Picketing in the New Economy

Hiba Hafiz

PICKETING IN THE NEW ECONOMY

by Hiba Hafiz*

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The rise of the contingent and gig economies and of outsourced and subcontracted work has left many workers with insufficient bargaining power to successfully negotiate collective bargaining agreements with their direct employers. This problem is exacerbated by a statutory ban on worker picketing and boycotts of non-employers, or "secondaries," even where those employers: collude with direct employers on wage-fixing or the suppression of union activity; have monopsony power over direct employers; or have substantial indirect control over worker wages through contractual arrangements.

This Article is a crucial intervention in modernizing the labor law on worker picketing in the New Economy. It first outlines the current distinction between direct and "secondary" employers under the National Labor Relation Act's secondary picketing ban. It then provides an overview of New Economy work arrangements and developments in economic theory necessary for updating the law on this distinction and for developing the economic expertise of judicial and administrative labor regulation. The Article then proposes unified principles for measuring labor law's success under New Economy work structures. These principles align expressive and associational values with achieving economically efficient and distributional outcomes for labor and capital.

On this foundation, the Article assesses current law on the primary-secondary distinction and finds it deficient under these principles. It puts forward instead an economic effects-based standard that would make a defense to secondary picketing available where employees can demonstrate, through economic evidence, that a secondary target – whether through contractual agreements with a direct employer, monopsony power, or oligopsonistic collusion – has sufficient market power to determine the wages or working conditions of picketing workers. The rule would dramatically benefit employees in the "fissured"

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workplace by providing a tool to correct for unequal bargaining power between workers and their employers. Remedying this imbalance can enhance protections for the expressive activity and self-determination critical for democratic and civil society values and reverse the adverse microeconomic wage effects and distributive consequences of the current law.

TABLE OF CONTENTS

INTRODUCTION

When food industry leaders like Yum! Brands and Tropicana were questioned about the existence of enslaved farmworkers in their supply chains, their responses, like many companies criticized for supply chain abuses, disclaimed responsibility: "We don't believe it's our place to get involved in another company's labor dispute involving its employees."[1] Unlike other companies, however, Yum! Brands and Tropicana were ultimately forced to accept responsibility for those farmworkers—thousands of chronically underpaid tomato and citrus harvesters in Immokalee, Florida—after an organization known as the Coalition of Immokalee Workers (CIW) organized a "secondary" boycott against them. In bypassing their direct, or "primary," employers—labor contractors and growers—the CIW were able to secure better wages, working conditions, and a participatory role in the workplace by picketing those who *dealt* with those employers, employers known as "secondaries" under the labor law.

Before the CIW's supply-chain campaign, the farmworkers' average annual income was just over $6,500, earned for long hours of backbreaking work, without rest or water breaks, often in 95-degree heat, suffering harsh environmental conditions, pesticide inhalation and sexual harassment.[2] The CIW initially organized strikes against Florida growers to increase wage rates stagnant from the 1970s, but they were unsuccessful in even compelling them to come to the negotiating table.[3] Like many U.S. industries, agricultural production and distribution in Florida is increasingly concentrated: two or three major firms supply

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[1] John Bowe, *Nobodies: Does Slavery Exist in America?*, NEW YORKER, Apr. 21, 2003, at 106.

[2] *Id.*; Stephen Greenhouse, *In Florida Tomato Fields, A Penny Buys Progress*, N.Y. TIMES, April 24, 2014, http://www.nytimes.com/2014/04/25/business/in-florida-tomato-fields-a-penny-buys-progress.html; Richard Chin Quee, *Rape in the Fields: A Frontline-Univision Investigation*, WCGU (June 19, 2013), http://news.wgcu.org/post/rape-fields-frontlineunivision-investigation; HUMAN RIGHTS WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT (May 2012), available at https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and-sexual (last visited Jan. 2, 2017).

[3] Greg Asbed & Sean Sellers, *The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farmworkers*, 16 U. PA. J.L. & SOC. CHANGE 39, 43 (2013).

millions of pounds of tomatoes, directly or indirectly, to supermarkets and fast food chains.[4] In the citrus industry, two companies own tens of thousands of acres in Florida alone and sell to three ultimate buyers.[5]

The CIW determined that market power concentration of buyers in the supply chain created tremendous downward pressure on suppliers'—the growers'—prices. They thus developed a "boomerang" strategy to target those large corporate buyers through a combination of nationwide secondary picketing and consumer boycotts.[6] Their goal was to pressure top brands to boycott growers unless those growers improved farmworker wages and working conditions.[7]

The CIW's secondary pickets were an unparalleled success: in under ten years, they succeeded in establishing an award-winning "Fair Food Program" where buyers at the top of the agricultural supply chain pledged to purchase only from suppliers that: (1) paid a "penny-per-pound" more per bucket of tomatoes picked; and (2) followed the Program's requirements for improved working conditions.[8] The Program has been heralded as a model for improving agricultural working conditions around

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[4] Bowe, *supra* note 1, at 106. For increasing industry concentration, *see*, *e.g.*, KEITH FUGLIE ET AL., U.S. DEP'T OF AGRIC., RISING CONCENTRATION IN AGRICULTURAL INPUT INDUSTRIES INFLUENCES NEW FARM TECHNOLOGIES (2012); Council of Economic Advisors (CEA) Issue Brief, *Benefits of Competition and Indicators of Market Power*, Apr. 2016, at 4-6, https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_ competition_ issue_brief.pdf; Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?*, 2016 China International Conference in Finance, Xiamen, China (June 2016), available at: http://www.cicfconf.org/sites/default/files/paper_388.pdf.

[5] Bowe, *supra* note 1, at 106. Those buyers are Cargill, Tropicana (owned by PepsiCo) and Minute Maid (owned by Coca-Cola).

[6] Asbed & Sellers, *supra* note 3, at 43-44; Elly Leary, *Immokalee Workers Take Down Taco Bell*, MONTHLY REV., Oct. 2005, at 11.

[7] *Id.*

[8] *See* FAIR FOOD STANDARDS COUNCIL, FAIR FOOD PROGRAM: 2014 ANNUAL REPORT 5-7 ("FFSC 2014 REPORT"), http://www.fairfoodstandards.org/reports/14SOTP-Web.pdf. For a broader history of the CIW, *see* SILVIA GIAGNONI, FIELDS OF RESISTANCE: THE STRUGGLE OF FLORIDA'S FARMWORKERS FOR JUSTICE (2011). The Program included: a Fair Food Code of Conduct with a zero tolerance policy for forced labor, violence, and sexual assault; a worker-triggered complaint mechanism for wage violations and hazardous working conditions; changes in harvesting operations, including rest breaks and the use of time clocks; and ongoing audits of participating growers' compliance. FFSC 2014 REPORT, *supra*, at 2.

the world.[9] The penny-per-pound premium lifted worker wages an extra $60 to $80 per week, a 20 to 35 percent weekly pay increase.[10] Its supply-chain monitoring has dramatically improved working conditions while effectively sanctioning suppliers that do not comply, results that have rarely been matched in international supply-chain monitoring schemes.[11]

Without the ability to engage in a secondary boycott, it is highly unlikely that the CIW would have been able to achieve this success. And yet the CIW was only able to execute their secondary boycott campaign because farmworkers are not classified as "employees" under the National Labor Relations Act (NLRA).[12] Although this meant that they were not entitled to NLRA's protections, it also meant that they were exempt from its punishing ban on secondary activity. At its simplest, secondary activity is "a combination to influence *A* by exerting some sort of economic or social pressure against persons who deal with *A*."[13]

The ban on secondary activity was intended, according to its co-sponsor Senator Robert A. Taft, to "make it unlawful to . . . injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees."[14] But it is no accident that

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[9] Greenhouse, *supra* note 2. The CIW's Fair Food Program has received a number of awards, including the 2015 Presidential Medal for Extraordinary Efforts to Combat Human Trafficking. *See* http://www.ciw-online.org/about/.

[10] Greenhouse, *supra* note 2.

[11] *See, e.g.*, DAVID WEIL, THE FISSURED WORKPLACE 262-65 (2014) (providing overview of global supply-chain monitoring efforts); RICHARD M. LOCKE, THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY 24-45 (2013); GAY W. SEIDMAN, BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS AND TRANSNATIONAL ACTIVISM 15-46 (2007); Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 57 STANFORD J. INT'L L. 1-54 (2016); Daniel Berliner et al., *Governing Global Supply Chains: What We Know (and Don't) About Improving Labor Rights and Working Conditions*, 11 ANN. REV. L. & SOC. SCI. 193 (2015); Richard M. Locke & Monica Romis, *The Promise and Perils of Private Voluntary Regulation: Labor Standards and Work Organization in Two Mexican Garment Factories*, 17 REV. INT'L POL. ECON. 45 (2010); Mark Barenberg, *Corporate Social Responsibility and Labor Rights in US-Based Corporations*, *in* NON-GOVERNMENTAL POLITICS (M. Feher ed. 2007); Richard M. Locke et al., *Does Monitoring Improve Labor Standards? Lessons from Nike*, 61 IND. LABOR REL. REV. 361 (2007).

[12] Farmworkers are exempt from the National Labor Relations Act under Section 2(3). National Labor Relations Act (NLRA), 29 U.S.C. § 152(3) (2012).

[13] FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 43 (1930).

[14] 93 Cong. Rec. 4198 (1947) (Sen. Robert A. Taft).

judges, legislators and scholars have identified the secondary activity ban, and specifically the way in which it has artificially separated "primary" from "secondary" employers, as alternately: "draw[ing] no lines more arbitrary, tenuous, and shifting [under the labor law]"; "gradual[ly] sapping . . . union strength"; giving employers a "special legal advantage"; and "fit[ting] very uncomfortably with a regime of free collective bargaining."[15] Richard Trumka, the current president of the AFL-CIO, advocated the abolition of the entire NLRA to in part rid the labor movement of the "secondary boycott provisions that hamstring labor at every turn."[16] This is because the CIW's story is not unique in illustrating the impact of corporate structures on workers' wages and terms and conditions of work and the importance of workers' access to secondary activity protections.

The NLRA's overbroad definition of "secondaries" has adverse effects on workers' expressive and associational rights but also impacts workers' ability to negotiate an efficient wage, increase union density and enlarge their share of the pie in the context of deep income inequality.[17] Before the statutory ban, secondary boycotts were strategically used in the late nineteenth and early twentieth century to solidify unionized workers' gains against non-unionized employers.[18] Courts began widely enjoining secondary strikes in the 1920s and 1930s, with dramatic impacts on union

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[15] *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 386-387 (1969); Sen. Committee on Labor and Human Resources, Workplace Fairness Act, S. Rep. No. 103-110, at 36 (1993); PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 269-73 (1990). *See also* FRANKFURTER & GREENE, *supra* note 13, at 170 ("To attempt . . . to decide the propriety of a 'secondary boycott' is to leave definiteness of fact for ambiguity of phrasing. For to talk about 'secondary boycott' is to become involved in a confusion of terms, and, therefore, in a confusion of thought.").

[16] Richard Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871, 881 (1987).

[17] For discussions of inequality in the U.S., *see* ANTHONY B. ATKINSON, INEQUALITY: WHAT CAN BE DONE? 133-54 (2015) (discussing the relationship between inequality and the bargaining power of workers and labor unions); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 23-24, 294-96, 314-15 (2014); LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 31-32 (2008) (providing summary of changing income distributions in the U.S. in the twentieth century). For the adverse effects of secondary activity on union density, *see* Paul Weiler, *Striking a New Balance*, 98 HARV. L. REV. 351, 403-04 (1984).

[18] For the role of secondary boycotts in nineteenth-century unionism, *see* DAVID MONTGOMERY, FALL OF THE HOUSE OF LABOR 147-48 (1988).

strength.[19] Congress then formally amended the NLRA to ban secondary boycott bans in the 1940s and 1950s, constructing a legal regime that oversaw the steady decline of union density in the private sector from a high of 35.7% after the Korean War to its current 6.4% today.[20] This tracks a corresponding decline in non-union worker wages and an increase in income inequality.[21] Absolute income mobility trends since 1940, or the fraction of children who earn more than their parents, has fallen from approximately 90% for children born in 1940 to 50% for children born in the 1980s.[22]

The consequences of the ban are all the more acute in the New Economy where worker leverage over indirect employers' power over wages is paltry—a dramatically understudied source of the rise and persistence of economic inequality. The increasing fragmentation of work arrangements—replacing vertically integrated firms with the transactional

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[19] *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 479 (1921), *superseded by statute*, Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932). For effect of union density and 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); Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 UC IRVINE L. REV. 561, 571 (2014) (describing effects of *Duplex Printing* on "disappearing" labor movement and "rapid rise in income inequality").

[20] *See* H. Rep. No. 669, 72d Congress, 1st Session, at 3 ("The purpose of the [Norris-LaGuardia] bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act."); *see also United States v. Hutcheson*, 312 U.S. 219, 229 (1941) (describing legislative history of Clayton and Norris-LaGuardia Acts); News Release, Bureau of Labor Statistics, *U.S. Dep't of Labor, Union Members—2016* (Jan. 26, 2017), https://www.bls.gov/news.release/pdf/union2.pdf; Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 454-55 (Cynthia L. Estlund & Michael L. Wachter eds., 2014); Barry T. Hirsch, *Sluggish Institutions in a Dynamic World: Can Unions and Industrial Competition Coexist?*, 22 J. ECON. PERSP. 153 (2008).

[21] *See* 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: Evidence from the Private and Public Sectors*, 18 J. LAB. RES. 425, 426 (1997) (same).

[22] Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940* 8-9 (NBER Working Paper No. 22910, December 2016), http://scholar.harvard.edu/files/hendren/files/abs_mobility_paper.pdf. *See also* PIKETTY, *supra* note 17, at 23-24, 294-96, 314-15 (discussing rise of U.S. income inequality).

economies of subcontracting, outsourcing, franchising and supply chain disintegration—accompanied by the rise of contingent work and growing evidence of employer purchasing power, has fundamentally decentralized employment. Instead of confronting a single employer, workers contend with a number of entities that determine or control their wages, work arrangements, and terms and conditions of work.[23] Yet the NLRA limits workers to just one option when they picket for higher wages—a narrowly-defined direct employer. This creates a perverse incentive for employers to avoid labor and employment law liability merely by restructuring.[24] Picketing employers who fall outside the circumscribed definition can result in the imposition of labor law's harshest penalties: injunctions against picketing, statutory damages plus the costs of suit, and even treble damages if the picketing is found to violate the antitrust laws.[25] These high stakes have all but eliminated from labor's tool-kit a key source of economic pressure, which has in turn resulted in the erosion of workers' bargaining power and arbitrary foreclosure of their ability to picket employers that have more impact on wage determinations than their direct employers.[26]

Current scholarship has failed to fully address these effects of the current law or provide comprehensive proposals for reform. First, scholars have failed to take an integrated approach to analyzing the problems with the ban on secondary activity. For example, scholars have examined the impact of the ban on workers' constitutional right to free expression without examining the ban's adverse welfare and fairness effects.[27] Alternatively, scholars have assessed the impact of secondary

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[23] WEIL, *supra* note 11, at 28-42.

[24] While the NLRA does not expressly define "employers," 29 U.S.C. §152(2) ("[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly"), the Board and the courts have until recently interpreted the term narrowly. *See infra* Section I.B and note 76.

[25] 29 U.S.C. § 160(l) (granting Board power to seek injunctive relief from district court pending resolution of secondary boycott claim); *id.* § 187 (2000) (granting employers statutory damages for unlawful secondary activity); 15 U.S.C. § 15(a) (private plaintiffs in antitrust actions "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee").

[26] KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 199-200 (2004) (surveying literature on rise of employer bargaining power vis-à-vis unions since 1980s); PAUL OSTERMAN, SECURING PROSPERITY 5 (1999) (arguing that employer power in the workplace increased since 1990s).

[27] *See, e.g.*, Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First*

boycotts on consumer welfare, with debates centering on how best to police labor's exemption from the antitrust laws, without assessing the impact of such activity on wages and distribution.[28] Others have devised alternative tests to clarify the primary-secondary distinction or bring coherence to secondary activity doctrine without either incorporating contemporary developments in labor economics and antitrust policy or detailing what kind of economic evidence should be relevant for any new rules.[29] A number of articles have more broadly extended economic

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Amendment, 36 BERKELEY J. EMP. & LAB. L. 277, 300-15 (2015) (arguing that recognitional picketing contravenes current First Amendment law); Joseph L. Guza, *A Cure for Laryngitis: A First Amendment Challenge to the NLRA's Ban on Secondary Picketing*, 59 BUFFALO L. REV. 1267, 1270-71 (2011) (arguing that secondary boycott ban is unconstitutional as viewpoint discrimination and as vague).

[28] *See*, *e.g.*, EDWARD R. MILLER, ANTITRUST LAWS AND EMPLOYEE RELATIONS 57-60 (1984); Daniel J. Chepaitis, *The National Labor Relations Act, Non-Paralleled Competition, and Market Power*, 85 CALIF. L. REV. 769, 769-70 (1997); Randall Marks, *Labor and Antitrust: Striking a Balance Without Balancing*, 35 AM. U.L. REV. 699, 700-03 (1986); Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 992-94 (1986); Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 989-90 (1984); Douglas Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1184-85 (1980); Douglas Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 HARV. L. REV. 904, 908-20 (1976); Bernard D. Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Law*, 32 U. CHI. L. REV. 659, 659-61 (1965); Ralph K. Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 14-17 (1963).

[29] *See*, *e.g.*, RALPH M. DERESHINSKY, ALAN D. BERKOWITZ & PHILIP A. MISCIMARRA, THE NLRB AND SECONDARY BOYCOTTS 1-9 (1981); Michael C. Duff, *ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U.L. REV. 837, 838-43 (2014); Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(B) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 906-7 (2005); Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B. C. L. REV. 329, 329-30 (1998); James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 894-900 (1991); Lester Asher, *Secondary Boycotts: The Ally-Doctrine Revisited*, 4 LOY. U. CHI. L.J. 293, 293-94 (1973); Howard Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000, 1000-04 (1965); Lester Asher, *Secondary Boycotts—Allied, Neutral and Single Employers*, 52 GEO. L. J. 406, 406-07 (1964); Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1363-66 (1962); Jerome R. Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 YALE L.J. 341, 341-44 (1938). Chepaitis, *supra* note 28, at 771-72, argues that secondary activity should only be permitted when it functions to assert union "countervailing market power" against an employer. My approach differs. Instead of focusing a justification for allowing picketing on the *union*'s market power within a narrowly defined labor market, I concentrate on the market power of secondaries in determining picketed employees' wages and employment conditions.

analysis to the policy goals of the labor laws, but, with one exception, have not applied that analysis to conduct specifically regulated as secondary activity.[30]

This Article decisively restructures and advances these debates by integrating developments in the New Economy and economic theory into the analysis of secondary activity. It presents unified principles for the labor law's success based on those developments, and proposing a novel test that furthers the expressive, efficiency and equitable goals of labor regulation. It is an attempt to move beyond the "ossification of the labor law"[31] by reviving and adapting its purposes to contemporary workplace arrangements, and particularly, its designation of lawful targets of picketing. After outlining the current state of the law on the primary-secondary distinction in secondary boycott doctrine,[32] the Article takes a step back to elaborate, as a preliminary matter, key developments in workplace arrangements as well as in economic theory in the areas of labor economics, theories of the firm, and contemporary antitrust policy and analysis. For decades, the National Labor Relations Board (NLRB), its enforcement officers, and courts interpreting the NLRA have failed to apply economic analysis to or empirically assess the targets of workers' secondary activity. The NLRA's ban on Board hiring of economists and its failure to solicit the expertise of social scientists as amici in its highly doctrinal adjudication have hindered the integration of contemporary advances in economic analysis into the labor law.[33] As a key theoretical

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[30] *See, e.g.*, Richard A. Epstein, *Labor Unions: Saviors or Scourges?*, 41 CAP. U. L. REV. 1, 1-8 (2013); Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 829-30 (1996); Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 421-25 (1992); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE. L.J. 1357, 1357-58 (1983).

