNE (Apr. 13, 2021, 6:51 PM), https://fortune.com/2021/04/13/amazon-workers-union-efforts-collective-power-working-conditions-activism/.

142. *See* Laura Alexander, *Monopsony and the Consumer Harm Standard*, 95 GEO. L.J. 1611, 1621–22 (recognizing the breadth of the ancillary restraints doctrine and the barriers it poses for monopsony plaintiffs).

143. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 694-95 (1978).

144. *See* Eugene Kim, *As Amazon's Dominance Grows, Suppliers Are Forced to Play by Its Rules*, CNBC (Dec. 21, 2017; 2:20 PM), https://www.cnbc.com/2017/12/21/as-amazons-dominance-grows-suppliers-are-forced-to-play-by-its-rules.html.

145. *See* Alexander, *supra* note 142, at 1621.

146. *See* Day, *supra* note 25, at 531–32.

147. *See id.*; Khan, *supra* note 139, at 716.

148. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2155 (2021) (declining to express views on whether pro-competitive effects proffered in one market can offset anticompetitive effects in another).

injuries. There is reason to believe that a future Amazon lawsuit will provide a case that affords this opportunity.[149] The newly-appointed FTC commissioner, Lina Khan, has expressed a willingness to resume investigations against the company's practices.[150] Under President Biden's leadership, the antitrust agencies have been encouraged to pursue anti-competitive practices previously left alone.[151] A recent executive order specifically aims "to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of . . . monopsony—especially as these issues arise in labor markets . . . ."[152]

However, there remains the possibility that the Court would refuse to go so far as to reject the consumer harm standard.[153] In that case, it may be necessary to introduce legislation to amend the antitrust laws to ensure fair treatment of monopsony victims.[154] Such legislation is no far cry; legislators for years have advocated for updating the Sherman Act and the other antitrust laws to reflect current economic priorities.[155] For instance, Senator Amy Klobuchar has introduced the Competition and Antitrust Law Enforcement Reform Act, which attempts to fill some gaps in the Sherman and Clayton Acts regarding monopsonies.[156] Furthermore, states have taken the initiative

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149. *See* Marcy Gordon, *Amazon Asks for FTC Head to Step Aside from Antitrust Investigations*, PBS (June 30, 2021, 5:48 PM), https://www.pbs.org/newshour/economy/amazon-asks-for-ftc-head-to-step-aside-from-antitrust-investigations (noting that the FTC has been leading investigations of large technology companies such as Facebook).

150. *See id.*; *see also* Khan, *supra* note 139 (advocating for increased antitrust enforcement action against Amazon given significant increases in both seller and buyer power).

151. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021); *see also* Matthew Perlman, *Sweeping Biden Order Aims to Attack Lack of Competition*, LAW360 (July 9, 2021, 9:59 AM), https://www.law360.com%2Farticles%2F1401687%2Fsweeping-biden-order-aims-to-attack-lack-of-competition&usg=AOvVaw1ukPY1iBP9WnNmpWRH6-7C (stating how the executive order is going to increase the likelihood of equal opportunities in the market industry).

152. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021).

153. *See Alston*, 141 S. Ct. at 2162 (stating how the district court found that the NCAA student-athlete's abilities to prove that a "substantially less restrictive alternative" rule existed to achieve the same procompetitive benefits was satisfied when the NCAA was able to).

154. *See* Lauren Feiner, *Congress Just Finished Its Big Tech Antitrust Report — Now It's Time to Rewrite the Laws*, CNBC (Oct. 7, 2020, 7:49 AM), https://www.cnbc.com/2020/10/07/after-congress-big-tech-antitrust-report-its-time-to-rewrite-the-laws.html.

155. *See id.* ("[L]awmakers on both sides of the aisle have remained interested in antitrust reform . . . .").

156. Bill Baer, *How Senator Klobuchar's Proposals Will Move the Antitrust Debate Forward*, BROOKINGS (Feb. 8, 2021), https://www.brookings.edu/blog/techtank/2021/02/08/how-senator-klobuchars-

to fill in the gaps left by federal antitrust law.[157]

V. CONCLUSION

The continued use of the consumer harm standard in monopsony cases conflicts with the antitrust laws' purpose and allows powerful buyers to impose unfair conditions on laborers and small sellers alike.[158] While they share theoretical similarities, in practice monopolies and monopsonies have different outcomes in their respective markets, especially in terms of the prices paid by consumers.[159] Further, these practical differences have led to current inconsistent application of the consumer harm standard in monopsony cases at the district court and circuit court levels. The Supreme Court's holding in *Alston* and its limited application to educational benefits failed to provide an answer for whether a showing of pure consumer harm is required for monopsony plaintiffs to prevail under the Sherman Act.[160] For now, the challenges faced by lower courts in assessing the claims of monopsony plaintiffs, balancing the purpose of the Sherman Act as a shield for competition against the consumer harm standard, will likely continue. Finally, the consumer harm standard should be abandoned on monopsony cases, given the unreasonably high bar it presents for plaintiffs and its impact on workers.

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proposals-will-move-the-antitrust-debate-forward/.

157. *See*, *e.g.*, J. Mark Gidley et al., *New York's Sweeping New Antitrust Bill—Requiring NY State Premerger Notification ($9.2M Filing Threshold) and Prohibiting "Abuse of Dominance" —Inches Closer to Becoming Law*, WHITE & CASE (June 11, 2021), https://www.whitecase.com/publications/alert/new-yorks-sweeping-new-antitrust-bill-requiring-ny-state-premerger-notification (reporting on the state of New York releasing a promising antitrust law).

158. *See* Day, *supra* note 25, at 510–11.

159. *See id.* at 508, 510–11.

160. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2162 (2021).