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Labor in Competition Law

*Introduction*

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In recent years, a certain set of boundary questions between labor and competition law have become increasingly salient within a number of jurisdictions and international legal frameworks. The ascendance of these questions has been brought about, in the first instance, by changes in economic organization and business practices at both the enterprise and market levels resulting in the growth of work beyond the bounds of employment. In turn, theoretical questions about the relationship between the two fields are again on the rise in commentary and scholarship. These deeper questions were previously smoothed over by a more or less functional broader social compromise between labor and business – particularly within the primarily wealthy, economically developed countries where the problem is most acutely presented. At the broadest level, therefore, the ascendance of this issue may be viewed as a symptom of a larger breakdown in the domestic social compromise between labor and business.

The response at the level of both positive law and commentary has thus far revolved mainly around debate about the location of the boundary between competition and labor law. Determining that location could turn on determining the scope and expansiveness of a number of categories. These categories are sometimes drawn from the positive law in the two fields of law themselves (such as “worker,” “employee,” or “undertaking”); from higher-level conceptualizations of fundamental rights, as codified in constitutions, international treaties, or other legal frameworks; or from economists’ conceptualizations of markets. For the most part, interrogation of these categories, diverse as they are, largely leaves conventional understandings of the purposes of labor law and competition law, and the relationship between them, intact.

This is perhaps clearest with the positive law categories, which directly mediate the reach of the two areas of law. One way of going beyond the first level of available mediating categories is by appeal to fundamental rights – of association, of organization, of expression, or to strike.<sup>1</sup> Authors in this volume highlight both the promise and limits of this approach. For example, Tonia Novitz’ chapter carefully analyzes the potential of the International Labor Organization freedom of association and right to strike standards for mediating labor and competition law concerns. At the same time, both Alan Bogg’s and Charlotte Garden’s chapters offer examples in which freedom of association and expression norms can actually undermine labor rights, both at the competition law intersection and beyond it. An important point that emerges from both

<sup>1</sup> See Chapters 2 (Novitz), 3 (Bogg), and 4 (Garden) in this volume, as well as the chapter on the EU by Countouris, de Stefano and Lianos (Chapter 19), for discussion of fundamental rights, right of association, and freedom of expression interests as they may arise at the labor-competition law border.

these chapters is that influential judicial bodies have read *particular conceptions* of competition into their construction of these fundamental rights.<sup>2</sup>

Another attempt to make sense of the labor-competition law boundary at the theoretical level – one which has been particularly influential in the international policy discussion – is to construe labor markets, or markets for gig work, in terms of the economic theory of imperfect competition. On this theory, collective bargaining is justified as a kind of remedial solution under conditions of imperfect competition. On this approach, labor markets often deviate from a theoretical ideal in which there is a unique, market-clearing price (or wage) that also maps onto marginal productivity – and thus, by implication, allocates overall resources in an optimal manner and gives each person their due.<sup>3</sup> As applied to the boundary between labor and competition law, the idea is that to the extent that markets lying effectively in-between labor markets and product markets also behave in this “monopsonistic” way, particular remedies such as collective bargaining rights, may – or may not – be justified.<sup>4</sup>

This influential theoretical approach to the interaction between labor and competition law, and to the markets in between them, also dovetails naturally with the somewhat broader notion that labor law and competition law are inherently in a kind of latent conflict. The debate on this issue is ultimately structured by the idea that one body of law (labor) inherently favors and facilitates economic coordination, and the other (competition) inherently disfavors it. While boundary questions do naturally come up across many areas of law, this structuring assumption tends to cast the boundary between labor and competition law in particularly stark and oppositional terms.

1.1 ANOTHER APPROACH

We hope in this volume to begin to move the conversation beyond the assumption of latent conflict between labor and competition law. We are motivated by the sense that neither the formal legal category “employment,” nor deviations from the theoretical economic concept of perfect competition, ultimately offer a satisfying principle for deciding when the law ought to permit economic coordination, and when it ought to prohibit it. Instead, both labor law and

<sup>2</sup> See Garden’s discussion of the application of the First Amendment of the United States Constitution to a state rule limiting advertising by pharmacists in the landmark case *Virginia Board of Pharmacy* (reading a particular conception of market competition into the interpretation of rights of expression), and Bogg’s discussion of *Gustaffson* and other decisions of the European Court of Human Rights concerning negative freedom association (similarly reading a particular conception of competition and markets into the right of association).

