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REFORMING THE NATIONAL LABOR RELATIONS ACT: A CAUTIONARY NOTE

David Weinstein*

I. INTRODUCTION

In 1955, 35 percent of all workers in the private sector belonged to unions, today only 16.8 percent are members and the percentage is destined to fall even more unless something changes.\(^1\) This sharp decline in unions' fortunes has triggered a number of inquiries into its causes and has stimulated a number of proposals to correct it.

The would-be reformers are essentially agreed on the causes but this apparent agreement on causes masks rather sharp differences about the ultimate objectives to be achieved by labor law reform. Those who favor removal of what they believe are abuses and distortions in the interpretation and administration of the National Labor Relations Act (hereinafter "Act" or "NLRA"),\(^2\) explicitly or implicitly, wish to return to some earlier state of affairs in which the Act, in their view, was correctly interpreted and administered. Removal of the perceived distortions and abuses, however, would not move us forward but only back to the conditions which prevailed before they arose.

Others would take it a step further ahead, but do so by moving us even farther back to still happier days. This apparent paradox is explained by the history of the NLRA. It is not a single statute but an amalgamation of several different laws with conflicting objectives. The original version was the Wagner Act of 1935\(^3\) which moved the federal government from comparative neutrality in the struggle between unions and employers to active support for unions organizing

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The Labor Management Relations Act of 1947 (hereinafter "Taft-Hartley Act") recognized the rights of employers and employees to oppose or refrain from union activities and collective bargaining. The Taft-Hartley Act purported to restore a balance between the rights of employers and unions to organize and the rights of employers to resist. A focus on "rights," however, ignores important questions about the ability of each side to exercise its rights and the willingness and capacity of the other to frustrate that exercise.

The 1959 Landrum-Griffin Act amendments limited the right of unions to use certain of its most effective economic weapons. This limitation was exacerbated by the increased ability and willingness of employers to use, legitimately and illegitimately, economic power to frustrate union organizing and collective bargaining. Some trade union leaders and others believe that the trade-offs made by Congress have destroyed union organizing because the unions lost any effective capacity to engage in strikes or secondary activity while employers have retained their power to defeat unions. These people advocate repeal of the Act and conclude that there will be fundamental barriers to organizing so long as the National Labor Relations Board (hereinafter "NLRB" or the "Board") regulate the use of economic power by unions.

Most proponents of reform of the Act stop well-short of advocating either outright repeal or even major changes in the statutory balance established by the 1947 and 1959 amendments. As will be seen, they conclude that employers have used illegitimate tactics such as delay, litigiousness and commission of unfair labor practices to defeat union organizing and bargaining. They propose administrative and remedial reforms designed to remove the benefits that employers accrue by creating delay and fear, both of which undermine

11. See id.
The substantive changes these reformers propose are correctives that challenge few, if any, basic assumptions.

There are, however, others who would repeal certain key provisions of the 1947 and 1959 amendments to the Act and return to the goals of the original Wagner Act. They are less confident that cleaning up abuses, speeding up case processing and beefing up remedies will really make enough of a difference. They propose to limit the ability of employers to campaign against unions and avoid initial collective bargaining agreements, and also to remove some restrictions on the use of union economic power.

These proposals rest on a number of untested assumptions about their necessity, efficacy and desirability if, indeed, they actually did work. This article will explore some of these untested assumptions. Although it is impossible with our current knowledge and understanding to conclusively validate or invalidate these assumptions, some important open questions need to be answered before Congress acts to reform the NLRA. It must, first, decide if the proposed reforms are really necessary. There is a coincidence between employer manipulation of administrative and remedial deficiencies and the decline of union success in organizing but, mere coincidence does not necessarily establish the causal relationship upon which the reformers so heavily rely. There may be more compelling factors that explain union decline and which are now changing in ways that will, quite independently of statutory or administrative reform, improve the unions' chances of success.

Second, increased regulation or outright prohibition of illegitimate tactics will only directly affect those who employ such tactics. If a substantial majority of employers win without violating the law or manipulating the system, then any such reforms will not directly affect them. There may, of course, be indirect effects of reform, especially on the climate for organizing, but the bulk of reformers lack any model for predicting how changes in climate would translate into increased organizing.

12. See infra text and accompanying notes 20-36 (discussing those reformers in more detail).

Indeed, this seems to be the chief deficiency in the reformers' positions. They focus on correlations between abuses and employer success or union failure, but they do not adequately explain how it came to be that employers decided at some point to take advantage of preexisting weaknesses in the system which they did not exploit earlier. Without some sense of how the actors respond to the inherent incentives and disincentives in the present system, Congress will have great difficulty in formulating reforms that actually work.

