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ARTICLE

TOWARD A PROGRESSIVE LABOR ANTITRUST

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For decades, antitrust enforcers ignored employer power in labor markets, adopting neoclassical assumptions that labor markets are competitive. Despite fanfare regarding recent labor antitrust enforcement, enforcers still deploy neoclassical assumptions and methods, targeting only proven deviations from a presumed competitive baseline, or infracompetitive wages and working conditions. The New Labor Antitrust deduces harms only from reduced competition that workers suffer.

This Article radically challenges that approach as contrary to law and policy. First, as a legal matter, it uncovers the Clayton and Norris–LaGuardia Acts' labor and wage policy as rejecting competitively determined wages in favor of bargained-for wages determined through workers' collective self-determination. It contextualizes those Acts as Progressive and institutional economists' policy victories over neoclassical and formalist views of labor relations. Second, as a policy matter, the New Labor Antitrust's approach contradicts mounting evidence of imperfect competition that should drive new assumptions and methods of detecting and countering employer power. Market-based metrics undercount employer power and its effects, making it needlessly challenging to establish liability. And when liability is established, it may

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be established for only competition-based—rather than non-competition-based—harms like reducing workers' countervailing power and freedom of association.

The Article explains how the New Labor Antitrust inherited neoclassical doctrine and methods developed outside labor antitrust to usurp Congress's now-forgotten labor and wage policy. It proposes reframing labor antitrust regulation to better detect and target employer power's sources consistent with a policy favoring workers' collective self-determination. It offers preliminary solutions, drawing from broader federal labor policy and the social scientific and philosophical literatures.

INTRODUCTION

"[T]he labor of a human being is not a commodity or article of commerce."
— Clayton Act.[1]

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."
— Norris–LaGuardia Act.[2]

"We have aimed, incidentally, to bring into view the sovereignty of moral law in the economic practice of the world. If competition were supreme, it would be supremely immoral; if it existed otherwise than by sufferance, it would be a demon."
— John Bates Clark.[3]

In 1914, Congress enacted a radically novel federal labor and wage policy, and it did so through antitrust law.[4] Hailed as "the Magna Carta of America's workers" by Samuel Gompers, then-President of the American Federation of Labor (AFL),[5] this law exempted from antitrust enforcement workers' organizing and refusals to deal with their employers.[6] Congress declared the basis of that exemption that "[t]he labor of a human being is not a commodity or article of commerce."[7] The

1. Clayton Act of 1914, Pub. L. No. 63-212, 38 Stat. 730, 731 (codified at 15 U.S.C. § 17 (2018)).

2. Norris–LaGuardia Act, ch. 90, 47 Stat. 70, 70 (1932) (codified at 29 U.S.C. § 102 (2018)).

3. John Bates Clark, Non-Competitive Economics, 5 New Englander 837, 845–46 (1882).

4. Clayton Act of 1914, 38 Stat. 730.

5. See Samuel Gompers, Labor and the War: The Movement for Universal Peace Must Assume the Aggressive, 21 Am. Federationist 849, 860 (1914).

6. See 15 U.S.C. § 17 ("Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . .").

7. Id.

choice of the term "commodity" was no accident. Its selection drew from a rich American intellectual tradition rejecting labor's "commodity" status in the Progressive Era.[8] Excavating this intellectual history reveals how labor advocates, policymakers, and economists converged to reject labor's commodification based on one unifying principle: Arm's-length, market-based wage-setting determined through competition and the forces of supply and demand was deeply socially harmful, and guaranteeing workers' associational freedom, coordination, and collective power against employers through certain forms of strike activity was a better mechanism for achieving fair and reasonable employment terms that properly valued labor.[9] In this regulatory battle, Progressive and emerging institutional economists won a resounding victory over classical and neoclassical economists and theorists.[10]

When courts defied the Clayton Act's labor exemption to enjoin strikes and protect employers' union busting, including by upholding employers' "yellow-dog contracts" conditioning employment on foregoing union affiliation, Congress again intervened to clarify its federal labor policy through antitrust law.[11] In the 1932 Norris–LaGuardia Act, Congress explicitly declared its "public policy" in labor matters, and it did so to restrain what it viewed as misguided and improper judicial overreach in regulating labor disputes and the employment bargain.[12] Specifically, Congress recognized the helplessness of the "individual unorganized worker . . . to obtain acceptable terms and conditions of employment" from employers who, "with the aid of governmental authority," "organize[d] in the corporate and other forms of ownership association."[13] As a remedy to this power imbalance, and to ensure "acceptable" employment terms, Congress deemed it "necessary that [the individual worker] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, . . . free from the interference, restraint, or coercion of employers of labor" in designating such representatives, organizing, or engaging in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[14] Consistent with that declaration, Congress dramatically restricted court jurisdiction over labor disputes, prohibiting injunctions in antitrust cases against most labor strikes, picketing, and boycotts, outlawing judicial

8. See infra section I.A.

9. See infra section I.A.

10. See infra section I.A.

11. See infra section I.B.

12. See Norris–LaGuardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70, 70 (codified at 29 U.S.C. § 102 (2018)) (imposing "limitations upon[] the jurisdiction and authority of the courts of the United States").

13. Id.

14. Id.

enforcement of yellow-dog contracts, and generally prohibiting imposition of equitable remedies contrary to this stated labor policy.[15]

Federal antitrust law's labor policy has been entirely forgotten by enforcers in their unprecedented shift towards applying antitrust law against employers.[16] The "New Labor Antitrust," for all its novelty and importance, has applied and continues to apply neoclassical industrial organizations (IO) tools to analyze employer power only through employers' ability to deviate profitably from wages set in perfect competition, or below the marginal revenue product (MRP) of labor.[17] The only cognizable harms it recognizes are the adverse effects of the exercise of employer power on compensation that result from reduced labor market competition, or deviations from market-based wages that would have occurred under more fulsome competition absent its exercise.[18] In other words, current antitrust enforcement imposes a neoclassical wage policy favoring labor's valuation within a supply-and-demand equilibrium of cutthroat competition that enforcement seeks to restore in direct contravention of Congress's goals in the Clayton and Norris–LaGuardia Acts.[19] The New Labor Antitrust thus amounts to a methodological usurpation that reverse engineers a radically new regulatory policy supplanting the language and goals of Congress's original policy established in the antitrust laws themselves.[20]

And the ramifications are significant. Proof of employer power and its harms is the central pivot on which enforcement, liability, and damages turn in antitrust actions, so the tools and benchmarks represent fundamental public policy choices.[21] In addition to commodifying labor's value, current methods undercount employer power, make it more challenging to establish antitrust liability, and limit the achievements of antitrust policy to market-based competitive outcomes.[22] Importantly, by centering competitive wage-setting and averting competition-based harms as the driving policy goals of antitrust law, current enforcement displaces measurement of *other* forms of collectivist and institution-based wage-setting that Congress viewed as superior on a number of dimensions: as

15. See 29 U.S.C. §§ 101, 103 (prohibiting courts from issuing restraining orders or injunctions regarding labor disputes and declaring yellow-dog contracts unenforceable as against public policy, respectively).

16. For current enforcement, see, e.g., Eric A. Posner, How Antitrust Failed Workers 5–6, 34–44 (2021) [hereinafter Posner, How Antitrust Failed Workers] (describing recent executive branch and antitrust agency attention to labor antitrust enforcement); Eric A. Posner, The New Labor Antitrust, 86 Antitrust L.J. 503, 511–16 (2024) (summarizing recent developments in labor antitrust enforcement).

17. See infra sections II.A–.B.

18. See infra sections II.A–.B.

19. See infra section II.C.

20. See infra section II.C.

21. See infra section II.C.

22. See infra section II.C.

measures of labor's contributions to production, but also as mechanisms that further broader social policy and enable economic self-determination.[23] Enforcers' current approach also limits remedies for employers' antitrust violations to creating market structures and conduct rules that encourage more labor market competition rather than working to integrate or support worker-led labor institutions to bargain for compensation.[24] Worker-led compensation-setting institutions are viewed as orthogonal to or, at best, third-party beneficiaries of more competitive wage-setting.[25]

This Article is the first to unearth antitrust law *as* federal labor and wage policy and to argue that its public policy goals are not limited to promoting labor market competition. Quite the contrary: It argues that antitrust's labor and wage policy is to ensure labor has countervailing leverage against employers to enable negotiation of "acceptable terms and conditions of employment"[26] free from employer interference, restraint, or coercion.[27] By exclusively prioritizing market- and competition-based metrics and goals, current labor antitrust enforcement betrays Congress's regulatory vision.[28]

Section I.A offers an intellectual history of Progressive Era debates regarding wage theory and labor's valuation to contextualize discussion in section I.B of the legislative histories of the Clayton and Norris–LaGuardia Acts.[29] It describes debates among economists, social scientists, and policymakers as focusing less on whether corporate employers controlled the employment bargain, justifying government intervention—there was general consensus on that as a factual and policy matter before the New Deal.[30] Instead, disagreements primarily turned on whether government intervention should strengthen workers' freedom to contract individually or collectively, through weakening or strengthening worker-led labor market institutions.[31] On one side, classical political economists and a new

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23. See infra section II.C.

24. See infra section II.C.

25. See infra section II.C.

26. Norris–LaGuardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70, 70 (codified at 29 U.S.C. § 102 (2018)).

27. See infra Part III.

28. See infra Part III.

29. See infra section I.A.

30. See infra section I.A; see also, e.g., Yuval P. Yonay, The Struggle Over the Soul of Economics: Institutionalist and Neoclassical Economists in America Between the Wars 35–40 (1998) (describing the consensus among the American Economic Association's founders in favor of labor in questions of labor legislation and union activities); Daniel Ernst, The Yellow-Dog Contract and Liberal Reform, 1917–1932, 30 Lab. Hist. 251, 273 (1989) [hereinafter Ernst, Yellow-Dog Contract] (arguing that, by 1932, most Americans "believed . . . that 'actual liberty of contract' could no longer exist between an individual employee and a corporate employer").

31. See infra section I.A.

generation of neoclassical economists favored designing interventions to enhance labor compensation based on a conviction that properly functioning markets achieved workers' MRP as their optimal compensation.[32] Progressive social scientists, on the other side, rejected market-based wage-setting as a goal, favoring instead institution-based wage-setting through labor organizations, collective bargaining, and commissions that facilitated just and reasonable wages.[33] The institutionalists won in Congress: Despite the many complex disagreements policymakers had about the scope and source of protected union activity,[34] there was consensus in passing the Clayton and Norris–LaGuardia Acts that collective wage-bargaining was superior public policy to market-based wage-setting through competition.[35]

Part II then provides an overview of the New Labor Antitrust's enforcement infrastructure, inherited from decades-long neoclassical, IO-focused antitrust enforcement. It begins with a history of antitrust regulation and methodologies that led enforcers to the assumption that they must *prove* employer power rather than presume it (in all but the most egregious wage-fixing cases) and that they must do so exclusively through applying a marginalist analysis to ascertain infracompetitive wages compared to a perfectly competitive market.[36] Part II critiques the application of these methods as a matter of law and policy, explaining how they contravene the labor and wage policy of the Clayton and Norris–LaGuardia Acts and are inapt for tackling the scale of harms generated by employers' exercise of buyer power over workers.[37] Specifically, it argues that the extension of prior methods and proof structures to labor markets undercounts the presence and effects of employer power and limits the nature and scope of remedies deemed appropriate for employer harms.[38]

Finally, Part III outlines new methods and enforcement goals that better cohere with the language and policy of the Clayton and Norris–LaGuardia Acts. To achieve the transformative potential of a New Labor Antitrust, it argues for adoption of progressive and pro-worker methodological innovations to match new, noncompetition-based

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32. See infra section I.A.

33. See infra section I.A.

34. See James Gray Pope, Labor's Constitution of Freedom, 106 Yale L.J. 941, 962–77 (1997) [hereinafter Pope, Labor's Constitution] (describing the labor movement's resistance to laws restricting workers' freedom of association and right to strike on Thirteenth Amendment grounds); James Gray Pope, The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957, 102 Colum. L. Rev. 1, 12–46 (2002) [hereinafter Pope, Thirteenth Amendment] (describing congressional debates about the scope of the Thirteenth Amendment's protection of workers' concerted activity).

35. See infra section I.B.

36. See infra section II.A.

37. See infra sections II.B–.C.

38. See infra section II.C.

substantive policy goals.[39] Antitrust enforcement could embrace a "new materialism" in both its methods and objectives that integrates contemporary social scientific methods and a deep theoretical awareness of the structural and institutional sources of employer power—including in the law itself—that enable capital's coercion and rent extraction from labor.[40] Rather than modeling labor markets as perfectly competitive, enforcers should presume a model of imperfect competition, placing the burden on employers to prove the contrary in enforcement actions. Further, enforcers should not exclusively measure employer power and its harms through competition-based models but also through violations of public policy stated in the Norris–LaGuardia Act: harms to the full freedom of association, self-organization, and collective representation and negotiation of employment terms and conditions. The New Labor Antitrust should focus on strengthening worker power and workers' bargaining leverage through fortifying labor market institutions, facilitating collective bargaining, and measuring damages based on compensation and labor conditions that would have prevailed had workers been truly free to coordinate and collectively demand improved employment terms and conditions.

The New Labor Antitrust has yet to achieve its full promise beyond the metrics and narrow goals of an economic policy that was never legislated but that has nevertheless usurped its enforcement apparatus. At its roots, antitrust's labor and wage policy recognized both market-based and legal sources of employers' unequal bargaining power with workers. That recognition was backed by social scientific and evidence-based findings that have not only been confirmed but are even more richly demonstrated now.[41] We have the methods, enforcement strategies, and objectives necessary for tackling and preventing the harms of employer power on worker earnings, working conditions, and income inequality—we have only to operationalize them in our current enforcement infrastructure.

I. ANTITRUST'S LABOR AND WAGE POLICY

Standard histories of labor regulation start with the New Deal: Congress passed the 1935 National Labor Relations Act (NLRA) to establish protections for worker organizing, collective bargaining, and strikes.[42] Congress sought to displace courts' attempts to crush union

39. See infra Part III.

40. This "new materialist" approach draws from deeper intellectual traditions of integrating law and social science from historical materialism through the Legal Realist, Critical Legal Studies, and, most recently, the Law and Political Economy movements.

41. See infra Part III.

42. See, e.g., Cynthia L. Estlund, The Ossification of American Labor Law, 102 Colum. L. Rev. 1527, 1529–40 (2002) (anchoring the origins of labor law in the "New Deal's

militancy through the aggressive exercise of equitable jurisdiction under antitrust and common law.[43] Labor, according to these accounts, won a temporary victory with early labor exemptions to antitrust enforcement, but courts narrowed those exemptions, and the exemptions themselves failed workers by not constitutionally sourcing workers' right to organize and strike in the Thirteenth Amendment.[44] While the labor movement won permanent statutory protections in the NLRA, the rights were grounded in the Commerce Clause and were dramatically eroded by judicial interpretation and legislative amendments, weakening worker power and relegating labor disputes to a hidden realm of depoliticized, private adjudication.[45]

These accounts ignore the origin of federal labor and wage policy in the antitrust laws, a legislative victory that anchored statutes and executive orders establishing a series of regulatory schemes.[46] These regulatory schemes entrenched worker-led institutions, collective bargaining, and collectively negotiated wage-setting in the War Labor Board, National Railroad Adjustment Board, National Mediation Board, National Industrial Recovery Act (NIRA) labor codes, the NLRB, and a number of other wage-administering boards and commissions in the growing administrative state.[47] The foundation of these institutional supports for labor bargaining within government agencies and commissions was the product of Progressive- and New Deal–era lawmaking that sought to displace judicial economic regulation with expert-led administrative regulation of the employment bargain in a vast system that survived into the 1960s and 1970s.[48] As expert agencies were established within the administrative state, the antitrust agencies ceded nearly all labor

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institutionalization of collective bargaining" in the passage of the Wagner Act); Karl E. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941, 62 Minn. L. Rev. 265, 265–70 (1978) (tracing the origins of radical labor protections to the passage and imposition of the Wagner Act on resistant employers); Pope, Thirteenth Amendment, supra note 34, at 46–59 (describing the history of the Wagner Act's passage between 1933 and 1935).

43. See Herbert Hovenkamp, Labor Conspiracies in American Law, 1880–1930, 66 Tex. L. Rev. 919, 953 (1988) (describing federal courts' use of injunctions to subdue labor activities).

44. See Pope, Thirteenth Amendment, supra note 34, at 14–46 (tracing the history of congressional debates about grounding the NLRA in the Commerce Clause rather than the Thirteenth Amendment).

45. See id. (describing the history of constitutional arguments to uphold the NLRA under the Commerce Clause); see also Mark Barenberg, The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation, 106 Harv. L. Rev. 1379, 1492–96 (1993) (describing the evolution of labor law through administrative and judicial interpretations and legislative amendments that produced hierarchical labor–management structures and undermined "union strength and involvement").

46. See infra section II.A.2.

47. See infra section II.A.2.

48. See infra section I.A.

regulation elsewhere.[49] In the meantime, they focused their enforcement and expertise development on regulating firm conduct in product markets through increasingly conservative methods grounded in neoclassical modeling that both Congress and labor had explicitly rejected as inapt for economic regulation of the employment relationship.[50]

This Part tells that forgotten story. It identifies the Progressive Era as the crucial turning point for both economic thought and regulatory theory regarding labor, labor's proper valuation, and the role of government institutions in securing that proper valuation.[51] Progressive and institutional economists—in part through their impact on the rise of Legal Realism—directly challenged the precepts of classical political economy, early neoclassical economics, and Classical Legal Thought that viewed the employment relationship as the product of contract between equally free parties.[52] These debates culminated in radically opposed visions of employer power and market-based wage-setting, with clear legislative winners in the Clayton and Norris–LaGuardia Acts and subsequent acts establishing minimum wage, maximum hour, and unionization protections.[53] These statutory and regulatory frameworks evolved into a vast system of direct government intervention and controls over the terms of the employment bargain.[54] This Part contextualizes antitrust law's labor exemptions and their stated labor and wage policies in the economic and legal literature of their time to better understand the exemptions' import for the tools and policy of labor market regulation.

A. *Progressive Era Wage Theory and Labor Valuation*

Between the 1890s and 1930s, Progressive and institutional economists were centrally preoccupied with properly understanding the scope of employer power and labor's value to production.[55] The

49. See infra sections I.A, II.A.

50. See infra sections II.A–.B.

51. See infra section I.A.

52. See infra section I.A.

53. See infra section I.B.

54. See infra section I.B.

55. It is important to note here that Progressivism was not a coherent "movement" with a single, unified aim. See, e.g., James T. Kloppenberg, Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870–1920, at 311 & 487 n.27, 362–63 (1986) (describing Progressivism as "a variety of different constituencies agitating for different and often incompatible reforms"); Peter G. Filene, An Obituary for "The Progressive Movement", 22 Am. Q. 20, 20–24 (1970) ("[S]everal central items in the progressive program divided rather than collected the members of that movement."). There were certainly some individuals within Progressive circles who did not categorically oppose neoclassical thought and marginalism. But this Article focuses on those self-identified "Progressives" who were most involved in the social scientific study of labor and who served as key advisors and policymakers theorizing and drafting the labor and antitrust legislation that is at the core of this Article. While even these Progressive economists had differing views

culmination of their intellectual debates with neoclassical economists—and the reception of those debates in court decisions, legal treatises, and labor-market regulation[56]—informed the language and framing of the Clayton and Norris–LaGuardia Acts' labor exemptions from antitrust enforcement on grounds that labor was not a "commodity or article of commerce."[57] In rejecting labor's commodification, Clayton Act legislators repudiated both neoclassical economics and juridical abstraction of the employment bargain as a negotiated exchange between equals, drawing from Progressive economic thought and early administration of wage regulation.[58] After the federal judiciary narrowed the exemption, Congress returned to state a more expansive "public policy" on labor matters in the Norris–LaGuardia Act.[59] By laying out the intellectual, administrative, and juridical context of these debates, this section illuminates why competing theorizations and methodological approaches to valuing labor were so critical for legislating labor's exemption from antitrust liability. Most importantly, it was novel social scientific approaches to and documentation of poverty wages and hazardous working conditions that diagnosed employer power as a source of labor unrest, justified regulated wage setting, and established unprecedented agencies and tribunals to administer reasonable wages as an alternative to market-based valuation through competition.[60]

1. *Labor Valuation in Economic Thought and Technocratic Administration.* — Over nearly two centuries, from classical political economy's "labor theory of value"[61] to Progressive economists' administration of government wage regulation,[62] intellectual thought on

about how interventionist the state should be in labor–management relations, they took common aim at classical and neoclassical economic thought, which they viewed as outdated and disconnected from labor-market realities. See Laura Phillips-Sawyer, Restructuring American Antitrust Law: Institutionalist Economics and the Antitrust Labor Immunity, 1890–1940s, 90 U. Chi. L. Rev. 659, 662–63 (2023) ("Despite their differences, . . . trade unionists and pragmatic progressivists all remained committed to the overarching progressive liberal project, which may be observed in their generalizable belief in the efficiencies and imperfections of markets, . . . and the necessity of economic regulation to remedy those market imperfections . . . .").

56. See infra section I.A.2.

57. Clayton Act, Pub. L. No. 63-212, 38 Stat. 730, 731 (codified at 15 U.S.C. § 17 (2018)); see also Norris–LaGuardia Act of 1932, Pub. L. No. 72-65, § 4, 47 Stat. 70, 70 (codified at 29 U.S.C. § 104 (2018)) (eliminating federal court jurisdiction "to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute" in certain circumstances).

58. See infra section I.B.

59. See Norris–LaGuardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70, 70 (codified at 29 U.S.C. § 102 (2018)).

60. See infra section I.A.1.

61. See Adam Smith, The Wealth of Nations 26 (J.M. Dent & Sons 1964) (1776) [hereinafter Smith, Wealth of Nations] ("Labour . . . is the real measure of the exchangeable value of all commodities.").

62. See infra notes 270–275 and accompanying text.

the employment bargain underwent a fundamental shift. A centrally debated question was whether labor's contributions—as a source of individual well-being and social productivity—were best elicited and valued through market exchange and the mechanism of supply and demand or instead through social (including legal) institutions.

On one side of the debate were "free labor" economists who understood labor as liberated and most fairly valued by free market exchange.[63] These included, most prominently, William Graham Sumner, John Bates Clark, Henry Carter Adams, Herbert Joseph Davenport, and Henry Ludwell Moore, among others.[64] As early founders of neoclassical economics in American universities, they drew on classical political economy to support their theorization of social and moral alternatives to enslavement, reconceptualizing American labor production under a contractual—as opposed to property- or status-based—system.[65] The moral valence of labor's freedom to contract lay in the market's ability to properly value labor as a commodity owned by the *laborer*, borrowing from Adam Smith's account in *The Wealth of Nations*: "Labour," Smith explained, "is the real measure of the exchangeable value of all commodities" because "[t]he value of any commodity . . . is equal to the quantity of labour which it enables him to purchase or command."[66] Supply and demand drove the

63. See Herbert Hovenkamp, Enterprise and American Law, 1836–1937, at 221–25 (1991) [hereinafter Hovenkamp, Enterprise and American Law] (describing the intellectual origins of "conservative, or bourgeois, free labor ideology" among neoclassical economists and in the rise of American marginalism). For a broader intellectual history of "free labor" debates, see Eric Foner, Reconstruction 156–67 (2d ed. 2014) (describing the evolution of "free labor" thought in the Reconstruction period under the administration of the Freedmen's Bureau); Alex Gourevitch, From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century 38–68 (2015) (describing competing camps of "free labor" thinkers, including laissez faire republicans who treated waged labor as a guarantee of republican liberty); William E. Forbath, The Ambiguities of Free Labor: Labor and the Law in the Gilded Age, 1985 Wis. L. Rev. 767, 772–814 (describing competing strands of "free labor" ideology among jurists and in working-class culture).

64. See infra note 98 and accompanying text.

65. See Herbert Spencer, Social Statics 397, 414, 436 (Routledge 1996) (1851) (explaining the "law of equal freedom"); William Graham Sumner, What Social Classes Owe to Each Other 24–26 (New York, Harper & Bros. 1884) ("[Middle Age] society was dependent . . . on status . . . . In our modern state . . . the social structure is based on contract, and status is of the least importance. . . . A society based on contract is a society of free and independent men . . . ."); Henry C. Adams, Relation of the State to Industrial Action, 1 Publ'ns Am. Econ. Ass'n, Jan. 1887, at 35, 84 [hereinafter Adams, Relation of the State] ("[T]he labor problem must be worked out on the basis of freedom of contract."); Walter J. Matherly, The Emergence of Factory Labor, 4 Soc. Forces 175, 183 (1925) ("[The present-day workman] is an economic power of great magnitude. . . . No employer can compel him to labor unless he cares to do so. The owners of the agencies of production need him just as badly as he needs them.").

66. Smith, Wealth of Nations, supra note 61, at 26–40.

market price of labor as a commodity.[67] American economists, like Davenport, positioned employers as proxies for "social demand," imagining employers were "engaged in the purchase of the results produced by labor, and compelled by competition . . . to recompense labourers approximately in proportion to the services rendered. No distinction in principle exists . . . between the goods commonly termed services, and those . . . commonly termed commodities."[68]

Nineteenth-century American neoclassical economists also modernized classical political economy with insights from British and European "marginalism."[69] Marginalists theorized production as a series of incremental economic decisions to maximize utility based on costs and earnings accrued by a single additional unit of production.[70] They conceptualized firm pricing, input, and output decisions based on firm

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67. Id. at 48–77; see also Edmund Burke, Thoughts and Details on Scarcity 6 (London, T. Gillet 1800) ("Labour is a commodity like every other, and rises or falls according to the demand. . . . [Wages] bear a full proportion to the result of their labour."). Adam Smith recognized the masters' greater bargaining "advantage" due to greater resources and ability to collude but analyzed workers' wage differentials assuming a perfectly competitive labor market. See Smith, Wealth of Nations, supra note 61, at 57–77, 88–129; Bruce E. Kaufman, The Evolution of Thought on the Competitive Nature of Markets, *in* Labor Economics and Industrial Relations 145, 147–50 (Clark Kerr & Paul D. Staudohar eds., 1994) (describing Smith's paradoxical views in *The Wealth of Nations*, which recognizes employers' superior bargaining power in chapter eight while portraying "the workings of a competitive labor market . . . that promote[s] an efficient allocation of labor resources" in chapter ten).

68. Herbert Joseph Davenport, Outlines of Economic Theory 151 (MacMillan Co., 1905) (1896).

69. See Herbert Hovenkamp, The Marginalist Revolution in Legal Thought, 46 Vand. L. Rev. 305, 321–30 (1993) [hereinafter Hovenkamp, Marginalist Revolution] (describing the influence of the "marginalist revolution" on American legal thought relating to social welfare, theories of value, and criminal and civil liability as deterrents). The "marginalist revolution" was led by William Stanley Jevons (1835–1882), Alfred Marshall (1842–1924), Carl Menger (1840–1921), Léon Walras (1834–1910), and Philip Wicksteed (1844–1927). See id. at 306–14 (describing the contributions of Jevons, Marshall, and Menger); see also Erich Roll, A History of Economic Thought 371 (1939) (describing Jevons, Menger, and Walras as the "celebrated trinity" of the "first generation of modern marginal-utility theorists"); Herbert Hovenkamp, The Political Economy of Substantive Due Process, 40 Stan. L. Rev. 379, 409 n.159 (1988) (remarking that Jevons, Marshall, and Wicksteed were "the great revisionists of classical political economy" who contributed to marginal ideas).

70. See, e.g., W. Stanley Jevons, The Theory of Political Economy 199–201, 217–19, 236 (London, MacMillan & Co. 1871) (theorizing that capital enables the expenditure of labor in advance to maximize utility); Alfred Marshall, Principles of Economics 61 (8th ed. 1920) (developing a theory of marginal utility); Carl Menger, Principles of Economics 181–90 (James Dingwall & Bert F. Hoselitz trans. 1976) (1871) (theorizing about the "limits of economic exchange"); Léon Walras, Elements of Pure Economics 217–24 (William Jaffé trans. 1954) (1874) (developing a theory of marginal productivity); Philip H. Wicksteed, An Essay on the Co-ordination of the Laws of Distribution 6 (London, MacMillan & Co. 1894) (describing the relationship between community satisfaction, production, and marginal efficiency); see also Paul J. McNulty, The Origins and Development of Labor Economics: A Chapter in the History of Social Thought 117–26 (1980) (providing an intellectual history of marginalism); Hovenkamp, Marginalist Revolution, supra note 69, at 310–13 (describing the emergence of marginalism as a coherent movement).

estimations of "marginal cost" and "marginal revenue" under both competitive and monopoly conditions, a mounting concern in the era of increasing consolidation.[71]

Among other contributions, these economists used marginalist models and statistical methods to discern a science of wage-setting beneficial to private industry and government regulation.[72] They measured labor's value as one of many inputs about which firms made pricing decisions, generating a technical science of compensation as a standardized commodity in a market exchange.[73] John Bates Clark was critical in conceptualizing labor this way, viewing each worker's value to production in terms of their individualized "marginal" utility, with their proper entitlement to compensation measured as the "marginal product" of their labor.[74] Viewing labor as a commodity "regulated" by supply and demand like any other, economists like Clark were suspicious of unionization as cartelization that would distort free market exchange, "dedicated to the proposition that each laborer deserved to be free, independent, and equal in the eyes of the law, precisely the same as each capitalist and employer."[75] Clark's conviction in the moral economy of wage-setting was based in a "philosophy of value" that understood the market as enabling social measurement of products' and services' "effective utility" beyond any selfishly interested single market participant's valuations.[76] "Free competition" and "free labor" allowed

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71. Marshall's *Principles of Economics*, supra note 70, was the first to incorporate marginalist analysis into price and output theory. See Hovenkamp, Enterprise and American Law, supra note 63, at 216–17.

72. See, e.g., John A. Hobson, The Evolution of Modern Capitalism: A Study of Machine Production 148–53 (London, Walter Scott, Ltd. 1894) ("[T]here is no power to compel [stronger trusts] to [pay high wages], and it would be pure hypocrisy to pretend that the interests of the labourers formed any part of the motive which led a body of keen business men to acquire a monopoly.").

73. See, e.g., Yonay, supra note 30, at 128–33 (describing how the "neoclassical theory of wages" used the idea of the "parity of marginal productivity and wages").

74. See John F. Henry, John Bates Clark and the Marginal Product: An Historical Inquiry Into the Origins of Value-Free Economic Theory, 15 Hist. Pol. Econ. 375, 382–88 (1983) (describing John Bates Clark's writing after 1889 and illustrating his view that "those who argue and press for higher wages than are delivered by the market are actually promoting injustices"); see also John Bates Clark, The Distribution of Wealth: A Theory of Wages, Interest and Profits 77–115 (London, MacMillan & Co., 1899) [hereinafter Clark, Distribution of Wealth] (theorizing about the relationship between wages and labor); John B. Clark, Possibility of a Scientific Law of Wages, 4 Publ'ns Am. Econ. Ass'n, Mar. 1889, at 37, 39–49 [hereinafter Clark, Scientific Law] (developing a general scientific theory of marginal wages based on the principle that "[g]eneral wages tend to equal the actual product created by the last labor that is added to the social working force" (emphasis omitted)).

75. Hovenkamp, Enterprise and American Law, supra note 63, at 222.

76. See J. B. Clark, The Philosophy of Value, 4 New Englander 457, 464–67 (1881) [hereinafter Clark, Philosophy] ("Market value is a measure of utility made by society

everyone to receive what he produced or its equivalent through "free contract": "Each gets an amount gauged by the product of its own final increment."[77] In sum, traditional marginalists conceived labor's contribution to production as any other commodity input, measured workers' MRP as the best approximation of labor's value, and assumed that employers' marginal investment decisions in labor occurred in a competitive market.[78]

By the turn of the century, escalating inequality and economic instability drove economists and social scientists to interrogate the limits of neoclassical, deductive theories about the market's ability to efficiently allocate socially valuable production, particularly when it came to valuing labor's contributions. The Panics of 1873 and 1893 and ensuing depressions, rampant financial speculation, and unprecedented corporate consolidation—along with mass unemployment and escalating worker unrest—generated significant skepticism about the general descriptive and predictive capacity of classical and neoclassical economics from inside and outside the social sciences.[79] Responding to the financial crises of the 1870s, political economists and writers like Henry Demarest Lloyd proposed the expulsion of "political economy" from the British Association of the Advancement of Science "on the ground that it had failed to make good its scientific pretension":

> It is an unfortunate moment for the break-down of the science that claimed to be able to reconcile self-interest with the harmony of interests.
>
> . . . In a recent address[,] . . . [Professor Sumner] said, "Unfortunately the economist can't create facts, and history

considered as one great isolated being; market price is, of course, that measure expressed in terms of a common standard.").

