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REPLY

THE MARKET FOR UNION SERVICES: REFRAMING THE DEBATE

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WHAT is union representation? Is it a banding together of employees for mutual aid and protection? Or is it the decision by a group of employees to contract with a provider of negotiation services? And what, then, is the union representation election? A laboratory experiment, a rough-and-tumble election, or something else entirely?

At the center of my article, Information and the Market for Union Representation,[1] is a new conception of the union representation election. My many thanks to Catherine Fisk, Harry Hutchison, and Jeff Hirsch for their thoughtful and thought-provoking essays in response to the article.[2] This Essay is a brief reply to their efforts, in hopes that it is just the beginning of a much more extended conversation about the way we conceive of and regulate union representation.

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[1] Matthew T. Bodie, Information and the Market for Union Representation, 94 Va. L. Rev. 1 (2008).

[2] Catherine L. Fisk, Thoughts on Treating Union Representation Processes as a Market in Need of Legally Required Disclosure of Information, 94 Va. L. Rev. In Brief 1 (2008); Jeffrey M. Hirsch, Rent-to-Own Unionism?, 94 Va. L. Rev. In Brief 9 (2008); Harry G. Hutchison, The Market for Union Representation: An Information Deficit or Rational Behavior?, 94 Va. L. Rev. In Brief 15 (2008).

Traditionally, labor law has characterized the election as a laboratory in which the "uninhibited desires" of employees can be distilled or as a political campaign in which two sides vie for victory.[3] These metaphors, however, are more misleading than instructive. Instead of the enforced sterility of the laboratory or the competitive hurly-burly of an election, a better approach is to see the election as a decision whether or not to purchase union representation services.[4] Because the union is selling a collective good, an election provides a means for determining the wishes of the majority. But framing the decision as an election does not change the underlying dynamic—namely, employees are deciding whether or not to pay a particular union to represent them in collective bargaining.

Although the commentators all have different responses to this "purchase-of-services" paradigm, none of them argue that the laboratory conditions model or the political campaign model should remain ensconced as the appropriate framework. Moreover, all three seem to agree on the importance of the information to the representation election process.[5] However, they diverge in their concerns about the policy implication of this new approach. Because the article focused on establishing both the new approach and the information deficiencies that the new approach illuminates, I did not spend much time on the policy implications. But since the commentators have brought up a number of fascinating possibilities, I would like to devote the substance of this brief Essay to the policy implications they raise.

MANDATORY DISCLOSURE

The representation election is the decision point in an extended process during which employees judge for themselves whether they want a union to serve as their collective representative. There are significant reasons to be concerned about the information that employees get through this process. Information asymmetry, inverse

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[3] Bodie, supra note 1, at 8–25.

[4] Id. at 35.

[5] Fisk, supra note 2, at 7 (discussing "the substantial information problems that already exist in the [election] process"); Hirsch, supra note 2, at 14 (discussing the "information deficiencies implicated by union elections"); Hutchison, supra note 2, at 16 (discussing how "information may help workers to make a free and reasoned choice").

employer incentives, and the toleration of misrepresentations are just some of the concerns raised in the article about the information provided to employees under current "market" conditions.[6] These informational deficiencies, I argue, may lead employees to make suboptimal decisions in the union representation market.

In the article, I discuss mandatory disclosure as a traditional regulatory response to information deficiencies.[7] However, I also note that a system of mandatory disclosure would not be a "panacea" and that there would be "significant concerns about the efficacy and the costs of such a system."[8] Indeed, I hope that the article provides a starting point for the question of whether—not just how—a system of mandatory disclosure could assist in remedying the potential deficiencies.

Professors Fisk and Hirsch seem particularly concerned about the specifics of such a system. Hirsch argues that mandatory disclosure would not provide the information most valuable to the employees' decision, such as how well the union will negotiate on their behalf, or the "employer's financial situation and ability to make concessions."[9] Of course, this problem is not unique to union representation; initial public offerings, for example, cannot tell potential buyers how much the stock will be worth after the offering. However, they can tell buyers all sorts of lesser-order information that might help in making the overall decision. And in fact, a system of disclosure could require an employer to disclose its "financial situation." Mandatory disclosure could include both unions and employers as part of the process.

Professor Fisk raises the concern that the article focuses on union disclosure and ignores the real problem of employer-provided (mis)information. Using the purchase-of-services model, Fisk raises a number of fascinating possibilities about how a disclosure regime could be shaped.[10] Would employees have a way of getting access to this disclosure? Would there be damages for misinformation? Perhaps her primary concern, however, is the role of the employer as "anti-seller"—an entity with enormous power seeking to

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[6] Bodie, supra note 1, at 45–69.
[7] Id. at 69–73.
[8] Id. at 69–70.
[9] Hirsch, supra note 2, at 10–11.
[10] Fisk, supra note 2, at 4.

dissuade the employees from making the purchase.[11] Fisk believes the employer's control over the information flow distorts the information that employees receive, and she worries that the article's concern about union-oriented information overshadows these more critical deficiencies.

