Is the NLRA Still Relevant to Today's Economy and Workplace?

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In attempting to answer the question posed in the title of this paper, we begin by briefly reviewing the premises upon which the National Labor Relations Act (NLRA, or Wagner Act) is based. Stated in a sentence, these premises are: that a significant conflict of interest exists between employer and employee; the individual employer possesses a power advantage over the individual worker in both the external labor market and internal governance structure of the firm; this power imbalance works against attainment of maximum efficiency, equity, and human well-being in the employment relationship; and it is thus in the public interest to balance power by promoting and protecting collective bargaining. After describing in greater detail the nature of and rationale for each of these premises, we proceed to consider their validity for today's economy and workplace in light of the numerous and often profound changes that have taken place in economic, social, and political conditions since the Act's passage over six decades ago. The picture that emerges is one of continued but attenuated relevance. We conclude with a brief consideration of policy implications.

THE CENTRAL PREMISES OF THE NLRA

The testimony offered during Congressional hearings in 1934-1935 on Senator Robert Wagner's (D-NY) proposed National Labor Relations Act, and particularly the speeches by

Wagner himself, reveal that it was based on four fundamental premises.[2] The first premise is that the employment relationship is fundamentally of a mixed-motive nature, which is to say it embodies substantial incentives for both cooperation and conflict between the employer and employee. An incentive for cooperation exists because it takes the combined contributions of capital and labor to create the material goods that are the basis of human existence and economic progress, but incentives for conflict are also endemic over the respective roles and responsibilities of each party in the process of production and the distribution of the fruits thereof.

The second major premise is that in a capitalist, laissez faire economy, such as existed to a significant degree in the pre-NLRA United States, the individual employer typically enjoys a distinct power advantage over the worker. The worker's inferiority in power resides in two different locations.

One is in the labor market external to the firm. Here the individual worker in the pre-NLRA years, often possessing little property or savings, modest to negligible human capital in the form of education or skills, and limited knowledge of alternative job opportunities and ability to compete for them, faced the individual employer who in that day increasingly took the form of a giant corporation composed of the capital of thousands of investors and run by a cadre of professional and often socially advantaged managers. These structural sources of inequality, compounded by frequent periods of large scale unemployment, massive flows of new immigrants, various market imperfections that favored employers (e.g., one-company towns, collusion orchestrated by employers' associations), and frequent collaboration between companies and state agents (e.g., judges and police) all combined to seriously undercut the bargaining power of the individual worker vis-a-vis the firm in the determination of wages and other terms and conditions of employment. The result was, except in rare cases of full employment or for highly skilled or "brain" workers, a chronic downward pressure on wages and labor standards with consequent high levels of poverty, long hours, injurious working conditions, and wastage of the nation's human resources.[3]

ALTHOUGH THE NATION'S WORKERS ENJOYED POLITICAL DEMOCRACY IN THE GOVERNANCE OF THE NATION, THEY SPENT THEIR WORKING LIVES IN A SYSTEM OF INDUSTRIAL AUTOCRACY.

The second location of inequality, as seen by the proponents of the Act, is in the internal governance structure of the firm. To a degree, organizational effectiveness requires an inequality of power in the sense that some person or group must be vested with ultimate authority and responsibility in the firm for establishing policy, making decisions, and resolving disputes. And in a free market, laissez faire economy, law and custom give this authority and responsibility to the owners of capital and their appointed managers. The problem, according to Wagner and his like-minded allies, was that this power vis-a-vis the use and treatment of labor, as enshrined in the "master-servant" philosophy of employment then popular in the law, was practically unchecked in its exercise and lacked any mechanism for employee participation in the determination of the terms and conditions under which they worked or for due process provisions to safeguard elementary employee rights. Thus, although the nation's workers enjoyed political democracy in the governance of the nation, they spent their working lives in a system of industrial autocracy.[4]

We now come to the third central premise of the NLRA. It is that the two inequalities of power outlined above lead to numerous outcomes in the employment relationship that in various ways diminish or impair the attainment of maximum production of goods and services (effi-

ciency), the promotion of procedural and distributive justice in the employment relationship (equity), and the happiness enjoyed by each person from realization of their full potential (human well-being).

Efficiency, for example, is harmed by the low wages, adverse working conditions, and drift toward greater income inequality that comes from labor's inequality of bargaining power that, at a macroeconomic level, restricts consumer purchasing power and leads to recurrent bouts of recession and depression and, at a microeconomic level, results in wastage of the nation's human resources due to involuntary idleness, the deleterious effect of poverty living standards, and excessive rates of workplace injury and illness. Equity is also undermined by the inequality of power since employers are motivated to provide justice only to the extent it promotes profit which, in a system without built-in protection of employee rights, means frequent cases of unfair discharge, arbitrary and capricious discipline, and discrimination with respect to race, gender, and religion. And human well-being likewise suffers in this system because low wages, long hours and unhealthful working conditions are harmful to workers' physical and mental health, while lack of any semblance of democratic protections and procedures is demeaning to the human spirit and harmful to workers' development as full and effective participants in civil society.

