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LABOR LAW REFORM IN A WORLD OF COMPETITIVE PRODUCT MARKETS

SAMUEL ESTREICHER*

U.S. private sector unionism is in decline. From a high water-mark in 1953 of around 35.7% of the private nonagricultural workforce, union membership has fallen to 11.5% and unions represent under 13% of private sector workers.¹ Absent reform of the labor relations system,² the trend is clear. Unions will remain a significant force in government employment, big-city commercial construction, rail and air transportation, and certain shrinking mining and manufacturing industries. Aside from these pockets of unionism,

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1. "Union density" is the percentage of wage and salary workers who are members of unions and employee associations or are represented by such organizations. (Until the early 1980s, the Labor Department obtained membership data from the organizations themselves. Since 1985, this information is derived from the Department's monthly household employment survey (conducted by the U.S. Bureau of the Census—called the "Current Population Survey"). Prior to 1980, the Labor Department did not separate public from private unionism. The 1953 figure is from LEO TROY & NEIL SHEFLIN, UNION SOURCEBOOK: MEMBERSHIP, STRUCTURE AND FINANCE DIRECTORY app. A, at A-1 (1st ed. 1985).

In 1991, 13.1% of employees in private firms, or 10.9 million workers, were either members of unions and employee associations or represented by such organizations. In 1992, the union density rate dropped to 12.7%, or 10.6 million workers. See Union Membership: Proportion of Union Members Declines to Low of 15.8 Percent, Daily Lab. Rep. (BNA) No. 25, at B-5 (Feb. 9, 1993). Some employees covered by union contracts pay union dues but are not union members. The proportion of the private workforce who were members of labor organizations was 11.9%, or 9.9 million workers, in 1991, and 11.5%, or 9.7 million workers, in 1992. Id.

2. Although this Paper addresses labor law reform, I am not suggesting that any change in the legal framework for the conduct of labor relations can itself stem or redirect the larger economic and socio-cultural forces at work. However, to the extent the legal system inhibits the development of alternative institutional arrangements and encourages the actors in the system to perceive and advance their interests in particular ways, legal reform holds the promise of new alternatives and incentive structures, and perhaps different outcomes of the system.
however, workplace-based representation of the interests of working people will become a distinctly marginal phenomenon in our society.

The falling fortunes of the organized labor movement do not, standing alone, establish a case for reform of existing arrangements. However, whatever our views of unions, collective bargaining, strikes, and the like, the prospect of a virtual disappearance in private firms of mechanisms for employees to have a say in the terms and conditions of their employment should be a cause for public concern.

With a new labor-friendly administration in Washington, and the appointment of the Commission on the Future of Worker-Management Relations (chaired by former U.S. Secretary of Labor John T. Dunlop), a window of opportunity has opened to revisit basic ground rules. Such openings are rare in our political history and should not be squandered. In shaping the reform agenda, we need to squarely confront the underlying causes of labor’s decline.

I. THE CAUSES OF UNION DECLINE IN THE PRIVATE SECTOR

A. The Employer Opposition View

The consensus among academic commentators sympathetic to organized labor, such as Paul Weiler of the Harvard Law School and Richard Freeman of the Harvard economics department, identifies employer resistance to unionism as the principal culprit behind the plummeting unionization rate. These writers acknowledge the impact of structural shifts in the economy—the shrinkage in the manufacturing sector and the growth of service industries, traditionally infertile terrain for union drives—but downplay the impact of such

3. On March 24, 1993, Secretary of Commerce Ron Brown and Secretary of Labor Robert B. Reich jointly announced the formation of the Dunlop panel. The Commission is charged with reporting back to the Secretaries within a year on (1) what (if any) “new methods or institutions” should be encouraged to enhance productivity “through labor-management cooperation and employee participation”; (2) what (if any) changes in legal framework and bargaining procedure should be made “to enhance cooperative behavior, improve productivity and reduce conflict and delay”; and (3) what (if anything) should be done “to increase the extent to which workplace problems are directly resolved by the parties themselves” rather than by recourse to the courts or regulators. U.S. DEPT. OF LABOR, OFFICE OF INFORMATION, NEWS, USDL 93-105 (Mar. 24, 1993) (Mission Statement). Subsequently, the Commission announced that it would issue a fact-finding report in May 1994, and its recommendations in November of that year.

forces. Rather, they suggest, the dominant explanation for labor's plight is the persistent, if not increasingly emboldened, refusal of employers to come to terms with basic rights of employees to form unions and engage in collective bargaining.

Doubtless, employer illegality has played a role, and I favor stiffer penalties for unlawful discharge of union organizers. Professor Weiler estimates that one in twenty union supporters are unlawfully discharged. Professor Bernard Meltzer and Robert LaLonde at the University of Chicago put the figure at one in sixty, which "represents a potentially significant disregard by employers of the Act's statutory protections." Either figure is too high and calls for remedies with a real "bite."

Weiler's and Freeman's real point is not employer illegality but employer opposition—the fact that, entirely within the law, employers are resisting union organizing drives, demanding wage concessions, and exploiting weaknesses in the labor law that have existed from the

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5. Professors Freeman and Medoff report that on one level the changing structure of the workforce, in terms of its personal, job and geographic characteristics, explains "72 percent of the observed decline" in unionization for the 1954-79 period, but argue that such "technocratic explanations" assume that worker preferences do not change over time and cannot account for union successes in the public sector and other countries (notably Canada). See Richard B. Freeman & James L. Medoff, What Do Unions Do? 225-28 (1984). Looking at a more limited period, Professor Farber and Krueger conclude that "[a]bout 35 percent of the 4.8 point decline in unionization between 1977 and 1984 can be accounted for by structural changes in the labor force.” Henry S. Farber & Alan B. Krueger, Union Membership in the United States: The Decline Continues, in Employee Representation: Alternatives and Future Directions 105, 115 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993) [hereinafter Employee Representation].

Professor Freeman's and Medoff's 1984 account of the role of the structural factors, coupled with Professor Freeman's later emphasis on the contribution of union wage premium policies and competitive product market forces to union decline, see infra note 43 and accompanying text, suggests that structural change is likely to be a more significant causal factor than these writers are prepared to acknowledge. In my view, the increasing competitive pressures on private firms has affected significantly both the attitudes of workers about the wisdom of opting for traditional union representation and the costs on employers of operating under traditional union programs. See infra notes 31 to 45 and accompanying text.

6. Weiler, supra note 4, at 1781. Professor Weiler's estimate is based on the fact that the NLRB in 1980 secured reinstatement for more than 10,000 employees who had been illegally discharged and obtained back pay settlements for another 5000 employees, and an additional number of discriminatees did not file charges. He then suggests that of the at least 10,000 employees who were fired in 1980 for involvement in representation campaigns, the employees most at risk were among the 200,000 who voted for union representation in 1980. Id. at 1780-81. Hence, the 1:20 ratio.

7. See Robert J. LaLonde & Bernard D. Meltzer, Hard Times for Unions: Another Look at the Significance of Employer Illegitivities, 58 U. Chi. L. Rev. 953, 1006 (1991). Professors LaLonde and Meltzer argue that Professor Weiler's estimate mistakenly assumes that most illegal discharges occur during organizing drives, that an insignificant percentage of discharges occur in established bargaining units, and that each § 8(a)(3) violation in an organizational campaign is likely to result in substantially the same number of reinstates as would result from a § 8(a)(3) violation in an established bargaining unit. Id. at 992.
very beginning (such as the right to hire permanent replacements for economic strikers). Although an important factor in union decline, employer opposition cannot be the full story, and it would be a mistake to ground the reform prescription entirely on this diagnosis.

B. Other Causes

The shift from a manufacturing to a service economy has eroded the base of the strong industrial unions that previously set the pattern for workers nationwide. For example, the Steelworkers Union lost a half million members from 1975 to 1985—principally because of job loss in a contracting industry—and half of its membership is now drawn from workers outside of the metals industries.\(^8\) None of the major industrial unions ranks among the AFL-CIO's largest affiliates.\(^9\)

The extent of union organization is a function of both the supply of unionized jobs and the demand for union services.\(^10\) On the supply side, union organizing efforts have plainly ebbed. Although the rate of organization (eligible voters in NLRB elections as a percentage of all unorganized workers) has been falling since the early 1950s,\(^11\) it

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9. The largest AFL-CIO affiliate, the International Brotherhood of Teamsters (IBT)—an organization that early on began organizing outside of its traditional industry—reports 1.3 million members in 1993, followed by the American Federation of State, County and Municipal Employees (AFSCME), with 1.2 million members, and two unions operating in the service sector, the United Food and Commercial Workers (UFCW) with 977,000 members, and the Service Employees International Union (SEIU) with 919,000 members (a good many of whom work for public employers). See AFL-CIO Statistics, supra note 8, at D-1 to D-3.


Recent research casts doubt on the idea that declining union election success is the main source of falling union representation . . . . The percentage of the nonunion labor force involved in certification elections fell from about 2.6 percent in 1950 to about 1 percent in 1980. Most of the decline occurred rather precipitously in the 1950s, but the decrease continued, at a slower rate, throughout the 1970s. The decline after 1950 in the union success rate in those elections that did occur reinforced the effect of reduced organizing activity.
plummed during the 1980s. While the union victory rate in NLRB elections stayed constant at slightly under 50%, the number of elections sought by unions fell from around 6858 in 1980 to 3561 in 1982 and has remained at the 1982 level for the remainder of the decade. From 1982 to 1987, the average annual gain of employees in new units was less than half of the average from 1975 to 1981.\[12\] Although it is debatable whether organizing efforts at, say, the level of the 1950s could have fully reversed the decline,\[13\] labor's failure to invest in organizing\[14\] contributed to the emergence of nonunion firms in traditionally unionized industries, and an all but faint union presence in the rapidly growing service sector.\[15\]

Unions are rational actors, and to the extent employer resistance (or other factors) has raised the costs of organization drives, they may well have decided that more could be gained from deploying limited resources in political or other arenas than in attempting to win new members. However, the example of the Service Employees International Union—which increased its ranks by 250,000 since 1985\[16\]—suggests that vigorous organizing can yield membership gains, and that other unions could have done more to improve their position.

On the demand side, there is also reason to believe that traditional union programs may not appeal to the "Baby Boomer" genera-


16. See AFL-CIO Statistics, *supra* note 8, at D-3. Some of the SEIU's growth was in the public sector, including the absorption in 1989 of units of the former Hospital and Health Care Employees (58,000 members); other hospital units were merged into AFSCME. Id. at D-2 & D-3. Although gains are not reflected in the AFL-CIO statistics, the United Food and Commercial Workers (UFCW) is reported to have increased its ranks by 100,000 during the 1980s. See Tim W. Ferguson, *Food Union Tastes Gains Even as Trends Eat at Base*, Wall St. J., Feb. 16, 1993, at A15.
tion and to professionals or other "symbolic analysts" (to use Robert Reich's term) in growth sectors of the economy. Partly due to the example (or threat) of unionization but also in response to the needs of modern firms, management practices in the nonunion sector are more sophisticated and employee-friendly than may have been true in earlier times. Legal developments providing employee protections may also have had a union-substitution effect. Thus, Henry Farber and Alan Krueger, Princeton economists, identify the job satisfaction level of nonunion employees as the principal factor explaining the decline in union density from 1977 to 1991. (This can change if layoffs by nonunion firms increase job insecurity and unions come to be seen as effective agents for improving terms and conditions in a modern economy.)

Employer opposition can, of course, affect the demand, as well as supply, side of the story. Professors Richard Freeman and Joel Rogers discount the Farber-Krueger studies. Pointing to opinion polls suggesting that at least a third of the nonunion workforce desires union representation, they argue that awareness of the "personal

17. But cf. Louis Harris & Associates, AFL-CIO, A Study of the Outlook for Trade Union Organizing 63 tbl. 20 (AFL-CIO Study No. 843008, 1984) (on file with author) [hereinafter HARRIS STUDY] (workers 18-24 years old were most likely (42%) to vote union; workers in the 15-34 years (28%) and 35-44 years (27%) brackets were only slightly less likely to vote union than their counterparts in the 45-54 years (30%) category).

18. Professors Farber and Krueger find that:

[V]irtually all of the decline in unionization between 1977 and 1991 seems to be due to decline in demand for union representation. There is no evidence that any significant part of the decline in unionization is due to increased employer resistance other than the sort of resistance that would be reflected in lower demand for unionization by workers.

Farber & Krueger, supra note 5, at 118. The authors acknowledge that further inquiry is needed to determine whether the decline in demand is due to the fact that "the services unions provide are no longer perceived as valuable by nonunion workers, or that unions have not been able to convince workers of the value of union representation, perhaps because of poor public relations." Id. at 130.

This Farber-Krueger study confirms Professor Farber's earlier finding that virtually all of the 1977-1984 decline in union demand for union representation could be accounted for by an increase in nonunion workers' job satisfaction, particularly with respect to pay and job security. See Henry S. Farber, The Decline of Unionization in the United States: What Can be Learned from Recent Experience?, 8 J. LAB. ECON. S75 (1990).

