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## The National Labor Relations Act, Non-Paralleled Competition, and Market Power

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*The National Labor Relations Act protects and, to a degree, encourages employee concerted action, such as collective bargaining and collective work stoppages. The Act has been criticized as an unwarranted intervention in a competitive, efficient market. This Article applies fundamental concepts of antitrust law and economics to assess the claims that labor markets in the United States are competitive, that the market adequately protects individual employees, and that governmental intervention is therefore unwarranted. The Article concludes that employing firms likely exercise a degree of market power—the power to set terms unconstrained by competition—that would be unacceptable if exercised by producers in consumer markets. The author argues that the National Labor Relations Act provides employees with a means to counteract the market power exercised by employing firms, but at the same time attempts to preserve residual competition that the employing firm has not eliminated from the open market.*

I think it has been recognized that, due to our industrial growth, it is simply absurd [sic] to say that an individual, one of 10,000 workers, is on an equality with his employer in bargaining for his wages. . . . When 10,000 come together and collectively

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bargain with the employer, then there is equality of bargaining power.<sup>1</sup>

[W]hat we are doing here is implementing the exact idea of the original Wagner Act, which was to say that the employees in dealing with the employers shall not be at the disadvantage of being a thousand men on their side, dealing with one man on the other side. Instead of that, the act intended that one man representing the union should deal with one man representing the employer.<sup>2</sup>

### INTRODUCTION

The National Labor Relations Act ("NLRA"),<sup>3</sup> enacted in 1935, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Pursuant to the central provisions of the NLRA, an employing firm runs afoul of the law if it attempts to undermine or bypass its employees' attempts to associate and bargain collectively.<sup>4</sup> To many legislators, industry representatives, and academics, however, this amounts to state encouragement of unions, presumptively distorts the efficient functioning of the market, and appears rationally indefensible.<sup>5</sup>

1. *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Education and Labor*, 73d Cong. 9 (1934) [hereinafter *Labor Bd. Hearings*] (statement of Sen. Wagner), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 47 (1985).

2. 93 CONG. REC. 4573 (1947) (statement of Sen. Taft) (referring to proposed reforms to the NLRA subsequently enacted in the Taft-Hartley Act of 1947), reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 1225-26 (1974).

3. 29 U.S.C. § 157 (1935).

4. An employing firm can be enjoined from and sanctioned for various "unfair labor practices." 29 U.S.C. § 158(a). These include, inter alia, interfering with, restraining, or coercing employees in the exercise of the right to self-organization; dominating or interfering with labor organizations; discriminating against pro-union employees or potential employees with regard to hiring, tenure, or the terms and conditions of employment; and failing to bargain with employees' collective bargaining representative. See 29 U.S.C. § 158(a)(1)-(3),(5).

5. See, e.g., SENATE COMM. ON LABOR AND HUMAN RESOURCES, WORKPLACE FAIRNESS ACT, S. REP. NO. 103-110, at 36 (1993) [hereinafter SENATE COMM.] (arguing that encouragement of unionization dislodges wages from market forces of supply and demand); RICHARD A. POSNER, OVERCOMING LAW 456 (1995) (referring to labor unions as "industrial dinosaurs" and stating that their passing would be a positive development); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 325 (1992) [hereinafter POSNER, ECONOMIC ANALYSIS OF LAW] ("The NLRA is . . . designed to encourage cartelization of labor markets, whereas the Sherman Act (and the other antitrust laws) are designed to discourage cartelization of product markets. . . . [T]he economic logic of the law is not always a logic of efficiency."); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983) [hereinafter Epstein, *Common Law for Labor Relations*] (asserting that the law's special treatment of labor issues is inappropriate); see also RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION

The amendments to the NLRA enacted in the Taft-Hartley Act of 1947 established significant limitations on the union activity protected by the NLRA.<sup>6</sup> These limitations on employee association, in particular the prohibition on secondary boycotts,<sup>7</sup> have been widely criticized by supporters of unionization.<sup>8</sup> By what principle can contending and inconsistent positions on the proper scope of government-protected and government-permitted unionization be mediated?

One judge and scholar has stated that the labor laws are "a fascinating counterpoint to the antitrust laws . . . [A] kind of reverse Sherman Act."<sup>9</sup> In this Article, I apply principles of antitrust economics and policy to argue the contrary point; the legal regime presently governing labor relations in the United States is firmly rooted in theoretical precepts that are considered uncontroversial in antitrust regulation of product markets. This is true both insofar as the current law encourages unions and insofar as it places limits on unionization. I will argue that lack of competition in, or centralization of control over, the supply of jobs is the primary concern of our labor laws. Critics of the NLRA ignore, and supporters of unions fail to explore, basic analogies between this concern for lack of competition in the job market and the parallel concern for lack of competition in product markets.

In Part I, I propose and defend a comprehensive theory of American labor law: the "countervailing market power" ("CMP") model of labor relations.<sup>10</sup> The CMP model posits that labor laws are

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LAWS (1992) [hereinafter EPSTEIN, FORBIDDEN GROUNDS] (extending his critique of intervention in labor markets to anti-discrimination laws).

6. The Taft-Hartley Act guaranteed employees the right to refrain from participation in a union, except where an employing firm had entered into a union security clause. See 29 U.S.C. § 157. It also prohibited several unfair labor practices by labor organizations. See 29 U.S.C. § 158(b)(1)-(7).

7. The definition of a secondary boycott is complex. See *infra* Part II.B. In brief, a secondary boycott is one form of appeal outside the immediate workplace for help in shutting down an employing firm by cutting off supplies. See 29 U.S.C. § 158(b)(4). In this Article, I focus on appeals to other workers.

8. See, e.g., SENATE COMM., *supra* note 5, at 14-15 (criticizing "law's gradual sapping of union strength," most notably the 1947 Taft-Hartley Act's limitations on secondary boycotts); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 269-73 (1990) [hereinafter WEILER, GOVERNING THE WORKPLACE] (arguing that the prohibition on secondary boycotts gives employers a "special legal advantage"); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 415 (1984) [hereinafter Weiler, *Striking a New Balance*] (stating that the current secondary boycott doctrine "fits very uncomfortably with a regime of free collective bargaining").

9. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 5, at 325. From the context, it seems clear that Judge Posner does not intend "fascinating" as high praise, and that it is likely intended to be interpreted to mean "indefensible."

10. Economist Jolin Kenneth Galbraith coined the concept of countervailing power. See JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 108-34 (1980) (first published 1952). Until the last few decades, it was widely acknowledged that the NLRA and other New Deal legislative programs were intended to encourage the growth of non-business

primarily structured to counteract a specific form of power in private relations—market power created by the growth of large firms or, economically speaking, by the integration and concentration of productive resources. In plain language and in short, “market power” exists because workers are presented with too few and inadequate substitutes for the employing firms with whom they get stuck to enjoy the liberties that a competitive market presumes.

Contemporary analyses of our labor laws ignore the need for countervailing market power because they ignore three essential propositions. First, an employing firm is a form of collective ownership and control of productive resources by investors and is therefore a restraint on trade in the supply of jobs. Second, as a result, competition is severely curtailed in labor markets. Contemporary labor law scholars assume that, for the typical employee, a broad spectrum of jobs provides adequate substitute opportunities. From this they conclude that unreasonable demands by one employing firm will result in a painless substitution of jobs by the employee. However, the relevant labor market for most potential employees is far narrower than labor law scholars posit. Consequently, employer restraints on trade circumscribe competition on the job-supply side of the labor market far more than commonly acknowledged. Third, the market cannot be relied upon to “restore” competitive conditions in labor markets. Potential employers will not rush to pay competitive wages in markets where existing employers exercise market power, because employers, in order to survive in highly competitive product and stock markets, are forced to exercise market power in labor markets. The competitive price in these other markets presumes a noncompetitive price in labor markets.

These three propositions establish an analytic framework that has, as of yet, not been fully developed.<sup>11</sup> In Part I, I discuss each of the above propositions in detail. By analyzing the deficiencies in the neo-classical analysis, I illustrate how these three propositions compel a fundamentally different conclusion about the social value of unions and the

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groups that could counteract the market power of businesses with their own market power. *See id.* at 136; ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 7 (1966) (stating that some New Dealers, “wary of governmental intervention, hoped that business could reform itself or that non-business groups could develop their own market power”).

11. My starting point is the proposition that an employing firm is a restraint on trade. In this respect, I am simply repeating the received wisdom of the past. However, my analysis differs from that of earlier scholarship, and from Galbraith’s in particular, in asserting that market power is likely more prevalent in labor markets than in product markets and that the competitive nature of product and investment markets may exacerbate the exercise of market power by employing firms in labor markets. In *AMERICAN CAPITALISM*, Galbraith conducted no serious analysis of the differences between competitive potential in product and labor markets. Instead, he seems to have summarily concluded that almost all product and labor markets are not competitive. *See generally* GALBRAITH, *supra* note 10.

government-protected right to self-organization. I conclude that, if employing firms do enjoy market power, employees should have the choice to engage in concerted action that mirrors the employing firm's own integration, the source of the employing firm's market power. I refer to this limited employee collusion as "integration-wide" organization.

In Part II, I demonstrate that the CMP model provides a convincing explanation for specific labor law doctrines. Contemporary accounts of what labor law doctrine in fact accomplishes usually assert that the labor laws permit employees to eliminate competition on terms and conditions of employment. This is a vast oversimplification that ignores the numerous limitations placed on employee association by the NLRA. The NLRA insulates the association of employees to eliminate only "non-paralleled" competition—competition between employees that competition between employing firms does not balance—over wages and other terms and conditions of employment.

In Part II, I demonstrate that this principle explains the building blocks of collective bargaining, including the prohibition on interference with employee concerted action and employer domination of labor organizations, the duty to bargain, exclusive representation, and the scope of collective bargaining units. I then look at two specific labor law doctrines to illustrate how the CMP model can clarify complex doctrines, critically appraise controversial doctrines, and suggest lines of inquiry for inadequately developed doctrine. I demonstrate that the prohibition on secondary boycotts and the judicial doctrine that has evolved around that prohibition are firmly rooted in CMP theory. In contrast, the Supreme Court's allowance of permanent striker replacements is contrary to CMP theory.

## I

### TAKING CHOICE SERIOUSLY IN THE LABOR MARKET: THE COUNTERVAILING MARKET POWER MODEL

The principles of countervailing market power are implicit in the statement of findings and declaration of policy of the NLRA. The Act justifies its encouragement of labor unions by reference to the "inequality of bargaining power" between employer and employee.<sup>12</sup> Section 1 of the NLRA states that "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association" burdens commerce,

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12. See 29 U.S.C. § 151 (1995) (establishing the finding of facts and declaration of policy that underlie the NLRA).

depresses wages, and prevents the stabilization of competitive wage rates and working conditions.<sup>13</sup>

The CMP model, which I explain in more depth below, explains the causal relationship identified but not explicated by the NLRA between an inequality of bargaining power and the depression of wages below competitive levels. The main contours of the CMP model are as follows. The existence of the firm, a form of capital cartelization, creates the possibility of employer market power. Unions are a source of countervailing market power. The concentration and integration of the producing firms that hire workers justify the development and protection of worker collective action.

Despite the clear emphasis in the NLRA on the corporate form and on competitive wages, few contemporary industrial relations scholars identify inequality of bargaining power with employer restraints on trade and harm to competition. Contemporary commentary ignores the justification for our labor laws given in the NLRA itself. Instead, contemporary industrial relations scholars, and legal scholars in particular, seem to agree that the supply of jobs is competitive.<sup>14</sup> Economists have only recently begun to challenge this orthodox view.<sup>15</sup>

In order to breathe new life into the NLRA's statement of findings and declaration of policy, it is first necessary to provide a theoretical basis for rejecting the premise that the supply of jobs is competitive. I do this by discussing first what it means to say that an employing firm "restrains" the competitive supply of jobs. Second, I argue that this restraint results in significant harm to competition, primarily because all jobs at a given wage or salary level are not adequate substitutes for all other jobs at the same wage level. Third, I present reasons for believing that the market will not automatically adjust to "restore" competition.

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13. *Id.* For examples from the debates over the Taft-Hartley Act of the recognition of the basic principle that a corporation is simply a form of concerted activity by shareholders, see 93 CONG. REC. 4491 (1947), reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, *supra* note 2, at 1168 (statement of Sen. Pepper) ("The yellow-dog contract was, generally speaking, a contract between one prospective employee and management, the heads of which represented all the stockholders, and were chosen by the stockholders, and they represented the concerted power of all the dollars which were invested in the particular enterprise."). In one of the more interesting exchanges during the debate over Taft-Hartley, Senator Pepper was instrumental in persuading Senator Taft of the fundamental unfairness manifest when an employing firm insists that its employees deal with it individually, without a union. See 93 CONG. REC. 4490, 4491, 4493-95, 4712, 4572 (1947), reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, *supra* note 2, at 1167-70, 1173, 1250, 1224 (1974) (statements of Sen. Pepper and Sen. Taft).

14. See *infra* note 41 and accompanying text.

15. See, e.g., Bruce E. Kaufman, *The Evolution of Thought on the Competitive Nature of Labor Markets*, in LABOR ECONOMICS AND INDUSTRIAL RELATIONS 145 (Clark Kerr & Paul D. Staudohar eds., 1994) (discussing the evolution and recent dominance of the belief that the job supply is competitive and recent challenges to that orthodoxy).

Finally, I apply the theory developed in this section to the general framework of the NLRA.

A. *The Theory Of The Firm: The Firm As Restraint On Trade*

Industrialization involves the integration and combination of productive resources.<sup>16</sup> Examples of this include a car produced on an assembly line, a meal cooked and served in a restaurant, and the factual investigation, legal research and writing, and courtroom representation that takes place in a litigation law firm. Hypothetically, each input involved in these examples could be individually owned and separate uses of the inputs bargained over. In the manufacture of automobiles, for example, participants could bargain at every step over metal, fenders, doors, steering wheels, and labor power of varying sorts. The impersonal forces of supply and demand—the “price mechanism”—would set the terms of each individual use.<sup>17</sup> Likewise, the ownership of the units of a given input could be disaggregated (many producers could make the hubcaps), so that negotiations would occur between a greater variety of bargaining entities. Also, ownership is not the only possibility for such a decentralized system of production; machinery could be rented out to individual laborers to perform discrete tasks. However, in industrialized societies like our own, many transactions do not occur in the market. Rather, they are internalized in entities known as “firms.” Indeed, the firm has been defined as an entity in which allocation of resources occurs primarily through centralized ordering rather than the price mechanism.<sup>18</sup>

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16. To illustrate these terms, “combination” could describe two lawyers, previously potential competitors, coming together to form a law firm. “Integration” could describe two lawyers who provide complementary services coming together to form a law firm. I discuss what it means to come together to form a firm below. Throughout the Article, I refer to both combination and integration simply as integration. Where necessary to differentiate the two, I refer to combination as “horizontal integration” and integration proper as “vertical integration.”

17. My discussion of the relationship between firms and the market is drawn primarily from R.H. Coase, *The Nature of the Firm*, reprinted in *THE FIRM, THE MARKET, AND THE LAW* 33 (1988).