<sup>3</sup> See, e.g., Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Indiana Law Journal 1031 (2019), for a widely cited account that clearly articulates the analytical framework implied by this approach. “In a competitive labor market, each recruiting firm is small (a drop in the proverbial bucket) and it can hire as many workers as it wants at the market wage. In a monopsonistic labor market, the hiring firm has market power and hiring more workers necessitates an increase in wages. Therefore, if the labor market is perfectly competitive, wages are equal to marginal productivity and there is no incentive for companies to hire fewer workers to make higher profits by depressing wages. If the labor market is not perfectly competitive and companies are in a position to be able to pay workers below their marginal productivity, then wages and production are both lower than under the competitive equilibrium.” The second point, about matching prices or wages to contribution, is largely implicit in this framework.

<sup>4</sup> The framework indeed implies that wages may sometimes be *above* marginal product, or at a minimum that some “interventions” may bring wages above “the competitive level.” Some prominent scholars taking this approach have embraced this implication explicitly. If that is true, and since the permission of collective bargaining is typically construed as an “intervention,” with a lack of horizontal coordination among market actors constituting the normal state of a competitive market, then collective bargaining rights in in-between markets (contingently justified on the basis of their deviation from perfect competition) would not be justified either, becoming again “collusion” that distorts the competitive outcome.

competition law – along with various other areas of law – fundamentally *direct the forms* that both economic coordination and competition will take, from the ground up, and inevitably do so on the basis of some set of normative criteria.<sup>5</sup> If there is a conflict between them, it is not between coordination and competition, as such, but between different visions of what economic coordination ought to look like and the terms on which economic competition ought to proceed. (Of course, there are different normative visions *within* these fields of law as well, particularly as current debates about antitrust and antimonopoly reform continue to gain steam.<sup>6</sup>) Too often, however, debate about the normative criteria according to which economic coordination rights are to be allocated, and the terms on which competition is to proceed, are masked by formal considerations that track neither how real-world markets work nor the substantive, moral or political disagreements we may have about market rules.

Still, the rise of the boundary question in the positive law is actually an opportunity to re-examine the relationship between labor law and competition law and accordingly, the underlying purposes of both. We certainly do not undertake those large tasks in any comprehensive way here, but we do hope to help open up a different path for doing so. The fact is that competition law, presumed to be in conflict with labor law to the extent that the latter authorizes particular sorts of economic coordination, is *itself* constantly authorizing various forms of economic coordination (while prohibiting or disfavoring others).<sup>7</sup> This is true of existing systems of competition law, but it is also a more or less necessary quality of any potential system. Economic coordination of some kind or another is ubiquitous, and inevitable; law must authorize it in *some* form, having mainly to decide what those forms will be. Competition law often functions therefore as a kind of “appellate body of coordination law,” as one chapter in this volume puts it.<sup>8</sup>

Many existing systems, notably the United States’ but many others as well, have performed this task by anointing *the business firm* as the basic unit and locus of economic coordination – which in the twentieth century has meant that large, hierarchically organized associations have been the primary mechanisms for organizing economic activity. The background common sense that informs much contemporary competition law analysis is slow to see economic coordination *as such* as inevitable and necessary, but on the other hand views firms in particular – which are a particular form of economic coordination – as inevitable and necessary. These two attitudes are perhaps reconciled by the fact that economic coordination within firms is considered so necessary and natural that it becomes nearly invisible altogether. And this invisibility is reinforced by the framework of neoclassical microeconomics proper, in which firms are simply viewed as *units* of economic competition – taken as given at the outset of the same basic theory that will then govern and often prohibit other forms of economic association, rather than as forms of economic organization themselves to be explained.<sup>9</sup> Yet business firms, and market management based on a dominant firm or a few dominant firms, are not the only possible forms

<sup>5</sup> See Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020); see Tankus and Herrine, Chapter 5 in this collection for an elaboration.

