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Redefining the Antitrust Labor Exemption

Daniel J. Gifford*

Congress urgently needs to reformulate the antitrust labor exemption. Courts and legal scholars alike have largely neglected the legal significance of the impact of industry-wide collective bargaining on price-output decisions in concentrated industries. They have, moreover, attended even less to the skewing tendencies produced by the almost universally practiced seniority system on labor union bargaining strategies.

This Article contends that a coherent reconciliation of antitrust and labor policies requires significant modifications in the content of labor negotiations in concentrated industries. Such a

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* Professor of Law, University of Minnesota. I wish to express my appreciation to Professors Carl Auerbach, Stephen Befort, Laura Cooper, Daniel Farber, Robert Hudec, Victor Kramer, Roger Park, and Leo Raskind for their helpful comments on and criticisms of an earlier draft of this Article.

1. Although the authors direct their attention to matters other than the subject of the present Article, useful background for the matters discussed in the text can be found in Campbell, Labor Law and Economics, 38 Stan. L. Rev. 991 (1986); Epstein, A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation, 92 Yale L.J. 1357, 1382 (1983); Leslie, Labor Bargaining Units, 70 Va. L. Rev. 353 (1984); Posner, Some Economics of Labor Law, 51 U. Chi. L. Rev. 988 (1984). Professor Richard Epstein, in his overall critique of the National Labor Relations Act, observes that an alternative to the present labor policy might embrace as a goal the elimination of the product-market effects of union organization. Epstein, supra, at 1384-85. Contrary to Epstein, the proposal contained in this Article would preserve labor's power in the labor market but would mitigate the most restrictive product-market effects of that power. Economists have explored labor union bargaining and bargaining strategies, but generally without specific recommendations for legal change. Professor John Dunlop has explicitly discussed the effects of product-market structure on collective bargaining. See J. Dunlop, Wage Determination Under Trade Unions 74-94 (1944). Professor Frederick Warren-Boulton has examined a labor union's relations with an employer as a particular manifestation of relations between an input supplier and an output producer. See F. Warren-Boulton, Vertical Control of Markets: Business and Labor Practices 119-60 (1978). During the late 1950s and early 1960s the collective bargaining process in oligopolistic industries was widely discussed under the rubric of "administered pricing." See Auerbach, Administered Prices and the Concentration of Economic Power, 47 Minn. L. Rev. 139, 173-76 (1962). The focus of that discussion was primarily on inflation. No proposals to redefine the labor exemption emerged from that discussion, so far as the author is aware.
development would further antitrust policies and, it is argued, preserve the benefits to labor contemplated by the National Labor Relations Act. The modifications in the content of labor negotiations under the reformulated labor exemption proposed in this Article would benefit the public, many union members, and other workers. These modifications would also increase the range of economic opportunities available to blacks and other minorities.

The argument for reform made here is not drawn solely from the antitrust and labor fields, but also from the nation's commitment to economic policies embodied in trade, civil rights, and other laws. It concludes that, while the larger outlines of present labor-management negotiation practices can be reconciled with the goals of those statutes, limited reform is nonetheless urgently required. This Article proposes to reach this needed reform through a redefinition of the antitrust labor exemption.

The Article contends that collective bargaining for worker compensation measured on an hourly wage basis exacerbates the output-restrictive tendencies of concentrated industries. In less than fully competitive industries, in which the principal firms possess significant market power, industry-wide collective bargaining for hourly-wage based compensation places the bargaining labor union in a position analogous to that of a monopoly input supplier selling to a monopoly output producer: the union has an effective monopoly over industry-specific labor and is, in effect, selling that labor to firms possessing power in the product markets in which they sell. In significant parts of industry, therefore, one monopoly is piled on top of another with the result that output and employment in those industries are unduly restricted.

The influence of the union seniority system upon a union's approach to collective bargaining is likely to further exacerbate this restrictive impact on output. The seniority system creates a class of workers who—so long as their employers remain in business—possess almost guaranteed lifetime employment, whose fortunes are largely insulated from the cyclical fortunes of their employers, and who have effectively cast the risks of economic downturns upon others. Because these workers tend to form the core of union membership, union bargaining objectives tend to weight their interests inordinately high vis-à-vis the interests of less senior union members or labor interests as a whole.
Collective bargaining negotiations are generally conducted on an industry-by-industry basis and focus on worker compensation based on an hourly-wage standard. This bargaining method has transformed the profits earned in periods of prosperity by efficiently operated (albeit concentrated) industries into permanent, higher wage costs. This effect tends systematically to erode or destroy the comparative advantage of those industries in international trade. For those industries, this bargaining method has thereby tended to destroy or shrink potential markets and concomitantly to reduce their levels of employment.

Because the bargaining processes described tend to affect mass-production industries that add substantial value to their raw material inputs, they are the very industries that reward their workers with above-average compensation. Reduced employment in these industries forces workers who might otherwise earn these higher wages to seek lower paying employment elsewhere. Blacks and other minority groups who constitute a significant proportion of the working class in the industrial centers of the northeast and midwest bear much of this burden. The general public suffers to the extent that the potential productivity of the nation's resources is not fully employed.

The public also suffers from the delay in the full social and economic integration of blacks and other minorities imposed by these practices. Since mass-production industries typically provide high levels of compensation for jobs whose educational qualifications are low, a diminishing competitive position for those industries partially blocks an important path for minorities and the educationally disadvantaged to enter into rewarding employment. Generations of earlier disadvantaged classes had used that path, now increasingly out of reach to the disadvantaged, as a means to transform themselves, over one or two generations, into the middle class. As a result the present state of affairs aggravates racial and class conflict and diminishes the level of overall economic well-being of society. Present labor policy has thus come into conflict with the goals of the civil rights acts and the full employment acts.

The antitrust laws have embraced the principle of allocative efficiency. This same principle underlies United States trade policy. In both instances the principle is used as a guide towards policies furthering this nation's economic betterment. Other national laws—in particular, title VII of the Civil Rights

Act of 1964\(^3\) and the Full Employment and Balanced Growth Act of 1978\(^4\)—have as their objectives the full inclusion of women and minorities in the class of those who benefit from the nation's economic growth. The reform urged would further the allocative efficiency goals of antitrust law at the same time that it maximizes labor's returns from collective bargaining. It would also further national goals concerned with trade, growth, and social integration.

I. THE POLICIES BEHIND THE PRESENT-DAY LAW

A. ANTITRUST LAW

Whatever may once have been thought about the objectives underlying the antitrust laws, most courts and scholars agree that the ultimate goal of the antitrust laws is the enhancement of consumer welfare. The prohibitions against trade restraints and monopolization contained in antitrust laws are not ends in themselves: they also advance the economic enrichment of society, an ultimate purpose that is often stated in the language of furthering consumer welfare.

This present-day appreciation of the underlying consumer welfare goal of antitrust is a relatively new development. Only forty years ago Judge Learned Hand boldly asserted that the antitrust laws contained social engineering imperatives. In his famous opinion in United States v. Aluminum Co. of America (Alcoa),\(^5\) he suggested that the antitrust laws were designed at least in part to foster a reorganization of industry into "a system of small producers."\(^6\) Moreover, he asserted that an industrial organization of this kind was desirable in and of itself, regardless of its efficiency, or in other words, regardless of its lesser ability to satisfy consumer needs or wants.\(^7\)

Indeed, as late as 1962 the United States Supreme Court ruled in Brown Shoe Co. v. United States\(^8\) that the efficiencies

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5. 148 F.2d 416, 427 (2d Cir. 1945).
6. Id. Judge Hand also asserted that "[t]hroughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." Id. at 429.
7. Id.
achieved by a shoe manufacturer's vertical integration into distribution were reason to condemn a corporate merger under section 7 of the Clayton Act, because those efficiencies would disadvantage unintegrated independent distributors. The public, under the Court's ruling, would pay more for shoes to preserve the viability of a class of independent merchants, whose existence was apparently desirable in itself.

Since the late 1970s, however, a substantial consensus has emerged among antitrust scholars and judges that the antitrust laws call not for competition as an end in itself, but for competition with a purpose—the promotion of economic efficiency and hence the satisfaction of consumer wants at the lowest cost. Competitive markets achieve an efficient provision of goods and services through the furtherance of both allocative and productive efficiency. Industries attain productive efficiency when they employ inputs in such combination as to maximize output, or produce goods and services through the least cost method of production. Society achieves allocative effi-

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9. *Ibid.* at 344. In ruling that the efficiencies created by vertical integration constituted a ground for condemning the merger of a manufacturer with a retailer, the Court stated:

The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. . . . [Such] expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.

Id.

ciency when overall societal resources are routed in ways that maximize consumer satisfaction.\textsuperscript{11}

This unidimensional understanding of the antitrust laws is compatible with the view that society has goals other than economic efficiency. Likewise, it acknowledges the historical reality that other such goals can be found articulated in the legislative history of these laws and have been manifested in the decisions of some cases. The consensus merely reflects the belief that, without the single purpose of economic efficiency, the antitrust laws are effectively inadministrable.

Judge Bork helped significantly to build this present-day consensus with his book, \textit{The Antitrust Paradox},\textsuperscript{12} in which he forcefully argued that only economic efficiency provided a lode-star for judges to resolve antitrust disputes.\textsuperscript{13} He argued that if the antitrust laws were deemed to contain other—largely undefined—social purposes, judges would be left with vast, unguided discretion in deciding antitrust cases. Indeed, that discretion would, in effect, call for them to incorporate their own individual social theories into the administration of the antitrust laws.\textsuperscript{14} This was what Judge Hand had done in \textit{Alcoa} and what a majority of the Court had done in \textit{Brown Shoe}. Thus even in using a superficially simple, nonefficiency purpose like the preservation of small merchants—the rationale in \textit{Brown Shoe}—judges would be left without guidance as to when, in what circumstances, and at what economic cost to society, the goal of preserving small merchants should prevail and when competing considerations should outweigh it. The judiciary can

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\item[\textsuperscript{11}]
When antitrust commentators refer to the furtherance of consumer welfare as the ultimate objective of antitrust law, their remarks are sometimes misunderstood. Judge Bork has used that phrase as synonymous with the furtherance of productive and allocative efficiency. In that use, consumer welfare is equated with the enrichment of society, regardless of which particular groups or classes within that society benefit. In this manner of speaking consumer welfare is said to increase when increased efficiencies from a corporate merger increase overall wealth, even though that additional wealth takes the form solely of enhanced profits. Moreover, such a merger would be said to enhance consumer welfare even if consumer surplus were reduced as a result of higher prices. See R. BORK, \textit{supra} note 10, at 107-15. Professor Oliver Williamson has also argued that the allocative efficiency effects of business transactions are, at least in general, more important than their income distribution effects. See Williamson, \textit{Economies as an Antitrust Defense Revisited}, 125 U. PA. L. REV. 659, 711 (1977); \textit{Economies As An Antitrust Defense: The Welfare Tradeoffs}, 58 AM. ECON. REV. 18, 27-28 (1968).
\item[\textsuperscript{12}]
R. BORK, \textit{supra} note 10.
\item[\textsuperscript{13}]
\textit{Id.} at 28.
\item[\textsuperscript{14}]
\textit{Id.} at 409-10.
\end{itemize}
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obtain the guidance needed only by construing the antitrust laws as embodying the single purpose of fostering economic efficiency through the preservation of competition.\(^\text{18}\)

Under this consensus the pursuit of social goals other than the furtherance of economic efficiency requires legislation separate from the antitrust laws or modifying those laws for a specific purpose. Through legislation, Congress has often pursued such purposes, even in areas impinging upon core antitrust concerns. For example, through the patent laws,\(^\text{16}\) Congress has restricted short-run competition to promote product and process innovations. Likewise, in the enactment of the Robinson–Patman Act of 1936,\(^\text{17}\) Congress provided protection to small business against larger, more efficient chain stores and mass merchandise distributors.\(^\text{18}\)

The statutory and nonstatutory labor exemptions constitute restrictions on the scope of the antitrust laws particularly relevant to this Article. Through these exemptions, Congress and the courts have largely eliminated competition in the labor market (or the lack thereof) from the scope and hence the concern of the antitrust laws. Congress intended the antitrust laws to foster competition in product markets but to ignore competition in labor markets, regardless of the effect that a lack of competition in labor markets had upon manufacturing costs.

This Article argues for reconceptualizing the labor exemption. In restating the way antitrust laws should be reconciled with the nation's labor laws, it is, of course, necessary to broaden the inquiry beyond a concern for economic efficiency, because the labor laws have incorporated nonefficiency values. Fortunately, however, the approach recommended here not only achieves a superior reconciliation between antitrust and labor policies; it also furthers a broad spectrum of other national goals. Moreover, the recommended approach furthers these goals by removing the restraints on output which impede market mechanisms from allocating resources in an efficient manner. A broad confluence of national policy objectives, as well as the most basic concern of antitrust policy, support the

\(^{15}\) For a short but trenchant critique of the Alcoa and Brown Shoe opinions, see P. Areeda & D. Turner, supra note 10, at 9-12.


\(^{17}\) Ch. 592, 49 Stat. 1526-28 (codified at 15 U.S.C. §§ 13-13b, 21a (1982)).

recommended approach.19

B. UNITED STATES TRADE POLICY

United States trade policy has changed drastically in the last century. From a highly protectionist stance in the early part of the century, the United States since the end of World War II has followed a course of encouraging international trade. In 1947 the United States, with other developed nations, helped to organize the General Agreement on Tariff and Trade (GATT),20 a negotiation and agreement framework used collectively by the developed and developing nations to reduce tariffs and other trading barriers. Since its founding the GATT has formed a cornerstone of United States trade policy. Congress has enacted several major pieces of legislation to assist in carrying out the progressive lowering of tariffs contemplated by the GATT.21 Although the United States has taken a protectionist position in a number of well-publicized cases, various administrations and congressional leaders have repeatedly affirmed an overall national policy favoring the progressive elimination of trade barriers.

