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The Post-War Paradigm in American Labor Law*

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TABLE OF CONTENTS

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I. Introduction

The Supreme Court, in its interpretation of the National Labor Relations Act (NLRA),[1] has adopted a model of class relations, the ramifications of which are beginning to permeate other branches of federal law. This model has evolved doctrinally from the decision of *Textile Workers Union v. Lincoln Mills*,[2] which authorized the creation of a federal common law of collective bargaining agreements. Its substance is derived from the human relations school of industrial sociology. This model, which I shall call "industrial pluralism," is both a descriptive and a prescriptive vision of class relations in industrial society.

Industrial pluralism is the view that collective bargaining is self-government by management and labor: management and labor are considered to be equal parties who jointly determine the conditions of the sale of labor power. The collective bargaining process is said to function like a legislature in which management and labor, both sides representing their separate constituencies, engage in debate and compromise, and together legislate the rules under which the workplace will be governed. The set of rules that results is alternatively called a statute or a constitution—the basic industrial pluralist metaphors for the collective bargaining agreement.

This model of collective bargaining is the lens through which all issues that involve class relations have come to be viewed. As with any pair of lenses habitually worn, the distortions it causes have been long forgotten. The thesis of this article is that the industrial pluralist view of labor relations is based upon a false assumption: the assumption that management and labor have equal power in the workplace. Thus the model is a false description; that is, a set of prism glasses that distorts rather than clarifies the industrial world. As a false description, industrial pluralism obscures the real issues and problems posed by the exercise of power in the workplace, issues that the courts are now increasingly forced to confront. With increased government intervention in employment relations, industrial pluralism is proving to be an ill-suited analytic tool for the solution of the problems that arise. The internal contradictions within the model are surfacing, and the implications of the model, previously merely latent, are coming to light.

A. *The Long View of American Labor Law*

The history of labor relations law in this country can be viewed as a

1. 29 U.S.C. §§ 151-187 (1976 & Supp. III 1979).
2. 353 U.S. 448 (1957).

300-year-long debate over the proper level of government intervention in the relationship between employers and employees. In the colonial era, many features of the wage bargain were set by statute.[3] In the nineteenth century, however, the wage contract was redefined to be a private arrangement between two individuals—a seller and a buyer of a service—not amenable to legislative intervention.[4] The transaction, in this view, was no different from any other transaction between private individuals, and the role of law was merely to facilitate the transaction and to provide remedies should either side fail to perform. This view culminated in the case of *Lochner v. New York*,[5] in which the Supreme Court held that it was a violation of due process for a state to pass a law regulating maximum hours of work.

In 1935, the conception of appropriate state intervention in the workplace was reversed again. Congress passed the Wagner Act,[6] which gave workers the right to organize unions and to bargain collectively with their employers. Two years later, the Supreme Court held, in the case of *West Coast Hotel Co. v. Parrish*,[7] that a state may legislate minimum wages for work. Those two events signaled the establishment of a new era—they represented the high-water mark of government intervention in the employment relationship. They emerged from a conception of the wage bargain as a matter of public concern, the terms of which affect society as a whole.[8]

Since 1937, debate over the proper level of government intervention has developed along two tracks. On the one hand, a myriad of state and federal laws have been passed on the heels of *West Coast Hotel*, which regulate many aspects of the wage bargain, such as the minimum wage,[9]

3. *See, e.g.*, Massachusetts Bay Colony Code of 1648, *reprinted in* READINGS IN AMERICAN LEGAL HISTORY 230 (M. Howe ed. 1949).

4. *See, e.g.*, Millett v. People, 117 Ill. 294, 7 N.E. 631 (1886) (state law requiring coal mine to install scales for weighing coal and to pay miners tonnage rates violated due process by interfering with freedom of contract); Low v. Rees Printing Co., 41 Neb. 127, 59 N.W. 362 (1894) (state law requiring payment of extra compensation for work exceeding eight hours is unconstitutional violation of freedom of contract); Godcharles & Co. v. Wigeman, 113 Pa. 431, 6 A. 354 (1886) (state law requiring employers to pay workmen in money rather than in goods is unconstitutional violation of freedom of contract).

5. 198 U.S. 45 (1905).

6. Ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-187 (1976 & Supp. III 1979)). The original National Labor Relations Act, the Wagner Act, was amended by the Labor-Management Relations Act (known as the Taft-Hartley Amendments), in 1947. Ch. 120, tit. 1, § 101, 61 Stat. 136 (1947). The NLRA was further amended in 1959, by the Labor-Management Reporting and Disclosure Act (known as the Landrum-Griffin Amendments). Pub. L. No. 86-257, §§ 701(b), 703, 73 Stat. 542 (1959). In this article, the "Wagner Act" refers to the original 1935 Act and the "National Labor Relations Act" or "NLRA" refers to the Act after the 1947 amendments. The word "Act" refers to either depending on the context.

7. 300 U.S. 379 (1937).

8. *See id.* at 399-400.

9. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976 & Supp. III 1979).

health and safety conditions,[10] discrimination by race, sex,[11] and age,[12] and some of the terms of private pensions.[13] These statutes have generally been regarded as regulating peripheral conditions of the wage bargain.

The core conditions of the bargain, on the other hand, have been determined by collective bargaining. The Wagner Act established collective bargaining as the means by which workers themselves could determine the core conditions of the sale of their labor. The Act contained a package of rights for employees and imposed corresponding duties on employers to facilitate collective employee action, in order to create "equality of bargaining power between employers and employees."[14] The Act gave employees the right to organize, to bargain collectively, and to engage in concerted activities for mutual aid and protection.[15] It also gave employees the right to be free of employer interference with those rights by making it an unfair labor practice for an employer to dominate unions, to discriminate against employees because of union membership, to refuse to bargain with a certified union, or otherwise to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed [by the Act]."[16] The Act established an administrative agency, the National Labor Relations Board (NLRB), which was empowered to certify majority bargaining representatives[17] and to prevent unfair labor practices. The Board was authorized to conduct investigations into unfair labor practice charges, to hold adjudicatory hearings, to issue cease-and-desist orders, to award affirmative remedies, and, in appropriate cases, to petition the federal courts for injunctive relief to effect the goals of the Act.[18]

Despite the broad nature of the intervention detailed in it, the Act has been interpreted by industrial pluralists to confer no substantive rights upon labor at all. A procedural interpretation has emerged that treats the Act as a "bare legal framework" to facilitate private ordering by management and labor.[19] This interpretation has negated many of the substantive rights that the Act explicitly conferred. In fact, it has prevented intervention by government in employment relations more effectively than did the *Lochner* decision. Furthermore, this interpretive tradition is premised

10. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976 & Supp. III 1979).
11. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976 & Supp. III 1979).
12. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979).
13. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381 (1976 & Supp. III 1979).
14. 29 U.S.C. § 151 (1976); *see* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).
15. 29 U.S.C. § 157 (1976).
16. *Id.* § 158(a).
17. *Id.* § 159.
18. *Id.* § 160.
19. Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1000 (1955).

upon an assumption of equality of power between management and labor, the very equality that the Act was intended to create. This assumption has rendered the Act incapable of actually creating that equality.

B. *The Theory of Industrial Pluralism*

Archibald Cox, one of the leading theorists of industrial pluralism, describes the collective bargaining process as follows:

> In annual conferences, the employer and the union representing the employees, in addition to fixing wage rates, write a basic statute for the government of an industry or plant, under which they work out together through grievance procedures and arbitration the day-to-day problems of administration. By this "collective bargaining" the employee shares through his chosen representatives in fixing the conditions under which he works, and a rule of the law is substituted for absolute authority. With these roots in the ideals of self-rule and government according to law, the institution seems certain to grow, at least as long as there survives the political democracy on whose achievement it has followed.[20]

This is the basic industrial pluralist model for class relations;[21] it is deeply embedded in post-war American labor law doctrine and literature. Although it appears simple and straightforward, it represents a sophisticated, integrated, and comprehensive vision of class relations.

William Leiserson was the first to apply the metaphor of industrial self-government to American labor relations.[22] Referring to the English system of constitutional government, he described the joint meetings between the union and management as parliamentary, being "at the same time constitutional conventions and statute making legislatures."[23] To complete the analogy, Leiserson also stated that private arbitration of disputes under the collective agreement played the role of the judiciary and was necessary to the metaphoric constitutional government.[24]

20. Cox, *Some Aspects of the Labor Management Relations Act, 1947* (pt. 1), 61 HARV. L. REV. 1, 1 (1947).

21. *See* W. LEISERSON, AMERICAN TRADE UNION DEMOCRACY 6-7 (1959); C. GOLDEN & H. ROTTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY 40-43 (1942); Cox, *Some Aspects of the Labor Management Relations Act, 1947* (pt. 2), 61 HARV. L. REV. 274, 274-77 (1948).

22. Leiserson, *Constitutional Government in American Industries*, 12 AM. ECON. REV. 56, 60-61 (Supp. 1922). Leiserson was the Chairman of the Board of Arbitration of the Men's Clothing Industry in New York during the 1920s.

23. *Id.* at 62. This meant that the problem of judicial review—that is, the power of arbitrators to override the collective agreement—did not arise.

24. *Id.* at 63. Leiserson was speaking in a time when arbitration was uncommon to labor agreements. To show how well it worked, he applied the self-government metaphor to particular disputes resolved by the New York and Chicago garment industry arbitration boards. Thus, for example, he said that because a constitution must give all citizens equal protection, in the garment industry when

Arbitration is not a mere afterthought in this scheme, but goes to the heart of this vision of the collective bargaining process. Under the Wagner Act, once a union is formed, both the union and management have a statutory duty to bargain together to produce a written agreement.[25] Under any such agreement, issues of contract application and enforcement inevitably arise. If there is no mechanism for enforcing the collective agreement, then the duty to bargain is a sham, and the union has in fact achieved no power in the shop at all.

Therefore, the question of enforcing collective bargaining agreements is the same question as what power a union actually has under the statutory scheme set up by the Wagner Act. In the industrial pluralist model, disputes over breaches of collective agreements are not submitted to an administrative or judicial tribunal. Rather, they are submitted to the dispute-resolution mechanism that the parties in this mini-democracy have established for themselves—private arbitration. The arbitrator takes on the functions of a judge, outside of the legislative process of contract negotiations and above the day-to-day disputes between the parties. The power of the union, then, is to compel its employer to go to arbitration.[26] This, however, is a procedural power only. The actual power is determined in every given dispute by the particular arbitrator.

According to the industrial pluralist view, there is a separation of powers in the workplace: the parties are said to govern themselves democratically. A corollary of this description of the industrial world is the prescription that the processes of the state—the courts and administrative tribunals—should keep out. The workplace, portrayed as a self-contained mini-democracy, becomes in the industrial pluralist theory an island of self-rule whose self-regulating mechanisms must not be disrupted by judicial intervention or other scrutiny by outsiders.[27]

C. *This Article*

This article argues that the industrial pluralist model of collective bargaining represents an ideology shared by legal theorists, judges, industrial sociologists, and labor economists in the post-war era.[28] Those who shared

work is slack, arbitrators have ordered the companies not to layoff people, but to spread and share the work equally. *Id.* at 70. He gave other instances in which arbitrators, using the self-government metaphor, prevented subcontracting, *id.* at 73, approved featherbedding for workers displaced by technological change, *id.* at 74, and even discharged supervisors pursuant to a worker's complaint of abusive treatment, *id.* Arbitral decisions such as these are almost unheard of today, but Leiserson's basic vision of the workplace as a mini-democracy with the arbitrator as the judge has survived.

25. 29 U.S.C. §§ 158(a)(5), (b)(3) (1976).

26. Shulman, *supra* note 19, at 1007.

27. *Id.* at 1024.

28. Ideology is an elusive concept whose meaning has been defined differently by various writers. For the purposes of this article, I define ideology as the set of categories with which one views the

the ideology[29] were the post-war liberals who argued for a form of collective bargaining that would preserve the rights of labor unions. Their writings had an enormous impact on the shape of legal doctrine and on the terms of labor-management debates. Although some may disavow either the descriptive or prescriptive implications of the ideology, they all expressed in their writings a belief in the basic tenets of the industrial pluralist ideology. These tenets can be summarized as follows:

(1) the workplace under collective bargaining can be analogized to a political democracy;
(2) private arbitration is a necessary element in the workplace mini-democracy;
(3) in order to foster arbitration and to ensure the functioning of the mini-democracy, the processes of the state must not intervene;
(4) individual rights in collective bargaining must yield to the collective rights of the union; and
(5) under the Act, labor's only rights are to bargain collectively and to arbitrate its disputes with its employer.

This article takes a close look at this ideology in order to evaluate its plausibility as a description of the industrial world and its desirability as a prescription for the organization of class relations in society as a whole.

The next two sections trace Supreme Court doctrine that has interpreted the Act, in order to demonstrate the extent to which it has been informed by the industrial pluralist ideology. The remainder of the article is devoted to a critique of the ideology itself. The argument is that the ideology, although it has a certain surface plausibility, is fundamentally incoherent. It fails to provide an internally consistent basis for judicial decision, and it cannot account for the practice of arbitrators. The roots of this incoherency are traced to the fundamental flaw in the description of the industrial world that the ideology contains and to its prescription of government nonintervention in industrial life. It is also argued that the ideology, although incoherent and basicially unworkable, has had a tenacity and longevity in legal theory due to its fulfillment of certain unstated

world. Individuals and societies formulate categories in order to navigate in the world. Individuals need categories in order to organize experience and to act. E. SCHACTEL, METAMORPHOSIS 284 (1959). These categories are abstractions of experience and observation; they embody both a description of the world and a prescription for action. It is the formal coherence of such categories that I call "ideology."

29. Among them are Archibald Cox of the Harvard Law School, Harry Shulman, former Dean of the Yale Law School and Impartial Umpire for the UAW-Ford Motor Company agreement, John Dunlop, former Secretary of Labor, George Taylor, former chairman of the War Labor Board and founding President of the American Arbitration Association, Arthur Goldberg, former labor lawyer and Supreme Court Justice, Neil Chamberlain, economist at the Harvard Business School, Benjamin Aaron, a prominent arbitrator, and Sumner Schlicter, a leading labor economist.

functions—it serves as a vehicle for the manipulation of employee discontent and for the legitimation of existing inequalities of power in the workplace.

D. *A Final Preliminary Observation*

This article is a general critique of the interpretive history of the National Labor Relations Act. The Act, like most of the social legislation of the past forty-five years, is now coming under attack. Government regulation in many spheres of economic life is being curtailed, and the liberal programs of the past are being dismantled. In this context, there is also likely to be a reexamination of the rights of labor conferred by the Act. This article, in criticizing the prevailing interpretations of the Act, does not propose that the Act be jettisoned for its failures. On the contrary, it urges a substantive interpretation of labor relations.

The article's larger argument is that the industrial pluralist interpretation of the Act provided only a half-way measure. Under the guise of government regulation and protection, that interpretation delegated the crucial aspects of collective bargaining to a private forum, shielded from public penetration. Such half-way measures are characteristic of many liberal social programs of the last generation.[30] Medicaid and Medicare, for example, have attempted to provide health care to poor people without affecting the market-based pricing mechanism for health services.[31] Such programs brought certain aspects of economic life within the realm of government regulation, but the regulation itself involved the delegation of the crucial issues back to the private sector. This article is a case study of the failure of such half-way measures.]It is this failure that has rendered the social programs of the past vulnerable to the assault now in progress. As these programs are curtailed or dismantled, it is important for progressive thinkers and activists to analyze the reasons for the failure. From this analysis, a theoretical framework can emerge to inform the development of more viable programs for government action in the future.

30. Grant McConnell reports that the parcelling out of government power to essentially private groups has become increasingly characteristic of government programs in America. The agencies of government themselves, he argues, become moribund as a result of this delegation:

> The public official, for his part, will by this process have successfully maintained his formal position and have cleared his desk of immediate work and trouble. Nevertheless, by his action he will have materially diminished his office and will over time discover that he has incurred a permanent debt to the group he has helped conjure into being and has endowed with authority.

G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 163 (1966). McConnell's analysis implies that if government agencies retained their jurisdiction and did not delegate their power to private groups, they would be altogether different institutions.

31. 42 U.S.C. §§ 1395-1396j (1976 & Supp. III 1979).

II. The Doctrine of Industrial Pluralism

Over the last thirty years, the Supreme Court has developed an interpretation of the NLRA that expresses the industrial pluralist vision of relations between management and labor. This doctrinal development can be seen most clearly when set against the backdrop of judicial treatment of collective bargaining agreements prior to the passage of the Act.

A. *Judicial Treatment of Collective Bargaining Agreements Prior to The NLRA*

In the nineteenth century, courts were generally hostile to collective action by workers. They employed doctrines such as conspiracy and tortious interference with contractual relations to suppress the organization of labor.[32] By the early twentieth century, however, courts began to accept collective organization of employees as a useful, even necessary, counterweight to employers' control of the labor market.[33]

As unions became more prevalent and gained acceptability, they called upon courts to enforce the rights contained in their collective bargaining agreements. Initially, the courts did not permit unions to bring suit to enforce these agreements because unions were unincorporated associations.[34] In addition, the agreements were said to lack mutuality of obligation because a union's implicit promise to provide laborers in exchange for employer concessions was unenforceable due to the personal service rule.[35] This view of collective bargaining agreements barred unions from seeking legal remedies for even the most flagrant violations of agreements, because unions had no standing to sue.

At best, courts in the early twentieth century permitted individual workers to sue to enforce rights embodied in the collective agreements.

32. Sayre, *Labor and the Courts*, 39 YALE L.J. 682, 684-95 (1930) (conspiracy); Note, *Tortious Interference With Contractual Relations in the Nineteenth Century*, 93 HARV. L. REV. 1510, 1529-30 (1980) (tortious interference with contract). *See generally* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 4 (1930) (conspiracy and restraint of trade used as "convenient grab-bag terms" to render group activities illegal); Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 7-9 (1894) (tort of interference with business relations as applied to labor union activities is judicial policymaking).

33. *See, e.g.*, Vegelahn v. Gunter, 167 Mass. 92, 108-09, 44 N. E. 1077, 1081-82 (1896) (Holmes, J., dissenting); Jacobs v. Cohen, 183 N.Y. 207, 211-12, 76 N.E. 5, 7 (1905).

34. *See, e.g.*, A.R. Barnes & Co. v. Berry, 169 F. 225, 228 (6th Cir. 1909); Grand Int'l Bhd. of Locomotive Engineers v. Green, 206 Ala. 196, 198, 89 So. 435, 436 (1921); *see* Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383, 396-99 (1924) (legal doctrine that prevents labor unions and other unincorporated associations from suing as legal entities is policy judgment which courts should abandon).

35. *See, e.g.*, Schwartz v. Driscoll, 217 Mich. 384, 388-89, 186 N.W. 522, 523 (1922); Stone Cleaning & Pointing Union v. Russell, 38 Misc. 513, 513, 77 N.Y.S. 1049, 1050 (Sup. Ct. 1902); *see* Comment, *Present Day Labor Litigation*, 30 YALE L.J. 618, 622 (1921) (personal service rule bars courts from enjoining strikes by ordering individuals back to work).

The terms of the agreements were treated as prevailing customs or usages—analogous to an understanding as to who would supply tools or workclothes—that were implied into the individual contracts of employment. Even when a breach deprived individual workers of a specific entitlement, they could prevail in a suit only if they could prove that they personally had known of the "usage" and had adopted it as part of their original contract of hire. The courts often set a high standard of proof, and as a result, workers rarely could recover.