<sup>6</sup> For a sector-specific illustration of the current discussion, see, e.g., Claire Kelloway and Sandeep Vaheesan, “Antimonopoly Is About Democratizing the Food System (and the Rest of the Economy),” *LPE Blog* (June 3, 2021).

<sup>7</sup> Paul (n. 5).

<sup>8</sup> Tankus and Herrine, Chapter 5. Of course, whether competition law has primacy in any given situation is itself a contingent question for a legal system to address. However, to the extent it is associated with an allied analytical framework that is commonly accorded the status of an independent science, neither relying on normative commitments itself nor in need of normative justification, competition law’s tendency toward legal primacy is enhanced.

<sup>9</sup> See, e.g., Oliver Williamson, *The Organization of Work: A Comparative Institutional Assessment*, 1 J. Econ. Behavior & Org. 5 (1980) (“questions regarding alternative modes of internal organization do not arise naturally within, and in some respects are even alien to, the neoclassical tradition”).

of economic coordination; others exist and are possible. Producers’ or retailers’ cooperatives, trade associations, public administrative bodies, even markets in which a labor union is the primary locus of market management, are possible and indeed have existed at various points in time. The disfavor with which competition law tends to view some such arrangements in many systems may help to explain their relative rarity in some economies.<sup>10</sup>

While this focus on the business firm may at first seem afiel from the question of labor in competition law, it is not. First, the privileged place of the firm in competition law analysis is precisely bound up analytically with the presumed disfavor of labor coordination, and of other alternative, more democratic forms of economic coordination beyond firm boundaries, more generally. In other words, traditionally organized, investor-controlled firms are *one* logically possible solution to the basic, ubiquitous problems of economic coordination. That solution is then turned into a kind of unstated axiom in the very theoretical apparatus – neoclassical price theory – that is the ultimate basis for disfavoring *other* more horizontal and democratic forms of coordination, including but not limited to labor coordination, whether inside the formal employment relationship or not. Coordination between independent market actors distorts the ideal competitive outcomes that the theory prescribes, and that it holds will result in an optimal allocation of social and economic resources.

Interestingly, the ultimate justification for the privileged place of the firm in systems of competition is itself bound up with the regulation of labor. Starting with economist Ronald Coase’s famous and widely influential theory of the firm, master-servant law was a starting point for analyzing the firm.<sup>11</sup> Later modifications within this strand of analysis ultimately revolve around the idea that controlling “shirking” or “malingering” among workers is a, if not the, fundamental problem of economic organization and thus is the ultimate *raison d’être* for traditionally organized business firms.<sup>12</sup> In fact, on the Coasean view, the employment relationship is *constitutive* of firm-ness; having employees is what distinguishes a firm from the market.<sup>13</sup> Eventually, this logic of labor discipline was effectively extended beyond firm boundaries to apply to, for instance, distribution relationships, and in theory to relationships with producers and service-providers not in formal employment relationships.<sup>14</sup> But it does

<sup>10</sup> See, e.g., Kathleen Thelen, Employer Organization and the Law: American Exceptionalism in Comparative Perspective 83 *Law and Contemporary Problems* 23 (2020).

<sup>11</sup> Ronald Coase, The Nature of the Firm, 4 *Economica* 386 (1937).

<sup>12</sup> See generally, e.g., Oliver Williamson, *Markets and Hierarchies: Some Elementary Considerations*, 63 *Amer. Econ. Rev.* 316 (1973). Some well-known accounts that are sometimes cited as *critiques* of the view of the firm as a hierarchy (emphasizing the firm as a collection of contracts instead) also in fact wind up effectively endorsing the traditionally organized business firm, with centralized operational and ownership structure, as the most productively efficient, in part also for reasons having to do with minimizing shirking. See, e.g., Armen A. Alchian and Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *Amer. Econ. Rev.* 777 (1972).

While largely outside the scope of this volume, the literature on *worker co-determination* also contests the mainline theory of the firm discussion, from another angle. Worker co-determination is the idea that workers, as actors within business firms, ought to have intra-enterprise governance rights alongside shareholders and directors; it is the policy in some corporate law systems (perhaps most notably, Germany’s). See, e.g., GRANT M. HAYDEN & MATTHEW T. BODIE, *RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE* (Cambridge University Press 2021); Brett McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 *STAN. J.L. BUS. & FIN.* 334 (2008); Ewan McGaughey, *Democracy in America at Work: The History of Labor’s Vote in Corporate Governance*, 42 *Seattle U. L. Rev.* 697 (2019).

