April 21, 2020

The Honorable David Cicilline, Chairman
The Honorable F. James Sensenbrenner, Jr., Ranking Member
Subcommittee on Antitrust, Commercial and Administrative Law
U.S. House of Representatives

Chairman Cicilline and Ranking Member Sensenbrenner:

I thank you for the opportunity to share my input on the adequacy of existing antitrust law and competition policy as part of your investigation into digital markets. I applaud the Subcommittee for taking a fresh look at the wide range of subject matter areas across antitrust law that are implicated by this investigation. While as a general matter antitrust law and institutions should do more to curtail the unchecked power of platform monopolists and other dominant firms, which would implicate subject matter areas from vertical restraints to monopolization to merger review to the authority of the Federal Trade Commission to define unfair business practices,[1] this submission will focus upon one often-overlooked issue that also contributes to concentrated power in the digital economy: *over*-enforcement as to horizontal cooperation beyond firm boundaries, particularly among smaller players. I recommend that the Subcommittee reconsider antitrust law's unnecessary prohibition of such cooperation, particularly when it could serve as a countervailing check upon the power of dominant players, in the digital economy and beyond.

Introduction

Antitrust law allocates economic coordination rights: it authorizes some forms of economic coordination and discourages or prohibits others.[2] Deciding upon the criteria for allocating these coordination rights is, thus, the fundamental law-making task in the domain of antitrust. The nature of this task has been obscured by the assumption (in recent decades) that economic theory provides neutral answers to antitrust questions. It does not. Economics is a useful resource to guide your deliberations and decision-making as law-makers, but it cannot do your job for you. You must choose the normative criteria for deciding between acceptable and unacceptable forms of coordination by deciding the values that the law should promote—remembering that it cannot

[1] *See generally* Submissions of the Open Markets Institute, Marshall Steinbaum, Hal Singer, and John Newman.
[2] Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. __ (forthcoming 2020). This memo draws to a large extent from this paper and other existing academic work, to which additional citations are provided where relevant. Those include: Paul, *Reconsidering Judicial Supremacy in Antitrust* (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3564452; Paul, "Fissuring and the Firm Exemption," 82 LAW & CONTEMP. PROBS. 65 (2019); Paul, "Recovering Labor Antimonopoly," 28(3) *New Labor Forum* 34 (2019); Paul, "Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications," 38 BERKELEY J. EMP. & LAB. L. 233 (2017); Paul, "The Enduring Ambiguities of Antitrust Liability for Worker Collective Action," 47 LOYOLA UNIV. CHICAGO L. J. 969 (2016)

avoid promoting values one way or another. Those values might include things like: fairness, incentives to economic productivity, dispersal of power, operational efficiency/cost savings, economic democracy, consumer protection and welfare, environmental sustainability, and others. As representatives of the American people, you are both entitled and obligated to decide upon these criteria, bearing the democratic preferences of the people you represent in mind.

Currently, antitrust law allocates coordination rights by anointing control and concentrated power as the preferred forms of economic coordination, while discouraging economic coordination in which power and decisionmaking are more broadly dispersed.[3] Roughly since the 1970s, the reigning antitrust paradigm has authorized large, powerful firms as the primary mechanisms of economic and market coordination, while largely undermining all others: from small business cooperation to workers' organizations to democratic regulation of markets. While deploying the legal concept of competition to undermine disfavored forms of economic coordination, antitrust law also relies upon the idea of "efficiencies" to quietly underwrite numerous exceptions to the rule of competition, all of which function by concentrating power. Unfortunately, the idea of "efficiencies" in antitrust law is not as analytically clear as it ought to be, and is frequently unmoored from empirical investigation and study.[4]

What scholars call "the fissured workplace" is just one example of how antitrust law has actively served to help concentrate power in the economy by favoring vertical control and disfavoring horizontal coordination.[5] Other examples include Amazon's relationship to third-party sellers and suppliers, and Google's and Facebook's dominant position over newspapers and other news content creators. This tendency to favor control and disfavor cooperation happens to be a perfect inversion of the original legislative purpose of antitrust law. Moreover, it has been accomplished through an elevation of the role of the judiciary in law-making that was never intended by Congress. Congress ought to act decisively to end the reign of judicial supremacy in antitrust law and clearly state its desired decision rules in any forthcoming legislation.

