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Competition Law as Collective Bargaining Law

Nathan Tankus and Luke Herrine[1]

[T]oo often discourse about "the market" conveys the sense of something definite – a space or constitution of exchange . . . when in fact, sometimes unknown to the term's user, it is being employed as a metaphor of economic process, or an idealisation or abstraction from that process.

– E. P. Thompson[2]

5.1 INTRODUCTION

To those who study governance of the labor relationship, it is obvious that the relationship between business and labor must be governed, and that stability in this social relation is something valued by labor, business, and society writ large.[3] Strangely, the ideas that governance is necessary and price stability is good are both obscure interlopers to the study of competition law. To bridge the gap between these two areas of law – and incidentally give labor a greater role and stature in theorizing competition law – we aim to provide a general "market governance" framework for understanding how markets are governed in the context of the legal rules that allow and disallow certain forms of coordination. This framework draws from multiple heterodox traditions in political economy, but is particularly oriented toward building out the emerging framework of *Neochartalist microeconomics*.[4]

[1] We are tremendously grateful to Sanjukta Paul for the invitation to write this chapter and her editorial comments. For their comments on a draft, we are also indebted to Sandeep Vaheesan, William Boyd, Hannah Appel, and the participants at the Inframarginalism Conference, especially Adrian Kuenzler and Ramsi Woodcock.

[2] *Moral Economy Reviewed*, *in* CUSTOMS IN COMMON 273 (1991).

[3] Of course, stability when injustice and exploitation predominate is at best a mixed blessing for the exploited and marginalized. Yet, even here, we think it will be recognized that instability is really a "necessary evil" for accomplishing some other goal. A strike, even a revolution, is an episode of instability that instigators provoke with the hopes of creating and stabilizing a new workplace or social order in their own interest (or a wider social interest). Stability is desired by everyone; it just comes at too high of a cost for some in particular social circumstances.

[4] Neochartalism, or Modern Monetary Theory (MMT), began as a macroeconomic framework for understanding how legal institutions produce and reproduce money and monetary value, particularly the acceptance of monetary objects in payments of taxes and court-ordered obligations. In developing over the last twenty-five years, Neochartalism has become an interdisciplinary perspective for understanding and reinterpreting a variety of social phenomena. Some scholarship, particularly the path-breaking work of the late economist Fred Lee (whom we rely on in conceptualizing issues in this chapter) builds up a microeconomic framework that is uniquely consistent with – and reliant on – MMT insights. We hope others choose to follow Lee and us in making contributions to Neochartalist Microeconomics and expanding the reach of Neochartalism in a variety of subfields that remain dominated by mainstream microeconomics.

While it is beyond the scope of the current chapter to identify all the ways in which our current perspective accords with unique insights of Neochartalism, our focus on potential financial and market instability, money prices and money income as a focus of analysis rather than relative prices and "real variables" reflect our Neochartalist lens. Our

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Arriving at a theory of market governance requires rejecting economic common sense. Far too much economics scholarship – both among orthodox scholars and their critics – treats "perfect competition" as the analytical (and often normative) baseline for all markets, including labor markets. Under perfect competition, prices (including wages) are arrived at entirely via the uncoordinated matching of bids and asks, assumed to result in settled equilibriums represented by intersecting supply and demand curves. If all markets are perfectly competitive (and certain other conditions obtain), then each input and output has its proper price which sends "signals" throughout the economy and results in a perfectly "efficient" allocation of resources.

From this perspective, coordination, especially coordination over prices (again, including wages), appears as an unnatural intervention, a way for those acting collectively to collect "rents" above the "real" value of their contribution to society. If coordination is to be justified, it is usually to correct for some other deviation from perfect competition: workers might bargain collectively to capture some of a monopsonist's rents, for example. And, indeed, many of those trained in economics who advocate for collective bargaining or other worker-empowerment measures appeal to one or more "market failure."[5] In doing so, they reproduce the idea – intentionally or not – that if competition were finally left to do its work it would reveal the prices that reflect the allocation of goods and services that perfectly matches relative scarcity, that markets would work "better" if they were moved "closer" to (or to "resemble" or "approximate") the "competitive" ideal.[6] Collective bargaining is a distortion, but it is the best we can do in our distorted world.

But here's the rub: collective bargaining is *not* a distortion of a preexisting "labor market." More generally, coordination between market participants (over price or other matters) is not in itself a distortion of *any* market. There is not and has never been a market without coordination, including over prices.

Take one market often conceptualized as an example of perfect competition: commodities exchanges.[7] These are spaces in which prices are arrived at through the continuous matching of bids and asks by multiple buyers and sellers who are highly specialized and informed about the commodities being traded. But the mere fact that bidding and asking by

focus on the legal construction of markets also adds to Neochartalism's emphasis on the legal construction of a monetary production economy in general. Our focus on inherent and irreducible mediated social interdependence also accords with the scholarly perspective that Neochartalist humanities scholars bring to Neochartalism *e.g.* Scott Ferguson , Declarations of Dependence: Money, Aesthetics, and the Politics of Care (2018).

[5] *E.g.* Suresh Naidu, Eric A. Posner, & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536 (2018); Suresh Naidu & Eric A. Posner, Labor Monopsony and the Limits of the Law (Working Paper, June 19, 2020), http://tuvalu.santafe.edu/~snaidu/papers/limitsoflaw2.pdf; Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L. & Contemp. Probs. 45 (2019); *see also* Alan Manning, *Monoposony in Labor Markets: A Review*, 74 I.L.R. Rev. 3 (2021); Anna Sokolova & Todd Sorensen, *Monopsony in Labor Markets: A Meta-Analysis*, 74 I.LR. Rev. 37 (2021).

[6] Internal neoclassical critiques of these points such as Lipsey & Lancaster's "theory of second best" – R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 Rev. Econ. Stud. 11 (1956) – never seem to be quite internalized, at least not sufficiently to make people question the use of perfect competition as a normative benchmark. *See* John E. Davies & Frederic S. Lee, *A Post Keynesian Appraisal of the Contestability Criterion*, 11 J. Post Keynesian Econ. 3 (1988). Various theoretical developments over the twentieth century were created in mainstream economics to try to deal with the inevitability of interdependence but they have all failed to solve the core problem. When these theoretical developments edge into abandoning perfect competition as a normative benchmark (or their subfield's equivalent) the results are too indeterminate to be useful. Some try to fill the gap with history and law, but then they end up producing something closer to the perspective we've presented in this chapter. For excellent critical discussion see Donald J. Harris, *On the Classical Theory of Competition*, 12 Cambridge J. Econ. 139 (1988); Yannis Varoufakis, *Capitalism According to Evolutionary Game Theory: The Impossibility of a Sufficiently Evolutionary Theory of Change*, 72 Sci. & Soc. 1 (2008) Tae-Hee Jo, *What if There are No Conventional Price Mechanisms?*, 50 J. Econ. Issues 327 (2016).

[7] Marco Bertilorenzi, *From Cartels to Futures. The Aluminum Industry, the London Metal Exchange and European Competition Policies, 1960s–1980s*, 62 Bus. Hist. 782 (2020).

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informed buyers and sellers is a part of the set of procedures through which prices are set on these markets does not mean that prices on these markets are the emergent result of the intersection of supply and demand. In fact, supply and demand curves don't have anything to do with the impact that bids and asks have on any exchange. Among other things, prices usually have a strong relationship to the historical pattern of recent prices (i.e., to traders' perceptions of how others are pricing), a phenomenon that plays no role in supply or demand curves and precludes the formation of a settled equilibrium.[8]

To actually grasp how pricing works on these markets requires tracing how institutions structure the bidding, asking, and matching process. When trades happen "on exchange," they must all go through one firm: the exchange. We mean this quite literally: the exchange acts as a clearinghouse that buys from all sellers and sells to all buyers. It stabilizes the market by centralizing all counterparty risk and regularizing the process of negotiating, arriving at an agreement, and executing the exchange. Exchanges also set and enforce the rules of trading, and their position as counterparties to everybody makes fine-grained enforcement of these rules possible (including extensive surveillance of trades, setting up arbitral tribunals, etc.). These rules include times at which trading may and may not occur, the process through which trading may and may not happen, and the prohibition on all trading if prices are moving too rapidly (i.e. a "circuit breaker").[9] These are rules that would clearly be treated as anticompetitive if issued by any cartel or dominant firm, but they have not even been challenged since the early twentieth century.[10]

What is more, most exchanges on these markets go through a set of specialists who are neither producers nor users of these commodities.[11] *Brokers* don't take positions in the product themselves and have a fiduciary obligation to clients to provide the best prices, while *dealers* buy and sell "on their own account." Brokers are rarely told to buy or sell at "any price." Instead they submit something on their customer's behalf called a "limit order" – and more complex variations of the same idea – which directs the clearinghouse to make bids and asks only if a given commodity hits a specified price or price range. These "reservation prices" – among other social devices – lead to markets that never "clear" and are in fact designed to never "clear,"

[8] *See* Maureen O'Hara, Market Microstructure Theory (1995).

[9] *See generally* LME Clear Limited Rules and Procedures (March 1, 2021), *available at* www.lme.com/lme-clear/rules-and-regulations/; CME Rulebook, www.cmegroup.com/rulebook/CME/; *Leist* v. *Simplot*, 638 F.2d 283 (2d Cir. 1980) (describing the legal and institutional dynamics of commodities exchanges); Bernard Harcourt, The Illusion of Free Markets (2011); Philip Mirowski, *Markets Come to Bits: Evolution, Computation and Markomata in Economic Science*, 63 J. Econ. Org. & Behavior 209 (2007).

[10] The Supreme Court has ruled multiple times (in old cases that are still good law) that chartered exchanges are allowed to regulate the conduct of "on exchange" trading – including regulating whether and how participants may transact "off exchange." The landmark cases are *Anderson* v. *US*, 171 U.S. 604 (1898) and *Chicago Board of Trade* v. *US*, 246 U.S. 231 (1918).