[31] Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1611-12 (2002); *see also* WEIL, *supra* note 11, at 180 (arguing that "fissured" workplace requires "requires rethinking our basic definitions of employment"); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 1, 13-36 (2016) (detailing the "demise of the twentieth-century labor law regime").

[32] *See infra* Section I, at 11-17.

[33] 29 U.S.C. § 154(a) ("Nothing in this subchapter shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis."); Charlotte Garden, *Toward Politically Stable NLRB Rulemaking: Rulemaking vs. Adjudication*, 64 EMORY L. J. 1469, 1475, 1486-87 (2015) (discussing Board failure to solicit social scientific expertise); Robin Stryker, *Limits on Technocratization of the Law: The Elimination of the National Labor Relation Board's*

contribution, the Article provides an overview of these developments and demonstrates how they are applicable to secondary boycott law's primary-secondary distinction.[34]

The Article then develops unified principles for evaluating the labor law's success in the context of these critical developments.[35] While the literature has traditionally opposed the socially valuable goals of achieving economically efficient outcomes for labor and capital, on the one hand, with achieving equitable distributional outcomes and protecting workers' First Amendment expressive and associational rights, on the other, it argues that these interests need not be opposed. Where labor regulation can achieve all three, it should be broadly embraced as normatively ideal. The Article then evaluates the current standard for distinguishing primary and secondary employers under these updated principles and is the first to review its deficiencies on expressive, microeconomic and macroeconomic grounds.[36]

Finally, the Article puts forward a principled, economic effects-based standard that satisfies the principles for labor law's success: the *market power rule*.[37] Under that rule, indirect employers with sufficient market power—whether through contractual agreements with a direct employer, monopsony power, or oligopsonistic collusion—in the direct employer's labor input or product market to determine workers' wages and/or their terms and conditions of work would be deemed "transactional primaries" rather than prohibited "secondary" picketing targets. The picketing of transactional primaries would be entitled to the same protections as the picketing of primary employers. The rule would have three key benefits. First, in addition to better protecting First Amendment expressive and associational rights, the rule would also increase worker bargaining power, with concomitant micro- and macroeconomic effects, without frustrating the purposes of the statutory ban. Second, the rule would protect workers against indirect employers' evasion of their labor and employment law obligations. And third, the rule would develop the economic expertise of the Board and the courts, enhancing labor law's

Division of Economic Research, 54 AM. SOC. REV. 341, 344-56 (providing historical background and sociological analysis of the elimination of the NLRB's Division of Economic Research).

[34] *See infra* Section II, at 17-34.

[35] *See infra* Section III.A, at 34-39.

[36] *See infra* Section III.B, at 39-53.

[37] *See infra* Section IV, at 53-65.

ability to more closely track labor market conditions in the New Economy. The market power rule could be implemented through adjudication as a defense available to picketing employees or through either Board rulemaking or legislative amendment.[38]

I. THE LAW OF SECONDARY PICKETING

A. The NLRA's Evolving and Competing Purposes

Properly delineating lawful from unlawful targets of picketing requires first parsing the purposes of the labor law that inform the regulation of picketing generally and the secondary boycott ban in particular. The preamble of the NLRA lists multiple "Findings and Declaration of Policy" for the federal law:

> to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions . . . by encouraging . . . collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[39]

There is an extensive literature on the relationship between and priorities among the NLRA's purposes. Unpacking this relationship, and these priorities, is no easy matter, given the obvious tensions between the Wagner Act of 1935—which set out the basic framework of the modern NLRA—and later amendments to the Act by the Labor Management Relations Act of 1947 ("Taft-Hartley Amendment") and Labor-Management Reporting and Disclosure Act of 1959 ("Landrum-Griffin Amendment").[40]

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[38] *Id.*

[39] *See* 29 U.S.C. §151; Mark Barenberg, *The Political Economy of the Wagner Act*, 106 HARV. L. REV. 1379, 1390 n. 31 (1993) (discussing Wagner Act's purposes).

[40] For debates about the NLRA's purposes, *see* CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS 318 (1985) (arguing that Wagner Act proponents saw right of self-organization as only a means to labor peace); Kenneth H. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 295-96 (1987) (arguing that proto-Keynesian policy was Act's primary purpose); Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72

The cooperationist vision of the Wagner Act set out two interdependent goals for the new national labor policy: labor peace and equal bargaining power between "labor" and "capital."[41] Framed as a response to the rise of large-scale industry and the severe economic effects of the Depression on workers, the statute's associational protections and collective bargaining scheme were a direct attempt to increase both individual worker bargaining power and workers' mass purchasing power, with the larger aim of stabilizing the economy and encouraging macroeconomic growth.[42] As stated in the Act's Preamble:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate . . . association 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 and by preventing the stabilization of competitive wage rates and working conditions within and between industries. Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers

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CORNELL L. REV. 245, 254-56 (1987) (equating Congress's primary goal of industrial peace with allocative efficiency); James A. Gross, *Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making*, 39 INDUS. & LAB. REL. 7, 10-13 (1985) (arguing that "advancement of economic and social justice, rather than the reduction of industrial strife," was Wagner Act's primary objective).

[41] Wachter, *supra* note 20, at 429-31 (discussing twin purposes of promoting bargaining equity and industrial peace); Dau-Schmidt, *supra* note 30, at 461 (same).

[42] *S*ee 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); Barenberg, *Political Economy*, *supra* note 39, at 1418-19.

and employees.[43]

For the Act's chief architect, Senator Robert Wagner, equal bargaining power was essential for the Act's success. He believed cooperation was "given only to equals," and "[t]o match the huge aggregate of modern capital[,] the wage-earner must be organized."[44] In Congressional debates, he claimed it "simply absur[]d to say that an individual, one of 10,000 workers, is on equality with his employer in bargaining for his wages . . . When 10,000 come together and collectively bargain with the employer, then there is equality of bargaining power."[45] He and others emphasized collective bargaining as a means of ridding individual workers' employment contracts with large-scale employers from duress.[46] When the Supreme Court upheld the NLRA's constitutionality, it did so on the basis of the government's interest in promoting economic growth by facilitating equal bargaining power between employers and employees.[47]

The Taft-Hartley and Landrum-Griffin Amendments to the Wagner Act had different goals. Justified as necessary to restrain the purported abuses and excesses enabled by the Wagner Act, the Taft-Hartley and Landrum-Griffin Amendments emphasized individualistic and employer-friendly policy goals not emphasized by the earlier statute. These included protecting individual workers' autonomy to reject collective bargaining and restraining unions' ability to obstruct commerce.[48] By challenging unions' ability to present a unified front against employers and weakening

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[43] 29 U.S.C. at § 151. For discussion of the Wagner Act's cooperationist vision, *see* Barenberg, *Political Economy*, *supra* note 39, at 1427-30.

[44] Barenberg, *Political Economy*, *supra* note 39, at 1467 & 1467 n.377 (citing Robert Wagner, *The New Responsibilities of Organized Labor*, Address at the Convention of the New York State Federation of Labor 2, 6 (August 28, 1928)).

[45] *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. On Education and Labor*, 73d Cong. 9 (1934) (statement of Sen. Wagner), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935 ("1 LEGIS. HIST."), at 47 (1985).

[46] *See* 78 Cong. Rec. 3678-79 (1934) (statement of Sen. Wagner), *reprinted in* 1 LEGIS. HIST., *supra* note 45, at 20 ("The primary requirement for cooperation is that employers and employees should possess equality of bargaining power."); *see also* 79 Cong. Rec. 6183, 6184 (1935), *reprinted in* 2 LEGIS. HIST., *supra* note 42, at 2283 (same); S. 2926, 73d. Cong., 2d Sess. § 2 (1934), *reprinted in* 1 LEGIS. HIST., *supra* note 45, at 1 (identifying centralized economic activity as negating genuine liberty of contract).

[47] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34 (1937).

[48] Gross, *supra* note 40, at 12-16.

the economic weapons unions had available, the Amendments were in tension with the Wagner Act's focus on bilateral labor-management cooperation reliant on establishing *equal* bargaining power between the two to ensure labor peace.

Over time, the NLRB and the courts reconciled the collectivist aims of the Wagner Act with the more individualist concerns of the later Amendments by reconceiving the primary purposes of the NLRA as the promotion of "industrial peace" and the "free flow of commerce."[49] That reconciliation has contributed to an emphasis on continued production over the competitive wage and distributional goals of the labor law, regardless of the broader state of the economy and any resulting economic effects.[50]

B. The NLRA's Secondary Picketing Ban

The secondary activity ban, enacted as part of the Taft-Hartley and Landrum-Griffin Amendments to the NLRA, was a critical component of the shift away from the Act's distributional goals in favor of prioritizing continued production. Under the amended provisions, it is an unfair labor practice for workers in a labor dispute with a direct employer to "threaten, coerce, or restrain" other, "secondary" or "neutral" employers to join forces with them in boycotting or refusing to deal with their immediate employer ("Section 8(b)(4)").[51] It is also an unfair labor practice to induce or encourage employees of another employer to "strike or refus[e] in the course of his employment" to deal with or handle a

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[49] For emphasis on industrial peace in the legislative history, *see* S. Rep. No. 573, 74th Cong., 1st Sess. 1 (1935), *reprinted in* 5 NLRB, *in* LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 2300 (1935) ("The first objective of the bill is to promote industrial peace."). For case law emphasizing the purposes of industrial peace and the free flow of commerce, *see, e.g.*, *NLRB v. Financial Inst. Employees of Am.*, Local 1182, 475 U.S. 192, 208 (1986) (stating Act's basic purpose "is to preserve industrial peace"); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981) (stating Act's fundamental aim as "the establishment and maintenance of industrial peace to preserve the flow of interstate commerce").

[50] *See, e.g.*, JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 111 (1983) ("The most commonly expressed goal of the Wagner Act was the achievement of industrial peace."); Donald A. Dripps, *New Directions for the Regulation of Public Employee Strikes*, 60 N.Y.U. L. REV. 590, 594 (1985) ("Since [the Great Depression], 'industrial harmony' has replaced 'equality of bargaining power' as the primary justification of our labor law."); Schwab, *supra* note 40, at 252-53 (discussing the labor law's purpose of industrial peace and equating it with economic efficiency).

[51] 29 U.S.C. at § 158(b)(4).

direct employer's goods or services.[52]

Prior to the Wagner Act, secondary activity was prohibited under a number of legal theories, from criminal and antitrust conspiracy to the torts of trespass and disturbing the peace.[53] While the Clayton Antitrust Act of 1914 arguably legalized peaceful secondary pressure, the Supreme Court in *Duplex Printing Co. v. Deering* stripped workers of virtually all secondary activity protections granted under that Act.[54] After significant pressure from organized labor and progressives, Congress revived protections for peaceful union secondary conduct in the Norris-La Guardia Act of 1932.[55] However, the legality of secondary activity remained controversial, and in 1947, over a Presidential veto, Section 8(b)(4) was amended to the Act.[56] Taft Hartley passed in the context of increased anti-union sentiment following worker strikes protesting post-World War II layoffs and price increases.[57]

The purposes of the proscription on secondary activity were multifold. First, it was intended to protect employers neutral to a labor dispute from union pressure that would force them to cease dealing with a struck employer.[58] The concern was that of enmeshing those with only indirect

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[52] *Id.*

[53] *See generally* DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM 69-89 (1995) (documenting pre-Wagner Act theories of legal proscription of secondary boycotts).

[54] Pub. L. No. 106-274, ch. 323, 38 Stat. 730 (1914) (codified as amended in 15 U.S.C.); *Duplex Printing*, 254 U.S. at 479.

[55] Pub. L. No. 106-274, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§101-115 (1994)).

[56] *See* 29 U.S.C. §158(b)(4); *see also* Gerard D. Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285, 285-300 (1960) (discussing legislative history of Taft-Hartley Amendments).

[57] *See* MELVYN DUBOFSKY & FOSTER RHEA DULLES, LABOR IN AMERICA: A HISTORY 326-35 (2004) (describing labor strife and mobilization of business community around Taft-Hartley Amendments); TOMLINS, *supra* note 40, at 148-50 (same); Gross, *supra* note 40 (describing conditions that gave rise to the Taft-Hartley amendments). The secondary activity prohibitions were strengthened in the Landrum-Griffin Amendments of 1959. Pub. L. 86-257 (codified at 29 U.S.C. §§153, 158-60, 164, 186-87 (1994)).

[58] 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 ["1947 LEGIS. HIST."], at 1106 (1948); *id.* at 547; *see also NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675, 692 (1951) (citing congressional objective "of shielding unoffending employers and others from pressures in controversies not their own"); Raymond Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 U. KAN. L. REV. 651, 653-655 (1971) (discussing legislative history and purpose of

power to resolve a labor dispute in the adverse economic consequences of a strike.[59] Second, the prohibition was intended to prevent unions from colluding with employers to reduce competition by targeting an employer's competitors.[60] Finally, Congress was concerned about unions coercing non-unionized workers of other employers to compel them to accept union representation through a form of "top-down organizing."[61]

The Board enforces these goals by distinguishing between "primary" and "secondary" employers. While the Board has recently begun to extend statutory "employer" status to franchisors and hiring firms in the franchising and temporary employment contexts under common law agency tests,[62] it defines "primary" and "secondary" employers under Section 8(b)(4) quite differently.[63] Employers not in a direct employment relationship with picketing statutory employees are deemed "secondaries"

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secondary activity ban).

[59] *Id.*

[60] 93 Cong. Rec. 270 (1947) (citing *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797, 798-800 (1945)); Fred W. Jones, *The "Secondary Boycott" Provision of the Taft-Hartley Act*, 9 LA. L. REV. 282, 285 (1949). *See also* Campbell, *supra* note 28, at 1022-39 (discussing adverse effects of extending labor's monopoly on inputs to firm outputs through secondary activity); Leslie, *Principles*, *supra* note 28, at 1224-33 (proposing antitrust regulation of certain union-management schemes to regulate product markets by controlling prices, outputs or market allocation); Meltzer, *supra* note 28, at 710 (discussing unions' ability to collude with employers); Winter, *supra* note 28, at 16 (discussing anticompetitive incentives in both labor and management where collecting bargaining is based on employee organization along product market lines).

[61] 1947 LEGIS. HIST., *supra* note 58, at 4432-37; *see also* LAURA WEINRIB, TAMING OF FREE SPEECH 33-34, 304-305, 321 (2016) (providing historical context for concerns about union coercion of non-union employees of other employers); Weiler, *supra* note 17, at 415-16.

[62] *See Browning-Ferris Industries of California*, 362 NLRB No. 186, slip op. at 2, 15-16, 18-20 (2015) (expanding joint-employer standard to include indirect right to control the "means or manner of employees' work and terms of employment."); *id.* at 12 (applying RESTATEMENT (SECOND) OF AGENCY (1958)'s common-law agency test to define a "servant"); *McDonald's USA, LLC, a joint employer, et al.,* 362 NLRB No. 168, slip op. at 2 (2015) (applying *Browning-Ferris* joint-employer test to franchising); *see also Retro Environmental, Inc.*, 364 NLRB No. 70, slip op. at 1 (2016) (applying *Browning-Ferris* joint-employer test to temporary staffing agency and construction company). As of this writing, the status of *Browning-Ferris*'s joint-employer test is uncertain and remains on appeal before the D.C. Circuit. *See Browning-Ferris Industries of California, Inc., d/b/a/ Browning-Ferris Newby Island Recyclery v. National Labor Relations Board*, Nos. 16-1028, 16-1063 and 16-1064 (D.C. Cir. filed Sept. 7, 2016).

[63] *See supra* note 24.

with two narrow exceptions.[64] First, under the "ally doctrine," otherwise neutral employers who perform struck work farmed out by a primary employer forfeit their neutral status.[65] Second, under the "single employer doctrine," an employer forfeits neutral status if it functions as a single employer with a direct employer under a demanding four-factor test: (1) common ownership; (2) common management; (3) interrelation of operations, and (4) common or centralized control of labor relations.[66] Union penalties for picketing secondary employers are severe: employers can request injunctive relief from the NLRB's Solicitor General and can directly seek statutory damages under Section 303 of the LMRA as well as potential treble damages under the antitrust laws.[67] Union violations of Section 8(b)(4) are the only unfair labor practice that can result in statutory damages available to employers under NLRA.

Although the ban serves important goals, the very broad definition of "secondary" employers that the Board employs creates serious problems for worker bargaining power in New Economy workplace structures—as the next Section explores.[68]

II. DEVELOPMENTS IN THE NEW ECONOMY AND ECONOMIC THEORY

The secondary boycott ban and its exceptions fail to take account of or integrate the dramatic changes in workplace arrangements that have comet to characterize the New Economy. Nor do they consider key contemporary developments in labor economics, the theory of the firm, and antitrust policy, either in assessing which economic actors impact labor conditions or in determining, on a more theoretical level, how corporate restructuring and contractual relationships have shifted bargaining power away from labor in favor of both direct and indirect

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[64] *See, e.g.*, *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 626 (1967) (describing "ally doctrine" exception to secondary boycott rule); *Chauffeurs, Teamsters & Helpers, Local 776 (Pennsy Supply, Inc.)*, 313 N.L.R.B. 1148, 1164 n.2 (1994) (defining the Board's interpretation of "single employer"). *See also* DERESHINSKY, *supra* note 29, at 121-189 (summarizing case law).

[65] *Carpet, Linoleum, Soft Tile, etc. Local 419 v. NLRB*, 429 F.2d 747, 753 (D.C. Cir. 1970) (discussing "ally" doctrine).

[66] *See, e.g.*, *United Mine Workers (Boich Mining Co.)*, 301 N.L.R.B. 82, 873 (1991).

