2018

Economic Analysis in Labor Regulation

Hiba Hafiz

ECONOMIC ANALYSIS OF LABOR REGULATION

Hiba Hafiz[*]

___ WIS. L. REV. ___ (forthcoming 2018)

In an era when administrative agency actions succeed or fail based on the thoroughness and rigor of their cost-benefit analyses and expertise, the 1940 statutory ban on hiring economists at the National Labor Relations Board (NLRB) is a shocking anachronism. The ban, accompanied by the Board's failure to solicit external expertise, severely limits the success of the Board's actions on judicial review, its institutional competency, and its ability to assess the economic effects of its labor regulation in achieving a central goal of the National Labor Relations Act: equal bargaining power between workers and their employers that secures competitive wages and increases worker purchasing power.

This Article proposes the reestablishment of a Division of Economic Research at the NLRB to integrate the study, analysis and propagation of labor-related social science into the Board's enforcement and policy-making. In doing so, it draws on the history of the Board's short-lived Division of Economic Research (1935-1940) and on the broader development and incorporation of economic and social scientific expertise into the administrative state to consolidate best practices for a new Division. Rejecting the development of expertise through interagency working groups (IWGs) and Office of Information and Regulatory Affairs (OIRA) review as insufficient, the Article provides the first roadmap of its kind on how a new internal "think tank" could integrate micro- and macroeconomic analysis into the Board's labor regulation. The work of a new Division would not only develop and hone the Board's ability to achieve the Act's goals through rulemaking and adjudication, but it would also enhance the standing of the Board before the courts and the Board's ability to contribute to national debates on how to fight inequality and reverse the dramatic decline of labor's share of national income relative to capital.

---

[*] Harry A. Bigelow Teaching Fellow and Lecturer in Law, University of Chicago. The author is grateful for invaluable comments from William Baude, Adam Chilton, Daniel Hemel, Aziz Huq, Jonathan Masur, Randall Picker, Michael Pollack, Laura Weinrib and the Chicago Bigelow Fellows.

TABLE OF CONTENTS

INTRODUCTION

In 1935, when the National Labor Relations Act (NLRA) was passed to protect and encourage workers to join collectively and lift themselves out of the Depression, union density was at 16.6 percent.[1] Union density

---

[1] Stanley Lebergott, *The American Labor Force*, *in* AMERICAN ECONOMIC GROWTH 220 (Lance Davis et al. eds., 1971)

is now at 10.7 percent overall, and in the private sector regulated under the NLRA, just 6.4 percent.[2] Then, as now, the likelihood of a broad, coordinated and unified workers' movement rising to combat unprecedented inequality, pervasive corporate concentration, and widespread precarious employment was uncertain.[3] But between 1935 and 1940, a small team of attorneys, economists and labor relations experts at the constitutionally precarious National Labor Relations Board (NLRB) weathered *Lochner*-era persistent judicial dismantling of the New Deal, mobilized Congressional enmity, potent corporate challenges, union in-fighting, a culture of red-baiting, and the fits and starts of a fractured workers' movement just beginning to understand its newfound rights to not only defend the Board's jurisdiction over hostile private employers but do what was widely believed to be impossible: win Supreme Court recognition of the NLRA's constitutionality and begin institutionalizing organizing and collective bargaining rights in private workplaces.[4]

An underacknowledged secret weapon of that successful fight was the Board's now statutorily banned Division of Economic Research (DER).[5] And its abolition in 1940—due to a combination of Congressional anti-labor sentiment, red-baiting, employer resistance to the use of economic data and internal betrayals–played no small part in the erosion of worker protections as well as the delegitimizing of workers' collective organizing efforts and the NLRB's expertise before the courts, political branches and the public at large. This Article tells the story of how, in an age of the dominance of cost-benefit analysis, the rise of administrative agency expertise, and the innovative deployment of "big data" and behavioral science, the definitive source of governmental labor regulation has atrophied in the absence of robust economic and social scientific analysis. Drawing from the history of the DER and administrative agency best practices for incorporating social scientific work, it proposes a return to integrating the study, analysis and propagation of labor-related social science in the Board's enforcement and policy-making. The work of a new DER would not only develop and hone the Board's ability to ensure a key purpose of the NLRA—equalizing bargaining power between labor and

[2] Bureau of Labor Statistics, U.S. Dep't of Labor, *Union Members – 2016* (2017), https://www.bls.gov/news.release/union2.nr0.htm.

[3] *See, e.g.*, THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014); NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 20-53 (2002); JAMES GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD 177 (1981); GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD (1974).

[4] *NLRB v. Jones & Laughlin Steel Corp,* 301 U.S. 1 (1937).

[5] *See* 29 U.S.C. § 154(a).

capital—in its rulemaking and adjudication, but it would also facilitate a broader role for the Board in national debates about how to fight inequality and reverse the dramatic decline of labor's share of national income.

Part I of the Article provides an overview of the absence of economic analysis at the Board, beginning with the short-lived but vigorous work of the DER and the external and internal reasons for its demise. It then details how, following the ban on hiring economists, the Board has failed to solicit economic and social scientific expertise through rulemaking and *amicus curiae* briefing in adjudication. Part I concludes with a discussion of the adverse regulatory and institutional effects of the absence of Board expertise on workers' right to organize and bargain collectively.

While the Board has lagged behind, other agencies have dramatically progressed in their integration of economic and social scientific analysis in their regulatory functions. The rise of mandated cost-benefit analysis, more aggressive judicial review and institutional knowledge have set the stage for significantly advancing agency expertise. Part II discusses the broader role of economic analysis in the administrative state, cataloguing how agencies are moving beyond mere cost-benefit analysis, technical litigation support, neoclassical economic presumptions, and applied microeconomics to becoming "think tanks" for broader economic analysis and policy-making, including utilizing advances in behavioral science, "big data" collection, and even macroeconomic modeling to assess economy-wide impacts of regulation.

On this foundation, Part III considers three institutional mechanisms for integrating economic analysis into labor regulation. It reviews the advantages and disadvantages of forming an interagency working group, or labor "superagency"; coordinating review of NLRB rulemakings with the Office of Information and Regulatory Affairs (OIRA); and developing an internal DER at the Board, ultimately favoring the latter.

Part IV begins to imagine how the new DER could utilize microeconomic analysis in a range of areas, beginning with enforcement and policy-making, but extending more broadly into data collection and analysis as well as research projects that could reset the Board's priorities in adjudication and rulemaking. Taking the Board's failed Notice Posting Rule requiring employers' posting of employees' NLRA rights in the workplace, it imagines how the Rule could have been successfully guided through the rulemaking process and judicial review with the help of economic and social scientific evidence.

Extending the discussion from microeconomic to macroeconomic analysis, Part V begins by highlighting the macroeconomic effects of labor regulation on labor's share of national income, rising inequality, and enhancing worker output. After considering these effects, it outlines research opportunities for a new DER that could resituate the Board in its crucial role as an agency working to enhance workers' purchasing power and productivity. Part V concludes with a case study exploring how a new DER could dramatically impact current doctrine in "independent contractor" misclassification cases. Specifically, it discusses how the new Division could gather and analyze data to forecast the economy-wide effects of narrower and broader interpretations of the "independent contractor" classification, which places millions of workers outside of the NLRA's protections and the Board's jurisdiction. It thus aims to demonstrate how harnessing the benefits of advances in social scientific tools and analysis would not only enhance the NLRB's expertise and legitimacy, but could allow it to reshape the national debate on the importance of workers' collective rights as a socio-economic matter.

I. ABSENCE OF ECONOMIC ANALYSIS AT THE NLRB

The NLRB is the only administrative agency to which Congress has expressly banned the "appoint[ment of] individuals for . . . economic analysis."[6] In an age where failing to engage in robust cost-benefit analysis can be the death knell of even independent agency rulemaking,[7] the Congressional ban is at best an anomaly. But the performance of economic analysis was not always prohibited at the Board. In fact, the work of the Board's short-lived Division of Economic Research (DER) (1935-1940) was critical to the Board's early litigation strategy and the Supreme Court's determination of the NLRA's constitutionality. In this Section, I discuss the context and bases for the Congressional ban as well as the Board's subsequent failure to solicit economic expertise through engaging in rulemakings or incorporating the expertise of *amici curiae* in adjudications. I then assess the institutional and regulatory effects of the

[6] 29 U.S.C. § 154(a).

[7] *See, e.g.*, *Business Roundtable v. SEC*, 647 F.3d 1144, 1146 (D.C. Cir. 2015) (striking down SEC proxy access rule for failing to sufficiently address its impacts on "efficiency, competition, and capital formation" in a cost-benefit analysis); *Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015) ("The [EPA] must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary."); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991) (striking down EPA asbestos regulation for failing to demonstrate it was the least burdensome means of regulating health hazards in a cost-benefit analysis).

Board's absence of economic expertise on labor regulation.

A. Ban on Economic Analysis

The NLRB's Division of Economic Research was established in the shadow of the Supreme Court's assault on New Deal legislation, and more specifically, its *Schechter Poultry* decision invalidating, on commerce clause and other grounds, a provision of the National Industrial Recovery Act (NIRA) that authorized Executive approval of "codes of fair competition" for the poultry and other industries.[8] Edwin S. Smith, a member of the newly-founded Board, advised its first Chairman, J. Warren Madden, that the Board needed "an 'industrial economist' thoroughly versed in the history of labor relations in various industries in this country" to furnish the Board with "material adequately[,] both in writing and as a witness," on the connection between collective bargaining failures and unlawful union-busting campaigns on the one hand and strikes as disruptions of interstate commerce on the other.[9]

In advertising for the Division's Chief Economist, the Board had high standards, requiring

> a minimum eight years of responsible, successful experience of a highly technical nature in economic research, or in college teaching of economics, or in a combination of such research and teaching. This experience must have included at least four years of experience in research in labor economics or in college teaching in the field of labor economics, or in a combination of such research and teaching; and, in addition, must have included at least one year of supervision either of a corps of research economists or of a college or university department of economics. The experience and writings of the applicants must clearly demonstrate outstanding attainment in the field of labor economics and ability to perform the above-mentioned duties.[10]

---

[8] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935).

[9] James Gross, *Economics, Politics, and the Law: The NLRB's Division of Economic Research, 1935-1940*, 55 CORNELL L. REV. 321, 323 (1970) (citing NLRB files, Memorandum from Edwin S. Smith to J. Warren Madden, Industrial Economist, Aug. 31, 1935)). For the Board's constitutional strategy, *see* GROSS, RESHAPING OF THE NLRB, *supra* note 3, at 173-88.

[10] Letter from David J. Saposs to Reps. Murdock and Healey, Apr. 17, 1940, ACLU

The degree of expertise that the Board sought was a clear indication of the import of the Chief Economist's role in the new Board, but the details of that role were vague from the start. When David J. Saposs, the first and only Chief Economist in the Division, was recommended to the position by Harry A. Millis (a member of the pre-Wagner National Labor Board) and Francis Biddle (the pre-Wagner Board's Chairman), then-Chairman Madden told Saposs he "ha[d]n't the slightest idea what you can do in the Board or for the Board" to derive a plan of economic research adequate to the daunting task assigned.[11]

Organizationally, the Division at its founding had equal status with the Legal Division, the Trial Examining Division, and the Division of Publications.[12] Saposs, a labor economist trained at the University of Wisconsin in the institutional economics school as John R. Commons' student and co-author,[13] had no shortage of work or ideas. While Saposs selected diverse staff with a wide range of backgrounds—labor economists, social workers, political scientists, historians, journalists, monetary theorists—their central focus was the study of the "actual experience" of labor relations in the United States.[14] Throughout his tenure, Saposs would invite industry experts from labor journalists to government administrators and the Reuther Brothers to give the staff "advice into their research, organization, mediation, or whatever else was of current concern[,] this wide-ranging group representing all political hues."[15] He would also hold "staff seminars" to bring in the newest research or labor story of the day as examples to engage "pedagogical-administrative devices . . . to embark upon new studies."[16] For example, he would alert the staff: "I read in the paper this morning that a company has bargained with the union, but has simply refused to put the agreement in writing. Is this a refusal to bargain in good faith? What does 'good

Archives.

[11] Gross, *supra* note 9, at 323 & n.12 (quoting Oral History Interview with David J. Saposs, July 22, 1968, at 5, Labor Management Documentation Center, Cornell University).

[12] *Id.* at 324 & n.16 (quoting Saposs Interview, *supra* note 11, at 11).

[13] *See, e.g.*, JOHN R. COMMONS ET AL., HISTORY OF LABOR IN THE UNITED STATES (1918).

[14] Morris Weisz, *Research as a Tool of Administration: The Contribution of David J. Saposs*, in THE LABOR MOVEMENT: A RE-EXAMINATION 102 (Jack Barbash ed., 1967).

[15] *Id.* at 104.

[16] *Id.* at 102.

faith' mean? We'll have to study this."[17]

And study it they would. The work of the Division took on many forms. Primarily, the Division: (1) provided litigation support to Board enforcement actions; and (2) drafted general studies on labor relations problems as guidance for Board policy.[18] In terms of litigation support, the Division: assisted in drafting complaints by investigating the Board's jurisdiction over employers based on corporate organization and assets as well as the level of their interstate operations; collected economic materials as evidence in litigation from economic sources on industrial organization and labor economics as well as government reports; and provided detailed economic review of those employers' written agreements, employment records, labor policies and activities, history with labor disputes and the existence *vel non* of company rather than independent unions. For this, Saposs drew on his extensive labor economics research with Commons as well as on his prior work in a "think tank" he had founded with leading labor economists—the "Labor Bureau, Inc."—that researched and prepared economic data for union use in collective bargaining.[19]

In terms of policy guidance, the Division prepared research memoranda, research outlines, and printed bulletins for the Board's use in future cases, general policy planning, and public consumption.[20] These studies were initiated by the Division or evolved from individual cases for broader industry-wide or economy-wide studies. These included studies on "Effective Collective Bargaining," "Employer Labor Policies and Activities," "The Structure of AFL Unions," "The Role of Supervisory Employees in Spreading Employer Views," "Governmental Protection of Labor's Right to Organize," and in a classic example, "Written Trade Agreements in Collective Bargaining," which expanded the economic materials prepared for the Board's *Inland Steel* case evaluating whether written rather than informal trade agreements were integral to collective bargaining and labor peace.[21] The Division also investigated the broader history of collective bargaining failures by industry, company interference and domination of unions, businesses' profits and losses to determine the good or bad faith of employers in refusing to entertain employees' wage

---

[17] *Id.*

[18] Gross, *supra* note 9, at 324-25.

[19] E.L. Oliver, *The Economist and the Labor Union—Then and Now*, in THE LABOR MOVEMENT, *supra* note 14, at 114-15.

[20] Gross, *supra* note 9, at 326.

[21] *Id.* at 326; GROSS, RESHAPING OF THE NLRB, *supra* note 3, at 177; *Inland Steel Co. v. NLRB*, 109 F.2d 9 (7th Cir. 1940).

demands, and even the effect on collective bargaining of the presence of members of the public in collective bargaining conference rooms.[22]

In this work, Saposs "supplied the economic groundwork for the division's thinking" as well as the foundational economic materials for cases working their way through to ultimate constitutional challenge at the Supreme Court, serving as a testifying expert in the Board's leading cases.[23] Economic data had been successfully used by employers in early antitrust labor boycott cases,[24] but with the influence of the "Brandeis technique," were being deployed by Progressives, most iconically in *Muller v. Oregon* and other minimum wage and maximum hour cases.[25] In the NLRA cases, the Board dramatically centralized its authority, developed a rigorous litigation strategy, vetted cases for inevitable Supreme Court review, and set the Division on the task of fortifying the congressional findings in section 1 of the NLRA: "that employer unfair labor practices lead to strikes and industrial unrest, which physically obstruct the flow of commerce."[26]

In September 1935, the Board prepared an outline that detailed the necessary economic data for its litigation strategy on the commerce clause issue, demanding for each leading case information about: the employer respondent's business and industry, its relative size, products produced, capital invested, sources of raw materials and manufactured parts, markets for finished products, the amount and value of production and advertising across state lines, and the use of products of other businesses and industries in interstate commerce.[27] The data collection did not end there because the Division also had to empirically justify the purported causal relationship between employer unfair labor practices and strikes. For this information, economists were to dig into the history of company and industry strikes or strike threats as well as the effects of those strikes on interstate commerce.[28] For a more substantial foundation, the Division was

---

[22] David Ziskind, *The Use of Economic Data in Labor Cases*, 6 U. CHI. L. REV. 607, 631 (1939).

[23] Weisz, *supra* note 14, at 105; Gross, *supra* note 9, at 325.

[24] *See* Ziskind, *supra* note 22, at 611-12.

[25] For the impact of the "Brandeis technique" on Saposs, *see* Gross, *supra* note 9, at 324. For fuller discussion of the "Brandeis brief," *see, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 188-89, 209-10 (1992).

[26] GROSS, MAKING OF THE NLRB, *supra* note 3, at 158-59, 179-88.

[27] *Id.* at 182 (citing NLRB files, "The Relevance and Importance of the Congressional Findings Contained in the National Labor Relations Act," Memorandum by Stanley S. Surrey, Sept. 30, 1935, at 3-5, 25-27).

[28] *Id.* at 183.

to investigate labor relations broadly to determine the causes of strikes in general, the effects of the removal of unfair labor practices on workers' propensity to strike, and the advantages of NLRA tools like collective bargaining on that propensity.[29]

The development and deployment of the rich economic data collected, produced and analyzed by the Division was an unequivocal success for the Board's drive towards both legitimation and recognition of the constitutionality of the NLRA. Whereas labor advocates in pre-Board cases, from the "yellow dog" contract cases of *Adair v. United States* and others[30] to the early secondary boycott cases, neither made an effort to deploy economic data nor succeeded in challenging *Lochner*-era legislation,[31] the Board carefully and successfully secured amenable review by the Supreme Court through use of economic data, economic expert reports, and expert testimony.[32]

Favorable review of cases featuring the Division's supporting evidence of interstate commerce and the effects of the NLRA's collective bargaining provisions culminated in the Court upholding the NLRA's constitutionality in *NLRB v. Jones & Laughlin Steel Corp*.[33] In its momentous decision, the Court not only reviewed the Division's data and expert testimony by Saposs and others—made available through transcripts of the Board's hearings, official Board bulletins, and in Board attorneys' briefs and oral arguments—but explicitly cited them to support its finding that "[r]efusal to confer and negotiate has been one of the most prolific causes of strife."[34] Not only did the majority opinion reference instances of such resulting strife, it listed in a footnote several reports supplied by the Division and the Board's bulletin, and even alluded to the train of evidence submitted in *prior* cases by recognizing that strikes caused by employer refusals to bargain were "such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances."[35]

The day after the *Jones & Laughlin* decision came down, the

---

[29] *Id.*

[30] *See generally Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908); and accompanying party briefs.

[31] Ziskind, *supra* note 22, at 608-12, 615-17, 623.

[32] *Id.* at 624-31.

[33] *Id.*; 301 U.S. 1.

[34] 301 U.S. at 42; Ziskind, *supra* note 22, at 624; GROSS, MAKING OF THE NLRB, *supra* note 3, at 191-92.

[35] 301 U.S. at 42-43 & n.8.

atmosphere at the Board was "just wild," "like a carnival."[36] But Saposs was hard at work preparing proposals for the Division's broader role at the Board, presenting those proposals to the Board's Chairman, Members and General Counsel just one week after the Supreme Court decision.[37] Specifically, Saposs sought to have: the Board's jurisdiction determined in the field "by a member of the staff trained in economics, working in cooperation with the regional attorney"; an economist proficient in labor relations to "assist, not only in the preparation of evidence prior to the hearing, but also at the hearing," in "importance cases"; close cooperation between the Division and reviewing attorneys handling the case after Board hearings; data prepared of all major industries; the publication of educational materials on appropriate labor relations issues "for the public, employers, workers, and legislators"; and the establishment of a reading course "for *all* our staff," supplemented by lectures, "in the history and practices of labor relations."[38]

But for a number of external and internal reasons, Saposs' ambitious goals for the Division would not only go unfulfilled, but the Division itself would be stripped of its funding and, in a little noticed Congressional measure, banned from resurfacing by the Taft-Hartley Amendments to the NLRA.

