Essay

Guns, Firms, and Zeal: Deconstructing Labor-Management Relations and U.S. Employment Policy

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> *"Why did wealth and power become distributed as they now are, rather than in some other way? . . . The history of interactions among disparate peoples is what shaped the modern world . . . ."*
>
> –Jared Diamond, Guns, Germs, and Steel: The Fates of Human Societies 5–6 (1997).

INTRODUCTION

Jared Diamond has received wide acclaim for his Pulitzer Prize-winning book—*Guns, Germs, and Steel: The Fates of Human Societies*[1]—which charts the path of human history. Professor Diamond asks why Europeans explored and dominated populations in North America and Africa, rather than the other way around, and he concludes that Europeans prevailed because of guns, germs, and steel, referring to (1) their advanced weapons; (2) devastating epidemics among people who had no immunity to infectious diseases; and (3) other advantages associated with tools and implements made of steel.[2] It is only slightly less ambitious to attempt a de-

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1. JARED DIAMOND, GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES (1997).

2. Professor Diamond summarizes the "proximate factors that resulted in Europeans' colonizing the New World instead of Native Americans' colonizing Europe" as follows:

> Immediate reasons for Pizarro's success [in capturing Atahuallpa] included military technology based on guns, steel weapons, and horses; infectious diseases endemic in Eurasia; European maritime technology; the centralized political organization of European states; and writing. The title of this book will serve as shorthand for those proximate

construction of labor-management relations in the United States.

There is no shortage of insightful commentary regarding the ebb and flow of U.S. labor and employment policy, unions, and labor-management relations,[3] and this Essay does not dispute any of the diverse views expressed by advocates on all sides. Much of the available analysis, however, leaves unanswered two fundamental questions. First, *why* have labor-management issues continued to spawn such immense acrimony, seemingly without regard to the state of affairs regarding labor-management relations and changing levels of union representation? Second, does answering the first question provide any insights about potential alternate paths for those who advocate changes in U.S. labor and employment law?

With apologies to Professor Diamond, this Essay suggests three concepts—*guns*, *firms*, and *zeal*—that shed light on these questions. "Guns" refers to the bargaining model central to the National Labor Relations Act (NLRA), where each side's leverage largely stems from economic damage it may inflict on the other party. "Firms" refers to companies and unions and their emergence as part of a nationwide economy that existed when the NLRA became law in 1935. "Zeal" refers to the discourse

> factors, which also enabled modern Europeans to conquer peoples of other continents.

DIAMOND, *supra* note 1, at 80–81.

3. *See, e.g.*, Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993); Dale Belman & Paula B. Voos, *Union Wages and Union Decline: Evidence from the Construction Industry*, 60 INDUS. & LAB. REL. REV. 67 (2006); Richard A. Epstein, *Labor Unions: Saviors or Scourges?*, 41 CAP. U. L. REV. 1 (2013); Cynthia L. Estlund, *Are Unions Doomed to Being a "Niche Movement" in a Competitive Economy?*, 155 U. PA. L. REV. PENNumbra 165 (2006); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3 (1993); Henry S. Farber, *Nonunion Wage Rates and the Threat of Unionization*, 58 INDUS. & LAB. REL. REV. 335 (2005); John Godard, *The Exceptional Decline of the American Labor Movement*, 63 INDUS. & LAB. REL. REV. 82 (2009); William B. Gould IV, *A Century and Half Century of Advance and Retreat: The Ebbs and Flows of Workplace Democracy*, 86 ST. JOHN'S L. REV. 431 (2012); Raymond L. Hogler, *The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions*, 23 HOFSTRA LAB. & EMP. L.J. 101 (2005); David Millon, *Keeping Hope Alive*, 68 WASH. & LEE L. REV. 369 (2011); Katherine S. Newman, *The Great Recession and the Pressure on Workplace Rights,* 88 CHI.-KENT L. REV. 529 (2013); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010); Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581 (2007).

regarding labor-management policy issues that has become so contentious in recent years.

As to the first question posed above—*why* labor-management issues currently involve so much "zeal"—I suggest that the answer is heavily influenced by "guns" and "firms," combined with a global economy that was barely imaginable in 1935 when the NLRA was adopted.[4] The potential infliction of economic injury affects companies, unions, and employees very differently now, in an economy that defies national boundaries, because there is a much greater risk, both real and perceived, that economic conflict may result in financial ruin, and unions understandably regard employer opposition (regardless of the reasons) as challenging their institutional existence. This hypothesis—described in Part I below—differs from the time-worn suggestion that labor-management relations are inherently adversarial.[5] Rather, the work of labor economists John R. Commons and Selig Perlman, who are perhaps the two most authoritative historians of the American labor movement, indicates that a similar situation arose when the transition to national markets resulted in unprecedented business competition, which, in turn, caused extensive labor-management instability.[6]

As to the second question posed above, examining these concepts—guns, firms, and zeal—suggests that some alternative paths may provide opportunities for a different, more constructive evaluation of labor and employment policy reforms.

4. This Essay focuses on technological and other changes responsible for global competition which, in turn, has tended to destabilize labor-management relations. *See infra* notes 13–27 and accompanying text. Such changes have also increased the extent of competition *within* the United States in equally profound ways. Therefore, I believe the observations in the text have similar relevance to the hospitality and service industries, for example, and other U.S. employers, employees, and unions even if they are not directly involved in international commerce.

5. There have been many examples of significant labor-management cooperation and constructive labor relations. *See, e.g.*, *infra* notes 8–9 and accompanying text.

