ENDING MONOPOLIZATION VIA MERGERS: HOW AND WHY TO RESTORE LEGISLATIVE INTENT BEHIND THE U.S. ANTI-MERGER LAWS

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Mergers have been a persistent tactic by which powerful companies grow their power and monopolize markets. In passing and amending the Clayton Act, Congress intended to prevent monopolization, and in order to reach that goal, limited mergers and corporate takeovers –particularly those involving dominant firms. Congress believed these laws barring monopoly through mergers would create an economy in which firms could enter industries with relative ease and, once there, join a multitude of other firms that would joust in order to best serve their customers and communities. For many decades, however, pro-monopoly economists, lawyers and policymakers have worked to circumvent the functioning of the laws intended to prevent monopolization through mergers and, in doing so, to undermine the will of Congress in passing these laws. In this article, I examine in part the legislative and judicial record supporting the strong enforcement of the anti-merger laws – legislative intent that has been largely cast aside over the past half-century. To restore the intent behind the anti-merger laws – and ultimately to help deconcentrate the economy – I propose a significant shift in our anti-merger enforcement and education that would direct agencies and judges to restrict industrial concentration and support open, democratic markets.

I. INTRODUCTION

Sometime in 2023, the two U.S. federal antitrust agencies, the Federal Trade Commission and the Department of Justice, will issue new guidelines that will govern their approach to analyzing and challenging corporate mergers. The guidelines, the first vision of which were published in 1968 and last updated 13 years ago, have served as rulebooks for the agencies, businesses, and courts as to when a merger or acquisition runs afoul of the antitrust laws.[2]

The 1968 guidelines reflected what was, at the time, the widely-accepted purpose of and intent behind the anti-merger laws: To arrest corporate concentration in its incipiency well before a corporation could gain significant economic and political power. Beginning in the early 1980s, successive versions of the guidelines created an increasingly permissive environment for corporations intending to increase their size and market power through dealmaking. For the past 40 years, this reliance on the merger guidelines at various levels of our regulatory structure has contributed to unprecedented levels of corporate concentration, harming industries and the overall economy.

The new, soon-to-be published guidance will very likely return in principle to those original 1968 guidelines. The heads of both agencies - Lina Khan at the FTC and Jonathan Kanter at the DOJ's antitrust division - have suggested that corporate mergers have led to significant economic harm,[3] and Kanter has questioned whether merger enforcement has been fully faithful to the text of the Clayton Act, including the tendency for mergers to lead to monopoly.[4] Indeed, academic and industrial research has shown that wave after wave of corporate tie-ups have unduly concentrated industries, cost untold thousands of jobs, left industries vulnerable to economic and production shocks, and concentrated vast amounts of political power in the hands of an increasingly small number of mega-firms.

The new guidelines will almost certainly help tamp down the current merger wave and prevent further industrial consolidation. But at this point, after four decades of rapid consolidation, toothless enforcement and pro-bigness court precedents, more is needed to undo the persistent march toward monopolization driven by corporate mergers.

Repairing our anti-merger regime and the economy-wide monopoly power that has resulted from unchecked mergers requires action at all three levels of our enforcement structure. The antitrust agencies must issue guidelines that are far more restrictive of mergers and enforce the law according to those guidelines, past Supreme Court precedent, and original legislative intent. Congress should work to support the work of the enforcement agencies, including holding high-profile hearings on pending mergers and market power, and considering ways to amend the anti-merger laws that restate and clarify Congress' original intent to arrest industrial consolidation in its incipiency. And while the merger guidelines will do significant work in educating federal judges on the standards by which they should judge the legality of mergers, civil society groups critical of monopoly power should launch a program to educate generalist judges on the harmful effects of corporate mergers and Congressional intent in passing the anti-merger laws.

This refocusing of public policy should of course include what are commonly called "mega-mergers," in which two already-powerful firms combine, often giving the new company significant new market share, the ability to foreclose rivals, and so on. Under the Biden administration, this is largely happening. But in order to truly adhere to original Congressional intent, and to stop the slow march of industrial consolidation throughout the economy, policymakers and enforcers must also focus on mergers and transactions that are today often overlooked or difficult to enforce. Policymakers should ban the smaller acquisitions by powerful companies that, brick by brick, build and reinforce the monopoly titans that dominate industries today. They should investigate and when necessary prevent mergers that create the tendency toward monopoly power in an industry that the Clayton Act intends to prohibit. And public merger policy should be deeply critical of vertical and conglomerate mergers and their ability to consolidate economic power.

