New Merger Guidelines: Are the Agencies on a Collision Course with Case Law?

BY JAMES KEYTE*

SINCE THE EARLY 1980s, NEW MERGER guidelines from the agencies have arrived in sporadic waves, and by all indications a whole new set is coming soon. But, unlike the series of guidelines starting in the 1980s, we are not likely merely to see a new iteration of how to assess whether a merger (horizontal or otherwise) may harm consumer welfare under the courts' established Section 7 standard—i.e., by metrics of price, output and, more recently, quality and innovation. Far from it; we now have new sheriffs in town with a very different antitrust philosophy and enforcement agenda—one built on the Brandeisian distrust of structural monopolies and oligopolies and which expressly rejects the consumer-welfare standard that has pervaded our courts since the late 1970s.

Yet, how far these new merger guidelines will attempt to reach is another question. If, for example, they simply expand on the current Section 7 standard with more to say about quality, innovation, dynamic effects, monopsony (in well-defined markets) and labor markets (also well defined), they essentially will reflect the current evolution of Section 7 jurisprudence—again, all consistent with an underlying consumer-welfare focus. But if our new enforcers—led by Federal Trade Commission Chair, Lina Khan, Assistant Attorney General nominee, Jonathan Kanter, and (less directly) White House Technology and Competition policy advisor, Tim Wu—follow their own deeply held views about the proper role of antitrust, we may be in for some real fireworks and, eventually, significant litigated decisions over the agencies' new merger standards and enforcement actions. Moreover, we may in time even find the agencies somewhat split in their views, as Jonathan Kanter will have to decide whether the DOJ will adopt some of the more provocative policy positions of the FTC's new leadership, including the stated plan to jettison the consumer-welfare standard (discussed below).

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This comment discusses (i) the main differences between the Neo-Brandeisian school of antitrust and the consumer-welfare standard, including its Post-Chicago iteration, and (ii) the prospect that courts will defer to the agencies on new merger standards that are likely both to harken back to a more bright-line structural view of antitrust policy and enforcement; and push forward: with today's progressive concern over access to markets, wage disparities and the other perceived distributional inequities. It concludes that, under our antitrust common law tradition, the battle for control of antitrust standards in the courts may have already been lost and that any true leaps in a progressive direction may have to fall to Congress—a whole different (and itself nascent) battleground.

Understanding the Neo-Brandeisian School of Antitrust

For many practitioners, the various schools of antitrust thought that have evolved over the years are interesting but rarely relevant to the tasks at hand; these intellectual excursions are best left for debates at academic gatherings or panel discussions. No longer: with proudly progressive antitrust enforcers at the helm—and new merger guidelines (as well as new FTC rulemaking) on the horizon[1]—it is best to understand what these divergent camps believe and what new leadership may have in mind.

For Neo-Brandeisians, the Roots of Antitrust Are Political, Not Economic

In order to understand the current progressive or Neo-Brandeisian perspective on today's antitrust environment, one needs to recognize that this school of thought draws a direct line from industry concentration to political power over institutions and individuals. The notion is that firms that achieve a certain size within a concentrated industry effectively obtain political power that can significantly influence, if not control, many aspects of our lives.[2] And, indeed, it is easy to see how these concepts resonate with many in today's Big Tech environment where firms can and do have significant ability to influence what people think and do—a reality that has led to a loose coalition of the progressive left and many of the conservative right who seek to break up or rein in Big Tech.[3] For Neo-Brandeisians, this is all based on the text and legislative intent of both the Sherman Act (1890) and the Clayton Act (1914), which in their view were fundamentally premised on the notion that monopolies or concentrated industries tended toward political consolidation and attendant restrictions on democracy and individual freedom.[4]

Neo-Brandeisians Believe That Big Is Indeed "Bad"

From a merger perspective, in particular, Neo-Brandeisians view the Clayton Act, as written, as an express check on transactions that may lead to monopolies or concentrated industries; indeed, in their view, the "incipiency" standard really does mean "may" and what was written is intended precisely to check the type of industrial power that translates to political consolidation and distributional inequities.[5] And, as we know, this same view quickly—and for some decades—made its way into court decisions. In later decades, we see this prophylactic, bright-line thinking in the Section 7 decisions of *Brown Shoe,*[6] *Von's*[7] and others. In this sense, the Neo-Brandeisians are not just saying "big is bad" in the abstract, they are asserting that our entire antitrust regime was built on the express premise that an industrial monopoly or shared power in consolidated industries harms our democratic institutions and way of life beyond the economic concerns over prices or output—the mainstays of the later Chicago school of thought built around price theory.[8]

