

ANTITRUST AND MODERN U.S. LABOR MARKETS: AN ECONOMICS PERSPECTIVE

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Among the most high-profile initiatives of the Federal Trade Commission (FTC) during the Biden Administration has been a focus on using antitrust law to address issues relating to economic inequality, specifically the role that corporate mergers purport to play in undermining labor market competition, and in turn harming workers.² Proponents of the FTC's current approach appeal to academic analysis in support of their argument.³ We submit that this focus is misguided, and based on flawed assumptions with respect to both the state of the labor market and the purported growth in economic inequality. Rather, we argue, when analyzed correctly, the data regarding workplace flexibility, labor market concentration, and so-called "income inequality" show that, if the FTC continues down this regulatory path, the workers the agency claims to protect will suffer the greatest harm. The application of antitrust law to the labor market is unprecedented and, perhaps more importantly, antithetical to the well-being of workers. For the reasons we explain below, it should be rejected.

In his latest book, *How Antitrust Failed Workers*,⁴ University of Chicago Professor Eric Posner argues that firms exert wage-setting power over workers through labor market power⁵ and employment concentration,⁶ known in economic terms as monopsony. According to Professor Posner, workers have no choice but to accept the wages and terms offered by firms that have monopsony employment power, and firms use this power to keep down wages—a practice known as wage suppression.⁷ Professor Posner claims that it is the job of the antitrust authorities, the Department of Justice and the Federal Trade Commission to oversee this abuse of employment monopsony power, just as they have the authority to review antitrust authority to review abuse of product and service markets.⁸ Professor Posner, who has been hired as Counsel

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² Press Release, Federal Trade Commission, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (January 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

³ Impact of Corporate Power on Workers and Consumers: Hearing on the Imbalance of Power: How Market Concentration Affects Worker Compensation and Consumer Prices Before the H. Select Comm. on Economic Disparity and Fairness in Growth, 117th Cong. (2022) [hereinafter H. Select Comm.].

⁴ Eric A. Posner, *How Antitrust Failed Workers* (Oxford University Press 2021).

⁵ *Id.* at 1.

⁶ *Id.* at 2.

⁷ *Id.* at 1.

⁸ *Id.* at 32–33.

to the Assistant Attorney General⁹ at the Antitrust Division of the U.S. Department of Justice to work in this area, has published other articles on the topic, most recently “Antitrust and Labor Markets: A Reply to Richard Epstein,” in the latest volume of the *New York University Journal of Law and Liberty*.¹⁰

However, data from the Bureau of Labor Statistics of the U.S. Department of Labor show that exercise of monopsony power is generally not occurring in today’s 21st century economy, nor has it been a characteristic of labor markets over the past half century.¹¹ In 2022, at the time of this writing, there are over 11 million unfilled jobs,¹² and employers are raising wages and improving benefits to find workers.¹³ In addition to normal turnover over the past several decades, which has been substantial and greater than other countries, the “Great Resignation” has seen workers leave in substantial numbers for jobs with better pay and more favorable working conditions.¹⁴ In addition to better pay, 45 percent of workers surveyed by the Pew Research Center moved to new jobs to have more flexibility to work full-time or part-time from home.¹⁵ Rather than spend a career with one employer, workers have an average of 12 different jobs before the age of 54 according to the data from the National Longitudinal Survey.¹⁶

Professor Posner states that “the anticompetitive behavior of employers causes significant harm to social welfare,”¹⁷ although he admits that “the frequency with which collusion takes place in labor markets is an open question.”¹⁸ It is quite possible that employer power was a feature of some geographically isolated labor markets in the 19th century, when some small towns were characterized by one employer or a small number of employers, and workers in these remote towns faced substantial costs to move and instead generally spent much or all of their careers with one employer.¹⁹

Professor Posner’s concerns about labor concentration and monopsony have spread beyond the realm of academia to the Executive Branch and Congress.

⁹ Chief of Staff and Senior Advisors, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE (May 25, 2022), <https://www.justice.gov/atr/chief-staff-and-senior-advisors>.

¹⁰ Eric A. Posner, *Antitrust And Labor Markets: A Reply To Richard Epstein*, 15 N.Y.U. J.L. & LIBERTY 389 (2022). See also Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); Ioana Marinescu & Eric Posner, *Why Has Antitrust Law Failed Workers?*, 015 CORN. L. REV. 1343 (2020).

¹¹ Bureau Of Labor Statistics, Job Openings And Labor Turnover – May 2022 (2022), <https://www.bls.gov/news.release/pdf/jolts.pdf> [hereinafter *May Job Openings and Labor Turnover Survey*]; Bureau Of Labor Statistics, Number Of Jobs, Labor Market Experience, Marital Status And Health: Results From A National Longitudinal Survey (2021), <https://www.bls.gov/news.release/pdf/nlsoy.pdf> [hereinafter *National Longitudinal Survey*].

¹² *May Job Openings and Labor Turnover Survey*, supra note 11.

¹³ Bureau Of Labor Statistics, Employment Cost Index – June 2022 (2022), <https://www.bls.gov/news.release/pdf/eci.pdf>.

¹⁴ *May Job Openings and Labor Turnover Survey*, supra note 11.

¹⁵ PEW RESEARCH CENTER, AMERICAN TRENDS PANEL WAVE 103 FEBRUARY 2022 (2022), <https://www.pewresearch.org/wp-content/uploads/2022/03/W103-Great-Resignation-topline.pdf>.

¹⁶ *National Longitudinal Survey*, supra note 11.

¹⁷ Eric A. Posner, *Antitrust And Labor Markets: A Reply To Richard Epstein*, 15 N.Y.U. J.L. & LIBERTY 389, 389 (2022), https://static1.squarespace.com/static/5f6103f36b5eee6bf0ab2c1d/t/623501b782d84e066ca1ff1b/1647641017622/15.2_Posner_Final.pdf.

¹⁸ *Id.* at 398.

¹⁹ Hardy Green, *Company Towns in the United States*, OXFORD RESEARCH ENCYCLOPEDIAS (Mar. 28, 2018), <https://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-569>.

President Biden directly addressed monopsony in his Executive Order 14036,²⁰ issued July 9, 2021, which referred to “the harmful effects of monopoly and monopsony—especially as these issues arise in labor markets.”²¹

On January 18, 2022, the Federal Trade Commission and the Antitrust Division of the Department of Justice asked for public comments²² on illegal merger enforcement, including on “labor market effects of mergers.” (The comment period was extended until April 21, 2022, from March 21, 2022.)²³ The U.S. Department of the Treasury issued a report on March 7, 2022, entitled “The State of Labor Market Competition.”²⁴

On April 6, 2022, the U.S. House of Representatives Select Committee on Economic Disparity and Fairness in Growth held a hearing entitled “(Im)balance of Power: How Market Concentration Affects Worker Compensation and Consumer Prices.”²⁵

In July, 2022, the National Bureau of Economic Research released a paper by economists Antonio Falato, Hyunseob Kim, and Till M. Von Wachter. It concludes that “increases in the concentration of more powerful institutional shareholders reduce employment and labor income, because the objectives and interests of the shareholders more likely conflict with those of the workers.”²⁶

On July 19, 2022, Chair Lina Khan of the Federal Trade Commission and General Counsel Jennifer Abruzzo of the National Labor Relations Board signed a Memorandum of Understanding pledging to cooperate in areas of mutual interest. The memorandum states, “Issues of common regulatory interest include labor market developments relating to the gig economy and other alternative work arrangements; claims and disclosures about earnings and costs associated with gig and other work; the imposition of one-sided and restrictive contract provisions, such as noncompete and nondisclosure provisions; the extent and impact of labor market concentration; the impact of algorithmic decision-making on workers; the ability of workers to act collectively; and the classification and treatment of workers.”²⁷

Recommendations to relieve so-called monopsony power include reducing occupational licensing; strengthening antitrust laws with regard to labor markets; raising the minimum wage; expanding the power of unionized labor; increasing funding for the National Labor Relations Board; broadening the Affordable Care Act; and reducing the numbers of independent

²⁰ Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

²¹ *See id.* § 1.

²² Press Release, Federal Trade Commission, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (January 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

²³ Press Release, Federal Trade Commission, FTC and DOJ Extend Deadline for Public Comment on Ways to Strengthen Enforcement Against Illegal Mergers (March 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-doj-extend-deadline-public-comment-ways-strengthen-enforcement-against-illegal-mergers>.

²⁴ U.S. DEPARTMENT OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION (2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>.

²⁵ H. Select Comm., *supra* note 3.

²⁶ Antonio Falato, Hyunseob Kim, & Till M. von Wachter, *Shareholder Power and the Decline of Labor* 31 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30203, July 2022).

²⁷ Lina M. Khan & Jennifer A. Abruzzo, *Memorandum to Understanding*, FEDERAL TRADE COMMISSION (July 19, 2022), <https://www.ftc.gov/legal-library/browse/cooperation-agreements/memorandum-understanding>.

contractors.²⁸ The burden on new entrants to the labor force of excessive occupational licensing requirements for professions such as flower-arranging, tree-cutting, and hair braiding has been well-documented,²⁹ and most people agree that these licensing requirements should be reduced. The other recommendations, which have been advocated before as cures for supposed inequality, wage disparity, and other societal problems,³⁰ show that labor monopsony is a solution in search of a problem. These recommendations would reduce flexibility for workers rather than expanding it, as will be explained below.

In this paper, we first provide data from the U.S. Department of Labor to show that America's labor markets are flexible, with high rates of employee turnover,³¹ high rates of firm expansion and contraction,³² regular movement of workers between states;³³ and an average of 12 jobs held over an individual's career.³⁴ Second, we argue that the concept of labor market concentration is not relevant in a modern economy, and product market concentration generally is not linked to labor market concentration. Third, since inequality is given as a rationale for FTC investigations of product market concentration, we provide data from academic studies demonstrating that inequality has not been increasing and that Americans' income has in fact been rising over time.³⁵

²⁸ U.S. DEPARTMENT OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION (2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>; ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS (2021); Press Release, Federal Trade Commission, FTC and DOJ Extend Deadline for Public Comment on Ways to Strengthen Enforcement Against Illegal Mergers (March 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-doj-extend-deadline-public-comment-ways-strengthen-enforcement-against-illegal-mergers>.

²⁹ Dick M. Carpenter, Lisa Knepper, Angela C. Erickson & John K. Ross, *License to Work: A National Study of Burdens of Occupational Licensing*, INSTITUTE FOR JUSTICE (2012), <https://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf>.

