

# CHARTING THE REFORM PATH

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INEQUALITY AND THE LABOR MARKET: THE CASE FOR GREATER COMPETITION. Edited by *Sharon Block* and *Benjamin H. Harris*. Washington, D.C.: Brookings Institution Press. 2021. Pp. xix, 241. \$37.99.

## INTRODUCTION

Markets abhor a coordination vacuum. Dismantling one market-coordination mechanism without attention to what will replace it does not lead to markets that are self-coordinating. Instead, it seems to open up space for other, potentially more pernicious forms of market coordination. More generally, competition by itself does not create self-regulating markets: the role of law in selecting market-coordination mechanisms and channeling economic competition in particular directions is essential. The current conversation around competition and labor markets has yet to truly integrate these deceptively simple points.

Consider an example. The American trucking industry once supported stable, middle-class jobs.<sup>1</sup> For much of the mid-twentieth century, the trucking market was coordinated through joint decisionmaking by unionized workers, relatively stable firms, and an active administrative agency (the Interstate Commerce Commission). But in the late 1970s and 1980s, driven not only by the rise of Chicago School thought but also by preexisting criticism of the public coordination of trucking markets, this system was overhauled. The changes were motivated by the basic idea that licensing and other limitations upon market entry should be disfavored because they limit competition.<sup>2</sup> Trucking deregulation led to unstable price competition between firms; non-union entrants were able to underprice unionized incumbents due to lower labor costs, capturing their market share and soon driving deunionization

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1. STEVE VISCELLI, THE BIG RIG: TRUCKING AND THE DECLINE OF THE AMERICAN DREAM 9–22 (2016).

2. See generally ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY (2022) (discussing economic arguments in favor of transport-sector deregulation, including those associated with the “Harvard school” of industrial-organization theory dating to the mid-twentieth century).

across the industry.<sup>3</sup> Without unions to help ensure a wage floor, wage competition soon turned good jobs into “sweatshops on wheels,” requiring drivers to work longer for the same or lower wages.<sup>4</sup> Deregulation and the subsequent transformation of the trucking market also coincided with major shifts in antitrust law, particularly relating to the emergence and persistence of large, dominant firms.<sup>5</sup> As such, powerful buyers of trucking services, including big-box retail stores, brands, and shipping lines, often took on informal market-coordination roles, particularly in subsectors like port trucking.<sup>6</sup>

The story of trucking deregulation illustrates—and this Review further elaborates on—the ubiquity of market-coordination mechanisms, the ever-present role of law in selecting them, and the resulting elusiveness of the competitive ideal, in the abstract, as a normative benchmark for regulation. While “deregulation” was and continues to be expressly framed as the withdrawal of law from markets, it in fact entailed the replacement of one legal regime for allocating coordination rights with another.<sup>7</sup> Frequently, when researchers describe a “more competitive” outcome, or the outcome that would obtain in an ideal competitive market, they are really describing the outcome that would obtain in a hypothetical market constructed by their preferred coordination mechanism. This does not mean that business competition, channeled appropriately, cannot improve outcomes for workers and the public—quite the opposite. But it does mean that the *abstract* ideal of a competitive market may be less than useful as a normative benchmark for law and for well-functioning labor markets. Sharon Block and Benjamin H. Harris’s *Inequality and the Labor Market: The Case for Greater Competition*,<sup>8</sup> an edited volume of policy-

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3. For a detailed account of this process that also remains the definitive one, see MICHAEL H. BELZER, *SWEATSHOPS ON WHEELS: WINNERS AND LOSERS IN TRUCKING DEREGULATION* (2000). The notable exception to this pattern was UPS, which for reasons specific to the “less than truckload” market was able to hang onto much of its market share. *Id.* at 110.

4. *Id.*; see also DAVID BENSMAN, DÉMOS, *PORT TRUCKING DOWN THE LOW ROAD: A SAD STORY OF DEREGULATION* 3–4 (2009), <https://www.demos.org/sites/default/files/publications/Port%20Trucking%20Down%20the%20Low%20Road.pdf> [perma.cc/NF93-92DR].

5. See, e.g., Sandeep Vaheesan, *Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law*, 1 J.L. & POL. ECON. 28, 30–31 (2020) (summarizing changes to merger oversight policy beginning in the early 1980s).

6. Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 380 (2020) [hereinafter Paul, *Antitrust as Allocator*]. For additional discussion of the port-trucking sector following deregulation, see Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 979–984 (2016).

7. A parallel object lesson is the transformation of many local taxi markets, later followed by the onset of platform-based ride services like Uber and Lyft. As Veena Dubal’s account of this transformation of San Francisco taxi markets shows, both stages—first in the 1970s and then in the early 2010s—were also driven by calls for greater competition. V.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).

8. Sharon Block was, most recently, acting administrator of the Office of Information and Regulatory Affairs. Benjamin H. Harris is executive director of the Kellogg Public-Private Initiative at Northwestern University.

oriented essays, is a valuable contribution to the developing conversation about competition and labor markets that reminds us of the importance of recentering the role of law in selecting market-coordination mechanisms.

#### I. FAULT LINES IN THE DEBATE OVER COMPETITION AND LABOR MARKETS

The scope of the conversation in the United States about antitrust law, competition and monopoly, and the organization of markets has significantly broadened in recent years.<sup>9</sup> Prior to this disruption, and since the 1970s, the analytic framework in antitrust law—which influences many other areas of policy thinking relating to the organization of markets—had coalesced to a remarkable degree of unanimity. Broadly speaking, this analytical consolidation had two elements: the *deletion* of normative concerns not readily cognized within neoclassical economics’ modeling of markets (such as nondomination and fairness); and the *elevation* of one particular consideration—operational efficiency (presumed to follow from scale and from certain forms of vertical control)—within the neoclassical approach to markets, over an emphasis on competition and over concerns not cognizable within the framework.<sup>10</sup>

In recent years, a number of normative concerns—some of which had been pressed by dissenting voices all along—have reentered the mainstream conversation: understanding fair economic competition as an instantiated,

9. See, e.g., William E. Kovacic, Comment, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, ANTITRUST, Summer 2021, at 46, 46, 53 (noting that “[t]he United States stands at the threshold of a major realignment of its competition policy regime” that has the potential—though yet unrealized—to “restore the primacy of egalitarian values and mobilize sustained efforts to deconcentrate American commerce”); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655 (2020) (reviewing TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018)).

10. Discussing the Chicago School transformation generally, George Priest remarks:

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.

George L. Priest, *The Limits of Antitrust and the Chicago School Tradition*, 6 J. COMPETITION L. & ECON. 1, 2 (2010); see also Ariel Katz, *The Chicago School and the Forgotten Political Dimension of Antitrust Law*, 87 U. CHI. L. REV. 413 (2020); Paul, *Antitrust as Allocator*, *supra* note 6, at 384.

