

# ANTITRUST ENFORCEMENT AND LABOR MARKETS UNDER THE BIDEN ADMINISTRATION

Thomas W. Joo\*

## I. INTRODUCTION

Antitrust enforcement has primarily focused on policing anticompetitive conduct by firms as sellers in product markets.<sup>1</sup> The obvious examples are cartelization and monopolization.<sup>2</sup> This focus typically benefits competitor firms in the affected markets, and benefits consumers by preserving price competition.<sup>3</sup> Antitrust law has been applied less often to anticompetitive conduct by firms as *buyers* in input markets. This type of enforcement can benefit suppliers of inputs, including workers (sellers of labor). Indeed, many cases have treated worker organizations as a potentially anticompetitive force. The Biden Administration, as part of its announced intention to use “the whole of government” to promote competition across the economy, expressly promised to apply antitrust and unfair competition law to labor markets.<sup>4</sup> Surprisingly, the FTC under the se Trump Administration appears to agree with this goal. This essay evaluates the Biden Administration’s performance of that promise and puts it in the context of antitrust law, policy, and history.

Antitrust law originally had multiple policy justifications.<sup>5</sup> Monopolies and cartels not only raised prices and took unfair profits, but also eliminated small local businesses and created concentrations of economic and political

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\* Martin Luther King Jr. Professor of Law, University of California, Davis, School of Law. I would like to thank Professor Danielle Hart for inviting me to participate in this conference and Piper Hinson of the Southwestern Law Review for her outstanding editorial work.

1. John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192 (2008).

2. Sherman Act, 15 U.S.C.A. §§ 1-2.

3. See Daniel S. Frost, *Labor’s Antitrust Exemption*, 55 CALIF. L. REV. 254, 268-69 (1967).

4. Exec. Order No. 14036, 3 C.F.R. 609, 612 (2022).

5. See Judge H. Ginsburg, *Wither the Consumer Welfare Standard?*, 46 HARV. J. L. & PUB. POL’Y 69, 70 (2023).

power that threatened to rival governments.<sup>6</sup> Since the 1970s, however, a neoclassical law-and-economics approach, epitomized by Robert Bork's scholarship, has come to dominate antitrust policy.<sup>7</sup> The now-dominant "consumer welfare" approach holds that the concentration and collusion constitute social problems only where they harm "consumer welfare" by increasing prices.<sup>8</sup> Indeed, the argument goes, some instances of concentration and collusion can *improve* consumer welfare by decreasing prices or increasing choice.<sup>9</sup> Under this view, antitrust enforcement should not interfere with business behavior unless harm to consumer welfare can be definitively proven.<sup>10</sup>

Many courts have identified harm to consumer welfare as an anticompetitive effect,<sup>11</sup> as have antitrust enforcers under both Republican and Democratic administrations.<sup>12</sup> The Biden Administration expressly pledged to broaden its focus beyond consumer welfare to employ antitrust law against "abuses of market power, and the harmful effects of monopoly and monopsony, especially as these issues arise in *labor markets* [emphasis added]."<sup>13</sup>

## II. ANTITRUST AND LABOR BACKGROUND AND HISTORY

Workers can obtain bargaining power vis-à-vis employers in labor markets by banding together to demand better wages, benefits and/or working conditions. This requires them to agree not to compete with each other on these bases, and to instead bargain collectively for mutual aid and protection.<sup>14</sup> Thus, workers who engage in collective bargaining are

6. See, e.g., *id.* at 73; James May, *The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History*, 59 ANTITRUST L.J. 93, 95 (1990).

7. May, *supra* note 6, at 93.

8. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 720-21 (2017) (While mainstream academic analysis focuses on benefits to consumers, Bork's idiosyncratic definition of "consumer welfare" included benefits to producers and others—that is, what most economists would call aggregate welfare); see Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Standard Imperiled?*, 45 J. CORP. L. 65, 65-66 (2019).

9. Khan, *supra* note 8, at 710.

10. Christine S. Wilson, Comm'r, U.S. Fed. Trade Comm'n, Luncheon Keynote Address at the George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? (Feb. 15, 2019), in FTC.GOV, Feb 2019, at 1 ("Under the consumer welfare standard, business conduct and mergers are evaluated to determine whether they harm consumers in any relevant market. Generally speaking, if consumers are not harmed, the antitrust agencies do not act.")

11. Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMP. L. & ECON. 133, 135-36 (2011).

12. Wilson, *supra* note 10, at 1, 4.

13. Exec. Order No. 14036, 3 C.F.R. 609, 610 (2022).

14. Frost, *supra* note 3, at 268.

engaging in anticompetitive “concerted action,” which can potentially violate the Sherman Antitrust Act.<sup>15</sup> The Act was intended to combat the concentration of industry by cartelization and monopolization.<sup>16</sup> But neither the Act’s text nor legislative history clearly indicate what other conduct violates its prohibition on agreements “in restraint of trade.”<sup>17</sup> Contemporaneously with Congressional debates leading up to the Sherman Act, a special Senate committee report found that the “beef trust,” a consortium of Chicago meatpacking firms, was fixing both a high price for meat buyers *and* a low price for ranchers selling cattle.<sup>18</sup> The report endorsed the Sherman Act.<sup>19</sup> In the debates leading up to the Sherman Act, Congress considered an express exemption for labor.<sup>20</sup> The Act as passed, however, does not expressly mention labor.<sup>21</sup> Whether this omission implies the inclusion or exclusion of labor is unclear.<sup>22</sup>

Nonetheless, prosecutors, employers, and courts initially used the Sherman Act against labor.<sup>23</sup> Indeed, the Act was used against labor far more than against cartels or monopolies: all but one of the first thirteen adjudicated Sherman Act violations were labor strikes.<sup>24</sup>

Since then, the applicability of the Sherman Act to labor has been subject to a long back-and-forth between the various branches of government.<sup>25</sup> When Congress passed the Clayton Act in 1914, broadening the reach of antitrust law, it also attempted to create an express exemption for organized labor.<sup>26</sup> Section 6 of the Clayton Act states that the antitrust laws do not prohibit the existence of labor organizations or forbid them from “lawfully carrying out the legitimate objects thereof.”<sup>27</sup> Section 20 of the Clayton Act

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15. Joseph L. Greenslade, *Labor Unions and the Sherman Act: Rethinking Labor’s Nonstatutory Exemption*, 22 LOY. L.A. L. REV. 151, 151-52, 196 (1988).

