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Reducing Unions' Monopoly Power: Costs and Benefits

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REDUCING UNIONS' MONOPOLY POWER: COSTS AND BENEFITS*

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I. INTRODUCTION

> No one seriously suggests that antitrust policy should be concerned with the labor market *per se*. [ARCHIBALD COX][1]

THERE is a fundamental conflict between labor law and antitrust law. The antitrust laws reflect the powerful idea that competition should usually dictate the way our economy is organized, to the benefit of the economy as a whole, including workers. But the labor exemption to the antitrust laws suggests a different policy: workers should have the right to eliminate competition for wages, hours, and working conditions.

We plan to examine a key feature of the labor exemption to the antitrust laws: the longstanding policy of allowing the workers of several firms, and even of an entire industry, to bargain as a unit and the corresponding policy of allowing all affected employers to bargain together in opposition. We compare this system to an alternative proposal—allowing the workers of each company to form a union but examining the mergers of those unions by the standards of merger guidelines. Throughout this paper we assume that if two unions cannot merge they also cannot conspire to fix wages, strike, and so forth, in accordance with "normal" antitrust principles.

We begin by attempting to determine the primary goals of the industry-wide features of the labor exemption to the antitrust laws. Using Con-

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[1] Archibald Cox, Labor and the Antitrust Laws: A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 254 (1955).

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gress's goals in this area, we compare qualitatively the costs and benefits of these alternatives. We ask whether preventing collective bargaining units from possessing large market shares might reduce the monopoly aspects and rent-seeking behavior of unions and employers, without significantly sacrificing unions' abilities to protect workers' rents and enhance efficiency.[2] Our goal is to frame the analysis in terms of a cost-benefit trade-off. We provide a framework for debating whether this proposal might be in the best interest of both workers and society as a whole.

II. The Legislative Framework

Although hundreds of pages of labor statutes bear on the labor exemption to the antitrust laws,[3] the core of this exemption arises from three statutes: the Sherman Act, the Clayton Act, and the Norris-LaGuardia Act.[4] Congress's primary reason for passing the labor exemption seems to have been to allow workers to form effective unions that could protect them from the results of their inability to negotiate as equals with corporations.[5] This statutory relief sought primarily to protect workers from hav-

[2] There have been other proposals for limiting unions in various ways. See, for example, Bernard D. Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659, 709–14 (1965) (reprinted from 6 J. Law & Econ. 152 (1963)); Ralph K. Winter, Jr., Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L. J. 14 (1963); H. Gregg Lewis, The Labor-Monopoly Problems: A Positive Program, 59 J. Pol. Econ. 277 (1951). However, many recent examinations of the area conclude that the labor exemption is generally justified. See, for example, Richard B. Freeman & James L. Medoff, What Do Unions Do? (1984).

[3] Numerous articles and decisions have analyzed the history of the conflict between labor and antitrust. We need not repeat it here. See Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1944); United States v. Hutchenson, 312 U.S. 219 (1941). These cases firmly established that collective bargaining enjoys a general exemption from the antitrust laws. See also Connell Construction Co. v. Plumbers & Steamfitters, Local 100, 421 U.S. 616 (1975). Some of the best articles in this area include Symposium: The Application of Antitrust Laws to Labor-related Activities, 21 Duq. L. Rev. 331–448 (1983); Douglas L. Leslie, Principles of Labor Antitrust, 66 Va. L. Rev. 1183 (1980); Meltzer, *supra* note 2.

[4] Current version of the Sherman Act codified at 15 U.S.C. § 1 (1976). For the legislative history of the Sherman Act's concern with labor, see Allen G. Siegel, Walter B. Connolly, Jr., & Richard K. Walker, The Antitrust Exemption for Labor—Magna Carta or Carte Blanche? 13 Duq. L. Rev. 411, 415–20 (1975) and the sources cited therein. Current version of the Clayton Act codified at 29 U.S.C. §§ 17, 52 (1976). Norris-LaGuardia Act, 29 U.S.C. §§ 101–15 (1976). As the Supreme Court has observed, these laws are "interlacing statutes" that must be read together to understand the labor exemption properly. See Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 806 (1945).

