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Antitrust as Allocator of Coordination Rights

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ABSTRACT

The reigning antitrust paradigm has turned the notion of 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 idea of competition and its companion, allocative efficiency, have been deployed to attack disfavored forms of economic coordination, both within antitrust and beyond. 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 Article 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, contracts, or 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. Intrafirm 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 inconsistent with the conventional justifications for it. This Article also briefly sketches policy choices 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.

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INTRODUCTION

The central function of antitrust law is to allocate economic coordination rights. This means that private decisions to engage in economic coordination are always subject to public approval, which antitrust law grants either expressly or tacitly. Currently, its methods for accomplishing this function have the effect of anointing control and concentrated power as the preferred form of economic coordination, and to frown upon forms of economic coordination in which power and decisionmaking are more broadly dispersed. Antitrust law's current methods for allocating coordination rights include what I call its firm exemption, as well as its preference for vertical over horizontal coordination beyond firm boundaries. Antitrust's methods of allocating coordination rights are ultimately indigenous and cannot be explained away by external referents: neither by other areas of law, nor by putatively neutral conclusions of social science. They are also historically contingent and have shifted over time.

Practically speaking, the reigning antitrust paradigm authorizes large, powerful firms as the primary mechanisms of economic and market coordination, while largely undermining others: from workers' organizations to small business cooperation to democratic regulation of markets. While deploying the legal concept of competition to undermine disfavored forms of economic coordination, antitrust law also quietly underwrites certain major exceptions to principles of competition, notably, the business firm itself. In surfacing the firm exemption, this Article also isolates the underlying, largely unexamined decision criteria for allocating coordination rights that it employs.

The current paradigm for thinking and decisionmaking within antitrust law has a professed commitment to implementing the insights of neoclassical economic theory in legal decisionmaking.[1] According to that framework, the aggregate of individual market transactions, rather than direct coordination, will result in an optimal allocation of society's resources. But this process of market allocation, which the law is supposed to facilitate but not displace, itself has no existence independent of prior *legal* allocations of economic coordination rights. Those coordination rights are shaped by numerous areas of law—from property to corporate to labor to antitrust, among others. This Article focuses on antitrust law, where this function is rarely acknowledged. Although the law and economics paradigm has enormous institutional sticking power in current antitrust law, the basic purposes and methods of antitrust law are also up for debate today in a way

1. *See infra* Part IV.

that they have not been in decades. Recent contributions to the antitrust revival have emphasized the law's traditional concerns with corporate power and fairness, which were largely written out of antitrust law in the Chicago School revolution.[2] Dissenting voices asserted these as legitimate antitrust concerns even prior to the current challenge.[3] Mirroring the reformist call to put some limits upon the broad coordination rights of the powerful, a growing chorus of scholarship has emphasized the need to expand the coordination rights of small players to some extent or another, beginning with the question of workers and microenterprises caught between labor and antitrust regulation.[4]

However, proposals to reform antitrust, or to reconceptualize it, have thus far generally stopped short of questioning the basic premise that its primary function is to promote competition. At least officially, if increasingly uneasily, competition is still king. To be sure, many posit that antitrust performs this stated function badly, or does not perform it at all in certain markets.[5] Even when reintroducing values such as fairness and deconcentrating power, for the most part the reform camp has characterized those values as flowing from—or at least coextensive with—promoting or protecting competition. Thus, the political debate over antitrust has been characterized by all sides claiming the idea of competition and defining what it means to promote competition in different ways.

In the current moment of paradigm instability,[6] this Article aims to serve a clarifying role. Defenders of Chicago School antitrust tend to view reformers' concerns—for example, fairness or deconcentrating corporate power—as extraneous to the fundamental function of antitrust law. That view, however, relies upon the idea that the function of antitrust law is to promote competition and that the law does so by following the independent guidance of economics. But

2. *See, e.g.*, Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 238 (2017).
3. *See, e.g.*, Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917 (1987); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).
4. *See* Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543 (2018); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016) [hereinafter Paul, *Enduring Ambiguities*]; Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233 (2017) [hereinafter Paul, *Uber as For-Profit*]; Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766 (2019).
5. *See, e.g.*, Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018).
6. *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (Otto Neurath et. al. eds., 2d ed. 1970).

neither of these things is true. Antitrust law decides where competition will be required and where coordination will be permitted. And in accomplishing that task, its most fundamental judgments are not ultimately derived from a neutral external referent, such as economic theory. Meanwhile, 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, again, 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 a conscious reallocation would not constitute a special exemption from a general principle. Instead, it would simply be a *different* allocation of coordination rights, requiring justification no more and no less than the current one. By reframing antitrust law as this Article does, we can clarify what we are actually debating: what criteria should antitrust law use to allocate economic coordination rights? What forms of economic coordination should it permit or even promote, and what forms of economic coordination should it discourage or even prohibit?

Part I of the Article sets out the doctrinal and logical argument that a core function of antitrust law is to allocate economic coordination rights, that its disfavor of horizontal coordination beyond firm boundaries is an example of this function, and that this function cannot be reduced to the operation of other areas of law. Part II then shows how antitrust's firm exemption, as embodied in Supreme Court case law, involves the concentration of economic coordination rights—a preference that is mirrored in other aspects of antitrust doctrine as well. Part III briefly describes how these criteria for allocating coordination rights—preferring control over cooperation, and naturalizing the coordination embodied in hierarchically organized business firms—resulted from a historically contingent process within the development of antitrust law itself. Part IV addresses the contention that this allocation of coordination rights can be rationalized and justified by reference to economic theory, focusing on a now-foundational argument articulated by Robert Bork.

I. ANTITRUST LAW'S OVERALL ALLOCATION OF ECONOMIC COORDINATION RIGHTS

Antitrust law's core function is to allocate coordination rights to some economic actors and deny them to others. This makes private decisions to engage in economic coordination subject to public approval, which antitrust law grants either expressly or tacitly. Importantly, this reframing is an analytic claim that redescribes existing reality; it is not a normative claim about what antitrust law ought to do. That said, reframing antitrust law this way renders visible economic coordination that has been naturalized and invites us to consider new forms of economic coordination that have been presumed illegitimate. Ultimately, transparency about antitrust law's core function should lead to transparency in performing it—that is, in articulating and defending the criteria by which coordination rights are allocated. Currently, those criteria are often obscure and implicit; where they are acknowledged at all, they are often presumed, incorrectly, to be derived from the independent conclusions of social science.

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 asks—either explicitly or implicitly—whether that coordination is justified, and then answers that question one way or the other. Moreover, the answers that antitrust gives to these questions are not derivable from property, contract, or corporate law—though its answers interact with each of these.

Currently, antitrust law tends to allocate coordination rights, across doctrinal areas, according to criteria that systematically prefer concentrated control over dispersed coordination or cooperation. If we envision antitrust's approach to allocating economic coordination rights as a three-legged stool, its conception of the firm is one leg. The other two are its treatment of horizontal coordination beyond firm boundaries and its treatment of vertical coordination beyond firm boundaries. In deciding how to evaluate interfirm coordination, antitrust law first decides whether that coordination is horizontal (between competitor firms in the same market) or vertical (between firms in adjacent markets, such as supplier or distributor relationships). Antitrust law's stark preference for coordination accomplished through vertical contracting over horizontal interfirm coordination mirrors the criteria according to which the firm exemption itself is applied. Both preferences embody the preference for control over cooperation, which is to say, for the concentration of economic coordination in fewer rather in many hands. This Article focuses primarily on the firm exemption because it is the most obscure of the three legs, and because both vertical interfirm coordination and horizontal coordination beyond firm boundaries are dealt with in greater detail in other work.[7] For context, I briefly summarize the doctrinal content of the other two legs of the stool, and their relationship to the firm exemption. I also briefly describe the

7. *See* Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 LAW & CONTEMP. PROBS. 65 (2019); Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBS. 45 (2019); Brian Callaci, *Control Without Responsibility: The Legal Creation of Franchising, 1960–1980*, ENTERPRISE & SOC'Y (forthcoming 2020).

role of the Chicago School revolution in establishing this overall allocation of coordination rights, although this Article does not provide an exhaustive account of historical origins or etiology of current doctrine.[8]

A. Horizontal and Vertical Interfirm Coordination

Horizontal coordination beyond firm boundaries—including between individuals—has become increasingly disfavored in antitrust law over time, while vertical interfirm coordination has come increasingly into favor. Together, these tendencies represent the same preference for control over dispersed coordination that is embodied in the firm exemption itself. Moreover, the disfavor of horizontal interfirm coordination adds to the significance of the firm exemption by allocating certain coordination rights *uniquely* to firms.

I do not claim that a single school or influence within antitrust law is, by itself, responsible for this overall allocation of coordination rights: the legs of the stool have been built with a variety of materials over an extended time. Yet the Chicago School revolution in antitrust analysis has played an important role in creating or intensifying several aspects of antitrust's current approach to allocating coordination rights, and some background on its influence is therefore warranted.

The Chicago School influence helped to construct antitrust's attitude to both horizontal and vertical interfirm coordination in a few ways. First, it intentionally cleared away specific normative benchmarks in older antitrust analysis—notably, conceptions of fair business conduct, the flourishing of small enterprise, and attention to the influence of disparities in economic power upon the polity—that would have provided counterweights to other legal criteria. Second, the Chicago School elevated and intensified the focus upon the ideal competitive order as the unitary normative framework for antitrust analysis; that framework implies that horizontal interfirm coordination has inherently distorting effects. Third, the Chicago School specifically argued for relaxing antitrust scrutiny of vertical interfirm coordination.

1. 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

8. More detail on the development of some of these doctrines is set out in forthcoming work. *See* SANJUKTA PAUL, SOLIDARITY IN THE SHADOW OF ANTITRUST (under contract with Cambridge University Press).

consolidations of economic power in both inter- and intrafirm arrangements.[9] As the pre–New Deal judiciary increasingly used the Sherman Act instead to aid firms in consolidating their power over workers,[10] while doing little to check corporate consolidation itself,[11] Congress ultimately responded, in part, by again reaffirming its express commitment to fairness as a goal of antitrust policy in passing the Federal Trade Commission Act.[12] As modern antitrust enforcement then took off in the latter part of the New Deal era, this antitrust commitment to fairness went hand in hand with the well-documented purpose of dispersing economic power, including the flourishing of small enterprise.[13] Antitrust analysis in the New Deal and midcentury period considered ideas of fairness overtly.[14]

Indeed, in their foundational 1956 article, key Chicago School thinkers Aaron Director and Edward Levi described antitrust, as they found it, as having to do as much with the "laws of fair conduct" as with the narrower economic theory

9. *See infra* Part II; *see also, e.g.*, 21 CONG. REC. 3152 (1890) (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").