[67] 29 U.S.C. § 160(l) (granting Board power to seek injunctive relief); *id.* § 187 (2000) (granting employers statutory damages); 15 U.S.C. § 15(a) (granting private antitrust plaintiffs treble damages remedy plus costs of suit and attorneys' fees).

[68] *See infra* note 40.

employers. These developments provide useful analytical frameworks for assessing labor market dynamics and pricing structures, offering critical interventions and guiding principles for identifying which entities determine workers' wages and working conditions and which are "wholly unconcerned" with those determinations. By doing so, they can aid in identifying exactly where the current primary-secondary distinction fails to track the statute's purposes and offer insights for revising that distinction to better further them.

A. New Economy Work Structures

Dramatic changes in the structure and valuation of work present significant challenges to labor law's outdated regulatory infrastructure. A growing number of workers are in work arrangements where direct as well as indirect employers determine their wages. Economists estimate that workers engaged in alternative work arrangements—temporary, on-call or contract workers as well as independent contractors or freelancers—rose from 10.7 percent, or around 15 million workers, in 2005 to 15.8 percent, or 23.6 million workers, in late 2015.[69] Some predict that as much as 40 percent of the American workforce will be contingent workers or independent contractors by 2020.[70] While comprehensive numbers have not yet been collected, there are an estimated 3.3 million workers in fast-food franchises and 525,000 in outsourced janitorial services.[71] Over 80 percent of hotel properties alternate company-operated hotels with franchising and subcontracting arrangements,[72] and the hotel industry overall employs 1.86 million workers.[73] There are also countless workers laboring in vertically disintegrated supply chains—manufacturing and supplying parts, handling distribution, providing contracted-for services, all spun off from previously vertically-integrated companies—including in the fastest-

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[69] Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* 7-8 (Princeton University Industrial Relations Section, Working Paper No. 603, 2016), *available at* http://arks.princeton.edu/ark:/88435/dsp01zs25xb933.

[70] INTUIT, INTUIT 2020 REPORT: TWENTY TRENDS THAT WILL SHAPE THE NEXT DECADE 20-21 (October 2010), http://http-download.intuit.com/http.intuit/CMO/intuit/futureofsmallbusiness/intuit_2020_report.pdf.

[71] WEIL, *supra* note 11, at 129-30, 133.

[72] *Id.* at 146, 154-55.

[73] *Id.* at 155.

growing U.S. industries.[74]

Restructuring work arrangements are a key way employers in the New Economy evade compliance with labor and employment law.[75] New Economy employment blurs firm responsibility for the terms and conditions of work and creates an imbalance in worker bargaining power relative to indirect employers.[76] By shifting from setting wages to setting prices for contracted-out, primarily non-union work, employers operating within disintegrated supply chains, franchisor-franchisee relationships, and complex production-and-distribution networks can capture the difference between contracted-out wages (at the marginal revenue product of labor) and prevailing wage rates in the vertical integration era that were set through collective bargaining or internal labor markets while shedding the

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[74] *See, e.g.*, EUNICE HYUNHYE CHO ET AL., CHAIN OF GREED: HOW WALMART'S DOMESTIC OUTSOURCING PRODUCES EVERYDAY LOW WAGES AND POOR WORKING CONDITIONS FOR WAREHOUSE WORKERS (2012); Gary Herrigel & Jonathan Zeitlin, *Inter-Firm Relations in Global Manufacturing: Disintegrated Production and its Globalization*, *in* OXFORD HANDBOOK OF COMPARATIVE INSTITUTIONAL ANALYSIS 527-63 (G. Morgan & J. Campbell, eds., 2010).

[75] WEIL, *supra* note 11, at 185-208 (detailing how competing definitions of "employee" and "employer" in labor and employment law fail to track New Economy employment).

[76] *See generally* WEIL, *supra* note 11, at 7-27 (collecting empirical literature on decline in workers' real wages, benefits, employment security and ability to voice concerns in "fissured" workplace); *see also* LABOR IN THE NEW ECONOMY (Katherine G. Abraham, James R. Speltzer & Michael Harper eds., 2010) (collecting essays by leading economists on effects of corporate restructuring on earning inequality, benefits, job security, work hours, and workplace health and safety); Andrias, *supra* note 31, at 13-31 (discussing the relationship between economic restructuring and decline of worker influence in their workplaces and in policy-making at the state and federal levels); Mark Barenberg, *Widening the Scope of Worker Organizing: Legal Reforms to Facilitate Multi-Employer Organizing, Bargaining, and Striking*, ROOSEVELT INST. 1-10 (Oct. 1 2015), http://rooseveltinstitute.org/wp-content/uploads/2015/10/Widening-the-Scope-of-Worker-Organizing.pdf (discussing diminution of labor's bargaining power under corporate restructuring); Annette Bernhardt, *The Role of Labor Market Regulation in Rebuilding Economic Opportunity in the U.S.*, ROOSEVELT INST. 1-13 (2014) (arguing for strengthened labor regulation due to growing employer evasion of legal responsibility under new corporate structures); Harry Katz, *United States: The Spread of Coordination and Decentralization without National-Level Tripartism, in* NEW STRUCTURE OF LABOR RELATIONS, *supra* note 29, at 192-212 (discussing effects of decentralized collective bargaining on worker bargaining power in the United States); Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527 (1996) (describing transition and evolution of employment relationships with decline of manufacturing sector and rise of service sector).

costs of legal liability as statutory "employers."[77] Yet, employers within these disintegrated networks have detailed contractual provisions with direct employers that set standards, quality controls and monitoring requirements on production and service.[78] The contractual delineations of responsibility for employment conditions *between* employers disrupt the traditional principal-agent model of employment adopted under the NLRA.[79] And these arrangements place many obstacles in workers way as they attempt to improve their plight through collective action with others. The fragmentation of protections even *within* a given workplace—between ill-defined direct employees and independent contractors, temporary and permanent workers, and direct and outsourced workers—increases workers' coordination costs and impedes the building of solidarity and cohesion necessary to build a union.[80]

Employees that *do* have labor law protections face a series of legal obstacles in organizing and bargaining with multiple employers,[81] including the fact that the post-industrial, service sector-oriented economy has made single-firm careers itinerant and flexible.[82] Core features of the labor law designed to improve working conditions on the timescale of a worker's productive life—emphasizing seniority systems and narrow bargaining units for workers trained to specialize in circumscribed and firm-specific job skills—are not compatible with, say, on-call employment at Uber, temp work, or the transient, project- and team-oriented job descriptions through which workers migrate in a single job.[83] Finally,

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[77] WEIL, *supra* note 11, at 88-90; STONE, *supra* note 26, at 68-86; *see also* Rosenfeld et al., *supra* note 21 (summarizing findings on independent effects of union decline on wages, arguing that private-sector union decline since late-1970s contributed to substantial wage losses among non-union workers); Harper, *supra* note 29, at 330 (discussing effects of corporate reorganization on collective bargaining rights in segmented employment arrangements).

[78] WEIL, *supra* note 11, at 99-177 (detailing monitoring and quality control provisions in subcontracting, franchising, and supply chain agreements).

[79] Harper, *supra* note 29, at 334.

[80] *See, e.g.*, STONE, *supra* note 26, at 206-9 (describing NLRB's failure to accord bargaining unit determinations with "blurring of boundaries . . . typical of work practices today."); David S. Pedulla, *The Hidden Costs of Contingency*, 92 SOC. FORCES 691, 692-3 (summarizing empirical studies of effects of contingent labor on standard, full-time employees' earnings and working conditions).

[81] Barenberg, *Widening the Scope*, *supra* note 76, at 10-14 (listing obstacles to multiemployer organizing and bargaining under current law).

[82] STONE, *supra* note 26, at 87-99 (describing rise of post-industrial "new employment relationship").

[83] *See id.* at 125, 203-9 (pointing to features of American unionism as "antithetical to

workers' access to NLRB remedies is so protracted that there is little incentive in the fast-paced economy to utilize or rely on enforcement mechanisms for labor rights protections.[84]

Labor law's ability to successfully adapt will determine its relevance as a regulatory mechanism capable of achieving its policy goals.[85] The failures of current law provide ammunition for questioning the value of labor regulation altogether and invite calls for its dismantling.[86] A critical political and scholarly project justifying the NLRA's regulatory regime must connect its stated policy goals with a goal long argued to be in opposition to them: maximizing social welfare.[87] In fact, efficiency goals are not antithetical to the purposes of the labor law. With the Board's recent decisions and rulemaking on the chopping block, it is crucial to revive and adapt the NLRA's purposes by integrating current developments in economic theory that inform the labor law's ability to achieve both welfare and fairness benefits. These developments explain the effects of workplace arrangements on worker bargaining power and offer tools to correct for existing regulations' lagging behind. The following Subsections provide an overview of these developments, concentrating on how they are relevant for secondary boycott law's primary-secondary distinction specifically.

B. Developments in Labor Economics on Wage Determination

The primary-secondary distinction and its common law carve-outs for "allies" and "single employers" fail to take into account how current

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boundaryless careers.").

[84] Andrias, *supra* note 31, at 25-26 (detailing failures of NLRB's remedial scheme); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1777 & n.24 (1983) (same).

[85] *See* 29 U.S.C. § 151; Barenberg, *Political Economy*, *supra* note 39, at 1390 n. 31 (1993) (discussing Wagner Act purposes).

[86] *See, e.g.*, Robert Iafolla, *New House Labor Committee Chair Questions Need for Unions*, REUTERS, Dec. 5, 2016, http://www.reuters.com/article/us-usa-congress-unions-idUSKBN13U2NE (reporting Rep. Virginia Foxx's arguments to repeal Obama administration labor policies because organized labor has "lost its reason for being").

[87] *See, e.g.*, Epstein, *Labor Unions*, *supra* note 30, at 33 ("At one time, unions offered attractive benefits to their members, but always at the cost of overall social welfare."); Epstein, *Common Law*, *supra* note 30, at 1402-3 (arguing that American labor law "shrinks the pie" for certain workers' benefit over other workers and employers).

labor markets work, particularly in the area of wage determination.[88] The Wagner Act envisioned collective bargaining as the exclusive vehicle for wage setting, isolated from what John R. Commons described as the "cutthroat competition" of external market wage-setting that the "cheapest laborer" would accept.[89] The Act's success turned on the fact that a single "employer" had the power to lift its employees' wages outside those competitive determinations.[90] Once suspended, workers and employers could bargain for a neat division of firm revenues from sales in a final product market.[91]

In fact, the economic arrangement in contemporary workplaces is often far more complex. Many firms have developed what economists call "internal labor markets," or ILMs.[92] ILMs are administrative units "within which the pricing and allocation of labor is governed by a set of administrative rules and procedures" within a firm that establish methods of compensation, benefit packages, and job ladders for in-house promotional hiring.[93] The impact of internal labor market structures on workplace organization has been profound.[94] Employers benefit from

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[88] WEIL, *supra* note 11, at 76-92 (collecting studies on economic effects of fissuring on wage determination); ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS 115-40, 217-234 (2003) (describing employers' wage policies in monopsonistic labor markets); ALBERT REES, THE ECONOMICS OF TRADE UNIONS 42-43 (3d ed. 1989).

[89] JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 48 (4th ed. 1936); Wachter, *supra* note 20, at 428, 440-42, 430-31.

[90] *Id.*; *see also* Barenberg, *Political Economy*, *supra* note 39, at 1421.

[91] *Id.*

[92] For foundational discussions of internal labor markets, *see* RICHARD LESTER, HIRING PRACTICES AND LABOR COMPETITION (1954); LLOYD REYNOLDS, THE STRUCTURE OF LABOR MARKETS (1951); Clark Kerr, *The Balkanization of Labor Markets*, *in* LABOR MOBILITY AND ECONOMY OPPORTUNITY 92-110 (1954); *see also* John Dunlop, *The Tasks of Contemporary Wage Theory*, *in* NEW CONCEPTS IN WAGE DETERMINATION 117-39 (George Taylor & Frank Pierson, eds. 1957).

[93] PETER DOERINGER & MICHAEL PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS 1-3 (1971); *see also* Paul Osterman & M. Diane Burton, *Ports and Ladders: The Nature and Relevance of Internal Labor Markets in a Changing World*, *in* THE OXFORD HANDBOOK OF WORK AND ORGANIZATION 426-39 (Stephen Ackroyd et al. eds., 2006) (discussing implications of contemporary workplace changes for internal labor market literature); *see also* STONE, *supra* note 26, at 28, 49-63 (discussing historical transition from scientific management to internal labor market between the 1950s and 1970s).

[94] Oded Stark & Walter Hyll, *On the Economic Architecture of the Workplace: Repercussions of Social Comparisons among Heterogeneous Workers*, 29 J. LAB. ECON. 349, 350-75 (2011) (modeling how wage sharing and fairness concerns impact

establishing internal structures as a means of capturing the complexity of labor as a dynamic input of production: fixed compensation structures allowed employers to recover recruitment and training costs by incentivizing longer-term attachments through higher wage premiums and turnover reduction.[95] 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.[96] A dominant trend of ILMs is the establishment of horizontal and vertical pay equity structures to maintain "internal harmony and morale" by setting standard pay across and between comparable positions within a firm, even if individual performance varies.[97]

While ILM schemes were prevalent and remain common,[98] the growth

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compensation policy and worker productivity). Labor scholars debate the impact of unionization in the creation of internal labor markets through the establishment of seniority arrangements and other protections for job security. For example, Clark Kerr and Paul Osterman argue that internal labor market policies are a result of union pressure on employers. Kerr, *supra* note 92, at 29; Paul Osterman, *Introduction: The Nature and Importance of Internal Labor Markets*, *in* INTERNAL LABOR MARKETS, *supra* note 93, at 1, 9; *see also* WEILER, *supra* note 15, at 8-9 (1990). On the other hand, Katherine Stone contends that, as a historical matter, internal labor market structures were established by employers in a period that "predated unions, often by several decades," and that such structures are frequently found in nonunion firms. STONE, *supra* note 26, at 60-61.

[95] 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 ILM policies).

[96] WEIL, *supra* note 11, at 81; BECKER, *supra* note 95, 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, 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); Sherwin Rosen, *Implicit Contracts: A Survey*, 25 J. ECON. LIT. 1144-75 (1988); Oliver Williamson, Jeffrey Harris & Michael Wachter, *Understanding the Employment Relation – The Analysis of Idiosyncratic Exchange*, 6 BELL J. ECON. 250 (1975) (linking the development of internal labor markets to employers' need to develop self-enforcing performance incentives).

[97] TRUMAN BEWLEY, WHY WAGES DON'T FALL DURING A RECESSION 79, 81 (1999) (explaining existence of pay equity structures and nominal wage rigidity on fairness grounds); *see also* WEIL, *supra* note 11, at 83-85 (discussing evolution of internal equity schemes); David E. Card, Alexandre Mas, Enrico Moretti & Emmanuel Saez, *Inequality at Work: The Effect of Peer Salaries on Job Satisfaction*, 102 AM. ECON. REV. 2981, 2982-3003 (2012).

[98] BEWLEY, *supra* note 97, at 70-85 (documenting ILM prevalence); *see also* Emily

of contingent employment has impacted workers' ability to access and benefit from them.[99] Because contingent work is priced on the external market, employers can avoid the downward rigidity of wages and loss aversion of existing employees.[100] Evasion of direct employer liability under labor and employment laws also lowers the hiring and labor costs of contingent workers and/or the costs of doing business with those who rely on contingent work.[101] Employers have thus increasingly moved towards the benefits of "fissured" workplace structures without wanting to relinquish the benefits of relational contracting for labor inputs, characterized by repeat play, extensive monitoring, and reliance on workers' development of firm-specific skills.[102] Ordinarily, but for a contract between direct employers and labor providers, such work would be less "market-oriented," more determined by firm-specific value-added, and wages would be set by the level of competition within an ILM rather than based on external market rates. Instead, by switching from wage-setting to pricing, firms are able to wage discriminate and capture wage differential rents through contract.[103] As David Weil describes it, "shifting work outward allows redistribution of gains upward."[104]

C. Developments in Economic Theories of the Firm

The theory of the firm is another significant area of study in the economics literature not incorporated into analysis of the primary-secondary distinction. Neither the Wagner Act nor its subsequent

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Breza, Supreet Kaur & Yogita Shamdasani, *The Morale Effects of Pay Inequality*, NAT'L BUREAU ECON. RESEARCH WORKING PAPER NO. 22491 (2016).

[99] STONE, *supra* note 26, at 67-86 (describing shift from permanent to contingent employment).

[100] BEWLEY, *supra* note 97, at 18-19 ("greater flexibility of hiring pay (for secondary workers) derived from the lesser importance of internal pay equity.").

[101] Katherine V.W. Stone, *Legal Protections for Atypical Employees*, 27 BERKELEY J. EMP. & LAB. L. 251, 272-73 (2006) (providing overview of lack of legal protections for contingent workers); David Autour, *Outsourcing at Will: The Contribution of Unjust Dismissal Doctrine to the Growth of Employment Outsourcing*, 21 J. LAB. ECON. 1, 3 (2003) (finding that firm reliance on outsourced workers grew at a higher rate in states that adopted exceptions to common law doctrine of at-will employment and with smaller declines in unionization).

[102] WEIL, *supra* note 11, at 60-72 (discussing detailed, firm-specific work provided by contracted entities with lead firms as well as extensive, low-cost monitoring networks enabling quality control).

[103] *Id.* at 20, 87-91.

[104] *Id.* at 90.

amendments explicitly proffer a theory of the firm in which labor disputes are resolved.[105] And neither Board nor court decisions have developed one or applied one to their analysis of who should count as a "primary" or a "secondary" under Section 8(b)(4). By failing to do so, they have failed to integrate into their analysis of the primary-secondary distinction the effects of employer control over asset usage on contracting employers' relative bargaining power with each other *ex ante* and *ex post*. They also fail to consider how a "secondary" employer's bargaining power over the wages and terms and conditions of work of a primary employer, or on the division of *ex post* surplus in the network of relationships between primary employers, their workers, and contracting parties affect who should count as a "primary" rather than a "secondary." Incorporating a nuanced theory of the firm into the analysis of the primary-secondary distinction is crucial not only for understanding firm incentives within the "fissured" workplace but also for discerning the effects of decisions about corporate structure, contracting and ownership rights on employer control and employee bargaining power.

Under a neoclassical conception of the firm, assuming no agency costs, a firm's production choices are focused on maximizing the owner's welfare, and the firm functions as a set of production plans capitalized upon by managers buying and selling inputs and outputs to achieve that goal.[106] The revisions of Coasean transaction-cost economics introduced the impact of planning and contracting costs on the structure of the firm. Specifically, Coasean theory marked the firm's boundaries where marginal cost savings from transacting *within* the firm are the same as the costs of any errors resulting from concentrating decision-making in a single managerial authority plus any associated administrative rigidity costs.[107]

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[105] The Board applies a narrowly rebuttable presumption in favor of initial bargaining units being limited to a single facility of a single employer, allowing multi-employer bargaining units only under certain circumstances. *J&L Plate, Inc.*, 310 N.L.R.B. 429, 429 (1993).

