Articles

Cooperative Enterprise as an Antimonopoly Strategy

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ABSTRACT

After decades of neglect, antitrust is once again a topic of public debate. Proponents of reviving antitrust have called for abandoning the narrow consumer welfare objective and embracing a broader set of objectives. One essential element that has been overlooked thus far is the ownership structure of the firm itself. The dominant model of investor-owned business and associated philosophy of shareholder wealth maximization exacerbate the pernicious effects of market power. In contrast, cooperative ownership models can mitigate the effects of monopoly and oligopoly, as well as advance the interests of consumers, workers, small business owners, and citizens. The promotion of fair competition among large firms should be paired with support for democratic cooperation within firms.

Antitrust law has had a complicated history and relationship with cooperative enterprise. Corporations threatened by cooperatives have used the antitrust laws to frustrate the growth of these alternative businesses. To

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The authors thank Lauren Bridges, Michelle Meagher, Sanjukta Paul, and Ganesh Sitaraman for thoughtful feedback on earlier drafts of this Article.

insulate cooperatives from the antitrust threat, Congress has enacted exemptions to protect cooperative entities, notably a general immunity for farm cooperatives in the 1922 Capper-Volstead Act. As part of an agenda to tame corporate monopoly, all three branches of the federal government and the states should revisit these ideas and seek to protect and enable the cooperative model across the economy. Although protections that farmers fought for a century ago may seem obsolete in an era of big-box retail and online platforms, matters of ownership design have at least as much relevance today and should be a part of the antimonopoly arsenal.

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I. INTRODUCTION

Antitrust is back. In the words of former Acting Assistant Attorney General Renata Hesse, "It is, as it was at its inception, the stuff of popular imagination."[1] This legal and policy regime, which has been in retreat for as long as many of us can remember,[2] has regained some of the spirit and urgency that led to its early development[3]—if not yet the legislative ingenuity or political will. Democratic Party politicians are taking notice: Senator Elizabeth Warren, at first,[4] and, subsequently, party leaders whose 2017 "A Better Deal" document called for "cracking down on corporate monopolies."[5] This mood has even taken hold among some Republicans, especially the populist wing emboldened by the presidency of Donald Trump.[6] For example, the Trump administration broke with recent practice when it attempted to block the proposed vertical merger of AT&T and Time Warner.[7] From different points of view and for different reasons,

1. Renata Hesse, Acting Assistant Att'y Gen., U.S. Dep't of Justice Opening Remarks at 2016 Global Antitrust Enforcement Symposium: And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement (Sept. 20, 2016), *available at* https://bit.ly/2dwx2qV.

2. By way of example, the Department of Justice has filed only one monopolization suit in the past 20 years. Antitrust Div. Workload Stats. FY 2009 – 2018, http://bit.ly/2ZYz0Vr; Antitrust Div. Workload Stats. FY 2000 – 2009, http://bit.ly/2KNGHY6. For a review of antitrust law's historical development and changing objectives and rules, see generally Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370 (2014). The prevailing consumer welfare model is neither consistent with the original motivations of antitrust law nor adequate to address emerging concentrations of economic and political power. *See* John J. Flynn, *The Reagan Administration's Antitrust Policy, Original Intent, and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 303 (1988).

3. For instance, Lina Khan published a widely circulated Yale Law Journal note on the clout of Amazon and contemporary antitrust law's blindness to its power. *See generally* Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 56 (2017).

4. Mario Trujillo, *Warren Targets Amazon, Apple, Google in Anti-Monopoly Speech*, THE HILL (June 29, 2016, 1:12 PM), https://bit.ly/2JQt3FB.

5. *A Better Deal*, SENATE DEMOCRATS, https://bit.ly/2MosdlG (last visited June 1, 2019).

6. Former Trump campaign CEO and senior counselor, Steve Bannon, reportedly believes major online platforms like Facebook and Google should be regarded as monopolistic utilities. *See* Ryan Grim, *Steve Bannon Wants Facebook and Google Regulated Like Utilities*, THE INTERCEPT (July 27, 2017, 9:31 AM), https://bit.ly/2tH31c8. That said, Bannon's and the Trump administration's support for antimonopoly policy should be treated with deep skepticism. While supporting public utility regulation for tech platforms, Bannon also seeks the "deconstruction of the administrative state"—the same administrative that would regulate entities like Facebook and Google. *See* Jon Michaels, *How Trump Is Dismantling a Pillar of the American State*, THE GUARDIAN (Nov. 7, 2017, 8:36 AM), https://bit.ly/2iDkiyQ.

7. Steven Overly & Josh Gerstein, *Trump Administration Sues to Block AT&T-Time Warner Merger*, POLITICO (Nov. 20, 2017, 8:59 PM), https://politi.co/2zUHbYU. United States v. AT&T, Inc., 916 F.3d 1029, 1047 (D.C. Cir. 2019) (affirming district court's denial of government's request for preliminary injunction against the merger). The Obama administration, in contrast, permitted large vertical consolidations to proceed on the

many politicians and public figures are coming to agree with the assessment of Nobel-laureate economist Joseph Stiglitz: "America has a monopoly problem—and it's huge."[8]

With this renewed interest in antitrust, citizens, legislators, and regulators should consider a full range of ideas and strategies to address the economic and political power of large corporations. This Article reconsiders one little-discussed component of the antimonopoly tradition in the United States and argues for its renewed relevance to help resolve the challenges of the present—cooperative enterprise. In addition to the structure of markets, citizens and lawmakers recognized a century ago that the structure of the firm itself has important economic, political, and social ramifications. The architects of antitrust law, under pressure from constituents, enacted a series of exemptions and accommodations, mainly on behalf of rural economies. By passing exemption and accommodation laws, Congress aimed to protect democratically owned and governed businesses and collectives from antitrust suits and to support these entities as a means of countering the power of monopolistic corporations. These principles deserve to be taken at least as seriously today, including for applications far beyond their agrarian origins. The promotion of fair *competition among* large firms should be paired with support for democratic *cooperation within* firms.

Antitrust law and cooperatives (or co-ops) have a long and complicated history. Antitrust enforcement, and the threat of enforcement, has affected cooperative activity for more than a century. In particular, antitrust law's strict prohibition of horizontal collusion has sometimes been an impediment to socially beneficial cooperation among consumers, farmers, workers, and other powerless actors. Congress and the courts have attempted to accommodate cooperatives under antitrust law. Since farmers have been the group of cooperators best organized to promote their interests, Congress has principally enacted antitrust exemptions to protect agricultural cooperatives.[9] Fully-integrated cooperatives, which bring independent entities together to create a new product or business, have won recognition in the courts. Supreme Court justices have recognized the significance of cooperative models in cases regarding entities ranging

condition that they agree to non-discrimination and other behavioral remedies. *See, e.g.*, United States v. Comcast Corp., 808 F. Supp. 2d 145, 147–48 (D.D.C. 2011); United States v. Ticketmaster Entertainment, Inc., 1:10-cv-00139, 2010 U.S. Dist. LEXIS 88626 (D.D.C. July 30, 2010). Before the AT&T complaint, the federal antitrust enforcers had not sought to block a vertical merger in nearly forty years. *See generally* Fruehauf Corp. v. Fed. Trade Comm'n, 603 F.2d 345 (2d Cir. 1979).

8. Joseph E. Stiglitz, *America Has a Monopoly Problem—and It's Huge*, THE NATION (Oct. 23, 2017), https://bit.ly/2y3kD3z.

9. James L. Guth, *Farmer Monopolies, Cooperatives, and the Intent of Congress: Origins of the Capper-Volstead Act*, 56 AGRIC. HIST. 67, 82 (1982).

from the Associated Press ("AP"), a co-op of news agencies,[10] to Topco, a co-op of small grocery stores.[11] With the growing political appetite for antitrust policy to confront today's equivalents of the old railroads and telegraph networks,[12] the rich and complicated history between cooperatives and antitrust should be rediscovered and studied.

This Article proceeds as follows. Part I examines the competitive and social impacts of dominant ownership models and their relevance to antitrust concerns. Part II turns to cooperative models and shows how they can mitigate the harms of monopoly and advance a broader set of economic, political, and social interests than businesses committed to shareholder wealth maximization do. Part III reviews the entanglements between cooperatives and antitrust law and the historical efforts of accommodating cooperatives in the antitrust framework. Part IV presents a series of legislative and regulatory ideas on how the cooperative model can be protected and promoted across the economy.

II. THE RELEVANCE OF OWNERSHIP DESIGN

Business ethicist Marjorie Kelly usefully employs the language of "ownership design" and, in turn, distinguishes "extractive" from "generative" corporate structures.[13] For Kelly, extractive company ownership designs are those that seek "maximum physical and financial extraction" on behalf of investor-owners.[14] "The generative economy," in contrast, "is one whose fundamental architecture tends to create beneficial rather than harmful outcomes."[15] Kelly's characterizations may seem to over rely on the eye of the beholder, but Kelly goes on to make a

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10. Associated Press v. United States, 326 U.S. 1, 50 (1945).

11. As stated by Justice Thurgood Marshall in the majority opinion:

> Members of the association vary in the degree of market share that they possess in their respective areas. The range is from 1.5% to 16%, with the average being approximately 6%. While it is difficult to compare these figures with the market shares of larger regional and national chains because of the absence in the record of accurate statistics for these chains, there is much evidence in the record that Topco members are frequently in as strong a competitive position in their respective areas as any other chain. The strength of this competitive position is due, in some measure, to the success of Topco-brand products. Although only 10% of the total goods sold by Topco members bear the association's brand names, the profit on these goods is substantial and their very existence has improved the competitive potential of Topco members with respect to other large and powerful chains.

United States v. Topco Assocs., Inc., 405 U.S. 596, 600 (1972)

12. Robinson Meyer, *How to Fight Amazon (Before You Turn 29)*, ATLANTIC, http://bit.ly/31Dcx0v (last visited June 29, 2018).

13. MARJORIE KELLY, OWNING OUR FUTURE: THE EMERGING OWNERSHIP REVOLUTION 1–18 (2012).

14. *Id.* at 11.

15. *Id.*

compelling case that when company ownership lies with participant-stakeholders—such as with workers, customers, or mission-driven foundations—rather than profit-seeking investors, companies are able to engage in more pro-social behaviors and avoid abuses of market power.[16] Kelly's findings have been echoed in a variety of studies.[17] Ownership design has been an essential, but often overlooked, ingredient in addressing the mounting crisis of corporate consolidation.[18]

Advocates of an antitrust renaissance have an ample record of evidentiary support. For example, two-thirds of economic sectors in the United States economy became more consolidated between 1997 and 2012.[19] Although such concentration alone may not be illegal under the current interpretation of antitrust law,[20] it is grounds for broader economic and political concern. Additionally, rates of firm creation have declined in comparison to rates of exit, to the point of convergence.[21] The "consumer welfare" or "efficiency" regime, which has defined much of the current antitrust practice,[22] has failed on its own terms. Empirical research has

16. *See generally id.*

17. On economic efficiencies, see Svend Albæk & Christian Schultz, *On the Relative Advantage of Cooperatives*, 59 ECON. LETTERS 397, 401 (1998); on member benefit, see Petter Molk, *The Puzzling Lack of Cooperatives*, 88 TUL. L. REV. 899, 941 (2014); on stability and productivity, see VIRGINIE PÉROTIN, WHAT DO WE REALLY KNOW ABOUT WORKER COOPERATIVES? 20 (2016), *available at* https://bit.ly/1OpS5TC; on broad-based wealth creation, see Joseph Blasi et al., *Having a Stake: Evidence and Implications for Broad-Based Employee Stock Ownership and Profit Sharing*, THIRD WAY, https://bit.ly/2H536Oo (last updated Feb. 1, 2017).

18. *But see* Phillip Longman, *The Case for Small-Business Cooperation*, WASH. MONTHLY (Nov./Dec. 2018), http://bit.ly/2MilgS7.

19. *Too Much of a Good Thing*, THE ECONOMIST (Mar. 26, 2016), https://econ.st/2PEdrYl.

20. Hesse, *supra* note 1. Although resolved decisively as yes in recent decades, the question of whether dominant firms must engage in exclusionary or predatory conduct to violate antimonopoly law has a rich history in U.S. antitrust. *Compare* United States v. Grinnell Corp., 384 U.S. 563, 570–71 ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."), *with* Judge Learned Hand's opinion in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945):

> In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any "specific," intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing. So here, "Alcoa" meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to "monopolize" that market, however innocently it otherwise proceeded.

Id. at 432.

21. COUNCIL OF ECONOMIC ADVISORS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 5 (2016), *available at* https://bit.ly/3127SFQ.

22. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'") (citing ROBERT H. BORK, THE

shown a strong positive association between market concentration, prices, and mark-ups.[23] Furthermore, an influential meta-study of merger retrospective analyses found price increases and reduction in output in approximately 80 percent of cases, along with trends toward decreased investment in research and development.[24]

Shareholder wealth maximization serves to accelerate monopolization of the economy and to supercharge the socially harmful consequences of concentrated power. The ideology of "shareholder primacy"[25] privileges the interests of stockholders, who are disproportionately wealthy,[26] above those of workers, customers, or the general public, and has faced less political challenge in the United States than in other developed nations.[27] Shareholder primacy often promotes the acquisition and exercise of monopoly and oligopoly power because it stresses short-term cash flow generation that can support dividends and share buybacks.[28] Investment banks counsel their clients that consolidation tends to boost investor returns.[29] Thanks to concentrated market structures, corporate profitability and returns to capital investors have been strong.[30] Yet, in addition to the reasons for doubting that consolidation benefits consumers, it may have a causal relationship (alongside declining union

ANTITRUST PARADOX 66 (1978)); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, Horizontal Merger Guidelines § 1 (2010), https://bit.ly/21jA9Tt ("Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers.").

23. *See, e.g.*, Gustavo Grullon et al., *Are U.S. Industries Becoming More Concentrated?,* 23 REV. FIN. 697, 698–99 (2019); Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* 31 (Nat'l Bureau of Econ. Research, Working Paper No. 23687, 2017), https://bit.ly/2ZkbIZl; Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 24 (Nat'l Bureau of Econ. Research, Working Paper No. 22750, 2016), https://bit.ly/2X9NkMA.

24. JOHN E. KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF US POLICY 112–13, 159 (2015).

25. Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1173 (2013).

26. *See* Thomas L. Hungerford, *Changes in Income Inequality Among U.S. Tax Filers between 1991 and 2006: The Role of Wages, Capital Income, and Taxes* (2013), https://ssrn.com/abstract=2207372.

27. MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT 104–05 (2003).

28. William Lazonick, *Profits Without Prosperity*, 92 HARV. BUS. REV. 46–55(Sept. 2014), *available at* https://bit.ly/1yd02Ff.

29. *Too Much of a Good Thing*, *supra* note 19; Marc Jarsulic et al., *Reviving Antitrust: Why Our Economy Needs a Progressive Competition Policy*, CTR. FOR AM. PROGRESS (June 29, 2016 at 12:01 A.M.), https://ampr.gs/30Vy7xI; Robert D. Boroujerdi et al., *Does Consolidation Create Value?*, GOLDMAN SACHS (Feb. 12, 2014), https://bit.ly/2QGnOc2.

30. *The Problem with Profits*, ECONOMIST (Mar. 26, 2016), https://econ.st/2Z6luOS.

density and other factors) with the wage stagnation[31] that has beset the United States economy since the 1970s.[32] Tellingly, when managers at investor-owned businesses have sought to share some of their profits with workers they have faced backlash from Wall Street.[33] In contrast to shareholders, other stakeholder groups have a broader set of concerns than short-term profit maximization[34] and would likely not insist on this frenetic consolidation activity.

Investor motivations for consolidation seem especially evident in the case of the online economy's platform business models—found in companies like Google, Amazon, and Facebook—which now constitute some of the most valuable entities traded on public markets.[35] Rather than simply manufacturing a product and selling it to customers, platform companies create and control multi-sided markets designed to capture entire sectors of the economy.[36] Venture-capital financiers, who tend to gain ownership and governance rights in such companies at their early stages, often expect and demand "exponential" growth, which encourages monopolistic behavior.[37] Moreover, such platforms rely on "network effects" for proper function. A critical mass of users is necessary for the platform to function at all, and once that critical mass is achieved, new entrants can face insurmountable obstacles to challenging incumbents.[38] Financing strategies, the resulting ownership designs, and network effects thus converge to result in firms designed for consolidation on the behalf of investor-owners.

