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MULTIEMPLOYER BARGAINING RULES

*Douglas L. Leslie**

I. INTRODUCTION

IN this Article, I analyze *Charles D. Bonanno Linen Service, Inc. v. NLRB*,¹ a labor law case decided by the United States Supreme Court in 1982. I contend that the application of an economic analysis of legal rules to labor law issues offers useful and interesting ways of thinking about these issues. The particular rules that I analyze, those governing the rights of parties to withdraw from multiemployer labor negotiations, provide insight into how courts should interpret behavior and which rules should be chosen within the multiemployer setting.

In *Bonanno*, the Supreme Court approved a National Labor Relations Board (Board) rule that an employer who, having consented to multiemployer bargaining, thereafter attempts to withdraw from multiemployer bargaining without the union's consent due to a bargaining impasse commits an unfair labor practice. The withdrawal is thus unsuccessful and the employer is bound to any bargaining agreement reached by the union and the multiemployer bargaining group.²

Multiemployer bargaining is a common labor practice.³ The term ordinarily refers to negotiations between a group of employers on one side and a union on the other.⁴ The employers have two common characteristics: they are in the same product market, and their employees are represented by the union.⁵ A bargaining agreement reached by the multiemployer group and the union binds the union and each employer that is a member of the group.

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¹ 454 U.S. 404 (1982).

² *Id.* at 405-06.

³ Department of Labor statistics indicate that 42% of major collective-bargaining agreements covering 1000 or more employees are multiemployer agreements. See Bureau of Labor Statistics, U.S. Dep't of Labor, Bull. No. 2065, Characteristics of Major Collective Bargaining Agreements—Jan. 1, 1978, at 12 table 1.8 (1980) [hereinafter Labor Statistics], cited in *Bonanno*, 454 U.S. at 410 n.4. Given that employers and unions choose multiemployer bargaining, inter alia, to reduce negotiating costs, see *id.* at 409 n.3, one would expect that figure to be even greater for smaller employers. See *infra* note 78 and accompanying text.

⁴ Occasionally, more than one union will meet with the multiemployer group at the same negotiations.

⁵ The employers are often organized as a trade association.

Section 8 of the National Labor Relations Act (Act)⁶ provided the basis for the Board's establishing the rules of multiemployer bargaining.⁷ Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."⁸ The Board has always held that multiemployer bargaining is consensual on both sides of the bargaining table; therefore, either the employer or the union violates the Act if one side seeks to coerce the other into commencing multiemployer bargaining.⁹

Before 1958, the Board permitted employers and unions to withdraw from multiemployer bargaining unless an agreement had actually been reached.¹⁰ In that year, the Board changed its policy and ruled that when an employer and a union have agreed to engage in multiemployer bargaining, neither can withdraw once negotiations have begun, absent the consent of the other side or "unusual circumstances."¹¹ In the early 1970s, the Board held that a bargaining "impasse"¹² between a union and a multiemployer group is not so unusual as to justify unilateral employer withdrawal from multiemployer bargaining.¹³ This is the rule even if the union conducts a "whipsaw" strike¹⁴ against and signs an "interim" agreement¹⁵ with one or more of the

⁶ Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

⁷ Labor Management Relations Act, ch. 120, § 8, 61 Stat. 141-42 (1947) (current version at 29 U.S.C. § 158 (1982)).

⁸ Id. § 8(a)(5), 61 Stat. 141 (1947) (current version at 29 U.S.C. § 158(a)(5) (1982)).

⁹ Coercing the other side into commencing multiemployer bargaining has been held to interfere with the party's right under section 7 of the Act to select its own bargaining representative. *United Mine Workers, Local No. 1854 (AMAX Coal Co.)*, 238 N.L.R.B. 1583 (1978).

¹⁰ See *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 410 (1982).

¹¹ *Retail Associates, Inc.*, 120 N.L.R.B. 388, 395 (1958).

¹² An impasse occurs when parties reach irreconcilable differences after exhaustive negotiation. See *Murphy, Impasse and the Duty to Bargain in Good Faith*, 39 U. Pitt. L. Rev. 1, 1-2 (1977).

¹³ *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23-24 (1973), enforcement denied, 500 F.2d 184 (5th Cir. 1974) (denying enforcement on fairness grounds because the company could not have anticipated this new rule in light of the Board's prior rulings).

¹⁴ This is called a whipsaw strike because a union strikes against an employer while not striking against some of the employer's competitors in the multiemployer bargaining unit. Thus, the struck employer may suffer considerable losses in the product market. As early as 1957, the Supreme Court held that if a union strikes against one employer in a multiemployer bargaining unit, the other employers may "lock out" their employees (that is, temporarily shut down) without violating labor laws. *NLRB v. Truck Driver's Local No. 449 (Buffalo Linen Supply Co.)*, 353 U.S. 87 (1957). Moreover, in *NLRB v. Brown*, 380 U.S. 278 (1965), the Court held that the employers in a whipsaw strike situation violate no labor laws if they lock out their union employees and continue to operate the business using temporary replacement employees. *Id.* at 280.

¹⁵ An interim agreement is one in which the union agrees that its members will continue to work for the signing employer (while the union strikes against some other employers in the

members of the multiemployer group.¹⁶

In *Bonanno*, the Teamsters Union (Union) represented drivers and helpers employed by the Bonanno Linen Service Company (Bonanno). The Union also represented drivers and helpers employed at competing firms in the area. Bonanno had been a member of a ten-firm multiemployer bargaining group (Group) for several years and was a party to a collective bargaining agreement that expired in the spring of 1975. In March and April 1975, the Union and the Group held ten negotiating sessions. On May 4, the Union's membership rejected a tentative new bargaining agreement. The major disagreement was over the membership's desire to be paid by commission and the employers' desire to continue to pay on an hourly basis. On May 15, the parties stipulated that they had reached impasse. The Union struck against Bonanno on June 23, and the other employers promptly locked out their drivers. Bonanno hired permanent replacements for all of its striking drivers.¹⁷ On November 21, Bonanno notified the Union and the other members of the Group that it was withdrawing from the multiemployer negotiations.¹⁸

Shortly thereafter, the other members of the Group ended their lockout and multiemployer bargaining resumed, without Bonanno. The Group signed a new agreement in April 1976, which was given retroactive effect to April 1975.¹⁹

Filing unfair labor practice charges against Bonanno, the Union alleged that Bonanno's withdrawal was ineffective and that Bonanno was bound by the agreement. Bonanno denied that it was bound by the new agreement. The Board affirmed the decision of the administrative law judge and held that no unusual circumstance excused Bonanno from the Group. It ordered Bonanno to sign the multiemployer bargaining agreement and to give it retroactive effect. The United States Court of Appeals for the First Circuit

group), and in which the signing employer agrees to be bound by the bargaining agreement to which the group eventually agrees and (ordinarily) to pay retroactively the new agreement's wage rate.

¹⁶ An "unusual circumstance" does occur, however, where the bargaining unit has been substantially fragmented. See *Connell Typesetting Co.*, 212 N.L.R.B. 918 (1974). One instance of this is where the union has signed permanent (that is, non-interim) agreements with one or more of the multiemployer group's firms. See *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 414-15 (1982) (citation omitted). Another unusual circumstance occurs where an employer withdraws from the multiemployer group because the employer's existence as a viable business entity has ceased or is about to cease. *Western Pac. Roofing Corp.*, 244 N.L.R.B. 501, 507 (1979), *aff'd*, 669 F.2d 1332 (9th Cir. 1982).

¹⁷ See *supra* note 14. It is unclear whether it would have been lawful for the other employers to have hired permanent replacements.

¹⁸ See *Bonanno*, 454 U.S. at 407.

¹⁹ *Id.* at 408.

enforced the Board's order against Bonanno, and a divided Supreme Court affirmed.²⁰

In his majority opinion for the Court, Justice White approved the Board's dual policies of preserving the voluntary nature of multiemployer bargaining rules and of seeking "to further the utility of multiemployer bargaining as an instrument of labor peace by limiting the circumstances under which any party may unilaterally withdraw during negotiations."²¹ Justice White also agreed with the Board's assessment of the nature of a bargaining impasse. Impasses recur in labor negotiations, and most are only temporary deadlocks. Moreover, a party can strategically initiate impasses in negotiations in order "to further, rather than destroy, the bargaining process."²² If the Board were to allow an impasse to justify withdrawal from multiemployer bargaining, parties not completely satisfied with the shape of a developing new agreement would have an incentive to precipitate an impasse in order to flee the multiemployer group and avoid the agreement.

Deferring to the Board's decision,²³ Justice White held that the following findings were sufficient to survive judicial review. First, strikes and interim agreements often occur separately from impasse. Second, because the signers of interim agreements continue to have a substantial stake in the outcome of multiemployer bargaining, an interim agreement does not fragment the unit in the way that a permanent agreement does. Third, the unequal application of economic pressure (for instance, a strike against some but not all of the employers in the group, perhaps followed by a lockout and some interim agreements) is not inconsistent with the vitality of the multiemployer bargaining unit *qua* unit.²⁴

In his concurring opinion, Justice Stevens wrote:

The Court's holding does not preclude an employer from explicitly conditioning its participation in group bargaining on any special terms of its own design. Presumably, an employer could refuse to participate in multiemployer bargaining unless the union accepted the employer's right to withdraw from the bargaining unit should an impasse develop. The union or the other members of the bargaining unit of course may reject such a condition; in such a case, however,

²⁰ *Id.* Justice White wrote for himself and four other justices. Justice Stevens concurred separately. Chief Justice Burger dissented in an opinion joined by Justice Rehnquist. Agreeing in part with the Chief Justice's opinion, Justice O'Connor dissented separately in an opinion joined by Justice Powell.

²¹ *Id.* at 412.

²² *Id.* (quoting *Charles D. Bonanno Linen Service, Inc.*, 243 N.L.R.B. 1093, 1094 (1979), *aff'd*, 454 U.S. 404 (1982)).

²³ *Id.* at 409-10 (citing *Bonanno*, 243 N.L.R.B. at 96).

