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Earl V. Brown Jr.

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THE LABOR-MANAGEMENT RELATIONS ACT (LMRA)
AND SMALL BUSINESS: SHOULD THE ACT BE
REFORMED TO ACCOMMODATE
SMALL BUSINESS?

EARL V. BROWN, JR. †

I. INTRODUCTION: LABOR LAW EXEMPTIONS

FROM Thomas Jefferson¹ to Ronald Reagan,² American political leaders of all stripes have persistently evoked the theme of a “decentralized communal society.”³ Despite this indelible preference for small towns, small farms and small businesses in our political discourse, American labor law only sporadically exempts small business from its requirements. This should not be surprising. Modern labor law was born during the conflict between the vast insurgency of mass production workers and the military hierarchies of heavy industry.⁴ Small business was hardly prominent in that confrontation.

The centerpiece of labor law, the Labor Management Relations Act of 1947 (Act or LMRA),⁵ covers the most diminutive enterprises. The Act, since its inception as the Wagner (National Labor Relations) Act of 1935⁶ has covered “any industry or activity in commerce,” as well as any employer with whom a potential labor dispute would “burden” or “tend to burden” commerce.⁷ The case law confirms the literal sweep of these words. In *NLRB v. Fainblatt*,⁸ the Supreme Court held that the Act applied to all

† Associate General Counsel, United Mine Workers of America. University of Virginia 1973 (J.D.).

1. See S. LYND, *INTELLECTUAL ORIGINS OF AMERICAN RADICALISM* 85, 161 (1969).

2. See L. CANNON, *REAGAN* 24, 319 (1982) (noting President Reagan’s view that tending to needs of others is communal obligation rather than institutional obligation of federal government).

3. S. LYND, *supra* note 1, at 161.

4. See M. DUBOFSKY & W. VAN TINE, *JOHN L. LEWIS* 215-16 (1977).

5. Pub. L. No. 101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-197, 557 (1982)).

6. Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1978)).

7. 29 U.S.C. § 142(1).

8. 306 U.S. 601 (1939). In *Fainblatt*, the National Labor Relations Board (NLRB) sought an enforcement petition against an employer’s efforts to keep its employees from joining a local union. *Id.* at 603-04. The employer, a small piecework garment manufacturer, challenged the sufficiency of its nexus with

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commerce "great or small,"⁹ save "that to which the courts would apply the maxim *de minimis*."¹⁰ This reach is ameliorated only by dollar volume limits on the exercise of its jurisdiction administratively promulgated by the National Labor Relations Board (NLRB or Board).¹¹ These jurisdictional yardsticks were adopted to contain the drain on Board resources, and not out of any solicitude for the plight of small business.¹² The NLRB's yardsticks are nonetheless encompassing, providing for jurisdiction over retail businesses with a yearly volume of business of \$500,000 and other enterprises which buy or sell over \$50,000 worth of goods or services across state lines.¹³ Although the Act does exempt certain groups of employers and employees, such as governmental bodies, agricultural employees and household workers,¹⁴ there

interstate commerce to confer jurisdiction upon the NLRB. *Id.* at 604. The employer emphasized that it never took title to the raw materials or the finished goods which traveled in interstate commerce. *Id.* Further, the employer argued that the relatively small volume of its product had an insufficient impact upon the flow of commerce. *Id.* The Supreme Court held that neither the taking of title, nor the volume of the interstate shipments, was determinative for purposes of determining NLRB jurisdiction. *Id.* at 605-06.

9. *Id.* at 606.

10. *Id.* at 607.

11. 29 U.S.C. § 164(c)(1) (1986) empowers the NLRB to decline jurisdiction where the effect of the labor dispute upon interstate commerce is not substantial. In 1959, Congress amended section 164(c)(1) to prevent the NLRB from narrowing the scope of its federal jurisdiction below those jurisdictional standards prevailing on August 1, 1959. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. § 153 (1982)). The jurisdictional standards prevailing at that time were adopted by the NLRB on October 2, 1958. See NLRB Release No. R-576, 42 L.R.R.M. (BNA) 96, LAB. L. REP. (CCH) ¶ 1610.75.

