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Article

“Easy In, Easy Out”: A Future for U.S. Workplace Representation

Samuel Estreicher[†]

This paper proposes an amendment to our basic labor laws that I call “easy in, easy out.” Essentially, representation elections—secret-ballot votes to decide whether employees want union representation and whether they want to be represented by the particular petitioning labor organization(s)—in relatively broad units, would, over time, become automatic. Every two years (unless the union achieved a collective bargaining agreement, in which case every three years) the employees in the unit, after an initial minimal required showing of interest, would have an opportunity to vote in a secret ballot whether they wish to continue the union’s representation, select another organization, or have no union representation at all. Petitioning labor organizations and employers would be required to share certain specified information, in electronic form, with the voting employees. The theory is to make representation elections more like general political elections, to make it easier to vote in a union (if that is the employees’ preference), and to make it easier to vote the union out if the employees no longer believe the bargaining agent is accountable to them or worth the dues they pay. Other aspects of the labor laws would continue unchanged.

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This proposal may be regarded by some as a quixotic enterprise. In many respects, labor law reform may be closer to the third rail of American politics than even social security (or healthcare) reform. My colleague Cynthia Estlund has famously complained of the “ossification” of American labor law,¹ but at present there is no constituency for change. U.S. managers and owners are relatively satisfied with the state of U.S. workplace representation, given the low rate (now under eight percent) of unionization in private companies.² They might prefer some alternative to the litigation system for resolution of employment disputes, but do not view union-negotiated grievance and arbitration systems as preferable to the status quo. Unions, on the other hand, would prefer change but only if it takes the form of an easier path to obtaining bargaining authority, coupled with interest arbitration where the parties cannot agree on a first contract and tort remedies for recalcitrant employers.³ If unions cannot get that type of labor law reform, they prefer to stick with what they have. Employee-side plaintiffs’ lawyers generally thrive under the litigation system; the change they might seek is repeal of rules enforcing pre-dispute arbitration agreements covering employment disputes. In short, there would appear to be no obvious or stable consensus for labor law reform.

This paper is not about politics or political science.⁴ It assumes change is not in the offing in the near term. Rather, it addresses a future-law question: What sort of labor-law regime would make sense, given U.S. institutional arrangements, our legal culture, and the likely perspectives of companies (and their managers), unions, and the employment plaintiffs’ bar?

I. A “PUBLIC INTEREST” CASE FOR EXPANDING WORKPLACE REPRESENTATION?

Is there a public-interest case for expanding workplace representation? By “workplace representation,” I mean organi-

1. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

2. See Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members—2013, at 5 tbl.1 (Jan. 24, 2014), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

3. In the proposed Employee Free Choice Act of 2009, H.R. 1409, S. 560, 111th Cong. (2009), the NLRB would have been authorized to levy civil penalties for repeat NLRA violators.

4. The political considerations are surveyed in Samuel Estreicher, *Strategy for Labor Revisited*, 86 ST. JOHN’S L. REV. 413 (2012).

zations formed at the workplace with the consent of the affected employees that address workplace concerns through bargaining with employers, whether or not the organizations belong to a larger labor federation, are organized as membership bodies governed by a constitution, or have the goals of traditional labor unions. By a “public-interest case,” I mean premises that do not depend on one’s political or ideological preferences or on one’s perception of whose political or ideological oxen will be gored, but rather on a shared sense of what sort of workplace relations arrangements would help our economy grow and improve the welfare of all who work for a living. I think there is such a case.

It has, of course, been the premise of major federal legislation beginning with the Railway Labor Act of 1926 (RLA),⁵ the Norris-LaGuardia Act of 1932,⁶ the National Labor Relations Act of 1935 (NLRA),⁷ and similar state laws in the Northeast, Midwest, and Pacific Coast states⁸ that public policy favors the right of workers to form organizations of their own choosing, to engage in strikes and other concerted activity, and to seek to compel employers to bargain with them in good faith toward the achievement of collective contracts. The justifications for these laws are twofold: (1) collective representation helps workers negotiate fairer contracts as a group than they could on their own and, in the process, boosts consumer demand for U.S. products and services (the “equality-of-bargaining-power” rationale);⁹ and (2) an administrative process for resolving labor relations disputes will reduce the incidence of industrial conflict with spillover effects on the larger society (the “industrial-peace” rationale).¹⁰

5. Pub. L. No. 69-257, 44 Stat. 577 (codified as amended at 45 U.S.C. §§ 151–188 (2006)).

6. Pub. L. No. 72-65, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101–115 (2012)).

7. Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169). Related provisions are also found in the Labor Management Relations Act of 1947 (LMRA), Pub. L. No. 80-101, 61 Stat. 146 (codified as amended at 29 U.S.C. §§ 141–197). The NLRA and the LMRA are collectively referred to in the text as the NLRA.

8. See, e.g., Minnesota Labor Relations Act, ch. 440, 1939 Minn. Laws 985 (codified as amended at MINN. STAT. §§ 179.01–.17 (2013)).

9. See Bruce E. Kaufman, *Why the Wagner Act? Reestablishing Contact with Its Original Purpose*, in 7 *ADVANCES IN INDUSTRIAL AND LABOR RELATIONS* 15 (David Lewin, Bruce E. Kaufman & Donna Sockell eds., 1996).

