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FEDERAL REGULATION OF THE WORKPLACE IN THE NEXT HALF CENTURY*

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I. INTRODUCTION

There is an ancient Chinese curse that I find remarkably apt for labor law practitioners and labor law watchers in the mid-1980's: "May you live in interesting times!" A half dozen years or so ago, labor law scholarship was in the doldrums. Suddenly it has become a central item on everyone's agenda—the New Left's, the New Right's, and even the old centrists'. The product of all this furor is indeed interesting. It can also be opinionated, contradictory, and irritating. The frequent stridency of the discourse does not destroy its usefulness, however; at the very least it compels the reexamination of traditional principles.

Critical legal theorists like Karl Klare[1] and James Atleson[2] believe that the Wagner Act[3] had the potential for being the most radical piece of legislation ever adopted by Congress. Properly interpreted, it could have transformed the American workplace, breaking down age-old patterns of hierarchical domination and elevating the rank-and-file worker to a position of authority rivaling that of management. In this view a seemingly progressive[4] but actually conservative Supreme Court, attuned

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1. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985). Sharply critical of Klare's historiography is Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984).

Without trying to decide who "won" the debate, I think the Finkin-Klare exchange led Klare to produce a markedly clearer, narrower, and more defensible statement of his thesis. The ordinary reader, not attuned to critical legal thought or terminology, could well have understood Klare's 1978 article as claiming the Supreme Court somehow betrayed the congressional purpose behind the Wagner Act. I do not believe the legislative history of the statute supports such a charge. It is much more plausible and intriguing to argue, as appears to be Klare's position in his latest piece, that the basic conservatism of the Court prevented it from realizing the Wagner Act's full *potential* for restructuring industrial society with a worker orientation.

2. J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983).

3. National Labor Relations Act, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1982)).

4. A 5-4 majority of the Court took a liberal view of the Commerce and Due Process Clauses

to the authoritarian mind-set of the propertied class, thwarted the design of the statute. The strike weapon was sapped of much of its force by the license granted employers to replace strikers permanently,[5] workers were denied property rights in their jobs,[6] and unions were installed as management's enforcers of order and discipline on the shop floor.[7]

At the polar extreme from those views is Richard Epstein. Closely aligned with the Chicago school of economists, he would repeal the Wagner Act, reject its paternalistic philosophy, and return to the market place rules of the common law.[8] The "yellow dog" contract, whereby an employee agrees not to join a union while working for a particular employer, would once again be an entirely legitimate bargain struck between two equally free and uncoerced parties.[9] Charles Fried is less absolutist than Epstein, but still highly critical of the Wagner Act as "ponderous and increasingly out of touch with national and international social, political, and economic developments."[10] Fried is skeptical of the monopolistic principle of exclusive representation, and he is opposed to any sharp dichotomy between workers and managers.[11] He favors much more flexibility in the relations between employers and employees than the law now allows.

The more moderate labor law reformers have found a fresh new voice in Paul Weiler. Coming from a Canadian background, with its more favorable labor climate, Weiler would reinvigorate the Wagner Act as a well-spring of union strength by such innovations as "instant" elections,[12] compulsory arbitration when there is egregious bad faith in first-contract negotiations,[13] elimination of an employer's right to replace strikers,[14] and decreased control of secondary boycotts.[15] Other scholars

to sustain the constitutionality of the Wagner Act in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

5. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

6. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (sitdown strikes as unprotected activity).

7. NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939) (strikes in violation of collective agreement as unprotected activity).

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

9. *Id.* at 1382-85.

10. Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1040 (1984).

11. *Id.* at 1019, 1037-39.

12. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1811-13 (1983).

13. Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 405-12 (1984).

14. *Id.* at 412-14.

15. *Id.* at 415-19.

have sought new directions along more traditional pathways. These have included Benjamin Aaron and Jack Getman, urging greater restraints on certain unilateral employer actions like plant closings, and more emphasis on advance consultation and collective bargaining;[16] Clyde Summers and Cornelius Peck, stressing the plight of the unorganized worker and arguing for modifications in the traditional doctrine of employment at will;[17] and Michael Harper and Douglas Leslie, advocating loosened restrictions on union activity in the labor market under antiboycott and antitrust law.[18]

Even the general circulation press, from the *New York Times*[19] to the *Los Angeles Times*[20] to *Business Week*,[21] has taken to examining the current malaise of the labor movement and the increased emphasis upon ensuring the safety, health, and economic security of employees through direct governmental regulation rather than through collective bargaining. What accounts for this upsurge of scholarly and popular interest in labor relations and labor law? There are undoubtedly multiple causes but I should like to focus on a couple of reasons that seem preeminent to me.

II. Reasons for Renewed Interest in Labor and Employment Law

Two factors, perhaps interrelated, do much in my view to explain the recent outpouring of studies and articles on labor and employment law. The first is the steady, and now dramatic, decline in organized labor over the past thirty years. In 1933, on the eve of the Wagner Act of 1935, union membership stood at 2.9 million, or 11.5 percent of nonagricultural employment.[22] Buoyed by the Wagner Act's declaration that the policy of the United States was one of "encouraging the practice and

16. Aaron, *Plant Closings: American and Comparative Perspectives*, 59 CHI.-KENT L. REV. 941 (1983); Getman, *The Courts and Collective Bargaining* 59 CHI.-KENT L. REV. 969 (1983); A comprehensive overview of legal and economic challenges confronting unions in this country is Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633.

17. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979).

18. Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984); Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183 (1980).

19. *E.g.*, Serrin, *Unionism Struggles through Middle Age*, N.Y. Times, Oct. 27, 1985, at E4, col. 3.

20. *E.g.*, Dreyfuss, *Arbitration May Help Fired Worker and Company, Too*, Los Angeles Times, June 7, 1985, at 1, col. 1.

21. *E.g.*, Hoerr et al., *Beyond Unions: A Revolution in Employee Rights Is in the Making*, Bus. Wk., July 8, 1985, at 72.

22. L. REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 339 (7th ed. 1978). *See also*,

procedure of collective bargaining,"[23] and proudly brandishing placards proclaiming, "President Roosevelt wants you to join the union,"[24] the labor movement went on to enjoy the most spectacular decade of growth in its history. By 1945 its membership had increased five-fold, to 14.8 million, or 35.8 percent of nonagricultural employment.[25]

Then began a long, slow slide in the percentage of unionized workers, which except for an abortive spurt in the mid-fifties during the Korean War has continued almost uninterruptedly to the present day. Despite a constantly growing labor force, total union membership sank from an all-time peak of 22.8 million in 1974 to 19.8 million in 1982.[26] The organized portion of nonagricultural employment was down to 22 percent in 1982,[27] and it is probably below 20 percent toady.[28] Were it not for the remarkable rise of public employee unionism during the last twenty-five years,[29] the figures would be even more devastating. Private sector unions that used to win 75 to 85 percent of the representation elections conducted by the National Labor Relations board are prevailing in only 43 to 46 percent of the elections in the early 1980's.[30] It is not without reason that Paul Weiler has likened contemporary American labor law to "an elegant tombstone for a dying institution."[31]

A second major cause of the heightened attention that is being paid to labor law is the recently expanded activity of government in the employment arena. Following the passage of the Fair Labor Standards Act of 1938,[32] which established minimum wages and maximum hours for many employees in private industry, the federal government largely refrained for the next twenty-five years from interfering with the substantive terms of employment, and contented itself with defining the procedures by which employers and unions might set those terms. Probably the most significant development during the past quarter century

BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 2070, HANDBOOK OF LABOR STATISTICS-1980 at 412.

23. 49 Stat. 449, § 1 (1935) (codified as amended at 29 U.S.C. § 151 (1982)).

24. F. DULLES, LABOR IN AMERICA 267-68 (1960).

25. *See supra* note 22.

26. DIRECTORY OF U.S. LABOR ORGANIZATIONS—1984-85 EDITION 2 (C. Gifford ed. 1984).

27. *Id.* at 3, Exhibit 1 (percentage calculated by author based on figures for private nonagricultural and government employees, including supervisory personnel).

28. *See supra* notes 19 and 21. Some caution must be exercised concerning figures in the popular press, however, since they do not always distinguish carefully between percentages based on the total civilian labor force and those based only on nonagricultural employment.

29. H. EDWARDS, R. CLARK & C. CRAVER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 4, 8-9 (2d ed. 1979), and authorities quoted therein.

30. For the latest figures *see* 46 NLRB ANN. REP. 17 (1981). For earlier years *see* 9 NLRB ANN. REP. 22, 86 (1944); 15 NLRB ANN. REP. 11, 232 (1950).

31. Weiler, *supra* note 12, at 1769.

32. 52 Stat. 1060 (1938) (codified as amended as 29 U.S.C. § 201 (1982)).

has been the shift of the spotlight from more conventional labor relations, with heavy stress on voluntary collective bargaining, to what might be termed the employment relationship, with much more direct government regulation of employer-employee relations and to a lesser extent of union-member relations.

The current retreat from voluntarism toward a more European-style legal framework began with the Landrum-Griffin Act of 1959[33] and continued with the Equal Pay Act of 1963,[34] Title VII of the 1964 Civil Rights Act,[35] the Age Discrimination in Employment Act of 1967,[36] the Occupational Safety and Health Act of 1970,[37] and the Employee Retirement Income Security Act of 1974.[38] During the past decade some thirty states have furthered this trend by showing their willingness through holdings or dicta to modify the traditional judicial doctrine of employment at will.[39]

Do these developments portend a permanently diminished role for unions and collective bargaining? Since bargaining can build on, and is not necessarily displaced by, government regulation,[40] it seems to me that the answer lies largely in an assessment of the long-term fate of organized labor. Does its current low estate reflect a terminal condition or merely a passing malady attributable to a transitional period in American employment relations? I turn now to that question.

