

**Beyond the Labor Exemption:  
Labor's Antimonopoly Vision and the Fight  
for Greater Democracy**

Kate Andrias

This work will appear in: *Antimonopoly and American Democracy*, edited by Daniel A. Crane and William J. Novak, forthcoming from Oxford University Press.

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## **Beyond the Labor Exemption: Labor’s Antimonopoly Vision and the Fight for Greater Democracy**

Kate Andrias<sup>1\*</sup>

Professor of Law, Columbia Law School

### **Introduction**

The story of the relationship between labor and antitrust policy in the twentieth century United States is largely one of conflict. From the enactment of the Sherman Act in 1890 until the Supreme Court’s decisions in *Apex Hosiery Co. v. Leader* in 1940,<sup>2</sup> and *United States v. Hutcheson* in 1941,<sup>3</sup> the federal courts relentlessly subjected unions to antitrust penalties for engaging in strikes, boycotts, and other concerted activities—on the ground that such activity is inherently anticompetitive.<sup>4</sup> The government’s use of antitrust law against workers at the behest of corporations repeatedly crippled unions, destroying more than a few. As numerous scholars have documented, the American Federation of Labor (AFL) responded with a multi-decade

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<sup>1\*</sup> Professor of Law, Columbia Law School. For helpful feedback on this essay, I am grateful to Bill Novak, Dan Crane, the staff and leadership at the Tobin Project, the other authors in this volume, workshop participants at the Max Planck Sciences Po Center on Coping with Instability in Market Societies, and to Nico Bowie, Willy Forbath, Lorenzo Luisetto, Lina Khan, Nelson Lichtenstein, and Stacey Mitchell. Thanks also to Chris Blythe, Nicole Frazer, and MacKenzie Thurman for excellent research assistance and to the librarians at the University of Michigan Law Library, where the research for this project was completed. All errors are mine.

<sup>2</sup> *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

<sup>3</sup> *United States v. Hutcheson*, 312 U.S. 219 (1941).

<sup>4</sup> *E.g.*, *Loewe v. Lawlor*, 208 U.S. 274 (1908).

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campaign to win an express labor exemption from the law’s prohibition against anticompetitive activity.<sup>5</sup>

This long history of conflict between labor and antitrust law, combined with the tendency of some antimonopoly advocates to deemphasize problems of class and to focus on breaking up business in ways that do not necessarily provide workers more power, has left the impression that the labor tradition and the antimonopoly tradition are distinct, if not fundamentally incompatible.<sup>6</sup> According to the conventional story, antimonopoly sentiment did not historically enjoy substantial labor support and labor’s agenda on these matters has been almost exclusively focused on removing itself from antitrust law’s sanction.<sup>7</sup>

This Essay challenges the dominant account, showing that labor’s antimonopoly focus has not always been limited to removing itself from antitrust law’s sanction, nor has the antimonopoly tradition always been divergent from labor’s goals. Rather, from the late nineteenth century through the post-World War II period, the more left-leaning industrial unions repeatedly and insistently used the language of antimonopoly to argue that private concentration

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<sup>5</sup> See, e.g., Daniel R. Ernst, “The Labor Exemption, 1908–1914,” *Iowa Law Review* 74, no. 5 (1989): 1151; Edward Berman, *Labor and the Sherman Act* (1930), 3–87; William E. Forbath, “The Shaping of the American Labor Movement,” *Harvard Law Review* 102, no. 6 (1989): 1109, 1185–95; Alpheus Mason, *Organized Labor and the Law* (1925), 119–62; Elizabeth Sanders, *Roots of Reform* (1999), 93–100, 286–89.

<sup>6</sup> See Gabriel Winant, “No Going Back: The Power and Limits of the Anti-Monopolist Tradition,” *The Nation* (January 21, 2020), <https://www.thenation.com/article/culture/goliath-monopoly-and-democracy-matt-stoller-review/> (critiquing Matt Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy* (2019)).

<sup>7</sup> See *infra*, Part II.

of economic power posed a grave threat to workers and to democracy. In their view, however, the cure for monopoly power was not necessarily decentralization or smaller business organization, as often associated with Louis Brandeis and Progressive Era antimonopoly thinkers. Instead, labor argued that antimonopolism demanded that firms' autonomy and power be democratically constrained either by the firm's workers or by a more democratic state. The precise contours of left-labor's antimonopoly agenda changed over time as the economy evolved, but at bottom, it focused on building a more democratic political economy.

Three key features characterized industrial labor's antimonopoly agenda beyond the labor exemption. First, these unions focused on problems of *power* and, in particular, on achieving a more egalitarian distribution of power. They were acutely attuned to how law and policy created, reproduced, and protected concentrated political and economic power. They sought to shift power relationships not only by obtaining an end to injunctions against workers' collective action, but also by organizing industrial unions to achieve countervailing power at the worksite and in the broader economy. They also advocated legislative and administrative interventions that would reduce subsidies and legal advantages granted to large corporations. Second, the industrial unions were committed to *democracy*—a more radical form of democracy than simply the use of the franchise. That is, they explicitly argued that concentrated economic power posed a threat to republican government and, more fundamentally, to political equality. Through a range of strategies, they sought to impose democracy at the workplace, democracy over the economy, and a more democratic form of governance. Third, and relatedly, for most of the industrial unions, the agenda was explicitly *statist*, or *social*, as well as cooperative. Specifically,

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in advancing their antimonopoly agenda, they recognized that the exercise of governmental power was inevitable and therefore governmental power needed to be used for democratic and egalitarian ends. Industrial labor thus advanced its goals through political channels as well as through industrial action and worker cooperation, seeking to harness the power of the state against economic royalists.

To these ends, the industrial unionists worked to build labor organization on a mass scale to enable workers to wield power in the workplace and in government; sought to impose national democratic economic planning in which workers would play a co-equal role with business; supported a range of progressive regulatory reforms to help workers and consumers; opposed policies that enabled business to concentrate economic power; and demanded nationalization or public control of certain industries—all the while explicitly invoking the language of antimonopoly, as well as the language of industrial democracy.

By examining labor's antimonopoly tradition beyond the struggle for a labor exemption, this Essay draws a more complicated picture of the American antimonopoly tradition—one that challenges the dominant narrative about the relationship between labor and antitrust and enriches our understanding of what the Progressive and New Deal-era antimonopoly vision entailed. It shows that, like the Brandeisians, the more left-leaning and industrial wing of labor was determined to cut back on the power of economic royalists, but it saw this effort as part of a broader program to achieve greater industrial and political democracy. Applied to contemporary debates, this vision suggests that the goals of an antimonopoly movement ought not to be exclusively, or even primarily, the size or market power of the firms in question—although those

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are important factors—but rather the degree to which firms’ autonomy and power are democratically constrained and, ultimately, the extent to which reforms help achieve a more democratic political economy.

### **The Struggle for a Labor Exemption**

For years, leading accounts of the relationship between labor and antitrust have posited a fundamental conflict between the two regimes. Even prominent labor law scholars have labeled the two regimes “intrinsically incompatible.”<sup>8</sup> On this account, “[t]he purpose and effect of every labor organization is to eliminate competition in the labor market.”<sup>9</sup> In contrast, the antitrust laws have the primary goal of advancing economic efficiency by promoting competition and prohibiting restraint of trade. Thus, antitrust law, logically extended, “must condemn the very existence of labor organizations, since their minimum aim has always been the suppression of any inclination on the part of working people to offer their services to employers at different prices.”<sup>10</sup>

Even before the enactment of antitrust law, common law condemned the concerted activities of workers as criminal and then civil conspiracies.<sup>11</sup> Efforts of workers to set prices for

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<sup>8</sup> Ted St. Antoine, “Connell: Antitrust Law at the Expense of Labor Law,” *Virginia Law Review* 62, no. 1 (1976): 603.

<sup>9</sup> Archibald Cox, “Labor and the Antitrust Laws—A Preliminary Analysis,” *University of Pennsylvania Law Review* 104, no. 2 (1955): 252, 254.

<sup>10</sup> St. Antoine, “Antitrust Law at the Expense of Labor Law.”

<sup>11</sup> See Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (1985), 11–59; Forbath, “The Shaping of the American Labor Movement,” 1185–95.

their labor violated the liberty of contract. Eventually, juries and state court judges began to reject the argument that workers' concerted efforts to raise wages constituted an illegal conspiracy under state law. But following the enactment of the Sherman Act in 1890, union opponents successfully turned to federal courts and antitrust law to achieve similar results. By one count, at least 4,300 injunctions were issued against union activity between 1880 and 1930.<sup>12</sup> At the same time, courts struck down hundreds of protective labor laws by invoking the due process liberty of contract doctrine, as well as a narrow understanding of congressional commerce power.<sup>13</sup>

The decision by federal courts to apply antitrust law to labor activity was, from the outset, on exceedingly thin legal ground. The Sherman Act was directed at business monopolies; there is considerable evidence that it was never intended to apply to labor.<sup>14</sup> The popular movement that agitated for the Sherman Act and many of the legislators who enacted it had a view of antitrust law that permitted democratic coordination among social actors with the aim of

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<sup>12</sup>William E. Forbath, "The New Deal Constitution in Exile," *Duke Law Journal* 51, no. 1 (2001): 165; Forbath, "The Shaping of the American Labor Movement," app. B, 1249–53.

<sup>13</sup>Forbath, "The Shaping of the American Labor Movement," 1133 n.78, app. A, 1237–48.

<sup>14</sup> St. Antoine, "Antitrust Law at the Expense of Labor Law," 604; Berman, *Labor and the Sherman Act*, 3–54; Mason, *Organized Labor and the Law*, 120–31; Louis B. Boudin, "The Sherman Act and Labor Disputes: I," *Columbia Law Review* 39, no. 8 (1939): 128; Louis B. Boudin, "The Sherman Act and Labor Disputes: II," *Columbia Law Review* 40, no. 1 (1940): 14; *see also* Sandeep Vaheesan, "Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages," *Maryland Law Review* 78, no. 4 (2019): 766, 768, 779–83 (2019); Sanjukta Paul, *Solidarity in the Shadow of Antitrust: Labor and the Legal Idea of Competition* (forthcoming). For a contrary perspective, see Herbert Hovenkamp, "Labor Conspiracies in American Law, 1880–1930," *Texas Law Review* 66, no. 5 (1988): 919, 951 (arguing that the Sherman Act effectively brought the conspiracy theory of labor organization into federal law).

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reducing economic domination.<sup>15</sup> To be sure, many in Congress voted for the Sherman Act in order to avert more radical reforms.<sup>16</sup> But even those more conservative legislators saw antitrust law as a means to limit concentrations of corporate power to protect democracy and safeguard labor rights, as well as to ensure business competition.<sup>17</sup> Justice Harlan articulated the statute’s more ambitious goals in the famous 1911 *Standard Oil* case:

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery—fortunately, as all now feel—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life. . . . [T]o the end that the people . . . might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the Anti-Trust act of 1890.<sup>18</sup>

Nonetheless, during the era before the New Deal, the Supreme Court’s crabbed reading of congressional power under the Commerce Clause sharply constrained the government’s ability to challenge corporate mergers, effectively enabling a rise of monopolies and oligopolies. Most famously, in *United States v. E. C. Knight*, the Court held that Congress did not have the

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<sup>15</sup> See Sanjukta Paul, “Recovering the Moral Economy Foundations of the Sherman Act,” *Yale Law Journal* 131, no. 1 (2021): 175.

<sup>16</sup> Daniel Crane, “Antitrust’s Unconventional Politics,” *Virginia Law Review Online* 104 (2018): 118, 133–34.

<sup>17</sup> Robert Pitofsky, “The Political Content of Antitrust,” *University of Pennsylvania Law Review* 127, no. 4 (1979): 1051; Vaheesan, “Accommodating Capital and Policing Labor,” 772–73, 777; Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (2018); Paul, *Solidarity in the Shadow of Antitrust*.

<sup>18</sup> *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 83–84 (1911).



constitutional authority to regulate manufacturing using the Commerce Clause and therefore the Attorney General could not use the Sherman Act to challenge mergers among manufacturing companies.<sup>19</sup> Conversely, in 1908 with *Loewe v. Lawlor* (the Danbury Hatters' case), the Supreme Court concluded that federal antitrust laws could be applied to restrain the activity of organized labor.<sup>20</sup>

Although some observers emphasized the narrow impact of the Danbury Hatters' case, Samuel Gompers, president of the AFL, was outraged and alarmed by it. In his view, the opinion enabled federal courts to condemn most labor activism—almost any strike or boycott might be forbidden as an unlawful attempt to restrain interstate commerce.<sup>21</sup> Gompers was soon proven correct: The federal labor injunction became a potent weapon for subduing labor activity.<sup>22</sup> Most famously, in 1912, when the United Mine Workers (UMW) sought to regularize wages throughout the coal industry, they were met not only by violent repression by coal operators, but also by criminal indictments of union leaders and a court injunction that permanently prevented the UMW from organizing the nonunion coal mines.<sup>23</sup>

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<sup>19</sup> *United States v. E. C. Knight*, 156 U.S. 1 (1895).

<sup>20</sup> *Loewe v. Lawlor*, 208 U.S. 274 (1908).

<sup>21</sup> Ernst, "The Labor Exemption," 1153; Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916* (1988), 224.

<sup>22</sup> Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (2011), 384 (noting that the Sherman Act was "aimed at capital but hit labor"); Hovenkamp, "Labor Conspiracies in American Law," 950–63 (describing how the law of labor injunctions became more hostile to labor activity over time).

<sup>23</sup> *Hitchman Coal & Coke Co. v. Mitchell*, 202 F. 512 (N.D.W. Va. 1912); *see also* *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925). For further discussion, *see* Ernst, "The Labor Exemption," 1160.

Facing what it believed to be an existential threat, the AFL dedicated itself to reforming antitrust law to make clear that labor was exempt.<sup>24</sup> In 1914, the labor federation thought it had prevailed. Congress enacted the Clayton Act of 1914 providing, in Section 6, that the “labor of a human being is not a commodity or article of commerce” and that the antitrust laws were not to be construed to forbid the existence of labor unions or to restrain individual members from “lawfully carrying out the legitimate objects thereof.”<sup>25</sup> Gompers declared the Act the “Magna Carta” of organized labor.<sup>26</sup>

The Supreme Court, however, soon interpreted Section 6 as a mere codification of existing law: Because an intent to restrain trade was not considered to be a “legitimate” object of a labor organization, courts continued to enjoin workers’ collective activity, particularly when it involved strikes and boycotts across more than one employer or against a “neutral” employer.<sup>27</sup> For decades, labor remained sharply constrained by antitrust law with numerous courts rejecting the notion that combinations of workers should be judged differently than those of business.<sup>28</sup>

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<sup>24</sup> See William E. Forbath, *Law and the Shaping of the American Labor Movement* (1991); Ernst, “The Labor Exemption”; Louis B. Boudin, “Organized Labor and the Clayton Act,” *Virginia Law Review* 29, no. 4 (1942): 272.

