Book Review
An Alternative Labor-Oriented Merger Policy

John N. Drobak

Rethinking Market Regulation: Helping Labor by Overcoming Economic Myths

Oxford University Press, 2021

Reviewed by Richard M. Brunell

"No one rings a bell when a union negotiates higher wages," laments John Drobak, the George Alexander Madill Professor of Law at the Washington University School of Law in St. Louis in his new, labor-oriented book on markets and regulation. *Rethinking Market Regulation* highlights some of the factors that contribute to the continued dominance (in Drobak's view) of free-market ideology in the economics profession and among the public more generally, exemplified by the iconic ringing of the opening bell on the New York Stock Exchange. This dominance, Drobak argues, leads to the distressing disregard for the welfare of workers and communities, and to greater economic inequality. Drobak's examination of the persistence of unfounded economic myths about markets and regulation follows in the tradition of his colleague, Nobel economics laureate Douglass C. North, and the International Society for New Institutional Economics which Drobek helped found.

Rethinking Market Regulation is of interest to those concerned about antitrust policy for a few reasons. Drobak views the claim that "markets are generally competitive" as a central myth of the free-market ideology he challenges, and devotes a chapter to rebutting that claim. He surveys commentary and empirical literature on profits and market concentration in various industries and provides his own empirical analysis of the lack of competitiveness of the airline industry. Drobak also argues that lax merger policy is an important factor contributing to the increasing concentration of U.S. markets.

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Although Drobak's take on merger policy is labor-oriented, he does not focus, as some progressive antitrust advocates do, on mergers' potential effect in reducing wages. While Drobak endorses efforts to include labor-market effects in merger analysis, his focus is on the loss of jobs from mergers (and outsourcing) and the resulting adverse impact on workers and the communities in which they live. Noting that there is no comprehensive database of merger-related mass layoffs, Drobak estimates from media reports and public filings that at least 100,000 workers lost their jobs this century as a result of mergers. Harking back to the early 1980s literature on the adverse social consequences of mergers,[1] Drobak also observes that the elimination of corporate headquarters as a result of mergers can harm cities by, for example, reducing corporate charitable giving and civic engagement. He also highlights the devastating effect that plant closings, whether merger-induced or not, have had on communities. As Drobak explains, these negative externalities are not

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1 *See*, *e.g.*, Betty Bock et al., The Impact of the Modern Corporation (1984). For a more recent iteration, see Richard M. Brunell, *The Social Costs of Mergers: Restoring "Local Control" As a Factor in Merger Policy*, 85 N. C. L. Rev. 149 (2006).

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presently considered in merger analysis, except perhaps to *justify* a merger on efficiency grounds. Drobak might have noted here that, unless the resulting cost savings of job cuts reduce marginal costs rather than corporate overhead, such savings would not ordinarily be sufficient to offset any upward pricing pressure otherwise attributable to mergers.[2] Still, Drobak's larger point is to ask why mergers should be allowed if they have adverse effects on workers and communities without offsetting consumer benefits.

Drobak proposes that a new regulatory board independent of the antitrust authorities be established to review the unemployment aspects of mergers; the board would also review outsourcing. He would place the burden on the merging firms to demonstrate a high probability of consumer benefit that would outweigh the expected harm to workers and their communities. Drobak recognizes that his proposal would be controversial. A few obvious questions come to mind: Which transactions would be reviewed? How is consumer benefit to be measured? Are innovation and product quality relevant? How would unemployment effects be measured? Does it matter if the unemployment rate in the relevant community is low? Under what metric would tradeoffs between consumer and labor welfare be made? And, more generally, are the other solutions Drobak discusses (e.g., mandated severance payments to laid-off workers or codetermination by labor and management) likely to be more effective than a review board? Drobak devotes a useful chapter to comparing U.S. and European labor protections, but the stronger European protections do not include regulatory review of mergers for job losses.

Drobak also explores the myth of shareholder primacy (and its cousin, the glorification of greed) as a critical factor in undermining labor and increasing inequality, noting its relatively recent origins and contrasting it to European views on the role of the corporate managers. He observes that while competition could protect consumers and suppliers, there is generally no competitive pressure protecting labor or community stakeholders; he does not explore whether increased competition might in fact *undermine* the ability of corporate managers to benefit labor or communities.

Progressives perhaps hoped that the Great Recession would make the world safe for government regulation again, but, as Drobak helpfully reminds us, free-market ideology and the "zombie economics" that accompanies it have unusual staying power. The current resurgence of antitrust enforcement may serve as a counterpoint, and perhaps a wave that can be ridden to benefit labor, although fear of Big Tech (not discussed by Drobak) seems to be its main driving force. As the FTC and Justice Department revise their merger guidelines (and Congress considers merger reforms) policymakers would be wise to keep in mind the ideas in *Rethinking Market Regulation*. In particular, at the least, the social impact of mergers is worthy of renewed study, and the role of job losses in the consideration of efficiencies should be clarified. More ambitiously, policymakers might consider whether adverse employment or community impacts should count against a merger under the existing regulatory framework, even if only as a tie breaker or factor shifting to the merging parties the burden of proof as to competitive effects.[3] In all events, *Rethinking Market Regulation* is a useful and timely addition to the antitrust and labor literature. ●

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2 *See* U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines § 10 (2010), http://ftc.gov/os/2010/08/100819hmg.pdf. And job losses have sometimes been a lurking factor in the exercise of prosecutorial discretion to pursue a merger challenge, especially among state attorneys general. *See* Horizontal Merger Guidelines of the National Association of Attorneys General § 2 (1993).

3 *Cf.* Robert Pitofksy, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979); Brunell, *supra* n. 1.