[5] This short analysis of the legislative history of the exemption is based on a reading of relevant Committee Reports, the material that the Supreme Court cited in important labor exemption cases, and selected portions of the congressional debates. It is not meant to be a complete examination of the topic. Only illustrative citations are provided. For examples of Congress's quest for equality, in the Sherman Act debates Senator Stewart advocated "combination among the laborers to protect themselves from grasping monopolies . . . ." 21

ing to accept less than they were "entitled" to receive as a "fair" return for their labor—in other words, Congress implicitly assigned property rights to certain rents to workers. Efficiency also appears to have been a concern. Congress wanted to prevent labor-management violence and thereby to ensure the peaceful resolution of labor disputes through collective bargaining; this has clear efficiency implications. Members of Congress gave other reasons as well, but Congress's central concern was to equalize workers' bargaining position so that they could earn a "fair" wage, as many leading Supreme Court labor exemption opinions have recognized.[6]

This countervailing power notion also seems to have been the rationale behind permitting multiemployer and industry-wide bargaining.[7] Formal 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. Unions often coordinate their behavior informally, however.

Cong. Rec. 2606 (1890). The Clayton Act debates quote an article from Organized Labor, May 23, 1914, entitled "Labor's Position on the Antitrust Law": "[Labor Unions] are formed to prevent the lowering of wages even more than to further the raising of wages. . . . Their end is not a monopoly of work, but proper pay for the work the workers perform. . . . [Unions desire] only to see that the laborer gets his proper hire. . . . [Employers seek] to gouge labor of its share of what it produces." 51 Cong. Rec. 9551–52 (1914). Senator Ashurst noted: "The individual employee is frequently unable to insist upon the 'square deal'; . . . unless he acts in concert with his brother employees." *Id.* at 13,667. See also 51 Cong. Rec. 9086 (workers should be able to "band together for the protection of their rights and interests") (remarks of Rep. Kelly). See also 51 Cong. Rec. 13,662 (remarks of Senator Ashurst). The Senate Report on what later became the Norris-LaGuardia Act stated: "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." S. Rep. 163, 72d Cong., 1st Sess, to accompany S.935 at 9. There was also a realization that strikes were harmful to the economy as a whole. See 51 Cong. Rec. 9658 (remarks of Rep. Volstead). We nevertheless found only scattered direct references to the efficiency concept. See, for example, 51 Cong. Rec. 13,668. Other congressional goals included protecting workers' freedom of contract, protecting workers from arbitrary employer activity, and preserving social stability. See 51 Cong. Rec. 13,662 (remarks of Senator Ashurst). S. Rep. 163, 72d Cong., 1st Sess., to accompany S. 935, mentioned as goals securing "that freedom of association, self-organization, and mutual help and protection which all of us want to make secure" (page 8) and "the redress of grievances [and] peace rather than strife" (page 10).

[6] For example, the Court noted in United States v. Hutchenson, 312 U.S. at 229, quoting with approval Duplex Co. v. Deering, 254 U.S. 443, 484 (1921), that the exemption "was designed to equalize before the law the position of working men and employer as industrial combatants."

[7] No law directly permits multiemployer bargaining. Its origins are obscure, and it appears to be judicially created. See The Developing Labor Law (Charles J. Morris ed., 2d ed. 1983); Leonard L. Scheinholtz & Kenneth Kettering, Exemption under the Antitrust Laws for Joint Employer Activity, 21 Duq. L. Rev. 346, 355–57 (1983). As those sources note, the Supreme Court has approved the existence of multiemployer bargaining units on several occasions.

Given the background, it is not surprising that Congress and the Supreme Court did not consider the possibility that there might be ways to secure equality for workers with fewer inefficient side effects.[8] One comes away with the impression that Congress saw the choice as either offering unions virtually complete exemption from the antitrust laws or not achieving anything close to equality of bargaining power.[9] The elimination or reduction of union monopoly power is not, however, inconsistent with the legislative language or with the congressional record. Existing law arose from the courts' inability to achieve the congressional goal of equality while limiting union monopoly power. The notion of preserving equality of bargaining through imposing market share restraints on unions and multiemployer bargaining units is perhaps a more finely tuned approach than could have been expected at the time.