The United States' goal of lowering tariff and other trading barriers at home and of encouraging other nations to take similar steps is premised upon certain assumptions widely shared among economists and policymakers. Those assumptions, which are intimately related to the theory of comparative ad-

19. That the proposed reformulation of the labor exemption is consistent not only with antitrust policy but with the furtherance of a broad range of legal objectives is a powerful argument for its acceptance as implicit in the body of existing law. Professor Ronald Dworkin argues that wide-ranging consistency with past and contemporaneous authorities supports the validity of a judge's interpretation. R. DWORKIN, LAW'S EMPIRE 225-27 (1986); see also T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 144-59 (2d ed. 1970) (important reason why new scientific paradigm replaces another is former's better "fit" with wide range of existing data).


vantage,\textsuperscript{22} are that all nations are enriched under a regime of free trade; that consumer satisfaction is the ultimate goal of trade; and that this satisfaction is maximized when consumer needs and wants are satisfied at the lowest cost. Assumptions about allocative efficiency underlie United States trade policy. In this case these assumptions relate to the world's resources: the world is enriched when its resources are allocated in such a way as to satisfy consumer needs and wants at the lowest cost. Thus the assumptions underlying United States trade policy are similar or identical to those underlying the United States antitrust laws.\textsuperscript{23}

C. \textbf{ANTIDISCRIMINATION ACTS}

In other major statutes, Congress has set forth economic objectives that must be reconciled with the objectives of present American labor policy. Through title VII of the Civil Rights Act of 1964,\textsuperscript{24} Congress outlawed employment discrimination based upon race or sex. In so doing Congress intended to draw blacks, other minorities, and women into full participation in the nation's economic life.\textsuperscript{25} In the Employment Act of 1946\textsuperscript{26} and the Full Employment and Balanced Growth Act of 1978,\textsuperscript{27} Congress endorsed economic policies that would provide full employment. In the latter Act, Congress also endorsed the view that attaining full employment would achieve the goals of title VII.\textsuperscript{28}

\textsuperscript{22} For a discussion of the theory of comparative advantage, see P. \textsc{Samuelson}, \textit{Economics}, 626-50 (11th ed. 1980).

\textsuperscript{23} See \textit{supra} notes 10-11 and accompanying text.


\textsuperscript{25} The legislative history of title VII includes explicit recognition of the economic waste that had been incurred as a result of the exclusion of blacks from that economic life. One group of Representatives observed that as a result of discrimination in employment, "the country is burdened with added costs for the payment of unemployment compensation, relief, disease, and crime," and that because of that discrimination, "American industry is not obtaining the quantity of skilled workers it needs." \textsc{H.R. Rep.} No. 914, 88th Cong., 1st Sess., pt. 2, at 28, \textit{reprinted} in 1964 \textsc{U.S. Code Cong. & Admin. News} 2391, 2515 (additional views on H.R. 7152 of Reps. McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias, and Bromwell).

\textsuperscript{26} Feb. 20, 1946, ch. 33, 60 Stat. 23 (codified as amended at 15 \textsc{U.S.C.} §§ 1021-1025 (1982 & Supp. IV 1986)).


\textsuperscript{28} Among the Congressional findings supporting the Full Employment and Balanced Growth Act of 1978 were the following: "Increasing job opportunities and full employment would greatly contribute to the elimination of dis-
The assumptions underlying these Acts are not as precise as those underlying antitrust and trade policy. They are not so clearly premised upon a commitment to allocative efficiency. As the Article will demonstrate, however, the policies set forth in title VII and in the Employment Acts become increasingly more effective as allocative efficiency is furthered.

D. LABOR LAW

1. The Goal of Collective Bargaining

American labor policy is contained in a number of separate statutes, all of which Congress designed to facilitate worker organization or to prevent legal institutions from impeding such organization. The most important of these statutes is the National Labor Relations Act (NLRA), first enacted in 1935,29 and substantially modified in the Taft–Hartley Amendments of 1947.30 The stated rationale underlying the National Labor Relations Act is the promotion of industrial peace.31 It has been a tenet of labor policy that workers and employers can not only resolve their differences peacefully through the collective bargaining process, but that the collective bargaining process is the most effective means for resolving those differences.32

Worker organization and the collective bargaining which it facilitates, however, restrain the operation of the marketplace. Not only do these restraints directly affect the labor market, they can also significantly affect product markets when wage bargaining is conducted on an industry-by-industry basis.33 To the extent that labor market restraints induce monopoly-like effects in product markets, the labor policy that tolerates or encourages these restraints apparently conflicts with the general

crimination based upon sex, age, race, color, religion, national origin, handicap, or other improper factors.” 15 U.S.C. § 3101(b)(4) (1982).


32. Id.

33. See infra notes 81-86 and accompanying text.
national policy favoring free markets.\textsuperscript{34} Indeed, this nation's labor policies appear to be in conflict with the goals of allocative efficiency that underlie its antitrust laws and trading policies.\textsuperscript{35} This very different policy for labor relations, therefore, calls for special inquiry and justification in light of these other potentially competing economic goals. Despite the apparent differences between the nation's labor and other economic policies, however, those differences are not accidental: present labor policy is the result of decades of development.

2. The Evolution of Labor Policy: From Common Law Hostility to Government Protection and Supervision

Because the early common law as well as the Sherman Act had embraced a free-market policy, the courts—especially the federal courts—tended to view the labor movement unsympathetically in the nineteenth and early twentieth centuries.\textsuperscript{36} Judges perceived unions as trade restraints. Their early antitrust decisions included labor unions within the scope of trade restraints prohibited by the Sherman Act.\textsuperscript{37}

\textsuperscript{34} See infra notes 59-66 and accompanying text.

\textsuperscript{35} The conflict is not limited to the labor market, in which Congress sought to facilitate collective bargaining by workers, but extends into the product markets. When a union controls the supply of industry-specific labor, it is able to create restraints in the product market that are identical to those that would be brought about by a producer cartel. See infra notes 84-86 and accompanying text.

\textsuperscript{36} Cases holding labor unions subject to Sherman Act prohibitions are cited infra note 37. Even apart from issues arising under the antitrust laws, the United States Supreme Court evidenced a general hostility to labor unions during this period. In Adair v. United States, 208 U.S. 161 (1908), the Court held unconstitutional a statute prohibiting rail carriers from discriminating against an employee because of his union membership. Id. at 174-75. Similarly, in Coppage v. Kansas, 236 U.S. 1 (1915), the Court held invalid a state statute prohibiting employers from requiring employees not to belong to labor unions. Id. at 11.

\textsuperscript{37} See, e.g., Duplex Printing Co. v. Deering, 254 U.S. 443, 478-79 (1921) (union boycott of employer's products violates Sherman Act, as amended by Clayton Act); Loewe v. Lawlor, 208 U.S. 274, 301-09 (1908) (union members' boycott of hat manufacturer violates Sherman Act); United States v. Debs, 64 F. 724, 745, 755 (N.D. Ill. 1894) (strike and boycott against use of Pullman cars violates Sherman Act), aff'd on other grounds sub. nom. In re Debs, 158 U.S. 564 (1895); United States v. Workingmen's Amalgamated Council, 54 F. 994, 995-96, 999-1000 (E.D. La.) (injunction against strike under Sherman Act proper even though strike has ended), aff'd, 57 F. 85 (5th Cir. 1893).

After the enactment of §§ 6 and 20 of the Clayton Act, the Supreme Court continued to limit the number of pickets allowed at each gate on the ground that such limitation was necessary to ensure that nonunion members were not coerced. See American Steel Foundaries v. Tri-City Cent. Trades Council, 257 U.S. 184, 206 (1921) (allowing one striker or sympathizer at each gate). In
In response to this judicial perception of unions as restraints of trade, in 1914 Congress specifically provided in section 6 of the Clayton Act that labor unions were not to be "held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." In section 20 of the Clayton Act, Congress prohibited the courts from issuing injunctions or restraining orders against strikes, worker boycotts, and other typical labor union activities. Congress enacted the Norris-LaGuardia Act in 1932, largely divesting the federal courts of jurisdiction to issue injunctions and restraining orders in labor disputes.

Clearly, therefore, even before the enactment of the National Labor Relations Act and its immediate predecessor, section 7(a) of the National Industrial Recovery Act, Congress had rejected atomistic competition as a governing legal norm for labor markets: it had repeatedly approved of the kind of restraints in the labor market that collective bargaining necessarily entails.

Congress has not, however, explicitly approved of collective bargaining on an industry-wide scale. Indeed, the full ramifications of industry-wide collective bargaining—especially on concentrated industries—have never been carefully evaluated or debated in the political arena.

3. The Wagner Act

The authors of the Wagner Act intended it to preserve and expand the policy protecting worker organization contained in Truax v. Corrigan, 257 U.S. 312 (1921), the Supreme Court held invalid under the equal protection clause an Arizona statute modeled upon § 20 of the Clayton Act. The Court partially justified its decision on the basis that the Arizona courts construed it more broadly than § 20 had been construed in American Steel Foundaries. Id. at 340-41.

39. Id. § 20, 38 Stat. at 738 (codified at 29 U.S.C. § 52 (1982)).
42. Campbell, supra note 1, at 1054-56; see also C. Summers, H. Wellingtton & A. Hyde, CASES AND MATERIALS ON LABOR LAW 650 (2d ed. 1982). The National Labor Relations Act mentions as appropriate bargaining units "the employer unit, craft unit, plant unit or subdivision thereof." NLRA § 9(b), 29 U.S.C. § 159(b) (1982). The failure of a proposal to condemn multi-employer bargaining at the time of the enactment of the Taft-Hartley Act is described in Campbell, supra note 1, at 1055-56.
section 7(a) of the National Industrial Recovery Act (NIRA),\(^43\) the New Deal's first major effort to bring the nation out of the depths of the Great Depression. The NIRA was designed to impose a cartel-like structure upon American industry through which boards of industry and government leaders would govern both prices and production.\(^44\) The underlying premise of NIRA was that government action was needed to bring prices to levels above costs, thereby creating conditions conducive to production.\(^45\) The context in which they were enacted, therefore, suggests that the labor provisions of the NIRA were designed to allocate to labor a portion of the cartel profits generated from price-output restrictions.\(^46\)

When the New Deal's governing philosophy later began to back away from an output restriction policy,\(^47\) its basic approach towards protecting and encouraging union organization and collective bargaining remained intact. It became necessary, therefore, to enact separate legislation, incorporating the objectives of section 7(a), when it became apparent that the NIRA would not survive constitutional challenge. Senator Wagner and other backers of the new legislation repeatedly referred to the role of that legislation in raising the overall level of wages.\(^48\) Yet the legislative history of the Wagner Act does not reveal any consideration of the extent to which labor organizations would be empowered to wield monopoly power in the product markets in which employers sold.

The Wagner Act's pursuit of unionization and collective bargaining was at least in substantial part overtly based on a social cost rationale. The Act's findings refer to the disruptions of the nation's economic life caused by industrial unrest,\(^49\) and


\(^{45}\) See Gifford, supra note 44, at 300-01.

\(^{46}\) See id. at 301; J. FREDERICK, supra note 44, at 89-90; see also 79 CONG. REC. 7567-68 (1935) (remarks of Sen. Wagner) (discussing policy of recovery program and § 7(a) of NIRA).


the Senate Report accompanying the Wagner Act recited annual losses exceeding one billion dollars (in dollars of the early 1930s) due to strikes.\textsuperscript{50} Congress, in the Wagner Act, sought to channel labor unrest away from strikes and into collective bargaining, thereby enhancing the production process.\textsuperscript{51}

These congressional findings tend to obscure significant normative judgments incorporated in the enacted legislation. The costs of strikes and other labor disruptions that the Act sought to reduce were probably less than the costs that the Act itself would impose upon society. The stated purpose of the Act was to substitute collective bargaining for strikes. But if labor-management disputes could have been settled at lesser cost to both parties through collective bargaining, the parties, as rational economic actors, would have employed that process long before the government intervened under the Wagner Act. If both labor and management were trying to enhance their own economic interests, strikes would occur only when one party misjudged the constraints on the other.\textsuperscript{52}

Thus Congress was motivated by a purpose other than the reduction of social costs when it enacted the Wagner Act. The most apparent alternative goal would have been to raise wages—a goal which the legislative history, in fact, shows was shared by many of the Act's supporters.\textsuperscript{53} Many members of

\begin{itemize}
\item \textsuperscript{50} S. REP. No. 573, 74th Cong., 1st Sess. 2 (1935); see also Hearings on S. 1958 Before Senate Comm. on Education and Labor, 74th Cong., 1st Sess. 36 (1935) (statement of Sen. Wagner) (32,000,000 man-days lost due to labor controversies in 1933 and 1934).
\item \textsuperscript{51} This social-cost reduction rationale for promoting collective bargaining could be restated as an efficiency justification of sorts, because productive efficiency consists of cost reduction. Of course, it was not truly an efficiency justification because—as the text points out—if labor-management disputes could have been settled at lesser cost to both parties through collective bargaining, the parties as rational economic actors would have employed that process without the need for government intervention.
\item \textsuperscript{52} This congressional approach of encouraging conditions conducive to wage increases that would ultimately be passed on to the public had been foreshadowed by the various railway labor acts. Under these acts Congress encouraged collective bargaining in the railroad industry. To the extent that those acts substituted wage increases resulting from collective bargaining for strikes, it substituted a result that—as measured by the marketplace—was socially more costly than the alternative. Congress therefore must have made the normative judgment that increased wage levels in the railroad industry were justified and that the burden of those increased wage levels properly ought to be borne by consumers. Because railroad rates were regulated, Congress may have anticipated that the Interstate Commerce Commission would act as a check upon excessive labor costs by refusing to allow them as legitimate expenses in the rate-setting process.
\item \textsuperscript{53} See supra note 48 and accompanying text.
\end{itemize}
Congress perceived wages as unduly low and saw the Wagner Act as a device for raising them. By protecting workers’ rights to organize and by compelling employers to bargain with organized workers, the Act significantly altered the context in which wages were set and shifted significant new power to organized labor. Congress fully appreciated that the establishment of a new relationship between labor and management was not merely a procedural action. Rather, it anticipated that the new procedural context would produce higher wages overall and that consumers would necessarily bear the burden of those higher wages.

At least some of those who supported the enactment of the Wagner Act shared another, more sophisticated, goal—the redistribution of income from shareholders to workers. In the view of some, the Great Depression resulted from a failure of demand. Professor Rexford Tugwell, one of the early so-called “brain trusters,” had argued along with others that although productivity had increased significantly during the 1920s, wages had not kept pace. Because workers as people with lower net income had a higher propensity to consume than had the wealthier classes, some theorists thought that routing more of the monetary returns from production to labor and less to capital would raise overall demand. Many who took this view saw the fostering of unionization as a means of stimulating demand by raising wages.