18. *See id.* at 40. Coase acknowledges that there is no clear line between transactions conducted in the market and those ordered within the firm. The distinction is similar to that between an employee and an independent contractor. For the employee, broad limits are set for the responsibilities and rights of both parties to the employment relationship. Within those broad limits, the purchaser of labor governs the performance of the employee. For the independent contractor, who is not so dependent upon this one relationship, terms of the supply of labor and the rights and responsibilities of the parties are more likely to be reevaluated on a continuous basis. Just as actual employment relationships range along a continuum between these extremes, transactions occur on a continuum between those conducted in the market and those ordered by a firm. It is not essential to my discussion that an entity I refer to as a firm meet a particular definition so long as the firm removes productive factors, such as physical resources or labor, from the realm of open market competition.

According to R.H. Coase, the firm is a response to the existence of transaction costs in the marketplace.<sup>19</sup> As an early historian of industrialization noted, "[t]he successive buying and selling of partly finished products were sheer waste of energy."<sup>20</sup> Coase made this observation the focal point of his theory of the firm. Centralized administration of the allocation of resources may be less costly than market transactions. For example, if Ford Motor Company controls the production and supply of all parts and services necessary to supply cars to consumers, the decrease in transaction costs may outweigh the allocative efficiencies of the market. The size of the firm will be limited, however, because "a point must be reached where the loss through the waste of resources is equal to the marketing costs of the exchange transaction in the open market or to the loss if the transaction was organized by another entrepreneur."<sup>21</sup> Up to that point, it will be efficient for a firm to internalize the factors of production that would otherwise be purchased through the market, since the value of the factor is increased through non-market allocation.<sup>22</sup>

There is a negative side to this story of the firm—one that provides an alternative motivation for integration and a justification for state intervention. As our antitrust laws recognize,<sup>23</sup> integration can have negative effects on competition, which is an essential element of the allocative efficiency of the price mechanism and the "invisible hand" of the marketplace.<sup>24</sup> Competition presupposes large numbers. Where there are many buyers and many sellers, the equilibrium price will be set at a price where all mutually beneficial transactions—those transactions

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19. See *id.* at 38 ("The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism."). Coase's theory continues to provide the foundation for modern theories of the firm. Cf. F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 88-90 (1980) (restating Coase's theory of the firm: "Resource allocation in the market is normally guided through prices, but within the firm the job is done through the conscious decisions and commands of management."); Henry Hansmann, *When Does Worker Ownership Work?: ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 *YALE L.J.* 1749 (1990) (discussing the specific forms of transaction costs that dictate the form a firm takes). For an alternative view, see Stephen Marglin, *What Do Bosses Do?: The Origins and Functions of Hierarchy in Capitalist Production*, 6 *REV. OF RADICAL POL. ECON.* 60 (1974) (arguing that the rise of the hierarchically-structured firm gave owners of capital a larger share of the pie).

20. ABBOTT PAYSON USHER, *AN INTRODUCTION TO THE INDUSTRIAL HISTORY OF ENGLAND* 13 (1920), quoted in COASE, *supra* note 17, at 39 n.19.

21. COASE, *supra* note 17, at 43.

22. See *id.* at 45.

23. The following summary of basic antitrust principles is based largely on ROBERT H. BORK, *THE ANTITRUST PARADOX* 90-104 (1978); RICHARD G. LIPSEY ET AL., *ECONOMICS* 246-53 (1987); Ernest Gellhorn, *An Introduction to Antitrust Economics*, 1975 *DUKE L.J.* 1, 24-43 (1975).

24. This follows, though not inevitably, from the very purpose of the firm, which is to allocate resources by centralized control rather than the price mechanism. It is by no means inevitable that this will harm competition in the market at-large, because the price mechanism can still operate as long as overall market allocation is decentralized.

where the value to the buyer is equal to or greater than the cost to the seller<sup>25</sup>—are made. In the situation of many independent sellers, if one seller attempts to raise price above cost, she will lose all her customers to sellers willing to price at cost. Each buyer has numerous substitutes to whom she can turn. Thus, no seller has the power to affect the overall price in the market.

However, as the number of independent sources for substitute goods diminishes, it may become profitable for a seller<sup>26</sup> to forego mutually beneficial transactions in the marketplace because, with few close competitors, it can raise price above cost without the dramatic substitution experienced under conditions of perfect competition. Every price increase will lead to some substitution, but at some point moving along the continuum from perfect competition to perfect monopoly, a supplier can raise price above cost without losing sufficient business to competitors to make the price increase unprofitable. This is known as “power over price” or “market power.”<sup>27</sup>

A useful illustration of the phenomenon of monopolization and market power is provided by the following scenario.<sup>28</sup> Imagine a highway along which gas stations are positioned every ten miles. As long as the gas stations are individually-owned and drivers do not have reason to assume that they are going to suddenly hit a long stretch without any stations, Station A must be cautious in raising price above cost, because many drivers will simply wait ten miles to fill up at Station B. B is an almost perfect substitute for A. However, if A can either buy or collude with B, then drivers must make a difficult decision in deciding whether to risk the availability of an independently owned gas station, C, 20 miles down the road. As each next-best substitute is drawn into the cartel<sup>29</sup> led by A, fewer drivers will substitute and more will pay the higher price.

As the number of suitable substitutes decreases, there are more “captive” users and fewer “precarious” users.<sup>30</sup> In a state of perfect monopoly, there are only captive users. The point at which it becomes

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25. In the discussion that follows, I focus only on the position of the seller, because each buyer can be reconceptualized as a supplier or seller, and vice-versa, and because antitrust analysis is structured on the paradigm of inadequate competition between sellers.

26. The seller can be a single entity or a group of entities acting, either expressly or tacitly, as a cartel.

27. See William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

28. This example was used in a lecture by Professor Steven Salop of the Georgetown University Law Center in the Fall of 1994.

29. A cartel, to the extent the price mechanism is truly suppressed, satisfies Coase's definition of a firm as a set of resources withdrawn from pure market allocation.

30. See MILTON HANDLER ET AL., *CASES AND MATERIALS ON TRADE REGULATION* 218 (1990) (defining “captive users” as customers without reasonable substitutes and “precarious users” as customers with reasonable substitutes).

profitable to raise price above cost by a meaningful amount is the point at which the supplier will lose less revenue from the precarious users who substitute than it will gain from the captive users who pay the higher price. While the supplier with market power profits, society loses the benefit of transactions that would have increased the welfare of society by allocating goods to those who value them the most. Every driver who derived greater benefit from the gas than the cost of the gas would transact with the gas stations. Under non-competitive conditions, however, some efficient trades will not occur.

Despite this potential harm, our antitrust laws do not ban all integration. As Robert Bork has written, "The integration of economic activities, which is indispensable to productive efficiency, always involves the implicit elimination of actual or potential competition. We allow it—indeed, should encourage it—because the integration creates wealth for the community."<sup>31</sup> Antitrust laws seek to balance the benefits of decreased production costs and improved products that may result from integration against the allocative inefficiencies that the elimination of competition can create.<sup>32</sup> The tangible benefits of the antitrust laws are the maximization of choice for and the minimization of costs to consumers in product markets.

### *B. Extending Antitrust Analysis to Labor Markets*

Integration into firms restrains the supply of jobs as well as consumer products. To the extent such restraint causes labor markets to deviate from competitive conditions, there is good reason to reject the neo-classical understanding of our current labor laws as an inefficient restraint on the market. Instead, our labor laws must be seen as a compliment to our antitrust laws; while the antitrust laws remedy anti-competitive harms in product markets, the labor laws remedy anti-competitive harms in labor markets.<sup>33</sup>

Antitrust economists and practitioners recognize that integration that benefits consumers in a particular market, because it produces an overall gain to those consumers despite potential anti-competitive consequences, may not benefit consumers in other markets affected by the integration. This may be because competition provides less of a check

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31. BORK, *supra* note 23, at 28.

32. *See, e.g., id.* at 107-10.

33. Curiously, the antitrust literature makes little mention of the potential ancillary effects of integration on competition among potential employers in the labor market. This disregard for lack of competition in the supply of jobs is particularly striking given that antitrust analysis is applied to assess the harm to consumers in product markets that are of no significant consequence to a consumer's lifestyle.

on the firm's conduct in the second affected market.<sup>34</sup> In our gas station example, collusion among gas stations might undermine competitive conditions in the sale of gas, but competition from other sellers of snack-items along the road may ensure competitive conditions in the sale of snacks.

Integration may also simply confer no cost-reducing or product-enhancing benefits in a second market in which it adversely affects competition. On this basis, notwithstanding benefits in the first market, the restraint may be condemned in the second market.<sup>35</sup> Thus, gas stations might be permitted to participate in a jointly controlled towing service, justified by their inability to provide the service individually, but the benefits of integration in this market would not justify price-fixing in the sale of gas.

The preceding analysis is of obvious relevance to any analysis of the reasonableness of restraints in the supply of jobs created by integration. Many examples of integration that look harmless from the perspective of a product consumer take on a different light when viewed from the perspective of a worker. All firms operate in product markets and, simultaneously, in labor markets. The factors that justify integration with respect to the sale of products—cost-decreasing and product-enhancing improvements in production and distribution and competition among sellers of the product—will not necessarily justify integration in the setting of wages.

Under the antitrust laws, the lowest level of scrutiny is usually saved for vertical integration,<sup>36</sup> which involves producers of goods that are not substitutes for one another but are instead complementary, such as producers of hubcaps and car doors, food and dining room service, or legal research and secretarial services. The antitrust laws assume that such integration is unlikely to be motivated by a desire to decrease competition and gain monopoly profits, and very likely to be motivated by a

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34. See *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 465-79 (1992) (finding that competition may have resulted in a greater check on the firm's conduct in equipment sales than in services and parts markets).

35. See *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 20-24 (1979). In *Broadcast Music*, the Court held that a centrally fixed price for blanket licenses for copyrighted musical compositions was not per se illegal price-fixing. *Id.* at 48. The Court reasoned that the integration was arguably necessary for provision of a new product, the blanket license. *Id.* at 22. The market for blanket licenses, though, was analytically distinct from the market for licenses to individual compositions. The Court's ruling was premised on the fact that the integration did not prevent competitors in the supply of individual compositions from competing against one another. *Id.* at 23-24 & n.42. The opinion clearly implied that the benefits to consumers of integration used to justify central pricing of the blanket license would not justify central pricing of licenses to individual compositions. *Id.*

36. See *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 733-34 (1988); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57-59 (1977).

desire to create a better product or to lower costs.<sup>37</sup> Vertical integration does not involve ownership or control of a competitor that acts as a source of substitutes for the consumer. Instead, the integration implicates the basis of the firm as Coase defined it: reduced transaction costs for exchange of complimentary products.

Yet such integration will often involve employers who would otherwise be potential competitors for labor power. The integration will be vertical with respect to the consumer product, but often horizontal with respect to the supply of jobs. Absent integration, for example, the automobile manufacturer in a company town might be disaggregated into many employers competing for skilled labor in the town and in neighboring areas. The local diner could be disaggregated into a kitchen owner and a dining room owner, each bidding up the price of service-sector labor. Or the law firm partnership could be disaggregated into individual law practices that would compete for the services of talented legal secretaries. Obviously, the value of a worker's labor will increase as her employing firm is able to produce more using less labor, that is, to produce efficiently<sup>38</sup> so few today would recommend an aggressive antitrust policy on behalf of workers that did not take into account the benefits of efficiency gains.<sup>39</sup> Whatever the results of such a balancing exercise would be, no one today consciously seeks to balance the anti-competitive harms and efficiency gains of integration in the employment market. This is true, perhaps, because most economists

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37. See David Reiffen & Michael Vita, *Comment: Is There New Thinking on Vertical Mergers?*, 63 ANTITRUST L.J. 917, 920 (1995) (arguing that, in contrast to horizontal combination, efficiency is always a possible motivation and consequence of vertical integration).

38. "Efficiency" is a much-abused word. Here, I am using efficiency in its broadest and least controversial sense as the allocation of resources in such a way that their value is maximized. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 12 (3d ed. 1986). I am also not confining value to value measured in monetary terms and set by the market.

In this broad definition of efficiency, allocation of a worker's labor power is "efficient" if it maximizes the overall value created by the labor power, including wealth that goes, *inter alia*, to improved worker benefits, improved job satisfaction, improved work conditions, and improved opportunities to forego work and pursue other valuable activities.

"Efficiency" can be, and often is, used in a value-laden manner. Robert Bork admits as much when he explains that "productive efficiency," as normally used in antitrust law, is interpreted as a measure of consumer welfare, or the benefit of the bargain consumers receive for their money. See BORK, *supra* note 23, at 104-10. This measure of efficiency dictates that consumers receive a maximum output for a given price paid, or, stated differently, the same output for a lower price. *Id.* As I discuss *infra*, Section I.C., such a definition is premised on the normative judgment that the "cost" of inputs is something society wants to minimize. Thus, the consumer welfare model targets wages and other worker benefits as "costs" which take away from consumer welfare.

39. That an aggressive antitrust policy could be pursued in order to decrease employer market power is not unthinkable. In fact, attempts to halt the aggregation of capital characterized the early history of the American labor movement as much, if not more, than attempts to facilitate the aggregation of labor power. See VICTORIA C. HATTAM, *LABOR VISIONS AND STATE POWER* 98-104 (1993) (discussing the early focus of laborers, small employers, and farmers on antimonopoly measures).

and legal theorists accept that, while employers and individual employees supposedly often face union-created labor cartels,<sup>40</sup> the exercise of market power by employing firms is not a serious issue in contemporary America.<sup>41</sup>

Indeed, the most influential attacks on workplace regulation have been fundamentally premised on the existence of competition among employers for workers. Richard Epstein bases his critique of the NLRA, and of regulation of the workplace generally, on the supposed competitiveness of the supply of jobs. He believes that employees' ability to "exit" adequately protects them from exploitation.<sup>42</sup> This belief is based upon some basic hypotheses of neo-classical economic theory. Specifically, Epstein argues that the employer who attempts to exploit his workers, like any supplier of a good who attempts to raise prices above the competitive level, "loses all customers [in this case, job-seekers] to rivals."<sup>43</sup> Epstein's belief in competitive labor markets is widely held. Even supporters of the role of unions appear to concede that employer market power is not an issue.<sup>44</sup>

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40. One economist wrote in the 1970s, "[i]t had always been recognized that tariffs, oil import quotas, the agricultural program, and the legal support of unions constructed impediments to the free flow of resources and created higher returns for small segments of the economy at greater cost to the more dispersed masses." Harold Demsetz, *Two Systems of Belief About Monopoly*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 164, 169 (Harvery J. Goldschmid et al. eds., 1974) (emphasis added); see also POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 5, at 325.