10. See NLRA § 1, 29 U.S.C. § 151.

Both justifications, in somewhat modified form, still frame the debate. The industrial-peace rationale has limited ongoing reach. It does explain the continued need for special measures in the railroad and airlines industries¹¹ and in the healthcare industry,¹² as well as the power of the President to intervene in national emergency disputes.¹³ It also explains the law's prohibition of certain weapons of economic conflict, such as the secondary boycott, which Congress feared ensnared neutral employers in disputes not of their making. But this is principally a reactive justification that loses its force with the declining incidence of industrial strife.

The equality-of-bargaining-power rationale has not lost its force, as attested by continued public agitation for higher wages.¹⁴ But in what sense does the collective-representation option protected by the labor laws, in the words of the NLRA, help "restor[e] equality of bargaining power between employers and employees"?¹⁵ Within the overall equality-of-bargaining-power objective, we need to distinguish between (1) what labor law does to remedy defects in the individual-worker contracting market (what I will call the "market-failure" concern or dimension) and (2) what it does to enhance through collective bargaining (as opposed to political action) "the purchasing power of wage earners in industry"¹⁶ (what I will call the "increasing-employee-economic-power" concern or dimension).

II. THE INTEGRATIVE, NON-REDISTRIBUTIVE FACE OF UNION REPRESENTATION

As to the market-failure concern, labor law helps solve a collective-action problem with individual-worker contracting. A common law agency—where the worker hires and can fire at-will his own representative—does not normally obtain in the employment context.¹⁷ This is because most employees work

11. See RLA, 45 U.S.C. §§ 151–188 (2006).

12. See LMRA § 213, 29 U.S.C. § 183 (added by Act of July 26, 1974, Pub. L. No. 93-360, § 2, 88 Stat. 395, 396).

13. LMRA §§ 208–212, 29 U.S.C. §§ 176–182.

14. See, e.g., Karen McVeigh, *Walmart Workers Protest over Minimum Wage in 15 U.S. Cities*, GUARDIAN, Sept. 5, 2013, <http://www.theguardian.com/business/2013/sep/05/walmart-workers-strike-us-thursday>.

15. NLRA § 1, 29 U.S.C. § 151.

16. *Id.*

17. An important exception is in the entertainment and sports industries where high-valued talent often negotiate their own individual contracts with the assistance of talent agents regulated somewhat by unions. On talent agen-

under circumstances where terms and conditions have to be generally applicable to all who work in similar jobs for the particular employer. Hence, individual employees usually have no incentive to hire agents to negotiate individualized terms because those terms would have to be extended, as a practical matter, to others similarly situated.¹⁸ In other words, the costs of a negotiated improvement in collective terms would typically exceed the value to the individual employee of obtaining that improvement. Yet there are circumstances where collective improvements might have been negotiated if there had been some mechanism by which the collective costs of those improvements could be addressed and absorbed, in whole or in part, by all of the benefited employees.

Many of the terms negotiated in collective agreements have this “collective goods” feature. Consider, for example, a grievance procedure culminating in binding arbitration as the final step in the process. It is certainly possible for highly paid individual employees to negotiate an arbitration clause for themselves, especially if they occupy a relatively unique position within the firm.¹⁹ But for the overwhelming number of a firm’s rank-and-file production, clerical, maintenance, technical, marketing, distribution, accounting, professional, and other non-executive workers, any dispute-resolution mechanism would have to be provided, as a practical matter, to all workers who are similarly situated. To the employer, the costs of providing the mechanism (including the costs of training company representatives and paying for mediators and arbitra-

cies, see generally *Preston v. Ferrer*, 552 U.S. 346 (2008), and *H.A. Artists & Associates, Inc. v. Actors’ Equity Ass’n*, 451 U.S. 704 (1981). The phenomenon of individual bargaining over the collective agreement’s minimum terms is discussed in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

18. This is the premise of the RESTATEMENT (THIRD) OF EMP’T LAW §§ 2.05–.06 (Council Draft No. 10, 2013) (covering general enforceability of unilateral employer policy statements). The author is the chief reporter for this effort.

19. Sometimes companies and executives choose arbitration as the preferred mechanism for resolving contract disputes. See Randall Thomas, Erin O’Hara & Kenneth Martin, *Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis*, 63 VAND. L. REV. 959 (2010). In the financial services industry, arbitration is required as a condition of registration with the industry’s self-regulatory organizations. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23–24 (1991). See generally Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753 (1990); Samuel Estreicher, *The Story of Gilmer v. Interstate/Johnson Lane Corp.: The Emergence of Employment Arbitration*, in EMPLOYMENT LAW STORIES 8 (Samuel Estreicher & Gillian Lester eds., 2007).

tors) appear as a collective cost. Collective bargaining provides a means for workers to collectively express their preference for such terms, and for the parties to determine whether the collective benefits outweigh the collective costs of its provision and what the appropriate cost-sharing rule should be.

Companies in non-union settings try to make this type of determination through their human resources (HR) department—attempting to anticipate employee preferences and designing pay and benefit packages and working conditions that reflect the preferences of a majority of the employees.²⁰ Such unilateral standard-setting by non-union management may well do a good job in many cases, but across the board there are areas where the approach does not work optimally from the employees' perspectives. This is because employees' reluctance to voice their concerns means that the HR department may not learn of them in time or at all. Moreover, where there is a clash of interests between management and employees, the HR department represents the employer's interests.

