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STRUCTURAL LABOR RIGHTS

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American labor law was designed to ensure equal bargaining power between workers and employers. But workers' collective power against increasingly dominant employers has disintegrated. With union density at an abysmal 6.2 percent in the private sector—a level unequaled since the Great Depression—the vast majority of workers depend only on individual negotiations with employers to lift stagnant wages and ensure upward economic mobility. But decentralized, individual bargaining is not enough. Economists and legal scholars increasingly agree that, absent regulation to protect workers' collective rights, labor markets naturally strengthen employers' bargaining power over workers. Existing labor and antitrust law have failed to step in, leaving employers free to coordinate and consolidate labor-market power while constraining workers' ability to do the same. The dissolution of workers' collective rights has resulted in spiking income inequality: workers have suffered economy-wide wage stagnation and a declining share of the national income for decades. To resolve this crisis, some scholars have advocated for ambitious labor law reforms, like sector-wide bargaining, while others have turned to antitrust law to tackle employer power. While these proposals are vital, they overlook an existing opportunity already contained in the labor law that would avoid the political and doctrinal obstacles to such large-scale reforms.

This Article argues for a "structural" approach to the labor law that revives and modernizes its equal bargaining power purpose through deploying innovative social scientific analysis. A "structural" approach is one that takes into account workers' bargaining power relative to employers in determining the scope of substantive labor rights and in resolving disputes. Because employers' current buyer power strengthens their ability to indefinitely hold out on worker demands in the employment bargain, the "structural" approach seeks to deploy social scientific tools to tailor the labor law's provisions so that they resituate workers to a bargaining position from which they could equally hold out.

This Article makes three key contributions. First, it documents the dispersion and misalignment of workers' collective rights under current labor law, detailing the historical narrowing of workers' collective rights to limited tactics

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by a small set of workers against highly protected individual enterprises and the concomitant rise of employer power (Part I). Second, it introduces and schematizes the wealth of social scientific literature relevant for evaluating the relative bargaining power of employers and employees (Part II). And finally, it offers concrete proposals for how to apply these social scientific tools and insights to three areas of the National Labor Relation Board's adjudication and regulatory authority: the determination of "employer"/"employee" status, the determination of employees' substantive rights under section 7 of the National Labor Relations Act (NLRA), and the determination of what counts as sanctionable unfair labor practices under section 8 of the NLRA (Part III).

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INTRODUCTION

Workers' collective power against increasingly dominant employers has disintegrated. With union density at an abysmal 6.2 percent in the private sector—a level unequaled since the Great Depression[1]—the vast majority of workers depend only on individual negotiations with employers to lift stagnant wages and ensure upward economic mobility.[2] But decentralized, individual bargaining is not enough. Economists and legal scholars increasingly agree that, absent regulation, labor markets naturally strengthen employers' bargaining power over workers.[3]

The social costs of unequal bargaining power are immense. When employers have monopsony power, or power to operate as wage setters rather than wage takers in the employment bargain, they hire fewer workers—increasing under- and unemployment—and those workers suffer suppressed pay and benefits as well as worse working conditions.[4] Monopsony power also reduces economic productivity because employers are not competing over wages to lure workers into jobs that are the best match for their productivity and skills.[5] Monopsony has distributional effects as well, increasing in-

1. Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 582 (2007) ("Today, private sector union membership is less than ten percent of private sector employment, . . . roughly where it was in 1930.").

2. *See News Release: Union Members—2019*, BUREAU LAB. STAT. (Jan. 22, 2020), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/TDP6-XDQH].

3. *See generally* ANTHONY B. ATKINSON, INEQUALITY: WHAT CAN BE DONE? 147 (2015); ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS 29–52 (2003); Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 556–60 (2018).

4. *See supra* note 3. Monopsony power is the flip side of monopoly power—it describes power over price on the *buy* side of a transaction, where monopoly power describes power over price on the *sell* side of a transaction. The classic definition of monopsony power is the power to set wages below competitive levels, but labor economists and sociologists also define monopsony power as power to exact an unequal distribution of the relationship-specific surplus or to suppress wages below union premium to market rates. For fuller discussion, see *infra* notes 295–297 and accompanying text.

5. Naidu et al., *supra* note 3, at 558–59.

equality by allowing employers to capture rents from workers' labor.[6] In addition, when firms hire fewer workers, they produce less output and can charge higher prices that harm consumers.[7]

Existing law has failed to step in, leaving employers free to coordinate and consolidate labor-market power while limiting workers' ability to do the same.[8] Focused on consumer welfare, antitrust enforcers have allowed employers to merge without considering the effects of increased labor-market concentration on workers' wages.[9] And lax enforcement has enabled employers to engage in a range of conduct that suppresses worker pay, such as reaching wage-fixing and "no-poach" agreements with other employers and imposing restrictive noncompete provisions in employment contracts.[10] Unsurprisingly, in the absence of collective, or "countervailing," power against employers, workers enter individualized bargaining at a significant disadvantage.[11] And the empirical consensus is in: income inequality has spiked as

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6. *See supra* note 3.

7. *See generally* Hiba Hafiz, *Labor Antitrust's Paradox*, 86 U. CHI. L. REV. 381, 391–92 (2019) (describing circumstances where employer monopsony benefits and harms consumers).

8. *See, e.g.*, Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

9. *See* Hafiz, *supra* note 7, at 392–99; Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 95 CHI.-KENT L. REV. 37 (2020) [hereinafter Hafiz, *Interagency Merger*]; Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343 (2020); Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1032, 1043 (2019); Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of the Law*, SSRN (Jan. 13, 2019), https://ssrn.com/abstract=3365374 [https://perma.cc/3GZL-5ZJ5]; Naidu et al., *supra* note 3, at 547. On labor-market concentration, see generally TIM WU, THE CURSE OF BIGNESS (2018); Yue Qiu & Aaron Sojourner, *Labor-Market Concentration and Labor Compensation* (IZA Inst. of Lab. Econ., IZA DP No. 12089, 2019), http://ftp.iza.org/dp12089.pdf [https://perma.cc/TAP8-RMB8]; Arindrajit Dube, Jeff Jacobs, Suresh Naidu & Siddharth Suri, *Monopsony in Online Labor Markets*, 2 AER: INSIGHTS 33 (2020); Brad Hershbein, Claudia Macaluso & Chen Yeh, *Concentration in U.S. Local Labor Markets: Evidence from Vacancy and Employment Data* (Soc'y for Econ. Dynamics, Meeting Paper No. 1136, 2019), https://economicdynamics.org/meetpapers/2019/paper_1336.pdf [https://perma.cc/FV9E-LHW7]; José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* (IZA Inst. of Lab. Econ., IZA DP No. 11379, 2018), http://ftp.iza.org/dp11379.pdf [https://perma.cc/5SQZ-G4ZT].

10. *See, e.g.*, EVAN STARR, ECON. INNOVATION GRP., THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS 14 (2019), https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf [https://perma.cc/5H4A-EFNE]; Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 20 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24831, 2018), https://www.nber.org/papers/w24831.pdf [https://perma.cc/Y8HU-SSNV]; Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, SSRN (Sept. 13, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453433 [https://perma.cc/G3XG-8SGW].

11. *See* Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 23 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24307, 2018), https://www.nber.org/system/files/working_papers

workers have suffered economy-wide wage stagnation and a declining share of the national income for decades.[12]

When passed in 1935, the National Labor Relations Act (NLRA or Act) was designed to overcome this disparity by lifting workers' leverage as against their employers. The Act established labor rights *as* collective rights to ensure "equal[] . . . bargaining power between employers and employees."[13] It created a national labor enforcement agency—the National Labor Relations Board (NLRB or Board)—to secure this balance.[14] And its first members set out to establish a Division of Economic Research (DER) to ensure institutional alignment between this foundational purpose and the Board's real-world enforcement.[15] The DER furnished the Board with robust social scientific analyses to help the Board target its enforcement to ensure that workers' bargaining strength matched that of employers.[16]

But employer lobbying and formalist interpretations of the NLRA have driven labor law from its original purpose. In its Taft-Hartley and Landrum-Griffin Amendments to the Act, among other things, Congress exempted independent contractors from its jurisdiction and reduced workers' strike

/w24307/w24307.pdf [https://perma.cc/H32D-U3K2] (showing weaker negative correlation between labor-market concentration and wages in unionized industries); Henry S. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality over the Twentieth Century* 33–34 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24587, 2018), https://www.nber.org/system/files/working_papers/w24587/w24587.pdf [https://perma.cc/7DR7-P4N3] (showing unions' equalizing income-distribution effect).

12. On the rise in income inequality, see THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014); ESTELLE SOMMEILLER, MARK PRICE & ELLIS WAZETER, ECON. POL'Y INST., INCOME INEQUALITY IN THE U.S. BY STATE, METROPOLITAN AREA, AND COUNTY (2016), https://files.epi.org/pdf/107100.pdf [https://perma.cc/7T2B-DBBG]; Raj Chetty, David Grusky, Maximilian Hell, Nathaniel Hendren, Robert Manduca & Jimmy Narang, *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCIENCE 398 (2017). On wage stagnation and decline in workers' bargaining power, see, for example, Josh Bivens, Lawrence Mishel & John Schmitt, ECON. POL'Y INST., IT'S NOT JUST MONOPOLY AND MONOPSONY: HOW MARKET POWER HAS AFFECTED AMERICAN WAGES (2018), https://files.epi.org/pdf/145564.pdf [https://perma.cc/3M5G-SAR6], and LAWRENCE MISHEL, ELISE GOULD & JOSH BIVENS, ECON. POL'Y INST., WAGE STAGNATION IN NINE CHARTS (2015), http://www.epi.org/files/2013/wage-stagnation-in-nine-charts.pdf [https://perma.cc/MMR5-GPZ6]. On decline in labor's share of income, see, for example, *Nonfarm Business Sector: Labor Share*, FRED (June 4, 2020), https://fred.stlouisfed.org/series/PRS85006173 [https://perma.cc/AY6U-DE3Q?type=image], and David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *Concentrating on the Fall of the Labor Share*, 105 AM. ECON. REV. (PAPERS & PROC.) 180 (2017).

13. 29 U.S.C. § 151.

14. 29 U.S.C. § 153 (1953).

15. *See* Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 WIS. L. REV. 1115, 1119–25.

16. *See infra* Section I.A; James A. Gross, *Economics, Politics, and the Law: The NLRB's Division of Economic Research, 1935-1940*, 55 CORNELL L. REV. 321, 326 (1970).

protections.[17] Even more, labor law doctrine restrained workers' rights to isolated pockets of enterprise bargaining, or bargaining restricted to a single, narrowly defined employer, and limited protections for workers' exercise of economic pressure against employer buyer power.[18] This is particularly true in "fissured" workplaces, where the rise of franchising, outsourcing, subcontracting, and vertical disintegration has increasingly fragmented workplace structures, in part as a means of stripping upstream employers of compliance obligations under labor and employment law.[19] So while *employers* retain rights to integrate, disintegrate, consolidate, or tacitly coordinate their power to their advantage under corporate, antitrust, contract, and property law,[20] *workers'* collective rights have eroded to the point where they lack any substantive ability to function as *counter*structure—as effective countervailing power against employers. A legislative ban on Board hiring of economists cemented this collapse and relegated the Board to outlier status among federal agencies.[21] Lacking a social scientist-staffed internal division, the Board was handicapped in its ability to tailor regulation to the policy goals of its organic statute.[22] This lack of social scientific expertise has deprived the Board and the courts of the benefits of empirical analysis in evaluating how their decisions contribute to reducing workers' bargaining power.[23]

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17. *See, e.g.*, JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD 248–59 (1981); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983). While some interpret the Taft-Hartley and Landrum-Griffin Amendments as altering or even phasing out the NLRA's equal bargaining power purpose, this Article argues that the NLRA's equal bargaining power purpose persists due to (1) the Amendments' retention of the equal bargaining power purpose language in the Act's Preamble; (2) the Amendments' stated purpose of eliminating and preventing employer practices that diminish employment and wages, which accords with preventing employer monopsony and ensuring equal bargaining power; (3) the Amendments' legisla-legislative history; and (4) *in pari materia* principles requiring construal of the NLRA as an integrated scheme structuring labor markets in tandem with the antitrust laws' labor exemption because of their coevolution, the NLRA's verbatim adoption of the antitrust statutes' labor-exemption language, and the survival of those antitrust statutes through the NLRA's Amendments. *See infra* note 159 and accompanying text.

18. *See, e.g.*, Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978); Estlund, *supra* note 8.

19. *See* DAVID WEIL, THE FISSURED WORKPLACE (2014).

20. *See, e.g.*, Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 LAW & CONTEMP. PROBS. 65, 65 (2019).

21. *See* 29 U.S.C. § 154(a).

22. *See* Hafiz, *supra* note 15. A nonexhaustive list of internal agency divisions housing social scientific experts include the Department of Labor's Bureau of Labor Statistics; the Department of Justice's Antitrust Division's Economic Analysis Group; the Federal Trade Commission's Bureau of Economics; the Consumer Financial Protection Bureau's Office of Research and Academic Research Council; and the Securities and Exchange Commission's Division of Economic and Risk Assessment. *Id.* at 1140–51.

23. *Id.*; Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1467, 1475 n.23 (2015); Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2044–53 (2009).

The NLRB's recent adjudication of the lawfulness of the McDonald's antiunion campaign is illustrative of this failure. McDonald's franchisees allegedly fired Sean Caldwell, Tracee Nash, and Quanisha Dupree and temporarily suspended and reduced work hours of others in retaliation for their participation in the Fight for $15 campaign, a national campaign led by unions, worker centers, and labor advocates to lift the minimum wage to $15 an hour.[24] In all, the NLRB's General Counsel ("GC") charged McDonald's franchisees with seventy-eight unfair labor practice ("ULP") violations for interfering with and retaliating against workers for their participation.[25] But the GC did not stop there. He charged McDonald's USA—the franchisees' *franchisor*—as a "joint employer" for coordinating and controlling franchisees' responses to the campaign.[26] Adjudication of these charges launched the longest trial in NLRB history.[27] The trial produced a voluminous record, blasting open McDonald's USA's highly guarded but deep involvement in its franchisees' anti-union fight.[28] It was the Board's most profound examination yet of employment relationships in the "fissured workplace."[29] As significant as the "veritable deluge of evidence" at trial was, the GC's three-year effort foundered.[30] McDonald's USA strategically delayed proceedings until the Trump Administration's GC was confirmed, and he quickly settled days before the trial's close.[31] But despite the trial's impressive dive into the extent of McDonald's control over its franchisees' employees, the Board and its GC did not deploy the NLRA's most potent metric for empirically ascertaining control: the franchisor's unequal bargaining power over its franchisees' employees.[32] Thus, by not anchoring its analysis of the NLRA's provisions—here, the statutory definition of "employer"—in the Act's equal bargaining power purpose, the Board failed to consider significant evidence that could reveal the franchisor's wage-setting ability over its franchisees' employees.

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24. McDonald's USA, LLC, Case No. 02-CA-093893, slip op. at 14 (N.L.R.B. Div. of Judges July 17, 2018) (denying motions to approve settlement agreements); *About Us*, FIGHT FOR $15, https://fightfor15.org/about-us/ [https://perma.cc/D2GJ-L9F9].

25. *NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers*, NAT'L LAB. REL. BD. (Dec. 19, 2014), https://www.nlrb.gov/news-outreach/news-story/nlrb-office-of-the-general-counsel-issues-consolidated-complaints-against [https://perma.cc/4WN8-BBNP].

26. *Id.*

27. *McDonald's*, slip op. at 37.

28. *Id.* at 8, 33–36.

29. *See supra* note 19 and accompanying text.

30. *McDonald's*, slip op. at 27–31, 33–37.

31. *See id.* at 11, 37; Sharon Block & Benjamin Sachs, *The Trump Administration Is Abandoning McDonald's Workers – And Everyone Else*, WASH. POST (Feb. 9, 2018, 6:00 AM), https://www.washingtonpost.com/news/posteverything/wp/2018/02/09/the-trump-administration-is-abandoning-mcdonalds-workers-and-everyone-else/ (on file with the *Michigan Law Review*). The NLRB has since directed the ALJ to approve the settlement agreements. McDonald's USA, LLC, 368 N.L.R.B. 134 (2019).

32. *See* 29 U.S.C. § 151.

There were key indications of McDonald's USA's superior bargaining position over its franchisees' employees that antitrust scholars and social scientists would find dispositive of its wage-setting power but that were not considered at trial. Most importantly, the Board never considered McDonald's USA's uniform use of no-poaching provisions and other vertical restraints in its franchising agreements that secure its control of franchisee labor costs.[33] Legal scholars, social scientists, and the antitrust agencies all recognize that no-poaching agreements function as restraints that limit labor-market competition and reduce workers' wages.[34] Being able to move from job to job and seek offers from other employers "is critical for earnings growth," so restraints that prevent mobility deny workers "the benefits of within-industry competition for their skills."[35] Workers who sign noncompetes in their employment contracts earn less than equivalent workers who do not, and workers subject to no-poaching agreements are even worse off because they are often unaware that those agreements exist.[36] Workers are not *parties* to such employer-to-employer agreements, and employers agree to them in secret because they can violate the antitrust laws.[37] No-poaching agreements benefit franchisors and franchisees by allowing them to suppress labor costs while hiding conduct that could trigger litigation and organizing campaigns across individual franchisees.[38] But franchisor restraints in franchisee labor markets are not limited to no-poaching provisions. Social scientific research has revealed how a *range* of vertical restraints in franchising agreements solidify franchisors' control of franchisees' labor costs.[39] Together, these social scientific models and empirical data reveal significant franchisor power over franchisee employees' wages and working conditions.

Because the Board failed to prioritize the Act's equal bargaining power purpose when assessing McDonald's USA's "joint employer" status, it missed a key opportunity to secure franchisee employees' countervailing

33. *See* Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2018 WL 3105955, at *2 (N.D. Ill. June 25, 2018); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4 (2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/24FK-YBQG]; *No-Poach Approach: Division Update Spring 2019*, U.S. DEP'T JUST. (Sept. 30, 2019), http://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach [https://perma.cc/7JZ8-ZRCG]; *see also* Kati L. Griffith, *An Empirical Study of Fast-Food Franchising Contracts: Towards a New "Intermediary" Theory of Joint Employment*, 94 WASH. L. REV. 171, 198–200 (2019); Brian Callaci, The Historical and Legal Creation of a Fissured Workplace: The Case of Franchising (Sept. 2019) (Ph.D. dissertation, University of Massachusetts Amherst), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=2719&context=dissertations_2 [https://perma.cc/KDV3-PLDF]; STARR, *supra* note 10.

34. STARR, *supra* note 10, at 10; U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 33; Griffith, *supra* note 33.

35. STARR, *supra* note 10, at 10.

36. *Id.*; *see also Deslandes*, 2018 WL 3105955, at *3.

37. STARR, *supra* note 10, at 4.

38. *See, e.g.*, *Deslandes*, 2018 WL 3105955.

39. *See* Callaci, *supra* note 33.

power in negotiating their wages and working conditions. Where a franchisor controls the purse strings but has no duties to collectively bargain with workers as a "joint employer," workers may only lawfully exert economic pressure through striking an intermediary actor—their *franchisee* employer—that has little power to improve their wages or terms and conditions of work. Thus, failing to find joint employer status has cascading effects on workers' ability to remedy the power imbalance through collective action. There can be no conceivable *equal* bargaining power between franchisee employees and a franchisor that retains power over their wages but lacks any duty to bargain over them and, even worse, may affirmatively enjoin and seek monetary penalties from such employees for trying to compel better wage terms or employment conditions.

The government's failure to successfully regulate employer buyer power over workers has invited a number of proposed reforms to both labor and antitrust law. First, labor law scholars and advocates have proposed amending the NLRA to strengthen its organizing and strike protections and extend universal bargaining coverage to all workers through sectoral bargaining, or sector-wide collective bargaining where workers and employers negotiate employment terms that cover both unionized *and* nonunionized workers within that sector.[40] Others propose jettisoning the NLRA's framework altogether in favor of a new statute or broader social-safety-net protections that liberate workers from depending on employers for healthcare and other benefits.[41]

While these proposals are rich and fruitful, they face significant challenges. The first is political: congressional inability or unwillingness to amend current labor law is well documented.[42] And other Democratic agenda items—healthcare, immigration, and climate-change reforms—will likely take priority over labor law reform, exhausting limited political capital

40. *See, e.g.*, Kate Andrias, *Union Rights for All: Toward Sectoral Bargaining in the United States*, *in* THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 56 (Richard Bales & Charlotte Garden eds., 2019); SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 3, 37–45, https://lwp.law.harvard.edu/files/lwp/files/full_report_clean_slate_for_worker_power.pdf [https://perma.cc/2J44-D5LR]; David Madland, *How to Promote Sectoral Bargaining in the United States*, CTR. FOR AM. PROGRESS ACTION FUND (July 10, 2019, 12:01 AM), https://www.americanprogressaction.org/issues/economy/report/2019/07/10/174385/promote-sectoral-bargaining-united-states [https://perma.cc/BGQ3-V2YP]; KATE ANDRIAS & BRISHEN ROGERS, ROOSEVELT INST., REBUILDING WORKER VOICE IN TODAY'S ECONOMY 26–33 (2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Rebuilding-Worker-Voice-201808.pdf [https://perma.cc/4T7T-VXNK]; Andrias, *supra* note 8.

41. Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254 (2018); Brishen Rogers, *Basic Income in a Just Society*, BOS. REV. (May 15, 2017), http://bostonreview.net/forum/brishen-rogers-basic-income-just-society [https://perma.cc/UY9H-MG4P].

42. *See, e.g.*, LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 233–68 (2d ed. 2016); AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION (James A. Thurber & Antoine Yoshinaka eds., 2015); Andrias, *supra* note 8, at 32–37.

Democrats can expend if elected.[43] Second, sectoral bargaining and antipoverty programs are only as effective as the governmental and labor-market institutions that enforce them.[44] Those institutions consist most importantly of unions and other worker-led organizations, whose strength turns on the protections and remedies substantive labor law affords them.[45] Thus, while empirical evidence suggests that broad collective bargaining coverage strengthens worker bargaining power and reduces wage inequality in other countries, those results are highly correlated with much higher union-density rates, stronger labor-market institutions, and robust labor law protections.[46] In other words, without institutions and protections ensuring workers' equal bargaining power with employers, sectoral bargaining may not strengthen and may even weaken unionization rates.[47] Indeed, the history of sectoral bargaining in the United States *without* strong unions—under National Industrial Recovery Act (NIRA) labor boards and current state-level wage boards—is characterized by weak enforcement and political overrides of high wage demands.[48] That history also instructs that, without equal-

43. The Affordable Care Act's impact on exhausting the Obama Administration's political capital at the expense of other priorities is illustrative. *See, e.g.*, Mike DeBonis, *The Political Price of Obamacare*, WASH. POST (Aug. 16, 2016), https://www.washingtonpost.com/graphics/national/obama-legacy/obamacare.html [https://perma.cc/VEZ4-WMK3].

44. *See* Catherine L. Fisk, *Sustainable Alt-Labor*, 95 CHI.-KENT L. REV. 7 (2020).

45. *See, e.g.*, Andrew Bossie, *Labor and Institutions in the Wake of the World Wars*, ANDREW BOSSIE 1–2 (Oct. 25, 2009), http://andrewbossie.com/working%20papers/Labor_Inst_World_Wars.pdf [https://perma.cc/7DSW-XMVQ]; Suresh Naidu & Noam Yuchtman, *Labor Market Institutions in the Gilded Age of American Economic History* (Nat'l Bureau of Econ. Rsch., Working Paper No. 22117, 2016), https://www.nber.org/papers/w22117.pdf [https://perma.cc/6LQG-N8BT].

46. *See, e.g.*, MAARTEN VAN KLAVEREN & DENIS GREGORY, RESTORING MULTI-EMPLOYER BARGAINING IN EUROPE: PROSPECTS AND CHALLENGES (2019); ORG. ECON. CO-OPERATION & DEV., GOOD JOBS FOR ALL IN A CHANGING WORLD OF WORK (2018); SHANE GODFREY, INT'L LAB. OFF., MULTI-EMPLOYER COLLECTIVE BARGAINING IN SOUTH AFRICA (2018); *What's Happening to Collective Bargaining in Europe?*, EUR. TRADE UNION INST. (Apr. 11, 2019), https://www.etui.org/services/facts-figures/benchmarks/what-s-happening-to-collective-bargaining-in-europe [https://perma.cc/2XDX-M4HS]; Maarten Keune, *Less Governance Capacity and More Inequality: The Effects of the Assault on Collective Bargaining in the EU*, *in* WAGE BARGAINING UNDER THE NEW EUROPEAN ECONOMIC GOVERNANCE: ALTERNATIVE STRATEGIES FOR INCLUSIVE GROWTH 283 (Guy Van Gyes & Thorsten Schulten eds., 2015); Damian Grimshaw, Gerhard Bosch & Jill Rubery, *Minimum Wages and Collective Bargaining: What Types of Pay Bargaining Can Foster Positive Pay Equity Outcomes?*, 52 BRIT. J. INDUS. RELS. 470 (2014).

47. *See, e.g.*, César F. Rosado Marzán, *Can Wage Boards Revive U.S. Labor?: Marshalling Evidence from Puerto Rico*, 95 CHI.-KENT L. REV. 127, 134–35 (2020); Lyle Scruggs, *The Ghent System and Union Membership in Europe*, 1970–1996, 55 POL. RSCH. Q. 275, 286–90 (2002).