A typical case is *Hudson v. Cincinnati, N.O. & T.P. Ry.*[36] An employee was fired for misconduct and tried to use the grievance procedure specified in his collective bargaining agreement. When his supervisor refused to give him a hearing, he sued on the contract for wages due. The court gave several reasons for rejecting the claim. The employee's name was not explicitly included in the collective agreement, and there was no evidence that the union had acted as his agent in concluding it; nor was there evidence that the plaintiff had ratified the agreement when he accepted the job. Mere knowledge that the agreement was in force did not constitute ratification. The court refused to infer ratification of the collective agreement from the fact of the employee's membership in the union.[37] Thus, the collective agreement was reduced to a "memorandum of rates of pay and regulations . . . which acquires legal force because people make contracts in reference to it."[38] The court stated that the union's role was merely "to induce employers to establish usages in respect to wages and working conditions which are fair, reasonable, and humane, leaving to its members each to determine for himself whether or not and for what length of time he will contract in reference to such usages."[39] The treatment of the collective bargaining agreement in this case was typical of the custom or usage doctrine that prevailed until about 1920.[40] Using this approach, the courts denied that collective agreements were contracts at all, so that only the individual contract of employment was enforceable.[41]

In 1922, however, unions gained a major victory. In *Schlesinger v. Quinto*,[42] the Appellate Division of the New York Supreme Court upheld an injunction to prevent the garment manufacturers' association from restoring a piece-rates system, increasing hours, and reducing wage rates, all

36. 152 Ky. 711, 154 S.W. 47 (1913).
37. *Id.* at 715, 154 S.W. at 49.
38. *Id.* at 717, 154 S.W. at 49-50.
39. *Id.* at 715, 154 S.W. at 49.
40. *See, e.g.*, W.A. Snow Iron Works, Inc. v. Chadwick, 227 Mass. 382, 116 N.E. 801 (1917); Burnetta v. Marceline Coal Co., 180 Mo. 241, 79 S.W. 136 (1904).
41. *See* Rice, *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572, 581-93 (1931); Note, *The Present Status of Collective Labor Agreements*, 51 HARV. L. REV. 520 (1938).
42. 201 A.D. 487, 194 N.Y.S. 401 (1922).

in violation of the collective bargaining agreement in effect. Both the lower and appellate courts assumed that the union had standing to sue on the collective agreement, and focused on whether an injunction was the appropriate remedy. The Appellate Division viewed the agreement as a contract between two organizations both of which could compel performance by their members, and thus found mutuality of obligation.[43] It went on to hold that just as employers were able to obtain injunctive relief from the courts in labor disputes, mutuality of remedy required that the same relief be available to unions.[44] "[T]he law does not have one rule for the employer and another for the employee."[45]

Several years later, a New York court made it clear that a union had standing to sue by noting that the union has more at stake when an employer breaches a collective agreement than the sum of damages sustained by its members. In *Goldman v. Cohen*,[46] an employer was temporarily enjoined from locking out its union employees and moving its plant to another location where it intended to operate on a nonunion basis. The court held that this violated the closed shop clause in the collective bargaining agreement.[47] The court added that the union's right of action was essential to preserve the rights of collective bargaining and the economic benefits to the community that collective bargaining confers.[48]

These two cases were cited as precedents in many jurisdictions throughout the 1920s and 1930s.[49] In subsequent lawsuits, courts defined the standards established in the labor contracts and became "the ultimate guardians of the pact."[50] For example, in *Wetzel v. Clise*,[51] the Supreme Court of Washington enjoined a laundry establishment from using a union label on its sales slips and laundry tickets after its contract with the union expired. In *Weber v. Nasser*,[52] a California court granted a musician's union an injunction that prevented the theaters with which the

43. *Id.* at 499, 194 N.Y.S. at 410.
44. *Id.* at 498-99, 194 N.Y.S. at 409-10.
45. *Id.* at 498, 194 N.Y.S. at 409.
46. 222 A.D. 631, 227 N.Y.S. 311 (1928).
47. *Id.* at 633, 227 N.Y.S. at 314.
48. *Id.* at 633, 227 N.Y.S. at 314.
49. *See, e.g.*, Mississippi Theatres Corp. v. Hattiesburg Local 615, 174 Miss. 439, 446, 164 So. 887, 889 (1936); Harper v. Local 520, 48 S.W.2d 1033, 1040 (Tex. Civ. App. 1932); *see* Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 MICH. L. REV. 1109, 1109-10 (1941) (in 20 years since *Schlesinger v. Quinto*, judicial barriers to enforcement of collective agreements have disappeared); Witte, *Labor's Resort to Injunctions*, 39 YALE L.J. 374, 375 (1930) (after *Schlesinger v. Quinto*, use of injunctions to enjoin many types of employer breaches increased). *See also* Christenson, *Legally Enforceable Interests in American Labor Union Working Agreements*, 9 IND. L.J. 69, 102-03 (1933) (courts are beginning to permit unions to enforce collective agreements in recognition of fact that unions have rights apart from those of their members).
50. Rice, *supra* note 41, at 574.
51. 148 Wash. 75, 79-80, 268 P. 161, 163 (1928).
52. 286 P. 1074 (Cal. Ct. App. 1930).

union had contracts from discharging their orchestras and installing "talking devices."[53]

The state courts continued to enforce collective bargaining agreements as contracts even after passage of the Wagner Act in 1935.[54] Using this approach, the courts intervened in many aspects of the employment relationship—wages, hours, method of wage payment, selection of employees, and union security and labor solidarity arrangements. Judicial involvement spanned the scope of the relationship between labor and capital, from the details of wage incentive structures to the larger questions of movements of capital, investment decisions, and changes in ownership.[55] This indeed was a great change in the relationship between the courts and private employment.[56]

B. *Collective Bargaining Agreements Under the Wagner Act*

The impact of the Wagner Act on these developments remained uncertain through the Second World War.[57] Because the Act did not give federal courts or the NLRB jurisdiction to enforce collective bargaining

53. *Id.* at 1075, 1077.

54. *See, e.g.*, Mississippi Theatres Corp. v. Hattiesburg Local 615, 174 Miss. 439, 164 So. 887 (1936); Dubinsky v. Blue Dale Dress Co., 162 Misc. 177, 292 N.Y.S. 898 (Sup. Ct. 1936); Farulla v. Ralph A. Freundlich, Inc., 155 Misc. 262, 279 N.Y.S. 228 (Sup. Ct. 1935).

55. *See, e.g.*, Dubinsky v. Blue Dale Dress Co., 162 Misc. 177, 183, 292 N.Y.S. 898, 905 (Sup. Ct. 1936) (directing runaway shop to end lockout and put union members back to work, and to move machinery and other firm assets back to original locations); Farulla v. Ralph A. Freundlich, Inc., 155 Misc. 262, 286, 279 N.Y.S. 228, 254 (Sup. Ct. 1935) (company that had relocated to evade union directed to return and to comply with terms of collective bargaining agreement regarding certain working conditions). The court in the latter case justified this drastic remedy by saying, "[t]he logic of the situation calls for application of strong measures . . . . Without a remedy as wide as that need, unscrupulous employers of labor will be tempted to play one community off against another . . . ." *Id.*

56. Although contractualism in law is usually seen as the epitome of individualistic private ordering without judicial interference, *see* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1767-71 (1976), the doctrines of contractualism, in a collective setting, have the opposite effect. Collective contractualism enables courts to become involved in many details of the relationship between the parties. *See generally* Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969). The reason for this is that collective contracts are not merely the sum of the individual contracts of union members. When there are many parties to and many terms in an agreement, the meaning of performance is different than when only two parties are involved. Rather than creating sharply defined contract rights, collective contracts establish a network of interwoven rights standing in complex relationship to each other. In addition, in the employment setting, the conditions of performance of a contract are fluid because of the long-term nature of the relationship involved and the unpredictability of technology and production requirements. Moreover, certain questions that are relatively easy to address in the context of an individual contract require extensive judicial intervention in a collective context. This is true of such questions as: What is a breach rather than a modification? What is a repudiation rather than a protest against the other's breach? When has each side acted in good faith to keep its obligation? In answering these questions and in enforcing collective employment contracts, courts become intricately involved in the day-to-day relationship between management and labor.

57. *See* C. GREGORY, LABOR AND THE LAW 379 (1946); Lenhoff, *supra* note 49, at 1136 (legal status of contracts to be negotiated by statutory representative "awaits solution"); Note, *supra* note 41, at 531-33 (evaluating impact of Wagner Act on validity of labor contracts).

agreements, no dispute that concerned enforcement of such an agreement came before the United States Supreme Court between 1933 and 1944. Dicta in several cases suggested, however, that the Court did not differentiate collective bargaining agreements from conventional contracts.[58] Indeed, the Court applied contract law notions such as anticipatory repudiation[59] and the duty to mitigate damages[60] to collective bargaining agreements. In addition, the Court implied that employment contract rights and obligations would be enforceable in state courts.[61]

Although the judiciary lacked a coherent vision of labor relations under the Wagner Act, glimmerings of industrial pluralism appeared at the end of this period of uncertainty. In *J.I. Case Co. v. NLRB*,[62] the Supreme Court held that individual employment contracts, although lawful in themselves, could not excuse an employer's refusal to bargain with a union,[63] and that the individual contracts could not limit the terms of the collective bargaining agreement.[64] In commenting on the general nature of collective bargaining agreements, the Court noted that such agreements are not contracts in the conventional sense; rather, they are like tariffs or rate schedules, which "do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established."[65] This was a major step in the direction of industrial pluralism. It was not a wholesale adoption of the industrial pluralist perspective, however, because the analogy of collective bargaining agreements to tariffs or rate schedules does not carry with it the same prescription of judicial nonintervention as does the self-sufficient mini-democracy analogy of industrial pluralism. Rather, the schedule-of-rates analogy permits the enforcement of the terms of collective bargaining agreements in the courts.

The implications of this view of collective bargaining agreements remained unexplored because shortly after *J.I. Case* was decided, the Court wholeheartedly adopted the industrial pluralist paradigm in its stead. *J.I. Case* did establish, however, one of the essential features of industrial plu-

58. *See, e.g.*, H. J. Heinz Co. v. NLRB, 311 U.S. 514, 526 (1941) (labor agreements analogized to normal business agreements); NLRB v. Columbian Enameling & Stamping Co. 306 U.S. 292, 297 (1939) (applying doctrine of offer and acceptance to duty to bargain). *See generally* Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 293-310 (1978) (discussing judicial adoption of contractualist language in interpretation of Wagner Act between 1937 and 1941).

59. NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939).

60. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941).

61. *See* National Licorice Co. v. NLRB, 309 U.S. 350, 365-66 (1940) (Wagner Act does not foreclose employees from acting to secure adjudication on contracts in state courts).

62. 321 U.S. 332 (1944).

63. *Id.* at 337.

64. *Id.*

65. *Id.* at 335.

ralism. By holding that individual employment contracts could not defeat a collective bargaining agreement, the Court established that the rights conferred by the Act are collective rights, not individual rights. This comported with the notion, found in general pluralist theories of democracy, that the basic unit of social life is the group.[66]

C. *The Rising Prominence and Respectability of Arbitration*

As these legal doctrines developed, voluntary arbitration became the preferred method of labor dispute settlement under the War Labor Board (WLB).[67] In 1941, management and labor voluntarily agreed to suspend all strikes and lockouts. The following year, the Economic Stabilization Act required government approval of all collective agreements.[68] The WLB declined to dictate the terms of those agreements, and instead allowed labor and management to arrange them voluntarily. In addition, pursuant to Executive Order 9017,[69] the Board required all grievances that arose under collective bargaining agreements to go to arbitration.[70] The WLB not only encouraged parties to include arbitration clauses in their collective agreements, but also ordered arbitration of some disputes that arose under agreements that had no such clause.[71] Moreover, it enforced arbitrator's awards without reviewing their substance in order to support arbitration as an effective instrument for the peaceful settlement of disputes.[72]

At the end of the war, the no-strike era came to an end, and in 1947, the country experienced the largest strike wave in its history. Labor used its new found legal and organizational strength to demand increases in wages that had fallen behind the wartime inflation rate and to oppose cutbacks in employment as the defense economy was dismantled. Industry groups responded to the strike wave by urging government controls on the terms of industrial life. Such government intervention was labeled "compulsory arbitration" by its critics, and contrasted to the more voluntary processes developed under the WLB.[73]

66. R. DAHL, A PREFACE TO DEMOCRATIC THEORY 145 (1956); S. LIPSET, POLITICAL MAN 39-40 145 (1963).

67. *See* Freiden & Ulman, *Arbitration and the National War Labor Board*, 58 HARV. L. REV. 309, 344 (1945); Frey, *Arbitration and the War Labor Board*, 29 IOWA L. REV. 202, 210 (1944). *But see* Updegraff, *War-time Arbitration of Labor Disputes*, 29 IOWA L. REV. 328, 345-46 (1944) (comparing United States Conciliation Service with WLB to conclude that WLB was less "voluntary").

68. Act of Oct. 2, 1942, ch. 578, 56 Stat. 765 (expired 1944); *see* Boudin, *The Authority of the National War Labor Board Over Labor Disputes*, 43 MICH. L. REV. 329, 329-32 (1949) (discussing statutory and constitutional authority of WLB).

69. 7 Fed. Reg. 237 (1942).

70. Freiden & Ulman, *supra* note 67, at 313, 315.

71. *Id.* at 344.

72. *Id.* at 324.

73. For example, one legal scholar wrote in 1949: "The phrase 'compulsory arbitration' has com-

The spectre of government regulation of daily plant relations prompted a vigorous defense of collective bargaining. Prounion labor commentators and economists envisioned compulsory arbitration as the initial step toward government control of prices, profits, and production. Compulsory arbitration, they argued, threatened to destroy collective bargaining and labor unions, and ultimately threatened to undermine the free enterprise system.[74]

This movement to defend collective bargaining spawned the ideology of industrial pluralism. Professional labor relations specialists sought to justify collective bargaining while dissociating themselves from the class conflict it seemed to entail. Thus, they developed an ideology that tied collective bargaining to the entire system of private determination of wages and working conditions. Voluntarism in labor relations was equated with the free enterprise system.[75] Within this ideology, voluntary arbitration occupied a crucial position. The industrial pluralists needed to demonstrate that industrial disputes could be resolved peacefully, thereby avoiding labor-management strife. Any such mechanism, if it was to fit within the ideology, had to produce a solution to which both parties could be said to have consented. Judicial resolution of labor disputes, for example, was unacceptable because it imposed a noncontractual solution upon the parties.[76] Voluntary arbitration, by contrast, presented the attractive possibility of producing a solution that both labor and management had previously agreed would bind them.

In addition to providing a dispute-resolution mechanism apparently consistent with the premises of industrial pluralism, voluntary arbitration had pragmatic attractions. The wartime experience with arbitration had resulted in widespread use of arbitration provisions in collective bargaining agreements. Arbitration therefore had become a credible dispute-resolution mechanism. At the same time, arbitrators emerged as a distinct professional group who successfully advocated their role in the collective

monly come to mean any system whereby the parties to a labor dispute are forced by the government to submit their dispute to final settlement by some third party. The usual modes of self-help, the strike and the lock-out, are forbidden." Williams, *The Compulsory Settlement of Contract Negotiation Labor Disputes*, 27 TEX. L. REV. 587, 588 (1949); *see* Freiden & Ulman, *supra* note 67, at 345 (direct government intervention is "administratively impossible and out of harmony with the expressed desire of labor and industry"); Jaffe, *Post-War Labor Relations: The Contributions of the War Labor Board*, 29 IOWA L. REV. 276, 281-83 (1944) (expressing doubt that compulsory arbitration would be widely used after war); Updegraff, *supra* note 67, at 331-35, 342-46 (discussing advantages of voluntary arbitration).

74. *See* Freiden, *The Public Interest in Labor Dispute Settlement*, 12 LAW & CONTEMP. PROB. 367, 372-73 (1947) (collective bargaining weakened by any government role as decisionmaker).

75. C. GOLDEN & H. RUTTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY 40-43 (1942); Shulman, *supra* note 19, at 1002.

76. Sanders, *Types of Labor Disputes and Approaches to their Settlement*, 12 LAW & CONTEMP. PROB. 211, 217 (1947).

bargaining process.[77]

The industrial pluralist metaphor of modern industry as a mini-democracy also gave collective bargaining a legitimacy derived from the legitimacy of the larger political system. In democratic theory, the electorate is thought to guide national policy through its choice of representatives. By analogy, industrial pluralism posits that workers in factories are free and equal actors who decide the conditions of their work through their elected union representatives. This analogy provided a means of viewing industrial conditions as a product of worker self-determination, rather than of management fiat.

D. *Section 301: A Legal Obstacle*

In 1947, Congress passed the Taft-Hartley Amendments to the Wagner Act.[78] Section 301 of the amended Act threatened to undermine the evolving industrial pluralist model of collective bargaining by apparently creating federal court jurisdiction to enforce collective bargaining agreements.[79] Legal commentators, such as Shulman and Cox, feared that section 301, if so interpreted, could end arbitration and, as a result, could end voluntary collective bargaining. Such a change in the law, they argued, would shatter the pluralists' image of the workplace as a private democracy. The federal judiciary would displace arbitration, the mutually agreed-upon dispute resolution device, and open the way for government determination of the terms of industrial life.[80]

Harry Shulman adamantly criticized judicial intervention to enforce collective bargaining agreements. He urged that the administration and interpretation of trade agreements be left to the "judicial" mechanism the

77. R. FLEMING, THE LABOR ARBITRATION PROCESS 19 (1965).

78. Ch. 120, tit. 1, § 101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-144, 151-167, 171-187 (1976 & Supp. III 1979)).

79. 29 U.S.C. § 185(a) (1976) states: "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ."

80. *See, e.g.*, Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 24-25 (1957). Bickel and Wellington articulated a number of arguments about why arbitration was a better vehicle than the courts for resolution of day-to-day labor disputes:

> [T]he point is that the courts will draw from a body of experience not germane to the problem they will face. Given their limited means of informing themselves and the episodic nature of their efforts to do so, they will only dimly perceive the situations on which they impose their order. Even if they do perceive, they will necessarily come too late with a pound of "remedy" where the smaller measure of prevention was needed. Their rules, tailored to the last bit of trouble, will never catch up with the next and different dispute. They will allow or forbid and be wrong in either event, because continuous, pragmatic and flexible regulation alone can help.

Id. at 25. The arguments for arbitration based on the special expertise of arbitrators, the informality of arbitration procedure, and the speed and flexibility of arbitral remedies have not always been supported by experience. Feller, *Arbitration: The Days of Its Glory Are Numbered*, 2 INDUS. REL. L.J. 97, 98-99 (1977).

parties had established—the grievance and arbitration procedure.[81] Resort to the courts was only appropriate when self-government in the workplace disintegrated completely. Sporadic judicial intervention in labor disputes would corrode the parties' continuing relationship and adversely affect the evolving systems of self-government.[82] Archibald Cox, although not as critical of section 301 as was Shulman, also advocated the primacy of arbitration. Cox urged that the courts respect the "new institutions of self-government" and coexist with arbitration in a relationship of mutual support.[83]

Cox and Shulman shared the interpretation that the NLRA created an institutional framework for self-government but did not confer any substantive rights on labor. In their view, the right to organize and the duty to bargain—the major substantive provisions of the Act—established a "bare legal framework [which] is hardly an encroachment on the premise that wages and other conditions of employment be left to autonomous determination by employers and labor. On the contrary, [the Act] merely establishes the conditions necessary for the exercise of that autonomy."[84] Hence, they urged the courts not to use section 301 to preempt private arbitration or to expand government control of the workplace. Instead, they called on courts to affirm the industrial pluralist vision of the democratic, self-determined workplace. The Supreme Court, over the next twenty-five years, did just that.

E. *The Impact of Section 301 on the Enforceability of Collective Bargaining Agreements*

Section 301 first reached the Supreme Court for interpretation in *Association of Westinghouse Salaried Employees v. Westinghouse Electric*

81. H. SHULMAN, COLLECTIVE BARGAINING AND ARBITRATION 19, 20-21 (Institute of Industrial Relations, University of California, 1949).

82. Shulman, *supra* note 19, at 1024.

83. Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 604-5 (1956); *see* Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1488-89 (1959) (analyzing judicial perspective on role of arbitrator) [hereinafter cited as Cox, *Reflections*].

84. Shulman, *supra* note 19, at 1000. The pluralists argue that the right to organize does not guarantee union security and that the duty to bargain does not entail a judgment about the fairness of the terms of the agreement being negotiated. In this view, no substantive judgments are implied by the Act. For example, Cox and Dunlop described the extent of the duty to bargain as follows:

> Once it is understood that the function of Section 8(a)(5) [the duty to bargain] was to establish an institution, it becomes fairly clear that an employer does not commit an unfair labor practice by refusing to discuss, outside the framework of a grievance procedure, matters to which the procedure applies.

Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, 1104 (1950). *But see* Jensen, *Good Faith Bargaining With No Concessions Under the NLRA—An Intractable Antinomy*, 49 N.D. L. REV. 85, 97 (1972) (it is impossible to enforce duty to bargain procedurally without making substantive judgments about fairness of outcomes).

Corp.[85] The union sued Westinghouse for withholding one day's pay from each of 4,000 union members in violation of the collective bargaining agreement. Justice Frankfurter's plurality opinion began with a discussion of the constitutional problems posed by section 301.[86] He was concerned that the amendment expanded the jurisdiction of the federal courts in nondiversity cases beyond the scope of Article III.[87] Although he considered the possibility that section 301 was not merely procedural, but was meant to apply federal substantive law to suits over breaches of collective bargaining agreements,[88] he concluded that neither the legislative history nor the statute itself could support such an interpretation.[89] He also rejected the possibility that section 301 was intended to empower the federal courts to resolve the conceptual and legal ambiguity of the nature of collective bargaining agreements.[90] Frankfurter concluded that it was undesirable to give section 301 a substantive interpretation because it would make the federal courts "inextricably involved in questions of interpretation of the language of contracts."[91] Frankfurter, however, did not declare the statute unconstitutional. Reasoning that it was unnecessary to decide whether the union could sue under section 301, he found that the case involved 4,000 individuals, each of whom had a valid suit in a state court for breach of contract.[92] He thereby avoided the constitutional issue by deciding that, whatever the constitutionality of the statute, it was not intended to permit a union to sue to enforce rights of individuals that could be enforced elsewhere.[93] Thus the suit was dismissed for lack of jurisdiction.

Only two other Justices, Burton and Minton, joined in this opinion. An equal number challenged Frankfurter on the larger point involved—the constitutionality of section 301. Reed in a concurrence and Douglas and Black in a dissent all claimed that section 301 created federal substantive law in the form of "guiding principles which will bear on contracts made under it" and "machinery for reaching those agreements."[94]

Only two years later, in the landmark decision of *Textile Workers Union v. Lincoln Mills*,[95] a new majority of five vindicated the dissenters of *Westinghouse Electric Corp.* by upholding the constitutionality of

85. 348 U.S. 437 (1955).
86. *Id.* at 442.
87. *Id.* at 449-51.
88. *Id.*
89. *Id.* at 447, 449.
90. *Id.* at 455-56.
91. *Id.* at 456.
92. *Id.* at 460-61.
93. *Id.*
94. *Id.* at 462 (Reed, J., concurring); *id.* at 465 (Douglas & Black, JJ., dissenting).
95. 353 U.S. 448 (1957).

section 301. Justice Douglas' majority opinion stated that section 301 was a mandate to the federal courts to create a federal substantive law of collective bargaining agreements to implement "the policy of our national labor laws."[96] *Lincoln Mills* held that a federal court could grant a union specific enforcement of an employer's promise to arbitrate grievances over work loads and work assignments. In establishing the constitutionality of section 301, Douglas concluded that its history indicated a congressional intent to promote no-strike clauses in collective bargaining agreements.[97] From this he reasoned that

> [p]lainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce *these agreements* on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.[98]

The "quid pro quo," asserted without any authority in the legislative history and without any empirical basis, became the substantive meaning that saved the constitutionality of section 301. As Douglas subsequently developed it, the concept of quid pro quo converted arbitration itself into the national labor policy which federal courts were to interpret the law to create.

