

# NOTES

## The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law

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### INTRODUCTION

Buyers of labor or input goods can collude to engage in anticompetitive conduct to decrease their own production costs. Lower production costs decrease the price that profit-maximizing firms will choose to charge customers; as a result, such conduct indirectly benefits

customers.<sup>1</sup> These buyers are exercising monopsony power over the labor or other input market. Conceptually, monopsony is similar to monopoly; a monopolist is the only seller of goods, while a monopsonist is the only buyer of goods.<sup>2</sup> Often, a monopsonist exercises its market power in an input market, where it purchases components that it uses to create products that it sells. Output markets are the markets where those products are sold. Commentators and courts analyze buyer exercises of market power in a variety of circumstances, including labor markets,<sup>3</sup> component parts for goods,<sup>4</sup> or retailers that are large relative to the firms they purchase from.<sup>5</sup> For example, an employer with the power to profitably pay wages that are lower than the competitive level has monopsony power. Recently, in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, the Supreme Court stated that monopsony is the “mirror image” of monopoly and that “similar legal standards” should apply to antitrust claims arising out of both buyer conduct and seller conduct.<sup>6</sup> However, applying similar legal standards to anticompetitive conduct by buyers and sellers results in underenforcement against anticompetitive buyer conduct.<sup>7</sup>

Antitrust law focuses on the benefit that consumers derive from markets, with consumer generally meaning customer. As such, legal standards have evolved to address sellers’ anticompetitive conduct. These standards require courts to measure the procompetitive and

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1. See *infra* Part III.

2. In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, the Court stated that “monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a ‘buyer’s monopoly.’” 549 U.S. 312, 320 (2007). In this quote, the buy side of the market refers to the purchasers of a commodity, while the sell side refers to those who sell a commodity.

3. See generally Orley C. Ashenfelter, Henry Farber, & Michael R. Ransom, *Labor Market Monopsony*, 28 J. LABOR ECON. 203 (2008) (presenting a basic model of labor market monopsony and discussing the use of monopsony in the analysis of labor markets).

4. E.g., *Weyerhaeuser*, 549 U.S. at 314–16 (analyzing market power where defendant, sawmill, predatorily bid down the price of sawlogs it used as inputs).

5. For example, some scholars have argued that Walmart is such a monopsonist. See, e.g., Alessandro Bonanno & Rigoberto A. Lopez, *Wal-Mart’s Monopsony Power in Metro and Non-Metro Labor Markets*, 42 REGIONAL SCI. & URB. ECON. 569 (2012).

6. 549 U.S. at 320, 322.

7. See Jonathon M. Jacobsen, *Monopsony 2013: Still Not Truly Symmetric*, 13 ANTITRUST 1, 1 (2013) (“[T]he conclusion some [commentators] have told us to draw, that symmetric legal and economic treatment is required, is sometimes quite wrong. Despite the superficial appeal of symmetric outcomes, economic analysis frequently yields a different result.”); Maurice E. Stucke, *Looking at Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1514 (2013) (“[D]eveloping the legal standards for evaluating monopsonization claims will be more complex than simply mirroring the monopolization standards.”).

anticompetitive effects of firm conduct and balance them against each other.<sup>8</sup> Because buyer exercises of market power in intermediate markets tend to increase the welfare of the final customers, courts have been more forgiving to monopsonist conduct;<sup>9</sup> they find that monopsonistic conduct reduces final prices and find no liability under antitrust law.<sup>10</sup> Currently, courts routinely find anticompetitive conduct by buyers in input markets permissible, whereas parallel conduct by a seller in the output market would be unlawful.<sup>11</sup>

This Note analyzes how courts' leniency affects a particular category of anticompetitive buyer conduct: agreements between employers that restrict competition in labor markets. If, as courts and commentators generally agree, the goal of antitrust law is to promote the welfare of consumers,<sup>12</sup> how should courts balance the welfare of workers and customers under antitrust analysis? Arguably, worker welfare should be included in consumer welfare.<sup>13</sup> If so, anticompetitive agreements between employers benefit one subset of consumers (customers), while hurting another subset (workers). The persistent procustomer and antiworker effect of such complicates a court's choice to find conduct per se unreasonable or to apply the rule of reason under § 1 of the Sherman Act.<sup>14</sup> Further, it calls into question how to balance procompetitive and anticompetitive effects of agreements subject to rule of reason analysis.

Because exercises of market power in labor markets tend to cause a result that courts treat as a procompetitive effect of restraints of trade,<sup>15</sup> courts must change how they weigh the anticompetitive effects of anticompetitive employer conduct against its procompetitive effects. In output markets (the markets in which goods are sold to the

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8. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007) (describing the rule of reason as distinguishing between restraints that are harmful to consumers and in consumers' best interests, and per se rules as appropriate for conduct that nearly always hurts consumers).

9. Throughout this Note, I use monopsonistic conduct to refer to joint or individual exercises of market power on the buyer side of the market. The reader should not interpret monopsonistic to include only unilateral actions by an individual buyer who is the only buyer in the market.

10. Jacobsen, *supra* note 7, at 1.

11. *Id.*

12. *E.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (“Congress designed the Sherman Act as a consumer welfare prescription.”); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 133 (2010).

13. See *infra* Section II.A.

14. 15 U.S.C. § 1 (2012).

15. See *infra* Section II.B.

end-use customer),<sup>16</sup> courts appropriately focus on the effect of anticompetitive conduct on customers because anticompetitive conduct in output markets extracts welfare directly from customers. Courts should analyze monopsonistic restraints of trade in labor markets with the same primary (and often exclusive) focus on the parties from whom the anticompetitive conduct extracts welfare—the workers.

Such a change would force courts to consider the welfare of workers or customers that a restraint immediately affects, determine whether it has a net anticompetitive effect within that specific market, and, if so, find it impermissible. Such a change to antitrust analysis generally would preserve courts' current focus on customers when a seller engages in anticompetitive conduct, while refocusing courts' attention to workers when employers do so. Effectively, this solution presumes that the welfare loss of workers, whom employers most directly affect through noncompetitive conduct in labor markets, outweighs the welfare gain to customers.

Favoring workers over the customers who benefit from lower prices is in line with congressional intent and maximizing economic welfare. With the Clayton Act,<sup>17</sup> Congress created an exception to the antitrust laws for union activity.<sup>18</sup> Unions are combinations that shift welfare from producers and customers to workers;<sup>19</sup> it follows that courts should favor workers over customers and producers in other related areas of antitrust law. Moreover, lower wages likely hurt workers more than higher prices hurt customers. If consumers exhibit diminishing marginal utilities of wealth and lower wages represent a greater proportional loss of wealth than higher prices, workers lose more economic welfare even when anticompetitive conduct merely shifts equivalent amounts of money from workers to customers.<sup>20</sup> Finally, while antitrust law has not embraced behavioral economic analysis, the fact that workers likely exhibit loss aversion implies courts should favor workers who would lose wages in order for customers to gain lower prices.<sup>21</sup>

Part I of this Note reviews the relevant modes of analysis that courts apply to anticompetitive agreements among competitors. It also

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16. Throughout this Note, I use “market” in a very narrow sense: a market for labor is one market, while the market for goods is another.

17. Clayton Act § 6, 15 U.S.C. § 17 (2012).

18. *See infra* Section II.B.

19. *See infra* Section III.B.

20. *See infra* Section III.B.

21. *See infra* Section III.B.

discusses how courts have analyzed agreements among employers to restrict labor markets. Part II discusses welfare measurement under antitrust law, highlighting the ways that the traditional analysis sorts welfare into an inaccurate dichotomy. Part II also presents the economics behind monopsonistic agreements, demonstrating that anticompetitive agreements between employers have the tendency to economically hurt workers while benefiting customers. It then brings these two discussions together to highlight how antitrust law unevenly balances the welfare of workers and customers when employers restrain trade in labor markets. Part III discusses how focusing on the welfare of workers rather than customers (unless the harm to workers is *de minimis*) is the appropriate way to analyze monopsonistic agreements between employers.

### I. ANTITRUST LAW'S TREATMENT OF EMPLOYER RESTRAINTS OF TRADE

The Sherman Act<sup>22</sup> and the Clayton Act<sup>23</sup> together provide the statutory basis for antitrust treatment of employer restraints of labor markets. This Part provides a background on how courts use these statutes and their accompanying doctrines to analyze employer restraints of trade. Section A presents the modes of analysis that courts use in Sherman Act § 1 cases. Section B discusses the labor exemptions from antitrust law that the Clayton Act provides, and how courts have analyzed employer restraints of trade falling outside of those exemptions.

#### *A. Per Se, Quick Look, and Rule of Reason: The Good, the Bad, and the Ugly*

Section 1 of the Sherman Antitrust Act imposes civil and criminal liability on entities that enter a conspiracy in restraint of trade.<sup>24</sup> In *Standard Oil Co. of New Jersey v. United States*, the Supreme Court held that the Sherman Act only applies to *unreasonable* restraints of trade.<sup>25</sup> Courts employ two modes of analysis for determining whether a restraint of trade is unreasonable: “per se illegality” and “rule of reason” analysis.

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22. 15 U.S.C. § 1 (2012).

23. Clayton Act §§ 6, 20, 15 U.S.C. § 17 (2012); 29 U.S.C. § 52 (2012).

24. 15 U.S.C. § 1.

25. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 31 (1911).