For these reasons, the fourth premise that underlies the NLRA is that it is in the public interest to promote and protect the right of employees to form and join trade unions and to engage with their employers in collective bargaining. Collective bargaining overcomes the weakness of the individual labor bargain by allowing workers to withhold their labor as a group, thus confronting organized capital (the corporation) with the power of organized labor. By leveling the metaphorical playing field, collective bargaining brings about higher wages and better terms and conditions of employment and also institutes constitutional government in industry in the form of a trade agreement, that spells-out the rules and procedures for layoff, discipline, promotion, etc. Rather than a monopolistic-like cause of economic inefficiency, the improved wages and conditions bargained for by unions are, on net, a source of greater efficiency because they promote aggregate demand and full employment, overcome employer domination in wage determination, and promote better use of the nation's human capital.[5] Likewise, the trade agreement and its attendant rules and regulations, while inherently restrictive in nature, promote equity and well-being (and quite possibly efficiency) by transforming the management of the workplace from a system of "rule by people" to one of "rule by law."

BY LEVELING THE METAPHORICAL PLAYING FIELD, COLLECTIVE BARGAINING BRINGS ABOUT HIGHER WAGES AND BETTER TERMS AND CONDITIONS OF EMPLOYMENT.

THE CHANGING EXTERNAL DIMENSION OF POWER INEQUALITY

Conceptually, the premise of unequal external bargaining power between employer and employee in the labor market is a premise about individual exchange relationships, and the weaknesses thereof. To assess the continued relevance of the NLRA, it is thus necessary to examine these (alleged) weaknesses in light of the six decades of historical experience and evolutionary change in the economic, social and legal environment surrounding the employment relationship. Here briefly described are some of the more salient facts, as they appear to us.[6]

The evidence suggests two broad conclusions. The first is that, on net, from 1935 to 1998 there has occurred a net diminution in the employer's superiority of bargaining power vis-a-vis the individual employee in nonunion labor markets. The second is that while the extent and severity

of labor's inequality of bargaining power has significantly declined, it has by no means been totally eliminated; and, indeed, in certain respects and for certain labor force groups has arguably worsened in recent years. These conclusions imply, in turn, that there remains a compelling rationale for continued public support and encouragement of trade unionism and collective bargaining but, at the same time, this rationale is significantly attenuated.

As to the first conclusion, the reasons behind the long term decline in labor's disadvantage include the following:

- Employer domination of labor markets has substantially declined due to greater geographical mobility of labor, economic integration of remote or rural areas into the mainstream economy, the decline in collusive labor practices by employers' associations, and the much greater degree of information available to workers about job opportunities and conditions of employment.[7]
- The macroeconomy has operated at a much lower average level of unemployment in the post-Great Depression economy. Recessions still occur, but they are shorter and shallower. The level of immigration is also reduced relative to levels early in the century.
- Workers are under less financial pressure to take a job at any price due to greater savings, greater likelihood of a dual earner spouse, and a much broader social safety net.
- The level of education and skills among the workforce has increased greatly, providing many employees with more leverage vis-a-vis employers. The shift from a manual labor, blue-collar workforce to a white-collar, professional and service workforce has also abetted this trend.
- Since passage of the NLRA, a plethora of protective labor laws have been enacted, including minimum wages, maximum hours, pension protection, discrimination and equal employment opportunity, and family and medical leave. All of these laws either buttress labor's bargaining position or protect through legislative means interests that workers would otherwise look to unions to protect.[8]
- New systems of work organization, popularly referred to as "high performance" workplaces, have tended to equalize worker bargaining power by giving employees much greater amounts of training, information, and control over the production process. Greater use of gainsharing and profit-sharing pay systems also has the same effect.[9]

FROM 1935 TO 1998 THERE HAS OCCURRED A NET DIMINUTION IN THE EMPLOYER'S SUPERIORITY OF BARGAINING POWER VIS-A-VIS THE INDIVIDUAL EMPLOYEE IN NONUNION LABOR MARKETS.

There are, of course, trends and developments that work in the opposite direction, i.e., to maintain or increase labor's disadvantage. We judge these to be less important in a quantitative sense relative to those just described, but they nonetheless must be factored into the argument and given due weight. Examples include:

- The globalization of markets puts American workers in competition with low-wage workers across the world, resulting in downward pressure on labor conditions among the unskilled, and those in labor intensive or import sensitive industries. Such globalization also makes it more difficult for the U.S. to achieve macroeconomic stabilization.
- Real wages, especially among blue-collar manufacturing workers and the less educated, have declined during the last quarter-century and, concomitantly, family income inequality has increased. At the same time, returns to capital (both physical and human) have risen sharply. This divergence in financial rewards to the less skilled and educated portions of the labor force vis a vis the owners of physical and human capital both reflects the worsened relative power position of the former and reinforces their

disadvantage by further undercutting the financial reserves of these workers and ability to hold out for better terms in the bargaining process.

