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New York State Senate bill S.933 would amend the state's antitrust statute to make it the strongest of any state. It represents significant progress toward remedying the power imbalance in the economy and would serve as a model for other states and the federal government when it comes to concrete legal reforms to reverse the decades-long deterioration of antitrust jurisprudence, under the influence of economic theories that we now know to have been false.

The specific innovations that I am very pleased to see instantiated in S.933 include:

1. It outlaws the abuse of monopsony power, i.e. the power that employers or dominant purchasers exercise over workers and suppliers. At present, antitrust is over-focused on consumer welfare, which means that business models that exploit workers and squeeze suppliers can be billed as reducing prices and therefore beneficial to consumers in order to escape liability, even when in reality they have no consumer benefits. The idea that workers are suppliers are the victim often serves as its own "efficiency" justification.
2. It comprehensively revamps legal standards for establishing market power, particularly through direct evidence. At present, antitrust jurisprudence is over-focused on market definition, the ostensible point of which is that establishing that a defendant holds a large share of the market establishes that they enjoy market power. This means that antitrust cases come down to a defendant-friendly broad market definition (thus implying a low market share) versus a plaintiff-friendly narrow market definition (thus implying a high market share), with judges or juries having to decide between these competing definitions on the basis of not very much insight or expertise. Again, the purpose of the exercise is supposedly to establish or disprove market power through "indirect" means. But even if market definition were a straightforward exercise, it isn't true that high market shares necessarily correspond to high market power, and low market shares imply its absence. And moreover, it isn't a useful locus of litigation.

Instead, this bill enumerates direct indicia of market power (in addition to clarifying market definition, the better to adjudicate market share as an indirect market power measure) that together intuitively capture what the idea of power is, and which are well-grounded in economics research. Examples include the ability to set their own prices or wages, rather than being constrained by competition in the market, as well as the demonstrated ability to impose non-price contractual terms on a counterparty without compensation, something that would be impossible if the balance of power were equal. Both the provisions, for direct and indirect proof of market power, will make antitrust more administrable and less abstruse.

3. S.933 outlaws abuse of a dominant position (as established by either direct or indirect evidence), which is a more expansive notion of the harm arising from market power than exists currently in either state or federal antitrust law. That conceptualizes the set of victims as counterparties or rivals, as opposed to just consumers. In so doing it envisions an economy in which everyone has the potential to transact on equal footing, and it renders irrelevant the usual defense in antitrust

cases against powerful companies, that their dominance is somehow natural or beneficial to anyone other than themselves.

4. In combination, the three enumerated provisions above serve to provide an avenue for gig workers in particular to challenge their terms and conditions of work, when that avenue has been closed off by their current misclassified status as independent contractors. In combination, the laxness of employment law (exempting gig workers) and antitrust law (exempting employers of gig workers for the vertical restraints that make gig work viable) have served to carve out the gray area in which gig employers currently operate: they can direct and control their workers as they see fit, but they are not responsible for that control in the form of wages and hours regulations or contributions to social insurance. This bill does what no other proposed legislation anywhere in the country would do, which is close the antitrust half of that loophole by making the control that gig employers exercise over gig workers the potential subject of an antitrust suit. It would in turn shift the balance of interest of gig employers in favor of properly classifying workers as employees, to escape the threat of antitrust. In other contexts, where contractors want to preserve their autonomy, it would give them a powerful weapon with which to evade the control that powerful suppliers or buyers exercise over them, ensuring that the benefits of labor and production don't only flow to the top.

For all these reasons, I would encourage New York state legislators to pass S.933, and legislators in other states and federally to take direction from it in their own jurisdictions.



Marshall Steinbaum
Assistant Professor of Economics
University of Utah