41. See, e.g., RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY* 70-73, 84-85 (1988) (arguing that, although recent studies indicate that small-town hospitals exercise some market power over their registered nurses and that public schools in non-urban areas may have some market power over public school teachers, the domination of a labor market by a very few employers does not affect the wage-scale of most firms); EPSTEIN, *FORBIDDEN GROUNDS*, *supra* note 5, at 87 ("Employment markets are normally competitive . . ."); POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 5, at 322 (conceding that employer monopsony power "may have been common in the nineteenth century" but dismissing its contemporary relevance because it "is probably not a serious problem in this country today"); George M. Cohen & Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, in *PROCEEDINGS OF NEW YORK UNIVERSITY 43RD ANNUAL NATIONAL CONFERENCE ON LABOR* 109, 114 n.8 (Bruno Stein ed., 1990) ("A claim that labor law promotes efficiency in [the external labor] market would require demonstrating that external markets are monopsonistic. There is little evidence of monopsony in today's external labor market, however, and in light of the great increases in worker and firm mobility in the external market, no serious claims are made to the contrary."); Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1353 (1988) [hereinafter Wachter & Cohen, *Law and Economics*] ("External labor markets—the markets for new employees—closely resemble the textbook economic model in which the supply of and demand for labor determine the wage. These markets approach allocative efficiency because of the mobility of workers and competition among firms for these workers.") (citation omitted).

42. See EPSTEIN, *FORBIDDEN GROUNDS*, *supra* note 5, at 28-58, 79-87.

43. EPSTEIN, *FORBIDDEN GROUNDS*, *supra* note 5, at 80 ("Within the competitive market the seller will produce the good at the point where price and marginal cost are equal. . . . The seller who raises prices loses all customers to rivals.")

44. See, e.g., Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 428 n.32, 455-56 (1992)

These scholars, however, are wrong to dismiss the possibility of employer market power. While an empirical assessment of the true state of current labor markets is beyond the scope of this Article,<sup>45</sup> the economic literature on competition in product markets provides some serious theoretical objections to the conclusory treatment of the concept of employer market power. These objections are two-fold and intimately connected. First, economic analyses of our labor laws incorrectly assume that the possibility of exit, without more, conclusively establishes that those markets are competitive. Second, these same analyses are based upon assumptions about the relevant market for job substitutes that are descriptively inaccurate and normatively indefensible.

### 1. *The Fallacy That Exit Proves Competition*

Conditions of employment existing in a market accessible to any given employee are not necessarily competitive simply because workers can and will exit at some point when employer demands and wages become too oppressive. The observation that some workers will exit tells us nothing about whether labor markets are competitive. Yet the assumption that the possibility and occurrence of exit indicate competitive markets is central to Epstein's assessment of the labor market and apparently central to the failure of others to seriously challenge the core of his arguments.<sup>46</sup>

Most current discussions of competitiveness in the supply of jobs suffer from a form of the "*Cellophane* fallacy,"<sup>47</sup> an error committed by the Supreme Court in *United States v. E.I. Du Pont de Nemours & Co.*<sup>48</sup> In *Du Pont*, a case which arose under federal antitrust laws, the Court wrongly asserted that if a producer could not profitably raise its price above the existing price because of substitution by consumers, it had no power over price in the consumer product market.<sup>49</sup> The Court ignored the fact that an economically rational producer with market power will already be charging a price above the competitive price. There is a limit to how far any producer can raise the price without

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(asserting that employers as buyers of labor power are not in a "monopsony" position, and only briefly discussing employer market power as a possible source of unequal bargaining power).

45. *But see infra* Part I.C., where I do discuss some empirical phenomena that are best explained by the presence of employer market power or, at least, take on an altogether different meaning when seen through the lens of the CMP model.

46. *See, e.g.,* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 5, at 87.

47. For analysis of the "*Cellophane* fallacy," see RICHARD A. POSNER, ANTITRUST LAW, 128 (1976); Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 256 n.75 (1987).

48. 351 U.S. 377 (1956).

49. *See id.* at 394-400.

substitution leading to decreased profits,<sup>50</sup> and every economically rational firm with market power will try to price at that level and not higher.<sup>51</sup> It is, therefore, pointless to inquire only whether the producer can raise her price further without unprofitable substitution occurring.

A similar misconception underlies the assertion that the existence of an external market serves as an adequate check on the reasonableness of employer and employee demands in the internal market of the workplace. The pertinent inquiry should not be whether there is some possibility of exit. Underlying such an inquiry is the false assumption that perfect competition reigns absent an absolute monopoly.<sup>52</sup> Instead, there must be some measure by which one can determine whether the level of choice available in an external market is acceptable.

Even Epstein acknowledges as much when he implies that an absolute monopoly in employment markets would justify government intervention. He offers the example of a "government monopoly on employment," which something like the "nationalization of major industries under the British Labour Party" might produce.<sup>53</sup> In such a case, he argues, market dynamics would no longer protect workers from employer market power. This categorical distinction between markets in which exit protects workers (effective competition) and markets in which it does not (which, in Epstein's mind, occurs only in the complete absence of competition—an absolute monopoly) is untenable. Between these two examples lies a spectrum of imperfectly competitive markets.

By accepting the false distinction described above, Epstein is forced to make a strange, counter-factual assertion. In the hypothetical England he conjures up, Epstein posits that "it is no longer possible for any single person to move elsewhere to escape hostile parties."<sup>54</sup> But of course it is. Each incremental exercise of market power by the Labour Party would cause English workers to move to France, America, Canada, or Australia. Indeed, undoubtedly some English workers may find the choices presented by the external labor market unacceptable and would leave England the day the Labour Party took control of the major

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50. For example, if there were only one producer of automobiles in the world, there would be a price beyond which consumers would substitute to subways, bicycles, and, for that matter, horse and carriage, in sufficient numbers to make a price-rise unprofitable. This by no means indicates that the automobile manufacturer does not have power over price.

51. See Phillip Areeda, *Market Definition and Horizontal Restraints*, 52 ANTITRUST L.J. 553, 565 (1983) ("If elasticity [the tendency to substitute products in response to a price change] is high at current prices, that may only mean that the defendant in fact has significant price enhancing power but has already exercised it to the point where he has no further power profitably to increase price."); Krattenmaker et al., *supra* note 47, at 256.

52. See GALBRAITH, *supra* note 10, at 40-41 (criticizing assumption that if absolute monopoly does not exist, competitive conditions prevail); Kaufman, *supra* note 15, at 173-74 (noting false dichotomy between monopsony model and model of perfect competition).

53. EPSTEIN, *FORBIDDEN GROUNDS*, *supra* note 5, at 79.

54. *Id.* at 80.

industries, even without any further Labour Party action. At some point, the incremental loss in government wealth from emigration of labor would exceed the incremental increase in monopoly rent.

Thus, Epstein is not condemning only a pure monopoly, in which there are only captive users who will not substitute. Instead, he is identifying a necessary level of choice and condemning a hypothetical market in which that level of choice is not present. Just because the English Labour Party is restricted at some outer limit does not mean that the "extortionate" Labour Party is not, up until that point, exercising market power.

Once Epstein admits that exit is necessarily relative and that a society must have some measure of its adequacy, his attack on unionization begins to fail. What is true of the English Labour Party in a socialist England can also be true, though perhaps to a lesser degree, of a "private" steel company in a company town. Imagine that the steel company demands that its workers accept increased hours of work, allows its supervisors more leeway in sexually harassing its workers, or begins to disregard the minimal safety precautions it previously provided. At some point, the lone McDonald's in the town would begin to look like attractive employment, and moving to other towns would also become an option. The steel company will suffer losses because of the resulting employee exit, and at some point its incremental losses from exit will exceed its incremental gains from the sub-competitive wages it pays. The steel company will not be able profitably to demand more of its employees.

Are the workers' alternatives then competitive in a sense that the English workers' are not? Are they competitive in a sense that the alternatives available to cellophane consumers in *DuPont* are not? We cannot accept that these substitutes are adequate, any more than we can accept that France is a suitable substitute for an English worker, or that wax paper is a suitable substitute for the consumer of cellophane, until we have done a more rigorous analysis of the options available.

In short, one cannot assume that the external labor market is competitive—that wages, benefits, and work conditions are competitively set in the external market—simply because some employees will find other jobs if employers make greater demands on them or decrease benefits. If employees in a given job market do not benefit from a competitive market, job demands (hours worked, skills required, harassment tolerated) will already be non-competitively high, and wages and benefits will be set non-competitively low. It would be economically irrational for the employing firm that enjoys market power not to take all it can get from workers and give them as little as possible. The fact that

employers cannot profitably increase their demands or decrease wages tells us nothing about the reasonableness of their demands.

## 2. *The Relevant Market For Employees: The Adequacy of Substitution*

The second and related aspect of my theoretical objections to the conclusory treatment of employer market power in the economic literature concerns the empirical assertion that scholars make to imply that exit is in fact adequate to protect the interests of employees. This assertion is based upon an erroneous definition of the "relevant market" of employing firms for any job-seeking employee. In antitrust law, the relevant market for consumers of goods is comprised of those product substitutes that effectively constrain a potential possessor of market power from exercising control over the terms at which its good is offered.<sup>55</sup> Epstein's theory of the relevant market for employees in a given labor market, by contrast, is limited to the following principal: workers are looking for "an employer who will make a high offer for her goods or services."<sup>56</sup> Similarly, Michael Wachter and George Cohen, co-authors of several well-known articles on labor law and labor relations, adopt a broad definition of the relevant market for a given employee: "The external labor market is both diverse and geographically large, since any given set of high school graduates may become semiskilled workers in firms as different as American Home Products, Citicorp, General Electric, Hospital Corporation of America, Safeway, or USX."<sup>57</sup>

These broad definitions of relevant labor markets stand in stark contrast to discussions of consumer welfare and the existence of market power among sellers of consumer products. In consumer-product markets, it is not sufficient that there are substitutes for a product in the most general sense. Part of the Supreme Court's "*Cellophane* fallacy," for example, was to assume that *Cellophane* competed with almost all flexible wrapping materials, though it serves different purposes than

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55. See U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (1992), reprinted in PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 1001 (1995 Supp.). The relevant market and a firm's market share in that market provide a rough measure of a firm's market power. Antitrust litigation often uses this measure. See Areeda, *supra* note 51, at 565.

56. EPSTEIN, FORBIDDEN GROUNDS, *supra* note 5, at 31.

57. Wachter & Cohen, *Law and Economics*, *supra* note 41, at 1357. Not only is this assertion empirically unfounded and theoretically unsound, it is especially ironic that Wachter and Cohen emphasize this supposed lack of diversity in unskilled jobs in order to assert that the job market is *competitive*. I would interpret this lack of diversity as evidence that the supply of jobs is not competitive and thus employers do not need to diversify job experiences. In Communist Eastern Germany, where the buildings built by the communist government all looked alike and many of the restaurants served the same food, it would be impossible to conclude that the economy was competitive because each building and restaurant was a perfect substitute for any other. Wachter and Cohen seem to have confused cause and effect.

many of them, has different qualities, and costs up to seven times as much.<sup>58</sup>

In order to comprehend what an approach like Epstein's would mean for the product markets, imagine the soft-drink market. If Pepsi purchased every company that produced soft drinks and juices, contrary to the approach Epstein applies to the labor markets, the market for "drinks" would not be competitive just because water is still available. In fact, Pepsi likely would have market power even if it only acquired Coke and 7-Up, even though consumers could then drink juice or water from independent sources. Likewise, the fact that consumers live in a big city where there are many perishable goods costing between, say, \$0.75 and \$1.00, is simply not relevant to Pepsi's market power. This is because consumers will not substitute endlessly, and our laws do not expect that they will do so.

There is no apparent reason why we should expect workers to substitute between jobs endlessly, yet discussions of the labor market lump together all jobs that pay a roughly equivalent wage and require roughly similar skill levels. A worker is supposedly protected, simply because there are many jobs that provide at least minimal benefits and demand, say, between 40 and 60 hours per week.

This disparity in economic analyses of product markets and labor markets, and of the behavior of consumers of commodities and consumers of jobs, is based on a peculiar hypothesis about human nature; it can only be explained if we hypothesize that people care little about the nature of their jobs but care intensely about whether they drink Pepsi or Coke. Our expectations should be exactly the opposite. Our expectations should be shaped, in part, by the unique characteristics of the sale of labor power—the use of labor power as a currency. In particular, workers' preferences and choices are naturally less responsive to market signals than are those of a soft-drink purchaser.<sup>59</sup>

There is both a normative and a descriptive side to this lack of responsiveness to market signals. Normatively, substitution in product markets is not a matter of concern from the community's standpoint; we expect that, at some point, a Pepsi drinker will substitute a different drink if Pepsi corners the soft-drink market, and we expect, without reason for concern, that her tastes may change so that she will substitute even if the price of Pepsi becomes competitive again. There is little reason to be concerned that this substitution and this change in taste will violate the consumer's identity.

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58. See *Du Pont*, 351 U.S. at 414-26 (Warren, J., dissenting).

59. For an interesting discussion of this common-sense intuition, see CLAUD OFFE, *DISORGANIZED CAPITALISM* 22, 56-57 (John Keane ed., 1985) (describing the ways in which the sale of labor power differs from sales and purchases of commodities).

In contrast, few of us would desire a society in which a worker was willing to abandon her home, her neighborhood, and her occupational aspirations, and drag her children from one school district to the next in order to ensure a large relevant market of employers competing for her labor power. At some level, our society has an interest in limiting the extent to which people have to be protean to be free. Society must draw the line between freedom as resort to exit and freedom as the ability to maintain certain attributes and attachments essential to one's identity while still enjoying some choice.<sup>60</sup>

As a descriptive matter, it is safe to assume that the attachments we hope workers will have to their communities, to their friends, and to their personal aspirations *do* influence their choice of work and their choice of an employer.

To illustrate these normative and descriptive dimensions, consider the case of a nurse, whose desire is to spend her life helping the sick (indeed, she went to nursing school for that reason), make a decent income, spend her workdays in an atmosphere of professionalism, be free from sexual harassment on the job, live in a certain area of town, and receive a certain package of vacation, health, and retirement benefits. Imagine that she works for the only hospital within commuting distance from the community in which she lives, that this hospital has just decided to cut vacation and health benefits, and that she faces the choice of accepting these decreased benefits or finding a job elsewhere. Suppose further that this nurse received an offer for a job as a secretary where she would receive a similar salary. However, suppose that she would receive inferior health benefits, that she has heard that previous secretaries in this position were sexually harassed on the job, and that she would be relegated to work she did not find fulfilling. According to the economic analysis of the labor market criticized above, she is adequately protected by the multiplicity of job opportunities. However, in the eyes of those who are not blind to economic principles applied in product markets and who, thus, have different assumptions about the competitiveness of the labor market, competition does not adequately constrain the hospital in this case.

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60. For a critique of philosophically liberal arguments, such as Epstein's, that posit the individual as an "unencumbered self" for whom no particular preference or good is essential, see MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 11-13, 203-05 (1996); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 54-65, 175-83 (1982). Epstein's philosophical conception of the self can lead to unfortunate consequences in labor markets. Behavior and the intensity with which preferences are held are responsive to larger societal forces, and it is important to examine those societal causes. A person may be forced to become an unencumbered self if economic realities make attachment to place, vocation, and family dangerous. Just as consumers in the product market would learn to be indifferent to specific products if competition were not enforced, so too workers will learn to be detached from specific work if labor markets are not competitive.