- The wave of downsizings, restructurings and plant closings has reduced perceptions of job security across all of the labor force but has particularly affected white-collar workers in management and corporate staff positions. Often the value of their firm-specific human capital is substantially reduced upon loss of job, as is their subsequent bargaining power.
- Although the economy is near full employment, the types of jobs being created are often in low-wage service and trade sectors. To the extent workers perceive these as clearly inferior to what they now have, employers gain a commensurate amount of leverage to dictate a "take it or leave it" set of employment conditions.[10]
- Despite the broader social safety net today relative to six decades ago, many millions of American workers still have no health insurance and only limited access to other forms of income support. Recent welfare reforms have further constricted the social safety net.
- The bargaining power of nonunion workers has been adversely affected because of the decline of the union threat effect. Part of this decline is attributable to the weak penalties in the NLRA for employer unfair labor practice violations (e.g., discharge of union activists).

Examined as a totality, it is difficult not to conclude that the average American worker is certainly in a more advantageous bargaining position in the labor market than his/her predecessor in the pre-NLRA years. Although bargaining power in the aggregate is more likely to be evenly balanced today than six decades ago, and even though some skilled and highly educated groups of employees are effectively in the driver's seat, there remain millions of others who continue to suffer from the low wages and substandard conditions that are part and parcel of unequal bargaining power. Be it due to pockets of unemployment, low skills or education, lack of effective employer competition for labor, the forces of discrimination, or employment in marginal or import-sensitive lines of work, these workers confront the same weakness in individual bargaining that their industrial predecessors did. Only the severity of this weakness, and the relative proportion of the workforce affected, is smaller. We postpone until a later section further discussion of the policy implications of this analysis vis-a-vis the NLRA.

THE CHANGING INTERNAL DIMENSION OF POWER INEQUALITY

Conceptually, the premise of unequal internal bargaining power between employer and employee in the firm is grounded in the centuries old notion of the master-servant relationship. The modern version or expression of this concept is employment-at-will. In pure master-servant or employment-at-will relationships, the internal governance structure of the firm is completely one-sided; that is, the employer governs and power is not shared with employees. The NLRA was designed in part to redress this power imbalance. In this section, we analyze the extent to which this objective has been achieved and the NLRA's role in its achievement.

On balance, we conclude that from 1935 to 1998 there has occurred a net reduction in the employer's superior bargaining power over the employee in the internal governance of the firm.[11] In the first two decades or so following passage of the Wagner Act, unionism and collective bargaining were the main mechanisms by which employee power sharing with employers was achieved. In the next four decades or so, such power sharing stemmed from a variety of other factors (discussed below). But even though the imbalance between employer and employee power in the internal governance of the firm has diminished considerably since the mid-1930s, it has not been eliminated. Thus, there remains a rationale for continued public support of trade unionism and collective bargaining, though a less compelling rationale than that on which the Wagner Act rests. Specific

reasons for the decline of labor's internal power disadvantage include the following:

- Much protective labor legislation has been enacted in the U.S., ranging from older statutes such as the Social Security, Workers' Compensation and Fair Labor Standards Acts to newer ones such as the Civil Rights, Occupational Safety and Health, and Americans with Disabilities Acts. Court suits filed under these and other federal laws have substantially restricted the use of pure employment-at-will by employers. This trend away from employment-at-will has been further spurred by wrongful termination suits against employers brought by former employees in state courts. And, one can safely say that today plaintiffs' attorneys are readily available and willing to file discrimination, wrongful termination, and other employment-related suits on behalf of current and former employees (a high "lawyer threat effect").
- The social ethos about employee rights and participation has changed over time. Certainly the once common use of "drive" methods of employee motivation, such as verbal abuse and physical intimidation by supervisors and foremen, have receded from the American workplace.[12] Likewise, various minority groups in the workforce, such as African-Americans, Jews, and gays and lesbians, are accorded far more equal treatment today than six decades ago. In another example, sexual harassment in the workplace is now routinely forbidden by employers, and employee manuals and handbooks typically contain detailed language pertaining to the reporting, investigation of and penalties for such harassment.
- In an economy that is relatively close to full employment, employers have incentives to reduce employee turnover, retain costly human capital, and increase employee satisfaction with work and the employer. Increasing employees' role in the internal governance of the firm is one way to help achieve these objectives.
- The idea that employees can be used to achieve sustainable competitive advantage appears to have taken hold in a substantial portion of American firms. In particular, high involvement work practices such as employee participation in decision making through workplace and organizational teams, employee equity participation in the firm, information sharing with employees, and formal employee training programs are often claimed to provide competitive advantage to the firm.[13] Some empirical research bears out these claims, finding that high involvement work practices reduce employee turnover and increase firms' productivity, returns to capital, and market value. Hence, from a management perspective, it makes sense to share power internally with a constituency or stakeholder, namely, employees, that contributes positively to the performance of the firm.
- Much innovation with new forms of workplace dispute resolution has occurred in nonunion firms, ranging from formal grievance systems culminating in arbitration to peer review, ombudsperson procedures, mediation, and alternative dispute resolution (ADR) type systems.[14] In this regard, conflict is viewed as a "normal" part of the employment relationship and emphasis is placed on designing a dispute resolution system that best fits the firm and its employees. Note, too, that a workplace dispute resolution system is considered by some researchers and practitioners to be a high-involvement type work practice.[15]
- Today's managers are more sophisticated, socially aware and professionally trained than their predecessors, and have adopted work force management practices that dif-