<sup>25</sup> 38 Stat. 930 (1914), 15 U.S.C. § 17 (2018).

<sup>26</sup> William Forbath, “Politics, State Building, and the Courts, 1870–1920,” in 2 *The Cambridge History of Law in America*, eds. Michael Grossberg & Christopher Tomlins (2007): 1092, 1151.

<sup>27</sup> *E.g.*, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *see also* *Paine Lumber Co. v. Neal*, 244 U.S. 459, 485 (1917).

<sup>28</sup> See Forbath, *Law and the Shaping of the American Labor Movement*, 75, 101; Daniel Ernst, *Lawyers Against Labor: From Individual Rights to Corporate Liberalism* (1995).

In 1932, at labor’s urging, Congress intervened again with passage of the Norris–La Guardia Act.<sup>29</sup> This time the legislature was even more explicit: The new Act explicitly overturned the Court’s narrow construction of the Clayton Act and prohibited issuance of injunctions in all cases involving a “labor dispute.” The Supreme Court, now in its post-New Deal composition, finally assented. With its decisions in *Apex Hosiery Co. v. Leader*<sup>30</sup> and then *United States v. Hutcheson*,<sup>31</sup> the Court held that most union concerted action would be exempt from antitrust law. Thus began a period, lasting until the 1970s, during which the Court largely interpreted antitrust law to serve as a check on the power of capital, not labor.<sup>32</sup>

### **Labor’s Broader Antimonopoly Tradition and the “Desire for Democracy”**

The vast majority of scholarship that examines the relationship of labor to the problem of monopoly power details the preceding history, and then goes on to trace subsequent developments regarding the scope of the labor exemption. The focus on this history is understandable: The debate over the labor exemption was not only about statutory interpretation of the antitrust laws but also about the very legitimacy of unions and collective bargaining during

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<sup>29</sup> 29 U.S.C. §§ 101–115 (1940).

<sup>30</sup> *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

<sup>31</sup> *United States v. Hutcheson*, 312 U.S. 219 (1941). *But see* *Allen Bradley Co. v. Int’l Bhd. of Elec. Workers*, 325 U.S. 797 (1945) (holding that the labor exemption does not shield a union that conspires with employers to monopolize and fix prices, even when such agreement was obtained through union pressure for a closed shop and hot cargo agreements).

<sup>32</sup> Vaheesan, “Accommodating Capital and Policing Labor,” 792–93.

a period of intense industrialization and labor strife. Moreover, the dispute had lasting implications for the labor movement.

As William Forbath and Victoria Hattam have argued, labor’s interaction with antitrust law helps explain both the dominant union ideology at the time and the shape of modern labor law. Encounters with the legal system at the turn of the century, and in particular the use of antitrust law against unions, led the labor movement—the AFL in particular—to turn toward “voluntarism,” i.e., a commitment to the private ordering of industrial relations between unions and employers and a disinterest in a broader egalitarian or socialist political agenda.<sup>33</sup> In so doing, the AFL broke from the nineteenth-century labor movement’s more radical vision of social and political reform.<sup>34</sup> As Samuel Gompers declared in 1901, testifying before the Industrial Commission:

[O]rganized labor looks with apprehension at the many panaceas and remedies offered by theorists to curb the growth and development or destroy the combinations of industry. We have seen those who knew little of statecraft and less of economics urge the adoption of laws to ‘regulate’ interstate commerce and laws to ‘prevent’ combinations and trusts, and we have also seen that these measures, when enacted, have been the very instruments to deprive labor of the benefit organized effort, while at the same time they have simply proved incentives to more

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<sup>33</sup> Forbath, “The Shaping of the American Labor Movement”; Victoria C. Hattam, *Labor Visions and State Power, The Origins of Business Unionism in the United States* (1994); see also Sanders, *Roots of Reform*, 71–93.

<sup>34</sup> On the nineteenth century movements, see Alex Gourevitch, *From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century* (2015); David Montgomery, *Beyond Equality: Labor and the Radical Republicans, 1862–1872* (1974); David Montgomery, *Citizen Worker* (2010); Leon Fink, *Workingmen’s Democracy: The Knights of Labor and American Politics* (1983); Forbath, *Law and the Shaping of the American Labor Movement*; William Forbath, “The Ambiguities of Free Labor: Labor and the Law in the Gilded Age,” *Wisconsin Law Review* 1985, no. 4 (1985): 767.

subtly and surely lubricate the wheels of capital’s combination. For our own part we are convinced that the State is not capable of preventing development or natural concentration of industry.<sup>35</sup>

The current legal regime is very much shaped by the AFL ideology. The National Labor Relations Act (NLRA) enables voluntary, private bargaining on a worksite-by-worksite basis. Unlike most industrial democracies, the United States lacks a system of government-mandated sectoral bargaining, leaving millions of workers without union rights and unions with little influence over the direction of the political economy.<sup>36</sup>

Yet, the focus on the labor exemption has resulted in a blinkered account of labor’s antimonopoly tradition more broadly. In fact, a broader antimonopoly tradition, embracing a fundamental critique of capitalism, was pressed in varying forms by early labor groups like the Knights of Labor in the nineteenth century, the Industrial Workers of the World (IWW) and socialist labor leader Eugene Debs in the early twentieth century, and even, at times, the AFL and Gompers himself. Similar themes were again taken up by industrial labor leaders like

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<sup>35</sup> U.S. Indus. Comm’n, 57th Cong., 7 Rep. of the Industrial Commission on the Relations and Conditions of Capital and Labor Employed in Manufactures and General Business, at 656 (1901) (“While I believe that the trust should be regulated, believe in publicity of the trust, I fear most the attempt of legislative action to deal with them, for as a rule the methods proposed to deal with the trust have not dealt with the trust, but they have dealt with us. The courts have interpreted these laws to apply to us, to organized labor, and not to trusts. It has not affected the trusts at all.”).

<sup>36</sup> See Kate Andrias, “The New Labor Law,” *Yale Law Journal* 126, no. 1 (2016): 2; Nelson Lichtenstein, *State of the Union* (2002). *But cf.* Kate Andrias, “An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act,” *Yale Law Journal* 128, no. 2 (2019): 616 (describing partial system of sectoral bargaining over wages under the early FLSA); Mark Barenberg, “The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation,” *Harvard Law Review* 106, no. 7 (1993): 1379, 1389 (describing Senator Wagner’s aspirations to use the NLRA to build a cooperative social democracy).

Sydney Hillman of the garment workers, John Lewis of the mine workers, and later United Auto Workers (UAW) president Walter Reuther and Steelworkers president Philip Murray, as well as by female progressive labor activists from the National Consumers' League, like Florence Kelly and Lucy Mason. These labor leaders and their movements all offered a sustained critique of concentrated economic power and its effect on both workers and democracy. Albeit in varying ways and to different extents, they all sought reforms far broader than a labor exemption to antitrust law—and they rejected the premise that labor rights and antimonopoly policy were in tension. To the contrary, they located the fight against monopoly power in part of a broader struggle to democratize the economy and provide for worker freedom, and they drew on antimonopoly rhetoric in offering their vision for a more democratic and egalitarian political economy.

*From the Knights of Labor to Eugene Debs*

From the Civil War until the turn of the twentieth century, labor, along with nearly every agricultural group and many small producers, championed a broad antimonopoly agenda, one that understood concentrations of capital to be a threat to democracy and to freedom.<sup>37</sup> The

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<sup>37</sup> See Richard John, “TITLE,” in *The Antimonopoly Tradition*, eds. Daniel Crane & William J. Novak (2022), XX; Gretchen Ritter, *Goldbugs and Greenbacks: The Antimonopoly Tradition and the Politics of Finance in America, 1865–1896* (1997); Kenneth Lipartito, “The Antimonopoly Tradition,” *University of St. Thomas Law Journal* 10, no. 4 (2013): 1991; Sanders, *Roots of Reform*, 107–08; Montgomery, *Beyond Equality*. Indeed, as early as the 1810s, and particularly following the Panic of 1819, working people were worried about the problem of concentrated economic power and its relationship to democracy. Through

Knights of Labor had a particular perspective in this effort. The largest labor organization in the post-Civil War period, the Knights appealed to workers as both producers and citizens, organizing coal miners and factory workers, as well as artisans and craftsmen; they welcomed not only native-born white men but also immigrants, African-Americans, and women.<sup>38</sup> In the view of the Knights of Labor, the developing system of “wage-slavery” threatened republican liberty. As Terrence Powderly, the leader of the Knights, argued in a famous 1890 speech: “One hundred years ago we had one king of limited powers. . . . Now we have a hundred kings, uncrowned ones, it is true, but monarchs of unlimited power, for they rule through the wealth they possess.”<sup>39</sup> In the view of Powderly and the Knights, the survival of republican government required the end of the “tyranny” of corporations and capital.<sup>40</sup>

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new Workingmen’s Parties, they argued that banking “was the foundation of artificial inequality of wealth, and, thereby, of artificial inequality of power.” Jill Lepore, *These Truths* (2018), 207. They demanded shorter hours and better conditions and objected to “an unequal and very excessive accumulation of wealth and power into the hands of a few.” Lepore; *see also* Leon Fink, “The New Labor History and the Powers of Historical Pessimism: Consensus, Hegemony, and the Case of the Knights of Labor,” *Journal of American History* 75, no. 1 (1988): 115, 116.

<sup>38</sup> Forbath, *Law and the Shaping of the American Labor Movement*, 12; Sanders, *Roots of Reform*, 33–55; *see also* Nell Painter, “Black Workers from Reconstruction to the Depression,” in *Working for Democracy*, eds. Paul Buhle & Alan Dawley (1985), 63, 66–68 (describing the racial justice focus of the Knights, in contrast to the segregationist commitments of the AFL).

<sup>39</sup> Jefferson Cowie, *The Great Exception: The New Deal & the Limits of American Politics* (2016), 41–42 (2016) (quoting Terence V. Powderly, Gen. Master Workman, Knights of Labor, *Address at Priceburg* (July 4, 1890)).

<sup>40</sup> Fink, “The New Labor History and the Powers of Historical Pessimism,” 4; Gourevitch, *From Slavery to the Cooperative Commonwealth*; Forbath, “The Ambiguities of Free Labor”; Cowie, *The New Deal & the Limits of American Politics*.

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To that end, the Knights of Labor advanced not only a “free labor” agenda but also an antimonopoly agenda.<sup>41</sup> Although some Knights leaders expressed concern about government intervention, describing themselves as “individualist[s],”<sup>42</sup> the organization sought the enactment of wage and hour laws and workplace regulation, while also urging the breaking up of big companies, the abolition of private banking, public funding for worker-owned industry, the nationalization of monopolies,<sup>43</sup> and the possibility of cooperative ownership as a way to practice republican ideals.<sup>44</sup> At the 1899 Chicago Conference on Trusts, for example, John Hayes, the Knights’ General Secretary, urged that the problem of trusts and monopolies be understood not as an issue of competition, but rather as one of “human rights, of individual liberty, of the status of the citizen, of the dignity of citizenship, the right of defense, a limit to the power of wealth.”<sup>45</sup> In his speeches, Terrence Powderly repeatedly and explicitly connected problems of labor to problems of monopoly power, asking:

Should we not make an effort to dissolve the political bonds which have connected the vital interests of the American people with the trusts, combines, and monopolies of the present age? Is it not high time for us to cast about for a means of separation

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<sup>41</sup> See Sanjukta Paul, “Recovering Labor Antimonopoly,” *New Labor Forum* 28, no. 3 (2019): 34; Sanders, *Roots of Reform*, 46–48.

<sup>42</sup> U.S. Indus. Comm’n, 57th Cong., 7 Rep. of the Industrial Commission on the Relations and Conditions of Capital and Labor Employed in Manufactures and General Business, at 450 (1901) (statement of Jacob Schonfarber, Rep., Knights of Labor).

<sup>43</sup> Forbath, *Law and the Shaping of the American Labor Movement*, 13–14; Sanders, *Roots of Reform*, 46–49.

<sup>44</sup> See Fink, “The New Labor History,” 34, 228; Gourevitch, *From Slavery to the Cooperative Commonwealth*, 10, 97–137; Steve Leikin, *The Practical Utopians: American Workers and the Cooperative Movement in the Gilded Age* (2005), xviii.

<sup>45</sup> Richard White, “TITLE,” in *The Antimonopoly Tradition*, eds. Daniel Crane & William J. Novak (2022), XX (quoting John W. Hayes, Chicago Conference on Trusts (1899)).

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and should we not declare the causes which impel us to shake off yoke of monopoly when we seek for the final separation? Is not history repeating itself, is it not time to think of making a new Declaration of Independence?<sup>46</sup>

Critically, Powderly advocated government ownership of telephones, telegraphs, railroads, and coalfields, saying he could “see no reason in supporting two governments when one [would] answer all practical purposes.”<sup>47</sup>

By the end of the nineteenth century, however, the Knights of Labor were defunct, the AFL was ascendant, and it had become clear that labor in exchange for wages would be a permanent fact of working-class life for men and women.<sup>48</sup> Under the leadership of Samuel Gompers, the AFL increasingly came to embrace an antistatist view, eschewing broad ranging political reforms and privileging instead the right of craftsmen to privately negotiate with employers.<sup>49</sup> To be sure, within the AFL, the staunchly voluntarist position was contested. Some AFL union leaders favored greater political engagement and a broader economic reform agenda, including the end of government grants of privileges to railroad monopolies.<sup>50</sup> Others, including

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<sup>46</sup> Fink, “The New Labor History,” 133–34 (quoting Terence V. Powderly, Gen. Master Workman, Knights of Labor, *Address at Priceburg* (July 4, 1890)).

<sup>47</sup> Fink, “The New Labor History.”

<sup>48</sup> Lawrence B. Glickman, *A Living Wage: American Workers and the Making of Consumer Society* (1997), 11–13, 80.

<sup>49</sup> See Forbath, “The Ambiguities of Free Labor”; Hattam, *Labor Visions and State Power*; Sanders, *Roots of Reform*, 81–93; see also Andrew Wender Cohen, *The Racketeer’s Progress: Chicago and the Struggle for the Modern American Economy, 1900–1940* (2004) (describing the resistance of craftsmen in Chicago to corporate dominance and showing how unions and associations governed commerce through pickets, assaults, and bombings).

<sup>50</sup> David Montgomery, “Industrial Democracy or Democracy in Industry: The Theory and Practice of the Labor Movement, 1870–1935,” in *Industrial Democracy in America: The Ambiguous Promise*, eds. Nelson Lichtenstein & Howell Harris (1993), 20, 24, 28, 35–36.