To analogize to our Pepsi example, if the consumer decides to drink a generic soft drink—or water—at a lower cost, that is not evidence that a competitive market exists. To analogize to Epstein's Orwellian example of the nationalization of major industries in England, the English worker's option of packing his bags and heading for France is likewise not an adequate substitute and does not demonstrate the existence of a competitive market.

In sum, when people go into the job market looking to exchange the currency of labor power, a job at McDonald's is no more part of the relevant market for many potential employees than water is for many potential soft-drink purchasers.<sup>61</sup> Society demands a certain level of choice for consumers in the product market through the antitrust laws, but legal scholars and economists are less sensitive to the social value of choice in the job market.<sup>62</sup> In fact, the level of choice guaranteed

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61. Even some supporters of unionization overlook this fact. Paul Weiler, for example, asserts that if there are non-competitive conditions in labor markets they are "of relatively recent vintage." WEILER, *GOVERNING THE WORKPLACE*, *supra* note 8, at 141. Weiler bases this conclusion on a belief that laborers have been, at least until recently, highly "mobile," which belief derives from his assessment of statistics generated by Sanford M. Jacoby. *See generally* SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900-1945* (1985). Jacoby, however, is far more cautious than Weiler in interpreting the data he presents. Jacoby has characterized the market for unskilled labor in the United States between roughly 1890 and 1915 as "a market of movement," in which "[b]oth parties in the relationship took full advantage of their legal rights . . . to quit or dismiss at will." *Id.* at 34, 37. Ironically for Weiler's interpretation of Jacoby's work, Jacoby hypothesizes that worker mobility was a learned trait of immigrant laborers with peasant backgrounds: "The transience of the immigrant labor force was part of an older European pattern of peasant mobility. In Italy, landless day laborers roamed from place to place looking for work . . . . Polish peasants went to Germany." *Id.* at 33.

Jacoby's assumption that immigrant workers retained the same lifestyle when seeking employment in the United States implies that the objective choices available were not radically different. Surely, Weiler would not assert that European peasants were not subject to market power at the hands of landowners. A better interpretation of Jacoby's work is that peasants learned to be disattached from their jobs because European landowners exercised overwhelming market power. In a sense, Weiler commits the "Cellophane fallacy" of assuming that exit implies a lack of market power.

Because Weiler accepts an erroneous understanding of the relevant labor market for job-seekers, he is forced to avoid antitrust analysis. Instead, he is forced to develop an elaborate theory of inequality of bargaining power which is based on "lock-in" of skilled workers and opportunism. *See* WEILER, *GOVERNING THE WORKPLACE*, *supra* note 8, at 21, 140-52. This is not the place to assess that theory fully. At this point, I merely suggest that the question of lock-in and opportunism on both sides does not explain inequality of bargaining power. Instead, the lock-in theory needs to be subsumed under the broader issue of market power to make any sense. *See generally* Eastman Kodak v. Image Technical Servs., 504 U.S. 451, 476-78 (1992) (discussing connection between lock-in and relevant market in product markets).

62. *See, e.g., supra* note 57 and accompanying text. Economists' treatment of the job-search requirements for unemployment insurance recipients provides an interesting exception to this failure to recognize the relevant market for a job-searcher. Applicants for unemployment benefits are not required to exhaust all employment opportunities for which they are qualified before they can receive the insurance. Instead, benefits will only be refused if the unemployed applicant refuses "suitable work." Most notably, employees with certain skills are not required to accept employment

consumers in product markets seems perverse when one considers the lack of choice we tolerate in labor markets.<sup>63</sup> Indeed, it may be productive to emphasize how similar the choice of employment is to many other purchases that are central to the well-being of people:

[E]mployees seek to satisfy many interests through their jobs beyond merely bringing home a paycheck. Workers spend a good deal of their lives in the workplace, developing friends, habits, and interests; it is important to them that the work environment be pleasurable and that it not be taken from them by unwarranted discharge. Employees hope to secure intellectual satisfaction and psychological self-esteem from their work; it is important . . . that their interests in participating in the creative life of the workplace be vindicated. Moreover, employees have a vital stake in the health and integrity of their bodies; it is important that the workplace provide occupational safety and health.<sup>64</sup>

Of course, the sky is not the limit as to what an employee can reasonably expect. However, the limits on these expectations should not be greater than those in the product markets. If a potential employer can provide terms desirable to an employee at a cost below the value of the labor power that employee has to give, this transaction is efficient and should not be foregone. And yet, where employers enjoy market power as a result of the integration of productive resources, they will regularly forego such transactions in order to demand a higher price (longer hours, more investment in education, lower benefits, worse working conditions, etc.) from those they hire. Where employers enjoy market power, employees who are not hired are forced to turn to employers offering them the job-equivalent of a generic-brand soft drink.

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in jobs where their skills would be wasted. According to the economists, requiring workers to accept the first job that comes their way is inefficient, because they are not allowed to look for the job that represents the most highly valued use of their labor. See, e.g., STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 538, 544-47 (1993). The common law recognizes a similar principle, in that employees who sue for wrongful discharge under either a contract or tort theory are not normally required to mitigate damages by accepting jobs that do not match their training or, to some extent, their career interests. See MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 585 (1994) ("The employee's obligation is to seek and obtain employment comparable to the position from which he or she was fired. . . . [A]s a general matter, the employee does not have to change fields, take an inferior position, or relocate to find employment.").

63. Consumers in product markets are undoubtedly more attached to particular brand names than they would be if lax enforcement of the antitrust laws forced them to rely on exit as a means of obtaining a reasonable price. In contrast, our lack of concern for worker choice undoubtedly encourages detachment from communities and callings; just such a detachment helps to preserve the freedom that many professionals experience in the labor market.

64. Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 *YALE L.J.* 2767, 2788 (1991).

C. *The Effect of Competition In Product and Capital Markets on a Firm's Motivation to Exercise Market Power in Labor Markets*

To maintain the position that the supply of jobs is competitive, Epstein and others might offer the obvious defense that, if employees' labor is being undervalued, other potential employers can enter the market to exploit the profit to be earned by employing such labor at terms more favorable to labor, but still profitable to the employer. For example, if a steel company exercises market power in its hiring in an isolated town, we might expect other producers to move into the town and exploit the lower wages, eventually bidding up wages to a competitive wage.

According to the neoclassical model favored by Epstein, employees may have no remedy against a particular employer, but even if they cannot find another employer who will value their labor appropriately, employers will find them. If this proposition is true, then the market will allocate resources efficiently, although there may be some delay. A fundamental principle of economic "law" is that resources gravitate towards their highest valued use;<sup>65</sup> other employers should be willing to exploit the gap between the cost of employing a particular worker and the value of her labor in the marketplace. If an employing firm is underpaying its employees, it will lose its best employees to other producers. On the other hand, if workers make demands that the product market simply will not bear, then other job applicants will beat them out, accepting the lower compensation as a step up from their other options. Thus, according to the neoclassical model, the wages set in the labor market at-large establish a check on either employing firms or employees who attempt to demand too much, and the existing market prices define the competitive wage.

Although this argument has the virtue of theoretical elegance, it fails to recognize that employers may have to exercise market power in labor markets in order to survive in competitive product markets and stock markets.

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65. See POSNER, *ECONOMIC ANALYSIS OF THE LAW*, *supra* note 5, at 10. There is a joke that best captures the extremes to which adherents to the "Chicago School" of neoclassical economics, including Richard Epstein, have taken this economic law. Milton Friedman, a Chicago School economist, and a non-Chicago School economist were taking a walk one day in Chicago. Suddenly, the non-Chicago economist saw a five-dollar bill lying on the sidewalk and exclaimed, "My lucky day, a five dollar bill!" He then began walking over to the bill to pick it up. Milton Friedman, not even looking over to where the other economist supposedly saw the money, chided his companion, "If there were really a five-dollar bill there, someone would have picked it up already." I am indebted to Professor Steven Salop for this joke, which he related in a Fall 1994 lecture. Posner himself disavows such an extreme faith in the allocative efficiency of unregulated markets: "If the magnet [the incentive for higher-valued users to purchase the resource] doesn't work, the economist takes this as a sign . . . that there are barriers to the free flow of resources." *Id.* at 11.

In any firm there is a hierarchy of “mobile” constituents—those constituents who are able to protect their interests through exit. Individual stockholders, for example, are the most mobile, in that they can easily sell their stock and purchase substitutes if they perceive that their interests are not being served. Individual consumers, by comparison, are slightly less mobile, because it is more difficult to substitute consumer goods than stocks. Individual workers are, by far, the least mobile constituents of a firm in that the exit option protects them least. Given this hierarchy, the immobility of certain individual constituents of the firm will leave them vulnerable to coercion by more mobile constituencies.<sup>66</sup>

Our antitrust laws ensure that employers will have an incentive to minimize product costs because of competition for consumer purchases. Other laws augment the objective of the antitrust laws and ensure, to some extent, the ability of consumers to search the nation for the lowest cost producer. Transportation subsidies, such as federal highway funds and the early land grants to railroads, increase the geographic range of product markets.<sup>67</sup> International trade agreements such as the North American Free Trade Agreement do likewise. Competition in product markets is not only national, but international.

By contrast, if one employer is able to exercise market power over employees, all other potential employers will have to exercise similar market power in the labor market in order to compete; other firms cannot enter that product market and compete unless their labor costs are comparable. If one employing firm is unable to extract similarly disadvantageous arrangements from their employees, then consumers will take advantage of the exit protections a competitive product market affords.

Thus, preventing the aggregation of producers in a relevant product market without preventing the aggregation of potential employers in a relevant labor market distributes wealth to people as consumers at the expense of people as employees. The well-recognized fact that

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66. Of course, all workers are also consumers and many are also stockholders. For most workers, however, their role as wage-earner in concentrated labor markets is prior to their role as consumer or stockholder. Their initial entitlement is their labor power currency. If this currency can only be spent in concentrated markets, the total of their wealth will be decreased because of the market power that employing firms exercise. For some, however, inheritance in the form of concrete assets, an education, means of transportation, or cash given to them by their parents will represent their initial entitlement. These inherited entitlements may allow the worker to enter a job market where the imbalance in market power is not so great or to earn a portion of her necessary income through the more competitive investment market. This second worker may never experience the bottleneck of employer unilateral market power—at least not on the wrong side.

67. Significantly, our current concentration on highway subsidies rather than public transportation subsidies exacerbates the different levels of competition in product and labor markets. If you want an orange, it can be trucked up from Florida fairly cheaply, but, in many cities, if you want to investigate jobs across town you had better own a car.

employees receive higher wages in industries that are relatively insulated from competition in the product markets evidences this truth.<sup>68</sup> Rather than an example of workers holding consumers ransom, this is more accurately understood as an example of workers and consumers reaching an equilibrium price where both benefit from a similar level of competition for their respective currencies.

Indeed, almost all of the empirical evidence used to support arguments concerning the negative effects of unions is susceptible to a substantially different interpretation—one that leads to the conclusion that unions are socially valuable. Many studies attach negative significance to the empirical finding that unionized employees gain a premium above the benefits paid to employees who individually bargain.<sup>69</sup> These studies often conclude that this premium ruins the unionized industries as consumers shift to lower-cost goods. To the contrary, however, the inability of unionized industries to survive is better understood as evidence that employers are driven to produce goods using labor purchased at sub-competitive wages.

The CMP model also demonstrates the fallacy of claiming that any defense of unionization requires a showing that unionized employees are an adequate substitute for non-unionized employees in terms of productivity. Such a claim is implied in many studies finding that productivity in unionized companies is lower than in non-unionized companies.<sup>70</sup> The CMP model need not challenge the accuracy of these studies, because it predicts that this will be the case. Productivity is the price employees pay for the benefits of the job. Wages are the primary

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68. See, e.g., William T. Dickens & Lawrence F. Katz, *Inter-Industry Wage Differences and Industry Characteristics*, in UNEMPLOYMENT AND THE STRUCTURE OF LABOR MARKETS 48 (Kevin Lang & Jonathan S. Leonard eds., 1987); Alan B. Krueger & Lawrence H. Summers, *Efficiency Wages and the Inter-Industry Wage Structure*, 56 *ECONOMETRICA* 259 (1988); Carl Shapiro & Joseph E. Stiglitz, *Equilibrium Unemployment as a Worker Discipline Device*, 74 *AM. ECON. REV.* 433 (1984); Joseph E. Stiglitz, *Theories of Wage Rigidity*, National Economic Research Paper No. 1442; Janet L. Yellen, *Efficiency Wage Models of Unemployment*, 74 *AM. ECON. REV.* 200 (1984). All of these sources are offered by Linda A. Bell and Richard B. Freeman as examples of the existing literature that offers rent-sharing as an explanation of inter-industry wage differentials. See Linda A. Bell & Richard B. Freeman, *The Causes of Increasing Interindustry Wage Dispersion in the United States*, 44 *INDUS. & LAB. REL. REV.* 275, 285 (1991).

69. See, e.g., Peter D. Linneman et al., *Evaluating the Evidence on Union Employment and Wages*, 44 *INDUS. & LAB. REL. REV.* 34, 51 (1990) (asserting that "although unions may have been hurt by exogenous forces causing sectoral output shifts . . . they have been hurt even more by their rising wage premiums").

70. See, e.g., Brian Bemmels, *How Unions Affect Productivity in Manufacturing Plants*, 40 *INDUS. & LAB. REL. REV.* 241, 251-52 (1987) (finding that the net impact of unions on a firm's productivity is negative and analyzing the myriad of ways in which unions render managerial practices less effective). Some economists, however, have found evidence of greater productivity in unionized firms. See Richard B. Freeman, *American Exceptionalism in the Labor Market: Union-Nonunion Differentials in the United States and Other Countries*, in *LABOR ECONOMICS AND INDUSTRIAL RELATIONS*, *supra* note 15, at 272, 291-92.

benefit, or good, received. If there is employer market power in the absence of unions, it is quite natural that, where there are no unions, employees will pay more (higher productivity) and receive less (lower wages). This is no different from the result of the exercise of market power in a product market; consumers will pay more (increased price) for less (decreased output). A national labor policy that neither weakens managerial power to force more productivity out of a firm's employees nor raises union wages above those of wages found in the non-unionized sector would be as successful as an antitrust policy that does not enable consumers to purchase better products at lower prices.

The relationship between consumer and labor markets, then, is unfortunate. If employers exercise market power over the supply of jobs in most industries, consumers will find the goods from those few industries that are unionized to be overly expensive, and the consumers will seek satisfaction elsewhere.

As with consumers, the possibility of exit protects shareholders to a far greater extent than workers. In fact, because investment returns from one stock purchase are often perfect substitutes for returns from a different stock purchase, shareholders are protected to a greater extent even than consumers.<sup>71</sup> This greater mobility, in turn, means that, with few exceptions, the highly competitive securities markets ensure that management, particularly in publicly-traded corporations, must exercise the greatest possible degree of market power in labor markets.

