# LABOR LAW AND LABOR-MANAGEMENT COOPERATION: TWO INCOMPATIBLE VIEWS

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## Introduction

There are few informed observers of the labor-management scene who do not agree that U.S. labor relations and its institutions need fundamental reform. In two earlier papers (Baird 1985b, 1987), I considered some of the ways that current American labor law, especially the National Labor Relations Act (NLRA), adversely affects the outcomes of the entrepreneurial discovery process in labor-management relations, and thus impairs the ability of American unionized and nonunionized firms to compete effectively in international markets. In June 1986, Stephen Schlossberg, Deputy Under Secretary in the U.S. Department of Labor (DOL), released a report he coauthored with Steven Fetter, also of DOL, concerning the potential conflict between existing labor law and the increasing attempts of management and workers to cooperate in the discovery and development of ways to make American industries more competitive. Schlossberg and Fetter (hereinafter, SF) agree with me that existing labor law, especially the NLRA, can impede the discovery and development of effective forms of worker-management cooperation. However, their diagnosis and suggested remedies are diametrically opposed to my own.

Although SF recognize that existing labor law and practices can impede the discovery and implementation of such innovations as worker participation in management and quality of work-life programs, they insist that those impediments be removed in ways that will maintain and strengthen existing Wagner Act institutions of

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compulsory, monopoly bargaining. They invite labor-management practitioners and academicians to identify, develop, and promote changes in labor law that would make it easier for its compulsory aspects—mandatory collective bargaining between exclusive bargaining agents and employers, union security arrangements, job property rights for strikers, and the proscription of company unions—to coexist with newly emerging experiments in cooperative labor-management relations. They even suggest that labor law ought to be changed to make it easier for unions to gain monopoly representation rights over workers in the first place.

In other words, SF see newly emerging forms of worker-management cooperation as a threat to monopoly compulsory bargaining and want to develop changes in the law that will protect and extend monopoly compulsory bargaining. To SF, cooperation is acceptable only if monopoly compulsory bargaining is not threatened. In their view, the end to be achieved is the protection and extension of monopoly compulsory bargaining. To them, existing labor law must be changed to promote the kinds of cooperation that are consistent with that end.

On the other hand, I propose that the entire framework of compulsory unionism be scrapped in favor of a system of voluntary unionism within which there can be no conflict between labor law and labor-management cooperation. I see monopoly compulsory bargaining as a threat to the discovery and development of superior modes of labor-management relations, and I advocate repeal of existing labor laws to eliminate that threat. In my view, the end to be achieved is the discovery and implementation of superior modes of labor-management relations within which cooperation can flourish. To me, existing labor institutions are a threat to that end and must be removed. In the remainder of the paper, I will first outline my arguments and then explain and critique those of SF.

## Government Regulation and Entrepreneurial Discovery

My arguments in favor of deregulation of the labor market are based on the Mises-Hayek-Kirzner analysis of the competitive entrepreneurial market process.[1] The key insight of that analysis is that every situation of discoordination, economic error, or institutional failure contains profit opportunities for those entrepreneurs alert enough to

[1]The best exposition of this analytical framework is Kirzner (1973, 1985). See also Hayek ([1968] 1978).

notice them and act on them. When entrepreneurs act on such opportunities the unintended consequence of their actions is that the discoordination, error, or failure is ameliorated.

Standard neoclassical criticism of government regulation focuses on two sources of government failure: the knowledge problem and the political problem. Inasmuch as the knowledge necessary for regulators to improve upon market outcomes when there has been some sort of "market failure" exists nowhere in its entirety, but is, rather, divided up in widely dispersed bits, regulators must make their decisions, which are to apply to the whole economy, in ignorance of most of the necessary knowledge.[2] Thus their decisions are likely to make things worse rather than better. Furthermore, regulatory decisions are political decisions. They are inevitably made in response to political pressures, not a dispassionate consideration of costs and benefits. Only some costs and benefits are considered—those that affect interest groups with political clout.

Israel Kirzner (1985, chap. 6) has pointed out a third source of government regulatory failure—the effects of regulation on the outcomes of the entepreneurial discovery process. There are four such effects, which he labels "unsimulated discovery," "undiscovered discovery," "stifled discovery," and "superfluous discovery."