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fer markedly from the highly authoritarian practices under the doctrine of scientific management that predominated in the pre-Wagner years. Moreover, most managers are also employees (not business owners) and thus have some of the same interests as non-management employees in issues of participation in decision making, employment discrimination, and employee rights.

While these factors reduce the internal power imbalance between employers and employees, other factors and developments have a countervailing impact. These appear to us to be less important in a quantitative sense than those just described, but they nevertheless must be taken account of in our analysis. Examples include:

- The globalization of economic competition has put considerable pressure on U.S. firms to cut costs, notably labor costs, and thus to treat the worker more like a commodity than an asset. In seeking lower labor costs, most firms have reduced employment rather than compensation rates, though notable examples of the latter have occurred in some industries (for example, steel manufacturing, airlines and supermarkets). The forces of deregulation, technological change, and shorter product life cycles have reinforced the trends toward labor cost-cutting and treatment of the worker as a commodity.
- In cutting labor costs, employers have reduced their core, full-time work forces and increased the number of employees who work on a temporary, part-time or short-term contract basis. Such peripheral workers generally have less protection than core workers under prevailing labor laws, and are of less concern to management than core workers with respect to provisions for skill development, workplace participation, and fair treatment.
- Much publicized and touted "high involvement" work practices actually cover only a distinct minority of the workforce, such as core employees in certain of the Fortune 500 type companies. The large majority of employees in this country continue to work in fairly traditional employment situations characterized by "command and control" management systems and modest-to-negligible provisions for formal systems of employee voice and due process. Further, widespread diffusion of high involvement practices in the coming years is problematic given their high start-up costs, small productivity payoff in a number of industries and lines of work, and management resistance to change and power sharing.[16]
- Even when formal dispute resolution systems are in place, employees cite fear of reprisal as the principal reason for failing to use these systems.[17] Also, the more loyal the employee, the less likely he or she is to voice a workplace-related complaint.[18] Such silence, even in the face of perceived workplace injustice or inequity, is reinforced by employee fear of job loss in the next wave of downsizings.
- The era of implicit employment contracting in which the firm employed individual nonunion workers for an entire career by under-paying them (relative to the value of their marginal products) early in that career and over-paying them (again relative to the value of their marginal products) later in that career is coming to an end.[19] Thus, employment relationships appear to be governed less by long-term institutional mechanisms and arrangements and more by a short-term, commodity-type market orientation on the part of employers.
- The decline of union membership and worker representation through collective

A MORE IMAGINATIVE AND SOCIALLY PROGRESSIVE LABOR MOVEMENT IS THUS ONE LIKELY PRE-CONDITION . . . FOR ANY SIGNIFICANT STRENGTHENING OF THE NRLA.

bargaining from the mid-1950s through the late 1990s weakens incentives for employers to share power with employees in the internal governance of the firm. That is, today employers in general face only a weak union threat effect in terms of internal employer-employee power inequality. This is in marked contrast to the growth of unionism and collective bargaining from the mid-1930s to the mid- 1950s in the U.S.

- Court suits as a mechanism for addressing employee grievances over alleged employer violation of workplace rights are expensive, time consuming and risky. In addition, their resolution rarely results in restoration of the employment relationship between the employer and the employee(s) bringing the suit.

Taken as a whole, we conclude from these developments that the average American worker is clearly in a stronger, more powerful position vis-a-vis the employer in the internal governance of the firm than was the case in the pre-NLRA years. Further, this relatively more equal power relationship has been achieved despite the fact that 90 percent of the private sector work force does not belong to unions and are thus not covered by collective bargaining agreements. Employees who are highly educated, deeply skilled, or who work for progressive, high involvement companies are likely to enjoy a relatively balanced, protected internal power position vis a vis management. Yet, for various reasons, tens of millions of employees have little or no internal power relative to that of their employers, do not participate in an internal governance system, and lack the means for exercising voice or receiving due process in the employment relationship. In short, there has indeed been a net reduction in labor's internal power disadvantage over the last six decades. Yet, while some workers are employed in conditions of relative industrial democracy, others labor in conditions of relative industrial autocracy of the type known by previous generations of workers.