2 For a detailed history of the federal antimerger guidelines, see "Rolling Back Corporate Concentration: How New Federal Antimerger Guidelines Can Restore Competition and Build Local Power," Stacy Mitchell and Ron Knox, Institute for Local Self-Reliance, June 2022.

3 "Statement of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement," Docket No. FTC 003-2022 (stating, in part, that "Evidence suggests that decades of mergers have been a key driver of consolidation across industries, with this latest merger wave threatening to concentrate our markets further yet…industry consolidation and weakened competition have 'den[ied] Americans the benefits of an open economy,' with 'workers, farmers, small businesses, and consumers paying the price.'"(quoting President Biden)).

4 Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines," U.S. Department of Justice press release, Jan. 18, 2022.

II. RECENT HISTORY vs. LEGISLATIVE INTENT

It's a story that's been told many times: For the past half-century, policymakers and judges, led astray by corporate interests, have embraced bigness through mergers largely for their supposed ability to create economic "efficiencies" in these combinations of companies – a framework commonly called the "consumer welfare standard."[5] The economy-wide corporate concentration that resulted from adherence to this standard has reduced many industries to oligopoly structures in which just three or four companies share monopoly power and monopoly rents in an industry.

The examples of such industries in which mergers have flattened their structures are too numerous to name in this article. But a few examples stand out. Because of a series of unchallenged mergers, we've gone from 10 nationwide airlines in 2000 to just four today - and only three with a significant number of international routes.[6] Mergers have allowed AT&T to reclaim the companies it spun off when its monopoly was broken up in the 1980s and is now an even larger communications conglomerate.[7] Today, just three companies provide nationwide wireless service after T-Mobile was allowed to buy Sprint in 2020.[8] Mergers have left just three or four companies to dominate meatpacking in America.[9] Supermarkets have gone through multiple waves of mergers; in 2019, just four companies accounted for an estimated two-thirds of all grocery sales, with a merger between giants Kroger and Albertsons pending.[10] The list goes on.

Smaller, vertical and conglomerate mergers have also contributed to monopoly dominance. These deals have often gone unchecked or unchallenged by the antitrust agencies, or courts have declined to block the mergers after enforcers intervened.[11] Google, for example, has built its online dominance through a series of smaller acquisitions – DoubleClick, AdSense and AdMob in online advertising, Waze in digital mapping, YouTube in online video, and so on.[12] Amazon similarly has buttressed its online retail monopoly through vertical and conglomerate mergers, including takeovers of supermarket Whole Foods, warehouse robotics firm Kiva Systems, several voice technology startups to create its voice assistant Alexa, among many others.[13] A significant FTC study, published in 2021, showed that the five largest tech firms had acquired 616 total small companies and startups in the decade between 2010 and 2019 that they were not required to report to the antitrust agencies. While the report did not comment as to the effect of these acquisitions on the firms' online dominance, it noted that many of the acquisitions involved technology applications in spaces where the Big Tech firms are active, including mobile technologies, business applications, content, etc. A Congressional investigation found that the Big Tech companies often bought out smaller firms to "neutralize a competitive threat" or kill the acquired companies entirely.[14]

Similarly, vertical mergers have contributed to significant monopoly issues even though the enforcement agencies in recent decades have generally viewed such mergers as either benign or efficiency-enhancing. The vertical mergers between retail pharmacy CVS, health insurer Aetna and pharmacy benefit manager Caremark has given the combined company, CVS Health, the power to abuse smaller, rival drug stores with impunity.[15] The *Live Nation/Ticketmaster* vertical merger has been so damaging, the Justice Department stepped in to punish the combined company for abusing its power.[16]

5 "The Profound Nonsense of Consumer Welfare Antitrust," Sandeep Vaheesan, The Antitrust Bulletin, 2019.

6 "The runway to the final four," CNN Money, infographic, date unknown.

7 "How AT&T conquered all forms of communication after the government forced it to break up," Matthew Stuart, Business Insider, Mar. 5, 2018.