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leading progressive reformers, resisted the depiction of the labor movement as divided between those who wanted increased government control of industries and those who wanted solutions to economic and moral questions through voluntary cooperation, arguing that both were needed.<sup>51</sup> Indeed, at times, Gompers himself spoke in terms of building a different kind of democracy: At the 1899 conference, he expressed hope that through the creation of strong unions, workers, albeit in some distant future, could eventually take over the government.<sup>52</sup> But in Gompers' view the state had long been "the representative of the wealth-possessors"; until workers were fully organized, he had little interest in a broad political reform project.<sup>53</sup> At the national level, the AFL focused its efforts on ending the use of the Sherman Act and court injunctions as weapons against labor, as discussed in Part II.<sup>54</sup>

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<sup>51</sup> William English Walling, "Is Labor Divided as to Political Principles," *American Federationist* 32 (1925): 347, 348–50 ("Voluntary organizations can be made secure only by an increased popular control over government and an increased governmental control over industry. . . . Progress by voluntary organization and progress by political democracy are not two hostile or rival movements, they are interdependent parts of a single movement—real or industrial democracy. Organized labor in American has consistently supported both liberalism and progressivism.").

<sup>52</sup> See White, *The Transcontinentals and the Making of Modern America*, 36.

<sup>53</sup> U.S. Indus. Comm'n, 57<sup>th</sup> Cong., 7 Rep. of the Industrial Commission on the Relations and Conditions of Capital and Labor Employed in Manufactures and General Business, at 655 (1901) ("The great wrongs attributable to the trusts are their corrupting influence on the politics of the country; but as the State has always been the representative of the wealth-possessors we shall be compelled to endure this evil until the toilers are organized and educated to the degree when they shall know that the State is by right theirs.").

<sup>54</sup> That is not to say that the AFL had no other political program. Among other initiatives, the AFL was involved in backing Progressive Era democracy reforms, for example, seeking to enact state and national initiative processes and recall mechanisms. See 5 Philip S. Foner, *History of the Labor Movement* (1980), 45–55.

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Yet while the AFL’s struggle against antitrust injunctions was its hallmark, Gompers was never the only face of labor—nor of labor’s views on antitrust and antimonopoly. In 1893, Eugene Debs, frustrated with the narrow craft unionism of his AFL affiliate union, the Brotherhood of Locomotive Fireman, helped found the American Railway Union (ARU), with the aim of organizing all railway workers on an industrial basis.<sup>55</sup> In 1894, the ARU won its first major strike against the Great Northern Railroad.<sup>56</sup> Pressed by union delegates and rank-and-file workers, an initially reluctant Debs next threw his support behind a strike against the Pullman Company, which had imposed a severe wage cut on employees in addition to autocratic and harsh management tactics.<sup>57</sup> Railroad workers across the country joined the strike, aiming to pressure their employers to stop hauling Pullman cars.<sup>58</sup> The strike was met with extraordinary governmental repression. The Attorney General of the United States obtained a court injunction against the union for violating the Sherman Act; President Grover Cleveland ordered federal troops to suppress the strikers; and Debs and other union leaders were tried and imprisoned for their leadership of the strike.<sup>59</sup>

Debs emerged from prison having learned different lessons than Gompers from his direct conflict with antitrust law and the coercive power of the state. In his view, the alliance between

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<sup>55</sup> Nick Salvatore, *Eugene V. Debs: Citizen and Socialist* (1982), 110–15 .

<sup>56</sup> Salvatore, 119–23; *see In re Debs*, 158 U.S. 564, 599–600 (1895) (relying on the Commerce Clause powers to uphold the governmental actions against the strikers).

<sup>57</sup> Salvatore, *Eugene V. Debs: Citizen and Socialist*, 126–30; White, *The Transcontinentals and the Making of Modern America*, 418–19, 430.

<sup>58</sup> White, *The Transcontinentals and the Making of Modern America*, 430.

<sup>59</sup> Salvatore, *Eugene V. Debs: Citizen and Socialist*, 131–38, 148–50.

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the corporation and the government was too strong to challenge solely on the private, economic front.<sup>60</sup> Political engagement was imperative. Debs now explicitly identified as a socialist, though his form of socialism was deeply American, rooted in Protestant and Republican values.<sup>61</sup> In the next years, he helped found the International Workers of the World,<sup>62</sup> which, unlike the AFL, was committed to organizing on an industrial scale, engaging in a political as well as an economic program, and including African Americans, women, and immigrant workers.<sup>63</sup> Debs also began running for President as a socialist, which he did in 1904, 1908, 1912, and 1920. His political career culminated with yet another conflict against the government—a trial and conviction for violating the Espionage Act by urging resistance to the draft—and with Debs eventually running his last presidential campaign from prison.<sup>64</sup>

The story of Debs as a labor leader and American socialist is well-covered in the literature. But his views on antimonopoly policy are less familiar.<sup>65</sup> In fact, during this period, Debs repeatedly pressed a set of arguments about monopoly power, tying them expressly to both labor rights and democracy. In an essay entitled “Political Lessons of the Pullman Strike,” for

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<sup>60</sup> Salvatore, 148–50.

<sup>61</sup> Salvatore, 150–52; *see also* Sanders, *Roots of Reform*, 60. For an example of Debs’ invocation of the particularly American roots of his socialism, see “Eugene V. Debs to the Workingmen of Cleveland,” *Cleveland World* (January 19, 1896): 3.

<sup>62</sup> Salvatore, *Eugene V. Debs: Citizen and Socialist*, 183–207

<sup>63</sup> 3 Philip S. Foner, *History of the Labor Movement* (1964).

<sup>64</sup> Salvatore, *Eugene V. Debs: Citizen and Socialist*, 220–61, 292–302.

<sup>65</sup> *But cf.* Crane, “Antitrust’s Unconventional Politics,” 125 (citing Debs).

example, Debs condemned the system of “wage slavery” that prevailed under “trusts” and “syndicates,” analogizing its harms to chattel slavery:

Since that period of vanquishing wrong [African American slavery] and the enthronement of the right, a system of wage-slavery has been introduced. Warmed into life in the womb of greed, and fostered by laws and legislation as unholy as that which legalized slave stealing and the breeding of human beings, like swine, for the market, it has gained power and prestige until wage-slaves, under the domination of the money power, acting through trusts, syndicates, corporations, and monopoly-land stealing, capitalization, railroad wrecking, bribery, and corruption, defying proper characterization, we are confronted with conditions bearing the impress of peonism, infinitely more alarming than was African slavery in its darkest days.<sup>66</sup>

In numerous other speeches, he called for the breaking up of “trusts, monopolies, and unholy combinations of human sharks” as part-and-parcel of a set of demands about democracy.<sup>67</sup>

Over time, however, Debs came to see trusts as an inevitable part of industrial capitalism—and as a necessary precursor to socialism.<sup>68</sup> Against that background, he argued, labor needed to mimic capital’s concentration by organizing into strong, industrial unions.<sup>69</sup> And

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<sup>66</sup> Eugene V. Debs, “Political Lessons of the Pullman Strike,” *Railway Times* 2, no. 5 (March 1, 1895): 1, 2–3.

<sup>67</sup> Eugene V. Debs, “Do We Want Industrial Peace?,” *Locomotive Firemen’s Magazine* (March 1890): 193–95; *see also* Debs, “Political Lessons of the Pullman Strike,” 1, 2–3; “Eugene V. Debs to the Workingmen of Cleveland,” *Cleveland World* 7, no. 147 (January 19, 1896): 3 (critiquing the way courts enjoined labor concerted activity but not corporate activity and arguing that there “can be no civil liberty with industrial slavery”).

<sup>68</sup> “Eugene V. Debs to the Workingmen of Cleveland,” 3.; *see also* Eugene V. Debs, “The Workers and the Trusts,” *Jamestown Weekly Alert* (August 31, 1899): 6; Eugene V. Debs, Speech at Central Music Hall: *Competition vs. Cooperation* (October 13, 1900); “Debs’ Great Speech,” *Miners’ Magazine* (August 1902): 26–35; Eugene V. Debs, “The Socialist Party’s Appeal,” *The Independent* (October 24, 1912): 950.

<sup>69</sup> “Industrial Union Manifesto,” *Voice of Labor* (March 1905): 3–5; “Eugene V. Debs to the Workingmen of Cleveland,” 3.

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he urged that working people, through democratic processes, should take over monopolies, nationalizing functions that he believed were rightly governmental.<sup>70</sup> Thus, like Louis Brandeis and other leading antimonopolists of the time, Debs' concern was not so much with exclusive privilege granted by the government, but rather with private economic power more generally.<sup>71</sup> At the same time, Debs' vision was quite distinct from that of Brandeis, whose 1914 essay, "A Curse of Bigness," in *Harper's Weekly* offered a Jeffersonian vision of a social-economic order organized on a small scale.<sup>72</sup> Whereas Brandeis focused on breaking up concentrations of economic power, Debs focused on transforming its ownership. In 1916, Debs drew the contrast, writing: "Republicans, Democratic, and Progressive parties believe in regulating the trusts. The socialist party believes in owning them so that all the people may get the benefit of them . . . ."<sup>73</sup>

*Progressive Era and Early New Deal: Antimonopoly Through Regulation, Planning, and Collective Organization*

Other industrial union leaders from the early twentieth century focused less explicitly on socialism, but they took up many of Debs' themes on trusts and monopoly power, connecting them to arguments about industrial and political democracy.<sup>74</sup> Dissatisfied with the Gompers

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<sup>70</sup> "Eugene V. Debs to the Workingmen of Cleveland," 3; *see also* Speech at Central Music Hall; "Debs' Great Speech," 26–35.

<sup>71</sup> Crane, "Antitrust's Unconventional Politics," 120.

<sup>72</sup> Louis D. Brandeis, "A Curse of Bigness," *Harper's Weekly* (January 10, 1914): 18.

<sup>73</sup> Eugene V. Debs, *Labor and Freedom* (1916), 167–75.

<sup>74</sup> Nelson Lichtenstein & Howell Harris, "Introduction" in *Industrial Democracy in America: The Ambiguous Promise*, eds. Nelson Lichtenstein & Howell Harris (1993) (tracing history of the term "industrial democracy").

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approach, these labor leaders sought to redistribute power over economic life both by changing work relations at the site of production and by demanding national economic planning, social and economic regulation, and, sometimes, collective or state ownership.<sup>75</sup> Notably, they sought to build power for all workers—women, immigrants, and African-Americans, as well as white men.

William “Big Bill” Haywood, leader of the Industrial Workers of the World, for example, argued that oligarchic corporations “ma[de] the real laws of the land,” thereby imposing “an awful tyranny” on workers.<sup>76</sup> IWW organizers detailed the problem of monopoly in industries like timber and mining, and the resulting power corporations exercised over workers and the “state machinery of government.”<sup>77</sup> They urged direct worker action in the form of industry-wide strikes aiming for worker control of industry.<sup>78</sup> In their view, industrial democracy—which they defined as “the supervision of industry in the hands of those who do the work”—was the answer to concentrated economic power.<sup>79</sup>

In a similar vein, Sidney Hillman, president of the industrial garment workers’ union, the Amalgamated Clothing Workers of America, urged shared control of economic decisions in

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<sup>75</sup> David Montgomery, “Industrial Democracy or Democracy in Industry,” 20, 35–36. For a discussion of Progressive Era approaches to monopoly more generally, see Sanders, *Roots of Reform*, 197–202, 275–82; Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916* (1988).

<sup>76</sup> William D. Haywood & Frank Bohn, *Industrial Socialism* (1911), 37, 52.

<sup>77</sup> James Rowan, *The IWW in the Lumber Industry* (1921).

<sup>78</sup> See Nico Bowie, “Corporate Personhood v. Corporate Statehood,” *Harvard Law Review* 132, no. 7 (2019): 2009, 2029–35.

<sup>79</sup> William E. Trautman, ed., *Proceedings of the First Convention of the Industrial Workers of the World I* (1905) (speech of Chairman William D. Haywood, June 27, 1905).

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factories, through unionization, industrial strikes, and collective bargaining, as well as new forms of political and regulatory control.<sup>80</sup> Notably, the experience in the garment industry highlighted for Hillman the limits of an antimonopoly agenda focused on breaking up business into smaller units. The chaotic, disorganized nature of the textile industry made organizing unions challenging and pushed wages down. Governmental regulation was necessary to force coordination among employers and to enable union organization. Thus, although Hillman shared the Brandeisian commitment to “regulated competition” and to “industrial liberty,” he was less enamored with atomistic competition.<sup>81</sup> Hillman’s opposition to extreme concentration of capital also led him, like Debs, to urge governmental takeover of trusts and public ownership, though this was never his primary agenda.<sup>82</sup>

Progressive reformers of the time agreed that while monopoly power was dangerous, the answer was not simply breaking up big business but rather imposing a broader democratization of the economy.<sup>83</sup> Indeed, Brandeis himself supported workers’ demands for industrial democracy, although his vision of industrial democracy involved more worker participation rather than worker control.<sup>84</sup> Meanwhile, leaders of the National Consumers’ League (NCL), like

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<sup>80</sup> Steve Fraser, *Labor Will Rule: Sidney Hillman and the Rise of American Labor* (1991).

<sup>81</sup> See Forbath, “Politics, State Building, and the Courts,” 1121; cf. Brandeis, “A Curse of Bigness,” 18. For further discussion of Brandeis’s vision, see Gerald Berk, *Louis D. Brandeis and the Making of Regulated Competition, 1900–1932* (2009).

<sup>82</sup> Sidney Hillman, “Address at National Press Club,” *Amalgamated Clothing Workers of America* (March 16, 1912) (on file with author) (“The nation must own the trusts instead of the trust magnates owning the nation and this is to my knowledge the only solution of the trust question.”).

<sup>83</sup> Sanders, *Roots of Reform*, 277–313.

<sup>84</sup> Bowie, “Corporate Personhood v. Corporate Statehood,” 2038–39.



Florence Kelly, focused on protective legislation—such as wage and hour laws for women and worker safety legislation—which they saw as a way to weaken employer power and protect women excluded from unions.<sup>85</sup> Like the union leaders, some of the progressive reformers also urged planned production and collective organization.<sup>86</sup> For example, Lucy Randolph Mason, who began her career with the NCL but ultimately became a union organizer, sought to impose order on the southern textile industry in order to improve labor conditions for both Black and white female workers, while also seeking to eliminate racial exclusions.<sup>87</sup> For women in the South, overproduction and unmitigated competition were disastrous, leading to long hours and dangerous night work.<sup>88</sup> Changing this behavior required moving away from the ideal of robust competition among small businesses and toward a degree of cooperation and standard setting within a given industry.<sup>89</sup> By the 1920s, success was limited in the South, but in the North, the garment workers’ union had penetrated industry decision-making at virtually every level. As Nelson Lichtenstein has written, “[i]ts representatives jointly set piece rates, influenced the appointment of foreman, bailed out bankrupt firms, set the terms for introduction of new technology, and . . . helped managers even of the largest clothing firms plan and market new product lines.”<sup>90</sup>

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<sup>85</sup> Alan Dawley, *Struggles for Justice* (1991), 102–03, 156.

<sup>86</sup> Landon R. Y. Storrs, *Civilizing Capitalism* (2003), 72.

<sup>87</sup> Storrs, 72–74, 105.

<sup>88</sup> Storrs, 71.