POLICY IMPLICATIONS

The factors listed above lead to several conclusions and implications about public policy toward unions and collective bargaining and, most particularly, the continued relevance of the NLRA to today's economy and workplace.

WE SEE NO REASON TO BELIEVE THAT THE EMPLOYMENT RELATIONSHIP IS NOT STILL FUNDAMENTALLY OF THE MIXED-MOTIVE TYPE, WHICH IS TO SAY A COMBINATION OF COOPERATION AND CONFLICT.

Based on the historical evidence, we think the original decision to enact the NLRA was good policy. Although doubts may be expressed about certain aspects of the original NLRA (e.g., the absence of protections against union unfair labor practices and the ban on many forms of nonunion employee representation) and some of the theoretical rationales used to justify its enactment (e.g., promotion of macroeconomic recovery), we nonetheless believe that the four central premises underlying the Act, as previously described, are factually correct in broad outline with regard to the employment relationship as it existed in early 20th century America.[20]

Over the intervening six decades, however, numerous and sometimes far-reaching changes have occurred in the workplace, economy, and society. We also have six decades of experience with large-scale unionism and collective bargaining from which valuable lessons can be learned. As a result, quite possibly what was good policy in 1935 may not be good policy, or at least the best policy, in 1998. Here are our thoughts on the matter, proceeding from premise one to premise four.

We see no reason to believe that the employment relationship is not still fundamentally of the mixed-motive type, which is to say a combi-

nation of cooperation and conflict. Most certainly there remain fundamental aspects of employment that are for the most part a zero-sum game between employers and employees, particularly in the short-run. To see this, one need only look at the millions of layoffs, widespread wage and benefit cuts, and the longer and more stressful work schedules that have emerged out of the last decade's efforts by American companies to gain competitive advantage and increase shareholder returns. By contrast, one may reasonably hypothesize that the extent and degree of conflict of interests between employers and employees has diminished since passage of the NLRA. American management is, as a class, far more professional, sophisticated, and socially conscious in its approach to employee relations. Also, the gradual spread of socio-technical and high-performance work systems, which by their nature foster a mutual gains, cooperative approach to employment relations, promises to reduce (but not eliminate) adversarialism in the workplace—per well-known examples such as NUMMI and lesser known examples scattered across industrial America.[21] And, one must also cite the impact of technology which has made jobs and working conditions far less onerous and unpleasant than was the rule six decades ago.

THE SINGLE MOST IMPORTANT THING PUBLIC POLICY CAN DO TO . . . ENSURE THAT WORKERS GET A SQUARE DEAL FROM EMPLOYERS IS TO MAINTAIN AS CLOSE TO FULL EMPLOYMENT AS IS POSSIBLE.

Then we come to premise two, the external and internal inequalities in power. Given that there is conflict between employers and employees, to what degree do they have equal power in determining the outcome? Here again we believe that this fundamental premise of the NLRA remains valid, albeit less so than when the Act was passed. The sine qua non of equal bargaining power in labor markets (the external dimension) is that both the employer and employee face the same range of alternatives and opportunities in the labor market (e.g., employers have N candidates to hire from and employees have N jobs to choose from) and both have the same ability to hold out for better terms and conditions. We see no reason to doubt that in the context of the 1930s, and earlier, employers as a rule had the distinct power advantage in bargaining. But what about since then?

For the reasons previously outlined, we perceive that the individual worker's inequality of power in nonunion labor markets has diminished considerably in terms of both extent and severity. The most important contributing factor is control of the business cycle and much reduced levels of unemployment, but greater educational attainment, welfare state social insurance and income maintenance programs, and greater workforce mobility have also played a role.

These factors notwithstanding, it also remains the case that unequal bargaining power continues to be a problem for millions of American employees. These workers are found in all parts of the workforce and come from occupations as diverse as police, clerical, construction, professors, and truck drivers, but are concentrated among the less-skilled and educated, people of color and foreign origin, female heads of households, and workers "locked in" to jobs because of seniority rights, fear of losing health care benefits, and lack of resources to finance a search for a new job. The common denominator among all of these workers is that they have fewer options in the labor market than do the employers they face and less "withholding ability" to achieve better terms, thus tipping the bargaining advantage in the employer's favor.

The situation is no different with respect to the internal dimension of unequal power. Here again notable progress has been made in the American workplace in providing employees with greater protections from arbitrary and capricious management decisions and in provid-

ing opportunities for voice and participation. Certainly the master-servant relationship, as it existed in the pre-Wagner Act years, gave employers a distinct and frequently oppressive power advantage over employees in the formulation of labor policy and its administration within the firm. Today, the protections given employees by law as well as higher standards of social consciousness have dramatically reduced the unvarnished autocracy and blatant inequity found six decades ago, as have the plethora of new and more formal dispute resolution systems adopted by progressive nonunion firms. Also noteworthy contributing factors to more equal internal power are the spread of more egalitarian models of work organization (e.g., socio-technical systems) and the much increased threat of litigation against employers.