Let's return to the example of a grievance procedure. Fear of supervisor retaliation may deter employees from raising legitimate concerns that management would address satisfactorily if it knew of these concerns. Where the supervisor discourages such reports, whether deliberately or because of his style of supervision, the supervisor is acting against the interests of management. In other settings, the supervisor is insisting on a level of work effort that may be excessive but still serves management interests. Employees wishing to retain their position and the good favor of their supervisor will be reluctant to press their concerns. Often, the company would be better off if it had early notice of these issues; employee problems with management style and the intensity of supervision can adversely affect morale and productivity, can lead to employee quits, and can sometimes turn into expensive lawsuits against the company.

In the employee-benefits context, management may wish to shift from a traditional defined-benefit pension plan to a defined-contribution pension plan. The HR department will try to gauge employee reaction, but sometimes it is the unit championing the initiative or is otherwise implementing a clear directive from upper management. Even if receptive to employee concerns, HR may not be able to discern the full extent of em-

20. See generally SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE 20TH CENTURY* 213–14 (rev. ed. 2004).

ployee opposition to the shift or to some feature of the new plan. Were these issues identifiable in advance, mitigating measures might be available that would still permit the shift to take place but with less adverse impact on, say, long-service employees.²¹

To offer another example, most companies wish to avoid the human and economic costs of serious on-the-job injuries, but managers may be unwilling to permit necessary changes in work routine or to authorize necessary investments in, say, engineering controls that would improve workplace safety but at an increase in operating costs. Here, too, employees may be unwilling to press the point; lower- to mid-level supervision may not be receptive to, or may affirmatively deter expression of, their concerns. The company, at the upper levels, might have taken a different view than local managers but may not learn of the problem until an accident occurs or the company is audited by the government.²²

Even where employees have been given statutory rights to a collective good—say, occupational safety and health—the enforcement of those rights is often lodged with an inevitably under-staffed government agency or remitted to private rights of action that depend on the availability of private lawyers. Collective bargaining can result in an enforcement mechanism—both in terms of identifying violations and providing relatively prompt redress—that is often cheaper and more effective than either government action or litigation.²³

These and other examples suggest that a case can be made for some form of independent worker voice to help press employee interests in settings where local supervision/manage-

21. Problems of this sort occurred in connection with IBM's attempt to move from a traditional defined-benefit pension plan to a "cash balance" plan, also a defined-benefit plan but one which tends to favor long-term workers less than the traditional plan. See generally *The Official National Site for the IBM Employees' Union CWA Local 1701, AFL-CIO, ALLIANCE@IBM*, <http://www.endicottalliance.org> (last updated Apr. 2, 2014). The Seventh Circuit upheld IBM's conversion to a cash balance plan against a challenge under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–633(a) (2012), in *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006).

22. See David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 INDUS. REL. 20 (1991).

23. See generally Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827 (1996); Stewart J. Schwab, *The Union as Broker of Employment Rights*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 248 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).

ment may be opposed but the employee demands are not inconsistent with the overall interests of the firm. This is essentially the integrative, non-redistributive case for workplace representation.²⁴ By the term “integrative,” I am suggesting a worker-organization role that does not detract from the company’s return on investment and that helps achieve worker objectives without materially increasing operating costs to the company.²⁵

III. THE ADVERSARIAL, REDISTRIBUTIVE FACE OF UNION REPRESENTATION

The increasing-employee-economic-power objective of the labor laws, by contrast, envisions not merely an improvement in the contracting process—in the ability of the firm to achieve its goals—but also a strengthening of labor’s leverage in bargaining with the employer. Whether the economic surplus produced by the firm expands or not, this objective seeks a larger share of the surplus for the employees. Improved bargaining outcomes are said to result from the expertise of union negotiators, the building up of union strike funds to enable workers to hold out for desired terms for longer periods of time than they could on their own, and, in some cases, the ability of the union, in alliance with other organizations, to impose increased labor costs (derived from the union’s economic gains) on all competitors in the same product market. This is the redistributive case for workplace representation—that workers can obtain a larger part of the economic returns from the firm’s operations than workers could without collective representation.

Most workers who vote for, and are willing to pay dues to, unions expect union representation to bring higher wages, richer benefits, and better working conditions. Effecting such out-

24. Samuel Estreicher, “Think Global, Act Local”: *Employee Representation in a World of Global Labor and Product Market Competition*, 4 VA. L. & BUS. REV. 81, 85 (2009).

25. This terminology originated in a description of models (or styles) of collective bargaining in RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (Seymour E. Harris ed., 1965). I first used it in describing models of unionism in Samuel Estreicher, *Models of Workplace Representation for an Era of Global Labor and Product Market Competition*, in *LABOUR LAW, HUMAN RIGHTS AND SOCIAL JUSTICE: LIBER AMICORUM IN HONOUR OF RUTH BEN-ISRAEL 51* (Roger Blanpain ed., 2001), and further developed the concept in Estreicher, *supra* note 24, at 85. The basic dichotomy between “integrative” and “redistributive” workplace representation is inspired by the distinction between the “voice” and “monopoly” face(s) of unions in RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 6–7 (1984).