Arbitration was elevated to the center stage of national labor policy in 1960 in three cases known as the *Steelworkers Trilogy*, all written by Justice Douglas. *United Steelworkers v. American Manufacturing Co.*,[99] the first of the three, held that courts should enforce agreements to arbitrate irrespective of the merit of the underlying grievance. Douglas indicated that a court should decide only whether the grievance is governed by the arbitration clause of the collective agreement and therefore comes within the promise to arbitrate.[100]

The second case, *United Steelworkers v. Warrior & Gulf Navigation Co.*,[101] created a presumption of arbitrability.[102] In that case, the union filed a grievance when the company subcontracted maintenance work. The company refused to arbitrate; it relied on an ambiguous management rights clause to argue that it did not promise to arbitrate that kind of

96. *Id.* at 456.
97. *Id.* at 453-54.
98. *Id.* at 455 (emphasis added).
99. 363 U.S. 564 (1960).
100. *Id.* at 567-68.
101. 363 U.S. 574 (1960).
102. *Id.* at 585.

dispute. The court repeated its previous rule that the judicial inquiry is only whether the parties had agreed to arbitrate the question involved. When the scope of the agreement to arbitrate is ambiguous, "[d]oubts should be resolved in favor of coverage."[103]

The third case in the trilogy, *United Steelworkers v. Enterprise Wheel & Car Corp.*,[104] involved a company's refusal to comply with an arbitrator's award of reinstatement and back pay for several workers who had been fired. The company claimed that because the back pay period extended beyond the expiration date of the collective bargaining agreement, the arbitrator had exceeded his authority, which was derived only from the collective bargaining agreement. In holding for the union, the court stated that an arbitrator's award will be enforced so long as it "draws its essence from the collective bargaining agreement."[105] Furthermore, the court said that arbitrators need not disclose the rationale for their decision, and that "mere ambiguity" concerning its basis will not invalidate the award.[106] If the award could conceivably be derived from the collective bargaining agreement, the arbitrator has acted within his authority.

The *Steelworkers Trilogy* elevated arbitration to a favored position by requiring courts to promote arbitration, without permitting them to scrutinize the outcomes of the disputes. Paradoxically, this extreme judicial deference derived from the extreme judicial lawmaking of *Lincoln Mills*.[107]

F. *The Institutional Implications*

Lincoln Mills and the *Steelworkers Trilogy* established a federal common law of labor relations in which voluntary arbitration was made the primary institution for the resolution of disputes between management and labor. The doctrines enunciated in those cases defined the relationship between the courts and arbitration: the courts were to support, but not to interfere with, the parties' self-government.[108] The Supreme Court's decision to substitute the arbitral forum for the judicial forum was not a mere "change of venue": the choice of forum has an impact on the substantive rights of the aggrieved parties.[109] As Justice Black pointed out dissenting in a later case that applied the doctrine of the *Steelworkers Trilogy*:

103. *Id.* at 582-83.
104. 363 U.S. 593 (1960).
105. *Id.* at 597.
106. *Id.* at 598.
107. For a critique of judicial lawmaking in the *Lincoln Mills* decision, see Bickel & Wellington, *supra* note 80, at 34-35 (Court should have "remanded" case to Congress for consideration of broad delegation of power under § 301).
108. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 585 (1960).
109. *See* United States Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 359-61 (1971) (Harlan, J., concurring).

> Arbitration differs from judicial proceedings in many ways: arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited.[110]

To that list may be added certain other significant differences between the judicial and the arbitral forums. Arbitrators are not bound by precedents,[111] their awards are rarely published, the hearings are not held in open court, and arbitrators are not public officials accountable to public pressures and sworn to uphold public policies. The arbitral hearing process and the outcomes are wholly in the private domain.

This choice of forum was rationalized by Douglas' assertion in the *Steelworkers Trilogy* that "[i]n the commercial case, arbitration is the substitute for litigation. Here [in a labor relations case] arbitration is the substitute for industrial strife."[112] This alleged rationale, however, was mere bootstrapping. If the Court had given unions and individual workers the right to litigate breach of contract claims in federal courts under section 301, then the stated distinction between labor arbitration and commercial arbitration would disappear. Labor arbitration would be an alternative to litigation. Nothing in the Wagner Act or in the Taft-Hartley Amendments dictated that workers or unions be deprived of their rights as citizens to judicial adjudication of their disputes with employers.

In part, the institutional choice of arbitration over the courts was motivated by systemic concerns—a fear that the federal courts would be inundated with small claims by employees for minor company breaches of collective agreements.[113] That concern itself, however, is not sufficient to deprive unions or workers of their rights to use the federal courts.[114] Nor does it explain why the administrative agency established by the Act—the NLRB—was not adequate to the task of adjudicating these disputes. The courts justified the institutional choice by tying it to the industrial pluralist view that arbitration is an instrument of the parties' self-government.

110. Republic Steel Corp. v. Maddox, 379 U.S. 650, 664 (1965) (Black, J., dissenting).

111. This is not to say that some arbitrators do not follow precedent in the particular shop or industry. *See* Hill, *Discussion*, in THE ARBITRATOR AND THE PARTIES 100, 106-07 (J. McKelvey ed. 1958).

112. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

113. *See* United States Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 377 (White, J., dissenting); Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 460 (1955).

114 *Cf.* Republic Steel Corp. v. Maddox, 379 U.S. 650, 669-70 (Black, J., dissenting) (access to courts is important right).

III. The Industrial Pluralist Institutional Mandate

Having established a supportive, hands-off relationship between arbitration and the courts as the central pillar of national labor policy, the Supreme Court had to determine what role, if any, the NLRB should play in this emerging common law. Because there were three adjudicative institutions involved in regulating labor relations—the courts, arbitration, and the Board—the Court had to establish an orderly relationship between them. As the Court developed these interrelationships, it erected an institutional structure for implementing national labor policy that fulfilled the industrial pluralist vision. Much of the labor law doctrine since the *Steelworkers Trilogy* can be understood as establishing this unique institutional arrangement, which, in addition to fulfilling the pluralist vision, has had significant implications for the substantive rights sought to be adjudicated.

A. *The NLRB and Private Arbitration*

In *Lincoln Mills* and the *Steelworkers Trilogy*, Justice Douglas sidestepped the central question of the NLRB's role in the new labor policy. This silence is puzzling, because the NLRB occupies a central position in the NLRA. Moreover, both the *Steelworkers Trilogy* and *Lincoln Mills* rely heavily on arguments about the superiority of arbitration to settle labor disputes, citing the special expertise of arbitrators, the informality of the arbitration procedures, and arbitrator's flexibility of remedy.[115] Yet the NLRB shares these same advantages. Furthermore, reliance upon the Board would have quieted the systemic fears expressed that such breach of contract suits would swamp the courts.[116] The Act would support an interpretation giving the NLRB jurisdiction over breaches of contract. Under section 8(a)(1) the Board is required to prevent any interference with employees' rights to organize and bargain collectively. Because frequent employer breaches of collective agreements discredit a union and undermine its strength, such breaches are arguably unfair labor practices. Furthermore, under section 10(a) of the Act, the Board is empowered to prevent unfair labor practices notwithstanding any other means of adjustment established by agreement.[117] The Court, however, chose not to adopt this viewpoint. Instead it reinforced the primacy of the arbitral forum by diminishing the power of the Board even over its explict statutory

115. *See* United Steelworkers v. Enterprise Wheel & Car, 363 U.S. 593, 596-97 (1960); United Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 580-82 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1957).

116. *See* note 113 *supra*.

117. 29 U.S.C. § 160(a) (1976).

jurisdiction.

The eclipsing of the NLRB by private arbitration occurred through two simultaneous developments. Judicial review of disputes over collective bargaining agreements forced the courts to consider the relationship between the rights granted by the NLRA and the rights created by collective agreements. Simultaneously, the Board developed its own position on disputes over which the Board had concurrent jurisdiction with private arbitration. These two paths intersected in the concept of deference—the notion that the Board should defer to private arbitration. Deference provided a major pillar in the emerging common law of labor relations.

The Supreme Court first faced the problem of an overlap of jurisdiction between the Board and arbitration in *Carey v. Westinghouse Electric Corp.*[118] At issue was whether a group of employees should be classified as "production and maintenance," putting them within the membership and under the collective bargaining agreement of one union in the plant, or as "technical employees," putting them under the agreement of the other union in the plant. One of the unions filed a grievance claiming that some employees were misclassified and urging that the dispute go to arbitration. The company refused. It claimed that the dispute was a matter of representation and unit determination, and thus one for the Board to decide.

Justice Douglas, writing for the majority, acknowledged that the dispute could be looked at as one that involved either the construction of the collective bargaining agreements or the application of the NLRA.[119] He decided that national labor policy dictated that the dispute go to arbitration. Douglas reasoned that, just as a remedy from the Board does not preclude a remedy in court for breach of a collective bargaining agreement, an NLRB remedy should not preclude a remedy from arbitration.[120] Although he implied that the two unions could seek clarification of the representation petition by the Board after an arbitration hearing was held and decided,[121] he cast doubt on the possibility of dual jurisdiction. He wrote that "[i]f by the time the dispute reaches the Board, arbitration has already taken place, the Board shows deference to the arbitral award."[122] The opinion equivocated on whether "deference" meant that the Board should delay review of the dispute until after arbitration had ended or whether it meant that the Board should decline to undertake its own decision on the merits and adopt the arbitrator's decision instead.[123] This lat-

118. 375 U.S. 261 (1964).
119. *Id.* at 266, 268.
120. *Id.* at 269-70.
121. *Id.* at 268, 271-72.
122. *Id.* at 270.
123. "Defer" is a word of two subtly but significantly different meanings. It can mean "[t]o put off to a future time; to postpone; delay," or it can mean "[t]o yield or submit to the opinion or wishes

ter kind of deference became one of the defining features of the emerging institutional structure of industrial pluralism.

At the same time that the policy of deference entered Supreme Court doctrine, the NLRB developed its own position on concurrent jurisdiction of the Board and arbitration. *Spielburg Manufacturing Co. v. Harold Gruenberg*,[124] decided in 1955, introduced the deference concept. In *Spielburg*, the Board declined to consider a section 8(a)(3) unfair labor practice charge after a "fair and regular" arbitration hearing had reviewed the same incident.[125] In dispute was the discharge of four strikers after a strike was settled. The Board deferred to the arbitrator's decision which sustained the employer's charge of picket-line misconduct.

At first, *Spielburg* was relied on by the Board to dismiss unfair labor practice charges that overlapped with completed "fair and regular" arbitration proceedings. The Board, however, continued to assert jurisdiction in cases in which arbitration had not been conducted.[126] In 1969, the Board extended the *Spielburg* principle to prevent Board review of an unfair labor practice that was scheduled for arbitration. In *Joseph Schlitz Brewing Co.*,[127] the Board said that even though no hearing had been conducted, it must presume that the hearing would be fair and that the outcome would be consistent with the Act.

The deference idea achieved its fullest expression in *Collyer Insulated Wire*,[128] in which the NLRB extended the principles of *Spielburg* and *Schlitz* to defer review when no hearing was scheduled or even foreseeable, but arbitration was possible. In *Collyer*, the deference principle was interpreted to mean that the Board would withhold its processes and would dismiss unfair labor practice complaints for all disputes subject to an arbitration provision in a collective bargaining agreement.[129] Whether the arbitration would actually occur, or whether it would cover the same

of another." WEBSTERS NEW INTERNATIONAL DICTIONARY, UNABRIDGED 687 (2d ed. 1957). In the *Carey* opinion, Douglas conflated the two meanings of the word in order to reach the holding of the case. He used the former meaning when he drew an analogy to Board election procedures: "[T]he Board *defers* decision on the eligibility of discharged employees to vote in a representation case, until the awards are made." Carey v. Westinghouse Elec. Corp. 375 U.S. 261, 271 (1964) (emphasis added). He used the latter meaning in his references to the Board's Raley's Inc., 143 N.L.R.B. 256 (1963), and International Harvester Co., 138 N.L.R.B. 923 (1962), decisions. 375 U.S. at 270-271 ("If by the time the dispute reaches the Board, arbitration has already taken place, the Board shows *deference* to the arbitral award . . . .") (emphasis added). Douglas' conflation of these two meanings of "deference" gave unwarranted persuasiveness to the reasoning process by which the Court sanctioned the development of the Board's own deference policies.

124. 112 N.L.R.B. 1080 (1955).

125. *Id.* at 1082.

126. *See* Collyer Insulated Wire, 192 N.L.R.B. 837, 850 n.32 (1971) (Jenkins, dissenting) (Board has often decided "unilateral change of contract" cases despite availability of arbitration).

127. 175 N.L.R.B. 141 (1969).

128. 192 N.L.R.B. 837 (1971).

129. *Id.* at 839.

issues and apply the same substantive rules as would NLRB review, were concerns that were disregarded.[130]

The Board justified this extreme deference as supportive of the national policy that favored voluntary settlement of labor disputes through arbitration.[131] The Board echoed the industrial pluralist vision of the workplace as an independent, self-governed arena. The deference policy, it stated, is "merely giving full effect to [the parties'] own voluntary agreements to submit all such disputes to arbitration, rather than permitting such agreements to be side-stepped and permitting the substitution of our own processes, a forum not contemplated by their own agreement."[132] Citing *Lincoln Mills*, the Board opinion in *Collyer* concluded that: "We believe it to be consistent with the fundamental objectives of Federal law to require the parties here to honor their contractual obligations rather than, by casting this dispute in statutory terms, to ignore their agreed-upon procedures."[133]

The potential scope of the *Collyer* decision was vast. As Jenkins pointed out in dissent, almost any unfair labor practice could be construed as a contract violation by means of broad construction of general clauses in collective agreements.[134] Thus the *Collyer* decision had the potential to strip the Board of its entire unfair labor practice jurisdiction.

Because the *Collyer* doctrine has enjoyed continuing support in the courts, workers' access to the NLRB for the enforcement of their statutory rights has been severely limited.[135] Recently, the Board has cut back the scope of *Collyer* deference as the industrial pluralist paradigm has come under strain.[136] The courts, however, continue to require deference in all

130. Under *Collyer*, the Board retained limited jurisdiction to entertain a motion for reconsideration on the basis that the arbitration hearing did not measure up to the *Spielburg* standards of procedural fairness. *Id.* at 843.

131. *Id.* at 840.

132. *Id.* at 842.

133. *Id.* at 843. The *Collyer* decision evoked vigorous dissents by two Board members, Fanning, *see id.* at 846, and Jenkins, *see id.* at 850. Member Fanning pointed out that the decision flew in the face of section 10(a) of the Act, which states that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." *Id.* at 849 (quoting National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) (1976)). In the *Collyer* case, in which no grievance had been filed, the rationale that arbitration was the preferred forum of both parties did not make sense. *See* 192 N.L.R.B. at 846-47 (Fanning, dissenting); *id.* at 855 (Jenkins, dissenting). Furthermore, the Board's remedies are entirely different from those of an arbitrator, and the arbitration process, unlike a hearing before the Board, can be invoked only by the union, not by an individual worker. *Id.* at 855 (Jenkins, dissenting).

134. 192 N.L.R.B. at 855 (Jenkins, dissenting).

135. *See, e.g.*, NLRB v. Pincus Bros., Inc.-Maxwell, 620 F.2d 367 (3d Cir. 1980) (NLRB abused its discretion in refusing to defer to arbitral award that upheld discharge of employee who distributed leaflets to protest employer's piece-rate policies); Servair, Inc. v. NLRB, 102 L.R.R.M. 2705 (9th Cir. 1979) (NLRB abused its discretion by refusing to defer to arbitration award that upheld discharge of 19 employees who struck in protest of firing of union activist).

136. *See* General Am. Transp. Corp., 228 N.L.R.B. 808 (1977), *discussed in* NLRB v. Pincus

cases that involve overlapping jurisdiction.[137] The principle of deference, as expressed in *Collyer*, formed a crucial leg in the triangular relationship between the courts, arbitration, and the Board. With the full-blown concept of deference and the limited judicial review of arbitration dictated by the *Steelworkers Trilogy*, arbitration became, with certain limited exceptions,[138] the only forum with jurisdiction to adjudicate claims of breaches of collective bargaining agreements.

B. *The Courts and the NLRB*

Thus far we have seen the creation of two sides of the triangular relationship between the courts, the Board, and private arbitration. There is yet a third side to the triangle: the relationship between the courts and the NLRB. A primary feature of this relationship is contained in the preemption doctrine and the exceptions developed thereto. In the development of these exceptions, what emerged was a further diminution of the Board's unfair labor practice jurisdiction and a further affirmation of the primacy of arbitration.

In *Smith v. Evening News Association*,[139] the Supreme Court was confronted with a claim of both a violation of a collective bargaining agreement and an unfair labor practice. The employee sued his employer for treating him differently from nonunion employees, in violation of a clause in the collective agreement that said " 'there shall be no discrimination against any employee because of his [union] membership.' "[140] This allegation also stated a violation of section 8(a)(3) of the NLRA.[141] Because there was no arbitration clause in the collective bargaining agreement,[142] the Court could not have referred the dispute to arbitration under the doctrine of the *Steelworkers Trilogy*. Rather, it had to decide whether to resolve the dispute on the merits or to refuse jurisdiction in favor of the NLRB. The Court accepted jurisdiction. In so doing, it refused to apply its preemption doctrine, which acknowledges the NLRB's exclusive jurisdiction over activities arguably protected by the Act.[143] Instead, and without explanation, the Court created an exception for a category of unfair labor practices that are cognizable under section 301, and found concur-

Bros. Inc.-Maxwell, 620 F.2d 367, 392-94 (3d Cir. 1980) (Gibbons, J., dissenting).

137. *See* NLRB v. Pincus Bros. Inc.-Maxwell, 620 F.2d 367, 396-98 (3d Cir. 1980) (Gibbons, J., dissenting) (discussing cases in which courts upheld Board's deference policy).

138. *See* pp. 1535-37 *infra* (discussing exceptions).

139. 371 U.S. 195 (1962).

140. *Id.* at 196 (quoting clause in employer's contract with Newspaper Guild of Detroit).

141. *Id.* at 197 n.5; *see* 29 U.S.C. § 158(a) (1976) ("It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization . . . .")

142. *Id.* at 196 n.1.

143. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

rent jurisdiction in the courts and the NLRB for suits that involve breaches of collective agreements.[144]

The explanation for the exception can be found in the subsequent duty-of-fair-representation cases, particularly in the milestone case of *Vaca v. Sipes*.[145] In *Vaca*, an employee on sick leave for high blood pressure wanted to return to work. Although his doctor permitted him to return, the company doctor would not. He reported for work anyway and, upon discovery, was fired. He filed a grievance, but the union, after investigating and concluding that the company doctor was right, refused to take the case to arbitration. He then sued the union for a breach of its duty of fair representation and claimed as damages the amount forfeited by the loss of his job.

The case involved both a potential breach of duty by the union and a potential breach of contract by the employer.[146] The Court ruled that the employee could not sue the employer directly under section 301 because there were grievance and arbitration procedures established in the collective bargaining agreement. But because the union had thwarted his access to those procedures, the employee could sue the union under section 8(b)(1) of the Act for breach of the duty of fair representation.[147] The standard set to establish a union's breach of duty was failure to process the grievance "in good faith and in a nonarbitrary manner."[148] Should the employee prevail against the union, then and only then could the employee be heard on the merits of the underlying breach of contract claim against the employer.

Vaca v. Sipes contains a lengthy discussion of the appropriate forum for these combined breach of duty-breach of contract actions. The Court relied on *Smith* to find concurrent jurisdiction with the Board over the breach of contract part of the suit.[149] But the Court took jurisdiction over the breach of duty issue as well. Theoretically, this should have been a matter exclusively for the Board, because the duty arises under the Act. Under the NLRA, breach of duty is an unfair labor practice,[150] and the

144. Smith v. Evening News Ass'n, 371 U.S. 195, 197-98 (1962). Previously, the Court had excepted section 301 actions from the *Garmon* rule, *see, e.g.*, Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 245 n.5 (1962); Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 101 n.9 (1962); Dowd Box v. Courtney, 368 U.S. 502, 513 (1962), but in none of these was the preemption issue necessary to the holding, *see* Smith v. Evening New Ass'n, 371 U.S. at 201-02 (Black, J., dissenting).

145. 386 U.S. 171 (1967).

146. *Id.* at 173, 185-88.

147. *Id.*

148. *Id.* at 194-95. This standard has its roots in earlier suits that involved breaches of fair representation. *See* Humphrey v. Moore, 375 U.S. 335, 350 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953).

149. 386 U.S. at 183-84.

150. *See id.* at 177 (discussing cases that developed duty, which is "grounded in federal statutes");

preemption doctrine should have relegated the issue to the Board.[151]

Only one of the reasons given for the Court's jurisdiction over the union's breach of duty is persuasive. The Court said that some aspects of the contract claim may depend on issues raised by the breach of duty claim.[152] This is particularly true for the issue of remedy. The damage formula the court devised was that the union is liable for the amount by which its conduct enhanced the employees' injury resulting from the employer's breach. Based on this formula, the Court argued that because the section 301 action is justiciable under *Smith*, the breach of duty action should be as well. In that way, a remedy can be fashioned against both defendants at the same time. Otherwise, "the Board would be compelled in many cases either to remedy injuries arising out of a breach of contract . . . or to leave the individual employee without remedy for the union's wrong."[153]

The result in *Vaca* made it clear that the Court did not want to relegate the breach of contract question to the Board under any circumstances. When faced with a choice of forum to decide a dispute combining breach of duty and breach of contract issues, the Court dismissed factors that argued for exclusive Board jurisdiction and found concurrent jurisdiction instead. The interdependency of the claims, the fact that the union's breach of duty is exclusively a statutory violation, and the Board's section 10(a) mandate to prevent all unfair labor practices notwithstanding other means of prevention would have been ample reasons to give the entire suit to the NLRB, should the Court have been so inclined.