6. John R. Commons and Selig Perlman carefully documented the history of the American labor movement, commencing with a 1786 strike among Philadelphia wage-earners who demanded a minimum wage of six dollars per week. *See* 1 JOHN R. COMMONS, HISTORY OF LABOUR IN THE UNITED STATES 25–30 (1918); SELIG PERLMAN, A HISTORY OF TRADE UNIONISM IN THE UNITED STATES 36–41 (1922); *see also* PHILIP S. FONER, THE HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: FROM COLONIAL TIMES TO THE FOUNDING OF THE AMERICAN FEDERATION OF LABOR 338–40 (1947).

These potential alternative paths are described in Part II below.

The ensuing discussion is subject to several important disclaimers. First, as noted previously, these views are not intended to supplant or detract from the many diverse opinions that scholars and practitioners in this area have expressed.[7] No single theory or explanation accounts for the current state of U.S. labor-management relations. Labor-management relations involve a wide variety of relevant issues, so support usually exists somewhere, to some degree, even for the most extreme views on all sides of every argument. Thus, former Chairman John Fanning served on the NLRB under Democrats and Republicans for nearly twenty-five years, and he stated, "[a]s someone who . . . participated in some 25,000 decisions of the Board, I can assure you that the one factor every [NLRB] case has in common . . . is the presence of at least two people who see things completely different."[8]

Second, this Essay does not advocate changes in current law. As a member of the NLRB, I am committed to the even-handed enforcement of the *current* NLRA, which, in its present form, provides important protection to employees, unions, and employers. There is no shortage of scholars, commentators, and practitioners who seek to expand, limit, or otherwise modify the protection afforded by the NLRA and other statutes. Congress is responsible for establishing the appropriate balance of interests between employers, unions, employees, and the public, and for determining whether there should be changes in current law. I completely yield to others the question of whether or how anyone should argue for such changes.

Third, the NLRA's reliance on economic injury—which creates an incentive for parties to inflict or threaten one another with economic harm—does not mean unions and companies are irrevocably committed to ruinous conflict and adversarial labor-management relations. Many companies, unions, and employees have forged constructive relationships and have jointly re-

7. *See, e.g.*, *supra* note 3 (citing articles expressing a number of diverse opinions relating to the American labor movement).

8. John H. Fanning, *The National Labor Relations Act: Its Past and Its Future*, *in* FIRST ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE 59, 62 (William F. Dolson ed., 1985), *quoted in* Matthew M. Bodah, *Congress and the National Labor Relations Board: A Review of the Recent Past*, 22 J. LAB. RES. 699, 713 (2001).

solved many difficult workplace problems.[9] Similarly, this Essay's discussion of economic conflict under the NLRA is not meant to disparage the Act. Possible resort to economic weapons is the engine Congress devised for inducing parties to agree upon *alternatives* to industrial strife.[10] The types of economic injuries permitted under the Act—and whether there might be some adjustment in the available weapons as part of broader labor reform efforts—are worthy of discussion, particularly since these issues play such an important role in our statutory scheme.

Finally, it is important to recognize that many parties will have difficulty finding common ground regarding these matters. Representatives of unions and management frequently have years of experience giving rise to strong feelings about the other side's actions, practices, and motives.[11] Some people may believe that their interests are well served by continuing the status quo, and others may believe that constructive discourse constitutes the improper surrender of fundamental ideological views. At a minimum, such differences demonstrate that the

9. *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 162–80 (1984); *see also* James T. Bennett & Bruce E. Kaufman, *Introduction* to WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE 1, 2 (James T. Bennett & Bruce E. Kaufman eds., 2007); THOMAS A. KOCHAN & PAUL OSTERMAN, THE MUTUAL GAINS ENTERPRISE: FORGING A WINNING PARTNERSHIP AMONG LABOR, MANAGEMENT, AND GOVERNMENT 45 (1994); IRVING H. SIEGEL & EDGAR WEINBERG, LABOR-MANAGEMENT COOPERATION: THE AMERICAN EXPERIENCE 76–97 (1982); SUMNER H. SLICHTER, JAMES J. HEALY & E. ROBERT LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT (1960); George H. Cohen, Dir., Fed. Mediation & Conciliation Serv., Address at the White House Labor and Management Partnership Summit (Dec. 6, 2013), http://www.fmcs.gov/internet/itemDetail.asp?categoryID=39&itemID=24405.

10. *See infra* Part I.B; *infra* notes 27–37 and accompanying text.

11. Of course, forceful advocacy regarding employment matters in the workplace among two or more employees is affirmatively protected under the NLRA. *See, e.g.*, Starbucks Coffee Co., 355 N.L.R.B. 636, 636 (2010); Datwyler Rubber & Plastics, 350 N.L.R.B. 669, 670–71 (2007); CKS Tool & Eng'g, 332 N.L.R.B. 1578, 1580–81, 1586 (2000). Regarding the NLRB, I have written that one can even "reasonably expect to be criticized for engaging in the *effort* to have 'dispassionate' discourse since the work of the Board affects jobs, families, communities, the economy, employment stability, and a wide array of freedoms (*e.g.*, freedom of speech, association, competition, individual versus collective decision-making, and the exercise versus non-exercise of NLRA rights)." Philip A. Miscimarra, Address at the ABA Committee on Practice and Procedure under the National Labor Relations Act, *Angels, Demons and the NLRB—Perspectives on Congressional Oversight* 2 (Mar. 3, 2012), https://www.morganlewis.com/pubs/Miscimarra_AngelsDemonsNLRB_03march12.pdf.

