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Anticonsumer Effects of Union Mergers: An Antiitrust Solution, 46 *Duke L.J.* 197 (1996-97)

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ANTICONSUMER EFFECTS OF UNION MERGERS: AN ANTITRUST SOLUTION

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INTRODUCTION

On July 27, 1995, three of the largest labor unions in the United States announced their agreement to merge. Although unions have been merging in recent years with increasing frequency,¹ the combination of the United Auto Workers, United Steelworkers, and International Association of Machinists is unprecedented.² It is in many respects the labor equivalent of a corporate merger between every major United States auto manufacturer, steel producer, and airplane assembler. It might be part of an attempt by organized labor to recapture its declining monopoly power.³

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1. "As recently as the 1970s there were 129 unions in the AFL-CIO; with this merger there would be fewer than 80." Frank Swoboda, *Leaders of 3 Large U.S. Labor Unions Agree to Merger*, WASH. POST, July 27, 1995, at A1. In the 28 years between 1956 and 1984 there were 92 union mergers. See John L. Conant & David L. Kaserman, *Union Merger Incentives and Pecuniary Externalities*, 10 J. LAB. RES. 243, 243 (1989). That number represents a significant increase from earlier periods—56 union mergers occurred between 1890 and 1935; 35 occurred between 1936 and 1955. See *id.*

2. The resulting union will be the largest in North America, with 2 million active and 1.4 million retired members. See Frank Swoboda, *3 Merging Unions Invite Others to Join*, WASH. POST., July 28, 1995, at C2. The three unions are expected to be fully merged by the year 2000. See *id.*

3. See *infra* text accompanying notes 196–207.

Large corporate mergers are, of course, scrutinized under the antitrust laws. The relevant corporate merger statute blocks those mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly,"⁴ and permits those likely to be benign, procompetitive, or proconsumer.⁵

Collective bargaining, by contrast, enjoys a broad exemption from the antitrust laws. If they follow appropriate procedures,⁶ unions—even unions that, when taken together, cover all workers within a given industry—are permitted to merge or to coordinate their activity.⁷ There is no review of such mergers or coordinated activity to determine whether monopoly power or other anticompetitive or anticonsumer activity will result.⁸

This Article asks whether mergers between labor unions should be examined under a standard similar to that used to scrutinize corporate mergers⁹ and outlines an alternative proposal that

4. Clayton Act § 7, 15 U.S.C. § 18 (1994).

5. See U.S. DEPT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES 1-3 (1992).

6. For some of these necessary procedures, as well as complications accompanying union mergers, see GIDEON CHITAYAT, TRADE UNION MERGERS AND LABOR CONGLOMERATES 136-38 (1979). Chitayat provides useful examples of mergers that have occurred despite these procedures and complications. See *id.*

7. Unions sometimes bargain together as a formal unit, and sometimes coordinate their bargaining informally. Formal bargaining that involves more than one employer, however, can occur only under limited circumstances; multi-employer bargaining does occur in the construction trades and took place for a long time in the unionized coal industry. Industry-wide bargaining occurs routinely in some industries, while in others it never occurs. In the auto industry, one union bargains with each employer separately; the first contract sets the pace for the others. These characterizations of union bargaining are based on a discussion with Jon Brock of the University of Washington Graduate School of Public Affairs on Nov. 13, 1996. For a more complete discussion of industry-wide and multi-employer bargaining, see *infra* notes 54-71 and accompanying text.

8. In considering this antitrust exemption from an economic viewpoint, it is important to note that public regulation of labor and management relations takes place in a highly-charged political and emotional atmosphere. See generally FOSTER RHEA DULLES & MELVYN DUBOFSKY, LABOR IN AMERICA (4th ed. 1984) (describing the contentious history of labor law from Colonial America to the present). Yet, basic principles of economics can be applied in the formulation of public policy involving unions and collective bargaining, just as these principles have been applied in policy-making elsewhere. See *infra* notes 164-75 and accompanying text.

9. The question itself is likely to be extremely controversial. For example, then AFL-CIO President Lane Kirkland argued that federal labor law as it stands gives workers insufficient protection. See Cathy Trost & Leonard M. Apar, *AFL-CIO Chief Calls Labor Laws A 'Dead Letter'*, WALL ST. J., Aug. 16, 1984, at 8. Kirkland stated that workers might be "better off with the law of the jungle," and that the AFL-CIO would "seriously consider" the option of repealing "all but the earliest and most basic rights" unions secured decades ago. *Id.* The one labor law Kirkland singled out as desirable was

allows workers within individual companies to form a union or otherwise coordinate their bargaining, but then subjects all proposed mergers or other alliances of these units to the merger provisions of the antitrust laws.¹⁰

We begin by determining the primary goals of the labor exemption to the antitrust laws. We find that Congress, when enacting the exemption,¹¹ was primarily concerned with protecting the rights of workers, who were perceived as being in an inferior bargaining position relative to their employers.¹² This concern for an equality of bargaining positions seems to evince a desire to prevent opportunistic employers or employers with monopsony power over their employees from unfairly exploiting their workers.¹³

We take Congress' concerns as a given and demonstrate that Congress could substantially have reached its primary goal in a better way. Congress and the Supreme Court chose to protect workers by allowing all of the workers in an industry to join together and bargain as a unit.¹⁴ This solution protects workers from exploitation and promotes those efficiencies associated with unionization.¹⁵ But it also permits unions to acquire monopoly power and creates a strong likelihood of anticompetitive behavior.¹⁶

organized labor's antitrust immunity. *See id.*

10. Throughout this Article we assume that if two unions cannot merge they also cannot conspire to fix wages, strike, etc., in accordance with "normal" antitrust principles prohibiting concerted anticompetitive action. For a survey of these principles, see ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (2d ed. 1984). We do not suggest that antitrust law be used to eliminate workers' ability to bargain collectively with management. That is, agreements among workers to seek certain wages, hours and working conditions should not be antitrust violations.

11. Courts also played a role in the recognition of this exemption. *See infra* notes 27-33 and accompanying text.

12. Congress was concerned, to a lesser extent, with issues of efficiency. *See infra* note 36 and accompanying text.

13. For an economic definition of exploitation in this context, see *infra* notes 73-85 and accompanying text.

14. We believe Congress and the Court acted as they did in an atmosphere of intense struggle between labor and capital, rather than in an environment conducive to producing the most socially desirable result. *See infra* notes 37, 50-51.

15. *See infra* text accompanying notes 62-69.

16. A potential imbalance of bargaining power is created by allowing all workers in an industry to bargain as a unit while employers must bargain as individuals. The courts corrected this imbalance by allowing affected employers to bargain as a unit in opposition to such alliances of workers. *See infra* notes 104-06. This solution, however, encour-

The untried, alternative approach would have been to permit workers within a firm to unionize or bargain as a unit,¹⁷ but to allow the resulting unions to merge only to the extent permitted by the analogous corporate merger laws. Under such an approach, unions would also be prevented from coordinating their behavior in accordance with normal corporate antitrust principles.¹⁸ This solution might very well reduce the monopoly aspects and anti-competitive and anticonsumer behavior of unions without significantly sacrificing their protective and efficiency-enhancing aspects. This Article focuses upon some of the implications and practical consequences that could arise from this alternative policy.

As an instructive comparison, this Article also briefly analyzes the Japanese collective bargaining system and contrasts it to relevant aspects of the United States' system. We examine the Japanese system's strengths and weaknesses, and ask whether certain restrictions on union mergers might move the collective bargaining system in the United States closer to the Japanese system in a way that mirrors the latter system's strengths but not its weaknesses.

The purpose of this Article is not necessarily to develop a politically realistic alternative. Nor is it to examine every feature of the labor exemption to the antitrust laws. We will not, for example, examine such important questions as how to decide what constitutes a labor union. Instead, we focus on union mergers and how to maximize consumer welfare within the constraints imposed by social policy.

ages rent-seeking behavior by both unions and firms. See *infra* notes 105-06, 108-10.

17. A firm-wide union preserves workers' rents but does not significantly restrain trade. See *infra* notes 74-85. Even though a union may have a monopoly over its workers' services, the existence of firm-wide unions should not be considered a violation of the antitrust laws.

18. This approach is similar to earlier proposals in certain respects. See, e.g., H. Gregg Lewis, *The Labor-Monopoly Problem: A Positive Program*, 59 J. POL. ECON. 277, 278 (1951) (arguing that the size of collective bargaining units should be limited to individual enterprises or employers, with collusion among them being unlawful); Bernard D. Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 713 (1965) (suggesting that the Sherman Act should be applied to direct union restraints on prices, production, and product sales, but not to collective bargaining over wages, hours, work loads, and work sharing). Many examinations of the area conclude that the current approach is generally justified. See, e.g., RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 246-51 (1984); see also sources cited *infra* notes 79-83.

I. THE LEGISLATIVE FRAMEWORK

Although there are hundreds of pages of labor statutes that one could consider as support for the labor exemption to the antitrust laws,¹⁹ the core of the exemption arises from three statutes: the Sherman Act,²⁰ the Clayton Act,²¹ and the Norris-LaGuardia Act.²² As the Supreme Court has observed, these laws are “interlacing statutes” that must be read together to understand the labor exemption properly.²³

A. Congressional Goals Underlying the Exemption

The Sherman Act forbids every “contract, combination, or conspiracy in restraint of trade,” and does not contain an express exception for labor unions.²⁴ Although there is relatively little discussion of the matter in the legislative record, there is some reason to believe that the Act’s framers may not have meant to extend coverage to unions.²⁵ Nevertheless, a number of early Sherman Act prosecutions were brought against labor unions.²⁶

19. For example, the National Labor Relations Act, 29 U.S.C. §§ 151–69 (1994), is a crucially important labor law statute.

20. 15 U.S.C. §§ 1–3 (1994) (original version at ch. 647, 26 Stat. 209 (1890)).

21. 15 U.S.C. § 12 et seq. (1994) (original version at ch. 323, 38 Stat. 730 (1914)).

22. 29 U.S.C. §§ 101–15 (1994) (original version at ch. 90, 47 Stat. 70 (1932)).

23. *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 806 (1945). Numerous judicial decisions have analyzed the history of the conflict between labor and antitrust. See, e.g., *id.* at 801–10; *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 486–513 (1940); *United States v. Hutcheson*, 312 U.S. 219, 229–31 (1941). These three cases firmly established collective bargaining’s general exemption from the antitrust laws. A more recent synopsis can be found in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621–26 (1975). The best articles in this area include: Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions For Anticompetitive Litigation*, 80 CAL. L. REV. 757 (1992); *Symposium: The Application of Antitrust Laws to Labor-Related Activities*, 21 DUQ. L. REV. 331 (1983).

24. 15 U.S.C. § 1 (1994).

25. See 51 CONG. REC. 13,662–64 (1914) (summarizing debate over passage of the Sherman Act); see also EDWARD BERMAN, *LABOR AND THE SHERMAN ACT* 11–51 (1930) (arguing that Congress intended the Act to militate against trusts, not unions). During Congressional debate on the Clayton Act, Senator Henry Ashurst noted additional Sherman Act debates on point. See CONG. REC., *supra*, at 13,662–64. On March 24, 1890, Senator John Sherman, after whom the Act was named, had stated that “the combinations of workmen to promote their interests, promote their welfare, and increase their pay if you please, to get their fair share in the division of production, are not affected in the slightest degree, nor can they be included in the words or intent of the bill as now reported.” 21 CONG. REC. 2562 (1890).

26. In fact, more early Sherman Act suits were filed against labor unions than against corporations. See Ralph K. Winter, Jr., *Collective Bargaining and Competition: The*

The courts seemed to encourage these prosecutions. The Supreme Court held that labor unions were not automatically exempt from the Sherman Act,²⁷ although the Court never clarified precisely how the Sherman Act would affect unions. Courts had held that union activity could violate the Sherman Act.²⁸ Further, since one could consider the very existence of a significant union a conspiracy in restraint of trade,²⁹ the union members reasonably feared that the Sherman Act might be used to dissolve their unions, and even to jail union officials when the unions engaged in collective bargaining, striking, or picketing.³⁰

These fears reflect the fundamental reasons why Congress included a labor exemption in the Clayton Act: without a specific exemption the courts might render unions ineffective,³¹ the union or its members might be prosecuted under the Sherman Act, or the Sherman Act might be used to dissolve unions.³² For these reasons, unions were able to persuade Congress to include a provi-

Application of Antitrust Standards to Union Activities, 73 YALE L.J. 14, 31 (1963). In 1914 Senator Ashurst stated that he knew of 101 Sherman Act proceedings against farmers and labor organizations. See 51 CONG. REC. 13,848 (1914); see also *Loewe v. Lawlor*, 208 U.S. 274, 279-80 (1908) (stating that labor unions are not exempt from the Sherman Act and citing several cases involving suits against labor unions pursued under the Act).

27. See *Loewe*, 208 U.S. at 301. For an excellent discussion of this issue, see Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 950-58 (1988).

28. See *Loewe*, 208 U.S. at 301-04; *Vandell v. United States*, 6 F.2d 188, 190 (2nd Cir. 1925); *United States v. Cassidy*, 67 F. 698, 705-06 (N.D. Cal. 1895).

