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REFLECTIONS ON LABOR LAW REFORM AND THE CRISIS OF AMERICAN LABOR

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In 1932, when the American labor movement was at its nadir, experts like George Barnett predicted the demise of collective representation in the United States. The AFL had given up on organizing the mass production industries, while the company union movement was moribund.[1] Yet five years later the situation changed dramatically, as millions of workers became members of affiliated and employer-initiated (company) unions. There were several causes of this turnaround: legal reforms emanating from Washington; the emergence of new or redesigned representational forms, including the industrial union and the federal labor union; and competition between these new forms and more traditional craft and company unions.

The CIO's industrial unions can be thought of in Darwinian terms as a successful adaptation to the economic environment of the 1930s. The environment, however, has changed over the last sixty years. Today's markets are global, so industrial unions cannot take wages out of competition; neither do high union wages guarantee Keynesian prosperity for the American economy. (Any stimulative impact from union wage premiums is lost when union members spend their incomes on imported goods.)[2] On top of this, unions face a multitude of organizing barriers, including hostile employers and a skeptical workforce.

What is needed, argue this Symposium's contributors, is a spark from Washington that would touch off a proliferation of representational forms better suited to the present environment. Precisely what these forms might look like the contributors do not agree, although most of them think that enterprise-oriented representation (works

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1. On Barnett and other pundits, see David Brody, *The Expansion of the American Labor Movement: Institutional Sources of Stimulus and Restraint, in* INSTITUTIONS IN MODERN AMERICA: INNOVATION IN STRUCTURE AND PROCESS 11 (Stephen E. Ambrose ed., 1967).

2. *See* THE WORKERS OF NATIONS: INDUSTRIAL RELATIONS IN A GLOBAL ECONOMY (Sanford M. Jacoby ed., 1994) [hereinafter THE WORKERS OF NATIONS]. *See also* Daniel J.B. Mitchell, *Inflation, Unemployment, and the Wagner Act: A Critical Reappraisal*, 38 STAN. L. REV. 1065 (1986).

councils, plant participation plans, nonmajority representation) would offer a better "fit" than traditional unionism.

One may question, however, whether economic reality justifies this Symposium's focus on enterprise representation. The past ten years have seen not only economic globalization but also the disintegration of the stable employment relationships which are a prerequisite to enterprise representation. Large nonunion companies like IBM and Eastman Kodak no longer guarantee quasi-lifetime jobs. A rapidly increasing share of the workforce is comprised of contingent employees (part-time, temporary, and contract workers) whose ties to the employer—and whose employers' ties to them—are weak. Of all the contributors, only Finkin, Gottesman, and Rogers mention this problem. Like the promoters of the AFL-CIO's associate member program, Gottesman envisions the emergence of an associational unionism whose cohesion does not depend on stable ties between employers and employees.[3] Similarly, Rogers envisions a labor movement that helps members with their training and counseling needs regardless of who employs them, if anyone.[4] Although I have doubts about the political feasibility of the legal reforms needed to support these ideas, I do, however, think that Gottesman and Rogers are on the right track. Enterprise-oriented representation constitutes but a portion of what is required to close the "representation gap."[5]

Nevertheless, expansion of enterprise-oriented representation remains a worthy objective of industrial relations policy. After all, the supply of relatively stable, career-type jobs may be declining, but there still are many of them around. Properly designed, enterprise representation can serve, like European works councils, as a complement to traditional multi-employer unionism; it can also stand alone. This point is made forcefully by Estreicher[6] and Summers[7] (and by

3. Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59 (1993).

4. Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97 (1993). For related ideas, see CHARLES C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION (1988); Dorothy Sue Cobble, *Organizing the Postindustrial Work Force: Lessons from the History of Waitress Unionism*, 44 INDUS. & LAB. REL. REV. 419 (1991).

5. The AFL-CIO's associate membership program similarly recognizes this fact. Paul Jarley & Jack Fiorito, *Associate Membership: Unionism or Consumerism?*, 43 INDUS. & LAB. REL. REV. 209 (1990).

6. Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3 (1993).

7. Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129 (1993).

Rogers[8] in his other writings). Each outlines overlapping proposals under which employers would establish works councils to provide channels for employee voice, and for participative problem-solving in the workplace.

The proposals divide on a couple of practical issues. First, there is the matter of whether employers should be pressured, in some fashion, to set up works councils or whether their choice should be unconstrained by policy. The former is Rogers's position; he has urged that employers be given positive incentives to create works councils, perhaps by allowing the councils to supervise the enforcement of OSHA regulations or to implement federal on-the-job worker training programs.[9] Some employers would welcome this decentralized regulatory approach; works councils would devise safety and training policies tailored to idiosyncratic employer needs rather than the "plain vanilla" variety emanating from Washington. Rogers has also suggested that the government's administrative savings on decentralization be refunded to employers in the form of tax breaks.[10]

To some, using employer incentives to promote works councils may sound far-fetched. Estreicher, for one, is opposed (he calls it "a bad idea"). Rather than legislate new forms of representation, Estreicher would prefer simply to amend the company union prohibition in section 8(a)(2) of the National Labor Relations Act, and confine the section's reach to "truly coercive or deceptive practices."[11] Once section 8(a)(2) is amended, a variety of alternatives to traditional unionism will, presumably, come bubbling forth, each variant designed to meet local conditions.

Summers picks up where Estreicher leaves off, filling in the details of how, precisely, section 8(a)(2) should and should not be amended. According to Summers, works councils may be created by the employer and would "meet and confer" rather than engage in bargaining. Otherwise, however, works councils would be subject to the entire range of unfair labor practice rules presently in place. Getting rid of these section 8(a)(2) and other unfair labor practice restrictions would, Summers fears, open up a Pandora's box filled with regressive

8. Richard B. Freeman & Joel Rogers, *Who Speaks for Us?: Employee Representation in a Non-Union Labor Market*, *in* EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS (Morris Kleiner & Bruce Kaufman eds., 1993).

9. *Id.* at 63.

10. Id. at 64-65. *See also* Sanford M. Jacoby & Anil Verma, *Enterprise Unions in the United States*, 31 INDUS. REL. 137 (1992).

11. Estreicher, *supra* note 6, at 35.

historical phenomena; a plethora of "sham" company unions might return to haunt us.[12]

But radical reform of section 8(a)(2) is not likely to take industrial relations back to the Dark Ages. After all, we have had nearly sixty years of experience under the Wagner Act. Unions are more institutionally secure than in pre-Wagner days. And, whatever one's position on the *Law and Reality* debate, modern employees are more sophisticated than after the Second World War, when NLRB chair Paul Herzog testified to Congress, "This is 1947, not 1935; in the interim employees have learned much about protecting their own rights and making their own choices with the full facts before them."[13] Changing section 8(a)(2) is necessary and such reform should be more expansive than Summers would allow.

Merely changing section 8(a)(2) is, however, insufficient. In today's legal climate, most nonunion employers do not find section 8(a)(2) to be an impediment to establishing employee involvement (EI) plans (pace *Electromation, Inc.*[14]). Hence something more than a change in section 8(a)(2) is needed to spur employers without EI plans to adopt them and to get existing plans to deal with a broader range of topics, especially the enterprise-wide issues that most EI groups do not address. In other words, employers must be given incentives (other than the negative incentive of an organizing campaign) to experiment with collective representation. The idea of employer incentives is not as far-fetched as it might sound. It has the attention of President Clinton's new Commission on the Future of Worker Management Relations, which hopes to promote works councils as part of an overall strategy for "decentralizing and internalizing responsibility for administering or enforcing government policies."[15] If safety-and-training-oriented councils can reduce the government's administrative and enforcement costs, then it is efficient to share those savings with employers. Incentives are also a way to kick-start the process of representational innovation and diffusion.

A second point in contention is the scope of permissible bargaining issues. Rogers would prohibit works councils from bargaining

12. Summers, *supra* note 7, at 137-48.

13. Detroit Edison Co., 74 N.L.R.B. 267, 279 (1947). *See also* JULIUS G. GETMAN, ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976).