THE PROVISIONS THAT IN VARIOUS WAYS CONSTRAINED OR WEAKENED UNION POWER IN THE TAFT-HARTLEY AMENDMENTS TO THE NLRA IN 1947 WERE ON BALANCE AN APPROPRIATE POLICY MOVE.

But, again, one must temper these optimistic conclusions with the realization that many workplaces remain largely autocratic. When "push comes to shove" in workplace decisions and disputes, management has the final say, the much publicized high-performance workplace prevails only in a minority of employment relationships, and the equally much-publicized new breed of ADR systems have a checkered record in preventing employer retaliation against grievants (or in chilling perceptions thereof).

Given that inequalities of power in both the external and internal dimension continue to exist, do they also continue to impede attainment of maximum efficiency, equity, and human well-being, per the third premise? Again, we believe the answer is yes. When employers have a dominant position in the labor market or largely unchecked autocratic powers inside the firm, the results are inimical to the three considerations just mentioned. Unequal power provides the opportunity for exploitation and injustice, and both will occur without some restraint, be it in the form of below-competitive wages, excessively long hours, unsafe conditions, or discriminatory or abusive treatment. Happily, these conditions are significantly reduced relative to earlier decades, given the aforementioned decline in employers' relative external and internal power advantage over employees, but they have not by any means disappeared.

For all of these reasons, we believe that—per the fourth premise underlying the NLRA—it remains sound public policy to continue to protect the rights of employees to join unions and engage in collective bargaining.[22] Unions remain one of the best mechanisms yet devised to remedy the individual worker's weakness in power vis-a-vis the employer. Unions also have several other advantages over other methods of protection or power equalization (e.g., government legislation). They can, for example, accomplish their social purpose more flexibly and selectively than a "one size fits all" legal enactment approach, better promote decentralization of decision making and democratic participation, and provide a valuable counterweight to the power of business interests in the political process.[23] The union threat effect is also a major stimulus to progressive employment practices in nonunion companies.

Having given this broad endorsement to the NLRA, we nevertheless have several reservations about its current relevance and usefulness. These include:

- A significant source of labor's unequal bargaining power in external labor markets comes from the globalization of markets. Since the NLRA covers only the American economy, its policy goal of taking wages out of competition via unionization is increasingly problematic. Protection of American labor standards is thus less well served by

further augmenting American union power (e.g., through card check elections or banning striker replacements) than it would be by passage of NLRA-type legislation (or more active union organizing) in other low labor standards countries, such as Mexico and Taiwan.

- The provisions that in various ways constrained or weakened union power in the Taft-Hartley amendments to the NLRA in 1947 were on balance an appropriate policy move. Within a decade of the passage of the NLRA it became obvious that in a number of cases strong and powerful unions had gained, or were in the process of so gaining, a power advantage over employers, or were exercising their new-found power in socially irresponsible ways. Restrictions on secondary boycotts and closed union shops, as well as provisions for injunctions in cases of national emergency strikes, were thus a justified attempt to restore a balance of power, as well as protect the public interest, in collective bargaining. Similar thoughts apply equally well to the Landrum-Griffin amendments in 1959. If fault is to be found here, it is that these amendments to the NLRA did not always go far enough or were not sufficiently enforced (e.g., relaxing the ban on nonunion representation plans, rooting-out egregious examples of union corruption). By the same token, certain restrictions written into the NLRA that once appeared to make sense (e.g., the exclusion from coverage of the Act of front-line employees who exercise some kind of management function or responsibility, the mandatory versus permissive distinction on subjects of bargaining) now increasingly seem, on net, to unduly narrow the scope and effectiveness of collective bargaining.
- The concerns raised about excessive union power in the Taft-Hartley debate point out an enduring paradox in American industrial relations. The course pursued by American trade unions for the last one hundred years has been, with certain notable exceptions, to concentrate organizing on higher-wage craft workers or production workers in oligopolistic industries. These workers often suffered from an inequality of power (particularly in the internal dimension) in pre-Wagner Act years, so unionization and collective bargaining were quite possibly in the social interest as a way to offset employer domination. But over the next six decades these unions exploited their bargaining power, and the employers' ability to pay, by progressively raising labor costs until they were far above competitive levels, in effect substantiating the "labor monopoly" charge of union critics.[24]

THE RELEVANCE AND SOCIAL USEFULNESS OF THE NLRA CANNOT BE DIVORCED FROM THE QUALITIES AND PURPOSES OF THE LABOR MOVEMENT.