54. See A. SCHLESINGER, JR., THE COMING OF THE NEW DEAL 123 (1959). Senator Wagner complained that although technological changes increased the productivity of workers in manufacturing by 71% from 1919 to 1933, workers’ share in the product created by manufacturing fell from 42% to 36% in the same period. The Senator also complained that wages had not risen sufficiently to create a demand adequate to absorb the large increases in production which had occurred during the 1920s. In support of that complaint, he asserted that the 10% rise in wages which had occurred during the period from 1922 to 1929 was vastly outdistanced by the 91% increase in the production of machinery and the 70% increase in the production of capital equipment which had occurred during the same period. See 79 CONG. REC. 7567 (1935).

55. See, e.g., S. REP. No. 573, 74th Cong., 1st Sess. 3-4 (1935); 79 CONG. REC. 7567-68 (1935) (remarks of Sen. Wagner); 78 CONG. REC. 9061, 12,018 (1934) (statements of Rep. Carpenter and Sen. Wagner); see also Epstein, supra note 1, at 1363 (income redistribution was a consequence of the Wagner Act). Congress's ultimate acceptance of the view that fostering unionization stimulates aggregate demand by raising wages is present in the findings and policies of § 1 of the NLRA:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of com-
When Congress enacted the Wagner Act, it adopted a social policy permitting labor unions to exploit market power in labor markets, with concomitant negative impacts upon production and employment in organized industries. That policy, moreover, was adopted with awareness of its consequences. A union that successfully organizes all or most of the workers in an industry is in a position to use that labor-market monopoly to impose cartel-like restrictions on the product market, capturing monopoly returns for its members.

II. LABOR POLICY AND MARKET POWER

A. THE EXTENT (AND LIMITS) OF ORGANIZED LABOR'S LEGITIMATE POWER IN THE LABOR MARKET

1. Labor Policy as an Exception to a General Free-Market Policy

At least since the enactment of the Sherman Act, Congress has followed a policy of encouraging competition in product markets. That policy has been restated and strengthened from time to time in various amendments to the antitrust laws such as the Clayton Act in 1914, the antimerger amendment of the Clayton Act in 1950, and the Hart-Scott-Rodino Act in 1976. Yet over the same period of time, Congress has established a policy of encouraging collective bargaining in the labor market. It did this initially in the Railway Labor Act and

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56. See infra notes 67-76 and accompanying text.
57. See infra notes 84-86 and accompanying text.
then later embraced this policy for the economy generally in the National Labor Relations Act\textsuperscript{63} and the Taft–Hartley Amendments to that Act.\textsuperscript{64}

Charged with interpreting both congressional directives, the courts, therefore, have been required to reconcile areas of potential conflict in those policies. Courts must, of course, exclude from the coverage of the antitrust laws the particular kinds of labor restraints identified in sections 6 and 20 of the Clayton Act.\textsuperscript{65} They also are called upon to exclude from the coverage of the antitrust laws such other behavior as is necessary to facilitate the operation of the National Labor Relations Act.\textsuperscript{66} This reconciliation has occasionally challenged the courts' analytical and perceptive powers and is in present need of revision.

2. The Assumptions Underlying Labor Policy: An Initial Inquiry

Whether Congress in enacting the antitrust labor exemptions contained in sections 6 and 20 of the Clayton Act thought about the effect of unionization on prices and outputs in product markets is unclear. If members of that Congress had not anticipated industry-wide organization, they might have believed that competition among manufacturers would constrain the power of organized labor.

Congress, in enacting the Wagner and Taft–Hartley Acts, however, showed increasing awareness that it was facilitating the exercise by unions of product-market power. The legislative history of the Wagner Act is somewhat cloudy on this issue, particularly because the Act itself carefully avoids endorsing industry-wide bargaining units\textsuperscript{67} under which union...
control over the labor supply would directly translate into exercises of product-market power. Professor Thomas Campbell, focusing upon the multi-employer aspect of industry-wide bargaining, points out that such bargaining received implicit approval when Congress removed language impeding multi-employer bargaining from the bill that became the Wagner Act.\textsuperscript{68}

Congress intended the Wagner Act, moreover, as a replacement for the substantive provisions of section 7(a) of the NIRA. Section 7(a) not only guaranteed workers the right to organize and bargain collectively, but also sought to impose upon all employers standard industry wages through the mechanism of industry codes\textsuperscript{69} and the concomitant elimination of wage competition. When Congress enacted the Wagner Act, therefore, it was familiar with the goal of industry-wide organization and of the elimination of wage competition among employers. Although the Wagner Act did not impose a wage structure upon industry, Congress must have been aware that the mechanisms it was creating would result in less wage competition. In the context not only of the NIRA but of other regulatory legislation of the time,\textsuperscript{70} it is likely that most members of Congress supporting the Wagner Act who considered the matter felt that product-market restraints reflecting the unionization of industry labor were a fair price to pay for the wage increases which that Act would engender.\textsuperscript{71}

By the time it enacted the Taft–Hartley Amendments in 1947, Congress—or at least some of its membership—appears to have become more cognizant of the effects of industry-wide bargaining on product markets.\textsuperscript{72} Although a prohibition on in-
industry-wide bargaining was not contained in the bill ultimately enacted,73 the House version prohibited industry-wide bargaining,74 and a proposed amendment to the Senate bill which would have prohibited industry-wide bargaining units was defeated on the Senate floor by one vote.75 At least some of the proponents of such a prohibition grasped the connection between the wage rate and product-market prices.76 By declining to prevent industry-wide unions from exploiting product-market power despite Congress’s growing institutional awareness of that phenomenon, Congress tacitly approved or condoned that behavior.

brought the compelling pressure of strikes to bear more upon the Government and the public than upon the employers involved. Arrangements by which competing employers combine, voluntarily or involuntarily, to bargain together, and arrangements by which great national and international labor monopolies dictate the terms upon which competing employers must operate seriously undermine our free competitive system. . . .

Such arrangements as these stifle competition among employers, and slow down the development of new techniques for producing more goods to sell at lower prices. They tend, in some cases, to reduce the resistance of employers to extravagant demands of the unions, and, in others, to holding down wages in plants where greater efficiency than prevails in others might, but for the group arrangements, result in better wages for the employees. The arrangements often are the foundation of shocking restraints of trade, such as we find in the construction trades and in parts of the clothing industry.

. . . Most employers believe that the disadvantages of industry-wide bargaining outweigh its advantages. Our concern, however, is not with its advantages and disadvantages for either employers or unions. Our concern is the public interest, and the public interest demands that monopolistic practices in collective bargaining come to an end.


73. See H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 59 (1947), reprinted in 1947 U.S. CODE CONG. SERV. 1135, 1165 ("The provisions of section 12 treating 'monopolistic strikes' as unlawful concerted activities involved the matter of industry-wide bargaining, and this subject matter has been omitted from the conference agreement.").

74. The House bill prohibited bargaining units larger than the employees of a single employer "unless the employees of . . . [competing] employers . . . are regularly less than one hundred in number and the plants or other facilities . . . are less than fifty miles apart . . . ." H.R. 3020, 80th Cong., 1st Sess. § 9(f) (1947), reprinted in LMRA HISTORY, supra note 72, at 187-88. It also prohibited "monopolistic" strikes by unions representing, in separate bargaining units, employees of competing employers. Id. §§ 2(16), 12(a)(3)(A), reprinted in LMRA HISTORY, supra note 72, at 169-70, 204-05.

75. 93 CONG. REC. 4676 (1947).

The legislative histories of the Wagner and Taft–Hartley Acts do not reveal any congressional grasp, however, of the exaggerated restraints on the product market that result from the combination of union control over industry labor supply and oligopolistic power in the product market by employers. The restraint that results from this combination, therefore, calls for a reexamination of the antitrust labor exemption.

3. The Relation Between Labor and Antitrust Policies

The Congressional policies embodied in the labor and antitrust laws, although relatively clear, have created a conundrum for the enforcement authorities and the courts. The difficulty arises because Congress has adopted two different policies for two spheres of activity; yet the two spheres are not so independent from each other that they can always be treated separately. Congress, through the enactment of the Wagner and Taft–Hartley Acts, must be presumed to have approved the exercise of market power by labor unions in the labor market. Conversely, Congress, in the antitrust laws, explicitly disapproved of anticompetitive restraints in product markets. The demand for labor in any industry, however, is derived from the demand for the product of that industry. The exercise of market power in the labor market, therefore, will have repercussions on price and output in the associated product market.

A reconciliation between labor and antitrust policies must take account of the interrelation between labor and product markets. To be faithful to the purposes of both labor and antitrust law, reconciliation must prevent, so far as practicable, a union from exercising market power in the labor market that needlessly restricts the product market: the product market should be affected no more than necessary to give workers as a group the full benefit of their union’s exercise of its monopoly power in the labor market.

77. Most of those favoring a prohibition of industry-wide bargaining focused upon the inconvenience of industry-wide strikes and the concentration of decision-making power in the leadership of national and international unions. The opponents of such a prohibition argued that industry-wide bargaining was necessary to prevent employer competition from forcing wages down. This was, of course, an implied recognition of the product-market effects of industry-wide bargaining. There was no recognition, however, of the peculiarly restrictive effects of bargaining between a union controlling the industry labor supply and employers possessing oligopolistic power in the product market.
B. MARKET POWER IN LABOR AND PRODUCT MARKETS

1. Collective Bargaining as a Trade Restraint

Collective bargaining is a means by which workers bargain as a unit (through a union) with their employer. In collective bargaining, a union, controlling the labor supply for all or a part of an employer's operation, threatens to withhold that labor supply unless the employer and the union agree on contract terms. Protected by the antitrust laws, this kind of labor-market restraint is a premise of the National Labor Relations Act (NLRA). Indeed, the NLRA requires an employer to bargain with a union supported by a majority of the employer's workers.

The union derives bargaining power from the threat that it will withhold labor from the employer's plant, and the employer derives bargaining power from the threat that the employer will not operate its plant and thereby deny employment to those workers. The process does not contemplate that the union would try to sell one employer's labor supply to a second employer; nor does it contemplate that the employer would look elsewhere than to the union for workers. Collective bargaining is a model of bilateral negotiation in which neither party has recourse to substitutes provided by third parties.

2. The Organization of Labor in a Competitively Structured Industry

Visualize an industry composed of relatively small producers geographically separated from each other and their customers, who are also scattered geographically. Despite the geographic separation, the producers compete vigorously with one another.

In such an industry, a labor union representing the workers at a particular firm may obtain for its members an increased share of that firm's profits. But because the industry is

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80. The process of collective bargaining does not contemplate that the employer will seek workers who are not represented by the union. See 29 U.S.C. §§ 158(a)(5), 159(a) (1982). The employer's hiring of permanent replacement workers during a strike, although permitted under the Act, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938), is a situation that does not arise in the successful practice of collective bargaining. Moreover, the Act requires the employer to reinstate replaced strikers as vacancies appear, a practice that replacements may perceive as engendering a threatening work environment. See Posner, supra note 1, at 997-98.
competitive, although imperfectly so, competition in the output market constrains the union's achievements in the labor market. The union's attempt to increase wages is an attempt to increase the employer's labor costs. Because competition in the output market places a ceiling upon the employer's prices, any wage increase narrows the employer's profit margins by increasing its labor costs. Of course, some employers may have wider room to bargain than others: some employers may be earning higher than normal profits because they possess locational advantages over rivals (and thus incur lower transportation costs) or because they are otherwise relatively more efficient. Regardless of their relative efficiencies, however, all employers will reduce the quantity of goods that they offer for sale in response to higher labor costs. Thus profits will shrink not only because of the increased cost effect represented as a shrinkage in profit margin, but also because of the effect of the increased labor costs on volume: the higher labor cost will reduce the number of units that can be produced at a profit.81

As that union organizes more and more firms, the economic pressures felt by any individual employer are eased. When a substantial number of firms reach an identical wage settlement with the union, the increased labor costs incurred by each firm begin to affect the overall supply curve of the industry. Price for the industry product readjusts to a higher level, reflecting the widely shared, higher labor costs. The firms that had earlier experienced a squeeze on their profit margins now experience some relief: market price has increased, lessening the profit margin squeeze and permitting them now to profitably increase production over the reduced level to which they had been forced by the earlier wage agreements.82

With all firms in the industry organized and paying an identical wage as a result of negotiations with the union, most industry workers will be better off. The industry's product will be more expensive, but the price increase will be less than the

81. Each employer that grants a wage increase will thereby increase its labor costs. The higher labor cost will be reflected in the employer's marginal cost curve; and the marginal cost curve will intersect with the employer's marginal revenue curve (in the case of an imperfectly competitive market) or with market price (in the case of a perfectly competitive market) at a lower level of output than before the wage increase.

82. Note that employers holding out against union attempts to impose wage increases upon them experience increased profits as their own labor costs remain at the old level while the price for their product increases, due to the lower overall industry output.
wage increase allocable to each product. Total industry output will decline somewhat and some workers will lose their jobs. If economic conditions are otherwise healthy, those displaced workers will find employment in other industries. The industry will continue to be competitive, but competition among producers to pay low wages will have ended.

In the scenario described, the competitive structure of the product market acted as a constraint upon union wage demands until the union had organized most of the industry. At that time the union’s power in the labor market eased the product-market constraints on employers who acceded to union wage demands. Because the union was able to control the wage costs of most employers, it could protect employers paying union wages from being squeezed by competition from low-wage rivals.

After a union has organized an entire competitively structured industry, the constraints upon its power are derived primarily from the product market. Because labor cost is one component of production cost, the demand for labor is, in effect, market demand for the product minus the cost of the product’s other components. More precisely, a demand for labor can be constructed by subtracting nonlabor marginal cost from the product demand curve and then adjusting the resulting curve for changes in labor productivity that accompany changes in output. Such a derived demand curve furnishes

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83. Given the conventional assumptions that the demand for the industry product increases as price falls (that is, that the demand curve slopes downward to the right) and that the aggregate marginal cost curve increases with output, the price increase will be less than the wage increase allocable per unit of output.

