BEGINNINGS OF AN ANTITRUST REVOLUTION?

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BEGINNINGS OF AN ANTITRUST REVOLUTION?

By Sandeep Vaheesan

President Biden made antitrust law — and reforming it — an important part of his administration's agenda. Nearly nine months after he issued a sweeping Executive Order on Promoting Competition in the American Economy, an assessment of the Department of Justice and Federal Trade Commission's activity reveals some progress. Both federal antitrust agencies have stepped up merger enforcement, including against vertical consolidations, but have done far less on unfair conduct. They have a great deal to do if they want to break with 40 years of policy and practice that have elevated short-term consumer interests above all else and made the open-ended rule of reason the default analytical framework of antitrust. The DOJ's enforcement and advocacy suggest a broader rethinking of antitrust may be afoot in the Biden administration. The DOJ has filed several criminal cases against employers for colluding against workers, challenged a merger that would likely harm workers, and deemed certain methods of competition unfair. If the agencies build on the DOJ's nascent steps, they could revive and expand a historical antitrust tradition that protects consumers, workers, suppliers, and competitors from powerful corporations and applies bright-line rules to mergers and unfair competitive practices.

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I. INTRODUCTION

The Biden administration has made antitrust law a key part of its agenda. Last July, the president issued a sweeping executive order entitled "Promoting Competition in the American Economy" that featured 72 directives and recommendations to his administration.[2] In a speech accompanying the executive order, Biden faulted Robert Bork for leading the courts and enforcers astray with his consumer welfare ideology.[3] In addition to committing the entire administration to antimonopoly enforcement and policymaking, the president urged the Department of Justice and the Federal Trade Commission to break with the 40-year bipartisan *status quo* of antitrust that has permitted and encouraged consolidation and monopolization across the economy and to restore the Rooseveltian (Theodore & Franklin) antitrust tradition of "capitalism working for people."[4]

Nine months later, a review of the DOJ and the FTC record reveals some progress, but a great deal that needs to be done in the remainder of Biden's time in the White House. As a threshold matter, the president and Senate Democrats have not prioritized staffing the antitrust agencies. The DOJ's Antitrust Division did not have a permanent chief until November 2021,[5] and the FTC does not have a fifth commissioner and is deadlocked on key matters.[6]

With this caveat on appointments, what have the federal antitrust agencies accomplished so far? Both have prioritized merger enforcement and challenged consolidations that likely would have been permitted or only remedied by previous Democratic and Republican administrations. At the same time, the ongoing merger wave shows the limits of more litigation alone and underscores the need to remake merger policy — an undertaking the DOJ and the FTC have initiated. In the conduct arena, the advances have been more limited. The DOJ has brought employer collusion into its criminal prosecution crosshairs, but otherwise the agencies have taken very few fresh steps to address unfair practices.

If the DOJ and the FTC want to break with the status quo, they will have to do much more. The DOJ's enforcement and advocacy suggest something broader may be in the works. The Antitrust Division has taken concrete steps to protect the interests of workers from employer and other forms of buyer power and advocated for reduced reliance on the traditional rule of reason.

If the agencies build on the DOJ's moves so far, what might a fundamental rethinking of antitrust look like? It should reject the two mainstays of antitrust over the past 40 years: the ideology of consumer welfare and the rule of reason as the default analytical standard. First, the agencies should aim to distribute power downward, expanding antitrust law's protected classes beyond consumers and explicitly bringing workers, suppliers, and rivals under the protection of the antitrust umbrella too. Second, they should reject the standards-like and resource-intensive rule of reason and endorse and enact bright-line rules that categorically prohibit certain practices, such as non-compete clauses for workers and exclusionary contracting by dominant firms.

II. REINVIGORATION OF ANTI-MERGER ENFORCEMENT

The federal antitrust agencies have stepped up anti-merger enforcement. While they have accepted remedies for some mergers, they have sought to enjoin several mergers in their entirety. An increase in merger enforcement alone is not novel given recent history. Past Democratic administrations appeared to be more aggressive in challenging mergers than their Republican counterparts.[7] What is notable now is the types of mergers and the grounds on which they are being challenged.

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2 Exec. Order on Promoting *Competition* in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

3 Joseph R. Biden, Jr., President of the United States, Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/.

4 *Id.*

5 U.S. Dep't of Justice, Meet the Assistant Attorney General, https://www.justice.gov/atr/staff-profile/meet-assistant-attorney-general.

