

Antitrust as Allocator of Coordination Rights

Sanjukta Paul*

The reigning antitrust paradigm has turned “competition” into a talisman, even as antitrust law in reality has functioned as a sorting mechanism to elevate one species of economic coordination and undermine others. Thus, the ideal-state version of “competition” and its companion “efficiency” have been deployed to attack disfavored forms of economic coordination, both within antitrust and without. These include horizontal coordination beyond firm boundaries, democratic market coordination, and labor unions. Meanwhile, a very specific exception to the “competitive order” has been written into the law for one type of coordination, and one type only: that embodied by the traditionally organized, top-down business firm.

This paper traces the appearance of this legal preference and reveals its logical content. It also explains why antitrust’s “firm exemption” is a specific policy choice that cannot be derived from corporate law, nor from contracts, nor even from property. Indeed, because antitrust has effectively established a state monopoly on the allocation of coordination rights, we ought to view coordination rights as a public resource, to be allocated and regulated in the public interest rather than for the pursuit of only private ends. Intra-firm coordination is conventionally viewed as entirely private, buoyed up by the contractarian theory of the firm. But the contractarian view of the firm cannot explain antitrust’s firm exemption, and is indeed inconsistent with the conventional justifications for it. The paper also briefly sketches some of the policy directions that flow from the recognition that coordination rights are a public resource, focusing upon expanding the right to engage in horizontal coordination beyond firm boundaries.

*Assistant Professor of Law, Wayne State University. I am grateful to Vincent Buccola, Suresh Naidu, Saule Omarova, Nathan Tankus, Sandeep Vaheesan and Noah Zatz for their helpful comments and suggestions, and to Nathan Tankus for excellent research assistance. All errors and omissions are mine.

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INTRODUCTION

The reigning antitrust paradigm authorizes large, powerful firms as the primary mechanisms of economic and market coordination, while largely undermining all others: from workers’ organizations to small business cooperation to democratic regulation of markets. This paper argues that rather than promoting competition, as conventionally understood, antitrust’s basic function is to *allocate coordination rights*. While deploying the notion of competition to undermine its disfavored forms of economic coordination, antitrust law also relies upon conceptually unrelated “efficiencies” to quietly underwrite a major exception to its principles of competition: the business firm itself. By surfacing what I call antitrust’s firm exemption, I reveal the contingency of the law’s choices about permissible economic coordination—and bring the possibility of making different choices closer.

Proposals to reform antitrust have generally stopped short of questioning the basic understanding that its primary function is to promote competition. To be sure, many posit that antitrust performs this stated function badly.¹ And some have begun the critical work of re-introducing other, older normative benchmarks to antitrust analysis,² whose memory a minor strain of earlier scholars had kept alive.³ To varying degrees, this work still regards antitrust primarily in terms of promoting competition. Meanwhile, more mainstream antitrust scholarship’s official consensus position is that the ideal competitive market is the only appropriate normative benchmark for decision-making.⁴ At least officially, if increasingly uneasily, competition is still king.

Some recent contributions have emphasized the need to expand the coordination rights of small players, beginning with the question of workers and micro-enterprises caught between labor and antitrust regulation.⁵ That view is now also beginning to find some favor within broader policy reform

¹ See, e.g., Suresh Naidu, Eric Posner, and Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018).

² See, e.g., Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. EUROPEAN COMP. L. & PRACTICE 131 (2018).

³ See, e.g., Robert Pitofsky, *The Political Content of Antitrust* 127 U. PA. L. REV. 1051 (1979).

⁴ I say this is the *official* position because mainstream antitrust also posits and relies upon “efficiencies” that have no logical relationship to this official normative benchmark, nor to promoting competition in some other consensus sense, as further discussed in Part III.A., *infra*.

⁵ Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016); Sanjukta Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233 (2017); Marina Lao, *Workers in the ‘Gig’ Economy: The Case for Extending the Antitrust Labor Exemption*, 51 UC DAVIS L. REV. 1543 (2018); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, __ MARYLAND L. REV. __ (forthcoming).

discussions. As the opposition to antitrust’s targeting of small players’ economic cooperation builds, some have begun to respond that this opposition evinces an inconsistency within the antitrust reform program, which otherwise generally favors increased antitrust enforcement. But this objection only makes sense if one assumes that antitrust’s purpose is to promote competition, full stop. By showing that antitrust in fact *already* allocates coordination rights, I also show that it can and should consciously re-allocate them.

Antitrust’s current allocation of coordination rights made its way into the law most directly through the work of Robert Bork.⁶ In Part I, I set the stage for a closer examination of this turning point by describing the gradual transition in antitrust’s attitude to horizontal coordination beyond firm boundaries, enabled by the Chicago School. In Part II, I describe what I call the firm exemption to antitrust. While the right of business firms to engage in internal coordination and price-setting is treated as axiomatic, the development of that right was in fact more contingent and path-dependent than we ordinarily acknowledge. In Part III, I turn to Bork. I argue that his argument for expanding the firm exemption relied upon a notion of “efficiency” that is conceptually distinct from—though conveniently homonymous with—the notion of economic efficiency that was deployed to undermine other forms of economic coordination. I then locate the Borkian allocation of coordination rights in the case-law that implements antitrust’s firm exemption.

Finally, in Part IV, I draw some preliminary normative conclusions from the account of antitrust as allocator of coordination rights. First, I explain why antitrust law’s grant of coordination rights to the firm cannot be derived from corporate law, nor from contracts, nor even from property. Because antitrust has effectively established a state monopoly on the allocation of coordination rights, we ought to view coordination rights as a public resource, to be allocated and regulated in the public interest. Intra-firm coordination is conventionally viewed as entirely private, a view that is buoyed up by the contractarian theory of the firm. But the contractarian view of the firm cannot explain antitrust’s firm exemption, and is indeed inconsistent with the conventional justifications for it. Second, I briefly describe some of the policy directions that flow from the recognition that

⁶ See, e.g., George Priest, *Bork’s Strategy, Price Fixing, and the Influence of the Chicago School on Modern Antitrust Law* 51 J. & L. ECON., 51 (2014); William E. Kovacic, *The Antitrust Paradox Revisited*, 36 Wayne L. Rev. 1413 (1990) (systematically assessing and describing the enormous influence Bork’s book had on the remaking of antitrust law). Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, ANTITRUST L. J., at note 6 (2014) (“Bork had a greater effect on the development of antitrust law than his Chicago contemporaries...”).

coordination rights are a public resource, focusing upon expanding rights to engage in horizontal coordination beyond firm boundaries. I also explain how the account of antitrust law I present lends support to the building critique of corporate monopoly.

I. BACKGROUND: ECONOMIC COORDINATION BEYOND FIRM BOUNDARIES

The Chicago School approach to antitrust law sought to clear previously existing, “thick” normative benchmarks for antitrust analysis, replacing them as much as possible with its official decision framework defined by economic efficiency. One effect of this transition was to strengthen the antitrust norm against horizontal coordination beyond firm boundaries, as well as to strengthen other legal and policy norms against workers’ organizations and democratic market coordination.

A. *Clearing away older normative benchmarks*

An original goal of federal antimonopoly legislation was to promote *fair* competition and business practices, and to furnish a check on emerging consolidations of economic power within both inter- and intra-firm arrangements.⁷ As the pre-New Deal judiciary increasingly used the statute instead to aid firms in consolidating their power over workers,⁸ while doing little to check corporate consolidation itself,⁹ Congress responded in part by again re-affirming its express commitment to fairness as a goal of antitrust policy in passing the Federal Trade Commission Act.¹⁰ This antitrust commitment to fairness went hand in hand with the well-documented purpose of dispersing private power, expressly including the flourishing of

⁷ See Part II, *infra*; see also, e.g., 21 CONG. REC. 3152 (1890), quoted in *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 n.15 (1956) (Senator Hoar describing the statute’s purpose in terms of “the sole engrossing to a man’s self by means which prevent other men from engaging in fair competition with him”); Pitofsky, *supra* note 3.

⁸ Paul, *Enduring Ambiguities*, *supra* note 5. Landmark cases in this jurisprudence included *Workingmen’s Amalgamated*, 54 F. 994 -- *United States v. Workingmen’s Amalgamated Council of New Orleans*, 54 F. 994, 994 (1893) (D. La. 1893); *Loewe v. Lawlor*, 208 U.S. 274 (1908), *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925).

⁹ Naomi Lamoreaux, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904* (Cambridge, 1985)

¹⁰ See, e.g., Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 231 (1980).

small enterprise.¹¹ Antitrust analysis entailed a consideration and sometimes a contest of values, a fact that has been repeatedly documented.¹²

Indeed, in their foundational 1956 paper, Director and Levi themselves described antitrust, as they found it, as having to do as much with the “laws of fair conduct” as with the narrower economic theory they thought ought to displace them:

there is uncertainty whether the dominant theme of the antitrust laws is to be the evolution of laws of fair conduct, which may have nothing whatever to do with economics, or the evolution of minimal rules protecting competition or prohibiting monopoly or monopolizing in an economic sense.¹³

The acknowledgment is notable because the paper also sought to establish precedent for their reform project in existing law, while conceding “the [existing] law’s skepticism for economists and economics.”¹⁴

To discredit broader and thicker normative benchmarks such as fairness, dispersal of power, and a commitment to small enterprise, Chicago School antitrust also helped to shift antitrust’s very idea of competition—from the multifarious social and economic *processes* invoked by legislators¹⁵

¹¹ Notably, *Brown Shoe Co. v. United States*, 370 U.S. 294, 315-16 (1962), cited the inherent dangers of unchecked corporate expansion, desirability of local control over industry, protection of small business, and “the threat to other values.” Pre-New Deal courts also acknowledged these statutory purposes, even though they often did not go on to fulfill them. See, e.g., *United States v. American Can Co.*, 230 F. 859, 902 (D. Md. 1916), appeal dismissed 256 U.S. 706 (1921) (noting that “one of the designs of the framers of the Anti-Trust Act was to prevent the concentration in a few hands of control over great industries. They preferred a social and industrial state in which there should be many independent producers. Size and power are themselves facts some of whose consequences do not depend upon the way in which they were created or in which they are used. It is easy to conceive that they might be acquired honestly and used as fairly as men who are in business for the legitimate purpose of making money for themselves and their associates could be expected to use them, human nature being what it is, and for all that constitute a public danger, or at all events give rise to difficult social, industrial and political problems...”).

¹² See, e.g. Pitofsky. *supra* note 3; Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* 925 (2000); Jesse H. Markham, *Lessons for Competition Law from the Financial Crisis*, 16 Fordham J. Corp. & Fin. L. 261, 278 (2011).

¹³ Aaron Director and Edward Hirsch Levi, *Trade Regulation*, 51 NORTHWESTERN L. REV. 281, 282 (1956).

¹⁴ *Id.*

¹⁵ Competition as a process in the real world is about, first, the *existence* of competitors, and second, about a healthy level of business rivalry. Even here, it is always balanced with some level of coordination, the form of which we choose in some way or another. But this sense of “competition” is distinct from the way most economists typically use the term, to describe an ideal state (or specified forms of deviation from that ideal state). See, e.g., Harry S. Gerla, *Restoring Rivalry as a Central Concept of Antitrust Law*, 75 NEB. L. REV. 209 (1996). Current antitrust discourse often seems to move between the two, with the more familiar, real-world

and by many antitrust actors since then, to the *ideal state* contemplated by mainstream economic theory. The Chicago School Antitrust Project, as it was known, built upon an earlier, conscious decision by its founding members to substitute this “competitive order” for the classical liberal *laissez-faire* framework (favored by much of the pre-New Deal federal judiciary) in order to advance the same, fundamentally conservative political and economic order.¹⁶ It then applied that conceptual framework to antitrust law. Thereafter, as one commentator put it, “Lawyers for corporate interests and industrial organization economists of the Chicago School mounted an organized effort that succeeded in persuading the federal courts to adopt a far narrower view of antitrust that has as its single objective the avoidance of economically inefficient transactions, referred to by economists as ‘allocative efficiency.’”¹⁷ Fairness, of course, has no role in this conceptual framework.

As a logical matter, these earlier normative benchmarks would pose a challenge to the allocation of coordination rights that antitrust later erected. Most obviously, the concern for the existence and flourishing of small enterprise supports the inclusion of many more persons in the privilege and the responsibility of economic coordination. It also itself furnishes an argument in favor of reasonable horizontal coordination beyond firm boundaries, insofar as such coordination contributes to the survival and flourishing of small business. This logical connection is also supported by the express legislative intention to authorize coordination among workers, farmers, *and* small business.¹⁸ The well-established antitrust concern with fairness also grounds an argument in favor of a more equitable allocation of coordination rights. Thus, removing these normative benchmarks from antitrust analysis was critical to the subsequent affirmative project of

sense used to motivate support for the pro-competition norm, and the second, less accessible sense used to operationalize that norm. *See also* Lina Khan, *The Ideological Roots of America’s Market Power Problem* YALE L. J. 127 (2018) (making a different but related distinction between competition as process and efficiency as outcome).

¹⁶ Rob Van Horn, *Reinventing Monopoly and the Role of Corporations: The Roots of Chicago Law and Economics*, in *THE ROAD FROM MONT PELERIN* 217 (Philip Mirowski & Dieter Plehwe, eds., 2014) (quoting Milton Friedman, “Neoliberalism and its Prospects” (1951)). Van Horn notes that the “reconceptualization of the state” in terms of the competitive order “became one of the hallmarks of neoliberalism” more generally. *Id.* He also notes that Friedman was Aaron Director’s brother-in-law and along with him, one of the three key members of the “Free Market Study” that directly preceded the Antitrust Project at Chicago. *Id.* at 205, 216. Meanwhile, Van Horn and Mirowski also show that historically, the Chicago School project was grounded in advancing the aim of a particular political-economic order, rather than merely an abstract commitment to the *analytical* framework of the competitive order. Rob Van Horn & Philip Mirowski, *The Rise of the Chicago School of Economics and the Birth of Neoliberalism* (2014) in *THE ROAD FROM MONT PELERIN*.

¹⁷ Markham, *supra* note 12. *See also* Van Horn, *id.*, *Reinventing Monopoly and the Role of Corporations: The Roots of Chicago Law and Economics*.

¹⁸ *See* Part II, *infra*.

undermining coordination rights beyond business firms. In this way, officially clearing the field of normative benchmarks other than “competition” removed challenges to the selective preference for coordination based on hierarchical control, exercised over others on the basis of concentrated ownership claims—which the Chicago School would later defend as the one permitted exception to the “competitive order.”

B. *The emerging norm against horizontal coordination beyond firm boundaries*

Both the shift in the concept of competition itself, and the clearing of other normative benchmarks other than promoting competition, strengthened the antitrust norm against horizontal coordination beyond firm boundaries. While the conception of competition as a dynamic social process has room for reasonable coordination, the conception of competition as an ideal state—a competitive market—has no space for coordination between separate actors in the same market. Both by entrenching the latter and by working to clear other normative benchmarks for antitrust analysis, then, Chicago School antitrust strengthened the norm against horizontal coordination beyond firm boundaries.

Besides the transformation that took place inside the technical confines of antitrust doctrine itself, many elements of the New Deal order more broadly had an enduringly strong pro-coordination bent, even if overt public price coordination did not survive “the first New Deal” as uniform national policy.¹⁹ These too were similarly attacked and undermined by other arms of Chicago School policy thinking. As Laura Phillips Sawyer has shown, trade associations among small merchants played a large role in coordinating markets through the 1940’s, after which much market management passed to public or quasi-public entities and regulators (which were exempted from antitrust).²⁰ And of course, New Deal labor regulation enacted a system of collective bargaining that functioned as a market coordination mechanism not only for labor markets but also beyond.²¹ The other key policy arms of the Chicago School movement, besides antitrust, specifically focused on

¹⁹ National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933), *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

²⁰ Laura Phillips Sawyer, *AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE “NEW COMPETITION,” 1890-1940* (Cambridge, 2018).

²¹ 29 USCA § 151 *et seq.* During the mid-century period, as a practical matter labor unions in many industries participated in coordinating not only labor but also product markets. This was most obvious in regulated industries like trucking and rail, in which rates were set through the Interstate Commerce Commission with both labor and business input, but was also the case in other key industries as well.

attacking labor union power and later, public coordination of markets.²² In both these policy projects, the “competitive order” supplied the normative keystone: both worker collective bargaining and public coordination of markets distorted the competitive ideal, which in turn was meant to have various ill effects. Indeed, the mid-century attack on labor unions was precisely formulated around the notion of “labor monopoly” as a distortion of ideal prices (wages), beginning with a few early formulations in the 1940’s and growing into a developed “literature that analyzed [unions] in terms of monopoly power ... appear[ing] as the counterpart in economics of the concurrent political assault on American unions and those in business or government that supported them.”²³ The consolidation of the antitrust norm against horizontal coordination beyond firm boundaries then was both a legal microcosm of these broader policy arguments, and was likely rendered the more potent as a result of their eventual success—given that both public and labor union coordination had until their eventual near-demise served as de facto mechanisms for market coordination on behalf of ordinary people, helping to balance the influence of large, powerful firms.

Early New Deal antitrust, on the other hand, seemed to contain a pragmatic understanding that coordination is a part of economic life, and that coordination should be targeted where it is socially and economically harmful, not simply because it *is* coordination. This was true even insofar as early New Deal antitrust sometimes targeted labor unions prior to the solidification of the labor exemption. For example, Thurman Arnold, when he headed the Antitrust Division at the Department of Justice, sought to prosecute some construction unions on the ground that the particular sorts of coordination they were engaged in was harmful to the public. Yet, even before the labor exemption had been judicially ratified, he did not seek to establish the rule that labor coordination was itself a Section 1 violation, nor did his enforcement choices reflect that view.²⁴

²² See, e.g., Van Horn, *supra* note 16, at 212 (antitrust and labor unions were the first and main policy projects of the early neoliberal intellectual movement that birthed the Chicago School); Yves Steiner, *The Neoliberals Confront the Trade Unions*, in *THE ROAD FROM MONT PELERIN*.

²³ Steiner, *id.* Some examples described by Steiner include Fritz Machlup, “Monopolistic Wage Determination as a Part of the General Problem of Monopoly” (pamphlet, first given as a speech to the American Chamber of Commerce Economic Institute, January 1947); Vernon O. Watts, *Union Monopoly, Its Cause and Cure* (1954) (specifically asserting, as Steiner put it, that “‘concentrations of economic power [are] necessary for incentive purposes’ in case of capitalist firms, but ... not for unions”); D. McCord Wright (ed.), *THE IMPACT OF THE UNION: EIGHT ECONOMIC THEORISTS EVALUATE THE LABOR UNION MOVEMENT* (1951); P. Bradley (ed.), *THE PUBLIC STAKE IN UNION POWER* (1959).