The Supreme Court has stated that conduct that “always or almost always tend[s] to restrict competition,” should be per se illegal.<sup>26</sup> For example, horizontal price fixing,<sup>27</sup> geographic division of markets,<sup>28</sup> and group boycotts<sup>29</sup> are all per se illegal. Despite the categorical appearance of per se rules, the Court has declined to apply per se rules in cases where conduct that fits within one of the above categories might not be inherently anticompetitive.<sup>30</sup>

The distinction between per se illegality and the rule of reason is critical to litigants. If a court declares a defendant’s conduct to be per se illegal, it forecloses that defendant from arguing that his or her conduct has a procompetitive justification.<sup>31</sup> As such, defendants will exert considerable effort and resources to convince courts to find that their conduct is outside the scope of a per se rule.<sup>32</sup> Empirically, most defendants are successful at convincing courts that their conduct is not per se illegal: the vast majority of Sherman Act § 1 cases are subject to rule of reason analysis.<sup>33</sup>

When conduct is not per se illegal, courts engage in rule of reason analysis, considering all circumstances of the case to determine whether a particular restraint is reasonable.<sup>34</sup> The ultimate inquiry is whether a restraint of trade’s procompetitive effects outweigh its anticompetitive effects.<sup>35</sup> Procompetitive effects include increased

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26. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

27. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–22 (1940).

28. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972).

29. *Klor’s Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1969).

30. *See, e.g., Nw. Wholesale Stationers v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 293–94 (1985) (declining to apply the per se rule against group boycotts where membership in an association was not necessary to enable the boycotted firm to effectively compete); *Nat’l Collegiate Athletics Assoc. v. Bd. of Regents*, 468 U.S. 85, 101 (1984) (declining to apply a per se rule to an output limitation in an industry in which horizontal restraints on competition are necessary for the product to exist).

31. *Leegin*, 551 U.S. at 886.

32. Peter Nealis, *Per se Legality: A New Standard in Antitrust Adjudication Under the Rule of Reason*, 61 OHIO ST. L.J. 347, 366 (2000).

33. Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1214 (2008).

34. *Leegin*, 551 U.S. at 885–86.

35. *See Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (“Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”); *Cont’l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 508 (4th Cir. 2002) (“[A] plaintiff must show that the net effect of a challenged restraint is harmful to competition.”).

market information,<sup>36</sup> reducing the market power of existing monopolists,<sup>37</sup> and smaller transaction costs;<sup>38</sup> anticompetitive effects include higher prices and lower quality goods or services.<sup>39</sup> The Supreme Court has highlighted the relevance of context in rule of reason analysis. When analyzing a restraint of trade under the rule of reason, courts should consider “specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature, and effect,”<sup>40</sup> as well as “market power and market structure.”<sup>41</sup> The rule of reason serves to distinguish between restraints of trade that decrease consumer welfare (anticompetitive effects outweigh procompetitive effects) and those that increase consumer welfare (procompetitive effects outweigh anticompetitive effects).<sup>42</sup>

In recent years, many courts have adopted a burden-shifting approach to rule of reason litigation to add some structure to the otherwise complex analysis. First, a plaintiff must establish a prima facie case of anticompetitive effect; if the plaintiff succeeds, the burden shifts to the defendant to demonstrate a procompetitive justification. If the defendant meets its burden, the burden shifts back to the plaintiff to demonstrate that the anticompetitive effect outweighs the procompetitive benefit.<sup>43</sup>

Rule of reason analysis heavily favors defendants. Because rule of reason cases are so context dependent, litigation is long and expensive, requiring extensive testimony from economists and documentary evidence on the effect of the defendant’s conduct.<sup>44</sup>

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36. *Maple Flooring Mfrs. Ass’n v. United States*, 268 U.S. 563, 582–83 (1925).

37. *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 235–41 (1918).

38. *Broad. Music v. Columbia Broad. Sys.*, 441 U.S. 1, 22–24 (1979).

39. *Cf. Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (“The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.”).

40. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

41. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984).

42. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (“In its design and function, the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”).

43. Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1267 (1999). Commentators have noted that this burden-shifting framework is often employed to avoid actually having to balance welfare, rather than to weed out cases without merit. Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 45 (2016).

44. Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1761 (1994).

Because plaintiffs (including enforcement agencies, consumers, or competitors) bear the initial burden of proving anticompetitive effect, they suffer from the expense of rule of reason litigation. The difficulty of marshaling sufficient evidence and the weight of litigation costs result in an overwhelming failure rate for plaintiffs under the rule of reason. A recent empirical study found that courts dismiss ninety-seven percent of rule of reason cases at the first stage of the burden shifting framework.<sup>45</sup> While commentators have attributed this high failure rate to a variety of factors, most emphasize evidentiary issues and the tremendous expense of litigation.<sup>46</sup> Consequently, many potential plaintiffs simply decline to bring suit where courts are expected to apply the rule of reason to their cases.<sup>47</sup>

Occasionally, courts will apply a “quick look” rule of reason analysis. The Supreme Court has stated that a quick look analysis is appropriate where “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”<sup>48</sup> Quick look analysis requires plaintiffs to demonstrate that the particular conduct at issue did have an anticompetitive effect; however, that burden is particularly easy to meet.<sup>49</sup> Notably, courts will not apply a quick look where there are plausible procompetitive justifications for a restraint.<sup>50</sup>

The labels “per se,” “rule of reason,” and “quick look” seem to indicate that analysis of anticompetitive agreements under the Sherman Act falls into distinct categories; however, this is not

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45. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009); *see also* Carrier, *supra* note 43, at 1268 (finding that courts dismissed eighty four percent of rule of reason cases at the first stage for lack of an anticompetitive effect in an earlier data set).

46. Nealis, *supra* note 32, at 366–369.

47. Piraino, *supra* note 44, at 1761. As an illustration of this phenomenon, Thomas Piraino notes that in the eighteen years following *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (holding that nonprice vertical restraints are subject to rule of reason analysis), plaintiffs brought very few cases challenging nonprice vertical restraints; out of the few cases brought, only two were successful. Piraino, *supra* note 44, at 1761 n.50.

48. *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 770 (1999).

49. *See id.* (“[Q]uick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained.”).

50. *Compare* *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 961 F.2d 667, 674–76 (7th Cir. 1992) (applying quick look analysis after rejecting as implausible procompetitive justifications of the restraint), *with* *United States v. Brown Univ.*, 5 F.3d 658, 678 (1993) (applying full rule of reason analysis because of the defendant’s “asserted precompetitive and pro-consumer features” of the restraint at issue).



completely accurate. The Supreme Court has increasingly embraced a continuum model of antitrust analysis.<sup>51</sup> As already mentioned, the Court sometimes analyzes conduct normally within the scope of a *per se* rule under the rule of reason when the defendant has demonstrated a procompetitive justification for his or her conduct.<sup>52</sup> In *California Dental Ass'n v. FTC*, the Court explicitly recognized that antitrust doctrines do not provide neat boxes in which courts can place cases:

As the circumstances of this case demonstrate, there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.<sup>53</sup>

*California Dental* appears to invite a sliding scale approach, requiring stronger or weaker proof of anticompetitive effect based on the case at hand.<sup>54</sup> If conduct obviously causes a net anticompetitive effect, courts generally push it into a *per se* category; if a more nuanced approach is necessary, courts use the rule of reason. For cases where conduct had obvious anticompetitive effects with plausible but ultimately unlikely procompetitive justifications, courts apply quick look analysis. Determining the appropriate mode of analysis when employers restrain trade in employee markets becomes tricky precisely because of this shifting scale.

### *B. The Intersection of Labor and Antitrust*

Labor and employment occupy a unique space in antitrust. Sections 6 and 20 of the Clayton Act provide for a statutory labor exception in antitrust law.<sup>55</sup> The sections state that antitrust law does

51. Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 759 (2012).

52. See, e.g., *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 117–18 (1984) (applying rule of reason to horizontal price fixing agreement among NCAA members because horizontal agreement was necessary for intercollegiate athletics to exist); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23–24 (1979) (applying rule of reason to horizontal agreement to set uniform licensing fees because the fee facilitated competition and because the license fee was only part of price licensors paid to license music).

53. *Cal. Dental*, 526 U.S. at 780–81.

54. Gavil, *supra* note 51, at 769; see also *Cal. Dental*, 526 U.S. at 780 (“[T]he quality of proof required should vary with the circumstances.” (quoting Philip Areeda, ANTITRUST LAW ¶ 1507 (1986))).

55. Clayton Act §§ 6, 20, 15 U.S.C. § 17 (2012); 29 U.S.C. § 52 (2012).

not forbid the existence and operation of labor unions,<sup>56</sup> and that courts may not issue injunctions in any case arising out of a dispute concerning terms and conditions of employment unless necessary to prevent irreparable injury.<sup>57</sup> In *Duplex Printing Press Co. v. Deering*, the Supreme Court interpreted these provisions narrowly by holding illegal a union's boycott of the goods of a firm that the union was in a labor dispute with.<sup>58</sup> However, the Court has since embraced a more broad "non-statutory labor exemption" for labor in antitrust to reflect the balance that Congress sought to strike between unions and firms.<sup>59</sup> The exemption allows employers and groups of employees or unions to engage in activities that would otherwise be found anticompetitive as long as the actions are part of a good faith effort to bargain for wages, hours, or other working conditions.<sup>60</sup>

Outside of suits arising from bargaining conflicts, courts have readily applied antitrust laws to employer restraints of trade in markets for labor.<sup>61</sup> Federal courts have applied per se illegality rules in wage fixing cases<sup>62</sup> and the rule of reason to a wide variety of other agreements restricting trade in labor markets. For example, agreements between employers to respect each other's covenants to not compete are subject to rule of reason analysis.<sup>63</sup> Appellate courts in

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56. 15 U.S.C. § 17.

57. 29 U.S.C. § 52.

58. 254 U.S. 443, 477–78 (1921).

59. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235–36 (1996).

60. *Id.* *But see* *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1130 (9th Cir. 2011): [T]he grocers cannot succeed in exempting their agreement merely by asserting its value to them and purpose as an economic weapon in the labor dispute over core bargaining subjects. If this were so, a group of employers could claim that fixing prices made them stronger and was useful as an economic weapon in a strike.