III. Causes of Union Decline

A. Industrial Changes

On the face of it, the most obvious explanation for the decline in the percentage of unionized workers over the last three decades is the shift in employment from organized to unorganized industries and from organized to unorganized parts of the country. In 1950 about 40.9 percent of American nonagricultural employment was concentrated in manufactur-

33. 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. § 401 (1982)).

34. 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206(d) (1982)).

35. 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e (1982)).

36. 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. § 621 (1982)).

37. 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. § 651 (1982)).

38. 88 Stat. 832 (1974) (codified in part as amended at 29 U.S.C. § 1001 (1982) and throughout the Internal Revenue Code, 26 U.S.C. (1982)).

39. *See infra* note 166 and accompanying text.

40. Collective bargaining agreements customarily provide for time-and-a-half overtime after eight hours of work in a single day, as well as after the forty hours of work in a single week specified by the Fair Labor Standards Act. *See also* Fillion & Trebilcock, *The Duty to Bargain Under ERISA*, 17 WM. & MARY L. REV. 251 (1975); Oldham, *Organized Labor, the Environment, and the Taft-Hartley Act*, 71 MICH. L. REV. 936 (1973).

ing, construction, and mining.[41] By 1983 that figure had fallen to 26.0 percent. In contrast, employment in retail and wholesale trade, finance, and miscellaneous services had risen from 36.9 percent to 51.1 percent of the total during the same period. At the same time the population in the fourteen "Sunbelt" states that now have right-to-work laws[42] had grown from 25.2 percent ot 29.2 percent of the total U.S. population between 1950 and 1980,[43] a considerably smaller change, I suspect, than many proponents of the "geographical" explanation of union decline, including myself, would have surmised. I can only conclude that the so-called migration to the Sunbelt must be regarded as no more than a marginal contributor to the ills of organized labor.[44]

It would also be easy to exaggerate the importance, as an explanation for the loss of union strength, of the movement of workers from "blue collar" jobs to "white collar" jobs.[45] In fact, union concentrations in such vaunted bastions of organization as manufacturing and construction contracted sharply during the last decade and a half, shrinking from over 38 percent in manufacturing in 1970 to about 26 percent in 1984, and from almost 40 percent in construction in 1970 to less than 23 percent in 1984.[46] At the same time, the unionized portion of public employment soared throughout this period, going from almost nothing in 1960 to 49.8 percent of full-time state and local government workers by 1976,[47] even though about twenty states still did not authorize collective bargaining for state or municipal employees. Two quintessentially white collar unions, the National Education Association and the American Federation of Teachers, alone accounted for over 2.2 million members in 1982, mostly in the public sector.[48] That would seem to belie the belief in some quarters that white collar employees, especially professionals and high-level technicians, are inherently unorganizable. Further evidence

41. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 2217, HANDBOOK OF LABOR STATISTICS—1985 at 174-75 (percentages calculated by author).

42. Alabama, Arizona, Arkansas, Florida, Georgia, Louisiana, Mississippi, Nevada, North Carolina, South Carolina, Tennessee, Texas, Utah, and Virginia.

43. INFORMATION PLEASE ALMANAC—1985 at 756 (1984) (percentages calculated by author).

44. For a more sophisticated statistical analysis that is generally supportive of this conclusion while taking account of the growing percentage of nonagricultural employment in the South, *see* Farber, *The Extent of Unionization in the United States*, in CHALLENGES AND CHOICES FACING AMERICAN LABOR 17-19 (T. Kochan ed. 1985). *See also*, R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 224-27 (1984).

45. *Id.*

46. N.Y. Times, Sept. 1, 1985, at F6, col. 3 (graph).

47. H. EDWARDS, R. CLARK & C. CRAVER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 4, 8-9 (2d ed. 1979), and authorities quoted therein. It is probably not coincidental that when a state legislature authorizes collective bargaining for public employees, the officials of affected agencies rarely resort to vigorous opposition.

48. DIRECTORY OF U.S. LABOR ORGANIZATIONS—1984-85 EDITION 3 (C. Gifford ed. 1984).

that the labor movement need not be an alien in the post-industrial world, and that its recent setbacks in the American private sector may constitute a unique phenomenon, can be found in the experience of Canada and Western Europe. There, unions have continued to forge ahead or at least hold their own in the face of advancing technologies and changing career styles.[49]

B. Legal and Attitudinal Changes

Revisions of federal law may also have affected the long-term trends in American union membership. The Labor Management Relations (Taft-Hartley) Act of 1947[50] rewrote the NLRA, inserting a code of union unfair labor practices and limiting one of labor's major organizing devices, the secondary boycott. Further restrictions on boycotts and organizational picketing were added by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959.[51] Enactment of Taft-Hartley coincided with an abrupt halt in the progress of unionization throughout the country.[52] Arguably, union growth had reached a natural plateau about that time, at least in the private sector. Nonetheless, various studies, including comparisons of the superior membership gains of Canadian unions in the years after 1947, suggest that Taft-Hartley and amendments to it may have played a substantial role in impeding organization.[53]

The massive wave of strikes which swept the country at the end of World War II and helped pave the way for Taft-Hartley, as well as the exposure by the McClellan Senate Select Committee in the late 1950's of corruption and undemocratic practices in certain labor organizations, dramatically altered predominant American attitudes toward unionism, from sympathy and support to neutrality at best and increasing distrust or hostility at worst.[54] Recent analyses of voting patterns in NLRB representation elections indicate that unions fare far better in geographical

49. Meltz, *Labor Movements in Canada and the United States*, in CHALLENGES AND CHOICES FACING AMERICAN LABOR 316-18 (T. Kochan ed. 1985); R. FREEMAN & J. MEDOFF, *supra* note 44, at 227; L. REYNOLDS, *supra* note 22, at 352-58; Bok, *Reflections on the Distinctive Character of American Labor Law*, 84 HARV. L. REV. 1394, 1412 n. 50 (1971).

50. 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 141 (1982)).

51. 73 Stat. 519, 542-44 (1959) (codified at 29 U.S.C. § 158(b)(4), (b)(7), and (e) (1982)).

52. *See supra* notes 25-28 and accompanying text.

53. *See e.g.*, Spielman, *The Taft-Hartley Law: Its Effect on the Growth of the Labor Movement*, 13 LAB. L.J. 287, 290-91, 299-300 (1962); Levinson, *Trucking*, in COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE 99, 135-36, 147 (G. Somers ed. 1980).

54. Opinion polls in the 1970's showed there was no other major institution in our society whose leadership so consistently lacked the confidence of the general public. Ladd, *The Polls: The Question of Confidence*, 40 PUB. OPINION Q. 544, 545 (1977).

areas where the public image of organized labor is a positive one.[55] There may be some question about the exact causal link here: Do employees reject unions because they are reflecting their neighbors' views, or are they more influenced (or intimidated) by their employers, who have been emboldened by community sentiments to step up their antiunion attacks? About a marked acceleration in employer resistance, however, including illegal resistance, there can be no doubt.

C. Employer Activity

A 1980 report by a subcommittee of the U.S. House Labor and Education Committee declared that there had been "a staggering increase in the number of practicing labor consultants,"[56] with one leading consultant estimating a tenfold growth in the industry in the preceding ten years. Another witness calculated that the consultant industry had an annual volume of business well over 500 million dollars.[57] Even if we presume that most of this activity was entirely legal, an expression of the employer's statutory right to try to persuade its employees to oppose unionization,[58] there seem to be serious questions about a good deal of it.

More to the point, a 1984 report by the same U.S. House Labor Subcommittee declared that the most "startling statistic" revealed at hearings held in June 1984 was that "at least one in twenty workers who vote for a union today are illegally fired for their union support."[59] Drawing on figures compiled by Paul Weiler, the subcommittee presented the following comparisons between the number of discharged employees reinstated by the NLRB and the number of certification elections since 1950:[60]

55. Unpublished paper delivered by Professor James Medoff of Harvard University before the Washington, D.C. Chapter of the Industrial Relations Research Association on October 23, 1985.

56. Quoted in THE FAILURE OF LABOR LAW—A BETRAYAL OF AMERICAN WORKERS, S. REP. NO. 98—, 98th Cong., 2d Sess. 6 (1984) [hereinafter cited as FAILURE].

57. *Id. See also*, Bethel, *Profiting from Unfair Labor Practices: A Proposal to Regulate Management Representatives*, 79 NW. U.L. REV. 506-08 (1984).

58. Sec. 8(c) of the NLRA 29 U.S.C. § 158(c) (1982), provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

59. FAILURE, *supra* note 56, at 5.

60. *Id.* (percentages calculated by author).

Years	Elections	Reinstates	Reinstates as % of Elections
1950	5,619	2,111	37.6
1957	4,729	922	19.5
1965	7,576	5,875	77.5
1970	7,773	3,779	48.6
1980	7,296	10,033	137.5

Whatever quibbles may be raised about the absolute figures provided by Weiler,[61] the item I find most striking and significant is the ratio of reinstatements to elections conducted. In proportion to the number of elections, an employee was more than seven times as likely to be discharged for union activity in 1980 as in 1957. If 1950 is taken as a more "normal" base year, the employee was still close to four times as vulnerable to dismissal in 1980.

The intensity of opposition to unionization which is exhibited by American employers has no parallel in the western industrial world.[62] There is keen irony here. Ours is the most conservative, least ideological of all labor movements, traditionally committed to the capitalistic system and to the principle that management should have the primary responsibility for managing.[63] Yet employers will pay millions of dollars to experts in "union avoidance" in order to maintain their nonunion status.[64] In part this resistance is explained by the highly decentralized character of American industrial relations. Because of this decentralization, an employer typically must confront a union on a one-to-one basis, without the protective shield of an association to negotiate on behalf of all or substantially all the firms in a particular industry, as is true in Western Europe. In part the resistance to union organization may result, among both employers and workers, from ingrained American attitudes of rugged individualism and the ideal of the classless society.[65]

Aversion to unionism can hardly be supported by a dispassionate analysis of the actual impact of collective bargaining in this country. For many years labor economists wrangled over whether *any* significant eco-

61. Former NLRB General Counsel John Irving has observed that the "vast majority" of the 10,000 employees reinstated in 1980 "were reinstated through voluntary settlement agreements without any final determination by the Board or anyone else that the law had, in fact, been violated." Irving, *The Board's Representation Process: Another View* at 4 (unpublished paper delivered at The Labor Board at Mid-Century Symposium sponsored by Southern Methodist University School of Law in Washington, D.C. on Oct. 2-4, 1985).