The reason why the Court made this choice when faced with an overlap of jurisdiction between the courts and the Board can be found in the substance of the controversy involved. Once the Court decided, as it had in *Smith v. Evening News Ass'n*,[154] that an individual had enforceable rights

Miranda Fuel Co., 140 N.L.R.B. 181, 188 (1962), *enforcement denied sub. nom.* NLRB v. Miranda Fuel Co., Inc., 326 F.2d 172 (2d Cir. 1963) (Board's first interpretation of § 8(b) to include union's breach of duty of fair representation as unfair labor practice).

151. *See* 386 U.S. at 202-03 (Fortas, J., concurring) (breach of statutory duty is unfair labor practice).

152. *Id.* at 187. The other two reasons given were that fair representation questions would often require a review of substantive positions taken by the union at negotiations and in its handling of the grievance machinery, matters "not normally within the Board's unfair labor practice jurisdiction," *id.* at 181, and that the General Counsel has unreviewable discretion over the issuance or nonissuance of a complaint, *id.* at 182-83. The first reason is simply wrong. The Board's entire section 8(b) jurisdiction authorizes it to scrutinize the substantive activities of unions in collective bargaining and in the handling of grievances. The second reason merely states that the General Counsel might abuse its discretion, a danger inherent in any delegation of authority to an administrative agency. Furthermore, such abuse of discretion is reviewable under the rule of Leedom v. Kyne, 358 U.S. 184 (1958) (court may review and reverse decision of NLRB that exceeds its delegated powers).

153. 386 U.S. at 187-88 (footnote omitted).

154. 371 U.S. 195 (1962).

under section 301 to sue for breach of a collective bargaining agreement,[155] then individual suits in which a breach of the duty of fair representation was also alleged raised a new problem. Because unions control access to the grievance and arbitration processes, merely to refer such cases back to the parties' own institutions of self-government, as the *Steelworkers Trilogy* prescribes, would defeat the duty of fair representation altogether. A breach of this duty is a dysfunction that undermines the integrity of the arbitration mechanism. Therefore, an exception to the principle of arbitral finality and exclusivity was required.

Any exception to the national labor policy of the *Steelworkers Trilogy* for duty of fair representation cases was, however, an exception capable of swallowing the rule. Such suits could be used by an aggrieved worker to challenge every union decision concerning grievances, and thereby to secure a ruling from an outside forum on the merits of the contract claim. The only limiting factor in the individual's ability to secure outside adjudication of his contract claim would be the standard set for proving a breach of the union's duty. If the standard were set low, then a breach would be relatively easy to establish and the contract claim would have to be heard, thus undermining the entire principle of the exclusivity and the finality of arbitration. In order to keep this exception within bounds and to prevent the demise of the doctrines of the *Steelworkers Trilogy*, the Court decided to retain jurisdiction over these hybrid breach of duty-breach of contract actions.

C. *The Labor Injunction*

Industrial pluralism thus dictated a unique set of institutional arrangements between the courts, the NLRB, and arbitration. The relationship between the courts and arbitration was defined by the *Steelworkers Trilogy* hands-off policy, which was supportive of arbitration; between the Board and arbitration by the *Collyer* doctrine of deference to arbitration; and between the Board and the courts by the *Smith v. Evening News* rule of concurrent jurisdiction for section 301 suits. These interrelationships made arbitration the only forum to hear most actions that involve breach of labor-management contracts; by themselves, however, they were not self-effectuating. Workers still retained the right to strike, guaranteed by

155. Another aspect of the *Smith* decision was the interpretation of section 301 to embrace suits brought by individuals as well as by unions to enforce collective bargaining agreements. Section 301 reads in part: "Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court . . . ." 29 U.S.C. §185 (a) (1976). The *Smith* decision interpreted the word "between" as modifying "contracts" rather than "suits." 371 U.S. at 200. By so interpreting the statutory language, the Court held that an individual could sue to enforce a right contained in a collective agreement. *Id.* For a critique of this aspect of the holding in *Smith*, see Ratner, *Some Contemporary Observations on Section 301*, 52 GEO. L.J. 260, 260 (1964).

the Norris-LaGuardia Act[156] and by section 13 of the National Labor Relations Act.[157] Although Douglas asserted that arbitration was a quid pro quo for an agreement not to strike,[158] arbitration in fact sometimes proved ineffective because it was often too slow to prevent or to remedy a breach.[159] In such cases, strikes over employer breaches occurred.

In *Boys Market, Inc. v. Retail Clerks Local 770*,[160] the union protested a company decision to assign supervisors to perform bargaining unit work. When the company refused to reverse its decision, the union went on strike. At that point, the employer sought arbitration of its alleged right to assign the supervisors to unit work, and sought to enjoin the strike.[161] In deciding that an injunction should issue, the Supreme Court gave the industrial pluralist edifice a solid foundation—the equitable power of the Court.[162]

The availability of injunctive relief to force a union to cease striking pending arbitration was a powerful boost to arbitration. It meant that the quid pro quo relationship asserted by Douglas in *Lincoln Mills* was not a relationship of consent but rather one of compulsion.[163] The union's alternative economic weapons were withdrawn. The court had stated earlier that a promise not to strike would be implied in an agreement containing an arbitration clause.[164] Furthermore, because the Court stated in *Boys Market* that injunctive relief was only available when there was an express or implied no-strike clause in the collective agreement,[165] the decision was an incentive to employers to include arbitration clauses in their

156. 29 U.S.C. §§ 101-115 (1976).

157. 29 U.S.C. § 163 (1976).

158. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957); *see* Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 104-06 (1962) (court may find no-strike clause implicit in collective bargaining agreement to extent that area of dispute is exclusively covered by compulsory terminal arbitration).

159. Employer breaches of collective bargaining agreements usually take the form of unilateral actions instituted in spite of union objection. Some such actions may have immediate and irreparable consequences for employees, such as the subcontracting of bargaining-unit work, the closing of part of the employer's facility, or the operation of a plant in the face of a serious safety hazard. In such a situation, the delay entailed by waiting for an arbitral hearing and award may effectively extinguish the union's contractual rights. *See, e.g.*, Lever Bros. Co. v. International Chem. Workers Union, 554 F.2d 115, 122-23 (4th Cir. 1976); Pittsburgh Newspaper Printing Pressmen's Union v. Pittsburgh Press Co., 479 F.2d 607, 609 (3d Cir. 1973); Local Div. 1098, Amalgamated Ass'n of St. Employees v. Eastern Greyhound Lines, 225 F. Supp. 28, 31 (D.D.C. 1963); Letter Carriers Branch 352 v. U.S. Postal Service, 88 L.R.R.M. 2678, 2678-79 (S.D. Iowa 1975); IUE v. Radio Corp. of America, 77 L.R.R.M. 2201, 2204 (D.N.J. 1971).

160. 398 U.S. 235 (1970).

161. *Id.* at 238-40.

162. *See id.* at 253.

163. 353 U.S. 448 (1957).

164. Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 104-06 (1962) (strike over dispute consigned to arbitration by collective bargaining agreement violates agreement even in absence of no-strike clause); *see* Gateway Coal Co. v. UMW, 414 U.S. 368, 380-84 (1974) (duty to arbitrate gives rise to implied no-strike obligation enforceable by injunction).

165. *See* Boys Market, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 248, 253 (1970).

agreements.[166] The subsequent decision in *Buffalo Forge Co. v. United Steelworkers*[167] took this rationale even further by holding that *Boys Market* injunctions were only authorized when the arbitration clause in the collective bargaining agreement covered that dispute. Thus employers who otherwise might want to keep certain areas outside the scope of the grievance procedure and under their unilateral control, now might decide it was preferable to make such issues arbitrable, and hence enjoinable in the event of a work stoppage.[168]

There are other reasons why the use of the injunction was consistent with, if not necessitated by, the institutional structure that was emerging at the time. Once the enforcement of collective bargaining agreements was turned over to private arbitrators, the problem of remedies for breach became problematic. Under the NLRA, the Board has a whole panoply of possible enforcement devices both before and after any hearing. These include access to company premises, the power to subpoena records, the authority to issue cease-and-desist orders punishable by fines for willful interference, the ability to withdraw certification for unlawful union conduct, and the power to order bargaining in the absence of a union election when there has been company conduct inherently destructive of employee rights.[169] The Board has wide remedial latitude because the NLRA is a multi-faceted intervention into the relationship between the company and the union. Each facet gives the Board a lever with which to enforce the rights conferred by the Act.

Arbitration, on the other hand, is a brittle tool for remedying breaches of collective agreements. An arbitrator can merely issue an award. An arbitrator has no prehearing power to intervene in a dispute. When arbitration processes are too slow to preserve the rights of either side, the only alternative under the industrial pluralist structure is to seek equitable relief. This limitation on the remedial powers of arbitration had lead the Court in *Sinclair Refining Co. v. Atkinson*,[170] to say that "if injunctions are necessary, [possibly] the whole idea of enforcement of these agreements by private suits should be discarded in favor of enforcement through the administrative machinery of the Labor Board."[171] *Boys Market* overruled *Sinclair Refining*,[172] seriously undermining the Norris-La-

166. *See* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 409-12 (1976).
167. *Id.*
168. *See* Rabin, *Limitations on Employer Independent Actions*, 27 VAND. L. REV. 133, 181 (1974).
169. 29 U.S.C. §§ 160, 161 (1976); *see* NLRB v. Gissel Packing Co., 395 U.S. 575, 610-616 (1969); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187-89 (1941).
170. 370 U.S. 195 (1962) (Norris-LaGuardia Act prevents use of injunctive relief to enforce collective bargaining agreements).
171. *Id.* at 214.
172. 398 U.S. 235, 253-55 (1970).

Guardia Act at the same time.

D. *The Structure Collapses*

Although the industrial pluralist paradigm provided a consistent framework within which to allocate functions between the competing forums that regulate labor relations, the structure was unstable from its inception, and with time, the strains began to show. Paradoxically, the very cases that defined the structure at the same time signaled its demise.

Vaca v. Sipes,[173] for example, was the ultimate statement by the Court on the treatment of suits that allege both breach of contract and breach of the duty of fair representation. But once individuals possessed the right under section 301 to sue on the contract in the event of a breach of the duty of fair representation, the finality of arbitration was threatened. Initially, *Vaca* was applied only to suits in which a union failed to bring a case to arbitration in violation of its fair representation duty. In *Hines v. Anchor Motor Freight Inc.*,[174] however, the Court expanded the doctrine to include cases in which the union had acted improperly in the conduct of the arbitration itself. Arbitral finality, in such a case, was lost.

David Feller, in his classic work, *A General Theory of the Collective Bargaining Agreement*,[175] argued that in a *Vaca*-type case, the employee should not be entitled to a judicial decision on the merits of his grievance, but rather should be entitled to a court order directing the union to proceed to arbitration. He based this on the logic of industrial pluralism, stating that "[a] court should not determine whether the grievance presents an arguable tenable claim for breach of contract, because arbitration is not being sought as an alternative forum for such a claim, but as the performance of the *only promise made*."[176] After *Hines*, in which the Court held that an employee can challenge a completed arbitration under section 301, Feller's proposal no longer makes sense. Arbitration is no longer a cure-all because a union's good faith cannot be presumed. If there has been a breach of the duty of fair representation in the conduct of the arbitration, simply ordering another arbitration will not remedy the situation.

The ability of individuals to attack a union's handling of grievance and arbitration decisions under section 301 presents a major problem for industrial pluralism. Under the industrial pluralist theory, a union must be given a wide range of discretion to trade-off interests of groups of employ-

173. 386 U.S. 171 (1967).
174. 424 U.S. 554 (1976).
175. 61 CALIF. L. REV. 663, 801-02 (1973).
176. *Id.* at 801 (emphasis added).

ees within its bargaining unit[177] and to make judgments about the treatment of individual grievances.[178] Otherwise, it cannot represent the collective interest.[179] Permitting individuals to attack union decisions and independently to litigate contract issues undermines the notion of group representation, for "what was made collectively could be promptly unmade individually."[180] The more vested rights an individual has under a collective agreement, the less power the union has to bind its constituents at the bargaining table and in grievance conferences. If the standard for establishing a breach of the duty were high, perhaps this would not be a problem. But some courts have gone so far as to impose a negligence standard on unions, finding a breach of duty whenever the union's behavior is short of "due care."[181] In such a case, the industrial pluralist notion that the Act protects collective rights rather than individual rights becomes strained.

The breach of the duty of fair representation poses problems for industrial pluralism precisely because of the choice of private forums for the adjudication of contract disputes. If such disputes were adjudicated by the NLRB, any party—union or individual—could initiate an action;[182] there could be no breach of a union's duty in handling and settling grievances. Furthermore, the Board could easily join the union, the individual, and the employer in such an action in order to provide a remedy consistent both with the union's responsibility for administering the collective agreement and with the individual employee's unique circumstances.[183]

In the area of labor injunctions, there also has been an implosion of the industrial pluralist vision. The decision in *Boys Markets, Inc. v. Retail Clerks Local 770*[184] made injunctive relief available to remedy a union's breach of its no-strike obligation and thus to compel arbitration. The decision, however, was ambiguous: is the injunction intended to stop the breach or to force arbitration? If the injunction is against the breach, then

177. *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1953).

178. *See* Humphrey v. Moore, 375 U.S. 335, 349-50 (1964).

179. *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 338-39 (1944); Ratner, *supra* note 155, at 260, 260-61.

180. Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 346 (1944).

181. *See, e.g.*, Milstead v. International Bhd. of Teamsters Local 957, 580 F.2d 232, 235 (6th Cir. 1978); Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975); Schum v. South Buffalo Ry. Co., 496 F.2d 328, 331 (2d Cir. 1974); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 284 (1st Cir.), *cert. denied sub nom.* Puerto Rico Tel. Co. v. Figueroa de Arroyo, 400 U.S. 877 (1970).

182. Under the Act, complaints may be brought by any "person," and any other "person" may be allowed to intervene in the same proceeding. 29 U.S.C. § 160(b) (1976). "Person" is defined as "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." 29 U.S.C. § 152(a) (1976).

183. Section 160(b) gives the Board authority to join other parties in a pending proceeding. 29 U.S.C. § 160(b) (1976).

184. 398 U.S. 235 (1970).

presumably any employer or union breach of agreement that produces imminent irreparable harm also should be enjoinable. Many courts have accepted this reasoning and issued "reverse-*Boys Market* injunctions" in order to prevent unilateral employer action that violated a collective bargaining agreement and that threatened irreparable harm.[185] By so doing, the courts in effect enforced the collective bargaining agreements.

In *Buffalo Forge Co. v. United Steelworkers*,[186] the Supreme Court expressed disapproval of such injunctions because they permit the court "to hold hearings, make findings of fact, interpret the applicable provisions of the contract and issue injunctions so as to restore the status quo, or to otherwise regulate the relationship of the parties . . . . This would . . . make the courts potential participants in a wide range of arbitrable disputes . . . ."[187] Indeed, the Court in *Buffalo Forge* correctly noted that the availability of injunctive relief for employer breaches necessarily embroils the Court in interpreting collective bargaining agreements in order to specify breaches and define the status quo ante. It was precisely to avoid this task that the Court established the doctrines of the *Steelworkers Trilogy*. Therefore, the *Buffalo Forge* Court made it appear that the *Boys Market* injunction was available, not to enjoin a breach, but only to force arbitration.

If, however, *Boys Market* does not involve an injunction against a breach, but merely an injunction to force arbitration, then the availability of injunctive relief must be limited to cases in which the arbitration itself is jeopardized by one party's breach.[188] The inquiry then should become not only whether there was a union or an employer breach, but also whether it was a breach that would make arbitration impossible or futile. That later step, however, was not part of the inquiry in the *Boys Market* decision. Was *Boys Market* wrongly decided?

In *Boys Market*, there was no allegation or suggestion by the Court that the union's breach of its no-strike pledge jeopardized arbitration. Indeed, the employer could presumably have expedited arbitration and thereby ended the strike itself. Was the Court stating a sub-rosa presump-

185. *See, e.g.*, Lever Bros. Co. v. International Chem. Workers Local 217, 554 F.2d 115, 122-23 (4th Cir. 1976); National Ass'n of Letter Carriers v. U.S. Postal Service, 88 L.R.R.M. 2678, 2679 (S.D. Iowa 1975); IUE v. Radio Corp. of America, 77 L.R.R.M. 2201, 2204 (D.N.J. 1971); Local Div. 1098, Amalgamated Ass'n of Street Employees v. Eastern Greyhound Lines, 225 F. Supp. 28, 31 (D.D.C. 1963); *see* Gould, *On Labor Injunctions Pending Arbitration: Recasting* Buffalo Forge, 30 STAN. L. REV. 533, 552-61 (1978); Payne, *Enjoining Employers Pending Arbitration—From M-K-T to Greyhound and Beyond*, 3 INDUS. REL. L. J. 169, 172 (1979); Simon, *Injunctive Relief to Maintain the Status Quo Pending Arbitration: A Union Practitioner's View*, 29 N.Y.U. CONF. LAB. 317, 317-42 (1976).

186. 428 U.S. 397 (1976).

187. *Id.* at 410 (footnote omitted).

188. *See* Payne, *supra* note 185, at 214 n.246; Simon, *supra* note 185, at 337-42.

tion that any strike by a union in violation of a no-strike pledge threatens to undermine arbitration? If so, on what basis?

Subsequent decisions applying *Buffalo Forge* and *Boys Market* have been inconsistent about the meaning of these rulings. At least one court of appeals has interpreted *Buffalo Forge* in a reverse-*Boys Market* situation to state a presumption that union breaches of no-strike pledges imperil the arbitral process, but that employer breaches of collective agreements do not.[189] One district court, however, has said that *Buffalo Forge* has no applicability to any situation except that of sympathy strikes,[190] and one circuit has applied *Boys Market* injunctions to any breaches by employer or union that threaten to render arbitration a "hollow formality."[191]

Whichever way the reverse-*Boys Market* cases are ultimately decided, the issue will pose a problem for industrial pluralist theory. If such suits are permitted and injunctive relief is equally available to management and labor, courts increasingly will have to confront problems of contract interpretation in contravention of the *Steelworkers Trilogy*. If such suits are curtailed by a presumption that only union breaches imperil arbitration, the appearance of neutrality that courts adopt under industrial pluralism will be seriously compromised, and the quid pro quo will become a great deal more quid than quo.

The internal inconsistencies emerging in the application of industrial pluralist theory to legal cases are indicative of flaws in the theory itself. The procedural interpretation of the Act urged by the pluralists cannot free the courts from confronting substantive issues of labor-management relations. Although these flaws are now surfacing, no one has yet suggested that the theory be discarded. Instead, courts and commmentators continue to invoke its rhetoric and to apply the doctrine, while rendering decisions that undermine its rationale.[192]

IV. The Premise of Joint Sovereignty

In order to understand the current doctrinal confusion in labor law, it is first necessary to understand the ways in which the theory is flawed and

189. Amalgamated Transit Div. 1384 v. Greyhound Lines, Inc., 550 F.2d 1237, 1238 (9th Cir.), *cert. denied*, 434 U.S. 837 (1977).

190. Communications Workers v. Western Elec. Co., 430 F. Supp. 969, 977 (S.D.N.Y. 1977).

191. Lever Bros. Co. v. International Chem. Workers Local 217, 554 F.2d 115, 123 (4th Cir. 1976).

192. *See, e.g.*, NLRB v. Pincus Bros., Inc.-Maxwell, 620 F.2d 367 (3d Cir. 1980); Boise Cascade Corp. v. United Steelworkers Local 7001, 588 F.2d 127 (5th Cir.), *cert. denied*, 444 U.S. 830 (1979); Feller, *supra* note 80, at 99-102 (arbitration is integral part of industrial self-government); Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 274-277 (1980) (labor and management have institutional stake in arbitral finality); *cf.* Note, *Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702, 703-707 (1980) (advocating unions' Title VII liability for employment discrimination based on unions' role in collective bargaining).

the reasons why courts and commentators refuse to acknowledge its impending demise. Central to the industrial pluralist view of the NLRA—as merely establishing a democratic framework within which labor relations occur rather than as endowing substantive rights—is the proposition that labor and management jointly determine workplace conditions by negotiating a collective bargaining agreement. Through private negotiations, labor and capital compromise their own self-interest and arrive at mutually agreeable terms for their services. Government intervention is limited to facilitating the negotiations; it does not dictate the terms that result.[193]

This view of industrial relations assumes that labor and management come to the bargaining table not only in an adversarial position, but also out of mutual need and with comparable power. The fact of negotiations alone, however, does not ensure that one party has not dictated terms to the other. Labor and management have different powers at the bargaining table, powers partially determined by the law itself.[194] These disparities affect the extent to which the agreement can be said to have been "jointly" settled. In addition, the agenda of the negotiations—that is, what issues are put up for discussion—is constrained by practical and legal barriers.

The industrial pluralists have recognized the fragile character of joint sovereignty in the industrial workplace. Their writings reflect a concern that the removal of certain issues from the collective bargaining process and the relegation of those issues to management's exclusive prerogative effectively can negate the mutuality of decisionmaking in industrial life. Examination of the pluralists' attempts to reconcile a belief in retained management prerogatives with the premise of joint sovereignty reveals a fundamental incoherency in the pluralist worldview.

A. *The Duty to Bargain*

Prior to the Wagner Act, the existence of joint control by management and labor resulted directly from the assertion of joint power: without roughly equal power, there was nothing to compel bargaining in the first place. Consider, for example, the following description of collective bargaining written in 1922:

> Every trade union, . . . when it becomes strong enough to contest the power of the employers in the industry in which it operates, enters into joint conferences or conventions with them. Ordinarily it is

193. Cox, *Reflections*, *supra* note 83, at 1517; Feller, *supra* note 80, at 101-02; Shulman, *supra* note 19, at 1024.