61. *E.g.*, *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 364–65 (1926) (shipowners violated Sherman Act by agreeing to have hiring and wage decisions set collectively through a complex registration scheme); *Cordova v. Bache & Co.*, 321 F. Supp. 600, 606–07 (S.D.N.Y. 1970) (brokerage firms violated antitrust law by collectively agreeing to reduced commissions for employee brokers).

62. *See, e.g.*, *Todd v. Exxon Corp.*, 275 F.3d 191 (stating that a per se rule would apply to a wage fixing agreement).

63. *E.g.*, *Hanger v. Berkley Grp., Inc.*, No. 5:13-cv-113, 2015 WL 3439255, at \*1–2 (W.D. Va. May 28, 2015) (finding defendants' settlement, including a provision to not challenge the validity of or hire employees, subject to covenants to not compete and permissible under rule of reason); *see also* *Eichom v. AT&T Corp.*, 248 F.3d 131, 143–44 (3d Cir. 2001) (finding "no support within the relevant case law" that no-hire agreements entered upon the sale of a business are per se illegal). *But see* *Reed Elsevier, Inc. v. Transunion Holding Co.*, No. 13-cv-8739(PKC), 2014 WL 97317, at \*2–5 (S.D.N.Y. Jan. 9, 2014) (analyzing a similar agreement as if it were a covenant not to compete between an employee and employer). The *Reed Elsevier* court's peculiar treatment of

cases such as *Nichols v. Spencer International Press, Inc.*<sup>64</sup> and *Union Circulation Co. v. FTC*<sup>65</sup> applied the rule of reason to “no-switching agreements” where employers agree to not hire each other’s current employees as well as former employees for a period of time after their employment ceases. *In re High-Tech Employee Antitrust Litigation*, a recent employee suit against several Silicon Valley employers, concerned a network of bilateral “no-poaching agreements” where several employers agreed to not recruit each other’s employees.<sup>66</sup>

Agreements to not hire or recruit each other’s employees resemble territorial allocations by sellers that courts have declared per se illegal.<sup>67</sup> In both types of cases, two firms apportion customers or employees according to some standard (geographic location or current employer) that would not result in a competitive market.<sup>68</sup> While one may expect that courts would accord such parallel cases with per se treatment, their frequent application of the far more lenient rule of reason to agreements between buyers illustrates the aforementioned tendency of antitrust courts to be more lenient toward monopsonistic behavior. Such differential treatment arises because anticompetitive conduct in a labor market lowers wages, which in turn results in lower prices. Lower prices, being the “very essence of competition,”<sup>69</sup> cause courts to permit manifestly anticompetitive conduct in labor markets that give rise to the lower prices in the output market.

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the agreement between two competitors to not hire each other’s employees is due to the fact that the plaintiff sued for breach of contract rather than antitrust harm. *Id.*

64. 371 F.2d 332, 337 (7th Cir. 1967) (holding that a no-switching agreement should be analyzed for reasonableness on remand and emphasizing the effect the agreement may have on the output market).

65. 241 F.2d 652, 656–58 (2d Cir. 1957) (finding a no-switching agreement unlawful under the rule of reason because of the tendency to decrease competition in the output market).

66. 856 F. Supp. 2d 1103, 1110–12 (N.D. Cal. 2012). *In re High-Tech Employee Antitrust Litigation* settled before the court determined which antitrust mode of analysis should apply. No. 11-CV-02509, 2015 WL 5159441, at \*8 (N.D. Cal. Sept. 2, 2015).

67. *See, e.g., Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 50 (1990) (holding a market allocation between two competing sellers of bar review courses to be per se illegal).

68. *Compare United States v. Topco Assocs., Inc.*, 405 U.S. 596, 602, 606–07 (1972) (members’ firms agreed not to sell in geographic areas assigned to other firms so as not to compete in prices), *with Union Circulation*, 241 F.2d at 654–56, 658 (competitors agreed to not hire employees working for other firms decreasing labor mobility, competition, and wages).

69. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993).

## II. A TALE OF TWO CONSUMERS: HOW LABOR MARKET MONOPSONY AFFECTS CUSTOMERS AND WORKERS

While it is uncontroversial that antitrust law exists to protect competition, the meaning of “protecting competition” is not universally agreed upon. This Part analyzes how the nebulous definition of protecting competition presents a problem when employers collude to restrain labor markets. Section A discusses the existing debate over the meaning of “consumer welfare” in antitrust law. It then argues that consumer welfare should encompass not only the economic welfare of customers who purchase goods, but also the welfare of employees in labor markets. Section B discusses the economic theory behind monopsonistic conduct, demonstrating that labor monopsony will generally increase the welfare of customers at workers’ expense. Section C analyzes how courts have addressed the contradictory effects of labor monopsonies on worker welfare, ultimately suggesting that courts give undue weight to price effects when reviewing employer anticompetitive agreements, resulting in overly lenient treatment of employer restraints of labor markets.

### *A. Whose Welfare Is It Anyway?*

Antitrust law promotes economic welfare by protecting competition.<sup>70</sup> Significant debate exists as to whether the goal of antitrust is to maximize total economic welfare or consumer welfare alone.<sup>71</sup> Commentators and courts generally equate consumer welfare with the measure that economists call “consumer surplus,” while total welfare includes both consumer surplus and “producer surplus.” Consumer surplus is the sum across all consumers of the difference between the value that each consumer ascribes to a good and the price that the consumer paid; it is the total economic gain that all consumers acquire from participating in a market. Likewise, producer surplus is the total profit of the firms, or the difference between the price at which

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70. Allensworth, *supra* note 43, at 16; *see also* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 909 (2007) (“The Sherman Act seeks to maintain a marketplace free of anticompetitive practices, in particular those enforced by agreement among firms.”); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (“The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.”); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 447 (6th Cir. 2007) (“[A]ntitrust laws protect competition, not competitors.”); Christopher R. Leslie, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price Fixing*, 81 CALIF. L. REV. 243, 251 (1993) (“Congress’ overriding concern was economic welfare, not social and political issues.”).

71. Allensworth, *supra* note 43, at 16.

goods are sold and the cost at which each good was sold. Producer surplus and consumer surplus are the classic measures of economic benefit from a market.

Under the total welfare standard, a restraint of trade could be considered to have net procompetitive effects if it increased total economic welfare. Under such a standard, a restraint that resulted in large profits for producers but only minimal economic harm to consumers in the aggregate would be permissible. Under the consumer welfare standard, however, a restraint would have a net anticompetitive effect if it decreases consumer welfare, regardless of the effect on producers. A restraint that resulted in large profits for producers but minimal harm to consumers would “harm competition” under such a standard. The governing welfare standard is thus crucial to a court’s rule of reason analysis of whether a restraint of trade has greater anticompetitive or procompetitive effects.<sup>72</sup> Consumer welfare is currently the prevailing standard in both scholarship and in the courts.<sup>73</sup>

The current debate fails to address how to evaluate economic welfare that does not fit neatly into the consumer-producer dichotomy. When firms engage in anticompetitive conduct in labor markets to decrease the wages they pay, the conduct will likely change the prices that customers in the output market pay.<sup>74</sup> Producer welfare includes the increased profits from lower labor costs and consumer welfare includes the increased benefit to customers from lower prices, but which welfare category tallies the loss that workers experience from lower wages?

The division of welfare between two and only two mutually exclusive groups in antitrust analysis is largely an artifact inherited from economic partial equilibrium analysis, where economists consider a single market in isolation, assuming that conditions in other markets remain constant.<sup>75</sup> Partial equilibrium analysis is the dominant mode of economic analysis in antitrust largely because it is tractable and will usually aptly describe the welfare issues at play.<sup>76</sup> However,

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72. *See supra* Section II.A.

73. Allensworth, *supra* note 43, at 16.

74. *See infra* Section II.B. At the very least, the decrease in cost will decrease the price that a profit-maximizing firm will charge. *See infra* note 82 and accompanying text.

75. Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 856 (2000). Partial equilibrium analysis is properly contrasted with general equilibrium analysis, which considers conditions in all markets simultaneously. *Id.* at 855.

76. *Id.* at 855–57.

anticompetitive agreements between buyers provide an example where partial equilibrium analysis focusing on the output market alone is insufficient to properly protect competition. At a minimum, anticompetitive agreements require a broader analysis that includes both the output market where firms sell final goods *and* the input market where those firms purchase labor. Such an analysis preserves the tractability of partial equilibrium analysis by focusing on only the labor market that a restraint directly affects and the output market where indirect effects necessarily manifest, while assuming that conditions elsewhere remain constant.

Adopting the conventional labels of partial equilibrium analysis, anticompetitive agreements between employers present courts with four different measures of welfare to evaluate: producer surplus, consumer surplus, employer surplus, and employee surplus.<sup>77</sup> Employer surplus and employee surplus are the labor market analogues to producer surplus and consumer surplus in the output market. Employer surplus is the aggregate difference between the benefit that employees provide to employers and the wage the employers pay the employees. Employee surplus is the aggregate difference between the wages that employees receive and the minimum wage that employees would be willing to work for.<sup>78</sup>

Under the consumer welfare standard, employee surplus must be included in consumer welfare while employer surplus should be ignored. As argued above, anticompetitive agreements in a labor market affect both the input and output markets sufficiently that a court must analyze welfare changes in the labor market. The issue is whether employees and employers are “consumers” such that their welfare counts, or whether they are producers who are to be ignored. Equity requires that employee surplus is part of consumer welfare. Otherwise, the rule of reason provides no protection to employees who are the victims of anticompetitive schemes that decrease prices in the output market. Such a result is absurd as well as inapposite to Supreme Court precedent.<sup>79</sup> Moreover, employees’ economic interests are opposed to employers, whose surplus is properly classified as part of

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77. Employer surplus is the consumer surplus in a labor market, while employee surplus is the producer surplus. *See* cases cited *supra* note 70.