48. *See generally* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE 166–68 (Fordham Univ. Press 1995) (1966); LEWIS L. LORWIN & ARTHUR WUBNIG, LABOR RELATIONS BOARDS: THE REGULATION OF COLLECTIVE BARGAINING UNDER THE NATIONAL INDUSTRIAL RECOVERY ACT (1935); Kate Andrias, *Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law*, 12 HARV. L. & POL'Y REV. ONLINE 1, 6–10 (2017); Harold L. Cole & Lee E. Ohanian, *New Deal*

izing bargaining power, sectoral bargaining can facilitate employer collusion in labor and product markets at the expense of workers *and* consumers.[49] So labor law's ability to regulate workers' relative bargaining power is and will continue to be a necessary component of any successful labor-market regulation scheme.

A second strand of scholarship has sought to tackle employer power and its resulting wage suppression through the antitrust laws. This recent body of antitrust scholarship has been motivated in part by the failure of existing labor law reform efforts.[50] But, as I have addressed elsewhere, workers face significant obstacles to success under existing antitrust doctrine, which generally prioritizes consumer welfare over that of other constituencies, like workers.[51] And the singular focus of antitrust enforcers on traditional microeconomic analysis provides limited insight into the complicated bargaining dynamics that determine compensation in labor markets.[52] As a result, antitrust scholars readily concede that labor law reform is a necessary complement to antitrust enforcement in correcting for employers' monopsony power and anticompetitive conduct in labor markets.[53]

This Article builds on and responds to current proposals by arguing for a "structural" approach to labor law itself. By "structural" approach, I mean one that takes into account workers' relative bargaining power as compared to their employers in determining the scope of substantive labor rights and

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Policies and the Persistence of the Great Depression: A General Equilibrium Analysis, 112 J. POL. ECON. 779 (2004).

49. *See* HAWLEY, *supra* note 48, at 166–68.

50. *See supra* note 9; Ioana Marinescu & Eric A. Posner, *A Proposal to Enhance Antitrust Protection Against Labor Monopsony* (Roosevelt Inst. Working Paper, 2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_ProposalToEnhanceAntitrust Protection_workingpaper_201812.pdf [https://perma.cc/8G8F-77K9].

51. Hafiz, *supra* note 7, at 383.

52. *See infra* Section II.F.

53. Naidu & Posner, *supra* note 9, at 2 ("[A]ntitrust regulation is a poor substitute for traditional employment/labor law, . . . more extensive labor market intervention is required to combat the natural monopsonies in labor market[s]."); *see also* Marinescu & Posner, *supra* note 9, at 1389–91 (advocating supplementing antitrust with labor law findings); Marinescu & Posner, *supra* note 50, at 13–16, 21 (same). A third set of scholars address market failures and unequal gains from trade through law and economics, microeconomic theory, game theory, and behavioral science solutions. *See, e.g.*, OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (Penguin Books 2009) (2008); Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665 (2012); Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869 (2011) [hereinafter Ben-Shahar, *Fixing Unfair Contracts*]; Omri Ben-Shahar, Essay, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396 (2009) [hereinafter Ben-Shahar, *A Bargaining Power Theory of Default Rules*]. While they integrate and advance the literature in many areas—particularly contract and consumer protection law—they have not concentrated on remedying the employment bargain or collective bargaining. *But see* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1502–04 (1998).

in resolving disputes. A key component of such an approach involves the integration of social scientific advances in the study of market power and bargaining power into the NLRA's administration.[54] Because employers' current buyer power strengthens their ability to indefinitely hold out on worker demands in the employment bargain, the "structural" approach seeks to resituate workers to a bargaining position from which they could equally hold out. And it proposes accomplishing that by applying social scientific tools to a reinvigorated analysis of the NLRA's core regulatory components: who counts as "employees" and "employers"; the scope of workers' right to organize, form unions, bargain collectively, and engage in concerted activity; and the scope of workers' and employers' ULPs.[55]

This proposal does not require overcoming stubborn congressional impasses because it is already baked into the purpose of the labor law. The NLRA's legislative history and policy goals support achieving equal bargaining power, as does the Board's early practice of institutionally aligning research and litigation support with its DER. Reviving attention to this purpose is consistent with the Board and the courts' long-adopted purposivist approach to the NLRA.[56] In the face of unprecedented income inequality,

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54. *See infra* Sections II.A–E.

55. *See generally* 29 U.S.C. §§ 152(2)–(3), 157–158; *see also infra* Section III.

56. *See, e.g.*, NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 835 (1984) ("[W]hat emerges from the general background of § 7—and what is consistent with the Act's statement of purpose—is a congressional intent to create an equality in bargaining power between the employee and the employer."); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 123–24 (1944) ("Whether, given the intended national uniformity, the term 'employee' includes such workers as these . . . must be answered primarily from the history, terms and purposes of the legislation."); Amy Semet, *An Empirical Examination of Agency Statutory Interpretation*, 103 MINN. L. REV. 2255, 2291 (2019) (finding the "Board uses purposive methods, at least in part, in almost all" of over seven thousand dataset decisions from Clinton through Obama Boards); Fisk & Malamud, *supra* note 23, at 2040 ("The Supreme Court's statutory interpretation in NLRA cases often turns on nothing more than . . . the underlying purposes of the statute."); Daniel P. O'Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMP. L. REV. 177, 217–20 (2008); *see also* Lechmere, Inc. v. NLRB, 502 U.S. 527, 536 (1992) ("[W]e have long recognized[] that the Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life.' " (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963))); GUY DAVIDOV, A PURPOSIVE APPROACH TO LABOUR LAW (2016). While the NLRA has multiple purposes, Parts I and III argue that Congress viewed equal bargaining power as necessary for achieving the NLRA's other purposes, and social scientific developments support that view. The purposivist reading as proposed here is also consistent with other approaches to statutory interpretation. First, it is consistent with a textualist reading: the equal bargaining power purpose is clearly stated in the text of the Preamble, and the statutory text of the NLRA's various provisions discussed herein (sections 2, 7, and 8) are interpreted in the context of the whole statute under a textualist approach. *See, e.g.*, Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347–48, 376, 348 n.5, 376 n.88 (2005). Further, a purposivist reading is consistent with an intentionalist/statutory originalist approach to interpreting the NLRA. The legislative history of both the 1935 NLRA and the Taft-Hartley and Landrum-Griffin Amendments reveal Congress's intent that the NLRA equalize bargaining power between employers and employees. *See infra* Section I.A and note 159; *see also* Transcript of Oral Argument at 30, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1618) (questioning counsel about whether the 1964 Congress, in prohibiting discrimination on the

ensuring workers' countervailing power to pervasive employer power is a crucial policy goal, now more than ever. As employers continue to devise new mechanisms to evade legal obligations under labor law, including through workplace restructuring and outsourcing to the "gig" economy, a structural analysis would ensure that legal determinations under the labor law are tethered to labor-market realities that limit workers' leverage over their terms and conditions of work. And ensuring equal bargaining power could complement broader legislative reform efforts if and when Congress moves forward on them.

Nonlabor agencies such as the antitrust agencies and the Consumer Financial Protection Bureau (CFPB) already utilize analyses of market and bargaining power based on contributions from a range of social scientific fields.[57] Repealing the ban on Board hiring of economists and/or utilizing agency regulatory tools like notice-and-comment rulemaking, solicitation of amicus briefs, and coordination with other agencies could allow the Board to follow their lead and modernize Board regulation of collective rights.[58] Integrating social science into the Board's analysis of and justifications for its regulation would better substantiate its factual findings and interpretive decisions for judicial review.[59] And it would open new, evidence-based lines of contestation about the sources and adequacy of the Board's rationales.

In advocating for a structural approach to labor-rights regulation, this Article makes three key contributions. First, it documents the dispersion and misalignment of workers' collective rights under current labor law. Part I reveals the early institutional alignment between Board enforcement and its social scientific expertise through the NLRA's equal bargaining power purpose. It then documents the historical narrowing of workers' collective rights to limited tactics by a small set of workers against highly protected individual enterprises and the concomitant rise of employer power over workers' wages and working conditions. This narrowing occurred through three mechanisms: (1) tightening the labor exemption to the antitrust laws, (2) shrinking bargaining units and expanding exemptions to the labor law's protections, and (3) circumscribing workers' NLRA-protected rights while construing ULP violations in favor of employers over employees. This Article demon-

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basis of "sex," intended to prohibit discrimination on the basis of sexual orientation); Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 87–88 (2019) (providing a brief account of the rise of "original public meaning" statutory originalism as a method of statutory interpretation).

57. *See* Hafiz, *supra* note 15, at 1140–54.

58. A repeal of the NLRA's economist-hiring ban was passed by the House of Representatives as part of the Protecting the Right to Organize ("PRO") Act on February 6, 2020. H.R. 2472, 116th Cong. § 2(c) (2020) (enacted). This is inspired by similar institutional-design-based approaches to balancing power in the administrative state. *See generally* K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2016); K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671 (2018) (book review); Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016).

59. *See infra* note 320 and accompanying text.

strates that this narrowing has strengthened employers' bargaining power relative to workers, and thus frustrated the NLRA's key equal bargaining power purpose. In Part II, this Article advances equal bargaining power theory by deriving four schematic categories of bargaining power from social scientific developments in economics, industrial relations, and the sociology and psychology of work: "external," "transactional," "internal," and "distributional." It summarizes the social scientific research contributing to these four mechanisms of assessing bargaining power and how they can be used by the Board and the courts to better ensure equal bargaining power. And finally, Part III offers concrete proposals for how to apply those social scientific tools to three areas of the Board's adjudication and regulatory authority: the determination of "employer"/"employee" status, the determination of employees' substantive rights under the NLRA's section 7, and the determination of what counts as sanctionable ULPs under the NLRA's section 8.

I. DISPERSION AND MISALIGNMENT OF WORKERS' COLLECTIVE RIGHTS

Modern labor-market regulation emerged from a congressional recognition that, to enable workers to lift their wages and secure a more equal share of their contributions to economic growth, it would need to restrain firms' ability to consolidate economic power under the antitrust laws while exempting and protecting workers' collective coordination under the Act. Thus, antitrust and labor law were an integrated scheme that coevolved under the supervision of regulators and social scientists who viewed economic stabilization—through economic panics, recessions, the Great Depression, and rampant strikes—as hinging crucially on calibrating the equal bargaining power of labor and capital. This Part details these integrated origins and the political and doctrinal forces that dismantled Congress's unitary vision of labor-market regulation after the Second World War. It delineates the mechanisms by which the Board, the courts, and the postwar Congress shifted from a centralized system of labor-market regulation directed at restraining employers' economic power to a decentralized system curbing and dispersing workers' collective economic power.

A. *Equal Bargaining Power: The Origins of Modern Labor Regulation*

The NLRA's equal bargaining power purpose is at the core of workers' substantive collective rights under the statute. Those rights are enshrined in the NLRA's section 7: "Employees 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 . . . ."[60] By far the most potent collective protection under the Act is that for workers' "concerted activities," or protected ability to engage in

60. 29 U.S.C. § 157.

strikes and other economic weapons collectively.[61] Section 7's language was extracted verbatim from prior statutes immunizing workers' coordination from antitrust liability and injunctions under the Sherman Antitrust Act as a means of ensuring equal bargaining power. This Subpart reveals how antitrust law and social science shaped the NLRA's design and implementation as a means of overcoming employer wage setting and achieving macroeconomic growth and redistributive goals. It historically situates the NLRA's equal bargaining power purpose to better understand why analysis of economic power and social scientific expertise were so central to the NLRA's original achievements that would later be dismantled.

Until the Clayton Act of 1914, federal courts applied the Sherman Act against labor activity more often than business activity.[62] A product of massive labor organizing, the Clayton Act exempted worker coordination from the antitrust laws, declaring that "labor . . . is not a commodity or article of commerce" and labor unions were not "illegal combinations or conspiracies in restraint of trade, under the antitrust laws."[63] It prohibited courts from enjoining strikes, boycotts, and other lawful concerted activities as long as they arose out of employer-employee disputes over employment terms.[64] The Supreme Court recognized the labor exemption's congressional purpose as equalizing worker bargaining power with employers' industry-wide:

> Union was essential to give laborers opportunity to deal on equality with their employer. . . . To render this combination at all effective, employees must make their combination extend *beyond one shop*. . . . [B]ecause in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood.[65]

But a conservative judiciary interpreted the Clayton Act narrowly, granting injunctive relief to employers against strikes pending resolution of their legal challenges to workers' coordinated conduct.[66] Courts' imposition of strike-killing injunctions propelled union advocacy for broader immunity from antitrust liability and the ultimate 1932 passage of the Norris-LaGuardia Act.[67] The Act barred federal courts from enjoining workers'

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61. *See, e.g.*, Alex Gourevitch, *The Right to Strike: A Radical View*, 112 AM. POL. SCI. REV. 905, 905 (2018); Ahmed White, *Its Own Dubious Battle: The Impossible Defense of an Effective Right to Strike*, 2018 WIS. L. REV. 1065 (2018).

62. Clayton Antitrust Act of 1914, ch. 323, § 7, 38 Stat. 730, 731–32 (codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53); WILLIAM BREIT & KENNETH G. ELZINGA, ANTITRUST PENALTY REFORM: AN ECONOMIC ANALYSIS 52 (1986); ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 2–3 (1976). *See generally* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930).

63. Clayton Act § 6 (1914) (current version at 15 U.S.C. § 17).

64. *Id.* § 20 (current version at 29 U.S.C. § 52).

65. Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921) (emphasis added).

66. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

67. Eileen Silverstein, *Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction*, 11 HOFSTRA LAB. & EMP. L.J. 97, 107–08 (1993).

nonviolent labor disputes.[68] It recognized that individual workers' unequal bargaining power relative to employers—who could legally engage in collective forms of ownership—necessitated the ban. The Act also recognized the need for worker protection against "interference, restraint, or coercion of employers . . . in self-organization or *in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*."[69]

The Norris-La Guardia Act's labor exemption from antitrust law was the product of a policy consensus recognizing individual workers' unequal bargaining power against firms and consolidated industries. Its language was crafted by leading attorneys and an economist who together would compose Franklin Delano Roosevelt's brain trust—Felix Frankfurter, Francis Sayre, Herman Oliphant, Edwin Witte, and Donald Richberg.[70] They distilled a broader Progressive understanding—from Legal Realists to institutional economists and beyond—that employers' unequal bargaining power stemmed from state-granted privileges and rights under corporate and property law. This unequal power precluded any ideal of formal equality achievable through individual employment contracts: "The premise of legal equality was in fact fallacious, for legal rights, privileges and duties depend on property rights and these depend on the law. . . . [which] still imposes vastly unequal handicaps."[71] In presenting the bill, Senator George Norris emphasized individual workers' helplessness relative to "the combination of large corporations in a particular line of business."[72] Such combinations of employer power, he argued, required "the laboring man . . . [to] accept unconditionally the terms [employers] laid down," and "[i]f conditions become unbearable, . . . to go alone and face the big combination of perhaps millions of wealth. . . . He has no opportunity to join with his fellows and make his demands effective."[73]

This consensus was even more pronounced in the passage and implementation of the NIRA, which adopted—again verbatim—the collective-rights protections exempted from antitrust scrutiny in the Norris-La Guardia Act. The NIRA suspended the antitrust laws to allow industries to form trade associations and adopt codes of fair competition that would regulate production and pricing, including industry-wide standards for wages and working conditions.[74] Approval of industry committees' codes was condi-

68. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115).

69. 29 U.S.C. § 102 (emphasis added).

70. Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 332–35 (1981) (collecting sources).

71. Robert L. Hale, *Labor Law*, *in* 8 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 667, 667–68 (Edwin R.A. Seligman et al. eds., 1932).

72. 75 CONG. REC. 4504 (1932).

73. *Id.*

74. National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 195, § 1, *declared unconstitutional by* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

tioned, under section 7 of the Act, on employees in the industry having "the right to organize and bargain collectively through representatives of their own choosing, . . . free from interference, restraint, or coercion of employers . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[75] The NIRA also required employers to comply with maximum hours, minimum rates of pay, and other working conditions "approved or prescribed by the President."[76]

But the employee-representation plans industries formed to comply with section 7 were deeply disappointing to organized labor and Senator Robert Wagner. Wagner used the lessons of the NIRA's industry-wide labor-management regulatory scheme to inform his first failed Labor Disputes Act of 1934 and the final NLRA of 1935. The National Recovery Administration's (NRA's) weaknesses stemmed in no small part from employer groups colluding and controlling labor decisions through standard setting in their respective industry codes.[77] Immunizing this standard setting from antitrust liability allowed employers to share information not only about current and future production quotas and pricing in product markets but also about labor costs and union-busting strategies in labor markets.[78] Organized labor's interests were left to their limited advisory capacity on a nonbinding Labor Advisory Board to the NRA, the political process, and strikes.[79]

In responding to these deficiencies, Wagner sought to reinvigorate the NRA's core benefit of *restructuring* the relationship between labor and capital, but through adapting section 7 into *labor* legislation. Wagner appreciated the NRA's attempt to establish "a *balance* between production and profits on one side and wages on the other[,] . . . promot[ing] healthy price relationships and . . . prevent[ing] any particular group from becoming too favored in the exchange process."[80] But Wagner saw a key limitation in the NRA: its inability to achieve distributional fairness that would increase mass-purchasing power necessary for a sustainable recovery.[81] What struck Wagner most was the fact that, despite suspending the antitrust laws and allowing industries to price-fix, and despite the growth in industrial output and

75. *Id.* § 7(a).

76. *Id.*

77. *See generally* 1 JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD 7–15 (1974).

78. *See generally id.*; IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 35–37 (1950).

79. *See* LORWIN & WUBNIG, *supra* note 48, at 57–59.

80. 78 CONG. REC. 9334 (1934) (emphasis added).

81. *Id.* at 9335 ("The immediate problem before us . . . is to prevent the production-control devices of the new deal from being turned into an old-deal instrument for the profit of the few and the denial of the many. . . . More fundamental than any of the questions . . . is the relationship between wages and profits. A *balance* between the return to industry and the return to labor is at the very core of economic stability, and it is here that the new-deal program seems in greatest need of immediate improvement." (emphasis added)).

profits the NRA effectuated, employers refused to reduce workers' hours or raise wages.[82] Further, under the NRA, employment rates had only minimally increased, making "additional and more serious depressions . . . only a matter of a few years."[83] Wagner, in other words, blamed employer collusion and ability to profitably suppress wages, advocating for *more* than merely returning wages to levels allowing industry to run at existing rates. He argued, "We cannot justify ourselves in stopping short when that level is reached. We must go on to create a *fairer system*, in which the worker shall *share equitably* in our great wealth . . . ."[84] He justified worker combinations under the Wagner Act as a means of doing so: "To match the huge aggregate[] of modern capital[,] the wage earner must be organized . . . ."[85]

Wagner's labor law was thus first proposed as a NIRA amendment to administer its section 7 provisions through "a national labor board with adequate enforcement powers."[86] It was anchored in employers' ability to "unite in trade associations"—a necessity, Wagner believed, to lift the country out of depression. But he viewed this "united strength" as "fraught with great danger to workers and consumers if it is not *counterbalanced* by the equal organization and equal bargaining power of employees."[87] Wagner understood that equality as necessary to ensure "a wise distribution of wealth between management and labor, to maintain a full flow of purchasing power, and to prevent recurrent depressions. Genuine collective bargaining is the only way to attain equality of bargaining power."[88]

This foundational purpose—achieving equal bargaining power—animated all other provisions of Wagner's Act. The Act's proposed ban on employer-dominated, or "company," unions was based on those unions

> mak[ing] a sham of equal bargaining power by restricting employee cooperation to a *single employer unit at a time* when business men are allowed to band together in large groups. It deprives workers of the wider cooperation . . . necessary . . . to stabilize and standardize wage levels . . . and to exercise their proper voice in economic affairs.[89]

Wagner believed company unions could not correct information asymmetries and other market failures accruing to employer power:

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82. *Id.*

83. *Id.*

84. *Id.* at 9335–36 (emphasis added).

85. Robert Wagner, Senator, The New Responsibilities of Organized Labor, Address at the New York State Federation of Labor Convention, *in* 70 CONG. REC. 225, 226 (1928); *see also* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1409 n.124 (1993) (discussing impact on NLRA of legal realist analysis of "pervasiveness of relations of power and coercion in the labor market").

86. 78 CONG. REC. 3443 (1934).

87. *Id.* (emphasis added).

88. *Id.*

89. *Id.* (emphasis added).

> [A worker] has *only slight knowledge of the labor market, or of general business conditions*. His trade is tending a machine. If forbidden to hire an expert in industrial relationships, he is entirely ineffectual in his attempts to take advantage of legitimate opportunities. . . . [O]nly representatives who are not subservient to the employer . . . can act freely in the interest of employees.[90]

Wagner concluded—based on the "preeminent institutionalist economists" who formed his inner circle[91]—that employer buyer power, unchecked by labor-market institutions with real countervailing power, would fail to lift workers' wages.[92] The bill, as summarized, was introduced as Senate Bill 2926 "to equalize the bargaining power of employers and employees," and it was referred in final form by that same language.[93]

The NLRA formulated workers' substantive rights in the very language of workers' protected coordination rights under the Norris-La Guardia Act and NIRA's section 7, retaining as a core purpose equal bargaining power between employers and employees. In referring the bill, the Senate Report stated the NLRA's objectives as industrial peace and encouraging "that equality of bargaining power which is a *prerequisite* to equality of opportunity and freedom of contract."[94] The Senate grounded this second objective on the consensus that the "relative weakness of the isolated wage earner caught in the complex of modern industrialism" was "such a commonplace of our economic literature and political vocabulary that it needs no exposition."[95] This consensus stemmed from an understanding of how market concentration and weaker government and judicial antitrust enforcement against firms impacted workers.[96] The Committee Report cited a long history of

90. *Id.* (emphasis added).

91. Barenberg, *supra* note 85, at 1405.

92. 78 CONG. REC. 3439, 3444 (1934) ("The recovery program . . . . made relatively slow progress in affecting that fair distribution of purchasing power upon which permanent prosperity must rest. Today, despite the minimum-wage provisions of the codes, the purchasing power of the individual employee . . . is less than it was . . . last year. This situation cannot be remedied by new codes or by general exhortations. It can be remedied only when there is genuine cooperation between employers and employees, on a basis of equal bargaining power.").

93. *Id.*; S. REP. NO. 573, at 1 (1935).

94. S. REP. NO. 573, at 3 (emphasis added); Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 617 (2009). The NLRA's language and legislative history is ambiguous as to whether Congress intended the Board to *administer* an even balance of bargaining power or intended the establishment of collective bargaining to *itself* place labor and capital on equal footing. *See* 29 U.S.C. § 151; Klare, *supra* note 18, at 282 n.56. In the face of this ambiguity, courts devised doctrine favoring the latter interpretation, excising from the Board's analysis and intervention in the unionization and collective bargaining process substantive determinations about the realities of equal bargaining power in labor-management relations and the impact of its regulation on those realities. *See infra* Section I.D.1.

95. S. REP. NO. 573, at 3.

96. *Id.* ("This relative weakness of position has been intensified by the . . . greater concentration of business, by the tendency of the courts to narrow the application of the antitrust

Congress's role "in redressing this inequality of bargaining power" through the Railway Labor and Norris-LaGuardia Acts as well as Depression-era interventionist labor policies.[97] It thus envisioned an enduring policy to equalize bargaining power originating from antitrust exemptions and fulfilled by the NLRA, unifying antitrust and labor policy under a single goal. Minimum wage/maximum hour legislation alone was "not a complete solution."[98] The Committee's consensus was that "collective bargaining, as it bears upon industrial peace and equality of bargaining power," was necessary under a "permanent Federal law" of national scope.[99]

To achieve the NLRA's equal bargaining power goal, the Senate Report understood statutory "employees" as "not limited to the employees of a particular employer" or "a single-employer unit."[100] Accustomed to sectoral bargaining under the NIRA's industrial boards, the Senate not only welcomed industry-wide bargaining but may also have thought it necessary for the Act's survival on Commerce Clause grounds after *Schechter Poultry* declared the NIRA unconstitutional.[101] Contemporaneous commentary viewed restricting collective bargaining to a single employer group as frustrating the NLRA's policy of "stabiliz[ing] . . . wage rates throughout each industry," "ignor[ing] the realities of an industrial system dominated by huge combines subject to centralized control."[102] The NLRA's equal bargaining power purpose was also extended to justify "confining the bill to unfair labor practices by employers" as opposed to unions as well.[103]

As passed, the 1935 NLRA's stated purpose in its Preamble—"restoring equality of bargaining power between employers and employees"—structurally reinforced the language it drew verbatim from the language of the Clayton and Norris-LaGuardia Act's exemptions of worker coordination from antitrust liability.[104] This purpose was institutionally aligned with the Board's development of expertise in its DER, which researched, analyzed,

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laws, and more recently by the policy of the Government in encouraging cooperative activity among trade and industrial groups.").

97. *Id.*

98. *Id.* at 4.

99. *Id.*

100. *Id.* at 6.

101. A.L.A. Schechter Poultry v. United States, 295 U.S. 495 (1935). *See* S. REP. NO. 573, at 7 ("[T]he limitation of this bill to events affecting interstate commerce is sufficient to prevent intervention by the Federal Government in controversies of purely local significance."); *id.* (" '[L]abor dispute' includes cases where the disputants do not stand in the proximate relation of employer and employee. . . . [C]ourts and Congress have already recognized that employers and employees not in proximate relationship may be drawn into common controversies by economic forces.").

102. Legislation Comment, *The Wagner Labor Disputes Act*, 35 COLUM. L. REV. 1098, 1107 (1935).

103. S. REP. NO. 573, at 16. The 1947 Taft-Hartley Amendments extended the NLRA's prohibition against employers' unfair labor practices to also cover unfair labor practices committed by unions. *See infra* note 159 and accompanying text.