19. See Richard B. Freeman & Joel Rogers, Who Speaks for Us? Employee Representation in a Nonunion Labor Market, in Employee Representation, supra note 5, at 13, 32. Farber and Krueger concede, however, that "frustrated demand" (the probability that a worker prefers union representation but is not employed on a union job) "remained fairly constant at about 28 percent of the work force" from 1977 to 1991. See Farber & Krueger, supra note 5, at 117 tbl. 40.

There are several questions about these survey results that merit further consideration. First, can we assume that the 28-33% of nonunion workers desiring union representation are randomly distributed in all work places, such that this level of union support can be expected at any work site? Second, what do we know about the intensity of preferences involved, for after all 65% of the nonunion workers in, say, the Harris poll, indicated they would definitely or probably vote against a union? See HARRIS STUDY, supra note 17, tbl. 20. Third, to what extent
costs of seeking union organization against management wishes" is "likely to depress affirmative responses to questions about the willingness to vote for a union in an NLRB election and contaminate efforts to infer an intrinsic 'demand for unionism' from questions about voting intentions . . . ."\(^{20}\)

II. EXPLAINING THE PERSISTENCE OF EMPLOYER OPPOSITION

I am not an econometrician and for present purposes leave to others the task of teasing out the precise contribution of each factor outlined above to the decline in unionization. Even if, for the sake of argument, structural factors (narrowly conceived as the changing personal, job, and geographic characteristics of U.S. workers) are discounted as too static an explanation\(^{21}\) and employer opposition is viewed as the principal cause, we need a dynamic account: what has changed? What explains the resilience, if not rise, of employer opposition, and why has it succeeded in reducing the power of unions and the prevalence of collective bargaining? Blame is often laid at the door of the Reagan administration, which displayed a level of hostility to unions, as demonstrated by its 1981 firing of air traffic controllers for engaging in an illegal strike and some of its appointments to the NLRB.

Although the PATCO strike and decisions of the Reagan Labor Board influenced employer behavior at the margin, this point is largely a rhetorical one.\(^{22}\) Private sector unionism was in decline throughout the 1960s and 1970s. That was why a major campaign for labor law reform was launched during the Carter years (but could not overcome a Senate filibuster). We entered the 1980s at a union-den-

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20. Freeman & Rogers, supra note 19, at 32. The 1984 Harris poll, commissioned by the AFL-CIO, found that only 2% of the nonunion employees who indicated they would definitely or probably vote against a union in their workplace gave "Fear of employer retaliation" as the "main" reason, yet 62% of these workers agreed with the statement that if a group of employees attempted to form a union at their workplace, employers would "make life difficult for those who supported a union." See Harris Study, supra note 17, tbls. 22 & 26.

21. But see supra note 5.

22. As Professors Blanchflower and Freeman acknowledge, "[T]he decline in U.S. union density is not an aberration—the result of Reagan's breaking the air traffic controllers union, of stodgy, incompetent union leadership, or of the decline in manufacturing in the 1980s—but is structurally rooted in what U.S. unions do on the wage front." David G. Blanchflower & Richard B. Freeman, Unionism in the United States and Other Advanced OECD Countries, in Labor Market Institutions and the Future Role of Unions 56, 76 (Mario F. Bognanno & Morris M. Kleiner eds., 1992).
sity rate of around 20%.\textsuperscript{23} We are now at 13%. At the most, Reagan administration policy arguably accelerated the rate of decline.\textsuperscript{24}

Something more fundamental is at work. The labor laws have allowed permanent replacement of strikers at least since 1938\textsuperscript{25} and lawful employer opposition to union organizing drives since 1947 (if not earlier\textsuperscript{26}), and have never provided other than mild remedies for employer infractions. The conflicts of interest between labor and management, and hence the incentive to economize on labor costs, have been with us since the very beginning. American managers have never welcomed unions, and yet unions grew from 1935 to 1954 and have declined ever since.

The change in labor-management relations, and the relative position of unions, is essentially due to an unleashing of competitive forces in the markets for American products and services. Given a large domestic market and barriers to entry in many industries, unions for many years were able to pursue traditional high-labor-cost policies across entire product markets and thus grow or at least maintain their positions despite hostile, or at best grudging, managements and a relatively toothless labor law. As we enter an era of intense product market competition, however, the underlying strains in the system are now apparent.

\textit{A. Premises of the U.S. Labor Relations System}

The persistence and growth of employer opposition (and perhaps other causes of union decline) stem from an incompatibility between the premises of our labor relations system and the pressures of competitive product markets. Consider the following features of our system.

First, it is decentralized. Largely because unions seek elections on the basis of the smallest organizing unit, NLRB elections are held


\textsuperscript{24} This is disputed in Farber & Krueger, \textit{supra} note 5. See \textit{supra} note 18 and accompanying text.

\textsuperscript{25} Dictum in the 1938 decision in NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), recognizes the employer's right to attempt to maintain operations during an economic strike by hiring permanent replacements. The distinctly pro-union NLRB of the time was of the same view. \textit{See Reply Brief for the National Labor Relations Board at 15-17, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (No. 37-706).}

\textsuperscript{26} See NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941) (questioning the Labor Board's authority to find as an unfair labor practice non-coercive employer expression in opposition to a union drive).
at the plant level, usually among a subset of the workers—with craft workers and professionals having the right to opt for separate representation. Multiemployer bargaining units are formed only by consent and in many industries have unravelled. Union organizers like small organizing units, and decentralized structures often ensure a relatively high level of responsiveness to affected employees.

Second, the system is based on an adversarial model of labor-management relations. Admittedly, the system does not “require” adversarial unions or managements. However, an essential premise of the NLRA is that there is a fundamental conflict of interest—a chasm—between labor and management, that is thought to require structural guarantees to keep separate their respective spheres of influence. Thus, employers can play no role in forming labor organizations or providing assistance to them. Similarly, the representatives of management, including supervisors and nonsupervisory personnel having a role in the making or implementation of policy, have no right to form unions and are aligned by the statute against the ranks of the organized, largely blue-collar workers. Also, the scope of mandatory bargaining is defined so as to rigidly separate the domains of labor and management.

Third, unions are multiemployer organizations representing employees of competing firms. This makes it very difficult for any firm to share proprietary information with, or to secure variable labor terms from, the multiemployer union. For example, in the still-unresolved Caterpillar-UAW dispute, at stake is not the rather modest economic differences between the two sides. Rather, the union’s concern is its ability to maintain “pattern” bargaining—in this case, to impose on Caterpillar the terms agreed to by its weaker, less export-sensitive competitor, Deere, and also to preserve that strategy for bargaining with the Big Three auto manufacturers.

Finally, unions are institutionally insecure. In the old days, the competition came from rival unions. This has diminished since the 1955 merger of the AFL and CIO (although the demise of manufac-

27. For example, the Labor Board regards the single worksite unit as presumptively appropriate in retail settings. See, e.g., Sav-On Drugs, Inc., 138 N.L.R.B. 1032 (1962); Frisch’s Big Boy Ill-Mar, Inc., 147 N.L.R.B. 551 (1964), enforcement denied, 356 F.2d 895 (7th Cir. 1966).

turing has spawned a new form of competition among "general" unions for employees in the growing service and public sectors). Today the unions' vulnerability comes from the growing nonunion sector, and the various mechanisms for policing union responsiveness, such as decertification elections, the employers' ability to test majority support by withdrawing recognition, duty of fair representation suits, the rights of nonunion members to seek rebates of union dues used for non-collective-bargaining purposes, and union democracy safeguards. All other things being equal, union leaders would like to maintain (and increase) employment levels. Internal political pressures require them, however, to cater to the preferences of the median voter in the bargaining unit—typically long-service, older workers who are relatively free of the risk of layoff because of seniority rules.\(^2\) Absent a palpable crisis threatening the jobs of those voters, flexibility in bargaining objectives and cooperation with management in reducing labor costs are politically unpopular, as Donald Ephlin, an advocate for greater union-management cooperation, learned during his leadership of the UAW's GM department.\(^3\)

**B. The Illusive Quest: "Taking Wages Out of Competition"**

The features I have described are, on one level, desirable and certainly understandable. As a general matter, they help promote independent unions that are responsive to rank-and-file preferences, and reflect individualist values of our political culture. Also, for several decades they coexisted with union growth and strong unionism. This was largely because unions could credibly promise unionized firms that they would, in due course, organize all firms in the relevant product market, and hence ensure that any gains at the bargaining table would be imposed on all competitors. Consumers might lose in such a world,\(^3\) but most importantly the union-represented firm suffered no competitive disadvantage.


\(^3\) In March 1993, Michael Bennett, president of United Auto Workers Local 1853, a strong proponent of the teamwork concept at GM's innovative Saturn subsidiary, faced a tough challenge from dissidents complaining that Bennett had "lost touch with the membership." Neal Templin, *Union Boss at GM's Saturn Unit Faces Tough Runoff Bid*, WALL ST. J., Mar. 29, 1993, at B6C. Ephlin's and Bennett's difficulties may have had more with leadership style than substance, but it is telling that the rhetoric of the opposition in both cases sought to exploit disquiet with labor-management cooperation.

\(^3\) To the extent union gains are taken from a firm's monopoly profits, there should be no loss of consumer welfare. See Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American...*
This story has changed because American industry and the U.S. place in the world economy has changed. The ability of unions to "take wages out of competition" has declined substantially thanks to the competitive forces unleashed by the emergence of global product markets; the deregulation of previously union-dense industries, such as airlines, trucking, and telecommunications; and technological change altering needs for skilled labor and reducing the advantages of local producers.


32. Professor Freeman acknowledges in a recent essay that the book he coauthored in 1984 with Professor Medoff, What Do Unions Do?, supra note 5, failed to link past successes of U.S. unions with the changing position of the United States in the world economy:

When the U.S. had a technological and productivity lead over the rest of the world, American producers had potential "monopoly rents" that unions could extract for workers with little adverse effect on investment.... However, after the oil shock, the loss of the U.S. productivity edge, and the deregulation of the 1970s and 1980s, unions could no longer simply bargain for workers' share of a company's economic rent. The rent was no longer there. From this sweeping perspective, the slow adjustment of unions and unionized firms to the loss of American economic dominance contributed to the decline in union density. What worked for unions in the 1950s and 1960s did not work in the 1970s and 1980s.


33. The impact of international product market competition has been principally felt in the manufacturing sector—in particular, the clothing, steel, automobile, rubber, and electronics industries. Union decline in mining, construction, transportation, communications, and public utilities is largely due to other factors since the products or services of these industries are generally not imported. However, the decline of manufacturing can affect demand for unionized construction work, according to Bob Wood, Remarks on Papers Dealing with Construction Union Density at the AFL-CIO/Cornell University Conference on Labor Law Reform (Oct. 25, 1993).

34. See Barry T. Hirsch, Trucking Deregulation and Labor Earnings: Is the Union Premium a Compensating Differential?, 11 J. Lab. Econ. 279, 297-98 (1993) (cost pressures due to deregulation narrowed union-nonunion wage differentials but insufficiently to prevent decline in unionization rate in the previously regulated for-hire sector of the trucking industry from about 60% during the regulatory period to about 25% by 1990).

35. At an October 1, 1993 Roundtable on Labor Law Reform, sponsored by the University of Pennsylvania's Institute of Law and Economics, David M. Silberman, head of the AFL-CIO's task force on labor law reform, criticized my failure to account for employer opposition in service industries, such as hotels and restaurants, that have been unaffected by international competition, deregulation, or technological change. But these industries have always been difficult to organize precisely because of the cost pressures due to intense product market competition. In 1991, whereas 13.1% of private nonagricultural workers were represented by unions, 7.3% of the workers in the retail trade industry and 6.8% of workers in the service industry were represented by unions. Among broad occupational categories, excluding executives and farming, sales (6.0%) and nonprotective services (10.9%) registered the lowest unionization rates. See U.S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings 229 (1992). On the problems of organizing service-sector workers, see generally Howard Wial, The Emerging Organizational Structure of Unionism in Low-Wage Services, 45 Rutgers L. Rev. 671 (1993). These problems are similarly present in Canada despite a distinctly more favorable legal regime. See Noah Meltz, Unionism in the Private-Service Sector: A Canada-United States Comparison, in The Challenge of Restructuring: North American Labor Movements Respond (Jane Jenson & Rianne Mahon eds., 1993).
U.S. unions can no longer credibly promise employers that they will succeed in imposing the costs of union contracts on their competitors. However, to retain the support of their members and attract new ones, many unions must continue to pursue “wage premium” and “job control” policies that raise labor costs in excess of the productivity gains attributable to unionization. (The studies of Robert Lawrence now at Harvard’s Kennedy School and Michael Wachter of Wharton and their associates suggest that the union wage premium actually increases as union density declines in some industries.) Share prices usually fall in response to union organizing drives.