comes is also how union leaders see their primary objective. And there are situations (usually where firms face limited product market competition) where unions are able to obtain such improvements from the employer without harming the employer's position in the market or financial health.²⁶ Where this occurs, the unions help boost the purchasing power of represented workers, with some positive spillover effects for non-union employees of companies who anticipate being targeted for union organizing down the road and attempt to ward off such efforts by adopting the economic or other terms of unionized employers.²⁷ Collective bargaining here can help reduce the extra-competitive returns monopoly firms enjoy.²⁸ This is what my colleague Richard Epstein (no fan of unionism or collective bargaining) calls a "bilateral monopoly,"²⁹ and suggests a limited public-interest case for a redistributive model of workplace representation.³⁰

It is not always clear, however, whether unions can achieve these objectives and, if they can, whether these gains come out of the employer's profits or are ultimately paid for by other means.³¹ Many economists would say that if unions take away from firm profits, they undermine the firm's economic performance and its prospects for growth.³² In this account, signifi-

26. Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Voluntarism?*, 54 ST. LOUIS U. L.J. 415, 419 (2010).

27. See FREEMAN & MEDOFF, *supra* note 25, at 152–53.

28. See *infra* note 32.

29. See Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1385 (1983).

30. See Richard Freeman's interesting essay on labor's new role in the face of financialization of U.S. industry. Richard Freeman, *New Roles for Unions and Collective Bargaining Post the Implosion of Wall Street Capitalism*, in THE ROLE OF COLLECTIVE BARGAINING IN THE GLOBAL ECONOMY: NEGOTIATING FOR SOCIAL JUSTICE 254 (Susan Hayter ed., 2011).

31. See Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419 (1992), for a valiant effort to defend redistributive unionism.

32. Unions affect investment and the growth of the firm. See WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE 16–20 (James T. Bennett & Bruce E. Kaufman eds., 2007). Their effect on profits is ambiguous; studies find a limited effect in competitive industries and a much more significant effect in concentrated industries (where profits might be considered "monopoly rents" and presumably it would be easier to pass on the costs of the labor contract to the consumer). See generally John T. Addison & Clive R. Belfield, *Unions and Employment Growth: The One Constant?* 11–12 (Inst. for the Study of Labor, Discussion Paper No. 479, 2002), available at <http://ftp.iza.org/dp479.pdf> (discussing unions' adverse effects on employment growth and profitability). Unions do not, however, drive companies out of business. See Richard B. Freeman

cant union wage gains of this sort will tend to be short-lived, unless the company has physical assets in place it cannot easily move or dispose of.³³ Otherwise, the firm will either move to a less union-friendly region or reduce its investment level in the unionized part of its business. More likely, any union wage gains will come at the expense of the employment level at the unionized business, as the company substitutes capital for labor and lower-priced subcontractors for its own people. In short, we are told, higher union-negotiated wages invariably means fewer available jobs at those wages.

Whatever one's view of the net benefits of the redistributive role of unions for the employees involved or the larger society, they are harder to come by in today's world. In large part because of the effects of technology, deregulation, and global product and labor market competition, unions increasingly face difficulty compelling competitors of unionized firms to operate on the same terms.³⁴ If the unionized firm cannot be insulated from competition on the basis of labor costs, that firm will not for long continue to bear the costs of the union-negotiated wage and benefit package. Again, the firm has a number of options—it can substitute capital for labor, leave the region, deprive its unionized plant of needed capital investment, transfer assets to purchasers who will operate on a non-union basis, take a strike to force a lower-cost contract, or go into bankruptcy.

The question for people who care about workplace representation is whether the social benefits of employee organization can be preserved without inviting, or fostering, aspects of redistributive trade unionism that can create a downward spiral for unionized companies.

IV. THE EUROPEAN TWO-CHANNEL APPROACH TO WORKER REPRESENTATION

Continental European countries offer a potential alternative approach. These countries typically provide a dual track of representation: (1) works councils that operate at the firm level

& Morris M. Kleiner, *Do Unions Make Enterprises Insolvent?*, 52 *INDUS. & LAB. REL. REV.* 510, 526 (1999).

33. See, e.g., Barry T. Hirsch, *Unions, Dynamism, and Economic Performance*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW*, *supra* note 23, at 107, 131–32.

34. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 *CHI.-KENT L. REV.* 3, 12–15 (1993); Estreicher, *supra* note 24, at 82–91.

as a consultative organ without the right to strike or negotiate wages,³⁵ and (2) trade unions that operate at the multi-employer level to negotiate wages and other economic terms for broad sectors of industry. Employers are under no legal duty to bargain with unions, but extension laws enable labor ministries to impose collective bargaining contracts on unorganized sectors of industry.³⁶ Unions play an informal role in the works councils; their representatives often secure elected work councilor positions.³⁷ But works councils have their own legal status with statutory rights to information and to be consulted over important firm decisions, such as layoffs and the introduction of new technology.³⁸

Collective bargaining occurs at the multi-enterprise level with employers organized into large multi-employer federations negotiating a minimum-terms agreement with the national, regional, or sectoral federation of unions. Because many companies of different size and economic position are represented through the employer federations, and firm participation, in the first instance, is voluntary (although subject to the prospect of extension decrees),³⁹ the collective agreement must be keyed to the economic situation of the median or maybe even to the economically weaker members of the employer federation. If a company wishes to pay wages above the collectively-bargained minimum, as it may have to in order to retain its workers, this is done in an informal manner after consultation with the works council.⁴⁰ These above-the-collective-contract wages are typically not legally binding, but subject to unilateral modification by the employer when its position worsens.