Finally, assuming that some reforms will increase union organizing success, Congress must decide if that is what it really wants. Most analysts seem to believe that removing abuses will return union organizing to some preexisting successful path from which it has been artificially deflected. Implicitly, this prior path is taken to be the "natural" but, one based on the reformers' own arguments, they assume this path was shaped by government policies, some of which they propose to change. By merely removing abuses, however, one would at best return to success rates which prevailed prior to the abuses. Others, whose proposals are more far-reaching, would like to reproduce union success rates prevailing before the Act was amended in 1947 and 1959 and before employers so actively resisted organizing.

Since, as is argued below, unions are likely to do better even without any changes in current law and practice, modifications may (and some of the major ones almost surely would) produce a considerable increase in organizing success and collective bargaining. Congress must decide if this is what it really wants. Even advocates of serious reform have expressed reservations about the value and future of collective bargaining.\textsuperscript{14} Traditional justifications for it emphasize the security and participation unions provide.\textsuperscript{15} As governments at all levels provide statutory and common law protections equaling or exceeding those which unions can offer to workers and as employers co-opt unions' economic and participatory programs, these justifications no longer ring as true as they once did. The traditional justifications embody a rather narrow view of the role and functions of autonomous worker organizations. There are some who envision a broader role in which unions not only ensure the genuine labor-management cooperation our country needs to compete internationally, but also ensure that workers will be able to take advantage of the enhanced statutory and common protections adopted for their

\textsuperscript{14} See Weiler, \textit{Milestone or Tombstone}, supra note 13, at 18.
\textsuperscript{15} See id.
benefit.\footnote{16}

Unions, in this view, are essential tools of national industrial policy and, therefore, should be actively encouraged. Congress will have to carefully ponder such a radical change in usual assumptions.

Whatever the ultimate justification for unions, the more expansive proposals to improve their success would curtail the freedom of choice of both employers and employees. To promote organizing dramatically, Congress will have to limit the ability of employers to resist unions and force more employees, who do not want unions, to accept their majority rule. Not only does this cut against the grain of current practice, it also means that Congress will have to decide how it can protect individuals' rights at the same time that it is increasing the power of labor organizations over workers.

It will not be possible to adequately address all of these intended and unintended side effects of labor law reform within the confines of this article, but some thoughts are offered below for further consideration. The main focus here is on the reform proposals, their necessity and their efficacy. The conclusion is that anyone who would benefit from most of the proposed modifications probably does not need them.

\section*{II. Scope of Reform}

One may divide reformers into three broad schools: 1) those who would repeal the Act; 2) those who remove abuses and distortions; and 3) those who would make more radical changes to promote organizing. The repealers may be divided into two major factions which, as will be seen below, operate on markedly different assumptions. The first group consists of trade union leaders and their supporters who wish to repeal the NLRA so they can once again use economic weapons denied to them by the Act.\footnote{17} They are willing to remove similar restrictions on employers and slug it out with them.

The other advocates of repeal believe that market forces supplemented by the common law of torts and contracts will produce, on balance, more desirable outcomes for workers, employers and the economy than any regulatory system, NLRA or otherwise, can.\footnote{18} Tort and contract law would impose some limits on the union's use


17. \textit{See Trumka, supra note 10.}


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of economic weapons so there would be regulation, but not in the present form.\(^{19}\)

A much larger group of reformers would remove what it views as distortions or abuses of the system by employers who use delay and unfair labor practices to defeat organizing. They cite empirical studies which show that a union’s chances of winning an organizing drive decrease substantially if the employer can delay the election and if the employer commits unfair labor practices to intimidate prospective voters.\(^{20}\) Both instances of delay and the commission of unfair labor practices are increasing,\(^{21}\) and the Board seems unable to act either expeditiously or, because of its emphasis on remediation of individual wrongs, effectively, to deter violations that impact group interests.\(^{22}\) The Board’s remedies are particularly ineffective in deterring willful violators who have little to fear from reinstatement of improperly terminated workers and of back pay awards to them.\(^{23}\) Since most people do not wish to return to a company which summarily discharged them, and have to earn a living, the intentional violator that gets credit for interim earnings stands to lose little and gain much from violating the law.\(^{24}\)

This group’s proposals fall into three broad categories. Some would have Congress or the NLRB streamline its structure and procedures to remove delay and make remedies more meaningful. Their proposals include: expanding Board membership and term of office; limiting appeals from administrative law judges’ decisions; making Board orders self-enforcing; using special mediation staff; increasing use of rule-making and other public guidance; raising jurisdictional standards to reduce NLRB caseload; establishing mandatory time tables for case processing; abolishing forum shopping; using smaller panels to decide cases; and giving higher priority to certain classes of unfair practice cases.\(^{25}\)

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22. R. Flanagan, supra note 7; Weiler, Promises to Keep, supra note 13, at 1778.