77. Clark, Scientific Law, supra note 74, at 61.

78. See, e.g., Clark, Distribution of Wealth, supra note 74, at 77–115 ("Wages tend to equal the product of marginal labor . . . ." (emphasis omitted)); Hovenkamp, Enterprise and American Law, supra note 63, at 191–92 ("[John Bates] Clark's view that each laborer was entitled to his 'marginal product' was part of the 'free labor' ideology that had dominated American labor policy [in the 1880s and 1890s] since the passage of the fourteenth amendment."); Marshall, supra note 70, at 335–36 (providing a marginalist account of the difference in wages between "skilled and unskilled labour").

79. See, e.g., 3 Joseph Dorfman, The Economic Mind in American Civilization, 1865–1918, at 15, 29–30, 222, 279–83, 458–72 (1949) (describing the Panics of 1873 and 1893 and the economic theories of John R. Commons and Wesley C. Mitchell, who were responding to those crises); Yonay, supra note 30, at 35–46, 50–53 (providing an intellectual history of American economics from the 1880s to World War I); Carl P. Parrini & Martin J. Sklar, New Thinking About the Market, 1896–1904: Some American Economists on Investment and the Theory of Surplus Capital, 43 J. Econ. Hist. 559, 559–63 (1983) (summarizing the work of several theorists who challenged "the classical model of the competitive market" after "the prolonged economic depression of the 1890s," which had led to "a disaffection with the unregulated market . . . among capitalists and enterprisers in all major sectors of the economy").

> furnishes him but few. Consequently, hypotheses have to be used." . . . [W]hile the abstract economists are suffering for facts, the latest parliamentary commission . . . to investigate one of the greatest economic conundrums of modern society—the relations of railroads to other business and the state—have been actually overwhelmed with facts.[80]

Lloyd represented an emerging consensus that, absent government intervention, the "free market" generated devastating social harms, a consensus built in part by the symbiotic relationship developing between government regulation and empirical social science.[81] Locally, nationally, and internationally, the weight of economic depressions and labor unrest wrenching industrial democracies into episodic crises produced a range of regulatory efforts, from support for private trade associations to full government ownership of firms and industries with forms of public–private regulatory commissions in between.[82] These associations, agencies, and commissions were first and foremost data collection bodies at unprecedented scale.[83]

Data collected on contemporary workplace realities was bleak: Starvation wages, grueling hours, and hazardous to deadly working conditions drove escalating labor unrest.[84] This mounting evidence promoted consensus among social scientists and policymakers that leaving regulation of the employment relationship to competitive market forces was untenable and invited support for government intervention through labor legislation.[85] Even a few neoclassical economists, like John Bates

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80. Henry D. Lloyd, The Political Economy of Seventy-Three Million Dollars, Atl. Monthly, July 1882, at 69, 70–71.

81. See Gerald Berk, Louis D. Brandeis and the Making of Regulated Competition, 1900–1932, at 35–111 (2009) (describing Louis Brandeis's theory of expertise-led government "regulated competition" of industry); Thomas C. Leonard, Progressive Era Origins of the Regulatory State and the Economist as Expert, 47 Hist. Pol. Econ. 49, 49–50 (2015) (describing three "acts" in the rise of economics as a discipline in America).

82. See Berk, supra note 81, at 7–11 (discussing industrialization and industrial responses to economic crises in the United States).

83. See Leonard, supra note 81, at 72 (discussing the rise of "scientific management methods" and the use of economic information in industrial practices during World War I); see also infra notes 109–116 and accompanying text.

84. See David Brody, Workers in Industrial America: Essays on the Twentieth Century Struggle 3–119 (1980) (describing dire working conditions in industrial mass production as impelling the rise of "mass-production unionism"); David Montgomery, The Fall of the House of Labor 22–57 (1987) (describing how late nineteenth- and early twentieth-century workplace conditions transformed the role of the state and American labor activism); John Fabian Witt, The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law 22–42 (2004) (describing the "industrial-accident crisis" in the late nineteenth century).

85. See 3 Dorfman, supra note 79, at 351–52 (describing the emerging consensus among academic economists in favor of limited working hours, collective bargaining, workmen's compensation, minimum wage laws, and old-age pensions); Yonay, supra note 30, at 35–40 (discussing the economic theories of the American Economic Association's

Clark, recognized the necessity of unions to ensure just wages when persistent unemployment reduced workers' bargaining power and suppressed wages below workers' MRP.[86] Clark believed certain "forms of non-competitive economies," like "the adjustment of wages by arbitration," could "soften the exceptionally harsh effects of" "the general competitive principle" and wished that an arbitral system "determining the rewards of labor had a more than rudimentary existence in America."[87] A fellow marginalist and political economist, Henry Carter Adams, understood competition as "forc[ing] the moral sentiment . . . to the level of that which characterizes the worst man who can maintain himself in it," proposing countercyclical wage setting through state-supported collective bargaining.[88] Adams was key in devising a science of "reasonable" rate regulation as Director of the Statistical Bureau for the Interstate Commerce Commission (ICC), establishing a model accounting system through nearly three decades of service "[c]ollecting, compiling, and publishing . . . commercial facts . . . essential to safe business calculations [to] remove the chief obstacle to [the] efficient functioning [of competition]."[89]

Aggregated data prompted new lines of inquiry into the unregulated market's role in distorting wages (and prices) in boom-and-bust cycles.[90] A new generation of Progressive Era social scientists, coalescing around a school of "institutional" economists,[91] took on as prominent research

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founders, who "pursued liberal reforms in the fields of labor relations, monopoly regulation, and protective tariffs" during the late nineteenth century).

86. See John Bates Clark, Essentials of Economic Theory as Applied to Modern Problems of Industry and Public Policy 451–502 (1907) ("[T]here would always be in the general market some unemployed men. . . . The presence of even a few men able to do good work and not able to get employment is often sufficient to make individual bargaining work unfairly to the laborer.").

87. See J.B. Clark, Non-Competitive Economics, 5 New Englander 837, 845–46 (1882); see also Clark, Distribution of Wealth, supra note 74, at 77–114 ("If competition works in ideal perfection, wherever . . . marginal workers go, they get their exact products as their pay; though, in fact, as competition works imperfectly, what the men get is merely an approximation to their products.").

88. Adams, Relation of the State, supra note 65, at 38.

89. 3 Dorfman, supra note 79, at 172–73.

90. See Hovenkamp, Enterprise and American Law, supra note 63, at 296–307 (describing the evolution of schools of late nineteenth-century economic thought in response to shifting economic and industrial realities, including the rise of the modern business trust and its ability to distort prices); Naomi R. Lamoreaux, The Great Merger Movement in American Business, 1895–1904, at 159–86 (1985) (describing the evolution of federal antitrust regulation and informational capacity in response to the instability generated by the "great merger movement").

91. "Institutional economics" was first used to describe Thorstein Veblen's work and gradually encompassed a self-identified group of economists that dominated economics and government in the Progressive and interwar periods. See Geoffrey M. Hodgson, The Evolution of Institutional Economics: Agency, Structure and Darwinism in American Institutionalism 255–57 (2004) (describing how institutional economists became

topics the mechanisms by which wages (and prices) were set within the market, how the market enabled concentrations of private power, the proper role and regulation of trusts, theories of combination and natural monopoly, and, importantly, the "labor question."[92] Study of the labor question—and labor's proper "asking price"—was important not only for averting labor unrest but also as part of the expanding rationalization and statistical study of economic production, from calculating lost earnings in workers' compensation schemes to estimating the economy-wide effects of cyclical recessions.

Empirical research made possible by the growing information infrastructure of "government by commission," particularly during and after World War I, propelled institutionalists like Thorstein Veblen,[93]

increasingly influential after World War I, including through the Committee on Cooperation in Economic Research); Yonay, supra note 30, at 50–70 (discussing institutional economists' contributions to New Deal legislation).

92. See Dorothy Ross, The Origins of American Social Science 143–302 (1991) (discussing the various paradigms formulated by Progressive Era social scientists, including "neoclassical economics, liberal economic interpretations of history, a sociology and ideology of social control, and pragmatism"); Malcolm Rutherford, The Institutionalist Movement in American Economics, 1918–1947: Science and Social Control 47–53 (2011) [hereinafter Rutherford, Institutionalist Movement] (detailing institutionalists' theoretical and policy contributions to, among other things, labor market issues, public utilities, social security, and unemployment insurance); Yonay, supra note 30, at 128–30 (describing the institutionalists' attack on neoclassical economic theory, channeled through their examination of the contemporary power imbalance between labor and capital).

93. Veblen (1857–1929) was an economist, sociologist, and author of *The Theory of the Leisure Class* (1899). For more on Veblen, see generally 1 Thorstein Veblen: Critical Assessments (John Cunningham Wood ed., 1993) (providing a wide array of perspectives on Veblen's scholarly and policy contributions); Rick Tilman, Thorstein Veblen and His Critics, 1891–1963: Conservative, Liberal, and Radical Perspectives (1992) (covering Veblen's life and economic theories, as well as prominent criticisms of his work). Veblen famously criticized marginalist economics, including its application to the wage bargain. See Thorstein Veblen, The Limitations of Marginal Utility, 17 J. Pol. Econ. 620, 620–21 (1909) ("[A]s to the causes of change or the unfolding sequence of the phenomena of economic life [economists espousing marginal-utility theory] have had nothing to say hitherto; nor can they, since their theory is not drawn in causal terms but in terms of teleology.").

Wesley Clair Mitchell,[94] Richard T. Ely,[95] John R. Commons,[96] and John Maurice (J.M.) Clark,[97] among others,[98] to reject abstract neoclassical theories of market-based wage-setting and measurement of labor's value under models of perfect competition.[99] Institutional economists worked to dispel neoclassical economists' and "physiocrats'" views that "[t]o buy in

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94. Mitchell (1874–1948) was an economist at Columbia known for his leading empirical research and theorization of the business cycle. See 3 Dorfman, supra note 79, at 455–73 (relating Mitchell's academic life and describing his theory of business cycles and its impact). He was the founding President of the National Bureau of Economic Research (NBER) and, between 1920 and 1945, he collected and analyzed data to inform debates about business cycle fluctuations, labor's share of national income, and unemployment. See Yonay, supra note 30, at 51–52 ("[Mitchell's] vision was the quantification of economic studies. He believed that quantification would lead to the discovery of patterns of economic behavior and provide policy makers with the knowledge necessary to navigate economic life.").

95. Ely (1854–1943) was an economist, leader of the Progressive movement, and founder of the American Economic Association (AEA). See Richard T. Ely, Ground Under Our Feet: An Autobiography 132–64 (1938) (describing the founding of the AEA). He led Johns Hopkins' Department of Historical and Political Science and cofounded, with John R. Commons, the American Association for Labor Legislation (AALL) to advocate for labor and social legislation. See id. at 65, 97–174, 148; see also Robert Adcock, Liberalism and the Emergence of American Political Science: A Transatlantic Tale 135–69 (2013) (describing Ely's role in building out the Hopkins Department of Historical and Political Science).

96. Commons (1862–1945) was Richard Ely's student and the well-recognized founder of American labor economics at the University of Wisconsin. John R. Commons, Myself 92, 128–31 (1934). Commons' scholarship was interdisciplinary, pioneering institutional economics and analyzing the legal sources of capitalism, labor history, and the sociology of work. Id. at 127–37. He advocated for a robust administrative state to protect workers, drafted labor legislation, and advised government officials on employment regulations. Id. at 74, 102, 106–11.

97. Clark (1884–1963), son of John Bates Clark, was a prominent economist at Columbia and served as President of the AEA. 5 Dorfman, supra note 79, at 438; In Memoriam: John Maurice Clark, 79 Pol. Sci. Q. (1964). He was best known for his research on dynamic firm costs and economic governance. E.g., John Maurice Clark, Economics of Planning Public Works (1935); John Maurice Clark, Social Control of Business (1926); J. Maurice Clark, Studies in the Economics of Overhead Costs (1923).

98. In addition to those named, other "institutionalists" of this generation include W. Jett Lauck (1879–1949), Walton Hale Hamilton (1881–1958), Leo Wolman (1890–1961), Rexford G. Tugwell (1891–1979), Sumner Slichter (1892–1959), Frederick C. Mills (1892–1964), Paul Douglas (1892–1976), Gardiner Means (1896–1988), Simon Kuznets (1901–1985), Arthur F. Burns (1904–1987), Leon Keyserling (1908–1987), and John Thomas Dunlop (1914–2003). See 3 Dorfman, supra note 79, at 520–44 (providing an overview of institutionalists' contributions to the field of industrial relations); McNulty, supra note 70, at 49–62, 180–97, 203 (describing the roots of institutional analysis as "institutional realism" in classical economics and the evolution of institutional labor economics between the 1930s and 1950s); Rutherford, supra note 91, at 223–28 (chronicling the concentration of institutionalists at Columbia University between 1913 and the early 1930s); Yonay, supra note 30, at 53–54, 57–58 (discussing institutionalism during the interwar period).

99. See Yonay, supra note 30, at 118–20, 128–35 (offering examples of institutionalists' recognition of the divergence between abstract economic models of competition and labor market realities, including the divergence of price and value generated by the power disparity between employers and employees).

the cheapest and to sell in the dearest market was . . . a law of God" and that "[l]abor was a commodity that must obey this 'natural' law."[100] Progressives viewed the "deductive and mathematical" models of "orthodox economics"[101] and marginalism as inapt in the labor context in which market forces are "modified, restricted, and even replaced by social and other non-economic elements"[102] that required "inductive and historical" study.[103] John Kells Ingram, an Irish economist who influenced Progressive economists and leaders like Ely, argued against the "very *narrow, and therefore . . . false*" position of classical economists that treated labor

> *as a commodity*, like corn or cotton . . . . [B]y fixing exclusive . . . attention on these [abstractions], *we miss the deepest and truly characteristic features of the relation of master and workman* . . . . As in science it is the method we pursue on which the value of our investigations will in the long run depend, so in matters of conduct the point of view at which we place ourselves tends to determine the character of our whole procedure . . . . Such a perverted conception arises from the individualistic way of looking at the relation . . . as if it were purely a matter of private concernment. But the entire case receives a different complexion when we place ourselves at the social point of view, from which alone these subjects can be rightly studied.[104]

The narrow "commodity" view that understood labor's value as set by competition ignored the reality that, as economist and sociologist Charles Horton Cooley argued, competition was *itself* not a "natural" development, but could only exist as a "conscious object of public will" with significant public investment in human capital and private industry supports.[105] Commons criticized the "commodity theory of labor" as "not false" but "incomplete," just as were other partial theories that focused exclusively

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100. The New Encyclopedia of Social Reform 14 (William D. P. Bliss & Rudolph M. Binder eds., 1908).

101. See 3 Dorfman, supra note 79, at 162.

102. See Richard A. Lester, Labor and Industrial Relations 48 (1951).

103. See 3 Dorfman, supra note 79, at 162; see also Lloyd G. Reynolds, The Structure of Labor Markets: Wages and Labor Mobility in Theory and Practice 2 (1951); Richard T. Ely, The Past and the Present of Political Economy, *in* 2 Johns Hopkins University Studies in Historical and Political Science 141, 144–47 (Herbert B. Adams ed., Baltimore, John Murphy & Co. 1884); Rexford Guy Tugwell, Experimental Economics, *in* The Trend of Economics 369, 391–92 (Rexford Guy Tugwell ed., 1924); Albert Benedict Wolfe, Functional Economics, *in* The Trend of Economics, supra, at 445–47.

104. John K. Ingram, Work and the Workman: Being an Address to the Trades Union Congress in Dublin, September 1880, at 8 (2d ed. reprt. 1928) (1884) (emphasis added).

105. See Charles Horton Cooley, Political Economy and Social Process, *in* Sociological Theory and Social Research 268, 273–74 (1930); see also 3 Dorfman, supra note 79, at 401–07 (describing Cooley's contributions and intellectual influence on institutionalist economists).

on one dimension of labor's value at the expense of incorporating "theories of democracy, of partnership, of solidarity."[106] More broadly, institutionalists rejected the constricted "commodity" view because it obscured systemic power imbalances between employers and workers that made divergence from perfect labor market competition pervasive and harmful wage outcomes inevitable.[107]

To better understand the "labor question," Commons and other institutionalists proposed a wholly new approach. They advocated for and devised institutional forms of valuation, both public and private, to replace purely market-based forms of valuation. They studied price and wage theory—mechanisms and methods for ascertaining fair and reasonable prices and wages—and "business cycle" theory—ways interconnected pricing and price shocks can systemically impact the economy—to ascertain whether and when government or even private associations should intervene in pricing and wage-setting for improved social welfare.[108]

In developing this new approach, Progressive and institutional economists deployed statistical, sociological, and broader inductive methods developed through scrutiny of increasingly ample administrative data.[109] They sourced data from newly established statistical bureaus in independent and executive agencies, state public utility and railroad

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106. See John R. Commons, Industrial Goodwill 5–6, 14–27, 63–64 (1919). For "commodity theory of labor," see id. at 192–97.

107. See Yonay, supra note 30, at 123 (discussing how a lack of information on workers' conditions limited workers' ability to "maximize their utility in the way that neoclassical theory assumed"); Sumner H. Slichter, The Organization and Control of Economic Activity, *in* The Trend of Economics, supra note 103, at 314–17 (criticizing the "theory of free enterprise" in labor markets for its "presuppos[ition] that workmen can accurately compare different occupations and different plants" because "[m]uch of the needed information is not available in any form and little of it is in such shape that workmen can easily use it").

108. See Wesley Clair Mitchell, Business Cycles 570–81 (1913) (summarizing Mitchell's business cycle theory and critiquing alternative theories); John Augustine Ryan, A Living Wage 222–33 (1906) (discussing the determination of wages while arguing for a right to a living wage); 1 Sidney Webb & Beatrice Webb, Industrial Democracy 145–51 (London, Longmans, Green, & Co. 1897) (explaining views on the functions of trade unions); Clark, Scientific Law, supra note 74, at 37–69 (stating Clark's theory of wages); John R. Commons, Political Economy and Business Economy: Comments on Fisher's Capital and Income, 22 Q.J. Econ. 120, 120–25 (1907) (critiquing economists who ignore the distinction between value and cost).

109. See Rutherford, Institutionalist Movement, supra note 92, at 15–56 ("[To a young aspiring economist in the mid-1920s, institutionalism] would have appeared to be something new and modern, promising critical realism, scientific investigation of economic issues, consistency with the latest in related areas of social science, law, and philosophy, and involvement in important issues of social reform."); Yonay, supra note 30, at 55–56, 80–81 ("[Institutionalists] made the argument that proper science, *as it was practiced in all other disciplines*, was based on the laborious collection of facts, the search for recurring patterns, attempts to generalize the data, and, finally, the construction of theories to make sense of the amassed facts and generalizations.").

commissions, and other agencies that provided extensive price and wage indexes for analysis.[110] In 1842, the State Department established the first Bureau of Statistics to collect data on commerce with foreign nations, including pricing data.[111] Between 1866 and 1914, Congress created a Bureau of Statistics in the Treasury and Commerce departments to collect statistics on trade and commerce (including relative wage rates) as well as the Bureau of Labor to collect statistics on labor prices.[112] Congress also established a Bureau of Statistics in the ICC to track railroad rates and wages in the railroad industry.[113]

Evidence from real-world economic data drove Progressive economists' conviction that price and wage valuations were the product of contextual negotiation between parties with differing bargaining leverage, generated and fortified by social institutions, as opposed to abstract equilibration of supply and demand, as predicted under classical pricing theory.[114] As Lionel D. Edie put it, the "standards of industrial behavior . . . persist long after they have outlived their usefulness" because institutions resist quick adaptation to new market conditions.[115] Institutionalists viewed neoclassical analyses as engaging in a "conscious[] endeavor to *prevent* social institutions and usages"—whether they be legal institutions, corporations, trade associations, labor unions, credit networks, or any others—"from intruding themselves in the formulation of economic doctrines" at the expense of understanding basic economic phenomena.[116]

Progressives' conclusions about employers' uneven bargaining power with workers were influenced by the German historical school and English economists and sociologists Sydney and Beatrice Webb, who provided a seminal analysis of employer power in their 1897 book, *Industrial Democracy*.[117] The Webbs attributed employers' stronger leverage to the

110. See, e.g., Mitchell, supra note 108, at 130 (identifying U.S. Bureau of Labor Bulletins as a source of wage data); Henry Moore, The Variability of Wages, 22 Pol. Sci. Q. 61, 64 (1907) (relying on Treasury Census data).

111. See William F. Willoughby, Statistical Publications of the United States Government, 2 Annals Am. Acad. Pol. & Soc. Sci. 236, 237–38 (1891).

112. Id. at 93, 97.

113. Id.

114. See John R. Commons, Institutional Economics: Its Place in Political Economy 789–805 (1934) (providing an institutionalist critique of "banker stabilization" of prices); John R. Commons, Legal Foundations of Capitalism 65–134, 283–312 (1924) (describing the importance of institutions in transactions and the wage bargain); Yonay, supra note 30, at 110–12 (describing the institutionalist critique of neoclassical economics).

115. See Lionel D. Edie, Some Positive Contributions of the Institutional Concept, 41 Q.J. Econ. 405, 407 (1927).

116. Slichter, supra note 107, at 304 (emphasis added).

117. See 1 Webb & Webb, supra note 108; see also Kaufman, supra note 67, at 153 ("[Institutionalism] drew its early inspiration from two foreign sources: the economists of the German historical school and the English economists/sociologists Sydney and Beatrice Webb . . . .").

"reserve army," or excess supply in the labor market, as well as to labor's perishability, workers' relative lack of financial resources, mobility costs and restraints, information asymmetries, employers' superior bargaining skill, and employer collusion.[118] But institutionalists built on their theoretical contributions to empirically document workers' "willing[ness] to endure long hours, extremely heavy work, or extraordinarily great risks for little or no extra compensation," and employers' greater ability "to wait or to take advantage of alternative opportunities" and "put up with a . . . serious shortage of workers rather than pay more than they consider labor to be worth."[119]

To remedy that imbalance, institutionalists supported unionization, wage floors, and standardized working conditions, in part because they believed workers' weaker bargaining leverage fostered a "competitive menace": The least ethical employers with the lowest wages and worst labor standards would force others to compete down to their level, with negative externalities industry-wide, to labor's share of national income, and for macroeconomic stability.[120] Because competition drove firms to settle "wages and conditions of work . . . in each plant separately," it gave each firm "a powerful incentive to obtain an advantage by paying less . . . than its rivals," generating inefficiencies while polarizing labor and management, increasing labor strife, and depriving management of "suggestions and criticisms from those . . . in the best position to observe points of waste and suggest changes, namely, the workmen and the minor officials."[121] As Edwin Walter Kemmerer put it, "[c]ompetition works very

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118. See 1 Webb & Webb, supra note 108, at 603–702 (describing the sources of employers' stronger bargaining leverage in the wage bargain).

119. Slichter, supra note 107, at 322–25; see also A.L. Bowley & A.R. Burnettt-Hurst, Livelihood and Poverty 32–45 (1915) (identifying the causes of inadequate wages "below the minimum standard necessary to physical health" in four English towns); Arthur L. Bowley, The Change in the Distribution of the National Income: 1880–1913, at 16–27 (1920) (describing the decline of real wages relative to prices in the pre-war period and the transfer of wealth "from wage-earners to classes with higher incomes"); A.L. Bowley, Wages and Income in the United Kingdom Since 1860, at 27–99 (1937) (documenting changes in real wage rates relative to prices between 1880 and 1937 and the distribution of income between wage earners and property owners); Paul H. Douglas, The Reality of Non-Commercial Incentives in Economic Life, *in* The Trend of Economics, supra note 103, at 151–88 (describing noncommercial incentives that impact employer wage-setting); Edie, supra note 115, at 423–27 (exploring wage determinants and determinants of the "shares of distribution" through institutions like collective bargaining, immigration restrictions, minimum wage legislation, and other mechanisms).

120. See John R. Commons, American Shoemakers, 1648–1895: A Sketch of Industrial Evolution, 24 Q.J. Econ. 39, 68–69 (1909) (describing the effect of "marginal producers" on others as "depend[ing] on the extent to which he can be used as a club to intimidate others," enabling the "capitalist who can reach out for these low-level producers" to "use them . . . to break down the spirit of resistance").

121. Slichter, supra note 107, at 332–33, 340, 350; see also Edie, supra note 115, at 425 ("Each recipient of income seems to adopt . . . the rule that what each can get for himself

imperfectly, and . . . inadequately, in providing a fair wage" because "less scrupulous competitors" would constrain employers "glad to pay a fair compensation" from offering them, forcing society to "meet the 'depreciation charges' in the form of charities and institutions for [workers'] care."[122] Allowing the unregulated market to set the marginal worker's pay thus "exercise[s] an influence upon the wages of others often entirely out of proportion to their numbers," compelling some to propose "that the minimum wage principle . . . be extended to *all* classes of labor" as a living wage administered through wage boards.[123] Institutionalists thus viewed the neoclassical model of perfect competition as not only descriptively inaccurate but normatively misguided, understanding the goals of competition and "free markets" as wasteful and socially harmful.[124]

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depends less on his efficiency in producing goods for the use of others than on his efficiency in encroaching upon the gains of others by driving shrewd price bargains.").

122. 1 N.Y. State Factory Investigating Comm'n, Fourth Report, S. 138–43, 1st Sess., at 614, 615–16 (1915) [hereinafter Fourth Report] (statement of E.W. Kemmerer); see also Morris A. Copeland, Economic Theory and the Natural Science Point of View, *in* Fact and Theory in Economics: The Testament of an Institutionalist 37, 52 (Chandler Morse ed., 1958) ("The law of supply and demand describes . . . some markets fairly well; . . . in yet others like the labor market . . . it offers little more than a convenient classification of factors and policies affecting price into supply and demand factors."); 2 Webb & Webb, supra note 108, at 658 ("Thus, in the making of the labor contract the isolated individual workman, unprotected by any combination with his fellows, stands in all respects at a disadvantage compared with the capitalist employer."); Morris A. Copeland, Communities of Economic Interest and the Price System, *in* The Trend of Economics, supra note 103, at 103–50 [hereinafter Copeland, Communities of Economic Interest] (discussing the mechanisms of "cut-throat competition"); Daniel R. Ernst, The Labor Exemption, 1908–1914, 74 Iowa L. Rev. 1151, 1161 (1989) (discussing economic debates about exempting labor from antitrust scrutiny as "necessary to offset the power of combined capital"); Henry R. Seager, Trade Unions and the Law, 31 Survey 448, 448–49 (1914) [hereinafter Seager, Trade Unions] (arguing in favor of exempting labor unions from antitrust law because wage-earners "should be allowed to combine with equal freedom" as employers); Henry Rogers Seager, The Theory of the Minimum Wage, 3 Am. Lab. Legis. Rev. 81, 81 (1913) ("[T]he competition for employment may be so intense as to force wages below the living level, and the conditions which control the number of competitors may be so inflexible that [employees] continue at starvation rates year after year with no tendency toward improvement."); Slichter, supra note 107, at 314–17 (describing information asymmetries between workers and employers as a source of wage suppression). Kemmerer was a Princeton economist and helped design the Federal Reserve. Rebeca Gomez Betancourt, Edwin Walter Kemmerer and the Origins of the Fed, 32 J. Hist. Econ. Thought 445, 447–66 (2010).

123. Fourth Report, supra note 122, at 617–18 (statement of E.W. Kimmerer) (emphasis added); see also 2 Webb & Webb, supra note 108, at 774–84 ("[I]f the employers paid more, the labor would quickly be worth more. In so far as this proved to be the case, the National Minimum would have raised the Standard of Life without loss of work, without cost to the employer, and without disadvantage to the community.").

124. See Copeland, Communities of Economic Interest, supra note 122, at 110–14 (stating that a "profitivity theory" as opposed to a "productivity theory" allows individuals to pursue their "own greatest gain" but often at the cost of the "common good"); Slichter, supra note 107, at 309, 341–46 (noting that "[u]nemployment, industrial accidents,

Institutionalists extended their influence on the labor question and government regulation in academia and government commissions. At the University of Wisconsin, John Commons pioneered the study of labor economics and is widely viewed as "the intellectual origin of the New Deal, of labor legislation, of social security, of . . . a welfare state."[125] With the help of Wisconsin Governor Robert La Follette and University President Charles Van Hise, the Wisconsin School became the center of a new institutional approach to understanding labor markets,[126] drawing prominent figures like Selig Perlman, Edwin Witte, and Martin Glaeser, among others.[127] The Wisconsin School sought to incorporate into economic theory and analysis the impact of social institutions on labor market formation and the terms of market exchange.[128] But it also sought to create and utilize government institutions to regulate and study labor market wage-setting dynamics, including state- and federal-level government institutions that drafted and enforced experimental labor regulation and public utility rate- and labor standard-setting in state-level public utility, railroad, and other commissions.[129]

Progressive and institutional economists' experiences administering labor legislation increased their expertise with and documentation of the market's limitations in setting socially optimal wages, fortifying their

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industrial disease, [and] pollution" are among the social costs caused by private businesses engaging in cost shifting in the free market).

125. See Kenneth E. Boulding, A New Look at Institutionalism, 47 Am. Econ. Rev. 1, 7 (1957); see also Robert Ekelund & Robert Hébert, A History of Economic Theory 418 (2d ed. 1983) (noting Commons's lasting influence on federal regulations relating to economic reforms); Yonay, supra note 30, at 62–63 (describing Commons as "[t]he main contributor to economic policy" among institutionalists).

126. See Robert S. Maxwell, La Follette and the Progressive Machine in Wisconsin, 48 Ind. Mag. Hist. 55, 58 (1952) (discussing the role of La Follette and Van Hise in making the University of Wisconsin "closely identified with the Progressive Republican administration").

127. See Malcolm Rutherford, Wisconsin Institutionalism: John R. Commons and His Students, 47 Lab. Hist. 161, 165 (2006) (noting that Commons and his students, including Glaesar, Perlman, and Witte, "transformed" economics at the University of Wisconsin).

128. See id. at 163–71 (discussing the influence of institutionalist scholars as evidenced by the economics course offerings during that period, which were "empirical, focused on institutions, and concerned with social control").

129. See David A. Moss, Socializing Security: Progressive-Era Economists and the Origins of American Social Policy 4–5 (1996) (explaining how Ely and Commons along with their staff at the University of Wisconsin, studied "all types of protective labor legislation, focusing in particular on factory inspection and child labor laws"). For Commons' involvement in institutional reforms, see John R. Commons, The La Follette Railroad Law in Wisconsin, 32 Am. Monthly Rev. Revs. 76, 76–79 (1905) (exploring in detail a newly enacted state law that created a commission to regulate railroad rates); Grover Huebner, Five Years of Railroad Regulation by the States, 32 Annals Am. Acad. Pol. & Soc. Sci. 138, 151 (1908) (describing state-level wage regulation through commissions, including in Wisconsin). Commons and Ely cofounded the AALL to promote labor and social legislation. See Daniel T. Rodgers, Atlantic Crossings: Social Politics in a Progressive Age 236–54 (1998).

resistance to viewing labor as a commodity.[130] Their excavation of these limitations went deep. Institutionalists "regard[ed] as the fundamental data for analysis such underlying institutions as ownership, inheritance, the standards of consumption, and the development of technology,"[131] but also any "method of action arrived at by habituation and convention,"[132] like corporate structures, worker-led institutions, and, more broadly, the law and state institutions.[133] On this analysis, the statement "labor gets exactly what it produces" "under the hypothesis of perfect competition"[134] is better understood as, to cite Columbia economist Henry Moore, "labor gets what the assumed property rights and assumed organization of industry make possible, and the important question is not so much whether labor gets what it produces under those conditions, but rather why actual conditions make possible so small a product."[135]

Taking this more expansive view, institutionalists "pioneered industry-specific studies" to assess, as legal historian Laura Phillips-Sawyer put it, "how embedded social customs dictated employee–employer working rules and increasingly limited labor cohesion, which redounded to the benefit of employers, allowing them to collect more than their fair share of returns."[136] They also collected and analyzed variations in prices and wages to better understand the logic of the price and wage system writ large. Wesley Claire Mitchell was the first to elaborate a data-based analysis and theory of business cycles to explain how and why prices changed for different goods and services in the same market and for the same goods and services in different markets.[137] His analyses demonstrated gender pay gaps and deduced workers' divergent shares of firm earnings based on variations in wholesale and retail prices or prices of raw materials and

130. See William J. Novak, New Democracy: The Creation of the Modern American State 1–24 (2022) (describing the centralization of labor market regulation and the emergence of institutional economics in the context of the federal government's growing administrative capacity between 1866 and 1932); Yonay, supra note 30, at 58–61 (describing institutional economists' contributions to economics and influence on government labor regulation).