*Unsimulated Discovery*

It is impossible for government functionaries to simulate the entrepreneurial discovery process because (a) the division of knowledge makes it impossible for them to use most of the relevant knowledge and (b) it is difficult for them to capture the profits that result from successful discovery for themselves, so they will not be as alert to such opportunities as they would be if they could.

Even a bureaucrat who is dedicated to the public interest is unlikely to be motivated to discover that which is as yet undreamed of by anyone. The most a dedicated bureaucrat is likely to do is engage in purposive search for that which he knows he does not know. Most bureaucrats spend their time making decisions regarding known alternatives rather than seeking out new opportunities. And bureaucrats are like everyone else—they are dedicated primarily to what is in their own interest. Moreover, in contrast to the entrepreneurial discovery process in the private marketplace, there is no mechanism in government regulation that assures that less competent regulators will be replaced with those who are more competent.

[2]The notion of the division of knowledge, although employed in neoclassical analysis, originated with Hayek ([1945] 1948).

*Undiscovered Discovery*

It is impossible for government regulators to know where the unregulated market discovery process would, if left alone, lead. Thus, even if some sort of genuine marketplace problem exists, the imposition of regulations based on less knowledge than is discovered and used in the market discovery process may forestall corrective entrepreneurial discoveries that otherwise would have been forthcoming. Regulators should not assume that because the market has not solved a problem now, it is incapable of doing so. The market discovery process is not instantaneous. If regulations are imposed the discoveries that otherwise would have been made may not be made. And genuine solutions, solutions based on more complete knowledge than any regulator or group of regulators could ever have, will never become known and implemented.

*Stifled Discovery*

Government regulation often takes the form of restriction of particular market activities such as market entry by interlopers who may have new ideas about how to do things. A major vehicle for entrepreneurial discovery is the freedom of newcomers to innovate. If gains from innovation by interlopers and those who would try alternative organizational and institutional arrangements are foreclosed by blocked entry (government-granted monopoly) there will be less alertness to such possibilities than there otherwise would be. Discoveries that newcomers might have tried and proved, and others might have adopted, will never be tried, proved, and adopted.

*Superfluous Discovery*

Finally, entrepreneurs try to do the best they can for themselves given the circumstances and constraints they confront. The imposition of government regulations may push entrepreneurial discovery in wholly unanticipated and unwelcome directions. Bureaucrats cannot anticipate the profit opportunities that are opened up by newly imposed regulatory constraints and thus cannot predict where the resulting discovery process will lead.

This is in addition to the neoclassical point that government regulation diverts alertness away from market competition and innovation toward political competition for special favors. General benefits through entrepreneurial discovery in the private market are sacrificed in favor of attempts to discover opportunities for political gains by organized interests who pursue narrow benefits for themselves at the expense of all others. The positive sum game of entrepreneurial

discovery in the private market is gradually replaced by the zero sum game of entrepreneurial discovery in the political market.

## Three Labor Laws

The Clayton Act (1914), the Norris-La Guardia Act (1932), and the National Labor Relations Act (1935, amended 1947) have important features that adversely affect the outcomes of entrepreneurial discovery in the labor market. The Clayton Act (CA) was the first law to grant labor unions immunity from prosecution under antitrust law. The Norris-La Guardia Act (NLA) reinforced the union antitrust exemption and outlawed union-free agreements (the so-called "yellow dog" contracts) between employees and employers. The National Labor Relations Act (NLRA), as amended, has four features especially germane to the present inquiry: exclusive representation, union security, the proscription of company unions, and job property rights for strikers.

Under the CA and the NLA, one union can represent all the workers in an entire industry, and unions that represent workers in different industries can affiliate with each other without fear of violating antitrust laws. For example, the United Steel Workers (USW) can represent the workers who are employed by *all* the steel companies, and the United Auto Workers (UAW) can represent *all* the workers who are employed in the automobile industry, and the USW and the UAW can affiliate as members of the AFL-CIO. If all the steel companies, or all the auto companies, got together to collude on price, quality, and marketing strategies in the output markets of those industries, they would run afoul of the Sherman Antitrust Act. But USW and the UAW need fear no legal ramifications if they do the same in the labor markets of those industries.