³⁰ For prior advocacy of recommendations, see the following. For health care, see Marquisha Jones & Jill Rosenthal, *How Investing in Public Health Will Strengthen America's Health*, CENTER FOR AMERICAN PROGRESS (May 17, 2022), <https://www.americanprogress.org/article/how-investing-in-public-health-will-strengthen-americas-health/>.

For strengthening unions, see Aurelia Glass & David Madland, *Unions can rebuild the middle class and narrow the racial wealth gap*, CENTER FOR AMERICAN PROGRESS (Sep. 13, 2021), <https://www.americanprogress.org/article/unions-can-rebuild-middle-class-narrow-racial-wealth-gap/>.

For broadening union power, see Celine McNicholas, Margaret Poydock, & Lynn Poydock, *How the PRO Act restores workers' right to unionize*, ECONOMIC POLICY INSTITUTE (Feb. 4, 2021), <https://www.epi.org/publication/pro-act-problem-solution-chart/>. For raising minimum wage, see Julia Cusick, *STATEMENT: Raising the Contractor Minimum Wage and Phasing Out the Subminimum Wage for Disabled Contractors Will Improve Hundreds of Thousands of Lives*, CENTER FOR AMERICAN PROGRESS (Nov. 22, 2021), <https://www.americanprogress.org/press/statement-raising-the-contractor-minimum-wage-and-phasing-out-the-subminimum-wage-for-disabled-contractors-will-improve-hundreds-of-thousands-of-lives/>. For reducing numbers of independent contractors, see Karla Walter, *Workers who risk their lives to run others' errands should have basic benefits: Personal protection, a minimum wage, health insurance, and more*, CENTER FOR AMERICAN PROGRESS (Apr. 2, 2020), <https://www.americanprogress.org/article/workers-risk-lives-run-others-errands-basic-benefits-personal-protection-minimum-wage-health-insurance/>. For push for mandatory employer-provided parental leave, see Barbara Gault, Heidi Hartmann, Ariane Hegewisch, Jessica Milli & Lindsey Reichlin, *Paid Parental Leave in the United States*, INSTITUTE FOR WOMEN'S POLICY RESEARCH (2014), <https://iwpr.org/wp-content/uploads/2020/09/B334-Paid-Parental-Leave-in-the-United-States.pdf>.

³¹ See May Job Openings and Labor Turnover Survey, *supra* note 11.

³² See BUREAU OF LABOR STATISTICS, BUSINESS EMPLOYMENT DYNAMICS – FOURTH QUARTER 2021 (Apr. 27, 2022), <https://www.bls.gov/news.release/pdf/cewbd.pdf> [hereinafter *Employment Dynamics*].

³³ See Press Release, United States Census Bureau, New Vintage 2021 Population Estimates Available for the Nation, States, and Puerto Rico (Dec. 21, 2021), <https://www.census.gov/newsroom/press-releases/2021/2021-population-estimates.html> [hereinafter *Population Estimates*].

³⁴ *National Longitudinal Survey*, *supra* note 16.

³⁵ See Diana Furchtgott-Roth, *Introduction and Summary* to DIANA FURCHTGOTT-ROTH, UNITED STATES INCOME, WEALTH, CONSUMPTION, AND INEQUALITY 1–9 (2021); James Ewell, Kevin Corinth, & Richard V. Burkhauser, *Income Growth and Its Distribution from Eisenhower to Obama: The Growing Importance of In-Kind Transfers (1959-2016)*, in DIANA FURCHTGOTT-ROTH,

FTC investigations are a solution to an invented labor monopsony problem. Fourth, we analyze recommendations made by Professor Posner and others and show that these would not add to workers' welfare. Finally, we suggest that American workers not only would not benefit from a newly invented antitrust application to labor markets, but would be injured by Professor Posner's solutions.

I. JOB TURNOVER IN AMERICA'S LABOR FORCE

America's labor markets are the most flexible in the world. Organization for Economic Cooperation and Development data show that the United States has the highest employee turnover and shortest job tenure of developed countries.³⁶ Table 2 shows that over the past decade the median job tenure in the United States has been about 4 years, but for most other developed countries median tenure is 5 to 10 years.³⁷ American workers also find jobs faster than those in other countries. (See Table 1). In the United States in 2021, the latest year available, 23.1 percent of unemployed workers could not find work within 12 months.³⁸ This compares with 28.4 percent for the UK, 29.5 per cent in France, 32.6 percent in Germany and 58 percent in Italy.³⁹ In the European Union as a whole, the percentage of the unemployed out of work for longer than a year was 36.2 percent, and for the OECD as a whole it was 28.4 percent.⁴⁰

In the United States in 2021, the latest full year available, with a labor force of 161 million, there were 69 million separations (of which 48 million were voluntary quits) and 76 million hires.⁴¹ (See Table 3.) This churning labor market has long been a feature of the U.S. labor force and is not simply due to post-pandemic supply chain shortages.⁴² The same results hold on an annual basis back to 2001.⁴³ For instance, in 2017, before the pandemic, with a labor force of 160 million, there were 63 million separations (of which 38 million were quits) and 66 million hires.⁴⁴ (See Figure 3.) The latest data from the Job Openings and Labor Turnover survey,⁴⁵ for May 2022, show over 11 million job openings in that month alone. There were 6 million separations in May, of which 4.3 million voluntary quits. The number of hires totaled 6.5 million hires. The number

UNITED STATES INCOME, WEALTH, CONSUMPTION, AND INEQUALITY 90–124 (2021); Gerald Auten & David Splinter, *Top Income Shares and the Difficulties of Using Tax Data*, in DIANA FURCHTGOTT-ROTH, UNITED STATES INCOME, WEALTH, CONSUMPTION, AND INEQUALITY 125–152 (2021); Edward Conard, *The Economics of Inequality in High-Wage Economies*, in DIANA FURCHTGOTT-ROTH, UNITED STATES INCOME, WEALTH, CONSUMPTION, AND INEQUALITY 262–286 (2021).

³⁶ OECD, EMPLOYMENT BY JOB TENURE INTERVALS – PERSONS, https://stats.oecd.org/Index.aspx?DataSetCode=EPL_OV# (last visited May 23, 2022) (Select “Labour”, “Labour Force Statistics”, “Job tenure”, “Employment by job tenure intervals - persons”, “Employment by job tenure intervals - persons”).

³⁷ *Id.*

³⁸ OECD, LONG-TERM UNEMPLOYMENT RATE, https://www.oecd-ilibrary.org/employment/long-term-unemployment-rate/indicator/english_76471ad5-en (last visited July 8, 2022).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ BUREAU OF LABOR STATISTICS, JOB OPENINGS AND LABOR TURNOVER – JANUARY 2022 (2022), https://www.bls.gov/news.release/archives/jolts_03092022.pdf, at 3 [hereinafter *January Job Openings and Labor Turnover Survey*].

⁴² *Id.* at Tables 13–22.

⁴³ Bureau Of Labor Statistics, New Monthly Data Series on Job Openings and Labor Turnover Announced by BLS (2002), https://www.bls.gov/jlt/jlt_nr1.pdf.

⁴⁴ *Id.*, at Tables 13, 15, & 17.

⁴⁵ May Job Openings and Labor Turnover Survey, *supra* note 11.

of layoffs and discharges, another subset of separations, was 1.4 million. (See Table 4 and Figure 1.) Every month millions of people separate from their jobs, and every month millions are hired. These data refute the description of America's labor markets as concentrated.

Data show that the American labor force is in a constant state of turnover, with people leaving one job and finding another on a regular basis.⁴⁶ The Bureau of Labor Statistics publishes monthly data on labor turnover that include number of job openings; number of separations (people who have left a place of employment for any reason); number of quits (people who have voluntarily left their job); and number of hires (additions to employers' payrolls).⁴⁷

As well as collecting numbers of separations, quits, layoffs, and hires, the Bureau of Labor Statistics calculates these as a share of the workforce by dividing the number of separations, quits, layoffs, and hires by employment and multiplying that quotient by 100. If labor market concentration were harming workers, one would expect to see the lowest rates of movement—quits and hires—in low-wage jobs. Lower-wage workers are supposedly trapped in their occupations, and need government action to help them move up.⁴⁸ However, the Bureau of Labor Statistics data show that separations and hiring rates for low-wage workers are higher than average.⁴⁹ Low-wage occupations, such as leisure and hospitality and retail trade, showed quit rates of 5.5 percent and 4.0 percent respectively, compared to an economy-wide average quit rate of 2.8 percent.⁵⁰ Similarly, these industries showed separation rates of 6.7 percent and 5.0 percent respectively, compared to an average of 3.9 percent.⁵¹ Hiring rates were 7.3 percent and 5.1 percent respectively, compared to an average hiring rate of 4.3 percent.⁵² (See Table 5 and Figure 2.)

Some people may quit jobs twice in a year and be hired twice.⁵³ So these annual numbers do not necessarily translate into a share of the workforce and must be interpreted carefully. To look at it another way, in 2017 a group equivalent to 26 percent of the workforce quit their jobs, and this figure rose to 33 percent in 2021.⁵⁴ (See Table 7.) In 2017 the hiring rate was 45 percent, and in 2021 it was 52 percent.⁵⁵

The Labor Department data show differences between regions.⁵⁶ Although incomes in the South are lower, the South shows more turnover—contrary to the thesis that low-income workers are trapped in their jobs. Quits were highest in the South, at 28.6 percent in 2017 and 37 percent in 2021, and smallest in the Northeast, at 20 percent in 2017 and 25 percent in 2021.⁵⁷ Hiring rates,

⁴⁶ May Job Openings and Labor Turnover Survey, *supra* note 11.

⁴⁷ *Id.*

⁴⁸ POSNER, *supra* note 4 at 132, 135, 161–162.

⁴⁹ May Job Openings and Labor Turnover Survey, *supra* note 11, at Tables 2–4.

⁵⁰ *Id.*, at Table 4.

⁵¹ *Id.*, at Table 3.

⁵² *Id.*, at Table 2.

⁵³ *January Job Openings and Labor Turnover Survey*, *supra* note 41, at § Job Openings and Labor Technical Note.

⁵⁴ *Id.*, at Table 18.

⁵⁵ *Id.*, at Table 14.

⁵⁶ *Id.* at Tables 1–22.

⁵⁷ *Id.* at Table 18.

defined as the number of hires during the year as a share of annual average employment, were also high.⁵⁸ (See Table 8.)