131. Walter W. Stewart, Lewis H. Haney, B. M. Anderson, Jr. & J. M. Clark, Economic Theory—Discussion, 9 Am. Econ. Rev. 319, 319–20 (Supp. 1919).

132. 3 Dorfman, supra note 79, at 439.

133. See McNulty, supra note 70, at 153–76 (describing institutional economists' theories and methods); Walton H. Hamilton, The Institutional Approach to Economic Theory, 9 Am. Econ. Rev. 309, 311–13 (Supp. 1919) (same); Malcolm Rutherford, Institutional Economics: Then and Now, 15 J. Econ. Persps. 173, 174–78 (2001) (same).

134. Henry Moore, Paradoxes of Competition, 20 Q.J. Econ. 211, 216 (1906).

135. Id. at 216 n.1.

136. See Phillips-Sawyer, supra note 55, at 672; see also Commons, Institutional Economics, supra note 114, at 52–92 (reasoning from industry-specific studies to assess social customs).

137. See 3 Dorfman, supra note 79, at 458–72 (describing Mitchell's research trajectory).

manufactured goods.[138] These differentiations illustrated how contingent wages were as a measure of labor's productivity and supported institutional economists' view that prices were "social conventions" that "varied [to] reflect the different types of commodity, institution, mode of calculation, and pricing process."[139]

Early administrative investigations, wage board, and wage commission reports confirmed this. Following increased labor unrest after the 1902 Pennsylvania anthracite coal strike, President Theodore Roosevelt turned to a commission to resolve the labor dispute through arbitration, but the arbitration board struggled to ascertain a "scientific" method for investigating a "reasonable" or "just wage."[140] University of Wisconsin President Van Hise sat on the Board and drafted its report, an experience that informed his widely read *Concentration and Control*[141] and the underlying philosophy of the NIRA.[142] The Board's report challenged the limited capacity of neoclassical wage theory to ascertain "reasonable" wages:

> Possibly there should be some theoretical relation . . . between the amount of the income that should go to labor and the amount that should go to capital; and if this question were decided, a scale of wages might be devised . . . which would determine the amount rightly absorbed by labor. It may be that . . . some such solution will be worked out . . . and if so, the income of the railroads could be so apportioned. Thus far, however, political economy is *unable to furnish such a principle as that suggested*. There is no generally accepted theory of the division of income between capital and labor . . . . What, then, is

138. Mitchell, supra note 108, at 132–36, 468–81; see also 3 Dorfman, supra note 79, at 458–59 (summarizing Mitchell's research).

139. Geoffrey Hodgson, The Approach of Institutional Economics, 36 J. Econ. Lit. 166, 169–70 (1998); see also Copeland, Communities of Economic Interest, supra note 122, at 114–15 (discussing the concept of "differential advantage" (emphasis omitted)); Edie, supra note 115, at 425 (explaining the "make-work fallacy" (internal quotation marks omitted)).

140. See 3 Dorfman, supra note 79, at 324–25 (describing the history and challenges of the Anthracite Coal Strike Commission).

141. See Charles R. Van Hise, Concentration and Control: A Solution of the Trust Problem in the United States 248 (1912) ("[C]ommissions should be created to control industrial corporations affected with a public interest just as they now control the public service corporations, as they control quality in industry.").

142. See Ellis Wayne Hawley, The New Deal and the Problem of Monopoly 43–46 (1966) (describing how NIRA was supported by the notion "of a collectivist democracy," which incorporated Van Hise's policy priorities of "[c]oncentration, cooperation, and control"); Phillips-Sawyer, supra note 55, at 673–74 (describing the importance of Van Hise's *Concentration and Control* in its time, including Van Hise's view of the efficiency of production at scale for consumers).

> the basis upon which a judgment may be passed as to whether the existing wage scale of the engineers . . . is fair and reasonable?[143]

The 1912 Massachusetts Commission on Minimum Wage Boards was equally suspicious, proposing a voluntary minimum wage for women and minors but recognizing that no "economic law . . . by some mysterious but certain process[] correlates earnings and wages. Wages among the unorganized and lower grades of labor [were] mainly the result of tradition and of slight competition."[144]

The disruptive scale of labor unrest over wages and working conditions, including horrific instances of workplace deaths, drew national attention and calls for reform. Reform demands utilized social scientific data to press standardization of compensation and labor conditions, taking wages out of market competition for at least some portion of workers. Testifying before the New York Factory Investigating Commission after the 1911 Triangle Shirtwaist Fire, Edwin Kemmerer advised the government, in addition to establishing minimum wage schedules for all workers, to "level up and standardize" industry rules of conduct, including by passing laws requiring that facts about workplaces be "collected, scientifically classified, and made accessible to the public."[145] Louis Brandeis and Josephine Goldmark's famous "Brandeis Briefs," defending state maximum hour and minimum wage laws, deployed the products of this new social science—they assembled hundreds of pages of "*facts*, published by anyone with expert knowledge of industry in its relation to women's hours of labor."[146] Brandeis's "sociological jurisprudence" sought to justify state intervention in markets to a judiciary invalidating legislative reform efforts.[147] As Professor Phillips-Sawyer put it, "Brandeis insisted that contextualizing real-world economic data revealed the true imbalances in market power faced by laborers and thus justified protective legislation."[148]

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143. Charles R. Van Hise, Oscar Straus, Frederick N. Judson, Albert Shaw, Otto M. Eidlitz, Daniel Willard & P. H. Morrissey, Report of the Board of Arbitration in the Matter of the Controversy Between Eastern Railroads and the Brotherhood of Locomotive Engineers 47 (1912) (emphasis added).

144. Henry Lefavour, Richard Olney, John Golden, Elizabeth G. Evans & George W. Anderson, Report of the Massachusetts Commission on Minimum Wage Boards 18 (1912).

145. Fourth Report, supra note 122, at 617, 620.

146. Josephine Goldmark, Impatient Crusader 155 (1953). For an example of a Brandeis Brief, see Brief for the State of Oregon, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605.

147. See Berk, supra note 81, at 46 (describing Brandeis as the "founder of the 'sociological jurisprudence' movement"); Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy 188–89, 209 (1992) (describing the role of the "Brandeis brief" in introducing social scientific research to the judiciary and "providing a necessary demystifying first step toward the goal of social reform").

148. See Phillips-Sawyer, supra note 55, at 677.

Institutionalists' analyses thus challenged the neoclassical theory that free market competition would naturally regulate and accurately value labor based on its contributions. Commons and his Wisconsin colleague John Andrews described the mechanism of market-based competition as "cutthroat," "highly oppressive to the worker and injurious to society in general," noting that "[a]mong the unskilled, unorganized workers, the wage that the cheapest laborer . . . is willing to take, very largely fixes the wage level for the whole group."[149] Commentators echoed their skepticism that market-based wage-setting accurately measured a worker's value as opposed to the value powerful employers could unilaterally set:

> All the machinery of the abstract political economist is driven by the force of competition . . . . The critic of this method wants a political economy that will disclose the actual, not the hypothetical, regulators of prices, wages, rents, and profits. By excluding all forces but those of competition, these economists shut themselves out from the consideration of the gravest problems of the day, which are questions of combination, and not of competition.[150]

More generally, as economists were exposed to data made available by the government's regulation of railroads and public utilities, they began to directly challenge, as Moore put it, "the critical limitations of the current method of investigating economic questions" and the "extremely hypothetical character" of "the theory that, as wages, the laborer gets what he produces."[151] Economists could point to concrete instances where the theory was "fallacious" and not backed by "statistics," particularly in cases of monopoly and oligopoly.[152] Progressive economists favored unionization to increase wages above financially devastating, competitively set wages in boom-and-bust business cycles to achieve countercyclical stabilization.[153]

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149. See John R. Commons & John B. Andrews, Principles of Labor Legislation 48, 373 (4th rev. ed. 1936).

150. Lloyd, supra note 80, at 72; see also Raymond Bye, Some Recent Developments of Economic Theory, *in* The Trend of Economics, supra note 103, at 280–81 (1924) (arguing that, to the extent workers were "paid according to [their] marginal productivity," their compensation would at best be set "*according to its value to employers* who are bidding for it in a competitive market").

151. Moore, supra note 135, at 229–30.

152. Id.

153. See Arthur T. Hadley, Railroad Transportation: Its History and Its Laws 78–79 (1885) (describing the effects of the business cycle on workers supporting families with the result that "[t]he workman seeks relief in combination"); Henry Carter Adams, Professor, Cornell Univ., The Labor Problem, *in* 22 Sci. Am. Supp. 8861, 8861 (1886) ("[C]ompetition applied to the distribution of what is produced[,] . . . while capital . . . is concentrated in the hands of a comparatively few, will give to the employer such an advantage as to exclude the laborer from a just share in . . . an advancing material civilization."); id. at 8863 (describing a system in which workers "are given tenure of employment," "promoted from the ranks," and "consulted whether hours of work or the numbers employed shall be reduced" so they

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In sum, the Progressive Era witnessed deep divisions between neoclassical and Progressive social scientists regarding the mechanisms that set labor's value in the employment bargain. Marginal neoclassical economics calculated labor's value under assumptions of perfect competition and viewed labor like any other input about which employers made incremental, profit-maximizing decisions. In their view, market competition would properly set the value of labor's contributions just like any other commodity. But the realities of highly complex variation in wage-setting, and workers' unequal bargaining leverage, increasingly favored the institutional economists' view that market-based wage regulation was highly contingent and determined more by employers' institution-backed dominance than by "efficient" market forces.

2. *Labor's Commodity Status in Legal Thought.* — While the Progressive Era witnessed deep transformations in social scientific study, especially on the "labor question," legal doctrine primarily ignored them. Judicial opinions and treatises instead applied a thicket of common law frameworks to labor within the tradition of Classical Legal Thought.[154] Courts—and judicial treatises—increasingly viewed workers' strikes as unlawful antitrust conspiracies subject to injunction, classifying labor as a "commodity" which made "the 'labor and skill of the workman' and the 'plant of the manufacturer' . . . all equally 'property,' to which the same set of legal rules should apply."[155] This position diverged from earlier nineteenth-century opinions and a minority of Progressive Era courts that refused to subject labor coordination to antitrust scrutiny on grounds that labor was *not* a commodity.[156]

The commodity distinction mattered as a *legal* distinction for two key reasons. First, labor's "commodity" status determined whether it was laborers' *property* interest protected under federal and state constitutions.[157] If workers had a property interest in their labor, government

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"secure[] a right to live in hard times from the fund of capital created by them in flush times").

154. See Daniel R. Ernst, Lawyers Against Labor: From Individual Rights to Corporate Liberalism 69–164 (1995) (describing the evolution of common law conspiracy and tort doctrines to labor combinations alongside the development of social scientific thought); Hovenkamp, Enterprise and American Law, supra note 63, at 207–38 (describing doctrinal and treatise treatment of labor combinations under common law and Classical Legal Thought). For more on Classical Legal Thought, see generally William Wiecek, The Lost World of Classical Legal Thought (1998) (describing the evolution of Classical Legal Thought between 1886 and 1937 in the context of labor unrest).

155. Hovenkamp, Enterprise and American Law, supra note 63, at 211 (quoting Hopkins v. Oxley Stave Co., 83 F. 912, 919 (8th Cir. 1897)).

156. See infra notes 170–182 and accompanying text.

157. See, e.g., Coppage v. Kansas, 236 U.S. 1, 14 (1915) (holding Kansas's ban on yellow-dog contracts unconstitutional as violative of both employers' and employees' rights to liberty and property).

restraints on its "sale"—including through protective state and federal labor legislation—could be constitutionally challenged as due process violations.[158] But second, if labor were *not* a "commodity," Congress could not regulate its sale in interstate commerce—or, more importantly, its withdrawal from sale as strikes that impacted the flow of commerce—under the Constitution's Commerce Clause.[159] Threading this needle was challenging for judicial labor regulation and divided the judiciary on labor's status.[160]

The "commodity" debate became supercharged with the Supreme Court's 1897 *United States v. Trans-Missouri Freight Ass'n*[161] and 1905 *Lochner v. New York*[162] decisions. In *Trans-Missouri*, the Court held that joint rate-setting by competing railroads could violate the Sherman Act, distinguishing its earlier decision, *United States v. E.C. Knight*,[163] which held that in-state price collusion was beyond the Sherman Act's reach.[164] These cases generated significant debate about the quantum of "interstate" impact required for Sherman Act enforceability, particularly when it came to labor strikes.[165] Whether labor was regulable as a "commodity" or "article of commerce" thus became all the more important as employers deployed the Sherman Act to enjoin strikes and hold unions liable for the strikes' effects.[166] *Lochner*, for its part, struck down a New York state maximum-hour law under the Fourteenth Amendment, which prohibits

158. See, e.g., id. ("Included in the right of personal liberty and the right of private property . . . is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property.").

159. See Phillips-Sawyer, supra note 55, at 683–85 (discussing restrictions placed on antitrust laws by the Commerce Clause).

160. See id. at 700 ("[E]ven after the settlement in *Hutcheson*, labor disputes continued to spill over into the courts on antitrust grounds, and, as we saw in *Jewel Tea*, progressive jurists continued to disagree over the proper boundaries of antitrust law as applied to labor disputes.").

161. 166 U.S. 290 (1897).

162. 198 U.S. 45 (1905).

163. 156 U.S. 1 (1895).

164. See *Trans-Missouri*, 166 U.S. at 313 (distinguishing *E.C. Knight*, which involved "a company engaged in one state in the refining of sugar," whereas the case before the Court concerned "agreements as to rates by competing railroads for the transportation of articles of commerce between the states"); *E.C. Knight*, 156 U.S. at 16–17 (holding the Sherman Act inapplicable because "the contracts and acts of the defendants related exclusively to the acquisition of . . . Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states").

165. See Phillips-Sawyer, supra note 55, at 669, 684, 686–87.

166. See Ernst, supra note 154, at 112–23 (describing employers' legal campaign to challenge worker strikes under the Sherman Act); Phillips-Sawyer, supra note 55, at 668–84 (describing the Supreme Court's jurisprudence in applying the Sherman Act to strike activity).

state deprivation of "liberty" and "property" without due process.[167] The *Lochner* opinion followed Justice Field's reasoning in his 1873 *Slaughter-House Cases* dissent, which quoted Adam Smith:

> "The property which every man has in his own labor," says Adam Smith, "as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this . . . is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him."[168]

After *Lochner*, both federal and state courts used its rationale to strike down Progressive labor legislation, with many emphasizing the "commodity" status of labor. A classic example is the Supreme Court's decision in *Adkins v. Children's Hospital*, which cited *Lochner* in striking down a District of Columbia minimum wage law for female employees as interfering with their liberty of contract.[169] At the state level, the Louisiana Supreme Court cited *Lochner* in its 1913 decision, *State v. Barba*, which struck down Louisiana's eight-hour work law as unconstitutional.[170] The court affirmed the lower court, which had held it a "self-evident and undeniable proposition of law that labor is a commodity, and that the right to labor and to employ labor, and make, in respect thereto, contracts upon such terms as may be agreed upon by the parties . . . cannot be interfered with by the Legislature except on some reasonable ground."[171]

But other courts disagreed, tethering their rulings to abolitionism. The trajectory of the judicial "anti-commodity" tradition mirrors the rise and fall of radical Republican thought between the Civil War, Reconstruction, and Redemption.[172] A foundational ruling in this

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167. See 198 U.S. at 53–54; see also U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

168. 83 U.S. (16 Wall.) 36, 110 n.39 (1873) (Field, J., dissenting) (quoting Smith, supra note 66, at 110).

169. See 261 U.S. 525, 548, 553–59, 562 (1923).

170. See 61 So. 784, 785 (La. 1913).

171. Id. (quoting opinion of Louisiana District Judge F. D. Chretien) (citing Ritchie v. People, 40 N.E. 454 (Ill. 1895); Godcharles v. Wigeman, 6 A. 354 (Pa. 1886); State v. Goodwill, 10 S.E. 285 (W. Va. 1889)).

172. For more on radical Republicanism, see, e.g., Foner, Reconstruction, supra note 63, at 228–586 (describing the rise of Radical Reconstruction, the First Redemption, the retreat from Reconstruction, and the Redeemer's New South); Gourevitch, supra note 63, at 47–66 (describing the "[l]aissez-[f]aire Republican [t]urn"). For representative court opinions, see, e.g., Hopkins v. Oxley Stave Co., 83 F. 912, 937, 939 (8th Cir. 1897) (Caldwell, J., dissenting) (analogizing judicial injunctions of workers' strikes and boycotts to "the revival of despotism for laborers . . . mean[ing] their practical enslavement to great aggregations of capital, whose greed takes no note of human destitution and suffering"); Arthur v. Oakes, 63 F. 310, 318–29, 327 (7th Cir. 1894) (discussing judicial regulation constraining workers as akin to involuntary servitude, "a condition which the supreme law

tradition is the 1842 decision of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Hunt*, which held that state conspiracy law did not apply to indicted workers who struck employers that hired nonunion labor.[173] The court protected the workers' conduct on grounds that their association was used for "fair or honorable and lawful means,"[174] and while some subsequent courts followed its reasoning to exempt labor from antitrust scrutiny,[175] others cited *Hunt* as precedent for limiting antitrust law's reach on the basis that labor was not a commodity regulable by those laws.

A 1908 Iowa Supreme Court decision, *Rohlf v. Kasemeier*, is exemplary but not singular.[176] In *Rohlf*, physicians were criminally prosecuted for combining to fix their medical service fees in violation of Iowa's antitrust law.[177] That law prohibited price-fixing "of any article of merchandise or commodity," and the question was whether physicians' labor services came within its terms.[178] Justice Horace Deemer, a Progressive Republican, drafted the opinion finding they did not.[179] His opinion interpreted the statute's terms "according to the context and . . . approved usage of language," including in social scientific debates:

> Now, whilst there is a class of political economists who treat labor as so much merchandise, the wage being regulated simply by supply and demand, there is another class, which . . . sees in it something more than a commodity, and refuses to subscribe to the doctrine that supply and demand alone regulate the price . . . . It is not . . . within the province of courts of justice to adopt or promulgate any particular system of political science; but in the interpretation of statutes they must take notice of current political theory and conviction. If we were to adopt

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of the land declares shall not exist within the United States, or in any place subject to their jurisdiction"); Kemp v. Div. No. 241, Amalgamated Ass'n of St. & Elec. Ry. Emps. of Am., 99 N.E. 389, 392 (Ill. 1912) ("[Workers' right to withdraw their labor] cannot be abridged or taken away by any act of the Legislature, nor is it subject to any control by the courts, it being guaranteed . . . by the thirteenth amendment[,] . . . which declares that involuntary servitude . . . shall not exist within the United States . . . .").

173. See 45 Mass. (4 Met.) 111, 129–30 (1842).

174. Id. at 134.

175. See, e.g., Queen v. State, 24 S.W. 397, 404 (Tex. 1893). Some courts exempted labor coordination under statutory labor exemptions to state antitrust law after attempts to explicitly exempt labor in the Sherman Act failed. See, e.g., Hunt v. Riverside Club, 104 N.W. 40, 44 (Mich. 1905); State ex rel. Star Pub. v. Associated Press, 60 S.W. 91, 107–08 (Mo. 1900); Cleland v. Anderson, 92 N.W. 306, 310 (Neb. 1902).

176. See 118 N.W. 276, 278–79 (Iowa 1908) (concluding that fixing labor prices did not violate antitrust law); see also supra note 175.

177. See *Rohlf*, 118 N.W. at 277.

178. Id.

179. Id. at 277, 279; see also 11 Benjamin F. Shambaugh, Biographies and Portraits of the Progressive Men of Iowa 471–73 (Des Moines, Conaway & Shaw 1899) (describing Horace Deemer).

> [appellant's] view . . . , it would be on the assumption that the associated words "merchandise" and "commodity" include the wages to be paid for labor . . . . This is a strained and unnatural construction, and gives to the word "commodity" a meaning which is . . . not the commonly accepted one. . . . . With this in mind, we are constrained to hold that labor is not a commodity within the meaning of the act now in question.[180]

The Minnesota Supreme Court followed *Rohlf*'s reasoning in 1909, holding in *State v. Duluth Board of Trade* that a defendant trade board did not violate antitrust law by requiring its members to charge uniform service commissions in their grain sales.[181] The court understood the service commissions as outside the state law's definition of "commodity" because, as it noted had also been the case in *Rohlf*, labor "is not by any fair rule of construction . . . an 'article, commodity, or utility' which 'enters into the manufacture of any article of utility,' within the meaning of those words as used in the statute."[182]

These "anti-commodity" decisions challenged Congress's power to regulate labor under the Commerce Clause, including through passing *protective* labor legislation. Legislative inaction allowed judges to enjoin strikes under the Sherman Act, facilitating a judicial consensus that labor *was* regulable as a "commodity" or "article of commerce" subject to state and federal antitrust law.[183] In their reasoning, judges "imbibed the dominant economic thinking of the nineteenth-century American tradition."[184] The Supreme Court's 1908 *Loewe v. Lawlor* ("*Danbury Hatters*") decision left no remaining ambiguity that the Sherman Act could reach and prohibit "combinations of labor as well as of capital" that restrain trade.[185] Despite the Sherman Act's equivocal legislative history regarding its exemption of labor,[186] the Supreme Court declared that the

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180. *Rohlf*, 118 N.W. at 278. To support its decision, the court cited a Missouri Supreme Court decision, State v. Henke, 19 Mo. 225 (1853). *Rohlf*, 118 N.W. at 278. *Henke* concerned whether hiring an enslaved person away from their master contravened a pre-Civil War state law prohibiting enslaved people from dealing in any commodity without their master's consent. See id. at 226–27. The antebellum decision found the indictment of railroad contractors for hiring an enslaved person to maul rails defective with the explanation that "'[t]he mauling of rails' . . . is not the commodity contemplated by the legislature" because "any commodity" "does not include the manual labor of the slave." See id.

181. See 121 N.W. 395, 414–15 (Minn. 1909).

182. Id. at 412.

183. See Hovenkamp, Labor Conspiracies, supra note 43, at 919, 924–26, 932 n.79 (summarizing case law). For the evolution of judicial thought in issuing labor injunctions, see Felix Frankfurter & Nathan Greene, The Labor Injunction 82–133 (1930) [hereinafter Frankfurter & Greene, The Labor Injunction] (documenting judicial injunctions of labor strikes).

184. Hovenkamp, Enterprise and American Law, supra note 63, at 192.

185. See 208 U.S. 274, 292, 302 (1908).

186. See Sherman Act of 1890, *in* Legislative History of the Federal Antitrust Laws and Related Statutes 3, 7–9 (Earl W. Kintner, ed., 1978). For arguments that the Sherman Act

Sherman Act's meaning "is manifest, and . . . it includes combinations which are composed of laborers acting in the interest of laborers."[187]

Leading up to and following *Danbury Hatters*, treatise writers on conspiracy and antitrust law held them equally applicable to labor and capital, equating labor services and goods as objects of market exchange. Arthur Eddy's 1901 treatise *The Law of Combinations* concluded that the law prohibits capital *and* labor combinations because prices are based on costs, and costs consist of "[l]abor, represented by wages" and "[c]apital, represented by the material consumed and depreciation of plant, machinery, tools, etc."[188] The law should be "directed impartially against combinations of both labor and capital."[189] In Frederick Cooke's 1909 book *The Law of Combinations, Monopolies, and Labor Unions*, he stated that, "[o]n principle, it is not apparent why the legality of combinations among employees . . . should be subjected to any different test from that applied to combinations among employers . . . or among tradesmen."[190]

B. *Antitrust Law's Labor Exemptions as Labor Decommodification*

Judicial consensus that labor's "commodity" status subjected worker coordination and strikes to antitrust law instigated policymakers, legal thinkers, social scientists, and labor leaders to mobilize for legislative reform. In his summary of *The Doctrine that Labor Is a Commodity*, institutional economist and administrator Edwin Witte urged a labor exemption from antitrust enforcement based on the realities of the employment bargain: "[T]he law governing controversies between labor and capital is being recast. If a satisfactory law is to evolve, the emphasis must be upon the facts of the present situation, rather than upon abstract reasoning."[191] It was in this spirit that reformers sought to amend the Sherman Act in what would become the Clayton and Norris–LaGuardia Acts' labor exemptions. This section summarizes the legislative history of these exemptions as deeply informed by contemporary social scientific

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exempted labor, see Edward Berman, Labor and the Sherman Act 11–51 (1930); Louis Boudin, The Sherman Act and Labor Disputes: I, 39 Colum. L. Rev. 1283, 1285–93 (1939); Samuel Gompers, The Hatters' Case, 17 Am. Federationist 197, 202 (1910); Sanjukta Paul, The Case for Repealing the Firm Exemption to Antitrust, *in* Cambridge Handbook of U.S. Labor Law 88, 89–90 (2019). For contrary arguments, see Joseph Joyce, A Treatise on Monopolies and Unlawful Combinations or Restraints 175 (1911); Alpheus Mason, Organized Labor and the Law 122–27 (1925); William Thornton, A Treatise on the Sherman Anti-Trust Act 1–31 (1913); Marina Lao, Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption, 51 U.C. Davis L. Rev. 1543, 1560 (2018).

187. See *Danbury Hatters*, 208 U.S. at 302.

188. Arthur J. Eddy, The Law of Combinations 1330 (1901).

189. Id. at 1331.

190. See Frederick H. Cooke, The Law of Combinations, Monopolies and Labor Unions 104 (2d ed. 1909).

191. Edwin E. Witte, The Doctrine that Labor Is a Commodity, 69 Annals Am. Acad. Pol. & Soc. Sci. 133, 139 (1917).

and doctrinal approaches to understanding and measuring labor's value. It argues that their rejection of labor as a "commodity" was a legislative rejection of consigning labor's value to market-based determinations. That rejection became clearer in the Norris–LaGuardia Act's restriction of judicial jurisdiction over labor disputes and formal statement of antitrust law's labor and wage policy favoring workers' exercise of their collective rights to "obtain acceptable terms and conditions of employment."[192]

Progressives and labor leaders opposed judicial intervention in labor organizing well before the *Danbury Hatters* decision. The Democratic Party placed labor's exemption from antitrust law at the center of its 1908 and 1912 national platforms, declaring that

> [t]he expanding organization of industry makes it essential that there should be no abridgement of the right of wage earners and producers to organize for the protection of wages and the improvement of labor conditions, to the end that such labor organizations and their members should not be regarded as illegal combinations in restraint of trade.[193]

Democrats inveighed against "[g]overnment by injunction," in which judges rather than legislatures "determine[d] [the] legitimacy of challenged behavior" and "policy of society towards industrial strife." [194]

"Government by injunction" was also rejected for imposing policy by abstraction.[195] Reception of the Supreme Court's jurisprudence on "yellow-dog contracts"—employment contracts forbidding workers to join labor unions—is illustrative. In *Adair v. United States*[196] and *Coppage v. Kansas*,[197] the Court held unconstitutional federal and state law yellow-dog contract bans.[198] Felix Frankfurter and Nathan Greene rejected the Court's reasoning as "pernicious abstractions" "presuppos[ing] a perfectly balanced symmetry of rights: [T]he employer and employee are on an equality, and legislation which disturbs that equality is an arbitrary

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192. Norris–LaGuardia Act, Pub. L. No. 72-65, § 2, 47 Stat. 70, 70 (codified at 29 U.S.C. § 102 (2018)).

193. 51 Cong. Rec. 9544 (1914) (statement of Rep. Bartlett) (quoting 1908 Democratic National Convention platform, American Presidency Project, https://www.presidency.ucsb.edu/documents/1908-democratic-party-platform [https://perma.cc/6RDG-8C4D] (last visited Oct. 11, 2024)); see also Joseph Kovner, The Legislative History of Section 6 of the Clayton Act, 47 Colum. L. Rev. 749, 750–51 (1947) (describing the Democratic Party's response to the *Danbury Hatters*' decision in its party platforms).

194. Felix Frankfurter & Nathan Greene, Legislation Affecting Labor Injunctions, 38 Yale L.J. 879, 879–80 (1929) [hereinafter Frankfurter & Greene, Legislation] (internal quotation marks omitted).

195. See William Forbath, The New Deal Constitution in Exile, 51 Duke L.J. 165, 183–89 (2001) [hereinafter Forbath, New Deal Constitution] (summarizing early twentieth-century criticisms of injunctions against labor organizing).

196. 208 U.S. 161 (1908).

197. 236 U.S. 1 (1915).

198. See *Coppage*, 236 U.S. at 13; *Adair*, 208 U.S. at 175.

interference 'with the liberty of contract.'"[199] Labor leaders also protested judicial reasoning presuming an abstract "equality" between workers and employers, pointing to law that enabled employers to combine but not workers.[200] Frank Foster, the 27-year-old secretary of the Knights of Labor who later co-founded the American Federation of Labor (AFL) with Samuel Gompers, testified before Congress against:

> the argument that the law of supply and demand regulates the labor market, that the workingmen must submit to that law, and that it is entirely useless for them to attempt to rebel against its inexorable and inevitable operation. Even accepting the doctrine of the orthodox school of political economy, that labor is in large measure a *commodity*, . . . the supply of any commodity in the market is not a fixed quantity, but is . . . *regulated by combination*. We know that we pay an artificial price for many of the staple commodities of life. The Standard Oil Company . . . fixes for us the price of the light in the workingman's home, . . . not at its real value, but by regulating the supply . . . . We claim, [*if* labor is a commodity,] that the workingmen have . . . the same power and the same privilege and the same right to control the labor market as the stock broker or the oil broker . . . . [A]nd we claim that high wages is one of the main factors in domestic prosperity; that the cause . . . of financial depression . . . is not a glut in the market, not an overproduction, but rather an insufficient power of consumption possessed by the working people.[201]

The push to legislate a labor exemption from antitrust law thus turned as much on advocates' policy positions regarding unions' social value as it did on rejecting abstract methods of analyzing the employment relationship as a market exchange between equals.

Progressives, institutional economists, and critics of "orthodox" political economy informed the policy, drafting, and language of the Clayton Act that exempted labor on grounds it was not a "commodity" or "article of commerce."[202] Presidential candidate Woodrow Wilson—trained by institutional economist Richard Ely—appointed Louis Brandeis to be his 1912 campaign advisor.[203] "Brandeis influenced the drafting of the Clayton Act" to remedy the "imbalance in bargaining power between employers and employees by removing antitrust law as a roadblock to

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199. Frankfurter & Greene, Legislation, supra note 194, at 891 (quoting *Adair*, 208 U.S. at 175).

200. See 1 Sen. Comm. Educ. & Labor, 48th Cong., Report of the Committee of the Senate Upon the Relations Between Labor and Capital and Testimony Taken by the Committee 41, 667–68 (1885) (testimony of Frank K. Foster).