[106] For accounts of neoclassical theory of the firm, *see* HAL R. VARIAN, MICROECONOMIC ANALYSIS 6-78 (1984); JAMES MITCHELL HENDERSON & RICHARD E. QUANDT, MICROECONOMIC THEORY: A MATHEMATICAL APPROACH 64-134 (1980). Principal-agent theory complicated this account by identifying conflicts of interest between different economic actors, observability problems, and asymmetries of information within the firm. *See, e.g.*, Steven Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55 (1979); Bengt Holmstrom, *Moral Hazard and Observability*, 10 BELL J. ECON. 74 (1979).

[107] Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1760-61 (1989) (citing Ronald H. Coase, *The Nature of the Firm*, 4

Three main criticisms of Coasean theory of the firm complicated his account and contribute to the explanation of both workplace "fissuring" and its economists challenged Coase's dichotomy between an isolated, dominant internal authority within the firm and the authority of competitively determined market valuations, arguing that a firm's authority to dictate obedience from an employee is determined less by authority relations and more by the employee's opportunity costs on the market.[108] Second, they highlighted the importance of sunk costs and lock-in effects like firm- and relationship-specific worker training on the boundaries of the firm, introducing ways in which external markets fail to guide employers and employees' opportunity costs after such investments.[109] Finally, economists broke down distinctions between internal and external markets to view the firm as a nexus of contracts with one instituting and governing "standard form" contract establishing the business entity and allowing a proliferation of contractual relationships with employees, customers, and others.[110]

Later economic theorists developed a property-rights approach to the theory of the firm,[111] viewing the firm as the owner of residual rights of control over nonhuman assets in contractual relationships.[112] Ownership rights structure the contracting parties' incentives: "When contracts are incomplete, the boundaries of the firm . . . determine who owns and controls which assets."[113] The choice between contracting with an outside firm and merging or integrating with it affects workers' incentives depending on whether any training or investment in skills benefits a direct

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ECONOMICA 386, 395 (1937)).

[108] Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777-78, 783-84 (1972).

[109] *See generally* OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 30, 61, 95-96 (1985); OLIVER WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975).

[110] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310-11 (1976).

[111] Hart, *supra* note 107, at 1764-65.

[112] *See generally* Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119, 1120-25 (1990); Bengt Holmstrom & Jean Tirole, *The Theory of the Firm, in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 61-133 (Richard Schmalensee & Robert Willig eds., 1989); Sanford Grossman & Oliver Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986).

[113] Hart, *supra* note 107, at 1766.

employer only, the contractual arrangement between a direct employer and another firm, or the outside firm.[114] A supplier-purchaser relationship between General Motors and Fisher Body, an entity that supplies GM with car bodies, illustrates this point.[115] If GM and Fisher are *separate* companies, a Fisher employee's incentives to invest in improvements specific to Fisher or GM will depend on which company owns the assets. For example, if Fisher owns the assets, he could invest in improving the quality of Fisher's output by learning some aspect of Fisher's production process better. If, of all of Fisher's customers, only GM cares about the improvement, that employee could increase his value to the Fisher-GM venture by investing in the improvement and possibly extracting its benefits with a higher wage or promotion.[116] Since the improvement is GM-specific, the employee incurs lower costs negotiating directly with GM both because GM is the party that benefits from the employee's increased skill and because negotiating with Fisher would require Fisher in turn to bargain with GM and the employee would capture a lower share of the surplus Fisher decides to parlay, reducing the employee's overall incentive to make the improvement.[117]

The employee benefits, and thus his incentives to make the investment increase, the lower the number of possible hold-ups: if Fisher owns the assets, two hold-ups—Fisher's denial of the employee's access to the assets and GM declining to pay more for the improved product—make it likely that the employee at best receives a third of his increased marginal product. With GM management controlling the assets, there is only one hold-up: GM's power to deny the employee his increased marginal product rests solely in one agent's hands, making it likely that the employee at best receives half of his increased marginal product.

However, if the improvement is non-GM-specific and reduces Fisher's costs of production regardless of Fisher's final customer, we reach the opposite conclusion: the hold-ups are reduced by giving Fisher control and increased if GM, the indirect recipient, were given control.[118] An employee's incentives to make improvements specific to either company are also low where the assets are jointly owned because the number of

[114] *Id.*
[115] *Id.* at 1767-78.
[116] *Id.* at 1768.
[117] *Id.* at 1768-69.
[118] *Id.* at 1769.

parties with hold-up power will always be two.[119] This illustration demonstrates how property rights over physical assets can affect control over human assets because the owner of the physical assets has more leverage over the worker: it can deprive the employee of the assets he works with and hire others to work with them.[120]

* * *

These developments in the theory of the firm literature introduce critical insights for secondary activity analysis. First, it makes clear that wages and terms and conditions of work are not exclusively determined by who directly controls the employee, but by a broader set of factors: the transaction costs of contracting inside the firm and in the external market (including agency and monitoring costs), the nexus of contracts within which workers provide services, and the ownership and property rights of direct employers and their contracting parties. Second, these developments highlight the ways in which firm decisions, whether internal or in the marketplace, impact worker bargaining power relative to employers regarding the division of *ex post* surplus not only in their direct relationships, but through employer bargains with contracting parties.

D. Developments in Labor Economics and Antitrust Policy

Finally, the NLRB and the courts have ignored the effect of indirect employer monopsony power and monopsonistic competition in markets with multiple employers on employee wages when distinguishing "primaries" from "secondaries." This is an area of growing study and concern in both the economic and antitrust literature.[121] Monopsony power is the inverse of monopoly power, or the ability to charge higher prices

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[119] *Id.* at 1770.

[120] *Id.* at 1770-71.

[121] Joan Robinson coined the term "monopsony" to describe employer market power over wages. *See* JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 1-12 (1969). For more recent accounts, *see, e.g.*, MANNING, *supra* note 88, at 1-28; LLOYD REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 76-77 (8th ed. 1982); Orley C. Ashenfelter, Henry Farber & Michael R. Ransom, *Labor Market Monopsony*, 28 J. LAB. ECON. 203, 203-10 (2010); Alan Manning, *Imperfect Competition in the Labor Market*, *in* 4 HANDBOOK OF LABOR ECONOMICS, at 973-1041; Venkatarman Bhaskar and 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).

for a product.[122] Firms with monopsony power have the ability to pay lower prices for inputs without losing sellers to competition from other firms buying the same or similar product.[123] In the labor market, monopsonistic employers can pay lower wages to workers than would otherwise prevail in a competitive market without losing those workers to competing employers. As with monopoly, monopsony power can lead to economic inefficiencies, and in the labor market, to redistribution from workers to employers.[124] This is because, in an otherwise competitive labor market, firms would bid wages up to recruit workers from other firms as long as the revenue they could earn by hiring another worker exceeds the wage it must pay, tracking as closely as possible wages and worker productivity, or the worker's value-added. If a firm bids too low for a worker's wages in a perfectly competitive market, the worker would find alternative employment, so competitive firms would all need to pay market wages and compensation would equalize across similarly productive workers for similar types of jobs.[125] However, when there is imperfect competition, firms with monopsony power are incentivized to employ fewer workers at a lower wage than they would in a competitive labor market because what they lose in reduced output and revenue they can make up for in reduced labor costs by paying lower wages.[126] Monopsonistic employers can thus recoup labor and recruitment costs, shifting the benefits of production from wages to profits.[127]

Economists and policymakers increasingly recognize the existence of employer monopsony power in labor markets based on direct evidence of collusion between employers and non-compete agreements as well as indirect evidence of minimum wage impacts on employment, wage-setting, and wage discrimination.[128] The Department of Justice and class

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[122] *See, e.g.*, MANNING, *supra* note 88, at 1-28; PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 575 (3d ed. 2006); ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS 1-2 (2010) (defining monopsony power and lamenting the "scant attention in most antitrust casebooks and texts"); *see also Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) (defining monopsony power as "market power on the buy side of the market").

[123] AREEDA & HOVENKAMP, *supra* note 122, at ¶ 575.

[124] Council of Economic Advisors (CEA), *Labor Market Monopsony: Trends, Consequences, and Policy Responses*, 2 (CEA Issue Brief, Oct. 2016).

[125] *Id.* at 2; MANNING, *supra* note 88, at 29-32.

[126] CEA, *Labor Market Monopsony*, *supra* note 124, at 2

[127] *Id.*

[128] *Id.* at 9-10. For a historical discussion of monopsonistic competition in labor markets, *see* SANFORD JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS AND

action litigants have brought suit against major Silicon Valley employers, hospital and sports associations for artificially suppressing the wages of high-tech employees, nurses, mixed martial arts fighters and others, through no-poaching agreements, collusive wage-setting and unlawful monopsony acquisition and maintenance.[129] An estimated 18 percent of the U.S. labor force is covered by non-compete agreements based on recent survey evidence.[130] Indirect evidence of monopsonistic wage-setting is also strong. Beginning in the 1990s, economists began finding that minimum wage increases were not accompanied by job loss, indicating that wages have not been bid up to the marginal value of labor.[131] Empirical evidence also indicates that workers' quit rates are less responsive to wage changes than would be expected if labor markets were competitive, suggesting that employers can set wages significantly below what would prevail in a competitive market without losing their workforce.[132] Employment restructuring is a critical component of firms' ability to engage in wage discrimination by outsourcing and subcontracting away from internal equity constraints.[133]

THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900-1943 (1985).

[129] *See*, *e.g.*, Sarah Cwiek, *Detroit Medical Center Agrees to Settle with Nurses*, NPR MICH. RADIO (Sept. 14, 2015); Lance Whitney, *Apple, Google, Others Settle Antipoaching Lawsuit for $415 million*, CNET (Sept. 3, 2015); Seth Rosenblatt, *Judge Approves First Payout in Antitrust Wage-Fixing Lawsuit*, CNET (May 16, 2014); Press Release, Dep't of Just. Off. of Pub. Aff., *Justice Department Requires eBay to End Anticompetitive "No Poach" Hiring Agreements* (May 1, 2014); Press Release, Dep't of Just. Off. of Pub. Aff., *Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements* (Sept. 24, 2010); Roger D. Blair & Christina DePasquale, *Monopsony and Countervailing Power in the Market for Nurses*, ANTITRUST HEALTH CARE CHRON. (Dec. 2010); Press Release, Dep't of Just. Off. of Pub. Aff., *Justice Department Reaches Settlement with the Arizona Hospital and Healthcare Association and its Subsidiary* (May 22, 2007). Prevalence of non-compete agreements among workers unlikely to have trade secrets is also evidences monopsony power. U.S. DEP'T OF TREAS. OFFICE OF ECON. POL'Y, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 4, 11-12 (March 2016).

[130] U.S. DEP'T OF TREAS., *supra* note 129, at 6; Norman Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 498-504 (2016).

[131] CEA, *Labor Market Monopsony*, *supra* note 124, at 9; DALE BELMAN & PAUL J. WOLFSON, WHAT DOES THE MINIMUM WAGE DO? 1-18 (2014); Arindrajit Dube, T. William Lester & Michael Reich, *Minimum Wage Shocks, Employment Flows and Labor Market Frictions*, 34 J. LAB. ECON. 663-704 (2016).

[132] CEA, *Labor Market Monopsony*, *supra* note 124, at 9; Arindrajit Dube, T. William Lester & Michael Reich, *Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties*, 92 REV. ECON. AND STATISTICS 945, 946-54 (2010).

[133] WEIL, *supra* note 11, at 40-41, 87-88; Arandajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from*

There is also evidence that employer discretion over workers' wages may be rising due to rising market concentration, declining labor market dynamism, and the decline of unions and the federal minimum wage.[134] Between 1997 and 2012, there has been a steady increase of product market concentration in the U.S. economy, where the majority of industries have seen increases in revenue share by the 50 largest firms.[135] Rising concentration can impact labor markets by expanding each individual firm's monopsony power, facilitating collusion, and increasing barriers to entry.[136] Labor market dynamism, or the frequency of changes in who is working for whom, has also been in a pattern of long-term decline, suggesting that incumbents are shielded from competitive upward pressure on wages and an increase in job-switching costs for non-contingent workers.[137] Finally, with union density in the private sector at a historic low, and the real value of the federal minimum wage declining 24 percent since its peak of $9.55 (in 2015 dollars) in 1968, there are reduced checks to employer wage-setting power.[138]

Integrating the distorting effects of monopsony power and oligopsonistic collusion on wage suppression is necessary for evaluating labor market impacts on worker bargaining power and any resulting efficiency and distributional effects.[139] Without assessing which firms in

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Janitors and Guards, 63 INDUS. LAB. RELATIONS REV. 287, 288-306 (2010) (finding a "wage penalty" of 4%-7% for janitors working as contractors as opposed to working directly for an employer); Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment in Labor Laws in America's Cities*, CENTER FOR URBAN ECONOMIC DEVELOPMENT, UNIVERSITY OF ILLINOIS CHICAGO / NATIONAL EMPLOYMENT LAW PROJECT / UCLA INSTITUTE FOR RESEARCH ON LABOR AND EMPLOYMENT, at 29-39 (2009) (reporting workplace violations by industry based on survey results); Samuel Berlinski, *Wages and Contracting Out: Does the Law of One Price Hold?*, 46 BRIT. J. OF INDUS. REL. 59 (2008) (finding that janitors who worked as contractors earned 15% less than those working in-house).

[134] CEA, *Labor Market Monopsony*, *supra* note 124, at 2-4.

[135] CEA, *Benefits of Competition*, *supra* note 4, at 4 & Table 1.

[136] CEA, *Labor Market Monopsony*, *supra* note 124, at 2-4.

[137] *Id.* at 10-12; Raven Molloy et al., *Understanding Declining Fluidity in the U.S. Labor Market*, BROOKINGS PAPER ON ECONOMIC ACTIVITY 183-88 (2016); Steven J. Davis & John Haltiwanger, *Labor Market Fluidity and Economic Performance* 1-3 (NBER Working Paper No. 20479, 2014).

[138] CEA, *Labor Market Monopsony*, *supra* note 124, at 12-13; BLS, *Union Members—2016*, *supra* note 20.

[139] *See* Exec. Order No. 13,725, 81 C.F.R. 23417 (Apr. 20, 2016); CEA, *Labor Market Monopsony*, *supra* note 124, at 4-5; *see also* Renata B. Hesse, *And Never the*

fact have the power to determine wages, the purpose, function and success of a collective bargaining framework for negotiating wages becomes shadow puppetry. Antitrust scholars, economists, and the courts have developed a range of mechanisms for measuring harm resulting from an employer's monopsony power or monopsonistic competition, whether through unilateral conduct or through agreement, providing economic modeling that can be used in adjudication to determine whether workers suffer lower wages due to monopsony power or monopsonistic competition in the labor market.[140]

Monopsony power by an indirect employer can be directly shown with evidence that that employer can depress wages below the competitive level by withholding the purchase of labor inputs and not losing the sellers of those inputs to other purchasers or employers.[141] Monopsony power can also be shown indirectly with evidence of an indirect employers' market share in a relevant geographic market for labor inputs protected by entry barriers.[142] Courts have found a 20% market share to be sufficient to infer buyer market power over sellers of labor inputs.[143] But even buyers with low market shares can exert significant market power over sellers to the extent that sellers are more dependent on buyers than buyers on sellers.[144] For example, high-volume retailers have tremendous leverage over suppliers, especially where the market for particular products is relatively small but benefits from resale in high-distribution, nationally-scaled businesses like Amazon.com or Wal-Mart are significant.[145] There is a

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Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement, Presentation at GLOBAL ANTITRUST ENFORCEMENT SYMPOSIUM (Sept. 20, 2016) (emphasizing that antitrust enforcement "benefit[s] workers, whose wages won't be driven down by dominant employers with the power to dictate terms of employment").

[140] *See infra* at IV.B.

[141] *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007) ("monopoly power may be proven through direct evidence of supracompetitive prices and restricted output."); *see also* Samuel Muehlemann, Paul Ryan & Stefan C. Wolter, *Monopsony Power, Pay Structure and Training*, 66 ILR REV. 1097, 1097-98 (2013) (discussing direct and indirect evidence of monopsony power).

[142] *United States v. Microsoft*, 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc) (per curiam); ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 229 (6th ed. 2007).

[143] *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

[144] Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1538-39 (2013).

[145] *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 776-77 (6th Cir. 2002); Stucke, *supra* note 144, at 1538-39; *see also* Barry C. Lynn, *Breaking the Chain: The*

strong consensus that market share thresholds alone are insufficient to find monopsony power, and courts should thus consider interrelated factors such as "upward sloping or somewhat inelastic supply curve[s] in the input market" and "an inability or unwillingness for new purchasers to enter the market or current purchasers to expand the amount of their purchases in the market."[146] An employer's market share can be determined as the percentage of its share in either dollars or units of its labor input purchases; the elasticity of fringe demand can be the capacity of alternative buyers to purchase the labor inputs "without undue delay, risk, or cost" (including barriers to entry); and the elasticity of supply can be determined by the workers' ability and incentive to switch to selling other services.[147] Where employees are less responsive to wage changes than would be expected in a competitive labor market, economists infer evidence of monopsony power.[148] Further, evidence of worker search costs, labor market frictions, "job lock," information asymmetries and barriers to market price discovery, immobile benefits, and regulatory or other barriers to worker mobility can support a finding of monopsony power.[149]

Where multiple employers collude on wages and agree to fix wages, employer conduct is *per se* unlawful and litigants need not establish that anticompetitive harms outweigh any procompetitive benefits from agreement.[150] Where agreements are not directly evidenced, they can be inferred through circumstantial evidence of market concentration, industry structures, firm histories, employer collusion (such as through no-

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Antitrust Case Against Wal-Mart, HARPER'S MAGAZINE 29-36 (July 2006).

[146] *Spring Nextel Corp. v. AT&T Inc.*, 821 F. Supp. 2d 308, 324 (D.D.C. 2011); *see also* BLAIR & HARRISON, *supra* note 122, at 58.

[147] BLAIR & HARRISON, *supra* note 122, at 58-59; DOJ & FTC, HORIZONTAL MERGER GUIDELINES 32-33 (2010).

[148] Arindrajit Dube, Laura Giuliano & Jonathan Leonard, *Fairness and Frictions: The Impact of Unequal Raises on Quit Behavior* 1-5 (IZA Discussion Paper 9149, 2015) (finding quit rates unresponsive among sales employees at a large retail firm); Douglas O. Staiger, Joanne Spetz & Ciaran S. Phibbs, *Is There Monopsony in the Labor Market? Evidence From a Natural Experiment*, 28 J. LAB. ECON. 211, 212-36 (2010) (inferring employer monopsony power by lower quit responses among registered nurses).

[149] CEA, *Labor Monopsony Power*, *supra* note 130, at 5-10; Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 A. ECON. REV. 460, 461 (2002).