8 "T-Mobile completes merger with Sprint," Arriana McLymore and Diane Bartz, Reuters, April 1, 2020.

9 "Monopolies in Meat: Endangering Workers, Farmers, and Consumers," Ron Knox, The American Prospect, May 4 2020.

10 "The Economic Cost of Food Monopolies: The Grocery Cartels," Food & Water Watch issue brief, Nov. 2021.

11 For example, the courts denied the Justice Department's recent attempt to block the vertical *AT&T/Time Warner merger.*

12 See, for example, "The acquisitions that made Google a search monopoly," Nicolás Rivero, Quartz, Oct. 20, 2020.

13 "The acquisitions that made Amazon the giant it is today," Qayyah Moynihan and Alberto Payo, Business Insider, June 30, 2019 (Amazon has since made or is proposing a number of other significant acquisitions, including its purchase of film and television studio MGM.

14 "Investigation of Competition in Digital Markets," Majority staff report and recommendations, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary of The House of Representatives, released Oct. 2020.

15 "How the FTC Protected the Market Power of Pharmacy Benefit Managers," Stacy Mitchell and Zach Freed, ProMarket, Feb. 19, 2021.

16 "Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster," Department of Justice press release, Dec. 19, 2019.

A. Congress' Intent — Preventing Monopolization and Its Harms

These acquisitions, large and small, were permitted for myriad reasons. Many were permitted based on promised "efficiencies." Others fell below reporting thresholds under current law. Regardless, it is clear from the legislative record that, when debating and passing the anti-merger laws, Congress' primary concern with corporate mergers was not the potential for rising prices, and they said nothing about the potential for mergers to create any kind of economic efficiency.[17] Instead, lawmakers rightfully worried that the country's permissiveness of corporate mergers was undermining the intent of the Sherman Act to prevent monopolization and all of its harms, specifically the dangerous accumulation of political and economic power in the hands of a few large corporate actors. By preventing those harms, Congress aimed to create a dispersed economy that ensured vitality in every region, with ample opportunity for small businesses to open and thrive.

In a speech to Congress as it debated whether to strengthen the anti-merger provisions of the Clayton Act in 1949, Rep. Emmanuel Celler explained the motivation behind closing loopholes that had allowed waves of corporate mergers across industries. He named industry after industry, including cigarettes, soap, spirits and others, in which monopoly power was accumulated not through mega-mergers between corporate giants, but through the gradual growth of market share via dozens of smaller acquisitions. A stronger anti-merger law that would arrest many corporate mergers "will help to the extent that they will put the brakes upon the evil, the evil tendency of the big fellows to swallow up the little fellows," Celler said.[18]

While lawmakers debating the Clayton Act amendments were rightly concerned with mergers between horizontal competitors, the record also provides evidence that Congress was concerned with other kinds of corporate acquisitions that contributed to a firm's overall power. Lawmakers had cited a series of takeovers that added to the monopoly power of the United States Steel, for example. These cited acquisitions included steel drum makers, a wire cloth fabricator, a cement company, an oil well equipment firm and so on. "This is an example of 'vertical' acquisitions, in which the giant corporation gobbles up its suppliers and customer firms," Senator Estes Kefauver said. In citing both vertical and horizontal mergers, the record is clear that Congress intended the anti-merger laws to apply to a wide swath of corporate dealmaking, and if the law was not amended so, "the theory of competition will have been relegated to the limbo of well-intentioned by ineffective ideals."[19]

The 1950 Celler-Kefauver Act corrected a (now, in retrospect) vast oversight in the Clayton Act – that the Clayton Act's prohibition on mergers only applied to the purchase of a company's shares, rather than of assets. But that was not all the updated anti-merger law hoped to accomplish. Lawmakers in passing the act "built a strong record that the act was aimed at prohibiting merger-induced structural changes falling far short of actual monopoly."[20] The specific change in the standard, to prevent mergers whose effect "may be" to substantially lessen competition, reflected Congress' intent that the law apply to all mergers that resulted in industrial concentration. "The law was designed to forestall anticompetitive mergers in their incipiency, before their adverse effects were experienced or even known with certainty."[21] Crucially, in passing the anti-merger amendments to the Clayton Act, Congress also believed that by arresting anti-competitive corporate mergers, concentrated industries could be effectively de-concentrated through the entry of new competitors to a market.