104. 29 U.S.C. § 151.

and provided litigation support for Board enforcement between 1935 and 1940, when its appropriations were cut.[105] During the period that the DER functioned, it conducted industry- and economy-wide studies that assessed the sources of employer and employee bargaining power in specific industries.[106] Social scientists in the Division completed impact studies of the effects of employer coercion on worker organizing; collective bargaining on labor peace; and, in likely the first agency cost-benefit analysis ever, the NLRB's regulation and failure to regulate.[107]

A good example of the DER's use of social science to further the NLRA's equal bargaining power goals is its 217-page study researching collective bargaining in the newspaper industry. The study, entitled "Collective Bargaining in the Newspaper Industry," framed its inquiry in terms of the "legislative finding which led to the [Board's] creation": "that the flow of commerce is affected and burdened by the inequality of bargaining power" between employers and employees.[108] And its research on labor relations in the newspaper industry was to serve as the "basis upon which conclusions may be reached on . . . whether there is disparity between the bargaining power of employers and that of employees."[109] The report advised the Board on "how to increase and coordinate [union] membership in order to achieve bargaining power commensurate with that of large scale industry and publishers' associations."[110] It described the "integration of management . . . characteristic of the industry" as "mean[ing] that the usual inequal-inequality of bargaining power between the employer and the individual employee is increased" because

> [t]he employee . . . faces not only the management of his paper but the centralized authority of the *entire chain*, with the augmented power derived from[:] its increased political and social influence[;] its pooled resources[;] . . . its capacity to hire the services of able attorneys and labor experts and to own large facilities for research and propaganda[;]

and its membership in the American Newspaper Publishers' Association.[111] The study reported that industry-wide "[c]entralization and coordination of bargaining activity and increased membership . . . enabled the Guild to reduce the disparity in bargaining power between the local Guilds and the

105. *See* Hafiz, *supra* note 15.

106. *See, e.g.*, DIV. ECON. RSCH., NLRB, COLLECTIVE BARGAINING IN THE NEWSPAPER INDUSTRY (1939).

107. *See, e.g.*, 4 NLRB ANN. REP. 21, 57, 155–56 (1939); DAVID J. SAPOSS & MORRIS WEISZ, NLRB, DIV. OF ECON. RSCH., RESEARCH MEMORANDUM NO. 7, SAVINGS RESULTING FROM THE EFFECTIVE OPERATION OF THE NATIONAL LABOR RELATIONS ACT IN 1938, COMPARED WITH COSTS OF ITS OPERATION (1939).

108. DIV. ECON. RSCH., NLRB, *supra* note 106, at ix.

109. *Id.* at x.

110. *Id.* at 68.

111. *Id.* at 127, 169 (emphasis added).

publishers."[112] In other studies, the DER introduced firm-specific and industry-wide evidence to support the Board's prosecution of ULPs based on employers' unequal bargaining power; the scope of appropriate bargaining units (e.g., whether "the collective bargaining history and the economic character of an industry warrant the certification of a multiple employer unit"); and whether certain workers, including agricultural processing workers, ought to be deemed "employees" based on the Act's purposes.[113]

Courts relied on and cited the DER's data and analyses in their purposivist interpretation of the NLRA throughout the DER's five-year contribution to Board enforcement and adjudication.[114] Most prominently, when the Supreme Court upheld the NLRA's constitutionality in *NLRB v. Jones & Laughlin Steel*, it explicitly relied on the DER's expertise and reports, reinforcing the Act's equal bargaining power purpose by describing "the reason for labor organizations" stated "[l]ong ago": "that union was essential to give laborers opportunity to deal on an equality with their employer."[115] The Court recognized that the NLRA placed within the Board's authority the decision on "the unit appropriate for the purposes of collective bargaining," stating that the Board must make that decision to "effectuate the policies of this [Act,]" including equal bargaining power.[116] After *Jones & Laughlin*, the Board ruled that "employers" governed by the Act included multiemployer associations as agents for constituent employers.[117]

Thus, the NLRA originally envisioned a broad grant of collective-labor protections sufficient to counter employers' asymmetric buyer power in the employment bargain. Unfortunately, despite this radical start,[118] that broad grant was short-lived. Employers coordinated fierce antiunion resistance through congressional lobbying (resulting in the Taft-Hartley and Landrum-Griffin Amendments) and successful campaigns to defang the NLRA's original scope and worker protections in the Board and the courts.[119] A Red Scare

112. *Id.* at 127.

113. 4 NLRB ANN. REP. 155 (1939). For examples of DER-produced evidence in NLRA cases, see *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 & n.8 (1937); *Virginia Railway Co. v. System Federation No. 40*, 300 U.S. 515, 545–46 & nn. 4–5 (1937); *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 267 & n.2 (1938); *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523–24 & n.1 (1941); and *NLRB v. Crowe Coal Co.*, 104 F.2d 633, 634 & n.1 (8th Cir. 1939). *See also* David Ziskind, *The Use of Economic Data in Labor Cases*, 6 U. CHI. L. REV. 607 (1939).

114. *See supra* note 113. For a detailed account of the Supreme Court's reliance on DER data and analysis, see Gross, *supra* note 16, at 321–22, 332–34.

115. *See* 301 U.S. at 33; Gross, *supra* note 16.

116. 29 U.S.C. §§ 159(b), 160(c). *See generally* Kenneth Casebeer, *Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 INDUS. RELS. L.J. 73, 77–86, app. (1989) (recounting legislative history).

117. Shipowners' Ass'n of the Pac. Coast, 7 N.L.R.B. 1002, 1024–25 (1938); *see also* 29 U.S.C. § 152(1)–(2).

118. Klare, *supra* note 18, at 265–66, 281–89.

119. *See, e.g.*, JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994 (1995); G. WILLIAM DOMHOFF, THE HIGHER CIRCLES: THE GOVERNING CLASS IN AMERICA 156–250 (1970); *supra* note 17 and accompanying text.

purge of the Board's interdisciplinary social scientific experts who informed its equal bargaining analysis—eliminating DER appropriations and then statutorily banning Board hiring of economists[120]—decimated the Board's expertise in labor-market regulation, creating a vacuum where the Board once anchored its justifications and legitimacy on judicial review.[121] And while the durability of other New Deal and post-New Deal social-safety-net programs—federal welfare programs, social security, Medicare—was fueled by expert bureaucracies implementing equality-based government schemes,[122] the institutional absence of social science at the Board, combined with employers' political pressure and anemically substantiated, formalist court decisions, narrowed the Act's scope to decentralized, single-enterprise bargaining with weak union protections.

The dismantling of workers' collective structural power occurred in three broad movements: judicial limitation of workers' exempted coordination from the antitrust laws; agency, judicial, and legislative confinement of workers' collective rights to single-firm bargaining-unit defaults and expansion of worker exemptions from the NLRA; and agency, judicial, and legislative narrowing of workers' substantive rights under Sections 7 and 8 of the NLRA. The following Subparts detail these.

B. *Narrowing Workers' Collective Rights: Antitrust's Labor Exemption*

Courts first confined workers' ability to leverage their collective rights indirectly, by narrowing workers' antitrust immunity for coordinating against firms beyond their individual employer. This Subpart explains how this narrowing occurred, thus chilling and deterring worker coordination. It argues that, because courts' analysis neither was informed by labor-market structure nor contemplated employer wage-setting power and collusion, it ignored how workers' collective response beyond their individual employer might be required to correct employers' accrued buyer power. This Subpart further details how, in shaping the parameters of the labor exemption, courts valued consumer welfare in product markets over worker welfare in labor markets. Courts did this without fully assessing the short- and long-term impacts of prioritizing consumer welfare on employers' buyer power to suppress wages and extract unequal surplus from the employment relationship.

Workers initially used the Clayton and Norris-LaGuardia Acts' "statutory exemption" from antitrust law as a shield to protect their coordinated leverage against their direct employers' labor-market competitors, indirect

120. *See* Hafiz, *supra* note 15, at 1119–29.

121. *See supra* text accompanying note 23.

122. *See, e.g.*, DAVID BARTON SMITH, THE POWER TO HEAL: CIVIL RIGHTS, MEDICARE, AND THE STRUGGLE TO TRANSFORM AMERICA'S HEALTH CARE SYSTEM 105–10 (2016); Rahman, *supra* note 58, at 1686–87; Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 343–44 (2012).

employers, and those who dealt with their direct employers.[123] Specifically, workers targeted and struck (1) nonunionized firms to increase union density and limit employers' ability to draw on a reserve army of nonunionized replacement workers; and/or (2) firms that enabled their employer to ride out strikes, including suppliers or distribution outlets that serviced their direct employer's continued operation during work stoppages.[124] But courts eroded that statutory exemption through antitrust common law—the "*non*-statutory" labor exemption—widely subjecting worker strikes and other concerted activity to criminal sanction, treble damages, and injunctions.[125] The non-statutory exemption exposes workers to antitrust liability if the primary effects of their restraints are felt in product rather than labor markets.[126] The most common form of such restraints is conduct—like strikes and union agreements—aimed at earlier targets of workers' coordinated leverage: their direct employer's nonunionized competitors and suppliers or distributors that, in servicing that employer's continued operations during strikes, enable that employer's stronger bargaining leverage.[127] Such restraints subject unions to liability after balancing national labor policy against antitrust policy: where the restraint's effects neither are "intimately related" to nor " 'follow naturally' from the elimination of competition over wages and working conditions," courts subject them to antitrust liability.[128]

Through narrow interpretation of the non-statutory exemption, the Supreme Court significantly restructured workers' bargaining leverage, limiting their lawful coordinated action outside of single-firm bargaining.[129] Beginning in 1965, in *UMW v. Pennington*, the Court held that an agreement between the United Mine Workers and coal producers to secure industry-wide wage rates higher than what smaller producers could offer was not exempt from antitrust law, even though it concerned a core mandatory subject of union collective bargaining: wages.[130] The Court's reasoning relied on its view that the NLRA imposed a default of single-employer bargaining: "[A]

123. For "statutory" labor exemption, see 15 U.S.C. § 17 (2012); 29 U.S.C. §§ 52, 101; and Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1560–61 (2018).

124. DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM 71–72, 167–69 (1995).

125. For "non-statutory exemption," see, for example, Lao *supra* note 123, at 1543, 1561 n.73, and Douglas L. Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1192–224 (1980).

126. Randall Marks, *Labor and Antitrust: Striking a Balance Without Balancing*, 35 AM. U. L. REV. 699, 718–19, 731 (1986).

127. *See id.* at 730–44.

128. *Id.* at 736–43.

129. *See* Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Local Union No. 189 v. Jewel Tea Co., 381 U.S. 676 (1965); Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797 (1945).

130. 381 U.S. at 661–69.

union *forfeits* its exemption from the antitrust laws when it . . . has agreed with one set of employers to impose a certain wage scale on *other bargaining units*."[131] Thus, despite NLRA sanctioning of industry-wide bargaining through multiemployer bargaining units, the Court imposed a "unit-by-unit" bargaining rule. That rule restrained unions from reaching interfirm wage agreements that sought to pressure nonunionized producers by subjecting them to antitrust liability. A multiemployer agreement remains lawful if it is "intimately related" to labor conditions and pursues a union's own labor policies rather than policies furthering a union-employer conspiracy to reduce competition downstream.[132]

But distinguishing between agreements aimed at labor and those aimed at product-market conditions is challenging. The Court's definitive attempt is *Connell Construction*, where a local union picketed a general contractor for refusing to agree to subcontract its mechanical work only to firms that had collective bargaining agreements with the union.[133] The contractor sued the union, alleging antitrust violations. The Court found that the union's multiemployer subcontracting agreements with general contractors prevented competition in the subcontracting market because they enabled the union to exclude nonresident firms. And because the union was not seeking to unionize the general contractor's employees *itself*, it could not rely on national labor policy favoring collective bargaining to shield the agreements under the labor exemption.[134] Thus, as in *Pennington*, the Court found that the union forfeited its antitrust exemption by imposing direct market restraints through an agreement with a nonlabor party—the general contractor—*outside* the collective bargaining context. In doing so, the Court formulated a new test: if anticompetitive effects in product markets "follow naturally from the elimination of competition over wages and working conditions," they are exempt from antitrust and protected under labor law, but if they do not, they are subject to antitrust law.[135] The agreements failed that test and so were not exempt from antitrust law.

Connell Construction has been widely criticized for failing to coherently distinguish when exactly anticompetitive effects in product markets—reductions in output or product quality, or increased prices—"follow naturally" from union agreements that establish labor-market restraints.[136] Further, in restricting the parameters of the labor exemption to only protect restraints that have no adverse impact in product markets, the Court functionally extended a consumer-welfare trump to the equal bargaining power

131. *Pennington*, 381 U.S. at 665–66 (emphasis added).

132. *Jewel Tea*, 381 U.S. at 689–90.

133. 421 U.S. at 618–19.

134. *Connell Constr.*, 421 U.S. at 624–26.

135. *Id.* at 625.

136. *See, e.g.*, Theodore J. St. Antoine, Connell*: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976); Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845, 1852 & n.28 (2018).

goal of American labor law and policy. The Court extended this trump to make workers liable under antitrust law for coordinating even in circumstances where antitrust and labor policy might converge to combat employer monopsony power in labor markets—in other words, where broader coordination between workers is necessary to combat employers' unequal bargaining power that inefficiently suppresses workers' wages and increases unemployment. Even worse, empirical evidence suggests that product-market concentration—and the realities of product-market structures "mediated by direct employers but ultimately governed by dominant buyers"—*contributes* to labor-market wage stagnation and wage suppression.[137] But workers are vulnerable to antitrust liability if they coordinate to assert countervailing power against such dominant buyers even through *contract*, let alone strikes. And legal uncertainty on the applicability of antitrust liability to multiemployer, cross-organizational, and industry-wide agreements with unions has contributed to chilling such agreements. In 1947, between 25% and 33% of workers were covered by agreements negotiated between unions and multiemployer associations, encompassing over 4 million workers.[138] While the number of unionized private-sector workers declined through the 1970s,[139] roughly 2.8 million workers under collective bargaining agreements covering 1,000 workers or more had multiemployer agreements in 1980, around 43% of workers.[140] That number dramatically fell after *Connell Construction* and the deregulation and decline of core American industries that were the nerve center of traditional multiemployer pattern bargaining.[141] By 1996, only 25% of employers had pattern-bargaining agreements with workers, and that number has continued to decline to the point that the Office of Labor-Management Standards no longer tracks it.[142] Judicial uncertainty about the labor exemption's scope has contributed to a single-employer bargaining default at the expense of collective bargaining mandates grounded in equal bargaining power assessments.[143]

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137. *E.g.*, Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AM. SOC. REV. 213, 214 (2018).

138. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., BULL. NO. 897, COLLECTIVE BARGAINING WITH ASSOCIATIONS AND GROUPS OF EMPLOYERS 2 (1947).

139. *See* NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 186 (rev. & expanded ed. 2013).

140. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., BULL. NO. 2095, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS, JANUARY 1, 1980, at 19 tbl.1.8 (1981).

141. *See* HARRY C. KATZ, THOMAS A. KOCHAN & ALEXANDER J.S. COLVIN, AN INTRODUCTION TO U.S. COLLECTIVE BARGAINING AND LABOR RELATIONS 186–87 (5th ed. 2017); *see also* LICHTENSTEIN, *supra* note 139, at 126–28, 186–87.

142. Robert C. Marshall & Antonio Merlo, *Pattern Bargaining*, 45 INT'L ECON. REV. 239, 239 (2004); *see* Email from OLMS-Public to author (July 17, 2019, 6:15 PM) (on file with the *Michigan Law Review*) (stating OLMS ceased collecting multiemployer-bargaining-unit data).

143. *See, e.g.*, Joseph T. Casey, Jr. & Michael J. Cozzillio, *Labor-Antitrust: The Problems of* Connell *and a Remedy that Follows Naturally*, 1980 DUKE L.J. 235, 257–68 (collecting and discussing cases).

Finally, labor exemptions from the antitrust laws, if they shield worker coordination at all, protect only statutory NLRA "employees." If exempted workers, like independent contractors (discussed below), coordinate or engage in collective action, they risk injunctions, antitrust liability, and treble damages. Independent-contractor organizing has become central to policy discussions about expanding the labor exemption because of both FTC enforcement actions and aggressive employer litigation against Uber drivers, home healthcare and childcare providers, taxi drivers, low-paid truck drivers, and other workers.[144]

C. *Narrowing Workers' Collective Rights: Bargaining Units and Unprotected Workers*

The second area where Congress, the Board, and the courts entrenched decentralized, single-enterprise bargaining was through bargaining-unit defaults and broad worker exemptions from labor protection. These rules and exemptions narrow the number and types of workers that can engage in protected collective action to restrain employer buyer power and restrict the size of bargaining units that can function as countervailing power against those employers. Thus, labor-market regulation—through a combination of labor and antitrust law—restrained and even penalized effective countervailing worker coordination for large sets of workers, contravening the NLRA's equal bargaining power purpose.

First, the Board has used its discretion as the arbiter of bargaining-unit determinations to establish a single-employer bargaining-unit default, making it exceedingly difficult for workers to establish multiemployer bargaining units. In 1963, the NLRB ruled that "[a] single-plant unit . . . is presumptively appropriate[] . . . even though another unit, if requested, might also be appropriate."[145] The presumption of a single plant may be rebutted by a number of considerations: "central control over daily operations and labor relations, including the extent of local autonomy; similarity of skills, functions, and working conditions; degree of employee interchange; distance between locations; and bargaining history, if any."[146] None of these considerations directly include analysis of workers' relative bargaining power over their employer in a given labor market.

This default creates perverse incentives for employer manipulation. If a union demands recognition for a smaller bargaining unit, the employer can reject it by arguing that the union lacks majority support in a larger unit,

144. Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 983–86 (2016); Lao, *supra* note 123.

145. Dixie Belle Mills, Inc., 139 N.L.R.B. 629, 631 (1962). This in part stemmed from Democratic Board concerns that larger units would tax union resources and defeat organizing campaigns where unions lack a sufficient showing of interest plant-wide or across multiple employers. *See* WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 72–81 (6th ed. 2019).

146. J&L Plate, Inc., 310 N.L.R.B. 429, 429 (1993).

forcing the union to petition the Board for an election in the smaller unit.[147] Thus, employers get the advantage of a default unit no larger than a single employer but can burden organizing workers with requiring them to attain majority support of the largest number of employees that conceivably share a "community of interest"[148] before getting certification to serve as an exclusive bargaining representative. The Board does not consider how exclusively placing coordination costs to reach majority status on organizing workers burdens unionization and favors employers' bargaining position.[149] This is particularly problematic in light of extensive evidence of employers' successful use of antiunion campaigns and retaliation to thwart unionization efforts.[150]

To achieve *multiemployer* units, a majority of workers within each unit must first designate a single worker organization as their exclusive representative.[151] The union must then merge the separate units to develop a bargaining structure for collective bargaining.[152] The Board can only certify a multiemployer association as an appropriate "employer unit" if there is a clear history of stable collective bargaining between it and the union, or, lacking such a history, by voluntary consent of all employers.[153] The union cannot strike or threaten to strike to pressure employers to join a multiemployer bargaining unit.[154] And any employer can leave the arrangement so long as it clearly announces its intent to do so before a new bargaining round.[155] Thus, for nonlegacy industries, like service-sector industries with lower union density, workers face a tall order: incur all the coordination

147. MARK BARENBERG, ROOSEVELT INST., WIDENING THE SCOPE OF WORKER ORGANIZING 13 (2015), https://rooseveltinstitute.org/wp-content/uploads/2015/10/RI-Widening-Scope-Worker-Organizing-201510-2.pdf [https://perma.cc/E5SG-XV9X]; *see also* 29 U.S.C. § 159(b) (stating that the NLRB has general authority to decide the appropriate unit size); PCC Structurals, Inc., No. 19-RC-202188 (N.L.R.B. Nov. 28, 2018) (demonstrating the ability for employers to challenge the unit size).

148. *PCC Structurals, Inc.*, No. 19-RC-202188 (employing the "community of interest" test in analyzing unit size).

149. *See, e.g.*, Benjamin I. Sachs, *Law, Organizing, and Status Quo Vulnerability*, 96 TEX. L. REV. 351, 360–61, 374 (2017); *see also* Bruce E. Kaufman & David I. Levine, *An Economic Analysis of Employee Representation*, *in* NONUNION EMPLOYEE REPRESENTATION 149 (Bruce E. Kaufman & Daphne Gottlieb Taras eds., 2000).

150. *See, e.g.*, CELINE MCNICHOLAS, MARGARET POYDOCK, JULIA WOLFE, BEN ZIPPERER, GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., UNLAWFUL (2019), https://www.epi.org/files/pdf/179315.pdf [https://perma.cc/NV8L-BBGS]; KATE BRONFENBRENNER, ECON. POL'Y INST., BRIEFING PAPER NO. 235, NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING (2009), https://www.epi.org/files/page/-/pdf/bp235.pdf [https://perma.cc/LV8E-ZCEF].

151. *See* 29 U.S.C. § 159.

152. *See, e.g.*, Mohawk Bus. Machs. Corp., 116 N.L.R.B. 248 (1956).

153. Arden Farms, 117 N.L.R.B. 318, 319 (1957); York Transfer & Storage Co., 107 N.L.R.B. 139, 142 (1953).

154. *See* Kroger Co., 148 N.L.R.B. 569 (1964).

155. McAnary & Welter, Inc., 115 N.L.R.B. 1029, 1031 (1956).

costs of unionizing across multiple employers and convince each to recognize a multiemployer bargaining structure.

In addition to these challenges, workers' collective rights have been narrowed by congressional, agency, and judicial exemptions of large numbers of workers from labor protections. The most prominent of these are "independent contractors," although the managerial and supervisorial worker exemption is also significant.[156] In the fissured workplace, where employers have severed legal obligations to workers through subcontracting and outsourcing—"misclassifying" employees as nonemployees—and promoting employees through *pro forma* job-classification titles—"overclassifying" employees as managerial or supervisory—they have withered the number of workers eligible for protected bargaining units that function as sources of countervailing power.[157] Domestic and agricultural workers are also exempt from NLRA coverage.[158] These exemptions neither track economic determinations of employers' buyer power nor align with ensuring equal bargaining power between employers and NLRA-protected employees that work alongside exempted workers.

D. *Narrowing Workers' Section 7 Rights and Unfair Labor Practices*

Finally, Congress, the Board, and the courts confined workers' collective rights through NLRA amendments and Board and court interpretations of the NLRA, which, combined, favored employer buyer power over workers' countervailing power. First, the Board and the courts circumscribed the range of workers' section 7-protected rights to engage in concerted activity, including strikes and procedural forms of collective action in the courts. Congress also amended section 8 of the NLRA in the 1947 and 1959 Taft-Hartley and Landrum-Griffin Amendments to extend ULP sanctions originally applicable only to employer misconduct to unions' conduct.[159] The

156. *See* 29 U.S.C. § 152(3).

157. *See* WEIL, *supra* note 19, at 77–78.

158. 29 U.S.C. § 152(3). For the racist and sexist origins of NLRA worker exclusions, see, for example, Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95 (2011).

159. 29 U.S.C. § 158(b). It could be argued that the Taft-Hartley and Landrum-Griffin Amendments' exemptions and protection of worker rights to *refrain* from union activities and representation supersede or conflict with the NLRA's equal bargaining power purpose. *See, e.g.*, Fisk & Malamud, *supra* note 23, at 2033–38. However, while Board and court interpretations of the NLRA have mostly ignored this purpose, Taft-Hartley retained the Preamble's language stating the statute's equal bargaining power purpose. *See* 29 U.S.C. § 151. Landrum-Griffin arguably fortified this purpose in reiterating that its amendments to the Act were necessary to eliminate and prevent employer practices that "caus[e] diminution of employment and wages" that "substantially . . . impair or disrupt the market for goods" in "channels of commerce," a concern identical with eliminating and preventing employer buyer power that artificially suppresses labor inputs and/or wages that can harm consumers. 29 U.S.C. § 401(c)(4). Further, the legislative history indicates that the Amendments, at least on their face, sought "to restore equality of bargaining power" by establishing equal duties and obligations on unions as

1935 Congress had not viewed it as necessary to grant employers tools under the labor law to sanction union conduct due to their assessment of employers' unequal bargaining power. But the 1947 and 1959 Amendments not only extended sanctionable ULPs to unions for refusing to collectively bargain and coercing individual workers to join a union but also sanctioned a wide range of worker conduct capable of exerting economic pressure on employers. In perhaps the most severe blow to workers' ability to exercise countervailing power, Congress banned workers from engaging in secondary activity, or boycotts and strikes of those with whom a primary employer deals to pressure their primary employer.[160] Even where "secondary" entities have buyer power over workers' wages and working conditions, workers cannot collectively exert economic pressure on them to equalize their bargaining power.[161] Further, the NLRB and the courts interpreted sanctions against unions broadly and sanctions against employers narrowly, providing no analysis of that doctrinal evolution's impact on workers' relative bargaining power.

1. Section 7 Labor Rights

As discussed, the very language of workers' section 7 rights derives from statutes exempting worker actions from antitrust scrutiny based in part on a national labor policy to ensure equal bargaining power. The rights granted under section 7—"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," as well as "the right to refrain from any or all of such activities"—form the core of workers' ability to consolidate countervailing power against employers.[162] For a worker action, such as a strike, to be protected, it must be a (1) "concerted" and (2) "protected" activity concerning the interests of employees as employees, as developed under NLRB and judge-made common law.[163] If the activity is found unlawful, then it is unprotected under the NLRA, but concerted activity can

employers. 93 CONG. REC. 3836 (1947) (statement of Sen. Taft); *see also id.* at 3835 (explaining Taft-Hartley's aim "to get back to the point where, when an employer meets with his employees, they have substantially equal bargaining power . . . . If there is reasonable equality at the bargaining table, I believe that there is much more hope for labor peace."). Additionally, Congress envisioned equal bargaining power to be a policy anchored in amendments to the Sherman and Clayton Acts—antitrust statutes that survive independently of amendments to the NLRA. *See supra* Section I.A. *In pari materia* principles require construing the NLRA and the labor exemption of the antitrust statutes in harmony with each other where the statutes are an "integrated scheme" of regulation. *See* CALEB NELSON, STATUTORY INTERPRETATION 487 (2011).