6 See e.g. Bob Herman, *FTC Won't Study Pharmacy Benefit Managers*, Axios, Feb. 17, 2022, https://www.axios.com/ftc-wont-study-pharmacy-benefit-managers-pbm-16f433c6-a60a-4c61-9c28-a7577bb8514f.html.

7 See e.g. Jonathan B. Baker & Carl Shapiro, *Response: Evaluating Merger Enforcement During the Obama Administration*, 65 Stan. L. Rev. Online 28 (2012).

The DOJ and the FTC have revived vertical merger enforcement after a multidecade dormancy. Apart from the DOJ's unsuccessful suit against AT&T's acquisition of Time Warner in the Trump years,[8] litigation against vertical mergers was rare from the late 1970s through 2020.[9] In the past year alone though, the FTC challenged three vertical mergers[10] and successfully forced the merging parties in two of them to abandon their proposed consolidations.[11] Last month, the DOJ sued to stop UnitedHealth's acquisition of Change Healthcare, principally on vertical grounds.[12]

The DOJ seemingly broke new ground with its litigation against Penguin Random House's proposed acquisition of Simon & Schuster.[13] This deal would combine Penguin Random House (the largest publisher in the United States) with Simon & Schuster (the fourth-largest publisher), two of the so-called "Big Five" in book publishing.

The DOJ challenged the merger solely on buyer power grounds. It did not allege a theory of harm to readers. The DOJ argued the merger would harm authors in general and authors of anticipated best sellers specifically who would seek contracts with one of the Big Five publishers. If the Big Five became the Big Four, the DOJ alleged authors would be hurt by the diminished competition among publishers for their manuscripts and proposals, translating to reduced royalties and other forms of author compensation. This may be the first merger challenge in court that was based purely on harms to sellers of a good or service.[14]

The current merger wave, however, shows the limits of an enforcement-only strategy. In calendar year 2021, the DOJ and the FTC received more than 4,000 merger notifications.[15] This is a record number of merger filings. In fiscal year 2019, the agencies received 2,089 merger notifications and in 2013 a comparatively modest 1,326.[16]

This merger wave exposes a basic deficiency in current merger policy: It fails to deter consolidation. Even with ramped-up enforcement, corporations recognize that the agencies do not have the capacity to investigate and litigate even a small fraction of the problematic mergers that they confront. In September 2021, an FTC official conceded that her agency does not have enough staff to fully review every merger application they received within the 30-day statutory waiting period.[17]

So long as the agencies evaluate mergers using a complicated and costly rule of reason-like framework in which they attempt to predict the effects of a proposed consolidation,[18] corporations will feel confident they can pursue ever-more audacious mergers. They can count on the

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8 *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

9 Steven C. Salop, *Invigorating Vertical Merger Enforcement,* 127 Yale L.J. 1962, 1964 (2018).

10 Press Release, Fed. Trade Comm'n, FTC Sues to Block Lockheed Martin Corporation's $4.4 Billion Vertical Acquisition of Aerojet Rocketdyne Holdings Inc. (Jan. 25, 2022). https://www.ftc.gov/news-events/press-releases/2022/01/ftc-sues-block-lockheed-martin-corporations-44-billion-vertical; Press Release, Fed. Trade Comm'n, FTC Sues to Block $40 Billion Semiconductor Chip Merger (Dec. 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger; Press Release, Fed. Trade Comm'n, FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail (Mar. 30, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection.

11 Press Release, Fed. Trade Comm'n, Statement Regarding Termination of Lockheed Martin Corporation's Attempted Acquisition of Aerojet Rocketdyne Holdings Inc. (Feb. 15, 2022), https://www.ftc.gov/news-events/press-releases/2022/02/statement-regarding-termination-lockheed-martin-corporations; Press Release, Fed. Trade Comm'n, Statement Regarding Termination of Nvidia Corp.'s Attempted Acquisition of Arm Ltd. (Feb. 14, 2022), https://www.ftc.gov/news-events/press-releases/2022/02/statement-termination-of-nvidia-attempted-acquisition-of-arm-ltd.

12 Press Release, Dep't of Justice, Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare (Feb. 24, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare.

13 Press Release, Dep't of Justice, Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster (Nov. 2, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon.