Massive churning has existed since data collection began, as can be seen from rates of hires, separations, and quits. For instance, between 2001 and 2021, the hiring rate ranged from 38 percent of the workforce to 52 percent.⁵⁹ It was under 40 percent in only four years, from 2009 to 2012,⁶⁰ and it was above 50 percent in 2020 and 2021.⁶¹ The quit rate ranged from 16 percent to 33 percent, and it was below 20 percent from 2009 to 2012, during the recession and its aftermath.⁶² (See Table 9.)

At any point over the past 20 years, there have been millions of job openings. (See Table 10.)⁶³ Currently there are over 11 million job openings due to post-pandemic labor shortages.⁶⁴ Excluding 2021, job openings range from a low of 2.5 million per month in a recession year to 7.2 million in an expansionary year.⁶⁵ Many of these jobs get filled, and others open up.

Data from the U.S. Census Bureau show that Americans are willing to leave their home state in search of better jobs, better climate, or lower taxes.⁶⁶ Americans are not trapped in one state at the mercy of one employer. From July 1, 2020, to July 1, 2021, the populations of Florida, Texas, and Arizona saw the largest gains, and the populations of California, New York, and Illinois saw the largest numeric losses⁶⁷. In terms of share of population, Idaho, Utah, and Montana showed the greatest percentage growth, and the District of Columbia, New York, Illinois, and Hawaii showed the greatest percentage decline.⁶⁸ (See Table 11.)

Businesses are also in a constant state of turnover. To measure this, the Bureau of Labor Statistics publishes a quarterly series entitled Business Employment Dynamics.⁶⁹ The latest data

⁵⁸*Id.* at Table 14.

⁵⁹ Job Openings and Labor Turnover Survey, BUREAU OF LABOR STATISTICS, <https://data.bls.gov/PDQWeb/jt> (Select “Total nonfarm”, “Total US”, “All areas”, “Hires”, “All size classes”, “Rate”, and “Not seasonally adjusted”, then select “Get Data”, then adjust the “From:” input to “2001” and select “include annual averages”, then observe the data under “Annual” within the table).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Job Openings and Labor Turnover Survey, BUREAU OF LABOR STATISTICS, <https://data.bls.gov/PDQWeb/jt> (Select “Total nonfarm”, “Total US”, “All areas”, “Quits”, “All size classes”, “Rate”, and “Not seasonally adjusted”, then select “Get Data”, then adjust the “From:” input to “2001” and select “include annual averages”, then observe the data under “Annual” within the table).

⁶³ Job Openings and Labor Turnover Survey, BUREAU OF LABOR STATISTICS, <https://data.bls.gov/PDQWeb/jt> (Select “Total nonfarm”, “Total US”, “All areas”, “Job openings”, “All size classes”, “Level – In Thousands”, and “Seasonally adjusted”, then select “Get Data”, then adjust the “From:” input to “2001”, then observe the data within the table).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Population Estimates, supra* note 33. These Americans are not solely those in higher income brackets, *See Also Geographic Mobility by Selected Characteristics*, U.S. CENSUS BUREAU (March 2022), <https://data.census.gov/cedsci/table?q=S0701%3A%20GEOGRAPHIC%20MOBILITY%20BY%20SELECTED%22CHARACTERISTICS%20IN%20THE%20UNITED%20STATES&g=0400000US04,06,12,17,36,48&tid=ACSST5Y2020.S0701>; *Median Income In The Past 12 Months (In 2020 Inflation-Adjusted Dollars) By Geographical Mobility In The Past Year For Residence 1 Year Ago In The United States*, U.S. CENSUS BUREAU (March 2022), <https://data.census.gov/cedsci/table?t=Residential%20Mobility&g=0400000US04,06,12,17,36,48&tid=ACSST5Y2020.B07411>.

⁶⁷*Id.* at Tables 2 and 4.

⁶⁸*Id.* at Tables 3 and 5.

⁶⁹ Employment Dynamics, *supra* note 32.

show that in the fourth quarter of 2021 total job gains from new and expanding companies were 9.6 million, and total job losses from firms that closed or were shrinking were 6.7 million.⁷⁰ The net job gain was 2.9 million jobs.⁷¹ These data offer a window into the churning among American businesses. (See Table 12.)

In order to show the number of jobs people have over their lifetimes, the Bureau of Labor Statistics publishes information from the National Longitudinal Survey of Youth 1979,⁷² a group of 10,000 people who have been interviewed regularly since 1979. The latest data show that people born between 1957 and 1964 held an average of 12 jobs between the ages of 18 to 54. This does not fit Professor Posner's thesis that people are trapped by the employer in one job. (See Table 13.)

Professor Posner suggests that employers strengthen labor monopsonies by taking a "paternalistic interest in the well-being of workers and their families."⁷³ Elements include company picnics, snacks at the workplace, gyms, and subsidized cafeterias.⁷⁴ These features of the workplace are not evidence of monopsony, but proof that the labor market is so competitive that in order to retain workers employers have to provide adequate compensation packages, including more money or more benefits. In either case, employees are free to leave—and the perks Professor Posner cites are only evidence of that freedom.

Some companies deliberately offer generous benefits to save employees' time and encourage them to spend more time in the office. For example, Palantir, which conducts sophisticated analytical work for private and corporate global clients, provides many services above its generous wages to employees in its Georgetown office in Washington, D.C.⁷⁵ Employees can bring their dogs to work and take their dogs to meetings in the conference rooms.⁷⁶ The office has shower facilities, nap rooms, a whiskey room for an employee whiskey tasting club, a free laundry service, and three free meals daily.⁷⁷ The object is to retain highly-skilled and trained workers. But this does not mean that Palantir is a monopsony. In fact, it suggests the opposite: Palantir must compete vigorously for its workers, to the point of offering benefits well beyond the ubiquitous coffee machine and workday company picnic.

II. PRODUCT MARKET AND LABOR MARKET CONCENTRATION ARE UNRELATED

Professor Posner wants the Federal Trade Commission and the Department of Justice to investigate labor concentration in the same way that these agencies investigate product market concentration.⁷⁸ However, the concept of labor concentration is not relevant in a modern economy, outside some highly specialized high-income professions. From an economic perspective, one speaks of a concentrated market as one in which a small number of entities are

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *National Longitudinal Survey*, *supra* note 16.

⁷³ POSNER, *supra* note 4, at 16.

⁷⁴ *Id.* at 17.

⁷⁵ Diana Furchtgott-Roth, Visit to Palantir Georgetown Office (August 2019).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ POSNER, *supra* note 4 at 3.

available to provide a good or service.⁷⁹ For instance, the Department of Justice and groups of state attorneys general are investigating Google for monopolizing search and online advertising⁸⁰ as well as Facebook for suppressing competition from online rivals.⁸¹ The Department of Justice is also investigating Amazon for suppressing competition in e-commerce⁸², and Apple is being sued by Epic in U.S. District Court for monopolizing app purchases.⁸³ But the workers in these firms cannot be described as concentrated as they are not all similar—and they are not all employed in technology. High-skilled employees include computer programmers, program managers, app developers, and software developers and engineers. Others are employed in human resources, marketing, public relations, and federal affairs. Lower skilled workers have jobs as cleaners, security guards, and cafeteria workers.

Professor Posner cites non-compete agreements between Apple and Google, but people in the Bay Area move frequently between leading tech firms, including Facebook, Apple, and Google, because this is a faster way to get salary increases.⁸⁴ Moves are openly publicized on individuals' LinkedIn pages, which show that people have worked for multiple companies. Employees go to start-ups if they want a chance to make millions, Facebook if they want more pay, and other firms if they want a better work-life balance. One famous case illustrates the irrelevance of non-compete agreements. In 2016 engineer Anthony Levandowski left Google for Uber to work on Uber's self-driving cars—the same field that he worked on when at Google.⁸⁵ He was sued not for moving to Uber and breaking a non-compete agreement, but for taking 14,000 documents with him containing proprietary information about Google's vehicles and salary structure.⁸⁶ Employees in non-specialized fields such as human resources, marketing, security, and food preparation at firms with high product market concentrations are also free to move.

III. INEQUALITY JUSTIFIES FTC ACTION AGAINST SUPPOSED LABOR CONCENTRATION

Professor Posner and others justify the need for FTC enforcement against labor concentration on the grounds that inequality has been increasing.⁸⁷ This concern is exaggerated for a number of reasons.

First, pre-tax, pre-transfer measures of income are not realistic measures of inequality because these measures do not reflect taxes paid and transfers received. Studies that use post-transfer,

⁷⁹ P.R.G. Layard & A.A. Walters, *Microeconomic Theory* 238 (1978).

⁸⁰ *United States v. Google, LLC*, No. 1:20-cv-03010 (D.D.C. filed October 20, 2020).

⁸¹ Brief for United States as Amicus Curiae Supporting Plaintiffs, *State of New York v. Facebook, Inc.*, No. 21-7078 (D.C. Cir. filed January 28, 2022).

⁸² Letter from U.S. H. Comm. on the Judiciary to Merrick Garland, U.S. A.G. (March 9, 2022), https://judiciary.house.gov/uploadedfiles/hjc_referral_-_amazon.pdf.

⁸³ *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR (N.D. Cal. Sept. 10, 2021). *See also* *Epic Games, Inc. v. Apple Inc.*, Nos. 21-16506 & 21-16695 (9th Cir. filed Mar. 24, 2022).

⁸⁴ Conversation of Diana Furchtgott-Roth with Google employee (May 2022).

⁸⁵ Daniel Cooper, *The creator of Google's self-driving car now works for Uber*, ENGADGET (Aug. 18, 2016), <https://www.engadget.com/2016-08-18-the-creator-of-google-s-self-driving-car-now-works-for-uber.html>.

⁸⁶ *United States v. Levandowski*, No. 3:19-cr-00377 (N.D. Cal. Aug. 6, 2020).

⁸⁷ *See* POSNER, *supra* note 4 at 1; U.S. DEP'T. TREASURY, *supra* note 24 at ii; Kate Bahn, Testimony before H. Select Comm., *supra* note 3, page 6, <https://docs.house.gov/meetings/EF/EF00/20220406/114615/HHRG-117-EF00-Wstate-BahnK-20220406.pdf>.

post-tax measures of income find no increases in inequality.⁸⁸ In 2019, the latest data available, the top one percent paid 39 percent of all individual income taxes and earned 20 percent of reported income. The top half of earners paid 97 percent and the bottom half of earners paid 3 percent of all federal individual income taxes. The bottom half of earners receive back a share of the 97 percent paid by the top half for programs including Medicaid, food stamps, the earned income tax credit, housing vouchers, and unemployment insurance.