²⁴ See Alan Brinkley, *The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold*, 80 *J. OF AMER. HIST.* 557, 566 (1993).

More generally, horizontal price coordination beyond firm boundaries was not consistently prosecuted, despite the official doctrine that it was *per se* illegal. Nor was it even consistently *held* to be illegal, once prosecuted. Director and Levi again made just this point: “despite the repetition of the slogan that price fixing is illegal *per se*, the cases as yet do not hold, save possibly for resale price control, that price-fixing agreements without power to affect the market price are illegal.”²⁵

Indeed, the early Chicago School position was in fact far more consistent as between its treatment of “cartels” and monopoly than the later version that has made its way into law. Director and Levi went so far as to say, regarding trade associations of small firms, that the “counterpart of efficient scale in the size problem is the improvement of the market where collusion is concerned.”²⁶ This argument, however, disappeared from Chicago School antitrust advocacy and indeed reversed itself by the 1970’s. Cartels came to serve as the express contrast case for the arrangements, like vertical restraints and mergers, that were to be liberalized, particularly in Bork’s work, which was also the main conduit of influence on the positive law.²⁷

Importantly, the adoption of the “competitive order” as an increasingly dominant benchmark for antitrust analysis was a precondition of this later scapegoating of cartels. Differences between inter-firm and intra-firm coordination aside, before the “competitive order” was enshrined as the central normative benchmark of antitrust law one simply didn’t need to look for *special* justifications for reasonable coordination. The increasing acceptance of the “competitive order” as a key benchmark manifested even in the manner that later New Deal antitrust went about its work (even when that work was harmonious with the preexisting benchmarks of dispersing power and maintaining decentralized markets).²⁸ But the norm against horizontal coordination beyond firm boundaries asserted itself increasingly strongly as the Chicago School became increasingly influential, eventually culminating in Bork’s express use of cartels as the negative contrast for “efficient” corporate mergers and vertical restraints.²⁹ In the reported

²⁵ Aaron Director and Edward Hirsch Levi, “Trade Regulation,” 51 NORTHWESTERN L. REV. 281, 295 (1956).

²⁶ *Id.* at 295.

²⁷ Priest, *supra* note 6; see also Part III.A, *infra*.

²⁸ Markham, *supra* note 12; U.S. Dep’t of Justice, Merger Guidelines (May 30, 1968)

²⁹ Priest, *supra* note 6. One can also see the hardening of this norm in the line of cases from *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), to *National Soc’y of Prof. Engineers v. United States*, 435 U.S. 679 (1978), to *FTC v. Superior Ct. Trial Lawyers Ass’n*, 493 U.S. 411 (1990). Interestingly, Bork made an appearance as counsel in *Goldfarb*, in his capacity as Solicitor General representing the United States as *amicus curiae*.

decisions, it flowered fully in the Supreme Court's full-throated endorsement of the FTC's prosecution of collective action in pursuit of reasonable rates by a group of low-paid panel attorneys.³⁰

Meanwhile, the Chicago School argument for relaxing norms governing corporate consolidation was based in part upon another argument derived from the notion of the "competitive order": the idea that even very large firms in concentrated markets are forced to 'behave competitively,' i.e., to charge the prices that *would* be charged in a decentralized market, because the threat of market entry prevents them from charging an extra-competitive premium. In other words, the argument relied upon the purported role of potential competitors in regulating the behavior of actual market participants.³¹

Putting aside for the moment the merits of the contestable markets logic, this argument ought to, on its own terms, undermine the per se rule against horizontal coordination *just as much or more* as it undermines norms against corporate consolidation. On the logic of contestable markets, a cartel ought to respond to potential competitors in exactly the same manner as a large corporation of the same size (and the same market share) would, and therefore would charge competitive rather than inflated prices.³² This conclusion receives indirect support, indeed, from Director and Levi's own earlier permissive attitude to price collusion.

Logic aside, in the real world of ideational and political contestation, Chicago School proponents did not focus on advancing that proposition.³³ On the contrary, Bork urged that horizontal price coordination beyond firm boundaries be condemned wholesale, even as he put forth his brief in favor of corporate consolidation and vertical coordination.³⁴ The logic of perfect

³⁰ Superior Ct. Trial Lawyers' Ass'n, *id.*

³¹ For a critical analysis, see John E. Davies and Frederic S. Lee *A Post Keynesian appraisal of the contestability criterion*, 11(1) J. POST. K. ECON. 3 (1988) (arguing that "logic demands that acceptance of the usefulness of perfect competition implies acceptance of its more generalized form--the contestability criterion.")

³² And this grants for the purpose of argument that a cartel would have the same power to charge extra-competitive prices as a corporation of the same size, in the first place. If anything, the downward pressure on pricing among members of cartels, which are obviously far less cohesive than firms and easily admit of defectors, would be greater. See e.g. P. W. S. Andrews, *Competition in the modern economy*, in *THE ECONOMICS OF COMPETITIVE ENTERPRISE: SELECTED ESSAYS OF P.W.S. ANDREWS* 323 (Frederic S. Lee & Peter Earl, eds., 1993).

³³ Interestingly, a few marginal later voices that generally supported Chicago School antitrust pointed out this discrepancy at the time, though not because it disadvantaged the less-powerful. See, e.g., *Why Not Abolish Antitrust?*, American Enterprise Institute (1983) (suggesting, among other things, that price-fixing too ought to be legalized).

³⁴ Robert Bork, *THE ANTITRUST PARADOX* (1978).

competition has thus been selectively deployed to justify an absolute norm against inter-firm coordination while grounding a more permissive attitude to corporate consolidation and vertical restraints. Indeed, that the rule against horizontal coordination was the only meaningful tool of antitrust enforcement remaining itself likely fueled its strengthening—simply as a result of institutional inertia and quite apart from any conscious policy or political project.

C. *Antitrust and worker “cartels” today*

Today, this dynamic unfolds on perhaps a final remaining front. Driven out of unions and even out of statutory employment relationships, both of which guarantee some form of limited coordination rights, many working people seek to coordinate directly among themselves as individual service-providers or producers, only to have the resultant cooperative structures prosecuted or threatened with prosecution as cartels.

As I have previously written, this situation, which is exacerbated by the proliferation of work beyond the bounds of employment and the growth of the so-called gig economy, echoes the antitrust prosecution of worker collective action prior to the New Deal and its ratification of the “labor exemption” to antitrust.³⁵ However, there is an important distinction between the current echo and its origin: even prior to the ratification of the labor exemption, antitrust did not prosecute workers’ economic coordination *as such*. Rather, there typically had to be either “secondary activity” or some other “unlawful” aim; at a bare minimum, a showing that the coordination was socially harmful was required.³⁶ Moreover, that harm was not understood as a mere lessening of competition—which collective bargaining, or unilateral action aimed at a change to terms or conditions of employment by definition is—but as some additional, affirmative harm.³⁷

This is in stark contrast to the way that antitrust is deployed today against the cooperation of workers and small actors who are unprotected by the antitrust exemptions, such that any price coordination between them is

³⁵ Paul, *Enduring Ambiguities*, *supra* note 5. In *United States v. Hutcheson*, 312 U.S. 219 (1941), the Court created the modern form of the labor exemption by reading the Clayton Act of 1914 (whose labor proviso had previously been rendered a dead letter by the Supreme Court) and the Norris-La Guardia Act of 1932 together with the Sherman Act. The Court centered the threshold question of affirmative New Deal labor legislation—the employment relationship—to determine the bounds of the exemption. Paul, *id.*

³⁶ This point is further developed in forthcoming work. Sanjukta Paul, *SOLIDARITY IN THE SHADOW OF ANTITRUST: LABOR AND THE LEGAL IDEA OF COMPETITION* (under contract with Cambridge University Press), Chapter 2.

³⁷ *Id.*

condemned per se. And for cooperation that falls short of price coordination or other “per se” categories, the sort of harm that must be shown (and the sort of countervailing benefit that may be considered) is again defined entirely in terms of competition or price-based consumer benefit. These contrasts follow directly from clearing of previously extant normative benchmarks for antitrust analysis described above, notably fairness and dispersal of power, and the simultaneous hardening of the “competitive order” benchmark. As a result, those workers and small actors who are not exempted from antitrust today face a much *more* draconian anti-coordination legal norm than did workers prior to the New Deal.

A ready illustration of this shift involves truck drivers, who had previously as a group been unionized employees. A couple of decades ago, smarting from the abysmal wages and punishing hours brought about by trucking deregulation,³⁸ port truck drivers engaged in a wave of wildcat strikes and faced a raft of antitrust lawsuits in response. These efforts at self-organization, in an effort to bring countervailing power to bear upon negotiating the ruinously low rates in the drayage sector, were met with a host of lawsuits from private, public and quasi-public entities as well as an investigation of worker leaders by the Federal Trade Commission.³⁹ Thereafter, the advocacy campaign to improve wages and working conditions—and to make space for a voice for workers—has been fundamentally limited by antitrust, in part because unions, workers, and cities do not have the resources to test uncertainties in the law.⁴⁰

More recently, drivers in the app-based ride services sector, deemed independent entrepreneurs by firms like Uber and Lyft, sought to exercise coordination rights through the mechanism of a local municipal ordinance

³⁸ Paul, *Enduring Ambiguities*, *supra* note 5.

³⁹ Bill Mongelluzzo, Operators Seek to Organize, J. OF COM. (Dec. 1, 1999), http://www.joc.com/operators-seek-organize_19991201.html; see also Rip Watson, Container Haulers Seek to Unionize, J. OF COM. (Sept. 12, 1999, 8:00 PM), http://www.joc.com/container-haulers-seek-unionize_19990912.html; Mark Gordon, Truckers Union Boss Ordered to Testify, FLA. TIMES UNION (Dec. 4, 1999), http://jacksonville.com/tu-online/stories/120499/bus_1E1FTC_.html. Complaint for Antitrust Violations at 1-2, Miami-Dade Cty. v. Support Trucking Grp., No. 04-cv-21687, 2004 WL 2868811 (S.D. Fla. 2004) (“This case arises out of a massive conspiracy... with the purpose and effect of an attempt to monopolize, to fix prices and to commit other unlawful practices designed to inflate the prices of trucking services provided by non-union truckers for the movement of goods into and out of the Port of Miami.”); Port of Miami Terminal Operating Co. v. Support Trucking, No. 04-cv-21703, 2004 WL 2868838 (S.D. Fla. 2004); Antillean Marine Shipping Corp. v. Various Indep. Owners & Operators of Indep. Trucking Cos., No. 04-cv-22530, 2004 WL 2875072 (S.D. Fla. 2004); Universal Maritime Serv. Corp. v. Support Trucking Grp., Nos. 04-cv-21687, 04-cv-21688, and 04-cv-21703, 2004 WL 2868849 (S.D. Fla. 2004). See also Paul, *Enduring Ambiguities*, *supra* note 5.

⁴⁰ Paul, *id.* at 982.

that provided for collective bargaining between drivers and the firms.⁴¹ The Seattle ordinance quickly met with a federal preemption challenge under the Sherman Act, brought by the national Chamber of Commerce on behalf of Uber and other members and litigated up to the Circuit on the issue of the state action exemption.⁴² Following a decision by the Circuit that the local ordinance was likely not “clearly authorized” by the State of Washington⁴³—an increasingly finely parsed requirement of state action antitrust immunity⁴⁴—Seattle very recently entered into a “compromise” wherein it removed payments to drivers from the subjects of bargaining,⁴⁵ rendering any resultant bargaining likely meaningless as to working conditions as well. As Michael Belzer and others have shown, in sectors involving relatively low-wage services or piecework, “non-economic” aspects of work like hours, working conditions, and workplace safety are themselves driven almost entirely by rates of pay, notwithstanding attempts to directly regulate or bargain them.⁴⁶ As discussed further in Part IV.B, this result sits uneasily next to the fact that Uber’s own coordination would constitute impermissible price-fixing under the same construction of Section 1 that would bar drivers’ collective bargaining.

Finally, numerous individual service-providers and small producers in trade associations, guilds, and similar coordination structures have been formally and informally censured and prevented from engaging in coordination as a result of antitrust law in recent years. The FTC itself has recently investigated and prosecuted guilds and associations of piano

⁴¹ Seattle Council Bill 118499 (codified at SEATTLE, WASH., MUN. CODE § § 6.310.110-735 (2015)) (“An ordinance relating to taxicab, transportation network company, and for-hire vehicle drivers ... authorizing the election of driver representatives.”).

⁴² Complaint, Chamber of Commerce of the U.S. v. City of Seattle, 2016 WL 836320 (W.D. Wash. Mar. 3, 2016) (No. 2:16-CV-00322).

⁴³ Chamber of Commerce of the United States of America v. City of Seattle, 890 F.3d 769 (9th Cir. 2018).

⁴⁴ The hostility to the state action exemption is driven by precisely the constellation of factors described in this section: all market coordination beyond firm boundaries, *other than* that which enacts the favored paradigm of hierarchical control imposed through the mechanism of concentrated ownership interests, is disfavored by antitrust and associated areas of policy thinking on the ground that it distorts allocative efficiency.

⁴⁵ City of Seattle Council Bill 119427 - Proposed Substitute (to Ordinance 124968) <http://seattle.legistar.com/View.ashx?M=F&ID=6843818&GUID=3AAA581E-E3F6-4BDF-82E0-5910E816E3FF>

⁴⁶ Belzer has painstakingly documented this pattern in the case of trucking, where, once stable rates and wages were replaced by destructive competition, attempts to regulate safety and hours directly have largely been a spectacular failure. Michael Belzer, SWEATSHOPS ON WHEELS: WINNERS AND LOSERS IN TRUCKING DEREGULATION (2000).

teachers, ice skating instructors, and church organists, to name a few.⁴⁷ Strikingly, these groups comprise a significant proportion of the FTC's overall enforcement activities in recent years, a fact that at least some of its decision-makers seem to self-consciously embrace.⁴⁸ The fact that this embrace needs to be articulated bears out my point that the path toward rigid enforcement of the norm against horizontal coordination beyond firm boundaries has been a contingent one, whose flowering into its full logical conclusion we have witnessed only relatively recently.

The agency claims otherwise, suggesting that the prosecution of trade associations for price coordination and limits upon competition flows from “old-time antitrust principles.”⁴⁹ But the notion that horizontal economic coordination beyond firm boundaries was always viewed the way it is by antitrust enforcers and courts now is incorrect, as Director and Levi noted in the 1950's⁵⁰ and as this section has argued more generally. The agency cites the Commission's first annual report as evidence of this perennial, unchanging attitude to trade associations and to all horizontal coordination beyond firm boundaries.⁵¹ Yet this report, insofar as it discusses trade associations, proves precisely the opposite. Of the four sectors the 1916 report discusses—Mexican sisal hemp, anthracite coal, bituminous coal, and newspapers—none seem to bear out the Commission's adoption of a blanket condemnatory attitude to price coordination through trade associations.⁵² On

⁴⁷ See, e.g., *In the Matter of American Guild of Organists* (FTC Case No. 151-0159, 2017), *In the Matter of Music Teachers National Association, Inc.* (FTC Case No. 131-0118, 2014), and *In the Matter of Professional Skaters Association, Inc.* (FTC Case No. 131-0168, 2014).

⁴⁸ See, e.g., Geoffrey Green (FTC Bureau of Competition), “Unflattering resemblance” (Jan 13, 2015), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/01/unflattering-resemblance>

⁴⁹ Geoffrey Green (FTC Bureau of Competition), “Antitrust by association(s)” (May 1, 2014), <https://www.ftc.gov/news-events/blogs/competition-matters/2014/05/antitrust-associations>

⁵⁰ Director and Levi, *supra* note 25.

⁵¹ *Id.* Similarly, the same post cites an early FTC complaint against the (nationwide) trade association of flag manufacturers as evidence of the same perennial attitude to price coordination in the context of a trade association. But the complaint again is evidence of the more measured attitude to price coordination that the Commission and other antitrust actors in fact previously took. In its key passage, the complaint notably alleges that the association and its members were “engaged in a concerted movement to *unduly* enhance the prices of American flags.” *FTC v. Association of Flag Manufacturers of America*, 1 FTC 55 (1918) (in *FEDERAL TRADE COMMISSION DECISIONS: VOLUME 1*, at p. 58). This is a telling and intentional word choice, which implies that the FTC would not have deemed price coordination resulting in *reasonable* prices to be unfair competition.

⁵² ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1916 (https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1916/ar1916_0.pdf). The Report notes that “no thorough investigation [as to trade associations] was attempted.” Report at 25.

the contrary, in the two sectors (sisal and newspapers) where the Commission appeared concerned with enhanced prices as a result of coordination among members, it was concerned with a “*marked advance*” in prices, and in the case of sisal, with “difficulties . . . in obtaining this commodity.”⁵³ This is consonant with my claim that antitrust was historically concerned with price coordination insofar as it posed a specific public policy harm, and not full stop (even if the prices are higher relative to the no-coordination case), in contrast to the current attitude. In the case of anthracite coal, the Commission’s concern with enhanced price appeared to be that the price increase seemed not to correspond to concomitantly higher wages—a very different policy issue than the reasons typically proffered today.⁵⁴ And in the case of bituminous coal, the Commission’s main motivation to investigate (with a view to authorizing price coordination) seemed to be *depressed* prices—and consequently, poor wages, safety, and working conditions.⁵⁵

In any event, these documented and reported uses of the antitrust norm against horizontal coordination beyond firm boundaries likely only scratch the surface of the extent to which that norm now structures economic activity in the United States. Small operators who deal with a larger company may face informal cease and desist demands when they attempt to coordinate for better rates.⁵⁶ At an even deeper level, the impermissibility of coordination among small operators generally heightens the unequal bargaining power between them and the powerful actors with whom they frequently deal, eroding their margins and driving down wages for the many Americans who work for small enterprises, from truck drivers to fast-food workers. For example, fast food franchisors exert both express and informal downward pressure upon franchisee businesses’ prices, a fact that has direct consequences for the viability of such small businesses and for the many low-

⁵³ *Id.* at 25-26 (emphasis added).