<sup>89</sup> Storrs, 72–74.

<sup>90</sup> Nelson Lichtenstein, “Great Expectations: The Promise of Industrial Jurisprudence and Its Demise, 1930–1960,” in *Industrial Democracy in America: The Ambiguous Promise*, 113, 118.

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Efforts to share in economic power at the worksite were only part of the strategy.

Working with leading Progressive reformers, the garment workers' union also experimented with cooperative approaches to economic activity, focusing on social service provision through cooperative housing, banking, and unemployment insurance.<sup>91</sup> But unlike the Knights of Labor, the garment workers did not envision a return to a utopian world of private, collective ownership by workers. Rather, the union tried to use its cooperatives to exercise greater control over capital by, for example, employing its cooperative bank to supervise the business operations of garment companies that sought loans from the bank.<sup>92</sup>

In addition, the garment workers' union and other industrial unions urged economic democracy through political action.<sup>93</sup> For example, joining Debs and Hillman's calls for public ownership, in 1919 and 1920, the UMW passed resolutions calling for the nationalization of coal mines and the public ownership of railroads.<sup>94</sup> The UMW also urged legislation to make employer interference with unionization of workers a criminal offense; to establish a 30-hour week; to create a system of national health insurance; and to require the release of all political prisoners and the demilitarization of United States.<sup>95</sup> Indeed, World War I had highlighted for these groups the capacity of the modern state to harness the government's coercive power to

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<sup>91</sup> Fraser, *Sidney Hillman and the Rise of American Labor*, 220.

<sup>92</sup> Fraser.

<sup>93</sup> Montgomery, "Industrial Democracy or Democracy in Industry," 42.

<sup>94</sup> Montgomery, 36; *see also* David Montgomery, *The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865–1925* (1987), 370–410.

<sup>95</sup> Montgomery, "Industrial Democracy or Democracy in Industry," 36.

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cabin the power of capital—and the limits of purely voluntary and cooperative approaches. The War Labor Boards, which helped grow union membership while engaging the unions in economic policymaking, encouraged those unionists who wanted both more political engagement and more industrial struggle as a means for workers to share power over the economy and the worksite.<sup>96</sup>

*The New Deal Through World War II: Industrial Democracy, Economic Democracy, for All?*

With the post-World War I recession, union growth stalled and labor’s hopes for a broader democratization of the economy dimmed.<sup>97</sup> The following decade was devastating for workers—and a boon for concentrated capital. By 1929, the two hundred largest U.S. corporations controlled half of all corporate assets, wages had stagnated or declined, and inequality skyrocketed.<sup>98</sup> The Great Depression and the election of President Franklin D. Roosevelt, however, brought both the labor question and the monopoly question back to the center of political debate.<sup>99</sup>

The series of statutes enacted in the New Deal reflected much of labor’s intertwined antimonopoly and industrial democracy agenda. First, Congress enacted the Norris–La Guardia Act in 1932, prohibiting federal courts from enjoining most labor activity, including under the

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<sup>96</sup> Montgomery, 35–36.

<sup>97</sup> Montgomery, 42.

<sup>98</sup> Lichtenstein, *State of the Union*, 23.

<sup>99</sup> Lichtenstein, 23.

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Sherman Act.<sup>100</sup> The Act represented the legislative capstone of the AFL’s long-running campaign to exempt union activity from antitrust law’s sanction.

Early New Deal legislation also embraced some of labor’s demands for industrial democracy and democratic economic planning.<sup>101</sup> The National Industrial Recovery Act of 1932 (NIRA) required the executive branch to establish industrial committees with participation from both business and labor organizations and, at the same time, protected the right of workers to organize unions (albeit without an enforcement mechanism). NIRA ultimately failed, mired in practical problems even before the Supreme Court struck down the legislation for delegating too much power to the President.<sup>102</sup> However, in the view of industrial labor leaders and female labor activists, the problem with NIRA was not its commitment to state involvement and economic planning—i.e., the cartelization of the economy—but rather its pro-business cast.<sup>103</sup> As Lucy Mason explained in a searing critique that was signed by over 200 supporters, the NIRA codes failed to do enough to raise wages or to build worker power.<sup>104</sup>

“Industrial democracy” was the key frame for labor’s ambitions during this period,<sup>105</sup> but the movement also expressly drew on antimonopoly rhetoric. The two goals were interconnected. Unions must be given their share, Lucy Mason wrote, “not only in the profits of their industry

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<sup>100</sup> 29 U.S.C. § 52 (2018).

<sup>101</sup> Lichtenstein, *State of the Union*, 24–26.

<sup>102</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>103</sup> Storrs, *Civilizing Capitalism*, 103, 119; cf. Colin Gordon, *New Deals: Business, Labor, and Politics in America, 1920–1935* (1995).

<sup>104</sup> Storrs, *Civilizing Capitalism*, 103, 119.

<sup>105</sup> See Lichtenstein, *State of the Union*, 30–35.

but what is far more important, in the control of their methods of work, their conditions of life, and their own industrial government.” At stake, she declared, was whether “big business will dominate America.”<sup>106</sup>

Labor’s chief demand focused on the need for strong industrial unions to counter the power of capital. The National Labor Relations Act of 1935 (NLRA), or the Wagner Act, was the key piece of legislation to that end.<sup>107</sup> The Wagner Act gave workers the right to organize and bargain collectively and established the National Labor Relations Board (NLRB) to enforce the statute. In the aftermath of the Act’s passage, John Lewis of the United Mine Workers and Sidney Hillman of the Amalgamated Clothing Workers of America formed the new Committee for Industrial Organization (CIO) and began a massive industrial organizing campaign, rejecting the AFL’s narrow, craft-based, and often exclusionary approach.<sup>108</sup> The CIO’s success was remarkable. In the year following the United Auto Worker strike at General Motors in Michigan, nearly 5 million workers took part in industrial action and almost 3 million joined a union.<sup>109</sup> Although the NLRA established a firm-by-firm system of organizing and bargaining, the industrial unions that comprised the CIO aimed to organize *all* workers—male and female, white

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<sup>106</sup> Storrs, *Civilizing Capitalism*, 123 (quoting Lucy Mason, Open Letter, in *The Nation*, *Survey Graphic*, and *The New Republic* (April 1934)); see also Ellis W. Hawley, *The New Deal and the Problem of Monopoly* (1966), 72, 80–81, 139, 149.

<sup>107</sup> Hawley, *The New Deal and the Problem of Monopoly*, 195; Lichtenstein, *State of the Union*, 36; Barenberg, “The Political Economy of the Wagner Act.”

<sup>108</sup> Lichtenstein, *State of the Union*, 44; Irving Bernstein, *The Turbulent Years: 1933-1941*, (1970), 400–02; Melvyn Dubofsky & Warren Van Tine, *John L. Lewis: A Biography* (1986), 163.

<sup>109</sup> Lichtenstein, *State of the Union*, 51–52.

and Black, native born and immigrant—striving for “the complete organization of the workers of America.”<sup>110</sup> Industry-wide trade unions, the theory ran, would defend workers’ dignity on the job, while also providing workers a co-equal role with business in production policy and national economic planning.<sup>111</sup>

Over the next decade, the industrial unions continued to grow, breaking with the craft unions’ exclusionary policies and becoming a vehicle for racial and economic empowerment of African Americans as well as a force for workplace democracy and rising living standards.<sup>112</sup> The CIO saw the efforts to organize the South and to organize Black workers as essential to challenge the industrial oligarchy of that region. Unionists hoped that the effort to organize the South, known as “Operation Dixie,” would both avoid downward pressure on wages and job conditions and realign southern politics, weakening the stranglehold of southern capital.<sup>113</sup>

While engaging in mass organizing campaigns, the CIO also advanced a broader economic democracy agenda, echoing many of the antimonopoly demands made by earlier generations of labor leaders like Debs and the Knights of Labor.<sup>114</sup> In a 1939 piece in the *New*

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<sup>110</sup> Sidney Hillman, “The Promise of American Labor,” *New Republic* 101 (1939): 62; *see also* Barenberg, “The Political Economy of the Wagner Act.”

<sup>111</sup> Lichtenstein, *State of the Union*, 148.

<sup>112</sup> Lichtenstein, 78–85, 104; *see also* Robin Kelley, *Hammer and Hoe* (2015) (describing organizing of Black Communists in Alabama and their work with the CIO).

<sup>113</sup> Lichtenstein, *State of the Union*, 153; *see also* Lucy Mason, *To Win These Rights: A Personal Story of the CIO in the South* (1952).

<sup>114</sup> Andrew Wender Cohen, *The Racketeer’s Progress* (2009).

*Republic*, Sidney Hillman framed the unions’ goals as fundamentally about sharing power over the economy:

American labor is satisfied that that [the] challenge [confronting our generation] can be met within the framework of the democratic process. It believes that our failure to remove these obstacles has been the result, not of too much, but of too little democracy—too little organized participation by the great mass of our people in the affairs of government and industry. . . . The first prerequisite to intelligent and effective planning is the establishment of strong, responsible, and independent organizations representing the various groups and interests in our national life. Thus the complete organization of the workers of America is a basic necessity, not only for the protection of the immediate interests of labor but as one of the instrumentalities essential for a planned economy.<sup>115</sup>

CIO publications explicitly connected the labor-organizing project to a project for economic democracy, distinguishing this effort from “trust busting.”<sup>116</sup> One article declared:

[W]age earners have turned to unions not only for better living conditions but also because of their desire for greater democracy. . . . It is well to consider the power of big business at this time because our nation will be making important decisions on democracy and on levels of living in the next few years. CIO unions do not go in for trust busting of the old style. They know that big concerns are here to stay. But the unions do ask that power be tempered by democratic participation.<sup>117</sup>

In a monograph entitled “The Dynamics of Industrial Democracy” (1942), Clinton S. Golden and Harold Ruttenberg of the Steelworkers Union similarly advanced a vision of economic democracy achieved through strong industrial unions and economic planning as key mechanisms to temper the power of big business. In their view, individual employee/employer

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<sup>115</sup> Hillman, “The Promise of American Labor.”

<sup>116</sup> CIO, Department of Education & Research, “Business and Democracy,” *Economic Outlook* (September 1944): 1.

<sup>117</sup> CIO, “Business and Democracy,” 1, 4.

bargaining was a “primitive form of industrial democracy,” and instead the goal should be for labor to have a share in the management of individual companies, industry, and the national economy.<sup>118</sup> Philip Murray, who was vice president of the mine workers’ union from 1920 to 1942, the first president of the United Steelworkers of America from 1942 until his death in 1952, and the president of the CIO, co-authored a monograph in which he argued for a form of centralized planning.<sup>119</sup> He distinguished the unions’ demands from the economic systems of Germany and Italy, emphasizing that planning should not and need not “weaken liberty and initiative.”<sup>120</sup>

During World War II, the industrial unions increased their demands for national economic planning in which worker organizations would play a key role, along with large industrial firms. Walter Reuther of the UAW, for example, emerged as a forceful spokesperson for labor participation in production policy. Industry councils, in his view, could give labor “representation in the field of industry and in the field of government.”<sup>121</sup> In January 1942, unions saw some of their demands for a role in economic planning granted when President Roosevelt resurrected the National War Labor Board (WLB), first established by President Woodrow Wilson during World War I.<sup>122</sup> The aim of the WLB was to ensure industrial peace

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<sup>118</sup> Clinton S. Golden & Harold J. Ruttenberg, *The Dynamics of Industrial Democracy* (1942).

<sup>119</sup> Philip Murray & Morris Llewellyn Cooke, *Organized Labor and Production* (1940), 246.

<sup>120</sup> Murray & Cooke, *Organized Labor and Production*.

<sup>121</sup> Lichtenstein, *State of the Union*, 144.

<sup>122</sup> Exec. Order No. 9017, 7 C.F.R. 237 (1942).

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during wartime.<sup>123</sup> Unions were required to forego strike activity in exchange for the opportunity to submit disputes to arbitration. Nonetheless, the WLB's tripartite structure, with an equal number of representatives from labor, industry, and government, afforded labor a relatively unprecedented role in setting national labor and employment policy, while the NLRB's pro-union posture during this period also contributed to rapid union growth.<sup>124</sup>

The popular press took note of the CIO's far-reaching economic democracy agenda,<sup>125</sup> underlining the extent to which it represented a break from the AFL's focus on limiting the use of the antitrust injunction against unions.<sup>126</sup> Indeed, although the CIO, like the AFL, maintained the fight against the antitrust injunction, it located the arguments about the labor exemption in a broader narrative about economic power and democracy. For example, the CIO's amicus brief in *Apex Hosiery Co. v. Leader*<sup>127</sup> emphasized that the Sherman Act was intended to eliminate "the vast accumulation of wealth in the hands of corporations and individuals, the enormous

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<sup>123</sup> Josiah Bartlett Lambert, *"If the Workers Took a Notion": The Right to Strike and American Political Development* (2005), 110.

<sup>124</sup> Lambert, *The Right to Strike and American Political Development*, 111; Steve Fraser, "The Good War and the Workers," *The American Prospect* (September 20, 2009), <https://prospect.org/special-report/good-war-workers/>; Clyde Summers, "Labor and the Wartime State," *University of Pennsylvania Journal of Labor & Employment Law* 2 (1999): 375, 375 (reviewing James B. Atleson, *Labor and the Wartime State: Labor Relations and Law During World War II* (1998)).

<sup>125</sup> "Industrial Union Extends Aims," *Christian Science Monitor* (February 9, 1937): 4.

<sup>126</sup> "To Regulate Monopoly," *New Republic* (August 5, 1946): 120; Oliver Hoyem, "What Labor Intends to Get . . ." *Washington* (April 1945): 36; see also Robert M. Bleiberg, "Suspensions and Resentments Affect Labor Productivity: Belief Widespread that Only Union Pressure Can Win Economic Gains," *Barron's National Business & Financial Weekly* (November 4, 1947): 3 (critiquing the CIO's hostility to free enterprise).

<sup>127</sup> *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

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development of corporate organizations.”<sup>128</sup> In addition, the CIO argued, drafters of the Sherman and Clayton Act believed that “the anti-trust laws could not apply to labor organizations because they were necessary to the existence of Republican institutions.”<sup>129</sup> Accordingly, the legislators “did not intend to include them in a bill directed toward organizations menacing Republican institutions and relating only to commercial transactions.”<sup>130</sup> And the CIO contextualized antitrust law within a broader framework of statutes designed to achieve a more democratic political economy:

The Congressional Acts cited above are not isolated enactments. Each constitutes a thread in a definite pattern of social policy. . . . It is anticipated and intended that under this national policy (a) Labor, free to organize, will develop national unions able to cope with modern aggregates of capital to obtain for the workers and their families their fair share of the bounties of the country; and (b) Unions will be free to exercise their economic power against the employers who are determined to break down and destroy the unions and the standards which they seek to establish, thereby assuring a competitive protection to the employers who desire to cooperate through collective bargaining and comply with the national policy of the country. It is significant that this policy, in its basic outlines, was advanced and defended by the statesmen who framed and passed the Sherman Act.<sup>131</sup>

*The Post-War Period and the CIO’s Struggle Against “Octopus” Corporations*

During the period immediately following World War II, the United States seemed poised to move to the kind of labor-backed social democracy that the CIO urged, and that would

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<sup>128</sup> Brief for the CIO as Amicus Curiae at 14, *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) (No. 638), 1940 WL 71203 (quoting *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 50 (1911)).