84. The demand for labor is the marginal revenue product of labor or the value of what the last unit of labor produces, which in turn is equal to the product value less the other input components. When the market is competitively structured and the union has not organized all of the industry’s workers, each firm sees product value as given by market price and hence sees the value of the marginal product of labor determined accordingly. See, e.g., R. Ehrenberg & R. Smith, Modern Labor Economics 59 (3d ed. 1988). Although the value of the marginal product of labor would vary at different market prices, no firm in a competitive market has the power to vary market price.

When the entire labor force of an industry is organized, however, the marginal revenue product of labor is no longer given by market price, because the union is in a position to control market price by controlling the industry wage rate. In such circumstances the marginal product of labor is derived from the product demand curve. See id. at 92-94.

85. This derived demand, as so constructed, is a demand for labor stated in terms of units of labor consumed per unit of product-market output.
the basis for the calculation by a labor union of its bargaining strategy. If a labor union operated like a business firm attempting to maximize its profits, the union would attempt to maximize the return to labor under that derived demand. In a competitively structured product marketplace, employers possess no market power. A union controlling the industry labor supply, however, is in a position to set industry labor costs. In so doing, the union leverages its power in the labor market into the product market, forcing increased prices and reduced output similar to those that would be set by a product market monopolist. The union then transforms those monopoly-like product market revenues into wages.

3. Labor Organization in a Monopolistic or Oligopolistic Industry

Union organization in oligopolistic or monopolistic industries produces a somewhat more complex scenario. In an industry in which a single firm is responsible for all production, that firm sets a price–output policy based upon its own costs. Unlike a competitively structured industry which the union has not fully organized, competition from nonunion firms possessing lower wage costs never constrains the range of bargaining between the union and a monopolist employer. Rather, a union begins the bargaining process in a context in which the basic external constraint is overall demand for the industry product.

Indeed, the employer’s position as a monopolist in the product market changes the bargaining process significantly. Because the employer has discretion in making its price–output decisions and decides according to its own costs, the union that bargains with the employer over wages always participates in the employer’s exercise of monopoly power in its product market. The scenario is essentially the same when a small number of firms control the supply of an industry’s product.

All other factors remaining the same, the union is always better off when the industry that it has organized is competitively structured and the union shares no monopoly power with the employers. A product market monopolist is a monopsonist purchaser of industry-specific labor. Its monopsony power in

86. As pointed out in text, the analogy is imperfect because labor unions have no analogue to a business firm’s profits to maximize. As a result attempts to explain union bargaining behavior have varied. See J. Dunlop, supra note 1, at 28-44; D. Martin, An Ownership Theory of the Trade Union 6-30, 47-89 (1980); A. Ross, Trade Union Wage Policy 21-44 (1948).
the labor market offsets the union's monopoly power over industry-specific labor. As the only industry employer, a monopolist is immune to a union's "whipsaw" tactics, that is, tactics by which the union obtains concessions from one employer under the pressure of a strike while the employer's rivals continue to sell to their own as well as to the struck employer's customers.

III. THE PRESENT-DAY LABOR–ANTITRUST INTERFACE

A. IMPERFECT COMPETITION IN PRODUCT MARKETS TODAY

In the two decades following the end of World War II, it was commonplace to describe much of American industry as oligopolistically structured. Since that time, however, substantial parts of American industry have come under increasing competition from foreign producers. Foreign producers, for example, presently account for over twenty percent of the United States market for both automobiles and steel. These percentages would probably be larger in the absence of official or unofficial import restrictions. The formerly oligopolistic structure of much of American industry appears to be rapidly evolving into one of imperfect or monopolistic competition in which United States producers at best must share the domestic market with foreign rivals.

This increased foreign competition for domestic sales does not necessarily eliminate all or most price discretion by American sellers. Critics of the voluntary restraint arrangement with Japan in the automobile industry have asserted that United States producers reacted to the protection that the arrangement gave them by increasing their prices rather than ex-

87. The monopsony of the employer that possesses a product-market monopoly is a function of the organization of industry-specific labor. In the absence of that organization, the employer would hire labor from the broad (interindustry) labor market. The employer would thus compete with employers in other industries for labor. An employer monopsony created by union organization has no power to drive the wage level below competitive rates as does a real monopsonist. See, e.g., P. Samuelson, supra note 22, at 549.

88. See, e.g., J. Galbraith, The Affluent Society 214-15 (1958) (describing "the typical industrial market—steel, machinery, oil, automobiles, most nonferrous metals, chemicals" as oligopolistically structured and hence a market in which "a relatively small number of large firms enjoy, in one way or another, a considerable discretion in setting prices").

panding their sales. Similar complaints have been voiced about the various restrictions on steel imports. Both domestic automobile and steel producers probably continue to retain significant power over price and thus remain industries in which organized labor's power in the labor market requires it to participate in the employers' exercise of market power in the product markets.

In any market in which producers exercise significant market power, collective bargaining for wages under an hourly-wage standard necessarily involves the union in the employers' exercise of their market power. As long as labor thus participates in the exercise of market power wielded by employers, its wage demands exercise an exaggerated restrictive effect upon employers' sales in the product market and thus produce an undue negative effect upon industry employment. As this Article will show, union members as a group would be better off if their wage demands could be transformed into profit-sharing demands.

B. THE STATUS OF THE ANTITRUST LABOR EXEMPTION

Over the last several decades a significant number of cases have explored the interrelations between labor law and antitrust law. Out of this antitrust case law a nonstatutory labor exemption has emerged. The older statutory exemption, contained in sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act, had eliminated strikes and certain other types of union behavior from the scope of the antitrust laws. The courts designed the newer, nonstatutory exemption to ensure that the antitrust laws do not interfere with the operation of the NLRA. From the case law that engendered the nonstatutory labor exemption, courts have developed the rule that a labor union may lawfully exercise its power as a monopoly supplier of labor in the labor market, but it may not com-

90. See, e.g., Adams & Brock, supra note 89, at 159-60.
91. See Adams & Mueller, supra note 89, at 113-14.
92. See infra Parts V, VI.
bine with employers to restructure a previously competitive product market as an oligopoly or as a less competitive market.\footnote{96}{Pennington, 381 U.S. at 661-69; Allen Bradley, 325 U.S. at 798, 810.}

This case law developed from the Supreme Court's 1945 decision in \textit{Allen Bradley Co. v. Local Union No. 3.}\footnote{97}{325 U.S. 797 (1945).} In \textit{Allen Bradley} the Court condemned arrangements between a New York City local union and electrical contractors under which the contractors agreed to purchase all of their electrical equipment from suppliers that recognized the local as the bargaining agent for their workers. The arrangement effectively isolated the New York City area as a separate market for electrical equipment. The New York City area became a captive market for New York manufacturers who then charged monopoly prices to their local customers and shared their monopoly profits with their unionized workers. Writing for the Court, Justice Black condemned the arrangement on the ground that the union was aiding local manufacturers in violating the Sherman Act by excluding rivals from the area.\footnote{98}{See id. at 808.} In Black's view the vice of the arrangement—and that which brought it within the scope of the Sherman Act—was the manufacturers' combination. The union's participation in that combination brought the union itself within the scope of the Sherman Act. Black conceded that under his formulation, "the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups."\footnote{99}{Id. at 810.}

The Supreme Court used the theme of union participation in an employer conspiracy twenty years later in \textit{United Mine Workers of America v. Pennington}.\footnote{100}{381 U.S. 661-69 (1965).} In \textit{Pennington} respondents charged the United Mine Workers with conspiring with large coal mine operators to impose high wage rates upon less productive, smaller operators to drive them out of business and thereby reduce the amount of industry production. The large employers and the union would then share the benefits of this product market restraint. Justice White, speaking for the Court, acknowledged that when a union controlling the industry labor supply employs that power to obtain a wage rate agreement, the product market is restrained.\footnote{101}{Justice White stated:}
however, he defended as one contemplated by Congress.\textsuperscript{102} Although a union was perfectly free to seek identical terms from all employers and could pursue this objective through multi-employer negotiations, it could not—consistent with the antitrust laws—agree with one set of employers to impose a wage scale on another group of employers. White drew a largely formal distinction, ignoring the economic effect of the union activity. He modeled the distinction upon Black's approach in \textit{Allen-Bradley}: the union's exemption from the antitrust laws turned upon whether it was a party to an employer conspiracy.

The Supreme Court has also permitted unions to impose, through collective-bargaining agreements or otherwise, explicit restrictions in the product market when those product-market restrictions were found to be closely related to a mandatory subject of bargaining and not part of a larger employer conspiracy. Thus, on the same day that he wrote his opinion in PENNINGTON, Justice White wrote for a plurality in \textit{Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.},\textsuperscript{103} that a collective-bargaining agreement limiting an employer's hours of operation in the product market was exempt from antitrust scrutiny.\textsuperscript{104} Similarly, in other cases courts have permitted unions to control the market for dance bands\textsuperscript{105} and to establish control over theatrical agents\textsuperscript{106} on the ground that their activities were necessary to exert control over wages—a mandatory subject of bargaining.\textsuperscript{107}

The caselaw formulation of the labor exemption, however, is flawed because it asks a misleading question. By asking whether the union is participating in an employer conspiracy, the courts direct attention away from the exaggerated restraints on the product market which sometimes result from collective-bargaining agreements themselves. The question im-

\textsuperscript{102} See id.
\textsuperscript{103} 381 U.S. 676 (1965).
\textsuperscript{104} Id. at 689, 697.
\textsuperscript{107} See H.A. Artists, 451 U.S. at 713-22; Carroll, 391 U.S. at 105-07.
licitly suggests that the wrong that a union can perform—and that therefore denies the union an otherwise available exemption from the antitrust laws—is the creation of employer market power. As this Article shows,\textsuperscript{108} however, it would never be in a union's economic interest to create market power for employers selling in a single marketplace because the demand for labor is derived from the demand for the employers' product. In a competitive product market, a union that has organized all of the industry's workers can exploit its monopoly over the labor supply, constrained only by the overall demand for the industry's product. In a monopolistic or oligopolistic product market, however, the employer's power in the product market partially offsets the union's power. In an oligopolistic or monopolistic industry, then, the union must share its power with the producers, while in a competitive industry the union is free to exploit its power over the derived demand for labor without such a constraint.

In looking for a combination with employers as the principal indicator of behavior within the cognizance of the antitrust laws, the Supreme Court has diverted attention away from the most substantial product-market restraints that result from union organization. In so doing the Court has obscured the balance implicit in existing law that condemns product-market restraints unnecessary to fulfill the objectives of labor law.\textsuperscript{109} Rather than ask the formalistic question whether the union has combined with employers to restrain the product market, courts should ask whether the restraints on the product market are greater than those that would be produced by union control of the labor market alone. Indeed, such a question might be derived from the Court's 1975 opinion in \textit{Connell Construction Co. v. Plumbers & Steamfitters Local No. 100}\textsuperscript{110}: are antitrust policies contravened to a degree not justified by congressional labor

\textsuperscript{108} See supra note 87 and accompanying text.

\textsuperscript{109} That was Justice White's implicit ruling in \textit{Jewel Tea}. \textit{See} 381 U.S. at 692 (discussing whether restrictions on hours of self-service meat markets by meatcutters union were legitimate union concern). The cases that have tolerated product-market restraints did so on the ground that those restraints were necessary to enable the union to exercise control over the labor market. \textit{See H.A. Artists}, 451 U.S. at 719-22; \textit{Carroll}, 391 U.S. at 105-07.

\textsuperscript{110} 421 U.S. 616 (1975). Describing the agreement that Local 100 had entered with Connell and other general contractors, Justice Powell stated that "[the agreement] contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws." \textit{Id.} at 625.
policy? An affirmative answer to that question should remove collective bargaining activity from the labor exemption.

In a concentrated product market, collective bargaining agreements containing wage provisions cast in the traditional form of fixed hourly compensation are likely to restrict excessively the product market. Because the product-market restraints in that situation are unnecessary to allow the union to fully exploit the labor market, the antitrust laws should require that bargaining take a less restrictive direction. The objective, in short, should be to tolerate union exploitation of its control over the labor market without exacerbating the restrictive effects of a preexisting employer oligopoly in the product market.

Nothing in the history of the Wagner Act indicates that Congress contemplated more than the encouragement of union organization and the creation of a set of conditions under which unions could exploit economic power over the labor market. Congress never addressed the possibility that the combination of union power over labor and employer product-market power would doubly restrain the product market. This peculiar combination of powers acutely raises an apparent policy conflict between the antitrust and labor laws. Yet this policy conflict is only apparent because the principles embodied in existing law provide the means for achieving the goals of both antitrust and labor law. A redefinition of the labor exemption from antitrust law would have the salutary effect of freeing product markets from this potential double restraint while preserving organized labor's ability to exploit fully its power in the labor market.

C. ANTITRUST LAWS AND THE EXERCISE OF Oligopolistic Power

Although competitive markets are objectives of the antitrust laws, and although the Sherman Act condemns unreasonable restraints brought about through concerted action, the courts have been unable effectively to undo the effects of oligopolistic behavior.

Since World War II, courts and the enforcement authorities have wrestled with the application of the antitrust laws to oligopolistic behavior. In American Tobacco Co. v. United States,111 the Supreme Court upheld a conviction of the major tobacco companies and some of their officials for conspiracy to

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111. 328 U.S. 781 (1946).
violate sections 1 and 2 of the Sherman Act.\textsuperscript{112} That conspiracy consisted, in part, of the companies following (up or down) the pricing decisions of a leader.\textsuperscript{113} That behavior, however, amounted only to the companies consciously recognizing the interdependence of their pricing decisions.\textsuperscript{114} Indeed, it was only because of the criminal nature of the proceeding\textsuperscript{115} that the Court's decision was not immediately exposed as an unworkable interpretation of the antitrust laws. Had the proceeding been a civil enforcement action, the trial court would have been required to issue an injunction rather than impose a penalty; and it would have been apparent that an injunction prohibiting parallel pricing in an oligopoly setting could not be written. The untenable nature of \textit{American Tobacco}'s condemnation of parallel pricing is now widely recognized.