14. 309 N.L.R.B. 990 (1992).

15. Thomas A. Kochan, *Toward a Mutual Gains Paradigm for Labor-Management Relations*, 44 LAB. L.J. 455, 458 (1993); *GAO Launches Examination of Workplace Regulations*, Daily Lab. Rep. (BNA) No. 173, at A-8 (Sept. 9, 1993).

over distributive issues such as wages, hours, and benefits;[16] Estreicher and Summers would allow them to address any and all matters that affect employees' working lives and/or the competitive position of the firm.[17] Rogers's position draws on the German and Japanese experiences, where national wage norms established through centralized bargaining or *shunto* serve to reduce economic adversarialism at the plant level. This permits German works councils and Japanese enterprise unions to focus more easily on integrative issues such as plant conditions and competitiveness. Because they focus on "win-win" topics, works councils and enterprise unions are viewed favorably by employers and employees; in the German case, this focus reassures national unions that their economic functions are not being usurped by the works councils.

Here lies the strongest argument in favor of prohibiting American works councils from pursuing wage bargains: such a ban would differentiate national unions from works councils, thus drawing support for a councils proposal from national unions and from employers. National unions would still have the unique role of representing workers wishing to bargain over pay; employers may be reassured that the integrative benefits of works councils could be obtained without the costs associated with wage bargaining.[18]

Back in the 1930s, critics faulted employee representation plans for failing to assimilate wage bargaining into their integrative approach. Senator Robert F. Wagner wrote in 1934 that the company union "has improved personal relations, group welfare activities, discipline and the other matters which may be handled on a local basis. But it has failed dismally to standardize or improve wage levels, for the wage question is a general one whose sweep embraces whole industries, or States, or even the nation."[19] Wagner's criticism had found the Achilles heel of 1920s-style employee representation. But

16. Rogers, *supra* note 4.

17. Estreicher, *supra* note 6, at 29-30; Summers, *supra* note 7, at 143.

18. The same argument can be made about strikes: prohibiting works councils from striking would facilitate enterprise cooperation and differentiate councils from national unions. The "peace obligation" of German works councils is based on this idea. Most U.S. advocates of the German approach support a ban on concerted activity for employer-initiated councils.

19. Robert F. Wagner, *Company Unions: A Vast Industrial Issue*, N.Y. TIMES, Mar. 11, 1934, § 9, at 1. Company unions that survived the Wagner Act evolved into independent labor unions (ILUs), a hybrid combining the cooperativeness of an enterprise union with the economic assertiveness of an affiliated union. Companies with ILUs were saddled with high labor costs, sometimes exceeding national union wage levels. Although companies preferred ILUs to affiliated unions, they shed the ILUs as soon as a lower-cost alternative became available, namely, the "new" nonunion model of the 1960s, which provided the same integrative benefits as ILUs but at lower cost. Jacoby & Verma, *supra* note 10.

the argument has little meaning today. Wage standardization no longer serves the economic function once envisioned by underconsumptionists like Wagner. And in contrast to the situation in 1934, national unions are today entrenched in those sectors of the economy still prone to oligopoly.

That still leaves open, however, the question of how wages would be determined in a works council system. In his article for this Symposium, Rogers suggests the possibility of regional wage standardization along lines currently being tried in Canada,[20] an interesting idea which, potentially, could facilitate either enterprise or multiemployer unionism. The proposal is not so far-fetched; analogues already exist in the form of the Davis-Bacon Act[21] and other prevailing wage laws. Another route to solving the wage problem would be to jettison the outdated notion of wage standardization and instead encourage employers to tie compensation to their firm's ability to pay. Many firms already are doing this, although in piecemeal and haphazard fashion. Employers would, undoubtedly, be less averse to the promulgation of revenue-or gain-sharing formulas than to wage bargaining or mandated standardization. Works councils could play an auditing role, ensuring employees of the reliability of the employer's financial data and revenue allocations. Of course, this kind of system would, *ceteris paribus*, raise rather than reduce pay inequality. Inequality could, however, be remedied through the fiscal system (e.g., negative income taxes, which the Clinton administration already has endorsed) instead of the labor market.[22]

One point on which this Symposium's participants agree is the continued importance of, and need for, national unions. New representational forms—be they works councils, nonmajority groups, or whatever—are seen as supplements to, not substitutes for, national unions. Just how important national unions will be in the future the authors do not say, though the implied range runs from traditionalists like Summers (very important) to skeptics like Estreicher and Gottesman (not very).