10. *See* Paul, *Enduring Ambiguities*, *supra* note 4, at 990–1020. Landmark cases in this jurisprudence included *Loewe v. Lawlor*, 208 U.S. 274 (1908), and *United States v. Workingmen's Amalgamated Council of New Orleans*, 54 F.994 (1893) (E.D. La. 1893).

11. *See generally* NAOMI LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904 (1985) (describing how Lochner era antitrust law contributed to corporate consolidation through its permissiveness toward it, particularly relative to its attitude to interfirm coordination).

12. *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, 234–35 (1980) (describing the legislative history of the FTC Act, highlighting legislators' central concern with the concepts of fair and unfair competition).

13. *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," *id.* at 316. 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. Am. Can Co., 230 F. 859 (D. Md. 1916). The court in *Am. Can Co.* noted:

> [O]ne 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.

Id. at 901.

14. *See, e.g.*, Jesse W. Markham, Jr., *Lessons for Competition Law From the Economic Crisis: The Prospect for Antitrust Responses to the "Too-Big-to-Fail" Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261, 278 (2011); Pitofsky, *supra* note 3.

they thought ought to displace them: "[T]here 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."[15] The acknowledgment is notable because their goal was to establish precedent for their reform project in existing law, while conceding "the [existing] law's skepticism for economists and economics."[16]

To discredit substantive 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 a dynamic social and economic process of business rivalry[17] to the ideal state contemplated by neoclassical economic theory. The Chicago School Antitrust Project, as it was known, built upon an earlier, conscious decision by its founding members to substitute this idealized competitive order for the classical laissez-faire framework, associated with the *Lochner* era federal judiciary, in order to advance the same, fundamentally hierarchical political and economic order.[18] It then applied that conceptual framework to antitrust law. Thereafter, as one commentator put it, "[l]awyers for corporate interests and industrial organization economists of the Chicago School mounted an organized effort that

15. Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 282 (1956).
16. *Id.*
17. Competition as a process in the real world is 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 in Antitrust Law*, 75 NEB. L. REV. 209, 211–22 (1996) (arguing that the ordinary language sense of "competition," supported by pre-Chicago judicial precedent and legislative history, denotes moment to moment business rivalry and not economic efficiency). Current antitrust discourse often seems to move between the two, with the more familiar, real-world sense used to motivate support for the procompetition norm, and the second, less accessible sense used to operationalize that norm. *See also* Lina M. 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).
18. *See* Rob Van Horn, *Reinventing Monopoly and the Role of Corporations: The Roots of Chicago Law and Economics*, *in* THE ROAD FROM MONT PELERIN 204, 217 (Philip Mirowski & Dieter Plehwe eds., 2009). 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 Director was one of the three key members of the "Free Market Study" that directly preceded the Antitrust Project at Chicago, *id.* at 205. In another chapter in the same volume, Van Horn and Mirowski 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 an analytical framework. *See* Rob Van Horn & Philip Mirowski, *The Rise of the Chicago School of Economics and the Birth of Neoliberalism*, in THE ROAD FROM MONT PELERIN, *supra*, at 139.

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.'"[19] Fairness has no role in this conceptual framework.

As a logical matter, these earlier normative benchmarks—fairness, dispersal of power, flourishing of small enterprise—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 enterprise.[20] 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 undermined any existing tendencies to allocate coordinate rights in a way that balances power.

2. The Norm Against Horizontal Interfirm Coordination

Both the shift in the concept of competition itself, and the clearing of normative benchmarks other than the ideal competitive order, strengthened the antitrust norm against horizontal coordination beyond firm boundaries. Although the conception of competition as a dynamic, instantiated 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 conception of competition as an ideal state and by working to clear other normative benchmarks for antitrust analysis, Chicago School antitrust thus strengthened the norm against horizontal coordination beyond firm boundaries. Besides the transformation that took place inside the 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 phase of the New Deal as uniform national policy.[21] These elements too were similarly attacked and undermined by other arms of Chicago School policy thinking.

19. Markham, *supra* note 14, at 278; *see also* Van Horn, *supra* note 18.
20. This connection is also supported by the apparent legislative intent to authorize coordination among workers, farmers, and small enterprise. *See infra* Part II.
21. 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)).

As Laura Phillips Sawyer has argued, New Deal era public market coordination, with its roots in trade associations of small enterprises, had an enduring legacy within the modern administrative state.[22] And of course, New Deal labor regulation enacted a system of collective bargaining that functioned as a market coordination mechanism not only in labor markets but often also more broadly.[23] And the other key policy projects of the Chicago School movement, besides antitrust, specifically focused on attacking labor union power and, eventually, public coordination of markets.[24] The competitive order supplied the normative keystone here: both worker collective bargaining and public coordination of markets distort the ideal market outcomes, on this view, which in turn results in the misallocation of resources, harming overall welfare. Indeed, the intellectual arm of the midcentury attack on labor unions was formulated around the notion of labor monopoly as a distortion of ideal prices—wages—beginning with a few early formulations in the 1940s and growing into a developed "literature . . . that analyzed [unions] in terms of monopoly power . . . . [and] appeared as the counterpart in economics of the concurrent political assault on American unions and those in business or in government that supported them."[25]

22. LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE "NEW COMPETITION," 1890–1940, at 23 (2018) (noting that even after New Deal experiments in a broadly coordinated market economy had ended, "the modern administrative state had achieved a level of autonomy that subsumed issues of managing competitive markets into various administrative processes").
23. 29 U.S.C. §§ 151–166 (2018). 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. *See, e.g.*, MICHAEL BELZER, SWEATSHOPS ON WHEELS: WINNERS AND LOSERS IN TRUCKING DEREGULATION (2000) (describing tripartite market coordination in the trucking sector, and its dismantling in the late 1970s and1980s). More informally, such coordination took place in other industries as well. *See e.g.*, THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK (2004) (offering an informal account of such union-led market coordination in coal mining).
24. *See, e.g.*, Yves Steiner, *The Neoliberals Confront the Trade Unions*, in THE ROAD FROM MONT PELERIN, *supra* note 18, at 181; Van Horn, *supra* note 18, at 212 (explaining that antitrust law and labor unions were the first and main policy aims of the early neoliberal intellectual movement that birthed the Chicago School).
25. Steiner, *supra* note 24, at 191. Some examples cited by Steiner include: EDWARD H. CHAMBERLAIN ET AL., THE PUBLIC STAKE IN UNION POWER (Philip D. Bradley ed., 1959); THE IMPACT OF THE UNION: EIGHT ECONOMIC THEORISTS EVALUATE THE LABOR UNION MOVEMENT (David McCord Wright & John Maurice Clark eds., 1951); Vernon O. Watts, *Union Monopoly, Its Cause and Cure*, STUD. FOUND. SOC. RES., Spring 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," Steiner, *supra* note 24, at 191 (quoting Watts, *supra*)); and Fritz Machlup, Address to the American Chamber of Commerce Economic

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 all the more potent as a result of their eventual success—given that both public and labor union coordination had once helped to balance the influence of large, powerful firms.

Midcentury antitrust, on the other hand, seemed to contain some 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. 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: "[D]espite 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."[26]

The Chicago School did not invent antitrust law's relative disfavor of horizontal interfirm coordination,[27] and indeed, some thinkers associated with the group even questioned it, together with their criticisms of other aspects of antitrust enforcement. 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."[28] But the Chicago School also asserted the ideal competitive order as the sole normative benchmark for antitrust analysis, thus purging other values from antitrust decisionmaking; those values might all have counseled toleration of some coordination among smaller players, despite decreasing competition. Moreover, even if some Chicago School thinkers had questioned enforcement against horizontal coordination, this certainly was not a primary priority; the relaxation of enforcement when it came to corporate mergers, monopolization, and vertical restraints, was the priority. And if one of the underlying political priorities of the Chicago School was to secure the power of concentrated capital,[29] then price-fixing was the most obvious concession.

Institute: Monopolistic Wage Determination as a Part of the General Problem of Monopoly (January 1947).

26. Director & Levi, *supra* note 15, at 295.
27. That relative disfavor came much earlier, during the judge-made antitrust law that emerged during the *Lochner* era. *See, e.g.*, LAMOREAUX, *supra* note 11; SAWYER, *supra* note 22.
28. Director & Levi, *supra* note 15, at 295.
29. I imply nothing about the individual thoughts or motivations of any individual members of the group, as this is not required to understand the logic of the paradigm as a whole. Moreover,

To be sure, horizontal interfirm coordination is a tool that is also used by powerful firms, and not only by smaller players. While it is more likely to occur in oligopolistic markets containing powerful firms than in decentralized ones containing smaller players, horizontal coordination is also the *only* coordination tool available to smaller, independent players in the market—at least if they want to maintain their status as independent, smaller players—while investment banks and venture capitalists can, through the firms they control, pursue horizontal consolidation and vertical control of smaller players in their orbits as alternate strategies for securing a foothold or for stabilizing their markets. For example, Uber and Lyft enjoy a virtual duopoly in horizontal terms, while also relying upon antitrust's tolerance of their vertical control over drivers to maintain their positions.[30] Meanwhile, drivers are barred under antitrust law's ban on horizontal interfirm coordination from cooperating among each other to improve their positions or even building competing platforms.[31] Price-fixing may not be exclusively the weapon of the weak, but it is among the only weapons that the weak have.

In any event, 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 invocation of cartels as the foil for efficient corporate mergers and vertical restraints.[32] Indeed, George Priest has argued that Bork's success in influencing antitrust law, relative to other Chicago School thinkers, had precisely to do with his willingness to emphasize the merits of prosecuting horizontal price-fixing in order to achieve other goals, namely the relaxation of enforcement as to vertical restraints and corporate mergers.[33] Judge-made law followed suit, gradually hardening the norm

as recounted *supra*, the origins and establishment of the Chicago Antitrust Project had express political goals tied to powerful business interests. *See* Van Horn & Mirowski, *supra* note 18.