62. Bok, *supra* note 49, at 1409-11.

63. *See, e.g.*, LABOR AND AMERICAN POLITICS 4-5, *passim* (C. Rehmus, D. McLaughlin & F. Nesbit rev. ed. 1978).

64. FAILURE, *supra* note 56, at 6.

65. Bok, *supra* note 49, at 1458-62.

nomic effect could be demonstrated. Today there is an emerging consensus. Unionism cannot be proven to have brought about any substantial redistribution of wealth as between labor and capital. It has achieved a wage level that is roughly ten to twenty percent higher for union workers, but that differential is largely offset by increased efficiency and greater productivity in unionized firms.[66]

The major achievement of collective bargaining has probably not been economic at all. It has been the creation of the grievance and arbitration system, the formalized procedure whereby labor and management may resolve disputes arising during the term of a collective agreement, either by voluntary settlements between the parties themselves or by reference to an impartial outsider, without resort to economic force or court litigation.[67] The mere existence of a grievance and arbitration system helps to eradicate such former abuses as favoritism, arbitrary or ill-informed decision-making, and outright discrimination in the workplace. Collective bargaining has promoted both industrial peace and broader worker participation in the governance of the shop,[68] while simultaneously stimulating higher productivity and causing only modest dislocation in the economy generally. It is tragic that so few nonunion employers have learned that lesson.

D. The Reagan Board

Beginning with *Midland National Life Insurance Co.*[69] in 1982, President Reagan's appointees to the NLRB (who have constituted a majority of the Board's membership since May 1983) participated in the overruling of at least twenty significant precedents established by earlier Boards. Nearly all the discarded decisions favored union organizing or bargaining rights. On the face of it that suggested considerable pro-management bias, and the expectable hue-and-cry was forthcoming from organized labor's representatives and supporters.[70]

Yet for all the suspicious appearances, several things need be said about this string of overrulings. Almost all the issues were genuinely

66. A. REES, THE ECONOMICS OF TRADE UNIONS 74, 89-90 (2d ed. 1977); R. FREEMAN & J. MEDOFF, *supra* note 44, at 43-60, 162-180.

67. *See, e.g.*, D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 463-65 (1970); A. REES, *supra* note 66, at 187.

68. *Id.*; S. SLICHTER, J. HEALY & E.R. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 960 (1960).

69. 263 N.L.R.B. 127 (1982).

70. Cohen & Bor, *The National Labor Relations Act Under Siege: A Labor View of the Reagan Board*, in SOUTHWESTERN LEGAL FOUNDATION, THIRTY-FIRST ANNUAL INST. ON LABOR LAW DEVELOPMENTS 4-1 (1985); FAILURE, *supra* note 56, at 14-23.

close calls. Scholars had debated several vigorously,[71] and the NLRB itself had vacillated on many in the past.[72] As long as we continue to invite if not mandate the Labor Board to "follow the election returns" by limiting its five members to terms as short as five years,[73] we should hardly be shocked if the pendulum swings widely when a solidly conservative administration succeeds a fairly liberal one. Most of the overruled decisions were themselves of recent vintage, and the vast majority of those that had been reviewed by the federal courts of appeals had fared badly there.[74] Finally, most of the Reagan Board's holdings did not create brand new pro-management legal principles, but simply reverted to the law that had existed prior to the overruled decisions.[75]

Midland National Life[76] is a case in point. There, two new Reagan appointees joined a Carter holdover to rule that a Board election will not be set aside because of a party's misrepresentations, so long as there are no forged documents that would prevent a voter from recognizing propaganda for what it is. This 3-2 decision of the "almost-Reagan" Board overruled a 3-2 decision of the Carter Board,[77] which in turn had overruled a 3-2 decision of the Nixon-Ford Board,[78] which in turn had overruled a decision of the Kennedy Board that was 3-2 on its rationale.[79] These shifts by the Board mirrored a heated and continuing exchange among scholars over whether campaign propaganda or even employer unfair labor practices have any significant impact on the outcome of union elections.[80]

In other major decisions, the Reagan Board narrowed the meaning of "concerted" employee activity protected under section 7 of the NLRB by excluding a single individual's protest;[81] declined to reinstate a striker

71. *Compare* S. Goldberg, J. Getman & J. Brett, *The Relationship between Free Choice and Labor Board Doctrine: Differing Empirical Approaches*, 79 Nw. U.L. REV. 721 (1984), *with* Freeman, *Why Are Unions Faring Poorly in NLRB Representation Elections?*, in CHALLENGES AND CHOICES FACING AMERICAN LABOR 45, 54-59 (T. Kochan ed. 1985), and authorities cited therein; *compare* Schatzki, *N.L.R.B. Resolution of Contract Disputes Under 8(a)(5)*, 50 TEX. L. REV. 225 (1972), *and* Zimmer, *Wired for Collyer: Rationalizing NLRB and Arbitration Jurisdiction*, 48 IND. L.J. 141 (1973), *with* Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty*, 49 IND. L.J. 57 (1973).

72. Walther, *The NLRB Today*, 36 LAB. L.J. 803, 805, 809-16 (1985).

73. NLRA § 3(a), 29 U.S.C. § 153(a)(1982).

74. Walther, *supra* note 72, at 804-05, 809-16.

75. *Id.* at 803, 805.

76. 263 N.L.R.B. 127 (1982).

77. General Knit of California, Inc., 239 N.L.R.B. 619 (1978).

78. Shopping Kart Food Market, Inc., 228 N.L.R.B. 1311 (1977).

79. Hollywood Ceramics Co., Inc., 140 N.L.R.B. 221 (1962).

80. *See supra* note 71 and first two authorities cited therein.

81. Meyers Industries, Inc., 268 N.L.R.B. 493 (1984), *remanded sub nom.* Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985).

who had engaged in verbal threats unaccompanied by physical acts or gestures;[82] permitted an employer to interrogate a known union adherent about his interest, when there was no other evidence of interference or coercion;[83] refused to order an employer guilty of egregious unfair labor practices to bargain with a union that had never obtained majority support;[84] extended the doctrine of deferral to arbitration by (1) honoring an award where the contractual issue factually paralleled the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to the latter, even though there was no extended consideration of the statutory issue,[85] and (2) forcing an employee to arbitrate a claim that his employer had threatened him in violation of section 8(a)(1) of the NLRA, rather than enabling him to process his charge immediately before the Board;[86] and allowed an employer, during the term of a contract containing no work preservation clause, to transfer assembly operations to a nonunion plant to save labor costs.[87]

I do not regard *Midland National Life*, or a single one of the other Reagan Board decisions just mentioned, as indefensible. Most I would have decided the same way. One with which I disagree, the nonmajority bargaining order case, involves a highly controversial remedy that the Board had never imposed prior to 1982.[88]

My strongest dissent from a Reagan Board holding is reserved for *Otis Elevator Co.*[89] There, an employer's decision to terminate its research and development functions at a facility in New Jersey and to relocate and consolidate those functions at another facility in Connecticut was ruled not to be a mandatory subject of bargaining. A Board plurality opinion emphasized that the employer's decision "did not turn upon labor costs" but rather "turned upon a fundamental change in the nature and direction of the business."[90] The decision was thus not "amenable to bargaining," regardless of its "effect on employees [or] a union's ability to offer alternatives."[91] I consider *Otis Elevator* a grave impairment of the flexible, creative, cooperative, and ameliorative process that collective

82. Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984).

83. Rossmore House, 269 N.L.R.B. 1176 (1984), *aff'd sub nom.*; Hotel & Restaurant Employees Local 11 v. NLRB, 760 F.2d 1006 (9th Cir. 1985).

84. Gourmet Foods, Inc., 270 N.L.R.B. 578 (1984).

85. Olin Corp., 268 N.L.R.B. 573 (1984).

86. United Technologies Corp., 268 N.L.R.B. 557 (1984).

87. Milwaukee Spring Div., 268 N.L.R.B. 601 (1984), *enforced sub nom.* UAW Local 547 v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

88. Conair Corp., 261 N.L.R.B. 1189 (1982), *enforcement denied*, 721 F.2d 1355 (D.C. Cir. 1983).

89. 269 N.L.R.B. 891 (1984).

90. *Id.* at 892.

91. *Id.*

bargaining ought ideally to be. But although the Board's holding goes well beyond the facts of the Supreme Court case of *First National Maintenance Corp. v. NLRB*,[92] there is much in the language and logic of the latter to support *Otis Elevator*. That includes a broad declaration by the Court that an employer has no duty to bargain about a decision "to shut down part of its business purely for economic reasons."[93]

My point, however, does not go to the merits of any of these Reagan Board rulings. My point is that they are well within the acceptable parameters of law-making by a quasi-judicial, quasi-political body like the NLRB. The Reagan Board is probably no more disrespectful of precedent than either the Kennedy-Johnson or Carter Boards. At worst the Reagan Board's much-publicized overrulings have returned labor relations to the law of an earlier era; they have not been proven a principal cause of organized labor's current tribulations.