While this particular dynamic has not been discussed by experts in labor law, it follows from a much-discussed phenomenon in corporate law: the responsiveness of corporate form and of management conduct to the interests of shareholders. Most corporate and securities law experts conclude that management must be highly solicitous of the

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71. This was noted by Senator Robert F. Wagner early in his Senatorial career. "Compare how easy it is to sell the stock of one corporation and buy that of another, and how difficult it is to quit work in one plant and obtain it in another." Senator Robert F. Wagner, *The New Responsibilities of Organized Labor*, Speech Before the New York State Federation of Labor Convention (August 8, 1928) (transcript available in the Robert F. Wagner Papers, Georgetown University). Wagner argued that the concept of workers as suppliers of a product had to be reconceptualized before workers attained freedom equal to that of shareholders and consumers:

Our thinking on the subject [of the worker's stake in the company], I believe, would become clearer, if we no longer spoke of wages as costs. As soon as costs are mentioned the efficiency expert jumps to the conclusion that he has to bear downward. But wages must not be kept down. The true highway to prosperity is along the road of high wages. Wages like dividends, represent that which is taken out, not that which is put into industry. Good management has as its aim not only high dividends but high wages. Good management recognizes that in organized labor there is the greatest untapped source of efficiency, high wages and high dividends.

*Id.*

interests of shareholders in most decisions concerning the firm.<sup>72</sup> If they are not, they will lose out to companies or other investment opportunities which the investor can monitor and which will conform to her demands; investment money walks without much cost to the investor. Disagreements occur as to the ability of management personnel to defy the interests of shareholders in order to take a larger share of the pie for themselves,<sup>73</sup> but this says little about the inability of shareholders to police the assertiveness of regular employees and to discipline those employees through exit.

Brian Becker and Craig Olson, two labor relations scholars, have found that unionized firms are often less profitable for shareholders than comparable nonunion firms.<sup>74</sup> They conclude that "[s]tockholders' losses associated with unionization and collective bargaining explain the union-avoidance policies pursued by management."<sup>75</sup> As with the fact that wages are higher and productivity lower for unionized workers, decreased profitability in unionized firms should not surprise us in the least. Profits are the price employees pay to shareholders for jobs and the price consumers pay to shareholders for products. If investors do not enjoy any advantage in market control over labor, their share of the benefits of the firm will be less. Just as we would not assert triumphantly that shareholders' profits are higher in concentrated product markets, however, we should not bemoan the fact that shareholders' profits are lower where management is unable to exercise this kind of market power. Higher profits, in the language of antitrust economics, may be just a "monopoly overcharge" imposed on non-unionized employees.

The logical consequence of a legal system that protects competition in the markets for consumers and for shareholders, but does not protect

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72. See Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, in FOUNDATIONS OF CORPORATE LAW 101, 103 (Roberta Romano ed., 1993) ("Managers may do their best to take advantage of their investors, but they find that the dynamics of the market drive them to act as if they had investors' interests at heart."); Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, in FOUNDATIONS OF CORPORATE LAW, *supra*, at 303, 304 [hereinafter, Easterbrook & Fischel, *Mandatory Disclosure*] (observing that investors are protected by alternative investment opportunities and ease of transfer of investment); Roberta Romano, *The State Competition Debate in Corporate Law*, in FOUNDATIONS OF CORPORATE LAW, *supra*, at 87, 92-93 (concluding that corporations select a state of incorporation based, in significant part, on the propensity of that state's laws to maximize shareholder value).

73. See, e.g., Easterbrook & Fischel, *Mandatory Disclosure*, *supra* note 72, at 304-08 (acknowledging limited market failure, but generally holding that a firm has interests in line with its shareholders); John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, in FOUNDATIONS OF CORPORATE LAW, *supra* note 72, at 309, 309-10 (questioning alignment of shareholder and management interests and defending limited state intervention on behalf of shareholders).

74. See Brian E. Becker & Craig A. Olson, *Unionization and Shareholder Interests*, 42 INDUS. & LAB. REL. REV. 246, 258 (1989).

75. *Id.*

competition for workers, is the parade of horrors predicted by Karl Marx: workers driven to accept work at subsistence wages.<sup>76</sup> The anti-trust laws seek to create sufficient competition to ensure pricing at cost in product markets. The at-cost price, however, should also include both the opportunity cost of shareholders investing in one firm rather than another (reasonable profits) and the opportunity cost of workers investing their labor power in that same firm and not another (reasonable wages and benefits). The securities and corporate laws ensure capital mobility so that consumers and workers do not provide revenue and labor power above cost—so that dividends are as high as possible given a certain investment. In turn, this maximum return on investment should include the opportunity costs of consumers buying the products of that firm and of workers investing their labor in that firm. Yet, if there is competition only in the product and stock markets, the labor component of “at cost” will not include opportunity costs—it will only include the cost of keeping the worker productive.

By itself, then, the unregulated market cannot be relied upon as a source of competition in the job-supply market. Instead, the pressures created by competitive product and stock markets will force employers to exert as much market power over the supply of jobs as they possibly can.

#### *D. Countervailing Market Power As The Purpose Of The NLRA*

The foregoing discussion of integration, anti-competitive harm, and the disciplinary force of competition in product and capital markets acts as a foundation for the CMP model of labor relations, which provides a framework within which the purpose of the labor laws can be intelligently discussed. Proceeding from the assumption that competition with other employers does not adequately constrain employing firms, the CMP model offers a defense of the position that our existing scheme of labor laws seeks to preserve the desirable reductions in transaction costs that flow from integration and simultaneously to prevent employing firms from taking advantage of that integration to exercise market power in labor markets. It also offers grounds for critically evaluating the conclusions of Richard Epstein and other proponents of the strong neo-classical economic view, who argue that the labor laws unjustifiably and inefficiently redistribute wealth

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76. See KARL MARX, *ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844 65-67* (Dirk J. Struik ed., 1964) (asserting that wages need only be high enough to enable the worker to sustain an animal existence and, perhaps, support a family and reproduce the worker class); KARL MARX, *VALUE, PRICE AND PROFIT* 38-45 (Eleanor Marx Aveling ed., 1935) (developing theory of surplus-value, which posits that the capitalist forces the worker to labor to the limits of her bodily strength and energy, and seizes the excess value created beyond that necessary to keep the worker functioning).

from shareholders, consumers, and unorganized employees to organized employees.

A review of Epstein's critique of the labor laws provides an appropriate foil for the CMP model. Epstein's critique of the labor laws is based on important insights into liberty and the market economy and asserts values that many who disagree with his conclusions probably share. However, his empirical assumptions are unfounded and thus his conclusions are flawed.

Epstein is not blind to issues of power in contractual relations. However, he believes that governmental interference should not impede an individual employee's protections of easy entry and exit from contractual relations.<sup>77</sup> He assumes that if employing firms are prevented from taking advantage of competition among workers, and some workers are able to press demands for compensation exceeding that of their value to the employer, employers will respond by decreasing output and substituting capital for labor, thereby decreasing the overall supply of jobs.<sup>78</sup> Thus, Epstein argues, legal regulation will simply decrease overall welfare.<sup>79</sup> Furthermore, according to Epstein, even if one accepts that the state is sometimes justified in ignoring the welfare of society as a whole in pursuing redistributive goals, there is no reason to assume that the state should intervene on behalf of organized workers, especially if it is non-unionized workers who will bear the cost.<sup>80</sup>

Although Epstein believes that employee concerted activity is costly, he does not necessarily believe that the state should ban it. The

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77. See Epstein, *Common Law for Labor Relations*, *supra* note 5, at 1363 (arguing that the labor laws are "destructive of both personal liberty and economic wealth for both society as a whole and most (but never all) individuals within it."). Attempts to adjust the balance of power between parties to a contract in favor of one of those parties violate the principle of pareto optimality, which is central to neoclassical economics. The principle of pareto superiority posits that the allocation of resources brought about by a consensual transaction is, by definition, superior to the allocation existing before, because neither party to the transaction would have entered into the transaction unless they believed they would be made better off thereby. More importantly, the concept of pareto optimality asserts that no other alteration in the existing allocation of resources can be guaranteed to increase overall welfare, because if the transfer of the resource would benefit the receiver more than it would harm the loser, the receiver would normally have purchased the resource in a voluntary transaction. See POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 5, at 13; Epstein, *Common Law for Labor Relations*, *supra* note 5, at 1361 n.11 ("[T]he institution of contract still allows the weaker party to be left better off by the exchange."); *id.* at 1382-83 (stating that agreements by employees, as a condition of employment, not to join a union is best explained by individual and rational self-interest and will necessarily be advantageous to both employer and employee).

78. See EPSTEIN, *FORBIDDEN GROUNDS*, *supra* note 5, at 73-74 (arguing that regulation of employers necessarily leads to a reduction in jobs). See also, EHRENBERG & SMITH, *supra* note 41 at 484-85 (reviewing the neoclassical critique of unions).

79. See Epstein, *Common Law for Labor Relations*, *supra* note 5, at 1393-94 (stating that the NLRA will increase labor costs and reduce overall production); *id.* at 1402 (asserting that the NLRA will predictably lead to substitution of capital for labor).

80. See *id.* at 1362 ("There is no solid moral case for treating union members, as such, as the favored class of wealth redistribution.").

result, it appears, depends on whether Epstein is wearing his libertarian or his utilitarian hat. While not clearly taking a position between the two results, he asserts that libertarian principles would counsel that employees should be free to refuse to deal with a potential employer<sup>81</sup> and that employers should be free to demand that employees, as a condition of employment, agree not to join a union.<sup>82</sup> Using utilitarian principles, on the other hand, he asserts that employees should not be able to restrain trade where it will distort competitive pricing in the labor market.<sup>83</sup> Wearing his libertarian hat, Epstein goes so far as to suggest that the antitrust laws, which regulate the degree of concentration among producers, are indefensible.<sup>84</sup> Wearing his utilitarian hat again, he acknowledges that the libertarian approach to both employee and producer combination could have serious effects on social welfare.<sup>85</sup>

The understanding of labor relations embodied in the CMP model reveals flaws in both these libertarian and utilitarian approaches. I have already discussed the flaws in Epstein's assumptions about the adequacy of exit as protection for individual workers. That discussion suggests why the choice of an employer to resist unionization and the choice of employees to attempt to unionize are not liberties that society must tolerate equally, either based on libertarian or utilitarian principles.

Epstein's libertarian argument, that employees should be free to unionize and employers should be free to retaliate because this preserves equal liberty for all, is flawed, because liberty to exercise market power is not a liberty of equal dignity to the liberty to resist the exercise of market power. The former is more closely analogous to a hypothetical "liberty" to exercise governmental power. I doubt that Epstein or any other libertarian would classify the exercise of government power as a "liberty."

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81. See *id.* at 1366 ("If A could enter into a contract with a prospective employer, then there is no reason he cannot enter into a contract with his potential rival, B, to present a united front against the employer.").

82. See *id.* at 1370-72 (arguing that "yellow dog" contracts, in which a worker agrees not to join a union as a condition to employment, "should be accorded the same respect as any other voluntary agreement").

83. See generally *id.* at 1381-83.

84. See *id.* at 1366 n.30 ("There is no autonomy-based theory that accounts for antitrust law as applied to industry or for antitrust law as applied to labor law."). According to Epstein's libertarian position, the right to exit is not important because market power and the foregone transactions that result from such power are irrelevant to any considerations of fairness. See Epstein, *Common Law for Labor Relations*, *supra* note 5, at 1369 ("restraint of trade itself should not be illegal"); *id.* at 1371 (stating that, under the entitlement theory of liberty of contract, the only relevant question is whether a buyer is being forced to choose between two things the buyer owns or between "something one owns and something one wants," implying that the collective control of resources is irrelevant); *id.* at 1373 ("command over resources" is irrelevant to entitlement theory of contract).

85. See generally *id.* at 1381-82.

Epstein's utilitarian argument, that employees should be free to organize and employing firms free to retaliate, is flawed, because employing firms will not retaliate only when it is efficient. Instead, firms will oppose unionization in order to exercise market power. If a firm succeeds, they stand to recoup, through market-power rents, any losses they incur in firing quality workers, disrupting union elections, and provoking strikes. Similarly, Epstein's utilitarian argument is flawed, because he fails to see that firms, like unions, restrain competition in the labor markets. Union-busting tactics benefit the employing firm by creating market power, but union busting harms society by depriving job seekers of mutually beneficial transactions on competitive terms.

Under the CMP model of labor relations delineated in the remainder of the Article, the NLRA attempts to minimize the anti-competitive effects of concentration in the supply of jobs by encouraging elimination of competition among employees when there is no corresponding competition among shareholders. The American legal system does not protect only the interests of consumers in product markets and of shareholders in stock markets. The antitrust laws, it is true, have not been even minimally enforced to prohibit horizontal labor market integration of potential employers in order to protect competitive labor markets—an implicit determination has apparently been made that society has too strong an interest in the potential efficiency gains in both consumer product and job markets that can be derived from this sort of integration. However, the labor laws do prevent employing firms from evading collective bargaining in order to exercise unilateral market power.

Without collective bargaining, a firm bargains for labor power as an integrated whole, yet is able to benefit from competition among individual employees in setting the terms of work. This competition on the job-demand side of the employment relationship, without competition on the job-supply side, is best understood as "non-paralleled" competition. The NLRA, at least in aspiration, departs from a libertarian model of labor law in that it prohibits employers from taking advantage of non-paralleled competition in setting terms of work. If employees wish to bargain collectively, the employer may not interfere.

On the other hand, the NLRA does not encourage unlimited employee collective action. In many situations, the NLRA seeks to protect individual employees, consumers, and shareholders from labor cartelization by preventing employees from organizing beyond the scope of employer integration.<sup>86</sup> It limits employees, in other words, to "integration-wide" organization. For example, the labor laws prohibit

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86. This preference for employee organizations that match the scope of an employing firm is revealed in the comments of Senator Robert F. Wagner. See *supra* text accompanying note 1.

employees from striking employers other than those integrated into the employing firm that controls the terms and conditions of their employment.<sup>87</sup> Without such limitations, labor organizations could enjoy non-paralleled competition. Assuming effective antitrust and corporations laws, this restraint on labor power should ensure that consumers in the product markets and shareholders in stock markets are not subject to labor market power.

The elimination of non-paralleled competition through the limitation of employee association to integration-wide organization also ensures that individual consumers are not subject to greater market power under the system of collective bargaining than they were under a system of unilateral management power. The antitrust principle of the "single monopoly profit" holds that, where a monopoly exists at one stage of production, the creation of a monopoly at a second level of production will not result in higher prices to consumers, higher overall profits to producers, or a different output.<sup>88</sup> The same market power is exercised over the consumer at the final stage of purchasing whether there is a monopolist only at the stage of an initial input or whether there is a monopoly at each and every level of production. Similarly, a collective of workers, in order to harm the consumer, must create a level of horizontal integration at the stage of the labor input greater than the level of horizontal integration of the workers' employer. If the collective simply withdraws from competition all workers who provide labor to a given firm, consumers will be subject to no greater market power than if all the workers of that firm negotiated individually with the employer. If Firm B cannot exercise market power, its workers, acting collectively, will also not exercise market power.

Nor will a union that is organized integration-wide enjoy any greater market power over individual employees in the setting of terms and conditions of employment.<sup>89</sup> Neither substituting an integrated

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87. See *infra* Part II.B.