78. This minimum wage is called the employee’s reservation wage. The employee surplus is measured with reference to the reservation wage because it is the employee’s internal cost of working. To see this, note that an employee would not work if their reservation wage exceeded the wage an employer offered—implying that the costs of work exceed the benefits of working.

79. *E.g.*, *Anderson v. Shipowners’ Ass’n of Pac. Coast*, 272 U.S. 359, 364–65 (1926).

producer surplus. The employer surplus in the input market is a portion (or all) of the producer surplus in the output market.<sup>80</sup> Thus, changes to the employer surplus are irrelevant to protecting competition under the consumer welfare standard.

As such, courts weighing the anticompetitive and procompetitive results of anticompetitive employer conduct must balance the effects of the conduct on customers and workers. However, antitrust law has no doctrine or methodology to compare the welfare of different groups of consumers (for example, customers and employees) in two different markets when their interests are not aligned.<sup>81</sup> As the next Section discusses, anticompetitive employer conduct will generally have opposing effects for customers and employees and thus require courts to balance employee and customer welfare somehow.

*B. Employer-Monopsony: Customers and Employers Win,  
Employees Lose.*

Employers exercise monopsonistic market power on the buy side of the market<sup>82</sup> to decrease long-term costs.<sup>83</sup> There are several types of anticompetitive agreements that employers could enter to decrease labor costs. Explicit wage-setting agreements with competitors<sup>84</sup> and joint decisions allocating workers,<sup>85</sup> for instance, do so directly. Other

80. The producer's total profit, equivalent to the producer surplus in the output market, can be expressed as the sum of surpluses from each input market. This is so because the employer surplus is the difference between the benefit that employees provide to an employer (what an employer can sell the employee's output for in the output market) and the wage the employer pays the employee. Using the language of producer surplus, the employee surplus is the difference between the price of the employee's output and the employer's cost of creating that output. If the firm's only input were labor, producer surplus and employer surplus would be equal.

81. Allensworth, *supra* note 43, at 67.

82. Market power in an output market is defined as the ability to raise prices above the competitive level without losing profit. See George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807, 812–13 (1991) (discussing common definitions of market power). The analogous definition for market power in a labor market is the ability to lower wages below the competitive without losing profit. For a firm without market power, lowering wages would result in lost profit because all workers would leave the firm to work in one with higher wages, and the firm would be incapable of producing (and therefore selling) any goods.

83. As the Supreme Court noted in *Weyerhaeuser*, predatory bidding schemes result in higher costs in the short term. See *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 323 (2007) (“A predatory-bidding scheme requires a buyer of inputs to suffer losses today on the change that it will reap supracompetitive profits in the future.”).

84. *E.g.*, *Cordova v. Bache & Co.*, 321 F. Supp. 600, 606–07 (S.D.N.Y. 1970).

85. *E.g.*, *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 364–65 (1926).

actions, such as no-poaching agreements,<sup>86</sup> no-switching agreements,<sup>87</sup> or employer agreements regarding each other's non-compete agreements, do so more indirectly by decreasing opportunities for workers to switch to jobs with higher wages. Over time, decreased labor mobility suppresses wage growth in an industry because workers have fewer opportunities to switch to higher-paying positions in other firms.<sup>88</sup>

Firms that restrain trade in labor markets earn higher profits because they pay lower wages for workers who provide the same productivity per worker.<sup>89</sup> While antitrust law does not take issue with producers increasing profits,<sup>90</sup> it takes issue with the spillover welfare effects the conduct has on consumers.<sup>91</sup> The effects of these cost decreases on entities other than producers depend significantly on market conditions.<sup>92</sup> Because lower costs allow firms to profitably charge lower prices and more customers will purchase at lower prices, profit-maximizing firms will reduce the price of their goods in response

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86. *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103, 1110–12 (N.D. Cal. 2012).

87. *E.g.*, *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 337 (7th Cir. 1967).

88. Jacob Mincer & Boyan Jovanovic, *Labor Mobility and Wages*, in *STUDIES IN LABOR MARKETS* 22, 37–42 (Sherwin Rosen ed., 1981); *cf.* ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* 179 (2013) (describing how noncompete agreements are associated with lower salaries); Thomas J. Kniesner & John D. Leeth, *Compensating Wage Differentials for Fatal Injury Risks in Australia, Japan, and the United States*, 4 *J. RISK & UNCERTAINTY* 75, 78 (1991) (“[W]orker mobility helps establish compensating differentials for workplace risks.”).

89. V. Bhaskar, Alan Manning, & Ted To, *Oligopsony and Monopsonistic Competition in Labor Markets*, 16 *J. ECON. PERSP.* 155, 162–65 (2002). Note that it is perfectly plausible (and necessary under models where labor supply is a continuous function of wage with some responsiveness to the wage) for some workers to stop working because of the lower wages. However, the monopsonist firm or cartel chooses a profit-maximizing wage such that the surplus they receive under the noncompetitive outcome exceeds the outcome in the competitive labor market. *Id.*

90. *Cf.* *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994) (“If the complaint showed that Cooksey’s only gripe was that it had been expelled from a cartel and thereby deprived of *cartel* profits, it could not recover those lost profits as antitrust damages.” (emphasis added)); *Viacom Int'l, Inc. v. Time Inc.*, 785 F. Supp. 371, 379 (S.D.N.Y. 1992) (“It is of course axiomatic that the antitrust laws do not operate to prevent a vertically integrated firm from reaping the rewards of its efficiency or to punish a company that profits from its expertise or innovativeness.”); Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 *COLUM. L. REV.* 1695, 1759 (2000) (“Antitrust law does not care whether or not a monopolist increases its net profitability. It cares whether a monopolist acquires its power legitimately.”).

91. *See infra* Section III.A.

92. *See generally* Keith Cowling & Dennis Mueller, *The Social Costs of Monopoly Power*, 88 *ECON. J.* 727 (1978) (discussing factors that shape the size of social loss from monopoly power).



to these lower costs.<sup>93</sup> The size of the price decrease that firms pass on to customers will depend on many factors, most notably idiosyncratic market characteristics and the employer's power in the output market.<sup>94</sup> Thus, employer collusion to reduce wages harms workers but likely benefits customers. For this reason, anticompetitive agreements between employers that would otherwise compete for the same employees are unique among agreements subject to antitrust laws—they necessarily force courts to weigh the interests of two groups of consumers (customers and workers) in two markets against each other.

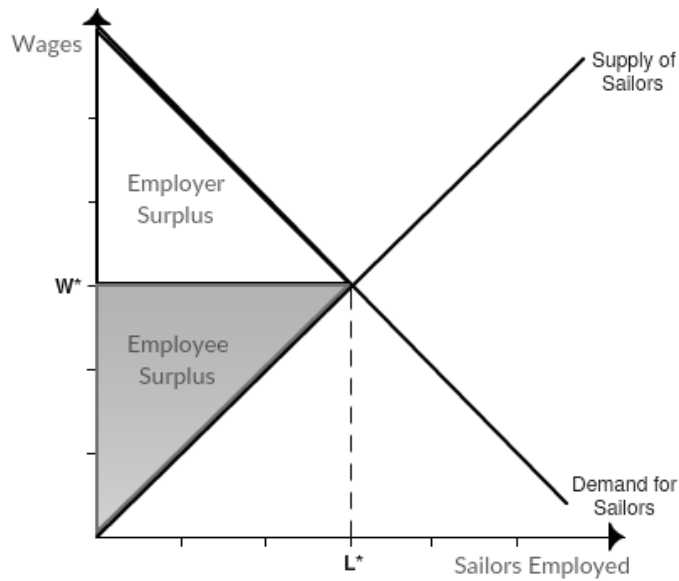
To illustrate the welfare gains customers will experience following monopsonistic or oligopsonistic conduct, consider the following example, loosely based on *Anderson v. Shipowners' Association of Pacific Coast*.<sup>95</sup> Suppose there is a labor market where ship owners hire sailors, and some of those owners participate in the output market for transporting widgets. At the start, the labor market for sailors is in equilibrium, with many ships employing  $L^*$  sailors at the equilibrium wage,  $W^*$ . The following supply and demand curves characterize the willingness of sailors to work at various wages and the willingness of ships to hire sailors at various wages:

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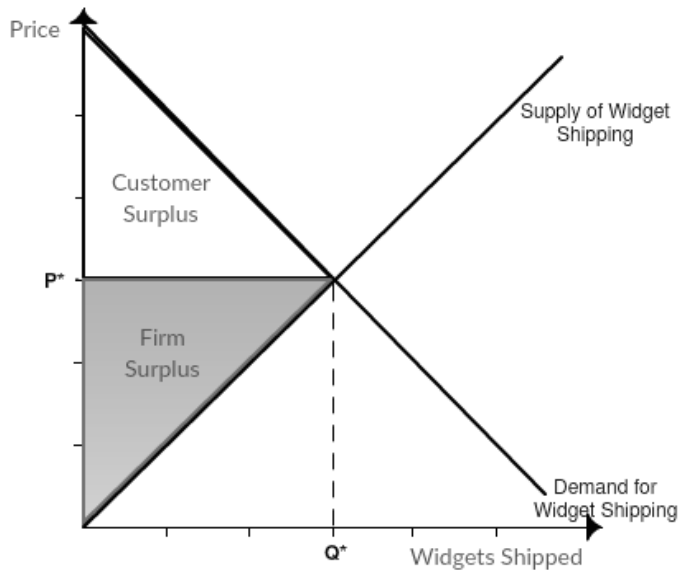
93. Note that this is true regardless of whether the output market is perfectly competitive, oligopolistic, or monopolistic. See ANDREW MAS-COLELL, MICHAEL D. WINSTON & JERRY R. GREEN, *MICROECONOMIC THEORY* 387–99 (1995) (presenting models of imperfectly competitive output markets where decreases in costs result in decreases in price); HAL VARIAN, *MICROECONOMIC ANALYSIS* 216 (1992) (presenting a model of a perfectly competitive market where the equilibrium price is equal to each firm's marginal cost).