To begin: the external reasons for the Division's banishment. The Division's work propelled the success of an agency that was widely believed to be destined for extinction after *Schechter Poultry*. When the ability of the NLRB to intervene in private employment relationships survived constitutional scrutiny, both the NLRB and the Division moved more deeply into the maelstrom of shifting politics after the 1938 elections and larger political debates about the administrative state as a target of Congressional circumscription. Two years after *Jones & Laughlin*, the House Labor Committee opened hearings on amendments to the NLRA after an arch-conservative Virginia Congressman, Howard Smith, submitted a House resolution to establish a special committee to investigate, take testimony, and report on the NLRB's administration of the NLRA and recommend to Congress desirable changes to the Act and

---

[36] GROSS, MAKING OF THE NLRB, *supra* note 3, at 231 (quoting Charles Fahy, Oral History Interview, July 23, 1968, at 32; Herbert Glaser, Oral History Interview, Mar. 18, 1969, at 28).

[37] *Id.* at 235.

[38] *Id.* (quoting NLRB Files, "Suggested Plan of Activities for the Division of Economic Research," Memorandum from D.J. Saposs to J.W. Madden, E.S. Smith, D.W. Smith, C. Fahy, R. Watts, N. Witt, B. Wolf, P. Levy, Apr. 19, 1937, at 1-3).

the NLRB's personnel.[39] The House Special Committee to Investigate the National Labor Relations Board, or the "Smith Committee," was stacked with three Republicans and Southern Democrats on one side and two New Dealers (Arthur Healey from Massachusetts and Abe Murdock of Utah) on the other.[40] The Committee began their investigation in December 1939 and continued hearings through the submission of a Final Report in December 1941.[41]

Two key lines of attack emerged in the Smith Committee investigations that doomed the Division. First, concerns about the power of agencies in the new administrative state concentrated on the role of the Division in developing expertise and introducing evidence in Board and court adjudication. In its *Intermediate Report*, produced to gain support for Smith's own bill to amend the NLRA to, among other things, abolish the Division, the Committee majority contended that the NLRB improperly combined its functions by basing decisions on economic material it produced in-house by the Division, acting "as prosecutor, judge, and jury" in how it

> conducts the investigation, initiates the complaint, hears the evidence upon the complaint, and then renders its decision. The coexistence of these functions in the same body makes it possible for this administrative agency to overlook the separation requirement that is so deeply ingrained in our political pattern.[42]

Employer respondents shared these as dominant complaints of the Board and the Division, both in court and in Congressional testimony.[43]

While many New Deal agencies mixed prosecutorial and judicial functions, and charges that the Board failed to enter its economic evidence

---

[39] GROSS, RESHAPING OF THE NLRB, *supra* note 3, at 103-106.

[40] *Id.* at 151-54.

[41] *Id.* at 157-59.

[42] *See* U.S. House of Rep., *Intermediate Report of the Special Committee to Investigate the NLRB*, Report No. 1902, 76th Cong., 3rd Sess. (Washington, D.C.: GPO, 1940) (hereafter *Intermediate Report*), 45, 89-90; Robin Stryker, *Limits on Technocratization of the Law: The Elimination of the National Labor Relations Board's Division of Economic Research*, 54 AM. SOC. REV. 341, 350-51 (1989).

[43] *Intermediate Report*, *supra* note 42, at 89; U.S. Senate, *Hearings Before the Committee on Education and Labor on National Labor Relations Act and Proposed Amendments*, Vol. 10, 76th Cong., 1st-3rd Sess. (Washington, D.C.: GPO, 1939-40), 1927-57; Stryker, *supra* note 42, at 349.

into the case record were unfounded, the NLRB became an easy nexus of convergence for political anxieties about the administrative state.[44] Board employees, and Saposs in particular, came under virulent attack for purportedly harboring Communist views. The Committee, familiar with the Division's importance in winning Board cases, claimed that Saposs, who was "born in Russia," had "radical views," advocated the "destruction of the capitalistic system in this country," was a member of the Socialist Party as a student at the University of Wisconsin, and brought a "strangely exaggerated social consciousness . . . . to his work."[45] In its *Final Report*, the Committee complained that NLRB personnel "holding to alien tenets which stress class warfare as a means of abolishing the free system of private enterprise cannot . . . be fair and impartial quasi-judicial officers in the administration of the National Labor Relations Act" and contribute "to a condition of intensified class feeling."[46]

While the attacks on Saposs mirrored a broader culture of red-baiting, they were ironically enough directed at a fervent anti-Communist and were in part aided by claims from *within* the Board by those who viewed Saposs' institutionalist views as too conservative.[47] In fact, Saposs served as an alarmist within the Board about "Communist infiltration."[48] But Saposs' attempt to "out" the Communists at the Board during the Smith Committee hearings dramatically backfired: he sought out and met with minority members Murdock and Healey as a way to defend himself and the Division by identifying the "real" Communists at the Board, but this appeared only to confirm their infiltration of the agency, and given that the political momentum had so drastically swung against him and the Division, made him the easiest scapegoat.[49] For liberals and New Dealers looking to more broadly save the NLRA from the Smith Bill amendments or worse, silencing the whistleblower and giving the conservatives the Division shut-down they were universally behind killed two birds with one stone.

---

[44] *See* DANIEL ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 97-99 (2014); Jeremy Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 752 (2016); Gross, *supra* note 9, at 342-43.

[45] 86 CONG. REC. 7560 (1940); *see also* Stryker, *supra* note 42, at 350-51.

[46] U.S. House of Rep., *Final Report of the Special Committee to Investigate the NLRB*, Report No. 3109, 76th Cong., 3rd Sess. (Washington, D.C.: GPO, 1941), 5.

[47] Gross, *supra* note 9, at 340-41.

[48] GROSS, RESHAPING THE NLRB, *supra* note 3, at 89, 131-50.

[49] *Id.* 214-16, 219-20.

The Division was not aided by an institutional tension *within* the Board between lawyers on the one hand and economists and social scientists on the other. As a cultural matter, the lawyers viewed the economists as a dime a dozen, Chairman Madden describing them as technocrats performing work that "any kind of individual" with "a certain type of education . . . can do."[50] Charles Fahy, the Board's General Counsel, believed the economists' work in presenting economic data to the Supreme Court, while "prudent, wise, and helpful," was not as important as they thought it was and ought ultimately be subservient to the legal work.[51] Saposs nevertheless persisted, insisting on the DER's significance in Board reports and bulletins, citing the economic and sociological basis of the NLRA and foretelling a "trend toward enlightenment" where "the public consciousness is being focused on the economic factors inherent in the problems confronting the Board."[52] When Saposs described the Board's Supreme Court victories, he characterized them as "affirm[ing] the appropriateness of the 'economic approach' for which the Brandeis brief was the precedent" in making "full use of the economic evidence presented in each case, coupled with the complete disregard for finely spun legal distinctions."[53] But when Saposs presented his proposals for the future work of the Division after the *Jones & Laughlin* decision, Fahy's Office rejected them, directing all regional attorneys to interface with the Board exclusively through his office and ordering the elimination of "all economic material except that which is necessary to prove the operations of the particular respondent."[54] Fahy suggested the use of economic data in appellate briefing in "borderline cases" and opposed establishing any general rules for incorporating economic data in adjudication, perhaps because he viewed the interstate commerce clause issue to have been resolved.[55] The Board sustained Fahy's recommendations.[56]

The edifice began crumbling around the Division in June 1940, when

---

[50] GROSS, MAKING OF THE NLRB, *supra* note 3, at 175 (quoting U.S. Congress, Senate, *Hearings on H.R. 10539 Before the Sub-committee of the Senate Committee on Appropriations*, 76th Cong., 1st Sess., part 1 (Washington, D.C.: GPO, 1940), 578).

[51] *Id.* at 234 (quoting Oral History Interview with Charles Fahy, *supra* note 36, at 28, 30-31)).

[52] *Id.* at 234-35 (quoting NLRB, *Second Annual Report*, at 46).

[53] *Id.* at 235 (quoting NLRB, *Second Annual Report*, at 47).

[54] *Id.* at 236 (quoting NLRB Files, "Economic Material as Evidence in Hearings," Memorandum from C. Fahy to D.J. Saposs, May 13, 1937, at 1).

[55] *Id.*

[56] *Id.* (citing NLRB Files, "Jurisdictional Proof and Cooperation Between Legal Staff and Economic Division," Memorandum from C. Fahy to Regional Attorneys and Attorneys in Regional Offices, Sept. 22, 1937).

the House Appropriations Committee, following the Smith Committee's recommendations, severely cut the Division's appropriation.[57] In an attempt to salvage what was left of the Division, Madden retained Saposs but renamed the DER the "Technical Service Division," limiting it to the technical work of calculating back-pay awards in discrimination cases and gathering case statistics.[58] The House Appropriations Committee saw through the ruse and eliminated the Division altogether in October 1940, through provisions of Public Law No. 812.[59] Section 4(a) of the 1947 Taft-Hartley Amendments to the NLRA, with a thin legislative history, officially codified the ban in the statute itself: "Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis."[60] In protesting the provision, New Dealer Senator Harley Kilgore (D-WV), who helped establish the National Science Foundation in 1950, expressed his concerns in complaining that economic experts were:

> [N]ecessary to study industrial relations, to study company statistical records, . . . to provide the necessary advice for the Board to determine what is and what is not fair in the way of wages. But they are forbidden to hire such men. Whom are they going to get? Will the Board proceed along the line of intelligent guesses we hear so much about? How a Government agency concerned week in and week out with problems arising out of economic conditions can function with the help of economists is a question I cannot answer. I would as soon operate a mine without a mining-engineer as to try to establish a wage scale without an economic staff who can study the economics of the situation.[61]

---

[57] Gross, *supra* note 9, at 341.

[58] *Id.*

[59] Act of October 9, 1940, ch. 780, 54 Stat. 1037 ("After the date of the enactment of this Act, none of the appropriation, 'Salaries, National Labor Relations Board, 1941,' shall be obligated for the Division of Economic Research or for the Division of Technical Service.").

[60] 29 U.S.C. 154(a). The Senate Report for the Amendment indicates that the words "or for economic analysis" were substituted for a narrower "(or for statistical work, where such service may be obtained from the Department of Labor)." The new language was added in conference, but the conference report itself does not refer to it. *See* H.R. REP. NO. 510, at 37-38 (1947) (Conf. Rep.).

[61] 93 CONG. REC. 7418 (1947). For Kilgore's involvement in the foundation of the NSF, *see* DANIEL LEE KLEINMAN, POLITICS ON THE ENDLESS FRONTIER 75-99 (1995).

In response, Senator Homer Ferguson (R-MI) justified the provision on procedural grounds: without it, the Board could "go outside the record, build up its own record unbeknown to the union or the company, and make a decision based on what it may find from the opinion of its own economists outside the record."[62] Thus, while the Senate's debate highlighted at least one Senator's concern about the implications of the provision, the legacy of the Smith Committee persisted in justifying the ban.

B. Failure to Solicit Economic Analysis

Agencies have since leapt forward in gaining economic expertise to engage in cost-benefit and even broader economic and social scientific analysis in rulemaking and policy-setting following Presidential Executive Orders, statutory amendments to agencies' organic statutes, and evolving judicial requirements.[63] But despite this overwhelming revolution in agency practice and structure, the NLRB's DER has never been revived, leaving the Board a "historical anachronism," "the only administrative agency forbidden to seek such economic information on its own."[64]

But the Board has also failed to elicit economic analysis through notice-and-comment rulemaking or through soliciting and incorporating expertise from *amici curiae* in adjudications.[65] To begin, despite overwhelming criticism, the Board has only successfully engaged in two substantive rulemakings, one on bargaining unit determinations in the

---

[62] 93 CONG. REC. 7419 (1947).

[63] *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86-91 (2006 & Supp. V 2011); Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted as amended in* 5 U.S.C. § 601 app. at 102-02; Exec. Order No. 13,579 § 1(b)–(c), 3 C.F.R. 256, 257 (2012), *reprinted as amended in* 5 U.S.C. § 601 app. at 102. The literature on the rise of cost-benefit analysis in agency regulation is immense, but the following is a sampling. *See, e.g.*, CASS SUNSTEIN, THE COST-BENEFIT STATE (2002); Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, N.Y.U. L. REV. 437 (2003).

[64] GROSS, RESHAPING THE NLRB, *supra* note 3, at 264-65

[65] *See generally* Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469 (2015); Catherine Fisk & Deborah Malamud, *The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 101 (2009); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985).

health care industry and the other on streamlining union representation elections.[66] For context, other agencies collectively publish 2,500 to 4,500 final rules a year (1,350 "major" rules between 1997 and 2015 alone).[67]

In defending itself, the Board has focused on the benefits of adjudication in allowing it to develop policy in relation to actual cases, arguing that "[b]road public participation would necessarily involve delay and diffusion of issues in disposition of specific cases, contrary to sound judicial practice and the special need for speedy resolution of labor disputes brought to the Board for determination."[68] But the Board's defenses do not address how its choice to engage in adjudication rather than rulemaking affects its economic expertise.[69] In fact, while the Board has solicited amicus briefs in high-profile cases, it is non-mandatory, rare, and case-specific.[70] When it *has* occurred, and the Board has incorporated the arguments and analyses of *amici*, it has rarely resulted in the Board modifying or more fully engaging in the economic implications of any given adjudication.[71]

In sum, where the Board lacks the internal capacity to develop economic expertise under the statutory ban, it does not make up for it by soliciting such expertise through its agency actions. Its failure to engage in

---

[66] *See id.*; Appropriate Bargaining Units in the Health Care Industry, 29 C.F.R. § 103.30 (1991); Representation – Case Procedures, 79 Fed. Reg. 74,308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101-103). The Fifth Circuit and D.C. District Court recently upheld the representation election rule. *Associated Builders & Contrs. of Tex. v. NLRB*, 826 F.3d 215, 218 (2016); *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171, 177 (D.D.C. 2015).

[67] Gov't Accountability Office, Fed. Rules, http://www.gao.gov/legal/congressional-review-act/overview#fedRulesForm; MAEVE P. CAREY, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 1 (Washington, D.C.: CRS, 2016).

[68] STAFF OF HOUSE COMM. GOV'T OPERATIONS, 85TH CONG., 1ST SESS., SURVEY AND STUDY OF ADMINISTRATIVE ORGANIZATIONS, PROCEDURE, AND PRACTICE IN THE FEDERAL AGENCIES—AGENCY RESPONSE TO QUESTIONNAIRE 1811 (Comm. Print 1957). *See also* 46 LAB. REL. REP. 343 (1960); 46 A.B.A.J. 455 (1960); 45 LAB. REL. REP. 407, 409 (1959).

[69] *See, e.g.*, Fisk & Malamud, *supra* note 65, at 2016 & n. 12 (collecting sources).

[70] *See Archived Notices for Briefs and Invitations, NLRB,* http://www.nlrb.gov/cases-decisions/invitations-file-briefs/archived-notices-briefs-and-invitations (last visited July 19, 2017).

[71] *See, e.g.*, *Babcock & Wilcox Constr. Co.*, 361 N.L.R.B. No. 132, 2014 NLRB LEXIS 964, at *4-6, 19 (Dec. 15, 2014) (providing limited review of amici arguments on Board's standard for deferring to arbitral decisions); *Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (Aug. 26, 2011) (same on Board's rule barring election petitions for a reasonable period after voluntary recognition of a union by a majority of employees).

economic analysis has serious regulatory and institutional effects.

C. Institutional and Regulatory Effects of Absence of Economic Analysis

1. Regulatory Effects

The Board's lack of expertise first and foremost has meant a lack of expert supervision and utilization of pertinent social scientific and industrial relations developments in fulfilling a key purpose of the NLRA: increasing worker bargaining power to lift competitive wage rates and mass purchasing power.[72] The termination of the DER has also meant that the Board's regulatory role in shaping national discourse on unionization has floundered, from rulemaking to adjudication and beyond: setting policy and Board priorities; providing solid guidance through informed research to both the public and private sectors on the importance of protecting workers' right to organize and collectively bargain; and collecting and maintaining institutionalized data from its own investigations and the Board's adjudications for future Board use as well as for social scientific and policy research.

Further, the Board's recent experience with rulemaking *and* adjudication on key issues, ranging from mandatory notice posting to "independent contractor" misclassification, suggests its vulnerability to judicial invalidation.[73] The Board's decades-long failure to engage in rulemaking also has dramatic effects on its ability to regulate labor in accordance with advances in economic theory and broader social scientific developments on labor relations.[74] Rulemaking provides a convenient site

---

[72] 29 U.S.C. § 151; GROSS, RESHAPING THE NLRB, *supra* note 3, at 265. For a summary of the literature on the NLRA's competing purposes, and the subordination of the micro- and macroeconomic goals of the Act to the achievement of "labor peace," *see* Hiba Hafiz, *Picketing in the New Economy*, 38 CARDOZO L. REV. ___, ___ & n.43 (forthcoming 2018).

[73] *See, e.g.*, Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011) (requiring employers to post a notice of employee rights); *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013) (striking down the rule); *Nat'l Ass'n of Mfrs. V. NLRB*, 717 F.3d 947 (D.C. Cir. 2013) (same); Employee Rights Notice Posting, NLRB, http://www.nlrb.gov/poster (withdrawing notice rule); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (overturning Board determination of FedEx drivers as "employees" rather than "independent contractors").

[74] *See, e.g.*, Myron Roomkin & Roger I. Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 Harv. L. Rev. 1441, 1442, 1445-47 (1977) (arguing for rulemaking to incorporate developments in behavioral science and human relations

for the convergence of expert opinion on the economic impacts of proposed rules and policy changes that would aid in developing the Board's expertise and help to ensure predictable, *ex ante* policymaking grounded in industry- and economy-wide workplace realities.[75]

Rulemaking would allow solicitation of greater public information aimed at a broader range of situations than any particular adjudication, and on matters that the Board is charged with regulating, it is much easier for it to conduct data collection than the courts.[76] In its first rulemaking, the Board accumulated a vast amount of empirical data "that simply had not been available to it in adjudications."[77] Not only does the Board collect more data through rulemaking than adjudication, but it is required to incorporate and respond to that information substantively to better survive "arbitrary and capricious" review. *Ex ante* engagement with outside sources would facilitate centralized policy-setting as compared to *ad hoc* policy-making based on cases pursued by Board regional directors, and it would provide regulated parties clarity and consistency for planning purposes, especially in light of the Board's frequent policy reversals through adjudication.[78]

The Board's failure to embrace economic analysis enhances the

---

that illuminate employer-employee conduct and interactions).

[75] *See, e.g.*, JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 4046 (1938) (providing classic justification for agency policymaking through inclusive procedure, reliance on experts and empirical evidence, and political accountability); Estreicher, *supra* note 65, at 172-173, 176; Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 403 (1972) (arguing that public participation improves the administrative process by identifying interests deserving of protection, producing relevant evidence and arguments for appropriate action, and closing the gap between agencies and their constituents). However, administrative law scholars have also drawn attention to the potential for agency capture and information costs in rulemaking. *See, e.g.*, Miriam Seifter, *Second Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1306, 1325-27 (2016) (highlighting how interest group participation in rulemaking can distort agency agendas and frustrate enhancement of agency expertise); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1325, 1380 (2010) (describing parties' "information capture" of the regulatory process). Institutional design solutions can encourage expertise-enhancing rulemaking. *See, e.g.*, Matthew Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1426 (2011).

[76] Garden, *supra* note 65, at 1475, 1486; Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 320 (1991)

[77] Grunewald, *supra* note 76, at 320.