These dominant platforms can offer a wide selection of products at low prices and, on the surface, can be congenial to consumers. Some platform companies, like Google and Facebook, do not charge for their

31. *See* Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AM. SOC. REV. 213, 230–32 (2018); José Azar et al., *Labor Market Concentration* 13 (Nat'l Bureau of Econ. Research, Working Paper No. 24147, 2019), https://bit.ly/2II7vI7 (noting the relation between market concentration and wage stagnation).

32. Efraim Benmelech et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 23–24 (Nat'l Bureau of Econ. Research, Working Paper No. 24307, 2018), https://bit.ly/2HnHAqq.

33. *See, e.g.*, Justin Bachman, *American's CEO Sides with Airline Workers Against Wall Street*, BLOOMBERG (Apr. 27, 2017, 11:29 A.M.), https://bloom.bg/2RkX6X7.

34. *See* Stout, *supra* note 25, at 1171.

35. *See The 100 Largest Companies in the World by Market Value in 2018 (in Billion U.S. Dollars)*, STATISTA, https://bit.ly/2IDS8AJ (last visited Sep. 6, 2019)

36. Martin Kenney & John Zysman, *The Rise of the Platform Economy*, 32 ISSUES SCI. & TECH. 61, 61–62 (2016).

37. *See, e.g.*, Dirk Engel, *The Impact of Venture Capital on Firm Growth: An Empirical Investigation* 7 (ZEW, Disc. Paper No. 02-02, 2002), https://bit.ly/2X8PjRh.

38. GEOFFREY G. PARKER ET AL., PLATFORM REVOLUTION: HOW NETWORKED MARKETS ARE TRANSFORMING THE ECONOMY AND HOW TO MAKE THEM WORK FOR YOU 60 (2016).

core services. But such benefits come with hidden costs—hidden from consumers and from an interpretation of antitrust law that looks principally to consumer prices rather than other harms that might come from overwhelming market power.[39] Investor ownership can further exacerbate the harms that market power might hold for the common good.

A. Harms to Consumers

Investor-owned businesses often exercise their market power to make large short-term profits. Corporations with market power raise prices to consumers and bolster their bottom-line. In turn, the profits are often disbursed to shareholders in the form of dividends and stock buybacks that generate capital gains. This exercise of market power is seen across the economy in sectors such as airlines,[40] pharmaceuticals,[41] and telecom.[42] Health-care is a telling example: highly concentrated local hospital markets across the country are a principal driver of increased health care costs.[43] Market power likely transfers a significant fraction of gross domestic product from ordinary consumers to the disproportionately affluent executives and shareholders of monopolistic and oligopolistic businesses.[44]

In addition to this classic exercise of market power, investor-owned firms can draw financing as long as they maintain high expectations for the future value of their shares. Today, the prospect of monopoly profits in the future can be sufficient to attract investors and support a high share price. For example, firms might be able to drive competitors out of a market with below-cost pricing and raise prices once they face fewer competitive constraints.[45] This phenomenon seems to be increasingly common in the online economy. Highly valued tech platforms like Amazon and Uber can operate at a loss while they invest in achieving

39. *See generally* Charles Duhigg, *The Case Against Google*, N.Y. TIMES (Feb. 20, 2018), https://nyti.ms/2BDUsWs.

40. *See, e.g.*, Ying Shen, *Market Competition and Market Price: Evidence from United/Continental Airline Mergers*, 10 ECON. TRANSP. 1, 6 (2017).

41. *See, e.g.*, ROBIN FELDMAN & EVAN FRONDORF, DRUG WARS: HOW BIG PHARMA RAISES PRICES AND KEEPS GENERICS OFF THE MARKET (2017).

42. *See, e.g.*, SUSAN P. CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE (2013).

43. *See, e.g.*, Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured* (Nat'l Bureau of Econ., Working Paper No. 21815, 2018), https://bit.ly/2KfQbge; Alex R. Horsenstein & Manual S. Santos, *Understanding Growth Patterns in U.S. Health Care Expenditures,* 17 J. EUR. ECON. ASS'N 284 (2018).

44. *See, e.g.*, William S. Comanor & Robert H. Smiley, *Monopoly and the Distribution of Wealth*, 89 Q. J. ECON. 177, 194 (1975).

45. *See* Sandeep Vaheesan, *Reconsidering Brooke Group: Predatory Pricing in Light of the Empirical Learning*, 12 BERKELEY BUS. L.J. 81, 84–94 (2015) (summarizing some of the case studies and other empirical research documenting dominant firms' successful use of below-cost pricing).

market dominance.[46] Consumers experience low or even imperceptible costs, so they eagerly participate in this process.

Increasingly, investors in diverse industries can count on an additional source of future returns: consumer data. This data can be sold on secondary markets or used to create future products for the company itself.[47] Consumers may share their data unknowingly or because they have no alternative,[48] and in many cases the "terms of service" adhesion contracts they must agree to immunize companies from the consequences of lawbreaking through mechanisms such as mandatory arbitration and class-action waivers.[49] Furthermore, the unilateral agreements are highly malleable and imprecise, granting companies sweeping flexibility in their future use of consumers' data contributions without those consumers' knowledge or explicit consent.[50] Public commitments about data practices are no less malleable, such as when Facebook reneged on a promise not to siphon data from WhatsApp users after purchasing the popular messaging app.[51]

These investor-owned, data-driven companies carry out a balancing act: they must divert consumers' attention away from the potential uses and abuses of the data being collected, while at the same time remind investors of the valuable future opportunities that growing market power affords. But the scales of this balance are tipped. An investor-owned company regards consumers as means to the investors' ends.[52] When the

46. *See* Khan, *supra* note 3, at 712.

47. *Id.* at 785–86.

48. JOSEPH TUROW ET AL., THE TRADEOFF FALLACY: HOW MARKETERS ARE MISREPRESENTING AMERICAN CONSUMERS AND OPENING THEM UP TO EXPLOITATION (2015), *available at* https://bit.ly/1F4S958.

49. JAMILA VENTURINI ET AL., TERMS OF SERVICE AND HUMAN RIGHTS: AN ANALYSIS OF ONLINE PLATFORM CONTRACTS (Flavio Jardim & Cibeli Hirsch trans., 2016). The Supreme Court has interpreted the Federal Arbitration Act expansively to permit corporations to enforce mandatory arbitration clauses, including class action waivers. *See* American Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 238–39 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351–52 (2011). For a critical analysis of contracts of adhesion, see generally MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013).

50. Casey Fiesler et al., *Reality and Perception of Copyright Terms of Service for Online Content Creation*, Conference Report, Proceedings of the 19th ACM Conference on Computer-Supported Cooperative Work & Social Computing (Feb. 27–Mar. 2, 2016), https://bit.ly/2Id6Mjg. *See generally* TERMS OF SERVICE; DIDN'T READ, https://tosdr.org (last visited June 12, 2019).

51. Mike Isaac & Mark Scott, *Relaxing Privacy Vow, WhatsApp Will Share Some Data With Facebook*, N.Y. TIMES (Aug. 25, 2016), https://nyti.ms/2Hf7utD.

52. For a comprehensive analysis of how Facebook, Google, and other "surveillance capitalists" capture and monetize user behavior to drive targeted advertising business, *see generally* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019).

company is forced to choose between those two stakeholder groups' interests, the ownership design predetermines which will prevail.

B. Harms to Fair Competition

The threats to open markets posed by ambitious investors in the age of railroads and telegraph lines are exacerbated in the internet economy. Data economies, combined with network effects, promise both rewards to investors and threats to competition. Many of the most profitable new markets (from personalized advertising to artificial intelligence) depend on access to vast troves of data. Such data require time, expense, and often market power to build in the first place.[53] Further, companies like Google, Amazon, and Facebook have each become involved in offering utility-level services (such as cloud computing, undersea cables, and internet service provision) that increasingly put pressure on would-be competitors to become dependent on them.

Academic and judicial observers have tended to hold that, despite their size, the large platform companies have only a precarious dominance.[54] They contend that as went MySpace and Friendster so can Facebook, but there are reasons to believe that the new dominant, networked firms are different from their predecessors. Unlike MySpace and Friendster, Facebook, Google, and Amazon have dominated for a decade or more and appear more protected from competition than ever.[55] If this is the case, greater market entrenchment rewards those companies' investors, especially when antitrust oversight is blind to their power. The dominant model of investor-owned businesses and philosophy of shareholder wealth maximization ensure that the interests of executives and shareholders will capture the lion's share of spoils from the pervasive market power in the American political economy.[56]

The dangers that investor ownership can pose to competition are not limited to the data-driven online economy. The structure of capital markets invites investor-dominated firms to exceed market expectations at all costs. This can lead to socially beneficial behavior, but it can also invite a firm to seek market dominance as an end in itself. Growth becomes an overriding imperative; more than stability, sustainability, quality products,

53. *See* Khan, *supra* note 3, at 785–86.

54. *See, e.g.*, Justus Haucap & Ulrich Heimeshoff, *Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?*, 11 INT'L ECON. & ECON. POL'Y 49, (2014).

55. *See* Ethan Chiel, *Can Facebook and Google Be Disrupted?*, INTELLIGENCER (Dec. 12, 2017), https://nym.ag/2wNq4p0.

56. *See* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 234, 239–45 (2017).

or other metrics.[57] Investment banks likewise tend to view consolidation as an advantage.[58] Especially in a context of weak or non-existent antitrust rules on exclusionary practices, firms can find that predatory behavior is cheaper, and more rewarded in capital markets than customer-facing competition on product quality or price. The advent of diversified investment funds raises another monopoly concern. When a single institutional investor holds shares in companies across a given industry, the investor may seek to dampen risk-taking and innovation to protect the overall portfolio rather than seeking competitive advantage for any one firm.[59]

To discourage the acquisition and exercise of market power on behalf of investors, the investor-owned firm as an organizational structure should face competition from other kinds of firms. If investors opt for market power over product quality, for instance, other kinds of owners can compete on quality. If investors opt to dampen competition across a diverse portfolio, firms not owned by investors can stimulate competition in their place.

C. *Harms to Workers*

Growing consolidation has diminished the power and wealth of workers and hurt the overall standing of labor. Labor market concentration is associated with lower wages, and most local labor markets across the country are moderately or highly concentrated.[60] Workers in the United States have experienced wage stagnation or decline for decades.[61] Meanwhile, workers who were once salaried employees with medical and retirement benefits now find themselves working gig-to-gig, without a safety net from the companies that direct and manage their work.[62] Millions of Americans struggle to subsist and face financial ruin if an emergency strikes.[63]

57. *See generally* Myron J. Gordon & Jeffrey S. Rosenthal, *Capitalism's Growth Imperative*, 27 *CAMBRIDGE J. ECON.* 25 (2003).

58. *See* Boroujerdi et al., *supra* note 29.

59. *See* ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 168–204 (2018).

60. *See* Benmelech et al., *supra* note 32, at 23–24; Azar et al., *supra* note 31, at 17–18.

61. *See* Issue Brief # 330, Lawrence Mishel, *The Wedges between Productivity and Median Compensation Growth*, ECON. POL'Y INST. (Apr. 26, 2012), https://bit.ly/2wxxD2X.

62. *See* TREBOR SCHOLZ, UBERWORKED AND UNDERPAID: HOW WORKERS ARE DISRUPTING THE DIGITAL ECONOMY 13 (2017).

63. *See* FED. RESERVE SYS., REPORT ON THE ECON. WELL-BEING OF U.S. HOUSEHOLDS IN 2016 2 (2017), https://bit.ly/2qTwKhw ("Forty-four percent of adults say they either could not cover an emergency expense costing $400, or would cover it by selling something or borrowing money . . . .").

The largest firms whose business occurs primarily online have used their market power in ways that show little sign of reversing such trends. On the one hand, large online companies frequently pay their skilled employees generous salaries and employee stock-purchase plans are almost commonplace, enabling salaried workers to enjoy the rewards of investor ownership.[64] On the other hand, large online companies employ far fewer salaried employees than the largest industrial corporations of earlier generations did—just thousands or tens of thousands, compared to hundreds of thousands in companies like General Motors and General Electric.[65]

Today, both new and old corporations rely more on non-employee workers and free labor. Online platforms in particular depend on a large number of non-employee contributors of work—from Uber drivers to users posting creative content to Facebook. If paid for their services, these contributors are regarded as contractors and receive less in wages and benefits and have fewer rights than workers of the past could expect from such economic giants.[66] The arrangement between platforms and non-employee contractors is one that investors have come to expect and, often times, encourage.[67] Such expectations have encouraged many older companies to reduce the number of employees on their payroll and outsource core functions to contractors who use contingent employment arrangements.[68] The commonplace suits filed by workers for being misclassified as contractors suggest that this phenomenon is driven primarily by the investor-owners of the hiring firms, not by workers themselves.

64. *See* James C. Sesil et al., *Broad-based Employee Stock Options in U.S. 'New Economy' Firms*, 40 BRIT. J. INDUS. REL. 273, 275–78 (2002).

65. *See* Alexis C. Madrigal, *Silicon Valley's Big Three vs. Detroit's Golden-Age Big Three*, THE ATLANTIC (May 24, 2017), https://bit.ly/2qd3pBE.

66. *See, e.g.*, Daisuke Wakabayashi, *Google's Shadow Work Force: Temps Who Outnumber Full-Time Employees*, N.Y. TIMES (May 28, 2019), https://www.nytimes.com/2019/05/28/technology/google-temp-workers.html?searchResultPosition=2&module=inline.

67. *See generally* Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577 (2016).

68. *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 83–87 (2014). Revisions to antitrust laws contributed to the group of the fissured workplace in which contractors and specialized independent firms perform the core functions of a corporation. Beginning in the late 1970s, the relaxation of antitrust rules governing vertical restraints (between firms in connected markets) allowed businesses, like fast food franchisors, to exercise control over those formally outside their corporate roof, like franchisees. *See generally* Brian Callaci, *Vertical Restraints and the Creation of a Fissured Workplace: Evidence from Franchise Contracts* (2018).

D. Harms to Society

In addition to suppressing potential rivals and diminishing worker leverage, the combination of investor-ownership with market concentration results in reduced opportunity throughout society. Although stock ownership is, in principle, universally accessible, in practice such ownership and the capital gains resulting from it are highly concentrated—and increasingly so.[69] Under such conditions, investor-owned firms with durable market power contribute to widening wealth inequality, which in turn can reduce the prospects for individual economic mobility.[70]

When combined with pervasive market power, the shareholder value maximization ideology can also imperil long-term economic development and prosperity. Monopoly and oligopoly power reduce companies' incentive to develop new capacities and can make long-term investment a losing proposition.[71] Instead, the safer approach would be extracting as much profit from existing capacity. Furthermore, shareholder-centric management philosophy has engendered an extreme short-termism across much of the business sector. Many companies and their managements seek to generate as much short-term capital gains and dividends as possible.[72] As a result, they often forgo investments that have longer-term payoffs. This short-termism can have serious effects on long-term economic growth and standards of living.[73] Private equity-owned businesses exemplify this shareholder value maximization in action. Under private equity ownership, businesses routinely borrow substantial amounts of

69. *See* Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q. J. ECON. 519, 530–31 (2016); Jeanna Smialek, *Stock Ownership Flashes a Warning Signal for Wealth Inequality*, BLOOMBERG (May 30, 2017, 8:28 A.M.), https://bloom.bg/2rBgQeQ.

70. *See* Janet L. Yellen, Chairman, Bd. of Governors of the Fed. Reserve Sys., Speech at the Conference on Economic Opportunity and Inequality: Perspectives on Inequality and Opportunity from the Survey of Consumer Finances (Oct. 17, 2014), *available at* https://bit.ly/ZHI0OS.

71. *See America's Uncompetitive Markets Harm Its Economy*, ECONOMIST (July 27, 2017), https://econ.st/2WIxokb. During a strike by Verizon workers in 2015, a commentator compared and contrasted the company's relationship with shareholders to its relationship with workers:

> There's a lot of attention on the Verizon strike, but less attention to Verizon's payouts to shareholders. Verizon did a $5 billion stock buyback last year to boost its stock price, on top of an already generous dividend. If that money had instead been divided among 180,000 workers, it would have come to $28,000 per person — showing that there's plenty of profit to be shared across the company. Or, if it costs $500 to install FiOS in one household, that money could have been used to help 10 million households cross the digital divide.

