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Recovering the Moral Economy Foundations of the Sherman Act

ABSTRACT. This Feature deepens and seeks to provide a foundation for the current broadening in the antitrust debate and, ultimately, in adjacent areas relating to market organization. As normative reconstruction, it may help guide current reform efforts as well as the interpretation and implementation of the existing antitrust laws. The Feature traces a thread beginning with the “moral economy” origins of antitrust and the common law of restraint of trade; continues through the American antimonopoly coalition’s distinctive and egalitarian moral economy vision; and culminates in a reinterpretation of the legislative history of the Sherman Act, both as to affirmative purpose and as to judicial role. I propose a core prescription: the command to disperse economic coordination rights. This core prescription in turn implies three key tasks: taking affirmative steps to contain domination, to accommodate and promote democratic coordination, and to set rules of fair competition.

The normative thread traced here, culminating in an argument about legislative purpose, is interwoven with an argument about institutional roles. The widely held conventional wisdom is that the Sherman Act is the paradigmatic “common-law statute,” entailing a delegation of lawmaking power by Congress to the courts that spans the field of antitrust. The common-law-statute thesis is more than just the proposition that the courts should guide the application of the law as circumstances change. Instead, it has been understood as an effective “blank check” to federal courts to generate the foundational normative criteria according to which the statutory framework will function. But the legislative history of the Sherman Act undermines both the argument for judicial supremacy and the particular prescriptions with which the most pronounced, current episode of judicial lawmaking has been associated. Finally, the Feature briefly sketches the broad outlines of an alternative path for implementing antitrust’s core prescription, emphasizing the potential role of the Federal Trade Commission in administering the moral economy.



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INTRODUCTION

Antitrust law is at a crossroads.¹ In recent years, a number of normative concerns—some of which dissenting voices have long pressed—have reentered the mainstream conversation: instantiating fair economic competition as a real-world process rather than a theoretical ideal;² curbing vertical control³ as a mechanism of economic and market organization and replacing it with more horizontal forms of cooperation;⁴ ensuring substantively egalitarian economic outcomes;⁵ curbing the outsized influence of the economically powerful in elections

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1. William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, 35 ANTITRUST 46, 46, 53 (2021) (noting the view of a former Republican chair of the Federal Trade Commission (FTC) that “the United States stands at the threshold of a major realignment of its competition policy regime,” which has the potential—though yet unrealized—to “restore the primacy of egalitarian values and mobilize sustained efforts to de-concentrate American commerce”); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1656 (2020). This moment is part of a larger one in which settled orthodoxies in many other areas of law and policy, particularly those that shape economic life, have been ruptured and new constructive projects have begun. For a transsubstantive survey, see Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020).
 2. See, e.g., *Nelson/Khan/Kiernan Nominations: Hearing Before the S. Comm. on Com., Sci. & Transp.*, 117th Cong. (2021) (statement of Lina Khan, Nominee for Comm’r of the FTC) (describing “fair competition” as a goal of law and as a defining purpose of the FTC); Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2160 (2013) (positing concern with the “process of rivalry” as an antitrust concern left out by the Chicago Revolution); Harry S. Gerla, *Restoring Rivalry as a Central Concept in Antitrust Law*, 75 NEB. L. REV. 209, 211-222 (1996) (arguing that competition was meant to be defined as rivalry between firms for customers).
 3. See Brian Callaci, *Control Without Responsibility: The Legal Creation of Franchising, 1960-1980*, 22 ENTER. & SOC’Y 156, 178 (2020); Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 L. & CONTEMP. PROBS. 65, 67-72 (2019); Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L. & CONTEMP. PROBS. 45, 62 (2019).
 4. Paul, *supra* note 3, at 87; Sandeep Vaheesan, *Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law*, 1 J.L. & POL. ECON. 28, 29 (2020).
 5. Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 10-13 (2015) (discussing the connection between antitrust and inequality); Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595, 595 (2020) (emphasizing inequality as a consequence, in part, of the current antitrust regime).

and government;⁶ and reorienting consumer protection from a narrow view of consumer sovereignty to substantive goals of fairness and consumer protection.⁷

Building on earlier work reconceptualizing antitrust law as the legal organization of economic coordination,⁸ this Feature deepens and seeks to provide a foundation for the current normative broadening in the antitrust field and ultimately, in adjacent areas relating to market organization.⁹ As normative reconstruction, it may help to guide current reform efforts as well as the interpretation and implementation of the existing antitrust laws. As part of this reconstruction, I reinterpret the legislative history of the Sherman Act, both as to affirmative purpose and as to judicial role. I propose a core prescription: the command to disperse economic coordination rights. This core prescription in turn implies three key tasks: taking affirmative steps to contain *domination*, to accommodate and promote *democratic coordination*, and to set rules of *fair competition*. The notion that antitrust law can be governed by a scientific ideal that transcends contestation over values has understandable appeal but is not logically sustainable. That conclusion both clears the way for and requires particularized normative elaboration, which this Feature aims to provide.

This proposed antitrust prescription draws on a *moral economy* vision, which takes the social coordination of markets as given, and embraces making and implementing normative choices about market construction as a key regulatory task. This vision runs through each of the three sources I primarily consider: the pre-enactment common law of restraint of trade and its antecedents, nineteenth-century antimonopoly politics, and the Sherman Act's legislative history. The common-law tradition generally viewed markets as socially and legally constituted, rather than self-regulating: from this perspective, the key issues were distinguishing between beneficial and deviant coordination, and enforcing rules of fair competition—rather than punishing coordination as such, or promoting competition as such.¹⁰ The nineteenth-century antimonopoly political vision, grounded in a farmer-labor coalition, offered an egalitarian interpretation of moral economy traditions. This vision critically involved both cultivating democratic coordination and containing domination¹¹—or “power with” rather than

6. K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 89 (2017); ZEPHYR TEACHOUT, *BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY* 109-25 (2020); Zephyr Teachout, *The Problem of Monopolies and Corporate Political Corruption*, 147 *DAEDALUS* 111, 118 (2018).

7. Luke Herrine, *The Folklore of Unfairness*, 96 *N.Y.U. L. REV.* 431, 528 (2021).

8. Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 *UCLA L. REV.* 378, 380 (2020).

9. See generally sources cited *supra* notes 2-7 (describing an expanded scope and normative ambition for antitrust and competition law).

10. See *infra* Part I.

11. See *infra* Part II.

“power over,” as it would later be articulated in Progressive thought.¹² Within the moral economy perspective, all markets are understood to be coordinated, and in the antimonopoly vision, democratic coordination is the preferred mode.

The legislative record, too, is continuous with the moral economy framework, which makes sense of legislators’ actions better than an analytical framework that revolves around self-regulating markets. While recovery of legislative purpose in antitrust has recently not been in fashion,¹³ this account builds on an older literature that has shaped the law and broader thinking.¹⁴ I argue that the core prescription suggested by the legislative history is to *disperse economic coordination rights*.¹⁵ This prescription entails both containing domination and accommodating democratic coordination, while also carrying forward the emphasis on fair competition already present in the common-law tradition.

The normative thread traced here, culminating in an argument about legislative purpose, is interwoven with an argument about institutional roles. The widely held conventional wisdom is that the Sherman Act is the paradigmatic “common-law statute,” entailing a delegation of lawmaking power by Congress to the courts that spans the field of antitrust.¹⁶ The common-law-statute thesis is more than just the proposition that the courts should guide the application of

12. MARY PARKER FOLLETT, *Power*, in DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT 95, 101-07 (Henry C. Metcalf & L. Urwick eds., 1940); see also Domènec Melé & Josep M. Rosanas, *Power, Freedom and Authority in Management: Mary Parker Follett’s ‘Power-With,’* 3 PHIL. MGMT. 35 (2003) (discussing Follett’s concepts of “power-over” and “power-with”); BLAKE EMERSON, THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 99 (2019) (discussing Follett); Amy J. Cohen, *A Labor Theory of Negotiation: From Integration to Value Creation*, 1 J.L. & POL. ECON. 147, 175-76 (2020) (discussing Follett, and arguing that her thought advanced a “socialist theory” of negotiation, implying the democratic organization of productive enterprise); *infra* Part V (discussing Follett’s ideas in the context of the Sherman Act).
13. See *infra* Part III. Commentators on many sides of the debate have concluded that the legislative purpose is beyond grasp, and the argument herein contests this conclusion. See, e.g., TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 32 (2018) (“Let us not spend any more time on the impossible task of trying to find the true original meaning of the Sherman Act.”).
14. For a longer discussion of the literature regarding the legislative history of the Sherman Act in relation to affirmative statutory purpose, see *infra* text accompanying notes 124-128.
15. See Paul, *supra* note 8, at 380-82 (arguing that antitrust law necessarily allocates economic coordination rights, and that choices about how to do so constitute the key normative questions in antitrust).
16. The conventional wisdom is just beginning to come up for debate today. Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1206 (2021) (“This view is so widely entrenched in the legal profession’s understanding of the antitrust laws—including, it must be admitted, this author’s—that it seems presumptuous to claim that the conventional wisdom is wrong, or at least significantly overstated. But it is.”). For further discussion of the state of the current debate, see *infra* Part IV.

the law as circumstances change. Instead, it has been understood as an effective “blank check” to federal courts to generate the foundational normative criteria according to which the statutory framework will function.¹⁷

This judicial power enabled the last major paradigm shift in antitrust law,¹⁸ associated with the Chicago School of antitrust thinking.¹⁹ Recent articulations of this judicial primacy reflect how closely connected it is to the substantive content of the legal developments it facilitated: “the Sherman Act can be regarded as ‘enabling legislation’—an invitation to the federal courts to learn how businesses and markets work and formulate a set of rules that will make them work in socially efficient ways.”²⁰ A primary basis for judicial primacy in antitrust law-making is the notion that by adopting the phrase “restraint of trade” in Section 1 of the Sherman Act, Congress “invoke[d] the common law itself.”²¹ As a result, according to proponents, the Sherman Act “effectively authorize[s] courts to create new lines of common law.”²² But the legislative history of the Sherman Act undermines both the argument for judicial supremacy and the particular pre-

17. See, e.g., Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702 (1986) (observing that the Sherman Act “does not contain a program; it is instead a blank check”).

18. See *infra* Part IV (regarding the intertwined character of burgeoning judicial supremacy and the Chicago School revolution); see also Khan, *supra* note 1, at 1678 (“[T]he extraordinary latitude that courts enjoy in crafting antitrust policy helped account for both the relative swiftness with which Chicago’s descriptive and normative claims reoriented antitrust—as well as the stubbornness with which even now-refuted theories remain firmly embedded in case law.”).

19. For a general account of the normative content of the Chicago School revolution, see, for example, George L. Priest, *The Limits of Antitrust and the Chicago School Tradition*, 6 J. COMPETITION L. & ECON. 1, 2 (2010), which notes:

Looking back on those efforts, law and economics, as developed by Director and Coase, was not exactly ideological, but derived from what might be called a deeply held belief system that political interference in market activities interfered with freedom and reduced societal welfare. The phrase “reduced societal welfare” is a modern, technocratic concept. The opposition of Director and Coase to governmental interference in market activities was much deeper.

Other accounts include Ariel Katz, *The Chicago School and the Forgotten Political Dimension of Antitrust Law*, 87 U. CHI. L. REV. 413, 413 (2020); and Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL’Y REV. 235, 268-75 (2017).

20. HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 52 (1985).

21. *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 732 (1988).

22. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544 (1983).

scriptions with which the most pronounced, current episode of judicial lawmaking has been associated.²³ As such, this Feature contributes to a growing literature that focuses on the institutional character of antitrust decision-making,²⁴

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23. Thomas C. Arthur is the only commentator on the topic of judicial power to address directly and somewhat extensively the legislative-history evidence in connection with the Sherman Act. Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 272-91 (1986). While Arthur reaches a similar conclusion regarding Congress's supposed delegation to the courts, in light of common-law precedent, his interpretive approach and its results as to the affirmative statutory purpose are very different than the one presented here. He expressly adopted a view of legislation as a "contract" between divergent interest groups and is skeptical of the notion of legislative purpose, a perspective that tends to undermine the effectuation of broad and underlying normative aims. *Id.* at 274; see *infra* Part III, Section IV.B. He also argued that Congress adopted the proscription of "loose combinations" (i.e., "cartels" or horizontal coordination beyond firm boundaries) as well as the "tight combinations" represented by the late nineteenth-century business trusts, which is not how I read the common-law precedent or Congress's policy choices in light of the moral economy framework that shaped both. Arthur, *supra*, at 289; see *infra* Parts I, III.

Other, important discussions of open-ended judicial lawmaking in antitrust have not primarily or extensively focused upon how the legislative history of the Act bears on that question. See, e.g., Daniel A. Farber & Brett H. McDonnell, "Is There a Text in This Class?" *The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 641 (2005) (arguing that judicial supremacy in antitrust is contraindicated on textualist grounds, but noting that "without delving into the confusing legislative history of the statute or its surrounding political context, it seems fair to say that the Sherman Act was as much designed to stop unfair business methods as to promote competitive markets"); Crane, *supra* note 16, at 1217 (noting that "[a]lthough the Sherman Act's legislative history may be too muddled to be of great help interpretatively, what themes can be gleaned from it are at best mixed" where an open-ended rule of reason, which Crane identifies closely with judicial power, is concerned). Thomas C. Arthur and Daniel A. Crane also identify the onset of judicial lawmaking power in antitrust as an earlier and broader phenomenon than this account does.

24. See, e.g., Daniel A. Crane, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* (2011); Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 362-63 (2018) ("The exclusive [institutional] reliance on case-by-case adjudication" instead of rulemaking has the function of "depriv[ing] both the public and market participants of any real opportunity to participate in the creation of substantive antitrust rules."); Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 J. BUS. L. 645, 674 (2017) (arguing that "[t]he FTC must renounce the narrow efficiency paradigm and reembrace the broad vision of Congress" by changing its interpretation of the FTC Act's prohibition on unfair methods of competition); Khan, *supra* note 1, at 1677-81 (discussing the inextricable connection between antitrust's institutional structure and its normative goals); Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191, 1240-48 (2014) (arguing for deference to administrative agencies); David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 FORDHAM L. REV. 2163, 2166-69 (2013) (discussing how administrative agencies "must balance competing considerations in deciding how to implement the statutes [they are] charged with enforcing"); Rebecca Haw Allensworth, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1284-91

and specifically builds upon an emerging conversation about the role and character of judicial lawmaking power in the field.²⁵

Part I of this Feature addresses the common-law context of the statutory text “restraint of trade,” emphasizing its origins in the moral economy concepts of fair price and fair competition. Part II describes the social-movement context to which legislators were responding—namely, the antimonopoly coalition. Part III reinterprets the legislative history itself, arguing that it establishes an underlying decision rule to disperse economic coordination rights. Part IV argues that the strong form of judicial primacy in antitrust decision-making emerged in tandem with relatively recent legal developments, and that the canonical justifications for this approach rely on the normative economic views with which it is associated. Finally, Part V briefly sketches the beginnings of an alternative path forward for implementing the core antitrust prescription described herein.

I. THE COMMON LAW AND MORAL ECONOMY

A major strand of the common-law antecedents of antitrust law was rooted in the perspective of “moral economy.”²⁶ The moral economy perspective is one in which the social coordination of markets is taken as a given, and the relevant normative question about particular instances of economic coordination is not whether they are anticompetitive in the abstract but whether they are fair or unfair. Elsewhere I have argued that even antitrust law today functions in essentially this way, although its normative reasoning is often suppressed in favor of asking simply whether conduct is anticompetitive or not.²⁷ In the restraint-of-

(2011) (discussing the outsized role of amicus briefs as embodying the judicial reliance on outside economic expertise as a part of judicial decision-making in antitrust, and concluding that interpretation of the Sherman Act should be entrusted in the first instance to an administrative agency).

25. See, e.g., Arthur, *supra* note 23; Farber & McDonnell, *supra* note 23; Crane, *supra* note 16. Generally unlike existing accounts, the argument herein identifies the understanding and exercise of judicial power that arose with the substantive legal developments of the Chicago School revolution as *sui generis*, and as critically shaped by the latter’s analytic and normative commitments regarding the relationship of law to markets. See *infra* Part IV.
26. E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76, 79 (1971) (originating the term in the contemporary literature); see also, e.g., JOHN BOHSTEDT, *THE POLITICS OF PROVISIONS: FOOD RIOTS, MORAL ECONOMY, AND MARKET TRANSITION IN ENGLAND, C. 1550-1850*, at 1-15 (2010) (discussing E.P. Thompson’s creation and use of the term); *infra* Section III.D.1 (elaborating on more recent uses of the term, including its adoption here).
27. Paul, *supra* note 8. For a resonant analysis of section 2 law, see Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 WM. & MARY L. REV. ONLINE (forthcoming 2022), Vaheesan, Sandeep, *The Morality of Monopolization Law* (September 23, 2021). William & Mary Law

trade case law, which formed an important antecedent for the Sherman Act,²⁸ such normative reasoning about acceptable and unacceptable market conduct is more frequently on the surface. Indeed, as discussed herein, many of antitrust law's common-law precedents were animated by notions of fairness: they set out positive rules of fair dealing, often assumed fair or just price as an underlying normative benchmark, and sought to define fair competition as an overall legal goal.²⁹

The more usual approach is to read the common-law tradition through the elite tradition of classical economics or classical political economy (which certainly informed it as well, particularly in the nineteenth century), rather than

Review Online (forthcoming), <https://ssrn.com/abstract=3929159> [<https://perma.cc/N6PK-W3YS>]. Vaheesan notes that while monopolization law uses terms like “anticompetitive” to condemn certain forms of competition, “[t]he normative criteria informing the courts’ interpretation of Section 2 of the Sherman Act [are] implicit.” *Id.* at 2. Many modern commentators have also argued that antitrust law *should* pursue political or moral concerns (primarily, the dispersal of private power) in addition to protecting competition and efficiency, but these interventions have usually been framed by interposing “noneconomic” concerns in addition to or as coextensive with economic ones. See, e.g., Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1140 (1981) (“[E]fficiency defined in terms of serving consumers’ long-run interests and implemented by protecting the competition process is and should continue to be a major goal of antitrust, and that the basic socio-political values of antitrust other than smallness for its own sake coincide with efficiency as so conceived and should continue to guide antitrust policy.”); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051-52 (1979) (“Because interpretations that exclude all but economic concerns have lately become so influential, however, it is important to explain why economic concerns, although properly of paramount importance, should not control exclusively.”). By contrast, the view urged here, in earlier work, and shared by the moral economy framework is that markets cannot be separated from public power—and, thus, that economic and noneconomic concerns are fundamentally intertwined. This means that decisions about the moral constitution of markets cannot be avoided. In one way or another, the law is already making de facto moral determinations.

28. The importance of the common-law notion of restraint of trade, in particular, is evidenced by the text of the Act, the title of the bill and precursor bills, and references to it by Senator Sherman and others. See, e.g., 15 U.S.C. § 1 (2018); 1 LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 64 (Earl W. Kintner ed., 1978) [hereinafter 1 LEGISLATIVE HISTORY] (reprinting S. 3445, “[a bill to] declare unlawful trusts and combinations in restraint of trade and production,” reported by the Senate Finance Committee on September 11, 1888); Arthur, *supra* note 23, at 279 n.66 (discussing Senator Sherman’s appeal to the common law in his description of the bill, including specific references to “combinations in restraint of trade”); see also *infra* Part III (discussing references to the common law in the legislative debates).
29. For a contemporary discussion of competition law that is largely continuous with this older normative framework, see generally Nicolas Cornell, *Competition Wrongs*, 129 YALE L.J. 2030, 2037 (2020). An interesting element of Cornell’s piece is that it places fairness at the heart of competition law, while largely circumventing current debates in the field about whether fairness *should* have anything to do with competition law. In this respect, it is continuous with the framework within which common-law precedents were theorized.

through the popular vision signified by moral economy.³⁰ Reorienting our understanding of antitrust's common-law precedents in this way is significant because it turns us away from the notion of a self-regulating market as a normative benchmark for law, thus also foregrounding questions of fairness as primary and unavoidable. Moreover, the concrete moral economy tradition in which these precedents were embedded was the very same one that led to E.P. Thompson's coinage of the term "moral economy," itself grounded in a popular movement. While the common law itself was heterogenous, the fact that antitrust has roots in this soil of moral economy is both significant and largely neglected.

Approaching the common law through a moral economy lens ultimately also invites an interpretive reorientation regarding the Sherman Act's legislative history.³¹ This is important not only for understanding the affirmative legislative purpose, but also because the statutory language invoking the common law of restraint of trade is one of the primary bases for the inference of congressional delegation to courts.

A. *Traditional Market Regulation and the Moral Economy*

The common-law antecedents of antitrust law are best understood in the context of traditional market regulation, or the old moral economy. Antitrust law has its ultimate origins in the doctrines of forestalling, regrating, and engrossing.³² The beginnings of these doctrines seem to extend more or less as far back as the common law itself.³³ Narrowly, forestalling can be defined as an attempt to sell above the customary price, or otherwise to conduct transactions outside marketing hours and rules; regrating can refer simply to specific methods of selling at a profit; and engrossing to buying up crops in the field or prior to coming to market.³⁴ More broadly, however, these "marketing offenses" largely sought

30. See, e.g., Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1029-38 (1989).

31. See *infra* Part III.

32. WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 51-52 (1981); William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. ON REG. 721, 723 n.2 (2018); Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 762-66 (1955). Chief Justice White, while applying the Sherman Act to Standard Oil's network of acquisitions through intracorporate stock ownership, noted that these doctrines were the basis for modern regulation of monopoly and trade. *Standard Oil Co. v. United States*, 221 U.S. 1, 50-60 (1911).

33. See, e.g., Wendell Herbruck, *Forestalling, Regrating and Engrossing*, 27 MICH. L. REV. 365, 365 (1929) (examining the medieval roots of these doctrines).

34. William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 368 (1954) (describing the evolving definitions of the marketing offenses and noting that as a

to contain violations and disruptions of the traditional market order, and to some degree viewed profit-seeking behavior of many kinds as suspect in itself.³⁵ Notably, buying up goods (particularly foodstuffs, crops, and other necessities of life) for resale, particularly in a single local area where the seller did not contribute transportation as a substantial additional value, was an inherently suspect activity subject to regulatory scrutiny.³⁶

The marketing offenses, and traditional market regulation more generally, were in turn steeped in the concept of “just price.”³⁷ Late medieval prices were traditionally administered in the context of the social institutions of markets and fairs, and in the context of craft guilds and municipal regulation, which were inherently seen as embedded in ethical relations between people.³⁸ Confining exchange to these socially managed contexts was thus one important secondary aim of moral economy regulation.³⁹ In this context, economic coordination would be evaluated in terms of whether it was a departure from these socially administered prices. Economic coordination was not frowned upon per se. On the contrary, fair prices were themselves the product of social coordination. Thus, none of these doctrines can be understood as disfavoring economic coordination as such or as disfavoring coordination that deviates from the ideal com-

group, they later came to be associated with the notion of “cornering the market,” as in coming to control sufficient market share to exert control over prices).