14 Eriq Gardner, *In Targeting ViacomCBS' Simon & Schuster Sale, Biden's Antitrust Team Makes First Bold Move*, Hollywood Rep., Nov. 10, 2021, https://www.hollywoodreporter.com/business/business-news/viacomcbs-simon-schuster-sale-bidens-antitrust-team-makes-first-bold-move-1235045112/.

15 Fed. Trade Comm'n, Premerger Notification Program, https://www.ftc.gov/enforcement/premerger-notification-program.

16 Fed. Trade Comm'n & Dep't of Justice, Hart-Scott-Rodino Annual Report: Fiscal Year 2020 1-3, https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf.

17 Holly Vedova, Fed. Trade Comm'n, Adjusting Merger Review to Deal with the Surge in Merger Filings (Aug. 3, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

18 See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (2010) ("Market shares may not fully reflect the competitive significance of firms in the market or the impact of a merger. They are used in conjunction with other evidence of competitive effects."); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) ("That the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this analysis. Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness[.]").

DOJ and the FTC's inability to litigate more than a few mergers at a given time. Even with increased enforcement, anti-merger policy, at present, serves as little more than a minor impediment to overall corporate consolidation.

The agencies have recognized the shortcomings of current merger policy and initiated actions to strengthen the underlying rules. First, the FTC reinstituted a prior approval policy in merger complaints and settlements. Specifically, "the Commission returns now to its prior practice of routinely requiring merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged."[19] This will deter firms from pursuing the same or similar acquisitions that the FTC previously blocked or remedied.

Second, and more consequentially, the DOJ and the FTC have opened a review of their current merger guidelines.[20] They are examining and taking public comments on the 2010 DOJ/FTC Horizontal Merger Guidelines and the 1984 DOJ Non-Horizontal Merger Guidelines. While the outcome of this effort cannot be predicted, the agencies could issue radically more aggressive guidelines that reject the rule of reason-like framework of the current guidelines and adopt bright-line rules tied to market share and concentration, much as the first merger guidelines published by the DOJ in 1968 did.[21] Guidelines do not carry the force of law and do not bind the courts. The courts, however, have treated the guidelines as persuasive authority and adopted them into case law.[22] New guidelines that are rooted in statutory text, legislative history, and Supreme Court precedent, as well as reflecting the empirical research on mergers, could push the courts in a pro-enforcement direction on merger policy.

III. MOSTLY QUIET ON THE CONDUCT FRONT

In contrast to the enforcement and policymaking activity on mergers, the DOJ and the FTC have been less active in addressing unfair competitive conduct. The most notable change is the DOJ broadening the crosshairs of its criminal anti-collusion enforcement to target wage-fixing and other conspiracies among rival employers. The major developments on monopolization have been in cases that the Trump administration initiated. The relative inaction on the conduct front can be attributed, in part, to the delay in nominating and confirming Jonathan Kanter to lead DOJ's Antitrust Division and the ongoing deadlock between two Democrats and two Republicans at the FTC.

The DOJ has prioritized prosecution of collusion among employers. It has brought a series of criminal indictments against firms and managers involved in no-poach, wage-fixing, and other forms of horizontal collusion among rival employers.[23] For instance, the DOJ obtained an indictment against "a former manager of a major aerospace engineering company and five executives of outsource engineering suppliers . . . for participating in a long-running conspiracy to restrict the hiring and recruiting of employees among their respective companies."[24] Through these actions, the DOJ has put into effect a policy announcement made by the DOJ and the FTC at the tail end of the Obama administration. In the Antitrust Guidance for Human Resources Potential published in October 2016, the DOJ stated it "intends to proceed criminally against naked wage-fixing or no-poaching agreements" among employers.[25]

Anti-monopolization enforcement has been mostly quiet since President Biden took office on January 20, 2021. The FTC filed an amended complaint against Facebook,[26] after District Judge James Boasberg dismissed the original complaint the Trump administration had

19 Fed. Trade Comm'n, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25. 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

20 Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers.

21 U.S. Dep't of Justice, 1968 Merger Guidelines §§ 5-6.

22 Hillary Greene, *Guideline Institutionalization: The Role of Guidelines in Antitrust Discourse*, 48 Wm. & Mary L. Rev. 771 (2006). For a case that relied extensively on the analytical framework set out in the merger guidelines, see *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

23 E.g. Press Release, Dep't of Justice, Four Individuals Indicted on Wage Fixing and Labor Market Allocation Charges (Jan. 28, 2022), https://www.justice.gov/opa/pr/four-individuals-indicted-wage-fixing-and-labor-market-allocation-charges; Press Release, Dep't of Justice, DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry (July 15, 2021), https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care; Press Release, Dep't of Justice, Former Health Care Staffing Company Executives Charged in Superseding Indictment with Wage Fixing and Obstruction (Apr. 19, 2021), https://www.justice.gov/usao-edtx/pr/former-health-care-staffing-company-executives-charged-superseding-indictment-wage.