160. 29 U.S.C. § 158(b)(4).

161. *See* Hafiz, *supra* note 136, at 1893–95 (proposing "market power" test for discerning boundaries of protected secondary activity).

162. 29 U.S.C. § 157.

163. *See, e.g.*, Eastex, Inc., v. NLRB, 437 U.S. 556, 565–70 (1978).

be unprotected without being unlawful.[164] If workers engage in unprotected activity, employers can lawfully discharge them, and workers can be enjoined and fined for engaging in secondary activity.

Section 7 *is* amenable to an equal bargaining power analysis, even if such analysis has been rare in the postwar period. A seminal Burger Court decision, *NLRB v. City Disposal Systems, Inc.*,[165] illustrates the rare exception. In an opinion authored by Justice Brennan, the Supreme Court construed workers' section 7 right to engage in "concerted activity" as extending to an individual worker's conduct based on the equal bargaining power purpose of the statute. *City Disposal* considered whether a garbage truck driver's refusal to drive an unsafe truck was "concerted activity."[166] In holding it was, the Court found that the driver's refusal stemmed from an employer-granted right in a collective bargaining agreement not to require driving vehicles in unsafe operating condition.[167] Justice Brennan traced section 7's "concerted activities" language to "Congress' first attempt to equalize the bargaining power of management and labor, . . . its first use of the term 'concert' in this context, came in 1914 with the . . . Clayton Act."[168] He tied that language to the NLRA through the Norris-La Guardia Act and section 7 of the NIRA, concluding that "Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."[169] The Court found no indication Congress intended to limit "concerted activity" to group activities, finding instead an intent "to create an equality in bargaining power between the employee and the employer throughout the *entire process* of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements."[170] The Court based the legal authority that individual employees may engage in NLRA-protected "concerted activity"[171] "on a recognition that the potential inequality in the relationship between the employee and the employer continues *beyond* the point at which a collective bargaining agreement is signed, mitigates that inequality throughout the duration of the employment relationship, and is, therefore, fully consistent with congressional intent."[172]

164. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255 (1939).

165. 465 U.S. 822 (1984).

166. *City Disposal Sys.*, 465 U.S. at 825.

167. *Id.* at 839.

168. *Id.* at 834.

169. *Id.* at 835.

170. *Id.* (emphasis added).

171. Interboro Contractors, Inc., 157 N.L.R.B. 1295 (1966).

172. *City Disposal Sys.*, 465 U.S. at 835 (emphasis added). Justice Brennan's 1984 interpretation of section 7 in terms of the NLRA's equal bargaining power purpose evolved as a rejection of his earlier, more formalist approach in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960). *See infra* notes 188–191 and accompanying text. His later view is more consistent with his opinion in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257, 262 (1975), which interpreted section 8 in light of the NLRA's equal bargaining power purpose to find that

But Justice Brennan's section 7 jurisprudence in *City Disposal* is an outlier: the Board and the courts have otherwise abdicated anchoring interpretation of the scope of protected "concerted activity" on ensuring equal bargaining power between labor and capital. In failing to incorporate bargaining-power analysis either in their reasoning in individual cases or in ascertaining the cumulative impacts of their decisions, the Board and the courts significantly eroded workers' ability to assert countervailing power against employers, particularly through strikes,[173] finding almost always unprotected wildcat strikes;[174] mass picketing;[175] sympathy strikes;[176] strikes over employers' refusal to bargain over "permissive" subjects of bargaining like plant closures, capital allocations, and other strategic management decisions;[177] modification strikes to alter collective bargaining agreements;[178] and virtually all "inside actions" such as sit-down strikes, slowdowns, partial strikes (refusing to perform all tasks while on the job), overtime strikes (refusing to work overtime), and intermittent, or on-and-off, strikes for portions of time.[179] Strike potency was also dramatically limited by granting employers broad self-help options when they occur. For example, workers

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an employer subjecting an employee to an investigatory interview without a requested union representative was a ULP. There, Justice Brennan, writing for the Court, reiterated that the Act "is designed to eliminate the 'inequality of bargaining power between employees . . . and employers'" and that "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided 'to redress the perceived imbalance of economic power between labor and management.'" *Id.* at 262 (quoting Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965)).

173. *See* White, *supra* note 61, at 1096–1110; James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 528 (2004) (examining five key labor law doctrines that hollowed out workers' right to strike); Klare, *supra* note 18, at 267 (arguing that American law has overseen "a diminution of labor's combativeness").

174. Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 60–70 (1975) (holding wildcat strikes unprotected).

175. *See* Ahmed A. White, *Workers Disarmed: The Campaign Against Mass Picketing and the Dilemma of Liberal Labor Rights*, 49 HARV. C.R.-C.L. L. REV. 59, 59 (2014).

176. White, *supra* note 61, at 1110 ("Section 8(b)(4) of the Taft-Hartley Act imposed a broad ban on secondary boycotts, thus effectively prohibiting sympathy strikes and general strikes.").

177. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (holding employers' duty to bargain limited to mandatory, not permissive, subjects).

178. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280, 284–89 (1956) (stating strikes to modify collective bargaining agreement with no-strike clause unprotected).

179. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 246, 252 (1939) (holding sit-downs unprotected); *In re* Elk Lumber Co., 91 N.L.R.B. 333, 337–38 (1950) (holding slowdowns unprotected); NLRB v. Montgomery Ward & Co., 157 F.2d 486, 496 (8th Cir. 1946) (holding partial strikes unprotected); C.G. Conn, Ltd. v. NLRB, 108 F.2d 390, 397 (7th Cir. 1939) (holding overtime strikes unprotected); Int'l Union, UAW, Local 232 v. Wis. Emp. Rels. Bd., 336 U.S. 245, 264 (1949) (holding "that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by Federal statute nor was it legalized and approved thereby"). *See also* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 678–79, 686 (1981) (holding plant closings permissive subjects and thus unprotected).

engaging in "economic" strikes—strikes over wages, hours, and working conditions against employers that have not violated the labor law—can be permanently replaced, and picketing to pressure employers to recognize unions is drastically limited.[180] Employers can enjoin union strikes pending arbitration over disputes subject to collective-bargaining-agreement arbitra-arbitration clauses, but courts only occasionally allow unions to preserve the status quo under the same circumstances. In those circumstances, workers must comply with the employer's change subject to resolution of grievance procedures, and unless irreparable harm is shown, employers can terminate employees if they violate this "obey now, grieve later" rule.[181]

The Supreme Court further narrowed worker protections when it held in *Epic Systems Corporation v. Lewis* that class and collective actions are not protected "concerted activities" under section 7.[182] So when employers impose class and collective action waivers in employment contracts, they do not violate the NLRA, nor do they violate the NLRA by requiring workers to sign mandatory arbitration agreements—on threat of being fired—after they are asked to "opt in" to class actions.[183] The Court's recent turn is consistent with *Lochner*-era positioning of workers and employers in a formal equality as "free choosers," even while viewing *union* agreements with workers as "coercive," like in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*.[184]

2. Section 8 Unfair Labor Practices

The Board and the courts have disproportionately restricted workers' countervailing power against employers by interpreting union ULPs broadly while interpreting employer ULPs narrowly.[185] Workers' section 7 rights are protected from employer intrusion under section 8 of the Act—specifically, section 8(a)(1)—which makes it a ULP for employers "to interfere with, re-

180. NLRB v. Mackay Radio & Tel., 304 U.S. 333, 345–46 (1938) (economic strikes); 29 U.S.C. § 158(b)(7) (curtailing protections for representation strikes).

181. Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970); Lever Brothers Co. v. Int'l Chem. Workers Union, Local 217, 554 F.2d 115 (4th Cir. 1976); James B. Atleson, Forum, *The Circle of* Boys Market*: A Comment on Judicial Inventiveness*, 7 INDUS. RELS. L.J. 88, 101 (1985).

182. 138 S. Ct. 1612, 1624 (2018).

183. *Epic Sys. Corp.*, 138 U.S. at 1632; Cordúa Rests., Inc., 368 N.L.R.B. No. 43, slip op. at 1 (Aug. 14, 2019).

184. 138 S. Ct. 2448 (2018); *see* Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 411, 414–19 (2020); Charlotte Garden, Epic Systems v. Lewis*: The Return of Freedom of Contract in Work Law?*, 2017–2018 AM. CONST. SOC'Y SUP. CT. REV. 137, 159.

185. *Cf.* Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 IND. L.J. 5, 15 (2018) (outlining judicial "reinforc[ement of] inegalitarian distributions of power" in labor cases); Julius G. Getman, *The NLRB: What Went Wrong and Should We Try to Fix It*, 64 EMORY L.J. 1495, 1496–98 (2015) (collecting cases).

strain, or coerce employees in the exercise of" their section 7 rights.[186] But in the Taft-Hartley and Landrum-Griffin Amendments to the NLRA, Congress added a series of ULPs—the section 8*(b)* series—sanctioning a range of *union* conduct, including interfering with employees' section 7 rights and violating collective bargaining duties.[187]

A 1960 Supreme Court decision, *NLRB v. Insurance Agents' International Union*, in part generated this imbalance.[188] In that case, a union engaged in a slowdown during collective bargaining negotiations, and the Board issued a cease-and-desist order, finding the slowdown indicative of the union's refusal to bargain in good faith under section 8(b)(3).[189] The Court set aside the order as based merely on the fact that

> tactics designed to exert economic pressure were employed during the course of the good-faith negotiations. Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon . . . . And if the Board could regulate the choice of economic weapons . . . it would . . . exercise considerable influence upon the substantive terms on which the parties contract. . . . Our labor policy is not presently erected on a foundation of government control of the *results* of negotiations. Nor does it contain a charter for the [NLRB] to act at large in equalizing disparities of bargaining power between employer and union.[190]

The Court found no indication that Congress meant the Board "to define . . . what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."[191]

In justifying its reversal of the Board, the Court conflated two analytically distinct Board authorities: (1) to intervene in impacting the *substance* of collective bargaining terms; and (2) to evaluate, based on its expertise, what tools the *law* offers to equalize the bargaining leverage of capital and labor outside the bargaining room, regardless and independently of the substantive outcomes. In other words, it conflated regulating bargaining *outcomes* with regulating the bargaining *process*. And in doing so, the Court appeared to assume that Board *restraint* from assessing tools of economic pressure would *not* impact substantive bargaining outcomes or workers' ability to organize unions and bargain on an equal playing field with employers.[192]

In fact, cumulative Board and court rulings *did* create an unbalanced bargaining process favoring employers' bargaining leverage relative to un-

186. 29 U.S.C. §§ 157–158.

187. *Id.* § 158(b).

188. 361 U.S. 477 (1960). *But see supra* note 182.

189. *Insurance Agents'*, 361 U.S. at 479–81.

190. *Id.* at 490 (emphasis added) (citations omitted).

191. *Id.* at 499–500.

192. *See, e.g.*, Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451, 452 (1920) ("[E]ach party to the contract, by the threat to call on the government to enforce his power over the liberty of the other, *imposes* the terms of the contract on the other.").

ions and organizing workers. First, the scope of unions' sanctionable conduct expanded. Most importantly for confining union density and decentralizing bargaining, section 8(b)(4) of the Taft-Hartley and Landrum-Griffin Amendments prohibited unions and their agents from engaging, inducing, or encouraging "secondary activity."[193] Secondary boycotts and strikes were so potent before the statutory ban that Richard Trumka, current president of the AFL-CIO, stated he would abolish the entire NLRA to rid the labor movement of section 8(b)(4).[194] The provisions made it a ULP for unions and their agents to "threaten, coerce, or restrain" other "secondary" or "neutral" employers to join forces with them in boycotting or refusing to deal with their immediate employer during labor disputes.[195] It also prohibited inducing or encouraging another employer's employees to "strike or . . . refus[e] in the course of his employment" to deal with or handle a direct employer's goods or services.[196] In distinguishing between "primary" and "secondary" employers, the Board has viewed "secondaries" broadly to include all employers not in a direct employment relationship with statutorily protected employees, with narrow exceptions: (1) "allies," or otherwise neutral employers performing struck work of a primary employer; and (2) "single employers" sharing interrelation of operations and common ownership, management, and centralized control of labor relations with a direct employer.[197] This overbroad definition of secondaries even limits workers from engaging in secondary activity against employers who agree to wage fix with direct employers, have no-poaching agreements with direct employers, and have monopsony power over a direct employer's employees. The labor law makes no assessment of wage-setting power when it determines which entities employees may boycott or strike.[198] The secondary activity ban has overwhelmingly curtailed workers' concerted activity against nonemployers, including indirect employers, a problem all the more severe in the fissured workplace where work arrangements are fragmented and obligations are shared between a number of employers through subcontracting, outsourcing, franchising, and other supply-chain arrangements.[199] And it restricts unions' free expression in ways not tolerated in almost any First Amend-

193. 29 U.S.C. § 158(b)(4).

194. *See* Richard L. Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871, 881 (1987); Hafiz, *supra* note 123, at 1849–50.

195. 29 U.S.C. § 158(b)(4).

196. *Id.*

197. *See, e.g.*, Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 627 (1967) ("ally doctrine"); Int'l Union, United Mine Workers, 301 N.L.R.B. 872, 873 (1991) ("single employer" doctrine).

198. *See* Hafiz, *supra* note 136, at 1876–901 (discussing this and proposing "market power" defense for secondary activity).

199. *Id.* at 1850–51.

ment setting, imposing viewpoint- and speaker-discriminatory restrictions on union speech.[200]

But the Board and the courts also interpreted union ULPs in ways that chipped away at workers' options for recourse when employers refuse to recognize their union, make take-it-or-leave-it offers, or make corporate decisions that impact their wages and working conditions. For example, a union's ability to impose economic pressure by striking during collective bargaining negotiations, as discussed, is unprotected if it concerns "permissive" subjects of bargaining.[201] Employers can enjoin and even fire strikers for doing so without committing a ULP, and they can impose the same retaliation if their workers engage in coercive "misconduct"[202] or refuse to cross another union's picket line if the collective bargaining agreement between the employees' union and that employer contains a no-strike clause.[203]

Conversely, the Board and the courts have been lenient in interpreting whether *employers* have committed ULPs. They have found that it is *not* a ULP for employers to permanently replace economic strikers;[204] temporarily replace strikers protesting employer ULPs;[205] offensively or defensively lock out workers;[206] limit reinstatement rights of strikers who risk damage to employers' property;[207] or unilaterally change a collective bargaining agreement if they bargain to an impasse or unilaterally act without union consent if a mandatory term is not clearly in the collective bargaining agreement.[208] The courts have also limited public benefits to striking workers in ways that reduce their bargaining power, holding that striking workers are ineligible for food stamps.[209]

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In sum, workers' collective rights and bargaining power have been appreciably eroded, first by Congress and then more profoundly by the NLRB and the courts. To be clear, this Article does not contend that all restraints

200. Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2072–73 (2018).

201. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958).

202. *See, e.g.*, Consol. Commc'ns, 367 N.L.R.B. No. 7, slip op. at 2 (Oct. 2, 2018); Universal Truss, Inc., 348 N.L.R.B. 733, 735 (2006).

203. NLRB v. Rockaway News Supply Co., 345 U.S. 71, 80–81 (1953).

204. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938).

205. *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956).

206. *See, e.g.*, Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 307–10 (1965); NLRB v. Brown Food Store, 380 U.S. 278, 283–84 (1965); Buffalo Linen Supply Co., 109 N.L.R.B. 447, 448 (1954).

207. *See, e.g.*, NLRB v. Marshall Car Wheel & Foundry Co., 218 F.2d 409, 413 (5th Cir. 1955).

208. *See* Laborers Health & Welfare Tr. Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 833 n.5 (1988).

209. *See* Lyng v. Int'l Union, UAW, 485 U.S. 360, 368 (1988).

on workers' labor rights are categorically or theoretically inconsistent with furthering an equal bargaining power purpose. It merely argues that, for theoretical,[210] empirical,[211] and historically contingent reasons—due in no small part to regulatory and doctrinal decisions discussed in this Part that failed to contend with labor-market realities that favor employer bargaining power over workers—government regulators have rigged labor-market regulation of workers' collective rights in favor of employers' buyer power. For those reasons, regulation should err on the side of *avoiding false negatives*, or Type 2 errors (mistakes of *not* finding that workers are in a weaker bargaining position relative to employers when in fact they *are*), as opposed to erring on the side of avoiding false *positives*, or Type 1 errors (mistakes of finding that workers are in a weaker bargaining position relative to employers when in fact they are not).[212]

Because our current law makes no accommodation to the NLRA's equal bargaining power purpose, it perpetuates a legal misalignment dissipating workers' countervailing power as against employers by instituting a decentralized, single-enterprise-based system of containing that power. This misalignment has occurred at the same time workplace restructuring has replaced highly centralized industrial employment and evidence mounts of pervasive employer buyer power that artificially suppresses workers' wages, exacerbating nearly unprecedented economic inequality.[213] This failure to properly regulate imperfect competition in labor markets increases already-high worker-coordination costs, making it more difficult to establish workers' countervailing power against employers. And it perpetuates distortions in those markets that do not only harm workers. It reduces tax revenues collected from income; overburdens social-safety-net programs that end up subsidizing powerful employers; burdens overstrained agency enforcement; and places the bulk of any compliance on intermediated, smaller employers, raising their costs and creating interfirm inequality that further strengthens lead "superstar" firms. [214]

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210. On justifications for presuming imperfect competition in labor markets as a theoretical matter, see *infra* note 224 and accompanying text.

211. For empirical evidence of employers' buyer power, see *infra* notes 229–231, 347–348 and accompanying text.

212. For Type 1 and Type 2 errors, see generally Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 2, 5–6 (2015); Raaj Kumar Sah & Joseph E. Stiglitz, *The Architecture of Economic Systems: Hierarchies and Polyarchies*, 76 AM. ECON. REV. 716 (1986); and Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) (applying an error-cost framework to judicial regulation of market restraints and market power).

213. *See supra* notes 10–11; José Azar, Emiliano Huet-Vaughn, Ioana Marinescu, Bledi Taska & Till von Wachter, *Minimum Wage Employment Effects and Labor Market Concentration* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26101, 2019).

214. *See* MICHAEL J. PIORE & ANDREW SCHRANK, ROOT-CAUSE REGULATION: PROTECTING WORK AND WORKERS IN THE TWENTY-FIRST CENTURY 18–40 (2018); WEIL, *supra* note 19, at 7–27.

But it would neither be methodologically impracticable nor contravene current law for the Board to take its mandate of ensuring equal bargaining power seriously.[215] The next Part covers the social science tools relevant for the Board and courts' analysis of equal bargaining power, while the final Part explains how they could be integrated into three core areas of the NLRA's administration to better establish structural labor rights.

II. EQUAL BARGAINING POWER AND SOCIAL SCIENCE DEVELOPMENTS

The social science literature analyzing employer buyer power, and bargaining power more broadly, has grown in theoretical nuance and empirical depth. While scholars have been skeptical of the conceptual utility and regulatory purchase of equal bargaining power as obscure or difficult to administer, this Part argues that these developments offer analytical precision and substantive content for identifying when parties' bargaining power is unequal, discerning conditions that strengthen and weaken parties' relative bargaining power, and developing remedies to equalize it.[216] Based on social scientific contributions, this Part develops a generalized and administrable conception of equal bargaining power as a standard best approximating placement of both parties—workers and employers—in a bargaining position from which they could *hold out indefinitely*. Because both parties' interests collapse into each other only upon an indefinite holdout—since it would result in a total shutdown of production bankrupting the employer and forcing workers out of a job—that bargaining position best simulates an equal playing field and effectuates achieving an equal distribution of the gains of

215. While the NLRA has multiple, and arguably conflicting, purposes, *see generally* James A. Gross, *Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making*, 39 INDUS. & LAB. RELS. REV. 7 (1985), ensuring equal bargaining power is consistent with and even services the NLRA's other primary goal of ensuring the free flow of commerce. *See supra* text accompanying note 108.

216. For detractors of equal bargaining power as an analytical concept, see, for example, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 101–04 (3d ed. 1986) (questioning "whether the concept of unequal bargaining power is fruitful, or even meaningful"); David Cabrelli & Rebecca Zahn, *Civic Republican Political Theory and Labour Law*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 104, 105 (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2019) (arguing unequal bargaining power "lacks clarity in its concept"); Bagchi, *supra* note 94, at 580 ("[B]argaining power disparity does not capture the moral problem raised by inequality in the employment relation . . . ."); and Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 623 (1982) (stating that unequal bargaining power doctrine "may be internally incoherent"). *But see* RUTH DUKES, THE LABOUR CONSTITUTION: THE ENDURING IDEA OF LABOUR LAW 212 (2014) (arguing for equalizing bargaining power through labor law because it is "tied . . . more broadly to questions of power relations and human freedom"); Ben-Shahar, *A Bargaining Power Theory of Default Rules*, *supra* note 53, at 408–09 ("It would be naïve to expect . . . courts . . . to measure bargaining power with complete precision. Still, implementing a regime with error . . . is better than nothing. Moreover, in some situations crude approximations of relative bargaining power are likely to be correct, even if imperfect. . . . In fact, courts already quite regularly refer to bargaining power as a factor that justifies case outcomes [citing unconscionability, duress, and *contra proferentum* doctrines].").

trade. For those reasons, achieving the NLRA's equal bargaining power purpose is consistent with and furthers its labor peace goals.[217] Simulating indefinite equilibrium in the negotiation game between labor and capital can compel more efficient agreement on an equal share of gains because it structures negotiation rules in the shadow of a result that would make both worse off. Therefore, integrating bargaining-power analysis into core aspects of labor law enforcement is both a pragmatic and effective mechanism that would further labor policy.[218]

Social scientific scholarship has devised tools to ascertain parties' relative holdout ability and provided experimental data on correctives for bargaining power imbalances. Their contributions can be schematically organized as assessing bargaining power under four crucial categories: "external," "transactional," "internal," and "distributional." Labor-economics and industrial-organization research supplies "external" accounts of employer buyer power: assuming the *inside* of a firm is a "black box," they focus on the labor market *outside* the firm to ascertain how labor-market concentration, labor-market structure, and employers' market share give an individual employer (or a certain number of employers) buyer power in the market for workers' services. "Transactional" accounts—primarily developed in microeconomic, bargaining, negotiation, and game theory—concentrate on theoretically and experimentally discerning bargaining power *within* the bargaining process between parties, whether within or outside the firm, based on a range of bargaining constraints. These accounts theorize and evaluate bargaining under conditions of short- and long-term, or relational, contracting, including bargaining in employment contracts between labor and capital. "Internal" bargaining-power accounts from behavioral economics, labor and industrial relations, labor economics, and organizational psychology and behavior open up the "black box" of the firm. They allow analysis of how internal relationships between workers and management contribute to or counter employer buyer power, whether through cognitive heuristics, group dynamics, participatory structures and institutions like labor unions, and management decisionmaking concerning compensation structures and productivity controls. Finally, "distributional" accounts—primarily centered in macroeconomic research—focus on labor's share of

217. *See* 29 U.S.C. § 151. Assuming perfect information, equal bargaining power can reduce strike length because parties know counterparties can hold out indefinitely, and vice versa, increasing the perceived costs of striking and incentives to avoid them. NOLAN MCCARTY & ADAM MEIROWITZ, POLITICAL GAME THEORY: AN INTRODUCTION 275–80 (2007); MARTIN J. OSBORNE & ARIEL RUBINSTEIN, BARGAINING AND MARKETS 104–07 (1990); Layman E. Allen, *Games Bargaining: A Proposed Application of the Theory of Games to Collective Bargaining*, 65 YALE L.J. 660, 687 & n.40 (1956).

218. I emphasize "pragmatic" based on a long history of political obstacles limiting more radical solutions to the inequality between labor and capital. *See infra* notes 42–43 and accompanying text. A new political landscape more amenable to systemic labor law reform could better ensure distributive gains at the site of production, assuming tax and other reforms fail in their redistributive roles in combating inequality.

national income or profits relative to capital, finding unequal shares indicative of unequal bargaining power on industry- and nationwide scales.[219] Bringing each of these categorical approaches to bear on the employment bargain will be key for fully understanding the relative bargaining power of labor and capital in the labor law.

This Part summarizes these social scientific developments with an eye toward explaining their utility in sharpening labor law rules to ensure workers' countervailing power. It outlines how each field's methods, models, and benchmarks offer fruitful approaches to understanding the dynamics of the employment bargain.

A. *Bargaining Power in Labor Economics*

Traditional labor-economics modeling assumed labor markets functioned with perfect competition: supply and demand determined worker's wages, and bargaining power was irrelevant.[220] But increasingly, labor economists view it as more appropriate to model labor markets "as imperfectly competitive, subject to monopsony-like effects, collusive behavior by firms . . . and surpluses that are bargained over."[221] In addition to collusion, they view market failures—information asymmetries, search frictions, job-lock effects, job differentiation, heterogeneous preferences, and mobility costs—as pervasive.[222] Employers are thus more properly understood as wage *setters* rather than wage *takers*.[223]

Empirical research supports this model of imperfect labor-market competition, demonstrating firm monopsony power and rising labor-market concentration leading to wage suppression; "high variability in pay for workers with identical skills in different industries or firms" or of different genders or races; minimum wage hikes not increasing unemployment; and firm reluctance to "raise wages when vacancies are hard to fill."[224] There is also

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219. Political theory also offers new insights into theories of domination, offering useful metrics for benchmarking employer power relative to workers on dimensions of dependency, power imbalance, and arbitrariness. *See, e.g.*, FRANK LOVETT, A GENERAL THEORY OF DOMINATION AND JUSTICE (2010); Cabrelli & Zahn, *supra* note 216, at 104–21; Samuel Bowles & Herbert Gintis, *Power and Wealth in a Competitive Capitalist Economy*, 21 PHIL. & PUB. AFFS. 324 (1992).