[78] Garden, *supra* note 65, at 1476, 1489; Estreicher, *supra* note 65, at 173; Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication & Rule-making*, 117 U. PA. L. REV. 254, 270 (1968).

already-existing structural obstacles it faces in making coherent labor policy, placing it in a kind of "administrative law exile."[79] As commentators have noted, those structural obstacles include:

> [T]he exclusion of social scientists from is policymaking staff and social science-based reasoning from its decisions, its isolation from labor policymaking activities and data analysis at the Department of Labor, and the tendency of Board members, who recently have been drawn almost entirely from the ranks of labor and management attorneys, to reason like lawyers balancing rights rather than policy analysts studying social and economic regulatory problems.[80]

These obstacles prevent the Board from discerning whether its policies accord with the NLRA's goals and broader policy-setting within the administrative state concerning labor and employment. Such capacity is necessary to "quantify the effects of labor law on the constituencies of labor policy (or indeed to identify those constituencies)."[81] Where other agencies are expected to improve based on their social scientific expertise, the Board lacks the capacity to even determine if its remedies produce their desired regulatory effects. For example, one of the Board's most aggressive remedies—reinstatement of employees discharged because of union activity—has not been subjected to thorough empirical investigation to evaluate whether or not it is effective after over seventy-five years.[82]

The Board's impotence in appraising the success of its remedies is just one area that its limited capacity forsakes workers. Without supporting economic data and analysis in the records of underlying regional enforcement actions, and without an internal Division supervising enforcement at its various stages to ensure a developed record, the Board and the courts are unbound in their reasoning *even as* they pervasively base that reasoning, in case after case, on unverified and unsubstantiated economic grounds. In addition to the remedies example just discussed, the

---

[79] *See generally* Fisk & Malamud, *supra* note 65, at 2044-57; *see also* James J. Brudney, *Isolated & Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 235 (2005).

[80] Fisk & Malamud, *supra* note 65, at 2019.

[81] Fisk & Malamud, *supra* note 65, at 2055.

[82] GROSS, RESHAPING THE NLRB, *supra* note 3, at 266.

following are just a sampling of the many areas of labor law doctrine that have radically shaped the landscape of worker protections without a social scientific basis. In each of these examples, the Board and the courts have failed to either ground their opinions in economic evidence or have failed to consider how their line-drawing has adverse economic effects on the relative bargaining power of employees and employers that, as a result, impact workers' ability to negotiate better wage and non-wage terms as well as their share of the overall pie.

- **Right to Information.** Under the Supreme Court's *Truitt* rule, an employer that claims an inability to provide wage increases must disclose financial information to support that claim.[83] But recent decisions have limited employers' disclosure obligation to instances where they explicitly state that they cannot afford a union demand, leaving employers significant opportunity for strategic behavior by claiming alternative justifications for refusal to agree to a higher wage, evading financial disclosure requirements and creating an information asymmetry between workers and employers at the bargaining table.[84] The Board and the courts have delineated workers' right to financial information without economic analysis of how the right affects bargaining power while simultaneously limiting unions' access to economic data that it could use to substantiate wage demands as a matter of doctrine.[85] Further, the limited (if any) ground-level data in the Board's case records limits its ability to determine whether employers' refusal to bargain on *Truitt*-related grounds is justified.

- **Coercion.** The Supreme Court's *NuTone* decision and subsequent case law have held that, where an employer had mandatory captive audience meetings with employees and committed an

[83] *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956).

[84] *See, e.g.*, *Graphic Commc'ns Int'l Union, Local 508 v. NLRB*, 977 F.2d 1168, 1170-71 (7th Cir. 1992).

[85] For a discussion of how information asymmetries create labor market inefficiencies, *see, e.g.*, Kenneth Dau-Schmidt, *Promoting Employee Voice in the American Economy*, 94 MARQ. L. REV. 765, 781-82 (2011); Michael L. Wachter, *Theories of the Employment Relationship*, *in* THEORETICAL PERSPECTIVES ON WORK AND THE EMPLOYMENT RELATIONSHIP 167-71 (Bruce E. Kaufman ed., 2004); Joseph E. Stiglitz, *Employment, Social Justice and Societal Well-Being*, 141 INT'L LAB. J. 9, 11, 14 (2002).

unfair labor practice in its anti-union campaign, it was not an unfair labor practice to forbid employees from engaging in "equal time" pro-union solicitation during working hours or to distribute literature in the employer's plant.[86] Pro-union employees must overcome a presumption to get a "right of reply" to employer's anti-union speech, and only under very special circumstances because the Court found that NLRA did not grant employees an entitlement "to use a medium of communication simply because the employer is using it."[87] This determination drew a line that restructured the relative rights of employers and employees without reviewing empirical data or assessing its material effects on worker bargaining power. Nor did it have before it empirical studies that have since demonstrated that captive audience meetings by employers are intimidating and effective in defeating unions in representation elections.[88] Courts have since found that employers do not commit an unfair labor practice where they provide "predictions" (as opposed to "threats") of economic losses from unionization or grant raises to non-unionized workers but not to unionizing workers during elections, without assessing data on the potential coercive effects of employers incentivizing anti-union decision-making on the NLRA's purposes of equalizing bargaining power and encouraging unionization.[89]

- **Collective Bargaining.** The labor law distinguishes between mandatory and permissive subjects of bargaining.[90] Employers may make unilateral changes to collective bargaining agreements if they bargain in good faith to an impasse on mandatory bargaining subjects, and while neither party is obligated to bargain on permissive subjects, employees are not protected if

[86] *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 364 (1958); *General Electric Co.*, 156 N.L.R.B. 1247, 1251 (1966).

[87] *Id.* at 363-64.

[88] *See* Paul M. Secunda, *The Future of NLRB Doctrine on Captive Audience Speeches*, 87 INDIANA L.J. 123, 127 & n. 25 (2012) (collecting case law and data); Secunda, *The Contemporary "Fist Inside the Velvet Glove": Employer Captive Audience Meetings Under the NLRA*, 5 FLA. INT'L. U.L. REV. 385, 391-99 (2011) (same).

[89] *See, e.g.*, *NLRB v. Gissel Packing*, 395 U.S. 575, 617-19 (1969); *Arc Bridges, Inc. v. NLRB*, No. 15-1113, 2017 WL 2818637 (D.C. Cir. June 30, 2017).

[90] *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349-50 (1958).

they strike on a permissive subject.[91] Jurisprudence on what constitutes a permissive rather than mandatory subject of bargaining has neither considered economic evidence nor evaluated the economic effects of granting either party the right to engage in a protected hold up or to use a strike threat to affect the employers' "best alternatives to a negotiated agreement" (BATNA).[92] Plant closures were deemed permissive subjects of bargaining because, the Supreme Court held, while the Act requires bargaining over the *effects* of management decisions, it does not require bargaining over the *decisions* themselves.[93] But the Court required neither an economic test nor provided an economic or empirical basis to substantively justify the distinction between "effects-bargaining" and "decision-bargaining."[94] Thus, where plant closures are challenged, employers need not present their economic justifications for closure unless there is evidence of anti-union animus, and neither the employees nor the adjudicators have data to evaluate whether it is legitimately justified or whether the benefit for labor-management relations and the bargaining process outweighs the burden placed on the conduct of the business.[95] Further, no evidence regarding the economic circumstances that aid in an employer's capacity to grant concessions is required for determining whether an employer has engaged in good-faith bargaining, so neither the employees nor the adjudicators can make a determination on the basis of any data.[96] Where the Board and the courts make no such assessment, they are left flat-footed

---

[91] *NLRB v. Katz*, 369 U.S. 736, 744-46 (1962); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255-57 (1939)

[92] *See, e.g.*, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 684-86 (1981) (holding plant closures a permissive subject of bargaining); *Pall Corporation v. NLRB*, 275 F.3d 116, 123 (D.C. Cir. 2002) (holding card-check agreements about employer's new facilities a permissive subject of bargaining). For BATNA, *see* ROGER FISHER & WILLIAM URY, GETTING TO YES 97-106 (3d ed. 2011).

[93] 452 U.S. at 681-82.

[94] *See, e.g.*, *Dubuque Packing Co.*, 287 N.L.R.B. 499 (1987).

[95] *See* Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining*, 136 U. PA. L. REV. 1349, 1378-94 (1988).

[96] *See, e.g.*, *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970); *Gissel Packing*, 395 U.S. 575; *Katz*, 369 U.S. 736; *Borg-Warner*, 356 U.S. 342. For a fuller discussion of the need for having "relevant economic and financial data be on the table," *see* Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the NLRA*, 71 TEX. L. REV. 921, 985 (1993).

in being able to ensure their decisions fulfill the purposes of the labor law in equalizing employer-employee bargaining power.

- **Concerted Activity.** While Section 7 of the Act protects workers' right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection," the impact of employee strikes has been significantly eroded by decisions that preserve self-help protections for employers while denying such protections to employees, and then further limiting employee protections depending on whether employer self-help would allow employers to successfully ride out a strike.[97] For example, while employees' right to conduct a *full* strike is protected, employers do not violate the Act if they hire permanent replacements during such a strike.[98] In making that determination, the Supreme Court neither considered its effects on worker bargaining power nor mandated a quantitative analysis of the employers' diversification of assets, loss in relation to need, or other considerations that might determine whether the self-help was adequately justified for continued business operations. Further, the Court failed to consider how a rule allowing for strike replacements may privilege more skilled workers over unskilled workers because unskilled workers are easier to replace, turning a law that was intended to protect vulnerable workers into one that both protects their bargaining power least and exposes weaker workers to the greatest costs.[99] Further, employees are not protected when they engage in a range of concerted activity that makes them difficult to replace: sit-downs, slowdowns, overtime strikes, intermittent strikes, and partial strikes.[100] In making the determination that these types of strikes are not protected, neither the Board nor the courts provided an economic or empirically-based analysis of whether they were more or less disruptive than full strikes, nor did they assess how the decision to deem them unprotected would affect worker bargaining power. While it is clear that, in a full strike, employers can rely on permanent replacements to keep the

[97] 29 U.S.C. § 157.

[98] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938).

[99] I thank Mark Barenberg for this insight.

[100] *Fansteel*, 306 U.S. at 255-57; *Elk Lumber Co.*, 91 N.L.R.B. 333, 334 (1950); *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 496-97 (8th Cir. 1946).

> business running, employers face limited self-help options in sit-downs and the forms of partial strike. But if the purpose of the NLRA is to equalize bargaining power between employers and employees, empirical assessment and a metric is required to determine the relative hold-out capacity of *both* parties to ensure that the Board or the courts do not tip the balance in favor of either.

These examples illustrate not only that the social scientific bases for the Board and the courts' decision-making on core aspects of the NLRA's mandate are deficient, but they also reveal workers to be the more likely victim of haphazardly-decided precedent, with profound regulatory effects.

2. Institutional Effects

It is no secret that the Board has a reputation for being the most "political" of the agencies, primarily because its adjudications have flip-flopped from administration to administration following partisan appointments.[101] Such flip-flopping—as in the much-publicized switching of Board positions on whether graduate students are "employees" protected by the NLRA[102]—"feeds a political narrative of an out-of-control Board that must be throttled by the legislative and judicial branches of government."[103] The absence of an institutional role for economic and social scientific analysis contributes to the reputation of the agency as having political or ideological bases for its regulation as opposed to more objective bases grounded in expertise.[104] Such grounding would shift the burden of proof to the Board's detractors to support their criticisms with equally probative evidence based in data and rigorous analysis thereof rather than ideological arguments or purely abstract, common law-based arguments about rights untethered to how employer or employee conduct impact those rights.[105]

---

[101] *See, e.g.*, Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1, 13–14 (2009); Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 711 (2006).

[102] *See Columbia University*, 364 N.L.R.B. No. 90 (2016); *Brown University*, 342 N.L.R.B. 483 (2004); *New York University*, 332 N.L.R.B. 1205 (2000).

[103] Garden, *supra* note 65, at 1472.

[104] GROSS, RESHAPING THE NLRB, *supra* note 3, at 266.

[105] *Id.* at 266-67.

Failure to utilize such expertise can have institutional effects on the Board's legitimacy in the public eye and as viewed by Congress and the courts.[106] Other agencies' use of frequent rulemaking, and accompanying requirement to engage in cost-benefit analysis and substantively respond to notice and comment, has allowed them to evolve in tandem with current administrative law standards, including doctrinal developments in what is required for such cost-benefit analysis at the agency level.[107] But "[t]he fact that the NLRB eschews . . . rulemaking makes it immune to the frequent post-Administrative Procedure Act waves of regulatory reform that have focused on the rationalization and coordination of informal rulemaking."[108] The Board's institutional role has already fallen far in the eyes of the judiciary from the days of *Jones & Laughlin*, as recently demonstrated by its Supreme Court's dramatic discrediting and refusal to grant it deference in *Hoffman Plastics* based in part on its lack of social scientific expertise.[109] With courts taking a more aggressive role in their review of agency procedure and conclusions in conducting cost-benefit analyses,[110] the Board's failure to engage in economic analysis makes it all the more vulnerable to judicial rebukes and substitutions of their own judgment where the Board has demonstrated a lack of expertise.[111] The ban handcuffs the Board, and by undercutting its expertise, frustrates the NLRA drafters' intent of delegating labor regulation to an independent agency to which the courts should defer.[112]

The Board's isolation has also meant that it has a less dominant role in

[106] *See, e.g.*, Garden, *supra* note 65, at 1476; David Fontana, *Reforming the Administrative Procedure Act*, 74 Fordham L. Rev. 81, 102-04 (2005).

[107] Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. ___ (forthcoming 2018).

[108] Fisk & Malamud, *supra* note 65, at 2017-18.

[109] *Id.* at 2051-52; *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 142-44 (2002).

[110] *See supra* note 7; Masur & Posner, *supra* note ___, at ___; John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation*, 124 YALE L. J. 882, 909-26 (2015).

[111] *See, e.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 268-69, 274-89 (1974) (declining to defer to Board's determination that buyers at a plant were not "managerial employees"). For a full account of judicial refusal to defer to the NLRB, *see* Theodore J. St. Antoine, *The NLRB, The Courts, The Administrative Procedure Act, and* Chevron*: Now and Then*, 64 EMORY L.J. 1529 (2015).

[112] *See Amalgamated Ass'n of Street, Electric Rwy. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 288 (1971) (stating that Congress "deliberately plac[ed] the responsibility for applying and developing this comprehensive legal system in the hands of an expert body rather than the federalized judicial system"); Ralph K. Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 67-74 (1968).

shaping and contributing to normative debates about the importance of unionization in the broader suite of workers' rights and protections.[113] It has also meant that it must formulate labor policy within the complex patchwork of other federal statutes—the Fair Labor Standards Act, the Occupational Health and Safety Act, Title VII, and so on—blind not only to the effects of its agency actions on workers' Section 7 rights,[114] but also to the ripple effects on broader labor and employment policy. Moreover, its dominant regulation by adjudication has primarily excised its role in collecting data and information about or in recognizing the status of Section 7 protections in unorganized sectors of the economy that lack live adjudications.[115]

II. ECONOMIC ANALYSIS IN THE ADMINISTRATIVE STATE

The Federal government's Executive branch currently employs 4,640 economists doing primarily statistical, regulatory, and redistributive data collection and analysis.[116] The statistical work—exemplified by the work of the Department of Labor's Bureau of Labor Statistics and the Department of Commerce's Bureau of Economic Analysis and Census Bureau—involves collecting, synthesizing and analyzing data, producing official government statistics, generating government estimates for broad consumption, and honing data-collection and interpretation methods.[117] Regulatory economic work primarily involves using applied microeconomics to: generate and revise regulations; and conduct

---

[113] For how agency use of economists as internal experts affect normative debates and national policy, *see, e.g.*, Ryan Grim, *Priceless: How the Federal Reserve Bought the Economics Profession*, HUFFINGTON POST, Oct. 23, 2009.

[114] Section 7 of the NLRA provides that employees:

> shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

29 U.S.C. § 157.

[115] Fisk & Malamud, *supra* note 65, at 2053-54.

[116] U.S. Office of Personnel Management (OPM), Employment-March 2017, http://www.fedscope.opm.gov/ibmcognos/cgi-bin/cognosisapi.dll; GEORGE F. DEMARTINO, THE ECONOMIST'S OATH: ON THE NEED FOR AND CONTENT OF PROFESSIONAL ECONOMIC ETHICS 25-26 (2011).

[117] DEMARTINO, *supra* note 116, at 27.

economic analysis to investigate whether current regulations are effective and/or have been violated. The Environmental Protection Agency (EPA), Federal Trade Commission (FTC), Occupational Safety and Health Administration and Federal Reserve primarily use economists for this purpose.[118] Finally, economists at agencies like the Social Security Administration, the Internal Revenue Service, Department of Labor, and others, provide support and calculate penalties that are redistributive, such as helping devise income support programs, subsidies and tax credits as well as fines, fees and taxes.[119] Some—like economists in the Treasury Department, Federal Reserve, Office of Management and Budget (OMB) and the EPA—do economy-wide modeling to assess the macroeconomic effects of regulations or policies.[120]

While the nature and extent of economic analysis performed in administrative agencies depends on statutory requirements, developments in administrative law, and agencies' respective regulatory functions, as a general matter, agencies have evolved different strategies and approaches to conducting and integrating economic analysis into those functions. This section provides an overview of agency best practices in utilizing economic analysis with respect to four key areas: (1) engaging in but not limiting analysis to the costs and benefits of particular regulations; (2) policy-setting and litigation support; (3) incorporating broader social scientific developments in economic theory and behavioral science; and (4) utilizing both microeconomic and macroeconomic modeling.

A. Economic Analysis vs. Cost-Benefit Analysis

The economic analysis of law in administrative agencies extends far beyond Regulatory Impact Analyses (RIAs) performed to fulfill cost-benefit analysis requirements of economically significant rules.[121] While the costs and benefits of *itself* mandating cost-benefit analysis have been and continues to be debated,[122] economists in administrative agencies

[118] *Id.*

[119] *Id.*

[120] Richard L Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State*, 34 YALE J. REG. 545, 554-59 (2017).

[121] For broader overviews of cost-benefit analysis, *see, e.g.*, MATTHEW D. ADLER & ERIC POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS (2006); CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (2002).

[122] Coates, *supra* note 110, at 889-909 (providing an overview of these debates).

engage in a much broader set of economic and social scientific analyses as a part of agency functioning. For simplicity's sake, I refer to this broader set of analyses as "economic analysis" and attempt to delineate them here.

First, a brief exposition on how economists aid in cost-benefit analysis at the agency level. With the help of guidance from the OMB and OIRA,[123] agencies work with economists to both develop and implement agency-specific guidance on best practices for conducting cost-benefit analysis.[124] Economists assist at each stage of the multi-step process of cost-benefit analysis: stating the need for regulatory action; defining the baseline of the world but for the action; setting the time horizon of the analysis; identifying a range of regulatory alternatives and their consequences; quantifying and monetizing the benefits and costs; discounting future benefits and costs; evaluating non-quantified and non-monetized benefits and costs; and characterizing uncertainty in the overall analysis.[125]

While Executive agencies are required by Executive Order and statute to conduct cost-benefit analysis in certain rulemakings, absent mandates in their organic statutes, independent agencies are subject to lesser requirements.[126] Commentators have claimed that independent agencies

---

[123] *See* OIRA, "Regulatory Impact Analysis: A Primer"; *Circular A-4: Regulatory Analysis*, OFF. MGMT. & BUDGET (2003) [hereinafter "OMB Guidance"].

[124] *See, e.g.*, Memorandum for RSFI and OGC to the Staff of the Rulewriting Divisions and Offices of the SEC (Mar. 16, 2012), *available at*: http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf; U.S. ENVTL. PROTECTION AGENCY, *Guidelines for Preparing Economic Analyses*, EPA 240-R-10-001 (2010), http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0568-50.pdf/$file/EE-0568-50.pdf [hereinafter "*EPA Guidelines*"].

[125] *See supra* note 123.