<sup>129</sup> Brief for the CIO, 19.

<sup>130</sup> Brief for the CIO, 19.

<sup>131</sup> Brief for the CIO, 65–66.

characterize much of post-war Europe, with its attendant democratic controls over capital.<sup>132</sup> And antitrust law seemed ready to accommodate this vision, albeit somewhat uneasily. The Supreme Court’s recognition of a labor exemption in *Apex Hosiery* and *Hutcheson*, although not fully on the terms the labor movement had urged, had left most workers free to organize without fear of antitrust enforcement.<sup>133</sup>

Likewise, with *Parker v. Brown* in 1943, the Court recognized a state action exemption permitting states to legislate for the public good even if they do so in ways that are anticompetitive, as long as the state policy is clear and any anticompetitive activity is supervised by the state.<sup>134</sup> As Dan Crane has explained, from one perspective, *Parker* stood the meaning of “monopoly” on its head:

Whereas, the primary meaning of “monopoly” in the Anglo-American tradition had been a governmental grant of exclusive privilege—an interference with the natural rights of other market participants—that primary sense of “monopoly” was now to be excluded altogether from the Sherman Act’s antimonopoly legal regime. Only purely private monopolies—the second sense of the word discussed above—would be covered by antitrust.”<sup>135</sup>

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<sup>132</sup> Lichtenstein, *State of the Union*, 124–33; see also Lizabeth Cohen, *A Consumers’ Republic: The Politics of Mass Consumption in Postwar America* (2003); Meg Jacobs, *Pocketbook Politics: Economic Citizenship in Twentieth-Century America* (2005); Jennifer Klein, *For All These Rights: Business, Labor, and The Shaping of America’s Public-Private Welfare State* (2003).

<sup>133</sup> See *supra*, notes 29–30. For the limitations of these decisions, see Sanjukta Paul, “The Enduring Ambiguities of Antitrust Liability for Worker Collective Action,” *Loyola University of Chicago Law Journal* 47, no. 3 (2016): 101.

<sup>134</sup> *Parker v. Brown*, 317 U.S. 341 (1943).

<sup>135</sup> Crane, “Antitrust’s Unconventional Politics,” 130–31.

However, if antitrust is understood as only one piece of a broader project to democratize power over the economy, *Parker* is entirely consistent with antitrust law.<sup>136</sup> Indeed, *Parker* grew out of the Supreme Court’s post-1937 constitutional jurisprudence rejecting *Lochner*-era judicial scrutiny of regulatory schemes—frequently labor and employment laws—impairing property or contract rights.<sup>137</sup> Just as the post-1937 constitutional settlement would avoid second guessing democratic legislative and regulatory judgments under the due process doctrine, so too *Parker* held that the courts would avoid second guessing legislatures under the Sherman Act.

In World War II’s aftermath, however, the industrial unions found their efforts to build a more democratic political economy stymied.<sup>138</sup> Unions faced a slew of hostile court decisions, a powerful remobilization of business and conservative forces in the legislative arena, and the dismantling of state-sponsored bargaining.<sup>139</sup> Most notably, in 1947, at the behest of business, and buoyed by popular concerns about rising labor militancy and union abuses, Congress passed the Taft–Hartley Act over President Harry Truman’s veto.<sup>140</sup> With the enactment of Taft–

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<sup>136</sup> See Merrick B. Garland, “Antitrust and State Action: Economic Efficiency and the Political Process,” *Yale Law Journal* 96, no. 3 (1987): 486, 489 (“A child of the New Deal, *Parker* assertedly saw regulation both as an economically necessary effort to correct market defects, and as a politically legitimate effort to serve the public interest. It was this public interest vision that drove the Court to defer to state regulation and declare it off-limits to antitrust challenge.”).

<sup>137</sup> Crane, “Antitrust’s Unconventional Politics,” 130.

<sup>138</sup> Lichtenstein, *State of the Union*, 84–89, 134.

<sup>139</sup> Lichtenstein, 134; see also James A. Gross, *The Reshaping of the National Labor Relations Board: National Labor Policy in Transition, 1937–1947* (1981); Tomlins, *The State and the Unions*, 148–50.

<sup>140</sup> Labor Management Relations (Taft–Hartley) Act of 1947, 29 U.S.C. §§ 141–197 (2018) (amending the National Labor Relations Act of 1935). On the passage of Taft–Hartley, see generally Kim Phillips-Fein, *Invisible Hands: The Businessmen’s Crusade Against the New Deal* (2010), 31–32; Archibald Cox, “The Evolution of Labor-Management Relations,” in *Law and the National Labor Policy* (1960), 13–18. Labor

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Hartley, federal policy no longer favored unions' concerted action and collective bargaining. Instead, it took on the voluntarist and privatized orientation it maintains today, guaranteeing employees' "full freedom" to *refrain* from engaging in union activity while only weakly protecting their right to engage in it.<sup>141</sup> Moreover, the Act limited unions' ability to exercise power over the economy. In particular, Taft–Hartley forbade unions from engaging in secondary boycotts, a practice wherein workers had successfully exerted economic pressure and won significant gains across industries by refusing to handle goods from firms where other workers were embroiled in a union dispute.<sup>142</sup> In short, although the Sherman Act still offered a "labor exemption," the Taft–Hartley Act prohibited the very practice that had been most targeted by the antitrust injunction.

In the next years, the labor movement increasingly had to battle the argument that unions were inherently anticompetitive. Labor worried about congressional efforts to put unions once again under the ambit of the Sherman Act. It reiterated its arguments that "labor is not a commodity" and that labor unions arose to counterbalance the monopolistic power of

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historians disagree as to whether the Taft–Hartley Act was a codification and consolidation of preexisting legal restrictions or a turning point. See Tomlins, *The State and the Unions*, 250–51; Nelson Lichtenstein, "Taft–Hartley: A Slave-Labor Law?," *Catholic University Law Review* 47, no. 3 (1998): 763, 763–65. On the anticommunist campaigns that eventually culminated in the Taft–Hartley loyalty oath, see Landon R.Y. Storrs, *The Second Red Scare and the Unmaking of the New Deal Left* (2013).

<sup>141</sup> 29 U.S.C. § 151 (2018); see Andrias, "The New Labor Law," 18–19 (describing retrenchment under the Taft–Hartley Act); Richard Yeselson, "Fortress Unionism," *Democracy* 29 (Summer 2013), <https://democracyjournal.org/magazine/29/fortress-unionism/>; Lichtenstein, *State of the Union*.

<sup>142</sup> 29 U.S.C. § 158(b)(4) (2018); see also Kate Andrias, "The Fortification of Inequality," *Indiana Law Journal* 93, no. 5 (2018): 5, 12–15; Julius Getman, *The Supreme Court on Unions* (2016), 90–100.

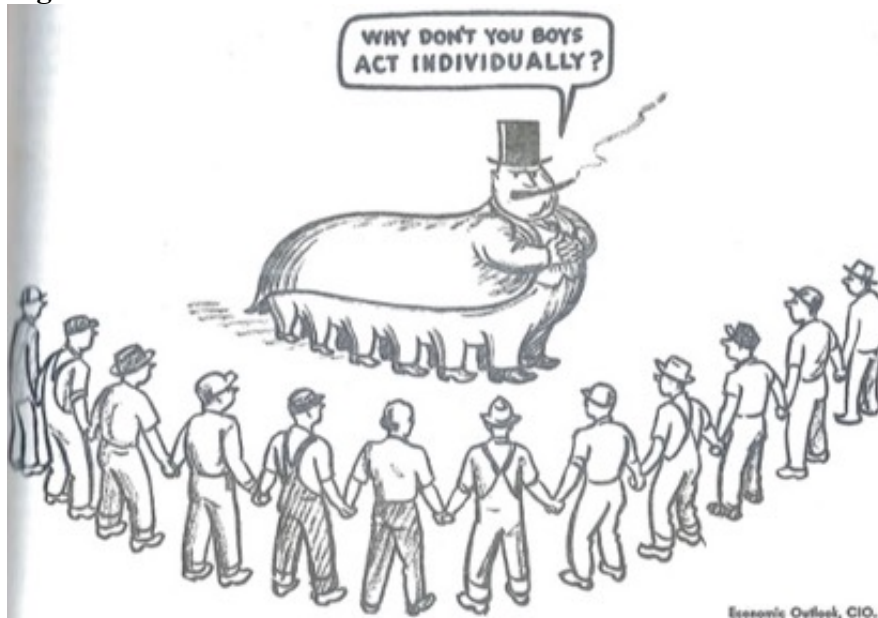
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employers.<sup>143</sup> In a series of articles and cartoons, CIO publications highlighted the hypocrisy of monopolistic corporations using antitrust law to restrain labor:

Today a handful of octopus corporations already exert near monopoly control over a score of major industries. Is it not an amazing spectacle when these same Big Business outfits who violate the spirit, if not the letter, of the Antitrust Act every day, hurl the monopoly charge at organized labor? . . . Corporate monopolies are anti-social conspiracies created only to increase profits to enrich the few at the expense of the consuming public. Labor unions arose to end monopoly in the labor market—the employers’ monopoly over wages and working conditions.<sup>144</sup>

Figure 1:<sup>145</sup>



<sup>143</sup> CIO, Department of Education & Research, “‘Labor Monopoly’—A Phony Issue,” *Economic Outlook* 11 (1950): 25.

<sup>144</sup> CIO, “A Phony Issue,” 25, 28; see also CIO, Department of Education & Research, “Big Business Is Getting Bigger,” *Economic Outlook* 10 (1949): 73; CIO, Department of Education & Research, “How Big Is Big Business?,” *Economic Outlook* (August 1946):1.

<sup>145</sup> CIO, Department of Education & Research, “‘Labor Monopoly’—A Phony Issue,” *Economic Outlook* 11 (1950): 25.

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At the same time as it sought to protect unions from once again becoming targets of antitrust law, the CIO expressly and repeatedly offered an affirmative antimonopoly vision: Union leaders linked concentrated economic power to an erosion of democracy and worker freedom, while advocating far-reaching reforms. A 1949 CIO publication noted that organized labor had “naturally concentrated the greater part of its attention” on Social Security, public housing, minimum wage, labor legislation, and related issues but declared that “beneath the surface of our economic life rolling freely and steadily, have been growing forces of economic concentration and monopoly.”<sup>146</sup> CIO President Murray highlighted labor’s antimonopoly demands in an essay in the *New Republic*, entitled, “What Union Labor Wants”:

We must also come to grips with the problem of monopoly control of our nation’s industry and natural resources. The staggering accumulation of financial power accruing to the great corporations in recent years threatens a serious lack of balance in our national life. . . . More effective checks and balances over the distribution of wealth and economic power are in order, both for our own domestic welfare and for the preservation and strengthening of America’s democratic influence throughout the world.<sup>147</sup>

Murray explained the connection between monopolies and the erosion of democracy, emphasizing the necessity of electing legislative bodies that could resist industry pressure.<sup>148</sup> Building on this theme, in a series of newsletters addressed to its members, the CIO emphasized the relationship between monopoly power and democracy, warning about the effect of

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<sup>146</sup> CIO, “Big Business Is Getting Bigger,” 73.

<sup>147</sup> Philip Murray, “What Union Labor Wants,” *New Republic* (March 27, 1950): 12.

<sup>148</sup> Murray, “What Union Labor Wants.”

concentrated power on the behavior of administrative agencies and government actors.<sup>149</sup> CIO cartoons depicted business as an aristocrat, not only greedy, but incompatible with political and social equality.

Over time, the CIO increasingly framed its antimonopoly concerns in the language of consumerism, reflecting the rise of consumer politics in the mid-twentieth century United States.<sup>150</sup> In a 1947 issue of its *Economic Outlook*, for example, the CIO Department of Education and Research detailed the problems of monopoly power to workers as consumers.<sup>151</sup> First, the article went through the typical day of an average working man—“Mr. Jones”—and pointed out all the ways that monopolies impacted him, for instance, by raising the price of milk, his morning cigarette, and newspaper ink. The article noted that if Mr. Jones thought concretely about how monopolies affect him personally, he would treat the subject as one of the “basic and central questions affecting the welfare and future of the ordinary citizen in the United States” ranking “only below the improvement of industrial relations and preservation of civil liberties.”<sup>152</sup> More generally, the CIO provided data to its readers on the extent of monopoly

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<sup>149</sup> CIO, Department of Education & Research, “Consumers, Workers Pay Cost of New Factories,” *Economic Outlook* 10 (1949): 1; *see also* CIO, “Big Business Is Getting Bigger,” 76 (“No great stretch of the imagination is required to foresee that if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country or the Government will be impelled to step in and impose some form of direct regulation in the public interest.” (quoting the Federal Trade Commission)).

<sup>150</sup> On the rise of consumerism, see Louis Glickman, *Buying Power: A History of Consumer Activism in America* (2009).

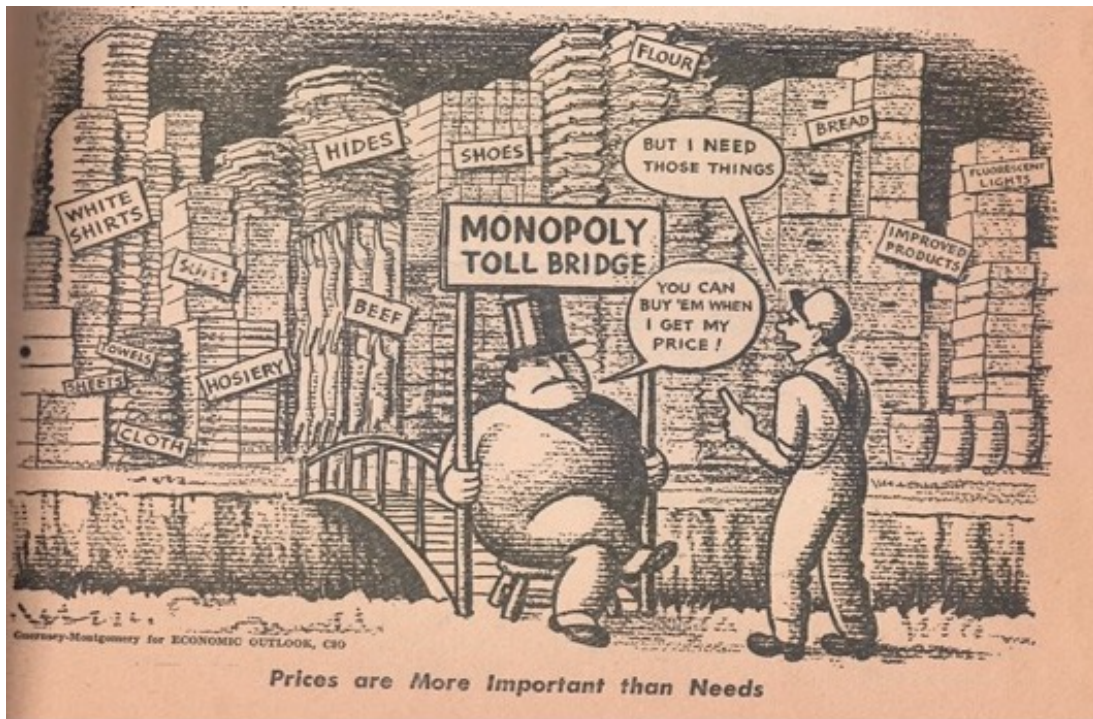
<sup>151</sup> CIO, Department of Education & Research, “Growth of Monopolies Threatens Age of Plenty,” *Economic Outlook* (June 1947): 1.

