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Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law

Abstract

Democratic and Republican administrations and the Supreme Court, in implementing antitrust law as "a consumer welfare prescription" over the past 40 years, reached a consensus on two important issues. First, antitrust enforcers and courts have presumed that corporate mergers generally advance, or at least do not threaten, consumer welfare. Second, enforcers and courts have treated horizontal collusion, among both big and small actors, as the principal evil for antitrust enforcers to root out. This deference to the consolidation of business property and hostility to horizontal agreements have concentrated power in the economy among a small elite.

For antitrust law to redistribute power downward, a radical philosophical change is necessary. First, antitrust law should tightly restrict the consolidation of corporate property. Second, policymakers should recognize that collusion among powerless actors can represent socially desirable cooperation. Reconstructing antitrust law in this manner would transfer power in markets away from corporate executives and financial interests to workers, professionals, and small firms.

Keywords: antitrust, consolidation, collusion, cooperation, Chicago School

I. Introduction

For nearly forty years, we have lived in the age of Chicago School antitrust. Antitrust specialists, without much exaggeration, could until recently paraphrase President Richard Nixon and claim that "we're all Chicago Schoolers now" (Weisbrot 2008). In implementing the model of antitrust as "a consumer welfare prescription," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), Democratic and Republican administrations and the Supreme Court have embraced a bipartisan consensus on two important issues.[1] First, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (the two public antitrust enforcers at the federal level) and courts have presumed that corporate mergers and the exercise of concentrated business power generally advance, or at least do not diminish, consumer welfare. Second, enforcers and courts have treated horizontal collusion (the setting of prices and other terms among rivals) as a categorical threat to consumer welfare and the

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[1] Antitrust law principally governs three types of conduct: 1) corporate mergers, 2) contracts between businesses and individuals, and 3) exclusionary and other unfair practices by monopolists and non-monopolists. This article will focus on mergers and contracts between independent economic actors who are actual or potential competitors.

principal evil for antitrust enforcers to root out and punish. Indeed, the Supreme Court has described collusion as "the supreme evil of antitrust," *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004), and federal enforcers have prioritized anti-cartel activities.

In short, Chicago School antitrust has tolerated and even encouraged horizontal, vertical, and conglomerate consolidation of business property and proscribed horizontal cooperation agreements among all independent economic actors, big and small. In the words of legal scholar Sanjukta Paul, the executive branch and courts have granted "coordination rights" to property holders, giving them the power to set prices and other terms of trade and structure economic activity, and largely withheld this power from everyone else (Paul 2020, 33).

This deference to the consolidation of business property and hostility to horizontal agreements have failed to advance consumer welfare. The agencies, in presuming consolidation to be benign, have tolerated extensive anti-consumer consolidation in the economy. Mergers generally have not produced the promised efficiencies and have often led to higher consumer prices. Indeed, the tolerance of consolidation has created market structures conducive to tacit price coordination and effectively undercut the anti-collusion norm of contemporary antitrust. Further, in emphasizing the prosecution of collusion, the agencies have devoted disproportionate attention to trivial matters, frequently pursuing cases against small-time price fixing that posed minimal harm to consumer welfare.

Beyond the confines of consumer welfare, the prevailing antitrust philosophy has had grave economic and political consequences. The antitrust tolerance of consolidation has contributed to wage stagnation, diminished new firm formation, and corporate subversion of democratic institutions. And the categorical hostility toward horizontal collusion has led to a "bias against Lilliputians" in antitrust (Grimes 2001). The antitrust agencies have targeted the efforts of workers, professionals, and other relatively powerless actors to build power through collective action. Chicago School antitrust has helped produced the yawning economic and political inequality that defines American society today.

For antitrust law to tame the economic and political power of corporations, a radical philosophical change is necessary. Antitrust policy should have a much more aggressive posture toward the concentration of property. Consolidation of business property, in addition to frequently reducing consumer welfare, concentrates private economic and political power in the hands of fewer and fewer large firms. Whereas antitrust law should restrict the concentration of business assets, it should adopt a more tolerant and nuanced attitude toward horizontal coordination. Instead of being the supreme evil of antitrust, collusion among powerless actors can represent socially desirable cooperation. For example, sellers on Amazon's marketplace can strike better terms of trade, such as lower commissions, if they have the right to bargain collectively with the online commerce giant (Schneider and Vaheesan 2019). For the antitrust laws to be a "comprehensive charter of economic liberty" for ordinary Americans once again, *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958), this body of law must restrict consolidation among large corporations and permit cooperation among the powerless.