16. Nolan Ezra Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125, 1136 (1985).

17. Greenslade, *supra* note 15, at 154-57.

18. See Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 713-716 (2007).

19. *Id.* at 716.

20. Greenslade, *supra* note 15, at 155-57.

21. *Id.*

22. See Elinor R. Hoffmann, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK. L. REV. 1, 16-19 (1983); *But see* Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 990, 991 (2016) (Sherman Act “was not originally intended to apply to worker collective action.”).

23. Marina Lao, *Workers in the “Gig” Economy: The Case for Extending the Antitrust Lab. Exemption*, 51 U.C. DAVIS L. REV. 1543, 1560 (2018) (citing examples).

24. HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 at 229 (1991).

25. Greenslade, *supra* note 15, at 165.

26. Frost, *supra* note 3, at 254.

27. 15 U.S.C. § 17 (2018).

prohibits courts from issuing injunctions in employer-employee disputes over terms of employment “unless necessary to prevent irreparable injury to property, or to a property right . . . for which . . . there is no adequate remedy at law.”<sup>28</sup> The Clayton Act begins with the sweeping declaration that the “labor of a human being is not a commodity or article of commerce.”<sup>29</sup> On its face, this suggests that the union exemption is based on categorical philosophical notions about labor and human rights, and not on economic concepts such as welfare maximization.

Despite the Clayton Act, courts continued to apply antitrust laws to, and issue injunctions against, many types of union activity. In the 1920s, the Supreme Court upheld several such cases by adopting narrow textual readings that interpreted Sections 6 and 20 nearly out of existence.<sup>30</sup> In *Duplex Printing Press Co.*, the Court held that Section 6’s exception for “lawfully carrying out the legitimate objects” of a union is no exception at all, because a union’s “legitimate objects” do not include “an actual combination or conspiracy in restraint of trade.”<sup>31</sup> In the same opinion, it held that Section 20’s permission of injunctions to prevent “irreparable injury” to property included injury to the business of an employer—i.e., the obvious consequence, if not the very purpose, of labor strikes and boycotts.<sup>32</sup>

The *Duplex* Court further held that Section 20, by prohibiting injunctions in employer-employee disputes involving “terms or conditions of employment,” protects only employees who are disputing “the terms or conditions of *their own* employment.”<sup>33</sup> Thus, according to the Court, Section 20 permitted injunctions against workers whom the disputed terms and conditions did not directly affect, including *members of the same union* as the directly affected workers.<sup>34</sup> By the same logic, Section 20 permitted courts to enjoin secondary boycotts—that is, pressuring an employer by strikes, boycotts and picketing against the employer’s customers.<sup>35</sup>

In 1932, Congress rebuked the courts again and overruled *Duplex* in the Norris-LaGuardia Act.<sup>36</sup> “The underlying aim of the Norris-LaGuardia Act,”

28. 29 U.S.C. § 52 (2018).

29. 15 U.S.C. § 17 (2018).

30. Greenslade, *supra* note 15, at 166-67.

31. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 469 (1921).

32. *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 202 (1921) (citing *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921)).

33. *Duplex*, 254 U.S. at 472.

34. *Id.*

35. *Id.* at 477.

36. Charles O. Gregory, *The New Sherman-Clayton-Norris-LaGuardia Act*, 8 U. CHI. L. REV. 503, 507 (1941).

according to Justice Frankfurter, “was to restore the broad purpose which Congress thought it had formulated in the Clayton Act, but which was frustrated, so Congress believed, by unduly restrictive judicial construction.”<sup>37</sup> Even as clarified by Norris-LaGuardia, however, the Clayton Act protected only organized labor activity, which employers aggressively suppressed. In response, Congress passed Section 7 of the National Labor Relations Act in 1935 to protect the right of “employees” to organize with respect to wages and working conditions.<sup>38</sup>

The Clayton, Norris-LaGuardia, and National Labor Relations Acts together finally established a meaningful “labor exemption” to antitrust law, but only with respect to those workers classed as “employees.”<sup>39</sup> “Independent contractors” have neither the right to organize nor an antitrust exemption permitting them to bargain collectively.<sup>40</sup> *FTC v. Superior Court Trial Lawyers Ass’n*, for example, involved lawyers who served on a case-by-case basis as court-appointed counsel for indigent criminal defendants in the District of Columbia.<sup>41</sup> A group of about 100 lawyers agreed not to take on any more cases unless the District increased their pay.<sup>42</sup> The Supreme Court agreed that they had engaged in an illegal “conspiracy to fix prices.”<sup>43</sup> The opinion never considered the applicability of the labor exemption, presumably because it considered the lawyers to be independent contractors.<sup>44</sup> Employees’ right to organize is one of the many reasons for the current controversy over whether “gig workers,” particularly those who work for app-based platforms such as rideshare or food delivery, should be classed as “independent contractors” or “employees.”<sup>45</sup>

### III. BIDEN ADMINISTRATION’S USE OF ANTITRUST POWERS TO PROTECT

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37. *United States v. Hutcheson*, 312 U.S. 219, 235-36 (1941).

38. 29 U.S.C. § 157 (2018).

39. Greenslade, *supra* note 15, at 179.

40. Annick Masselot & Martha Ceballos, *The Crossroad Between Employees and Contractors*, 40 HOFSTRA LAB. & EMP. L.J. 73, 73 (2022).

41. *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 411 (1990).

42. *Id.* at 416.

43. *Id.* at 418.

44. *Id.* at 432.