Much more troubling in my view is the accusation that the Reagan Board has tipped the scales against unions in run-of-the-mill discrimination and representation cases by overturning the credibility determinations of administrative law judges and by other similar techniques. For example, according to statistics compiled by the AFL-CIO, during the last months of the Nixon-Ford and Carter Boards and during a comparable period of the Reagan Board, their respective dispositions of unfair labor practice charges against employers and unions and of representation cases looked like this:[94]

	Nixon-Ford (9/75-4/76)	Carter (9/79-4/80)	Reagan (9/83-4/84)
Charges v. employers sustained	86.6%	85.7%	56.8%
Charges v. employers dismissed	13.4%	14.3%	43.2%
Charges v. unions substained	72.8%	75.0%	84.6%
Charges v. unions dismissed	27.2%	25.0%	15.4%
Employer-won representation appeals	35.6%	44.4%	74.5%
Union-won representation appeals	64.4%	55.6%	25.5%

These are gross, undiscriminating figures, of only modest probative value standing alone. But they suggest an appropriate line of inquiry. If the Reagan Board is systematically rejecting the findings of the career personnel of what has long been one of the federal government's most respected agencies, and drastically altering the normal decisional pat-

92. 452 U.S. 666 (1981).

93. *Id.* at 686.

94. Cohen & Bor, *supra* note 70, at 4-43 - 4-44. *See also*, FAILURE, *supra* note 56, at 16.

terns of both Republican and Democratic predecessors without a satisfactory explanation, there is indeed cause for the gravest concern.

A final aspect of the Reagan Board is important symbolically, and may have important practical implications. To the best of my knowledge, no union official or attorney has ever been named a member of the NLRB. In contrast, a number of prominent management lawyers have been appointed to the Board over the years. But they have generally been mainstream figures, skilled in and accepting of the collective bargaining process.[95] The Reagan Board is different. The first appointee, Chairman John Van de Water, was a management consultant apparently so lacking in the required neutrality that he ultimately failed to secure Senate confirmation.[96] His successor, Chairman Donald Dotson, had written disparagingly of collective bargaining as recently as 1980, equating it with "labor monopoly" and "the destruction of individual freedom."[97] Another appointee, Robert P. Hunter, came from a staff position with antiunion Senator Orrin Hatch.[98] A fourth appointee, Patricia Diaz Dennis, was a young management attorney of ability and balanced judgment but limited experience in collective bargaining.[99] It was not a lineup to inspire confidence among embattled unionists.

Not until May 1985, with the appointment of Wilford Johansen, a career Board employee, and Marshall Babson, another management lawyer, did the Reagan administration choose a member from a more traditional mold.[100] In the meantime, an overburdened Board had been left to function for some twenty-seven months with only four members, and for half a year with only three.[101] Since delay is one of the most serious problems confronting the NLRB,[102] and since the maxim about justice delayed is nowhere more applicable than in matters involving workers'

95. *E.g.*, Guy Farmer (1953-55), Edward B. Miller (1970-74), Betty Southard Murphy (1975-79), and Peter D. Walther (1975-77).

96. FAILURE, *supra* note 56, at 15.

97. *Id.*

98. Cohen & Bor, *supra* note 70, at 4-3.

99. *Id.* at 4-4; 34 LAB. L.J. 66 (1983).

100. 119 LAB. REL. REP. (BNA) 81-82 (June 3, 1985).

101. *Id.*; Cohen & Bor, *supra* note 70, at 4-4 n.8.

102. From the beginning of fiscal year 1981 to the beginning of fiscal year 1984, the Board's backlog of unfair labor practice cases rose from 371 to 1095, and its backlog of representation cases from 164 to 290. Meanwhile, the median time between the issuance of an administrative law judge's decision and the issuance of the Board's decision went from 133 days in fiscal year 1980 to 194 days in fiscal year 1983. All told, a worker who files a meritorious charge that is contested must now wait an average of about three years before a Board remedial order is finally enforced by a federal court of appeals. FAILURE, *supra* note 56, at 11, 13. By then, of course, an organizing drive is likely to have died.

rights, one is tempted to infer that justice in the realm of labor relations is not one of the Reagan administration's highest priorities.

E. Union Failings

Unions must bear a share of the responsibility for their decline. They have been stodgy and unimaginative in responding to the needs of a changing work force. That is especially true of their appeals to the young, women, minorities, and white collar workers generally.[103] But there are welcome signs that organized labor is shaking itself out of its lethargy. In August 1982 the AFL-CIO Executive Council established the Committee on the Evolution of Work, which has already issued two hard-hitting reports.[104] The second study recognized that "the labor movement must demonstrate that union representation is the best available means for working people to express their individuality on the job and their desire to control their own working lives, and that unions are democratic institutions controlled by their members," and conceded frankly that "we have not been sufficiently successful on either score."[105] Specific recommendations were made for improving communications to both union and nonunion employees, revitalizing organizational activity, and restructuring unions through mergers and other means.

IV. THE TEST OF JUST, SOUND LABOR LAW

Much fascination may be found in contemplating the decline of the old industrial labor movement, and in speculating about the prospects for a reconstructed body of organized workers to reassert itself in the post-industrial world. But my principal purpose is not to try to divine what unions must ultimately do for themselves. My objective is to assess what role law should play, especially federal law, in the regulation of the workplace over the next half century.

Whatever deficiencies the critical legal theorists may suffer from as legal historians in ascribing revolutionary intentions or potential to the Wagner Act,[106] it seems to me they have made one contribution that has

103. Greenhouse, *Reshaping Labor to Woo the Young*, N.Y. Times, Sept. 1, 1985 at F1, col. 2. Paradoxically, although only 14 percent of the country's workers under 35 are unionized, 40 percent of nonunion workers in that age group told a Harris poll they would vote for a union, as compared with about 25 percent of the workers over 50. *Id.* at F6, col. 2. *See also*, Freeman, *supra* note 71, at 49-50 & n.6. *Cf.* Farber, *supra* note 44, at 20-21 (females).

104. AFL-CIO COMMITTEE ON EVOLUTION OF WORK, THE FUTURE OF WORK (1983); AFL-CIO COMMITTEE ON EVOLUTION OF WORK, THE CHANGING SITUATION OF WORKERS AND THEIR UNIONS (1985) [hereinafter cited as CHANGING].

105. CHANGING, *supra* note 104, at 13.

106. *See supra* notes 1—2 and accompanying text. *See also*, Dubofsky, *Legal Theory and Work-*

put us much in their debt. They have helped refocus attention on the individual employee and his or her total well-being as the criterion for testing the quality of our labor legislation.[107] I would phrase it this way: The goal of just, sound labor law has to be the fullest feasible autonomy of the individual working person. That is unabashedly a moral concept—seasoned, I hope, with sufficient practicality to make it more than an idle dream.

The moral significance of an employee's life on the job cannot be avoided, because it is primarily work that defines a man or a woman. An authoritative recent study found that "most, if not all, working people tend to describe themselves in terms of the work groups or organization to which they belong. The question 'Who are you?' often elicits an organizationally related response. . . . Occupational role is usually a part of the response for all classes: 'I'm a steelworker,' or 'I'm a lawyer.' "[108]

By "fullest feasible autonomy" I mean that the worker must be given the widest scope to develop his own skills and to have a voice in the structuring of his job and the governance of the enterprise, consistent with the legitimate needs of fellow employees, the employer, and the larger public. That might sound Utopian were it not for the example of eminently practical businesses. About one-third of the companies in the Fortune 500 have established programs in participative management.[109] "Quality of work life" programs are in effect in around two-thirds of the 150 UAW bargaining units at General Motors,[110] and the Company and the Union have carried the concept even further in the development of the new Saturn project.[111] More and more studies attest that it is simply smart business to heed the voice of the individual employee and to give him or her a stake in the successful operation of the enterprise.[112]

ers' Rights: A Historian's Critique, 4 INDUS. REL. L.J. 496 (1981); Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503 (1981); Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981); Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483 (1981).

107. *Id.*

108. SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE, WORK IN AMERICA 6 (1973). For the poignant comments of an auto worker on his love-hate relationship with his product, *see* S. TERKEL, WORKING 177 (1974): "What it drains out of a human being, the car ain't worth it. But I think of a certain area of proudness . . . . I put my labor in it."

109. Wallace & Driscoll, *Social Issues in Collective Bargaining*, in U.S. INDUSTRIAL RELATIONS, 1950-1980: A CRITICAL ASSESSMENT 199, 241 (J. Stieber, R. McKersie & D.Q. Mills eds. 1981).

110. Based on figures supplied the author by representatives of the General Motors Corporation and the United Automobile Workers. In addition, the 1982 Ford-UAW contract provided for "Mutual Growth Forums." Solidarity, Mar. 1982, at 8. Other major unions involved in QWL projects include the Steelworkers, Communications Workers, and International Brotherhood of Electrical Workers. Wallace & Driscoll, *supra* note 109, at 246.

111. 119 Lab. Rel. Rep. (BNA) 275-76 (Aug. 5, 1985).

112. There remains a good deal of controversy about existing QWL or participative management

V. A PROSPECTUS FOR FUTURE LABOR LAW

A. Representational Rights

Paul Weiler believes that it was a blessing in disguise for the American labor movement that an extended Senate filibuster in 1978 defeated a proposed Labor Reform Act (LRA), which would have streamlined the NLRB's representational processes and authorized more substantial remedies in organizing situations.[113] He argues that the proposed reforms were too modest and conventional, and advocates instead the more radical surgery of "instant elections" and compulsory arbitration of first contracts as a remedy for employer refusals to bargain.[114] Although I said at the time that the LRA, for all its considerable virtues, was "out of date before it is passed,"[115] I feel that Weiler also is wide of the mark.