Even Richard Freeman and James Medoff’s celebrated 1984 defense in What Do Unions Do? concedes that unions reduce firm profits. In a subsequent essay, Richard Freeman and David Blanchflower observe that in the United States “unionism is associated with markedly lower profitability”—a “profits effect” that is the result of the large effect of unionism on wages, which exceeds the positive


[U]nion wage premiums increased significantly across a broad spectrum of industries between 1973 and 1986, particularly in sectors where premiums were already high. On the other hand, premiums were stable or declining in construction, finance, and services. These changes, combined with systematic compositional shifts . . . create the statistical artifact of a relatively stable aggregate premium.


37. There is large body of work, reported in Freeman & Medoff, supra note 5, to the effect that unions improve productivity, but even Professors Freeman and Medoff do not argue that the wage premiums unions seek are fully “paid for” by productivity gains. See, e.g., id. at 183. Moreover, such studies may overstate the productivity-enhancing role of unions because they use measures of productivity that reflect the ability of union-represented firms to pass through higher costs via higher prices, and take account only of the effect of unions on surviving firms. See John T. Addison & Barry T. Hirsch, Union Effects on Productivity, Profits and Growth: Has the Long Run Arrived?, 7 J. Lab. Econ. 72 (1989).


41. Freeman & Medoff, supra note 5.

42. See id. at ch. 12.
effect of unions on productivity." Because unions represent an increase in the cost of capital, the upshot is that capital increasingly withdraws from the union sector.44

A union movement that today represents a little under eleven million private sector workers will continue to be a factor and, it must be noted, that unions like the Steelworkers, Autoworkers, and Rubberworkers have reached creative and constructive solutions with managements in some settings to preserve jobs and enhance the firm's market position.45 But these are the unions whose memberships are dropping the fastest, and they have reached these accommodations against a background of forces that spell a diminishing role for unions. To avoid this fate, there must be a change in union objectives, management responses, and, ultimately, the labor-management climate.

III. COMPARISONS TO OTHER SYSTEMS

Labor relations specialists like Weiler and Freeman would respond to my diagnosis by pointing to the examples of Canada and Germany, where strong union movements coexist with competitive product markets because of pro-union labor laws.46

A. Germany

In the case of Germany, however, we have a radically different framework for labor-management relations. The Germans have institutionalized their unions through a system of centralized, industry-

43. Blanchflower & Freeman, supra note 22, at 69. These authors attribute the decline in unionization of the late 1970s and 1980s to the jump in the union-nonunion wage differential from 15% to 20-25% during this period. See id. at 71.


45. Consider also the interesting recent agreement between the Amalgamated Clothing Workers (ACTWU) and clothing manufacturers permitting use of nonunion, largely overseas, shops for up to 10% of production in exchange for certain investment and job guarantees and conformity to international labor standards. The pact permits union producers to offer a full range of products, not just domestically-produced, expensive lines. See Labor Letter, WALL ST. J., Oct. 19, 1993, at A1.

46. Professor Freeman recognizes, however, that despite pro-union legislation in Canada, union density has fallen in Canadian manufacturing because of a similar union-nonunion wage differential and resulting "profits effect." See Blanchflower & Freeman, supra note 22, at 74-75.
wide collective bargaining coupled with extension by law of collective agreements to unorganized firms. Union members (defined as dues-payers) represent approximately one-third of private sector workers, but union contracts cover over 90% of private sector workers. Also, German social legislation—often prompted by the political power of the labor movement—regulates many of the substantive areas handled in the U.S. through collective bargaining. Given the extent of union-contract coverage, the fact that bargaining takes place at the multienterprise level, and the prominent role of social legislation, collective bargaining in Germany might better be seen as a means of negotiating the rate of inflation for broad sectors, if not the society as a whole.

Most important, the Germans have found a way to reconcile a major union role in setting standards for labor market competition while allowing flexibility in setting a firm's compensation and staffing levels. The industry-wide collective bargaining agreement sets true minima—there is no statutory minimum wage—while as much as 25% of average compensation is set at the level of the firm. Notably, such


49. Two terms are used in the literature to describe such supplementary compensation: "wage gap" refers to the difference between the collectively bargained wage and the effective wage paid at the level of the firm; "wage drift" refers to the difference in the rate of change between collective wage rates and firm wage rates. Both "wage gap" and "wage drift" appear to have been quite substantial in the 1950s and 1960s. See KATHLEEN A. THELEN, UNION OF PARTS: LABOR POLITICS IN POSTWAR GERMANY 82 (1991) ("Between 1960 and 1970, collectively bargained wages increased at an average annual rate of 7.3 percent. Workers' effective wages in that period, however, rose at an average annual rate of 9.4 percent."). It has been suggested that "wage drift" has become less important in the 1980s, see Jacobi et al., supra note 48, at 250; Wolfgang Streeck, Pay Restraint Without Incomes Policy: Institutionalized Monetarism and Industrial Unionism in Germany 9 n.10 (Aug. 1993) (unpublished manuscript, on file with author). However, "wage gap"—despite cutbacks in a changing economy, see PETER SWENSON, FAIR SHARES: UNIONS, PAY, AND POLITICS IN SWEDEN AND WEST GERMANY 81-82 (1989) (unofficial strikes in 1973 protesting employer reductions in supplementary pay as high as 30% of contract wages)—continues to be an important phenomenon. In a 1989 essay, Professor Streeck observed that "wages at the big car assemblers are about 20 to 25 percent higher than stipulated by the metal industry agreement." Wolfgang Streeck, Successful Adjustment to Turbulent Markets: The Automobile Industry, in INDUSTRY AND POLITICS IN WEST GERMANY: TOWARD THE THIRD REPUBLIC 113, 125 (Peter J. Katzenstein ed., 1989). A recent Labor Department publication reports that Daimler Benz, Germany's largest company, pays, on average, 17% more than the contractual rate set in the metal industry's central agreement. See U.S. DEP'T OF LABOR, FOREIGN LABOR TRENDS REPORT, FEDERAL REPUBLIC OF GERMANY 31 (1991-1992).

Quantitative data are difficult to come by. U.S. Department of Labor statistics suggest that in 1992 "other direct pay"—which "consists primarily of vacation and holiday pay and seasonal bonuses"—accounted for only 6.6% of hourly compensation costs for production workers in
supplementary compensation is negotiated not with multienterprise organizations but determined at the enterprise level, where a statutory works council represents all of the nonexecutive employees and is prohibited by law from striking.\textsuperscript{50}

Despite these structural advantages,\textsuperscript{51} German unions have trouble retaining membership because of the serious "free rider" aspects of their system. The German system is also facing pressures for change: rising unemployment (from one-seventh of U.S. levels in 1973 to parity with the U.S. by the mid-1980s and a rate in excess of U.S. levels in 1993);\textsuperscript{52} joblessness of exceptionally long duration;\textsuperscript{53} a grow-


50. Interest arbitration is also not available. Under § 87 of the Works Constitution Act, the works council has "a right of co-determination" with respect to certain matters to the extent not prescribed by legislation or collective bargaining. Works Constitution Act 1972, § 87 (F.R.G.). As to these subjects, the employer must obtain the consent of the works council or, barring agreement, resolution by a tripartite "conciliation committee." \textit{Id.} § 76. However, it is doubtful whether supplementary compensation comes within the category of subjects triggering a "right of co-determination." \textit{Cf.} \textit{id.} § 87 pts. 4 & 10-11. Indeed, it appears that employers can unilaterally reduce supplementary compensation:

As by law employers are obligated to pay only contract minima, extra-contractual pay (\textit{uber tariffliche Lohnbestandteile}) is a matter about which employers alone have final say. In practice, works councils frequently haggle with employers about extra-contractual changes, patterning their increases and structure generally after contractual changes (thus maintaining the wage gap). On the other hand, employers frequently exercise their right unilaterally to reduce and restructure extra-contractual pay.

\textbf{Swenson, supra} note 49, at 81. During the current economic downturn, such cut-backs have been quite common. Interview with Wolfgang Trittin, Industriegewerkschaft Metall Vorstand (IG Metall), in Frankfurt am Main (July 26, 1993).

51. However, the few empirical studies to date do not indicate that German works councils contribute to firm productivity or profits. \textit{See John T. Addison et al., German Works Councils and Firm Performance, in Employee Representation, supra} note 5, at 305-38.

52. In 1982, the unemployment rate for the \textit{lander} or states comprising the former West Germany was 5.8\%; it rose to 7.5\% in July 1993. \textit{German Unemployment Up to 7.5\% in July, Data Show, Daily Lab. Rep. (BNA) No. 151, at A-10 (Aug. 9, 1993).} OECD projects an unemployment rate of 8.3\% for 1993, and 9.9\% for 1994. The situation is far worse in the former East Germany. \textit{See 53 OECD Economic Outlook, 71 (1993); see also Ronald E. Kutscher & Constance E. Sorrentino, Employment and Unemployment Patterns in the U.S. and Europe, 1973-1987, 10 J. Lab. Res. 5, 12 & tbl. 4 (1989).}

53. \textit{See Kutscher & Sorrentino, supra} note 52, at 15 tbl. 5 (noting that in 1986, 52.2\% of total unemployed in Germany were out of work six months or more and 32.2\% were out of work for twelve months or more, with the comparable U.S. figures 14.4\% and 8.7\%, respectively).
ing contingent, part-time workforce;\textsuperscript{54} and the opening of German production facilities in other countries, such as the BMW plant in Spartansburg, South Carolina and the planned Mercedes-Benz facility in Alabama.\textsuperscript{55}

B. Canada

The Canadian experience is more relevant. In many respects, we share a common culture and, increasingly, a common market with the Canadians. The labor laws in the Canadian provinces and at the federal sector are markedly more pro-union than our own. Several of the provinces allow unions to obtain bargaining rights on the basis of authorization cards in lieu of contested elections, impose interest arbitration in first-contract situations (where the parties cannot reach agreement on their own), and prohibit the hiring of permanent replacements during strikes. (Indeed, Quebec and Ontario bar resort even to temporary replacements.\textsuperscript{56})

The union density figures (combining public- and private-sector unionism) in Canada are twice as high as our own, and despite a decline in the 1970s, appear in recent years to have levelled off or slightly increased. The extent to which unions have maintained their positions in private firms during the turbulent late 1970s and 1980s is a matter of considerable dispute. However, it is not contested that—despite favorable pro-union laws—unionization in the private sector is well under 50% of the level in the public sector, and that private sec-

\textsuperscript{54} "In 1986 . . . , about 25 percent of West Germany's workers were under nonpermanent, nonfulltime contracts, and 1 out of 12 unemployed workers could find work only on a fixed-term basis." \textit{The European Labor Market: Some Background, in EUROPEAN AND AMERICAN LABOR MARKETS: DIFFERENT MODELS AND DIFFERENT RESULTS} 117 app. at 119 (Richard S. Belous et al. eds., 1992). The Employment Protection Act of 1985, as amended in 1989, accelerated this trend by permitting initial hires on fixed-term contracts for up to eighteen months. Presumably, such contracts may be terminated free of the scriptures of German wrongful dismissal law. \textit{See} Jacobi et al., \textit{supra} note 48, at 240.

\textsuperscript{55} The German labor relations system is in a state of ferment. In September 1993, Gesamtmetall, the employers federation, for the first time in history took the initiative and cancelled its wage agreements with IG Metall, announcing it would be seeking cut-backs in holiday time and vacation pay and greater freedom for individual firms to set wages with local works councils. Some companies, like IBM's German subsidiary, are seeking to exclude much of their operations from the multi-employer framework. \textit{See Time to Leave the Cocoon?}, \textit{Bus. Wk.}, Oct. 18, 1993, at 46-47; Terence Roth, \textit{German Industry Group Cancels Wage Pact, Pre-Empting Union}, \textit{Wall St. J.}, Sept. 29, 1993, at A15.

\textsuperscript{56} In June 1992, the New Democratic Party government in Ontario repealed a law that allowed employers to hire permanent replacements after the sixth month of an economic strike, and substituted rules that significantly limit the ability of employers to maintain operations during an economic strike (including the use of temporary help). \textit{See} Ontario Labour Relations Act § 73, 3 Can. Lab. L. Rep. (CCH) ¶ 60,373 (1992).
tor unionism, particularly in manufacturing, has declined. The disagreement is over the extent of the union slide, and whether the decline has been halted in Canada by public policy.

Without venturing into the methodological thicket of the debate over the U.S.-Canada "density gap," I am willing to assume, for present purposes, that Canadian pro-union legislation has retarded the decline in private sector unionism in that country. But these laws have not prevented the erosion of traditional union sectors, where the available evidence suggests a significant shift of capital to nonunion

57. See, e.g., Blanchflower & Freeman, supra note 22, at 74 ("In manufacturing, density was stable throughout the 1970s but fell from 49 percent organized in 1977 to 42 percent organized in 1986 . . . .") (citation omitted); Noah Meltz & Anil Verma, Developments in Industrial Relations and Human Resource Practices in Canada: An Update from the 1980s, in EMPLOYMENT RELATIONS IN A CHANGING WORLD ECONOMY tbl. 1 (Thomas A. Kochan et al. eds., forthcoming 1994) (union density in manufacturing declined from 43.2% in 1980 to 36.7% in 1990; however, overall private sector density remained stable at a little under 21%); Leo Troy, Is the U.S. Unique in the Decline of Private Sector Unionism?, 11 J. LAB. RES. 111, 127 tbl. 4 (1990) (overall decline in private union density from 25.7% in 1975 to 20.7% in 1985); Mary Lou Coates, Is There a Future for the Canadian Labour Movement?, 3 ch. 2 (Industrial Relations Centre, Queen's University Current Issues Series, 1992) (unionization rate declined from 1977-1988 in mining and manufacturing, but grew in transportation and services while remaining stable in construction, communications and utilities).