45. Lao, *supra* note 23, at 1545-46.

## LABOR

*A. Policy Statements and Agency Cooperation Agreements*

In 2021, President Biden issued Executive Order 14036, also known as the Executive Order on Competition.<sup>46</sup> In addition to recognizing and pledging to combat overconcentration generally, it prominently discussed labor market competition from the workers' point of view: "For workers, a competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage . . . Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions. Powerful companies require workers to sign non-compete agreements . . ." <sup>47</sup> Moreover, although it had no mandatory content, the Order announced that the Administration intended to:

enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony, especially as these issues arise in *labor markets*, agricultural markets, Internet platform industries, healthcare markets [and other markets].<sup>48</sup>

In 2022, the FTC released a policy statement that asserted a broad interpretation of its authority under Section 5 of the FTC Act.<sup>49</sup> The FTC declared that Congress had deliberately empowered it to address "a broader range of anticompetitive conduct than can be reached under the Clayton and Sherman Acts."<sup>50</sup> It also specifically advocated for the consideration of labor welfare in addition to consumer welfare, asserting that the anticompetitive nature of conduct lies in "the tendency of the conduct to negatively affect competitive conditions—*whether by affecting consumers, workers, or other market participants.*"<sup>51</sup>

Commissioner Christine Wilson, the only Republican Commissioner at the time, wrote separately to dissent from the statement and criticize its "repudiation of the consumer welfare standard" and arguing that the FTC was claiming the power "to condemn essentially any business conduct it finds

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46. *Exec. Order No. 14036*, 3 C.F.R. 609 (2022).

47. *Id.*

48. *Id.* at 610-11.

49. FTC, Pol'y Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, FTC File No. P221202 (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf).

50. *Id.* at 5.

51. *Id.* at 9.

distasteful.”<sup>52</sup> The three members of the FTC’s Democratic majority also wrote separately to defend the Commission’s statement, arguing that whatever the intent behind the Sherman Act, Congress did not intend to limit the FTC to protecting consumer welfare.<sup>53</sup> Chair Lina M. Khan wrote, “While courts have applied the rule of reason and consumer welfare standards in the context of the Sherman Act, there is no basis in precedent for applying them wholesale to standalone Section 5.”<sup>54</sup> Commissioner Alvaro M. Bedoya cited the legislative history of the FTC Act. According to one Senator, the Act would “‘rescue’ small businesses from ‘great corporations.’”<sup>55</sup> Another Senator expressly rejected the consumer welfare standard’s focus on low prices: “I think we can purchase cheapness at altogether too high a price, if it involves the surrender of the individual, the subjugation of a great mass of people to a single master mind.”<sup>56</sup>

The Executive Order instructed the Secretary of the Treasury to: “direct the Office of Economic Policy, in consultation with the Attorney General, the Secretary of Labor, and the Chair of the FTC, to submit a report . . . on the effects of lack of competition on labor markets.”<sup>57</sup> The Order also “encouraged” the FTC to adopt regulations “to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”<sup>58</sup> The Order further “encouraged” the Attorney General and the FTC to “consider whether to revise”<sup>59</sup> a 2016 document, *Antitrust*

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52. Christine S. Wilson, *Dissenting Statement of Comm’r Christine S. Wilson Regarding the “Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act”* at 1, FTC (Nov. 10, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-of-commissioner-wilson-on-policy-statement-regarding-section-5>. (Although there are five seats on the Commission (three appointed by the majority party and two by the minority), Noah J. Phillips had stepped down in October 2022 and had not been replaced at the time of the November statement (as of February 2024, both Republican seats remain vacant).

53. FTC, Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act at 4 (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Section5PolicyStmntKhanSlaughterBedoyaStmnt.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Section5PolicyStmntKhanSlaughterBedoyaStmnt.pdf).

54. *Id.*

55. FTC, Statement of Commissioner Alvaro M. Bedoya, Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter, On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition under Section 5 of the FTC Act at 4 (Nov. 10, 2022) (quoting Senator Rublee), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStmntBedoyaStmnt.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStmntBedoyaStmnt.pdf).

56. *Id.* at 5 (quoting Senator Cummins).

57. Exec. Order No. 14036, 86 Fed. Reg. 36987, 36999 (July 14, 2021).

58. *Id.* at 36992.

59. *Id.*

*Guidance for Human Resource Professionals*.<sup>60</sup> That document was “intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws.”<sup>61</sup>

In response to the Order, the Treasury Department released “The State of Labor Market Competition,” a report describing “the prevalence and impact of uncompetitive firm behavior in labor markets . . . [and] the ways in which insufficient labor market competition hurts workers.”<sup>62</sup> According to the report, employer market power may be an “inherent” aspect of labor markets, due to factors such as employers’ superior information about wages and conditions and the switching costs that limit worker mobility.<sup>63</sup> The bargaining power gap may be further aggravated by industry consolidation and “tacit collusion” among employers.<sup>64</sup> Employer market power may limit worker mobility, lower wages, and weaken unions.<sup>65</sup> The report, reviewing empirical academic studies, estimates that employer market power has depressed wages “at least” 15 percent below the competitive level and perhaps as much as 25 percent.<sup>66</sup>

The Treasury report called for legislative initiatives such as guaranteeing labor rights for more workers, raising the minimum wage, and limiting mandatory arbitration and class action waivers in employment disputes.<sup>67</sup> It also called for civil and criminal antitrust enforcement against employer collusion in labor markets, as well as updating agency guidance to make clear that antitrust law is “protective of workers’ access to robust, competitive labor markets.”<sup>68</sup>

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60. DEP’T OF JUST. ANTITRUST DIV. & FTC, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016), <https://www.justice.gov/atr/file/903511/download>.

61. *Id.* at 1; As of March 2023, the DOJ and FTC were “working to revise” the Guidance to reflect “recent case experience and research that have shown that information-sharing, particularly in concentrated markets, may have potentially significant anticompetitive effects even when purportedly anonymized.” U.S. DEP’T OF TREASURY, THE STATE OF LAB. MARKET COMPETITION 56 (2022) [hereinafter TREASURY REPORT], <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>.