Studies that account for the value of transfers, including those by University of Chicago professor Bruce Meyer, University of Notre Dame professor James Sullivan, and Cornell University professor Richard Burkhauser, come to different conclusions.⁸⁹ They find that inequality of consumption—what people buy—has not increased.⁹⁰ Treasury Department economist Gerald Auten and Joint Committee on Taxation economist David Splinter reached similar results in a paper written in January, 2022.⁹¹ The Congressional Budget Office⁹² has calculated that transfers have steadily reduced measures of inequality between 1979 and 2017.⁹³ (See Figure 6.)

Second, many measures do not account for the movement of women into the workforce during the 1970s and 1980s. It became increasingly common for mothers with children to work outside the home in the 1980s.⁹⁴ In the top fifth of the income distribution, households average two earners per family.⁹⁵ In the middle quintile, households have about one earner per household.⁹⁶ In the lowest fifth, there is one earner for every two households, with retirees and unemployed.⁹⁷

Third, the size of households has changed since 1980.⁹⁸ Due to the increased prevalence of divorce and longer life expectancy, there are more households composed of one person or non-family households. These households tend to be in the lower quintile.⁹⁹ This contributes to perceived inequality. On average, households in the bottom quintile have fewer than two

⁸⁸ Gerald Auten & David Splinter, *supra* note 35, 143. See also Ewell et al., *supra* note 35, 113.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Gerald Auten & David Splinter, *Income Inequality in the United States: Using Tax Data to Measure Long-Term Trends* (J. Comm. on Taxation, February 18, 2022), http://davidsplinter.com/AutenSplinter-Tax_Data_and_Inequality.pdf.

⁹² CONGRESSIONAL BUDGET OFFICE, *THE DISTRIBUTION OF HOUSEHOLD INCOME, 2017* (2020), <https://www.cbo.gov/system/files/2020-10/56575-Household-Income.pdf>.

⁹³ *Id.*

⁹⁴ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *WOMEN IN THE WORKFORCE: A DATABOOK Table 7* (2022), *available at* <https://www.bls.gov/opub/reports/womens-databook/2021/home.htm>.

⁹⁵ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *CONSUMER EXPECTATIONS IN 2020 Table 2* (2021), *available at* <https://www.bls.gov/opub/reports/consumer-expenditures/2020/pdf/home.pdf>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Table HH-1 of *Historical Household Tables*, U.S. CENSUS BUREAU (Nov. 22, 2021), <https://www.census.gov/data/tables/time-series/demo/families/households.html>; See also Table HH-4 of *Historical Household Tables*, U.S. CENSUS BUREAU (Nov. 22, 2021), <https://www.census.gov/data/tables/time-series/demo/families/households.html>; also Table H-9 of *Historical Income Tables: Households*, U.S. CENSUS BUREAU (Nov. 8, 2021), <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html>.

⁹⁹ Table H-11 of *Historical Income Tables: Households*, U.S. CENSUS BUREAU (Nov. 8, 2021), <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html>; See also Table HH-4 of *Historical Household Tables*, U.S. CENSUS BUREAU (Nov. 22, 2021), <https://www.census.gov/data/tables/time-series/demo/families/households.html>.

members, and those in the top quintile have four members.¹⁰⁰ Some measures of inequality over the past forty years are picking up additional two-earner couples at the top of the distribution and additional numbers of singles at the bottom of the distribution.

Fourth, people move around the income distribution during their life cycle, and inequality captures natural life cycle changes. Some Americans may have negative income while at school, and then enter the workforce in their 20s.¹⁰¹ When they marry, their income could double.¹⁰² They reach peak earnings in their 50s.¹⁰³ When they leave the paid workforce, they have lower incomes and live off accumulated assets.¹⁰⁴ Treasury Department data¹⁰⁵ show substantial movement even among the top 400 adjusted gross income earners. Of the 4,584 people who appeared in the top 400 U.S. taxpayers by adjusted gross income over the period 1992 to 2014, only 138 people appeared there for 10 or more years.¹⁰⁶ The top one percent are not static. Sometimes a one-time event, such as selling a company, selling a house, or a making a large capital gain can elevate one's income bracket for only a short time.¹⁰⁷

IV. ADVERSE CONSEQUENCES OF RECOMMENDATIONS TO REDUCE MONOPSONY

Data presented above show that labor concentration does not exist in the United States. Recommendations to reduce supposed labor concentration include ending occupational licensing, changing labor laws to encourage unionization, and raising the minimum wage.¹⁰⁸ These proposals—the left-of-center's policy agenda—will not reduce economic concentration or inequality. Rather, they will reduce economic growth, giving people fewer opportunities to change jobs and to move up the career ladder.

A. Occupational Licensing

There is general agreement that state-based licensing requirements—such as mandatory professional certifications regulating practice in a wide variety of professions ranging from cutting hair to driving taxis—serve to reduce entry into particular professions and keep wages high.¹⁰⁹ Many people support reducing licensing requirements.¹¹⁰ But existing workers support the current level of licensing requirements because the requirements keep wages high.¹¹¹ They

¹⁰⁰ Table H-11 of *Historical Income Tables: Households*, U.S. CENSUS BUREAU (Nov. 8, 2021), <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html>.

¹⁰¹ Adrienne L. Fernandes-Alcantara, *Youth And The Labor Force: Background And Trends 23-24* (2018), <https://sgp.fas.org/crs/misc/R42519.pdf>.

¹⁰² Kathy Morris, *Your Job Might Have Something To Do With Who You Marry*, ZIPPIA (Jul. 19, 2020), https://www.zippia.com/advice/people-in-these-jobs-most-likely-to-marry-each-other/?survey_step=step3.

¹⁰³ *Median Household Income in the United States in 2020, by age of householder*, STATISTA (Oct. 8, 2021), <https://www.statista.com/statistics/233184/median-household-income-in-the-united-states-by-age/>.

¹⁰⁴ *Id.*

¹⁰⁵ The 400 Individual Income Tax Returns Reporting the Largest Adjusted Gross Incomes Each Year, 1992–2014, IRS (Jan. 4, 2016), <https://www.irs.gov/pub/irs-soi/14intop400.pdf>.

¹⁰⁶ *Id.*

¹⁰⁷ *Topic No. 409 Capital Gains and Losses*, IRS (May 19, 2022), <https://www.irs.gov/taxtopics/tc409>.

¹⁰⁸ POSNER, *supra* note 4, at 127–28, 132.

¹⁰⁹ CARPENTER ET AL., *supra* note 29; *see also* POSNER, *supra* note 4.

¹¹⁰ CARPENTER ET AL., *supra* note 29.

¹¹¹ Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 B.J.I.R. 676, 685 (2010), <https://doi.org/10.1111/j.1467-8543.2010.00807.x>; *See also* Kleiner et. al, *Relaxing Occupational Licensing Requirements: Analyzing*

harm outsiders trying to get in, not existing workers who have completed the certifications. By artificially reducing the labor supply, occupational licenses increase worker bargaining power. Unions function in much the same way: they create a legal monopoly in labor and give workers more leverage by restricting supply. It is puzzling that Professor Posner and others support granting more power to union leaders while opposing licensing.

These licensing requirements, while harmful, are not an example of employers exploiting workers and preventing them from finding other jobs. Employers have nothing to do with licensing, but states do.¹¹² States put in place licensing requirements for different professions, with professions differing by state.¹¹³ As I wrote in *Disinherited: How Washington Is Betraying America's Young*,¹¹⁴ licensing requirements disproportionately hurt young workers, who cannot break into professions without substantial cost.¹¹⁵ They also harm spouses in military families, who move frequently and cannot requalify before the next move.¹¹⁶ Licensing requirements raise the price of labor to employers and the price of services to consumers.¹¹⁷

One example of how occupational licensing raises prices by creating a cartel is New York City's medallion requirement for taxi operators.¹¹⁸ These medallions, before Uber and Lyft entered the industry, used to be valued at millions of dollars.¹¹⁹ The purchase of a medallion would guarantee a stream of revenue for a cab driver.¹²⁰ When ridesharing companies began to compete with New York taxi drivers, taxi drivers' income (and the value of these medallions)

Wages and Prices for a Medical Service, 59 J.L.E. 261, 286-287 (2016), <https://www.jstor.org/stable/26456992>, *Okech v. Thompson*, where Tedy Okech challenged the State of Idaho for the right to braid hair without a cosmetology license. *Okech v. Thompson*, No.1:22-cv-106 (D. Idaho filed Mar. 8, 2022).; see also *Harper v. City of Lincoln*, where Cynthia Harper challenged the City of Lincoln, Nebraska for the right to sell cookies, cakes, breads, and jams from home. *Harper v. City of Lincoln*, No.CI 20-1706, 2020 WL 9596383, at *1 (D. Neb. Oct. 26, 2020).

¹¹² Morris M. Kleiner & Kyoung Won Park, *Battles Among Licensed Occupations: Analyzing Government Regulations on Labor Market Outcomes for Dentists and Hygienists* 19-20 (Nat'l Bureau of Econ. Rsch., Working Paper No. 16560, Nov. 2010); In Louisiana, you need a license to be a retail or a wholesale florist. *Louisiana Horticulture Commission*, LA. DEP'T. OF AGRIC. AND FORESTRY (May 2022), <https://www.ldaf.state.la.us/ldaf-programs/horticulture-programs/louisiana-horticulture-commission/>, [https://perma.cc/2CJR-Y73B]. In Idaho, you need a license to be a mortician, a shorthand reporter, or a residential facility care administrator. *Licensing and Registration Search*, IDAHO DIV. OCCUPATIONAL AND PRO. LICENSING (Mar. 22, 2022, 9:44 AM), <https://dopl.idaho.gov/licensing/> [https://perma.cc/MGL6-GXWL].

¹¹³ Examples include funeral service directors, barbers, and auctioneers. See Suzanne Hultin, *The National Occupational Licensing Database*, NAT'L CONF. STATE LEGIS. (Mar. 1, 2022), <https://www.ncsl.org/research/labor-and-employment/occupational-licensing-statute-database.aspx>, [https://perma.cc/7QMM-U4SJ].

¹¹⁴ Diana Furchtgott-Roth & Jared Meyer, *Disinherited: How Washington is Betraying America's Young* 8, 122 (2015).