88. See PHILIP AREEDA & DONALD F. TURNER, IX ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1706b, at 74 (1991); PHILIP AREEDA & DONALD F. TURNER, III ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 725b, at 199 (1978) ("Under any given cost and demand conditions, there is but one maximum monopoly profit to be gained from the sale of an end-product. . . . [I]ntegration and monopolization of a prior stage would have no effect on profits, prices, or outputs unless there were diseconomies in integration.").

89. The legal realist Robert Hale anticipated this application of the concept of the single monopoly profit to labor unions in 1935:

There is frequently a great deal of talk to the effect that a closed shop destroys the freedom of the worker to be independent of a union if he wishes to be. Well, to a certain extent, of course, it does, but in a complicated modern society like ours, nobody is going to be entirely free. If a man wants to work in a steel plant, he does not just go out and work according to his own ideas about how it should be worked; he has to join an organization. Normally, in the case of a steel plant, he becomes an employee of a steel company, and then he has no

work-force organization for an integrated shareholder organization as the hiring agent of the firm nor including a union in the process of setting the terms of employment should make a difference in the availability of alternative employment.<sup>90</sup> The existence of a union does not constrain an employee's degree of choice; if employer market power preceded unionization, the democratic processes of a union will probably even ameliorate its effects.

In short, then, the CMP model of labor relations involves a recognition of the forces that affect the balance of power between employers and employees in the labor market. By recognizing both that incorporation places the owners of productive resources in a position to exert market power over employees and that unbridled unionization would give a similar power to labor organizations, the CMP model effectively explains the tension that exists between laws encouraging unionization and those that limit employee collective action. It also helps us understand the existing structure of the legal regulation of the employment relationship.

## II

### THE CMP MODEL, ELIMINATION OF NON-PARALLELED COMPETITION, AND LEGAL DOCTRINE UNDER THE NLRA

The CMP model provides a clear explanation for the structure of the NLRA and for most, although not all, judicial interpretation of the NLRA. This is true both as a descriptive matter, in that the CMP model allows us to accurately predict what labor laws will look like, and as a normative matter, in that it provides a basis for evaluating and critiquing the existing law when these predictions are incorrect. In Section II.A, I illustrate how the CMP model explains such basic tenets of the NLRA as

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freedom as to the details of his work whatever; he is a non-voting member of a society. Now, if he belongs to a union in a closed-shop industry, it is perfectly true he has no freedom to work without being a member of the union, but he has a little more freedom through the brotherhood of his union against the restraint imposed upon him by the employer.

*Labor Bd. Hearings*, *supra* note 1, at 51 (statement of Robert L. Hale).

90. The failure to acknowledge this is one of the great wonders of Epstein's critique of labor unions. He asserts that choice among employers is sufficient to protect individual employees from oppression and yet he asserts that unions decrease competition in the labor markets to a greater extent than employing firms. See Epstein, *Common Law for Labor Relations*, *supra* note 5, at 1401 ("[Employees who are opposed to a union] may not currently be willing to leave the union because their alternative sources of employment may be still less attractive: The restrictive practices of unions may make it difficult to find employment elsewhere within the industry . . .") (emphasis added). A search of Epstein's writings on the adequacy of competition among employing firms reveals no such similarly strong statement of the narrow scope of the relevant job market for employees in the context of a discussion of employer integration. Moreover, such a search also fails to reveal a discussion of informal employer collusion in refusing to hire employees who seem like activists. Epstein's critique of the "restrictive practices of unions," however, is front and center in his discussion.

the prohibition on employer interference with the right of concerted action, the prohibition on employer domination of unions, exclusivity of union representation, the duty of an employer to bargain in good faith with the employees' collective bargaining representative, and the guidelines for certification of the appropriate bargaining unit. In Sections II.B and II.C., I examine two specific labor law doctrines—secondary boycotts and permanent striker replacements—in order to illustrate how the CMP model can guide the evolution of particular doctrines.

The point I make in the following sections is not that doctrine under the NLRA is entirely “rational,” whatever that might mean, and not that the legislative enactments and judicial decisions in question are immune from political compromises, prejudices, favoritism of powerful groups, lack of information, or any of the many other factors criticized in legislative and judicial decision-making. Instead, my point is simply that the structure of the NLRA both insulates and limits employee collective action and does so, in surprising measure, in accord with what the CMP model would recommend, and that where it does not, discrete changes in the law would result in a desirable level of countervailing market power.

*A. The CMP Model and the General Contours of the NLRA: Eliminating Non-Paralleled Competition*

In this Section, I offer the CMP explanation for three basic tenets of NLRA doctrine. In Section II.A.1., I show that the NLRA's prohibitions on employer interference with employee concerted action and employer domination of labor organizations protect employees from employer conduct that is likely to result in the exercise of unilateral market power. In Section II.A.2., I apply the same analysis to the duty to bargain in good faith and the principle of exclusive representation. And, in Section II.A.3., I explain how determinations of the appropriate bargaining unit for employees are designed to ensure employees' rights to integration-wide organization—that is, to collective bargaining that permits the employees effectively to eliminate competition among themselves to the same extent as the employing firm suppresses competition among shareholders—without resulting in undesirable employee integration.

*1. Prohibitions on Employer Interference and Domination*

An employing firm stands to gain if it can create non-paralleled competition by eliminating its employees' collective bargaining agent.

The NLRA's prohibition on interference with employees' concerted activities<sup>91</sup> is a straightforward response to this threat.

Thus, in *NLRB v. Gissel Packing Co.*,<sup>92</sup> the United States Supreme Court upheld the National Labor Relations Board's ("the NLRB" or "the Board") holding that the communications of an employer, in opposing a union's organization drive, may not include a "threat of reprisal or force or promise of benefit."<sup>93</sup> For an employing firm which, after defeat of the union, will be able to exercise market power in setting the terms of employment, even the threat of a seemingly inefficient action, such as laying off productive workers or shutting down the plant, may be an economically rational move. The employees have good reason to believe that the threats, although not dictated by efficiency, will be carried out in the hope that the employing firm will be able to avoid countervailing market power.

It may even be rational for the employing firm to offer a benefit to the employees, not because a non-union work force is more efficient, but because the employing firm can exercise market power after the union is defeated and demand that the employees accept sub-competitive benefits. As the Supreme Court has stated elsewhere, "[t]he absence of conditions or threats pertaining to the particular benefits conferred would be of controlling significance only if it could be presumed that no question of additional benefits or renegotiation of existing benefits would arise in the future."<sup>94</sup> In other words, an offer of benefits tied to defeat of a union drive is innocuous only if the employer will not have a future opportunity to exploit non-paralleled competition. In sum, "[t]he beneficence of an employer is likely to be ephemeral if prompted by a threat of unionization which is subsequently removed."<sup>95</sup>

*Gissel* is fascinating, not only for the reasonable rule it upholds, but even more so because a desire to maintain non-paralleled competition so consciously motivated the management threats in that case. These threats even explicitly pointed out that the scope of employee organization sought would not eliminate the non-paralleled competition then in existence. Management at the particular plant that workers were attempting to organize emphasized that a strike "could lead to the closing of the plant,' since the parent company had ample manufacturing facilities elsewhere."<sup>96</sup> Thus, management expressly argued to its employees that their attempt to unionize that individual plant would be in

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91. See 29 U.S.C. §§ 157, 158(a)(1) (1935).

92. 395 U.S. 575 (1969).

93. *Id.* at 618.

94. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 410 (1964).

95. *Id.*

96. *Gissel*, 395 U.S. at 588.

vain, because the employing firm would still enjoy non-paralleled competition among the employees of different plants controlled by that firm and would exploit competition among the employees of different plants to punish unionization. This threat was properly sanctioned as illegal interference with the employees' concerted action.

Another example of how our labor laws conform with the CMP model is found in section 8(a)(2) of the NLRA, which prohibits domination of labor organizations by management.<sup>97</sup> This provision is justified, because the existence of a union does not adequately eliminate non-paralleled competition if the employing firm controls it. As one would expect from the CMP model, however, management domination is only a concern if the domination is of a collective bargaining agent—the NLRA does not prohibit all joint employer-employee organizations or all contacts between employee representatives and management. Instead, such contact is prohibited only when employer contact with an employee organization threatens the ability of employees to act in a concerted manner independently of the shareholders' representatives in bargaining over the terms at which jobs are supplied. Doctrinally, there must be both domination and a "labor organization."<sup>98</sup>

In determining whether an organization is a labor organization, the recurrent question is "whether an organization exists to 'deal' with employers regarding conditions of work."<sup>99</sup> The Sixth Circuit, for example, has held that an employing firm violates the NLRA when it establishes a series of employee committees "the effect [of which] . . . is that of a single employee representation plan dealing with all the matters normally the subject of collective bargaining."<sup>100</sup>

Today, the pressing issue is the extent to which this rule prohibits Employee Involvement Plans ("EIPs"), such as "quality circles," which management usually organizes and controls and are common tools for management to elicit information from employees ostensibly in order to permit both greater productivity and greater job satisfaction.<sup>101</sup> The line between, on the one hand, a labor organization that either stands in the shoes of a bargaining representative chosen by the employees or impedes the employees' ability to organize their own collective representative and, on the other hand, an employer initiative

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97. See 29 U.S.C. § 158(a)(2) (1935).

98. The textual support for this rule is found in § 152(5) of the NLRA, which provides that "'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5).

99. NLRB v. Streamway Div., 691 F.2d 288, 291 (6th Cir. 1982).

100. NLRB v. General Shoe Corp., 192 F.2d 504, 504 (6th Cir. 1951) (quoting from the petition of the NLRB).

101. See WEILER, GOVERNING THE WORKPLACE, *supra* note 8, at 211-14.

that facilitates both communication between employees and management and employees' performance of their jobs, is necessarily difficult to draw.<sup>102</sup> The CMP model, in accord with current law, would not recommend a ban on all EIPs, as long as they do not supersede employee collective bargaining representatives. For example, quality control committees can certainly be instituted without interference with employees' collective bargaining and should, therefore, be permitted. At the same time, the CMP model does not support an amendment that would withdraw special scrutiny from employer-instituted EIPs,<sup>103</sup> because if management-dominated EIPs are allowed to effectively set the terms and conditions of employment, the employees will again be subject to non-paralleled market power in the hands of an employer.<sup>104</sup>

## 2. *The Duty to Bargain in Good Faith and Exclusive Representation*

Under the NLRA, it is an unfair labor practice for an employing firm either to refuse to bargain with the employees' duly authorized collective bargaining representative<sup>105</sup> or to bargain with individual employees within the bargaining unit.<sup>106</sup> The employees' collective bargaining representative has a similar duty to bargain with management.<sup>107</sup> The duty "to bargain collectively" is defined as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." <sup>108</sup> It is axiomatic, at least since Congress clarified the duty to bargain in the Taft-Hartley Amendments in 1947, that the

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102. See, e.g., *Streamway*, 691 F.2d at 294 (acknowledging that the difference between a group organized to facilitate the communication of ideas and one designed to pursue a course of dealings is, at times, "seemingly indistinct").

103. In this respect, I disagree with Paul Weiler. Cf. WEILER, *GOVERNING THE WORKPLACE*, *supra* note 8, at 214 ("I do not consider an EIP to be a benefit so qualitatively different that it should be singled out for a blanket legal ban, on the theory that this kind of program is peculiarly likely to divert workers from the collective bargaining alternative.").

104. Obviously, if management and boards of directors did not by law exclusively represent the shareholders, it might be appropriate to cut back on the requirement that work committees that affect terms and conditions of work not be dominated by management. In Germany, employee representatives have some say in management decisions and, not surprisingly, plant-level work councils are more widely used. See WEILER, *GOVERNING THE WORKPLACE*, *supra* note 8, at 289-90. For an interesting case that presents a rough corollary to the prohibition on company unions and, in effect, discourages employee attempts to dominate management, see *Harrah's Lake Tahoe Resort Casino*, 307 N.L.R.B. 182 (1992). In *Harrah's*, the NLRB held that an employee's appeal to other employees to invest in stocks of the employing firm was not protected employee activity for "mutual aid or protection" of employees "qua employees." *Id.* The practical consequence of *Harrah's* was that the employer could discipline the employee for making such appeals.

105. See 29 U.S.C. § 158(a)(5) (1935).

106. See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944).

107. See 29 U.S.C. § 158(b)(3).

108. 29 U.S.C. § 158(d).

Act regulates the parties' bargaining process; it does not give the NLRB or the courts the authority to review the reasonableness of the terms of the parties' proposals and demands.<sup>109</sup> The NLRB and the courts are authorized to ensure that the parties meet, confer, and negotiate, that the parties deal with each other in good faith, and that they do so with respect to terms and conditions of employment.<sup>110</sup>

This emphasis on procedure coincides with the CMP model's procedural concern for the consequences of inequality of bargaining power between an individual employee and a representative of an employing firm. If an employing firm refuses to bargain with a collective bargaining representative of the employees, then the employing firm is, in essence, boycotting employees who attempt to exercise countervailing power and demanding that any employees who remain accept its terms. To allow this would be to allow a firm to exercise non-paralleled market power.

The cases illustrate how an employing firm may attempt to bypass the employees' collective representative. In *NLRB v. A-1 King Size Sandwiches, Inc.*,<sup>111</sup> the employing firm demanded nothing short of a total abnegation of any right to collective bargaining. It "insisted that it remain in total control over wages" and insisted on including in the collective bargaining agreement terms under which "the Company could unilaterally reduce [any increases] which had been given in a previous merit increase and the Union could not grieve such action."<sup>112</sup> The union "could not even discuss the matter with the Company," and management retained "each and every right, power and privilege that it had ever enjoyed, whether exercised or not," including the unilateral setting of almost every imaginable condition of employment.<sup>113</sup> Finally, the firm demanded that the employees' collective bargaining representative "relinquish the employees' statutory right to notice and bargaining" over all managerial prerogatives, and that the representative agree to a no-strike clause.<sup>114</sup> In other words, the employing firm insisted on maintaining all aspects of its non-paralleled market power.

The exclusivity of collective bargaining representatives is simply a logical corollary to the duty to bargain in good faith. In *J.I. Case*, the

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109. See THE DEVELOPING LABOR LAW 591 (Patrick Hardin ed., 3d ed. 1992) (documenting that Congress amended the NLRA to prevent such review after both the Board and the Courts had issued decisions assessing the reasonableness of employer proposals); *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970) (stating that the NLRB's role under the NLRA is "to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties").

110. See 29 U.S.C. § 158(d).

111. 732 F.2d 872 (11th Cir. 1984).

112. *Id.* at 874-75.

113. *Id.* at 875.

114. *Id.* at 876.

United States Supreme Court held that a collective bargaining agreement superseded preexisting individual employment contracts.<sup>115</sup> Subsequent cases have extended *J.I. Case* to prohibit employer attempts to bargain directly with individual employees within a bargaining unit covered by an existing collective bargaining agreement.<sup>116</sup> In *J.I. Case* itself, the Court was responding to the concern that individual employees might be able to negotiate more favorable terms than the collective bargaining agreement and, thus, that exclusive representation would be disadvantageous to individual employees: “[W]e find the *mere possibility* that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones.”<sup>117</sup> The continuation of individual bargaining would undermine the purpose of the NLRA, which is to provide a means by which employees can eliminate non-paralleled competition. If the employing firm could continue to bargain with individual employees, the union-represented employees would compete with non-unionized employees, while on the other side, the employing firm would present a unified front for the shareholders. As explained above with reference to employers’ offers of benefits made in connection with union-busting drives, advantageous individual terms will often be ephemeral if non-paralleled competition later enables the employer to exercise unilateral market power.