Neo-Brandeisians Want Antitrust to Reflect Values Seeking More Access, Justice and Equity

Finally, Neo-Brandeisians have paid particular attention to what they see as a clear connection between industry concentration and effects on wages, job opportunities, upward mobility and asserted other forms of inequitable distribution of resources.[9] In this sense, Neo-Brandeisians naturally see the solution as breaking up monopolies (or highly concentrated market structures), precluding acquisitions altogether for large firms (both horizontally and vertically) and overtly dumping the consumer welfare standard in favor of a citizen-type standard that goes well beyond demonstrable likely effects on price, output, quality or innovation. They also dislike the idea of permitting mergers to go through with remedies, even most structural relief.[10]

How Neo-Brandeisian Thought Translates to Merger Enforcement

The objective here is to understand how these lofty views on the roots and purpose of our antitrust laws translate into merger policy and enforcement. Given the amount of writing on the topic from a Neo-Brandeisian perspective, as well as Chair Khan's most recent pronouncements, it is not difficult to discern. Likewise, "[t]he task now facing [the] New Brandeisian reformers is to translate their critiques into a positive vision, including rules and analytical frameworks that should govern how courts and enforcers assess what the antitrust laws prohibit."[11]

An Anti-Oligopoly View of Horizontal Mergers

In practical terms, what the Neo-Brandeisians would like to see with respect to horizontal mergers is a return to structural competition, the notion that more competitively-structured markets—i.e., a collection of smaller competitors with rivalrous interaction—is best for all citizens from an economic and democratic perspective.[12] And it is exactly that underlying premise which led courts and agencies in the 1960s to invoke the bright-line rules reflected by *United States v. Philadelphia National Bank*[13] and the 1968 Merger Guidelines.[14] The strongly-held view was that high market share, alone, reflects "inherently anticompetitive tendenc[ies]"[15] and therefore there need not be "elaborate proof of market structure, market behavior, or probable anticompetitive effects."[16] This is consistent with ensuring market structures that are believed to protect equal opportunity and access for small businesses—a stalwart principle of the Brandeisian view of all antitrust law, which remains a core principle of today's progressive movement as well.[17] It is not surprising, then, that President Biden's Executive Order on competition rejects 40 years of past merger guidelines, implicitly leaving the 1968 Guidelines untouched—one can easily see the hand of Tim Wu in these and other remarks and directives in the Executive Order.[18]

A Strong Distaste for Vertical Integration

One interesting aspect of Neo-Brandeisian thinking is that it abhors vertical integration by large firms almost as much as it does horizontal mergers in concentrated industries. Again, the issue is much more than economic: the notion is that firms vertically integrate in ways that create inherent conflicts of interest, foreclose opportunity of rivals and small start-ups (and, in turn, upward mobility and fair wages) and also enable large firms to extend their political and cultural reach and dominance.[19]

From a vertical perspective, it is the 1962 decision of *Brown Shoe* that reflects the perceived ills of vertical integration, especially the potential to foreclose "small, locally owned business[es]."[20] And the Court, as well as Congress, knew at the time that the trade off was more fragmented industries and potentially higher costs and prices.[21] That same premise and acknowledgement is reflected in today's Neo-Brandeisian thinking, where the potential economic benefits of vertical integration are viewed as far outweighed by their likely ills.