35. *Id.* at 356-66, 379-81; Thompson, *supra* note 26, at 83-88, 95-96.
36. Herbruck, *supra* note 33, at 377; *see also* An Acte Against Regratours Forestallers and Engrossers 1551-52, 5 & 6 Edw. 6 c. 14 (Eng.) (defining forestalling as, inter alia, buying goods on their way to market or port, or contracting to do the same).
37. *See generally* Boyd, *supra* note 32, at 731-32 (tracing the history of the just-price concept to Saint Thomas Aquinas and, through him, to Aristotle); Thompson, *supra* note 26, at 79-88 (discussing the popular assertion of the doctrines of forestalling and engrossing as a continuation of the tradition of just price in the eighteenth century); Robert C. Hockett & Roy Kreitner, *Just Prices*, 27 CORNELL J.L. & PUB. POL'Y 771 (2018) (discussing some of the leading historical and contemporary economic and philosophical arguments regarding just price).
38. Boyd, *supra* note 32, at 736-39 (surveying historical scholarship on the just-price concept). William Boyd concluded that the best-informed recent scholarship shows that the medieval concept of just price could not be reduced to the price produced by competition, and that as “a way of regulating prices, just price was grounded in a broader set of customs and norms within particular communities. The idea that the economy constituted a sphere of activity separate from social, political, and ethical relations made little sense.” *See id.* *See generally* ODD LANGHOLM, *THE LEGACY OF SCHOLASTICISM IN ECONOMIC THOUGHT: ANTECEDENTS OF CHOICE AND POWER* (1998) (delineating how medieval scholastics influenced economics and exchange).
39. Herrine, *supra* note 7, at 446 (“One crucial part of traditional moral economy regimes was to force as many transactions as possible to take place within public markets and to impose detailed regulations on those markets in an attempt to standardize those transactions.”).

petitive price. The moral economy perspective, like the view of market governance that I draw on here, simply did not consider prices given by a self-regulating competitive market as the relevant normative benchmark.⁴⁰

The marketing offenses informed the way English common law was brought to bear upon private attempts at price coordination in the eighteenth century, which (as further discussed below) gave rise to decisions that are still invoked in accounts of the Sherman Act's origins. As the traditional market order in England was increasingly frequently disrupted and as markets expanded geographically over the course of the eighteenth century, the concepts of forestalling, regrating, and engrossing were reasserted by an agrarian-consumer movement

40. Setting aside the question of whether it is desirable, a growing literature raises significant questions about whether a normative benchmark based on a self-regulating competitive market is analytically sound. As Nathan Tankus and Luke Herrine argue, even commodities exchanges, typically taken to be among the closest approximations of perfect competition, are coordinated at both the formal level (the rules and customs of the exchange itself) and the informal level (insofar as traders rely on historical pricing patterns and dealers tend to “carefully manage[] [spot prices] because of their reverberating impact on price setting processes in related and connected markets”). Nathan Tankus & Luke Herrine, *Competition Law as Collective Bargaining Law*, in CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW (forthcoming 2022) (manuscript at 4-6) (on file with author); see also William Boyd, *Ways of Price Making and the Challenge of Market Governance in US Energy Law*, 105 MINN. L. REV. 739, 820-27 (2020) (discussing formal and informal coordination in energy markets). Such coordination, including price coordination, likely exists in all markets in some form or another. Tankus & Herrine, *supra* (manuscript at 7); see also, e.g., NEIL FLIGSTEIN, *THE ARCHITECTURE OF MARKETS: AN ECONOMIC SOCIOLOGY OF TWENTY-FIRST-CENTURY CAPITALIST SOCIETIES* 27-35 (2018) (discussing the idea of markets as structured institutions with “social relations between competitors to govern competition”); FREDERIC S. LEE, *MICROECONOMIC THEORY: A HETEROODOX APPROACH* 189 (Tae-Hee Jo ed., 2018) (describing the role of coordination within and between business enterprises). Importantly, the character and content of this price coordination is itself contingent: it could be done in some other way, resulting in different prices and other outcomes, and both it and the negative space it implies—the coordination that *doesn't* take place—is reliant upon and shaped by (again, contingent) *legal* choices. Paul, *supra* note 8, at 382-401, 413-29; see also Hockett & Kreitner, *supra* note 37, at 782-83 (“Prices do not ‘just happen’ in a completely decentralized and uncoordinated manner. Markets have to be made, infrastructures supplied, units of account determined and managed, rules established as to what counts as property Market creation and market maintenance are the products not of spontaneous genesis, but of institutional design, legislative action, and judicial decision. Even more importantly, they do not set an immutable baseline leaving disorganized parties to play a game of price with eternally fixed rules. Instead, collective, organizational [and public] decisions play a central role in manufacturing and moving prices Less obviously yet more pervasively, the price system cannot actually circumvent inherently contestable valuation, because money itself is disseminated and managed via centralized decisions that directly affect prices.” (footnotes omitted)); Robert C. Hockett & Saule T. Omarova, “Private” Means to “Public” Ends: Governments as Market Actors, 15 THEORETICAL INQUIRIES L. 53, 62-65 (2014) (discussing “market-moving on the part of [both] government instrumentalities” and private parties); Tae-Hee Jo, *What If There Are No Conventional Price Mechanisms?*, 50 J. ECON. ISSUES 327, 332-37 (2016) (discussing institutionalist criticisms of the neoclassical price mechanism).

made up largely of rural poor people injured by the disruptions. This reassertion was steeped in what E.P. Thompson, in his account of that movement, called the “old notions of right” associated with just price and the traditional market order.⁴¹ Wendell Herbruck explains: “In the eighteenth century public spirited citizens offered rewards for the detection of forestallers, who were described as ‘public enemies.’ They were the subject of much vilification in the pulpit and in Parliament”⁴² This movement and the sentiment associated with it was not about preserving prices set by open competition. Rather, it was about preserving the moral economy, or traditional market regulation, against new types of profit-seeking conduct among sellers enabled by the geographical expansion of markets: the bottom-up social movement was about collectively and fairly “setting the price.”⁴³ It was also very concretely about agrarian working people’s moral claim to their daily bread.⁴⁴ In the particular context, this project of preservation involved asserting the rights and interests of working people qua consumers – and specifically qua consumers of basic caloric necessities – but that fact did not imply the priority of consumer interests as such over producer interests as such. On the contrary, the notion of just price was meant to incorporate both perspectives: the “old moral economy of provision” and the traditional organization of “industry and trade.”⁴⁵ Indeed, Thompson himself said that “[t]he consumer defended his old notions of right as stubbornly as (*perhaps the same man in another role*) he defended his craft status as an artisan.”⁴⁶

While in one sense “all economies are moral economies: all differentiate and hierarchize between good and bad, high and low, legitimate or illegitimate, and the market economy is no exception,” economic systems do vary in the extent to which they acknowledge this essential normative structuring and, therefore, in how they go about it.⁴⁷ I would suggest that we understand “moral economy” both as an *approach* to understanding law and markets – one that acknowledges

41. Thompson, *supra* note 26, at 132; *see also* Boyd, *supra* note 32, at 740 (“As articulated by Thompson, the moral economy of the crowd incorporated the idea of just price as a customary practice of establishing fairness in market exchange and regulating the prices of food and other necessities during times of dearth.”).

42. Herbruck, *supra* note 33, at 365-66.

43. Thompson, *supra* note 26, at 108.

44. *Id.*

45. *Id.* at 132, 136.

46. *Id.* at 132 (emphasis added).

47. Marion Fourcade, *The Fly and the Cookie: Alignment and Unhinging in 21st Century Capitalism*, 15 SOCIO-ECON. REV. 661, 665 (2017). William Boyd notes that “[s]ome economies and economic relationships . . . are more overtly normative than others in terms of the manner in which custom, tradition, and values are mobilized in the regulation or governance of economic activity.” Boyd, *supra* note 32, at 740.

the essential role of law and other normative choices in structuring any market, and that embraces making and implementing those normative choices in market construction as a key regulatory task—and as the type of *system* that results from that approach.⁴⁸ Importantly, the acknowledgment of these tasks makes possible (though it does not require) carrying them out in a manner that is open and democratic, rather than tacitly folded into other technocratic determinations.

Classical economics arrived in time to criticize the marketing offenses and their popular revival. Adam Smith, notably, dismissed the enthusiasm for enforcing the old doctrines of forestalling, engrossing, and the like as irrational, superstitious prejudice.⁴⁹ Even while Smith dismissed prosecutions for forestalling and engrossing as akin to the persecution of putative witches, he also famously condemned the traditional guilds and companies that organized non-agricultural production as “conspiracies against the public,” specifically to raise prices.⁵⁰ In fact, Smith has been cited by antitrust historians in evaluating precedents for the law of horizontal price fixing.⁵¹ For Smith, the price-setting of the

48. What this leaves out, importantly, is the *content* of those normative choices, which may be substantively hierarchical or democratic, extractive or egalitarian. As discussed further in Part II *infra*, I also suggest we understand the antimonopoly tendency that gave rise to the Sherman Act as a specific application of moral economy: one that chooses relatively democratic and egalitarian rules and market-governance structures.

49. Adam Smith compared people’s enthusiasm for traditional market regulation, that is, doctrines like forestalling, regrating and engrossing, to the popular fear of witchcraft:

The popular fear of engrossing and forestalling may be compared to the popular terrors and suspicions of witchcraft. The unfortunate wretches accused of this latter crime were not more innocent of the misfortunes imputed to them, than those who have been accused of the former. The law which put an end to all prosecutions against witchcraft, which put it out of any man’s power to gratify his own malice by accusing his neighbor of that imaginary crime, seems effectually to have put an end to those fears and suspicions, by taking away the great cause which encouraged and supported them. The law which should restore entire freedom to the inland trade of corn, would probably prove as effectual to put an end to the popular fears of engrossing and forestalling.

ADAM SMITH, *THE WEALTH OF NATIONS* 500 (Edwin Cannan ed., Random House, Inc. 1937) (1776).

50. *Id.* at 128 (“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”).

51. See, e.g., John C. Peppin, *Price-Fixing Agreements Under the Sherman Anti-Trust Law*, 28 CALIF. L. REV. 297, 317 n.76 (1940) (quoting Smith on trade societies as conspiracies to raise prices). John C. Peppin argued that early English precedents embodied a rule disfavoring horizontal price setting as such (a point that is disputed in the next Section), and he cited Smith as evidence that the practice was common at the time. *Id.* Yet Peppin did not note Smith’s unfavorable comments about prosecutions of forestalling and engrossing, even though contemporaneous prosecutions of price fixing were fundamentally continuous and overlapped with those offenses. See *infra* Section I.B.

forestallers and engrossers who were *disrupting* customary market structures was beneficial, while the price coordination inherent in guilds and trade associations that were *part of* the moral economy was a harmful distortion of the market.⁵²

Classical economics is particularly significant as a foil for moral economy because, while it differs in important respects from the neoclassical perspective that dominates antitrust theory today, it shares with the latter the ideal of a “self-governing market,” in sharp contrast to the moral economy approach.⁵³ As further discussed below, the political and economic vision of the American coalition that later pushed for antitrust regulation was in essence a continuation and application of the moral economy vision and traditions, while nineteenth-century economists were indifferent to antitrust legislation at the time of passage.⁵⁴

The statutes relating to the marketing offenses, sounding so clearly in the register of moral economy, were eventually repealed.⁵⁵ But their presence and influence on the common law did not disappear so easily.

B. *The Common Law of Restraint of Trade*

The assertion that the common law of restraint of trade was fundamentally concerned with deciding between fair and unfair competition is not controversial. Indeed, in one sense, it is trivial. Forestalling, regrating, and engrossing – and the moral economy milieu in which these doctrines were embedded – continued to shape the common law as it came into recognizable modern form.⁵⁶ And the basic concern with fair and unfair competition survived even as the

52. Among other things, this highlights the extent to which case law that would later be claimed as part of the antitrust tradition was made of the same stuff as the old moral economy, rather than the stuff of the new classical economics. See *infra* Section I.B.

53. Karl Polanyi described the genesis of the self-governing ideal in the debates over changes to the English Poor Laws: “In this struggle the slogan of interventionism was coined by the classical economists and Speenhamland branded an artificial interference with an actually non-existent market order.” KARL POLANYI, *THE GREAT TRANSFORMATION* 231 (2001).

54. See *infra* Section II.D.

55. Herbruck, *supra* note 33, at 386-88. The last general statute referring to forestalling, regrating, and engrossing seems to have been An Acte Against Regrators Forestallers and Engrossers 1551-52, 5 & 6 Edw. 6 c. 14 (Eng.) (defining forestalling as buying goods on their way to market or port, contracting to do the same, or attempting to enhance prices; defining regrating as buying and reselling goods within four miles of the original purchase; defining engrossing as buying grain growing in the field or as other purchase with the intent of domestic resale; and providing various exceptions).

56. See generally Dewey, *supra* note 32 (discussing the presence and influence of forestalling, regrating, and engrossing in the common law as it stood prior to enactment). In his influential account of the common law that shaped the Sherman Act, William L. Letwin also acknowledged the close connection between it and the common-law decisions censuring the price coordination of sellers. Letwin, *supra* note 34, at 368-73.

broader context of the moral economy began to fade, and as laissez-faire concepts came to inform the law.

This general point can be illustrated by considering a particular legal issue that later commentators have found vexing: the extent to which the common law censured horizontal economic coordination beyond firm boundaries, considered to be at the very heart of competition wrongs today.⁵⁷ Broadly speaking, the core body of restraint-of-trade law was tolerant of horizontal price coordination (unless it offended norms of fairness in some specific way), with two apparent exceptions at opposite temporal ends of that body of law—one involving market disruptions in eighteenth-century England and the other involving the rise of trusts in late nineteenth-century America.

Still, as a general matter, nineteenth-century restraint-of-trade common law was relatively tolerant of price coordination as such between horizontally placed enterprises, a practice that was conventional as well as consistent with the social price-setting of traditional market regulation.⁵⁸ John C. Peppin undertook perhaps the most comprehensive survey of the horizontal-price-fixing cases, concluding that “the American common law authorities prior to 1890 did not support the proposition that agreements directly fixing prices were unlawful *per se*,”

57. *Verizon Commc'ns, Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (describing “collusion” as the “supreme evil of antitrust”); *see also* *United States v. Apple, Inc.*, 791 F.3d 290, 297 (2d Cir. 2015) (arguing that “the dissent’s conclusion rests on an erroneous premise: that one who organizes a horizontal price-fixing conspiracy—the ‘supreme evil of antitrust’—among those competing at a different level of the market has somehow done less damage to competition than its co-conspirators” (citation omitted)); Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 *ANTITRUST L.J.* 527, 527 (2013) (“When the term ‘hard core’ is applied to an antitrust violation, or the ‘supreme evil’ of antitrust is identified, the reference is invariably to cartels.” (footnotes omitted)).

This debate was significant early in the development of antitrust law, with *United States v. Trans-Missouri Freight Ass’n*, 58 F. 58, 82-83 (8th Cir. 1893), *rev’d*, 166 U.S. 290 (1897), and *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 299-300 (6th Cir. 1898), coming to opposite conclusions regarding the state of the common law. Notably, these decisions assumed that the outcome at common law controlled the outcome under the Sherman Act, and did not claim for courts the power to decide the rule de novo.

58. I do not discuss nineteenth-century English cases much here. However, it is not particularly controversial that English law in this period was, if anything, even more tolerant of horizontal price and market coordination, and that this tendency persisted. *See, e.g.*, TONY FREYER, *REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA 1880-1990*, at 1-10 (1992) (noting that the tendency to accommodate informal or even formal price coordination persisted for decades longer in the United Kingdom, which remained relatively tolerant of even overt cartelization until after World War II).

nor did the common law hold that other arrangements for eliminating competition between the parties to the agreement were unlawful per se.⁵⁹ In the ten cases dealing solely with horizontal price-fixing, Peppin found that seven of the agreements were “held valid,” while of the three invalid agreements, one was rejected because the prices set were unreasonable and one was rejected because of the extent of control over the market.⁶⁰

Peppin’s analysis would seem to leave at least one American decision that found price-fixing as such to be a restraint of trade (or, in some other manner, a tort or an offense) at common law, but this is not so.⁶¹ In the remaining case where a court invalidated a price-fixing agreement, *Central Ohio Salt Co. v. Guthrie*, the Ohio Supreme Court simply declined to enforce an agreement among salt manufacturers setting minimum prices, which the association had sought to enforce against an offending member.⁶² Conversely, some of the cases finding price-fixing agreements lawful did not merely involve courts declining to prosecute the colluders, but affirmative judicial enforcement of the agreements.⁶³ Thus, if anything Peppin slightly understated the American courts’ toleration of horizontal price-fixing, at least among smaller producers and dealers.⁶⁴ Notably,

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59. Peppin, *supra* note 51, at 350; see also Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 938 (1988) (“Under the notion of competition prevailing among late nineteenth century jurists, courts did not perceive simple price fixing, without coercion directed at those unwilling to participate, to be particularly harmful.”); HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 185 (1955). Note that Herbert Hovenkamp based his conclusion that simple price-fixing was generally not considered illegal at common law upon the prevalence of the classical rather than the neoclassical notion of competition at the time—while the case for this conclusion is even stronger when one considers the persistent salience of the moral economy perspective on markets and regulation. Cf. Arthur, *supra* note 23, at 282 (“[M]ost American courts in the late 1800’s applied a per se rule against enforcement of cartel agreements.”).
60. Peppin, *supra* note 51, at 336-38 (collecting cases).
61. The decision Peppin names is *Central Ohio Salt Co. v. Guthrie*. See *id.* at 337-38.
62. 35 Ohio St. 666, 671-72 (1880) (holding the contract void as against public policy and opining that “[w]e think the contract before us should not be enforced”).
63. See, e.g., *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 523, 527-28 (1880) (affirming damages judgment against defendant, one of twenty-four stone-quarry operators and signatories to a local price-setting agreement, for violating agreement).
64. It is worth noting that early cases disfavoring noncompete agreements are sometimes also cited in support of a stance against price-fixing. Noncompete agreements were a critical part of the origin of the restraint-of-trade doctrine. See, e.g., THORELLI, *supra* note 59, at 17-20. Such restraints were (and are) fundamentally different from price coordination because, particularly in the context of their origins among craftspeople and other individuals, they threatened to prevent someone from practicing his or her trade altogether, thus posing a harm both to him and to society. See, e.g., Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 629 (1960) (discussing the famous early case *Mitchell v. Reynolds* [1711] 24 Eng.

the Missouri Supreme Court enforced a price-setting agreement among stone-quarry operators in a decentralized market (twenty-four operators in just one district of St. Louis) in part on the ground that it was not “made by large companies or corporations.”⁶⁵

This aspect of the restraint-of-trade law is best understood through a moral economy lens, rather than in terms of a generic directive to promote competition.⁶⁶ Even as of the 1870s, “the social management of manufacturing industries was not deviant.”⁶⁷ Through much of the nineteenth century, American markets were socially ordered through extensive local regulation and custom, including price regulation as well as common-law and municipal prohibitions on offenses such as forestalling.⁶⁸ This included, for example, formal and informal extensions of the assize of bread, itself at the heart of traditional market regulation.⁶⁹

Rep. 347 (QB) and noting that the “presumption of invalidity stems from the ‘mischief’ which the restraints may cause, first, in the possible loss of the covenantor’s means of earning a livelihood and, second, in the loss to society of the services of a useful member”). Meanwhile, price coordination between sellers, as described in this Section, was generally understood as a market-governance mechanism for the practice of that trade and for its reproduction.

65. *Skrainka*, 8 Mo. App. at 523, 525.
66. In this sense, “moral economy” refers to a system in which markets are self-consciously morally ordered—however flawed or imperfect that morality may have been in a particular context. See Boyd, *supra* note 32, at 740 (“This idea of a moral economy, it should be emphasized, is not intended in a prescriptive sense. Rather, it is used here as a descriptive term to capture the pervasive role of customs, norms, and values in regulating economic behavior in various times and places.”).
67. WILLIAM G. ROY, *SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA 189* (1997). William G. Roy notes the examples of the Gunpowder Trade Association, whose organizing documents declared that it would meet quarterly “for the purpose of establishing prices if need be”; iron-bit manufacturers; and ax manufacturers. *Id.*
68. William Novak has called this the “well-ordered market”: the question was not *whether* there should be economic regulation (or coordination) with an aim to the communal good, but what sorts of regulation (or coordination) would achieve that common good. See William J. Novak, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 83-113 (1996) (arguing that the approach to economic life in early America involved a deep integration of market and state); William J. Novak, *Public Economy and the Well-Ordered Market: Law and Economic Regulation in 19th-Century America*, 18 L. & SOC. INQUIRY 1 (1993) (same). On municipal forestalling ordinances, see, for example, *BY-LAWS AND ORDINANCES OF THE MAYOR, ALDERMAN AND COMMONALTY OF THE CITY OF NEW YORK* 80 (1839), which prohibited forestalling and combinations to raise the price of goods. Roy notes that “[m]ost industry was organized in local or regional communities that effectively prevented market dynamics from consistently undermining collective interests.” ROY, *supra* note 67, at 178-79.
69. Jeremy Fisher, *Feeding the Million: Markets, Metabolism, and the Transformation of the Food System in New York City, 1800-1860*, at 147-53 (Dec. 2012) (Ph.D. dissertation, Pennsylvania State University) (ProQuest) (discussing the assize of bread in New York City, where in addition to regulating quality, the weight of loaves—of standard prices—was set according to the price of flour and a predetermined rate of profit). The Assize of Bread in the British context is further discussed below.

In other words, numerous business practices, including prices, were socially coordinated at varying degrees of formality at the local or regional level. In this context, horizontal coordination among sellers was simply one practical aspect of this social management of markets. Problems would arise when sellers colluded in ways that defied community norms. This became a more systemic problem when markets expanded relatively quickly, disrupting older market rules and frequently displacing smaller local firms with larger national ones.

As the Missouri Supreme Court noted while enforcing a price-fixing agreement among local, small producers in 1883, “the odious nature of monopoly . . . has become more apparent,” posing a “danger . . . from the accumulation of wealth and power in the hands of great corporations, and the abuses by which large capitalists may so combine as to relax or destroy competition in trade.”⁷⁰ This accumulation of power occurred as business coordination transitioned from simple associations to “pools” and finally to formal trust arrangements in the years after the Civil War, when transportation networks improved and the geographical scope of markets expanded, disrupting and reorganizing patterns of economic coordination.⁷¹ Pools were a kind of intermediate stage between cartels and trusts in terms of the degree to which ownership and control was centralized. They varied quite widely in the extent of integration between participant enterprises: a typical variant was a joint-selling agency that set prices and in which output was “pooled.”⁷² The transitions to pools and then to trusts represented moves toward greater degrees of centralized ownership and control (as did the later transition to single, massive corporations), and this prompted a response from the same courts that had enforced price-fixing agreements among small local producers.

An example of a case involving a pool is *Craft v. McConoughy*⁷³ — one of the primary cases cited by those commentators who argue that the American restraint-of-trade cases did condemn horizontal economic coordination beyond firm boundaries as such.⁷⁴ The dispute involved a grain pool in Rochelle, Illinois; the price-fixing arrangement was held unenforceable both because it had established a monopoly and because the participants had the power to control entry into the market on the basis of their property ownership. “All the ware-

70. *Skrainka*, 8 Mo. App. at 526.

71. THORELLI, *supra* note 59, at 73-76.

72. See generally ROY, *supra* note 67, at 183-92 (providing a historical description of the pool).

73. 79 Ill. 346 (1875).

74. E.g., Arthur, *supra* note 23, at 289 n.123; Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 22 n.40 (1966); see also *infra* Part III (discussing this aspect of Bork's argument in connection with the legislative purpose).

houses in the city, and every lot suitable to erect a warehouse upon, were controlled by the [grain pool]” and it “attempted to control and monopolize the entire grain trade of the town and surrounding country.”⁷⁵ In *Craft*, the court applied a legal framework for assessing restraints of trade in which it asked whether the restraint in question afforded only “fair protection” to the interests of the contracting parties, and did not constitute so great a restraint as to “interfere with the interest of the public.”⁷⁶ That framework did not imply a rule against price coordination per se, as indeed the Missouri Supreme Court noted when distinguishing it not long after.⁷⁷

The other case often cited in favor of the conclusion that the common law condemned simple price-fixing⁷⁸ is *Chicago Gas-Light & Coke Co. v. People’s Gas-Light & Coke Co.*⁷⁹ This was a case in which the court simply *declined to enforce* a horizontal market-allocation agreement (dividing up regions of Chicago for the provision of gas).⁸⁰ But not only that: the Illinois Supreme Court relied specifically on the public character of the corporation, its consequent duties to the public, and the resulting fact that the power to enter into such an agreement (which contravened its duty to provide services to the public) was ultra vires in consideration of its corporate charter.⁸¹ The court came close to implying, if it did not outright imply, that the contract *would* have been legal if the corporations involved had been ordinary ones rather than ones imbued with special public duties.

Thus far I have discussed late nineteenth-century American cases, where we find that courts condemned horizontal coordination mainly only where it was accompanied by new concentrations of economic power, or posed some other specific harm to the public. Sometimes, however, earlier cases, mainly dating to eighteenth- or late seventeenth-century England, are also cited for the proposition that the common law, or certain strands of it, condemned horizontal price coordination.⁸² But that group of cases is also the one most fully embedded in

75. *Id.* at 348-49.

76. *Id.* at 350.

77. *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 526-27 (1880) (distinguishing *Craft*); *see also* Peppin, *supra* note 51, at 339-41 (discussing cases involving pools, including *Craft*).

78. *E.g.*, Arthur, *supra* note 23, at 289 n.123; Bork, *supra* note 74, at 22 n.40.

79. 13 N.E. 169 (Ill. 1887).

80. *Id.* at 174-76.

81. *Id.* at 172-74, 176. Moreover, the attribution of public duties to corporations is itself a part of nineteenth-century moral economy concepts and has little to do with embracing a self-regulating market as the primary normative benchmark.

82. *See, e.g.*, Peppin, *supra* note 51, at 317-24 (summarizing cases).

the original context of moral economy, and thus in traditional moral economy concepts.