III. Economic Effects of the Industry-wide Exemption

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

A policy consistent with the maximization of social welfare would possibly encourage, and at least not be inimical to, the formation of unions in some form. Klein, Crawford, and Alchian cogently suggest how the existence of unions may promote efficiency.[10] Unions may be a mechanism to reduce contract costs where the firm or employees invest in specific human capital. In the absence of unions, both employer and employee have an incentive to extract rents opportunistically. The union may be able to enhance the credibility of workers and ensure the performance of long-term contracts by preventing individual workers from acting opportunistically. At the same time, the union provides a credible threat (strike) against companies that attempt opportunistic behavior. Thus, the existence of unions can ensure that workers obtain a larger portion of these rents and also encourage efficiency. Some of these efficiencies might depend on the size of the bargaining unit. We have, however, discovered

[8] Complex NLRB procedures govern the formation and dissolution of multiemployer bargaining units. See Morris, *supra* note 7, at 476–80. A crucial question posed by this paper is whether the NLRB could refuse to certify multiemployer bargaining units with larger than specified market shares.

[9] The labor exemption was much more limited until the depression. Even if, as an antidepression measure, Congress wished through the Wagner Act to give monopoly power to unions, we question whether this is an appealing rationale for allowing union monopoly power today.

[10] Benjamin Klein, Robert Crawford, & Armen Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J. Law & Econ. 297 (1978).

no important examples of efficiencies that require unions larger than the plant or firm, other than economies of organization and bargaining.

There is also a public goods argument for the existence of unions. Many features of the workplace, such as safety conditions, pollution levels, comfort, the speed of the production line, and the grievance procedure, have a public goods quality. Many people get the gains, or no one does. Any individual worker has an insufficient incentive to provide information on these matters to management, because benefits accrue to workers collectively. Unions can provide a "voice" and be efficient suppliers of information to management.[11] Finally, unions may arise and persist as a means of monitoring the effectiveness of management.[12] That is, badly managed firms attract unions and realize gains from implementing more effective use of the labor force. Workers may be better able than stockholders to monitor certain management inefficiencies.[13]

The view of unions as efficient providers of services has support in the empirical literature. In manufacturing and construction (and, at one time, underground bituminous coal mining), unionized firms appear to have greater productivity than nonunion firms, other things being equal.[14] Part of the union/nonunion differential in productivity can be explained because the quit rate is much lower for unionized companies,[15] a fact consis-

[11] See Freeman & Medoff, *supra* note 2, at 8–10.

[12] Clark, in his study of the cement industry, found that entrance of unions was typically followed by a change in lower or middle management. Clark also found the quality of management to be higher in unionized firms. Kim B. Clark, The Impact of Unionization on Productivity: A Case Study, 33 Indus. Lab. Relations Rev. 451 (1980); Kim Clark, Unionization and Productivity: Micro Econometric Evidence, 95 Q. J. Econ. 613 (1980). 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. Richard B. Freeman & James L. Medoff, The Two Faces of Unionism, 57 Pub. Interest 69 (1979).

[13] Richard B. Freeman & James L. Medoff, The Impact of Collective Bargaining; Can the New Facts Be Explained by Monopoly Unionism, in New Approaches to Labor Unions (Special Volume, Res. Labor Econ.) (Suppl. 2, Joseph Reid ed. 1983) at 293, conclude that unions increase inequality among blue-collar workers due to the higher wages of blue-collar union workers but reduce inequality among union workers and reduce the blue-collar/white-collar differential. They argue that these latter equality effects are greater than the inequality effect. However, one reason we do not find this argument convincing is that, in spite of their claims, Freeman and Medoff are unable to compare the difference in inequality between the situation in which unions exist and one in which unions do not exist. *Id.* at 304. In a careful analysis of existing studies Lewis finds that unions are probably neutral with respect to income inequality. See H. Gregg Lewis, Union Relative Wage Effects: A Survey (forthcoming).