23. See R. Flanagan, supra note 7 (analyzing this proposition).

24. See Weiler, Promises to Keep, supra note 13, at 1791.

Others propose broader changes in procedure or structure such as assigning to the federal courts, either the U.S. District Court\textsuperscript{26} or a special labor court,\textsuperscript{27} jurisdiction over unfair labor practices and representation elections. The immediate availability of judicial monetary remedies, injunctive relief and the court’s contempt power would, in theory, eliminate many of the problems of delay, noncompliance, and inadequacy of remedies to vindicate group rights as distinguished from individual rights.\textsuperscript{28}

A third subset of those who would, in essence, restore the status quo ante advocate remedial changes such as: double or treble damages for illegal discharges (without any offset for interim earnings); denial of the right to discharge union activists without Board permission; temporary injunctions to restrain employer violations and maintain the status quo; denial to willful violators of the right to contract with the federal government; limits on use of strike replacements and make-whole remedies for refusal to bargain. Some among this group would also strengthen the unions’ organizing effectiveness by expanding their right to use slowdowns or partial strikes and engage in secondary activity.\textsuperscript{29} Many of these reforms were embodied in the ill-fated Labor Reform Act of 1978.\textsuperscript{30} If past and present legislative

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\textsuperscript{27} See Morris, The Case for Unitary Enforcement of Federal Law—Concerning Specialized Article III Court and Reorganization of Existing Agencies, 26 Sw. L.J. 471 (1972) (calling for interpretation and enforcement of existing federal labor laws by a specialized labor court).

\textsuperscript{28} See Gregory, Proposals to Harmonize Labor Law Jurisprudence and to Reconcile Political Tensions, 65 Neb. L. Rev. 75 (1986) (including a discussion and critique of proposals to establish a non-appellate labor court).


\textsuperscript{30} See 1978 CONG. Q. ALMANAC 284-87 (providing a history of the rise and fall of this legislation). The Labor Reform Act of 1978 was the last major attempt at a comprehensive overhaul of the National Labor Relations Act. See id. As passed by the House of Representatives, on October 6, 1977, the legislation (HR 8410) streamlined NLRB procedures and stiffened penalties for labor law violators. Id. Specifically, HR 8410 provided for:

—quick deadlines for holding union representation elections (25 days for majority card showing and up to 75 days in exceptional cases);

—union access to company premises with comparable employer access to union
proposals are any guide, this group's views have the ear of Congress.

Although there is great diversity among those placed here in the second group of reformers, they all seem to share a broad common goal to remove barriers to organizing which result from administrative or remedial failure. For the most part, they do not challenge the legitimacy of the basic rights granted to employers by Congress so long as these rights are exercised within the letter and spirit of the law. In particular, they do not question the right of employers to campaign against unions in representation elections and they do not question the right of employers to resist collective bargaining agreements, although they would eliminate abuse in the exercise of those rights. Their more limited goal is restoration of a fair system for exercise of pre-existing rights.

The third group of reformers challenges several basic assumptions behind the Act, especially those underlying the Taft-Hartley Amendments. One assumption is that employers have the right to campaign actively against unions, and another is the prohibition against the government, directly or indirectly, to require parties to enter into collective bargaining agreements or accept dictated contract terms. The chief proponent of more sweeping changes is Professor Paul Weiler of Harvard Law School. Although his starting point is the same as others, he recognizes the limits of remedial and procedural reform and proposes more sweeping changes including: instant elections; bans on permanent replacement of strikers; expansion of permitted secondary activity; union discipline of members halls during representation campaigns;--double back pay to employees illegally fired for union activities;--"make whole" remedies for wages lost during an employer's refusal to negotiate a first contract;--federal contract debarment for repeated labor law violators;—court enforcement of NLRB orders absent a company appeal within 30 days;—required use of injunctions against employers during organizational drives to prevent unlawful discharges; and—increased NLRB membership (from 5 to 7 members), and small panel handling of routine cases.

See id.

Despite initial success, HR 8410, as amended and reported to the Senate Committee on Human Resources, met considerable resistance on the Senate floor. See id. Following a five week filibuster, the bill was recommitted to the Human Resources Committee, never to resurface as a comprehensive package again. See id.

31. See supra note 29 (providing examples of these reformers).
32. See id.
33. See id.
34. See, e.g., Weiler, Milestone or Tombstone, supra note 13; Weiler, Promises to Keep, supra note 13; Weiler, Striking a New Balance, supra note 13.
who cross a picket line; judicial civil damage remedies for illegal discharges; and binding arbitration of initial agreements as a remedy for refusals to bargain in good faith.\textsuperscript{35}

Weiler, while purporting simply to be proposing more effective ways to negate employer power through remedial and administrative reform, is really proposing a restructuring of the basic power relationship between labor and management. He would eliminate not only illegitimate employer opposition to unions and collective bargaining but also much of the presently legitimate opposition. He cites with approval the Canadian experience where reforms such as those he proposes have contributed to degrees of union organizing success and union penetration of the private sector exceeding any we have ever seen in this country.\textsuperscript{36} His proposals are qualitatively different in their challenge to and their ramifications for our industrial labor-relations system.