12. See, e.g., *Breeding Transfer Co.*, 110 NLRB Dec. 493, 35 L.R.R.M. (BNA) 1020 (1954). In *Breeding Transfer Co.*, the NLRB decided not to exercise jurisdiction over a trucking company which had gross revenues of only \$26,500, which was well below the newly established threshold of \$100,000 for the transport industry. *Id.* at 494, 498, 35 L.R.R.M. at 1021, 1024. The policy rationale for the adoption of the narrower jurisdictional standard was the furtherance of the NLRB's "long established policy of limiting the exercise of its jurisdiction to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce." *Id.* at 494, 35 L.R.R.M. at 1021. The majority of the Board viewed the new standards as removing "truly local operations from the proper bounds of the Board's jurisdiction." *Id.* at 500, 35 L.R.R.M. at 1024. In a dissenting opinion, Member Murdock asserted that the 1954 jurisdictional standards were motivated by the Board's interest in reducing its own case load, at the expense of depriving hundreds of thousands of employees and employers of the Act's protections. *Id.* at 502, 35 L.R.R.M. at 1025 (Murdock, M., dissenting).

13. See 42 L.R.R.M. (BNA) 96, LAB. L. REP. (CCH) ¶ 1610.75 (1958).

14. Exempt employers are "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act." 29 U.S.C. § 152(2). Exempt employees are "any individual employed as an agricultural

is no categorical exemption based upon number of employees.¹⁵ The upshot is that the Act makes few exceptions for small business.

Other federal laws regulating the relationship of employee and employer, such as the Fair Labor Standards Act (FLSA),¹⁶ Title VII of the 1964 Civil Rights Act (Title VII),¹⁷ the Occupational Safety and Health Act (OSHA),¹⁸ and the Employee Retirement Income Security Act (ERISA),¹⁹ are as entitled to the status of labor law as is the LMRA. Some of this legislation is limited to employers with certain numbers of employees. For example, Title VII, with its critical prohibitions against employment discrimination, quixotically applies only to employers of fifteen or more employees.²⁰ It is unclear why Title VII's important proscriptions should not apply to all employers. Compliance with its standards presumably involves only negligible labor costs.²¹

laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act." 29 U.S.C. § 152(3).

15. 29 U.S.C. § 152.

16. Ch. 676, § 1, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201 (1982)). The FLSA establishes minimum conditions in such areas as minimum wages (29 U.S.C. § 206), maximum working hours (29 U.S.C. § 207) and child labor standards (29 U.S.C. § 212). *Id.*

17. Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 1975a, 2000a (1982)). Laws guaranteeing equal employment opportunities are contained in 42 U.S.C. § 2000e (1982).

18. Pub. L. 91-596, § 34, 84 Stat. 1620 (codified as amended at 29 U.S.C. § 651 (1982)) (regulating the physical safety of the workplace).

19. Pub. L. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. § 1001 (1986)) (regulating employee pension and benefit plans).

20. 42 U.S.C. § 2000e(b) (1982). This loophole is an example of unwarranted deference to small business. Many state laws plug this gap. *See, e.g.*, California Fair Employment and Housing Act, 1980 Cal. Stat. 992, § 4, Cal. Gov't Code § 12900, 12926(c) (West 1980 & Supp. 1988) (defining employer as "any person regularly employing five or more persons."). *See also* Reconstruction Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 144 (codified as amended 42 U.S.C. § 1981 (1982) (proscribing discrimination in employment without regard to number of employees)). *But see* *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986) (Title VII much broader in scope than section 1981's narrower prohibition against discrimination; section 1981 applicable only in context of making and enforcing contracts), *cert. granted*, 108 S. Ct. 65 (1987).