201. Id. (emphasis added).

202. See Yonay, supra note 30, at 53–60 (summarizing institutionalists' government influence).

203. 3 Dorfman, supra note 79, at 337.

certain union action."[204] The Wilson Administration was Brandeis's opportunity to "codify the Wisconsin progressives' idea of trade unionism into a prospective law that would recalibrate market power" between workers and employers.[205] But Progressives and labor leaders shaped the framing of the labor exemption most in terms of the "anti-commodity" tradition. Economist Henry Seager debated labor exemption legislation in 1914 with the American Anti-Boycott Association's leading attorney, Walter Merritt, in *The Survey*, a leading social work journal.[206] Seager advocated enacting a principled exclusion of labor unions from Sherman Act scrutiny: "[T]wo distinct sets of economic relations are clearly separable. One concerns the dealings between the . . . sellers and buyers[] of commodities; the other the dealings between employers and employe[e]s."[207] "Wage-earners should be encouraged to combine" to offset the power of combined capital.[208] The broader circulation of John Kells Ingram's 1880 address to the Trades Union Congress in Dublin was also influential in its explicit rejection of the "false" view that labor is "a commodity."[209] In a later 1928 reissue of the speech introduced by Richard Ely, Ely recalled:

> There is a striking correspondence between [Dr. Ingram's ideals] and the ideals that have found expression in the struggles of the [AFL]. . . . Samuel Gompers always fought the idea that labour is a commodity, and, as a result of his struggles and the struggles of those associated with him, Congress enacted legislation setting forth that labour must not be regarded as a commodity.[210]

Prior to the Clayton Act's passage, Gompers argued that it was "an outrage upon our language" to treat worker and property owner combinations as equivalent since workers "own nothing but themselves and undertake to control nothing but themselves and their power to work."[211] Gompers's *Labor Not a Commodity* stated his position clearly, as Congressman Buchanan highlighted in debate: "[Anti]trust laws[] may rightfully apply to the products of labor, but they do not rightfully apply to the labor power of a free man."[212]

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204. Phillips-Sawyer, supra note 55, at 677; see also Berk, supra note 82, at 40 (describing the enlistment of Brandeis' counsel in drafting the legislation).

205. Phillips-Sawyer, supra note 55, at 678.

206. See Seager, Trade Unions, supra note 122, at 448–49; see also Ernst, Labor Exemption, supra note 122, at 1161.

207. Seager, Trade Unions, supra note 122, at 448–49.

208. Id.

209. See Ingram, supra note 104, at 8; see also supra note 100 and accompanying text.

210. Richard T. Ely, Introduction to Ingram, supra note 104, at 3.

211. Sen. Charles Culberson, Unlawful Restraints and Monopolies, S. Rep. No. 63-698, at 11 (1914).

212. Samuel Gompers, Labor Not a Commodity, 21 Am. Federationist 849, 866 (1914).

In their treatise *The Labor Injunction*, Frankfurter and Greene identify "the plea of Samuel Gompers" as the reason Congress introduced the Clayton Act's labor exemption.[213] Another scholar identifies Gompers as the source of its anti-commodity language based on Gompers's relationship with Ingram and the British Trade Union Congress and later drafting of the International Labor Organization's Charter, setting as the organization's "guiding principle . . . that labour should not be regarded merely as a commodity or article of commerce."[214]

Congressional debates of the Clayton Act's "commodity" language mirrored this literature. The House first put forward section 6 of the Clayton Act without any reference to labor as a "commodity or article of commerce."[215] In House debates, Congressman Robert Henry (D-TX), the Rules Committee Chair, framed his view of the bill in anti-commodity terms, arguing that Congress "never intended that the [antitrust] law should apply to labor organizations" because "it was never intended that the man who sells his labor . . . should be classed as conspiring against trade or in unlawful combinations."[216] Congressman David Lewis (D-MD), a former coal miner and expert on social insurance legislation, echoed these sentiments, contending that "there is this distinction between labor and a barrel of oil, a commodity: Labor is never in truth a commodity."[217]

Progressive leader Senator Albert Cummins (R-IA) amended the House bill that introduced section 6's opening language declaring that the "labor of a human being is not a commodity or article of commerce."[218] Cummins represented Iowa Grange Movement farmers in antitrust

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213. See Frankfurter & Greene, The Labor Injunction, supra note 183, at 142.

214. See Paul O'Higgins, "Labor Is Not a Commodity"—An Irish Contribution to International Labour Law, 26 Indus. L.J. 225, 229 (1997) (alteration in original) (quoting Peace Treaty of Versailles, June 28, 1919, art. 427, https://wwi.lib.byu.edu/index.php/Articles_400_-_427_and_Annex [https://perma.cc/N6LK-YSKT] (last visited Oct. 11, 2024) (internal quotation marks omitted)).

215. 51 Cong. Rec. 9538 (1914) ("That nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of . . . labor . . . organizations, orders, or associations instituted for the purposes of mutual help . . . ; or to forbid or restrain individual members of such organizations . . . from carrying out the legitimate objects thereof . . . .").

216. 51 Cong. Rec. 9540–67 (statement of Rep. Henry).

217. Id. at 9565 (statement of Rep. Lewis). These sentiments were echoed by many. See, e.g., id. at 9672 (statement of Rep. Buchanan) (noting the "difference between commodities and living human beings"); id. at 9559 (statement of Rep. Casey) (arguing that "[l]abor power [cannot] be property"); id. at 9173 (statement of Rep. Sherwood) ("Labor power is not property, because it [cannot] be separated from the laborer."); 48 Cong. Rec. 6446 (1912) (statement of Rep. Wilson) ("[T]he assumption . . . that man is property[] [is] an assumption repugnant to . . . all civilized communities . . . ."); id. at 6457 (statement of Rep. Graham) ("Property rights are getting too much recognition at the expense of human rights, and this bill is simply an attempt to get back to where Abraham Lincoln would have us . . . .").

218. See 51 Cong. Rec. 14,546 (statement of Sen. Cummins) (amending what was at the time section 7).

litigation against a barbed wire trust before serving as a reform governor and seeking the 1912 Republican Presidential nomination as a Progressive "insurgent."[219] He served on both the Judiciary Committee that prepared the Clayton bill and the Commerce Committee, where he was a chief sponsor of the Federal Trade Commission (FTC) Act.[220] As early as 1911, Cummins testified that antitrust should address both economic *and* "sociological" "object[s] of danger," noting "the desirability of having as many men as possible who are their own masters, rather than having a few masters and a good many employees."[221] Cummins's statement introducing the introductory language sounded in Republican "free labor" ideology:

> Society has the right to regulate the sale and the transportation of the thing produced, but society has no right . . . to say that a man who has the capacity to work shall work. He is free to either work or to abstain from working. He is free to persuade others to abstain from working. The thing in which he is dealing is not a commodity, and if we do not recognize the difference between the labor of a human being and the commodities that are produced by labor and capital . . . we have lost the main distinction which warrants, justifies, and demands that labor organizations coming together for the purpose of bettering the conditions under which they work, of lessening the hours which they work, . . . shall not be reckoned to be within a statute which is intended to prevent restraints of trade . . . . [M]y [amendment] recognizes the high quality of labor, distinguishes the power . . . of the human being to render service to his fellow men from the commodity which may be produced through that service.[222]

Senator Hamilton Lewis quoted Senator Sherman's 1890 Senate address calling to "allow laborers to make associations, combinations, contracts, agreements for the sake of maintaining and advancing their wages, in regard to which . . . their contracts are to be made with large corporations who are themselves but an association or combination or aggregation of capital on the other side."[223] Progressive Senator and

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219. See Marc Winerman, The Origins of the FTC: Concentration, Cooperation, Control, and Competition, 71 Antitrust L.J. 1, 81–84 (2003) (describing Cummins's rise to fame and political trajectory); see also Benjamin Gue, History of Iowa 64–65 (1903) (same).

220. See Winerman, supra note 219, at 69, 81–88 (discussing Cummins's views on the FTC Act).

221. See 2 Control of Corporations, Persons, and Firms Engaged in Interstate Commerce: Hearing on S. Res. 98 Before the S. Comm. on Interstate Com., 62d Cong. 1584 (1913) (statement of Sen. Cummins, Member, S. Comm. on Interstate Com.).

222. 51 Cong. Rec. 14,585–86 (statement of Sen. Cummins).

223. See id. at 14,587 (statement of Sen. Lewis (quoting 21 Cong. Rec. 2728 (1890) (statement of Sen. Sherman))).

Wilson ally John Kern (D-IN) explicitly connected the "commodity" view of labor to slavery and derided related strains of economic thought, placing into the record a "very well-considered and able" 1914 editorial from *The Outlook* "on the subject of 'Trust laws and labor'":

> The whole question whether labor unions should come under the operations of the antitrust law rests upon the question whether labor is merchandise or not. From the point of the slave holder, . . . labor is merchandise . . . . From the point of view of some economists, labor is regarded as a commodity which, like potatoes, or steel . . . is offered by the owner in the highest market and sought by the buyer in the lowest market . . . . This view of labor as a commodity is rightly becoming obsolete. Slavery is no longer countenanced among civilized people. . . . With the abandonment of that idea must be abandoned the idea of labor as a commodity, for labor consists of human beings . . . . Since the antitrust law does not recognize the difference, Congress ought to amend the law.[224]

While Senator William Borah (R-ID) raised concerns that the language could preclude Congress from enacting protective labor legislation under the Commerce Clause, it was ultimately amended to the House bill and passed.[225] It was a milestone that marked the first and only time Congress exempted conduct from antitrust enforcement on grounds that it was not properly viewed as "an article of commerce" subject to market forces as a "commodity."[226]

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224. Id. at 14608–09 (statement of Sen. Kern). *The Outlook* (1867–1935) was an influential Progressive weekly that included Theodore Roosevelt as a Contributing Editor. See Hazel Dicken-Garcia, Journalistic Standards in Nineteenth-Century America 253 (1989) (providing a general overview of the journal's history); Roosevelt Begins Work as an Editor, N.Y. Times, Mar. 5, 1909, at 5 (discussing Theodore Roosevelt's "new post as associate editor of The Outlook"). The editorial was likely drafted by Lyman Abbott, then-Editor-in-Chief, an advocate of industrial democracy who gave the funeral address at economist Henry George's funeral. See Lyman Abbott, Address of the Rev. Lyman Abbott, D.D., *in* Addresses at the Funeral of Henry George 25–30 (Edmund Yardley ed., 1905); Lyman Abbott, Industrial Democracy, *in* 9 Forum 658–69 (Lorettus S. Metcalf ed., New York, The Forum Publishing Co. 1889) ("[A]s slavery gave place to serfdom and serfdom to the wages system, so in time the wages system will give place to industrial democracy.").

225. See 51 Cong. Rec. 14,591, 14,610. This concern echoed broader worries about sourcing labor protections in Congress's Commerce Clause as opposed to Thirteenth Amendment authority. See generally Pope, Thirteenth Amendment, supra note 34 (discussing constitutional sourcing debates for labor legislation in the Commerce Clause and Thirteenth Amendment, respectively); Pope, Labor's Constitution, supra note 34 (same).

226. See 51 Cong. Rec. 14,591 (statement of Sen. Borah) ("[The House bill] is a declaration upon the part of Congress that labor is not a commodity *or* an article of commerce." (emphasis added)).

The Clayton Act's passage inaugurated broader federal efforts to protect workers and worker organizing, from the first War Labor Board,[227] National Railroad Adjustment and Mediation Boards,[228] NIRA labor codes and unionization protections,[229] to the NLRA[230] and the Fair Labor Standards Act (FLSA),[231] all of which established boards and commissions that either directly regulated wages and labor standards or facilitated and supervised workers' collective bargaining with employers over the same.[232]

Expanding workers' collective rights in a growing administrative state was meant to displace judicial jurisdiction over labor disputes to correct two equally important errors: (1) *substantive*—judicial deviation from an emerging consensus favoring wage determination through collective bargaining rather than market competition and (2) *methodological*—judicial reliance on abstract rather than evidence-based, social scientific reasoning in adjudicating labor disputes. Reformers' battle against the courts escalated soon after the Clayton Act's passage. In *Duplex Printing Press Co. v. Deering*, the Supreme Court narrowly interpreted the Clayton Act's labor exemption to uphold an injunction of a union's secondary boycotts of their employer's distributors and customers.[233] The decision mobilized more support for Congress to restrain the courts. Labor movement leaders resisted judicial injunctions on constitutional grounds, arguing that the Thirteenth Amendment limited courts' equitable jurisdiction "to protect property when there is no remedy at law" because labor could not be "property"[234]—the AFL's proposed anti-injunction bill

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227. See Exec. Order No. 9017, 7 Fed. Reg. 237 (Jan. 14, 1942).

228. See Railway Labor Act, Pub. L. No. 69-257, 44 Stat. 577 (codified at 45 U.S.C. §§ 153–154 (2018)).

229. See National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 195.

230. See National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151–169 (2018)).

231. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201–219).

232. See Hiba Hafiz, Structural Labor Rights, 119 Mich. L. Rev. 651, 664–73 (2021) [hereinafter Hafiz, Structural Labor Rights] (relating the NLRA's equal bargaining power purpose); see also Kate Andrias, An American Approach to Social Democracy, 128 Yale L.J. 616, 650–93 (2019) (same). For a summary of these federal efforts, see Hiba Hafiz, Why a "Whole-of-Government" Approach is the Solution to Antitrust's Current Labor Problem, ProMarket (Nov. 18, 2021), https://www.promarket.org/2021/11/18/antitrust-monopsony-government-labor/ [https://perma.cc/2KV9-V4DA] [hereinafter Hafiz, Whole-of-Government Approach] (describing the history of government commissions to regulate wages and labor standards).

233. See 254 U.S. 443, 471 (1921) (reading the labor exemption narrowly because it "imposes an exceptional and extraordinary restriction upon the equity powers of the courts" and because a broader reading "would violate rules of statutory construction"), superseded by statute, National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449, as recognized in Brown v. Pro Football, Inc., 518 U.S. 231 (1996).

234. See, e.g., Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy 112–20, 202–12 (2022) (describing the constitutional stakes of labor resistance between Reconstruction and the

stated: "[N]othing shall be held to be property unless it is tangible and transferable."[235] The labor movement demanded policy recognition of workers' freedom of association and rights to withdraw their labor, and they deployed social scientific justifications to protect their collective action based on employers' unequal bargaining power.[236] The Supreme Court was not far from conceding this position—after *Duplex Printing*, the Court partially overturned state labor strike bans and labor injunctions on grounds that workers' concerted activity was deemed "essential to give laborers opportunity to deal on equality with their employer."[237]

But for reformers, those decisions did not go far enough. Progressive lawyers and social scientists—including Felix Frankfurter, Edwin Witte, Francis Sayre, Donald Richberg, and Herman Oliphant—sought new legislation to strip courts of equitable jurisdiction over labor disputes, prohibit certain employer conduct, and state a clear labor policy to guide and constrain judicial labor market regulation.[238] In what became the Norris–LaGuardia Act, Frankfurter, Witte, Sayre, Richberg, and Oliphant drafted a new federal labor policy in the antitrust laws, centered on an

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New Deal); Forbath, New Deal Constitution, supra note 195, at 186–202 (describing the history of workers' constitutional resistance against legal and jurisprudential characterization of their labor as employers' "property"); Pope, Thirteenth Amendment, supra note 34, at 12–46 (describing Thirteenth Amendment arguments against labor injunctions in the period before the New Deal); Pope, Labor's Constitution, supra note 34, at 962–77 (explaining "[l]abor's claim to a constitutional right to strike" and telling the story of Alexander McWhirter Howat, a union leader who was jailed in 1921 for defying a labor injunction).

235. See Frankfurter & Greene, Labor Injunction, supra note 183, at 279 (reprinting text of S. 1482).

236. See, e.g., Debate Between Samuel Gompers and Henry J. Allen at Carnegie Hall, New York, May 28, 1920, at 15 (1920) (recording Gompers arguing that workers' ability to counter employer power merely through quitting rather than collective action was "subterfuge," and asking "just imagine what a wonderful influence such an individual would have, say for instance [on] the U.S. Steel Corporation"); J.W. Walker, Only Worker Suffers, Workers Chron. Apr. 29, 1921, at 3 (denouncing the asymmetry in bargaining position between workers and employers and arguing that organizing and striking are the only ways to put workers and employers "on a parity").

237. See Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921); see also Charles Wolff Packing Co. v. Ct. of Indus. Rels., 262 U.S. 522, 540 (1923) ("[The worker] is forbidden [by the Industrial Court Act] to strike . . . and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.").

238. See Frankfurter & Greene, The Labor Injunction, supra note 183, at 280–81 (reprinting S. 1482, Frankfurter and others' proposed anti-injunction bill whose labor policy language was adopted in the Norris–LaGuardia Act); Edwin Witte, The Government in Labor Disputes 274–75 (1932) (recounting the Norris–LaGuardia Act's legislative history); see also Phillips-Sawyer, supra note 55, at 687–88 (stating that Senator George Norris invited Frankfurter, Oliphant, and others "to draft a new federal anti-injunction bill," which resulted in a bill "codifying a procedural approach to the problem of industrial disputes"); Pope, Thirteenth Amendment, supra note 34, at 36–46 (describing the political maneuvering of Senator Norris and his committee of social scientists, which led to the passage of the Norris–LaGuardia Act).

institutionalist understanding of employer power and justifying jurisdiction-stripping as a means of protecting the rise of labor market institutions that were better equipped to set the terms of the employment bargain:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted.[239]

The Act prohibited coercive yellow-dog contracts and the exercise of court jurisdiction over labor matters that would contravene its stated public policy.[240] Progressive and institutional economists and lawyers drafted this language with the conviction that labor deserved "more than the rhetoric of abstractions" courts used to justify labor injunctions.[241] In lieu of those abstractions, the Norris–LaGuardia Act's policy statement reflected "a belief widely entertained by economists as well as by workers, and frequently acted upon by employers themselves, that the workmen engaged in every division of a single industry are bound by a common

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239. 29 U.S.C. § 102 (2018). For more on Frankfurter's, Oliphant's, Richberg's, Sayre's, and Witte's roles in drafting the Norris–LaGuardia Act, see Irving Bernstein, The Lean Years: A History of the American Worker, 1920–1933, at 397–403 (1960) [hereinafter Bernstein, Lean Years] (describing the drafting of the Norris–LaGuardia Act by Frankfurter, Richberg, Oliphant, Sayre, and Witte in 1928); William E. Forbath, Law and the Shaping of the American Labor Movement 163–64 (1991) (describing the legislative history of the Norris–LaGuardia Act); Ernst, Yellow-Dog Contract, supra note 30, at 271–72 (detailing Richberg's role in drafting the Norris–LaGuardia Act along with Frankfurter, Oliphant, Sayre, and Witte); Robert Gorman & Matthew Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U. Pa. L. Rev. 286, 333–35, 337–38 (1981) (detailing the drafting of the Norris–LaGuardia Act and internal policy debates between Frankfurter, Oliphant, Richberg, Sayre, and Witte).

240. See 29 U.S.C. §§ 101, 103.

241. See Felix Frankfurter & Nathan Greene, Congressional Power Over the Labor Injunction, 31 Colum. L. Rev. 385, 405–06 (1931).

economic bond."[242] That common bond extended from workers' unequal bargaining power based in part on legal and governmental sanctioning of the corporate form which precluded unorganized workers' actual liberty to contract in an arm's-length market exchange.[243] Given that reality, the Act's policy centered uncoerced collective assertions of worker demands as the best means of establishing "acceptable terms and conditions of employment."[244]

* * *

Progressive Era legal debates fundamentally shifted the parameters of labor market regulation. And they did so not merely by centering the documentation and empirical assessment of economic workplace realities in legislative discussions but also by "institutionalizing" policy mechanisms Progressives believed could temper the existence and adverse effects of employer power relative to individual unorganized workers. The culmination of these new foundations of legal and regulatory thought were the Clayton and Norris–LaGuardia Acts. While these statutes restrained judicial injunctions against workers' strikes against their direct employers—conduct that received more protection with the NLRA's enactment—they failed to prevent persistent judicial narrowing of workers' entitled protections to organize and strike under the judicial "'non-statutory' labor exemption."[245] Perhaps even more surprising is the extent to which Congress's recognition of employer power in those Acts had no impact on antitrust enforcement or policy with regard to *employers*. In their century-long enforcement record, antitrust enforcers, with very limited exceptions, never targeted enforcement to challenge employer power that harmed workers.[246]

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242. See id.

243. See 29 U.S.C. § 102 (noting that under "prevailing economic conditions," the individual worker is "commonly helpless to exercise actual liberty of contract and to protect his freedom of labor").

244. Id.

245. See, e.g., Hiba Hafiz, Labor Antitrust's Paradox, 86 U. Chi. L. Rev. 381, 385–88 [hereinafter Hafiz, Labor's Antitrust Paradox] (2018) (describing judicial interpretations of the Clayton and Norris–LaGuardia Acts through a nonstatutory exemption); Phillips-Sawyer, supra note 55, at 697–99 (same); Pope, Labor's Constitution, supra note 34, at 987 (describing the judicial nullification of the Clayton Act's labor exemption); Theodore St. Antoine, *Connell*: Antitrust Law at the Expense of Labor Law, 62 Va. L. Rev. 603, 606, 617–18, 618 n.64 (1976) (describing the nonstatutory exemption's doctrinal evolution).

246. See Posner, How Antitrust Failed Workers, supra note 16, at 13 ("While antitrust law . . . nominally applied to *all* markets—labor markets as well as product markets—antitrust enforcement would focus almost exclusively on product markets."); Hafiz, Labor Antitrust's Paradox, supra note 245, at 388–91 ("The recent focus of attention on the anticompetitive effects of employer buyer power has prompted calls for aggressive labor-antitrust enforcement and even incorporation of work-law violations into antitrust liability analysis against employers."); Ioana Marinescu & Eric A. Posner, Why Has Antitrust Law

Until now.[247] Enforcers' new attention to employers' anticompetitive conduct has transformed the antitrust landscape, raising a range of doctrinal and policy questions regarding how to adapt antitrust law to the new labor market context. But little attention has yet been paid to the question of whether entirely new methods and goals should be applied in this setting in light of Congress's labor and wage policy enacted in the labor exemptions. In expanding antitrust enforcement to labor markets, enforcers have applied the same methods used to target the harms of anticompetitive conduct in markets for commodities—product markets—rather than methods uniquely amenable to labor markets. And the tools applied to assess employers' conduct, and employers' market power more generally, have been precisely the tools Progressives and institutional economists inveighed against: marginalist analysis to detect employer power over wages that deviates from a presumption of perfect competition. Part II describes the history and rise of these methods, their recent deployment in labor markets, and the extent to which enforcers have returned to a presumption of labor as a commodity in estimating and targeting employer power and conduct in violation of the law.[248]

II. THE NEW LABOR ANTITRUST AS LABOR COMMODIFICATION

Recent antitrust enforcement and policy challenging employers' anticompetitive conduct in labor markets has launched a new regulatory arena for worker protection. But it did not emerge on a clean slate. In applying antitrust law to employers, enforcers must contend with over a century of antitrust doctrine and precedent shaped nearly exclusively by enforcement in *product* markets, where courts have primarily focused on price and output effects in commodity sales to consumers.[249] Enforcers are also tethered to methods they developed to prove liability and harm in those markets by evidentiary doctrine and institutionalized economic expertise.[250] Expert testimony used to prove market power and its adverse effects has drawn exclusively from neoclassical industrial organizations

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Failed Workers?, 105 Cornell L. Rev. 1343, 1375–82 (2020) [hereinafter Marinescu & Posner, Has Antitrust Failed Workers?] (exploring why "labor monopsony cases are rare").

247. See infra section II.B (describing recent enforcement in labor antitrust cases).

248. By "enforcers," this Article refers to both public and private enforcers, including public and private litigators as well as the courts.

249. See Posner, How Antitrust Failed Workers, supra note 16, at 34–45 ("Because there is more product-side litigation than labor-side litigation, there is more product-side case law, and thus product-side outcomes are easier to predict."); Hafiz, Labor Antitrust's Paradox, supra note 245, at 391–404 (presenting "the range of employers' procompetitive justifications of, and defenses to, labor market restraints and the resulting challenges labor antitrust faces under the consumer welfare standard").

250. See, e.g., Elizabeth Popp Berman, Thinking Like an Economist: How Efficiency Replaced Equality in U.S. Public Policy 72–95, 129–41 (2022) ("[A] feedback loop between enforcement actions and court decisions institutionalized economic reasoning as the only legitimate lens through which policy could be pursued.").

(IO) economics (with a recent incorporation of game theory and behavioral theory), focusing on models that seek to discern whether a seller of goods marginally raised (or lowered, in the case of a buyer) prices or reduced output above or below a competitive market equilibrium. The admissibility and weight of economic expert testimony have survived judicial review countless times, and judicial admission of and factfinder reliance on that testimony has established decades of precedent that both eases and complicates subsequent enforcement. Enforcement is easier for those trained in and able to bear the costs of these methods as well as for courts that have developed expertise in and relied on them to make their decisions appeal-proof. But that precedent burdens those seeking to establish economic power and its resulting harms—workers who are often unfamiliar with or cannot afford costly economic experts or seek to establish coercive power through alternative methods and theories.[251] Neoclassical IO methods are not just persuasive in antitrust administration. They are institutionalized through agency and interagency practice, personnel hiring, and contracting arrangements with experts in the Department of Justice (DOJ) Antitrust Division's Chief Economist and Expert Analysis Group, the Bureau of Economics at the FTC, and leading expert shops hired to prove that complex economic transactions amount to antitrust violations.[252]

This Part lays out the methodological and procedural infrastructure that the New Labor Antitrust inherited from a legacy of IO-based antitrust enforcement in product markets. It explains how the application of these methods to labor markets contravenes the labor policy of the Clayton and Norris–LaGuardia Acts and is inapt for adequately tackling the harms of employers' exercise of buyer power over workers. Specifically, it argues that extending prior methods and proof structures to labor markets mistakenly dismisses the nature and extent of employer power and erroneously establishes competitive wage-setting as a benchmark and goal of enforcement. First, current approaches do not assume, as the statutes require, that corporate employers presumptively have buyer power and harms to workers' countervailing leverage are of primary policy concern. Instead, they assume a default of perfect competition in labor markets that requires enforcers, in all cases beyond naked price-fixing and market allocation agreements, to *prove* employer power resulting in competition-

251. See, e.g., Jesse Eisinger & Justin Elliott, These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers, ProPublica (Nov. 16, 2016), https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers [https://perma.cc/D2ZW-EDH8] (explaining the costs of economic expertise).

252. See Popp Berman, supra note 250, at 24 (explaining how macroeconomic theories of reasoning were incorporated into institutions); Hiba Hafiz, Economic Analysis of Labor Regulation, 2017 Wis. L. Rev. 1115, 1140–48 [hereinafter Hafiz, Economic Analysis] (outlining agencies' "strategies and approaches to conducting and integrating economic analysis" into their "regulatory functions").

based harms for liability to attach. Second, in detecting employer power, current methods benchmark the "market price" of labor to detect wage deviations rather than assume that wage-setting through institutions—like institutions of collective bargaining—offers the best benchmark of labor's contributions and value to production against which to evaluate employers' ability to suppress compensation or slow compensation growth. Enforcers measure harms and orient remedies towards correcting deviations from competitive wage-setting rather than measuring and remedying employer chilling of worker organizing, institution-building, and exercise of countervailing power to achieve collectively bargained employment conditions. The Part concludes by critiquing the application of current methods as a matter of law and policy, arguing that they undercount the presence and effects of employer power and limit the nature and scope of appropriate remedies for employer violations.

A. *Antitrust's Economic Turn and Proving Employer Power*

Congress's ban on regulating labor as a "commodity"—and its deeper understanding of the harms of competitive wage-setting that informed that ban—stands in stark contrast to labor antitrust's current, exclusive focus on promoting labor market competition.[253] But deviation from Congress's labor policy in the Clayton and Norris–LaGuardia Acts is longstanding, beginning with antitrust enforcers' selective enforcement against labor but not employers.[254] After Congress enacted the labor exemption, antitrust enforcers continued targeting strikes and established a special labor office in the DOJ's Antitrust Division to centralize its anti-union enforcement.[255] Meanwhile, the agencies never targeted employer monopsony, coordination, or other anticompetitive conduct.[256] This occurred despite economists' concerns, during and after the labor exemptions' enactment, about workers' unequal bargaining power with employers, employers' use

253. See, e.g., Exec. Order No. 14,036, 86 Fed. Reg. 36,987 §§ 1–2 (July 9, 2021) [hereinafter, E.O. 14,036] ("Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions.").

254. See supra note 183 and accompanying text.

255. See Corwin D. Edwards, Thurman Arnold and the Antitrust Laws, 58 Pol. Sci. Q. 338, 346–48 (1943) (providing a history of the DOJ's Antitrust Division's labor program); see also supra note 183 and accompanying text.

256. The record of antitrust enforcement between 1890 and 1930 reveals no enforcement action against employers, and on the contrary, while antitrust enforcement was generally weak, it was predominantly deployed against workers' combinations; three-quarters of antitrust prison terms were imposed against labor. See Walton Hamilton & Irene Till, Antitrust in Action, U.S. Temp. Nat'l Econ. Comm. Monograph No. 16, at 25–101, apps. A, B, G (1940) (listing antitrust enforcement actions between 1890 and 1930); Marc Allen Eisner, Antitrust and the Triumph of Economics 52 (1991) (discussing early antitrust enforcement against labor unions); Frankfurter & Greene, The Labor Injunction, supra note 183, at 47–53, 231–49 (collecting and analyzing federal court injunctions against worker combinations between 1890 and 1930).

of harmful restraints in employment contracts, and employers' rampant coordination on "common policies with reference to employe[e]s."[257]

Professor Eric Posner hypothesizes that the reason antitrust agencies neglected enforcement against employers was their reliance on the "traditional assumption of economists that labor markets are competitive," but "had [economists] been consulted," they "would have been of little help" because they "have until recently given this topic little attention."[258] While this is partly true with regard to neoclassical economists' assumptions in the post-war period,[259] it is an incomplete account of the history of economic thought on imperfect labor market competition.[260] It also ignores a robust tradition since the Progressive Era of economists and lawyers directly regulating employer power through administrative policymaking and enforcement in recognition of imperfect labor market competition.[261] Economists—particularly Progressive and labor economists—advocated for and designed commissions and agencies to administer labor and wage regulations to protect against employers' unilateral wage-setting and dangerous working conditions that contributed to disruptive strikes from the 1890s onward.[262] Their views of employer power informed their active involvement in wage regulation and efforts to equalize bargaining power through federal wage boards from World War I through the Nixon Administration, and they informed the 1935 founding of the NLRB's Division of Economic Research through its General Counsel's aggressive briefing on workers' relative bargaining power in the 1980s.[263]

So there is a more complex story here. This section recounts the deeper enforcement history that led to the operative assumption in the

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257. See, e.g., Seager, Trade Unions, supra note 122, at 449.

258. See Posner, How Antitrust Failed Workers, supra note 16, at 37–40.

259. See, e.g., id. at 36 ("Postwar economists assumed that labor markets were reasonably competitive, and accordingly that labor market power was not an important social problem."); Paul A. Samuelson & William D. Nordhaus, Economics 41–44, 771–73 (13th ed. 1989) (highlighting that only "[a]fter two centuries of experience and thought" do "we now recognize the scope and realistic limitations of [the 'invisible hand'] doctrine"); David Card, Who Set Your Wage?, 112 Am. Econ. Rev. 1075, 1076–77 (2022) ("[B]y the 1970s the standard graduate-level textbooks in microeconomics theory . . . chose to give only a brief discussion of market power in output markets, and to complete[ly] ignore monopsony.").

260. See supra notes 67, 108 and accompanying text.

261. See supra section I.A.1.

262. See supra section I.A.1.

263. See Hafiz, Economic Analysis, supra note 252, at 1119–29 (discussing the creation of the NLRB Division of Economic Research and explaining that the Division was "stripped of its funding and, in a little noticed Congressional measure, banned from resurfacing by the Taft-Hartley Amendments to the NLRA"); Hafiz, Structural Labor Rights, supra note 232, at 671–72 (describing studies of unequal bargaining power in labor markets produced by the NLRB Division of Economic Research and the impact of those studies on "Board enforcement and adjudication").

New Labor Antitrust that: (1) Employer power is something enforcers cannot presume but must *prove* in all cases (except wage-fixing); (2) proof of such power can only be demonstrated through a neoclassical marginalist analysis of infracompetitive wages relative to an ideal competitive market; and (3) antitrust can only be utilized to remedy competition-based harms and infracompetitive employment outcomes.