58. Professors Meltz and Verma find that private sector union density stabilized during the 1980s at 20.7%, with unions strengthening their position in growing trade and finance services to compensate for losses in goods-producing industries. See Meltz & Verma, supra note 57, at 17-18. By contrast, Professor Troy projects a continuing decline in union membership, explaining that the present higher Canadian unionization rate is a function of differences in the timing of structural changes such as the shift from manufacturing and primary industries to services. See Troy, supra note 57; Leo Troy, Convergence in International Unionism, etc.: The Case of Canada and the U.S.A., 30 BRIT. J. OF INDUS. REL. 1 (1992).

59. Using data from a 1984 household Survey of Union Membership by Statistics Canada, Professor Riddell pegs the private sector unionization rate at 29% (workers who are union members) and 34% (workers covered by collective agreement)—figures considerably higher than the Meltz-Verma or Troy estimates of around 21% for the same period. See W. Craig Riddell, Unionization in Canada and the United States: A Tale of Two Countries, in SMALL DIFFERENCES THAT MATTER: LABOR MARKET AND INCOME MAINTENANCE IN CANADA AND THE UNITED STATES 109, 136 tbl. 4.9 (David Card & Richard B. Freeman eds., 1993).

Some of the disparity in the published results may be due to the fact that the survey Riddell relies upon lumps together membership in unions with membership in professional associations (whether or not they engage in collective bargaining). See Farber & Krueger, supra note 5, at 124-25. There is also a definitional disagreement over whether to include all employees in health, welfare services and education in the public sector; public monies fund these services, but some of the employees work for private employers. See Riddell, supra, at 134 & n.23. Moreover, as Professor Riddell acknowledges, Canadian "Crown Companies" operate in traditional private-sector fields. Id. at 139. In 1984, 500,000 employees (or 5% of the nonagricultural work force) worked in such government enterprises. See Allen Ponak, Public Sector Collective Bargaining, in UNION-MANAGEMENT RELATIONS IN CANADA 343-44 tbl. 1 (J.C. Anderson et al. eds., 1989) [hereinafter UNION-MANAGEMENT RELATIONS]; Mark Thompson, Collective Bargaining by Professionals, in UNION-MANAGEMENT RELATIONS, supra. Finally, differences may also stem from the use of different data bases, with Riddell relying on the 1984 household survey and Troy relying on union surveys conducted by Statistics Canada and Labour Canada. See generally Pradeep Kumar, Estimates of Unionism and Collective Bargaining Coverage in Canada, 43 REL. INDUSTRIELLES 757 (1988).
The situation is likely to get worse as the free trade agreement with Canada continues to narrow labor-cost differentials between the two countries. As in the United States, Professors Blanchflower and Freeman observe, high union-nonunion wage differentials in Canada "have begun to cut into membership where unionized employers competed with overseas firms, including increasingly deunionized U.S. manufacturers." The question for U.S. public policy is whether the dominant thrust of labor law reform should be essentially to mimic the Canadian approach—through protective laws that help U.S. unions maintain their position while they pursue their traditional program—or whether other avenues should be explored to enhance employee voice, union and nonunion, in competitive markets.

IV. What Should Be Done?

A. The Case for Change

The decline of union density on its own does not state a case for change in U.S. labor law. One option is to do nothing and let the chips fall where they will. Much depends on the view one takes of the value of workplace representation of employee interests. I believe that we are worse off as a society if workers are bereft of a meaningful opportunity for collective voice in factories and offices.

60. See Richard J. Long, The Effect of Unionization on Employment Growth of Canadian Companies, 46 Indus. & Lab. Rel. 691, 698 (1993) ("With controls for industry, firm size, and firm age, union manufacturing firms grew about 3.7% per year more slowly than their nonunion counterparts, and union nonmanufacturing firms grew about 3.9% more slowly than their nonunion counterparts.").


63. Professor Richard Epstein of Chicago urges wholesale deregulation, see Richard A. Epstein, A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation, 92 Yale L.J. 1357 (1983), but a deregulatory agenda is difficult to assess without knowing what the background rules will be after the Wagner Act and Railway Labor Act are repealed. Presumably, Epstein would keep in place common-law and statutory antitrust restrictions on union picketing and secondary boycotts. In any event, it is far from clear that labor markets operate like commodity markets in the manner described by standard microeconomic price theory—both because workers make undiversified investments of their labor in firms, and firms in many situations act more like wage-setters than wage-takers. Moreover, if workers wish to be represented by a collective agency, norms of self-determination and freedom of association argue for requiring employers to negotiate with the chosen representative of the workers. See, e.g., Charles Fried, Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and its Prospects, 51 U. Chi. L. Rev. 1012, 1023-25 (1984).
However, the case for reform cannot be persuasively based on the "monopoly" role of unions as agents for effecting a redistribution of wealth from capital to labor. Tax and spending measures are better suited for this purpose than is collective bargaining. Freeman and Medoff acknowledge that union wage gains at the expense of profits are largely confined to industries sheltered from vigorous competition. Whatever force collective bargaining once may have had as a redistributive strategy, unions will have difficulty pursuing traditional wage premium and job control policies in a world of competitive product markets.

It is, rather, the "voice" benefits of workplace representation—whether supplied by unions or other mechanisms—that argue for reform. To use Albert Hirschman's influential terminology, workers have a need for "voice" because of a limited ability to "exit," as they are rooted in their communities and tied to the firm by training and benefits policies that discourage mobility. Voice is important not only because of the contribution it makes to the dignity and autonomy of the individual worker. Voice mechanisms in the workplace also promote efficient contracts between workers and firms. Some contractual terms like a meaningful grievance procedure are "collective goods" that are likely to be underproduced in individual bargains, and

64. Freeman and Medoff write in *What Do Unions Do?*, supra note 5, at 186:

These data suggest that unionism has no impact on the profitability of competitive firms. Among highly concentrated industries, by contrast, the table shows enormous differences in profitability by union density; the highly unionized industries have considerably lower profitability in all calculations. . . . What unions do is reduce the exceedingly high levels of profitability in highly concentrated industries toward normal competitive levels. In these calculations, the union profit effect appears to take the form of a reduction of monopoly profits.

Professors Addison and Hirsch question whether concentration is a major source of union gains, and argue that the union effect on profits influences adversely firm investments by keeping in place inefficient capital as a means of moderating union demands. See Addison & Hirsch, supra note 37, at 94. Under either account, traditional union wage premium policy will be difficult to maintain in competitive product markets.

65. Professor Dau-Schmidt's recent article, supra note 31, attempts to ground a public policy of fostering unions and collective bargaining in redistributive terms. Dau-Schmidt's essay assumes that persisting union gains are drawn exclusively from a "cooperative surplus" derived from a combination of the firm's supracompetitive profits and productivity gains attributable to unions. In his model:

[E]mployers and unions who seek to maximize the monetary value of the employer rents they divide will employ the same amount of labor and set the same product price as they would in the absence of a union. Inefficiency in production and consumption will occur only to the extent that the union is willing to trade employment for wages at the expense of maximizing the monetary value of the cooperative surplus and to the extent that the union derives its wage increase from an effective labor cartel.

*Id.* at 491. This is not the place for an extensive discussion of this interesting article, other than to note that Dau-Schmidt offers no evidence of the extent to which unionized firms in today's economy enjoy such supracompetitive "rents."
unilateral employer promulgation may not adequately capture employee preferences. In addition, many productivity-enhancing improvements in the workplace such as employee involvement programs and flexible pay schemes are difficult to put in place without a mechanism for representing employees and eliciting their cooperation and trust.

There may also be a direct relationship between the decline of workplace representation and the rise in demand for social legislation. In some cases, as suggested by today's debate over workplace-based health insurance, appropriate legislation may be preferable to reliance on the outcomes of decentralized collective bargaining or unilateral employer policies. However, the demand for legislation can also take the form of an ever-growing list of "mandates" that may poorly reflect employee preferences, deter needed job growth, and divert resources to the litigation system. Unions or other institutions for employee voice, when they effectively communicate employee preferences, provide an important alternative to such "minimum terms" legislation.

The Wagner Act framework was intended to recognize these benefits of collective representation, but it no longer serves most workers. If we do nothing, the opportunity for collective voice may well disappear from the American workplace. In the absence of reform, we will be poorer as a society.

B. Models of Labor Law Reform

Several models of labor law reform have been proposed in the literature. In the main, these proposals are deficient because of incompleteness, lack of fit with U.S. institutional arrangements, or a failure to confront the challenge of competitive markets for traditional union programs. I offer an alternative approach later in these pages.

1. Collaborative Representation

Some, though not all, voices in U.S. management would like to see a significant relaxation of the existing prohibition in section 8(a)(2) of the NLRA of company-dominated or supported "labor organizations." Although the original impetus for this provision was to prevent employers from installing sham unions, the term "labor or...
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organization" was broadly defined to include "any organization of any kind, or any agency or employee representation committee or plan," in which employees participate for the purpose of "dealing with" their employer, even if such dealings fall short of actual bargaining over contracts.67

In December 1992, the Labor Board issued its long-awaited ruling in Electromation, Inc.,68 in which the agency found a company guilty of no other impropriety than forming employee "action committees" for joint dealings with management over absenteeism, pay progression, and no-smoking policies. A portion of the U.S. management community fears that Electromation (and a related ruling in the union setting69) will place in jeopardy current strategies of workplace organization that emphasize reduced layers of supervision and increased employee involvement in work redesign and product and service delivery improvements.70

Although it is too early to tell how far-reaching Electromation's impact will be, there is some cause for concern. It appears that practices that involve complete delegations of managerial authority to work teams or grievance boards,71 or avoid any element of what the Labor Board terms, "a bilateral process involving employees and management in order to reach bilateral solutions on the basis of employee-initiated proposals,"72 will survive scrutiny. However, practices involving any representational element at all,73 or any "bilateral process" that can be viewed as distinct from of a natural work group-


72. Electromation, 309 N.L.R.B. at 997.
73. The Labor Board left open the question whether the putative "labor organization" must be acting in a representational capacity. However, the agency found a representational element in Electromation's "Action Committees" on rather meager facts:

It is also clear that Respondent contemplated that employee-members of the Action Committees would act on behalf of other employees. Thus, after talking 'back and forth' with their fellow employees, members were to get ideas from other employees regarding the subjects of their committees for the purpose of reaching solutions that would satisfy the employees as a whole. This would occur only if the proposals presented by the employee-members were in line with the desires of other employees. In these circumstances, we find that employee-members of the Action Committees ac-
ing or the workforce as a whole,\textsuperscript{74} are likely to elicit regulatory action.\textsuperscript{75}

\textit{Electromation} brings to the fore the basic theory of the Wagner Act: employees should be put the choice of collective representation by a union or unilateral decisionmaking by their employer. Senator Wagner and his colleagues were of the view that any form of representation by mechanisms other than an independent organization would be likely to manipulate workers and forestall the conditions for independent unionism.\textsuperscript{76}

This is not the place for an extended analysis of section 8(a)(2) and its legislative history.\textsuperscript{77} Whatever its original justification, this provision has not spurred union growth and has had largely negative effects. From the perspective of a predominantly nonunion work
ted in a representational capacity and that the Action Committees were an “employee representation committee or plan” as set forth in Section 2(5).

\textit{Id.} As then NLRB General Counsel Jerry M. Hunter observed, in a memorandum to regional directors, “should the Board ultimately conclude the statute requires employee committees to act in a representational capacity, such a factual test may not be difficult to meet,” and hence representational capacity “may not be an issue in many cases . . . .” Memorandum from NLRB General Counsel GC 93-4, Guideline Memorandum Concerning Electromation, Inc., \textit{309 N.L.R.B.} No. 163 (Apr. 15, 1993), \textit{reprinted in} Daily Lab. Rep. (BNA) No. 78, at G-1, G-6 (Apr. 26, 1993).

74. There is a suggestion in Member Oviatt’s concurrence that programs confined to narrowly-conceived “productivity” and “quality” issues do not come within the subjects of “dealing” reached by § 2(5) (“grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work”). This suggestion is of doubtful practical utility because “[t]he very foundation of employee participation programs is the notion that employees should be consulted because they have knowledge and experience concerning the workplace.” Harold J. Datz, \textit{Employee Participation Programs and the National Labor Relations Act—A Guide for the Perplexed}, Daily Lab. Rep. (BNA) No. 30, at E-1, E-2 (Feb. 17, 1993).