II. Tolerance of Consolidation, Intolerance of Collusion

Along with the adoption of consumer welfare objective, the federal antitrust agencies and courts have looked to neoclassical economics—a very particular school of it—in rewriting antitrust doctrine. This doctrinal reconstruction is at least as important to the contemporary field as the displacement of traditional economic and political goals with the consumer welfare goal. Two hypotheses define contemporary antitrust economics and practice. First, the consolidation of business property through mergers and acquisitions is generally beneficial or neutral. The prevailing wisdom holds that mergers and acquisitions allow corporations to achieve economies of scale (in the case of horizontal consolidation) and other "productive efficiencies" and offer the promise of lower prices for consumers. Second, collusion on price and other terms between direct competitors is categorically bad. Coordination among independent rivals produces higher prices and reduced output and holds no promise of productive efficiencies (or other social benefits), according to mainstream thinking.

A. Tolerance of Corporate Mergers and Acquisitions

Antitrust policy and law have a benign view of corporate consolidation. In contrast to the historical distrust of concentration, *Brown Shoe Co. v. United States*, 370 U.S. 294, 315–17 (1962), the federal agencies and courts view mergers as generally desirable or harmless. The courts and especially the federal antitrust agencies have accordingly raised the legal burden for challenging mergers. The permissive approach toward consolidation has been an important feature of modern antitrust.

The federal antitrust agencies have incorporated pro-merger economics through the Merger Guidelines. Although the Guidelines do not carry the force of law, they are influential and, in general, treated as persuasive authority by the courts. Since 1982, the Department of Justice and the Federal Trade Commission have steadily relaxed merger policy. They have consistently stated that they view the bulk of merger activity as benign (U.S. Department of Justice 1982, I). Only horizontal mergers (combining head-to-head competitors) typically raise antitrust concerns. And in practice, the agencies, in recent years, have only sought to block horizontal mergers in highly concentrated markets (Kwoka 2017, 866–67).

Consider the revision of the market share and concentration thresholds over time. Since the 1968 Guidelines, the agencies have raised the concentration level for problematic horizontal mergers. The 1968 Guidelines stated that the Department of Justice, in a market in which the four largest firms together had a share of 75% or more, would challenge a merger between two firms each with a share of 4% or more (U.S. Department of Justice 1968, I.5). And in less concentrated markets, the DOJ indicated it would challenge a merger between two firms each with 5% or more of the market (ibid., I.6). The contrast with present-day merger policy is striking. The Department of Justice and Federal Trade Commission apply a presumption of illegality at a much higher level of market concentration—a market in which four firms of equal size account for the entire market (U.S. Department of Justice and Federal Trade Commission 2010, § 5.3). And the agencies do not consistently enforce this presumption in practice (Kwoka 2018, 19–20).

Due to the antitrust agencies' reinterpretation of the law, federal anti-merger policy poses only a minor impediment to corporate consolidation. On top of adopting the desirability or at least neutrality of mergers as an analytical baseline, the agencies have recognized an efficiencies defense to otherwise illegal mergers. For instance, competitors in a highly concentrated market can persuade the DOJ or the FTC not to file suit if they can show productive efficiencies that are merger-specific and offer credible evidence in support of them (U.S. Department of Justice and Federal Trade Commission 2010, § 10). Other mergers, whether horizontal mergers in less concentrated markets or non-horizontal mergers, face little risk of being blocked in court. For instance, the federal antitrust agencies did not sue to stop a single vertical merger (combining firms in an actual or potential customer-supplier relationship) between 1979 and 2017.[2]

Due to the paucity of litigated mergers, the courts have issued comparatively few merger rulings since the early 1980s. The Supreme Court itself has not decided a merger case on the merits since 1974. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974). As a result, the Court has not revisited, let alone overruled, its anti-merger decisions from the 1960s.[3]

Nonetheless, the Supreme Court has embraced, at least in part, the pro-consolidation philosophy espoused by the federal antitrust agencies. The Court restricted private firms' ability to challenge mergers among their competitors. It cited concerns that these competitor suits may thwart firm combinations that can achieve productive efficiencies and stimulate price competition. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 114–15 (1986). In multiple rulings, the Court has also held that integrated firms and joint ventures achieve, or have the promise of yielding, operational efficiencies and accordingly should have broad autonomy to set prices as they see fit.[4]