If interloper labor representation organizations were free to enter the labor representation market, antitrust laws would be superfluous at best and, as in product markets, harmful in fact. But, because of the monopoly-granting features of the NLRA to be discussed below, the labor representation market is not open. Thus the monopoly power of industry-wide unions is not checked by normal market processes. The AFL-CIO, free of fear of antitrust prosecution, prohibits or regulates competition among member unions for representation rights; so competition among AFL-CIO affiliated unions cannot be relied on to keep incumbent exclusive bargaining agents honest. AFL-CIO unions do face organizing competition in some employments from unions outside the federation, such as the Teamsters, but even this competition can be quashed by "gentlemen's agreements"

without fear of antitrust prosecution. And existing labor law makes it illegal for independent interloper employee organizations of diverse types, such as employer-sponsored unions, to compete with incumbents.

Section 3 of the NLA provides that the courts may not enforce agreements between employees and employers whereby initial and continued employment is contingent upon an employee's abstension from membership in, or affiliation with, a labor union. Such union-free agreements were frequently requested by *employees* as protection against the threats and arguments of union organizers (Reynolds 1984, pp. 97–100). They were also, of course, frequently used by employers to make it more difficult for unions to organize workers.

Section 9(a) of the NLRA states that a union that is selected by a majority of employees in a bargaining unit of a firm in a union representation election shall be the exclusive bargaining agent for all the employees in that bargaining unit. Employers and dissenting employees cannot prevent such certification elections from taking place if a union gains the signatures of 30 percent or more of the workers asking the union to represent them. The winning union not only gets to represent those employees who freely choose such representation, it also gets to represent those employees who want to be represented by some other union as well as those employees who do not want to be represented by any union. The winning union gets to be a monopolist in the provision of representation services to the employees. Competition from other unions and from nonunion modes of representation, such as employee committees set up to cooperate with management on developing improvements in work rules and productivity, is blocked by force of law.

Section 8(a)3 of the NLRA empowers labor unions that are exclusive bargaining agents to agree with employers that all employees either must join the union shortly after being hired (a union shop) or, in other cases, may refrain from joining the union but still must pay union dues (an agency shop). Not only must employees who do not want to be represented by the union acquiesce to such representation "services," where there is a union shop or an agency shop they must pay for what they do not want or be fired. Not only is the union granted a government protected monopoly, it is empowered to force people to pay for what it monopolistically provides no matter how poorly it performs. These two forms of union security are designed to protect the unions against dissatisfied employees who would otherwise withhold support from unions that perform poorly. One of the most important mechanisms of the competitive market process—

escape from poor performance—is blocked.[3] The only escape routes provided by the NLRA are costly and time-consuming decertification and deauthorization campaigns. Individuals cannot escape on their own.

Section 8(a)2 of the NLRA forbids employers to be involved in the "formation or administration" of any "labor organization" or to "contribute financial or other support to it." This feature of the law is addressed to the alleged role of company-sponsored unions in the years prior to the passage of the original Wagner Act. It was widely asserted that such so-called company unions acted merely as fronts for the employer who would use them to exploit employees. According to union folklore, company unions were formed merely to meet the requirements of Section 7(a) of the 1933 National Industrial Recovery Act so that the "real" unions (mainly those affiliated with the American Federation of Labor) could be kept out. The truth of the matter is that most company-sponsored unions were formed in an effort by both employees and employers to discover effective modes of labor management relations. Many of them could reasonably be regarded as early forms of what today are called "quality of work life" arrangements whereby employees participate in the formation of management decisions regarding production arrangements. The company unions stressed the fact that labor and management are complementary members of the production team. The "real" unions—those affiliated with the AFL and, later, the CIO—on the other hand, promoted the view that management and labor are natural enemies. It should come as no surprise that labor-management cooperation is difficult to achieve under the aegis of "real" unions.