94. See MAS-COLELL, WINSTON, & GREEN, *supra* note 93, at 387–99 (demonstrating that the quantity of price decrease depends on the demand function and how many firms are in the output market).

95. 272 U.S. 359 (1926).

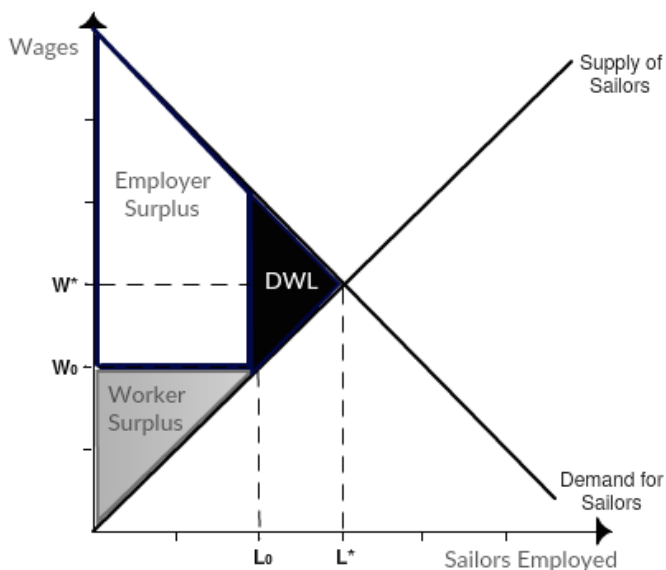
FIGURE 1: LABOR MARKET FOR SAILORS

The white triangle below the demand curve and above the equilibrium wage represents the economic welfare that employers gain from the market (employer surplus); likewise, the grey triangle below the equilibrium wage and above the supply curve represents the economic welfare that employees gain from the market (worker surplus). Suppose also that the market for transporting widgets is in a competitive equilibrium, with ship owners charging  $P^*$  to transport each of the  $Q^*$  widgets. The demand and supply curves of this market in equilibrium are as follows:

FIGURE 2: OUTPUT MARKET FOR WIDGET SHIPPING SERVICES

Analogous to the labor market graph, the white triangle is the customer surplus and the grey triangle is the firm's surplus from the output market.

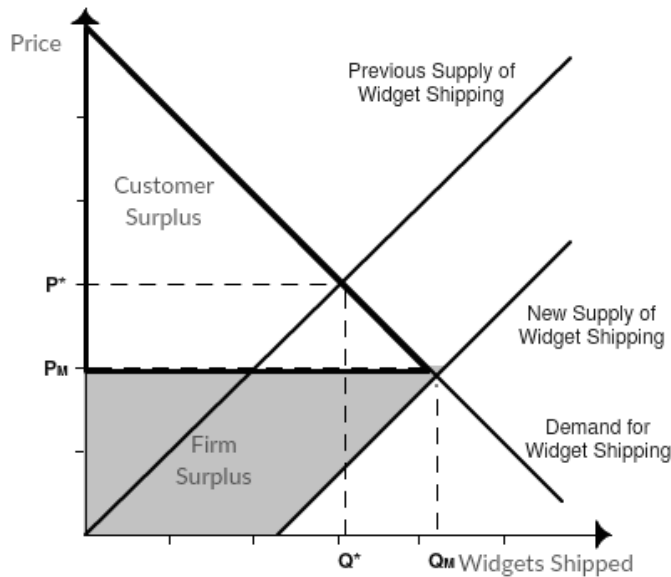
Now, imagine that widget shippers realize that they have an opportunity to come to an agreement on the conditions of employment that they offer sailors. They could require registration and joint assignment to ships at an agreed upon salary, as in *Anderson*, or reach any other monopsonistic agreement that results in paying lower wages to sailors. Essentially, through some scheme, widget shippers enter an agreement that moves wages from the prevailing level  $W^*$  to the new, noncompetitive lower level  $W_0$ :

FIGURE 3: INPUT MARKET AFTER A RESTRAINT

The welfare of sailors has decreased, the welfare of shippers has increased, and the anticompetitive arrangement has created deadweight loss<sup>96</sup> (marked DWL), as shown in the figure. Now that all ships pay sailors less, it will be cheaper to ship widgets. Ships will thus be willing to ship more widgets at any price; graphically, the supply curve shifts to the right as a result:

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96. The deadweight loss is the welfare that is lost as a result of a deviation from the competitive equilibrium. See generally Jerry A. Hausman, *Exact Consumer's Surplus and Deadweight Loss*, 71 AM. ECON. REV. 662 (1981) (describing the measurement of deadweight loss under various circumstances).

FIGURE 4: OUTPUT MARKET AFTER THE INPUT MARKET RESTRAINT

The decreased costs have resulted in more widgets shipped at cheaper rates. As a result, customer surplus and firm surplus have both increased. This is an unambiguous benefit to the customers in the widget-shipping market.

This result is robust to relaxing the assumption that the employers face a competitive market for the output good. If the several ship owners could create a cartel to set wages in the labor market, it seems likely that they could fix prices in the output market. However, it could be harder to sustain a fixed price *and* a fixed wage than it would be to sustain either separately. Economic theory suggests that members of a cartel each have an incentive to deviate from the agreed upon price or wage; if all other members are cooperating, each member could obtain more profit by deviating from the agreement.<sup>97</sup> If an individual firm offers a wage incrementally above the value that the firms agreed upon, all workers will want to work for the deviating firm. The firm could then hire more employees, produce more output, and make a higher profit. Because each firm in the cartel possesses this incentive,

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97. See M.P. Donsimoni, N.S. Economides & H.M. Polemarchakis, *Stable Cartels*, 27 INT'L ECON. REV. 317, 317 (1986) (“[I]ndividual members of the cartel have an incentive to increase output beyond the point of joint profit maximization; at the latter, marginal revenue exceeds marginal cost.”).

it is likely that someone will deviate. The incentive to deviate is why economists have often characterized cartels as inherently unstable.<sup>98</sup> Some market conditions, including a more concentrated market with few small sellers, barriers to entry, and homogeneous products, are more conducive to stable cartels.<sup>99</sup> Given that the markets for labor and shipping services are separate in this example, it is possible that some of these characteristics exist in one side of the market but not the other. For example, there likely exist many ships that do not transport widgets in equilibrium, but if the cartel were to fix a supracompetitive price many such ships would enter the market at a price lower than the cartel price. As a result, a cartel might exist in only the labor market.

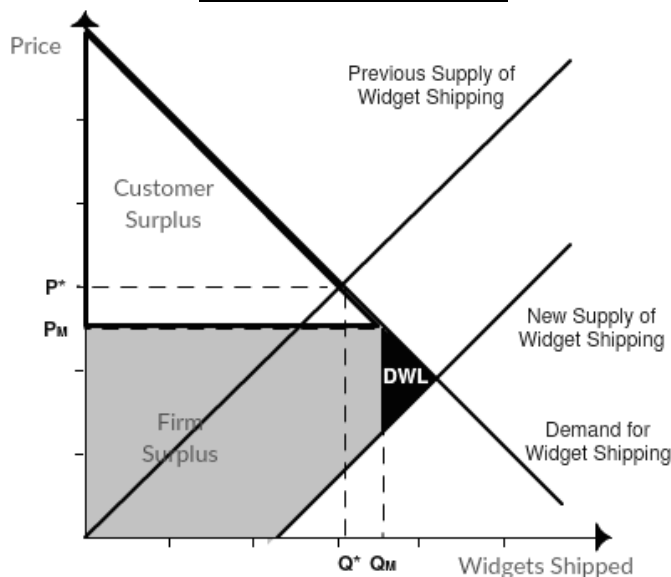
Nevertheless, even if the cartel exercised its market power on both sides of the market, it would still be possible for customer welfare to be higher than in the perfectly competitive market. The precise outcome would depend greatly on the conditions in the market, but as shown in the following graph, a shift in the supply curve could result in welfare increases for customers even if the cartel sets prices at some price  $P_M$  that is higher than the equilibrium level:

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98. *Id.*; see also Robert Rothschild, *Cartel Stability When Costs Are Heterogeneous*, 17 INT'L J. INDUS. ORG. 717, 729–30 (discussing how heterogeneity in firm costs can make cartels less likely to persist).

99. See RICHARD A. POSNER, ANTITRUST LAW 69–79 (2001) (describing market conditions that are likely associated with stable cartels).

FIGURE 5: OUTPUT MARKET AFTER A RESTRAINT IN BOTH THE INPUT AND OUTPUT MARKETS



This example illustrates that anticompetitive agreements decrease firm labor costs, and decreased labor costs will result in lower prices than there would otherwise be, all else equal. Because many courts will consider this price decrease to be a procompetitive benefit, courts will likely favor the rule of reason over other modes of antitrust analysis and find said agreements permissible.

### *C. Rule of Reason Analysis in Monopsony Cases*

As stated above, under the rule of reason, courts deem unlawful conduct that has greater anticompetitive effects than procompetitive effects.<sup>100</sup> This Section explores how federal courts have balanced these effects in the face of monopsonistic restraints of trade in labor markets—and where the courts have gone wrong.

In *Weyerhaeuser*, the Supreme Court stated that monopsony is the mirror image of monopoly, and that similar antitrust standards should apply to anticompetitive conduct in both situations.<sup>101</sup> The Court's holding gave rise to significant scholarly debate. Some scholars have argued that monopsonistic conduct presents unique challenges

100. See *supra* Section II.A.

101. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320–22 (2007).

justifying different treatment,<sup>102</sup> while others assert that similar tests will be correct often enough to justify their administrative efficiency.<sup>103</sup> The post-*Weyerhaeuser* case law demonstrates that applying the same legal tests to anticompetitive conduct in the buyer and seller sides of the market is insufficient to protect competition.