⁵⁴ *Id.* at 25 (“the Commission was directed to make an investigation of the anthracite coal industry with reference to . . . especially the relation of the price increase to the increase of labor cost”).

⁵⁵ *Id.* (noting that investigation was undertaken in response to “requests made by coal operators with respect to existing conditions and various plans of cooperation which they desired to undertake to remedy a situation which was claimed to the injuries [*sic*] not only to the bituminous coal producers, both operators and miners, but also to the consumers and the general public.”).

⁵⁶ Even when the FTC has, laudably, taken action against abuses like wage-fixing by small operators, it is likely that such attempts to suppress labor costs are in fact a response to enterprises’ inability to exert countervailing power as against the low rates imposed by much more powerful downstream firms. See, e.g., Comment of Sanjukta Paul, et al, In the Matter of Your Therapy Source, LLC; Neeraj Jindal; and Sheri Yarbray, FTC File No. 171-0134 (August 30, 2018).

wage workers in this sector.⁵⁷ The same pattern likely holds in many other sectors in which relatively large, powerful firms bargain with numerous small operators.

In each of these examples of horizontal price coordination beyond firm boundaries, increasingly censured by antitrust, the impermissible coordination would be permissible if it took place within the confines of firm boundaries. While that seems axiomatic to us now, it is the point of this paper to unsettle the comfortable assumption that this axiom makes sense. It turns out that many of the very policy bases that are supposed to support the hard line against “collusion” indeed obtain just as clearly where economic activity is further coordinated within a single firm.

II. ANTITRUST’S FIRM EXEMPTION

The counterpoint to this increasingly rigid attitude to horizontal coordination beyond firm boundaries is antitrust’s increasingly relaxed attitude to coordination *within* firms. The firm itself is an allocation of economic coordination rights. In other words, we might say that antitrust has a “firm exemption,” treating intra-firm economic coordination with a deference that few other forms receive. The firm exemption preceded Bork and the Chicago School, as Bork himself emphasized, invoking it as support for his argument that the deeper foundations of antitrust already supported his conception of the consumer welfare standard.⁵⁸ However, in fact the firm exemption of pre-Borkian antitrust was both more contested and more qualified than Bork’s characterization would suggest. The goals of Borkian antitrust were fundamentally to quiet those challenges, to expand the powers of intra-firm coordination, and at the same time to extinguish *other* allocations of coordination rights, however modest by comparison. By succeeding in this project, Borkian antitrust thereby eventually extended the domain of the firm exemption not only in magnitude but into new forms.

However, the original legislative vision for antitrust did not involve an unqualified firm exemption of the sort we now take for granted. The legislators who passed the first federal antitrust law, the Sherman Act, did not make so much of the firm-market boundary that organizes contemporary antitrust. They focused on whether the conduct in question was socially or economically harmful, rather than on categorizing it as “unilateral” or

⁵⁷ Jana Kasperkevic, “McDonald’s franchise owners: what they really think about the fight for \$15,” *The Guardian* (April 14, 2015); Lydia DePillis, “McDonald’s franchisee says the company told her ‘just pay your employees less,’” *Washington Post* (August 4, 2014).

⁵⁸ See Part III.A, *infra*.

“multilateral,” which modern jurisprudence imposes as a threshold question, as clearly exemplified in *Copperweld*.⁵⁹ They did not envision antitrust to authorize an unqualified allocation of coordination rights to business firms; on the contrary, they crafted the legislation in an attempt to reign in this ever-expanding allocation of rights from the state, especially from the federal judiciary. Thus antitrust was an intervention in an unfolding political and legal contest about the sort and scope of coordination rights that the state ought to allocate to business firms, and it was an intervention with precisely the opposite valence of the Borkian framework.

Consider first the contemporaneous legal and regulatory environment that defined the firm outside antitrust. The currently dominant moral metaphysics of the firm, which casts it as both an independent person for rights-bearing purposes and as simultaneously derivative of the private interests of owners or shareholders in purpose, did not develop until later.⁶⁰ Business corporations in particular originally had a profoundly public dimension that was given legal form in their charters, which enumerated the specific activities that the association could engage in, effectively conditioning the allocation of coordination rights upon the performance of a specific public purpose.⁶¹ The undoing of specific charters was itself a particular, path-dependent development.⁶²

Legislators were motivated to pass antitrust legislation in the first place because they were concerned that the emerging, largely judge-made

⁵⁹ See Part III.B, *infra*.

⁶⁰ Of course, there are earlier references to firms or corporations as persons, and the view has roots that precede this period. But as David Ciepley compellingly argues, the contemporary “neoliberal” conception of the corporation as *both* a unitary, separate person for rights-bearing purposes *and* as existing for the purpose of the private interest of shareholders is relatively new. David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AMER. POL. SCI. REV. 139 (2013). Many Progressives were corporatists to the extent that they believed that the empowerment of corporate managers (relative to owners or shareholders) would lead to conducting of corporate business in the public interest rather than primarily for shareholders’ private gain. See, e.g., Eldon J. Eisenach, THE LOST PROMISE OF PROGRESSIVISM, 161-63 (1994).

⁶¹ See, e.g., Robert Hockett and Saule Omarova, “*Special, Vestigial, or Visionary? What Bank Regulation Tells Us about the Corporation - and Vice Versa*,” 39 SEATTLE UNIVERSITY LAW REVIEW 453 (2016); Ciepley, “Beyond Public and Private,” *id.* (“the end of the corporation, at least originally, was not only the good of its shareholder-members but also the good of the chartering government and its general citizenry”). Ciepley describes corporations as originating in “indirect arms of the state,” then becoming hybrid public-private institutions chartered specifically for “public benefits,” for which private profits were understood as the consideration; and only recently becoming institutions that *receive* special public and legal benefits but are conventionally understood to exist only to advance the private interest of shareholders. *Id.* at 152.

⁶² Hockett and Omarova, *id.*

market order⁶³ allocated economic coordination rights to too few, too-powerful individuals,⁶⁴ whether they organized themselves in single corporations, trusts, or cartels (and whether or not those single firms had “monopoly” power in the technical, contemporary sense⁶⁵). Indeed, legislators discussed state efforts to regulate the emerging business firms’ power directly, as well as the federal courts’ unenthusiastic response to those regulatory efforts. And notably, the first version of the bill that became the Sherman Act did not contain two sections at all—a key basis of the contemporary obsession with distinguishing unilateral and multilateral conduct—but rather “comprised a single section declaring all arrangements, contracts, agreements, trusts, or combinations to prevent full and free competition in the production, manufacture or sale of goods. . . to be against public policy, unlawful, and void.”⁶⁶ Since single-firm conduct in the form of monopolization or related practices was, uncontroversially, encompassed by the successor legislation, we may infer that the original, single-section bill referred to both inter-firm and intra-firm conduct as well. Evidently, it did so without making much distinction between intra-firm and inter-firm conduct.

Moreover, legislators certainly assumed that coordination between formally separate business entities under common ownership and control—which is what the original “trusts” were—could indeed constitute conspiracies or combinations for antitrust purposes, just as contracts

⁶³ See Richard Franklin Bense, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900* (2000), in particular Chapter 5, “The Political Construction of the National Market” (describing, among other things, intensive judicial activity to prevent state and local regulation that conflicted with the emerging market order, including elements of state corporations codes).

⁶⁴ The popular movement that generated the antitrust statute certainly made no distinction between economic power concentrated in single firms, trusts, or other business combinations. The largely farmer-led movement sought to preserve the traditional economic coordination rights that some working people had enjoyed, increasingly threatened by new consolidations of economic power (whether firms or trusts) that small producers newly found themselves compelled to deal with as both buyers and sellers. See, e.g., Elizabeth Sanders, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877-1917*, at 268-71 (1999). This agrarian movement also expressly sought out the alliance of emerging organized labor, in particular the Knights of Labor, and sought to foster cooperation and coordination among working people even as it sought checks upon the coordination rights of big capital.

⁶⁵ Gary Richardson, *A Tale of Two Theories: Monopolies and Craft Guilds in Medieval Europe and Modern Imagination*, 23 J. HIST. OF ECON. THOUGHT 217, 220 (2001) (discussing various facets of the “meandering meaning of monopoly” in social-scientific as well as popular thought, with the contemporary definition used by antitrust law arriving late on the scene).

⁶⁶ *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES*, Earl W. Kinter (ed.), Part I, Volume I (1978), pp. 14-15 (S. 3445, 50th Cong., 1st Sess. (1888)).

between entirely separate entities could.⁶⁷ Most remarkably of all, they frequently referred to “trusts” and “corporations” in the same breath, as instances of a common series, which is a very different way of slicing up the world than the rigid firm-market distinction assumed by our current antitrust paradigm. For example, Senator Teller, worried (as many senators were) that the statute would be mis-applied to prevent labor and farmer combinations, expressed his worry by noting that “these great *trusts*, these great *corporations*, these large moneyed institutions can escape the provisions of a penal statute, and I know how much more likely they are to escape than the men who have less influence and less money.”⁶⁸

Later on, during Senate deliberations, Senator Sherman described the problem with the Standard Oil Company—a single firm—in terms of the economic coordination rights that it concentrated in a few hands:

I do not wish to single out the Standard Oil Company, which is a great and powerful corporation, composed in great part of the citizens of my own state, and some of the very best men I know of. Still, they are controlling and can control the market as absolutely as they choose to do it; it is a question of their will. *The point for us is to consider whether...it is safe in this country to leave the production of property, the transportation of our whole country, to depend on the will of a few men sitting at their council board ...* I do not say anything against these men . . . I only refer to them because they are the oldest of these combinations founded upon contracts which have been copied by the other combinations.⁶⁹

The words “contracts” and “combinations” are the foundation-stones of the text of Section 1 of the statute,⁷⁰ now conventionally supposed not to reach intra-firm economic coordination but requiring at least two parties. And of course, there is nothing in the text of either Section 1 or Section 2 themselves that either exempts intra-firm conduct from the reach of the statute, or even draws a distinction between it and inter-firm conduct.⁷¹

⁶⁷ This observation was indeed made by Justices Stevens, Brennan and Marshall in their dissent in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 787-88 (1984).

⁶⁸ 21 CONG. REC. 2562 (1890) (emphasis added).

⁶⁹ 21 CONG. REC. 2570 (1890) (emphasis added).

⁷⁰ “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1.

⁷¹ *Id.*; 15 U.S.C. § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”)

Senator Hoar was even more direct in naming intra-firm economic coordination as a phenomenon that was relevant to antitrust, and that constituted an allocation of coordination rights. He expressly premised his view that the statute did not prevent workers' or small producers' cooperation on that ground that such actors' "contracts are to be made with large corporations who are themselves but an association or combination or aggregation of capital on the other side."⁷² Legislators seemed to generally acknowledge the fact (whatever view they took of it) that "the capitalists, the manufacturers, are allowed to combine, they having large capital," as Senator George put it, by virtue of the legal forms of business associations, i.e., firms.⁷³

In short, considering intra-firm economic coordination in the same breath with inter-firm coordination was perfectly natural to legislators' world-picture, in which firms and enterprises did not occupy an ontological status separate and apart from other economic arrangements. Thus, the original vision for antitrust, far from endorsing an unqualified allocation of economic coordination rights to business firms, was precisely designed to contest it.

The firm exemption of course won the day in early antitrust jurisprudence, but the nature of the contest over it again shows that key voices, including its proponents, did not take it for granted. Business actors worried aloud about intra-corporate or intra-firm liability, until the Supreme Court finally addressed the question in *United States v. Joint Traffic Ass'n*.⁷⁴ In that case, not only were the defendant railroads worried about intra-enterprise liability under Section 1, but they in fact argued against the per se rule against horizontal price coordination on the ground that it would invite the conclusion that price coordination within corporations, partnerships, and other business organizations is itself a violation of Section 1.⁷⁵ This suggests that as of the turn of the century, the antitrust axiom that I call the firm exemption had not quite taken hold even among the key legal and business actors pushing for the expansion of business firms' coordination rights: instead of *contrasting* intra-firm coordination and horizontal coordination beyond firm boundaries as opposite poles (as antitrust voices routinely do now⁷⁶) these actors thought of them as species within a genus—so much so that they worried that proscribing one per se would also endanger the other.

⁷² 21 Cong. Rec. 2728 (March 27, 1890).

⁷³ 21 Cong. Rec. 2727 (1890)

⁷⁴ 171 U.S. 505 (1898).

⁷⁵ *Id.*

⁷⁶ See Part III.B, *infra* (discussing *Copperweld*).

To be sure, there were voices even then defending the “efficiencies” of the firm from antitrust scrutiny, and whose arguments in substance were not dissimilar from later 20th-century ones. But even these arguments reflected the placement of both intra-firm and inter-firm coordination within the same genus. One prominent such voice, Arthur Eddy, had argued not only for the public benefits of permitting intra-firm economic coordination, but also for inter-firm coordination, what would now be called business “collusion.”⁷⁷ Now, Eddy did insist upon a contrast between forms of economic coordination, but not one that opposed coordination among businessmen within firms on the one hand, with coordination among businessmen of separate firms on the other. Rather, he argued more or less straightforwardly that coordination among businessmen generally (whether on an intra-firm or inter-firm basis) ought to be favored, while coordination among laborers and the hoi polloi more generally ought not. “Partnerships, corporations, trusts are all in the direction of more for less money,” Eddy wrote, while “labor unions and farmers’ organizations are all in the direction of less for more money.”⁷⁸ One of the striking things about this statement is that it shows us that in the early 20th century, in contrast to today, business corporations and other business entities were still regarded as the natural analogues of labor unions and even of small producers’ organizations—even in the mind of one of the fiercest advocates of the former and critics of the latter. This normative distinction between business and labor combinations was not only about benefits to the consumer from business but not labor combination, nor only about genteel Victorian classism about who was to be entrusted with the public weal, but also seemed to involve a plain ordering of interests, as was also reflected in the early antitrust-labor cases and in the common law labor conspiracy cases from which they drew.⁷⁹ Doing best for society even seemed to occasionally be *defined* to include increases to business profits, while increases to the wages of laborers was opposed to the social interest.⁸⁰

⁷⁷ Arthur Jerome Eddy, *THE NEW COMPETITION* (1917)

⁷⁸ *Id.*

⁷⁹ Paul, *Enduring Ambiguities*, *supra* note 5; *SOLIDARITY*, *supra* note 36, Chapter 2.

⁸⁰ For example, Professor Hovenkamp observed: “When mainstream American political economists around 1900 viewed business combinations, they saw increased efficiencies from economies of scale, lower overall prices, better product quality, and higher *profits*. But the same economists looked at labor combinations and saw only higher product prices with *no accompanying efficiencies* to offset them.” Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 940 (1988) (emphasis added). This too is echoed today, as recent debates about antitrust’s application to the fissured workplace draw frank suggestions that “shareholder value” ought to be counted as a saving social benefit for antitrust purposes to justify coordination by firms like Uber. See also Part IV.B., *infra*.

Even once the firm's basic coordination rights were secured notwithstanding the Sherman Act, they continued to be contested, especially by legislators, for some decades thereafter. For example, the legislative genesis of the Federal Trade Commission Act might be understood as yet another volley in this exchange, contesting the judicial construction of the firm exemption. Notably, the Act's predecessor bills would have required federal registration for all corporations, revocable by the Commission, thereby perhaps seeking to accomplish through federal law the sort of direct regulation of firm behavior that had been abandoned under state corporations codes.⁸¹ Even after a couple of decades, the firm exemption had not yet become completely invisible. We can see this for example in the text of the Wagner Act, which declared that the coordination rights granted to owners of capital in the form of business associations created an "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association."⁸² In short, the idea of questioning the allocation of coordination rights represented by the firm exemption isn't just an idle thought experiment; it was identified and contested in the real world for quite some time.

At a certain point, of course, the firm exemption indeed became embedded in legal consciousness and beyond. This process began already in the pre-New Deal period, as the federal judiciary remade antitrust as a mechanism for helping the newly emergent business entities secure control over their labor supplies⁸³ (a critical task that largely defined the terrain on which the New Deal compromise would later be erected), while also suspending the statute's potential for checking corporate consolidation, instead indeed encouraging consolidation by targeting traditional, decentralized coordination among small business and micro-enterprises.⁸⁴ Indeed, the rationale of the common law labor conspiracy cases themselves (upon which the early antitrust-labor decisions relied) was based upon extending the coordination rights inhering in the ownership of property and

⁸¹ "Both bills provided for the federal registration of corporations ... The provisions stated that 'the Commission may at any time ... revoke and cancel the registration of any corporation ... upon the ground of either violation of any operative judicial decree rendered under [the Sherman Act] ... or the use of materially unfair or oppressive methods of competition.'" Neil W. Averitt, *The Meaning of 'Unfair Methods of Competition' in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. Rev. 227, 231 (1980). See also S. 2941, at § 7 (introduced on July 5, 1911).

⁸² 29 U.S.C. § 151

⁸³ SOLIDARITY, *supra* note 36, Chapter 2.

⁸⁴ Naomi R. Lamoreaux, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904* (1985); Laura Phillips Sawyer, *AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE "NEW COMPETITION," 1890-1940* (2018).

the employment of labor, while denying coordination rights to workers.⁸⁵ Its importation into antitrust was one aspect of a larger jurisprudential trend aimed at effectuating an overall vision for allocating economic coordination rights. In that vision, the responsibility and privilege of economic coordination ought to be vested in a few hands, namely those of owners of capital, rather than workers or the public. Owners of large corporations got coordination rights over people, physical things, and land in this vision because they were the right men for the job; because physical and business consolidation minimized costs; and because the subordination of labor minimized costs. Workers, meanwhile, didn't get coordination rights specifically because they were workers (and not, say, because they were construed as tiny businesses selling their labor, and whose coordination thus constituted business collusion).⁸⁶

Corresponding closely to this judicial allocation of coordination rights as between workers and owners, the legal building blocks of the firm are themselves derived from agency law.⁸⁷ Agency law in turn is derived master and servant law, i.e., from the pre-New Deal common law of labor relations⁸⁸—which was also the basis for disciplining worker combinations under both the common law labor conspiracy cases and the early antitrust cases.⁸⁹ Entrenching and expanding the firm exemption while suppressing other forms of economic coordination thus in an important way echoes and reprises the pre-New Deal judiciary's allocation of coordination rights. In short, while Bork mischaracterized the *original* antitrust vision, he was correct that what he called a “proconsumer policy”—which he specifically defined as a preference for economic coordination within a conventionally organized firm—preceded him.