1. *Regulation of Employer Power Before the New Deal.* — Following Congress's enactment of the Clayton and Norris–LaGuardia Acts, the antitrust agencies neither quantified nor analyzed employer power.[264] The contemporary judicial and regulatory context made their regulation of employer power less likely.[265] The antitrust agencies were weak, courts were generally hostile to analyzing employer-worker bargaining power, and *other* administrative agencies whose core mandates were expert-led regulation of employer power were gaining ground.[266]

Before the 1950s, the DOJ's Antitrust Division and the FTC had limited resources and primarily relegated economic expertise to nonenforcement data collection and analysis.[267] When the FTC's Economic Division opened its doors in 1914, it inherited economists from the Roosevelt Administration's Bureau of Corporations with a decade of expertise devising industrial policy and investigating the organization, conduct, and management of business associations.[268] But those economists were isolated from the FTC's litigation division.[269] The lack of internal personnel expertise in labor markets meant that litigators lacked robust social scientific analysis of how labor market competition worked,

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264. See, e.g., Posner, How Antitrust Failed Workers, supra note 16, at 37–38 (discussing the absence of antitrust agency enforcement against employers).

265. See supra sections I.A.2–I.B.

266. For examples and discussion of judicial hostility, see, e.g., Nat'l Lab. Rels. Bd. v. Ins. Agents' Int'l Union, 361 U.S. 477, 490 (1960) ("[Our labor policy] does [not] contain a charter for the [NLRB] to act at large in equalizing disparities of bargaining power between employer and union."); Hafiz, Structural Labor Rights, supra note 232, at 684–86 ("[C]umulative [NLRB] and court rulings . . . create[d] an unbalanced bargaining process favoring employers' bargaining leverage relative to unions and organizing workers.").

267. See Eisner, supra note 256, at 47–89 (summarizing the early history of the DOJ Antitrust Division and the FTC).

268. See id. at 59 ("In large part, the FTC was an extension of the Bureau of Corporations, created under Roosevelt's direction as part of the Department of Commerce and Labor in 1903."); William Letwin, Law and Economic Policy in America 240–54 (1965) (describing the development of antitrust law and policy through Roosevelt's Bureau of Corporations).

269. See Eisner, supra note 256, at 59 (discussing the organization of the FTC at its creation); see also Berk, supra note 81, at 122–48 (discussing the development of institutional expertise at the FTC in cost accounting and the supervision of trade agreements); W. Stull Holt, The Federal Trade Commission: Its History, Activities and Organization 25–31 (1922) (describing "the economic activities of the commission" and characterizing them as "for the most part . . . entirely distinct from the other work of the commission").

let alone with regard to employer power.[270] Further, the agencies lacked the political will and capacity to make coherent antitrust policy and select cases based on established criteria, not least as against employers, so attorneys primarily focused on narrow, easy cases, relegating substantive policy to the courts.[271] As the nation hurtled from recessions to depression, the agencies' labor priority became stabilizing industry from strikes to ensure continued production, using administrative enforcement power to, on the one hand, protect employer collusion with regard to a continued labor supply, and on the other, enjoin strikes in relatively straightforward per se cases against workers' coordination.[272] Courts were generally hostile to labor, continued to uphold antitrust challenges to worker coordination, and primarily adopted a formalist approach that viewed the employment relationship as a transaction between equals best regulated by the market.[273] When the DOJ challenged a glass manufacturers' labor market allocation agreement, the Supreme Court held it did not violate the antitrust laws.[274]

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270. See Eisner, supra note 256, at 71–75 ("The Budget Bureau identified the isolation and the insufficient strength of the economics staff as one of the critical problems.").

271. Id. at 47 (describing the antitrust agencies' limited capacities and "lack[] [of] mechanisms for planning and selecting cases," resulting in "a preoccupation with trivial cases that could be won with relative ease").

272. For the agencies' persistent use of the labor injunction, see supra note 245 and accompanying text. Antitrust law analyzes conduct under one of two review standards: the per se rule and the rule of reason. Conduct that is per se unlawful—price-fixing, bid-rigging, market allocation agreements, and horizontal boycotts—is easier to establish because it does not require enforcers to define a market or prove market power, violative intent, or anticompetitive effects. Conduct analyzed under the rule of reason—unlawful monopolization, mergers, vertical restraints, and other anticompetitive conduct—requires establishing a relevant market, market power, anticompetitive effects, and either a balancing or less restrictive alternative to the conduct's procompetitive benefits. See Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 885–86 (2007) (summarizing the legal standard established for evaluating conduct that violates the Sherman Act under the "rule of reason"); C. Scott Hemphill, Less Restrictive Alternatives in Antitrust Law, 116 Colum. L. Rev. 927, 938 (2015) (same); Herbert Hovenkamp, The Rule of Reason, 70 U. Fla. L. Rev. 81, 91–92 (2018) (same).

273. See Bernstein, Lean Years, supra note 239, at 190–243 (describing judicial hostility toward labor in the 1920s); Frankfurter & Greene, The Labor Injunction, supra note 183, at 79–80 (stating that labor unions often did not fight injunctions they felt were issued by judges who were "hostile to [sic] organized labor" (internal quotation marks omitted) (quoting Report of Seventh Vice President Ames, 21 Machinists' Monthly J. 816, 816 (1909)) (misquotation)); Hafiz, Structural Labor Rights, supra note 232, at 673–88 ("Through narrow interpretation of the non-statutory exemption, the Supreme Court significantly restructured workers' bargaining leverage, limiting their lawful coordinated action outside of single-firm bargaining."); Klare, supra note 42, at 304 (discussing *NLRB v. Sands Manufacturing Co.*, which was an example of Supreme Court jurisprudence that "relied on a highly formalistic and contractualist reading of the [NLRA] to legitimize the inequalities of bargaining power arising from the unequal social distribution of property ownership").

274. Nat'l Ass'n of Window Glass Mfrs. v. United States, 263 U.S. 403, 413 (1923) ("[W]e see no combination in unreasonable restraint of trade in the arrangements made to meet the short supply of men.").

While the antitrust agencies neglected enforcement against employers, an increasing array of administrative agencies and commissions were created to regulate terms and conditions of work, from labor commissions enforcing state maximum-hour, minimum-wage, and other protections (1837–1887), to the ICC (1887–1996), and with the start of World War I, the Commission on Industrial Relations (1915), the War Industries Board (1917–1919), National Mediation Commission (1917), U.S. Railroad Administration (1917–1920), War Labor Policies Board (1918), the Federal Wage Commission (1918), National War Labor Board (1918–1919), National Industrial Conference (1919), and the Railway Labor Act's National Mediation and National Railroad Adjustment Boards (authorized in 1926).[275] These agencies directly intervened in (or mediated) the employment bargain between workers and employers in the most prominent industries nationwide, promoting and facilitating collective bargaining, establishing shop committees to collectively bargain in non-unionized workplaces, arbitrating labor disputes, and establishing industry-wide "labor codes" providing for an eight-hour day, minimum wage, overtime pay, and wage differentials.[276] Between 1917 and 1920, the federal government nationalized the railroad industry—the industry that employed by far the most workers of all the industries in the country—creating the U.S. Railroad Administration that set labor and wage standards for over 1.5 million workers.[277] The Administration established an eight-hour workday, provided raises that gave the lowest-paid workers the highest-percentage increases, required equal pay for equal work, and mandated overtime and holidays.[278] When railroad workers were asked in

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275. See 3 Dorfman, supra note 79, at 49–65 (describing institutionalists' impact in government from 1890 to the interwar period, including through devising labor legislation and serving in agencies and on commissions); Lewis L. Lorwin & Arthur Wubnig, Labor Relations Boards: The Regulation of Collective Bargaining Under the National Industrial Recovery Act 3–49 (1935) (discussing the development of the National War Labor Board and the War Labor Policies Board); Hafiz, Whole-of-Government Approach, supra note 232 (discussing several agencies that Congress created to regulate labor in the first half of the twentieth century); see also supra notes 227–231.

276. See Lorwin & Wubnig, supra note 275, at 8–25, 45–46, 291–324, 332–35 (describing administration of NIRA's labor codes, the National Labor Board, and the first National Labor Relations Board by industry).

277. See Robert B. Matchette, Anne B. Eales, Lance J. Fischer, Brenda B. Kepley & Judith A. Koucky, Records of the U.S. Railroad Administration, *in* 1 Guide to Federal Records in the National Archives of the United States 14.1–.10 (1995) (collecting the records of the U.S. Railroad Administration, including its promulgated labor and wage standards).

278. See Marver H. Bernstein, Regulating Business by Independent Commission 16–52 (1955) (providing an overview of public regulation of business between 1887 and 1920); Douglas B. Craig, "Don't You Hear all the Railroad Men Squeak?": William G. McAdoo, the United States Railroad Administration, and the Democratic Presidential Nomination of 1924, 48 J. Am. Stud. 777, 782–84 (2014) (detailing wage increases enacted by the USSRA in 1918); Mary Van Kleeck, Federal Policies for Women in Industry, 81 Annals Am. Acad. of Pol. & Soc. Sci. 87, 87–89 (1919) (describing federal regulatory standards for contractors,

1918 whether to keep the industry nationalized, over 300,000, or 99.5% of those voting, voted in favor.[279]

While the government's support of workers varied by industry and conflict, government administrators gained significant experience documenting, analyzing, and negotiating over the "science" of wage-setting and labor standards compliance, all while learning about the extent and risks of employer power and the proportion of labor costs to profits in leading industries.[280] While this extensive regulatory apparatus likely did not reach employer monopsony and conduct outside major industrial production sites, it brought firms that drove the majority of production within the reach of direct government regulation of wages and standardized working conditions, fundamentally transforming the labor movement and fortifying labor's ranks to double its union membership—reaching 5 million unionized workers—by the end of the war.[281]

2. *Regulating Employer Power Between the New Deal and Post-War Period.* — Between the New Deal and World War II, regulation of employer power came under the purview of new regulatory regimes and administrative agencies, including, most importantly, the 1933 NIRA's industry and labor code boards, the 1935 NLRA's NLRB, and the 1938 FLSA's wage-regulating industry committees, or wage boards.[282] The NIRA established the first federal labor protections for collective bargaining and

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including "the eight-hour day, prohibition of night work, one day of rest in seven, a minimum wage based on the cost of living, and equal pay for women doing the same work as men").

279. See Colin J. Davis, Power at Odds: The 1922 National Railroad Shopmen's Strike 44 (1997) (describing the outcome of a shopmen vote on "the advisability of government control or ownership of the railroads"); Demands of Railway Labor Unions, 10 Current Hist. 445, 445–46 (1919) (describing "a scheme of railway nationalization" known as the Plumb Plan).

280. The sheer amount of work performed in commissions, committees, administrations, and agencies during this period on the economics of wage-setting is too vast to cite here. For useful sources documenting the history of government investigation and regulation of wage-setting, see generally Irving Bernstein, The New Deal Collective Bargaining Policy (1950) (describing the evolution of federal collective bargaining policy from the NIRA and Railway Labor Act to the NLRA); Elma B. Carr, The Use of Cost-of-Living Figures in Wage Adjustments (1925) (summarizing the workings of federal, state, and municipal agencies and commissions in regulating wages and labor standards before 1925); Gerald G. Eggert, Railroad Labor Disputes: The Beginnings of Federal Strike Policy (1967) (describing the administration of wage and labor standard regulation by government commissions and agencies in the railroad industry); Joseph P. Goldberg & William T. Moye, DOL, The First Hundred Years of the Bureau of Labor Statistics (1985) (describing the history and use of Bureau of Labor Statistics data in government wage regulation); Lorwin & Wubnig, supra note 276 (describing the history of twentieth-century labor boards before the passage of the NLRA); see also supra notes 130–131.

281. See Brody, supra note 84, at 12–46 ("[U]nion membership, doubling in four years, stood at five million in 1920.").

282. See 29 U.S.C. §§ 151–169 (2018) (creating the NLRB); 29 U.S.C §§ 201–218 (2019) (creating the "Wage and Hour Division in the Department of Labor"); Andrias, supra note 232, at 650–93 (describing the rise, fall, and aftermath of NIRA).

codes for determining labor standards absent collective bargaining agreements, and government-supervised boards mediated labor disputes in the private sector to check employer power.[283] The NLRA and FLSA were intended to restore equal bargaining power between workers and employers and set wage floors to limit the impact of corrosive competition on wages.[284] Employer power was also tempered by an unprecedented expansion in federal jobs programs in the Works Progress and Public Works Administrations, forcing private sector employers to compete with the government on wages and labor standards and conditioning federal contracting on meeting wage and labor standards, respectively.[285] Employers' labor policies and wage-setting was also regulated by the National War Labor Board (1942–1945), the Korean War Economic Stabilization Agency (1950–1953), and the Defense Manpower Administration (1950–1953), which administered wage controls and arbitrated labor disputes in a number of industries, while executive orders established labor standards with federal contractors and ordered investigations into labor strikes.[286] This extensive background of government institutions regulating the employment bargain contributed to the highest union density ever in the U.S., almost thirty-five percent of wage and salary employment by 1954, with the total number of union members peaking at around twenty-one million in 1979.[287]

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283. See Lorwin & Wubnig, supra note 275, at 437–45 (discussing the creation of several labor boards, such as the Newspaper Industrial Board and the National Construction Planning and Adjustment Board).

284. See 29 U.S.C. § 151 (stating the NLRA's policy of "restoring equality of bargaining power between employers and employees"); Hafiz, Structural Labor Rights, supra note 232, at 664–73 (demonstrating "how antitrust law and social science shaped the NLRA's design and implementation as a means of overcoming employer wage setting"); Michael L. Wachter, Labor Unions: A Corporatist Institution in a Competitive World, 155 U. Pa. L. Rev. 581, 593–97 (2007) ("It is now received wisdom that the [Robinson–Patman] Act was a product of the pessimistic view that unregulated competition meant destructive competition . . . ."). The wage boards "recommended . . . the highest minimum wage rates for the industry which . . . will not substantially curtail employment." Fair Labor Standards Act of 1938, ch. 676, § 8(b), 52 Stat. 1060, 1064.

285. See Steven Attewell, People Must Live by Work: Direct Job Creation in America, From FDR to Reagan 144 (2018) (describing the impact of the Works Progress Administration and Public Works Administration on private sector competition); Margaret Weir, Politics and Jobs: The Boundaries of Employment Policy in the United States 28–50 (1992) (describing business organizations' opposition to New Deal policies and an increasingly powerful federal government).

286. See, e.g., Exec. Order No. 10,161, 15 Fed. Reg. 6105, 6106 (Sept. 9, 1950) (establishing the Economic Stabilization Agency); Exec. Order No. 10,140, 15 Fed. Reg. 4333 (July 6, 1950) (investigating the Pullman strike); Exec. Order No. 10,135, 15 Fed. Reg. 4239 (June 30, 1950) (establishing the eight-hour day and extending Exec. Order 9898, as amended by Exec. Order 9926); Exec. Order No. 9017, 7 Fed. Reg. 237 (Jan. 12, 1942) (establishing the National War Labor Board).

287. See Gerald Mayer, Cong. Rsch. Serv., RL32553, Union Membership Trends in the United States 10, 12 (2004), https://sgp.fas.org/crs/misc/RL32553.pdf [https://perma.cc/XWY9-Z96T] (summarizing union membership statistics).

Given the extensive government involvement in industry-based wage regulation in this period, it is not surprising that the antitrust agencies did not expend their limited resources on intervening in labor markets. The recovery programs of the 1930s reversed the Depression's downward spiral, but when the economy entered the 1937 recession, the President's advisors pointed to high levels of industry concentration and collusion as a source.[288] Drawing from IO, they developed an "economic structuralist" analysis—the Structure-Conduct-Performance (S-C-P) paradigm—predicting that market structure, or market concentration, incentivized and facilitated collusion, reducing economic performance.[289] Concentration insulated firms from market forces, resulting in inefficiencies, higher prices, barriers to entry, reduced technological innovation, and harmful wealth transfers.[290]

In 1938, Congress established the Temporary National Economic Committee (TNEC) to bring together congressmembers and representatives from the Antitrust Division and other agencies to study "the extent, causes, and effects of concentrated economic power."[291] TNEC hearings conducted between 1938 and 1941 produced "the most detailed analyses of the American economy ever conducted."[292] Their studies included analyses by leading economists at Harvard, MIT, and the Bureau of Labor Statistics (BLS) of "Industrial Wage Rates, Labor Costs and Price Policies," detailing industry- and firm-specific wage data, and analyzing the "processes of wage determination" to find that firms engaged in "follow the leader" wage-setting at an economy-wide scale.[293] The Industrial Wage Rates study revealed that consumer price changes "were not based primarily on wage rate changes, even when [they] were fully reflected in labor costs," but that "labor costs were universally a principal [management] concern . . . because of their effect upon profits

288. See Eisner, supra note 256, at 77 (describing the formation of an economic consensus around the causes of the 1937 recession).

289. See Joe S. Bain, Industrial Organization 19–43 (2d ed. 1968) (laying out the economic and political theories concerning industrial organization); id. at 85–144 (describing market structures and the impacts of business concentration in the economy and individual markets); id. at 406–27 (describing the relation of market structure to market performance); Hawley, supra note 142, at 373–76 (describing the adaptation of the S-C-P paradigm from IO in the antitrust context).

290. See Eisner, supra note 256, at 101–103 (outlining the structure-conduct-performance paradigm and its theories of harm regarding concentrated industrial structures).

291. Id. at 77.

292. Id.

293. Douglass V. Brown, John T. Dunlop, Edwin M. Martin, Charles A. Myers & John A. Brownell, Industrial Wage Rates, Labor Costs and Price Policies, U.S. Temp. Nat'l Econ. Comm. Monograph No. 5, at ix–xi, xvi, 8, 28–30, 107 (1940) (internal quotation marks omitted) (documenting "follow-the-leader" wage-setting in the shoe, paper, and cotton textile industries).

and . . . the [company's] cash position."[294] In other words, firms' labor costs were not being passed on to consumers: Wage-setting was primarily a *distributional* concern rather than an *efficiency* concern about the appropriate pay to maximize output. The TNEC also commissioned a study by Jacob Perlman, Wisconsin-trained institutional economist and Chief of the BLS's Division of Wage and Hour Statistics, on "Hourly Earnings of Employees in Large and Small Enterprises."[295] Perlman found "[w]ide variations" in wage structure "not only throughout industry . . . but also within a single industry, a single plant, and even a single occupation in the same plant," and made clear that no single competitive market rule governed wage determination.[296] Perlman's study was likely the first to document a large-firm premium in oligopolistic industries—a finding consistent with collusion.[297]

The TNEC hearings motivated a newfound support for antitrust enforcement and economic structuralism more generally.[298] Walton Hamilton and Irene Till's internal review of the Antitrust Division criticized the limited role of economists in litigation, stating that enforcement would "be best served by an amphibian who could use with equal ease the idiom of law and of economics."[299] The TNEC studies, and Roosevelt's appointment of Thurman Arnold to lead the Antitrust Division, launched S-C-P as the dominant analytical paradigm for antitrust agency analysis of industries and firm conduct, and the period between the 1950s and 1970s saw more general adoption of economic structuralist thinking in Congress and by the courts in their understanding of antitrust policy and its administration.[300]

But in adopting IO's economic structuralist analysis and neoclassical assumptions that labor markets were competitive, enforcers ignored developments in labor economics and other fields that theorized and documented employer wage-setting power. The IO literature generally produced no S-C-P analysis of employer power, and S-C-P-driven policy resulted in no direct challenges to employer conduct, even in

294. Id. at x–xi.

295. Jacob Perlman, Hourly Earnings of Employees in Large and Small Enterprises, TNEC Monograph No. 14, at i, iii (1940) (describing the author and underlying materials of Perlman's TNEC-commissioned study).

296. See id. at 1.

297. See id. at xi, xiii.

298. Eisner, supra note 256, at 77.

299. See Hamilton & Till, supra note 256, at 33.

300. See Eisner, supra note 256, at 90–183 (describing the adoption of economic thinking, the S-C-P model, and industrial organization economics in broader antitrust policy and within both the DOJ's Antitrust Division and the FTC); Hawley, supra note 142, at 404–72 (describing the importance of the TNEC studies and Arnold's appointment to the integration of economic thought in antitrust policy and enforcement).

concentrated industries.[301] The Antitrust Division continued prosecuting labor unions, including criminally prosecuting striking Anheuser-Busch workers in a case the Supreme Court dismissed on labor exemption grounds.[302] While the S-C-P framework identified market structure and conduct that could harm consumers, small businesses, and even trading partners, its application centered product market definition as the exclusive analytic focus of corporate concentration's effects.[303] That inquiry provided a limited window into labor market concentration levels and labor market effects.[304]

In 1950, Congress passed the Celler–Kefauver Act to expand the agencies' authority to challenge mergers based on economic structuralist

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301. The author conducted a keyword search for "employer" AND "antitrust" in the following dominant IO and economics journals between 1937 and 1980: *American Economic Review* (est. 1911), *Antitrust Bulletin* (est. 1955), *Antitrust Law & Economics Review* (est. 1967), *Antitrust Law Journal* (est. 1952), *Econometrica* (est. 1933), *Journal of Economic Literature* (est. 1969), and the *Quarterly Journal of Economics* (est. 1886). Articles referencing labor markets focused entirely on unions, worker coordination, the labor exemption, and union–employer collusion. Only two articles referenced employer power. The first, Clark Kerr's *Labor Markets: Their Character and Consequences*, 40 Am. Econ. Rev. 278, 279–84 (1950), referenced five labor market models—perfect, neoclassical, institutional, managed, and natural—some assuming imperfect competition and monopsonistic wage-setting. The second, Glen Cain's *The Challenge of Segmented Labor Market Theories to Orthodox Theory: A Survey*, 14 J. Econ. Literature 1215, 1215–16 (1976), presented labor economists' critiques of neoclassical economics based on research into segmented labor markets.

302. See, e.g., Apex Hosiery v. Leader, 310 U.S. 469, 501–04, 513 (1940) (exemplifying the Court's approach in restraining a workers' strike); Hamilton & Till, supra note 256, at 122–43 (identifying and describing convictions, fines, consent decrees, and the handling of criminal cases under federal antitrust law from July 1890 to July 1940). For an institutionalist's critique, see Edwin Witte, A Critique of Mr. Arnold's Proposed Antilabor Amendments to the Antitrust Laws, 32 Am. Econ. Rev. 449, 449–59 (1942) [hereinafter Witte, Critique of Proposed Amendments] (arguing against antitrust legislation and enforcement against labor unions).

303. See, e.g., United States v. Von's Grocery Co., 384 U.S. 270, 272–74 (1966) (examining concentration in the grocery store market in Los Angeles); United States v. Phila. Nat'l Bank, 374 U.S. 321, 356 (1963) (discussing identification of a product market as a necessary step in the analysis); Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (focusing on determining the outer boundaries of a product market).

304. See Gregor Schubert, Anna Stansbury & Bledi Taska, Employer Concentration and Outside Options 48 & n.70 (Working Paper, 2020), https://scholar.harvard.edu/files/gregorschubert/files/stansbury-jmp-nov17.pdf [https://perma.cc/H34P-BNYL] (noting that "the degree of employer concentration in a given local area is at least to some extent endogenous to local economic conditions," which "is one of the concerns which motivated industrial organization economists to move away from the [S-C-P] paradigm and focus less on market concentration statistics"); see also Steven Berry, Martin Gaynor & Fiona Scott Morton, Do Increasing Markups Matter? Lessons From Empirical Industrial Organization, 33 J. Econ. Persps. 44, 45 (2019) (analyzing "the shortcomings of the [S-C-P] approach" and offering alternatives); Richard Schmalensee, Inter-Industry Studies of Structure and Performance, *in* 2 Handbook of Industrial Organizations 951, 952–53 (1989) (arguing for the value of "inter-industry research" as an alternative to contemporary methods of market analysis).

analysis of corporate concentration and collusion.[305] The antitrust agencies increasingly internalized IO economics into agency functioning and enforcement prioritization due to judicial, internal, and external pressures to professionalize and anchor antitrust policy on neoclassical principles.[306] Political appointees viewed economic analysis as capable of bringing "greater coherence" and uniform metrics to antitrust policy by providing "simple decision rules" to evaluate investigations and cases, facilitate planning, and maximize efficient use of limited resources.[307] At the DOJ, agency reorganization, establishment of the Policy Planning office, and top-down leadership from political appointees—most importantly, Donald Turner (Assistant Attorney General, 1965–68)—centered economic analysis in agency enforcement decisions and substantive prosecution of antitrust violations.[308] The agency issued its first Merger Guidelines, clarifying its policy and analytic methods for merger enforcement and signaling the S-C-P approach as its governing framework.[309] The Guidelines made no mention of employer power.[310] The FTC had been reorganized in 1961 to expand the Chair's power over agency personnel and create an Office of Program Review to help the Chair define the agency's policy goals.[311] FTC economists played a substantial role in merger enforcement and otherwise interpreted financial statistics and provided evidence for enforcement actions.[312] But

305. Celler–Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified at 15 U.S.C. § 18 (2018)); see also Eleanor Fox, The Modernization of Antitrust: A New Equilibrium, 66 Cornell L. Rev. 1140, 1150–51 (1981) (describing the Celler–Kefauver Act's legislative history and related case law).

306. See Eisner, supra note 256, at 17, 90–91 (relating the shift in antitrust policy from 1960 to 1980 toward privileging economic theory at the expense of legal analysis); see also Popp Berman, supra note 250, at 132–41 (discussing how by the 1980s "antitrust policy would be based on the value of efficiency rather than a commitment to limiting political power or encouraging small business" on account of "the integration of economic reasoning into the executive branch" and the courts' acceptance of the consumer welfare standard).

307. See Eisner, supra note 256, at 17.

308. See id. at 123–49 (describing the assistant attorneys general who led the DOJ Antitrust Division during the 1960s and 1970s and their impact on the Division's approach to enforcement).

309. See Antitrust Div., DOJ, Merger Guidelines 1 (1968), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf [https://perma.cc/PQ32-ES9Z] [hereinafter 1968 DOJ Merger Guidelines] ("[T]he primary role of [Clayton Act] Section 7 enforcement is to preserve and promote market structures conducive to competition."). The Guidelines also codified judicial decisions that applied economic analysis to merger enforcement. See Eisner, supra note 256, at 128–32 ("[T]he guidelines presented an economic translation of enforcement criteria that had evolved over the course of the [1960s] in a number of important court decisions.").

310. See 1968 DOJ Merger Guidelines, supra note 309, at 2–5 (explaining the DOJ's approach to defining markets with references to sales of products and services but not labor acquisition).

311. Eisner, supra note 256, at 75.

312. Id. at 152.

there is no evidence that IO-trained FTC economists assessed mergers' labor market effects or were concerned with employer power during enforcement.[313]

Relatively high union density may also explain the agencies' neglect of labor market enforcement, particularly given congressmembers' concern that, if anything, workers had too much consolidated power.[314] Higher union density meant that many workers were in a bilateral monopoly with strong employers, mitigating employers' monopsony.[315] Once union density reaches around thirty percent, economists document significant effects on nonunion wages, with no continued increase of impact at the highest densities, so high density in the post-war period may have defused any perceived need for government intervention.[316]

Still, both industrial relations experts and labor economists continued the Progressive and institutionalist traditions of documenting and theorizing employers' monopsonistic wage-setting, including wage-setting as a result of labor market segmentation and labor market frictions.[317]

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313. The Clayton Act's labor exemption does not preclude enforcement in labor markets where, "in any line of commerce or in any *activity affecting commerce*[,] . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." See 15 U.S.C. § 18 (2018) (emphasis added); see also Suresh Naidu, Eric A. Posner & Glen Weyl, Antitrust Remedies for Labor Market Power, 132 Harv. L. Rev. 536, 569–72 (2018) [hereinafter Naidu et al., Remedies for Labor] (stating that, apart from the Clayton Act section 6 exemption for union organizing, "nothing in the antitrust laws distinguishes labor markets from other types of markets, and the courts have agreed that anticompetitive behavior in labor markets violates the antitrust law").

314. The Taft–Hartley Amendments (1947) to the NLRA, dramatically weakening workers' labor protections, are illustrative. See Sean Farhang & Ira Katznelson, The Southern Imposition: Congress and Labor in the New Deal and Fair Deal, 19 Stud. Am. Pol. Dev. 1, 2–29 (2005) (explaining that the Taft–Hartley Amendments expanded agricultural exemptions to the NLRA).

315. See, e.g., Alan Manning, Monopsony in Motion: Imperfect Competition in Labor Markets 350–59 (2003) [hereinafter Manning, Monopsony in Motion] ("[W]ages set by very powerful unions will be independent of the extent of monopsony power in the labor market . . . .").

316. For a discussion of union density's effects on nonunion wages, see, e.g., John T. Addison, Pedro Portugal & Hugo de Almeida Vilares, Union Membership Density and Wages: The Role of Worker, Firm, and Job-Title Heterogeneity, 233 J. Econometrics 612, 613 (2023) ("Some critical mass of union density—around 30 percent—is required to have any material influence on wages, while beyond some level (approximating 70 percent) further increases in union density detract from the peak premium.").

317. See, e.g., Robert L. Bunting, Employer Concentration in Local Labor Markets 42–113 (1962) (studying factor-market concentrations and the impacts of employer concentration on local labor markets); Joan Robinson, The Economics of Imperfect Competition 209–32 (2d ed. 1969) (theorizing imperfect competition and monopsony in buy-side markets); Caroline Ware, The Early New England Cotton Manufacture 113–17, 230–82, 325–54 (1966) (studying the rise of cotton manufacturing in New England and the relationship between corporate structure and wages); Robert Zevin, The Growth of Manufacturing in Early Nineteenth-Century New England 1–21 (1975) (studying returns to labor in the rise of manufacturing in nineteenth-century New England); Martin Bronfenbrenner, Potential Monopsony in Labor Markets, 9 Indus. & Lab. Rels. Rev. 577,

These labor economists adapted IO models and S-C-P analysis, viewing "the literature on labor monopsony [as] draw[ing] on the same microeconomic theory as the industrial organization literature on product-market power."[318] But there is no evidence that IO economists or antitrust policymakers either read or recognized the significance of this literature for their regulatory mandates.

3. *Industrial Organizations, the Chicago School, and Deregulation.* — The relatively pro-enforcement S-C-P framework internalized economic analysis in antitrust enforcement and administration but also normalized agencies' reliance on economics to enable a relatively seamless adaptation to new IO approaches under the Chicago School's influence.[319] Shifting to the new Chicago School paradigm meant adopting a broader, deregulatory policy agenda. But it also meant shifting antitrust enforcement, policy, and, later, doctrine to a "price theory," predominantly consumer-welfare-focused approach to measuring actionable harm, making assessment of worker welfare harms and non-market-focused measurement and assessment of employer power effects more elusive.[320]

577–78 (1956) ("[T]he typical employer in an unorganized labor market has some degree of monopsony power . . . ."); Charles R. Link & John H. Landon, Market Structure, Nonpecuniary Factors, and Professional Salaries: Registered Nurses, 28 J. Econ. & Bus. 151, 151 (1976) (examining the effects of monopsony in the labor market for nurses); Gerald W. Scully, Pay and Performance in Major League Baseball, 64 Am. Econ. Rev. 915, 915–30 (1974) (setting out "to crudely measure the economic loss to [baseball] players due to the restrictions of the reserve clause," which "restrict[ed] the player's freedom of negotiation to the owner of the contract").

318. William M. Boal & Michael R. Ransom, Monopsony in the Labor Market, 35 J. Econ. Literature 86, 86 (1997) (citing labor-economic studies that drew from the IO literature from the 1960s onward).

319. See Eisner, supra note 256, at 112–16 (describing the administrative and jurisprudential conditions at the beginning of the shift from the S-C-P framework to the Chicago School); Gary Gerstle, The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era 73–106 (2022) (describing the development of neoliberal thought in the middle of the twentieth century); Herbert Hovenkamp & Fiona Scott Morton, Framing the Chicago School of Antitrust Analysis, 168 U. Pa. L. Rev. 1843, 1871 (2020) (explaining the influence of the Chicago School's brand of economics on federal courts).