The massive recognition strikes of 1933–35 were, by and large, not strikes by a majority of employees of the involved firms. More often than not an outside union got a few employees of a firm to go on strike and then the union would send in "flying squadrons" of nonemployees to act as pickets and to intimidate the majority of the employees, often members of company-sponsored unions or small independent unions not approved by the AFL, who wanted to continue to work (Baird 1984, pp. 42–44). The role of company unions was nicely stated by Judge John P. Nields in his decision in the 1934 *Wierton Steel* case, which involved a fight between a Wierton-sponsored and an AFL union (Baird 1984, p. 43):

[3]For a discussion of the pros and cons of exclusive representation and union security, see Baird (1984, pp. 48–51, 55–59). Of course, under a system of voluntary unionism, with no mandatory bargaining and no legislatively enforced exclusivity, union security arrangements would be consistent with the principles of voluntary exchange contracting.

> It is said that this relation (between management and workers) involves the problem of an economic balance of the power of labor against the power of capital. The theory of a balance of power is based upon the assumption of an inevitable and necessary diversity of interest. This is the traditional old-world theory. It is not the 20th century American theory of that relation as dependent upon mutual interest, understanding, and goodwill. The modern theory is embodied in the Wierton plan of employee organization.

Section 13 of the NLRA affirms the legal "right" of unionized workers to strike. Section 2(3) stipulates that a striking worker maintains his or her status as an employee, and case law, based upon Section 8's proscription of "unfair labor practices," has established that strikers have property rights to their jobs after a strike is settled. Strikers in an unfair labor practice strike must be immediately rehired when the strike is settled. No replacement worker can keep a job if doing so means that a striker would lose a job. In an economic strike *strikers have first claim on any jobs vacated by replacement workers* who were hired during the strike. But an economic strike can be reclassified into an unfair labor practice strike if an employer is deemed to have failed to bargain "in good faith" over the economic issues. Thus, as a result of the NLRA, a strike is more than just a collective withholding of labor services in face of unacceptable offers of terms of employment. A strike is also a denial of the right of nonstrikers permanently to replace those who strike. And during strikes strikers can, with impunity, through picket lines, attempt to block access to the struck firms of nonstriking workers, suppliers, and customers.

## Labor Law and Entrepreneurial Discovery

It is no secret that many basic industries in the United States such as autos, steel, and textiles are in trouble. They are unable to compete effectively with foreign producers, notably the Japanese, and so they are declining. In response to this decline, both management and unions have appealed to the federal government for protection against foreign competition and for taxpayer subsidies. In addition, unions have appealed for plant closing restrictions. I contend that it is no accident that the industries that are most imperiled by competition from the Japanese are precisely those industries that are most heavily unionized according to the strictures of current labor law.

The CA-NLA exemption of labor unions from antitrust law, in light of the closed market in labor representation services set up and enforced by the NLRA, makes competition between existing labor unions and between existing unions and interlopers virtually impos-

sible. If different unions represented the employees of the different firms in the auto industry, for example, competition between them would perhaps have forestalled the establishment of the 83 percent premium of employee compensation in the auto industry over the average for all manufacturing employments in 1985 (Reynolds 1986, p. 112). The development of restrictive work rules that impair entrepreneurial discovery by workers of ways to improve productivity might never have developed. The large compensation premium and the restrictive work rules have not been in the long-run interests of either the employees or the employers. The entrepreneurial discovery process that would otherwise have identified and implemented pay and work-rule arrangements that were mutually beneficial on a long-run basis was stifled, and the industry was the victim of undiscovered discovery.

The NLA's proscription of enforceable union-free agreements between employees and employers cuts off experimentation with guaranteed union-free environments. Experimentation with personnel practices and work rules in nonunion firms is often circumscribed by fears of both employees and employers that union organizers will exploit any perceived problems that may emerge. Under the threat of monopoly unionism it is better to play it safe than to be too innovative.

The four features of the NLRA previously cited—exclusive representation, union security, proscription of company unions, and the creation of job property rights for strikers—have also blocked the discovery of superior forms of labor-management relations that would have permitted American unionized industries better to adapt to changing market conditions. And they have given rise to superfluous discovery that hurts nonunion as well as unionized industries.