²⁴ *Id.* at 414-15.

the employer simply would be forced to choose between agreeing to be bound by the terms of group negotiation without a right of withdrawal at impasse, or forgoing the advantages of multiemployer bargaining and bargaining on its own.²⁵

In his dissent, Chief Justice Burger argued that a rule permitting unilateral employer withdrawal from multiemployer bargaining when an impasse has occurred is preferable to the Board's rule. The Chief Justice suggested that he might also support a rule that focused on the severity and length of the impasse and on the presence of interim agreements. Complaining that the majority had adopted a too deferential standard of review ("uncritical judicial rubberstamping"), Chief Justice Burger disagreed with the Board at several critical steps in the Board's argument in support of its rule.²⁶ The bottleneck in negotiations in this case, argued the Chief Justice, was no "temporary . . . hiatus;"²⁷ rather, it was a "complete breakdown in negotiations coupled with a prolonged strike and lockout."²⁸ The Board's rule would continue to hold an employer in multiemployer bargaining "no matter how long it lasts or how far apart the parties remain."²⁹ The Chief Justice did not share the Board's conclusion about the effect of interim agreements. He wrote that interim agreements fragment multiemployer units because those signing them "are able to operate fully while their competitors are hampered by a strike or defensive lockout; employers covered by interim agreements have a natural economic interest in prolonging the deadlock, thereby increasing their competitive advantage over the employers who remain in the multiemployer group."³⁰

Withdrawal by an employer from multiemployer bargaining after impasse does not necessarily frustrate bargaining. Instead, argued Chief Justice Burger, withdrawal can facilitate bargaining and the reaching of an agreement,³¹ as the *Bonanno* case exemplifies. To reach an "impasse justifies withdrawal" test, the Chief Justice disposed of two objections raised by the Board. First, the test is workable because impasse triggers other rights under labor law, and the Board has defined impasse in those other contexts. Second, application of the duty to bargain in good faith can foreclose strategic creation of impasse by an employer in order to justify withdrawal from the multiemployer bargaining unit.³²

²⁵ *Id.* at 420.

²⁶ *Id.* at 423.

²⁷ *Id.* at 422 (quoting *Bonanno*, 243 N.L.R.B. at 1093).

²⁸ *Id.*

²⁹ *Id.* at 427.

³⁰ *Id.* at 424.

³¹ *Id.*

³² *Id.* at 425-27.

In her dissent, Justice O'Connor wrote:

The problem with the Board's approach is that it reasons by definition. That is, while an impasse may be a temporary deadlock, a deadlock cannot be made temporary simply by calling it an impasse. Thus, while the rule may be efficient, it does not contribute to principled decisionmaking. This case provides an excellent example of the result which obtains when the Board applies a general rule without analysis of the particular fact situation.³³

Alternatively, Justice O'Connor suggested that "the Board should examine the circumstances surrounding and following an impasse to determine whether an unusual circumstance sufficient to justify withdrawal has occurred. . . ."³⁴ Justice O'Connor mentioned several issues that she considered relevant to such a determination in the case at hand. First, this was more than a "temporary lull" in negotiations—there had been six months of deadlock at the time that Bonanno withdrew from the Group.³⁵ Second, no finding was made "whether, when Bonanno withdrew, the parties were likely to have broken the impasse."³⁶ Third, there was no inquiry as to whether either the union or the employers had "additional economic weapons which, if used, might have ended the impasse."³⁷ Fourth, there was no suggestion by the Board or any party "that Bonauno precipitated the May 15 impasse as a means to excuse its withdrawal from" the Group."³⁸ Fifth, the majority's conclusion is even less likely to be correct when "applied to a highly competitive industry which relies upon skilled workers and counts heavily on repetitive patronage."³⁹ An interim agreement gives a powerful competitive advantage to an employer who is permitted by the union to sign one, and that employer will attempt to capitalize on the advantage by prolonging the deadlock. Sixth, the Board ought to have determined what percentage of the multiemployer group's work force was covered by interim agreements during the deadlock—the larger the percentage, the greater the effect of the interim agreements to shatter the unit.⁴⁰

³³ *Id.* at 428.

³⁴ *Id.* at 427.

³⁵ *Id.* at 428.

³⁶ *Id.* at 429.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 430.

⁴⁰ *Id.*

II. PRECISE RULES VERSUS MULTIFACTORED RULES

Justice O'Connor is surely correct to suggest the importance of determining whether the Board's rule allows withdrawal for any impasse, for no impasse, or for impasse in certain circumstances.

Each type of rule has distinctive advantages and disadvantages.⁴¹ Justice O'Connor's opinion suggests that although "bright line" rules are more efficient, they are inferior to rules that consider more facts.⁴² Although traditional analytical methodology of labor law takes into account that some rules are *per se* whereas others use a case-by-case analysis, this traditional methodology promotes little appreciation of what is at stake in determining the appropriate rule.

Legal rules can be arrayed along a spectrum. At one end of the spectrum is the precise rule,⁴³ which considers only a single, easily determined fact. At the other end of the spectrum is the multifactored rule, which considers and ranks many relevant facts. The purpose of every rule is to implement a standard or embody a policy. A standard can come from any source of law, such as a statute or a common law decision.

The following example illustrates this terminology. Consider the control of the speed of automobiles on highways. Suppose the standard is optimizing swift, individualized transportation of people and goods by automobile while also preserving safety. A rule permitting automobiles to go fifty-five miles per hour (mi/h) but no faster is a precise rule. It relies on a single fact that, in the day of the radar gun, is easily determined. On the other hand, an example of a multifactored rule in this context would be as follows: "Automobiles may travel at a speed no greater than is reasonable under the circumstances. Such circumstances include: (a) pavement condition, (b) number of cars on the highway, (c) the speed of other cars on the highway, (d) visibility conditions, (e) eyesight and reflexes of the driver generally, (f) the condition of the driver at the time (for example, lack of sleep)."

The aptness of any rule depends on how well it implements the standard. In this analysis, the standard is "given."⁴⁴ Thus, the alternative rules in the automobile speed example would be evaluated differently if the standard

⁴¹ See Ehrlich & Posner, *An Economic Analysis of Rulemaking*, 3 *J. Legal Stud.* 257 (1974). Although my analysis in this Article relies heavily on that proposed by Ehrlich and Posner, I have made several alterations significant to my analysis.

⁴² See *Bonanno*, 454 U.S. at 427 (O'Connor, J., dissenting).

⁴³ A "per se" rule is not necessarily precise. For example, antitrust law has a "per se" rule against price-fixing, see *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940), but deciding whether a particular practice is "price fixing" is clearly a multifactored inquiry.

⁴⁴ For a discussion of the controversy surrounding the identity and complexity of the standard, see *infra* notes 98-105 and accompanying text.

were one of accommodating swift, individualized transportation by car and reducing dependence on foreign oil.

The fewer and simpler (that is, knowable, discoverable, and provable) the facts to which legal consequences attach, the more precise the rule.⁴⁵ The standard is implemented by a rule that causes parties subject to the rule to adapt their future behavior. When deciding whether to engage in particular conduct, according to an economic model,⁴⁶ an individual multiplies the subjective probability that his conduct will be discovered and prosecuted by the subjective probability of being convicted of an offense (a crime, tort, breach of contract, unfair labor practice, and so forth) and by the legal, social, and psychological remedy imposed as a sanction for the conduct. To this total is added the subjective probability of being discovered and prosecuted multiplied by the cost of mounting a defense. The sum of these two quantities is then compared to the subjective prediction of the benefit level from the conduct under consideration. Within the context of this calculus, the costs and benefits of precise and multifactored rules can be described.

If concealability/discoverability is held constant,⁴⁷ the advantages and disadvantages of precise and multifactored rules turn on behavior-adaptive and process effects. The more precise a rule, the greater the certainty whether it will apply to a given activity or transaction. Thus, the subjective probability of "conviction" for engaging in the activity is high, and the subjective probability of being erroneously (mistakenly) convicted is low. With the precise 55 mi/h speed limit, it is certain that if driving at more than 55

⁴⁵ Legal rules are ordinarily considered to be tests for deciding whether to apply a sanction, which in turn is used to deter socially objectionable future behavior. But rules, both social and legal, are also used to encourage socially desirable behavior and to distribute benefits. Thus, rules exist for who will be invited to a cocktail party, admitted to a university, granted a tax deduction, given money because of a permanent disability resulting from an industrial accident, and so forth.

⁴⁶ See Polinski, *Private Versus Public Enforcement of Fines*, 9 *J. Legal Stud.* 105 (1980); Stigler, *The Optimum Enforcement of Laws*, 78 *J. Pol. Econ.* 526 (1970).

⁴⁷ The choice between a precise and a multifactored rule has an uncertain effect on the subjective probability of being caught and prosecuted. In the extreme case where liability turns on a single, simple fact, the subjective probability of being discovered and prosecuted depends on the concealability of that fact. Assuming that there is positive gain for the prosecutor from a successful prosecution, then a rule that turns on such a discoverable fact raises the conviction probability closer to 100%.

Note that by using the term "prosecutor," I do not necessarily mean a government official. For example, a private party suing for a breach of contract remedy would be a prosecutor under this terminology.

Where many facts are relevant to the imposition of a sanction, the probability of conviction may decrease. As the number of discoverable, relevant facts increases, however, the probability that the conduct will come to the attention of the prosecutor may also increase.

mi/h is prosecuted, there will be a conviction.⁴⁸ It is equally certain that driving at 54 mi/h will not lead to a mistaken conviction. (Of course, as measurement techniques become less certain, the 55 mi/h rule becomes less precise.)

If the single, simple fact that determines liability with the precise rule is a perfect talisman for the conduct that the policymaker seeks to capture—that is, if it corresponds perfectly to the standard—then so far as behavior-adaptive effects are concerned, it is the apt rule.

There are also beneficial process effects with a precise rule. Litigants are less likely to have differing predictions of outcome probabilities where the rule is precise, thereby resulting in less litigation. (This treats as constant any advantage that the prosecutor or the defendant receives from delaying the outcome of litigation.)

What happens when a precise rule does not perfectly fit the standard? A 55 mi/h rule is underinclusive (for example, 55 mi/h is too dangerous in a snowstorm at night on a hilly two-lane highway) because it does not capture all of the socially undesirable conduct that ought to be captured according to the standard. The precise 55 mi/h rule is also overinclusive. For example, going faster than 55 mi/h on a deserted Nevada highway, at midday, is desirable conduct (assuming speedy travel is part of your standard) that will be deterred by this precise rule.

Properly constructed, a multifactored rule may have a better fit with the standard than that achieved by any precise rule. Thus, a rule that considers traffic density, weather, terrain, and other facts in sanctioning driving behavior fits better with the standard than does the precise rule. The multifactored rule, however, may also be overinclusive and underinclusive. Because there are more relevant facts, the decisionmaker⁴⁹ has more room for “error” with respect to one or more facts. For instance, the decisionmaker may conclude that the weather was rainy when it was actually sunny. Moreover, because one fact may cut one way and a second fact another way, prioritization is necessary. Potential defendants may make different predictions as to what facts will be found and as to what priority will be given (for example, it was raining, but there was no other traffic). Where

⁴⁸ I ignore here the case where the rule is subject to prosecutorial discretion. Although Ehrlich and Posner treat this as a case of backing up a rule with the standard, see Ehrlich & Posner, *supra* note 41, at 268-69, it seems to me that it is just a matter of the rule sliding along the spectrum from the precise towards the multifactored rule. The additional factors are whatever the prosecutor considers in deciding whether to prosecute the case.

⁴⁹ A decisionmaker, such as a common law judge, determines the facts and, ordinarily, applies the sanction. In labor law cases under the Act, an administrative law judge determines the facts, and the Board applies the sanction after reviewing the factual determinations. At this level of analysis, nothing turns on these details.

a potential defendant incorrectly predicts that the multifactored rule will result in his conduct being subjected to a sanction, he will be deterred from socially desirable activity; where he incorrectly predicts that the multifactored rule will exonerate his conduct, he will engage in socially undesirable activity.