Meanwhile, largely left out of collective bargaining were large groups of low-wage workers who suffered the worst inequalities of power and labor conditions, and yet the labor movement for practical and philosophical reasons frequently did not aggressively pursue them—a situation which only today shows some signs of change (as illustrated by the Justice for Janitors campaign). Thus, the anomaly that emerged by the 1970s was that the NLRA increasingly fostered and protected monopoly union gains in long-established collective bargaining relationships but did little to improve the conditions of many workers who truly suffered from unequal power.

- A central challenge facing public policy is thus how to further blunt or constrain the monopoly wage push of powerful, long-established unions while at the same time providing further encouragement and protection to those among the unorganized who both want and need collective bargaining.[25] Despite employer abuses and consequent need for some legislative safeguards, the

emergence and widespread use of striker replacement has so far been the most effective option for securing the former goal. An alternative, more positive approach to the same end might be legal encouragement of some form of gain-sharing so that union members have a greater stake in wage moderation and flexible work rules. Meanwhile, making unionization a more readily attainable option to the unorganized could well be promoted by stronger financial penalties against employers for anti-union discrimination, arbitration of refusals to bargain in first contract disputes, and tighter restrictions on subcontracting and successorship.

- This last point illustrates that the relevance and social usefulness of the NLRA cannot be divorced from the qualities and purposes of the labor movement that it seeks to promote and protect. And here we think it can fairly be said the record is quite mixed. Without doubt the American labor movement has been a potent and constructive force in promoting improved employment practices and conditions of work for the mass of American workers, as it has in battling for progressive labor legislation. But there are also a number of blemishes that considerably reduce both the appeal of American unions to the unorganized and to the public who otherwise might be more sympathetic to the goals of the NLRA. Examples include continuing cases of internal union corruption and autocracy by top leaders, lack of a compelling social agenda, perception that unions are a monopolistic special interest group, outmoded methods and philosophies for today's new workforce and economy, and profound "image" problems. A more imaginative and socially progressive labor movement is thus one likely pre-condition (as is some form of economic or social crisis) for any significant strengthening of the NLRA. In a real sense, then, the problems and shortcomings of the labor movement are themselves important impediments to reform of the NLRA and attainment of the goal of making collective bargaining more readily available to the low paid and inequitably treated portions of the work force.

FROM A MANAGEMENT PERSPECTIVE, IT MAKES SENSE TO SHARE POWER INTERNALLY WITH A CONSTITUENCY OR STAKEHOLDER, NAMELY, EMPLOYEES, THAT CONTRIBUTES POSITIVELY TO THE PERFORMANCE OF THE FIRM.

- The plethora of protective labor laws passed in the last three decades (civil rights, safety and health, etc.), and the phalanx of plaintiffs' attorneys that has emerged to press litigation pursuant to these laws, have to a significant degree served as substitutes for the power equalizing role of unions. But evidence strongly suggests that the American penchant to under-fund government regulatory agencies and in other ways practice lax enforcement of regulatory standards, coupled with the high costs and lengthy time delays associated with attorneys and court suits, opens up a window of opportunity for unions to provide social value added to the extent they take on the job of the workers' advisor and representative in enforcement of workplace laws and regulation.[26] This is a role that current labor law permits unions to fulfill reasonably well in organized shops, but a change in the law (say to permit minority representation or to guarantee unorganized workers protected access to union consultants and negotiators) would be required if unions are to perform this role where the social payoff is most likely the greatest—the nonunion sector where nearly 90 percent of American private sector workers are employed.

■ The single most important thing public policy can do to equalize bargaining power and ensure that workers get a square deal from employers is to maintain the macroeconomy as close to full employment as is possible over the longer-term. The extent to which other forms of countervailing power need to be given to workers, whether in the form of protection of collective bargaining or labor standards legislation, varies in direct proportion to the amount and persistence of involuntary unemployment in the labor market. Both employers and employees suffer from idle capital and labor resources, but employees suffer more—and this is as true today as it was in the pre-NLRA era. ▲

ENDNOTES

[1] We thank Professor Paula Voos, University of Wisconsin-Madison, and Christopher Erickson, UCLA, for helpful comments on an earlier draft of this paper.

[2] See National Labor Relations Board, *Legislative Hearings on the National Labor Relations Act*, Washington, DC: Government Printing Office, 1985; and Leon Keyserling, "Why the Wagner Act?," in L. Silverberg, ed., *The Wagner Act After Ten Years*, Washington, DC: Bureau of National Affairs, 1945.

[3] See John Commons and John Andrews, *Principles of Labor Legislation*, 4th ed., New York, NY: Harper and Bros.; and Bruce E. Kaufman, "Labor Markets and Employment Regulation: The View of the Old Institutionalists," in Bruce E. Kaufman, ed., *Government Regulation of the Employment Relationship*, Madison, WI: Industrial Relations Research Association, 1997: pp. 11-55.

[4] Nelson Lichtenstein and Howell Harris, eds., *Industrial Democracy in America*, New York, NY: Oxford University Press, 1993.