<sup>13</sup> Coase (n. 11).

<sup>14</sup> On the extension of the logic of productive efficiencies through hierarchical organization to vertical contracting beyond firm boundaries, see, e.g., Brian Callaci, *What Do Franchisees Do? Vertical Restraints as Workplace Fissuring and Labor Discipline Devices*, 1 *JOURNAL OF LAW AND POLITICAL ECONOMY* 397 (2021); Marshall Steinbaum, “Monopsony and the Business Model of Gig Economy Platforms,” Note, OECD Roundtable on Competition Issues in Labour Markets (September 17, 2020) (discussing certain transaction cost theorists’ approval of vertical

not clearly cohere, as part of a unitary whole, with the ideal price theory that militates against “collusion” beyond firm boundaries.

Of course, the point of this argument is not that business firms should not exist. Rather, taking their existence seriously prompts a real reconsideration of the theoretical apparatus that undergirds competition law’s hostility to labor coordination, and specifically to coordination among workers beyond the bounds of employment. Moreover, a consideration of antitrust’s firm exemption reveals how choices in competition law in recent decades have helped to create the conditions for the proliferation of work beyond the bounds of employment in the first place. As we see in some of the following chapters, this “firm exemption” in competition law also has knock-on effects in other aspects of market organization.<sup>15</sup> This crucially includes the extension of the firm exemption in recent decades to authorize certain forms of vertical, “firm-like” coordination *beyond* firm boundaries, which makes formal vertical disintegration and control through contract possible, and thus accommodates the forms of contract labor that give rise to the contemporary boundary question in the first place.<sup>16</sup> This change in so-called vertical restraints law was most pronounced in the United States – which of course is also the home of Silicon Valley, where the first generation of app-based gig firms emerged.<sup>17</sup>

The rise of the so-called gig economy – enabled in part by a kind of expansion of the firm exemption – also helps to make visible what has long been relatively invisible, highlighting the functional similarity of much economic activity that takes place inside and outside firms, and highlighting the often formal nature of firm boundaries. To take a concrete example, imagine a firm that sells a service: say, playing the organ for special events. Independent organists who band together to engage in price coordination or market share allocation would be censured by many systems of competition law, absent an applicable exemption.<sup>18</sup> On the other hand, if investors jointly create a corporation that then hires the same organists, their price-setting (or internal market allocation) activity is deemed untouchable by competition law. Thus far, we have described only the textbook firm exemption.

But notably, even a firm that only *contracts* with the organists – not as employees, but as putatively independent market actors – is permitted to set prices for their services, engage in geographical market allocation between the contracted workers, and so forth. Even in this example, notice that the firm is already engaging in coordination beyond its own boundaries, even though economic coordination would not be allowed to the organists themselves under

restraints upon distributors on the basis that they will ensure that “the supplier can be sure that each of the distributors will work very hard on the seller’s behalf”) (quoting Blair and Kaserman).

<sup>15</sup> See, e.g., Tankus and Herrine, Chapter 5 in this collection.

<sup>16</sup> See n. 14.

<sup>17</sup> Certainly, one might ask why countries importing the business model did not take action through their competition law regimes. But business decision-making generally occurs in the *shadow* of legal changes: in this case, that decision-making initially occurred in the USA, which saw the most dramatic changes to vertical restraints law. As Brian Callaci has discussed, these changes in law (and attempts to influence them) were explicitly part of the deliberations of business decision-makers in predecessor business forms to the gig economy, notably business format franchising. While it is certainly interesting to investigate the extent to which countries where the gig economy business model was exported might or might not have used their own competition law to censure it, that is a somewhat different question to how changes in law may help explain the original ascendance of certain business models. The export also only takes place after a firm or business model has gained enough of a market foothold to attract significant investors, as well as political and social backing. It is quite plausible that an accommodating legal environment helps to explain the *rise* of a business model, even if an otherwise less-accommodating jurisdiction ultimately did not challenge that business model once it was more firmly established and exported.