<sup>152</sup> CIO, “Growth of Monopolies Threatens Age of Plenty.”



concentration and pointed to data and case studies from the Great Depression to illustrate how monopolies and monopsonies function to reduce competition, set prices, and control employment opportunities.<sup>153</sup>

Figure 2:<sup>154</sup>



Notably, CIO authors did not treat monopoly power as a natural byproduct of market forces. Rather, they repeatedly identified a connection between the concentration of economic

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<sup>153</sup> CIO, "Growth of Monopolies Threatens Age of Plenty" (noting that two hundred of the largest non-financial corporations owned about fifty-five percent of the total corporate assets and examining the cigarette and bread industries as case studies).

<sup>154</sup> CIO, Department of Education & Research, "How Big Is Big Business?," *Economic Outlook* (August 1946): 1.

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power in a few corporations and governmental policy.<sup>155</sup> In particular, they advanced a pointed critique of the relationship between war contracts and concentrated economic power, detailing how defense contracts helped facilitate monopoly power, and urged support for small businesses.<sup>156</sup> The organization also identified tax policy as a cause of monopoly power.<sup>157</sup>

**Figure 3:**<sup>158</sup>



<sup>155</sup> Milton Plumb, “Why Don’t The Monopolies Move into U.S. Treasury?,” *CIO News* (August 27, 1951): 3.

<sup>156</sup> “Too Many Defense Contracts Held By Too Few Firms,” *CIO News* (September 17, 1951): 3.

<sup>157</sup> CIO, Department of Education & Research, “CIO’s Tax Program for Full Employment,” *Economic Outlook* (April 1947): 4, 6 (urging that tax relief be given to small corporations because “[t]hey are the bulwarks against monopoly control and monopolistic practices of big business”); Irving Fagan & Cushman Reynolds, “You, Mr. Taxpayer, Pay for Industry’s Expansion,” *CIO News* (April 9, 1951): 5 (critiquing tax amortization).

<sup>158</sup> CIO, Department of Education & Research, “How Much Profit Is Enough?,” *Economic Outlook* 11 (1950): 41.

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Among the specific antitrust reforms urged by the CIO and industrial unions were for the Interstate Commerce Commission, the Federal Trade Commission (FTC), and the Department of Justice to coordinate their work, for Congress to better staff the agencies, and for agency enforcement powers to be expanded.<sup>159</sup> The CIO repeatedly pushed the FTC to take more aggressive antitrust enforcement action.<sup>160</sup> It also expressed support for a bill that would limit the ability of firms to purchase assets,<sup>161</sup> advocated in support of small businesses, including for government-provided loans to such businesses,<sup>162</sup> and sought changes in corporate law and tax law to diffuse concentrated power.<sup>163</sup>

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<sup>159</sup> See CIO, Department of Education & Research, “Who Owns Corporations?,” *Economic Outlook* (July 1948): 12 (arguing that “Congress should give the Department of Justice the right to stop mergers resulting from large corporations acquiring the assets of small companies” and that American corporations should not be able to enter into international cartel agreements).

<sup>160</sup> CIO, “How Big Is Big Business?,” 8; see also “Anti-Trust Suit Is Aimed at \$6 Billion duPont Empire,” *CIO News* (March 10, 1952): 5; “Interlocks: How Big Business Runs the Economy,” *CIO News* (March 5, 1951): 7; “Economic Outlook X-rays Monopolies,” *CIO News* (November 14, 1949): 9.

<sup>161</sup> CIO, “Big Business Is Getting Bigger,” 78 (expressing support for H.R. 2734 (a bill preventing the purchase of assets of other corporations, if the result would lessen competition “substantially” or “tend to monopoly”), which had passed the House and was pending before the Senate Judiciary Committee in October 1949, and declaring: “For over twenty years the FTC has pleaded for legislation to plug this gap in our anti-monopoly laws and carry out the original intent of the Clayton Act”).

<sup>162</sup> CIO, “Growth of Monopolies Threatens Age of Plenty,” 12 (“Government should provide loans to small businesses because the banking houses that control monopoly corporations may be reluctant to lend to competing businesses.”). For discussion of the CIO’s alliance with small business, see Stacy Mitchell & Susan R. Holmberg, “Why the Left Should Ally with Small Business,” *The Nation* (November 18, 2020), <https://www.thenation.com/article/society/democrats-labor-business-monopoly/>.

<sup>163</sup> CIO, “Who Owns Corporations?,” 1, 4 (criticizing the outsized influence that a small number of wealthy individuals have on corporations due to their ownership of a large number of shares and directorships on corporations’ boards and noting the impact of the interconnectedness of corporate ownership on the control of corporations).

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More radically, the CIO urged increased public control and ownership of industry, though not to the same extent or with the same vigor as some of the earlier labor leaders like Debs or the UMW. One article in the *Economic Outlook* ventured: “In the light of the present economic tendencies, it may become necessary to give serious consideration to this suggestion that ‘public control, either through regulation or ownership,’ be explored as a means of curbing monopoly practices.”<sup>164</sup> The federation was particularly concerned about patent access, arguing for universal use and control of patent rights and for “unrestricted use in American industry of patents resulting from government research.”<sup>165</sup> In a 1954 publication, the CIO argued that the federal government should not let private industry take over the commercial development of the atom.<sup>166</sup> More generally, the CIO urged that there should be a preference for public and cooperative entities, licensing should be opened fairly to both small and big businesses, and there should be “government yardsticks.”<sup>167</sup> CIO publications pointed to past experiences with “power monopolies” that resulted in high electricity prices. In areas with “yardstick operations,” such as those operated by the Tennessee Valley Authority, private companies had to reduce their

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<sup>164</sup> CIO, “How Big Is Big Business?,” 1, 8.

<sup>165</sup> CIO, “Growth of Monopolies Threatens Age of Plenty,” 12.

<sup>166</sup> CIO, Department of Education & Research, “The Atom: Golden Windfall for Big Business?,” *Economic Outlook* 15 (1954): 73.

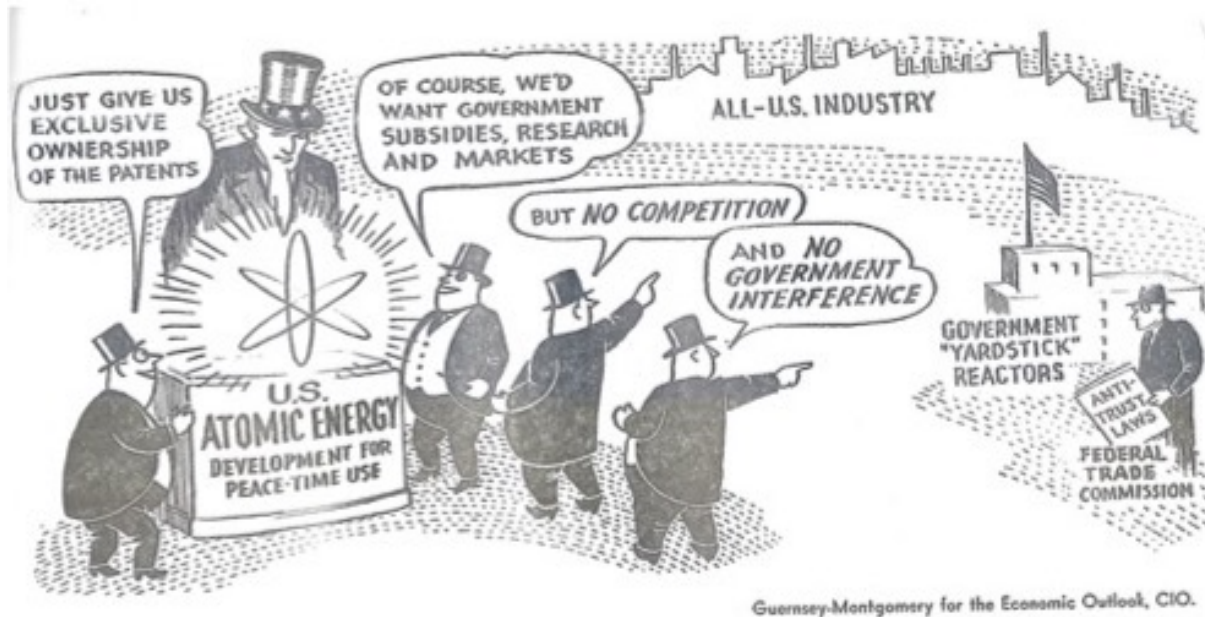
<sup>167</sup> CIO, “The Atom: Golden Windfall for Big Business?”

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prices.<sup>168</sup> By 1951, the CIO newsletter declared, “[n]early all Americans agree that the word ‘monopoly’ has just about the most evil meaning in all the economic vocabulary.”<sup>169</sup>

Figure 4:<sup>170</sup>



### *The AFL and CIO Merger and the Monopoly Capitalism Settlement*

In 1955, however, the AFL and the CIO merged, and in subsequent years the newly unified labor movement dropped its more aggressive antimonopoly rhetoric,<sup>171</sup> as well as its

<sup>168</sup> CIO, “The Atom: Golden Windfall for Big Business?”

<sup>169</sup> Milton Plumb, “Why Don’t The Monopolies Move into U.S. Treasury?,” *CIO News* (August 27, 1951): 3.

<sup>170</sup> CIO, Department of Education & Research, “The Atom: Golden Windfall for Big Business?,” *Economic Outlook* 15 (1954): 73.

<sup>171</sup> For example, while antimonopoly rhetoric pervaded nearly every issue of the CIO’s *Economic Outlook*, the 1963 publication by the AFL-CIO that surveyed economic problems did not once mention monopoly power or antitrust. Executive Council of the AFL-CIO, *Labor Looks at the Nation’s Economy* (1963). The AFL-CIO’s 1976 Platform Proposal to the Democratic and Republican Parties did highlight

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explicit demands for economic democracy through mass unions, national economic planning, and public ownership.<sup>172</sup> A few leaders persisted in offering a more transformative vision, with Walter Reuther, for example, telling the *Detroit Free Press* in 1959 that “when monopolies . . . jeopardize the safety of the country, they can no longer be trusted in private hands to use them for a profit.”<sup>173</sup> But even Reuther tempered his views, adding, “[t]hat is my private philosophy. It hasn’t got a damn thing to do with automobiles or industries operating on non-monopolistic basis. And it has nothing to do with the question of wages in this case.”<sup>174</sup>

Thus, labor increasingly agreed to settle for a private system of bargaining, albeit one that brought its members significant gains.<sup>175</sup> Because unions in industries like auto and steel had already achieved significant density, they were able to force employers to engage in pattern or

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the problem of concentrated economic power, but it offered few ideas for reform beyond tax policy changes and did not mention antitrust or antimonopoly as goals. *The AFL-CIO Platform Proposals* (1976). Labor did continue to speak out against rising inequality and corporate profits and to demand price controls and profit sharing. See, e.g., *The AFL-CIO Platform Proposals*; The January 1966 Economic Report of the President: Hearings Before the Joint Economic Committee, 89th Cong., at 387–436 (1966) (statement of Nathaniel Goldfinger, Director of Research, AFL-CIO); The 1967 Economic Report of the President: Hearings Before the Joint Economic Committee, 90th Cong., at 717–92 (1967) (statement of Walter Reuther, President, AFL-CIO).

<sup>172</sup> Joseph Shister, “Unresolved Problems and New Paths for American Labor,” *Industrial and Labor Relations Review* 9, no. 3 (1956): 447; cf. A. H. Raskin, “What’s Ahead for Labor?,” *Challenge Magazine* 1, no. 6 (1953): 6.

<sup>173</sup> Robert Shogan, “Will Reuther and Hoffa Tangle? Their Contrasts May Hold Answer,” *Detroit Free Press* (April 19, 1959).

<sup>174</sup> Shogan, “Will Reuther and Hoffa Tangle?”

<sup>175</sup> Steve Fraser, “The ‘Labor Question’,” in *The Rise and Fall of the New Deal Order, 1930–1980*, eds. Steve Fraser & Gary Gerstle (1989), 55; Lichtenstein, *State of the Union*, 143–44; Shister, “Unresolved Problems and New Paths for American Labor,” 447.

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industry-wide bargaining.<sup>176</sup> In exchange for assurances of industrial discipline and stability, unions won substantial wage increases with cost of living adjustments, pensions, and generous health benefits.<sup>177</sup> The companies could afford to agree to such generous contracts in part because they enjoyed limited competition in their coordinated, oligopolistic markets.<sup>178</sup> Meanwhile, the government frequently inserted itself into collective bargaining in consolidated markets like steel and auto in order to hold down prices.<sup>179</sup> The arrangement, known to some observers as “monopoly capitalism,” had some significant downsides, including technological stagnation, the eventual rise of inflation, and a comparatively depoliticized and complacent labor movement. It also primarily benefitted white male workers, excluding industries dominated by

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<sup>176</sup> Nelson Lichtenstein, *The Most Dangerous Man in Detroit* (1995), 271–98; Lichtenstein, *State of the Union*, 296–98; Mark Anner, Jennifer Bair & Jeremy Blasi, “Learning from the Past: The Relevance of Twentieth-Century New York Jobbers’ Agreements for Twenty-First-Century Global Supply Chains,” in *Achieving Workers’ Rights in the Global Economy*, eds. Richard P. Appelbaum & Nelson Lichtenstein (2013), 239. Industry-wide bargaining persists in some industries, including the arts and professional sports. See, e.g., Catherine Fisk, *Writing for Hire: Unions, Hollywood, and Madison Avenue* (2016) (describing industry-wide bargaining in Hollywood). But while permitted, these arrangements are not required by law.

<sup>177</sup> Lichtenstein, *State of the Union*, 296–98. For example, between 1947 and 1960, during the heyday of the UAW, average wages in the automobile industry nearly doubled. Lichtenstein, *Most Dangerous Man*, 288.

<sup>178</sup> Winant, “The Power and Limits of the Anti-Monopolist Tradition.”