Where there is a certified exclusive bargaining agent, there cannot be active competition between two or more labor unions at the same firm at the same time. Neither can there be competition between union and nonunion providers of representation services. Individuals cannot even represent themselves. Protected by its government-granted monopoly, an exclusive bargaining agent has less incentive than it otherwise would have to be alert to possible innovations which would benefit both managers and workers by, for example, lowering costs and thereby allowing the firm to be a better competitor. Indeed, the exclusive bargaining agent has little incentive even to be alert to opportunities to better improve its own services to employees. It does not have to fear that dissatisfied employees will seek representation services elsewhere or decide to represent themselves. The only way individual employees can escape from union abuse is to

organize a majority in favor of undertaking a lengthy and costly decertification procedure. If more than one union were permitted to function at the same time, and if individual employees always had the ability immediately to opt out of the services provided by an unsatisfactory union, every union would have a strong incentive to remain alert to opportunities to improve its services to employees.

The attempt to stifle experimentation with alternative forms of labor-management relations under the rubric of exclusive representation is well illustrated by the recently announced agreement between General Motors and the UAW regarding GM's Saturn project to be undertaken in Spring Hill, Tennessee. GM has agreed, in a "prehire agreement," to recognize the UAW as the exclusive bargaining agent for all Saturn employees even though those employes have not yet been identified and hired. The prehire agreement gives hiring preference to UAW members who have been laid off from other GM plants. The Saturn project is an attempt to identify ways for GM to cope more effectively with Japanese auto competition. But even before the project gets underway, GM has forsaken any chance of innovation in labor-management relations by chaining itself to the failed practices of the UAW.

Why would GM do such a thing? I think it is because GM considers itself stuck with the UAW in most of its plants. The monopoly advantages given the UAW by the NLRA have made getting rid of the UAW very difficult. GM figures that if it is stuck with the UAW it is going to make it more difficult for other auto companies, especially Japanese plants set up in the United States, to avoid the UAW. Nissan has set up a plant in Smyrna, Tennessee, 30 miles from the Saturn site. Giving the UAW a toehold in the region makes Nissan more vulnerable. Alfred Warren, GM's vice president for industrial relations, put it this way: "I do not believe the UAW can afford to let Nissan go unorganized. If they continue without a union, other Japanese manufacturers might get the idea that they too can work in the United States without a union."[4]

The principle of union security makes it even easier for exclusive bargaining agents to survive without being alert to opportunities to discover how better to serve the common interests of employees and employers. If employees cannot even withdraw financial support from union officers who perform unsatisfactorily, those officers can tune their alertness to ways to better serve themselves rather than their members. Protected by forced union dues, they are free to undertake what, from the viewpoint of employees and employers,

[4]Quoted by Reynolds (1986, p. 121)

are wholly superfluous discovery processes. A symptom of this is the current enthusiasm of labor union leaders for laws enforcing the doctrine called "comparable worth." If such laws were passed, wages would no longer be determined by collective bargaining; they would be determined by political wage boards. Apparently union officers now think they are better at political manipulation than collective bargaining (Baird 1985a).

The proscription of employer involvement in labor unions cuts off an obvious avenue of entrepreneurial discovery in labor relations. Since workers and management are complementary participants in production, it seems likely that if they were free explicitly to cooperate in experimenting with alternatives to the existing structure of unionism, significant innovations would be discovered and implemented. For example, it was a company union, the Leeds and Northrup Cooperative Association, that, in 1922, first introduced and experimented with unemployment insurance. Other company unions—e.g., the Industrial Assembly of Goodyear Tire and Rubber, the Filene Cooperative Association, and the Employees Representation Plan of Colorado Fuel and Iron Co.—were significant contributors to the development of modern personnel programs (Nelson 1982).

The fact that the NLRA prohibits such discovery is well illustrated in *NLRB v. Cabot Carbon Co.* (360 U.S. 203 [1959]). In this case the U.S. Supreme Court held that employer-created employee committees set up to confer with management on a regular basis on matters of mutual concern—such as quality control, production innovation, and complaint settlement—violated Section 8(a)(2) of the NLRA because the committees were, in the language of Section 2(5), "dealing with" employers and thus were "labor organizations." Although three district courts of appeal have subsequently rendered decisions based on a broader interpretation of the definition of a labor organization, the Supreme Court has never modified its ruling in *Cabot Carbon,* and that case is still used by the NLRB and other federal courts to prohibit such forms of labor-management cooperation.