This tendency towards underinclusiveness and overinclusiveness is affected by risk preference. When one is a risk preferrer, the tendency towards underdeterrence is aggravated. If one is risk averse, there is a greater overdeterrence of desirable activity. Risk is similarly skewed if people misperceive it. If people systematically underestimate risk, undesirable activity will increase, and there will be less deterrence of desirable activity. If risk is systematically overestimated, there will be too little desirable activity but more deterrence of undesirable activity. The magnitude of all these effects, but not the direction, can be altered by adjusting the remedy (sanction).

III. WHEN RULES MATTER: A TRANSACTIONS COST ANALYSIS

After examining the types of rules from which we choose, I consider whether the legal rules in this context are likely to matter. In other words, do they affect the parties' behavior?

A. *The Coasian Framework*

In 1960, Ronald Coase wrote "The Problem of Social Cost."⁵⁰ The implications of his argument have enriched many areas of legal analysis, but they have not yet deeply penetrated analyses of labor law issues.⁵¹ Furthermore, the implications of Coase's analysis for contract issues, as opposed to tort and property issues, is not well understood even by those who are well acquainted with Coase's article. For these reasons, I work through the general arguments.

Assume the following:⁵²

1. There are no transactions costs.⁵³

⁵⁰ 3 J.L. & Econ. 1 (1960).

⁵¹ For a Coasian analysis of labor law issues, see D. Leslie, *Cases and Materials on Labor Law* 369-73 (2d ed. 1985); Schwab, *Collective Bargaining and the Coase Theorem*, 72 *Cornell L. Rev.* 245 (1987). Our articles are inherently different in their approach. Professor Schwab believes that there are no substantial transactions costs in labor bargaining about legal rules, see Schwab, *supra*, at 266-68, whereas I assume that such costs exist and try to guess what they might be, see D. Leslie, *supra*, at 369-73.

⁵² I am not arguing that these are realistic assumptions. These assumptions begin the analysis, not end it.

⁵³ Transactions costs, broadly speaking, are the costs to the parties of initiating and conducting exchange transactions.

2. Entitlements are clear (who owns what, who can do what to whom).
3. Parties have perfect information (they know one another's preferences, for instance).
4. Contracts are costlessly enforceable and statutory entitlements (rights) can be waived.⁵⁴

Coase argued that in a world where these assumptions hold, legal rules will have no *allocative* effect: a choice of one legal rule over another will not change the mix of goods and services in society.⁵⁵ Consider the following example. Dan owns a house on a river in a rural part of the state. Lynn has a small factory upstream from Dan's house. Lynn's manufacturing process causes her to dump a colorless, non-toxic waste product into the river. The waste product has an offensive odor that decreases Dan's enjoyment of sitting on his porch in the early evening. No other landowner is affected because the smell soon dissipates. Dan puts a value of thirty dollars per day on the loss of his opportunity to enjoy sitting on his porch. Lynn values the opportunity to dump the waste product into the river at twenty dollars per day—above which she could dispose of the waste product in another way. There are two potential legal rules: Dan could have a right to prevent the dumping, or Lynn could have the right to dump.

The Coase Theorem, as the principle that emerges from Coase's article has come to be known, says that the choice of legal rule will not have any effect on dumping. If the rule adopted is that Lynn has the right to dump, Dan will pay her some amount between twenty and thirty dollars not to dump. If the legal rule adopted is that Dan can prevent the dumping (that is, can get an injunction), Lynn will not offer him enough money to keep him from exercising his right.

A comparable result follows if Dan values at twenty dollars being free of the pollution, and Lynn values the right to dump at thirty dollars. If Dan has the right to have the dumping enjoined, Lynn will pay him between twenty and thirty dollars not to exercise his right. If the legal rule is that Lynn has the right to dump, Dan will not offer her enough money to prevent the dumping.

Although the legal rule in this example does not affect the amount of dumping (the allocative effect), it does have a *distributional* effect. Lynn is wealthier under one rule, and Dan is wealthier under the alternative rule. Under similar reasoning, a gap-filling rule in contract law—that is, a rule

⁵⁴ Such assumptions can become much more sophisticated than is suggested by this Article. See, e.g., Hoffman & Spitzer, *Experimental Tests of the Coase Theorem with Large Bargaining Groups*, 15 *J. Legal Stud.* 149 (1986).

⁵⁵ See Coase, *supra* note 50, at 5-6.

governing contract relations that is not explicitly addressed in the contract—would have no allocative effect. But does a contract gap-filling rule have a distributional effect? Consider the following example.

Sharon wants to buy a Hydro Underwater watch. She lives in Richmond, Virginia, where three downtown stores sell that type of watch. Assume that the (common law) legal rule in Virginia is that, unless otherwise specified, watches labeled as “underwater” by the manufacturer are not guaranteed to be waterproof below thirty feet of water. Sharon visits all three stores on Monday morning. The first store offers the watch for thirty dollars. The sign says nothing about a waterproof guaranty, and, therefore, the legal rule is that the watch carries no guaranty. The second store offers the watch for forty dollars. Its sign says, “money-back guaranty if the watch leaks at less than 150 feet.” The third store offers the watch at two prices: thirty dollars without a guaranty and forty dollars with a money-back guaranty that the watch will be waterproof to 150 feet.

On Monday afternoon, the Supreme Court of Virginia changes the legal rule. Now, unless the buyer and the seller agree otherwise, all watches labeled as “underwater” carry a money-back guaranty to be waterproof to 150 feet. On Tuesday morning, Sharon visits the three stores again. Making the Coasian assumptions, what prices will Sharon find at the three stores? The first store will offer the watch for thirty dollars, and its sign will read, “This watch is not guaranteed to be waterproof below thirty feet.” The second store will offer the watch for forty dollars, and it can take down its sign specifying a guaranty (because that is now provided by the legal rule). The third store offers the same two prices. The gap-filling rule has neither allocative nor distributional effects. It has not made watch buyers better or worse off, nor is there any reason to believe that it has changed their desire for underwater watches. Sharon is presented with precisely the same choices under each legal rule.⁵⁶

The preceding example involved a competitive market; now, consider the following example absent such competitiveness. Charlie has a SAAB Model 92, and Judy would like to buy it. It is a very rare car, and Judy would not know where else to find such a car. On the other hand, few people know

⁵⁶ Consider the following example:

Suppose the state legislature passes a statute saying that every household contracting for the services of a plumber must provide the plumber with free coffee unless the plumber waives this right. The price for plumbing before the coffee law was passed was \$17/hour, and plumbers value on-the-job coffee at \$2/hour. After the law is passed, we would expect to see two prices for plumbing: \$15/hour with coffee and \$17 with a waiver of coffee. (The regulation may be so misguided that the only price ordinarily offered is \$17/hour with the waiver.)

Leslie, *supra* note 51, at 370 & n.5.

anything about a Model 92, and Charlie would not know where to find another buyer. Charlie values the SAAB at \$1000—below that he would prefer not to sell it. Judy values it at \$8000. Their bargaining range is thus \$1000 to \$8000.

Before any sale is negotiated, the state legislature passes a law saying that unless the right is waived, every person selling a used car must have the car repainted before delivery. This statute does not change the bargaining range. Suppose that Judy would pay up to \$500 to have the SAAB repainted. Either Charlie can have the car painted prior to delivery, or Judy can have the car painted after delivery. If Charlie's costs are less than Judy's and less than \$500, Judy will want Charlie to paint the car, and she will "pay" him to secure his promise to do so by adjusting the selling price (which cannot be determined but is still in the range). Given the statutory rule, Judy gets Charlie's promise to pay for the painting by saying nothing in the contract about painting—the painting term is provided by the statute. If Judy can have the car repainted at less cost than Charlie can, then the selling price will not be adjusted, and a waiver of the statutory right will appear in the contract to sell the SAAB. These calculations would not change if the statutory rule were different (that is, if the seller had no duty to repaint the car unless it is so specified in the sales contract). Thus, when a contractual gap-filler is at stake, the statutory "entitlement" has neither an allocative nor a distributional effect. The distinctive feature of a contractual gap-filler is that it has no existence absent a contract, whereas property and tort rules have effects without regard to contracting.

The rule in *Bonanno* is such a contractual gap-filler.⁵⁷ Entering into multiemployer bargaining is consensual, and, like a product warranty, the "right" to withdraw from such bargaining carries no meaning unless the parties have agreed to multiemployer bargaining in the first place. The rule provided by *Bonanno*, so long as it is waivable, merely specifies the rule that will apply unless the parties tailor-make an alternative rule to apply to their multiemployer bargaining agreement.

The road of analysis now branches. One path is for those who believe that the Coasian assumptions are fairly descriptive of labor-management transactions.⁵⁸ The argument is that these are often sophisticated bargainers with experience. Unlike bargainers in other areas, these bargainers have no diffi-

⁵⁷ There are many similar gap-fillers in labor law. Three examples are the meaning of a no-strike clause (for example, whether a promise not to strike during the term of an agreement also implies a promise not to honor a picket line), see *NLRB v. Rockway*, 345 U.S. 71 (1953); the scope of an arbitrator's authority, see *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); and the right to have a union representative present at a disciplinary interview, see *NLRB v. Weingarten*, 420 U.S. 251 (1975).

⁵⁸ See Schwab, *supra* note 51, at 266.

culty "finding one another." Because they are likely to be repeat players who bargain with each other over the course of several years, each would tend to be aware of the others' preferences.

The role of a legal rule in such a context is to find and adopt the contractual gap-filler to which most parties would agree if they bargained explicitly over the rule.⁵⁹ Thus, most contracting parties will be saved the costs of explicit bargaining, which, though generally low, are still positive costs.⁶⁰ Those that would prefer a different (idiosyncratic) rule are free to bargain to reach their preferred result.

The other path is for those who have a "hunch" that there are serious transactions costs involved with labor-management gap-filling.⁶¹ Being of that view, I now consider the shapes in which those costs might take.

B. Transactions Costs in the Labor Context

1. Trivial Entitlements

If the value of a particular gap-filling rule provided by statute is trivial as far as employees and managers are concerned, one would not expect to see parties negotiate around the rule. A rule is trivial when the costs of talking about and reducing a tailor-made rule to writing are greater than the gain from having a tailor-made rule. The interests affected by the rule might be very small, either in an absolute sense or in the sense of an expected value—that is, the latter involves an event of some importance but with a very low probability of occurrence.

Although the value of a gap-filling rule may be trivial to each affected party, there may be substantial lobbying with the Board, courts, or legislatures for such rules. The value of a particular right when summed across all affected unions may be substantial,⁶² and, therefore, the AFL-CIO or affected international unions may do the lobbying. Moreover, the value of a particular rule may be low because the probability (*ex ante*) of its invocation

⁵⁹ This is a normative statement. Given the assumption of low transactions costs, however, no other normative goal seems attainable because the parties will bargain around any gap-filler that does not maximize benefits to each side. To open up other normative possibilities, the gap-filler would have to be nonwaivable.