When analyzing competitive effects under the rule of reason, courts could focus on the effects in labor (input) markets, the customer (output) markets, or both. Because of antitrust law's historical pedigree as a consumer welfare prescription, courts have shied away from analyzing competitive effects in restricted labor markets alone. Such analysis is generally confined to cases where the defendant's conduct patently qualifies for per se condemnation, such as naked wage fixing.<sup>104</sup> Instead, courts determining whether a restraint of trade is reasonable either consider welfare effects in both markets or they analyze the output market alone.

*California ex rel. Harris v. Safeway, Inc.* illustrates both approaches to a reasonableness analysis.<sup>105</sup> In *Safeway*, multiple grocery stores entered into an agreement to share revenues in the event union workers went on strike during negotiations.<sup>106</sup> The Ninth Circuit analyzed the agreement itself to determine what antitrust standard to apply.<sup>107</sup> The case deeply fractured the en banc court: only four of the eleven judges joined the plurality opinion; seven other judges joined three separate opinions.<sup>108</sup>

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102. Stucke, *supra* note 7, at 1516–26.

103. Jacobsen, *supra* note 7, at 10–12.

104. See, e.g., *Cordova v. Bache & Co.*, 321 F. Supp. 600, 606–07 (S.D.N.Y. 1970) (analyzing competitive effects where brokerage firms violated antitrust law by collectively agreeing to reduced commissions for employee brokers).

105. 651 F.3d 1118 (9th Cir. 2011) (en banc).

106. *Id.* at 1122–25.

107. *Safeway* is often cited for its reasoning on the limits of the nonstatutory labor exception. E.g., *Int'l Longshore & Warehouse Union v. ICTSI Or., Inc.*, 15 F. Supp. 3d 1075, 1090 (D. Or. 2014). The court distinguished the revenue sharing agreement from the agreement in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), in almost every material way, and concluded that the agreement was outside the scope of the exception.

108. Only the plurality opinion and Judge Reinhardt's dissenting opinion are relevant to the analysis here. Judge Kozinski's dissent criticized the court for issuing what he called an "advisory opinion" on the labor exception given the parties' stipulation that the court dismiss the case if the rule of reason applied. *Safeway*, 651 F.3d at 1140 (Kozinski, J., dissenting). Judge Fisher's opinion concurred in the outcome of the case, but espoused a belief that the court's opinion did not appreciate the full extent of the anticompetitive effects of the revenue sharing agreement. *Id.* at 1139–40 (Fisher, J., concurring).



The plurality concluded that the rule of reason was the appropriate test, focusing on what it considered to be ambiguous competitive effects in the retail grocery market (the relevant output market).<sup>109</sup> Importantly, the court formally declined to evaluate whether lower prices from the agreement were a procompetitive effect. However, this was only because of the case's procedural posture.<sup>110</sup> The court failed to consider the effects of the agreement on the labor market even though the intent of the restraint was to enable the grocers to pay lower wages.<sup>111</sup>

Judge Reinhardt, dissenting in part and concurring in part, weighed the effects of the agreement in both the labor market and the output market.<sup>112</sup> His opinion favored applying quick look analysis rather than the rule of reason.<sup>113</sup> Analogizing to other cases declaring revenue-sharing provisions unreasonable per se, he concluded that the defendants' agreement had manifestly anticompetitive effects in both markets.<sup>114</sup>

Turning to the defendant's proffered procompetitive benefits, Judge Reinhardt rejected the notion that lower prices derived from lower wages could be a procompetitive benefit relevant to analyzing an agreement.<sup>115</sup> Analogizing the profit-sharing agreement to a cartel on the buyer side of the market, he noted, "[A]ntitrust law operates to correct all distortions of competition . . . whether on the buyer side or

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109. *Id.* at 1138–39. This result was particularly surprising because revenue sharing agreements are a way for firms to pool profits (and the agreement here was actually calibrated precisely to share marginal profits), which courts traditionally condemn as per se illegal. Laura Kaplan, *An Implicit Exemption, Implicitly Applied: Blurring the Line of Accommodation Between Labor Policy and Antitrust Law in Harris v. Safeway*, 53 B.C. L. REV. E-SUPP. 181, 189 (2012).

110. *Safeway*, 651 F.3d at 1138 (“The features of the RSP . . . strongly suggest that the agreement ‘might plausibly be thought to have a net pro-competitive effect, or possibly no effect at all on competition.’”) (quoting *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 771 (1999)). The footnote to that sentence stated, “The grocers argue that the RSP has precompetitive benefits in the form of lower prices for consumers as a result of the growers’ ability to negotiate a more favorable contract on labor costs. Because California has not met its burden to show that the RSP is obviously anticompetitive, we need not address the grocers’ procompetitive justification.” *Id.* at 1138 n.17.

111. *Id.* at 1134–39, 1138 n.17.

112. *Id.* at 1144–62.

113. *Id.* at 1150–62.

114. *Id.* at 1144–60.

115. *Id.* at 1161 (Reinhardt, J., concurring in part and dissenting in part) (“[D]riving down compensating to workers in this way is not a benefit to consumers cognizable under our laws as a ‘precompetitive’ benefit.”).

seller side.”<sup>116</sup> Judge Reinhardt’s focus on welfare effects in the labor market distinguishes the fundamental approaches of the plurality and the judges joining Reinhardt’s opinion.<sup>117</sup> Judge Reinhardt argued that characterizing lower prices that result from an anticompetitive agreement in a labor market as a procompetitive justification was “absurd” and would result in less antitrust liability for firms that restrained competition.<sup>118</sup>

Courts were split on whether to weigh anticompetitive effects in labor markets even before *Weyerhaeuser*. To illustrate this, consider the reasoning that courts employed in *Nichols v. Spencer International Press*<sup>119</sup> and *Union Circulation Co. v. FTC*.<sup>120</sup> In *Union Circulation*, the court found a no-switching agreement unreasonable after considering the impact on the magazine-selling industry (the relevant output market) as well as the affected employees.<sup>121</sup> The court discussed several anticompetitive effects of the agreement, including “freez[ing] the labor supply,” “discouraging labor mobility,” and “diminish[ing] competition between existing subscription agencies.”<sup>122</sup> However, the *Union Circulation* court analyzed the labor market merely to show that such the restraint would ultimately harm competition in the output market, rather than considering harm in the labor market as an independent reason to find the restraint illegal.<sup>123</sup> Compare this to the more truncated reasoning in *Nichols*.<sup>124</sup> *Nichols* also considered whether a no-switching agreement among competitors that employed salesmen (encyclopedia salesmen in this case) violated antitrust law.<sup>125</sup> The court quoted *Union Circulation* at length, but ultimately reversed

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116. *Id.* at 1161 (citing *Weyerhaeuser Co. v. Ross-Simmons Hardwood Co.*, 549 U.S. 312, 322 (2007)).

117. Two other judges joined Judge Reinhardt’s opinion. *Id.* at 1144 (Reinhardt, Schroeder & Graber, JJ., concurring in part and dissenting in part).

118. *Id.* at 1162 (“Allowing them to do so would lead to the absurd result that conduct which restrains *more* competition, in the sense that it distorts competition in both buying and selling markets, would be subject to less demanding scrutiny than would be a comparable restraint that just distorted one market.”).

119. 371 F.2d 332 (7th Cir. 1967).

120. 241 F.2d 652 (2d Cir. 1957).

121. *Id.* at 658.

122. *Id.*

123. *Id.*

124. Part of the abbreviated nature of the *Nichols* court’s consideration is due to the procedural posture of the case; the appeal was on a grant of summary judgment for the defendant. *Nichols*, 371 F.2d at 333.

125. *Id.*

summary judgment because of the “effect of the ‘no-switching’ agreement . . . upon the business of supplying encyclopedias and reference books.”<sup>126</sup> The court ignored the anticompetitive effects that the agreements were likely to have on the workers themselves and focused its attention on the welfare of customers in the output market.<sup>127</sup>

In sum, cases from the lower courts do not make clear whether courts should look for anticompetitive effects in the input market, the output market, or both. The output-centric model that the plurality in *Safeway* and the court in *Nichols* typify is inappropriate because they ignore an entire class of consumers: workers. The approach of Judge Reinhardt’s opinion and the court in *Union Circulation* explicitly considering monopsonistic conduct’s effect on labor markets is better, but still imperfect. By directly weighing anticompetitive effects on the labor market against procompetitive effects in the output market, the historical pedigree of output market welfare effects may result in the overweighing of procompetitive effects in the output market. Especially where courts focus on price as a signal of procompetitive benefit, the mixed approach risks overleniency for defendants. The approach for balancing anticompetitive and procompetitive effects which courts have yet to embrace, and which may be most likely to appropriately account for the interest of workers, is focusing on workers’ interests first.

### III. WORKERS FIRST: A PROPOSAL TO MODIFY CONSIDERATION OF PROCOMPETITIVE AND ANTICOMPETITIVE EFFECTS OF EMPLOYER-MONOPSONIST CONDUCT

Courts must reevaluate how they weigh the net anticompetitive effect of a monopsonistic restraint of trade. Section A of this Part proposes how courts should weigh the anticompetitive effects of a restraint in labor markets against their procustomer benefits in output markets. Section B discusses the policy justifications for this analysis. Section C discusses how a court implementing this proposal would

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126. *Id.* at 337.

127. *Id.*

analyze the revenue sharing agreement from *Safeway*<sup>128</sup> and no-switching agreements from *Nichols*<sup>129</sup> and *Union Circulation*.<sup>130</sup>

### A. Workers' Welfare Is First in Line

Because employer restraints of trade tend to decrease prices, courts that look only at the welfare effects on customers in output markets find anticompetitive agreements between employers to have an erroneously inflated procompetitive effect. This Note proposes that where a restraint of trade plausibly affects different groups of consumers in different markets (such as workers and customers), courts should weigh the competitive effects of a restraint only in the markets in which that restraint *directly* occurs, unless the anticompetitive effect in a market is de minimis. If effects are de minimis, courts may consider the effect of a restraint on other related markets. This rule would force courts to consider the welfare of all the consumers (both workers and customers) that a restraint immediately affects, decide whether it has a net anticompetitive effect on those consumers within any specific market, and if so, find that restraint impermissible.

