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RESPONSE

THE MARKET FOR UNION REPRESENTATION: AN INFORMATION DEFICIT OR RATIONAL BEHAVIOR?

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THE National Labor Relations Act provides the legal framework for private-sector workers to choose collective representation. The National Labor Relations Board (“NLRB”) supervises this process and relies on an election campaign model that is premised on the assumption that competition between the union and the employer will generate sufficient information to enable workers to reach a rational decision. In his recent article, *Information and the Market for Union Representation*, Professor Matthew Bodie asserts the NLRB’s model fails to ensure the inclusion of sufficient relevant information.¹ Offering a “purchase of services” paradigm as an alternative way to understand the decision to choose or refrain from choosing to join a union, Bodie conceives the representation election as a collective economic decision rather than the end result of a political campaign. In order for the market for union representation to function satisfactorily, adequate knowledge is required. Bodie states that this market is afflicted by a number of difficulties, including information asymmetry, inverse employer in-

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¹ Matthew T. Bodie, *Information and the Market for Union Representation*, 94 Va. L. Rev. 1, 47 (2008).

centives, absence of competition among unions, and the lack of public confidence in labor unions.² Information deficiencies impair employees' capacity to act rationally. Professor Bodie tenders a provisional solution—mandatory disclosure aimed at boosting public confidence in the market for union representation.

Based on insights derived from mandatory disclosure requirements within the nation's securities market, Bodie concedes that additional disclosures may "create costs and . . . change market dynamics in inefficient ways."³ Despite these welcome caveats, Bodie's proposal suffers from a number of shortcomings. First, unions may resist disclosure initiatives unless they are paired with a card-check certification program, which defeats the goal of enabling workers to make rational decisions about union membership. Second, Bodie's conception of capture focuses on employer capture and ignores the problem of capture by outside interest groups aligned with union hierarchs. Finally, Bodie's mistaken conclusion that unions secure better conditions for workers leads to a faulty assessment of the problem of free riding. This response addresses each problem in turn.

Although information may help workers to make a free and reasoned choice, efforts to mandate additional disclosure may be impractical because unions have historically opposed transparency. Moreover, they are unlikely to welcome additional disclosure initiatives. Nowhere is this clearer than in the example of unions' fierce opposition to the disclosure of their spending on politics. Unions spend only a fraction of their dues revenues on collective bargaining and related activities, and expenditures for political and related purposes have continued to rise on a per member basis.⁴ Apparently believing that the disclosure of such information would impair their ability to attract and retain members, unions often refuse to provide verifiable information to dues payers about how dues are spent.⁵ Such lack of transparency is further compounded

² See *id.* at 47–67.

³ *Id.* at 68–70.

⁴ Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* 12 (2004).

See Press Release, U.S. House Committee on Education and the Workforce, Johnson Introduces Three Bills to Hold Union Leaders Accountable, Improve Accountability & Transparency on Behalf of Union Members (March 3, 2005), available at

by the fact that union spending is not subject to an independent audit. This lack of accurate information implies that workers who decide to join a union may be doing so simply because they are uninformed.

Over time, however, workers may acquire accurate knowledge, narrowing the information deficit. If so, they may rationally attempt to withdraw their support for unions, although barriers to exit remain. Richard Epstein predicted such moves, forecasting that private sector labor unions cannot gain ground because they no longer provide their membership with benefits that outweigh their costs.⁶ Consistent with Epstein's analysis, current union density rates fail to differ greatly from union penetration rates prior to the passage of the NLRA.⁷

Given the likelihood that his proposal will adversely affect union representation efforts, Bodie suggests that mandatory disclosure be softened by combining it with a card-check certification program that would make it easier for unions to organize. This solution amounts to a remarkable capitulation to paradox: if rational decisionmaking is the goal, why should anyone be troubled when rational choice shrinks union density rates? By decreasing the probability of a contested election, neutrality and card-check agreements reduce the likelihood that workers will receive relevant information from employers. Mandatory disclosure may be useful in boosting public confidence in the market for union representation, but when coupled with a card-check program, its larger purpose appears clear enough: increasing unionization within the private-sector labor market.

The second deficiency associated with Bodie's proposal is his reliance on a constrained conception of capture to shape his approach. He insists that conflict of interest problems result from un-

<http://republicans.edlabor.house.gov/archive/press/press109/first/03mar/unionbills030305.htm>.

⁶ Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *Yale L.J.* 1357, 1407 (1983).