[126] Independent agencies are listed in the Paperwork Reduction Act of 1980. 44 U.S.C. § 3502(5) (2012). As such, they are not subject to the requirements of the series of Executive Orders and the Unfunded Mandates Reform Act. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981), *superseded by* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), *amended by* Exec. Order No. 13,258, 67 Fed. Reg. 9385 (Feb. 26, 2002), *supplemented by* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011). Under these Executive Orders, Executive agencies are required to conduct quantified cost-benefit analysis to the extent feasible, to submit significant rules to OIRA in advance, to provide cost-benefit analyses to OIRA, to wait until OIRA reviews them before publishing rules for public comment, and to publish them with rules. *Id.* Independent agencies are required only to provide OMB with an annual agenda of significant regulatory actions for the upcoming year, including "to the extent feasible and permitted by law," a summary cost-benefit analysis. *Id.* The Unfunded Mandates Reform Act requires that executive agencies, but not independent agencies, include written cost-benefit analyses for each economically significant rulemaking. Unfunded Mandates

"lack the capability to conduct cost-benefit analyses of the quality that is commonplace in the Executive Branch, in part as a result of the role of the [OIRA]."[127] However, with the exception of the NLRB, many independent agencies have more economists on staff than OIRA's 45: the EPA employs 176 economists; the SEC, 110; and the FTC, 81.[128]

But economists on staff at independent agencies do much more than frame and conduct cost-benefit analyses. For example, in addition to providing basic technical and statistical assistance, the SEC's Division of Economic and Risk Analysis (DERA) engages in broad data collection and analysis as well as economic modeling and forecasting. Craig Lewis, DERA's former Chief Economist, distinguished "cost-benefit analysis" from broader "economic analysis" of which it is "one aspect," describing the latter as "the consideration of the potential economic effects—i.e., effects on the market—of the SEC's policy choices."[129] DERA describes itself as the SEC's "think tank," "integrat[ing] financial economics and rigorous data analytics into the core mission of the SEC . . . across the entire range of SEC activities, including policy-making, rule-making, enforcement, and examination."[130] Created in 2009, DERA has ten offices engaged in "quantitative research and risk assessment," including:

Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified as amended in scattered sections of 2 U.S.C.). However, independent agencies are subject to the requirements of three cost-benefit analysis-related statutes: the Paperwork Reduction Act, Pub. L. No. 104-13, 109 Stat. 163 (1995) (codified at 44 U.S.C. §§ 3501-3520) (requiring agencies to justify public information collection, to minimize the burden of any information-collection process, and to maximize the utility of information gathered); the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) (requiring agencies to assess and consider alternatives to the burden of regulation on small entities); and the Congressional Review Act, Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (codified as amended in 5 U.S.C. §§ 801 et seq.) (requiring agencies to submit proposed rules—along with any cost-benefit analysis the agencies have conducted—to Congress and the Government Accountability Office (GAO)).

[127] Revesz, *supra* note 120, at 548.

[128] *See* *OIRA*, *About OIRA*, OFF. MGMT. & BUDGET, https://obamawhitehouse.archives.gov/omb/oira/about (*last visited* July 23, 2017); OPM, *supra* note 116.

[129] Craig M. Lewis, Chief Economist and Dir., Div. of Risk, Strategy & Fin. Innovation, Sec. & Exch. Comm'n, SIFMA Compliance Luncheon, *The Expanded Role of Economists in SEC Rulemaking* (Oct. 16, 2012), https://www.sec.gov/news/speech/2012-spch101612cmlhtm.

[130] SEC, *About the Division of Economic and Risk Analysis*, https://www.sec.gov/dera/about.

providing "high-quality economic and statistical analyses, and specific subject-matter expertise" within the SEC; "[i]dentifying and analyzing issues, trends, and innovations in the marketplace"; developing customized tools and analyses to "proactively detect market risks"; working with outside experts to "strengthen the Commission's foundation of market knowledge"; managing and analyzing public and private data "to support relevant initiatives and projects"; conducting research and publishing in peer-reviewed journals; and participating in academic and industry conferences.[131] DERA economists and experts also support the SEC's enforcement actions by estimating "the amount of ill-gotten gains and providing critiques of expert witness testimony" as well as assisting other Divisions when "there are breaking events in the markets, providing data analysis and other technical expertise."[132]

Key to DERA's ability to engage in broader economic analysis is its enhanced use of data analyses. For example, in rulemaking defining "security-based swap dealer" or a "major security-based swap participant," DERA economists "analyzed voluminous amounts of transaction and position data to examine the amount of CDS [credit default swap] dealing activity that would be covered – and likewise, the amount of dealing activity that would be unregulated – under various de minimis thresholds."[133] After the rulemaking, the Division produced a memorandum "describing its analysis of the CDS data, along with the methodologies and assumptions underlying that analysis" for future use.[134] DERA economists also collect and analyze data "in previously largely unregulated areas," for example, by "identify[ing] types of participants in the CDS market, the frequency of their participation, concentrations of risk, and how this risk travels across jurisdictional boundaries" to ensure the SEC can fulfill its statutory mandate as complex markets evolve.[135] DERA thus pushes the SEC beyond its current docket and dependence on

---

[131] *Id.*; Lewis, *supra* note 129; *see also* Michael S. Piwowar, Comm'r, Sec. & Exch. Comm'n, Remarks to the First Annual Conference on the Regulation of Financial Markets (May 16, 2014), http://www.sec.gov/News/Speech/Detail/Speech/1370541854237#. VCNoJitdXkY.

[132] Lewis, *supra* note 129.

[133] *Id.*

[134] *Id.*

[135] *Id.* For another example of economists' contribution in breaking the deadlock between Commissioners on a rulemaking to reform money market fund regulation, *see* Bruce R. Kraus, *Economists in the Room at the SEC*, 124 YALE L.J.F. 280, 296-303 (2015).

parties' submissions, deploying "its econometric abilities to ascertain *for itself* the economic reality of financial markets before it seeks to regulate them."[136]

Finally, DERA's integration of economic analysis beyond mere technical assistance with rulemakings includes a broader application of social scientific developments and insights into the SEC's work. DERA "promot[es] collaborative efforts throughout the agency and breaking through silos that might otherwise limit the impact of the agency's institutional expertise."[137] Prior to the creation of the Division, the relationship between economists and policymakers was described by an insider as in "a stable dysfunctional equilibrium."[138] Much like the NLRB's DER, economists were "bystanders" pursuing their own research interests, and policymakers policed their imposition of data and analyses that could "limit their policy discretion."[139] However, DERA's creation and institutional transformation, personnel turnovers at key levels in the Divisions, and external pressure imposed by the courts to better justify SEC rulemakings "encouraged a new working relationship that puts economists at the table from the beginning of each rule to the end."[140] The SEC's 2012 Guidance "in effect amended the micro-constitution of the SEC staff, elevating the economist to the status of a co-equal branch of the agency" so that "old habits, presumptions, and prejudices" are now "largely gone."[141]

B. Policy-Setting vs. Litigation Support

The role of agency economists in setting policy as opposed to providing on litigation support depends on the agency. For example, the 50 Ph.D. economists in the Economic Analysis Group (EAG) at the Department of Justice Antitrust Division are primarily trained in Industrial

---

[136] Kraus, *supra* note 135, at 300 (emphasis added).

[137] SEC, *About the Division*, *supra* note 130.

[138] Kraus, *supra* note 135, at 302.

[139] *Id.*

[140] *Id.* For judicial interventions faulting the SEC for inadequate economic analysis in rulemakings, *see, e.g.*, *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177 (D.C. Cir. 2010); *Chamber of Commerce v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006); *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005). For broader assessment of how the SEC transformed itself to better survive judicial scrutiny, *see* Joshua T. White, *The Theory and Structure of Financial Regulatory Agencies*, 50 GA. L. REV. 293, 307-24 (2015).

[141] *Id.*

Organization and applied microeconomics.[142] EAG is composed of three sections: Competition Policy, Economic Litigation, and the Economic Regulatory Sections.[143] Overall, their work is primarily litigation-focused, working in teams with the Antitrust Division's attorneys "on every civil investigation of proposed mergers or possible anticompetitive business conduct by firms" which involves, at the early stages of an investigation: (1) interviewing firm executives and evaluating company documents and data to determine how to model the industry at issue; (2) identifying potentially dispositive facts and empirical projects therefrom; (3) defining the potential competitive theories of harm; and (4) shaping projects to test those theories.[144] They brief the Division's "top decision makers during the course of an investigation and make a recommendation on whether to challenge the merger or conduct."[145] If the Division decides to go forward in challenging the conduct, EAG economists support and prepare expert testimony and work as members of the case team on trial strategy and execution.[146] While economists are encouraged to pursue personal research projects as well as publish and participate in conferences, their main policy-setting function is researching and amending the Department of Justice's *Horizontal* and *Non-Horizontal Merger Guidelines*.[147]

While some commentators have criticized both the Antitrust Division and the FTC for not engaging sufficiently in policy-setting and rulemaking,[148] others criticize agencies like the SEC for failing to fully integrate economists into enforcement.[149] For example, after the D.C. Circuit struck down the SEC's first rule promulgated under the Dodd-

---

[142] DEP'T OF JUSTICE, ECONOMIC ANALYSIS GROUP, https://www.justice.gov/atr/about-division/economic-analysis-group.

[143] *Id.*

[144] *Id.*; Diane S. Owen, *Economists in the Division*, CSWEP NEWS 7 (2016), https://www.justice.gov/atr/file/economists-in-the-antitrust-division/download. Economists are less involved in the Division's criminal price-fixing investigations. *Id.*

[145] *Id.*

[146] *Id.*

[147] *See Department of Justice, Merger Review Process Initiative – Backgrounder*, https://www.justice.gov/atr/merger-review-process-initiative-backgrounder (*last visited* July 21, 2017); Carl Shapiro, Deputy Ass't Att. Gen., Antitrust Div., U.S. Dep't of Justice, Updating the Merger Guidelines: Issues for the Upcoming Workshops, Fall Forum, Antitrust Section, American Bar Association (Nov. 12, 2009), http://faculty.haas.berkeley.edu/shapiro/updating.pdf.

[148] *See, e.g.*, Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1285-89 (2011).

[149] *See, e.g.*, J.W. Verret, *Economic Analysis in Securities Enforcement: The Next Frontier at the SEC*, 82 U. CIN. L. REV. 491, 491-503 (2013).

Frank Act—the "proxy access rule"—commentators criticized the fact that DERA "has no authority to participate in the decision to bring an investigation or action nor to set the ground rules for how the SEC Enforcement Division prioritizes its caseload or determines penalties and settlements."[150] They instead put the FTC forward as a model for how to incorporate "economic analysis into [the SEC's] enforcement process," and by extension, that of other independent agencies.[151]

The FTC's Bureau of Economics employs 81 economists divided between consumer protection and antitrust activities.[152] In the consumer protection area, economists assist in both litigation and policy-setting, including: assessing the costs and benefits of pursuing enforcement actions; evaluating proposals for investigations, complaints, consent negotiations, and settlements; providing litigation support and day-to-day guidance on individual matters; and developing and disseminating "historical and analytical information needed to devise sound consumer protection policy."[153] Economists' role in antitrust regulation is more focused on litigation—performing an almost identical role to those in the EAG—with a smaller research and policy assessment program.[154]

FTC economists' role has been highlighted as exemplary because of the early and important function they play in its decisions to bring enforcement actions.[155] In the 1970s, economists were elevated in both the Antitrust Division and the FTC through institutional changes that shifted enforcement priorities based on developments in industrial organization theory.[156] Economists conducted empirical research to "spur[] [theoretical] developments and adjustments in antitrust doctrine and enforcement policy" in a feedback loop.[157] Economists' elevated participation also

---

[150] *Id.* at 495.

[151] *Id.* at 496.

[152] OPM, *supra* note 116; *Federal Trade Commission, About the Bureau of Economics*, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/about-bureau-economics.

[153] *Id.*

[154] *Id.*

[155] Verret, *supra* note 149, at 498; William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 400-02 (2003).

[156] Kovacic, *supra* note 155, at 400; MARC A. EISNER, ANTITRUST AND THE TRIUMPH OF ECONOMICS: INSTITUTIONS, EXPERTISE, AND POLICY CHANGE 119-83 (1991).

[157] Kovacic, *supra* note 155, at 401; Timothy J. Muris, GTE Sylvania *and the Empirical Foundations of Antitrust*, 68 ANTITRUST L.J. 899, 903-07 (2001) (describing effect of economic theory on merger enforcement policy). *See also State Oil Co. v. Khan*, 522 U.S. 3, 15-18 (1997) (providing overview of how scholarship on vertical restraints impacted judicial reassessment of *per se* ban on maximum resale price

altered the agency's metrics of success: instead of determining whether enforcement goals were met based on the number of cases brought or the size of either the target of investigation or the agency's recovery, success was determined based on how likely it would be that the enforcement actions would deter future anticompetitive conduct or vindicate a novel legal theory based on economic analysis.[158]

Extrapolating best practices from the success of integrating economists into agency antitrust enforcement, it is clear that incorporating economic analysis is critical at the earliest stages, from aiding in the systematic development of enforcement priorities to developing novel theories of harm that maximize fulfillment of regulatory goals. It also demonstrates the value of establishing economic divisions that have co-equal authority and budgetary allocations to enforcement divisions as well as similar reporting requirements to top-level decisionmakers within agencies.[159]

C. Beyond Neoclassical Economics

For agency regulation to remain current and adaptive, incorporating developments in economic theory and social science is key. These developments can range from enhanced methods in economic modeling and collecting empirical data, including gathering and incorporating "big data," to the rise of new economic approaches in new institutional or behavioral economics. This subsection will concentrate on how two agencies – the SEC and the Consumer Financial Protection Bureau (CFPB) – have integrated artificial intelligence (AI) research (financial technology, or "FinTech," and regulatory technology, or "RegTech") and behavioral economics, respectively, into their regulatory functions.

First, AI research is useful to securities regulation because assessing risk in financial markets is both difficult and time-consuming, and RegTech automated supervision tools can amass a complex base of data, track that data, and facilitate sophisticated reporting and monitoring that mirrors the technological complexity of evolving markets.[160] Starting in

---

maintenance).

[158] Kovacic, *supra* note 155, at 405.

[159] GROSS, RESHAPING THE NLRB, *supra* note 3, at 265-67; Verret, *supra* note 149, at 501-03.

[160] *See, e.g.*, Scott W. Bauguess, Acting Dir. and Acting Chief Economist, DERA, *The Role of Big Data, Machine Learning, and AI in Assessing Risks*, OpRisk North America 2017 (June 21, 2017), https://www.sec.gov/news/speech/bauguess-big-data-ai#_ednref1; Lawrence G. Baxter, *Adaptive Financial Regulation and RegTech*, 66 DUKE L. J. 567, 598-604 (2016).

2015, the SEC began utilizing machine learning, and specifically, text analytic methods, to determine whether it could have foreseen risks posed by the rise and use of CDS contracts leading up to the financial crisis through tracking rates at which such contracts were mentioned in Form 10-Ks and news articles from major news outlets.[161] Since then, DERA has applied topic modeling methods such as latent dirichlet allocation (LDA) to identify abnormal disclosures by corporate issuers charged with wrongdoing.[162] They found that, "when firms were subject to financial reporting-related enforcement actions, they made less use of an LDA-identified topic related to performance discussion."[163] DERA has expanded its use of topic modeling and other cluster analysis techniques to efficiently identify latent trends in vast amounts of unstructured financial information, and working with the SEC's enforcement and investigation teams, can "leverage knowledge from these collaborations to train the machine learning algorithms."[164] It thus incorporates the benefits of human judgment in identifying possible fraud or misconduct in registrant examinations to "train" an algorithm to find the same in new and existing SEC filings.[165] Such methods have developed algorithms that have proven five times better than random at identifying language in investment adviser regulatory filings that could merit a referral to enforcement.[166]

Second, the rise and integration of the behavioral sciences in regulation, and specifically the use of "choice architecture" and "nudges" to impact outcomes, has been a transformative turn in administrative regulation.[167] The "behavioral turn" has attempted to theorize, empirically assess, and incorporate into agency action correctives for human cognition errors—primarily heuristics and biases—that adversely affect welfare-enhancing decision-making.[168] Agencies from the Food and Drug Administration to the Federal Reserve have relied on behavioral research

---

[161] Bauguess, *supra* note 160.

[162] *Id. See also* Gerard Hoberg & Craig Lewis, *Do Fraudulent Firms Produce Abnormal Disclosure?*, 43 J. CORP. FINANCE 58-85 (2017).

[163] Bauguess, *supra* note 160.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] For a general overview of the impact of behavioral science on administrative regulation, *see* CASS R. SUNSTEIN, THE ETHICS OF INFLUENCE: GOVERNMENT IN THE AGE OF BEHAVIORAL SCIENCE (2016); BEHAVIORAL LAW AND ECONOMICS (Cass Sunstein, ed., 2000); Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

[168] *See generally* Cass R. Sunstein, *Introduction*, *in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 167, at 1-10.

in issuing regulations like revising "nutrition facts" labeling on food packages and forbidding banks from automatically enrolling customers in overdraft protection programs.[169] To more broadly integrate these efforts into agency regulation, and perhaps to preempt arbitrary and capricious review of agency actions relying on behavioral science, President Obama issued an Executive Order in 2015 encouraging federal agencies to "identify policies, programs and operations where applying behavioral science insights may yield substantial improvements in public welfare, program outcomes, and program cost effectiveness" and develop strategies for applying such insights to programs.[170] The Order also encouraged agencies to "recruit behavioral science experts to join the Federal Government" and "strengthen agency relationships with the research community to better use empirical findings from the behavioral sciences."[171]

More than any other agency, the CFPB was founded upon and has most directly incorporated the insights of behavioral science into its regulation of consumer credit and other financial products.[172] Under the Dodd-Frank Act, the CFPB is tasked with ensuring that "markets for consumer financial products and services are fair, transparent, and competitive."[173] In doing so, it must consider the "understanding by consumers of the risks of a type of consumer financial product or service," a monitoring function that has invited the expertise of behavioral scientists.[174] The CFPB established a Research, Markets and Regulations Division coequal with its enforcement divisions targeting unfair lending practices and consumer protection.[175] The Office of Research within the Division contains a Decision-Making and Behavioral Studies Section staffed with behavioral science experts.[176] The Section Chief leads an

---

[169] SUNSTEIN, ETHICS, *supra* note 167, at 6-7.

[170] Exec. Order No. 13,707, 80 Fed. Reg. 56365 (Sept. 15, 2015).

[171] *Id.*

[172] *See, e.g.*, SUNSTEIN, ETHICS, *supra* note 167, at 7-8, 81, 113-14. The idea for a new, independent agency to regulate deceptive and even exploitative practices by credit card companies and other lenders originated in the work of Elizabeth Warren and Oren Bar-Gill. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 6-7 (2008) (identifying "need for systemic regulation" in financial services markets and advocating creation of federal agency to regulate consumer credit products).

[173] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5511 (2010).

[174] *Id.* § 5512.

[175] *See* CFPB, Bureau Structure, https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/.

[176] *Id.*; CFPB, CFPB Researchers, https://www.consumerfinance.gov/data-

interdisciplinary team to research "household financial decision-making and behavioral science," provide "strategic and methodological guidance" on primary data collection, and supervise a number of key projects for the CFPB.[177] Specifically, the Section team: designs and fields surveys to develop insights into consumer financial decision-making and integrate into the CFPB's policy-making; supports CFPB rulemaking teams in developing and implementing policy (including testing proposed financial disclosures against the CFPB's policy goals); advises cross-agency teams on the design and evaluation of public-facing tools to support consumer financial decision-making; develops and conducts experiments in laboratory settings that contribute to the CFPB's "foundational knowledge" on consumer decision-making; and collaborates with financial services providers to conduct field trials of financial products and disclosures for ease of consumer comprehension.[178] Behavioral scientists thus play a pivotal role in collecting data, policy-setting, determining enforcement priorities, rulemaking, field enforcement, and integrating its data and analyses throughout the agency.

The CFPB has also appointed prominent behavioral economists and social scientists like Richard Thaler, John Campbell and Christine Jolls to its Academic Research Council (ARC), which "advise[s] the Bureau's Office of Research on research methodologies, data collection, and analytic strategies and provides feedback about research and strategic planning."[179] CFPB behavioral researchers have a symbiotic relationship with ARC, presenting their research and receiving feedback on a range of matters: disclosures in consumer financial products; the dynamics of household balance sheets; trends in consumer finance research; measuring costs and benefits of consumer financial regulation for consumers; the role of payment heuristics in consumer decision-making on credit card bill

---

research/cfpb-researchers/?form-id= 1&filter1_title = &filter1_topics= behavioral-economics (*last retrieved* July 24, 2017);

[177] CFPB, Section Chief, Decision Making & Behavioral Studies, http://www.decisionsciencenews.com/wp-content/uploads/2015/12/cfpb_SecChiefDecision Making.pdf.