By weighing competitive effects in the market in which a restraint directly occurs, courts will measure the anticompetitive effect on the direct victims of anticompetitive conduct. A horizontal agreement to restrict output,<sup>131</sup> for example, would increase prices for consumers and may decrease wages because it decreases the demand for workers at any wage level. However, any wage effects are incidental to the output restriction. The restriction clearly occurs in the output market, and so a court would consider the welfare of customers first. Where a restriction directly occurs in the labor market, such as an agreement to restrict employment levels, courts should instead start with the welfare in that labor market. If the net competitive effect in the market where a restriction occurs is de minimis, a court should be able to consider competitive effects in the other, related markets.

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128. California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118 (9th Cir. 2011) (en banc).

129. 371 F.2d 332 (7th Cir. 1967).

130. 241 F.2d 652 (2d Cir. 1957).

131. Of course, a naked horizontal agreement to restrict output is per se illegal. This example merely illustrates that this Note's proposal does not affect the analysis of agreements that restrain trade in an output market. An output restriction could be subject to the rule of reason if a court was presented with a case where the facts of the case suggested a horizontal restriction would not "always or almost always tend to restrict competition," as in *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 99–104 (1984).

The appropriate size of a de minimis effect is admittedly somewhat nebulous. An effect will certainly be de minimis if the welfare losses are insufficient to change the behavior of market actors. A “changing behavior” standard would need to be broadly construed—customers with an extremely inelastic demand (such as for a necessity) will not change their consumption behavior in the relevant market in response to price changes, but they will buy fewer goods *elsewhere*, and that would demonstrate an effect that is not de minimis. Ultimately, the size of a de minimis welfare effect would likely need to be established with precedent. However, the inability to precisely define a threshold does not make this proposal inoperable. Courts apply a nebulous de minimis standard in a variety of areas of the law.<sup>132</sup> As a result, courts are well equipped to determine what direct effect on competition is small enough that it could consider effects on other markets as well. Admittedly, a “de minimis economic harm” is somewhat more technical than a de minimis effect may be in other legal analyses. However, the analysis is no more technical than other issues in antitrust economics that antitrust courts routinely handle.

As an illustration of my solution in practice, consider the restraint discussed in Section III.B where ship owners colluded to pay sailors lower wages. Assume that the graphs capture the full scope of anticompetitive and procompetitive effects. Under the traditional, yet mistakenly applied rule of reason analysis, a court would look at the loss to workers in the labor market, and compare it to the indirect gain to customers in the output market to determine whether the agreement had a net competitive effect. The aggregate additional surplus to customers in Figure 4 is roughly equal to the loss to workers in Figure 3.<sup>133</sup> In this case, a court would likely conclude that the agreement was not a violation of the rule of reason.

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132. *E.g.*, *Brown v. Thomson*, 462 U.S. 835, 841 (1983) (discussing de minimis effects on voting power); *United States v. Von's Grocery Co.*, 384 U.S. 270, 294 (1966) (discussing de minimis effect on competition of a past merger).

133. *See* Figures 3 and 4, *supra* Section II.B. The graphs lack units, but the reader can assume they are drawn on the same scale. Generally, roughly equal gains to customers and losses to workers is possible, but not likely. It assumes small deadweight loss in the welfare market, and a large increase in demand from small price increases. Such could occur for a small change in wages and prices if the labor supply curve was very inelastic relative to the labor demand curve. More likely is a situation where workers lose more than buyers gain, but the court weighs the gains to customers more heavily due to the persistent bias toward benefits to customers in antitrust. *Cf.* Jacobsen, *supra* note 7, at 1 (discussing how courts focus on the effects of prices to end customers over the anticompetitive effects of monopsony).

However, I propose courts start by looking only at the welfare of workers. Because the restriction has an unambiguous and large anticompetitive effect on workers, it would violate the rule of reason. There would be no need to consider the price decreases for customers. Suppose instead the ship owners' restriction only had a de minimis impact on worker wages;<sup>134</sup> the court would consider the effect on customers. An example of such an agreement could be requiring all job applicants to attend sailor training that would increase each sailor's productivity. Assume that such a training would be too expensive for any firm to hold individually, but feasible for all firms to fund together. Such a training agreement would have a de minimis negative effect on workers but would benefit customers, because more productive workers increase customer surplus.<sup>135</sup> If customers benefited while workers did not lose, the court could conclude that the restriction is permissible under the rule of reason.

### *B. The Case for Prioritizing Worker Welfare*

As this Note has already stated, the purpose of antitrust law is to protect competition, but the meaning of competition is nebulous.<sup>136</sup> Regardless of whether total welfare or the consumer welfare standard is the appropriate measure of net competitive effect,<sup>137</sup> a body of law that protects competition should not allow firms to engage in conduct that restricts trade severely in one part of the supply chain merely because it prioritizes end customer benefits.<sup>138</sup> As a class of consumers, workers also deserve protection from anticompetitive employer agreements.

Congressional intent supports prioritizing the interests of workers over customers when analyzing anticompetitive restraints in labor markets. Unions are inherently anticompetitive; a union is a

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134. An agreement among competitors to require job applicants to attend a training program at the company's expense, for example, could be a small restriction on trade that results in going to the second stage of analysis. The training could cause workers to produce more or higher quality goods (and thus cheaper in a cost per unit of quality sense), providing lower costs to workers with only a minimal effect on workers.

135. *See infra* Section III.B. Increasing worker productivity shifts the supply curve outward, increasing the equilibrium quantity and decreasing the equilibrium price.

136. *See supra* Section III.A.

137. *See supra* Section III.A.

138. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 989 (9th Cir. 2000) ("Clearly mistaken is the occasional court that considers low buying prices pro-competitive or that thinks sellers receiving illegally low prices do not suffer antitrust injury.").

combination of workers jointly setting wages and other work conditions, just as a cartel is a combination of firms setting prices together.<sup>139</sup> As a result, the existence of unions increases the wages that firms pay their workers, which in turn results in price increases for customers.<sup>140</sup> Nonetheless, labor law staunchly defends the ability of workers to create unions. When antitrust restrictions would deter union conduct, Congress has decided that labor law carries more weight.<sup>141</sup> Thus, the labor exceptions to antitrust law<sup>142</sup> demonstrate a congressional decision that the welfare gains to workers from increased wages and other improved terms of employment outweigh the costs to customers in the output market from the resulting increased prices. Given that Congress protects workers in one class of anticompetitive conduct, it is reasonable to structure antitrust law to protect workers from conduct with parallel effects. Restraints of trade in labor markets are the converse of unions, trading lower wages for lower prices.

However, it is possible that Congressional intent extends only to weighing the interests of workers over customers in the special case of union activity. Even though unions engage in political activities, the aims of unions are primarily economic.<sup>143</sup> Thus, Congress supports the economic mission of unions (advancing the welfare of workers despite the potential economic effects on firms and customers) by favoring them in antitrust law. Unions are only special in antitrust because Congress has expressed a legislative preference for workers over other economic actors. It is thus appropriate for courts to weigh workers over other actors when firms engage in conduct that affects workers at the expense of other groups.

Further, the welfare economics of restricting competition in employment markets supports worker protection. Economists generally agree that individuals exhibit diminishing marginal utilities of wealth—that is, each additional dollar an individual receives makes

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139. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996) (describing unions as an anticompetitive agreement that labor law welcomes).

140. See Barry T. Hirsch, *Union Coverage and Profitability Among United States Firms*, 73 REV. ECON. STAT. 69, 73 (1991) (discussing how unions result in price increases because they increase labor costs).

141. See Clayton Act § 6, 15 U.S.C. § 17 (2012); *Pro Football*, 518 U.S. at 237 (“[F]ederal labor law’s goals could never be achieved if ordinary anticompetitive effects of collective bargaining were held to violate the antitrust laws.” (internal quotation marks omitted)).

142. See *supra* Section I.B.

143. Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1025 n.218 (2011).

them a little less well off than the previous dollar did.<sup>144</sup> Diminishing marginal utility of wealth thus implies that when two individuals lose equivalent amounts of money, the individual for whom the loss was a greater portion of his or her wealth suffers a greater loss.<sup>145</sup> Generally, the wages that workers lose as a result of anticompetitive conduct will be larger than the price cuts for customers.<sup>146</sup> Where the monopsonist also has market power in the output market, the price decrease passed on to customers will be even smaller than in a competitive output market.<sup>147</sup> Because wages likely represent a larger portion of workers' wealth than the additional wealth consumers gain from lower prices, workers lose more welfare than customers gain.

Moreover, behavioral economics suggest that the losses to workers from wage reductions will hurt workers more than the gains that customers will receive from lower prices.<sup>148</sup> Behavioral economists have recognized that individual utility is relative to a reference point like the status quo; losses relative to that reference point cause a welfare loss about twice the size of the welfare gain from an equivalent gain.<sup>149</sup> Put simply, losses hurt more than equivalent gains feel good. Because monopsonistic conduct results in losses for workers and gains for customers relative to the competitive equilibrium, the total net effect on welfare that consumers experience is even more likely to be negative. To be sure, behavioral economics has not been universally welcomed in antitrust law.<sup>150</sup> But courts have entertained behavioral economics

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144. See Richard A. Easterlin, *Diminishing Marginal Utility of Income? Caveat Emptor*, 70 SOC. INDICATORS RES. 243, 243 (2005) ("Few generalizations in the social sciences enjoy such wide-ranging support as that of diminishing marginal utility of income."); see also VARIAN, *supra* note 93, at 177 (stating that risk aversion is equivalent to diminishing marginal utility of wealth); Nancy Ammon Jianakoplos & Alexandra Bernasek, *Are Women More Risk Averse?*, 36 ECON. INQUIRY 620, 624 (1998) (finding that people exhibit risk aversion).