62. TREASURY REPORT, *supra* note 61 at i.

63. *Id.*

64. TREASURY REPORT, *supra* note 61 at i, 41.

65. TREASURY REPORT, *supra* note 61 at 1.

66. TREASURY REPORT, *supra* note 61 at 24-25.

67. TREASURY REPORT, *supra* note 61 at ii, 52.

68. TREASURY REPORT, *supra* note 61 at 54-56.

The Executive Order encouraged agencies to collaborate and take advantage of their respective expertise to promote competition.<sup>69</sup> In response, the DOJ and FTC have entered into multiple cross-agency memoranda of understanding (“MOUs”) indicating specific areas of cooperation.<sup>70</sup> In March 2022, the DOJ signed an agreement with the Department of Labor to strengthen the partnership between the two agencies.<sup>71</sup> They promised to share information and resources related to enforcement activity, promoting their shared goals of protecting workers from “employer collusion, ensuring compliance with labor laws, and promoting competitive labor markets and worker mobility.”<sup>72</sup> In July 2022, the DOJ also signed an MOU with the National Labor Relations Board concerning similar information sharing and the coordination of enforcement activity to better protect workers from unlawful interference by employers and ensure the free exercise of their rights under applicable labor laws.<sup>73</sup>

That same month, the FTC and the NLRB signed an MOU identifying their shared goals of “promoting competitive U.S. labor markets and putting an end to unfair practices that harm workers.”<sup>74</sup> According to the MOU, they would share information, conduct cross-training of employees, and collaborate on investigations.<sup>75</sup> In September 2023, the FTC and the Department of Labor entered another MOU that outlines how the agencies would work together to address issues such as labor market concentration, one-sided contract terms, and labor developments in the “gig economy.”<sup>76</sup>

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69. Release, WHITE HOUSE, FACT SHEET: EXEC. ORDER ON PROMOTING COMPETITION IN THE AM. ECON. (July 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.

70. Press Release, U.S. DEP’T OF JUST., DEP’T OF JUST. & LAB. STRENGTHEN P’SHIP TO PROTECT WORKERS, <https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers> (Mar. 10, 2022).

71. *Id.*

72. Marty Walsh, *How the Dep’t of Lab. is Promoting Competition in Lab. Markets*, U.S. DEP’T LAB. BLOG (July 11, 2022), <https://blog.dol.gov/2022/07/11/how-the-department-of-labor-is-promoting-competition-in-labor-markets>.

73. Press Release, U.S. DEP’T OF JUST., JUST. DEP’T & NAT’L LAB. RELS. BOARD ANNOUNCE P’SHIP TO PROTECT WORKERS, <https://www.justice.gov/opa/pr/justice-department-and-national-labor-relations-board-announce-partnership-protect-workers> (July 26, 2022).

74. Press Release, FTC, FED. TRADE COMM’N, NAT’L LAB. RELS. BOARD FORGE NEW P’SHIP TO PROTECT WORKERS FROM ANTICOMPETITIVE, UNFAIR, AND DECEPTIVE PRACTICES (July 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers>.

75. *Id.*

76. Press Release, FTC, FTC, DEP’T OF LAB. PARTNER TO PROTECT WORKERS FROM ANTICOMPETITIVE, UNFAIR, AND DECEPTIVE PRACTICES (Sept. 21, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-department-labor-partner-protect-workers-anticompetitive-unfair-deceptive-practices>.

## B. Concrete Actions

In addition to these policy statements, reports, and pledges of cooperation, the FTC and DOJ took a significant number of concrete actions against employers' anticompetitive conduct in labor markets, primarily in the area of non-compete agreements and mergers.<sup>77</sup>

### 1. Non-compete Agreements

Non-compete agreements are contracts or contractual provisions by which an employer prohibits an employee from working for a competing employer or starting a competing business for a period of time after their employment ends.<sup>78</sup> They are anticompetitive by their very nature.<sup>79</sup> The Executive Order on Competition “encouraged” the FTC to pass regulations “to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”<sup>80</sup> The Commission responded dramatically, adopting a rule banning non-competes, effective September 4, 2024.<sup>81</sup> Republican FTC Commissioner Andrew Ferguson wrote a lengthy and vociferous dissent.<sup>82</sup> The following month, a federal district court declared the rule “arbitrary and capricious” and issued a nationwide injunction against its enforcement.<sup>83</sup> Ferguson, elevated to FTC Chair by President Trump, is unlikely to fight to restore the blanket ban on noncompetes. He has stated, however, that the Republicans are a “workers’ party” whose FTC will investigate and prosecute abuses of non-compete clauses on a case-by-case basis.<sup>84</sup>

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77. In addition to the actions recounted below, the DOJ brought charges against a number of employers for no-poach or wage-fixing agreements, in which firms agreed not to recruit each other’s employees or offer them higher salaries. Those prosecutions were unsuccessful, however. Three ended in acquittals, and the DOJ voluntarily dismissed a fourth with prejudice in late 2023. See Leslie E. John et al., *DOJ Gives Up on Its Sole Remaining Criminal No-Poach Prosecution*, BALLARD SPAHR (Nov. 16, 2023), <https://www.ballardspahr.com/insights/alerts-and-articles/2023/11/doj-gives-up-on-its-sole-remaining-criminal-no-poach-prosecution>.

78. FTC Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3482 (Jan. 19, 2023).

79. *Id.* See also Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977) (“[E]mployee agreements not to compete are proper subjects for scrutiny under section 1 of the Sherman Act.”).

80. Exec. Order No. 14036, 86 Fed. Reg. 36987, 36992 (July 14, 2021).

81. FTC Non-Compete Clause Rule, 16 C.F.R. §§910-910.6 (2024).

82. Andrew N. Ferguson, *Dissenting Statement of Comm’r In The Matter of the Non-Compete Clause Rule*, Matter Number P201200, (June 28, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ferguson-noncompete-dissent.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf).