29. See Hovenkamp, *supra* note 27, at 932-35, 950-58.

30. See 1 THE DEVELOPING LABOR LAW 8-12 (Charles J. Morris ed., 2d ed. 1983) (explaining that the Sherman Act's substantive provisions were broadly interpreted to apply to labor unions); 51 CONG. REC. 13,663 (1914) (statement of Sen. Ashurst). The Democratic platform in 1908, reprinted in 1912, declared that "there should be no abridgment of the right of wage earners and producers to organize for the protection of wages and the improvement of labor conditions to the end that such labor organizations and their members should not be regarded as illegal combinations in restraint of trade." 51 CONG. REC. 13,847 (1914) (remarks of Sen. William Thompson). President Wilson, in a speech accepting the 1912 Democratic presidential nomination, stated:

No law that safeguards . . . [workers' lives,] that improves the physical and moral conditions under which they live, that makes their . . . hours of labor rational and tolerable, that gives them freedom to act in their own interests, and that protects them where they can not protect themselves can properly be regarded as class legislation or as anything but a measure taken in the interest of the whole people, whose partnership in right action we are trying to establish and make real and practical.

51 CONG. REC. 13,847 (1914) (remarks of Sen. Thompson, quoting President Wilson).

31. For a discussion involving several congressmen of different perspectives, see 51 CONG. REC. 14,587-91 (1914). See also H.R. REP. NO. 627, at 14-16 (1914).

32. See sources cited *supra* note 26.

sion in the Clayton Act declaring that human labor was not an item of commerce and was thus outside the coverage of the anti-trust laws.³³

The debates in Congress over the passage of the Clayton Act also explain why Congress thought it important that unions be allowed to exist. Congress' primary reason for passing the labor exemption was to attempt to protect workers from the results of their inability to negotiate as equals with corporations.³⁴ This protection primarily consisted of protecting workers from earning less than they were "entitled" as a "fair" return on their labor.³⁵ Economic efficiency also appears to have been a concern of Congress.³⁶ One important goal of the exemption was preventing la-

33. See 15 U.S.C. § 17 (1994).

34. See *id.* Labor asserted that the Sherman Act was not originally meant to apply to labor unions but that the courts had misinterpreted it. See 51 CONG. REC. 9551 (1914) (quoting *Labor's Position on the Antitrust Law*, ORGANIZED LABOR, May 23, 1914); see also 51 CONG. REC. 13,662-64 (1914) (stating that the legislative history of the Sherman Antitrust Act reveals a congressional intent to exempt labor organizations from its provisions).

35. 51 CONG. REC. 9552 (1914) (quoting *Labor's Position On the Antitrust Law*, ORGANIZED LABOR, May 23, 1914).

[Labor unions] are formed to prevent the lowering of wages even more than to further the raising of wages. That the unions seek a labor monopoly in restraint of trade is not true. Their end is not a monopoly of work, but proper pay for the work the workers perform—what labor organization aims at and what combinations and trusts aim at are entirely different things. The one seeks only to see that the laborer gets his proper hire. The other seeks to gouge labor of its share of what it produces.

Id. Senator Ashurst noted:

The individual employee is frequently unable to insist upon the "square deal"; . . . unless he acts in concert with his brother employees. In many instances the power of the employer to withhold a subsistence is a more effective weapon than the power of the employee to refuse to labor. Under such circumstances the law of "supply and demand" doctrine as applied to labor should really be called "despotism in contract."

Id. at 13,667; see also *id.* at 9086 (remarks of Rep. Melville Kelly) (claiming that workers should be able to act "together for the protection of their rights and interests").

36. Of course, strikes can be harmful to the economy as a whole. However, the record reveals only scattered direct references to the concept of efficiency. See, e.g., 51 CONG. REC. 13,668 (1914).

It should come as no surprise that Congress was interested in more than economic efficiency. George Stigler noted that economists frequently waste their time analyzing legislation solely in terms of economic efficiency even though politicians who pass legislation almost always care primarily about transferring wealth to or from certain groups. Stigler cited rent control and tariffs as areas where real world public policy decisions have little to do with efficiency considerations. In each case, legislation is enacted because an interest group perceives (often mistakenly) that the legislation will benefit it. See George J. Stigler, *Economists and Public Policy*, REGULATION, May/June 1982, at 13.

bor-management violence and insuring the peaceful resolution of labor disputes through collective bargaining; this has clear efficiency implications.³⁷ Other concerns included the desire to protect workers' freedom of contract, to protect workers from arbitrary employer activity, and to preserve social stability.³⁸ But far and away the central concern of Congress was to equalize workers' bargaining position so that they could earn a "fair" wage.³⁹

We are unable to determine whether labor supporters believed that corporate stockholders would absorb all of the costs of these higher wages, or whether labor supporters realized that the exemption might cause higher prices for consumers.⁴⁰ And, al-

For applications of this argument to antitrust, see Robert H. Lande, *Wealth Transfers As The Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 82-93 (1982); Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1588-93 (1983); see also Alan A. Fisher & Richard Sciacca, *An Economic Analysis of Vertical Merger Enforcement Policy*, 6 RES. L. & ECON. 1, 7-10 (1984) (providing economic criticisms of legislative, judicial and executive policy towards vertical mergers).

37. For examples of labor-management violence, see the facts underlying *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 480-83 (1940) and *United States v. Hutcheson*, 312 U.S. 219, 227-28 (1941). As the Supreme Court stated in *H.K. Porter Co. v. NLRB*:

[T]he object of this Act was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.

397 U.S. 99, 103 (1970).

38. See *id.*; see also 51 CONG. REC. 13,662 (1914) (remarks of Sen. Ashurst) (maintaining that the integrity of the democratic system depends on the right to organize); 51 CONG. REC. 9086 (1914) (remarks of Rep. Kelly) (blaming social unrest upon the lack of worker bargaining power).

39. See *supra* note 34 and accompanying text.

40. In the Sherman Act debates Senator Stewart made one interesting statement in this regard:

[S]uppose that capital should combine against labor, as it is very much inclined to do, and there should be a combination among the laborers which would increase the cost of production and increase the cost of all articles consumed. Suppose there should be a combination among the laborers to protect themselves from grasping monopolies; they would all be criminals for doing it.

21 CONG. REC. 2606 (1890). Senator Ashurst, however, stated:

It has been asserted that it is dangerous for laborers to possess the power to compel a compliance with their demands for a living wage. I reply that such power is indeed dangerous—to monopoly, oppression, tyranny, avarice, and greed—but is wholesome to the general welfare and to public tranquillity. Internal dangers to a State need never be apprehended from a general desire and effort on the part of the creators of wealth to promote their own efficiency, improve and exalt their own station

51 CONG. REC. 13,668 (1914).

though legislators denounced monopolistic corporations on the same pages of the Congressional Record on which they cried for protection of workers,⁴¹ there did not appear to be any cry that workers should capture their "fair" share of such firms' monopoly profits. We also found no discussion of the possibility of allowing the workers of each company to form labor unions but subjecting them to the merger and other antitrust laws.

For a variety of reasons, the Clayton Act's labor exemption did not accomplish its primary goals. The Act's provisions at least established the nominal right of workers to form unions.⁴² The Supreme Court, however, declined to interpret the Clayton Act in a manner that gave the unions effective bargaining power, or to create as broad an exemption as the unions desired.⁴³ The nominal right of workers to form unions was often practically meaningless.⁴⁴

Also, largely due to the Depression,⁴⁵ by 1932 the plight of workers was more grave than in 1914.⁴⁶ The unions persuaded Congress to pass the Norris-LaGuardia Act,⁴⁷ whose purpose was largely to overturn unfavorable Court decisions and give labor broad, effective antitrust protection.⁴⁸ It reiterated and strength-

41. See, e.g., 51 CONG. REC., at 9086 (1914) (remarks of Rep. Kelly).

42. See 29 U.S.C. §§ 17, 52; see also *infra* note 44 (describing the ineffectiveness of worker rights established by the Clayton Act).

43. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 468-77 (1921); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, 50-52 (1927). These decisions prevented unions from engaging in secondary boycotts against dealers who sold goods produced by non-union labor. The Court limited the antitrust protection accorded "labor disputes" to disputes between employees and employers over wages and benefits, thereby excluding secondary boycotts from the exemption.

44. One way that employers avoided union organization was to require all employees to sign "yellow dog" contracts, pledging that the employee would not join a union, or, if already a member, would quit. See S. REP. NO. 72-163, at 14-16 (1932) [hereinafter SENATE REPORT]. Further, the courts issued at least one injunction forbidding unions from publicizing the facts involved in their strikes or aiding striking workers. See *id.* at 17. Some of these decisions also held labor leaders personally liable for damages caused by the illegal acts of striking workers. See *id.*

45. In 1932, it was the depression, not the lack of an effective antitrust exemption, that caused significant hardship for workers. In this context, it is not surprising that Congress decided to exempt labor from the antitrust laws. As when it passed the National Recovery Act, the Depression-era Congress might have been willing to permit monopoly capitalism. See DULLES & DUBOFSKY, *supra* note 8, at 250-254.

46. In 1914 there were 3,120,000 unemployed workers as compared to 12,060,000 unemployed workers in 1932. UNITED STATES BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES COLONIAL TIMES TO 1970 126 (1975).

47. 29 U.S.C. §§ 101-15 (1994) (original version at ch. 90, 47 Stat. 70 (1932)).

48. The report accompanying the House version of the Act stated:

ened the fundamental principle that a labor union or a strike could not constitute an illegal combination or conspiracy in restraint of trade.⁴⁹ And, although the Act significantly changed the legal standards governing the labor exemption, the economic rationale underlying it in the debates seemed to be very similar to that underlying the corresponding portions of the Clayton Act. The major theme of promoting bargaining equality between labor and capital pervaded Congress' deliberations⁵⁰ and the Act's preamble.⁵¹ The other themes of 1914 also seem to have been pres-

It is easy to say that an employee is not compelled to accept employment and that an employer has the right to make such conditions as he may see fit surrounding the employment. But, aside from . . . materially diminishing [an employee's] freedom of contract, the vice of such ["yellow dog"] contracts, which are becoming alarmingly widespread, is that if they are carried to their ultimate conclusion, they would abolish trade-unionism.

H.R. REP. NO. 72-669, at 7 (1932). The Report also quoted the Supreme Court for the view that if such contracts were enforced, "collective action would be a mockery." *Id.* (quoting *Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 570 (1930)).

49. See 29 U.S.C. § 105. It also outlawed "yellow dog" contracts, *id.* § 103, enumerated a lengthy list of common union practices that were made no longer subject to restraining orders or injunctions, *id.* § 104, added procedural safeguards, *id.* § 107, and immunized labor leaders from responsibility for illegal acts by union members, except upon "clear proof of actual participation in, or actual authorization of, such acts," *id.* § 106.

50. The Senate Report stated:

[G]overnmental grants of authority to form corporations . . . [ensure that] thousands of owners of property are enabled to combine hundreds of millions of dollars of capital and, in this way, substantially to control and sometimes to monopolize opportunities for employment. Such a power, unrestrained by the organization of labor, would permit employers arbitrarily to fix the wages and conditions of labor under which millions of men and women would find their only opportunity to earn a living.

A single laborer, standing alone, confronted with such far-reaching, overwhelming concentration of employer power, and compelled to labor for the support of himself and family, is absolutely helpless to negotiate or to exert any influence over the fixing of his wages or the hours and conditions of his labor If he can exercise no control over his conditions of employment, he is subjected to involuntary servitude.

SENATE REPORT, *supra* note 44, at 9.

51. The declaration of public policy in the Preamble to the Norris-LaGuardia Act states:

[T]he individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, 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

ent,⁵² but the concern with bargaining inequality was of primary importance, as many of the leading Supreme Court interpretations of this Act have recognized.⁵³

B. *Multi-Union, Multi-Employer, and Industry-wide Collective Bargaining*

Once organized labor secured an effective exemption from the antitrust laws, the issue of union mergers and alliances inevitably arose, because unions, like workers, increase their bargaining strength by acting together. Moreover, when separate unions face all their employers in one bargaining session, they save the transaction costs of multiple negotiations and ensure equality of compensation and working conditions.⁵⁴ In time, multi-employer bar-

29 U.S.C. § 102 (1994).

52. See *id.* The Report that accompanied the Senate version of the Act mentioned as goals "that freedom of association, self-organization and mutual help and protection which all of us want to make secure," SENATE REPORT, *supra* note 44, at 8, and "the redress of grievances and . . . peace rather than strife," *id.* at 10 (quoting *Texas & New Orleans R.R.*, 281 U.S. at 570).

53. The Court noted in *United States v. Hutcheson* that the exemption "was designed to equalize before the law the position of workmen and employer as industrial combatants." 312 U.S. 219, 229 (1941) (quoting with approval *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 484 (1921)). Congress was interested in "protecting and favoring labor organizations and eliminating the competition of employers and employees based on labor conditions regarded as substandard, through the establishment of industry-wide standards." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 504 n.23 (1940).

Interestingly, Justice Holmes wrote in *Vegeahn v. Guntner* that:

Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. . . .

If it be true that workmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.

44 N.E. 1077, 1081 (Mass. 1896) (dissenting opinion).

54. Multi-employer or industry-wide collective bargaining can be carried out in any of a number of ways: unions may merely share information and goals, they may "coordinate" bargaining, or they may formally impose procedure which obligate the unions to agree to identical terms. Some of these activities would be legal if performed by corporations; others could constitute horizontal price fixing which would violate the Sherman Act.