320. There is a tremendous literature on the Chicago School's impact on antitrust policy. See, e.g., Robert Pitofsky, Introduction to How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust 5 (Robert Pitofsky ed., 2008) ("Specific concerns [shared by many lawyers and scholars] include current preferences for economic models over facts, the tendency to assume that the free market mechanisms will cure all market imperfections, the belief that only efficiency matters, . . . but most of all, lack of support for rigorous enforcement . . . ."); Elliott Ash, Daniel L. Chen & Suresh Naidu, Ideas Have Consequences: The Impact of Law and Economics on American Justice 4 (Nat'l Bureau of Econ. Rsch. Working Paper No. 29788, 2022), https://www.nber.org/papers/w29788 [https://perma.cc/XHN5-QYNU] (finding "some evidence that . . . judges [who have attended the Manne Economics Institute for Federal Judges] are more likely to vote against antitrust protections"); Filippo Lancieri, Eric A. Posner & Luigi Zingales, The Political Economy of the Decline of Antitrust Enforcement in the United States 3 (2023) (unpublished manuscript), https://papers.ssrn.com/

Chicago School economists and antitrust policymakers viewed markets, including labor markets, as self-equilibrating and efficient so long as market actors were left free to operate based on their rational, profit-maximizing self-interest.[321] Price theory enabled them to overcome perceived weaknesses in prior economic approaches' "microscopic examination of the idiosyncrasies of particular markets."[322] The dominance of new economic approaches supercharged measuring all forms of economic power through marginalist analyses of deviations from a competitive market price. [323] Labor markets were presumed to operate on a model of perfect competition with no idiosyncrasies relative to other markets.[324] Further, Chicago School economists believed perfect competition in labor markets would achieve the best results for the economy by allocating employment and productivity in combinations that maximize production and consumption.[325]

Any residual sense that broader economic stakeholders, like workers, were impacted by anticompetitive conduct was displaced by an exclusive focus on consumer welfare in product markets.[326] Leading the FTC's

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sol3/papers.cfm?abstract_id=4011335 [https://perma.cc/WAE2-NS6U] (questioning the "enlightened technocrat narrative," which posits that antitrust enforcement declined due to the influence of the Chicago School, and proposing an alternative theory that "US antitrust policy (courts and regulatory agencies) ha[s] been captured by special interests"). For primary sources, see generally Robert Bork, The Antitrust Paradox (1978) (arguing that antitrust law should prioritize consumer welfare and efficiency over protecting individual competitors and small businesses); Richard A. Posner, Antitrust Law: An Economic Perspective (1976) (critiquing existing antitrust doctrine in favor of a law and economics approach to analyzing antitrust policy, collusion, exclusionary practices, and enforcement); Richard A. Posner, The Chicago School of Antitrust Analysis, 127 U. Pa. L. Rev. 925, 925 (1979) [hereinafter Posner, Chicago School] (disclaiming the notion that the Chicago School was, at time of writing, "a distinctive approach to antitrust policy").

321. See, e.g., Samuelson & Nordhaus, supra note 259, at 541–67, 771–73 (providing a basic theory about market inefficiency with externalities).

322. Posner, Chicago School, supra note 320, at 931.

323. See, e.g., John N. Drobak, Rethinking Market Regulation: Helping Labor by Overcoming Economic Myths 15–23 (2021) ("In the messy real world, the [perfect competition] model works well at some times and poorly at others.").

324. See id. (describing the assumptions of models of perfect competition in labor markets).

325. See, e.g., George J. Stigler, The New Welfare Economics, 33 Am. Econ. Rev. 355, 355–59 (1943) (criticizing "the new welfare economics" which proposes that "income (of all countries together) is maximized by free trade").

326. See, e.g., Zephyr Teachout, Break 'Em Up: Recovering Our Freedom From Big Ag, Big Tech, and Big Money 148, 173, 178 (2020) (critiquing the impact of the Chicago School of Economics on antitrust policy and enforcement); Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 88–91, 135–37 (2018) ("[Judge] Bork contended, implausibly, that the Congress of 1890 exclusively intended the antitrust law to deal with one very narrow type of harm: higher prices to consumers."); Lina Khan, The New Brandeis Movement: America's Antimonopoly Debate, 9 J. Eur. Competition L. & Prac. 131, 131–32 (2018) ("[Consumer welfare] has warped America's antimonopoly regime, by leading both enforcers and courts to focus mainly on promoting 'efficiency' on the theory that this will result in low prices for consumers.").

Office of Policy Planning and Evaluation (OPPE), Wesley Liebeler unequivocally stated:

> [T]he basic objective of these laws is to maximize consumer welfare. . . . We are not aware of any other operationally viable objective available to the Commission in setting priorities. The choice as to which programs should be undertaken, which given priority and which deferred, should be made on the basis of their expected economic impact on the consumer in dollars-and-cents terms.[327]

Employer power's harms to workers were not conceptualized as a component of the agencies' antitrust enforcement.

Under the guidance of new leadership, the Chicago School era saw significant institutional changes within the antitrust agencies.[328] They trained attorneys in economics, expanded staff economist hiring in new internal offices to independently analyze cases on par with attorneys, and prioritized economic analysis on Chicago School principles in premerger screenings and merger reviews under the 1976 Hart–Scott–Rodino Act and new 1984 Merger Guidelines.[329] This reorientation within the agencies was also driven by the Supreme Court, which, in its *United States v. General Dynamics*, *Continental T.V., Inc. v. GTE Sylvania*, and subsequent decisions, signaled skepticism of the S-C-P paradigm in favor of a Chicago School approach more lenient to mergers, vertical restraints, and other anticompetitive conduct.[330]

The rise and seeming fall of the Chicago School has been heralded for some time, but the New Labor Antitrust has crossed partisan and ideological lines.[331] As the product of political appointments in the

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327. Off. of Pol'y Plan. & Evaluation, FTC, 1976 Budget Overview (1974), reprinted in 692 Antitrust & Trade Reg. Rep. (BNA) No. 692, at E-1 (Dec. 10, 1974).

328. See Eisner, supra note 256, at 135–83 (describing institutional changes to the DOJ and FTC in the Chicago School era); B. Dan Wood & James E. Anderson, The Politics of U.S. Antitrust Regulation, 37 Am. J. Pol. Sci. 1, 30–37 (1993) (examining DOJ Antitrust Division enforcement practices from 1970 to 1989).

329. See Eisner, supra note 256, at 135–227 (describing the integration of law and economics at the DOJ's Antitrust Division and the Bureau of Competition at the FTC between the late 1960s through the 1980s); Wood & Anderson, supra note 328, at 30–37 (same).

330. See Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 37, 41–42, 57–59 (1977) (overruling precedent requiring the Court to find a per se violation and applying the rule of reason to uphold a franchise agreement between a manufacturer and retailer); United States v. Marine Bancorp., Inc., 418 U.S. 602, 605–06 (1974) (rejecting government challenge to a regional bank merger); United States v. Gen. Dynamics Corp., 415 U.S. 486, 504 (1974) (protecting coal industry merger). For judicial skepticism of the S-C-P paradigm, see James Miller, The Economist as Reformer 8 (1989) (reporting that the FTC's success rate on appeal in federal courts fell from eighty-eight percent in cases decided between 1971 and 1976 to forty-three percent in cases decided between 1977 and 1981).

331. See supra note 326; see also Christopher S. Yoo, The Post-Chicago Antitrust Revolution: A Retrospective, 168 U. Pa. L. Rev. 2145, 2166–68 (2020) (describing the

Obama, Trump, and Biden administrations, The New Labor Antitrust has supercharged the agencies' antitrust enforcement against employers.[332] These efforts include executive orders, White House reports, calls to action, policy briefs, and other agency actions ranging from guidance on employers' information-sharing, enforcement against wage-fixing, no-poaching, noncompete, and information-sharing agreements, integration of labor market effects analysis into merger reviews, and rulemaking prohibiting non-competes in employment contracts.[333] Yet, in all their enforcement, the agencies have deployed traditional IO approaches to assessing employer power, applying neoclassical marginalist analysis to ascertain employers' ability to profitably offer infracompetitive wages in a relevant antitrust market.[334] The next section explains how this deployment is consistent with labor commodification, tethering analysis of employer power to market-based determinations of labor's value.

B. *Quantifying Employer Power in Current Labor Antitrust Enforcement*

More aggressively than ever, New Labor Antitrust enforcers have taken on employers' anticompetitive conduct, and in the case of the FTC, perhaps broader worker exploitation and coercion.[335] But these interventions target only deviations from a primarily quantitative, market-based determination of competitive benchmarks and labor's value.[336] Under current law, employers can violate antitrust law in three main ways: unlawfully agreeing with other employers on workers' compensation or no-poach agreements (per se unlawful); reaching other agreements that reduce labor market competition, including agreements to merge or acquire firms if that may substantially lessen competition or tend to create a monopoly (subject to rule of reason analysis); and unlawfully acquiring or maintaining labor market monopsony (subject to rule of reason

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emerging debate over Neo-Brandeisian antitrust beyond the "Post-Chicago Revolution"); Lina M. Khan, The End of Antitrust History Revisited, 133 Harv. L. Rev. 1655, 1677–81 (2020) (reviewing Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age (2018)) (describing the "Neo-Brandeisian" program in antitrust policy and enforcement).

332. See Hiba Hafiz, Imperfect Competition in Labor Markets, Competition Pol'y Int'l, 3–4 (2021), https://www.competitionpolicyinternational.com/wp-content/uploads/2021/10/5-Imperfect-Competition-in-Labor-Markets-By-Hiba-Hafiz.pdf [https://perma.cc/PQ8Z-V3B7] (explaining why recent antitrust enforcement has targeted employer monopsony).

333. See id.

334. See id.

335. See, e.g., FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 9 (Comm'n File No. P221202, Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [https://perma.cc/P33A-TBY9] [hereinafter FTC UMC Policy Statement] (listing as unfair methods of competition "conduct [that] may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature").

336. See supra section II.A.3.

analysis).[337] In the first circumstance—where employers engage in wage-fixing, no-poaching, or market allocation agreements—antitrust enforcers benefit from a per se prohibition and are not required to prove employer power, but only if employers cannot successfully claim the agreement was ancillary to a procompetitive venture.[338] In recent enforcement efforts, courts have erred on the side of allowing employer justifications, in part because the Supreme Court has previously ruled that "it is only after considerable experience with certain business relationships that courts classify [restraints] as *per se* violations."[339] Most prominent cases against employers, however, involve conduct judges analyze under the rule of reason, including horizontal agreements between employers alleged to constitute ancillary restraints, information-sharing agreements, vertical no-poaching or other labor market restraints, mergers and acquisitions, and unlawful monopsonization.[340] In these cases, courts require proof that

337. See 15 U.S.C. §§ 1, 2, 18 (2018). For an overview, see Posner, supra note 16, How Antitrust Failed Workers, at 45–113 (explaining the mechanisms with which employers exert market power over labor markets to harm workers).

338. See, e.g., United States v. Addyston Pipe & Steel Co., 85 F. 271, 281–82 (6th Cir. 1898) ("[N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract . . . ."); Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130, 157–62 (N.D.N.Y. 2010) (holding that the plaintiffs could withstand summary judgment on their wage-fixing claim through circumstantial evidence tending to show such a conspiracy without a demonstration of market power); Antitrust Div., DOJ & FTC, Antitrust Guidance for Human Resource Professionals 3 (2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/4ZAW-KYLR] ("Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws."); Hovenkamp, Rule of Reason, supra note 272, at 139–40 (discussing Judge Bork's development of the "ancillary restraints doctrine," which "he attributed largely to then Sixth Circuit Judge Taft's decision in the *Addyston Pipe* case").

339. See Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 9 (1979) (internal quotation marks omitted) (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972)). For recent labor antitrust cases applying the rule of reason to restraints analyzed as per se unlawful in product markets, see Posner, New Labor Antitrust, supra note 16, at 546–48, 555, 558–60.

340. See, e.g., NCAA v. Alston, 141 S. Ct. 2141, 2154–60 (2021) (rejecting the NCAA's objections to "subjecting [the NCAA's student-athlete] compensation restrictions to a rule of reason analysis"); Todd v. Exxon Corp., 275 F.3d 191, 202–10 (2d Cir. 2001) (applying the rule of reason to a "data exchange" of employee compensation information in the oil industry); Eichorn v. AT&T Corp., 248 F.3d 131, 144–46 (3d Cir. 2001) ("[W]e hold the no-hire agreement here is more appropriately analyzed under the rule of reason."); United States v. Bertelsmann SE & Co., 646 F. Supp. 3d 1, 23–35 (D.D.C. 2022) (defining the market for cash advances from publishers to authors while reviewing a government challenge of a publisher merger); Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 794–97 (S.D. Ill. 2018) (discussing a hub-and-spoke conspiracy between a restaurant chain corporation and its franchises to enforce a "no-hire" provision preventing workers from moving from one franchise to another); Le v. Zuffa, LLC, 216 F. Supp. 3d 1154, 1166–69 (D. Nev. 2016) (requiring a showing of market power in the labor market for "Elite Professional MMA Fighters"); In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1120–24 (N.D. Cal. 2012) (refusing to decide whether to apply a per se or rule of reason analysis at the motion to dismiss stage).

employers have buyer power in a relevant antitrust market, which involves proving at least some level of market power in markets for labor services that workers would consider reasonable substitutes to the jobs offered by the targeted employer(s), defined by job classification and a geographic area, usually commuting distance.[341] Market power is shown through a marginalist analysis of employers' ability to profitably suppress wages and working conditions below what would otherwise exist in a more competitive labor market.[342] Courts also require proof that the targeted conduct had "anticompetitive effects" and resulted in harm "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[343]

The internalization of Chicago School IO analysis in antitrust jurisprudence and enforcement has been formative of this market definition analysis and its application to labor markets. After some early confusion, economists, antitrust enforcers, and the courts have converged on a more consistent mirroring of *product* market definition and market power analyses in *labor* markets.[344] In doing so, enforcers first define a "relevant antitrust market," primarily applying a variant of the "hypothetical monopolist" test used in product markets, which asks whether "a hypothetical profit-maximizing firm . . . that was the only present and future seller of a group of products . . . likely would undertake

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341. See, e.g., Posner, supra note 16, at 64–68 (collecting cases); DOJ & FTC, Merger Guidelines § 4.3.D.8, at 48 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/P8T4-MMVV] [hereinafter 2023 Merger Guidelines] (providing agency guidance on market definition for labor markets); José A. Azar, Steven T. Berry & Ioana Marinescu, Estimating Labor Market Power 2–19 (Nat'l Bureau of Econ. Rsch. Working Paper No. 30365, 2022), https://www.nber.org/papers/w30365 [https://perma.cc/4DRV-9Z4Z] [hereinafter Azar et al., Estimating Labor Market Power] (describing economic methods for estimating employer power in labor markets).

342. See, e.g., U.S. Dep't of the Treasury, The State of Labor Market Competition 3–4 (2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf [https://perma.cc/T2AL-69JK] [hereinafter Treasury Report] ("A labor market monopsonist leverages their position to pay their workers less than the competitive rate for a given job.").

343. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889–90 (2007) (holding per se analysis inapplicable to vertical restraints setting minimum resale prices because "economics literature is replete with procompetitive justifications for" the practice); Hemphill, supra note 272, at 940–42 (describing the lower federal courts' use of a burden-shifting framework combining the less restrictive alternatives test with an assessment of anticompetitive effects to determine liability).

344. See Posner, How Antitrust Failed Workers, supra note 16, at 30–41 (providing an overview of judicial analysis of labor antitrust cases in relation to doctrine focused on product markets); Hafiz, Labor Antitrust's Paradox, supra note 245, at 391–99 (describing market power analysis in the context of labor-market restraints); Marinescu & Posner, Has Antitrust Failed Workers?, supra note 246, at 1362–82 ("The Supreme Court has confirmed that antitrust law applies to labor markets in the same way that it applies to product markets.").

at least a small but significant and non-transitory increase in price ('SSNIP') or other worsening terms ('SSNIPT') for at least one product in the group."[345] The quantum increase in price has traditionally been set at five percent.[346] In labor markets, the agencies consider "whether the hypothetical monopsonist would undertake at least a SSNIPT, such as a . . . decrease in the wage offered to workers or a worsening of their working conditions or benefits."[347] If a firm could profitably do so, then they have market power relative to a competitive market where workers would switch to other employers if they offered such an infracompetitive employment term.[348] Similar to product market cases,[349] enforcers then ask whether workers would *switch* employers to a new employer substitute in response to such a diminished term under a substitution analysis, estimating or even surveying workers' tendency to switch employers "as a result of an incremental decrease in wages."[350] In other words, economists, enforcers, and the courts use equilibrium models to assess employers' ability to offer employment terms below those that would be offered in a more competitive environment where the supply of labor would meet competitive demand, assuming workers' services are fungible within a job category and geographic area. Enforcers can only target employers able to set employment terms that deviate from market-based terms set under conditions of perfect competition, or failing that, more competitive market conditions (identified through a benchmark or proxy) that would have existed absent the anticompetitive conduct.[351] That competitive wage is understood by economists, antitrust scholars, and enforcers to be the "marginal revenue product" (MRP) of labor.[352]

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345. See 2023 Merger Guidelines, supra note 341, § 4.3, at 41–42.

346. Id. § 4.3.B., at 43.

347. See id. § 4.3.B., at 42.

348. See id. at §§ 4.3.B–D.8 (describing agencies' approach to market definition in labor markets).

349. See id. § 4.3 ("The same market definition tools and principles discussed above [in product markets] can be used for input markets and labor markets, where labor is a particular type of input."); Russell Pittman, Three Economist's Tools for Antitrust and Merger Analysis: Case Applications 7 (Econ. Analysis Grp. Discussion Paper No. 21-2) (economic analysis group discussion paper 21-2) (2021), https://www.justice.gov/atr/page/file/1404436/download [https://perma.cc/R2VW-8H2H] (describing economists' substitution analysis in antitrust and merger enforcement in product markets).

350. See Naidu et al., Remedies for Labor, supra note 313, at 548.

351. For a more detailed discussion, see Brian Callaci, Competition Is Not the Cure, Bos. Rev. (Nov. 23, 2021), https://www.bostonreview.net/articles/competition-is-not-thecure/ [https://perma.cc/8RGF-XY4Y] (reviewing Posner, How Antitrust Failed Workers, supra note 13) (critiquing Posner's proposals for labor antitrust enforcement for focusing too much on comparing workers' wages and "their marginal product, or the amount they would be paid if reality conformed to the economic model of perfect competition," and neglecting dynamic effects and nonwage union benefits).

352. See, e.g., Treasury Report, supra note 342, at 3–4 ("In a perfectly competitive labor market, each worker earns the market value of what they contribute to production—known as the 'marginal revenue product of labor' . . . ."); IIB Phillip E. Areeda, Herbert

The antitrust agencies' new Merger Guidelines recognize that labor markets have unique characteristics—they exhibit "high switching costs and search frictions" and workers have "individual needs" that "may limit the geographical and work scope of the jobs that are competitive substitutes."[353] These characteristics justify "relatively narrow" market definitions with fewer employer substitutes than for consumers in product markets.[354] But the agencies were clear that "[t]he same—or analogous—tools used to assess the effects of a merger of sellers can be used to analyze the effects of a merger of . . . employers as buyers of labor" and "[t]he same general concerns as in other markets apply to labor markets where employers are the buyers of labor and workers are the sellers."[355] In analyzing labor markets, the agencies' focus will be on how a merger's "reduction in labor market competition may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality."[356] The quantum of wage reduction or slower wage growth is set based on IO models seeking to detect an employer's ability to deviate from an equilibrium *competitive* wage—workers' MRP.

In addition to defining markets and measuring employer power through market-based metrics, applying the adapted neoclassical IO framework limits labor market enforcement to competition-based harms, or adverse effects that workers suffer due to *reduced labor market competition* as opposed to, say, the opposite: the adverse effects of employer competition to reduce labor costs in a race to the bottom. For example, a non-union employer that outcompetes its unionized rivals by using aggressive anti-union tactics against its workers—even committing unlawful unfair labor practices under the NLRA—may instigate competition with its rivals to reduce labor costs, particularly if it passes on its lower labor costs to consumers in the form of lower prices and increases its market share, pressuring other employers to lower their *own* workers' wages or wage growth. This kind of conduct alone would not violate current understandings of antitrust law because it does not reduce labor market competition.

Courts, policymakers, and scholars have reinforced labor antitrust's exclusive focus on competition-based harms in explicit statements of

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Hovenkamp & John L. Solow, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 503 (5th ed. 2021) (summarizing formal price–cost measure analyses of market power); Boal & Ransom, supra note 318, at 87–88 (using marginal revenue product in a model of a single firm); Naidu et al., Remedies for Labor, supra note 313, at 537 (describing labor market power as the ability of an employer to set wages "below workers' marginal revenue product").

353. See 2023 Merger Guidelines, supra note 341, § 2.10, at 27.

354. See id.

355. See id., § 2.10., at 26.

356. See id., § 2.10., at 27.

doctrine and policy. For example, in *NCAA v. Alston*, the Supreme Court's most recent labor antitrust case, the Court held that the NCAA's restrictions on student athletes' compensation and benefits violated antitrust law.[357] But the Court stated that, "[i]n the Sherman Act, Congress tasked the courts with enforcing an antitrust policy of competition on the theory that market forces 'yield the best allocation' of the Nation's resources," and understood its touchstone as assessing the NCAA's "challenged restraint's 'actual effect on competition.'"[358] The Court emphasized the lower courts' findings that, absent the NCAA's restraints, "competition among schools would increase."[359] Similarly, in executive orders and agency statements defining labor antitrust policy, the President and the antitrust agencies have focused exclusively on the harms of reduced competition from increased labor market concentration and anticompetitive labor market restraints.[360] While the FTC's recent Policy Statement Regarding the Scope of Unfair Methods of Competition under section 5 leaves room for alternative conceptions of cognizable harm resulting from employers' "coercive, exploitative, collusive, abusive, deceptive, predatory," or other conduct that "involve[s] the use of economic power of a similar nature," its Notice of Proposed Rulemaking (NPRM) on Non-Compete Clauses focuses exclusively on such clauses' harm to competition in labor markets, and no FTC guidance, policy statement, or enforcement action has yet indicated what, if any, employer conduct may be actionable under section 5 to the extent it does *not* reduce labor market competition.[361] Further, the FTC made clear that "violations of generally applicable laws by themselves, such as environmental or tax laws, that merely give an actor a cost advantage would be unlikely to constitute a method of competition."[362] In other words, mere violations of labor law, as generally applicable law, would not alone constitute a violation of section 5.

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357. See 141 S. Ct. 2141, 2166 (2021) (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104, n. 27 (1984)).

358. See id. at 2147, 2151 (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018)).

359. See id. at 2152 (internal quotation marks omitted) (quoting In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1068 (N.D. Cal. 2019)).

360. See E.O. 14,036, supra note 253, at 36987–89 ("Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions."); 2023 Merger Guidelines, supra note 341, § 2.10, at 26 ("[A] reduction in competition among buyers can lead to artificially suppressed input prices or purchase volume . . . ."); Treasury Report, supra note 342, at i–ii, 1–2 (summarizing the ways in which constraints on labor market competition hurt workers and the "broader macroeconomy").

361. See FTC UMC Policy Statement, supra note 335, at 9; see also Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) [hereinafter "Non-Compete NPRM"].

362. See FTC UMC Policy Statement, supra note 335, at 8.

Further, in seeking to remedy labor antitrust violations, enforcers have focused only on relief directed at eliminating anticompetitive conduct or increasing competition between employers, not relief that, as per the language of the Norris–LaGuardia Act, ensures "[the individual unorganized worker] shall be free from the interference, restraint, or coercion of employers of labor . . . in the designation of . . . representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[363] Remedies in the form of treble damages are tethered to workers' losses only from declining competition, and while they impose economic costs on employers, they do nothing to chill employer resistance to worker organizing or compel the act's stated "acceptable terms and conditions of employment" achievable through the collective worker voice backed by a strike threat.[364] Remedies enjoining anticompetitive mergers or the use of anticompetitive agreements are not designed to impact workers' countervailing leverage and may in fact undermine it.[365]

C. *Against Quantitative Commodification and Competition-Based Labor Antitrust Enforcement*

Currently, antitrust law solely recognizes employer power if employers can profitably deviate from paying competitive wages, ideally understood as workers' MRP.[366] Relatedly, the only cognizable harm from that power is harm generated by reduced labor market competition. This section offers a legal and policy critique of deploying exclusively competition-based metrics to discern whether the necessary elements of antitrust violations are met in the labor antitrust enforcement context, including, most importantly, as they apply to quantifying employer power and exclusion of non-competition-based harms.

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363. See 29 U.S.C. § 102 (2018).

364. Id. For treble damages, see 15 U.S.C. § 15(a) (2018).

365. For injunctive relief, see supra note 340. For merger remedies undermining workers' leverage, see Hiba Hafiz, Rethinking Breakups, 71 Duke L.J. 1491, 1572–95 (2022) [hereinafter Hafiz, Rethinking Breakups] (describing the circumstances in which merger remedies like breakups can harm workers).

366. See supra note 352 and accompanying text. For recent decisions on benchmarking competitive wages as workers' MRP, see, e.g., Le v. Zuffa, LLC, No. 2:15-cv-01045-RFB-BNW, 2023 WL 5085064, at *30 n.42 (D. Nev. Aug. 9, 2023) (accepting MRP as benchmark); Morris v. Tyson Chicken, Inc., No. 4:15-cv-00077-JHM, 2020 WL 6331092 (W.D. Ky. Oct. 28, 2020) (same); Cason-Merenda v. Detroit Med. Ctr., No. 06-15601, 2013 WL 1721651, at *2–3 (E.D. Mich. Apr. 22, 2013) (same); Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130, 146 (N.D.N.Y. 2010) (admitting expert testimony on harm to nurses' wages because it "is based on the widely accepted economic concept of marginal revenue product"); White v. NCAA, No. CV-06-099-RGK (MANx), 2006 WL 8066803, at *4, *7 (C.D. Cal. Oct. 19, 2006) (accepting plaintiffs' use of MRP in a competitive labor market as the benchmark for compensation).

First, as a threshold matter, the New Labor Antitrust contravenes the language and policy of the antitrust statutes themselves. Enforcers' adoption of neoclassical methods usurped Congress's stated policies in the Clayton and Norris–LaGuardia Acts, which explicitly rejected the goals of competition-focused wage policy. Their text, legislative history, and purpose are also in deep tension with the view that antitrust enforcement in labor markets should be either focused on promoting labor market competition or exclusively directed at employer conduct that reduces labor market competition on compensation.[367] Congress could not have been clearer that it did not view labor's value as properly determined by market exchange, and it explicitly recognized that the public policy of antitrust law was to support *non*-market-based wage bargaining through protecting workers' countervailing leverage in the form of labor organizations, specifically because of the bargaining power imbalance between corporate employers and individual workers negotiating at arm's length in the open market.[368]

In the Clayton Act, Congress debated the Cummins Amendment, and with a record vote, decided to include its language that the "labor of a human being is not a commodity or article of commerce."[369] Senator Cummins, among others, made clear that its language distinguished product and labor markets for antitrust purposes:

> [I]f we do not recognize the difference between the labor of a human being and the commodities that are produced by labor and capital . . . we have lost the main distinction which warrants, justifies, and demands that labor organizations coming together for the purpose of bettering the conditions under which they work, of lessening the hours which they work, and of increasing the wages for which they work shall not be reckoned to be within a statute which is intended to prevent restraints of trade and monopoly.[370]

Further, the language and legislative history of the Norris–LaGuardia Act[371] establish a policy preference for relegating wage-setting not to market forces but to labor organizations and the leverage they can exert to set wage rates and terms of conditions of work.[372] In fact, it was courts'

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367. See 15 U.S.C. § 17 (enacting a labor exemption from antitrust laws); 29 U.S.C §§ 101–103 (2018) (enacting a labor exemption and stating the antitrust laws' public policy in labor matters and stripping courts of jurisdiction over "undertakings in conflict with" its "public policy"); supra Part I.

368. 15 U.S.C. § 17; 29 U.S.C §§ 101–103; supra Part I.

369. See 51 Cong. Rec. 14,590–91 (1914).

370. Id. at 14585 (statement of Sen. Cummins).

371. See supra text accompanying notes 9–11.

372. For legislative history, see supra Part I.B.

narrow interpretation of the Clayton Act's labor exemption that led to the adoption of the Norris–LaGuardia Act's public policy language.[373]

That Congress went so far as to declare unenforceable agreements that conflicted with its "public policy" in labor matters supports a claim that judicial interpretations—and antitrust enforcement more generally—that tether antitrust measurement of labor's value, employer power, or its harms to worker's MRP defy Congress's purposes and stated antitrust policy.[374] Further, setting the parameters of antitrust enforcement to capture *only* conduct that deviates from a model of perfect competition sets labor's value in a way Congress recognized could only misvalue labor below "acceptable terms and conditions of employment" and institutionally entrenches public policy contrary to the language of the exemptions on their face.[375] Congressional rejection of market-based valuations of labor challenges the very IO methods enforcers and the courts have deployed that only evaluate employer power and its effects in a relevant "labor market" defined by its own supply and demand equilibrium negotiated through arm's-length "external" labor market wage-setting.[376] In other words, while Congress sought to remove labor from competitive market-based valuation, current enforcement limits cognizable liability to enforcers' proper market definition for labor's commodified exchange and places competitive valuation within that market as its only goal.

Focusing labor antitrust enforcement only on competition-based harms limits the achievement of Congress's "public policy" in labor matters to ensure workers' freedom to "obtain acceptable terms and conditions of employment" through union organizing, collective bargaining, and workplace democracy—in other words, a kind of "internal" labor market wage set through administrative rules and procedures established in recognition of workers' collective voice. Antitrust laws' stated labor policy suggests that Congress sought to vindicate *non*-competition-based harms through antitrust regulation—specifically, conduct that reduced workers' countervailing leverage through disrupting their ability to organize, collectively bargain, and seek mutual aid or protection, and, more generally, harms from employers' increased bargaining power that took advantage of or reinforced workers' helplessness in the employment bargain. These types of harms are much broader than competition-based

373. See Norris–LaGuardia Act, Pub. L. No. 72-65, § 2, 47 Stat. 70 (1932) (as amended by Pub. L. 98-620); supra notes 238–244 and accompanying text.

374. See Norris–LaGuardia Act.

375. See id.

376. For "internal" and "external" labor markets, see generally Peter B. Doeringer & Michael J. Piore, Internal Labor Markets and Manpower Analysis (1970) (developing the theory of internal labor markets governed by administrative rules within the firm as distinct from external labor markets in which prices are controlled by economic factors).

harms or harms resulting from a reduction in labor market competition between employers.

Second, as a matter of policy, modeling labor markets on assumptions of perfect competition contravenes current social scientific consensus regarding the labor market realities most workers face in relation to their corporate employers.[377] That a model of *imperfect* competition better approximates those realities is not a new argument.[378] But while antitrust enforcers have ignored those arguments while focusing exclusively on neoclassical models, social scientists with labor market expertise, including Nobel Prize winners, have produced a rich, decades-long literature documenting the extent of market frictions, social institutions, and customs that fortify employer power and structurally limit workers' ability to switch employers, even when underpaid or working in inferior conditions.[379] And while labor economists have empirically studied and published their findings on imperfect competition since the Progressive Era,[380] the current empirical turn in economics, fueled by reliance on larger, increasingly complex data sets, has produced considerable research to support an assumption of imperfect competition. This more recent turn has produced evidence of pervasive labor market concentration, employer collusion, and agreements restraining worker mobility as well as of market frictions like matching costs, search and mobility costs, information asymmetries, and heterogeneous preferences.[381] Even the U.S. Treasury

377. Following the language of the Clayton and Norris–LaGuardia Acts, this Article's discussion and proposals focus exclusively on employers organized in corporate or other forms of business organization.

378. See supra notes 66, 317 and accompanying text.

379. See, e.g., Manning, Monopsony in Motion, supra note 315, at 360–61 (describing sources of imperfect competition in labor markets); Robert M. Solow, The Labor Market as a Social Institution 1–27 (1990) (identifying how the character of the labor market as a social institution distinguishes its operation from other markets); Hiba Hafiz & Ioana Marinescu, Labor Market Regulation and Worker Power, 90 U. Chi. L. Rev. 469, 474–77 (2023) (collecting literature); Alan Manning, Monopsony in Labor Markets: A Review, 74 ILR Rev. 3, 3–26 (2021) (same).

