Unchaining the Workers

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Since the adoption of the National Labor Relations Act (NLRA) in 1935, individual workers have been chained to the will of the majority in choosing representatives to bargain over the terms and conditions of employment. Under the NLRA, representation typically is determined by a majority-takes-all vote among the employees. If the majority votes in favor of a particular union, then that union has the exclusive right to speak for all of the employees. The selected union represents not only the workers who voted for it, but also those who voted against it and those who did not vote. Individual workers are forbidden to represent themselves, to choose a different union to speak for them, or to choose some other form of representation.

The NLRA awards certified unions two additional privileges beyond exclusive representation. First, unions hold their representational status indefinitely; they can only be decertified through an extraordinary special election. Second, unions have "union security" in that, except in the 22 right-to-work states, all of the represented workers must pay for union representation whether the workers want it or not.

Exclusive representation and union security are certainly good deals for the unions. But what of an individual worker who may not want such representation or disapproves of the union's other activities but is forced to accept and pay for either or both? Whether one is a supporter of unions or not, one must wonder if each individual worker is being treated fairly by this system.

GOVERNMENT AND PRIVATE DECISIONS

Proponents of the NLRA-established system justify the monopoly power of certified unions by appeal to democracy. The majority rules in a democracy, they say; just as a congressman is elected by a majority of voters to be that district's monopoly representative in Congress, so the majority of workers in a workplace get to determine the workplace's bargaining representative.

But that analogy is inapt and incomplete. Democracy is about the rules for governmental decision-making. It gives a voice in those decisions to the people who are governed. But such reasoning does not extend to private decision-making; the majority should not control the private matters of an individual, including the conditions of his employment. Though some workers may freely choose to band together and accept union representation, it seems inappropriate to have such representation forced on an individual worker.

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THE ARMEY BILL

In 1993, Rep. Dick Armey (R-Tex.) submitted a bill (H.R. 1341) that would have amended the NLRA to enable individual workers to opt out of union representation. The bill would have preserved a union's status as exclusive union representative in a workplace, but individual workers – even those who voted for the union – could opt out and instead represent themselves in bargaining for their own wages, hours, and other terms and conditions of employment. What is more, those workers would not have to pay mandatory union dues.

Under Armey's bill, the terms and conditions negotiated by a union would apply only to those workers who opted to be represented by the union. So, although a certified union would not have to contend with competing unions, it would represent only those workers who wanted the representation and were willing to pay for it. Moreover, those who agreed to accept the representation and pay for it would have had to affirm their consent in writing, and their consent could be withdrawn at any time.

Unfortunately, Armey's bill was virtually ignored by the Democrat-controlled 103rd Congress and received very little attention in the press. It died quietly in a House subcommittee without receiving a vote.

INDIVIDUAL WORKERS' FREEDOM

If it had been adopted, Armey's bill would have been a major step toward protecting the freedom of individual workers. However, the bill did not go far enough in enabling employees to designate representatives of their own choosing. Lawmakers should introduce a new "Voluntary Bargaining" bill that expands choice of representation in the workplace and that ensures contractual freedom.

Pluralistic representation One important component of such legislation would be for individual employees in a workplace to be able to have different representatives. Some employees might pick a fellow worker, some might pick a union, some might pick a different union, some might pick nonunion organizations such as employment agencies,

and some might decide to represent themselves. There would be pluralistic representation.

Unions claim that pluralistic representation would be unworkable. Many employers, too, think pluralistic representation would greatly complicate the collective bargaining process. However, before 1935 it was legal for different unions to represent groups of workers who did the same job for the same employer. That was called members-only bargaining, and it was usually done by the unions forming a joint bargaining committee made up of members from unions in proportion to the workers they represented. For example, if there were 100 workers with 25 represented by union A, 50 by union B, and 25 representing themselves, the bargaining committee's make-up would be one-third (25/75) from union A and two-thirds from union B. That practice usually worked fairly well. In fact, members-only bargaining is typical in most of Europe. The original NLRA invented exclusive representation, which was soon copied in Canada. Today, the United States and Canada are the only major countries in which it is used.

ACCEPTING THE UNION LABEL? Workers vote on forming a union.