It is often in the interests of some or all of the employers in an industry to bargain collectively; it at least allows them to offset organized labor's bargaining strength. Further, employers are often less concerned with absolute wage and benefit levels than with ensuring that they do not pay more for labor than do their competitors. Thus, de-

gaining units were also found exempt from the Sherman Act.

The origin of the labor exemption which permits multi-employer bargaining is obscure;⁵⁵ no statute explicitly permits it. In 1935, however, Congress passed the Wagner Act⁵⁶ to further strengthen the rights of workers to organize, bargain collectively, and engage in concerted activity.⁵⁷ This Act also established an administrative agency—the National Labor Relations Board (NLRB)—with exclusive jurisdiction over allegedly unfair labor practices.⁵⁸ Although no law expressly authorizes the NLRB to certify multi-employer bargaining units, and although multi-employer bargaining units were not uncommon before the NLRB was created in 1935,⁵⁹ a 1940 Supreme Court decision construed the Act as empowering the board to certify multi-employer bargaining.⁶⁰ Thus, the exemption appears judicially created.⁶¹

pending upon the conditions in an industry, multi-employer bargaining is often believed to be desirable both by unions and by management. It is also possible that all of the workers and employers could get together to form a cartel and divide its monopoly profits, or for rent-seeking purposes generally.

55. The legislative histories of the statutes that granted the exemption plainly and repeatedly state that Congress passed them for the benefit of employees, not employers. *See supra* notes 35–37, 40. The statutes themselves also embody a preoccupation with the rights of labor unions and virtually ignore the rights of employers. However, section 6 of the Clayton Act does declare that “[t]he labor of a human being is not a commodity or article of commerce.” 15 U.S.C. § 17 (1994). Arguably this definition excludes joint employer activity concerning wages from the antitrust laws. A few legislators also expressed the view that the Clayton Act exemption would apply to both employers and employees. *See, e.g.*, 51 CONG. REC. 14,333 (1914) (statement of Sen. Charles Thomas); 51 CONG. REC. 14,366 (1914) (statement of Sen. Hoke Smith); 51 CONG. REC. 16,279 (1914) (statement of Rep. Edwin Webb); *see* Leonard L. Scheinholtz & Kenneth C. Kettering, *Exemption Under the Antitrust Laws for Joint Employer Activity*, 21 DUQ. L. REV. 347, 351–52 (1983) (noting several general references in the floor debates to legislators’ views that the Act also applies to employers).

56. 29 U.S.C. §§ 151–66 (1994).

57. Section 7 of this Act originally provided: “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 concerted activities, for the purpose of collective bargaining or other mutual aid or protection.” National Labor Relations Act, ch. 372, 49 Stat. 449, 452 (1935).

58. *See* DEVELOPING LABOR LAW, *supra* note 30, at 28.

59. *See supra* note 55. Moreover, multi-employer bargaining units predated the Sherman Act. *See* DEVELOPING LABOR LAW, *supra* note 30, at 473.

60. *See* AFL v. NLRB, 308 U.S. 401, 411 (1940); *see also In re Waterfront Employers Ass’n*, 71 N.L.R.B. 80, 110–11 (1946). It has been observed that:

The Board noted that Section 9(b) provided for ‘employer’ units, that Section 2(2) defined ‘employer’ to include any ‘person’ acting in an employer’s interest, and that Section 2(1) defined ‘person’ to include ‘associations.’ Therefore, the Act contemplated that an employer unit could consist of an association acting in the employer’s interest, i.e., a multi-employer unit.

The exemption provides that employers may combine to oppose workers' collective wage demands, but only within the context of collective bargaining.⁶² Further, the scope of the multi-employer bargaining unit can be no wider than the scope of the collective bargaining unit that it forms to oppose.⁶³ Collective bargaining involving more than one employer and more than one local union must be agreed to by every participating union and employer before it will be certified by the NLRB.⁶⁴ Thus, the idea of multi-employer bargaining seems to be based upon the notion of countervailing power.⁶⁵

DEVELOPING LABOR LAW, *supra* note 30, at 474-75; see also PHILLIP AREEDA & DONALD F. TURNER, 1 ANTITRUST LAW 198-202 (1978).

61. The Supreme Court has approved the existence of multi-employer bargaining units on several occasions. See *NLRB v. Truck Drivers Local Union 449, International Brotherhood of Teamsters*, 353 U.S. 87, 89-90 (1957) [hereinafter *Buffalo Linen*]; *NLRB v. Brown*, 380 U.S. 278, 284 (1965); *Charles D. Bonanno Linen Serv. v. NLRB*, 454 U.S. 404, 409-10 (1982). Further, in *United Mine Workers v. Pennington*, 381 U.S. 657, 664 (1965), the Court noted that "the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit." See also *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 287 n.5 (1968) (Harlan, J., concurring); *Amalgamated Meat Cutters & Butcher Workmen, Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 712-14 (1965) (Goldberg, J., dissenting); *Scheinoltz & Kettering*, *supra* note 55, at 355-57; Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1020-22 (1986).

62. See William C. Zifchak, *Labor-Antitrust Principles Applicable to Joint Labor-Management Conduct*, 21 DUQ. L. REV. 365, 370-72 (1983).

63. *Scheinoltz & Kettering*, *supra* note 55, at 357; see also AREEDA & TURNER, *supra* note 60, at 200 (emphasizing equality of bargaining power, suggesting that immunity should attach "regardless of the dimensions of the formal bargaining unit, for an employer combination that is no broader than the union" and noting that the exemption includes protection for joint lockouts of striking workers). During the 1940s many proposals to limit multi-employer bargaining were introduced into Congress, including some by business organizations. One of the most sweeping proposals was sponsored by the National Association of Manufacturers. See DEVELOPING LABOR LAW, *supra* note 30, at 475. None were enacted. See *id.* "In *NLRB v. Truck Drivers Local 449*, the Supreme Court reviewed the failure of legislative efforts to curb such bargaining and concluded that Congress intended the Board to 'continue its established administrative practice of certifying multi-employer units.'" *Id.* (citations omitted). Today, multi-employer bargaining is relatively common, and complex NLRB procedures govern their formation and dissolution. See *id.* at 476-87. A crucial question which we have not yet been able to answer is whether the NLRB could refuse to certify multi-employer bargaining units with larger than specified market shares.

64. Unions that do not belong to a certified multi-employer bargaining unit can still informally coordinate their bargaining.

65. This countervailing power approach appeals to our sense of equity, but is nevertheless inefficient. It allows labor and capital to combine at the expense of consumers, who are not represented at the bargaining table. See discussion *infra* Section III.B.2.

In summary, the reasons that labor supporters advanced in favor of the original labor exemption from the antitrust laws were quite modest. When viewed historically, their agenda seems readily understandable. Without the minimum guaranteed right to form effective unions, the bargaining position of workers was believed to be drastically inferior to that of their employers. The courts (and perhaps Congress) later ratified union mergers, coordinated union activity, and multi-employer bargaining.⁶⁶ Congress' primary goal in passing the labor exemption was to achieve equality in bargaining.⁶⁷ We found no significant evidence that Congress intended to promote labor interests at the expense of consumers.⁶⁸ The monopoly aspects of unions were largely unforeseen and unintended by Congress in 1890, 1914 and 1932.⁶⁹

Given this historical background, it is not surprising that there was little or no attention given to the possibility that there might be ways to secure equality for workers with fewer undesirable side effects on the efficiency of the economy as a whole.⁷⁰ One comes away with the impression that Congress saw the choice as either exempting unions from the antitrust laws almost completely,⁷¹ or

66. Given that Congress was attempting to establish a broad antitrust exemption for labor, it would have been difficult for them to deny all the workers in an industry the right to bargain collectively. With workers having this right, management could be expected also to want the right to bargain collectively. Since formalized multi-employer bargaining has always been consensual, perhaps both labor and management saw it as a tool, which they were not required to use, and which could sometimes work to their advantage.

67. We are cautioned in our conclusion, however, by the wisdom expressed in FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 145 (1930): "With a legislative history like that which surrounds [the labor exemption from] the Clayton Act, talk about the legislative intent as a means of construing legislation is simply repeating an empty formula. The Supreme Court had to find meaning where Congress had done its best to conceal meaning."

68. It is difficult to imagine labor supporters engaged in congressional debate publicly calling for unions effectively to acquire economic surplus from consumers, or for such common labor goals as featherbedding or retarding the spread of new technology. Nevertheless, early labor advocates must have had at least an inkling of some of the major inefficiency consequences of the exemption. As Felix Frankfurter and Nathan Greene noted in *The Labor Injunction*, "[t]he truth to be dealt with is that every measure upon which a labor union relies for acceptance of its demands, involves the curtailment of some temporal interest of employer, non-union employee, and frequently the public." *Id.* at 24.

69. For a contrary view, see generally Campbell, *supra* note 61, at 1047-58.

70. And, of course, economic conditions have changed dramatically in the last half-century. Measures that might well have been proper in 1914 or 1932 could easily have a new set of effects today.

71. The labor exemption to the antitrust laws is not absolute. For example, if a

not achieving anything close to equality of bargaining power. The notion of, for example, imposing market share restraints on unions would perhaps have been a more finely tuned approach than could have been expected at the time.

II. ECONOMIC EFFECTS OF EXEMPTING UNION MERGERS FROM THE ANTITRUST LAWS

We now consider unions' actual ability to merge, coordinate behavior, and engage in industry-wide collective bargaining. We analyze these effects of this behavior initially with respect to Congress' primary goal—protecting workers' rents⁷² from acquisition by monopsonistic or opportunistic employers—and examine the efficiency-creating aspects of this protection. We then examine some of the other, probably unintended, economic effects of the labor exemption from the antitrust laws generally and from the merger laws particularly, and we describe the rent-seeking behavior and economic inefficiency that they permit.

union and a group of employers combine to fix prices or divide territories, such activity is generally held to be outside the scope of the exemption. See *Local 167, International Brotherhood of Teamsters v. United States*, 291 U.S. 293, 297 (1934). See also *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 808–10 (1945) (holding, in part, that a union and employers cannot enter into a conspiracy with manufacturers to give employers a monopoly in the industry and the union a monopoly of the workers).

72. For a definition of "rent" see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 9 (2d ed. 1977). In economics, "rent" is identified with producer surplus. Producer surplus is the amount that can be taken as a lump sum from a producer without affecting the level of production. Less technically, it is approximately the same as economic profit. For example, imagine that one owned a spring that produced water with unique properties whose only costs of production were those of bottling and transporting the water. Assume that water from this spring sells at a very high price. If the government were to tax water from this spring, this would lower net income but not the amount of water sold. The government would have extracted some of its rent.

In short, rent-seeking is simply the attempt to extract a supranormal profit (a rent) without producing any more. Resources devoted to rent-seeking are a social loss since they do not contribute to greater production.

Another definition of "rent-seeking" comes from Roger Miller and Raymond Fische: "An attempt to secure monopoly profits by investing resources to influence public policy." ROGER LEROY MILLER & RAYMOND P.H. FISHE, *MICROECONOMICS: PRICE THEORY IN PRACTICE* 430 (1995).

A. *Protection of Workers' Rents and Enhancement of Economic Efficiency*

A policy consistent with the maximization of societal welfare would certainly encourage, or at least not be inimical to, the formation of unions in some form.⁷³ Unions may arise as a mechanism to reduce contract costs where the firm or the employee invests in specific human capital. In the absence of unions, both employer and employee have an incentive to extract rents opportunistically: having incurred training costs, the party that bore these costs may not have an efficient mechanism for recovering them.⁷⁴ The worker trained at company expense may go to another company, or the company may offer the worker, trained at the worker's own expense in areas specific to the employer, less-than-promised wages. In general the union may be able to supply credibility and ensure the performance of long-term contracts by preventing individual workers from acting opportunistically.⁷⁵ At the same time, the union provides a credible threat (it can strike) against companies that attempt opportunistic behavior.⁷⁶

It is important to note that the positive effect of unionization on productivity is observed even considering the higher wages that unionization causes.⁷⁷ Part of the union/non-union differential in productivity seems to be due to striking differences in quit rates⁷⁸—the quit rate is much lower at unionized companies, a fact consistent with the notion that unions supply the credibility to ensure

73. See Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 315 (1978).

74. This explanation implies that unions are more likely to exist when the opportunistic cheating problem is greater. See *id.* at 316. This implication has not, however, been systematically tested.

75. Consistent with this explanation are data showing that quit rates are substantially lower for union workers as compared with non-union workers when wages and other factors are held constant. Richard B. Freeman & James L. Medoff, *The Impact of Collective Bargaining: Can the New Facts Be Explained By Monopoly Unionism?*, in RESEARCH IN LABOR ECONOMICS 293 (Joseph D. Reid, Jr. ed., 1983).

76. See generally *id.* (considering the non-wage effects of unions). In manufacturing and construction (and, at one time, underground bituminous coal mining), unionized firms appear to have greater productivity than non-union firms, other things being equal. See *id.* at 305.

77. That is, the higher productivity remains after the effect of capital-labor ratios and higher quality labor for unionized firms are taken into account. See *id.* at 304, 306.