35. See generally Richard B. Freeman & Edward P. Lazear, *An Economic Analysis of Works Councils*, in *WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS* 27 (Joel Rogers & Wolfgang Streeck eds., 1995).

36. See SAMUEL ESTREICHER, *GLOBAL ISSUES IN LABOR LAW* 177–83 (2007); Estreicher, *supra* note 34, at 15–17 & n.49.

37. See ESTREICHER, *supra* note 36, at 219 (“It is estimated that about 80% of those sitting on a [German] works council belong to a union.”).

38. See Freeman & Lazear, *supra* note 35, at 27, 29.

39. See ESTREICHER, *supra* note 36, at 177, 180–81, 218.

40. See John T. Addison, Paulino Teixeira & Thomas Zwick, *German Works Councils and the Anatomy of Wages*, 63 *INDUS. & LAB. REL. REV.* 247, 248 (2010); Sven Jung & Claus Schnabel, *Paying More Than Necessary? The Wage Cushion in Germany*, 25 *LABOUR* 182, 183 (2011). The claim that works councils have positive effects on firm productivity is challenged in John T. Addison et al., *German Works Councils in the Production Process* 22 (Inst. for the Study of Labor, Discussion Paper No. 812, 2003). For an overall positive assessment of works councils, see Freeman & Lazear, *supra* note 35.

Many Continental European countries are handicapped by rigid aspects of their labor systems (although more flexible rules have been under discussion). Critics of the European approach point to legislation that prohibits discharge without cause, mandates that buyers of companies retain the prior workforce and wage and benefit levels, and requires cumbersome negotiation of restructuring plans and payment of severance benefits before layoffs can take place.

Even if aspects of the European model were otherwise desirable, however, no magic wand is available to transplant it to the United States. Aside from the lack of political will, there is a fundamental problem of institutional fit because unions in this country operate as bargaining agents at the company level. Either the works councils would entirely displace unions, or they would be unions in all but name.⁴¹ The very feature of the European model that may be most attractive—the separation of the integrative and redistributive roles of workplace organization—could not be readily accomplished.

We need an American solution that fits American institutional arrangements and legal culture.

V. THE BASIC PROPOSAL: FROM “HARD IN, HARD OUT” TO “EASY IN, EASY OUT”

The basic proposal here is to convert what is now a “hard in, hard out” system for deciding whether employees obtain workplace representation, to an “easy in, easy out” system. Current arrangements make it very difficult for a union to obtain bargaining authority and therefore very expensive for a union to organize new workers. Sometimes a union can secure the employer’s voluntary recognition because the company needs support for a critical regulatory approval,⁴² it wishes to be relieved of the pressures of a union-mounted “corporate

41. Volkswagen is apparently considering a German-style works council at its Chattanooga, Tennessee plant. Jack Ewing & Bill Vlasic, *VW Plan Opens Door to Union and Dispute*, N.Y. TIMES, Oct. 11, 2013, at B1. In February 2014, the employees at the Chattanooga plant voted against representation by the United Automobile Workers (UAW), even though the company supported the union bid and the union had indicated receptivity to the works-council idea. Steven Greenhouse, *Labor Regroups in South After VW Vote*, N.Y. TIMES, Feb. 16, 2014, <http://www.nytimes.com/2014/02/17/business/labor-regroups-in-south-after-vw-vote.html>. The union is challenging the election results. *Id.*

42. See, e.g., Harry C. Katz et al., *The Revitalization of the CWA: Integrating Collective Bargaining, Political Action, and Organizing*, 56 INDUS. & LAB. REL. REV. 573, 580 (2003).

campaign,”⁴³ or the parent foreign corporation acquiesces to union representation for its U.S. affiliate in order to stay on good terms with its own domestic unions.⁴⁴ Where unions have this sort of leverage, the company will recognize the union (upon proof of majority support)—for at least some of its operations—without a fight.

More typically, a fight ensues. The union files a petition for a representation election with the National Labor Relations Board (NLRB). The petition triggers an administrative process during which an intense, often bitter campaign is mounted by both sides to affect the outcome of the election.⁴⁵ Normally, the election results are also hardly the end of the matter, as at least two years of litigation awaits the resolution of unfair labor-practice issues resulting from the campaign.

The fight is so intense because the stakes are high. They are certainly high for the employer who faces the prospect of a third-party bargaining agent likely—if the union’s record and its current promises to its employees are a good guide to the future—to seek costly wages and benefit terms and cumbersome work rules. The union may, of course, temper its bargaining objectives and rhetoric once it is in place, but the employer faces considerable uncertainty, which it tends to resolve by fighting the organizing drive.⁴⁶

The stakes are also high for the workers involved because their job security will depend on the continued economic health of the employer. A good number of the workers may be dissatisfied with their wages or their supervisors—after all, unions do not try to organize facilities without some worker support, and need thirty percent of a bargaining unit to obtain an NLRB election. But once workers hear their employer’s concerns about the adverse consequences of unionization or the record of the

43. See Estreicher, *supra* note 26, at 423. See generally JAROL B. MANHEIM, *THE DEATH OF A THOUSAND CUTS: CORPORATE CAMPAIGNS AND THE ATTACK ON THE CORPORATION* (2001).