Price regulation, particularly relating to standard foodstuffs such as bread and ale, forms a critical background to understanding the marketing offenses and price-fixing prosecutions of this period. The leading source on the Assize of Bread, “by which the justices of the peace had periodically to regulate the price of wheaten bread,” notes that it was “a mere surviving remnant from an extensive system of regulating the price of provisions, dating, probably, from Anglo-Saxon times.”⁸³ The Assize worked by periodically fixing the weights of loaves of bread sold at certain standard prices (such as a penny for a “penny loaf”), calculating backward in order to guarantee the maker a reasonable profit or allowance after costs.⁸⁴ Marketing and price-fixing cases prior to the nineteenth century—that is, precisely when these cases were most likely to be prosecuted successfully—took such socially coordinated prices, rather than the theoretical price set by open competition, as the normative benchmark.

For instance, *King v. Starling*⁸⁵ contains a dictum concerning the price of pepper⁸⁶ that has sometimes led it to be cited in favor of the common law’s condemnation of horizontal price coordination. The decision, though, seems to be quite clearly rooted in the normative framework of traditional market regulation. The case involved an alleged conspiracy by brewers in London to sell beer only in small quantities, thereby taking away the “gallon trade.”⁸⁷ The court repeatedly characterized the conspiracy in terms of “meet[ing] and consult[ing] to depauperate the [farmers].”⁸⁸ This does not seem to be a general statement against horizontal price coordination. Rather, *Starling* indicates that specific sorts of price coordination by sellers were unacceptable—not as such, but precisely to the extent that they pauperized the farmers. And when judges were willing to listen to the farmers’ demands in these cases, they were precisely preserving the old moral economy, not subverting it in favor of a policy of competition for its own

83. Sidney Webb & Beatrice Webb, *The Assize of Bread*, 14 ECON. J. 196, 196 (1904).

84. *Id.* at 197-98; Alan S.C. Ross, *The Assize of Bread*, 9 ECON. HIST. REV. 332, 332-33 (1956); Fisher, *supra* note 69, at 145.

85. (1663) 1 Keb. 650.

86. See Peppin, *supra* note 51, at 317-18.

87. *Starling*, 1 Keb. at 650. Compare this account with Peppin, *supra* note 51, at 317, who says that the conspiracy was to *refuse* to brew small beer. Rather, the opinion seems to say that the conspiracy was to end the gallon trade and *only* to brew small beer, for three months.

88. *Starling*, 1 Keb. at 650.

sake or embracing the self-regulating market as a normative benchmark.⁸⁹ Other eighteenth-century cases extending the older offenses of forestalling, regrating, or engrossing at common law are in accord.⁹⁰ These cases, whether they expressly invoke the old doctrines of forestalling and engrossing or not, are best understood in terms of the courts' support (for a time) for the norms contained in traditional market regulation.⁹¹

I have dwelled on the common-law authorities' stance on horizontal price coordination, in particular, because this activity is especially at odds with the

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89. Notably, ale was also one of the central goods subject to an assize. See, e.g., Ross, *supra* note 84, at 336-41 (documenting the English Assize of Bread and Ale). One local example is provided by the Town Council records of Haddington, Scotland: "Bakers were ordered to bake only good quality bread with a 4d. loaf weighing 22 oz. A boll of wheat was to be sold for 30s. Bread was not to be left unweighed, under threat of penalty contained in previous Acts . . . quality ale was to be sold for 4d per pint." *Extracts from Council Records of the Burgh of Haddington*, in 2 HISTORY OF A ROYAL BURGH 46, 59 (Gerald Urwin trans., 2002).
90. For instance, as part of the discussion of his claim that early English authorities were hostile to agreements to fix prices, Peppin cites *King v. Waddington* [1800] 1 East 143 (KB). Peppin, *supra* note 51, at 316-17 (specifically arguing that *Waddington* extended repealed statutory offenses at common law). Yet *Waddington* did not involve a price-fixing agreement among several sellers at all; instead, it involved a rich (if ultimately unfortunate) London merchant who challenged brewers' control over the hops market by allegedly seeking to corner it, buying up a large quantity of hops with the supposed intention of purposely causing a scarcity. Douglas Hay, *The State and the Market in 1800: Lord Kenyon and Mr Waddington*, 162 PAST & PRESENT 101, 117 (1999). Lord Chief Justice Kenyon, who seems to have been in large part responsible for the continuation of the marketing offenses at common law, see *id.* at 102 ("After Kenyon's death in 1802 further prosecutions for marketing offences were quietly dropped; by 1816 the treatise writers declared that the law, so loudly proclaimed by the judges and so dramatically enforced at the expense of Mr Waddington, was dead."), was quite expressly concerned with injuries to the poor from excessive prices (and with quelling riots over food prices by showing the law was active), see *id.* at 125 ("What [Kenyon] found important was the immorality of playing the markets, the nefariousness of starving the poor.").
91. Early English cases involving combinations by journeymen or laborers (which Peppin cites alongside cases involving price-fixing by sellers) derive from a separate line of regulation and arguably a different set of social concerns, but similarly involve deviation from socially sanctioned coordination, rather than deviation from competition. For example, in *R v. Journeymen-Tailors of Cambridge* (the first known labor-conspiracy case, and cited by Peppin), the court noted that the journeymen tailors refused to work for wages less than demanded, which were "more than is directed by the statute." 8. Mod. 10, 11 (1721) (referring to tailors' wages set by statute). The notorious Combination Acts of 1799 and 1800 expressly targeted journeymen's combinations. JOHN V. ORTH, COMBINATION AND CONSPIRACY: A LEGAL HISTORY OF TRADE UNIONISM, 1721-1906, at 44-50 (1991). But in addition to the Combination Acts, in numerous sectors wages and hours had been directly set by statute, providing a predicate for common-law conspiracy with the object of setting wages or hours that differed from the statutory rates. *Id.* at 14-16. This is important because again, the underlying wrong did not involve deviating from the price set by open competition, but from a *socially set price*. The common-law regulation of labor coordination is covered in much greater detail in separate forthcoming work.

ideal of a self-governing market. One important and largely overlooked explanation for the complex attitude of the common law is that it was embedded in a vision of markets in which economic coordination was straightforwardly evaluated according to substantive normative criteria, rather than censured as deviant in itself. The roots of this body of law in the marketing offenses, and the close connection between the latter and organized agitation by poor people to influence market organization, foreshadow subsequent developments in the context of American antimonopoly politics.

II. THE ANTIMONOPOLY COALITION

The moral economy background of the common law was heterogenous and nebulous in various ways, but the antimonopoly coalition that took up its legacy in the nineteenth-century United States gave it more defined contours. This process would prove pivotal to the eventual passage of federal antitrust legislation. In this more sharply egalitarian interpretation of moral economy, the twin ideas of containing domination and cultivating cooperation – power-with rather than power-over – emerged.

The antimonopoly coalition arose in response to the rise of corporate power in the late nineteenth century and the attendant reorganization of existing patterns of economic coordination. It aimed both to cultivate cooperation among and between workers, farmers, and small producers, and to contain domination through a variety of legal reforms. In developing its own popular vision of law and markets, the antimonopoly coalition can be understood as effectively repurposing old moral economy ideas and traditions, while moving them in discernibly egalitarian and democratic directions. Ultimately, the vision embodied by this constellation was the dispersal of economic coordination rights.

A common theme of antimonopoly politics was to contest the concentration of coordination rights represented by the trusts and by the corporations with which they were interchangeable in functional terms and in social imagination. Richard White writes that “[a]ntimonopolists argued that all of the bulwarks of freedom in the United States were under assault from corporations that were, by their very nature, monopolies” because they were sites of special privileges granted to private actors by the state, and that “[b]y the 1870s special privilege and monopoly had become synonymous with corporations.”⁹²

Ironically, the trusts themselves were ultimately responses to the breakdown of earlier and more localized coordination mechanisms, reproducing economic coordination on a national scale while centralizing it and, generally speaking,

92. RICHARD WHITE, *RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA* 111 (2011).

rendering it more extractive.⁹³ The term “trust” referred both to the formal trust arrangements of the 1880s and to the emerging megacorporations themselves.⁹⁴ The purpose of the trust mechanism in this context was to centralize control over the productive assets of the participant firms in such a way that reversion to open competition would become unlikely or practically impossible.⁹⁵ As a matter of legal mechanics, this was accomplished by creating a fiduciary relationship between a small, centralized control group (the trustees) and the shareholders (or a majority of shareholders) of individual corporations. The shareholders conveyed voting power over their shares to the trustees, thus conveying control over the individual corporations to the central group, while the trustees undertook to manage the combined enterprise for the joint benefit of the shareholders.⁹⁶ The stock itself now held in trust, this fiduciary relationship was recorded in the form of trust certificates issued to shareholders, signifying a proportional interest in benefits from the overall enterprise.⁹⁷ This is of course a “tight,” rather than “loose,” coordination mechanism, involving centralized control.⁹⁸ Successful enterprises often sought to extend this control into adjacent markets, frequently

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93. See generally ROY, *supra* note 67, at 178-79 (“Most industry was organized in local or regional communities that effectively prevented market dynamics from consistently undermining collective interests.”).
94. 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 ROY, *supra* note 67, at 192 (“The manufacturing corporation was already widespread in the 1880s and in public discourse often equated with ‘trusts.’ But since manufacturing firms were rarely part of the institutional structure of the large publicly traded corporations based on financial capital, the legal form of the corporation was used for several kinds of property regimes, including entrepreneurships, industrial trusts, and occasionally experiments like profit sharing. It was only when other means of organizing their industries were prohibited that they began to use corporate structures in a way that ironically reflected the original conception of corporations as supracompetitive, socially owned, financially capitalized, large-scale enterprises.”).
95. See ROY, *supra* note 67, at 149 (“[S]ome industrialists attempted to use the powers of ownership to compel adherence to collective decisions about prices and production, resulting in the trust experiment.”).
96. See, e.g., THORELLI, *supra* note 59, at 77.
97. *Id.*; see also H.R. REP. NO. 50-3112, at 311 (1888) (establishing the powers and duties of Standard Oil trustees). The Standard Oil Trust Agreement of 1882 both inaugurated and exemplified this arrangement. THORELLI, *supra* note 59, at 76-77. See generally IDA M. TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* (1904) (providing a critical history of Standard Oil’s practices).
98. Thorelli, *supra* note 59, at 2.

rendering market relations more extractive—a tendency that seems to have had its worst effects on the least powerful actors in the supply or distribution chain, typically workers and the smallest farmers and sellers.⁹⁹

In response, farmers, workers, and small merchants, who formed the heart of the antimonopoly coalition, redeployed moral economy traditions and ideas.¹⁰⁰ Cooperative farmers' organizations, beginning with the Grange, were at the heart of the antimonopoly coalition.¹⁰¹ The Farmers' Alliance and the National Grange were strongly and explicitly influenced by "the Rochdale model," borrowed from the eponymous English weavers' cooperative.¹⁰² The Rochdale principles embodied the continuation of moral economy principles.¹⁰³ Agrarian antimonopolists applied and extended these principles in a positive vision that anticipated later Progressive reformer Mary Parker Follett's ideal, "power-with" (achieved through horizontal, democratic cooperation) in place of "power-over" (embodied by centralized corporate power).¹⁰⁴

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99. See, e.g., DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925*, at 27-28 (1987) (discussing the connection between business consolidation and loss of manufacturing workers' traditional privileges, with a particular focus on steel); JEFFERSON COWIE, *THE GREAT EXCEPTION: THE NEW DEAL AND THE LIMITS OF AMERICAN POLITICS* 36 (2016) (correlating business consolidation with the loss of artisanal privileges in work); Branden Adams, *Coalminers and Coordination Rights*, LPE PROJECT BLOG (July 15, 2021), <https://lpeproject.org/blog/coalminers-and-coordination-rights> [<https://perma.cc/7U6T-7EMT>] (discussing the contest between mine workers and mine operators on the one hand and railroads on the other to coordinate the coal-production market).
100. See, e.g., WHITE, *supra* note 92, at xxxi (characterizing antimonopoly activists as a constellation of "merchants, farmers, and workers" opposing corporate power).
101. SOLON JUSTUS BUCK, *THE GRANGER MOVEMENT: A STUDY OF AGRICULTURAL ORGANIZATION AND ITS POLITICAL, ECONOMIC AND SOCIAL MANIFESTATIONS: 1870-1880*, at 87-88 (1913); LETWIN, *supra* note 32, at 67 ("Agitation for antimonopoly laws was first led by the Grangers or Patrons of Husbandry."); ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877-1917*, at 105 (1999). The material source of farmers' antimonopoly sentiment was probably twofold: lower prices and high transport (and often, storage) costs. See generally BUCK, *supra*, at 10-12 (discussing the roots of farmer agitation).
102. On the influence of the Rochdale model upon American agricultural cooperation, see VICTORIA SAKER WOESTE, *THE FARMER'S BENEVOLENT TRUST: LAW AND AGRICULTURAL COOPERATION IN INDUSTRIAL AMERICA, 1865-1945*, at 20-21 (1998), which discusses Rochdale, the Farmers' Alliance, and the Grange; and *id.* at 24, which states that "[i]n sum, American farmers increasingly relied on the Rochdale model to unite producers after the Civil War."
103. E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76, 136 (1971) ("[T]he breakthrough of the new political economy of the free market was also the breakdown of the old moral economy of provision. After the wars all that was left of it was charity—and Speenhamland. The moral economy of the crowd took longer to die: it is picked up by the early cooperative flour mills, by some Owenite socialists, and it lingered on for years somewhere in the bowels of the Cooperative Wholesale Society.").
104. See sources cited *supra* note 12.

Thus, the farmers' movement sought equally to contain the existing and emerging corporate monopolies and to foster cooperation among farmers (and between farmers and industrial workers). From a basic moral economy orientation in which economic coordination is taken for granted and choices about economic coordination are fundamental, there is no contradiction between these dual aims.¹⁰⁵ For instance, the Grange aimed both to contain the power of the railroads¹⁰⁶ and to foster cooperation among farmers.¹⁰⁷ The founder of the Grange, commenting on the great early success of the organization in attracting members, proclaimed: "'Cooperation' and 'Down with Monopolies' were proving popular watchwords."¹⁰⁸ The Grange coordinated, or tried to coordinate, cooperative ventures that would allow farmers to pool their bargaining power both as purchasers (of farming supplies), as sellers, and as potential distributors (in an attempt to capture more of the value to be had in the distribution chain).¹⁰⁹

As industrial wage work spread, the farmers' organizations increasingly made common cause with workers. Many workers were former farmers or former artisans and acutely shared their sense of loss of autonomy—previously accommodated within moral economy structures that had crossed the Atlantic—as control over production was increasingly centralized over the course of the nineteenth century.¹¹⁰ At its height in the 1880s, the Knights of Labor was the major

105. See *supra* Section I.A for a discussion of moral economy's aims.

106. The Illinois Farmers' Convention of 1873 concluded that monopolies are "dangerous to republican institutions" and that the unregulated railroads were "as opposed to free institutions and free commerce . . . as were the feudal barons of the middle ages." JOHNATHAN PERIAM, *THE GROUNDSWELL: A HISTORY OF THE ORIGIN, AIMS, AND PROGRESS OF THE FARMERS' MOVEMENT* 286 (1874), *quoted in* LETWIN, *supra* note 32, at 67-68.

107. SANDERS, *supra* note 101, at 105 ("Such cooperation, in both purchasing and marketing, and agitation against railroads became the principal activities of the early organization.").

108. BUCK, *supra* note 101, at 53.

109. For Solon Justus Buck's description of the range and details of Grange cooperative ventures, see *id.* at 238-78.

110. CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 34 (1985) ("The idea that a trade or calling possessed a particular right to govern its own affairs had accompanied craftsmen migrating to North America in the seventeenth and eighteenth centuries," resulting in the "establishment of the workshop mode of production" in the United States.); Sean Wilentz, *Artisan Republican Festivals and the Rise of Class Conflict in New York City, 1788-1837*, in *WORKING CLASS AMERICA: ESSAYS ON LABOR, COMMUNITY, AND AMERICAN SOCIETY* 37, 40 (Michael H. Frisch & Daniel J. Walkowitz eds., 1983) (explaining that while tradesmen did not formally operate under the rules common to European and English guilds, they "preserved the ambiguous dualities of artisan production . . . outlined by Marx: 'The master . . . has precisely the same relationship to his apprentices as a professor to his students. Hence his approach to his apprentices is not that of a capitalist but of a *master* of his craft.'"). On the loss of autonomy,

American labor organization of the antimonopoly period.¹¹¹ As with antimonopoly politics more broadly, the Knights were concerned with the corruption of the polity represented by aggregated wealth and the “extreme economic inequalities” it implied.¹¹²

Although it had focused principally upon financial reform, the Greenback Party, which had largely absorbed the initial Grange organization in the mid-1870s, quickly drew on its natural alliance with labor in order to incorporate “virtually the whole of labor’s political agenda” into its national platform.¹¹³ The Farmers’ Alliance, first founded at the end of the 1870s and influential in several regions, continued this dual emphasis on direct economic cooperation and a broader set of “antimonopoly political demands” and soon actively sought to act in concert with labor.¹¹⁴ The politics of the Farmers’ Alliance, as expressed by one regional group, was organized around forging connections between all people “now suffering at the hands of arrogant capitalists and powerful corporations,” which expressly included railroad and industrial workers.¹¹⁵ The platform thus “interwove the specific demands of farmers and workers.”¹¹⁶

Following various other iterations,¹¹⁷ the farmer-labor coalition culminated in the Union Labor Party,¹¹⁸ which foregrounded the demand for federal antimonopoly legislation in their 1888 platform, concluding: “The paramount issues

see BRUCE LAURIE, *ARTISANS INTO WORKERS: LABOR IN NINETEENTH-CENTURY AMERICA* (1997); Wythe Holt, *Labour Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication*, 22 *OSGOODE HALL L.J.* 591, 606-07 (1984); MONTGOMERY, *supra* note 99; and CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 260-70* (1993).

111. ALEX GOUREVITCH, *FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY* 99 (2015) (“[F]or more than a decade, the Knights of Labor was the most powerful national organization of labor of the century and was a major player in the defining events of the day.”).
112. *Id.* at 104 (quoting Knight George McNeill on the evils of “aggregated wealth”).
113. SANDERS, *supra* note 101, at 115. On the financial reform aspects of that agenda—also interpreting them in terms of moral economy—see Jakob Feinig, *The Moral Economy of Money Between the Gold Standard and the New Deal*, 30 *J. HIST. SOCIO.* 315, 316-17 (2017).
114. SANDERS, *supra* note 101, at 119, 121, 124; see also WHITE, *supra* note 92, at 279 (observing that an antimonopoly alliance that included wageworkers “became the explicit goal of both the Knights of Labor and the Farmers’ Alliance”).
115. SANDERS, *supra* note 101, at 119.
116. *Id.* at 120.
117. Between 1887 and 1888, the Farmers’ Alliance merged with a number of other southern farmers organizations that had “pledged [themselves] to concerted action with labor unions” to form the Farmers’ and Laborers’ Union of America. *Id.* at 121.
118. The party was “formed by a coalition of Greenbackers, Knights of Labor, and farmer organizations.” William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 *U. CHI. L. Rev.* 221, 247 (1956).

to be solved in the interests of humanity are the abolition of usury, monopoly, and trusts, and we denounce the Democratic and Republican parties for creating and perpetuating these monstrous evils.”¹¹⁹ Other third parties followed suit.¹²⁰ And when the two major political parties adopted positions in favor of regulating monopoly as well, they did so in response to this farmer-labor coalition,¹²¹ and to appeal to farmers and labor as political constituencies.¹²² William Letwin interpreted the prominence Democrats gave to the trust issue in the 1888 platform as part of an overall attempt to appeal to labor.¹²³

So, although by the late 1880s the desire for federal legislation to contain monopoly arguably encompassed a broad spectrum of American society, it remained firmly rooted in the farmer-labor coalition, not only in its causal etiology but also in real-time electoral politics. As Elizabeth Sanders writes, the “agitation that led” to the Sherman Act “was clearly rooted in the political crusades of the Grange, the Farmers’ Alliance, and the Antimonopoly, Greenback, and Union Labor Parties of the 1870s and 1880s.”¹²⁴

Thus, when legislators undertook to draft and enact antimonopoly legislation, they acted in response to a political constellation with farmers and workers at its center. Repurposing moral economy concepts and traditions in response to the rise of the trusts and corporate power, this popular movement embodied a

119. THOMAS HUDSON MCKEE, *THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES 1789-1905: CONVENTION, POPULAR, AND ELECTORAL VOTE* 251 (1906).

120. “Anti-monopoly planks appeared also in the 1888 platforms of the Prohibition Party and of the United Labor Party.” LETWIN, *supra* note 32, at 85 n.3.

121. During the 1888 presidential campaigns, both major parties adopted antitrust platforms. The Republican Party’s was as follows: “We declare our opposition to all combinations of capital, organized in trusts . . . to control arbitrarily the condition of trade among our citizens; and we recommend to Congress . . . such legislation as will prevent the execution of all schemes to oppress the people . . .” THORELLI, *supra* note 59, at 151 (quoting MCKEE, *supra* note 119, at 241). The Democratic Party’s platform stated: “[T]he interests of the people are betrayed when . . . trusts and combinations are permitted to exist, which, while mainly unduly enriching the few that combine, rob the body of our citizens by depriving them of the benefits of natural competition.” *Id.* at 151 (quoting MCKEE, *supra* note 119, at 235).

122. Letwin, *supra* note 118, at 248 (“[T]he trust issue was especially useful for appealing to farmers and laborers who might otherwise shift their vote to the third party.”).

123. *Id.* (“The party apparently felt obliged to make up for” its failure to support silver coinage, generally supported by labor, so that “somehow, and amidst sympathetic references to ‘the industrious freemen of our land,’ ‘every tiller of the soil’ and ‘the cry of American labor for a better share in the rewards of industry,’ [the platform] asserted that, ‘Judged by Democratic principles, the interests of the people are betrayed when, by unnecessary taxation, trusts and combinations are permitted to exist, which, while unduly enriching the few that combine, rob the body of our citizens . . .’”).

124. SANDERS, *supra* note 101, at 268.

coherent, if simple, vision of law and markets: that the law should act affirmatively to contain economic domination while accommodating structures of democratic coordination.

III. THE LEGISLATIVE HISTORY

The legislative history of the Sherman Act, particularly when read in light of its common-law background and popular genesis, supports the conclusion that legislators acted on the economic vision of the antimonopoly movement. Specifically, it supports the core prescription to maintain dispersed economic coordination rights. This prescription in turn implies containing domination (for instance, on the part of the trusts); accommodating democratic coordination (for instance, among workers and small producers); and maintaining norms of fair competition, as the common law did. This conclusion emerges relatively naturally once one dispenses with – or at least softens – the imputation of a self-regulating market ideal to legislators. From a moral economy perspective, there is no inconsistency between accommodating some forms of economic coordination while prohibiting or containing others so long as coherent normative criteria govern the choices between them. While I do not deny that the notion of a self-regulating market is relevant to understanding some of their statements, I offer this account as a corrective to prevalent interpretations that foreground it.

Interpretations of the Sherman Act's legislative history in recent decades have often revolved around Robert H. Bork's highly influential reading of the genesis of the Sherman Act as aiming at (what he called) "consumer welfare."¹²⁵ As Christopher Leslie put it, a "clear consensus exists among economic historians and legal scholars that Bork misconstrued the legislative history of the Sherman Act."¹²⁶ In a significant intervention, Robert H. Lande argued that legislators were after neither productive nor allocative efficiency, but aimed to protect true consumer welfare (rather than Bork's misleading interpretation of the concept). He defined consumer welfare as preventing consumers from paying supracompetitive prices – and, secondarily, preventing small sellers from receiving

125. See generally Bork, *supra* note 74 (arguing that Congress intended courts to implement the value of consumer welfare in their interpretation of the Sherman Act); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citing Robert H. Bork's interpretation of the legislative history of the Sherman Act as a "consumer welfare prescription"). For discussion of Robert Bork's influence on the direction of antitrust law more generally, see George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & ECON. S1 (2014); Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 917, 917 (2014); and RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992: HISTORY, RHETORIC*, LAW 258 (rev. ed. 1996).