### 3. *Determining the Appropriate Bargaining Unit*

In so far as possible without facilitating the exercise of unilateral market power by employing firms, the NLRA recognizes a need to protect employees who perceive their interests to be different from those of other employees and to allow different groups of employees to obtain terms and conditions in accord with the perceived interests of each group. One of the primary mechanisms by which exclusive representation is confined so as not to become oppressive to individual employees is the NLRB determination of an appropriate bargaining unit. The Board’s power to make this determination stems from section 9(a) of the NLRA, which provides that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . .”<sup>118</sup> As with the prohibition on employer interference and with the duty to bargain, this

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115. See *J.I. Case*, 321 U.S. at 337.

116. See, e.g., *General Electric Co.*, 150 N.L.R.B. 192, 194 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969) (holding that the duty to bargain collectively at least requires “recognition that the statutory representative is the one with whom [the employer] must deal in conducting bargaining negotiations, and that it can no longer bargain directly or indirectly with the employees”).

117. *J.I. Case*, 321 U.S. at 338 (emphasis added).

118. 29 U.S.C. § 159(a) (1935) (emphasis added).

need to identify appropriate bargaining units is firmly rooted in the principles of countervailing power central to the CMP model of labor laws.

According to the CMP model, two mirror considerations should be paramount in determining the appropriate unit. First, individual employees should not be included against their will in bargaining units if they are not substitutes for the other employees in the bargaining unit. This is true because, if they are not substitutes, non-inclusion in a common bargaining unit does not pose a threat of non-paralleled competition and of unilateral market power; including them in the bargaining unit would not do anything to counterbalance the employer's market power. Second, and conversely, employees should have the opportunity to eliminate all competition among themselves that is non-paralleled. In other words, employees should not be forced to compete against each other in cases where integration into firms allows employers to avoid competing among themselves.

These two considerations are reflected, though not clearly explained, in case law:

The choice of a very large unit with a diversified constituency increases the possibility that there will be conflicts of interests that will undercut the union's ability to represent all unit members effectively. On the other hand, the designation of a small unit that excludes employees with common skills, attitudes, and economic interests may unnecessarily curtail the union's bargaining power and may generate destructive factionalization and in-fighting among employees.<sup>119</sup>

These considerations are also reflected in the specific guidelines the NLRB must follow in identifying a bargaining unit. While the overall mandate of the Board is "to assure to employees the fullest freedom in exercising the rights guaranteed by [this Act],"<sup>120</sup> it considers the following criteria in establishing a bargaining unit: (1) similarity in scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of work; (3) similarity in work performed; (4) similarities in the human capital that employees bring to the job; (5) frequency of contact and interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) history of collective bargaining;

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119. *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980).

120. 29 U.S.C. § 159(b).

(10) desires of affected employees; and (11) the extent of union organization.<sup>121</sup>

While some of these criteria, such as contact and geographical proximity, relate only indirectly to the ability of the employees to maintain a united front, most of them are a direct measure of whether employees constitute an adequate class to eliminate non-paralleled competition. Most obviously, the first four criteria and the seventh criterion directly measure whether employees are adequate substitutes for each other. If employees' earnings are similarly determined, they receive similar benefits, they perform similar work, they have similar qualifications, and they work in closely related aspects of the overall production processes, they are likely to be excellent substitutes for one another, and the employing firm can profitably play one against the other to drive down wages. The eighth, "common supervision and determination of labor-relations policy," is a direct application of the CMP model; without common control of labor policy by the employing firm, competition is not non-paralleled. The last three reflect deference to the experience of employees and unions in determining whether a bargaining unit adequately protects the employees' interests.

The logical result of the application of either the factors applied in the case law or of the CMP model is that employees who are not competing with one another should not be forced to join a common bargaining unit, nor should employees of more than one employing firm if the employing firms are not foreclosing competition in the supply of jobs. Such overbroad organization does not serve any clear purpose under the CMP model, may undermine the effectiveness of the collective bargaining unit, and forces association with yet another organization that, like the employing firm, is not primarily concerned with the individual employee's interests.

*B. Limitations On Appeals To Other Workers:  
Secondary Strikes And Picketing*

The CMP model explains not only labor laws which encourage unionization, but also those laws which limit employee collective action. One important example of such laws is the regulation of secondary strikes and picketing. The Taft-Hartley Act of 1947 established much of our present system of regulation of secondary boycotts. Court interpretations and a few subsequent amendments have further defined this regulation. The NLRA's complex regulation of union secondary boycotts, including "common-situs" picketing and the "ally" doctrine, illustrates the need for a paradigm that can explain these limitations on

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121. See *NLRB v. DMR Corp.*, 699 F.2d 788, 791 (5th Cir. 1983); *Purnell's Pride, Inc.*, 609 F.2d at 1156-58.

employee concerted action. The CMP model provides a paradigm to explain regulation of direct restraints on trade by employees.<sup>122</sup>

### 1. *Basic Principles of Secondary Boycott Law*

The NLRA's constraints on secondary boycotts attempt to limit labor disputes to the parties directly involved. When employees have a dispute with their employing firm, they are restricted by law in their ability to appeal to "secondary" employers and their employees.<sup>123</sup> For example, nurses at a hospital are limited in their ability to seek support from workers at a company that supplies the hospital with clean linen. The nurses cannot ask the workers at the laundry company to strike the laundry in order to punish the laundry for doing business with the hospital. Similarly, the nurses are limited in the manner and scope of their appeals to the management and owners of that laundry; if they threaten the secondary employer, they violate the NLRA. These limitations on contact with secondary actors hold true whenever the object of such contact is to persuade them to stop dealing with the workers' employer.<sup>124</sup>

Defining "secondary" employees and employers—the persons who must not be drawn into a labor dispute—was left largely to the courts. The Supreme Court has stated that the provision restraining secondary boycotts should be interpreted so as to balance the dual goals of "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."<sup>125</sup> In an early case, the Supreme Court labeled the

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122. Secondary activities often involve speech that does not directly restrain trade. Examples of such activities include handbilling to consumers, urging them not to buy the products of a company, or other negative publicity about a company. The proper principles of regulation in the marketplace of ideas are beyond the scope of this Article. I would simply suggest that there is little justification for government restraints on informational activity that is not a direct appeal to other workers to decrease competition in labor markets. Competition in the marketplace of ideas is normally sufficient in the context of labor disputes.

123. See 29 U.S.C. § 158(b)(4)(i) (prohibiting appeals to secondary employees by declaring it an unfair labor practice for a labor organization to "induce or encourage any individual employed by any person" to strike or otherwise refuse to work where the object is to place economic pressure on the primary employer); 29 U.S.C. § 158(b)(4)(ii) (prohibiting appeals to both secondary employees and secondary employers by declaring it an unfair labor practice for a labor organization to "threaten, coerce or restrain *any person*" where the object is to force them to quit dealing with the primary employer) (emphasis added).

124. See 29 U.S.C. § 158(b)(4)(B) (limiting the prohibition on contact with secondary actors to that contact which is directed at "foreing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.").

125. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951).

distinctions that would have to be drawn between lawful and unlawful objects of union activity "lines more nice than obvious."<sup>126</sup> One standard textbook concludes that

the drawing of the line between primary and secondary activity in . . . borderline cases will be informed by the values and attitudes of the line-drawer, particularly that person's concern on the one hand for minimizing economic combat or on the other hand for maximizing the access of workers to peaceful measures for the furtherance of employee or union interests.<sup>127</sup>

To the contrary, however, the doctrine of secondary boycotts demonstrates the existence of a clear baseline, not an ad hoc balancing of concern for industrial peace with the desire to promote unionization. This baseline derives from the same principles of CMP that have informed this Article. An examination of the borderline cases where the site of strike activity or picketing is a place of employment for employees of both the struck employer and of another employer ("common situs" cases) or where the other employer is arguably an ally of the struck employer (the "ally" doctrine) supports the existence of the baseline.

## 2. *Common Situs Picketing*

In *Local 761, International Union of Electrical Workers v. NLRB*<sup>128</sup> ("*General Electric*"), the Supreme Court established the basic principles for common situs cases. A struck employer created a separate entry for the employees of independent contractors who performed work at the General Electric ("GE") manufacturing facility. The strikers picketed the separate entry, and most of the independent contractor's employees refused to cross the picket line. The Supreme Court instructed the NLRB to allow the picketing if the employees entering through the separate gate "performed conventional maintenance work necessary to the normal operations of General Electric."<sup>129</sup>

The Board determined that the work of some of the independent contractors was sufficiently related to the normal operations of the facility for them to be legitimate targets of picketing. It stated that the work done by these employees was "an essential step in resuming the production of finished products."<sup>130</sup> The Board further found that the work done by many of the independent contractors' employees was similar to work done by the striking employees. Thus, the picketing was

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126. *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667, 674 (1961).

127. ARCHIBALD COX ET AL., *CASES AND MATERIALS ON LABOR LAW* 657 (1991).

128. 366 U.S. 667 (1961).

129. *Id.* at 682.

130. *Local 761, Int'l Union of Elec., Radio, Etc.*, 138 N.L.R.B. 342, 345 (1962).

lawful primary activity.<sup>131</sup> If the other employees did not do similar work, however, the striking workers could not picket or appeal to them.

The CMP model explicates the intuition shared by the Supreme Court and the NLRB that the integration of the independent contractor's employees into the production process and the substitutability of the two groups of employees provide a guide to the appropriate level of employee collusion. On the job-supply side of the *General Electric* case, it is unlikely that there would be vigorous competition between GE and the independent contractor in the terms offered to potential employees. The independent contractor would probably not aggressively attempt to bid employees away from GE and vice-versa. Moreover, on the job-demand side, the independent contractor's employees were placed into direct competition with GE's employees. Indeed, the purpose of independent contracting is often simply to create competition among employees and to drive wages down. Thus, the independent contractor's employees were part of the primary dispute with GE—they were an essential element in the non-paralleled competition that GE and the independent contractor had created. The right to countervailing market power mandated that the GE employees be allowed to picket the separate gate and appeal to their competitors.

By contrast, if the employees of the independent contractor were not substitutes for the striking workers, to allow them to be picketed would be to extend employee concerted activity beyond the scope necessary to counteract the employing firm's unilateral market power and eliminate non-paralleled competition. In this latter case of truly secondary activity, it is not true, as some proponents of unionization have argued,<sup>132</sup> that the employing firm's cooperation with suppliers is comparable to the union's cooperation with secondary employees. In the case of a truly secondary picket, the union seeks to prohibit any labor power sold in indirect furtherance of the employer's continued operation. Thus, the union attempts to control the terms under which employees beyond the individual employing firm are employed. If such activity were permitted without limit, a bilateral monopoly could spiral out of control, forcing higher and higher levels of integration on both sides of the employment relationship.

It is not apparent, on the other hand, that the employing firm, by buying supplies from another firm, is attempting to set the terms at which jobs may be had beyond the employing firm's gates. The

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131. *See id.*

132. Professor Paul Weiler, for example, has argued that current labor law doctrine is unfair, because the employer is permitted "to continue its business relations with cooperative outsiders," while employees are not similarly permitted to "request the help of sympathetic union members elsewhere in attempting to achieve an effective shutdown of the struck plant." Weiler, *Striking a New Balance*, *supra* note 8, at 415.

employing firm is not trying to shut down the striking employees by foreclosing employment elsewhere or by setting the terms that can be obtained elsewhere. Of course, as the following discussion of the ally doctrine demonstrates, if an employing firm effectively attempts to influence terms of employment beyond its gates, limitations on secondary activity by employees are unjustified.

### 3. *The Ally Doctrine*

In 1948, *Douds v. Metropolitan Federation of Architects*<sup>133</sup> laid the groundwork for the ally doctrine. In that case, the employees of Ebasco, a firm supplying engineering services, went on strike. Ebasco transferred the struck work to Project, a business "identical with Ebasco's."<sup>134</sup> For the year prior to the strike, Ebasco had subcontracted a fair amount of its work to Project and had closely supervised Project's employees. An appreciable percentage of Project's business was work secured from Ebasco and, after the strike began, Ebasco projects amounted to 75% of Project's business.<sup>135</sup> The union representing Ebasco's employees visited Project to appeal to its employees not to do the work contracted from Ebasco and picketed Project's workplace.<sup>136</sup>

The court held that the picketing was not illegal secondary activity, because the picketing did not have as its object "requiring \* \* \* any \* \* \* person \* \* \* to cease doing business with any other person."<sup>137</sup> It held that the provision of the NLRA prohibiting secondary activity applied only where it could truly be said that the "other person" had no interest in the dispute.<sup>138</sup> The court concluded that Project was a party to the dispute, emphasizing that, in its contracts with Project, "[Ebasco] established the maximum wage rates for which it would be charged. Invoices were in terms of man-hours, employee by employee. . . . [Ebasco and Project] were doing business on terms which cast a shadow of doubt upon the identity of the employer."<sup>139</sup>

The *Douds* court looked past the formal boundaries of "corporation ownership or insulation of legal interests" to the *de facto* integration of the two firms in their employment practices—the hiring

133. 75 F. Supp. 672 (S.D.N.Y. 1948) (interpreting the scope of § 8(b)(4)(A) of the NLRA).

134. *Id.* at 674.

135. *See id.*

136. *See id.* at 674-75.

137. *Id.* at 675 (quoting § 8(b)(4)(A) of the NLRA, now embodied in 29 U.S.C. § 158(b)(4)(B)) (alterations in original).

138. *See id.* at 676. The court's opinion quotes a statement made by Senator Taft during the debates over the Taft-Hartely Act as evidence of Congressional intent concerning the scope of the Act: "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." *Id.*

139. *Id.* at 676-77.

and setting of the terms of employment. It recognized that Project's employees were used as direct substitutes on identical work: "The economic effect upon Ebasco's employees was precisely that which would flow from Ebasco's hiring strikebreakers to work on its own premises."<sup>140</sup> Ebasco's workers would have been able to picket the entrances where strikebreakers entered; they should also be able to picket Project.

Subsequent decisions by Courts of Appeals and the NLRB have more clearly identified two interconnected elements of the ally theory: common control on the job-supply side and the substitution of the ally's employees for the strikers on the job-demand side in performing struck work.<sup>141</sup> Companies that have common control over negotiations in the labor market are horizontally integrated. The employees of such firms, if they do not engage in concerted bargaining activity, compete with each other. The courts have been careful not to require that employers be entirely integrated before they will be considered allies; coordination in setting the terms of employees performing similar work (horizontal job-supply side integration) is enough to result in unilateral market power harms. In one case, for example, the NLRB held that warehouses which were separately managed on a day-to-day basis were nonetheless allies, because corporate headquarters had the ability to veto collective bargaining agreements and wage plans formulated or agreed upon by the warehouses.<sup>142</sup> In other words, the warehouses and corporate headquarters presented a united front in setting the terms of employment.