¹¹⁵ *Id.* at 83–5.

¹¹⁶ *Military Spouse Employment: DOD Should Continue Assessing State Licensing Practices and Increase Awareness of Resources*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (Jan. 27, 2021), <https://www.gao.gov/products/gao-21-193>, [https://perma.cc/E5Q8-E7NH].

¹¹⁷ Morris M. Kleiner & Evgeny S. Vorotnikov, *At What Cost: State and National Estimates of the Economic Costs of Occupational Licensing*, INSTITUTE FOR JUSTICE 1, 5 (2018), https://ij.org/wp-content/uploads/2018/11/Licensure_Report_WEB.pdf, [https://perma.cc/264C-LDHD].

¹¹⁸ Stewart Dompe & Adam C. Smith, *Taxicab Cartels Restrict Entry into Market at the Expense of Consumers*, MERCATUS CENTER (Nov. 24, 2014), <https://www.mercatus.org/publications/technology-and-innovation/taxicab-cartels-restrict-entry-market-expense-consumers>, [https://perma.cc/9Y2G-6JTV].

¹¹⁹ Aaron Jacobs, *Distressed Drivers: Solving the New York City Taxi Medallion Debt Crisis*, COLUMBIA HUMAN RIGHTS LAW REVIEW ONLINE (Mar. 16, 2022), <https://blogs.law.columbia.edu/hrlr/files/2022/03/Jacobs-Online.pdf>.

¹²⁰ See Ydanis Rodriguez et al., *Report of the Taxi Medallion Task Force*, TAXICAB MEDALLION SALE PRICES TASK FORCE, at 34 (January 31, 2020), <https://council.nyc.gov/data/wp-content/uploads/sites/73/2020/01/Taxi-Medallion-Task-Force-Report-Final.pdf>, [https://perma.cc/75HD-U22Q].

plummeted.¹²¹ Drivers who were still paying off their debts from purchasing their medallions were hit hard, and some committed suicide.¹²² New York City restructured medallion holders' loans at taxpayer expense.¹²³ As with other occupational licensing schemes, this had nothing to do with labor concentration.

B. Encouraging Unionization

Professor Posner and others concerned about supposed labor concentration recommend making it easier for workers to unionize as a means of reducing the supposed concentration.¹²⁴ Only 6.1 percent of private-sector workers belong to labor unions,¹²⁵ perhaps because most other workers believe that the costs of union dues are not worth the benefits of being a union member. The largest share of unionized workers can be found in state and local government, where they can bargain over working conditions but not salaries.¹²⁶

But unions are not promoters of the free market; they are cartels of labor. An authority no less than the U.S. Supreme Court, in a case involving the United Mine Workers in 1965, has said that it is the legitimate goal of any national labor union to eliminate competition over labor standards.¹²⁷ Unions were exempted from antitrust laws in 1914.¹²⁸ Opportunities for public school teachers, transit workers, police and firefighters, and nurses, are only offered where employees have to join the union as a condition of taking the job. Raises must be negotiated between union management and the employer. Exit from the job is limited because it takes twenty or twenty-five years for a worker's retirement plan to fully vest, and if they leave beforehand, they lose their contributions and are left with no retirement assets outside Social Security. A frequently cited 2021 study by economists Elena Prager and Matt Schmitt, published in the *American Economic Review*, found that when large hospitals merged, nurses' wage growth slowed.¹²⁹ The nursing industry is highly unionized, and unionization prevented wage growth.

C. Increasing the Minimum Wage

Professor Posner and others recommend raising the minimum wage to make workers better off.¹³⁰ However, minimum wages discriminate against low-skill workers, because the value that these workers can provide is not worth a higher wage. Minimum wages were originally put into place in the early 20th century to exclude less-educated Black, immigrant, and female workers from jobs by raising wages above their earning power.¹³¹ Then Harvard Law School professor

¹²¹ Jacobs, *supra* note 119, at 174.

¹²² Jacobs, *supra* note 119, at 175.

¹²³ See Press Release, N.Y. Attorney General, Attorney General James' Statement After NYC Agrees to Supplement Taxi Medallion Relief Program (Nov. 4, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-statement-after-nyc-agrees-supplement-taxi-medallion>, [https://perma.cc/63AB-DDTY].

¹²⁴ POSNER, *supra* note 4, at 132.

¹²⁵ BUREAU OF LABOR STATISTICS, USDL-22-0079, UNION MEMBERS – 2021 (2022), <https://www.bls.gov/news.release/pdf/union2.pdf>, [https://perma.cc/GL8J-RA4X].

¹²⁶ *Id.*

¹²⁷ See *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 662 (1965).

¹²⁸ 15 U.S.C. § 17.

¹²⁹ Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397, 398 (2021), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20190690>.

¹³⁰ POSNER, *supra* note 4, at 127; U.S. DEP'T. TREASURY, *supra* note 24, at 52.

¹³¹ Thomas C. Leonard, *Illiberal Reformers: Race, Eugenics, and American Economics in the Progressive Era* 140 (2016).

Felix Frankfurter, in a 1916 brief to the Supreme Court supporting Oregon's minimum wage, wrote, "[t]he state, therefore, may use means, like the present statute, of sorting the normal self-supporting workers from the unemployables and then deal with the latter appropriately as a special class...."¹³²

Similarly, British minimum wage supporters Sidney and Beatrice Webb wrote in *Industrial Democracy*, "[t]here are races who, like the African negro, have no assignable minimum, but a very low maximum; they will work, that is, for indefinitely low wages...."¹³³ The Federal minimum wage, put in place by the Fair Labor Standards Act of 1938, led to lower, not higher, standards of living for women and minorities who entered domestic service and farming (professions exempted from the minimum wage), because they were excluded from other jobs as "unemployables."¹³⁴

Research by Nobel Prize winning University of California (Berkeley) economist David Card and the late Princeton University economics professor Alan Krueger claims to show that raising the minimum wage had no effect on employment.¹³⁵ This research is frequently cited by proponents of anti-trust enforcement of supposed labor concentration. The Card and Krueger studies are so often cited that it is worth addressing their results in more detail. Card and Krueger examined the effects of a 1992 increase in the minimum wage on fast-food restaurants in New Jersey and Pennsylvania and found that raising the minimum wage did not reduce employment. The studies, published in 1994¹³⁶ and 2000,¹³⁷ compared New Jersey with neighboring Pennsylvania, which did not raise the minimum wage.

The studies had numerous flaws. First, the authors did not include information on the share of workers who were employed at the minimum wage. If workers were paid more than the minimum wage, then an increase would not reduce employment. Second, the studies did not include county information such as income, unemployment, teen unemployment, labor force, labor-force-participation rates, and changes in state taxes and franchise fees. Third, the regression statistics explain little variance, and practically none of the coefficients are significant. Finally, the studies examine fast food restaurants, but exclude the hospitality industry, which also could have been affected. Other studies using a superior methodology have come to different conclusions. For instance, a 2014 study by University of California (San Diego) economists Jeffrey Clemens and Michael Wither¹³⁸ found that the 40% increase in the minimum wage between 2007 and 2010 reduced the employment-population ratio by 6.6 percentage points in states with a binding

¹³² Thomas Reed Powell, *The Oregon Minimum-Wage Cases*, 32 POL. SCI. Q. 296, 310 (1917), <https://www.jstor.org/stable/2141734>.

¹³³ Sidney Webb & Beatrice Webb, *Industrial Democracy* 698 (1920 ed. 1920).

¹³⁴ LEONARD, *supra* note 131, at 129–40.

¹³⁵ David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772 (1994), <https://www.jstor.org/stable/2118030>; see also David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania: Reply*, 90 AM. ECON. REV. 1397 (2000), <https://www.aeaweb.org/articles?id=10.1257/aer.90.5.1397>.

¹³⁶ David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772 (1994), <https://www.jstor.org/stable/2118030>.

¹³⁷ David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania: Reply*, 90 AM. ECON. REV. 1397 (2000), <https://www.aeaweb.org/articles?id=10.1257/aer.90.5.1397>.

¹³⁸ Jeffery Clemens & Michael Wither, *The Minimum Wage and the Great Recession: Evidence of Effects on the Employment and Income Trajectories of Low-Skilled Workers*, 170 J. PUB. ECON. 53 (2019), <https://doi.org/10.1016/j.jpubeco.2019.01.004>.

minimum wage.¹³⁹ Low-income workers were particularly harmed because they had fewer job opportunities.¹⁴⁰ Between 2007 and 2010, as the minimum wage rose in three installments from \$5.15 an hour to \$7.25 an hour,¹⁴¹ the share of the population that was employed declined by 4 percentage points among adults aged 25 to 54 and by 8 percentage points among those aged 15 to 24.¹⁴²

Since some states had minimum wages that were above the federal minimum wage, Clemens and Wither could compare changes in states where the federal minimum wage was binding to those states with higher minimum wages where it was not.¹⁴³ They found that some low skill workers who earned the old minimum wage were employed at the new minimum wage.¹⁴⁴ However, the higher federal minimum wage reduced employment. By the second year of the \$7.25 minimum wage rate, employment of low-skill workers had declined by 6.6 percentage points, or 9% more in states with the binding federal minimum wage than in states with a higher state minimum wage.¹⁴⁵ University of California (Irvine) Professor David Neumark has also found negative effects of minimum wage increases among teens and low-skill workers.¹⁴⁶

V. CONCLUSION

Antitrust law does not, and should not, deal with labor markets in the United States. Antitrust law does not deal with labor markets because American workers *compete* with each other to be hired. Labor markets are among the most competitive markets in America. The reason that antitrust law has not addressed labor markets is not because American lawyers have been too lazy or ignorant to miss a legal opportunity to promote the interest of clients. Rather, as Professor Posner has admitted, American lawyers and courts have generally not found that antitrust law applies to American labor markets.¹⁴⁷

Those who see excessive labor concentration suggest that some independent contractors are misclassified, and should have the status of employees with full benefits.¹⁴⁸ Reducing the number of independent contractors would deprive workers of the benefits of flexible, part-time employment that enables them to monetize unused portions of their days and to combine work with other pursuits, such as studying and child-rearing. The pandemic, followed by the Great

¹³⁹ *Id.* at 59, Table 2.

¹⁴⁰ *Id.* at 62, ¶1.

¹⁴¹ U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, Pub. L. No. 110-28, 121 Stat. 112.

¹⁴² *Employment rate by age in the United States from 2000 to 2020*, STATISTA (May 2, 2022), <https://www.statista.com/statistics/217899/us-employment-rate-by-age/>, [https://perma.cc/ME8S-24UU].