78. See *id.* at 302; see also Richard B. Freeman, *The Effect of Unionism on Worker Attachment to Firms*, 1 J. LAB. RES. 29, 30, 48-49 (1980) (stating that trade unionism is associated with significantly lower probabilities of separation).

long-term contract fulfillment. The research suggests that the reduction of turnover among unionized employees is not primarily due to monopoly wages, reduction in employer-initiated separations, or unionization of more stable workers. Rather, it seems to stem from changes in worker attitudes and behavior arising from the union setting.⁷⁹

These are not the only efficiencies that are likely to be caused by unions.⁸⁰ Unions provide management with valuable information and advice. Management can attempt, through the union, to discuss and implement workplace improvements in order to prevent workers from quitting.⁸¹ Richard Freeman and James

79. In the cement industry, a significant portion of the union/non-union productivity differential arises because the quality of management is higher in union than in non-union firms. One possibility is that the union is an efficient means of communicating median employee preferences to management. An alternative hypothesis would be that firms with better management tend to become unionized. If management is collecting short-term rents, the formation of a union may preserve these rents for workers. This would not, however, explain a persistent association of unions with better management. See Freeman & Medoff, *supra* note 75, at 304; Richard B. Freeman & James L. Medoff, *The Two Faces of Unionism*, 57 PUB. INTEREST 69, 80-82 (1979); Kim B. Clark, *The Impact of Unionization on Productivity: A Case Study*, 33 INDUS. & LAB. REL. REV. 451, 451-69 (1980); Kim B. Clark, *Unionization and Productivity: Micro-Econometric Evidence*, 95 Q.J. ECON. 613, 636-38 (1980).

80. The existence of unions also appears to serve the end of some people's sense of distributive justice. A series of studies finds that unions in part act to reduce wage differences. Strong unions apparently cross-subsidize lower-paid workers, and wage inequality is much lower among unionized workers than among comparable non-unionized workers. Wage differentials among workers who differ in race, service, skill level, and education (but not sex) are less in union than in non-union firms. Finally, seniority, independent of productivity, is more important in promotion decisions at unionized companies than at otherwise comparable non-unionized companies. See generally Freeman and Medoff, *supra* note 75.

Freeman also contends that unions reduce income inequality. See Richard B. Freeman, *Unionism and the Dispersion of Wages*, 34 INDUS. & LAB. REL. REV. 3, 23 (1980); see also FREEMAN AND MEDOFF, *supra* note 18, at 20. The authors suggest that unions increase inequality among blue-collar workers due to the greater wages of blue-collar union workers, but that unions reduce inequality among *union* workers and between the blue-collar workers and white-collar workers. See *id.* They argue that these latter equality-enhancing effects are greater than the inequality effect. See *id.* However, one reason we do not find this argument convincing is that, in spite of their claims, Freeman and Medoff did not compare the difference in inequality between the situation in which unions exist and one in which unions do not exist.

81. Unions can often help resolve legitimate worker grievances and protect workers from arbitrary corporate action in ways that cost the firm little or nothing. Unions can also help convince workers of the sincerity of management initiatives that are in fact in everyone's best interest. Thus, unions can serve to make the labor market more efficient by acting as a coordinating mechanism for labor and employer interests.

Medoff have explained why public goods aspects of an effective workplace "voice" require collective worker action,⁸² and note other benefits from having a collective worker voice.⁸³

Thus, there is theory and evidence to suggest that unions can efficiently supply workers with information on public goods in the workplace. Unions can also efficiently deter firms' and employees' rent-seeking behavior. A policy consistent with efficiency would encourage unions, in some form, to competitively supply those services.⁸⁴ If this was their only effect, profit-maximizing firms

82. Freeman and Medoff point out that many important aspects of an industrial setting are "public goods" with high costs of exclusion. Safety conditions, lighting, heating, pollution levels, the comfort of the work place, the speed of the production line, the grievance procedure, the speed of the production line, and promotion affect the entire work force. "Without a collective organization, the incentive for the individual to take into account the effects of his or her actions on others, or to express his or her preferences, or to invest time and money in changing conditions, is likely to be too small to spur action." FREEMAN & MEDOFF, *supra* note 18, at 9. This public goods character of worker-supplied information is another reason, in addition to that advanced by Klein et al., *see supra* notes 73-75 and accompanying text, why it is efficient for unions to exist in some form.

Freeman and Kleiner have found that union organizing in the 1980s had little effect on union wages but considerable effect on giving members a greater voice through improved grievance procedures, seniority protection, and job posting and bidding. They conclude that the gain in "collective voice" rather than the gain in monopoly power explains the motivation for new unionization during this period. *See* Richard B. Freeman & Morris M. Kleiner, *The Impact of New Unionism on Wages and Working Conditions*, 8 J. LAB. ECON. S8, S9, S24, S25 (1990).

83.

The collective nature of trade unionism fundamentally alters the operation of a labor market and, hence, the nature of the labor contract. In a nonunion setting, where exit-and-entry is the predominant form of adjustment, the signals and incentives to firms depend on the preferences of the "marginal" worker, the one who might leave because of (or be attracted by) small changes in the conditions of employment. The firm responds primarily to the needs of this marginal worker, who is generally young and marketable; the firm can to a considerable extent ignore the preferences of typically older, less marketable workers, who—for reasons of skill, knowledge, rights that cannot be readily transferred to other enterprises, as well as because of other costs associated with changing firms—are effectively immobile. In a unionized setting, by contrast, the union takes account of *all* workers in determining its demands at the bargaining table, so that the desires of workers who are highly unlikely to leave the enterprise are also represented. With respect to public goods at the workplace, the union can add up members' preferences in much the same manner as a government can add up voters' preferences for defense, police protection, and the like to determine social demand for them.

FREEMAN & MEDOFF, *supra* note 18, at 9-10.

This is a simply another expression of the Klein, Crawford and Alchein argument, *supra* notes 73-74 and accompanying text. Unions ensure greater weight for the preferences of senior workers and thus increase the younger workers' incentive to invest in job-specific training and stay.

84. The return to unions would be equal to the cost of supplying those services. The

would welcome unions. The fact that they do not is consistent with the existence of union monopoly power.

Much of the theory and evidence demonstrating the efficiencies that can arise from unions is new and controversial. For purposes of this Article, however, we will accept these efficiencies as both real and empirically significant. Even assuming all of these efficiencies from unionization do commonly arise, however, the critical question for this paper is whether large union mergers, coordination among large unions, and industry-wide collective bargaining are required to produce these benefits.⁸⁵

B. *Rent-Seeking Behavior and Economic Inefficiency*

1. *Monopoly Aspects of the Exemption.* We have found no evidence that the existence of monopoly power by unions is necessary for, or even related to, those aspects of unions that promote efficiency. Moreover, no one has suggested a mechanism through which such a relation would exist. We will proceed under the assumption that the efficiency aspects of unions exist separately from any monopoly power of unions.⁸⁶

There is surprisingly little accurate information on the type, extent or magnitude of those effects of unions associated solely with their monopoly power. There are hundreds of studies of the relative effects of unions that have appeared since H.G. Lewis' classic study of 1963,⁸⁷ including a newer survey by Lewis in

unions that more efficiently supplied those services would drive out less efficient unions.

85. Gideon Chitayat, in his comprehensive study of union mergers, concludes that national unions with fewer than 50,000 members might be too small and inefficient to survive, but does not address the question of when significant economies of scale diminish or disappear, or whether unions might become too large to be efficient. See CHITAYAT, *supra* note 6, at 131. Chitayat also documents a trend towards larger labor unions. See *id.* at 139.

86. Authors who emphasize the positive contributions of unions do not deny their monopoly aspects. For example, Freeman and Medoff note:

As monopoly institutions, unions reduce society's output in three ways. First, union-won wage increases cause a misallocation of resources by inducing organized firms to hire fewer workers, to use more capital per worker, and to hire workers of higher quality than is socially optimal. Second, strikes called to force management to accept union demands reduce gross national product. Third, union contract provisions—such as limits on the loads that can be handled by workers, restrictions on tasks performed, and featherbedding—lower the productivity of labor and capital.

FREEMAN & MEDOFF, *supra* note 18, at 14.

87. H. GREGG LEWIS, *UNIONISM AND RELATIVE WAGES IN THE UNITED STATES: AN EMPIRICAL INQUIRY* (1963).

1986.⁸⁸ Lewis finds that these studies show an average union/non-union wage differential of about 15%, although he believes this estimate has an upward bias.⁸⁹ These studies, however, provide an estimate of the wage gain from unionization relative to the nonexistence of unions only if the supply curve of non-union labor is completely elastic or is unaffected by unionization.⁹⁰ This assumption is generally untrue; it cannot be true for the economy as a whole when the economy is near full employment since new workers can only be enticed into the labor market by higher wages.⁹¹ In addition, there is almost no data that might be used to measure the monopoly power of unions, and no estimates of that part of the wage gap or gain that is due to monopoly power.⁹² Thus, we know neither the wage effects of unions (compared to not having a union), nor the wage effects of union monopoly power.

Nevertheless, striking evidence of the influence of monopoly power on union wages is found in the pattern of union/non-union wage differentials as it varies with the unions' jurisdiction. One would expect, as somewhat casual empirical evidence suggests, that the wage gap depends crucially on the ability of unions to extend their coverage to all firms in a particular market.⁹³ A characteris-

88. H. GREGG LEWIS, *UNION RELATIVE WAGE EFFECTS: A SURVEY 174-87* (1986). Other more recent studies include Farrell E. Bloch and Mark S. Kuskin, *Wage Determination in the Union and Non Union Sectors*, 31 *INDUS. & LAB. REL. REV.*, 183 (1978); Wesley Mellow, *Employer Size, Unionism and Wages*, in *RESEARCH IN LABOR ECONOMICS* 253-82 (Supp. 2, Joseph D. Reid ed., 1983); John Raisian, *Union Dues and Wage Premiums*, 4 *J. LAB. RES.* 1 (1983).

There is considerable evidence that foreign competition has significantly reduced union monopoly power. Freeman and Kleiner find that new unionization in the 1980s produced wage and benefit gains far below those implied by the standard earlier cross sectional studies of union wage effects. See Freeman & Kleiner, *supra* note 82, at S9. Instead, newly organized workers made gains primarily in the areas of grievance procedures, job posting and bidding, and seniority protection, although there were some wage gains as well. See *id.* Freeman and Kleiner do suggest, however, that these limited wage effects may be temporary and may end with the period of union formation and "first-contract" effects. See *id.*

89. See LEWIS, *supra* note 88, at 186-87.

90. See Mellow, *supra* note 88, at 260-61, 276.

91. See generally RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS* 26-29 (2d ed. 1985).

92. One reason for this could be the absence of proposals such as ours to motivate such an analysis.

93. That is, a key variable is the cost to the unions to organize and extend their jurisdiction and control. See ROBERT J. FLANAGAN ET AL., *LABOR ECONOMICS AND LABOR RELATIONS* 435-38 (1984).

tic of unions that are relatively successful, such as miners, truckers, longshoremen, and construction workers, is that there are distinct geographic limits to the relevant product markets.⁹⁴

Mergers are a powerful means of gaining the requisite coverage. John Conant and David Kaserman note that "union mergers play a role similar to the monopolization role of corporate mergers."⁹⁵ This monopolization motive is recognized by union leaders; the director of collective bargaining for an international union stated in an interview that "[b]argaining power may increase if a union is able to gain a greater monopoly advantage."⁹⁶

To maximize net rents, unions need to control quantities as well as prices of both inputs and outputs. In addition, part of union rents will be reflected in working conditions as well as wages. For both these reasons, the choice of inputs and working conditions will be affected by the existence of unions with monopoly power. Thus, restrictive work practices and featherbedding are associated with unions.⁹⁷ There is widespread agreement that such restrictive practices impose a substantial social cost. Albert Rees estimates that this cost is probably larger than the welfare losses associated with the relative wage effect.⁹⁸

One estimate of the economic inefficiency caused by unions' wage effects is approximately \$5-10 billion per year.⁹⁹ This esti-

94. The teamsters gain leverage through control of terminal facilities in a few major cities. See THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 130 (1994). Construction sites and mines are immobile. Deregulation reduces the control of unions by increasing organizing and policing costs, and thereby reduces the wage gap. The antipathy of unions to deregulation is well-known. See generally RONALD G. EHRENBERG, *THE REGULATORY PROCESS AND LABOR EARNINGS* (1979) (detailing labor costs in regulated industries).

95. Conant & Kaserman, *supra* note 1, at 245.

96. Kay Statton-Devine, *Union Merger Benefits: An Empirical Analysis*, 13 J. LAB. RES. 136-37 (1992).

97. For an economic analysis, see Paul Weinstein, *The Featherbedding Problem*, 54 AM. ECON. REV. 145, 145-52 (1964). Restrictive work practices are also associated with non-union workers. See generally STANLEY B. MATTHEWSON, *RESTRICTION OF OUTPUT AMONG UNUNIONIZED WORKERS* (1931).

98. See Albert Rees, *The Effect of Unions on Resource Allocation*, 6 J.L. & ECON. 69, 72-73 (1963).

99. See FREEMAN & MEDOFF, *supra* note 18, at 57. This estimate of the deadweight loss from the union wage effect is probably too high. The true estimate might be only approximately one-third of their estimate, for several reasons. First, their estimate of the wage effect of unions is based on the union/non-union differential when the relevant figure is the union wage compared with the wage in the absence of unions. See *supra* notes 80-83 and accompanying text. More importantly, their estimate is based on partial

mate implies a transfer of wealth from shareholders and consumers to union members of about ten times this amount.¹⁰⁰ Perhaps the most striking feature of these estimates is that they were made by economists relatively sympathetic to organized labor.