126. Leslie, *supra* note 125, at 924 & n.47 (citing the views of, among others, Kenneth G. Elzinga, Robert H. Lande, Herbert Hovenkamp, Peter J. Hammer, and William E. Kovacic).

infracompetitive prices.¹²⁷ Lande’s challenge to Bork, together with some others, preserved ideal competitive markets as the basic normative benchmark for antitrust.¹²⁸ Other challenges to Bork’s reading were based in an interest-group analysis of the legislative origins of the statute, attacking Bork’s argument from the premise that a coherent logic cannot be found in the legislative history.¹²⁹ Some commentators, notably Christopher Grandy, have pointed out that the legislative debates, including in their reference to the common law, showed “an independent concern for fair competition” and for small producers rather than consumers, casting doubt on the consumer welfare theory.¹³⁰

The interpretation offered here challenges Bork’s on a different basis and suggests a more basic divergence. Congress did not aim primarily at consumer welfare, nor productive efficiency, nor even competitive markets in an abstract sense.¹³¹ It sought to disperse economic coordination rights – a goal that implies accommodating some forms of economic coordination while containing others.

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127. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 105-06 (1982).
128. Although Robert H. Lande argues that legislators could not have had allocative efficiency as a goal, his description of the appropriate normative benchmark for antitrust – the avoidance of supracompetitive or infracompetitive prices – is also closely related to the goal of allocative efficiency. *Id.*; see also Barak Orbach, *How Antitrust Lost its Goal*, 81 FORDHAM L. REV. 2253, 2255 (2013) (arguing that the goal of antitrust, viewed through the legislative history and its context, is to preserve competition full stop).
129. See, e.g., Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, 30 ECON. INQUIRY 263, 264 (1992) (arguing that Congress did not embrace allocative efficiency or consumer benefit as primary goals of antitrust on the grounds that the legislative process was characterized by “satisfy[ing] the demands of an array of political interest groups, including the facilitation of rent creating legislation,” and that in particular, Republicans’ “protectionist” approach with respect to the contemporaneous tariff question showed they could not have been serious about addressing monopoly). This approach harmonizes with the focus on “rent seeking” by interest groups associated with the public-choice view of the legislative process, which was also associated with the Chicago School remaking of antitrust. See *infra* Section IV.B.
130. Christopher Grandy, *Original Intent and the Sherman Act: A Re-examination of the Consumer Welfare Hypothesis*, 53 J. ECON. HIST. 359, 363, 367 (1993) (harmonizing with the account presented here in a number of ways, particularly in terms of his identification of legislators’ concern with fair competition); see also Farber & McDonnell, *supra* note 23, at 641 (“[W]ithout delving into the confusing legislative history of the statute . . . it seems fair to say that the Sherman Act was as much designed to stop unfair business methods as to promote competitive markets.”).
131. Bork’s running together of allocative efficiency and consumer benefit forms the starting point of many critiques. See, e.g., Paul, *supra* note 8, at 390. Commentators differ regarding the direction in which the conflation should be resolved.

Bork's claim that Congress sought to condemn 'cartels' was pivotal to his conclusion that the Sherman Act was a consumer-welfare prescription.¹³² The alternative claim that Congress in fact wanted to *accommodate* democratic coordination among small players is equally important to the argument that the Act aimed to disperse economic coordination rights. While of course legislators held a variety of personal views on various issues implicated, I approach the legislative record as if the legislative enterprise can at least potentially yield a shared, coherent logic.¹³³ In this case, it turns out that legislators were not especially divided on the underlying policy questions that they agreed legislation was needed to address, although they debated and deliberated over the best tactical choices to achieve these aims.

The "restraint of trade" language in the statute is the textual anchor for the argument that Congress intended a basic delegation of policymaking power to the courts. But on the account set out below, no such explanation of the drafting choice is necessary or warranted. In their deliberations, legislators were primarily occupied with the worry that courts would either eviscerate or pervert the statutory purpose. Their choice of the common-law language was immediately motivated by those worries. Simply moving to federalize an existing body of law, as signified by the use of the phrase "restraint of trade," was projected as a less audacious move, and thus a less extravagant use of the federal Commerce Clause power, than crafting a new edict altogether. And the use of the phrase "restraint of trade" in the final bill also replaced language in the earlier bill about raising consumer prices, likely seen by legislators as the primary threat to coordination among small players, which they sought to preserve.

A. *Initiation*

Overall, legislative deliberation over the bill focused heavily on the question of constitutional authority for congressional action in the area, and to a lesser extent on the question of whether trusts should be addressed by direct regulation or by removing tariffs on imports (which were presumed to benefit the trusts). There was relatively little debate about the merits of the trust problem itself. Rather, the discussion suggests broad consensus that it was indeed a problem, and one that should be addressed by congressional action.

The antitrust plank of the Republican Party platform of June 19, 1888 is an instructive starting point for interpreting the legislative effort. The antitrust

132. Bork, *supra* note 74, at 11 ("The flat prohibition of cartel agreements which Congress envisaged seems fully consistent only with the idea that output should not be artificially restricted, and that desire is in turn explained only by a concern for consumer well-being.")

133. I discuss this issue further in Section III.D.1, *infra*.

plank of the Party's platform expressly invoked the just-price concept that was central to the moral economy tradition, and it targeted economic coordination in the form of control, or "power-over." In both respects, this mirrored the anti-monopoly coalition and the traditional market regulation in which the common law of restraint of trade was rooted. The title of the plank, "Combinations of Capital," further delimits the sort of economic coordination at which it was aimed. It declared the Party's opposition to "all combinations of capital, organized in trusts or otherwise, to control arbitrarily the condition of trade among our citizens . . ." ¹³⁴ It also explicitly aimed at preventing "all schemes to oppress the people" as producers (not just as consumers), for example, by "undue charges on their supplies, or by *unjust rates* for the transportation of their products . . ." ¹³⁵ The focus was on unjust rates, not the coordination of rates per se. As we saw, this is consonant with the nature of the common-law regulation of price coordination.

When President Cleveland addressed Congress at the end of that same year, he too focused on the new "[c]ombinations, monopolies, and aggregations of capital."¹³⁶ The following section of his speech is frequently quoted:

As we view the achievements of aggregated capital, we discover the existence of trusts, combinations, and monopolies, while the citizen is struggling far in the rear or is trampled to death beneath an iron heel. Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters. ¹³⁷

Less frequently quoted is the immediately preceding sentence: "The gulf between employers and the employed is constantly widening, and classes are rapidly forming, one comprising the very rich and powerful, while in another are found the toiling poor."¹³⁸ Notably, then, the labor antimonopoly stream was represented in the political articulation of the antimonopoly message that led to federal antitrust legislation from the beginning. Benjamin Harrison took office

¹³⁴. MCKEE, *supra* note 119, at 241.

¹³⁵. *Id.* (emphasis added). The Democratic Party also included an antitrust plank in its platform that year. 1 LEGISLATIVE HISTORY, *supra* note 28, at 54 ("Antitrust Plank Of The Democratic Party Platform: June 5, 1888."); *see also* THORELLI, *supra* note 59, at 150-51 (discussing the Democratic platform).

¹³⁶. Fourth Annual Message of President Grover Cleveland (Dec. 3, 1888), in 1 LEGISLATIVE HISTORY, *supra* note 28, at 57.

¹³⁷. *Id.* at 58.

¹³⁸. *Id.*

the following year and sounded a similar theme in his first annual message addressing Congress, stating that “[e]arnest attention should be given by Congress” to “the restraint of those combinations of capital commonly called ‘trusts.’”¹³⁹ Both statements evidence, as does the legislative record, a concern with *particular forms* of harmful economic coordination—specifically those that dominated or exerted ‘power over’ the many—rather than with economic coordination as such.

The Sherman Act primarily took form in the Senate.¹⁴⁰ Deliberations began with the introduction of Senator John Sherman’s bill “to declare unlawful trusts and combinations in restraint of trade and production” on August 14, 1888.¹⁴¹ Senators James George and John Reagan introduced parallel antitrust bills.¹⁴² The large bulk of discussions that took place between this time and the passage of the Sherman Act in March of 1890 centered around congressional authority to enact the legislation rather than to questions of substantive policy. The reach of Congress’s Commerce Clause power, only very recently tested with the more limited subject-matter scope of the Interstate Commerce Act,¹⁴³ was discussed at various points throughout the deliberations.¹⁴⁴

The first incarnation of the bill targeted combinations that tended or were designed to “prevent full and free competition” or to “advance the cost to the consumer” of a given commodity.¹⁴⁵ Interestingly, the original bill named the following series in its damages clause: “arrangement, contract, agreement, trust,

139. First Annual Message of President Benjamin Harrison (Dec. 3, 1889), in 1 LEGISLATIVE HISTORY, *supra* note 28, at 60.

140. There were also various activities relating to the trust problem in the House, with sixteen bills on the issue referred to committees between January and October 1888, and eighteen more during the 51st Congress. None were reported out to the full House, however. THORELLI, *supra* note 59, at 173-74. Later, the House took up consideration of the Senate’s bill after it was adopted by the other body in 1890. *Id.* at 175-76.

141. S. 3445, 50th Cong. (1888). A month earlier, the Senate had—without debate—adopted a resolution (offered by Senator Sherman) directing the Committee on Finance (on which Senator Sherman served) to craft legislation to deal with the trust problem. THORELLI, *supra* note 59, at 166.

142. THORELLI, *supra* note 59, at 174.

143. An Act to Regulate Commerce, ch. 104, 24 Stat. 379 (1887). For historical context regarding the creation of the Interstate Commerce Commission, see Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139 (2015).

144. For a summary, see Grandy, *supra* note 130, at 371, which notes that “[t]he most frequently expressed doubts over Sherman’s bill focused on the constitutional authority for national legislation on trusts” and “[j]urisdictional questions repeatedly threatened the proposed legislation.”

145. S. 3445, 50th Cong. (1888), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 28, at 63.

or *corporation*.”¹⁴⁶ Although this series was later deleted, it is one among other pieces of evidence that legislators were not primarily focused on the legal formalism of the arrangement, but rather upon the concentration of economic coordination rights, coinciding with concentration of wealth and power. Minor changes were made to the bill over the next month or so, largely relating to the enforcement provisions of the bill, and adding clauses intended to bolster the bill’s constitutionality. While it continued to be changed in small ways here and there, the majority of Senate discussion centered on this incarnation of the legislation.

After the adoption of an amendment that located the statute’s constitutional grounding in the Commerce Clause – by eliminating the basis on which it was to be grounded in the taxing power¹⁴⁷ – as well as some minor amendments,¹⁴⁸ discussion turned to the substantive policy behind the legislation for the first time. Senator James Jones of Arkansas first gave a lengthy speech identifying numerous evils to be addressed by the legislation. But the evils he identified were not economic coordination or “price-fixing” in some general sense. They were, specifically, the “commercial monsters called trusts” whose growth “in the last few years has become appalling.”¹⁴⁹ Their success was “an example of evil that has excited the greed and conscienceless rapacity of commercial sharks.”¹⁵⁰ They included specifically the steel trust, “the iniquities of the Standard Oil Company,” the “long, felonious fingers” of the sugar trust, and more.¹⁵¹ Recall that each of these trusts was far more akin to what we would now consider a single firm than to an association of firms, with coordination concentrated in a single board of trustees and grounded in the trustees’ controlling ownership interest in each formally separate corporation.¹⁵²

146. *Id.* at 64 (emphasis added).

147. That basis would have been that the commodity in question “competes with any similar article upon which a duty is levied by the United States,” removed by amendment in January 1889. 20 CONG. REC. 1167 (1889), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 28, at 73; *id.* at 69, 72-73 (discussing the location of the source of congressional power to enact the bill in “the power to regulate foreign and interstate commerce”); THORELLI, *supra* note 59, at 171.

148. 20 CONG. REC. 1167 (1889), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 28, at 70-72 (discussing amendments to, for example, the length of time after passage that the Act’s prohibitions would become effective upon existing arrangements).

149. 20 CONG. REC. 1457 (1889), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 28, at 75, 76.

150. *Id.*

151. *Id.* at 76-77.

152. *See supra* Part II (briefly discussing the trust mechanism). In just a few more years, a number of these trusts would take the final step and become single corporations. *See generally* NAOMI LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904 (observing that turn-of-the-century mergers were predominantly horizontal consolidations – the simultaneous merger of competitors in an industry into a single enterprise).

Senator George, who played a key role in the shaping of the law, spoke next, stating that he was “extremely anxious” that Congress pass a law to “put an end forever to the practice, now becoming too common, of large corporations, and of single persons, too, of large wealth, so arranging that they dictate to the people of this country what they shall pay when they purchase, and what they shall receive when they sell.”¹⁵³ Because Senator George influenced the direction of the proceedings as much as he did, his comments about the underlying normative questions at hand are also relevant to understanding the shape and meaning of Sherman’s bill. His emphasis was certainly not on the lowest possible prices in all cases. In fact, he specifically identified the lowering of suppliers’ prices as one of the harms to be addressed by legislation.¹⁵⁴ Nor did he identify horizontal coordination beyond firm boundaries as the problem. Rather, the issue was the increasing *concentration* of economic coordination rights in “large corporations and . . . single persons too, of large wealth”¹⁵⁵ — precisely the sort of concentrated economic coordination that is privileged by antitrust law today.

Senator George also stated his concern that the language in the bill then under consideration would have the effect of penalizing coordination *between* persons or firms that the bill was intended to help. In particular, he stated that prohibiting combinations designed or tending to “prevent free and full competition” could have the unintended consequence of “bringing under the punitive provisions of the bill” the “most innocent and necessary arrangements” of the very “farmers and laborers of the country who are sending their voices to the Congress . . . asking, pleading, imploring us to take action to put down trusts”¹⁵⁶ This not only reveals Senator George’s view regarding economic coordination among small players, but also confirms key legislators’ view of the bill as a direct response to the aspirations of the farmer-labor coalition. To illustrate his point, Senator George explained that the recent boycott of the jute-bagging trust by southern farmers would come under the language of the bill—a fact he thought would “strike the Senate probably with some astonishment.”¹⁵⁷

Indeed, this proposition did seem to strike Senator Sherman with great astonishment, which he expressed (after confirming again exactly what Senator George meant): “That is a very extraordinary proposition.” Senator Sherman added, “I desire to say distinctly that is not my idea or the idea of any one of the

153. 20 CONG. REC. 1458 (1889).

154. *Id.*; 21 CONG. REC. 1768 (1890) (“They regulate prices at their will, depress the price of what they buy and increase the price of what they sell.”).

155. 20 CONG. REC. 1458 (1889).

156. *Id.*

157. *Id.*

committee.”¹⁵⁸ This seems to have been the first time that Senator Sherman, or the Senate, considered the potential application of the bill to proscribe horizontal cooperation among small, atomized actors. Sherman’s surprise seems to suggest the extent to which he and other legislators were focused upon the specific phenomenon of the business trusts and emerging corporate power in the impetus for and drafting of the legislation, and not upon coordination *per se*.

Senator George then went on to describe another variant of this undesirable consequence of the bill as drafted. By this example, he confirmed that he was worried not only about the punishment of collective decisions not to buy, as in the jute-bagging boycott, but also about punishing price coordination itself:

By this provision is drawn within the punitive provisions of this bill every agreement made by farmers not to sell any particular article of their production unless they receive a certain price for it There have been combinations of that sort, lawful in their character, meritorious in their aims, which have tended to prevent the farmers of this country from being fleeced by the great trusts¹⁵⁹

Senator George later closed his discussion by again expressing his worry that the bill would unintentionally capture “numerous arrangements and agreements made by the producers of raw material in this country which have hitherto been regarded as a perfectly innocent exercise of the power of combination”¹⁶⁰

In this speech, and Senator Sherman’s reaction to it, two bases for legislators’ nascent concerns about the breadth of the bill as it then existed emerge. First, they were concerned that defensive coordination by farmers, workers, and other small players to protect themselves from the trusts would be proscribed by the law, as interpreted by the courts. Second, they worried more generally that dispersed coordination among producers that had long been viewed as “perfectly innocent” (trusts or no trusts) would be proscribed. The problem, and the purpose, then was to craft a bill that would capture what legislators viewed as the harmful coordination of the trusts while leaving unmolested the innocent coordination among ordinary producers and workers. In the ensuing discussions, there were disagreements about *whether* the bill as drafted would fulfill this two-fold purpose – but almost no disagreement that these were indeed its purposes.

¹⁵⁸. *Id.*

¹⁵⁹. *Id.* at 1459.

¹⁶⁰. *Id.* at 1462.

B. Consideration of the Labor and Farmer Amendment

Eventually, the argument that the first incarnation of the bill would have the unintended consequence of proscribing horizontal economic coordination among small actors, and therefore required an express amendment exempting workers and farmers, won out. In the fifty-first Congress, Senator Sherman introduced a bill that was substantially similar to the one he had introduced in the previous Congress, while Senators George and Reagan again introduced parallel antitrust bills.¹⁶¹ Senator George's bill now included a tort provision much like Senator Sherman's, in addition to giving the President power to suspend tariffs on similarly situated imports when the law was violated.¹⁶²

Toward the beginning of the deliberations, Senator George gave a long speech attacking Senator Sherman's bill, which primarily advanced his contentions that the bill would be ineffective to deal with the trusts and that it exceeded Congress's constitutional power to act. A passage from this important speech sheds more light on the overarching purposes of antitrust legislation:

These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. They aggregate to themselves great, enormous wealth by extortion which make[s] the people poor. Then making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of speculation under the law, till they are fast producing that condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command.¹⁶³

Notably, Senator Sherman quoted this precise speech later in the deliberations in answer to the question: "How is such a law to be construed? Liberally with a

161. S. 1, 51st Cong. (1889), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 28, at 89. Senator Reagan's bill was also substantially similar to the one he had introduced in the prior Congress. Neither Senator George's nor Senator Reagan's bills were reported out of committee, though George is understood to have exerted substantial influence over the bill that became the Sherman Act. THORELLI, *supra* note 59, at 174-75.

162. THORELLI, *supra* note 59, at 174.

163. 21 CONG. REC. 1768 (1890).

view to promote its objects. What are the evils complained of?”¹⁶⁴ He answered by stating, “They are well depicted by the Senator from Mississippi in this language, and I will read it as my own with quotation marks.”¹⁶⁵

This significant passage again shows that neither lowering consumer prices nor promoting competition as such were the primary purposes of the legislative effort. On the contrary, the trusts’ power to depress others’ prices was just as harmful. Moreover, the trusts’ price coordination was considered harmful because the resultant prices were “beyond reason” – and because both such price increases for basic necessities, as well as price decreases for products sold by ordinary people, tended to “make the people poor.”¹⁶⁶ Senator George here espoused a normative benchmark according to which lower prices are not always good, and price coordination is not always bad.¹⁶⁷ And this benchmark implies that other business practices, not only price coordination, that tend to “make the people poor” are also contrary to the purposes of antitrust policy.

The elements that tie the whole passage together – and that connect it to the vision of the farmer-labor coalition whose members were “sending their voices to the Congress”¹⁶⁸ in the first place – are the notions of “aggregated wealth” and the people’s servitude to it. Indeed, if there is any *per se* rule about price coordination that can be inferred from the legislative history (with this passage serving as an exemplar), it is that price coordination is impermissible when it is orchestrated from centers of aggregated wealth to exercise control over others. Senators seemed to wish to accommodate price coordination when dispersed across numerous, smaller centers of property ownership and decision-making.

At several other points before the farmer-labor amendment was introduced and considered, discussions again suggest that senators were concerned primarily with the concentration of economic coordination rights. For example, one senator said: “Take the Standard Oil Trust, another great and ramifying corporation That combination, whatever it is, . . . controls practically the price of the raw material in our country”¹⁶⁹ Here, the senator first refers to the Standard Oil Trust as a “corporation” and then as a “combination, whatever it

164. 21 CONG. REC. 2461 (1890).

165. *Id.*

166. *Id.* at 1768.

167. Many commentators have interpreted this and similar passages as implying legislators’ condemnation of monopsony as well as monopoly powers. *See, e.g.,* Lande, *supra* note 127. To the extent such an interpretation implies that “infracompetitive prices,” relative to an ideal competitive market, are the primary harm, the interpretation offered in Senator George’s speech differs. Here, Senator George seemed to evaluate the social harm of unfairly low or unfairly high prices more directly. 21 CONG. REC. 1767-68 (1890).

168. 20 CONG. REC. 1458 (1889).

169. 21 CONG. REC. 2471 (1890) (statement of Sen. William B. Allison).

is,” reflecting legislators’ understanding of the firm-like quality of the trust. Later on, Senator Sherman also brought up the Standard Oil Trust:

I do not wish to single out the Standard Oil Company, which is a great and powerful corporation, composed in great part of the citizens of my own [s]tate, and some of the very best men I know of. Still, they are controlling and can control the market as absolutely as they choose to do it; it is a question of their will. *The point for us is to consider whether . . . it is safe in this country to leave the production of property, the transportation of our whole country, to depend on the will of a few men sitting at their council board . . . ?* I do not say anything against these men . . . I only refer to them because they are the oldest of these combinations founded upon contracts which have been copied by the other combinations.¹⁷⁰

Even putting aside the likely looseness of his reference to the “Standard Oil Company” (which, technically, at that time was an Ohio corporation), Senator Sherman again seems to be referring to the trust as a whole. As importantly, he identified the question at hand as the concentration of coordination rights: whether “it is safe . . . to leave” the economy of the whole country to depend on the will of a few men.

This theme reappeared a few days later in a discussion about the farmer-labor amendment itself. The text of the amendment was as follows:

That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers, made with a view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of their own agricultural or horticultural products.¹⁷¹

Aside from a question about whether wool counted as an agricultural product and some jokes, there was no discussion of the amendment when it was initially introduced on March 25, and it was agreed to without incident, apparently without a roll call.¹⁷²

Two days later, in preparation for considering the bill as a whole, the Senate decided to first consider each pending amendment in the order that it was proposed to appear in the text of the bill.¹⁷³ The reason for going through all the

170. 21 CONG. REC. 2570 (1890) (emphasis added).

171. 21 CONG. REC. 2612 (1890).

172. *Id.*

173. *Id.* at 2723-24.

amendments again, rather than only those that had been tabled, was that the previous day's session had ended in the adoption of a numerous amendments, which Senator Sherman felt endangered the bill as a whole (or more specifically, made it more likely that it would be transferred to another committee to be re-written, thereby robbing him of control over it).¹⁷⁴ The farmer-labor amendment, together with an amendment to it, was the last amendment that the Senate discussed that day before adjourning.¹⁷⁵ There was initially some confusion about whether the farmer-labor amendment itself, or a further amendment to it, was the one being raised, but the discussion quickly turned to the underlying merits, with Senator George Edmunds deciding to "say what [he had] to say about the general feature of this bill" using that amendment as the occasion.¹⁷⁶

The discussion that ensued was the one occasion on which a senator seemed to take exception to the principles behind the farmer-labor amendment.¹⁷⁷ Senator Edmunds opined generally that any proscription on combination should apply symmetrically to capital and to labor, and that to exempt labor while regulating combinations of capital would actually hurt workers.¹⁷⁸ Senator George responded that a manufacturing corporation could typically adapt to increased labor costs by increasing its own price.¹⁷⁹ Senator George Hoar responded more forcefully, insisting first upon the larger importance of labor combinations to the polity:

The laborer who is engaged lawfully and usefully and accomplishing his purpose in whole or in part in endeavoring to raise the standard of wages

174. Various amendments were proposed amidst laughter, according to the reporter, adding to section 8 of the bill then under consideration. This section listed the articles of commerce to which its provisions would apply, including items like "stocks and bonds," "whisk[e]y," and others. *Id.* at 2655. Senator Sherman said to his colleagues, "This would be very funny if the hour was not so late . . ." *Id.*; see also EDWARD BERMAN, *LABOR AND THE SHERMAN ACT* 22-23 (1930) (discussing "The Encumbering Amendments").

175. 21 CONG. REC. 2728-31 (1890) (discussing various amendments, with farmer-labor amendment discussed last).

176. 21 CONG. REC. 2726 (1890). The further amendment had been proposed by Senator Aldrich of Rhode Island, and it provided that price-*lowering* combinations of any kind would not come under the Act—so long as they did not lower prices by lowering the wages of labor. This amendment to the amendment was also agreed upon at the time it was first discussed. *Id.* at 2654-55.

177. Others have reached the same conclusion. See BERMAN, *supra* note 174, at 23; Louis B. Boudin, *The Sherman Act and Labor Disputes: I*, 39 COLUM. L. REV. 1283, 1289 (1939).

178. 21 CONG. REC. 2726 (1890).