[150] *See, e.g.*, DOJ ANTITRUST DIV. & FTC, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3 (2016); *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (price-fixing agreements unlawful *per se* under Sherman Act).

poaching agreements and coordinating wage offers), and market environments that are conducive to and/or facilitate collusion.[151] Other "plus factors" indicating agreement include: actions contrary to an employer's self-interest; evidence of employers' regular communication; industry performance data suggesting successful coordination; and the absence of a plausible business rationale for suspicious conduct.[152]

The core evidence of harm to workers from employer monopsony power is artificially suppressed wages.[153] Evidence of artificially suppressed wages can be determined through econometric regressions comparing existing wage conditions to a "but-for" world where wages would be competitive within the same labor market.[154] Economists usually utilize a benchmark or yardstick approach comparing existing wages to those before the anticompetitive conduct occurred (say, prior to the merger of two defendant firms) or in comparison to a similar industry with similar labor market conditions to ascertain the marginal revenue product (MRP), the value that an employee creates for his or her employer in competitive conditions.[155] For example, in a case alleging that hospitals in the Albany area colluded to suppress registered nurses' wages, economic expert testimony was offered to show that wages of agency nurses in the same geographic market, argued to be interchangeable with registered nurses they worked alongside performing the same tasks on the same days, was the appropriate benchmark for comparing registered nurses' wages, and agency nurse wages exceeded the registered nurses' wages.[156]

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[151] RICHARD A. POSNER, ANTITRUST LAW 55-93 (2d ed. 2001) (collecting and analyzing "plus factors"); *see generally*, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984) (to infer agreement, "there must be evidence that tends to exclude the possibility of independent action by the [parties].").

[152] ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 310-11 (2d ed. 2008); William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 405-6 (2011).

[153] BLAIR & HARRISON, *supra* note 122, at 310-21 (discussing economic harms resulting from monopsony).

[154] Roger D. Blair & Jessica S. Haynes, *Monopsony, Monopsony Power, and Antitrust Policy*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW 256-7 & n.14 (Einer Elhauge ed., 2012).

[155] *Id.* at 255-56 (discussing Lerner Index of measuring market power); Daniel L. Rubinfield, *Antitrust Damages*, *in* RESEARCH HANDBOOK, *supra* note 154, at 381 (describing benchmark and yardstick approaches).

[156] *See Fleischman v. Albany Medical Center*, 728 F. Supp. 2d 130, 145-57 (N.D.N.Y. 2010) (discussing expert testimony on behalf of plaintiff nurses).

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Developments in labor economics and antitrust policy have significantly advanced both theoretical and empirical tools for assessing when indirect employers have sufficient power to artificially suppress indirect employees' wages. Labor law could dramatically benefit from utilizing these tools in determining employers' market power for the purposes of distinguishing between primaries and secondaries, and more broadly, to ensure that workers have protections to effectuate the purposes of the labor law.

III. PROBLEMS WITH THE CURRENT LAW IN THE NEW ECONOMY

Integrating developments in the New Economy and economic theory into evaluations of existing labor regulation can provide a clearer view of when those regulations are not achieving the labor law's purposes and when reforms are needed. Further, perhaps more surprisingly, it can offer a way out of viewing the labor law's expressive, microeconomic and macroeconomic goals as necessarily conflicting. Instead, economic theory suggests that the regulation of secondary activity can be recalibrated to achieve *all* of these purposes. This Section elaborates those principles, and applying the insights from the prior Section, explains how current law on the primary-secondary distinction fails under them.

A. Unified Principles for Evaluating Labor Law Rules

Judge Richard Posner is not the first to view labor law as "founded on a policy that is the opposite of the policies of competition and economic efficiency that most economists support."[157] But labor regulation is not inherently inefficient. Rather, it is best conceived as achieving three socially beneficial outcomes on a sliding scale: (1) enhancing expressive and associational rights at work ("First Amendment protections"); (2) minimizing inefficient resource allocations to ensure the stabilization of competitive wages ("microeconomic policy"); and (3) achieving the distributional goals of enhancing mass purchasing power ("macroeconomic policy").

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[157] Posner, *supra* note 28, at 990. *See also* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 3 & 261 n.1 (1984) (summarizing negative economic literature on unions).

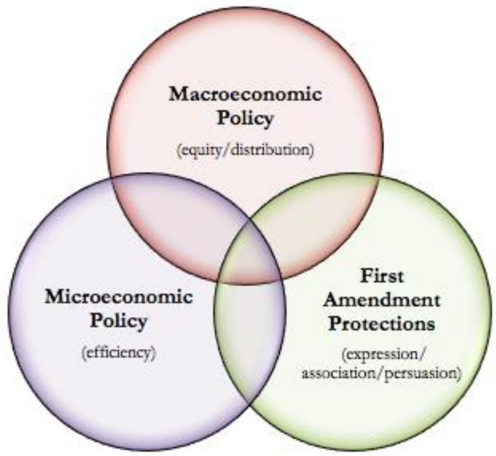

Fig. 1. ***Overlapping Principles for Evaluating Labor Law's Success***

First, since its inception, labor law has been committed to promoting workers' expressive and associational rights.[158] These rights operate as an "analogue[] to the First Amendment and the 'Republican Form of Government' clause."[159] There are strong normative reasons to promote this foundational concern of the labor law as not only fundamental to self-expression and self-determination but also to social and political well-being.[160] Worker voice can have positive effects on worker productivity and the social welfare by "articulating the preferences and internal trade-offs of workers; improving communications between workers and management; fostering due process and restricting the capricious actions of managers; reducing quits; and 'shocking' management into more

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[158] *See, e.g.*, 29 U.S.C. § 157 (granting workers right to self-organization and "to form, join, or assist labor organizations"); 78 Cong. Rec. 12017 (June 16, 1934) (statement of Sen. Wagner) (arguing that members of Congress had recognized "full freedom of association and self-organization among workers was desirable"); *Hague v. CIO*, 307 U.S. 496, 517-18 (1939) (holding that union organizers had First Amendment right to speak to workers about NLRA rights).

[159] CYNTHIA ESTLUND, WORKING TOGETHER 135 (2003) (analogizing the animating vision of the Wagner Act to a "basic charter of civil liberties and a form of workplace democracy available at the option of a majority of the workforce").

[160] Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights after Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1075 (2013); *see also* ESTLUND, *supra* note 159, at 3-21 (arguing that "what happens in the workplace is extraordinarily important in a diverse democratic society"); Joseph Fishkin & William E. Forbath, *Anti-Oligarchy Constitution*, 94 B.U. L. REV. 671, 673-90 (2014) (discussing value of self-rule in constitutional thought).

efficient work practices."[161] Worker voice benefits employers by "improving morale, enhancing loyalty and commitment, reducing costly turnover, ensuring the receipt of deferred compensation and providing information to employers."[162]

Second, the NLRA was intended to "stabiliz[e] . . . competitive wage rates,"[163] and failing to evaluate the microeconomic effects of labor regulation neglects that key purpose by ignoring regulatory impacts on inefficient resource allocation and labor market failures. For example, where labor regulation results in enhanced employer monopsony power, which in turn can result in artificially suppressed wages, it can result in reduced output, the exit or failure of entry of the most productive workers, a weakened link between labor productivity and wages, and other adverse effects on firm-specific institutions (for example, on grievance procedures and incentive structures that keep firm-specific skills in the firm).[164] Efficient bargains in the workplace can also reduce labor unrest.[165] Insights from the behavioral economics literature highlight the significance of workers' perceptions of wage *fairness*, not only with respect to their own wage but with respect and relative to others' wages, on productivity and high-quality job performance.[166]

Third, distributional goals of increasing wage earners' purchasing power in the context of depressed wage rates was an essential macroeconomic policy goal of the NLRA.[167] This purpose is all the more

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[161] Morley Gunderson, *Two Faces of Union Voice in the Public Sector*, *in* WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE 401 (James T. Bennett & Bruce E. Kaufman eds. 2007).

[162] *Id.*

[163] 29 U.S.C. § 151.

[164] For full discussion of the adverse microeconomic effects of employer monopsony power, *see infra* Section III.B.2.

[165] Eric A. Posner, *Four Economic Perspectives on American Labor Law and the Problem of Social Conflict*, 159 J. INST. & THEORETICAL ECON. 101, 103, 106-107, 113-15 (2003) (arguing that labor law can promote conflict resolution and order); Dau-Schmidt, *supra* note 30, at 491-93 (1992) (arguing that measures to reduce strikes maximize welfare).

[166] *See* WEIL, *supra* note 11, at 81-83 (summarizing behavioral economics literature); BEWLEY, *supra* note 97, at 81 (1999) (explaining existence of pay equity structures and nominal wage rigidity on fairness grounds); Daniel Kahneman, Jack Knetsch, and Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AMER. ECON. REV. 728, 739-40 (1986) (finding fairness constraints apply to wage-setting).

[167] *See infra* Section I.A.

relevant in light of the dramatic rise in inequality following the Reagan administration's deregulation of labor markets.[168] Two critical restructurings within human-resource management practices have contributed to what Paul Krugman has called the "Great Divergence" in American income inequality: the "financialization" of the firm and the "fissuring" of the American workplace.[169] First, the transformation of the American firm to prioritize maximizing shareholder returns has deeply altered the firm's relationship with its employees, incentivizing the systematic deployment of labor-cost minimization to satisfy profitability constraints while making flexible temporary work arrangements more attractive.[170] This shift in human resource management has corresponded with a continuous rise in labor productivity, wage stagnation, and increased returns to shareholders.[171] While worker productivity is estimated to have grown 64.9 percent between 1979 and 2013, hourly compensation has only increased by 8.2 percent.[172]

Second, the vertical disintegration and "fissuring" of lead company production, distribution, and employment, including how firms hire, evaluate, pay, supervise, train and coordinate labor inputs, has become a

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[168] WEILER, *supra* note 15, at 18-22 (discussing distributional effects of Reagan administration's deregulatory policies).

[169] *See generally* WEIL, *supra* note 11, at 281; PAUL KRUGMAN, THE CONSCIENCE OF A LIBERAL 5 (2007); MICHEL AGLIETTA & ANTOINE REBÉRIOUX, CORPORATE GOVERNANCE ADRIFT: A CRITIQUE OF SHAREHOLDER VALUE 1-20 (2005).

[170] *See generally* JOSEPH E. STIGLITZ, REWRITING THE RULES OF THE AMERICAN ECONOMY 33-36 (2015) (describing "shareholder revolution" and corresponding rise in executive compensation relative to worker pay); Ken-Hou Lin & Donald Tomaskovic-Devey, *Financialization and U.S. Income Inequality*, 1970-2008, 118 AM. J. SOC. 1284, 1285-329 (2013) (discussing effects of financialization on inequality); Gerald F. Davis, *Shareholder Value and the Jobs Crisis*, 17 PERSP. ON WORK 47-50 (2013) (detailing relationship between prioritizing shareholder value and the decline in job growth); Forrest Briscoe & Chad Murphy, *Sleight of Hand? Practice Opacity, Third-Party Responses, and the Interorganizational Diffusion of Controversial Practices*, 57 ADMIN. SCI. Q. 553-84 (2012) (describing reduction of retiree health benefits in shareholder-oriented firms); Neil Fligstein & Taekjin Shin, *Shareholder Value and the Transformation of the U.S. Economy*, 1984-2000, 22 SOC. F. 399-424 (2007).

[171] STIGLITZ, *supra* note 170, at 43; Josh Bivens & Lawrence Mishel, *Understanding the Historic Divergence Between Productivity and a Typical Worker's Pay* 4 & Fig. A (EPI Briefing Paper No. 406, 2015) (charting increased gap between productivity and typical worker's compensation between 1948 and 2014).

[172] Josh Bivens, Elise Gould, Lawrence Mishel & Heidi Shierholz, *Raising America's Pay* 9-10 (EPI Briefing Paper No. 378, 2014); Bivens & Mishel, *supra* note 171, at 4.

mainstream means of shedding wage-setting costs for employment.[173] Gains to firms from both restructurings have disproportionately benefited executives and their investors at the expense of workers' wages.[174] In fact, 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.[175] The share of corporate-sector income going to labor compensation rather than corporate profits since 2000 is at historic lows, estimated at $535 billion less for workers.[176] 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.[177] Declining unionization is estimated to account for between a fifth and a third of the increase in inequality since the 1970s.[178] This adverse macroeconomic distribution can result in underconsumption, persistent unemployment and deflation.[179] Measuring the impact of labor regulation on workers' diminished share of the pie can be a crucial means for servicing the needs of macroeconomic policy.

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Putting these three policy goals together, a unifying set of principles for evaluating labor regulation thus favors rules that:

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[173] WEIL, *supra* note 11, at 1-26, 281-82; *see infra* at Section II.A.

[174] WEIL, *supra* note 11, at 282; Bivens et al., *supra* note 172, at 7-8, 12, 25, 51-53; Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States*, Working Paper, UC-Berkeley 1-5 (2013), *available at* http://eml.berkeley.edu/~saez/saez-UStopincomes-2011.pdf.

[175] PIKETTY, *supra* note 17, at 23-24, 294-96, 314-15.

[176] 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* KRUGMAN, *supra* note 169, at 54-55 (2007).

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

[178] LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 6-8 (12th ed. 2012); CEA, *Labor Market Monopsony*, *supra* note 124, 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).

[179] *See* Bruce E. Kaufman, *Labor's Inequality of Bargaining Power: Changes Over Time and Implications for Public Policy*, 10 J. LAB. RES. 285, 291-92 (1989).

1) Are more protective of *worker expression and association* in the workplace with little or no constraints on employer expression;
2) Are Kaldor-Hicks optimal,[180] effectuating *efficient* resource allocation and wage-setting; *and*
3) Further macroeconomic distributional policy goals of reducing inequality and increasing mass purchasing power.

The advantage of the unified principles is that they establish a framework for evaluating the labor law's competing purposes in a non-oppositional manner, inviting both information about and evaluation of any and all relevant effects of labor regulations while also allowing for a more informed conversation on how to judge the preferability of certain labor rules over others. The principles provide a framework for assessing how the various dimensions of a law's effects interact. Further, they avoid a myopic focus on one perspective of the benefits or detriments of labor regulation over others, and by doing so, demand broader evaluation of each of the social values at stake in labor policy.

B. Current Secondary Picketing Law Fails Under the Unified Principles

While the coercive potential of secondary activity on employers and non-union employees is a legitimate concern, current regulation of secondary activity is overinclusive in designating employers that have market power to determine wages and terms and conditions of employment as "secondaries" "wholly unconcerned" with the labor dispute.[181] By reducing worker bargaining power as against direct employers and transactional primaries, the current legal standards for distinguishing primaries from "neutrals" or "secondaries" are deficient under the unified principles.

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[180] Resolution of a bargain or conflict is "Kaldor-Hicks optimal" relative to the status quo where a hypothetical, costless redistribution from those who benefit to those who do not would make no one worse off. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2 (9th ed. 2014); ROBIN W. BOADWAY & NEIL BRUCE, WELFARE ECONOMICS 97-99 (1984).

[181] STONE, *supra* note 26, at 210-12 (arguing that current exceptions to secondary boycott rule are too narrow); Harper, *supra* note 29, at 330, 338, 348 (rejecting overbroad exemption of employers reliant on contingent workers from collective bargaining obligations).

First, the sweeping application of the ban unduly obstructs worker expression and association in the workplace.[182] Second, the overbroad demarcation decreases worker bargaining power, which can result in inefficient wages. Prohibiting lawful targeting and economic pressure on *all* wage-determining employers prevents workers from countering the adverse effects of employers' market power on their wage determinations and terms and conditions of work. Finally, current law obstructs the labor law's macroeconomic goals by favoring distributional gains to employers at the expense of employees. Left unchecked, employers' externalization of labor costs are borne by society and taxpayers in the form of increased coordination costs, declining consumer purchasing power, increased burdens on the social safety net, and increased health problems and domestic instability associated with poverty wages.[183] Much as the social and political consequences of market concentration are getting a new airing in antitrust policy, the NLRA's stated purposes of "equality of bargaining power" and "the stabilization of competitive wage rates and working conditions" deserve a reinvigoration, both theoretically and pragmatically, to ensure that the distributive and macroeconomic objectives of the labor law can be achieved.[184]

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[182] The Supreme Court has directly upheld the ban as not violative of the First Amendment against objections of dissenting judges and scholars alike. *See, e.g.*, *Int'l Bhd. of Elec. Workers, Local 501 v. NLRB*, 341 U.S. 694, 705 (1951) (declaring Section 8(b)(4) does not constitutionally abridge free speech); *but see NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 76-80 (1964) (Black, J., dissenting) (arguing that Section 8(b)(4) "abridges freedom of speech and press in violation of the First Amendment."). Current law requires that, because Section 8(b)(4) addresses "expressive activity," it must be construed narrowly to avoid First Amendment concerns. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568, 576 (1988).

[183] *See, e.g.*, WEIL, *supra* note 11, at 18-20; SYLVIA ALLEGRETTO ET AL., FAST FOOD, POVERTY WAGES (Oct. 15, 2013) (estimating costs of public assistance for fast-food workers at roughly $7 billion a year).

[184] 29 U.S.C. § 151; *Apex Hosiery Co. v. Leader*, 310 U.S. 468, 503 (1940) (stating that national labor policy promotes "elimination of price competition based on differences in labor standards"). For antitrust scholarship emphasizing the relationship between market concentration and inequality, *see*, *e.g.*, JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES 1-38 (2014); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality*, 11 HARV. LAW & POL'Y REV. 1, 5-36 (2016); Marc Jarsulic, Ethan Gurwitz, Kate Bahn & Andy Green, *Reviving Antitrust: Why Our Economy Needs a Progressive Competition Policy*, CENTER FOR AMERICAN PROGRESS (June 29, 2016), *available at*: https://www.americanprogress.org/issues/economy/reports/2016/06/29/140613/reviving-

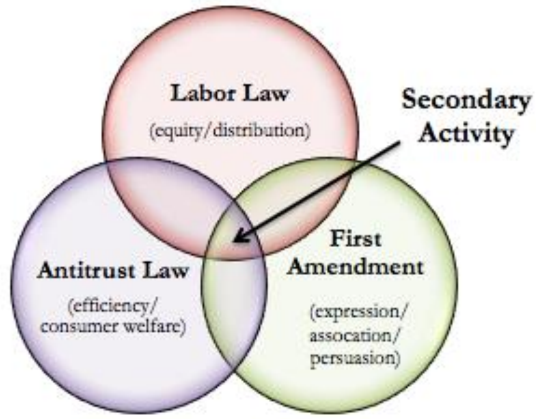

Fig. 2. *Overlapping Interests in Regulating Secondary Activity*

An example from the janitorial services market, a market that typifies the complexities of New Economy workplace structures, clarifies these limitations. Janitors were traditionally employed directly by building owners but are now overwhelmingly: (1) employed (and often misclassified) as independent contractors;[185] (2) employed by independent janitorial firms that contract with building owners; or (3) employed as individual franchisees in larger franchised companies like Jani-King International.[186] Contractual agreements between janitorial firms and building owners or between franchisees and franchisors generally reflect the weaker bargaining power of the former relative to the latter due to the competitive market for spun-off janitorial services: pricing is based on price-for-service provisions without reference to hours worked; janitorial workers, whether as employees of janitorial firms or as franchisees, do not directly negotiate with building owners regarding terms and conditions of work; and franchisees are required to pay initial franchisor fees, purchase cleaning materials from franchisors, and pay ongoing royalty and management fees that make it so difficult to break even that the industry

antitrust/; *but see* Daniel Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171 (2016).