[14] See Freeman & Medoff, *supra* note 13, and references cited therein. The higher productivity remains after the effect of capital-labor ratios and higher-quality labor for unionized firms are taken into account.

[15] *Id.* at 302.

tent with the notion that unions may supply credibility to ensure long-term contract fulfillment.[16] The reduction in quit rates associated with unionization cannot be attributed to monopoly wages, to reduction in employer-initiated separations, or to unionization of more stable workers. Rather, the critical factor seems to be changes in worker attitudes and behavior that arise from the union setting.[17]

Much of the theory and evidence demonstrating the efficiencies that can arise from unions is new and controversial. Doubtless it will be criticized. Even assuming that all of these efficiencies from unionization do commonly arise and that unionization also serves to protect workers' rents, however, the critical question for this paper is whether industry-wide collective bargaining is required to produce these benefits. We have found no evidence that the existence of monopoly power by unions vis-à-vis employers is necessary for, or even related to, those aspects of unions that promote efficiency or protect workers' rents.

B. Rent-seeking Behavior and Economic Inefficiency

1. *Monopoly Aspects of the Exemption.* There is surprisingly little reliable information on the type, extent, or magnitude of those effects of unions associated solely with their monopoly power. Reasonable data on the market share of unions do not exist. On the order of 200 studies of the relative effects of unions have appeared since Lewis's classic 1963 study.[18] Current work by Lewis finds that these studies show an average union/nonunion wage differential of about 15 percent.[19] In addition, there are almost no data that might be used to measure the monopoly power of unions, or even concentration ratios, and no estimates of that part of the wage gap or gain due to monopoly power.[20] Thus we know neither the

[16] Freeman and Medoff point out that the firm responds primarily to the needs of the marginal worker, who is young and marketable. In a unionized setting, by contrast, the union takes account of all workers, and senior workers may be more powerful within the union in determining its demands at the bargaining table, so that the desires of workers who are less able to leave the enterprise are also represented. Freeman & Medoff, *supra* note 2, at 9–10. Since unions ensure greater weight for the preferences of senior workers they might encourage younger workers to invest in job-specific training and to stay.

[17] *Id.*

[18] H. Gregg Lewis, Unionism and Relative Wages in the U.S. (1963).

[19] See Lewis, *supra* note 13, at ch. 9. This work is unpublished, and his estimates must be regarded as preliminary. Lewis believes this estimate has an upward bias. These studies provide an estimate of the wage gain from unionization relative to nonunionization only if the supply curve of nonunion labor is completely elastic and is unaffected by unionization.

[20] As far as we can determine no concentration ratios or Herfindahl index have been calculated for unions. We have calculated a Herfindahl index for unions at the industry two-

wage effects of unions compared to not having a union nor the wage effects of union monopoly power.

Consequently, there is considerable controversy about how much of the union/nonunion wage differential is attributable to the efficiency effects of unions and how much to the monopoly effects. Some argue that the efficiency effects completely offset or even override the effect of monopoly.

The best evidence is that they do not.[21] A study of 253 NLRB representation elections from 1962 to 1980 found that stock prices fell both when a petition for a union election was filed with the NLRB and when a union was certified as bargaining agent. Moreover, the fall in stock prices was larger in response to a petition before the election in cases in which the union ultimately won the election.[22] Second, and consistent with the previous point, management usually resists the formation of a union. Third, the rate of profit per unit of capital appears to be lower under unionism.[23]

Finally, evidence of the influence of monopoly power on union wages is found in the pattern of the union/nonunion wage differential as it varies with the unions' jurisdiction. The wage gap depends crucially on the ability of a union to extend its coverage to all firms in a particular market.[24] A characteristic of some unions that are relatively successful, such as miners, longshoremen, and construction workers, is that there are distinct geographic limits to the relevant product markets.