<sup>18</sup> See, e.g., *Am. Guild of Organists*, F.T.C. 151 0159 (2017) (United States Federal Trade Commission prosecution of organists’ guild for market allocation arrangements).

these circumstances in many systems. Whether this is justified as “efficient” vertical coordination to be contrasted with inherently “inefficient” horizontal coordination, or whether it is simply a silent extension of the firm exemption that no one notices, it highlights the frequent functional similarity between permitted and prohibited economic coordination.<sup>19</sup>

But now notice that many contemporary gig work arrangements take this disjunction in the legal treatment of economic coordination even further. Imagine if this same organist corporation now presents itself as a “gig firm” or a “tech platform,” selling the use of an online app to both organists and their customers. In the current regulatory environment (absent new enforcement initiatives or reform), this firm will most likely be permitted to engage in price coordination beyond firm boundaries: setting the price of a product it does not even purport to sell, namely organist services. At the same time, the organists themselves are still barred from joint price-setting, or joint bargaining with the firm. To be fair, the tech firm’s price-setting may serve a market stabilization purpose by blunting destructive competition between organists and stabilizing prices – something the organists are prevented from doing for themselves under many systems of competition law. In a sense, then, we can say that the organists are effectively compelled to pay the corporation for use of the license to engage in price coordination – which it, the corporation, receives free of charge from the state.<sup>20</sup> Ride-hailing tech firms like Uber and Lyft of course engage in such price coordination beyond firm boundaries, as do many other so-called gig firms.

Finally, a reconsideration of the relationship between competition law and labor law is apposite given other developments: the rise of a reform moment in competition (or antitrust) law that emphasizes values such as *nondomination*, *democracy*, and *fairness* rather than a narrow view of consumer welfare, together with a widespread sense that labor law and labor institutions in many countries are also failing to achieve their more generally recognized goals of curtailing domination and facilitating broader participation in economic decision-making.<sup>21</sup> If antitrust reformers are right, then competition law is or should be aimed at nondomination and fair competition as well. And then there is no necessary conflict with labor law at all.

The two areas of law, putatively in conflict, in fact have a great deal in common. Both exist at another boundary, between the conventionally understood categories of “private law” and “public law.” Accordingly, they both help to constitute economic institutions and organizations, rather than simply deciding individual rights and duties. At the same time, the faultlines of debate in both fields are often shaped by the notion of “private” market ordering – either in the form of direct prescription or in the form of a kind of background specter that the law is supposedly always modifying. And both areas of law are ultimately concerned with questions of market governance and to some extent enterprise governance. In other words, both areas of law help to determine the terms of a market “settlement” that will help to govern interactions

<sup>19</sup> Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 LAW AND CONTEMPORARY PROBLEMS 65 (2019) (discussing this example, and the broader issue, in terms of vertical restraints versus horizontal coordination); Sanjukta Paul, *Uber as For Profit Hiring Hall, A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233 (2017) (earlier articulation of gig firms operating in the shadow of the “firm exemption”).

<sup>20</sup> Paul, *Fissuring* (n. 19) (making a version of the same argument).

<sup>21</sup> Importantly, consumer welfare and open competition do remain as goals in this vision, but they are reconceived as part of a larger commitment to a fair and democratic economy (and society). For example, consumer welfare becomes (again) a question of constructing fair markets, rather than a question of ensuring the abstract idea of “consumer sovereignty.” Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431 (2021). Competition is also still important in the concrete sense of preserving outside options for people and firms whenever possible, on the understanding that the presence of outside options tends to improve human behavior and to help ensure that people, and organizations of people, act in ways that are fair and reasonable. (Indeed, this might point to a very different type of relevance of competition for labor law and labor institutions)



between actors in a market, as well as market actors’ own decisions about things like prices, wages, what to produce, how much, and how to market it.<sup>22</sup>

This volume certainly does not fully remap the relationship between these two fields of law, nor does it set out a comprehensive theory and affirmative set of reforms that would harmonize them. But we hope that it opens up those endeavors for a larger group of researchers and policy-makers, and brings those already engaged in the endeavor into conversation with one another. This endeavor is one in which labor coordination, and democratic forms of coordination beyond business firms more generally, are not odd exceptions to a broader ideal of competitive markets but rather partially constitutive of fair competition, and in which labor law and competition law are partners in shaping markets and organizations to meet broader social goals.<sup>23</sup> In keeping with the view of markets we encourage here, this endeavor of remapping is itself also a social enterprise: accordingly, we are pleased to have brought together in this volume researchers working primarily in labor law, primarily in competition law, and increasingly, a number working in both.