In the 1970s the Federal Trade Commission, through a newly developed doctrine of "shared monopoly,"\textsuperscript{116} undertook another assault upon oligopoly pricing. Although it brought several cases, the Commission's assault was also unsuccessful.\textsuperscript{117}

In practice the antitrust laws counter oligopoly either by preventing it in the first place through merger prohibitions or by shielding independent pricing decisions from the scrutiny of rivals. Section 7 of the Clayton Act proscribes mergers and acquisitions that threaten to transform competitive market structures into oligopolistic ones. The Department of Justice Merger Guidelines employ market concentration indices to carry out the objectives of section 7.

The antitrust laws also mitigate the anticompetitive effects of an oligopolistic market structure by limiting the communication of firm-specific pricing information from one oligopolist to another. Thus, in a number of cases, the Supreme Court has sought to protect the kind of secret price negotiation that erodes oligopolistic and other noncompetitive pricing structures.

\textsuperscript{112} Id. at 814-15.
\textsuperscript{113} See id. at 801-02.
\textsuperscript{114} See id. at 800-04.
\textsuperscript{115} See id. at 783.
\textsuperscript{116} The concept was articulated in 1978 by John H. Shenfield, Assistant Attorney General, Antitrust Division. \textit{See} Antitrust & Trade Reg. Rptr. (BNA) No. 874, at F-1 to F-6 (1978). Shared monopolies involve parallel practices in a highly concentrated industry which facilitate the coordination of prices or production or cause the exclusion of new competitors. \textit{Id.} at F-1.
In *Sugar Institute v. United States*,\(^{118}\) for example, the Court modified and approved an antitrust decree that helped to shield sellers' secret price negotiations from the scrutiny of rivals.\(^{119}\) The Court, in *United States v. Container Corp. of America*,\(^{120}\) condemned a practice of mutual price verification in an industry whose characteristics betrayed noncompetitive pricing.\(^{121}\) Following that same approach, in *United States v. United States Gypsum Co.*,\(^{122}\) Chief Justice Burger's opinion for the Court explicitly recognized the value of secret price negotiations in breaking down oligopolistic restraints.\(^{123}\)

In short, the antitrust laws have sought to mitigate the effects of oligopoly whenever possible. This Article shows that union control of industry labor supply tends to exacerbate the restrictive effects of oligopolistic price-output decisions. Union control over the labor supply in an oligopolistically structured industry, therefore, should become a matter of antitrust cognizance; and the effects of the combined employer-union power should be weighed in the process of redefining the parameters of the labor exemption.

IV. COLLECTIVE BARGAINING AND UNION ORGANIZATION

In industries that have been successfully organized, a labor union acts like a monopoly supplier of a needed input into the manufacturing process. Although the union cannot effectively divert the supply of labor it controls from one employer to another or to employers outside the industry, the employers cannot obtain labor except on the terms to which they and the union have agreed. The result is almost certainly a higher wage rate than would otherwise occur. This higher wage rate necessarily means that fewer jobs will be available in the unionized industry\(^{124}\) and that some workers who might otherwise have found employment in that industry will be shut out.

When Congress enacted the Wagner Act, it did not focus upon that aspect of the collective bargaining process that trades

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118. 297 U.S. 553 (1936).
119. See id. at 602-05.
121. See id. at 334-35.
123. See id. at 456-58.
employment for higher wages. Indeed, Congress appears to have acted under an opposite premise: many members of Congress believed higher wages, produced under a regime of collective bargaining, would create purchasing power that would in turn engender an expansion of existing employment.

Moreover, Congress gave absolutely no thought to the question of how the structure of labor unions themselves might affect the policies that the unions pursued. Thus no basis exists for believing that Congress has ever tacitly approved the way in which certain structural features of union organization foster the pursuit of the trade-off between jobs and higher wages to extreme, socially detrimental lengths. Developed below is an analysis of union decision-making incentives revealing, not only how internal conflicts within the union are likely to work counterproductively, but also how the resolution of those conflicts adversely affects unorganized workers, racial minorities, workers from other disadvantaged groups, and the general public.

A. LABOR UNION DECISION MAKING AND UNION BARGAINING STRATEGY

1. A Parable

Assume that one union has organized an entire industry and that union organization is democratic in the extreme: a majority vote of the entire membership makes union policy town-meeting style. Assume further that when layoffs occur, they affect workers in reverse order of seniority: those workers employed for the shortest period are the first to be laid off and those employed for the longest period are the last. Finally, assume that laid-off union members who remain unemployed for longer than one year find employment outside the industry and drop their union membership. Collective bargaining contracts are entered for two-year periods.

The union must decide upon a wage policy to pursue in negotiations for the next two-year collective bargaining contract. Because any wage increase will diminish the employers' profits, employers will to some extent resist any union attempt to increase wages. Despite the employers' resistance, the union must itself decide whether to seek a substantial wage increase, a moderate one, or no wage increase at all.

Because any general wage increase will be immediately reflected in the industry prices and output, the union faces an evident trade-off between the wage rate and the number of
persons employed in the industry. The union's decision-making process thus differs significantly from the decision-making process of a typical supplier that seeks to maximize its profits from selling inputs to an output producer. The latter has a simple goal—maximize profits—but for a union the maximization of worker welfare is ambiguous. Is worker welfare measured solely by the level of wages, the number of workers employed, or by some combination of the two?

In the simplified situation of this parable, the union's decision-making structure provides the answer. Those workers with the longest seniority will be the last to leave when reduced output requires some workers to be laid off. Workers with the greatest seniority, therefore, will have the least to fear from layoffs and the most to gain from wage increases. Conversely, workers with the least seniority will be laid off first and will lose as a result of any wage increase that causes worker layoffs.

Because the union's decisions are made democratically, the union will decide to seek a wage increase that will not threaten the continued employment of the majority of its members with greatest seniority. More precisely, the members will approve, by a majority vote, a policy that seeks the maximum wage increase that will not produce layoffs for a majority. The union will strive to obtain the highest wage rate consistent with the continued employment of just over fifty percent of its membership.

Two years later the union will again decide upon the wage policy it will pursue in negotiations for the next collective bargaining contract. The earlier contract produced a wage rate close to that desired by the union majority, resulting in a lay off of a large minority of union members. Those workers laid off have not worked in the industry for close to two years and have now dropped out of the union. Employment in the industry is slightly more than half the employment of two years earlier; and the union membership is now slightly more than half its membership of two years earlier. Accordingly, this smaller number of employed union members will vote on the union's new bargaining policy.

The reduced union membership will adopt, by majority vote, a bargaining goal of the maximum wage consistent with the continued employment of a majority. To the extent that the union successfully imposes its policy on employers, the in-
The industry wage rate will rise, industry production will decline, and industry employment will be reduced.

This scenario will repeat itself at two-year intervals. At each repetition, the industry wage rate will increase, and employment will fall by slightly less than fifty percent. In theory, the spiral of rising wages, falling output, and falling employment continues indefinitely.

2. Reflections on the Parable

The parable above simplifies reality with various assumptions: unions bargain collectively with employers in recurring two-year sequences; labor unions use town-meeting style democracy to adopt bargaining goals; union members vote their individual economic interest; members cease to participate in union affairs one year after being laid off; and productivity and overall demand remain entirely unchanged. Moreover, carried relentlessly to its conclusion, the logic of the parable indicates that employment and output would approach zero after several rounds of contract negotiation, a result that is inconsistent with experience. The fact that unions in reality do not pursue such extreme strategies shows that offsetting factors are at work: some unions are not as democratic as the parable assumes; workers are not unaffected by the interests of their colleagues; and institutional factors within the union—especially the efforts of union managers—operate to blur the membership's perceptions of their individual interests. Indeed, union managers may have incentives of their own, which conflict with the interests of the majority: to maintain large membership rolls to enhance their own power and prestige as leaders of a large organization and maintain or increase union revenues from dues-paying members.

Despite its simplifications, however, the parable draws attention to two significant factors affecting the bargaining process: the trade-off between wage increases and employment reduction and the way in which the union's decision-making process may affect its bargaining goals. The first factor is analogous to other trade-offs affecting economic relations, such as the trade-off between prices charged and quantities purchased. The second factor involves the union reaction to the wage-employment trade-off. These factors will be examined below.

The parable shows that the incentive for unions progressively to trade employment for higher wages exists regardless
of the degree of competition in the product market (or lack thereof). Generally, union negotiators would experience pressure to seek a return skewed toward the interests of the most senior workers. Maximizing labor's overall return would be inconsistent with maximizing the return to the most senior workers.

B. COLLECTIVE BARGAINING AND THE ECONOMIC ANALYSIS OF VERTICAL RESTRAINTS

1. Vertical Supply Contracts in General

Economists have analyzed the determinants of contracts between input suppliers and business firms that purchase those inputs for use in production or for resale. Because a labor union controls the labor supply available to an employer for use in production, the union acts as a monopoly input supplier. The part of economic analysis that most clearly bears on the determinants of collective bargaining, therefore, is concerned

125. In only one restricted market setting would these incentives exert pressure on union negotiators to seek to maximize the overall return to labor. In a situation of a linear product demand and constant marginal costs (including labor costs), a wage rate which would maximize the return of a majority of the most senior workers would coincide with the maximum return available to labor in the aggregate.


This standard analysis is generally subdivided into analyses of the case in which the output producer must use a monopolized input in constant proportions with other inputs and of the case in which the output producer may use a monopolized input with variable proportions of other inputs. In the latter case, the monopolist input supplier would attempt to preclude the output producer from substituting other inputs for the monopolized one. One way to avoid those substitution effects is through various forms of vertical integration. See, e.g., R. BLAIR & D. KASERMAN, supra, at 28-82. Although producers may, to significant degrees, substitute capital for labor, the analysis in this Article does not direct itself to the substitution effects on employer production processes engendered by union control over the labor supply.
with the relation between a monopoly input supplier and its customers.

Input suppliers' positions worsen as their customers gain market power, whether or not the input industry is competitively or monopolistically structured. When the input industry is selling to distributors possessing monopolies over their areas of distribution, the distributors tend to restrict sales to exploit their local monopolies. Their restricted sales reduce the quantities they purchase and the prices they pay to input suppliers from the quantities and price levels that would have prevailed if the distributors operated in a competitively structured market.

Even when the input industry is itself a monopoly or an oligopoly, the input industry will be worse off when their customers also possess market power. When the customers of oligopolistic or monopolistic input suppliers possess market power, the monopolists or oligopolists controlling the input industry are forced to share their own market power with their customers. Indeed, when the customers exercise market power in the output market, the resulting restraint in the output market is reflected in a reduced demand for the input, because the demand for the input is derived from the demand for the output.

If the customer exercises unrestrained monopoly power in the output market, then derived demand for the input is restrained to the maximum extent, and the input producer's exercise of its own monopoly control over input supply results in a doubly restrictive impact. The restrictive actions of the input supplier become the base from which the output seller adds its own restrictions. The restrictive actions of both firms inflate the price of the output. As a result prices for the output are higher and quantities of the output are smaller than they would be if only one market was monopolized. Moreover, the combined monopoly profits of the input and output sellers are less than the profits that would be earned by an integrated input–output seller.

Because its customers' market power in the output market constrains the profit-making capabilities of an input producer with market power in the input market, input producers sometimes try to place a ceiling on the prices of the output producer. Ideally, they place the ceiling at the level at which the output producer would sell if it purchased from a monopolist supplier.
(which it does) and sold in a competitive market. The final price should be at the level at which the output producer's marginal cost curve intersects with the product's demand curve.

The input producer may have insufficient bargaining power vis-à-vis the output producer to impose a ceiling upon the latter's prices. Nonetheless, the two firms have an incentive to reach an agreement under which prices for the output product would equal those set by an output producer purchasing from a monopolist supplier but reselling in a competitive market. They would reach that arrangement either by integrating their operations into one firm or by setting the prices of the output product through contract and dividing the profits of the combined operation in such a way that each company's profits increased.

Whether the two firms integrate vertically into a single enterprise or replicate the operations of a merged enterprise through a contractual arrangement, the aggregate profits of the input supplier and the output producer will be greater than the aggregate profits of the two firms acting separately. When acting individually, each follows its limited instincts by attempting to sell at a monopoly price calculated according to its own separate operations. When acting in combination, however, the firms increase the total output, sell the end product at lower prices, and earn higher total profits.

2. Vertical Contract Analysis as Applied to Unions as Monopoly Suppliers of Labor

Under the standard analysis of vertical agreements, a monopoly input supplier's economic interest is furthered when the output producer replicates the behavior of a firm in a competitive market. When the output firm expands production until its marginal cost equals market price and in the process earns only a normal, competitive return, the return to the input supplier is maximized. Considering labor as an input and a labor union as a monopoly supplier of that input, this analysis suggests that the union's interest is furthered when the output producer (the employer) operates at price and output levels that replicate those of a firm selling in a competitive market.


128. The standard analysis of vertical contracts indicates that a monopoly output producer's economic interest is furthered when its input supplier repli-
This analysis, which applies to monopoly input suppliers, however, cannot be directly applied to labor unions because it is predicated upon the assumption that the input supplier strives to maximize its profits, and the goal of the labor union is more ambiguous.

V. MAXIMIZING LABOR'S RETURN

A. MAXIMIZING THE AGGREGATE RETURN TO LABOR

According to the analysis of vertical relationships, workers considered as a group maximize their return when the union, and not the employer, exercises monopoly power. The collective bargaining contract can maximize the aggregate return to labor only when the employer does not independently attempt to exercise market power. For several reasons, however, labor unions might not follow a strategy that maximizes the aggregate return to workers. It is not clear how labor unions trade off the prospect of wage increases against prospective reductions in industry employment or how the internal decision-making processes of labor unions work. It is clear, however, that because of the effects of seniority, the economic incentives of the majority of workers rarely coincide with the maximization of the overall return to labor. Finally, it is uncertain what time horizons prevail when labor decision making must balance workers' short-run interests against their longer term ones.

To maximize the aggregate return to labor, unions, in bargaining with employers in oligopolistically or monopolistically structured industries, must discourage or prevent those employ-
ers from exercising market power in their product market. Collective bargaining negotiators could properly ignore employers' price and output decisions in competitively structured product markets because competitive pressures effectively discourage restrictive behavior by employers. In industries in which employers possess market power, however, bargaining contracts should contain constraints on employers' power because the exercise of market power in product markets reduces the residual power available to labor and thereby diminishes labor's potential aggregate return.