Because the estimates of the monopoly effect of unions are crude, there

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digit level. The index was constructed using union data from the U.S. Bureau of Labor Statistics, Directory of National Unions and Employee Associations, Bulletin 2079 (1980) and employment data from the Statistical Abstract of the U.S. (1980). The Directory of National Unions, Appendix I, 105–07, gives the percentage of membership employed in each industry group for the major unions in each group. From these figures the number of employees represented by each union in each industry was calculated by taking the appropriate percentage of the membership figures given in the directory. The figure for the market share of each union was then calculated as the ratio of number of union employees in the industry to total number of employees in the industry. All data are for 1978. Even for such gross market definitions the index is above the 1800 level and is often higher than corporate four-digit industry concentration levels within the same two-digit classification.

[21] See Kim B. Clark, Unionization and Firm Performance: The Impact on Profits, Growth, and Productivity, 74 Am. Econ. Rev. 893 (1984).

[22] Richard S. Ruboch & Martin B. Zimmerman, Unionization and Profitability: Evidence from the Capital Market (unpublished manuscript) (Sloan School Mgmt., MIT, October 1982).

[23] Charles Brown & James L. Medoff, Trade Unionism in the Production Process, 86 J. Pol. Econ. 355 (1978); Kim Clark, The Impact of Unionization on Firm Performance: Profits, Growth and Productivity (working paper, Harv. Bus. Sch. HBS 83-9900 1983); John Frantz, The Impact of Trade Unions on Productivity in the Wood Household Furniture Industry (1970) (unpublished senior honors thesis, Harv. Univ.).

[24] See Harold M. Levinson, Determining Forces in Collective Bargaining (1966).

are no good estimates of the deadweight loss. A recent estimate puts the loss at approximately $5–$10 billion per year.[25] These calculations also imply a transfer of wealth from shareholders and consumers to union members of about ten times this amount.[26]

In addition, unions can be expected to take part of their rent in working conditions or featherbedding instead of wages.[27] For both these reasons, the choice of inputs and working conditions will be affected by the existence of unions with monopoly power, and restrictive work practices and featherbedding are associated with unions.[28] And, although there are no reliable recent estimates, such restrictive practices impose a social cost. Albert Rees some twenty years ago concluded that this cost is probably larger than the welfare losses associated with the relative wage effect.[29]

Multiemployer bargaining is consistent with the desire to equalize bargaining power, and it can offset union power. Multiemployer bargaining may not involve monopoly power and may materially reduce negotiating costs. To this extent such bargaining units are desirable. To the extent multiemployer bargaining involves monopoly power on either side, however, it is not in the interests of consumers. Further, employers often are much less concerned with their absolute costs than with their costs relative to their competitors, and since multiemployer bargaining reduces the elasticity of labor demand as compared with single-firm bargaining, it is possible that multiemployer bargaining could lead to increased wages.[30]

[25] Freeman & Medoff, *supra* note 2, at 57. This estimate of the deadweight loss from the union wage effect by Freeman and Medoff might be too high, perhaps by two-thirds. Their estimate is based on partial equilibrium assumptions that are clearly inappropriate. Neither income nor cross effects are taken into account. Lee Edelfson, The Deadweight Loss Triangle as a Measure of General Equilibrium Welfare Loss: Harberger Reconsidered (working paper, Univ. Washington, Dep't Econ. 1984) provides a method of doing this and finds general equilibrium calculations of the deadweight loss triangle for typical simulation of parameters usually to be a fraction of the loss calculated by partial equilibrium analysis. The threat of unionization, however, leads to higher wages for nonunionized workers, tending to make this estimate too low.

[26] Calculated from Freeman & Medoff, *supra* note 2, at 267.

[27] Existing labor law does not enable unions to maximize rents. To maximize its total rents or its wage rate, ignoring costs of extraction (transaction costs), a union would need to control the price and quantities of other inputs and the price, quantities, qualities, and characteristics of output. However, such control is often illegal. Without it, as unions raise their wages, employers adjust their employment 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 Yoram Barzel & Keith Leffler, Tie-in Sales and Multi-Good Pricing (working paper, Univ. Wash., Dep't. Econ. 1980); Frederick Warren Boulton, Vertical Control and Markets (1978).