NLRA has continuing relevance, as reflected in the contentious discussion of so many labor-management policy issues.[12]

I. GUNS, FIRMS, AND ZEAL: THE ELEMENTS OF STRUCTURAL DISCORD

From its inception, the NLRA has produced a steady stream of criticism from all sides, much of it directed at the NLRB.[13] This gives rise to the question raised earlier: *why* is

12. Not much has changed since Professor Summers made the following observation about the NLRB more than fifty years ago:

> The labor lawyer's world is not a secure one, for [the lawyer] walks on a thin crust of precedents. The body of Board decisions in many areas often gives an appearance of firmness only to have tremors beneath the surface open unexpected fissures or raise new ranges of decisions. In our primitiveness we may see these faults and upheavals in the crust of precedents as acts of God or Satan, crediting angels or devils incarnate in the bodies of Board members. With the appointment of new members the warning rumblings become more noticeable, and we spur our efforts to seek out the spirits and identify them as good or evil.

Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 93 (1955).

13. Democrats and Republicans alike, at different times, have challenged the work of the Board, as evidenced by the following eight examples.

(1) A 1947 Senate report regarding the Taft-Hartley amendments to the NLRA stated:

> The need for such legislation is urgent. . . . [T]he administration of the National Labor Relations Act itself has tended to destroy the equality of bargaining power necessary to maintain industrial peace. . . . Moreover, as a result of certain administrative practices . . . the Board has acquired a reputation for partisanship, which the committee bill seeks to overcome, by insisting upon certain procedural reforms.

S. Rep. No. 80-105 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407, 408 (1948).

(2) A 1984 House report quoted a statement by James Kane—then President of United Electrical, Radio, and Machine Workers of America—that the Board was "dominated by anti-labor zealots." SUBCOMM. ON LABOR-MGMT. RELATIONS OF THE COMM. ON EDUC., & LABOR, 98TH CONG., THE FAILURE OF LABOR LAW—A BETRAYAL OF AMERICAN WORKERS 14 (Comm. Print 1984) (citations omitted). The report also indicated there was a "collapse of confidence in the objectivity of the current Board," because the Board "altered the substance of the law in a manner contrary to the objectives of the Act." *Id.* at 15–16.

(3) In 1997, House Republicans conducted a hearing in which then General Counsel Fred Feinstein was called "the most biased General Counsel in history." *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1998*, *Hearings Before the Subcomm. on the Dep'ts of Labor, Health & Human Servs., Educ. & Related Agencies of the H. Comm. on Appropriations*, Part 6, 105th Cong. 706 (1997) (statement of Rep. Henry Bonilla). Feinstein was questioned regarding "the frequency of

there so much antipathy regarding labor-management issues, where the competing views have been unaffected by changing metrics regarding union density and levels of union representation?

[his] contact with union attorneys," and accused of extravagance relating to "private showers for Board Members, chauffeur-driven limousines, private libraries for Board members, and a kitchen and cooks at Board headquarters." Matthew M. Bodah, *Congress and the National Labor Relations Board: A Review of the Recent Past*, 22 J. LAB. RES. 699, 706 (2001).

(4) In 2007, a joint hearing was conducted by the House and Senate labor committees regarding the NLRB in which Democratic House Committee on Education and Labor Chairman George Miller stated that "brick by brick, the NLRB has worked to dismantle the foundation of workers' rights in this country." *The National Labor Relations Board: Recent Decisions and their Impact on Workers' Rights*, *Joint Hearing Before the Subcomm. on Health, Emp't, Labor & Pensions of the H. Comm. on Education & Labor, and Subcomm. on Emp't & Workplace Safety of the S. Comm. on Health, Educ., Labor & Pensions,* 110th Cong. 2 (2007) (prepared statement of George Miller, Chairman, H. Comm. on Educ. & Labor).

(5) To the same effect, Democratic Senate Labor Committee Chairman Edward Kennedy stated:

> This board has undermined collective bargaining at every turn, putting the power of the law on the side of lawbreakers, not victims, on the side of a minority of workers who want to get rid of a union, not the majority who want one and on the side of employers who refuse to hire union supporters, not the hard-working union members who want to exercise their democratic rights.

Id. at 15 (statement of Edward Kennedy, Chairman, S. Comm. on Health, Educ., Labor, & Pensions).

(6) In 2011, the Subcommittee on Health, Employment, Labor and Pensions of the House Committee on Education and the Workforce held a hearing, where Republican Subcommittee Chairman Phil Roe stated, "the Board has abandoned its traditional sense of fairness and neutrality and instead embraced a far more activist approach," and that "[n]umerous actions by the Board suggest it is eager to tilt the playing field in favor of powerful special interests against the interests of rank and file workers." *Emerging Trends at the National Labor Relations Board*, *Hearing Before the Subcomm. on Health, Emp't, Labor & Pensions of the H. Comm. on Educ. & the Workforce,* 112th Cong. 2 (2011).

(7) In a 2013 hearing, Democrat John F. Tierney stated that Republicans were pursuing a "special interest driven anti-worker agenda" to "lower wages, impede workers' rights to associate freely, and threaten the economic security of the middle class." *Hearing on H.R. 2346 "Secret Ballot Protection Act," and H.R. 2347 "Representation Fairness Restoration Act" Before the Subcomm. on Health, Emp't, Labor & Pensions* of the *H. Comm. on Educ. & the Workforce,* 113th Cong. (2013), *available at* http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=340556 (statement of Rep. John F. Tierney).

(8) At the same hearing, Republican Phil Roe stated that the NLRB was imposing a "radically different" standard regarding bargaining units where "labor bosses will gerrymander workplaces, [and] employers will be buried in union red tape." *Id.* (statement of Phil Roe, Chairman, Subcomm. on Health, Emp't, Labor & Pensions).