⁶⁰ In the extreme case of low bargaining costs, the legal rule only saves the parties the paper and ink necessary to write the rule into their own agreement.

⁶¹ Some labor-management negotiators say that "unions never give anything back." For those who believe transactions costs are low in this context, such statements cannot be believed.

⁶² A contractual gap-filler is a "collective good." See Leslie, *Labor Bargaining Units*, 70 Va. L. Rev. 353, 354 (1984). Those incurring the costs to produce it—litigating, lobbying, and so forth—cannot exclude others from enjoying its benefits. Such a good will be underproduced unless the collective goods problem can be solved. See *id.* at 355-56.

is low, although once the event triggering the rule has occurred, the (ex post) value of the rule may warrant litigation by the affected parties.⁶³

2. *Batch Theory*

“Batch” theory is an inelegant name for the difficulty of comparing the gain of a specific asset with the loss of another when collective bargaining negotiations deal with “batches” of assets. To illustrate this theory in the context of labor-management relations, consider the following example. Assume that the positions of union officer and union (bargaining agreement) negotiator have positive value to the incumbent officer or negotiator and that retaining such a position depends to some extent on pleasing the union membership—for example, persuading the members that the incumbent has performed well in negotiations. One way of categorizing the subjects that are dealt with when a new agreement is negotiated is as follows:

1. Assets⁶⁴ present in the expiring agreement and being retained.
2. Assets not found in the expiring agreement but sought and obtained.
3. Assets not found in the expiring agreement and sought but not obtained.
4. Assets not found in the expiring agreement and not sought.
5. Assets present in the expiring agreement but not being retained.

Assuming no difficulties of communicating to the membership, it is plausible to say that the negotiators’ success ought to be measured by what they secured in negotiations as compared to what some other bargainer could have secured. Yet it also makes sense to judge current negotiating success against the base rate of what was previously secured as recorded in the prior bargaining agreement.⁶⁵ Preferably, the quantities compared ought to be in terms of the respective overall contract value, but this requires careful valuation of every change from the old to the new contract.⁶⁶ Even this may be

⁶³ A gap-filler providing that management has a duty to bargain to impasse before it is allowed to shut down its plant during the term of a collective bargaining agreement would have trivial value if the probability of a shut-down was very low at the time of negotiations, even though the gap-filler might be very valuable ex post—that is, if the company decided to close the plant.

⁶⁴ By “asset,” I mean anything of value, such as a wage or vacation benefit or a favorable clause respecting plant shutdown.

⁶⁵ Do not most of us judge next year’s salary by comparing it to that of this year?

⁶⁶ Assume that the old contract gave the union 20 items of value, and ignore the fact that it also gave managers items of value. The new contract retains 15 of those items of value without alteration. (Thus five of the past contract’s items of value have been “lost.”) It also has four items of value that were not in the old contract. Deciding how well their negotiators did requires the union’s members to put a value on all 19 items and then to compare the total value

quite difficult. Many assets are difficult to compute—for example, the dollar value of a right to have a union representative present when a worker is called in by management for an interview that could result in disciplinary action by the managers. A possible surrogate can be computed by evaluating particular exchanges that occurred within the overall negotiating framework.⁶⁷

Terms in collective bargaining agreements may be negotiated in “batches.” A contract proposal containing many terms is presented, and a counterproposal comes back with many terms changed or deleted and with new terms added. Some of the differences are dickered over, other proposals are exchanged, and an agreement is reached. The union negotiators may be unable to say precisely what they received for a particular asset; that tradeoff

with what the membership believes could have been negotiated by a different set of negotiators in light of the union’s strike power. Using the old agreement as the relevant base means that it is less important to place a value on the 15 items that both contracts have in common. The issue is “how much better off did the negotiators make me, and how does this compare with how well I think that others would have done?” The values of nine items—the five that were lost, and the four that were gained—need to be determined. This analysis holds regardless of the level of precision of valuation that is assumed.

⁶⁷ Consider the following two scenarios:

Case 1. The legal gap-filling rule during the period that the first bargaining agreement was negotiated and in effect was *A*. It favors management. In negotiations for the second bargaining agreement (upon the expiration of the first), the union asked for *B* (tailor-made), which favors the union. Management refused, and the negotiators abandoned the request.

Case 2. Same as *Case 1* except that during the first agreement the Board changed the gap-filling rule from *A* to *B*. In negotiations for the second bargaining agreement, management asked for *A* (tailor-made). The union negotiators agreed.

Under the Coasian analysis, there is no difference in the two cases. Note that there is a wealth redistribution from management to the union members during the period of the first agreement after the rule has been changed. But the incentives of the negotiators in one scenario may be different from their incentives in the other. When the asset “belongs” to management (that is, management will have the asset unless the union expressly secures it in collective bargaining—in this example, when the gap-filling rule is *A*), union negotiators may respond to a request from union members for an explanation of why the asset was not secured by saying, “Management valued this rule greatly and we didn’t have enough power to push for it.” The union negotiators may not try to establish the precise value that managers put on the asset, but only establish that it was “high.”

A similar explanation can be demanded from the negotiators by the membership in *Case 2*, where the Board has adopted rule *B* and the negotiators have agreed to put *A* in the contract. There may be a problem, however, in explaining to the membership what the negotiators received from the managers in return for the asset. In one sense the satisfactory answer is “nothing.” The union did not have this gap-filling rule in its favor when it negotiated the first agreement, although the rule favored it after the Board’s change in policy. Arguably, the appropriate base line for comparing the two agreements is the first agreement as it stood when negotiated, not as supplemented by unanticipated shifts in background legal rules. If the membership sees it this way, then the problem evaporates.

was submerged in a host of tradeoffs. Because the negotiators have given up something of value without being able to identify its quid pro quo, they may be especially vulnerable to critics within the union. To avoid this criticism, negotiators may refuse to bargain away assets granted by statute.

If this argument is plausible, it is nonetheless incomplete. Why would not management negotiators act the same way? They too are responsible to other managers or to owners, and they must satisfy their superiors that their performance has been competent. But that creates the puzzling situation of both sides in labor-management bargaining refusing to "give anything back."

3. *Framing Device Theory*

In the previous Section, I suggested that union negotiators and union members may evaluate offers of new bargaining agreements against the baseline of the expiring agreement. Daniel Kahneman and Amos Tversky have conducted studies suggesting that individuals are generally risk averse when gains are at stake and risk preferring when losses are at stake.⁶⁸ For example, when surveyed individuals were offered the choice between a prospect that offers an 85% chance of winning \$1000 (with a 15% chance of winning nothing) and the alternative of a 100% of winning \$800, a large majority preferred the sure thing to the gamble. When forced to choose between an 85% chance of losing \$1000 (with a 15% chance of losing nothing) and a 100% chance of losing \$800, a large majority of the individuals surveyed preferred the gamble to the sure loss.⁶⁹

Kahneman and Tversky also discovered that choice is influenced by how the problem is framed. Risk preference is shown when the choice is described as though a loss is at stake, and risk aversion is shown when the choice is described as though a gain is at stake. The reference point (gain versus loss) is critical, although the choices are the same.⁷⁰

⁶⁸ See Tversky & Kahneman, Rational Choice and the Framing of Decisions, *in* Rational Choice: The Contrast between Economics and Psychology 67 (R. Hogarth & M. Reder eds. 1987).

⁶⁹ Kahneman & Tversky, Choices, Values, and Frames, 39 *Am. Psychologist* 341, 341-43 (1984).

⁷⁰ In one experiment, the following two problems in a questionnaire were administered to a test group. (The total number of respondents in each problem is denoted by *N*, and the percentage who chose each option is given in parentheses.)

Problem 1 (*N*=152): Imagine that the U.S. is preparing for the outbreak of an unusual Asian disease, which is expected to kill 600 people. Two alternative programs to combat the disease have been proposed.

The accepted scientific estimate of the consequences of the program is as follows: if program *A* is adopted, 200 people will be saved (72%); if program *B* is adopted, there is

This research is relevant for our analysis of labor-management bargaining. It suggests that if courts or the Board have adopted a contractual gap-filler favoring management, the union may see an attempt to secure the alternative tailor-made gap-filler as a risky prospect for a gain. If the gap-filler has been placed with the union, the union may see a management attempt to secure the alternative tailor-made gap-filler as presenting the union with a risky prospect of preventing a loss.

There are, however, several lines of inquiry that must be explored before reaching any conclusion. Kahneman and Tversky's questions were asked of individuals. Would the answers be the same if those surveyed were given time to reflect on their answers? Would the answers be the same if the individuals represented not only their interests but the interests of groups of employees, employers, or an industry? Would the same answers be given if the respondents reached their decision as a group, following discussions? Union negotiators may be seen as very sophisticated bargainers, and this is a repeat game, not a one-shot transaction, for union bargainers. Finally, as pointed out in the previous Section, union members need not see the matter as involving risky gain/loss questions.⁷¹ For the union to treat it as a risky prospect, the union must view it not as a part of an overall bargain but as a marginal gain or loss against the backdrop of an existing bargain.⁷²

a one-third probability that 600 people will be saved and a two-thirds probability that no people will be saved (28%).

Which of the two programs would you favor?

Problem 2 ($N=155$, other subjects): Imagine the same facts as in *Problem 1*.

The accepted scientific estimate of the consequences of the program is as follows: if program *C* is adopted, 400 people will die (22%); if program *D* is adopted, there is a one-third probability that nobody will die and a two-thirds probability that 600 people will die (78%).

The reference point in *Problem 1* is a state of affairs in which the disease will take its toll of 600 lives, and the choice is between a sure gain and a risky gain. The second problem, objectively identical to the first, assumes as a reference point a state of affairs in which no one dies of the disease, and the choice is between a sure loss and a risky loss. *Id.* at 343; see Tversky & Kahneman, *supra* note 68, at 76.

⁷¹ See *supra* notes 66-67 and accompanying text. The alternative approach is to view an entitlement as a gap-filler that enhances the overall value of the bargain when it is placed with the party that values it more highly.