83. Ryan LLC v. Federal Trade Commission, 746 F. Supp. 3d 369 (N.D. Tex. 2024).

84. Jesse M. Coleman, Michael D. Wexler, & Gio Perez, *FTC Launches Joint Task Force to Investigate and Prosecute Non-Compete Agreements, as FTC Chairman declares the GOP a “Workers’ Party,”* Seyfarth Shaw LLP, (Mar 10, 2025), <https://www.seyfarth.com/news->

Prior to adopting the rule, Biden's FTC invoked its broad § 5 authority to act against "unfair competition" in order to bring actions against employers for requiring their employees to sign noncompete agreements.<sup>85</sup> In January 2023, the FTC issued orders in three cases against employers who imposed noncompete restrictions on thousands of employees, including "workers in positions ranging from low-wage security guards to manufacturing workers to engineers."<sup>86</sup> The orders prohibit Prudential Security, Inc. and Prudential Command Inc., and two glass manufacturers, O-I Glass, Inc. and Ardagh Group S.A from enforcing or threatening to enforce the agreements.<sup>87</sup> The defendants may not tell the affected employees or competitors that a noncompete is in effect and may not penalize the employees.<sup>88</sup> The orders further require the defendants to notify current and past employees and current and future hiring personnel of the complaint and order.<sup>89</sup> In addition, for the ten years following the order, the defendants must specifically notify new employees of their right to compete after separating from employment.<sup>90</sup>

The FTC also acted against noncompete agreements in settlements to reduce the anticompetitive effects of mergers on labor markets, prohibiting acquiring companies from enforcing noncompete agreements against employees of the acquired companies. These actions will be discussed in the next section of this essay.

A related anticompetitive practice is the "no-poach" or "wage-fixing" agreement, in which firms agree not to recruit each other's employees or entice them with higher salaries.<sup>91</sup> Beginning in 2020, the DOJ brought charges against several employers for such agreements.<sup>92</sup> The prosecutions were unsuccessful, however, three ended in acquittals, and the DOJ voluntarily dismissed a fourth with prejudice in late 2023.<sup>93</sup>

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insights/ftc-launches-joint-task-force-to-investigate-and-prosecute-non-compete-agreements-as-ftc-chairman-declares-the-gop-a-workers-party.html.

85. Press Release, FTC, FTC CRACKS DOWN ON COMPANIES THAT IMPOSE HARMFUL NONCOMPETE RESTRICTIONS ON THOUSANDS OF WORKERS (Jan. 4, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers>.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Price Fixing*, FTC, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing> (last visited Mar. 21, 2024).

92. See John et al., *supra* note 77.

93. *Id.*

## 2. Merger Regulation and Labor Markets

“Anticompetitive” mergers are illegal under Clayton Act § 7.<sup>94</sup> The FTC and DOJ have joint authority to enforce this provision.<sup>95</sup> Under the Hart-Scott-Rodino Act, companies planning to conduct a merger above a certain size must first disclose company and market information in “premerger notification” forms filed with both the FTC and DOJ.<sup>96</sup> The two agencies confer and decide which agency has “clearance” to review which cases.<sup>97</sup> The reviewing agency may allow a deal to proceed by allowing a prescribed waiting period to expire or by terminating the waiting period.<sup>98</sup> If the agency suspects the merger may have anticompetitive effects, however, it will extend the waiting period pending disclosure of further information.<sup>99</sup> After this second round of disclosure, the regulator will either permit the deal to proceed as planned, permit the deal conditional on a consent agreement modifying some aspects of the transaction, or go to court to enjoin the deal.<sup>100</sup>

The “Merger Guidelines,” a nonbinding joint document issued by the DOJ and FTC, identifies factors the premerger review process will consider in determining whether a merger is anticompetitive.<sup>101</sup> The FTC and DOJ released a major overhaul of the Guidelines at the end of 2023 that signals a more aggressive approach to merger review in many respects.<sup>102</sup> Moreover, the 2023 version of the Guidelines is the first to expressly state that merger review will “consider whether workers face a risk that the merger may substantially lessen competition for their labor.”<sup>103</sup> Consistent with this change, the FTC separately proposed amending the premerger notification

94. *Mergers*, FTC, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers> (last visited Apr. 12, 2024).

95. *The Enforcers*, FTC, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers> (last visited Apr. 12, 2024).

96. *Premerger Notification and the Merger Review Process*, FTC, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process> (last visited Apr. 12, 2024).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. See generally U.S. DEP’T OF JUST. & FED. TRADE COMM’N, MERGER GUIDELINES (2023) [hereinafter MERGER GUIDELINES], <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

102. The more expansive approach is indicated in the very name of the document. Previous versions were called “Horizontal Merger Guidelines.” The 2023 version, however, is titled “Merger Guidelines” and no longer distinguishes between horizontal and vertical mergers. See, e.g., *id.* at 13 (stating that limiting rivals’ access to inputs can be an anticompetitive effect of both vertical and non-vertical mergers); *id.* at 22 (stating that regulators will consider evidence of vertical integration in merger review).

103. MERGER GUIDELINES, *supra* note 100, at 26.

forms to require information about the merger parties' workforce to help regulators evaluate the merger's effect on the labor market.<sup>104</sup> Previous versions of the Guidelines made no mention of effects on labor markets; indeed, they did not even contain the word "labor." In a surprising turn of events, Andrew Ferguson, President Trump's new FTC Chair, declared, "Insofar as there is any ambiguity, let me be clear: the FTC's and DOJ's joint 2023 Merger Guidelines are in effect and are the framework for this agency's merger-review analysis."<sup>105</sup>

The DOJ's merger review had begun considering labor market effects even before the new Guidelines were released. In 2020, Bertelsmann AG, the multinational corporate parent of the largest U.S. book publisher, Penguin Random House, signed a deal to acquire Simon & Schuster, the third largest U.S. publisher.<sup>106</sup> At the time, following a long period of consolidation in the industry, the two publishers were among five that dominated the market for general readership books.<sup>107</sup> In 2022, the Justice Department obtained a permanent injunction against the acquisition.<sup>108</sup> The court found that the merger was "likely to substantially lessen competition to acquire the [U.S.] publishing rights to anticipated top-selling books."<sup>109</sup> The court found at trial that publishers compete in an auction for the rights to publish anticipated best-sellers.<sup>110</sup> This competition "benefits authors by increasing advances paid for their books," and evidence indicated that "the loss of that competition would be harmful to authors."<sup>111</sup>

According to Assistant Attorney General Jonathan Kanter, "The proposed merger would have reduced competition, decreased author compensation, diminished the breadth, depth, and diversity of our stories and ideas, and ultimately impoverished our democracy."<sup>112</sup> Kanter went on to call the case "a victory for workers more broadly . . . [that] reaffirms that

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104. FTC Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178, 42176 (proposed June 29, 2023).