220. *E.g.*, Manning, *supra* note 3, at 3–4; Alan B. Krueger, Princeton Univ. & Nat'l Bureau of Econ. Rsch., Reflections on Dwindling Worker Bargaining Power and Monetary Policy, Luncheon Address at the Jackson Hole Economic Symposium 1 (Aug. 24, 2018), https://www.kansascityfed.org/~/media/files/publicat/sympos/2018/papersandhandouts/824180824kruegerremarks.pdf [https://perma.cc/Q2SZ-7XM5].

221. Krueger, *supra* note 220, at 267–68.

222. *See generally* Naidu & Posner, *supra* note 9, at 2–7; Hafiz, *supra* note 136, at 1874.

223. Krueger, *supra* note 220.

224. *Id.*; *see, e.g.*, Doruk Cengiz, Arindrajit Dube, Attila Lindner & Ben Zipperer, *The Effect of Minimum Wages on Low-Wage Jobs*, 134 Q.J. ECON. 1405 (2019); Jae Song, David J. Price, Fatih Guvenen, Nicholas Bloom & Till von Wachter, *Firming Up Inequality*, 134 Q.J. ECON. 1, 1–50 (2019); Org. for Econ. Co-operation & Dev. [OECD], *Market Concentration* -

increasing evidence of employer collusion and other anticompetitive conduct, from wage fixing and no-poaching agreements to the use of noncompetes, occupational licensing, and other restraints limiting worker mobility.[225] Current methodologies and empirical studies can more closely track labor-market realities to ascertain the existence of, and mechanisms that produce, employer buyer power. Employer buyer power over labor inputs is precisely the type of unequal bargaining power the labor law was intended to remedy, so deploying labor economists' theoretical and empirical analyses can serve to align labor law enforcement with its original purpose.

Labor economists have also focused on workers' ability to assert countervailing power against employers. Specifically, they have studied the impact of bilateral monopoly established through unions, collective bargaining, and cross-workplace coordination on wages.[226] And they assess how the boundaries of the firm can impact employers' wage-setting power, differentiating between internal and external wage setting. "Internal labor markets" are direct employer-employee relationships regulated by internal administrative rules and procedures. They are characterized by wage premiums and a range of on-the-job protections and benefits for direct employees. Employer contracts for labor inputs *outside* the firm form "external labor markets." External labor markets are characterized by a range of outsourcing, subcontracting, and other ad hoc or temporary arrangements where wage setting is determined based on the level of competition for labor inputs in those markets. In addition, labor economists evaluate how segmented labor markets impact wage setting in "primary" and "secondary" markets based on the so-

Note by the United States to the Directorate for Financial and Enterprise Affairs Competition, OECD Doc. DAF/COMP/WD(2018)59 (June 7, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)59/en/pdf [https://perma.cc/R7WH-XNDT]; Arindrajit Dube, Alan Manning & Suresh Naidu, *Monopsony and Employer Mis-optimization Explain Why Wages Bunch at Round Numbers* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24991, 2020); Wilmers, *supra* note 137; Azar et al., *supra* note 9; Benmelech et al., *supra* note 11; David Card, Ana Rute Cardoso, Joerg Heining & Patrick Kline, *Firms and Labor Market Inequality: Evidence and Some Theory*, 36 J. LAB. ECON. S13 (2018); Dube et al., *supra* note 9; Erling Barth, Alex Bryson, James C. Davis & Richard Freeman, *It's Where You Work: Increases in the Dispersion of Earnings Across Establishments and Individuals in the United States*, 34 J. LAB. ECON. S67 (2016); Douglas A. Webber, *Firm-Level Monopsony and the Gender Pay Gap*, 55 INDUS. RELS. 323 (2016); Douglas A. Webber, *Firm Market Power and the Earnings Distribution*, 35 LAB. ECON. 123 (2015).

225. *See* Hafiz, *supra* note 7, at 392–402 (collecting sources and cases); Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupants Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093 (2014).

226. *See, e.g.*, RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984) (discussing efficiency-enhancing functions of unions); Nathan Wilmers, *Solidarity Within and Across Workplaces: How Cross-Workplace Coordination Affects Earnings Inequality*, RUSSELL SAGE FOUND. J. SOC. SCI., Sept. 2019, at 190 (2019); 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 (1992); Barry T. Hirsch, *What Do Unions Do for Economic Performance?*, *in* WHAT DO UNIONS DO?: A TWENTY-YEAR PERSPECTIVE 193 (James T. Bennett & Bruce E. Kaufman eds., 2007).

cietal value of certain labor inputs over others. "Primary" markets offer higher wages and good working conditions, while "secondary" markets are characterized by low wages and poorer working conditions.[227] These scholars study the effects of unions on expanding or restricting employment; ameliorating or increasing economic inefficiencies; bringing workers' wages closer to the opportunity cost of labor; creating dispersion effects on the nonunion sector; and creating wage inequality.[228] In other words, they assess when labor-market institutions can readjust the bargaining imbalance between employers and workers through correcting employer buyer power that reduces labor inputs, suppresses workers' wages, or reduces the quality of employment conditions.

Thus, scholarship in labor economics takes a broad view of factors impacting employer wage setting—labor-market institutions, industry-wide and aggregate dispersion effects, the effects of fairness and equity as wage-setting restraints—and introduces methodological elements of game theory and negotiation theory (discussed more fully below) to evaluate employers' and workers' relative bargaining leverage and best alternatives to a negotiated agreement. Having developed a theoretical and empirical canon on which to draw, labor economists can ascertain when workers—direct employees as well as indirect, outsourced workers—have established (or failed to establish) countervailing power against purchasers of their services.

B. *Market Power in Antitrust Law and Industrial Organization Economics*

Industrial organization economics (IO) predicts how employer market power and conduct impacts workers' wages, offering social scientists and antitrust regulators models and empirical analyses of when employers have buyer power.[229] The dominant structural (or modified structural) IO approach views the internal workings of the firm as a black box, concentrating on the structure and behavior of firms in imperfectly competitive markets.[230] It applies traditional microeconomic methods and analysis to predict efficient wage setting and ascertain the wage effects of imperfect competition.[231] Ideal, efficiency-maximizing outcomes in competitive markets occur when

227. *See, e.g.*, LABOR MARKET SEGMENTATION (Richard Edwards, Michael Reich & David M. Gordon eds., 1973).

228. *See, e.g.*, ALBERT REES, THE ECONOMICS OF TRADE UNIONS (3d ed. 1989); John T. Addison & Barry T. Hirsch, *The Economic Effects of Employment Regulation: What Are the Limits?*, *in* GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 125 (Bruce Kaufman ed., 1997); Bruce E. Kaufman, *What Unions Do: Insights from Economic Theory*, *in* WHAT DO UNIONS DO?, *supra* note 226, at 12.

229. *See* Naidu et al., *supra* note 3, at 542; *see also* ADIL ABDELA & MARSHALL STEINBAUM, ECON. POL'Y INST., LABOR MARKET IMPACT OF THE PROPOSED SPRINT–T-MOBILE MERGER (2018). Standard experimental econometrics are used in conducting empirical assessments of the impact of labor-market concentration and employer buyer power on workers' wages. *See* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 4 (1988).

230. *See* TIROLE, *supra* note 229, at 1–14.

231. *See, e.g.*, *id.*

firms set wages at the marginal revenue created due to the increment to output produced by the last worker employed, or the marginal revenue product (MRP) of labor.

A major assumption of IO is that, under competitive conditions, the market will set wages based on alternative uses for relatively homogeneous units of worker productivity and skill. Assuming relatively uniform labor inputs, you can expect wage differentiation *only* based on firms' acquisition of market power. IO thus identifies employers' ability to profitably pay workers below their MRP as direct evidence of their market power. A firm's market share can be indirect evidence of market power—whether the amount of workers employed or the percentage of total job vacancies posted.[232] In the merger context, market power can be assessed through measures of employer concentration, as in the Herfindahl-Hirschman Index (HHI), or through measures of "[d]ownward [w]age [p]ressure."[233] In sum, IO models employers' ability to suppress wages based on assumptions about how firms exploit their market position by reducing labor inputs and setting infracompetitive compensation, adopting wages approximating workers' MRP as the competitive benchmark.[234]

Influenced by IO, structural labor economics has developed tools that attempt to capture the "two-sided nature of differentiation" in labor markets.[235] Labor markets are described as *doubly* differentiated by employers' and workers' heterogeneous preferences that create frictions in employer-worker matching and employers' wage-setting or wage-taking ability.[236] Such approaches model and estimate employers' ability to engage in monopsonistic wage setting, *regardless* of workers' outside options, due to lock-in effects, commuting costs, affordable housing within commuting distance, childcare options, job information, information asymmetries, dependency on local networks, and so on.[237]

Economists, policymakers, and antitrust experts in the Department of Justice (DOJ) and Federal Trade Commission (FTC) have also developed useful mechanisms for tempering imbalances between monopsonists and sellers. Their expertise is key to remedying the impacts of proposed mergers

232. Marinescu & Posner, *supra* note 50, at 20–21.

233. *See* Naidu et al., *supra* note 3, at 539, 578–80.

234. Some IO scholars recognize that wages likely fall below that "because of search frictions and job differentiation" in naturally monopsonistic labor markets. Marinescu & Posner, *supra* note 50, at 13.

235. Naidu et al., *supra* note 3, at 584.

236. *Id.* For two-sided matching in labor markets, see, for example, Sydnee Caldwell & Oren Danieli, *Outside Options in the Labor Market*, SCHOLARS HARV. (Nov. 7, 2018), https://scholar.harvard.edu/files/danieli/files/danieli_jmp.pdf [https://perma.cc/7Q9R-RWNC]; Eduardo M. Azevedo & Jacob D. Leshno, *A Supply and Demand Framework for Two-Sided Matching Markets*, 124 J. POL. ECON. 1235 (2016); Card et al., *supra* note 224; Konrad Menzel, *Large Matching Markets as Two-Sided Demand Systems*, 83 ECONOMETRICA 897 (2015); and Nikhil Agarwal, *An Empirical Model of the Medical Match*, 105 AM. ECON. REV. 1939 (2015).

237. *See, e.g.*, Naidu et al., *supra* note 3, at 555.

on market concentration and proposing solutions to firm market power in enforcement actions.[238] Injunctive remedies and settlement conditions in antitrust cases are designed to diffuse a strong firm's market power and are relevant for designing solutions to balance employer-union bargaining power as well, whether through prohibiting specific kinds of conduct; "fencing in" provisions that limit conduct bringing parties close to repeat violations; transparency provisions; adjusting property rights through shared use, equal access, and nondiscrimination duties; or breaking firms apart.[239]

C. *Bargaining Power in Microeconomic, Negotiation, and Game Theory*

Game theory and bargaining models have also developed relevant tools for assessing parties' relative bargaining power in labor markets. Concentrating on how a party's interacting choices under uncertainty produce outcomes that fulfill or frustrate their preferences or utilities, microeconomic game and bargaining theory defines bargaining power as the power to make agreements more favorable to oneself than one's counterparty; equal bargaining power is when the parties share equally from the gains of trade.[240] It identifies variables that determine negotiation outcomes, sources of bargaining power, and strategies that improve bargaining power, all to assess those outcomes' efficiency and distributive properties.[241]

While simple games begin as two-person zero-sum games with mixed-strategy equilibria (stable solutions), several-player games can be analyzed as "cooperative" (players cooperate because of externally enforced restraints,

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238. *See* Hafiz, *Interagency Merger*, *supra* note 9. *See generally* ABA SECTION OF ANTITRUST L., MARKET POWER HANDBOOK: COMPETITON LAW AND ECONOMIC FOUNDATIONS 5–8, 13–34 (2d ed. 2012).

239. *See* Org. for Econ. Co-operation & Dev. [OECD], *Commitment Decisions in Antitrust Cases: Note by the United States to the Directorate for Financial and Enterprise Affairs Competition*, OECD Doc. DAF/COMP/WD(2016)23 (June 2, 2016), https://www.justice.gov/atr/file/873491/download [https://perma.cc/F5JU-792N]; ANTITRUST DIV., U.S. DEP'T OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2004), https://www.justice.gov/atr/page/file/1175136/download [https://perma.cc/N2A4-DLM6]. The DOJ and FTC have committed to integrating labor market-effects analysis into merger review and targeting wage-fixing and no-poaching agreements with limited, if any, follow through. *See* [Proposed] Final Judgment, *United States v. Deutsche Telekom AG*, No. 1:19-cv-02232 (D.D.C. July 26, 2019) (failing to incorporate labor market-effects analysis in conditional approval of Sprint-T-Mobile merger); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 33, at 3; *Hearing on the Oversight of the Antitrust L. Before the Subcomm. on Antitrust, Competition Pol'y & Consumer Rts. of the S. Comm. on the Judiciary*, 115th Cong. 20 (2018) (responses to questions for the record of Joseph Simons, Chairman, Fed. Trade Comm'n). *See generally* Hafiz, *Interagency Merger*, *supra* note 9.

240. *See, e.g.*, MATTHEW O. JACKSON, SOCIAL AND ECONOMIC NETWORKS 545 (2008); THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 22 (1960).

241. *See generally* JOHN VON NEUMANN & OSKAR MORGENSTERN, THE THEORY OF GAMES AND ECONOMIC BEHAVIOR (60th anniversary ed. 2004); John Nash, *Two-Person Cooperative Games*, 21 ECONOMETRICA 128 (1953); John Nash, *Non-cooperative Games*, 54 ANNALS MATH. J. 286 (1951) [hereinafter Nash, *Non-cooperative Games*]; John F. Nash, Jr., *The Bargaining Problem*, 18 ECONOMETRICA 155 (1950).

like law) or "noncooperative" (players do not forge coalitions and agreements are self-enforcing through credible threats or other mechanisms).[242] The most basic models assume frictionless bargaining. Frictionless bargaining occurs when there are no transaction costs; the parties have perfect information; and they can make alternating offers through an infinite time horizon, as in a chess game where players can witness results of past strategies and engage in sequential moves.[243] In standard accounts of frictionless bargaining, the parties agree to the most efficient terms for surplus allocation from the bargain.[244]

More advanced games relax those assumptions, introducing transaction costs, delay costs (or the benefits of patience), imperfect or asymmetric information, risk aversion, the availability of outside options, and other variables.[245] Each variable shifts bargaining power in favor of one party in a bargaining model. For example, patience confers bargaining power because parties that can delay without costs have more bargaining power relative to those who cannot delay without significant costs. So employers might be able to delay without costs because the law allows them to replace workers or otherwise continue production during a strike. On the other hand, workers might not be able to delay without significant costs during a strike because they may have limited strike funds or cannot access unemployment benefits or food stamps while striking. Likewise, risk aversion reduces bargaining power, so a player's bargaining power is higher the less averse she is to risk relative to her counterparty. And where there are information asymmetries, delays can be strategies through which privately held information can be credibly communicated to an uninformed party.[246] A party's bargaining power increases if she can take action prior to and/or during bargaining negotiations that would commit her to a favorable position.[247] The larger the cost of revoking a partial commitment, the higher a player's bargaining pow-

242. *See* Nash, *Non-cooperative Games*, *supra* note 241.

243. *See, e.g.*, Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 ECONOMETRICA 97 (1982).

244. *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 554 (2003). For debates on agreement to efficient terms, see, for example, David A. Miller & Joel Watson, *A Theory of Disagreement in Repeated Games with Bargaining*, 81 ECONOMETRICA 2303 (2013) (arguing that attaining efficiency depends on stage game and bargaining protocol); Choi & Triantis, *supra* note 53, at 1671–72 (describing when inefficient terms may result); Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953, 959, 971 (2006) (finding variations in nonprice contract terms seeming to correlate with bargaining power).

245. *See* THE ECONOMICS OF BARGAINING (Ken Binmore & Partha Dasgupta eds., 1987); Rubinstein, *supra* note 243.

246. Where legal theorists assume information asymmetries or other market failures, they draw on IO, which assumes imperfect competition in its modeling. *See, e.g.*, Choi & Triantis, *supra* note 53.

247. SCHELLING, *supra* note 240, at 21–27.

er.[248] So, for example, when employers can permanently replace striking workers *during* collective bargaining negotiations, "precommiting" them to locked-in replacement sources of labor inputs *before* bargaining outcomes are reached, that places unions in weaker bargaining positions for final bargaining outcomes.

In the labor context, understanding when parties have unequal bargaining power involves determining when labor or management appropriates more of the surplus through negotiation. Thus, you can discern that "[a]n employer . . . possess[es] an inequality of bargaining power when he is able to appropriate more than half the surplus."[249] The bargaining process is modeled such that the parties agree to a price within a bargaining range that is defined by their respective reservation prices, or their Best Alternatives to a Negotiated Settlement (BATNA).[250] The lowest point in the bargaining range is the seller's BATNA—in employment, the worker's reservation wage, or the value of the worker's next best use of her services. And the highest point in the range is the buyer's, or employer's, BATNA: the value of its next best use of funds, whether wages for alternative workers or the foregone benefit of walking away.[251] A presumption within the paradigm is that the point at which the employer and workers agree will be determined by their "relative patience and risk aversion . . . as they look at the prospect of continued bargaining and delayed agreement."[252] So more patient, less risk-averse parties get a larger share of the surplus, assuming perfect information.[253] The boundaries of the parties' bargaining range and the wage they ultimately choose is driven by supply and demand conditions; market concentration; private information; patience and risk aversion; and negotiating skills and strategy.[254]

In addition to natural market failures that confer monopsony power on employers, existing legal frameworks—like property law and constitutional law—and other financial and resource advantages place employers in a stronger bargaining position relative to workers. For example, access to financing and credit, lower discount rates, the marginal value of money, employers' higher liquidity, and other considerations award employers more

248. *See* Yeon-Koo Che & József Sákovics, *A Dynamic Theory of Holdup*, 72 ECONOMETRICA 1063 (2004).

249. Richard A. Epstein, *In Defense of Contract at Will*, 51 U. CHI. L. REV. 947, 974 (1984); *see also* RANDALL K. FILER, DANIEL S. HAMERMESH & ALBERT E. REES, THE ECONOMICS OF WORK AND PAY (6th ed. 1996); REES, *supra* note 228, at 28.

250. *See, e.g.*, ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES 97–102, 106 (2d ed. 1991) ("The better your BATNA, the greater your power.").

251. Choi & Triantis, *supra* note 53, at 1675.

252. *Id.*

253. *See* INGOLF STÅHL, BARGAINING THEORY 121 (1972); Rubinstein, *supra* note 243, at 108.

254. Choi & Triantis, *supra* note 53, at 1675. *See generally* OSBORNE & RUBINSTEIN, *supra* note 217, 29–65, 50–55 (analyzing factors that affect bargaining outcomes); Ben-Shahar, *A Bargaining Power Theory of Default Rules*, *supra* note 53, at 408 (same).

bargaining power than workers absent labor-market regulation adjusting workers' disadvantaged position. But increased demand for or reduced supply of labor inputs, say, because of a strike, increases workers' bargaining power. Unions' and employers' respective reservation prices are higher (or lower) in the absence of other sellers (monopoly) or buyers (monopsony) than they would be in a competitive market. Informational advantages—knowing more than the other party or being able to conceal private information, like the employer's valuation of procured services or the value of a strike fund—shift parties' relative bargaining power.[255] Patience and risk aversion are a function of increasing one's own but also decreasing one's counterparty's advantage through negotiation over time. Individual workers may be more irrationally risk-averse than firms, so patience can be a function of character traits but also solvency and liquidity constraints, ability to diversify risks of unfavorable bargaining outcomes, and other considerations.[256] And the parties' ability to engage in sophisticated negotiation tactics can alter the "actual or perceived reservation price of either party," shifting the bargaining range.[257]

Scholars recommend a number of strategies for more even sharing where a bargaining-power imbalance is found, including establishing default rules and disclosure requirements, introducing competition, letting contracting parties renegotiate contracts, and giving the weaker party the opportunity to dictate bargaining terms with a secured delay.[258] Additionally, contract remedies can be deployed to invalidate contract terms or entire agreements where overweening power negates genuine consent.[259]

D. *Bargaining in Behavioral Economics, Industrial Relations, and Organizational Psychology*

Labor markets are social institutions where decisionmaking is based on a wide range of motives and values, including fairness. And social norms can

255. Choi & Triantis, *supra* note 53, at 1676.

256. *Id.*; Cass Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 236–47 (2001).

257. Choi & Triantis, *supra* note 53, at 1676; *see, e.g.*, AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE 291 (1991); G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 103–16 (3d ed. 2018); Pierre Cahuc, Fabien Postel-Vinay & Jean-Marc Robin, *Wage Bargaining with On-the-Job Search: Theory and Evidence*, 74 ECONOMETRICA 323 (2006) (finding bargaining power increasing from less to more skilled occupations).

258. Choi & Triantis, *supra* note 53, at 1673; *see also* SUNSTEIN, *supra* note 53; Oren Bar-Gill & Ariel Porat, *Disclosure Rules in Contract Law* (Harvard Pub. L. Working Paper, Paper No. 17–34, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985115 [https://perma.cc/4V5X-EA4J]; Ben-Shahar, *Fixing Unfair Contracts*, *supra* note 53.

259. Ben-Shahar, *Fixing Unfair Contracts*, *supra* note 53, at 873–76.

constrain bargaining decisions.[260] The realities of human cognition, cognitive biases, the psychology of groups, and the intersection of values in the workplace and broader labor market impact both employers' and workers' decisionmaking about productivity and acceptable compensation. Thus, these realities impact the relative bargaining power of labor and capital—how much both parties are willing to hold out for better terms. For example, fairness matters in significant ways when it comes to surplus division, as illustrated by the "ultimatum game." The "ultimatum game" is a two-player game where the first player may only make one take-it-or-leave-it offer to split a $10 pot, but if the second player rejects it, neither receives anything.[261] Second players typically reject lowball offers even though they would be better off with any amount over nothing, and first players typically anticipate this, offering between 40 and 50 percent of the pot.[262] Employers similarly face constraints in wage offers based on fairness.[263] And workers' relative bargaining power suffers from information constraints that distort their views of entitlement—most workers assume "for cause" rather than "at-will" employment regimes, for example—and these and other constraints compel behavioral scientific and industrial-relations tools to identify and analyze their bargaining power impacts.[264] This Subpart describes how developments in behavioral economics, labor/industrial relations, and organizational psychology reveal the psychological and sociological dimensions of constraints on labor-market decisionmaking, which, in turn, impact the relative bargaining power of labor and capital.

Behavioral economics examines the impact of relational contracting and fairness concerns on wage setting and wage taking, considerations that markedly enhance our understanding of patience, risk aversion, and reservation wages.[265] It also studies labor-market failures caused by heuristics that restrain firm wage setting, like reciprocity valuations that impact downward

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260. *See* ROBERT M. SOLOW, THE LABOR MARKET AS A SOCIAL INSTITUTION 3–5, 23 (1990); Jolls et al., *supra* note 53, at 1502–04.

261. *See* COLIN F. CAMERER, BEHAVIORAL GAME THEORY: EXPERIMENTS IN STRATEGIC INTERACTION (2003); Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q.J. ECON. 817 (1999).

262. Fehr & Schmidt, *supra* note 261, at 826.

263. *See* WEIL, *supra* note 19, at 83–87.

264. *See* Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 9 (2002); Pauline T. Kim, *Norms, Learning and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447; Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

265. *See, e.g.*, TRUMAN F. BEWLEY, WHY WAGES DON'T FALL DURING A RECESSION (1999); CAMERER, *supra* note 261; Ernst Fehr, Lorenz Goette & Christian Zehnder, *A Behavioral Account of the Labor Market: The Role of Fairness Concerns*, 1 ANN. REV. ECON. 355 (2009); Armin Falk, Ernst Fehr & Christian Zehnder, *Fairness Perceptions and Reservation Wages—The Behavioral Effects of Minimum Wage Laws*, 121 Q.J. ECON. 1347 (2006); Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728 (1986).

wage rigidity, or "stickiness," limiting employers' ability to lower wages in adverse economic conditions.[266] For example, in researching wage bargaining in incomplete contracts, behavioral economists have studied the impact of "reference dependence," or employees' view of their own wages as "fair" based on what other workers' wages are within the same job ("horizontal equity") or based on their view of what they should be earning relative to others in jobs hierarchically above or below them ("vertical equity").[267] They also study the impacts of "loss aversion," or workers' tendency to prefer avoiding losses to acquiring equivalent gains, which can result in wage "stickiness."[268] These accounts help explain empirical phenomena—such as downward wage rigidity, unresponsiveness of incumbents' wages to labor-market conditions, cohort effects, noncompetitive wage premia—that confound standard economic models that assume profit-maximizing firm conduct.[269]

Industrial/human relations and industrial and organization psychology (I/O Psychology) adopt an interdisciplinary approach to studying how workplace norms, management strategies, and employer wage setting impact worker productivity and firm profitability—all areas critical for understanding the overall gains to trade over which employers and workers bargain and estimate reservation pricing.[270] Industrial relations developed during the New Deal, bringing together sociology, economics, management, history, human resource psychology, law, politics, and geography to study the employment relationship.[271] The field primarily divided between personnel management (studying work from the employer's perspective—developing worker productivity and compensation schemes for maximal profit and effectiveness) and labor relations (studying collective bargaining and workforce governance from the employees' perspective).[272] Starting in the 1980s, "personnel management" evolved into Human Resource Management (HRM), Organizational Behavior (OB), Organizational Development (OD),

266. *See, e.g.*, BEWLEY, *supra* note 265.