III. THE LOGIC OF OUR BORKIAN WORLD

Our current antitrust paradigm has elevated the stature of competition as talisman, even as it has functioned in reality as a sorting mechanism for elevating one species of economic coordination and vilifying others. Thus the ideal-state version of “competition,” and its companion

⁸⁵ SOLIDARITY, *supra* note 36, Chapter 2

⁸⁶ *Id.*

⁸⁷ Eric Orts, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM (2013) (agency, not contract, explains the most distinctive aspects of the firm); Ciepley, *supra* note 60, at 149 (agency principles, derived from master and servant, constitute the firm).

⁸⁸ Ciepley, *id.*; Karen Orren, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991) (on the pre-New Deal common law of labor and employment as fundamentally constituted by feudal status relations).

⁸⁹ Paul, *Enduring Ambiguities*, *supra* note 5; SOLIDARITY, *supra* note 36, Chapter 2.

“efficiency,” have been deployed to attack disfavored forms of economic coordination, both within antitrust and without: horizontal coordination beyond firm boundaries, democratic market coordination, and labor unions. Meanwhile, a very specific exception to the “competitive order” was written into the law for one type of coordination, and one type only—that embodied by the traditionally organized, top-down business firm.

The key analytic move that established this exception relied ultimately upon a notion of “efficiency” that was conceptually distinct from—though conveniently homonymous with—the notion of efficiency deployed to undermine other forms of coordination, and was in turn used to redefine both “competition” and “consumer welfare” in idiosyncratic ways. When I say it was conceptually distinct, I do not mean that it was a cousin-concept, or that it has some distinctive features, but that it is nothing more than a homonym of the concept used to undermine other forms of coordination. The label embodies an argument from empirical contingencies that is ultimately extrinsic to *both* law and to mainstream economics.⁹⁰ That argument assumes that production in the context of a traditional firm, in which both ownership and control are concentrated, saves costs. The premises of that argument ultimately concern economies of scale, incentives to work, and other contingent facts—if they are facts—about the process of production.

Taking in ideas about the firm that were in circulation decades ago, these arguments from empirical contingencies are now effectively assumed as a matter of law within the framework of antitrust law, where they constitute the only putative justification for the diametrically differential treatment of firms and cartels. As a matter of black-letter law today, cartels are simply *defined* to lack productive efficiencies; firms are simply *defined* to have them. Not only is functionally identical price coordination per se illegal outside the firm and per se legal inside it (a fact that preceded Bork but which he drew upon), but also, firms that seek to merge with other firms are permitted to prove up countervailing social and economic benefits, where they are not simply assumed on their behalf. That opportunity is denied to an otherwise-similar cartel or other looser economic association of independent or interdependent actors, whether those actors are individuals, small producers, service-providers, or simply small- or medium-sized firms themselves.

⁹⁰ What was likely taken as “given” in the 1970’s about productive efficiencies in the firm also assumed a version of social and legal facts—essentially, the traditional, vertically integrated mid-century business firm—that has radically changed. See notes 179 & 181, *infra* (discussing economies of scale).

These legal definitions rely essentially upon a tendency to run together the unrelated concepts that are both labeled “efficiency.” Without the argument from “productive efficiency,” they lose their justification. In this Part, I disentangle these concepts, drawing upon the seminal text for the establishment of this aspect of our current antitrust world, Bork’s 1978 *The Antitrust Paradox*.⁹¹

A. *The foundational homonyms*

Bork propagated three sets of key, homonymous concept-pairs that serve to cloak the contingent and extrinsic argument from productive efficiencies. In particular, both “competition” and “consumer welfare” were *defined* in terms of “productive efficiencies.” In turn these homonyms help to cloak the preference for economic coordination in the form of hierarchical control over others, based upon ownership claims, as paradigmatically embodied in the traditional, top-down business firm.

a. *Competition*

The first of these homonym-pairs involves “competition” itself. As a preliminary matter, even before Bork’s intentional redefinitions and their later deployment, “competition” had at least two relevant senses. One was the sense that was intended by legislators, and is also the ordinary-language sense that the public and also many legal actors still use: competition as a dynamic, socially instantiated *process* of business or economic rivalry.⁹² The other sense, which was not in circulation at all at the time of legislative deliberation upon the Sherman Act and was minimally influential at the time of deliberation upon the Federal Trade Commission Act, is the ideal-state notion of “competition” used by present-day mainstream economists.⁹³ Now, the Chicago School didn’t *create* this semantic ambiguity, though it did make use of it in various ways. For example, the general public faith in actually-embodied business rivalry could be channeled, at least indirectly, to support

⁹¹ Bork, *supra* note 34. Earlier representative writings include Robert Bork and Ward Bowman Jr., *The Crisis in Antitrust*, 65(3) COLUM. L. REV. 363 (1965); Robert Bork, *Legislative intent and the policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); Robert Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75(3) YALE L.J. 373 (1966).

⁹² See, e.g., Harry S. Gerla, *Restoring Rivalry as a Central Concept of Antitrust Law*, 75 NEB. L. REV. 209 (1996).

⁹³ See, e.g., John Weeks, *The fallacy of competition: markets and the movement of capital*, in ALTERNATIVE THEORIES OF COMPETITION (Jamee K. Moudud, Cyrus Bina, & Patrick L. Mason, eds., 2013).

dubious uses of the ideal-state concept—as in the notion of contestable markets to justify markets with few or no actual business rivals.⁹⁴

While these two senses of “competition” might be described as distinct concepts that nevertheless developed organically out of a single set of social concerns and questions, the same cannot be said of Bork’s unilateral redefinition of “competition.” Bork acknowledged both these senses of competition,⁹⁵ and he rejected them. It is particularly important to underline that he rejected the technical concept borrowed from economic theory as “useless” for antitrust law:

‘Competition’ may be read as that *state* of the market ‘in which the individual buyer or seller does not influence the price by his purchase or sales ... This is...utterly useless as a goal of law.’⁹⁶

Instead, Bork went on to re-define “competition” in terms of his concept of consumer welfare. This is a manner in which no one would naturally understand the word, in either and ordinary language *or* a technical sense. In other words, Bork expressly defines “competition” as whatever will serve “consumer welfare”:

‘Competition’ may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternate state of affairs by judicial decree ... We are compelled, I think to accept this definition of ‘competition’...⁹⁷

Thus, Bork expressly stated that the sense of “competition” entailed by his core legal prescriptions was *entirely derivative* of his distinctive conception of consumer welfare, and was also entirely distinct from the ideal-state economic conception of competition.

Recall that the ideal-state conception of competition is the one that was deployed to attack all disfavored forms of economic coordination: public market coordination, labor unions, and informal horizontal coordination beyond firm boundaries. But when it came time to justify the preferred form

⁹⁴ See, e.g., Khan, *supra* note 15 (regarding this use of “competition” and contestable markets).

⁹⁵ Bork, *supra* note 34, at 59-61 (discussing various distinct senses of “competition”—in addition to business rivalry and the ideal state of economic theory, Bork notes that competition may denote “an absence of restraint over one person’s or firm’s economic activities by another person or firm,” or it may refer to decentralized markets preserved by protecting small enterprise, or it may, finally, refer to his own redefinition of competition in terms of “consumer welfare”).

⁹⁶ *Id.* at 59 (emphasis added).

⁹⁷ *Id.* at 61.

of economic coordination—the large, powerful business firm—that would replace those, an entirely different concept was introduced. And since it is in fact a completely distinct concept, we should give it a different label for ease of reference: competition_B (for “Bork”). Nevertheless, its homonym, competition_A, conveniently provided the *appearance* of justification for this preferred form of economic coordination—through the homonymous relationship to the intellectual pedigree of mainstream economics on the one hand, and also to the intuitively appealing ordinary language sense of business rivalry on the other.

b. Consumer welfare

So to understand competition_B, we have to understand “consumer welfare,” which alone supplies its analytical content. This leads us directly into the second Borkian homonym pair. Here, as with “competition,” there is a pre-existing ambiguity upon which the new homonym built. Some senses of “consumer welfare,” naturally, preceded Bork and the Chicago School. Prior invocations of consumer welfare varied in content and in policy prescriptions, but they were all “thick” concepts with substantive content, not putative derivations of economic efficiency. For example, even legislators invoked consumer welfare—although not exclusively, not in the way that Bork has claimed, and even then often in terms of the interests of small producers who were forced to buy from the new monopolies. So too did later voices like Arthur Eddy, who relatively forthrightly asserted consumers’ interests against workers’. Of course, the consumer protection charge of the Federal Trade Commission (deriving from other statutory sources) is entirely based on thick notions of consumer welfare. For the purpose of the present point, it is not that these invocations were correct or incorrect as a normative matter, nor that they were even consistent among each other. Rather, they all had something in common insofar as they involved a *thick, tangible* notion of consumer welfare, and that notion took its place alongside other thick economic or social ideals.

In this case, Bork did settle upon a meaning roughly corresponding to one of the preexisting conceptions of consumer welfare, namely the one associated with pre-New Deal antitrust. That earlier conception of consumer welfare was associated with a specific empirical argument—an argument about what was good for consumers and what was not. The argument went that the hierarchical control imposed by the new business firms (including, importantly, upon their workers) was good for consumers, while direct

coordination among those workers was not good for consumers.⁹⁸ The novel move Bork made was to literally embed that empirical and normative argument into the *definition* of his conception of consumer welfare—call it “consumer welfare_B.” Bork also labeled this empirical argument (upon which his conception of consumer welfare relied) “efficiency” for short (on which, more below).

Thus, the key equivocation in the notion “consumer welfare” lies in whether it is meant merely as an operationalization of the more basic concept of allocative efficiency that is associated with the pro-competition norm, or whether it is a substantive preference for consumers’ interests in the normative framework for antitrust decision-making. In the former sense, higher prices are presumed to correspond to reduced output, which in turn is presumed to be a move toward inefficiency. This ambiguity, mostly unlike the other two identified here, is widely recognized and actively debated.⁹⁹ But it is important to step back from this debate to appreciate the implications of this simple point about the meanings of words: these two senses of “consumer welfare” are *completely distinct*. And at a minimum, as the existence of the debate shows, both are present in the current antitrust discourse and jurisprudence. For example, Bork at times identified consumer welfare with allocative efficiency¹⁰⁰ but also unambiguously embraced the conception of consumer welfare as a question of substantively ordering consumers’ interests over producers’, both directly and in its reliance upon the notion of “productive efficiencies.”¹⁰¹ Subsequent participants in the paradigm have addressed this ambiguity in various ways. For example, Professor Hovenkamp recently articulated the standard as an operationalization of overall welfare, understood in terms of allocative efficiency.¹⁰² But the

⁹⁸ For example, Arthur Eddy, arguing for the permission of coordination among businessmen, wrote in 1917: “Partnerships, corporations, trusts are all in the direction of more for less money,” Eddy wrote, while “labor unions and farmers’ organizations are all in the direction of less for more money. Eddy, *THE NEW COMPETITION* (1917). *See also* *SOLIDARITY*, *supra* note 36.

⁹⁹ See, e.g., Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, J. COMP’N L. & ECON., 7(1); Nathan Tankus & Sandeep Vaheesan, *The Consumer Welfare Standard without the Price Mechanism* (Working Paper) (showing that attempts to understand the consumer welfare standard in terms of reduction in output, or as distorting the ideal allocation of resources, end in incoherence).

¹⁰⁰ Orbach, *id.*, at 147; Bork, *The Goals of Antitrust Policy*, at 242.

¹⁰¹ Bork, *THE ANTITRUST PARADOX*, at p. 108 et seq. (defining productive efficiency in a merger between two firms as consisting in the putative “long-run average cost savings of the two firms” following merger, and positing it as a countervailing factor to the allocative efficiency concept, which would generally militate against merger because merger is presumed to reduce output and increase prices according to price theory).

¹⁰² Herbert Hovenkamp, *Is Antitrust’s Consumer Welfare Principle Imperiled?* U. Penn. Law & Econ. Working Paper, June 2018 (also discussing the “total welfare standard,” the “trading partners standard,” and the reduction in output standard).

“thick” sense of consumer welfare is accepted practice among legal and institutional actors,¹⁰³ who often understand it simply in terms of lower prices in reference to existing reality.¹⁰⁴

Moreover, it would be wrong to dismiss this as a naïve—or easily correctible—mistake. Technical expositions also frequently refer straightforwardly to lower prices, if less directly and with more qualifications.¹⁰⁵ And indeed, actual lower consumer prices are Bork’s (and Williamson’s) professed justification for considering “productive efficiencies” in antitrust decision-making in the first place.¹⁰⁶ That is, Bork justifies the consideration of “productive efficiencies” in decision-making on the basis of consumer welfare in the sense of lower prices: productive efficiencies lower costs and thereby lower consumer prices.

In short, this ambiguity or equivocation in the concept “consumer welfare” has been exceedingly useful, perhaps indispensable. From the perspective of the paradigm as a whole, the second, thick sense of “consumer welfare” has functioned to provide an intuitive and (supposedly) administrable decision rule for actual cases, a point that is often made in its favor and as against proposals to move away from it. Meanwhile the first, thin sense has enabled laying claim, for justificatory purposes, to the intellectual pedigree of mainstream economics. These two concepts are analytically distinct, and the justification for consumer welfare_A cannot, logically, serve as the justification for consumer welfare_B. Yet as a matter of practice the equivocation has largely functioned to *transfer* the intellectual justification from one concept to the other. In this way it is emblematic of the modus operandi of the entire paradigm: justifying in terms of

¹⁰³ Orbach, *supra* note 99, at 133–164 (“Antitrust scholars have known for many years that Bork was “confused” when he used the term “consumer welfare.” Yet, we have failed to inform courts who borrow from Bork’s terminology that they are relying on flawed analysis and misleading economic terminology.”).

¹⁰⁴ See, e.g., *Superior Court Trial Lawyers’ Ass’n* (defining harm in terms of higher prices). Again, to the extent it is considered, this practice has been assumed to be consistent with the underlying normative benchmark of perfect competition, thanks to the presumed relationship between price and output. But see Tankus & Vaheesan, *supra* note 99, for a refutation of this presumption of consistency.

¹⁰⁵ For instance, in his recent defense of the consumer welfare standard, Professor Hovenkamp mainly embraces the position that it is simply shorthand for reduction in output, and is not always indicated by lower prices as such. Hovenkamp, *supra* note 102. Yet in another section of the paper he criticizes the broader political implications of the “neo-Brandeisian” antitrust framework in that it has recently influenced the Democratic Party to embrace revived antitrust enforcement, but not in terms of “lower prices.” Hovenkamp, p. 27.

¹⁰⁶ Bork, *supra* note 34, at Chapter 5.

competition what is in fact a separate normative decision that allocates economic coordination rights.

c. Efficiency

The third and most important Borkian homonym pair is “efficiency.” As you will recall, it is required in order to fill in the content of consumer welfare_B, which is in turn necessary to fill in the content of competition_B.

The notion of *productive efficiency*—the “B” member of the “efficiency” homonym pair—is the ultimate foundation of the Borkian allocation of coordination rights. Although commonly associated with the overall idea that antitrust is about promoting competition, neither the ordinary-language nor the technical sense of “competition” can generate the notion of productive efficiency. And the special Borkian redefinition of “competition,” competition_B, is entirely parasitic upon both the normative benchmark of lower consumer prices and then upon the notion that “productive efficiencies” generate these lower prices.

Productive efficiencies, per Bork, are cost savings realized from firm-based coordination, in theory passed onto consumers as lower prices.¹⁰⁷ This “productively efficient” coordination may consist in the vertical, hierarchically organized coordination presumed to take place within a firm, or it may be vertical, hierarchical coordination beyond firm boundaries, as for example when a large firm gives direction to a small sub-contracted firm. Thus, the posited empirical *fact* of productive efficiencies, together with the *normative benchmark* of the consumer welfare standard, together generate Borkian antitrust’s preference for top-down, ownership-based coordination.

Bork’s notion of productive efficiencies is continuous with the work of Oliver Williamson, upon which he relied.¹⁰⁸ Williamson’s thought itself was continuous with the ideas set forth by Ronald Coase decades earlier. In *The Nature of the Firm*, Coase famously recognized the firm as a limitation upon and exception to the pro-competition norm. Coase’s account turned upon the fact that inter-firm relations were structured through the mechanism, and the relation, of *command* rather than *contract*. Instead of contracting with someone to perform a particular task, the firm hires a worker who will do whatever task (within a given range) the firm decides needs done at a given time. Coase thus took for granted that the firm was constituted from agency, or master-servant, principles. It is those legal

¹⁰⁷ *Id.* at 108-09.

¹⁰⁸ See, e.g., Oliver Williamson, *Allocative Efficiency and the Limits of Antitrust* 59 AMER. ECON. R. 105 (1969).

principles that supply the “duty of obedience” to the common law employment relationship, and that do the work of substituting (in Coase’s account) for a contractual obligation to perform a specific task or a discrete set of specific tasks. Managerial hierarchies, and the separation of work from ownership, were thus basic to Coase’s account.¹⁰⁹

Williamson, picking up the Coasean thread, constructed a justification for traditionally organized firms based upon their avoidance of “transaction costs,” which would attend transactions in the market. Notably, this explanation and justification of firm-based coordination was meant to distinguish it not only from looser coordination outside the firm and in the market, but also from non-traditional internal organization. In other words, the paradigm firm is one in which decision-making and organization is relatively vertical, in which owners are not workers, and which owners elect management.¹¹⁰ Work is, in other words, separated from and subordinated to ownership.¹¹¹ In short, managerial hierarchies were central to the benefits of firm-based coordination in both Williamson’s thought and that of other influential contemporaries.¹¹²

It is this body of thought, and the supposed operational or productive “efficiencies” that it imputed to the traditionally organized firm, which was directly infused into the bloodstream of antitrust law through Bork.¹¹³ This infusion effectively expanded and magnified the preferential

¹⁰⁹ Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937). See also Thompson (2015) (“Indeed, Coase (1937) equated managerial hierarchies (which he saw as the defining feature of the firm in general) with the capitalist firm. For instance, the most efficient way to incentivise managers to monitor workers is to award them the property rights to the ‘residual’, which represents the product left over after all individually contractible returns have been paid.”)