It is fair to ask, of course, whether the recent 2020 Vertical Merger Guidelines[22] address some of these concerns. For the Neo-Brandeisian, the answer is no. Those Guidelines, at best, are an extension of the Post-Chicago school of thought, which focuses in part on vertical integration that may "raise rivals' costs" and, in turn, affect price, output or quality in related markets. But for Neo-Brandeisians, this is still a paradigm that remains linked to metrics of the consumer-welfare standard and, hence, lacks the definitiveness of presumptive structural standards and the flexibility to look at effects on other values such as wages, access, fairness or other distributional inequities.[23]

The dramatic shift in policy and focus became tangible when the FTC, on September 15, 2021, announced the withdrawal of the 2020 Vertical Merger Guidelines because they included "unsound economic theories . . . unsupported by the law or market realities."[24] In particular, the Democratic majority of FTC commissioners found that the 2020 Guidelines "contravened" the text of Section 7 by even considering efficiencies, including most notoriously the theoretical elimination of double marginalization (EDM) that, as we all know, played such a prominent role in the *AT&T/Time Warner* decision[25] and itself was significantly scaled back in the 2020 Guidelines. The FTC's press release also highlighted that the types of harms considered from vertical mergers will be expanded (including assessing effects on labor) and that remedies (of any kind) will be disfavored and difficult to negotiate.[26]

In sum, if the current agency leadership is true to their convictions—as we believe they will be—then we can expect to see proposed merger guidelines that are a blend of the 1968 structural bright-line rules and the more current focus on distributional values and presumed effects that reach far beyond traditional consumer-welfare parameters. What we will *not* see are standards or analyses that focus primarily on potential price effects or efficiencies, as these are precisely where the Neo-Brandeisians believe the courts and the agencies got it wrong by following the Chicago-School movement of the 1970s and 1980s—most notably Robert Bork and Richard Posner.[27]

A Preview of New Merger Guidelines?

Interestingly, Chair Khan has been writing about the need for new merger guidelines at least as far back as 2014, arguing that the Department of Justice and the FTC "could rewrite merger guidelines to make it easier to block deals that would hurt competition and foreclose opportunity [and] could also stop outright more anti-competitive mergers" rather than negotiate remedies.[28]

In June of 2016, Khan (while a law student at Yale) laid her thoughts out in more detail, writing for the Roosevelt Institute. After highlighting that the DOJ and the FTC effectively adopted the Chicago-School consumer-welfare paradigm starting with the 1982 Guidelines (and thereafter), Khan recommended that the next president could "revive competition" by revising the merger guidelines along the following lines (some of which echo the 1968 Guidelines):

- "Stronger merger guidelines reassert the centrality of market structure to competition analyses—namely the idea that how a market is structured directly implicates its competitiveness;"
- The DOJ "should scrutinize vertical mergers. Current analysis of vertical deals is extremely rudimentary and neglects to consider how these tie-ups can create anti-competitive conflicts of interest and market structures conducive to exclusionary conduct;"
- The Agencies "should establish a policy in favor of simple rules and presumptions over 'rule of reason' analyses. . . . This [also] would involve blocking problematic deals rather than seeking to mitigate harms through conduct remedies or divestitures,"
- "The agencies "must orient the merger guidelines to promote a 'public interest' or 'citizen interest' standard. A more comprehensive approach to competition policy would acknowledge the full range of consolidation's effects—including its effects on—quality . . . potential competitors . . . monopsony power over both workers and producers [and] innovation."[29]

In Khan's view (as of then at least), these changes would require no new laws or new rulemaking process. Instead, she relied on the notion that courts "generally defer to agencies," which would minimize private challenges to the new guidance.[30]

As FTC Chair, Khan has been consistent and equally blunt in her view of what new merger guidelines should and should not encompass. In her public memorandum on the "Vision and Priorities for the FTC,"[31] Chair Khan makes clear that in all areas of antitrust enforcement, the FTC will take a "holistic approach" to identifying harms without distinction between antitrust and consumer protection, focusing on "power asymmetries," "root causes" (rather than playing "whack-a-mole") "marginalized communities" and labor.[32] As to mergers, specifically, Chair Khan stated that the FTC will focus on addressing "rampant consolidation," including revising the FTC's guidelines to make clear what the agency views as "facially illegal deals," apparently based on market structure alone.[33]

Khan was more explicit in her Statement (joined by Commissioners Chopra and Slaughter) on the withdrawal of the 2020 Vertical Merger Guidelines, highlighting that antitrust law has long invoked presumptions, including per se illegality, for practices that clearly tend to harm competition, and the FTC majority sees no reason that this should not also apply to mergers.[34] The Statement lays out in detail a view that consolidation itself can be harmful in terms of higher prices and margins, lower wages and impacts on independent businesses. Khan also highlighted that the Clayton Act "does not distinguish between 'horizontal' and 'vertical' mergers," nor does it create an efficiency defense—which is why, in the current FTC's view, EDM should not even be relevant (presumably for horizontal efficiencies as well).[35] Further, based on the extensive cites to the works of Steven Salop and others on vertical GUPPIs and the like[36]—as well as Chair Khan's endorsement of the clarity and predictability of bright-line structural standards—it is clear that the FTC's new merger guidelines (horizontal and vertical) will focus much more on structural presumptions (or outright illegality in its view) than on detailed analytical frameworks for assessing effects. We can even anticipate that, for some mergers, illegality will be presumed.