The surprising fact is that no one has estimated generally the effect of unions' monopoly power (as opposed to the effect of their efficiency-creating aspects) on wages.¹⁰¹ There are no good estimates separating the monopoly effects of unions¹⁰² on wages

equilibrium assumptions that are clearly inappropriate. Neither income nor cross-effects are taken into account. Lee Edlefsen provides a method of doing this and finds that general equilibrium calculations of the deadweight loss for typical simulation of parameters usually is a fraction of the loss calculated by partial equilibrium analysis. See RICHARD O. ZERBE, JR. & DWIGHT D. DIVELY, *BENEFIT COST ANALYSIS: IN THEORY AND PRACTICE* 480-84 (1994).

100. See *id.* at 236-47. We believe that this estimate is conservative. Even if the elasticity of demand for labor is close to one, the welfare loss calculated by Freeman and Medoff suggests a transfer of wealth from shareholders and consumers of about ten times this amount. With an elasticity of one and a wage increase from the competitive wage of 15%, the decrease in the quantity of union labor would also be about 15%. The deadweight welfare loss can be approximated by multiplying one half of the wage increase by the number of workers losing jobs as a result of union monopoly wage increases. That is, $\text{Welfare Loss} = \frac{1}{2} \times .15W \times .15L$, where W is the wage of workers before monopoly and L is the number of workers before monopoly. The ratio of union workers remaining to those no longer working as union workers would be then 85 to 15. The size of the transfer will be found, approximately, by multiplying the size of the wage increase by the number of workers working after the wage increase. That is, $\text{Transfer} = .15W \times .85L$. The ratio of the transfer to the welfare loss then is .85 to .075, or about 11 to 1.

101. It is still an open question whether unions have an optimal effect on wages after the productivity-enhancing effects of a union are accounted for. The most sensible position seems to be that the positive effects on productivity are less than the total wage effects. This is the only position consistent with the recent finding that in unionized firms the profit per unit of capital is lower, *ceteris paribus*, than in non-unionized firms. See John Barton & Gordon Tullock, *Concluding Comments*, in *RESEARCH IN LABOR ECONOMICS* 347 Supp. 2 (Joseph D. Reid, Jr. ed., 1983).

102. The returns to union monopoly will be greater if the union, in addition to controlling the supply of labor, is able to control the price, quality, and quantity of other inputs and of outputs. However, such control is often illegal and as a practical matter virtually impossible. Without it, as unions raise their wages, employers adjust their utilization of all inputs and output margins, thereby in part frustrating union attempts to maximize the benefits that they achieve for their members. This result can be inferred from FREDERICK R. WARREN-BOULTON, *VERTICAL CONTROL OF MARKETS: BUSINESS AND LABOR PRACTICES* 122-25 (1978).

Complete control over all inputs and outputs could have positive efficiency effects as well as maximizing a union's total rents (or wages). Whenever two stages in a production setting are subject to separate monopoly powers, output is over-restricted, leading to a double-monopoly loss. Ownership of both stages, or decision-making by one party, however, would enable those involved to internalize the separate effects of monopoly power at both stages and thereby increase overall efficiency. For a thorough discussion, see Fisher & Sciacca, *supra* note 36, at 14-15, 109. However, this efficiency is a "second

from the efficiency effects.¹⁰³

The monopoly aspects of unionism are somewhat counterbalanced by the existence of multi-employer bargaining,¹⁰⁴ which has complex effects that can benefit either employers or unions, depending on the circumstances, and that may add to the harm to consumers.¹⁰⁵

The formation of a multi-employer bargaining unit largely replaces a labor monopolist bargaining arrangement with bilateral monopoly. A multi-employer unit may use its additional power to resist union demands. Since, however, employers are much more concerned with their costs relative to one another, and since multi-employer bargaining strikingly reduces the elasticity of labor demand as compared with single firm bargaining, it seems possible or even likely that multi-employer bargaining would lead to increased wages. This is in fact the result indicated by the empirical evidence for multi-employee bargaining units operating in the local, as opposed to the national, labor markets.¹⁰⁶

best" solution; a preferable solution in terms of global efficiency would be to eliminate the monopoly power at both stages.

103. Indeed, as far as we can determine, no concentration ratios or Herfindahl indices have been calculated for unions. We have calculated a Herfindahl-Hirschmann index for unions at the industry 2-digit level. Even for such gross market definitions the index is above the 1,800 level (listed in the 1992 *Horizontal Merger Guidelines*, *supra* note 5, as the point of "high" concentration) and is higher than many corporate 4-digit industry concentration levels within the same 2-digit classification. See Calculations for Unions at the Industry 2-Digit Level (on file with author).

104. Legal decisions in this area, however, generally have been more favorable to employers than to unions. For example, courts have uniformly held that employers may jointly lock out employees if threatened with a "whipsaw" strike, even if they are not members of the same multi-employer bargaining unit. See *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298, 1310-12 (E.D. Wash. 1981); *Newspaper Drivers & Handlers' Local 372 v. NLRB*, 404 F.2d 1159, 1161 (6th Cir. 1968); *Amalgamated Meat Cutters & Butchers Workmen v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979). See also Scheinholtz & Kettering, *supra* note 55, at 358-59 (stating the same proposition). Mutual lockout pacts by employers have also generally been upheld. See *id.* at 359. Finally, the courts have upheld at least one insurance pact, under which non-struck firms agreed to cover fixed costs for struck firms. See *Kennedy v. Long Island R.R.*, 319 F.2d 366, 372 (2d Cir. 1963).

105. On some occasions the monopoly aspects serve to reduce unions' transaction costs of bargaining with employers. In many relatively atomistic industries, unions prefer to participate in one large proceeding, rather than in hundreds of negotiations. Further, unions may prefer uniform wages across an industry, even if they are able to price discriminate and secure higher wages for some workers, because of the internal tension such a practice would create.

106. See, e.g., Peter Feuille et al., *Wage and Non-wage Outcomes in Collective Bargaining: Determinants and Tradeoffs*, 2 J. LAB. RES. 39, 50 (1981); Wallace E. Hendricks

Although multi-employer bargaining units can reduce the magnitude of the monopoly rents acquired by unions, they also increase the potential for rent-seeking by unions and employers,¹⁰⁷ as the next section illustrates.

2. *Rent-Seeking by Unions and Employers.* An emerging literature forcefully argues that the problem of rent-seeking by raising competitors' costs¹⁰⁸ is an important, widespread and

& Lawrence M. Kahn, *The Demand for Labor Market Structure: An Economic Approach*, 2 J. LAB. ECON. 412, 416-17 (1984); Wallace E. Hendricks, *Labor Market Structure and Union Wage Levels*, 13 ECON. INQUIRY 401, 413-15 (1975).

The tendency toward multi-employer bargaining is reduced to the extent that there are different unions at different companies in the industry. See D.R. Deaton & P.B. Beaumont, *The Determinants of Bargaining Structure: Some Large Scale Survey Evidence for Britain*, 18 BRIT. J. INDUS. REL. 201, 209 (1990); Wallace E. Hendricks & Lawrence M. Kahn, *The Determinants of Bargaining Structure in U.S. Manufacturing Industries*, 35 INDUS. & LAB. REL. REV. 181, 190-91 (1982) [hereinafter Hendricks & Kahn, *Determinants*] (concluding that "interunion rivalry appears to increase the perceived labor return to single-employer as opposed to multiemployer agreements"); Thomas A. Kochan & Richard N. Block, *An Inter-Industry Analysis of Bargaining Outcomes: Preliminary Evidence from Two-Digit Industries*, 91 Q.J. ECON. 431, 442-45 (1977).

Multi-employer bargaining can also reduce negotiation costs. This use is consistent with findings that such bargaining is more likely in industries with a relatively large number of firms, each with a relatively small plant size. Multi-employer bargaining is also more likely where labor constitutes a relatively large proportion of total costs, a fact consistent with the use of multi-employer bargaining to escape a competitive disadvantage. See Deaton & Beaumont, *supra*, at 207; Hendricks & Kahn, *Determinants, supra*, at 194.

107. Judge Ruggero Aldisert of the United States Court of Appeals for the Third Circuit noted that "[t]hose of us who are active in this field know . . . that ninety-five percent of antitrust law is judge-made law, and that the same is true of our national labor law . . . [W]hat we are talking about today is . . . federal common law." *Remarks of the Honorable Ruggero I. Aldisert*, 21 DUQ. L. REV. 337, 339 (1983).

108. That cost-increasing rent-seeking may be common should come as no surprise. The gains from raising a rival's costs are immediate; there is no sacrifice of short-run profits for longer-term gains. Nor is it necessary, as in price-cutting, to entirely drive out a rival for some exit of the rival to occur. The rival's response to increased costs is to decrease output, allowing some combination of a higher price and an increased market share for the firm initiating the cost increase. Finally, cost-increasing strategies do not require a deep pocket or superior access to financial resources. Steven Salop and David Scheffman have shown that a sufficient condition for a cost-increasing strategy to be profitable is that the price increase by more than the increase in the average costs of the dominant firm. This increases the dominant firm's profits even if the firm does not adjust outputs in response to the increased costs. This can be expressed as a condition in terms of the dominant firm's market share of the elasticity of the fringe supply and the market demand elasticity. The cost-raising strategy is more likely to be profitable the more elastic the fringe supply, the more inelastic the market demand, and the greater the dominant firm's market share. For mathematical proof of this proposition, see Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983).

costly phenomenon.¹⁰⁹ Unions, sometimes in conjunction with employers, often engage in this sort of rent-seeking behavior.¹¹⁰

Several cases illustrate the importance of the problem and indicate the difficult legal distinctions involved. Unions' use of wages and rent-seeking behavior is most clearly illustrated in *United Mine Workers v. Pennington*.¹¹¹ In that case, the trustees of the United Mine Workers Union Welfare and Retirement Fund sued a small coal company, Phillips, for failure to live up to a bargaining agreement. Phillips cross-claimed, alleging that in violation of the Sherman Act the United Mine Workers, the trustees of the fund, and certain large coal operators had conspired to raise the costs of smaller firms that were not members of the bargaining unit. The allegations were that the union had entered into an illegal agreement with coal mine operators and that as a result wages were set higher than some firms could pay.¹¹²

The circumstances of the *Pennington* case may have involved rent-seeking in which larger firms attempted differentially to raise the costs of smaller firms.¹¹³ Because the smaller firms were

109. The seminal article is by George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). A classic vehicle for rent-seeking is government regulation. Changes in costs or in output characteristics differentially affect the average cost of firms. Government regulations primarily affect costs, thus affecting firms differently. Moreover, firms differ in their access to political influence. In general, political efforts to acquire or prevent regulations are exempt from antitrust scrutiny. See James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 66-68 (1985). Hence, the battle to acquire or prevent regulation is a primary source of rent-seeking behavior.

110. The economic literature, to a greater extent than the legal literature, has paid inadequate attention to this sort of rent-seeking. The existence of rent-seeking behavior in explaining regulations does not mean that public interest elements are not also involved. Other things being equal, the greater the net social rent (i.e., the greater the efficiency gain in the Kaldor-Hicks sense), the greater the potential benefits to politicians who deliver these gains. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 394-95 (1983); Richard O. Zerbe, Jr. & Nicole Urban, *Including the Public Interest in Theories of Regulation*, 11 RES. L. & ECON. 1, 3-4 (1988).

111. 381 U.S. 657 (1965). See also Oliver Williamson, *Wage Rates As A Barrier to Entry: The Pennington Case In Perspective*, 82 Q.J. ECON. 85 (1968).

112. Phillips also alleged that the unions and the larger companies agreed to approach the Secretary of Labor jointly to obtain a minimum wage for companies selling to the Tennessee Valley Authority (TVA) and that such a provision would make it difficult for smaller companies to compete in the TVA. The court dismissed this charge as inconsistent with precedent that efforts to influence public officials usually cannot violate the antitrust laws regardless of intent. See Hurwitz, *supra* note 109, at 80.

113. See Williamson, *supra* note 111, at 113.

more labor-intensive than the larger coal firms, wage increases disproportionately increased the wage bills of the smaller firms and harmed them in relation to larger firms. The union gained higher wages at the expense of lower employment, a result consistent with abundant evidence showing that the interests of senior members of the UMW dominated that union's decision making. Thus, *Pennington* demonstrates how a union could use any matter properly a subject of bargaining which affected one firm more than another to raise the costs of some firms in comparison with those of rivals.

The use of nonwage aspects in rent-seeking arose in *Amalgamated Meat Cutters and Butchers Workmen Local 189 v. Jewel Tea Co.*¹¹⁴ and in *Adams Dairy Company v. St. Louis Dairy Company*.¹¹⁵ Jewel, operated in Chicago, introduced prepackaged self-service marketing of meat beginning in 1948. By 1957, Jewel had developed a chain of 196 stores, 174 of which provided this special service. Multi-employer multi-union negotiations in 1957 resulted in a provision stating that "market operating hours shall be 9:00 a.m. to 6:00 p.m. on Monday through Saturday inclusive. No customer shall be served who comes into the market before or after the hours set forth above."¹¹⁶

Jewel objected to this provision and sought to have it eliminated as a violation of the antitrust laws.¹¹⁷ Convenience in shopping hours is an extremely important aspect of quality in the retail grocery market, and the restriction on marketing hours unquestionably would have reduced Jewel's ability to compete by offering more convenient hours. Rivals of Jewel not offering these convenient hours clearly would have gained from the restriction. However, the court found the hours provision to be a legitimate subject for collective bargaining and therefore exempt from the antitrust laws.¹¹⁸

In *Adams Dairy* the union and the industry legally conspired to raise the costs of a more efficient industry member (even though the targeted firm's employees were also union members).¹¹⁹ Adams had introduced milk in paper cartons for sale in

114. 381 U.S. at 676.