21. Title VII does impose record-keeping requirements on employers. 42 U.S.C. § 2000e-8 (1982); *see also* 29 C.F.R. § 1602.1 (1988). But for small employers, the required records are simply the employer's normal personnel records. *Id.* § 1607.15. Large employers, with over 100 employees, must file EEO-1 reports. *Id.* § 1602.7. Employers subject to affirmative action requirements, such as government contractors, must create affirmative action programs. These are complex documents. *See* BNA, FEP MANUAL 441:12 (summary chart of federal record-keeping requirements).

More than any other labor statute, the FLSA²² affords small business special treatment. Complex coverage and exemption rules often result in the dispensation of localized retail and service establishments from statutory requirements.²³ A host of other types of employers, such as small newspapers,²⁴ those employers engaged in certain fishing activities,²⁵ agricultural activities²⁶ and other smaller trades, are excepted from the Act.²⁷ The FLSA also provides for administrative waivers from some of its standards for defined categories of workers such as working students;²⁸ a feature that may favor small businesses such as restaurants and fast-food franchises. Yet, this patchwork of exemptions for specific small businesses appears largely a happenstance of lobbying clout rather than a product of coherent policy. Accordingly, this branch of labor law affords little guidance on the task of melding broad enforcement of labor standards with the circumstances of small scale industry and trade.

II. THE GREAT DEBATE: LABOR LAW REFORM

The contemporary academic and policy debate over labor law is equally unhelpful in resolving any tension between labor standards and small business needs. Despite the unremitting hostility to trade unionism of the recent years, there has been a resurgence of critical labor law theory on both the left and the right.²⁹

22. Ch. 676, § 1, 52 Stat. 1060 (1938) (current version at 29 U.S.C. § 201 (1982)).

23. The FLSA exempts most retail or service establishments, with the exception of laundering, cleaning, tailoring, hospital, institutional or schooling industries, from its minimum wage and maximum hour provisions. 29 U.S.C. § 213(a)(2).

24. 29 U.S.C. § 213(a)(8) (exempting any locally distributed publication with circulation of less than four thousand).

25. 29 U.S.C. § 213(a)(5) & (12).

26. 29 U.S.C. § 213(a)(6).

27. See *Walling v. Jacksonville Paper*, 317 U.S. 564, 570-72 (1943) (applicability of FLSA dependent upon character of employee's work, as opposed to particular class of employer's business; retailer exemption was intended by Congress to address unique plight of purely local, small business, and not to exempt particular classes).

28. 29 U.S.C. § 214(b). Section 214 generally allows a sub-minimum wage scale for full time students, apprentices, student-learners enrolled in a vocational training program, learners and handicapped workers. An employer may employ a full time student (defined at 29 C.F.R. § 519.2) at a wage rate of eighty-five percent of the minimum wage. 29 U.S.C. § 214(b)(1)(A). The regulations place restrictions upon the percentage of an employer's workforce which may be employed at such sub-minimum wage. 29 C.F.R. § 519.6.

29. Dunlop, *Have the 1980's Changed U.S. Industrial Relations?*, 111 MONTHLY LAB. REV., May 1988, at 29. Professor Dunlop, a former Republican Secretary of

This body of writing is helpful because it elevates the discourse beyond the doctrinal details of the case law.³⁰ However, these critiques, and accompanying calls for labor law reform, evince scant concern for the small scale entrepreneur. If the free market analysis of labor law is correct—that trade unions are government

Labor and a scholar of unparalleled experience in labor-management relations, characterizes “the hostility” between labor and government during this Administration as “unmatched in this century.” *Id.* at 31. But, while acknowledging this change in the political climate, as well as the effects of Reaganomics (tax cuts, trade deficits, international monetary imbalances, increased international product-market competition and deregulation), Professor Dunlop concludes that the events of the late 1970’s and 1980’s have not changed the features of U.S. industrial relations. *Id.* at 31, 33. Professor Dunlop sees little change in the traditional intensity of employer opposition to labor organization, despite “50 years of legislation,” and characterizes smaller employers’ opposition to labor organization and to social legislation as “particularly intense.” *Id.* at 31.