The Japanese model of labor-management relations is often held up as the one we ought to emulate. That model is squarely based on employer participation in labor unions. It is striking to realize that the infamous company unions of the 1930s could have evolved into labor-management institutions similar to those so highly regarded and recommended today. If it had not been for the adoption of the NLRA they might have done just that. Or some altogether different and superior forms of unionism might have emerged. The tragedy is that we can never know what might have been discovered in the absence of these government-imposed blocks to entrepreneurial

discovery. All we know is that we are the victims of undiscovered discovery.

Finally, as Mises (1949) pointed out, all people behave entrepreneurially. Workers, no less than employers and investors, undertake to discover and correct economic error when it is in their interest to do so, and when the costs of doing so are low enough to make it worthwhile. Workers hired to replace strikers could be a major source of entrepreneurial discovery of ways and means of increasing productivity, improving the workplace environment, settling disputes, and improving labor-management relations. The job property rights granted to strikers makes hiring replacement workers more difficult than it otherwise would be. Workers are reluctant to accept jobs they know are temporary, and if they accept the jobs, they will not be motivated to be as alert to possibilities for long-run organizational improvements as they otherwise would be. Undiscovered and stifled discovery again take their toll.

## The Schlossberg-Fetter View

The SF study (1986) is an invitation to practitioners and analysts of labor law to address the issues posed by the apparent points of conflict between labor law and the development of new forms of labor-management cooperation. In their words (pp. 2–3, 12):

> This potential conflict . . . has led the U.S. Department of Labor to embark on a study of the nation's labor and related laws, and, perhaps, also collective bargaining traditions and practices that may inhibit improved labor-management relations. . . .
>
> [W]e will seek to determine whether our existing labor laws impede or, indeed, totally bar, many of the cooperative efforts the Department is currently encouraging and publicizing. . . .
>
> Clearly . . . it seems unproductive and even foolish to allow our traditional adversarial model of industrial relations to retard the spread of innovative and promising cooperative employer-employee ventures.

Lest these words be misconstrued to imply that SF are looking to the repeal of the laws that have given us our "traditional adversarial" labor relations, or even to amendments of the laws that would make them less adversarial, consider their discussion and their approach.

After briefly describing what they consider to be favorable programs of union-management cooperation at GM's Fiero plant in Pontiac, Michigan, and the NUMMI plant in Fremont, California, they come to the GM Saturn Project. They characterize the Saturn agreement between GM and the UAW as "an extraordinary commitment to cooperative ways of dealing," which is "the longest step yet taken [by management] toward full partnership with labor in every phase

of planning and production," wherein "the employer gains maximum flexibility and employees secure new forms of compensation and employment protection" (p. 12). SF lament that this "innovative Saturn understanding and a forward-looking agreement between the building trades unions and their contractors were threatened" by charges that the agreements violated current labor law (p. 12). They imply that the work rules and compensation schemes agreed to by the UAW and GM were challenged as unfair labor practices.

In fact no such allegations were made. The National Right to Work Legal Defense Foundation charged that the prehire agreement, whereby union members were given hiring preference over non-union workers and GM agreed to recognize the UAW as exclusive bargaining agent for all workers before letting the workers vote on the matter, violated Sections 9(a) and 8(a)3 of the NLRA. The Foundation expressed no disagreement whatsoever with the forms of cooperation adopted or with the idea of seeking cooperative solutions, but it strongly objected to coercing yet-to-be-hired workers to accept the UAW as exclusive bargaining agent and to discriminating against nonunion workers at initial hiring.

The actual nature of SF's concern is made clear by their reference to the "forward-looking agreement" between the building trades unions and contractors. That agreement was simply that only union labor would be used in the construction of the Saturn plant. Nonunion firms would not even be permitted to bid on the project. The whole of the SF essay focuses on the issue of *union*-management cooperation, not on the issue of labor-management cooperation. This comes as no surprise to readers who know that Schlossberg was formerly chief counsel for the AFL-CIO. He quite naturally looks at all labor issues through union glasses. To SF, cooperation is fine, as long as it involves an exclusive bargaining agent. Cooperation of employers with nonunion employees has no value at all.