Legislative history of the Sherman Act

The legislative history of the foundational antitrust statute, the Sherman Act, prescribes a decision rule of *dispersing* rather than *concentrating* economic coordination rights.[6] In recent decades, the federal courts have ignored this legislative history and have indeed inverted the decision rule it embodies. While the courts could in theory correct that wrong turn on their own, it is relatively unlikely, making Congress' re-affirmation of its intent all the more urgent.

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[3] *Id.*; see also *Fissuring and the Firm Exemption*.
[4] See *Antitrust as Allocator*, Part IV (regarding the use of the concept "efficiency" in key texts); see also Submission of Marshall Steinbaum (regarding arguments based on efficiencies in the context of vertical restraints).
[5] See *Fissuring.*
[6] This argument, excerpted herein, is set out in greater detail in Paul, *Reconsidering Judicial Supremacy in Antitrust* (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3564452.

Legislators did not conceive of the Sherman Act in terms of promoting consumer welfare or low consumer prices as such, nor in terms of operational efficiency, nor even in terms of promoting competition for its own sake—though these were all seen as important secondary goals, among others. Legislators were aiming primarily at checking the power of the business trusts—a broad category that included the rise of corporate power more generally, including the concentration of power represented by the modern business corporation itself.[7] Legislators were responding, specifically, to the increasing concentration of economic coordination rights.

For example, Senator George, a key figure in the crafting of the Sherman Act, gave a speech that is emblematic of the statements made by legislators throughout the deliberations regarding the overarching purposes of antitrust legislation. Senator Sherman specifically quoted the following passage from the speech later on, in answer to the question of how he hoped the statute would be construed:

> The trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. The operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business and they decrease the cost of raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. They aggregate to themselves great, enormous wealth by extortion which make[s] the people poor. Then making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States … till they are fast producing that condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command.[8]

This key passage expressing the purpose of the Sherman Act thus again shows that lowering consumer prices, in itself, was simply not the primary purpose of the legislative effort: on the contrary, the trusts' power to depress others' prices was seen as just as harmful. Moreover, the trusts' price coordination was considered harmful because the resultant prices were "beyond reason"—and because both such price increases in the necessaries of life, as well as price decreases in the products sold by ordinary people, tended to "make the people poor." The passage espouses a normative benchmark according to which lower prices are not always good—and price coordination is not always bad. Moreover, this benchmark implies that other business practices that tend to "make the people poor" are also contrary to the purposes of antitrust policy.

Finally, the elements that tie the whole passage together—and that connect it to the vision of the farmer-labor coalition whose members had sent up their voices to the Congress for antitrust legislation in the first place[9]—are the notions of "aggregated wealth" and the people's servitude

[7] *Reconsidering Judicial Supremacy*, Part II.
[8] 21 Cong. Rec. 1768 (March 21, 1890) (quoted by Sherman at 21 Cong. Rec. 2461).
[9] *Reconsidering Judicial Supremacy*, Part II.

to it. Indeed, if there is any per se rule about economic coordination rights that can be inferred from the legislative history, it is that price coordination is impermissible when it is done from centers of aggregated wealth to exercise control over others—while it is permissible when performed in a manner that is dispersed across numerous, smaller centers of ownership and decision-making. This passage encapsulates that idea, and it is also representative of the views expressed by legislators at the time.[10] It is, however, virtually the inverse of the rule about allocating coordination rights that we now have.