[11] This is important because in textbook markets the equilibrium prices are determined by the preferences of consumers interfacing with the preferences of producers as expressed through demand and supply curves. Since real-world formal commodity exchanges are structured by exchanges, these market specialists and the social rules and practices that they engage with, these markets are very different from textbook supply and demand curve markets and can't be claimed to reflect the preferences of producers or consumers even if consumer demand for final output and producer's sales policies indirectly and loosely impact the prices determined on formal exchanges. This is a critical reason why markets where bids and asks have an important influence on prices can't be conflated with how orthodox economics textbooks explain market prices, even if both are superficially and inaccurately referred to as "supply and demand markets." This is even clearer in formal exchanges where financial assets are traded, such as a stock exchange. By definition bids can't reflect the preferences of "consumers" of goods and services and thus there would be no basis for constructing a demand curve. Frederic S. Lee, *The Oxford Challenge to Marshallian Supply and Demand: The History of the Oxford Economists' Research Group*, 33 Oxford Econ. Papers 339 (1981); P. W. S. Andrews & Elizabeth Brunner, *The Crisis in Micro-economic Theory*, *in* Studies in Pricing 1 (1975).

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that is, be emptied of offers to transact and leave all parties permanently satisfied.[12] Doing so, would, after all, cause the market to disappear as an ongoing social institution providing monetary income to both specialist participants and the exchange itself.

Market specialists, meanwhile, manage their "order flows" to *avoid* impacting the spot price of the item they are buying or selling. Spot prices in chartered commodities exchanges must be carefully managed because of their reverberating impact on price-setting processes in related and connected markets.[13] Averages of spot prices at a given time on a given day are often used as pricing benchmarks in longer-term contracts that happen "off exchange" or "off reporter."[14] They must be orderly enough to allow continuous production, investment, and sales to occur without the constant need for readjustment of terms.

Complicating matters further (and further burying the conflation of perfect competition with chartered exchange prices) large firms and significant market concentration are frequent among participants in these markets. Though cartels and concentrated firms that operate in industries with dominant chartered exchanges often don't have direct control over benchmark market prices, they can indirectly manage the benchmark price by regulating the flow of output available for sale on one or more chartered exchanges.[15] And, as Walter Mattli has shown with respect to securities markets (which have similar structures to commodities markets), when a small number of market makers in a chartered exchange gain enough power, they can actually shift the locus of price coordination away from the chartered exchange.[16]

In sum, a market type that was supposed to be something like perfect competition because of its manifold buyers and sellers finding each other at mutually agreeable prices is more accurately described as social space in which the state has, through antitrust law, legitimized market governance by chartered exchanges oriented towards financial institutions while imposing limited public standards on these chartered exchanges through commodities market regulation.

[12] Scholars of orthodox finance would likely object to this characterization as these market details are well known and studied. In this respect orthodox finance theory is much closer to the ideas laid out here than textbook economics, though is still missing a "social construction" revolution. William M. Taylor & Edward E. Williams, *Market Microstructure and Post Keynesian Theory*, 14 J. of Post Keynesian Econ. 233 (1991); Mirowski (n. 9). Our only observation is that this "market microstructure" literature has never, to our knowledge, been reconciled with the logical core of "preference-driven" supply and demand curves. Thus its more realistic features can't be used to defend perfect competition as a normative benchmark. In fact, foundational texts on market microstructure motivate the study of market microstructure by pointing to the inherent failures and incoherent assumptions of both the Marshallian and Walrasian (lack of) approach to market microstructure which implausibly deny that market microstructure are a determinative factor in what prices are set and provide no insight into the dynamics of actual trading processes. *See* O'Hara (n. 8). *See also* Dave Elder-Vass, *No Price without Value: Towards a Theory of Value and Price*, 43 Cambridge J. Econ. 1485 (2019).

[13] *See* William Boyd, *Ways of Price Making and the Challenge of Market Governance in US Energy Law*, 105 Minn. L. Rev. 739 (2020).

[14] *Cf.* Random Lengths, Lumber Methodology Guide 3 (September 2020), *available at* www.randomlengths.com/Methodology/ ("During the price discovery process, the price reporter's goal is to discover at what representative level market participants have concluded business, made offers or received bids over a certain defined trading period. A price reported by Random Lengths is a benchmark, or indicator, of the trading level of an item at the time of publication. Prices reported are judgments of market prices just prior to publication of the weekly report."); Mark R. Manfredo & Dwight R. Sanders, *Price Discovery in a Private Cash Forward Market for Lumber*, 14 J. Forest Econ. 73 (2008).

[15] Of course, legal cartels have the much more obvious and powerful tool of announcing their price range targets and production cuts, which immediately impact market trading. This is, for example, how OPEC has operated for the last thirty years. Bassam Fattouh, Oxford Institute for Energy Studies, OPEC Pricing Power: The Need for a New Perspective (2007).

[16] Walter Mattli, Darkness by Design (2019).

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One could perform this type of reinterpretation of any market. Some – those for the radio spectrum, for expensive art, for contracts for government work – force all potential buyers to bid at a public auction.[17] Others – those for cocoa, for diamonds, for grain and feed – arrive at prices via bargaining between a relatively small universe of buyers and sellers who use standard contracts drafted by a trade organization of which most are members that also settles disputes between parties.[18] It turns out that the abstracting work of "the market" has obscured the instituted reality of actually existing markets, and specifically the fact that "market" can refer to quite different forms of institutionalization of buyer-seller interaction. The wide variety of possible forms of market organization that make up actually existing markets create different social spaces which require different social practices to function. These and other markets are governed – *always* governed – by some social process to regularize the process of price-setting (among other things).

An accurate conception of how market governance works should thematize this reality rather than treating it as an enumerated list of deviations from an unattainable ideal. Focusing on price-setting in particular, we should reject perfect competition as either an analytic or normative baseline and acknowledge that prices are not contingently but necessarily the subject of coordination. Our analysis thus begins from the premise that stable price formation is impossible without some form of coordination between market participants to regularize the process. Competition and coordination always coexist because competition – in markets and elsewhere – is an inherently social phenomenon embedded in a process by which individuals form collectivities to arrive at the rules by which they will manage their inherent interdependence. There is no ideal form of competition; there are only different ways of managing it. And the legal system structures how it is managed by legitimating some forms of coordination while cracking down on others.[19]

5.2 THEORETICAL GROUNDWORK

5.2.1 *The Necessity of Social Coordination in Markets*

To focus on market governance is to begin from the premise that the process of price formation always and everywhere requires social coordination.[20] As anthropologists have demonstrated, extensive social coordination is necessary even to bring two parties together for a simple exchange, especially if that exchange involves any delay in performance. Exchanges require at least a basic level of trust between parties, enough of a shared set of social practices to be able to interpret the meaning of an exchange partner's actions and to anticipate her likely responses to one's own, a basic form of communication, and the like. People from the same community

[17] *Cf.* Edward Nik-Khan, A *Tale of Two Auctions*, 4 J. INST. ECON. 73 (2008).

[18] *Cf. Transmar Commodity Group, Ltd.* v. *Cooperativa Agraria Industrial Naranjillo Ltda.*, 721 F. App'x 88 (2018) (cocoa); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (diamonds); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Law's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) (grain and feed). *See also* Stewart Macaulay, *Non-Contractual Relations and Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (classic study of business norms in auto supply industry); David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999) (resituating the relevance of Bernstein's work in a less law-and-economics framework).

[19] As will become clear, we are here quite directly drawing from the work of Sanjukta Paul. Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 U.C.L.A. L. REV. 378 (2020).

[20] *See generally* DAVID S. GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION (2008); Christine A. Desan, *Money As a Legal Institution*, *in* MONEY IN THE WESTERN LEGAL TRADITION (David Fox & Wolfgang Ernst. eds., 2015).

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(tribe, ethnic group, etc.) can exchange based on a preexisting and thick set of shared norms and conventions, but exchange across communities (or among enemies) generally requires various intentional acts of trust-building and elaborate commitment devices to create makeshift solidarity. The social coordination that makes exchanges – and transactions more generally – possible also shapes how they proceed – the terms it is appropriate to offer, the time and place it is appropriate to commence and settle the transaction, whether a transaction is appropriately repeated, etc. Thus even seemingly simple transactions look quite different depending on the form of social coordination in which they are embedded.[21]

Much more extensive coordination is required for repeat transactions, and still more extensive coordination for a complex production and distribution process. Businesses that cannot effectively anticipate likely demand for their products, costs for their supplies, the likelihood that their behavior will be sanctioned, or other factors affecting their future inward and outward flows of money will plan ineffectively, producing too much or too little to pay their creditors (i.e. employees, investors, suppliers, customers who paid in advance, etc.). In such an environment, competition becomes ruthless and ruinous. Making long-term investments becomes foolish. Such instability is especially harmful to firms with high overhead costs (and without open-ended access to financing) whose average total costs rise the most for every decline in sales. However, firms and industries with various levels of overhead costs have suffered destabilizing losses from disorderly markets.[22]

All economic action requires the social construction of social stability in order for participants to be able to rely on others' actions, to plan around them, to invest time and resources into a given course of action, and thus to act effectively as a market participant. The mechanics of market governance are less evident when markets work well, because the instability they guard against exists only *in potentia*. Yet ignoring governance during stable times would be – and has been – a mistake. As economist Hyman Minsky has pointed out, in economic systems in which going concerns compete for monetary incomes, stability is destabilizing.[23] Without institutions to prevent it, long periods of tranquility encourage social actors to act as if instability is impossible. This increasing disregard for the social practices that generate stability can rapidly lead to the instability that was declared impossible. So markets must develop and maintain – they must *reproduce* – institutions to manage quotidian threats to stability. As the heterodox economist Fred Lee has pointed out, "[t]he most important form of potential instability in a market is price competition[,] and a major objective of the enterprises in markets is to produce a form of competition that will produce a stable market."[24] If competition leads firms to cut prices below

[21] *See* David Graeber, Debt: The First 5,000 Years 21–43, 127–64 (2011); David Graeber, *Fetishes as Social Creativity: or, Fetishes are Gods in the Process of Construction*, 5 Anthro. Theory 407 (2005); Stephen Gudeman, The Anthropology of Economy 80–144 (2001).

[22] Although not usually understood as a sophisticated economic theorist, Louis Brandeis realized that this cyclical dynamic was important in market competition, and made protecting against it the basis for his understanding of democratic market governance. *See* Gerald Berk, *Neither Markets nor Administration: Brandeis and the Antitrust Reforms of 1914*, 8 Stud. Am. Pol. Dev. 24 (1994). The idea of a firm as a "going concern" that must match time-sensitive flows of income is introduced into economics by Thorstein Veblen. *See* Thorstein Veblen, The Theory of Business Enterprise (1904). He borrowed it from accountants, who created it as a way to conceptualize the need for social and monetary reproduction into the most basic accounting standards. After Veblen, it has played an important role in the development of heterodox microeconomics, primarily through the work of American institutionalists, some of whom blended it with post-Keynesian theory. *See* Tae-Hee Jo, *The Institutionalist Theory of the Business Enterprise: Past, Present, and Future*, 53 J. Econ. Issues 597 (2019); Jamee Moudud, *The Constitutional Theory of the Business Enterprise: Toward a Monetary Theory of Production*, LPE Blog (February 20, 2020).