The same perspective is apparent in SF's discussion of the relevance of *NLRB v. Yeshiva University* (444 U.S. 672 [1980]) to the issue of labor-management cooperation. In that case the Supreme Court declared that faculty members at private colleges and universities, who exercise decision authority over faculty hiring and promotion, as well as curriculum and other management-type matters, cannot be covered by the NLRA. SF explicitly align themselves with the views expressed by John T. Dunlop, former Secretary of Labor. Dunlop laments that the *Yeshiva* decision is an inappropriate "transfer to the academic or to the medical care worlds of the industrial plant model of supervision or hiring, promotion and discharge."[5]

[5]Quoted by SF (1986, p. 11).

Now, I certainly agree that the industrial model should not be transplanted to the academy. But to me that means that the whole apparatus of monopoly compulsory bargaining set up in the NLRA has no place in colleges and universities (Baird 1981). This is not what SF and Dunlop have in mind. They want exclusive representation and mandatory bargaining in the academy. What they do not want the academy to adopt from the industrial model is the distinction between management and nonmanagement employees because that distinction, under current law, permits private college and university faculties to escape from monopoly compulsory bargaining. They fear that, in light of newly emerging forms of labor-management cooperation that blur the distinction between management and nonmanagement employees, still more employees will be able to avoid NLRA unionism.

SF evaluate the *Yeshiva* decision in these words (pp. 14–16):

> In the final analysis, the Court finds inconsistent with the NLRA's model any requirement for bargaining between the real management of an institution and the faculty. That conclusion, unfortunately, jeopardizes the desired method of operation in an ideal employee/employer participation plan, and, if extended, could potentially cast doubt upon the most innovative features of the Saturn, NUMMI, and Pontiac Fiero relationships. . . .
>
> [W]hen the NLRB finds . . . that physicians and dentists who have a say in the management of their facility cannot belong to a union, those individuals best suited to helping labor-management cooperation along are lost to the cause. . . .
>
> In the end the *Yeshiva* case is troubling because it is at war with the idea of consensus between professional employees and their administrators—and, by analogy, in other employee-employer relationships as well. That, of course, is the nub of the situation. Do our labor laws and the decisions they spawn prevent or impede problem solving and the advantages which flow from such an orientation?

Why should the "ideal employee/employer participation plan" require an exclusive bargaining agent representing employees? The nonunion collegial form of university governance is squarely based on the idea of cooperation and consensus between administrators and professionals. Faculty unionism in public universities has nearly destroyed that idea. Who says that the "individuals best suited to helping labor-management cooperation along" are those of unionist sympathies? And if they are "lost to the cause," what cause? The cause of cooperation, or the cause of unionism? Is the *Yeshiva* decision "at war with the idea of consensus between professional employees and their administrators" or at war with the extension of monopoly compulsory bargaining?

There follows a long discussion of what SF call "the 8(a)2 problem" related to the *Cabot Carbon* case. They recognize, as I do, that the development of employee participation in management and quality of work-life arrangements is likely to be impaired by the NLRA's strictures against company-sponsored "labor organizations," but their remedy is not to do away with those strictures. They argue (p. 16) that

> there is an obvious necessity to preserve genuine prohibitions on "company unionism" and to proscribe the use by unscrupulous employers of spurious cooperative or participation schemes conceived as means to defeat legitimate efforts at union organization. Labor-management cooperation in the context of this paper contemplates and assumes the coming together of truly independent entities in a cooperative activity perceived to be mutually beneficial.

SF simply assume that only NLRA unions can be "truly independent." Any labor-management cooperation programs in the absence of such unions are, in their view, likely to be "schemes conceived as means to defeat legitimate efforts at union organization." SF do not tell us how the law should be changed to cope with the 8(a)2 problem, they simply tell us how it ought not to be changed.