⁷ Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values*, 14 *Wm. & Mary Bill Rts. J.* 1309, 1345 n.216 (2006) (citing Harry G. Hutchinson, *Diversity, Tolerance, and Human Rights: The Future of Labor Unions and the Union Dues Dispute*, 49 *Wayne L. Rev.* 705, 721 (2003)).

ions being captured by employers.⁸ But public choice theory shows that the possibility of capture, grounded in self-interest, is not limited to employers. Both ideological and economic forms of self-interest shape all human activity, including the self-interested conduct of outside interest groups aligned with union leaders and union hierarchs. It is possible to achieve private aims and objectives through government processes more efficiently than by relying on market processes.⁹ This same tendency afflicts labor unions. Unions often act as political and ideological entities as opposed to labor organizations. The existence of outsiders, animated by nonrepresentational issues,¹⁰ who are allied with union hierarchs, constitutes a rich source of agency costs. This signals that some unions have been captured by subgroups of workers, union majorities, or entrenched leaders. After capture, “[t]hose in power may . . . deploy general group revenues to finance special interest benefits as opposed to excludable club goods that might provide benefits solely to members.”¹¹ It is unlikely that during a representation campaign, unions will eagerly disclose their informal but nonetheless real capture by outsiders and union hierarchs.

Even so, Bodie’s analysis challenges employer involvement in the representation decision. Bodie intimates that the employer is an unnecessary third party to the representation transaction between workers and their purported agent (the union) because employers will have an incentive to disseminate negative information about the union.¹² Equally clearly, union hierarchs and outsiders as rational third parties will have an incentive to overstate the positive information associated with unionization, because they are primarily animated by the prospect of acquiring union dues to fund their politics. Analysis focused on this probability appears to be missing. It is not clear that Bodie’s mandatory disclosure regime would necessarily constrain pro-union arguments made by outsid-

⁸ Bodie, *supra* note 1 at 71.

⁹ William C. Mitchell & Randy T. Simmons, *Beyond Politics: Markets, Welfare, and the Failure of Bureaucracy* 107–08 (1994).

¹⁰ See, e.g., Chavez & Gray, *supra* note 4, at 18–19 (listing union support for abortion, opposition to welfare reform, and the support for legalization of marijuana and noting information linking unions and outside groups such as the Democratic Socialists of American).

¹¹ Hutchison, *supra* note 7, at 1342.

¹² Bodie, *supra* note 1, at 53.

ers, no matter how misleading their activities may be. This is so despite the existence of NLRB precedent precluding outside groups from offering certain kinds of inflammatory appeals on behalf of employers.¹³

Capture by self-interested hierarchs and outsiders “is rooted in the political and social ambitions of unions and their leaders.”¹⁴ “Even staunch union supporters blanch over the autocracy, entrenchment, and corruption of some union leaders.”¹⁵ Accountability is largely absent because the evidence indicates that “union elections provide members with little real control over leaders,” and “unions are inherently undemocratic.”¹⁶ Evidence shows that unions, far from advancing collective bargaining goals and objectives, appear too occupied by nonrepresentational objectives, including ideological gains purchased through coercive transfers (dues) from represented workers.¹⁷

Professor Bodie’s failure to flesh out the likelihood of union capture by union hierarchs and outside interest groups gives rise to a third deficiency: his conclusion that union negotiations secure better terms and conditions for workers.¹⁸ This conclusion persuades him to support a prevailing—but questionable—conception of free riding. He argues that “[e]mployees choose unions because of the [employer-negotiation] services they provide.”¹⁹ Bodie’s approach presumes that all represented workers benefit from such representation, but his analysis ignores two problems. First, labor union capture produces political and ideological benefits that are shared by union hierarchs and their ideological allies, yet there is an ab-

¹³ See, e.g., Stanley D. Henderson, *Labor Law: Cases and Comment* 211–15 (2d ed. 2005).

¹⁴ Hutchison, *supra* note 7, at 1317.

¹⁵ Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. Ill. L. Rev. 367, 368 (1992) (footnotes omitted).

¹⁶ *Id.* at 369–70.

¹⁷ See Robert P. Hunter et al., *The Michigan Union Accountability Act: A Step Toward Accountability and Democracy in Labor Organization* 4–15 (2001), available at <http://www.mackinac.org/archives/2001/s2001-02.pdf> (Observing that the United States Supreme Court approved a detailed examination of union financial records suggesting that (A) in *Communications Workers of America v. Beck*, seventy-nine percent of union dues were not chargeable to collective bargaining and related activities, and (B) in *Lehnert v. Ferris Faculty Association*, the union spent ninety percent of its dues revenue on non-representational activities).

¹⁸ Bodie, *supra* note 1, at 38–39.

¹⁹ *Id.* at 36.

sence of evidence showing that workers share in such benefits. Second, union organizing does not supply pecuniary benefits to all workers. This is particularly true for workers who eventually lose their jobs due to unionization. Additionally, some newly represented workers will discover that representation provides little change in their economic circumstances. In the short run a successful union organizing campaign that results in a collective bargaining agreement—an unlikely event—may simply shift “union members in lower-wage jobs into the nonunion sector, and, accordingly, the wage rate paid in the nonunion sector falls.”²⁰ If unions succeed in negotiating wage increases, in the long run unionized employers may adjust to higher union wages with additional layoffs implemented either through technology improvements or outsourcing that further diminish gains attributable to unionization.