III. WILL ADMINISTRATIVE AND REMEDIAL REFORM WORK?

One reason Weiler would go beyond correcting abuses is that he doubts that administrative and remedial reforms will make much of a difference in union success. There are two measures of union success. One is the percentage of private sector workers who are represented by unions, the other is the success rate in representation elections.

Union density is a function of a number of factors such as organizing effort, economic climate, regulatory environment and employer resistance. Even if unions had won every representation election since 1950, they would still have represented a smaller percentage of the total private workforce than they did in 1955.\textsuperscript{37} Structural, attitudinal and other changes in the work force and the economy will continue to cause an erosion in union strength unless there are some dramatic reversals in union organizing.

A number of analysts have tried to determine why unions have fared so poorly in representation elections.\textsuperscript{38} Their studies indicate

\textsuperscript{35.} See id.
\textsuperscript{36.} See Weiler, Promises to Keep, supra note 13, at 1816-19.
\textsuperscript{37.} See Dickens & Leonard, Accounting for the Decline in Union Membership, 1950-1980, 38 INDUS. & LAB. REL. REV. 323 (1985) (providing a study that analyzes post-1950 trends in union organizing and challenges the view that the reduction in the unionized share of the workforce is caused primarily by the decline in employment in highly unionized industries).
\textsuperscript{38.} A number of empirical studies are summarized and reviewed in R. FREEMAN & J. MEDOFF, supra note 20. See also Dickens & Leonard, supra note 37; Heneman & Sandver, Predicting the Outcome of Union Certification Elections: A Review of the Literature, 36 INDUS.
that employer resistance, both legal and illegal, is an important correlate of the union's decline, although the effort expended on organizing and the general economic climate and industrial mix nationally all played an important role in union success. The studies, however, tend to assign less weight to the economic variables.\footnote{39}

These findings pose several questions. Even though delay and meritorious unfair labor practice charges have been rising steadily for years, and the NLRB under the Reagan Administration was unsupportive of union organizing, since the early 1970's, a union's chances of winning representation elections has changed remarkably little. In the 1973-78 period, unions won approximately 47 percent of all private sector representation elections\footnote{40} and in the 1980's, through the first half of 1988, unions won approximately 45-48 percent of all representation elections.\footnote{41} Despite all the changes in the economy, the composition and philosophy of the Board, the commission of unfair labor practices and delay in case processing, unions have fared nearly the same during the entire period.

It is not entirely clear what this means but, at a minimum, it appears that there is some irreducible demand for unions which survives despite all the barriers to unionization. The data also suggest that the explanations offered for union decline leave something to be desired, having predicted a lower election success rate than actually materialized.

It may well be that the empirical studies are too limited to offer any guidance for policy. Most are inductive studies in which analysts offer post hoc theoretical justifications to explain empirical relations.\footnote{42} The identification of a relationship is not the same, however, as proving a causal relationship.\footnote{43} For example, there is a correlation between unions' expenditures on organizing and their organizing success, but in which direction does cause and effect run? Did the unions forego opportunities to gain members because they cut back on organizing expenditures or did they cut back on organizing because the estimated gains were outweighed by the projected costs?

These studies focus on static relationships and fail to explain the dynamic interaction among the variables studied. In an interesting
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study, Professor Robert J. Flanagan of Stanford Business School attempted to trace the dynamic relationship between union organizing and employers' willingness to use delay, unfair labor practices and associated litigation to resist unions. He concluded that an employer is willing to violate the law if the expected payoffs exceed the expected costs. Flanagan describes the employer's and union's decision-making processes in terms of action and reaction rather than simply using aggregate data to construct correlations between variables.

His study suggests that the potential to manipulate the system or violate the law is always present. However, it is unclear why some employers decide to use the weapons available to them and others do not. One possible explanation is that when operating with a union becomes markedly more expensive than operating without one, employers respond by increasing their resistance to unions.

Even when the costs of non-compliance with the law are figured in (e.g., litigation costs, back pay remedies), it may still be cheaper to resist. Board decisions favoring employers also reduce the costs of resistance which, in turn, further spurs employers to resist. Consequently, this produces unfair practice charges by individuals and unions that create additional backlog and delay which, in turn, increase the rewards of resistance, and so forth. What triggered this entire vicious circle was, however, the prospect of economic gain from non-compliance. Flanagan uses the union/nonunion wage differential as a measure of the cost of unionization and concludes that resistance increases as the differential grows larger because the cost of unionization increases.