B. Supreme Court Precedent – Restating Congressional Intent

Following passage of the Celler-Kefauver Act, the Supreme Court decided a series of merger-related antitrust cases that restated lawmakers' intent in passing the law, and created a body of jurisprudence that backed legislative intent to stop the growth of monopoly power in its incipiency. In the most noteworthy and precedential of these decisions, the court made clear its intent to uphold the will of Congress in preventing the rise of monopoly power in its incipiency by blocking mergers that concentrate markets. The Court during this period was crystal clear in its view of, and respect for, Congressional intent. By targeting not just the biggest horizontal mergers, but also smaller buyouts, vertical deals and conglomerate mergers, "Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency, before that trend developed to the point that a market was left in the grip of a few big companies," Justice Hugo Black wrote for the Court's majority in *Von's Grocery*.[22]

17 "Antitrust's Looser Guidelines; New Rules Breed Wasteful Mergers," Herman Schwartz, The New York Times, May 19, 1985 (the former Senate Antitrust Subcommittee chief counsel wrote that "This preoccupation with economic efficiency ignores Congressional intent and judicial precedent. The legislative history of the antitrust laws contains almost no mention of efficiency, production or price.").

18 Transcript of House Judiciary Committee hearing "Amending Sections 7 and 11 of the Clayton Act," 81st Congress, First Session, May 19, 1949.

19 *Ibid*. p. 17 (Rep. Celler quoting Kefauver from a prior Senate hearing on the bill).

20 "The Celler-Kefauver Act: The First 27 Years," House Judiciary Committee study, 95th Congress, Second Session, Dec. 1978.

21 *Ibid*. p. 18.

22 *United States v. Von's Grocery Co.*, 348 U.S. 270, (1966).

In *Brown Shoe, Von's Grocery, Pabst*, and other cases, the Court built a body of jurisprudence against mergers that pushed industries toward concentration, including those between suppliers and sellers. It did this by repeatedly lifting the voices of lawmakers in enacting the 1950 anti-merger act. Justice William Brennan wrote in Brown Shoe: "Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum."[23] Meanwhile, the Court's decision in *Philadelphia National Bank* created case law around mergers-to-oligopoly in which the industry and geographic market tended toward concentration.[24]

In these decisions, the Court saw concentration not as an isolated incident, but as a cascade, in which concentration begets concentration in an industry and throughout a supply chain. If the intent of the anti-merger laws was to prevent monopolization, that required law enforcers and courts to prevent those first instance mergers that could trigger a chain reaction of concentration, a cascade of corporate tie-ups that would eventually lead to the pooling of immense power. The Court time and again took an originalist view of the anti-merger laws and agreed that mergers, even those that resulted in a relatively small share of a market, must be prevented in order to avoid an industry tumbling into corporate dominance. These decisions not only ensured that markets remained open, diverse and democratic, but they also demanded that courts interpret the law in accordance with Congressional intent, not according to their whims or political viewpoints.

Combined, assertive agency enforcement and instructive Supreme Court decisions served to keep most industries from further concentrating, and allowed for entry sufficient enough to deconcentrate markets that had come to harbor monopoly power post-World War II. "Strict public policy toward horizontal mergers has…prevented merger-induced increases in market concentration in many industries, thereby opening opportunities for deconcentration to occur."[25]

The midcentury U.S. dairy industry remains a prominent example of an industry in which strong anti-merger policy led to deconcentration. After years of rapid consolidation, the FTC sued the four largest dairy companies in 1956, challenging a series of prior acquisitions. After those cases and others in the industry, the average number of acquisitions by the eight largest dairies dropped from 71 a year between 1950 and 1955, to just three per year after 1963. "I am confident that it," the FTC's merger policy in the industry, "has encouraged the survival and growth of many small and medium size businesses which otherwise would not have been able to compete effectively with the biggest dairies," former FTC chief economist Willard Muller reported to Congress.[26] Dairy was among several industries that experienced a period of deconcentration in the 1950s and 1960s following the passage of the Celler-Kefauver amendments, perhaps most notably including the U.S. steel industry. "I cannot emphasize too strongly the central role which antimerger policy has played in permitting deconcentration in some industries and preventing further increases in others," former FTC Chairman Paul Rand Dixon told lawmakers.[27]