How Stubborn Will the Consumer-Welfare Standard Be When Challenged Under Section 7?

If a decidedly progressive set of new merger guidelines comes to fruition and becomes operational in seeking to block mergers of all sorts, we can expect merging parties to fight many of these out in court. After all, the past 40 years have seen the Supreme Court embrace the consumer-welfare standard in a variety of antitrust contexts. Interestingly, however, the Supreme Court tends not to take merger cases and, as all practitioners know, *Philadelphia National Bank* and *Brown Shoe* have not expressly been "overruled" by the Court and indeed are often cited for other purposes—e.g., structural presumptions and the ever-present *Brown Shoe* "indicia" for market definition.

Yet, as Professor Teachout and Lina Khan wrote in 2014, "[i]n every important way 'these [Chicago-School] theorists won the war.' "[37] As Khan has recognized, "scholars and judges have long argued that lawmakers who passed the Sherman Act [and other antitrust statutes] delegated to the judiciary broad powers to craft substantive rules of antitrust law." And while she believes that this "judicial lawmaking" has been contrary to the text and legislative history, Khan in the past recognized that "'control over the meaning of the antitrust laws now rests firmly in the grip of this unelected judiciary.'"[38] What Khan—as well as Tim Wu and other Neo-Brandeisians—would prefer is an "administrative approach" that would "democratize" antitrust and either supplant or complement our existing common law framework.[39]

By the late 1970s, the Supreme Court had decided that "Congress designed the Sherman Act as a 'consumer welfare prescription;'"[40] and throughout the 1980s, 1990s and to date, the Court has viewed all antitrust challenges through the lens of consumer welfare.[41] Likewise, as described below, appellate courts also fully adopted the consumer-welfare paradigm, as we see in leading Section 7 cases cutting across merger types and structures. In all of these, the courts look well beyond structural analyses, focusing instead on probable effects on price, output, quality and innovation. And, in each instance, the court expressly or implicitly acknowledged that the consumer-welfare standard was the overarching framework by which to assess the potential effects of the challenged transactions. Importantly, for purposes here, that standard has become part of the fabric of Section 7 common law; it was not just an extension of the agencies' expert views reflected in the various iterations of the merger guidelines.

Structure Is Now Only a Starting Point for Assessing Likely Effects

Probably the most significant shift in merger analysis resulting from the courts' adoption of a consumer-welfare standard is that market structure is the beginning of the analysis,[42] whereas in past cases (and the 1968 Guidelines), it often was the end. To be sure, under the Horizontal Merger Guidelines from 1980-2010, market shares and structure still mattered, providing the government with an often fairly easy structural presumption and requiring the merging parties to come forward with evidence that anticompetitive effects are unlikely, markets are dynamic and changing or the efficiencies are strong or assertedly overwhelming. This takes us quickly beyond structure and into likely effects that, since at least the early 1980s, courts assess in terms of price, output and, more recently, quality and innovation metrics. We see this standard applied routinely now in mergers that are challenged and blocked, as well as in mergers that are challenged and allowed by courts to proceed.[43] But, in all cases, courts focus on consumer-welfare effects in well-defined antitrust markets. Indeed, even under these standards, the agencies have been hampered by the requirement of Section 7 that they prove likely anticompetitive effects in a "line of commerce," which courts have continued to define as requiring market definition.[44]

There is very little room in this line of case law to bring into play an assertion that a merger which creates a concentrated structure, alone, can violate the statute or provide an inference of anticompetitive effects or, more boldly, that such an inference can relate to non-economic considerations (absent defined markets) such as income disparity, effects on small rivals or potential competition. If any new merger guidelines go that far, it will be a heavy lift for the agencies in court.