This Essay suggests that one answer to this question involves structural discord that results from the combination of three things: (1) the manner in which employers and unions functioned in the national economy that existed when the NLRA was adopted (i.e., "firms"); (2) the NLRA bargaining model, which focuses in large part on the threatened or actual infliction of economic injury (i.e., "guns"); and (3) the impact of our increasingly global economy on these aspects of U.S. labor and employment policy, which explains to a significant degree the contentious nature of labor policy debates in recent years (i.e., "zeal"). These three elements are briefly described below, followed by an examination in Part II of the potential implications for any future discussions about labor and employment policy reform.

A. FIRMS—IMPACT OF A CHANGING ECONOMY

Labor and legal scholars have written extensively about the uneven course of union representation and collective bargaining in the United States, dating back to this country's origins. This work reveals that the history of U.S. unions has been inextricably tied to the economy, and, in particular, to the extent of relevant markets. In his authoritative history of the U.S. labor movement, John R. Commons emphasized that the labor movement accompanied the "extension of markets" to our national boundaries.[14] Thus, by the 1880s, according to Commons, "the extension of markets had practically reached its limit . . . and the nation had become a single market."[15]

Further economic development produced the "labour movement of the twentieth century"[16] that became the focus of New Deal legislation in the 1930s. Commenting on this "modern movement,"[17] Commons observed that "on the one side, the huge corporation, [and] on the other side, the trade union . . . *each reached a stage of centralisation under a single head that brooks no competitor*—far beyond the loose and tolerant syndicates of capital or unions of labour in foreign lands."[18]

Labor economist Selig Perlman traced the development of unions in the shoe industry, which he said "epitomized the gen-

14. COMMONS, *supra* note 6, at 6.
15. *Id.* at 8.
16. *Id.* at 21.
17. *Id.* at 8.
18. *Id.* (emphasis added).

eral economic evolution of the country."[19] At first, the industry was "purely local,"[20] but improved transportation prompted business owners to expand into other markets.[21] Initially, this market expansion significantly increased "cut-throat" competition and depressed prices, with substantial downward pressure on wage rates.[22] According to Perlman, "The capitalist . . . placed himself across the outlets to the market and dominated *by using all the available competitive menaces to both contractor and wage earner*. Hence the bitter class struggle."[23] By the 1890s, however, the business climate became more advantageous to manufacturers because they acquired greater competitive leverage based on the introduction of national store chains and better intellectual property protection.[24] Consequently, labor-management relations improved and the "industrial class struggle [began] to abate in intensity."[25] Perlman explained:

> The employer, now comparatively free of anxiety that he may be forced to operate at a loss, is able to diminish pressure on wages. But more than this: the greater certainty about the future, now that he is a free agent, enables him to enter into time agreements with a trade union. At first he is generally disinclined to forego any share of his newly acquired freedom by tying himself up with a union. But if the union is strong and can offer battle, then he accepts the situation and "recognizes" it. Thus the class struggle instead of becoming sharper and sharper with the advance of capitalism and leading, as Marx predicted, to a social revolution, in reality, grows less and less revolutionary and leads to a compromise or succession of compromises—namely, collective trade agreements.[26]

19. PERLMAN, *supra* note 6, at 269.

20. *Id.*

21. *Id.*

22. *Id*. at 271, 273–74.

23. *Id*. at 271–72 (emphasis added). To the same effect, when describing the "single market" that emerged from economic expansion by the 1880s, Commons stated it was "menaced at every point of its vast expanse by every competitor, no matter where situated." COMMONS, *supra* note 6, at 8.

24. PERLMAN, *supra* note 6, at 274.

25. *Id*.

26. *Id*. at 274–75. In addition to the impact of geographic expansion, labor-management relations have also been greatly affected by cyclical fluctuations in the economy. Perlman wrote: "The character of the labor struggle has been influenced by cyclical changes in industry as much as by the permanent changes in the organization of industry and market." *Id*. Perlman elaborated as follows:

> [W]hat determined the plane of thought and action at any one time *was the state of business measured by movements of wholesale and retail prices and employment and unemployment*. When prices rose and margins of employers' profits were on the increase, the demand for labor increased and accordingly also labor's strength as a bargainer;

Thus, when the NLRA was enacted in 1935, (1) American trade unions and companies both functioned in a national economy, and (2) the United States was regarded as distinct and independent from other countries. This was described by Commons, writing in 1918:

> The vast area of the United States, coupled with free trade within that area and a spreading network of transportation, has developed an unparalleled extension of the competitive area of markets, and thereby *has strikingly distinguished American movements from those of other countries*. It is almost as though the countries of Europe, from Ireland to Turkey, from Norway to Italy, had been joined in a single empire like China, but, unlike China, had passed through a century of industrial revolution. Here, indeed, we have had at first thirteen, and now forty-eight sovereign states *within a single empire* . . . .[27]

B. GUNS—THE NLRA'S ECONOMIC INJURY MODEL

The NLRA (or "Wagner Act")[28] resulted from years of work by Congress in the midst of the Great Depression.[29] Consistent with then-existing union and corporate growth, the Act's legis-

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> at the same time, labor was compelled to organize to meet a rising cost of living. At such times trade unionism monopolized the arena, won strikes, increased membership, and forced "cure-alls" and politics into the background. *When, however, prices fell and margins of profit contracted, labor's bargaining strength waned, strikes were lost, trade unions faced the danger of extinction, and "cure-alls" and politics received their day in court. Labor would turn to government and politics only as a last resort, when it had lost confidence in its ability to hold its own in industry*. This phenomenon, noticeable also in other countries, came out with particular clearness in America.

Id. at 276–77 (emphasis added).

