Labor Law and Fundamental Issues in Unionism: A Research Agenda*

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For the past ten years, critics and supporters of the NLRA have debated the status of the Act. The author notes that this debate has raised fundamental questions concerning the role of unions and labor law in the United States which have not been properly addressed. The author describes these unanswered questions and suggests a research agenda which would attempt to define the future direction and role of unions in America.

I
INTRODUCTION

The National Labor Relations Act (NLRA) will be fifty years old in 1985. Yet, for the last ten years, there has been vigorous debate over the state of the Act. Although most of the criticism has come from the union side, employer representatives have not been silent, and some former National Labor Relations Board (NLRB) chairpersons have also spoken out on perceived problems with the Act. Debate over Board decisions and policies is to be expected, given the conflicting interests and often deeply held convictions that the Act and the Board must reconcile. Indeed, some controversy is inherent in the statute, since Board members and the General Counsel are political appointees.

The fact that the President of the AFL-CIO has publicly called for consideration of repeal of much of the NLRA, however, indicates that

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2. See, e.g., Remarks of John S. Irving, Jr. on Recent Developments at the NLRB, DAILY LAB. REP. (BNA) No. 207, at D-1-D-12 (Oct. 26, 1982).


the criticism of union leadership is rooted in something more than differences over the interpretation of generally accepted principles of labor relations and labor law. An anomalous situation seems to have developed. Leaders of unions, the presumed beneficiaries of the Act, are favorably considering the repeal of the NLRA. Spokespersons for corporations, the class of actors in the industrial relations system whose alleged abuses led to the legislation, are not so sure. This would suggest that the decade-old debate on the NLRA is a symptom that the problems that have developed in the industrial relations regulatory system reflect fundamental questions of American unionism and American labor law.

It is the task of researchers in industrial relations to address this fundamental conflict. This paper will suggest a rationale for a labor law research agenda based on questions fundamental to unionism in the United States.

II

Fundamental Questions of Unionism

Any law reflects society's view as to the relative rights and status of those affected by the law. When the NLRA was enacted in 1935, there must have been a societal consensus that employers, on the whole, had more bargaining power in the employment relationship than employees, and that the exercise of that power against employees favoring unionization and against unions not only disrupted interstate commerce, but gave employers an unfair advantage vis-a-vis unions and employees who desired union representation. The NLRA placed constraints on employer use of their power. In essence, society told employers "there are certain things you cannot do to resist unionism among your employees." The available evidence would strongly suggest that these restraints on the tactics of employers, the major societal adversary of unions, were instrumental in permitting unions to become well established as major economic actors between the late 1930's and the early 1950's.

This establishment and legitimization of unions and unionism, however, was not costless. The costs included a reduction in the freedom of corporate management to make decisions perceived to be in the best in-

terest of the corporation's shareholders, and the costs associated with a reduction in employee freedom of contract. Thus infringements were imposed on the freedom of two classes of actors in society, corporate management and employees not wishing to be represented by unions, in order to benefit two other classes of actors, unions and employees desiring union representation. The public, expressing its will through Congress when it enacted the NLRA, must have believed that the benefits of unionism outweighed the costs. The NLRA reflected a type of choice that Congress, acting as an expression of the public will, often makes when it enacts laws. It places restraints on one or more classes of actors in society in order to benefit other classes of actors.  

Compare the choice made in the labor relations area by policymakers in 1935 with the choices made by current policymakers. Union spokespersons have taken great pains to make Congress aware that the law has worked against them. Congress, for its part, has chosen not to respond. From this, two inferences can be drawn. First, the law is not serving the interests of unions, one of its original beneficiaries. Second, policymakers in Congress have made a conscious decision to retain the law as it is currently interpreted and administered. Congress has chosen to deny additional rights and privileges to unions and has refused to place additional restraints on employers and/or employees who do not desire union representation. Under the assumption that Congress roughly reflects the sentiment of the public on labor (and other) matters, it is reasonable to assume that the NLRA is currently interpreted and administered in a manner generally consistent with the preferences of the citizenry of the United States. 