30. A summary of the critique from the left is presented by Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983); see also Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1986). In his analysis of the Wagner Act, Klare initially focuses upon the hope of labor and the fear of employers that the bill would result in radical “industrial democracy.” *Id.* at 284-93. Klare concludes that while the Wagner Act could have caused tremendous changes in American industrial relations, the judiciary foreclosed that possibility by adopting an interpretation of the Act which perpetuated the status quo. *Id.* at 292. Thus, Klare believes that, despite such progressive legislation as the Wagner Act, the emancipation of the worker cannot occur until the law itself becomes emancipated. *Id.* at 339.

A pit-bull version of the view from the right is Professor Morgan O. Reynolds’s critique of the United Auto Workers’ (U.A.W.) agreement with General Motors (G.M.) pertaining to G.M.’s new Saturn plant project. Reynolds, *Unions and Jobs: The U.S. Auto Industry*, 7 J. LAB. REL. 103 (1986). Professor Reynolds attacks the U.A.W. as a “labor monopoly” which has saddled American auto makers with labor costs at an eighty percent premium to comparable non-union costs. *Id.* at 122, 125. He argues that the U.A.W. does not really protect auto workers because, in promoting excessive wage rates and unproductive work rules, it has caused the auto industry to lose to overseas manufacturers nearly 250,000 high-paying jobs. *Id.* at 125. Professor Reynolds would not ban unions outright, but would establish a federal policy, via interpretation of the Wagner Act, designed to promote more competition between union and nonunion auto plants and suppliers. *Id.* at 122. He views the Saturn Agreement as an obstacle to a free-market labor force. He argues that the agreement, whereby G.M. and the U.A.W. agreed to the union’s status as the exclusive labor representative at the new Saturn plant, implicitly requires G.M. to employ only unionized labor in the construction and operation of the plant. *Id.* at 103-04. The principal criticism of the accord is that “it violates the spirit and letter of the National Labor Relations Act,” and restricts employees’ freedom to choose or not to choose union representation. *Id.* at 121.

A more stately version of the market perspective on labor law may be found in Posner, *Some Economics of Labor Law*, in LABOR LAW AND THE EMPLOYMENT MARKET 44 (R. Epstein & J. Paul ed. 1985). Applying traditional economic principles to American labor law, Judge Posner concludes that unionization is a device for the cartelization of labor markets, as its practical effect is to raise the price of labor above, and depress the supply of labor below, the competitive level in the nonunionized sector. *Id.* at 46, 57.

sanctioned cartels functioning to extract “abnormal” profits for labor—then any significant accommodation of modern labor standards and small scale enterprise would appear to be foreclosed from the outset.³¹ A labor cartel can only be particularly disadvantageous for small businesses. The academic discourse, accordingly, does little to illuminate this topic.

This paucity suggests that the real protagonists in the debate over labor law are the larger collectivities—big business and labor. Only where small business aggregates sufficient lobbying clout, as in the FLSA, is it able to affect statutory design. In such cases, the most prominent technique for reconciling labor standards and small business exigencies is exemption, whether by limitations on coverage based on the character of the business, the size of employee complement, or by administrative decision respecting particular trades or types of employees.³² Small business itself does not notably enrich this dialogue. Rather, small business contents itself with an abolitionist view as to all social legislation.³³

In labor law, then, “small” is perhaps not so “beautiful.”³⁴ Even so, labor law is obviously not the predominant cause of small business morbidity. Restrictions on credit, for example, surely play a more immediate role in limiting small entrepreneurs.³⁵ Nor should an affinity for small scale economic activity

31. See Posner, *supra* note 30, at 58; see also Hirsch & Link, *Labor Union Effects on Innovative Activity*, 8 J. LAB. RES. 323 (1987) (supplying empirical analysis to support conclusion that unions impose “quasi-rents” upon profits their companies reap from nontransferable research and development (output that cannot be profitably licensed)).