27. COMMONS, *supra* note 6, at 5–6 (emphasis added).

28. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

29. The Wagner Act legislation dates back to March 1, 1934, when Senator Robert F. Wagner introduced S. 2926 during the 73d Congress. S. 2926, 73d Cong. (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1 (1949) [hereinafter LEGISLATIVE HISTORY]. Companion legislation—H.R. 8423—was introduced in the House by Representative William Connery, Chairman of the House Committee on Labor. H.R. 8423, 73d Cong. (1934), *reprinted in* 1 LEGISLATIVE HISTORY, *supra*, at 1128 (introduced March 1, 1934). Prior to the Wagner Act's adoption, important labor-management issues were addressed in the Norris-La Guardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932), and the National Industrial Recovery Act (NIRA), Pub. L. No. 73-67, 48 Stat. 195 (1933) (codified as amended at 15 U.S.C. §§ 703–712 (2012)). The Supreme Court declared the NIRA unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

lative history reveals that Congress focused on "the protection of *Nation-wide* commerce."[30]

Paradoxically, the NLRA safeguards the right of employees, unions, and companies to *utilize* strikes, lockouts, and a variety of other economic weapons in order to *avoid* obstructions to commerce.[31] As the Supreme Court stated in *NLRB v. Insurance Agents' International Union*,[32] parties in collective bargaining "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."[33]

30. As stated in the Senate report on S. 1958 (which, with some refinement, became the Wagner Act):

> An analysis of the effect of a decline in mass purchasing power upon all commercial transactions forces the conclusion that the protection of Nation-wide commerce depends as much upon a floor for wages as upon a ceiling for prices. And in stabilizing wages, no factor plays a more important role than collective bargaining.

S. Rep. No. 74-573, at 18–19 (1935), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 29, at 2318.

31. NLRA § 1, 29 U.S.C. § 151 (2012) (establishing policy "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions"); *see also* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 674 (1981) ("A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce." (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937))); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964) ("One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."); Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 295 (1959) ("The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining . . . and thereby to minimize industrial strife.").

32. 361 U.S. 477 (1960).

33. *Id*. at 487–89. The NLRA's legislative history includes references to many labor disputes that caused substantial economic dislocation in the early twentieth century. As reflected in one Senate report:

> The first objective of the bill is to promote industrial peace. The challenge of economic unrest is not new. During the period from 1915 through 1921 there were on the average 3,043 strikes per year, involving the vacating of 1,745,000 jobs and the loss of 50,242,000 working days every 12 months. From 1922 through 1926 the annual average totaled 1,050 strikes, 775,000 strikers, and 17,050,000 working-days lost. From 1927 through 1931 the yearly average for disputes was 763, for employees leaving their work 275,000, and for days lost 5,665,000. In 1933 over 812,137 workers were drawn into strikes, and in 1934 the number rose to 1,277,344. In this 2-year period over 32,000,000 working-days were lost because of labor controversies. While exactitude is impossible, reliable authority has it that over a

It has been tricky to maintain the right balance in this calculus because it risks producing a cure that could kill the patient. The right of unions and employers to engage in strikes, lockouts, and related tactics—if used too frequently or on too large a scale—could destroy the very unions and companies whose activities are being protected. Debilitating conflict, if realized, could impede or eliminate the hope of fostering economic security for employees, family members, customers, vendors, suppliers, and local and state governments, all of whom are dependent on successful businesses. Yet, these businesses can only accomplish their objectives through the people they employ.

In part to refine the statute's balancing of labor-management interests, important NLRA amendments were adopted in 1947 as part of the Taft-Hartley Act, which, among other things, added union unfair labor practices to the Act.[34] In 1959, the Landrum-Griffin Act amended the NLRA in other respects, including adjustments to the Act's "secondary boycott" provisions (which afford protection to "neutral" parties not directly involved in the "primary" dispute giving rise to a labor-management conflict).[35] In 1974, Congress adopted amendments to address particularized concerns regarding the role of the NLRA in healthcare settings.[36]

Under the NLRA and its various amendments, potential economic harm has been the engine of collective bargaining for nearly eighty years.[37] Over this period, our bargaining model has produced many instances of successful agreements and collaboration between employers, unions, and employees on an array of complex issues.[38] And since the 1930s, all kinds of enterprises in the United States have flourished, as have many

> long range of time the losses due to strikes in this country has amounted to at least $1,000,000,000 per year. And no one can count the cost in bitterness of feeling, in inefficiency, and in permanent industrial dislocation.

S. Rep. No. 74-573, at 1–2 (1935), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 29, at 2300–01.

34. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

35. Labor Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended in scattered sections of 29 U.S.C.).

36. Health Care Amendments to the National Labor Relations Act (the "Health Care Amendments"), Pub. L. No 93-360, 88 Stat. 395 (1974) (codified as amended in scattered sections of 29 U.S.C.).

37. *See supra* notes 30–32 and accompanying text.

38. *See, e.g.*, sources cited *supra* note 9 (listing authorities who cite to examples of such agreements).

millions of represented and unrepresented employees, resulting in goods and services that benefit people throughout the world.

Yet, it is also undeniable that labor-management conflict under the NLRA has, at times, imposed real costs on employers, unions, employees, and others. The Taft-Hartley amendments resulted in large part from labor-management strife that occurred in the aftermath of World War II (during which there had been stringent wage-price controls).[39] Some commentators have also written that collectively bargained gains—though conferring important benefits—have involved tradeoffs causing or contributing to layoffs, shutdowns, or the decline of certain employers and industries.[40]

C. ZEAL—IMPACT OF ECONOMIC INJURY IN A GLOBAL ECONOMY

The primary question posed at the outset of this Essay is *why* labor-management issues have continued to spawn such immense acrimony, seemingly without regard to the current state of affairs of labor-management relations, levels of union representation, and similar matters. This question—which focuses on what I call "zeal"—can be explained in part by considering together the two other concepts described previously: firms (how employers and unions functioned in the 1930s when the Wagner Act was adopted), and guns (the role played by economic injury in the NLRA's bargaining model). When evaluating the interaction of these concepts (firms and guns), one should keep in mind the work of labor economists such as Commons and Seligman, who directly attributed the emergence of stable unions and companies—and stable labor-management relations—to the existence of a national economy. As noted previously, they concluded that stable labor-management relations resulted when the national economy "brook[ed] no com-

39. Jack Barbash, *Unions and Rights in the Space Age*, *in* THE U.S. DEPARTMENT OF LABOR BICENTENNIAL HISTORY OF THE AMERICAN WORKER 248 (Richard B. Morris ed., 1976), *available at* http://www.dol.gov/oasam/programs/history/chapter6.htm.