Horizontal coordination

The submissions of a number of my colleagues argue that antitrust law's permissiveness in recent decades towards vertical power exerted beyond firm boundaries is unjustifiable.[11] Just as antitrust law's increasing permissiveness toward vertical control beyond firm boundaries has empowered already-powerful actors (as has its permissiveness toward mergers and acquisitions[12]), its hostility to horizontal cooperation has also disempowered smaller and less-powerful ones.[13] Antitrust law today tends to view horizontal price-fixing as the perennial and supreme evil of antitrust law, but in fact the negative focus on this form of coordination is relatively recent. Simple price coordination beyond firm boundaries was not prohibited at common law;[14] in fact, the origins of antitrust law *assumed* a concept of fair price that was socially administered through institutions such as craft guilds, municipal regulation, and other less formal local and regional networks.[15] Legislators, still steeped in these forms of traditional market regulation, did not seek to prohibit simple price coordination among traditional sellers when such coordination took place outside the new business trusts or other new concentrations of corporate power, which had formed the impetus for federal antitrust legislation.[16] Some level of toleration toward horizontal cooperation, including price coordination, continued for decades after the Act was passed (although it was at this point certainly more disfavored than it had been previously).[17] Even the Federal Trade Commission in

[10] *Id.* at Part III (considering the legislative history in greater detail).
[11] Vertical power beyond firm boundaries can be (and should be) an issue under both Sections 1 and 2 of the Sherman Act. *See* Submission of Marshall Steinbaum (discussing the insufficiency of economic arguments for vertical restraints generally, including in relation to labor platforms), Submission of John Newman (discussing the unjustifiability of the framework set out in *Ohio v. American Express*, 585 U.S. __ (2018), which has generally tended to further expand existing permissiveness toward vertical power imposed by powerful firms), and Submission of Hal Singer ("Congress should overturn the Supreme Court's decision in *Ohio v. American Express*, which if left intact, has the potential eviscerate what remains of Section 2 enforcement by allowing courts to consider offsetting benefits to third parties from adjacent markets as a means to negate cognizable harms to antitrust plaintiffs in the market in question.").
[12] *See* Submission of the Open Markets Institute.
[13] To be sure, powerful firms in concentrated markets also engage in horizontal coordination beyond firm boundaries, but while that is only one of many coordination strategies available to them, it is frequently the *only* strategy available to smaller, atomized actors--and is often, for the latter, an existential matter.
[14] *Reconsidering Judicial Supremacy*, Part I.B (discussing cases and secondary sources on common law of restraint of trade).
[15] *Id.* at Part I.A.
[16] *Id.* at Part III.
[17] *Antitrust as Allocator* at Part I.

its early decades took an at-most ambivalent attitude to horizontal price coordination, with Brandeis seeking to help trade associations of small sellers organize and stabilize their markets through the agency.[18]

The modern zero-tolerance approach toward such cooperation and joint action among smaller and less-powerful actors is best encapsulated in the Supreme Court's decisions in *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, a case ultimately involving a strike for reasonable rates by panel attorneys representing indigent defendants in the District of Columbia.[19] Everyone involved, including officials in the District, seemed to agree that the rates sought were reasonable, yet the FTC—a very different agency by now from the one that Brandeis had sought to make a coordination mechanism for trade associations of small merchants—insisted upon prosecuting the case up to the Supreme Court. The Court held that the lawyers' collective action, regardless of the reasonableness of the resultant rates, was an inherent trespass upon the market order. What the Court failed to make explicit is this market order *already* involved coordination—as indeed every market does. Here, that consisted in the District's own coordination of the market for legal services for indigent criminal defendants. But the market might have been organized in any number of other ways: there may have been, say, a few large law firms bargaining with the District, or there may have been more than one buyer for the lawyers' services.[20] The District, as the sole buyer of legal services for indigent criminal defendants, directly coordinated the market for those services, setting the hourly rates by legislation and coordinating the market along various other dimensions as well. Yet the Court chose to entirely disregard this coordination activity by the only buyer, while singling out the economic coordination of the individual providers of legal services for censure. Patterns of market coordination arise for all sorts of reasons, buyer power being one species. In all of them, public power is present to some degree or other, whether through background law or in some more active form.