⁷² A preference exposure theory may also illustrate transactions costs which impede bargaining. It is easier, however, to construct an example of preference exposure theory in a context other than labor-management bargaining. For example, suppose Jeff is negotiating with a wealthy collector of rare coins to sell two Roman coins that Jeff discovered in his family attic. Jeff is not sure how badly the collector wants the coins, but he is pretty certain that one of the coins (which is larger and in better condition) is the more valuable—perhaps ten times as valuable as the smaller. Jeff begins to bargain over the price of the smaller coin, which he believes will fetch about \$100. The collector offers Jeff \$500. The effect of the offer is not only to give Jeff information about the value of the smaller coin to the collector but also about the

C. Replicating the Hypothetical Bargain

So far, there is no empirical research about transactions costs in labor-management bargaining. In the presence of transactions costs, we cannot be assured that any legal entitlement will end up in the hands of the party that values it most highly. In the case of contractual gap-filling rules in particular, transactions costs may prevent some parties from contracting out of that rule. One way for the legal system to react to a contractual context in which transactions costs are high is to seek the contractual gap-filler that the majority of bargainers would have selected if transactions costs were low. Support for this criteria of gap-filling rules is the familiar contention that such rules save the costs of bargaining for those bargainers who have majoritarian preferences and who would otherwise be able to overcome the transactions costs. Disadvantaged are those with nonmajoritarian preferences who cannot overcome the transactions costs and are therefore subjected to the "wrong" legal rules.⁷³

One suspects that there is also a normative element in most arguments for choosing the legal rule that replicates the result that most parties would choose were they bargaining in a frictionless environment. Whether this turns on autonomy concerns, or something else, it is especially appealing if no conflicting criteria exist, as may be the case with labor-management gap-fillers.⁷⁴ A criterion of adopting the gap-filling rule that would be least sub-

value of the larger, more valuable coin. If the collector foresees this as a danger, he may refuse to bid on the smaller coin, or bid at too low a price to bring about a sale, because he fears revealing the extent of his desire for the larger coin. The question is whether the topics of collective bargaining are similarly connected.

⁷³ Although I suggest that the legal system should adopt a contractual gap-filler that most bargainers would select, both when the Coasian assumptions of low transactions costs are accurate and when serious transactions costs are present, the analysis in the two cases is very different. When transactions costs are low, parties on which majoritarian preferences are imposed will bargain out of these gap-filling rules if the rules do not fit. In the presence of high transactions costs, however, parties saddled with an unwanted gap-filling rule can not bargain out from under the wrong rule.

⁷⁴ For a discussion of the normative bases for adopting the gap filler that most parties would have adopted if they had thought about the issue in advance, see Schwartz & Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 Va. L. Rev. 1387 (1983); J. Coleman, *A Bargaining Theory to Default Provisions and Disclosure Rules in Contract Law* (1988) (unpublished manuscript on file with the Virginia Law Review Association). If there is a substantive policy at stake—that is, a particular outcome is preferred regardless of whether the parties favor it—the most effective approach is to legislate a contractual gap-filler and make it nonwaivable. Legislators, however, may wish to do something less intrusive. For an examination of the situation where legislators craft a gap-filling rule with interests in mind going beyond that of the contracting parties but where the rule is nonetheless waivable by the parties, see *infra* notes 106-09 and accompanying text.

ject to transactions costs is an alternative, but it may be impractical to identify the nature of transactions costs.⁷⁵

One way of discovering how the majority of parties would draft a particular contractual term if transactions costs were low is to research existing contracts that explicitly address such terms. The assumption is that those contracts are good evidence of majoritarian preferences. Perhaps because that assumption may be unwarranted, or because empirical verification is difficult, if not impossible, another approach is attractive. That approach is to make our best guess, based on plausible assumptions about the parties' incentives, as to which contractual party would value the contractual right more highly, and to adopt the gap-filling rule favoring that party because it would be in the interest of both parties to the agreement to allocate the rule in such a manner if they had bargained in advance.

Identifying the contracting party that values a gap-filling rule more than its contractual partner values the alternative gap-filler requires an examination of the context of the bargain and the incentives of the parties. This involves more than just a little speculation. In the *Bonanno* context, which is a good illustration of the magnitude of the inquiry, we must identify the benefits for firms and unions of engaging in multiemployer bargaining and the risks (of unforeseen events and of strategic behavior, for example) inherent in multiemployer bargaining.

IV. INCENTIVES TO ENGAGE IN MULTIEMPLOYER BARGAINING

A. *Relevance of the Inquiry*

In the absence of explicit statutory direction, determining the appropriate standard for withdrawal from multiemployer bargaining requires that we have a theory explaining why parties consent to multiemployer bargaining, what societal effects that form of bargaining is likely to have, and what forms of behavior ought to be considered "strategic."

There are several specific reasons to examine why firms and unions engage in multiemployer bargaining. First, in order to evaluate the choice between a precise rule and a multifactored rule, the appropriate standard must be identified. In *Bonanno*, the justices seemed to assume that the legislature had identified the standard, leaving only the issue of how best to implement it.⁷⁶ I argue below that this is incorrect.

Second, the transactions costs analysis requires this inquiry. Whether one believes that transactions costs are low and, therefore, that getting the rule

⁷⁵ To use a previous example, it may be less costly for the parties to move from *A* to *B* than vice versa. See *supra* note 67.

⁷⁶ See *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 413 (1982).

“right” is less important or that transactions costs are high, replicating the bargain that the parties would have struck had they bargained explicitly over the issue in advance demands an attempt to understand the parties’ incentives in agreeing to multiemployer bargaining.

Finally, analysis of multiemployer bargaining may reveal costs (or benefits) to society of alternative legal rules—costs not borne by the contracting parties. These costs may support gap-filling rules that do not replicate the parties’ hypothetical bargain but that serve another purpose.

B. Power Distribution and Product Market Cartelization

Multiemployer bargaining might be explained by arguing that the bargaining power of the party entering into multiemployer bargaining is enhanced by that form of bargaining. Without more, however, the explanation fails because if multiemployer bargaining enhanced the power of one side, the other side would not consent to it. No one appears to argue that multiemployer bargaining occurs because both sides believe it increases their power but one side is mistaken.

A different version of this explanation is somewhat more plausible: through multiemployer bargaining, the firms enhance their bargaining strength vis-a-vis the union, and the union is benefited by having fewer negotiating sessions. Firms increase their power because multiemployer bargaining reduces the threat of a union whipsaw strike. The costs to the union are the greater difficulty of staging a whipsaw strike and the lost ability to form a bargaining agreement with each firm that is tailored to that firm’s ability to pay and to that firm’s ability to withstand the union’s economic power.⁷⁷

Meeting costs are saved by multiemployer bargaining even if the employers are large, but when those saved costs are computed on a per employee basis, the cost/benefit ratio differs for the union depending on the size of the firm with which it bargains. One might therefore predict that multiemployer bargaining ought to be less attractive for the union when bargaining with large firms than when bargaining with small firms. Some evidence suggests, however, that this is not the direction that multiemployer bargaining takes in practice. The majority opinion in *Bonanno*, for example, stated: “A recent survey of major collective-bargaining agreements (those covering 1,000 or more employees) found that of 1,536 major agreements, 648 (42%) were multiemployer agreements and that 3,238,400 employees were covered by these agreements.”⁷⁸ Perhaps these are multiemployer groups with very many small firms; otherwise, the figures suggest that multiemployer bargaining is by no means a characteristic limited to small firms.

⁷⁷ Thus, the firm might be wealthy but also quite capable of withstanding a strike.

⁷⁸ 454 U.S. at 410 n.4. (quoting Labor Statistics, *supra* note 3, at 12 table 1.8).

Another explanation for why unions and firms agree to multiemployer bargaining is that bargaining structure enables firms to cartelize the product market. The firms earn supracompetitive profits, which they share with their unionized employees. Because multiemployer bargaining provides an occasion for firms to exchange information legally, it also facilitates illegal discussions of product prices and output.⁷⁹ In a recent article, Professor Campbell advanced a different version of the cartel theory:

The terms of a contract reached through the multi-employer bargaining process need not explicitly refer to output quantity or price in order to accomplish a cartelizing effect. Nor is a massive cutback in output necessary. Often, an agreement will substantially enhance revenues simply by ensuring that there is no more expansion of output in an industry facing expanding demand, so that price will rise instead. For example, with a "voluntary" import restraint on Japanese cars, demand for smaller American cars rose rapidly in the American market. Restrictions on moving to the sun belt, on subcontracting assembly work, and on the speed of production lines inserted into each of the Big Three (GM, Ford, and Chrysler) contracts could effectively insure that the increased demand would result in increased prices to the benefit of all three. This would be viewed by the producers as preferable to a competitive war among themselves to make more automobiles to fill the increased demand, leading to very little price increase at all. Where demand is growing, increased profits can be made by producers who agree to stay where they are.⁸⁰

Professor Campbell is correct to seek an explanation other than the facilitation of explicit price-fixing. It is difficult to sustain a price-fixing cartel. Firms have a powerful incentive to "cheat" on prices in order to capture more than their share of the supracompetitive profits. They cheat through secret deals with buyers and by offering price reductions disguised as favorable delivery terms, credit terms, and so forth. Except for industries with a single, simple, standardized product, a price-fixing agreement requires overwhelming detail. Even then, without a barrier to entry by new firms, the cartel will fail.

An output-restricting agreement is also difficult. For such an agreement to succeed, each firm in the unionized sector of a product market would need to have an established output, agree that the division of the market corresponding to those historical outputs was just, maintain a stable supply and demand, be able to monitor output quantity and quality, have unions that

⁷⁹ Explicit price-fixing and output-restricting agreements by competitors generally violate the antitrust laws. See L. Sullivan, *Handbook of the Law of Antitrust* §§ 74, 93-96 (1977).

⁸⁰ Campbell, *Law and Economics*, 38 *Stan. L. Rev.* 991, 1049-50 (1986) (footnote omitted).

could effectively punish firms that exceeded the agreed output, and be able to block entry by new firms.

The uniqueness of Professor Campbell's example becomes clearer in this light. The all-important barrier to entry is provided by scale economies in the United States and by governmental chilling of entry by foreign manufacturers. Demand for the product is increasing. The firms are few ("the Big Three," as Professor Campbell refers to them),⁸¹ so that arguments over the appropriate share of output to be allocated to each may not be serious. It is difficult to increase production without being noticed. There may be other industries that share these characteristics, but there cannot be many. Because multiemployer bargaining is not limited to a few industries, the explanation cannot be complete.⁸²

Statistics on multiemployer bargaining are not very complete. The Department of Labor periodically examines collective bargaining agreements that cover 1000 employees or more. The most recent report examined 1550 such agreements in effect on or after January 1, 1980.⁸³ The agreements covered 6,593,800 workers. Of those workers, 2,839,600 (43%) were covered by multiemployer bargaining agreements.⁸⁴

⁸¹ See text accompanying note 80.

⁸² It is ironic to note that the industry chosen by Professor Campbell for his example—the automotive industry—does not have multiemployer bargaining.

⁸³ See Labor Statistics, *supra* note 3, at 12.