Mike Konczal, *How the Rise of Finance Has Warped Our Values*, WASH. POST (Apr. 22, 2016), https://wapo.st/315v4D7.

72. *See* Lazonick, *supra* note 28.

73. *See* Karen Brettell et al., *The Cannibalized Company*, REUTERS (Nov. 16, 2015), https://reut.rs/2vo0pSJ .

money to pay generous dividends to their owners and cripple their long-term financial viability in the process.[74]

Widening inequality and labor disruption are just a few of the public harms produced by the combination of market power with investor-focused ownership designs. Investor-owned companies, for instance, have difficulty addressing environmental considerations head-on. After revelations that ExxonMobil executives had knowingly misled the public on climate change for many years, shareholders had standing to sue the company, not for ecological damage, but merely for related losses in the value of their shares.[75] Due to a series of court decisions across a range of areas, investor-owned businesses face few constraints on their political activities and can advance their short-term business interests at the expense of more multifarious perceptions of the common good.[76]

E. Appetite for Alternatives

Despite the prevalence of investor-owned firms in the *Fortune* 500, this model of ownership faces growing protest and criticism from commentators and in the business world itself. Some scholars perceive that shareholder primacy is on the decline.[77] Management schools that once held this ideology as gospel have begun teaching competing notions such as the "triple bottom line" and "social entrepreneurship."[78] Companies have found that they can gain trust and loyalty of customers by pursuing the relatively recent B Corp charter, which incorporates an entity as a benefit corporation. A growing number of states are allowing B Corp charters and legally allowing a company's managers to prioritize social

74. *See* Nabila Ahmed & Sridhar Natarajan, *Private Equity Wins Even When It Loses, Thanks to Debt Markets*, BLOOMBERG (Mar. 20, 2017, 5:00 A.M.), https://bloom.bg/2ndpQnk.

75. *See* Geoffrey Supran & Naomi Oreskes, *What Exxon Mobil Didn't Say About Climate Change*, N.Y. TIMES (Aug. 22, 2017), https://nyti.ms/2v4LBLp.

76. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 929 (2010) ("[T]o exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate."); Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379–80 (1991) ("The federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government. . . . That a private party's political motives are selfish is irrelevant: *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.") (internal quotation marks omitted). *See generally* Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations*, 51 HARV. C. R.-C. L. L. REV. 423 (2016).

77. *See* Stout, *supra* note 25, at 1178–81.

78. Gerald F. Davis & Christopher White, *The Traits of Socially Innovative Companies*, HARV. BUS. REV. (Apr. 17, 2015), https://bit.ly/1HhsdYU; *see also* Ana María Peredoa & Murdith McLean, *Social Entrepreneurship: A Critical Review of the Concept*, 41 J. WORLD BUS. 56, 56 (2006).

mission over profit maximization.[79] Some entrepreneurs have sought to abandon conventional corporate structures altogether with "distributed autonomous organizations" and the like, which are enabled by the blockchain technology underlying Bitcoin. To be sure, in many cases, these systems have been used to merely replicate under-regulated speculative markets.[80]

Part of this experimentation has been a revival of interest in cooperative business structures. Since the 2008 financial crisis, there has been a surge of interest in "move your money" campaigns preferring credit unions over investor-owned banks, policy initiatives on behalf of worker-owned businesses, and a phenomenon known as "platform cooperativism"—a marriage of cooperative ownership designs with the platform economy which has spawned conferences, startups, policy initiatives, and more.[81] While such efforts have tended to strike a utopian chord, the cooperative model is arguably the oldest and most well-proven form of social enterprise. The cooperative model represents a tradition that also bears neglected significance for antitrust.

III. COOPERATIVE ADVANTAGES

A cooperative is a business or other collective owned and governed by the people or organizations that benefit from its product, service, or employment, rather than by outside investors seeking solely financial return. Though it is common today to regard cooperatives as an "alternative" kind of corporation, Henry Hansmann's seminal study, *The Ownership of Enterprise*, reverses the relation by describing the primarily investor-owned (or "capitalist") corporation as "the most familiar form of producer cooperative."[82] Hansmann considers the cooperative a general rubric of joint ownership and governance, under which capitalist corporations are a subset that happens to grant particular privilege to capital-contributors (as opposed to other stakeholders such as employees,

79. *See* Janine S. Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J. BUS. ETHICS 287, 288 (2012). For an example of conflict between investor-ownership and a cousin of B Corp incorporation, B Corp certification, see David Gelles, *Inside the Revolution at Etsy*, N.Y. TIMES (Nov. 25, 2017), https://nyti.ms/2n1PGfy.

80. *See generally* PRIMAVERA DE FILIPPI & AARON WRIGHT, BLOCKCHAIN AND THE LAW: THE RULE OF CODE (2018).

81. *See generally* TREBOR SCHOLZ & NATHAN SCHNEIDER, OURS TO HACK AND TO OWN: THE RISE OF PLATFORM COOPERATIVISM, A NEW VISION FOR THE FUTURE OF WORK AND A FAIRER INTERNET (Trebor Scholz & Nathan Schneider eds., 2016); Nathan Schneider, *An Internet of ownership: Democratic design for the online economy*, 66 SOC. REV. 320 (2018) [hereinafter *An Internet of Ownership*]; NATHAN SCHNEIDER, EVERYTHING FOR EVERYONE: THE RADICAL TRADITION THAT IS SHAPING THE NEXT ECONOMY 82–83 (2018) [hereinafter *EVERYTHING FOR EVERYONE*].

82. HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE ix (1996).

customers, or suppliers).[83] Cooperative scholars tend to consider this an over-simplification, since the cooperative "movement" asserts principles and values over and above merely a shared ownership structure.[84]

Cooperative businesses arose in tandem with the advent of the industrial firm. Textile mill workers in Rochdale, England founded a customer-owned store, widely regarded as the first modern co-op in the Anglophone world, in 1844. In the subsequent decades, this model was replicated widely and spawned a national wholesale purchasing and manufacturing co-op whose descendant, the Co-operative Group, remains an important British retailer today.[85] In the nineteenth century United States, cooperatives were among the first to establish the insurance industry (in which major firms such as State Farm and Northwestern Mutual are still owned by their policyholders) and were instrumental in modernizing agriculture (through joint purchasing and marketing efforts).[86] By the early twentieth century, the U.S. federal government actively supported co-op development, especially under the purview of the Department of Agriculture. Cooperative brands include grocery store staples such as Land O'Lakes butter, Organic Valley milk, Ocean Spray cranberries, and Sun-Kist oranges.[87] Less visible on retail shelves, but nonetheless significant, is CHS, a *Fortune* 500 farm supply and marketing firm.[88] Additionally, CoBank, a product of the Farm Credit System established by Congress in 1916, is one of several large agricultural banks whose member-owners are the co-ops with which they do business.[89]

The phenomenon of smaller businesses doing joint purchasing or marketing through cooperative firms is by no means limited to agriculture. Familiar examples include, for instance, hardware purchasing

83. *See id.*

84. *See* Sonja Novkovic, *Defining the Cooperative Difference*, 37 J. SOCIO-ECONOMICS 2168, 2175 (2008).

85. *See* JOHN F. WILSON ET AL., BUILDING CO-OPERATION: A BUSINESS HISTORY OF THE CO-OPERATIVE GROUP, 1863–2013 (2013).

86. *See generally* JOHN CURL, FOR ALL THE PEOPLE: UNCOVERING THE HIDDEN HISTORY OF COOPERATION, COOPERATIVE MOVEMENTS, AND COMMUNALISM IN AMERICA (2012); JESSICA GORDON NEMBHARD, COLLECTIVE COURAGE: A HISTORY OF AFRICAN AMERICAN COOPERATIVE ECONOMIC THOUGHT AND PRACTICE (2014); JOSEPH G. KNAPP, THE RISE OF AMERICAN COOPERATIVE ENTERPRISE: 1620–1920 (1969); EDWARD K. SPANN, BROTHERLY TOMORROWS: MOVEMENTS FOR A COOPERATIVE SOCIETY IN AMERICA, 1820–1920 (1989).

87. *See Co-ops Commit: The 2017 NCB Co-op 100*, NAT'L COOPERATIVE BANK, https://bit.ly/31vocz5 (last visited July 15, 2019).

88. *See CHS Financials and News*, FORTUNE, https://bit.ly/2WCMd7S (last visited Sep. 6, 2019).

89. *See Corporate*, COBANK, https://bit.ly/2XiShiV (last visited July 15, 2019).

cooperatives such as Ace and, until recently, True Value.[90] These co-ops have helped ensure the survival of many locally owned hardware stores, which in turn are member-owners of the co-ops.[91] Some retail franchises, such as Dairy Queen and Best Western, have co-ops built into their franchise structures.[92]

Cooperatives with individual consumers as members have also created sustainable enterprises and achieved economies of scale. During the interwar years, farmers lacking access to electricity began to form their own electric utility co-ops. In 1936 the Rural Electrification Act granted low-interest federal loans and technical assistance that spurred the creation of what are now nearly 900 such utilities, which provide power for more than half of the United States landmass and increasingly offer broadband internet as well.[93] Meanwhile, department store mogul Edward Filene coined the term "credit union" for customer-owned, co-op retail banking and he advocated for the passage of enabling legislation.[94] Credit unions provide consumer-owned banking services for many millions of people, both rural and urban, sometimes out-competing far larger banks on certain products.[95] Consumer-owned retail stores have also been essential for developing new markets, such as for high-end sporting goods—consider REI or Canada's Mountain Equipment Co-operative—and the natural foods co-ops that paved the way for the Amazon-owned giant Whole Foods.[96] Other countries have even more significant examples of retail cooperation, such as Italy's Coop Italia, a federation of regional consumer cooperatives that constitutes the country's largest grocery chain.[97]

Worldwide, approximately three million cooperatives reportedly account for about 10 percent of all employment.[98] A recent survey of the

90. *See* Lauren Zumbach, *True Value Owners Approve Selling Majority Stake in Hardware Co-op to Private Equity Firm*, CHI. TRIB. (Apr. 20, 2018, 12:05 P.M.), https://bit.ly/2QBbgTz.

91. *See generally* William P. Darrow et al., *David vs. Goliath in the Hardware Industry: Generic Strategies and Critical Success Factors as Revealed by Business Practice*, 37 MID-ATLANTIC J. BUS. 97 (2001).

92. *See, e.g.*, *About*, DQOA/DQOC, https://bit.ly/2YWPZGP (last visited July 15, 2019); *see also* Quist v. Best Western Int., Inc., 354 N.W.2d 656, 659 (N.D. 1984).

93. *See* Nathan Schneider, *Economic Democracy and the Billion-Dollar Co-op*, THE NATION (May 8, 2017), https://bit.ly/2pdtwYL.

94. *See generally* CARROLL MOODY & GILBERT C. FITE, THE CREDIT UNION MOVEMENT: ORIGINS AND DEVELOPMENT, 1850–1980 (1984).

95. *See* JOHN TATOM, *Competitive Advantage: A Study of the Federal Tax Exemption for Credit Unions* (2006).

96. *See* Ruth Little et al., *Collective Purchase: Moving Local and Organic Foods beyond the Niche Market*, 42 ENV'T & PLAN. A: ECON. & SPACE 1797, 1800–02 (2010).

97. *See* Paul W. Dobson et al., *The Patterns and Implications of Increasing Concentration in European Food Retailing*, 54 J. AG. ECON. 111, 116 (2003).

98. *See Facts and Figures,* INT'L CO-OPERATIVE ALLIANCE, https://bit.ly/2GfUV04 (last visited July 15, 2019).

co-op sector in the United States counted nearly 40,000 businesses employing over 600,000 people.[99] These businesses include co-ops owned by their workers, their small-business clients, their individual customers, and more. Some include in their ownership structure several types of stakeholder classes. Additionally, as many as 14 million workers participate in employee stock-ownership plans, which bear some resemblance to cooperatives.[100] Since co-ops take such different forms, it is a flexible business structure that allows for diverse "bottom lines" in lieu of the shareholder value that motivates typical investor-owned firms. Research suggests a similarly diverse set of social benefits, including contributions to community governance,[101] protection against exploitation,[102] and resilience in times of economic hardship.[103]

Despite their advantages, cooperatives face certain challenges. In times past, people might have pooled their resources in a co-op to circumvent the high costs of capital, or outright barriers to capital access. In societies where finance plays a growing role and captures a larger share of the economy,[104] the cost of investor capital for new enterprises may be so low that democratic self-organizing is seen as expensive in comparison to investor ownership. Although cooperative financing mechanisms are widespread in certain sectors (such as agriculture and electric utilities) they are almost nonexistent in others (such as software and manufacturing). Historically, success in overcoming such barriers has tended to come through a blend of entrepreneurship and policy support.[105]

Cooperatives can also struggle with costly and ineffective governance, especially when they endure shifts in scale or member culture that the founders failed to anticipate.[106] This is one reason why co-ops frequently depend on regional, national, and international associations to

99. *See Measuring the Cooperative Economy*, U. WIS. CTR. FOR COOPERATIVES, https://mce.uwcc.wisc.edu (last visited July 15, 2019).

100. *See* Joseph R. Blasi et al., *Having a Stake: Evidence and Implications for Broad-based Employee Stock Ownership and Profit Sharing,* THIRD WAY (Feb. 1, 2017), https://bit.ly/2H536Oo.

101. *See* Andrew Zitcer & Richardson Dilworth, *Grocery Cooperatives as Governing Institutions in Neighborhood Commercial Corridors,* URB. AFFAIRS REV. (June 15, 2017), https://bit.ly/2KMJuCs.

102. *See* Pérotin, *supra* note 17, at 20.

103. *See* Guillermo Alves et al., *Workplace democracy and job flows,* 44 J. OF COMP. ECON. 258, 263 (2016).

104. *See* THOMAS I. PALLEY, FINANCIALIZATION: THE ECONOMICS OF FINANCE CAPITAL DOMINATION (2013).

105. *Id.* at 53–56.

106. *See* Derek C. Jones & Panu Kalmi, *Economies of Scale Versus Participation: A Co-Operative Dilemma?* J. OF ENTREPRENEURIAL AND ORGANIZATIONAL DIVERSITY 37, 38 (Dec. 2012); Keith A. Taylor & Art Sherwood, *Unique Expectations of Co-operative Boards: taking on the challenges of the democratic enterprise,* INT. J. OF CO-OPERATIVE MGMT, 29, 30 (Aug. 2014).

establish standards, best practices, and member-training regimes, as well as to exert pressure in cases of stagnation or mismanagement.[107] In addition to such more or less voluntary associations, legal regimes have also played a role in establishing and enforcing standards for cooperative firms.

The International Co-operative Alliance, which represents the co-op sector globally, maintains an official definition, seven principles and six values, that it regards as constituting "cooperative identity," last updated in 1995.[108] In the United States, as with other features of corporate law, co-op incorporation statutes vary state-by-state. The United States Department of Agriculture ("USDA") has provided a far more concise, three-point definition:[109]

- *User-Owner Principle:* Those who own and finance the cooperative are those who use the cooperative.
- *User-Control Principle:* Those who control the cooperative are those who use the cooperative.
- *User-Benefits Principle:* The cooperative's sole purpose is to provide and distribute benefits to its users on the basis of their use.

The "user" in question can be a consumer, farmer, worker, another co-op, or another kind of business. Although many co-ops overseen by the USDA have become increasingly consolidated,[110] these principles nevertheless amount to a kind of ownership design quite distinct from ownership by investors seeking only higher share prices and dividends. This distinctiveness can have consequences for antitrust policy.

The 1922 Capper-Volstead Act, sometimes known as the "Magna Carta of cooperatives," provided farmers with some protection from antitrust laws that might otherwise target their co-ops.[111] According to its sponsor, Senator Arthur Capper of Kansas, the act's purpose was "to give to the farmer the same right to bargain collectively that [was]already

107. *See generally* Antonio Fici, *Cooperation among Cooperatives in Italian and Comparative Law,* 4 J. ENTREPRENEURIAL & ORGANIZATIONAL DIVERSITY 64 (2015).

108. *See Co-operative Identity, Values & Principles,* INT'L CO-OPERATIVE ALLIANCE, https://bit.ly/10eJZLu (last visited May 28, 2019) ("Cooperatives are based on the values of self-help, self-responsibility, democracy, equality, equity, and solidarity. In the tradition of their founders, cooperative members believe in the ethical values of honesty, openness, social responsibility and caring for others.").