The role of the employer in the market for union representation is a curious one. There is generally no "anti-seller" in a market for services, let alone an anti-seller that can impose penalties for failing to heed its wishes. The employer's only legitimate role in the process is as a provider of information to employees. Given the other deficiencies in the market—a lack of competition between unions, for example—the need for negative information about a particular union is heightened. But as I note in the article, the employer's incentive for dissuading employees would seem to be inversely related to the benefits that employees would get from the union—the better the union is at providing representation services, the worse it is for the employer.[12] Thus, the employer is often a poor proxy for the interests of employees. I certainly agree with Fisk that a regime of mandatory disclosure by unions would only address a small piece of the overall puzzle. Nevertheless, those who favor reducing the role of employers in the process must acknowledge the role that employers play in providing information and must consider the consequences of eliminating that information.

CARD-CHECK AND NEUTRALITY AGREEMENTS

A discussion of the union representation election would be incomplete without an acknowledgement of the increasing number of representation decisions made through a neutrality and/or card-check agreement. Such agreements are voluntary contracts between unions and employers in which they agree that (a) the employer will not speak for or against the union (neutrality) and/or (b) the employer will recognize the union if it can get signed authorization cards from a majority of the unit members (card-

[11] Id. at 1.

[12] Bodie, supra note 1, at 51–55. Of course, this is only a general rule; both employer and employees would have strong reasons to avoid a corrupt union.

check).[13] Congress came close to passing a law last summer that would have allowed unions to be certified by the Board through a card-check process.[14] Many commentators believe that such agreements are the wave of the future for union organizing.

From a purchase-of-services perspective, card-check agreements make a lot of sense. They allow the employees to make their own decisions just as most such purchasing decisions are made. The use of an election is a highly unusual market device, and as Professor Fisk notes, having an anti-seller trying to dissuade the purchaser is even stranger. Although the article does not address the "easy in, easy out" system discussed by Professor Hirsch, such a model would arguably be closer to the market-oriented approach that the article espouses. We usually do not erect barriers to purchasing decisions—either entry or exit—akin to those in the union representation context.

Professor Fisk fears that opponents of card-check and neutrality agreements will seize on this article as "vindication of their view that card-check and neutrality are bad because they silence speech."[15] As she correctly intuits, however, the article does not really support such an interpretation.[16] It is true that such agreements do not provide for a sustained election campaign, and therefore there is less time and opportunity for employees to learn about their representation choices. However, as noted earlier, the employer is often a poor supplier of information for employees, as it has its own (generally quite different) interests at stake. In fact, I believe the answer is not to prohibit such agreements, but rather to build in some information protections to insure that employees get the data they need. If Congress revisits the Employee Free Choice Act, it should consider building in such protections as a way of achieving a new card-check system that better balances the legitimate interests at stake.[17]

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[13] For a deeper discussion of these agreements, see James J. Brudney, Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms, 90 Iowa L. Rev. 819 (2005).

[14] Employee Free Choice Act of 2007, H.R. 800, 110th Cong. § 2 (2007).

[15] Fisk, supra note 2, at 7.

[16] In fact, Professor Hutchison reads my article as supporting card-check legislation. See Hutchison, supra note 2, at 17.

[17] The Board's *Dana Corp.* decision endeavors to protect employee free choice by requiring a forty-five-day window for decertification petitions. Dana Corp., 351

MORE INFORMATION EQUALS LESS UNION REPRESENTATION?

In considering the choice of union representation, I believe in the purchase-of-services model for many reasons. I believe it more accurately captures the underlying dynamic of the decision at issue. I believe it provides for a novel and illuminating way to reconsider many of the policy decisions that Congress and the Board have made. But perhaps most importantly, I believe that the purchase-of-services model reorients the field back to the most important player in this drama: the employee.

Under the NLRA, the two primary players are the union and the employer. The representation election campaign pits the union against the employer, and if successful, the union continues the struggle against employer in collective bargaining. Labor law naturally attracts partisans who are either for or against unions. Union supporters seemingly assume that all employees would be better off if they were in unions, while union opponents believe that unions use rhetoric and fraud to fool employees into thinking that the union has their interests at heart.

I am seeking to redraw the lines here. By reframing the law around a purchase-of-services model, I endeavor to put the employee back at the center of the debate. The law should make sure that the individual employee has the resources necessary to make the best decision for her interests. The article points out a number of factors in the representation process that impede information flowing to employees. Thus, an employee-oriented labor law must endeavor to remedy these information failures.

As Professor Hutchison point out, it is of course possible that more information will mean that fewer employees will be interested in unionization.[18] An employee-oriented labor law must be comfortable with such a result: if employees are making such choices in their rational self-interest, then the law has done its job. However, there are reasons to believe that, as with the stock mar-

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N.L.R.B. No. 28 (Sept. 29, 2007). However, this is an ex post approach; it may be more fruitful to consider an ex ante approach that makes information available before the decision is made.

[18] Hutchison, supra note 2, at 22. According to Professor Hutchison, my article claims that "union negotiations secure better terms and conditions for workers." Id. at 19. However, while I argue that this is what "successful" unions do, I do not make any empirical claims as to their overall results. See Bodie, supra note 1, at 39.

ket, more information will mean stronger consumer confidence and thus a more robust market.[19] An NLRB that works to establish a framework for informed decisions may make employees more willing to take the leap of faith that unionization requires. Whatever the result, employees must drive the process.

I am most grateful to Professors Fisk, Hirsch, and Hutchison for their commentary, as well as the *Virginia Law Review* for providing the *In Brief* forum. I hope that this forum is the beginning of a continuing discussion about the nature of the representation election and of union representation itself.

[19] For more on this argument, see Bodie, supra note 1, at 67–69.