[178] *Id.*

[179] Barbara S. Mishkin, *CFPB Use of Behavioral Economics Validated by Executive Order*, CFPB MONITOR (Sept. 17, 2015); CFPB, Academic Research Council: Member Biographies (Sept. 2016), http://files.consumerfinance.gov/f/documents/ARC_Bios_2016-_2017.pdf; CFPB, Annual Report of the Academic Research Council (Sept. 2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201612_cfpb_Annual_Report_Academic_Research_Council.pdf [hereinafter "CFPB ARC Report"].

payments; and so on.[180]

D. Microeconomic vs. Macroeconomic Modeling

The bulk of the economic analysis discussed thus far involves applied microeconomic analysis. While some Executive agencies quite explicitly develop, utilize and rely on macroeconomic modeling as part of their core functioning—the Macroeconomic Analysis Staff at the Treasury Department, the Macroeconomic and Quantitative Studies Section in the Federal Reserve, the Bureau of Economic Analysis in the Commerce Department, and so on—there is a heated scholarly debate about how far "law and macroeconomics" should extend beyond such agencies.[181] While the crisis in microeconomic modeling has begun to abate, it is still raging in the world of macroeconomic modeling.[182] The level of theoretical and empirical uncertainty in macroeconomic modeling has led many to condemn broad agency mandates to conduct macroeconomic analysis, and some reject agency reliance on and integration of such analyses in policy-making altogether.[183]

But, on a voluntary basis, and due to Congressional pressure, some agencies have begun to venture into assessing the economy-wide effects of their policies through macroeconomic modeling and forecasting.[184] The

---

[180] CFPB ARC Report, *supra* note 179; CFPB, Academic Research Council Agenda (May 7, 2015); CFPB, Academic Research Council Agenda (Apr. 25, 2014); CFPB, Academic Research Council Meeting Summary (June 17, 2013), https://s3.amazonaws.com/files.consumerfinance.gov/f/201412_cfpb_meeting-minutes-arc-meeting-june2013.pdf.

[181] *See, e.g.*, Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions* 8-10 (Yale Law & Econ. Research Paper No. 559, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 2828352; Jonathan S. Masur & Eric A. Posner, *Should Regulation be Countercyclical?*, 35 YALE J. REG. ___ (forthcoming 2018); Revesz, *supra* note 120, at 554-56; Jeffrey S. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. LEGAL STUD. S351 (2014); Bruno Meyerhof Salama, *The Art of Law and Macroeconomics*, 74 U. PITT. L. REV. 131 (2012); Mark Kelman, *Should Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, 45 STAN. L. REV. 1215 (1993).

[182] *See, e.g.*, Revesz, *supra* note 120, at 554-56.

[183] *See, e.g.*, ROGER E. BACKHOUSE, THE PUZZLE OF MODERN ECONOMICS: SCIENCE OR IDEOLOGY? 117-37 (2010) (summarizing debates over whether and how to construct macroeconomic models and ability of those models to forecast economic behavior).

[184] *See, e.g.*, *Eye on the EPA: Transparency Request #4, Snapshot Approach Toward Economic Analysis Doesn't Work*, U.S. SEN. COMMITTEE ON ENVT. & PUBLIC WORKS (Apr. 25, 2013), http://www.epw.senate.gov/public/index.cfm/in-the-news?ID= 4310AC51-EF70-4C02-03EA-CBF64C1486C2 (demanding EPA disseminate

EPA's National Center for Environmental Economics (NCEE) is the most prominent example. In 2010, the Agency developed *Guidelines for Preparing Economic Analyses* advising that, where substantial environmental policy changes in one sector result in indirect consequences in other sectors, "a general equilibrium framework, which captures linkages between markets across the entire economy, may be a more appropriate choice" for conducting economic analyses.[185] Such models generally work by estimating a policy change's impact by "'shocking' the model" with a proposed regulation and then determining "changes in economic welfare measures" based on the difference between the equilibria before and after the "shock."[186]

The EPA has utilized general equilibrium frameworks—computable general equilibrium (CGE) modeling and Intertemporal General Equilibrium Models—to forecast changes in the economy resulting from potential changes in environmental policy.[187] The agency describes the strengths and weaknesses of such modeling in its *Guidelines*, including their ability to forecast "large economy-wide impacts, especially when indirect and interaction effects are expected to be significant," such impacts are anticipated over long time horizons, and the Agency seeks to "estimate the distributional impacts of policy shocks on household groups or industrial sectors."[188] The EPA has used CGE models to: conduct a retrospective cost-benefit analysis of the Clean Air Act;[189] quantify the costs of mitigating greenhouse gases in accordance with the Kyoto Protocol and proposed congressional actions on climate change;[190] and assess the potential economy-wide impacts and social costs of an alternate ozone standard.[191]

"new guidance mandating 'whole economy' modeling on major rules").

[185] *EPA Guidelines*, *supra* note 124, at 8-4.

[186] *Id.* at 8-19.

[187] Revesz, *supra* note 120, at 556-59; *EPA Guidelines*, *supra* note 124, at 8-21; *Economy-Wide Modeling: Social Cost and Welfare White Paper* 45 (Sept. 22, 2015), https://yosemite.epa.gov/sab/sabproduct.nsf//LookupWebProjectsCurrentBOARD/07E67CF77B54734285257BB0004F87ED/$File/Social+ Cost+ and+ Welfare+ White+ Paper+ 9-22-15.pdf.

[188] Revesz, *supra* note 120, at 557; EPA *Guidelines*, *supra* note 124, at 8-21.

[189] OFFICE OF AIR & RADIATION & OFFICE OF POLICY, PLANNING AND EVALUATION, U.S. ENVTL. PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT: 1970-1990, EPA/410/R-97/002 (1997).

[190] *EPA Guidelines*, *supra* note 124, at 8-20.

[191] U.S. ENVTL. PROTECTION AGENCY, FINAL OZONE NAAQS REGULATORY IMPACT ANALYSIS, EPA 452/R-08-003, at 5b-1, 5b-2 (2008), http://www3.epa.gov/ttn/ecas/regdata/RIAs/452_R_08_003.pdf.

III. INTEGRATING ECONOMIC ANALYSIS INTO LABOR REGULATION

While there are many avenues of integrating economic analysis into labor regulation, this Section assesses three of the most practicable options: (1) creating an interagency group on economic analysis of labor and employment, a kind of labor "superagency"; (2) mandating or allowing OIRA review of NLRB rulemakings; and (3) developing the NLRB's internal capacity by reestablishing the DER. Of the three, I focus most on the third as the necessary condition for robust agency collaboration through the first two avenues.

A. *Interagency Group on Economic Analysis of Labor and Employment*

Interagency working groups (IWGs) facilitate the involvement of Federal agencies with overlapping mandates and expertise to execute or improve the achievement of statutory or regulatory goals. IWGs have been established for a range of purposes, from ensuring immigrants receive agency-wide labor and employment law protections in tandem with immigration enforcement to determining the social cost of carbon.[192] IWGs have been successful in harmonizing policy between agencies where agency mandates overlap and can produce inconsistent results. For example, the IWG on labor and immigration developed and issued an important joint guidance for employers to ensure that internal audits of I-9 work authorization forms were conducted fairly and without discrimination or retaliation against immigrant employees.[193] And the IWG on the social cost of carbon (SCC) was able to develop a figure for the SCC in 2009, adopt the value a year later after public comment, and issue

---

[192] *See* U.S. DEP'T OF LABOR, *Fact Sheet: Establishment of Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment and Immigration Laws*, https://www.dol.gov/general/immigration/interagency-working-group; INTERAGENCY WORKING GROUP (IWG) ON SOCIAL COST OF CARBON, U.S. GOV'T, RESPONSE TO COMMENTS: SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866 1 (2015), http://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-response-to-commments-final-july-2015.pdf. President Trump has since disbanded the IWG on the Social Cost of Carbon. Presidential Executive Order on Promoting Energy Independence and Economic Growth § 5(b) (2017).

[193] U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *DOJ, DHS Announce Joint Guidance to Employers on Internal Form 1-9 Audits* (Dec. 14, 2015), https://www.ice.gov/news/releases/doj-dhs-announce-joint-guidance-employers-internal-form-i-9-audits.

a revised estimate in 2013.[194] The IWG devised the value through using a broad class of computational algorithms, and the process of estimating and updating it was open and subject to public comment on both methods and outcomes.[195] The IWG's estimates have since been used in thirty-four rulemakings performed by the EPA and the Departments of Energy, Transportation, Agriculture and Housing and Urban Development as of July 2015.[196] Its success in developing a very complex and politically salient metric for valuing a central component to broader climate change policy on carbon dioxide reductions has been heralded as a model for cross-agency collaborations because of the transparency of its methodology, establishment of protocols for dealing with uncertainties, and allowing genuine opportunities for public participation and comment.[197]

As these examples illustrate, IWGs can serve as coordinating bodies between agencies with overlapping purviews that would benefit from relying on a centralized set of standards for regulatory consistency and efficiency. The fragmented, *ad hoc* and uneven regulation of the workplace between the various agencies that impact labor regulation and labor markets could certainly benefit from harmonious standardization. The Department of Labor, the NLRB, and the EEOC notoriously have different definitions of "employer" and "employee," which results in the evolution of inconsistent workplace standards for various workplace rights and bodies of doctrine that do not cohere a unified set of principles on core regulatory triggers.[198] An IWG could aid in harmonizing this area of law while also preserving the tailored utility of various jurisdictional boundaries for each regulatory context.

Further, while the Department of Justice and the FTC have deftly integrated economic analysis into their policymaking and enforcement, they do not share their data, methods, analyses and policy prescriptions with federal agencies that regulate labor and employment, a fact all the more significant because they are charged with regulating anticompetitive conduct in and impacts of mergers on labor markets. The way in which

---

[194] IWG ON SOCIAL COST OF CARBON, *supra* note 192, at 2.

[195] Revesz, *supra* note 120, at 582 & nn. 289-95.

[196] IWG ON SOCIAL COST OF CARBON, *supra* note 192, at 4.

[197] Revesz, *supra* note 120, at 583.

[198] *See, e.g.*, KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004); Katherine V.W. Stone, *Rethinking Labour Law: Employment Protection for Boundaryless Workers*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 155 (Guy Davidov & Brian Langille eds., 2006).

firm conduct, competition between firms, and market structures and processes effect the workings of labor markets is not only critical information for labor and workplace agencies, but should also inform their regulatory priorities. For example, industries where employers have monopsony power or have engaged in collusion to suppress wages should be a regulatory priority for the enforcement of unionization protections, wage-and-hour and overtime laws, and antidiscrimination laws because workers under those circumstances have less bargaining power to correct for the adverse efficiency and distributional effects that can result from such anticompetitive conduct.[199]

Finally, the Office of Economic Policy at the Treasury Department, charged with analyzing and reporting on economic developments that impact the creation of economic and job opportunities, has published a series of papers and reports on the effect of non-compete agreements on "worker welfare, job mobility, business dynamics, and economic growth more generally."[200] The Office of Economic Policy was able to issue its report on non-competes because of a "recent development of more comprehensive data on their usage" from academic researchers, data the policy implications of which could be assessed more fully in conjunction with agencies also concerned with the protection of workplace rights and regulating labor markets.[201]

An Interagency Working Group on Economic Analysis of Labor and Employment Law could serve as an economic analysis clearinghouse with a "systemic viewpoint" for all agencies regulating labor and employment.[202] Participating agencies could include the Department of Labor, the NLRB, the EEOC, the Council of Economic Advisers, the OMB, the Department of Justice, the FTC, Treasury Department, and the National Economic Council. A collaborative effort is all the more necessary because of the uneven levels of economic expertise as between

---

[199] *See* Hafiz, *supra* note 72, at ___.

[200] OFFICE OF ECONOMIC POLICY, U.S. DEP'T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 3 (March 2016), https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf. These papers and reports were issued in compliance with a 2016 Obama Administration Executive Order on Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy. Exec. Order No. 13,725, 81 Fed. Reg. 23417-23419 (Apr. 15, 2016).

[201] TREASURY DEP'T, NON-COMPETE CONTRACTS, *supra* note 200, at 6; *see also* Evan Starr, J.J. Prescott & Norman Bishara, *Understanding Noncompetition Agreements*, 2016 MICH. ST. L. REV. 369 (2016).

[202] For a proposal to create an interagency group providing a "systemic viewpoint" on financial regulation, *see Revesz*, *supra* note 120, at 575.

these agencies: the NLRB and the EEOC have no economists on staff, and the other agencies with robust economic research capabilities have no institutionalized mechanism for sharing and diffusing their knowledge. An IWG could facilitate genuine collaboration between these agencies and create an infrastructure for researching and preparing not only first-rate cost-benefit analyses but also broader economic analyses that could aid in unifying incoherent or inconsistent labor and workplace regulation while mutually reinforcing policy goals of competitive wages, job growth, and reducing income inequality.

Where an IWG's benefits would diminish would be in providing agency-specific guidance on the range of matters that lack overlap but require significant expertise. For example, the Board has developed expertise in administering the NLRA in areas of a highly technical nature: collective bargaining rules and duties, unfair labor practices, the range of protected concerted activity, bargaining unit determinations, and more. While integrating economic analysis into these areas of the Board's purview would add significant regulatory improvements, they would likely not be worthy of interagency coordination, and the IWG ought not be tasked with conducting economic analysis of them.

B. OIRA Review of NLRB Rulemakings

Another alternative for enhancing the NLRB's economic expertise would be to subject its major rulemakings to OIRA review, assuming OIRA would have the authority to review its regulatory analyses as an "independent" agency.[203] Given the trend in more aggressive judicial review of independent agency cost-benefit assessments,[204] OIRA review could provide both a valuable institutional role and expertise to legitimize

---

[203] *See supra* note 126. *See also* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 827-32, 837 (2013) (arguing that, "[b]ecause Congress has not by statute insulated the so-called independent agencies from regulatory review, the President can require them to comply with the . . . executive orders" governing Executive agencies); Rachel E. Barkow, *Insulating Agencies*, 89 TEX. L. REV. 15, 31-32 & n. 81 (2010) (arguing that the constitutionality of expanding OIRA review to independent agencies is an "open . . . question"); Memorandum for the Hon. David Stockman, Director of OMB, from Larry L. Sims, Acting Ass't Atty. Gen., O.L.C. (Feb. 12, 1981), reprinted in *Role of OMB in Regulation: Hearing Before the Subcomm. On Oversight and Investigations of the H. Comm. On Energy and Commerce*, 97th Cong., 1st Sess. 158-63 (1981) (providing statutory and constitutional underpinnings for extending Executive review over independent agencies).

[204] *See* Section I.C.2.

Board rulemakings and allow the NLRB to benefit from the experience of other agencies that OIRA reviews.[205] For example, agencies could harmonize their positions on a range of regulatory issues relating to labor markets and workplace protections by encouraging OIRA to either mediate between them or adopt a position that harmonizes their goals.[206]

However, OIRA review would not be an ideal solution as a substitute for the development of internal NLRB economic analysis expertise for a number of reasons. First, the NLRB rarely engages in rulemaking, and as discussed *supra*, there is a broader need for economic analysis in labor regulation beyond the limited rulemaking and potential cost-benefit analysis that the Board would engage in and apply. The Board would ideally incorporate social scientific expertise into its enforcement decisions, adjudication, priority setting and policy-making. Further, while Memoranda of Understanding (MOUs) between OIRA and independent agencies have resulted in mixed success,[207] the utter lack of economists on staff to collaborate with or properly receive technical guidance and quantitative assistance from OIRA staff, and similarly, OIRA's limited expertise on labor law, would all make any partnership a challenging one.

C. Internal Division of Economic Research at the NLRB

By far the most comprehensive and efficient solution to providing much-needed social scientific expertise at the Board would be to reestablish an internal DER. Expertise developed in an internal Division could elicit the enforcement and policy-setting benefits described *supra*: enhancing informed decision-making in agency actions; aligning labor regulation with state-of-the-art social scientific research and economic realities; and honing Board expertise on what kind of economic evidence is necessary for the efficient resolution of adjudicative or other regulatory problems, including being better able to parse evidence presented to it by

---

205 *See* Ryan Bubb, *Comment: The OIRA Model for Institutionalizing CBA of Financial Regulation*, 78 LAW & CONTEMP. PROBS. 47, 52 (2015) (describing OIRA's success in a wide range of regulatory domains); Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U.CHI. L. REV. 609, 661-66 (2014) (explaining process by which OIRA review leads Executive agencies to influence each other).

206 Livermore, *supra* note 205, at 661.

207 *See* Revesz, *supra* note 120, at 570-75 (discussing Commodity Futures Trading Commission's MOU with OIRA and mixed success of rules propagated thereunder after judicial review); *see also Memorandum of Understanding between Office of Info. & Reg. Aff. And Office of Advocacy, U.S. Small Bus. Admin.* (Mar. 19, 2002), https://www.sba.gov/sites/default/files/advocacy/MOU_OIRA.pdf.

parties. The Board's repeat exposure to labor law cases would give it the opportunity to further collect data and integrate industry-specific challenges to resolving labor disputes into a broader, social scientific perspective on what kinds of disputes commonly arise in what settings. Systematizing that knowledge would improve the Board's policy-making and better justify judicial deference to its expertise.

Like other regulatory agencies that have taken steps to improve their capacity to gather, analyze and integrate economic and broader social scientific data, the Board could first develop an internal blueprint of best practices as well as draft and publish internal guidelines for preparing economic analysis.[208] The OMB's Circular A-4 could serve as initial guidance, but guidelines of other agencies like the EPA's NCEE and the SEC's DERA, which extend beyond quantification strategies for cost-benefit analyses in RIAs, could provide supplementary models for the scope of the Division's guidelines. The Division could update those guidelines in a continuing effort to enhance its expertise and could solicit public feedback and comments for improvements.

Division guidelines could lay out standard practices for developing and disseminating analytical advice to the Board's various offices and divisions, including to Board Members and the Board's General Counsel. The Division could also be responsible for funding outside projects and soliciting expertise from the academic community.[209] Just like its earlier incarnation, the Division could research and draft reports on issues critical for efficient enforcement of the NLRA, including, for example, the status of joint employment and its affect on Section 7 rights, the accuracy with which employers designate workers—such as supervisors, managerial staff, and independent contractors—as exempt from the NLRA, and so on. The Board's own adjudications could serve as a Bayesian source of data collection,[210] but the Division need not limit itself to research data from workplaces with already unionized employees.

Another benefit of an internal Division is that it would liberate the Board from being dependent on parties that appear before it for information, thus limiting the likelihood of regulatory capture by the

---

[208] *See, e.g.*, *EPA Guidelines*, *supra* note 124, at 1-1; Revesz, *supra* note 120, at 592; Al McGartland, *Thirty Years of Economics at the EPA*, 42 AGRIC. & RESOURCE ECON. REV. 436, 438-41 (2013).

[209] Livermore, *supra* note 205, at 627-28.

[210] For a "Bayesian" proposal for updating priors as an "institutional solution to the problem of regulatory uncertainty," *see* Jonathan S. Masur & Eric A. Posner, *Unquantified Benefits and the Problem of Regulation Under Uncertainty*, 102 CORNELL L. REV. 87, 92-93 (2016).

groups it is meant to be regulating.[211] Instead of deciding particular cases exclusively on the basis of such private material, the Board could also rely on industry-wide data, much as it did during the first DER's years of constitutional challenge. Institutional design is critical for ensuring agency independence, and the best way of "imbed[ding] information generation and dissemination into any agency's structure" is to "create a research arm in the agency to produce reports and studies and ensure that it is adequately funded."[212]

While the Department of Labor's Bureau of Labor Statistics (BLS) already employs around 28% of economists in federal agencies—1,284—a new DER would not be duplicative. The BLS serves as the "principal Federal agency responsible for measuring labor market activity, working conditions, and price changes in the economy," but the Division would collect different data, have a different mission, and would need policy-making integration and synergies independent of the BLS's foci. Specifically, the Division would gather and analyze information beyond unionization rates[213] to more broadly assess how economic realities affect workers' ability to exercise their Section 7 rights: their right to organize, bargain collectively, engage in concerted activity, achieve equal bargaining power with employers and so on. For example, the Division could be tasked with collecting and analyzing data on how changes in labor markets, labor market structures and processes, corporate restructuring, inflation and pricing in product markets, employment rates, unemployment, the relationship between labor productivity and wages, and so on enhances or diminishes the exercise of Section 7 rights. How does vertical disintegration affect unionization rates and why? How does labor market segmentation affect workers' right to collectively bargain? What makes unionization more successful in certain industries over others? Would an expansion of "joint employer" doctrine to allow collective bargaining between directly employed and subcontracted workers on the one hand with subcontracting employers on the other overcome coordination costs between workers and ensure competitive

---

[211] GROSS, RESHAPING OF THE NLRB, *supra* note 3, at 265; Barkow, *supra* note 203, at 59 ("One of the most powerful weapons policy makers can give agencies is the ability to generate and disseminate information that is politically powerful"). For useful overviews of agency capture, see B. DAN WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY 18 (1994) and Michael E. Levine & Jennifer Forrence, *Regulatory Capture, Public Interest, and the Public Agenda*, 6 J.L. ECON. & ORG. 167 (1990).