40. Because management and union representatives agree to collectively bargained contract terms, this undermines arguments that one side bears sole responsibility for the consequences of labor negotiations. Long-term trends, however, are clearly influenced by the legal framework that governs collective bargaining, including the economic weapons available to the parties, among other factors. For two interesting accounts regarding the impact of collective bargaining on very different industries, see JOHN HELYAR, THE LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL (1994); JOHN HOERR, AND THE WOLF FINALLY CAME: THE DECLINE OF THE AMERICAN STEEL INDUSTRY (1988).

petitor" for companies and unions,[41] the United States constituted a "single empire" independent from other countries,[42] and this meant parties were "comparatively free of [economic] anxiety" because they had relative "certainty about the future."[43]

The American economy has undergone monumental changes since the NLRA's adoption in 1935, and the past several decades have been characterized by unparalleled global economic integration. Thus, as former Federal Reserve Chairman Ben Bernanke stated, "the greater part of the earth's population is now engaged, at least potentially, in the global economy."[44]

41. COMMONS, *supra* note 6, at 8.

42. *Id*. at 6 (emphasis added).

43. PERLMAN, *supra* note 6, at 274–75.

44. Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve, Global Economic Integration: What's New and What's Not?, Speech at the Federal Reserve Bank of Kansas City's Thirtieth Annual Economic Symposium (Aug. 25, 2006), *available at* http://www.federalreserve.gov/newsevents/speech/Bernanke20060825a.htm. Chairman Bernanke described post-World War II economic integration as resulting from "several factors, both technological and political," as follows:

> Technological advances further reduced the costs of transportation and communication, as the air freight fleet was converted from propeller to jet and intermodal shipping techniques (including containerization) became common. Telephone communication expanded, and digital electronic computing came into use. Taken together, these advances allowed an ever-broadening set of products to be traded internationally. In the policy sphere, tariff barriers—which had been dramatically increased during the Great Depression—were lowered, with many of these reductions negotiated within the multilateral framework provided by the General Agreement on Tariffs and Trade. Globalization was, to some extent, also supported by geopolitical considerations, as economic integration among the Western market economies became viewed as part of the strategy for waging the Cold War.
>
> . . . .
>
> By almost any economically relevant metric, distances have shrunk considerably in recent decades. As a consequence, economically speaking, Wausau and Wuhan are today closer and more interdependent than ever before.

Id. Thomas Friedman has similarly described our economic interdependence, which has increased dramatically in recent years:

> 'Globalization' is the word we came up with to describe the changing relationships between governments and big businesses. . . . But what is going on today is a much broader, much more profound phenomenon. . . . It is about things that impact some of the deepest, most ingrained aspects of society right down to the nature of the social contract. . . . What happens if the political entity in which you are located no longer corresponds to a job that takes place in cyberspace, or no longer really encompasses workers collaborating with other workers in different corners of the globe, or no longer really captures products produced in multiple places simultaneously? Who regulates the work?

In contrast to the early-twentieth-century assessment of relevant markets by labor economists Commons and Perlman, the modern-day global economy means that virtually nobody is "comparatively free" of anxiety over competition, nor can one have nearly as much "certainty about the future."[45] In this respect, employers operate in a climate similar to how Selig Perlman described the 1880s, when the expanded markets meant employers faced unprecedented competition, which, in turn, produced intense labor competition and wage pressure, resulting in substantial labor-management instability.[46] This makes it easier to understand why so many employers—and possibly employees—might presently have concerns about a process centered around the threat or infliction of economic injury on the business where people are employed. Conversely, for organized labor, the most objectionable element in this calculus is, understandably, the employer's resistance to union representation.[47] These factors almost invariably appear to place employers and unions in opposition to one another, while employees are left to determine what best advances their interests. In the resulting struggle, one can anticipate why companies and unions might denounce one another's motives and tactics without dispassionately examining the impact of real or threatened economic injury in a global economy.

Certainly, there are other explanations for the rancorous debate that has so often accompanied discourse over labor-management issues. One oft-cited factor relates to increased political partisanship, especially when Congress considers labor-management issues.[48] As I have previously written:

> [P]olitical polarization obviously affects Congress and the Board, but there may be disagreements here regarding what constitutes the "cause" and what constitutes the "effect." . . . It is not self-evident [whether] increased political polarization within Congress causes increased controversy regarding Board oversight; or whether the "someone wins/someone loses" aspect of NLRB decision-making is the reason congressional oversight activities involve greater political polarization. It is perhaps most likely that a complex variety of factors

THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 45 (2005) (quoting David Rothkopf, a former senior Department of Commerce official in the Clinton Administration).

45. PERLMAN, *supra* note 6, at 274–75 (emphasis added).

46. *See supra* text accompanying note 23.

47. *See* Estreicher, *supra* note 3, at 2–6; *cf.* Samuel Estreicher, *Trade Unionism Under Globalization, The Demise of Volunteerism*?, 54 ST. LOUIS U. L.J. 415 (2009).