77. Section 8(a)(2) may have been a broader restriction than was necessary to address the specific evils before the 1935 Congress. Much of the experience with company unions during the National Industrial Recovery Act (NIRA) period involved firms that used their in-house employee representation plans to refuse to bargain with outside unions even in the face of strikes reflecting clear majority support. \textit{See, e.g.,} the Edward G. Budd Mfg. Co. case, described in IRVING BERNSTEIN, \textit{TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER}, 1933-1941 at 179 (1970); \textit{Hearings on S. 2926 Before the Comm. on Education and Labor, 73d Cong.,} 2d Sess. 104-06 (1934) (testimony of William Green), \textit{reprinted in} 1 NLRB \textit{Legislative History of the National Labor Relations Act}, 1935 at 134-36 (1985).
force, it affirmatively discourages what the law should encourage: enhanced employee voice in nonunion shops. Moreover, under current social conditions—a better educated workforce, minimum wage and other protective legislation, and a rights-conscious legal culture—it is doubtful that permitting employers to institute consultative arrangements or to use employee representatives in grievance procedures would have the effect of preventing employees from making an uncoerced decision over whether they wish to be represented by an independent union.

A substantial modification of section 8(a)(2) is called for as part of a broader package of reforms of the labor laws. I propose limiting section 2(5)'s definition of "labor organization" to entities that "bargain with" their employer over terms and conditions of employment. Employers should not be able to establish and dominate representational structures that purport to function as bargaining agents for the employees, so as to deceive employees into believing they are represented by independent unions when, in fact, they are not. Formal agreements would not be required to trigger the statutory prohibition; it would reach any employer-dominated or supported structure that purported, or was reasonably perceived by the employees, to function as a collective bargaining agency. Employees would retain their section 7 rights to engage in concerted activity for self-representation and "other mutual aid and protection," and, most importantly, their section 9 right to petition for independent unions. No agreement with an employer-dominated committee could bar an election. In addition, employers should not be permitted to install employee committees as a purely strategic device to win over workers in the midst of an NLRB representation election.

78. Section 8(a)(2), as amended, would still prohibit an employer's recognition of a minority union as an exclusive bargaining agent and negotiation of an agreement providing for the checkoff of union dues. See ILGWU v. NLRB, 366 U.S. 731 (1961). (I would, however, relax the prohibition of prehire contracts under certain conditions described below.) In the Electric-Case, the "Action Committees" were found to have violated § 8(a)(2) without any basis in the record that the employees in that plant believed, reasonably or otherwise, that the committees were acting as their bargaining agent. Whether or not such committees promote greater job satisfaction, they should pose no threat to the employees' ability to make an uncoerced decision as to representation by independent unions, if the NLRA is also amended to strengthen the legal protection of employees opting for independent unions. Under my proposal, such committees would not be treated as a "labor organization" triggering § 8(a)(2).

79. Under current law, employers are prohibited from changing terms and conditions of employment for the purpose of affecting the outcome of a pending NLRB election. See NLRB v. Exchange Parts Co., 375 U.S. 405 (1964). There is also merit in extending the prohibition to an earlier point, say, when the employer receives a demand for recognition from a union organizing its work force, or perhaps first learns of the organizing drive. Professor Gottesman would extend the constraint to situations where there had been an organizing drive in the past
But a relaxation of the section 8(a)(2) prohibition, standing alone, is likely to distort the cost-benefit calculus of workers if they are confronted simply with the choice between a “free” form of representation under the employer’s plan and risk of job loss in opting for independent unionism.80 Workers dissatisfied with collaborative representation must be able, with minimum cost, to choose independent unions. Reform, if it is to take place, should be part of an integrated package that includes a substantial bolstering of the legal protections for workers opting for independent organizations to advance their interests.

We should resist, however, suggestions that any employer plan or committee system seeking freedom from section 8(a)(2)’s strictures must provide for an elaborate set of safeguards—including a secret-ballot election, independent resources for employee representatives, separate representation of supervisory and nonsupervisory personnel, protection from discharge of employee representatives, and the like—that would approximate the state of affairs that would obtain if an independent union had been voted in.81 Such requirements would be


80. In a thoughtful essay, Laurence Gold, the AFL-CIO’s able general counsel, has suggested that any opening up of § 8(a)(2) will distort the employee’s cost-benefit analysis in deciding whether to be represented by an independent union. See Laurence Gold, The Legal Status of “Employee Participation” Programs After the Labor Board’s Electromation and du Pont Decisions, in PROCEEDINGS OF NEW YORK UNIVERSITY 46TH ANNUAL NATIONAL CONFERENCE ON LABOR 21-24 (Bruno Stein ed., forthcoming 1994).

Admittedly, liberalization of § 8(a)(2) may enhance job satisfaction, and otherwise raise union organizing costs by offering employees an alternative form of representation presently denied to them. However, I believe Mr. Gold overstates the magnitude of the distortion of the cost-benefit calculus (the implications of his view would also require prohibition of voluntary recognition of unions without elections)—provided (1) the employer-dominated structure is not permitted to function as a bargaining agency; and (2) meaningful protection against retaliatory discharge and union rights of access to the employee electorate are put in place. See infra note 81 and accompanying text.

81. This appears to be the thrust of Professor Summers’ proposal in this Symposium. See Clyde W. Summers, Employee Voice and Employer Choice: A Structured Exception to Section 8(A)(2), 69 CHI.-KENT L. REV. 129, 141-48 (1993); see also Janice Bellace, Electromation: The Dilemma of Employee Participation under the NLRA, in PROCEEDINGS OF NEW YORK UNIVERSITY 45TH ANNUAL NATIONAL CONFERENCE ON LABOR 225, 236-43 (Bruno Stein ed., 1993) [hereinafter NYU PROCEEDINGS]. If required to choose, I much prefer Professor Hyde’s approach (also in this Symposium), requiring only a secret-ballot election, notice that the employees are free to oppose the employee representation plan, and periodic reauthorization elections. See Alan Hyde, Employee Caucus: A Key Institution in the Emerging System of Employment Law, 69 CHI.-KENT L. REV. 149, 188 (1993). But election requirements make little sense if the employees are part of a natural work grouping or are chosen to participate in, say, a safety committee because of their expertise. Even in the case of Electromation-type committees, for those employers who seek employee participation programs as a means of reinvigorating a low-productivity, low-morale work force, Professor Hyde’s proposal gives employees an effective veto over what may be needed changes in the workplace culture. Moreover, any election re-
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entirely inappropriate for employee involvement programs based on
natural work groupings. Moreover, even for "off-line" committees
such as those at issue in Electromation, these strictures would essen-
tially be self-defeating, for employers are not seeking to put in place
independent—or depending on your point of view, adversarial—struc-
tures of their own making. Moreover, it is important to maintain
conceptual and practical distance between collaborative structures
and independent employee organizations in order to preserve the con-
ditions for employee free choice; employees should clearly understand
that the employer's committee system is a vehicle for participation in
workplace decisions, in aid of management's objectives, not an alter-
native form of union representation.

2. German-Style Labor Law Reform

Another approach to labor law reform would be to attempt to
replicate the system of another country that we think does a pretty
good job of promoting worker representation values and firm compet-
itiveness. If we were to adopt the German model, for example, the
labor laws might require industry-wide collective bargaining (though
not mandated by German law), an extension procedure enabling un-
ions and employers to petition the state to extend collective agree-
ments to the unorganized sector, union representation in the
corporate board room, and the establishment of works councils at the
enterprise level.

Although proposals for mandating union or employee represen-
tation on corporate boards have been floated in the past, this aspect of
the German "codetermination" system is not a prominent feature of
the current debate. However, there appears to be considerable sup-
port for mandatory works councils (at least in academic circles).

requirement is likely substantially to raise the costs for union organizers (in Mr. Gold's terms, see
supra note 80) by endowing the collaborative representation structure with the trappings of in-
dependent representation.

82. Apparently, Professor Gottesman is in accord. See Gottesman, supra note 79, at 86.
83. Proposals to import a particular feature of the German system must consider how that
feature relates to other aspects of that country's labor relations framework, and whether that
feature would present the same mix of costs and benefits within the U.S. framework. See gener-
84. For a proposal envisioning a limited "voice" role for employee directors, see Robert J.
Borzone, Jr., Codetermination in the United States (paper prepared for NYU Law School Semi-
nar on Labor Law Theory, Spring 1993) (unpublished manuscript, on file with author). Appar-
etly, Professor Gottesman is working on a similar project. See Gottesman, supra note 79, at 93-
96.
85. See, e.g., Paul C. Weiler, Governing the Workplace: The Future of Labor and
Employment Law 283-95 (1990); Summers, supra note 81, at 131 ("The obstacle is not struc-
Professor Weiler has offered a particularly nuanced proposal. He would urge legislation requiring every firm above a certain size to establish an Employee Participation Committee (EPC), elected through a proportional scheme to reflect the different constituencies in the firm. The EPC’s function would be to address “the broad spectrum of resource policies of the firm,” with some initial responsibility for the administration of public laws; the range of subject matter would be “even broader than what is now required by the NLRA for employers engaged in full-fledged bargaining with a national union.” The law would require extensive information-sharing concerning not only the firm’s personnel policies but also its “broader financial, investment, and profit situation”; and would oblige management to meet and confer with the EPC over its plans for the firm. Although the EPC’s consent would not be required as a prerequisite to management action, the EPC could exercise its section 7 rights under the NLRA to strike or form independent unions.

If we put aside nagging questions about whether works councils in Germany actually contribute to, rather than detract from, firm productivity and profits, and whether there is a political constituency for such a sweeping change, mandatory works councils of the German variety, in the abstract, offer an attractive framework for ensuring collective employee voice without some of the costs associated with the U.S. system of multienterprise unionism and decentralized collective bargaining. But Professor Weiler’s approach differs significantly from the German version. Notably, it preserves a right to strike and the option of converting the EPC into an independent union. By contrast,
German works councils are prohibited by law from striking and operate as a body independent of unions with a set of functions and responsibilities separate from the realm of centralized collective bargaining.91

It seems doubtful that EPCs of the Weiler strain will function on American soil as integrative organizations. Predictions as to the likely impact of EPCs vary. The French experience suggests that works councils do not function well where unions are weak, and multenterprise collective bargaining has been unsuccessful.92 In the United States, I suspect, they are likely to be seedbeds of traditional unionism, if they take hold at all.93

The problem proponents of mandatory works councils have is that our existing system is committed to legal protection of the right to form independent unions that organize and bargain at the level of the firm. Works councils and trade unions are both firm-based organizations. Unless the range of subjects lodged with works councils is severely curtailed, they will either threaten extinction for conventional unions (at least where such unions do not perform a hiring hall function, as in construction), or they will become unions in all but name.

Seeking a way out of this conundrum, Professors Freeman and Rogers advocate withholding “tax breaks” from employers who fail to establish EPCs that would have rights to information and consultation over labor policies and would help enforce government policies in such as areas as occupational safety and health, job training, and job closings, while steering clear of “wage bargaining” and presumably other matters commonly addressed in collective bargaining.94 They

91. Admittedly, the Works Constitution Act of 1972 broadened the union role by granting union officials access to plants and permitting works councillors to engage in union activities within plants. See Andrei M. Karkovits, The Politics of the West German Trade Unions: Strategies of Class and Interest Representation in Growth and Crisis 49 (1986). German unions have made substantial inroads, with 76.3% of works councillors members of DGB-affiliated unions. See Jacobi et al., supra note 48, at 243-44 & tbl. 7.9. On the successful adaptation of unions to works councils, see Theilen, supra note 49; Lowell Turner, Democracy At Work: Changing World Markets and the Future of Labor Unions 95-103 (1991).


93. Compare Alan Hyde, Endangered Species, 91 Colum. L. Rev. 456, 466 (1991) (reviewing Paul C. Weiler, Governing the Workplace: The Future of Labor and Employment Law (1990)) (such organizations will be potent rivals for union power) with Gottesman, supra note 90, at 2807 (absent provision of interest arbitration, they are likely to be ineffectual, producing “mere frustration”).

94. See Freeman & Rogers, supra note 19, at 63-64; A New Deal for Labor, N.Y. Times, Mar. 10, 1993, at A14. See also Gottesman, supra note 90, at 44-45.
also advocate allowing 40% of the workers in a unit to insist upon 
EPCs in their shops.

If such proposals envision narrow-purpose works councils set up 
largely to police conformity with external law, they are, I submit, mis-
guided.\textsuperscript{95} If we think it appropriate to mandate, or use tax policy vir-
tually to compel, collaborative representation, such works councils 
should be allowed to address constructively the entire range of is-
sues—productivity improvements, wages, hours and benefits, as well 
as occupational safety and plant closings—affecting the welfare of the 
employees and the competitive position of the firm.\textsuperscript{96}

3. Canadian-Style Labor Law Reform

Should we enact Canadian-style labor laws to strengthen the 
hand of existing unions? New rules could be put in place to facilitate 
union organization by permitting certification on the basis of card 
showings in lieu of elections and using arbitrators to impose labor con-
tracts on newly organized units where the parties cannot reach agree-
ment. We could also boost union bargaining power by allowing 
secondary boycotts in aid of organizing drives and strikes, and we 
could ban the hiring of permanent replacements (and perhaps temporaries as well, as in Ontario and Quebec).

