

# Why Has Antitrust Law Failed Workers?

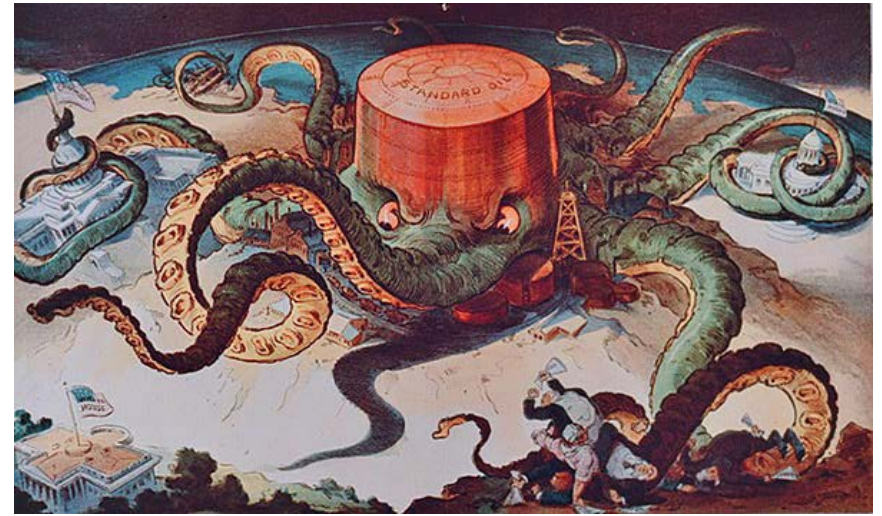
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# Outline

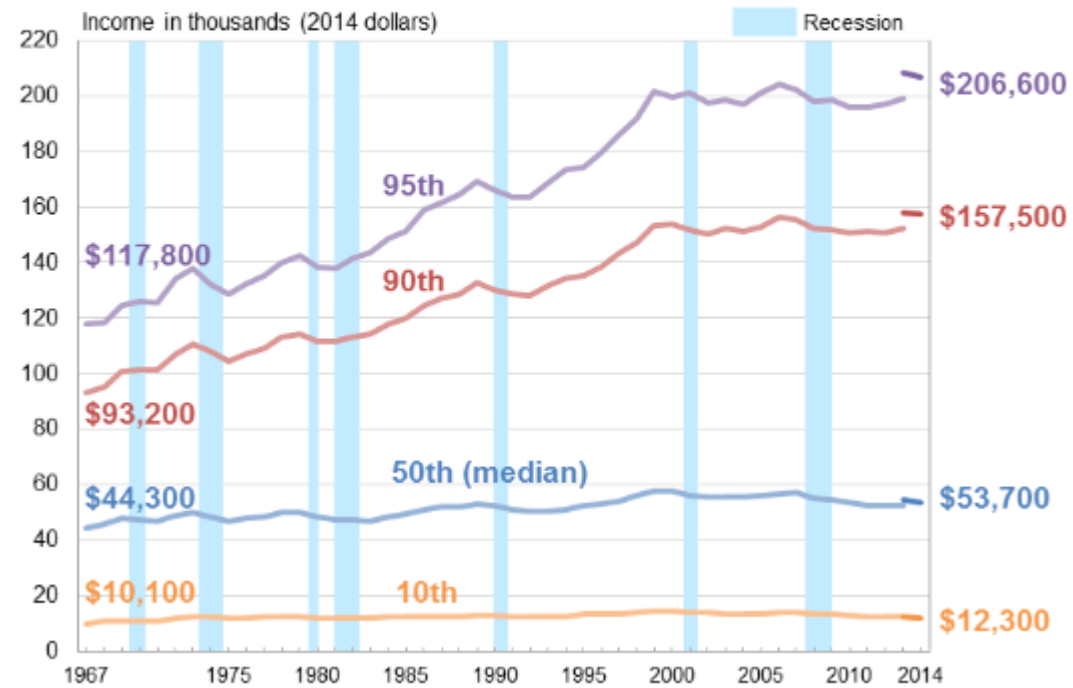
- The problem of labor monopsony
- The litigation gap
- Proposals for reform

# The Problem

- No-poaching agreements across firms
  - Silicon Valley tech scandal (2010)
- Noncompetes, especially involving low-skill workers
  - Jimmy John's scandal (2014)
- No-poaching agreements within franchises
  - State AG cases against McDonald's, Arby's, and others (2018)
- Earlier litigation against hospitals for conspiring to suppress wages (2006)
- More broadly, concerns about wage stagnation ...