30. *See, e.g.*, Paul, *supra* note 7, at 69, 72–76 (discussing mid-century precedents on vertical restraints, Chicago School-influenced changes in the case-law, and application to ride-hailing platforms); Steinbaum, *supra* note 7, at 53–56 (describing various instances of platforms' control over drivers in terms of current antitrust's tolerance for vertical restraints, from prices to non-linear pay structures to limits on multi-homing).
31. *See* Sanjukta Paul & Nathan Tankus, *The Firm Exemption and the Hierarchy of Finance in the Gig Economy*, 16 U. ST. THOMAS L.J. 45 (2019).
32. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1st ed. 1978), 108. *See infra* Part IV.A for a discussion of this argument.
33. *See* George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & ECON. S1, S10–S13 (2014) (arguing that Bork was distinctive in leveraging the prohibition of price-fixing in order to undermine other antitrust regulation, particularly the regulation of vertical restraints, and that this strategy was central to his influence upon the law and legal institutions).

against interfirm coordination itself,[34] and increasingly invoking cartel conduct as a contrast case to other, permitted conduct, often involving a dominant party.[35] The rule flowered fully in *FTC v. Superior Court Trial Lawyers Association*, the U.S. 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.[36] In that opinion, Justice Stevens embraced Chicago School analysis—citing Bork, among others—to condemn horizontal coordination among small players as a distortion of ideal market outcomes.[37] Commitment to this rule is nearly universal.[38] The logic of perfect competition has thus been selectively deployed to justify an absolute norm against interfirm coordination while grounding a more permissive attitude to corporate consolidation and vertical restraints.[39] Indeed, the fact that the rule against horizontal coordination was one of the very few meaningful remaining tools of antitrust enforcement likely further caused it to be strengthened—simply as a result of institutional inertia and quite apart from any conscious policy or political project.

These developments are reflected in antitrust enforcement agencies' regulatory stances today. For instance, the Justice Department and the FTC filed an amicus brief in a recent case challenging a local ordinance that would have permitted joint bargaining and other horizontal coordination among drivers in the ride-hailing sector, arguing that the ordinance should be preempted by federal antitrust law.[40] Yet the agencies have never investigated the ride-hailing platforms' own price-fixing of rides across hundreds of thousands of putatively independent businesses.[41] Moreover, numerous individual service providers and small

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34. *See* Fed. Trade Comm'n v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990); Nat'l Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978); Goldfarb v. Va. State Bar, 421 U.S. 773 (1975).
35. *See, e.g.*, Verizon Commc'ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004) (calling horizontal interfirm coordination the "supreme evil of antitrust," *id.* at 408, while refusing to apply the monopolization doctrine to a dominant player).
36. *Trial Lawyers*, 493 U.S. 411.
37. *See generally id.*; *see also* Paul, *supra* note 7, at 79–84 (discussing Justice Stevens's opinion in *Trial Lawyers* and how it drew upon Chicago School analysis).
38. Interestingly, a few marginal 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.*, Fred L. Smith, Jr., *Why Not Abolish Antitrust?*, AM. ENTERPRISE INST. J. ON GOV'T & SOC'Y, Jan.-Feb. 1983, at 23 (suggesting, among other things, that price-fixing ought to be legalized).
39. Ramsi Woodcock, *Inconsistency in Antitrust*, 68 U. MIAMI L. REV. 105, 109–15 (2013) (discussing the selective deployment of neoclassical microeconomic logic as between the regulatory treatment of cartels and monopoly).
40. Brief for the United States & the Federal Trade Commission as Amici Curiae in Support of Appellant & in Favor of Reversal, Chamber of Commerce v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640).
41. Uber and Lyft set the prices of a commodity—ride services—that they claim they do not sell, and that they claim is sold by independent businesses (drivers), a practice that should raise

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 teachers, ice skating instructors, and church organists, among others.[42] These groups comprise a not-insignificant proportion of the FTC's overall enforcement activities in recent years, a fact that at least some of its decisionmakers seem to self-consciously embrace.[43] At the same time, that this embrace needs to be articulated bears out the 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.

Some voices within the FTC have suggested that the prosecution of trade associations for price coordination and other limits upon competition flows from "old-time antitrust principles."[44] But the notion that horizontal economic coordination beyond firm boundaries was always viewed the way it now is by antitrust enforcers and courts is not accurate, as we have already seen. The FTC 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.[45] Yet the report, insofar as it discusses trade associations, shows 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

serious concerns under Section 1 of the Sherman Act. *See* Paul, *supra* note 7, at 72; *see also* Paul, *Uber as For-Profit*, *supra* note 4.

42. *See, e.g.*, *In re* Am. Guild of Organists, No. C-4617, 2017 F.T.C. LEXIS 76 (May 26, 2017); *see also In re* Music Teachers Nat'l Ass'n, No. C-4448, 2014 WL 1396512 (F.T.C. Apr. 3, 2014); Decision & Order, *In re* Prof'l Skaters Ass'n, No. C-4509 (F.T.C. Feb. 13, 2015).

43. *See, e.g.*, Geoffrey Green, *Unflattering Resemblance*, FTC COMPETITION MATTERS BLOG (Jan. 13, 2015, 1:18 PM), https://www.ftc.gov/news-events/blogs/competition-matters/2015/01/unflattering-resemblance [https://perma.cc/NY6E-ZTV7].

44. Geoffrey Green, *Antitrust by Association(s)*, FTC COMPETITION MATTERS BLOG (May 1, 2014, 8:34 AM), https://www.ftc.gov/news-events/blogs/competition-matters/2014/05/antitrust-associations [https://perma.cc/LES2-XJP3].

45. *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. Ass'n of Flag Mfrs., 1 F.T.C. 55, 58 (1918) (emphasis added). This is telling word choice, suggesting that the FTC would not have deemed price coordination resulting in reasonable prices to be unfair competition.

to price coordination through trade associations.[46] On 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*"[47] in prices, and in the case of sisal, with "difficulties . . . in obtaining this commodity."[48] This is consonant with the claim that antitrust was historically concerned with price coordination insofar as it posed a specific public policy harm, and not full stop, and moreover that prices higher relative to the no-coordination case did not, alone, necessarily establish such a harm. In the case of anthracite coal, the commission's concern with enhanced price appeared to be that the price increase was not accompanied by concomitantly higher wages—a very different policy issue than the reasons typically proffered today.[49] 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.[50] In fact, an early vision for the FTC, one which went some way toward actualizing in the pre–New Deal period, was as an affirmative mechanism for horizontal interfirm coordination to stabilize markets, rather than as a mechanism for punishing such coordination.[51]

The publicly 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. 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.

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46. *See* FTC, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1916, at 25 (1916), https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1916/ar1916_0.pdf [https://perma.cc/FV3P-BKVY] (noting that "no thorough investigation [as to trade associations] was attempted").
47. *Id.* (emphasis added).
48. *Id.*
49. *Id.* ("[T]he Commission was directed to make an investigation of the anthracite coal industry with reference to . . . the relation of the price increase to the increase of labor cost.").
50. *See 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.").
51. SAWYER, *supra* note 22, at 152–73 (discussing efforts to institutionalize "the new competition," which is to say, decentralized markets stabilized by interfirm coordination, in federal administrative agencies including the FTC).

3. Vertical Interfirm Coordination

Relaxing antitrust enforcement against vertical restraints was a key goal of the Chicago School. When that goal was realized, domination through vertical contracting, often accompanied by vertical disintegration, became a viable business strategy. As economist Brian Callaci's recent work has described, antitrust law has therefore played an indispensable role in the creation of the "fissured workplace,"[52] in which dominant firms exert control over smaller players in their orbits while disclaiming responsibility for their activities.[53] The modern, Chicago School–shaped law of vertical restraints repudiates older precedent that had refused to immunize such coordination partly on the ground that it involved a kind of feudal dominion that should not exist beyond firm boundaries.[54] These precedents were justified on the basis of economic arguments that vertical restraints create efficiencies that ultimately redound to the benefit of consumers,[55] paralleling the economic arguments that were deployed to justify corporate mergers and to permit powerful firms to dominate markets.[56]

Relaxing the law of vertical restraints is part of an overall allocation of coordination rights in which domination is preferred over cooperation. Indeed, the arguments against horizontal cooperation were specifically deployed in favor

52. Callaci, *supra* note 7. Callaci suggests that changes in this area of law were influenced by the advocacy of franchisors' associations, which filed amicus briefs in pending cases relating to vertical restraints (while franchisee groups generally did not). *Id.* at 11, 13–14. The franchisors' association filed an amicus brief in the pivotal decision *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (expanding the permission of geographical market allocation restraints placed by franchisors upon franchisees, and heralding the contemporary permissive attitude toward vertical restraints more generally); parts of the brief's language, Callaci points out, were adopted in the Court's opinion.

53. *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

54. 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 resellers). That decision repudiated *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964) (holding vertically imposed price-fixing by oil company on gas station resellers 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. 1951) (holding 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); Paul, *supra* note 7; Steinbaum, *supra* note 7.

55. *See, e.g.*, ROGER D. BLAIR & DAVID KASERMAN, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL (1983).

56. *See infra* Part IV.

of relaxing the law of vertical restraints, and thus to justify a form of coordination through domination.[57]

B. The Indigeneity of Antitrust's Preference for Intrafirm Coordination

Before delving more deeply into the legal doctrine that constitutes antitrust's firm exemption, this Subpart next explores its basic logical structure.

What is horizontal interfirm coordination and how does it relate to the firm exemption? Consider an example. Many trucking firms in the United States buy truck driving services from individuals and 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 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 price coordination is uncontroversially permitted, to one that courts and federal competition authorities would undoubtedly label a "garden variety price-fixing ring."[58] Note that between these examples, there is no difference in effects on third parties, whether they are customers, suppliers, or rival firms or associations. So there does not seem to be a justification, at least in terms of anticompetitive effects or even in terms of effects on prices, for allocating coordination rights to the trucking firm but not to the truck driver cartel.

In fact, one of the key Chicago School arguments for relaxing antitrust concern with market concentration, the theory of contestable markets, applies as forcefully or more forcefully to cartels as it does to monopolistic firms. The basic idea is that even very large firms in concentrated markets are forced to behave competitively—to charge the prices that *would* be charged in a decentralized

57. *See* Priest, *supra* note 33, at S10–S13 (discussing Bork's endorsement of the per se prohibition of price-fixing as a key step in his argument that the Court should relax its treatment of vertical restraints).
58. BORK, *supra* note 32, at 108.

market, because the threat of market entry prevents them from charging an extra competitive premium. This argument relies upon the purported role of potential competitors in regulating the behavior of actual market participants.[59] Putting aside its merits, the contestable markets 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 would a large corporation of the same size and the same market share. It would, therefore, charge competitive rather than inflated prices.[60] In other words, a key element of Chicago School logic itself fails to support the firm exemption.