¹¹⁰ See, e.g., Oliver Williamson, *The Organization of Work: a Comparative Institutional Assessment* 1 *J. ECON. BEH. & ORG.* 5 (1980). A major concern was managers’ ability to monitor, reward, and punish workers, who would otherwise free-ride or “shirk.” See also Spencer Thompson, *Toward a Social Theory of the Firm: Worker Cooperatives Reconsidered* 3(1) *J. OF CO. ORG. & MAN.* 3 (2015) (discussing Williamson’s and other contemporaries’ ideas).

¹¹¹ Williamson, *id.* Thompson points out that the disfavor toward firms organized in other ways, for example through worker ownership, was not limited to firms involving “one-worker/one-vote” styles of management, but even to “the bundling of work and wealth” itself, thus extending to worker-owned firms in general. Spencer, *id.*

¹¹² See, e.g., Williamson, *id.*; Alfred D. Chandler, Jr., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977). See also Thompson, *id.* at 9 (pointing out that “[c]ompetence-based theories ... maintain that managerial hierarchies are required to achieve the coordination that would otherwise be lacking in a complex division of labour. In particular, by facilitating specialisation in the management function, managerial hierarchies can efficiently control the flow of information and the allocation of skills and resources between stages of production, taking into account risk, antitr uncertainty, and change.”)

¹¹³ See, e.g., Bork, *supra* note 34, at Chapter 5 (“The Consumer Welfare Model”). See also, e.g., Alan J. Meese, *Robert Bork’s Forgotten Role in the Transaction Cost Revolution*, 79(3)

treatment of hierarchical coordination associated with concentrated ownership (already present in the form of the firm exemption itself), by furnishing a conceptual basis for a more permissive attitude both to corporate mergers and to “partial integration” through vertical restraints.¹¹⁴

These productive efficiencies have nothing to do with the notion of economic efficiency upon which the current antitrust paradigm generally justifies itself; they are not a species, a sub-set, or a cousin of this concept. They are not derived from or related to the notion of a competitive market, as economic “efficiency” is. They exist in the way that they are posited if and only if an empirical claim about organizing human activity and technological functioning in time and space is correct. This specificity, which quite clearly implicates technological, social and historical contingencies, is also why we should be skeptical of how universally such productive efficiencies are posited to exist, if they ever existed at all.

It is true that this sense of “efficiency” is related to the presumed *goal* of ideal theory insofar as its proponents assume that it is “output-enhancing.” But even so, the argument that hierarchical control (rather than democratic coordination) is output-enhancing is based upon a causal mechanism that is entirely distinct from economic competition (and instead consists in a restraint upon competition). The Borkian concept of productive efficiency indeed expressly posits that some restraints on competition ultimately enhance output, and thus should be permitted as exceptions to the general pro-competition norm. Just like the other two homonym-pairs organized around the ideal-state supplied by neoclassical economics on the one hand, and some other “thicker” normative benchmark (ultimately having to do with lower consumer prices and hierarchical coordination) on the other, productive efficiency and allocative efficiency are *no more than mere homonyms*. This pair of homonyms, both terms of art, are all the more likely to blend in everyday legal and institutional practice. I will henceforth refer to them as efficiency_A and efficiency_B.

Efficiency_A is used to discipline workers—and anyone else whose economic coordination is not mediated by a large firm—even as efficiency_B is deployed to justify coordination controlled by large firms. In other words, efficiency_A is used to attack all *disfavored* forms of economic coordination, from cartels to unions to public market coordination. Yet efficiency_B is used to defend economic coordination performed through the mechanism of a large, powerful firm. The two are judged by different metrics, and that

ANTITRUST L.J. 953 (2014) (pointing out that Bork himself participated in reviving and extending the Coasean tradition, at least initially independently of Williamson).

¹¹⁴ Bork, *supra* note 34; Priest, *supra* note 6; Meese, *id.*

differential judging is written into the law itself. Thus, even if consumer welfare were accepted as the substantive benchmark, horizontal coordination beyond firm boundaries is barred from showing that it produces such benefits, while corporate mergers are in many cases presumed to produce these benefits.

The reason for this is that generally speaking, increasing coordination among producers, whether by merger or by coordination beyond firm boundaries, is presumed to increase consumer prices and reduce output. Bork is quite clear about this: “Mergers eliminate rivalry between the participating firms even more effectively than do cartels, and they are much more permanent.”¹¹⁵ But Bork goes on to say that the “disparity” in the treatment of cartels and mergers—a disparity whose intensification he advocated—“is explainable in terms of, and only in terms of, a policy of consumer welfare.”¹¹⁶ In other words, “a preference for [productive] efficiency,” which implies the preference for mergers over cartels, “is explainable only by a proconsumer policy.”¹¹⁷ Bork was making a very specific point here: that this preference for mergers over cartels was already in antitrust law, and that therefore the proconsumer policy was already in antitrust law. While Bork was incorrect that the legislative history supports his substantive “proconsumer policy,”¹¹⁸ he was not wrong that antitrust, as he found it, already displayed a preference for mergers over cartels. Indeed, this is a corollary of the true proposition that antitrust already contained a preference for firm-based, and indeed hierarchical and ownership-based, economic coordination even before Bork.¹¹⁹ In effect, Bork proffered the fact there was such a preexisting preference in the law—along with his empirical claim about productive efficiencies, and his incorrect imputation of legislative intent—as the justification for then further intensifying that very preference.

The merits of Bork’s argument from past antitrust policy aside, the argument carries within it the frank admission that logically, a pro-competition norm alone can never generate the antitrust preference for mergers (and for monopolization, however it arises) over “cartels”—or more precisely, over horizontal coordination beyond firm boundaries. In other words, Bork quite clearly stated that the pro-competition norm does not justify the firm exemption, and that only a substantive “proconsumer policy” (in the sense of consumer welfare_B) can justify it. In particular, the argument

¹¹⁵ Bork, *id.*, at 67.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ SOLIDARITY, *supra* note 36, Chapter 1.

¹¹⁹ See Part II, *supra*.

is that in the case of horizontal mergers, efficiency_B may outweigh the posited losses from coordination, i.e., efficiency_A, thereby justifying its permission.¹²⁰ For a horizontal merger the price-lowering effect of efficiency_B may outweigh the price-increasing effect of efficiency_A. (And in case of vertical mergers or vertical coordination beyond firm boundaries, according to Bork there may be no losses from coordination, or efficiency_A, at all.) But again, in case of horizontal coordination beyond firm boundaries, for Bork there are no productive efficiencies; thus one need waste no time searching for mitigating benefits:

It must also be remembered that there need not always be a tradeoff ... Some phenomena involve only a deadweight loss and no, or insignificant, cost savings. *That is the case with the garden-variety price-fixing ring* ... Other phenomena will involve only efficiency gain and no dead-weight loss. Examples of these include most of the mergers the Supreme Court strikes down . . .¹²¹

So the Borkian notion of efficiency_B is defined to imply that horizontal coordination beyond firm boundaries has substantively fewer benefits for consumers and, by extension, society, than vertically organized coordination. The empirical assumption embodied in “productive efficiencies,” along with a substantive “proconsumer policy,” thus together form the linchpin of Borkian antitrust. Once this substantive policy is in place, efficiency_B grounds both the permissive attitude to mergers and vertical coordination (particularly vertical coordination involving unequal relations between firms, where the cost-savings of hierarchy may be realized) *and* the disciplinary attitude to horizontal coordination beyond firm boundaries. Thus, whatever the logical basis of efficiency_B is, that is also the logical basis of this fundamental preference for hierarchical economic coordination over democratic forms of coordination. And efficiency_B is based on the notion that organizing production activities on the basis of command, in a traditionally organized top-down firm, will yield social and economic benefits.

¹²⁰ The “efficiency” homonym-pair is where the rubber really hits the road in terms of the Borkian sleight of hand, because the pair are not only semantically distinct and unrelated but actually *opposed* regarding the very question at hand.

¹²¹ Bork, *supra* note 34, at 108 (emphasis added).

The foundational Borkian homonyms

“a” concept	semantic content/ analytical basis	“b” concept	semantic content/ analytical basis
competition _A	Competitive market as ideal state	competition _B	Consumer welfare
consumer welfare _A	“ ”	consumer welfare _B	Lower prices (or other substantive benefits to consumers); “productive efficiencies”
efficiency _A	“ ”	efficiency _B	Empirical argument about organizing economic activity through command & separation of work/ownership

The Borkian remaking of antitrust law thus involved the widespread adoption of the idea of competition as an ideal state in supplying the *official* decision criteria for antitrust—even as Bork freely and repeatedly told us that this is not what the consumer welfare standard meant, and also admitted that this sense of competition could not explain or generate the preference for top-down, ownership-based coordination that is the central organizing principle of the legal paradigm he birthed. No number of attempts to “correct” the Borkian framework to make it hew to the narrow sense of ideal-state competition that he explicitly disavowed can truly change this—at least not while retaining the simultaneous commitment to the consumer welfare standard as he understood it.

By successfully marrying a set of empirical arguments about organizing production to save costs to a set of theoretical arguments about the ideal, competitive state, the policy outcome Bork accomplished was to *strengthen* the regulatory anti-coordination stance as to all disfavored forms of economic coordination—primarily “cartels” or horizontal coordination beyond firm boundaries—while *relaxing* the anti-coordination stance as to one favored form of economic coordination: hierarchical control, typically exercised from a locus of concentrated ownership claims. That marriage, I have argued, was accomplished in good part by labeling the empirical arguments in a manner that was homonymous with the theoretical arguments, thereby transferring to the empirical arguments the social deference with which the theoretical ones were widely regarded.

B. *Antitrust's theory of the firm*

Bork thus drew upon the fact that firms are the sole islands of economic coordination within a sea of competition as the basis for his argument that antitrust law fundamentally is and ought be the enactment of a “proconsumer policy,” implemented through a legal preference for economic coordination that displays “productive efficiencies.” I now turn to antitrust’s conception of the firm, which in Bork’s wake transformed itself further in his image. That conception turns the attributes of the conventionally organized business firm into a matter of positive antitrust doctrine for marking the boundaries of the firm exemption, incorporating decision criteria involving a “unitary decisionmaking quality” and the “single aggregation of economic power.”¹²² These criteria have been interpreted to favor concentrated ownership while disfavoring dispersed ownership, and to favor hierarchical control imposed from a single control center while disfavoring interdependent coordination among many “centers of decisionmaking.”¹²³

I note that Bork’s widely recognized influence upon the law of vertical restraints,¹²⁴ which in many ways also implements this preference for economic coordination in the form of hierarchical control, is related to the single entity doctrine both in philosophical origin and practical effects. Indeed, the modern law of vertical restraints repudiates older, New Deal-era precedent that had refused to immunize such coordination partly on the very ground that it involved a kind of feudal dominion that should not exist beyond firm boundaries.¹²⁵ Of course, this also re-affirms that even during

¹²² *American Needle, Inc. v. National Football League*, 560 U.S. 183, 196 (2010).

¹²³ *Id.*

¹²⁴ Brian Callaci argues that changes in this area of law were also heavily influenced by the lobbying of interest groups, notably franchisors’ associations. Such a group filed an amicus brief in the key decision *GTE Sylvania v. Continental Television*, 433 U.S. 36 (1977) (expanding the permission of geographical market allocation restraints placed by franchisors upon franchisees), which was handed down a year before Bork’s book was published. Brian Callaci, *Vertical Dis-Integration and the Creation of a New Business Form: Franchising 1960-1980* (Univ. of Mass.-Amherst, Dept. of Econ., Working Paper, Sep. 2018). While Bork had previously published several papers upon which he drew in the book, it is generally regarded that the book itself had the greatest influence upon the judiciary. *See, e.g.*, Priest, *supra* note 6. *Cf.* Meese, *supra* note 113.

¹²⁵ The full flowering of the Borkian turn in the law of vertical restraints is perhaps best embodied in *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (legalizing maximum price restraints by powerful firms upon small re-sellers). That decision repudiated *Simpson v. Union Oil Co.* (1964) (vertically imposed price-fixing by oil company on gas station re-sellers illegal), a decision that was based as much upon the value inhering in the *freedom* of the small dealers, as it was on promoting the competitive price). *See also* *United States v. Richfield Oil Corp.*, 99 F.Supp. 280 (S.D. Cal. 1952) (vertical restrictions on gas station operators by oil company impermissible, reasoning that gas station operators were tenants, not employees, and thus principles of subordination in hierarchical vertical coordination were inappropriate outside the basically feudal subordination inherent in the employment relationship).

the New Deal period, firms themselves were still basically regarded by antitrust law as enacting the preference for economic coordination in the form of hierarchical control rather than voluntary cooperation.¹²⁶

However, Borkian antitrust took this view of the firm further, arguably turning it from a latent description to an active prescription. The Supreme Court’s landmark decision in *Copperweld Corporation v. Independence Tubing Corporation*¹²⁷ expressly declared the preference for economic coordination as centralized ownership and control. Here the Court in many ways channeled Bork, most significantly by scapegoating horizontal coordination as the principal contrast case. The single entity doctrine whose development *Copperweld* initiated furnishes a refracted image of Borkian antitrust’s conception of the firm: it gives expression to the allocation of coordination rights that is entailed by antitrust’s more deeply embedded firm exemption.

a. Copperweld

At the broadest level, what *Copperweld* did is to extend the antitrust privilege of firm status beyond formal firm boundaries. In this way, it made colorable various firms’ legal claims to control activities beyond the borders set by corporate law itself. Again at the broadest level, this means that some firms are able to claim the benefits of narrower firm boundaries for corporate law purposes (segregating their assets and liabilities, for instance, a standard aspect of corporate “families”)¹²⁸ and for labor law purposes (avoiding the obligations of employment, among other things),¹²⁹ while also claiming the benefits of broader firm boundaries for antitrust purposes (permitting coordination within the “family” that would be otherwise impermissible under Section 1). This, unsurprisingly, leads to anomalous results, some of which are discussed in Part IV.B, *infra*. But *Copperweld* is as significant for just *how* it facilitated these future developments relating to “fissuring” and the gig economy—by expressly inscribing the criteria that underlie the firm exemption.

¹²⁶ Because they are both widely covered elsewhere and less directly related to the core point of this paper regarding firms and cartels, I do not discuss vertical restraints in further detail here.

¹²⁷ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

¹²⁸ It is worth noting that this rule itself is subject to criticism on the ground that it unfairly apportions privileges and responsibilities.

¹²⁹ Limiting firm boundaries for labor law purposes had additional implications: it also permits firms to further limit *workers’* freedom—by limiting labor picketing within the corporate “family” under the NLRA’s ban on secondary labor collective action, for example.

“Intra-enterprise conspiracy,” referring to coordination among closely related but formally separate business entities, had been for decades a recognized legal theory. It was explicitly recognized by the Supreme Court in *United States v. Yellow Cab*, in which the Court noted that an unreasonable restraint on trade “may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent” and that “any ... integration” flowing from such a relationship “cannot insulate” the coordination from the statute.¹³⁰ The rule that a parent-subsidiary relationship does not necessarily insulate coordination from Section 1 liability was then reaffirmed by the Court and by the courts of appeal to consider it.¹³¹ Still, even before *Copperweld*, firms in corporate “families” weren’t treated quite the same as other firms: as the dissent in *Copperweld* noted, simple price coordination or other economic cooperation between a parent and a subsidiary, which would be a Section 1 violation between “separate” firms, was already permissible.

Copperweld itself involved a different sort of cooperation between parent and subsidiary. The parent corporation (Copperweld) and its wholly owned subsidiary (Regal) conspired to send threatening, factually embellished letters to banks, potential customers and potential landlords, in order to exclude a would-be competitor of Regal from the steel tubing market.¹³² The antitrust aspect of the resulting litigation, which also included various business torts, was based upon this coordination (rather than, say, price-fixing or other economic cooperation).¹³³

Without dealing with the merits of this theory of the case, or with the substance of any of the business relationships involved other than the one between Regal and Copperweld, the Court ruled that coordination between a

¹³⁰ 332 U.S. 218, 227 (1947).

¹³¹ *Copperweld*, 467 U.S. (collecting court of appeals cases).

¹³² Interestingly, Regal had begun life as a wholly owned subsidiary of yet another company, which sold it to the company (Lear Siegler) that eventually sold it to Copperweld. But at the time of acquisition by Copperweld, Regal was in fact an unincorporated division (not a subsidiary) of Lear Siegler. The sale of its Regal division to Copperweld also entailed a non-compete agreement preventing Lear Siegler from entering the steel tubing market. Lear Siegler itself, having sold the division that previously manufactured steel tubing, had no plans to re-enter that market. However, what Copperweld hadn’t bargained for (quite literally) was that the former division manager of Regal, one enterprising David Grohne, had no intention of personally leaving the steel tubing business. He quickly set about creating the (fittingly named) Independence Tube Corporation. Since Grohne wasn’t personally bound by the non-compete agreement with his former employer, Copperweld resorted to threatening embellishments (based partly upon its ownership of Regal’s trade secrets) to contact third parties that would have dealt with Independence (including potential customers, suppliers, real estate holders, and financiers) in an attempt to prevent Independence from entering into the contracts necessary to begin doing business. *Id.*

¹³³ 467 U.S. at 758; 691 F.2d 310, 318 (7th Cir. 1982).

parent and a subsidiary is insufficient as a matter of law to meet the concerted action requirement of § 1, because for antitrust purposes it involves one actor rather than two. “The Sherman Act contains a ‘basic distinction between concerted and independent action.’ The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization.”¹³⁴ But as discussed in Part II, *supra*, this “basic distinction” certainly wasn’t original to the framers of the Sherman Act, and indeed seems to have solidified precisely as the firm exemption solidified in legal consciousness. Moreover, the very same antitrust framework that was so fully embraced by the *Copperweld* majority also undermined any tangible possibility of regulating unilateral firm conduct when it “threatens ... monopolization.” Indeed, in the very same breath the Court went on to characterize single-firm conduct that earlier courts might have found troubling as “the competitive zeal of a single aggressive entrepreneur.”¹³⁵

In justifying this categorical distinction—and here echoing Bork almost verse for verse—the Court also simultaneously condemned horizontal price coordination between dispersed actors, for which no redeeming efficiencies can be found as a matter of law. Rehearsing these ordered preferences among forms of economic coordination, the Court wrote:

“Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. Certain agreements, such as horizontal price-fixing and market allocation, are thought so inherently anti-competitive 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.”¹³⁶

To support this rigid distinction between unilateral and bilateral conduct, the Court relied upon the importance of maximizing horizontal competition. To this extent, it endorsed the ideal-state version of “competition.”