## Real Household Income at Selected Percentiles: 1967 to 2014





Shaded areas indicate U.S. recessions

Source: U.S. Bureau of Labor Statistics

fred.stlouisfed.org

# Empirical Research on Labor Monopsony (1)

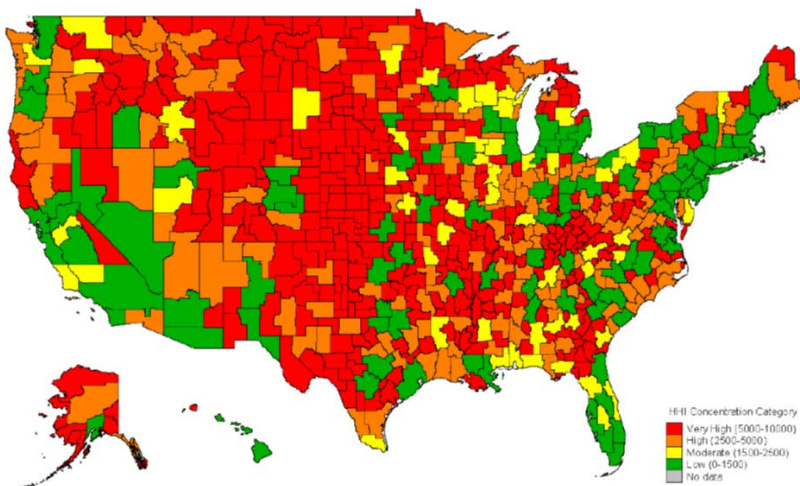
- Noncompetes
  - About 15-20% of all workers have been bound by a non-compete clause
  - 12-17% of low-income workers were subject to non-competes
  - Sources: Starr et al., 2017; Krueger and Posner, 2018.
- Within-franchise no-poaching agreements
  - Over half of major franchisors use no-poaching agreements in their franchise contracts, up from about 36% in 1996 (Krueger and Ashenfelter, 2017; Krueger and Posner, 2018)

# Empirical Research on Labor Monopsony (2)

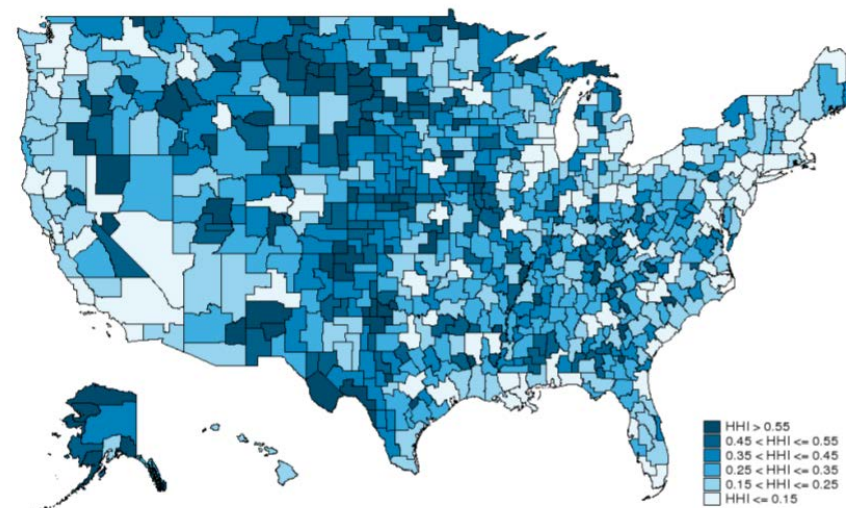
- Azar, Marinescu, Steinbaum, and Taska, 2018
- Benmelech, Bergman, and Kim, 2018
- Hershbein, Macaluso, and Yeh, 2018
- Rinz, 2018
- Lipsius, 2018
- Qiu and Sojourner, 2019

Using various datasets and methods, all reach consistent results...