It Will Be Even Harder to Assert Structural Harm in Vertical Cases

One of the obvious points driven home in the *AT&T/Time Warner* litigation (both at the district and circuit court levels) is that, with vertical mergers, there is no structural *elimination* of competition as the number of horizontal competitors remains the same in vertical transactions.[45] This meant that there are no structural presumptions for the government to invoke; rather, any likely harms to consumers have to be proven from the outset. Moreover, as we all know, the government (and the court) actually gave procompetitive credit to the parties based on the theoretical concession that vertical mergers result in the elimination of double marginalization;[46] hence, for vertical mergers, any presumptions relating to likely price effects—at least in the courts—tend to run the other way. Moreover, as noted above, even the more flexible 2020 Vertical Merger Guidelines still operate within a consumer-welfare paradigm, looking at how given vertical relationships are likely to lead to changes in bargaining or foreclosure, but all with an eye toward ultimate effects on price, output, quality or innovation.

What we do not see in the modern vertical setting is a return to the *Brown Shoe* Court's overriding concern with locally-owned businesses or a recognition that these concerns can prevail even if prices would go down for consumers. Nor do we see any of the "conflict of interest" concerns of the Neo-Brandeisians, except to the extent they may relate to a predictable and measurable leveraging or foreclosure strategy that harms consumers under traditional standards. Finally, absent well-defined labor markets and demonstrable effects on wage levels, we do not see vertical cases where the concern centers more broadly on income disparity or inequitable distribution of wealth and opportunity—these simply do not make it into the consumer-welfare discussion.

In short, current case law—even if sparse in areas—is not likely to accommodate a return to the view that Section 7 was intended to protect structural competition, without more. But one does not really know until a battle is joined, so the real question is whether such a conflict is brewing with potential new merger guidelines.

Can New Merger Guidelines Influence Common Law Antitrust?

The rub, then, is whether the new leadership in the FTC and the DOJ will, in the first instance, have the resolve to incorporate their views into actual merger guidelines and, more boldly, enforcement decisions. If not, there will not be much to talk about or little reason to have new guidelines. Indeed, the consumer-welfare standard itself in the courts has evolved beyond pure short-term price effects and now fairly routinely encompasses innovation, quality and longer-term dynamic effects; in order to effectuate real change, any new guidelines must do much more. Accordingly, we suspect that the new proposed merger guidelines will put some of the major aspirational principles espoused by the Neo-Brandeisian school of thought into use, and why not? As often observed, elections have consequences, and it goes as well for the ebb and flow of antitrust policy and enforcement, especially in an economy where more progressive views appear to be gaining popular and political traction.

As a threshold matter, there is no reason to suggest that new merger guidelines *cannot* have an effect on case law. Agency guidelines have had a significant influence in the development of antitrust court decisions, including in the Section 7 setting. Numerous courts, for example, were influenced by or outright adopted the agencies' use of the hypothetical monopolist—or SSNIP—test for assessing market definition in the merger context.[47] Numerous courts were also influenced to adopt the agencies' more detailed assessment of entry—i.e., assessing it under a "timely, likely and sufficient" standard.[48] And many courts have followed the agencies' views and guidelines in assessing the types of effects that are relevant (e.g., "unilateral") as well as the treatment of efficiencies, where the agencies continue to focus narrowly on reductions in marginal cost and whether pass-through to consumers is likely.[49]

Yet, all of these examples—and others—remain consistent with the current state of merger analysis, which is centered on the consumer-welfare standard. All relate to prospective price or output effects (or quality and innovation) and all could be said to operate within the overarching theme of protecting "competition" rather than "competitors" and, in particular, focusing on predicted outcomes following rigorous detailed analysis. Hence, if any new merger guidelines—like the recent 2020 Vertical Merger Guidelines—continue to operate with an underlying consumer-welfare framework in mind, we can expect the courts to be receptive, even if it moves the ball forward to some degree toward a more expansive view of consumer welfare.