As further set out in Part II, whether an arrangement is a firm or a cartel for purposes of fundamental economic coordination rights is a question *internal* to antitrust law. It is not derivable from corporate law. The firm boundaries given by corporate law are neither necessary nor sufficient to qualify for antitrust's firm exemption. Incorporation or association does not insulate what antitrust would otherwise deem a cartel—likely including, for example, an incorporated version of the price-fixing ring of truck drivers described above.[61] Meanwhile, antitrust also confers the firm exemption upon arrangements that are *not* firms under corporate law.[62]

Nor can antitrust's allocation of coordination rights be derived from property law. To be sure, property itself implies control rights, and control is a form of economic coordination. And ownership of a business—a bundle of rights with a broader scope than just ownership of physical or financial capital—implies a plenary right to control that business, a fact that is recognized, or more accurately created, across a number of areas of law.[63] But the price coordination that takes place within a business corporation, for example, cannot be derived from

59. For a critical analysis, as a well as the argument that the contestable markets hypothesis flows logically from the perfect competition benchmark of neoclassical economics generally, see John E. Davies & Frederic S. Lee, *A Post Keynesian Appraisal of the Contestability Criterion*, 11 J. POST KEYNESIAN ECON. 3, 22 (1988) ("[L]ogic demands that acceptance of the usefulness of perfect competition implies acceptance of its more generalized form—the contestability criterion.").

60. 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 cartels, which always face the problem 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 E. Earl eds., 1993); *see also* Woodcock, *supra* note 39.

61. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010); *see also infra* Part II.

62. *See infra* Part II.

63. Both corporate law and labor law recognize such a right.

property rights because neither of the actors to whom the right to coordinate prices could plausibly be attributed—shareholders or officers/managers—are in fact owners of the corporation.[64] 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 law also 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. Moreover, even where property rights *do* directly imply control rights, antitrust's decision to immunize that coordination and not the coordination achieved through, say, contract or horizontal cooperation—activities that are also permitted or supported by law, if one takes antitrust out of the picture—is still a logically independent determination.

Beyond direct deference to property rights, antitrust's distinctions between acceptable and unacceptable forms of coordination often defer to significant property claims[65] as the putative justification, even when the distinctions are not directly derivable from positive property rights. To take the simplest case, the price coordination that takes place within a firm is typically given—if one digs far enough—its putative justification by the property rights of investors, even though it is not usually derivable from them. 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. The single entity doctrine, for example, expressly enshrines a deference to existing concentrated ownership rights as a basis for allocating additional coordination rights.[66] Thus, antitrust law often relies upon ownership rights over something other than the economic

64. Neither officers, managers, nor shareholders are owners of the corporation. *See* LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 40–41 (2012); *see also* David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 146 (2013). Rather, the only coherent view is that the corporation is self-owning.

65. In fact, as one attorney in the Antitrust Division suggested, deference to property ought to come before efficiency considerations in antitrust's decision calculus for allocating coordination rights under the single entity doctrine. *See* DEAN V. WILLIAMSON, ANTITRUST DIV., U.S. DEP'T OF JUSTICE, EAG NO. 06-4, ORGANIZATION, CONTROL AND THE SINGLE ENTITY DEFENSE IN ANTITRUST (2006), https://www.justice.gov/sites/default/files/atr/legacy/2007/09/28/221876.pdf [https://perma.cc/6NP6-FADU].

66. See *infra* Subpart II.B.

arrangement through which the coordination in question 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 coordination rights that only antitrust law can confer, and that it denies to other actors or arrangements.

Finally, the coordination rights allocated to the firm cannot be explained by or derived from contract. Contractarian theories of the firm dominate in law and economics circles, the influence of which has also reshaped antitrust law.[67] There are many good reasons to contest the contractarian view of the firm, on the basis that it does not actually describe what is distinctive about a firm.[68] 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. Even if that were true, it certainly would not help in justifying the firm exemption. Simply put, if the firm is made out of

67. The putative 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. *See, e.g.*, Chris Sagers, *Why* Copperweld *Was Actually Kind of Dumb: Sound, Fury and the Once and Still Missing Antitrust Theory of the Firm*, 18 JEFFREY S. MOORAD SPORTS 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) ("[W]e do not exactly know what the firm is—nor is it vital to know. The word 'firm' is simply a shorthand description of a way to organize activities under contractual arrangements that differ from those of ordinary product markets."). Thus, while a Coasean might seek to straightforwardly justify the legal allocation of coordination rights to the firm, the contractarian tends to discount its significance. If intrafirm price coordination is economically irrelevant because prices are set by the market, our contractarian interlocutor might then say that a legal preference for intrafirm 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: AN ECONOMIC SOCIOLOGY OF TWENTY-FIRST CENTURY CAPITALIST SOCIETIES (2001).

Moreover, if the legal preference for intrafirm 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.

68. *See* ERIC ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM 67 (2013) (agency, not contract, explains the most distinctive aspects of the firm); Ciepley, *supra* note 64, at 149 (agency principles, derived from master and servant, constitute the firm).

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

The trucking firm example again furnishes a useful illustration. A great number of trucking firms are 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 upon 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.[69] 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. In this way, they are the real-life operationalization of contractarian theories of the firm. Yet they also retain the privileges of antitrust's firm exemption. If such a firm is simply a collection of contracts, with no further distinctiveness, then there is again no justification to treat its contracts with independent contractor workers as privileged for antitrust purposes.

Put another way, the contractarian view of the firm is in basic tension with antitrust's current 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.[70] It cannot 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 do not logically 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, intimating 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, as a logical matter, private

69. *See, e.g.*, FedEx Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009).
70. See *infra* Part IV for a discussion of this argument.

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.[71] Because private actors cannot contract among each other to generate such rights, the rights are a dispensation from the public.

This argument 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 prohibited 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.[72] 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.[73] In this context, the Federal Trade Commission, as one representative locus of this form of thinking, has argued for closer oversight by public bodies over any economic coordination authorized by the state action doctrine.[74] One rationale to be found in this stance is that the coordination, since it is a privilege granted by the state,

71. David Ciepley makes a parallel claim about the irreducibly public nature of the legal privileges granted to business corporations by corporate law, *see* Ciepley, *supra* note 64, and Saule Omarova and Robert Hockett make a parallel 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), *see* Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143 (2017).

72. *See* Parker v. Brown, 317 U.S. 341 (1943) (holding that, so long as state action serves local ends and does not discriminate against commerce, the Sherman Act was not intended to restrain states from activities directed by the state's legislature).

73. *See supra* Subpart I.A; *see also* N.C. State Bd. of Dental Examiners v. FTC, 574 U.S. 494 (2015) (evincing 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).

74. *See, e.g.*, *Dental Examiners*, 574 U.S. 494; *see also* Pallavi Guniganti, *An Interview with Maureen Ohlhausen*, GLOBAL COMPETITION REV., Dec. 2013, at 4, 5 (former FTC Commissioner sharing her view that "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.").

ought to have genuine public benefits, and that its public benefits ought to outweigh any harms.

But this amounts to the assertion that, in effect, the coordination rights granted pursuant to the state action doctrine are a public resource that ought to be allocated and regulated in the public interest. If that is right, then the even more fundamental allocation of coordination rights embodied by the firm exemption also has a public character—and coordination within the firm also ought to have genuine public benefits as a condition of the privilege. Moreover, this stance lends support to 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 the first place—and therefore to see it as a privilege granted by the state. Yet because the grant of economic coordination rights antitrust law makes to the firm is so deeply naturalized, and thus nearly invisible, our current framework largely denies its public character.

An inspection of the logic of the firm exemption thus implies that the right to engage in intrafirm coordination should be allocated with the public interest in mind—just as limited rights to engage in interfirm coordination are.

II. ANTITRUST'S FIRM EXEMPTION

Antitrust's firm exemption is more than the allocation of coordination rights to business firms: it is the particular *conception* of the firm associated with those rights. That conception of the firm supplies the criteria for deciding whether the coordination in question will be permitted. The criteria include, for example, whether the economic coordination involves a "unitary decisionmaking quality" or a "single aggregation of economic power."[75] Overall, 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."[76] The Supreme Court's landmark decision in *Copperweld Corporation v. Independence Tubing Corporation*[77] expressly declared the preference for economic coordination as centralized ownership and control by defining a "single entity" for antitrust purposes in precisely those terms. Here, the Court in many ways channeled Bork

75. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 196 (2010).
76. *Id.* at 197 (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984)).
77. 467 U.S. 752.

and the Chicago School influence, most significantly by scapegoating horizontal coordination as the principal contrast case.

A. *Copperweld*

At the broadest level, what *Copperweld* accomplished was to extend the antitrust privilege of firm status beyond the firm boundaries given by corporate law. In this way, it gave many actors legal rights to control activities beyond the borders set by corporate law itself. This fact implies 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) and also for labor law purposes (avoiding the responsibilities and countervailing rights associated with employment, among other things) while also claiming the benefits of broader firm boundaries for antitrust purposes, that is, permitting economic coordination within the corporate family that would otherwise fall into the ambit of Section 1. This inconsistency in the drawing of firm boundaries across areas of law unsurprisingly leads to anomalous results.[78] But *Copperweld* is as significant for just *how* it facilitated developments relating to fissuring and the gig economy—in other words, for the criteria that underlie the firm exemption—as for the fact that it did so.