109. *See* BRUCE J. REYNOLDS, COMPARING COOPERATIVE PRINCIPLES OF THE U.S. DEPARTMENT OF AGRICULTURE AND THE INTERNATIONAL COOPERATIVE ALLIANCE 2 (U.S. Dep't of Agric. ed. 2014).

110. *See* Keri Jacobs, *Ag cooperatives consolidating, too*, 55 AgriMarketing 16–18 (April 2017), https://bit.ly/2kMwgLn.

111. Donald M. Barnes & Christopher E. Ondeck, *The Capper-Volstead Act: Opportunity Today and Tomorrow*, NAT'L COUNCIL OF FARMER COOPERATIVES' NAT'L INST. ON COOPERATIVE EDUC., ANN. CONF. (Aug. 5, 1997), https://bit.ly/2zlDdqo.

enjoyed by corporations."[112] This rationale reflects the assumption that, with respect to antitrust policy, a group of small producers organizing together in a cooperative business should be treated differently from other kinds of corporations. This insight is no less relevant today.

A. Economies of Scale with Less Need for Conglomeration

One significant difference between cooperatives and investor-owned businesses lies in how they tend to achieve scale: through federation rather than conglomeration. Large cooperatives are usually composed of, and accountable to, smaller co-ops or other kinds of businesses. Thus, large co-ops incline toward supporting diverse, competitive, smaller enterprises, rather than seeking to undercut, eliminate, or absorb them. For instance, the regional component co-ops of Coop Italia are not subsidiaries of the national company; instead, they own it.[113] Most United States electric co-ops do something similar. On a regional basis, they have formed larger "generation and transmission" co-ops, owned by the smaller ones, to undertake major capital investments like power plants and high-voltage transmission lines.[114] Nationally, electric co-ops have formed cooperatives for shared financing and technology needs.[115] Regional grocery and agricultural co-ops likewise achieve national economies of scale through such federations.

Although federations can create market power, they are not likely to seek and exercise market power in the same way that investor-owned corporations do. Accountability in a cooperative federation flows downward, toward participant enterprises or individuals rather than to outside investors. In some cases the constituent members are non-competitive natural monopolies, such as the electric utility co-ops. In other cases, cooperative arrangements enable and support member businesses that compete with one another. Neighboring farmers, retail stores, or service contractors may belong to the same co-op in order to achieve economies of scale in discrete activities and, at the same time, continue competing for employees, customers, and productivity.[116] Thus, cooperative federation can present lower risk of anticompetitive and other unfair conduct than corporate conglomeration. Evidence also suggests that cooperatives can reach higher rates of productivity and efficiency than

112. 62 CONG. REC. 2057 (1922).

113. *See* Nathan Schneider, *How Communists and Catholics Built a Commonwealth*, AM. MAG. (Sept, 7, 2017), https://bit.ly/2xq4xnV.

114. EVERYTHING FOR EVERYONE, *supra* note 81.

115. *See id.*

116. The Supreme Court has, at times, helped ensure this, such as when it required the Associated Press to open membership to competing news agencies. *See generally* Assoc. Press v. United States, 326 U.S. 1 (1945).

investor-owned competitors,[117] and thereby create savings that are designed to be passed on to their members.

B. *Worker Independence with Less Vulnerability*

Labor organizing and cooperatives have a long history together in the United States. From the late eighteenth to the early twentieth centuries, workers seeking rights and benefits on the job frequently combined union strategies (such as strikes) with co-op strategies (such as forming worker-owned manufacturing, insurance, housing, and retail businesses).[118] For instance, co-op stores enabled workers to obtain necessary goods at lower prices and co-op workshops allowed workers to earn income in the case of a strike. In addition to higher wages, shorter hours, and greater employment stability, workers often fought for collective control of the workplace.[119] National unions such as the Knights of Labor and the Industrial Workers of the World actively pursued cooperative development when they were most active.[120] This pattern largely ceased after the National Labor Relations Act of 1935, which regularized labor disputes in a way that left little room for the creative alternative-building that cooperative development represented.

In the United States and Europe, interest in co-ops has re-emerged among workers facing greater vulnerability in the erosion of the postwar social contract.[121] Unions such as the Service Employees International Union and United Steelworkers, among others, have pursued co-op development.[122] Some of the most promising developments, though, are taking place among the contract workers not ordinarily served by labor unions. Notably, SMart is a Belgian cooperative (now spreading across Europe and beyond) that enables its tens of thousands of active members to carry out their freelance payroll and bookkeeping as employees of the co-op, granting them access to a more robust social safety network than they otherwise would have.[123] The New York-based Freelancers Union is

117. *See* Molk, *supra* note 17, at 912.

118. *See generally* JOHN CURL, FOR ALL THE PEOPLE: UNCOVERING THE HIDDEN HISTORY OF COOPERATION, COOPERATIVE MOVEMENTS, AND COMMUNALISM IN AMERICA (2012).

119. *See* DAVID MONTGOMERY, WORKERS' CONTROL IN AMERICA 98–100 (Cambridge Univ. Press ed., 1979).

120. *See generally* STEVE LEIKIN, THE PRACTICAL UTOPIANS: AMERICAN WORKERS AND THE COOPERATIVE MOVEMENT IN THE GILDED AGE (2005).

121. *See* Pat Conaty et al., *Working Together: Trade union and co-operative innovations for precarious workers*, CO-OPERATIVES UK (2018), https://bit.ly/2HOJc9q.

122. *See* Brian Van Slyke, *Unions and Cooperatives: How Workers Can Survive and Thrive*, TRUTHOUT (Feb. 27, 2016), https://bit.ly/2JRrZS1; *see also* Laura Hanson Schlachter, *Stronger Together? The USW-Mondragon Union Co-op Model*, 42 LAB. STUD. J. 124, 125 (2017).

123. *See* SMART, *What Is SMart?*, https://bit.ly/31bACw2 (last visited Jun. 1, 2019).

not a cooperative (nor a union), but it has recreated features of past worker-supporting co-ops by providing access to medical insurance and other services, together with lobbying and a smartphone app for those seeking legal advice.[124] A variety of platform cooperatives, such as the gig-marketplace Loconomics and the home-cleaning app Up & Go, have also sought to use shared ownership as a means of taming and improving the quality of life possible under irregular employment conditions.[125]

Whereas an investor-owned firm may have strong incentives to subjugate worker well-being to opportunities for shareholder value, cooperative firms can prioritize outcomes for workers as an end in itself—especially when the firm is a worker-owned cooperative. In some cases, this can take the form of merely dulling some of the more pernicious effects of less stable, predictable, and rewarding work arrangements. But shared ownership can also enable workers to propose and practice their own visions for the unfolding process that has come to be called "the future of work."

C. Self-governance with Less Risk of Public Harm

With or without internal competition, cooperative forms of association can mitigate other harms that arise from concentrated corporate power. One example is in the potential for self-regulation. While investor-owned companies carry strong incentives to prioritize (often short-term) share value above other concerns, cooperatives' participant members tend to have a wider range of concerns that boards and managers must address. This can introduce dynamism and reduce the need for outside regulation to prevent harm to parties outside of the cooperative. Co-op participants are more likely to feel the effects of such harms, and seek to prevent them, than profit-seeking investors. Such self-regulation in cooperatives has already been recognized by policymakers. Electric utility co-ops, for instance, operate with less regulation in most states relative to investor-owned utilities.[126]

Democratically owned and managed enterprises may require less extensive public regulation than investor-owned firms, and the benefits may outweigh the costs of more diverse stakeholder interests. In cases such as the resilience of credit unions after the 2008 financial crisis, cooperative governance has shown an ability to accommodate a diverse set of priorities.[127] Cooperatives can also come to operate as democratic and complementary "governing institutions" alongside the public

124. *See* FREELANCERS UNION, https://freelancersunion.org (last visited Jun. 1, 2019).

125. *See An Internet of ownership*, *supra* note 81, at 325.

126. *See* John Farrell et al., *Re-Member-ing the Cooperative Way*, INST. FOR LOCAL SELF-RELIANCE (2016), https://bit.ly/2JRutjj; Jim Cooper, *Electric Co-operatives: From New Deal to Bad Deal?*, 45 HARV. J. ON LEG. 335, 373 (2008).

127. *See* Taylor & Sherwood, *supra* note 106, at 38.

sector.[128] These kinds of enterprises, when functioning properly, respond to a wide range of community needs and concerns and enable regulators to focus on proactive collective-action challenges.

Furthermore, through market participation, cooperative enterprise can compete directly with investor-owned businesses and perform an indirect, but important, regulatory function. Through this head-to-head rivalry with corporate entities, co-ops can provide beneficial "yardstick competition" and push prices closer to what a competitive market would yield.[129] American history reveals the value of this type of competition. During the 1930s, the federal government's promotion of power projects, such as the Tennessee Valley Authority, and rural electric cooperatives provided critical competition to investor-owned utilities and yielded more affordable electric rates.[130]

The governance issues facing cooperatives, however, should not be discounted. Although electric co-op customer satisfaction is consistently higher than for investor-owned electric companies,[131] member participation in governance is almost universally low—nearly two-thirds of electric co-ops receive ballots from less than 10 percent of members in board elections.[132] These utilities have also faced accusations of racial discrimination and disenfranchisement.[133] Electric cooperatives are just one example of how large, longstanding cooperatives can fall into danger of becoming highly centralized and unresponsive to members.[134] This danger can lead to operational inefficiency, abusive labor practices, and even outright self-dealing among managers.[135]

A cooperative-oriented economy will require more robust oversight to ensure that cooperatives adhere to high standards of accountability and are run along democratic lines. Such an economy will also demand a blend of legislation, regulation, and voluntary associations. Some countries, like Kenya, rely on strong national regulations to oversee cooperative

128. *See, e.g.*, Zitcer & Dilworth, *supra* note 101, at 559.

129. *See, e.g.*, Markus Hanisch et al., *The Cooperative Yardstick Revisited: Panel Evidence from the European Dairy Sectors*, 11 J. AGRIC. & FOOD INDUS. ORG. 151 (2013).

130. *See* Williams M. Emmons III, *Franklin D. Roosevelt, Electric Utilities, and the Power of Competition*, 53 J. ECON. HIST. 880, 900–02 (1993).

131. *See* Michael W. Khan, *Déjà Vu as Co-ops Lead in Satisfaction*, AM.'S ELEC. COOPERATIVES (Jul. 17, 2008), https://www.electric.coop/co-ops-lead-satisfaction-j-d-power.

132. *See* Farrell et al., *supra* note 126.

133. *See* EVERYTHING FOR EVERYONE, *supra* note 81.

134. *See, e.g.*, Leah Douglas, *How Rural America Got Milked*, WASH. MONTHLY (2018), https://bit.ly/2mQ1Rc0.

135. *Id.*

behavior,[136] while others, like Italy, have employed the co-ops' associations themselves to enforce good management practices.[137]

D. Network Effects with Less Need for Centralization

The capacity of cooperative models to mitigate the potential harms of market concentration may be especially relevant in networked, internet-enabled economies. Network effects create conditions that can resemble natural monopoly in sectors ranging from social media and online retail to operating systems and cloud services.[138] Users may benefit from ubiquity, especially when they are not directly exposed to costs such as data surveillance and high barriers of entry for startup competitors. Cooperative ownership models could deliver the benefits while mitigating the harms of network effects, especially by eliminating the temptation to leverage user data on behalf of returns for outside investors. Federation could enable large-scale networks, while user ownership would help ensure that such networks remain accountable to the people who contribute to them.

Forms of cooperation have already been remarkably present on the internet, in cases such as corporations and individuals jointly producing open-source software, or standards-setting organizations, like the World Wide Web Consortium, that orchestrate infrastructure among a variety of stakeholders.[139] These rationales could be extended to companies themselves. If certain core Facebook or Amazon services were reorganized cooperatively, a startup could participate in those services as a full partner, not as a mere client and potential competitor. Just as people interact over email using various software and providers, competing companies might offer access to the Facebook or Amazon networks with a wider range of terms and options. Indeed, the internet is a federated network of servers and clients, suggesting that federated, cooperative business models might be especially well suited to its economies.[140]

In the past, political will and policy have recognized that cooperative models merit a distinct kind of treatment under antitrust law. When co-ops do gain market power, it will likely be exercised in a different way than the way investor-owned firms exercise such power. At a time when

136. *See generally* Ndwakhulu Tshishonga & Andrew Emmanuel Okem, *A Review of the Kenyan Cooperative Movement*, *in* THEORETICAL AND EMPIRICAL STUDIES ON COOPERATIVES, (Andrew Emmanuel Okem ed., 2016).

137. *See, e.g.*, Fici, *supra* note 107, at 64; Antonio Fici, *The Essential Role of Co-operative Law and Some Related Issues*, *in* THE OXFORD HANDBOOK OF MUTUAL, CO-OPERATIVE, AND CO-OWNED BUSINESS 539 (Jonathan Michie et al. eds., 2017).

138. *See* Nicholas Economides, *The Economics of Networks*, 14 INT'L J. INDUS. ORG. 673, 691 (1996).

139. *See generally* MILTON L. MUELLER, NETWORKS AND STATES: THE GLOBAL POLITICS OF INTERNET GOVERNANCE (2010).

140. Nathan Schneider, *Next, the Internet*, COOPERATIVE BUS. J. 4 (2018).

concentrated market power is a matter of growing public concern, and public opinion is turning back to antitrust enthusiasm, the place of cooperative models in the antitrust tradition should be part of the conversation as well. The remainder of this Article will consider the legal specifics of the cooperative model legacy and some opportunities for reviving it to meet the challenges of the present.

IV. ANTITRUST LAW AND THE COOPERATIVE FORM

Antitrust law has a complicated relationship and history with cooperatives. Certain types of cooperatives exist uneasily in today's antitrust landscape, while others face minimal danger from the antitrust laws. Co-ops that seek only to enhance members' bargaining power may encounter serious antitrust risk. In contrast, co-ops that pool the resources of members to engage in production, distribution, or retail activities will not likely confront greater antitrust risks than investor-owned businesses. Because of the serious threat antitrust poses to certain forms of cooperatives, Congress has established discrete antitrust immunities for cooperatives and other collectives composed of particular classes of members.

Antitrust law today features a default rule that all market participants—large businesses, small businesses, workers, and consumers—are subject to the same antitrust duties and prohibitions.[141] Judicial and statutory exemptions immunize certain actors from antitrust liability.[142] These exemptions, however, are the exception rather than the rule. The Supreme Court has described the antitrust laws as embodying the "fundamental national values of free enterprise and economic competition."[143]

Federal antitrust enforcers and courts treat horizontal collusion between otherwise competing actors as the most serious antitrust offense. Even as the Supreme Court has relaxed legal rules governing a range of

141. Sanjukta Paul has described antitrust law's choice to treat a corporation—a collective composed sometimes of tens of thousands of workers and billions in assets—as a single entity as the "firm exemption." Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. (forthcoming 2020).

142. *See, e.g.*, Assoc. Gen. Contractors of Cal., Inc., v. Cal. State Council of Carpenters, 459 U.S. 519, 539–40 (1983) ("Federal policy has since developed not only a broad labor exemption from the antitrust laws, but also a separate body of labor law specifically designed to protect and encourage the organizational and representational activities of labor unions."); Square D. Co. v. Niagara Tariff Bureau, Inc., 476 U.S. 409, 422 (1986) (affirming the principle that rates filed with a regulatory body cannot be challenged through treble damage lawsuits); Flood v. Kuhn, 407 U.S. 258, 285 (1972) (affirming judicially-created antitrust exemption for baseball in light of congressional inaction).

143. Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 225 (2013).

competitively suspect business conduct,[144] the Court continues to treat collusion as per se illegal, condemning it as "the supreme evil of antitrust."[145] The United States Department of Justice ("DOJ") devotes the bulk of its enforcement resources to prosecuting individuals and businesses for price-fixing, market division, and other types of "naked collusion."[146] Each year, the DOJ obtains prison sentences for numerous individuals for cartel activity and collects hundreds of millions of dollars in fines.[147] Antitrust enforcers subscribe to a bipartisan consensus that rooting out collusion should be the most important priority for public antitrust.[148]

The vehicle through which collusion takes place—whether a specially created corporation or something more informal—cannot redeem an otherwise illegal price-fixing arrangement.[149] The courts have long held that "an otherwise naked [and per se illegal] trade restraint cannot be made legal just by incorporating it."[150] Drawing on this precedent, Antitrust Guidelines for Collaborators Among Competitors, from the DOJ and the Federal Trade Commission ("FTC"), have affirmed that they likely will challenge joint action without economic integration as per se illegal conduct.[151]

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144. S*ee, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (overruling the nearly century-old per se prohibition on resale price maintenance and holding this practice should be evaluated under the rule of reason); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993) (holding that predatory pricing claim requires showing of both below-cost pricing and dangerous probability of recoupment of below-cost pricing).

145. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, L.L.P., 540 U.S. 398, 408 (2004).

146. DEP'T OF JUSTICE, ANTITRUST DIVISION, WORKLOAD STATISTICS (FY 2008-2017 5–7), https://bit.ly/2WicgBZ.

147. *See* Dep't of Justice, *Criminal Enforcement Trends Charts*, https://bit.ly/2EPmIGe (last visited Sep. 18, 2019).

148. *See, e.g.*, Bill Baer, Assistant Att'y Gen., Dep't of Justice Antitrust Div., Prosecuting Antitrust Crimes, Address at Georgetown University Law Center Global Antitrust Enforcement Symposium (Sept. 10, 2014), https://bit.ly/2UvHTCy; Thomas O. Barnett, Assistant Att'y Gen., Dep't of Justice Antitrust Div., Perspectives on Cartel Enforcement in the United States and Brazil, Address at the Universidade de São Paolo (Apr. 28, 2008), https://bit.ly/2wyRw9I .

149. *See* Assoc. Press v. United States, 326 U.S. 1, 19 (1945) ("[A]rrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose."); Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191 (2010) ("[W]e have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity.").

150. Chris Sagers, *Why* Copperweld *Was Actually Kind of Dumb: Sound, Fury and the Once and Still Missing Antitrust Theory of the Firm*, 18 VILL. SPORTS & ENT. L.J. 377, 387 (2011).

151. The antitrust agencies have stated the following:

> The mere coordination of decisions on output is not integration . . . . Th[is] agreement is of a type so likely to harm competition and to have no significant

A. *Co-op Accommodations in Antitrust Law*

Since the passage of the Sherman Act in 1890, Congress and the courts have made multiple efforts to accommodate cooperatives. Through the Clayton Act in 1914 and Capper-Volstead Act in 1922, Congress established antitrust exemptions for agricultural cooperatives. With the Clayton Act and Norris-LaGuardia Act in 1933, Congress sought to protect the activities of labor unions from antitrust challenge.

1. Protection for Agricultural Cooperatives

In the early decades of the Sherman Act, agricultural cooperatives confronted a real risk of antitrust prosecutions. This was ironic: farmers and their associations were among the earliest victims of the trusts and became principal promoters of federal antitrust law.[152] As organizations that sought to build the collective power of individual farmers, cooperatives and their members feared that they and their activities would be condemned as illegal restraints of trade under the Sherman Act.[153] Indeed, several state courts held that cooperatives were illegal under their antitrust laws. For instance, in 1913, the Supreme Court of Iowa held that a cooperative of hog farmers violated the state's law prohibiting price fixing.[154] Additionally, milk dealers repeatedly brought antitrust suits against dairy cooperatives, alleging illegal restraints of trade.[155] These antitrust actions and decisions posed a serious threat to the ongoing existence and activities of cooperatives.

Due to the concerns of farmers and their cooperatives, Congress established an antitrust immunity for agricultural cooperatives. The Clayton Act provided immunity for certain types of agricultural cooperatives. The relevant section of the Clayton Act provides that "[n]othing contained in the antitrust laws shall be construed to forbid the

> benefits that particularized inquiry into its competitive effect is deemed by the antitrust laws not to be worth the time and expense that would be required. Consequently, the evaluating Agency likely would conclude that th[is type of] agreement is per se illegal.

FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.2 (2000) [hereinafter *COMPETITOR COLLABORATION GUIDELINES*].

152. Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 85 N.D. L. REV. 449, 450–53 (1999); Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Anti-trust*, 30 ECON. INQUIRY 242, 256 (1992).

153. John E. Noakes, *Agricultural Cooperatives*, 33 ANTITRUST L.J. 7, 8 (1967).

154. *See* Reeves v. Decorah Farmers' Coop. Soc'y, 140 N.W. 844 (Iowa 1913). The Illinois Supreme Court also held cooperative selling activity violated state antitrust law. Ford v. Chicago Milk Shippers' Ass'n, 39 N.E. 651 (Ill. 1895).

155. *See* JOSEPH G. KNAPP, CAPPER-VOLSTEAD IMPACT ON COOPERATIVE STRUCTURE 4 (1975).

existence and operation of labor, *agricultural, or horticultural organizations*, instituted for the purposes of mutual help, and not having capital stock or conducted for profit[.]"[156]A sponsor of the bill in the House described this exemption as making express what had been implicit until then: antitrust laws were not intended to apply to farmers' cooperatives.[157] Examining the legislative record of the Sherman Act, Senator Hollis said that "[a]t that time no one imagined that labor unions or farmers' associations would come within the act. No abuses from such organizations challenged attention."[158] This exemption notably excluded cooperatives with capital stock and thereby did not immunize the largest segment of agricultural cooperatives at the time the act was being debated.[159]

The Capper-Volstead Act, enacted in the midst of a serious agricultural depression, built on and broadened the Clayton Act's immunity for cooperatives.[160] This statute expanded the immunity to cover cooperatives with capital stock and established criteria for qualifying cooperatives. To be eligible for the Capper-Volstead immunity, a co-op must comprise producers of agricultural products, such as "farmers, planters, ranchmen, dairymen, nut or fruit growers," and "collectively process[], prepar[e] for market, handl[e], and market[] in interstate and foreign commerce, such products of persons so engaged."[161] Furthermore, a qualifying co-op must either limit all members to no more than one vote or cap dividends on stock or membership capital at 8 percent per year, and must not handle, by value, more non-member products than member products.[162] Recognizing that these cooperatives could raise the price of agricultural products to the detriment of consumers, the Capper-Volstead Act granted the USDA the authority to investigate and obtain cease-and-desist orders against cooperatives that engaged in conduct, such as monopolization and restraints of trade, that "unduly enhanced" the price of an agricultural product.[163] Subsequently, in 1934, Congress created an antitrust immunity, structured like the Capper-Volstead Act, to cover cooperatives composed of fishers.[164]

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156. 15 U.S.C. § 17 (2018 & Supp. 2017) (emphasis added).

157. *See* 51 CONG. REC. 9540–41 (1914) (statement of Rep. Henry).

158. *Id.* at 13967.

159. *See* KNAPP, *supra* note 155, at 4.

160. For background on the political currents and debate leading up to the passage of the Capper-Volstead Act, *see id.* at 4–11; Lauck, *supra* note 152, at 491–93.

161. 7 U.S.C. § 291.

162. *Id.*

163. 7 U.S.C. § 292.

164. 15 U.S.C. §§ 521–22. Importantly, the Supreme Court held in 1926 that the federal government and states could enact laws to support the growth of cooperative enterprise, without violating the Fourteenth Amendment. *See generally* Liberty Warehouse Co. v. Burley Tobacco Growers' Coop. Mktg. Ass'n, 276 U.S. 71 (1928).

The Capper-Volstead Act was described as a means of granting farmers the freedom to build power in the marketplace. Representative Volstead held that the new law would allow farmers to combine just as "[b]usiness men can combine by putting their money into corporations."[165] Senator Capper stated that the statute would allow farmers to "bargain collectively" so as to enjoy the privileges that corporations already possessed.[166] Several members of Congress predicted that farmers, using the cooperative form, would be able to integrate into processing of agricultural goods and reduce the markups imposed by corporate processors, thereby benefiting the general public too.[167]

The Supreme Court has articulated the bounds of the Capper-Volstead immunity. The Court has held that cooperatives must be comprised *entirely* of producers to be entitled to the immunity.[168] The presence of even one non-producer, such as a non-integrated agricultural processor, deprives a cooperative of the Capper-Volstead immunity. Although the Capper-Volstead Act creates a special USDA price oversight process, the Court has held that this system supplements rather than displaces the primary antitrust statutes.[169] Certain forms of cooperative behavior are not immunized under Capper-Volstead. Agreements between a cooperative and a non-cooperative, including a cooperative's acquisition of a non-cooperative firm,[170] or between a cooperative and a non-producer are not immune from the antitrust laws.[171] Furthermore, cooperatives can be held liable for predatory and other unfair conduct that hurts competitors and consumers.[172] In recent years, lower courts have held that cooperative conduct and rules that directly regulate production are also not immune from antitrust challenge. For instance, courts have held that efforts to

165. 61 CONG. REC. 1033 (1921).

166. 62 CONG. REC. 2057 (1922).

167. *See id.* at 2049 (statement of Sen. Kellogg); *id.* at 2059 (statement of Sen. Capper); *id.* at 2259, 2275 (statement of Sen. Norris).

168. *See* Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 394–95 (1967); Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 827–28 (1978).

169. *See* United States v. Borden Co., 308 U.S. 188, 205–06 (1939); *see also* Sunkist Growers, Inc. v. Fed. Trade Comm'n, 464 F. Supp. 302, 310–11 (C.D. Cal. 1979).

170. *See* Md. & Va. Milk Producers Ass'n, Inc. v. United States, 362 U.S. 458, 472 (1960). A few courts have held that voluntary mergers between cooperatives are immunized under the Capper-Volstead Act. *See* Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1045 (2d Cir. 1980); Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1182 (8th Cir. 1982).

171. *See Borden*, 308 U.S. at 204–05.

172. *See Md. & Va. Milk Producers*, 362 U.S. at 468.

directly regulate the production of mushrooms[173] and potatoes[174] were outside the scope of the Capper-Volstead immunity.[175]

2. Partial Antitrust Exemption for Collective Action by Workers

Even more so than agricultural cooperatives, unions and concerted activity among workers faced grave threats from the federal antitrust laws at the turn of the twentieth century. These precedents are newly relevant at a time when union and cooperative strategies are once again blending, especially among freelance and contract workers.[176] Although the principal congressional drafters of the Sherman Act did not intend for it to apply to worker organizing,[177] the federal government and employers frequently used the new law to target workers when they exercised their power.[178] Federal prosecutions under the Sherman Act targeted labor as often as capital in the early years.[179] Employers and supportive federal administrations viewed the Sherman Act as an important weapon against secondary boycotts and strikes.[180] Through these methods, workers and their unions sought to apply pressure on parties that conducted business with companies that resisted unionization of the workplace.[181] In 1908, the Supreme Court held that workers and their unions could be liable for damages to businesses from secondary boycotts and strikes.[182]

In 1914, Congress enacted the Clayton Act and established an express antitrust exemption for labor unions, as well as farmer cooperatives. The exemption reads:

173. *See* In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 291 (E.D. Pa. 2009).

174. *See* In re Fresh and Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1157 (D. Idaho 2011).

175. *See generally* Alison Peck, *The Cost of Cutting Agricultural Output: Interpreting the Capper-Volstead Act*, 80 MO. L. REV. 451 (2015).

176. *See, e.g.*, Vic Vaiana, *Disrupting Uber*, JACOBIN (July 31, 2016), https://bit.ly/2aXpYPS (describing ridesharing drivers' efforts to improve working conditions and terms of work and develop cooperatively owned alternatives to Uber).

177. *See* Joseph L. Greenslade, *Labor Unions and the Sherman Act: Rethinking Labor's Nonstatutory Exemption*, 22 LOY. L.A. L. REV. 151, 155–56 (1988).

178. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 95–96 (1989). *See, e.g.*, United States v. Workingmen's Amalgamated Council, 54 F. 994 (C.C.E.D. La. 1893).

179. *See* William Letwin, *The First Decade of the Sherman Act: Early Administration*, 68 YALE L.J. 464 (1959).

180. Secondary actions involve boycotting and striking companies that do business with a firm subject to a labor dispute. *See* Robert M. Schwartz, *Secondary Targets Can Be Union's Primary Focus*, LABOR NOTES (June 20, 2012), https://bit.ly/2Z83pQt.

181. *See* DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM 71–72 (1995).

182. *See* Loewe v. Lawlor, 208 U.S. 274, 308–09 (1908).

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.[183]

Several sponsors of the bill in Congress championed the exemption as a means of undoing a judicial misinterpretation of the Sherman Act and establishing clear protection for workers. Representative Quinn, reviewing the legislative history of the Sherman Act, asserted that "[t]he whole record shows that the great lawyers of that Congress never dreamed of such an outrage as the Sherman antitrust law being construed by the courts so as to affect the farmers and labor organizations of this country."[184] With the new exemption, the sponsors of the Clayton Act believed that the courts would no longer be able to use antitrust law to police the activities of workers and to aid employers in labor disputes.[185] Notwithstanding Congress's intent, the courts continued to apply the Sherman Act to the activities of labor and did so until the New Deal's overhaul of labor market regulations in the 1930s.[186] Only after Congress passed the Norris-LaGuardia Act in the midst of the Great Depression, did the Supreme Court grant labor the ability to act with broad freedom from antitrust interference.[187]

Congress's serial efforts to protect labor have created important protections for a subset of American workers. Labor unions and other worker collectives, composed of workers classified as employees under federal law, enjoy broad latitude to act to advance their members' interests. Not all workers can avail themselves of the antitrust immunity, because of how the courts have interpreted the Clayton and Norris-LaGuardia Acts.

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183. 15 U.S.C. § 17.

184. 51 CONG. REC. 9546 (1914) (statement of Rep. Quinn).

185. *See generally* Louis B. Boudin, *Organized Labor and the Clayton Act: Part II*, 29 VA. L. REV. 395 (1943).

186. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 478 (1921). William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 188 (2001).

187. This landmark statute did not speak specifically about the Sherman Act or other antitrust laws. Rather, it deprives the federal courts of equity jurisdiction in labor disputes. 29 U.S.C. § 101 (2012 & Supp. 2017). A 1940 Supreme Court decision explained the relationship between antitrust and labor organizing in the wake of New Deal reforms.

> Federal legislation aimed at protecting and favoring labor organizations and eliminating the competition of employers and employees based on labor conditions regarded as substandard, through the establishment of industry-wide standards both by collective bargaining and by legislation setting up minimum wage and hour standards, supports the conclusion that Congress does not regard the effects upon competition from such combinations and standards as against public policy or condemned by the Sherman Act.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 504 n.24 (1940)

The antitrust exemption for the collective action of workers applies only to workers who are classified as employees under federal labor law.[188]

The crabbed judicial interpretation of the labor exemption[189] creates a real threat to many workers who seek to organize. Workers who are classified, or misclassified,[190] as independent contractors are not protected from the antitrust laws, and employers today classify a growing number of workers as independent contractors.[191] Due to the real risk of antitrust investigations and litigation,[192] independent contractors may be deterred from organizing and, if they seek to organize, be sued by the federal government or employers.[193]

B. *How Current Antitrust Doctrine Impedes Certain Cooperative Forms and Not Others*

Antitrust law, as currently interpreted, presents serious legal risks to certain cooperative activities and forms. Cooperatives and other collectives that only seek to aggregate the power of individual members (whether consumers, workers, or small firms) and do not engage in any

188. *See, e.g.*, Taylor v. Local No.7, Int'l Union of Journeymen Horseshoers, 353 F.2d 593, 597 (4th Cir. 1965); Spence v. Se. Alaska Pilots' Ass'n, 789 F. Supp. 1007, 1012–13 (D. Alaska 1990). The Supreme Court also declined to extend the labor exemption to cover fishers who were in a position similar to workers but were formally independent entrepreneurs. *Columbia River Packers Assn., Inc. v. Hinton*, 315 U.S. 143, 146-47 (1940). For an interesting intersection between antitrust law and small producer cooperation, see the Department of Justice's enforcement action against Maine lobstermen over their collective effort to raise prices in the 1950s following the Great Lobster War. United States v. Me. Lobstermen's Ass'n, 160 F. Supp. 115, 116 (D. Me. 1957); Michael L. O'Brien, *Mayday, Mayday: Maine's Lobstermen Need Exemption from Federal Antitrust Laws*, 19 OCEAN & COASTAL L.J. 145, 147-51 (2014).

189. *See generally* Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016).