The prime appeal of the LRA lay in its very narrowness, in the precision and circumspection with which it picked its targets. It aimed at organizing the unorganized, not tipping the balance of bargaining power in unionized firms. It wound up, after all, commanding the support of every living ex-Secretary of Labor, Democrat and Republican alike, and of substantial majorities in both houses of Congress.[116] It only succumbed to one of the most shrewdly engineered filibusters, and the most massive write-in campaign, in the history of the Senate.[117] In my view, Weiler's stronger proposals would cut too much against the American grain. His "instant election" would effectively deprive an employer of

programs. Some have undoubtedly been used to circumvent unions. Their staying power over time has also been questioned. For varying appraisals, *see* WORKER PARTICIPATION: SUCCESS AND PROBLEMS (H. Jain ed. 1980); T. KOCHAN, H. KATZ & N. MOWER, WORKER PARTICIPATION AND AMERICAN UNIONS: THREAT OR OPPORTUNITY? (1984); D. ZWERDLING, WORKPLACE DEMOCRACY (1980); Goodman, *Quality of Work Life Projects in the 1980's*, 31 LAB. L.J. 487 (1980); Locke & Schweiger, *Participating in Decision-Making: One More Look*, in 1 RESEARCH IN ORGANIZATION BEHAVIOR 265, 271 (B. Staw ed. 1979); Merrifield, *Worker Participation in Decisions Within Undertakings*, 5 COMP. LAB. L. 1 (1982); Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367 (1980); Wallace & Driscoll, *supra* note 109, at 238-51; *Symposium, Workers' Participation in Management: An International Comparison*, 18 INDUS. REL. 247 (1979).

113. Weiler, *supra* note 12, at 1770, discussing H.R. 8410, 95th Cong., 1st Sess. (1977); S. 2647, 95th Cong., 2d Sess. (1978).

114. *Id.* at 1811-13; Weiler, *supra* note 13, at 405-12.

115. St. Antoine, *Proposed Labor Reform: "Brave New World" or "Looking Backward"?* in I.R.R.A. THIRTIETH ANNUAL WINTER MEETING, REFORMING THE NATIONAL LABOR RELATIONS ACT 165 (1977).

116. *Hearings on H.R. 8410 [Labor Reform Act] before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor*, 95th Cong., 1st Sess. Pt. 2 at 326, 357 (1978) (statements of Willard Wirtz and John T. Dunlop). The bill passed the House by a vote of 257-163 but an unprecedented six attempts at cloture failed by a handful of votes in the Senate. 123 CONG. REC. 32316 (1977); 34 CONG. Q. ALMANAC 184 (1978).

117. Rosen, *Labor Law Reform: Dead or Alive?* 57 U. DET. J. URB. L. 1, 8 (1979); Asher, *Prospects for Labor Law Reform: Implications for Unions*, in N.Y.U. THIRTIETH ANNUAL CONFERENCE ON LABOR 257, 264 (1978).

the opportunity to present his side of the case to the employees, which immediately offends many persons' sense of fairness[118] and may raise constitutional free speech issues as well.[119] His compulsory arbitration of first contracts, even if limited to cases of flagrant violations, goes counter to as basic a policy as any we have in our labor law, namely, freedom of contract.[120] Deeply embedded in labor jurisprudence is the precept that government may not "sit in judgment upon the substantive terms of collective bargaining agreements."[121] That goes so far as to preclude the NLRB from imposing a contract term even as the remedy for an employer's proven refusal to bargain.[122] True, those are judicial determinations, susceptible to reversal by the legislature at any time. But I do not see a cautious Congress overturning them in the foreseeable future.

It is entirely possible that during the next half century the principal means of representing or reflecting employees' interests within industrial enterprises, and of channeling their views into a company's decisional processes, will be a mechanism very different from traditional labor organizations and collective bargaining.[123] But I assume that at least for the time being unions as we have known them will remain a significant factor on the labor relations scene. Before we strike out boldly in new directions, therefore, we should finish the job that was started with the Wagner Act fifty years ago. We should make sure that workers are truly free to join labor unions if they wish, and we should make sure that remedies for violations of workers' statutory rights are truly effective.

The ill-fated Labor Reform Act of 1978 provides an excellent point of departure. Although I reject Paul Weiler's notion of "instant elections," the blunt reality is that prolonged campaigns are an invitation to coercive tactics by unscrupulous employers.[124] A statutory time limit should be imposed on the processing of the routine representation case, a maximum of perhaps thirty to forty days between the filing of the petition and the holding of the election.[125] No more than two or three weeks

118. *See, e.g.*, Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 66-92 (1964), and authorities cited therein.

119. *See, e.g.*, NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941); Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1787 n. 11 (1962).

120. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937); NLRB v. Insurance Agents, 361 U.S. 477, 487 (1960); H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970).

121. NLRB v. Amer. Nat'l. Ins. Co., 343 U.S. 395, 404 (1952).

122. H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

123. *See infra* note 155 and accompanying text.

124. The longer the delay between the election petition and the actual election, the less likely is a union win. Freeman, *supra* note 71, at 54-58, and authorities cited therein.

125. As passed by the House, H.R. 8410, 95th Cong., 1st Sess. § 5 (1977) would have imposed a maximum of 25 days between the petition and the election. The original Senate bill as reported from committee would have allowed 30 days. S. REP. NO. 628, 95th Cong., 2d Sess. 50 (1978). Half of all

should elapse between the date the election is ordered and the date it is conducted.[126]

I would accord sufficient credibility to the controversial Getman-Goldbert empirical study on union representation elections to take the Labor Board largely out of the time-consuming, hair-splitting business of scrutinizing the content of employer speeches or writings for evidence of misleading or vaguely coercive statements.[127] I base this conclusion not only on the Getman-Goldbert data but also on Derek Bok's and my own separate conversations with union organizers. They concede that the *content* of employer communications are seldom intimidating or even very influential, although they insist that the presence of employer spokespersons and the absence of union counterparts at the workplace convey a much more important message about the respective power and significance of the competing parties.[128] In keeping with another Getman-Goldbert recommendation,[129] I would grant unions equal access to an employer's premises to counter management campaigning prior to an election, at least at larger enterprises in urban areas where numerous employees disperse widely at the end of the working day. In such situations the plant or shop site is the natural forum for an exchange of views about unionization, and a party denied access is placed at a substantial disadvantage in reaching the voters.[130]

representation elections are conducted in units of twenty or fewer employees. Weiler, *supra* note 12, at 1774 n. 10. One must assume that many of the employers will be inexperienced in NLRB procedures. Fairness demands that they be permitted at least a week or two to prepare themselves for any necessary Board hearing. It now takes about forty days between the filing of the petition and the Regional Director's decision directing the election. 46 NLRB ANN. REP. 15 (1981).

126. The 1977 House-passed bill might have left as little as a week between the ordering and the holding of the election. Again that seems unduly short for the small, inexperienced employer. *See supra* note 125.

127. On the basis of their study of thirty-one representation elections, Professors Julius G. Getman and Stephen B. Goldberg concluded that voting behavior was not "significantly" affected by an employer's coercive tactics. J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 128-30, 146-52 (1976) [hereinafter cited as ELECTIONS]. They therefore recommended that the NLRB "cease regulating speech and, for election purposes, nearly all conduct." *Id.* at 159. Partly because their findings as to the impact of employer unfair labor practices are disputed by most other investigators, *see* Freeman, *supra* note 71, and authorities cited therein, and partly because I feel all parties are entitled to elections free of egregious threats or outright discrimination, the Board in my judgment should continue to set aside elections marred by serious misconduct or blatantly coercive speech. But I see little sense in dithering over such employer comments as, "I will fight the Union in every legal way possible. . . I'll deal hard with it, I'll deal cold with it. I'll deal at arm's length with it." *See Herman Wilson Lumber Co.*, 149 N.L.R.B. 673, 678 (1964) (2-1 majority found § 8(a)(1) violation), *enforcement denied sub nom.*, 355 F.2d 426 (8th Cir. 1966) (2-1 decision).

128. Bok, *supra* note 118, at 88-92, 96-106.

129. ELECTIONS, *supra* note 127, at 156-59.

130. The Supreme Court and the NLRB have generally excluded nonemployee union organizers from company premises, but the Court has recognized that "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to com-

When an employer unlawfully refuses to bargain with a majority union, the employees are deprived of the benefits that the negotiations might have produced, including in most instances a wage increase. Yet the conventional remedy of a bargaining order operates only prospectively and does nothing to restore the one- or two-year financial loss the employees may have suffered. Elsewhere I have argued at length that the Labor Board should be able to provide monetary relief in these cases, at least if the employer's violation is flagrant and egregious.[131] A make-whole remedy would not be a contract imposed on the parties by the Board; it would have no continuing existence. It would be a form of back-pay order, based on the putative contract that could have resulted from good faith bargaining. The measure of the loss would be derived from a composite of union contracts in similar labor-management relationships. That would be no more speculative than many contract, tort, or antitrust damage awards. Such make-whole relief would also be genuinely remedial and not punitive.[132] I think the NLRA as written should be interpreted to authorize this salutary remedy, but if necessary statutory authorization ought to be enacted.

B. Duty to Bargain

Going beyond the organizing situation, which was the primary focus of the Labor Reform Act of 1978, we should seek to realize the full potential of creative collective bargaining by shedding as much as possible of the straitjacket imposed by *NLRB v. Wooster Div. of Borg-Warner, Corp.*[133] There, the Supreme Court recognized a rigid and unrealistic dichotomy between "mandatory" and "permissive" subjects of bargaining. Mandatory subjects are the statutorily prescribed "wages, hours, and other terms and conditions of employment,"[134] about which either party must bargain at the behest of the other. Permissive subjects are all other lawful items, including a broad array of so-called managerial prerogatives or internal union affairs, which are often of intense interest to unions or management, respectively, but about which they cannot demand bargaining if the other party objects.[135] Governmental fiat should

municate with them, the employer must allow the union to approach his employees on his property." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956).

131. St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039, 1041-47, 1053-54 (1968).

132. It is a fundamental principle that NLRB orders must provide a remedy and not impose a penalty. Republic Steel Corp. v. NLRB, 311 U.S. 7, 12-13 (1940); Carpenters Local 60 v. NLRB, 365 U.S. 651, 655-56 (1961).

133. 356 U.S. 342 (1958).

134. NLRA § 8(d), 29 U.S.C. § 158(d) (1982).

135. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLEC-

not govern so basic and individualized a question as the contract issues a particular employer or union deems important enough to back up with a lockout or a strike.