48. *See supra* note 13.

> (*e.g.*, global competition, an unfavorable economy, declines in union density, *and* political polarization in the country) all contribute to an environment that makes Board actions and congressional oversight activities contentious and controversial.[49]

II. POTENTIAL IMPLICATIONS FOR LABOR AND EMPLOYMENT POLICY

Among advocates of labor and employment law reform, most recent efforts have focused on adjusting the law to increase the effectiveness of tools available to unions in organizing and collective bargaining, combined with limiting the ability of employers to oppose union representation.[50] Conversely, at other times, changes in the law have been criticized as being too favorable to employers.[51] In a global economy, where so many parties face exceptionally difficult challenges, such reform efforts arguably leave the players in the same arena while increasing the intensity of the weapons available to each side.[52] Thus, when such reforms are considered, it is predictable that many parties denounce one another without more critically evaluating the underlying reason there appears to be a zero-sum game—i.e., whatever one side wins, the other side loses.[53] Yet, from the perspective of U.S. policy, if one leaves unchanged the fact of global competition, then increasing labor-management conflict can result in negative consequences for *all* of the U.S. participants.

What alternative paths might provide opportunities for discussing changes to U.S. labor and employment policy on a more constructive basis? As noted previously, I do not advocate

49. Miscimarra, *supra* note 11, at 14. As indicated in note 13, *supra*, there is no shortage of examples where Democrats and Republicans in Congress have criticized the NLRB.

50. The most prominent recent example of such a proposed reform involved efforts to enact the Employee Free Choice Act (EFCA), introduced in the 111th Congress, which would have required union recognition based on majority support evidenced by signed authorization cards, the formulation of initial contracts based on arbitration if negotiated agreements did not occur within prescribed time periods, and the modification of certain NLRA remedies. *See* S. 560, 111th Cong. (2009); H.R. 1409, 111th Cong. (2009).

51. *See, e.g.*, supra note 13 (describing negative comments in 1984 and 2007, for example, criticizing NLRB decisions as undermining the interests of unions, workers and collective bargaining).

52. *See* Estreicher, *supra* note 3, at 30–33 (discussing a Canadian model of labor law reform).

53. *Id*. at 32–33 (critiquing attempts to strengthen union membership without changing existing rules to strengthen union competitiveness).

any particular reforms, but—by way of illustration—there are potential alternatives to the zero-sum-game approaches described above.

A. EMPLOYMENT *AND* LABOR LAW REFORMS

One possibility is to increase the size of the arena. This could involve a broader consideration of U.S. labor and employment policy reforms that extend beyond labor-management issues. For example, the NLRA was created to produce a single, national regulatory scheme that broadly preempted state and local law.[54] Especially when evaluating U.S. labor and employment policy in the context of global economic challenges, one

54. The Supreme Court explained the doctrine of federal preemption regarding labor law issues as follows:

> Congress [in the NLRA] did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal, and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. Indeed, Pennsylvania passed a statute the same year as its labor relations Act reciting abuses of the injunction in labor litigations attributable more to procedure and usage than to substantive rules.

Garner v. Teamsters Union, 346 U.S. 485, 490 (1953). In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Supreme Court likewise indicated that the NLRA incorporated a "single, uniform, national rule" that displaced the "variegated laws of the several States," even though the doctrine of federal preemption was described as involving "difficult problems of federal-state relations." *Id*. at 239, 241. The Court elaborated: "When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting." *Id*. at 243. *See also* Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n, 427 U.S. 132 (1976) (holding that States and the NLRB cannot regulate peaceful employee action not addressed in the NLRA). *See generally* ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 1078–110 (2d ed. 2004). The Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 (2012)), similarly preempts a broad array of state laws regarding employee benefits issues. *See* ERISA § 514, 29 U.S.C. § 1144 (providing that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"); Dist. of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125 (1992); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988); Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985); Shaw v. Delta Air Lines, 463 U.S. 85 (1983); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981).

might evaluate labor law changes while, at the same time, advocating more uniform state employment laws, or even a single federal regulatory scheme that would broadly preempt state and local laws regarding employment discrimination and harassment, wage-hour and overtime practices, and wage-payment obligations, in addition to employment-related remedies, among other things. Employers, unions, and employees might each reap significant benefits from eliminating the current multiplicity of state and local employment rights and obligations. The result might be greater uniformity and, possibly, a more efficient system for resolving employment-related legal disputes.

Extraordinary challenges—legal, practical, and political—would complicate any effort to secure a consensus on wide-ranging legal reforms affecting U.S. labor and employment laws generally. Many advocates, for multiple reasons, are likely to oppose any curtailment of state and local employment laws, which often afford legal protection and remedies not available at the federal level.[55]

Yet, others may argue that, when there is a federal system of employment regulation (part of which already purports to preempt state and local laws), it undermines any coherent national labor and employment policy to have fifty-plus regulatory systems concerning employment, particularly in a world characterized by intense international and domestic competition. In this regard, the "fifty-plus" number does not take into account the additional existence of multiple forums within most states for adjudicating employment-related claims— e.g., one for workers' compensation claims, another for wage-payment collection violations, and others for alleged employment discrimination, all in addition to state and local courts. The broader discussion of national labor *and* employment policy could encompass potential gains for *all* of the constituencies that so often have found themselves deadlocked in recent "winner-takes-all" labor-management debates.