[23] Hyman Minsky, Stabilizing an Unstable Economy (1986).

[24] Frederic S. Lee, Microeconomic Theory: A Heterodox Approach 154 (Tae-Hee Jo ed., 2017).

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the level at which they can reproduce themselves as going concerns, that competition is destructive. It leads to the sort of market instability that can precipitate mass business failures.[25]

It is in their mutual interest, then, for businesses to develop mechanisms to manage the process of competition over prices by channeling price formation through one or another regularizing process. In relatively small markets – or in markets where control is highly concentrated – social networks, trust, common culture, and a sense of common purpose may be enough institutional infrastructure to facilitate stable processes of price formation. When social networks are more diffuse and the processes to manage more complex, more complex and formalized institutions are necessary to supplement informal norms and taken-for-granted rituals into which participants in a given market are socialized.

It is useful, then, to follow economic sociologists like Neil Fligstein and treat markets as a social field in which the terms of stability are the subject of punctuated contestation.[26] Rather than thinking about the pattern of prices (and other terms) in markets in terms of *equilibria* that emerge out of the coincidence of wants severally pursued, then, a market governance approach thinks in terms of how social relationships of cooperation, domination, negotiation, imitation, and the like produce *settlements*. As with any social field, the structure of a settlement will generally reflect the balance of power over the coordinating mechanisms in a field. It will, then, tend to favor the interests of the most powerful actors within that market – actors to whom Fligstein sometimes refers as "incumbents." By contrast, "challengers" in a given market are those who are relatively disadvantaged by the current settlement governing a market and who are more grudging in their reproduction thereof. In normal times, challengers will go along to get along – they benefit from stability, even if it is a stability that relatively disadvantages them – but they can be mobilized to disrupt the reproduction of the status quo in the right circumstances.[27] This disruption creates a scramble in which actors in the field compete and cooperate to determine the new terms of the settlement that will govern the field. This settlement then lasts as long as it can be successfully managed. And so on.

5.2.2 *Coordination Rights*

What role does a legal system play in structuring social coordination in markets? Sanjukta Paul introduced the concept of "coordination rights" as a way to think functionally about how legal systems construct, allocate, and condition the authority to make decisions about various parts of the social provisioning process.[28] Coordination rights are legal permissions which grant an

[25] It is important to emphasize that the balance sheets and money incomes of firms matter to the functioning of markets, employment levels, and the degree of business investment. Mass bankruptcies reduce business investment by the bankrupt and can have spillover effects on weakened competitors and adjacent markets. These issues are neglected in conventional approaches to market analysis, because they neglect financial and nominal variables and focus on ephemeral "optimal equilibriums." Nominal price instability (and declines) tend to reduce investment for the obvious reason that nominal profit flows are the net income from which investment is primarily funded. Market governance forms which breakdown into significant periods of instability because of large declines in demand exacerbate overall business cycle instability. Conversely, it is possible that market governance forms which generate quota systems regularize capacity-creating investment and thus limit the possibility of breakdown in recessions or depressions. These sorts of issues should be the subject of further future research.

[26] Economic sociology is a large and growing field with diverse theoretical perspectives. *See generally* The Handbook of Economic Sociology (Neil Smelser & Richard Swedberg eds., 2d ed.). Our approach is particularly influenced by Neil Fligstein's "political-cultural approach," an approach that also influenced Fred Lee, our main heterodox economics influence. *See* Neil Fligstein, The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies (2001); Neil Fligstein & Doug McAdam, A Theory of Fields (2012).

[27] Fligstein & McAdam (n. 26) at 14.

[28] Paul, *Antitrust as Allocator* (n. 19).

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individual or a group of individuals some degree of authority to direct some element of the production and distribution process.[29] A legal regime can grant coordination rights *expressly* by authorizing some form of coordination through charter, registration or license, or *implicitly* by declining to prohibit a specific form of coordination.[30] Coordination rights can govern basic decisions about the quality of goods or services, the quantity of output, the physical organization of production, the distribution system, the marketing process, or the terms on which labor is provided. They also relate to our focus here: the ability to set prices.

As Paul points out, the pattern of coordination rights at any given place and time can only be discerned by exploring how the various areas of law governing a given area of provisioning interact. Competition law always interacts with property law, labor law, corporate (company) law, contract law, et al. to produce the pattern of authority to make a given type of decision. Nevertheless, competition law plays an especially important role in most complex modern legal regimes. That is because it functions as a sort of appellate body of coordination law: it explicitly considers the emergent patterns of coordination rights *qua* coordination and determines whether they are working well according to the set of values that has been coded into the competition law regime.[31]

Paul calls the allocation of coordination rights competition law's "core function."[32] In performing this function, competition law "makes private decisions to engage in coordination subject to public approval."[33] Focusing just on the price-setting process: competition law determines which social processes of coordinating/stabilizing prices are lawful and which are subject to sanction. Competition law does so independently of how other parts of the legal system facilitate price coordination. It determines whether and under what conditions price coordination (even price fixing) can take place among competitors in different firms, whether via cartels, guilds, trade associations, price posting, or winks and nudges. It determines whether and under what conditions price coordination can be concentrated in a single firm. It also determines whether and to what degree property rights provide authority over pricing and, relatedly, whether and to what degree organized workers or consumers with no property interests can engage in collective action to influence pricing. In a sense, it serves as an independent reviewer of the social coordination that takes place in putatively private commerce: other parts of the legal system make the first go at constructing the price-setting process, and competition law reviews the results based on its own concerns.

Importantly, there is no inherent or natural connection between coordination rights over the price-setting process and property rights over the output whose price is being set or in the capital equipment or plant or the intellectual property used to produce the output. Nor is there any necessary connection between coordination rights and legal incorporation – that is, "the firm." One of the most powerful insights of Paul's work is that coordination rights can and have cut across other legal forms. They are "shaped by numerous areas of law – from property to corporate to labor law to antitrust [i.e. competition law], among others."[34] These areas of law

[29] The term "production and distribution process" is meant in a broad sense. It includes the monetary system, the investment process, marketing and advertising, training, etc.

[30] Of course, all coordination rights are technically explicitly authorized when they operate on the basis of property title. So to be more precise, by implicitly granted coordination rights we mean those uses of property, or combinations of property, which are not expressly authorized in property title and could in principle be limited by some other area of law, e.g., competition law.

[31] Paul, *Antitrust as Allocator* (n. 19) at 380–82.

[32] *Id.*, at 382.

[33] *Id.*

[34] *Id.*, at 380.

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interact to create the space in which economic actors can coordinate without running afoul of the legal system. In other words, what Paul's work shows us is that allocating coordination rights by property ownership is an allocational *choice* made by a legal system, a choice that different legal systems (including the same system during different historical periods) have made differently.

When competition lawyers and political economists view coordination within a firm as qualitatively – and normatively – different from coordination across firm boundaries, they reify and naturalize the boundaries of the firm. Paul refers to this reification as the "firm exemption."[35] Whereas the "labor exemption" was explicitly written into US competition law to (attempt to) prevent courts from wielding it as a weapon against labor organizing, the "firm exemption" is not an explicitly recognized legal doctrine. It is a concept Paul developed to highlight the way US competition law implicitly enables forms of economic coordination to take place within the legal boundaries of a firm (especially a corporation) that are denied to actors who are coordinating across such legal boundaries. In doing so, competition law fails to grapple with its own role in naturalizing price-setting within firms.

For our current purposes, what is most important about the firm exemption is that it grants firms the ability to set prices on the output they own that would be denied to actors who collectively owned the same quantity of output but who coordinated price-setting across formal legal boundaries (via a cooperative, cartel, ad hoc boycott, etc.).[36] Because it treats intra-firm price coordination as different from inter-firm coordination, it privileges forms of market governance that rely on concentrated power in one or a few firms. Because it does so implicitly rather than explicitly, it treats these forms of market governance as not *really* governance or as a "natural" form of governance.

Paul has suggested that once we move beyond the firm exemption we can begin to classify coordination more functionally. She divides coordination into three types: (1) (usually vertical) coordination that happens within firm boundaries, (2) horizontal coordination across firm boundaries (i.e. coordination "between competitor firms in the same market"), and (3) vertical coordination across firm boundaries (i.e. between firms in upstream/downstream markets, crucially including workers that provide labor for a firm without being legally classified as "employees").[37] She argues further that, at least in the United States, competition law during the neoliberal era has tended to favor vertical forms of coordination, being most deferential to intra-firm coordination (loosening monopolization laws), only slightly less deferential to vertical inter-firm coordination (facilitating the rise of franchises and fissured workplaces), and downright hostile to horizontal inter-firm coordination (pursuing cartels, even among small businesses, as the "supreme evil of antitrust"). The result has been increased consolidation of control over the social provisioning process among a relatively small group of decision-makers, usually justified by obfuscatory appeals to "efficiency."[38]

5.2.3 *Market Governance and Price-Setting Processes*

Paul's work helps us denaturalize "the firm" which is key to making clear the nature of the normative project of choosing which forms of market governance are desirable. By

[35] *Id.*, at 401.
[36] One can replace "output they own" with "intellectual property they own" or "services they control" and the sentence retains its meaning and significance.
[37] Paul, *Antitrust as Allocator* (n. 19) at 383.
[38] *Id.*, at 419–25.

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acknowledging that firms are defined by their legal boundaries and that their administrative and social boundaries follow the nature and form of their legal boundaries, we are able to see that the way a legal regime chooses to allocate coordination rights defines the very categories it works with. These legal categories also shape the way participants in a market institutionalize their price coordination.[39]

In the introduction we discussed the way this works in commodities exchanges.[40] The state licenses private companies (the exchanges) to supervise price-setting in part by acting as an intermediary to all transactions. Brokers and dealers, often coordinating with the exchanges, regularize the process of matching bids to asks in order to maintain a smooth price trajectory based on longstanding norms that supplement formal rules. Thus, the rules that govern how prices are formed and managed are not determined, or even directly influenced, by the producers, wholesalers, retailers, or consumers in the market. Instead, they are established and enforced by notionally neutral parties who, if they profit at all, profit without taking positions in the markets in question. In coordination rights terms, these market structures allocate coordination rights to specialized firms and financial institutions that are ill-equipped to engage in physical market transactions[41] but are highly specialized at trading abstract claims to standardized physical products.