Then there is the matter of the distinction between mandatory and permissive subjects of bargaining. In *NLRB v. Wooster Division of the Borg-Warner Corp* (356 U.S. 342 [1958]) the Supreme Court held that the duty to bargain in Section 8(a)5 of the NLRA is limited to those areas specifically listed in Section 9(a)—"rates of pay, wages, hours of employment, or other conditions of employment." Employers must bargain with exclusive bargaining agents on those matters. They are mandatory subjects of bargaining. But on other matters, such as partial or complete plant closings for economic reasons, consolidations of operations, and benefits for already-retired employees, employers do not have to bargain with unions. They may do so if they choose, but they do not have to. The latter are permissive subjects of bargaining. Unions may not bargain to an impasse and strike over matters that are merely permissive subjects of collective bargaining. Decisions on permissive subjects of bargaining are considered management prerogatives.

About this distinction SF write (p. 25):

> Only by removing the artificial distinction between mandatory and permissive subjects of bargaining can both parties be assured that any issue relevant to the employment relationship will, at the behest of either side, receive full and fair discussion and consideration. . . . [S]hould company and union representatives argue about what they

> *must* discuss, or should they be encouraged to find solutions to *whatever* perceived problems between them they can lawfully resolve?

Although SF do not say so, they strongly imply that the best remedy here is to make all subjects mandatory subjects of bargaining. If the law were changed in this way it would mean that, where there was an exclusive bargaining agent, no decisions regarding private firms could be made without the concurrence of the union. Management, representing owners, would have to get union permission even to go out of business. Effective private ownership and operation of business would cease to exist. There would be a de facto socialization of ownership and control.

That SF would consider such an outcome acceptable is not altogether surprising. In the Dunlop speech referred to above, the former Secretary of Labor states that he thinks the "needs of the country" sometimes require "tripartite consultations" involving unions, management, and government, "over such questions as shutdown of operations or plants" (Dunlop 1984, p. E-3). The fact that "tripartite consultations" were the main feature of Mussolini's organization of the Italian economy is instructive.

My solution to any problems created by the distinction between mandatory and permissive subjects of bargaining is to make bargaining on all subjects *voluntary*. If the end is to develop labor-management cooperation, the extension of coercion would seem to be a singularly inappropriate means. The essence of cooperation is voluntary exchange. Mutually beneficial arrangements will systematically emerge only when all parties are at liberty to say no and walk away.

## Conclusion

There is indeed an inherent conflict between existing labor law and innovations in labor-management relations based on cooperation rather than conflict. The NLRA was fashioned by people who thought of labor-management relations as inherently adversarial. In fact it is only compulsory union-management relations that are unavoidably adversarial, and that adversity is largely responsible for the inability of many basic American industries effectively to compete. The obvious remedy is to repeal the NLRA and return to the form of unionism President Franklin Roosevelt endorsed in his March 1934 Automobile Settlement—voluntary unionism based on proportional representation and the right of workers to choose, on an individual basis rather than by majority vote, whether to be represented by a union

and, if so, whether the union is independent or employer-sponsored (Baird 1984, pp. 39–42).

SF, however, have a different agenda. Under the guise of promoting labor-management cooperation they apparently want to resurrect the failed 1978 labor law reform movement (p. 30):

> These difficult issues and the manner in which they are handled will be crucial in setting the future tone of U.S. labor relations. . . . It has been clear since the union-backed labor reform effort failed in 1978 that, in the words of Professor Dunlop, "redesign must come from discussion and consensus among labor [unions] and management, principals not lawyers, to be followed by public and legislative review."

In other words, in 1978 the politicians failed to give us what we want so now we must take a more roundabout route to our goals.

The bottom line of the 1978 reform effort was to make it easier for unions to become certified exclusive bargaining agents. SF develop this theme by favorably referring to Paul Weiler's proposed changes in labor law. Weiler (1983), deeply concerned about the recent union failure rate in representation elections, proposed, among other things, that such elections be held immediately after unions apply to the NLRB for them, before employers have a chance to campaign against union representation. But surely it makes little sense to pursue competitive advantages by expanding the very form of unionism that is largely responsible for our present competitive disadvantages.

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