# Empirics



Azar et al., 2018. Source: Burning Glass Technologies (2016)



Rinz, 2018. Source: Census Longitudinal Business Database (2015)

HHI > 7,200 in 25% of labor markets

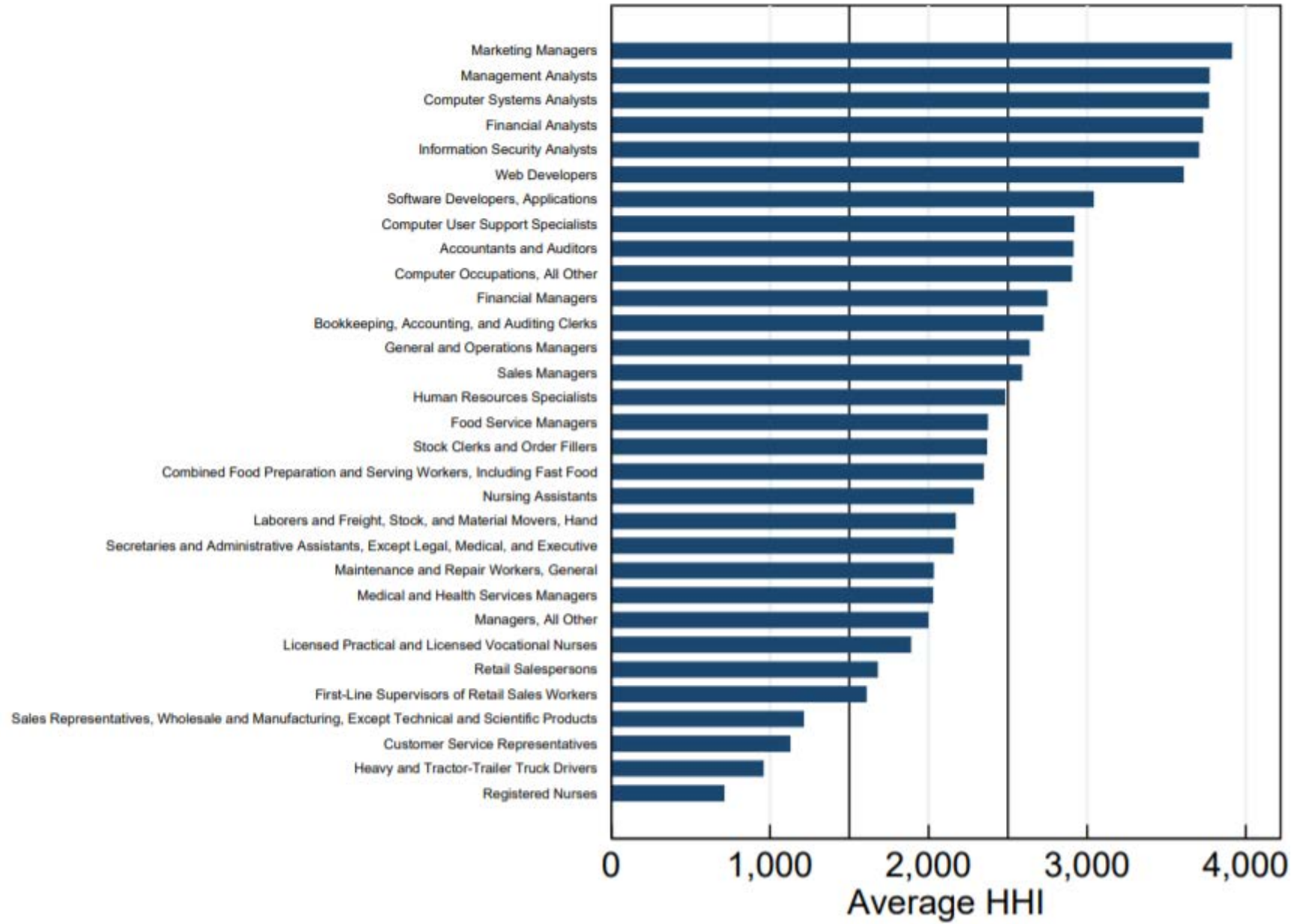
HHI > 2,500 in 60% of labor markets

Average HHI (manufacturing):