Antitrust's bias against horizontal coordination, which is accompanied by and inextricably linked with its tolerance of other, more concentrated forms of economic coordination, just amounts to a preference for one particular *type* of market, among many other possible ones. Unfortunately, this intolerance contributes to precisely the concentration of power that antitrust law was intended to counteract.[21] The FTC's recent prosecutions of trade associations of small service-providers

[18] See, e.g., Laura Phillips Sawyer, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE "NEW COMPETITION," 1890–1940 (2018); GERALD BERK, LOUIS C. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932 (2009). See also *Antitrust as Allocator*, Part I.
[19] FTC v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990).
[20] For further discussion of this decision, see *Fissuring*, Part III.
[2121] Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy*, 124 PENN. ST. L. REV. 1 (2019).

bear this out,[22] as does the use of antitrust law against Uber drivers[23] and truck drivers.[24] There is nothing written in stone about this bias against horizontal cooperation, and it is in your power to change it.

Suppressing horizontal cooperation concentrates economic power

What David Weil calls "the fissured workplace," a massive problem according to work and labor experts, is constructed by antitrust law as much as it is by labor law, and specifically by antitrust's censuring of workers beyond the bounds of employment to coordinate in order to better the terms of their bargains with more powerful actor, including dominant labor platforms. As I have previously written, in every fissured business arrangement:

> [T]he expansion of coordination rights for the more powerful actor is accompanied by a contraction of coordination rights for the less powerful ones in its orbit. Antitrust denies to franchisees any rights to engage in economic coordination, either as to their own price-setting or as to their bargains with the powerful franchisor firms. Franchisors' control over franchisees is thus underwritten by not one but two antitrust rules: the allocation of coordination rights to franchisors, and the denial of coordination rights to franchisees. Uber and similar firms, meanwhile, insist that their drivers have no right to coordinate under antitrust; and thus far, the law has denied them that right. Indeed, Uber has argued that the per se rule bars drivers' coordination and that a local ordinance authorizing collective bargaining among drivers is therefore subject to federal preemption by the Sherman Act. And independent contractor truck drivers have been sued by trucking firms when they engaged in concerted action to improve their positions; the law has also largely assumed that they lack coordination rights. If franchisees were able to bring countervailing power to bear in their bargains with franchisors, the result might be an ability to bargain more meaningfully with their own employees. Uber drivers who formed a union and bargained their contracts with Uber might, building on these connections, put themselves in a position to launch an app of their own.[25]

As the submissions of my colleagues detail, labor platforms are also able to exert power over workers on their platforms (without legally employing them) as a result of antitrust law's lax attitude to such vertical restraints, and this lax attitude is unjustified.[26] Equally, antitrust serves as

[22] See, e.g., Am. Guild of Organists, 151 F.T.C. 159 (2017); Music Teachers Nat'l Ass'n, 131 F.T.C. 118 (2013); Professional Skaters Ass'n, 131 F.T.C. 168 (2015). See also Sandeep Vaheesan, "Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages," 78 MD. L. REV. 766 (2019).
[23] See *Uber as For-Profit Hiring Hall*.
[24] See *Enduring Ambiguities*, Part I.
[25] See *Fissuring* at 78.
[26] Submission of Marshall Steinbaum. See also *Fissuring* at 67-77.

a weapon that such platforms can wield against their own workers to prevent them from exercising any countervailing collective power whatsoever, as indeed they have done overtly.[27]