The more interesting question is how courts are likely to react to more ambitious and provocative proposed merger guidelines, those that partially or fully embrace the progressive view and desire for significant relative change that one would expect from the Neo-Brandeisian school of thought. For example, let us suppose that the new merger guidelines, much like those in 1968, adopt bright-line structural presumptions—or even outright prohibitions—for certain types of horizontal and vertical (or even conglomerate) mergers. And let us likewise suppose that the new merger guidelines make clear that part of the standard involves protecting—irrespective of likely market-wide effects—new entrants and small rivals from the efficiency-related effects of large incumbent firms or oligopoly-structured markets. Or, at the outer edges, what if the new merger guidelines outright reject consumer welfare as a standard to be replaced by some form of "citizen" standard that encompasses effects on jobs, wages, income distribution or other values derived from fairness, justice or equity? Setting aside the question of whether these are appropriate subjects for legislative consideration (which many surely are), any enforcement actions by the antitrust agencies that invoke such principles are likely to be met with lines drawn in the sand in an *AT&T/Time Warner*-type litigation battle.

The question then becomes whether a court, presented with detailed progressive arguments about the legislative history of the Sherman Act and Clayton Act, could backtrack on 40 plus years of the consumer-welfare standard as we know it. To be sure, there is a legitimate debate that the Chicago-School influence on antitrust standards itself was a departure from the populist roots of the antitrust statutes. But the courts have been applying a common law iterative approach to antitrust statutes since the early 20th century—e.g., developing the rule of reason and adopting a "structure-conduct-performance" paradigm of antitrust that prevailed in the 1960s and 1970s. Each, by definition, was a common law extension of the statutory text and, where viewed as relevant, legislative history. Hence, for any significant departure from the consumer-welfare standard, one can expect vigorous litigation up through the appellate courts, and it would not be surprising to see it resolved by the Supreme Court—we have our suspicions how that would play out.

It Will Likely Take New Legislation to Create a Neo-Brandeisian Antitrust Regime

If, in fact, the courts turn out not to be receptive to what may be viewed as an anti-consumer-welfare standard for Section 7 analysis, the question becomes whether proposed or prospective legislation can further the agencies' more progressive objectives. Based on what we know to date, that, too, may be a tall order.

In the Senate, for example, Senator Klobuchar's proposed bill certainly would focus on mergers by particularly large firms and significantly change the substantive standards and burdens of proof.[50] Yet the metrics involve assessing potential "harm to competition" without expressly modifying the traditional consumer-welfare focus or standard. Likewise, even with their focus on Big Tech, other Senate bills do not outright ban mergers under structural thresholds or depart from consumer-welfare principles, even if merger enforcement would be facilitated and made much easier under the proposed legislation.[51] Potential House legislation is decidedly more structural, yet it focuses quite explicitly on mergers involving dominant platforms—essentially the Big Tech firms.[52] And, even at that, the prospect for passage is some way off.

Where the new agencies land on any new merger guidelines is anyone's guess. But what we do know is that turning progressive aspirations—however legitimate or vigorously pursued—into binding case law or, if need be, legislation is no easy task. Either way, it will be an interesting ride for all involved, especially if the agencies see new merger guidelines as a vehicle to take some of the bold actions we anticipate. ■

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1 *See* Exec. Order No. 14036, Promoting Competition in the American Economy, §5(c), 86 Fed. Reg. 36,987, 36, 991 (July 14, 2021) (directing consideration of new horizontal and vertical merger guidelines); §5(h), 86 Fed. Reg at 36, 992 (encouraging new FTC statutory rulemaking under Section 5 of the FTC Act).

2 *See generally* Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power,* 9 Duke Const. L. & Pub. Pol'y 37 (2014).

3 *See* James Keyte, Frederic Jenny & Eleanor Fox, *Buckle Up: The Global Future of Antitrust Enforcement and Regulation,* Antitrust (Spring 2021), at 32.

4 Teachout & Khan, supra note 2, at 60-66.

5 *See* Lina M. Khan, *Response, The Ideological Roots of America's Market Power Problem,* at 966, Yale L.J.F. (June 4, 2018), https://www.yalelawjournal.org/pdf/khan_hxxcykpx.pdf.

6 Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

7 United States v. Von's Grocery Co., 384 U.S. 270 (1966).

8 Teachout & Khan, *supra,* note 2, at 66-67.

9 *See generally* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents,* 11 Harv. L. & Pol'y Rev. 235 (2017).