32. See *New York Racing Assoc. v. NLRB*, 708 F.2d 46, 48, 113 L.R.R.M. (BNA) 2746, 2748 (2d Cir.), *cert. denied*, 464 U.S. 914 (1983) (upholding NLRB’s decision to decline jurisdiction over horse racing industry, based upon part-time, short term and sporadic nature of employment in industry; these characteristics lead to conclusion that impact upon commerce was minimal); see also *Pari-Mutual Clerks Union v. Fair Grounds Corp.*, 703 F.2d 913, 915, 917, 113 L.R.R.M. (BNA) 2201, 2203-04 (5th Cir.) (NLRB’s refusal to assert jurisdiction over racing industry, because such industry is local concern, was justified; however, NLRB’s non-action did not foreclose district court from determining horseracing industry to be within scope of NLRA and exercising jurisdiction over dispute itself), *cert. denied*, 464 U.S. 846 (1983).

33. Dunlop, *supra* note 29, at 31 (“The opposition among smaller employers to labor organizations and to more social legislation can only be described as particularly intense.”); see also NATIONAL SMALL BUSINESS UNITED, BUILDING A SMALL BUSINESS PLATFORM 5, 9 (1988) (opposing imposition of mandatory health insurance on small businesses, and increases in, or indexing of, federally mandated minimum wage).

34. E. SHUMACHER, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED (1973).

35. NATIONAL FEDERATION OF INDEPENDENT BUSINESS RESEARCH AND EDUCA-

result in the creation of a "two-tier" system of labor standards.³⁶ The labor movement is correct; there is no reason why laws providing for union representation, minimum wages and hours, job health and safety, pension security and the banning of discrimination should not protect all employees and thus apply to all employers. The only question is whether such standards can be tailored to small business in a fashion that imposes less cost on the employer and does not abandon the employee. There is much evidence to suggest that the LMRA accomplishes just this result, although not out of any particular concern for small business.

III. THE LMRA ALREADY PROTECTS SMALL EMPLOYERS

First, the LMRA, on its face, deals mainly with process and does not directly exact any costs.³⁷ Senator Robert Wagner introduced the bill that ultimately became the Act with these words: "It creates no new substantive rights. It merely provides that employees, if they desire to do so, shall be free to organize"³⁸ Judge Posner, for whom the Act establishes the union as a labor cartel, principally through its conferral of exclusive bargaining agent status on the majority union, would regard even the representational process of the Act as imposing costs.³⁹ Nonetheless, it is possible, in a literal way, to envision the entire gamut of the

TION FOUNDATION, CREDIT, BANKS AND SMALL BUSINESS: 1980-1984 42 (1985) (losses resulting from high levels of business failure during recession of early 1980's left banks more reluctant to solicit small firm business).

36. Samuelson, *Minimum Wage Politicking*, NEWSWEEK, July 7, 1988, at 54. Samuelson argues that most employees affected by minimum wage increases will be displaced by the higher labor costs imposed by an increase in the minimum wage. *Id.* See also F. WELCH, MINIMUM WAGES 21-33 (1978). Welch supports Samuelson's position, stating that "[i]t is obvious that if a minimum wage floor is fixed above levels that would otherwise hold in a competitive economy, employment will fall." *Id.* at 21. He compares "covered" (i.e., industries subject to minimum wage) and "uncovered" industries and concludes that the minimum wage has merely served to shift unskilled labor (e.g., elderly, teenage and part time workers) out of covered to uncovered industries, thus driving down wages offered to, and reducing employment opportunities for, this class of workers. *Id.* at 30-32.

37. The LMRA, unlike other labor statutes, has no general recordkeeping and reporting requirements.

38. P. ROSS, THE GOVERNMENT AS A SOURCE OF UNION POWER 71-72 (1965) (footnote omitted) (quoting hearings before U.S. Congress, Senate, Subcommittee of the Committee on Education and Labor, 74th Cong., 1st Sess., 79 CONG. REC. 2371 (1935)).

39. Posner, *supra* note 30, at 52 (asserting that in absence of statutory representational procedures, employers can use intimidation and coercion to inhibit unionization at little cost to themselves).