Prior to *Copperweld,* the doctrine of intraenterprise conspiracy referred to coordination among closely related but formally separate business entities. This was explicitly recognized by *United States v. Yellow Cab*,[79] in which the Supreme Court held that "the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act."[80] The rule that a parent-subsidiary relationship does not necessarily insulate coordination between firms within the corporate family from Section 1 liability was subsequently reaffirmed by the Court.[81] Still, even before *Copperweld*, firms in corporate families were not treated quite the same as other groups of firms for antitrust purposes: as the dissent in *Copperweld* noted, simple

78. Some of these anomalies are explored in Paul, *supra* note 7.
79. 332 U.S. 218 (1947).
80. *Id.* at 227–28.
81. *See, e.g.*, Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968) (involving a conspiracy among a parent corporation and its subsidiaries), *overruled by Copperweld*, 467 U.S. 752; Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (two wholly owned subsidiaries of a liquor distiller were liable under § 1 of the Sherman Act for jointly refusing to supply a wholesaler who declined to abide by a maximum resale pricing scheme), *overruled by Copperweld*, 467 U.S. 752; Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (involving Section 1 liability for coordination between firms connected to each other through intracorporate stock ownership), *overruled by Copperweld*, 467 U.S. 752.

price coordination or other economic cooperation between a parent and a subsidiary, which would be a Section 1 violation between separate firms, was already tolerated.

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.[82] The antitrust aspect of the resulting litigation,[83] which also involved various business torts, was based upon this coordination.[84]

Without dealing with the merits of this conduct, 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 parent and a subsidiary is insufficient as a matter of law to meet the concerted action requirement of Section 1, because for antitrust purposes it involves one actor—a single enterprise—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."[85]

In supporting this categorical distinction, the Court also simultaneously condemned horizontal price coordination between dispersed actors, for which no

82. 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. *Copperweld*, 467 U.S. at 756. At the time of acquisition by Copperweld, Regal was an unincorporated division of Lear Siegler. The sale of its Regal division to Copperweld also entailed a noncompete 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 reenter that market. However, what Copperweld had not bargained for was that the former division manager of Regal quickly set about creating the Independence Tube Corporation. Since that manager was not personally bound by the noncompete agreement with his former employer, Copperweld resorted to the tactics that gave rise to the litigation against it in an attempt to prevent Independence from entering into the market. *Id.*
83. *Id.* at 758.
84. Indep. Tube Corp. v. Copperweld Corp., 691 F.2d 310, 318 (7th Cir. 1982), *rev'd*, 467 U.S. 752 (1984).
85. *Copperweld*, 467 U.S. at 767. Ironically, in the very same breath the Court went on to characterize single-firm conduct that earlier courts might have found troubling as merely "the competitive zeal of a single aggressive entrepreneur." *Id.* at 768. It is odd for the Court to invoke the "zeal of a single aggressive entrepreneur" with respect to Regal and Copperweld's conduct in particular—which 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.

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 anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. . . . Other combinations such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively.[86]

In other words, the Court posited and leveraged the normative polarity between horizontal interfirm coordination on the one hand, and mergers and vertical restraints on the other, in order to broaden the firm exemption.

The Court 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 the sort that results in cost savings to a firm, thus "enabling it to compete more effectively." Importantly, 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 the existence of 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. Preventing competition was the essence of the conduct at issue in this case in terms of both means *and* ends.

Copperweld held that, where indicia involving concentrated ownership and control are 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 she otherwise "keeps a tight rein."[87] But in adopting these criteria, the Court was not merely respecting existing legal claims, based in other areas of law. Rather, it was leveraging them as a jumping-off point for antitrust's own further assignment of rights. In other words, it held that the legal right of an actor to control another, originating outside antitrust law, also

86. *Id.* (citation omitted).
87. *Id.* at 771–72.

ought to ground the assignment of coordination rights to that actor for antitrust purposes. That this is a separate and additional legal judgment is evident from the fact that two separate persons or firms—which are "independent centers of decision-making"[88]—also have the legal right, antitrust aside, to enter into a contract to engage in horizontal cooperation. Yet that fact obviously does not result in the conferral of coordination rights for antitrust purposes. Rather, antitrust makes an affirmative judgment to support the right to *control* while denying the right to *cooperate*.

B. *Copperweld*'s Progeny and *American Needle*

Three points emerge from the single entity doctrine as it developed post-*Copperweld*. 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 decisionmakers, 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 later case law pays lip service to a particular normative benchmark—the preservation of independent centers of decisionmaking 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.[89] Following *Copperweld*, courts extended single entity immunity to affiliated enterprises whose relationship was less integrated than that of a wholly owned subsidiary. This has included, for example, coordination between sibling-subsidiary corporations.[90] It has also included *de minimis*

88. *Id.* at 769.

89. "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." WILLIAMSON, *supra* note 65, at 17 (footnote omitted). *See also Copperweld*, 467 U.S. at 770; Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1148 (9th Cir. 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). For another discussion and perspective on the single entity doctrine, and *American Needle* in particular, see Herbert J. Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813, 855 (2013) (emphasizing that when there are "actual or potentially separate business interests, as in *American Needle*, then there are multiple entities capable of conspiring for antitrust purposes.").

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

deviation from the ownership relation implied by the parent-subsidiary relationship.[91] If ownership is not sufficiently concentrated, concentration of control rights may suffice.

Following *Copperweld*, courts followed its prescribed criteria, requiring the centralization of decisionmaking and ownership as a condition of the coordination rights associated with single entity status, until the Court again revisited and further strengthened these criteria in 2010. For example, a mushroom producers' and distributors' cooperative that did not qualify for the statutory exemption in the Capper-Volstead Act[92] was also denied single entity status under *Copperweld* due to a lack of concentrated ownership and decisionmaking.[93] The extension of *Copperweld* to franchise families on at least one occasion exemplifies this same preference.[94] Commenting on the post-*Copperweld* development of the single entity doctrine, prior to its further clarification in *American Needle*, 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.*[95]

Thus, within the single entity doctrine, deference to ownership-based coordination rights seems to revert to its original, self-justifying character, rather than relying upon utilitarian justifications. Again, this is not just deference to property endowments in the sense of respecting existing boundaries set by

91. *See, e.g.*, Siegel Transfer, Inc. v. Carrier Exp., Inc., 54 F.3d 1125 (3d Cir. 1995).
92. 7 U.S.C. § 291 (2018); *see generally* Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy*, 124 PA. ST. L. REV. 1 (2019) (discussing the development of agricultural cooperatives pursuant to the Capper-Volstead Act).
93. *In re* Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 290–91 (E.D. Pa. 2009); *cf.* City of Mt. Pleasant v. Associated Elec. Coop., 838 F.2d 268, 275 (8th Cir. 1988) (reaching behind *Copperweld* to older cases finding single entity status for the purpose of fulfilling the statutory requirements of agricultural cooperative immunities, and relying on *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962)).
94. Williams v. I.B. Fischer Nev., 999 F.2d 445 (9th Cir. 1993) (dismissing former employee's claim that a no-switching provision in franchising agreement violated Sherman Act on the basis that franchisor and franchisee cannot conspire under *Copperweld*).
95. WILLIAMSON, *supra* note 65, at 18 (emphasis added).

property law. Rather, it is about using those boundaries to allocate new rights, namely the economic coordination rights that antitrust is in the business of defining and governing.

The preference for concentrated ownership and control rather than cooperation that defines antitrust's firm exemption applies equally when antitrust narrows the boundaries given by corporate law rather than expanding them. In *American Needle*, the Court reviewed its history in this area, noting that it had "repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity."[96] At issue in *American Needle* was National Football League Properties, a corporation which made marketing and licensing decisions regarding the intellectual property separately owned by NFL teams, namely, team logos to appear on clothing and merchandise. The Court held that licensing decisions made by NFLP were not the unilateral acts of a single entity for purposes of Section 1 of the Sherman Act, but rather constituted a shield for concerted action between "independent centers of decision-making," namely the individual NFL teams, as to their individually owned intellectual property.[97] Thus, "[t]he 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."[98] Taking *Copperweld* and *American Needle* together, it is evident that the boundaries supplied by the law of business associations are neither necessary nor sufficient to confer the privilege of antitrust's firm exemption.

When this area of law refers to criteria other than concentrated ownership or control, those criteria often turn out to be either overbroad or question-begging when taken literally.[99] For example, whether certain economic actors are "potential competitors"[100] or "independent centers of decision-making"[101] are questions that antitrust's conferral or denial of firm status *decides*; they are not independent bases for deciding firm status. Yet they are sometimes posed as criteria for deciding whether a given form of coordination counts as a single entity

96. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191–92 (2015) (citing decisions involving incorporated business entities that were nevertheless subject to Section 1); *id.* at 200 (noting that the corporate form can be a "formalistic shell" masking "concerted action").
97. *Id.* at 197 (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984)).
98. *Id.* at 196.
99. This circularity might be one of the reasons why so many commentators, wherever they may fall in their normative views, find the single entity doctrine confused. *See, e.g.*, WILLIAMSON, *supra* note 65; Sagers, *supra* note 67, at 387.
100. WILLIAMSON, *supra* note 65, at 16.
101. *Am. Needle*, 560 U.S. at 197 (quoting *Copperweld*, 467 U.S. at 769).

for antitrust purposes. In substance, whether actors are potential competitors only distinguishes people or groups of people who engage in 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 (under positive law) for denying it the firm exemption. Indeed, if applied literally and in a noncircular manner, 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, whether another actor is a potential competitor cannot very well serve as the criterion of applicability for the firm exemption if taken at face value; it is either overinclusive, or it simply reiterates the preference for conventionally organized associations.

In particular, 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 require hierarchy and power polarity. It is for this reason, of course, that employees who perform the same service for a firm are not 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.

Notably, this deference to power imbalances extends beyond employment to some instances of contract—contracts that inscribe and extend power polarities that already 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.[102] This sort of justification is again circular: after all, the "garden variety price-fixing ring,"[103] which is regarded as the "supreme evil of antitrust,"[104] *also* has common economic goals. It is just that those common economic goals are ruled out of bounds by antitrust law. The substantive difference is, again, that franchisors exercise control over franchisees, while the price-fixing ring—whether it is 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 these doctrinal criteria meaningful is to backfill them with the deference to hierarchy and ownership that is deeply embedded in antitrust's current attitude to economic coordination.

102. *See, e.g.*, Williams v. I.B. Fischer Nev., 999 F.2d 445, 447 (9th Cir. 1993) (dismissing former employee's claim that a no-switching provision in franchising agreement violated Sherman Act on the basis that franchisor and franchisee cannot conspire under *Copperweld*).
103. BORK, *supra* note 32, at 108.
104. Verizon Commc'ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

Finally, both *Copperweld* and *American Needle* attempt to restate their decision criteria in terms of the simple-sounding test that asks whether allocating coordination rights to a given entity would "deprive the marketplace of independent centers of decision-making."[105] 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, causally speaking, independent centers of decisionmaking in the marketplace. Yet antitrust withholds the right to engage in such coordination, while granting coordination rights to vertically integrated firms as well as the lead firms in vertically controlled corporate families and franchise families.