[5] See Donald Stabile, *Activist Unionism: The Institutional Economics of Solomon Barkin*, Armonk, NY: M.E. Sharpe, 1993; and Bruce E. Kaufman, "The Wagner Act: Reestablishing Contact with Its Original Purpose," in David Lewin, Donna Sockell, and Bruce E. Kaufman, eds., *Advances in Industrial and Labor Relations*, Vol. 7, Greenwich, CT: JAI Press, 1996: pp. 15-68.

[6] For further elaboration, see the following by Bruce E. Kaufman: "Labor's Inequality of Bargaining Power: Changes Over Time and Implications for Public Policy," *Journal of Labor Research*, Vol. 10 (Summer): pp. 285-98; "Labor's Inequality of Bargaining Power: Myth or Reality?," *Journal of Labor Research*, Vol. 11 (Spring): pp. 151-66; "The Evolution of Thought on the Competitive Nature of Labor Markets," in Clark Kerr and Paul Staudohar, eds., *Labor Economics and Industrial Relations: Markets and Institutions*, Cambridge, MA: Harvard University Press, 1994: pp. 145-89; "A New Paradigm: Deregulating Labor Relations—A Comment of Reynolds," *Journal of Labor Research*, Vol. 17 (Winter): pp. 129-34; and "Labor Markets and Employment Regulation: The View of the Old Institutionalists," in *Government Regulation of the Employment Relationship, Madison, WI: Industrial Relations Research Association*, 1997: pp. 11-55.

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[8] Richard Edwards, "Alternative Regulatory Approaches to Protecting Workers' Rights," in Bruce E. kaufman, ed., *Government Regulation of the Employment Relationship*, Madison, WI: Industrial Relations Research Association, 1997: pp. 403-28.

[9] David Nadler and Marc Gerstein, "Designing High-Performance Work Systems: Organizing People, Work, Technology, and Information," in David Nadler, et. al., *Organizational Architecture: Designs for Changing Organizations*, San Francisco, CA: Jossey-Bass: pp. 110-32.

[10] Lawrence Mishel, Jared Bernstein, and John Schmitt, *The State of Working America, 1996-97*, Armonk, NY: M.E. Sharpe, 1997.

[11] Paul Weiler, *Governing the Workplace*, Cambridge, MA: Harvard University Press; Bruce E. Kaufman, "Labor Markets and Employment Regulation: The View of the Old Institutionalists." A conceptual analysis of internal governance structures in firms is provided in Bruce E. Kaufman and David Lewin, "Workforce Governance," in Gerald Ferris, Sherman Rosen, and Darold Barnum, eds., *Handbook of Human Resource Management*, New York, NY: Blackwell, 1995: pp. 404-26.

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[15] Huselid, "The Impact of Human Resource Management Practices, on Turnover, Productivity, and Corporate Financial Performance."

[16] Frits Pil and John Paul Macduffie, "The Adoption of High-Involvement Work Practices," *Industrial Relations*, Vol. 35 (July): pp. 423-55.

[17] See David Lewin and Karen Boroff, "The Role of Loyalty in Exit and Voice: A Conceptual and Empirical Analysis," In David Lewin, Donna Sockell, and Bruce E. Kaufman, eds., *Advances in Industrial and Labor Relations*, Vol. 7, Greenwich, CT: JAI Press, 1996: pp. 69-96.

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[19] David Lewin and Daniel Mitchell, *Human Resource Management: An Economic Approach*, 2nd ed., Cincinnati, OH: South-Western.

[20] On defects of the NLRA, see Bruce E. Kaufman, "The Wagner Act: Reestablishing Contact with Its Original Purpose," and Bruce E. Kaufman, "Company Unions: Sham Organizations or Victims of the New Deal?," *Proceedings of the Forty-Ninth Annual Winter Meeting of the Industrial Relations Research Association*, Madison, WI:IRRA, 1997: pp. 166-80.

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[22] Also see Ray Marshall, "Work Organization, Unions, and Economic Performance," in Lawrence Mishel and Paula Voos, eds., *Unions and Economic Competitiveness*, Washington, DC: Economic Policy Institute, 1992: pp. 287-315.

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[24] See John Addison and Barry Hirsch, "The Economic Effects of Employment Regulation: What are the Limits?," in Bruce E. Kaufman, ed., *Government Regulation of the Employment Relationship*, Madison, WI: Industrial Relations Research Association, 1997: pp. 125-78.

[25] Bruce E. Kaufman, "Labor's Inequality of Bargaining Power: Changes of Time and Implications for Public Policy."

[26] David Weil, "Implementing Employment Regulation: Insights on the Determinants of Regulatory Performance," In Bruce E. Kaufman, ed., *Government Regulation of the Employment Relationship*, Madison, WI: Industrial Relations Research Association, 1997: pp. 429-74.