Hypocrisy is encouraged, and candor reduced, by the *Borg-Warner* formula. A savvy party that urgently desires a permissive subject in a contract can usually bring negotiations to an artificial deadlock over a legally sanctioned mandatory topic. Experienced, sophisticated participants in a mature, durable bargaining relationship do not engage in such ploys to evade the law's strained distinctions.[136] If a union wishes during a period of rapid inflation to discuss pension increases for retired workers, technically a nonmandatory subject,[137] they are discussed.[138] In those circumstances the law is superfluous. Where legal regulation is needed is for inexperienced or hostile parties and immature, fragile relationships. Finally, the time required for bargaining should not be a serious impediment to management's occasional need for swift action. A sampling I made of NLRB cases during the 1970's indicated that negotiations reached a deadlock or "impasse" in a median period of six and one-half weeks. After impasse, of course, an employer may institute its proposed terms unilaterally, without the union's consent.[139]

Borg-Warner's mandatory-permissive rubric probably reflects an American consensus that there is some "untouchable" core of entrepreneurial sovereignty (and an analogous area of union autonomy) that is beyond the reach of compulsory collective bargaining. An outright overruling of *Borg-Warner*, either judicially or legislatively, is therefore unlikely. But at least I think it would make for far healthier and more responsible labor relations if the duty to bargain encompassed, as the Kennedy-Johnson Board put it, any employer action that could effect a "significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit."[140] In my judgment that conclusion is adequately supported by the language, legislative history, and policy of the NLRA as it currently

TIVE BARGAINING 496-98 (1976); 1 C. MORRIS, THE DEVELOPING LABOR LAW 761-64 (2d ed. 1983).

136. *See, e.g.*, Wollett, *The Borg-Warner Case and the Role of the NLRB in the Bargaining Process*, N.Y.U. TWELFTH ANNUAL CONFERENCE ON LABOR 39, 46-51 (1959).

137. Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

138. LABOR RELATIONS YEARBOOK 1973 at 27 (1974); LABOR RELATIONS YEARBOOK 1976 at 7-9 (1977).

139. NLRB v. Katz, 369 U.S. 736 (1962).

140. Westinghouse Elec. Corp., 150 N.L.R.B. 1574, 1576 (1965).

exists.[141]

There is considerable debate these days whether we are moving from an era of adversarial or confrontational relations between unions and management into a new cooperative and conciliatory phase.[142] I suspect such speculation is rather fruitless. Collective bargaining relationships in this country are so diverse and fluid that generalized predictions are necessarily hazardous. Unions and employers will cooperate when they find it mutually advantageous—probably in very good times and in very bad times—and they will lock horns when they feel they have more to gain that way. In the long view that seems neither surprising nor alarming. What is vital is that both sides negotiate with a realistic sense of each other's needs and bargaining flexibility.

C. *Compulsory Arbitration*

For many years compulsory or governmentally imposed arbitration of the terms of new collective agreements was an anathema to both management and organized labor.[143] It ran too much counter to our cherished belief in freedom of contract. But a change of heart began in the public sector, especially with regard to police and firefighters, who it is almost universally conceded cannot be given the right to strike.[144] Then the steel industry began experimenting voluntarily with provisions for arbitration of a new contract if negotiations broke down upon the expiration of the old agreement.[145] Meanwhile, almost without noticing it, we accepted the idea that there could not be a nationwide strike of any duration in the railroad industry.[146] The alternative had to be a kind of com-

141. My views are set forth more fully in St. Antoine, *The Collective Bargaining Process*, in the LABOR BOARD AT MID-CENTURY SYMPOSIUM D-1, D-8 - D-19 (C. Morris ed. 1985).

142. *See, e.g.*, McKersie, Katz & Kochan, *Epilogue: Is a New Industrial Relations System Emerging?* in CHALLENGES AND CHOICES FACING AMERICAN LABOR 339-45 (T. Kochan ed. 1985); *Symposium, The Future of American Unionism*, 473 ANNALS 9-189 (L. Ferman ed. 1984); *Symposium, The Future of Industrial Relations*, 23 INDUS. REL. 1-57 (1984); *Symposium, The role of Unions in the 1980's*, 52 FORDHAM L. REV. 1061-1170 (1984); *cf.* Fischer, *Labor's Dilemma: Adapting to Post-Recession Unionism*, 222:3 INDUSTRY WEEK 41, 42 (Aug. 6, 1984) ("whether [the parties] are friendly or feuding . . . is less important than whether they are addressing matters of genuine relatedness to the viability of the firm and its employees").

143. *See, e.g.*, F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 14-18 (4th ed. 1985), and authorities cited therein.

144. *Id.* at 9-10 & n.38, 81-85. *See generally* Aksen, *The Impetus to Contract Arbitration in the Public Area*, in N.Y.U. TWENTY-FOURTH ANNUAL CONFERENCE ON LABOR 103 (1972); Feller, *The Impetus to Contact Arbitration in the Private Area*, 79 (1972); Fleming, *"Interest" Arbitration Revisited*, 7 U. MICH. J.L. REF. 1 (1973); McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972).

145. LABOR RELATIONS YEARBOOK 1973 at 32-37 (1974).

146. Cullen, *Strike Experience Under the Railway Labor Act*, in THE RAILWAY LABOR ACT AT FIFTY 187, 188-90 (C. Rehmus ed. 1976), and authorities cited therein. In fact there has not been a nationwide railway strike since the two-day shutdown in 1946. *Id.*

pulsory arbitration, although some preferred such euphemisms as "mediation to finality."[147]

As our society grows ever more complex and interdependent, it seems to me that industrywide strikes of substantial length will become infeasible in a number of areas. In addition to transportation, communications and certain public utilities are obvious examples.[148] To compensate for depriving unions in those industries of the negotiating leverage the strike now provides, some form of compulsory arbitration would seem almost preordained.

D. Secondary Boycotts

The secondary boycott was once a major organizing weapon for unions in certain industries, especially transportation and construction. The Taft-Hartley and Landrum-Griffin amendments sharply limited the use of the boycott.[149] Furthermore, the Supreme Court in the famous *Denver Building Trades* case[150] treated the various contractors and subcontractors working together at a building site as separate, independent employers, thus making boycott law applicable in a way that seems both unrealistic and inequitable.[151]

Studies by several commentators, including myself, indicate that boycotts in fact contribute significantly to union organizing efforts while doing relatively little damage to so-called secondary or "neutral" parties.[152] If that is so, we should consider relaxing the current statutory restrictions on boycotts, at least in the particular industries or in the particular situations, *e.g.*, organizing, where union need is greatest. Congress has already adopted a similar approach in the garment industry[153]

147. The intractable "fireman-on-the-diesel" dispute forced Congress to enact its first peacetime compulsory arbitration law in 1963. Pub. L. 88-108, 77 Stat. 132 (1963); *see also*, Pub. L. 90-54, 81 Stat. 122 (1967). *See generally* Kaufman, *The Railroad Labor Dispute: A Marathon of Maneuver and Improvisation*, 18 IND. & LAB. REL. REV. 196 (1965); Levinson, *The Locomotive Firemen's Dispute*, 17 LAB. L.J. 671 (1966).

148. *See, e.g.*, F. ELKOURI & E. ELKOURI, *supra* note 143, at 17. Automation, however, may make communications almost impervious to strikes for a long period.

149. NLRA §§ 8(b)(4), 8(e), 29 U.S.C. §§ 158(b)(4), 158(e) (1982). *See generally* Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

150. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

151. After *Denver* was decided in 1951, every administration from Truman's to Nixon's favored legislation to overrule or modify it. Ironically, the only time Congress mustered the votes to authorize "common situs" picketing was during the Ford presidency, and he vetoed the bill. LABOR RELATIONS YEARBOOK 1975 at 6 (1976).

152. Brinker & Cullison, *Secondary Boycotts in the United States Since 1947*, 12 LAB. L.J. 397, 399, 403 (1961); St. Antoine, *The Rational Regulation of Union Restrictive Practices*, in SOUTHWESTERN LEGAL FOUNDATION, FOURTEENTH ANNUAL INSTITUTE ON LABOR LAW DEVELOPMENTS 1, 10-14 (1968). *Cf.* Levinson, *supra* note 53, at 136, 147.

153. NLRA § 8(e) (second proviso), 29 U.S.C. § 158(e) (1982).

and to a limited extent in the construction industry.[154]

E. Nonunion Representation

Throughout the country today there are both large and small companies whose employees, by their own choice, are unorganized. Whether they have been beguiled by clever, parsimonious employers is not for me to say. At least insofar as any of us can be said to exercise free choice, they have exercised it. Moreover, many of these employees are in highly technical fields, and their numbers are bound to grow. Now, even though they are not unionized, their employers do not wish to ignore them. Indeed, companies often wish to solicit their views in a systematic way. Inevitably, the employer or some worker will come up with the idea of a "representative committee."[155] The company is even happy to provide an office and a typewriter. We have this sort of thing all over the country.

Sad to say, nearly every one of these arrangements is, under the wooden logic of the applicable NLRB decisions, a violation of section 8(a)(2) of the Labor Act.[156] As some federal courts of appeals have realized,[157] however, section 8(a)(2) was aimed at quite different targets, at the shabby "company unions" of the 1930's and at the employer who gave aid and comfort to his favorite as between two or more competing unions. If, in the contemporary situation I have described, the employees choose freely and knowingly and the committee or other body acts truly on their behalf and for their benefit, no reason exists for objection save ideology. An expert observer might believe the workers' interests would be better served by a union and collective bargaining, but it is their decision and they have taken another path. Should the weight of precedent be too heavy to permit validating such arrangements, the law should be changed.[158]

154. NLRA § 8(e) (first priviso), 29 U.S.C. § 158(e) (1982).

155. *See* Sangerman, *Employee Committees: Can They Survive Under the Taft-Hartley Act*? 24 LAB. L.J. 684 (1973).