Importantly, the existence of operational efficiency is, strictly speaking, an empirical proposition that does not depend logically upon the neoclassical modeling of markets at all. I refer to it here as internal to the prevailing paradigm in antitrust only because researchers and thinkers within that paradigm have generally treated it as both cognizable within and internal to that framework. However, a legal-institutionalist or moral economy view of markets has no less conceptual space for attending to the operational efficiency of various economic arrangements. See *infra* note 31 and accompanying text.

real-world process rather than a theoretical ideal;<sup>11</sup> curbing vertical control<sup>12</sup> as a mechanism of economic and market organization and replacing it with more horizontal forms of cooperation;<sup>13</sup> pursuing substantively egalitarian economic outcomes;<sup>14</sup> curbing the outsized influence of the economically powerful in elections and government;<sup>15</sup> and reorienting consumer protection from a narrow view of consumer sovereignty to substantive goals of fairness and consumer protection.<sup>16</sup> The relationship of these concerns to a neoclassical concept of competition remains somewhat ambiguous: while “some are cognizable in terms of welfare economics, others appeal to a broader set of democratic and institutionalist values. . . . [T]hese distinct values sometimes align . . . while in other instances they are in tension.”<sup>17</sup>

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11. See, e.g., *Testimony of Lina M. Khan*, U.S. SENATE COMM. ON COM., SCI. & TRANSP. (Apr. 21, 2021), <https://www.commerce.senate.gov/services/files/C6833010-7232-45CF-B1E0-3E8C471B3035> [perma.cc/NX88-68LH] (describing “fair competition” as a goal of law and as a defining purpose of the Federal Trade Commission); Eleanor M. Fox, *Against Goals*, 81 *FORDHAM L. REV.* 2157, 2160 (2013) (positing 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, 211–22 (1996).

12. See generally Brian Callaci, *Control Without Responsibility: The Legal Creation of Franchising, 1960–1980*, 22 *ENTER. & SOC’Y* 156 (2021) (describing franchising as a type of vertical integration and the impact of relaxed antitrust prohibitions on franchising); Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 *LAW & CONTEMP. PROBS.*, no. 3, 2019, at 65 (describing the reallocation of coordination rights due to changes in antitrust law, including vertical restraints, that made fissured business arrangements possible); Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 *LAW & CONTEMP. PROBS.*, no. 3, 2019, at 45 (describing legalization of vertical restraints and effects on power imbalances in the workplace).

13. See Paul, *Antitrust as Allocator*, *supra* note 6; Paul, *supra* note 12; Vaheesan, *supra* note 5.

14. See generally K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017) (arguing that a central problem of the economy is corporate domination and an imbalance of economic power, which could be addressed by economic policy reforms including the use of antitrust law); 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 (2020) (emphasizing inequality as a consequence, in part, of the current antitrust regime).

15. See generally ZEPHYR TEACHOUT, *BREAK ’EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY* (2020) (discussing the threats monopolies and lobbying pose to a democratic society); Zephyr Teachout, *The Problem of Monopolies & Corporate Public Corruption*, *DAEDALUS*, Summer 2018, at 111 [hereinafter Teachout, *The Problem of Monopolies*] (arguing for antitrust initiatives and other reforms that contain monopoly power and for campaign-finance reform that reduces corporate influence on elections); RAHMAN, *supra* note 14 (supporting democratic reforms that address the imbalances of economic and political power).

16. See generally Luke Herrine, *The Folklore of Unfairness*, 96 *N.Y.U. L. REV.* 431 (2021) (arguing for a more robust and historically grounded concept of “fairness” than is employed in current understandings of the powers of the Federal Trade Commission).

17. Lina M. Khan, *The Separation of Platforms and Commerce*, 119 *COLUM. L. REV.* 973, 981 (2019).

The renewed attention to workers, who have long been sidelined (or worse) in antitrust thinking,<sup>18</sup> is often cited as part of the widening of antitrust concerns, and at a broad level this is true.<sup>19</sup> However, the most influential strain of the recent discussion about labor markets and competition has not been particularly enthusiastic about the normative pluralism<sup>20</sup> present in the broader debate about antitrust law, instead mainly encouraging the extension of existing legal frameworks to labor markets. Some of the most prominent representatives of this strain say so explicitly: Eric Posner states in his new book that his “argument uses the traditional antitrust methods that are currently dominant in courts and academic scholarship . . . [T]he problem has not been that antitrust law has the wrong economic goals; it is that antitrust has almost never been applied to labor markets.”<sup>21</sup> Block and Harris’s volume is not quite so unequivocal, though it is closer to this strain of the conversation than to the one pressing a normative broadening. As such, it provides a snapshot of the current conversation and furnishes a natural location to query some of its underlying fault lines.

While the essays in *Inequality and the Labor Market* vary in orientation, they are united by a basic policy outlook: inequality, both between high-wage and lower-wage workers and between owners and workers, is high; wages, especially for low- and mid-wage workers, are low; collective bargaining is an essential mechanism for coordinating markets, but collective bargaining law and institutions are currently not very functional; and purchasers of labor are using oppressive contractual terms to seal their advantages over sellers of labor. Another substantive common thread of the volume is the focus on (relatively unchecked) corporate power as a factor in labor market outcomes.<sup>22</sup> Generally speaking, the contributors to this volume, mainly lawyers and economists, are professionally committed to improving the position of workers.<sup>23</sup>

At the broadest level, the volume evokes a choice between two distinct and ultimately incompatible possibilities: on the one hand, *restoring* a com-

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18. See Marina Lao, *Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543 (2018); Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343 (2020); Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018).

19. See, e.g., Hiba Hafiz, *Labor Antitrust’s Paradox*, 87 U. CHI. L. REV. 381 (2020) (describing how workers have been sidelined or subordinated to other concerns in antitrust analysis and why extending existing antitrust standards to labor markets may not redress the issue).

20. Khan, *supra* note 17, at 981 (describing the “normatively pluralistic framework” in which concerns raised in the current antitrust conversation register).

21. ERIC A. POSNER, *HOW ANTITRUST FAILED WORKERS* 7 (2021). I discuss the limitations of such an approach in greater detail in a forthcoming work. See SANJUKTA PAUL, *SOLIDARITY IN THE SHADOW OF ANTITRUST: LABOR AND THE LEGAL IDEA OF COMPETITION* (forthcoming 2023).