194. *See, e.g.*, National Labor Relations Act §§ 8(b)(4), (6), (7), 8(e), 29 U.S.C. §§ 158(b)(4), (6), (7), 158(e) (1976) (limiting tactics available to unions); pp. 1542-44 *supra* (discussion of *Boys Markets* and *Buffalo Forge*). *But see* National Labor Relations Act § 13, 29 U.S.C. § 163 (1976) (preserving right to strike).

> the employers who refuse to meet the union representatives and they have to be forced to confer by means of a strike. Sometimes, however, when a union grows suddenly strong, it attempts to substitute its dictation for that of the employers. In such cases the latter usually shut down their plants, and thus the revolutionary unions are forced by the employers to hold conferences and jointly determine conditions of employment.
>
> The condition that always brings these conferences about is the equalizing of bargaining power between the wage earners and the employers.[195]

The Wagner Act superimposes a legal framework on this reality. Under the Wagner Act, the employer is obliged to bargain not because the union has "persuaded" him to, but because the law requires him to do so.[196] He is not required to bargain before a union has been certified, and the process of winning certification is itself a power contest.[197] The Act also alters the exercise of workers' power once a union is certified. In order to retain the protection of the law, the union must surrender many of its economic weapons. The right to strike is restricted or impliedly waived; secondary boycotts and sympathy strikes are prohibited.[198]

The employers' economic weapons, however, are not similarly curtailed by the law. Employer direct action persists in many forms. He can lock out his employees.[199] He also can weaken the union by discharging shop leaders, reducing wages, laying off part of the work force, or changing the production methods.[200] The Act does not prohibit these "tactics" unless done with a specific and provable anti-union intent.[201] As one union official has said: "In principle, the action of an employer in putting a decision into effect over the protest of his employees is as much 'direct action' and

195. Leiserson, *supra* note 22, at 60-61.

196. 29 U.S.C. § 158(a)(5) (1976).

197. *See* Oliver, *The Arbitration of Labor Disputes*, 83 U. PA. L. REV. 206, 208 (1934) (union election campaigns, though initially sparked by dissatisfaction with specific conditions of employment, are ultimately attempts to limit absolute power of employer).

198. *See* 29 U.S.C. § 158(b)(4) (1976). *See also* Lynd, *The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History*, 50 IND. L. REV. 720, 720-30 (1975) (union recognition limits workers to economic weapons); Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?* 123 U. PA. L. REV. 897, 900-01 (1975) (judicial interpretation of § 7 has restricted unions' ability to exert economic pressure).

199. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 310-12 (1965).

200. Such unilateral employer acts are permitted by the Act if there is no provable intent to discourage union membership or if they are not found to be inherently destructive of important employee rights. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221, 227 (1963).

201. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965); *cf.* 29 U.S.C. § 158(a)(3) (1976) (prohibiting discrimination by employers against union members).

open conflict as is the strike."[202]

Thus, the NLRA has transformed the economic conflict that marked labor relations prior to its passage. The Act guarantees the company's presence at the bargaining table, but despite the mandate in its statement of purpose,[203] it does not equalize the bargaining power of the parties.[204] If anything, it places limits on many of the traditional sources of the union's strength. The negotiation process no longer accurately reflects the power position of the parties. Instead, it is a form of shadowboxing in which the economic strength of each is modified by legal sanction. The economic weapons, of uncertain value and potency, are kept in the closet, out of the sight of the law. This is why negotiation often appears to be less a contest of economic power and more an exercise in gamesmanship tempered by the conventions of "good faith." In this shadowboxing match, the pluralists see the basis of joint sovereignty between labor and management. There, the union participates in the formation of the rules of modern industrial enterprise, but not necessarily on an equal footing.[205]

B. *Narrowing the Realm of Joint Sovereignty*

Even if it is accepted that joint sovereignty in the industrial pluralist theory does not mean the equalization of power, other problems challenge the coherency of the premise. The law restricts the sphere of joint sovereignty by limiting the scope of the duty to bargain. Management need not negotiate about all issues that the union wants to discuss. Some topics are excluded altogether as impermissible subjects for negotiations;[206] others are divided into two categories: mandatory and permissive.[207] The duty to bargain extends only to subjects the Supreme Court considers "mandatory."[208] For those deemed "permissive," the union has only a limited right to compel negotiations. Bargaining on permissive items cannot

202. Oliver, *supra* note 197, at 211.

203. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937); National Labor Relations Act § 1, 29 U.S.C. § 151 (1976).

204. *Cf.* First Nat'l Maintenance Corp. v. NLRB, 101 S. Ct. 2573, 2579 (1981) (dictum) ("Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed.")

205. *Cf.* Shulman, *supra* note 19, at 1002-04 (unions and employers establish rules to guide massive and complex enterprises).

206. *See* NLRB v. American Ins. Co., 343 U.S. 395, 405 n.15 (1952).

207. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348 (1958) (bargaining is mandatory only with respect to " 'wages, hours, and other terms and conditions of employment' ") (quoting National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1976)). In practice, the mandatory-permissive distinction is less significant than it appears, because a union may find a way at negotiations to hold out on a mandatory item but, at the same time, to let management know that if it yields on a permissive item, agreement can be achieved. If no agreement is reached, however, and a strike ensues, the Labor Board will penetrate the parties' official positions to determine whether it was a protected or unprotected strike.

208. 356 U.S. at 349.

go to impasse, and thus those items cannot be the subject of a protected strike.[209] Moreover, the Act allows the company to make unilateral changes in permissive items during the contract term.[210]

Not all the issues of importance to unions are within the scope of mandatory bargaining.[211] Perhaps the most important limitations are those related to employer subcontracting, and the introduction of new technology.[212] In *Fibreboard Paper Products Corp. v. NLRB*,[213] the concurring opinion of Justices Stewart, Douglas, and Harlan emphasized that the duty to bargain does not extend to management decisions that "lie at the core of entrepreneurial control . . . [including] [d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise."[214] Since 1971, the NLRB has adopted this position and has not required a company to bargain over investment decisions.[215] Most recently, the Supreme Court has applied the logic of *Fibreboard* to hold in *First National Maintenance Corp. v. NLRB* that a company is not required to bargain over a decision to shut down part of its operation.[216]

C. *The Problem of Retained Rights*

Even within this narrowed sphere of joint sovereignty, the law is still ambiguous on the issue of whether the union is entitled to an equal voice in the governance of the workplace. This issue comes up repeatedly in the conflict over the scope of management rights. It goes to the very heart of the industrial pluralists' conception of collective bargaining.

Collective bargaining agreements specify certain rights and obligations in the workplace. Much is left unspecified, however, and this prompts the question: do all items not enumerated in the collective agreement fall within the sphere of joint sovereignty or within the "core of entrepreneurial control?" Many important issues lie within this nether space. For example, practices in existence when an agreement is negoti-

209. *See* Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965) (neither party required to bargain about permissive subjects).

210. Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187-88 (1971) (bargaining over retired employees pension benefits not mandatory and therefore subject to unilateral change by employer during contract term).

211. *E.g., id.*

212. *See, e.g.*, Fibreboard Paper Prods. Co. v. NLRB, 379 U.S. 203, 211-12 (1964) (subcontracting); Lufkin Foundry & Mach. Co., 181 N.L.R.B. 187, 195 (1970) (change in technology).

213. 379 U.S. 203 (1964). The Supreme Court held that the employer violated the duty to bargain by refusing to negotiate with the union over its decision to subcontract out bargaining-unit work. *Id.* at 215. The decision was restricted, however, to instances of subcontracting that did not involve new capital investment or reorganization of plant operations. *Id.* at 213.

214. *Id.* at 223 (Stewart, J., concurring).

215. *See* Lynd, *Investment Decisions and the Quid Pro Quo Myth*, 29 CASE W. RES. L. REV. 396, 402 (1979); Rabin, *supra* note 168, at 153.

216. First Nat'l Maintenance Corp. v. NLRB, 101 S. Ct. 2573, 2584 (1981).

ated are usually not mentioned in the agreement. Such practices include rules about the time of various shifts, the existence of wash-up time, the right to receive phone calls during the day, the availability of locker and shower facilities, sick leave policy, the right to refuse overtime, Christmas bonuses, vacation schedules, the freedom to smoke on the job, and innumerable other items. Under current law, it is unclear whether a unilateral employer change in such practices constitutes an arbitrable grievance, and if so, how an arbitrator should interpret the agreement's silence. One position—the retained rights of management approach—is that only violations of explicit contractual provisions are arbitrable. The opposing position—the joint sovereignty approach—is that the agreement includes all existing conditions and practices, so that any unilateral change is subject to arbitration. The answer depends on whether there is a duty to bargain about such items during the term of an existing agreement.

Section 8(d) of the Act limits the section 8(a)(5) and section 8(b)(3) duty to bargain by allowing a party to refuse to discuss or to agree to modifications to an existing contract.[217] Section 8(d) was added to the Taft-Hartley Amendments in reaction to the Board's view that the duty to bargain continued despite the existence of a written agreement.[218] In 1949, the Board reinterpreted the duty to bargain in the light of section 8(d) in the case of *In re Allied Mills, Inc.*[219] There the Board adopted the view that section 8(d) referred only to items specified in the written agreement, and that the duty to bargain continued for all "unwritten terms dealing with 'wages, hours and other terms and conditions of employment.' "[220] This view represented a rejection of the retained rights approach, and an adoption of the joint sovereignty approach to the statutory language.[221]

Two years later, however, the Board retreated from this position. In *Jacobs Manufacturing Co.*[222] it held that the duty to bargain does not apply to matters covered in the collective agreement or discussed in negotiations.[223] Since then the Board and the courts have been inconsistent in determining the scope of section 8(d) and the duty to bargain.[224] In par-

217. 29 U.S.C. § 158(d) (1976).

218. *Cf.* Timken Roller Bearing Co. v. NLRB, 161 F.2d 949, 953 (6th Cir. 1947) (rejecting NLRB's determination that there is continuous statutory obligation to bargain that exists independently of all contractual obligations, and that breach of contract on part of union does not relieve employer from this obligation).

219. 82 N.L.R.B. 854 (1949).

220. *Id.* at 862.

221. *But see* Cox & Dunlop, *supra* note 84, at 1108 (Board should resolve claims that employer or union refused to bargain about interpretation or application of existing agreement only when contract contains no applicable grievance procedure).

222. 94 N.L.R.B. 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952).

223. *Id.* at 1219.

224. *See* Rabin, *supra* note 168, at 177-79 (Board and courts have applied *Jacobs Manufacturing* doctrine and related rules inconsistently).

ticular, the question of which existing terms and conditions should be considered part of the contract, and thus excluded by section 8(d) from further mandatory negotiations, is still unresolved.[225]

Sometimes the parties have tried to settle this question themselves in negotiations by inserting into the contract a "zipper clause." Such a clause states that there is no duty to bargain about any matter not covered by the agreement. The Board has often refused to enforce such clauses, however, on the grounds that they are too broad a waiver of the union's statutory right.[226] Another method used to resolve the continual deadlocks over this question has been the inclusion of a definition of what constitutes an arbitrable grievance in the agreement itself. Management-rights clauses[227] and past-practice clauses provide such definitions.[228] Those clauses, however,

225. *Compare* NLRB v. Scam Instrument Corp., 394 F.2d 884, 887 (7th Cir. 1968), *enforcing* 163 N.L.R.B. 284 (1967) (unilateral employer midterm modification of collective agreement is unfair labor practice) *with* United Tel. Co., 112 N.L.R.B. 779, 780-81 (1955) (unilateral employer action in accord with its interpretation of collective agreement is not modification and thus is not subject to duty to bargain).

226. *See, e.g.*, Unit Drop Forge Div. of Eaton Yale & Towne Inc., 171 N.L.R.B. 600, 601 (1968) (when contract includes general waiver of union's right to bargain, that waiver will be given effect only if matter in issue was fully discussed and union consciously yielded or clearly waived its intent in matter).

227. Management-rights clauses are clauses which appear in collective bargaining agreements that specify the rights management retains under the agreement. Not all agreements contain such clauses, and those that do appear to vary greatly. Examples of management rights clauses are:

> The Union and the Locals recognize that subject only to the express provisions of this Agreement, the supervision, management, and control of the Company's business, operations, and plants are exclusively the function of the Company. (General Electric Co. *and* Electrical Workers [UE]; exp. 10/69). . . .
>
> It is understood and agreed that the Company has all the customary and usual rights, powers, functions and authority of management.
>
> Any of the rights, powers, functions or authority which the Company had prior to the signing of this agreement, or any agreement with the Union, including those in respect of rates of pay, hours of employment or conditions of work, are retained by the Company, except as those rights, powers, functions or authority are specifically abridged or modified by this agreement or by any supplement to this agreement arrived at through the process of collective bargaining. (Timken Roller Bearing Co. *and* Steelworkers; exp. 8/68)
>
> . . . .
>
> The Company retains the sole right to manage its business, and direct the working force, including by way of illustration, but not limited to the rights to decide the machine and tool equipment, the materials to be processed, the methods of processing, the schedule of production, together with all designing, engineering, and the control of raw materials, semi-manufactured and finished parts which may be incorporated into the products manufactured; to maintain order and efficiency in its plants and operations; to hire, layoff, assign, transfer, and promote employees, and to determine the starting and quitting time and the number of hours to be worked, subject only to such regulations governing the exercise of these rights as are expressly provided in this Agreement. (Commercial Steel Treating Corp. *and* Auto Workers; exp. 3/70).

R. SMITH, L. MERRIFIELD, & D. ROTHSCHILD, COLLECTIVE BARGAINING AND LABOR ARBITRATION 314-16 (1970) (quoting 2 BNA COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS § 65, at 11-14 (1969)).

228. Past practices clauses state that preexisting conditions and practices in a workplace will be continued during the term of a collective bargaining agreement. Examples of such clauses include:

> Should there be any local working conditions in effect which have existed regularly over a period of time under the applicable circumstances and which provide benefits that are in excess

pose similar problems of conflicting interpretations. A management-rights clause may be construed to include only enumerated rights, or it may be construed to encompass unforeseeable circumstances as well as specified circumstances. Past-practice clauses present problems of deciding which practices are included. For example, should management be able to invoke practices in effect before there was collective bargaining, and thus be able to benefit from its prior period of unilateral control? Or should past practices be limited to the union's lifetime in that shop?

Furthermore, neither of these clauses settles the question of the scope of the duty to bargain and to arbitrate. Does the absence of explicitly enumerated practices mean that particular practices should be deemed included or deemed excluded? And does the lack of either clause mean that there are no management rights or no past practices? Moreover, agreements frequently contain both clauses, compounding the problem of interpretation.

The problem does not stop with the question of arbitrability. Once a practice is determined to be within the duty to arbitrate, an arbitrator must decide on the merits. Considerable anguish and ink has been spent by arbitrators on these questions. If their job is to interpret the agreement, they must have a notion of what the agreement is. How an arbitrator rules on a given question is a statement about which side controls the unwritten terms.

The problem recurs when the arbitrator weighs the evidence he receives. There is a commonly accepted doctrine among arbitrators that a worker who is aggrieved by a company order that he believes violates the agreement must obey first and then file a grievance.[229] This doctrine was announced in an arbitration decision by Harry Shulman in *In re Ford Motor Co., Spring & Upset Building.*[230] Given this sequence, an arbitrator is likely to be "influenced by the weight of the accomplished fact."[231] Management often uses this reasoning to bolster its argument that "the Company's right to manage requires that union grievances be extra well-

> of or in addition to the benefits established by this Agreement, they shall remain in effect for the term of this Agreement, except as they are changed or eliminated by mutual agreement or in accordance with Subparagraph (d) of this Section 3.

Id. at 266 (quoting Republic Steel Corp. v. United Steelworkers Local 1375 (Mar. 17, 1962) (Ryder, Arb.)), and "The exercise by the Company of any such [management] functions will be in accordance with the established past practices previously agreed to and all other provisions of this Agreement," *id.* at 317.

229. *See* note 300 *infra*; Bamburg, *Insubordination*, 1949 WASH. U. L.Q. 154, 158; Murphy, *Introduction*, in M. STONE, LABOR GRIEVANCES AND DECISIONS at xv, xix (1965); *cf.* Walker v. City of Birmingham, 388 U.S. 307, 320 (1967) (protesters must obey injunction issued to enforce unconstitutional ordinance and challenge its constitutionality afterwards).

230. 3 Lab. Arb. Rep. 779, 780 (1944).

231. Goldberg, *Management's Reserved Rights: A Labor View* in MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS 118, 121 (J. McKelvey ed. 1956).

founded to justify interference with this right."[232]

The dispute over the scope of management rights undermines the pluralists' premise of joint sovereignty. Logically, pluralists should favor bargaining over all the conditions of the workplace that affect workers, requiring joint assent for any changes in these conditions, and arbitrating grievances over unilateral changes. Such a position, however, would open up all issues to conflict and to escalated social warfare. None of the pluralists have gone this far.[233] The pluralists also reject the opposite view of the management rights issue: the position of pure retained rights. The pluralists do not contend that management retains unilateral control over all items not explicitly bargained away in the written agreement,[234] because that position would remove most of the issues of industrial life from the sphere of joint sovereignty. Their attempts to find a stable middle ground, however, have failed.

D. *The Pluralists' Response*

The pluralists need a defensible middle ground in order to show that there is truly a realm of joint sovereignty with identifiable boundaries within which the union has a genuine right to joint input into company decisions. If the realm of management control cannot be separated from the realm of joint control, then the union's input is not by right, but only by management's acquiescence, and is subject to extinction at any time.

Harry Shulman, who for years served as the arbitrator between the Ford Motor Corporation and the United Auto Workers Union, posed the dilemma with precision and clarity: "Is the agreement an exclusive statement of rights and privileges [for the union] or does it subsume continuation of existing conditions?"[235] His suggested resolution of the dilemma is less lucid. Shulman says that the arbitrator, when faced with an issue that falls within the nether space, must give a "wise judgment."[236] Although he continues with some observations about the proper role of the arbitrator and about advisable procedures to follow, he can only fall back on an appeal to process: if the arbitrator is not making sufficiently wise judgments, "the parties can readily dispense with him."[237] This begs the question.[238]

232. *Id.* at 121-22.

233. *See, e.g.*, W. BAER, THE LABOR ARBITRATION GUIDE 65, 163-64 (1974).

234. *See, e.g.*, Cox, *Reflections, supra* note 83, at 1498-99, 1503-07; Wallen, *The Silent Contract vs. Express Provisions: The Arbitration of Local Working Conditions*, in COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE 117, 117-37 (M. Kahn ed. 1962).

235. Shulman, *supra* note 19, at 1011.

236. *Id.* at 1016.

237. *Id.*

238. Although Shulman argues that the benefit of an arbitral decision is that the parties have selected the decisonmaker for themselves, Shulman, *supra* note 19, at 1016, his process-oriented solution to the retained rights problem is at odds with the pluralist rationale for arbitration. If arbitration

Archibald Cox and John Dunlop try to give a more satisfactory answer. They propose "that the parties to a comprehensive collective bargaining agreement, in the absence of contrary evidence, are to be presumed to have executed the agreement upon the understanding that major conditions of employment not covered by the agreement would continue 'as they were' unless changed by mutual agreement."[239] This is not exactly a middle ground: the company cannot make unilateral changes in "major conditions," and the union cannot demand new concessions during the term of the agreement. Because all conditions are open for "mutual agreement," this comes close to the pure joint sovereignty viewpoint. It means that an arbitrator should take the status quo as part of the existing agreement.

Cox and Dunlop's status quo position sounds simple and sound until a definition of the status quo is attempted. They admit this difficulty: "The proposition that existing arrangements are carried forward except as changed by the collective agreement, does not imply that all existing *substantive* conditions of employment should be regarded as frozen."[240] After all, businesses constantly have to make adjustments in production methods, at least in areas such as job content and work loads. Thus the status quo analysis needs to define those present conditions that are part of the status quo and those that are not, and thus can be changed by unilateral management action.

Cox and Dunlop suggest that the status quo should be considered to be:

> (a) the modes of procedure followed in making decisions concerning matters subject to continuous review, and
> (b) the basic substantive terms and conditions of employment which are changed only upon annual or biennial review. Where the collective bargaining agreement is silent, the pre-existing arrangement—whether it is a procedure for making continuous changes or an existing substantive term—should be deemed to be carried forward.[241]

This formula could define a boundary if there were a way to decide what is subject to "continuous review" and what is a "basic substantive term." So long as management's procedures for unilateral changes are constant, everything in Cox and Dunlop's first category would remain in the employer's unilateral control. So the test becomes what is subject to "continuous review" and what are "basic substantive terms." Cox and Dunlop are

serves the function of a judiciary in the mini-democracy, then in theory, the arbitrator is to interpret the language of the written agreement, not please the parties in a particular case. *See* pp. 1559, 1562 *infra*.

239. Cox & Dunlop, *supra* note 84, at 1118.
240. *Id.* at 1118.
241. *Id.* at 1118-19.

quick to state that this test should not be taken as a "rigid rule."[242]

Even as a flexible rule, however, it is hard to apply. What happens to wash-up time, for example? It may have existed for ten years, but if management wants to change it, they could argue that it was subject to continuous review insofar as they had the continuous right to abolish it. After all, they would argue, it is not a basic substantive term of employment. The matter seems to come down to what items management had the continuous right to review, and what is meant by "basic" in the phrase "basic substantive term of employment." Different speakers, giving different emphases to the words, would reach different results. Thus we are back to our original question: which employment conditions remain in exclusive management control and which are brought within joint control by the duty to bargain?