44. Cf. Anne Tempel et al., *Subsidiary Responses to Institutional Duality: Collective Representation Practices of US Multinationals in Britain and Germany*, 59 HUMAN REL. 1543 (2006).

45. See generally Craig Becker, *Democracy in the Workplace*, 77 MINN. L. REV. 495 (1993).

46. This is why the law should allow framework agreements between employers and unions that do not take effect until the union is able to demonstrate majority support in an appropriate unit. See *Montague v. NLRB*, 698 F.3d 307, 309 (6th Cir. 2012); Samuel Estreicher & Andrew M. Kramer, *NLRB Allows Pre-Recognition Framework Agreement*, N.Y. L.J., Feb. 23, 2011, at 4.

particular union, they often will tend to resolve uncertainty by voting “no union.”⁴⁷

The union, too, cannot readily afford to lose. A loss means that resources invested in the organizing drive have gone to waste and sends a signal to other employers in the industry, some of whom may be under union contract, that the union lacks “muscle,” that it cannot impose its collectively-bargained terms on the non-union sector. The likely calculus for the union is to avoid organization and contested elections altogether and pursue a “corporate campaign” or other means of placing pressure on companies to submit at least part of their operations to unionization. Moreover, unions increasingly appear to be moving in the direction of becoming more of a political movement than a collective-bargaining agency.⁴⁸

The thesis of this paper is that the stakes can be considerably lowered by making it easier for workers to disavow or change union representation after they have had a chance to experience it. Under present rules, the path to union representation is “hard in” (as discussed), but the exit from union representation is also “hard out.” Whether the union obtains its bargaining authority informally (by the employer’s voluntary recognition or simply the operation of the contract over time) or formally (through NLRB certification after a representation election), decertification requires an election.⁴⁹ Moreover, a petition requires a thirty-percent showing of interest among the workers and cannot be filed during the “insulated period”—usually a year from certification (with the period of unfair labor practices tacked on)—that the union is given by law to demon-

47. I agree with the views of commentators that employer opposition to the union drives down employee support for the union. See, e.g., Benjamin I. Sachs, *Union Organizing and the Architecture of Employee Choice*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW, *supra* note 23, at 146, 157–59. I question, however, whether that effect is due to unlawful opposition, rather than simply the fact of employer opposition. I also question the premise that employer opposition does not provide useful information to the employees considering whether to unionize or not.

48. This move is openly endorsed in Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148 (2013).

49. Interestingly, “hard out” is also a feature of the Canadian “easy in” system. See Micah Berul, *Revitalizing American Labor Through Canadian-Style Certification Reform: Is It in the Cards?*, in GLOBAL COMPETITION AND THE AMERICAN EMPLOYMENT LANDSCAPE: AS WE ENTER THE 21ST CENTURY 939, 977–78 (Samuel Estreicher ed., 2000).

strate its effectiveness as a bargaining agent.⁵⁰ If a contract is in place, workers dissatisfied with the union, again with the requisite thirty-percent showing of interest, must time their petition during a narrow window no earlier than ninety days before nor later than sixty days before the expiration of the contract.⁵¹ If a renewal contract is entered into with a term of three years or more, the NLRB will not recognize a decertification petition for another three years except for the ninety-to-sixty day window period from expiration of the new agreement.⁵²

Under present law, employers may not give any assistance to the decertification effort.⁵³ Even so much as telling employees their rights to file such a petition and allowing them time off from work or giving them carfare to go to the NLRB regional office to file it will lead to disallowance of the petition or nullification of the election results.⁵⁴ Employers are not permitted to poll their workers, even by means of a secret ballot, unless they already have an objective, good-faith doubt of the union's majority.⁵⁵ Even if workers no longer pay their dues or go to union meetings, and a good number come to management on their own to disavow the union, the NLRB is likely to rule the employer's withdrawal of recognition to be an unfair labor practice,⁵⁶ and is likely, under current practice, not to hold an election until this and other unfair labor practice charges are resolved (the agency's so-called "blocking charge" policy). Add to all of this the virtual disappearance of rival unionism, and the prospect of competition among union organization is quite remote.

50. See NLRA § 9(c)(3), 29 U.S.C. § 159(c)(3) (2012); Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. PA. J. LAB. & EMP. L. 651, 653 (2006).

51. See *Leonard Wholesale Meats, Inc.*, 136 N.L.R.B. 1000, 1001 (1962); Samuel Estreicher, *Deregulating Union Democracy*, 21 J. LAB. RES. 247, 250 (2000), reprinted in 2000 COLUM. BUS. L. REV. 501; Pawlenko, *supra* note 50, at 653.

52. *Gen. Cable Corp.*, 139 N.L.R.B. 1123, 125 (1962); Pawlenko, *supra* note 50, at 653.

53. Estreicher, *supra* note 51, at 250.

54. See *Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 211-12, 219 (D.C. Cir. 2002).

55. See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 361, 280 (1998).

56. See *Levitz Furniture Co. of the Pac.*, 333 N.L.R.B. 717 (2001) (ruling that employers may withdraw recognition from a union only if they can prove that the union in fact has lost its majority support).

Additionally, full rights of participation in the union are limited to union members. Unless represented employees are willing to become full-fledged union members—which entails higher dues (which reflect to some extent union political expenditures), union duties like manning a picket line, and the risk of union discipline for, say, refusing to honor a picket line—they have no say in the internal governance of the union. Most especially, they have no say over important economic decisions such as whether to accept the employer’s final offer, whether to vote for strike authorization, whether to end a losing strike, and whether to ratify the contract negotiated by the union on their behalf.