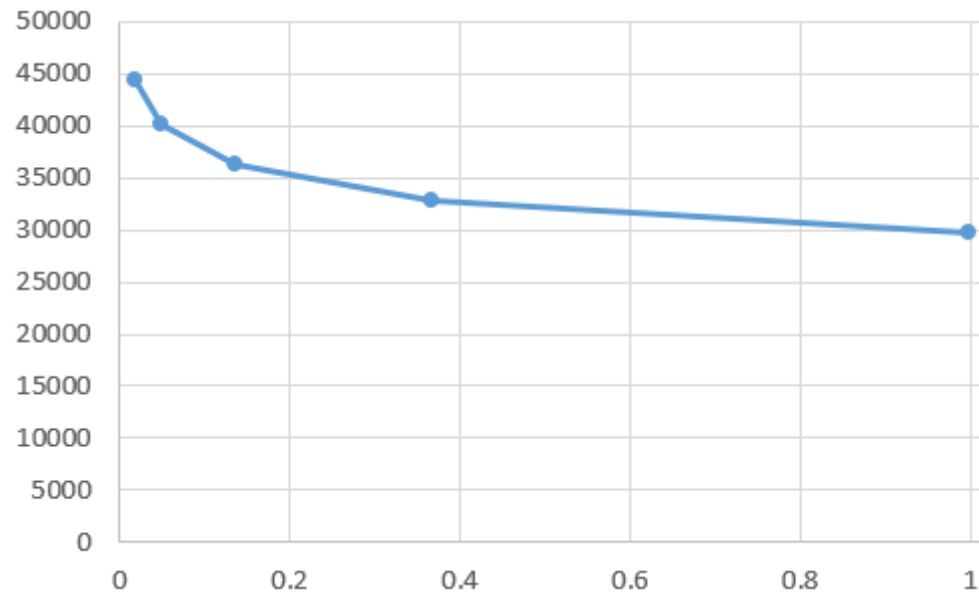
-- Labor markets: 4,374

-- Product markets: 411





# Labor monopsony reduces wages (and should also reduce employment)

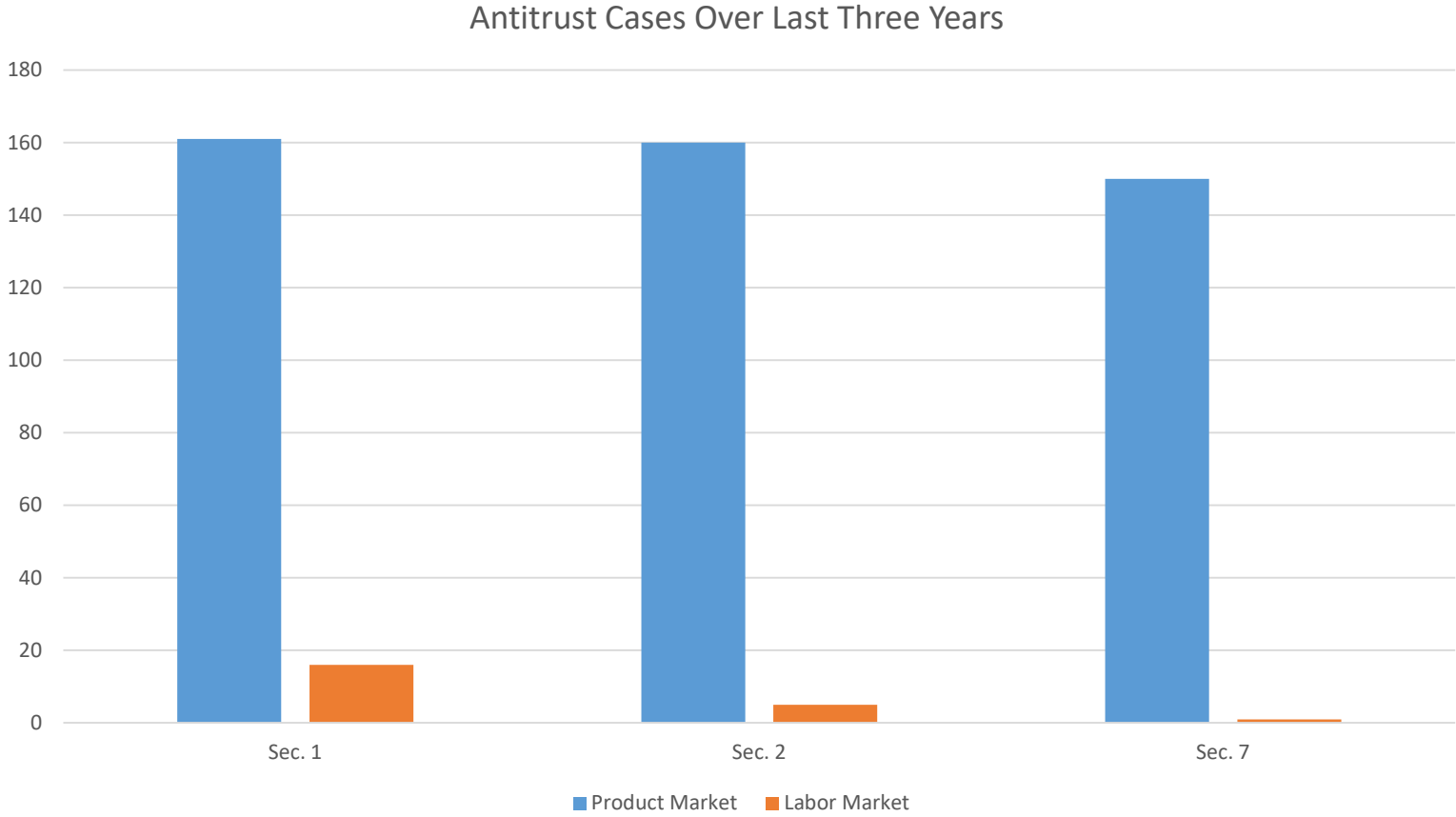


Correlation between HHI and wages (uncontrolled); a 10% increase in HHI leads to a 0.4% to 1.5% decrease in wages. Azar et al., 2018.

# Theory

- Concentration
  - Search frictions
  - Job differentiation
- 
- Note: labor monopsony does not result in lower prices for goods.
    - Labor monopsony reduces production, which will increase prices unless the product market is competitive.

# The Litigation Gap



# The Litigation Gap: Theories

- Policy differences for labor and product markets; conventional wisdom
- Legal barriers for labor-side litigation
- History and path dependence

# Will the Litigation Gap Narrow?

- FTC: “The Commission takes very seriously the potential for monopsony power among employers to affect workers’ wages and mobility.” (Senate Testimony of FTC chair Joseph Simons, 2018)
  - Hearings, 2018-2019
- DOJ: “The Division expects to pursue criminal charges” for no-poaching agreements that began after October 2016 (Principal Deputy Assistant Attorney General Andrew Finch, 2018)
- State AGs
  - No-poaching litigation
  - The Antitrust and Labor Issues Working Group of National Association of Attorneys General (2019)
- Congress: some monopsony-related proposals have circulated.
- Private litigation: ??

# Proposals for Reform

- Section 1