156. 29 U.S.C. § 158(a)(2) (1982). *See, e.g.*, St. Joseph Lead Co., 171 N.L.R.B. 541 (1968); Newman-Green, Inc., 161 N.L.R.B. 1062 (1966) *enforced*, 401 F.2d 1 (7th Cir. 1968); Thompson Ramo Wooldridge, Inc., 132 N.L.R.B. 993 (1961) *modified and enforced*, 305 F.2d 807 (7th Cir. 1962). *See also*, Stephens Inst., 241 N.L.R.B. 454 (1979) (faculty senate) *aff'd.*, 620 F.2d 720 (9th Cir. 1980).

157. *See, e.g.*, NLRB v. Streamway Div. of Scott & Fetzer Co., 691 F.2d 288 (6th Cir. 1982); Coppus Eng'r Corp. v. NLRB, 240 F.2d 564 (1st Cir. 1957). *See generally* H. PELLING, AMERICAN LABOR 146, 160 (1960).

158. *See generally* Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510 (1973).

F. The Employment Relationship

1. In General

As stated earlier[159] the major development affecting the whole labor field during the past two or three decades has been the increasing resort to direct governmental regulation of the substantive terms of the employment relationship. The matters covered range from civil rights[160] to physical safety[161] to economic security.[162] If union power and influence continue to wane, government will be forced all the more to step in to fill the vacuum.

Even a resurgence of organized labor or some equivalent employee interest group will probably not reverse the tide of government regulation in the workplace. Unions today, unlike some of their predecessors,[163] are not averse to statutory guarantees and minimum standards, on which they can build still better benefits and protections.[164] We can anticipate that over time legal safeguards for workers' physical well-being on the job and their economic well-being both during and after their earning years will become more refined and more stringent. A concomitant development may be the establishment of permanent "superfunds" and specialized procedures for dealing with the catastrophic damage that our chemicalized society can inflict on employees and the catastrophic liability it can inflict on employers.[165] But that is a large separate story and I leave it to the torts and insurance experts.

2. At-will employment

The most startling breakthrough in employment law during the past decade was the growing willingness of the courts to modify the traditional doctrine of employment-at-will. Applying either tort or contract theory, or both, judges in some thirty jurisdictions declared their readiness to blunt the worst rigors of the rule that an employment contract of indefinite duration can be terminated by either party at any time for any

159. *See supra* note 32 *et seq.* and accompanying text.

160. *See supra* notes 34-36 and accompanying text.

161. *See supra* note 37 and accompanying text.

162. *See supra* note 38 and accompanying text.

163. Throughout the 1920's the American Federation of Labor opposed or declined to endorse old-age pensions, unemployment compensation, and minimum wage legislation. *See, e.g.*, Witte, *Organized Labor and Social Security*, in LABOR AND THE NEW DEAL 239, 244-45, 249-50 (M. Derber & E. Young eds. 1961); Brandeis, *Organized Labor and Protective Labor Legislation*, *id.* at 193, 220-23; P. DOUGLAS, SOCIAL SECURITY IN THE UNITED STATES 4, 17-18 (1939).

164. *See supra* note 40 and accompanying text.

165. *See, e.g.*, P. BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985); Comment, *Asbestosis: Who Will Pay the Plaintiff?* 57 TUL. L. REV. 1491 (1983).

reason.[166] In practical terms, especially in times of serious unemployment, that ordinarily meant at the option of the employer. The dramatic changes in at-will employment doctrine evoked almost universal acclaim from disinterested commentators, primarily on the grounds of simple justice.[167] On the other hand, despite some extremely broad language in the opinions of certain courts, I do not believe there is a square holding anywhere that an employer may not fire an employee without a positive showing of just cause, unless there is a contract provision to that effect.

Acceptance of a wrongful discharge action will limit employer flexibility and may add to the cost of doing business. Frivolous claims are inevitable. Once past the egregious instances of employer injustice, *e.g.*, firing an employee for refusing to perjure himself to protect his employer,[168] some courts will flounder without guidelines to mark the boundaries of public policy. Emotional juries may be persuaded to award massive and excessive damages.[169] It can also be argued that the need for novel safeguards has not been demonstrated; the vast majority of employers treat their employees fairly. On balance, I think the equities tip in favor of the individual employee. Recognizing a wrongful discharge action will impose some additional burdens on business; failing to recognize it will perpetuate the economic and psychological devastation visited annually on some 100,000—150,000 nonunion, nonprobationary employees who are fired without just cause.[170] Moreover, American business would not be placed at a competitive disadvantage in the international markets. The United States remains the last major industrial democracy that has been heeded the call of the International Labor Or-

166. *See generally* C. BAKALY & J. GROSSMAN, MODERN LAW OF EMPLOYMENT CONTRACTS: FORMATION, OPERATION AND REMEDIES FOR BREACH (1983); W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES (1985); H. PERRITT, THE LAW OF WRONGFUL DISMISSAL (1984); *Symposium, Individual Rights in the Workplace: The Employment-at-Will Issue*, 16 U. MICH. J.L. REF. 199 (1983).

167. *See, e.g.*, Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); St. Antoine, *The Twilight of Employment at Will? An Update*, in FIRST ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE 1 (W. Dolson ed. 1985). *Contra*, Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Power, *A Defense of the Employment at Will Rule*, 27 ST. LOUIS U.L.J. 881 (1983).

168. Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

169. Punitive damages have boosted jury awards to as high as $4.7 million for a single employee. In California different studies have shown plaintiffs winning 70 percent of the cases that went to trial and 90 percent of those that went to juries. In one study the average award was $450,000, and in another it was $178,184 (punitive damages averaging $533,318 were awarded in over half the plaintiffs' judgments in the second study). Palefsky, *Wrongful Termination Litigation: "Dagwood" and Goliath*, 62 MICH. B.J. 776 (1983); Stieber, *Recent Developments in Employment-at-Will*, 36 LAB. L.J. 557, 559 (1985).

170. Stieber, *The Case for Protection of Unorganized Employees Against Unjust Discharge*, I.R.R.A. THIRTY-SECOND ANNUAL MEETING 155, 160-61 (1980); Stieber, *supra* note 169, at 558.

ganization for unjust dismissal legislation.[171]

The courts, at least in the more progressive states, have probably gone about as far with unjust discharge actions as they are going to go. They will entertain suits alleging serious violations of accepted public policy. They will hold employers to their unretracted word, *e.g.*, in employee handbooks, not to fire except for good reason. But ordinarily they will not impose an affirmative obligation on employers to prove just cause to support a discharge. They will not subject nonunion firms, as a matter of common law, to the same requirement exacted contractually from nearly every employer party to a collective bargaining agreement.

The next move is up to the legislatures, initially those of the states and perhaps eventually the U.S. Congress. Unjust dismissal bills have already been introduced in some half dozen states as well as Congress.[172] Early passage is unlikely. Employers oppose this legislation and unions are ambivalent. I consider both these groups shortsighted. Most of the proposals to date would substitute arbitrators or administrative agencies for judges and juries, and would limit relief to backpay, severance pay, and possibly reinstatement. The elimination of compensatory and punitive damages would relieve employers of the nightmare of multimillion dollar jury verdicts.[173] Although labor unions might lose a theoretical selling point, in practice a legislatively established just cause standard would probably afford them an unparalleled opportunity to demonstrate their effectiveness in enforcing workers' rights. That is a lesson public sector unions have already learned in representing employees in civil service proceedings.

Beyond any of these partisan considerations lies the overeaching goal of a decent working environment, one that will be conducive to both human dignity and efficient operations. The prevention of arbitrary treatment of employees may not only be the humane approach; it may also be good business. We lavish attention on the Japanese way of management, on the almost filial relationship between Japanese employees and their employers, and the lifelong careers guaranteed many workers in Japanese companies. We should be prepared to entertain the proposition that there may be a marked correlation between a secure work force and high productivity and quality output.[174]

171. Ass'n of Bar of City of N.Y., Committee on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal*, 36 THE RECORD 170 (1981); Stieber, *supra* note 169, at 558.

172. A.B.A. SEC. LAB. & EMP. LAW, 1983 COMMITTEE REPORTS 31-32; Stieber, *supra* note 169, at 561-62.

173. *See supra* note 169 and accompanying text.

174. *See, e.g.*, E. VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA 131-57 (1979); R.

3. Nationalization of employment law

In the earlier part of this century, especially during the Progressive Era, it was common for the individual states to serve as "laboratories" for social experimentation.[175] Workers' compensation, a pioneering form of no-fault insurance for job-related disabilities, swept the country between 1910 and 1920.[176] Wisconsin, Ohio, Massachusetts, and New York led the movement for unemployment insurance.[177] Prior to the Depression, statutes permitting counties to pay old age pensions were passed in eight states, and by mid-1934, under the lengthening shadow of the Depression, twenty-three states had mandatory pension laws and five more had optional statutes.[178]

Yet in our closely integrated economy it is a truism, as expressed by Paul Douglas, that "if any one state imposed a tax or laid down a set of labor conditions which raised costs, it thereby placed many of the employers within its borders at a competitive disadvantage."[179] The likely if not inevitable prospect is that most social programs with a significant price tag will have to be taken over by the federal government or at least subjected to minimum federal standards. That of course is what happened to old age pensions and unemployment compensation when the Social Security Act was passed in 1935.[180] The future of workers' compensation is still unsettled, but there are signs that benefit levels have become such political footballs in states seeking to attract or retain industry that federal standards may eventually become necessary there as well.[181]

Labor relations in private industry affecting commerce are largely

PASCALE & A. ATHOS, THE ART OF JAPANESE MANAGEMENT 131-237 (1981). *Cf.* SPECIAL TASK FORCE, *supra* note 108, at 93-110, 188-201.

175. *See, e.g.*, Smith & Clark, *Reappraisal of the Role of the States in Shaping Labor Relations Law*, 1965 WIS. L. REV. 411, 414, 421-61; J. RAYBACK, A HISTORY OF AMERICAN LABOR 260-72 (rev. ed. 1966).

176. NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 11-19 (1973).

177. NATIONAL COMMISSION ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT COMPENSATION: FINAL REPORT 8 (1980); D. NELSON, UNEMPLOYMENT INSURANCE: THE AMERICAN EXPERIENCE, 1915-1935 at 17-27, 104-28 (1969); P. DOUGLAS, *supra* note 163, at 12-21.

178. P. DOUGLAS, *supra* note 163, at 5-7; *see also* AMERICAN ASSOCIATION FOR SOCIAL SECURITY 237 (1935).

179. P. DOUGLAS, *supra* note 163, at 4-5; see also NATIONAL COMMISSION ON UNEMPLOYMENT COMPENSATION, *supra* note 177, at 8.

180. 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. § 1301 *et seq.* (1982)).

181. *See, e.g.*, J. BURTON & A. KRUEGER, INTERSTATE VARIATIONS IN THE EMPLOYERS' COSTS OF WORKERS' COMPENSATION, WITH PARTICULAR REFERENCE TO OHIO AND PENNSYLVANIA (1984); ST. ANTOINE, WORKERS' COMPENSATION IN MICHIGAN: COSTS, BENEFITS, AND FAIRNESS 6-22 (1984). *Cf.* NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, REPORT 124-27 (1972).

regulated by federal law, either the National Labor Relations Act[182] or the Railway Labor Act.[183] Public employment at the state and local levels remains subject to state control, but a few years ago there was a substantial movement for minimum federal standards in this area too.[184] I expect that issue will be revisited when the political climate next shifts.

What is the likely future direction of federal regulation of employment relations, *i.e.*, the relations between employers and individual employees, as distinguished from union-management relations? An obvious possibility is a federal statute prohibiting unjust dismissals generally.[185] That would probably not be as significant an extension of federal jurisdiction as it might seem at first glance. At present the discharge of any black (or white) or female (or male) or person between the ages of 40 and 70 or union adherent raises the possibility of a charge of statutory violation before one federal tribunal or another. A more practical question might be whether an arbitrary or unfounded firing should be an unfair labor practice, subject to the jurisdiction of the NLRB, or an unfair employment practice, subject to the jurisdiction of the Equal Employment Opportunity Commission. One might even hope that in the not too distant future discrimination in violation of Title VII of the 1964 Civil Rights Act[186] would become such a rarity that the EEOC could be dismantled and a single federal agency, perhaps styled the National *Employment* Relations Board, entrusted with total responsibility for preventing arbitrary or unjust treatment in the workplace on any grounds. A prerequisite for that consolidation would presumably be a substantial diminution in the current excessive caseload of the NLRB.[187]

Other federal legislation concerning the employment relationship that I think can be anticipated in the coming years would be a requirement that all employers notify employees in advance of contemplated technological changes, subcontracting arrangements, or plant removals which could adversely affect job security.[188] Statutes with greater financial implications, and thus more controversial and problematic, might prescribe severance pay or establish retraining and relocation funds for

182. *See supra* note 3.

183. 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. § 151 *et seq.* (1982)).

184. *See Hearings on H.R. 12532, H.R. 7684 & H.R. 9324 Before the Special Subcommittee on Labor of the House Committee on Education and Labor*, 92d Cong., 2d Sess. (1972); *Hearings on S. 3295 & S. 3294 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 93d Cong., 2d Sess. (1974).

185. H.R. 7010, 96th Cong., 2d Sess. (1980), was a proposed Corporate Democracy Act that included protections against unjust discharge. It did not pass.

186. *See supra* note 35.

187. *See supra* note 102 and accompanying text.

188. *See, e.g.*, Aaron, *supra* note 16; Craver, *supra* note 16, at 659, and authorities cited therein.

displaced workers.[189] All these proposals would merely cushion the impact of industrial adjustment to a highly competitive world economy, and not let the full burden fall upon any particular group of unfortunates. The ultimate legislation of this sort would be a true full employment measure, making government the employer of last resort.[190] Opposition to such humane measures will one day seem as misguided and uncaring as an earlier era's opposition to social insurance as the "dole."[191]

G. Mandated Employee Participation in Management

An increasing employee stake in the financial success of the enterprises where they work, and a louder employee voice in corporate affairs, are a distinctive phenomenon of our times. Employee stock ownership plans (ESOPs), industrial cooperatives, and outright worker ownership of their companies are some of the principal means by which wage earners have acquired a greater say in business decisions affecting their livelihood.[192] Participative management or quality of work life programs at the plant or shop level have been mentioned previously.[193] Employee pension funds, whose estimated assets of nearly one trillion dollars constitute the biggest single source of American investment capital, possess a

189. *Id.*

190. For the deficiencies of traditional transfer payments under the welfare system, or even of innovative efforts at skills training in the absence of "suitable employment and economic development programs," *see* Levitan, *The Evolving Welfare System*, 36 LAB. L.J. 577, 581-82 (1985). Probably the federal government's most ambitious venture since the 1930's Depression was the Comprehensive Employment and Training Act, Pub. L. 93-203, 87 Stat. 839 (1973), as amended generally by Pub. L. 95-524, § 2, 92 Stat. 1909 (1978). CETA was repealed by Pub. L. 97-300, 96 Stat. 1357 (1982). But even CETA took pains to ensure that the jobs it provided would be temporary and primarily for training purposes. One may draw blueprints for a more fundamental restructuring but should not expect the work to start overnight; it is only realistic to recognize that "the United States is a basically conservative nation with short periods of remission in which liberal reform becomes possible." Miller, *Defend and Change: The Welfare System in the Longer Run*, 36 LAB. L.J. 586, 590 (1985).

For sharply contrasting assessments of a Great Society approach to solving socioeconomic problems, *compare* Levine, *et al.*, *The Right to a Decent Standard of Living* in TOWARD NEW HUMAN RIGHTS: THE SOCIAL POLICIES OF THE KENNEDY AND JOHNSON ADMINISTRATIONS 55, 75, 95, 109, 127 (D. Warner ed. 1977) (five separate papers), *with* C. MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984). Before the next half-century is over, our society may find some positive virtue in public works projects designed to restore the nation's infrastructure (highways, railbeds, bridges, dams, etc.) and to put the unemployed back to work. The cost will be high; so is the defense budget. It is a matter of priorities. *See generally* R. KUTTNER, THE ECONOMIC ILLUSION: FALSE CHOICES BETWEEN PROSPERITY AND SOCIAL JUSTICE (1984).

191. P. DOUGLAS, *supra* note 163, at 3; D. NELSON, *supra* note 177, at 30, 45-46.

192. *See* K. BRADLEY & A. GELB, WORKER CAPITALISM: THE NEW INDUSTRIAL RELATIONS 68-72, 99-108 (1983); D. ZWERDLING, *supra* note 112, at 53-74, 95-96; Olson, *Union Experiences with Worker Ownership: Legal and Practical Issues Raised by ESOPs, TRASOPs, Stock Purchases and Co-Operatives*, 1982 WIS. L. REV. 729.

193. *See supra notes 109-12 and accompanying text.*

potential leverage in social and economic policy which labor trustees have hardly begun to exploit.[194] But perhaps the most dramatic single expression of this new role for workers in management affairs was the election of union officials to the boards of directors of Chrysler and Pan American as the *quid pro quo* for bargaining concessions.[195]

Legislation in West Germany, Sweden, the Netherlands, and other Western European nations mandates worker participation in decision-making at the plant level and often at the highest managerial levels as well.[196] Robert McKersie is undoubtedly correct that "we in this country are not ready to have legislation that would require the presence of worker/union representatives in various management councils."[197] But it is traditional for the United States to lag about half a century behind Western Europe in the adoption of social legislation.[198] The idea of mandated worker participation in management has been accepted in Europe; in this country we are becoming accustomed to the notion of voluntarily adopted forms of worker participation. After a bit more of the familiarization process, it might take only the nudge of some additional crises of the Chrysler and Pan American variety, especially in another economic recession, to trigger a legislative response, perhaps initially by requiring worker or union presence as part of the price for a government bailout.

VI. CONCLUSION

Part of the key to the future of federal labor legislation lies in the future of organized labor. If unions continue to decline, and worker unrest develops in a period of economic downturn, a substantial governmental intervention would seem unavoidable. The principal area of concentration would be what I have designated as the employment relationship, but tinkering with the management structure itself, through the mandated infusion of employee representation, would be a live possibility.

My own hope is that federal law, in its increasing emphasis on employment relations, will not neglect traditional union-management relations. Those who have participated in collective bargaining know that

194. Craver, *supra* note 16, at 688–90.

195. McKersie, *Union Involvement in Entrepreneurial Decisions of Business*, in CHALLENGES AND CHOICES FACING AMERICAN LABOR 149, 159 (T. Kochan ed. 1985).

196. Richardi, *Worker Participation in Decisions Within Undertakings in the Federal Republic of Germany*, 5 COMP. LAB. L. 23, 29-31 (1982); Berqvist, *Worker Participation in Decisions Within Undertakings in Sweden*, 5 COMP. LAB. L. 65 (1982); Carver, *supra* note 16, at 677, and authorities cited therein.

197. McKersie, *supra* note 195, at 163.

198. *See, e.g.*, Witte, *supra* note 163, at 242; D. NELSON, *supra* note 177, at 6-7.

there is a unique appeal about both the process and the product. The solutions negotiated voluntarily by union and company representatives across the table have a handtailored quality, a responsiveness to the particular needs of particular parties at a particular time and place, that can never be matched by the procrustean edicts issuing from Washington. One of the great contributions of this country to the industrial relations of the western world would be lost if collective bargaining were allowed to wither away.[199] A major goal of federal labor policy in the coming years should be to restore and revive that process.

199. John Dunlop has declared that "our collective bargaining system must be classified as one of the more successful distinctive American institutions along with the family farm, our higher educational system and constitutional government of checks and balances." Dunlop, *The Social Utility of Collective Bargaining*, in CHALLENGES TO COLLECTIVE BARGAINING 168, 172 (L. Ulman ed. 1967).