<sup>179</sup> Winant. Notably, some of the industrial unions encouraged greater governmental involvement in price controls. See The January 1966 Economic Report of the President: Hearings Before the Joint Economic Committee, 89th Cong., at 387–436 (1966) (statement of Nathaniel Goldfinger, Director of Research, AFL-CIO).

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people of color and women. Nonetheless, for a time, it helped produce one of the most economically egalitarian periods in American history.<sup>180</sup>

Moreover, despite the enactment of the Taft–Hartley Act and the emerging negative image of “big labor,”<sup>181</sup> the post-war years were marked by relatively little antitrust enforcement against labor—and relatively aggressive antitrust enforcement against companies.<sup>182</sup> The reigning model for antitrust enforcement during this period was the Harvard School’s structural approach,<sup>183</sup> which argued that economically concentrated markets are likely to perform poorly based solely on their structure and thus opposed market concentration even in cases where such concentration

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<sup>180</sup> Winant, “The Power and Limits of the Anti-Monopolist Tradition”; Nicholas von Hoffman, “A New Look at Unionism,” *Washington Post* (May 20, 1974). Union density and pattern bargaining in oligopolistic industries were by no means the only drivers of this relative economic equality. A range of other factors, including a growing economy, technological changes, the enactment of the GI Bill, comparatively low executive pay, robust financial regulation, a progressive tax system, the rise of public sector unionism, and the entrance of women into the workforce all contributed to the rise of the American middle class and the period of relative economic egalitarianism. See Cowie, *The New Deal & the Limits of American Politics*, 153; Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer—And Turned its Back on the Middle Class* (2010), 88–90 ; Michael Lind, *Land of Promise* (2012), 329–62; Suzanne Mettler, *Soldiers to Citizens: The G.I. Bill and the Making of the Greatest Generation* (2007).

<sup>181</sup> See AFL & CIO, Department of Research, “The “Labor Monopoly” Myth,” *Economic Review* 1 (1956): 13.

<sup>182</sup> Vaheesan, “Accommodating Capital and Policing Labor,” 792–93; Thomas A. Piraino, Jr., “Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century,” *Indiana Law Journal* 82, no. 2 (2007): 345, 348.

<sup>183</sup> William F. Adkinson, Jr., Karen L. Grimm & Christopher N. Bryan, “Enforcement of Section 2 of the Sherman Act: Theory and Practice” (November 3, 2008) (unpublished Federal Trade Commission working paper), [https://www.ftc.gov/system/files/documents/public\\_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2overview.pdf](https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2overview.pdf); Piraino, Jr., “Reconciling the Harvard and Chicago Schools.”

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might lower prices for consumers.<sup>184</sup> In 1950, Congress amended the Clayton Act to prohibit corporations from acquiring the assets of other corporations when doing so substantially lessened competition, while also extending the Act’s reach to vertical mergers.<sup>185</sup> The Supreme Court broadly interpreted the amendments to disfavor mergers<sup>186</sup> and sought to maintain fragmented markets.<sup>187</sup> More generally, the Supreme Court reduced the burden of proof on the government for a range of antitrust violations, including monopolization, while also rejecting efficiency defenses.<sup>188</sup> Meanwhile, the focus on structural market power left labor unions largely untouched by antitrust law, allowing significant collective activity without the threat of court injunction.

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<sup>184</sup> Piraino, Jr., “Reconciling the Harvard and Chicago Schools,” 349.

<sup>185</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 311–14, 316–17 (1962) (interpreting the Celler-Kefauver Anti-Merger Act). Prior to the 1950 amendments, the Clayton Act only covered stock acquisitions by direct competitors. *Brown Shoe Co.*, 312–13.

<sup>186</sup> *United States v. Phila. Nat’l Bank*, 374 U.S. 321 (1963).

<sup>187</sup> Debra A. Valentine, Former Gen. Counsel, Federal Trade Commission, Prepared Remarks Before INDECOPI Conference: *The Evolution of U.S. Merger Law* (August 13, 1996), <https://www.ftc.gov/public-statements/1996/08/evolution-us-merger-law>.

<sup>188</sup> Robert Pitofsky, “Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission,” *University of Chicago Law Review* 72, no. 1 (2005): 209, 211–12; see William E. Kovacic & Carl Shapiro, “Antitrust Policy: A Century of Economic and Legal Thinking,” *Journal of Economic Perspectives* 14, no. 1 (2000): 43, 50–51; “The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers,” *U.S. Department of Justice Archives*, <https://www.justice.gov/archives/atr/merger-guidelines-and-integration-efficiencies-antitrust-review-horizontal-mergers> (“During this period the Court showed a strong bias toward developing per se rules whenever possible.”). Leading examples from the case law include *Fed. Trade Comm’n v. Procter & Gamble Co.*, 386 U.S. 568, 578 (1967); *Phila. Nat’l Bank*, 374 U.S. at 364; *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); *United States v. Von’s Grocery Co.*, 384 U.S. 270, 274 (1966); *Brown Shoe Co.*, 370 U.S. at 344.

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### **Antitrust Against Labor, Again**

The détente between antitrust law and labor was, however, short-lived. In 1965, the Court issued a pair of rulings establishing what is now known as the *Noerr-Pennington* doctrine, which immunizes, for First Amendment reasons, concerted activity that involves petitioning the executive or legislative branch.<sup>189</sup> But while protecting government-focused concerted activity from antitrust liability, *Noerr-Pennington* and the accompanying case *Amalgamated Meat Cutters v. Jewel Tea* prohibited forms of collective action among workers aimed at exercising power over the economy: The Court held that unions violate the Sherman Act when they bargain to impose standards throughout an industry by conditioning collective bargaining agreements on achieving similar conditions with other employers.<sup>190</sup>

The renewed antipathy to labor was hardly limited to antitrust law. Employers began to implement a range of new management strategies that would ultimately lead to the collapse of labor unions in the private sector.<sup>191</sup> They waged sophisticated antiunion campaigns to ward off new organizing, while outsourcing and restructuring in order to reduce labor costs and move

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<sup>189</sup> *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

<sup>190</sup> *Pennington*, 381 U.S. 657; *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). The Court, however, did not prohibit all forms of pattern bargaining; “a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers.” *Pennington*, 381 U.S. at 665–66.

<sup>191</sup> Tami J. Friedman, “Capital Flight, ‘States’ Rights,’ and the Anti-Labor Offensive After World War II,” in *The Right and Labor in America: Politics, Ideology, and Imagination* (2012), 81–83; Andrias, *The New Labor Law*, 22–23.

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existing jobs out of unionized shops.<sup>192</sup> The Supreme Court largely permitted these tactics, privileging employers' managerial and property rights over employees' rights to organize, bargain, and strike when interpreting the NLRA.<sup>193</sup>

At the same time, a growing movement of conservative intellectuals, like Robert Bork and Richard Posner, began to push a new vision for antitrust law generally, putting greater emphasis on economic efficiency and consumer welfare.<sup>194</sup> The courts and agencies were increasingly persuaded by the “Chicago School” of economics. By the late 1970s, the federal antitrust agencies rarely blocked mergers, except for horizontal mergers in highly concentrated markets. The courts too accepted the theory that mergers produced productive efficiencies that benefited consumers and society.<sup>195</sup> Indeed, in 1979, the Supreme Court cited Bork, declaring

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<sup>192</sup> Cowie, *The New Deal & the Limits of American Politics*, 28; Lichtenstein, *State of the Union*, 228–245.

<sup>193</sup> See Andrias, *The New Labor Law*, 22–23; Karl E. Klare, “Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941,” *Minnesota Law Review* 62, no. 3 (1978): 265.

<sup>194</sup> See Herbert Hovenkamp, “On the Meaning of Antitrust’s Consumer Welfare Principle,” 45 *Journal of Corporation Law* 45 (2020): 101; Vaheesan, “Accommodating Capital and Policing Labor,” 769 (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)); Robert Bork, *The Antitrust Paradox* (1978), 66 (same); U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 1 (2010). On the role that the law and economics movement played in shaping judicial decision-making, see Elliott Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences: The Impact of Law and Economics on American Justice* (March 20, 2019) (unpublished manuscript), 992782. For an argument that the modern Harvard School also contributed to this shift, see William E. Kovacic, “The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix,” *Columbia Business Law Review* (2007): 1.

<sup>195</sup> Vaheesan, “Accommodating Capital and Policing Labor,” 770, 795.

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that “Congress designed the Sherman Act as a ‘consumer welfare prescription.’”<sup>196</sup> Labor frequently cooperated, trying to eke out benefits for workers ravaged by capital flight in exchange for not opposing mergers.<sup>197</sup>

Meanwhile, agencies and courts increasingly used antitrust law to restrain workers’ collective activity, which once again was seen as anticompetitive and harmful to consumer welfare. Most notably, in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, the Court held that a union violated antitrust law when it sought to compel general contractors to agree that they would deal only with subcontractors that were parties to the union’s current collective bargaining agreement.<sup>198</sup> In addition, the federal antitrust agencies called on states to scale back putatively anticompetitive occupational licensing rules designed to help workers.<sup>199</sup> They also opposed union-like organization by non-employee workers and professionals.<sup>200</sup> Increasingly, courts imposed a narrow reading of the labor exemption, holding that workers who

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<sup>196</sup> *Reiter*, 442 U.S. at 343 (quoting Bork, *The Antitrust Paradox*, 66). For further discussion, see Crane, “Antitrust’s Unconventional Politics.”

<sup>197</sup> See, e.g., Agis Salpukas, “Steel Union Offers a Lykes-LTV Merger Condition Support: Labor Leader Says Reopening of Youngstown Sheet’s Campbell Works Should Be Required,” *New York Times* (April 11, 1978). Unions were more likely to oppose coordination among non-union companies, joining with unionized competitors in those efforts. See John Koten, “Bumpy Road Ahead: GM Toyota Venture Stirs Major Antitrust and Labor Problems,” *Wall Street Journal* (June 10, 1983). On the tension between workers’ interests as workers and their interests as consumers, especially in an increasingly non-union environment, see Otto Kahn-Freund, *Labour Relations: Heritage and Adjustment* (1979), 78–79.

<sup>198</sup> *Connell Const. Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616 (1975). For a critique of this doctrine, see Milton Handler & William C. Zifchak, “Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption,” *Columbia Law Review* 81, no. 3 (1981): 459.

<sup>199</sup> Vaheesan, “Accommodating Capital and Policing Labor,” 810–11.

<sup>200</sup> Vaheesan, 798.

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are not employees under the National Labor Relations Act could be liable for collusive conduct under antitrust law when they engage in strikes and boycotts.<sup>201</sup> The antitrust agencies also advocated against collective bargaining rights at the state and local level among, for example, medical professionals, home health workers, and writers.<sup>202</sup>

In short, since the 1970s, the antitrust agencies and the federal courts embraced an interpretation of antitrust law that enabled the re-concentration of economic power in massive companies, while restricting the freedom of workers to organize and simultaneously constraining democratic regulatory power, all putatively in the service of a consumer welfare agenda. For the most part, this neoliberal antitrust approach was bipartisan, with minimal variation as political control of the executive branch shifted between parties.<sup>203</sup> And though the labor movement opposed some mergers and fought against the application of antitrust law to workers, it increasingly found itself on the defensive. Desperate to retain members' economic status in an

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<sup>201</sup> *E.g.*, *Fed. Trade Comm'n v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411 (1990).

<sup>202</sup> *See, e.g.*, Federal Trade Commission, Opinion Letter on Ohio Executive Order 2007 – 23S (February 14, 2008); *William Morris Endeavor Entm't, LLC v. Writers Guild of Am., West, Inc.*, No. 2:19-cv-05465-AB (AFMx), 2020 WL 2559491 (C.D. Cal. Apr. 27, 2020); *see also* Vaheesan, "Accommodating Capital and Policing Labor," 814. At the same time, the embrace of putatively efficient market-based solutions led to privatization of public services in the name of "competition." Federal and state governments—Democratic and Republican both—increasingly contracted out work, weakening public sector unions and democratic control over public services. On privatization, *see*, for example, Martha Minow, *Partners, Not Rivals: Privatization and the Public Good* (2002); and Jon D. Michaels, *Constitutional Coup: Privatization's Threat to the American Republic* (2017). On battles over public sector unions, *see* Kate Andrias, "Janus's Two Faces," *Supreme Court Review* 2018: 28.

<sup>203</sup> *See* Jonathan B. Baker, "Competition Policy as a Political Bargain," *Antitrust Law Journal* 73, no. 2 (2006): 483, 511–12 ("To a substantial extent . . . the shift in antitrust doctrine that took place during the late 1970s and 1980s appears to reflect a bipartisan consensus.").

increasingly antiunion, low-wage, and global economy, labor no longer advanced an ambitious, far-reaching antimonopoly agenda.

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The neoliberal or consumer welfare approach to antitrust, along with the renewed restraints on worker concerted activity, date to the 1970s. Yet, the negative impact on workers has increased in recent years. One reason is that labor monopsony has become increasingly pervasive in the United States, enabling employers to control their workers and suppress their wages through mergers, non-compete, and no-poaching agreements.<sup>204</sup>

The problem, however, is not limited to monopsony power. Antitrust law also stands as an ever more potent obstacle to worker concerted activity because of the increasingly fissured and contracted nature of the economy.<sup>205</sup> Consider the doctrine that prohibits the imposition of standards throughout an industry using an employer-union bargaining agreement. That rule, along with the Taft–Hartley Act’s prohibition against secondary boycotts, is increasingly far-reaching now that ever greater numbers of workers are employed in highly fissured industries

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<sup>204</sup> Marinescu & Posner, *Why Has Antitrust Law Failed Workers?* (collecting research); José Azar, Ioana E. Marinescu & Marshall Steinbaum, “Labor Market Concentration,” *Journal of Human Resources* (May 12, 2020); U.S. Department of Justice, Antitrust Division & Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals” (2016), <https://www.justice.gov/atr/file/903511/download>.

<sup>205</sup> See Marshall Steinbaum, “Antitrust, the Gig Economy, and Labor Market Power,” *Law and Contemporary Problems* 82, no. 3 (2019): 45; Hiba Hafiz, “Picketing in the New Economy,” *Cardozo Law Review* 39, no. 5 (2018): 1845; Sanjukta Paul, “The Enduring Ambiguities of Antitrust Liability,” 101. On fissuring of the employment relationship, see David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (2014), 10; and Nelson Lichtenstein, “Two Cheers for Vertical Integration,” in *Corporations and American Democracy*, eds. Naomi Lamoreaux & William J. Novak (2017).

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with their working conditions set by companies that do not qualify as their employers. The more fissured the industry, the more workers need to be able to impose terms throughout the sector, rather than solely with their employer, if they hope to improve conditions. In addition, as employers fissure the employment relationship, they classify more and more workers as independent contractors, rather than employees, thereby pushing more workers out of the reach of the labor exemption and under antitrust law. The millions who are now classified as contractors and freelancers are potentially liable if they join together in an attempt to improve the price at which they sell their labor.