Considered on their own terms, these rules make sense, furthering legitimate interests in giving new bargaining agents a chance to show their wares, promoting bargaining stability once contacts are reached, keeping the employer as much out of the process as possible, and preserving union autonomy by separating out the rights of union members from those of non-member represented employees. The net effect, however, is to create a fairly high barrier to exiting a union-representation regime or even being able to change bargaining representatives. It would be as if our vote for President of the United States or mayor of a large city were in substance a vote for an indefinite term, with the only chance of getting a vote to review the incumbent requiring a showing of support by thirty percent of the electorate and a limited period of time to file a petition, and no realistic prospect of competing bids for office.

A. “EASY IN” COMPONENT

The basic proposal has two elements: the first is “easy in”; the second is “easy out.” Both are necessary. Both borrow from the experience of our general political elections. Both require a revision of the representation-election provisions of the basic labor laws, the NLRA, and the RLA.

The “easy in” component would apply to workers not presently represented by a labor organization⁵⁷ for collective bar-

57. For purposes of this proposal, I adopt the definition of “labor organization” in section 2(5) of the NLRA, 29 U.S.C. § 152(5) (2012). Such an organization cannot be employer-supported or -dominated under section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2). See generally Samuel Estreicher, *Employee Involvement and the “Company Union” Prohibition: The Case for Partial Repeal of § 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125 (1994). Such an organization would also be subject to the union democracy and fiduciary safeguards of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), Pub. L.

gaining purposes. On a limited showing of interest, workers would have an automatic right, once every two years—say, on the second Monday after Labor Day—to cast a secret-ballot vote on whether they wish to be represented by a union and whether they wish to be represented by one of the petitioning unions. The NLRB and the National Mediation Board (NMB), its counterpart under the RLA, would be empowered to promulgate rules establishing in advance, and without the requirement of a hearing, appropriate bargaining units for the election and at least initial bargaining. The electorate would be all full- and part-time employees on the payroll by, say, Labor Day. The election would be decided by a majority of the votes cast within the particular unit. If a majority of the workers in the unit votes against union representation, the agency could not hold another election for a year.⁵⁸ If the majority of the workers in the unit votes for representation by one of the petitioning unions, that union would be automatically certified as the bargaining agent for a period of two years. The employer would be under a statutory duty to bargain with the certified union, as it is under present law.⁵⁹ A run-off election would be held if no choice won a majority on the first ballot.

B. “EASY OUT” COMPONENT

The “easy out” component would apply to any bargaining unit of workers covered by the NLRA or RLA for whom a union has been certified as the statutory bargaining agent, whether it achieved a collective bargaining contract or not. The workers in the unit would be able after two years to vote in an automatic secret-ballot election to decide whether they wished to continue the representation of the certified bargaining agent, whether they wanted no representation at all, or whether they wished to be represented by another, petitioning union. As with the initial election, a majority vote for no representation would preclude an NLRB election for another year; a vote to continue representation by the certified agent or to be represented by another union would preclude an election for a period of two years.

No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401–531). I relax the latter assumption in Estreicher, *supra* note 51, at 255.

58. This corresponds to the one year “election bar” in section 9(c)(3) of the NLRA, 29 U.S.C. § 159(c)(3).

59. See NLRA § 8(d), 29 U.S.C. § 158(d).

C. ADDITIONAL FEATURES

1. Showing of Interest

It may be inadvisable, given the number of potential bargaining units across the country, to incur the costs of running an election without some limited showing of interest on the part of the affected workers. I have in mind a five-to-ten percent showing in an appropriate unit. Some have suggested retaining a thirty-percent requirement for the initial representation election.⁶⁰ Two reasons have been offered: First, unions generally are going to want to be able to sign up at least thirty percent of the workers before they petition for an election that requires they win over a majority in a secret-ballot election. Second, given the number of potential bargaining units, it would be a waste of scarce administrative resources to require an election where this level of interest cannot be manifested. Any renewal election would be automatic after two years, without requiring a showing of interest.

These arguments have merit but have to be balanced against the desirability of relatively easy access to representation elections—the “easy in” feature of the basic proposal. Unions as petitioning organizations would generally wait until they have substantial support before they would call for an election. The proposal envisions situations where unorganized workers may seek representation even in advance of any established union organization appearing on the scene.

2. Access

Elections require an informed electorate. The NLRB has authority under current law to give a union limited access to employees once the required showing of interest for an election has been demonstrated.⁶¹ Presently, the agency requires only that the employer provide contact information for unit employees.⁶² This could be extended to requiring union access to non-work areas like the parking lot, cafeteria, and break room, and

60. Interview with Lafe Solomon, Former Acting Gen. Counsel, NLRB, in N.Y.C. (Oct. 21, 2013).

61. See Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1, 14–15 (2009).

62. *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236, 1239–40 (1966).

could be conditioned on compliance with reasonable security procedures.⁶³

3. Election Units

A significant policy choice for Congress would be whether to codify the existing bargaining-unit structure adopted by the NLRB and NMB, or to guide the process by stipulating the unit structure that would obtain in the absence of affirmative agency action to change the default rule. Broad, inclusive units—say, one unit of all hourly workers at a given physical location and one unit of all salaried, non-professional and non-managerial workers at that location—would be more likely to foster an integrative perspective by the union than smaller units. Broad units would also cut down the number of elections that need to be conducted. Unions are likely to object because it is harder for a union to win a large unit and there may be a serious heterogeneity of employee perspectives in such a unit complicating effective collective action.⁶⁴

4. Rival Bids

Where a petition has been filed with, say, a thirty-percent showing of interest, a rival organization should be able to get on the ballot by making a five-percent showing of interest. Notice of the initial organization's bid would be published on the NLRB or NMB website, and rival organizations would have, say, up to thirty days to make the required showing. The date of renewal elections would also be published on the agency's website, which rival organizations would be likely to monitor if interested in making a bid. Rival unions would need to make the same five-percent showing of interest to get on the renewal election ballot.