105. Andrew N. Ferguson, "Merger Guidelines" (Memorandum to FTC Staff) (Feb. 18, 2025), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ferguson-memo-re-merger-guidelines.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-memo-re-merger-guidelines.pdf).

106. *United States v. Bertelsmann SE & Co.*, 646 F. Supp. 3d 1, 10–11 (D.D.C. 2022).

107. *Id.* at 12.

108. *Id.*

109. *Id.* (internal quotation marks omitted).

110. *Id.* at 16–17.

111. *Id.* at 40.

112. Press Release, U.S. DEP'T OF JUST., JUST. DEP'T OBTAINS PERMANENT INJUNCTION BLOCKING PENGUIN RANDOM HOUSE'S PROPOSED ACQUISITION OF SIMON & SCHUSTER, <https://www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed> (Oct. 31, 2022).

the antitrust laws protect competition for the acquisition of goods and services from workers.”<sup>113</sup>

In 2022, the FTC voted to block a merger between two health care providers based on the allegation that it would give them market dominance in the market for inpatient health services.<sup>114</sup> Slaughter and Khan wrote separately to state that they would have also supported an allegation that the merger would lessen competition in the labor market for certain medical professionals.<sup>115</sup> “Just as consumers are worse off when mergers diminish competition for goods and services based on price, quality, and innovation, workers suffer when mergers diminish competition for their labor and employers are insulated from competition driving improved wages, benefits, working conditions, and other terms of employment.”<sup>116</sup>

In at least two cases, the FTC used its merger review authority to prohibit noncompete restrictions in order to abate “competitive concerns” about labor markets arising from acquisitions. In 2021, dialysis services provider, DaVita Inc. proposed the acquisition of the University of Utah’s dialysis clinics.<sup>117</sup> The two competitors operated seven clinics in the Provo, Utah area; a third company ran the only other clinic.<sup>118</sup> The FTC reached a consent order with DaVita requiring it to sell some of its Provo Clinics to a fourth competitor and, among other things, prohibiting DaVita from enforcing noncompete agreements against University of Utah doctors.<sup>119</sup> Also, in 2021, the FTC declared 7-Eleven’s completed acquisition of the competing Speedway gas station anticompetitive.<sup>120</sup> The Commission issued an order

113. *Id.*

114. FTC, Concurring Statement of Commissioner Rebecca Kelly Slaughter and Chair Lina M. Khan, Regarding FTC and State of Rhode Island v. Lifespan Corporation and Care New England Health System, Commission File No. 2110031 (Feb. 17, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/public\\_statement\\_of\\_commr\\_slaughter\\_chair\\_khan\\_re\\_lifespan-cne\\_redacted.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf).

115. *Id.*

116. *Id.*

117. Press Release, FTC, FTC IMPOSES STRICT LIMITS ON DAVITA, INC.’S FUTURE MERGERS FOLLOWING PROPOSED ACQUISITION OF UTAH DIALYSIS CLINICS (Oct. 25, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis>.

118. Complaint at 12, DaVita Inc. and Total Renal Care, Inc., F.T.C. No. 211-0013, (Oct. 25, 2021).

119. Press Release, FTC, FTC APPROVES FINAL ORDER IMPOSING STRICT LIMITS ON FUTURE MERGERS BY DIALYSIS SERVICE PROVIDER DAVITA, INC. (Jan. 12, 2021), <https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-approves-final-order-imposing-strict-limits-future-mergers-dialysis-service-provider-davita-inc>.

120. Notice, Seven & i Holdings Co., Ltd.; Analysis of Agreement Containing Consent Orders To Aid Public Comment, 86 Fed. Reg. 38343, 38344 (July 20, 2021); *see also* Press Release, FTC, FTC ORDERS THE DIVESTITURE OF HUNDREDS OF RETAIL STORES FOLLOWING 7-ELEVEN, INC.’S

requiring 7-Eleven to divest itself of some operations and prohibiting the enforcement of noncompete agreements against franchisees, employees, and business partners of the divested stores.<sup>121</sup>

#### IV. ANALYSIS: ANTITRUST, LABOR MARKETS AND CONSUMER WELFARE

According to Sanjukta M. Paul, “[t]he central function of antitrust law is to allocate economic coordination rights,” and, moreover, the law allocates these rights arbitrarily.<sup>122</sup> This flows from antitrust law’s choice of the “firm” as the basic unit of competition analysis. That is, while independent contractors or firms may not coordinate prices with each other, prices may be coordinated within a “firm,” and a “firm” may even coordinate prices with independent contractors outside the firm (the latter is precisely the business model pioneered by rideshare apps).<sup>123</sup> Paul has cleverly termed this the “firm exemption” to antitrust law.<sup>124</sup> She argues that coordination rights should be treated as a public resource that should be allocated more fairly and efficiently.<sup>125</sup> Put more simply, it is unfair on its face to allow firms to engage in the equivalent of collusion as buyers in labor markets while prohibiting workers from colluding as sellers in the same market.