The lower courts have adopted the pro-merger thinking as well. As a preliminary matter, courts have treated the Merger Guidelines as persuasive authority and applied their framework, in part or in whole, when deciding the legality of mergers (Greene 2006). For instance, the D.C. Circuit applied the market concentration thresholds announced in the 1992 Merger Guidelines and recognized the efficiencies defense the guidelines adopted. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716–17 (D.C. Cir. 2001). Other courts have similarly relied on the guidelines to decide merger cases. *St. Alphonsus Medical Ctr-Nampa Inc. v. St. Luke's Health System, Ltd.*, 778 F.3d 775, 784 n.9 (9th Cir. 2015); *Chicago Bridge and Iron Co. v. FTC*, 534 F.3d 410, 431 (5th Cir. 2008); *United States v. Bazaarvoice, Inc.*, 13-cv-00133-WHO, 2014 WL 203966, *36–37 (N.D. Cal. 2014). One influential court opinion attempted to limit the relevance of 1960s Supreme Court anti-merger decisions and accelerate an analytical shift away from the anti-consolidation philosophy underlying these earlier rulings. The D.C. Circuit, in an opinion authored by now Justice Clarence Thomas and joined by the late Justice Ruth Bader Ginsburg, moved away from a market structure approach to a more fact-intensive, competitive effects inquiry to merger law. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990).[5]

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[2] Fruehauf Corp. v. FTC, 603 F.2d 345 (2d Cir. 1979). The government unsuccessfully attempted to block the vertical merger between AT&T and Time Warner in 2017. United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019).

[3] These decisions greatly restricted mergers with horizontal and vertical elements and rejected efficiencies defenses for otherwise illegal mergers. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Philadelphia Nat. Bank, 473 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[4] See, for example, Texaco Inc. v. Dagher, 547 U.S. 1, 6 n.1 (2006); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19–21 (1979); see also Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984) ("Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. . . . Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect.").

[5] The court, citing a note in the *Harvard Law Review*, asserted that the Supreme Court had softened the structural presumption against horizontal mergers in concentrated markets. The Supreme Court had announced this presumption in *Philadelphia National Bank*. United States v. Baker Hughes, Inc., 908 F.2d 981, 991 (D.C. Cir. 1990) ("Without overruling *Philadelphia Bank*, then, the Supreme Court has at the very least lightened the evidentiary burden on a section 7 defendant.").

B. Hostility Toward Horizontal Collusion

Whereas they theorize that mergers yield social benefits (defined as productive efficiencies), the courts and the agencies continue to treat collusion among independent rivals as categorically harmful. The Supreme Court has repeatedly condemned collusion and refused to recognize exceptions to the per se ban on horizontal price fixing, market allocation, and other such restraints. The antitrust agencies, even as they have scaled back merger and monopoly enforcement, prioritize the prosecution of cartel activity. According to the prevailing philosophy of antitrust, whereas consolidation promises productive efficiencies along with the possibility of higher prices, collusion only offers the latter.

The Supreme Court has affirmed and elevated the long-standing ban on horizontal collusion. The Court announced this rule in the earlier years of the Sherman Act and has, with a brief exception in the 1930s, affirmed it since then. *United States v. Addyston Pipe & Steel Co.*, 175 U.S. 211 (1899); *United States v. Joint Traffic Association*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).[6] In a landmark 1940 decision, the Court held that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). In modern times, the Court has given the rule greater significance and made it the central prohibition of antitrust. The Supreme Court has described collusion as "the supreme evil of antitrust," *Trinko*, 540 U.S. at 408, and rigidly applied it to competing individuals and large firms alike.

The Court's decision in FTC v. Superior Court Trial Lawyers Association illustrates the unremitted hostility to horizontal collusion. *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990). The defendants in the case, lawyers in Washington, D.C., had organized a boycott of the city's public defender service in the aim of obtaining a fair wage for their work (ibid., 415–18). The campaign succeeded and the city agreed to raise the lawyers' hourly rate (ibid., 418). The FTC, however, sued the lawyers for their strike-like activity on the grounds that it was an illegal horizontal restraint of trade (ibid., 418–19). The Supreme Court agreed with the FTC and ruled the lawyers' boycott per se illegal (ibid., 436).

The Court saw no redeeming social benefit to this coordination. In a revealing excerpt, the majority analogized the per se rule to speed limits or bans on stunt flying:

> The per se rules in antitrust law serve purposes analogous to per se restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen. . . . A bad driver going slowly may be more dangerous than a good driver going quickly, but a good driver who obeys the law is safer still. So it is with boycotts and price fixing. Given an appropriate set of circumstances and some luck, the period [of collusive conduct] can be long enough to inflict real injury upon particular consumers or competitors. *Superior Court Trial Lawyers Association*, 493 U.S. at 433–35.

[6] For a short period during the Great Depression, which coincided with the federal government's embrace of price and wage coordination through the National Industrial Recovery Act, the Supreme Court softened the ban on horizontal price fixing for distressed industries. See Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

The stunt flying analogy is especially telling: an activity with private gain but little or no public benefit is deemed analogous to horizontal coordination among competitors. Informed by this analogy, the Court condemned the lawyers' conduct as categorically illegal.