1.2 HISTORICAL PERSPECTIVE

The perspective of this volume is primarily comparative rather than historical, though a few words on historical context, which shape the orientation of the book, are warranted.

It is no accident that the coverage of this volume tends to emphasize the most firmly common law-oriented jurisdictions: the UK, the United States, and Australia, among others. The relationship between labor coordination and the common law is indeed long – yet it is not really a relationship between labor and *competition* policy. The earliest modern competition statute is the United States’ Sherman Act, passed in 1890. Its clearest common law antecedents, mainly restraint of trade and monopoly, were not the primary means by which organization among journeymen workers had been regulated under the common law (in either the USA or England). Indeed, the common law of restraint of trade did not primarily target price-fixing agreements at all, but rather noncompete agreements between erstwhile masters and apprentices, or business partners. As Tony Freyer has noted, that tendency to accommodate informal price coordination continued in the UK, which remained relatively tolerant of cartelization right up until after World War II, when a consensus in favor of affirmative competition policy resulted in the Monopolies Act (1948) and the Restrictive Trade Practices Act (1956).<sup>24</sup>

Earlier on, however, “labor conspiracies” had indeed been prosecuted at common law – both in nineteenth-century America and in eighteenth- and nineteenth-century England – but that line of common law and its logic cannot straightforwardly be assimilated to a policy in favor of competition. English labor conspiracy cases at common law frequently revolved around the deviation of the wage demanded by a group of journeymen from the wage set by statute or custom – and certainly did not imply deviation from a hypothetical market-clearing wage.

<sup>22</sup> See Tankus and Herrine, Chapter 5 in this collection, for a discussion of this notion of a market settlement.

<sup>23</sup> Notably, the domestic jurisdiction farthest along in effectuating this vision, particularly where horizontal coordination among small players is concerned, is Australia. For an overview, see Tess Hardy & Shae McCrystal, *Bargaining in a Vacuum? An Examination of the Proposed Class Exemption for Collective Bargaining for Small Businesses*, 42 SYDNEY L. REV. 311 (2020).

<sup>24</sup> See generally TONY FREYER, *REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICAN 1880–1990* (1992). Australian competition law, meanwhile, originated first with the Australian Industries Preservation Act (1906), which expressly centered fair competition and the maintenance of fair wages, and was in part oriented toward cultivating the international competitiveness of Australian industry.

Indeed, the *absence* of such statutes was the basis of many American defense counsels’ arguments, in the courts of the early republic, that English labor conspiracy precedent did not apply. And in England, these statutes and the common law to which they gave rise had nothing to do with promoting competition or preventing coordination at all. Rather, they represented a particular form of public market coordination – one with deeply hierarchical and indeed feudal roots, to be sure, later interwoven with more democratic guild regulation – which the common law at times protected from other, newer forms of coordination.<sup>25</sup> Those new forms of coordination were of course the nascent journeymen’s and laborers’ organizations – as the guild system and customary price regulation both broke down, as geographical markets expanded, and as industrialization and the factory system were instituted.

Later on, these common law precedents were indeed effectively “uploaded” into the jurisprudence of the fledgling Sherman Act by American courts, and thus became a strand within modern competition policy. But that was a novel move at the time that it occurred, and was in no way necessitated either by the statute or by the common law tradition of restraint of trade (or monopoly).<sup>26</sup> Thus, in short, while the common law indeed casts a long shadow over the interaction between labor law and competition law, it is really the common law of *labor* regulation that casts that shadow (rather than any strand of common law clearly associated with modern competition law).