B. REEVALUATE ECONOMIC WEAPONS AS PART OF BROADER LABOR LAW REFORM

Another approach—when evaluating other potential labor law reforms—could tackle, head-on, the types of economic con-

55. *See* Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 361–72 (1990).

flict permitted under the NLRA. This would be no easy feat. Our current system of protecting strikes, lockouts, boycotts, and work stoppages has existed for nearly eighty years. Because survival has turned on success in inflicting or surviving real or threatened economic injury, parties would understandably loathe the prospect of giving up any existing rights, and it would be entirely rational to aggressively seek a decrease in the weapons and protection available to others. If proposed reforms affect either the right to withhold one's labor[56] or the employment-at-will doctrine[57]—both of which have long been recognized as fundamental principles—this would further increase the difficulty of accomplishing employment regulatory reforms. In fact, for these and other reasons, one might see *bipartisan* opposition to suggested changes in the economic weapons currently available to parties involved in labor-management disputes.

Yet, current U.S. labor law obviously does not constitute the only way that one might resolve labor disputes, protect the interests of employers, employees, and unions, and provide incentives for parties to reach private agreements. Congress has succeeded at least four times in reaching a consensus regarding significant changes in U.S. labor law policy.[58] Moreover, at

56. *See, e.g.*, JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 7 (1916).

> This right to withhold property is like the laborer's right to withhold his labor, by refusing to work or by quitting work. But in the case of the laborer this is also "liberty"—a "personal" right rather than a "property" right. It is his right to withhold his services from the use of others until their value can be agreed upon. This is the legal basis of his wage bargain.

Id. But see Harry T. Edwards, *Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 373 (1972) ("In the private sector, granting of the right to strike under the NLRA was not due to recognition of any constitutional right, but rather was the result of a public policy decision that the right to strike was a valuable step in guaranteeing self-determinism to employees." (citing Dorchy v. Kansas, 272 U.S. 306, 311 (1926); United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971) (mem.))).

57. The employment-at-will doctrine has been described as "a basic premise undergirding American Labor law" which generally recognizes the right of employers "to discharge or retain employees at will for good cause or for not cause, or even for bad cause," except as otherwise prohibited by statute or common law. Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65 (2000) (quoting Payne v. W. & Atl. R.R., 81 Tenn. 507, 518 (1884)).

58. As noted previously, the NLRA was adopted in 1935, and was amended in important respects in 1947, 1959 and 1974. *See supra* text accompanying notes 34–36.

some level, real and threatened economic injury undermines the interests of employers, employees, and unions alike. Nor is it unprecedented in the United States to have laws imposing certain constraints on strikes, lockouts, and other types of economic weaponry. Many are imposed under current federal law, and we have decades of experience regulating public-sector labor-management relations with even more significant limitations on strikes, lockouts, and other types of industrial action.[59] And perhaps not coincidentally, the public sector is where organized labor since the 1960s has been much more successful in attracting and retaining employee members.[60] Companies and unions have also agreed to no-strike/no-lockout commitments in collective bargaining agreements throughout most of our history under the NLRA.[61] Thus, contrary to what one might initially think, it may not be so radical to discuss reforms that modify our existing treatment of strikes, lockouts, and work stoppages, especially if such reforms are considered in the context of broader labor and employment policy changes that advance a variety of interests.

C. OTHER POTENTIAL OPTIONS

Additional suggestions for reform have entailed even more dramatic departures from the current U.S. collective bargaining model, including proposals for European-style works councils,[62] increased reliance on multinational corporate codes of

59. *See* Suzanne C. Lacampagne, *The Public Sector Right to Strike in Canada and the United States: A Comparative Analysis*, 6 B.C. INT'L & COMP. L. REV. 509, 525–30 (1983).

60. *See, e.g.*, Richard B. Freeman, *Contraction and Expansion: The Divergence of Private Sector and Public Sector Unionism in the United States*, 2 J. ECON. PERSP. 63 (1988); Henry S. Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors* (Princeton Univ., Working Paper No. 503, 2005), *available at* http://harris.princeton.edu/pubs/pdfs/503.pdf (comparing the fall of private sector union membership with the growth of public sector union membership through the 1970s and 1980s).

61. Over the years, the impact, scope and enforcement of privately negotiated no-strike/no-lockout arrangements have been addressed in countless decisions of the Board and the courts, including many Supreme Court decisions. *See, e.g.*, Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970); Buffalo Forge Co. v. United Steelworkers Of America, 428 U.S. 397 (1976). *Cf.* JOHN T. DUNLOP, DISPUTE RESOLUTION: NEGOTIATION AND CONSENSUS BUILDING 159 (1984) (describing no-strike, no-lockout pledges used by the Atomic Energy Labor Relations Panel and the President's Missile Sites Labor Commission in 1949 and 1961, respectively).

62. *See, e.g.*, Roy J. Adams, *Should Works Councils Be Used as Industrial Relations Policy?*, 108 MONTHLY LAB. REV. 25 (1985).

conduct,[63] and the unbundling of unions from collective bargaining in favor of "political unions" to redress representational inequality among lower-income groups.[64] Efforts to pursue these types of options would probably involve even more formidable hurdles and tradeoffs, while spawning yet additional controversy, but they might still produce some discussions that differ from the zero-sum debates that have become so common in recent years.

CONCLUSION

Throughout our history under the NLRA, the carrot and stick of collective bargaining have been the desire to avoid economic injury while dealing with the risk that such injury will occur. This arrangement has promoted private agreements while preserving economic weapons which balance the competing interests of labor, management, and employees. Yet, in the context of global markets for products, services, *and* labor, these same elements (which I have described as guns, firms, and zeal) profoundly affect public discourse regarding U.S. labor-management relations.

America remains a country of great opportunity in a world of challenges. When addressing U.S. labor and employment policy issues, all parties will benefit from recognizing their mutual interest in reducing conflict and enhancing their shared competitive positions in a global economy.

63. *See, e.g.*, Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006); Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663 (1995); Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389 (2005).

64. *See, e.g.*, Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148 (2013).