380. See supra section I.A.1; supra notes 317–318.

381. See, e.g., Ioana Marinescu & Jake Rosenfeld, WorkRise, Worker Power and Economic Mobility: A Landscape Report 8 (2022), https://www.workrisenetwork.org/sites/default/files/2022-08/correctedworker-power-economic-mobility-landscape-report.pdf [https://perma.cc/C7S9-JDFU] ("[T]he evidence on labor market concentration and labor supply elasticity clearly demonstrates that employers have *monopsony power*."); Treasury Report, supra note 342, at 3–22 (collecting literature); José Azar, Ioana Marinescu & Marshall Steinbaum, Labor Market Concentration, 57 J. Hum. Res. S167, S197 (2022) (demonstrating market concentration in local labor markets); Efraim Benmelech, Nittai K. Bergman & Hyunseob Kim, Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?, 57 J. Hum. Res. S200, S201 (2022) ("[W]ages may be set in imperfectly competitive markets, with a relatively small number of employers bargaining with workers, ultimately setting wages below perfectly competitive rates." (citation omitted)); David Berger, Kyle Herkenhoff & Simon Mongey, Labor Market Power, 112 Am. Econ. Rev. 1147, 1148 (2022) (developing a model to measure oligopsony power in labor markets); Boal & Ransom, supra note 318, at 97–99 (collecting evidence of qualitative labor

Department and neoclassical economists have joined the emerging consensus that labor markets are imperfectly competitive.[382]

Additionally, as a policy matter, limiting labor antitrust enforcement to employer conduct that suppresses wages below workers' MRP undercounts employer power and limits redress for its harms. Union premium wages better reflect the antitrust statutes' wage policy as determined by workers' collective voice and workplace institutions.[383] But even more conservatively, union premium wages may be better proxies for workers' value to production as compared to "competitive" wage rates, whether because they reduce the wage markdown of pervasive monopsony power or because "efficiency" wages better reflect workers' overall value-add. Administrative rules and procedures—internal labor market wage-setting—reflect pay equity norms, life-cycle productivity, and incentive structures that are better approximations of workers' contributions.[384] But more importantly, measuring employer power based on the employer's ability to deviate from a "market wage" as opposed to, say, a union premium wage, leaves out the full range of market power that employers can exercise to intimidate or coerce their employees into not joining unions, powers which many more employers possess relative to those that can merely suppress wages or working conditions, or slow wage growth,

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market features that monopsony models can explain); Arindrajit Dube, Jeff Jacobs, Suresh Naidu & Siddharth Suri, Monopsony in Online Labor Markets, 2 Am. Econ. Rev.: Insights 33, 43–44 (2020) ("The findings in this paper provide strong evidence that even in a thick labor market where search frictions may appear to be low, there is considerable monopsony power."); Kevin Rinz, Labor Market Concentration, Earnings, and Inequality, 57 J. Hum. Res. S251, S278 (2022) ("[I]ncreased local labor market concentration reduces earnings . . . ."); Azar et al., Estimating Labor Market Power, supra note 341, at 2 ("[J]ob differentiation is one possible source of imperfect competition in the labor market."); Alan B. Krueger & Orley Ashenfelter, Theory and Evidence on Employer Collusion in the Franchise Sector 2–3 (Nat'l Bureau of Econ. Rsch. Working Paper No. 24831, 2018), https://www.nber.org/papers/w24831.pdf [https://perma.cc/4Q8W-AWDH] ("[W]e seek to shed light on the extent of employer collusive action to restrict competition in the labor market by examining the prevalence of covenants in franchise contracts that restrict the recruitment and hiring of employees from other units within the same franchise chain.").

382. See Treasury Report, supra note 342, at 1 ("[T]he American labor market is characterized by high levels of employer power. . . . Employers exploit this market power by holding wages and certain non-wage benefits beneath their competitive level.").

383. See supra Part I.

384. See, e.g., David Weil, The Fissured Workplace 76–92 (2014) (discussing the processes that impact wage setting); Emily Breza, Supreet Kaur & Yogita Shamdasani, The Morale Effects of Pay Inequality, 133 Q.J. Econ. 611, 612–13 (2018) (summarizing the behavioral economics literature on the relationship between pay equity, morale, and worker behavior); Samuel Dodini, Kjell Salvanes & Alexander Willén, The Dynamics of Power in Labor Markets: Monopolistic Unions Versus Monopsonistic Employers 33–34 (IZA Discussion Paper No. 15635, 2022), https://docs.iza.org/dp15635.pdf [https://perma.cc/6V72-CCYA] (analyzing the effect of unions on earnings, employment, and inequality).

below what a "competitive" market would achieve.[385] And in addition to failing to countervail existing employer power, the harms from chilling collective worker voice register in failures to innovate, uncorrected production inefficiencies and disruptions, higher turnover, reduced morale and productivity, increased wage divergence and income inequality, wealth transfers, macroeconomic instability, and more.[386]

Coherent federal labor policy requires reading the Clayton and Norris–LaGuardia Acts consistently with the NLRA, which grants employees the right to organize, unionize, collectively bargain, and strike "for the purpose of collective bargaining or other mutual aid or protection," and prohibits employers' "interfere[nce] with, restrain[t], or coerc[ion]" of "employees in the exercise of th[os]e rights."[387] In other words, the New Labor Antitrust's approach limits enforcers' ability to further overall federal labor policy and, specifically, Congress's consistent public policy vision that wages either be set by workers through collective

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385. For the broader literature on employer intimidation and coercion in union-busting campaigns, see infra notes 390–392 and accompanying text.

386. See, e.g., John W. Budd, The Effect of Unions on Employee Benefits and Non-Wage Compensation: Monopoly Power, Collective Voice, and Facilitation, *in* What Do Unions Do? A Twenty-Year Perspective 160–92 (James T. Bennett & Bruce E. Kaufman eds., 2007) (describing how labor unions can lead to a higher rate of participation in employee benefit plans); Richard B. Freeman & James L. Medoff, What Do Unions Do? 78–180 (1984) (providing an overview of the labor economics literature on the benefits of unions); Kate Bahn & Joe Peck, How Unions Can Increase Firm Productivity and Strengthen Economic Growth, WorkRise (Sept. 6, 2023), https://www.workrisenetwork.org/working-knowledge/how-unions-can-increase-firm-productivity-and-strengthen-economic-growth [https://perma.cc/N32Q-SFCB] (collecting studies); Laura Feiveson, Labor Unions and the U.S. Economy, U.S. Dep't of the Treasury (Aug. 28, 2023), https://home.treasury.gov/news/featured-stories/labor-unions-and-the-us-economy [https://perma.cc/JM45-Z55K] (same).

387. See 29 U.S.C. §§ 157–158 (2018). Importantly, the Supreme Court and lower courts have not understood the NLRA as superseding the Clayton and Norris–LaGuardia Acts. See, e.g., Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145–47 (1942) (interpreting the term "labor dispute" within the meaning of the Norris–LaGuardia Act); New Negro All. v. Sanitary Grocery Store Co., 303 U.S. 552, 560–61 (1938) (same); Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 312–14 (1st Cir. 2022) (same). This is in part because the Clayton and Norris–LaGuardia Acts' provisions are broader than the NLRA's, as they apply to labor disputes "regardless of whether or not the disputants stand in the proximate relation of employer and employee," 29 U.S.C. § 113(c), and because the Norris–LaGuardia Act was "intended to embrace controversies other than those between employers and employees; between labor unions seeking to represent employees and employers; and between persons seeking employment and employers," *New Negro All.*, 303 U.S. at 560–61; see also *Columbia River Packers Ass'n*, 315 U.S. at 146 ("[B]y the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee."). But more generally, this Article focuses on policy statements and injunctions intended to guide *antitrust* law and enforcement as they are applied to employers' violations of antitrust law in labor markets, not the regulation or scope of workers' rights to organize, collectively bargain, or strike, or any associated unfair labor practices that worker activity may elicit.

bargaining *or* through negotiations free from the interference, restraint or coercion of employers in the exercise of their labor rights.[388]

Additionally, because labor antitrust enforcers have focused only on competitive wage reduction measures, they have ignored potential remedies that could more effectively counter harmful employer power and further federal labor policy in the NLRA. While remedies for labor antitrust violations are robust—treble damages of workers' losses from employers' anticompetitive conduct—they are retroactive and at best deter infracompetitive wage bargaining ex ante.[389] But because the New Labor Antitrust's enforcement approach benchmarks the competitive wage, employers' incentives ex ante are to negotiate only a market-based wage rather than, say, a union premium wage, and if the union premium wage were the benchmark, employers might instead be more incentivized to negotiate wages with worker representatives in labor organizations or through collective bargaining. So the competitive wage baseline has precluded remedies that mandate establishing or strengthening labor organizations' role in the employment bargain in ways that both contravene Congress's stated labor policy in the antitrust laws and undermine NLRA policy. Additionally, limiting labor antitrust enforcement to only competition-based harms has unnecessarily restrained enforcement that could prevent employers' rampant interference with, restraint of, or coercion of employees in exercising their right to organize, collectively bargain, and strike in violation of labor law. Employer noncompliance with labor law is pervasive, dramatically disrupting and chilling worker unionization, in part due to the NLRB's limited resources and lengthy remedial processes.[390] Economist Anna

388. Cf. 29 U.S.C. § 158(a)(1) (establishing as an unfair labor practice in violation of the National Labor Relations Act employers' "interfere[nce] with, restrain[t], or coerc[ion] [of] employees in the exercise of the rights guaranteed" in the statute).

389. See 15 U.S.C. § 15 (2018).

390. See In Solidarity: Removing Barriers to Organizing: Hearing Before the H. Comm'n on Educ. & Lab., 117th Cong. 8 (2022) (statement of Kate Bronfenbrenner, Dir. of Lab. Educ. Rsch., Cornell Sch. of Indus. & Lab. Rel.), https://edworkforce.house.gov/uploadedfiles/9.14.22__bronfenbrenner_testimony.pdf [https://perma.cc/L7SS-ZK3N] ("A majority of firms continue to mount aggressive anti-union campaigns, while a smaller number do little or no campaigning against the union."); The Right to Organize: Empowering American Workers in a 21st Century Economy: Hearing Before the S. Comm'n on Health, Educ., Lab. & Pensions, 117th Cong. 9 (2021) (statement of Mark Gaston Pearce, Former Chairman, NLRB), https://www.help.senate.gov/imo/media/doc/Pearce2.pdf [https://perma.cc/SPR3-WNWP] ("Without a credible deterrent, employers weighing the consequences of violating the law face a choice that all but incentivizes such serious interferences with employees' rights."); Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer & Lola Loustaunau, Econ. Pol'y Inst., Unlawful: U.S. Employers Are Charged With Violating Federal Law in 41.5% of All Union Election Campaigns 6 (2019), https://files.epi.org/pdf/179315.pdf [https://perma.cc/FFP6-PJ8P] (highlighting that "many union organizing efforts are thwarted by employers before making it to the filing stage" and "many anti-union violations go unreported"); Kate Bronfenbrenner, No Holds

Stansbury has found that the NLRA's sanctions for violations are so weak that employers have no economic incentive to comply.[391] Further, the dramatic decline in union density from nearly thirty-five percent in 1954 to six percent in 2019 is at least partially the result of employer coercion and retaliation.[392] Declining worker power not only harms worker earnings but also has broader macroeconomic, social, and political effects.[393]

III. TOWARD A PROGRESSIVE LABOR ANTITRUST

Antitrust policy and enforcement are at a crossroads. The Biden Administration's Executive Order on Promoting Competition in the American Economy and selection of progressives like Tim Wu, Jonathan Kanter, and Lina Khan to advise the President on competition policy and lead the DOJ's Antitrust Division and FTC, respectively, have heralded a shift from Chicago and Post-Chicago School thinking in favor of more

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Barred: The Intensification of Employer Opposition to Organizing 4 (Econ. Pol'y Inst., Briefing Paper No. 235, 2009), https://core.ac.uk/download/pdf/5133179.pdf [https://perma.cc/SC4K-HXME] ("As companies have globalized and restructured, corporate anti-union strategies have become more sophisticated, through resorting to implied or real threats of ownership change, outsourcing, or contracting out in response to nearly every organizing campaign." (citations omitted)).

391. See Anna Stansbury, Do US Firms Have an Incentive to Comply With the FLSA and the NLRA? 31 (Peterson Inst. for Int'l Econs. Working Paper No. 21-9, 2021), https://www.piie.com/sites/default/files/documents/wp21-9.pdf [https://perma.cc/CJC7-CPKD] ("[C]urrent penalties for typical firms mean that most firms need to expect a 78–88 percent chance of detection to have an incentive to comply with the FLSA.").

392. See Lawrence Mishel, Lynn Rhinehart & Lane Windham, Explaining the Erosion of Private-Sector Unions, Econ. Pol'y Inst., 9 fig.A, 45 (2020), https://files.epi.org/pdf/215908.pdf [https://perma.cc/RAA5-9WWL] ("The sharp decline of union representation and new union members in the 1970s—a decline from which workers and the labor movement have never recovered—was due not to worker disinterest but rather to a combination of employer tactics and weaknesses in the law that undermined worker organizing."); Mayer, supra note 287, at 22–23 (summarizing union statistics).

393. See Anna Stansbury & Lawrence H. Summers, The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy, Brookings Papers on Econ. Activity, Spring 2020, at 2 (arguing "that the decline in worker power has been the major structural change responsible for [] economic phenomena" occurring between the 1980s and 2020, including a decline in income to labor, a rise in average profitability, and a substantial fall in average unemployment); Tova Wang, Ash Ctr. for Democratic Governance & Innovation, Union Impact on Voter Participation—And How to Expand It 1 (2020), https://ash.harvard.edu/files/ash/files/300871_hvd_ash_union_impact_v2.pdf [https://perma.cc/A2VZ-JA8B] (examining the relationship between union participation and voter participation and finding that unions "increase voter participation among union members as well as the people around them"); Jasmine Kerrissey & Evan Schofer, Union Membership and Political Participation in the United States, 91 Soc. Forces 895, 919–21 (2013) (observing that from 1955 to 2008, as a result of union decline "[f]ewer individuals are exposed to the mobilizing effects of union membership, which, in aggregate, implies lower levels of voting, protesting and so on").

interventionist, Neo-Brandeisian antitrust policy.[394] The agencies' unprecedented commitment to labor antitrust enforcement has established a new regulatory environment to challenge employer power.

But the transformative potential of the New Labor Antitrust will turn on the details. Using Chicago School tools to tackle progressive and pro-worker antitrust goals has and will hamper achievement of those goals.[395] Antitrust enforcers can and should promote substantive policy advances that match the labor and wage policy of the antitrust laws, integrating contemporary social scientific methods that can more expansively target the sources and manifestations of employer power. This Part argues that the Clayton and Norris–LaGuardia Acts' stated policies displace traditional antitrust goals as applied to labor markets and, while not inconsistent with traditional goals of reducing employer power through promoting competition, establish independent antitrust goals of targeting corporate employer conduct that "interfere[s], restrain[s], or coerc[es]" collective worker organizing to establish representative workplace institutions for collective bargaining and mutual aid.[396] In other words, it argues that a Progressive Labor Antitrust should be equally concerned with harms to workers' countervailing leverage and voice that impact their ability to achieve "acceptable terms and conditions of employment" as with employer conduct that suppresses wages, wage growth, and workplace quality.[397] More broadly, antitrust enforcement should embrace a "new materialism" in both its methods and objectives that embraces the wealth of social scientific tools that are bottom up, but with a deep theoretical awareness of the structural sources of power, including through the ways that law and other institutions that support capital enable the coercion of labor and extraction of labor rents. This Part is a preliminary effort to outline alternative approaches antitrust enforcers could deploy to estimate employer power and its harms and offers recommendations for how to adapt those approaches in labor antitrust enforcement.

A. *Alternative Approaches to Evaluating Employer Power and Its Harms*

This section provides two preliminary suggestions of complementary alternatives to the current, competition-based wage-setting approach to assessing employer power and its harms. First, it argues that enforcers should flip their presumptions: Rather than assuming labor markets operate on a model of perfect competition, they should assume, consistent

394. See E.O. 14,036, supra note 253, at 36,987–90; Jim Tankersley & Cecilia Kang, Biden's Antitrust Team Signals a Big Swing at Corporate Titans, N.Y. Times (July 24, 2021), https://www.nytimes.com/2021/07/24/business/biden-antitrust-amazon-google.html (on file with the *Columbia Law Review*) (summarizing the Biden Administration's antitrust efforts).

395. See supra sections II.B–.C.

396. See 29 U.S.C. § 102 (2018).

397. See id.

with a growing empirical consensus, that labor markets operate on a model of imperfect competition. Second, enforcers should draw on broader social scientific methods and analytic tools from labor economics, behavioral economics, macroeconomics, sociology, political science, geography, and philosophy to assess employer power and its competition and *non*competition harms, consistent with the Clayton and Norris–LaGuardia Acts. These proposals are the start of a conversation, but the hope is to invite enforcers to benefit from the wealth of scholarly and empirical approaches to employer power as a first step.

Presumption of Imperfect Competition. Instead of assuming labor markets are competitive, a better approximation of the economic consensus is that most workers fall in the monopsony compensation range of a highly inelastic labor supply curve.[398] The new canon of economics textbooks starts with a fresh premise: "[I]t is monopsony, not perfect competition, that is the best simple model to describe the decision problem facing an individual employer," and "if one wants to model the market as a whole, models of oligopsony or monopsonistic competition are what is needed."[399] Assuming that labor markets are imperfectly competitive is also consistent with the language and purpose of the Clayton and Norris–LaGuardia Act exemptions.[400] Given this statutory and economic support, enforcers should preserve scarce enforcement resources and adopt a position—in policy documents, agency guidance, and litigation filings—that employer power should be rebuttably presumed in labor antitrust cases.Taking such a position is not unprecedented in antitrust enforcement history and doctrine. Canonical case law on mergers has established a structural presumption on the basis of economic understandings of market realities and the impacts of market structure, and agency guidance in Merger Guidelines has done the same.[401] Presumptions and burden of proof allocations exist throughout antitrust doctrine based on evolving empirical understandings of the likelihood of

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398. See supra notes 367–379 and accompanying text.

399. Manning, Monopsony in Motion, supra note 315, at 3.

400. See 15 U.S.C. § 17 (2018) (exempting the application of the antitrust laws to "forbid the existence and operation of labor . . . organizations" and declaring the "labor of a human being is not a commodity or article of commerce"); 29 U.S.C. §§ 101–103 (declaring the wage and labor policy of the Norris–LaGuardia Act); supra Part I.

401. See United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (citing IO economists' analyses to establish a structural presumption in merger enforcement); 2023 Merger Guidelines, supra note 341, at § 2.1 (declaring in Guideline 1 that "[m]ergers [r]aise a [p]resumption of [i]llegality [w]hen [t]hey [s]ignificantly [i]ncrease [c]oncentration in a [h]ighly [c]oncentrated [m]arket"); 1968 DOJ Merger Guidelines, supra note 309, at 1–2 (outlining presumptions about market structure and its effects on competition); Steven C. Salop, The Evolution and Vitality of Merger Presumptions, 80 Antitrust L.J. 269, 269 (2015) ("[*Philadelphia National Bank*] formulated what we would now call a 'quick look' type of decision process of using a preliminary screen to create a rebuttable presumption that certain mergers are anticompetitive.").

market realities and practices resulting in antitrust harms.[402] The Supreme Court recently offered an iteration of this longstanding principle: "From the beginning the Court has treated the Sherman Act as a common-law statute . . . . Just as the common law adapts to modern understanding and greater experience, so too do[] the Sherman Act's prohibition[s] . . . evolve to meet the dynamics of present economic conditions."[403] Burdens of proof and burden-shifting frameworks have changed over time with regard to nearly every form of firm conduct aside from price-fixing, including mergers, vertical restraints, unilateral conduct, and ancillary restraints, and these burdens have also changed based on specific industry realities, whether of declining industries and failing firms, industry-specific barriers to entry, or conditions that make it easier for firms to maintain cartels.[404] Where the Chicago School drove agency policy and judicial

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402. See Fed. Trade Comm'n v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 433 (1990) (explaining that "[judicial] experience" guides whether restraints are entitled to "a conclusive presumption" of unreasonableness (internal quotation marks omitted) (quoting Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344 (1982))); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100–01 (1984) (refusing to apply a per se rule against horizontal restraints on competition because of the nature of the relevant market); Andrew I. Gavil, Burden of Proof in U.S. Antitrust Law, *in* 1 Issues in Competition Law and Policy 125, 132–52 (Wayne Dale Collins et al., ABA Section of Antitrust L., ed., 2008) (providing case studies of burden allocation and burden shifting in antitrust cases over time); Herbert Hovenkamp & Carl Shapiro, Horizontal Mergers, Market Structure, and Burdens of Proof, 127 Yale L.J. 1996, 2001 (2017) ("The structural presumption is rooted in empirical evidence indicating that more concentrated markets tend to have higher prices and higher price-cost margins, all else equal.").

403. See Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 899 (2007). But see Daniel Crane, Antitrust Antitextualism, 96 Notre Dame L. Rev. 1205, 1211–12 (2021) (arguing that "antitrust statutes often have readily discernable meanings that the courts simply ignore"). Again, that Congress recognized in the Clayton and Norris–LaGuardia Acts labor market conditions that mirror economists' current recognition of pervasive imperfect competition in those markets further fortifies the evolution of the law in this direction, as they supersede common law assumptions of "free labor" contracting in labor markets. See, e.g., Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 401 (1950) (describing the longstanding canon of construction that a statute supersedes the common law when the statute is not consistent with the common law "and when a statute is designed as a revision of a whole body of law applicable to a given subject").

404. See State Oil Co. v. Khan, 522 U.S. 3, 21–22 (1997) (shifting scrutiny of maximum resale price maintenance agreements from per se to rule of reason); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977) (same with vertical non-price restraints); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487–88 (1977) (applying industry-specific analysis for merger liability in declining bowling industry); Nat'l Ass'n of Window Glass Mfrs. v. United States, 263 U.S. 403, 413 (1923) (using similar reasoning to assess the declining hand-blown glass industry); United States v. Microsoft Corp., 253 F.3d 34, 89–95 (D.C. Cir. 2001) (applying industry-specific rule of reason analysis for tying); United States v. Baker Hughes Inc., 908 F.2d 981, 991 (D.C. Cir. 1990) (applying new burden-shifting framework for merger analysis); E.I. du Pont de Nemours & Co. v. Fed. Trade Comm'n, 729 F.2d 128, 136 (2d Cir. 1984) (applying lenient analysis to price coordination in declining industry); supra notes 402–403; see also Harry First & Spencer Weber Waller, Bespoke Antitrust, 68 S.D. L. Rev. 468, 470 (2023) (noting a trend toward custom-tailoring analysis); Thomas

decisions based on theories of low entry barriers and firms' limited capacity for monopoly or cartel maintenance, enforcers today can drive agency policy and rules of decision by drawing on evidence-based analyses of market frictions, mobility costs, high entry barriers, and workers' limited capacity to switch employers.Finally, in addition to deploying a presumption of imperfect competition in labor markets, the FTC has a unique "unfair methods of competition" authority under section 5 of the FTC Act to establish prima facie liability for conduct that tends negatively to affect competitive conditions without requiring additional evidence or allowing cognizable justifications.[405] Given that authority, the agency could certainly argue for a presumption that certain labor market practices constitute unfair methods of competition due to pervasive employer power.[406] Such arguments could be supported by the FTC's own expert assessment of labor market conditions, further studies of labor market conditions under its section 6(b) authority,[407] case law holding that the FTC Act encompasses violations of the Sherman and Clayton Acts,[408] and case law holding that the FTC's authority to regulate unfair methods of competition is particularly broad when those methods conflict with "the basic policies of the Sherman and Clayton Acts."[409]

Broader Methods of Measuring Employer Power and Its Harms. A presumption of employer power would obviate enforcers having to prove employer power through metrics that center market-based valuations of worker's labor. But to the extent employers can rebut the presumption, and the question of employer power is live in any enforcement action, antitrust enforcers can rely on methods of determining employer power—and labor's underlying value—that extend beyond market-based metrics.

Nachbar, Qualitative Market Definition, 109 Va. L. Rev. 373, 409–16 (2023) (discussing the different sources of market power).

405. See 15 U.S.C. § 45(a)(1); FTC UMC Policy Statement, supra note 335, at 10 (discussing the FTC's broad discretion to establish liability).

406. While the agency did not make this argument in its Non-Compete NPRM, this Article argues it could have. See Non-Compete NPRM, supra note 361.

407. See FTC Act § 6(b), Pub. L. 63-203, 38 Stat. 717, 721 (codified at 15 U.S.C. § 46(b)); 15 U.S.C. § 46(a); FTC UMC Policy Statement, supra note 335, at 1 n.3, 12 (collecting cases that confirm the FTC's section 5 authority to regulate "various types of unfair conduct that tend to negatively affect competitive conditions" and summarizing examples).

408. See Fed. Trade Comm'n v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 395 (1953) (affirming that conduct "falls within the prohibitions of the Sherman Act and is therefore an 'unfair method of competition' within the meaning of § 5(a)").

409. Fed. Trade Comm'n v. Brown Shoe, 384 U.S. 316, 321 (1966); see also Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 242 (1972) (holding that "the Commission has broad powers to declare trade practices unfair" (internal quotation marks omitted) (quoting *Brown Shoe Co.*, 384 U.S. at 320–21)); Fed. Trade Comm'n v. Nat'l Lead Co., 352 U.S. 419, 428–29 (1957) (affirming rulings holding that the FTC has "wide discretion in . . . end[ing] . . . unfair practices" and is "the expert body to determine what remedy is necessary to eliminate [] unfair or deceptive trade practices" (internal quotation marks omitted) (quoting Jacob Siegel Co. v. Fed. Trade Comm'n, 327 U.S. 608, 612–13 (1946))).

Specifically, they can draw from broader methods of discerning power and coercive control from labor economics, behavioral economics, macroeconomics, sociology, political science, geography, and philosophy.

Labor Economics and Industrial Relations. First, current IO models applied to measure employer power assume external labor market wage-setting based on marginal decisions with static labor needs, ignoring a rich literature on compensation in labor economics, industrial relations, organizational studies, and human resource management. This literature documents and analyzes how firm policies and rules, productivity incentives, fairness, and other considerations impact employers' ability to unilaterally set wages and the range and design of compensation structures offered in employment contracts.[410] It also analyzes broader indicators of workers' relative bargaining power to employers, including its sources in workers' and employers' relative voice and exit options.[411] As this author argues in prior work, enforcers can rely on this literature to assess indicators of workers' and employers' relative bargaining power to get a clearer picture of employers' ability to undercompensate workers.[412] These indicators specify what types of evidence support findings of employer or worker power, respectively, and the policies and institutions that impact voice and exit options.[413] In other words, they incorporate into the analysis the ways in which law fortifies the bargaining leverage of the relevant parties, evidence crucial for building a "new materialism" of private power.

Current substitution analysis is limited, both statically and dynamically, with regard to identifying adequate substitutes based on existing industry practice and competitive wage rates and in discerning proper substitutes over time. This is equally true with, say, AI technologists in the tech sector as with delivery drivers choosing between independent contractor positions (e.g., FedEx or Amazon) and union jobs (e.g., UPS): Workers have heterogeneous preferences for the kinds of jobs, long-term investments, skills development, and personal control or voice they aspire to on the job and in their careers.[414] A more textured view of

410. See, e.g., Weil, supra note 384, at 76–92 (collecting literature); Hafiz, Economic Analysis, supra note 252, at 1148–52, 1163–64 (same).

411. See Albert Hirschman, Exit, Voice, and Loyalty 21–43 (1970) (describing workers' ability to use exit and voice); Hafiz & Marinescu, supra note 379, at 472 (examining the roles of voice and exit in bargaining dynamics between employers and workers); Marinescu & Rosenfeld, supra note 381, at 5 (same).

412. See Hafiz & Marinescu, supra note 379, at 494–96 ("These worker power indicators can help gauge how much power workers have in specific geographic locations, occupations, or industries.").

413. See id. at 477–92 (identifying indicators of workers' and employers' relative bargaining power based on their respective voice and exit options).

414. For the literature on workers' heterogeneous preferences and the relationship between heterogeneous preferences and employer monopsony, see, e.g., José Azar & Ioana Marinescu, Monopsony Power in the Labor Market 6–7, 13–19, 38, 52 (Inst. for the Econ. &

compensation-setting would starkly transform analysis of employer power because such a view introduces more nuanced questions about what counts as "adequate substitutes" for workers, including consideration of pay equity impacts, knowledge economies and information asymmetries, and amenities that more accurately capture quality-adjusted wages.[415] Further, more complex wage-setting models—including "efficiency wage" models—more accurately assess processes employers deploy to incentivize effort in light of the employment relationship operating as an incomplete contract.[416] The models' purpose is to set compensation levels for higher productivity outcomes.[417] They also incorporate fairness and morale considerations, which enable better assessment of workers' understanding of a fair division of their gains from trade.[418]

Labor economists have also tried to study workers' willingness to pay for dignity at work through qualitative survey data.[419] This data is critical for evaluating how workers view their outside options and the level of employer power in a given labor market. For example, workers may accept lower pay for non-wage amenities if they have more control over their schedules or more voice at work.[420] Non-IO economic approaches to understanding dynamic and dignitary wage-setting can improve enforcers' analysis of how workers value their contributions. Capturing these qualitative aspects of labor markets—and the social and normative logics that inform the employment bargain—more closely approximates the realities of bargaining leverage in that bargain.[421]

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the Future of Work, Discussion Paper No. 31/24, 2024), https://www.rfberlin.com/wp-content/uploads/2024/12/24031.pdf [https://perma.cc/8W6G-A5MS].

415. See Samuel Bowles & Herbert Gintis, Power 6 (U. Mass. Dep't of Econ., Working Paper No. 2007-03, 2007), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1039&context=econ_workingpaper [https://perma.cc/9XND-FJJY] (discussing the employer's power to dictate the quality of the workplace).

416. See Suresh Naidu, Labor Market Power in American Political Economy, *in* The American Political Economy: Politics, Markets, and Power 295, 309–11 (Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen eds., 2021) [hereinafter Naidu, Labor Market Power] (discussing the correlations between wages and outputs under the efficiency wage model).

417. Id.

418. There is a vast labor and behavioral economics literature on the relationship between fairness and morale considerations in the labor bargain. For a brief summary of labor economics models incorporating fairness and morale considerations in wage-setting, see Arindrajit Dube, Suresh Naidu & Adam D. Reich, Power and Dignity in the Low-Wage Labor Market 2–5, 30–31 (Nat'l Bureau Econ. Rsch., Working Paper No. 30441, 2022), https://www.nber.org/papers/w30441 [https://perma.cc/866D-GTB5] (exploring dignity at work through a study of Walmart employees).

419. See id. at 5 (describing the study's survey methodology).

420. See id. at 2–17, 26–31 (describing the non-wage amenities that employees value).

421. For more on qualitative market definition, see Nachbar, supra note 404, at 419–25 (examining the advantages of qualitative market definition over quantitative market definition, particularly in "the consideration of barriers to entry").

Behavioral Science and Information Economics. Enforcers can also better understand the realities of monopsonistic wage-setting by incorporating behavioral evidence of information asymmetries that accrue to employer power. Information asymmetries in labor markets generally favor employers because employers have more information about market wages than workers, hire more often than workers switch jobs, and have more negotiating expertise.[422] Power can also accrue to employers because workers lack accurate knowledge of legal rights that strengthen their bargaining leverage, thus lowering their compensation.[423]

Macroeconomics. Analyzing industry- or even economy-wide data can give enforcers a sharper understanding of employer power.[424] Big data grants economists more sophisticated tools to investigate the macroeconomic effects of corporate concentration.[425] Macroeconomic analysis measures labor's share of income, a useful indicator of workers'

422. See Marinescu & Rosenfeld, supra note 381, at 14 ("Firms are likely to have a lot more information about the market wage than workers, because firms hire more often than workers switch jobs."); Zoe Cullen & Bobak Pakzad-Hurson, Equilibrium Effects of Pay Transparency, 91 Econometrica 765, 766–68 (2023) (discussing the effects of pay transparency laws on two-sided incomplete-information bargaining by increasing individual workers' bargaining power relative to employers); Jason Sockin & Aaron Sojoruner, What's the Inside Scoop? Challenges in the Supply and Demand for Information on Employers, 41 J. Lab. Econ. 1041, 1075 (2023) ("Volunteers are reluctant to supply negative information and aspects of their own identity together."); Manudeep Bhuller, Domenico Ferraro, Andreas R. Kostøl & Trond C. Vigtel, The Internet, Search Frictions and Aggregate Unemployment 30 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30911, 2023), https://www.nber.org/system/files/working_papers/w30911/w30911.pdf [https://perma.cc/DB9V-GXBA] (explaining the effects of the internet on job searches and hiring).