267. *See, e.g.*, Ted O'Donoghue & Charles Sprenger, *Reference-Dependent Preferences*, *in* 1 HANDBOOK OF BEHAVIORAL ECONOMICS – FOUNDATIONS AND APPLICATIONS 2 (B. Douglas Bernheim, Stefano Dellavigna & David Laibson eds., 2018).

268. *See, e.g.*, Alex Dickson & Marco Fongoni, *Asymmetric Reference-Dependent Reciprocity, Downward Wage Rigidity, and the Employment Contract*, 163 J. ECON. BEHAV. & ORG. 409, 409–10 (2019).

269. Ernst Fehr, Lorenz Goette & Christian Zehnder, *The Behavioral Economics of the Labor Market: Central Findings and Their Policy Implications*, *in* POLICYMAKING INSIGHTS FROM BEHAVIORAL ECONOMICS 171, 226–27 (Christopher L. Foote, Lorenz Goette & Stephan Meier eds., 2009).

270. For industrial relations, see generally UNDERSTANDING WORK AND EMPLOYMENT: INDUSTRIAL RELATIONS IN TRANSITION (Peter Ackers & Adrian Wilkinson eds., 2003). For I/O Psychology, see, for example, EDWARD E. LAWLER III & JOHN W. BOUDREAU, HUMAN RESOURCE EXCELLENCE: AN ASSESSMENT OF STRATEGIES AND TRENDS (2018).

271. UNDERSTANDING WORK AND EMPLOYMENT, *supra* note 270, at 1–2, 20.

272. Bruce E. Kaufman, *Industrial Relations in North America*, *in* UNDERSTANDING WORK AND EMPLOYMENT, *supra* note 270, at 195, 196.

and related human resource fields, while "labor" or "industrial relations" became increasingly associated with only employee-side industrial relations.[273]

The study of bargaining power in industrial relations was dominated by institutional labor economists who formulated the NLRB DER's core approach and established the intellectual framework for the Clayton Act's rejection of labor commodification.[274] The study's evolved form is primarily populated by labor economists adopting an interdisciplinary approach to labor-market analysis. Through that interdisciplinary approach, they assess worker bargaining power; how strike duration impacts wage outcomes; the impact of workers' job searches on their bargaining power and wage dynamics; new forms of work organization and the high-performance workplace; and reform of American labor policy with new forms of employee representation.[275]

The HRM and human resource movement, on the other hand, focuses less on bargaining power and more on worker-output maximization. It studies management policies that grow the overall pie and manage workers' expectations of their share. Drawing from the "Hawthorne experiments" to improve workers' efficiency at Western Electric's Hawthorne Works, HRM researchers concentrate on "the internal social system in the plant" and managing employer care "of the psychosocial interactions among workers and between superiors and subordinates," viewing unions as hindering workplace cooperation.[276] Scholars and practitioners in growing "Human Resource" departments at universities and corporations study applied psychology to devise performance measurements, workplace motivation and reward systems, and the structure of work and organizational development, all to maximize worker productivity. The HRM literature focuses on reservation and efficiency wages, or wages that optimize worker productivity within a firm, rather than the theoretical MRP or competitive wage of IO or structural labor economics.[277]

Combined, the insights of behavioralists and industrial/human relations experts incorporate broader analytic metrics and remedial mechanisms to

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273. *Id.* at 199.

274. *Id.* at 202–05; Hafiz, *supra* note 15, at 1119–31.

275. *See, e.g.*, FREEMAN & MEDOFF, *supra* note 226; Shintaro Yamaguchi, *Job Search, Bargaining, and Wage Dynamics*, 28 J. LAB. ECON. 595 (2010); Bruce E. Kaufman, *The Employee Participation/Representation Gap*, 3 U. PA. J. LAB. & EMP. L. 491 (2001); David Card & Craig A. Olson, *Bargaining Power, Strike Durations, and Wage Outcomes: An Analysis of Strikes in the 1880s*, 13 J. LAB. ECON. 32 (1995).

276. Bruce E. Kaufman, *Human Resources and Industrial Relations: Commonalities and Differences*, 11 HUM. RES. MGMT. REV. 339, 352 (2001); *see also* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 43–44 (2003); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1566–77 (1981).

277. For "efficiency wages," see, for example, George A. Akerlof & Janet L. Yellen, *The Fair-Wage Effort Hypothesis and Unemployment*, 105 Q.J. ECON. 255 (1990), and George A. Akerlof, *Gift Exchange and Efficiency-Wage Theory: Four Views*, 74 AM. ECON. REV. (PAPERS & PROC.) 79 (1984).

employer wage-setting power. Where heuristics impact workers' relative bargaining power, their research proposes an opt-out union default to equalize bargaining due to unions' ability to correct behavioral market failures.[278] Because unions draw on knowledge of members, negotiators, and elected officials ("membership" and "expert effect"), as well as the collective experience of their own and parent organizations ("organizational learning effect"), they are better able to address the following behavioral market failures: (1) short-termism (focusing on short-term employment without considering future events); (2) inattention to important but nonsalient attributes (like an employer's hazard identification system or job-evaluation framework); (3) unrealistic optimism (like underpreparation for dismissal for unsatisfactory performance); and (4) poor probability estimation (like sufficiently funding pensions to fully finance retirement).[279] Unions better account for employees' long-term interests because they have a "large and diverse spectrum of members [within] a range of issues[,] . . . have less reason to be unrealistically optimistic," and have access to data that gives them "a better sense of baseline probabilities for future events and issues."[280] Behaviorists' research points to a need for disclosure requirements to reduce information asymmetries and supports multiemployer or pattern bargaining to limit employers' ability to capture rents from behavioral constraints.[281]

E. *Bargaining Power in Macroeconomics*

Macroeconomics research documents labor-market concentration's effects on labor's share of national income, modeling and tracking industry-specific impacts that could guide NLRB policymaking and adjudication on workers' relative bargaining power. It predicts and assesses drivers of labor-market inequality, concentration, and dynamism as well as distributional inequality while investigating the impact of those drivers on product-market concentration, labor's share of national income, and consumption.[282] Under

278. *See generally* Mark Harcourt, Gregor Gall, Rinu Vimal Kumar & Richard Croucher, *The Role of Unions in Addressing Behavioral Market Failure*, ECON & INDUS. DEMOCRACY: ONLINEFIRST (Jun. 6, 2019) [hereinafter Harcourt et al., *The Role of Unions*], https://journals.sagepub.com/doi/abs/10.1177/0143831x19853027 [https://perma.cc/AMY9-Z2SN]; Mark Harcourt, Gregor Gall, Rinu Vimal Kumar & Richard Croucher, *A Union Default: A Policy to Raise Union Membership, Promote the Freedom to Associate, Protect the Freedom Not to Associate and Progress Union Representation*, 48 INDUS. L.J. 66 (2019).

279. Harcourt et al., *The Role of Unions*, *supra* note 278, at 2.

280. *Id.*

281. *See* Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 592–96, 603–04 (2020); Andrias, *supra* note 8, at 79–80; LYNN RHINEHART & CELINE MCNICHOLAS, ECON. POL'Y INST., COLLECTIVE BARGAINING BEYOND THE WORKSITE 3 n.12 (2020), https://files.epi.org/pdf/193649.pdf [https://perma.cc/9TMT-ETT9].

282. *See, e.g.*, PIKETTY, *supra* note 12; David Berger, Kyle Herkenhoff & Simon Mongey, *Labor Market Power* (IZA Inst. of Lab. Econ., IZA DP No. 12276, 2019), http://ftp.iza.org/dp12276.pdf [https://perma.cc/WC2E-F2YU]; José Azar & Xavier Vives, *Oligopoly, Macroe-*

neoclassical macroeconomic theory, the shares of national income earned by capital and labor are constant and stable.[283] But empirical studies show that labor's share of national income is declining. Utilizing macroeconomic data and industry-level variation, economists have devised different theories for the decline, including decreased union density and the real value of minimum wages.[284] Some deploy microeconomic data at the firm and establishment level to evaluate how firm size impacts industry-level and aggregate labor share.[285] Macroeconomic methods and benchmarks for assessing relative bargaining power include measuring deviations from an equal division of the capital-labor share of national income; capital concentration within a national economy; capital costs and prices; and exogenous trade shocks. Macroeconomists also deploy microeconomic tools to measure industry-level product-market concentration and sales increases, assessing the fall in labor's share based on annual payroll data. For their analytical purposes, wage rates are less relevant than the *share* of income going to labor over capital, and unequal shares indicate unequal bargaining power in an industry or firm.

Macroeconomic evidence also suggests that increased market concentration leads to declines in employment, output, real wages, the labor share, real interest rates, and investment levels.[286] Administrative agencies outside the Treasury Department, Federal Reserve, and Congressional Budget Office have been slow to integrate macroeconomic modeling or analysis into policymaking and enforcement, and have not yet done so in their enforcement against employer buyer power, even though recent empirical work suggests that competition policy and market regulation impact macroeconomic performance.[287] Incorporating macroeconomic analysis into labor law could in-

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conomic Performance, and Competition Policy, IESE BLOG NETWORK (Dec. 18, 2018), https://blog.iese.edu/xvives/files/2018/12/Azar-Vives-Dec-2018.pdf [https://perma.cc/W6VH-4QKM]; David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms* (IZA Inst. of Lab. Econ., IZA DP No. 10756, 2017), http://ftp.iza.org/dp10756.pdf [https://perma.cc/2LPZ-DMWQ]; Lijun Zhu, *Industrial Concentration and the Declining Labor Share*, WASH. U. (Nov. 10, 2017), https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/7/815/files/2017/11/Job-Market-Paper_Lijun-Zhu-1pto4x7.pdf [https://perma.cc/B6G4-BAZ3].

283. *See, e.g.*, N. GREGORY MANKIW, MACROECONOMICS 58–59 (7th ed. 2009); Nicholas Kaldor, *Capital Accumulation and Economic Growth*, *in* THE THEORY OF CAPITAL 177, 177–78 (D.C. Hague ed., 1986).

284. *See, e.g.*, Berger et al., *supra* note 282; Michael W.L. Elsby, Bart Hobjin & Ayşegül Şahin, *The Decline of the U.S. Labor Share*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2013, at 38–39.

285. *See, e.g.*, Autor et al., *supra* note 282, at 2–3.

286. *See, e.g.*, Azar & Vives, *supra* note 282; Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421 (2020); Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* (Nat'l Bureau of Econ. Rsch., Working Paper No. 23687, 2017), https://www.nber.org/papers/w23687.pdf [https://perma.cc/F8PJ-7948].

287. *See, e.g.*, Azar & Vives, *supra* note 282. For agency integration of macroeconomic analysis, see Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 YALE J. ON REGUL. 545, 554–60 (2017).

form policymakers on how to gear policies toward economic growth by reducing employer buyer power.[288]

F. *Equal Bargaining Power: Coherence and Administrability*

Each approach outlined here has developed theoretical frameworks, methodological techniques, and empirical data and analyses that give real substance to the problem of identifying and correcting for unequal bargaining power. And each brings unique methods and analyses of the processes and strategies that impact parties' relative bargaining strength. Thus, in taking the NLRA's purposes seriously, the Board would ideally benefit from interdisciplinary expertise, cross-pollination, and consensus building within an internal research division that would advise its rulemaking and adjudication on the question of relative bargaining power impacts.[289] Interdisciplinary collaboration exists in a number of agencies, including the CFPB and the Securities and Exchange Commission's Division of Economic and Risk Analysis, and would allow the NLRB to bring significantly more expertise to its labor regulation than it currently can given its lack of internal social scientific infrastructure.[290] Thus, a congressional repeal of its ban on hiring social scientists and establishment of a new internal social science division within the NLRB would be ideal for analyzing the determinants and existence of unequal bargaining power. But even absent congressional intervention, the Board can do a considerable amount under its existing investigative powers, developing detailed records in adjudications based on parties' information, amicus briefing, and notice-and-comment rulemaking under the Administrative Procedure Act. Further, through Memoranda of Understanding (MOUs), the Board could, like the majority of agencies, collect information from other agencies on employers as well as industry-specific labor-market conditions. It could then organize this data within a network of "systemic facts" that inform its decisionmaking.[291] Thus, while in-house expertise is optimal, considerable data is available through government sources and academic research sharable with the Board in aid of its bargaining power determinations.

The challenges to integrating social scientific methods and research into an administrable equal bargaining power standard are determining how to weigh competing evidence; resolve conflicting approaches to bargaining power-analysis under its external, transactional, internal, and distributional variants; and decide what the correct balance of power is. But while the vari-

288. Azar & Vives, *supra* note 282, at 23–28.

289. *See* Hafiz, *supra* note 15, at 1179–83 (proposing new Division of Economic Research).

290. For overview of agencies' research divisions, see *id.* at 1143–52. For repeal, see *supra* note 58 and accompanying text.

291. For "systemic facts," see Crespo, *supra* note 58. For interagency coordination on labor-market regulation, see Hiba Hafiz, Labor Justice System (2020) (unpublished manuscript) (on file with the *Michigan Law Review*).

ous fields may be in tension with one another in certain respects discussed here, their approaches and empirical analyses can be deployed to approximate answers to one fundamental question: Will the legal rule at issue most closely mimic a bargaining process such that labor and management, going into bargaining negotiations, would be able to hold out indefinitely? Answers will require weighing competing views on the facts and data analysis and will necessarily be an evolutionary enterprise that will gain in sophistication over time.

For example, the Board would need to look beyond traditional IO approaches applied in antitrust law to ascertain employer monopsony because those approaches are exclusively concerned with market power that benchmarks ideal "competitive" wages at workers' MRP.[292] Antitrust policy and remedies are not concerned with a broad range of labor-market failures—search frictions, information asymmetries, and heterogeneous preferences—which labor economists identify as accruing to employers' buyer power, "even in large, non-concentrated labor markets with many employers."[293] Where labor economists identify such market failures and antitrust law is not tasked with correcting them, labor law must intervene or let the ensuing social harms go uncorrected. And there is a growing consensus by labor antitrust scholars that while "antitrust enforcement . . . should be strengthened," "stronger and more tailored policy instruments are needed to make significant progress on the problem of labor monopsony," including through the labor law.[294] Thus, labor law must adopt a broader understanding of employer buyer power beyond strict IO accounts. Employer buyer power under labor law must broadly include a more general "capacity to force lower prices from" workers: "These lower prices can be reduced below the market rate (as in classic monopsony); exacted out of an unequal distribution of relationship-specific surplus (as in transaction cost accounts); or arise from lowering inflated prices to a market rate."[295]

Additionally, standard IO models begin with an assumption of a homogenous goods market. This assumption is useful for basic market-power analyses but would be a tenuous foundation for broader labor regulatory policy because labor markets are replete with differentiated skills complexity, productivity rates, and difficult-to-measure individual contributions to participatory and team-based workplaces. And measuring employers' market share is difficult when workers choose between firm employment, shared employment, and self-employment, each demanding slightly different skills provision, risks, and opportunities. Further, calculating broader, nonwage anticompetitive harms of employer monopsony and collusion, like increased shirking, decreased or slowed innovation, and a reduction in the variety of

292. *See infra* notes 306–307 and accompanying text.

293. *See* Naidu & Posner, *supra* note 9, at 8.

294. *Id.*

295. Wilmers, *supra* note 137, at 239 n.2.

services, could benefit from behavioral and industrial-relations analyses.[296] The significant empirical findings of labor-market monopsony generated by IO have either bracketed these concerns or simplified their models; a broader, interdisciplinary approach to labor markets is required.[297]

Thus, solely relying on IO or structural labor economics' "external" assessments of employer market power is insufficient. It is necessary to assess "internal" bargaining power determinations *inside* the firm and broader determinants of wage setting to more accurately determine relative bargaining power. Industrial-relations experts are crucial for this endeavor because they incorporate analysis of equity and fairness within individual workplaces and across industries on wage bargaining (whether those be market-clearing wages, internal labor-market wages, union premium wages, or other compensation measures).[298] Non-IO approaches also view wage determination as a process that prices in labor productivity as a dynamic input of production—not only in terms of the variable productivity of workers within their life cycle (internal labor-market wages) but also in incentivizing productivity through "fairness" and discounting wage "stickiness."[299] This is a particularly important dimension to any bargaining-power analysis because output-maximizing wages increase the size of the pie that determines the wage-bargaining window. While some identify the MRP wage (or its proxies) as the output-maximizing wage,[300] using the MRP as the proper benchmark for the wage at which workers maximize output may be underinclusive within the broader social science literature. For example, behavioral economists and organizational psychologists might describe a particular employee's productivity-maximizing wage as the wage slightly below that employee's supervisor but above an employee they supervise, like an assistant, because the employee may shirk—or be less productive—at a lower wage. That wage may or may not correspond with the MRP. And exclusive reliance on economic rather than broader sociological, psychological, and industrial-relations approaches to fairness limits our understanding of workers' true valuation of the costs of holding out.

Nor do IO and more conventional labor economics focus on the impact and health of labor-market *institutions* in preempting or remedying bargain-

296. For nonprice monopsony power costs, see C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2083 (2018).

297. *See supra* notes 9, 229.

298. *See, e.g.*, WEIL, *supra* note 19, at 81–83 (summarizing literature); BEWLEY, *supra* note 265, at 81 (explaining pay equity fairness); PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS (1971); Arindrajit Dube, Laura Giuliano & Jonathan Leonard, *Fairness and Frictions: The Impact of Unequal Raises on Quit Behavior*, 109 AM. ECON. REV. 620 (2019); Christine Jolls, *Fairness, Minimum Wage Law, and Employee Benefits*, 77 N.Y.U. L. REV. 47 (2002); Mark G. Kelman, *Progressive Vacuums*, 48 STAN. L. REV. 975 (1996) (book review); Kahneman et al., *supra* note 265, at 739–40 (finding fairness rules apply to wage setting).

299. *See, e.g.*, Jolls, *supra* note 298; Kahneman et al., *supra* note 265, at 739–40.

300. *See* Marinescu & Posner, *supra* note 50, at 2–3.

ing-power imbalances. The impact of these institutions on static wage setting and broader, dynamic negotiations on work rules, life-cycle earnings, and countercyclical pricing games must be at the core of any structural regulatory approach to wage policy targeting macroeconomic effects.[301] Many aspects of employers' leverage over workers' wages and working conditions extend beyond wage setting into aspects of day-to-day control, scheduling, right to organize without retaliation, and other forms of deleveraging power primarily regulated under labor and employment law. This lived experience of workplace control is the framework within which employer coercion is exercised and workplace decisionmaking occurs,[302] but it is also the framework within which bargaining leverage accumulates.[303] IO and traditional labor-economics approaches neither assess nor monitor these effects on wage bargains.

In addition, neither is well-suited for assessing and servicing "distributional" bargaining power accounts or regulating employer buyer-power effects as unequal gains from the employment bargain. Nor are they concerned with monopsonistic externalities that can create or entrench buyer power that is "harder . . . to deal with [than seller power] because of the dispersed nature of its impact."[304] For example, employers routinely transfer the costs of deadweight loss, infracompetitive wages, and limited-if-any job benefits to the government, and policing the spread of these externalities in the "fissured" workplace is challenging.[305] Utilizing macroeconomic analysis to identify and adjust for the pernicious effects of employer buyer power on labor's share must critically be the purview of labor law as it fulfills the NLRA's equal bargaining power and macroeconomic goals.[306] And doing so would allow the NLRB to calibrate its regulation of employer buyer power with broader macroeconomic regulation that occurs in other agencies.

But how should the Board and the courts consolidate and evaluate competing estimations of employer bargaining power and benchmarks on wage suppression? An IO economist may view the MRP as the proper "competitive wage rate" that captures the "right" amount of bargaining power at perfect competition. An industrial-relations expert or labor economist may view a higher wage—a union premium or internal labor-market wage—as the

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301. *See, e.g.*, Benmelech et al., *supra* note 11.

302. *See* Michael M. Oswalt, *The Content of Coercion*, 52 U.C. DAVIS L. REV. 1585 (2019).

303. *See* Brishen Rogers, *The Limits of Antitrust Enforcement*, BOS. REV. (Apr. 30, 2018), http://bostonreview.net/class-inequality/brishen-rogers-limits-antitrust-enforcement [https://perma.cc/R8EN-LV34].

304. *See* PETER C. CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER 9 (2017).

305. *See, e.g.*, KEN JACOBS, IAN PERRY & JENIFER MACGILLVARY, UC BERKELEY LAB. CTR., THE HIGH PUBLIC COST OF LOW WAGES (2015), http://laborcenter.berkeley.edu/pdf/2015/the-high-public-cost-of-low-wages.pdf [https://perma.cc/HA2Y-GLSE].

306. *See, e.g.*, Bagenstos, *supra* note 184, at 412 n.18 ("[D]eclining labor share . . . suggests that workers . . . are systematically less able than employers to realize the surplus the two sides receive from contracting . . . [and] these laws help to rectify that situation.").

most appropriate division of the gains of trade because it is the output-maximizing wage that increases most the size of the pie. A macroeconomist may view an unequal division of profits between labor and capital as indicative of unequal bargaining power.[307] Which estimation or benchmark should govern their NLRA analysis if they conflict?

As the next Part discusses, the Board and the courts can *tether* evidence-based equal bargaining power judgments to the broader micro- and macroeconomic purposes of national labor policy. These purposes include "stabiliz[ing] . . . competitive wage rates and working conditions within and between industries" and preventing depression of wage earners' "purchasing power."[308] More specifically, the Board and the courts can synthesize and streamline disparate analyses into categorical rules based on their emerging understanding of parties' respective holdout ability after reviewing the totality of the administrative record in specific cases and industries. For example, the Board could establish—through rulemaking or adjudication—a default rule that wage setting below the MRP or a macroeconomic determination that labor's share of income relative to capital in a particular industry presents a rebuttable presumption of a bargaining-power imbalance. Additional evidence of market failures or coercion that accrues to employers could also indicate unequal bargaining power. Or, the Board might determine that evidence of an employer's historical record of labor and employment law violations, ease in replacing striking workers, contractual agreements and resources to ride out strikes, or aggressive use of its property rights to limit strike effectiveness creates a bargaining power imbalance.[309] The Board's judgment here will not be as predictable as a strict rule, much like most agency or court judgments requiring evaluation of social scientific evidence under broad legal standards. But it will be based on data and analysis that far exceed the reliability and accuracy of assessments of evidence under *already* broad current standards, which rely on no information about bargaining-power impact. And bargaining-power analysis will require regulators to provide strong justifications for burdens they places on workers' right to counter employers' buyer power.[310]

A second challenge to incorporating social science is that it is not immune from political malleability. [311] How could we guarantee that the Board

307. *See, e.g.*, Benjamin Bental & Dominique Demougin, *Declining Labor Shares and Bargaining Power: An Institutional Explanation*, 32 J. MACROECONOMICS 443 (2010).

308. National Labor Relations Act, 29 U.S.C. § 151.

309. For calibrating employers' property rights during strikes, see Hiba Hafiz, *Ownership Work and Work Ownership*, U. CHI. L. REV. ONLINE (Mar. 30, 2020), https://lawreviewblog.uchicago.edu/2020/03/30/ownership-work-and-work-ownership-by-hiba-hafiz/ [https://perma.cc/ZNK6-7QA5].

310. *See infra* note 315 and accompanying text.

311. *See, e.g.*, DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016); SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA (1995); Elliott Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences: The Impact of Law and Economics on American Jus-*

and the courts' legal judgments and fact finding are not ideologically based or biased? The Board's history of politicizing rulings—flip-flopping between Democratic and Republican administrations—provides reason for concern that integrating social scientific analysis will be manipulated to favor overdetermined results.[312] Trump Administration attempts to shape regulation by limiting or cherry-picking scientific evidence agencies rely on are foreboding for the proposition that evidence-based approaches informed by social science can overcome ideologically driven outcomes.[313] And in its most recent rulemakings, the Board has ignored comments that highlight and expose social scientific critiques of its proposed rules, so even where social scientific evidence is offered to refine rules, it has demonstrated a willingness to ignore it.[314]

However, Board and court decisions that rely on "relevant social science and empirical data" promise more transparency by "expressly articulat[ing] the grounds for factual assertions and, as a result, more clearly reflect the interpretive choices involved" in labor law decisionmaking.[315] Requiring agencies to develop a social scientific and evidentiary record has been a primary means for courts to hold agencies' feet to the fire, ensuring that they meet their procedural and substantive burdens in justifying policies.[316] So reintroducing social scientific analysis can create a new stage of contestation for parties and the public based on more thoroughly studied proxies of employ-

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tice, SSRN (Mar. 20, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2992782 [https://perma.cc/W88P-X94G]; Daniel Hirschman & Elizabeth Popp Berman, *Do Economists Make Policies? On the Political Effects of Economics*, 12 SOCIO-ECON. REV. 779 (2014); Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465 (Peter Newman ed., 1998).

312. On flip-flopping, see *supra* note 23 and accompanying text.

313. *See, e.g.*, Lisa Friedman, *E.P.A. to Limit Science Used to Write Public Health Rules*, N.Y. TIMES (Nov. 11, 2019), https://www.nytimes.com/2019/11/11/climate/epa-science-trump.html [https://perma.cc/4BZY-GG5D]; Kayla Epstein, Andrew Freedman, Jason Samenow & Kate Harrison Belz, *NOAA's Chief Scientist Will Investigate Why Agency Backed Trump over Experts, Email Shows*, WASH. POST (Sept. 9, 2019), https://www.washingtonpost.com/weather/2019/09/09/noaas-chief-scientist-will-investigate-why-agency-backed-trump-over-its-experts-dorian-email-shows/ (on file with the *Michigan Law Review*).