In contrast, some courts have held picketing to be secondary when picketed firms are integrated, but not in the setting of terms or conditions of employment for employees who compete with one another. The First Circuit, for example, held that a construction company and a lumber company, owned by the same family, were not allies, even though the construction company purchased a substantial amount of its lumber from the lumber company.<sup>143</sup> In so holding, the court emphasized that there was no evidence that the labor policies of the two firms were centrally-controlled.<sup>144</sup> Though the two firms were integrated in the product market—the price and supply of lumber was not set on the open market—they each had separate labor policies, and their employees were not substitutes for each other.

In the language of the CMP model, the ally doctrine recognizes the right of employees to collude when the employing firms create a united

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140. *See id.* at 677.

141. *See, e.g.,* Teamsters Local 560, 248 N.L.R.B. 1212, 1213 (1980).

142. *See id.* at 1214-15.

143. *See J.G. Roy & Sons Co. v. NLRB*, 251 F.2d 771, 774-75 (1st Cir. 1958).

144. *See id.* at 774-75.

front in setting the terms of employment. When they do not, however, employee organization is suspect. Taken as a whole, the separate elements of the doctrine of secondary strikes and picketing, including the common situs and ally doctrines, are best understood as a way of both providing and limiting the countervailing power a union holds. Instead of an ad hoc balancing of industrial peace and support for unionization, the secondary boycott doctrine springs from a desire to counteract employer market power over the supply of jobs but also to limit the countervailing power of unions to that necessary to accomplish this task.

### C. *The Problem Of Striker Replacements*

As with the doctrine of secondary boycotts, the CMP model provides a framework for analyzing the practice of permanent striker replacements. Employing the CMP framework here, however, reveals that the use of permanent striker replacements is inconsistent with the basic premise of the NLRA. This analysis provides strong normative arguments in favor of abandoning the current doctrine. In short, a ban on the use of permanent striker replacements is warranted because such a practice fails to protect workers from an employing firm's use of non-paralleled market power.

At present, workers covered by the NLRA are guaranteed, among their rights to concerted activity, the right to strike in furtherance of collective economic aims.<sup>145</sup> However, under the *Mackay Radio* decision, an employing firm also has the right to hire new workers to replace workers who exercise their right to strike and to offer replacement workers permanent employment.<sup>146</sup> Despite various attempts to overturn *Mackay Radio*,<sup>147</sup> the Supreme Court has repeatedly reaffirmed its holding.<sup>148</sup>

The issue is understandably divisive. At stake for unionized employees is the practical question of whether a striking employee will have a job when the strike ends or will instead be forced to wait until another position opens up.<sup>149</sup> To union employees, an employing

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145. See 29 U.S.C. §§ 157, 163 (1935).

146. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

147. Before the Democrats lost control of Congress in 1994, they attempted to overturn *Mackay*. Democrats in the 103d Congress attempted unsuccessfully to enact the *Workplace Fairness Act*, which would have amended the NLRA to ban the use of permanent striker replacements. See SENATE COMM., *supra* note 8, at 13-15. For a summary of efforts of the 101st and 102d Congresses to ban permanent striker replacement, see John G. McDonald, *Leveling the Playing Field or Tipping the Scales? Pending Strike Legislation: The Latest Battlefield Between Labor and Management—An Alternative Solution*, 42 SYRACUSE L. REV. 971, 985 (1991).

148. See, e.g., *Trans World Airlines v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 433-34 (1989).

149. Compare *L.A. Water Treatment v. NLRB*, 873 F.2d 1150, 1152 (8th Cir. 1989) (holding that striking workers are entitled to reinstatement only after positions filled by replacements open up

firm's ability to permanently replace striking workers, even though it may not discharge employees for exercising rights to collective action, is a cruel joke.<sup>150</sup> At stake for the employing firm is the question of whether, in order to continue operations during a strike, it may offer continued employment to striker replacements after the strike ends, or whether any employee hired during a strike must automatically give up the position when striking employees return to work.<sup>151</sup>

Both sides of the debate over the use of permanent striker replacements have failed to provide strong theoretical grounds for either continuing or reversing the *Mackay Radio* doctrine. Indeed, at times the debate has seemed to have no purpose other than to show that there can be no such grounds other than encouragement of or hostility to unions.

In favor of a ban on permanent striker replacements, the argument is usually made that the practice unduly burdens employee collective action, with "unduly" defined by reference to the inability of employees to successfully strike.<sup>152</sup> The problem with this argument is that it proves too much. In a sense, every attempt by an employing firm to continue operations during a strike imposes a burden on the right to strike; the employer's success in resisting undermines the union's success in forcing the employing firm to make concessions.<sup>153</sup> In *American Ship Building Co. v. NLRB*,<sup>154</sup> for example, the Supreme Court held that an employing firm has the right to "lock out" its employees. The Supreme Court explicitly criticized the view that any practice which increases the costs of exercising employee rights of collective action constitutes illegal interference with such rights under the NLRA. The Court stated that a lock-out is a legitimate weapon, because "the right to bargain collectively does not entail any 'right' to insist on one's

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again) with *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963) (finding that striking worker remains employee during and after strike).

150. See WEILER, GOVERNING THE WORKPLACE, *supra* note 8, at 266 ("The law may draw its own fine distinction between [discharge and permanent replacement] in terms of the subjective intent of the employer, but employees may be excused if they do not perceive much practical difference as far as their Section 7 rights are concerned.").

151. See *Mackay Radio*, 304 U.S. at 345-46 ("[I]t does not follow [from the employees' right to strike] that an employer, guilty of no act denounced by statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of the strikers, upon the election of the latter to resume their employment, in order to create places for them.").

152. This was, for example, the primary argument of the Senate Majority in the 103d Congress in favor of a ban. See SENATE COMM., *supra* note 8, at 3, 5-6, 15; see also Matthew W. Finkin, *Labor Policy and the Evisceration of the Economic Strike*, 1990 U. ILL. L. REV. 547, 567-69 (1990) (discussing the impossibility for most workers of striking if they face the possibility of permanent replacement and concluding that "evisceration of the strike renders the whole statutory structure of collective bargaining substanceless, a facade").

153. See Weiler, *Striking a New Balance*, *supra* note 8, at 389.

154. 380 U.S. 300, 313-15 (1965).

position free from economic disadvantage."<sup>155</sup> The Court warned that "the [NLRA's] provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the [NLRB] might think best conforms to the proper balance of bargaining power."<sup>156</sup> It simply cannot be that the NLRA is designed always to "cushion strikers against the consequences of action taken by their employer in defense of its own position in the dispute."<sup>157</sup>

On the other side of the debate, it is usually argued that a ban on hiring permanent replacements would leave the employer hostage to union demands.<sup>158</sup> During the recent debates in the Senate over attempts to ban the practice, the then-Senate Minority argued that "[t]he *Mackay* doctrine . . . serves as an important market check on opportunistically high demands of unions as well as on opportunistically low offers of employers who are prohibited from offering replacements a better deal than the one rejected by strikers. . . . '[T]he willingness of workers to cross picket lines and offer their services on the basis of the employer's final offer tells something about the economic reasonableness of the union's demands.'"<sup>159</sup>

This argument also proves too much. According to this "market-check" rationale, unions should not be permitted the status of exclusive bargaining representative, and employing firms should be permitted to deal with individual employees in order to check the "opportunistically high" demands of unions. Indeed, according to this argument, employing firms should be permitted to replace union workers with individually bargaining employees regardless of whether there is a strike—to discharge union employees at will. Obviously, supporters of the right to hire permanent striker replacements have no better way of distinguishing between legitimate self-help and prohibited interference than do opponents. They simply oppose any union weapon that is not already firmly established in the law.

Inadvertently, however, supporters of an employing firm's right to permanently replace striking workers have provided the strongest argument for overturning *Mackay*. Hiring permanent striker replacements is inconsistent with the NLRA because it allows an employing firm to set the terms and conditions of work that will govern the permanent work force under conditions of non-paralleled competition. Supporters of the right to permanently replace strikers admit that the terms individual permanent replacements accept will dictate post-strike terms of

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155. *Id.* at 309.

156. *Id.* at 310.

157. Weiler, *Striking a New Balance*, *supra* note 8, at 388.

158. See, e.g., SENATE COMM., *supra* note 8, at 36 (stating that ban would leave employers hostage to unions and would dislodge wages from the market forces of supply and demand).

159. *Id.* at 37-38.

employment for all workers. Indeed, they triumphantly proclaim that this is so. The terms that an individual employee is willing to accept will become the baseline that establishes the terms at which the unionized work force will be forced to come back.

Moreover, a large contingent of the post-strike work force will be made up of permanent strike replacements, whose employment was conditioned on their acceptance of terms negotiated under conditions of non-paralleled competition. These workers can likely be expected to free ride on the efforts of the union employees to fight collectively for improved terms and conditions. The employing firm can use permanent striker replacements to divide the work force and restore non-paralleled competition.<sup>160</sup> In fact, this divided work force may allow the firm to effect decertification of the union as the union loses majority support.<sup>161</sup>

According to the CMP model, it is demonstrably wrong to argue, as the Senate Minority Report has, that "the willingness of workers to cross picket lines and offer their services on the basis of the employer's final offer tells us something about the economic reasonableness of the union's demands."<sup>162</sup> The signatories of the Senate Minority Report believe that this baseline is fair. The CMP model, however, predicts that the baseline will be sub-competitive; an individual employee bargaining with an employing firm is facing competition from other individual employees in the job-supply market, while the employing firm does not face adequate competition in the job-demand market. The union is likely to be demanding a wage and other terms and conditions that approximate those that would prevail in a competitive market, not an opportunistic wage or premium. Ironically, the best argument *against* the use of permanent striker replacements is the Senate Minority Report's argument that it restores the wages that would prevail in a market where the management of an employing firm bargains as collective representative of the shareholders and employees bargain individually, competing against one another.

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160. By contrast, when an employing firm locks out all employees, as it is allowed to do, *see supra* text accompanying notes 154-155, the terms upon which the workers will come back to work will be set by the collective representative of the shareholders and the collective representative of the workers. If the permissible economic weapons of employers and employees included strikes and lock-outs, but not permanent replacement strikers, the workers would be deprived of all the jobs supplied by the employing firm, but the employing firm would likewise be foreclosed from hiring employees on an individual basis. Using the lockout mechanism does not by itself reestablish a condition of non-paralleled competition, but rather reaffirms the principle that if the shareholders are not competing with each other, neither should the employees be forced to compete among themselves.

161. *See* WEILER, GOVERNING THE WORKPLACE, *supra* note 8, at 266-68 (discussing the actual consequences of the hiring of permanent striker replacements, including the danger of decertification).

162. SENATE COMM., *supra* note 8, at 37-38.

## CONCLUSION

Theory should not substitute for factual inquiry. Instead, theory should suggest fruitful paths of inquiry likely to lead to meaningful conclusions that can be used for or against a position. I hope this Article serves that purpose. My objective has been to update the tools available for analyzing the probable consequence of a labor market dominated by employing firms, to use developments in the vocabulary of the theory of the firm and the theory of antitrust to articulate the objectives of our labor laws more clearly, and to offer a reminder that unions are not the only institutions in the labor market that restrict choice or restrain trade. I have not comprehensively addressed all aspects of NLRA doctrine, nor do I expect that the analysis I have offered will be the last word on the doctrines I discuss. Instead, I hope that the analysis I offer will shed some light on alternative theories, empirical data, and the experiences of individuals immersed in the process of collective bargaining.

I expect that a greater consciousness of the antitrust foundations of the NLRA will enrich discussions of whether the NLRA should be radically altered or abandoned. An unfortunate consequence of the success of the NLRA in facilitating the exercise of countervailing market power may be the absence of any literature applying antitrust principles to the supply of jobs. This neglect has resulted in industrial relations commentary that shows profound ignorance of antitrust concepts, as illustrated by Wachter and Cohen's assertion that the relevant market for an unskilled high school graduate includes every employing firm that will take the unskilled employee.<sup>163</sup>

The CMP model also suggests specific areas into which further empirical investigation will be useful. For example, inquiry into the extent to which separate employing firms coordinate their bargaining positions in response to strikes and in the general course of setting terms and conditions of employment may have important consequences in determining both the proper scope of bargaining units and whether strike or picketing activity is truly secondary. Conversely, proponents of unionization might begin to assess the cost to employees of centralization generally and question whether ever-increasing centralization of employee organizations is desirable. If it is not, union supporters might begin to explore antitrust solutions when the scope of employer association necessitates broader collective action than employees are willing to accept.

Finally, the specific theoretical contentions I make in this Article are applicable to other areas of employment regulation. Most obviously, abandoning collective bargaining as a means of regulating labor

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163. See *supra* note 57.

market abuses in favor of employment law, which attempts to regulate specific aspects of the employment relationship by means of statutorily and judicially imposed terms and conditions of employment,<sup>164</sup> is an unfortunate development. State-imposed terms of employment, such as safety regulations, may address one or more of the more egregious symptoms of employer market power, but they do not address the root problem. The employing firm will probably demand compensation for the state-mandated protections the employee gains, and the compensation will not be competitively set. Additionally, conservatives have a legitimate objection to the inflexibility of some government-mandated requirements, which may indeed be objectionable to employees as well as employers.

At the same time, the possibility of employer market power may provide additional justification for some controversial employment laws. The CMP model's conclusion that the supply of jobs is not competitive suggests that the market will not adequately protect minorities and women. Richard Epstein has developed a thorough attack on antidiscrimination laws that is expressly premised on the competitiveness of labor markets and on the efficiency of employment practices.<sup>165</sup> The possibility of developing employer market power, however, suggests a motivation for employers not related to efficiency.

The anti-competitive effects of horizontal allocation of markets can be illustrated by way of the gas station example I used to explain market power. Gas stations along a highway can exercise market power by agreeing to divide up markets just as they can by fixing prices. Thus, three gas stations could agree that one would only provide gas to trucks, one to family cars, and one to luxury and sports cars. If this agreement could be kept, it would enhance whatever other anti-competitive structural and behavioral factors already existed in the market.

Racial and gender codes in hiring result in horizontal allocation of the labor markets which, in turn, amplifies the market power any particular employing firm exercises.<sup>166</sup> Whereas allocation of markets is often geographic in product markets, it may be partially ethnicity-, race-, and gender-based in employment markets.

These are not, of course, the only possibilities for future inquiry that the CMP model suggests. The first step to any of these inquiries,

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164. See generally WEILER, *GOVERNING THE WORKPLACE*, *supra* note 8 (discussing increased emphasis on employment law and deterioration of collective bargaining).

165. See EPSTEIN, *FORBIDDEN GROUNDS*, *supra* note 5, at 79-87 (arguing that, although monopoly conditions may justify some government regulation, such a lack of competition does not characterize employment relationships, so this justification does not apply to employment discrimination laws).

166. See generally HANDLER, *supra* note 30, at 351-72 (collecting and summarizing cases discussing antitrust law's prohibition on horizontal allocation of markets).

however, is the simple recognition that the labor laws are best understood as a response to the very real problem of market power within labor relations. This Article will, I hope, help start us down that path.