One possible response to the “firm exception” insight is symmetry: expand the labor exception to include all workers, not just those protected under collective bargaining statutes—for example, categorize gig workers as “employees” protected by the labor exemption.<sup>126</sup> But the exemption only *permits* organization.<sup>127</sup> It offers no direct protection from exploitation.<sup>128</sup> It only benefits workers who succeed in organizing and enjoying a strong

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ANTICOMPETITIVE \$21 BILLION ACQUISITION OF THE SPEEDWAY RETAIL FUEL CHAIN (June 25, 2021), \_\_\_\_\_ <https://www.ftc.gov/news-events/news/press-releases/2021/06/ftc-orders-divestiture-hundreds-retail-stores-following-7-eleven-incs-anticompetitive-21-billion>. On a related note, when the FTC decided to sue to block a merger for eliminating competition for inpatient services between healthcare providers, FTC Chair Khan and a commissioner wrote separately to assert that the merger would also reduce competition in the labor market. “Empirical research suggests that increased employer labor market power via hospital mergers can contribute to wage stagnation for skilled health care professionals.” FTC, *supra* note 112, at 2.

121. See sources cited *supra* note 118.

122. Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 380 (2020).

123. *Id.* at 390.

124. *Id.* at 380.

125. *Id.* at 400.

126. See Lao, *supra* note 23, at 1558–59 (advocating for this approach).

127. Susan Schwochau, *The Labor Exemptions to Antitrust Law: An Overview*, 21 J. LAB. RSCH. 535, 536 (2000).

128. See *id.*

bargaining position.<sup>129</sup> The “blue collar” workers who have traditionally unionized derive bargaining power not just from organization, but also from their specialized skills.<sup>130</sup> Automation has reduced employers’ need for skilled “blue collar” workers.<sup>131</sup> Gig workers and other service workers, who often work part-time and require little or no training, supervision, or equipment, are relatively easy to replace.<sup>132</sup> An antitrust exception may be of limited use to such workers.<sup>133</sup> Indeed, “unskilled” service workers in sectors like fast food and retail often qualify as employees who may organize under labor law; nonetheless, they are rarely unionized because of their limited bargaining power.<sup>134</sup>

Antitrust enforcement priorities have come a long way from the first cases’ challenges to collective bargaining as collusion. Those cases focused on workers obtaining market power as sellers of labor. Since then, several cases have found antitrust violations involving “monopsony”—firms’ market power as *buyers* of labor. Like the early antitrust cases that treated unions as cartels, the labor exemption focuses on the potential abuse of market power by organized workers as sellers in the labor market. This, of course, discourages organization by independent contractors. Monopsony analysis flips the perspective to focus on employers’ potential abuse of market power as buyers. This analysis has potential to protect independent contractors, non-organized employees, and organized employees alike.

Courts have long made clear that the antitrust laws police market power on the buy side (firms’ purchase of inputs) as well as the sell side (firms’ sale of products).<sup>135</sup> The Supreme Court has recently reiterated that view in the labor market context. In *NCAA v. Alston*, the Court struck down NCAA rules limiting the educational benefits (i.e., compensation) member schools may offer to student-athletes.<sup>136</sup> The Court referred to the NCAA as holding “monopoly (or as it’s called on the buyer’s side, monopsony) control in that

129. Lao, *supra* note 23, at 1583.

130. See Claus Schnabel, *Union Membership and Density: Some (Not So) Stylized Facts and Challenges*, 19 EUR. J. INDUS. RELS., Aug. 2012, at 11–12.

131. See Daron Acemoglu et al., *Automation and the Workforce: A Firm-Level View From the 2019 Annual Business Survey*, NAT’L BUREAU OF ECON. RSCH. 1, 8 (June 25, 2022), [https://www.nber.org/system/files/working\\_papers/w30659/w30659.pdf](https://www.nber.org/system/files/working_papers/w30659/w30659.pdf).

132. See Richard A. Epstein, *The Application of Antitrust Law to Labor Markets - Then and Now*, 15 N.Y.U. J.L. & LIBERTY 327, 383 (2022).

133. See *id.*

134. Hiba Hafiz & Ioana Marinescu, *Labor Market Regulation and Worker Power*, 90 U. CHI. L. REV. 469, 471 (2023).

135. See, e.g., *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948).

136. *Nat’l Collegiate Athletic Ass’n v. Alston*, 594 U.S. 69 (2021).

labor market.”<sup>137</sup> Regardless of the doctrinal legitimacy of monopsony analysis in labor markets, however, three factors make its continued prominence in enforcement actions uncertain. First, enforcement decisions are under the discretion of agency leadership, which changes with presidential administrations. As noted above, however, President Trump’s FTC has defied expectations by embracing the 2023 Merger Guidelines and pledging to prosecute abusive noncompete clauses (although it will probably abandon the blanket ban on them). Second, regardless of the composition and enforcement priorities of the agencies, enforcement actions are subject to challenge in federal courts, where former President Trump’s administration had unusual success in appointments.<sup>138</sup> Finally, those courts, including the Supreme Court, are currently hearing a wave of constitutional challenges to the administrative state.<sup>139</sup> In addition to those fundamental challenges, one firm brought a challenge (since mooted) that could invalidate the existing procedures for merger review. When the FTC challenged its completed acquisition of its leading competitor in the market for police surveillance equipment, Axon Enterprise brought constitutional challenges to the FTC’s administrative structure and the FTC and DOJ’s collaborative practice of allocating, or “preclearing,” merger reviews between the two agencies.<sup>140</sup> After the firm, Axon Enterprise, received a favorable ruling from the Supreme Court on jurisdictional issues,<sup>141</sup> the FTC dropped its challenge to the merger.<sup>142</sup> A future merger party could, and likely will, bring a similar challenge in the future.

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137. *Id.* at 86; *see also* United States v. Adobe Sys., Inc., No. 10 CV 1629, 2011 WL 10883994, at \*1, \*2 (D.D.C. Mar. 18, 2011) (prohibiting tech firms from agreeing not to compete for each other’s employees).

138. John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Fed. Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>.