190. *See* Danny Vinik, *The Real Future of Work*, POLITICO (Jan. 4, 2018), https://politi.co/2EUSHTP ("[S]tate-level audits indicate that about 10 percent to 30 percent of American workers are currently misclassified. There are also some indications that misclassification is becoming more widespread.").

191. *See* Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Arrangements in the United States*, *1995-2015,* 71 ILR REV. 382 (finding that "the percentage of workers engaged in alternative work arrangements—defined as temporary help agency workers, on-call workers, contract company workers, and independent contractors or freelancers—rose from 10.7 [percent] in February 2005 to . . . 15.8 [percent] in late 2015" and all of the net employment growth in the U.S. economy between 2005 and 2015 happened in these alternative work arrangements).

192. *See supra* Section IV.A.1.

193. Consider the port truck drivers' efforts to organize:

> The counsel to the [drivers'] campaign noted that the campaign was extremely cautious about worker collective action on antitrust grounds in its early years, observing: Apart from the merits and whether damages were recovered, the sheer cost of defending such an action would have been sufficient to shut the campaign down.

Paul, *supra* note 189, at 982.

integrated activity face significant antitrust obstacles. Federal antitrust agencies and courts have condemned this exercise of collective power as an illegal restraint of trade. In contrast, cooperatives that engage in more than collective bargaining and operate as integrated firms in production, distribution, or retail face much less antitrust risk. Indeed, their risk of antitrust liability is comparable to that faced by investor-owned firms.

1. Bargaining Cooperatives

Because of its formalistic refusal to differentiate between economic actors and almost single-minded fixation on collusion, the contemporary antitrust regime is suspicious of joint action between independent economic actors, large and small alike. Collusion is collusion, whether it is done by an international cartel seeking to profit off consumers or small producers aiming to build power against a monopsony buyer.[194] This enforcement philosophy results in "a bias against Lilliputians" and antitrust hostility against relatively powerless actors.[195] In contrast to large businesses, consumers, small businesses, and workers can generally exercise power only through collective action.[196] Notwithstanding their lack of power in the economy, workers or small suppliers seeking to build bargaining power vis-à-vis a powerful purchaser are treated as engaging in collusion.

By bringing together consumers, farmers, small businesses, or workers, bargaining cooperatives seek to exercise the collective power of their members to obtain better terms of trade. Depending on their membership, bargaining co-ops try to obtain higher wages for workers, higher prices for small suppliers, or more affordable goods and services for consumers. In the jargon of the antitrust agencies, bargaining co-ops seek to "coordinate decisions on price [and] output."[197] The antitrust agencies' activities against cooperative bargaining among independent workers are instructive on how they treat cooperation between small players.

In recent years, a range of professions, small firms, and their associations have faced the wrath of federal antitrust law. The FTC has

194. *See* Geoffrey Green, *Unflattering Resemblance*, FED. TRADE COMM'N (Jan. 13, 2015, 1:18 P.M.), https://bit.ly/2XkESH7.

195. *See generally* Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST L.J. 195 (2000). Lilliputians are the diminutive residents of the island nation of Lilliput in Gulliver's Travels. *See generally* JONATHAN SWIFT, GULLIVER'S TRAVELS (1726).

196. *See* Grimes, *supra* note 195, at 206.

197. FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.2 (2000).

brought cases against associations of ice-skating coaches,[198] music teachers,[199] and organists[200] for acting collectively to restrict head-to-head competition and raise their incomes. In one of the more notorious uses of antitrust law, the Reagan-era FTC sued public defenders in Washington, D.C. because they collectively refused to represent indigent defendants until the city raised their meager hourly rates.[201] In a similar spirit, the FTC has brought many cases against doctors for bargaining collectively,[202] including against an association of independent doctors in North Texas for bargaining collectively with private insurers.[203] In upholding the FTC's ruling against the doctors, a federal court condemned the doctors' group for "using collective bargaining power to demand higher fees for physicians who were already under contract at a lower fee."[204]

Federal antitrust agencies have also advocated against collective bargaining rights for small players in the economy. In November 2017, the DOJ and FTC filed a brief in support of the Chamber of Commerce in its lawsuit challenging the City of Seattle's ordinance granting collective bargaining rights to Uber and cab drivers.[205] This antitrust hostility toward the powerless is not aberrant. For example, in 2008, the FTC criticized and opposed an Ohio executive order that would grant collective bargaining rights to underpaid, overworked[206] home health aides.[207]

198. *See* In re Prof'l Skaters Ass'n, No. C-4509, 2015 FTC LEXIS 46 (F.T.C. Feb. 13, 2015).

199. *See* In re Music Teachers Nat'l Ass'n, No. C-4448, 2014 FTC LEXIS 68 (F.T.C. Apr. 3, 2014); In re Nat'l Ass'n of Teachers of Singing, Inc., No. C-4491, 2014 FTC LEXIS 218 (F.T.C. Oct. 1, 2014).

200. *See* In re Am. Guild of Organists, No. C-4617, 2017 FTC LEXIS 76 (F.T.C. May 26, 2017).

201. *See* Fed. Trade Comm'n v. Superior Ct. Trial Law. Ass'n., 493 U.S. 411 (1990).

202. *See* In re Praxedes E. Alvarez Santiago, 2013 FTC LEXIS 66; In re M. Catherine Higgins, 149 F.T.C. 1114 (2010); In re Conn. Chiropractic Ass'n, 2008 FTC LEXIS 44; In re Me. Health Alliance, 136 F.T.C. 616 (2003).

203. *See* N. Tex. Specialty Physicians v. Fed. Trade Comm'n, 528 F.3d 346, 352 (5th Cir. 2008).

204. *Id.* at 369. In addition to the federal antitrust agencies, employers have also used antitrust laws in attempts to defeat the organizing of independent contractors. *E.g.*, Michael Paulson, *Theater Producers Accuse Casting Directors of Forming Illegal Cartel*, N.Y. TIMES (Dec. 5, 2017), https://nyti.ms/2W3D2Jx.

205. *See* Brief for The United States & Fed. Trade Comm'n as Amici Curiae Supporting Appellant, Chamber of Commerce of the United States v. City of Seattle, 2018 U.S. App. LEXIS 19395 (9th Cir.) (No. 17-35640), 2017 U.S. 9th Cir. Briefs LEXIS 737; *see also* Marshall Steinbaum, *The Feds Side Against Alt-Labor*, NEXT NEW DEAL: THE BLOG OF THE ROOSEVELT INSTITUTE (Nov. 16, 2017), http://rooseveltinstitute.org/feds-side-against-alt-labor/.

206. *See* Vann R. Newkirk II, *The Forgotten Providers*, ATLANTIC (Sept. 29, 2016), https://bit.ly/2WhDR68.

207. *See* Letter from Maureen K. Ohlhausen, Michael R. Baye & Jeffrey Schmidt, FED. TRADE COMM'N, to William J. Seitz, Ohio Senate 4–5 (Feb. 14, 2008), https://bit.ly/2WHjKy0.

In the current antitrust environment, bargaining cooperatives exist, at best, uneasily. The federal antitrust agencies, the FTC, in particular, have sued associations of professionals and other independent workers for engaging in collective bargaining and adopting restraints on direct price competition. Under current antitrust law, bargaining cooperatives are suspect and may even be condemned as per se illegal. Indeed, prevailing antitrust policy represents an existential threat to the core mission of bargaining co-ops to aggregate, permitting them to exist *so long as* they do not exercise the collective power of their individual members. In other words, antitrust law tolerates bargaining cooperatives that do not bargain cooperatively. As a result, organizations like the Freelancers Union[208] in the United States and SMart[209] in Europe, which have hundreds of thousands of members between them, would face significant constraints on their ability to advocate collectively for a class of independent workers. In an economy in which independent workers represent a significant share of the workforce, it is essential that independent workers have the ability to establish collective organizations and build collective voice.

2. Production, Distribution, and Retail Cooperatives

Cooperatives that bring together participants to develop jointly owned production, distribution, or retail services face much lower antitrust risk and are likely to be treated like investor-owned businesses. Antitrust doctrine has long recognized that integration of production activities can create economies of scale and other efficiencies.[210] In recent decades, the federal antitrust agencies and courts have further relaxed antitrust rules to encourage this type of collaboration among businesses.[211] The Competitor Collaboration Guidelines state that "collaboration may facilitate the attainment of scale or scope economies beyond the reach of any single participant."[212] Accordingly, the DOJ and FTC state that they will generally examine these types of collaborations and the associated restraints under the fact-specific rule of reason, rather than deem them per se illegal.[213] The Supreme Court has held that collaboration between rivals can yield new products or services that no individual party may be able to

208. *See* FREELANCERS UNION, https://freelancersunion.org (last visited Sep. 6, 2019).

209. *See What Is SMart?,* http://smartbe.be/media/uploads/2015/07/What-is-SMart.pdf (last visited Sep. 6, 2019).

210. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("[S]ome of the results of large integrated or chain operations are beneficial to consumers.").

211. *See, e.g.*, Competitor Collaboration Guidelines, *supra* note 151, at § 2.1.; United States v. Baker Hughes, Inc., 908 F. 2d 981, 990–91 (D.C. Cir. 1990).

212. Competitor Collaboration Guidelines, *supra* note 151, at § 2.1.

213. *See id.* at § 3.2.

offer.[214] In the case *Texaco Inc. v. Dagher*, the Supreme Court addressed whether price setting by an oil refining joint venture between Shell and Texaco was per se illegal.[215] The Court held that the pricing decisions of an integrated joint venture between rivals are not per se illegal and should be evaluated under the rule of reason.[216]

In light of agency guidance and legal precedents, production, distribution, and retail cooperatives are likely to receive much more favorable antitrust treatment than bargaining cooperatives. A cooperative that unites competing farmers or workers to create production facilities that would otherwise not exist is beneficial, per the prevailing interpretation of antitrust law.[217] In contrast to bargaining cooperatives, the mere existence of such a production cooperative would not be a per se violation of antitrust law. Antitrust law would treat this cooperative in the same way it treats an investor-owned corporation. The cooperative would be presumptively legal under antitrust law and could engage in a range of business conduct. A production cooperative, however, would not be permitted to engage in collusive or exclusionary practices, nor undertake anticompetitive mergers and acquisitions.[218]

Over the past 80 years, the Supreme Court has noted the economic benefits of the integrated cooperative form. In the 1945 case, *Associated Press v. United States*,[219] the Court evaluated the cooperative wire service's restrictions on the admission of new member-newspapers and the distribution of news reports to non-member newspapers.[220] The Court recognized that AP could collect and distribute a breadth and depth of news stories that no single newspaper could hope to match.[221] In other words, AP, as a cooperative, pooled the resources of hundreds of newspapers to create a product—comprehensive domestic and international news reporting—that otherwise would not exist.

While appreciating the benefits of the cooperative venture, the Court found that AP's restrictive membership policies amounted to the "erection of obstacles to the acquisition of membership . . . [, which made] it difficult, if not impossible, for non-members to get any of the news

214. *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20 & 23 (1979).

215. *See generally* Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

216. *See id.* at 7.

217. Competitor Collaboration Guidelines, *supra* note 151, at § 2.1.

218. *See* Pac. Bell Tel. Co. v. Linkline Commc'ns., 129 S. Ct. 1109, 1118 (2009); United States v. Anthem, Inc., 855 F.3d 345, 349–50 (D.C. Cir. 2017).

219. *See generally* Assoc. Press v. United States*,* 326 U.S. 1 (1945).

220. *See id.* at 4–5.

221. *See id.* at 18 ("[T]he District Court's unchallenged finding was that 'AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of great consequence.'").

furnished by AP or any of the individual members of this combination of American newspaper publishers."[222] Given the importance of AP wire reports to all newspapers, the Court held that these restrictions were anticompetitive.[223] The Court, in effect, imposed a non-discrimination duty on a cooperatively-created "essential facility."[224] Intentionally or not, the decision also brought AP into more complete compliance with the International Co-operative Alliance principle of "open membership."[225]

In 1972, the Court again recognized the productive advantages of the cooperative form. In *United States v. Topco Associates, Inc.*,[226] the Court evaluated the legality of the food purchasing cooperative's restrictions on where members could sell Topco brands.[227] The Court held that the selling restraints were per se illegal.[228] Although the Court invalidated the particular contracts at issue, it recognized the competitive benefits of the cooperative. According to the Court, the development of Topco private label brands had strengthened the competitive position of its members, mostly small and medium-sized grocery stores.[229] The Court found that though "only 10% of the total goods sold by Topco members bear the association's brand names, the profit on these goods [was] substantial and their very existence has improved the competitive potential of Topco members with respect to other large and powerful chains."[230]

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,[231] the Court resolved whether a small purchasing cooperative's decision to expel a member is a per se illegal group boycott.[232] The Court noted the advantages of the cooperative, stating that it "permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice."[233] The cooperative allowed the small retailers, who were its members, "to compete more effectively with larger retailers."[234] Because

222. *Id.* at 9.
223. *See id.* at 18–19.
224. *See* Marina Lao, *Networks, Access, and "Essential Facilities": From Terminal Railroad to Microsoft*, 62 SMU L. REV. 557, 569–70 (2009).
225. JONATHAN SILBERSTEIN-LOEB, THE INTERNATIONAL DISTRIBUTION OF NEWS: THE ASSOCIATED PRESS, PRESS ASSOCIATION, AND REUTERS, 1848–1947 (2014).
226. *See* United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).
227. *See id.* at 602–03.
228. *See id.* at 612.
229. *See id.* at 600.
230. *Id.*
231. *See* Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985).
232. *See id.* at 285–86.
233. *Id.* at 295.
234. *Id.*

the cooperative lacked market power or "exclusive access to an element essential to effective competition," the Court held that the cooperative's membership policies and decisions should be examined under the rule of reason.[235]

The DOJ, the FTC, and the Supreme Court have seen the economic advantages of the cooperative form. In their guidelines on Competitor Collaborations, the DOJ and the FTC have stated that economic collaboration can create public benefits and that the antitrust laws should permit such joint activity. In a series of decisions, the Supreme Court has observed that cooperatives can allow independent economic actors to come together and carry out functions that are beyond the capacity of any single member. At the same time, the Court has applied traditional antitrust doctrines to cooperatives to ensure that they cannot use their power to the detriment of consumers and competitors.

V. HOW THE FEDERAL GOVERNMENT AND STATES CAN PROTECT AND ENCOURAGE THE GROWTH OF COOPERATIVE BUSINESSES

Even though antitrust law offers significant scope for certain forms of cooperatives to exist and thrive, Congress, the courts, the federal antitrust agencies, and the states can take several steps to protect and encourage *all* types of cooperative entities. Cooperatives can allow ordinary Americans to build power and take control of their economic and political lives—control that is especially lacking at a time of staggering income and wealth inequality and high concentration across the economy.[236] Under the present interpretation of the antitrust laws, cooperatives face a range of antitrust risks, ranging from minimal to significant. Integrated cooperatives that combine the economic resources of many consumers, producers, and workers are likely to receive the same antitrust treatment that investor-owned businesses do. By way of example, an electric distribution cooperative owned by residents of a rural area can almost certainly exist and operate without antitrust interference and be entitled to rule of reason treatment in the event of antitrust litigation. In contrast, cooperatives that are created solely to build the bargaining power of members, such as consumers or small suppliers, vis-à-vis more powerful economic actors are more likely to face significant antitrust risks. Indeed, prevailing antitrust precedent may even condemn these cooperatives as per se illegal.

235. *Id.* at 296.

236. *See* Council of Econ. Advisors, *Benefits of Competition and Indicators of Market Power* 7 (Apr. 2016), https://bit.ly/2zeysNg; Brett Ryder, *Riding the Wave*, ECONOMIST (Oct. 3, 2013), https://econ.st/2KwPO0J.

Although the antitrust threat may appear to be confined to bargaining cooperatives, antitrust law is likely to impede the creation of new cooperatives in general. Many prospective distribution or production cooperatives may have to start as bargaining collectives. Given the challenges of establishing a cooperative enterprise, the creation of a bargaining cooperative may be a necessary first step on the path to building an integrated business.[237] Over time, the bargaining cooperative can acquire the resources and organizational cohesion necessary to establish production or distribution operations. For instance, the economist Richard Wolff has described the transformative potential of labor unions as, "a training ground, an experiential school, to teach working people how and why a worker co-op is the logical end of the whole process."[238] In other words, building cooperative *power* is often a necessary first step and precondition to building a cooperative *firm*. Recognizing this dynamic feature of cooperative formation and growth underscores the antitrust threat. By condemning joint bargaining activity as "price fixing," antitrust law may stifle the formation of not just bargaining cooperatives, but ultimately new distribution and production cooperatives, too.