C. Pro-Bigness Merger Policy

By the late 1970s and early 1980s, legal scholars and others aligned with corporate power forcefully shifted federal merger policy against the democratic will of Congress in passing the anti-merger laws by convincing policy makers, including President Ronald Reagan, that antitrust enforcement should only be used against the very largest horizontal mergers.[28] Pro-monopoly actors from the then-burgeoning cottage industry of "law and economics," including the conservative economist Henry Manne, began hosting privately-funded seminars for federal judges to steer them away from court precedent and democratic intent when judging antitrust cases, including mergers.[29] Those who helped undermine U.S. anti-merger policy - along with many other economic policies in place since the mid-20th century - found little resistance. Broadly, there was a general acceptance among policymakers, Congress and the public that big was indeed better, and that the era of worrying about the dangers of monopoly was behind us.

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23 *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

24 *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

25 "The Celler-Kefauver Act: The First 27 Years," p. 21.

26 "Concentration Trends and Merger Activity in U.S. Manufacturing Industries Since World War II," Willard F. Mueller, March 1967 (presented during the hearing, "Status and Future of Small Business in the American Economy, Select Committee on Small Business, United States Senate, 90th Congress, First Session.

27 Testimony of Paul Rand Dixon, "Status and Future of Small Business in the American Economy, Select Committee on Small Business, United States Senate, 90th Congress, First Session.

28 A Richard Posner & George Stigler Memo: "Throttling Back on Antitrust: A Practical Proposal for Deregulation," ProMarket, April 28, 2022 (the memo, pushed for the abolition of prohibitions against vertical and conglomerate mergers; although that has never become official enforcement policy, such prohibitions have largely occurred in practice).

29 "Ideas Have Consequences: The Impact of Law and Economics on American Justice," Elliott Ash, Daniel L. Chen, and Suresh Naidu, National Bureau of Economic Research working paper series, February 2022 (finding that, "On antitrust, the post-Manne judges tend to make pro-merger decisions, which would clearly benefit the business interests funding the program.").

Such views of bigness and the benefits of corporate mergers were not universal; influential antitrust thinkers pushed back against the turning tide, to little avail. In 1981, former FTC commissioner (and future chairman) Robert Pitofsky explained to Congress the risk of permitting mergers that consolidated industries, but didn't result in a big market share or an oligopoly structure. "[W]hen you clear one of these mergers at 15 or 20 percent, that is not the only consequence of the decision," Pitofsky said. "Because if you clear 20 percent, today, there is a domino effect."[30] By permitting one smaller merger, he explained, the agencies must then approve another similar merger in the same industry, and another, until concentration in the industry eventually reaches oligopoly levels. And if the agency permits such mergers in one industry, it only makes sense that they must permit similar mergers in every other industry. "So we are talking about a major change in economic policy," he said.[31]

III. THREE PROPOSALS FOR REDUCING HARMFUL MERGERS

And so it was. Today, perhaps more than any other moment in the past half-century, policy makers and indeed the American people have an opportunity to reclaim Congressional intent in the way we police corporate mergers, and expand on our anti-merger statutes to make clear which kinds of corporate tie-ups should be permitted, and which should not. Thankfully, none of these measures are far-fetched; many are already in progress, or have been credibly proposed by lawmakers or agency officials. What is needed, then, is action. Here are three proposals for reducing harmful mergers, and promoting market structures that are conducive to the kind of deconcentration needed to restore open markets and democratic economies.

A. Strengthen the Merger Guidelines and Aggressively Enforce the Anti-Merger Laws

Revising the current 2010 version of the merger guidelines and the more vigorous enforcement of the current antimerger law are both happening, and will likely continue to happen, under the current administration and leadership at the antitrust agencies. Already, the persistent, decades-long wave of corporate consolidation has been somewhat tamed by simply having more aggressive enforcement officials at the agencies.[32] The agencies sued to block 10 mergers last year, the most in at least a decade, according to law firm research. The same study showed that 60 percent of all "significant" merger investigations led to the deal collapsing, another record for the agencies.[33]