22. P. xv (detailing “policies that could address the concentration of corporate power”).

23. The contributors include Joseph Stiglitz, Ioana Marinescu, Josh Bivens and Heidi Shierholz of the Economic Policy Institute, and Evan Starr, to name a few.

petitive labor market, and on the other (articulated more faintly and implicitly), *exposing* the “myth” of this very goal,<sup>24</sup> which in turn would imply the need to construct an entirely new normative benchmark. The editors and contributors largely seem to espouse the goal of restoring a “competitive market,” describing desired reforms in these terms. The name of the conference from which the essays originate indicates this analytical perspective: “Unrigging the Market: Convening to Restore Competitive Labor Markets” (p. xix). This name implies that the North Star for evaluating policy is a “competitive labor market,” one in which wages are set “by the market” and “[w]orkers are . . . paid their marginal product or their economic value to the company.”<sup>25</sup>

At the same time, the lead essays (particularly the economists’ essays) are quick to point out that the actual existence of such a labor market is “wildly implausible” (p. xii). And a few essays point more affirmatively in another direction—toward a vision of markets and the economy that acknowledges that there are a variety of markets constructed by a variety of moral, political, and social choices; that prices and wages are always a result of these moral, political and social choices rather than value-neutral, impersonal market forces independent of those choices; and that, as a result, we cannot circumvent moral decisionmaking by appeal to “market prices” or “market wages.”<sup>26</sup> Despite this, as further described in the next Part, the editors seem to hold such a market out as the basic normative benchmark for evaluating and thinking about labor market policy.

## II. COMPETITIVE MARKETS: THE VERY IDEA

The concerns and arguments contained in *Inequality and the Labor Market* can be roughly divided into two categories. In one category, the book highlights certain legal strategies, policies, and reforms that would (presumably) help workers. These include concrete enforcement actions available (or plausibly available) under antitrust law as currently constituted, policies cast as increasing competition in labor markets (whether enacted through antitrust or another area), and proposed changes to antitrust law.<sup>27</sup> In the second category, the book urges an analytical reframing of several roughly adjacent law

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24. See p. xx.

25. See p. xii.

26. This type of vision is especially evident in the chapter by Sandeep Vaheesan and Matthew Buck, “How Antitrust Law Can Help—Instead of Hurt—Workers.” One also finds it in David Seligman’s chapter, “Having Their Cake and Eating It Too: Antitrust Laws and the Fissured Workplace,” and in Josh Bivens and Heidi Shierholz’s emphasis on “fair competition” in their chapter “Fair Competition in Labor Markets Requires a Policymaker’s Thumb on the Workers’ Side of the Scale.”

27. See, e.g., Starr, ch. 8 (worker noncompete agreements); Gerstein, ch. 11 (mandatory arbitration clauses).

and policy areas—based on a neoclassical imperfect-competition vision of labor markets—that serves as a new, potentially more authoritative and “scientific” justification for policies benefiting workers and worker organization.

The first category of arguments does not require a theoretical commitment to imperfect competition; it simply requires a commitment to the betterment of workers’ positions and a willingness to look at empirical evidence regarding the effects of certain practices and policies. Relatedly, one can embrace certain forms of real-world economic competition as healthy and beneficial policy goals without committing to neoclassical competition either descriptively or as a normative benchmark for policy. The second category of arguments, on the other hand, entails significant, contested choices about the analytical lens through which we ought to understand the world and respond to it. For the most part, however, the editors and contributors do not really acknowledge these choices at all. Instead, to the extent they do acknowledge and describe an alternative to neoclassical imperfect competition, that alternative is the picture of *perfectly competitive* labor markets that they point out has long formed the basis for policy thinking. As such, the editors often endorse, tacitly or expressly, the rates of pay and other outcomes produced by perfect or “natural[]” competition as the underlying normative benchmark for regulation.<sup>28</sup>

Both lead chapters by economists—one by Nobel laureate Joseph Stiglitz and one coauthored by assistant treasury secretary Benjamin Harris and long-time Biden economic advisor (and current member of the Council of Economic Advisors) Jared Bernstein—emphasize the mounting empirical evidence for “limited competition in labor markets.”<sup>29</sup> The independent evidence offered for this proposition is mainly of two types. The first is the body of empirical research documenting increasing concentration in labor markets and the causal relationship between such concentration and certain outcomes, including lower wages. The second is the growing body of empirical research showing that minimum wage increases do not automatically lead to increased unemployment, as perfect competition models would predict.<sup>30</sup> While both sorts of arguments challenge conventional policy thinking in important ways, neither is in fact evidence for neoclassical imperfect competition over a legal-institutionalist<sup>31</sup> picture of markets. Let’s take each set of arguments in turn.

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28. See, e.g., Block & Elga, p. 17 (explaining the problem as being that “market conditions . . . are not naturally competitive”); Block & Elga, p. 28 (stating that the goal is to bring wages “closer to . . . competitive levels” and thus “grow the economy as a whole by allocating resources more efficiently”).

29. Stiglitz, p. 10; see also Bernstein & Harris, pp. 42–43.

30. The lead authors also cite the existence of persistent coordination between employers in some markets as further evidence of deviation from perfect competition. Stiglitz, p. 10. Construing patterns of coordination as evidence of market power would seem to prove too much—as it would also have to apply when persistent patterns of coordination emerge among workers.

31. By using this term or the term “moral economy,” my aim, as further described below, is to capture the insight that the legal and institutional setup of markets (including but not lim-

First, several chapters of *Inequality and the Labor Market* highlight empirical evidence of growing labor market concentration and evidence of its causal connection to lower wages and other poorer outcomes for workers.<sup>32</sup> As a logical matter, neither of these important empirical propositions, on their own, requires acceptance of the neoclassical picture of markets. One may recognize the importance of real-world outside options for workers<sup>33</sup> and the causal impact (other things equal) of market concentration on wages without positing a “competitive rate” that uniquely awards each worker her economic contribution as a normative benchmark for policy. This much is perfectly consistent with a legal-institutionalist or a “moral economy” view of markets.<sup>34</sup> On this alternative approach, the *ubiquity* of economic coordination, the *variety* of market-coordination mechanisms, and the essential role of *law* in selecting among them, together refocus our attention from a fictional competitive rate given by social science toward straightforward normative criteria by which we may judge economic processes and outcomes: Are economic processes sufficiently democratic? Are economic outcomes sufficiently egalitarian? Does the organization of production or distribution minimize waste of real resources (whether that is labor effort, natural resources, or something else)? One can answer these questions by (among other things) embracing decentralized markets and the existence of healthy economic rivalry, but without embracing neoclassical competition theory.

A brief aside regarding moral economy and neoclassical price theory. One typical concern of moral economy is fair or just price: the social coordination of prices is acknowledged, and the goal of this process is understood to be expressly ethical.<sup>35</sup> At a deeper level, this is actually a point of overlap with price theory: the idea that everyone ought to get their due through the “right”

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ited to the distribution of economic coordination rights) is critical to market outcomes (including but not limited to prices and pricing patterns) and that whatever identifiable patterns of market dynamics arise across markets generally, they do not erase the significance of these necessarily specific and contingent legal choices. Note that “institutionalist” alone is a broad term in this context: many views historically labeled as institutionalist also subscribe to neoclassical imperfect-competition models, though some do not.