5. Contract Bar

Under present NLRB law, a collective bargaining agreement with a fixed duration of three or more years bars a representation election for three years, save for the ninety-to-sixty

63. See Estreicher, *supra* note 61, at 15–16.

64. These objections from the union side merit further evaluation. The experience under the RLA and during the early years of the NLRA suggests, however, that unions can win large units. In any event, the NLRB should not hold elections in small units that are not viable bases for collective bargaining. See NLRA § 9(c)(5), 29 U.S.C. § 159(c)(5) (specifying that the extent of organization cannot be a determinative factor in unit determination).

day window period. This bar promotes an important interest in contract stability. It can be preserved under an “easy in, easy out” regime by deferring the automatic renewal vote to three (or possibly four) years, but without requiring any showing of interest on the part of the affected workers to trigger such a vote.

6. Mandatory Disclosure

One way to de-escalate the atmosphere of representation elections is to require disclosure of appropriate information to enable workers to discount campaign propaganda and make intelligent voting decisions. The NLRB or NMB could be authorized to require petitioning unions to disclose what they would charge for dues and other fees, whether workers would have a right to vote on strike authorization and contract ratification without becoming union members, and whether workers as union members would be subject to union discipline and for what reasons. Unions might also be required to disclose basic terms of the collective bargaining agreements they have achieved in the same industry or location. Employers could be required to make appropriate disclosure of their economic performance at the particular business level, say, at the level of the facility and its business division within the company. If such information, not usually part of even a public company’s publicly available annual reports, requires confidential treatment, disclosure could be limited to accountants or other professional intermediaries who would report back to the union or workers in a manner that would not entail a breach of confidence. These rules could be liberalized by contract after a union obtains bargaining authority.

7. Grandfathering

Some grandfathering will be required to avoid disruption in existing units. One option is to allow existing bargaining relationships to continue indefinitely, subject to existing rules for decertification and employer withdrawal of recognition. A better approach would be to exempt existing relationships from the new “easy in, easy out” regime for a substantial fixed period of, say, five or ten years.

8. Voluntary Recognition

Where there is no existing certified representative, employers should be permitted voluntarily to recognize a union on

a showing of majority support in one of the agency-designated appropriate bargaining units. The recognition would have the same effect as an NLRB certification, and would be subject to an automatic secret-ballot renewal election after two years (absent a contract of three years' duration or more).

9. Bargaining Structure

As under current law, the parties would be free to bargain on a broader basis than the initial election unit. Any continuation of bargaining authority in non-grandfathered units would be subject to an automatic secret-ballot renewal election in the same unit where the initial election was held.

10. LMRDA-Compliant Labor Organizations

Another important policy choice for Congress is to decide whether to limit eligibility for bargaining authority to labor organizations that comply with the democracy and fiduciary safeguards of the Labor-Management Reporting and Disclosure Act (LMRDA).⁶⁵ As I have written elsewhere,⁶⁶ it is not entirely clear that workers are well-served by effectively limiting the pool of available bargaining agents to LMRDA-compliant non-profit membership associations.⁶⁷ The recent emergence of so-called “workers’ centers,” principally funded by foundations, is a case in point.⁶⁸ There would seem to be no good reason why single-purpose worker groups interested only in, say, bargaining over healthcare or retirement benefits could not vie for bargaining authority under this proposal. Of course, if they have no desire to bargain with the employer, they have no need for bargaining authority under the “easy in, easy out” regime. Organizations that combine collective bargaining with career-building and referral services or professional associations that

65. See LMRDA §§ 501–504, 29 U.S.C. §§ 501–504; LMRDA § 505 (amending LMRA § 302, 29 U.S.C. § 186).

66. See Estreicher, *supra* note 51, at 254–55.

67. Neither the NLRA nor the RLA require compliance with the LMRDA, but labor organizations may not be functioning lawfully if they fail to comply with the LMRDA. It is conceivable, in theory, that an individual could be certified as a bargaining agent under section 9 of the NLRA, but this rarely occurs.

68. See generally U.S. CHAMBER OF COMMERCE, THE NEW MODEL OF REPRESENTATION: AN OVERVIEW OF LEADING WORKER CENTERS (2014), available at <http://www.workforcefreedom.com/sites/default/files/WF1%20Worker%20Center%20Study%20-%20New%20Model%20of%20Representation.%20Final%20version%20downloaded%202.20.14.pdf>.

also include supervisors may offer other examples of desirable options for some workers.

* * *

The “easy in, easy out” proposal is not a panacea but it does hold promise for a possible future for U.S. workplace representation.