314. *Compare* Hiba Hafiz, Brishen Rogers, Kenneth G. Dau-Schmidt & Kate Bronfenbrenner, Comment Letter on the National Labor Relations Board's Proposed Joint-Employer Rule (Jan. 14, 2019), https://lawdigitalcommons.bc.edu/lsfp/1201/ [https://perma.cc/KY7P-X9MR] (criticizing a proposed rule by showing that indirect employers exploit labor-market power with, for instance, noncompetes), *with* Joint Employer Status Under the National Labor Relations Act, 29 C.F.R. 103 (2020) (responding to that criticism in only a sentence, saying that the current definition of joint employers can accommodate the Comment's concerns).

315. Tracey L. Meares & Bernard E. Harcourt, Foreword, *Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 735 (2000). I thank Ben Levin for alerting me to this research and its insights.

316. *See, e.g.*, Hafiz, *supra* note 15, at 1139; Jonathan Masur & Eric Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935 (2018).

er control. It can enhance visibility of the ideological assumptions informing Board reasoning, making it easier for the public to know the bases of its decisions and strategize on challenging them. Further, a growing administrative law literature has documented the tempering ability of civil-service protected-career officials with expertise on ideological swings generated by political appointees.[317] Evidence-based reasoning can ensure political accountability by constraining agencies from straying from Congress's delegating statute.[318]

And stronger, evidence-based results could strengthen the Board's position on judicial review under doctrines of deference, shielding it from judicial dilution of labor law.[319] As this Article has argued, eighty years of labor adjudication in the vacuum of the NLRB's original institutional alignment in interdisciplinary social science has enabled a judicial formalism that "deradicalized" the NLRA's original potency and dispersed and misaligned workers' collective rights.[320] Renewed institutional alignment of Board expertise and the NLRA's equal bargaining power purpose may enable and sustain a body of expertise and deliberative processes that slow political vacillations.

A third challenge to incorporating social science is that critics of equal-bargaining analysis have argued that unequal bargaining power doctrine is either "internally incoherent" or would "not capture the moral problem raised by inequality" in employment relationships.[321] Specifically, Duncan Kennedy has argued, primarily in reference to contract law, that unequal bargaining power doctrine falsely presumes a hypothetical state of affairs where the law has not already shaped the conditions for the possibility of bargaining outcomes. It then seeks to "equalize" bargaining power through judicial imposition of compulsory contract terms that rely on common law judges' contingent conceptions of voluntariness and freedom in ways that are manipulable, underdetermined, and internally contradictory within the common law canon.[322] An aligned critique that equal bargaining power

317. *See, e.g.*, ALAN M. JACOBS, GOVERNING FOR THE LONG TERM: DEMOCRACY AND THE POLITICS OF INVESTMENT 28–30 (2011); Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 526 (2011) (viewing stability as corollary to expertise); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 24 (2010). Scholars have also catalogued how federal bureaucracy can check presidential overreach through "bureaucratic resistance from below." Jennifer Nou, *Bureaucratic Resistance from Below*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 16, 2016), https://www.yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/ [https://perma.cc/D9EP-YVH7]; *see, e.g.*, ROSEMARY O'LEARY, THE ETHICS OF DISSENT: MANAGING GUERILLA GOVERNMENT (2d ed. 2014); JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE (1999); Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349 (2019); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011).

318. *See, e.g.*, Edward Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633 (2018).

319. *See supra* note 23.

320. Klare, *supra* note 18.

321. Kennedy, *supra* note 216, at 623; Bagchi, *supra* note 94, at 580.

322. *See* Kennedy, *supra* note 216, at 578–82.

analysis is underdetermined is that by Aditi Bagchi, who emphasizes how such analysis ignores the critical moral dimensions that elicit our view that such inequality is "unfair" or "unjust": "By attributing unappealing outcomes directly, or ultimately, to bargaining power inequality, we obscure the justice or injustice, i.e., the moral properties, of background institutions."[323]

But social scientific research and analysis can subject such background rules *to* their analysis as opposed to taking those rules as given, or at the very least reveal them as contributing to determinations of how rights have been allocated and establish the parameters of a richer debate on normative questions. What this Article has attempted to highlight are the vast efforts of these social scientists to use theoretical and empirical tools to put meat on the bones of the world as Kennedy and Bagchi see it. Social scientists have sought to give substance and contours to precisely how background rules are or are not incorporated into the framework of unequal bargaining power analysis and delineating the ways that legal and social institutions, market forces, and labor-market actors' conduct and beliefs enhance or deflate the power of actors in those markets. Social scientists have also devised strategies, models, and empirical analyses to ascertain what conduct and structural remedies might improve the state of play to combat substantive and procedural inequality, the adverse impacts of employer buyer power on workers, and the ossification of current distributions that predetermine certain outcomes over others absent intervention. Additionally, the interdisciplinary approach described here is one that very explicitly seeks to incorporate fairness considerations in the bargaining-power analysis, at least as fairness is understood subjectively by workers and employers through behavioral theory, organizational psychology, and other industrial-relations approaches. But it also plainly seeks to introduce the distributive dimension of fairness by applying the tools of bargaining and macroeconomic theory to directly evaluate both surplus distribution and the parties' perceptions of fairness in that distribution. And introducing these approaches into legal reasoning can better shape precedent than the alternatives because it would populate the record with facts, data, and interpretation that can shape and reshape our understanding of the realities of power formation. This could bring us closer to Kennedy's ideal of "knowing others, rather than just making rules for them."[324]

Finally, Board-led social scientific analysis of bargaining power is a public good in its own right. Ignoring social science has isolated the Board from the rigor of competing empirical understandings of how labor markets work as well as theoretical and empirical formulations of employer power. Enabling Board integration of interdisciplinary study into regulatory debates about which modeling and data are most relevant for executing and tailoring policy goals would further these understandings.[325] The benefits of more

323. Bagchi, *supra* note 94, at 595.

324. Kennedy, *supra* note 216, at 649.

325. *See* Hafiz, *supra* note 15, at 1130 & n.70.

Board-led research, data collection, and labor-market analysis would provide a significant service to the public, policymakers, labor market-regulating agencies, and independent researchers.

III. EQUAL BARGAINING POWER AND STRUCTURAL LABOR RIGHTS

To fulfill the NLRA's enduring equal bargaining power purpose, the Board can draw on the wealth of social scientific developments to reform doctrine in key areas that impact bargaining power most: the scope of its jurisdiction (who counts as covered "employees" and "employers"); the scope of workers' section 7 rights; and the scope of employer and union ULPs. Doing so will aid in achieving the normative values at the Act's core, namely, reducing inefficiencies and promoting distributional fairness to overcome labor-market failures.[326] But it will also service the Act's other goal of labor peace by creating optimal conditions for quick labor-dispute resolution.[327]

Drawing from social scientific developments, the Board should consider the sources of each party's relative bargaining power and outside options as well as broader industry-specific data it collects through adjudication and rulemaking.[328] In considering the sources of workers' bargaining power, the Board should examine the power workers attain due to existing protections under labor and employment law and how those protections might be undermined by other law—antitrust law, property law, social insurance, and other legal frameworks. For example, the Board might assess the impact of minimum wage laws as setting a wage floor and the extent and scope of government interventions to protect worker organizing, collective bargaining, and strikes on worker bargaining power. However, the Board might weigh that against other statutory provisions and doctrine that weaken worker bargaining power, like weaker minimum wage laws, legal bans on secondary boycotts, limited unemployment benefits, and other social safety nets that increase the risks of termination and employer retaliation. Other legal frameworks that might weaken worker bargaining power might be antitrust law and policy that prohibit worker combinations (depending on the scope of the labor exemptions), limitations on access to collective forms of legal action (whether through class action, collective action, or collective arbitration mechanisms), and limitations on First Amendment protections for accessing work sites and engaging in expressive activity on employer property. Other sources of worker bargaining power are economic: labor input-, industry-, and skill-specific scarcity; labor-market demand, industry- or skill-specific demand by employers, and availability of alternative employment; job guarantees or public-option employment; the nature of the industry (production of perishable goods or time-sensitive production cycles); and union strike funds, worker savings, liquid assets, and access to credit. Fur-

326. *See* 29 U.S.C. § 151.

327. *See supra* note 217 and accompanying text.

328. *See* 29 U.S.C. §§ 153, 161 (investigative authority); *id.* § 156 (rulemaking authority).

ther, certain labor markets might be more prone to market failures than others, and those market failures might accrue to the benefit of workers' or employers' bargaining power. For example, if there are high search costs in a particular labor market, or if there are lock-in effects that keep workers in jobs even when they are being paid below their MRP (whether because of heterogeneous preferences, nonportable benefits, nonportable firm-specific skills and training, the accumulation of human capital and trade secrets, or other reasons), that weakens worker bargaining power. Information asymmetries—for example, privately held information about union or strike support, membership rates, and the likelihood of employer devaluation of firm-specific capital—would also impact the bargaining power of workers relative to their employers. Additional sources of workers' bargaining power might include their ability to pressure employers through (in a nonexhaustive list) high union density within the industry; establishing "closed shops," union hiring halls, and other agreements; existing relationships and solidarity with other unions or workers; high-level organizing skills and outreach to existing and potential union members; robust relationships with political actors; and consumer boycotts, public-relations pressures, community relations, reputational costs of antiunion campaigns, and union labels.[329]

On the other hand, the Board should consider a range of sources of employers' bargaining power in its equal bargaining power analysis, and the following discussion is nonexhaustive. As with workers, employers gain bargaining power from existing legal protections and privileges, whether through legal defaults (like at-will employment); government intervention in organizing, collective bargaining, and strikes under labor and employment law (including protections for lock-outs, worker replacement, adjudicatory delays, availability of injunctive relief and remedies, and exemptions); employer property rights and control of the means of production; or First Amendment protections to engage in antiunion speech, limit government notification to workers of their rights, or limit workers' expressive activity.[330] Employers might also be able to rely on legal background rules and other government grants to increase their bargaining power over workers, like the ability to externalize costs of a healthy and productive workforce by relying on a government-provided safety net; access to government industry- or firm-specific subsidies; and transition costs to outsourcing, subcontracting, plant relocation, and offshoring under labor and employment, corporate, tax, and trade law. Employers' bargaining power might also be sourced in the economic conditions of labor markets from which they draw, whether due to their own conduct (acquiring and maintaining monopsony power, colluding with other employers to gain buyer power, merging to increase their market power) or due to natural labor-market frictions that favor them (search costs, heterogeneous preferences, worker mobility costs, lock-in effects, in-

329. *See, e.g.*, REES, *supra* note 228.

330. *See* Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305, 341–43 (1994); Hafiz, *supra* note 309.

formation asymmetries). Legal background rules also matter here: the ease with which employers might collude, merge, or allow common ownership under the antitrust laws impacts their relative bargaining power over workers. Further, existing labor-market and product-market conditions impact employers' bargaining leverage, so the Board should consider the level of competition in the labor supply for a "reserve army"; the availability of automation or worker substitutes; the employers' market power in product markets allowing them to reduce labor inputs; and durable consumer loyalty. Employers' ability to hold out during strikes and other activity gives them bargaining power, so the Board should review employer liquidity, credit access, and access to capital; contracts with suppliers, distributors, franchisors, and others that enable riding out strikes; enforceable profit-sharing agreements between employers during strikes; and other robust contingency planning. Finally, the Board might consider employers' marketing skills and resources, relationships with political actors and lobbying history, and other sources of support that could buttress their ability to withstand economic pressure from their workers.

The Subsections below offer new standards for defining and interpreting the NLRA's core provisions within an equal bargaining power framework and demonstrate how that framework is both administrable and normatively desirable. The Subsections are premised on the principle, in applying this new framework, that the Board (and the courts) will regulate the bargaining *process*, not the substantive terms of the bargain itself.[331] Thus, the approach is on the regulation side of the regulation/rate-setting or price-control spectrum. While the Board could look to prior bargains and current wage offers as *evidence* of the parties' bargaining positions, that evidence would be one among many indicators of where the parties stand relative to each other.

A. *Equal Bargaining Power Analysis of "Employer" and "Employee" Status*

The NLRB should use social scientific analysis in ascertaining its jurisdiction over "employers" and "employees" through its equal bargaining power purpose, whether through adjudication or rulemaking. It should ensure that status determinations *align* with guaranteeing workers' countervailing power against employers. More specifically, "employees" should be defined to include *all those providing labor inputs that face buyer power, direct or indirect, by a purchasing firm*, and the NLRB should likewise define "employer" or "joint employer" to include *all those with buyer power, direct or indirect, over workers' labor inputs*.[332] A buyer-power test is consistent with the Board's common law "right to control" test because it directly demonstrates the employer's power to "control . . . the details of the work" as a wage setter rather than a wage taker, and monopsony control of workers'

331. *See supra* notes 188–193 and accompanying text.

332. *See* Hafiz, *supra* note 15, at 1159.

outside options directly bears on whether workers have "significant entrepreneurial opportunity for gain or loss."[333]

The Board currently adopts a narrow view of "employee" and "employer." In defining "employee," the Trump Board views each common law agency test factor "through the prism of entrepreneurial opportunity," including the extent of employer control; the nature of the occupation and skill required; the length of employment; the method of payment; the parties' beliefs in creating a master-servant relationship; and whether the principal is a business, the worker is engaged in a distinct occupation from that regular business, and the worker supplies material.[334] As for joint employers, the Trump Board has implemented a more demanding standard through rulemaking, requiring that putative joint employers "possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment."[335] The rule overrides an Obama Board ruling extending "joint-employer" status to those that "share or codetermine . . . essential terms and conditions of employment" with direct employers; "control exercised *indirectly*—such as through an intermediary" was enough.[336]

Neither definition considers how withdrawal of Board jurisdiction to a smaller number of "employers" and "employees" in a fissured and highly nonunion workforce impacts relative bargaining power, nor do they accord common law agency requirements with the NLRA's equal bargaining power purpose.[337] But they could easily do so, and in fact, California and various state courts have adopted alternative tests "that give[] full weight to the importance of counteracting employer power."[338]

The Board could begin by incorporating firm- and industry-specific information about external, transactional, internal, and distributional bargaining power. It could assess labor's share of income relative to capital- and IO-based indicators of employer power as supplemented by labor, industrial-

333. Supershuttle DFW, Inc., 367 N.L.R.B. No. 75, slip op. at 1–2 (Jan. 25, 2019); 1 RESTATEMENT (SECOND) OF AGENCY § 220, 220 cmt. d (AM. L. INST. 1958); *see, e.g.*, NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968). In the alternative, as I argue elsewhere, Congress could amend the NLRA to align status determinations with employers' monopsony power. *See* Hafiz, *supra* note 15.

334. *Supershuttle*, slip op. at 1–2, 9–15; Memorandum from Jayme L. Sophir, Assoc. Gen. Couns., N.L.R.B. to Jill Coffman, Reg'l Dir., Region 20 (Apr. 16, 2019) (on file with the *Michigan Law Review*).

335. Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11,184, 11,235 (Feb. 26, 2020) (to be codified at 29 C.F.R. pt. 103).

336. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186, slip op. at 2 (Aug. 27, 2015) (quoting NLRB v. Browning-Ferris Indus. of Pa., Inc., 691 F.2d 1117, 1123 (3d. Cir. 1982)).

337. *See* Bagenstos, *supra* note 184, at 32 (arguing courts' "employer" and "employee" interpretations "undermine efforts to rectify imbalances in bargaining power").

338. *Id.* at 37–40 (citing Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1 (Cal. 2018), and Hargrove v. Sleepy's, L.L.C., 106 A.3d 449 (N.J. 2015)); *see also* CAL. LAB. CODE § 2750.3 (West 2020).

relations, and behavioral experts that better map employer/employee BATNAs. "Employee" and "employer" status would be centered on analyzing whether higher buyer power or bargaining leverage by employers would be balanced by countervailing power on the part of a broader definition of "employees." A worker would be deemed an "employee" if the purported employer has buyer power to force lower compensation for labor inputs. Likewise, a labor-inputs purchaser would be deemed an "employer" or "joint employer" if it can so force such lower compensation. In highly concentrated labor markets, the Board should infer, just as antitrust agencies do, that firms are highly susceptible to "coordinated interaction" and thus have sufficient oligopsony power over wages to count as "joint employers" under the NLRA.[339] The Board's data and analysis could be acquired through solicitation, information sharing with other agencies, analysis of existing empirical studies, and/or analysis generated through a new internal division.

Two examples that dominate "employee" and "joint employer" status discussions are rideshare drivers and franchisor employers, respectively. The equal bargaining power test could be applied to both consistent with existing precedent. As for rideshare drivers, the Board could evaluate "employee" status based on the above models and data under the common law agency test.[340] First, to assess a rideshare company's buyer power, the Board could evaluate existing theoretical and empirical studies, supplementing them with its data collection from rideshare companies in existing adjudications.[341] While an IO or structural-labor-economics analysis can serve as a baseline, broader social scientific evidence indicative of unequal bargaining power is relevant. The company's buyer power is direct evidence of its ability to control wages and the scope of drivers' entrepreneurial opportunity: a driver's "opportunity [to] gain or los[e]"[342] or "independence to pursue economic gain"[343] toward individual business development is impaired where her compensation is artificially suppressed. Further, buyer power just *is* the

339. For "coordinated interaction," *see* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 7.1 (2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [https://perma.cc/N45B-VYUH]. *See also* United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963); Fed. Trade Comm'n v. Elders Grain, 868 F.2d 901, 905 (7th Cir. 1989).

340. The discussion assumes application of the Board's current test, but the same analysis could apply under its prior decision in *FedEx Home Delivery*, 361 N.L.R.B. No. 55 (Sept. 30, 2014).

341. For current adjudications, see, for example, *Gonzalez v. Uber Technologies, Inc.*, No. 3:17-cv-02264 (N.D. Cal. filed Apr. 24, 2017), and *Meyer v. Kalanick*, No. 1:15-cv-9796 (S.D.N.Y. filed Dec. 16, 2015). For Uber's monopsony, see Marshall Steinbaum, *Monopsony and the Business Model of Gig Economy Platforms*, OECD (Jun. 5, 2019), https://one.oecd.org/document/DAF/COMP/WD(2019)66/en/pdf [https://perma.cc/2JXP-69R6]; Dube et al., *Monopsony in Online Labor Markets*, *supra* note 9; Seth Harris, *Workers, Protections, and Benefits in the U.S. Gig Economy*, 2018 GLOBAL L. REV. 7 (2018).

342. Supershuttle DFW, Inc., 367 N.L.R.B. No. 75, slip op. at 2 (Jan. 25, 2019).

343. *Id.* at 9 ("[I]n general, the more control, the less scope for entrepreneurial initiative, and vice versa.").

power to reduce labor inputs, so a rideshare company's profitable, unilateral reduction of the number of drivers servicing routes can be evidence of buyer power. Here, for example, Uber's buyer power is evidenced by its requirement of drivers' blind acceptance of passengers without knowing ride profitability; default setting of artificially low minimum fares; unilateral ability to deactivate drivers; mandated reverse rebates to lock in drivers against other apps; and "design decisions and information asymmetries . . . to effect a 'soft control' over workers' routines."[344] Additionally, information asymmetries generated by Uber's collection and retention of extensive monitoring data and information on driver performance while limiting drivers' knowledge of "referent wages" of Uber's internally employed workers would be relevant.[345]

As with "independent-contractor" status, the question of franchisor-franchisee "joint-employer" status is highly scrutinized, particularly in the fast-food industry.[346] But status determination could greatly benefit from bargaining-power analysis. Under an equal bargaining power framework, the Board would extend "employer" status to franchisors with buyer power over franchisees if it is in the franchisors' discretion to unilaterally limit *either* franchisee employee compensation *or* franchisees' labor-cost flexibility through product-market restraints. To assess a franchisor's buyer power, the Board could draw on existing academic studies, generate its own studies, and take notice of filings in existing judicial or administrative records. For example, the Board could review evidence of a bargaining power imbalance between franchisee employees and lead company franchisors from their respective income shares .[347] It could draw on empirical studies finding that lead companies have buyer power over outsourced or franchisee entities and their employees and that fissuring enables them to wage discriminate.[348] The Board and the Department of Labor have brought a series of enforcement actions against McDonald's and other franchisors, offering access to details of their franchising agreements' vertical restraints limiting franchisee control of labor-cost flexibility and information about actual pricing and labor

344. LAWRENCE MISHEL, ECON. POL'Y INST., UBER DRIVERS ARE NOT ENTREPRENEURS: NLRB GENERAL COUNSEL IGNORES THE REALITIES OF DRIVING FOR UBER (2019), https://www.epi.org/files/pdf/176202.pdf [https://perma.cc/DC4T-G6R2]; Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries*, 10 INT'L J. COMMC'N 3758, 3760–76 (2016).

345. *See, e.g.*, Jolls, *supra* note 298, at 65–66.

346. *See, e.g.*, WEIL, *supra* note 19, at 122–58.

347. *See* Autor et al., *supra* note 282, at 26.

348. For fissuring and wage penalties, see WEIL, *supra* note 19, at 88–91; Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in Low-Wage Service Occupations?*, 63 INDUS. & LAB. RELS. REV. 287 (2010); Matthew Dey, Susan Houseman & Anne Polivka, *What Do We Know About Contracting Out in the United States?*, *in* LABOR IN THE NEW ECONOMY 267 (Katharine G. Abraham, James R. Spletzer & Michael J. Harper eds., 2010). For monopsony in franchising, see WEIL, *supra* note 19, at 122–58; Callaci, *supra* note 33; MinWoong Ji & David Weil, *Does Ownership Structure Influence Regulatory Behavior?* (Bos. Univ. Sch. of Mgmt. Rsch. Paper Series, No. 2010-21, 2009); Annette Bernhardt, Michael W. Spiller & Nik Theodore, *Employers Gone Rogue: Explaining Industry Variation in Violations of Workplace Laws*, 66 ILR REV. 808 (2013).

costs.[349] The Board could evaluate additional labor-market restraints that limit workers' bargaining power, including use of no-poaching and non-compete provisions in franchising contracts.[350] Because noncompetes result in externalities that impact compensation and performance at other and future employers, it is critical the Board take their impacts seriously in evaluating workers' relative bargaining power.[351] Further, the Board could compare wage rates for franchisors' direct employees with franchisees' direct employees within the same geographic labor market to identify wage penalties indicative of buyer power and franchisor rents.[352] Additional data points could include franchisors' excessive royalty charges and other fees profitably imposed on franchisees. It could also include franchisors' reliance on spillovers or government subsidies to keep workers productive, including evidence of the social costs of fast-food franchising on taxpayer-funded safety-net programs.[353]

Extending the Board's jurisdiction is the best way to internalize externalities created by employer buyer power. Jurisdictional expansion will facilitate and ensure more populated and expansive labor-market institutions that can curtail the rise of that power in the first instance.[354] By more accurately defining "employee" and "employer" to track control over wage setting and workers' ability to counteract employer buyer power, the Board could better adhere to the NLRA's purposes and broader efficiency and distributive goals of labor policy in an era of inequality.

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349. *See e.g.*, *Cases of Interest: McDonald's*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/cases-decisions/cases/cases-and-organizations-interest?organization=%22McDonald%27s%22 [https://perma.cc/G3QV-SBPQ]; Salazar v. McDonald's Corp., No. 14-cv-02096, 2017 WL 950986 (N.D. Cal. March 10, 2017).

350. For such provisions in franchising agreements, see Rachel Abrams, *Why Aren't Paychecks Growing?*, N.Y. TIMES (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html [https://perma.cc/7D3L-JE56]. *See also* Butler v. Jimmy John's Franchise, 331 F. Supp. 3d 786 (S.D. Ill. 2018); Deslandes v. McDonald's U.S.A., L.L.C., No. 17 C 4857, 2018 WL 3105955 (N.D. Ill. Jun. 25, 2018); WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 5 (2016); OFF. OF ECON. POL'Y, U.S. DEP'T OF THE TREAS., NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (2016).

351. *Id.*; *see also* Posner, *supra* note 10; On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833 (2013).

352. For wage penalties, see *supra* note 229.

353. *See* Callaci, *supra* note 33; SYLVIA ALLEGRETTO, MARC DOUSSARD, DAVE GRAHAM-SQUIRE, KEN JACOBS, DAN THOMPSON & JEREMY THOMPSON, UC BERKELEY LAB. CTR., FAST FOOD, POVERTY WAGES: THE PUBLIC COST OF LOW-WAGE JOBS IN THE FAST-FOOD INDUSTRY (2013), http://laborcenter.berkeley.edu/pdf/2013/fast_food_poverty_wages.pdf [https://perma.cc/HLP2-96Z8]; Leslie Patton, *McDonald's Franchisees Rebel as Chain Raises Store Fees*, BLOOMBERG (Aug. 6, 2013), https://www.bloomberg.com/news/articles/2013-08-06/mcdonald-s-franchisees-go-rogue-with-meetings [https://perma.cc/L4K7-C7NY].

354. The Supreme Court recognized this in its foundational case upholding the FLSA's constitutionality. W. Coast Hotel v. Parrish, 300 U.S. 379, 399 (1937) (noting that "[w]hat . . . workers lose in wages the taxpayers are called upon to pay" and allowing employers to pay workers low wages amounts to "a subsidy for unconscionable employers").