DAMIAN DOVARGANES/AP

Voluntary Bargaining Voluntarism is not only an important freedom for workers; it is equally important for employers who should be free to choose whether to bargain with certain representatives. As it currently reads, the NLRA forces employers to bargain "in good faith" with certified unions. Case law shows that means employers must compromise with unions; no take-it-or-leave-it bargaining is permitted.

On the other hand, in ordinary contract law, all of the parties to a contract have to consent to enter into the bargaining process and agree to all of the terms that emerge as a result of the bargaining process. Contracts that are the result of coerced bargaining are considered null and void. But when it comes to collective bargaining contracts, coercion permeates every step of the bargaining process.

Mandatory good faith bargaining should be stripped out of the NLRA. If a group of employees hires an agent to represent them in the sale of their labor, then any employer who wants to hire them must bargain with their representative. But all employers should be free to refuse to bargain for the group's labor. Instead, employers could bargain with other workers or their representatives for the needed labor.

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Contractual Freedom In a completely deregulated labor market, there would be no reason to forbid voluntary exclusive representation, voluntary union security, and voluntary union-free hiring. An employer should be free to make job offers that include a notice that his firm operates on the principle of exclusive representation. Job applicants should be free to decide whether to accept or reject such offers.

The problem with the extant situation is not exclusive representation itself, but that the law compels exclusive representation. If an employer chooses to settle the issue of which union will represent all his workers by majority vote of the workers, so be it. The responses of workers to his job offers, as well as the responses of his customers and suppliers, will tell him whether that choice was wise or foolish. The employer, the employee, and the suppliers and customers would all be free to take their business dealings elsewhere.

The same is true for union-free "yellow dog" employment contracts. An employer should be free to make offers that include a notice that he hires only union-free workers and that if an employee joins a union, the employment relationship will be terminated. Job applicants could then freely decide whether to accept or reject such offers. The market will soon indicate whether such contracts are wise or foolish.

It is impossible to predict what competitive forms of labor relations would emerge in a labor relations market that is unchained from federal regulation. But whatever they might be, the successful forms would be those that best serve the interests of all the parties involved — the employees, the employer, the suppliers, and the customers. Now is a good time to start that discovery process. R

Controlling Cloning

By Henry I. Miller, M.D.
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The federal Food and Drug Administration (FDA) has launched two new salvos in the battle over cloning. Last spring, Dr. Kathryn Zoon, director of the FDA's Center for Biologics Evaluation and Research, threatened to shut down any attempts at human cloning after two scientific groups claimed that they would soon attempt to produce a human baby. Speaking to a House subcommittee, Zoon testified, "FDA views the use of cloning technology to clone a human being as a cause for public health concern," and assured Congress members that "FDA would not permit any such investigation to proceed."

More recently, the FDA showed that its concerns over cloning extend beyond human reproduction, by informing livestock-cloning companies that it will prohibit duplicated animals and their offspring from entering the food chain. Officials at the FDA's Center for Veterinary Medicine said they consider genetically identical cattle and pigs — analogous to Dolly the sheep, the first cloned mammal — to be "experimental" and not appropriate for human consumption.

Although there is an increased mortality rate compared to naturally conceived offspring and clones that survive to term frequently die early in life of "large offspring syndrome" (perhaps caused by known subtle differences in gene regulation even among animals derived from the same cell), the animals that survive "infanthood" appear to be normal. That fact, and the attraction of having consistent top-quality stock, has prompted farmers to begin ordering animals that are identical genetic copies of an existing animal. As one technologically bullish farmer who owns a pair of clones of a prize-winning Holstein cow observed, they are essentially twins of "a cow that was already in production."

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THE FDA AND CLONING

Cloning — of humans, at least — offers many thorny ethical issues, to be sure. A failure in the procedure could lead to grotesque deformities or the premature "death" of the clone. As described above, clones are likely to manifest subtle differences in gene expression, which might be manifest as unacceptable traits in human offspring. Even if the pro-

A WOOLLY PROBLEM?
Dolly the sheep

JOHN CHADWICK/AP

cedure were wholly successful, questions could arise as to who is responsible for the clone's development (to say nothing of its upbringing and college education). Moreover, there is no clear medical necessity for the procedure because there is no patient whose life or limb is at risk without it.