Arthur Goldberg, a labor lawyer and leading spokesman for industrial pluralism, has a more developed point of view. He states that management has the right to manage the business and to direct the work force. These are two different rights, with two different consequences. Managing the business involves determining "the product, the machine to be used, the manufacturing method, the price, the plant layout, the plant organization, and innumerable other questions. These are reserved rights, inherent rights, exclusive rights which are not diminished or modified by collective bargaining . . . ."[243] The other type of management right—the right to direct the work force with regard to wages, hours, or working conditions—is merely a "procedural right."

> It is a recognition of the fact that somebody must be boss; somebody has to run the plant. People can't be wandering around at loose ends, each deciding what to do next . . . . To assure order, there is a clear procedural line drawn: the company directs and the union grieves when it objects.[244]

Goldberg's argument suggests that the right to manage is in the realm of unilateral management control and that the right to direct is in the realm of joint control. It is unclear what happens, however, when the manufacturing method, the plant organization, and other management rights have an impact on wages and conditions of employment. The company may want to move to a new location, phase out a production line, automate some jobs, or change a production quota. All of these steps have serious impacts on wages, hours, and working conditions. What looks like

242. *Id.* at 1119.
243. Goldberg, *supra* note 231, at 123.
244. *Id.* at 120-21.

managing to management may well look like directing to workers.

Goldberg recognizes that management's "exclusive right to manage" can conflict with labor's right to have a say. He attempts a reconciliation:

> [A]n effort to claim that the exclusive right of management to establish a new method of manufacture keeps the worker from objecting effectively to the resulting working conditions not only confuses the labor-management issues, but it makes more difficult unequivocal acceptance of the rights of management. We are entirely in agreement that the company can establish the manufacturing methods, but, if management attempts to use this right as the basis for diminishing labor's rights, then there must inevitably develop hostility to the whole concept of exclusive management rights.[245]

This answer says to the arbitrator: "be flexible, avoid hostility, do the best you can."

David Feller, in a more recent articulation of the ideology of industrial pluralism,[246] does not even try to argue that the collective agreement represents joint sovereignty. Feller states that the rules embodied in a collective agreement represent in part management's retained rights and in part the "web of rules" necessary to govern relations between subordinates and superiors in any large-scale, hierarchically organized, complex organization.[247] The rules that emerge are therefore primarily the result of the nature of modern industrial enterprise.[248] He notes that at one time unions also tried, sometimes successfully, to impose their rules on the workplace, but that such union rules could only be imposed unilaterally if secured by a closed shop. Once the closed shop was banned by the Taft-Hartley Act,[249] however, the imposition of union work rules became impossible.[250] Thus collective bargaining is union participation in what would otherwise be unilateral management rulemaking,[251] but the scope of the union's input is limited from the start.[252] He states that rules in a collective agreement that limit management action are an implicit "acceptance [by the union] of the authoritarian nature of the employment relationship."[253] He

245. *Id.* at 123.

246. Feller, *supra* note 175, at 721.

247. *Id.* at 721. The concept of the "web of rules" as a necessary part of every industrial enterprise is derived from J. DUNLOP, INDUSTRIAL RELATIONS SYSTEMS 13 (1958).

248. Feller, *supra* note 175, at 722-23.

249. The closed shop was banned by both the explicit prohibition in section 8(a)(3) and by the prohibition of the secondary boycott in section 8(b)(4) which was the mechanism for the enforcement of the closed shop. *Id.* at 734.

250. *Id.* at 734-35.

251. *Id.* at 724.

252. Feller states this explicitly when he observes that under most collective bargaining agreements, "management and union are not coordinate partners in administration." *Id.* at 770.

253. *Id.* at 737.

concludes that because the collective bargaining agreement does not represent a regime of joint power, the problem of line drawing between areas of sovereignty should not arise.

Of course, the problem does arise in practice. Feller recognizes this factual contradiction in his theory: "Disputes as to whether particular actions fall within the area of joint control or within management's 'prerogatives' arise when management action is challenged through the adjudicative machinery."[254] Feller, however, does not even attempt to state a position. In fact, on the debate over the interpretation of an agreement's silences he says, "I do not propose to enter that controversy here."[255]

Feller sidesteps the problem of retained rights by asserting that it is not a problem. He does this by means of inconsistency and reification. His analysis is inconsistent on the contribution of unions to the collective agreement. Although the crux of his theory is that collective bargaining represents the consent of the workers through their union to the work rules and conditions, most of his analysis of the nature of rules in employment is designed to show that the union has no actual effect on those rules.[256] What rules there are exist as the product of management's needs and of the needs of complex organizations as such. This explains why he says it is not important to distinguish with precision the realm of unilateral control from that of joint control.[257]

He also reifies such concepts as "technical efficiency," and "large complex organization," so that most of the rules he discusses are attributed to impersonal, inevitable, transhistorical forces. He does not even consider the possibility that there could be alternative concepts of efficiency, or alternative, nonhierarchical means of organizing production.[258] He uses the

254. *Id.* at 738-39.

255. *Id.* at 760.

256. *See id.* at 738.

257. Feller's analysis draws on functionalist sociology in that it attempts to derive proscriptions for behavior from posited descriptions of innate functions. As with other functionalist arguments, Feller's assumes its conclusions in the descriptive categories with which it begins. Another example of industrial pluralist functionalism is found in the writings of Neil Chamberlain, labor economist and long-time arbitrator. Chamberlain urges that there is a standard of "relevancy" by which issues can be allocated to management prerogative or to joint sovereignty:

> The fact of recognition of the union as bargaining agent carries with it the obligation by management to seek agreement with the union on matters *relevant* to the union-management relationship before taking action. But by no means does this interpretation carry with it the corollary that the functions of management are thereby being shared.

Chamberlain, *Discussion*, in MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS 138, 145 (J. McKelvey ed. 1956).

According to Chamberlain, this formulation "binds management to prior consultation and negotiation with the union on a certain *generally understood* range of subject matter." *Id.* at 148. So much for a clear boundary.

258. An expanding body of literature supports the proposition that alternative methods of organizing production are both possible and possibly preferable to current "efficient" bureaucratic forms. *See, e.g.*, H. BRAVERMAN, LABOR AND MONOPOLY CAPITAL 184-233 (1974); D. NOBLE,

reified concepts to explain not only the content of the rules, but also their interpretation. The rules are self-executing in that they follow naturally and inevitably from the nature of modern industrial enterprise. Thus, he can say, on the controversial subject of whether an arbitrator may infer limitations on mangement not explicitly mentioned in the agreement, that "[t]he *very nature* of the agreement and the complex organization which it governs often require substantial implication, if only because of the impossibility of setting out in words all of the understandings and practices which the parties necessarily assume in executing it."[259] If the "very nature" of complex organization, modern industry, hierarchical organization, and the like dictated the answer to this question, it is puzzling why the problem keeps reemerging. Perhaps Feller has side-stepped the problem of retained rights because his analysis is incapable of providing an answer.

E. *Finding Meaning in Incoherency*

What conclusions can be drawn from this uniform descent into incoherency by the leading industrial pluralists when they confront the problem of retained management rights? Clearly each of them sees the problem, but cannot resolve it. Their ideology not only provides them no guidance; it renders them incapable of describing the real world.

The incoherence of the pluralists on this issue stems from a deep contradiction in their view of the world. Under the theory of the workplace as a mini-democracy, they cannot hold a pure belief in retained rights. Such a position would destroy the illusion of democracy because it would quickly become apparent that only a small number of situations that arise in the workplace are governed by explicit contract language. The overwhelming majority of plant-life issues would still be subject to unilateral management control. The area of joint control would be a miniature island of democracy in an otherwise autocratic ocean. Furthermore, the island would always be in danger of being submerged altogether because management's strategy at the bargaining table would be to keep as many items as possible out of the contract. Collective bargaining would then lose its appearance as a joint determination of wages and of conditions of employment. Instead, the bargaining process would look like the struggles in the days of open warfare, with the union trying to "capture" particular items in specific, unequivocal language and the management resisting. The collective agreement would hold out little promise of benefit to man-

AMERICA BY DESIGN 322-24 (1977); Stone, *The Origins of Job Structures in the Steel Industry*, in LABOR MARKET SEGMENTATION 27, 28 (R. Edwards, M. Reich, & D. Gordon eds. 1974).

259. Feller, *supra* note 175, at 748 (emphasis added).

agement, so the duty to bargain would be evaded. The resulting agreement would not appear to be a jointly determined law by which both sides are governed. In other words, a pure belief in retained rights would destroy the pluralist illusion.

Although the pluralists cannot adopt the theory of retained rights, they also are unwilling to adopt the position of joint sovereignty, because there is no way to draw a boundary with wages, hours, and conditions on one side and the management of the business on the other. All decisions that affect the business also affect the workforce. Decisions about plant location, choice of technology, and the nature of the product may affect the workforce more than any other decisions the company makes. In fact, the decisions that the pluralists want to term exclusive management prerogatives may be the ones in which it is most important for the union to have a say.

In order to avoid such an expansive definition of joint sovereignty, the pluralists invoke two arguments. They either invoke principles of private property by stating that the prerogatives of ownership give management unilateral control over major investment policy decisions, or they invoke some form of technological determinism to explain why it is in the very nature of large organizations that such decisions inevitably must be made by management. Neither of these arguments is compatible with joint sovereignty.

Joint sovereignty, if it is to mean anything at all, must mean a redefinition of the incidents of ownership, which entails both an attack on private property and a rejection of technological determinism. It must involve a relinquishment by management of what it has heretofore regarded as its exclusive decisionmaking prerogatives, even in such "vital" areas as investment decisions. Giving unions a voice in matters like wages and hours is of limited value if they have no say in matters that affect the competitive position of the firm, for that is what ensures the firm's ability to pay any wage at all. For the union to participate meaningfully in any matter that concerns workers, it must address issues that lie at the core of entrepreneurial control. A form of collective bargaining that gave unions an equal voice in such matters would be true joint sovereignty. Such a form, however, would deprive management of many of the incidents of private ownership, a result that neither management nor the industrial pluralists intended.[260] Joint sovereignty must also acknowledge the possibility that unions do influence the operation of the business, and thereby reject the view that industrial conditions are the inevitable and necessary result of large-scale organizations as such. Otherwise there would be no point in

260. Goldberg, *supra* note 231, at 127.

permitting the union to have input into decisions—the decisions would be predetermined.[261]

V. The Premise of Neutral Adjudication

A second premise of the industrial pluralist ideology is that impartial arbitration of breach of contract disputes is possible. This premise is implicit in the metaphor of industrial life as a mini-democracy. The analogy of an arbitrator to a judge subsumes the notion that a judge can decide a case in an apolitical way, above the conflict of forces that went into making the laws.[262]

It may well be that it is even more important in an industrial setting than in a judicial setting for the dispute-resolver to have a neutral methodology for dispute resolution. This is because an arbitrator, unlike a judge, is purely a creature of the parties' agreement. The "law" to be applied to a dispute is the set of rules that the parties have negotiated. There is no room for any outside considerations such as "public interest" or "good faith," which a court might feel justified in imposing on litigants. The arbitrator has no basis for bringing in any other rules than those provided by the parties' own agreement.[263]

Archibald Cox and John Dunlop have suggested the need for and possibility of neutral contract interpretation. In arguing that the section 8(d) definition of bargaining does not require continuous bargaining over items embodied in the written agreement,[264] they state that there is a "fundamental distinction" between making and enforcing collective bargaining agreements.[265] Continuous bargaining would undermine the very notion of a written agreement: "To require either management or union to bargain about a proposal to modify an existing contract would encourage either party to seek release from any of its commitments that happened to become onerous after the contract had been signed."[266] Cox and Dunlop add that under such a rule "the obligations of contract for a fixed period would have scarcely more effectiveness than those of a contract at will."[267] By casting a collective agreement as a bar to further negotiation, they state that the process of interpreting the agreement is fundamentally different

261. As with David Feller's resort to tehcnological determinism, any explanation based on the inherent nature of large organizations deprives the union of any role whatsoever in the formulation of rules. *See* note 257 *supra*.

262. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 256-59 (1977) (discussing "[t]he desire to separate law and politics"); Kennedy, *supra* note 56, at 1770 (describing individualist conception of judge as objective law-finder and law-applier).

263. Shulman, *supra* note 19, at 1009-12.

264. Cox & Dunlop, *supra* note 84, at 1112-14.

265. *Id.* at 1115.

266. *Id.* at 1113.

267. *Id.* at 1116.

from the negotiation process itself.

Cox and Dunlop qualify the distinction between the interpretation of the agreement and the negotiation process itself, however, as "a matter of emphasis and degree."[268] They say that "[s]ince the purpose of a labor agreement is to establish a general framework for a continuing human relationship, many of its provisions are not self-effectuating. Others are couched in general terms which do not supply a clear and unmistakable answer to every problem."[269] Subject to these limitations, they assert that neutral contract interpretation is possible. They describe this interpretation as a process "of particularizing general principles established by employer and union when the agreement was negotiated. It is an 'administrative' or 'judicial' process, and the 'legislative' session to be held upon the expiration of the contract is the only time at which the basic agreement should be altered . . . ."[270]

In this conception, the arbitrator neutrally implements the will of the parties by applying it to unforeseen or contested situations. Although he resolves disputes by ruling for one side or the other, he always derives the result from the collective agreement by a process of neutral interpretation which yields a "correct" solution to the dispute.

A. *The Arbitrator as Labor-Relations Physician*

Although the pluralists insist on the possibility of neutral arbitration, their description of the arbitrator's role and methodology appears strange. Any normal picture of judicial neutrality is abandoned altogether. They insist that arbitration is superior to a court for resolving day-to-day labor disputes because the judicial method is too rigid and therefore inappropriate in an industrial setting.[271] They posit a "common law of the shop which implements and furnishes the context of agreement."[272] This common law differs from that applied by a judge: it is made up of the "practices, assumptions, understandings, and aspirations of the going industrial concern."[273] Justice Douglas suggested this in the *Warrior & Gulf Navigation Co.* opinion of the *Steelworkers Trilogy*,[274] stating that an arbitrator is usually chosen for his "knowledge of the common law of the shop . . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he

268. *Id.* at 1115.
269. *Id.*
270. *Id.* at 1116.
271. *See, e.g.*, Shulman, *supra* note 19, at 1019.
272. Cox, *Reflections*, *supra* note 83, at 1499.
273. *Id.* at 1500.
274. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

cannot be similarly informed."[275]

This view of the arbitrator's task suggests that he does not simply construe the language of the agreement. The arbitrator must also be a source of special knowledge necessary to the decision, knowledge of the esoteric world of the workplace.[276] Furthermore, the arbitrator does not confine himself to the bench. According to Shulman, an arbitrator should actively participate in the hearings. "The arbitrator may have to take a more active part in the investigation than does a trial court . . . . Interpretation of the agreement requires, however, appreciation by the interpreter of relevant facts; and the arbitrator must assure himself as well as he can that he has them."[277] Shulman suggests that the arbitrator subpoena and question witnesses himself, and in other ways conduct his own investigation.

This activism and the application of unwritten "common law of the shop" principles, is not judicial lawmaking—arbitrator contract-making —asserts Shulman, because the arbitrator is directly accountable to the parties. If he violates the intentions expressed in the collective agreement, they can dismiss him. The need to obtain the continuing consent of the parties acts as a check on the arbitrator's discretion and insures that the arbitrator impartially applies the agreement as modified by the common law of the shop. Shulman explains that, although in any given case the losing party will object to the award, an arbitrator knows that he has acted neutrally if his opinions are accepted, "not resentfully, but cordially and willingly."[278]

The Shulman version of the arbitrator's role goes even further to include direct intervention in cases in which the arbitrator "conscientiously feels baffled." In such cases, Shulman suggests that the arbitrator use his office and his influence—including the "gentle pressure of a threat of decision"—to encourage the two sides to agree voluntarily to a settlement.[279]

Shulman's view reflects an extreme position in the debate about the role of arbitrators that took place in the 1950s and the 1960s.[280] The debate crystallized around a number of specific questions: Should the arbitrator depart from the written agreement? Should the arbitrator meet separately with the parties in efforts to promote settlement? Is a permanent umpire preferable to an ad hoc arbitrator? Positions on these issues tended to cluster. In general, the pluralists favored Shulman's approach of the creative, free-wheeling, sometimes-mediator arbitrator. They also tended to

275. *Id.* at 582.
276. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 & n.2 (1960).
277. Shulman, *supra* note 19, at 1017-18.
278. *Id.* at 1019.
279. *Id.* at 1023.
280. *See* Fuller, *Collective Bargaining and the Arbitrator*, in COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE 8, 8-11 (M. Kahn ed. 1962).

favor permanent umpires.[281]

The argument for a standing umpire complemented the Shulman method of arbitration. By developing a long-term relationship with the parties, a permanent arbitrator would be more sensitive to the assumptions and conditions that underlie their agreements. He would be better informed of the common law of the shop. As Benjamin Aaron expressed it: "The standing umpire is, in a sense, a partner in this relationship and, as compared with the ad hoc arbitrator, he has much more freedom to take into account the long-term interests of the parties in deciding disciplinary cases."[282]

The nonpluralists of the era took a different position on each of these issues.[283] Lon Fuller, for example, described the Shulman-style arbitrator as a "labor relations physician." Such an arbitrator, he stated, thinks he has a "roving commission to straighten things out."[284] He rejected Shulman's suggestion that arbitrators should meet separately with the two sides to a dispute in order to mediate a settlement.[285] According to Fuller, such meetings discredit the arbitration process by making awards appear "rigged." Fuller also warned that such behavior leads to the temptation to rig awards in fact. The appearance or fact of rigging, even if done with good motives, undermines the entire institution of arbitration by eroding its premise of neutrality and hence its legitimacy.[286]

Fuller's full venom was directed at "permanent umpire" arbitration through which "departures from the judicial role tend to become cumulative."[287] Over time, the parties increasingly depend on this arbitrator-mediator to resolve all kinds of disputes; he becomes a "super-manager."[288] As a result, "the moral force of the judicial role has been forfeited. It is no

281. For example, George Taylor, who had served both as the Chairman of the War Labor Board and the Chairman of the Hoisery Industry Arbitration Board argued that arbitration must necessarily involve attempts at mediation by the arbitrator. Taylor, *Effectuating the Labor Contract Through Arbitration*, in THE PROFESSION OF LABOR ARBITRATION 20, 21-22 (J. McKelvey ed. 1957) (Second Annual Meeting of the National Academy of Arbitrators). Taylor was also one of the strongest advocates for impartial umpires rather than ad hoc arbitrators. *See* Taylor, *The Voluntary Arbitration of Labor Disputes*, 49 MICH. L. REV. 787, 794 (1951).

282. Aaron, *Some Procedural Problems in Arbitration*, 10 VAND. L. REV. 733, 741 (1957).

283. *See* R. SMITH, L. MERRIFIELD, & D. ROTHSCHILD, *supra* note 227, at 236; Braden, *The Function of the Arbitrator in Labor-Management Disputes*, 4 ARB. J. 35, 37-40 (1949); Fuller, *supra* note 280, at 9. Wayne Morse, a former member of the War Labor Board and labor arbitrator, was adamant in his belief that arbitration is a judicial process, having nothing in common with mediation. Morse, in his capacity as a United States Senator, opposed section 8(d) of the Act. He argued that the duty to bargain should continue throughout the life of an agreement because "collective bargaining does not end with the consummation of a contract." 93 CONG. REC. 6612 (1947), *quoted in* Cox & Dunlop, *supra* note 84, at 1113.

284. *See* Fuller, *supra* note 280, at 9.

285. *Id.*

286. *Id.* at 26-27.

287. *Id.* at 46.

288. *Id.*

longer available as a reserve for meeting an eventual crisis. Meanwhile, the parties' capacity for unaided self-government may have suffered a serious decline through disuse."[289]

Fuller also dismissed Shulman's argument that the need to obtain the parties' consent controls the arbitrator's discretion:

> There is generally no real sense, for example, in which it can be said that the workers in a particular factory have approved either a loose or a strict interpretation of the arbitrator's role. In such a matter only a few key figures, chiefly the arbitrator himself, have that sense of alternatives which is required for intelligent choice.[290]

Fuller acknowledged that the Shulman model of the arbitrator as labor relations physician is derived from the pluralists' view of the collective agreement as both a constitution and a trade contract. Yet, he did not explore the connection. Instead, he asserts: "[F]rom the curiously mixed nature of the collective bargaining agreement there is derived (by a logic that is certainly not obvious) the conclusion that it must be construed freely."[291]

Fuller's observation is uncharacteristicaly understated. Not only is the conclusion not obvious, but on its face, the creative, free-wheeling type of arbitrator favored by Shulman contradicts the industiral pluralists' commitment to voluntarism; the Shulman arbitrator is encouraged to do far more than simply interpret the collective agreement. At the very least, Shulman's methodology undermines the appearance, if not the fact, of neutrality. Why then are the pluralists so insistent and so united in its praise?