The laws in Canada on “automatic” certifications without elec-
tions are designed to ease the union’s organizing task, and exclude the 
employer from any role in the representational process. In Ontario, if 
more than 55% of the employees in a unit are members of, or have 
applied for membership (by making a token payment) in, a union, the 
labor board may (and typically will) certify the union outright.\textsuperscript{97} The 
agency will not consider evidence of membership or disavowal of 
member file, or presented after the date of the union’s applica-
tion for certification.\textsuperscript{98} Evidence filed prior to the application date

\textsuperscript{95} My objection here is to “watchdog” committees serving as in-house instruments of state 
policy, as opposed to committees established with a constructive problem-solving mission—e.g., 
to administer government grants or to develop jointly agreed-upon standards for training 
programs.

\textsuperscript{96} Mandatory works councils, I would urge, should be relegated to a future reform agenda 
\textit{after} we have strengthened the independent union option, developed experience with collabora-
tive representation in the non-union sector, and have a better understanding of the role in-
dependent unions might play in U.S.-style works councils.


\textsuperscript{98} \textit{Id.} §§ 8(4)-(6). This freezing of the status quo at the time of application is also the law 
in Quebec, Alberta, British Columbia, Newfoundland, and the federal sector. See James D. Mer-
riman, Certification in Canadian Labor Law: Towards the “Ideal” Mix (June 9, 1993) (unpub-
lished manuscript, on file with author). Ontario had previously provided for a “return date” of 
ten days during which workers could revoke their membership. Professor Weiler recommends a
will be considered only if in writing and signed by each employee, but
the board will not examine whether the employee made an informed
choice.\textsuperscript{99} However, such informality does not attend the process of
decertification. Petitions will not be entertained during the first year
after certification, and if a collective agreement is in place, they will be
entertained only during the last two months of the third year of the
term (or of each succeeding year). They must be signed by 45\% of the
unit, and the signatures must not be tainted by management influence
or solicitation going beyond the "acceptable bounds of salesmanship."
\textsuperscript{100} If the petition satisfies the formalities, the board holds a
decertification vote.\textsuperscript{101}

The question for U.S. public policy is whether the deficiencies in
our representational process are so beyond repair that NLRB-supervised
elections should be dispensed with altogether as the principal
avenue (absent voluntary recognition) for the union’s acquisition of
bargaining authority. As developed below, I prefer to retain the elec-
toral model bolstered by enhanced penalties for retaliatory discharge
and union access rights to the electorate. Except where the em-
ployer’s illegality has precluded fair election conditions, a secret ballot
is still the best way to determine employee preferences.\textsuperscript{102} NLRB pol-
icy over the decades has recognized that employees often sign cards
(even when properly worded) under the mistaken impression that
they are merely authorizing an election or simply to avoid a personal
encounter with the union organizer. Moreover, the conversation be-
tween the employee and the union organizer is understandably one-
ten or fifteen day period to enable workers to change their minds. P\textsc{aul W}\textsc{eiler}, R\textsc{econcilable D\textsc{iffences: N\textsc{ew D\textsc{irections in C\textsc{anadian L\textsc{abour L\textsc{aw 43 (1980).}}}}\textsuperscript{99}}

\textsuperscript{99} Ontario Labour Relations Act \S 8(6); \textit{e.g.}, Johnson Controls Ltd. and C.A.W.-Canada, 8
C.L.R.B.R.2d 198, 203 (1991) (Ont.). In \textit{Johnson Controls}, an individual had signed an authoriza-
tion card and paid a $1 membership after campaigning against the union:
There is no dispute that S. McKibbon had been drinking. However, the Board finds
that he knew full well the nature of the transaction. His motive in signing the card
(whether he sought to impress his friends, for example) is of no concern to the Board as
the Board is satisfied his act in joining the union was voluntary.
\textit{Id.} at 207.

\textsuperscript{100} See Sandra Taylor and United Food and Comm'l Workers Int'l, Locals 175 and 633, 4


\textsuperscript{102} Consider Professor Cooper’s findings:
Only when a union had cards from more than 60\% of employees did it achieve at least
an even chance of winning the election. Another interesting finding . . . is that an
increase in the proportion of authorization cards collected over 70\% did not substan-
tially increase the union’s chance of success. Unions with authorization cards from 90-
100\% of employees still won only 65.7\% of the time.
Laura Cooper, A\textsc{uthorization C\textsc{ards and U}\textsc{nion R\textsc{epresentation E\textsc{lection O}\textsc{utcome: A\textsc{n E\textsc{mpirical A\textsc{ssessment of the A\textsc{ssumption Underlying the S\textsc{upreme Court’s G\textsc{issel D\textsc{ecision, 79 N\textsc{w. U. L. R\textsc{ev. 87, 119 (1984).}}}}}}}


Laura Cooper, \textit{Authorization Cards and Union Representation Election Outcome: An Empirical
Assessment of the Assumption Underlying the Supreme Court's Gissel Decision}, 79 Nw. U. L.
sided; the arguments against union representation and collective bargaining are not presented. Union representation is not always the right choice for workers; if it were, the law would simply mandate a union for every plant. Where an employer is unwilling voluntarily to extend recognition, and has no independent basis to believe the union is a majority representative, employees should be able to choose whether to be represented by a union or not after hearing opposing views and in a secret ballot.

As for some other aspects of the Canadian-style package of proposals, I am skeptical that lasting improvements are possible simply by enacting aggressively pro-union laws that do not take account of fundamental causes of the current state of affairs. Consider, for example, the AFL-CIO’s campaign to secure an absolute ban on the hiring of permanent replacements for economic strikers. Change is needed; an employer should have to show that operations could not be maintained with temporary replacements, and even then should be required to engage in collective bargaining for a significant period of time before resorting to permanent replacements. However, an absolute ban is a mistake. It will help unions prevail in particular disputes, but ignores the larger forces at work. What is needed is not greater insulation of unions from competitive pressures but a redirec-

103. The NLRB is free to abandon the agency policy sustained in Linden Lumber Div. v. NLRB, 419 U.S. 301 (1974), and require an employer to bargain with a union where it has independent knowledge, say, because of employee participation in a peaceful, clearly placarded recognitional strike, that the union enjoys majority support.

104. The House of Representatives passed H.R. 5, 103d Cong., 1st Sess. (1993) (Cesar Chavez Workplace Fairness Act), on June 15, 1993; the bill would amend the NLRA and the Railway Labor Act to bar the hiring of permanent replacements for strikers. The identical Senate version, S. 55, cleared the Senate Labor and Human Resources Committee on May 5, 1993, but its prospects for surmounting a threatened filibuster are unclear. Similar legislation failed to survive a Senate filibuster during the 102d Congress.

105. In a work in progress, Collective Bargaining or "Collective Begging"?: Economic Conflict Under the NLRA, I argue against an absolute ban on the hiring of permanent replacements in favor of a six-month period during which strikes are insulated from such labor-market pressures. I would also authorize the NLRB to decline to consider representational issues during an active strike, and would require a showing on the employer’s part—keyed to objective indicators such as unemployment rates in the particular industry or locality—that temporary replacements could not be hired for the wages and benefits offered to the striking workers; the use of permanent replacements where temporary workers are available inflicts a penalty on strikers for no legitimate purpose. For this latter proposal, it would be essential that the NLRB (or some other entity) be authorized to issue a prompt determination as to the availability of temporary workers, with provision for expedited review in the court of appeals. Workers should not be betting their jobs on the hope that the Labor Board will at some point in the distant future treat them as "unfair labor practice strikers" entitled to displace their replacements. Employers, too, should be able to respond to union demands with a minimum of legal uncertainty. See generally Samuel Estreicher, Strikers and Replacements, 3 LAB. LAW. 897 (1987).
tion of existing rules to enable independent unions better to take account of the competitive position of union-represented firms.

4. Nonmajority Unionism

A number of writers have urged modification of the exclusivity principle of American labor law as a means of broadening the opportunities for collective representation. These proposals would retain the rule that the majority representative is the exclusive representative of the workers in an appropriate unit. But absent majority support for a particular labor organization, employers would be obligated to bargain with any organization commanding the support of any, or some minimum percentage, of the work force.

There are a number of difficulties of considerable practical importance with this proposal. One is the costs to the firm of dealing with a proliferation of bargaining obligations in a particular plant. Professor Finkin's thoughtful piece in this Symposium offers a solution: allow the employer to demand joint bargaining "with respect to matters which have customarily been provided on a uniform basis," and in the absence of consent to such joint bargaining, to conclude an agreement with the organization which represents the largest number of employees and impose that agreement on the other organizations. Unions could demand joint bargaining, but employers would not be required to deal with a coalition. Other problems include the spectrum of discriminatory exclusion of disfavored groups. Professor Gottesman also voices concern over how to deal with "ever-shifting populations," strategic combinations to escape contracts by petitioning for NLRB certification, and conflicting demands from rival minorities in the work force.

The core difficulty is one of institutional fit. Plural unionism means something very different in a system like France's—hardly a success story—where collective bargaining occurs at the supraenter-


108. See Finkin, supra note 106, at 205-06.


110. See Gottesman, supra note 79, at 88-90.
prise, industry-wide level among unions representing political coalitions with little interest in plant-level issues than it would in the U.S. system based on decentralized collective bargaining which contemplates a comprehensive local agreement on terms and conditions of employment. In practice, the proposal to mandate nonmajority collective bargaining is likely to pull us further away from the goal of an integrative positive-sum labor relations system capable of providing employee voice in competitive markets.

5. Labor Law Reform for Competitive Product Markets

If labor law reform is to stand a reasonable chance not only of being enacted but also of promoting employee voice and changing the labor-management climate, it must take account of existing institutional arrangements. Whatever we may think of, say, the German system, we cannot simply waive the legislators’ wand and mandate centralized collective bargaining over minimum terms, works councils in every enterprise, and tripartite labor courts.

Of the several premises of the U.S. system previously discussed, the commitment to decentralized collective bargaining and multiemployer labor organizations seems particularly entrenched. Legal reform can, however, substantially reshape the arrangements that exacerbate adversarial labor-management relations and mitigate the institutional insecurity of independent employee organizations.

The reforms I have in mind would (i) remove legal restraints on the evolution of alternative workplace arrangements, (ii) strengthen the independent union option by bolstering remedies for employer illegality and enhancing union’s access to workers during organizing drives, and (iii) for unionized firms alter the system of incentives that contributes to adversarial labor-management relations.

111. The best writing on this subject remains Derek C. Bok, Reflections on the Distinctive Character of American Labor Laws, 84 Harv. L. Rev. 1394 (1971).

112. Professor Rogers’ piece in this Symposium, Joel Rogers, Reforming U.S. Labor Relations, 69 Chi.-Kent L. Rev. 97, 115-16 (1993), suggests, without offering details, a presumptive “requirement” of multi-employer and “sectoral” bargaining. With union density under 13% of the work force and the breakdown of multiemployer bargaining in many industries, it is difficult to see how this “requirement” could be implemented, even if the political will were found to enact such legislation. In any event, any proposal to extend union wages to unorganized firms runs up against the practical difficulty for unions of “free riding” and, more importantly, fails to take account of the need for a fundamentally different union program in a world of competitive product markets.
C. Outline of an Agenda for Reform

1. Amend the "Company Union" Prohibition

Under our labor laws, workers must choose between an independent union or no workplace representation at all. Companies that establish representative bodies, whether to hear employee grievances or to elicit employee input into managerial decisions, run afoul of the law. An employer who establishes a German-style works council for her employees faces considerable legal obstacles, even if there is a union in the shop. Moreover, unions are skeptical of "employee governance" proposals, in part because—as faculty unions have learned—individual workers who participate in the making or implementation of managerial policy are deemed part of management and excluded from union representation rights.

Alternatives to traditional unionism—or, to put the point somewhat differently, competitive pressures that might force a change in the labor relations climate—can never emerge if the law insists on one form of workplace representation or none at all. Through a narrowing of the definition of "labor organization" to reach only representational structures that purport to engage in a form of collective bargaining, the reach of the section 8(a)(2) prohibition would be confined to truly coercive or deceptive practices. Workers would still have the right to seek representation by independent unions, and would retain existing protection for concerted activities.

2. Ensure a Realistic Option to Choose Independent Representation

To prevent employer-based schemes from becoming mere tools to manipulate workers, the option to choose an independent union must be a realistic one. The law should be amended to substantially reduce the costs to employees—principally fear of job loss—who exercise their right to choose independent representation. Without the prospect of significant liability, it is too easy—even if Professors Meltzer and LaLonde are right that the risk of unlawful discharge is only 1

113. The proposals that follow are sketched here. They will be developed in more detail in a book under preparation with Harvard University Press.

114. Where a union is present, the employer must respect the employees' choice to be represented by an independent union. Any different or supplementary representational structure requires the consent of the union. Thus would have found it unnecessary to consider the § 8(a)(2) issue in E.I. du Pont de Nemours & Co., 311 N.L.R.B. No. 88, 1992-1993 NLRB Dec. (CCH) ¶ 17,862 (May 28, 1993), because the exclusive bargaining representative in that case had refused to accept the employer's committee system.
in 60\textsuperscript{115}—for unscrupulous employers to frustrate employee free choice by the simple expedient of firing supporters of the union drive.