- Section 2
- Clayton, section 7



# Section 1

- Collusion is easier in concentrated markets (HMG)
- Liability for Parallel No-Poaching
  - Kelsey K. v. NFL, 9<sup>th</sup> Cir., 2018
  - Disparate treatment analogy
- No-Poaching Agreements in Franchises
  - Vertical/horizontal problem
  - Interbrand competition problem
  - No-poaching provisions that are not tailored to employees' skill and responsibilities should be presumptively illegal
- Further details: Marinescu & Posner, 2019



# Section 2

- Section 2 cases should be easier to prove
- Presumptive labor market definitions based on SOC x CZ
- Presumptive labor market power, e.g., >50%
- Presumptive anticompetitive acts
  - Misclassification
  - Mergers
  - Noncompetes, no-poaching clauses
  - Unfair labor practices
  - Arbitration clauses
- Further Details: Marinescu & Posner, 2018

# Clayton, Section 7

- DOJ/FTC should review mergers for labor market effects
- Use HHI presumptions to challenge mergers
- Further details: Naidu, Posner, and Weyl, 2018; Marinescu and Hoffenkamp, 2018

# Conclusion

“We rarely hear, it has been said, of the combinations of masters, though frequently of those of workmen. But whoever imagines, upon this account, that masters rarely combine, is as ignorant of the world as of the subject. Masters are always and everywhere in a sort of tacit, but constant and uniform, combination, not to raise the wages of labour above their actual rate.”

Adam Smith, *The Wealth of Nations*, 1776