[28] For an economic analysis see Paul Weinstein, The Featherbedding Problem, 54 Am. Econ. Rev. 145 (1964).

[29] Albert Rees, The Effect of Union on Resource Allocations, 6 J. Law & Econ. 69 (1963).

[30] Thus, multiemployer bargaining is more likely where labor constitutes a relatively large

As the next section illustrates, multiemployer bargaining units also increase the potential for rent seeking by unions and employers.

2. *Rent Seeking by Unions and Employers.* An emerging literature forcefully argues that the problem of rent seeking by raising competitors' costs is an important, widespread, and costly phenomenon.[31] One example of this behavior comes from unions' and/or employers' using the unions' monopoly power to raise the costs of rival employers. Differences in capital/labor ratios, safety conditions, environmental conditions, methods of doing business, costs to enter a market or to introduce innovative business techniques all present potential opportunities for union contracts that affect firms in different ways. Cases of probable rent seeking by employers attempting to use unions' power form much of the backbone of the labor exemption to the antitrust laws.[32]

In the past decade dozens of cases have been decided in which rent seeking to raise costs to competitors using union monopoly power probably was involved. These and earlier cases involve possible attempts by a union to raise costs to nonunion firms and attempts by employers to raise costs to innovative rivals and to new entrants. This rent seeking is costly

proportion of total costs, a fact consistent with the use of multiemployer bargaining to escape a competitive disadvantage. D. R. Deaton & P. B. Beaumont, The Determinates of Bargaining Structure: Some Large Scale Evidence for Britain, 18 Brit. J. Ind. Relations 101 (1980); Wallace E. Hendricks & Lawrence M. Kahn, The Determinates of Bargaining Structure in U.S. Manufacturers Industries, 35 Ind. & Lab. Relations Rev. 181–95 (1982). Empirical evidence indicates multiemployer bargaining units raise wages for units operating in the local, as opposed to the national, labor markets. See Wallace E. Hendricks & Lawrence M. Kahn, The Demand for Labor Market Structure: An Economic Approach, 2 J. Lab. Econ. 412 (1984); Peter Feulle, Wallace E. Hendricks, & Lawrence M. Kahn, Wage and Non-Wage Outcomes in Collective Bargaining: Determinates and Tradeoffs, 2 Lab. Research 39 1981); Wallace E. Hendricks, Labor Market Structure and Union Wage Levels, 13 Econ. Inquiry 401 (1975).

[31] 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. 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. Salop and Scheffman show that a sufficient condition for a cost-increasing strategy to be profitable is that the market price must 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. Steven Salop & David Scheffman, Raising Rivals' Costs, 73 Am. Econ. Rev. 267 (1983). For early examples of rent seeking in this context, see Howard Marvel, Factory Regulation: A Reexamination of Early English Experience, 20 J. Law & Econ. 379 (1977); Oliver Williamson, Wage Rates as a Barrier to Entry: The Pennington Case in Perspective, 84 Q. J. Econ. (1968). The classic article on rent seeking is by George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).

[32] For representative cases, see United Mine Workers v. Pennington, 381 U.S. 657 (1965); Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676 (1965); Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 47 (8th Cir.) (1958).

both in terms of outcome and in terms of resources consumed in its pursuit, although no estimates of these costs can be easily made.

Collective bargaining inevitably affects employers in different ways. One cannot easily determine if these differential effects result from a union's seeking its own ends or from the attempts of one set of employers to raise the costs of others. In fact, these results in many instances may be compatible. Economic analysis therefore cannot cure the ambiguities flowing from the legal principles that currently define the boundaries of the labor exemption to the antitrust statutes.[33]

Under existing law it is all but impossible to prevent such rent-seeking behavior by unions or employers. The courts seem to be unwilling to find unlawful conduct unless the unions "conspire" with some nonexempt group (such as employers) to restrain competition on subjects outside the ordinary purview of bargaining (that is, different from wages, hours, or working conditions).[34] Courts also place varying reliance on whether the restraint is a labor market or product market restraint and whether the nonexempt group had the agreement thrust upon it or actively sought it. These distinctions are without substantial economic foundation. 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. The current legal doctrines catch only the unwise and unwary.