The forthcoming merger guidelines have tremendous potential to guide enforcement actions, educate judges on the proper analysis of merger challenges, and deter corporate actors from proposing dangerous mergers in the first place. As my organization explained in our submission to the agencies and in a companion report, the success of the forthcoming guidelines should be measured by the extent to which they help to craft an enforcement policy that deconcentrates industries over time. To do so, the guidelines should introduce a host of policies that, in total, serve to foster decentralized markets, including bright line prohibitions on some mergers and significant limitations on other dealmaking based on industry structure and trends toward consolidation.[34]

Specifically, the guidelines should include clear structural presumptions against mergers that concentrate markets or give additional power to already-dominant firms, in line with the Clayton Act's prohibition of mergers that tend to create a monopoly. The new guidelines should invigorate enforcement that is "guided by the structure of the market, including how concentrated it is and how open it is to new entrants," we write in our submission.[35] As we explain, the guidelines should also instruct the agencies to examine mergers that fall below these concentration presumptions "based on an analysis of market structure with the aim of fostering industries that are decentralized and host to a vibrant mix of competitors."[36] Structural issues should include markets with too little diversity in firms, few small businesses, high barriers to entry, trends toward consolidation, and so on.

30 Mergers and Acquisitions: Oversight Hearings before the Subcommittee on Monopolies and Commercial Law, of the Committee of the Judiciary, House of Representatives, 97th Congress, First Session, 1981.

31 *Ibid*. p. 216.

32 "Dealmakers brace for slow 2023 recovery after global M&A sinks," Anirban Sen & Pamela Barbaglia, Bloomberg, Dec. 21, 2022 (noting that, among other factors, global dealmaking had been slowed by "a tougher antitrust climate.").

33 "Biden antitrust enforcers block deals at a record pace," Alexei Alexis, CFO Dive, Feb. 1, 2023.

34 "Rolling Back Corporate Concentration: How New Federal Antimerger Guidelines Can Restore Competition and Build Local Power," Mitchell & Knox.

35 *Ibid*. p. 24.

36 *Ibid*. p. 25.

The guidelines should create other merger enforcement rules that promote more diverse industries and dispersed economic and political power. For example, the guidelines should include a presumption against vertical mergers in concentrated markets, and generally promote enforcement that is critical of vertical mergers, in line with Congressional intent when passing the Celler-Kefauver Act. We also recommend that "the guidelines express clear presumptions against mergers that create buyer power at even lower thresholds than mergers between sellers."[37]

Issuing merger guidelines that are critical of consolidation and promote decentralized markets can influence corporate officers and federal judges. For corporations, guidelines that promote strong enforcement and include clear structural presumptions against mergers would likely deter many corporate merger ideas before they leave the boardroom. And the merger guidelines have historically influenced federal judges when considering merger challenges.[38] We can expect new guidelines more critical of corporate consolidation through mergers to do the same.

B. Promote Anti-Merger Enforcement in Congress

The 1950 Celler-Kefauver amendments to the Clayton Act remain crucial to our ability to prevent harmful mergers and stop the rise of monopolization in its incipiency. That law remains relevant and active today. However, myriad factors mentioned above have functionally undone the will of Congress and created an enforcement environment in which only the largest horizontal mergers can be consistently successfully challenged. While the other policy suggestions here can help restore the functionality to the Celler-Kefauver Act, Congress should take actions that support the agencies and promote anti-merger enforcement that makes the intent of the law clear for courts, companies, and enforcers.

Lawmakers could help clarify the legal standard of the Clayton Act by highlighting and investigating consolidation issues in industries, including on pending or completed mergers. Congress has historically carried out extensive examinations of industrial concentration and the effectiveness of the law in preventing monopolization and abusive conduct.[39]Congress' recent record of investigating industries and mergers is extensive and impressive. The House antitrust subcommittee's months-long investigation of monopolization among the Big Tech companies led to both a thorough examination of the ways tech monopolies used mergers to grow their power, and recommendations for ways to improve antimerger enforcement through structural presumptions.[40] Lawmakers have held hearings on the effect of mergers among hospitals and agribusinesses.[41] Hearings examining the pending merger between supermarkets Kroger and Albertsons, and the closed merger of Live Nation and Ticketmaster, exposed the dangers of increasing buyer power and harms caused by vertical takeovers.