In theory, several options are open to a labor union that seeks to maximize the aggregate return to labor in its negotiations with an employer possessing market power. Most advantageous economically to the union would be the inclusion of a provision in the collective bargaining agreement that required the employer to price its goods at their marginal cost. Such a provision would put the union in a position analogous to that of a monopoly input supplier who sets a ceiling on the resale prices of a monopoly output producer.

Just as a monopoly input supplier may lack the bargaining power to compel a monopoly output producer (its customer) to observe a price ceiling and thereby to surrender any share in monopoly profits, the union may lack the bargaining power to compel an employer possessing market power to surrender the entire benefit of its market power to the union. In the case of the input and output product monopolies, however, economically rational conduct by the parties will lead them to a solution in which the return to each is increased, even though neither party possesses the bargaining power to force the other to forego all monopoly benefits. When neither the input supplier nor the output producer has the power to compel the other to turn over all the monopoly benefits, the parties can nonetheless optimize their positions by integrating into one enterprise and sharing the ownership (and profits) of that single integrated enterprise. Because the profits of the integrated enterprise will exceed the combined profits of each firm acting naively as an individual monopolist, the firms, acting as an inte-

129. Such an agreement involving, as it would the employer's behavior in its product market, would lie beyond the normal range of bargaining. See Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 692-97 (1965). Under current conceptions of antitrust, such an agreement might be viewed as vertical price fixing and as illegal per se under Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911), and Albrecht v. Herald Co., 390 U.S. 145, 152-53 (1968).
grated enterprise, will face a range of possible profit allocations that would improve each of their positions over its preintegration status.

A labor union that lacks power to force an employer with market power to surrender all its market power to the union may nonetheless be able to strike a bargain with the employer analogous to the integrated relationship of an input supplier and an output producer. A collective bargaining contract allocating to labor a percentage of the employer's return over its nonlabor variable costs would represent such a bargain.

B. PROFIT SHARING IN COLLECTIVE BARGAINING ARRANGEMENTS

When a union and an employer possessing market power incorporate a profit-sharing provision into a collective bargaining agreement as a substitute for an hourly wage increase or as a trade-off for an hourly wage reduction, they change the constraints affecting the employer's market behavior. To the extent that labor's remuneration is in the form of profit sharing, the employer's economic interest is furthered by maximizing the difference between total revenues and total nonlabor variable costs, because it is that aggregate from which the employer's operating profit, as well as the return to labor, is determined. Profit-sharing clauses thus pro tanto provide employers in oligopolistically structured industries with incentives to operate their businesses in ways that maximize labor's (as well as the employers') returns. Such clauses would, in short, reduce the restrictive incentives otherwise affecting these industries. In theory, employers' profits, aggregate wages, output, and employment would increase, while prices would fall.

1. The Impact of the Seniority System on Profit-Sharing Arrangements

Despite their potential for maximizing labor's return, most profit-sharing agreements are not in the interest of the most senior workers. A wage agreement that maximizes the wages of a majority of the most senior workers will always provide each of those workers individually with more compensation than will any profit-sharing plan. Profit sharing as an alternative to higher wages, therefore, conflicts with the economic interests of the union majority composed of the most senior workers.

Whether or not a union is receptive to profit sharing as a compensation arrangement depends upon whether it is most re-
sponsive to the economic interests of the most senior workers, rather than to the interests of workers as an aggregate regardless of their seniority. Normal organizational influences tend to make unions more responsive to the majority composed of their most senior members.

2. Explaining the Absence or Presence of Profit-Sharing Clauses

a. Union Policymaking and the Relative Rarity of Profit-Sharing Agreements

Despite the fact that, in oligopolistic industries, the use of profit sharing would increase the return to both employers and labor, profit-sharing provisions have not played a significant part in collective bargaining contracts until recently. The most obvious explanation for the absence of these clauses is that one of the parties does not want them. Profit-sharing clauses—while potentially maximizing the overall return to labor—are, as an alternative to any practicable form of hourly wage compensation, disadvantageous to the majority of workers with the greatest seniority.

The hourly wage protects the fortunes of the workers with the greatest seniority from short-run misfortune by casting the burden of short-run economic adjustments upon those workers with the least seniority. Paying a contractually fixed hourly wage, an employer that experiences a shrinking demand for its product cannot react by lowering its wage rate. Rather, it can adjust only by restricting output and laying off workers. The full impact of the hourly wage thus can be understood only in the context of the seniority system.

Not only does the fixed hourly wage, together with the seniority system, provide almost guaranteed lifetime employment to a firm’s most senior workers, but it also provides them with continuous increases in monetary benefits. Collective bargaining agreements periodically adjust the fixed hourly wage upwards in periods of prosperity, but rarely adjust it downwards. Because the present system of collective bargaining casts the burden of adverse economic conditions entirely on the workers with the least seniority, the combination of a fixed

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130. Although the seniority system provides the most senior workers with job security and continuously increasing monetary benefits, their real benefits may or may not increase over time, depending upon government economic policies. In particular, real wages may fall although monetary wages are increasing if the increase in money wages is less than the inflation rate.
hourly wage and the seniority system provides almost guaranteed lifetime employment with periodically increasing money wages to a core of workers with the greatest seniority.

For these reasons compensation in the form of profit sharing is less advantageous to the workers with the most seniority than is compensation in the form of hourly wages. To the extent that union bargaining positions reflect the interests of their most senior members, therefore, unions oppose profit-sharing provisions.

b. The Complex Process of Union Policy Formulation

Unions, however, do not appear simply to reflect the unmodified economic interests of their most senior members. They almost never force employers to engage in large-scale layoffs to provide substantially increased wages to the bare majority who remain employed. Instead, union practices show that they respond to the needs of more than a bare majority of their membership. Indeed, in moderating their wage demands sufficiently to avoid large layoffs, unions sacrifice the interests of the most senior workers to the interests of substantial numbers of less senior workers.

How unions formulate bargaining strategy is a question of major importance. In addition to the economic interests of the union members and the seniority system, other influences are at work. As instrumentalities for collective action by workers, unions depend partially upon an ideology of worker solidarity. This ideology could significantly dampen the influence of the economic interests of the most senior workers upon the union officials who formulate strategy. Such an ideological influence would be likely to reduce the impact of the members' individual economic interests without eliminating that impact entirely. Under such a hypothesis, the union would strive for a result that subordinates the interests of the most senior members to a goal of benefiting more than a bare majority of its members. Finally organizational factors, such as the incentives of union officials to broaden the membership base, also work to subordinate the purely economic interests of the most senior majority. This Article does not attempt to explain exactly how the union determines strategy but accepts the premise that the union decision makers are, in significant degree, responsive to the union's most senior members. Competing influences, such as ideology and organizational factors, however, may moderate this responsiveness.
Under the premise that unions are institutionally structured to reflect primarily the interests of their most senior members (moderated by other influences), the absence of profit-sharing agreements is readily explainable. The most senior workers naturally prefer to allocate the burden of economic downturns to their less senior colleagues. They also are understandably uninterested in any additional revenue that their firm might earn from expanded production and employment unless they benefit from that increased revenue. Because these most senior workers do not need the job security that profit sharing affords their less senior colleagues, and because they are unlikely to profit from the increased enterprise revenues that profit sharing facilitates, this core of senior workers has nothing to gain from profit-sharing agreements. By contrast, profit sharing would take away from them the benefit of the alternative hourly wage bargain and distribute that benefit over a wider class of workers.

c. **Explaining the Existence of Profit Sharing**

Some profit-sharing agreements, nevertheless, exist today for two reasons. When industry demand declines so rapidly that significant numbers of the most senior workers perceive their jobs threatened, a new majority emerges for whom job security is the predominant concern. Profit sharing then becomes attractive to union negotiators, who respond to this new majority.

Employers in oligopolistic (or monopolistic) markets also prefer profit sharing. When employers possess bargaining power sufficiently superior to their unions, they may impose profit-sharing arrangements upon their workers in lieu of hourly wage adjustments. Profit-sharing arrangements in unorganized firms such as Eastman Kodak, for example, fit that explanation. In some industries, like the automobile industry, the options to contract out work or to relocate production facilities abroad may enhance the employers' position, giving them the bargaining power to obtain union consent to the transformation of some hourly wage compensation into profit sharing. Moreover, in circumstances of declining demand, the employer interest in profit sharing coincides with the interests of the above described, newly emerging union majorities.
VI. THE IMPACT OF THE PREVAILING FORM OF COLLECTIVE BARGAINING ON UNITED STATES INTERNATIONAL TRADE

A. HOURLY-WAGE BARGAINING

Under the system of wage determination prevailing in the United States, bargaining about wages takes place on an industry-by-industry basis. Generally, one union represents all workers in an industry. An industry’s profit-making ability is usually taken as an indication of its ability to increase wages. The reverse, however, is generally not true. Industry losses or other economic reverses do not often result in wage reductions. Those losses or other reverses result in layoffs. Accordingly, almost all industries experience ratchet-like growth in wage rates over time. Good years produce wage increases, and bad years produce layoffs—but no wage reductions. When good years thereafter follow, employers rehire workers previously laid off during the downturn in business and increase wages from a base that was set during the last period of prosperity.

This process results in wage rates that continuously rise in all industries and wage rates that rise highest in the most profitable industries. Profitability may result from market power or efficiency. In an industry in which profitability arises from both sources, the tendencies described in this Article combine to produce perverse results.

As firms increase their efficiency, their profits increase. As their profits increase, they become, pro tanto, candidates for wage increases. Other factors aside, the more efficient industries thus are likely to become those that over time will pay higher wages than less efficient industries. Furthermore, because firms rarely reduce money wages, industries that at one time were highly efficient become saddled with a differentially high wage structure that remains in place even after they lose their efficiency lead.

B. WAGE COSTS AND INTERNATIONAL TRADE

The free-trade goals pursued by the United States since its entry into GATT in the immediate post-World War II period are based upon the premise that the entire world, including the United States, will be enriched when world resources are allocated in ways that best serve consumer wants. These goals are based upon a belief in the theory of comparative advantage in international trade: that when each nation specializes in pro-
ducing those products and services that it can produce at the lowest cost, the allocation of world resources is optimized.\textsuperscript{131} The industry-level bargaining practice followed in the United States erodes the comparative advantages (or exacerbates the comparative disadvantages) of the most successful United States industries.

The general wage level prevailing in a nation, under accepted international trade theory, can confer no comparative advantage or disadvantage upon that nation's producers in their competition for sales with foreign rivals. The general wage level, albeit low or high, confers no advantage or disadvantage on producers selling in foreign markets because the currency market in theory offsets the effects of the general wage level. The market for the nation's currency reflects any factor common to a nation's entire economy. A doubling of prices in the United Kingdom, for example, would not make English goods more expensive to an American buyer because the value of the pound in the currency market would fall to reflect such a doubling of prices in the United Kingdom. An American purchaser would pay the same amount of dollars to purchase twice the number of pounds and could use those pounds to purchase the same quality and quantity of English goods as he or she was able to purchase before the price rise.

In international trade the differential wage confers the wage cost advantage or disadvantage. An industry that pays its workers substantially more than the wage prevailing through all domestic industries incurs a wage cost disadvantage in comparison to its rivals in other nations whose wage costs do not vary so much from the norms prevailing in those nations.\textsuperscript{132}

The practice in the United States of negotiating hourly wage based compensation through industry-by-industry collective bargaining periodically transforms production efficiencies into wage costs. In so doing it perversely erodes or destroys comparative advantages initially possessed by United States firms in international trade. The process is simple: those advantages produce profits, and bargaining transforms those profits into wage costs raising differentially the costs of these most efficient industries. As a result the profitability of these firms that might otherwise have been shared with their employees is reduced or destroyed.

\begin{footnotesize}
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\item \textsuperscript{131} On the theory of comparative advantage, see P. \textsc{Samuelson}, \textit{supra} note 22, at 626-50.
\item \textsuperscript{132} \textit{See, e.g.}, M. \textsc{Kreinin}, \textsc{International Economics} 242-44 (5th ed. 1987).
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\end{footnotesize}
The seniority system, however, impedes the incentive of labor unions to change the focus of their negotiations to preserve or foster the comparative efficiencies of United States firms: the seniority system tends to make union negotiators responsive primarily to a core of long-term union members whose fortunes are substantially insulated from the fortunes of their employer and other workers.

If a United States industry that previously held a comparative advantage loses that advantage and retrenches, employment in that industry will fall, but the workers who are laid off will not necessarily be unemployed. If the domestic economy is operating at a full-employment level, those workers will find employment in another industry. This second industry, providing substitute employment to the laid-off workers, may or may not produce goods for sale in competition with goods produced abroad (traded goods). If it does produce traded goods and possesses a comparative advantage in their production and sale, ultimately it too will lose that comparative advantage as the scenario that eroded the comparative advantage of the first industry repeats itself. When this second industry loses its comparative advantage, it will also lay off workers who will be forced to seek substitute employment. This cycle tends to route workers away from traded goods industries into industries that do not compete with foreign producers.

Traded goods industries are among the most productive in terms of value added by each worker to their raw material inputs. When the collective bargaining scenario routes workers away from traded goods into nontraded goods industries, it often shifts workers from high (or potentially high) wage to low wage industries. Moreover, traded goods industries are often mass-production industries that have the potential of providing high wage employment to large numbers of relatively uneducated workers. The scenario, therefore, reduces the United States economy’s ability to meet the needs of its least fortunate members.

C. THE RELEVANCE OF INDUSTRY STRUCTURE TO THE EROSION OF THE MARKET POSITIONS OF UNITED STATES FIRMS

The phenomenon described here does not depend upon in-

133. The common expositions of the theory of comparative advantage assume universal full employment.
134. For a definition of traded goods, see A. KRUEGER, EXCHANGE-RATE DETERMINATION 27 & n.17 (1983).
dustry structure. Domestic producers lacking market power, and those retaining market power\textsuperscript{135} are equally vulnerable to this progressive erosion of their comparative cost positions.\textsuperscript{136} As industry cost positions erode away, increasingly uncompetitive prices and diminishing profits reflect the industries' growing cost disadvantages.