¹⁴³ Clemens & Wither, *supra* note 138, at 54, ¶8.

¹⁴⁴ Clemens & Wither, *supra* note 138, at 55, fig.2.

¹⁴⁵ Clemens & Wither, *supra* note 138, at 59, ¶6.

¹⁴⁶ See generally, David Neumark, J.M. Ian Salas & William Wascher, *Revisiting the Minimum Wage-Employment Debate: Throwing Out the Baby with the Bathwater?*, 67 ILR REVIEW, 608 (Supp. 2014), <https://www.socsci.uci.edu/~dneumark/neumark.salas.wascher-ilrr-14.pdf>, [https://perma.cc/C39Y-M4M7]; see also David Neumark, J.M. Ian Salas & William Wascher, *More on recent evidence on the effects of minimum wages in the United States*, 3 IZA J. LAB. POL'Y, 1 (2014), <https://doi.org/10.1186/2193-9004-3-24>, [https://perma.cc/F3YK-TT6X].

¹⁴⁷ POSNER, *supra* note 4, at 47, 48, 92, 3, 5.

¹⁴⁸ POSNER, *supra* note 4, at 159–60, 162, 163.

Resignation, has shown that many workers have market power and can bargain not only for higher wages, but also for flexible hours.¹⁴⁹

Professor Posner and others are mistaken in asserting that American workers would benefit with a newly invented antitrust application to labor markets. The United States has a wide array of labor laws to protect American workers, at both the federal and state levels. Antitrust is the wrong instrument to address workers' problems.

¹⁴⁹ May Job Openings and Labor Turnover Survey, *supra* note 11.

Table 1**Long Term Unemployment Rate, Selected Countries, European Union, and OECD, 2021¹⁵⁰**

Country/Partnership	Share of Unemployed Unable to Find Work Within 12 Months
United States	23.1
United Kingdom	28.4
France	29.5
Germany	32.6
Italy	58
OECD – Total	28.4
European Union	36.2

¹⁵⁰ OECD (2022), Long-term unemployment rate (indicator). doi: 10.1787/76471ad5-en, <https://data.oecd.org/unemp/long-term-unemployment-rate.htm> [https://perma.cc/5JQR-WEVQ] (last visited July 8, 2022).

Table 2

Median Job Tenure – OECD Countries¹⁵¹ (years)

	Australia ¹⁵²	Austria	Belgium	Canada ¹⁵³	Colombia
2010	3 – 5 ¹⁵⁴	5 – 10	5 – 10	5 – 10	5 – 10
2012	3 – 5	5 – 10	5 – 10	5 – 10	5 – 10
2014	3 – 5	5 – 10	5 – 10	5 – 10	5 – 10
2016	5 – 10	N/A	N/A	5 – 10	5 – 10
2018	N/A ¹⁵⁵	N/A	N/A	5 – 10	5 – 10
2020	N/A	N/A	N/A	5 – 10	5 – 10

	Costa Rica	Czech Republic	Denmark	Estonia	Finland
2010	3 – 5	5 – 10	3 – 5	1 – 3	5 – 10
2012	3 – 5	5 – 10	3 – 5	5 – 10	5 – 10
2014	.08 - .5	5 – 10	5 – 10	5 – 10	5 – 10
2016	3 – 5	N/A	N/A	N/A	N/A
2018	3 – 5	N/A	N/A	N/A	N/A
2020	3 – 5	N/A	N/A	N/A	N/A

	France	Germany	Greece	Hungary	Iceland
2010	5 – 10	5 – 10	5 – 10	5 – 10	3 – 5
2012	5 – 10	5 – 10	5 – 10	5 – 10	3 – 5
2014	5 – 10	5 – 10	5 – 10	5 – 10	3 – 5
2016	N/A	N/A	N/A	N/A	N/A
2018	N/A	N/A	N/A	N/A	N/A
2020	N/A	N/A	N/A	N/A	N/A

¹⁵¹ OECD, Employment by job tenure intervals, https://stats.oecd.org/Index.aspx?DataSetCode=EPL_OV# [https://perma.cc/T8BT-BX3J], (last visited May 24, 2022) (Select “Labour”, “Labour Force Statistics”, “Job tenure”, “Employment by job tenure intervals - persons”, “Employment by job tenure intervals - persons”).

¹⁵² For all countries excluding the U.S, the period associated with the year’s median is reported. As most of the data is skewed rightward per year, median estimation was performed. To determine skewness, the difference between the summation of persons with job tenure below five years and the summation of persons at or above five years was calculated. In addition to this indicator, the year’s median in relation to its mean was considered.

¹⁵³ Canada does not have observations for the period [0, 1) months.

¹⁵⁴ All rightward boundaries are non-inclusive.

¹⁵⁵ Indicates unbalanced data from the OECD for this time series.

	Ireland	Italy	Japan ¹⁵⁶	Latvia	Lithuania
2010	5 – 10	5 – 10	N/A	1 – 3	1 – 3
2012	5 – 10	5 – 10	5 – 10	3 – 5	3 – 5
2014	5 – 10	5 – 10	N/A	3 – 5	3 – 5
2016	N/A	N/A	N/A	N/A	N/A
2018	N/A	N/A	N/A	N/A	N/A
2020	N/A	N/A	N/A	N/A	N/A

	Luxembourg	Netherlands	New Zealand	Norway	Poland
2010	5 – 10	5 – 10	N/A	3 – 5	5 – 10
2012	5 – 10	5 – 10	N/A	3 – 5	5 – 10
2014	5 – 10	5 – 10	N/A	3 – 5	5 – 10
2016	N/A	N/A	N/A	N/A	N/A
2018	N/A	N/A	.5 – 1	N/A	N/A
2020	N/A	N/A	.5 – 1	N/A	N/A

	Portugal	Slovak Republic	Slovenia	Spain	Sweden
2010	5 – 10	5 – 10	5 – 10	5 – 10	5 – 10
2012	5 – 10	5 – 10	5 – 10	5 – 10	5 – 10
2014	5 – 10	5 – 10	5 – 10	5 – 10	5 – 10
2016	N/A	N/A	N/A	N/A	N/A
2018	N/A	N/A	N/A	N/A	N/A
2020	N/A	N/A	N/A	N/A	N/A

	Switzerland	Turkey ¹⁵⁷	United Kingdom	USA ¹⁵⁸	OECD
2010	5 – 10	N/A	5 – 10	4.4	3 – 5
2012	5 – 10	N/A	5 – 10	4.6	5 – 10
2014	5 – 10	N/A	5 – 10	4.6	5 – 10
2016	N/A	N/A	5 – 10	4.2	5 – 10
2018	N/A	N/A	5 – 10	4.2	5 – 10
2020	N/A	N/A	3 – 5	4.1	5 – 10

¹⁵⁶ Japan does not have observations for the time periods [0, 1) months and [1, 6) months.

¹⁵⁷ Unbalanced data, possesses time periods different from other countries reported.

¹⁵⁸ Bureau of Labor Statistics 2020, *Employee Tenure in 2020* (September 22, 2020 10:00 EST), <https://www.bls.gov/news.release/pdf/tenure.pdf> [https://perma.cc/KDA8-H7LX].

Table 3**Total Separations, Quits, and Hires 2017 to 2022 - Millions¹⁵⁹**

Category	2017	2018	2019	2020	2021
Separations ¹⁶⁰	63	66	68	81	69
Quits ¹⁶¹	38	40	42	36	48
Hires ¹⁶²	66	69	70	73	76

¹⁵⁹ January Job Openings and Labor Turnover Survey, *supra* note 41 at Tables 13, 15, & 17.

¹⁶⁰ Separations include all separations from payroll during the entire reference month.

¹⁶¹ Quits include employees who left voluntarily with the exception of retirements or transfers to other locations during the reference month.

¹⁶² Hires include all additions to the payroll during the entire reference month.

Table 4**Job Turnover in the U.S. Economy, May 2022¹⁶³**

	Number (millions)
Job Openings ¹⁶⁴	11.3
Hires	6.5
Separations	6.0
Quits	4.3
Layoffs and Discharges ¹⁶⁵	1.4
Other Separations ¹⁶⁶	.32

Note: Detailed definitions and technical methodology available from source.

¹⁶³ May Job Openings and Labor Turnover Survey, *supra* note 11, at Tables 1–6.

¹⁶⁴ Job openings include all positions that are open on the last business day of the reference month.

¹⁶⁵ Layoffs and discharges include involuntary separations initiated by employer during the reference month.

¹⁶⁶ Other separations include retirements, deaths, transfers to other locations.

Table 5**Separations, Quits, and Hiring Rates for Low-Wage Occupations, May 2022¹⁶⁷**

Industry	Separation (Percent)	Quits (Percent)	Hiring (Percent)
Total	3.9	2.8	4.3
Leisure and Hospitality	6.7	5.5	7.3
Retail Trade	5.0	4.0	5.1

Note: For definitions of Separations, Quits, and Hires, *see* Table 1. Rates are computed by dividing the number by employment and multiplying that quotient by 100.

¹⁶⁷ May Job Openings and Labor Turnover Survey, *supra* note 11, at Tables 2–4.

Table 6
Total Separations, Quits, and Hires, 2017¹⁶⁸

	Number
Separations	63 million
Quits	38 million
Hires	66 million

Note: for definitions, *see* Table 3. Detailed definitions available from source.

¹⁶⁸ January Job Openings and Labor Turnover Survey, *supra* note 41 at Tables 13, 15, & 17.

Table 7
Share of Workforce Quitting Jobs, 2017 through 2021¹⁶⁹

	Quit Rate (Percent)
2017	25.7
2018	27.1
2019	28.0
2020	25.2
2021	32.7

Note: for definitions, *see* Table 3. Detailed definitions available from source.

¹⁶⁹ January Job Openings and Labor Turnover Survey, *supra* note 41 at Table 18.

Table 8

Share of Workforce Quitting Jobs, 2017 through 2021, By Region¹⁷⁰

	Northeast (Percent)	South (Percent)	Midwest (Percent)	West (Percent)
2017	20.1	28.6	25.2	26.1
2018	19.8	30.2	27.7	27.4
2019	20.8	31.2	28.1	28.4
2020	18.8	28.8	26.0	23.7
2021	24.6	37.1	33.3	31.4

Note: for definitions, *see* Table 3. Detailed definitions available from source.