III. THE HISTORICAL CONTINGENCY OF THE CURRENT ALLOCATION OF COORDINATION RIGHTS

Antitrust law's allocation of coordination rights, including its firm exemption, is the product of a historically contingent process. The firm exemption and the preference for control over cooperation have not always been as axiomatic as they now are. This Part does not aim to exhaustively trace the overall formation of these preferences, but seeks to illustrate their historical contingency by reference to the Sherman Act's legislative history.

The original legislative vision for antitrust did not involve an unqualified firm exemption of the sort we now take for granted. Legislators did not envision the statute that became the Sherman Act to authorize an unqualified allocation of coordination rights to business firms; on the contrary, they crafted the legislation in an attempt to reign in the concentration of economic coordination embodied in emerging, late nineteenth-century American business corporations—otherwise known as "the trusts."[106]

Consider 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

105. *See Am. Needle*, 560 U.S. at 194; *Copperweld*, 467 U.S. at 769.

106. An earlier version of the points set out in this Part appear in Sanjukta Paul, *The Case For Repealing the Firm Exemption to Antitrust (A Modest Proposal; or, a Response to Professor Epstein)*, *in* THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 88 (Richard Bales & Charlotte Garden eds., 2020). A fuller account of the legislative history and its interaction with corporate law developments will be set out in separate forthcoming work. *See* PAUL, *supra* note 8.

in purpose, did not develop until later.[107] Business corporations in particular originally had a recognized public dimension, 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.[108]

Legislators were motivated to pass antitrust legislation in the first place because they were concerned that the emerging market order[109] allocated economic coordination rights to too few, too powerful individuals,[110] whether those individuals organized themselves in single corporations, trusts, or cartels.[111] Of course, there is nothing in the text of the statute itself that either limits its

107. 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. *See* Ciepley, *supra* note 64. 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).

108. *See, e.g.*, Ciepley, *supra* note 64, at 142 ("[T]he 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."); Robert C. Hockett & Saule T. Omarova, *"Special," Vestigial, or Visionary? What Bank Regulation Tells Us About the Corporation—And Vice Versa*, 39 SEATTLE U. L. REV. 453 (2016). 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. Ciepley, *supra* note 64, at 152.

109. *See, e.g.,* RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900, at 289–354 (2000) (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).

110. The popular movement that generated the antitrust statute 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. *Id.*

111. *See* Gary Richardson, *A Tale of Two Theories: Monopolies and Craft Guilds in Medieval England and Modern Imagination*, 23 J. HIST. ECON. THOUGHT 217, 220–25 (2001) (discussing various facets of the "meandering meaning of monopoly," *id.* at 220, in social scientific as well as popular thought, with the contemporary definition used by antitrust law arriving late on the scene).

applicability to intrafirm coordination, nor even draws a distinction between it and interfirm conduct.[112] Interestingly, in fact, 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."[113] Since single firm conduct in the form of monopolization or related practices was, without controversy, encompassed by the successor legislation, we may infer that the original, single-section bill referred to both interfirm and intrafirm conduct as well. Evidently, it did so without making the distinction between intrafirm and interfirm conduct salient.

Later on, during U.S. Senate deliberations, Senator Sherman described the problem with the Standard Oil Company 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 . . . . 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 to consider is whether . . . it is safe in this country to leave the production of property, the transportation of our whole country, to depend upon the will of a few men sitting at their council board* . . . I only refer to them because they are the oldest of these combinations founded upon contracts which have been copied by the other combinations.[114]

The italicized portion above clearly identifies the concentration of economic coordination rights in the hands—and wills—of "a few men" as the primary concern of the statute. To be sure, it is not completely clear from this excerpt whether Sherman was referring only to the Standard Oil Company of Ohio, or to the Standard Oil trust as a whole. But that, itself, supports the point: it is well-established that in the common parlance of the time, which Sherman and other legislators used during deliberations, the word "trust" referred both to the formal trust arrangements of the 1880s—necessitated by limitations on corporate mergers originating in state corporate law—*and* to the emerging megacorporations that those trusts eventually became as state corporate law

112. 15 U.S.C. §§ 1–2 (2018).
113. 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 14–15 (Earl W. Kinter ed., 1978).
114. 21 CONG. REC. 2570 (1890) (emphasis added).

barriers gradually fell away.[115] The Sherman Act was passed just as this transition was beginning.

Consistent with this, legislators 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.[116] For example, Senator Teller, worried, as many senators were, that the statute would be misapplied 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."[117]

Senator Hoar was even more direct in identifying intrafirm economic coordination as a phenomenon cognizable to antitrust, and constituting 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."[118] 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, through the legal form of the corporation.[119]

In short, considering intrafirm economic coordination in the same breath with interfirm coordination was perfectly natural to legislators' world picture, in which firms and enterprises did not occupy a special ontological status separate

115. *See* Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323, 335 n.52 (2007) ("In its narrowest sense, [the word "trust"] applied only to the voting trust arrangements, like Standard Oil and the Whiskey Trust, by which groups in certain industries were able to reduce price competition and dominate markets in the 1880s. In a slightly broader sense, it also referred to the consolidated corporations formed to carry on the business of the trusts after they came under legal attack in the late 1880s."); *see also* WILLIAM G. ROY, SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA 192 (1997); HANS B. THORELLI, FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 76 (1955).

116. Conversely, legislators clearly assumed that coordination between formally separate business entities under common ownership and control—which is what the original trusts (in the narrow sense of the term) were—could constitute conspiracies or combinations for antitrust purposes, just as contracts between entirely separate entities could. Justices Stevens, Brennan, and Marshall made this observation in their dissent in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 778–96 (1984) (Stevens, J., joined by Brennan, J. & Marshall, J., dissenting).

117. 21 CONG. REC. 2562 (1890) (emphasis added).

118. *Id.* at 2728.

119. *Id.* at 2727.

and apart from other forms of economic coordination. 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 judge-made antitrust law, contrary to the legislative vision, but it was more actively contested for a longer time than is commonly acknowledged.[120] Indeed, as of the turn of the century, the antitrust axiom that I am calling 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 intrafirm coordination and horizontal coordination beyond firm boundaries as opposite poles, as antitrust voices now routinely do,[121] these actors thought of them as species within a genus. For example, in *United States v. Joint Traffic Association*,[122] not only were the defendant railroads worried about intraenterprise liability under Section 1, but they also argued against the per se rule prohibiting horizontal interfirm 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.[123] And indeed, for a short period of time the Court was inclined to treat horizontal corporate mergers as at least akin to horizontal interfirm coordination—specifically relying upon precedent involving the latter.[124] Not until *Standard Oil* did the Court settle upon a stable divide between interfirm and intrafirm coordination.[125]

The firm exemption became entrenched through a combination of factors over time, but that process was both particular and contested. The legislators' own view of intrafirm coordination shows that alternative visions are very much possible.

IV. THE EFFICIENCY JUSTIFICATION

This Article began by arguing that the fundamental function of antitrust law is to allocate economic coordination rights. It has sketched the current overall allocation of those rights in terms of horizontal interfirm coordination, vertical

120. The development of the firm exemption in judge-made antitrust law of the *Lochner* era is set out in separate forthcoming work. *See* PAUL, *supra* note 8.
121. *See infra* Subpart II.B (discussing *Copperweld*).
122. 171 U.S. 505 (1898).
123. *Id.* at 506–07.
124. *See generally* N. Sec. Co. v. United States, 193 U.S. 197 (1904).
125. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911). *Standard Oil* applied a "rule of reason" to corporate mergers that would become the basis for statutory merger regulation, and which was only nominally the same as the rule of reason applied to interfirm conduct. *Id.* at 67.

interfirm coordination, the firm exemption, and some of the relationships among them. It has focused upon antitrust's firm exemption in particular, showing that this doctrine displays the overall preference for control over cooperation in allocating coordination rights. Finally, this Article has briefly described the historical contingency of this allocation of coordination rights.

To all this, however, a proponent of the current framework might say: today, we have the benefit of modern economic arguments that independently support antitrust's particular allocation of coordination rights, and the firm exemption in particular. This Part shows why this is not the case. As previously described, the Chicago School's remaking of antitrust law can be seen in part as an expansion of the firm exemption and a contraction of other coordination rights.[126] The conventional economic justifications for the firm exemption rely upon insufficiently examined empirical contingencies and, ultimately, upon normative assumptions that are not given independent justification.

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. This is how the idea of competition, and its companion, efficiency, have been deployed to attack disfavored forms of economic coordination, both within antitrust and beyond: horizontal coordination beyond firm boundaries, democratic public market coordination, and labor coordination. Meanwhile, a very specific exception to the competitive order has been written into our legal structures for one type of coordination, and one type only—that embodied by the hierarchically organized business firm.

The key analytic move that establishes this exception relies ultimately upon a notion of efficiency that is conceptually distinct from the notion of efficiency deployed to undermine other forms of coordination. This ambiguity was in turn used to redefine both competition and consumer welfare in idiosyncratic ways. The idea of efficiency used to justify the control-based forms of coordination embodies an argument from empirical contingencies that is ultimately extrinsic to the analytical framework of neoclassical economics, while that same framework is used to attack other, more democratic forms of economic coordination. The first move assumes that production in the context of a traditional firm, in which both ownership and control are concentrated, saves costs. The premises that would support that proposition 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,

126. *See also supra* Subpart I.A.

these arguments about operational efficiency are now effectively assumed as a matter of law within the framework of antitrust law, where they constitute the only noncircular justification for the diametrically differential treatment of firms and cartels.

The legal categories that underlie this differential treatment—efficiency, consumer welfare, and competition—all ultimately rely upon a tendency to run together the unrelated concepts that are both labeled "efficiency." Without the argument from productive efficiency, they lose any claim to provide independent justification for antitrust's allocation of coordination rights. The remainder of this Article aims to disentangle these concepts, drawing upon the seminal text for the establishment of this aspect of our current antitrust world, Robert Bork's 1978 *The Antitrust Paradox*.[127]

A. The Borkian Argument

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 redefined in terms of productive efficiencies. These homonymous terms then 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.