More generally, the process of market governance – of price stabilization – is built on top of the pattern of coordination rights that the legal system legitimates. Note that it is not necessary for market governance institutions and practices to set the transaction price for each and every market transaction. All market governance needs to do is establish a range of prices that market transaction prices rarely breach such that the existence of competitors doesn't eliminate the net cash flows most firms need to continue existing as going concerns.[42] In other words market governance organizations establish *benchmark* market prices that transaction prices, for the most part, follow.[43] That said, the more transaction prices deviate from benchmark market prices, the more likely market governance will break down.[44] In such circumstances market governance organizations and practices will either be reformed or destroyed and a new market governance system to benchmark prices will emerge.

In markets more directly relevant to the nexus of competition and labor law – and the markets that will form the primary focus of the rest of this chapter – it is producers, wholesalers, and/or retailers who deal directly in produced goods and services that manage the process of price-setting. They do so through what the institutionalist economist Gardiner Means referred to as

[39] For important work along these lines, see Herbert Simon, Administrative Behavior: A Study of Decision-Making Processes in Administrative Organizations (4th ed. 1997); Erik Nelson Dean, Toward a Heterodox Theory of the Business Enterprise: The Going Concern Model and the US Computer Industry (Dissertation, 2013), *available at* https://mospace.umsystem.edu/xmlui/handle/10355/40278; Erik Dean, *The Going Enterprise Paradox: Stability and Instability Under Money Manager Capitalism*, 52 J. Econ. Issues 1084 (2018); Brian Callaci, *Control Without Responsibility: The Legal Creations of Franchising, 1960-1980*, 22 Enterprise & Soc. 156 (2021).

[40] *Above* notes 7–16 and accompanying text.

[41] *Cf.* Tracy Alloway, *That Time I Tried to Buy an Actual Barrel of Crude Oil*, Bloomberg (November 3, 2015), www.bloomberg.com/news/articles/2015-11-03/that-time-i-tried-to-buy-some-crude-oil.

[42] See n. 22 (discussing going concerns).

[43] The point, of course, is not that benchmark prices totally constrain market participants' actions. Rather, they create a focal point that allows orderly pricing to proceed. This focal point still serves its function if a few defectors fail to follow it, but it fails to do so once these defectors grow too numerous. We are intentionally imprecise, since we are not aware of any basis on which to posit strict thresholds. This is a common feature of any social convention.

[44] Gyun Cheol Gu, Denial, Rationalization, and the Administered Price Thesis (MRPA Paper 42594, 2012), https://mpra.ub.uni-muenchen.de/42594/1/MPRA_paper_42594.pdf; Kai Hüschelrath & Tobias Veith, *Cartelization, Cartel Breakdown, and Price Behavior: Evidence from the German Cement Industry*, 16 J. of Industry, Competition and Trade 81 (2016).

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"administered pricing." Once firms are allocated the legal right to set prices on output they own, managers of those firms build administrative structures to set those prices.[45] There is a voluminous literature on this topic but for our purposes what is important is they have some set of procedures to determine their "normal" or "budgeted" costs, that is, those regularly recurring and predictable monetary expenses which they must consistently "recover."[46] The firm then averages those costs by the output of their "normal" or "budgeted" output[47] and then attaches a "normal" or "budgeted" profit markup to that in order to establish a price. This "administered price"[48] is then quoted to the public and becomes a part of the variety of similar products available for purchase. These "administered" prices are held for a period of time and a series of transactions, thus making them indifferent to the daily and weekly vicissitudes of buyer interest.

Those who research administered pricing have largely taken for granted that administered pricing takes place within a *firm*.[49] In so doing, these researchers have unthinkingly internalized the firm exemption. Nothing about the concept of administered pricing requires price governance to take place within the boundaries of a legally incorporated entity. It merely requires some institutional infrastructure that allows a collectivity of producers and/or sellers to set and enforce pricing rules. The fact that administered pricing often takes place within the boundaries of a firm is a contingent result of the relatively recent concentration of coordination rights within those boundaries. The administrative procedures that these entities have established to engage in sequential and recurring production, costing, pricing, and sales are built on top of a legal regime that has pushed authority to control production, set prices, enter into and settle contracts, etc. within firms.

But even within the modern firm-centric regime, market governance is an inherently *inter-firm* process outside extreme cases in which one firm controls all market output (i.e. pure monopoly). Even markets with highly dominant firms (which are often referred to loosely as "monopolists" even if they do not control all output) require inter-firm coordination of some sort to maintain the prevailing pattern of pricing. Thus while the firm exemption is a critical part of understanding modern market governance, it cannot by itself fully explain governance of modern markets outside of this special case.

That brings us back to Paul's framework. If modern markets are defined by the firm exemption, which has at its essence that explicit *horizontal* coordination across legal

[45] Of course, that administrative procedure could be as simple as basing one's price on the latest closing price of a formal exchange market. For the purposes of the above discussion, we are describing the vast majority of firms which have some discretion in setting prices, however limited.

[46] Importantly, expenses are only partially made up of expenditures on output during the costing period. They are also the partial recognition of previous expenditures as costs i.e. depreciation. Depreciation is most important when it comes to long lived machinery which may take years to fully recognize as costs. Building administrative procedures that produce regularized cost data is also important for firms whose benchmark prices are produced by chartered exchanges or auctions because it allows them to determine and predict their income even if they do not control selling prices.

[47] The concept of a "normal" or "budgeted" variable embeds forward-looking expectations into the administrative procedures of a firm. No specific individual in the firm may hold these "expectations" for the future, but "the firm" is basing its decisions on these expectations. This is important because the fact that prices are based on slow-moving and infrequently changed "expectations" for costs explains their stability and clearly distinguishes heterodox price theory from neoclassical price theory which is based on prices related to "actual" costs and should fluctuate frequently if "marginal" costs fluctuate.

[48] Frederic S. Lee, Post Keynesian Price Theory (1998).

[49] Frederic S. Lee & Paul Downward, *Retesting Gardiner Means's Evidence on Administered Prices*, 33 J. Econ. Issues 861 (1999). A notable example of heterodox economics scholarship that does not do this is Erik Dean, *Inter-and Intra-firm Governance in Heterodox Microeconomics: The Case of the US Software Industry*, *in* Advancing the Frontiers of Heterodox Economics 201–17 (2015). P. W. S. Andrews and Elizabeth Brunner are early heterodox economic theorists who don't neglect intra-firm governance as a form of what we now call "market governance." P. W. S. Andrews & Elizabeth Brunner, *Business Profits and the Quiet Life*, J. Industrial Econ. 72 (1962).

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boundaries is barred, how are markets nonetheless regularly *horizontally* governed?[50] Our answer will be that horizontal coordination which occurs *implicitly* – or at least prima facie *appears to be* occurring implicitly – is authorized by competition law. However, before we examine this point in detail we must step back and sketch a schematic history of the forms of market governance that immediately preceded it.

5.3 HISTORY AS PROLOGUE

5.3.1 *Market Governance and Moral Economy*

To grasp the nature and importance of today's market governance institutions, it is important to situate ourselves in the history of how markets were governed before multinational corporations came to dominate them at every level. Doing so requires appreciating the role of *convention*. In fast-paced and fluid contemporary societies where convention is often viewed as a negative inheritance of the past, it is easy to write off convention as inherently unstable or irrational.[51] But to do so would be a mistake.[52]

In time periods where most commerce happened between individuals representing themselves or other specific individuals, personal reputation predominated over all other possible social markers of legitimacy.[53] In the context of societies where occupation was mostly inherited and social mobility was extremely low, reputation was a valuable intergenerational resource. In other words, one's personal reputation was not simply made up of one's own actions and was also not something to be disposed of lightly. "Goodwill" was not merely an accounting convention. As a result, the networks of traders which guided commerce along local, regional, national, and sometimes even international lines were largely made up of a complex web of long standing personal and familial relationships. Sometimes peers monitored peers, other times the legal system was used to monitor other traders or enforce agreements after the fact.[54] Regardless, tradition and convention remained a powerful starting point in any new negotiations.

In these circumstances, prices were often set to specific values simply because they were "always" set that way.[55] In English language scholarship this notion is often associated with

[50] Of course, as posited it is relevant that markets can simply be *vertically* governed as vertical coordination is not restricted in the way that horizontal coordination is restricted. *See infra* Section 5.7.3 for a discussion of vertical market governance. Nonetheless, the fact that there are quite a large number of firms that set prices on their own output rather than having prices dictated by purchasers is evidence that horizontal market governance is still an ongoing and important fact.

[51] *But see* Joan Robinson, *Some Reflections on the Philosophy of Prices*, 26 THE MANCHESTER SCHOOL 116 (1958).

[52] An exhaustive list of all the varying ways markets were governed before the modern era is clearly well beyond the scope of this chapter. Instead, we seek to emphasize important forms of market governance that we think seem especially alien to modern eyes but are nonetheless very important to grasp as we move to the market governance institutions that exist now. As a result, the most glaring omission from what we say below is some important aspects of how international markets were governed. Of particular interest is how moral economy notions of fairness and fair dealing were (or were not) reconciled with slave trading in earlier centuries and racialized chattel slavery from the seventeenth to nineteenth centuries. Calvin Schermerhorn, *Slave Trading in a Republic of Credit: Financial Architecture of the US Slave Market*, 1815–1840, 36 SLAVERY & ABOLITION 586 (2015). Sean Kelley, *Scrambling for Slaves: Captive Sales in Colonial South Carolina*, 34 SLAVERY & ABOLITION 1 (2013); HANNAH BARKER, THAT MOST PRECIOUS MERCHANDISE: THE MEDITERRANEAN TRADE IN BLACK SEA SLAVES, 1260–1500, 92–120 (2019).

[53] ROWENA OLEGARIO, A CULTURE OF CREDIT: EMBEDDING TRUST AND TRANSPARENCY IN AMERICAN BUSINESS (2006).