Moreover, federal antitrust agencies, with support from the business community and the courts, have sought to narrow the state action exemption, limiting the ability of state and local governments to regulate in ways that protect workers, particularly the growing number of gig workers who do not benefit from the labor exemption.<sup>206</sup> For example, in one recent case, at the urging of both the business community and the FTC, the Ninth Circuit held that a city law enabling collective bargaining among gig workers was not saved by the state action doctrine.<sup>207</sup>

### **Conclusion: A New Antimonopoly Agenda for a Democratic Political Economy**

The renewed hostility to worker collective action and extensive judicial review of democratically enacted state and local laws under antitrust doctrine are another example of what

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<sup>206</sup> Vaheesan, “Accommodating Capital and Policing Labor,” 809–11.

<sup>207</sup> Chamber of Comm. v. City of Seattle, 890 F.3d 769 (9th Cir. 2018).

many have termed the new *Lochnerism*.<sup>208</sup> As in the original *Lochner* era, however, the reigning antitrust philosophy is very much contested. In the face of staggering inequality and new concentrations of economic power, the notion that antitrust law and policy should focus solely on economic efficiency and consumer welfare has come under attack from a range of prominent voices.<sup>209</sup> So-called neo-Brandeisian scholars and advocates urge not only aggressive antitrust enforcement, but also broad structural and regulatory reforms to achieve more decentralized and competitive markets.<sup>210</sup> Lina Khan, Zephyr Teachout, and Tim Wu, for example, argue for mandating separations between key economic functions and breaking up large companies.<sup>211</sup> Even scholars operating within the reigning consumer welfare model have conceded the need for reform, urging more aggressive antitrust enforcement in product markets.<sup>212</sup> Others have brought

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<sup>208</sup> On the “new *Lochner*” era, see, for example, Amanda Shanor, “The New *Lochner*,” *Wisconsin Law Review* 2016: 133, 199–200; Amy Kapczynski, “The *Lochnerized* First Amendment and the FDA: Toward a More Democratic Political Economy,” *Columbia Law Review Forum* 118, no. 7 (2018): 179; Jedediah Purdy, “Neoliberal Constitutionalism: *Lochnerism* for a New Economy,” *Law and Contemporary Problems* 77, no. 4 (2014): 195.

<sup>209</sup> See Crane, “Antitrust’s Unconventional Politics” (discussing vibrant contemporary debate in the field of antitrust, in both academic and political circles). *But cf.* Daniel A. Crane, “Antitrust and Wealth Inequality,” *Cornell Law Review* 101, no. 5 (2016): 1171, 1176, 1207 (questioning antitrust law’s relationship to inequality).

<sup>210</sup> See Lina Khan, “The New Brandeis Movement: America’s Antimonopoly Debate,” *Journal of European Competition Law and Practice* 9, no. 3 (2018): 131.

<sup>211</sup> Lina Khan, “The Separation of Platforms and Commerce,” *Columbia Law Review* 119, no. 4 (2019): 973; Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*; Zephyr Teachout, *Break ‘em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money* (2020).

<sup>212</sup> See, e.g., C. Scott Hemphill & Philip J. Weiser, “Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing,” *Yale Law Journal* 127, no. 7 (2018): 2048; Steven C. Salop, “Invigorating Vertical Merger Enforcement,” *Yale Law Journal* 127, no. 7 (2018): 1962; Michael Katz & Jonathan Sallet, “Multisided Platforms and Antitrust Enforcement,” *Yale Law Journal* 127, no. 7 (2018): 2142; C. Scott Hemphill & Nancy L. Rose, “Mergers that Harm Sellers,” *Yale Law Journal* 127, no. 7 (2018): 2078;



new attention to the problem of concentrated labor markets, advocating the use of existing antitrust law against labor monopsonists and new prohibitions on employers' ability to insist on arbitration and noncompete clauses in employment contracts.<sup>213</sup>

But for the most part, problems of class and the labor/capital conflict have not been at the center of these efforts. Moreover, it is not clear to what extent these approaches would improve workers' lives, let alone transform them. Without a mechanism for exercising collective power in both the workplace and in the broader political economy, workers, particularly those in low-wage jobs, will likely continue to find themselves exploited, working under autocratic and antidemocratic regimes, and with little power in the broader political economy.<sup>214</sup>

Thus, despite shared antipathy to rising inequality and to the reigning approach to antitrust law, unionists have spent little energy on antitrust policy, focusing instead on the need for worker organization.<sup>215</sup> Meanwhile, labor scholars have greeted the revived antimonopoly

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Herbert Hovenkamp & Carl Shapiro, "Horizontal Mergers, Market Structure, and Burdens of Proof," *Yale Law Journal* 127, no. 7 (2018): 1996; A. Douglas Melamed & Carl Shapiro, "How Antitrust Law Can Make FRAND Commitments More Effective," *Yale Law Journal* 127, no. 7 (2018): 2110; Fiona Scott Morton & Herbert Hovenkamp, "Horizontal Shareholding and Antitrust Policy," *127 Yale Law Journal* 127, no. 7 (2018): 2026.

<sup>213</sup> See, e.g., Suresh Naidu, Eric A. Posner & E. Glen Weyl, "Antitrust Remedies for Labor Market Power," *Harvard Law Review* 132, no. 2 (2018): 536; Ioana Marinescu & Eric A. Posner, "Why Has Antitrust Law Failed Workers?," *Cornell Law Review* 105, no. 5 (2020): 1343; see also Alan Manning, "Monopsony in Labor Markets: A Review," *Industrial and Labor Relations Review* 74, no. 1 (2021): 3, 13–15; Eric A. Posner, *How Antitrust Failed Workers* (2021).

<sup>214</sup> See Elizabeth Anderson, *Private Government: How Employers Rule Our Lives* (2017).

<sup>215</sup> See Tim Bray & Christy Hoffman, Opinion, "We Have a Question for Jeff Bezos and Other Billionaires: Will You Finally Let Your Workers Unionize?," *New York Times* (July 29, 2020), <https://www.nytimes.com/2020/07/29/opinion/amazon-union-congress-antitrust.html>. On labor's relative acquiescence, see Zephyr Teachout, (@ZephyrTeachout), *Twitter* (7:19 AM, July 28, 2020),

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project with some skepticism, highlighting the limits of antitrust enforcement for workers,<sup>216</sup> and arguing that the antimonopoly movement has too often “opposed the economic elite but not the social system that gave rise to it.”<sup>217</sup> Some scholars thus emphasize that anti-monopoly sentiment historically did not enjoy substantial support “among ‘the people’ in general or the working class in particular.”<sup>218</sup>

Yet as this Essay shows, the antimonopoly movement and the labor movement were not always conflicting or even distinct endeavors. Rather, industrial labor advanced its own version of antimonopolism: one that was intertwined with the struggle for industrial democracy and that put problems of class—and sometimes, although not frequently enough, race and gender—at the center. Recovering that history is important not only because it provides a more nuanced and complete picture of the antimonopoly tradition and of labor’s role in it, but also because it can help inspire a path forward for contemporary scholars and advocates working to innovate in both labor and antitrust. Rather than understanding the two endeavors as separate, overlapping only by coincidence or for tactical reasons, advocates should see them as part of the joint effort against concentrated economic power and in favor of greater economic and political democracy.

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<https://twitter.com/ZephyrTeachout/status/1288071648009244672>. *But see* Karen Weise & David McCabe, “Unions Push F.T.C. to Study if Amazon Warps the Economy,” *New York Times* (February 27, 2020), <https://www.nytimes.com/2020/02/27/technology/amazon-unions-ftc.html>.

<sup>216</sup> Brishen Rogers, “The Limits of Antitrust Enforcement,” *Boston Review* (April 30, 2018), <https://bostonreview.net/articles/brishen-rogers-labor-trusts/>.

<sup>217</sup> Winant, “The Power and Limits of the Anti-Monopolist Tradition.”

<sup>218</sup> Winant, “The Power and Limits of the Anti-Monopolist Tradition.”

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Several of the neo-Brandeisians and heterodox antitrust scholars have gestured in this direction. Sabeel Rahman and William Novak have emphasized the need to look beyond achieving decentralized markets in thinking about problems of monopoly power, focusing, for example, on public utility as a tool of democratic reform;<sup>219</sup> while others have focused on the role of public options<sup>220</sup> and on democratic economic planning.<sup>221</sup> Marshall Steinbaum has argued that labor policy and antitrust policy must operate in tandem to deconcentrate economic power and increase worker bargaining power.<sup>222</sup> Sanjukta Paul has sought to reframe the conception of antitrust law, showing how the law functions as an “allocator of coordination rights,” and urging protection for collective action among less-powerful economic actors.<sup>223</sup>

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<sup>219</sup> K. Sabeel Rahman, “Infrastructural Regulation and the New Utilities,” *Yale Journal on Regulation* 35 (2018): 911; William J. Novak, “TITLE,” in *The Antimonopoly Tradition*, eds. Daniel Crane & William J. Novak (2022), XX; cf. Lina Khan, “The End of Antitrust History Revisited,” *Harvard Law Review* 133 (2020): 1656, 1682 (reviewing Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (2018)) (urging subsequent work to engage in a broader analysis regarding monopoly power).

<sup>220</sup> Anne Alstott & Ganesh Sitaraman, *The Public Option How to Expand Freedom, Increase Opportunity, and Promote Equality* (2019).

<sup>221</sup> See Nell Abernathy, Darrick Hamilton & Julie Margetta Morgan, “New Rules for the 21<sup>st</sup> Century: Corporate Power, Public Power, and the Future of the American Economy,” *Roosevelt Institute* (2019), [https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI\\_2021-Report\\_201904.pdf](https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_2021-Report_201904.pdf); Todd Tucker & Steph Sterling, “Industrial Policy and Planning: A New (Old) Approach to Policymaking for a New Era,” *Roosevelt Institute* (2021), [https://rooseveltinstitute.org/wpcontent/uploads/2021/07/RI\\_ANewOldApproachtoPolicymakingforaNewEra\\_IssueBrief\\_202108.pdf](https://rooseveltinstitute.org/wpcontent/uploads/2021/07/RI_ANewOldApproachtoPolicymakingforaNewEra_IssueBrief_202108.pdf).

<sup>222</sup> Marshall Steinbaum, “Antitrust, the Gig Economy, and Labor Market Power,” 45; Brian Callaci, Opinion, “It’s Time for Labor to Embrace Antimonopoly,” *The Forge* (April 13, 2021), <https://forgeorganizing.org/article/its-time-labor-embrace-antimonopoly>; Vaheesan, “Accommodating Capital and Policing Labor”; see also Hiba Hafiz, “Labor Antitrust’s Paradox,” *University of Chicago Law Review* 87, no. 2 (2020): 381.

<sup>223</sup> Sanjukta Paul, “The Enduring Ambiguities of Antitrust Liability,” 101. On the need to protect small business, see Mitchell & Holmberg, “Why the Left Should Ally with Small Business.”

*This work will appear in: Antimonopoly and American Democracy, edited by Daniel A. Crane and William J. Novak, forthcoming from Oxford University Press.*

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Sandeep Vaheesan and Nathan Schneider have explored the possibility of worker cooperatives as an antimonopoly strategy.<sup>224</sup>

On the ground, new organizations are bringing together worker groups and citizen groups to fight against concentrated corporate power under a broad “democracy” banner.<sup>225</sup> Meanwhile, the Biden Administration, particularly the FTC under the leadership of Chair Lina Khan, has focused on the problem of market consolidation and its effect on workers.<sup>226</sup> In addition, reformers and government officials increasingly urge exempting independent contractors, such as gig economy workers, from antitrust law.<sup>227</sup>

Yet the unifying analytic frame for these efforts remains underdeveloped. The history presented in this Chapter helps provide such a frame. It offers, rather than smallness or decentralization, the goals of power redistribution and “greater democracy”—at the workplace, in the economy, and in the government. With greater democracy as the goal, many of the vexing conflicts between labor law and antitrust law can be resolved. For example, labor’s right to

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<sup>224</sup> Sandeep Vaheesan & Nathan Schneider, “Cooperative Enterprise as Antimonopoly Strategy,” *Pennsylvania State Law Review* 124, no. 1 (2019): 1.

<sup>225</sup> See Athena, *Delivering Democracy*, <https://athenaforall.org/>.

<sup>226</sup> Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>; see also “FTC and DOJ to Hold Virtual Public Workshop Exploring Competition in Labor Markets,” *Federal Trade Commission* (October 27, 2021), <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-doj-hold-virtual-public-workshop-exploring-competition-labor>.

<sup>227</sup> See, e.g., Erin Mulvaney & Siri Bulusu, “Gig-Economy Rise Prompts FTC Chief’s Call to Alter Antitrust Law,” *Bloomberg Law* (November 2, 2021), <https://news.bloomberglaw.com/antitrust/gig-economy-rise-prompts-ftc-chiefs-call-to-alter-antitrust-law>.

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engage in collective activity and government’s right to regulate under the *Parker* doctrine would no longer be understood as *exceptions* to antitrust law, but rather as consistent with the fundamental aims of greater economic democracy. From that vantage point, collective action rights would extend to non-traditional employees, including putative independent contractors who are workers, and *Parker* rights would extend to local governments as well as to states. In addition, other strategies to build economic democracy—including those that focus on building power for all workers—ought to be understood as central to the antimonopoly agenda.

Consistent with the vision of labor leaders from the early and mid-twentieth century, these strategies would include a new system of sectoral bargaining and “unions for all,” enabling all workers—including those long excluded from protections and those workers still subject to antitrust law’s sanction, like gig workers—to organize and bargain over their terms and conditions of work throughout their industries, and to engage in collective action both at their own workplaces and in solidarity with others. Also critical are regulations to limit the power of employers over workers’ lives, not only prohibitions on non-competes, no-poach, and mandatory arbitration agreements but also just cause rights to prevent arbitrary dismissal and discipline.<sup>228</sup> Even more ambitiously, a democracy-focused antimonopoly agenda could include a commitment to democratic economic planning—administrative processes that would give labor, as well as business, real power and input over decisions about the direction of the political economy and a

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<sup>228</sup> See Kate Andrias & Alexander Hertel-Fernandez, “Ending At-Will Employment: A Guide for Just Cause Reform,” *Roosevelt Institute* (2021), [https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI\\_AtWill\\_Report\\_202101.pdf](https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf).

defined role in overseeing a robust social welfare system. Finally, corporate and banking law reform could be redesigned to increase democratic control over capital and to encourage worker ownership, while antimonopolists might begin, once again, to explore public control or ownership of critical sectors of the economy on which all citizens depend.

In short, the goal is not to revive old approaches, but rather to recall and reinvigorate labor’s longstanding “desire for greater democracy” and to achieve, through a range of mechanisms, a more equitable distribution of power over the economy and the democracy. Ultimately, recovering the history of labor’s antimonopoly agenda helps underline that labor, antitrust, corporate, and other economic reforms should not be seen as a disparate array of policy proposals but as an integrated program in favor of a more democratic and egalitarian society.

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