115. 260 F.2d 46 (8th Cir. 1958).

116. *Jewel Tea*, 381 U.S. at 679-80.

117. *See id.* at 681.

118. *See id.* at 682.

119. *See* 260 F.2d at 48-49.

grocery stores in St. Louis and sold its milk for less than the price of home-delivered milk.¹²⁰ Prior to the entry of Adams, retail sales of milk in grocery stores had been small in comparison with sales of home-delivered milk. Typical delivery costs were a substantial fraction of the delivered price.¹²¹ Adams' innovation reduced costs of milk delivery and reduced the labor required for delivery. Unfortunately for Adams, the new 1950 contract increased by 100% the commission paid to drivers on routes with more than a specified number of delivery points.¹²² Adams was the only dairy with routes made up of more than the specified number of delivery points,¹²³ so the new union contract had the effect of substantially raising Adams' cost of doing business. Adams unsuccessfully brought suit for damages under the Sherman Act.¹²⁴

Although the current policy promotes industry-wide collective bargaining and may allow the industry and union to gain at the expense of the public, it may also harm the union and the industry. A compelling example of this is furnished by the cement industry. Management in this industry yielded to demands of a strong union, the Cement, Lime, Gypsum, and Allied Workers Union (CLGWU), on the grounds that since all domestic competitors were similarly situated, none would be unduly hurt.¹²⁵ The union won high wages and benefits and imposed highly restrictive work rules. However, foreign competition, substitution of capital

120. *See id.* at 49.

121. *See id.*

122. In addition, any driver whose route was split was to receive full base pay, plus average commissions equal to his monthly earnings just prior to the split, for a period of four months following the splitting of routes. *See id.* at 50.

123. Because Adams' drivers made milk deliveries to supermarkets, Adams' 12 routes averaged more than 55,000 points per month. Assuming all of Adams' routes contributed above 40,000 points, the extra cost to Adams was \$43,200 per year in 1950 dollars. *See id.*

Adams' response was to hire 10 new trucks and drivers and split the routes, which, of course, meant lower salaries to the previous drivers. Four years later, at the end of the contract, Adams was using 34 routes to handle deliveries, compared to 12 originally. *See id.* at 49-50.

124. The union may have been preying against parts of itself: there was some indication that the motivation of the original union was jealousy at the high wages of the Adams' drivers by other union members. *See id.* at 50-51. A significant portion of labor law may be viewed as attempting to prevent waste resulting from one union or part of a union from rent-seeking at the expense of another.

125. *See* Herbert R. Northrup, *From Union Hegemony to Union Disintegration: Collective Bargaining in Cement and Related Industries*, 10 J. LAB. RES. 337, 350-51 (1989).

for labor, and environmental regulations weakened both the union and domestic cement companies.¹²⁶ Small companies could not afford automation and disappeared.¹²⁷ Union membership declined from about 43,000 employees in 1950 to about 20,000 employees in 1988,¹²⁸ the companies suffered increasing hardship, and the union found it could no longer sustain strikes.¹²⁹ A merger did not prevent the breakup of the union,¹³⁰ today its replacements are weak.¹³¹

3. *Inadequacies of the Current Exemption.* In cases such as *Pennington*, *Jewel Tea* and *Adams Dairy*, the courts usually require a finding of a conspiracy with a non-exempt group, such as employers, and a finding of adverse effects on some other entity, usually another employer, before denying an antitrust exemption to a union.¹³² Although this proof seems straightforward,¹³³ such proof requires delineating a number of subtle distinctions before the courts will find an antitrust violation.¹³⁴

To determine if a union-employer conspiracy in violation of the antitrust laws has been formed, courts will examine whether the subject at issue was a "mandatory" subject of bargaining—wages, hours or working conditions.¹³⁵ For example, a crucial issue in *Jewel Tea* was "whether the marketing-hours restriction, like wages, and unlike prices, [was] so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision . . . falls within the protection of the national labor policy and is therefore exempt from the

126. *See id.* at 375-76.

127. *See id.* at 354-55.

128. *See id.* at 355 tbl.2.

129. *See id.* at 365-67.

130. *See id.* at 369-71.

131. *See id.* at 372-73.

132. *See* ABA ANTITRUST SECTION, *supra* note 10, at 625 (discussing *Pennington* and *Jewel Tea*).

133. However, the *Connell* case muddied the law. *See Connell Constr. Co. v. Plumbers & Steamfitters Local Union 100*, 421 U.S. 616 (1975); discussion *infra* note 142.

134. *See* *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 806-13 (1945); *Lumber Prod. Ass'n. v. United States*, 144 F.2d 546, 550-52 (1944), *rev'd sub nom. United Brotherhood of Carpenters & Joiners of America v. United States*, 330 U.S. 395, 410-13 (1947); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 501-07, 512-13 (1940).

135. *See* National Labor Relations Act, 29 U.S.C. §§ 158(a)(5), 158(b)(3), 159(a) (1994) (defining "mandatory").

Sherman Act.”¹³⁶ The exemption protects restraints that operate directly on the labor market but does not cover product or business market restraints that only affect the labor market indirectly.¹³⁷

Courts also examine whether a employer had the union agreement thrust on it, or whether it actively sought the agreement. On remand in *Pennington*, the district court required proof of a “conspiracy between employers and labor formed with the intention of driving competition out of business”¹³⁸ and found no such proof.¹³⁹ In *Adams Dairy* the court required a finding of anticompetitive intent on the part of both the union and the conspiring employers to invoke antitrust liability. The agreement ultimately survived antitrust scrutiny because the court decided that at least some of Adams’ rival employers had resisted the proposal that adversely affected only Adams.

Because the current legal doctrine is likely to only catch grossly foolish rent-seeking unions and employers, these distinctions have proven difficult for the courts.¹⁴⁰ In *Pennington* and *Jewel Tea*, for example, the court split into three groups of three Justices.¹⁴¹ The foregoing distinctions, difficult as they may be, were in some respects blurred further—and judicial review made more difficult—by the *Connell* decision in 1975.¹⁴² As a result,

136. *Amalgamated Meat Cutters & Butcher Workmen, Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 689–90 (1965).

137. The legality of multi-employer bargaining also depends crucially on one’s notion of what is the national labor policy. One can read Justice White in *Pennington* as saying that national labor policy is whatever is in the best interest of unions. But he goes on to say that the union was not acting in its own interest in giving up its ability to bargain flexibly with the smaller employers and that the agreement in *Pennington* therefore might have been contrary to national labor policy. Justice White thus appears to have believed that he knew the union’s own interests better than it did. See *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

138. *Lewis v. Pennington*, 257 F. Supp. 815, 829 (E.D. Tenn. 1966), *aff’d in part and rev’d in part*, 400 F.2d 806 (6th Cir. 1968). Intent is also stressed in *Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753*, 422 F.2d 546, 554 (7th Cir. 1970).

139. See *Pennington*, 257 F. Supp. at 829.

140. Attempting to distinguish which aspects of multi-employer bargaining are exempt from antitrust and which are part of an illegal conspiracy also adds to the problems. Even more basic is the question of whether a union is a true union, an employer-run union, or a group of employers masquerading as a union. See, e.g., Scheinholtz and Kettering, *supra* note 55, at 357–58.

141. Justice Douglas, speaking for one group, felt the collective bargaining agreement could itself be prima facie evidence of illegal intent. See *United Mine Workers of America*, 381 U.S. at 673 (concurring); *Jewel Tea*, 381 U.S. at 736 (dissenting).

142. In *Connell Constr. Co. v. Plumbers & Steamfitters Local Union 100*, 421 U.S. 616

the criteria for antitrust immunity for union multi-employer conspiracies clearly offer opportunities for rent-seeking.¹⁴³

In *Pennington*, *Jewel Tea*, and *Adams Dairy*, the courts found no antitrust liability due to the nonexistence of a conspiracy in the legal sense of the term. However, conspiracy in the legal sense is not necessary for rent-seeking to raise rivals' costs.¹⁴⁴ The concurrence of the interests of larger firms and the natural pressure of unions to seek higher and uniform wages may be sufficient.¹⁴⁵ A successful economic conspiracy requires an agreement and the ability to police it. The collective bargaining process and the collective bargaining agreement can provide both of these, even where an explicit anticompetitive agreement is absent. Strong unions, then, can use multi-employer bargaining to practice input predation. *Pennington*, *Jewel Tea* and *Adams Dairy* illustrate that cases where unions have done so form much of the labor exemption to the antitrust laws.

Economic theory provides no justification for the byzantine distinctions that exist in the antitrust law. But economic theory also cannot distinguish rent-seeking via multi-employer bargaining from normal collective bargaining (which almost invariably hurts one employer more than another), especially since unions seldom practice price discrimination.¹⁴⁶ Economic analysis therefore cannot cure the ambiguities flowing from the legal principles that define the boundaries of the labor exemption to the antitrust statutes. The current law on the labor exemption focuses upon the

(1975), a union sought to compel Connell, whose workers the union did not represent, to subcontract only to contractors who recognized the plumbers union. The Court denied an antitrust exemption even though no conspiracy between the Union and employers was alleged. *Id.* at 626-35.

We avoid the temptation to illustrate further the difficult distinctions required by *Connell* and by the overlap of the NLRA and the antitrust exemption. One could arguably read *Connell* as removing the conspiracy requirement and requiring only a direct restraint on the commercial market to lose antitrust immunity. This case, however, is extremely difficult to interpret and its precedential value is unclear. In the years since *Connell* there have been hundreds of federal court opinions concerned with labor-antitrust issues, as a quick search of LEXIS or Westlaw demonstrates. Many of these cases have involved what one may characterize as rent-seeking behavior. We take the prevalence of these cases as a reflection of both the ubiquity of rent-seeking by employers and unions and the lack of clarity of the law.

143. See generally Durie & Lemley, *supra* note 23, at 765-69.

144. See Williamson, *supra* note 111, at 114; see also cases cited *supra* note 134.

145. See Williamson, *supra* note 111, at 114.

146. See *id.* at 114-15.

wrong issue—agreement—when it should be concerned with competitive effect.

III. LESSONS FROM JAPAN

The number of books and articles discussing Japanese management techniques with an eye to transplanting many of their ideas to the United States is staggering. Americans understandably are impressed by Japanese efficiency and like to think the adoption of some of their techniques will aid our own industries. Often these proposals seem fanciful and fail to recognize the many differences between the two countries, their economic systems and their cultures. Nonetheless, there remains an important aspect of the Japanese economic system that might well contribute significantly to the efficiency of the United States economy that has received scant attention: the Japanese collective bargaining structure.

The Japanese collective bargaining system, like that of the U.S., starts with the goal of worker-management equality. This stated goal is “to elevate the status of workers . . . [to] equal[ize] standing with their employer[s].”¹⁴⁷ But the Japanese system has evolved in a dramatically different direction.

In Japan, unions are primarily organized on a plant-wide basis.¹⁴⁸ Even different plants within the same company typically have separate, truly independent unions.¹⁴⁹ Unions, or effective collections of unions, spanning more than one employer are almost nonexistent; more than 90% of unionized workers in Japan belong to company-specific “enterprise unions.”¹⁵⁰ And, while national federations of enterprise unions do exist, they are extremely loosely organized, with small staffs,¹⁵¹ and only have the power to advise the enterprise unions on negotiating goals and tactics.¹⁵²

147. MINISTRY OF LABOR, JAPAN LABOUR LAWS 15 (1968).

148. See Linda L. Rippey, Special Project Note, *Alternatives to the United States System of Labor Relations: A Comparative Analysis of the Labor Relations Systems in the Federal Republic of Germany, Japan, and Sweden*, 41 VAND. L. REV. 627, 640 (1988).

149. See Comment, *Japanese Labor Relations and Legal Implication of the Possible Use in the United States*, 5 NW. J. INT'L L. & BUS. 585, 601 n.130 (1983); Rippey, *supra* note 148, at 643-46.

150. See Comment, *supra* note 149, at 600; Rippey, *supra* note 148, at 640.

151. See William B. Gould, *Labor Law in Japan and the United States: A Comparative Perspective*, 6 INDUS. REL. L.J. 1, 10-12 (1984).

152. See Comment, *supra* note 149, at 601.

These federations do provide advice concerning the enterprise unions' annual "spring offensive" and also engage in political activity.¹⁵³ They are similar to American trade associations. But there are no organizations in Japan comparable to such American organizations as the United Auto Workers, the United Steelworkers, or the International Association of Machinists. A Japanese Ministry of Labor study showed that only 5% of labor negotiations surveyed involved union officials from outside the company.¹⁵⁴ Compare this to the coordinated activity among constituent unions comprising typical United States national labor organizations.