But this problem is not limited to the labor platforms and to workers beyond the bounds of the employment relationship. It is also evident for example with respect to immensely powerful digital platforms like Amazon. That platform itself is permitted to aggregate power and wield it over sellers, while sellers on the platform (including individual artisans and other small producers) are not able to engage in joint bargaining or other collective action with respect to their dealings with Amazon.[28]

Reps. Cicilline's and Collins' proposed Journalism Competition and Preservation Act (JCPA) would have helped to provide for such countervailing coordination in the news sector, which is dominated by handful of online platforms, whether a search engine or a social media platform.[29] These platforms take in massive amounts of revenue as a result of the work of news publishers and journalists. A logical regulatory response to this situation is to permit joint bargaining among news creators in their dealings with the platforms, explicitly including price coordination, as the bill would have done. As a colleague and I previously wrote: "The current highly lopsided power balance between platforms and original publishers means that platforms gobble up ad revenue and add to their already enormous profits, which has no discernible consumer benefit. However, as newspapers and other news outlets are continually squeezed on their margins, if they can survive at all they are decreasingly able to invest in quality news reporting—not to say investigation—and are forced to churn out quick "click-bait" in order to break even, if they're lucky. Allowing news outlets to capture a larger proportion of ad revenue would permit investment in quality reporting and investigation, with obvious consumer benefits and indeed, sorely needed social benefits in terms of democratic functioning."[30]

Recommendation

I encourage the subcommittee to formulate legislation that would substantially reverse antitrust's preference for vertical control and its hostility to horizontal coordination. With respect to the latter, there is precedent for doing so in other jurisdictions through regulatory channels. Most notably, the Australian Competition and Consumer Commission (ACCC) last year promulgated its proposal to implement a broad class exemption that would allow small businesses to

[27] *Uber as For-Profit Hiring Hall* (discussing antitrust preemption lawsuit brought by Chamber of Commerce against the City of Seattle's local ordinance providing for collective bargaining among drivers for ride-hailing platforms).
[28] See Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710 (2017) (noting that "Amazon's closest encounter with antitrust authorities was when the Justice Department sued other companies for teaming up against Amazon").
[29] See generally Sanjukta Paul and Hal Singer, "Countervailing Coordination Rights in the News Sector Are Good for the Public," *Competition Policy International* (June 12, 2019).
[30] *Id.*

collectively negotiate with their suppliers, processors, and some other entities.[31] Such an exemption should be expressly expanded to include customers where appropriate, particularly when those customers are commercial entities that wield aggregated power themselves. Notably, the ACCC's proposed exemption, which hinges upon annual revenue, evidently extends to a large number of Australian businesses, with only truly dominant firms excluded from the exemption. This is appropriate because it would prevent oligopolistic or otherwise powerful firms from engaging in direct coordination, while permitting countervailing coordination, similar to the sector-specific sort contemplated in the JCPA. Such an exemption is preferable to attempts to merely broaden the labor exemption to include gig workers, for a few reasons. First, the latter sort of proposal tend to be incomplete and to invite gaming at the borders, which is precisely what has happened with the labor exemption itself, and thus would fail to accomplish their intended purpose.[32] Second, and relatedly, an exemption based upon annual revenue, such as the ACCC proposal, is much more straightforward and simpler to implement. Third, a more limited "gig worker" exemption would have the negative effect of tending to undermine the purposes of labor law itself by inviting the entrenchment of a "third category" of worker with fewer rights. Fourth, even if effectual, such a limited exemption would not cover the many other actors that should also be able to engage in joint bargaining and cooperation, from small sellers and service-providers generally to companies dealing with particularly dominant players in their sectors.

Thank you for considering my input, and do not hesitate to let me know if you would like to further discuss any of it.

Very truly yours,

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[31] See Australian Competition and Consumer Commission, "Feedback sought on collective bargaining plan for small businesses," https://www.accc.gov.au/media-release/feedback-sought-on-collective-bargaining-plan-for-small-businesses.
[32] For more on the development of the labor exemption, see *Enduring Ambiguities*.