[212] Barkow, *supra* note 203, at 60.

[213] BLS, *Union Members*, *supra* note 2.

wage rates? And so on. Further, the Division would have its own independent interest in keeping up to date on developments in labor economics, human relations, industrial organizations, behavioral science, and other relevant social scientific fields for developments in how best to advance worker protections under the NLRA. Finally, the BLS is not tasked with evaluating the success of Board remedies, something an internal Division would be best placed to investigate and propose recommendations on to the extent they are deficient in meeting the statute's goals.

As a practical matter, the Board could reestablish the Division through an internal operating rule and be prepared, in light of interceding Executive injunctions and statutory mandates to conduct cost-benefit analysis, to defend "the position that the Board no longer construes the ban as broadly barring the internal development and evaluation of social science evidence."[214] Alternatively, Congress could repeal Section 4(a) and allocate budgetary resources to build capacity for economic analysis in a new Division. While the Board may face appropriations challenges, and it may take time for a new Division to get up to speed, the examples cited above from the SEC, the FTC, the EPA, and other agencies indicate that these challenges are surmountable.

IV. MICROECONOMIC ANALYSIS OF LABOR REGULATION

A new DER could be charged first and foremost with assessing the microeconomic effects of the NLRB's current and future regulation as well as its failure to regulate. This Section highlights key areas of focus for researching and assessing such microeconomic effects and proposes best practices for integrating microeconomic analysis into labor regulation. It then provides an example—the analysis of notice posting requirements—to illustrate how the Board could engage in analysis of microeconomic effects.

---

[214] The suggestion to revive the DER builds on the recommendations made in Fisk & Malamud, *supra* note 65, at 2078-79, but this Article goes beyond their recommendation to more fully historicize the original DER's contributions, integrate the current literature on the benefits of incorporating economic analysis into agency regulation, provide an overview of how that integration in various agency settings can derive a set of "best practices" for conducting economic analysis at the Board, and identify the ways in which a new DER could better assess the effects of labor regulation on achieving the Act's purpose of equalizing employee-employer bargaining power to ensure beneficial microeconomic effects on competitive wage rates and macroeconomic effects on worker purchasing power and labor's share of national income.

A. Microeconomic Effects of Labor Regulation

As mentioned *supra*, one purpose of the NLRA was to address the adverse consequences of unequal 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" which "prevent[s] the stabilization of competitive wage rates and working conditions within industries."[215] We now understand competitive wages to be the product of well-functioning labor markets free of market failures: monopsonistic or oligopsonistic wage-setting; limited information or information asymmetries; and public-goods problems, to name a few.[216] In 2016, the Obama Administration issued Executive Order 13,725, declaring as a matter of policy that "[p]romoting competitive markets and ensuring . . . workers have access to information needed to make informed choices must be a shared priority across the Federal Government," in both "Executive departments and agencies."[217] Agencies "can contribute to these goals through, among other things, pro-competitive rulemaking and regulations, and by eliminating regulations that create barriers to or limit competition."[218] The Order imposed responsibilities on "agencies with authorities that could be used to enhance competition" to "use those authorities to promote competition" and "identify specific actions that they can take in their areas of responsibility to build upon efforts to detect abuses such as price

---

[215] 29 U.S.C. § 151.

[216] *See, e.g.*, Stewart J. Schwab, *Law-and-Economics Approaches to Labour and Employment Law*, 33 INT'L J. COMP. LABOUR LAW & INDUS. REL. 115, 118 (2017). For broad overview of efficiency-enhancing role of unions, including solving public-goods problems, *see, e.g.*, RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984) (discussing efficiency-enhancing functions of unions); Kenneth Dau-Schmidt, *A Bargaining Analysis of Labor Law*, 91 MICH. L. REV. 419 (1992). For broader descriptions of market failures in the New Economy workplace, *see* DAVID WEIL, THE FISSURED WORKPLACE (2014). For a recent overview of the problem of monopsony and oligopsony in labor markets, *see* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS (2010); ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS (2003); Orley C. Ashenfelter, Henry Farber & Michael R. Ransom, *Labor Market Monopsony*, 28 J. LAB. ECON. 203 (2010); Venkatarman Bhaskar & Ted To, *Minimum Wages for Ronald McDonald Monopsonies: A Theory of Monopsonistic Competition*, 109 ECON. J. 190-203 (1999); Kenneth Burdett & Dale Mortensen, *Wage Differentials, Employer Size, and Unemployment*, 39 INT'L ECON. REV. 257-73 (1998).

[217] Exec. Order No. 13,725, *supra* note 200.

[218] *Id.*

fixing, [and] anticompetitive behavior in labor and other input markets. . . ."[219]

The Board's failure to engage in economic analysis has limited its ability to assess the effects of its adjudication and rulemaking, as well as its failure to act or set regulatory priorities, on workers' ability to collectively combat employer monopsony or oligopsony power to set infracompetitive wages and non-wage terms,[220] to overcome information asymmetries that decrease their bargaining power (from information about employer finances or decisions to close plants to basic information about their Section 7 rights), and to solve public-goods problems in the workplace through mandatory collective bargaining instead of relying on inefficient market-based exit.

In assessing the microeconomic effects of its actions (or failures to act), the Board—through a new DER—should not only assess effects on static allocative efficiency but also on dynamic efficiency.[221] Under a static efficiency model, assuming there are no recruitment or training costs, any amount of labor can be recruited at zero cost as long as the wage paid by an employer is at or above the competitive level, but no labor is available at any cost if a wage below the competitive wage is offered.[222] In other words, under this model, "the tiniest wage cut results in the complete inability to recruit any workers at all" because workers would either reject offers under the competitive wage or quit to work at a competitor firm if his or her wage was below the competitive wage.[223]

But work is rarely sold on a "spot market" for immediate delivery, where workers contract to provide labor in one-off exchanges with employers and their wages are competitively determined by the instant valuation of their marginal revenue product of their labor. Instead, compensation is determined in a world of incomplete contracts where worker productivity fluctuates and wages are determined dynamically,

---

[219] *Id.* § 2.

[220] For an example of the Board's failure to consider the adverse microeconomic effects of employer monopsony or oligopsony power on workers' secondary picketing rights, *see* Hafiz, *supra* note 72, at ___.

[221] For an overview of the need for labor regulation to correct for barriers to static and dynamic efficiencies, *see* Simon Deakin & Frank Wilkinson, *Labour Law and Economic Theory: A Reappraisal*, *in* LEGAL REGULATION OF THE EMPLOYMENT RELATION 1-6 (Hugh Collins, Paul Davies & Roger Rideout eds., 2000); *see also* Kelman, *supra* note 181, at 1219-1225 (describing legal economists' evolving focus from allocative efficiency to dynamic productive efficiency).

[222] Alan Manning, *A Generalized Model of Monopsony*, 116 ECON. J. 84, 86-87 (2006).

[223] *Id.* at 87.

through repeated or long-term exchange.[224] Thus, in order to consider the microeconomic effects of labor regulation, and in accordance with the NLRA's vision and goal of long-term collective bargaining in employment relationships, a new DER should consider dynamic efficiencies, or whether labor law rules are welfare enhancing over time. For example, regulating to ensure dynamic efficiencies could assess whether labor law rules enhance employee-employer welfare in a way that incorporates long-term worker productivity cycles. It could also assess whether rules create a "calculative trust" between employers and employees that encourages cooperation over conflict, or a "goodwill trust" where the parties are willing to perform over and above the literal terms of the contract to enhance flexibility, open-ended cooperation, and "productivity on long-term productive investments in skills and technology."[225] The Division could research the degree to which certain labor law rules over others create "an environment which is favourable to the emergence of high-trust employment relationships" based on their relative impact on workers' job satisfaction, fairness in treatment, and income and job security.[226] Key here would be an analysis of how labor market segmentation—or allocating different wages per "efficiency unit" for workers with comparable skills and efficiencies—has been effectuated through contract "design discrimination" that: excises large numbers of workers from NLRB jurisdiction; pits direct employees against temporary, outsourced and subcontracted employees that are not able to collectively bargain with *de facto* employers; and results in wage discrimination.[227] Where wage discrimination can result in lower average productivity, a decline in product innovation, or other adverse effects, the Division should consider how labor law rules—from determining whether an indirect employer is a "joint employer" to bargaining unit determination for collective bargaining—can improve dynamic efficiency.[228]

B. Towards Integrating Microeconomic Analysis into Labor Regulation

A new DER at the Board would be poised to benefit from lessons learned in applied microeconomic analysis done in other agencies as well as agencies' broader integration of social scientific methods from

[224] Deakin & Wilkinson, *supra* note 221, at 29-36.
[225] *Id.* at 31-32.
[226] *Id.* at 32.
[227] *Id.*
[228] *Id.* at 32-35.

behavioral science.

First, like the original DER, the staff of a new Division would ideally be interdisciplinary. While the majority of staff could have expertise in labor economics, a new DER could have researchers trained in behavioral science, industrial organizations, theory of the firm, sociology, industrial and organizational psychology, mathematical statistics and data science, just like the current staff of the BLS and the Office of Research at the CFPB. It could have co-equal authority with the General Counsel and the authority to provide supplemental staff reports or sign off on the General Counsel's staff reports, like the SEC's DERA staff.[229]

Second, the new DER's scrutiny of microeconomic effects could be incorporated into enforcement and policy-setting, litigation and rulemaking. It would thus be capable of conducting cost-benefit analyses as well as broader economic analysis.[230] For significant rulemaking, the DER could run extensive field studies to determine an empirical basis for regulation and collect economic and industrial relations data, providing the strongest possible underpinning for judicial review.[231] The DER could also conduct independent research projects and draft policy papers in areas of critical interest for the Board and for public dissemination. For enforcement actions and adjudications, the DER could assist the General Counsel and the Regional Directors in setting enforcement priorities, ranking cases in terms of the typical net harm caused to workers by different types of unfair labor practices in priority industries. Such prioritization could aid in deterring future wrongdoing with the biggest payoff while also allowing the Board's enforcement arm to test novel legal theories, say, on the breadth of joint employment doctrine. The new DER could also assist in promulgating guidance about how to calculate economic harm in other contexts that it purports to regulate (for example, where collective bargaining works well or is dominant in a given industry; what the history of labor and employment violations are in that industry; and what has served as effectuating compliance and internal controls). Finally, the DER could aid in reviewing enforcement personnel by scoring the relative economic impact of enforcement cases resolved annually, compare enforcement actions against economic data on union density, the rates of occurrence of unfair labor practices, successful cost-benefit analyses reached, recidivism rates of labor law violators in relation to the remedies imposed, and so on. In sum, the DER's involvement in Board

[229] *See* Kraus, *supra* note 135, at 302; Lewis, *supra* note 129.
[230] *See* Section II.A.
[231] *See* GROSS, RESHAPING THE NLRB, *supra* note 3, at 266.

action could change its calculus on enforcement significantly.

Third, when conducting microeconomic analyses of the Board's actions or failure to act, the DER could also work to develop and integrate behavioral scientific studies and data into its assessments. For example, it could conduct controlled research trials on labor law rules concerning, say, the timing of mandatory employer captive audience meetings with unionizing employees before a representation election to test how workers respond.[232] Instead of the Board relying on its "common sense" assumptions about "the effects of employer conduct on employee protected rights, and the implications of union activities on employers' managerial and property prerogatives," it should "be sensitized to behavioral science inputs" as a consumer of behavioral evidence and "should assume the burdens of conducting, facilitating, and guiding behavioral research on labor-management relations by establishing . . . a separate unit devoted to behavioral research" in the DER for both intra-agency and external use.[233] Such research could take the form of Behavioral Impact Statements that would become part of the Board's official record to which parties and the public could respond.[234]

C. Case Study: Notice Posting Requirements

If any story could demonstrate the NLRB's "administrative law exile," it is the story of the failure of its third major rulemaking requiring the posting of employees' NLRA rights in their workplaces.[235] Specifically, the rule required employers subject to the NLRA "to post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures," in the language set forth in an appendix listing: (1) employees' Section 7 rights; (2) unlawful employer conduct under the Act; (3) unlawful union conduct under the Act; (4) employer and union duties and remedies for illegal conduct; and (5) itself as "an official Government Notice."[236] The rule also created a few enforcement mechanisms. First, employers' failure to post the notice

[232] *See* Roomkin & Abrams, *supra* note 74, at 1455-57 (discussing behavioral research on impact of pre-election managerial communications on employee voting). For a broader assessment of incorporating behavioral science on manipulation, *see* SUNSTEIN, ETHICS, *supra* note 167, at 78-115.

[233] Roomkin & Abrams, *supra* note 74, at 1447.

[234] *Id.* at 1459.

[235] 76 Fed. Reg. 54,006.

[236] 29 C.F.R. § 104.202(a); *id.* 104, subpt. A, app.

could "be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7 . . . in violation of" the NLRA's unfair labor practice provision, Section 8(a)(1).[237] Second, the Board could suspend the running of the six-month limitations period for a filing of any unfair labor practice charge "unless the employee has received actual or constructive notice that the conduct complained of is unlawful."[238] And finally, the Board could consider an employer's "knowing and willful refusal to comply with the requirement to post the employee notice as evidence of unlawful motive in a case in which motive is an issue."[239]

The Board invoked Section 6 of the NLRA for its authority to promulgate the rule, which states that the "Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act], such rules and regulations as may be necessary to carry out the provisions" of the Act.[240] The need for notice posting, the Board stated, was that "it ha[d] reason to think that most" employees "do not" know their NLRA rights, and "[f]or employees to fully exercise" them, "they must know that those rights exist and that the Board protects" them.[241] The exclusive evidence that the Board cited for this proposition were three law review articles from the late 1980s and early 1990s.[242] The Board cited the same law review articles to explain why the knowledge gap existed: "the low percentage of employees who are represented by unions, and thus lack an important source of information about NLRA rights; the increasing proportion of immigrants in the workforce, who are unlikely to be familiar with their workplace rights; and lack of information about labor law and labor relations on the part of high school students who are about to enter the labor force."[243]

Both the D.C. and the Fourth Circuits struck down the rule on

---

[237] *Id.* § 104.210.

[238] *Id.* § 104.214(a).

[239] *Id.* § 104.214(b).

[240] 29 U.S.C. § 156.

[241] 76 Fed. Reg. 54,006.

[242] *Id.* at 54,006 n.3 (citing Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 433-34 (1995); Charles J. Morris, *Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board*, 23 STETSON L. REV. 101, 107 (1993); Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1675-76 (1989)).

[243] *Id.* at 54,006 & n.4.

statutory grounds under separate reasoning.[244] Despite widespread criticism of the merits of those decisions, the Board declined to appeal either ruling and chose instead to rescind the rule.[245] The decisions and the Board's subsequent rescission are a cautionary tale, and because of their potential chilling effect on future Board rulemaking, it is critical to walk through how the outcome may have been different if: (1) the Board had developed a robust social scientific record of why the notice posting rule was "necessary to carry out the provisions" of the NLRA; and (2) the Board had consistently engaged in rulemaking rather than adjudication in setting policy, thus inviting judicial review of its rulemaking authority alongside the evolution of administrative law doctrine as applied to other agencies.

As to the first point, the trouble began with Board Member Brian Hayes. Member Hayes dissented to the final rule on grounds that the "Board's rulemaking authority, broad as it is, does not encompass authority to promulgate a rule of this kind," and even if it did, "the action taken here is arbitrary and capricious, and therefore invalid, because it is not based on substantial evidence and it lacks a reasoned analysis."[246] On the first point, Member Hayes argued that, because Congress gave the NLRB no express authority to require notice posting, and it did not either explicitly or implicitly delegate authority to the NLRB to cure an ambiguity or address a gap in the statutory scheme through a notice-posting rule, the rule was *ultra vires*.[247] Member Hayes noted that, while the Department of Labor promulgated a notice-posting rule under the Fair Labor Standards Act (FLSA) despite the fact that "that statute does not contain a specific statutory provision in workplace postings," the FLSA was distinguishable from the NLRA because it "imposes a data-collection and recordkeeping requirement on employers."[248] For the latter point—that the rule is arbitrary and capricious—Member Hayes argued that deference to the Board was unwarranted under *Chevron* and the APA

[244] *See Nat'l Ass'n Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); *Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152 (4th Cir. 2013).

[245] Employee Rights Notice Posting, NLRB, *supra* note 73; Charles J. Morris, *Notice-Posting of Employee Rights*, 67 RUTGERS L. REV. 1367 (2015); Samuel Estreicher, *Depoliticizing the NLRB*, 64 EMORY L. J. 1611 (2015); Theodore J. St. Antoine, *The NLRB, the Courts, the Administrative Procedure Act, and* Chevron, *Now and Then*, 74 EMORY L.J. 1529 (2015); Editorial Board, *The N.L.R.B.'s Contested Poster*, N.Y. TIMES (May 9, 2013).

[246] 76 Fed. Reg. at 54,037.

[247] *Id.* at 54,038-54,039.

[248] *Id.* at 54,038 (citing 29 U.S.C. § 211(c)).

because "[n]either the Notice of Proposed Rulemaking nor today's notice come anywhere close to providing a substantial factual basis supporting the belief that most employees are unaware of their NLRA rights."[249] Citing *Business Roundtable* as precedent for finding agency action arbitrary and capricious for "relying on insufficient empirical data . . . and by completely discounting contrary studies," Member Hayes excoriated the Board for providing: "no empirical evidence of a correlation between union density and access to information about employee rights, just as there are no broad-based studies supporting the suppositions about a lack of information stemming from high school curricula or the influx of immigrants in the work force."[250] Member Hayes continued his criticism:

> At bottom, the inadequacy of the record to support my colleagues' factual premise is of no matter to them. In response to comments contending that the articles and studies they cite are old and inadequately supported, they glibly respond that the commentators "cite no more recent or better supported studies to the contrary," as if opponents of the proposed rule bear that burden. Of course, it is the agency responsibility to make factual findings that support its decision and those findings must be supported by substantial evidence that must examine the relevant data and articulate a satisfactory explanation for its action.
>
> Even more telling is the majority's footnote observation that there is no real need to conduct a study of the extent of employees' knowledge of NLRA rights because the notice posting rule would be justified even if only 10 percent of the workforce lacked such knowledge. This statement betrays the entire factual premise upon which the rulemaking initiative was purportedly founded and reveals a predisposition to issue the rule regardless of the facts. This is patently "arbitrary and capricious."[251]

The appellate courts agreed. The D.C. Circuit began its opinion by noting that the Board's action

---

[249] *Id.* at 54,041.
[250] *Id.* at 54,040-54,041.
[251] *Id.* at 54,041 (citation omitted).

> departs from its historic practice. From its inception in 1935, the Board has exhibited a "negative attitude" toward setting down principles in rulemaking, rather than adjudication. Despite its "broad" rulemaking authority under § 6 of the National Labor Relations Act, the Board had "used rulemaking as a means of announcing—or considering—its policies on only a few occasions" until 1989, the year in which it issued the substantive regulation upheld in *American Hospital*.[252]

The Fourth Circuit noted the same: "[t]he challenged rule is unusual in several respects. The Board has only rarely engaged in rulemaking during its seventy-seven year history. And it has never promulgated a notice-posting rule of any kind," even though it conceded that the Board has prospectively required employers to post remedial Board-supplied notices in adjudication when certain types of unfair labor practices were found.[253] Judge Henderson's concurrence to the D.C. Circuit's opinion went on to criticize the Board's basis for claiming that the posting rule was "necessary" under Section 6, stating that even if its "speculative assertions have some factual basis," the NLRA does not require employers to fill the "knowledge gap": "Unions and the NLRB are at least as qualified to disseminate appropriate information—easily and cheaply in this information technology age—and in fact already do so. The NLRA—and Section 6 in particular—simply does not authorize the Board to impose on an employer a freestanding obligation to educate its employees on the fine points of labor relations law."[254] For support, Judge Henderson cited the lower court's decision in the pending Fourth Circuit case: "Here, the Board's interpretation of Section 6 as authorizing the rule does not incorporate any labor-related expertise."[255] Neither court assessed the Board's analysis of the costs and benefits of mandating employers to post the Government-issued poster nor did the Fourth Circuit, which based its decision on the Board's violation of the APA, engage in cost-benefit analysis itself.[256]

[252] 717 F.3d at 949 (citing *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991)).