B. *Equal Bargaining Power Analysis of Workers' Substantive Rights Under Section 7*

The NLRB could also better fulfill the Act's equal bargaining power purpose by calibrating workers' protected coordinated action to that goal. Specifically, the Board should tailor workers' rights to collectively bargain and engage in protected concerted activity to ensure effective countervailing power by determining that the NLRA protects all concerted activity, including activity engaged in during collective bargaining, *unless doing so would give workers unequal bargaining power relative to employers*. This approach is consistent with NLRA section 13, which guarantees an effective right to strike, mandating that nothing in the Act "shall be construed . . . to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."[355]

Under current law, the Board takes no consideration of whether restricting section 7-protected conduct creates a bargaining power imbalance.[356] The Board and the courts have instead justified restricting workers' concerted activity based on conclusory determinations—ungrounded in social scientific analysis—that allowing certain forms of union activity would allow "a union to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment."[357] But, as previously discussed, employers are given many opportunities under existing law to unilaterally determine conditions of employment, and during strikes they have a range of "self-help" measures to defeat strike pressure. The structural differences in bargaining between labor and employers invites an evidence-based, rather than formal and procedural "equality"-based, approach that furthers the NLRA's equal bargaining power goal. It is thus imperative that the Board conduct informed assessments of the relative bargaining power of capital and labor to ensure that its regulation of workers' concerted activity accords with that goal.

A couple examples illustrate the superiority of applying an equal bargaining power framework relative to existing law. One of workers' most potent weapons against employers is unprotected inside action, or occupying employer work spaces—the very positions struck—by, for example, engaging in slowdowns.[358] Slowdowns occur when workers take more time to perform assigned tasks, joining together to regulate their pace by "enacting their own norms concerning a fair day's work."[359] Under current law, all such inside

355. 29 U.S.C. § 163; NLRB v. Erie Resistor Corp., 373 U.S. 221, 233–35 (1963).

356. *But see supra* text accompanying notes 166–172.

357. *See, e.g.*, Valley City Furniture Co., 110 N.L.R.B. 1589, 1595 (1954).

358. *See* Richard S. Hammett, Joel Seidman & Jack London, *The Slowdown as a Union Tactic*, 65 J. POL. ECON. 126, 126 (1957).

359. James Gray Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB*, 57 BUFF. L. REV. 653, 679–80 (2009).

actions are unprotected.[360] Determining whether workers are engaging in a slowdown is notoriously difficult: "Slowdowns" relative to what? In the defining NLRB case, an employer unilaterally reduced lumber car loaders' pay from $2.71/hour to $1.525/hour, claiming loading had become easier.[361] To match this unilateral reduction, the workers loaded only one car per day, the quota at surrounding plants and one they believed was a "good day's work" for that pay.[362] The employer terminated those workers even though it had no explicit production standard or output quota, and the Board upheld the discharges, holding "slowdowns" unprotected.[363] Historically, workers in trades controlled "their own norms and customs of work, . . . undercut[ting] the expectations and formal rules of employers."[364] But the Board here removed as inappropriate for worker "consideration, discretion, or participation" any calibration of their productivity based on "fairness."[365] Thus, with respect to "slowdowns"—or, to avoid weighted characterizations, union "counteroffers"—the Board took no consideration of the employer's bargaining power in unilaterally asserting a reduced pay scale relative to workers' ability to ensure any comparable holdout power.

In fact, inside-action "counteroffers" may be the most efficient and perhaps only means for workers to assert countervailing power against wage-setting employers. For non-consumer-facing industries and employers, or employers for whom an external-facing picket line would do little to exert economic pressure, inside action may be the most effective form of concerted activity among few, if any, options. For example, in the summer of 2019, American Airlines mechanics purportedly engaged in a slowdown by declining overtime and slowing plane repairs.[366] The mechanics' union and American reached a collective bargaining impasse after American merged with US Airways. The union insisted on preserving premerger work from outsourcing, premerger healthcare benefits, and parity in benefits between the two

360. *See supra* note 179 and accompanying text.

361. Elk Lumber Co., 91 N.L.R.B. 333, 335 (1950).

362. *Id.* (quoting the workers' testimony).

363. *Id.* at 335–36.

364. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 51 (1983).

365. *Id.* at 51–53.

366. Louis C. LaBrecque & Andrew Wallender, *American Airlines Mechanics' Slowdown Nixed by Federal Court (1)*, BLOOMBERG L. (June 17, 2019, 6:43 AM), https://news.bloomberglaw.com/daily-labor-report/american-airlines-mechanics-slow-down-blocked-by-federal-court [https://perma.cc/B6GU-JV8F]. The example is merely illustrative because the labor dispute is governed by the Railway Labor Act (RLA). 45 U.S.C. §§ 151–188. The RLA parallels the NLRA's requirements in most ways but establishes extensive mandatory dispute-resolution mechanisms that limit self-help options through strikes during a period of negotiation and mediation. Detroit & Toledo Shore Line R.R. Co. v. United States Transp. Union, 396 U.S. 142, 148–49 (1969). It grants employers injunctive relief but allows broader forms of concerted activity than the NLRA to accelerate the end of the dispute once major dispute mechanisms are exhausted. *See* Trans World Airlines v. Indep. Fed'n of Flight Attendants, 489 U.S. 426, 439 (1989).

premerger workgroups.[367] American, for its part, sought work and headcount reductions, elimination of premerger healthcare choices, and maintenance of the premerger profit-sharing formula the union claimed was among the worst of peer airline employers.[368] A federal judge granted American a temporary restraining order (TRO) preventing the union from "any form of interference with American's airline operations."[369] The judge held that American would suffer irreparable harm to its reputation and customer goodwill from the slowdown, the public would be harmed by deprived transportation, and the TRO's harm to the union would be "inconsequential" by comparison.[370] When it appeared the union did not comply with the TRO, the judge modified it to impose additional requirements, including ordering senior union leaders to conduct in-person group meetings with mechanics and all union officials *with* "representatives of American management . . . monitor[ing] compliance," and if unable to do so, communicate by telephone "a sincere and emphatic respect for the [TRO's] requirements" and an imperative of total compliance "subject to . . . fines or discipline."[371] Union leaders were also ordered to require each of their members to sign and date an acknowledgment form.[372] The court did no analysis of labor-market conditions or the parties' relative bargaining power. The union and American remain at an impasse as of this writing, suggesting that the court's resolution failed to promote labor peace and efficiency.

Under an equal bargaining power analysis on similar facts with NLRA-protected workers, whether the slowdown constituted protected "concerted activity" would turn on the parties' relative market power. The evaluation would begin with the fact that negotiations occurred right after the 2014 American-US Airways merger in an already highly consolidated industry. While the DOJ was obligated under its Merger Guidelines to consider buyer-power effects in its merger review, it had not yet taken its current vocal stance on evaluating labor market-concentration effects from proposed mergers.[373] Significant evidence emerged that airlines have been able,

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367. Michael Arria, *American Airlines Mechanics Threatening the "Bloodiest, Ugliest Battle" in Labor History*, SALON (June 2, 2019, 9:00 AM), https://www.salon.com/2019/06/02/american-airlines-mechanics-are-threatening-the-bloodiest-ugliest-battle-in-labor-history_partner/ [https://perma.cc/LJZ5-BDVD].

368. *Id.*

369. Temporary Restraining Order, Am. Airlines, Inc. v. Transp. Workers Union, No. 4:19-cv-00414-A (N.D. Tex. June 14, 2019), ECF No. 65, ¶¶ 6–7.

370. *Id.* ¶¶ 6, 7.

371. Modifications to June 14, 2019 Temporary Restraining Order at 2–3, Am. Airlines, Inc. v. Transp. Workers Union, No. 4:9-cv-00414-A (N.D. Tex. Jul. 10, 2019), ECF No. 111.

372. *Id.* at 3–4.

373. Neither did it analyze labor-market effects in public documents approving the merger. *See* Final Judgment, United States v. US Airways Grp., Inc., No. 1:13-cv-01236-CKK (D.D.C. Apr. 25, 2014), ECF No. 170. For Merger Guideline requirements, see HORIZONTAL MERGER GUIDELINES, *supra* note 339, § 12. For antitrust agencies' current stance, see *supra* note 239. These positions remain lip service; the DOJ's recent Sprint–T-Mobile merger ap-

postmerger, to more easily collude, raise consumer prices and ancillary fees (like baggage fees), and tighten capacity.[374] While the union members were highly skilled, and so had higher bargaining power because of their relatively inelastic supply, the consolidation of six legacy carriers to three resulted in a significant increase in the merged airline's buyer power. And American explicitly sought to reduce labor inputs in its bargaining negotiations.[375] Union bargaining power was also constrained by law: workers had limited access to strike protections, and unprotected inside action was one of few, if costly, tactics of bargaining leverage available. American also had significant bargaining power due to its unilateral decisionmaking power to outsource maintenance and access injunctive relief against the union. The union did not have comparable injunctive rights because of procedural strictures and its insistence on merely permissive bargaining subjects: American had no duty to bargain about its merger decision or the merger's effects on employment conditions.[376] The Board or the court could also evaluate competitive wage rates, or labor's MRP, pre- and postmerger, but could also consider labor and behavioral-economics benchmarks of "fair wages" relative to industry wages and profit-sharing agreements. If American had buyer power to price below industry standards, that would be sufficient to find it had higher bargaining power relative to workers.

A bargaining-power test could also transform intermittent-strike analysis. The NLRB recently held that Walmart did not violate the NLRA when it disciplined and discharged employees who participated in a five- to six-day work stoppage during their "Ride for Respect" to Walmart's shareholders' meeting.[377] Organization United for Respect (OUR) Walmart organized the work stoppage with support from the United Food and Commercial Workers Union (UFCW), and it was one in a series of four actions, timed three to

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proval made no assessment of labor market-concentration effects nor did it require labor market-specific remedies in its conditions, despite deep concerns. *See* [Proposed] Final Judgment, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. July 26, 2019), ECF No. 2-2; ABDELA & STEINBAUM, *supra* note 229.

374. *See, e.g.*, Yunzhou Zhang & Linda Nozick, *Investigating Pricing Impacts of the American Airlines and US Airways Merger*, TRANSP. RSCH. REC., December 2018, at 15; José Azar, Martin C. Schmalz & Isabel Tecu, *Anti-Competitive Effects of Common Ownership*, 73 J. FIN. 1513 (2018); *2014 Airline Financial Data*, BUREAU TRANSP. STAT. (May 5, 2015), https://www.bts.gov/newsroom/2014-airline-financial-data [https://perma.cc/9P24-D56P]; JAY SORENSEN, IDEAWORKS CO., THE CARTRAWLER YEARBOOK OF ANCILLARY REVENUE 5 (2015), https://assets.documentcloud.org/documents/2986625/2015-Ancillary-Revenue-Yearbook.pdf [https://perma.cc/JM87-WUD2]; Volodymyr Bilotkach & Paulos Ashebir Lakew, *On Sources of Market Power in the Airline Industry: Panel Data Evidence from the US Airports*, 59 TRANSP. RES. PART A 288 (2014); *see also* Consolidated Amended Class Action Complaint, In re Domestic Airline Travel Antitrust Litig., MDL No. 2656, Misc. No. 15-1404 (CKK) (D.D.C. Mar. 25, 2016), ECF No. 91.

375. *See* LaBrecque & Wallender, *supra* note 366.

376. *See* Int'l Ass'n of Machinists & Aerospace Workers v. Ne. Airlines, Inc., 473 F.2d 549, 555–60 (1st Cir. 1972).

377. Walmart Stores, Inc., 368 N.L.R.B. No. 24, slip op. at 1–4 (2019).

six months apart. These included (1) brief 2012 local work stoppages by 58 Los Angeles-area employees on October 4, demonstrations at Walmart's Arkansas headquarters on October 9–10, and a spontaneous one-day strike by several employees in Walmart's Lancaster, Texas, store on November 16; (2) a nationwide Black Friday strike in 2012; (3) the Ride for Respect in May 2013; and (4) a nationwide Black Friday strike in 2013.[378] Of Walmart's 1.3 million employees at over 4,000 stores employing an average of 300 employees each, 8 employees at any given store struck; the Ride for Respect included between 100 to 130 employees overall from about 50 stores, so only 1 or 2 employees left work from any particular store for the Arkansas trip.[379] No Walmart stores were forced to close because of the work stoppage, the strikers received no compensation from Walmart, and Walmart reassigned other employees to cover strikers' work.[380] Participating workers gave Walmart advanced notice of their work stoppage.[381]

The Board held that the Ride for Respect was an "intermittent" strike in a dramatic expansion of intermittent-strike doctrine. Specifically, it held that any concerted activity that constitutes a "plan to strike, return to work, and strike again" as part of "a strategy to use a series of strikes in support of the same goal" is an unprotected intermittent strike, regardless of how far apart in time or whether the "same goal" concerned basic employment issues like improving wages and working conditions.[382] What mattered to the Board was "direct evidence" of union intent, in one *post*-strike statement, to use a strategy of a series of strikes: "[T]he UFCW and OUR Walmart intend to continue planning and assisting Walmart workers in striking in a manner consistent with the strikes that [we] helped plan and assist Walmart workers hold in October and November 2012, June 2013, and November 2013."[383]

The Board conducted no analysis of whether the strikes exerted overwhelming power over Walmart such that they gave workers unequal bargaining power, rejecting past precedent that required effects-based analysis of whether the strikes "harass[ed] the company into a state of confusion."[384] And the Board went further, anchoring its reasoning on the fact that the strike threatened to disrupt the *employer's* higher bargaining position and access to economic weapons to secure it: "This random economic warfare deprives employers of their responsive defense of permanently replacing

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378. *Id.* at 1, 5 n.5.

379. *Id.* at 5–6.

380. *Id.* at 6.

381. *Id.* at 5.

382. *Id.* at 1 (quoting Farley Candy Co., 300 N.L.R.B. 849, 849 (1990)).

383. *Id.* at 1–2. Dissenting Member Lauren McFerran rejected the new standard as contrary to precedent and argued that the evidence did not even support an "intermittent strike" finding under the new standard because it showed that plans for the Ride began forming in early 2013, and the statement referred only to future intentions rather than past designs. *Id.* at 10–11 (McFerran, Member, dissenting).

384. *Id.* at 3 (citing Pac. Tel. & Tel. Co., 107 N.L.R.B. 1547 (1954)).

strikers. . . . [A] genuine economic strike involves employees fully withholding their labor in support of demands . . . until their demands are satisfied or they decide to abandon the strike."[385]

The Board thus appeared to deploy a test mandating preservation of *higher* employer bargaining power, finding workers' concerted activity unprotected unless it makes workers vulnerable to permanent replacement, *even if* the strike has no impact on the employer's business.

Within an equal bargaining power framework, the question of whether intermittent strikes are protected would turn on an analysis of the actual sources and effects of the parties' relative bargaining leverage. Here, Walmart may have significant buyer power depending on the struck store's location, particularly in rural labor markets.[386] In addition, the evidence showed that the Ride for Respect, singly *and* in succession with the other actions, had marginal if no impact on Walmart's bargaining leverage: the union notified the employer in advance, and the employer was entitled to permanently replace economic strikers. There was no evidence the displaced work even raised Walmart's labor costs in overtime pay for nonstriking workers or in recruiting, hiring, or training strike-replacement workers. Dissenting Member McFerran summarized: "Only a small percentage of [Walmart]'s employees participated. Each store lost a marginal number of staff . . . , and [Walmart] did not have to close any stores. Indeed, . . . [Walmart had] advance notice of the work stoppage, giving it sufficient time to prepare for any interruption to its operation."[387]

The nature of the work and labor supply here is also relevant: access to a highly elastic supply of low-skilled strike replacements gave Walmart significant bargaining power over strikers. Thus, there was no evidence that the strike functioned to assert effective countervailing power in the first instance, or that it placed Walmart in so weak a bargaining position relative to the union that the union had unequal bargaining power.

C. *Equal Bargaining Power Analysis of Employers' Unfair Labor Practices*

Finally, the Board should tailor both its ULP determinations and its section 8 remedies to ensure equal bargaining power between workers and employers. Under an equal bargaining power analysis, the Board could draw on social scientific theory and research to more accurately align the structural relationship between labor and capital. Specifically, the Board should only find a ULP *where conduct tips the scales in favor of one party such that, were the parties to enter a collective bargaining negotiation, they would be on une-*

385. *Id.* at 3.

386. *See, e.g.*, Barry C. Lynn, *The Case for Breaking Up Walmart*, FOREIGN POL'Y (Apr. 29, 2013, 3:00 AM), https://foreignpolicy.com/2013/04/29/the-case-for-breaking-up-walmart/ [https://perma.cc/R58M-G39P]; Alessandro Bonanno & Rigoberto A. Lopez, *Wal-Mart's Monopsony Power in Metro and Non-metro Labor Markets*, 42 REG'L SCI. & URB. ECON. 569 (2012).

387. *Walmart Stores*, slip op. at 7 (McFerran, Member, dissenting).

qual footing. To the extent the Board finds that a ULP places one party in a position to hold out longer than the other, it should tailor its remedies to correct for that imbalance.

As discussed, the Board has interpreted section 8 ULPs and exercised its remedial authority in a formalistic way, without analyzing how those interpretations or remedies impact parties' relative bargaining power. Currently, it is a ULP for employers to interfere with, restrain, or coerce employees in their exercise of section 7 rights; to dominate or interfere with a union to form a "company union"; to discriminate or condition employment terms on union membership; to retaliate against employees for filing charges or testifying before the NLRB; and to refuse to bargain collectively with a union that has achieved section 9(a) majority support.[388] Unions commit ULPs if they restrain or coerce employees in their exercise of section 7 rights or their employer in selecting representatives for collective bargaining; cause an employer to discriminate against employees based on union membership; refuse to bargain collectively with an employer as a certified representative of its employees; engage in secondary activity against those who deal with their employer; impose excessive or discriminatory union fees; exact payment from employers for services not to be performed; or engage in certain kinds of recognitional picketing.[389] The Board is generally empowered to prevent persons from engaging in ULPs, issue complaints, determine that a ULP has been committed after a hearing, and petition federal courts to enforce its orders.[390] It is required to prioritize union ULPs of secondary boycotts and recognitional picketing over others and petition a district court to enjoin them.[391]

But adopting a social scientific and data-driven approach to ensuring equal bargaining power could dramatically transform existing doctrine to correct power imbalances in labor markets. Recent doctrine on exempting employers from ULPs due to legal determinations of "disloyalty" is illustrative. In a recent case pertinent to the current social-media environment, *MikLin Enterprises v. NLRB*,[392] a Jimmy John's franchisee sought an exception for a ULP finding after it fired employees for engaging in consumer-facing poster campaigns against its sick-leave policy. The Eighth Circuit held that the franchisee did not commit a ULP when it discharged the employees for "disloyal" conduct.[393] The facts are telling. The discharged employees had sought paid sick leave and designed and distributed posters on community bulletin boards in their employer's stores. The posters featured two identical images of a Jimmy John's sandwich with text above the first image reading, "Your sandwich made by a healthy Jimmy John's worker," and text above the

388. 29 U.S.C. § 158(a).

389. *Id.* § 158(b).

390. *Id.* § 160 (a)–(j).

391. *Id.* § 160(l).

392. 861 F.3d 812 (8th Cir. 2017).

393. *MikLin Enters.*, 861 F.3d 812.

second reading, "Your sandwich made by a sick Jimmy John's worker," with text below both reading, "Can't tell the difference? That's too bad because Jimmy John's workers don't get paid sick days. Shoot, we can't even call in sick . . . We hope your immune system is ready because you're about to take the sandwich test."[394] The posters implied that, because of the employer's sick-leave policy, customers may be exposed to unsafe food because workers would be unable to stay home when ill. The employer then proposed a new sick-leave policy that required employees to find replacements to receive pay, and the workers publicly distributed the same posters with an additional line of text: "Let [the employer] know you want healthy workers making your sandwich!"[395] The employer fired six employees and issued written warnings to three workers, claiming the posters resulted in its "bombard[ment] by phone calls" for around a month.[396]

The NLRB found that the employer committed a ULP by interfering with employees' right to engage in public communications about ongoing labor disputes and was not entitled to the ULP "disloyalty" exception. Specifically, it found that the posters were "clearly related to the ongoing labor dispute" in that they targeted the employer's paid sick-leave policy as opposed to disparaging the employer or its product.[397] Further, because there was no evidence of a malicious motive or employee knowledge that the posters' statements were false or made with "reckless disregard for their truth or falsity," they were not "so disloyal, reckless, or maliciously untrue as to lose the Act's protection."[398] The Eighth Circuit disagreed. It found that the posters made a "disparaging attack upon the quality of the company's product and its business policies" and were "reasonably calculated to harm the company's reputation and reduce its income."[399] Specifically, it held that section 7 does not protect workers' appeals to third parties to improve their working conditions to such an extent that would derogate from employers' rights to fire employees "for cause" under NLRA section 10(c).[400] Because the posters were timed with flu season and would likely "outlive . . . the labor dispute," the NLRA did "not protect such calculated, devastating attacks."[401] The court further found that the "disloyalty" ULP exception is available even where employee appeals have a clear nexus to labor disputes.[402]

394. *Id.* at 815–16 (emphasis omitted).
395. *Id.*
396. *Id.* at 817.
397. *Id.* at 818.
398. *Id.*
399. *Id.* at 819.
400. *Id.*; 29 U.S.C. § 160(c).
401. *MikLin Enters.*, 861 F.3d at 825–26.
402. *Id.* at 821–22.

This decision has been much criticized for its broad extension of the disloyalty exception.[403] Specifically, it has been attacked as conflicting with the NLRA's equal bargaining power purpose because it grants employers the power to characterize a wide range of concerted activity as "disloyal," thus disarming section 7 and removing "from protection those economic weapons that effectively garner public support and threaten to harm the employer's reputation and income."[404] And the court appeared to functionally reinstate an at-will default rule by allowing termination solely at the employer's discretion—even during union organizing campaigns—by locating the statutory basis of the disloyalty test in section 10(c), which allows "justified," "for-cause" employee discharge based on employers' unilateral determinations. The court did this without any analysis of the union statements' veracity, the statements' impact on the employer's business, the employer's buyer power as a franchisee, extant labor-market restraints (like noncompete provisions), or the impact of broad-strokes regulation of union speech on union bargaining leverage.[405] Finally, both the Board and the court ignored a critical fact relevant for bargaining-power analysis: the information employees conveyed was accurate and corrected for an information asymmetry that benefited only the employer. The employees, by publicizing health risks that made consumers vulnerable, made the market more efficient by disclosing materially relevant information that enabled more informed choices about where to work and eat. The labor law should be tasked with correcting for such market failures above any vague categorizations of "disloyalty" that permit employer discretion at significant social cost.

Thus, in *MikLin*, as in other contexts, the court found no employer ULP even as the Board and the courts have been prohibitive when reviewing union ULPs. For example, as I have written elsewhere, workers' secondary activity against "transactional primary" employers—or firms that transact with a direct employer and have market power in that employer's labor or product market—ought to be protected where workers' concerted activity against their direct employer alone would not exert countervailing power against other wage-determining firms.[406] Thus, whether those transactional primaries are firms that agree to wage-fixing, no-poaching, or other horizontal restraints with a direct employer or other entities in that employer's supply

403. *See, e.g.*, Recent Case, *Labor Law—Employee Disloyalty—Eighth Circuit Holds Employee Organizing Activity Unprotected for Disloyalty Despite Lack of "Malicious Motive."—* MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812 (8th Cir. 2017) (en banc)*, 131 HARV. L. REV. 1820, 1825 (2018).

404. *Id.* at 1826; *see also* Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 133 (1995). By contrast, the *Jefferson Standard* disloyalty test is an "objective" test by which the Board may agree or disagree that employee expression deemed disloyal by the employer was legitimate and therefore protected. NLRB v. Local Union No. 1229, Int'l Brotherhood of Elec. Workers (*Jefferson Standard*), 346 U.S. 464, 475 (1953).

405. *See supra* note 350; Callaci, *supra* note 33.

406. Hafiz, *supra* note 136, at 1881–94.

chain, workers should have an affirmative defense for picketing them just as they would a direct employer.[407]

Labor law is the most important regulatory tool for ensuring that workers exercise countervailing power against employers,[408] and the Board should use its remedial authority to correct unequal bargaining power in its ULP remedies. For example, if employer conduct results in unequal bargaining power, the Board should consider granting workers a default union, default union bargaining, or to the extent a union is in place, a Board order enjoining collective bargaining under *NLRB v. Gissel Packing Co.*[409] And if workers elect to form a union and their employers refuse to bargain on their first contract—the most common impediment to successful collective bargaining[410]—workers should also be entitled to a *Gissel* bargaining order and defenses to concerted activity.[411] Analysis for determining whether an employer is acting in good faith could be informed by the employer's buyer power, social scientific data on the industry-specific value of incorporating labor as a dynamic input of production, and the NLRA's macroeconomic goals. Similarly, analysis of and remedial options for employer ULPs could be informed by buyer-power determinations and the extent of worker's outside options.

CONCLUSION

This Article reconfigures labor regulation through a structural approach. Where existing law has decentralized tools available to workers to exert countervailing power against employer wage setting, adopting more aggressive interpretations of the NLRA and utilizing more comprehensive remedies to correct for unequal bargaining power will be necessary to rectify the harms that result from employer control over the employment bargain. Integrating social scientific theory, methods, and empirical analyses into the jurisdictional scope of labor law protections, analysis of workers' concerted activity, and sanctionable ULPs will allow better legal tracking of existing labor-market conditions and determinants of labor's share of national income. And it will provide new lines of contestation concerning the rigor, accuracy, and level of substantiation of Board and court labor-market regulation.

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407. *Id.* at 1894.

408. *See supra* note 11.

409. 395 U.S. 575 (1969). *See generally* Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation*, 94 COLUM. L. REV. 753 (1994); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010).

410. *See* Ross Eisenbrey, *Employers Can Stall First Union Contract for Years*, ECON. POL'Y INST. (May 20, 2009), https://www.epi.org/publication/snapshot_20090520/ [https://perma.cc/CAN3-7MHX]; Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47 (2009).

411. 29 U.S.C. §§ 157, 158(a)(5), 158(d).