[54] Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153 (2012); Emily Kadens, *The Medieval Law Merchant: The Tyranny of a Construct*, 7 J. LEGAL ANAL. 251 (2015).

[55] James Davis, *Baking for the Common Good: A Reassessment of the Assize of Bread in Medieval England*, 57 ECON. HIST. REV. 465 (2004); Gwen Seabourne, *Assize Matters: Regulation of the Price of Bread in Medieval London*, 27 J.L. HIST. 29 (2006); Bert De Munck, *Guilds, Product Quality, and Intrinsic value. Towards a History of Conventions?*, 36 HIST. SOC.

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the idea of a "moral economy," but similar patterns of governance appear in many cultures.[56] What matters for our purposes is that social actors have a deeply internalized and shared sense of what prices (or profit markups) for a specific product "should be." In this framework, an inherited conventional price can only be modified by some counteracting circumstance that modifies or challenges the fairness of the inherited conventional price. In the terms that we used above, a transaction price may be produced by two social actors who see each other as honorable individuals using their judgment to find a "fair" (or "just") transaction price based on multiple benchmark prices or a single benchmark price modified by particular circumstance to produce a transaction price.[57] Even here though, some other factor was often adjusted – such as the quality of the product – in order to align the transaction price with the benchmark price.

The process of conventional market governance was reinforced primarily by social networks between competitors, which were either implicitly or explicitly recognized as legitimate forms of coordination. Competitors would often socialize with each other, especially when they were geographically adjacent to each other, and they didn't just talk about the weather.[58] Depending on time and place, these networks of sellers were sometimes formalized into organizational forms such as guilds, with formal recognition by the local legal system, not to mention central roles in administration of city governments, religious institutions, and other aspects of community life.[59] When organized into guilds, these networks developed explicit rules both to govern conduct between each other (i.e. between competitors) and to govern conduct between traders and customers (i.e. something like "consumer protection"). That guilds formed rules does not mean that they acted as one mind – they neither treated each other equally (powerful traders could tilt norms to their favor) nor simply set arbitrarily high prices to gouge their customers. Even if they came to explicit agreements over prices, these explicit agreements would be guided by the notions of fair prices and the benchmark conventions that guided their interactions with customers. It is easy for those of us accustomed to thinking of traders as entirely self-interested to be cynical towards these notions of fair dealing but it is important to grasp that notions of reciprocity, duty, and solidarity – even if they were tilted to favor incumbent groups – did actually order traders' thinking.[60]

Research 103 (2011); Louis Cellauro, *Architecture and Money: Palladio's Earnings and Social Status*, 34 Explorations in Renaissance Culture 124 (2008).

[56] *See* E. P. Thompson, The Making of the English Working Class 63–76, 203 (1963); E. P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 Past & Present 76 (1971); E. P. Thompson, *Moral Economy Reviewed*, *in* Customs in Common (1991); Rosamund Faith, The Moral Economy of the Countryside (2020); Laurence Fontaine, The Moral Economy (2014); James C. Scott, The Moral Economy of the Peasant (1977); Stephen Gudeman, Anthropology and Economy (2016); James Gordley, *Equality in Exchange*, 69 Cal. L. Rev. 1587 (1981).

[57] On the various interpretations of "just price" (i.e. *justum pretium*), see William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 Yale J. Reg. 721 (2018). Late in the drafting of this chapter, we discovered that our framework here shares many commonalities with Elder-Vass (n. 12) and his argument for the importance of "lay theories of value." *See also* Erin Metz McDonnell, Dustin S. Stoltz, & Marshall A. Taylor, *Multiple Market Moralities: Identifying Distinct Patterns of How Consumers Evaluate the Fairness of Price Changes*, 18 Soc. Econ. Rev. __ (forthcoming).

[58] Maurice H Robinson, *The Gary Dinner System: An Experiment in Cooperative Price Stabilization*, 7 Sw. Pol. & Soc. Sci. Q. 137 (1926); Mark R. Wilson, *Gentlemanly Price-fixing and its Limits: Collusion and Competition in the US Explosives Industry During the Civil War Era*, 77 Bus. Hist. Rev. 207 (2003); Andrew J. B. Fagal, *The Mills of Liberty: Foreign Capital, Government Contracts, and the Establishment of DuPont*, 1790–1820, 19 Enterprise & Soc. 309 (2018); Louis Galambos, Competition and Cooperation: The Emergence of a National Trade Association (1966).

[59] *See generally* Gary Richardson, *Medieval Guilds*, EH.net, https://eh.net/encyclopedia/medieval-guilds/ (last visited May 13, 2012).

[60] *See* Gary Richardson, *Guilds, Laws, and Markets for Manufactured Merchandise in Late-Medieval England*, 41 Explorations in Econ. Hist. 1 (2004); S.R. Epstein, *Craft Guilds in the Pre-Modern Economy: A Discussion*, 61 Econ. Hist. Rev. 155 (2008).

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Enforcement of conventions was reinforced by the fact that, at least for the most important commodities, nearly all trade within a given community was required to take place in a specific physical location: a "market" in its original sense. These geographically concrete markets were often chartered – that is, granted coordination rights by the state with control over the geographic area – to govern market transactions in specific places.[61] Most of our cities today bear the clear imprint of this form of market governance: big open town squares at the center (or at the original center) of a city are found all over the world. For wholesale regional or inter-regional trade (in which promissory notes, currencies, and other financial instruments were also traded) fairs, chartered exchanges, and bourses emerged.[62]

Prices that emerged from sales in these open spaces with many watchful eyes, including those of fellow-merchants concerned with upholding their collective honor and those of formal inspections of quality, were understood as presumptively fair. But courts (or proto-courts) were often also empowered to enforce price and conduct norms if a seller was able to corner a market or take advantage of an unwitting buyer. As well, barriers to entry, established minimum prices, geographic space between competitors and other such practices could prevent market instability and price wars from breaking out between established market participants granted physical space at a physical marketplace.[63]

Of course, this description is only impressionistic and is missing historical and geographic detail that is quite important. And of course, dishonest dealing and irreputable traders existed in significant quantities. But we think these broad outlines capture a core element of premodern market governance: its price-setting institutions were based on quite stable norms of honor and fairness that had multiple overlapping means of enforcement that were inextricable from other social institutions. The rise of the corporate economy fractured and distended these institutions of market stability (and community belonging), which meant that new institutions were needed to recreate market stability and ensure both markets and market actors were reproduced through time.

5.3.2 *Capitalism before the Firm Exemption: Trade Associations, Cartels, Trusts*

It took a long process of market reorganization and massively disruptive social change to break apart the "moral economy" in the west.[64] When it broke down, the next major type of market

[61] William Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America, ch. 6 (1996); Walton H. Hamilton, *The Ancient Maxim of Caveat Emptor*, 40 Yale L.J. 1133 (1931); Gergely Baics, *The Geography of Urban Food Retail: Locational Principles of Public Market Provisioning in New York City, 1790-1860*, 43 Urban Hist. 435 (2016).

[62] Kadens, *Myth* (n. 54); Kadens, *Tyranny* (n. 54); Fernand Braudel, Civilization and Capitalism, Vol. 2: The Wheels of Commerce 26–112 (1979).

[63] *See* Fontaine (n. 56); Faith (n. 56); Arang Keshavarzian, Bazaar and State in Iran: The Politics of the Tehran Marketplace (2007); Mojgan Taheri Tafti, *Assembling Street Vending*, 57 Urban Stud. 1887 (2020); Jeremy Fisher, Feeding the Million: Markets, Metabolism, and the Transformation of the Food System in New York City, 1800–1860 (2012); Jeremy Fisher, *Gendering Markets, Gendering Food: Women, Law and Markets in the New York City Food System, 1800–1840*, 117 Feminist Rev. 97 (2017).

[64] Social networks between competitors are still important to modern market governance. *See generally* Oscar B. Martinson Jr. & Gerald R. Campbell, *Social Network Analysis: Suggested Applications to Economic Control*, 13 J. Econ. Issues 471 (1979); Mark Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 Soc. Theory 201 (1983). However, arguably, fairness has declined as a social consideration in these social networks and thus other principles govern how these social networks facilitate market governance and the continuation of firms as going concerns. *But see* McDonnell, Stoltz, & Taylor (n. 57); Barbara Kiviat, *The Moral Limits of Predictive Practices: The Case of Credit-Based Insurance Scores*, 84 Am. Soc. Rev. 1134 (2019) (discussing disputes over the meaning of "fairness," including among industry participants, in the space of using credit scores for insurance pricing).

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governance organization emerged: the *trade association*. At the center of both the breakdown of moral economy and the emergence of trade associations was the increasing consolidation of coordination rights in the legal form of the corporation.[65]

Before the nineteenth century, incorporation was a highly specific legal privilege, used either for major infrastructure investments (such as mills, roads, or bridges) or for extending networks of global trade and colonialism.[66] In either case, corporations were conceptualized as express public grants of coordination rights – indeed, of monopoly power – over some domain of the social provisioning process. Although they could be (and often were) renewed, these grants were restricted in time, place, and purpose and the corporate form was itself designed as a political institution that accorded to aristocratic republican principles of good governance.[67] Because corporations were granted exclusive rights (at least as far as the granting jurisdiction was concerned-where rival states were involved, rival claims existed), there were sparse or no market governance organizations to manage relationships between corporations.[68] Indeed, the lack of governance organizations is manifest in rivalry between charter corporations such as the British and Dutch East India Companies: their rivalry took the form of rivalry between states. They were battles over competing claims to sovereign power (and domination over colonial subjects) as much as they were competitions for market share.[69] Indeed, it was out of these conflicts that the modern concept of international law developed: Hugo Grotius, the father of modern international law, developed his first articulation of the basic concepts while working as a hired lawyer to defend the conduct of the Dutch East India Company.[70]

Meanwhile domestic markets were populated by sole proprietor or limited partnership firms engaged mainly in geographically specific local or regional transactions governed by a mixture of the social conventions and the laws and regulations of chartered markets discussed above.[71] Transactions across these local markets, when not governed by a charter corporation, were managed by networks of merchants who ran what we would now think of as quite small firms primarily governed through partnership and agency relationships. The most stable merchant firms were nearly always family dynasties, using thick social ties to supplement state-granted coordination rights.[72]

Zhi Lu, Lisa E. Bolton, Sharon Ng, & Haipen (Allan) Chen, *The Price of Power: How Firm's Market Power Affects Perceived Fairness of Price Increases*, 96 J. Retailing 220 (2020).