The federal antitrust agencies have made the detection and prosecution of corporate cartels the mainstay of their work. The Department of Justice has brought many more cartel and other horizontal collusion cases than merger and monopoly cases. For instance, in 2016, the last full year of the Obama administration, the DOJ filed 39 criminal cartel complaints, challenged or remedied 15 mergers, and sued zero monopolists (U.S. Department of Justice Antitrust Division 2019). This pattern is consistent with enforcement practices before and since 2016 (U.S. Department of Justice Antitrust Division 2010).

Across administrations, Democratic and Republican, the Department of Justice has stressed rooting out collusive conduct (Baer 2014; Barnett 2006). Enforcers have invoked war metaphors to describe their campaign against collusion (Klein 1999), using language on par with, if not exceeding the rhetorical heat of, the Supreme Court's language of "supreme evil of antitrust," *Trinko*, 540 U.S. at 408).[7]

The federal antitrust agencies, in line with the Supreme Court's decision in *Superior Court Trial Lawyers Association*, have stressed that the per se rule against collusion applies to all actors, big and small. Federal antitrust enforcers, especially the FTC, have brought numerous cases against associations of independent contractors, including ice skating coaches,[8] music teachers,[9] physicians,[10] and public defenders (again).[11]

An FTC official in a 2014 blog post affirmed the blanket application of the per se rule. Geoffrey Green wrote:

> It is a fundamental principle of antitrust law that competitors—*whether businesses or individuals*—cannot join together to limit the way that they offer products or services to potential customers, especially where there is no legitimate business purpose other than avoiding competition. Strictly speaking, competitors are expected to compete (Green 2014, emphasis added).

For the FTC, collusion is collusion. The agency does not distinguish—and sees no reason to distinguish—between home health workers banding together with the hope of obtaining a living wage (Ohlhausen, Baye, and Schmidt 2008) and the largest corporations in the world suppressing wages through collusion.

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[7] "In the past several years, people all over the world have come to realize that cartels, and particularly international cartels, are a true scourge of the world economy. . . . Or to use street-talk for a second, as a character in the famous 1976 movie *Network* shouted, 'We're mad as hell and we're not going to take it any more'" (Klein 1999).

[8] In re Professional Skaters Association, 159 F.T.C. 758 (2015).

[9] In re Music Teachers National Association, Inc., No. C-4448, 2014 F.T.C. LEXIS 68 (Apr. 3, 2014); In re National Association of Teachers of Singing, Inc., No. C-4491, 2014 F.T.C. LEXIS 218 (Oct. 1, 2014).

[10] North Texas Specialty Physicians v. FTC, 528 F.3d 346, 369 (5th Cir. 2008).

[11] In re Lewis, 138 F.T.C. 213 (2004).

III. The Failure of Contemporary Antitrust Economics

Notwithstanding pretenses of science-like rigor (Muris and Nuechterlein 2020), the dominant model of antitrust economics has failed on its own consumer welfare terms as well as on a broader set of criteria. The tolerance of consolidation has produced mega-merger waves that have hurt consumers. The fixation on rooting out collusion and the tolerance of consolidation are illustrated by a case from the closing months of the Obama administration. The DOJ filed suit against AT&T and DirecTV over the improper sharing of information among themselves (as well as two of their television-provider rivals) when negotiating with a Los Angeles sports channel (U.S. Department of Justice 2016). Here is what remarkable: The suit was filed *after* the DOJ had permitted AT&T to acquire DirecTV and turn collusion between two firms into the decision of a single AT&T (U.S. Department of Justice 2015).

Present doctrines and policies have failed on their own narrow consumer welfare criterion and more. Even as the agencies police (often small-scale) overt collusion, they have permitted market structures that are susceptible to coordinated pricing on a much larger scale. And the failure of antitrust doctrine extends beyond consumer welfare. The tolerance of consolidation and hostility toward collusion have accelerated the transfer of economic and political power from ordinary people to corporate executives and shareholders (Khan and Vaheesan 2017).

A. Antitrust Doctrine Fails to Promote Consumer Welfare

Contemporary antitrust doctrine has failed on its own terms. Although the tolerance of consolidation has been justified on consumer welfare grounds, empirical research increasingly finds a disconnect between the theoretical promise of mergers and the real-world effects. Mergers often lead to higher prices and markups and generally fail to produce the promised productive efficiencies. The tolerance of consolidation has also made a mockery of the agencies' supposed determination to root out collusion because concentrated market structures are conducive to price leadership and other forms of tacit price coordination.