If this differential was higher in the past than it is now, the rewards of resistance would have been substantial. In fact, through the early 1980's, the differential continued to grow even as the economy slipped. The U.S. economy experienced rolling recessions with one sector after another feeling the negative effects of dramatically increased energy costs, severe inflation, serious foreign competition, lowered productivity, abnormally high unemployment and decline in the most heavily unionized mass production industries. This was a

44. See R. FLANAGAN, supra note 7.
45. See id.
47. See R. FLANAGAN, supra note 7.
most uncongenial atmosphere for union organizing. Employers resisted because they could no longer pass higher labor costs on to consumers. They also wished to innovate, but feared the work restrictions which unions seek. Finding a ready supply of replacement workers, employers were more willing to take a strike. Workers, under the circumstances, were reluctant to risk their already insecure jobs.

Of course, some of the blame for lack of success has to rest with the unions themselves. They were slow to recognize changes in the economy and the work force, they failed to change organizing tactics to reach different types of workers and they did not increase organizing efforts. The greater part seems, however, to be attributable to the deep shifts in the economy. The reformers rely on empirical studies which assign a lesser weight to economic factors. As the analysts recognize, however, the studies cannot discount the possibility that deep structural changes in the U.S. economy negatively impacted the ability of unions to organize. The hypothesis here is that it is not coincidental that the economy and union organizing success declined simultaneously.

If this is so, then one would expect an upturn in the economy and tightening of the labor market, together with narrowing image differentials to improve the unions' batting average. To put it another way, the unions were experiencing a cyclical rather than a secular decline. External economic forces and the unions' slow response, together with increased incentives for employers to resist, may account for the problems that many attribute to the substantive, remedial and administrative deficiencies of the Act and its enforcement.

Unions seem destined, in any event, to do somewhat better even without any of the proposed changes in the Act. Unemployment has fallen to a level last seen in 1973, a 16 year low. Profits are up, the number of young people entering the labor market is falling, U.S. companies are more competitive internationally and the labor movement is more cohesive than it has been in years. Except for pockets of hard-core unemployment, the country is facing a shortage of workers, not a shortage of jobs. Factory utilization rates have im-

50. Dickens & Leonard, supra note 37, at 332-33.
51. See Id.
proved to the point where the concern is overheating, not underemployment.\(^5\)

Even the symbols have changed. The Reagan administration's willingness to terminate public employees—air traffic controllers represented by PATCO—who struck in violation of statute, became the symbol, if not the cause, of employer resistance to private sector unions and their demands. Today, the symbol is union solidarity and resistance to Eastern Airlines. Even Eastern's pilots' organization, a group not previously known for its militancy or respect for union picket lines, joined the walkout, driving Eastern Airlines into bankruptcy.\(^6\) The NLRB has itself also become more accommodating. Recently, it imposed new rules for health care industry bargaining units which should speed up organizing.\(^6\) It may well be that the reform proposals are addressing yesterday's problems and while too late to do much good may cause future harm.

IV. Efficacy and Costs of Administrative and Remedial Reform

If Congress intends to act, proposals to speed up Board processes and strengthen Board remedial powers are likely to have limited success. First, they directly affect only those employers who rely on delay and unfair labor practices to defeat union organizing drives. The available data suggests that only a minority of employers use such tactics.\(^6\) Most employers, either obey the law or, if not, commit violations which unions do not pursue through the NLRB processes.\(^6\) Remedial reform will not affect these employers.

Even employers who violate the law may not be deterred by adoption of proposals which, for example, require the Board to seek injunctions against employers. The federal courts and the NLRB would have to deal with thousands of extra law suits which they may not be equipped to handle.\(^6\) In any event, increasing the compliance burden will simply increase the delay.

Another proposal is the use of punitive damages such as double or treble back pay awards in cases of improper discharge of union activists. Such penalties clearly increase the cost of illegal resistance but no one can be sure if they are too high, too low or just about

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54. \textit{Id.}
55. \textit{See Liscio, supra note 49.}
57. \textit{See R. FLANAGAN, supra note 7.}
58. \textit{Id.}
59. \textit{See Weiler, Striking a New Balance, supra note 13.}
Employers benefit from illegal discharges by not only ridding themselves of the individual employee, but also scaring other employees into abandoning their support for the union. Double or treble back pay awards to individuals may, in some cases, be too low to discourage illegal resistance if the rewards from group discouragement are great enough. In other cases, the penalty may be too high and the employer, for fear of violating the law, will retain poor employees who deserve to be fired. Even those proposing a ban on all discharges during an organizing drive, carve out an exception for truly awful employees who seek to avoid their just desserts by hiding behind union activity. In any event, employers will simply change tactics to avoid the penalized behavior while trying in other ways to retain the benefits of resistance to unions.