[253] 721 F.3d at 157 & n.5.

[254] *Id.* at 967 (Henderson, J., concurring); *see also* 721 F.3d at 163 (stating the same).

[255] *Id.* (citing *Chamber of Commerce of U.S. v. NLRB*, 856 F. Supp. 2d 778, 792 n.13 (D.S.C. 2012)).

[256] *See* 721 F.3d at 154 (holding that the Board's action exceeded its authority in

Thus, when the rule was challenged by the National Association of Manufacturers and the Chamber of Commerce, respectively, the thin social scientific basis for the rule was on full display *even though* the Board had no statutory authority to hire researchers to perform economic analysis, only receives data from the parties before it, and thus could never engage in broad prophylactic rulemaking based on its own empirical evidence. The tragedy is that this is not for lack of independent scholarly and empirical research on workers' lack of knowledge of their statutory rights, labor and information economics research on the role of information asymmetries in employment that result in discriminatory and other conduct that could rise to the level of unfair labor practices, and more.[257] The Board's weak support for the rule was therefore likely avoidable even without a new DER because of existing research, but without the internal capacity to solicit, cull and analyze it, and without its own independent research on the specific question of the absence of employee knowledge of NLRA rights as well as why the chosen enforcement mechanisms would be beneficial, the Board suffered.

Second, demonstrating the institutional effects of the Board falling into "administrative law exile" through its dereliction of rulemaking, the courts' reasoning on why the Board exceeded its authority in promulgating the rule was discordant with current administrative law doctrine and misinformed on significant Supreme Court precedent on judicial deference to the Board. I'll begin with the D.C. Circuit's opinion. Without reaching either the First Amendment issue or the issue of whether the Board had authority under Section 6 to promulgate the rule, the D.C. Circuit held

---

violation of the APA).

[257] *See, e.g.*, WEIL, *supra* note 216, at 245-46 & n.2 (summarizing literature on lack of knowledge of statutory rights under labor and employment law); Jack Fiorito & Paul Jarley, *Union Organizing and Membership Growth: Why Don't They Organize?*, 33 J. LAB. RES. 461, 482 (2012); Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STANFORD L. REV. 351, 363 & n.42 (2011) (describing and collecting literature on employees' lack of knowledge about workplace law); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447 (1999) (summarizing surveys documenting low levels of legal knowledge among the general population); Pauline T. Kim, *Bargaining with Imperfect Information*, 83 CORNELL L. REV. 105, 105-11 (1997) (presenting results of empirical study testing workers' knowledge of legal rules in at-will contracting). For economic analyses of asymmetric information in the workplace, *see* Alan Hyde, *What Is Labour Law?*, *in* BOUNDARIES AND FRONTIERS, *supra* note 198, at 16; Schwab, *supra* note 216, at 137-138 (providing examples of how asymmetric information impacts labor and employment law); Wachter, *supra* note 85, at 163, 167-71, 175; Cass Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 209 (2001).

that the rule violated Section 8(c) of the NLRA, which provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit."[258] The court reasoned that, because Section 8(c) precluded the Board from finding non-coercive employer speech to be an unfair labor practice, or evidence of an unfair labor practice, and because the Board notice was non-coercive speech it was requiring employers to disseminate, the posting requirement contravened Section 8(c).[259] Yet, the court neither addressed arguments for why, assuming the Board had authority to promulgate the rule, it should not defer to the Board's interpretation of why it did not violate Section 8(c), and it waffled between its analysis of Section 8(c) and its First Amendment analysis, interpreting the requirements of Section 8(c) exclusively under First Amendment law.[260] In explicitly declining to reach the First Amendment issue, however, the court failed to cite constitutional avoidance as its entitlement to trump *Chevron* deference and engage in its own analysis of why its interpretation of Section 8(c) was reasonable, eliding significant NLRB precedent in *DeBartolo v. Florida Gulf Coast Building and Construction Trades Council*[261] and the *Chevron* framework

[258] 717 F.3d at 955 (citing 29 U.S.C. § 158(c)).

[259] *Id.* at 955-56.

[260] Had the D.C. Circuit reached the First Amendment issue, it would have been overturned by *Am. Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014), but was instead only overturned in part as dicta. *American Meat* starkly reveals the D.C. Circuit's administrative law blind spot with respect to the NLRB. At issue was whether a U.S. Department of Agriculture disclosure requirement of country-of-origin information on meat products violated meat producers' First Amendment rights as compelled speech. *Id.* at 18-20. In holding that the requirement did not violate the First Amendment because the government's interest in compelling the disclosure was substantial, the court held that that interest extended beyond a mere interest in remedying deception. *Id.* at 20. The court explicitly overturned its prior *National Manufacturers Association* precedent, another disclosure requirement case, to the extent that case relied on a narrow interpretation of First Amendment doctrine that would have only sustained government-compelled disclosure requirements where the government could show an interest in correcting deception. *Id.* at 23.

[261] 485 U.S. 568, 575 (1988) (holding that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the *Court* will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); *see also* Charlotte Garden, *Constitutional Avoidance and Labor Law*, ___ (forthcoming) (on file with the author).

altogether.[262] Even if the court had cited the proper administrative law precedent, its interpretation of Section 8(c) ignored important Supreme Court precedent on how to address Board action that might encroach on First Amendment speech.[263] In *NLRB v. Gissel Packing*, the Court held that:

> Any assessment of the precise scope of employer expression must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso at § 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers. . . .[264]

The court's flagrant failure to abide by Supreme Court precedent here is not only a legal error but is also indicative of a decades-long process by which, since the 1940 lapse of the DER, NLRA jurisprudence has both lacked evidence of and failed to integrate evidence of "economic dependence" in its balancing of employers and employees' rights.

The Fourth Circuit's reasoning is no less indicative of how judicial review of NLRB rulemaking deviates from mainstream administrative law doctrine. It held that the Board lacked rulemaking authority under Section 6 to promulgate the rule because the text, structure and history of the NLRA, as well as the history of evolving regulation, confirmed that authority to be purely "reactive . . . in addressing unfair labor practice charges and conducting representation elections upon request."[265] But despite Supreme Court precedent that has emphasized the Board's broad rulemaking authority—holding that the Board "has the primary responsibility for developing and applying national labor policy" and "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions"[266]—and despite not making a finding as to

[262] Morris, *Notice-Posting*, *supra* note 245, at 1395.

[263] *Id.* at 1396-97.

[264] 395 U.S. 575, 617 (1969).

[265] *Chamber of Commerce*, 721 F.3d at 154.

[266] *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978)); *see also Am. Hosp. Ass'n*, 499 U.S. at 613 ("As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted in § 6, we would have expected it to do so in language expressly describing an exception from that section or at least

whether the NLRA is silent or ambiguous as to the specific question of notice posting, the court defies overwhelming authority on the APA to find it need not proceed to *Chevron* step two: whether the agency's answer is based on a permissible construction of the statute.[267]

To move past this series of errors and misjudgments on the part of both the Board and the courts, it is critical to bring the NLRB out of exile, focusing first on how to improve the rulemaking process through integrating economic and social scientific analysis. Like other agency rulemakings mandating disclosure requirements, the Board could have been prepared for judicial review by conducting a voluntary cost-benefit analysis following the requirements of Circular A-4: stating the need for regulatory action, defining the baseline but for the action, identifying regulatory alternatives and their consequences, quantifying and monetizing benefits and costs, evaluating non-quantified and non-monetized costs and benefits, and, in presenting its overall analysis, characterizing uncertainty.

A new DER would be perfectly placed to conduct and supervise this analysis, beginning with investigating the existence and extent of any market failure created by information asymmetries resulting from workers' lack of knowledge of their NLRA rights. The DER could begin by reviewing and evaluating existing empirical data *beyond* the three law review articles it cited[268] and could conduct its own field studies along the lines of those conducted by the CFPB's Research Division.[269] The Division could also compare the likelihood that employees file unfair labor practice charges or petitions for representation elections when they have been notified of their NLRA rights as opposed to when they have not, and given the large number of natural experiments available where federal labor statutes have required notice posting (the FLSA, Title VII, OSHA, and so on), could evaluate rates of compliance as well as whether they increased employees' exercise of federal rights. In evaluating compliance in other labor settings, the Division could establish a basis for determining whether notice posting has an impact on employer's violations of federal employment law. That determination could serve as a basis for justifying a correlation between notice posting and employer commission of unfair

---

referring specifically to the section.").

[267] *Id.* at 159-60. *See also* Morris, *Notice-Posting*, *supra* note 245, at 1391-92.

[268] *See supra* note 257.

[269] *See, e.g.*, CFPB, TOOLS FOR SAVING: USING PREPAID ACCOUNTS TO SET ASIDE FUNDS (Sept. 2016), https://www.consumerfincance.gov/data-research/research-reports/tools-saving-using-prepaid-accounts-set-aside-funds/ (presenting results of large field study exploring consumers' use of "set aside" feature on American Express prepaid card).

labor practices such that the disclosure requirement would be "necessary for carrying out" Section 8(a)(1), the provision of the NLRA that makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" under Section 7.[270] Such data would also aid in determining whether mandating notice would be "necessary for carrying out" the policy of the Act as stated in Section 1 of "restoring equality in bargaining power between employers and employees" by making sure both parties have the information necessary to negotiate from equal positions. Next, the DER could evaluate a range of enforcement mechanisms by studying their relative costs and benefits, including the non-quantified and non-monetized costs and benefits of burdening employers' speech. Finally, the DER could weigh the costs and benefits of a proposed notice-posting rule. The Board in fact conducted a limited cost-benefit analysis of the impact of the rule on small businesses as required by the Regulatory Flexibility Act and determined that "the economic impact of its notice-posting rule on small employers is not significant."[271] Specifically, it calculated the average compliance cost in the first year for all employers subject to the NLRA to be $64.40, finding it "unlikely in the extreme that this minimal cost would lead to either the short- or long-term insolvency of any business entity, or place small employers at a competitive disadvantage."[272] But the social benefits were found to "far outweigh the minimal costs to employers of posting notices informing employees of th[eir] rights."[273] With a new Division, the Board's analysis would be much more robustly supported by social scientific data on the relationship between knowledge of NLRA and their successful exercise, and, further, the economic impact on workers who successfully exercise their rights under the NLRA.[274]

V. MACROECONOMIC ANALYSIS OF LABOR REGULATION

A new DER could also be charged with assessing the macroeconomic effects of its current and future regulation as well as failure to regulate. This Section highlights areas of focus for researching and assessing such

[270] 29 U.S.C. § 158(a)(1).
[271] 76 Fed. Reg. at 54,043.
[272] *Id.*
[273] *Id.*
[274] For wage differentials between unionized and non-unionized workers, *see, e.g.*, Albert Schwenk, *Trends in the Differences Between Union and Nonunion Workers in Pay Using the Employment Cost Index*, COMPENSATION & WORKING CONDITIONS (Sept. 1996), at 44-51.

macroeconomic affects and proposes best practices for integrating macroeconomic analysis into labor regulation. It ends with an example of assessing how employees are classified as "independent contractors" as opposed to "employees" under the labor law to illustrate how macroeconomic modeling could improve the Board's regulation.

A. Macroeconomic Effects of Labor Regulation

Another purpose of the NLRA was to increase workers' mass purchasing power for macroeconomic stabilization and growth.[275] The Act's Preamble states that "the inequality of bargaining power between employees . . . and employers . . . substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry."[276] The Act was intended to work as a corrective.[277]

This purpose is all the more important now in light of labor's declining share of national income and almost unprecedented inequality.[278] Labor's share of national income has dropped from a high of 51.5 percent in 1970 to an estimated 42.9 percent in 2015.[279] The share of corporate-sector

---

[275] *See* 79 Cong. Rec. 7565, 7567-68, 7572 (1935) (statement of Sen. Wagner), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935 ("2 LEGIS. HIST."), at 2318, 2326, 2330, 2339-40 (1985); Mark Barenberg, *The Political Economy of the Wagner Act*, 106 HARV. L. REV. 1379, 1418-19 (1993).

[276] 29 U.S.C. § 151.

[277] *Id.*

[278] For the decline of labor's share of national income, *see* BLS, *Estimating the U.S. Labor Share*, MONTHLY LABOR REVIEW (Feb. 2017), https://www.bls.gov/opub/mlr/2017/ article/estimating-the-us-labor-share.htm. For discussions of inequality in the U.S., *see* ANTHONY B. ATKINSON, INEQUALITY: WHAT CAN BE DONE? 133-54 (2015) (discussing relationship between inequality and the bargaining power of workers and labor unions); PIKETTY, supra note 3, at 23-24, 294-96, 314-15 (2014). For the effect of union density on inequality, *see* IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933 63-70, 84-90 (1969) (discussing decline of union density and rise in inequality between 1920 and 1930 even as productivity increased); Jake Rosenfeld, Patrick Denice & Jennifer Laird, *Union Decline Lowers Wages of Nonunion Workers* 1-3 (EPI, Briefing Paper No. 112811, Aug. 30, 2016), http://www.epi.org/files/pdf/112811.pdf (finding that private-sector union decline since late 1970s contributed to wage losses among nonunion workers); Martin A. Asher & Robert H. DeFina, *The Impact of Changing Union Density on Earnings Inequality*, 18 J. LAB. RES. 425, 426 (1997) (same).

[279] U.S. Bureau of Economic Analysis, *Shares of Gross Domestic Income: Compensation of Employees, Paid: Wage and Salary Accruals: Disbursements: To Persons*, https://fred.stlouisfed.org/series/W270RE1A156NBEA (*last visited* July 28,

income going to labor compensation rather than corporate profits since 2000 is at historic lows.[280] Over the last decade alone, there has been a shift amounting to $750 billion from labor to capital, and industries with larger increases in market concentration exhibit a larger decline in labor's share.[281] The broader shift from wages to profits increases inequality, but much of the increase in inequality has occurred *within* labor's share, between compensation to high earners relative to low earners.[282] In his seminal account of the rise of income inequality, Thomas Piketty explains the 45-50 percent increase in the top decile's share of U.S. national income as resulting from "a veritable separation of the top managers of large firms from the rest of the population," those who have high bargaining power to set their own remuneration and those who do not.[283] In addition to these restructurings, declining union density has removed a critical countermechanism of achieving more equitable wealth distribution through asserting real bargaining leverage against employers.[284] Declining unionization is estimated to account for between a fifth and a third of the increase in inequality since the 1970s.[285] This adverse macroeconomic distribution can result in underconsumption, persistent unemployment and deflation.[286] The impact of institutional factors like labor market institutions, the bargaining power of workers, union density, minimum wage laws, unemployment benefits and coverage, and severance pay are all variables that impact the labor income share.[287]

2017).

[280] JOSH BIVENS, TRIPLE THREAT TO WORKERS AND HOUSEHOLDS—IMPACTS OF FEDERAL REGULATIONS ON JOBS, WAGES, AND STARTUPS, H.R. Doc. No. 114-65, at 8 & 10, Fig. 7 (2016); *see also* PAUL KRUGMAN, THE CONSCIENCE OF A LIBERAL 54-55 (2007).

[281] David Author, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *Concentrating on the Fall of the Labor Share*, 107 AM. ECON. REV. (PAPERS & PROCEEDINGS) 180 (2017); Council of Economic Advisors (CEA), *Labor Market Monopsony: Trends, Consequences, and Policy Responses*, 1 & Fig. 1 (CEA Issue Brief, Oct. 2016).

[282] LAWRENCE MISHEL, JOSH BIVENS, ELISE GOULD, & HEIDI SHIERHOLZ, THE STATE OF WORKING AMERICA 5-8, 173-320 (2012).

[283] PIKETTY, *supra* note 3, at 23-24, 294-96, 314-15.

[284] TITO BOERI & JAN VAN OURS, THE ECONOMICS OF IMPERFECT LABOR MARKETS 63-94 (2008).

[285] MISHEL ET AL., *supra* note 282, at 6-8; CEA, *Labor Market Monopsony*, *supra* note 281, at 10-12; Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 514-37 (2011).

[286] *See* Bruce E. Kaufman, *Labor's Inequality of Bargaining Power*, 10 J. LAB. RES. 285, 291-92 (1989).

[287] International Labour Organization, Organisation for Economic Cooperation and

Measuring the impact of NLRB regulation on workers' diminished share of the pie can thus be a crucial means for servicing the needs of macroeconomic policy.[288] Little scholarly attention has been placed on the potential use of macroeconomic modeling to forecast how new regulation, or regulatory changes, can impact labor's share of income. While economists have honed methods for determining labor's share,[289] the labor law literature has yet to integrate their utility for regulatory choices in the administrative state.

Additionally, countercyclical regulation and the use of cost-benefit analysis to consider the macroeconomic effects of regulation on employment (and unemployment) have recently become critical topics of scholarly interest.[290] But the specific effects of unions' output-enhancing role on macroeconomic stability has been less integrated into the law and economics scholarship, even as it has been a sustained subject of scholarly interest in labor economics.[291] Where unions in fact enhance output—through, for example, effectively promoting efficiencies through lower worker turnover, building trust between workers and managers, enforcing fair work rules through grievance procedures, giving voice to workers' collective concerns that each worker has inadequate incentive to raise on

---

Development, *The Labour Share in G20 Economies* 9-10 (OECD Report, 2015), https://www.oecd.org/g20/topics/employment-and-social-policy/The-Labour-Share-in-G20-Economies.pdf; Samuel Bentolila and Giles Saint-Paul, *Explaining Movements in the Labor Share*, 1 B.E. J. OF MACROECON. 1-33 (2003).

[288] Hafiz, *supra* note 72, at ___.

[289] *See, e.g.*, Alan B. Krueger, *Measuring Labor's Share*, 89 AM. ECON. REV. 45, 45-51 (1999).

[290] *See, e.g.*, Zachary Liscow, *Counter-Cyclical Bankruptcy Law*, 116 COLUM. L. REV. 1461, 1464-66 (2016) (proposing countercyclical bankruptcy law rules to preserve jobs through reorganization); Listokin, *supra* note 181, at 8-10 & nn. 17-29 (summarizing literature on law and macroeconomics); Jonathan S. Masur & Eric A. Posner, *Regulation, Unemployment, and Cost-Benefit Analysis*, 98 VA. L. REV. 579, 583 (2012) (arguing that agencies "should collect information about the nature of job loss caused by proposed regulations, better estimate these layoffs, and incorporate unemployment costs in cost-benefit analyses of major regulations"); David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection*, B.C. ENVTL. AFF. L. REV. 1, 35-38, 51 (2005) (advocating for feasibility analysis of regulation that takes into account their employment effects); Kelman, *supra* note 181, at 1227-46.

[291] With key exceptions being Kelman, *supra* note 181, at 1273-77; Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1012-22 (1986); Douglas Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 354-60 (1984). For labor economics literature on unions' output-enhancing role, *see, e.g.* FREEMAN & MEDOFF, *supra* note 216; Barry T. Hirsch, *What Do Unions Do for Economic Performance*, *in* WHAT DO UNIONS DO?: A TWENTY-YEAR PERSPECTIVE 193-237 (James T. Bennett & Bruce E. Kaufman eds., 2007).

their own, and overcoming free-rider problems bargaining for public goods (seniority, health and safety protocols, health insurance, pension plans and so on)—labor regulation should consider the macroeconomic impacts of promoting as opposed to weakening union density.

This is not to say that such macroeconomic modeling will be easy, or that the macroeconomic effects specifically on labor's share of national income or union's output-enhancing role should trump all other macroeconomic goals in policy-making.[292] My narrow argument is that the baby should not be thrown out with the bathwater: collecting data and modeling the macroeconomic effects of labor regulation on the strength of labor institutions as well as existing inequality provides a critical piece to the macroeconomic policy-making puzzle that can serve broader economic policy goals, and the more we know about that piece, the better. And as the following section discusses more fully, administrative agencies have developed best practices in macroeconomic modeling that offer hope that doing the same in the labor context can provide critical data points for better Board regulation.