A growing body of research finds that mergers lead to higher prices and that concentration is associated with higher prices and markups. John Kwoka reviewed retrospective studies of completed mergers and found that the federal antitrust agencies permitted many mergers that subsequently led to higher prices and diminished output (the agencies' measure of consumer welfare) (Kwoka 2015). A recent empirical analysis concluded that concentration is associated with higher prices and markups (Grullon, Larkin, and Michaely 2019). Two other studies concluded that rising concentration is responsible for rising profit margins (De Locker and Eeckhout 2017), and a decline in the labor share of gross domestic product (Barkai 2020). Herbert Hovenkamp and Carl Shapiro, two leading voices in the antitrust establishment, reviewed the empirical findings and concluded, "[C]oncentrated industries tend to perform poorly in serving consumers, as they displayed higher prices, higher price/cost margins, and higher profits than less concentrated industries" (Hovenkamp and Shapiro 2018, 2001).

Sectoral studies reach a similar conclusion. A study of mergers and acquisitions in manufacturing showed that these consolidations generally led to higher prices and price-cost markups (Blonigen and Pierce 2016). Examinations of hospital mergers have found that these combinations, especially in already concentrated markets, lead to higher prices for payors and patients. Studies have found that mergers among hospitals lead to higher prices and reduced quality of care (Gowrisankaran 2015; Dafny 2009; Capps and Dranove 2004). Another empirical analysis found that monopoly hospitals charge prices that are 12% higher than hospitals in markets with four or more competitors (Cooper, Craig, Gaynor and Van Reenen 2019). Other research has found price increases following mergers in airlines (Peters 2006), appliances (Ashenfelter, Hosken, and Weinberg 2013), and beer (Miller and Weinberg 2017).

Mergers have failed to produce the promised efficiencies. A large body of literature dating back to the 1980s has found that mergers yield little or no productive efficiencies (Ravenscraft and Scherer 1987; Lande and Vaheesan 2020). The study of manufacturing mergers cited earlier concluded these combinations rarely enhanced the productivity of the firm (Blonigen and Pierce 2016; Grullon, Larkin, and Michaely 2019). Indeed, mergers sometimes create operational *inefficiencies* (Ravenscraft and Scherer 1987). In other words, merged companies sometimes have higher cost structures than the independent companies that preceded them did. Business scholar Melissa Schilling offered a bleak assessment of the social benefits of mergers and wrote, "A considerable body of research concludes that most mergers do not create value for anyone, except perhaps the investment bankers that negotiated the deal" (Schilling 2018, 183).

Even treating collusion as the "supreme evil of antitrust," *Trinko*, 540 U.S. at 408, or "cancers on the open market economy" (Monti 2000), present-day merger policy is illogical. By creating concentrated market structures, horizontal mergers increase the likelihood of tacit collusion. In concentrated markets, firms can engage in price leadership and other types of coordinated pricing without any overt communication (Baker 1993; Peritz 2002). They can collude without leaving any "smoking gun" telephonic or email evidence and, as such, avoid antitrust liability. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954).

Conventional economic models posit that this type of pricing is common in concentrated industries (Farrell and Shapiro 1990). In markets with few players, corporations can tacitly coordinate on pricing (Rees 1993). For instance, the leading firm can initiate price revisions and coordinate pricing without overt communications with rivals. Under this regime of price leadership, firms can collectively raise prices without directly communicating with each other on price levels or pricing strategies (Heil and Helsen 2001). Tacit pricing can be preserved through actual or threatened price wars in which firms committed to the existing pricing structure respond with aggressive and even below-cost pricing to discipline firms that deviate from rivals' preferred pricing practices (ibid.).

The cigarette industry offers a history of coordinated pricing through price leadership. In this oligopolistic industry, four cigarette makers have maintained stable pricing for decades through price leadership (Adams and Brock 1995). They resorted to price wars when a firm, whether existing or new entrant, sought to compete on price (ibid.).[12]

In tolerating the creation of concentrated market structures, the agencies have subverted their own anti-collusion program. They have elevated a dry formalism—prosecuting overt collusion however minor or trivial (Vaheesan 2019)—over function—permitting market structures that allow large-scale

[12] In his dissent in a landmark predatory pricing case, Justice John Paul Stevens reviewed the allegations of a price war between two cigarette makers, Liggett and Brown and Williamson. Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 245–51 (1993) (Stevens, J., dissenting).