179. *Id.* at 2727. This, of course, would depend on that firm's role in the market, on whether labor costs rose for its competitors, and on other conditions in the firm.

is engaged in an occupation the success of which makes republican government itself possible and without which the Republic can not in substance, however it may nominally do in form, continue to exist.¹⁸⁰

Perhaps most significantly, he also again highlighted the economic power posed by intrafirm coordination itself—“large corporations who are themselves but an association or combination or aggregation of capital on the other side.”¹⁸¹

C. *The Rewriting of Sherman’s Bill*

At this point in the proceedings, Senator Sherman was eager to get to a vote and to prevent the bill from being transferred from the Finance Committee to the Judiciary Committee, where it would be rewritten without his direct involvement. Throughout the deliberations, this option had come up as a way of addressing the potential constitutional problems with the bill.¹⁸² The turning point appears to have been a speech given by Senator Platt of Connecticut, which centered the just-price concept that was so central to the moral economy tradition.

Before describing that speech, it is worth briefly introducing Bork’s telling of the legislative history. Bork’s account also focused on the legislative attitude toward horizontal price coordination, though he concluded that Congress condemned it.¹⁸³ The putative condemnation of horizontal price-fixing (and other horizontal economic coordination) was an essential element of Bork’s argument that the central policy or prescription of the enactment was consumer welfare—because concern with raising prices or restricting output is “explained only by a concern with consumer well-being.”¹⁸⁴

180. *Id.* at 2728.

181. *Id.*

182. See, e.g., 21 CONG. REC. 2600-01 (1890) (Senators George, Reagan, and Vest discussing Senator George’s motion to refer the bill to the Judiciary Committee because the Judiciary Committee had jurisdiction over “these great questions” concerning the bill’s constitutionality); William Kolasky, *Senator John Sherman and the Origin of Antitrust*, 24 ANTITRUST 85, 87 (2009) (noting that Senator Sherman had “successfully resisted having his bill referred to the Judiciary Committee on multiple occasions over nearly two years”); see also Grandy, *supra* note 130, at 371-72 (discussing contemporaneous concerns about the bill’s constitutionality).

183. Bork, *supra* note 74, at 21-25.

184. *Id.* at 11. Bork acknowledged that Congress endorsed two other prohibitions, on mergers tending toward monopoly and predatory business tactics. *Id.* at 11-12. Notably, however, both are explicable by basic policies in favor of containing domination and maintaining fair competition, and do not require a primary concern with consumer welfare. I do not comprehensively discuss Bork’s other arguments here, which have been widely addressed in the literature. For instance, Robert Lande has persuasively rebutted Bork’s claim that productive efficiency was a primary legislative goal. Lande, *supra* note 127, at 95-98 (arguing that Congress condemned trusts despite their presumed productive efficiency).

Returning to Senator Platt's speech, his primary concern was that even the farmer-labor exemption would not ameliorate the entire problem at which it was aimed because other producers (besides the trusts and trust-like concentrations of power at which the effort aimed) would still be subject to a rigid rule against price coordination. Again invoking the just-price concept, he explained that all producers should be able to coordinate to receive a fair return—whether they were workers, farmers, or others: “[P]rices should be just and reasonable and fair . . . [and they] should be such as will render a fair return to all persons engaged in its production.”¹⁸⁵ He agreed that the trusts were a special case and a special problem but that “the bill which is aimed at those trusts reaches every arrangement,” including that of “men and associations of comparatively small capital, most of whom have sprung up from the ranks of labor themselves, and who have largely associated with laborers in engaging their business.”¹⁸⁶ Senator Platt went on to highlight the value of horizontal coordination if it resulted in fair prices:

[E]very man . . . has a right, a legal and a moral right, to obtain a fair profit upon his business and his work; and if he is driven by fierce competition, . . . I believe it is his right to combine for the purpose of raising prices until they shall be fair and remunerative.¹⁸⁷

Similar to the moral economy roots of the common law of restraint of trade, and in line with the antimonopoly coalition's embrace of the twin goals of cultivating cooperation and containing domination, Senator Platt's speech revolved around the notion that economic coordination aimed at *fair prices* was justified and necessary, while the concentration of economic coordination rights (as in the form of the trusts) was a special problem.

Indeed, Senator Platt invoked precisely the concept of just and fair prices that had animated both traditional market regulation and what common-law support there was against price coordination among sellers (when it was unreasonable, harmful, or unfair). Recognizing that Senator Platt's speech conspicuously contravened his claims about the condemnation of horizontal economic coordination (and the policy behind this putative condemnation), Bork claimed that the “Senate paid no attention to . . . Platt . . . and reported Sherman's bill with its

¹⁸⁵. 21 CONG. REC. 2729 (1890).

¹⁸⁶. *Id.* at 2730.

¹⁸⁷. *Id.*

various additions and amendments to the Senate.”¹⁸⁸ But that is *not* what happened next.¹⁸⁹ Instead, immediately following Senator Platt’s speech, another senator moved for a vote to, at last, transfer the bill to the Judiciary Committee “with instructions to report within twenty days.”¹⁹⁰ Every indication is that Senator Platt’s speech finally prompted the transfer of the bill, and thus its rewriting.¹⁹¹ In fact, Senator Sherman evidently retained some bitterness toward Senator Platt about this event.¹⁹² Members of the Judiciary Committee who now controlled the bill included Senators George and Hoar, who were confirmed advocates of democratic coordination among small players: they had repeatedly spoken up in favor of workers’ and farmers’ coordination and were “determined supporters of labor unions.”¹⁹³

When the bill reemerged on April 2, 1890, it had been rewritten, essentially into the form we now recognize as the Sherman Act. Specifically, it was rewritten to remove language targeting combinations that would prevent “full and free competition,” as well as language that referenced advancing costs to consumers.¹⁹⁴ This is precisely the language that had been understood to lead to an overbroad rule against horizontal price coordination.¹⁹⁵ And if, as is generally agreed upon, Senator Platt’s speech furnished the final impetus to rewrite the bill, it stands to reason that it was rewritten to address the concerns that his speech raised. The most plausible reading of the proceedings is that the senators understood that by removing the language about competition and consumer prices, and instead using language that closely tracked the common law, they would

188. Bork, *supra* note 74, at 23.

189. Bork’s own citations to the legislative record confirm that Sherman’s bill was reported *before* Platt’s speech, not after. *Id.* at 23 nn.42-44 (correctly citing the reporting of S. 1 to the Senate, which took place on March 26th, and Senator Platt’s speech, which took place on March 27th); 21 CONG. REC. 2662 (1890) (reporting S. 1 as to the Senate); 21 CONG. REC. 2723-29 (1890) (reporting Platt’s speech).

190. 21 CONG. REC. 2731 (1890) (motion to transfer the bill to the Judiciary Committee and subsequent vote on the motion).

191. Kolasky, *supra* note 182, at 87 (describing Senator Platt’s “scathing attack” on the earlier version of the bill and then noting that “Sherman now lost control of the Act that would bear his name”); 1 LEGISLATIVE HISTORY, *supra* note 28, at 23-24 (“Following Senator Platt’s performance, another motion was made to refer the bill and amendments to the Judiciary Committee . . .”).

192. LOUIS ARTHUR COOLIDGE, AN OLD-FASHIONED SENATOR: ORVILLE H. PLATT, OF CONNECTICUT 443 (1910) (“Sherman never forgave him for the criticisms he offered on the floor; yet time has fully vindicated his course.”).

193. BERMAN, *supra* note 174, at 38; Boudin, *supra* note 177.

194. 1 LEGISLATIVE HISTORY, *supra* note 28, at 275 (text of S. 1 with the language described stricken).

195. Berman and Boudin concur in this inference, though they do not focus on Senator Platt’s speech. BERMAN, *supra* note 174, at 35-37; Boudin, *supra* note 177, at 1287 n.14.

avoid the problem of an overbroad rule, while also maximizing the odds that a court would find the law to be constitutional. Indeed, by clearly signaling that Congress was simply federalizing existing common law, the law had a better chance of being found within the scope of Congress's Commerce Clause power.¹⁹⁶ The senators likely understood that Senator Platt's concern – and with it, the subset of such concerns previously addressed by the farmer-labor amendment – had finally been resolved. Thus, with the broader category of beneficial coordination between small producers identified in Senator Platt's speech rendered safe, no special exemption for farmers and laborers was necessary. This explains why, as Berman pointed out, “[n]one of the senators who had supported labor criticized the [new] bill for its applicability to labor unions, nor did they speak a word which implied that they thought unions would be affected. None of them cast a vote against it.”¹⁹⁷

Bork's claim that subsequent “sparring” over the House's amendment further confirms the “intention of both houses of Congress to outlaw cartels” is also contravened by the evidence.¹⁹⁸ It is certainly true that the “Bland amendment” introduced language about “preventing competition,”¹⁹⁹ similar to the language in the version of the bill to which Platt had objected and which the Senate Judiciary Committee's version had then removed. As Bork acknowledged, the Senate Judiciary Committee responded by proposing instead an amendment that kept a portion of this language, but modified it as follows: “preventing competition . . . so that the rates . . . may be raised above what is just and reasonable.”²⁰⁰ The House and Senate ultimately both receded from their respective amendments, leaving the bill in the form it had been reported by the Senate Judiciary Committee following Senator Platt's speech.²⁰¹

196. See *infra* Section III.D.

197. BERMAN, *supra* note 174, at 38. Potential amendments (though no labor or farmer exemption amendment) were discussed by both houses, separately and in conference. But ultimately, the bill retained the same form it had when originally passed by the Senate. See 1 LEGISLATIVE HISTORY, *supra* note 28, at 362; 21 CONG. REC. 6414 (1890).

198. Bork, *supra* note 74, at 23.

199. *Id.*; 21 CONG. REC. 4104 (1890).

200. Bork, *supra* note 74, at 24; 21 CONG. REC. 5950 (1890) (Senator Stewart presenting a joint conference recommendation that the House recede from the Bland amendment and accede to the Senate's amendment, referring to “just and reasonable” rates).

201. 21 CONG. REC. 6208 (1890) (Senate concurring in a conference report recommending that both houses recede from their respective amendments); *id.* at 6312-14 (House adopting a conference report recommending that both houses recede from their respective amendments); Bork, *supra* note 74, at 24.

The “inference from this maneuvering . . . that all cartels were to be illegal, regardless of the price they set”²⁰² is not warranted. Bork claims that the Senate’s adoption of the “just and reasonable” rates amendment “constitutes an admission that the general language of the bill permitted no such construction.”²⁰³ But of course it does not constitute such an admission, since the Senate only proposed this amendment *after* the House reintroduced language about agreements tending to prevent competition—precisely the type of language it had removed following Senator Platt’s speech—and receded from it only when the House also receded from this new language.

D. *Interpreting the Legislative History*

The moral economy perspective, whose salience to the legislative process that produced the Sherman Act is established both by its popular-movement antecedent and its common-law antecedents, helps to establish a legislative purpose—to disperse economic coordination rights—that makes sense of elements of the Act’s origins that otherwise may seem disparate. The moral economy reading also bolsters existing arguments that legislators’ use of and reference to the common-law language in the statutory text signified substantive content, rather than an open-ended delegation of lawmaking power to the courts.

1. *Moral Economy as Background Interpretive Principle*

The foregoing Sections have adduced evidence from the legislative record that tends to demonstrate continuity with the moral economy tradition. The broader context of the legislation also supports a reliance on moral economy to fill interpretive gaps, rather than always reading back a normative benchmark involving a self-regulating market.

As an initial matter, as many commentators have pointed out, legislators and even early postenactment courts would not have invoked “competition” or allocative efficiency in the contemporary, neoclassical sense.²⁰⁴ A precursor of that framework—the self-governing market of classical economics—was an available

²⁰² Bork, *supra* note 74, at 24.

²⁰³ *Id.*

²⁰⁴ See, e.g., Hovenkamp, *supra* note 59, at 935 (observing that a modern, neoclassical conception of competition was not available to lawyers and economists until the end of the nineteenth century); Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 86 n.41 (2003) (distinguishing, in the context of formative postenactment decisions, between the contemporary neoclassical understanding of competition and the understanding of competition among classical economists shortly before the passage of the Sherman Act); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937*, at 270 (1991).

concept at the time.²⁰⁵ But this does not necessarily render the ideal competitive market (and the prices and wages that obtain therein) plausible as the primary normative benchmark for the legislative purpose.

Antitrust historians and historians of economic thought have concluded that the professional economists of the time were indifferent to or even dismissive of antitrust legislation, and were not part of the coalition in favor of its passage.²⁰⁶ Bolstering their accounts, recall that not so many decades earlier, the self-governing market ideal of classical economics had gotten its legs precisely in the context of rejecting moral economy traditions as outdated and ripe for disruption.²⁰⁷ Therefore, given that a popular politics immersed in the moral economy perspective is widely agreed to have formed the impetus for the legislation,²⁰⁸ given the natural and historical antagonism between moral economy and classical economics, and given contemporaneous economics' indifference to the legislation, it seems wise to avoid assimilating the Sherman Act's origins to the normative framework of classical economic ideas.²⁰⁹

205. The notion of a self-regulating competitive ideal existed in classical economics as well. See, e.g., Nicola Giocoli, *The (Rail)road to Lochner: Reproduction Cost and the Gilded Age Controversy over Rate Regulation*, 49 HIST. POL. ECON. 31, 33 n.4 (2017) ("Classical economists held that perfect resource mobility and entry freedom drove market prices to their natural level by equalizing the total advantages of alternative employments of labor and capital.").

206. See Fox, *supra* note 27, at 1153 n.71 (discussing "the view of economists at the time of the passage of the Sherman Act that the market, unconstrained by antitrust, would produce efficiencies: If anything, the tendency of the American Economic Association [in 1890] was to question the wisdom of any legislation directed against 'monopoly' in the economic sense, since the prevalent economists' view was that monopoly power, unbuttressed by legal supports such as patents, tariffs, licensing and the like, was by its nature rapidly eroded by market forces, and that legislative intervention would either impede that process or involve unnecessary social costs"); Anne Mayhew, *How American Economists Came to Love the Sherman Antitrust Act*, 30 HIST. POL. ECON. 179, 181 (Supp. 1998) ("A survey of articles that appeared in the *Quarterly Journal of Economics* (QJE), *American Economic Review* (AER), and *Journal of Political Economy* (JPEP) and of other works reveals that economists played almost no role in formulating the Sherman Antitrust Act and indeed were dismissive of it during the decades in which the act was formulated and enacted.").

207. See *supra* notes 49–53 (discussing Adam Smith's criticism of the marketing offenses – which were steeped in and constitutive of moral economy traditions – and Polanyi's description of the genesis of the self-governing market ideal in the debates over changes to the English Poor Laws).

208. See *supra* Part II.

209. Anne Mayhew's illuminating refutation of the "Whiggish analysis" of how economists came to embrace antitrust law (and antitrust law came to embrace ideal economic theory) is supported by considering moral economy as an economic perspective in its own right, rather than a prescientific mass of confusion. Mayhew, *supra* note 206, at 185–87.

This is of course not to say that some legislators, many of whom would have been trained in the classical liberal milieu of late nineteenth-century elite universities, would not have had classical economics available as a background framework.²¹⁰ Some portions of the legislative record may be best explained in those terms. I offer this account as a corrective to the neglect of economic ideas espoused by the relevant popular coalition, and suggest that they are equally, if not more, relevant to the exegetical task. The broad, popular antimonopoly ferment that produced the Sherman Act possessed key characteristics of what James Pope called a “republican moment.” In such moments, “social movements exert direct popular power on governmental . . . institutions” through direct political action, framing their demands in terms of broader principles.²¹¹ In these situations, attending to such broader principles in reading the statute would seem to be particularly indicated.²¹²

2. *The Invocation of the Common Law and the Common-Law-Statute Thesis*

Despite the availability of cogent refutations, the received view remains that Congress invoked the language of the common law of restraint of trade in the

210. For an example of how elite education in the 1870s, in that case at Yale, often knitted together the classical ideal of a competitive market with notions of proper moral and theological ordering, see DANIEL ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* 31-32 (1995). Again, my claim is not that these ideas were not in the air at all, particularly for many elite members of society (including judges and many legislators), but that interpretations of the Sherman Act and its origins have, tacitly or directly, overemphasized them while underemphasizing the moral economy vision that animated the popular movement.

211. James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 293 (1990). While Pope did not discuss the Sherman Act itself as an instance of a republican moment, he identified as factors associated with republican moments: “(1) widespread and serious public discussion; (2) debate framed in terms of principle and public good; (3) an intention to bring about major changes in the legal order; (4) direct citizen action, such as social protest . . .” *Id.* at 361. See *supra* Part II for a description of how these factors appeared in the antimonopoly movement that led to the Sherman Act.

212. *Id.* at 360. While the idea that the legal order needs periodic replenishment through popular moral storms is appealing, and supports attention to the Sherman Act’s popular origins, we should not exaggerate the differences between these “republican moments” and ordinary law-making. Pope’s framework suggests that interest-group factionalism is the norm, with republican moments only rarely punctuating it to reorient an aspect of the legal order in some basic way. However, the whole idea of moral economy is that public-facing, moral decision-making is not separate and apart from the mundane details of market coordination and administration; morality pervades everyday economic decisions and everyday economic decisions help to constitute moral life.

text of the Sherman Act in order to authorize the courts to engage in broad policymaking.²¹³ This common-law-statute thesis rests ultimately upon the statutory text of the Sherman Act, specifically its invocation of “restraint of trade” in Section 1.²¹⁴ The Supreme Court has held that Congress “adopted the term ‘restraint of trade’ along with its dynamic potential,” thus “invok[ing] the common law itself.”²¹⁵ As a result, influential commentators have argued that the Sherman Act “effectively authorize[s] courts to create new lines of common law” or that it is an open-ended invitation to courts to formulate new rules after learning how markets work.²¹⁶ However, the moral economy reading set out here bolsters already available arguments that legislators’ use of and reference to the common-law language in the statutory text signified substantive content, rather than an open-ended delegation of lawmaking power to the courts.

The use of the common-law language, which was inserted immediately following Senator Platt’s speech, was directly responsive to the content of the concerns he raised. Senator Platt had emphasized the value of loose coordination among small actors while invoking the just-price concept.²¹⁷ The tradition in which the common law of restraint of trade was rooted was strongly compatible with both of these normative touchstones.²¹⁸ This is true even of the specific common-law cases cited by senators during legislative deliberations that some commentators have highlighted to support the condemnation of horizontal economic coordination as such.²¹⁹ Just as the argument that Congress sought to accommodate democratic coordination has played a key role in the broader moral economy interpretation of antitrust’s origins set out here, the argument that

213. See *infra* Section IV.A for a discussion of current commentary and debate. This Section focuses primarily on the legislative-history basis for the common-law statute thesis.

214. 15 U.S.C. § 1 (2018).

215. *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 732 (1988).

216. Easterbrook, *supra* note 22, at 544; HOVENKAMP, *supra* note 20, at 52 (“[T]he Sherman Act can be regarded as ‘enabling legislation’—an invitation to the federal courts to learn how businesses and markets work and formulate a set of rules that will make them work in socially efficient ways.”).

217. 21 CONG. REC. 2729-30 (1890).

218. See *supra* Section I.A, where both of these arguments are set out at length.

219. *Chicago Gas-Light & Coke Co. v. People’s Gas-Light & Coke Co.*, 13 N.E. 169 (Ill 1887) and *Craft v. McConoughy*, 79 Ill. 346 (1875) are invoked by both Arthur and Bork for the conclusion that, by citing them, Congress sought to condemn horizontal economic coordination beyond firm boundaries as such (“loose combinations” or “cartels”). Arthur, *supra* note 23, at 289 n.123; Bork, *supra* note 74, at 22 n.40. As set out in detail in Section I.B, *supra*, these cases do not in fact stand for the proposition that horizontal economic coordination is impermissible as such.

Congress sought to *condemn* this form of coordination has played a critical role in other interpretations of legislative purpose.²²⁰

Legislators themselves described the substantive content of the common law in ways that both support the moral economy reading and, as others have pointed out, confirm that Congress sought to invoke the common law's content, and not simply its form as a delegation to courts. Senator Sherman famously stated:

[T]he object of this bill, as shown by the title, is "to declare unlawful trusts and combinations in restraint of trade and production." It declares that certain contracts are against public policy, null and void. It does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.²²¹

William Letwin noted that Senator Sherman "repeatedly" made this point.²²² Senators Edmunds and Hoar, both involved in the Judiciary Committee's re-drafting, "confirmed that the revised bill applied the common law."²²³ Indeed, in one of his invocations of common law, Senator Hoar noted that the bill "extend[s] the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States."²²⁴ The understanding that existing common-law principles would condemn the trusts – the instances of concentrated "power-over" that were the primary concern and impetus for the legislation – affirms both the formal and substantive continuity of the legislation with antitrust's moral economy origins and

220. For Bork, this purpose was the imputation of a consumer-welfare prescription. Bork, *supra* note 74, at 11. Even for others who are not sympathetic to Bork's reading of the legislative history or affirmative views, however, the conclusion that Congress sought to condemn horizontal economic coordination tends to reinforce the self-regulating market as a theoretical benchmark (even as prior commitment to that benchmark encourages the inference that Congress sought to condemn such coordination).

221. 21 CONG. REC. 2456 (1890); *see also* Peppin, *supra* note 51, at 306 n.29 (noting that Senators Hoar and Sherman "regarded the Act as declaratory of the common law"); Arthur, *supra* note 23, at 289-91 (arguing that Congress only intended a partial and qualified delegation – just as it does in all statutory enactments – for courts to apply its declared policy "to particular cases," and not to invent the policy itself).

222. Letwin, *supra* note 118, at 255-56. Senator Sherman also cited specific restraint-of-trade cases as examples of incorporated rules. *See, e.g.*, Arthur, *supra* note 23, at 280-81; 1 LEGISLATIVE HISTORY, *supra* note 28, at 117-22; 21 CONG. REC. 2457-60 (1890).

223. Arthur, *supra* note 23, at 279-80.

224. 1 LEGISLATIVE HISTORY, *supra* note 28, at 293 (also available at 21 CONG. REC. 3152 (1890)); Arthur, *supra* note 23, at 280.

the superfluity of the inference that the invocation of the common law signified a delegation to courts.

Finally, legislators' concern about the scope of their power to regulate the national market²²⁵ provides an additional explanation for the emphasis and reliance upon existing principles of common law. Sherman's insistence that the bill did "not announce a new principle of law, but applie[d] old and well recognized principles of the common law"²²⁶ was in part to ameliorate this concern.²²⁷ A broad delegation to federal courts to formulate policy would be inconsistent with this concern.²²⁸

3. Conclusion

I have suggested that the legislative record, read in context, supports a core prescription in favor of dispersing economic coordination rights, which further resolves into directives to contain domination, accommodate democratic coordination, and maintain fair competition. I note that taking such a generous approach to interpretation – toward the legislation as well as its popular origins – does not require attributing agency to a collective in a basic, metaphysical

225. See Grandy, *supra* note 130, at 371-72.

226. 21 CONG. REC. 2456 (1890).

227. This purpose is also supported by roughly contemporaneous legal developments, suggesting that this form of reasoning was potentially persuasive to courts. For example, the Supreme Court found that an 1894 statute was within the scope of the Commerce Clause power because it supplemented and extended policies already contained in existing state law. *The Lottery Case*, 188 U.S. 321, 357-58 (1903) ("In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States – perhaps all of them – which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end.").

228. Interestingly, Bork agreed. "Given the narrow view of the commerce power that prevailed in 1890 it is extremely unlikely that the Fifty-first Congress intended to give the courts the power to make broad social or political decisions through the Sherman Act." Bork, *supra* note 74, at 13. Where Bork erred is in supposing that social or political decision-making could be separated from economic decision-making (as he presumably did, if he was to distinguish the "social or political" midcentury antitrust decisions he famously criticized from the later court decisions that followed many of his prescriptions).

sense.²²⁹ It simply requires taking seriously the possibility of an emergent moral logic that is distinct from the sum of its parts. It does not erase individual agency, and still allows for the possibility of conflicting interests – but without endorsing the conclusion that conflicting interests *exhaust* the realm of possibility where legislation is concerned. There is of course a long-running, rich, and detailed debate over the attribution of legislative purpose and the use of legislative history in interpretation,²³⁰ which is largely beyond the scope of the argument set out here. In one sense, my argument stands apart from that debate: drawing upon legislative history and other sources, the enterprise at hand is broader normative reconstruction, which in principle stands independently of questions about judicial method or even questions of statutory interpretation in the narrow sense. On the other hand, the argument does assume, as a background premise, that some notion of legislative purpose is coherent and at least potentially accessible to us.²³¹ For the current purpose, the simplest pragmatic “justification for ignoring the difficulties inherent in the very concept of legislative intention,” as Bork puts it, “lies primarily in the fact that courts and lawyers do regularly ‘find,’ describe and rely upon such intentions.”²³²

229. See, e.g., Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 998 (2017) (“[O]n any plausible account of shared agency, Congress as structured is reliably incapable of forming collective intentions other than the bare intention to enact text into law. As a consequence, attributions to Congress of legislative intent are reliably false.”); Katharine Jackson, *All the Sovereign’s Agents: The Constitutional Credentials of Administration*, WM. & MARY BILL RTS. J. (forthcoming) (critiquing from a political-theory perspective the idea of a collective popular will, before or after institutional deliberation, and collecting other critiques of the notion); see also *infra* Section IV.B (discussing Easterbrook’s views regarding legislative purpose).