1. Competition

The first of these homonym-pairs involves the idea of 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 generally used by legislators, and is also the ordinary language sense that the public and many legal actors still use: competition as a dynamic, socially instantiated *process* of business or economic rivalry.[128] The other sense, which was not in

127. *See* BORK, *supra* note 32. Earlier representative writings include Robert Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373 (1966).

128. *See, e.g.*, Gerla, *supra* note 17, at 211–22. Gerla, who was taking the normative position that business rivalry ought to be a primary goal of antitrust law (in place of ideal-state economic efficiency), qualifies the claim that legislative history supports the business rivalry sense of "competition" as to the Sherman Act only because legislators were also willing to accommodate various *limits* upon business rivalry. While that is certainly true, and thus

circulation at the time of legislative deliberation upon the Sherman Act, is the ideal state notion of "competition" used by present-day mainstream economists.[129] Now, while the Chicago School did not create this semantic ambiguity, 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 dubious uses of the ideal-state concept—as in the notion of contestable markets to justify real world markets with few or no actual business rivals.[130]

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,[131] and he rejected them. It is particularly important to underscore 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 purchases or sales. . . . This is . . . utterly useless as a goal of law . . . .'[132]

Instead, Bork went on to redefine competition in terms of consumer welfare. In other words, after surveying various senses of the word competition, Bork expressly defines it 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."[133] Thus, Bork expressly stated that the notion of competition entailed by his core legal prescriptions was entirely derivative of his conception of consumer welfare, and was also entirely distinct from the ideal-state economic conception of competition. This is a manner in which no one would naturally understand the word, in either an ordinary language or a technical sense.

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 coordination, and informal horizontal coordination beyond

legislative history may not fully support the normative position he was urging, it does support the proposition that legislators understood the word, and the concept, this way.

129. *Id.* at 217.

130. *See, e.g.*, Khan, *supra* note 17 (regarding this use of "competition" and contestable markets).

131. *See* BORK, *supra* note 32, at 59–61 (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 any other person or firm," *id.* at 59, 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").

132. *Id.* at 59 (emphasis added) (quoting GEORGE K. STIGLER, A THEORY OF PRICE 87–88 (3d ed. 1966)).

133. *Id.* at 61.

firm boundaries. But when it came time to justify the preferred form of economic coordination—the large, powerful business firm—that would displace 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$_A$—a state of perfect competition—conveniently provided the broader warrant for this preferred form of economic coordination. This warrant derived from the intellectual prestige of neoclassical economics on the one hand, and also from the intuitively appealing ordinary language sense of business rivalry on the other.

2. Consumer Welfare

So, to understand competition$_{B,}$ we have to understand consumer welfare, which supplies its analytical content. This leads us directly into the second Borkian homonym-pair. Here, as with competition, there is a preexisting 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 had substantive content independent of allocative economic efficiency. For example, even legislators invoked consumer welfare—although not exclusively, and even then often in terms of the interests of small producers who were forced to buy from the new monopolies. The consumer protection charge of the Federal Trade Commission is based on substantive (and shifting) notions of consumer welfare.

Bork drew upon a meaning of consumer welfare that was associated with a specific empirical argument—an argument about what forms of coordination among producers and sellers were good for consumers and which ones were not. The general form of argument was not new with Bork.[134] Bork ultimately embedded an empirical and normative argument about forms of economic coordination into his legal 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.

The key equivocation in the Chicago School notion of consumer welfare lies in whether it is meant merely as an operationalization of the more basic concept of allocative efficiency that is associated with neoclassical theory, or whether it is a substantive preference for consumers' interests in the normative framework for

134. For example, Arthur Eddy, arguing for the merits of economic coordination among businessmen, wrote in 1912: "Partnerships, corporations, trusts, are all in the direction of more for less money," while "labor unions and farmers' organizations are all in the direction of less for more money." ARTHUR JEROME EDDY, THE NEW COMPETITION 51 (1912).

antitrust decisionmaking. In the former sense, higher prices are presumed to correspond to reduced output, which in turn is presumed to be a move towards inefficiency. This ambiguity, mostly unlike the other two identified here, is widely recognized and actively debated.[135] But it is important to step back from the technical debate to appreciate the implications of this simple point: these two senses of consumer welfare—operationalizing allocative efficiency, or committing to substantive consumer interests in the existing world—are 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 himself at times identified consumer welfare with allocative efficiency[136] but also unambiguously embraced the conception of consumer welfare as substantively ordering consumers' interests over others, both directly and in its reliance upon the notion of productive efficiencies.[137] Subsequent exponents of the existing antitrust framework have addressed this ambiguity in various ways, generally seeking to reconcile the search for real world consumer benefits with the commitment to allocative efficiency—deviations from which could result in seller harm and buyer benefit just as easily, in theory.[138] But the substantive sense of consumer welfare is accepted in practice among many, if not most, legal and institutional actors, who often understand it simply in terms of lower prices in reference to existing reality.[139]

And it would be wrong to dismiss this as a simply naïve—or easily correctible—mistake. Technical expositions also frequently refer straightforwardly to lower prices, or to a substantive preference for consumer interest.[140] Indeed, actual lower consumer prices are Bork's and Williamson's

135. *See, e.g.*, Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011).
136. *See* Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 242 (1967); *see also* Orbach, *supra* note 135, at 147.
137. *See, e.g.*, BORK, *supra* note 32, at 110 (stating that the consumer welfare model refers to "the total welfare of consumers as a class").
138. *See, e.g.,* Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 101 (2019) (stating that the consumer welfare standard is as substantively committed to addressing monopsonistic harms as monopolistic ones, but also arguing that the former are more difficult to detect).
139. *See, e.g.*, Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits"*, 12 GEO. MASON L. REV. 119, 119 (2003) ("Nearly everyone now agrees that a showing of consumer harm is a necessary condition for antitrust liability."); Orbach, *supra* note 135, at 136 ("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.").
140. *See, e.g.,* Hovenkamp, *supra* note 138, at 130 ("The neo-Brandeisian attack on low prices as a central antitrust goal is going to hurt consumers."); Klein, *supra* note 139.

professed justification for considering productive efficiencies in antitrust decisionmaking in the first place.[141] That is, Bork justifies the consideration of productive efficiencies in decisionmaking 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 of consumer welfare has been useful, and perhaps indispensable. From the perspective of the paradigm as a whole, the second, substantive 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, allocative efficiency sense has enabled laying claim, for justificatory purposes, to the intellectual prestige 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 warrant for one concept to the other. In this way it is emblematic of the method of the entire framework: justifying in terms of the ideal competitive order what is in fact a separate normative decision that itself allocates economic coordination rights.

3. Efficiency

The third and most important Borkian homonym-pair is efficiency. It is required in order to supply the content of consumer welfare$_{B,}$ which is in turn necessary to supply 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.[142] This productively efficient coordination may consist in the vertical, hierarchically organized coordination presumed to take place within a firm, or it may be vertical,

141. *See* BORK, *supra* note 32, at ch. 5 ("The Consumer Welfare Model").
142. *Id.* at 108–09.

hierarchical coordination beyond firm boundaries, as for example when a large firm gives direction to a small subcontracted firm. Thus, the posited empirical *fact* of productive efficiencies, together with the *normative benchmark* of the consumer welfare standard, together generate the Borkian 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.[143] 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 competitive order.[144] Coase's account of the firm turned upon the fact that interfirm 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, that the firm decides it 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 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.[145]

Williamson, picking up the Coasean thread, constructed a justification for traditionally organized firms based upon their avoidance of the transaction costs of market relations. 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 nontraditional, democratic internal organization. The paradigm firm on this view is thus one in which decisionmaking and organization is relatively vertical, in which owners are not workers, and which owners elect management.[146] Work is separated from and

143. *See id.* at 107–09 (citing Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 21 (1968)); *see also* Oliver E. Williamson, *Allocative Efficiency and the Limits of Antitrust*, 59 AM. ECON. REV. 105 (1969).

144. *See generally* R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

145. *See id.*; *see also* Spencer Thompson, *Towards a Social Theory of the Firm: Worker Cooperatives Reconsidered*, 3 J. CO-OPERATIVE ORG. & MGMT. 3, 12 (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.").

146. *See, e.g.*, Oliver E. Williamson, *The Organization of Work: A Comparative Institutional Assessment*, 1 J. ECON. BEHAV. & ORG. 5 (1980); *see also* Thompson, *supra* note 145 (discussing Williamson's and other contemporaries' ideas).

subordinated to ownership.[147] In short, managerial hierarchies were central to the benefits of firm-based coordination in both Williamson's thought and that of other influential contemporaries.[148]

It is this body of thought, and the supposed operational or productive efficiencies that it imputed to the hierarchically organized firm, that was directly infused into the bloodstream of antitrust law through Bork.[149] This infusion effectively expanded and magnified the preferential 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.

These productive efficiencies have nothing to do with the notion of economic efficiency upon which the current antitrust paradigm generally justifies itself; they are a not a species, subset, or cousin of this concept. They are not derived from or related to the notion of a competitive market, as allocative 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 exist.

It might be argued that productive efficiency is related to the presumed goal of ideal theory insofar as its proponents claim that it is output-enhancing. First, just as lower prices, relative to any given real-world reference point, are not necessarily efficient, neither is higher output. Moreover, the argument that

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147. Williamson, *supra* note 146. 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 wealth and work" itself, thus extending to worker-owned firms in general. *See* Thompson, *supra* note 145, at 12.

148. *See, e.g.*, Thompson, *supra* note 145, at 11 (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, uncertainty, and change." (emphasis omitted) (citations omitted)); Williamson, *supra* note 146; *see also generally* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977) (discussing productive efficiencies flowing from managerial hierarchies as an explanation for the rise of managerial corporations).

149. *See, e.g.*, BORK, *supra* note 32, at ch. 5 ("The Consumer Welfare Model"); *see also, e.g.*, Alan J. Meese, *Robert Bork's Forgotten Role in the Transaction Cost Revolution*, 79 ANTITRUST L.J. 953, 963–64, 972–73 (2014) (pointing out that Bork himself participated in reviving and extending the Coasean tradition, at least initially independently of Williamson).

hierarchical control, rather than more 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 procompetition norm. Just like the other two homonym-pairs organized around the ideal-state supplied by neoclassical theory on the one hand, and some other substantive 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 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."[150] 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."[151] In other words, "a preference for [productive] efficiency," which implies the preference for mergers over cartels, "is explainable only by a proconsumer policy."[152] Bork was making a very specific point here: that this preference for mergers over cartels was already in antitrust law,

150. BORK, *supra* note 32, at 67.
151. *Id.*
152. *Id.*

and that therefore the proconsumer policy was already in antitrust law. Bork was not wrong that antitrust, as he found it, already displayed a preference for firms, and indeed 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.[153] In effect, Bork proffered the fact that there was such a preexisting preference in the law—along with his empirical claim about productive efficiencies—as the justification for then further intensifying that very preference.