price coordination among rivals. In practice, if small players like individual purchasers of foreclosed homes or heir locators collude, they face criminal prosecution for doing so (U.S. Department of Justice 2019a; U.S. Department of Justice 2019b). In contrast, large corporations operating in concentrated markets can collude provided they do it tacitly and do not engage in collusive communications. And sometimes even when they do collude overtly, large firms have escaped the per se rule.[13]

The airline industry illustrates the shortcomings of the agencies' approach to consolidation and collusion on consumer welfare terms. The Department of Justice, which reviews airline mergers, has refused to check consolidation in the air travel industry (U.S. Department of Justice 2013; U.S. Department of Justice 2010; U.S. Department of Justice 2008). Because of the DOJ's permissive approach to mergers, four airlines dominate the American air travel business (Mouawad 2016). After allowing the last of the airline mega-mergers between American and U.S. Airways, the DOJ woke up to the risk of collusion. The agency opened an antitrust investigation into possible collusion in air travel (Drew 2015).[14] The DOJ had permitted market structures highly conducive to collusion and apparently regretted what it had enabled after the fact.

B. *Current Antitrust Doctrine Hurts Broader Economic and Political Interests*

Contemporary antitrust doctrine fails on broader economic and political grounds, too. In permitting consolidation across much of the economy, the agencies have presided over a massive concentration of private power. In addition to wielding power over consumers and purchasers, large corporations exercise power over workers, suppliers, competitors, and democratic political institutions. The categorical ban on "collusion" further compounds the tolerance of consolidation. Under prevailing antitrust rules, independent contractors, professionals, and small firms, in general, cannot engage in collective action against powerful entities without running afoul of the per se rule. At present, antitrust permits the concentration of power in the hands of corporate managers and thwarts efforts to challenge this dominance through cooperation.

Corporate power over workers translates into lower wages and salaries. Recent studies have found that a significant fraction of local labor markets in the United States are highly concentrated (Azar, Marinescu, and Steinbaum 2019; Benmelech, Bergman, and Kim 2018). Many local job markets are pure monopsonies—as in, workers in certain lines of work have only one potential employer (Azar, Marinescu, and Steinbaum 2019). This employer-side concentration translates to significantly lower wages (Azar, Marinescu, and Steinbaum 2019), and likely leads to less favorable terms of work in general. Concentration harms workers in other ways as well and can radiate far upstream. As a

[13] For instance, the Supreme Court held that collusive arrangements between branded and generic drug makers should be evaluated under the rule of reason and not be treated as presumptively or per se illegal. FTC v. Actavis, Inc., 570 U.S. 136, 159 (2013).

[14] DOJ created the problem that it was attempting to remedy afterward.

> Airlines rank high on the list of America's most hated industries, so it's tempting to celebrate DOJ's move both as just deserts for the companies and as the mark of a dedicated government looking out for the public. That gets the story backwards, though. The investigation is a sign not of DOJ's diligence but of its earlier failings. The Justice Department shouldn't be lauded for the investigation—but rebuked for creating the problem in the first place. Since 2005, what were once nine major airlines have merged their way down to four. Today, these remaining carriers—American, Delta, United and Southwest—control around 80 percent of air travel in the United States. The high level of concentration has handed the four companies enormous market power, equipping them to keep fares high even as oil prices have plummeted (Khan 2015).

dominant buyer—say a retailer—puts downward pricing pressure on suppliers, the suppliers in turn seek to manage costs, in part, by reducing wages and benefits to their workers. One study found that increased concentration at the retail level explains about 10% of the wage stagnation (the discrepancy between productivity and wage growth) since the 1970s (Wilmers 2018).

This consolidation of power also translates to greater power to shape market structure and control access. Firms with monopoly power or dominance can exclude rivals through a host of means. For example, they can tie up distributors, customers, and suppliers with restrictive contracts and prevent rivals from entering a market or growing their market share. *McWane, Inc. v. FTC*, 783 F.3d 814, 840–42 (11th Cir. 2015); *United States v. Dentsply International, Inc.*, 399 F.3d 181, 191–97 (3d Cir. 2005). They can also refuse to deal with rivals and deprive them of essential inputs needed to compete. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610–11 (1985). Furthermore, given the unequal access to financing, deep-pocketed monopolists and would-be monopolists can engage in extended periods of below-cost pricing to drive out existing rivals and discourage potential entrants. *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 950 (6th Cir. 2005).