[185] *See, e.g.*, Stephen Lerner, Jill Hurst & Glenn Adler, *Fighting and Winning in the Outsourced Economy*, *in* THE GLOVES-OFF ECONOMY, at 243-67 (Annette Bernhardt et al. eds., 2008) (describing prevalence of janitorial employee independent contractor misclassification).

[186] WEIL, *supra* note 11, at 132-42 (describing rise and effects of shift from direct janitorial employment to franchising).

has an annual turnover rate of 15%.[187] Given the very narrow margins in the industry, it is unsurprising that violations of labor standards are widespread, with 22-26% of workers reporting minimum wage violations and 63-71% reporting failure to receive overtime pay.[188] Recognizing the limited bargaining power of direct employer independent janitorial firms, and unable to negotiate better wages, terms and conditions from those employers, janitorial workers have increasingly turned to placing economic pressure on building owners and franchisors that contract with their direct employers.[189] In the late 1980s, the Service Employees International Union (SEIU)'s Justice for Janitors campaign began the first nationwide effort to organize janitors and extend peaceful picketing beyond direct employers to building owners and building management companies.[190] The picketing strategy came under quick fire as unlawful secondary activity.[191] For example, the SEIU picketed several Washington, D.C. building owners and building management companies that had contracted with two independent janitorial firms.[192] The building owners, managers and maintenance contractors then formed a trade association with the janitorial firms to "formulat[e] a strategy to counter the Union's efforts," directly supporting and financing the direct employers' antiunion campaign through a strike fund invoiced "to counter the SEIU's organizational campaign."[193] When the janitors picketed buildings owned or managed by trade association members, the trade association and its two most active indirect employers sought relief under Section 8(b)(4). The majority of the Board found the picketing unlawful because it was "'tactically calculated to satisfy [the union's] objectives elsewhere,' i.e., to organize the primary employers' employees," and

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[187] *Id.* at 134-41 (collecting and summarizing franchisor-franchisee agreements and turnover rates).

[188] *Id.* at 132-42 (discussing violations of labor standards in janitorial services sector); Dube & Kaplan, *supra* note 133, at 287-306 (finding "wage penalty" of 4%-7% between contracted-for and directly employed janitors).

[189] *See, e.g.*, *Williams v. Jani-King of Phila., Inc.*, No. 15-2049, 2016 U.S. App. LEXIS 17223 (3d Cir. Sept. 21, 2016) (holding that janitors working as Jani-King "franchisees" may pursue misclassification class action).

[190] Lydia Savage, *Justice for Janitors: Scales of Organizing and Representing Workers*, 38 ANTIPODE 645-666 (2006) (discussing Justice for Janitors campaign); *see also* STONE, *supra* note 26, at 211-12 (discussing negative impact of secondary boycott ban on Justice for Janitors campaign).

[191] *See, e.g.*, *Serv. Emp. Int'l Union (SEIU), AFL-CIO, and Gen. Maint. Serv. Co.*, 329 N.L.R.B. 638, 638-42 (1999); *id.* at 644-50 (dissenting opinion).

[192] *Id.*

[193] *Id.*

because the union failed to establish that the "secondaries" lost their neutrality under the ally or single employer doctrines.[194]

The next Subsections discuss in detail how the ban, illustrated by the above example, decreases worker bargaining power, resulting in adverse effects on workers' expressive and associational rights, workers' ability to earn an efficient wage, and the achievement of labor law's macroeconomic distributional goals.

1. Current Law Decreases Worker Bargaining Power

Labor law, as it has evolved, creates a structural imbalance in bargaining power between employees and employers by granting a broader set of economic tools and self-help protections to employers than employees in labor disputes.[195] Employers can: permanently replace striking workers; prohibit discussion of unionization in a wide range of circumstances; limit union access to employees; refuse to bargain collectively on permissive subjects of bargaining, which include outsourcing and plant closures; discharge workers engaged in concerted activity for insubordination or disloyalty; and enjoin unions to cease striking pending arbitration, to list a few.[196] Employers may also engage in self-help, including lockouts as well as terminating and suspending workers, when employee activity is unprotected. Employees' right to strike, their ultimate economic weapon, has been sharply curtailed as unprotected in a wide range of contexts. For example, employees cannot: strike in favor of permissive subjects of bargaining; strike to modify collective bargaining agreements; strike when a no-strike clause is present

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[194] *Id.* at 639-40.

[195] Katherine V.W. Stone, *Labor and the Corporate Structure*, 55 CHI. L. REV. 73, 86-120 (1988) (detailing aspects of labor law that allocate power between labor and management); Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 472-75 (1980); *see also* Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (discussing the impact of background laws of property, inheritance, incorporation and other common law entitlements on ordinary contract negotiations and outcomes).

[196] *See First Nat'l Maint.*, 452 U.S. at 674-80 (holding plant closings permissive subjects of bargaining); *NLRB v. Katz*, 369 U.S. 736, 741-42 (1962) (holding employers may unilaterally change collective bargaining agreement if they bargained to impasse); *NLRB v. Wooster Div. of Borg-Warner Corp.* 356 U.S. 342, 349 (1958) (holding employers' duty to bargain limited to mandatory rather than permissive subjects); *Mackay Radio*, 304 U.S. at 345 (holding that employers can permanently replace striking employees).

or implied in a collective bargaining agreement; strike as a minority unsanctioned by their union ("wildcat" strikes); engage in a slowdown; refuse to cross picket lines if a no-strike provision bars such refusal; and get food stamps while on strike.[197] The NLRB and the courts have also set default rules of contract interpretation that favor employers over employees, including implying no-strike clauses in collective bargaining agreements with mandatory arbitration provisions.[198] The decline in union density coupled with declining access to collective resources to conduct the obligatory union business in Right-to-Work states has also lessened union bargaining power in labor disputes.[199] Finally, in practical terms, delays in NLRB rulings on unfair labor practices and its limited exercise of its remedial authority have dramatically reduced employees' bargaining power at each stage of the recognition and collective bargaining process.[200]

The secondary activity ban takes on particular salience in the context of these background rules impacting worker bargaining power. At the most general level, it creates a blatant formal inequality in the law by allowing employer self-help during worker strikes that are not equally offered to employees, decreasing the potency of those strikes and allowing

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[197] *See, e.g.*, *Lyng v. Int'l Union,* 108 S. Ct. 1184, 1188 (1988) (holding statute denying food stamp eligibility to striking workers constitutional); *Emporium Capwell*, 420 U.S. at 60-70 (holding wildcat strikes unprotected); *Mastro Plastics v. NLRB*, 350 U.S. 270, 284-89 (1956) (holding strikes to modify collective bargaining agreement with a no-strike clause unprotected); *Milwaukee Spring Div. of Illinois Coil Spring Co.*, 268 N.L.R.B. No. 87, 115 L.R.R.M. at 1066 (1984) (holding that, if mandatory term is not clearly in collective bargaining agreement and employer bargained to an impasse, employer can unilaterally act without getting union consent); *Elk Lumber Co.*, 91 N.L.R.B. 333, 337 (1950) (holding slowdowns unprotected); *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 80-81 (1953) (holding employer discharge of union member-employee for refusal to cross picket line of another union not an unfair labor practice where collective labor contract contained no-strike provision).

[198] *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104-6 (1962) (holding no-strike clause implied in union-management arbitration agreement).

[199] For decline in union density, *see supra* note 20. As of this writing, 26 states have adopted right-to-work laws, with Kentucky, Missouri, and New Hampshire poised to become the next three. Rhonda Smith & Chris Brown, *Right-to-Work Bills Move Forward in Missouri, New Hampshire*, BLOOMBERG LAW (Jan. 27, 2017), https://goo.gl/bHNh0l; Steve Bittenbender, *Kentucky Lawmakers Pass "Right-to-Work" Legislation,* REUTERS (Jan. 7, 2017), http://www.reuters.com/article/us-kentucky-unions-idUSKBN14R0BN. Whether non-members of public employee unions must pay dues to cover union administration costs will likely be relitigated before a full Roberts Court after the Court's 4-4 tie *in Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016).

[200] *See supra* note 84 & accompanying text.

employers a broader set of resources to ride them out.[201] The prohibition restricts unions' outreach to all non-direct employers and their employees while employers can exercise extensive control over "neutrals" or third parties by incorporating into contractual agreements with those parties provisions that ensure their immunity from harm in the event of strikes.[202] Employers thus have more alternatives outside the bargaining relationship with their employees while employees have none, dramatically circumscribing employees' "best alternatives to a negotiated agreement" (BATNA) relative to employers.[203]

Further, only allowing workers to economically pressure a single employer when two or more employers in fact impact wage determinations reduces worker bargaining power by forbidding use of their strongest economic weapon as against those indirect employers. Lesser bargaining power means lower wages and less control over the terms and conditions of work, including the ability to negotiate better workplace protections and have collective representation, flexible scheduling, more stable employment, access to equitable grievance procedures, paid leave policies, and more. It also means that workers' ability to gain union recognition and better terms through collective bargaining as well as to impact their employers' decision-making through concerted activity are weaker because workers can neither picket nor join with indirect employers or their employees.

It is for this reason that, of all the asymmetries in the labor law between employers and employees, the ban on secondary picketing has the largest impact on union density across industries. This is likely the main motivation behind Richard Trumka's quip that he would abolish all of the labor law to be relieved of its secondary boycott ban.[204] The categorical

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[201] Katherine V.W. Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L. J. 1509, 1513-14 (1981) (challenging formal equality in bargaining power between employers and employees).

[202] *See, e.g.*, *Mackay Radio*, 304 U.S. at 345; *Boys Market, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 240-55 (1970) (enjoining strike pending arbitration); Kaufman, *supra* note 179, at 286-91.

[203] Weiler, *New Balance*, *supra* note 17, at 415 (arguing that current labor law unfairly allows employers "to continue business relations with cooperative outsiders" while employees are only permitted to request "help of sympathetic union members elsewhere"). For BATNA, *see* ROGER FISHER & WILLIAM URY, GETTING TO YES 97-106 (3d ed. 2011).

[204] Trumka, *supra* note 16, at 881.

ban prohibits workers in the New Economy from pressuring indirect employers and achieving sufficient union density to collectively challenge wage standards in industries with fragmented employment. This creates a structural inability for workers to gain equal bargaining power in a range of New Economy work structures: (1) indirect employer outsourcing or subcontracting with direct employers; (2) the franchisor-franchisee relationship; (3) contractors with monopsony power over direct employers within a supply chain or other corporate arrangement; and (4) horizontal wage-fixing or tacit collusion on wages in oligopsonistic industries.

a. Outsourcing, Subcontracting and Temporary Employment

The rise of outsourcing and subcontracting has impacted worker bargaining power in a number of ways. First, it has limited workers' ability to compel compliance from employers that, prior to outsourcing and subcontracting, would have been subject to labor and employment law.[205] To cite the janitorial contracting example, building owners have avoided legal sanctions for wage-and-hour law violations while also benefiting from fragmenting the labor force of janitorial service providers that dramatically increases worker coordination costs for unionization.[206] Further, building owners rely on the creation and persistence of a competitive market of sellers of janitorial services that cannot coordinate to increase prices for their contracted-for services under the antitrust laws and have been driven to race-to-the-bottom wages for their direct employees.[207]

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[205] WEIL, *supra* note 11, at 93-178 (discussing compliance effects of business restructuring).

[206] *Id.* at 136-42.

[207] The Sherman Act prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce," including price-fixing agreements and group boycotts. 15 U.S.C. § 1; *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421-25 (1990) (holding boycott for compensation increase unlawful as agreement among competitors); *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213-14 (1959) (holding concerted refusals to deal in a group boycott unlawful); *Socony-Vacuum Oil*, 310 U.S. at 218 (holding unlawful price-fixing agreements *per se*).

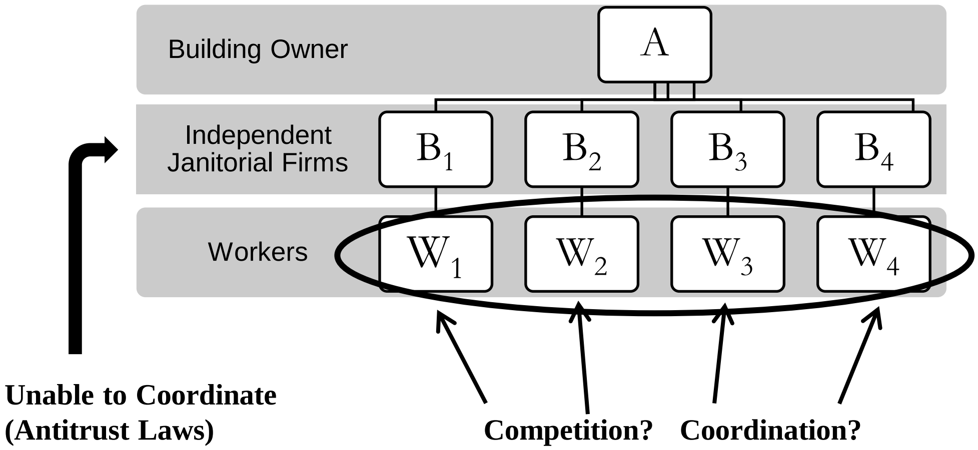

Fig. 3. ***Outsourcing and Subcontracting Arrangements***

Workers that find themselves in these arrangements have limited options if they seek to negotiate higher wages from their direct employers. First, an individual set of workers (say, W_1) could strike their direct employer (B_1) to seek recognition as a union, or if they are already unionized, to negotiate higher wages in a collective bargaining agreement. They would likely be unsuccessful at increasing their wage where B_1 has a cost-plus contract with A because B_1 cannot remain competitive with B_2, B_3 and B_4 to the extent they have lower labor costs. Thus, if B_1 demanded to renegotiate its contract with A, A would be more incentivized to assign B_1's contracted services to B_2, B_3 or B_4 to avoid paying higher prices to B_1. If B_1 nevertheless agreed to pay higher wages to W_1, it could go out of business.

Second, to the extent the workers (W_1, W_2, W_3 and W_4) could overcome coordination costs to collectively organize rather than compete with one another, they could use the protections of the labor law to engage in concerted activity against all of their direct employers, the Bs.[208] The advantage of striking all of the Bs is that the Bs could then confront A as a united front to boycott A unless A offers them better terms for the provision of janitorial services. However, a range of obstacles would challenge the success of that strategy. First, as in the SEIU case discussed above, A could collude with the Bs in an anti-union campaign since it is in

[208] 29 U.S.C. § 157 (granting employees right to engage in concerted activities).

neither of their interests to pay the Ws higher wages.[209] Second, A could wait out the pressures of cartel maintenance among the Bs or refuse to renegotiate contracts with any of the Bs. This could be relatively easy for A, given the very low barriers to entry in the independent janitorial firms market that currently exist.[210] Third, if the Ws rely on the Bs to agree on a plan to pressure A, they would have to hope the Bs could overcome high coordination costs to do so, and even then, the Bs' conduct could violate the antitrust laws.

The workers' final option would be to directly exert economic pressure on the building owner, A, by picketing its headquarters and the buildings it owns. This would increase their bargaining power with the Bs because it would create a picket line pressuring *all* janitorial service providers from providing services to A. Directly picketing A would override any coordination problems between the Bs in pressuring A and would also overcome the low barrier-to-entry problem in the market for Bs by blocking new Bs from providing their services to A. Secondarily, picketing A may bring reputational harm to A, and any tenants or customers of A may refuse to cross the Ws' picket lines. That workers are banned from directly picketing A even if, as an economic matter, A is setting a cap on their wages thus decreases their bargaining power in negotiating their wage.

b. Franchising and Independent Contracting

Workers employed by franchisors face many of the same problems as those employed by subcontractors. This is because, although franchisors differ from subcontractors in various respects, like subcontractors, they lack sufficient bargaining power to improve employment terms. In franchising, the lead franchising firm contracts with franchisees to carry out its core activities while retaining overall control of brand management. The secondary activity ban decreases worker bargaining power in the franchising context in either one of two ways. First, for workers working directly for franchisees, their bargaining power is decreased for the same reasons it is decreased in the outsourcing or subcontracting arrangement: their direct employers lack sufficient bargaining power to improve employment terms, and workers are unable to bargain over those terms directly with transactional primaries, the franchisors.

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[209] *See supra* note 191 & accompanying text.
[210] WEIL, *supra* note 11, at 136-39.

Workers in franchising arrangement may also confront a Catch-22. Instead of franchisors classifying them as "employees" protected by labor and employment law, they may classify them as independent contractor "franchisees" to which they owe no obligations under that law. In that circumstance, workers would have to choose to either forfeit the protections of the NLRA and other employment laws by maintaining a "misclassified" status, which would allow them to engage in a range of secondary activity much like the CIW workers did, or litigate their misclassified status and thereby opt into the NLRA's secondary picketing ban.[211] That they are prohibited from directly picketing building owners in the franchising context has the same effect on their bargaining power to negotiate wages and working conditions as in the outsourcing example. But the fact that workers may prefer to adopt "franchisee" status only shows how important evading the secondary activity ban is for them.

c. Contractors with Vertical Monopsony Power

The secondary boycott ban also weakens worker bargaining power in circumstances where transactional primaries have vertical monopsony power over direct employers. Vertical monopsony power may occur in supply-chain structures where a direct employer only buys or sells a critical supply or distributional service to another employer within a supply chain. For example, Ford was formerly vertically integrated but since the late 1960s and early 1970s has vertically disintegrated its supply chain.[212] Imagine Ford now has contracts with four widget manufacturers to supply widgets for a specific car model.

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[211] 29 U.S.C. § 152(3) (excluding independent contractors from "employee" definition).

[212] *See* ISABEL STUDER-NOGUEZ, FORD AND THE GLOBAL STRATEGIES OF MULTINATIONALS: THE NORTH AMERICAN AUTO INDUSTRY 98-117 (2003) (detailing vertical disintegration of Ford's supply chain).