Proposals to eliminate delay also have their limitations. Delay is inevitable and built into the system; cases simply take time to process if we wish to give both sides a chance to participate equally. The problem is that even short delays in holding elections orremedying unfair practices adversely affect the union's chances of winning a representation election. Moreover, the minority of employers who use delay as a tactic are likely to be the same ones who commit unfair labor practices as a tactic. Delay will persist unless the latter problem is dealt with and that may be difficult to do.

Weiler, for one, is convinced that remedial reform alone will not be effective and urges Congress to remove the opportunity for employers to use delay and unfair labor practices to defeat union organizing. His proposals for instant elections and arbitration of first contracts as a remedy for failure to bargain in good faith would reduce such opportunities, but at what price? These proposals as well as some of Weiler’s others (e.g., bans on permanent strike replacements; increased use of secondary activity in support of primary strikes; and union discipline of members who cross the picket line), all tend to promote unions’ institutional interests at the expense of individual choice.

Without employer campaigning, employees will be denied access to valuable information bearing on their upcoming choice. The only realistic source is, however, the employer who will not have time to prepare and present the information. First contract arbitration
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substitutes a third person's choice for that of the parties.

Proposals to bar permanent replacements and permit more secondary activity are intended, in tandem, to make the right to strike more effective. There is a question whether these measures are really needed. Some employers use permanent replacements, but only when lower skill levels, minimal training requirements, relaxed quality control and, above all, willingness of workers to cross a picket line all coincide. Employers have to consider the full costs of using permanent replacements which include picket line and other types of violence, and a divided and demoralized work force since at least some of the strikers will eventually return to work alongside their replacements. Employers who hire replacements, realistically, have to guarantee that they will not be terminated at the end of a strike. If an employer terminates the replacement workers as part of a strike settlement, it might face a suit by the replacements.64 Having taken on this additional financial burden, a company which uses replacements has really committed itself to getting rid of the union. Not many employers are willing or able to declare open warfare on their incumbent unions.

The present ability and willingness of employers to permanently replace strikers is probably much less than one would imagine. If nothing else, the tightening of the labor market suggests that employers will not be able to find the numbers of skilled, unemployed workers willing to cross picket lines that they could in the late 1970's and early 1980's. Changed circumstances may again have taken the urgency out of any proposed changes in the law.

Weiler also argues that strikers need additional weapons when employers operate during a strike. His answer is to let unions in such cases do indirectly that which they cannot do directly, i.e. stop the employer's goods and services from flowing into the stream of commerce. He proposes that limited secondary picketing be permitted when an employer operates during a strike and a majority of employees support the strike. Picketers would be allowed to urge employees of secondary employers to stop using, handling, processing, or servicing the goods and services of the struck employer.65 A successful single product boycott would produce the same interdiction as a successful primary strike. If the employer cannot operate during the strike, then this tactic will, of course, not be necessary.

Weiler recognizes the potential for “top-down” organizing and

65. See Weiler, Striking a New Balance, supra note 13.
interference with employee choice when unions use secondary activity to force reluctant primary employers and employees to support it. By limiting its use to economic strikes that command majority support, he has removed some but not all of the intrusion on free choice implicit in his proposals. Under Weiler's proposal, an employer, a bare majority of whose employees choose to cross the picket line, could be forced to close down because of relentless secondary pressure by the union. Imposition of union fines on employees crossing the picket line would further enhance union power.

The change from current practice is likely to be substantial. If 40 percent of the employees in a bargaining unit choose not to honor the picket line, it is probable that the strike has already failed and the remainder will drift back to work. Weiler would permit the 60 percent who support the strike to make effective strikes which otherwise would have failed. This is a radical shift of power. Union leaders would gain power which they have not had in years. Despite Weiler's recognition of the negative potential for "top down" organizing and the limitations which he proposes to remove some of this potential, he clearly seems to prefer institutional to individual interests. He would require recognition of unions based either on authorization cards or quick elections, both of which permit the union to organize without effective employer opposition.

He would also require that employees work for at least several years under a negotiated or arbitrated collective agreement. The union is expected in this period to entrench itself, proving its worth and lobbying for more support. Entrenchment would make it more difficult for employees who oppose the union to do so and would further reduce their freedom of choice.