⁸⁴ The industries are broken down as follows:

<i>Industry</i>	<i>Percent of employees in industry in multi-employer bargaining</i>	<i>Industry contribution to multiemployer bargaining (industry contribution to total in all units)</i>	
All manufacturing	14.7	15.7	(45.9)
Food, kindred products	55.7	4.6	(3.5)
Tobacco manufacturing	0	0	(0.3)
Textile mill products	29.8	0.3	(0.4)
Apparel	92.3	6.8	(3.2)
Lumber, wood products	40.9	0.2	(0.3)
Furniture, fixtures	32.7	0.3	(0.4)
Paper, allied products	17.0	0.4	(1.0)
Printing and publishing	77.8	0.9	(0.5)
Chemicals	0	0	(0.9)
Petroleum refining	0	0	(0.4)
Rubber and plastics	0	0	(1.0)
Leather products	51.5	0.4	(0.4)
Stone, clay, and glass	5.3	0.2	(1.4)
Primary metals	0.9	0.1	(7.0)
Fabricated metals	11.1	0.4	(1.4)
Machinery	1.4	0.1	(3.6)
Electrical machinery	0.9	0.1	(5.0)

Using these data, the requirements for Professor Campbell's theory are not met. Consider a few of the industries in which multiemployer bargaining is especially common: apparel, construction, and hotels and restaurants. Entry ought to be comparatively easy in the first and third industries. Only the efforts of unions keep the construction industry from being easy to enter and the unions from continuing to lose ground to open-shop contractors in that industry. The construction industry is marked by short-run jobs, and apparel is capable of such jobs, but hotel and restaurants are, by contrast, long-run businesses, even if marked by ease of entry and exit. In none of these industries are barriers to foreign competition important, as they were in Campbell's auto example. There is no evidence that the industries where multiemployer bargaining predominates are marked by increases in demand over time.

C. *A Wage Premium Theory*

I have developed three models for analyzing labor markets and union activity:⁸⁵ the price theory model, the relational contract model, and the collective goods model.⁸⁶ The price theory model is the model most com-

Transportation equipment	2.3	0.8	(14.5)
Instruments	0	0	(0.4)
Miscellaneous manufacturing	17.8	0.09	(0.2)
All nonmanufacturing	67.1	84.3	(54.1)
Mining, crude petroleum, and natural gas	86.4	5.1	(2.6)
Transportation (excluding railroads and airlines)	84.9	14.0	(7.1)
Communications	0	0	(9.4)
Utilities, electric, and gas	2.2	0.2	(3.1)
Wholesale trade	95.6	0.8	(0.4)
Retail trade	57.4	8.2	(6.1)
Hotels and restaurants	95.4	5.0	(2.2)
Services	78.6	9.0	(4.9)
Construction	99.7	41.9	(18.1)
Miscellaneous nonmanufacturing	100	0.1	(0.05)

Id.

⁸⁵ See Leslie, *supra* note 62.

⁸⁶ Many workplace benefits for employees are collective goods. Once such a good is produced for a particular employee, other workers cannot also be excluded from consuming it. Improved lighting that reduces headaches from working on an assembly line exemplifies such a collective good. The collective goods model explores the implications of the fact that without an agency to compel contributions toward the production of collective goods, such goods will be "underproduced." I have not drawn on this model in evaluating multiemployer bargaining because I do not believe that many goods are collective *across employers*. In other words, there

monly found in the literature. In that model, unions are labor supply monopolists that seek to raise wages.⁸⁷ The costs of this monopolization are borne primarily by consumers, nonunion workers, and out-of-work union members.⁸⁸

It is sometimes argued that multiemployer bargaining permits unions to "secure gains which no one employer can grant for fear of competitive disadvantage."⁸⁹ That does not explain why managers agree to multiemployer bargaining, however, because no industry is indifferent about seeing its costs rise.

Consider how managers determine wages. If managers have perfect information, the optimal wage/employment level (from the firm's point of view) will be set with no risk to the individual manager. With imperfect information, however, a manager will be uncertain as to the optimal wage.⁹⁰ Presumably, some managers are better at determining the optimal wage than others. Unionization of a firm adds a different uncertainty. When a union secures bargaining rights at the firm and demands a monopoly wage, the manager has some discretion. He can resist the union's demands to a greater or lesser extent while managers in competing firms make similar choices. Assume that the manager's goal is to minimize the sum of wage rents and strike costs imposed by the union. The manager can do better or worse than his competitors, and this will be reflected (eventually) in his own wages and job security. A risk-averse manager, or one who believes himself to be underskilled in this role, might agree to multiemployer bargaining to avoid this competition from managers in other firms. Multiemployer bargaining assures the manager that he and other firms' managers will choose the same wage rates. My hypothesis is that because the union is compensated by a wage premium, the resulting multiemployer rate is higher than the union's average gain would be without multiemployer bargaining. Absent a wage premium, the union maximizes its gains by tailoring each demand to the ability of the individual firm to pay. Any monopolist will discriminate with respect to prices if it has the ability to do so.

are few goods that have the characteristic that if they are produced by the employees of one firm, they will automatically be available for the employees of another firm.

⁸⁷ By the term, "wages," I mean to include the entire compensation package.

⁸⁸ See Leslie, *supra* note 62, at 361-62.

⁸⁹ A. Cox, D. Bok & R. Gorman, *Cases and Materials on Labor Law* 304 (10th ed. 1986).

⁹⁰ Too low a wage makes it difficult to attract quality employees. Too high a wage unnecessarily reduces firm profits. In a perfectly competitive price theory labor market, the manager of a firm has no discretion over wages. But unions cannot monopolize the supply of labor in a perfectly competitive labor market. In an imperfect labor market, managers have some control over the wage rate.

A final element is necessary to complete this explanation of multiemployer bargaining. Because the unions' average gains are increased by multiemployer bargaining while the benefits go to risk-averse labor relations managers, the firm's residual claimants—the shareholders or higher level managers, could prevent labor relations managers from engaging in multiemployer bargaining. Unlike other forms of managerial “slack,” which can be difficult to monitor, multiemployer bargaining is conspicuous and can be forbidden. The firm does better, for example, if managers control foremen so that workers are not treated arbitrarily and become dissatisfied. Controlling foremen may be costly to managers—it requires efforts and can interfere with social relationships. It may be difficult, however, for owners (shareholders) to determine if particular managers are adequately controlling foremen. Consenting to multiemployer bargaining, by contrast, is open and notorious. Yet multiemployer bargaining persists. It is possible that the residual claimants do not understand the effects of multiemployer bargaining on the firm. A more likely explanation is that residual claimants are also risk averse. They are unwilling to risk a result, during wage negotiations with a union, that is inferior to the results obtained by product market competitors.

In summary, unions engaged in multiemployer bargaining earn a wage premium to which managers agree because they are risk averse.⁹¹ The resulting upward pressure on product prices lessens product demand, and, although no single firm bears the entire loss in demand, this loss is “seen” by the multiemployer association. The association will have an incentive to minimize the union's wage premium. The overall effect is to increase the costs borne by consumers, nonunion workers, and unemployed union workers. Unless one believes that union workers deserve to be enriched at the expense of these groups, it may be that, as a normative matter, multiemployer bargaining ought to be discouraged.

Firms in the multiemployer group want competing firms outside the group to be charged the same wage premium. It is therefore no surprise to find a union that has negotiated a wage rate in multiemployer bargaining insisting on that same wage rate from any firm bargaining on an individual

⁹¹ Risk-neutral managers are better off staying out of multiemployer bargaining and avoiding the wage premium. That is also true for managers who are especially skilled at wage setting. The union has a strong incentive to force these managers to adopt the wage rate negotiated by the multiemployer group. Although the Board insists that the union refrain from pressuring a firm to join multiemployer bargaining, the Act does not prevent the union from seeking the same wage from a firm in the industry that has not agreed to multiemployer bargaining. See *United Mine Workers v. Pennington*, 381 U.S. 657, 663-64 (1965). The viability of a wage premium in multiemployer negotiations depends on there being some barriers to entry in the appropriate product market, but the existence of unions in an industry likewise depends on such barriers to entry.

basis in the same product market. Moreover, a union that has negotiated a multiemployer wage may be better able to persuade the employees of a firm not bound by the negotiations of the unfairness of accepting a lesser rate from their employer. Employees who would not have struck over a matter of a few peunies had they been negotiating in isolation will now strike rather than accept less than the multiemployer rate. The union's credibility in the single employer negotiations is thus enhanced.

If there is no wage premium in multiemployer bargaining, unions and firms ought not to be concerned when a firm seeks to withdraw during negotiations or even after agreement has been reached. The wage rate of a firm that bargains separately could be higher or lower than the firms staying in the multiemployer group, and there is no reason for a bias in either direction. If the union is unsuccessful at binding the outsider to the same wage premium, the multiemployer group may be undercut. Although there is no data available, my "hunch" is that most firms that seek to escape multiemployer bargaining do so with the expectation of negotiating a wage rate lower than that negotiated by the multiemployer bargaining group. Escaping the multiemployer bargaining unit is thus strategic behavior in the same sense as is cheating on a product market cartel by undercutting the established price. The benefit of a product market cartel is supracompetitive profits; undercutting the cartel price results in a greater share of those supracompetitive profits. The benefit of multiemployer bargaining is removing the downside risk of competition in the market for managers; undercutting the wage rate negotiated by the multiemployer group gives the manager an edge in the market for managers and the firm an edge in the labor market. If the wage premium theory is correct, then just as product market cartels cannot survive price cheaters,⁹² multiemployer bargaining groups cannot survive important defectors.

D. A Relative Wage Theory

Observers have long heard union leaders say that they seek to take wages out of competition. To an economist, this is puzzling. Consider, first, the textbook treatment of the product market monopolist faced with potential buyers of its product. The buyers desire the product in differing degrees, each with a different limit price at which it will buy the product. The "price-discriminating" monopolist earns the most if it charges to each potential buyer the maximum price it is willing to pay. Two problems, however, con-

⁹² They may be able to tolerate cheating by "little players," but only if the little players remain little. Thus, an oil cartel could tolerate cheating by an oil-producing country that was exceeding its allotted share of cartel output or undercutting the cartel price, but only if the reserves of the cheating country were small relative to overall cartel output.

front the monopolist. A buyer has an incentive to understate strategically the price it will pay for the product, and discovering the buyer's genuine maximum price can be costly. In fact, if there are many buyers, the costs of discovering particular buyers' preferences may be greater than the gain reduction from charging a single price. Second, arbitrage may be unpreventable: a buyer that has purchased the product at its maximum price will compete with the monopolist to sell the product to another buyer that values the product more. These two problems may force the monopolist to set a single price for the good.

As labor supply monopolists, most unions ought to try to be price discriminators. A union ought to try to extract from each firm the maximum wage package depending on the firm's ability to pay and its ability to withstand the union's economic weapons. The costs of seeking to discover the maximum wage that can be extracted from a particular firm will probably be lower than the wages forgone by adhering to a single wage demand for all employers.⁹³ Furthermore, arbitrage by firms is not available.⁹⁴

There is, however, a second model of labor markets and how unions act within those markets. I have called that model the relational contract model.⁹⁵ In that model, unions seek to drive up wages through the use of monopoly power, but they also facilitate comprehensive relational contracting. They encourage cooperation and both the acquisition and transmission of firm-specific and industry-specific skills by replacing spot-market labor contracting, and its bilateral monopoly problems, with an explicit, comprehensive contract. Rather than responding to measures of marginal productivity, as firms and employees are deemed to do in the price theory model, employees in the relational contract model react to relative wages—for example, is the firm altering the wage of Mechanic First Class vis-a-vis the wage of Mechanic Second Class? They do so either because "envy" is important, or because marginal productivity is difficult to measure and rela-

⁹³ When a product market monopolist sets a single price for all buyers, it loses the premium that it would like to extract from buyers higher on the demand curve; it also loses sales that could be made to some buyers who are lower on the demand curve—sales that could be made at a price higher than the monopolist's marginal cost. When a union sets a single wage goal, does it set it at a level higher than the ability of some firms to pay, thus forcing them out of business if the union is successful, or does it peg the wage to the ability to pay of the least financially able firm (or the firm best positioned to resist union demands)? The latter scenario seems particularly misguided. If the former scenario occurs, however, it does not seem to attract much attention. The United Mine Workers may have done the former in the 1950s but did attract attention. See *Pennington*, 381 U.S. 657.