Because the transformation of employer profits into hourly wages can erode the comparative advantages of domestic industries, a change in collective bargaining demands in favor of profit sharing would help to preserve the comparative advantages of these industries in international trade. The transformation of collective bargaining in domestic industries in which producers lack market power, however, raises a number of difficult problems. If unions in competitively structured industries were compelled to bargain for percentages of employer profits, rather than hourly wage rates, a union's control over the supply of industry-specific labor would be neutralized. A union's right to bargain for hourly wages enables it to impose identical wage costs upon all domestic producers. In so doing the union acts as a coordinating mechanism through which the industry charges monopoly prices to the public and routes the revenue generated to the industry's workers. The union's behavior in this circumstance exactly parallels the actions of a patentee, channelling monopoly profits to itself by setting the

\textsuperscript{135} In many industries domestic firms compete with foreign producers for sales either in the United States or abroad. In a significant number of such industries, a small number of United States producers supply a large portion of the domestic market. In these circumstances the United States producers are likely both to possess significant market power in the domestic market and yet to be subject to substantial competition from foreign rivals. That situation prevails, for example, in the automobile and steel industries.

\textsuperscript{136} In industries in which domestic producers possess market power, prices can be expected to reflect that power. The insistence of domestic producers on exploiting their remaining power in an eroding market position is, of course, not helpful to their long-run market position vis-à-vis their foreign rivals. It would be a mistake, however, to ignore the impact of the hourly wage rate by attributing the eroding competitive position of those industries solely to the producers' exploitation of their remaining power in the domestic market. All of the parties—the producers as well as their workers—are economic actors. The short-run profit maximization of producers possessing market power requires them to set their price–output policy in relation to their marginal production costs. Increased labor costs, are therefore necessarily reflected in higher prices and reduced output. Similarly, in competitively structured industries, as profits are transformed into higher wage costs, domestic producers become progressively burdened with differentially higher costs than their foreign competitors, thus directly eroding their competitive position and compelling them to reduce production and employment.
royalties of its licensees at levels that produce monopoly prices in the licensees’ selling market.\textsuperscript{137} A general requirement that unions bargain in terms of profit sharing about compensation that is over a specified amount, therefore, would conflict with national labor policy. A requirement that unions in industries facing foreign competition bargain in terms of profit sharing would also have to address apparent conflicts between trade policy and the national policy allowing unions to exploit fully whatever power they can muster in the labor market.

In those industries in which domestic producers possess significant market power, however, unions and employers can significantly reduce the progressive erosion of their competitive position vis-à-vis foreign producers. A requirement that, above a specified compensation level, collective bargaining negotiations employ profit sharing rather than hourly wage measures of compensation would remove wages from employers’ calculations of their price and output policies. Such a requirement would thereby eliminate the continuous transformation of profits into permanent increases in wage costs. In the affected industries it would engender lower prices, greater production, and increased employment. It would also increase the overall compensation paid to labor employed in those industries.

In industries in which domestic producers exercise significant market power, a requirement that collective bargaining focus on profit sharing would not conflict with national labor policy, and at the same time it would further national antitrust policy. Such a requirement would also be consistent with the goals of allocative efficiency underlying the nation’s free trade policies, and it would further other national goals concerned with the integration of minorities into the economic life of the nation.

A requirement that collective bargaining focus on profit sharing does not conflict with national labor policy in industries in which employers possess significant market power, because unions in those industries do not need hourly wage agreements to coordinate employer behavior in their product markets. In those industries in which employers possess market power, a union controlling industry-specific labor necessarily participates

in the employers' exploitation of that power. Indeed, by entering into profit-sharing arrangements with producers possessing market power, a union can more fully exploit its own power in the labor market. The union can, if it so chooses, maximize the aggregate return to labor.

Profit-sharing agreements between producers and unions further the goals of the antitrust laws because those agreements reduce the restrictive effects on the product market that result from the combination of union control over the labor supply and employer power in the product market. As previously indicated profit-sharing agreements transform what is essentially a double monopoly into a single monopoly. As a result they exert a depressing effect on price and an expanding effect on production.

D. THE WAGE BARGAIN IN SWEDEN

In Sweden unions representing all manufacturing workers periodically bargain about wages with all manufacturing enterprises as a group. Similarly, a coalition of unions representing white-collar government employees negotiates with the government as employer. As a result of these periodic negotiations, the parties usually agree to a straight percentage wage increase that affects all industries across the board, regardless of their relative profitabilities.

This Swedish practice possesses several characteristics different from its American counterpart. The workers of the more profitable industries in Sweden do not share in the extra profits of those industries as they do in the United States. In the United States, part of General Motors's profits, for example, are captured in the wage bargain and thereafter become part of that company's labor costs. In Sweden the above average profits of Volvo remain with the company, and the labor costs of Volvo remain on par with those of other manufacturing enterprises, or at least are not subject to periodic upward differential readjustments. Because Swedish industries do not transform above average profits into labor costs, their labor negotiations do not carry the potential of burdening Swedish

138. Swedish unions pursue a "solidaristic" wage policy with the goal of obtaining equal compensation for workers performing the same work regardless of the productivity of the industry in which they are employed. See Flanagan, Efficiency and Equality in Swedish Labor Markets, in The Swedish Economy 129, 131-32 (B. Bosworth & A. Rivlin eds. 1987).
139. Id. at 129.
enterprises with labor costs that impede competitiveness and expansion.

Because the parties periodically increase wage rates at a set percentage applicable to all industries, wage bargaining could not affect the comparative advantage of any industry for purposes of international trade, even if Sweden allowed its currency to be freely traded. In contrast to the United States, the Swedish system protects efficient industries initially possessing a comparative advantage from losing that advantage in labor negotiations. Efficient and successful industries that produce above average profits do not bargain with industry-specific unions about wages for the next contract period when some of those above average profits will be transformed into higher labor costs. Because Sweden follows a policy that fosters uniform or converging wage rates across all industries, efficient industries could not lose their trading advantages in industry-specific collective bargaining, even if Sweden decided to allow its currency to be freely traded.

Sweden's policy of fostering a convergence of wage rates denies workers in prosperous industries a share in the prosperity of those industries—a result contrary to the American tradition. This nation could learn from Sweden, however, without abandoning its own traditions. By adopting a labor policy—where it is most needed—that would permit workers to share in the profits of prospering industries without suffocating those industries with ever-increasing hourly wage costs, this country could obtain the market advantages of the Swedish system. This Article contends that this policy is most needed in those areas of the United States economy in which oligopolistic industries bargain with unions controlling the industry labor supply. Transforming substantial parts of labor's return in such industries into profit sharing would permit workers in prosperous industries to participate in their employers' prosperity without also destroying their employers' comparative trading advantages.

140. Sweden's currency does not freely float on the international currency markets. Rather, it is pegged to a basket of currencies, of which the United States dollar is a major ingredient. Because its currency does not freely float, the effects of wage adjustments on the international trading position of Swedish industry are not the same as similar adjustments would be on United States producers.

VII. THE RIGIDITY OF THE WAGE BARGAIN

A. THE INSENSITIVITY OF WAGES TO FALLING DEMAND

Various writers have observed the so-called “stickiness” of labor costs: prices do not fall in response to adverse economic conditions as rapidly as does demand for products. In response almost all industries adjust to falling demand by laying off workers, rather than by lowering the wages of employed workers.

This phenomenon is intimately related to the political—business cycle that has existed at least since World War II. Business profits invite labor demands for higher wages. When business turns unprofitable, employers adjust through layoffs rather than wage reductions. Hourly wage rates remain at the higher level engendered by the boom that preceded the recession. When the government stimulates demand—as it generally must—to end a prolonged recession, the stimulus must engender production from firms bearing the high labor costs created in the earlier boom. The setting of wage rates thus proceeds in a ratchet-like manner: wages almost always increase and never decrease, and recessions are ended by demand stimuli sufficiently great (in nominal dollars) to induce production at the wage rate set during the next preceding period of prosperity.

This state of affairs has given rise to a variety of new insights in economic theory. Monetarists have shown how unemployment in high-wage industries may give rise to inflation when government authorities increase the money supply sufficiently to restore demand for the industries’ products adequate to cover costs. This state of affairs has given rise to the rational expectations school of analysis, so named because all the actors can anticipate the stages of the scenario. The rational expectations school points out that, because participants can predict the stages in advance, government intervention becomes less effective as more and more participants predict that intervention.

B. PROFESSOR WEITZMAN AND THE “SHARE ECONOMY”

Professor Martin L. Weitzman has recently argued that substantial societal benefits would accrue from altering the conventional arrangements under which employers pay work-
ers a fixed hourly wage.\textsuperscript{143} He advocates a wage system in which workers take a substantial part of their remuneration as a percentage of an index reflecting employer output. Such an index could be gross receipts, gross profits, net profits, or another indicator varying directly with output.\textsuperscript{144}

Weitzman argues that under the current convention, wages are fixed but employment is left in the discretion of the employer. When demand for the employer's product falls, employers reduce output and lay off workers. Weitzman points out that the labor contract could be arranged differently so that wages, rather than employment, reflect reduced demand.

Weitzman believes that a restructuring of the labor contract by unions and employers in this manner would ease the effects on workers of changes in demand. Workers employed by firms faced with a declining demand for their products would incur a slight wage reduction rather than substantial layoffs. The unemployment that accompanies shifting demand patterns would be transformed into adjustments in remuneration. Workers, Weitzman argues, would find these adjustments more bearable than job losses.

Weitzman also argues that significant macroeconomic effects might be produced by a practice in which firms reacted to negative shifts in demand by reducing wages rather than by laying off workers.\textsuperscript{145} This manner of adjustment by a large proportion of the manufacturing firms would minimize the negative effects of their adjustments on overall purchasing power and dampen the extremes of the business cycle.\textsuperscript{146}

Weitzman recommends that employers and unions switch from the typical labor contract that provides a fixed hourly wage to one that allocates to labor a substantial share in gross receipts, gross profits, net profits, or other index of output. Construction of the labor contract in these terms would reduce the marginal cost to the employer of hiring an additional worker to an amount less than the average cost of its preexisting workers. The result is an impetus to employers to hire additional workers, expand production, and absorb reductions in demand by cutting prices rather than by cutting production and laying off workers.

\textsuperscript{143} M. \textsc{Weitzman}, \textit{The Share Economy: Conquering Stagflation} (1984).
\textsuperscript{144} \textit{Id.} at 3, 84-85.
\textsuperscript{145} \textit{Id.} at 107.
\textsuperscript{146} \textit{Id.} at 105-07.
Although Weitzman adverts only incidentally to the seniority system that engenders conflict of interests among workers, his recommended "share contract" nonetheless avoids the negative effects of that interest conflict: if employers adjust to falling demand by reducing wages rather than by laying off workers, they treat all workers alike. By contrast, if employers adjust through layoffs, they leave unaffected the workers with the greatest seniority. In avoiding the internal worker conflict of interest produced by the seniority system, Weitzman's proposal also avoids the negative effects of these conflicts upon output. Weitzman's proposal thus is a device for stimulating employment, production, and profits, even in the face of falling demand.

Weitzman, however, does not explore a number of problematic features of his proposal. Because the employer's marginal cost of employing an additional worker is less than the average cost of the workers already employed, the proposal contemplates that in every industry in which workers receive above average compensation, that compensation will be subject to a process of continuous erosion. Every new worker hired lowers the compensation of the workers previously hired. The industry reaches the theoretical limit of production expansion only when its compensation equals compensation in all other industries. Although unions are free to negotiate about profit sharing, their power to affect the product market would be taken away from them, even in competitively structured industries.

Weitzman's proposal is not dependent upon the market structure prevailing in any industry, nor is it designed solely to reduce or eliminate the restrictive effects that employer market power has upon employment and compensation. Under his proposal labor could not maximize its return in a competitively structured industry: because Weitzman's proposal would prevent industry-wide unions from imposing a fixed, hourly wage rate, they could not impose set labor costs upon all sellers. Share contracts would radically alter the constraints upon producers in competitively structured industries. Union control over labor supply would no longer be converted into monopoly price-output restrictions in the product market for the benefit of workers. Although his proposal would produce a result in oligopolistically structured industries similar to that proposed

147. Id. at 103, 107-09, 116, 133.
148. See supra notes 67-86 and accompanying text.
in this Article, Weitzman’s proposal would substantially reduce the return to labor in competitively structured industries whose labor supply is controlled by an industry-wide union. Rather than attempt to maximize labor’s return, Weitzman intends to achieve full employment at a market-determined labor rate more rapidly than present labor conditions permit.

Unlike Weitzman’s more grandiose proposal, this Article accepts as national policy the right of industry-wide unions to exploit fully whatever power they can muster in their industry-specific labor markets. It asks, however, that in oligopolistic industries—in which unions cannot exercise power in the labor market independently from employer power in the product market—unions exercise power for the benefit of industry labor as a whole. In context this means that union bargaining strategy must be modified to seek compensation in the form of profit sharing. This limited modification of union prerogatives would benefit not only industry-specific labor, but employers and the public as well.

Although Weitzman’s concerns differ from those set forth in this Article, his recommendations are consistent with those made here. His analysis, therefore, provides grounds additional to those made here for pursuing labor law reform.

VIII. LABOR NEGOTIATION AND THE PUBLIC INTEREST: THE LARGER PERSPECTIVE

Fifty years ago Justice Stone wrote in a now famous footnote in United States v. Carolene Products that a “more searching than normal” judicial inquiry may be required in reviewing statutes directed against “discrete and insular minorities” for whom the normal protections provided by the political processes were absent. Since then the Supreme Court has been sensitive to the plight of groups unable to use the political process effectively. The preceding discussion has made it abundantly clear that the collective bargaining processes minimize the inputs of workers with the least seniority and effectively exclude other workers from those processes altogether.

Unions are unresponsive to two groups of workers: those who are not, but could be, employed in an industry, and those who are employed but have the least seniority. A union has a necessary propensity to trade jobs for higher wages for its members. American labor legislation is premised upon the

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149. 304 U.S. 144, 152 n.4 (1938).
view that such a trade-off is not inherently objectionable. Society, however, has never seriously questioned whether limits should be set to the extent of that trade-off or under what circumstances limits should be set. Once a union sets its wage goals (and therefore implicitly accepts concomitant employment limitations), it has no occasion to listen to those who would have filled potential jobs that are traded away before they arise. Likewise, when it sets wage goals, the union has necessarily decided to trade away some jobs held by its own members with the least seniority.