24 Press Release, Dep't of Justice, Six Aerospace Executives and Managers Indicted for Leading Roles in Labor Market Conspiracy that Limited Workers' Mobility and Career Prospects (Dec. 16, 2021), https://www.justice.gov/usao-ct/pr/six-aerospace-executives-and-managers-indicted-leading-roles-labor-market-conspiracy-1.

25 Dep't of Justice Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals 4 (2016), https://www.justice.gov/atr/file/903511/download.

26 Press Release, Fed. Trade Comm'n, FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate (Aug. 19, 2021), https://www.ftc.gov/news-events/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush.

filed in December 2020.[27] (In a January 2022 order, the judge allowed the FTC to take one of its two claims against Facebook to trial.[28]) The FTC, along with a group of states, won a monopolization case against Vyera Pharmaceuticals' CEO Martin Shkreli in January and obtained substantial monetary and equitable relief against him,[29] though once again this was a case that the previous administration had brought.[30] The only new FTC monopolization matter involved Broadcom and was settled: the chipmaker agreed to stop using exclusive dealing and similar arrangements with manufacturers of broadband and set top devices as well as service providers.[31]

The DOJ has brought one new monopolization case since President Biden took office. Last month, it filed suit to stop a merger-to-monopoly in the market for pebbled fiberglass reinforced plastic wall panels.[32]

While Chair Lina Khan raised the possibility of new uses of the FTC's Section 5 "unfair methods of competition"[33] authority in July 2021,[34] the FTC has not initiated any Section 5 cases or rulemakings so far. When the FTC had a Democratic majority last summer, it sought comment on the general problem of unfair contractual terms, as well as two petitions for rulemaking that the Open Markets Institute (where I work) and its allies had submitted concerning non-compete clauses and exclusive dealing and related agreements.[35] The FTC has not opened a rulemaking proceeding on either petition, nor did it commit to doing any unfair methods of competition rulemakings in the Statement of Regulatory Priorities that it submitted to the Office of Management and Budget last year.[36]

IV. A REVOLUTION THAT IS YET TO COME

The DOJ and the FTC have taken important steps to revive antitrust law against corporate power. What they have done so far is encouraging but does not constitute a qualitative shift from what came before. The agencies' record thus far bears a resemblance to the Clinton administration's increased antitrust enforcement against powerful corporations. In particular, the DOJ during the Clinton years stepped up anti-merger (and -monopoly) litigation,[37] but critically stuck with the ideological revolution that the Reagan administration had instigated in which the agencies deemed consumer interests to be paramount and, for example, treated mergers as generally neutral or beneficial. [38]

Yet, the Biden administration is only in its second year. It is premature to dismiss the possibility of something much bigger from the DOJ and the FTC. Indeed, enforcement and advocacy by the agencies, especially the DOJ, suggest not just more litigation but a potential philosophical and doctrinal reconstruction of antitrust in the coming years.

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27 *FTC v. Facebook, Inc.*, 2021 WL 2643627 (D.D.C. 2021).

28 *FTC v. Facebook, Inc.*, 2022 WL 103308 (D.D.C. 2022).

29 *FTC v. Shkreli*, 2022 WL 135026.

30 Press Release, Fed. Trade Comm'n, FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life-Saving Drug Daraprim (Jan. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin.

31 Press Release, Fed. Trade Comm'n, FTC Charges Broadcom with Illegal Monopolization and Orders the Semiconductor Supplier to Cease its Anticompetitive Conduct (July 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-charges-broadcom-illegal-monopolization-orders-semiconductor.

32 Complaint at 16-17, *United States v. Grupo Verzatec S.A.*, (N.D. Ill. 2022) (No. 22-01401).

33 15 U.S.C. § 45.

34 Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks of Chair Lina M. Khan on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591506/remarks_of_chair_khan_on_the_withdrawal_of_the_statement_of_enforcement_principles_re_umc_under.pdf.