The merits of Bork's argument from precedent aside, the argument carries within it the frank admission that logically, a procompetition norm alone can never generate the antitrust preference for mergers, or for market concentration, however it arises, over cartels—or more precisely, over horizontal coordination beyond firm boundaries. In other words, Bork quite clearly stated that the procompetition 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 is that in the case of horizontal mergers, efficiency$_B$ may outweigh the posited losses in consumer benefits from coordination, efficiency$_A$, thereby justifying its permission.[154] For a horizontal merger, the price-lowering effect of efficiency$_B$ may outweigh the price-increasing effect of efficiency$_A$. And in the 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 the case of horizontal coordination beyond firm boundaries, for Bork there are no productive efficiencies; thus, one needs to 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 dead-weight 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 . . . .[155]

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

153. *See supra* Part II.
154. 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.
155. BORK, *supra* note 32, at 108 (emphasis added).

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.

Table 1: The Foundational Borkian Homonyms

"A" Concept	Semantic Content	"B" Concept	Semantic Content
competitionA	Competitive market as ideal state	competitionB	Consumer welfare
consumer welfareA	Prices set by perfectly competitive market	consumer welfareB	Lower prices (or other substantive benefits to consumers)
efficiencyA	Allocative efficiency	efficiencyB	Productive efficiency (from hierarchical organization)

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 midwifed into existence. 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 anticoordination stance as to all forms of economic coordination outside the control of powerful firms—primarily cartels or horizontal coordination beyond firm boundaries—while relaxing the anticoordination 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. It also took as given older legal presuppositions about the allocation of coordination rights between firms and other forms of coordination, repackaging them as independent dictates of social science.

B. Implications

The foregoing argument, and the argument of the Article more generally, implicates the basic question of the differential treatment of firms and other forms of economic coordination beyond the firm under antitrust. While a positive set of policy prescriptions is left for future work, the implications I briefly trace here should help to guide and structure deliberations about those policy possibilities.

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.[156] In the case of firms, ownership claims are a defense to the trespass. Meanwhile, other forms of economic coordination, such as cartels, are deemed to lack any defense. As we saw in the preceding Part, the ultimate justification for the trespass in the case of firms is the argument that control—and perhaps the possession of concentrated ownership interests itself—carries public benefits that outweigh the harm of the trespass against the competitive order.

There are two problems with this. First, even within this view of trespass, the reasons given to justify such polarized treatment are insufficient. 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. Second, the underlying theory of the trespass is undermined by the pervasive nature of economic coordination, and the law's involvement in it.

As to the first point, consider that, as a matter of law, antitrust refuses to consider the possibility of countervailing benefits in the case of horizontal coordination, rendering it per se illegal. Meanwhile, the presumption that such

156. *See supra* Subpart IV.A.

benefits flow from vertical, hierarchical coordination render much of the latter sort of coordination per se legal.[157] 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 existence of economies of scale that would justify the presumption of such countervailing benefits in the case of concentrated control and not in the case of looser democratic association is an empirically contested proposition—even in the manufacturing context where such a presumption is most readily applicable.[158] Individual firms in concentrated markets frequently extend 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 in theory be realized by trade associations or other looser forms of horizontal coordination beyond firm boundaries. 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 hierarchical coordination based upon concentrated ownership of capital in the context of plant-based production, they do not obviously apply when the commodities being

157. 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 intrafirm relationships. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [https://perma.cc/BR3X-F9GS].

158. While it is well beyond the scope of this Article to assess the issue, the literature evidences a far more contested field than the law's simplistic assumptions would suggest. *See generally* FREDERIC M. SCHERER ET AL., THE ECONOMICS OF MULTI-PLANT OPERATION: AN INTERNATIONAL COMPARISONS STUDY (1975); David B. Audretsch, *Corporate Form and Spatial Form*, *in* THE OXFORD HANDBOOK OF ECONOMIC GEOGRAPHY 333 (Gordon L. Clark et al. eds., 2000) (pointing out that many mergers and other corporate consolidation involve *ownership* concentration without accompanying geographic or physical integration); F.M. Scherer, *The Posnerian Harvest: Separating Wheat from Chaff*, 86 Yale L.J. 974, 1001 (1977) (reviewing RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976)) ("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. . . . "). Moreover, as one antitrust scholar has noted, the *comparative* empirical analysis of cartels and monopolies (or simply, firms) in relation to productive efficiency is virtually nonexistent. *See* Woodcock, *supra* note 39, at 115–16 ("[T]here is . . . no empirical evidence that cartels are mostly inefficient and monopolies mostly efficient." (footnote omitted)).

sold are services performed by individuals and when any 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 broader social and economic benefits of coordination. A mere cartel of truck drivers might eventually be in a position to reinvest in cleaner, greener technology on their own, for example, which would benefit the community in which the drivers work. Currently, antitrust law systematically prevents loosely associated independent operators from even potentially realizing the many of the same social and economic benefits that are assumed to justify preferential legal treatment of firm-based coordination generally.

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 businesses.[159] Considering it as an express part of legal decisionmaking would make its application more consistent.

As to the second problem with antitrust's approach to coordination rights, it is time to question the underlying presumption 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.[160] The original legislative vision for the Sherman Act certainly embraced a broader vision of dispersed coordination rights, and this normative vision had little to do with the ideal competitive order.[161] 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

159. *See, e.g.*, Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) (recognizing containing destructive competition as a valid purpose for a joint selling agency where prices were unsustainably low); Maple Flooring Mfrs.' 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).

160. *See, e.g.,* FLIGSTEIN, *supra* note 67; LEE, *supra* note 67.

161. *See supra* Part III; *see also* Gerla, *supra* note 17.

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, because 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.[162]

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 on a substantive level. To the extent that such coordination is permitted within the firm and not otherwise, the Court asked a deep question: why should antitrust law treat the expansion of coordination rights entailed by growth of a firm as strongly preferred, even while prohibiting functionally identical expansions of horizontal 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 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.[163] While it is not the approach of today's Court, the legacy of *Appalachian Coals* could be revived. Elements have survived in more recent decisions.[164]

162. *Appalachian Coals*, 288 U.S. at 377.
163. *Id.* at 364.
164. *See, e.g.*, City of Mt. Pleasant v. Associated Elec. Coop., 838 F.2d 268 (8th Cir. 1988); *cf.* United States v. Topco Assocs., 405 U.S. 596 (1972) (holding that a market allocation agreement for private-label products among small retailers was per se illegal, even though it conferred

Under a revived commitment to the principles of *Appalachian Coals*, horizontal coordination beyond firm boundaries ought to at least sometimes be permitted. At the level of implementation, this could be achieved in more than one way. One proposal would extend the benefits of looser cooperation to firms below a certain asset and revenue threshold, modeled on the Capper-Volstead Act.[165] Alternatively, courts could expand the set of procompetitive justifications that may already be considered in cases of trade associations, so that they expressly include preventing destructive competition and stabilizing markets, 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 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.

With an appropriate public oversight mechanism, permitting horizontal coordination beyond firm boundaries is in fact the best way to preserve independent centers of decisionmaking in the marketplace—one of the normative benchmarks held out in the post-*Copperweld* line of cases. The harsh treatment of horizontal coordination beyond firm boundaries implies that often the only method 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 entity. This might be in the form of an employment relationship, a contractor relationship, or in the 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 exert control beyond their own firm boundaries, 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 economic incentive to submit to a more thoroughly hierarchical relationship.

CONCLUSION

This Article has identified the allocation of coordination rights as a primary function of antitrust law. The law's current allocation of rights, in

intrabrand benefits by promoting competition outside the brand, in particular by enabling competition with larger retailers).

165. *See* Vaheesan & Schneider, *supra* note 92, at 41.

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 competition.

Indeed, antitrust's current allocation of coordination rights has relied upon a basic equivocation between two inconsistent claims about the firm, both of which are frequently deployed in law and economics thinking. On the one hand, there is the lionization of the firm to justify its special treatment, which requires that vertically organized 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, at its root, 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 preexisting 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. 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 more democratic, horizontal forms of economic coordination. To the extent that existing antitrust exemptions have embraced some such democratic forms of coordination, they have been construed as exceptions to more generally applicable principles. That in turn has contributed to the cabining of such exemptions, even while the firm exemption and vertical restraints have flourished and expanded.

This Article also has implications beyond antitrust law. A key aspect of the emerging law and political economy research program,[166] picking up the thread of the legal realist tradition,[167] is to show that the understanding of the market assumed by contemporary law and economics is constructed by law in ways that are often hidden and ultimately contingent. This Article shows that competition law—frequently understood as simply maintaining so-called free markets, and

166. *See, e.g.*, David Singh Grewal et al., *Law and Political Economy: Toward a Manifesto*, LAW & POL. ECON. (Nov. 6, 2017), https://lpeblog.org/2017/11/06/law-and-political-economy-toward-a-manifesto [https://perma.cc/V76J-FNXR].

167. *See, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

institutionally a site of one of law and economics' most complete victories—allocates economic coordination rights in idiosyncratic and autonomous ways that cannot be derived from independent principles. Law indeed allocates economic coordination rights more generally, a reframing that inverts the law and economics focus on the competitive order. It allows us to see humane, democratic and sustainable forms of economic coordination from the ground up, as it were, rather than from the top down, as exceptions to ideal theory.

The argument of this Article also adds a powerful new arrow to the quiver of corporate law reformers, who seek a return to the public conception of the corporation and its duties. That is because it reveals—along with limitations of shareholder liability and other unique legal benefits—another special privilege allocated to the business firm by the public, not enjoyed by many other associations. Coordination rights are allocated to the firm by antitrust law rather than by corporate law, but they implicate the basic philosophical debate now unfolding within corporate law about the extent of the business firm's public nature and public duties.

In the 1970s, 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."[168] The first principles that 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 Article has tried to extract the shape of that root from the institutional forms in which it has been embedded so that we may examine it, and soon perhaps plant something new.

168. BORK, *supra* note 32, at 3.