[65] We do not mean to claim that corporate law acted alone in bringing about the breakdown of traditional market governance, let alone the rise of industrial capitalism. We merely note one especially important shift in the way coordination rights functioned. A full account of how to tease apart the causal chains of the Industrial Revolution and its role in the rise of mass society is obviously well beyond the scope of this chapter.

[66] It is also worth noting that the corporate form was not initially (nor is it still) used exclusively for profit-focused firms. Convents and cities were the earliest forms of corporation. *See* David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 Am. Pol. Sci. Rev. 139 (2013); Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057 (1980).

[67] Ciepley (n. 66); Nikolas Bowie, *Why the Constitution was Written Down*, 71 Stan. L. Rev. 1397 (2019); Adam Winkler, We the Corporations 3–34 (2018).

[68] *See* Morton Horwitz, The Transformation of American Law 1780–1860: The Crisis of Legal Orthodoxy 114–16 (1977).

[69] Andrew Phillips & J. C. Sharman, Outsourcing Empire: How Company States Made the Modern World (2020); *see also* Chartering Capitalism: Organizing Markets, States, and Publics (Emily Erikson ed. 2015).

[70] Jon Miller, *Hugo Grotius*, Stanford Encyclopedia of Philosophy (2011), https://plato.stanford.edu/entries/grotius/; Hugo Grotius, The Law of War and Peace in Three Books (Francis W. Kelsey trans. 1925).

[71] *See* Ciepley (n. 66); Horwitz (n. 68); William G. Roy, Socializing Capital: The Rise of the Large Industrial Corporation in America (1997).

[72] *See* Alfred D. Chandler, The Visible Hand: The Managerial Revolution in Business 36–48, 62–67 (1977); Braudel (n. 62) at 138–68; Jairus Banaji, A Brief History of Commercial Capitalism 65–84 (2020); Fahad Ahmad Bishara, A Sea of Debt: Law and Economic Life in the Western Indian Ocean, 1780–1950, 66–79 (2017).

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But as control over production began to consolidate and markets became increasingly national and international, corporations gained increasing importance (with the administrative necessities of colonial extraction and railroad management playing especially important roles). Charters became less restricted – the first "general incorporation" statute was enacted in New York in 1811[73] – and corporations became big, long-lasting, and important enough that they began to compete with each other *within* jurisdictions.[74] Customary market governance institutions that were designed to mediate rivalries between local individuals and partnerships began breaking down. We cannot discuss this entire complicated history here, but, for our purposes, what is important is that market instability became endemic in these emerging regional and national markets.[75] Trade associations emerged to attempt to produce and enforce new benchmark prices, with varying degrees of success.[76]

5.3.2.1 Trade Associations

Trade associations made use of the express grant of coordination rights that came with incorporation and combined them with implicit approval for customary forms of negotiations among rivals. Although the legality of inter-firm governance of *price* in particular was ambiguous, there certainly was not any per se law against the broad range of practices that now go under the label of "price fixing." Thus, trade associations were frequently used as a legally legitimated supplement to the corporation for formal or informal collective governance over price.

Because trade associations were collectively governed, they could effectively enforce a pricing regime whether the market concentration of individual firms was low or high. As long as the market concentration *of the trade association* was high, the trade association retained the ability to set effective benchmark market prices.[77] Thus, during periods where trade association market governance was important, the firm exemption – which seems so natural to us today – had not clearly emerged.

Of course, to say that multiple firms in a market "collectively governed" that market does not imply that they did so on equal terms. Their relations were horizontal, but they were not egalitarian. Trade associations could be dominated by a few large firms. The important point for present purposes is that these firms' (and their managers') power over market prices resulted

[73] Ronald E. Seavoy, *Laws to Encourage Manufacturing: New York Policy and the 1811 General Incorporation Statute*, 46 Bus. Hist. Rev. 85 (1972).

[74] *See* Horwitz (n. 68) at 109–39; Roy (n. 71); Leon N. Lindberg, John L. Campbell, & J. Rogers Hollingsworth, *Economic Governance and the Analysis of Structural Change in the American Economy*, *in* Governance of the American Economy 3 (John L. Campbell, J. Rogers Hollingsworth, & Leon N. Lindberg eds., 1991).

[75] For a more detailed discussion, see Sanjukta Paul, Solidarity in the Shadow of Antitrust (forthcoming).

[76] *See* M. Howe, *A Study of Trade Association Price Fixing*, 21 J. Indus. Econ. 236–56 (1972). James E. Fickle, The New South and the 'New Competition': Trade Association Development in the Southern Pine Industry (1980); William H. Becker, *American Wholesale Hardware Trade Associations, 1870–1900*, 45 Bus. Hist. Rev. 179 (1971).

[77] This is a simplification. There were all sorts of complicated interactions involved in trying to sustain trade associations. The fact that, by common law, agreements "in restraint of trade" were often treated as unenforceable by courts in the United States weakened the coercive power trade associations had over members and a variety of enforcement methods had to be developed in order to manage competition within trade associations. There was also a wide variety of successes and failures. Most relevantly for our purposes, quota systems sometimes developed in order to manage firm market share and prevent destabilizing redistributions of power within trade associations. Of course, output quotas and explicit price coordination beyond firm boundaries made these types of trade associations what we would now call cartels. It is important to reiterate that enforcement mechanisms were designed to ensure that the vast majority of transaction prices followed, or were in alignment with, benchmark prices administered by the trade association so that the trade association's benchmark price remained effective.

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from a combination of the coordination rights that came with incorporation and the coordination rights that came with the control over a trade association.

5.3.2.2 Cartels

Cartels are organizations of producers that involve not just explicit price coordination, but explicit coordination over quantities produced and the market share to individual firms, whether geographically or otherwise. The line between trade associations and cartels is not bright: trade associations have often functioned as cartels or as organizations through which cartel participants have congregated. And, especially in more hostile legal environments, cartels have tended to be more informal or to operate clandestinely through legitimated forms of coordination. Among competition lawyers, especially in the USA, cartels are uniquely associated with criminality and conspiracies against the public. But this is a historically and geographically parochial notion. In some times and places, coordination rights between competitors were explicitly and exclusively allocated to firms which registered as cartels with competition law authorities. In these circumstances it is easier to see that governments have a monopoly over coordination rights that they franchise to "private" actors in a variety of ways.[78]

There is extensive literature discussing cartels in the nineteenth century, the emergence of "cartel registers" in the twentieth century and the fluctuating attitudes towards cartels over this long stretch of history in Europe.[79] Even in the United States, cartels have been legal. And depending on the strength of the enforcement mechanisms that cartels had access to, they can last long periods of time. The Aluminum cartel, for example, arguably lasted an entire century and was an international cartel.[80]

Cartels are often also treated as a uniquely pernicious form of market governance because they "rigidly" restrict competition and "restrict supply."[81] But cartels have not been immune to competitive pressures, whether internal or external. Threat of entry from external firms disciplined cartel participants just as they disciplined firms in non-cartelized industries.[82] Major changes in demand conditions have led to cartel breakdown and price wars in similar fashion to breakdowns of non-cartel market governance organizations and institutions. Changes in firm characteristics often require renegotiation of cartel agreements or cartel breakdown just as non-cartel market governance organizations and institutions see firms attempt to reorganize market structures in their interest.[83]

Disfavor for cartels is often associated with a notion that breaking them up will remove any form of market governance: letting "free competition" reign. But experience shows that cartel breakdowns usually result in the formation of a new cartel or to a wave of mergers and acquisitions to stabilize market conditions.[84] The great merger wave in the late nineteenth

[78] *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 Fordham L. Rev. 2279 (2012).

[79] See in particular Marco Bertilorenzi, The International Aluminium Cartel: The Business and Politics of a Cooperative Industrial Institution (1886–1978) (2015); Regulating Competition: Cartel Registers in the Twentieth-Century World (Susanna Fellman & Martin Shanahan, eds. 2015).

[80] Bertilorenzi (n. 79).

[81] James M. Griffin, *An Inside Look at a Cartel at Work: Common Characteristics of International Cartels*, *in* Fighting Cartels – Why and How? (2001).

[82] P. W. S Andrews, *Competition in the Modern Economy*, *in* The Economics of Competitive Enterprise: Selected Essays of P. W. S. Andrews 323 (Fred S. Lee & Peter S. Earl eds., 1993); Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. Econ. Lit. 43 (2006).

[83] *See* Daniel Herold & Johannes Paha, *Cartels as Defensive Devices: Evidence from Decisions of the European Commission 2001–2010*, 14 Rev. L. & Econ. 31 (2018).

[84] We discuss this further in n. 96.

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and early twentieth century is directly tied to the breakdown of cartels in managing market conditions. In fact, many trade associations simply saw their members try to incorporate and internally reorganize to comply with the new antitrust laws.[85] More unstable markets will see an extended period of heightened bankruptcies and market exits until firm market concentration was sufficiently high. The question is, sufficiently concentrated for what form of market governance?

5.3.2.3 Trusts

Before we move on, a quick word about the *trust*. In the United States, competition law goes under the label "antitrust law" because of this historically specific form of market governance. To modern eyes the trust appears as simply another type of corporate firm. But that is not quite right. It was an ingenious legal innovation that emerged to facilitate interstate coordination and control of production, distribution and sales, thereby avoiding restrictions in states' corporate laws that early anti-monopoly advocates had begun to enforce vigorously.[86] To create a trust, shares of each state corporation were deposited in a trust in a favorable state (like New Jersey) and shareholders were issued a trust certificate which provided them a return. However, they retained no voting rights in the corporation trust. Instead, the board of trustees retained all voting rights, and thus control, over the corporations "combined" in this fashion.[87] There were no doubt dominant players in the formation of these trusts, but their dominance was not different in kind from the dominance that major firms sometimes exhibited within trade associations.

5.4 CONTEMPORARY MARKET GOVERNANCE

But the trusts were indeed targeted. What resulted? Not an elimination of market governance (often treated as "increased competition") but rather, deeper reliance on the corporate form to facilitate market governance. As Paul has argued (and will argue in more detail in forthcoming work), in the early twentieth century, the prevailing feature of the most important markets was to concentrate coordination rights in the most successful firm in a market for a specific product or a bundle of similarly situated products. The firm exemption emerged to facilitate and legitimize this development.[88]

We agree. Nevertheless, most markets with dominant firms do not have firms that control the *entire* market via pure monopoly. This brings us back to the question we posited earlier: If modern markets are defined by the firm exemption which has at its essence that explicit *horizontal* coordination across firm boundaries is barred, how are markets nonetheless regularly *horizontally* governed? Put differently, how can markets be *legally* and *privately* governed where there is a dominant firm without a monopoly? Our answer is what we call the "price leadership exemption."