35 Fed. Trade Comm'n, Solicitation for Public Comment (Aug. 5, 2021), https://downloads.regulations.gov/FTC-2021-0036-0022/content.pdf.

36 Fed. Trade Comm'n, Statement of Regulatory Priorities, https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

37 Antitrust Div. Workload Stats. FY 1990-1999, https://www.justice.gov/sites/default/files/atr/legacy/2009/06/09/246419.pdf.

38 See e.g. Joel I. Klein, Assistant Atty Gen., Dep't of Justice, Antitrust Div., The Importance of Antitrust Enforcement in the New Economy, Address to New York State Bar Association Antitrust Law Section Program (Jan. 29, 1998) ("In keeping a watchful eye on the marketplace, we are concerned with consumers, not competitors, and even if it's boring to see the same person win over and over again, as long as those victories are based on economic efficiency, it will be good for consumers and the antitrust enforcers ought to stay out of the way."); U.S. Dep't of Justice & Fed. Trade Comm'n, 1997 Horizontal Merger Guidelines § 4 ("[M]ergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction. Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies.").

The DOJ has made buyer power a target of its enforcement program. In the past year, the DOJ filed at least five criminal cases against firms, executives, or managers for colluding against their workers. Even though the Obama administration announced a plan to criminally prosecute employer-side collusion, little came of this until 2021. The DOJ has also targeted buyer power in its merger enforcement. It challenged Penguin Random House's acquisition of Simon & Schuster solely on buyer power grounds, alleging the consolidation would harm authors.

An amicus brief the DOJ filed in a National Labor Relations Board matter is another sign of a possible philosophical revolution. In the Atlanta Opera case, the NLRB will decide the test for independent contractors — which workers enjoy genuine independence and are not subject to employment-like control?[39] The DOJ filed a brief articulating the relationship between antitrust and labor law and urged the NLRB to clarify and narrow its test for independent contractors. The DOJ noted that workers who are classified or misclassified as independent contractors lose the right to engage in concerted activity under the National Labor Relations Act and that their concerted activity may even violate the antitrust laws. Importantly, the DOJ argued that firms that misclassify their workers obtain a critical — and unfair — competitive advantage over rivals that comply with labor and employment law.[40] The DOJ's argument and its use of the "unfair competition" frame represent a different approach to antitrust law, which has long treated "competition" as something categorically good and failed to explicitly distinguish among different forms of competition.[41]

The DOJ has also taken preliminary steps to rely less on the rule of reason. In the case against UnitedHealth Group's acquisition of Change HealthCare, the DOJ alleged that the merger is presumptively illegal under Supreme Court precedent (not only the Horizontal Merger Guidelines) because it would create an unduly high level of concentration in the already concentrated market for electronic data interchanges (used to process insurance claims filed by doctors and hospitals).[42] The DOJ once again invoked Supreme Court precedent against horizontal mergers that "significantly increase concentration in an already concentrated market" in the suit to stop Grupo Verzatec's acquisition of Crane Composites, a rival producer of pebbled fiberglass reinforced plastic wall panels.[43] Although this "structural presumption" announced by the Supreme Court in 1963 remains good law,[44] the agencies, in recent times, have typically eschewed it when challenging mergers among competitors.

The DOJ has also supported simpler legal tests in its advocacy work. In a statement of interest filed in a state court case concerning the enforcement of non-compete clauses against anesthesiologists, the DOJ argued the restraints may be *per se* illegal horizontal market allocation agreements in effect and noted that some restraints (formally subject to the rule of reason) may be condemned under an abbreviated "quick look, or truncated rule-of-reason analysis" test.[45]

V. WHAT MIGHT AN ANTITRUST REVOLUTION LOOK LIKE?

If the agencies build on the DOJ's nascent moves described above, what might a different antitrust regime look like? What would be its philosophical orientation and its doctrines and rules? I offer one possible alternative vision of antitrust law here that would generalize the steps the DOJ has taken over the past year.

A new antitrust should break with the forty years of consumer welfare. The Supreme Court in 1979 described the Sherman Act as "a consumer welfare prescription." [46] This was a radical reinterpretation and narrowing of the Sherman Act's historical purpose. In prior decades,

39 Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party, *The Atlanta Opera, Inc.* (NLRB) (Case 10-RC-276-292), https://www.justice.gov/atr/case-document/file/1470846/download.

40 *Id.* at 7.

41 See e.g. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) ("The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.").