423. See Weil, supra note 384, at 245–46, 291 n.2 (summarizing literature); Jack Fiorito & Paul Jarley, Union Organizing and Membership Growth, 33 J. Lab. Res. 461, 482 (2012) (discussing the lack of choice for workers in union organizing); Pauline Kim, Bargaining With Imperfect Information, 83 Cornell L. Rev. 105, 105–11 (1997) (explaining employees' lack of knowledge about at-will employment); Pauline Kim, Norms, Learning, and Law, 1999 U. Ill. L. Rev. 447, 451 (1999) (summarizing arguments against at-will employment); J.J. Prescott & Evan Starr, Subjective Beliefs About Contract Enforceability, 53 J. Legal Stud. 435, 438 (2024) ("[Seventy] percent of employees with an unenforceable noncompete mistakenly believe that their noncompete is enforceable."); Stewart J. Schwab, Law-and-Economics Approaches to Labour and Employment Law, 33 Int'l J. Compar. Lab. L. & Indus. Rels. 115, 137–38 (2017) (explaining that the internal promotion system causes employees to get stuck with one employer); Evan Starr, J.J. Prescott & Norman Bishara, The Behavioral Effects of (Unenforceable) Contracts, 36 J.L., Econ., & Org. 633, 665 (2020) (investigating the effects of unenforceable noncompete contracts and finding that they affect employee tenure despite being unenforceable under state law).

424. See Hafiz, Economic Analysis, supra note 252, at 1176–83 (discussing ways to integrate "macroeconomic analysis into labor regulation").

425. See, e.g., Jan Eeckhout, The Profit Paradox 216–33 (2021) (discussing the importance of data in regulating market power); Jan De Loecker, Jan Eeckhout & Gabriel Unger, The Rise of Market Power and the Macroeconomic Implications, 135 Q.J. Econ. 561, 567–74 (2020) (describing the study's use of data to measure market power over time).

relative bargaining power.[426] That analysis has shown that competition law enforcement is associated with changes in labor's share in over twenty industries in twelve Organization for Economic Cooperation and Development (OECD) economies between 1995 and 2005.[427] These tools have not yet been integrated into antitrust enforcement to assess employer power but offer methods to aggregate industry-wide microeconomic data to estimate labor's share of the gains from trade across firms. At least one court has found that wage suppression from a dominant employer's anticompetitive conduct can be calculated through revenue share.[428]

Macroeconomic tools are particularly useful for proving employer power in highly concentrated labor markets and for setting agency enforcement priorities in industries where labor's share is low.[429] Macroeconomic analysis is additionally valuable for achieving antitrust's distributive goals and ensuring the shared benefits of economic development in ways that strengthen broad purchasing power and countercyclical planning.[430]*Sociology and Political Science.* Antitrust enforcers could revive the methodological pluralism of Progressive and New Deal labor regulation by turning to broader social scientific research in sociology and political science on employer power.[431] Since the New

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426. See, e.g., David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, Concentrating on the Fall of the Labor Share, 107 Am. Econ. Rev. 180, 185 (2017) (presenting the "superstar firm explanation" for the decline in labor share (emphasis omitted)); David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, The Fall of the Labor Share and the Rise of Superstar Firms, 135 Q.J. Econ. 645, 702 (2020) (discussing the connection between the fall in labor share and the rise of "superstar firms"); Simcha Barkai, Declining Labor and Capital Shares, 75 J. Fin. 2421, 2460 (2020) ("[I]ncreases in industry concentration are associated with declines in the labor share.").

427. See Amit Zac, Carola Casti, Christopher Decker & Ariel Ezrachi, Competition Policy and the Labor Share, 40 J.L., Econ., & Org. 786, 787–88 (2023).

428. See Le v. Zuffa, LLC, No. 2:15-CV-01045-RFB-BNW, 2023 WL 5085064, at *29 (D. Nev. Aug. 9, 2023) (finding a model based on revenue share to be a "reliable source[] of proof as to antitrust impact").

429. See supra note 426 and accompanying text.

430. For antitrust's distributive goals, see Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation, 34 Hastings L.J. 65, 93–96, 112–15, 127–30, 135–37 (1982) (describing the distributive goals of the Celler–Kefauver, Clayton, FTC, and Sherman Acts); Eric A. Posner & Cass R. Sunstein, Antitrust and Inequality, 2 Am. J.L. & Equal. 190, 191 (2022) (arguing that, "in some cases, it may be appropriate to consider sacrificing economic efficiency for distributional goals by introducing distributional weights into antitrust analysis" and that "doing so can increase social welfare").

431. For methodological pluralism during this period, see 3 Dorfman, supra note 79, at 205–12 (describing the formation of the American Economic Association and differences between the historical, statistical, and deductive methods of economists during the period); Rodgers, supra note 129, at 409–85 (providing an overview of methodological debates in Progressive social scientific thought); Ross, supra note 92, at 143–470 (same); Rutherford, Institutional Movement, supra note 92, at 3–56 (situating American Institutionalism in the history of economics and social scientific methodological debates between 1918 and 1947);

Deal period, economic sociologists, sociologists of work, and political scientists have developed theoretical models and empirical strategies for assessing "social relations of work and the structure of inequalities" in organizational forms across the "economic and sociological boundaries of the productive configuration."[432] These include developing new theories about the relationship between power, legal and political institutions, and social conventions, and analyzing the social and political strategies firms deploy to collude and stabilize control over labor as an input of production.[433]Political scientists in the emerging field of American Political Economy have sought to study the interconnection of markets and government to understand "the ways in which *institutional configurations* shape *coalitional politics* to produce long-term *developmental processes*."[434] For example, political scientists Kathleen Thelen, Alexander Hertel-Fernandez, and others have developed models and empirical tools for analyzing "institutional sources of business power" from state capture to policy feedback and lock-in effects from state delegation of public functions to corporate actors.[435] Others research the relationship between concentrated economic power, capture, and the potential impact of

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Yonay, supra note 30, at 49–162 (describing methodological debates between institutionalists and neoclassical economists in the interwar period); William J. Novak, Institutional Economics and the Progressive Movement for the Social Control of American Business, 93 Bus. Hist. Rev. 665, 676–94 (2019) (describing the historical and institutional methods deployed by social scientists in the Progressive movement).

432. Martine D'Amours, Leticia Pogliaghi, Guy Bellemare, Louise Briand & Frédéric Hanin, Reconceptualising Work and Employment in Complex Productive Configurations, 38 Work, Emp. & Soc'y 63, 64 (2024).

433. See, e.g., Re-Imagining Economic Sociology 23–27 (Patrik Aspers & Nigel Dodd eds., 2015) (summarizing novel approaches to economic sociology in the study of financial markets, economic structures, and economic relations); Lyn Spillman, Solidarity in Strategy: Making Business Meaningful in American Trade Associations 31–41, 73–370 (2012) (exploring theories of economic governance, the production of business culture, and the influence of business associations in politics through analyzing the social construction of business interests in trade associations); Erik Olin Wright, Working-Class Power, Capitalist-Class Interests, and Class Compromise, 105 Am. J. Socio. 957, 957–61 (2000) (proposing a theoretical framework for understanding working-class power and capitalist-class interests).

434. See Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen, The American Political Economy: A Framework and Agenda for Research, *in* The American Political Economy: Politics, Markets, and Power, supra note 416, at 7.

435. See Marius R. Busemeyer & Kathleen Thelen, Institutional Sources of Business Power, 72 World Pol. 448, 453–57 (2020) (exploring how delegation, deregulation, and accretion have enabled businesses to gain institutional power); see also Alexander Hertel-Fernandez, State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States—and the Nation 243–68 (2019) (exploring the relationship between state capture and American democracy); K. Sabeel Rahman & Kathleen Thelen, The Role of Law in the American Political Economy, in The American Political Economy: Politics, Markets, and Power, supra note 416, at 76 (examining "the role of the judiciary in the American political economy, tracing the impact of the law and the courts on political-economic institutions and outcomes, with an emphasis on developments since the 1970s").

countervailing institutions, like unions.[436] These institutional relationships and the coevolution of private and public decision-making are key for antitrust enforcers to understand in assessing how antitrust legal rules can themselves generate and protect employer power.

Research in sociology and political science is particularly useful in vertically disintegrated and "fissured" industries to evaluate lead firms' legal incentives to restructure while retaining monopsony power within their supply chains.[437] Sociologists have developed methods for studying power across supply chains or production networks by using Social Network Analysis (SNA) to analyze "key player[s,] . . . core and periphery positions, . . . [and] level[s] of consolidation" that quantify power "via a firm's financial ties to other entities," dependencies between core and periphery firms, and testing distribution patterns to determine levels of consolidation.[438] These theoretical and empirical contributions move beyond narrow marginalist and even substitution analyses to better

436. See Samuel Ely Bagg, The Dispersion of Power: A Critical Realist Theory of Democracy 1–174 (2024) (proposing a theory of democracy as collective self-rule dependent upon a dispersion of private power and structuring public power to resist state capture); Daniel J. Galvin, Alt-Labor and the New Politics of Workers' Rights 1–35, 66–172 (2024) (examining the rise of alt-labor and the "logic of alt-labor's political development" as a mechanism for building worker power); Chase Foster, Varieties of Neoliberalism: Courts, Competition Paradigms and the Atlantic Divide in Anti-Trust, 20 Socio-Economic Rev. 1653, 1653–78 (2022) (evaluating the contributions of economic interests, business power, and the relative influence of economists on the evolution of antitrust policy in the United States); Chris Howell, Rethinking the Role of the State in Employment Relations for a Neoliberal Era, 74 Indus. & Lab. Rel. Rev. 739, 739–72 (2021) (arguing that an activist state contributed to the liberalization of employment regulation through market making, displacing collective with individual employment regulation, state-directed social pacts, and redrawing the boundaries between work and non-work); Sarah Staszak, Privatizing Employment Law: The Expansion of Mandatory Arbitration in the Workplace, 34 Stud. Am. Pol. Dev. 239, 239–68 (2020) (examining the role of state institutions, politics, and legal developments on the evolution of employment arbitration as a form of justice enhancement to one co-opted by business-friendly conservatives focused on protecting employers from litigation).

437. See Wolfgang Streeck, On the Institutional Conditions of Diversified Quality Production, *in* Beyond Keynesianism: The Socio-Economics of Production and Full Employment 21, 21–57 (Egan Matzner & Wolfgang Streeck eds., 1991) (discussing the mechanisms by which societies can exploit the employment opportunities offered by advanced forms of demand); Kathleen Thelen, The American Precariat: U.S. Capitalism in Comparative Perspective, 17 Persps. on Pol. 5, 8 (2019) ("Firms have become increasingly fragmented . . . as companies construct extensive networks of subcontracting and franchising that allow them to outsource all kinds of operations, using cheaper third party suppliers of goods and services to cut costs, particularly labor costs."); Weil, supra note 384, at 89 ("Businesses at the top of supply chains split off employment so that they can focus their attention on more profitable activities connected to the revenue side of their income statement, leaving the manufacture of products or the provision of service to be fissured off.").

438. See Loka Ashwood, Andy Pilny, John Canfield, Mariyam Jamila & Ryan Thomson, From Big Ag to Big Finance: A Market Network Approach to Power in Agriculture, 39 Agric. & Hum. Values 1421, 1422 (2022).

comprehend the social, political, and institutional sources of employer power that enable employers' ability to profitably reduce pay, working conditions, and worker organizing.

Geography. Geographers study place-based sources of economic power, and their theories and methods could contribute another important dimension to analyzing employer power and its harms.[439] Labor markets—and the determinants of the employment bargain—are highly local: Production occurs based on "unique conjunctures of labour supply conditions, patterns of labour demand and skills acquisition, regulatory and legal frameworks, social conventions, [and] industrial relations practices."[440] Antitrust enforcers already assess employer power based on employers' ability to profitably reduce wages, wage growth, or workplace quality in a particular *geographic* market.[441] But their analysis focuses exclusively on workers' local employment options within their job classification under a marginalist, substitution analysis, ignoring a broader analysis of capital's "spatial fix"—or the "particular geographical distributions" that capital depends on to realize profit—in the broader, uneven development and spatial division of labor produced by capital and labor's relative mobility in space.[442]

Workers employed locally at a small retailer have different bargaining leverage than workers employed in the same town by Walmart or Amazon, even if their jobs are technically substitutable.[443] Large employers compete

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439. For law and a place-based analysis of employer power, see Hiba Hafiz, The Law of Geographic Labor Market Inequality, 172 U. Pa. L. Rev. 1183, 1222–67 (2024) (using a place-based lens to analyze labor market regulation).

440. Andrew Herod, Jamie Peck & Jane Wills, Geography and Industrial Relations, *in* Understanding Work and Unemployment: Industrial Relations in Transition 176, 178 (Peter Ackers & Adrian Wilkinson eds., 2003); see also Alan Manning & Barbara Petrongolo, How Local Are Labor Markets? Evidence From a Spatial Job Search Model, 107 Am. Econ. Rev. 2877, 2905 (2017) ("[U]nemployed workers' search efforts are strongly discouraged by distance to target jobs."); Enrico Moretti, Local Labor Markets, *in* 4B Handbook of Labor Economics 1237, 1238–91 (David Card & Orley Ashenfelter eds., 2011) (discussing the ways that "localized shocks" to a local labor market affect the rest of the economy); Ioana Marinescu & Roland Rathelot, Mismatch Unemployment and the Geography of Job Search, 10 Am. Econ. J.: Macroeconomics 42, 46–51 (2018) (showing that job seekers are less willing to apply to jobs that are further away).

441. See 2023 Merger Guidelines, supra note 341, § 4.3, at 40 ("A relevant antitrust market is an area of effective competition, comprising both product (or service) and geographic elements.").

442. See David Harvey, The Limits to Capital 373–413 (1982) (theorizing the spatial configuration of built environments that affects the relative geographic mobilities of capital and labor); Doreen Massey, Spatial Divisions of Labour: Social Structures and the Geography of Production 7, 65–121 (1984) (developing a theory of uneven development in the spatial structures of capitalist production); Neil Smith, Uneven Development 177 (2008) (noting that spatial equilibrium is a sort of "special fix" to capitalism's tendency toward geographic disequilibrium).

443. See Naidu et al., Labor Market Power, supra note 416, at 297–98 (arguing that large and small employers have different preferences with respect to labor's bargaining power).

economy-wide in their product markets and set human-resource policies at scale, including wages and work standards that exceed those offered by smaller retailers, making it harder for those retailers to compete for workers.[444] But national employment policies can also increase worker organizing costs at larger employers, as we have seen in the Walmart, Amazon, and Starbucks unionization campaigns.[445] Geographers' methods are sensitive to place-specific wage-setting, tackling the sources of employer power that come from the "built environment," but they also analyze how the politics of scale between local and globalized spaces of production impact the relative bargaining leverage of labor and capital.[446] Geographers have also studied "organized abandonment," or the ways capital arrangements with the state manage place-based decline and deregulation, including with regard to labor market institutions and human capital investments.[447] Integrating these conceptual frameworks into analysis of the scope and extent of employer power would aid antitrust enforcement and even generate local multiplier effects by strengthening worker power to achieve local economic development and macroeconomic goals.

Philosophy. Finally, philosophical approaches to coercion enable deeper theorization of the nature and normative stakes of employer power in antitrust policy. Far from focusing narrowly on the microeconomic inefficiencies and even macroeconomic harms of employer dominance, philosophers like Elizabeth Anderson, Judith Shklar, and Ruth Dukes examine the nature and effects of authoritarian power over workers' lives, on and off duty, within a longer tradition of conceptualizing the nature of freedom, dignity, and economic self-determination.[448] Philosophical

444. See id. at 297 (explaining that larger employers set economy-wide human resources policies).

445. See id. (arguing that national union enterprise laws can encourage workers to form unions at large employers).

446. See Andrew Herod, Scale 1–58 (2010) (conceptualizing the role of geographic scale in capitalist production and its impact on the relative power of private and public actors).

447. See Harvey, supra note 442, at 397 (describing "'red-lining' by financial institutions and urban renewal" as "entail[ing] organized abandonment" through state institutional arrangements with private actors, effectuating "a hierarchy of means—market, institutional and state—for the production, modification and transformation of spatial configurations to the built environment"); see also Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California 13–29 (2007) (explaining that the state of California has used its prison system to extract free labor from incarcerated individuals).

448. See Elizabeth Anderson, Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It) 37–74 (2017) (theorizing the modern workplace as a form of "private government" that governs by "communist dictatorship"); Ruth Dukes, The Labour Constitution: The Enduring Idea of Labour Law 33–68 (2014) (discussing the ways in which codetermination between employers and employees can be empowering for the latter); Judith N. Shklar, American Citizenship: The Quest for Inclusion 63–104 (1991) (arguing that, "[t]o be a recognized and active citizen," one "must be an equal member of the polity, a voter," and also "must be an 'earner,' . . . one who is rewarded for the actual work he has

understandings of economic power invite general consideration of theories of subordination and domination by extracting general principles of arbitrariness, control, and consent that can be public, intersubjective, or entirely subjective. Anderson has reconceptualized the role of negative, positive, and republican freedoms in employment as a form of "private government" in ways that challenge the "theory of the firm as ideological blinder":

> While this theory explains why firms exist and why they are constituted by hierarchies of authority, it does not explain the sweeping scope of employers' authority over workers in the United States. It does not explain, for example, why employers continue to have authority over workers' off-duty lives, given that their choice of sexual partner, political candidate, or Facebook posting has nothing to do with productive efficiency.[449]

What enables employers' authoritarian control, according to Anderson, is a "complex system of laws" that "determines the scope and limits of the employer's authority," most especially by establishing "the default employment contract" as "employment-at-will."[450] Answers to deeper philosophical questions regarding these fundamental values and sources of economic freedom and authoritarian control are often implicit in antitrust policy discussions, enforcement decisions, and judicial opinions—they are rarely rigorously surfaced and debated to ascertain the normative positions that inform statutory interpretation, enforcement priorities, and policy decisions. This is particularly true with regard to technocratic economic analysis of employer power. But to expand beyond a "commodified" understanding of labor and accord antitrust enforcement with Congress's vision of and public policy towards labor, more robust philosophical inquiry is warranted.

Broader Legal Thought. Finally, enforcers can draw on broader legal thought to service thinking about employer power harms *beyond* competition-based harms. Most importantly, consistent with the Clayton

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done"); Hiba Hafiz, Beyond Liberty: Toward a History and Theory of Economic Coercion, 83 Tenn. L. Rev. 1071, 1074 (2016) (arguing for a theory of economic coercion that incorporates theoretical notions of individual and collective power); Diana S. Reddy, After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions, 132 Yale L.J. 1391, 1452 (2023) ("At its core, American labor law empowers workers to join together to secure better pay, benefits, voice, and dignity.").

449. See Anderson, supra note 448, at 48, 52; see also id. at 45–61 (developing theory of "private government"). For employers' digital surveillance, see Brishen Rogers, Data and Democracy at Work: Advanced Information Technologies, Labor Law, and the New Working Class 6 (2023) (stating that employers use novel surveillance technologies to monitor and control their workers' attempts to organize); Veena Dubal, On Algorithmic Wage Discrimination, 123 Colum. L. Rev. 1929, 1930 (2023) ("Over the past two decades, technological developments have ushered in extreme levels of workplace monitoring and surveillance across many sectors.").

450. See Anderson, supra note 448, at 53.

and Norris–LaGuardia Acts, antitrust enforcers could admit as evidence of cognizable antitrust harm employer conduct recognized under other legal frameworks as reducing individual workers' "full freedom of association . . . in the designation of such representatives . . . for the purpose of collective bargaining."[451]

There are excellent proxies for such infringements: employers' unfair labor practices that violate the NLRA. At the very least, violations of the right to organize, collectively bargain, and strike should contravene the antitrust laws *regardless* of whether that conduct reduces competition between employers for workers' services. But analysis could extend beyond currently cognizable unfair labor practices to include analyses of workers' reduced countervailing power based on case-by-case assessments of employers' interference with, restraint, or coercion of workers' full freedom of association. More generally, given the significant market frictions and lock-in effects that increase switching costs in employment relationships, employer conduct that reduces or chills worker coordination to assert countervailing leverage is much more likely to strengthen employer wage-setting power—and reduce worker earnings and working conditions—than reducing competition with that employer's competitors.[452]

B. *Toward Progressive Labor Antitrust Methods*

While identifying the range of theories and methods that can inform an analysis of employer power and its harms is an important first step, operationalizing those theories and methods within enforcement institutions is much more challenging. The weight of judicial decisions and standards of proof—as well as the symbiotic development of expertise and training in the evolution and entrenchment of IO methods—imposes considerable pressure on maintaining the status quo.[453] While this Article cannot entirely solve for this, this section suggests concrete steps forward in adapting new methods of analyzing employer power into labor antitrust enforcement.

Establishing a Presumption of Imperfect Competition. First, as discussed, public and private litigators should avoid further "commodifying" labor by measuring employer power through market-based valuations and argue for a judicial presumption of employer power in labor antitrust cases that

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451. See 29 U.S.C. § 102 (2018).

452. See, e.g., Suresh Naidu & Eric A. Posner, Labor Monopsony and the Limits of the Law, 57 J. Hum. Res. (Special Issue) S284, S284 (2022) (describing labor market frictions and arguing that "there are strong reasons for believing that antitrust enforcement will be insufficient for countering labor market power"); id. at S314–15 (describing the importance of unionization "to counter the labor market power of employers").

453. See supra section II.B.

employers may rebut.[454] If defendants resort to current IO methods to prove their lack of market power in response, litigators could incorporate the broader set of theories and methods outlined above to counter employers' rebuttal.[455] Outside the context of litigation, policymakers, agency officials, and labor advocates can work to incorporate these broader approaches into draft legislation, agency guidance, comments to rulemakings, white papers, advocacy documents, and academic and popular writing.

Deploying New Methods in Enforcement. Integrating new theories and methods of discerning employer power and its harms into current approaches will come down to two things: (1) the nature and sources of broader evidence relevant for analyzing employer power and its harms; and (2) how that evidence should be weighted relative to evidence enforcers currently rely on, namely, the wage effects of anticompetitive conduct and reductions to competition.

Evidence and Data Collection. Enforcers can supplement IO and its substitution analysis with qualitative survey data, behavioral evidence, as well as industry-specific corporate, legal, and historical research. Starting with useful evidence from labor economics: In prior co-authored work with Ioana Marinescu, this author developed bargaining power indicators that draw on economic and legal sources of bargaining leverage to analyze workers' and employers' relative exit and voice options.[456] These included analyses of labor market tightness, labor share, union density, average period to a first collective bargaining agreement, strike activity, existence of organizing drives, and prior violations of workers' rights under antitrust, labor, and employment law, and so on.[457] Enforcers can also look to evidence of labor market frictions like matching costs, search and mobility costs, and information asymmetries. For these, heavier reliance on survey evidence from workers and from federal, state, and local labor and

454. See supra notes 399–406 and accompanying text.

455. See supra section III.A.

456. See Hafiz & Marinescu, supra note 379, at 494–96.

457. See id. at 495; see also SEIU Healthcare Pa. Strategic Org. Ctr., Complaint Against University of Pittsburgh Medical Center Regarding Potential Attempted and Actual Monopolization and Monopsonization in Violation of Section 2 of the Sherman Act 25, 44–45, 50 (filed with DOJ, May 18, 2023), https://thesoc.org/wp-content/uploads/2023/05/COMPLAINT_5.17_redacted.pdf [https://perma.cc/37QT-JPHK] (accusing the University of Pittsburgh Medical Center of "engaging in widespread and ongoing violations of workers' labor law rights, which prevents workers from asserting bargaining power that could act as a restraint on UPMC's monopsony power" in violation of Section 2 of the Sherman Act); Ioana Marinescu & Eric A. Posner, A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony 2, 16–17 (Roosevelt Inst., Working Paper, 2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_ProposalToEnhanceAntitrustProtection_workingpaper_201812.pdf [https://perma.cc/V9WQ-NLPN] ("We propose draft legislation that would strengthen the law so that workers, aggrieved competitors, antitrust agencies and attorneys general can more easily bring lawsuits against labor monopsonists.").

employment law enforcers, unions, workers' centers, and worker advocacy organizations is useful. Survey data could offer more detailed information about workers' experiences of employer control both at work and outside of work, workers' willingness to pay for nonwage amenities like "dignity at work,"[458] and workers' experiences of fear in advocating for themselves or their co-workers.[459] Behavioral evidence of employer power could comprise survey evidence of workers' awareness of rights that strengthen their countervailing power, including: their (mis)understanding of their employment contracts; at-will defaults; enforceability of noncompete agreements; and broader rights established under the labor, employment, and antitrust laws. Antitrust enforcers can also solicit expert testimony and evidence of employer power beyond IO economists, including from labor economists, behavioral economists, macroeconomists, sociologists, political scientists, historians, and even philosophers, to clarify their "theory of the case" and contextualize the quantitative and qualitative evidence they submit in litigation or to justify agency actions or judicial opinions.

Evaluating and Weighing New Evidence. While enforcers should weigh non-IO evidence of employer power and its harms relative to IO-based evidence, no legal standards yet govern non-IO evidence's admissibility, credibility, or sufficiency. For this reason, it is critical for enforcers to experiment and clarify the relationship of that evidence to novel approaches to employer power within the Clayton and Norris–LaGuardia Acts' strictures. Antitrust's "antitextualist" history reveals that interpretations of antitrust statutes are highly underdetermined.[460] As Part I discusses, various economic—and even noneconomic—approaches have been adopted to interpret the statutes, from the rise and fall of the S-C-P and Chicago School paradigms to the rise of the Neo-Brandeisian School, and the weight of consensus within the antitrust community ultimately determines how to value certain types of evidence over others.

Remedial Design. Another critical means of protecting workers from noncompetition-based harms—and ensuring their countervailing leverage through institutions that can secure them "acceptable terms and conditions of employment"—is incorporating worker power strengthening mechanisms into antitrust remedial design.[461] Current approaches limit remedies to treble damages of workers' lost compensation measured

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458. Dube et al., supra note 419, at 15 (internal quotation marks omitted).

459. See Corey Robin, Fear: The History of a Political Idea 190–99, 215–48 (2004) (detailing how fear in the workplace stops workers from advocating on their own behalf).

460. See Crane, supra note 403, at 1205–06 (discussing how the "antitrust statutes are open-textured, vague, indeterminate, and textually unilluminating").

461. See Norris–LaGuardia Act, Pub. L. No. 72-65, § 2, 47 Stat. 70, 70 (codified at 29 U.S.C. § 102 (2018)). For merger-specific remedial design in labor antitrust, see Hafiz, Rethinking Breakups, supra note 365, at 1527–95 (describing methodologies that agencies should deploy to incorporate worker power into antitrust remedial design).

against a "competitive" wage.[462] Instead, remedies should at least include: (1) ensuring robust labor market institutions that strengthen workers' voice and countervailing power; and (2) damages measured based on compensation and labor conditions (or quality-adjusted compensation) that would have existed had workers been truly free to coordinate and collectively demand improved terms and conditions of work, best approximated by union premium wages and security agreements.

Expanding Expertise and Institutional Capacity. Beyond specific reforms in labor antitrust enforcement, it is critical that Congress and the antitrust agencies expand their expertise and strengthen their institutional capacity in non-IO research fields investigating employer power. This will require funding and institution building, like creating an "Office of Labor Policy" akin to the various industry sections within the DOJ's Antitrust Division and the Office of Technology at the FTC.[463] The antitrust agencies currently lack any institutional center for labor antitrust enforcement, and there is no single agency official charged with establishing a unified agency-wide policy or resolving competing interpretations within the agency of its labor regulatory mandate.[464] The agencies' politically appointed economists and social scientifically-trained staff are overwhelmingly IO-trained with the recent addition of a small number of labor economists.[465] Establishing Offices of Labor Policy within the Antitrust Division and FTC would place a politically appointed official, a Chief Labor Officer, in charge of managing and monitoring the respective agencies' labor antitrust portfolios. The Office could hire a broad array of social scientists with labor expertise to work with the Chief Labor Officer to devise policy on where to prioritize enforcement, how to integrate IO and non-IO evidence into agency actions, and how to coordinate with the various offices and staff attorneys within the agency to formulate and ensure a uniform approach to labor antitrust enforcement. The Chief

462. See supra section II.C.

463. Industry-specific sections in the DOJ Antitrust Division focus on: Defense, Industrials, and Aerospace; Financial Services, Fintech, and Banking; Healthcare and Consumer Products; Media, Entertainment, and Communications; Technology and Digital Platforms; and Transportation, Energy, and Agriculture. See Sections and Offices, Antitrust Div., DOJ, https://www.justice.gov/atr/sections-and-offices [https://perma.cc/TTZ6-3XVH] (last visited Feb. 15, 2025). For the FTC's Office of Technology, see Office of Technology, FTC, https://www.ftc.gov/about-ftc/bureaus-offices/office-technology [https://perma.cc/96KH-V736] (last visited Feb. 15, 2025).

464. Between October 2022 and October 2023, the author served as an Expert Advisor to the FTC on labor competition matters. These observations are based only on publicly available information about the FTC's organizational structure.

465. See Bureau of Economics Biographies, FTC, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/bureau-economics-biographies [https://perma.cc/B66F-74WF] (last visited Oct. 13, 2024) (showing biographies of economists who work in the Bureau of Economics); About EAG, Antitrust Div., DOJ, https://www.justice.gov/atr/about-eag [https://perma.cc/6PE6-EUFZ] (last visited Oct. 13, 2024) (showing biographies of economists who work in the Expert Analysis Group).

Labor Officer could also supervise hiring labor and behavioral economists, macroeconomists, sociologists, political scientists, philosophers, and even union organizers and labor movement experts—much like the CFPB, SEC, and EPA do with their own interdisciplinary expert hiring (and much like the Division of Economic Research at the NLRB did during the New Deal).[466] The Officer could monitor and utilize the newly established interagency memoranda of understanding (MOUs) between the antitrust and labor agencies to ensure that the agencies are sharing information and working together to review the effects of their respective investigations, merger reviews, and enforcement actions on workers.[467] The MOUs can also enable the agencies to devise policy consistent with their respective federal mandates.[468]

CONCLUSION

In passing the 1914 and 1932 labor exemptions, Congress established a clear labor and wage policy that rejected viewing labor as a commodity, favoring protection for worker coordination that could take the outcomes of the employment bargain outside the market and its logic of supply and demand. Current New Labor Antitrust methods for calculating labor's value—and corollary measurement of employer power and its harms—have de facto commodified labor, only mobilizing antitrust protections to the extent employers deviate from an ideal of market-set wages and protections reduce labor market competition. But antitrust enforcers have had—and continue to have—a wealth of options for setting enforcement standards and metrics that trigger antitrust's protections. The rise of labor antitrust enforcement in the past decade is a long overdue development, and it should take advantage of the range of human effort and disciplinary expertise that has evolved to better understand how the employment bargain works and what the most accurate descriptions and predictors are of employer power and its broader harms. Without reforming the methods of antitrust analysis, antitrust policy can only go so far to protect workers from dominant employers.

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466. See Hafiz, Economic Analysis, supra note 252, at 1165 (discussing the importance of hiring an interdisciplinary staff).

467. See Hiba Hafiz, Roosevelt Inst., A Whole-of-Government Approach to Increasing Worker Power 6 (2022) https://rooseveltinstitute.org/wp-content/uploads/2022/12/RI_WholeofGovernmentApproachtoIncreasingWorkerPower_Brief_202212.pdf [https://perma.cc/W4TZ-YN33] (discussing the importance of wielding interagency coordination to strengthen worker power); Hiba Hafiz, Interagency Coordination on Labor Regulation, 6 Admin. L. Rev. Accord 199, 205 (2021) [hereinafter Hafiz, Interagency Coordination] (recognizing the importance of interagency coordination to enhancing the efficiency of the administrative state); Hiba Hafiz, Interagency Merger Review in Labor Markets, 95 Chi.-Kent L. Rev. 37, 39 (2020) (emphasizing the importance of interagency merger review to ensure long-term labor market health).

468. See Hafiz, Interagency Coordination, supra note 467, at 207 (discussing how MOUs can help administrative agencies create policies in line with their federal jurisdiction).