“Organizing can have at least two purposes: political and social transformation, on the one hand, and pecuniary gains, on the other.”²¹ Complexity haunts Bodie’s approach because unions no longer see themselves as limited vehicles designed to further the workers’ interest in the issues of wages, hours, and working conditions. No longer operating as agents, instead unions operate as principals. They issue forth as engines of progress as part of a radical vanguard that leads to societal transformation. Although this move may alter the social and political landscape of the country, it may impair the autonomy as well as the economic and ideological interest of represented workers.

The failure of all beneficiaries to the pay costs incurred in acquiring benefits gives rise to free riding. Partially consistent with this premise, Bodie states that “Congress permitted a union to charge nonmembers on the theory that nonmembers would be essentially free riding on the union’s services if payments were not made.”²² He argues that the Supreme Court has helped to make “the point that represented employees are paying for a service—that of union representation.”²³ That is not all they are paying for. Indeed, up to eighty percent of the benefits from unionization accrue to outsiders and union hierarchs in pursuits of nonrepresenta-

²⁰ Hutchison, *supra* note 7, at 1379.

²¹ *Id.* at 1392.

²² Bodie, *supra* note 1, at 39.

²³ *Id.* at 39–40.

tional (including ideological and political benefits) objectives for themselves and their political allies.²⁴ Dennis Mueller claimed that “[w]here the benefits from collective action are not the same across all group members, *there is a systematic tendency for “exploitation” of the great by the small.*”²⁵ Consistent with Mueller’s analysis, workers who are required to pay union dues and fees, but who fail to share the union’s preferred political outlook (possibly a majority of the workforce), as well as workers who fail to receive actual economic benefits, are exposed to the possibility that they will become *forced* riders when a labor union succeeds in its effort to represent workers.

While Professor Bodie offers a thoughtful proposal, unexplored issues persist, including his partial reliance on the conclusion that employer coercion and administrative delay remain key concerns in the regulation of the union representation election. Though administrative delay remains a problem, the employer coercion hypothesis has been decisively undermined by Professor Keith Hylton’s analysis.²⁶ Moreover, Professor Bodie’s thesis must confront the realities of a postmodern world wherein the dominant view about unions has splintered. No longer can we presume that workers are bound together in some transcendent conception of common interest that justifies the sacrifice of their individual interest to solidarity and the communal good. It is unlikely that a majority of workers share the conviction that conventional unions are the best vehicles for the advancement of their interests.²⁷ Without such conviction the prospect of a collectively rational outcome favoring union representation becomes increasingly difficult to imagine.

Friedrich Hayek emphasized the role of the price system in solving society’s economic problem, which is “how to secure the best use of resources known to any of the members of society, for ends

²⁴ Hutchison, *supra* note 7, at 1381.

²⁵ Dennis C. Mueller, *Public Choice* II 309 (rev. ed. 1989) (quoting Mancur Olson Jr., *The Logic of Collective Action* 29 (1965)).

²⁶ Keith N. Hylton, *Law and the Future of Organized Labor in America*, 49 *Wayne L. Rev.* 685, 695–698 (2003) (repudiating the employer coercion thesis and showing that the union win-rate in elections declined steadily from roughly eighty percent in 1940 to fifty percent in the mid 1970s and then remained at 50 percent until the present).

²⁷ Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 *Lab. Law* 117, 118 n.2 (1996) (citing research showing an absence of worker support for conventional labor unions).

whose relative importance only these individuals know.”²⁸ Put another way, “it is a problem of the utilization of knowledge which is not given to anyone [including the government] in its totality.”²⁹ Hayek believed that the price system, by aggregating widely dispersed interests and tastes, operates in such a way that society’s resources are allocated efficiently.

Hayek’s insights about the price system suggest that Bodie’s proposals for increased disclosure may not work to unions’ advantage. Even if unions continue to operate as cartels largely motivated by ideological gains, and if unions and their allies attempt to camouflage the costs and overstate the benefits of representation, in the long run it is likely that employers and capital markets will respond to the new labor market dynamics, thus enabling workers to acquire adequate information that narrows any resulting information deficit. Workers, as autonomous and adaptive principals, will respond to the market by rationally choosing—or more likely by declining to choose—union representation.

²⁸ Israel M Kirzner, *The Meaning of Market Process: Essays in the Development of Modern Austrian Economics*, 139 (1992) (quoting Friedrich A. Hayek, *The Use of Knowledge in Society*, in *Individualism and Economic Order* 77, 77–78 (1948)).

²⁹ *Id.*