42 Complaint at 37, *United States v. UnitedHealth Group Inc.*, (D.D.C. 2022) (No. 22-00481).

43 Complaint at 10, *United States v. Grupo Verzatec S.A.*, (N.D. Ill. 2022) (No. 22-01401).

44 *United States v. Philadelphia National Bank*, 374 U.S. 321, 363-64 (1963). Courts have applied the presumption when the antitrust agencies have used it. E.g. *Polypore International, Inc. v. FTC*, 686 F.3d 1208, 1214 (11th Cir. 2012).

45 Statement of the Interest of the United States at 5-7, *Beck v. Pickert Medical Group*, P.C. (2d Jud. Dist. Ct. Nev.) (No. CV21-02092), https://www.justice.gov/atr/case-document/file/1477091/download.

46 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Robert H. Bork, The Antitrust Paradox 66 (1978)).

the Court had spoken of the Sherman Act as "a comprehensive charter of liberty"[47] and stated the Sherman Act "does *not* confine its protection to consumers, or to purchasers, or to competitors, or to sellers."[48]

In remaking antitrust, the agencies should revive this older ideology in which consumers, sellers, and even competitors are entitled to protection of the antitrust. This philosophy prizes the broad dispersal of power in the economy.[49] The protection of sellers would not be a radical expansion of the law and has been endorsed by mainstream antitrust scholars.[50] Yet, treating sellers of goods and services, including workers, as equally deserving of antitrust protection as consumers would be a departure from present doctrine[51] and enforcement practice[52] in which sellers' interests have been subordinated to consumers' interests or ignored entirely. The DOJ's enforcement actions against employer collusion and suit against a merger solely on buyer power grounds *vis-à-vis* workers are important initial steps.

For antitrust law to explicitly protect competitors (from certain forms of competition) would be a major break with the *status quo*. The familiar mantra that antitrust law is concerned with "the protection of competition, not competitors"[53] disclaims competitors as a protect class of antitrust. Yet, in practice, the courts do protect competitors from unfair methods of competition and award them treble damages and injunctive relief if they are injured by, and lose profits due to, a monopolistic rival's exclusive dealing[54] or predatory pricing.[55] They, however, are not entitled to relief if harmed by a rival's superior products or better terms. The law, under the surface, already distinguishes among different forms of competition, proscribing some while permitting others. The agencies, building on the DOJ's amicus brief in *Atlanta Opera*, should recognize these existing norms of fair competition expressly and acknowledge that competitors are entitled to antitrust protection from unfair methods of competition.[56]

A new antitrust should be based on bright-line rules as opposed to the open-ended rule of reason. Many forms of business conduct should be subject to per se rules and presumptions of illegality. The DOJ and the FTC should break with the rule of reason that often demands that enforcers and courts engage in broad social cost-benefit analysis and make quasi-legislative judgments.[57] Under a rules-based approach, the DOJ and the FTC would not have to demonstrate future or past harm to consumers or other groups to establish the illegality of a merger or monopolistic practice. They would instead establish illegality based on bright-line rules similar to speed limits, instead of an effects-based approach akin to evaluating a totality of the circumstances to decide whether a driver was going "too fast."

If the agencies adopt this rules-based vision, their new merger guidelines should feature bright-line rules tied to market share and market concentration figures. Rather than determining the legality of a merger based on forecasting future price and non-price effects, the agencies in their new guidelines should identify illegal mergers based on market shares and market concentration numbers, heeding the Supreme Court's warning to "be alert to the danger of subverting congressional intent [in enacting Section 7 of the Clayton Act] by permitting a too-broad economic investigation."[58] The DOJ announced such bright-line rules in the 1968 Merger Guidelines[59]

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47 *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

48 *Mandeville Island Farms, Inc., v. American Sugar Crystal Co.*, 334 U.S. 219, 236 (1948) (emphasis added).

49 Sanjukta Paul & Sandeep Vaheesan, *Make Antitrust Democratic Again!*, Nation, Nov. 19, 2019, https://www.thenation.com/article/economy/antitrust-monopoly-economy/.

50 *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.); C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 Yale L.J. 2078 (2018).

51 For instance, the Supreme Court, at least implicitly, weighing injuries to workers from a restraint of trade against the purported benefits of the restraint to consumers. *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

52 Eric A. Posner, How Antitrust Failed Workers 32-33 (2021).

53 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

54 ZF *Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012).

55 *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005).

56 Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 Wm. & Mary L. Rev. (forthcoming 2022).