Thus under the assumption that the NLRA is not currently being interpreted and administered in a manner consistent with union interests, it may be because the citizenry of the United States does not wish unions to have more rights and privileges than they enjoy under current law. Alternatively, the public does not want additional infringements on the rights of employers vis-a-vis unions, or on the rights of employees not desiring union representation vis-a-vis the rights of unions and of employees desiring union representation. The citizenry would prefer to keep constraints on unions, and not make it too easy for unions to organize. While there is no evidence that the public wishes to outlaw unions, it

8. As another example, the antitrust laws place restraints on corporate pricing behavior because society believes that the benefits to one class of actors, consumers, are greater than the costs to another class of actors, corporations.
9. See supra note 1 and accompanying text.
10. The closest Congress has come to addressing union needs in this area is the Labor Law Reform Act of 1977-78. Although that legislation was passed by the House, it failed to reach a vote in the Senate because its supporters were unable to obtain a sufficient number of votes to invoke cloture and end a filibuster by the bill's opponents. See R. Freeman & J. Medoff, What Do Unions Do? 202-04 (1984).
may be that there is a general unwillingness to permit unions to engage in certain activities if those activities either interfere with employer decisionmaking or interfere with individual freedom. Yet, it is precisely these activities that permit unions to be effective in carrying out their representation function, and to be viable actors in the industrial relations system.

This doubt is consistent with views expressed by politicians in the Democratic party. Lawmakers must enact labor law changes, and one would think that the support must come primarily from Democrats, the traditional political ally of unions. Yet, Democratic party politicians seem to be questioning the role of organized labor and the party's traditional alliance with the labor movement. On balance, the establishment of organized labor has never felt comfortable with the Republican party. Under the assumption that, in the aggregate, the politicians in both parties are reasonably reflective of the great bulk of the American citizenry, this would also suggest that United States-style business unionism may be perceived as being outside the mainstream of current American economic and political life.

III
LABOR LAW AND THE FUNDAMENTALS OF AMERICAN UNIONISM

The above discussion is relevant to the question of research on labor law because most such research has been carried out within narrow boundaries. Little consideration has been given to the nature of the institution, unionism and collective bargaining, that the law is designed to foster and protect. Almost no consideration has been given to the larger societal context in which labor law operates and from which labor laws are ultimately derived.

Two kinds of research on labor law have dominated the field. One type is the traditional legal research, found in most law reviews. This type of research analyzes the doctrinal law under a particular section or sections of the NLRA, generally examining Board and Court decisions

12. See infra notes 18-22 and accompanying text.
13. Consider, for example, the comments of Governor Richard Lamm of Colorado, a Democrat, in response to a question on his view of the keynote address at the 1984 Democratic National Convention: "[p]assionate statements of what used to be. We weren't ready to face the issues of the future—like international competition and productivity and confronting organized labor..." Governor Richard Lamm, quoted in Reeves, Whose Party Is It Anyway?, N.Y. Times, Aug. 5, 1984, (Magazine), at 58 (emphasis added). See also Hume, Democrats Seek Comeback Chief, Wall St. J., Nov. 19, 1984, at 58, col. 2.
on major cases on recurring problems under the Act.\textsuperscript{15} The second type of research published in recent years concerns the effect of procedural, administrative, and remedial characteristics of the NLRA on the outcome of representation elections, specifically, and on the functioning of the NLRA, in general.\textsuperscript{16} This includes recent work on the impact of delay between the petition and the election on the outcome of NLRB representation elections, and the impact of alleged employer resistance to unionization. While this work generally contains policy implications or even specific policy recommendations, this work is generally limited to issues surrounding the NLRA.

As a result of this research, we generally know how the NLRA has been interpreted, and the arguments for and against diverse interpretations of various provisions of the NLRA. We also know that delay between the petition and an election can adversely affect the probability that the union will win the representation election, and that the remedial structure of the Act tends to favor employer interests vis-a-vis union interests.