¹⁷⁰ January Job Openings and Labor Turnover Survey, *supra* note 41 at Table 18.

Table 9
Job Turnover in the U.S. Economy, 2001-2021¹⁷¹

Year	Hires ¹⁷²	Separations ¹⁷³	Quits ¹⁷⁴
2001	47.4	48.7	26.4
2002	44.5	44.9	23.4
2003	43.6	43.7	21.7
2004	45.9	44.4	23.4
2005	47.5	45.6	25.2
2006	47.5	45.9	26.1
2007	46.3	45.4	25.3
2008	41.1	43.6	22.2
2009	35.6	39.6	15.9
2010	38.1	37.3	17.1
2011	39.2	37.6	17.9
2012	39.8	38.1	18.6
2013	40.3	38.5	20.1
2014	42.4	40.3	21.9
2015	44.1	42.3	23.7
2016	44.2	42.6	24.9
2017	44.7	43.3	25.7
2018	46.0	44.5	27.1
2019	46.3	45.1	28.0
2020	51.1	56.8	25.2
2021	51.7	47.2	32.7

¹⁷¹ Bureau of Labor Statistics, *Job Openings and Labor Turnover Survey*, <https://data.bls.gov/PDQWeb/jt> [<https://perma.cc/878H-8B4D>] (last visited April 30, 2022). Refer to notes 59 & 62, replicate with Separations.

¹⁷² Hires include all additions to the payroll during the entire reference month. The hires rate is computed by dividing the number of hires by employment and multiplying that quotient by 100.

¹⁷³ Separations include all separations from the payroll during the entire reference month. The separations rate is computed by dividing the number of separations by employment and multiplying that quotient by 100.

¹⁷⁴ Quits include employees who left voluntarily with the exception of retirements or transfers to other locations. The quits rate is computed by dividing the number of quits by employment and multiplying that quotient by 100.

Table 10
Millions of Job Openings in U.S. Economy, 2001-2021¹⁷⁵

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2001	5.2	5.1	4.8	4.6	4.4	4.4	4.4	4.0	4.1	3.7	3.8	3.7
2002	3.7	3.4	3.6	3.5	3.5	3.4	3.4	3.5	3.3	3.5	3.5	3.2
2003	3.4	3.2	3.1	3.1	3.3	3.4	3.0	3.2	3.1	3.3	3.3	3.4
2004	3.4	3.5	3.5	3.5	3.7	3.3	3.8	3.5	3.8	3.9	3.5	4.1
2005	3.8	4.0	4.0	4.2	3.8	4.1	4.3	4.1	4.4	4.2	4.2	4.3
2006	4.4	4.3	4.7	4.8	4.5	4.6	4.4	4.7	4.7	4.6	4.6	4.6
2007	4.8	4.7	5.0	4.7	4.7	4.9	4.6	4.5	4.7	4.6	4.6	4.5
2008	4.6	4.3	4.2	4.0	4.2	3.8	3.7	3.7	3.2	3.4	3.2	3.1
2009	2.7	2.9	2.5	2.3	2.5	2.5	2.2	2.3	2.5	2.4	2.5	2.6
2010	2.8	2.7	2.7	3.2	3.0	2.8	3.1	3.0	2.9	3.2	3.2	3.1
2011	3.1	3.2	3.3	3.3	3.2	3.5	3.6	3.3	3.8	3.6	3.6	3.8
2012	3.9	3.6	4.0	3.8	3.8	3.9	3.7	3.8	3.9	3.8	3.9	4.0
2013	3.9	4.0	4.1	4.0	4.1	4.2	3.9	4.1	4.1	4.2	4.1	4.1
2014	4.1	4.4	4.4	4.6	4.7	5.0	4.8	5.3	4.9	5.0	4.8	5.1
2015	5.3	5.5	5.2	5.6	5.6	5.2	6.1	5.5	5.5	5.8	5.7	5.8
2016	6.0	5.8	6.1	5.8	5.8	5.7	6.0	5.7	5.9	5.6	6.0	6.0
2017	5.6	5.9	5.8	6.1	5.8	6.3	6.2	6.3	6.3	6.4	6.3	6.3
2018	6.6	6.6	6.8	6.9	7.0	7.2	7.2	7.2	7.3	7.4	7.6	7.4
2019	7.5	7.1	7.3	7.2	7.3	7.1	7.1	7.1	7.1	7.4	6.9	6.7
2020	7.2	7.0	5.9	4.7	5.4	6.0	6.6	6.3	6.5	6.9	6.8	6.9
2021	7.2	7.9	8.5	9.3	9.6	9.9	10.8	10.6	10.7	11.1	10.9	11.4

¹⁷⁵ Job Openings and Labor Turnover Survey, supra note 171; refer to note 63.

Table 11
2021 Population Estimates¹⁷⁶

Numeric Growth

Rank	Geographic Area	Growth
1	Texas	310,288
2	Florida	211,196
3	Arizona	98,330

Percent Growth

Rank	Geographic Area	Growth
1	Idaho	2.9%
2	Utah	1.7%
3	Montana	1.7%

Numeric Decline

Rank	Geographic Area	Decline
1	New York	-319,020
2	California	-261,902
3	Illinois	-113,776

Percent Decline

Rank	Geographic Area	Decline
1	District of Columbia	-2.9%
2	New York	-1.6%
3	Illinois	-0.9%
4	Hawaii	-0.7%

¹⁷⁶ Population Estimates, supra note 33.

Table 12
Business Employment Dynamics – Fourth Quarter 2021¹⁷⁷

	Number (millions)
Gross Job Gains	9.6
Gross Job Losses	6.7
Net Employment Gain	2.9

¹⁷⁷ Employment Dynamics, supra note 32.

Table 13

Average Jobs Held by Age Group for Individuals Born between 1957-1964¹⁷⁸

Age Group (Years Old)	Avg Jobs Held
18-24	5.6
25-34 ¹⁷⁹	4.5
35-44	2.9
45-54 ¹⁸⁰	2.1
18-54 ¹⁸¹	12.4

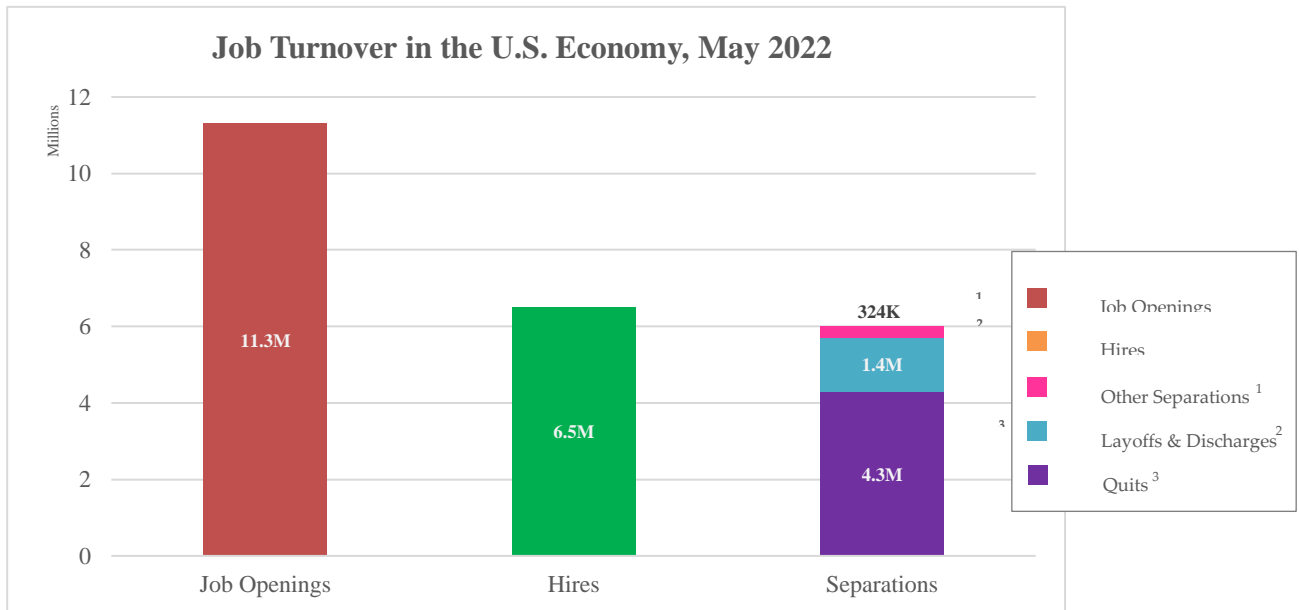
¹⁷⁸ National Longitudinal Survey, supra note 11.

¹⁷⁹ Excludes individuals who turned age 18 before January 1, 1978

¹⁸⁰ Excludes individuals who had not yet turned age 55 when interviewed in 2018-19

¹⁸¹ Jobs held in more than one age category were counted in each appropriate row, but only once in the total (last) row. Therefore, the overall average number of jobs is less than the sum of the number of jobs across age categories.

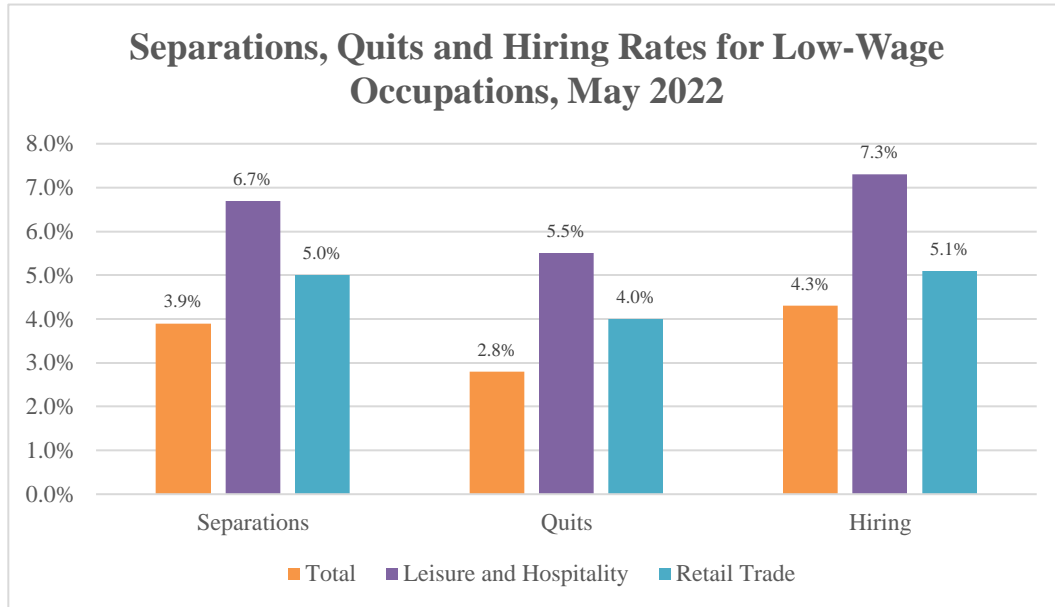
Figure 1: Job Turnover in the US Economy, May 2022¹⁸²



Note: Detailed definitions and technical methodology available from source.