1.3 INTERNATIONAL ISSUES AND GEOPOLITICAL COVERAGE

The book is not primarily about international law nor about the global economic order, though both are implicated by the issues covered. In terms of geopolitical coverage, the reader will notice a definite skew toward the wealthier, Global North countries (and within that, to some extent toward common law jurisdictions, although Europe is strongly represented as well). This is not especially surprising when one considers that the majority of Global South countries adopted competition law regimes quite recently, beginning in the 1990s and continuing through the 2010s.<sup>27</sup>

As for Global North jurisdictions, to some extent the issues covered in this book present more strongly in the countries that some social scientists have called “liberal market economies” (United States, UK, Australia, Ireland, New Zealand) than in those dubbed “coordinated market economies” (Germany, Japan, the Nordics, and others).<sup>28</sup> The role of domestic competition law would indeed have to be partially constitutive of this distinction. Yet the enthusiastic adoption of competition law – flavored with a distinctively European social philosophy closely associated with neoclassical economic theory – at the European Union level in recent decades renders it quite relevant in a number of traditional CMEs as well. Indeed, a leading comparative scholar of competition law noted, in the early days of the European project, that “[t]his ordoliberal creation

<sup>25</sup> See generally KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1991); JOHN V. ORTH, *COMBINATION AND CONSPIRACY: A LEGAL HISTORY OF TRADE UNIONISM, 1721–1906* (1991).

<sup>26</sup> This argument is developed at greater length in separate forthcoming work.

<sup>27</sup> Dina Waked, *Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges*, 12 J.L. Econ. & Pol’y 193 (2016). Some Latin American countries (which also occupy unique positions within the trajectory of decolonization) are exceptions.

<sup>28</sup> PETER A. HALL AND DAVID SOSKICE, *VARIETIES OF CAPITALISM* (2001). We make reference to the distinction because it is useful to put the geographical focus of the book within a broader subject matter context. However, *all* these economies are ultimately internally “coordinated”; it is simply more likely in LME’s that this coordination is delegated to putatively private market actors – frequently dominant firms – rather than actively managed by state actors.



has evolved into the European concept of competition law, and without it the development of the European Community is unimaginable.”<sup>29</sup>

The post–World War II export of United States antitrust law to a number of other regions is another topic that naturally intersects with the issues raised in this book, but is not covered directly.<sup>30</sup> Latin American countries in particular are important to consider in their particular context, and that project is largely beyond the scope of this volume.<sup>31</sup> In some such countries, the influence of economic thinking that was also associated with the 1970s revolution in United States antitrust helped to undermine labor rights through other means, bypassing competition law as a significant vehicle.

As for the global economic order more broadly, the primary topic of this book touches a number of larger issues that the primary chapters do not directly cover. Erik Peinert’s chapter helpfully sketches out the ways in which antitrust law and trade law (and policy) relate to each other. In the first instance, the classical/neoclassical approach to trade fits neatly with the classical/neoclassical approach to domestic competition: just as domestic markets self-regulate through price signals, allocating social resources to their most efficient uses, trade between nations directs them to focus on their comparative advantage, making everyone better off. As Peinert notes, by “assuming near-perfect competition domestically, [classical] trade models eliminate the need to think about the interaction between trade and any other rules.”<sup>32</sup>

Obviously, as both Global South scholars and many scholars in the Global North have pointed out for a very long time, this view of global trade completely erases the overt coercion, frequently violent, through which the initial conditions of such “comparative advantage” were set by key now-wealthy countries. But the story does not end with differential initial conditions, created in part through coercion, violence, and conquest. Rather, the legal and political architecture of the global world order itself cemented a particular version of “comparative advantage” that often consigned populations in the Global South to the export of raw materials and agricultural products, while already-wealthy countries monopolized the production and export of value-added, manufactured goods. As Peinert points out, the current “fissured” business structure of many previously vertically integrated industries – partially enabled through the accommodation of antitrust or competition law – scrambled this pattern further so that manufacture too was offshored from wealthy countries, though in many and perhaps most cases, control centers in the Global North still capture much of the value from this economic activity.