145. See Sarah B. Lawskey, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904, 917–19 (2011) (discussing the implications of declining marginal utility of wealth, including that gains and losses hurt relatively less if they are a smaller part of an individual's wealth).

146. See *supra* Section II.B.

147. *Id.*

148. Cf. Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039, 1047 (1991) (discussing loss aversion, the tendency of economic losses to "hurt" more than equivalent gains feel "good").

149. *Id.*

150. See Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517, 1548 (2012) ("Behavioral economics does not add significant explanatory power concerning the behavior of firms over and above existing theories."); see also James C. Cooper & William E. Kovacic, *Behavioral Economics and Its Meaning for Antitrust Agency Decision Making*, 8 J.L. ECON. & POL'Y 779, 800 (2012) (cautioning against



arguments in antitrust before, generally in cases where neoclassical economic analysis would sharply diverge from what the court believes a “real” customer would do.<sup>151</sup> Here, it is unlikely that customers weigh price decreases in the same way that workers weigh wage increases because wages are the primary source of most workers’ incomes; as a result, equivalent economic losses to workers likely outweigh the gain.<sup>152</sup>

Some commentators have suggested that the output market-centric model that the plurality in *Safeway* and the court in *Nichols* typify is appropriate under the Sherman Act. Specifically, they argue that restraints of trade in input markets should be illegal only when the restraint will affect customers in output markets.<sup>153</sup> If the role of antitrust law is to protect consumers, such a rule may have merit in cases where the input market involves a firm selling component goods to another firm who will then sell those goods to customers in the output market. But such an output-centric approach is completely contrary to the goals of antitrust law where the relevant input market is the market for labor. As I argue above, worker welfare is part of consumer welfare<sup>154</sup>; ignoring the anticompetitive effects that restraints of trade have on workers and focusing instead on lower prices for customers betrays the principles underlying antitrust law. Moreover, even before *Weyerhaeuser*, the Supreme Court squarely held that seller conduct falls within the scope of antitrust laws in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*<sup>155</sup> Lower courts have repeatedly cited

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behavioral economics in antitrust because antitrust regulators are subject to the very behavioral biases that behavioral antitrust would have to adjust for).

151. See, e.g., *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 473–76 (1992) (expressing disbelief that most customers of copy machines have the technical expertise and information to engage in lifecycle pricing, despite the neoclassical assumption that consumers do so); *United States v. Microsoft*, 253 F.3d 34, 71 (D.C. Cir. 2001) (recognizing that consumers choose the default program even where they might prefer another).

152. Among the chief objections against behavioral economics in antitrust is that it fails to “generate intellectually consistent policy implications.” Wright & Stone, *supra* note 150, at 1549. Where, as here, the implication is clear that losses weigh heavier than equivalent gains, it functions to consistently weigh against anticompetitive conduct that would seem to have roughly equivalent effects on workers and buyers.

153. J. Thomas Rosch, *Monopsony and the Meaning of “Consumer Welfare”: A Closer Look at Weyerhaeuser*, 2007 COLUM. BUS. L. REV. 353, 365–68 (2007).

154. See *supra* Section II.A.

155. See *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948):

It is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers. . . . The statute does not

*Mandeville Island* as recognizing that a firm can violate antitrust law exclusively through conduct in an input market.<sup>156</sup>

There could also be circumstances where analyzing anticompetitive effects in an input market compels a court to condemn a restraint of trade that truly is socially beneficial, even in light of the policy considerations discussed above.<sup>157</sup> However, antitrust doctrine has long recognized that the possibility that a rule occasionally compels an incorrect conclusion does not justify its abandonment where the rule compels the correct result generally.<sup>158</sup> Antitrust doctrines regularly prioritize judicial economy so as to save litigants time and money.<sup>159</sup> This proposal fits well within that tradition.

### *C. Revisiting Safeway and Restraints of Trade Affecting Labor Markets*

To illustrate how this solution would work practically, consider *California ex rel. Harris v. Safeway*, discussed at length above.<sup>160</sup> To determine the appropriate method of antitrust analysis, the *Safeway* court needed to consider the potential procompetitive versus anticompetitive effects of the revenue sharing agreements at issue.<sup>161</sup> The revenue sharing agreement is appropriately classified as a restriction on the labor market, based on the defendants' intent to use the agreement to pay lower wages.<sup>162</sup> As a result, under my solution,

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confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize outlawed acts because they are done by any of these.

156. *E.g.*, *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1134 (10th Cir. 2002).

157. For example, if labor supply was very inelastic and demand of the final product was very elastic, an agreement that moderately decreased wages could result in very large gains to customers' welfare and small decreases in worker welfare.

158. *California ex rel. Harris v. Safeway*, 651 F.3d 1118, 1151 (9th Cir. 2011) (en banc) (Reinhardt, J., dissenting in part and concurring in part).

159. *Id.*

160. *See generally id.*; *supra* Section II.C.

161. The court's statement of the legal test for whether quick look analysis applies didn't suggest that they were performing any balancing, but its actual reasoning appears to have done just that. *See Safeway*, 651 F.3d at 1138 (characterizing quick look analysis as appropriate when a rudimentary knowledge of economics would allow an observer to conclude that an agreement is anticompetitive, and then turning to discuss whether the agreement would in fact have net anticompetitive effects including its effect on prices).

162. This is not immediately obvious. Revenue sharing, on its face, seems to be an output market restriction because of the tendency to reduce competition in price. However, since *Board of Trade of Chicago v. United States*, the Supreme Court has acknowledged that "the reason for adopting a restraint" is just as important in characterizing a restraint as "the nature of the restraint and its effect." 246 U.S. 231, 235 (1918). Because the intent of the revenue-sharing

the court considering whether to apply quick look or rule of reason analysis (and if rule of reason analysis is appropriate, considering the net competitive effect of the restraint) would first consider the effect of the restraint on the labor market. The effect of this particular restraint was not de minimis: the defendants themselves argued the restraint would allow them to pay smaller wages in order to lower prices.<sup>163</sup> Therefore, quick look analysis would have been appropriate, and, under my proposal, the involved agreement would have been unlawful. Assuming that the case proceeded to full rule of reason analysis, the same result would occur. The court would more carefully consider the competitive effects and likely examine more empirical evidence, but it would still find a sizeable effect on workers without a mitigating procompetitive benefit. Thus, this solution allows easy cases to remain easy—anticompetitive conduct against laborers should not be permissible simply because it lowers prices, and this rule ensures this result.

Further, this solution resolves the tension from *Nichols* and *Union Circulation* about how those courts should have handled “no-switching” agreements.<sup>164</sup> In both cases, the agreements had the effect of decreasing labor mobility, which would ultimately result in suppressed wages. The *Union Circulation* and *Nichols* courts both came to the correct conclusion—that the no-switching agreement was unlawful in *Union Circulation* and that summary judgment was improperly granted in *Nichols*. Under my proposal, however, the courts would have employed different analyses. In both cases, the effects on the output market would have been initially ignored. Instead, the courts would consider the effect of no-switching agreements only on the workers (input market). Given that *Union Circulation* found the effects on workers to be substantial, when it considered the markets jointly, the same result would hold but with more focus on the welfare of workers. The analysis in *Nichols*, however, would differ remarkably. The court would instead have focused on workers.<sup>165</sup> Because the agreements and the industries in the two cases were very similar, under

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provision was to increase the market power of the grocery store chains in the labor markets, it is appropriately characterized as a labor market restraint.

163. *Safeway*, 651 F.3d at 1138 n.17.

164. *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 332 (7th Cir. 1967); *Union Circulation Co. v. FTC*, 241 F.2d 652, 652 (2d Cir. 1957).

165. To be fair to the court in *Nichols*, it did cite a large portion of the opinion in *Union Circulation. Nichols*, 371 F.3d at 336–37.

my proposal, it is likely the effect of no-switching agreements on workers would have had a net anticompetitive effect.<sup>166</sup>

### CONCLUSION

Monopsony continues to challenge antitrust law despite *Weyerhaeuser*. Given that anticompetitive agreements among employers benefit one group of consumers (customers) while hurting another consumer group (workers), antitrust law forces courts to weigh the interests of these two groups of consumers against one another. Weighing the interests of two groups of consumers is complex and requires courts to choose whose economic welfare matters more. Currently, courts are improperly allowing monopsonists to engage in anticompetitive conduct merely because it results in lower prices.<sup>167</sup> Currently, courts directly weigh the welfare of both customers and workers against each other. Because antitrust law traditionally focuses on customers and anticompetitive conduct in labor markets causes lower prices, direct comparison of the welfare is insufficient. Extending the antitrust history of partial equilibrium analysis, I propose that courts consider the welfare of workers first, then customers' welfare only if workers experience a *de minimis* harm. This proposal appropriately weighs the interests of workers against customers who receive a price cut from monopsonistic conduct. Further, this proposal sits well with antitrust law's long history of providing different treatment to anticompetitive conduct in labor. This rule does not solve every problem that a mirror treatment of monopoly and monopsony creates. Yet, this solution both operates within the established *Weyerhaeuser* framework to apply current antitrust standards in new ways and pursues antitrust law's goal of protecting competitive markets.

*Clayton J. Masterman\**

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166. *Compare Union Circulation*, 241 F.3d at 654–56 (agencies that sold magazine subscription entered into no-switching agreements covering salesmen), *with Nichols*, 371 F.2d at 333–34 (companies selling encyclopedias entered into no-switching agreements covering salesmen).

167. Jacobsen, *supra* note 7, at 1.

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