32. See, e.g., José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, J. HUM. RES. art. 1218-9914R1 (2020), <https://doi.org/10.3368/jhr.monopsony.1218-9914R1>, cited in Bernstein & Harris, p. 43; Marinescu, p. 55, 61; Bivens & Shierholz, p. 69; Vaheesan & Buck, p. 86 & nn.5–6; Seligman, p. 169.

33. As commentators and researchers have pointed out, the existence of outside options—which labor market concentration diminishes—is important in terms of providing a check upon abusive working conditions as much as it is in terms of wages. See, e.g., Gordon B. Dahl & Matthew M. Knepper, *Why Is Workplace Sexual Harassment Underreported? The Value of Outside Options amid the Threat of Retaliation* (Nat’l Bureau of Econ. Rsch., Working Paper No. 29248, 2021), <https://doi.org/10.3386/w29248>.

34. For further discussion of moral economy, see, for example, Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175 (2021).

35. See *id.* at 183–97; see also William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. ON REGUL. 721, 731–32 (2018) (tracing the history of the just price concept to Thomas Aquinas and, through him, to Aristotle).

price is part of the powerful intuitive appeal of the neoclassical picture of markets.<sup>36</sup> Yet in terms of mapping the theoretical “marginal product of labor”<sup>37</sup> onto a concept we should actually care about, it is far from clear how we would tease out a worker’s true economic contribution, even in principle. In some contexts, such as professional or other services provided on an individual basis, this mapping can at least seem theoretically possible. However, complexities can arise even there. Is one worker relying on know-how picked up from others, while another is not? Do the services provided rely on tools created by others’ efforts? In more complex or interdependent enterprises or productive chains, the problems seem almost insuperable. After going through this set of problems, Nobel laureate Amartya Sen pointed out that, even putting them aside, a basic conceptual problem remains: “Marginal product accounting, when consistent, is useful for deciding how to use additional resources so as to maximize profit, but it does not ‘show’ which resource has ‘produced’ how much of the total output.”<sup>38</sup> In other words, a rate of pay that corresponds to the marginal product of labor bears no obvious correspondence to a worker’s real contribution to an enterprise, even assuming that this contribution could actually be individuated and specified in principle.

The second type of evidence often proffered for imperfect competition or monopsony, in *Inequality and the Labor Market* and in the broader debate, is the empirical research on effects of minimum-wage increases upon employment.<sup>39</sup> Perfect-competition models of labor markets imply that a policy setting a wage floor above the “market-clearing rate” will lead, *ceteris paribus*, to a decrease in employment.<sup>40</sup> The reason for this is simple: while the slope of the labor market demand curve may vary somewhat depending upon features of the particular market (e.g., a particular set of firms’ demand for labor may be especially inelastic), market demand curves generally slope downward,

36. See HOWARD BOTWINICK, PERSISTENT INEQUALITIES: WAGE DISPARITY UNDER CAPITALIST COMPETITION 21–22 (2018) (noting that an aim of early neoclassical price theory was to argue that, generally speaking, “market forces would guarantee workers were paid their rightful share of the net product”); JOHN BATES CLARK, THE DISTRIBUTION OF WEALTH (Forgotten Books 2018) (1899) (a primary example of this argument).

37. P. 150. For a textbook definition of marginal product, see, for example., HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 356 (9th ed. 2014) (defining the marginal product of a given factor of production as the “extra amount of output” produced “per unit of extra input” of that factor).

38. Amartya Sen, *Just Deserts*, N.Y. REV. BOOKS (Mar. 4, 1982), <https://www.ny-books.com/articles/1982/03/04/just-deserts> [perma.cc/KQ25-H4UX] (“But even when all these assumptions have been made—quite a tall order—it is still arbitrary to assert that each resource’s earnings reflect the overall contribution made by that resource to the total output. There is nothing in the marginalist logic that establishes such an identification.”).

39. See, e.g., Stiglitz, p. 10; Bernstein & Harris, pp. 42–43 (“Under the competitive model, minimum wage increases should lead to massive job losses . . .”).

40. The market-clearing rate is where the supply curve and demand curve intersect, i.e., the theorization of where workers’ propensities to supply labor (across various rates) intersects with employers’ propensities to purchase labor (across various rates). At this rate, no value is “left on the table”; all possible bargains based on the market actors’ preferences have been made.

meaning that as the price of labor increases, the total demand for labor correspondingly decreases. For this proposition to have any practical salience, three things must be true: (1) raising the wage above a unique, market-clearing rate must reduce demand for labor in a predictable, law like way;<sup>41</sup> (2) actual wages, prior to imposition of the price floor, must be at (or above) that theoretical market-clearing rate; and (3) the mandated price floor must be higher than both the market-clearing rate and the status quo rate.<sup>42</sup> In other words, if a new wage floor raises actual wages, and actual wages are already at or above the competitive rate, then demand for labor will fall, increasing unemployment.

The essential disagreement between the central claim advanced in *Inequality and the Labor Market*—that “employers have the market power to depress wages below competitive levels” (Block & Elga, p. 20)—and the “textbook model” that the volume contests (Block & Elga, p. 39), revolves around proposition (2) above. The claim that labor markets are not competitive usually implies that status quo wages are *below* the competitive rate—and that raising the price floor (or enacting other policies) such that actual wages go up will thus often “restore” the competitive rate, rather than raising wages above it.<sup>43</sup> If this is true, then of course the disemployment effects just described will not follow. In fact, under those conditions increasing the statutory wage floor might cause more hiring.<sup>44</sup> It is for this reason that advocates of monopsony models argue that empirical evidence from recent research on local minimum-wage policies provides evidence for their position. Raising status quo wages in a perfectly competitive market would lead to noticeable disemployment effects; we have strong evidence that disemployment has not followed from minimum-wage rises or living-wage policies in many labor markets; ergo, labor markets are usually not perfectly competitive, specifically in the direction of buyer power.

However, the empirical evidence at issue is equally explicable by denying proposition (1) as by denying proposition (2): in other words, we might expect to see an absence of disemployment effects if there is *no* unique, market-clearing wage, such that raising the wage above it would reduce total employment. The lack of evidence for disemployment effects is equally well explained by

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41. The existence of such a unique market-clearing wage takes certain things as given: a complete set of preferences on the part of buyers and sellers, certain technological capacities, certain effort levels by workers, and, most broadly, certain available resources.