57 The Supreme Court recognized the challenges of the rule of reason 50 years ago. The Court wrote: If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 611-12 (1972).

58 *Philadelphia National Bank*, 374 U.S. at 362.

59 See e.g. U.S. Dep't of Justice, 1968 Merger Guidelines §§ 5-6 (laying out market share and concentration tests used to determine whether a horizontal merger would be challenged).

A rules-based approach would put companies on notice about what mergers would be challenged and channel their growth strategy in a different direction. Anti-merger law would have a deterrent effect that it has sorely lacked in recent decades. Bright-line merger rules would, moreover, encourage companies to pursue growth through internal expansion in lieu of growth through mergers and acquisitions.

In addition to bright-line rules for mergers, the agencies should revive and establish per se rules and presumptions for a range of exclusionary and predatory competitive practices. For instance, they should vigorously enforce the per se rule against tying by firms with "market power," a modified per se rule that the Supreme Court has repeatedly affirmed,[60] but the agencies have hardly used in practice.[61]

Critically, the FTC is not confined by judicial interpretations of the Sherman and Clayton Acts and has broad latitude to institute bright-line rules for a range of competitive practices. Using its Section 5 "unfair methods of competition" authority,[62] it can prohibit practices that do not necessarily violate the two principal federal antitrust statutes.[63] For instance, the FTC should prohibit non-compete clauses for all workers and exclusionary contracting by dominant firms and restrict below-cost pricing. As with strong anti-merger policy, these rules would channel business strategy toward fair treatment of trading partners, investment, and research and development.

The Robinson-Patman Act should be revived under a new antitrust regime that protects sellers and competitors. The FTC and the DOJ effectively stopped enforcing the law in the 1970s.[64] The extended non-enforcement of this New Deal statute reflects the consumerist orientation of antitrust. Critics have alleged that Robinson-Patman protects competitors (not competition) and is out of sync with prevailing antitrust thinking that centers consumer interests.[65]

Yet, under a fair competition philosophy, the Robinson-Patman Act is a sensible and sound statute that restricts certain methods of competition.[66] A clear analog can be drawn between the DOJ's position in the *Atlanta Opera* case and the Robinson-Patman Act: Just as firms should not be allowed to gain a competitive advantage by misclassifying their workers, they should not be permitted to gain an edge by squeezing their suppliers and obtaining special concessions from them. While the Robinson-Patman Act requires clarification through agency guidance or legislation, the DOJ and the FTC should start resurrecting it — and an important bright-line rule — by enforcing the old *Morton Salt* inference of illegality against price discrimination.[67]

VI. CONCLUSION

The DOJ and the FTC have increased anti-merger enforcement and targeted more than just mergers among competing sellers, which comprised the conventional focus of antitrust enforcement against mergers. On conduct, the DOJ has made criminal prosecution of employer collusion a priority. The monopolization front, however, has been largely quiet and not seen any new court cases under the Biden administration. What the agencies have done so far does not constitute a clean break with the antitrust orthodoxy of the past 40 years. They have much more to do to enact "new rules of monopoly."[68]

Yet, the DOJ's enforcement and advocacy suggest fundamental reform may be afoot. In making the protection of workers and other sellers of goods and services a priority, speaking in the language of fair competition, and calling for greater reliance on per se rules and presumptions of illegality, the DOJ may be laying the groundwork for a qualitatively new antitrust.

60 *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 42-43 (2006); *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984)

61 Max M. Miller, *Untying the Knots of the Digital Economy: It's Time for Enforcers to Resurrect a Pillar of Antitrust*, 19 Price Point 3 (2019).

62 15 U.S.C. § 45.

63 *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454-55 (1986).

64 Ryan Luchs et al., *The End of the Robinson-Patman Act? Evidence from Legal Case Data*, 56 Mgmt. Sci., 2123, 2125-26 (2010).

65 See generally Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125 (2000).

66 Brian Callaci & Sandeep Vaheesan, *How an Old U.S. Antitrust Law Could Foster a Fairer Retail Sector*, Harv. Bus. Rev., Feb. 9, 2022, https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector.

67 *FTC v. Morton Salt Co.*, 334 U.S. 37, 45 (1948).

68 Leah Nylen, *The New Rules of Monopoly*, Politico, Dec. 27, 2021, https://www.politico.com/news/2021/12/27/monopoly-antitrust-new-rules-tech-525161.

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