10 *See* K. Sabeel Rahman & Lina Khan, *Restoring Competition in the U.S. Economy,* in Untamed: How to Check Corporate Financial, and Monopoly Power, at 18 Nell Abernathy et al. eds., 2016).

11 *See* Lina M Khan*, The End of Antitrust History Revisited, 133* Harv. L. Rev. 1655, 1682 (2020) (reviewing Tim Wu, The Curse of Bigness: Antitrust In the New Gilded Age, by Tim Wu (2018)).

12 See *generally* Teachout & Khan, *supra* note 2.

13 United States v. Phila. Nat'l Bank 374 U.S. 321 (1963).

14 U.S. Dep't of Just.. 1968 Merger Guidelines, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf.

15 *Philadelphia National Bank*, 374 U.S. at 366.

16 *Id.* at. 363.

17 *See* Khan & Vaheesan, *supra* note 9.

18 *See* Executive Order No. 14036, *supra* note 1.

19 *See* Khan, *supra* note 5; see also Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale Law L.J. 710, 731-35 (2017).

20 *Brown Shoe,* U.S. at. 344

21 *See* Teachout & Khan, supra note 2 (citation omitted).

22 U.S. Dep't of Just. & Fed. Trade Comm'n, Vertical Merger Guidelines (2020), https://www.justice.gov/atr/page/file/1290686/download.

23 *See* Khan, *supra* note 11, at 71.

24 Press Release, Federal Trade Comm'n Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary, (Sept. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

25 United States v. AT&T, Inc., 310 F. Supp. 3d 161 9D.D.C. 2018), aff'd, 916 F. 3d 1029 (D.C. Cir. 2019).

26 Press Release, Fed. Trade Comm'n, *supra* note 24.

27 *See* Khan, *supra* note 11, at 1665-71.

28 Lina Khan & Sandeep Vaheesan, Opinion, *How America Became Uncompetitive and Unequal* Wash. Post (June 13, 2014), https://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499_story.html.

29 Rahman & Khan, *supra* note 10, at 20-21.

30 *Id.* at 20

31 Memorandum from Lina M. Khan, Chair, Fed. Trade Comm'n, to Commission Staff and Commissioners at 1-2 (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_ memo_from_chair_lina_m_khan_9-22-21.pdf.

32 *Id.* at 2-3.

33 *Id.*

34 *See* Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, Commission File No. P810034 (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_co mmissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

35 *Id.* at 3.

36 *See id.* at 2 nn.9, & 10, 5 n.32, 6 n.34, 8 nn.43 & 45.

37 Teachout & Khan, *supra* note 2, at 67.

38 *See* Khan, *supra* note 11, at 1678-79 (citation omitted).

39 *Id.* at p. 1658.

40 Reiter v. Sonotone Corp., 442 U.S.-330, 343 (1979) (citation omitted).

41 *See* Khan *supra* note 5.

42 *See, e.g.,* United States v. Baker Hughes, Inc., 908 F.3d 981 (D.C. Cir. 1990).

43 *See, e.g.,* United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir. 2017); United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.C. 2011); AT&T, 310 F. Supp. 3d 161; New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

44 *See, e.g.*, FTC v. H.J. Heinz Co., 246 F.3d 708, 713 (D.C. Cir. 2001) *Hughes*, 908 F.2d at 988.

45 *See U.S. v. AT&T,* 310 F. Supp. 3d at 191-93.

46 *Id*. at 187-98.

47 *See, e.g.,* United States v. Anthem, Inc., 236 F. Supp. 3d at 171, 193-98; (D.D.C. 2017); FTC v. Staples, Supp. 3d 100, 126-27 (D.D.C. 2016).

48 *See, e.g., H&R Block,* 833 F. Supp. 2d at 73 (citation omitted).

49 *See, e.g., Anthem,* 855 F.3d at 18-21.

50 *See* Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225 117th Cong. (2021).

51 *See* Trust-Busting for the Twenty-First Century Act, S. 1074 117th Cong. (2021); *see also* Tougher Enforcement Against Monopolists Act, S. 2039 117th Cong. (2021).

52 *See* Platform Competition and Opportunity Act of 2021, H.R. 3826, 117TH Cong. (2021); Ending Platform Monopolies Act, H.R. 3825, 117TH Cong. (2021).