42. This last requirement is relevant insofar as a low minimum wage (such as the current federal minimum wage) is, as an empirical matter, below actual wages in the vast majority of markets, and thus is presumed to be below the market-clearing rate in those markets as well.

43. See, e.g., Block & Elga, p. 28 (stating that the goal is to bring wages “closer to . . . competitive levels” and thus “grow the economy as a whole by allocating resources more efficiently”). The second claim of allocative efficiency expressly relies upon neoclassical price theory, assuming that price signals lead to an overall allocation of resources that ultimately maximizes output (and thus “grows the economy”).

44. José Azar et al., *Minimum Wage Employment Effects and Labor Market Concentration* (Nat’l Bureau of Econ. Rsch., Working Paper No. 26101, 2019), <https://doi.org/10.3386/w26101>.

the absence of a law-like relationship between price and demand as it is by the existence of monopsony or imperfect competition that subverts that law-like relationship.

So it may be logically possible to explain these empirical observations by denying proposition (1), but is there any motivation for doing so? One reason to question the relevance of a “competitive rate” as a normative and analytical benchmark is the ubiquity, the variety, and the legal and social construction of economic coordination. As Nathan Tankus and Luke Herrine have recently argued, 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”).<sup>45</sup> Such coordination, including price coordination, likely exists in all markets in some form or another.<sup>46</sup> 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—are reliant upon and shaped by (again, contingent) legal choices.<sup>47</sup> A unique or natural competitive rate, which key chapters in the book describe as corresponding to the marginal product of labor and thus to workers’ real economic contribution, assumes a multitude of economic organizations in competition with one another; coordination between competitors cannot persist in such conditions.<sup>48</sup> Yet such coordination is ubiquitous, even if it is tacit. And because that coordination is conditioned *by* law, it is not obvious how the theoretical apparatus of a unique competitive rate (which will be derived from actual conditions in some way or another) is able to serve as an independent guide *for* law.

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45. Nathan Tankus & Luke Herrine, *Competition Law as Collective Bargaining Law*, in THE CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW (Sanjukta Paul, Shae McCrystal & Ewan McGaughey eds., forthcoming June 2022) (manuscript at 6), <https://ssrn.com/abstract=3847377> [perma.cc/PQ37-RFZC]; see also *id.* (manuscript at 4) (arguing that brokers look to the “historical pattern of recent prices[, ]that is, to . . . perceptions of how others are pricing”); William Boyd, *Ways of Price Making and the Challenge of Market Governance in U.S. Energy Law*, 105 MINN. L. REV. 739 (2020).

46. For instance, Tankus and Herrine note that markets “for cocoa, for diamonds, for grain and feed[ ]arrive at prices via bargaining between a relatively small universe of buyers and sellers who use standard contracts drafted by a trade organization of which most are members that also settles disputes between parties.” Tankus & Herrine, *supra* note 45 (manuscript at 7); see also FREDERIC S. LEE, MICROECONOMIC THEORY: A HETERODOX APPROACH (Tae-Hee Jo ed., 2018); NEIL FLIGSTEIN, THE ARCHITECTURE OF MARKETS (2001).

47. Paul, *Antitrust as Allocator*, *supra* note 6.

48. Indeed, the lead essays assert this point as further evidence for monopsony: collusion between employers cannot persist in perfect competition, and since we have evidence that it occurs, we know that employers have monopsony power. Stiglitz, p. 10 (citing “the prevalence of practices (e.g., anticompetitive contracts) that simply would not exist if markets were truly competitive”).

To take a specific instance of this dilemma that is especially salient to our current world, consider firms and their boundaries. In our actual legal system and economy, as well as in the conventional theoretical apparatus we rely upon to describe and understand markets, we largely normalize business firms as the paradigmatic sites of economic coordination, such that economic coordination that takes place inside the boundaries of the firm is not only normalized and sanctified but, often, practically erased.<sup>49</sup> The neoclassical picture of markets assumes firms in competition with each other as its units of analysis; it treats firms for the most part as black boxes and does not explain the internal organization of those units.<sup>50</sup> The branch of standard theory that does seek to explain firms and internal organization relies on a notion of “transaction costs” that—while it also makes reference to prices set by perfect competition—is not derivable from neoclassical price theory and instead defines the key problems of economic coordination in empirical, normative, social, and sometimes psychological terms, and then posits empirically contingent solutions to those problems.<sup>51</sup> Interestingly, the definition of these key problems of economic coordination, as well as their solutions, revolve to a great degree around work and workers.

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49. Paul, *Antitrust as Allocator*, *supra* note 6 (arguing that firms, the fundamental units of analysis in standard microeconomic models, are authorized and shaped by antitrust law as sites of economic coordination); Paul, *supra* note 12. Tankus and Herrine elaborate this proposition in the context of what they dub the “price leadership exemption,” which they argue is an important mode of price-making in many markets. Tankus & Herrine, *supra* note 45 (manuscript at 31–35).

50. See, e.g., Oliver E. Williamson, *The Organization of Work: A Comparative Institutional Assessment*, 1 J. ECON. BEHAV. & ORG. 5, 5 (1980) (“[Q]uestions regarding . . . 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, Rigor and Relevance in a Changing Institutional Setting, Presidential Address to the American Economic Association (Dec. 29, 1975), in AM. ECON. REV., Mar. 1976, at 1, 3 (“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*, REV. RADICAL POL. ECON., July 1974, at 60, 83–84 (“In the competitive model, there is no scope for supervision and discipline except for that imposed by the market mechanism.”). It is thus not so much that standard “textbook” models of markets and competition assume a specific internal organization of the firms that populate markets and engage in competition but that they leave this question blank. This can occur at all because in perfect competition, key decisions that we associate with business decisionmakers in real-world markets (prices, technological possibilities) are in fact simply given by the market or “givens” that are exogenous to the model. But the moment we posit any space for strategic action or bargaining—not to mention for business decisions (and legal rules) that affect the availability of technology or the propensity of workers and managers to work well—organizational choices (and the legal rules that govern them) *do* matter.

51. A forthcoming work discusses this stream of thought, stretching from Coase to Williamson to contemporary thinking in competition policy, in greater detail. See PAUL, *supra* note 21.

Key changes in antitrust law that made the “fissured workplace”<sup>52</sup> possible in the first place were accomplished in part by reliance upon transaction cost theory.<sup>53</sup> By liberalizing the permission of vertical control beyond firm boundaries, courts influenced by Chicago School thought made possible the “control” component of the “control without responsibility” formula familiar to students of present-day industrial relations.<sup>54</sup> These courts relied on the premise that permitting economic coordination through vertical control would on the whole minimize transaction costs—indirectly justifying a tolerant attitude toward larger firms and thus toward mergers and market concentration—and that these savings would be passed onto consumers.<sup>55</sup> Importantly, mid-century antitrust law largely did not permit this species of economic coordination, partly on grounds of promoting competition but also on independent grounds of promoting *nondomination*.<sup>56</sup> In fact, the policing of vertical control beyond firm boundaries (whether cognized as an aspect of section 1 of the Sherman Act concerning general restraints of trade, as an aspect of section 2 concerning monopolization, or under other provisions of law) would make many contemporary business models associated with the fissured workplace difficult or impossible.<sup>57</sup>

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52. See DAVID WEIL, *THE FISSURED WORKPLACE* (2014); Paul, *supra* note 12 (discussing vertical restraints law and the fissured workplace).