⁹⁴ Subcontracting from a high-wage unionized firm to a low-wage unionized firm may be a form of arbitrage, but it is one that can be policed by the union, though sometimes imperfectly.

⁹⁵ Leslie, *supra* note 62, at 364-71.

tive wage rates are the preferable "second-best" gauge of appropriate treatment by the firm.

It may be unlikely that a network of relative wages and other working conditions often extends across firms or that a good secured by a union at one firm will involve externalities at another. Thus, one might conclude that a multiemployer agreement is unlikely to be a comprehensive relational contract. On the other hand, multiemployer bargaining agreements ordinarily contain a host of terms in addition to wage terms. This may suggest that multiemployer bargaining, like single firm bargaining, promotes relational contracting but that the resultant rationalized network of relative wage and other terms will not be tied to individualized history at particular firms.⁹⁶ But perhaps worker interest in relative wages is stronger than this analysis supposes and extends to the wages of "similarly situated" workers at other firms. If that is so, the union members might prefer wage equality to the increased total rents available from monopoly price discrimination.

If this is the correct view of multiemployer bargaining, the practice results in a lower level of union monopoly wage extraction than that resulting from bargaining with firms separately. Thus, if we prefer to enhance the welfare of those who bear the costs of unionization, as a normative matter, multiemployer bargaining ought to be encouraged.

I know of no practical way of determining whether the wage premium theory or the relative wage theory better describes the incentives that drive multiemployer bargaining. There is impressionistic evidence that multiemployer bargaining declines when product and labor market competition increases.⁹⁷ Substantial competition would exert great pressure on a multiemployer bargaining wage premium, and, therefore, we would predict that the frequency of multiemployer bargaining would vary inversely with the degree of competition. It would have no such effect on multiemployer bargaining on a relative wage theory.

V. CHOOSING AND IMPLEMENTING THE STANDARD

After looking at precise and multifaceted rules, analyzing the possibility of transactions costs potentially affecting the usefulness of any rule, and evaluating the incentives for multiemployer bargaining and their impact on the

⁹⁶ The historical pattern of relationships at a particular firm is thus supplanted by the multiemployer agreement's terms, which are applicable to all firms in the multiemployer group. An alternative, but less likely possibility, is that the multiemployer agreement contains the important monopoly wage terms but that equally important nonwage terms rationalizing a particular firm's internal labor market have been negotiated outside the multiemployer agreement.

⁹⁷ See Comeback Slated for Multiemployer Bargaining, 127 Lab. Rel. Rep. (BNA) 109 (1988).

choice of any rule, we are better able to evaluate alternative standards and the rules that implement them. In many instances, identifying the standard is difficult.⁹⁸ *Bonanno* is such a case. The Act does not specify the standard for legal regulation of multiemployer bargaining. Several formulations of the standard are possible. One is that the Board's rules ought to encourage industrial peace. Another is that the rules ought to encourage the stability of bargaining relationships. A third is that the rules ought to encourage multiemployer bargaining.

If the standard is industrial peace, there are a variety of rules to implement the standard, ranging from the precise to the multifaceted. Encouraging the stability of bargaining relationships is only one such rule. It may not be the "best" way to promote industrial peace. But encouraging bargaining relationships can itself be used as a standard against which to evaluate rules respecting multiemployer bargaining. Deciding what is the "best" rule in the *Bonanno* situation thus requires a sense of the hierarchical nature of standards.⁹⁹

An alternative standard would recognize three policies that have to be accommodated, much as travel needs and safety had to be accommodated in the earlier auto speed hypothetical.¹⁰⁰ These three policies are permitting multiemployer bargaining, permitting readjustment of the multiemployer

⁹⁸ This may be especially true in common law cases, where the entire analysis assumes a circular quality. Judges in contracts cases, for example, state the rules that they are applying, but it is the rare case in which the judge addresses the question of what the rule is seeking to accomplish. Those seeking to evaluate a particular contract rule and to compare it to an alternative rule try to infer the rule's goal—the policy underlying the rule, or in the terminology of this Article, the standard—by making shrewd guesses from the rule. Then the rule is evaluated in terms of how well it accomplishes its inferred purpose.

⁹⁹ The following hierarchy may be a good way to arrange the standards suggested by *Bonanno*:

- (1) industrial peace;
- (2) stability of bargaining relationships;
- (3) encouragement of multiemployer bargaining.

A similar hierarchy is implicit in the auto speed hypothetical. See *supra* notes 43-49 and accompanying text. One possible hierarchy would be:

- (1) greatest good for the greatest number;
- (2) efficiency;
- (3) accommodate travel needs with safety;
- (4) 55 mi/h versus reasonable under the conditions.

My point is not that this is the most plausible hierarchy, but that positing efficiency as the standard against which to evaluate speeding rules may obscure necessary, intermediate steps. Unfortunately, the hierarchy of industrial peace, stability of bargaining relationships, and encouragement of multiemployer bargaining does not particularly advance the analysis because industrial peace and bargaining stability might well require firms to engage in multiemployer bargaining. Congress clearly did not opt for that result.

¹⁰⁰ See *supra* notes 43-49 and accompanying text.

bargaining unit, and deterring strategic behavior (for example, manipulating bargaining impasse in order to fragment the unit because an unfavorable bargaining agreement is predicted).

Unless Congress has already adopted the standard to govern attempted withdrawals from multiemployer bargaining, selection of the standard depends on which explanation for multiemployer bargaining is most persuasive. The Court in *Bonanno*, by contrast, undertook no such inquiry. Instead, the justices found a standard not dependent on analyses of the incentives underlying multiemployer bargaining—industrial peace.¹⁰¹ In my view, “industrial peace” is too amorphous to be of use in deciding the *Bonanno* issue.

The meaning of the oft-used phrase “industrial peace” has never been clear. At face value, it suggests a blackmail-based explanation for the passage of the Wagner Act.¹⁰² Under this view, the Act was passed at a time of considerable economic and political unrest, when disruptive strikes threatened the stability of the country. To appease labor and as part of a program to stabilize the nation economically and politically, Congress passed the Wagner Act, which gave legitimacy to union monopolization of the labor supply. This rationale can lead to inconsistent approaches as to how the statute ought to be implemented. One approach is that the Board and courts ought to honor the political deal struck in 1935, notwithstanding deleterious effects of unions in the 1980s. Congress should decide when the statute is no longer necessary. Alternatively, perhaps the Board and courts ought to recognize the obsolescence of the rationale underlying the statute. Even if it is beyond the power of the Board and courts to repeal the express provisions of the statute, interpretations of that statute ought to have a goal of limiting union exploitation by exercising monopoly power and ought to permit unions only enough power to dampen serious labor unrest.¹⁰³

Even if we could agree on what “industrial peace” means and that it is an appropriate policy goal, we still would not have determined whether to protect multiemployer bargaining. Four positions can be contrasted. The first position is, “I do not know why firms and unions engage in multiemployer

¹⁰¹ Both Justice White's opinion for the Court in *Bonanno* and Chief Justice Burger's dissent appeared to acknowledge the same standard of promoting labor peace through strengthened collective bargaining. See *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 (1982); *id.* at 425 (Burger, C.J., dissenting).

¹⁰² National Labor Relations Act, ch. 372, 29 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

¹⁰³ I am not suggesting that the blackmail rationale is the only or the best explanation for why the Wagner Act was passed, but that it seems implicit in the notion of “industrial peace.” In my view, words like “industrial peace” are slogans that are not useful for pouring content into a statute.

bargaining; perhaps there are a variety of explanations, but multiemployer bargaining is common and the 1947 Congress refused to outlaw it. Thus, the Board and courts ought to fashion rules that neither encourage nor deter multiemployer bargaining. Unrestricted freedom to enter into and to exit multiemployer bargaining ought to be the rule."

A second position is, "I don't know why firms and unions engage in multiemployer bargaining, but it is not necessary to resolve that issue. Congress sought to promote industrial peace, and firms and unions seem to appreciate multiemployer bargaining. Until a multiemployer bargaining unit has been split apart by events, firms and unions that have consented to multiemployer bargaining ought to be encouraged to see it through."

A third position is, "The most probable explanations for multiemployer bargaining are the wage premium theory and the product market cartel theory. Each benefits union members and firm managers, but the costs are paid for by consumers, nonunion workers, and out-of-work union members. Although Congress has opted to tolerate those costs with respect to unionization in general, it has not explicitly protected multiemployer bargaining. It may stretch the Act too far to outlaw multiemployer bargaining, but the Board and courts ought not to encourage it. Any attempt by a union or a firm to withdraw from multiemployer bargaining ought to be honored, for the same reasons that we applaud those who cheat on product market cartels. Their motives may not be altruistic, but their actions confer a social benefit."

A fourth position, relying on the relative wage theory, is, "Multiemployer bargaining results in fewer extractions of monopoly rents by unions, and thus ought to be encouraged." Less clear under this position is how to go about encouraging multiemployer bargaining. Locking employers into multiemployer bargaining once that process has commenced preserves existing relationships, but such a rule deters employers from agreeing to multiemployer bargaining in the first place.

The choice of a standard to apply to the *Bonanno* issue is controversial. The first, third, and fourth positions suggest precise rules for their implementation. The second position—absent consent, no withdrawal from the unit is permitted unless the unit has already been split apart¹⁰⁴—requires a choice between a precise rule and a multifactored rule. Two precise rules are "impasse plus interim agreements does not constitute unit breakdown, and withdrawal from the unit is not permitted" and "impasse plus interim agreement constitutes unit breakdown, and unilateral withdrawal is permitted."

¹⁰⁴ This is at least very close to the position adopted by the Court in *Bonanno*, 454 U.S. at 416-17.

Support for the first rule rests on suppositions that impasse and interim agreements are not often associated with permanent breakdowns and that the alternative rule will encourage firms to manufacture an impasse.¹⁰⁵ Manufacturing an impasse will allow a firm to avoid the union entirely, by subsequently withdrawing recognition, or to seek a bargaining agreement more favorable to the firm than the one negotiators now predict will be reached by the multiemployer unit. Support for the second precise rule rests on the opposite empirical supposition about the linkage of impasse—interim agreements and permanent breakdowns in the unit—and on the belief that the contrary rule encourages a firm to force impasse in order to enjoy the product market advantage of producing while the union strikes against its competitors.

Precise rules are both underinclusive and overinclusive. In the absence of data, each depends on a “hunch,” and on the issue of whose hunch—that of the Board or of the Supreme Court—ought to control.