Act's procedures being played out with little real cost to the employer. A straight-forward election, accompanied by simple persuasive presentations on both sides, should cost little. The employer, particularly if he or she has paid attention to employee needs, could win. That would be the end of any costs at all. Should the union win, contract negotiations could proceed efficiently to a practical collective bargaining agreement.⁴⁰

Second, the Act allows for only minimal governmental scrutiny of the bargaining process and the resulting terms of the bargain.⁴¹ Because the Act does no more than "lead [the employees' representative] to the office door of their employer with legal authority to negotiate for their fellow employees," labor law does not itself prescribe standards for the bargain.⁴² Under the regime of "free" collective bargaining, the employer retains the ability to bring market realities to the table. There may be an inherent tendency, particularly in an overly legalized and bureaucratic system of labor law, to move incrementally from a review of "good faith" in the bargaining process to an insistence on substantive content in proposals as proof of a party's good faith. Yet, the LMRA's standard for bargaining is not a strong weapon for those who would wish to increase the level of governmental compulsion in union contract negotiations; there is no more relaxed legal test than that of good faith. "The line between lawful hard bargaining and unlawful intransigence, manifested by a party's substantive proposals, however, is often faint"⁴³

Thus, the Act, with its emphasis on the process rather than content, adequately accommodates many exigencies of small business. The realities of the employer's product market and the union's labor market necessarily permeate the bargaining and govern the real costs of unionism in small enterprises. Purely logical extrapolations from economic paradigms, such as the car-

40. However, even the most efficient bargaining diverts the owner and workers away from the enterprise, particularly in a small business. In a small business, this can cause significant disruptions, which lead to costs. See *Bonanno Linen Serv. v. NLRB*, 454 U.S. 404, 407, 409-10, 419 & nn.3-4 (1982) (discussing usefulness of multi-employer bargaining forums for small businesses; employer who withdrew from such forum in order to avoid exhausting and unproductive bargaining impasse found culpable of unfair labor practices).

41. See, e.g., *American Thread Co.*, 274 NLRB No. 164, 118 L.R.R.M. (BNA) 1499 (1985).

42. P. ROSS, *supra* note 38, at 61 (quoting 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1124 (1935)).

43. F. BARTOSIC & R. HARTLEY, *LABOR RELATIONS IN THE PRIVATE SECTOR* 288 (1986).

tel, do not sufficiently capture the economic constraints within which the union and the small employer must bargain.

Thirdly, the Act, through its broad prohibitions on secondary boycotts⁴⁴ and its recognition of multi-employer bargaining,⁴⁵ protects small employers confronting powerful unions. Secondary strikes and their contractual analogues, union signatory clauses,⁴⁶ were outlawed in part to prevent the massing of union power against small businesses. In urging restrictions on secondary boycotts in 1947, Senators Taft, Ball, Donnell and Jenner explained that their motive was to protect small employers:

There appears to be virtually no disagreement as to the complete injustice of secondary boycotts . . . [F]or the most part, it is the small employer, often with less than fifty employees, and the farmer or farm trucker who [were] the main victims of this type of racketeering union activity. To a small storekeeper, or machine shop, picketed out of business by unions intervening between him and his employees, or the farmer prevented from unloading his perishable produce, the remedy of dealing with the NLRB is a weak reed. There will only be a satisfactory remedy if he can go to his local court and obtain an injunction, first temporary and then permanent, against interference of this kind.⁴⁷

44. See 29 U.S.C. § 158(b)(4) (1982) (outlawing secondary boycotts). "Secondary boycott . . . refers to [a] refusal to work for, purchase from or handle products of [a] secondary employer ([one] with whom the union has no dispute) with [the] object of forcing such employer to stop doing business with [the] primary employer (one with whom the union [does have a] dispute)." BLACK'S LAW DICTIONARY 1212 (5th ed. 1979) (citing *C. Comella, Inc. v. United Farm Workers Org. Comm.*, 33 Ohio App. 2d 61, 72, 292 N.E.2d 647, 656 (1972)).