53. Influential economic arguments for vertical restraints upon distributors, such as exclusive-dealing provisions, proceeded on the basis that suppliers would have “an 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.” ROGER D. BLAIR & DAVID L. KASERMAN, *LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL* 172 (1983), *discussed in* Marshall Steinbaum, JT03465399, *Monopsony and the Business Model of Gig Economy Platforms*, ORG. FOR ECON. COOP. & DEV. [OECD] (June 5, 2019), [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) [perma.cc/PL8Y-ZDWB].

54. See Callaci, *supra* note 12 (cleaned up) (describing the relationship between changes in vertical restraints law and the rise of business format franchising); see also, e.g., *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (expanding the permissibility of geographical market-allocation restraints on franchisees); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (legalizing maximum price restraints by powerful firms upon small resellers).

55. See, e.g., *State Oil Co.*, 522 U.S. at 15 (“[W]e find it difficult to maintain that vertically imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation.”).

56. See, e.g., *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); see also Thomas C. Arthur, *The Core of Antitrust and the Slow Death of Dr. Miles*, 62 SMU L. REV. 437, 473–74 (2009). Justice White’s concurrence in the landmark Chicago-influenced *Sylvania* decision noted “the 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.” *Sylvania*, 433 U.S. at 66–67 (White, J., concurring).

57. 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.” Herbert J. Hovenkamp, *President Biden’s Executive Order*

David Seligman's helpful chapter on the fissured workplace highlights lead firms' current ability to control pricing and many other decisions by less powerful firms in their orbits while disavowing responsibility for these decisions and weaponizing antitrust norms against countervailing coordination (Seligman, chapter 10). But it is not clear that this intuitive tension actually registers within the framework of imperfect competition defined by economic theory, as the volume often seems to suggest, instead of on a prior and broader conceptual ground upon which legal principles are worked out.<sup>58</sup> The definition of firms and their legal boundaries—as well as other decisions to prohibit or permit, favor or disfavor various forms of coordination beyond firm boundaries—is a constitutional legal decision that *determines* market relationships rather than a decision that can be made according to criteria that rely upon putatively preexisting relations of economic power. These definitions create and distribute economic power. We can certainly revise them because we decide that the distributions and relationships of economic power they create are not ones that are fair, good, or socially beneficial. But it is not at all clear that revising them restores “competitive markets” abstracted from such moral and political judgments (or the wage rates and other outcomes prescribed by a competitive market, abstracted from these judgments).

The analytical framework foregrounded by *Inequality and the Labor Market* seems to assume that the legal allocation of economic coordination rights is something that follows the diagnosis of market power as a means of correcting it rather than always existing as a primary and foundational element of constituting markets.<sup>59</sup> This conceptualization of workers' coordination—potentially by non-employee workers, but also by unions themselves—entails that such coordination is a “second best” (where the best would presumably be individual workers competing with each other for jobs at firms under conditions of perfect competition).<sup>60</sup> Aside from the hesitation that many may feel about characterizing democratic worker organization as a “second best”

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on *Promoting Competition: An Antitrust Analysis*, 64 ARIZ. L. REV. (forthcoming 2022) (manuscript at 4), <https://doi.org/10.2139/ssrn.3887776> (discussing *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966)); see also Callaci, *supra* note 12 (considering the loosening of restrictions upon vertical restraints following heavy lobbying efforts).

58. The reduction of competition between otherwise “independent” market actors worked by vertical coordination does register in that framework—as would the idea that lead firms possess monopsony power over the less powerful actors with whom they contract, justifying countervailing coordination by those counterparties—but neither of these, alone, quite captures the tension in law that Seligman and others point to. *E.g.*, Seligman, p. 165.

59. See, *e.g.*, Block & Elga, pp. 28–29 (describing the “intellectual groundwork” or justification for worker organizing and unions as employers' market power, *i.e.*, the existing distortion of perfect competition).

60. This is expressly stated by Block and Elga—“[a]nd really this is a sort of second-best or least-restrictive free market solution to wage stagnation,” Block & Elga, p. 29—but is implied by the overall framework of neoclassical imperfect competition espoused in the lead essays and in several others. On the theory of “second best,” see, for example, Tankus & Herrine, *supra* note 45 (manuscript at 3 n.6) (citing R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956)).

to theoretical perfect competition, it is not even clear that this framework is analytically coherent<sup>61</sup> or that it provides a superior guide for assessing policy. In fact, most studies comparing actual rates of pay to the rates that would obtain in a hypothetical, preferred market *do* make assumptions about the legal allocation of coordination rights. For instance, in a powerful analysis demonstrating the interracial transfer of wealth from college football and basketball athletes to coaches and administrators under current market conditions organized by the NCAA, Hal Singer and Ted Tatos use a *unionized* hypothetical market as the normative benchmark for comparison.<sup>62</sup> I would argue that this choice of benchmark, ultimately shaped by contingent value judgments about fairness and democratic voice, is entirely appropriate—but it *is* shaped by these value judgments, from which the intellectual groundwork of neoclassical imperfect competition does not provide an escape.

Finally, even if labor markets are *always* monopsonized (a proposition that numerous economists will object to, and whose objections are likely to be persuasive to many judges and policymakers), there are nevertheless presumably degrees of monopsony or market power. From this, it is plausible to argue that the degree of workers' organizing rights ought to be keyed to the degree of employers' market power in that instance.<sup>63</sup> This is probably not the view of most of the worker advocates who contributed to this book. Yet it is not really obvious how one is to forestall these inferences and the resulting debates.

It is also worth noting that these debates are not entirely new. While the editors point out that perfectly competitive labor markets have long been the assumption of standard economic policy thinking, this was not always the case. Economist Harold Botwinick, for example, has described the midcentury debates between advocates of imperfect competition models (in labor markets and beyond) that enjoyed wide currency in the postwar period, on the one hand, and advocates of perfect competition who ultimately pushed back on these approaches, often by pointing out their logical lacunae.<sup>64</sup>

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61. It is not at all clear that it is possible to specify a hypothetical competitive market that abstracts from legal determinations of economic coordination rights (from unionization to rules governing vertical and horizontal coordination more generally). *See generally* Paul, *Antitrust as Allocator*, *supra* note 6. If this could be done, it is also not clear how we would specify the prices and wages that obtain in this fictional market, without making some assumptions about these legal rules (which are often themselves the object of assessment).