When pro-union workers are improperly fired, delay in achieving redress can undermine the most determined organizing drive. By the time the case works its way through the administrative process and on appeal, the original workers are often long gone and management has succeeded in eviscerating the momentum of the organizing campaign. These are avoidable costs of union organization. The NLRB should be authorized to impose strict penalties (not tied to the workers' economic losses) to deter flagrant unfair labor practices.\textsuperscript{116} Areas where courts have resisted broader remedies require explicit authorization. Section 10(j) should be rewritten to make clear that preliminary injunctive relief is available to reinstate improperly discharged union supporters pending the outcome of administrative hearings. Interim reinstatement orders, when coupled with the prospect of substantial penalties, should bring home to employees that they indeed have a legal entitlement to be represented by unions, and to employers that retaliatory discharge may not be a very sound course after all.\textsuperscript{117} Also, where employer illegality undermines fair election conditions, the law should explicitly provide\textsuperscript{118} that bargaining orders without elections are an appropriate remedy, whether or not there has been employee turnover.\textsuperscript{119}

\textsuperscript{115} See supra note 7 and accompanying text.

\textsuperscript{116} The initial version of labor law reform legislation introduced during the Carter administration would have provided for a doubling of backpay without mitigation. See H.R. 8410, 95th Cong., 1st Sess. (1977); S. 2467, 95th Cong., 2d Sess. (1978).

\textsuperscript{117} Writing in 1983, Professor Weiler stated that “[i]t is simply unrealistic to expect that the Board could give 'priority' to the investigation of 17,000 discriminatory discharge cases a year, and that the federal courts could dispose of 3500 injunction applications annually within the two- to three-month period that is crucial to the effective use of reinstatement to ensure the fairness of the representation process.” Weiler, supra note 4, at 1803. This observation assumes, however, that interim reinstatement orders must be sought in every case to achieve the right level of deterrence. If the Board makes clear it is prepared to pursue this remedy aggressively, and the courts are directed to be receptive to such applications, employers—especially the small companies that are likely targets of § 10(j) relief—will soon internalize the message. I may be wrong, but only actual experience under new rules will tell.


\textsuperscript{119} There is much the Labor Board can do administratively to streamline pre-election procedures to ensure that elections are held promptly after a petition has been filed. The Supreme Court has given the NLRB a “green light” to promulgate rules through notice-and-comment procedures, pursuant to § 553 of the Administrative Procedure Act, in lieu of case-by-case adjudications. See American Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991). This authority should be used to simplify unit determinations and to clarify disputed policies, such as those governing issuance of Gissel bargaining orders, that have met with resistance in the courts of appeals. See
In addition, we need to improve the access rights of unions in order to ensure that the NLRB-supervised election truly provides an accurate poll of employee wishes. That is, after all, the rationale for preferring the electoral model over "automatic" certification procedures. The Supreme Court's recent Lechmere decision\textsuperscript{120} should be overruled; parking lots in shopping malls are generally open to the public and should be available to union organizers for nondisruptive informational picketing and handbilling.\textsuperscript{121} The union's access can never be fully equal to the employer's, but more can be done to enable employees to hear both sides. The Board should be authorized to allow unions who secure card signatures from 30\% of the employees access to names and addresses well before an election is scheduled,\textsuperscript{122} absent a showing of union misconduct (in that case or other cases involving the same labor organization). Also, since employers presently have the right to hold "captive audience" addresses on their property,\textsuperscript{123} unions should have the right to come on the premises to address the workers at a scheduled time shortly before an NLRB election.

Legislative change is also needed to reduce current incentives to use the appeal process as a means of delaying effective bargaining with certified majority representatives. NLRB orders could be made self-enforcing without need to petition the courts of appeals in every case. Judicial review of representation case determinations and first-time bargaining orders also should not be a cost-free opportunity to stymie employees' desire for collective representation; costs, including attorney's fees, should be awarded to the prevailing party on appeal (at least absent a "substantial justification" for bringing the appeal).\textsuperscript{124}


121. The same principle would extend to non-disruptive solicitation in hospital cafeterias open to the public. \textit{Cf.} Oakwood Hosp. v. NLRB, 983 F.2d 698 (6th Cir. 1993).

122. The current rule requires the employer to furnish the union with an \textit{Excelsior} list within seven days after an order directing an election. \textit{See} Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966).


3. Encourage Alternatives to Strikes

Strikes are sometimes necessary to resolve disputes but they are often the product of bargaining failures. They promote an adversarial climate, and too often result in pitched battles destructive of entire communities and yielding little social benefit. Reform is needed to improve the flow of information and to encourage the parties to consider alternatives to strikes.

Both workers engaged in a strike and employers responding to a strike should make an informed decision: as a precondition to a lawful strike, all of the employees in the bargaining unit (including mere dues-payers who have not joined the union as such) should have a statutory right to vote by secret ballot on the employer's final offer and on whether or not they authorize a strike.¹²⁵

Interest arbitration—the use of neutral arbiters to resolve disputes over the content of labor contracts—is common in the public sector, but rarely used in the private sector. Under current law, interest arbitration is not within the scope of mandatory bargaining: a party desiring such a term cannot require the other side to bargain or use its economic leverage to insist upon it as a condition of an overall agreement.¹²⁶ Such barriers should be removed, and tax and other incentives to experiment with strike alternatives should be ex-


¹²⁵. Under current law, such votes are strictly a matter of internal union governance for the union to structure as it chooses. This practice creates unnecessary agency costs of unionism. In a number of highly-publicized strikes, unions have allowed constituencies other than the immediately affected workers to determine the outcome of strike and contract ratification votes. See, e.g., Henry J. Holcomb, Port Workers Reject Pact, Face Job Loss Wage Cuts and Rule Changes, PHILA. INQUIRER, Sept. 29, 1993, at A1 (Wilmington port workers voted against concession pact for Philadelphia port workers, even though Chilean fruit shipper threatened to divert traffic to lower-cost Wilmington port); Alex S. Jones, Paper Brinkmanship: Times and Drivers Are Joined in Fear Both Would Lose All-Out Labor War, N.Y. TIMES, May 15, 1992, at B2 (deal between New York Times and its drivers subject to majority vote of entire union including drivers for competitors, The Daily News and The New York Post).

The Taft-Hartley experience with employee votes on management’s final offer suggests, however, that employees will typically vote to reject. See DONALD E. CULLEN, NATIONAL EMERGENCY STRIKES 56-57 tbl. 6, 61 (1968). It is unclear whether this would occur generally outside of Taft-Hartley’s “emergency disputes” context. In any event, whether or not the procedure reduces the incidence of strikes, employers (and the public) should know that a strike enjoys the informed support of the affected employees rather than adherence to a top-down direction from the union leadership.

¹²⁶. See, e.g., Sheet Metal Workers, Local 59, 227 N.L.R.B. 520, 520-21 (1976) (future contract dispute resolution by third party is a permissive subject of bargaining).
plored. Also, as discussed below, the "quick fix" of hiring permanent replacements in response to an economic strike should be substantially curtailed, and, possibly, some form of advisory interest arbitration might be required prior to resort to economic conflict.

4. Allow Free Collective Bargaining

Existing law draws a sharp distinction between "mandatory" and "permissive" subjects. Under the Borg-Warner rule, the parties have a duty to bargain and a right to press disagreements over "mandatory" subjects defined narrowly to encompass only issues of immediate concern to employees. But management is not required to bargain over issues affecting the scope and direction of the enterprise, such as plant closings or capital investment; nor is the union allowed to strike over such issues. If collective bargaining is to succeed, the parties should be able to shape a deal that meets their needs without the government deciding which subjects can be deal-breakers. Such reform might unleash the creative potential of collective

127. For a useful survey, see Merton C. Bernstein, Alternatives to the Strike, 58 AAUP BULL. 404-12 (1972). The so-called "statutory strike" procedure imposes financial penalties on the parties for prolonged disagreement without entailing the disruption of a strike. See, e.g., Thomas J. Raleigh, Ease the Pain of Labor Negotiations, WALL ST. J., June 29, 1992, at A14.

128. See supra note 105; infra text accompanying note 160.

129. In a last-minute, unsuccessful attempt in June 1992 to overcome a filibuster on AFL-CIO backed legislation to bar the hiring of permanent replacements for strikers, Senators Packwood (R-Ore.) and Metzenbaum (D-Ohio), with labor backing, offered a compromise that would have made a proffer of binding interest arbitration a mandatory condition to resort to economic conflict. Under this proposal, an employer who refused to participate in arbitration or to accept an arbitration award could not hire permanent replacements; and if the union chose to strike without proffering interest arbitration or accepting the award, the employer would be free to use such replacements. See S. Res. 55, 102d Cong., 2d Sess. (1992). Another proposal would require submission of unresolved issues to advisory arbitration and impose mild sanctions as an additional settlement impetus. See George S. Roukis & Mamdouh I. Farid, An Alternative Approach to the Permanent Striker Replacement Strategy, 44 LAB. L.J. 80, 89-90 (1993). These and other approaches will be evaluated in a forthcoming article, see supra note 105.


132. See Michael C. Harper, Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining, 68 VA. L. REV. 1447 (1982) (purpose of permissive-mandatory distinction is to mark out the sphere of decisions unions should be able to influence through collective pressure).

133. I am urging here legislation adopting Justice Harlan's view of the bargaining process in the Borg-Warner case. In essence, the "right to insist" should be broader than the "duty to bargain"; either party can insist on subjects outside of the scope of mandatory bargaining, subject to an overall duty to bargain in good faith. See 356 U.S. at 351 (Harlan, J., with whom Clark and Whittaker, JJ., join, concurring in part and dissenting in part). At the October 1, 1993 Roundtable on Labor Law Reform, supra note 35, former NLRB member Marshall Babson suggested that Harlan's position, if enacted into law, would enable parties to act strategically, to insist on matters of little underlying substantive interest in order to gain leverage or delay signing contracts. By way of response, I offer Justice Harlan's caveat:
bargaining—for example, agreements over wages and job-bidding rights for a seat on the corporate board and enforceable guarantees of job security.134

5. Lengthen and Broaden Union Horizons

Labor laws should narrow, rather than widen, the divergence of perspective between the union and firm. For starters, long-term contracts should be encouraged. The typical term of labor agreements is three years, largely because the NLRB will not recognize a "contract bar" to challenges to the union's bargaining authority beyond three years. Successful relationships can bypass such hurdles.135 Thus, the Steelworkers Union-Magna Copper contract runs for 15 years (with provision for interest arbitration at 5-year intervals)136 and the union has reached similar long-term agreements with other steelmakers.137 Employers should be allowed to waive by contract their (not the employees') right to challenge the union's authority for any agreed-upon period.138

I do not deny that there may be instances where unyielding insistence on a particular item may be a relevant consideration in the over-all picture in determining "good faith," for the demands of a party might in the context of a particular industry be so extreme as to constitute some evidence of an unwillingness to bargain. Id. at 359. There may also be a narrow category of subjects that should be placed beyond the reach of either party's insistence, such as proposals to alter or dilute the representative status of a union. See, e.g., Boise Cascade Corp., 283 N.L.R.B. 462, 469 (1987) (proposal to consolidate two maintenance employee units involves a permissive subject), enforced, 860 F.2d 471 (D.C. Cir. 1988). Employer-initiated employee representation committees would also come within this category. See supra note 114.


135. Professor Jacoby's Essay in this Symposium, Sanford M. Jacoby, Reflections on Labor Law Reform and the Crisis of American Labor, 69 CHI.-KENT L. REV. 219, 225 n.24, misconstrues my position on the effect of the Board's "contract bar" rule. Plainly, the rule does not create an absolute "obstacle" to long-term contracts, but to the extent the union cannot contract for a waiver of the employer's ability to test its majority support for a coterminous term, the rule discourages the writing of such contracts.


138. There is, of course, a tradeoff between rules promoting long-term perspectives and rules ensuring union responsiveness to rank-and-file pressures. To the extent, as I argue, the law should allow long-term contracts barring employer petitions and also prevent employers from withdrawing recognition from unions without elections, see infra text and accompanying notes 150-51, the employer's role as an agent for ensuring union responsiveness will be considerably diminished. Employers were, however, never terribly faithful agents of employees in this process. It is far better, in my view, to rely on the employees themselves to monitor their represent-
Current law also encourages information-hoarding rather than information-sharing by overregulating the bargaining process. If an employer acknowledges an "inability"—rather than mere unwillingness—to pay for the union's proposals, this triggers a duty of disclosure and protracted agency oversight which the union can exploit as a source of leverage. Constructive bargaining over major corporate decisions, such as plant closings, is hampered by doctrines penalizing candor and excluding subjects affecting job security from all information-sharing and bargaining duties. If the parties have learned to work together, here too they can negotiate around the law. For example, the agreement between General Electric and the electrical workers union (IUE) provides for advance notice and consultation rights over plant closings and use of subcontractors.