Economic theory provides no justification for the Byzantine distinctions that arise naturally from the existing system of applying the antitrust law to multiemployer bargaining. In the next section we propose one way out: change the overall framework of the labor exemption.

IV. Implications of Subjecting Unions to the Antimerger Laws: Guidelines for Union Mergers

We propose that the law treat unions and corporations equally: mergers and joint operations are permissible, except those for which the anticompetitive potential is likely to outweigh the procompetitive benefits.[35] One

[33] The current law focuses on the wrong issue—"agreement"—when it should be concerned with competitive effect. If unions have no monopoly power, the presumption should be that their success in setting wages reflects efficiency considerations. An extension of the Klein, Crawford, and Alchian argument spells out the efficient possibility. For example, a firm with wage flexibility may unilaterally lower wages for workers who have made firm-specific capital investments. See Benjamin Klein, Contract Costs and Administered Prices: An Economic Theory of Rigid Wages, 74 Am. Econ. Rev., Papers & Proc. 332 (1984).

[34] Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975) muddied an already confusing area of the law. For a discussion of this case and the legal standards in this area see the articles cited in note 3 *supra*.

[35] The normal antitrust rules against conspiracies in restraint of trade between corpora-

should analyze contemplated union mergers and joint bargaining, like similar corporate activities, by balancing the inefficiencies likely to arise against any efficiencies and other congressionally sought benefits so arising.[36] And, just as antitrust law makes the presumption that implicit or explicit coordination between firms is more likely as industry concentration rises, a more concentrated labor market (that is, a market consisting of unions within the same industry) would be assumed more easily able to coordinate its actions.[37]

Assuming that unions provide both efficiencies and market power effects, the law should develop a set of merger guidelines for unions.[38] Under the Justice Department's Merger Guidelines, most horizontal corporate mergers are allowed unless they increase concentration significantly—the Guidelines suggest an increase of 50–100 points in the Herfindahl-Hirschman Index as a benchmark. Because Congress's prime objective in this area is achieving bargaining equality between labor and capital, the most appropriate way to resolve the trade-off is to use the corporate standards for union mergers as well.[39]

We have thus far uncovered no significant appropriable worker rents that could not be protected, or union efficiencies that could not be

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tions would also apply to conspiracies between unions. Similarly, just as two or more corporations often can 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.

[36] For a corporate merger trade-off analysis see Oliver Williamson, Economies as an Antitrust Defense: The Welfare Tradeoffs, 58 Am. Econ. Rev. 18 (1968). For a recent discussion of the topic see Alan A. Fisher & Robert H. Lande, Efficiency Considerations in Merger Enforcement, 71 Calif. L. Rev. 1580 (1983).

[37] We do not explore here the practical task of defining markets for the purpose of establishing union merger and bargaining guidelines. We note that in the case of craft unions the relevant market may be geographic and cut across several industries. In the case of industrial unions the relevant market may be coincidental with the industry.

[38] The raison d'être of guidelines is to give businessmen predictability and certainty, and to protect them from arbitrary or politically motivated governmental action. See Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399, 423–26 (1973). It might, of course, be difficult to keep political considerations from entering the type of analysis discussed in this paper.

[39] Such guidelines should probably make a de minimus exception for industries with fewer than a specified number of workers. For such industries, we might presume (without evidence) that inefficiencies caused by industry-wide unions were unlikely to be substantial, while industry-wide economies of scale might be significant and suggest that the entire industry's workers 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. Finally, there may be labor markets, such as certain building trade markets, for which special solutions might have to be devised.

achieved, despite some limitations on the market shares of unions. Any absolute size thresholds for effective union management, general experience and negotiating expertise, organization, and financial strength are presumably obtainable through vertical or conglomerate union mergers or through small horizontal union mergers,[40] which generally would be legal under our proposal.