B. *The Arbitrator as Plant Psychiatrist*

The pluralists themselves suggest an answer. They state that the apparent surface-level calm of industrial life may mask deep tensions that threaten to explode.[292] An individual grievance that appears slight may spark a great upheaval in the shop. According to Shulman: "[T]he frequent instances of stoppage of work in a department or a whole plant because of a disciplinary penalty imposed on a single employee indicates that what is involved is not merely the case of an individual but a group dispute."[293] Similar observations have been made by other pluralists.[294]

289. *Id.* at 47.
290. *Id.* at 49, 50.
291. *Id.* at 10.
292. *See* pp. 1571-72 *infra* (discussing impact of human relations on industrial pluralism).
293. Shulman, *supra* note 19, at 1015-16.
294. In observing the strong emotions aroused by discharge cases, Freiden and Ulman state:

This then is the special expertise of arbitrators which Douglas referred to in the *Steelworker Trilogy*. It is an expertise that enables the arbitrator to sense undercurrents of discontent beneath an individual grievance. Similarly, the flexibility that the pluralists claim makes arbitration superior to judicial resolution of these disputes is not only flexibility of procedure or of remedies, but also flexibility of outcomes. The pluralists suggest that arbitrators should tailor outcomes to alleviate tensions when underlying conditions are about to explode.[295] This may be why "the arbitration hearing has been called the psychiatrist's couch of industrial relations."[296]

This vision of the arbitrator's task assumes substantial, perhaps even unrealistic skills, on the part of arbitrators. At first glance, it is possible that a permanent umpire could sense underlying tensions and arbitrate so as to alleviate them. But could a one-time, ad hoc arbitrator also perform that function? Even the one-time arbitrator is not insulated fully from the plant life and the parties' underlying attitudes. Advocates in an arbitral hearing commonly intimate in their arguments the most acceptable form of an adverse decision.[297] Such subtle communication between the parties and the arbitrator might allow an ad hoc arbitrator to distinguish potentially explosive disputes that require "flexibility" from less volatile grievances. A permanent umpire would still be superior to an ad hoc arbitrator, however, because ongoing contact would allow the umpire a better opportunity to hear underground grumblings. The pluralists therefore prefer that form of arbitration. Furthermore, this interpretation explains Shulman's insistence that an arbitrator step down from the bench and play a mediating role when "the arbitrator is quite at sea with respect to the *consequences of his decision* in the operation of the enterprise."[298]

"When these issues become a test of power, a single discharge may loom far larger than its importance to the operation of the plant or the overall stability of the union." Freiden & Ulman, *supra* note 67, at 357. Isadore Katz, labor lawyer and legal scholar, wrote similarly in 1947 that: "The sense of injustice of aggrieved workers runs deeply to the very center of their being, and unless allayed quickly will be converted into hate and hostility leading directly to the flaming labor dispute . . . ." Katz, *Minimizing Disputes Through the Adjustment of Grievances*, 12 LAW & CONTEMP. PROB. 249, 259 (1947). In a pamphlet promoting labor arbitration, the Department of Labor also stated that resentment by individual employees who believe that they were treated unfairly had a tendency "to poison the industrial blood stream." *Settling Plant Grievances*, BULL. NO. 60 (1940) (U.S. Department of Labor), *cited in* Freiden & Ulman, *supra* note 67, at 312.

295. Shulman, *supra* note 19, at 1023. *See also* H. WELLINGTON, LABOR AND THE LEGAL PROCESS 94 (1968) (arbitrators frequently decide cases on prudential grounds rather than on basis of written agreement). This is not to suggest that all arbitrators adopt this view in practice. Many arbitrators do in fact render reasoned, disinterested interpretations of the contract. It is to suggest, rather, an inconsistency between the theory and the practice of arbitration on the part of its very architects.

296. Myers, *Concepts of Industrial Discipline*, in MANGEMENT'S RESERVED RIGHTS AND THE ARBITRATION PROCESS 70, 74 (J. McKelvey, ed. 1962).

297. Fuller, *supra* note 280, at 28.

298. Shulman, *supra* note 19, at 1023 (emphasis added); *see* Myers, *supra* note 296, at 74.

C. *A Reexamination of the Role of Arbitration*

If the pluralists' arbitrator in practice does not even try to be a neutral interpreter of the collective agreement, then a different view of the role of arbitration in the shop emerges. No longer is arbitration a judicial process of law application. It becomes an element in the existing conflicts between management and the union.[299] This is because all changes in plant conditions affect the relative balance of power between management and labor. In a situation of constant conflict, there is no possibility of neutral intervention. The resolution of each dispute becomes part of the background against which future disputes arise and are resolved. Arbitrators function in this power contest as active intervenors in plant life in order to ensure the smooth continuity of operations and the diffusion of tensions, so as to help to preserve industrial order. But, as with any form of social order, it is important to see who benefits from industrial orderliness, and at whose expense it is achieved. It is in disorder that workers experience and exercise their power in the production process. The entire history of the labor movement is a history of workers creating "disorder"—strikes, disruptions of production, picketing—in order to achieve unionization and to better their working conditions. Like the law of gravity, the collective power of workers is only evident when the everyday structures collapse. Only in the midst of "disorder" do workers have the leverage to press for their demands. Thus by intervening to preserve order, arbitrators are not only nonneutral, they are acting consistently on the side of management.[300]

299. Ratner, *supra* note 155, at 261-62.

300. Various arbitration doctrines that have developed and that have received widespread acceptability further the bias toward a management-serving status quo. One such doctrine is the so-called "obey now—grieve later" rule, first announced by Harry Shulman in Ford Motor Co., Spring & Upset Bldg., 3 Lab. Arb. Rep. 779, 780 (1944); *see* p. 1551 *supra*. Many subsequent decisions applied this rule. *See, e.g.*, C. Schmidt Co. v. Allied Indus. Workers Local 157, 66 Lab. Arb. Rep. 90, 93 (1976) (McIntosh, Arb.) (obey now—grieve later applied to improper work assignment); Pacific Southwest Airlines v. Southwest Ind. Stewardesses Ass'n, 62 Lab. Arb. Rep. 1189, 1195 (1974) (Gentile, Arb.) (obey now—grieve later rule applied to illegal work assignment); Chrysler Corp. v. UAW, 62 Lab. Arb. Rep. 161, 165 (1974) (Alexander, Arb.) (obey now—grieve later rule applied to posting sign). Other examples of nonneutral arbitral doctrines are the doctrine that in a discipline case the credibility of the grievant should be discounted because the grievant has a motive to lie. *See, e.g.*, Ford Motor Co. v. UAW, 1 AM. LAB. ARB. AWARDS (P-H) ¶ 67,274, at 67,619-20 (1975) (Shulman, Arb.) (in credibility dispute, it is general proposition that grievant has incentive to lie while management has no such incentive absent showing of ill-will); *see* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 188 (1960) (citing cases). Another doctrine holds that management has a right to make unilateral rules, as long as they are "reasonable," *see, e.g.*, Hydril Co. v. United Steelworkers Local 580, 61 Lab. Arb. Rep. 464, 467 (1973) (Carraway, Arb.) (management is justified in unilaterally instituting "no-fault" progressive discipline for absences without specific rulemaking authority in contract); Mechanical Hardline Sys., Inc., 26 Lab. Arb. Rep. 401, 403 (1956) (Keller, Arb.) (employer may make reasonable rules as long as contract does not prohibit), or justified by economic efficiency arguments, *see, e.g.*, Caproco, Inc. v. Upholsterers' Int'l Local 25, 56 Lab. Arb. Rep. 65, 66 (1971) (Larkin, Arb.) (company may install closed circuit television to surveil employees in order to operate efficiently). Some arbitrators also espouse a doctrine that an employer's showing of business justification may override explicit contract language. *See, e.g.*, Fruehauf Corp., Decatur Plant v. Aluminum

VI. The Two Facets of Industrial Pluralism

In the last two sections, the central premises of industrial pluralism were examined and found to be untenable. Management and labor do not resemble political parties in a legislature that jointly determine the rules of the workplace; doctrines such as retained rights and the mandatory-permissive bargaining distinction limit the union's ability to contribute equally to the most crucial aspects of plant life. Neutral adjudication of disputes by an impartial arbitrator is also an untenable premise. The notion that an arbitrator can interpret and enforce shop rules in a neutral manner, above the very power struggles that gave rise to the rules in the first place, was implausible even to the pluralists themselves. They see the role of arbitrators as guarantors of the smooth continuity of plant operations. Their interventionist methodology makes grievance resolution a continuation of the initial struggle that went into the negotiation of the agreement in the first place.

With the collapse of definable boundaries for joint sovereignty and the erosion of the distinction between contract making and contract enforcement, the industrial pluralist metaphor of the plant as a mini-democracy ceases to have any descriptive validity and becomes a mere illusion. Yet it is an illusion that continues to prevail in the case law[301] and in the industrial relations literature.[302] How then can we account for the persistence of this illusion?

The illusion of industrial pluralism—the myth of the mini-democracy—persists because it serves a function in industrial relations, or rather, two mutually reinforcing functions. First, industrial pluralism implements the ideas of the human relations school of industrial sociology, a school of thought that is self-consciously concerned with the manipulation of workers in order to increase productivity. Second, the pluralist myth creates an illusion of consent by workers to industrial conditions that legitimates the conditions that result. These two facets of industrial pluralism—manipulation and legitimation—together lend vitality to the theory despite its internal theoretical incoherency.

A. *The Human Relations School*

The human relations school of industrial sociology developed at the same time as did the theory of industrial pluralism. It grew out of experi-

Workers Int'l Local 203, 52 Lab. Arb. Rep. 1051, 1057 (1969) (Jenkins, Arb.) (contract clause governing reassignments and overtime can be overridden by employer's business "necessity").

301. *See* note 192 *supra*.

302. *See, e.g.*, Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 274-75 (1980) (arbitration is part of process by which labor participates in making rules of workplace).

ments performed at Western Electric's Hawthorne Works throughout the 1930s and 1940s by the Massachusetts Institute of Technology, the Harvard Business School, and the National Research Council.[303] The experiments began as a study of the relationship between lighting conditions and work efficiency. The results showed that the productivity of both the experimental group who had good lighting and that of the control group whose lighting conditions were unchanged increased during the course of observation. In trying to explain this surprising result, the experimenters altered other conditions in the workplace, such as temperature and humidity. They also changed the method of wage payments, gave more rest periods, and made other alterations in the work rules. The experimenters found that whatever change they made led to increased productivity in both the experimental group and the control group.[304]

To explain these findings, they brought in sociologists, psychologists, and anthropologists.[305] This multi-discipline team developed a hypothesis that the increased productivity of workers involved in the experiments was caused by the very fact that they were being studied. Because they were asked for comments and criticisms of the tests, workers, in the course of the experiments, became united as a group and developed group loyalty to the company, thus increasing their productivity.[306]

This hypothesis led to a general theory of industrial relations which said that factory life has a complex internal social organization of cliques and status hierarchies. Group pressure prevents "deviant" behavior. "Deviance," however, is defined by the group, and it often means "rate busting"; that is, the enforcement by group pressure of low production standards and restricted output. Thus, the theory concluded that informal work groups, not management, regulated productivity.[307]

In the 1920s and 1930s, as unions lost strength due to the employers' anti-union offensive and to the Depression, informal work groups increasingly limited output in order to spread the work and keep members on the job.[308] By the 1930s, American businessmen considered restriction of out-

303. *See generally* F. ROETHLISBERGER & W. DICKSON, MANAGEMENT AND THE WORKER (1939) (history and analysis of results of Hawthorne experiments); N. WHITEHEAD, THE INDUSTRIAL WORKER (1938) (statistical analysis of raw data from Hawthorne experiments). For a general overview of the development and the impact of the human relations school, see L. BARITZ, SERVANTS OF POWER 76-116 (1960).

304. *See, e.g.*, F. ROETHLISBERGER & W. DICKSON, *supra* note 303, at 127, 160 (neither variations in rest conditions nor wages account for productivity changes).

305. Among those brought in were Elton Mayo, William Werner, and Theodore Roethlissinger. *See generally* L. BARITZ, *supra* note 303, at 87-116.

306. *See* F. ROETHLISBERGER & W. DICKSON, *supra* note 303, at 58-59, 189-90.

307. *Id.* at 523-38 (explaining productivity variance in wiring experiment).

308. *See* S. MATHEWSON, RESTRICTION OF OUTPUT AMONGST UNORGANIZED WORKERS 86-102 (1934) (fear of unemployment was major cause of restriction of output).

put a major problem.[309] Therefore, as the Hawthorne Experiment continued into the 1930s, it focused increasingly on ways to prevent such restrictions. With the new theory of in-plant social life, the experimenters sought to induce employee work groups to adopt the goals of management, so that collective pressure would increase rather than decrease production.[310]

To achieve this goal, the experimenters conducted extensive worker interviews throughout the plant. They wanted to find out how workers perceived their jobs. The interviews led to great improvement in morale and productivity, and led experimenters to conclude that giving workers a chance to talk about their feelings also caused them to identify with the company.[311] Thus, a systematic "personnel counseling" program was set up in 1936 to encourage workers to articulate freely their feelings about their job and about the company.[312] Well-liked workers were trained and were placed back in their former departments to counsel, to listen to complaints, and to watch for signs of unrest. Individual counseling was seen as a safety valve by which anti-company group pressure could be diverted and diluted.[313] The counseling program, called "control by listening," was designed to make the workers feel that management was interested in their opinions.[314] Experimenters hoped that the program would create identification with the company and infuse the work groups with management values. At the Hawthorne Works the individual counseling program was considered a big success; it was thought to be responsible for keeping the company nonunion throughout the thirties and forties.[315]

A striking similarity exists between the job-counseling program set up in the Hawthorne Works and the typical union grievance procedure. The job counselor resembles the union shop steward, a similarity that did not escape the attention of industrial sociologists and industrial pluralists.[316] The original Hawthorne experimenters were explicitly concerned with the prevention of unionization, and directed their suggestions to that goal.[317]

309. *See* L. BARITZ, *supra* note 303, at 99 (regulation of output was major problem for management in 1930s); S. Slichter, Union Policies and Industrial Management 164-200 (1941) (Brookings Institute) (detailing various forms of restriction of output used in 1930s).

310. *See* F. ROETHLISBERGER, MANAGEMENT AND MORALE 22-26 (1942) (Hawthorne analysis of worker motivation provided opportunity to combat output restriction by understanding and environmental change).

311. *See* F. ROETHLISBERGER & W. DICKSON, *supra* note 303, at 226-229.

312. *Id.* at 593-601.

313. *Id.* at 601-03.

314. F. ROETHLISBERGER, *supra* note 310, at 106-08.

315. *See* L. BARITZ, *supra* note 303, at 113-66.

316. W. WHYTE, PATTERN FOR INDUSTRIAL PEACE 171-72, 185-86, 188-97 (1951) (management, by cooperating with union, can gain vital assistance in such areas as productivity and absenteeism).

317. B. SELEKMEN, LABOR RELATIONS AND HUMAN RELATIONS at v-ix (1947); L. BERITZ, *supra* note 303, at 113-66.

As unions became a fact of life, however, the human relations disciples and the advocates of collective bargaining used the Hawthorne theories to reconcile their differences.

B. *Human Relations and Unions*

Benjamin Selekman of the Harvard Business School was one of the first to do so. In his book, *Labor Relations and Human Relations*, published in 1947, Selekman attempted to show that the upsurge of unionism and collective bargaining in the decade following the passage of the Wagner Act could end the post-war wave of industrial strife.[318] Like the pluralists, he invoked the goal of "free collective bargaining" and decried any suggestion that legislative regulation be used to set up "compulsory arbitration or 'supermachinery' for disposition of labor disputes."[319] Instead, he argued that collective bargaining itself could "evolve as an appropriate form of human relations in industry."[320] His book is a manual that teaches management to react to a union in a way that minimizes tensions and establishes joint cooperative arrangements.

The crux of Selekman's suggestions involves the handling of shop grievances. He said: "Grievances are inextricably interwoven not only with objective shop conditions but with the whole texture of subjective shop relationships."[321] Stressing the importance of shop communication and management sensitivity to underlying worker discontent, he asserted that:

> What the administrator needs, therefore, is some means by which he can constantly gauge the smoothness of shop relationships. And it is precisely from this need that the grievance takes on cardinal significance. Each grievance and its adjustment offers such a gauge, such a continuing index of the effectiveness of ongoing relations.[322]

Selekman suggested that management abandon the legalistic approach of confining grievances strictly to questions of contract interpretation.[323] Under such an approach, many workers' complaints go unheeded and appear in other forms. This is undesirable because the underlying sense of injustice is never dealt with by management:

> When strong emotions are denied an outlet for expression in their own terms, they find ways of utilizing some other outlet for expres-

318. B. SELEKMAN, *supra* note 317, at 3.
319. *Id.* at 5.
320. *Id.* at 11.
321. *Id.* at 77.
322. *Id.* at 78.
323. *Id.* at 78-86.

> sion in approved or disguised terms . . . . No complaint, to put it bluntly, will ever be completely or effectively shut off or dismissed. It may be driven underground . . . only to reappear . . . in shop unrest, walkouts, slowdowns, turnover, absenteeism, lack of discipline, clique hostility, and so on.[324]

To avoid this parade of horribles, Selekman suggested that every gripe should be reviewable under the grievance procedure.[325] Under this approach, the grievance procedure would provide "an outlet for articulating and draining off dissatisfactions as well as cooperative techniques for settling and probing conflicts over interpretation of the contract."[326]

Human relations theorists perceived that grievance procedures and arbitration have the potential to create an illusion of fairness in the settlement of day-to-day disputes, which could obtain worker acquiesence to a broad range of industrial conditions.[327] One prophetic commentator noted, as early as 1939, before all the results of the Hawthorne experiments were in, that:

> [a]ny personnel executive will tell you that the most important factor in maintaining a satisfactory morale among employees is to prevent the individual employee from feeling that an injustice has been done him . . . From the management's viewpoint the problem of grievances is or should be Number One on its industrial relations program.[328]

The need for management to adopt a broad definition of "grievances" in order to undermine informal work groups and to gain control of workers has been a continuing theme in industrial relations literature since the Hawthorne experiments.[329] For example, Isadora Katz applied the idea directly to industrial pluralism in her article, *Minimizing Disputes*

324. *Id.* at 85-86.

325. *Id.* at 90.

326. *Id.* at 237; *see* Selekman, *Reducing Friction in Employer-Employee Relationships*, 12 LAW & CONTEMP. PROB. 232, 242 (1947).

327. *See* pp. 1573-74 *infra*. Joseph Scanlon of M.I.T., another first-generation disciple of the Hawthorne experimenters, published a study with Douglas McGregor in 1948 on the usefulness of the human relations approach in a unionized firm, based on a case study of the Dewey and Almy Chemical Company. They too put forward the idea that the grievance procedure could be used as a safety valve for employee discontent. D. MCGREGOR & J. SCANLON, THE DEWEY AND ALMY CHEMICAL COMPANY AND THE INTERNATIONAL CHEMICAL WORKERS UNION (1948) (National Planning Association, Washington, D.C.).

328. Pipin, *The Enforcement of Rights Under Collective Bargaining Agreements*, 6 U. CHI. L. REV. 651, 651 (1939).

329. Those who advocate an expansive definition of the grievance because of its safety valve function do not always advocate the same expansive scope for arbitration. For example, a relatively recent textbook in personnel relations theory states: "This all inclusive approach to grievances can be applied at all steps of the [grievance] procedure save the last one—arbitration." D. BEACH, PERSONNEL: THE MANAGEMENT OF PEOPLE AT WORK 592 (1965).

through the Adjustment of Grievances:[330]

> Grievances are complex reactions by workers to the interplay of psychological, social, and economic forces. A proper grievance procedure will be so designed that it will carry all grievances. Yet, in the early stages of the collective relation, management's bargainers tend to be concerned with preventing the adjustment of all but a restricted class of grievances. The grievances they would consider are only those which involve the interpretation and application of the terms of the agreement. This limitation misses the entire point of the grievance procedure and its office in the collective relation. The error derives from failure to appreciate the multi-faced nature of the collectively bargained agreement.
>
> The collective bargaining agreement is at once a business compact, a code of relations and a treaty of peace . . . . As a code of relations it seeks to create *a system of government* through the processes of which grievances are resolved, understanding achieved, a line of communication opened between management and employees and a self-disciplining labor force secured.[331]

C. *Human Relations and the Law*

The human relations approach to grievances was adopted by Archibald Cox,[332] in a passage which was quoted in the *Steelworkers Trilogy*.[333] Cox wrote:

> Frivolous cases are often taken, and are expected to be taken, to arbitration. What one man considers frivolous another may find meritorious, and it is common knowledge in industrial relations circles that grievance arbitration often serves as a safety valve for troublesome complaints. Under these circumstances it seems proper to arbitrate every claim, meritorious or frivolous, which the complainant bases upon the contract. The objection that equity will not order a party to do a useless act is outweighed by the cathartic value of arbitrating even frivolous grievances and by the dangers of excessive judicial intervention.[334]

In the *American Manufacturing Co.*[335] opinion, Justice Douglas used this passage as authority both for the proposition that any doubts about arbi-

330. 12 LAW & CONTEMP. PROB. 249 (1947).
331. *Id.* at 257. *See also* B. CRANE & R. HOFFMAN, SUCCESSFUL HANDLING OF LABOR GRIEVANCES 16-18 (1965) (need for broad definition of grievances).
332. Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MTN. L. REV. 247 (1958).
333. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 n.6 (1959).
334. Cox, *supra* note 332, at 261.
335. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1959).

trability should be decided in favor of arbitration,[336] and for the notion that the courts are not always sensitive to the "real" issues at stake and thus are not the appropriate body to hear the merits of a grievance.[337] Douglas stated: "Arbitration is a stabilizing influence only as it serves as a vehicle for handling every and all disputes that arise under the agreement . . . . The processing of even frivolous claims have therapeutic values of which those who are not a part of the plant environment may be quite unaware."[338] Although Douglas limited arbitration to disputes that arise under the agreement, his language echoed that of the human relations school. Furthermore, the presumption of arbitrability can be seen as his attempt to follow the advice of the Hawthorne experimenters and Selekman by expanding as far as possible the scope of arbitration.