¹⁸² May Job Openings and Labor Turnover Survey, supra note 11 at Tables 1–6.

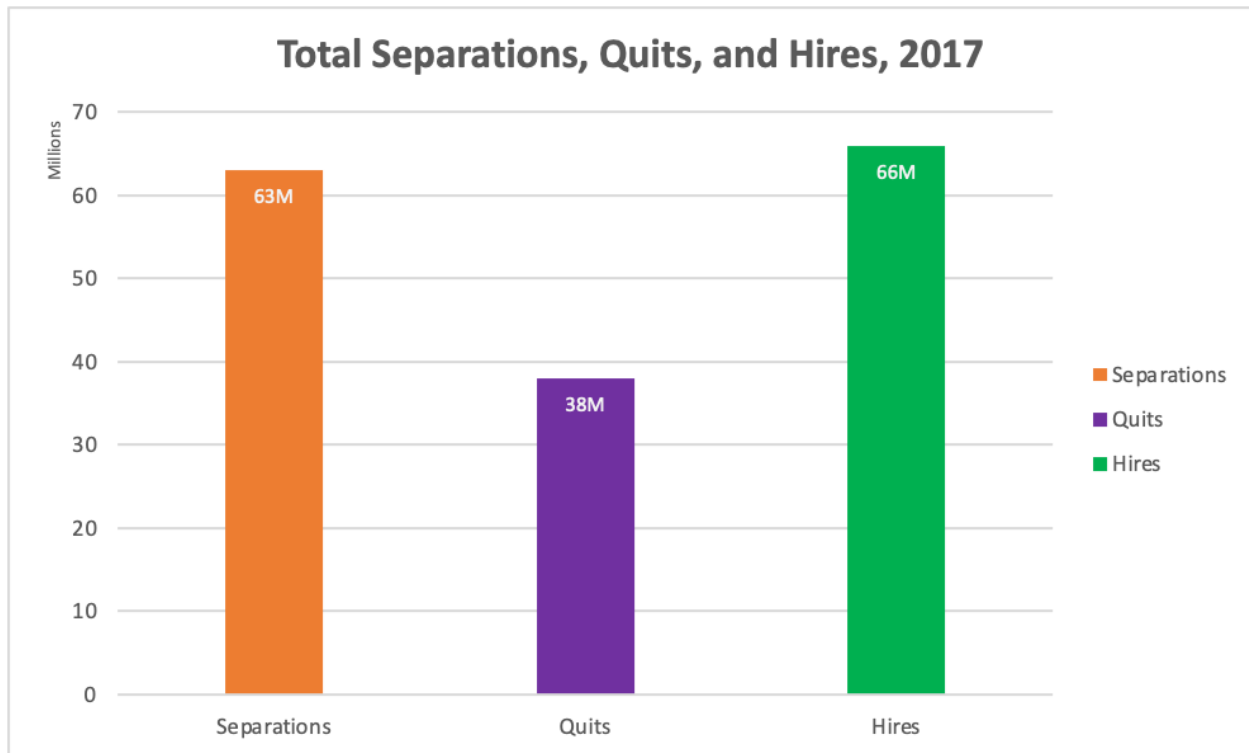
Figure 2: Separations, Quits and Hiring Rates for Low-Wage Occupations, May 2022¹⁸³



Note: For definitions of Separations, Quits, and Hires, see Table 3. Rates are computed by dividing the number by employment and multiplying that quotient by 100.

¹⁸³ May Job Openings and Labor Turnover Survey, *supra* note 11 at Tables 2–4.

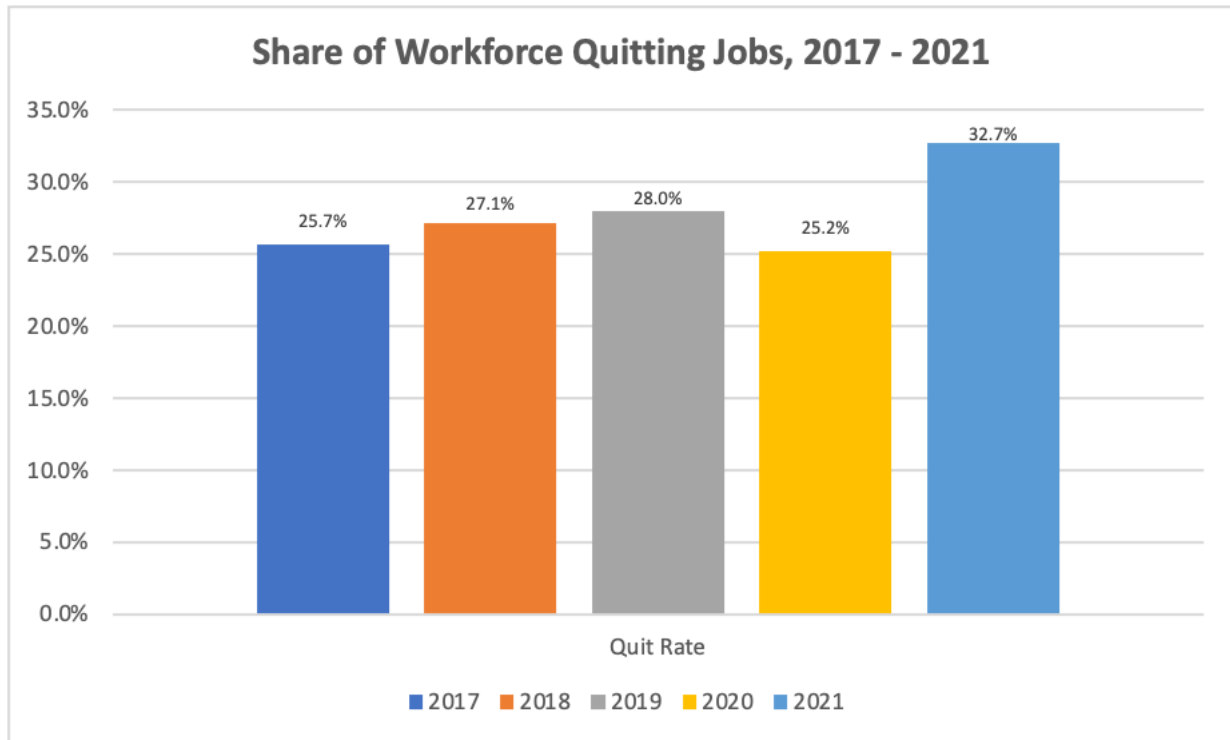
Figure 3: Total Separations, Quits, and Hires, 2017¹⁸⁴



Note: for definitions, *see* Table 3. Detailed definitions available from source.

¹⁸⁴ January Job Openings and Labor Turnover, *supra* note 41 at Tables 13, 15, & 17.

Figure 4: Share of Workforce Quitting Jobs, 2017-2021¹⁸⁵



Note: for definitions, see Table 3. Detailed definitions available from source.

¹⁸⁵ January Job Openings and Labor Turnover, supra note 41 at Table 18.

Figure 5: Share of Workforce Quitting Jobs, 2017 through 2021, By Region¹⁸⁶



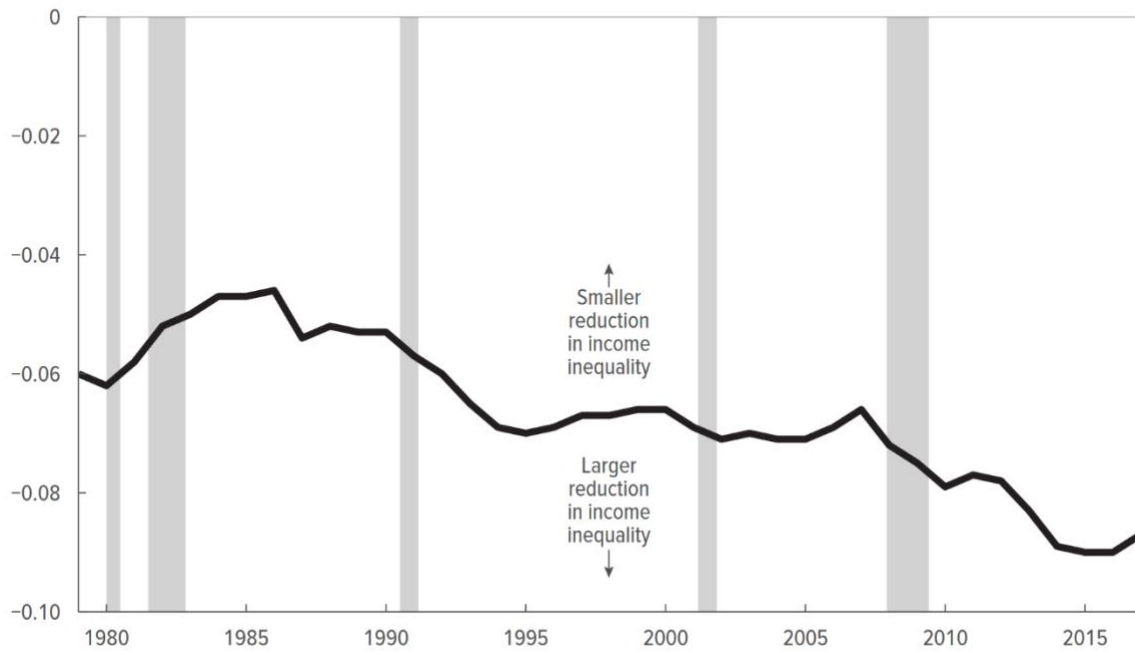
Note: for definitions, see Table 3. Detailed definitions available from source.

¹⁸⁶ *Id.*

Figure 6¹⁸⁷

Reduction in Income Inequality Stemming From Means-Tested Transfers and Federal Taxes, 1979 to 2017

Change in Gini Coefficient



Source: Congressional Budget Office.

¹⁸⁷ The Distribution of Household Income, supra note 92.