The federal government and the states can take important steps to protect and promote the cooperative form. They should address the existential threat posed by antitrust to certain cooperatives and place them, regardless of their purpose, on a level footing with investor-owned corporations. Indeed, in light of their socially desirable ownership structure cooperative enterprises should, in general, receive more favorable antitrust treatment than their investor-owned counterparts. At a minimum, federal and state governments should reform the scope and enforcement of antitrust law to provide legal protection for cooperatives of all forms and encourage the growth of this socially desirable business form.

237. The historical development of some farm co-ops is illustrative:

> [USDA cooperative expert C.E.] Bassett favored the use of a joint buying group—which "handles no money . . ., extends no credit, and orders no goods except for cash in the bank' as the 'safest and most economical" purchasing plan. However, he recognized that such groups should acquire warehouses when the business grew large enough to warrant it. In such cases he favored selling supplies at regular retail prices and dividing savings according to patronage at the end of the year. But he urged caution in moving forward. "As the child learns to walk before it runs, so a community should be satisfied to begin working together in the simplest ways and should undertake more elaborate plans only as their cooperative strength and confidence is developed."

KNAPP, *supra* note 86, at 321.

238. Richard W. Briefly, *Richard Wolff on Unions and Worker Co-ops*, YOUTUBE (Dec. 2, 2017), https://bit.ly/314x1Qi.

A. Congress: Expand and Refine Capper-Volstead Exemption to Cover Cooperatives Outside Agriculture

The Capper-Volstead Act offers a model on which to build legislation to protect and encourage the growth of the cooperative form. The Act grants farmers the freedom to band together to engage in collective bargaining, processing, distribution, and marketing. The sponsors of the law recognized that farmers needed freedom to act in concert to build power against dominant corporate actors and engage in economic activity on democratic lines.[239] Congress should extend this core principle to all cooperatives. Antitrust law, at present, serves as a major obstacle to collective activity between independent economic actors, like workers classified as independent contractors and consumers. Consumers, small firms, or workers who band together to build leverage against powerful corporate purchasers or sellers run the serious risk of inviting antitrust investigations and liability. Extending the principle of Capper-Volstead to cooperative activity between consumers, workers, and other "Lilliputians" in the United States political economy would foster the growth of cooperative entities.

A legislative generalization of the Capper-Volstead Act should have clear boundaries over who can participate and what entities and activities are protected from antitrust liability. As in the Capper-Volstead Act, the exemption should be restricted to organizations that are established for the mutual benefit of co-op members.[240] To ensure that cooperatives are democratically governed, the general cooperative exemption should be available *only* to organizations that follow the one member, one vote principle.[241] This requirement would be more restrictive than the Capper-Volstead Act, which does not require protected cooperatives to be run on democratic lines. To qualify for the Capper-Volstead exemption, a cooperative can either follow the one member, one vote principle or limit annual dividends at 8 percent.[242] Democratic governance should not be optional for cooperatives entitled to antitrust immunity. A requirement for one-member-one-vote governance would advance a core democratic value

239. *See supra* Section IV.B.1.

240. The Capper-Volstead Act's antitrust exemption applies only to "associations . . . operated for the mutual benefit of the members" and requires that "association[s] shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members." 7 U.S.C. § 291.

241. Some states are diluting this core principle of cooperatives. In November 2017, Wisconsin changed its cooperative law to allow co-ops to authorize members to vote in proportion to patronage or equity ownership. UW CTR. FOR COOPERATIVES, *Summary: 2017 Changes to Wisconsin's Cooperative Law* (Dec. 4, 2017), http://bit.ly/2YZ8NFh.

242. *See id.*

of cooperatives and the historical cooperative movement, as well as protect against managerial and non-member misuse of the cooperative form.[243]

A general cooperative immunity should also draw on the Capper-Volstead Act's pro-consumer framework. The statute grants the USDA the authority to investigate and remedy cooperative conduct that unduly enhances consumer prices.[244] This special provision allows the USDA to protect the public against cooperatives that gain market power and raise prices to consumers above a fair level. This authority ensures that cooperatives cannot unduly enrich themselves at the expense of the consuming public. Instead of the specialized USDA, the FTC (which has jurisdiction over most sectors of the economy) could be granted authority to investigate cooperatives that have market power and raise prices to the detriment of retail consumers or otherwise impair the public interest. Alternatively, a specialized regulator devoted exclusively to co-ops could be given this power.[245]

The courts have added two important glosses to the Capper-Volstead Act that should be included in a general statutory exemption for cooperatives. First, the exemption is limited to cooperatives comprised entirely of producers—namely farmers. The presence of a single non-farmer, such as a corporate processor, deprives the cooperative of Capper-Volstead immunity. This condition ensures that investor-owned businesses cannot immunize their anticompetitive conduct by creating or joining agricultural cooperatives. A statutory expansion of Capper-Volstead should adopt an analogous requirement and restrict cooperative membership to discrete classes of individuals and businesses.

Justice William Brennan explained the importance of clearly defining who is—and is not—eligible for Capper-Volstead immunity in his concurrence in *National Broiler Marketing Assn. v. United States*:[246]

> It is hard to believe that in enacting a provision to authorize horizontal combinations for purposes of collective processing, handling, and marketing so as to eliminate middlemen, Congress authorized firms which integrated further downstream beyond the level at which cooperatives could be utilized for these purposes to combine horizontally as a cartel with license to carve up the national agricultural market. Such a construction would turn on its head Congress' manifest purpose to

243. *See* Douglas, *supra* note 134 ("According to its 2016 financial statement, 60 percent of DFA's net income that year came from 'non-member business earnings,' none of which was shared with members.").

244. *See* 7 U.S.C. § 292.

245. By way of example, the National Credit Union Administration is responsible for regulating federally insured credit unions. NAT'L CREDIT UNION, ADMIN., *Historical Timeline* http://bit.ly/2WFj8Zx (last visited June 1, 2019).

246. *See generally* Nat'l Broiler Marketing Ass'n. v. United States, 436 U.S. 816 (1978).

> protect the small, individual economic units engaged in farming from exploitation and extinction at the hands of "these large aggregations of men who control the avenues and agencies through and by which farm products reach the consuming market," by exempting instead, and thereby fomenting "these great trusts, these great corporations, these large moneyed institutions" at which the Sherman Act took aim.[247]

Informed by Justice Brennan's insights, a general antitrust exemption for cooperatives should be restricted to workers, consumers, and *bona fide* small businesses that fall below certain size thresholds (including federations of such cooperatives that permit the realization of economies of scale). The alternative is an exemption that allows medium-sized and large corporations to use the cooperative form to obtain antitrust immunity.

Second, the Supreme Court has also held that agricultural cooperatives, notwithstanding the Capper-Volstead's exemption, can still be liable for exclusionary and predatory conduct.[248] In other words, farmers can establish a cooperative without running afoul of the Sherman Act's Section 1 prohibition on restraints of trade, but these cooperatives are still subject to the Sherman Act's Section 2 prohibition on monopolization and attempted monopolization. The Court's interpretation ensures that agricultural cooperatives cannot resort to exclusionary practices, such as exclusive dealing, predatory pricing, and tying, to acquire or maintain market dominance. Although they have different objectives and incentives than investor-owned businesses, large cooperatives may also engage in socially harmful monopolization.[249]

Whereas the Capper-Volstead Act arguably immunizes mergers between cooperatives from antitrust law,[250] a legislative exemption for

247. *Id.* at 835 (Brennan, J., concurring) (internal citation omitted).

248. United States v. Borden, Co., 308 U.S. 182, 204–05 (1939).

249. *E.g.*, Andrew Martin, *In Dairy Industry Consolidation, Lush Payday*, N.Y. TIMES (Oct. 27, 2012), https://nyti.ms/2WAxTgd (describing allegations of nation's largest dairy cooperative entering into contracts with milk bottlers that enriched co-op management and hurt dairy farmer members).

250. Peter C. Carstensen, *Agricultural Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy*, 58 S.D. L. REV. 462, 487 (2013). One court held that agricultural co-ops can acquire a monopoly position through mergers and acquisitions.

> [T]he effect of Capper-Volstead is to prevent the full application of the second element of this test to agricultural cooperatives. Capper-Volstead permits the formation of such cooperatives and places no limitation on their size. As the cooperative grows, so, normally, does its power over the market. Thus, while the formation, growth and operation of a powerful cooperative is obviously a "willful acquisition or maintenance of such power," and will rarely result from "a superior product, business acumen, or historic accident," id., it is exactly what Capper-Volstead permits. We conclude that *Grinnell* does not apply to monopoly power that results from such acts as the formation, growth and combination of

cooperative enterprises should not exempt cooperatives from merger rules. Unchecked mergers and acquisitions among cooperatives are undesirable for at least two reasons. First, large cooperatives may face serious governance issues that defeat the very purpose of the cooperative form. In a large cooperative, members may only exercise weak oversight over the cooperative's board and management.[251] As a result, the board and management may have the latitude to run the cooperative for their own benefit, rather than members' benefit. Certain large agricultural cooperatives have suffered from deficient governance in which executives have elevated their own interests above those of members' collective interests.[252] In general, small and medium-sized cooperatives are more likely to be democratically accountable than their larger counterparts. Second, although cooperatives' ownership structure is likely to restrain socially undesirable conduct to an extent,[253] large cooperatives can work against the interests of consumers, producers, workers, and rivals.[254]

To ensure that cooperatives work for members and in accordance with the larger public interest, a statutory antitrust exemption should include restrictions on cooperatives' mergers and acquisitions. Cooperative mergers should be reviewed using the same substantive standards as mergers between investor-owned businesses under the Clayton Act.[255] At the same time, this merger standard should not restrict

> agricultural cooperatives, but applies only to the acquisition of such power by other, predatory means.

Fairdale Farms, Inc. v. Yankee Milk, Inc. 635 F.2d 1037, 1045 (2d Cir. 1980).

251. *See* Carstensen, *supra* note 250, at 479–80.

252. *E.g.*, Peggy Lowe, *Farmers and Their Cooperative Settle Lawsuit on Fixing The Price Of Milk*, NPR (Jan. 23, 2013, 3:33 AM), https://n.pr/2YZAxcP. To be sure, the governance problems at some large cooperatives arise, in part, from weak state cooperative governance laws. These laws should be revised to ensure that cooperatives are run in the interests of members. *See* Carstensen, *supra* note 250, at 478–80, 490–91.

253. *See supra* Section III.C.

254. *See* Douglas, *supra* note 134; Carstensen, *supra* note 250, at 478–81. The record of non-profit hospitals can inform the antitrust treatment of cooperatives. In deciding government challenges to hospital mergers, some courts have assumed that non-profit hospitals are less likely to exercise their market power and more likely to pursue a broad community mission. *See, e.g.*, Fed. Trade Comm'n v. Butterworth Health Corp., 946 F. Supp. 1285, 1295 (W.D. Mich. 1996). Empirical research, however, finds that non-profit hospitals often behave similarly to their for-profit counterparts and should be subject to comparable antitrust rules. Gary J. Young et al., *Comty. Control and Pricing Patterns of Nonprofit Hospitals: An Antitrust Analysis*, 25 J. HEALTH POL., POL'Y & L. 1051, 1054 (2000); Cory Capps et al., *Antitrust Treatment of Nonprofits: Should Hospitals Receive Special Care?*, NAT'L BUREAU OF ECON. RES. WORKING PAPER SERIES, 36–37 (2017). http://bit.ly/2HQXw4o.

255. The Clayton Act states:

> No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where

cooperatives from growing by attracting new members. Seeking growth through new membership involves a different dynamic than attempting to grow through mergers and acquisitions with other cooperatives. To attract new members, a cooperative may need to show that it works for, and delivers tangible benefits to, existing members. By contrast, in a growth-through-merger strategy, a cooperative board and management may be able to expand the membership rolls without appealing to new and existing members and may even be able to advance their private interests at the expense of members' interests. [256] This distinction is analogous to a traditional distinction in American merger law: growth through product improvement and investment in new plants is preferable to growth through mergers and acquisitions.[257]

Although large co-op mergers should be discouraged, cooperatives should have broad freedom to establish federated and other joint activities with other cooperatives to achieve economies of scale and build new productive facilities. Small cooperatives, in particular, may not have the means to undertake certain projects. But pursued in conjunction with one or more cooperatives, a cooperative can acquire the necessary resources to make these investments. For instance, a small retail cooperative may not have the resources to establish a regional warehouse to store inventory. In partnership with another retail cooperative, however, it may be able to construct and run this warehouse and consequently lower their costs of purchase and distribution of goods. Under this policy of restricting mergers but tolerating joint ventures, cooperatives would be able to achieve the virtues of both democratic accountability associated with smaller size and the economies of scale resulting from combining certain operations.[258]

> in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18. The current approach to merger review is fact intensive. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *Horizontal Merger Guidelines* (2010), https://bit.ly/1FbvENe.

256. *See* KNAPP, *supra* note 86, at 252 (describing how the California citrus growers' cooperative attracted new members through more efficient, effective marketing activity).

257. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963) ("[S]urely one premise of an antimerger statute such as § 7 [of the Clayton Act] is that corporate growth by internal expansion is socially preferable to growth by acquisition."); Sandeep Vaheesan, *American Prosperity Depends on Stopping Mega-Mergers*, FT ALPHAVILLE (Apr. 25, 2019), https://on.ft.com/2DwQGyk ("[S]trong merger policy channels corporate executives' focus away from the next big deal and toward product improvement and investment that deliver more affordable and higher quality goods and services.").

258. *See* KNAPP, *supra* note 86, at 252 ("In theory and practice, the [citrus fruit] growers through their local associations retained full autonomy. They delegated to the

B. *Courts: Synthesize Existing Antitrust Doctrines to Promote Growth of Democratically Accountable Cooperatives*

The courts can draw on and synthesize existing precedent to protect *bona fide* cooperatives[259] and ensure that they work in the interests of their members. The principles stated in *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*[260] and *Copperweld Corp. v. Independence Tube Corp.*[261] together can be employed to insulate cooperatives with little market power from antitrust challenge. As for cooperatives with substantial market power, the non-discrimination requirement in *Associated Press* can be applied to dominant and other powerful cooperatives to ensure that they are not engaging in monopolistic conduct and are open to all comers.[262]

The courts should look to two key precedents when applying the antitrust laws to cooperatives that lack market power. In *Northwest Wholesale Stationers*, the Supreme Court held that the membership policies of cooperatives that lack market power would be evaluated under the rule of reason.[263] The Court concluded that the expulsion of a cooperative member—in effect a group boycott according to the ousted co-op member—would be categorically condemned only if the cooperative had market power.[264] The cooperative at issue was a purchasing cooperative that had integrated the buying operations of small stationery retailers.[265] As a result, it is unclear whether the principle announced in the case would extend to bargaining cooperatives in which members only aggregate their individual purchasing or selling power in the market. In *Copperweld*, the Court held that a corporation cannot conspire with one of its wholly-owned subsidiaries or divisions.[266] The Court held that a corporation, regardless of its internal structure, is a single entity and, by definition, cannot conspire with itself for purposes of Section 1 of the Sherman Act.[267]

Drawing on and synthesizing *Northwest Wholesale Stationers* and *Copperweld*, the courts should grant a quasi-immunity, or at least apply a strong presumption of legality, to cooperatives without market power.

district exchanges and the central exchange only certain broad functions which they were not in position to perform for themselves.").

259. *See supra* Section V.A.

260. Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985).

261. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

262. *See* Assoc. Press v. United States, 326 U.S. 1, 21 (1945).

263. *See Nw. Wholesale Stationers, Inc.,* 472 U.S. at 298.

264. *See id.* at 296.

265. *See id.* at 286.

266. *See Copperweld,* 467 U.S. at 777.

267. *See id.*

What constitutes a "firm" is fundamentally a legal and political question: a collective of independent contractors could be treated as a single entity instead of "colluding competitors." Indeed, labor law has already treated two nominally independent economic actors as a single entity for certain purposes. For instance, during the latter part of the Obama administration, the National Labor Relations Board ruled that, for instance, fast food franchisors and franchisees can be joint employers for labor law purposes.[268] Accordingly, courts should treat a bargaining cooperative as a single entity rather than as a "cartel" of its individual members. Applying this principle, two members of the same cooperative could be no more liable for price fixing than two employees within the same corporation. For bargaining cooperatives, this doctrine would free them from the threat of price fixing litigation and liability under Section 1 of the Sherman Act.