But the Court also decided that cooperation between a parent and a subsidiary was more like the “other combinations” that hold the promise of “efficiency.” The sense of “efficiency” here is of course none other than

¹³⁴ 467 U.S. at 767.

¹³⁵ *Id.* at 768. It is odd for the Court to invoke the ‘zeal of a single entrepreneur’ with respect to Regal & Copperweld’s conduct in particular—which quite literally consisted of a large, long-established business working to *prevent a new, less-established entrepreneur* from starting a business—but it is rhetorically effective given that it invokes a popular interpretation of antitrust law (and is even phrased so as to suggest a biological individual, rather than a corporate one).

¹³⁶ 467 U.S. at 768.

Bork’s “productive efficiency”: the sort that results in cost savings to a firm, thus “enabling it to compete more effectively.” It has nothing to do with the “efficiency” that is the corollary of either ideal-state “competition” *or* competition in the sense of business rivalry—as Bork himself said. And of course, the criterion of “enabling a firm to compete more effectively,” which could in theory apply to *anything* that lowers its costs, eliminates rivals, or even arguably increases its prices, is only connected to “competition” in the most tendentious of ways. It is not connected to the official, ideal-state notion of competition at all. And it is tendentiously connected to the concept of business rivalry, because such a criterion would often tend to diminish business rivalry rather than foster it. Indeed, that is precisely what the cooperation between Copperweld and Regal in this case was aimed at doing: eliminating the very existence of a business rival, by preventing him from so much as setting up shop (relying upon the penumbra of a non-compete agreement that did not legally bind him). Preventing competition was the essence of the conduct at issue in this case in terms of both means *and* ends.

To justify itself precedentially, the *Copperweld* majority invoked *Appalachian Coals*, wherein decades earlier the Supreme Court had permitted coordination between separate entities under Section 1.¹³⁷ *Appalachian Coals* was a Depression-era decision and an outlier in the jurisprudence insofar as it recognized a legally cognizable interest in stabilizing a decentralized market of small, independent producers through looser coordination beyond firm boundaries. Even though it precisely contested the market order that *Copperweld* endorsed, *Appalachian Coals* provided the jurisprudential hook for again expanding coordination beyond firm boundaries—albeit now in a way that would expressly prefer subordination to horizontal cooperation.

Copperweld held that, where indicia involving concentrated ownership and control claims are sufficiently satisfied, coordination between formally distinct business entities is, as a per se matter, not subject to examination under Section 1. In so doing, it likened the relationship of Regal and Copperweld to “a team of horses drawing a vehicle under the control of a single driver,” one where the driver “may assert full control at any moment” whether or not it otherwise “keeps a tight rein.”¹³⁸ But in adopting these criteria, the Court was not merely respecting existing legal claims, given by other areas of law. Rather, it was using them as a basis for antitrust’s *own* allocation of coordination rights, holding that the existing legal right (antitrust aside) of an actor to control another *also* holds that control immune from antitrust scrutiny. That this is a separate and additional legal judgment is evident from the fact that two separate persons or firms—“independent

¹³⁷ *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

¹³⁸ 467 U.S. at 771-72.

centers of decision-making”¹³⁹—also have the legal right (antitrust aside) to enter into whatever contract they wish, yet that fact does not immunize a resulting contract to fix prices from Section 1 scrutiny. Rather, antitrust makes an affirmative judgment to confer the right to control while denying the right to cooperate.

b. Copperweld’s progeny

Regarding the single entity doctrine as it developed post-*Copperweld*, three points emerge. First, its chosen criteria evince a preference for economic coordination that is accomplished by means of the concentration of ownership, control, or both. Second, its other criteria—for example, references to common economic goals, separate decision-makers, or even to “competitors”—are either question-begging, or they internalize agency and employment relationships (and sometimes even power differentials found in *contract*) as furnishing the relevant normative reference-point for antitrust’s allocation of coordination rights. Third, like *Copperweld* itself, the law plays lip service to a particular benchmark—the preservation of independent centers of decision-making in the economy—that, in practical effect, it works to undermine.

Concentrated control and ownership rights are the most discernible criteria that qualify an economic arrangement for protection from antitrust liability under the single entity doctrine.¹⁴⁰ Following *Copperweld*, the courts extended single entity immunity to affiliated enterprises whose relationship was less integrated than that of a wholly owned subsidiary of a parent. This has included for example coordination between sibling-subsidiary corporations.¹⁴¹ It has also included *de minimis* deviation from the ownership relation implied by the parent-subsidiary relationship.¹⁴² If ownership is not sufficiently concentrated, concentration of control or control rights may suffice.

¹³⁹ *Id.* at 769.

¹⁴⁰ “The first test, an “economic unity” test, inquires whether or not parties are already effectively integrated within a single entity. This is effectively a test of how concentrated control rights are. Evidence that control rights are fragmented and distributed across constituent entities frustrates the appeal to single entity status.” Dean V. Williamson, *Organization, Control and the Single Entity Defense in Antitrust*, U.S. Dept. of Justice—Antitrust Division, EAG 06-4 (2006). See also *Copperweld*, 467 U.S. at 770; *Freeman v. San Diego Association of Realtors*, 322 F.3d 1133, 1148 (2003) (citing “substantial common ownership, a fiduciary obligation to act for another entity’s economic benefit or an agreement to divide profits and losses” as key factors for economic unity).

¹⁴¹ See, e.g., *Eichorn v. AT&T Corp.*, 248 F.3d 131, 139 (3d Cir. 2001).

¹⁴² *Siegel Transfer, Inc. v. Carrier Exp. Inc.*, 54 F.3d 1125 (3d Cir. 1995).

Indeed, post-*Copperweld* decisions have generally declined to extend coordination rights to affiliations that were too horizontal, democratic, or insufficiently grounded in ownership—and expressly for those reasons. Again, this brings the irony of *Copperweld*'s reliance upon *Appalachian Coals*, which had contested precisely this preference, into even finer relief. For example, a mushroom producers' and distributors' cooperative that did not qualify for the statutory exemption in the Capper-Volstead Act¹⁴³ was also denied single entity status under *Copperweld*, due to a lack of concentrated ownership and decision-making.¹⁴⁴ As an attorney in the Antitrust Division of the Department of Justice noted:

The law is disposed to identify 'economic unity' with top-down, one-way, hierarchical control. The law accepts as single entities agglomerations that satisfy 'economic unity,' and it may stop analysis of the single entity issue there rather than bother to proceed to other tests, but observe what is and is not going on. '*Economic unity*' says *nothing about the welfare-enhancing, efficiency-generating features of such agglomerations. Rather the test provides a safe harbor against the courts marching in and abrogating established property rights and control rights.*¹⁴⁵

Thus in the single entity doctrine, deference to ownership-based coordination rights seems to revert to its original, self-justifying character,¹⁴⁶ rather than relying upon the utilitarian justifications that were contrived for that preference in the intervening period. This is not just deference to property endowments in the sense of respecting existing boundaries. Rather, it's about using those boundaries to *allocate new rights*, namely the economic coordination rights that antitrust is in the business of defining.

It should be said that there are a couple of exceptions to this trend, perhaps most notably *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc.*¹⁴⁷ The Eighth Circuit there expressly reached behind the curtain of *Copperweld* in order to base its reasoning upon older cases finding single entity status for the purpose of fulfilling the statutory requirements of agricultural cooperative

¹⁴³ 7 U.S.C. § 291. See also Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy*, available at: https://papers.ssrn.com/abstract_id=3279629 (Working Paper, Nov. 2018) (discussing potential and limitations of Capper-Volstead).

¹⁴⁴ In re Mushroom Direct Purchaser Antitrust Litigation, 621 F.Supp.2d 274, 290-91 (E.D. Penn. 2009).

¹⁴⁵ Williamson, *supra* note 140.

¹⁴⁶ These are expressly invoked in pre-New Deal cases using antitrust to discipline worker collective action. See SOLIDARITY, *supra* note 36, Chapter 2.

¹⁴⁷ 838 F.2d 268 (8th Cir. 1988)

immunities,¹⁴⁸ which at least in theory contemplate the permission of looser coordination among independent producers where ownership and control are dispersed rather than concentrated. *Mt. Pleasant*, along with of course *Appalachian Coals*, furnishes a template for reversing the primary direction of the law, which has been in the direction of privileging concentrated ownership and control as the basis for economic coordination while condemning horizontal, democratic coordination where ownership and control are dispersed.

In short, for extending the privilege of the firm exemption, antitrust manifests a preference for concentrated ownership and control rather than cooperation. Conversely, when antitrust *narrows* the reach of the firm exemption within formal firm boundaries, it again uses criteria that manifest the same preference. In other words, the entity boundaries supplied by the law of business associations are not sufficient to confer the privilege of antitrust's firm exemption. Most recently, the Supreme Court said that "we have repeatedly found instances in which members of a legally single entity," including duly incorporated or otherwise associated business entities, "violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity."¹⁴⁹ Thus, the definition of a firm given by the very area of law that most centrally deals with firms—the state law of business associations—is neither necessary nor sufficient to earn the privilege of firm status under antitrust law. Instead, antitrust supplies its own criteria.¹⁵⁰

As for criteria other than those that refer directly to concentrated ownership or control, they often turn out to be either over-broad or question-begging when taken literally.¹⁵¹ For example, whether certain economic actors are "potential competitors"¹⁵² or "independent centers of decision-making" is the question that antitrust's conferral or denial of firm status *decides*; it is not an independent decision basis for firm status. In substance, this description only distinguishes groups of people who engage in

¹⁴⁸ *Id.* at 275 (relying upon *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962)).

¹⁴⁹ *American Needle*, 560 U.S. at 191-92 (citing decisions involving incorporated business entities that were nevertheless subject to Section 1), and at 200-01 (noting that the corporate form can be a "formalistic shell" masking "concerted action").

¹⁵⁰ "The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business." *Id.* at 196.

¹⁵¹ This circularity might be reasons why so many critics, wherever they fall on the underlying preference for concentrated ownership and control for allocating coordination rights, find the single entity doctrine confused. Chris Sager, *Why Copperweld was Actually Kind of Dumb*, 18 VILL. SPORTS & ENT. L.J. 377, 387 (2011); Dean Williamson, *supra* note 140.

¹⁵² Dean Williamson, *id.*

the same or similar economic activity from those who do not—whether those people are within a firm or outside a firm. All lawyers in a law firm are potential competitors, but that certainly is not a sufficient basis for denying it the firm exemption. Indeed, if applied literally (and non-circularly), the potential competitor standard would imply that firms cannot employ large classes of people who perform the same service, which the firm goes on to sell. Thus, “actual or potential competitor” can’t very well serve as the criterion of applicability for the firm exemption if taken at face value; it is either over-inclusive, or it begs the question.

These criteria only make sense when they are understood as ancillary to the more express statements about concentrated ownership and control rights. In other words, they make sense if they internalize legal hierarchies and power polarities that are given by other areas of law—and sometimes simply by contract. It is for this reason, of course, that employees who perform the same service for a firm aren’t considered “potential competitors,” turning the firm that sells that service into a price-fixing conspiracy: antitrust defers to employers’ coordination rights over their employees. More precisely, antitrust imports the control rights inherent in the law of the employment relation into its *own* set of criteria for allocating coordination rights. Obviously, this again evinces a preference for concentrated control rights rather than more dispersed or democratic coordination.

Notably, this deference to power polarities extends beyond employment to some instances of contract—contracts that inscribe and extend power polarities that exist in the world. For example, *Copperweld* has been extended to insulate some coordination between franchisors and franchisees, on the ground that franchisors exercise control over franchisees and they share common economic goals.¹⁵³ This sort of justification again is circular on its face: the “garden variety price-fixing ring,” which is regarded as the “supreme evil of antitrust,” after all *also* has common economic goals. The only difference is that franchisors exercise “plenary control” over franchisees, while the price-fixing ring—whether it’s made up of coal processors, truck drivers, or church organists—is more like a band of brothers (or sisters). Again, the only way to render the facial criteria non-question-begging is to fill them in with the deference to hierarchy and ownership that antitrust prefers as the basis for economic coordination.

¹⁵³ *Williams v. I.B. Fischer Nevada*, 999 F.2d 445 (9th Cir. 1993) (dismissing former employee’s claim that “no-switching” provision in franchising agreement violated Sherman Act, on the basis that franchisor and franchisee cannot conspire under *Copperweld*).

Finally, both *Copperweld* and *American Needle* attempt to restate their decision criteria in terms of the neat-sounding test that asks whether allocating coordination rights to a given entity would “deprive the marketplace of independent centers of decision-making.”¹⁵⁴ But if this criterion is applied literally, then it militates in the *opposite* direction of the concentrated ownership and control that the single entity doctrine favors. In other words, favoring looser coordination beyond firm boundaries is precisely the regulatory stance that would tend to preserve “independent centers of decision-making” in the marketplace. Yet antitrust withholds the right to engage in such coordination, while granting coordination rights to a vertically integrated firm (or corporate family, or franchise family).

IV. NORMATIVE IMPLICATIONS

A. *Coordination rights as a public resource*

This paper has argued that one of antitrust law’s primary functions is to allocate coordination rights to some economic actors and deny them to others. Antitrust presently performs this function in large part through its firm exemption, which allocates coordination rights to owners, quasi-owners (shareholders), and corporate governors within firms. Because coordination rights cannot be exercised absent authorization by antitrust law, I also suggest that we ought to view them as a public resource. This in turn grounds the claim that such rights ought to be both allocated and regulated in the public interest. Conventional thinking by contrast assumes that it is justified for economic coordination within firms to be aimed *purely* toward fulfilling the select private interests. That thinking is buoyed up, in good part, by the “contractarian” theory of the firm, which suggests that the firm is simply a collection of contracts between private parties. But the economic coordination rights that are allocated by antitrust’s firm exemption cannot be derived from contract. Indeed, the contractarian vision of the firm is logically inconsistent with the proffered justifications, such as they are, for the firm exemption.

Economic coordination is always either authorized by antitrust law, or not. For any given instance of economic coordination, and certainly for any instance of economic coordination implicating prices, antitrust is always—either explicitly or implicitly—asking whether it is justified, and then answering that question one way or the other. For coordination within the firm, it generally answers that question in the affirmative (although there are still exceptions). For coordination beyond the firm, the antitrust doctrines

¹⁵⁴ *Copperweld*, 467 U.S. at 769 (quoted by *American Needle*, 560 U.S. at 194).

governing inter-firm coordination determine the answer. Moreover, the answers that antitrust gives to these questions are not derivable either from the more fundamental building blocks of property or contract, nor from corporate law—though its answers interact with each of these.

Let me illustrate the fact of intra-firm coordination with an example. Many trucking firms in the United States buy truck-driving services from individuals they sell trucking services to their customers. They typically have a few administrative employees, but their core product is the service performed by those individuals. Now consider the coordination performed by such a firm. The trucking firm gets to set the prices it charges its customers for trucking services. That seems natural enough. But is it? Functionally, this is a form of price coordination: the firm is setting the prices for the services performed by all, say, twenty drivers. Imagine that in this particular market for trucking services, there are four other firms of twenty drivers each. Now suppose that instead of working for the first firm, these same twenty drivers begin working directly for customers, but form a bargaining unit for the purpose of negotiating their contracts with customers. They agree internally upon rates and they do not deviate from rates set by their designated bargaining agent. Without changing much, if anything at all, about the tangible economic activity that is taking place, we have moved from a situation in which the right to coordinate prices is uncontested for antitrust purposes, to one that courts and federal competition authorities would undoubtedly label a “garden variety price-fixing ring.”¹⁵⁵

Note that between these examples, there is no difference in effects on third parties, whether they are customers, suppliers or rival firms or associations. Indeed, recall that Bork himself acknowledged this to be the case.¹⁵⁶ So there does not seem to be a justification, at least in terms of “anti-competitive effects” or even in terms of effects on prices, for allocating coordination rights to the trucking firm but not to the truck driver “cartel.”

As we saw in Part III, antitrust’s allocation of coordination rights to the firm is not derivable from the law of corporations (or other business entities). The firm boundaries given by corporate law are neither necessary nor sufficient to qualify for antitrust’s firm exemption.¹⁵⁷ Incorporation or association does not insulate what antitrust would otherwise deem a cartel—likely including, for example, the “price-fixing ring” of truck drivers

¹⁵⁵ Bork, *supra* note 34, at 108.

¹⁵⁶ See Part III.A, *supra*.

¹⁵⁷ They are not necessary, per *Copperweld*, and they are not sufficient, per (for example) *American Needle*.

mentioned above.¹⁵⁸ Meanwhile, antitrust confers the firm exemption upon arrangements that are not firms under corporate law (under the single entity doctrine). Whether something is a firm or a cartel is a question that antitrust treats as internal. Thus, antitrust cannot explain away its allocation of coordination rights as deference to, nor even borrowing from, corporate law.

Property concepts are closely connected with antitrust's allocation of coordination rights, although that allocation cannot be derived from positive property rights either. To be sure, property itself implies control rights, which is a form of economic coordination. And the owner of a business—a status that outstrips ownership of physical or financial capital—has plenary rights to control that business, a fact that is recognized, or created, across a number of areas of law. But the price coordination that takes place within a business corporation, for example, cannot be reduced to property rights, because neither of the actors to whom the right to coordinate prices could plausibly be attributed—shareholders on the one hand (who would then delegate that right to others), and officers and managers on the other—are in fact owners of the corporation.¹⁵⁹ Thus, the price coordination that takes place within *most* firms—those that are organized as corporations—cannot be justified on the basis of property rights. Additionally, antitrust permits coordination by franchisors and similarly situated “lead firms” that cannot be derived from property rights, as indeed firms in this position generally disclaim property rights in the firms over which they exercise control.¹⁶⁰ Moreover, as pointed out in Part III, even where property rights do directly imply control rights, antitrust's decision to immunize that coordination and not (also *otherwise* legal) coordination achieved through contract or horizontal cooperation, is still an independent and additional determination made by antitrust.

Beyond this, antitrust's distinctions between acceptable and unacceptable forms of coordination often defer to significant property claims¹⁶¹ as the putative justification, even while the distinctions are not actually derivable from positive property rights. To take the simplest case, the price coordination that takes place within a firm is typically—if one digs far enough—given its putative justification by the property rights of investors, even though it is not usually derivable from them. Imagine a firm that sells a

¹⁵⁸ *American Needle*, *supra* note 122 (collecting cases).