The bottom line is that, in Japan, each enterprise union acts independently. The U.S. notion that all comparable workers within an industry should be paid comparable wages is not a significant concern in Japan. Thus, in Japan competition on the basis of labor rates has not been eliminated.¹⁵⁵

The Japanese system can be explained better by sociology than by government regulation. It evolved in part from the paternalistic attitude of Japanese employers towards their workers, and the sense of obligation and loyalty on the part of Japanese workers towards their companies.¹⁵⁶ It is part of the same ethic which produces exceptionally hard workers who take pride in the quality of their teamwork, their ultimate products and services, and the reputation of their company. It grew out of a system where the employer takes a great deal of interest in the "non-business" aspects of employees' lives—firms are much more likely to play a role in securing employee housing, or schooling for employees' children, or to arrange company social events, than are U.S. companies.¹⁵⁷ This has led to a close relationship between labor and management and a desire on both sides to avoid labor strife.¹⁵⁸ And, of course, major employers typically offer lifetime security to permanent employees.¹⁵⁹ For all these reasons, Japanese employ-

153. See *id.* at 601 n.132; see also Gould, *supra* note 151, at 10-12.

154. See Gould, *supra* note 151, at 10.

155. See *id.* at 5.

156. See *id.* at 6; Rippey, *supra* note 148, at 643, 646; see also Yoichiro Hamabe, *Inadvertent Support of Traditional Employment Practices: Impediments To The Internationalization of Japanese Employment Law*, 12 UCLA PAC. BASIN L.J. 306, 306-08 (1994).

157. See MASANORI HASHIMOTO, *THE JAPANESE LABOR MARKET IN A COMPARATIVE PERSPECTIVE WITH THE UNITED STATES*, VII, 1-2 (1990).

158. See *id.*

159. See *id.*

ees generally think in terms of movement within a company rather than movement between companies. All this interacts to focus workers' attention on their company rather than upon their trade. A worker at Toyota or Honda tends to identify himself or herself as an employee of that company, rather than as an auto worker or a member of the Japanese equivalent of the United Auto Workers.¹⁶⁰

The Japanese system of plant-wide or company-wide unions undoubtedly gives rise to the many types of benefits described in Section II.A of this Article. For example, such unions may be able to prevent opportunistic behavior by employees or their employer, provide credibility for long-term contracts, and prevent public goods problems and free rider problems. In addition, a plant-wide or company-wide union may become more attuned and responsive to the particular needs of its plant or company.¹⁶¹ This can help the employer, both directly and indirectly, by further cementing workers' loyalties to their company.

The Japanese system is not, however, without deficiencies. Many unions in Japan are unduly weak, ineffective and dominated by management. They typically have meager strike funds and their leaders often lack organization or negotiation skills.¹⁶² In short, even though Japanese unions are coextensive with their employer's plant or company, they may not be able to achieve equality with management in terms of effective bargaining power.

We emphasize that we are not proposing that the United States adopt the Japanese system. Our proposal would, in fact, permit mergers or cooperation between modestly sized horizontally-competing unions, and virtually any vertical or horizontal arrangement between non-competing unions. Any absolute size thresholds for effective union management, negotiating ability, organizing experience, or financial strength, would be obtainable through small horizontal, and any vertical or conglomerate union mergers or cooperative agreement.¹⁶³ Such mergers or other ar-

160. See Gould, *supra* note 151, at 5, 7-8; Comment, *supra* note 149, at 594-602. See generally Rippey, *supra* note 148, at 643-46.

161. See Gould, *supra* note 151, at 12.

162. See Comment, *supra* note 149, at 602-03; see also Rippey, *supra* note 148, at 640-46 (explaining the social and cultural reasons why Japanese organized labor retains a structure which is fragmented and docile by U.S. standards).

163. Small unions in different industries could merge until they possessed the necessary economies of scale. See *infra* note 165-66.

rangements would also allow unions to pool their resources for political activities.

IV. IMPLICATIONS OF SUBJECTING UNIONS TO THE MERGER LAWS: ANTITRUST GUIDELINES FOR UNION MERGERS

In Part I we concluded that Congress' principal goal in exempting most union behavior from the antitrust laws was to equalize the bargaining ability of labor and capital. This goal roughly evinces a desire to protect workers' rents from acquisition by monopsonistic or opportunistic employers. In Part II we discussed some of the economic effects of the existing form of the labor exemption, focusing on rent protection, rent-seeking behavior, and other efficiency and wealth transfer (from consumers to union members) consequences. In this Part we discuss the possibility of subjecting unions to the merger laws—a proposal that very well might successfully carry out society's basic goals in this area more efficiently, with fewer harmful side effects, and in a manner that would be in workers' and consumers' long-run best interests.

This proposal would allow the employees of any company to form a union.¹⁶⁴ This, alone, should generally allow workers to preserve their rents from being acquired by opportunistic or monopsonistic employers. It would likely also allow many or all of the efficiencies arising from unionization. But it likely would not significantly allow unions to engage in rent-seeking behavior or to become industry-wide monopolists.

The essence of this Article's proposal is to treat unions and corporations equally under the antitrust laws. For both, the policy would generally permit mergers, except when the anticompetitive potential was likely to outweigh the procompetitive benefits.¹⁶⁵ Our proposal would permit every conglomerate union merger,

164. Of course, all of a firm's workers should be allowed to unionize, no matter how large that firm is. We would not define this as a merger.

165. The normal antitrust rules against conspiracies in restraint of trade between corporations should also apply to conspiracies between unions. Similarly, just as two or more corporations can often undertake joint ventures without violating the antitrust laws, we would often permit unions to form joint ventures, particularly those directed toward research. For example, we would generally permit some or all of the unions in an industry to form a joint venture to research ways to improve worker safety. We would not, of course, permit unions to enter a "joint venture" to achieve identical wages. For a cogent analysis of the law and economics of joint ventures, see Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1523-38 (1982).

every vertical union merger,¹⁶⁶ and most—but not all—horizontal union mergers.¹⁶⁷

In theory, one should analyze contemplated mergers between unions by balancing the harmful effects likely to arise from a given union merger against any efficiencies so arising. This methodology is the same type of Williamsonian tradeoff analysis that is widely regarded as being appropriate for corporate mergers.¹⁶⁸ And, just as antitrust law makes the controversial presumption that implicit or explicit coordination between firms is more likely as industry concentration rises,¹⁶⁹ we would presume that a more concentrated labor market (that is, a market consisting of few unions within the same industry) would be more able to coordinate its actions.¹⁷⁰

Even if legally prevented from merging, unions might nevertheless want to act jointly to secure wages or working conditions. This joint activity could consist of normal oligopolistic interdependence¹⁷¹ or outright horizontal conspiracies (with or without written agreements) that could be in restraint of trade. We might expect collusive activity, especially during a transition period, given unions' established patterns of behavior. Once impacted by a standard they would undoubtedly consider unfair, conspiracy might be

166. Vertical mergers can give rise to anticompetitive behavior, although such effects are likely to be relatively uncommon. See Fisher & Sciacca, *supra* note 36, at 71. For simplicity and predictability, however, it would be desirable to allow every vertical union merger despite the small probability that on a rare occasion one could cause an anticompetitive effect.

167. Gideon Chitayat's comprehensive study of labor union mergers found that from 1956, the time of the merger of the AFL and the CIO, to 1978, 57 mergers of national labor unions occurred. See CHITAYAT, *supra* note 6, at 1. Fifteen national unions (out of the top 30) were involved in 25 out of 41 mergers that combined large unions with small ones. See *id.* at 129. Although we have not attempted to analyze these 57 mergers in any detail, most appear to be conglomerate mergers or the merger of a large union and a much smaller one. See also *id.* at 1, 128, 143-51.

168. See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Trade-offs*, 58 AM. ECON. REV. 18 (1968), for the origin of Williamsonian merger analysis. For a comprehensive discussion of the topic, see generally Fisher & Lande, *supra* note 36.

169. For a review of the evidence concerning the validity of this assumption, see Paul A. Pautler, *A Review of the Economic Basis For Broad-Based Horizontal-Merger Policy*, 28 ANTITRUST BULL. 571, 587-684 (1983).

170. If we ever reversed this presumption for firms, and allowed all corporate mergers, we would equalize the bargaining position of labor by giving it the same freedom.

171. For an excellent summary of the legal standards in this area, see Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices after Ethyl Corp.*, 1983 WIS. L. REV. 887, 908-18 (1983).

a natural reaction. We would govern such activity by unions and employers by normal antitrust principles. Such activity would be illegal if it significantly restrained trade, and cases in this area often would be difficult.¹⁷² Moreover, unions would still be able to observe each others' behavior and act interdependently. One employer would be reluctant to give in to wage demands unless it knew that its rivals would also do so,¹⁷³ so both employers and unions would have an incentive to behave like normal corporate oligopolists.¹⁷⁴

We therefore recognize that our proposal would not lead to perfect wage competition in every industry.¹⁷⁵ However, we certainly hope that it would often improve competition among workers. This competition should decrease wage rates somewhat and improve economic efficiency, so it should ultimately lead to lower prices for consumers.

We also note that competition within an industry among unions, and among union leaders, could be desirable.¹⁷⁶ Unions (and union leaders) would compete for members. This competition would cause unions to convince workers that it could secure the best benefits and working conditions for its members, thereby possibly weeding out inefficient unions or corrupt union leaders who pay themselves too much, take bribes, or "sell out" to management.

In the short run a major disadvantage of our proposal is that it would constitute a shock to existing holders of rights to form unions unrestricted in size and coverage. It is harder to take

172. Oligopolistic interdependence among firms under the existing legal standards creates antitrust problems because it can lead to imperfect competition and price leadership.

173. See PHILLIP AREEDA & DONALD F. TURNER, 5 ANTITRUST LAW 166-68 (1980).

174. We would expect "price leadership," which is similar to the labor law concept of "pattern bargaining."

175. One interesting question concerns "most favored nation" clauses, upon which employers frequently insist. Just as such clauses in contracts between buying and selling firms create difficult antitrust problems, see Clark, *supra* note 171, at 932-34, so would they in a union-employer context.

176. Preventing such competition has sometimes been a significant factor explaining union mergers.

In some cases, rivalry and competition significantly motivate larger unions to merge with unions having the same jurisdictional lines The major motive of the Teamsters in its merger with the Brewery Union and of the Steelworkers in its merger with the Mine Mill union was to eliminate competition within the labor movement.

CHITAYAT, *supra* note 6, at 130-31.

something away than never to grant it in the first place¹⁷⁷—our proposal would likely have a negative effect on worker morale and productivity in the short run.¹⁷⁸

In the long run the effect on worker morale should be positive. This is true practically by definition. Unions increase productivity essentially by making the workplace better and by making workers happier. Our proposal will tend to increase union membership insofar as it will lower employer opposition. Lower opposition would appear to be a consequence of the productivity-enhancing effect of unions coupled with the reduction of their monopoly power. To argue that unions exist only to exploit monopoly power ignores their productivity-enhancing aspect. There is in fact no reason to believe the incentives of workers to form unions would be inappropriate absent monopoly power. Greater productivity created by unions will cause an upward shift in the demand for labor, and as long as the supply of labor is not completely elastic, will result in higher wages. If unions can create higher wages there will be an incentive to form unions.

In this Article we do not dispute that unions often give rise to substantial efficiencies.¹⁷⁹ A crucial question, however, is whether the efficiencies created by unions would be largely or entirely realized if all the workers of a firm were allowed to form a union, but some horizontal mergers and coordinated activity between unions were restricted. Our survey of the literature found few if any significant multi-employer union efficiencies that cannot be obtained through small horizontal union mergers, or through vertical or conglomerate union mergers. If few significant efficiencies—not bargaining advantages, but true efficiencies—arise from industry-wide collective bargaining, this Article's proposal is warranted.¹⁸⁰

177. See RICHARD H. THALER, *QUASIRATIONAL ECONOMICS* 146–47, 179–80 (1991).

178. Worker morale forms the basis of a justification for Congress' treatment of labor markets as distinct from product markets, according to the general counsel of the AFL-CIO: "the refusal to talk about the opportunity price of human labor when the labor market is the last resort and society's disdain for suicide as a way of dealing with economic adversity are not all that difficult to grasp." Laurence Gold, *The Antitrust Exemption for Joint Employee Activity*, 21 *DUQ. L. REV.* 343, 343–44 (1983)

179. For a discussion of efficiencies from unions, see *supra* Section II.A.

180. Even if efficiencies from industry-wide collective bargaining are significant, they could potentially be outweighed by the monopoly and rent-seeking effects noted in Part II. Additional monopoly power would be justified on efficiency grounds only as long as the marginal loss due to monopoly was less than the marginal efficiency gain.

We have not thus far uncovered significant worker rents which could not be protected, or union efficiencies which could not be achieved, by firm-wide unions, or by relatively small mergers of unions within an industry, or by vertical or conglomerate union mergers. We have found no evidence, in other words, that union monopoly power is necessary to induce the positive benefits often associated with unionization. This is especially true since the permitted mergers would allow unions to reach any absolute size thresholds for effective union management, general experience and negotiating expertise, organization, and financial strength.¹⁸¹

Assuming that unions provide both efficiencies and market power effects, we would resolve a tradeoff by developing a set of merger guidelines for unions.¹⁸² As the result of a normal Williamsonian merger analysis, and following the Merger Guidelines for corporations, virtually every horizontal corporate merger up to specified market share increases is allowed.¹⁸³ Perhaps the simplest way to resolve the trade-off for unions is to use these same standards for union mergers as well.¹⁸⁴ However, the Merg-

181. For example, unions in different industries would usually be permitted to pool their financial resources to enable individual unions to sustain and publicize strikes. Vertical and conglomerate mergers are virtually certain to arise and help unions achieve scale economies. Such mergers are a large part of our answer to anyone who believes that our proposal might largely destroy unions' strength.