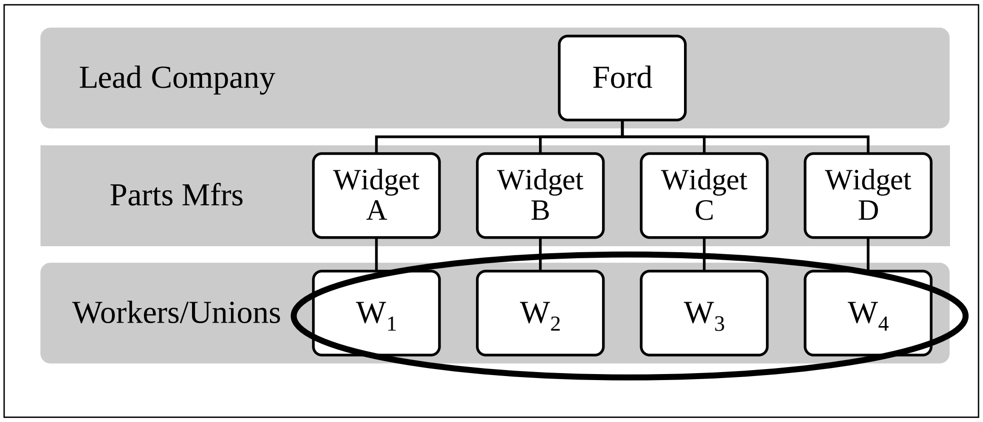

Fig. 4. ***Supply-Chain Monopsony Power***

Similar to the model depicted in Figure 3, direct employers in this scenario intermediate between the lead company and their workers, and the intermediaries are either competitors in the same product market in the lead company's supply chain or are complements in product markets with low barriers to entry.[213] This supply-chain model is duplicated in a range of settings, from the supply of raw materials, assembly or processing to manufacturing in the clothing, grocery, and other industries.[214] Where the lead company has monopsony power, say, because the manufacturer is producing lead company-specific products and has sunk costs (for example, by having invested in technology geared exclusively to the lead company), the intermediary entities have less leverage in renegotiating their contracts with the lead company because their costs of transferring production to another product line would be higher. Therefore, just as in the building-owner example, if Ford sought to lower its contract price with a widget manufacturer and had monopsony power over that manufacturer, the manufacturer would have little leverage to negotiate the contract price up where it is in a competitive market with low barriers to

[213] To the extent parts manufacturers produce product market complements and function as exclusive suppliers to Ford, they would have more bargaining power with Ford in a worker strike. In that case, workers' bargaining power would only be weaker to the extent the manufacturers collude with each other and/or Ford, and then only if the parts are universal to Ford products. The workers' bargaining power in relation to Ford would thus directly depend on the widget manufacturers' monopoly power relative to Ford.

[214] *See* Barenberg, *Widening the Scope*, *supra* note 76, at 3-10 (describing various supply chain structures).

entry. To remain competitive with other widget manufacturers, then, it would likely cut worker wages, and if workers can only lawfully picket their direct employer rather than both their direct employer and Ford, their bargaining power is reduced. Thus, the supply-chain scenario is very similar to the outsourcing and subcontracting scenario.[215]

d. Horizontal Wage-Fixing and Tacit Collusion

Employers may come to a horizontal agreement or tacitly collude to suppress wages in oligopsonistic industries or specific geographic markets. As mentioned above, both government and private attorneys general have targeted such wage-fixing in a range of industries.[216] To the extent workers may lawfully picket their direct employer in a bargaining dispute over wages, however, the secondary boycott ban prohibits them from picketing employers that have either come to wage-fixing or other agreements with their direct employer that suppress wages, have tacitly colluded with their direct employer, or rely on labor market-restricting mechanisms, such as "no-compete" clauses, to keep wages down in a particular industry. The prohibition thus reduces their bargaining power relative to their direct employer because they can assert no leverage or economic pressure over other employers that are effectively colluding with their direct employer to lower wages.

2. Adverse Effects of Decreased Bargaining Power under Unified Principles

By decreasing worker bargaining power, the secondary picketing ban fails under the unified principles for achieving successful labor regulation. First, excessive prohibition of secondary activity overly restricts otherwise First Amendment-protected activity. The Supreme Court has long rejected the view that labor picketing is conduct, and restrictions on labor picketing are content- and speaker-based restrictions that run contrary to contemporary First Amendment jurisprudence.[217] As a normative matter,

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[215] For a discussion of whether picketing Ford would effectuate a better wage, *see infra* at Section IV.A.

[216] *See, e.g.*, U.S. DOJ, OFFICE OF PUB. AFFAIRS, JUSTICE DEPARTMENT REQUIRES SIX HIGH TECH COMPANIES TO STOP ENTERING INTO ANTICOMPETITIVE EMPLOYEE SOLICITATION AGREEMENTS (2010); Blair & DePasquale, *supra* note 129.

[217] *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563-66 (2011) (holding state law prohibition of sale of prescriber-identifying information unconstitutional content- and

the prohibition on secondary activity in the New Economy and under current workplace arrangements restricts workers' expression on a critical aspect of their self-realization within the economic sphere, access to economic opportunity, and ability to participate in decisions that impact their livelihood.[218] The ability of workers to engage in peaceful speech in a public forum on a matter of public concern is important not only for democratic and civil society values, but also for bringing to light the social effects of employment disputes, the nature and impacts of transactional relationships in the "fissured" workplace, and exposing coordination costs in the New Economy.

The bargaining power imbalance as currently structured into the law's primary-secondary distinction can also have adverse microeconomic wage effects.[219] Where transactional primaries have monopsony power over workers, and workers are prohibited from engaging in concerted activity against them, the prohibition reduces worker opportunity to exert economic pressure to correct for artificially suppressed wages and achieve a competitive wage.[220] The structural asymmetries between labor and capital can occur because labor markets function differently than the auction model of competitive economic theory due to unique frictions caused primarily by information asymmetries, heterogeneous preferences

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speaker-based restriction); *Citizens United v. FTC*, 558 U.S. 310, 341 (2010) (holding federal campaign finance law imposing speaker-based restrictions on corporations unconstitutional); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-15 (1982) (holding picketing and consumer boycotts constitutionally protected); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-102 (1972) (striking down ordinance prohibiting picketing near schools except when involved in labor disputes); Fisk & Rutter, *supra* note 27, at 300-15 (arguing that restricting recognitional picketing contravenes current First Amendment law).

[218] *See, e.g.*, John W. Budd, *The Effect of Unions on Employee Benefits and Non-Wage Compensation*, *in* WHAT DO UNIONS DO?, *supra* note 161, at 160, 177-81; Pope, *supra* note 29, at 921 (discussing Supreme Court's recognition and normative value of associational and expressive rights in economic matters); Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4 (1984). *See also* FREEMAN & MEDOFF, *supra* note 157, at 103-10 (discussing empirical findings on how union voice decreases quit rates and economic impact of exit-voice tradeoff).

[219] Stone, *Policing Employment*, *supra* note 96, at 357-59 (discussing impact of legal regulation of strike protections, union organizing and bargaining rules on employer-employee bargaining power and distributive outcomes).

[220] For discussion of bargaining power and ability to influence wage rates, *see* FRITZ MACHLUP, THE POLITICAL ECONOMY OF MONOPOLY 369-70 (1951). For evidence of the effects of labor market monopsony on worker wages, *see supra* note 121; CEA, *Labor Market Monopsony*, *supra* note 124, at 10-13.

and mobility costs.[221]

The converging trends of workers' loss of bargaining power, rising industry concentration, and more widespread evidence of monopsonistic wage-setting can lead to substantial inefficiencies. Specifically, it can lead to inefficient reductions in employment and output where workers who would have been willing to work at the competitive market wage are never hired, and the output they would have produced is produced less efficiently by other firms, if at all.[222] Such monopsonistic wage-setting can also weaken the link between labor productivity and wages because when firms no longer compete aggressively for workers, wages differ between and within firms, and even among workers with similar skills.[223] Differing degrees of worker bargaining power across different groups of workers can lead to varying degrees of wage depression and within-firm inequality, particularly for workers in protected classes under the employment discrimination laws.[224] Wage discrimination is even more prevalent where firms are able to contract for the price of services as opposed to setting wages within an internal labor market because of the absence of internal equity pressures and increased information asymmetry between employers and outsourced or subcontracted workers relative to direct employees.[225] Additionally, there is extensive empirical evidence that wage theft through wage-and-hour and overtime violations are more pervasive in the "fissured" workplace than in other work arrangements, resulting in workers not being paid an efficient wage with limited, if any, labor law protections to pressure indirect employers for wage increases.[226] Empirical evidence suggests that workers in contingent or outsourced arrangements earn considerably less per week than do direct employees with similar characteristics and in similar occupations.[227] Thus, the overbroad

[221] ROBINSON, *supra* note 121, at 296; MANNING, *supra* note 88, at 4. *See also* 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).

[222] CEA, *Labor Market Monopsony*, *supra* note 124, at 3.

[223] Erling Barth et al., *It's Where You Work: Increases in Earnings Dispersion across Establishments and Individuals in the U.S.*, 34 J. LAB. ECON. S2 (2016); David Card et al., *Firms and Labor Market Inequality: Evidence and Some Theory*, IZA Discussion Papers 9850 (2016).

[224] CEA, *Labor Market Monopsony*, *supra* note 124, at 3.

[225] WEIL, *supra* note 11, at 80.

[226] WEIL, *supra* note 11, at 76-92, 131, 139-42, 154-58.

[227] Katz & Krueger, *supra* note 69, at 25; U.S. Gen. Accounting Office, *Contingent Workforce: Size, Characteristics, Earnings, and Benefits*, GAO-15-168R (2015).

secondary picketing ban can have adverse microeconomic wage effects.

Finally, the secondary activity ban's overinclusive definition of "secondaries," with its negative effects on worker bargaining power, precipitates material distributive harms.[228] The ban strips workers in current workplace arrangements from being able to economically pressure employers that shrink their share of the pie: "Fissuring results in redistribution away from workers and toward investors. It therefore contributes to the widening income distribution gap."[229] Arbitrarily prohibiting worker picketing beyond the confines of a direct employer prevents workers from exercising leverage over "capital providers [that] have the potential interest and the potential ability to offer enhanced wages" so as to ensure "joint returns of labor and capital it makes productive, and of an increase in the labor share of these joint returns."[230]

IV. PROPOSAL FOR A NEW PICKETING RULE

Given the significant uncertainty surrounding the status of employee protections in the New Economy, now is an opportune time for government action to reevaluate secondary activity regulation, and specifically, the primary-secondary distinction. This Section first explores how the application of a "market power rule" could predictably and narrowly protect worker picketing of secondaries as "transactional primaries" in line with the values of the unified principles. The Section then discusses other benefits of the proposed rule, including more effective enforcement of labor and employment laws and its potential to modernize labor law enforcement by developing the economic expertise of the Board and the courts in regulating worker protections. The Section concludes with a discussion of how the market power rule could be applied in adjudication and through legislation or rulemaking.

A. The Market Power Rule

This Article is the first to put forward an economic standard for distinguishing primary from secondary employers for the purposes of the labor law's secondary boycott ban. It proposes that workers be able to defend against the claim that they engaged in secondary activity by

[228] Stone, *Policing Employment*, *supra* note 96, at 357-59.
[229] WEIL, *supra* note 11, at 20; *see also id.* at 92, 280-82.
[230] Harper, *supra* note 29, at 331.

showing, via economic evidence, that the target of their boycott or picket, even if not a direct employer, nevertheless has sufficient market power over the direct employer's product market or the relevant labor market to determine picketing workers' wages and/or terms and conditions of work ("market power rule"). The rule would apply as a defense if workers have demonstrated majority support for a union and are engaged in recognitional picketing or picketing due to a bargaining dispute with their direct employer.[231]

1. Success Under New Labor Law's Unified Principles

Compared to current law distinguishing primaries and secondaries, the market power rule better protects workers' expressive activity with minimal effects on the expressive activity of others, can better correct for adverse microeconomic wage effects, and promises enhanced distributional benefits under the unified principles.

First, the rule would dramatically benefit employees in the "fissured" workplace by circumscribing the government's prohibition of otherwise First Amendment-protected activity. A labor law that recognizes the importance of free collective bargaining must give employees the ability to ask firms and fellow workers at those firms not to deal with their direct employer when that would be necessary to make the legal right to strike meaningful in practice.[232] By restricting secondary targets to only those "transactional primaries" with market power over workers' wages and working conditions, the rule is more protective of expression and association in the workplace with little or no constraints on the expression of picketed employers, who are still free to express their views on their own private property, or of those employers' employees, who may

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[231] Weiler, *New Balance*, *supra* note 17, at 417-18 (discussing democratic deficit concerns where workers strike without majority support). To the extent a picketing target is designated a "primary" under the market power rule, all lawful picketing restrictions that would apply to a primary would also apply to the "transactional primary." The rule goes beyond the exemption for "area standards" picketing – or picketing to protest an employer's failure to pay an "area standards" wage – because such picketing requires unions to demonstrate a bona fide attempt to determine whether the targeted employer is paying below-standard wages. The proposed rule rejects such a requirement in favor of a strict-liability approach based on market power. *See Local 88, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers (W. Coast Cycle Supply Co.)*, 208 N.L.R.B. 679, 680 (1974) (summarizing union obligations in defending area standards picketing).

[232] Weiler, *New Balance*, *supra* note 17, at 418.

express their views and associate with others consistent with any First Amendment or labor law restrictions. There are also normative reasons to allow workers and their unions to appeal to others to join in common cause with them: it resonates in core values of freedom of association and encourages self-regulation in labor disputes by placing the burden on workers to make sure their agreements with employers preserve their right to engage in sympathy actions rather than trading it away for short-term gains.[233] This could reinforce altruism among workers, "driv[ing] home the lesson that the primary responsibility for rescuing the institution of collective bargaining from its current straits lies not with the government, but with the workers themselves."[234]

Second, the market power rule is more beneficial than the current law in its micro- and macroeconomic effects without being overinclusive. As a matter of economic theory, multi-employer picketing in the settings described in Section III.B can correct for workers' unequal bargaining power and the resulting adverse micro- and macroeconomic effects of "fissuring." It provides a mechanism for discerning when labor market segmentation has impacted wage determination for distinguishing "primaries" from "secondaries" and more closely tracks the nature and scope of multiple contracting employers' control over a given workforce. The rule also invites the Board to delineate the effects of different employers' control and influence over workers under a more nuanced theory of the firm, assessing asset usage over primary employers in their contractual arrangements as well as the division of *ex post* surplus in those arrangements relative to worker wages. By extending picketing to transactional primaries, workers can impose the same pressure on those employers as they would on their direct employer: establishing a picket line imposes costs on the indirect employer—by forcing that employer to reduce or cease production—to equalize the bilateral-monopoly character of labor-management negotiations.[235] The strike-threat itself can function to realign the interests of those in contractual relationships by incorporating the risks of economic disruption into the bargaining terms of direct and indirect employer agreements as well as employment agreements between the direct employer and its employees.[236] An effective

[233] *Id.* at 419.
[234] *Id.*
[235] For discussions in economic theory of the effects of striking, *see, e.g.*, Posner, *supra* note 28, at 997-98.
[236] Weiler, *New Balance*, *supra* note 17, at 369-71.

bilateral-monopoly against all employers that determine workers' wages and working conditions can counter inefficient deadweight loss that result from artificially suppressed wages and employer wage discrimination.[237] Competitive wages that more closely track worker productivity produce efficiency gains for firms and workers.[238] The rule may also produce efficiency gains by allowing workers to exert pressure on multi-employer contractual arrangements that have disrupted ILM benefits, reducing high transaction costs associated with exclusively transacting in the external labor market such as asymmetric information and strategic behavior between firms and between employers and employees.[239] In addition, clarity in the law's application could simultaneously target those not "wholly unconcerned" with an underlying labor dispute while contributing to labor peace by allowing unions and employers to plan strikes and bargaining positions based on how much economic pressure they can exert.

Finally, where workers have the opportunity to pressure multiple employers to come to better wage terms through picketing, as in the CIW example, they have access to better distribution outcomes, even if the microeconomic gains of creating a larger pie fail. In other words, secondary picketing of transactional primaries has fairness benefits that can effectuate the macroeconomic goals of the labor law by putting more money into the pockets of lower-income workers.

An objection could be raised that picketing in accordance with the market power rule would not be effective for a number of reasons. First, workers' picket lines may not be respected, resulting in a failure to disrupt the primary employer's business relations. Second, transactional primaries

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[237] For a discussion of deadweight loss and wage discrimination, *see supra* Section II.D. For the effectiveness of bilateral monopolies, *see* Dau-Schmidt, *supra* note 30, at 492-93 (discussing how bilateral relationship that includes strike threat is "necessary prerequisite" to employees' "fully sharing in the proceeds of the enterprise"); Posner, *supra* note 28, at 997 (arguing that balancing of cost imposition in bilateral monopoly determines "ultimate settling point between the union's initial demand and the employer's initial offer").

[238] MANNING, *supra* note 88, at 347-48 (discussing impact of unions on bargaining for efficient wage); Ian M. McDonald & Robert M. Solow, *Wage Bargaining and Employment*, 71 AM. ECON. REV. 896, 899-902 (1981) (discussing efficient bargain model under which wages and employment are negotiated jointly for efficient outcome).

[239] Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining*, 136 U. PA. L. REV. 1349, 1358-62 (1988) (discussing efficiencies created by internal labor markets).

could already have anticipated and either "baked into" their contracts or contracted around any potential disruption in business relations with the primary employer such that any picket of a transactional primary would not produce any additional costs on either that primary or the direct employer.[240] Indeed, the effectiveness of a secondary boycott will depend on the nature of the direct employer's contractual and other relations with transactional primaries, the willingness of the employees and others related to the transactional primary to disrupt that employer's operations, the risks that those respecting workers' picket lines may incur by refusing to cross it, and conditions in both the labor and final product markets.[241] For example, while sympathy strikes may be protected under the NLRA, employees who engage in them can be permanently replaced by their employer.[242] To the extent those employees have no-strike clauses in their collective bargaining agreements, they could also suffer discipline or discharge without statutory protections.[243]

However, as discussed in Section III,[244] employee picketing of transactional primaries can pressure other employers as well as their employees to cease dealing with those transactional primaries. The effectiveness of picketing a transactional primary comes from workers' ability to limit or block a lead employer, franchisor, or other employers with monopsony power from alternative, substitutable labor inputs or products or services reliant on substitutable labor inputs. Enlisting the assistance of other employees can "temporarily interrupt[] business relations between outside firms and the struck employer,"[245] particularly where the expansion of secondary boycott protections were neither anticipated by nor incorporated into existing contracts between primary employers and transactional primaries.

The question of whether employees of transactional primaries would

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[240] I thank Saul Levmore for identifying these effectiveness concerns.

[241] Weiler, *New Balance*, *supra* note 17, at 419.

[242] NLRA § 7, 29 U.S.C. § 157; *NLRB v. Browning-Ferris Indus.*, 700 F.2d 385, 386-88 (7th Cir. 1983); Mori Rubin, *To Cross or Not To Cross: Picket Lines and Employee Rights*, 4 INDUS. REL. L.J. 419, 420-31 (1981).