5.4.1 *The Price Leadership Exemption*

Increased concentration of coordination rights in increasingly massive corporations made it possible for these corporations to unilaterally set benchmark prices in markets they dominate.

[85] Naomi Lamoreaux, The Great Merger Movement in American Business, 1896–1904 (1988); Roy (n. 71).
[86] Collins (n. 78).
[87] *Id.*
[88] Paul, *Coordination Rights* (n. 19); Paul, Solidarity in the Shadow (n. 75).

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Other participants can then follow their lead, resulting in *implicit* price coordination across firm boundaries. This is "price leadership."[89] When a legal system allows this implicit coordination to occur, as the US Supreme Court expressly did in 1927, it adds another stick to the bundle of coordination rights concentrated in dominant firms. We refer to this stick as the "price leadership exemption."

While there is no conceptual barrier to markets being implicitly coordinated without a dominant firm acting as price leader, in practice the emergence of a price leader has been a necessary precondition. In markets with many participants, none of whom have significant market power, implicit price coordination is a difficult proposition. These are the sorts of markets that tend to be governed by custom and/or associational relationships when still managed by participants (and by centralized third parties like chartered exchanges when not). It is also difficult to engage in implicit price coordination in markets characterized by some market power among similarly sized firms with similar cost structures, since determining how coordination will work between these firms without explicit communication is difficult. Thus price leadership markets generally require some minimum degree of market concentration and a firm with some differentiating characteristics in the areas of financial strength, market share, and/or average costs that can help establish that firm as a leader.

We have seen that dominance over a market can be achieved outside of firm boundaries via cartels, trade associations, and trusts. The possibilities for market dominance outside of firm boundaries are even bigger than we have emphasized so far. In the world without a firm exemption, a cartel or trade association with the same market share as a firm with a "submonopoly" market share could function as a price leader despite not controlling a majority of the market. Where those forms of coordination are disfavored, the firm exemption is necessary for price leadership. Thus implicit price coordination is a late arriving form of market coordination that all but requires a dominant firm. And a dominant firm, as Paul has emphasized, needs the firm exemption to legitimize its concentrated coordination rights.

But the firm exemption (or cartel substitute) is not *sufficient* for price leadership. Rather, price leadership is a *further* set of coordination rights granted to firms who already have various other coordination rights concentrated in them by the firm exemption. In the United States, this stick in the bundle of coordination rights was granted in 1927 in the *International Harvester* case.[90] Faced with the reality of implicit price coordination – in which International Harvester's competitors were "accustomed, independently and as a matter of business expediency, to follow approximately the prices at which it has sold its harvesting machines" – the majority saw nothing wrong with such coordination.[91] Justice Sanford reasoned that "the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination," nor does "the mere size [of that competitor]" so long as its power over the market is "unexerted."[92] The opinion legitimates price leadership by treating the clear pattern of a dominant firm setting prices that other market participants use as a benchmark as a form of noncoordination. Both the price leader and the price followers are treated as acting independently (independence is conflated with free will). The dominant firm's power remains "unexerted" because the firm does not engage in open intimidation or some other form of overt coercion. Justice Sanford thus took for

[89] This answer draws inspiration from the late economist Fred Lee: Lee (n. 24); Frederic S. Lee, *Competition, Going Enterprise, and Economic Activity*, 14 Alt. Theories of Competition: Challenges to the Orthodoxy 160 (2012).

[90] *US* v. *Int'l Harvester Co.*, 274 U.S. 693 (1927).

[91] *Id.* at 708.

[92] *Id.*

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granted the legitimacy of the price leader administering prices on its output (thus applying the firm exemption) and, building on that, treated the obvious reality of benchmark price formation as not really a form of coordination because price followers could theoretically choose to opt out at any time (thus applying the price leadership exemption).

To make sense of a clear pattern of leading and following as a form of *non*-coordination, "coordination" has to be defined in a way that requires express communication as a necessary precondition. The notion that participants in the same social space act in reference to each other through a pattern of ongoing and continuous market participation is ruled out. But this is a problematic line of reasoning. While at some point International Harvester – that is, the dominant firm – may have administered prices without realizing they were determining market prices while other participants in the market set prices without thinking about International Harvester's practices, the Court explicitly recognizes that over time both price leader and price follower recognized their respective roles and acted accordingly. What the Court does not recognize is that, without price leadership, this market would have surely either descended into chaos or resolved into some other form of price coordination.[93]

Now, there may or may not be good normative reasons to treat price leadership as a preferable form of coordination to others available, but that is not the same thing as avoiding the normative question by pretending coordination does not exist. Indeed, what the majority did not recognize in delivering this decision is that they had made price leadership the only legal form of private market governance by allocating implicit coordination rights to firms, particularly price leaders. Is price leadership the best way of governing markets? The majority does not say.

In fact, we would argue that this normative question has gone basically unexamined to today.[94] Even among mainstream economists, it is actually controversial whether implicit "collusion" leads to superior outcomes in terms of "allocative" or "productive" efficiency.[95] Yet, the issue has remained relatively peripheral in competition law discussions because of the presumption that something approaching the mainstream notion of "perfect competition" is achievable with vigorous enough competition law enforcement.[96] Once we recognize that competition law can only choose between different forms of legal market governance, the question of what type of market governance we find normatively superior becomes central.[97]

[93] *See generally* Herold & Paha (n. 83). Cartel formation can emerge from legal changes as much as changes in market conditions. Typically, it is presumed that cartels are simply attempts to increase profits for the sake of increasing profits, but when we drop this prejudice we can more clearly recognize attempts to stabilize markets both lead to cartel formations and to cartel breakdowns and new organizational forms of particular markets. In fact, when we recognize markets are always governed (albeit sometimes with greater instability and not by participants), we can begin to speak of price leadership formation and breakdown, formal exchange market formation and breakdown and so on in the same ways we speak about cartel formation and breakdown.

[94] Fred Lee is one of the few to examine this question. However, his paper on this topic remains unfinished and unpublished due to his untimely death. Frederic S. Lee, Heterodox Approach to Cartels and Market Competition (working paper on file with the authors).

[95] *See* Paul, *Antitrust as Allocator* (n. 19), at 413–29.

[96] The only recognition that some form of market governance will prevail ironically comes from the idea that competition enforcement authorities have limited budgets to enforce competition laws and thus must choose between different types of enforcement actions in a way that would tolerate some behaviors more than others. A 2013 article by Andreea Cosnita-Langlais and Jean-Philippe Tropeano that asks whether authorities should "fight cartels or control mergers" tackles this point most directly among the existing literature. Andreea Cosnita-Langlais & Jean-Philippe Tropeano, *Fight Cartels or Control Mergers? On the Optimal Allocation of Enforcement Efforts within Competition Policy*, 34 Int'l Rev. L. & Econ. 34 (2013). However, the paper presumes that some "optimal policy" can achieve "efficiency" within the competition authority's "budget constraints" which we do not think convincingly resurrects the core theoretical premises of the perfect competition as normative benchmark framework.

[97] The literature on what happens after the breakdown of one form of market governance is scattered but extensive. Some of the most interesting papers have emerged over the last fifteen years in studying the aftermath of illegal cartel breakdown.

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5.4.2 *The Continued Relevance of Cartels*

Saying that price leadership is the only current *legal* form of private horizontal market governance does not preclude the possibility that private actors are governing markets *illegally*. In fact, there is extensive documentation of price fixing and cartels among significantly sized firms, many of which are large corporations governing market prices in very concentrated markets.[98] Given its illegality, the extensive evidence of price fixing and cartels in the recent past suggests even more yet-to-be-discovered price fixers and cartels governing markets as of this writing. For our purposes, what is relevant is the presumption that these markets are governed legally emerges from the price leadership exemption. Cartels, especially cartels in concentrated markets, function under the cloak of the price leadership exemption. If both implicit and explicit price coordination across firm boundaries were illegal, stable market prices would be prima facie evidence of illegal coordination.

This is recognized by at least some commentators on competition law. In *Legitimacy in EU Cartel Control*, Ingeborg Simonsson states that "[A] prohibition on tacit collusion involves saying that a company ought to ignore its rivals' behaviour. A problem with a prohibition against tacit collusion is how to design an appropriate remedy: if companies are to ignore each other's behaviour then courts become involved in active price control, for which they are unsuited."[99] Simonsson is, without acknowledging as much, recognizing that competition law allocates coordination rights to firms *and* that these firms require the price leadership exemption so that they can implicitly coordinate prices ("tacitly collude") between firms. Since stable market prices are taken as prima facie evidence of legal implicit coordination, illegal activity is able to hide under the per se legality of implicit price coordination.

Of course, this ability to hide under the presumption of implicit coordination is little comfort to small actors such as gig economy workers who have little plausibility as price leaders. Thus, it shouldn't be a surprise that the most extensive forms of explicit price coordination taking place today are among large firms and concentrated markets.

There are examples of innovative strategies for implicit coordination after cartel breakdown, new cartel formation and mergers or acquisitions to generate sufficient concentration to form a stable price leadership market. The cartel breakdown literature is a rich source of information because, while most of it follows mainstream premises, the familiarity with an explicit and documented form of market governance focuses researchers on detecting other forms of market governance that may emerge after breakdown. It is a short journey from this perspective to the realization that all markets are governed and a breakdown of the existing form of market governance will simply lead to another form of market governance emerging. *See* Stephen Davies, Peter L. Ormosi, & Martin Graffenberger, *Mergers After Cartels: How Markets React to Cartel Breakdown*, 58 J.L. & ECON. 561 (2015); Leslie M. Marx & Jun Zhou, The Dynamics of Mergers among (Ex) Co-Conspirators in the Shadow of Cartel Enforcement (working Paper 2018), https://econ.biu.ac.il/sites/econ/files/seminars/dynamics_of_mergers.pdf; Kai Hüschelrath & Florian Smuda, *Do Cartel Breakdowns Induce Mergers? Evidence from EC Cartel Cases*, 9 EUR. COMPETITION J. 407 (2013); Ailin Dong, Massimo Massa, & Alminas Žaldokas, Busted! Now What? Effects of Cartel Enforcement on Firm Policies (working paper 2014), www.alminas. com/papers/Busted% 20Now% 20What. pdf; Thomas Bourveau, Guoman She, & Alminas Žaldokas, *Corporate Disclosure as a Tacit Coordination Mechanism: Evidence from Cartel Enforcement Regulations*, 58 J. ACCOUNTING RESEARCH 295 (2020); Hüschelrath & Veith, *Cartelization* (n. 44).