230. For a review of the history and the state of the debate, see, for example, Doerfler, *supra* note 229, at 1008–20, which discusses and evaluates various objections to the attribution of legislative intent, and various attempts to resuscitate it.

231. As even careful critics note, the attribution of legislative intent is not only ubiquitous but also unavoidable in legal practice. See, e.g., *id.* at 986–98. At the same time, as John F. Manning has argued, some form of skepticism about legislative intent or purpose among scholars and theorists is common today, even among proponents of the use of legislative history. John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1917–24 (2015). To the extent that some of the bases for such skepticism are generalizable to all collectives, and to the extent that many skeptics are sympathetic to egalitarian reform, it is worth noting that the notion of collective purpose and agency is practically axiomatic within popular labor politics and other egalitarian political projects, and within their theorization. See, e.g., Geoff Eley & Keith Nield, *Farewell to the Working Class?*, 57 INT’L LAB. & WORKING-CLASS HIST. 1 (2000) (discussing changes and prospects for Left politics in terms of collective political agency).

232. Bork, *supra* note 74, at 7 n.2; Doerfler, *supra* note 229, at 986–98.

IV. THE TRANSFORMATION OF ANTITRUST

I have not tried to tell a comprehensive antitrust history here, either in terms of substantive policies and values or in terms of institutional roles.²³³ Rather, I bring an attempt at normative recovery – of the origins of the Sherman Act – to bear upon current substantive and institutional questions. This requires an account of the making of the current moment.

The antitrust prescription that judicial decision-making has adopted in the current era is effectively to concentrate economic coordination rights in the service of efficiency.²³⁴ A broad view of judicial lawmaking power in antitrust is bound up with this prescription. It was asserted and established in the same judicial precedents and scholarly texts that were landmarks in the Chicago School transformation of antitrust. Indeed, the argument for the common-law-statute thesis partially relied upon the normative view of law and markets associated with the Chicago School. Thereafter, the common-law-statute thesis continued to lend support to the expansion of Chicago School antitrust thinking.

The goals of this Part are to establish the close relationship between the substantive values embraced by the current antitrust framework and the primacy of judicial decision-making; to suggest that the reasons we have to question those values may also be reasons to question judicial primacy; and to motivate an alternative approach to both, which in turn is recommended by the normative foundations of antitrust explored earlier in this Feature. The close relationship between judicial primacy and Chicago School values is established, for the most part, historically. While I do not make the strong claim that an egalitarian, moral economy approach is *incompatible* with judicial primacy, I do seek to motivate the conclusion that the relationship is not exactly accidental, either. In this, the account also departs from that of other critics of judicial primacy who have located its origins earlier, and for the most part as independent of any particular set of substantive values or view of markets. In making this case, I draw on a brief description of strands of midcentury antitrust law. Again, this is offered not in an attempt at comprehensive history, but because these strands are critical to capturing the content of the changes that laid the foundations for the current moment.

A. *From Midcentury Antitrust to Chicago in Substance and Method*

Judicial primacy, in its current form, largely co-originated with the ascendance of Chicago School views of market governance, starting in the late 1970s.

²³³. Both Arthur, *supra* note 23, and Crane, *supra* note 24, aim at more comprehensive accounts.

²³⁴. Paul, *supra* note 8, at 413-15.

The landmark case *Continental T.V., Inc. v. GTE Sylvania Inc.*²³⁵ signified a major shift not only in the Court's vertical-restraints jurisprudence, but also in its broader approach to antitrust law. *GTE Sylvania* is widely understood to have been one of the first major vehicles of the Chicago School remaking of antitrust law,²³⁶ which proponents saw as bringing modern economic analysis into the law, replacing moralistic and imprecise notions of fairness and romantic concern with fostering independent enterprise. Not long after *GTE Sylvania*, the Supreme Court declared that Congress had intended the Sherman Act as a "consumer welfare prescription," citing Bork's interpretation of the legislative history.²³⁷ Before turning to *GTE Sylvania*'s view of judicial power, I will briefly describe the substantive transition it both contributed to and came to symbolize.

1. Vertical Coordination as Emblem of Antitrust Transformation

GTE Sylvania and later cases expanding the scope of vertical coordination beyond firm boundaries were premised on understanding distributor and other contracts beyond firm boundaries effectively as agency relationships.²³⁸ These precedents, particularly the early cases, rely on a Chicago School-influenced framework that theorizes such vertical coordination as productively efficient.²³⁹

There is sometimes a tendency, among both advocates and critics of the current antitrust paradigm, to see the law as derivative of economic theory. The reform project might then be conceived in terms of replacing wrong or harmful economic theory with true or helpful economic theory. However, the relation-

235. 433 U.S. 36 (1977) (expanding the permission of geographical market-allocation restraints placed by franchisors upon franchisees).

236. See, e.g., Priest, *supra* note 125, at S6 ("More indelible evidence of Chicago school influence on the Court's change in doctrine are the Court's opinions in the same year in *Fortner II* . . . and in *GTE Sylvania*, acknowledging the benefits of vertical territorial restrictions, overruling the per se prohibition of those restrictions in *Schwinn* (1967). In *GTE Sylvania*, Bork's earlier *Yale Law Journal* articles were cited four times.").

237. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). That decision has been widely cited since for the general proposition that modern antitrust is based on the "consumer welfare standard." The consumer-welfare standard is variously asserted to revolve either around allocative efficiency, or around observably lower consumer prices (or other consumer benefit), as its central normative benchmark. See, e.g., Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 141, 149-50 (2011).

238. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 3-5 (1997) (legalizing maximum price restraints by powerful firms upon small resellers).

239. Of course, there were changes to other areas of antitrust law as well; I focus on vertical coordination beyond firm boundaries here as an example that illustrates both the substantive and institutional shifts, in interaction with the regulatory accommodation of democratic coordination.

ship between law and economic theory in supporting particular forms of economic coordination has always been symbiotic rather than derivative. In fact, neoclassical price theory at best does not define the internal organization of its fundamental units of analysis – firms – and at worst assumes them away as infinitely small or effectively individual producers.²⁴⁰ Neoclassical price theory of course predates the Chicago influence in antitrust policy thinking.²⁴¹ At the broadest level, the Chicago School did two things: it suggested that *only* ideal economic theory was relevant as a normative framework for antitrust analysis,²⁴² and as became particularly evident in the law of vertical restraints, it shifted the primary focus *within* that theory, from competition to productive efficiency.

The focus on productive efficiencies, unlike price theory itself, does evaluate alternative methods of economic coordination. This strand, famously initiated by Ronald Coase,²⁴³ was taken up in a transformative fashion by Oliver Williamson (and indirectly, by Bork) in the 1960s, when it began to influence antitrust and adjacent areas of law.²⁴⁴ Notably, in this framework the distinction between

240. See, e.g., Oliver Williamson, *The Organization of Work: A Comparative Institutional Assessment*, 1 J. ECON. BEHAV. & ORG. 5, 5 (1980) (“[Q]uestions regarding alternative modes of internal organization do not arise naturally within, and in some respects are even alien to, the neoclassical tradition.”); Robert Aaron Gordon, President, Am. Econ. Ass’n, Address to the American Economic Association (Dec. 29, 1975) (“Nor . . . should we forget the extent to which conventional theory ignores how and why work is organized within the firm and establishment in the way that it is.”); Stephen A. Marglin, *What Do Bosses Do?: The Origins and Functions of Hierarchy in Capitalist Production*, 6 REV. RADICAL POL. ECON. 60, 83-84 (1974) (“In the competitive model, there is no scope for supervision and discipline except for that imposed by the market mechanism.”).

241. See generally ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY (forthcoming Feb. 2022) (chronicling intellectual movements in economics in the twentieth century and beyond).

242. See, e.g., Fox, *supra* note 27, at 1145-46.

243. Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390-93 (1937) (observing that organizing production through “the price mechanism” on the open market has costs – specifically, the cost of discovering the “true” prices of inputs, and the cost of negotiating contracts for each individual input). Coase then posited that a particular type of economic coordination – the type embodied in the employment relationship, as structured by master/servant law – arose to solve the problem of these transaction costs. *Id.* at 390-93; see also Herbert Hovenkamp, *Harvard, Chicago, and Transaction Cost Economics in Antitrust Analysis*, 55 ANTI-TRUST BULL. 613, 623 (2010) (“Of course one must not forget that Ronald Coase, who must be considered the grandparent of TCE if Williamson is the parent, himself spent the greater part of his career at the University of Chicago.”).

244. See generally ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 107-10 (1st ed. 1978) (citing and relying on Williamson); George Priest, *The Abiding Influence of “The Antitrust Paradox”*, 31 HARV. J.L. & PUB. POL’Y 455, 456 (2008) (“Virtually all would agree that the Supreme Court, in its change of direction of antitrust law beginning in the late 1970s, drew principally from Judge Bork’s book both for guidance and support of its new consumer

true technical efficiencies and maximizing effort by workers inside or outside the firm is elusive, if not nonexistent.²⁴⁵

This line of analysis evaluates economic organizations in terms of how well they solve particular, inherent problems of economic coordination—with a central focus on “malingering” and other forms of “opportunism”—thus, either explaining or justifying the existence of particular types of economic organization.²⁴⁶ As such, an at least tacit claim that flows from this approach is that the law, by encouraging certain types of economic organization and discouraging many others, allocates coordination rights in a way that rewards better solutions of these coordination problems. Parts of this literature can therefore function as at least a tacit, and sometimes an explicit, normative argument for a particular legal distribution of coordination rights. Certainly, courts would come to treat it that way.²⁴⁷

In the midcentury regulation of vertical restraints and monopolization, the policy of containing domination—in line with the antimonopoly origins of the Sherman Act—was foregrounded. As jurists and commentators would observe later when this strict stance was reversed under the Chicago influence, preserving the autonomy of independent businesspersons drove midcentury vertical-restraints law at least as much as straightforward “competitive considerations”

welfare basis for antitrust doctrine.”); Hovenkamp, *supra* note 243, at 614–23 (describing the through line from Williamson to Bork).

245. Marshall Steinbaum, *Monopsony and the Business Model of Gig Economy Platforms*, ORG. FOR ECON. CO-OPERATION & DEV. (Sept. 17, 2020), [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2019\)66&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2019)66&docLanguage=En) [https://perma.cc/N53C-A4M6] (discussing Blair and Kaserman’s approval of vertical restraints, such as exclusive dealing provisions, upon distributors on the basis that they will ensure that “the supplier can be sure that each of the distributors will work very hard on the seller’s behalf”); see ROGER D. BLAIR & DAVID L. KASERMAN, *LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL* 172 (1983) (“The supplier may get improved product promotions from those with exclusive contracts. There will be added incentive to promote the seller’s product vigorously if that is all the buyer has to sell to the final consumer. Thus, the supplier can be sure that each of the distributors will work very hard on the seller’s behalf.”). The relationship between invocations of efficiency and labor effort is explored further in separate forthcoming work.

246. See, e.g., Oliver Williamson, *Markets and Hierarchies: Some Elementary Considerations*, 63 *AM. ECON. REV.* 316, 321 (1973). Williamson characterizes the more general problem of association as “opportunism,” which may be exhibited both by controllers of firms, in their dealings with each other and by individual workers toward the enterprise. Note that “opportunism” can arise for Williamson both in market dealings (thanks to situational market power) and in associations. *Id.* at 317; see also Williamson, *supra* note 240, at 12 (“Basically, the question of efficient versus inefficient modes of internal organization comes down to an examination of their properties in bounded rationality and opportunism respects.”).

247. See *infra* Section IV.A.2.

did.²⁴⁸ In other words, midcentury policing of vertical restraints was animated by the rationale of containing domination: the decision-making of independent distributors or retailers ought to be *actually* independent, rather than being preempted by contracts with more powerful manufacturers or wholesalers. The consolidation of the midcentury stance was in a case involving vertically imposed maximum prices.²⁴⁹ Monopolization case law sometimes also played a similar role, where manufacturers or wholesalers that already enjoyed dominance in their own markets imposed exclusive dealing or similar terms on distributors.²⁵⁰

By working to contain domination, the midcentury law of vertical restraints also specifically accommodated and made space for another policy goal embraced in the legislative purpose and in antitrust's deeper origins: democratic coordination. This is because it effectively confined hierarchical vertical coordination to

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248. See Thomas C. Arthur, *The Core of Antitrust and the Slow Death of Dr. Miles*, 62 SMU L. REV. 437, 474 (2009); Thomas E. Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325 (1968). Justice White noted in his concurrence in the landmark Chicago-influenced *Sylvania* decision: "[T]he notion in many of our cases involving vertical restraints that independent businessmen should have the freedom to dispose of the goods they own as they see fit." *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 66-67 (1977) (White, J., concurring). Competitive considerations were still relevant, however, because vertical restraints, particularly those that imposed exclusive dealing or equivalent terms, suppressed competition in the manufacturer's or wholesaler's market as well. Cf. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) (holding that the exclusive-dealing arrangement did not violate Section 3 of the Clayton Act, 15 U.S.C. § 14 (2018), since performance of the contract would not foreclose competition in a substantial share of the line of commerce affected). *Tampa Electric* arguably did rely primarily on concerns about competition, rather than containing domination.
249. *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13 (1964) (finding vertically imposed maximum prices by oil company on gas station resellers was illegal, where the Court's reasoning is based as much upon the freedom of the small dealers, as it is on promoting the competitive price); Arthur, *supra* note 248, at 471 (describing *Simpson* as the final closing of remaining "loop-holes"). The Court extended the rule to nonprice restraints in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (holding that geographical and other restrictions upon franchisees' sale of goods, once franchisees had taken title, violated Section 1 of the Sherman Act, 15 U.S.C. § 1 (2018)).
250. See, e.g., *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966). Interestingly, in *Brown Shoe*, the defendant argued that the FTC had failed to prove that the arrangement would substantially lessen competition or lead to a monopoly. *Id.* at 321. The Court held that Section 5 of the FTC Act did not require meeting this standard, even if Section 3 of the Clayton Act (which also regulates distribution and resale contracts) did. *Id.* at 321-22. While *Brown Shoe*, already "one of the world's largest manufacturers of shoes," pressed the competition rationale, arguing it was insufficiently met, the Court dismissed its concern by resting on nondomination, namely the freedom of the independent dealer. *Id.* at 317-21 ("This program obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market.").

firm boundaries,²⁵¹ that is, where countervailing horizontal-coordination rights were available (under labor law).²⁵² Contractual counterparties subject to command through contract under the Chicago School's more permissive orientation toward vertical coordination, by contrast, not only lacked such affirmative coordination rights; their attempts to engage in countervailing horizontal coordination would be (and are) subject to antitrust prohibition themselves.²⁵³ In this respect, midcentury regulation of vertical restraints acted not only to contain domination in the specific market dealings it regulated, but also to preserve space for democratic, horizontal coordination—at that time, primarily instantiated through the mechanism of labor law.

Indeed, accordingly, midcentury antitrust law's policing of vertical restraints beyond firm boundaries would make many contemporary business models that we today associate with the "fissured workplace" difficult or impossible.²⁵⁴ Take fast-food franchising—a business model in which coordination rights are concentrated in the leading firms, namely powerful franchisors. Brian Callaci's work shows how intertwined the development of this business model was with the

251. In one district court decision, the court reasoned that independent gas-station owners were not employees and therefore could not be subjected to the command of their counterparty over what products to carry. *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal. 1951) (holding vertical restrictions on gas-station operators by a landlord oil company violated antitrust laws, and reasoning that gas-station operators were tenants, not employees). Thank you to Marshall Steinbaum for first drawing my attention to this case.

In separate forthcoming work, I explore the development of the firm exemption and its place in both midcentury and Chicago School antitrust thinking in much greater detail. In short, while the firm exemption preceded Chicago, Chicago School thinkers effectively relied upon the rationales for firm-based hierarchy in order to ground the expansion of hierarchical vertical coordination *beyond* firm boundaries.

252. For all its flaws, the midcentury labor-law regime provided for meaningful horizontal coordination rights for a broad swath of workers. 29 U.S.C. §§ 151-169 (2018); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) (discussing the broad transformative potential of the Wagner Act and its limitation in early court rulings).

253. See, e.g., *FTC v. Superior Ct. Trial Law. Ass'n*, 493 U.S. 411, 434-36 (1990) (ruling against an agreement among independent trial lawyers to withhold services until compensation for appointments was increased).

254. See generally Callaci, *supra* note 3 (describing how the legalization of vertical restraints allowed franchising firms to narrow their legal boundaries and leave workers and other stakeholders uncovered); Paul, *supra* note 3 (analyzing how firms in fissured business arrangements take control beyond the firm, especially with regard to controlling small actors in their orbits); Steinbaum, *supra* note 3 (detailing how the legalization of vertical restraints allowed firms to direct and supervise less powerful actors as well as prevent those less powerful actors from organizing against the firms). On the concept of the fissured workplace, see generally DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

changes to vertical-restraints law.²⁵⁵ Many other business models, including the so-called gig economy, would also likely not be tractable under legal principles that effectively forced lead firms to choose between control on the one hand, and the disavowal of responsibility and the avoidance of countervailing coordination rights on the other.²⁵⁶ As Herbert Hovenkamp recently observed regarding the 1966 *Brown Shoe* decision, which held that an exclusive dealing contract constituted unfair competition, “[t]oday a ruling this broad would very likely wipe out the franchise agreements of many of the larger fast foods chains and the automobile industry.”²⁵⁷

2. *Judicial Supremacy and Chicago*

GTE Sylvania also signified another, related but distinct, shift in judicial methodology and ultimately in institutional role. The decision effectively blurred two things: the activity of applying a unitary normative decision rule to new economic and business *circumstances*, on the one hand, with the much stronger claim that the judiciary is empowered to invent the core normative content of the statute altogether, on the other. One may espouse the first position, which confers upon courts the power to apply fixed decision criteria to new economic arrangements, without supposing that they have the power to change or invent those basic criteria.²⁵⁸ Yet gesturing toward changing economic circumstances—some of which are indeed only enabled by judicial decision-making²⁵⁹—has helped to ground courts’ power to invent the very normative criteria for organizing economic activity, so far as antitrust law has a say.

In overruling *Schwinn*,²⁶⁰ the Court cited commentators who had criticized that earlier decision’s reliance upon (what it characterized as) actual common-law precedent, in the stead of modern economic theory. Whether or not *Schwinn*’s characterization of the common law (in that case, relating to restraints upon alienation of property) was *correct*, the *GTE Sylvania* Court went further by discounting the relevance of such precedent altogether, calling the *Schwinn*

255. Callaci, *supra* note 3.

256. See Paul, *supra* note 3, at 73; Steinbaum, *supra* note 3, at 53.

257. Herbert Hovenkamp, *President Biden’s Executive Order on Promoting Competition: An Antitrust Analysis* 3 (Univ. of Pa. Carey L. Sch., Research Paper No. 21-24, 2021) (discussing *Fed. Trade Comm’n v. Brown Shoe*, 384 U.S. 316 (1966)).

258. See Arthur, *supra* note 23, at 289-90.

259. For an example of this, consider the case of business format franchising. See generally, e.g., Callaci, *supra* note 3 (discussing the coevolution of the business form with legal changes that accommodated it).

260. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

Court's reliance upon it "a perversion of antitrust analysis."²⁶¹ The Court asserted its agreement with the *Schwinn* dissent insofar as "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today."²⁶²

The purported "perversion of antitrust analysis" in question was the appeal to the content of actual common-law precedent. In this regard, the *GTE Sylvania* Court cited (among others) some of Richard Posner's contemporaneous comments regarding *Schwinn*. Posner had said that common-law precedent is irrelevant to the interpretation of the statute because that precedent was not about promoting competition in the modern sense:

More important, the common law of restraint of trade was not a product of concern with promoting competition and was not enacted into federal law by the Sherman Act; there is no occasion to consider what a nineteenth-century judge interpreting a confusing body of English precedents would have done if confronted by methods of distribution unknown in his time.²⁶³

This argument, though, is circular. The claim is that the actual common law of restraint of trade, invoked by the statutory language, cannot be relevant to interpreting the Sherman Act, precisely *because* the actual common law was not about "promoting competition" in Chicago School terms. In other words, Posner's claim takes the substantive commitments of the Chicago School as a fixed point and on that basis, declares that the actual common law of restraint of trade is irrelevant to interpreting the statute because it is not consistent with that fixed point. This logical structure reflects the recursive nature of the larger triumph that the common-law-statute thesis has enjoyed.²⁶⁴

From *GTE Sylvania* forward, the common-law-statute thesis took root. It continued to be asserted in close conjunction with substantive Chicago School positions, and also spread beyond them to become a more general assertion

261. *Cont'l Television, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977).

262. *Id.* (quoting *Schwinn*, 388 U.S. at 392).

263. Richard Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 296 (1975).

264. Note that the argument here is not that the nineteenth-century common law should provide the primary normative content for antitrust law. Rather, it is that a circular argument about the relevance of the common law helped to ground judicial supremacy in antitrust. The affirmative normative argument made here is that the common-law tradition ought to inform our reading of the legislative history, and thus of legislative purpose.

about statutory interpretation and judicial methodology in antitrust law. Importantly, while these later authorities sometimes invoked earlier precedents, thereby suggesting an unbroken continuity in judicial approach, the common-law-statute thesis in modern form is quite novel. (The Chicago School criticism of midcentury vertical-restraints decisions for their reliance upon actual common-law precedents itself also undermines the claim of continuity.)

Standard Oil, for instance, was often cited as an early endorsement of the common-law-statute thesis.²⁶⁵ But as commentators have acknowledged,²⁶⁶ Chief Justice White's opinion in that decision in fact took the substantive content of the common law of restraint of trade quite seriously.²⁶⁷ Chief Justice White's opinion engaged with the common-law tradition at length, discussing its roots in traditional market regulation and in doctrines like forestalling and engrossing—and identifying the legislative purpose as curbing the concentrated power of business trusts and corporations, and the relatively few individuals who controlled them.²⁶⁸ It cannot both be that *Standard Oil* supports the modern version of the common-law-statute thesis, and that it is a “perversion of antitrust analysis,” as the *GTE Sylvania* Court later called it, to engage with the common law's substantive content.²⁶⁹ Indeed, shortly after the rule of reason was established, the Court rejected constitutional challenges to the statute in part on the ground

265. See, e.g., *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 732 (1988) (citing *Standard Oil* for the proposition that the “Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself”); see also Arthur, *supra* note 23, at 302 (discussing *Standard Oil* as the first in a line of cases representing the transition to the “constitutional Sherman Act” in federal jurisprudence).

266. Arthur acknowledges this point, while arguing that *Standard Oil* opened the door to broader latitude in judicial policymaking by espousing a vague, open-ended standard. Arthur, *supra* note 23, at 298-99.

267. *Standard Oil Co. v. United States*, 221 U.S. 1, 6-8 (1911); see also *supra* Part I (discussing Chief Justice White's close attention to the common law of restraint of trade and its roots in traditional market regulation, including doctrines such as forestalling and engrossing).

268. *Standard Oil*, 221 U.S. at 50 (“[T]he main cause which led to the legislation was the thought that it was required by . . . the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.”); see also *supra* Part I (engaging with the common-law context of the statutory text “restraint of trade”).