The consolidation of power also translates to greater political clout. Corporate size is associated with greater political activity in the form of campaign contributions and lobbying (Hill, Kelly, and Lockhart 2013; Borghesi and Chang 2015). Relative to their counterparts in unconcentrated markets, firms in concentrated industries also likely have an easier time overcoming collective action problems and coordinating their political activity (Olson 1965). While not examining the connection between firm size or market concentration and political activity specifically, an influential 2014 study found that large corporations (and the wealthy) wield a great deal of clout in Congress, whereas ordinary Americans exercise little or no influence (Gilens and Page 2014). Uber and other "gig economy" firms are an illustration of present-day antitrust law supercharging the power of large corporations. They dominate ride-hailing and related markets and wield great political power, shaping laws and regulations to preserve their business models (Said 2020; Steinbaum 2019).

Even as antitrust law has permitted consolidation of corporate power, the federal antitrust agencies and private plaintiffs have deployed it against workers. Critically, unlike workers in employment relationships, workers classified, or misclassified, as independent contractors are typically not entitled to an antitrust exemption (Paul 2016, 1032–33). See also *Taylor v. Local No.7, Int'l Union of Journeymen Horseshoers*, 353 F.2d 593, 597 (4th Cir. 1965); *Spence v. Southeastern Alaska Pilots' Association*, 789 F. Supp. 1007, 1012–13 (D. Alaska 1990).[15] Small firms are in a similar position of vulnerability. Their organizing efforts are potentially "collusion" and illegal under the antitrust laws. *In re Professional Lighting and Sign Mgmt. Cos., Inc.*, 159 F.T.C. 261 (2015).

In exploiting this gap in legal protection and mechanically enforcing the per se rule on collusion, the agencies have attacked the organizing efforts of many workers (Vaheesan 2019). As noted above, the FTC has targeted associations of ice skating coaches,[16] music teachers,[17] physicians,[18] and public defenders.[19] The FTC has also attacked state and local efforts to grant collective bargaining rights to

[15] Antitrust law permits independent contractors to organize when do so in concert with workers classified as employees. American Federation of Musicians v. Carroll, 391 U.S. 99 (1968).
[16] *Professional Skaters Association*, 159 F.T.C. at 758.
[17] *Music Teachers National Association*, No. C-4448, 2014 F.T.C. LEXIS at 68; National Association of Teachers of Singing, No. C-4491, 2014 F.T.C. LEXIS 218.
[18] *North Texas Specialty Physicians*, 528 F.3d at 369.
[19] *Lewis*, 138 F.T.C. at 213.

independent contractors, arguing that these governments are authorizing a per se violation of federal antitrust law (Ohlhausen, Baye, and Schmidt 2008). Private employers and other purchasers of labor services have also used the antitrust laws to attack the concerted activities of non-employee workers (Lee 2019; Paulson 2017). See also *Chamber of Commerce of the U.S. v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018).

With this tolerance of consolidation and hostility toward collusion or cooperation, antitrust law has supercharged the power of corporations and disempowered everyone else. Due to a series of merger waves since the 1980s, a handful of corporations dominate most markets. Three- or four-firm oligopolies are the norm (Open Markets Institute 2018). This corporate concentration means corporate power. In contrast, antitrust has frustrated workers' and small firms' efforts at building their own power. Congress enacted the antitrust laws to rebalance and create a more equitable distribution of power in the economy. Antitrust today, however, reinforces and deepens inequality between large businesses, on the one hand, and consumers, workers, small businesses, and citizens, on the other hand.

IV. Moving Forward: The Perils of Consolidation and the Promise of Cooperation

An antitrust policy that seeks to promote a more equitable distribution of power and wealth would have radically different foundations. Replacing the consumer welfare objective with the economic and political objectives that animated the Congresses that enacted the Sherman, Clayton, and Federal Trade Commission Acts is a critical step. Consumer welfare captures a relatively thin slice of corporate power. Equally important is rewriting the rules of antitrust to both curtail the consolidation and monopolization of business property and permit certain forms of coordination between independent actors.

Restrictions on mergers should be a core part of a progressive antitrust. Merger policy should be greatly strengthened for narrow consumer welfare grounds alone. Mergers and acquisitions fail to produce the promised efficiencies and often lead to higher prices and profit margins. But more importantly, mergers combine business assets and centralize power. Larger businesses, whether measured by market share or size, wield greater power over consumers, suppliers, workers, and citizens. A strong anti-consolidation norm should be a mainstay of progressive antitrust, as it was from 1950 through the early 1980s.[20]

An anti-merger norm would not be a categorical ban on business growth but would instead encourage growth through other means. The Clayton Act's anti-merger provisions restrict corporate growth through mergers, not corporate growth in general (Peritz 1996). It channels growth strategy away from

[20] In a 1966 decision, the Supreme Court described the purpose of the 1950 amendments to the anti-merger section of the Clayton Act:

> Like the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business. In stating the purposes of their bill, both of its sponsors, Representative Celler and Senator Kefauver, emphasized their fear, widely shared by other members of Congress, that this concentration was rapidly driving the small businessman out of the market. United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966).

buying rivals, suppliers, and distributors toward investment in new facilities and technologies. An implicit presumption of an anti-merger statute is that corporations will grow through internal expansion. *Philadelphia National Ban*k, 473 U.S. at 370. Even accepting the unsupported theory that corporate consolidation yields more efficient enterprises, a strong anti-merger rule is not a recipe for stunted firms and a loss of productive efficiencies. Indeed, it could be the basis for a far more productive and technologically dynamic corporate sector.[21]

Along with hostility toward corporate consolidation, antitrust law and policy should adopt a more nuanced view of collusion among independent actors. As a threshold matter, recognizing that antitrust law permits certain forms of coordinated activity, including mergers and acquisitions, is critical. As Sanjukta Paul has written, antitrust allows business firms to coordinate the activity of their employees, including across separate corporate entities under common ownership (Paul 2020). For instance, if antitrust law categorically promoted competition, it would prohibit two divisions of a single corporation or two members of a joint venture from setting prices—but the Supreme Court has clearly rejected such rules and treated these arrangements as the action of a single entity (Paul 2020). *See Copperweld*, 467 U.S. at 771; *Dagher,* 547 U.S. at 6. Instead it singles out price-setting among independent actors. The ban on collusion means small players are robbed of the one mechanism that allows them to govern markets while maintaining their independence (Paul 2020).

The tolerance of certain forms of collusion (or cooperation) is already built into the body of antitrust law. For instance, the courts have interpreted the Clayton Act, Norris-La Guardia Act, and National Labor Relations Act as permitting employees (though not other workers) to engage in some forms of coordinated activity. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512 (1940). In agriculture, the Capper-Volstead Act, 7 U.S.C. § 291, allows "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers" to undertake collective action as sellers without running afoul of antitrust law.

Instead of viewing these legislative exemptions as ad hoc "concessions" to certain groups, progressive antitrust advocates, enforcers, and scholars should treat them as a core part of an anti-monopoly program. Congress enacted the antitrust laws to constrain the power of monopolists and trusts, not to promote "competition"—even a socially destructive competition that further weakens the positions of workers and small firms—indiscriminately across the economy (Vaheesan 2019). Accordingly, a progressive antitrust should be built on constraining the autonomy of powerful corporations and protecting the freedom of workers, professionals, and small firms to join in solidarity. To put it in concrete terms, medium-sized and large corporations would face tight restrictions on acquiring rivals and controlling markets, whereas workers, professionals, and small firms would have the freedom to organize and engage in collective action against more powerful actors (Vaheesan and Schneider

[21] Loose merger policy may encourage companies to grow through mergers and acquisitions instead of expanding their existing capacities and investing in research and development. Walter Adams and James Brock made this argument powerfully in the mid-1980s:

> [T]wo decades of managerial energies devoted to sterile paper entrepreneurialism and the quick-growth-through-merger game are, at the same time, two decades during which management attention has been diverted from the critical task of investing in new plants, new products, and state-of-the-art manufacturing techniques. Billions of dollars spent on shuffling ownership shares are, at the same time, billions of dollars not spent on productivity-enhancing plant, equipment, and research and development (Adams and Brock 1986, 819).

2019).[22] (Importantly, small-player coordination should not be carte blanche for all forms of cooperation: for example, small firms should not be permitted to collude against their workers and keep their wages down.)[23] Such an antitrust regime would redistribute and democratize power downward (Paul and Vaheesan 2019) and even lay the groundwork for a radical transformation of corporations and the entire American economy (Schneider and Vaheesan 2019).

V. Conclusion

Antitrust law today deepens existing inequalities between large corporations and the public. Agency policy and judicial precedents have tolerated and encouraged consolidation of business assets and impeded the organizing of workers and small firms. The current configuration of antitrust rules has contributed to hyper-concentration in the corporate sector and atomization and fragmentation elsewhere. A progressive antitrust would invert the basic norms of antitrust today. It would not treat collusion as "the supreme evil of antitrust," *Trinko*, 540 U.S. at 408, and instead view certain forms of collusion among certain classes of actors as beneficial and essential for an equitable society. At the same time, it would restrict the centralization and concentration of business assets in ever fewer hands through mergers and acquisitions. In short, it would protect cooperation among the powerless and proscribe consolidation among corporations.

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[22] Congress could broaden the Capper-Volstead Act to protect all small players in the economy (Vaheesan and Schneider 2019).

[23] For example, farmers should not be permitted to collude against their workers (Vaheesan and Kelloway 2019).

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