The multifactored rule, involving an examination of each case individually to see if the unit seems to be fragmented, carries two types of costs. The first type is error and process costs. The Board or courts may “get it wrong” in the sense of misreading particular, important facts, or in assessing the relative importance of particular facts. The second, and perhaps greater, type of costs is produced by the incentive effects of uncertain outcomes. Behavior that the multifactored rule seeks to deter is the strategic maneuvering of impasse to capture strategic gains, such as withdrawing recognition or obtaining an agreement more favorable than that the multiemployer unit is predicted to obtain. The multifactored rule should encourage firms to strike their own deal when a multiemployer unit is fragmented.

Parties faced with a multifactored rule of uncertain application will consider the remedy imposed if a violation is found. A firm liable under the multifactored rule will have the multiemployer bargaining agreement applied to it and will have had a reduced input into the contents of that agreement if it left the bargaining table before the agreement was completely negotiated. We do not know, however, whether this remedy is adequate to deter strategic behavior by the firms.

VI. THE APPROPRIATE GAP-FILLER

Recall that there are two grounds, both normative, for seeking in a bargaining context the legal rule that replicates the rule that the majority of similarly situated contracting parties would have chosen had they considered the matter and bargained over it in advance. First, if transactions costs

¹⁰⁵ This notion of impasse is in a sense artificial because it does not occur due to a dispute over the terms of the next collective bargaining agreement.

are low, this gap-filler saves the parties the costs of actual negotiations. Reducing costs in this way is of value to society so long as no other social policies are implicated. Second, if transactions costs are high, this criteria for choosing a gap-filler must depend on some other normative intuition, such as "it shows respect for individual autonomy to apply the rule that the parties would have chosen" or "parties expect the law to establish rules that inmatch majoritarian expectations." The normative argument is that deals are struck against a background of inajoritarian expectation, and a rule contrary to that expectation constitutes a redistribution of wealth not anticipated by the parties.

In the *Bonanno* context, we are warranted in assuming that ex ante all parties were expected to gain from the multiemployer negotiating structure. It also seems fair to assume that ex ante all parties were interested in giving whatever guaranties were available that they would not engage in strategic behavior. By "strategic behavior," I mean conduct that does not increase the sum total of the contractual gains but seeks instead to rearrange those gains.

As a theoretical matter, it is not difficult to identify conduct that the parties would consider to be strategic behavior under either the wage premium model or the product market cartel model of multiemployer bargaining. These behaviors must be distinguished from the risks of multiemployer bargaining, as they appear to the parties ex ante.

Multiemployer bargaining gives managers an opportunity to cheat on the wage premium to which the multiemployer group agreed. If the managers of a firm can withdraw from the unit and get a bargaining agreement from the union more favorable than the unit's agreement, they will have replaced the uncertain outcome (vis-a-vis competing firms) of individual firm negotiations with a competitive advantage over their rivals. This is an important advantage, however, only where the withdrawing firm gets a permanent agreement from the union. The Board and the Supreme Court agree that permanent agreements with a member of the multiemployer group justify unilateral withdrawal by other firms in the unit.¹⁰⁶ A contractual rule against withdrawing from the unit in this circumstance, however, is not the only way to police this behavior. Only if the union agrees to the more favorable agreement can the firm and its managers secure this strategic gain. It is not apparent that the union would gain anything from agreeing.

The same method of policing strategic behavior is available in the case of a firm seeking an interim agreement during a union strike in order to enjoy a product market advantage over its multiemployer bargaining unit competitors. The agreement is available only if the union acquiesces. Although the

¹⁰⁶ See *Bonanno*, 454 U.S. at 414-15 (citation omitted).

union might agree in order to place additional pressure on the other firms in the negotiating group, this would seem to be a short-term strategy; other firms ought to refuse to engage in unconditional multiemployer bargaining the next time. The question is whether this long-term effect on the union and the multiemployer group is sufficient to deter this conduct. Even though such an agreement would not deter all instances of deleterious conduct, it could be enough of a deterrent to lessen considerably the need for a protective legal gap-filler that carries other costs.

Managers may have incorrectly predicted the amount of the wage premium and may wish to withdraw in order to take their chances driving their own deal with the union. Although members of the multiemployer group are in the same product market, all are not equally situated, and a manager who has underestimated the wage premium on behalf of a firm in precarious financial straits may have little choice but to seek a separate deal from the union. If this were the case, the firm would need a separate, permanent deal—an interim agreement would not be enough.

A firm in a weak position may be more vulnerable to a strike than other firms in the multiemployer group. Pressuring such a firm is not in the union's interest if the risk of permanently disabling the firm is high. Both the union and the weak firm are advantaged by an interim agreement during the strike. The question is whether the other firms in the group would consider this strategic behavior. The collapse of a product market competitor may enhance the welfare of the remaining firms, even if the competitor was weak to begin with; however, an insistence by healthy firms on a negotiated rule that forbids interim agreements for weak firms will deter those weak firms from entering multiemployer bargaining.

Is the *ex ante* interest of the parties served by a rule permitting all firms to withdraw if any firm signs an interim agreement? If a healthy firm is not really threatened when the union gives an interim agreement to a weak firm, then a desire by the healthy firm to withdraw must be explained on other grounds. There is a danger that the union will not limit interim agreements to weak competitors—that it will give an interim agreement to a firm with a strong (or potentially strong) position in the product market in order to exert extraordinary pressure on the remaining firms in the group. A rule allowing all firms the right to withdraw once a firm signs an interim agreement allows the firms to police this behavior. If the rule forbids withdrawal, then they must rely on the union to control its behavior. Most unions ought to avoid this conduct for the reason previously advanced: it would seem to be a one-time-only strategy that would substantially deter future multiemployer bargaining.

This analysis suggests that the union's use of such interim agreements can be tested by looking at the nature of the firms offered those agreements. If

those firms share the characteristic of substantial financial vulnerability to the strike, there is little likelihood that the union or the firms are using the interim agreements strategically.

The Bonanno firm not only withdrew from the Union, it replaced its striking workers permanently and continued operations.¹⁰⁷ I suspect that Bonanno expected never to sign another bargaining agreement with the Union. In the single firm bargaining context, this is legal behavior, so long as the firm has bargained in good faith.¹⁰⁸

In this situation, the firm uses the happenstance of impasse and interim agreement to oust the union from the firm. Would the parties, *ex ante*, consider this strategic behavior? They might not. Absent multiemployer bargaining, the firm has this right. Multiemployer bargaining under the *Bonanno* rule gives the union protection against this result. This is of value to the union, but it is a cost of agreeing to multiemployer bargaining to the firm. There is no way of discovering the relative value of this "asset" to most firms and unions by looking at other situations, because, to my knowledge, there are no other contexts in which a union can bargain with the firm for such protection.¹⁰⁹

Determining what rule the parties would negotiate if they were free of transactions costs is no easy matter. Moreover, as discussed above, even if the parties' choice could be identified with confidence, public policy with respect to multiemployer bargaining could trump the finding.

¹⁰⁷ *Id.* at 407.

¹⁰⁸ Presuming that the strike replacements support the union as did those striking employees they have replaced, the Board had held for a long time that refusing to bargain with the union once permanent replacements have been hired is unlawful. The Board recently changed this rule and now purports to apply no presumption in this situation. See *DOLD Foods, Inc.*, 289 N.L.R.B. No. 156, at 2 (July 28, 1988); *Station KKHI*, 284 N.L.R.B. No. 113, at 5 (July 27, 1987). Unless the union can persuade the firm to discharge the replacements, it seems likely that the union will not return to these firms.

¹⁰⁹ This behavior can also occur under the product market cartel model of multiemployer bargaining. This model adds the feature of either an explicit market fix through the establishment of price or output levels, or of an implicit fix through the negotiation of restrictions on firms' ability to expand output. In either event, the familiar principle applies: a firm may be better off being in a cartel than in competition, but a firm would choose to be outside the cartel when others are in it. Such a firm could undercut the cartel price only slightly and rake off a disproportionate share of the supracompetitive profits. Defections by firms from the cartel would destroy the cartel if those defections were major, but the cartel may be able to tolerate defections by small firms for a considerable period of time. An interim labor agreement, even when signed by a large firm, does not endanger the long-term viability of the cartel. A permanent, separate agreement between a major producer that did not contain the cartel restrictions would pose a danger to the cartel, but the union would have little interest in allowing such an agreement. I conclude that the product market cartel model adds little to the analysis of the *Bonanno* issue.

VII. CONCLUSION

Multiemployer bargaining seems relatively straightforward: a union bargains with a group of firms to a common bargaining agreement. The simplicity, however, is misleading. Analyzing legal rules governing multiemployer bargaining requires an understanding of union and managers' incentives in labor-management bargaining in general, and in multiemployer bargaining in particular. It also requires guesses about the nature of transactions costs in labor bargaining and about the incentive effects of alternative legal rules.

In this Article, I have tried to show that to evaluate legal rules respecting multiemployer bargaining, one must have a theory of why unions and managers engage in the practice. There are at least three reasons for this inquiry. First, an informed choice between a precise rule and a multifaceted rule requires specification of the standard that the rule would implement. Second, in the presence of positive transactions costs, whether high or low, the interests of the parties are best served by choosing the legal rule that the parties themselves would choose if they anticipated the problem and bargained about it in advance. Third, interests going beyond the immediate parties may call for the imposition of a particular rule on the parties.

Given the frequency of multiemployer bargaining, it is disappointing that scant attention has been paid to explaining the practice, even by those who are formulating the legal rules. In this Article, I have suggested several explanations and concluded that two of those explanations—wage premium theory and relative wage theory—are the most supportable.

The Supreme Court's choice of a standard to govern multiemployer bargaining rules—promoting "industrial peace"—is inadequate for the task. Congress could have directed the Board and courts how to treat multiemployer bargaining. Instead, except for complete prohibition or compulsion of the practice, Congress has allowed the Board and courts considerable leeway. Yet, even if we were sure of the welfare effects of multiemployer bargaining, I have suggested in this Article that the choice of a standard would not necessarily be dictated.

Because, under the current statute, policymakers lack the power either to require or to forbid multiemployer bargaining, determining how to influence parties' behavior is difficult. A rule that makes it difficult for a firm to withdraw from multiemployer bargaining once it has agreed to it stabilizes relationships; but some firms, aware of the rule, will either refuse to enter a multiemployer bargaining relationship or will insist on a contractual specification reversing the rule. Whether such contractual specification of the rule

is likely depends on the level of transactions costs.¹¹⁰

An "economic analysis" of multiemployer bargaining and the rules that govern it is thus devilishly difficult. It does not follow, in my view, that this indicates a defect in the method of analysis. Quite the contrary, after working through the various levels of inquiry, it is clear to me that at least we have begun to ask the appropriate questions.

¹¹⁰ A survey of multiemployer bargaining groups would probably show that parties enter into multiemployer bargaining without dickering over the terms respecting withdrawal from the unit. This is an area where some empirical research, though currently nonexistent, seems manageable.