New legislation may also serve to strengthen the anti-merger laws in two important ways: It could expand the legal standard to include a clear structural basis for illegality under the law, so that any merger beyond a certain size would tend to create a monopoly under the law. And an amended Clayton Act could ban acquisitions by firms with a dominant share of a market or those that exhibit clear dominant behavior. Under an expanded anti-merger program, the merger guidelines would also include these prohibitions. But amending the Clayton act to include more specific structural prohibitions would enshrine these changes into law. Lawmakers have already proposed some of these changes in various forms.[42]

C. Educate Federal Judges About the Concerns and Intent Behind the Anti-Merger Laws

Groups who support corporate power and advocate for the neutering of antitrust enforcement have for decades conducted an organized program of judicial education and training that pushed the consumer welfare standard and "law and economics" pseudo-science. Early research suggests this effort has been successful in creating skepticism of antitrust enforcement and a more permissive environment for corporate mergers.[43]

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37 *Ibid*. p. 27.

38 Hillary Greene, "Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse," William & Mary Law Review, 2006-2007.

39 Beginning even before the passage of the Sherman Act in 1890, Congress has examined numerous industries, mergers and the general effectiveness of the antitrust laws, including examining concentration in the oil, steel, finance, music, agriculture, and heath care industries, to name just a few. See for example, "Antitrust Policy and Competition," Hearing Before the Joint Economic Committee, 98th Congress, First Session, Nov. 14, 1983 (Rep. Dan Lungren introduced the hearing by saying, in part, that "Innumerable speeches, hearings, and pieces of legislation have been motivated by the fear of growing industrial concentration and, as a result, many proposals have been advanced in this Congress and in some Federal agencies to deter mergers or break up corporations allegedly wielding excessive monopoly power."

40 "Investigation of Competition in Digital Markets," Majority staff report and recommendations, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary of The House of Representatives, released Oct. 2020.

41 "Antitrust Applied: Hospital Consolidation Concerns and Solutions," Senate Subcommittee on Competition Policy, Antitrust, and Consumer Rights, May 19, 2021; "Consolidation and Competition in the U.S. Seed and Agrochemical Industry," Senate Judiciary Committee, Sep. 20, 2016.

42 Senators Amy Koburchar & Elizabeth Warren, among other co-sponsors, have in the past two years introduced bills that attempt to strengthen the merger laws in various ways.

43 "Ideas Have Consequences: The Impact of Law and Economics on American Justice," Ash, Chen & Naidu.

There is at least anecdotal evidence that law school classes being taught by progressive antitrust thinkers are growing in popularity. When Lina Khan was teaching at Columbia Law School in 2020, her class on antimonopoly tradition was deeply popular. "It was massively oversubscribed," Khan said in a law school article. "It's extremely encouraging that there is so much interest in this area."[44] Students in classes led by Khan, former White House official Tim Wu and others are likely to contribute to a clearer understanding of the intent behind and purpose of the antitrust laws among future lawyers and judges. Changes to the intellectual makeup of the judiciary will happen in time.

To help that change along, it is worthwhile for those in favor of progressive anti-merger enforcement to educate federal judges on what Congress intended when drafting the anti-merger law – namely, that lawmakers recognized dangers posed by the widespread use of mergers to seed and grow market power, threatening both economic and political democracy. Rather than making law, courts exist to ensure the enforcement of the laws reflects the democratic intent of the people's representatives when drafting those laws. In the case of the Clayton Act and the Celler-Kefauver amendment, Congress believed that economic concentration "would impair economic opportunity, deprive individuals of control over their own lives, and threaten the very existence of free enterprise and political democracy," and prescribed anti-merger action to combat and prevent that concentration.[45] Educating federal judges on the history of the law, and the important Supreme Court cases breathing jurisprudence into that history, would be important and useful work.

Educating federal judges on the history of the law, and the important Supreme Court cases breathing jurisprudence into that history, would be important and useful work. Such a program of judicial education could potentially be carried out by an academic center, such as the Utah Project on Antitrust and Consumer Protection, organized through the University of Utah by economists and scholars supporting progressive antitrust policy. This strategy, together with strong agency guidelines and vigorous oversight by Congress, would help restore the intent and efficacy of the nation's anti-monopoly laws.

44 "Antitrust Scholar Lina Khan Joins Faculty," Columbia Law School, published Dec. 2020.

45 "Modernization of Antitrust: A New Equilibrium," Eleanor Fox, Cornell Law Review, 1981.