62. Ted Tatos & Hal Singer, *Antitrust Anachronism: The Interracial Wealth Transfer in Collegiate Athletics Under the Consumer Welfare Standard*, 66 ANTITRUST BULL. 396 (2021).

63. Presumably, this would then be internalized into affirmative labor law as well.

64. *See* BOTWINICK, *supra* note 36, at 21–33. Just as postwar institutionalists pointed to “significant differentials in profit and wage rates . . . as evidence of the *lack of competition*,” *id.* at 31, current advocates of imperfect competition sometimes point to wage differentials as evidence of monopsony power. Moreover, Botwinick points out that more conservative economists successfully critiqued the logical gaps in these views—for instance, one neoclassical economist noted that “[i]f bargaining power were the important wage determinant, we would have wage rates ranging from infinitesimal amounts to infinity, rather than the pattern of wage conformity which actually exists.” *Id.* at 32 (emphasis added) (quoting ALLAN M. CARTTER, *THEORY OF WAGES*

I have not focused here on the many fine, specific policy prescriptions contained in Block and Harris's volume, and that is largely because I read the major purpose of the volume as putting forth the "intellectual groundwork" for worker-protective prescriptions in terms of restoring the outcomes expected under neoclassical perfect competition (Block & Elga, pp. 26–28). A primary goal of this Review is to suggest slowing down before embracing neoclassical competition theory as an intellectual groundwork, not only for antitrust's application to labor markets but for work law more generally. We ought to acknowledge that this is not an inevitable path prescribed by a univocal, independent social science, but instead one that relies upon a particular, contestable set of views *within* social science that cannot themselves be abstracted from contingent assumptions about the law.

### III. FIRST STEPS ON AN ALTERNATE PATH

This Review is not the place to set out and defend an alternative approach to thinking about competition, economic dominance, and labor markets, but it is important to at least note that there *are* alternatives. A growing literature highlights contingent decisions about market coordination, and the essential role of law in making or mediating those decisions, as partially determinative of key outcomes, including prices.<sup>65</sup> A moral economy approach to market regulation would center the ultimate moral and normative questions unavoidably implicated by these choices rather than either ignoring them or folding them into warring versions of an ideal competitive baseline.<sup>66</sup> Not only can this approach accommodate the evidence and arguments that have been adduced in favor of imperfect competition (as argued in the preceding Part), but it also better captures concerns about dominant firms' impact on workers and labor markets that are not straightforwardly cognizable in an imperfect-competition framework.

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AND EMPLOYMENT 6 (1959)). The fact is that such patterns are explicable without recourse to imperfect *or* perfect neoclassical competition: stable pricing patterns are precisely what one would expect to see if social coordination among market actors is common, as discussed earlier in this Review. See *supra* text following note 34.

65. See Boyd, *supra* note 45; Paul, *Antitrust as Allocator*, *supra* note 6, at 382–401, 413–29; Tankus & Herrine, *supra* note 45 (manuscript at 4–6); LEE, *supra* note 46, at 152–86; FLIGSTEIN, *supra* note 46, at 170–90; Robert C. Hockett & Roy Kreitner, *Just Prices*, 27 CORNELL J.L. & PUB. POL'Y 771, 782–83 (2018) ("Prices do not 'just happen' in a completely decentralized and uncoordinated manner. . . . Market creation and market maintenance are the products not of spontaneous genesis, but of institutional design, legislative action, and judicial decision. . . . [C]ollective, organizational decisions play a central role in manufacturing and moving prices." (footnote omitted)); Robert C. Hockett & Saule T. Omarova, "Private" Means to "Public" Ends: Governments as Market Actors, 15 THEORETICAL INQUIRIES L. 53, 62–65 (2014); Tae-Hee Jo, *What If There Are No Conventional Price Mechanisms?*, 50 J. ECON. ISSUES 327 (2016); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 716 n.7 (1980).

66. See generally Paul, *supra* note 34 (discussing moral economy as an approach to antitrust, and to market constitution and regulation more generally).

First, predatory or below-cost pricing is a traditional antitrust concern that directly implicates wages and the organization of labor markets. But we hear little or nothing about it in *Inequality and the Labor Market*, nor in other influential accounts of antitrust and labor markets that emphasize neoclassical imperfect competition. Below-cost pricing was one of the primary concerns of Louis Brandeis, one of the major antimonopoly figures of the Progressive Era and one of the inspirations in its revival today.<sup>67</sup> Predatory pricing was a central tactic of the original trusts<sup>68</sup> and it continues to be a major threat to independent and small producers and merchants.<sup>69</sup> More generally, below-cost pricing tends to drive down wages and is ultimately unsustainable for any business that is not 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.<sup>70</sup> It is not that predatory pricing cannot be cognized within traditional frameworks for understanding competition<sup>71</sup> but that the lack of focus on internal pricing decisions in the neoclassical framework tends to shift attention away from cost-based pricing. On the other hand, in a framework in which external competitive forces are part of the picture but not the whole of it, cost-based pricing becomes highly salient both as a descriptive matter—in terms of how businesses, embedded in broader networks and institutions, seek to reproduce themselves—and as a normative matter, in determining what types of competition one wishes to encourage.

Another long-running antitrust concern that is not obviously squared with the imperfect-competition framework is the outsized political influence of large, powerful firms. Examples of such political influence harming workers are common; one prominent recent example is Uber's sponsorship, spending,

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67. See, e.g., Louis D. Brandeis, *Cutthroat Prices: The Competition That Kills*, HARPER'S WKLY., Nov. 15, 1913, at 10, 12 ("Price-cutting has, naturally, played a prominent part in the history of nearly every American industrial monopoly."); see also David Dayen, *This Budding Movement Wants to Smash Monopolies*, NATION (Apr. 4, 2017), <https://www.thenation.com/article/archive/this-budding-movement-wants-to-smash-monopolies> [perma.cc/7U4B-8W25].

68. See, e.g., GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932, at 43 (2009) ("Standard Oil, American Tobacco, United Shoe Machinery, the big three meatpackers, and the railroads perfect[ed] the predatory tactics of the 'prize ring.' They drove independent producers to the wall with secret railroad rebates, predatory pricing, intimidation, industrial espionage, and tying contracts."); Brandeis, *supra* note 67, at 12.