45. See 29 U.S.C. § 159(b) (1982) (authorizing NLRB to approve multi-employer bargaining associations).

46. "Union signatory clauses" or "hot cargo" agreements are prohibited by 29 U.S.C. § 158(e). Neither term is employed in the NLRB, but both generally refer to contractual agreements by unionized employers to refrain from using goods or services of nonunion employers. Lab. L. Rep. (CCH) ¶ 5222, at 12,771 (1988); see also *Woelke & Romero Framing v. NLRB*, 456 U.S. 645 (1982) (interpreting section 159(e) construction industry exception to Act's general prohibition of union signatory clauses).

47. LEGISLATIVE HISTORY OF LMRA OF 1947: SUPPLEMENTAL VIEWS ON S. 1126, S. REP. NO. 105, 80th Cong., 1st Sess. 460 (1947) (statement of Sens. Taft, Ball, Donnell and Jenner).

The Act's restrictions on secondary boycott activity are surely overbroad in this respect. These prohibitions are not limited to small employers with less than fifty employees. Why large employers, with fifty or more employees, should also have these benefits is not clear from Senator Taft's argument. The absence of any linkage in the Act between small employer status and its prohibi-

Indeed, section 8(e) of the Act, (29 U.S.C. § 158(e)) enacted in 1959, which prohibits union signatory clauses, is a rare example of substantive governmental regulation of the content of collective bargaining. This substantive compulsion favors small business.

The Act's prohibitions on secondary activity protect small business in two important ways. The Act imposes, via section 303, (29 U.S.C. § 187), heavy sanctions on unions which use their "labor" market power in an industry to pressure small business vendors to unionized firms.⁴⁸ And, if the small business is union, the Act prevents the union from using its status as bargaining agent to induce the small employer to limit his or her transactions to union concerns.⁴⁹ Thus, the Act's treatment of secondary boycotts is a significant curtailment of the union's supposed "cartel" power. These restrictions on the ability of unions to employ their dominance in a particular labor market to overpower employers are obviously particularly valuable for small employers. In addition to prohibitions on secondary activity, the Act limits the cognate devices of jurisdictional and recognitional picketing.⁵⁰ These restrictions also benefit small employers, whether union or not.⁵¹ This activity is prohibited⁵² and enjoined,⁵³ and may be subject to damages as well.⁵⁴ The severity of the Act's multiple remedies against this type of conduct is unquestioned.⁵⁵ The upshot is that the Act in this area decisively favors small employers.

The Act, viewed in its entirety, thus establishes the union as a cartel only in the most specialized and attenuated way.⁵⁶ The

tions against secondary activity suggests that Senator Taft's evocation of the plight of the small storekeeper and farmer is not the complete story.

48. This activity is redressable in unfair labor practice proceedings and is also almost automatically enjoined at the instance of the Board. 29 U.S.C. § 160(l) (1982).

49. See, e.g., *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 623-26, *reh'g denied*, 387 U.S. 926 (1967).

50. See 29 U.S.C. § 158(b)(7).

51. See F. BARTOSIC & R. HARTLEY, *supra* note 43, at 227.

52. See 29 U.S.C. § 158(b) (delineating unfair labor practices by labor organizations).

53. See 29 U.S.C. § 160(l) (delineating procedures for district court to grant injunctive relief against unfair labor practices).

54. See 29 U.S.C. § 185(b) (providing that any labor organization may sue or be sued, and that money judgments are enforceable only against the organization and not against any individual member).