The first group of workers—those who never become employed in the industry—obviously never participate in the union decision-making process. The second group—workers with the least seniority—nominally participate in the union's internal processes, but the seniority system infects those processes by making them unresponsive to these marginally protected workers. When a union makes decisions that maximize the aggregate economic benefit to labor as a whole, it can justify the trade-off as compatible with the intentions of the Congress that enacted the Wagner Act. Yet when the trade-off of jobs for higher wages reduces the aggregate economic benefits to labor and shrinks the number of higher-paying employment opportunities for minorities, it becomes more difficult to justify.\textsuperscript{150} The unresponsiveness of union processes to the two identified classes of workers then stands as a naked assertion of power by some workers to benefit themselves by imposing disadvantages upon their colleagues.\textsuperscript{151}

\textsuperscript{150} This Article argues that the seniority system tends to skew union decision making toward a strategy that results in reduced employment in concentrated industries and that the burden of this reduced employment is borne to a significant degree by minorities. Whether or not significant numbers of minority workers are protected against layoffs by the seniority system is a question this Article does not address. For the view that many minority workers are protected by the seniority system, see R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 134-35 (1984).

\textsuperscript{151} Commenting on the substantive results of union organization, Professor Epstein sees collective bargaining resulting, inter alia, in wealth redistribution from unorganized workers to organized workers. Asserting that "[t]o make union members wealthier is to make poorer ... the nonunion workforce and the poorer members of the general population," Epstein questions "the moral case for treating union members, as such, as the favored class of wealth redistribution." Epstein, \textit{supra} note 1, at 1362. \textit{But see} R. FREEMAN & J. MEDOFF, \textit{supra} note 150, at 150-61 (asserting that nonunion workers in large firms and in firms threatened by union organization benefit from unionism). Although this Article proceeds from a different premise, Epstein's description of the redistributive effects of organization provides a background to the procedural issue discussed in the text. The law should impose some limits on the
The legal system cannot escape responsibility for this result. This nation has established a labor policy that encourages wage-employment trade-offs to be made through processes that exclude two peculiarly vulnerable classes of workers. Congress enacted the NLRA to improve the economic status of workers, but the Act's mechanisms are flawed. Under its structure employers must bargain on wages and working conditions, including seniority, with an organization primarily responsive to its most senior members. This structure not only fosters the union's replication of a producer monopolist's exercise of market power, it skews union bargaining strategy towards positions more restrictive than those taken by a market monopolist. When these restrictive effects reduce the overall economic returns available to labor, reform becomes necessary.

No major change in labor law is required to remedy this flawed process. The basic objective of the Wagner Act—to improve the economic conditions of workers through mechanisms involving worker participation—can be achieved while remedying this flawed procedure. What is required is a slight shift in the bargaining posture of labor unions in those situations in which employers possess significant power in the product mar-

152. In Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), the Court showed some awareness of how a seniority system predisposes union decision-making processes against junior workers. Ironically, in that case the Court's ruling protected the seniority of certain (white) teachers under the Michigan Teacher Tenure Act. Id. at 283-84 (plurality opinion). Their seniority had been threatened by provisions of a collective bargaining contract governing layoffs and designed to preserve minority faculty representation. Id. at 270-71. Those provisions mandated that "at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." Id. at 270. These contract provisions were characterized by Justice Marshall in dissent as a "compromise [that] avoided placing the entire burden of layoffs on either the white teachers as a group or the minority teachers as a group." Id. at 299. Writing for the Court, Justice Powell ruled that a majority composed of the most senior teachers could not waive the tenure rights of their less senior colleagues:

[T]he petitioners before us . . . are not "the white teachers as a group." They are Wendy Wygant and other individuals who claim that they were fired from their jobs because of their race. That claim cannot be waived by petitioners' more senior colleagues. In view of the way union seniority works, it is not surprising that while a straight freeze on minority layoffs was overwhelmingly rejected, a "compromise" eventually was reached that placed the entire burden of the compromise on the most junior union members. The more senior union members simply had nothing to lose from such a compromise.

Id. at 281 n.8 (plurality opinion).
ket. In those situations domestic labor would benefit overall by a union shift toward seeking increased compensation primarily through profit-sharing arrangements rather than through increases in hourly wages.

IX. REDEFINING THE ANTITRUST LABOR EXEMPTION

A shift in bargaining toward profit-sharing objectives in those industries in which employers possessed substantial market power could be achieved through reformulation of the antitrust labor exemption. This Article proposes a redefinition of the antitrust labor exemption that will exclude, prima facie, the combination of union control of the industry-specific labor supply with employer power\textsuperscript{153} in the product market. Under this redefinition of the labor exemption, courts would presume that agreements between oligopolistic or monopolistic employers and labor unions possessing power over the industry labor supply fell within the scope of the antitrust laws. As previously argued collective-bargaining agreements negotiated in hourly wage terms would produce unduly restrictive effects in these industries. Because collective bargaining agreements employing a profit-sharing method\textsuperscript{154} would not produce the doubly restrictive effect on the product market of an hourly wage agreement, proof that the agreement employed the former measure, or otherwise avoided excessive restrictive effects on the product market, would rebut the presumption. Once the

\textsuperscript{153} The existence of employer power in the product market should be no more difficult to establish in this context than in other circumstances in which the establishment of market power is a necessary condition to proof of an antitrust violation. See, e.g., Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284, 291 (1985) (relevance of dominant position to illegal boycott). Market power in the product market should be presumed when that market is highly concentrated. \textit{Cf.} United States v. General Dynamics Corp., 415 U.S. 486, 497-504 (1974) (statistics regarding market share and concentration are primary indicators of market power). Finally, the merger guidelines of the United States Department of Justice provide a workable means of identifying high levels of concentration. \textit{See} U.S. Department of Justice 1984 Merger Guidelines § 3.11(c), 49 Fed. Reg. 26,823, 26,831 (1984), reprinted in 2 Trade Reg. Rep. (CCH) ¶ 4490, 4493 at 6879-14 (June 14, 1984).

\textsuperscript{154} Under this approach the precise definition of profits could be left to the parties. The purpose of substituting profit sharing for hourly wage measures of compensation is to eliminate the disincentives to output expansion that the latter measure engenders. Whether the parties decided to include or to exclude extraordinary gain within the scope of profit sharing would be a matter that the law could ignore. Under either alternative the employer's incentive to increase output would remain, and both employer and employees in the aggregate would benefit from increases in output.
presumption was rebutted, the labor exemption would then apply. The antitrust laws, in short, should intervene in the bargaining context just enough to preclude agreements that restrict the product market more than is necessary to maximize the aggregate return to labor.

Imposing a duty on the parties to employ the least restrictive alternative is, of course, a traditional antitrust approach. For the reasons stated in this Article, this least restrictive alternative would require labor unions to bargain with oligopolist employers for increased compensation measured primarily in terms of the percentage of profits allocated to labor. This type of bargaining avoids the doubly restrictive effects of monopoly pricing by a powerful input supplier and a powerful output producer and maximizes the interests of employers, the public, and workers in the aggregate in that context. Under the reformulated labor exemption proposed, the Department of Justice, employers, or adversely affected workers themselves would have standing to institute civil suits to invalidate collective bargaining contracts which fell outside the labor exemption.

It would be both unnecessary and impractical, however, to require that unions and employers negotiate the entire compensation package in profit-sharing terms. Employers could provide workers with a portion of their compensation calculated in hourly wage terms if the workers so desired, without detracting from the economic benefits of profit sharing. Thus an employer and union could agree upon a percentage division of the firm’s profits, with a proviso that workers would receive a guaranteed minimum calculated in hourly wage terms; the effect of such an agreement on the employer’s price–output policies would be the same as without the proviso. If workers found this form of agreement more acceptable, no policy reason exists for opposing it.

The antitrust labor exemption is composed of a so-called statutory exemption and a nonstatutory exemption. Because the nonstatutory exemption applies to union–employer agreements, it is the nonstatutory exemption which most urgently requires redefinition. And because the nonstatutory definition is a judicial creation, the courts have the power to redefine it. This Article accordingly proposes that the courts redefine the nonstatutory labor exemption as it applies in concentrated industries. That judicial redefinition will, of course, require the courts to formulate and use criteria of concentration, but they

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155. See Campbell, supra note 1, at 1054 & n.283.
are capable of such tasks, as their decisions applying section 7 of the Clayton Act demonstrate. In concentrated industries the exemption should be judicially redefined to apply only to those collective-bargaining agreements that avoid the doubly restrictive effects produced when employers enter into agreements with a union controlling the industry labor supply and those agreements effectively set worker compensation under an hourly wage standard. As noted above, agreements measuring compensation increases by percentages of profits avoid those doubly restrictive effects.

Justice Black's opinion in *Allen-Bradley* contained dicta suggesting that a union which coerced an employer into anticompetitive behavior by striking might be protected by the statutory exemption contained in section 20 of the Clayton Act so long as the employer capitulated to the union demands without entering into an agreement.\(^{156}\) Black's suggestion provides a theoretical means for a union determined to seek compensation solely under an hourly wage measure to achieve that goal, even if the nonstatutory exemption were redefined as proposed here. This dicta, however, is based upon an unduly literal reading of section 20. That section is intended only to immunize strikes and other means of labor warfare, not to permit unions to achieve goals that would fall outside of the nonstatutory exemption if they were reached through agreement.

To put to rest doubts about whether section 20 would provide a path for a union controlling the industry labor supply to evade the goals of the redefined nonstatutory exemption proposed above, Congress should redefine the labor exemption by legislation. That legislation would deny an antitrust exemption to collective bargaining agreements between a union controlling industry labor supply and employers in concentrated industries that used hourly-wage measures to set compensation above a set minimum. A labor exemption redefined by legislation could speak with a degree of precision that would evade the courts. Such legislation could embody definitions of concentrated markets, control of industry labor supply, and compensation agreements that are effectively hourly wage agreements and those that are not. Because it would resolve all doubts about the effects of section 20 and because it could speak precisely to all of the technical questions involved in a revision of the labor exemption, a legislative revision of the entire antitrust exemption is preferable to a judicial revision of the non-

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156. *See supra* notes 97-99 and accompanying text.
statutory exemption. Until Congress is able to act, however, courts can give the best effect to the intentions that Congress manifested in the antitrust laws, the labor laws, the employment acts, and the civil rights statutes by redefining the labor exemption in the manner proposed in this Article.

CONCLUSION

Antitrust laws further consumer welfare by preventing un-economic restrictions on output. In the NLRA, Congress sought to give workers a means for participating in the determination of their compensation through collective bargaining and for sharing in increasing returns to capital. The almost universally observed seniority system, however, creates organizational incentives for labor unions to skew their bargaining goals in a direction that benefits a core body of high-seniority workers, thereby creating undue disadvantages for other workers and the public. When these skewed bargaining goals affect negotiations between a union controlling the industry labor supply and employers in an oligopolistically structured industry, the result is conflict with the consumer-welfare goal of the antitrust laws and a less than maximum return to labor.

This Article proposes that courts and Congress redefine the labor antitrust exemption to apply only to collective-bargaining agreements that do not involve both a union controlling the industry labor supply and employers in an oligopolistically structured industry, unless the agreement utilizes a profit-sharing wage structure rather than an hourly-wage standard. This proposal results in only a slight change in collective bargaining in concentrated industries, a change that would benefit the overall interests of labor. Moreover, the redefinition of the antitrust labor exemption would further both the basic goals of the antitrust laws and the international competitiveness of United States industry as well as potentially assisting in the economic advancement of educationally disadvantaged workers.
APPENDIX

The demand for industry-specific labor is derived from the demand for the industry's product. The demand for labor by any firm depends on the net marginal revenue product of labor, that is, what an additional worker could add to that firm's net revenues. Because the additional worker will generally require other inputs (such as raw materials) to produce additional output for the firm, the value of the additional worker's contribution to the firm is the value of the marginal worker's physical product less the cost of additional nonlabor input employed by that worker, or the net marginal revenue product of the additional worker.

In the diagram below, the curve DD' represents the demand for the industry's product. Curve BN is the result of subtracting nonlabor inputs (DB) from the demand for the industry's product (DD'). Labor cost per unit of output could not exceed the amounts represented by curve BN. A union controlling industry labor supply would perceive curve BN as representing the maximum labor cost that could be imposed upon industry producers corresponding to varying amounts of industry output. Should the union decide to maximize the aggregate return to labor, it would seek a wage corresponding to unit labor cost OE. At unit labor cost OE, output in a competitively structured industry would be OL; the total labor cost incurred by the industry would be represented by the rectangle OLKE; price would be OC=LM. Employment would be OL (output) divided by the average physical product produced per
worker. Wages would be OE (unit labor cost) times output per worker.

In a monopoly industry, a union controlling the industry labor supply would be governed by curve BL. Curve BL is the monopolist producer's marginal revenue curve (DM) less nonlabor inputs (DB). If the union sought to maximize the aggregate return to labor, it would seek a wage corresponding to unit labor cost OE. At unit labor cost OE, industry output would be OF; the total labor cost incurred by the industry would be represented by the rectangle OFGE; price would be OA=FI; the monopoly profits of the producer would be ACHI. Employment would be OF (output) divided by the average physical product produced per worker. Wages would be OE (unit labor cost) times output per worker.

Both the aggregate return to labor and the profits to the producer could be increased, however, if the producer and the union could find a way to share the larger revenues that would be obtainable from increased production. If production were expanded to OL, revenues less nonlabor inputs would be equal to the amount represented by the rectangle OLKE, an amount that exceeds the sum of the return to labor (OFGE) plus the monopoly profits of the producer (ACHI) under the union goals described in the last paragraph.

One way for labor and a monopoly employer to achieve this result is for their respective returns to be set in advance as percentages of net revenues (that is, revenues less nonlabor inputs). Under such an approach applied to a (fully unionized) monopolistically structured industry, the return to labor would be less than it would be in a (fully unionized) competitively structured industry, but it would exceed the aggregate return under an hourly-wage measure. Wages would be less than under an hourly-wage measure and less than wages in a competitively structured industry, but the union's control of the labor market would ensure that wages would be set at a higher level than would prevail in a competitive labor market. Moreover, larger numbers of workers would be employed at those supra competitive wage levels than under the present system.