B. Towards Integrating Macroeconomic Analysis into Labor Regulation

A new DER could be charged with researching and investigating how the NLRB's rules impact labor's share of national income and circumstances where unions have an output-enhancing role on macroeconomic stability. Beyond the agencies with clear mandates to conduct macroeconomic analyses (the Federal Reserve; the Treasury, Labor and Commerce Departments; the OMB; and the Congressional Budget Office), the question of whether administrative agencies should engage in macroeconomic analysis has been controversial.[293] However, the NCEE's considerable contributions to the economic analysis of environmental regulation and *EPA Guidelines* were not only recommended to the SEC by the author of *Business Roundtable*, but could serve as a

[292] For criticisms of macroeconomic modeling, *see, e.g.*, BACKHOUSE, *supra* note 183, at 117-37 (providing overview of debates of macroeconomic modeling, including disputes about whether such models adequately forecast economic behavior); Coates, *supra* note 110, at 905-09 (summarizing debates about macroeconomic modeling); *but see* Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1052-53, 1116-28 (2016) (rejecting invariance hypothesis that tax-and-transfer always trumps redistribution by other means and arguing that doctrinal redistribution can increase social welfare and warrants investigation).

[293] *See* Revesz, *supra* note 120, at 554-56 (summarizing debates).

model in the labor setting.[294] The NCEE employs "dozens of economists" within the Office of Policy at the EPA, and has been labeled as a "mini-OMB" within that agency for its economic analysis of the EPA's regulatory impacts.[295] It provides analytical advice to the EPA's other divisions, disseminates guidance on cost-benefit analysis across the agency, and funds outside projects.[296] Moreover, it produces and delegates to external researchers and scholars a wealth of research reports, over 660 between 1971 and 2011 alone.[297] As discussed *supra*,[298] the regulatory capacity and infrastructure that the EPA has developed in nearly forty years of cost-benefit analyses supports its pioneering use of CGE and other macroeconomic modeling methods to forecast the economy-wide impacts of environmental policy changes.

A new DER could not only develop original research projects and investigations but also marshal the considerable amount of scholarship and ongoing research to mobilize social-scientifically grounded macroeconomic analyses of the Board's regulation.

First, in researching and assessing how the Board's rules impact labor's share of national income, the DER could identify key areas of the Board's regulation for further study. For example, it could assess how the Board's jurisdiction over certain workers over others impacts labor's share. For example, as discussed more fully below, the DER could assess how NLRA jurisprudential line-drawing as between who constitutes an "employee," and is thus protected under the Act, and who constitutes an "independent contractor," and is thus exempt from its protections, has impacted relative wages and non-wage benefits of workers in the same labor market at the same firm or in the same industry.[299] It could then provide illuminating study of how different line-drawing—for example, including "independent contractors" that perform identical work at a firm as a majority of permanent employees within the definition of "employee"—could impact the labor share, assuming they were to exercise their right to organize and establish a union or join an existing

[294] Robert P. Bartlett III, *The Institutional Framework for Cost-Benefit Analysis in Financial Regulation*, 43 J. LEG. STUD. S379, S396 (2014) (citing Douglas Ginsburg, *Law and Economics: A Review from the Bench*, Lecture at the University of California Berkeley Law School (Nov. 19, 2012)).

[295] Livermore, *supra* note 205, at 627.

[296] *Id.* at 627-28.

[297] *Id.* at 630.

[298] *See* Section II.D.

[299] 29 U.S.C. §§ 152(3); *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 857 (D.C. Cir. 1995).

one. The DER could also compare the impact of denying immigrant workers the NLRA's remedies of back pay and/or reinstatement after *Hoffman Plastics* impacts not only immigrants' labor share of income, but also labor's share more generally to the extent there is a shirking or non-compliance effect on non-immigrant workers.[300] More broadly, the DER could examine not only which rules better facilitate unionization (shorter periods between filing petitions for representation elections and elections themselves, stronger remedies for NLRA violations, and so on), but also when putting the thumb on the scales in favor of those rules enhances labor's share.

The ability of Board regulation to lift labor's declining share of national income can also be the subject of DER study. Unions serve critical roles in: (1) *ex ante* bargaining over the amount of surplus unionized workers will capture; and (2) challenging employer rent-seeking by discharging workers through opportunistic breaches

> of long-term compensation contracts in which the employer is obliged to pay the long-term worker sums above current in-plant marginal product (or at least *closer* to in-plant product than market wages) in exchange for the worker having accepted lower payments in the past.[301]

Employers benefit from establishing long-term internal labor market (ILM) pay structures as a means of capturing the complexity of labor as a dynamic input of production: fixed compensation structures allow employers to recover recruitment and training costs by incentivizing longer-term attachments through higher wage premiums and turnover reduction.[302] ILMs are also a means by which firms overcome holdup problems, reduce monitoring costs, and prevent either workers or employers from cheating the other in the face of incomplete employment contracts.[303] Without regulation, employers can breach by engaging in

[300] 535 U.S. 137 (2002).

[301] Kelman, *supra* note 181, at 1273; Wachter & Cohen, *supra* note 95, at 1360-64.

[302] GARY BECKER, HUMAN CAPITAL 29-160 (3d ed., 1964) (explaining single employer compensation systems as mechanisms of structuring worker incentives under continuous employment); Walter Oi, *The Fixed Employment Costs of Specialized Labor*, *in* THE MEASUREMENT OF LABOR COSTS 63-122 (Jack Triplett ed., 1983) (explaining how firms manage complexity of changing labor productivity through ILMs).

[303] WEIL, *supra* note 216, at 81; BECKER, *supra* note 302, at 26 (explaining development of ILMs as reduction in firm costs); Katherine V.W. Stone, *Policing Employment Contracts Within the Nexus-of-Contracts Firm*, 43 U. TORONTO L. J. 353,

wage discrimination, opting out of unionized wages by hiring workers in the external labor market subject only to the constraint of enforcement of existing collective bargaining agreements (CBAs) or strike threats. CBA enforcement has limited impact where employers have cleverly circumvented the union's jurisdiction through hiring decisions and where unions lack bargaining power to either effectively introduce or implement subcontracting clauses.[304] And a strike may decrease both employers and employees' welfare by disrupting firm output. Thus, in circumstances where enforcement is "distributively justified,"[305] and contributes to the social stability of implicit or even explicit contracting to prevent employer rent-seeking and encourage increased output, rules facilitating the ease of CBA enforcement could have macroeconomic benefits.

A crucial question emerges, however, when concerted activity "is a costlier tool for workers to use than controlling the firm's capacity to adjust to shifting demand conditions (whether by hiring new workers in a boom, lowering wages in a slump, or laying off workers who will not accept lower wages)."[306] A new DER will need to balance the labor law's distributive goal—to increase workers' share of the pie—with its microeconomic goal of ensuring competitive wage rates, or not "permit[ting] workers to create rents by restricting supply, in ways that significantly redistribute from potential incumbent workers (rather than from employers to workers) *and* create unemployment."[307] In "imagin[ing] techniques to increase workers' bargaining power that do not simultaneously involve rent creation,"[308] the DER could consider altering the balance of permissible and impermissible primary and secondary activity. Depending on labor market conditions, primary activity, or employee strikes aimed at a direct employer to restrict that employer's labor supply, could adversely impact non-unionized worker wages and the overall labor share where secondary activity, or employee strikes aimed at

---

364-73 (1993) (discussing evolution and value of ILMs to employers and employees); Paul R. Milgrom, *Employment Contracts, Influence Activities, and Efficient Organization Design*, 96 J. POL. ECON. 42-60 (1988); Oliver Williamson, Jeffrey Harris & Michael Wachter, *Understanding the Employment Relation – The Analysis of Idiosyncratic Exchange*, 6 BELL J. ECON. 250 (1975) (linking development of ILMs to employers' need to develop self-enforcing performance incentives).

304 *See* BENNETT HARRISON & BARRY BLUESTONE, THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA 48-50 (1988) (discussing employers' union-avoidance strategies such as outsourcing, plant closures, and bankruptcy filings).

305 Kelman, *supra* note 181, at 1273.

306 *Id.* at 1274.

307 *Id.*

308 *Id.* at 1274-75.

other employers or employees with whom the employer deals or competes, could serve to incorporate and uplift non-unionized workers' wages and non-wage benefits, thus increasing labor's overall share of income. Such secondary activity is currently prohibited, but the DER could examine ways of adjusting the prohibition—say, by expanding the definition of "primaries" to include "transactional primaries" with market power over direct employers' product or labor input markets—so as to adjust existing regulation towards better macroeconomic benefits.[309]

Finally, the DER could research conditions under which unions have an output-enhancing role on a firm- or industry-wide basis. For example, it could investigate and compare unionized output with non-unionized output in industries on the firm level as well as whether Board rules imposed on unionized or unionizing workplaces have impacted output, pre- and post-rule. It could examine whether more rather than less inclusive bargaining units enhance output, or whether making a subject of bargaining mandatory or permissive enhances or decreases output.

C. Case Study: The Independent Contractor Exemption

One of the most widely and prominently debated issues in current labor law is the issue of "independent contractor" misclassification: whether employers are misclassifying their "employees" as "independent contractors" to avoid employer liability under federal and state labor and employment law.[310] The shift away from direct employment to independent contracting in the New Economy has meant a pervasive restructuring in the employment relationship, from the rise of Uber and Lyft drivers to repurposed "independent" cable installers to heavy-duty truckers.[311] Workers' ability to seek statutory protections rests on precarious and inconsistently applied line-drawing conducted by the Board, and with little deference thereto, the courts, in determining how far to extend common law agency doctrine. What the line-drawing has unfortunately ignored is virtually any and all economic analysis, as the following study of the leading case on the issue, *FedEx Home Delivery v.*

---

[309] *See* Hafiz, *supra* note 72, at ___.

[310] The scholarly literature on independent contractor misclassification is immense, so I list here only a sampling: STONE, *supra* note 198; Stone, *Rethinking*, *supra* note 198; Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153 (2003).

[311] WEIL, *supra* note 216, at 10, 21, 24, 119-21, 186, 205, 270.

NLRB, demonstrates.[312] However, this Sub-Section focuses on a narrower question: how the DER could research and provide guidance on how the line-drawing exercises performed by the Board and the courts have macroeconomic impacts to better inform regulating bodies and the judiciary of the broader economic implications of their decisions.

The core question before the D.C. Circuit in *FedEx* was whether FedEx's refusal to bargain with a union certified by FedEx drivers was an unfair labor practice because the drivers were "employees" and not "independent contractors" exempt from the protections of the Act.[313] In a controversial ruling that the drivers were "independent contractors," the court crafted a new test adapted from common law agency doctrine.[314] While the court still claimed to rely on traditional agency law principles, the Restatement (Second) of Agency's non-exhaustive ten-factor test, and the D.C. Circuit's case law precedent, it dramatically departed from its decades-long reliance on a "right-to-control test" in favor of an "entrepreneurial test."[315] Specifically, the court stated that while the new test retained "all of the common law factors," it shifted "emphasis" away from "the unwieldy control inquiry in favor of a more accurate proxy: whether the 'putative independent contractors have significant entrepreneurial opportunity for gain or loss.'"[316] The court then proceeded to consider such "entrepreneurial" opportunity for the FedEx drivers and found that "the indicia favoring a finding that the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity," and so much so that it need not grant deference to the Board: "the Board cannot be said to have made a choice between two fairly conflicting views."[317]

Since the outcome significantly turned on this "evidence," and because its deficiency is a useful example of how important it is that the Board be granted resources to collect data and conduct economic analysis, it is detailed here. First, it is crucial to point out that the Board excluded a substantial source of data from its consideration in its decision below: it refused to permit FedEx to introduce system-wide evidence concerning the number of route sales and driver profits it hoped would show the drivers' "entrepreneurial interest in their position."[318] So even though the D.C.

---

[312] 563 F.3d 492 (D.C. Cir. 2009).
[313] *Id.* at 495.
[314] *Id.* at 497.
[315] *Id.* at 495-97.
[316] *Id.* at 497 (internal quotation marks and citation omitted).
[317] *Id.* at 504.
[318] *Id.* at 495.

Circuit substituted an entrepreneurial test for its almost century-long reliance on a right-to-control test, a shift in emphasis that Judge Garland in dissent and other circuits rejected,[319] it did so without a developed evidentiary record of the economic realities of the drivers' actual access to entrepreneurial opportunity. In his dissent, Judge Garland found that the Board's failure to reasonably explain its exclusion of the evidence required that the D.C. Circuit remand the case back to the Board "to give FedEx a fair opportunity to make its case under the appropriate test."[320]

The core evidence the D.C. Circuit relied on as demonstrative of a "significant entrepreneurial opportunity for gain or loss" was the language of FedEx's Standard Agreement with drivers.[321] According to the court, that Agreement gave drivers sufficient discretion over their contracted-for services to warrant a finding of "independent contractor" status.[322] Beyond the Agreement's terms, the court admitted it had a "limited record."[323] That record consisted of: one driver using the FedEx truck off-hours to deliver lawn mowers for a repair company; two drivers independently incorporating; one driver negotiating with FedEx for higher fees; over 25 percent of drivers hiring their own employees at some point; and at least two contractors selling their routes (the question of whether the sales were profitable was disputed).[324]

In his dissent, Judge Garland not only rejected the majority's shift to a focus on entrepreneurial opportunity from a multi-factor test that "requires a broad examination of all facets of the relationship between" the company and the worker, but also highlighted evidence viewed as

[319] *Id.* at (Garland, J., dissenting); *Slayman v. FedEx Ground Package Sys.*, 765 F.3d 1033, 1045 (9th Cir. 2014).

[320] *Id.* at 518-19 (Garland, J., dissenting).

[321] *Id.* at 498.

[322] *Id.* at 498-99. The court found salient the fact that the Agreement: specified that drivers were not employees "for any purpose"; confirmed the "manner and means of reaching mutual business objectives" was within the contractor's discretion; stated that FedEx "may not prescribe hours of work, whether or when the contractors take breaks, what routes they follow, or other details of performance"; drivers can hire their own employees, serve multiple routes, and even assign their contractual rights to their routes to buyers FedEx accepts as qualified; required contractors to provide their own vehicles that must comply with government regulations and other safety requirements; and specified that drivers were "responsible for all the costs associated with operating and maintaining their vehicles" and could use them "for other commercial or personal purposes . . . so long as they remove or mask all FedEx home Logos and markings." *Id.*

[323] *Id.* at 498.

[324] *Id.* at 498-500; *id.* at 515-16 (Garland, J., dissenting)

underappreciated by the majority.[325] Specifically, he pointed to the Regional Director's findings that the drivers: perform a function that is a regular and essential part of FedEx's operations and must do business in its name; must wear uniforms and badges and operate vehicles that meet FedEx's specifications; are trained by FedEx if they have no prior experience; and are not permitted to use their vehicles for other purposes while providing service to FedEx.[326] He also cited evidence of FedEx's substantial control over drivers' performance of their functions: FedEx retains the right to reconfigure the service area unilaterally and unilaterally determines rates and compensation for all drivers; drivers must furnish a FedEx-approved vehicle and FedEx-approved driver daily from Tuesday through Saturday; drivers lack discretion to provide delivery services on a given day; FedEx controls their work schedule by requiring all packages be delivered on the day of assignment, and terminal managers determine how many deliveries they will make each day; and FedEx supports drivers with insurance and a Business Support Package, arranges substitute drivers, helps in defraying repair costs, and pays certain vehicle-related taxes and fees.[327] Finally, he cited the weak evidence outside the Agreement of drivers actually exercising their entrepreneurial opportunities as supporting a finding of "employee" status, citing precedent that "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the [c]ompany's claim that the workers are independent contractors."[328]

Neither the majority nor the dissent anchored their reasoning in economic analyses of how market structures or the terms of the contractual agreement create entrepreneurial risks and opportunities. In fact, while the majority and dissent starkly differed on whether the focus of the agency test should be on entrepreneurial opportunity as opposed to control, an economist would see them as two sides of the same coin: which party gets to fill the gaps of the incomplete employment contract?[329] And in seeking evidence to answer the question, he or she would look to the contract's compensation structures, residual rights, information

---

[325] *Id.* at 504-16 (Garland, J., dissenting).

[326] *Id.* at 510.

[327] *Id.* at 510-11.

[328] *Id.* at 511-16 (internal quotation marks and citation omitted).

[329] On contract incompleteness, *see generally* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003); Edward Rock & Michael Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (1996).

asymmetries between the parties, the parties' sunk costs, mobility costs, opportunity costs, market power, market conditions, and so on, *not* uniforms. To robustly determine entrepreneurial opportunity, the Board and the court would have needed to, but failed to even consider: the respective termination rights of the parties, contractual penalties, the scope and magnitude of contractual assignment of risks, how the contract restricts drivers' opportunity costs by mandating delivery days and how many deliveries must occur each day, and most significantly, actual empirical data.

Gathering and analyzing such data could be a critical function of the new DER. In a world of the "new psychological contract," where employees generally no longer assume that the employment contract offers job security and promotional opportunity at a single employer "but rather assume that it offers job opportunities with other employers and marketability in the external labor market," social scientific evidence will be all the more crucial for non-arbitrary line-drawing.[330]

But the Board should not limit itself to *ad hoc* line-drawing by adjudication. Instead, a new DER would have the opportunity to develop and hone economy-wide modeling on how more or less inclusive line-drawing around characteristics and employment arrangements deemed dispositive of "employee" or "independent contractor" status have broader impacts on labor's share of income, just like the EPA has utilized economy-wide modeling to determine the impacts of environmental regulation on the national economy. As of now, the Board lacks any ability to assess how many workers are denied the right to organize and bargain collectively because they are classified as "independent contractors." Like DERA, the Board should be able to deploy its own "econometric abilities to ascertain for itself the economic reality of [labor] markets before it seeks to regulate them," an ability that is particularly salient because the Board is much less likely to get such broad data from parties that it is not jurisdictionally permitted to regulate.[331] Such data collection and analysis could identify a pool of candidates misclassified as "independent contractors," identify their average compensation and frequency of participation in the labor market, model union wage or internal labor market wage rates through reviewing wage rates in the same

[330] For the "new psychological contract," *see* Katherine V.W. Stone, *The New Psychological Contract*, 48 UCLA L. REV. 519, 552 (2001); Denise M. Rousseau & Snehal A. Tijoriwala, *Assessing Psychological Contracts*, 19 J. ORG. BEHAV. 679, 683 (1998).

[331] Kraus, *supra* note 135, at 300.

or similar labor markets or through historical data, and assess the impacts on labor's share of income if more or less of the pool had wage rates determined by internal rather than external labor markets. It could then perform and offer a cost-benefit analysis of certain "independent contractor" definitions over others for a future definitional Board rulemaking that incorporates not only consideration of substantial data on independent contractors, but also the widespread effects of its choice of one definition over other regulatory alternatives.

CONCLUSION

This Article proposes a revival of the NLRB's Division of Economic Research to not only ground and refine the Board's policy-making adjudication, but also to set broader parameters for the Board's consideration of the micro- and macroeconomic effects of its regulation and failure to regulate. But it also encourages a broader engagement by the regulatory state with collaborative opportunities to hone enforcement and policy-making by propelling economic and social scientific analysis of work and worker's collective rights. For decades, an administrative law revolution has embraced the use of economic and social scientific analysis and is consistently raising the bar for agency expertise in regulatory policy. Labor regulation, and the prominence of the institutions devising and implementing it, has been left behind, harming not only the workers that the law is intended to protect, but also the legitimacy and influence of pro-worker regulation more generally.

Drawing on lessons from both the original Division of Economic Research and best practices from agency integration of the work of economists and social scientists in the administrative state, this Article presents a blueprint for how the NLRB could begin reclaiming a central role in regulatory debates. And it is not a moment too soon: rising inequality, eroding union density, increasing market concentration, and a lagging social safety net present significant challenges to the legacy of the New Deal. It is time that that legacy be invigorated and modernized to meet the demands of the New Economy workplace.

* * *