Another issue that arises here, and intersects with antitrust questions, is the extent to which developing countries could practice “protectionism” and encourage their infant industries through direct state action of various kinds. These became contested questions in the context of international trade treaties. By the 1980s and 1990s, the treaty terms sought by wealthy countries, principally the United States, had advanced to include expansions of intellectual

<sup>29</sup> David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe*, 42 Am. J. Comp. L. 25 (1994) (tracing the roots of German ordoliberal thought – “ordoliberals believed that economic competition would provide the basis for the society they envisioned, but only where law could create and maintain the conditions under which competition could function properly” – and connecting it both to the birth of contemporary Europe and to modern European competition law).

<sup>30</sup> See generally WYATT WELLS, ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD (2002); Freyer, note 24.

<sup>31</sup> On the context of United States’ export (and sometimes, eventual re-import) of economic policy to Latin America more generally, see AMY C. OFFNER, SORTING OUT THE MIXED ECONOMY: THE RISE AND FALL OF WELFARE AND DEVELOPMENTAL STATES IN THE AMERICAS (2019). On the influence of Chicago School economics, so pivotal to remaking present-day antitrust law in the United States, on the economic policy of the military dictatorship of Augusto Pinochet in Chile in the 1970s following the violent overthrow of the democratically elected Salvador Allende, see JUAN GABRIEL VALDES, PINOCHET’S ECONOMISTS: THE CHICAGO SCHOOL OF ECONOMICS IN CHILE (1995).

<sup>32</sup> See Peinert, Chapter 6 in this collection.

property entitlements in order to cement their market power and suppress competition from the Global South.<sup>33</sup>

The development of competition law in Global South countries in this context then poses two contrasting potentials. On the one hand, if viewed as a kind of on/off switch in favor of competition between private actors, competition law may seem to present a binary alternative to national industrial policy. On this conception, domestic competition law might actually hamper development.<sup>34</sup> Indeed, this on/off approach to competition law, in which business firms are deemed the only legitimate site of economic coordination, is particularly dangerous to the public interest in Global South countries, where it is likely to lead to the de facto designation of dominant firms as market coordinators, just as happens in Global North countries – except now these market managers are often not even domestic firms.

On the other hand, if modeled on goals of fair competition, the results of competition law enforcement in Global South countries might be quite different. Think of competition regulators in a country like India imposing fair contracting terms on a platform like Amazon, in its dealings with Indian sellers. Indeed, a recent antitrust case by Indian vendors against Amazon seeks this type of redress.<sup>35</sup> If successful, such a case would reinforce the principle that sellers and producers in a given country are entitled to fair margins – margins at which they can reproduce themselves, pay their workers properly, and perhaps invest and innovate in new ways. Such antitrust enforcement could help to preserve more of the benefits of commerce generated domestically. Finally, as an alternative to both highly centralized “industrial policy” on the one hand, and to a policy that emphasizes private competition on the other, a competition law system that favors and encourages the stabilization of markets through cooperatives and other dispersed, democratic arrangements might offer many of the development benefits of centralized industrial policy while also serving antitrust aims of dispersal of power (including the dispersal of power and benefit beyond local elites).

1.4 CONCLUSION

A number of “threshold questions” may mediate the intersection between competition and labor law. First-order legal categories like employment (or “worker,” or “undertaking”), more foundational values embodied in constitutions or human rights frameworks, and concepts imported from economic theory are all candidates. While border questions will always arise in law and its administration, a reconsideration of the relationship between labor and competition law – not as opposing coordination to competition, but as together constructing markets characterized by norms of fair competition and by mechanisms of democratic coordination – may render the border between these two fields less fraught and more productive. Our hope for this volume is to contribute to further opening up a transnational discussion and collaboration in this vein.

<sup>33</sup> Ibid.  
<sup>34</sup> See, e.g., THOMAS K. CHENG, COMPETITION LAW IN DEVELOPING COUNTRIES (2020), at Chapter 6 (*Industrial Policy and Competition Law Enforcement*).  
<sup>35</sup> “A group of more than 2,000 online sellers has filed an antitrust case against Amazon in India, alleging the US company favours some retailers whose online discounts drive independent vendors out of business.” Aditya Kalra, *Amazon Faces New Antitrust Challenge from Indian Online Sellers*, REUTERS (August 26, 2020).