The traditionalists argue comparatively: Like the United States, other countries have experienced intensified global competition and

20. Rogers, *supra* note 4, at 115-16.

21. 40 U.S.C. §§ 276a to 276a-5.

22. MARTIN L. WEITZMAN, THE SHARE ECONOMY: CONQUERING STAGFLATION (1984). Even in Germany and Scandinavia, where the local wage issue supposedly is mooted by industry bargaining, wage problems still crop up at the plant level, leading to inequality in the form of wage drift ("black wages"). To the extent that such inequality is reduced, the process occurs outside of, rather than within, the labor market.

decartelization, yet their union sectors have not declined nearly so much as our own. Causal reasoning then leads to two key factors differentiating the U.S. experience: a flawed legal regime and a highly decentralized bargaining system. Both of these factors, say the traditionalists, encourage employer resistance to unionism; such resistance is more important than economic circumstances in causing low union density in the United States. Because no one expects wage bargaining in the United States to ever become as centralized as in northern Europe[23] (or, under *shunto*, as coordinated as in Japan), that leaves reform of the legal regime as the main device for allowing national unions to realize their potential.

The skeptics recognize the need for labor law reform.[24] But they are dubious that it will lead to large density gains, chiefly because they doubt that employer resistance has been a major cause of labor's problems. To Estreicher, what is of equal if not greater causal importance is declining demand for unions; employees feel that their needs are better met by nonunion firms, by statutes, and by the market.[25] There is merit in this view. But Estreicher underemphasizes the importance of employer resistance. After all, a declining demand for unionism is not inconsistent with employer resistance; the latter may well have a chilling effect that turns workers away from unions.

These supply-demand issues are best considered in a comparative context. Canada provides a useful illustration; its workers and managers are similar to those in the United States but its legal framework is quite different. Yet according to a recent study, demand factors account for only twenty-nine percent of the private-sector union density difference between Canada and the United States; most of the differential is due to supply factors.[26] Such findings support the claim that employer resistance (and a less favorable legal environment) have reduced the relative supply of unionism in the United States. Thus labor law reform, including a smaller role for the courts and streamlined

23. Rogers's claim that, in Europe, "once robust structures of peak bargaining have widely collapsed" is surely an exaggeration. *See* Miriam Golden, et al., *The End of Corporatism?: Wage Setting in the Nordic and Germanic Countries, in* THE WORKERS OF NATIONS, *supra* note 2.

24. One reform advocated by Estreicher concerns the contract bar rule. The rule, he believes, determines contract durations, which he thinks are too brief. However, historical analysis suggests the reverse: the rule has been keyed to existing contract durations. Moreover, the bar has never been an obstacle to parties wishing to negotiate contracts with durations exeeding the bar. *See* Sanford M. Jacoby & Daniel J.B. Mitchell, *Does Implicit Contracting Explain Explicit Contracting?, in* PROCEEDINGS OF THE 35TH ANNUAL MEETING 319 (Industrial Relations Research Association, Barbara D. Dennis ed., 1983).