269. It is certainly true that *Standard Oil* was not well-received in Congress, on the related grounds that it created a standard that was too deferential to big business and that it empowered courts to exercise that deference. See, e.g., Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 231 (1980). However, it did not embody the level of judicial empowerment to formulate new rules that is often taken for granted in antitrust today.

that actual common-law precedents furnished the content of the standard and thus provided substantive guidance to litigants.²⁷⁰

Nor does *Chicago Board of Trade* stand for the modern common-law-statute thesis, although some commentators argued that it opened the door to broad, open-ended judicial policymaking.²⁷¹ The rule of reason, as it was formulated in that case, held that the legality of an instance of economic coordination turns on whether it “merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”²⁷² Bracketing for the moment the question of exactly how much latitude this formulation afforded judges, and its ultimate merits, the formulation did not invite judges to literally invent the normative criteria for organizing economic activity under the Sherman Act. One might read the formulation as, in this way, maximally open-ended if one started from the premise that the object of antitrust law is to promote competition, full stop. While the formulation could have been more explicit, Justice Brandeis’s own normative commitments were to fair competition, reasonable cooperation among smaller actors, and the dispersal of coordination rights through the maintenance of independent enterprises.²⁷³ He never advocated for maximal levels of competition in any given market, and he posited fairness as the limiting principle upon competition.²⁷⁴ Since Justice Brandeis’s normative framework is thus, in essential respects, continuous with the legislative purpose (set out in Part III), there is no reason to read his formulation of the rule of reason as opening up a new arena of judicial policymaking. Indeed, *Chicago Board of Trade* was itself in some ways continuous with traditional market regulation, whose doctrines (as we saw) were preoccupied with the buying and

270. Peppin, *supra* note 51, at 307 (“The reply of the Court in each case was the same: that the Sherman Act was not uncertain since the rule of reason embodied only the rules declared by these common law precedents and therefore afforded a definite and certain objective standard—one sufficient to satisfy the requirements of due process.” (referencing *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926) and *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927))).

271. See, e.g., Arthur, *supra* note 23, at 306 (arguing *Chicago Board of Trade* produced a standard where “no defense [ould] be ruled out so long as it [wa]s presented as some effort to right the wrongs of society”).

272. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

273. See, e.g., GERALD BERK, *LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900-1932*, at 35, 41 (2005); LAURA PHILLIPS SAWYER, *AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE “NEW COMPETITION,” 1890-1940*, at 107, 116-18, 139-40 (2018).

274. BERK, *supra* note 273; SAWYER, *supra* note 273. In its modern instantiation, the rule of reason has served to expand primarily a different limiting principle upon competition: putative productive efficiencies realized through concentrated control. See, e.g., Paul, *supra* note 8 (regarding the various meaning of “efficiency” in the contemporary framework).

selling of grain and other necessities of life.²⁷⁵ Just as those “old notions of right” insisted that trade in these items be done within the physical and socially created bounds of the town market – and not, for example, on the way to it or before it – so Justice Brandeis’s decision in *Chicago Board of Trade* insisted that a modern agricultural commodities market could limit and contain price competition within its temporal and socially created bounds.²⁷⁶

Similarly, the Depression-era *Appalachian Coals*, which permitted the operation of a joint selling agency of bituminous coal producers in order to stabilize a market characterized by destructive competition,²⁷⁷ has sometimes been interpreted as opening the door to any kind of coordination at all, with no criteria other than judicial discretion to license or prohibit it.²⁷⁸ This interpretation only makes sense, however, if one jettisons the concept that the Act sought to disperse rather than concentrate economic coordination rights. In fact, *Appalachian Coals* represented a particular sort of flexibility: one in which the extent and nature of competition in a market is relevant to determining the appropriateness of coordination, rather than a focus upon whether horizontal coordination is within or beyond firm boundaries.²⁷⁹ That type of flexibility does not imply that judges invent the criteria according to which coordination is permitted or not. Rather, it simply represents a *different* set of criteria than the current, conventional ones that largely revolve around whether the coordination in question emanates from a center of concentrated control (and is therefore likely to be productively efficient).²⁸⁰

Finally, Arthur posits the strongest early statement of the common-law-statute thesis as Judge Hand’s in *United States v. Associated Press*²⁸¹:

275. See *supra* Part I; cf. Tankus & Herrine, *supra* note 40 (arguing that *Chicago Board of Trade* is of a piece with the general favor of vertical-market governance and delegates governance power to controlling firms).

276. 246 U.S. at 237–38.

277. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 373–74, 378 (1933).

278. See, e.g., Arthur, *supra* note 23, at 306–08 (arguing *Appalachian Coals* completed the shift to the “constitutional” approach to the Sherman Act and maximizing judicial discretion).

279. In *Appalachian Coals*, the Court permitted a joint-selling agency of coal producers; that is, it permitted loose coordination among dispersed firms in order to prevent below-cost pricing and downward pressure on wages, while also removing the incentive to corporate consolidation produced by regulatory antipathy to horizontal coordination beyond firm boundaries together with a lax attitude toward corporate mergers. For a discussion of that general pattern in certain periods of judge-made antitrust law, see generally LAMOREAUX, *supra* note 152, at 1895–1904, which discusses the late nineteenth century wave of horizontal mergers that antitrust law incentivized; and Vaheesan, *supra* note 4, at 28, which argues that over the past forty years, courts have primarily enjoined horizontal collusion while enabling corporate mergers.

280. Paul, *supra* note 8, at 401–09.

281. Arthur, *supra* note 23, at 310; *United States v. Associated Press*, 52 F. Supp. 362 (1943).

Certainly such a function is ordinarily “legislative” But it is a mistake to suppose that courts are never called upon to make similar choices: i.e., to appraise and balance the value of opposed interests and to enforce their preference. The law of torts is for the most part the result of exactly that process, and the law of torts has been judge-made, especially in this very branch. Besides, even though we had more scruples than we do, we have here a legislative warrant, because Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case. Congress might have proceeded otherwise; it might have turned the whole matter over to an administrative tribunal, as indeed to a limited extent it has done to the Federal Trade Commission. But, though it has acted, it has left these particular controversies to the courts, where they have been from very ancient times.²⁸²

This statement, in a federal district-court decision by a uniquely influential judge, does appear to claim some type of delegation of decision-making power to the courts. However, later in the same opinion, Judge Hand appealed not to generalized judicial authority to set legal standards, but to the legal standards contained in the actual common law of restraint of trade and to Congress’s decision in adopting those standards.²⁸³ Accordingly, the actual “legislative” function that Judge Hand claimed for the court even in this case was the case-specific evaluation and comparison of the nature of the specific benefits and burdens, to the producers and the public, imposed by the restraint at issue – not the determination of the very normative criteria to be applied to evaluate the coordination at issue.²⁸⁴

282. *Associated Press*, 52 F. Supp. at 370.

283. *Id.* at 373 (“Congress, as we have said, has already acted, and it has acted by selecting the standard of the common law as the measure of its will. Historically that standard can only be applied by assessing the public importance of the activity which by hypothesis has been restricted; and practically no other conceivable standard is rationally available.”).

284. Generally speaking, Judge Hand adhered to a doctrine of legislative supremacy, particularly in the shadow of Progressive and New Deal legislation. See Thomas W. Merrill, *Learned Hand on Statutory Interpretation: Theory and Practice*, 87 *FORDHAM L. REV.* 1, 2 (2018) (“Learned Hand’s conception of separation of powers in this sense was similar to that of Justice Oliver Wendell Holmes, whom Hand intensely admired, and was consistent with that of other judicial luminaries who were roughly his contemporaries, such as Louis Brandeis and Felix Frankfurter. This conception gave nearly exclusive authority to the legislature in setting public policy and cautioned the judiciary not to interfere with the legislative prerogative. In embracing this conception, Hand and his like-minded contemporaries were responding to the central constitutional issue of the times: whether the policy innovations associated with the Progress-

Overall, the inference that older cases lacked any substantive criteria to organize economic decision-making may result from an anachronistic interpretive stance that effectively assumes contemporary priorities in organizing economic activity and understanding markets. Thus, decisions following *GTE Sylvania* invoked these older precedents for a much broader claim about judicial empowerment, according to which both the actual common law and the legislative history became largely irrelevant to judges' determinations of the normative criteria that would guide their decisions.²⁸⁵ More recently, the Supreme Court has gone even further than Arthur's argument that the common-law method was established by midcentury, asserting that "[f]rom the beginning the Court has treated the Sherman Act as a common-law statute."²⁸⁶

As it entered into antitrust orthodoxy, the common-law-statute thesis continued to be expressly connected to the goals of the Chicago School, including the central concept (or concepts) of efficiency. Herbert Hovenkamp wrote in the 1980s that "the Sherman Act can be regarded as 'enabling' legislation — an invitation to the federal courts to learn how businesses and markets work and formulate a set of rules that will make them work in socially efficient ways."²⁸⁷ Since then, it has not only led judges to reinvent doctrine after doctrine, but it has also empowered them to consciously disregard existing judicial precedent in doing so.²⁸⁸ In place of legislative history and past judicial precedent, judges were to rely upon the new economic learning.

The contemporary common-law-statute thesis is thus inextricably bound up with substantive Chicago School commitments: it has underwritten the remaking of antitrust law's basic decision rules according to Chicago principles; it co-emerged with those decision rules; and those commitments were proffered in favor of the common-law-statute thesis, often in a circular manner. Yet today,

sive Era at the beginning of the twentieth century, and later with the New Deal, were permissible, given the limited government an earlier generation of judges perceived to be enshrined in the Constitution. Hand agreed with Holmes and others that legislative experimentation should be allowed to go forward, and the judiciary should not stand in the way.").

285. See, e.g., *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 732 (1988) (citing *Standard Oil* for this kind of judicial authority); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

286. *Leegin Creative*, 551 U.S. at 899.

287. HOVENKAMP, *supra* note 20, at 52.

288. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20-21 (1997) (holding that *stare decisis* "has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition'" (quoting *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 688 (1978))); Farber & McDonnell, *supra* note 23, at 624-27 (discussing *Khan* both as an instance of substantive Chicago School antitrust analysis and of the common-law statute view's disregard for judicial precedent).

the common-law-statute thesis is accepted widely by scholars and jurists largely regardless of normative economic commitments, even and perhaps especially outside antitrust law.

In discussions of statutory-interpretation methodology, the common-law-statute thesis (with respect to antitrust law) is frequently taken as a fixed background point for other debates. For instance, Ethan J. Leib and Michael Serota have pointed to Congress' openness to "common law development by courts" in antitrust law as a point in favor of methodological pluralism, noting that in "the world of what are sometimes known as common-law statutes, broad delegation to the judiciary is uncontroversial, and the legislature expects judges to develop the law over time by utilizing a free-form common-law method."²⁸⁹ Even Margaret Lemos's critique of the "common-law statute" category treats the Sherman Act's position at the center of that category as more or less uncontroversial.²⁹⁰ And even in pointing out the fruitful consequences of relaxing the common-law-statute thesis in the antitrust arena itself, Lemos leans upon the now-conventional substantive commitments that the common-law-statute thesis in antitrust helped to usher in – namely that "[a]ntitrust law today implicates complicated and contested questions of economic theory," which might therefore be better handled by agency experts rather than by generalist judges.²⁹¹

However, Daniel A. Farber and Brett H. McDonnell have advanced an important internalist critique of judicial policymaking in antitrust.²⁹² Farber and McDonnell concluded that one must make a choice: jettison either the commitment to textualism (which many advocates of judicial primacy in antitrust law, such as Justice Scalia and Judge Easterbrook, share) or the common-law-statute

289. Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J.F. 47, 53, 54 (2010).

290. Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common Law Statutes" Different?*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 89, 91-92 (Shyamkrishna Balganesh ed., 2013). For instance, Lemos gives this general statement of the conventional view of common-law statutes as a category: "Congress did not define the precise content of common-law statutes, but instead 'expect[ed] the federal courts to interpret them by developing legal rules on a case-by-case basis in the common law tradition.'" *Id.* at 95 (quoting *Guardians Ass'n v. Civ. Serv. Comm'n*, 463 U.S. 582, 641 & n.12 (1982) (Stevens, J., dissenting)). She then says, "[a]s a description of statutes like the Sherman Act, that characterization is uncontroversial. It does not work, however, to define a self-contained category of statutes." Lemos, *supra*, at 95. Her primary objection is to the generalizability of this feature, rather than its application to the Sherman Act as such.

291. Lemos, *supra* note 290, at 105. Lemos's critique of the broader category contains, nevertheless, the seeds of a fundamental rethinking of the question it raises "concerning delegations of law-making power to the judiciary" even in the case of the Sherman Act itself. *Id.* at 90.

292. Farber & McDonnell, *supra* note 23. The argument is internalist insofar as it takes the commitment to textualism in statutory interpretation, which many adherents of the common-law-statute thesis share, as a starting premise.

thesis.²⁹³ Analogizing to a textualist interpretation in other statutory contexts – Justice Thomas’s approach to the Federal Employers’ Liability Act, for example, which drew upon common-law tort principles to limit the statutory remedy, where the statute tracked common-law language²⁹⁴ – they pointed out that textualism would indicate fidelity to the substantive content of common-law precedent, something that is rejected within the contemporary approach to judicial primacy in antitrust.²⁹⁵ Farber and McDonnell also pointed out that the standard Chicago (and post-Chicago) interpretation of antitrust as centered on the neo-classical perfect-competition ideal makes a portion of section 2 of the Sherman Act redundant, and that “[u]nder standard textualist analysis, courts should focus mainly on the language of the more recent and more specific statutes in the areas in which they apply” – namely the Federal Trade Commission (FTC) and Clayton Acts.²⁹⁶ Yet in antitrust, judges have done the opposite, assimilating the later statutes into the vortex of judicial primacy.

Most recently, Daniel Crane has argued that courts have selectively “read down” the antitrust statutes in favor of big business despite their relatively determinate meanings.²⁹⁷ Crane ultimately argues that Congress has acquiesced in this as part of a broader political arrangement, in which the legislature expresses “romantic” ideals in favor of small enterprise and republican values in economic life, and judges then quietly accommodate the supposedly practical reality of large-scale, top-down industrial organization.²⁹⁸ But the argument that Congress has acquiesced in judicial lawmaking seems to require heroic and constant legislative efforts to counter the courts’ interpretations. And in fact (as Crane acknowledges),²⁹⁹ Congress did respond to judicial construction of antitrust law

293. *Id.* at 621 (noting that the “praise of judicial activism in antitrust” has come from Justice Scalia and other “leading textualists,” such as Judge Easterbrook). Justice Scalia, perhaps the most famous textualist, also authored one of the Court’s strongest endorsements of the common-law-stature thesis in antitrust, in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 719-36 (1988). Farber and McDonnell also drew on Judge Easterbrook’s *Statutes’ Domains*, *supra* note 22, and other writings. Easterbrook’s arguments are discussed further in the next section. Farber and McDonnell did not themselves advocate for the use of legislative history in interpreting the statute – and their argument against judicial supremacy is not mainly based in legislative history – but their account provides a compelling reason to turn to it by undermining the usually-presented alternative.

294. Farber & McDonnell, *supra* note 23, at 637-39 (discussing *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994)).

295. See the discussion of *Continental Television, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), at the beginning of this Section.

296. Farber & McDonnell, *supra* note 23, at 642, 643.

297. Crane, *supra* note 16, at 1216.

298. *Id.* at 1247.

299. *Id.* at 1215-16.

of which it disapproved in major legislative reform moments, most significantly by passing the Clayton and Federal Trade Commission Acts.³⁰⁰ Moreover, key New Deal developments, including the Wagner Act,³⁰¹ can also be interpreted as congressional responses to the judicial construction of antitrust law. This interpretation follows once we recognize antitrust's core function of allocating coordination rights, and also acknowledge that the legislative purpose was to *disperse* economic coordination rights—a prescription that includes accommodating democratic coordination, which the Wagner Act effectuates. These congressional responses, though, take considerable effort; repeated, fine-grained congressional responses to judicial nullification should not be required to avoid the conclusion that Congress has acquiesced to judicial supremacy or to a particular substantive “reading down” of a statute.³⁰² While Crane concludes that Congress has ultimately acquiesced in judicial supremacy, and in the substantive organization of markets that has stood for, his argument is evidence of an increasing acknowledgment among antitrust scholars that the logical foundation of judicial lawmaking power in the field is, at the very least, shaky.³⁰³

B. Judges' Domains

In the foregoing Section, I argued that that the contemporary form of judicial primacy in antitrust is both historically distinctive and has been closely bound up with a particular set of substantive views about markets and regulation. This is true both in terms of the content of the legal developments with which judicial policymaking in antitrust has been associated³⁰⁴ and in terms of the arguments (against attending to earlier legal understandings of markets) that have been proffered in favor of judicial policymaking.³⁰⁵ In the latter case, I argued that there is a certain circularity to these arguments, insofar as a modern understanding of the ideal competitive market is first presumed to define the antitrust field, and earlier precedents are then discarded to the extent they do not fit naturally into that framework.³⁰⁶ In this Section, drawing on some of Judge Easterbrook's influential arguments for judicial primacy in antitrust by way of illustration, I

300. See Farber & McDonnell, *supra* note 23, at 643.

301. 29 U.S.C. §§ 151-169 (2018).

302. See, e.g., William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69-70 (1988).

303. See also Hurwitz, *supra* note 24, at 1193 (arguing for deference to administrative agencies).

304. See *supra* Section IV.A.1 (discussing an emblematic strain of Chicago School developments).

305. See *supra* Section IV.A.2 (discussing *GTE Sylvania's* view of judicial method and modes of antitrust analysis in connection with Richard Posner's arguments).

306. See *supra* Section IV.A.2.

argue that this circularity also applies within the assumptions that drive skepticism about attention to broader legislative purpose.

Easterbrook authored a meditation on statutory construction more generally, *Statutes' Domains*, that also became a canonical reference for judicial supremacy in antitrust.³⁰⁷ Easterbrook's essay asserts that the Sherman Act is a good example of a statute "that effectively authorize[s] courts to create new lines of common law."³⁰⁸ The essay also makes a broader case for disregarding legislative purpose in statutory interpretation, arguing that either legislatures specify general goals without specifying rules—in which case they authorize courts to create new lines of common law—or that they specify rules.³⁰⁹ In addition to asserting a binary choice between a code of rules and a broad delegation to courts, Easterbrook's argument again centers "today's wisdom":

If [the legislature] enacts some sort of code of rules, the code will be taken as complete (until amended); gaps will go unfilled. If instead it charges the court with a common law function, the court will solve new problems as they arise, *but using today's wisdom rather than conjuring up the solutions of a legislature long prorogued.*³¹⁰

The latter half of the disjunct is, precisely, the common-law-statute thesis: that the normative content of common-law statutes can and should be supplied by judges, according to "today's wisdom." In the case of antitrust (and many other statutes), this expressly meant, and continues to mean, the law and economics approach that was urged by the Chicago School.³¹¹ This approach entails particular, normative commitments about organizing markets³¹² that judicial supremacy enabled, and that motivated judicial supremacy.

Easterbrook argued that judges are not well equipped to divine legislative intent, and that therefore they should not be charged with fidelity to a legislative purpose or with applying it to new cases. A major reason for this is "[b]ecause legislatures comprise many members, [so] they do not have 'intents' or 'designs,'

307. Easterbrook, *supra* note 22.

308. *Id.* at 544.

309. *Id.* at 546-47. Specifying detailed rules is also not effective to achieve broad effectuation of legislative purpose, however, because (as further discussed below), the "more detailed the law, the more evidence of interest-group compromise," which does not imply judicial delegation but does indicate reading the statute narrowly. Frank Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 16 (1984).

310. Easterbrook, *supra* note 22, at 545 (emphasis added).

311. See also Posner, *supra* note 263, at 282-83 (criticizing the Supreme Court for failing to apply Chicago School understandings of antitrust).

312. See, e.g., Khan & Vaheesan, *supra* note 19, at 272-73 (discussing Chicago School antitrust approaches); Paul, *supra* note 8, at 389.

hidden yet discoverable.”³¹³ Individual legislators may have designs, but the legislature “has only outcomes.”³¹⁴ Importantly, Easterbrook goes on to say: “This [conclusion] follows from the discoveries of public choice theory.”³¹⁵

Public-choice theory is an affirmative, contested theory about the nature of the legislative process and, ultimately, about democracy more broadly.³¹⁶ While skepticism about legislative intent may have other bases,³¹⁷ its connection to public-choice theory, in the context of arguments that are also closely associated with judicial primacy in antitrust, is worth brief examination. Whatever else it does, public-choice theory takes a deflationist view of democratic engagement, wherein interest groups generally pursue private ends in a zero-sum environment where benefits are typically associated with costs.³¹⁸ This skepticism about public deliberation, first, has a deep resonance with the foundations of welfare economics (a commitment to which the origins of public-choice theory and many proponents, including Easterbrook, share), insofar as it largely minimizes

313. Easterbrook, *supra* note 22, at 547.

314. *Id.*

315. *Id.*

316. Public-choice theory can be traced to the publication of James Buchanan’s and Gordon Tullock’s *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1965). See Francesco Forte, *From The Calculus of Consent to Public Choice and to Public Economics in a Public Choice Approach*, 152 *PUB. CHOICE* 285 (2012) (offering a sympathetic account by an intellectual contemporary, and tracing the field to this origin point); see also Nancy MacLean, *DEMOCRACY IN CHAINS* 74-87 (2017) (providing a critical account of the origins of public-choice theory). MacLean notes that deflating any notion of “the common good” by characterizing majoritarian decision-making as inevitably inviting coordination in the form of “special interests” engaged in “rent seeking” was essential to the goals of “attack[ing] the leviathan state from the inside,” as one of the founders of public-choice theory put it. MacLean, *supra*, at 77-78. For additional writing on public-choice theory in recent legal scholarship, see, for example, RAHMAN, *supra* note 6, at 40-43; and Britton-Purdy et al., *supra* note 1, at 1811 nn.96-101.

317. See, e.g., Doerfler, *supra* note 229, and surrounding discussion.

318. See generally William N. Eskridge Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 *VA. L. REV.* 275, 276-77 (1988) (quoting James Buchanan and noting that public-choice theory has “deromanticized the political process” and that public-choice theory indicates that “the legislature will produce too few laws that serve truly public ends, and too many laws that serve private ends”).

the potential effects of public debate and deliberation on the preferences of individual legislators and interest groups,³¹⁹ which is also how welfare economics often views consumer preferences in markets.³²⁰

The skepticism about democratic ordering of markets, in particular, also derives some of its normative purchase from the notion that economic outcomes *absent* such democratic engagement are somehow more natural and fairer. There is no particular reason to think this except for the premise, which Easterbrook makes explicit, that markets ought to be governed primarily by “the liberal principles underlying our political order,” further glossed as the “presumption” that private contracts trump other allocations of coordination rights because “[t]hose who wrote and approved the Constitution thought that most social relations would be governed by private agreements, customs, and understandings, not resolved in the halls of government.”³²¹ Of course, this amounts to the claim that *certain* products of the “halls of government” should be privileged over others in ordering markets, *not* that social and economic relations should not be publicly governed.³²² But the premise that markets should be governed primarily through a specific set of property entitlements and agreements based on them is not an incontestable “principle[] underlying our political order.”³²³ Rather, it is one particular way of constructing and governing markets. Relatedly, labeling the distributive results of other ways of organizing markets as “rents” seems to lend a preference for and a sense of scientific legitimacy to a certain set of market rules. Yet that only becomes a colorable proposition if there is a unique distribu-

319. See, e.g., Easterbrook, *supra* note 22, at 547 (discussing individual legislators’ designs); Eskridge, *supra* note 318, at 283-95.

320. Some philosophers analyzing the foundations of welfare economics have noted that the central role of individual preferences in normative applications tends to sideline the fact that “people’s preferences for public goods of all sorts respond to arguments and may be different after public debate than they were before. Substituting cost-benefit analysis for public deliberation means that people’s preferences are never subjected to such challenges.” Daniel M. Hausman & Michael S. McPherson, *The Philosophical Foundations of Mainstream Normative Economics*, in *THE PHILOSOPHY OF ECONOMICS: AN ANTHOLOGY* 226, 247 (2008); see also Luke Herrine, *Consumer Protection after Consumer Sovereignty* 21 (Aug. 23, 2021) (unpublished manuscript) <https://ssrn.com/abstract=3781762> [<https://perma.cc/N6NF-VJKT>] (discussing the broader implications of social influences on consumer preferences).

321. Easterbrook, *supra* note 22, at 549.

322. For a classic critique of this notion, see, for example, Robert L. Hale, *Coercion and Distribution in the Supposedly Non-Coercive State*, 38 *POL. SCI. Q.* 470 (1923).