V. WHY PROMOTE UNION ORGANIZING?

Since Weiler intends to promote more organizing and, more collective bargaining and more collective labor agreements, he recognizes that he must demonstrate the advantages of this course, given its costs. He has offered several traditional justifications for it, but he has also expressed reservations about collective bargaining. One justification that he identifies is the introduction, through collective bargaining, of democratic participation in the workplace. He argues that career employees in mature enterprises have neither the mobil-

66. See id.
67. See id.
68. See id.
ity nor choice among alternative jobs to be able to use their market power, *i.e.* the threat to go elsewhere. Without such a credible threat, the average unorganized employee lacks the power to bargain effectively with his or her employer. Weiler claims that collective action through unions will give the career employee a voice in the terms of employment, how authority is exercised and the conditions under which work is performed. 69

Weiler also argues that in addition to increased control (and higher wages), collective bargaining agreements benefit career employees by: 1) substituting standardized wage systems for management discretion, typically reducing wage disparities; 2) allocating a larger percentage of the compensation package to fringe benefits, such as pensions, and life and accident insurance; 3) transforming employment-at-will into a tenure-like arrangement by requiring the employer to show just cause for dismissal, using seniority for layoffs, promotions and transfers, and submitting decisions to arbitral review. 70

Weiler's defense of collective bargaining is, by his own admission, a traditional one and is met by traditional responses from both sides. One group questions whether unions produce the net social utility that Weiler, and those upon whose findings he relies, claim. 71 The opposition argues that increased wage costs and associated lowered rates of production combined with income equality between union and nonunion workers offset any gains that might be achieved from the improved productivity of an unorganized work force. These critics believe that enlightened nonunion employers are voluntarily granting their employees the job security and even-handed treatment that unions seek for their members, thereby diminishing the need for unions. 72

They also question the benign and constructive face that some put on unions. They cite evidence tending to prove that all too many

70. *See Weiler, Striking a New Balance, supra note 13.*
71. *See Review Symposium: What Do Unions Do, by Richard B. Freeman and James L. Medoff, 38 INDUS & LAB. REL. REV. 244-63 (1985) Critics expressed a number of concerns about the empirical and analytic validity of Freeman and Medoff's analysis and conclusions. *Id.* They challenged: conclusions about the positive contributions that unions make to improvement in productivity (Ashenfelder, *id.* at 47; Hirsch, *id.* at 245-50); the use of the abstraction, "unionism," without adequate consideration of the different forms and paths unions and collective bargaining actually take (Lipsky, *id.* at 250-53); the limited explanatory power of the, "voice or exit," model of options open to workers (Mitchell, *id.* at 253-56); inadequate attention to the adverse effects of unions on non-union workers. (Reder, *id.* at 256-58).
72. *See id.*
unions are, at worst, undemocratic and corrupt and, at best, complacent, unimaginative and interested, primarily, in protecting the preferred status of senior employees who have the most to lose from technological and organizational change.\textsuperscript{73}

Those to the left attack the Weiler perspective for being too rooted in the status quo, overly concerned with advancement of institutional interests at the expense of individual workers' interests and insufficiently concerned with restructuring the work setting to change fundamental power relationships.\textsuperscript{74} Implicit in this criticism is a distrust of institutions, such as unions, and a faith in the potential for self-realization in nonhierarchical settings.\textsuperscript{76}

Both those on the left and those on the right point to the growth of statutory and common law protections against wrongful discharge and abuse in the workplace. The government today regulates many important aspects of the work setting and work relationship.\textsuperscript{76} Here again, unions have less to offer and employees less to gain from collective bargaining.

Some labor-management relations experts believe, however, for less traditional reasons, that increased unionization is not only desirable but essential.\textsuperscript{77} They argue that to meet international competition successfully, we must dramatically alter the nature and extent of labor-management cooperation and worker participation. It does not necessarily follow, of course, that unions are essential to improving labor-management cooperation.

A number of commentators have proposed improving such cooperation outside of traditional collective bargaining.\textsuperscript{78} Their opponents challenge these proposals on several fronts. First, traditional labor-management cooperative arrangements have to a great extent been devices for getting workers to accept management norms and objectives. Workers, however, have their own objectives which in many important respects clash with those of management. Plans which do not actively pursue workers' own objectives, are not genuinely coop-

\textsuperscript{73} See id.

\textsuperscript{74} See Klare, The Labor-Management Cooperation Debate: A Workplace Democracy Perspective, 23 HARV. C.R.-C.L. L. REV. 39 (1985) (stating that to achieve genuine labor-management cooperation, we must move beyond traditional collective bargaining to a more democratic, participatory workplace).

\textsuperscript{75} See id.

\textsuperscript{76} Weiler, Milestone or Tombstone, supra note 13, at 19 (listing federal statutes addressing problems of equal pay, discrimination, occupational safety and health and retirement income security).

\textsuperscript{77} See Dunlop's Address, supra note 16.