69. See, e.g., Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

70. For a brief summary of the critique of Uber and similar firms for engaging in below-cost pricing to corner the market, see, for example, Benjamin Sachs, *Monopoly as the Uber Business Model*, ONLABOR (Dec. 19, 2016), <https://onlabor.org/monopoly-as-the-uber-business-model> [perma.cc/E4AX-S5VP]. See also *SC Innovations, Inc. v. Uber Techs., Inc.*, No. 18-cv-07440-JCS, 2020 WL 2097611 (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 Dubal, *supra* note 7.

71. See Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695 (2013) (critiquing the recoupment requirement in modern predatory pricing law).

and media management leading up to a 2020 California ballot initiative called Proposition 22.<sup>72</sup> This concern, in fact, correlates less with market concentration and more with absolute measures of a firm's economic power outside a particular product or labor market—for instance, its absolute size or wealth as measured by its total assets or by its annual revenue.<sup>73</sup> A focus upon absolute firm size or assets is more easily cognizable in a broader legal-institutionalist view of markets than in a focus upon imperfect competition.

From a moral economy perspective, these concerns are straightforwardly cognizable as destabilizing markets, undermining fair prices and wages, and promoting economic and political domination. These concerns present themselves directly instead of being first funneled through the theoretical intermediary of deviations from perfect competition. This same principle would then apply to assessing other rules, policies, or institutional changes. For example, corporate mergers and acquisitions' effects on workers might be evaluated directly through business plans, testimony, and perhaps binding promises rather than through speculation about whether they will reduce competition in a given labor market. Unions would not be second-best alternatives to a fictive "free market" (that can never be specified in the absence of legal determinations of coordination rights) but one possible market-coordination mechanism among others. Indeed, a union itself can serve as an agent of market stabilization that benefits small firms in a decentralized market while also managing wages and working conditions.<sup>74</sup>

In this view, real-world economic competition, channeled in socially beneficial ways, is a crucial element of a healthy economy that spurs innovation and technological efficiency and encourages us all to do our best. It ensures that both consumers and workers have reasonable outside options, creating a check on bureaucratic power. The existence of competition, in the sense of numerosity of decisionmakers, also ensures some level of power distribution in the economy—though it is not sufficient to do so on its own. Block and Harris's volume affirms these important values by encouraging a focus on

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72. Andrew J. Hawkins, *Uber and Lyft Had an Edge in the Prop 22 Fight: Their Apps, VERGE* (Nov. 4, 2020, 2:30 PM), <https://www.theverge.com/2020/11/4/21549760/uber-lyft-prop-22-win-vote-app-message-notifications> [perma.cc/UB46-2RQQ] (noting that Uber and Lyft not only spent around \$200 million to influence voters but also used their apps to shape public perception of the ballot measure); Teachout, *The Problem of Monopolies*, *supra* note 15 (discussing corporate influence in politics); RAHMAN, *supra* note 14 (same).

73. Interestingly, this point was made by some more traditional neoclassical theorists in response to imperfect competition models in the mid-twentieth century. See, e.g., Arthur A. Thompson, *Absolute Firm Size, Administered Prices, and Inflation: An Exploratory Analysis*, 12 *ECON. INQUIRY* 240 (1974).

74. For historical examples of unions serving this function, see Branden Adams, *Coalminers and Coordination Rights*, LAW & POL. ECON. PROJECT (July 15, 2021), <https://lpeproject.org/blog/coalminers-and-coordination-rights> [perma.cc/TPH5-TKGN], and ANDREW WENDER COHEN, *THE RACKETEER'S PROGRESS: CHICAGO AND THE STRUGGLE FOR THE MODERN AMERICAN ECONOMY, 1900–1940* (2004).

market concentration, oppressive contractual terms of various sorts, and non-compete agreements and collusion among employers to suppress wages or limit worker mobility.

But while competition is an important element *of* a healthy economy, it can never be the primary organizing principle *for* an economy. Instead, those organizing principles are collectively supplied by us, in part through our representative lawmakers. We can make different choices about these organizing principles, but we cannot abdicate decisionmaking about how to structure markets altogether. The key is that law as a whole, and antitrust law in particular, already makes decisions about what forms of economic coordination it will permit, prohibit, discourage, or encourage.<sup>75</sup> It also makes decisions about the terms on which competition will proceed:<sup>76</sup> Will firms compete by aspiring to quality, technical efficiency, and being good to their customers and workers? Or will they compete by gobbling up other firms, by dominating counterparties and subjecting them to extractive contracts, and by imposing sweatshop wages and working conditions? There is no escaping these choices. Status quo antitrust law encourages economic coordination through the mechanism of powerful firms that are largely unaccountable to the public and are minimally constrained in their ability to impose terms on others. If we are going to replace that status quo with something else, we have to replace it with more democratic forms of economic coordination, and with fair competition—not just with competition in the abstract, and not just with limited or conditional democratic coordination as a “second best” to perfect competition.

#### CONCLUSION

*Inequality and the Labor Market* is a valuable contribution to the rapidly evolving conversation about competition, labor markets, and antitrust. It is important to note that the analytical frameworks I have described in this Review are sometimes messy and overlapping; moreover, much of this overlap is likely to persist even in case of the methodological shifts I have tried to motivate here. Even now, there are some who theorize labor markets in terms of imperfect competition who also espouse or at least have sympathy for a legal-institutionalist or moral economy view of markets,<sup>77</sup> while others may not. Constructing a new sort of law and economics is not an overnight project. Both tributaries of this interdisciplinary project are essential to it: one tending to emphasize the legal rules and institutional structures that form markets, the

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75. Paul, *Antitrust as Allocator*, *supra* note 6, at 430–31.

76. See, e.g., Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 WM. & MARY L. REV. ONLINE (forthcoming 2022).

77. For example, Marshall Steinbaum is a clear instance of an economist working within an imperfect-competition framing of labor markets who has also endorsed many key aspects of the legal-institutionalist and moral economy perspectives sketched here. Hal Singer’s work also frequently harmonizes with a moral economy approach, as does Ted Tatos’s. Suresh Naidu has also expressed sympathy for many aspects of this perspective.

other tending to emphasize identifiable, emergent patterns of market dynamics that may arise across types of markets. The suggestion I make here is simply to caution against prematurely taking the precepts of neoclassical economic theory as *primary*, or as a stable and independent basis from which to derive the rules of law. Instead, I suggest that we recenter law within “law and economics.”

The abstract ideal of competitive markets will not organize a market or an economy on its own. It will always invite tacit, ad hoc policy preferences—whether those preferences tend egalitarian and democratic, or inegalitarian and hierarchical—that cannot really be derived from its abstractions. Building an egalitarian and democratic policy program on top of this ideal is tempting because of its generality, its apparent neutrality, and its current epistemic prestige. But logically speaking, there is ultimately no avoiding institutional specificity and direct engagement with moral values, even if doing so requires bucking an intellectual paradigm that can seem inescapable. We may as well get to the task sooner than later.