As noted, policymakers, the representatives of the public, have not taken this evidence as a sufficiently strong reason for amending the law, presumably because of public disaffection with unions. Disaffection with unions may result from uncertainty and ambivalence as to the proper role of unions in the United States. Union spokespersons seem to be saying "we cannot perform our function under the current regulatory scheme." Corporate spokespersons seem to be saying "additional privileges for unions will make it that much more difficult for us to compete in newly competitive markets, and to make the adjustments that we must make to protect the interests of our constituencies." Consideration must also be given to the value of individual freedom of contract for employees, often defended for opportunistic reasons by employers, but a deeply held value nevertheless.

Accordingly, it may be time to consider rejustifying the role of un-

\textsuperscript{15} Although the best of this type of research will often present an evaluation of Board and Court decisions in terms of consistency with the perceived purposes of the Act, this research has, as its primary audience, the legal profession. It generally does not address labor relations or societal questions. There are recent exceptions, however. See, e.g., J. \textsc{Atleson}, \textit{Values and Assumptions in American Labor Law} (1983); Dubofsky, \textit{Legal Theory and Workers' Rights: A Historian's Critique}, 4 \textsc{Indus. Rel. L.J.} 496 (1981); Kennedy, \textit{Critical Labor Law Theory: A Comment}, 4 \textsc{Indus. Rel. L.J.} 503 (1981); Klare, \textit{Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law}, 4 \textsc{Indus. Rel. L.J.} 450 (1981); Lynd, \textit{Government Without Rights: The Labor Law Vision of Archibald Cox}, 4 \textsc{Indus. Rel. L.J.} 483 (1981); Stone, \textit{The Post-War Paradigm in American Labor Law}, 90 \textsc{Yale L.J.} 1509 (1981); Weiler, \textit{Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA}, 96 \textsc{Harv. L. Rev.} 1769 (1981); Note, \textit{Subjects of Bargaining Under the NLRA and the Limits of Liberal Political Imagination}, 97 \textsc{Harv. L. Rev.} 475 (1983).

ions in society. Are unions performing an important function, providing some benefit to society that would warrant giving unions some special privileges, with its associated infringements on the interests of others?

The traditional role of unions has been to provide an alternative for employees who did not wish to have their terms and conditions of employment unilaterally determined by their employer, and to bring some measure of due process and worker participation to the workplace without government intervention. In general, unionism is consistent with notions of pluralism; the idea that justice and democracy are best served when there are multiple power centers in society.\(^{17}\)

Yet, it seems that the law, over the last three decades, has inexorably nibbled away at the edges of legitimate union activity in the name of corporate or individual employee interests. For example, there have been limitations placed on the classifications of employees who are protected under the Act by removing NLRA coverage from managerial employees.\(^{18}\) Unions are generally not permitted to enter the employer's property to organize, while employers are permitted to campaign at the workplace as they see fit.\(^{19}\) Major corporate capital investment decisions that have employment effects on union members have been removed from the scope of bargaining.\(^{20}\) Employers are permitted to hire permanent replacements for strikers.\(^{21}\) Unions are not permitted to place resignation restraints on members for the purpose of preventing the crossing of duly authorized picket lines.\(^{22}\) While there may be a justification for each of these individual doctrines, taken together, they represent a substantial erosion of legitimate union activity.

What, then, is the research agenda? It may be phrased in the form of questions to which we have no answers or have answers which must be reaffirmed. What role do we want unions to play in a pluralistic society? What are the functions that unionism performs, or ought to perform? What must the industrial relations regulatory system look like in order to permit unions to perform those functions, taking into account the concerns of others in society whose interests might conflict with unions? These are the questions that must be addressed if unionism is to remain a viable option for employees, and if unions are to be vigorous actors in a pluralistic industrial relations system.


\(^{19}\) See, e.g., Block & Wolkinson, \textit{supra} note 7.