323. Easterbrook, *supra* note 22, at 549.

tion of incomes or benefits that results from an ideal competitive market—in abstraction from the very choices about market rules that are at issue.³²⁴ As one economist has succinctly put it, “[a] rent is an income that someone receives under the current rules, that they would not receive if the rules were different.”³²⁵

In addition to supporting a categorization of statutes in which antitrust statutes “are designed to vest discretion in courts, to transfer the locus of decision,”³²⁶ the public-choice view also suggests an impoverished approach to democratic coordination. For example, as a paradigm example of interest-group rent seeking in legislation, Judge Easterbrook described a hypothetical “statute regulating the price of fluid milk,” which on this view is effectively “a pact between milk producers and milk handlers designed to cut back output and raise price, to the benefit of both at the expense of consumers.”³²⁷ When confronted with the milk producers and handlers, judges should enforce their “bargain[s]” as “faithful agent[s] but without enthusiasm,” construing them narrowly.³²⁸ But absent vigorous antitrust scrutiny of vertical restraints,³²⁹ one can easily imagine a market where powerful dairy distributors effectively control milk prices and outputs through their contracts with atomized milk producers.³³⁰ Such “pacts”

324. Regarding reasons to doubt the analytical coherence of this ideal competitive market as a normative benchmark, see, for example, Hockett & Kreitner, *supra* note 37, at 782-84; Jo, *supra* note 40, at 328-29; Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

325. Josh Mason (@JWMason1), TWITTER (Dec. 4, 2018, 3:55 PM), <https://twitter.com/JWMason1/status/1070058916426465280?s=20> [<https://perma.cc/8Q4S-KY9W>].

326. Easterbrook, *supra* note 309, at 16 (“General-interest statutes, on the other hand, are designed to vest discretion in courts, to transfer the locus of decision; courts implementing general statutes (such as the antitrust laws) become the decisionmakers.”).

327. *Id.* at 15. While here the “pact” is struck in a “back-room deal,” *id.*, it is objectionable for similar reasons that horizontal coordination is under today’s understanding of antitrust. Richard Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 271 (1982) (describing statutes produced by “cartel like pressures for redistributing wealth”); Paul, *supra* note 3, at 78-84 (on the treatment of horizontal economic coordination under the currently prevailing wisdom).

328. Easterbrook, *supra* note 309, at 15.

329. See *supra* Section IV.A.2 (discussing changes to vertical restraints law under the influence of Chicago School thought).

330. To take a historical example, this was the situation in the turn of the century in many parts of the Midwest. See WOESTE, *supra* note 102, at 73. Strikingly, when farmers responded by organizing cooperative associations to sell their milk, even when they incorporated as ordinary corporations, courts applying state antitrust law did not always extend to them the firm exemption, instead insisting on viewing the organized farmers as a group of individuals engaging in unlawful coordination. See, e.g., *Ford v. Chicago Milk Shippers Ass’n*, 39 N.E. 651, 655 (Ill. 1895) (“While [it] is true, as a general proposition, that a corporation may be created and constituted a legal entity, existing separate and apart from the natural persons composing it,

made within a corporate boardroom (or more realistically, among senior managers) would be honored and supported by the legal system in numerous ways, including by policing countervailing coordination among counterparties such as producers. Yet public-choice theory would not seem to view such state action as a narrow effectuation of private interest. Other described indications of legislative rent seeking are similarly selective among the private interests they single out in their characterization of the public interest.³³¹

V. IMPLEMENTING ANTITRUST'S CORE PRESCRIPTION

I have argued that antitrust's core prescription, as reconstructed from the origins of the Sherman Act, is to disperse economic coordination rights. I further suggest that we understand this core prescription in terms of three specific tasks or functions: (1) containing domination, (2) accommodating and promoting democratic coordination, and (3) setting the terms of fair competition. In this final Part, I briefly illustrate how these functions might be implemented by an administrative agency, such as the FTC.

These three antitrust functions reinforce each other at the level of principle, and naturally also overlap in practice. For instance, democratic coordination among smaller actors in markets itself helps to limit and contain domination of more powerful actors.³³² Similarly, containing domination helps to create space

yet it cannot act independently . . . of the natural persons who constitute the corporate body. . . . And when the acts of the corporate body are violative of the statute of the state . . . such acts are wholly without the lawful power of the corporation, as the state will create no body with authority to violate its laws.”). The salience of such examples for understanding the development of the firm exemption in antitrust law and beyond is explored in separate forthcoming work.

331. Easterbrook, *supra* note 309, at 16 (describing statutory barriers on new entrants to a regulated industry as an indication of rent seeking); Posner, *supra* note 327, at 271 (describing statutes produced by “cartel like pressures for redistributing wealth”). Managing the number of participants in a market is viewed as illegitimately favoring the private interests of incumbents, on this view – ignoring the public nature of the interest in living wages among market participants, for example – while countervailing interests are presumed to be public in nature. Moreover, industries where regulation manages the number of participants are typically ones in which market actors are relatively atomized, setting up conditions for destructive competition. Other, more concentrated markets are *no less* managed, however; if not overtly monopolistic, prices are often stabilized through the price leadership of dominant firms, which antitrust law tolerates. See Tankus & Herrine, *supra* note 40 (discussing the “price leadership exemption” to antitrust law). More generally, from this perspective, all “redistributive” statutes will tend to be seen as rent seeking, indicating narrow construction, while legal support of the existing distribution of rents is effectively disregarded.
332. For recent work making this argument explicitly, see generally, for example, Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy*, 124 PENN ST.

for democratic coordination, helping to ensure that smaller players will have a voice in economic decision-making.³³³ Setting the terms of fair competition is essential once we recognize that limits upon competition are unavoidable and should be chosen consciously and systematically and, where possible, democratically—rather than ad hoc.³³⁴ All three elements together help to avoid the outcome that Senator Sherman identified as the central problem at which the Sherman Act was directed: “leav[ing] the production of property, the transportation of our whole country, to depend on the will of a few men sitting at their council board.”³³⁵

Where the details of implementation are not set out in the relevant statute, the appropriate administrative agency can direct the implementation of antitrust’s core prescription. Unlike delegation to courts, delegation to the Federal Trade Commission (and, indeed, to any agency created by future legislation) is supported by antitrust’s popular and democratic origins. While an administrative agency, like all arms of the state, is by its nature a creature of elites, it also has significant democratic potential. A rich existing literature on the democratic potential of administration³³⁶ has been recently replenished by scholars who seek

L. REV. 1 (2019), which discusses how coordination can serve as a counterweight to corporate concentration; and Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546 (2021), which discusses how democratic coordination can enable lower-income groups to build organizations capable of countervailing the political power of the wealthy.

333. See *supra* Section IV.A (discussing how antitrust’s containment of domination in the midcentury period created space for the effectuation of democratic coordination through the mechanism of labor law). Containing domination has also long been close to the heart of efforts to conceptualize labor law, which is the most significant area of existing modern law aimed at democratic coordination. For a recent effort to build expressly on nondomination as a normative basis for labor law, see Alan Bogg & Cynthia Estlund, *The Right to Strike and Contestatory Citizenship*, in *PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW* (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2018). For a critical evaluation of the potentials and pitfalls of the nondomination strand of the civic-republican tradition for conceptualizing or reforming labor law, see generally Alan Bogg, *Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?*, 33 INT’L J. COMPAR. LAB. L. & INDUS. RELS. 391, 392 (2017), which states that “[w]hile neo-republican theories of non-domination provide some deep insights into the nature of private power in the workplace, at least some of those neo-republican strands have the potential to unleash a process of radical labour market deregulation.”
334. As discussed in Part I, *supra*, the common-law tradition was *conscious* about setting the terms of fair competition. Democratizing that effort is part of the current task.
335. 21 CONG. REC. 2570 (1890) (statement of Sen. Sherman).
336. See, e.g., Jerry Frug, *Administrative Democracy*, 40 U. TORONTO L.J. 559, 561–63 (1990); David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1458 (2013). For a helpful review of the evolution of the discussion about the relationship between democracy and administration, see Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1318–25 (2016).

to revive the substantive Progressive tradition in which the FTC was born.³³⁷ As Blake Emerson has argued, administrative-agency practice did in the New Deal period and can now embody and extend democratic participation.³³⁸ Emerson draws upon the thought of, among others, Progressive thinker Mary Parker Follett, who emphasized that democracy—including economic democracy—ultimately involves not just majoritarianism or factionalism, but “new understandings and conceptions of self-interest among conflicting groups” who encounter each other in authentic ways, thus deepening democracy’s foundations.³³⁹ Such a notion of democratic public reason³⁴⁰ can help to anchor an approach to the implementation of antitrust law that recognizes the publicly expressed moral logic—not just the expressed preference to favor certain groups or market actors, as opposed to others—that may emerge from social movements, public democratic engagement, and ultimately the legislative process.

In antitrust law, such democratic participation is particularly indicated. Its origins, after all, lay in broad populist agitation that demanded a part for ordinary citizens in economic decision-making. The antimonopoly movement embodied the moral logic of “power with” rather than “power over,” in both aims and method, that Follett described.³⁴¹ The legislative history of the Act, particularly when read through a moral economy lens that recognizes the inevitability and ubiquity of economic coordination, indicates a directive to accommodate this “power with” while curbing “power over.”³⁴² Even the moral economy foundations of antitrust’s common-law antecedents, steeped in everyday market administration,³⁴³ recommend a primary role for administrators over judges.

The origins of the FTC itself are an extension of these precedents. Luke Her-rine has recently supplied an account of the FTC’s origins expressly conceiving

337. *E.g.*, EMERSON, *supra* note 12, at 19; RAHMAN, *supra* note 6, at 72.

338. EMERSON, *supra* note 12, at 19, 22; *see also* Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory*, 73 HASTINGS L.J. (forthcoming) (manuscript at 67-68) (describing modern agency decision-making as less democratic than in the New Deal era).

339. EMERSON, *supra* note 12, at 99; *see also* MARY PARKER FOLLETT, *THE NEW STATE* 1-12 (1918) (discussing reforms that could overcome what she sees as democratic stagnation); Cohen, *supra* note 12, at 150-55 (discussing Follett).

340. EMERSON, *supra* note 12, at 17-18, 99, 183.

341. *See supra* Part II (discussing the antimonopoly coalition); Melé & Rosanas, *supra* note 12, at 35 (on Follett’s notion of power-with and power-over). Cohen, *supra* note 12, at 147, argues that Follett has been read anachronistically by contemporary management theorists and that she had in fact developed a “socialist theory of negotiation in response to early twentieth century labor struggle,” where “socialist” refers ultimately to a democratic organization of productive enterprise.

342. *See supra* Part III.

343. *See supra* Part I.

of it as a moral economy institution.³⁴⁴ The legislative history of the FTC Act indicates a special relationship with Congress.³⁴⁵ And functionally, the FTC is better suited to the active construction of market rules, similar to the old town council—which actively balanced and mediated the claims of bakers, millers, journeymen and apprentices, and consumers in governing the market for bread—than are judges who sit back awaiting controversies between market participants—whose interactions are presumed to produce self-governing markets. This historical resonance is more salient than ever in today’s economy, where the participation by a broader range of market participants that is possible in the context of agency governance, for instance through rulemaking, can improve the substance of the rules themselves.³⁴⁶

So, how might the FTC help to actualize antitrust’s moral economy potential? By way of illustration, I briefly sketch here a concrete example of each of the three core tasks entailed by antitrust’s core prescription.

A. *Containing Domination*

A number of practices by dominant firms are ripe for more forceful containment.³⁴⁷ One that stands out, both in terms of its current relevance and its resonance with antitrust’s moral economy origins, is below-cost pricing.

344. Herrine, *supra* note 7, at 445-61.

345. Vaheesan, *supra* note 24, at 656 (arguing that the “FTC was created to act, in effect, as an arm of Congress that would use its expertise and investigatory powers to advance the legislative will” and quoting key senators’ wishes that the Commission be “the servant of Congress” and “a commission at all times under the power of Congress, at all times under the eye of the people” in contrast to “the comparative seclusion of the courts” (citations omitted)).

346. Chopra & Khan, *supra* note 24, at 362-63 (“The exclusive reliance on case-by-case adjudication leaves broad swaths of market participants watching from the sidelines, lacking an opportunity to contribute their perspective, their analysis, or their expertise . . . Firms, entrepreneurs, workers, and consumers across our economy vary wildly in their experiences and perspectives on market conduct. Enforcement and regulation of business conduct can more successfully promote competition when it incorporates more voices and evidence from across the marketplace.”).

347. In addition to below-cost pricing, another practice that FTC could ban entirely when undertaken by dominant firms is exclusive dealing. See Open Markets Institute et al., Petition for Rulemaking to Prohibit Exclusionary Contracts Filed with the FTC (July 21, 2020), <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f1729603e615a270b537c3d/1595353441408/Petition+for+Rulemaking+to+Prohibit+Exclusionary+Contracts.pdf> [<https://perma.cc/5Z79-G7TJ>] (calling on the FTC to ban exclusive dealing).

A number of scholars have pointed out the poverty of the current law of predatory pricing.³⁴⁸ Predatory pricing was a central tactic of the original trusts³⁴⁹ and antimonopoly's most prominent spokesperson in the Progressive Era was closely focused upon it.³⁵⁰ It continues to be a major threat to independent and small producers and merchants.³⁵¹ More generally, below-cost pricing drives down wages and is ultimately unsustainable for any business that is not being subsidized either by another division or product line, or by an external financing source. A dramatic example of this dynamic has been the competition between global, venture capital-backed tech firms and local working-class entrepreneurs in taxi or rideshare markets.³⁵²

The FTC might promulgate a rule under which below-cost pricing by dominant firms³⁵³ is presumptively unfair competition.³⁵⁴ A determination that prices are below costs would likely require a survey of costs in the relevant industry, standardized accounting techniques, and a determination of reasonable

348. Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1697-1700 (2013) (critiquing the recoupment requirement in modern predatory pricing law); Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 722-31 (2017) (discussing the particular problems posed by the poverty of the predatory-pricing doctrine in the context of the world's most powerful e-commerce platform).

349. See, e.g., BERK, *supra* note 273, at 43 ("Standard Oil, American Tobacco, United Shoe Machinery, the big three meatpackers, and the railroads . . . drove independent producers to the wall with secret railroad rebates, predatory pricing, intimidation, industrial espionage, and tying contracts."); Louis D. Brandeis, *Cutthroat Prices: The Competition that Kills*, HARPER'S WKLY.: J. CIVILIZATION, Nov. 15, 1913, at 10, 12 ("Price-cutting has, naturally, played a prominent part in the history of nearly every American industrial monopoly.").

350. Brandeis, *supra* note 349.

351. See, e.g., Khan, *supra* note 348, at 756-68.

352. For a brief summary of the critique of Uber and similar firms as engaging in below-cost pricing in order to corner the market, see, for example, Benjamin Sachs, *Monopoly as the Uber Business Model*, ONLABOR (Dec. 16, 2019), <https://onlabor.org/monopoly-as-the-uber-business-model> [<https://perma.cc/XUY3-RVZ9>]. See also SC Innovations, Inc. v. Uber Techs., Inc., No. 18-cv-07440-JCS, 2020 WL 2097611, at *11 (N.D. Cal., May 1, 2020) (denying Uber's motion to dismiss monopolization claim in lawsuit alleging predatory pricing). For a long-arc view of the development of taxi markets, see generally Veena B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco's Taxi & Uber Economies*, 38 BERKELEY J. EMP. & LAB. L. 73 (2017).

353. Dominance might be defined, for purposes of the rule, by either an absolute asset/annual revenue threshold, or by market share.

354. See 15 U.S.C. §§ 46(g), 57a(a)(2) (2018) (authorizing the Commission "to make rules and regulations for the purpose of carrying out the provisions of this subchapter"); Kurt Walters, FTC Rulemaking: Existing Authorities & Recommendations 31-35 (July 31, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3794346> [<https://perma.cc/J6XK-ARHH>] (noting that the FTC almost never used its competition rule-making authority but has the capacity to do so); Chopra & Khan, *supra* note 24, at 375-79.

costs. While this may seem like a daunting task, it is at the very heart of the Commission was originally envisioned to do.³⁵⁵ Moreover, if medieval town councils succeeded in managing complex price management that took into account a variety of costs, a reasonable income for producers, and consumer incomes,³⁵⁶ the modern administrative state can likely do so as well.

B. *Accommodating and Promoting Democratic Coordination*

In our existing world, we think of labor law as the primary vehicle by which the law accommodates and promotes democratic forms of economic coordination. In the traditional moral economy, of course, such regulatory mechanisms were much more pervasive. Throughout this Feature, I have argued that democratic coordination among small players in the economy has been a key component of the antitrust tradition. Though the courts as well as much orthodox thinking have turned against it,³⁵⁷ the FTC (alongside the Department of Justice (DOJ)) can take concrete steps in this direction even now, even if more fundamental reconfiguration turns out to require legislation.

The Australian Competition & Consumer Commission recently promulgated an administrative class exemption to permit collective bargaining by small businesses, relying upon an annual revenue threshold to determine eligibility.³⁵⁸ The FTC and the DOJ's Antitrust Division exercise prosecutorial discretion over their enforcement choices even now, and they ought to adjust those choices so that they are no longer enforcing actions against reasonable forms of coordination among smaller economic players.³⁵⁹ Moreover, they may also issue formal

355. For Brandeis, who helped to conceive of the agency, “regulating competitive markets depended on reliable cost information to locate predatory pricing,” a notion that the early FTC built upon. SAWYER, *supra* note 273, at 153; *see also* BERK, *supra* note , at 96-97 (describing how below-cost pricing and the related issue of cost accounting were central to Brandeis’ goals for the Commission).

356. *See supra* Part I.

357. *See, e.g.*, Fed. Trade Comm’n v. Superior Ct. Trial Lavs. Ass’n, 493 U.S. 411, 434-36 (1990); Paul, *supra* note 8, at 391.

358. *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020*, AUSTL. COMPETITION & CONSUMER COMM’N (Oct. 19, 2020), <https://www.accc.gov.au/system/files/public-registers/documents/Legislative%20instrument%20-%2019%20October%202020.pdf> [<https://perma.cc/R24P-8CS8>]. For more discussion on the Australian Competition and Consumer Commission’s new class exemption, *see* Tess Hardy & Shae McCrystal, *Bargaining in a Vacuum? An Examination of the Proposed Class Exemption for Collective Bargaining for Small Businesses*, 42 SYDNEY L. REV. 311 (2020).

359. *See, e.g.*, William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 TEX. L. REV. 661, 675-78 (1982) (arguing that the “prosecution of offenses against the United States is not a ministerial duty” and that in antitrust, the DOJ has prosecutorial discretion).

enforcement guidelines, much as they do for merger review now.³⁶⁰ Such guidelines might declare a policy of nonenforcement as to specific categories of coordination among small economic players, including franchisees, owner-operators, individual tradespeople or professionals, and all workers beyond the bounds of employment. The policy might further delineate an annual revenue threshold or other clearly operationalizable marker of nondominance that triggers applicability of the de facto “exemption.” Such guidelines would no doubt have an informal persuasive effect, and indeed “courts, and others, frequently accord rule-like deference to the [existing] guidelines.”³⁶¹

C. Constructing Rules of Fair Competition

Finally, aside from containing the domination of powerful market actors and accommodating or even promoting democratic coordination among less-powerful actors, implementing the core antitrust prescription requires setting and maintaining certain rules of competition by which all market actors must abide. Certain contractual terms may be oppressive or unfair regardless of whether the party imposing them is dominant or has market power. Put differently, there are

360. *Horizontal Merger Guidelines*, U.S. DEP’T JUST. & FED. TRADE COMM’N (2010), <https://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> [https://perma.cc/YZ4K-ATAM].

361. Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 841 (2006) (arguing against judicial deference to antitrust guidelines except under circumscribed conditions, but acknowledging that deference occurs); see also Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 252 (2014) (“[A]n agency need not arrive at its interpretations through a rule-making process for them to receive full *Chevron* deference. So long as the agency’s consideration of the matter is sufficiently rigorous, interpretations arrived at in the course of case-by-case adjudications may be entitled to *Chevron* deference.”); Hurwitz, *supra*, at 248 (“Section 5 is precisely the sort of statute to which *Chevron* deference is meant to apply.”). Notably, the FTC’s interpretations of the statute may be entitled to deference regardless of *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), given Congress’s special delegation of power to the Commission. Vaheesan, *supra* note 24, at 654-57; Averitt, *supra* note 269, at 231-35.

While the authority to promulgate a policy in favor of democratic coordination through a formal rule under the FTC’s competition authority may be slightly less straightforward, it is not obviously out of bounds. The FTC’s competition rulemaking authority encompasses interpretations of the Sherman Act (which would be implicated by such a policy) by reference, and this authority is entitled to *Chevron* deference. *FTC v. Cement Inst.*, 333 U.S. 683, 692-93 (1948) (holding that the FTC’s rulemaking authority encompasses matters that fall under the Sherman Act); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-22 (1966) (same); Herrine, *supra* note 7, at 460-61. Nevertheless, for a host of institutional and path-dependent reasons that are mutable, the FTC has not asked for the full deference to which it is entitled from the courts. See Hurwitz, *supra*, at 261.

economic dealings and practices we may wish to discourage regardless of a firm's size or power. While there may be overlap in particular instances, setting up the terms on which competition will proceed is conceptually distinct from containing domination. By banning worker noncompete agreements³⁶² and other oppressive contractual terms,³⁶³ the FTC can help to direct business competition into socially beneficial rather than destructive channels.

CONCLUSION

This Feature has been an exercise in recovery, interpretation, and prescription. While it may suggest and help to ground a legal argument about statutory interpretation, it is also intended more broadly as normative reconstruction that might help to guide further reform efforts, as well as the interpretation and implementation of the existing antitrust laws. And while the argument draws on history, it is neither primarily a historical argument nor does it aspire to a complete account of antitrust history. Instead, it looks to the Sherman Act's origins to recover a particular antitrust vision that is especially relevant today, and that undercuts the basis of both substantive and institutional assumptions that currently reign.³⁶⁴

The argument has also taken aim at the foundations of judicial primacy in setting antitrust policy. In recent decades, judges have arrogated to themselves the power to invent the criteria by which antitrust law will govern the economy, claiming all the while that Congress delegated this power of reinvention to them through the Sherman Act itself. On the basis of the available evidence, no such delegation occurred. Given that judicial primacy and the substantive vision of markets that it has helped to make paradigmatic have been comfortably extended to decision-making under all of the antitrust statutes, and are broadly assumed

362. See Open Markets Inst. et al., *supra* note 347, at 65-71.

363. Fed. Trade Comm'n, *Request for Public Comment Regarding Contract Terms That May Harm Fair Competition*, REGULATIONS.GOV (2021), <https://www.regulations.gov/docket/FTC-2021-0036> [<https://perma.cc/98P3-CZBC>]. To take one example of a potential sector-specific rule, the FTC might ban certain practices employed by gig platforms, such as price discrimination or "personalized pricing," whether imposed upon workers or consumers. See, e.g., OECD Secretariat, *Personalised Pricing in the Digital Era*, ORG. ECON. CO-OPERATION & DEV., (Nov. 28, 2018), [https://one.oecd.org/document/DAF/COMP\(2018\)13/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf) [<https://perma.cc/UX7Y-8QQF>].

364. This endeavor has necessarily taken in a broad swath of material in order to make the broader points it sets out. There is, obviously, much more to do with respect to many of the strands implicated here, and I hope that others will take them up, or contest them, or both.

to govern the field, they also potentially threaten a new enactment if uncritically extended.³⁶⁵

Why conjure up, today, “the solutions of a legislature long prorogued” – not to mention the aspirations of countless workers, farmers, and other ordinary people of whom we have even less record?³⁶⁶ In his famous speech on the Fourth of July, Frederick Douglass said: “We have to do with the past only as we can make it useful to the present and to the future. To all inspiring motives, to noble deeds which can be gained from the past, we are welcome. But now is the time, the important time.”³⁶⁷ While critiquing genteel hypocrisy, Douglass simultaneously urged the extension of the revolutionary principles of independence and equality – as too did the antimonopolists. Their aspirations, like any in the past, were imperfect. Yet – as neglected but essential elements of the antitrust tradition we already have demonstrate – there are also inspiring motives and noble deeds to be gained, and perhaps to be made useful to the present and to the future. This Feature is, I hope, just the very beginning of an attempt to do so.

365. The implications of this vision of markets also reach beyond antitrust, insofar as antitrust law has historically had a strong influence upon adjacent areas of law and policy. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1231-42 (2001) (discussing the Sherman Act’s pervasive penetration into law and society).

366. Easterbrook, *supra* note 22, at 545.

367. FREDERICK DOUGLASS, *The Meaning of July Fourth for the Negro (July 5, 1852)*, in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 188, 193 (Philip S. Foner & Yuval Taylor eds., 2000) (1852); see *id.* at 196 (“At a time like this . . . is not light that is needed, but fire; it is not the gentle shower, but thunder. We need the storm, the whirlwind, and the earthquake. The feeling of the nation must be quickened; the conscience of the nation must be roused; the propriety of the nation must be startled; the hypocrisy of the nation must be exposed; and its crimes against God and man must be proclaimed and denounced.”).