But the law can help reverse, rather than perpetuate, the distrust that mars other relationships. The rigidity of current law which links disclosure duties to the apparatus surrounding "mandatory" bargaining subjects needs change. The building of trust requires candid exchange of information, which should occur without fear that such action creates an entitlement to additional rounds of disclosure or means of delaying impasse. An employer should be required to give advance notice of, and consult with the union over, significant investment decisions, plant shutdowns, and the like. However, meaningful reform must also address legitimate employer concerns, by preventing disputes over financial information from being used to protract bargaining and requiring safeguards to prevent unions from sharing

atives. Employees need information to perform this role. This includes clear notice of their right to petition for decertification elections and a § 7 right to cast a secret-ballot vote on the employer's final contract offer, any proposed contract, and any strike authorization. They also need procedures that reduce the transaction costs of collective monitoring. This might take the form of a relaxation of contract bar rules for employee-initiated decertification petitions filed after the third year of a long-term contract, or provision of a regularly scheduled secret-ballot reauthorization election (untainted by employer illegality). Also, employees who are union members have rights to participate in the internal governance of their unions, as safeguarded by the Landrum-Griffin Act of 1959—a subject that is beyond the scope of this article. I will be exploring these and related questions in a forthcoming article, tentatively entitled Rethinking Employee Choice in U.S. Labor Law.

139. See, e.g., United Steelworkers of Am., AFL-CIO-CLC, Local Union 14534 v. NLRB, 983 F.2d 240 (D.C. Cir. 1993); United Paperworkers Int'l Union v. NLRB, 981 F.2d 861 (6th Cir. 1992) (both holding that insistence on concessions in order to remain competitive is not tantamount to a plea of poverty requiring access to financial substantiation under NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956)).


141. Information-sharing and consultation rights over major corporate decisions should be clearly defined in the form of "safe harbor" rules to prevent the unions or the NLRB from forestalling a declaration of "impasse" when the parties are plainly in deadlock.
proprietary information with competitor firms or the general public.\textsuperscript{142}

As a general matter, the labor laws should be encouraging representational structures that are broadly inclusive of all of the nonexecutive workers of a firm. The Supreme Court's \textit{Bell Aerospace} decision\textsuperscript{143} is badly in need of overhaul; workers should not be deprived of the right to seek independent representation because of their involvement in the making or implementation of company policies.\textsuperscript{144} Unions should also be freed of existing constraints in seeking units commingling professional and nonprofessional workers\textsuperscript{145} or craft with unskilled workers.

With due acknowledgment of the preferences of union organizers and the value of limiting initial recognitional authority to fairly small, cohesive units, current unit determination policies that allow fragmentation of bargaining structures within the firm should be reexamined. An employer and a union representing a threshold percentage of the workforce should be permitted, without need for a NLRB election, to extend labor agreements throughout the plant and, perhaps, other plants within the same commuting area, with an opportunity for a later NLRB-supervised secret-ballot poll of the affected employees.\textsuperscript{146}

\textsuperscript{142} \textit{Cf.} NLRB v. New England Newspapers, Inc., 856 F.2d 409, 414 (1st Cir. 1988) (noting favorably the Board's "sensitivity" in allowing the company to strike irrelevant price information from sales contract and ordering the union to keep the contents of the contract confidential). The Labor Board should use its rulemaking authority to develop "Chinese wall" rules to ensure that unions maintain internal procedures to preclude disclosure of a firm's confidential financial data from union officials who represent employees of competing firms.


\textsuperscript{144} See David M. Rabban, \textit{Distinguishing Excluded Managers from Covered Professionals Under the NLRA}, 89 \textit{Colum. L. Rev.} 1775 (1989). One question is whether such liberalization should extend to at least low-level supervisory personnel, in light of the largely unfavorable public-sector experience with foreman unionism. Any extension of NLRA protections to supervisors should provide that they are represented in separate units in order to permit agreements enabling management to call on supervisors to maintain operations during a strike by nonsupervisory personnel.


\textsuperscript{146} Such agreements do occur, see \textit{SEIU Master Pact for Washington Janitors Includes Area-wide Recognition Provision}, Daily Lab. Rep. (BNA) No. 193, at A-5 (Oct. 7, 1993), but it is unclear whether current law permits, in the absence of a functional accretion of units, the extension of contracts to new locations, even when conditioned by a later card showing of majority support. \textit{See} Houston Div. of the Kroger Co., 219 N.L.R.B. 388 (1975); Majestic Weaving Co., 147 N.L.R.B. 859 (1964), \textit{enforcement denied on other grounds}, 355 F.2d 854 (2d Cir. 1966). Moreover, current rules make it difficult to attack facially valid agreements after six months, see Machinists v. NLRB, 362 U.S. 411 (1960), and require any decertification elections to be held on the basis of the expanded unit (rather than the portion accreted), see George Brooks & Mark Thompson, \textit{Multi-Plant Units and Employee Choice}, 20 \textit{Indus. & Lab. Rel. Rev.} 363 (1967). Would it not be better to permit accretion agreements that provide for (1) a later secret-ballot authorization poll of the accreted work force, and (2) opportunity to petition for a decertification election on the basis of the accreted unit?
6. Promote Union Institutional Security

Responsible unionism requires institutionally secure unionism. UAW's innovative agreement with GM's Saturn division was negotiated before any of the employees were hired for the new Tennessee facility. By stipulating to the UAW's bargaining authority in advance, the Saturn management was able to encourage the union to experiment with broadened job classifications and a participative "team structure" at variance with the national UAW-GM agreement.\footnote{147} Saturn's success, however, should not obscure the fact that the agreement with the union was of questionable legality under the NLRA.

Prehire agreements outside of the construction industry are unlawful. The Saturn agreement was saved by an ingenious argument that General Motors and the UAW were really engaged in a form of "effects" bargaining for UAW-represented workers laid off in other plants.\footnote{148} Even this tack could not be used for foreign firms establishing plants here. The upshot is that companies like Mercedes and BMW have no vehicle for testing the union's receptivity to doing things differently; neither do American firms deciding whether to invest in new plants here or abroad. The law should encourage, rather than hinder, labor-management cooperation experiments in new "greenfield" plants by relaxing the prohibition of prehire agreements. The wishes of the employees ultimately hired can be ascertained in a less self-defeating, and more reliable, manner than by barring such agreements.\footnote{149}

Employers also should not be able unilaterally to withdraw recognition from unions; any test of the union's authority should occur only in a secret-ballot NLRB election (and only where employers have not waived their right to do so by contract). Current law allows the employer to claim that the union no longer represents its employees and

\footnote{147} See Barry Bluestone & Irving Bluestone, Negotiating the Future: A Labor Perspective on American Business 189-201 (1992); Saul Rubinstein et al., The Social Partnership: Co-Management and the Reinvention of the Local Union, in Employee Representation, supra note 5, at 339-70.

\footnote{148} See Advice Memorandum Issued by NLRB Associate General Counsel on UAW-GM Saturn Agreement, Daily Lab. Rep. (BNA) No. 110, at E-1 (June 9, 1986).

\footnote{149} For an initial period, such pre-hire agreements should not erect a "contract bar" to an employee decertification—as opposed to employer—petition, and it would be desirable to provide for a secret-ballot "authorization election" by the second year of operations. Compare the rules governing pre-hire contracts in the construction industry. See John Deklewa & Sons, 282 N.L.R.B. 1375 (1987), enforced sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1987), cert. denied, 488 U.S. 889 (1988).
to stop bargaining as soon as the prior contract expires.\textsuperscript{150} Such a move risks unfair labor practice charges, but in the two to three years it takes to resolve the issue the union may be gone. The employer's ability to withdraw recognition is not a very good, and hardly the best, mechanism one could devise to ensure that the union continues to enjoy majority support.\textsuperscript{151}

Under current "successorship" doctrine, union workers have no right to be hired by purchasers who take only the firm's assets and not its stock.\textsuperscript{152} Indeed, current law creates perverse incentives on the purchaser's part to select an entirely new work force and thereby escape the union contract altogether.\textsuperscript{153} This rule should be changed\textsuperscript{154} to require that firms buying a company's assets maintain the same work force and bargain with the union over the terms and conditions of employment,\textsuperscript{155} even if they do not purchase stock as well.

Some rules designed to protect dissenting voices exacerbate the union's institutional insecurity without adequate justification. For instance, section 14(b) of the NLRA, which allows states to enact "right to work" laws, enables those who benefit from the unions a "free ride," thus hampering unions' effectiveness as bargaining agents. It should be repealed; all employees benefited by collective representation should have to pay their share of the costs of that representation (whether or not they formally join the union). Also, union coopera-


\textsuperscript{151} For a preferable approach, see supra note 138.

\textsuperscript{152} In NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272, 294-95 (1972), the putative successor, a company that won a competitive bid to provide security services, was not required to hire the predecessor's employees and was under no duty to bargain with the predecessor union until it hired a majority from the predecessor work force. The rules announced in Burns make sense in the context of that case, but they have been extended to consensual transactions as well. See Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249 (1974). See generally Samuel Estreicher, Successorship Obligations, in Labor Law and Business Change 63-78 (Samuel Estreicher & Daniel G. Collins eds., 1988).

\textsuperscript{153} Admittedly, the new employer cannot discriminate against union-represented employees, but under the Burns decision, a preference for new workers would not be sufficient proof of anti-union animus. See, e.g., Southward v. South Cent. Ready Mix Supply, 7 F.3d 487 (6th Cir. 1993).

\textsuperscript{154} Unions can bargain around the rule by negotiating "successorship" clauses, but these can be of doubtful practical utility if the union is unable to obtain an injunction to block the transaction. See Estreicher, supra note 152, at 68-69; Katherine Van Wezel Stone, Employees as Stakeholders Under State Nonshareholder Constituency Statutes, 21 Stetson L. Rev. 45, 62-63 (1991).

\textsuperscript{155} Absent an express assumption, the predecessor's contract should not be binding on the purchaser, but it may serve to define the operational status quo for bargaining new terms.
tion with workplace discipline and job shifts is undermined by the spectre of jury trials for unfair representation brought by disgruntled employees; adjudicated violations of the fair-representation duties should trigger only a rearbitration remedy.\textsuperscript{156}

7. Lengthen and Broaden Employee Horizons

Unions at their best are only bargaining agents reflecting the preferences of their principals; the horizons of the workers themselves need to be lengthened and broadened. Communicating reliable information about the firm's economic position would help.\textsuperscript{157} Tax laws should affirmatively promote "gain sharing" and profit sharing in compensation packages as a way to enhance worker productivity and to facilitate employment stability during difficult economic times.\textsuperscript{158} Employees and unions understandably resist productivity improvements that may cause job loss. To promote greater receptivity to changes that will improve the health of the firm and, in the long run, the competitiveness of U.S. industry, public policy must address the problem of job security. The government should make transition easier by making benefits portable, offering relocation assistance, and retraining workers in growing sectors of the economy.\textsuperscript{159}

8. Lengthen and Broaden Management Horizons

Management attitudes and practices also need overhauling. We must prevent companies from using the "quick fix" of hiring permanent replacements during a strike. The employer's unconstrained ability under current law to replace striking workers with permanent employees undermines the bargaining process. Management has a legitimate need to keep operating during a strike, but it can usually meet this need with temporaries. Even where this cannot be done, companies should have to wait six months before permanently replacing strikers, as was the law until recently in Ontario.\textsuperscript{160}


\textsuperscript{157} Even in the union-represented sector, management should be permitted to communicate directly with employees (with union representatives present) on matters such as final bargaining offers and the reasons for particular business decisions.


\textsuperscript{160} Details will be developed in a forthcoming article. \textit{See supra} note 138.
Union representation on corporate boards is rare, and when it occurs it is usually in a concessionary or distress bargaining context in which the union agrees to wage and benefit reductions in exchange for stock. To the extent the labor laws or state corporate law prevent parties in healthy firms from addressing proposals in which union or employee directors representing employee interests have a role in corporate governance, those restrictions should be reexamined.

Government should widely disseminate information about labor-management success stories where unions have been made an integral part of the "employee involvement" program, such as prevail between Xerox and the Clothing Workers, AT&T and the Communications Workers, Inland Steel and the Steel Workers, and Goodyear and the Rubber Workers, among others. The Secretary of Labor's and the President's "bully pulpit" could profitably be employed to promote changes in labor-management culture.

Ultimately, however, stock-market-driven incentives need to be addressed. Management's obsession with short-term share price spurs workforce reductions that undermine the atmosphere of trust that is essential to cooperative unionism, wage flexibility, and long-term productivity. The debt-load legacy of the 1980s suggests that the benefits of the market for corporate control are vastly overrated, and costs of leveraging and short-termism understated.161 Tax and corporate law rules need redirection to promote longer-term perspectives.

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There are bright spots in the current scene—employee involvement programs in the nonunion sector and labor-management cooperation experiments in the one-time "mass production" industries are eliciting the guarded approval of unions like the UAW, Steel Workers, and Rubber Workers. We need a revitalization of our labor laws—one responsive to the forces at play in a world of competitive product markets—so that collective voice for employees in high-quality competitive firms becomes the norm and not the exception.