[243] *Rockaway News*, 345 U.S. at 80-81; Rubin, *supra* note 242, at 434-47. But courts may not enjoin sympathy strikes merely because they violate a no-strike clause in a collective bargaining agreement. *Buffalo Forge Co. v. United Steel Workers*, 428 U.S. 397, 405-8 (1976).

[244] *See supra* at 34-39.

[245] Weiler, *New Balance*, *supra* note 17, at 415.

respect others' picketing of their employer is indeed a difficult one. But there are both theoretical and empirical reasons to believe they would as well as normative justifications for granting picketing protections in any case. First, employees of a horizontal transactional primary, such as direct employees of an employer or a franchisor-run firm that temporary or franchisee employees are picketing, would respect a secondary picket because of self-interest: it may aid in achieving higher industry-standard wages and help "to preserve their jobs."[246] Second, employees of a transactional primary within a vertical arrangement, such as within a supply-chain arrangement, may decide that possible costs are worth long-term gains of increased union density or larger union or labor movement support for their own labor disputes down the road ("logrolling").[247] Empirical data support these explanations for why transactional primaries' employees would respect others' picket lines.[248]

2. Anti-Evasion of Labor and Employment Law Enforcement

Second, the market power rule is a key anti-evasion mechanism to enhance labor law enforcement and employer-employee incentives to self-regulate. Allowing unions to place economic pressure on multiple employers with market power to determine wages can pressure those employers to internalize the social costs of others' bad labor management or failures to comply with labor and employment laws. As in the CIW example, picketing can pressure lead employers to more closely monitor

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[246] REES, *supra* note 88, at 42-43.

[247] *Id.* at 43.

[248] Brian Klaas & John McClendon, *Crossing the Line: The Determinants of Picket Line Crossing During a Faculty Strike*, 16 J. LAB. RES. 331, 331-32, 340-45 (1995); Michael LeRoy, *A Multivariate Analysis of Unionized Employees' Propensity to Cross Their Union's Picket Line,* 13 J. LAB. RES. 285, 285-9191 (1992). Indirect evidence of the success of picket lines comes from extensive litigation and injunctions imposed on picket lines prior to the NLRA's grant of worker strike protections, the number of secondary pickets enjoined prior to Taft-Hartley and Landrum-Griffin, and consistent employer reliance on the NLRB and the courts to enjoin or seek damages for union picketing (at least 1,775 NLRB and federal court decisions). MONTGOMERY, *supra* note 18, at 147-48 (discussing impact of secondary boycotts in nineteenth century); ALAN MCADAMS, POWER AND POLITICS IN LABOR LEGISLATION 53 (1964) (arguing that, before Taft-Hartley and Landrum-Griffin, secondary boycotts were "powerful economic weapons in the hands of unions" and often "the only effective tool available" in union attempts to organize workers); FRANKFURTER & GREENE, *supra* note 13, at Appendix I-II (listing litigation history of federal labor injunction cases, including secondary boycott cases, between 1901-1927).

bad labor management and failure to comply with labor and wage-and-hour law protections. Further, by protecting workers' public picketing that brings pressure to the doors of those that impact their working conditions, targeted exemptions from the secondary boycott ban facilitate exposure of the social effects of employment disputes, the nature and impacts of transactional relationships in the "fissured" workplace, and coordination costs in the New Economy.[249] Adjudication of multi-employer picketing would also create a public record detailing employers' market power over employees' wages and working conditions. The rule can thus assist in publicizing rents received by indirect employers as well as the transaction costs of purchasing labor inputs through mediating firms. This can facilitate a correction of information asymmetries and resulting labor market failures, allowing more effective worker bargaining. In sum, the rule would function as a critical anti-evasion tool to remove arbitrary barriers between employees and employers that impact their wages and conditions of work while also disincentivizing employers' shirking of obligations and responsibilities under existing law.

3. Economic Analysis and Modernizing Labor Law

Finally, the market power rule uses economic analysis developed from the insights of labor economics, theories of the firm and antitrust law, providing an ideal regulatory framework that modernizes labor law enforcement and develops Board expertise in assessing the relative bargaining power of employees and employers. The rule isolates out only those employers that impact wage determinations and working conditions without being overinclusive of secondaries that have no relevance to or impact over labor disputes, as was the original concern of the prohibition's drafters. It also establishes clearer rules to assess whether a target is truly "neutral," promoting uniformity and predictability in the NLRB, an agency infamous for politically turbulent adjudication.

Specifically, the rule integrates developments in economy theory and analysis by providing a functional tool to track the impact of the New Economy on labor relations. By giving the Board scrutiny over how ownership rights within a broadened conception of the firm affects worker and employer incentives, the rule can track employer market power over employees more precisely. A better grasp on firm incentives and the

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[249] WEIL, *supra* note 11, at 18-19, 120-21, 286-89 (discussing coordination costs resulting from "fissuring" and welfare benefits of internalizing those costs).

effects of corporate organization, firm agreements and ownership rights will be critical for modern labor law to properly grasp and predict employer control and employee bargaining power.

Application of the rule would also incorporate the theoretical and empirical econometric and doctrinal tools developed in contemporary antitrust law and policy to the analysis of monopsonistic and oligopsonistic competition in the labor context. Clarity on the primary-secondary distinction could also serve to better police the line between labor law and antitrust law, carving out labor's exemption to antitrust liability only to the extent that secondary activity functions to further the goals of the labor laws under the unified principles. A more economically-tailored enforcement regime would be sensitive to the intersections of labor markets and firms' market power in product markets, enabling an assessment of when such activity is likely to affect price competition. For example, where product markets are fragmented, boycotts will not likely harm competition because removing one competitor is unlikely to affect price competition. Likewise, targeting those who deal with a monopsonist employer may serve a competitive function of reducing monopsony rents and encouraging support throughout the supply chain of potential competitor entrants.

Finally, adjudication of the rule would benefit Board and court expertise and application of economic standards to labor picketing by requiring them to make economic assessments and build the universe of economic data available for their disposal. The Board currently has no centralized source of empirical data on union-initiated secondary activity, either with respect to their frequency or the economic impact they have on "neutrals." Applying the market power rule could harness and effectuate systemic information gathering through secondary activity adjudications to identify and restructure doctrinal patterns based on that information. Similar to proposals made in the criminal law context,[250] the rule can function to pinpoint and tag relevant labor and product market data in secondary boycott cases before the Board as well as complementary data on labor market conditions collected and maintained by the Department of Labor to create a system for better determining whether a targeted party is truly "neutral" to a given labor dispute.

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[250] *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2050-53 (2016).

B. Implementing the New Rule

The market power rule can be easily and immediately implemented through Board and court adjudication. And a broader, more permanent overhaul of the secondary picketing ban can be implemented through Board rulemaking or Congressional amendment to the NLRA. This Section discusses possibilities for the rule's implementation under each of these avenues.

First, the market power rule can be applied to secondary boycotts through adjudication. Section 8(b)(4) does not define "neutral employers," and the only guidance available from the Act's legislative history is Senator Taft's remarks describing its purpose.[251] As noted above, those remarks limit the scope of "neutrals" to those "wholly unconcerned in the disagreement between an employer and his employees . . . . It is not intended to apply to a case where the third party is, in effect, in cahoots with or acting as a part of the primary employer."[252] While the Board and the courts have often ignored or narrowly interpreted Taft's "wholly unconcerned" language,[253] the Supreme Court requires that the secondary boycott prohibition be interpreted narrowly because it addresses First Amendment-protected "expressive activity."[254]

Additionally, the Board should adopt a lower threshold than the current standard for determining whether two entities are sufficiently related to be "primaries." This is because, under other NLRA provisions, the Government must meet a high burden in showing that two entities are sufficiently related to extend liability to a secondary, but under Section 8(b)(4), consistent with the Government's burden to prove unlawful acts, "a finding that an employer is *insufficiently related* to the primary dispute to forfeit its neutrality results in shielding that entity from what would otherwise be lawful activity under the Act and in *assessing liability* for an unfair labor practice against a union."[255] While the Supreme Court has

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[251] *Local 419*, 429 F.2d at 750.

[252] 1947 LEGIS. HIST., *supra* note 58, at 1106; 95 Cong. Rec. 8709 (1949).

[253] *See, e.g.*, *Carpet, Linoleum, Soft Tile etc., Local 419 v. NLRB*, 467 F.2d 392, 401 (D.C. Cir. 1972) (stating that "mere presence of some economic interdependence" between primary and secondary "will not automatically cause one to lose its secondary boycott protection").

[254] *DeBartolo*, 485 U.S. at 576.

[255] *SEIU*, 329 N.L.R.B. at 647 n.17 (Liebman, dissenting).

rejected Board or court interference with the substance of employer-employee bargains, the market power rule would not constitute interference because the restriction extends only to adjudicators writing the *terms* of collective bargaining agreements for the parties, not taking a hands-off approach toward which economic weapons both sides may wield.[256]

Thus, based on the statute's ambiguous language, its legislative history and purposes, principles of NLRA construction, and constitutional requirements, the Board and the courts may interpret "secondaries" as forfeiting their neutral status and constituting "transactional primaries" or a more expansive understanding of "allies" under the ally doctrine where they meet the requirements of the market power rule.

When asserting a defense for picketing under the market power rule, instead of presenting evidence of common control under the ally or single employer doctrines,[257] employees would present evidence of the picketed entity's power over price, in this case, wages or terms and conditions of work. As discussed in Section II.D, evidence could be direct or circumstantial. To summarize, direct evidence includes evidence of: (1) the actual use of monopsony or oligopsony power to lower wages or exclude competition in the relevant labor market; (2) actual detrimental effects, such as reduction in inputs or ability to withhold purchase of labor inputs; (3) artificially suppressed wages and high barriers to entry; or (4) wage-fixing agreements between employers.[258]

Indirect or circumstantial evidence of market power can include market share or structural evidence of a monopsonized market or

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[256] *See, e.g.*, *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960) (stating the NLRB may not intrude into "substantive aspects of the bargaining process" to influence "substantive terms on which the parties contract[]."). *See also supra* nn. 196-98 & accompanying text.

[257] *See, e.g.*, *Local 419*, 429 F.2d at 753; *Mine Workers (Boich Mining Co.)*, 301 N.L.R.B. 872, 873 (1991).

[258] *See, e.g.*, *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451-464-65, 477 (1992); *Heerwagen v. Clear Channel Communs.*, 435 F.3d 219, 226 (2d Cir. 2006) ("Monopoly power 'may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market.'"); *Broadcom*, 501 F.3d at 307 ("[M]onopoly power may be proven through direct evidence of supracompetitive prices and restricted output. . . . It may also be inferred from the structure and composition of the relevant market).

monopsonistic competition.[259] Structural evidence of market power can include the relative size and strength of the picketing target; market concentration in the relevant market for buying labor inputs or selling products; fluctuations in the target's market share; an upward sloping or somewhat inelastic supply curve in the market for labor inputs; an inability or unwillingness for new or current purchasers to enter or expand the amount of their purchases in the market; ease of entry into the industry and the history of the industry; excess in the demand of labor inputs; evidence of monopsony or oligopsony profit; evidence of anticompetitive conduct; the impact of regulation on the labor market; circumstances indicating that sellers of labor inputs are more dependent on buyers than buyers on sellers; and other evidence that the market environment is conducive to and/or facilitates collusion between employers purchasing labor inputs or selling products in the relevant product market.[260] Where there is no evidence of an explicit agreement between employers on wages, employees could present evidence of "plus factors."[261] Indirect evidence may also be offered to indicate that the picketing target is less responsive to wage changes of the picketing employees' labor inputs or price changes in the employer's product than would be expected in the competitive labor or product market.[262] Finally, evidence of employee search costs, labor market frictions, information asymmetries and barriers to market price discovery, immobile benefits, regulatory or other barriers to worker mobility imposed by the direct employers' transactional arrangement with the picketing target would be relevant for determining that target's market power.[263]

Employees may also present evidence of ILM effects on wages *but for* the fissuring of the labor market as benchmarks. This could include

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[259] *Id.*

[260] *Pharms. Tech. Corp. v. Barr Labs Inc.*, 386 F.3d 485, 501 (2d Cir. 2004) (citing market characteristics to be viewed in conjunction with market share to infer monopoly power); *Pastore v. Bell Tel. Co. of Penn.*, 24 F.3d 508, 513 (3d Cir. 1994) (listing factors to be reviewed in assessing monopoly); FTC & DOJ, IMPROVING HEALTH CARE: A DOSE OF COMPETITION 15, 17 (2004).

[261] *See infra* Section II.D.

[262] Dube, Giuliano & Leonard, *supra* note 148; Michael R. Ransom & David P. Sims, *Estimating the Firm's Labor Supply Curve in a 'New Monopsony' Framework: Schoolteachers in Missouri*, 28 J. LAB. ECON. 331, 332-55 (2010) (finding teachers' quit rates sufficiently unresponsive to wage differences that employers are able to pay around 25% below the competitive wage).

[263] CEA, *Labor Monopsony Power*, *supra* note 124, at 5-10; Stiglitz, *supra* note 149, at 461.

evidence of the development of firm-specific skills, or skills specific to the transactional or contractual relationship between the direct employer and the picketing target as well as evidence of firm-specific value-added by the employees of the primary to the enterprise of the picketing target. [264] It could also include:

- historical evidence that ILMs previously functioned as administrative units within which wage-setting and labor allocation was "governed by a set of administrative rules and procedures" pertaining to methods of compensation, job ladders for in-house promotional hiring, and benefit and welfare packages in the employment of employees in the same market for labor inputs;
- historical evidence of internal pay equity structures or the beneficial impact to workers of the picketing target's internalization of the pricing of labor inputs on picketing workers' wages or working conditions;
- historical evidence or evidence determined through econometric regressions that, in a but-for world, the direct employer and the "secondary" benefited or would benefit from establishing internal structures as a means of capturing the complexity of labor as a dynamic input of production (i.e., compensation structures that allow employers to recoup recruitment and training costs and reducing turnover).[265]

Further indirect evidence of market power may be comparator evidence, for example, that competitors within the same market for labor inputs as the primary employer, and contract with non-picketed employers to provide the same or similar labor services, have higher wages, or that the picketed employer can engage or has engaged in wage discrimination for labor inputs within the relevant labor market.

Market power may also be demonstrated through transactional and residual claimant evidence. This may include evidence that the picketing target has ownership rights that facilitate the joint production and monitoring of the direct employer's labor inputs, is a residual claimant and central party to all contracts with the labor inputs while retaining rights to observe input behavior, determine assignments, or sell or transfer

[264] Stone, *Policing Employment*, *supra* note 96, at 364-66.
[265] DOERINGER AND PIORE, *supra* note 93, at 1.

any of the ownership rights it holds.[266] Evidence of the direct employer's sunk costs and lock-in effects on picketing employees with respect to the picketing target would be relevant, as would relationship-specific worker training and costs to the direct employer of integrating with or contracting for services with other similar entities within the same buyer's market. Employees may also provide evidence that the picketing target owns residual rights of control over nonhuman assets in the contractual relationship to indicate its market power over the direct employer.

Additional expert evidence can include econometric analyses that picketing workers have suffered artificially suppressed wages as a result of the direct employer's contractual arrangements with transactional primaries. Econometric regressions could compare picketing workers' current wages with a competitive "but-for" wages determined through historical or other benchmarks as just discussed. Economic evidence could also be presented of: general price effects of direct employer and transactional primaries' anti-competitive conduct; how increasing wages affects employment levels in the relevant labor market; and how closely quit rates match wage changes.

Of course, Congress or the Board could also amend or clarify existing law by establishing the market power rule through an NLRA amendment or rulemaking. First, while legislative reform to the NLRA has foundered in recent decades,[267] Congress could clarify the overbroad secondary picketing ban by more clearly designating as "primaries" or excluding from the definition of "secondaries" all those who exert sufficient market power to determine picketing employees wages and/or terms and conditions of work.

Alternatively, the Board could engage in notice-and-comment rulemaking to clarify the primary-secondary distinction by using its authority to define "primaries" or exclude from the definition of "secondaries" those entities that have market power to determine picketing employees' wages and/or terms and conditions of work.[268]

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[266] Alchian & Demsetz, *supra* note 108, at 783.

[267] *See* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1163-64 (2011) (summarizing labor law reform failures); Estlund, *supra* note 31, at 1612 (same).

[268] Of all executive agencies, the NLRB is unique in implementing only one successful rulemaking in its over eighty-year history. *See* Appropriate Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16,347 (Apr. 21, 1989) (codified at 29 C.F.R.

Clarification through the rulemaking process would not only expand the scope of legally-sanctioned conduct to exert economic pressure on secondary targets but could also seek out industry-specific and labor market-specific comments on the effects of secondary activities. Specifically, the notice-and-comment process could solicit information on how incentives and market effects change based on which secondary targets are induced or impacted, under a range of market conditions and across horizontal and vertical employer arrangements, whether in concentrated oligopolistic markets or competitive markets, and whether the effects fall on neutral employers or the broader social welfare. Developing an effects-based rule that would incorporate comments from labor economists, industry and policy experts, labor unions, workers centers, community organizations and employers would provide the strongest foundation for a systemic, network- and market-based approach to resolving ambiguity and the fundamental mismatch between current law and contemporary working conditions.

CONCLUSION

This Article argues that, by integrating contemporary developments in labor economics, economic theory and antitrust policy, the labor law can enhance its expertise and best adapt to achieve much needed social welfare and fairness benefits in the New Economy. It can begin by applying those developments to the regulation of secondary picketing as a means of

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§ 103.30 (2008)); *see also* Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 289-306 (1991). Two Obama administration rulemakings – requiring employers to post a notice of employee rights and protections under the NLRA and streamlining union representation elections – have had mixed success: the first was struck down by the courts, and the second has recently been upheld by the Fifth Circuit but faces significant ongoing legal and Congressional challenge. S*ee* Representation—Case Procedures, 79 Fed. Reg. 74,308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101–103); Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011); *Chamber of Commerce of the U.S. v. NLRB*, 721 F.3d 152 (4th Cir. 2013); S.J. Res. 8, 114th Cong. (vetoed Mar. 31, 2015); *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015). For an overview on the NLRB's failed rulemakings, *see generally* Garden, *supra* note 33; Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 59 DUKE L. J. 101 (2009); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 260–75 (1968); and Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 752–62 (1960).

enhancing worker expression, microeconomic wage effects, and equitable distributional outcomes under the market power rule.

Such an economic effects-based approach is a critical intervention in the analysis of labor law regulation more broadly, and it has applications beyond secondary boycott doctrine. For example, it can illuminate areas of labor law doctrine to better regulate what types of concerted activity should be protected and which terms of bargaining ought to be mandatory or permissive. It can help better tailor remedial mechanisms for labor law violations and the relevant "communities of interest" of union bargaining units. Finally, it can even help us understand when a social wage may be justified where workers cannot achieve an efficient wage.