The costs of our proposal are several. First, there is trade-off between union size and multiemployer bargaining on the one hand and negotiating costs on the other. Since our proposal would reduce the size of some bargaining units, it may well cause small increases in negotiating costs in these cases. Among the costs of our proposal we consider that during a transition period we might expect collusive activity, given unions' established patterns of behavior. Broken up by a law unions would undeniably consider unfair, conspiracy among unions might be a natural tendency, at least initially. Our proposal could also have a negative effect on worker morale and productivity and could lead to violence by disgruntled union members, at least in the short term.

Moreover, unions could still observe each others' behavior and act interdependently. So would employers. One employer would be reluctant to give in to wage demands unless it knew that its rivals would also. Employers and unions would both have an incentive to behave like oligopolists.

The benefits of our proposal include the reduction of deadweight loss and rent-seeking costs. Our proposal would generate other benefits by stimulating competition among unions. Competition within an industry among unions and among union leaders is desirable, just as is competition among corporations and among corporate executives within an industry. Unions (and union leaders) would compete for members. Competition among unions would also determine which union could convince workers that it could secure the best benefits and working conditions for its members, perhaps weeding out inefficient unions or union leaders. This competition could also weed out corrupt union leaders who pay themselves too much, take bribes, or sell out to management.

An additional benefit would be the growth and formation of unions. Employers often resist the unionization of their employees. If the efficiency effects of unions are significant, both employers and employees

[40] 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 those who believe that our proposal might destroy unions' strength.

should desire them, even in the absence of their monopoly power. If the efficiency effects of unions are as common as some claim, our proposal might lead to the growth of unions in those areas in which the efficiencies could be realized.

One practical problem could arise from this paper's approach: it would require evaluating mergers between corporations in terms of both corporate and union market shares (and other factors). Suppose, for example, that two firms wanted to merge, and that each had 5 percent of an unconcentrated market. Courts and economists alike would normally allow such a merger. But suppose that their employees belonged to different industrial unions, that the relevant labor market is coextensive with the relevant product and geographic market, and that each of the unions had 20 percent of the workers in that market. We could avoid letting the unions merge to control 40 percent 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.[41] Although this solution could still cause the union merger guidelines to be violated somewhat, such violations might not be too substantial, and this solution might be optimal.[42] 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 could be disruptive, 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.

V. Conclusions

The purpose of this paper was to raise for discussion the desirability of changing the existing labor exemption and subjecting unions and multiemployer bargaining units to the antimerger and other antitrust laws. This proposal might substantially fulfill the primary goals of society underlying the labor exemption but in a more efficient way than the prevailing system. It would treat worker and business combinations equally, in a way that might make society, including workers, better off. It also might pre-

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

[42] However, the smaller union may be smaller because it is less efficient.

serve the rent-protection and efficiency-enhancing aspects of unions while diminishing their monopoly and rent-seeking aspects.[43] It should also continue to prevent employers from opportunistically acquiring workers' rents and from combining with unions to engage in rent-seeking behavior. Had our proposal for limiting union market shares been on the agenda when the basic features of the labor exemptions were being formulated and interpreted, it might have been chosen instead, either by Congress or the Supreme Court, as also consistent with Congress's goals. Moreover, the fact that our proposal would give a stimulus to the growth of unions may, even now, in this period of declining union membership, go a long way toward reducing otherwise powerful opposition.[44]

Whether such a solution actually would be superior to the present system depends on several unanswered, mostly empirical, questions, which have been discussed throughout this paper. Our purpose was not to answer these questions but to raise them and to suggest that carefully specified limitations on union monopoly power might be in the public interest.

[43] Meltzer, *supra* note 2, at 711, warns that a total ban on union mergers could produce unduly weak, atomistic unions. Our proposal, by contrast, which would allow many horizontal, and virtually all vertical and conglomerate union mergers, should not suffer from this defect. Given the current wave of union mergers, consideration of our proposal may be timely.

[44] In Japan multiemployer bargaining is relatively rare. Our proposal would move the U.S. system closer to the Japanese model. See William B. Gould, Labor Law in Japan and the United States: A Comparative Perspective, 6 Indus. Relations L. J. 1 (1984).