But one thing does seem clear in the debate over cloning: The FDA lacks the legal authority to interdict such research. The agency is responsible for regulating products — drugs, vaccines, pacemakers, X-ray machines, foods, and other items that meet certain statutory definitions. However, it has no authority to oversee processes or concepts like "cloning." Cloning need not involve the testing, use, or sale of an FDA-regulated product, yet we have FDA officials pushing the regulatory envelope and asserting jurisdiction over it.

PUSHING THE ENVELOPE

The prospect of FDA oversight of cloning and a requirement for pre-market review of cloned organisms is ominous. After all, this is the same agency (and, at the Center for Veterinary Medicine, many of the very same officials) that took nine years to review and approve bovine growth hormone, even though the FDA had previously taken only 18 months to approve the human analog, human growth hormone. Such disparities and uncertainties in the timing and expense of regulatory approval are anathema to corporate planners and to others who are tempted by the possibilities of a new technology.

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Why does the FDA push the envelope and create new regulatory disincentives to the use of biotechnology? There are several reasons: First, regulators are always seeking to expand their mandates and responsibilities. Expanding budgets and organizational size invariably lead to increased bureaucratic power and perks. And besides, it is in regulators' nature – as former FDA commissioner Frank E. Young once quipped, "Dogs bark, cows moo, and regulators regulate."

Second, there are only a handful of companies that perform animal cloning, or fertility groups that might attempt human cloning, for commercial purposes. Therefore, the politically powerful biotechnology industry and pharmaceutical trade associations have shown no interest in challenging the regulators. Only a few civil libertarians and students of regulation are likely to remonstrate against the FDA's assertion of jurisdiction.

Third, regulators are part of a lopsided decision-making process that is inherently biased against change and innovation. To see why, one must understand that regulators are susceptible to two types of mistakes: approval of a product that ultimately proves harmful, and delay or rejection of a product that would prove beneficial if it were on the market. In the first sort of error (Type I, in the parlance of risk analysis), a regulator permits something harmful to happen; in the second (Type II), a regulator prevents a benefit. Both errors have negative consequences for the public, but they have quite different impacts on the culpable regulator.

To see those differing effects, consider the FDA's 1976 approval of the swine flu vaccine. That decision is generally recognized as a Type I error because, although the vaccine was effective at preventing influenza, it had a major side effect that was unknown at the time of its approval: A small number of recipients suffered temporary paralysis from Guillain-Barré Syndrome. When that was discovered, it set off a whirlwind of government investigations, media reports, and public worry that produced a tightening of FDA regulations — and greater risk-aversion in future generations of FDA reviewers and managers.

Type I mistakes are highly visible and have immediate consequences. The developers of the product and the regulators who allow it to enter the market are excoriated and punished. Because a regulator's career might be damaged irreparably by an erroneous approval that was given in good faith, approval decisions are often made defensively. In other words, regulators have considerable incentive to avoid Type I errors at any cost, even if that means committing Type II errors. As an FDA official for many years, I call this the "sweaty palms" school of policy-making: If a regulator does not understand or is vaguely uneasy about a new product or technology, he interdicts or delays.

FEDERAL POWER

The FDA has a long and unsavory history of pushing the regulatory envelope beyond that which is legal and in the public interest. The agency's attempts to regulate cigarettes as a "drug delivery device" were rejected by the courts after lengthy and expensive litigation. Similarly, the FDA's efforts to interfere with constitutionally protected commercial free speech — in the form of drug companies' distribution of articles and textbooks that describe not-yet-approved uses of marketed drugs — have been struck down repeatedly and condemned by the judiciary. The FDA's requirement that companies perform drug testing on children represents a shocking attempt to arrogate the prerogatives of the private sector. And the agency's historic decision to remove harmless breast implants from the market terrified thousands of women, fostered spurious litigation for non-existent damages, drove Dow-Corning into bankruptcy, and interrupted the availability of silicone for other essential pharmaceuticals.

The fundamental question behind such regulation is, what is the appropriate threshold for the use of federal executive power? During the Clinton administration, government action seemed the remedy of first resort for any issue. Every societal ill, inequity, or iniquity was fair game for federal relief.

The controversy over cloning is more about the abuse of federal power than it is about the abuse of cloning technology or the possible risks of a "cloneburger." It will be instructive to see to what extent that power is reined in when the Bush administration appoints a new head of the FDA. Let us hope the nominee is not a clone of the last two. R