139. At the time of this writing in February 2024, the Supreme Court is considering three such cases, *Loper Bright Enterprises v. Raimondo* (challenging the *Chevron* doctrine), *Securities Exchange Commission v. Jarkesy* (challenging the legitimacy of administrative law judges on Seventh Amendment and nondelegation grounds), and *Consumer Financial Protection Bureau v. Community Financial Services of America* (challenging the method of funding the CFPB under the appropriations clause). *See generally* John Kruzell, *Explainer: How Is the ‘War on the Admin. State’ Faring at the Supreme Court?*, REUTERS (Jan. 19, 2024, 12:23 PM), <https://www.reuters.com/legal/how-is-war-administrative-state-faring-supreme-court-2024-01-19/>.

140. *See* Axon Enter., Inc. v. FTC, 598 US 175 (2023) (reversing and remanding Axon Enter., Inc. v. FTC, 986 F.3d 1173 (9th Cir. 2021) and affirming and remanding *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021)).

141. *See id.* at 207.

142. Press Release, AXON, FED. TRADE COMM’N DISMISSES ANTITRUST COMPLAINT AGAINST AXON (Oct. 9, 2023), <https://investor.axon.com/2023-10-09-Federal-Trade-Commission-Dismissses-Antitrust-Complaint-Against-Axon>.

Labor monopsony cases have involved labor markets for uniquely skilled and sought-after workers, such as college sports athletes<sup>143</sup> and coaches,<sup>144</sup> and Silicon Valley tech workers.<sup>145</sup> Enforcement has not focused on employer market power in labor markets for rank-and-file workers. As this essay shows, regulators under the Biden Administration have taken some steps in that direction. This approach is attuned to current developments facing the labor economy. As the Supreme Court has recognized, each antitrust case requires “a careful analysis of market realities. If those market realities change, so may the legal analysis.”<sup>146</sup> “New economy” industries, unlike “heavier” legacy industries such as manufacturing and transportation, use workers who have no legacy of unionization and lack bargaining power.<sup>147</sup> Thus, at least part of the growth of these industries has been thanks to low labor costs. Their massive growth and concentration in recent years have given them the potential to hold those labor costs down, despite labor productivity, by using monopsony power in labor markets.

As noted above, the Democratic members of the FTC have argued that the FTC’s powers under the FTC Act are not limited to the protection of consumer welfare. Nor is the Sherman Act, as indicated by its application to monopsony and noncompete cases.<sup>148</sup> By promoting competition among buyers of labor or other inputs, antitrust law is likely to increase production costs and thereby increase consumer prices.<sup>149</sup> Most antitrust cases measure harm to consumer welfare because they involve sellers’ market power in product markets; the relevant anticompetitive harm *in such cases* is the increase in price above the competitive equilibrium.<sup>150</sup>

In some situations, labor monopsony may cause increased consumer prices, but such an effect is not necessary in order to make out a case under the Sherman Act; the anticompetitive harm lies in the suppression of competition on the buy side of the input market.<sup>151</sup> The Tenth Circuit has held that anticompetitive effects on input markets may or may not affect output markets, but the effects on input markets are sufficient to make out an

143. Nat’l Collegiate Athletic Ass’n v. Alston, 594 U.S. 69 (2021).

144. Law v. Nat’l Collegiate Athletic Ass’n, 134 F.3d 1010 (10th Cir. 1998).

145. United States v. Adobe Sys., Inc., No. 10 CV 1629, 2011 WL 10883994, at \*1, \*2 (D.D.C. Mar. 18, 2011) (invalidating no-poach agreements among Silicon Valley tech firms).

146. *Alston*, 594 U.S. at 2158.

147. *Id.*

148. See C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 2078, 2079 (2018).

149. Alan J. Meese, *Don’t Abolish Employee Noncompete Agreements*, 57 WAKE FOREST L. REV. 631, 708 (2022).

150. Hemphill & Rose, *supra* note 147, at 2080.

151. Hemphill & Rose, *supra* note 147, at 2087–88.

antitrust violation.<sup>152</sup> In another case, the Tenth Circuit interpreted Supreme Court monopsony jurisprudence to conclude that antitrust law protects input sellers from buyer market power “even when the anti-competitive activity does not harm end users.”<sup>153</sup> Weyerhaeuser had used its power as a monopsonist in the market for raw alder logs (an input used in the production of finished alder lumber) to manipulate their price.<sup>154</sup> Weyerhaeuser was not a monopolist in the market for finished lumber, however (apparently because other types of lumber provided close substitutes for finished alder), and thus, its conduct could not have increased consumer prices.<sup>155</sup>

More broadly, cases involving buy-side market power have found antitrust violations based on harm to suppliers without regard to the effect on consumers.<sup>156</sup> Furthermore, at least some courts have indicated that any benefit to consumers in the form of lower prices cannot be weighed in favor of the defendant if obtained through the exercise of buy-side market power against suppliers.<sup>157</sup>

Detractors are likely to argue that a focus on market power in labor markets, regardless of their effect on downstream prices (consumer welfare), deprives antitrust law of a unified basis in economic theory.<sup>158</sup> But, it’s not clear why it needs one. On their face, the antitrust statutes are hostile to unfairly obtained market power regardless of whether it accrues to buyers or sellers, and regardless of whether they affect product markets or labor markets. The Sherman and Clayton Acts adhere to no unified economic theory in their text or legislative history. Insisting that they do so in application is to hold them to a higher standard than other statutes. Like most legislation, they are the result of political compromise and Congress most likely understood that they could serve multiple theoretical and policy goals.

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152. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321–25 (2007).

153. *Telecor Commc’ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1133–34 (10th Cir. 2002).

154. *Werden*, *supra* note 18 at 735.

155. *See id.*

156. *See Telecor Commc’n’s, Inc.*, 305 F.3d at 1134 (as cited in ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 802 (4th ed. 2022)).

157. *See, e.g., United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017); *Hemphill & Rose*, *supra* note 147, at 2106 (as cited in ANDREW I. GAVIL ET AL., *supra* note 155, at 801–02).

158. *See, e.g., Wilson*, *supra* note 10, at 11, 13 (arguing that the FTC’s abandonment of the consumer welfare standard left businesses in the dark about how to comply with antitrust law).