One federal appellate decision has applied this logic. The Court of Appeals for the Eighth Circuit, in reviewing allegations of monopolization against a federated electric generation and transmission cooperative, held that this federation was a single entity, stating that "a conglomeration of two or more legally distinct entities cannot conspire among themselves if

268. The National Labor Relations Board wrote:

> Today, we restate the Board's joint-employer standard to reaffirm the standard articulated by the Third Circuit in Browning-Ferris decision. Under this standard, the Board may find that two or more statutory employers are joint employers of the same statutory employees if they share or codetermine those matters governing the essential terms and conditions of employment. In determining whether a putative joint employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.

Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186, *2 (2015) (internal citations omitted). *But see* Press Release, NAT'L LAB. RELATIONS BD., *Board Proposes Rule to Change Its Joint-Employer Standard* (Sep. 13, 2018), https://bit.ly/2RZapjl. For a comparable legal rule in antitrust, consider the issue of whether consumers not in contractual privity with an antitrust violator can recover damages. The Supreme Court has barred consumer suits for damages when the consumer did not have a direct relationship with the antitrust violator. *See generally* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Courts, however, have established an exception to this rule when consumers purchased the affected goods from an intermediary over whom the alleged antitrust violator exercises control. *See id.* at 736 n.16 ("Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer."). *See, e.g.*, Kentucky v. Marathon Petroleum Co., No. 3:15-cv-354-DJH-CHL 2018 WL 4620621, at *11 (W.D. Ky. 2018) ("The [c]ourt . . . finds that the Commonwealth has sufficiently alleged 'functional economic unity' between Marathon LP and the retailers in question to make a sale of gasoline to the retailers effectively a sale to Kentucky consumers.").

they 'pursue the common interests of the whole rather than interests separate from those of the [group] itself.'"[269]

At the same time, dominant co-ops should face clear limits on their behavior. The Supreme Court has recognized the market power of dominant co-ops and established appropriate restrictions on their discretion. In *Associated Press*, the Court applied special duties on a dominant cooperative. The Court held that a dominant cooperative news service improperly excluded non-member newspapers from obtaining its news stories and joining the cooperative.[270] Because of the Court's decision, AP could not use its power to control the competitive landscape of the news publishing business across the country. Furthermore, the decision required AP to operate as an open, democratic cooperative instead of as a closed, exclusive monopoly. The principle announced in this case advanced a competitive market for news and also the basic principles of cooperative business and should apply to all dominant cooperatives.

C. Federal Antitrust Agencies: Draw a Distinction Between Joint Action Among Relatively Powerless Actors and Corporate Collusion

Even in the absence of Congressional or judicial reforms to insulate cooperatives from antitrust lawsuits, the DOJ and FTC should exercise their prosecutorial discretion to protect *bona fide* bargaining cooperatives. They should focus on corporate cartels, mergers, and monopolies rather than cooperatives composed of consumers, small businesses, and workers. Putting aside antitrust philosophy, this prioritization makes sense on pragmatic grounds too. With limited enforcement resources, the agencies should not police the conduct of these entities. By way of example, a hypothetical agency's use of public money to sue a consumer purchasing cooperative is, at best, a questionable use of public money and, at worst, indefensible enforcement activity. At a time of rising concentration across the economy, the federal antitrust agencies should focus their advocacy and enforcement activities on corporate monopolies and oligopolies.

Collusive conduct between large corporations carries radically different economic, political, and social implications than collusion between consumers, small businesses, or workers. Indeed, workers banding together to bargain collectively with employers is commonly described as solidarity, not collusion. This language of collusion versus solidarity captures a critical distinction between large businesses conspiring to enhance their economic and political power and workers

269. City of Mt. Pleasant v. Assoc. Elec. Coop., Inc., 838 F.2d 268, 274 (8th Cir. 1988).

270. *See* Assoc. Press v. United States, 326 U.S. 1, 17–18 (1945).

banding together to build countervailing power. Individuals who have nothing to sell in the market but their labor power have little or no power.[271] For millions, a job—any job—may be their only source of income and the only thing standing between subsistence and destitution.[272] Similarly, one consumer has little clout in the market: an individual boycotting a company for its deceptive marketing, product quality, or labor practices has no more than symbolic and personal psychic value. In sharp contrast, corporations that control a nation's means of production wield a great deal of economic, political, and social power. Often times, a large corporation can exercise power unilaterally and need not resort to collusion with rivals.[273]

The antitrust agencies should establish a posture of deference toward bargaining cooperatives through guidance documents. Through enforcement guidance, they could commit to not investigating or initiating enforcement actions against collective entities composed of consumers, small businesses, or workers when they engage in joint bargaining. Although this may sound radical, it would be a pragmatic exercise of discretion. Even from the perspective of consumer welfare, the antitrust agencies surely have more pressing targets than the professional associations representing ice-skating coaches and music teachers.[274] The new deference policy would signal to the public that the DOJ and the FTC

271. The Supreme Court in the early twentieth century, despite its generally pro-elite (and anti-populist) orientation, recognized the importance of collective action among workers. The Court in *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921) stated:

> A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer.

Id. at 209.

272. *See* Emmanuel Saez, *Income and Wealth Inequality: Evidence and Policy Implications*, 35 CONTEMP. ECON. POL'Y 7, 8 (2017) ("For the bottom 90% of income earners, capital income is negligible relative to labor income."); FED. RESERVE SYS., *supra* note 63, at 26 (noting that less than half of adults have sufficient personal savings to cover three months of expenses in the event of a major financial disruption).

273. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 63–67 (1965). A Second Circuit decision offers a useful definition of market power and ways to identify its existence:

> Market power has been defined by the Supreme Court to mean the power to control prices or exclude competition. Such power may be proven through evidence of specific conduct undertaken by the defendant that indicates he has the power to affect price or exclude competition. Alternatively, market power may be presumed if the defendant controls a large enough share of the relevant market.

United States v. Visa, U.S.A., Inc., 344 F.3d 229, 239 (2d Cir. 2003) (internal citations omitted).

274. *See supra* Section III.A.1.

would not interfere with the bargaining activities of relatively powerless actors and instead would use their resources to investigate and bring enforcement actions against corporate mergers and monopolies. Short of this general non-prosecution commitment against cooperatives, composed of relatively powerless members, the agencies could revise the Competitor Collaboration Guidelines to indicate they will not sue bargaining entities composed of consumers, small businesses, or workers that have a market share less than 30 percent.[275] The policy would grant broad latitude to cooperative entities, yet allow the antitrust agencies to police the activities of co-ops with market power.

Neither proposed change to enforcement practice would grant cooperatives absolute antitrust immunity. In contrast to potential legislation enacted by Congress or judicial revision of existing legal precedent, the antitrust agencies cannot change the substantive law through guidance documents. Even if they pledge not to investigate cooperatives or rewrite their Competitor Collaboration Guidelines to protect cooperative activity, the substantive standards of the Sherman Act would be unchanged. Private parties could still bring lawsuits against bargaining cooperatives for engaging in illegal price fixing.

Nonetheless, these suggested policy changes, if adopted, would confer significant benefits to bargaining cooperatives. First, a commitment from the antitrust agencies to not pursue investigations and enforcement actions would greatly reduce the legal risk to bargaining cooperatives. Despite the possibility of private antitrust actions, the investigative and enforcement activities of the antitrust agencies may be the greatest antitrust threat to many cooperatives.[276] Second, the revised Competitor Collaboration Guidelines may receive deference in the courts. Today, the courts consistently grant significant deference to agency guidance documents.[277] Even in private lawsuits, the courts may treat the revised Guidelines as persuasive evidence in deciding, for instance, whether the per se rule should apply to bargaining cooperatives. Moreover, the per se prohibition on price fixing is not as absolute as appearances may suggest. On occasion, the Supreme Court has considered economic circumstances in cases alleging horizontal collusion and qualified the application of the

275. Grimes, *supra* note 195, at 234.

276. *See* Paul, *supra* note 189, at 981–82 (describing how truck drivers in several major ports were hit with an FTC investigation when they attempted to unionize and had to account for antitrust liability when they organized).

277. *See* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 781–808 (2006) (examining growing influence on Horizontal Merger Guidelines in the courts over the past 40 years).

per se rule against price fixing when it believed that cooperation among rivals yielded economic and social benefits.[278]

D. States: Authorize and Actively Supervise Cooperatives

The Supreme Court has created the state action immunity to protect the legislative and regulatory of states from antitrust attack. States can enact statutes and regulations that restrict competition without risk of antitrust liability. Private parties can also invoke the state action immunity if they can establish that they are acting pursuant to clearly articulated state policy and subject to active supervision by the state. Like other private entities, cooperative businesses are entitled to the state action immunity and protection from antitrust lawsuits if they satisfy this two-part test.

The Court established this doctrine in the 1943 decision *Parker v. Brown*.[279] The plaintiff in that case challenged a California regulatory scheme that governed the production and distribution of raisins.[280] The Supreme Court held that the state was immune from antitrust liability. It wrote that "[t]he Sherman Act makes no mention of the state . . . and gives no hint that it was intended to restrain state action or official action directed by a state."[281] The Court further noted that "[t]he sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.'"[282] While a group of private producers who engaged in collusion would face antitrust liability, this conduct was immune once it had the imprimatur of state sanction.[283]

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278. *See* Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9–10 (1979); Nat'l Collegiate Athletic Ass'n. v. Bd. of Regents of Univ. Oklahoma, 468 U.S. 85, 100–01 (1984). In a case heard during the depths of the Great Depression, the Supreme Court declined to hold price fixing by a group of small coal producers as per se illegal.

> A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. . . . Putting an end to injurious practices, and the consequent improvement of the competitive position of a group of producers, is not a less worthy aim and may be entirely consonant with the public interest, where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices.

Appalachian Coals, Inc. v. United States, 288 U.S. 344, 373–74 (1934)

279. *See generally* Parker v. Brown, 317 U.S. 341 (1943).

280. *See id.* at 344–45.

281. *Id.* at 351.

282. *Id.*

283. *Id.* at 350–51.

The Court later articulated the standard by which private parties could qualify for the state action immunity. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc*,[284] the Court held that the activities of private parties were immune from antitrust challenge if they satisfied two conditions.[285] The Court wrote that "first, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself."[286] State-granted authority to act is not sufficient to satisfy the first prong; the anticompetitive outcome must be "the 'foreseeable result' of what the State authorized."[287] Active supervision means that a state entity reviewed the substance of the anticompetitive act and exercised the power to ratify or reject it.[288] Unless both conditions are met, a private party is not entitled to state action immunity.

In a 2015 decision, the Supreme Court further clarified the meaning of active supervision by the state. In *North Carolina Board of State Dental Examiners v. Federal Trade Commission*,[289] the Court held that private actors had to be supervised by an *independent* state authority to qualify for the state action immunity.[290] Supervision by a state agency "dominated by market participants" does not satisfy the active supervision requirement.[291] The majority wrote that such state agencies are indistinguishable from private trade associations and "pose the very risk of self-dealing [the active] supervision requirement was created to address."[292] As a result, for such agencies to claim state action immunity they must show that they are acting pursuant not only to clearly articulated state policy but also are subject to active supervision by the state.[293]

States can use the state action doctrine to promote the growth of democratically accountable cooperatives. They can pass laws authorizing cooperatives to engage in collaborative activities and subject this joint conduct to active state supervision. By doing so, states can limit the application of federal antitrust laws to cooperatives. Because every state

284. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).
285. *Id.* at 105.
286. *Id.*
287. Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 217 (2013).
288. Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 638 (1992).
289. *See* N.C. State Bd. of Dental Examiners v. Fed. Trade Comm'n, 135 S. Ct. 1101 (2015).
290. *Id.* at 1113.
291. *Id.* at 1116.
292. *Id.* at 1114.
293. *See id.* at 1113.

already has a statute for chartering cooperatives,[294] states would principally have to work toward establishing regulatory oversight. This oversight could be provided through the executive branch, courts, or regulatory agencies, but importantly not through a state agency "dominated by market participants."[295] Provided they are acting pursuant to state authorization and supervision, cooperatives would have greater freedom to operate. While cooperatives would not enjoy legal *carte blanche*, they would be free to engage in joint action that may otherwise run afoul of the federal antitrust laws. For instance, a bargaining cooperative composed of small businesses would be immune from federal antitrust law so long as it acts pursuant to state authority and is actively supervised by a state agency. State law and regulation can account for the distinctive needs and objectives of cooperatives, which may not always conform to the prevailing strictures of antitrust law.

VI. CONCLUSION

When Congress saw fit, as Senator Capper put it, "to give to the farmer the same right to bargain collectively that is already enjoyed by corporations,"[296] it affirmed the principle that distributed, competitive, and democratic activity ought to have a place in the economy alongside investor-owned corporations. The constituency most endangered by corporate power in 1922, and best organized to counter it, were farmers. For decades they formed cooperative enterprises as a means of counteracting the concentrated market power of bankers, suppliers, and railroads.[297] The Capper-Volstead Act was a means of affirming the value of those cooperative enterprises, and the kind of business they enabled, by ensuring that antitrust law did not mistake cooperation between powerless actors for collusion among corporations.

Today, the concerns that motivated Capper-Volstead have spread far beyond just farmers. Throughout the United States economy, especially in the emerging online economy, consolidation has become the norm. Small businesses face growing barriers to market entry and the growing ranks of independent workers find themselves at the mercy of the overwhelming market power of large corporations. As they did a century ago, people are now looking to cooperative ownership designs as a strategy for leveling the playing field with investor-owned corporations, but cooperative firms

294. *See, e.g.*, *State Cooperative Statute Library*, NAT'L COOPERATIVE BUS. ASSN. CLUSA INT'L, https://ncbaclusa.coop/resources/state-cooperative-statute-library/ (last visited Sep. 6, 2019).

295. *N.C. Bd. of Dental Examiners*, 135 S. Ct. at 1116.

296. 62 CONG. REC. 2057 (1922).

297. *See generally* KNAPP, *supra* note 86.

can face undue barriers and inadequate recognition for their contributions to ensuring a diverse and democratic economy.

In the context of the renewed interest in antitrust policy, the legacy and promise of cooperative enterprise deserves fresh consideration. Statutes such as the Clayton Act and the Capper-Volstead Act, along with various Supreme Court decisions, have secured a role for cooperatives in the United States antitrust tradition. That role should be no less significant in an age when online platforms are doing the work once done by railroads, when once again nascent kinds of natural-monopoly activity present both opportunities and dilemmas. The ambitions of Senator Capper and his bill's supporters have economy-wide relevance and should not be limited to agriculture or any other subset of economic activity. Accordingly, antitrust law and policy should protect cooperation outside of agriculture alone. Genuine cooperative enterprise is something that should not only be tolerated but also encouraged.

This Article proposes a series of interventions for how the spirit of Capper-Volstead might find new life today. First, Congress can extend the logic of that precedent to sectors outside of agriculture. Currently, when consolidation has spread to so many sectors, having such recognition limited to agriculture alone looks less like a considered choice than an accident of history. Second, courts can recognize the virtues of cooperative enterprise in their antitrust rulings and use such models as a tool for protecting beneficial economies of scale while retaining competition and diversity in markets. Third, federal agencies can distinguish between cooperation among the powerless and collusion among powerful corporations in their enforcement of antitrust law. Fourth, states can protect and supervise co-ops incorporated under their laws to ensure appropriately democratic practices and participation. Each of these recommendations calls for not just more generous treatment of cooperatives; it is equally necessary to revive a tradition of oversight to ensure that co-op businesses are, in fact, operating cooperatively and in the public interest.

Antimonopoly proponents have already called for restoring a broader set of analytical and legal tools for understanding and restructuring monopolistic and oligopolistic markets. Consumer price is an insufficient measure of anticompetitive behavior when services can be delivered by monopolistic actors for free or very low cost in the short term—consider ridesharing, online search, and product delivery. Reformers are calling for antitrust to protect the public from the full economic and political power of corporations. Thus far, ownership design largely has been neglected in their proposals. While protections that farmers fought for a century ago may be discounted or dismissed in an era of big-box retail and online networks, matters of ownership design have at least as much relevance today and should be a part of the antimonopoly arsenal.