¹⁵⁹ Officers and managers are not owners of the corporation. Neither are shareholders. Lynn Stout, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012), at pp. 40-41; Ciepley, *supra* note 60, at 146. Rather, the only coherent view is that the corporation is self-owning.

¹⁶⁰ See note 170, *infra*.

¹⁶¹ In fact, as one attorney in the Antitrust Division suggested, deference to property ought to come before efficiency considerations in the antitrust's decision calculus for allocating coordination rights under the single entity doctrine. Williamson, *supra* note 140.

service: playing the organ for special events, for example. Organists who band together to engage in price coordination or market allocation are denied such coordination rights by antitrust, as indeed a recent prosecution by the FTC confirmed.¹⁶² On the other hand, if investors jointly create a corporation that then hires the same organists, their price-setting (or internal market allocation) activity is deemed untouchable by antitrust.¹⁶³ (Notably, this is currently also true even if the firm only *contracts* with the organists—which is baldly unsustainable on any ground, as discussed in the following section.)

The implicit idea is that the shareholders of the business, and the control rights imputed to them by the status of ownership—ownership over *shares of stock*—transfer to the firm itself a right to engage in economic coordination that would be denied to economic actors who relate to each through some channel other than subjection to the control rights of a common “owner.” In other words, antitrust may rely upon existing property rights as a basis to ascribe *new* rights, ones only it can ascribe. This is true with respect to the single entity doctrine, and with respect to the law of vertical restraints. In both cases, there typically *aren’t* property rights to control the thing in question; instead coordination through contract is usually at issue. Yet the single entity doctrine, for example, expressly enshrines a deference to concentrated ownership rights as a basis for allocating coordination rights.¹⁶⁴ Thus, from single corporations to the single entity doctrine to vertical restraints, antitrust relies upon particular sorts of ownership rights—ownership rights over something other than the economic arrangement through which coordination takes place. Those other things may be shares of stock, a different firm, or even more inchoate things like a brand. These ownership rights then furnish the justification for

¹⁶² See *In the Matter of American Guild of Organists*, *supra* note 47

¹⁶³ Slightly more complicated cases seem to evince a preference for the *separation of ownership and work* (which indeed comports with some of the older social-scientific accounts of “productive efficiencies,” for example in the work of Oliver Williamson, upon which Bork relied). For example, a trucking firm, even one with numerous owners, can set rates of trucking services provided by its drivers. But in the absence of separate owners, several truck drivers who own their trucks and band together to set their prices (even if they incorporate) would likely be deemed a cartel. In this case the drivers *are* owners as well; the only distinguishing factor to explain the allocation of coordination rights seems to be the *separation* of ownership from work in the firm case. Even this distinction though has its own tensions. For example, in a classic law partnership or other professional services partnership, work and ownership are typically intermingled in the person of each partner. It is difficult to understand why antitrust permits price coordination in this instance but not in the case of the “cartel” of truck drivers. (I suspect the answer is something as simple as deference to tradition and convention; the relative “invisibility” of the firm exemption means that when those who don’t usually avail themselves of it try to do so, it suddenly becomes visible and contested.)

¹⁶⁴ See Part III.B, *supra*.

coordination rights that only antitrust can confer, and that antitrust denies to other actors.

Finally, the coordination rights allocated to the firm cannot be explained by contract. Contractarian theories of the firm dominate in law and economics circles, under the influence of the same outlook that has reshaped antitrust law.¹⁶⁵ There are significant reasons to contest the contractarian view of the firm, on the basis that it does not actually describe what is distinctive about a firm.¹⁶⁶ But say for a moment that the contractarians are right and that it is accurate or useful to think of a firm as a collection of contracts. If that were true, it certainly would not help in justifying the firm exemption. Simply put, if the firm *is* made out of contracts, many of those very contracts (for example, contracts to set prices) would be *illegal* under antitrust if they took place outside the firm, while they are legal inside firm boundaries. Positing the firm as a collection of contracts does not explain

¹⁶⁵ As Chris Sagers and others have pointed out, the guiding light of law and economics—ideal price theory—itself has little to say about the firm, likely because it considers it passive and largely unimportant, with all significant decisions—notably including pricing decisions—already determined by “market forces” external to the firm. Chris Sagers, 18 VILL. SPORTS & ENT. L.J. 377, 387 (2011). This tendency seems to extend even to nominal descendants of Coase, who still speak in terms of “transaction costs” but often seem to disregard the basic distinction between command and contract that was central to his conception of transaction costs. See, e.g., Steven N.S. Cheung, *The Contractual Nature of the Firm*, 26 J. L. & ECON. 1, 3 (1983) (“We do not exactly know what a firm is—nor is it vital to know. The word ‘firm’ is just a shorthand description of a way to organize activities under contractual arrangements that differ from those of ordinary product markets.”). Chris Sagers, summarized this approach as follows: “its argument is mainly to the effect that there is no real distinction at all between ‘single’ and ‘multiple’ economic actors, or, that if there is some distinction it is neither susceptible to theoretical definition nor is it especially important.” Thus, while Coase (along with heirs like Williamson) seek to straightforwardly justify the legal preference I am describing (even if they do not acknowledge the extent of that preference), the contractarian approach tends to discount its significance. If intra-firm price coordination is economically irrelevant because prices are set by the market, our contractarian interlocutor might say, then a legal preference for intra-firm coordination also has little significance.

But even some economists now challenge the foundational assumption that markets constrain pricing decisions to the degree assumed by the orthodox view. Instead, this alternative approach holds that pricing policies are just that—policies—whether they take place at the firm or the market level, neither chimerical nor inherently pernicious. See Frederic S. Lee, *MICROECONOMICS: A HETERODOX APPROACH* (2018). Many in other fields like sociology, as well as applied researchers who study particular markets, have long thought so. See, e.g., Neil Fligstein, *THE ARCHITECTURE OF MARKETS* (2001).

Moreover, if the legal preference for intra-firm coordination were in fact economically irrelevant because the market sets prices, one must wonder why the right to do so would ever be litigated, and so dearly. Market actors often seem to care a great deal about which side of the firm-cartel line they fall on, and they care about the differential legal treatment they will receive as a result. That itself is a powerful indicator that the pricing decisions made by firms (including firms that possess far less than the level of market power that would raise antitrust concerns) often have economic significance.

¹⁶⁶ See, e.g., Orts, *supra* note 87, at 67.

this fundamental difference in legal treatment among sets of contracts. In fact, it only highlights the lack of principle for the differential treatment.

The trucking firm example again furnishes a useful illustration. A great number of trucking firms are in fact organized on the independent contractor model. Many trucking firms in fact contribute very little functional integration other than bargaining customer contracts. (To the extent they do more, they very likely are misclassifying drivers as contractors rather than employees.) Recall that the firm exemption relies upon an internal organization based on command rather than contract. This “command” is derived from the relationship of agency—in other words, employment. And indeed, under the positive law, the very thing that makes an independent contractor what she is, is that she is not an agent of the firm.¹⁶⁷ But without her agency, what “firm-ness” is left? In recasting almost all its prior employment relationships as (putatively) commercial contracts, such firms do indeed seem to become literal collections of contracts, yet they also retain the privileges of the firm exemption. In this way, they are the real-life operationalization of contractarian theories of the firm. If such a firm *is* simply a collection of contracts, with no further distinctiveness, then there is again no justification to treat the “internal” contracts as privileged for antitrust purposes while those of a “cartel” are not.

Put another way, the contractarian view of the firm is in basic tension with Borkian antitrust’s allocation of coordination rights, whose foundational justification for the firm exemption is based precisely on the idea that the terrain of coordination inside the firm is something *other* than contract. It can’t *both* be that the firm is merely a collection of contracts, and that it results in cost-savings because it is organized according to command rather than contract, in contrast to horizontal coordination beyond firm boundaries.

So contractarian theories of the firm don’t explain or justify the nature of antitrust’s allocation of coordination rights to the business firm *qua* firm. But the contractarian approach does powerfully support a way of seeing the world that has made the public allocation of rights it receives less visible, and has intimated that those rights results from private decisions instead. If the firm is just a collection of contracts between private individuals, what has it received from the public—and what, in turn, could it owe the public? Yet private actors *cannot* contract with each other to allocate coordination rights to themselves; if they could, a cartel would do that. The coordination rights enjoyed by the firm connect it in a fundamental way to the public sphere.¹⁶⁸

¹⁶⁷ See, e.g. *FedEx Home Delivery v. Nat’l Labor Relations Bd.*, 563 F.3d 492 (2009).

¹⁶⁸ David Ciepley makes a very similar claim about business corporations insofar as they receive unique legal privileges for which private actors could not contract, and Saule

Because private actors cannot contract among each other to generate such rights, the rights must be a dispensation from the public.

This, finally, suggests that we should consider economic coordination rights a public resource. Interestingly, the weight of conventional antitrust thinking acknowledges, indeed urges, that coordination rights have a public character when they are exercised *beyond* firm boundaries, and that they must be allocated and regulated accordingly. (Of course, this issue only arises where such coordination is not banned by antitrust altogether.) This view has perhaps been articulated most expressly in the context of the state action doctrine, which permits states to legislate to permit conduct that would otherwise violate antitrust law.¹⁶⁹ I noted earlier that the contraction of the state action doctrine in recent decades is one manifestation of the influence of Chicago School thinking upon antitrust at the broadest level, namely to the extent that it casts a wary eye upon all economic coordination beyond firm boundaries, including public market coordination.¹⁷⁰ In this context, the Federal Trade Commission (as one representative locus of this form of thinking) has traditionally argued for closer oversight by public bodies over any economic coordination authorized by the state action doctrine.¹⁷¹ One rationale that runs through this stance is that the coordination ought to have genuine public benefits, and that its public benefits ought to outweigh any harms.

But this amounts to an argument that, in effect, the coordination rights granted by the state action doctrine are a public resource that ought to be allocated and regulated in the public interest. If that is right, it also suggests that the even more fundamental allocation of coordination rights embodied by the firm exemption also has a public character—and that

Omarova and Robert Hockett make a very similar claim about banks insofar as the franchise contained in a bank charter transfers to it the benefit of a public resource (the “full faith and credit” of the United States). Ciepley, “Beyond Public and Private” *supra* note 60; Saule Omarova and Robert Hockett, *The Finance Franchise*, 102 CORNELL L. REV. 1143 (2017)

¹⁶⁹ *Parker v. Brown*, 317 U.S. 341 (1943).

¹⁷⁰ See note 44, *supra*; Part I, *supra*; *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015) (evinced the courts’ increasingly skeptical attitude toward the traditional state action doctrine, while leaning heavily on the conventional Chicago School notion that economic coordination is harmful per se).

¹⁷¹ See, e.g., *North Carolina State Bd.* See also Pallavi Gunaganti, *An Interview with Maureen Ohlhausen*, 17 GLOBAL COMPETITION REV. 4 (Dec. 2013—Jan. 2014) (“One of the important points about the state action doctrine is that the protection it affords certain activity is meant to assign political responsibility and not obscure it. So the idea is that it has to be the action of the state itself, and I think that’s very important, because if it’s causing consumer harm, people who are being harmed should be able to know that the state has made this as a political decision; not that it’s cast some sort of – I think one of the cases calls it – “gauzy cloak” of state protection over what is essentially private anti-competitive action.”).

coordination within the firm also ought to have genuine public benefits. Moreover, it supports the even more general contention that the allocation of coordination rights is itself a public function, and that we ought to view it as a policy choice made in the public interest. Current antitrust thinking is able to embrace this view regarding economic coordination beyond firm boundaries, because it is able to *see* such coordination in terms of an allocation of rights from the state in the first place. Yet because the grant of economic coordination rights antitrust makes to the firm is so deeply naturalized, and thus nearly invisible, our current paradigm denies *its* public character.

If coordination rights are effectively a public resource, then they should both be allocated and regulated according to the public interest. This does not bar engaging in economic coordination for private ends, including private profit, to be sure. It simply means that, given that the law already allocates coordination rights, it ought to do so with the public interest in mind. While I leave a fuller statement of what this might entail to subsequent work, I next sketch one policy direction that might flow from this recognition.

B. *Policy directions*

The problem with antitrust law today is not necessarily that it insufficiently promotes competition (though that is often the case) but more fundamentally that it embodies a poor allocation of coordination rights, which are a public resource that ought to be allocated and regulated in the public interest. This contention captures the core concerns and insights of the push for antitrust reform *both* in the direction of increased enforcement and in the direction of relaxed enforcement. In other words, many aspects of the current calls for antitrust reform can be understood as, at the most fundamental level, seeking a *different allocation of economic coordination rights*: contracting some grants of these rights and expanding others.

The Borkian world in which we live has chosen large, powerful business firms as its preferred market coordination mechanism. Apart from working to dismantling corporate monopoly directly, allocating coordination rights in ways that would build up other centers of economic decision-making (to paraphrase the single entity case-law) is another way to address asymmetries in economic power. Some of these solutions lie outside of

antitrust: for example, strengthening labor law so that it actually grounds coordination rights in a meaningful way.¹⁷²

Within antitrust, reform requires balancing the permission and regulation of economic coordination both inside and outside the firm. Currently, that allocation of coordination rights is starkly asymmetrical: per se permission in one direction, and per se illegality in the other. Much movement can occur in both directions, even while still preserving some special (antitrust) privileges for the firm. In the direction of relaxing per se illegality, antitrust might grant the right to engage in horizontal economic coordination beyond firm boundaries with the proviso that it serve a public benefit. Conversely, antitrust also ought to condition the permission of economic coordination *within* firm boundaries upon service of a public benefit.

This recognition would also furnish additional grounding for proposals to better address business monopoly—encompassing reforms relating not only to firm size or market share but also to fair business practices.

a. Firms and “cartels”

Antitrust ought to expand rights to engage in horizontal coordination beyond firm boundaries, instead of treating such economic coordination as a scapegoat for corporate monopoly, which is its current role. We ought to find independent criteria for evaluating economic coordination— independent, in other words, of whether that coordination takes place in a firm or outside it. While it is beyond the scope of this paper to set out those affirmative criteria, I have tried to show why they are necessary—because the firm/cartel distinction is insufficient—and to suggest that a debate over those criteria would surface the *actual* normative disagreements that are currently obscured.

Many business arrangements associated with “fissuring”¹⁷³ or with the “gig economy” are instructive here. This is because such arrangements reveal how little substance often lies between the conventional categories of a “firm” and a “cartel.” They also reveal how much our current system tends to rely upon well-trodden pathways of doing and thinking, rather than upon principled distinctions, in order to categorically permit some economic

¹⁷² Labor law as presently constituted fails to ensure meaningful coordination rights to working people. See, e.g., Kate Andrias, *The New Labor Law*, 126(1) YALE L.J. 1 (2016).

¹⁷³ David Weil, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014)

arrangements while categorically prohibiting others. That lesson is not limited, however, to newfangled business models and “tech” firms themselves; it extends to the firm-cartel distinction more generally. By testing or pushing beyond even the conventionally accepted limits of the firm exemption—and by demanding that existing law be selectively applied to favor large, powerful firms while further disempowering workers, individual service-providers, and small enterprise—many of these newer business arrangements in fact lead us to question the underlying polarized regulatory treatment of firms and cartels.

The antitrust treatment of many “gig economy” firms is not only more favorable than the treatment of other actors within their own ecosystems, but also more favorable than the regulatory treatment of other actors generally. To see this, consider the following hypothetical. Let’s say that a new Silicon Valley start-up called “Organists on Demand” (OoD) decides to take advantage of the business opportunity created by the newly-destabilized market for organist services,¹⁷⁴ creating an app to book organists. This firm has raised millions in venture capital and is able to advertise somewhat lower rates than independent organists used to charge, while taking a significant cut of that rate as a service fee. At the same time, OoD is able to stabilize rates in the organist services market so that unrestrained rate competition does not take hold. It also provides some of the operational coordinating functions that the organists’ guild previously performed. Organists make far less overall, turning a middle-wage occupation into a low-wage one, yet the app is still preferable to the no-coordination alternative. Many organists sign up for the app, at least to bide time while regrouping and considering bigger life-changes.

Assume further that OoD uses an independent contractor model to retain organists—or simply claims that it doesn’t sell organist services at all, but that rather both organists and consumers are customers of OoD’s market coordination services. In this scenario, in the unlikely event that OoD were subject to antitrust scrutiny, it would claim various operational efficiencies and consumer benefits as defenses, and if the ride-hailing firms and other platform work arrangements are any indication, this would be sufficient to earn the forbearance of the antitrust authorities.¹⁷⁵ Meanwhile, the organists would be prohibited from re-combining into a guild to bargain over the terms of their individual contracts with OoD, and likely barred from raising

¹⁷⁴ In the Matter of American Guild of Organists (FTC Case No. 151-0159, 2017), put a stop to the guild’s traditional market allocation and price coordination functions. See *supra*, note 47.

¹⁷⁵ See, e.g., Mark Anderson and Max Huffman, *The Sharing Economy Meets The Sherman Act: Is Uber a Firm? a Cartel? or Something in Between?* 2017 COLUM. BUS. L. REV. 859 (2017).

social and economic benefits as defenses.¹⁷⁶ In this situation, the organists are effectively paying OoD for nothing more than its legal license to engage in the very same market coordination that the law denied to them. Much like Uber, OoD effectively serves as a price-coordination laundering device, albeit at a steep cost to actual service-providers. “Platforms” like OoD benefit from the firm exemption while they look less and less like traditional firms in many other respects.

In doing so, they also implicate the more basic question of the differential treatment of firms and “cartels,” in a way that it might not otherwise arise in the broader policy discussion. Antitrust’s differential treatment of firms and cartels is itself predicated ultimately on ownership claims, even though it is not actually derivable from positive property rights. To avoid that issue, let’s take the simplest case, involving direct ownership. In such a case, ownership does ground coordination rights, at least to the extent we take property law as given—but it still doesn’t ground the *differential* treatment of the firm and the cartel. The current antitrust framework views economic coordination as a kind of trespass against the public good, where the public good is defined by the “competitive order” and the associated conception of efficiency.¹⁷⁷ The ownership justification then excuses the trespass in the case of the firm (and in the cases of some other forms of economic coordination that are controlled by a single firm). Meanwhile, other forms of economic coordination, such as cartels, are deemed to lack any excuse for their trespass. As we saw, the excuse for the trespass in the first case is the argument that telling other people what to do—and perhaps the possession of concentrated ownership interests itself—carries public benefits that outweigh the harm of the trespass.