[98] Levenstein & Suslow (n. 82); John M. Connor, Price-fixing Overcharges: Legal and Economic Evidence (working paper 2007), www.emerald.com/insight/content/doi/10.1016/S0193-5895(06)22004-9/full/html; John M. Connor, *Effectiveness of Antitrust Sanctions on Modern International Cartels*, 6 J. INDUSTRY, COMPETITION AND TRADE 195 (2006); Oindrila De, *Analysis of Cartel Duration: Evidence from EC Prosecuted Cartels*, 17 INT'L J. OF ECON. BUS. 33 (2010); Jelle D. Jaspers, *Managing Cartels: How Cartel Participants Create Stability in the Absence of Law*, 23 EUR. J. CRIM. POL'Y & RESEARCH 319 (2017); D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think about Enforcement*, 78 ANTITRUST L.J. 201 (2012); Michael Hellwig & Kai Hüschelrath, *When do Firms Leave Cartels? Determinants and the Impact on Cartel Survival*, 54 INT'L REV. L. & ECON. 68 (2018).

[99] INGEBORG SIMONSSON, LEGITIMACY IN EU CARTEL CONTROL 71 (2010).

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5.4.3 *Vertical Market Governance*

We imagine labor lawyer readers perking up (assuming they're still with us). Did we say "gig economy"? Well, yes. The gig economy is a prime example of *vertical* market governance, in which dominant firms govern the price-setting process for firms or individuals that are upstream or downstream, including those providing labor as "independent contractors."[100]

Vertical market governance exists in many corners of the social provisioning process, in ways that are not always acknowledged. In the introduction, we discussed the market governance of chartered commodities exchanges, which is a prime example of unacknowledged vertical market governance.[101] But it is far from the only example. Suppliers and purchasers often use their market power to govern markets that lack horizontal market governance institutions.[102] Landlords choose retail tenants based on their likelihood of success (i.e. ability to continue paying rent) and thus avoid generating destructive competition by oversaturating specific geographic areas with similar businesses.[103] Franchisors make similar decisions when granting franchises.[104] Businesses regularly grant licensed dealers a specific territory that they have exclusive control of. Financiers also ration credit and discourage certain kinds of conduct that they see as potentially destabilizing markets and thus threatening the firm's ability to repay (or their competitors' ability to repay).[105]

Suppliers and purchasers also sometimes use their market power (possibly even in horizontal coordination with competitors) to destroy the horizontal market governance institutions and practices of their suppliers or customers. Powerful buyers regularly use their market power as buyers to bargain down the prices that sellers set. They also engage in vertical mergers and vertical market entry to gain control of customer or supplier markets and facilitate explicit production, distribution, and price coordination. Walmart, Cosco, Amazon, and other agents of the increasing consolidation of retail have all engaged in these tactics.[106]

When these types of coordination rights are explicitly or implicitly approveby competition authorities, market governance tilts toward vertical restraints. When they are approved of in an environment that disfavors horizontal restraints among small players, the pull toward vertical

[100] *See* Sanjukta Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and its Implications*, 38 Berkeley J. Empl. L. 233 (2017); David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, 5 RSF: Russell Sage Fdn. J. Soc. Sci. 147 (2019).

[101] The general favor for vertical governance of contemporary US competition law may well be sufficient explanation for these coordination rights, but it is also worth noting that chartered exchanges have many of the properties of old-fashioned public markets. They are not regulated by customary prices, of course, but they do force all exchanges to take place between registered participants in a given place during restricted hours subject to a detailed set of rules. No surprise, then, chartered exchanges have existed as ways to organize price-setting between wholesaling merchants and merchant bankers since the early modern era. They existed at the threshold between capitalist and customary market ordering and their continued existence maintains a connection to that past. *See* Braudel (n. 62), at 81–115.

[102] Alternatively, they may also choose to overwhelm those horizontal market governance institutions for their own interests.

[103] This kind of behavior that landlords are "incentivized" to pursue is often how horizontal market governance organizations cooperatively manage markets, i.e., they give different firms different geographic areas to operate in.

[104] McDonalds innovated by doing both. Out of frustration that they had insufficient vertical control over franchisees, McDonalds began buying the property that franchisees planned to use for their franchise and leasing it out to them on a long-term basis. They thus gained the power of a landlord to enforce their franchise agreement. Fan Wu, An Analysis of McDonald's Business Model Based on Business Ecosystem Theory (RSU Int'l Research Conf. No. 1. 2020); Ray Kroc & Robert Anderson, Grinding it Out: The Making of McDonald's (1987).

[105] This topic is well beyond the scope of this chapter but see e.g. Sanjukta Paul & Nathan Tankus, *The Firm Exemption and the Hierarchy of Finance in the Gig Economy*, 16 U. St. Thomas L.J. 44 (2019).

[106] *See generally* Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 564 (2017); Nelson Lichtensetin, The Retail Revolution: How Wal-Mart Created a Brave New World of Business (2010).

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restraints becomes all the stronger. Prices become increasingly vertically dictated or bargained by larger participants while small horizontal participants in markets governed by customers or suppliers are increasingly isolated from each other or simply owned by larger participants (thus immunizing this conduct because of the firm exemption).

This double tilt is most obvious in labor markets where individuals regularly face large, multinational corporations and have limited ability to bargain. In the case of firms like Uber and Lyft, individuals may not even be able to bargain for employee status and, once stuck as independent contractors, they have even less bargaining power because they are now a "firm" which cannot bargain horizontally beyond firm boundaries.[107] In this sense, labor unions are vertical market governance institutions which place vertical restraints on employers.[108] They are able to function, to the extent that they are able, because there is a "labor exemption" in competition law for their activities.[109] However, as the Uber example illustrates, this exemption is limited and can be manipulated. Eliminating the firm exemption is one way to strengthen labor's bargaining power with large dominant firms.

5.5 CONCLUSION

We have covered a lot of territory, but our argument can be simplified into three overlapping points. First, markets – and processes of price formation in particular – are always governed. There is no "free market" in which prices "find their level" – nor is there any important sense in which some actually existing markets are better or worse approximations of an ideal-form "free market." Instead, there are different ways of stabilizing and regularizing the pricing process, all of which require active coordination between market participants. Sometimes these institutions are weak and fragile, which leads to increasing market and price instability. When that occurs, either participants, suppliers, customers, or the state will act to build a new strong form of market governance which attempts to increase market stability. It follows that it is impossible to eliminate coordination between market participants and attempts to eliminate such coordination will only result in a different form of coordination taking its place.

Second, which form of market governance prevails at any given point in time will depend, at least in part, on how the governing legal system allocates coordination rights. Coordination rights need not be granted expressly. What is relevant is that some prior legal grant of authority (such as a property right) allows a market actor to initiate some sort of conduct and the legal system, particularly competition law, will either sanction, ignore, or legitimate that conduct.

Third, the tripartite hierarchy of coordination rights that Sanjukta Paul has identified in United States competition law (favoring intra-firm coordination and vertical cross-firm coordination over explicit horizontal cross-firm coordination), calls forth specific patterns of price coordination. Most price coordination happens within hierarchical massive multinational corporations, with only the most marginal input from lower-level employees when it comes to

[107] Paul, *Antitrust as Allocator* (n. 19) at 387–94.

[108] Indeed, historically a type of association firms engaged in was the "employer association" which collectively bargained with workers and protected the firm's interests. This included having armed agents (or hiring them from agencies like the Pinkertons) paid out of collective funds to break strikes. This is also a form of vertical market governance.

[109] Strangely, the labor exemption also provides an avenue for firms to stabilize their markets horizontally. By negotiating into labor contracts terms that make deviating from benchmark market prices undesirable, competitors can be dissuaded from antagonizing market governance organizations and institutions. Labor unions can also directly participate in the price-making process, preventing market instability right at the root of the pricing committee.

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fundamental business decision-making. The markets dominated by these firms tend to coordinate prices through price leadership, a form of inter-firm coordination that has been explicitly granted an exemption from antitrust scrutiny in part by presenting it as noncoordination. Many of these firms also control the pricing process of upstream and downstream firms through a variety of legal mechanisms that have also been exempted from antitrust enforcement. Attempts to resist the domination of these dominant firms are looked upon with a skeptical eye, and, if they do not fail due to private repression, are frequently quashed by the legal system.

In reorienting analysis in these ways, we hope to open up space for forms of empirical inquiry and normative analysis that take seriously how markets are actually governed rather than treating governance as somehow inherently suspicious. We are particularly interested in facilitating those forms of analysis that explore alternatives to market governance that concentrates power in the hands of a relatively small number of capitalists who have broad discretion to direct the social provisioning process to enrich themselves at the expense of the rest of us. What those forms of market governance might look like goes well beyond the scope of this already overlong chapter, but what we have said should be enough to motivate deep reconsideration of Pavlovian anti-cartel positions, of efforts to limit and generate democratic oversight of price leaders and followers, and of public price-setting via government ownership and public utility regulation, among other possibilities. We also hope we have said enough to motivate a rethinking of how to talk about the value of collective bargaining.

Most critically, the value of producing stable and orderly markets should be taken more seriously in competition law. We said above that in the absence of the price leadership exemption, current antitrust law would see stable market prices as prima facie evidence of illegal price coordination. Implicitly then, the drive to greater antitrust enforcement to generate something approaching "perfect competition" is a drive to generate market instability. Current competition law literature avoids this point by taking on the (admirable) task of documenting the varieties of activities firms engage in reality to avoid that instability.[110] Instead of trying to stamp out all efforts to stabilize markets, competition law should be redesigned to reallocate coordination rights and incentivize the formation of enduring market governance institutions which confer social and democratic benefits besides price stability. Accepting the inevitability of market governance is the first step towards unlocking its potential.

[110] *Cf.* n. 97.

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