\textsuperscript{78} See Kohler, Models of Worker Participation: The Uncertain Significance of Section 8 (a)(2), 37 B.C.L. REV. 499 (1986) (providing a review of these proposals).
erative arrangements.\textsuperscript{79} Second, from this one, may conclude that there must be a vehicle for workers to express their independent views. The traditional vehicle has been an autonomous workers' organization \textit{i.e.} a union of some type or other.\textsuperscript{80}

Dunlop and others argue that without institutional support, workers' views will not be recognized and needed cooperation will not be achieved. Moreover, when workers express their own views, rather than adopting management's, conflict with management is inevitable. Workers need some way to participate in the resolution of these inevitable conflicts and an ongoing autonomous organization is the only realistic vehicle.

Advocates of this position carry their argument a step further. They also assert that workers cannot realize the rights guaranteed by state and federal law without the institutional support and protection provided by unions.\textsuperscript{81} Regulatory agencies and courts lack both the power and the resources to find and correct statutory or common law violations. The laws will not work without private enforcement, but private enforcement by individuals is difficult to achieve. For example, grievance and arbitration systems for handling common law wrongful discharge claims may not function adequately without some institutional (\textit{e.g.}, union) support for individual workers who pursue arbitration. Otherwise, it is one employee against the system.

Much the same applies to statutory rights. Because of the potential effect on the entire work force of any adverse decision, an employer can afford to contest individual claims or even use self-help to defeat them (\textit{e.g.}, discharge of those filing for worker's compensation benefits). Individual workers have neither the resources, on the one hand, nor a stake in the outcome, on the other to pursue individual claims. Only unions with their financial strength and the ability to match self-help with self-help, can compel the employer to comply with the laws regulating the work place and the employment relationship.

Is there any assurance that the workers are going to get the kind of union leadership they require? Some unions, either willingly or otherwise, may become more democratic and responsive. Others may cling tenaciously to their traditional role of protecting the job

\textsuperscript{79} See id.

\textsuperscript{80} See Summers, supra note 29 (discussing alternative forms of representation that can occur if workers are not able to win full collective bargaining rights); see also Barkin, An Agenda for the Revision of the American Industrial Relations System, 36 Lab. L.J. 857 (1985).

\textsuperscript{81} See Dunlop's Adress, supra note 16.
security of relatively immobile senior workers. The latter is counter-
productive because it is these workers who benefit most from the sta-
tus quo and, being older, are less adaptable and have the most to
fear from innovation. The unions are in a bind because they may
have to accept such innovations to preserve the firm and its jobs at
the cost of injuring the very members who need them most and are
most loyal to them. The unions find themselves in a position where
they must be unresponsive to those who are most responsive to them.

It would appear that to achieve union growth and participation,
we cannot afford to worry too much about individual choice and
union democracy. Whatever their deficiencies as representative insti-
tutions, in this view, only autonomous, strong unions working with
employers can produce a national industrial policy based on genuine
cooperation. The federal government cannot even enforce the laws
already on the books let alone create and operate, from the top
down, a centrally administered system to promote industrial coopera-
tion. A bottom up approach is more likely to be successful, but the
price to be paid will be substantial.

If we are serious about promoting bottom up cooperation, Con-
gress must consider more than how we can increase unionization. It
must also consider deregulation of the bargaining process. We do not
know which forms of cooperation will work, but we assume that
firms and unions which cooperate successfully will survive and pros-
per and those that do not will sink and fail. If we intend to apply the
rules of survival of the fittest to labor-management relations, we
must also be willing to remove barriers to the struggle. Specifically,
the parties must be free to determine the dimensions of their own
relationships, therefore, regulations which limit bargaining unit de-
terminations, subjects of bargaining and use of economic weapons
must be removed or, at least, relaxed. Conflict will be increased, as
will its impact on outsiders in the short run, but as patterns of suc-
scessful cooperative bargaining emerge and the others begin to imi-
tate the winners, conflict should in the long run be reduced.

VI. Conclusion

Labor law reform is risky business. Congress must choose be-
tween either maintaining the status quo, eliminating some abuses
and restoring a prior balance or encouraging, more aggressively, the
unionization of U.S. business and industry. Doing nothing is, of
course, a choice of the status quo, but even if Congress failed to act
unions are likely to do much better in the future.

If Congress attempts to deal only with the abuses in the present
system, it is not likely to dramatically change the unions' success rate in representation elections; however, combined with changes in the economy, the cumulative effect of restoring the previous balance is likely to have an impact. Unions should be much more successful, but is this what we really want?

Congress should carefully consider the more drastic proposals to modify the basic assumptions of governmental neutrality which have, in principle, ruled since 1947. Although, in practice, the impact may be less than one might expect, the proposals represent a change in our assumption about labor-management relations. Unions would become the vehicle to carry out important national industrial policies. Are we prepared for this and the changes it would require? The question cannot be answered at present, but it should be more intensively and extensively addressed than it has been so far.