182. The *raison d'être* of guidelines is to give businessman predictability and certainty, and to protect them from arbitrary or politically motivated governmental action. See Fisher & Lande, *supra* note 36, at 1654-56; Fisher & Sciacca, *supra* note 36, at 77-84.

183. This is not completely true, of course. The 1992 Merger Guidelines are less clear than one would have liked. Their introduction stresses that the Department will decide whether to challenge each merger on the basis of specific industry facts and that the guidelines are not a set of rigid mathematical formulas. The basic methodology for applying the Guidelines' analysis is: 1) to define the relevant product and geographical markets; 2) calculate the concentration level within that market and increase in concentration due to the merger; and 3) determine the effect of a large number of factors (or potential defenses) that will make the Antitrust division more or less likely to sue.

For each relevant product and geographic market the Department will calculate the postmerger Herfindahl-Hirschman Index (HHI) level and increase. If the postmerger HHI level is less than 1,000, the department ordinarily will not challenge the merger. Further if the HHI is between 1,000 and 1,800 and the HHI increase is less than 100, the Department is "unlikely" to challenge the merger. By contrast, if the postmerger HHI is over 1,800 and the HHI increase is over 50, the merger "potentially raise[s] significant competitive concerns," and if the postmerger HHI is over 1,800 and the HHI increase is more than 100, the Guidelines make a rebuttable presumption that the merger will "create or enhance market power or facilitate its exercise." MERGER GUIDELINES, *supra* note 5, at 15-16. For a more detailed explanation of the methodology underlying the Merger Guidelines, see Pautler, *supra* note 169, at 597-684.

184. One might make a *de minimis* exception for industries with less than a specified

er Guideline thresholds for corporate mergers are lower than economic analysis might indicate, due to a large number of factors, including the incipency mandate in the law—a Type I, Type II error tradeoff¹⁸⁵ that Congress wanted to resolve on the side of preventing questionable mergers.¹⁸⁶ Since the labor exception area does not contain a congressional incipency mandate,¹⁸⁷ this could imply a higher guideline level for union mergers. Nevertheless, since society's prime objective in this area is achieving bargaining equality between labor and capital, it might be more appropriate to use the same standards that are used for corporate mergers. First, it would make our proposal more politically tenable since subjecting unions and corporations to the same merger guidelines appears fair. Second, since the merger guidelines are well-regarded¹⁸⁸ and well-thought-out, there is no reason to think they can be improved upon in developing something quite different for unions.

It is difficult to know whether there should be an efficiencies defense for union mergers that exceed our prospective guidelines' thresholds. The issue—like the issue of an efficiencies defense for corporate mergers¹⁸⁹—is complex and controversial. Although a full analysis of the issue is beyond the scope of this Article,¹⁹⁰ our inclination is that such a defense is likely to be unwise. In the

number of workers. For such industries, we might presume that inefficiencies caused by industry-wide unions were unlikely to be substantial, while industry-wide economies of scale might be significant and that the entire industry's workers should be allowed to unionize. Further, the union merger guidelines would have to define its terms very carefully. When calculating union market shares, for example, it would have to decide whether to count all of the workers at an open shop operation receiving benefits from the existence of the union, or only the union's members.

185. For description of the Type I, Type II tradeoff framework, see Fisher & Lande, *supra* note 36, at 1670–71.

186. *See id.* at 1592.

187. We would also have to give appropriate weight to Congress' concern with workers' freedom of contract, perhaps by resolving otherwise close questions on the side of allowing union mergers.

188. *See* Alan A. Fisher et al., *Do the DOJ Vertical Restraints Guidelines Provide Guidance?*, 32 ANTITRUST BULL. 609, 641 (1987) (demonstrating that "courts routinely discuss the DOJ Guidelines in merger decisions").

189. *See* Fisher & Lande, *supra* note 36, at 1596–98.

190. The work on an efficiencies defense by Alan Fisher and his colleagues totals 168 law review pages; this total includes neither all of the published work on the subject by Fisher nor the work of dozens of additional learned scholars. For citations to additional work by Fisher and others, see Fisher & Lande, *supra* note 35; Fisher & Sciacca, *supra* note 36.

output market, normally it is desirable for the most efficient manufacturer of a product to expand its market share by gradually taking away market share from its competitors, even if so doing will eventually give it 100% of the market.¹⁹¹ However, one should only allow a union already at the upper limit of the union merger guidelines to add market share as its companies grow through internal growth. Otherwise a very efficient union could absorb less efficient unions and eventually unionize an entire industry, resulting in the problems discussed earlier.¹⁹²

One significant problem could arise from this Article's approach: it would require evaluating mergers between corporations in terms of both corporate and union market shares (and other factors).¹⁹³ Suppose, for example, that two firms wanted to merge, and that each had 5% of an unconcentrated market. The antitrust authorities would normally allow such a merger. But suppose that their employees belonged to different unions, each of which had 15% of the workers in that market. The enforcers could avoid letting the unions merge to control 30% of the industry by several different methods.

First, we could require the workers of the combined company to join whichever of the two unions had the smaller market share.¹⁹⁴ Although this solution could still cause the union merger guidelines to be violated somewhat, such violations might not be too substantial. If the union merger concentration thresholds were set equal to the present corporate merger thresholds this solution would not usually¹⁹⁵ produce inordinately large unions¹⁹⁶ and this option might be optimal. If, however, the union

191. The exception is for predation. See Richard O. Zerbe, Jr. & Donald S. Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655, 666-72 (1982).

192. Of course, a more efficient union could also benefit its companies, thus helping them to grow, which would in turn help the union to add members.

193. For some of the union issues that arise from corporate mergers, see Jonni Walls, Comment, *Airline Mergers, Acquisitions and Bankruptcies: Will The Collective Bargaining Agreement Survive?*, 56 J. AIR L. & COM. 847, 850-75 (1991).

194. Of course, these workers should also have the option of forming their own separate union.

195. The potential market share of a union would be very much greater where, in a corporate merger in which different unions were also involved, the workers could choose among the involved unions, than where the workers were constrained to choose the smaller of the unions involved or form new unions.

196. Of course, if a firm with a 10% market share had to face a union with a 40% market share it might be somewhat reluctant to undertake a merger that would cause

merger guidelines were substantially more lax than the corporate merger guidelines (e.g., if unions were normally permitted to merge up to 33% of a market), then this option could permit the formation of unduly large unions.

Second, we could require the unions to split or reform on their own in any way that ensured that the unions did not exceed the Union Merger Guidelines. This would be an extremely disruptive solution, often requiring many workers to change unions. But it would have the advantages of flexibility and maximum control for workers over the format of their unions.

A third possibility would be to allow only those corporate mergers that would not result in violations of the union merger guidelines. This solution could, however, have the unfortunate effect of depriving society of the benefits of many efficiency-enhancing corporate mergers. Moreover, it violates the spirit of accommodative antitrust—"fix" a merger and allow the unobjectionable parts of the merger to go through.

A final alternative, contrary to what we earlier proposed, would be not to allow any significant horizontal union mergers but to continue to allow vertical and conglomerate union mergers.¹⁹⁷ Although this solution has the advantage of being clear and predictable, we believe that it is more drastic than needed and might unduly sacrifice union economies of scale and other strengths.¹⁹⁸

CONCLUSION

Organized labor finds itself at a historic crossroads. Its overall strength is at a modern low, having fallen from 33.2% of the workforce in 1955 to 15.5% today.¹⁹⁹ It has, however, formulated a three-front strategy to assure that this trend does not continue. First, the AFL-CIO, in its only openly contested election, recently opted for a militant new President, John J. Sweeney.²⁰⁰ Sweeney

this bargaining imbalance.

197. Workers employed by one company as a result of corporate mergers would of course be permitted to band into one union. Every vertical and conglomerate union merger would also be permitted.

198. One commentator warns that a total ban on union mergers could produce unduly weak, atomistic unions. See Meltzer, *supra* note 18, at 710-11. Our proposal, by contrast, which would allow many horizontal, and all vertical and conglomerate union mergers, would not suffer from this defect.

199. See George F. Will, 'Arise, Ye Prisoners . . .', NEWSWEEK, Nov. 27, 1995, at 98.

200. See Frank Swoboda, *AFL-CIO Elects New Leadership*, WASH. POST, Oct. 26,

has vowed to bring the same confrontational tactics to the bargaining table that he used with success while heading the Services Employees International Union.²⁰¹ To achieve his goals, Sweeney has threatened civil disobedience and the use of other unconventional tactics to implement a "massive campaign of resistance and retribution."²⁰² Organized labor's efforts in the 1996 elections reflect this activist approach.²⁰³ Second, the labor movement has announced that it will make a dramatic push to organize non-unionized workers. Sweeney, while head of the Services Employees International Union, nearly doubled its membership despite the nationwide anti-labor trends of recent years,²⁰⁴ and has promised to increase the AFL-CIO training and organizing budget by a factor of eight.²⁰⁵ Third, organized labor is undertaking a wave of union mergers unprecedented in scope.

These mergers might be an attempt by organized labor to recapture a declining monopoly strength through merger. To the extent that the attempt is successful, such mergers will often not be in the public interest. Alternatively, most or all of these mergers might arise from legitimate motives, such as a desire to

1995, at A1.

201. See *id.*; see also Steven Greenhouse, *Man in the News: John Joseph Sweeney; New Fire For Labor*, N.Y. TIMES, Oct. 26, 1995, at A1 (holding that Sweeney leadership style will be more aggressive and confrontational); Frank Swoboda, *Militants Shaking Up Labor's Ranks*, WASH. POST, Oct. 25, 1995, at A1, A12 ("It is Sweeney's union that has resorted to acts of civil disobedience to dramatize the cause of its members, most recently blocking traffic on Washington's Roosevelt Bridge during morning rush hour on Sept. 20 in support of efforts to organize janitors in the District of Columbia.").

202. Greenhouse, *supra* note 201, at A1 (internal quotation omitted). Several months before assuming his new duties, Sweeney told the Los Angeles County Board of Supervisors "if 18,000 workers were laid off, his union, the Service Employees International Union, would conduct 'a massive campaign of resistance and retribution.' Some 3,000 SEIU members made a show of strength outside, and 20 were arrested for blocking traffic." Carl Horowitz, *New Militancy at the AFL-CIO?*, INVESTOR'S BUS. DAILY, INC., Nov. 14, 1995, at A1. Joining Sweeney's leadership team is United Mine Workers President Richard Trumka, the AFL-CIO's new secretary-treasurer: "Trumka is blunt about the need for bruising, leg-breaking tactics, and has employed them in coal strikes. His rise gives a green light to intimidation." *Id.*

203. See Steven Greenhouse, *Despite Setbacks, Labor Chief is Upbeat over Election Role*, N.Y. TIMES, Nov. 15, 1996, at A1.

204. See Stanley Holmes, *AFL-CIO Chief Flexes Labor's Muscles*, SEATTLE TIMES, Nov. 11, 1995, at C1, C3; Greenhouse, *supra* note 201, at A12.

205. Horowitz, *supra* note 202, at A1; see also Frank Swoboda, *Labor Wants Political Focus on Wages*, WASH. POST, Dec. 16, 1995, at A20 (noting that Sweeney advocates an increase in the training and organizing budget from approximately 5% of unions' total budget to 33%).

achieve minimum efficient scale or any of the other reasons discussed in Section II.A. Even if the motives behind union mergers are entirely legitimate, however, these mergers may have anti-competitive effects.

The classic way to separate anticompetitive corporate mergers from benign or procompetitive ones is, of course, to use an anti-trust analysis to conduct a case-by-case review. This Article proposes that union mergers be reviewed in the same way. Such review could substantially fulfill the societal goals underlying the current labor exemption, and fulfill them more efficiently. Our proposal would treat worker and business combinations equally, which could make consumers and society as a whole better off; it might preserve the rent-protection and efficiency-enhancing aspects of unions while diminishing their monopoly and rent-seeking aspects.²⁰⁶

This may seem to some a strange proposal in a time when union strength is waning. We believe it is not. Instead, our proposal has the potential to strengthen unions and the union movement. With the unchecked threat of monopoly removed, unions would be perceived primarily in relation to their ability to contribute to workplace productivity. The application of antitrust guidelines to labor union mergers could be a logical step and, as experience with corporate merger guidelines suggests, one useful to consumers.²⁰⁷

206. We are not suggesting that union mergers usually should be blocked. Nor have we specifically analyzed the competitive merits or problems that might arise from the recently announced merger between the United Auto Workers, the United Steel Workers, and the International Association of Machinists.

207. Whether such a proposal would actually be superior to the present system depends upon a host of unanswered, mostly empirical questions. How large must unions be to protect workers' rents adequately and to generate efficiencies? What would be the effect of the proposal on some of the relatively unique goals of a labor exemption, such as promoting worker morale and discouraging violence? Are there any externalities, free rider problems, or other reasons why this proposal might not adequately protect workers? Are large horizontal mergers necessary, or can small horizontal mergers, or vertical or conglomerate union mergers, achieve virtually all of the benefits associated with unionization? This Article does not answer the many questions connected with our proposal. The purpose of this Article is not to answer these questions but to raise them.