There are two general problems with this. First, even granting this particular conception of trespass, the reasons given to justify this polarized treatment are insufficient. Second, the underlying conception of trespass and of the public good are also insufficient. In other words, even within a framework that recognizes only “the competitive order” as the basis for allocating coordination rights, the polarized regulatory treatment of firms and cartels is unjustified. And “the competitive order” is ultimately an insufficient conception of the public good for the purpose of allocating coordination rights, as the antitrust tradition itself recognizes.

As to the first problem with this foundational allocation of coordination rights, consider that as a *matter of law*, antitrust refuses to consider the possibility of countervailing benefits in the case of horizontal

¹⁷⁶ See, e.g., *Nat’l Soc’y of Prof. Engineers*, 435 U.S. See also notes 39-43, *supra*.

¹⁷⁷ See Part I.A, *supra*.

coordination, rendering it per se illegal. Meanwhile, the presumption that such benefits flow from vertical, hierarchical coordination render much of the latter sort of coordination per se legal.¹⁷⁸ Even if it were true that overall more such benefits flow from hierarchical coordination based in concentrated ownership than from horizontal coordination among relative equals, that still would not justify such polarized regulatory treatment. Ordering two outcomes first-best and second-best does not justify a rule prohibiting—indeed criminalizing—the second-best outcome. In very few other regulatory contexts do we respond to a first- and second-best ordering of policy outcomes in this way.

Beyond this, the extent of “economies of scale” that would justify the presumption of such countervailing benefits in the vertical case and not the horizontal one is an empirically contested proposition—even in the manufacturing context where such a presumption is most readily applicable.¹⁷⁹ Market concentration typically extends far beyond single plants, yet the legal presumption of cost-savings still applies. This is the case even though many of the benefits to be realized from firm integration beyond the plant level could equally be realized by trade associations or other looser forms of horizontal coordination beyond firm boundaries.¹⁸⁰ Moreover, the antitrust presumptions also apply regardless of the sector or the sort of economic activity involved. Importantly, there is especially little basis to give such a presumption credence in today’s services economy. Whatever economies of scale might justify the preferential legal treatment of

¹⁷⁸ It is of course per se legal within the firm; that per se status carries over into the presumptions that pervade merger analysis, insofar as even a horizontal merger transforms market relationships into intra-firm relationships. United States Dept. of Justice & United States Federal Trade Comm’n, *Horizontal Merger Guidelines* (2010).

¹⁷⁹ While it is well beyond the scope of this paper to assess the issue, the literature evidences a far more contested field than the law’s simplistic assumptions would suggest. See, e.g., Frederic M. Scherer, et al. THE ECONOMICS OF MULTI-PLANT OPERATION: AN INTERNATIONAL COMPARISONS STUDY HANDBOOK OF ECONOMIC GEOGRAPHY (1975) (scrutinizing “efficiencies” from multi-plant production; interrogating whether large plants themselves are in fact efficient or simply built by large firms); David B. Audretsch, *Corporate form and spatial form*, in THE OXFORD HANDBOOK OF ECONOMIC GEOGRAPHY 333 (Gordon L. Clark, Maryann P. Feldman & Meric S. Gertler, eds., 2000) (pointing out that many mergers and other corporate consolidation involve *ownership* concentration without accompanying geographic or physical concentration); F.M. Scherer, *The Posnerian Harvest: Separating Wheat from Chaff*, 86 Yale L. J. 974 (1977) (“Moreover, with little or nothing to lose in the way of efficiencies, there is much to be said for emphasizing another goal of antitrust—the desire for maximum decentralization of economic power ... I therefore believe that Congress should conduct a thoroughgoing review of the relevant evidence, sort out its own thinking, and provide a clear indication of what structural antitrust goals it wants implemented under what conditions. The result might be nothing, but it might also be a radical change in policy toward the kind of economic structure we will carry into the 21st century.”).

¹⁸⁰ *Id.*

hierarchical coordination based upon concentrated ownership of capital in the context of plant-based production, they do not obviously apply when the commodities being sold are services performed by individuals and when the “tools of the trade” are also dispersed.

Indeed, the presence or absence of these countervailing benefits is to some extent a product of the very legal permission to coordinate, for which the presence or absence of the benefits is proffered as a reason. In other words, a bargaining agency that receives permission to meaningfully coordinate is more likely to be in a position to eventually manifest the broader social and economic benefits of coordination. A mere “cartel” of truck drivers might eventually be in a position to re-invest in cleaner, greener technology on their own, for example, which would benefit the community in which the drivers work. Currently, antitrust systematically prevents loosely associated independent operators from realizing the very social and economic benefits that are assumed to justify preferential legal treatment of firm-based coordination generally.¹⁸¹

And finally, there is no good reason that the law should not consider a wider range of social and economic benefits that flow from horizontal coordination, up to and including the earning of reasonable rates themselves. The antitrust tradition itself once expressly recognized the importance of avoiding unreasonably low prices from the perspective of individual service-providers and small businesses—indeed, all businesses.¹⁸² Importantly, considering this factor has not disappeared entirely from antitrust analysis, although it should officially be anathema to an analytical framework based on the “competitive order.” These days it is likely to appear in the much less socially useful form of “shareholder value,”¹⁸³ but also occasionally in the form of operational profits.¹⁸⁴ Considering it as an express part of legal decision-making would simply make its application more consistent.

As to the second problem with antitrust’s foundational allocation of coordination rights, it is past time to question the underlying presumption

¹⁸¹ To take one example of benefits that would apply equally to coordination beyond firm boundaries and to coordination beyond the individual plant level but within a firm, branding benefits can be provided by membership in a trade association rather than through ownership or a franchisee relationship with a larger corporation. Scherer, “The Posnerian Harvest,” *supra* note 179.

¹⁸² See, e.g., *Appalachian Coals*, *supra* note 137; *Maple Flooring Manufacturers’ Ass’n. v. United States*, 268 U.S. 563 (1925). See also Gerald Berk, LOUIS C. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900-1932 (2009).

¹⁸³ See, e.g., Huffman and Anderson, *supra* note 186.

¹⁸⁴ See, e.g., Mark Jamison, *Some faulty premises of ‘neutrality’ movement—Part II*, *AEIdeas*, February 8, 2019 (arguing that Google’s profits are prima facie evidence of consumer welfare).

that economic coordination is intrinsically a trespass against the public good. A number of social scientists question both the descriptive and the normative aspects of the “competitive order” as a benchmark.¹⁸⁵ The original legislative vision for the Sherman Act certainly embraced a broader vision of dispersed coordination rights, a case I make elsewhere, and this normative vision had little to do with the “competitive order.”¹⁸⁶ The decisional law itself contains a minor strain that has tolerated and even advocated direct coordination beyond firm boundaries between producers, dealers, and workers, as a mechanism for stabilizing markets and making them sustainable for ordinary participants in economic life. Most fundamentally of all, the logical qualities of the firm exemption itself require us to question the “competitive order,” because they show that such an order will always contain a gaping exception to its own principles, which it must explain by resorting to extrinsic reasons.

The minor strain in Section 1 decisional law comes close to saying just this, for it contains the closely related recognition that antitrust allocates coordination rights to business firms as such—and that these coordination rights are in many cases functionally indistinguishable from those that antitrust denies to activity beyond firm boundaries. In *Appalachian Coals*, the Court said:

The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is not—makes but an artificial distinction. The Anti-Trust Act aims at substance.¹⁸⁷

This is, fundamentally, an acknowledgment that both a firm and a “selling agency” (which would today be dismissed as a cartel) engage in many of the same sorts of activities—and the same sort of coordination of activities—including price-setting. To the extent that such coordination is permitted within the firm and not otherwise, Justice Hughes asked the deep question: why should antitrust law treat the expansion of coordination rights entailed by growth of the firm as strongly preferred, while prohibiting functionally identical expansion of economic coordination *beyond* firm boundaries? Under current law, functionally identical coordination is prohibited per se when outside the firm, while it is permitted per se when inside the firm. (Moreover, the expansion of the scope of that coordination is effectively immunized when accomplished through “natural” growth of the firm, all-but immunized

¹⁸⁵ See Fligstein, Lee, *supra* note 165.

¹⁸⁶ See SOLIDARITY, *supra* note 36, Chapter 1.

¹⁸⁷ 288 U.S. at 377.

when accomplished by vertical merger, and strongly preferred to functionally equivalent coordination when accomplished by horizontal merger.) To take the simplest example, three separate firms cannot coordinate directly as to price, but if they become divisions of a single larger firm, price coordination is permitted. *Appalachian Coals* also cited market stability, the avoidance of destructive competition, and livable wages and working conditions for the workers of the firms that participated in the agency as factors in favor of permitting price coordination through the mechanism of the selling agency.¹⁸⁸

While it is not the approach of today's Court, the legacy of *Appalachian Coals* is still present, and could be more fully (and consistently) revived. Elements have survived in more recent decisions.¹⁸⁹ But the *most* definitive reason that today's Court cannot simply dismiss *Appalachian Coals* as a relic of the past is because it squarely relied on it in order to institute a key, living line of cases. Recall that *Copperweld* relied upon *Appalachian Coals* for the basic proposition that antitrust could permit coordination beyond firm boundaries—although of course it then extended that permission according to criteria that entirely missed Justice Hughes' core insight, and redoubled the preference for coordination based on hierarchy and concentrated ownership. Thus, the single entity doctrine itself is the jurisprudential basis upon which a wayward Court could choose to course-correct, getting back to the “substance” of allocating coordination rights in a way that is sensible and consistent with the purposes of the Act.

Under a revived commitment to the principles of *Appalachian Coals*, horizontal coordination beyond firm boundaries ought to at least sometimes be permitted. As a matter of implementation, this could be achieved in more than one way. One existing proposal would extend the benefits of looser cooperation to firms below a certain asset and revenue threshold, modeled on the Capper-Volstead Act.¹⁹⁰ Alternatively, courts could expand the set of “pro-competitive” justifications that may already be considered in case of trade associations, so that they expressly include preventing destructive competition and stabilizing a market, in addition to consumer, producer, and social benefits, following in the spirit of *Appalachian Coals*. The most radical proposal, which has the benefit of logic on its side, would be to reconcile the treatment of cartels and firms under antitrust law. The law would then condemn no cartel where—if size, market share and other functional

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., *City of Mt. Pleasant*, *supra* note 147; *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). *Cf.* *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972) (holding that market allocation agreement for private-label products among small retailers was per se illegal, even though it conferred intra-brand benefits by promoting competition outside the brand, in particular enabling competition with larger retailers).

¹⁹⁰ See Vaheesan and Schneider, *supra* note 143.

attributes are similar—it would not be willing to break up a corporation (or deny permission for a merger). This rule would remove the legal preference for firm-based coordination at its root.

Permitting horizontal coordination beyond firm boundaries, with an appropriate oversight mechanism, is in fact the best way to preserve “independent centers of decision-making” (one of the normative benchmarks held out in the post-*Copperweld* line of cases) in the marketplace. The harsh treatment of horizontal coordination beyond firm boundaries implies that often, the only way that small producers or service-providers have available to avoid the destructive competition acknowledged in *Appalachian Coals* is to subject themselves to the hierarchical control of a larger, more powerful intermediary entity. This might be in the form of an employment relationship, a contractor relationship, or in case of small enterprises, through acquisition by a larger entity or subjection to vertical restraints. Indeed, the ability of more powerful firms to control small and individual operators is partly predicated upon their legal privilege to coordinate beyond their own firm boundaries in order to control smaller actors, but it is also predicated upon the per se illegality of the smaller operators’ coordination with one another—which both weakens the smaller parties’ relative position *and* gives them an incentive to submit to a more thoroughly hierarchical relationship.

b. Monopoly as expansion of the firm exemption

The Borkian revolution entailed an expansion of the already-generous coordination rights allocated to the business firm, with the removal of most checks and qualifications upon those rights. Calls for reform are often framed in terms of the idea that too much power (economic and political) is currently concentrated in large, powerful business firms. This has resulted because, at the most basic level, the coordination rights granted to business firms have been too expansive. Specific reforms that would contain or check that power then are adjustments to that currently distorted allocation of coordination rights. In particular, many specific reform proposals aim at reviving antitrust enforcement as to *intra-firm* conduct, i.e., those actions taken *within* the boundaries of large, powerful firms, or as to action taken to enlarge those boundaries.¹⁹¹ These are readily understood as proposals to

¹⁹¹ Regarding mergers, see Sandeep Vaheesan, *Accommodating Capital*, *supra* note 5; Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L.J. 701, 707–08, 721 (2010); John Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015). Regarding unilateral firm conduct, see Vaheesan, *id.*, at 33–35 (in particular, regarding predatory pricing and refusals to deal); Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 756–62 (2017) (regarding predatory pricing).

amend the broad, unqualified set of coordination rights that the current antitrust paradigm allocates to the firm *qua* firm: they are, in effect, calls for limits and adjustments to the broad and relatively unqualified firm exemption.

While reformers sometimes frame their claims in terms of seeking “more competition” in the economy, even this claim can be understood in terms of broadening the allocation of coordination rights. “More competition” in this context usually really refers to the existence of more enterprises, and therefore the existence of actual business rivalry, together with market regulation that conduces to the flourishing of small enterprise.¹⁹² Both of these desiderata can be understood in terms of widening *participation* in economic coordination, effectively broadening the distribution of coordination rights to a larger set of people.

Another body of proposals consists in policy applications of recent empirical work that points to pervasive buyer power in and near labor markets.¹⁹³ Drawing upon the true proposition that legislators were as concerned about buyer power as they were about seller power, and as concerned about the welfare of workers and producers as that of consumers,¹⁹⁴ such proposals suggest that antitrust ought to systematically account for effects on workers in areas ranging from merger review to Section 1 enforcement.¹⁹⁵ One way to understand this strain of thought is that buyer power is one species of the preferred market coordination mechanism of our Borkian world—namely, large, powerful firms that unilaterally coordinate markets, and often even coordinate markets some steps removed from those they directly occupy. The remedy is not simply to

¹⁹² Moreover, liberalizing coordination rights beyond firm boundaries would precisely contribute to the flourishing and maintenance of small enterprise.

¹⁹³ See, e.g., Arindrajit Dube, Alan Manning, and Suresh Naidu, *Monopsony and Employer Mis-optimization Account for Round Number Bunching in the Wage Distribution* (documenting the pricing evidence of employer power without identifying one specific basis of that power) (2018); José Azar, Ioana Elena Marinescu, Marshall Steinbaum, *Labor Market Concentration*, (2018) (focusing on concentration). Other compelling recent empirical work points to the negative effects of *indirect* buyer power upon workers. Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers’ Wages, 1978 to 2014*, AMER. SOC. REV. (2018). Indeed, direct employers themselves often *lack* power precisely in the markets in which workers are most adversely affected by the pervasive buyer power of large firms. See IV.B.a.1, *supra* (franchising); see also Paul, *Enduring Ambiguities*, *supra* note 5.

¹⁹⁴ See, e.g., 21 CONG. REC. 2461 (1890) (Senator Sherman referred specifically to the power to depress prices, as well as to raise them, as a harm targeted by the statute, noting that powerful business combinations “decrease the cost of the raw materials, the farm products of the country” and “regulate prices at their will, depress the price of what they buy and increase the price of what they sell”).

¹⁹⁵ See, e.g., Suresh Naidu, Eric Posner, and Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018).

set about eradicating this coordination on the ground that coordination as such is bad, but rather to replace this form of economic coordination with policies that allocate coordination rights in a fairer and more sustainable manner.

Indeed, thinking about firms' power in terms of coordination rights strengthens existing critiques of corporate monopoly because it shifts the starting-point of the critique. Coordination within business firms already enjoys generous and differential treatment by antitrust law. This is true before a firm commits an unfair business practices, before it possesses monopoly power (in any sense), and certainly before it abuses its monopoly power through particular acts. Thus, this generous allocation of coordination rights already implies a kind of social contract requiring public benefit. The public necessarily authorizes the intra-firm coordination rights upon which the pursuit of private profit through the mechanism of the business firm relies. Recognizing this strengthens the case for regulation of business firms in the public interest, through the mechanism of antitrust law and beyond.

CONCLUSION

This paper has identified the allocation of coordination rights as a primary function of antitrust law. The law's current allocation of rights, in which the business firm is the central locus of economic coordination, also tends to prefer coordination through hierarchical organization and on the basis of concentrated ownership claims. This preference receives no logical support from the official decision calculus with which the current paradigm is associated: promoting the competitive order.

Indeed, antitrust's current allocation of coordination rights has relied upon a basic equivocation between two inconsistent claims about the firm. On the one hand, there is the lionization of the firm to justify its special treatment, which requires that firms are special, different and superior in their contributions to society, relative to other economic arrangements. On the other hand, antitrust's firm exemption also requires reducing and deflating the significance of the preferential antitrust treatment the firm receives by characterizing it as a mere collection of contracts constrained by the market. These claims are inconsistent. The Borkian turn in fact prescribes that economic coordination should be organized by command rather than by cooperation, whether that command is enacted through traditional employment relationships or through contracts that embody and magnify pre-existing polarities of power.

When seen clearly, the firm exemption and the coordination preferences upon which it relies expose the normative incompleteness of antitrust's official decision calculus. Because coordination rights are a public resource, this incompleteness can be remedied with the recognition that coordination rights ought to be allocated and regulated for the public good. Among other things, a reformed antitrust law would make space for voluntary economic coordination between relative equals. To the extent that existing antitrust exemptions have embraced some such coordination rights, they have been construed as exceptions to otherwise applicable antitrust principles. For example, even when it was functional, the labor exemption was construed mainly as an exception to the core antitrust principle of promoting competition. As I argue in both past and forthcoming work,¹⁹⁶ this indeed has contributed to the gradual chipping away of that exemption's already-insufficient allocation of coordination rights to working people.

Robert Bork wrote, perceptively and perhaps presciently: "Antitrust is a subcategory of ideology, and by the time a once militant ideology triumphs and achieves embodiment in institutional forms, its adherents are likely long since to have left off debating first principles."¹⁹⁷ The first principles we must reconsider and revise today involve antitrust's underlying allocation of economic coordination rights, which lies at the root of a number of current policy debates. This paper has aimed to extract the shape of that root from the institutional forms in which it has been embedded so that we may examine it, and perhaps plant something new.

¹⁹⁶ Paul, *Enduring Ambiguities*, *supra* note 5; Paul, SOLIDARITY, *supra* note 36.

¹⁹⁷ Bork, *supra* note 34, at 3.