25. Estreicher, *supra* note 6, at 7-8.

26. W. CRAIG RIDDELL, UNIONIZATION IN CANADA AND THE UNITED STATES: A TALE OF TWO COUNTRIES 16 (Queen's Papers in Industrial Relations Working Paper No. 1993-1, 1993).

representational procedures, has more potential for increasing union membership than the skeptics would have us believe.[27]

In arguing for labor law reform, however, I admit to being guilty of a sin shared by all contributors to this Symposium: a notable disregard of *realpolitik*. While the contributors offer proposals that are imaginative, well-reasoned, and logical (as one would expect from professors of law), they lack calibrations of political feasibility. Take the various suggestions for works councils. Are they within the realm of political reality? Frankly, none of us knows or has attempted to find out. We must consider: What are the views of major employers' groups, national unions, unorganized employees, and Congress? How might proposals be shaped to anticipate objections from the parties? Would reform of section 8(a)(2) be strongly opposed by unions? Would such reform be sufficient incentive for employers to establish works councils?

On this last point, my own opinion is that employers will want much more than a change in section 8(a)(2) before they adopt works councils or support legislation mandating them. After all, employers realize that a works council solves the collective action problem; in one stroke, it transforms an inchoate mass of employees into an organized group ripe for the picking by union organizers. The hassle of being hit with repeated organizing drives is one reason why employers gave up on independent unions in the 1950s; the "raiding rate" for independent unions in those years was roughly 10 percent per annum. Indeed, the attraction of the modern nonunion model is its emphasis on small group activities like EI. Small groups provide to employers—and to employees—many of the benefits of collective "voice" without the NLRB-election liabilities posed by larger groupings.[28]

Or take Finkin's proposal for nonmajority representation (which fits very closely Hyde's prescriptions for "caucus law").[29] Is it realistic to think that employers will support either set of proposals? Experience with craft severance provides some evidence on this issue.[30] Em-

27. "[T]he probability that a Canadian worker who desires union status will in fact be unionized is 0.84 higher than the equivalent likelihood for an American worker." *Id.* at 17.

28. Sanford M. Jacoby, *Reckoning with Company Unions: The Case of Thompson Products, 1934-1964*, 43 INDUS. & LAB. REL. REV. 19 (1989); ARTHUR B. SHOSTAK, AMERICA'S FORGOTTEN LABOR ORGANIZATION 115 (1962); ROBERT E. COLE, STRATEGIES FOR LEARNING: SMALL-GROUP ACTIVITIES IN AMERICAN, JAPANESE, AND SWEDISH INDUSTRY (1989).

29. Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI-KENT L. REV. 149 (1993).

30. The Globe Mach. & Stamping Co., 3 N.L.R.B. 294 (1937); General Elec. Co., 58 N.L.R.B. 57 (1944).

ployers traditionally have opposed the severing of crafts from industrial units because of a belief that small groups hinder representational efficiency. Employers undoubtedly would feel the same way about nonmajority representation. Moreover, employers will be concerned about adverse selection: Under nonmajority representation, employees have an incentive to form small groups that concentrate, rather than disperse, particular health and other risks.

And what about unions? Here we can to turn to theory. The collective action problem suggests that the groups most likely to take advantage of nonmajority representation will be dissatisfied factions within existing units, *not* unrepresented employees. Having factions break off from existing units will not make unions happy, just as craft severance irked the CIO in the early 1940s. On the other hand, the cost of servicing small units and the labor movement's commitment to exclusive representation make it unlikely that unions will push hard to create nonmajority units comprised of currently unorganized workers. Given all this, the political prospects for nonmajority representation are, to say the least, dim.

When it comes to proposals for workplace representation, we suffer an embarrassment of riches. What is needed, frankly, is less imagination and more practicality. The important question on the policy agenda is how to craft proposals that will be supported by a Congressional majority. We have a responsibility to consider how key interest groups—chiefly, employers and unions—will weigh the costs and benefits of particular proposals. Perhaps other interest groups should be considered; we do also need to assess the views of unorganized employees, as Rogers suggests. My hunch, however, is that no reform proposal will fly unless it is supported both by employers and by unions.[31] Absent such support, we are all just shouting in the wind.

31. Indeed, much as I like the idea of labor law for unorganized workers (Gottesman) or for caucuses (Hyde), who would sponsor such a proposal? No organized constituency—what Rogers calls a "committed agent"—is immediately obvious; this is a fatal flaw.