Other prominent industrial pluralists have also drawn explicitly on the human relations theories to justify collective bargaining and arbitration. For example, George Taylor, former Chirman of the War Labor Board, stated that restriction of output was "deeply entrenched and well-nigh universally practiced among virtually all employee groups,"[339] as a response to "job insecurity and . . . what were appraised as unfair terms of employment."[340] The antidote, he told them, is collective bargaining. "The direct representation of employees by a union at least permits a facing up to and a direct dealing with *those forces* upon which the employee contribution to production is so dependent."[341]

The intricate connection between industrial pluralism and the human relations school also explains why arbitrators abandon the neutrality of the judicial role to become plant psychiatrists. Arbitrators cite subterranean shop tensions and the potentially explosive nature of minor disputes as justification for their interventionist methodology. These are insights drawn from the human relations school. By attending to such invisible and submerged tensions, arbitrators put human relations theory into practice—they diffuse the build-up of collective tensions by addressing problems in an individuated manner. The goal of this psychiatric model of arbitration is the same as the job counseling program at the Hawthorne Works: it is to break up the cohesiveness of the informal work group and to counteract its power over production.

Even the everyday language of collective bargaining has been "Hawthornized." For a "grievance," strictly defined, is an employer

336. *Id.* at 567.
337. *Id.*
338. *Id.* at 567-68.
339. Taylor, *Collective Bargaining*, in AUTOMATION AND TECHNOLOGICAL CHANGE 84, 92-93 (J. Dunlop ed. 1962) (remarks at conference organized by John Dunlop in 1962).
340. *Id.*
341. *Id.*

breach of a collective bargaining agreement. By terming it a grievance that requires adjustment, rather than a breach of contract that requires a remedy, the industrial pluralists have shifted the focus away from the objective rights and duties of employers and employees under their agreements to a subjective inquiry into the employee's state of mind.[342] By shifting the focus, the concern becomes how to alleviate the discontent rather than how to correct the infraction.

The goal of defining grievances as subjective, individual concerns is to exact greater productivity from workers. By employing human relations theories, the industrial pluralists attempt not to satisfy workers' existing desires and motivations, but to alter their motivations through changes in the group structure. Work discipline, efficiency, and increased output are the stated objectives of the human relations school.

D. *The Presumption of Consent*

Industrial pluralism not only embodies and implements the manipulative strategies of the human relations school; it also provides a rationale to justify the exercise of private power in the workplace, a problem which has long been troublesome for democratic theorists.[343] The rhetoric of mini-democracy suggests that the workplace is not an enclave of private power and domination in an otherwise free and democratic society. Rather, it suggests that the workplace, too, is subject to the same democratic processes that prevail in the public life of our society. As in the larger democracy, the conditions of the workplace are said to represent the consent of the governed.

According to industrial pluralist theory, consent can be preserved because the collective bargaining agreement consists of jointly made rules by which labor and management order the workplace. As such it is said to reflect their joint wills. The democratic nature of collective bargaining is a function of the bargaining process itself, which is said to involve the joint input of both sides.[344] As one pluralist said, "[i]t should be made clear that it is *joint authorship of the rules*, rather than the procedures and sanctions available for their interpretation, application and enforcement, that char-

342. *Cf.* Republic Steel Corp. v. Maddox, 379 U.S. 650, 660-64 (1964) (Black, J., dissenting) (term "grievance" misleadingly applied to employee's contract claim for wages due).

343. *See* R. DAHL & C. LINDBLOM, POLITICS, ECONOMICS, AND WELFARE 482-83 (1953) ("Management cannot logically justify its control [over investment policies, labor relations, and other matters] except by showing that it is an agent of the society; yet if it is an agent of the society, management can scarcely justify its untrammeled discretion over decisions of such high value to the rest of society . . . . [O]nce the question of legitimacy is raised, it is difficult to justify the control of any particular minority organization over managerial decisions of giant corporations.").

344. *See* C. GOLDEN & H. RUTTENBURG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY 43 (1942).

acterizes collective bargaining."[345]

The stress on joint rule determination slides easily into an implicit assumption of self-determination by labor; that is, by helping to frame the rules, the union has "made its own bed." Although the process of negotiation necessarily entails some compromise, the resultant rules that displease the union are the bitter inextricably bound up with the sweet. Thus, the theory says, by participating in the bargaining process, the union consents to both.

For industrial pluralists, this theory distinguishes a collective bargaining agreement from an ordinary contract between two parties. If a collective bargaining agreement were seen as a conventional contract, the terms it contained would be seen as the product of the relative power each side had when it entered into the bargain; each side would be said to have obtained the best deal it could under the circumstances. Under industrial pluralism, however, the collective bargaining agreement is termed a system of government. The notion of government by consent of the governed implies that each side has accepted not only the particular terms of the agreement but also the entire network of procedures that surrounds the creation of the agreement, its enforcement, and its renegotiation. The particular rules that are generated by these processes are thought to express both sides' participation and both sides' consent to every aspect of the labor-management relationship.[346] The entire panoply of workplace regulations and decisions—disciplinary rules, methods and pace of production, hiring policies, and product quality—is implicitly within the union's consent. Thus virtually all management decisions are legitimated by the theory. David Feller, in his recent restatement of industrial pluralism, explained and extolled this result:

> Collective bargaining can serve many useful functions for management in connection with the formulation and administration of these rules. First, it establishes a mechanism by which employee consent to those rules can be obtained. That consent not only extends to those rules established in the collective agreement but also to rules established by management in areas not covered by the agreement to the extent that the unions, by not insisting upon participating in the formulation of those rules, can be said to have at least *implicitly consented to management's authority to impose them.*[347]

Is this expansive interpretation of consent merely a reductio ad ab-

345. Flanders, *The Nature of Collective Bargaining*, in COLLECTIVE BARGAINING 11, 20 (A. Flanders ed. 1969) (emphasis added).

346. Feller, *supra* note 80, at 100-06.

347. Feller, *supra* note 175, at 764 (emphasis added).

surdum of the theory? Apparently not. Courts have seized upon the industrial pluralist metaphor in order to hold unions jointly liable with employers for unlawful employment practices over which they have no control. For example, the trend in the decisional law under Title VII is to hold a union jointly liable for company-initiated acts of discrimination solely on the ground that the union is a party to the collective bargaining agreement.[348] This is true even in cases in which the acts found to be discriminatory involved areas wholly within management's unilateral control, such as hiring policies and job classification schemes,[349] and even choice of business location.[350]

The rhetoric of industrial pluralism also has the potential to encourage workers to react to unfavorable conditions by apportioning the blame between the union and their employer, thereby sparing the employer the full brunt of their dissatisfaction. John Dunlop and Benjamin Selekman have urged businessmen to exploit this possibility by embracing collective bargaining. Referring in particular to decisions that involved automation and the displacement of employees—decisions that are inevitably unpopular and provoke substantial resistance—they observed: "A strange thing begins to happen under the new power setup. It becomes evident that responsibility for unpleasant consequences can be shared."[351] Yet Dunlop and Selekman advocated not the actual sharing of decisionmaking power about such issues—issues that are not mandatory subjects of bargaining and thus not within the realm of joint sovereignty; rather, they advocated the spillover benefits achieved from the illusion of consent under the industrial pluralist version of collective bargaining.

It is impossible to know how deeply the illusion of consent affects individual worker attitudes toward their employers and their unions. According to Summer Schlicter, during the 1940s and 1950s, the "growth in the use of arbitration went hand-in-hand with the solution of wildcat strike

348. *See, e.g.*, Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1381 (5th Cir. 1974); Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252, 283 (N.D. Ind. 1977). *See generally* Note, *Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702, 703-05 (1980) (discussing cases in which unions held liable for their role in negotiating and signing collective bargaining agreements that contained discriminatory provisions).

349. *See, e.g.*, Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252, 260-61 (N.D. Ind. 1977); Hairston v. McLean Trucking Co., 62 F.R.D. 642, 675 (M.D. Cal. 1972).

350. *See* Macklin v. Spector Freight Sys. Inc., 478 F.2d 979, 988 (D.C. Cir. 1973).

Union liability under Title VII for employer discrimination has been found not only when the union acquiesced in the company's discriminatory actions, but also when the union actively opposed it. *See* Sabala v. Western Gilette, Inc., 516 F.2d 1251, 1263 (5th Cir. 1975); Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100, 1111 (N.D. Ga. 1975) (dicta). *But see* Terrell v. United States Pipe & Founding Co., 644 F.2d 1112, 1120-21 (5th Cir. 1981) (union, which actively opposed discriminatory seniority system, is not liable under Title VII).

351. Healy, Fuller, Lindberg, Dunlop, & Selekman, *Labor Relations: Union Power and Teamwork in American Industry*, in GETTING THINGS DONE IN BUSINESS 76, 95 (E. Bursk ed. 1953).

problems."[352] Similarly, a study by the Labor Study Group of the Committee for Economic Development concluded, in 1961, that: "The gains from this system are especially noteworthy because of their effect on the recognition and dignity of the individual worker . . . . Wildcat strikes and other disorderly means of protest have been curtailed and an effective work discipline generally established."[353] Such observations indicate that the manipulation and legitimation aspects of industrial pluralism have been effective pacifiers of collective class tensions.[354]

There is, however, an antinomy in the hidden agenda of industrial pluralism, a contradiction between its manipulation and legitmation facets. Industrial pluralism, like other forms of pluralism, posits the group as the basic unit of social life and consent as a group phenomenon. It is the collective consent to the governing structures, which in pluralist theory is said to be the basis for their legitimacy. Likewise, in industrial pluralism it is no problem for the theory that particular individuals may object to particular aspects of the terms and conditions of work, because the theory is premised on group consent. *J.I. Case Co. v. NLRB*[355] firmly embedded this notion in the law by holding that the individual is not free to negotiate contracts with his employer that differ from the collectively bargained agreement.[356]

Although collective consent is presumed, however, industrial pluralism secures this consent by attempting to individuate grievances and to destroy the group. The human relations writers are straightforward in their intent to undermine group cohesion and loyalty by means of personnel counselling programs. As the Hawthorne Works experiments proved, individual airing of grievances undermines the strength of work groups. This applies equally in union shops, so that the pluralist premise of group consent means, in practice, a fragmentation process aimed at destroying the group. Individual grievances are not clustered and dealt with collectively. They are not shared together and presented to management collectively in a way

352. S. SCHLICTER, J. HEALY, & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 746 (1960).

353. Independent Study Group of the Committee of Economic Development, The Public Interest in National Labor Policy 32 (1961), *cited in* A. COX, D. BOK, & R. GORMAN, LABOR LAW 571 (8th ed. 1977).

354. *See* Feller, *supra* note 175, at 765 ("[T]he process of collective bargaining . . . can serve to channel the natural desire of employees to exercise strategies of independence into acceptable forms and to legitimize the results . . . .") *See also* Freiden & Ulman, *supra* note 67, at 312; Katz, *supra* note 294, at 250-51.

355. 321 U.S. 332 (1944).

356. *Id.* at 338; *see, e.g.*, Republic Steel Corp. v. Maddox, 379 U.S. 650, 656 (1964) (individual may not circumvent grievance procedure and sue in court for severance pay due under collective bargaining agreement); *cf.* U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 352 (1971) (employee bound by provisions of collective bargaining agreement that governs procedures by which contract rights are enforced).

that maximizes the strength of the workers. Therefore, collective bargaining undermines collective action not only by the collective agreement's implied or real no-strike clause and the court's presumption of arbitrability, but also by the grievance and arbitration process itself.

This antinomy between the theory and the practice of industrial pluralism means that the viability of the theory as a way to legitimize the exercise of private power in industrial life is negated by the application of the theory itself. Indeed, when the practice of human relations successfully manipulates and channels employee discontent in the way that it aspires to do, its claim to achieve industrial democracy based on group consent becomes altogether specious. The more successful the theory is as a tool of manipulation, the less tenable it is as a mode of legitimation.

VII. The Locus of Struggle

So far it has been argued that the premises of industrial pluralism do not correspond to the reality of the industrial world. At bottom, the theory of industrial pluralism rests upon an assertion of equal power or potentially equal power between management and labor. Only if this assertion is true can the "legislative process" of collective bargaining be said to produce industrial democracy. Although the theorists of industrial pluralism do not clearly differentiate between the assertions of equal power and the assertions of merely potential equal power, this distinction is relevant. Thus far, the assertion of equal power has been examined and found to be false. Some pluralists, however, could maintain that the relative power of management and labor will gradually become equalized through the very process of collective bargaining.[357] This version of industrial pluralism would state that, by assuming an equality between management and labor, true equality is created; that is, that the pluralist interpretation of the NLRA sets in motion a process that, over time, will create joint sovereignty, neutral adjudication, and government by the consent of the governed—true industrial democracy.[358]

357. *See* S. SLICHTER, J. HEALY, & E. LIVERNASH, *supra* note 352, at 93 (differences in power between management and labor diminishes in significance under collective bargaining); Barkin, *Management Personnel Philosophy and Activities in a Collective Bargaining Era*, in PROCEEDINGS OF THE SIXTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 314, 334 (1953) (collective bargaining leads to joint administration in which relative power of labor and management becomes unimportant).

358. *See, e.g.*, S. SLICHTER, THE CHALLENGE OF INDUSTRIAL RELATIONS 129 (1947) (process of negotiation, in theory, creates mutual understanding which forms basis of increasingly improved relations between management and labor); W. WHYTE, INDUSTRY AND SOCIETY 174 (1946) (relations between management and labor become more harmonious as they engage in collective bargaining); Chamberlain & Kuhn, *Conjunctive and Cooperative Bargaining*, in COLLECTIVE BARGAINING 317, 318, 324 (A. Flanders ed. 1969) (collective bargaining builds trust and demonstrates to labor and management that they have mutual interests that can be furthered by collective bargaining).

This latter, teleological version of industrial pluralism is implicit when some pluralists speak of the expanding realm of collective bargaining that will occur through an expansion of the topics of bargaining.[359] In the 1950s, the pluralists frequently pointed to the emergence of bargaining over fringe benefits as proof of the expanding realm. The Coal Mine Health and Welfare Fund and the United Auto Workers' innovations in pensions were given as examples.[360] In the 1960s, these pluralists also spoke hopefully about the possibility of expanding the realm of bargaining further to deal jointly with the problem of technological change.[361] By expanding the topics of bargaining, it was argued that more issues, previously within management's unilateral control, would become subject to joint control.[362]

359. N. CHAMBERLAIN & J. KUHN, COLLECTIVE BARGAINING 106-07 (2d ed. 1965) (no limit to areas in which unions will want input); THE TWENTIETH CENTURY FUND, PARTNERS IN PRODUCTION 103-04 (1949) (assisted by O. Nichols) (role of unions expanding into areas of productivity, discipline, fringe benefits, work scheduling); Barton, *Major Trends in American Trade Union Development, 1933-1955*, in PROCEEDINGS OF THE EIGHTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 38, 39 (1955) (topics of collective bargaining have constantly broadened and trend will continue); Dolnick, *Major Collective Bargaining Trends 1933-1955*, in PROCEEDINGS OF THE EIGHTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 31, 37 (1955) (increase in topics of bargaining will continue indefinitely).

360. *See* Blankenship v. Boyle, 329 F. Supp. 1089, 1113 (D.D.C. 1971), *aff'd*, 498 F.2d 789 (2d Cir. 1974) ("pioneer role" of United Mineworkers of America Welfare and Retirement Fund of 1950); Lesser, *Problems in Pension Contributions and Benefits*, in PROCEEDINGS OF THE FIFTHTEENTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 86, 86 (1962) (UAW collectively bargained pension agreement in 1949 Ford Motor Company contract lead to proliferation of pension plans in unionized industries). *See generally* Barbash, *The Unions and Negotiated Health and Welfare Plans*, in NEW DIMENSIONS IN COLLECTIVE BARGAINING 91, 92-93 (W. Davey, H. Kaltenborn, & S. Ruttenberg eds. 1959) (tracing history of negotiated health and welfare plans); McConnell, *Initial Experience in Operation of Supplemental Unemployment Benefits*, in NEW DIMENSIONS IN COLLECTIVE BARGAINING 73, 80-82 (W. Davey, H. Kaltenborn, & S. Ruttenberg eds. 1959) (describing supplemental unemployment benefit plans in several union contracts). *See also* S. SLICHTER, J. HEALY, & E. LIVERNASH, *supra* note 352, at 372-489 (detailed history and description of union negotiated pension plans, health and welfare plans, and other employee fringe benefits that emerged in 1950s).

361. Aronson, *Automation—Challenge to Collective Bargaining?* in NEW DIMENSIONS IN COLLECTIVE BARGAINING 47, 63-64 (W. Davey, H. Kaltenborn, & S. Ruttenberg eds. 1959) (problems posed by automation are amenable to solution through collective bargaining). One example of bargaining over technological change that received considerable attention was the ILWU-PMA Mechanization and Modernization Agreement of 1960, in which longshoremen gave up hard-won work rules to permit operators to automate the docks. *See* L. FAIRLEY, FACING MECHANIZATION: THE WEST COAST LONGSHORE PLAN at xi-xii (1979). For descriptions and praise of the Agreement, see Chamberlain & Kuhn, *supra* note 358, at 325-26; Fairley, *The ILWU-PMA Mechanization and Modernization Experiment: The Union's Viewpoint*, in PROCEEDINGS OF THE SIXTEENTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 34, 34-47 (1963); Horwitz, *The ILWU-PMA Mechanization Agreement: An Experiment in Industrial Relations*, in PROCEEDINGS OF THE SIXTEENTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 22, 22-23 (1963); and Taylor, *supra* note 339, at 90-91. For a critique of the Agreement from a longshoreman's point of view, see Weir, *The ILWU, A Case Study in Bureaucracy*, in AUTOCRACY AND INSURGENCY IN ORGANIZED LABOR 80 (B. Hall ed. 1972).

362. D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 342-60 (1970) (unions are expanding their influence into such areas as training and education, work assignments, and should become involved in job design); S. SLICHTER, J. HEALY, & E. LIVERNASH, *supra* note 352, at 950 (management's area of discretion diminished by expansion in topics of collective bargaining); *see* H.

The problem with this teleological version of industrial pluralism is that there is nothing in the theory that can explain why the realm of joint sovereignty will grow rather than shrink.[363] Management is at least as likely, if not more likely, to attempt to retain unilateral control over as many areas of decisionmaking as it can, rather than to submit more areas to collective bargaining, grievance machinery, and arbitration.[364] Furthermore, the decisions of the Supreme Court, in the *Fibreboard*,[365] *Pittsburgh Plate Glass*,[366] and *First National Maintenance Corp.*[367] cases demonstrate that the realm of bargaining is not infinitely expandable. Arbitral decisional law that creates implied management rights and that recognizes the defense of business necessity for violations of explicit terms in collective agreements indicates that arbitrators also place limits on the realm of joint sovereignty.[368] Therefore, the teleological version of industrial pluralism has no more descriptive plausibility than the initial version of the theory with which this analysis began.

Both versions of the theory entail a prescription that the industrial world be treated as autonomous without interference from the larger political process. The theory thus provides a means to reconcile the tension between private ownership and political democracy which exists in American life.[369] It says that there is no contradiction between those two aspects of life because the statutory framework for collective bargaining permits democracy to flourish even in the privately owned industrial world.

These descriptive and prescriptive dimensions of the theory are intertwined and must stand or fall together.[370] If there is no equality of power between management and labor, and if the legal framework that the theory mandates cannot establish true industrial democracy, then the entire privatized approach to collective bargaining must be questioned. If there is a structural inequality of power between management and labor based

WELLINGTON, *supra* note 295, at 76-79 (no restrictions should be placed on scope and topics of collective bargaining).

363. *See, e.g.*, Goldberg, *Bargaining and Productivity in the Private Sector*, in COLLECTIVE BARGAINING AND PRODUCTIVITY 15, 43 (1975) (Industrial Relations Research Association) (collective bargaining over automation may not work in economy that is not expanding).

364. N. CHAMBERLAIN, THE UNION CHALLENGE TO MANAGEMENT CONTROL 2-6 (1948) (describing management's reluctance to expand realm of collective bargaining).

365. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

366. Allied Chem. Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971).

367. First Nat'l Maintenance Corp. v. NLRB, 101 S. Ct. 2573 (1981).

368. *See* note 300 *supra*.

369. R. DAHL & C. LINDBLOM, *supra* note 343, at 482-83 (pervasive tension exists between private ownership of industry and goals of democracy); G. MCCONNELL, *supra* note 30, at 251-55 (discussing problems of legitimacy posed by power of large corporations); *see* M. HORWITZ, *supra* note 262, at 254-55 (nineteenth century formalism attempted to disguise political, redistributive power of law); R. UNGER, KNOWLEDGE AND POLITICS 184-85 (1975) (welfare-corporate state characterized by conflict between class domination and claims to ideal egalitarian-democratic community).

370. R. HARE, THE LANGUAGE OF MORALS 111-26 (1971) (intricate relationships between descriptive and evaluative aspects of language).

upon the incidents of private property as the law has defined it, then no procedural solutions will create true industrial democracy. In that case, the law must intervene actively to alter the definitions of property rights in order to create true equality. If such equality is desirable, either to improve wages, hours, and working conditions, or to affirm workers' dignity, then there must be a new theoretical and doctrinal approach to the law of labor relations.

The starting point for any new approach is a more accurate description of the industrial world and a more viable analysis of the impediments to democracy built into it. Any new theory must also take a position on the question of whether the wage contract is a purely private concern or a concern of society as a whole. Industrial pluralism mandates legal arrangements that force workers to fight the daily struggles in the workplace in an invisible, privatized forum, where each dispute is framed in an individuated, minute, economistic form. The alternative is to define labor issues as a matter of public concern, and to submit resolution of these issues to the political process.

This approach would enable workers to struggle in the arena in which their strength is greatest—the national political arena. At the level of national economic and political institutions, they could utilize their collective strength and define their problems in such a way that genuine solutions would be possible. It is at that level that major decisions about investment policy, both private and public, are made. In the arena of national politics, the numerical strength of the working class and its commonality of interests around these problems would make it a potent force. By keeping labor disputes out of the political arena, however, industrial pluralism fosters the illusion, so central to pluralist theory in general, that there is no class conflict in America.