55. See, e.g., F. BARTOSIC & R. HARTLEY, *supra* note 43, at 269-73 (discussion of available remedies under Act).

56. Judge Posner omits discussion of the Act's significant restrictions on secondary, jurisdictional and recognitional picketing and union signatory

union, under the Act, is a labor supply cartel only to the extent that each employee is deemed to be an autonomous enterprise, possessing all the attributes of an enterprise in a free competitive system—knowledge of relevant information, the ability to enter and exit, the ability to effectively bargain and to alter that bargain over time. That theory of the employment relationship was interred by Justices Brandeis and Holmes long ago.⁵⁷

Exclusivity of representation is as indelible in labor law as the exaltation of the small entrepreneur in the rhetoric of politicians. As Professor Dunlop observes: “[T]he attribute of exclusive jurisdiction [developed] within the American Federation of Labor over 100 years ago and [we] implanted the idea in law in the Railway Labor Act (1926) and the National Labor Relations Act (1935).”⁵⁸ Thus, the exclusive agency status of the majority union is an improbable point of departure in the search for acceptable labor law accommodations to small business exigencies. Abandonment of representational exclusivity could only dissolve, in the current environment, into resurrection of the “yellow dog” contract at small businesses.⁵⁹

clauses “in the interests of time and space.” Posner, *supra* note 30, at 55. This may be because these prohibitions undermine his analysis, both as to its completeness, and in its relation to actual economic behavior.

57. See *Truax v. Corrigan*, 257 U.S. 312, 354 (1921) (Brandeis, J., dissenting). Before the *Truax* Court was the question of whether an Arizona statute prohibiting injunctions in labor disputes denied employers due process of law and violated the employers’ right to equal protection. *Id.* at 356. The Court held that the statute violated the employer’s right to equal protection, acknowledging that while peaceful picketing was lawful, the aggressive labor activity here amounted to an unlawful boycott. *Id.* at 319, 339. In a dissenting opinion, Justice Brandeis argued that injunctions substantially interfere with the employer/employee relationship, giving the employer “sovereign power.” *Id.* at 368 (Brandeis, J., dissenting). See also *Vegeahn v. Gurtner*, 167 Mass. 92, 108, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting). Justice Holmes stated:

If it be true that workmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.

Id. at 108, 44 N.E. at 1081 (Holmes, J., dissenting).

58. Dunlop, *supra* note 29, at 31; see also Freeman & Medoff, *Two Faces of Unionism*, 57 THE PUB. INTEREST 69, 70 (1979).

59. See *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917); but see Summers, *Past Promises, Present Failures, and Future Needs in Labor Legislation*, 31 BUFFALO L. REV. 9 (1982). Professor Summers outlines the possibility of minority unionism in an advocacy role. *Id.* at 24-30. He admits that it is “difficult to foresee” how this system could evolve. Professor Summers does not propose elimination of the system of exclusive representation. He only proposes that

If the conferral of exclusive agency on the majority union amounts to cartelizing the labor supply and abandonment of the free labor market, so be it. Polanyi puts it simply:

To separate labor from other activities of life and to subject it to the laws of the market was to annihilate all organic forms of existence and to replace them by a different type of organization, an atomistic and individualistic one.

Such a scheme of destruction was best served by the application of the principle of freedom of contract. In practice this meant that the noncontractual organizations of kinship, neighborhood, profession, and creed were to be liquidated since they claimed the allegiance of the individual and thus restrained his freedom. To represent this principle as one of noninterference, as economic liberals were wont to do, was merely the expression of an ingrained prejudice in favor of a definite kind of interference, namely, such as would destroy noncontractual relations between individuals and prevent their spontaneous re-formation.⁶⁰

No doubt, the exclusivity of the union's agency is a governmental privilege favoring unions. But this says little about the ultimate bargain, given the Act's minimal standards for bargaining and its limitations on union "cartel" powers. The collective bargain's increased cost over prior wages and benefits should be acceptable in a struggling small business where greater costs would jeopardize survival of the enterprise. Trade unions, impelled in great part by their membership's concern for job security, have greatly moderated wage and benefit demands.⁶¹ The Act's installation of the majority union is an economic weapon for trade unions, and collective bargaining a cost to small unionized business. The issue for small business is the extent of that cost. The Act, as we have seen, cabins the union's ability to enforce its "cartel" in its representation of the employees of the individual small business. This ensures that small businesses are not overpowered,

minority, "members only" unions be allowed a role in certain circumstances. *Id.* at 27.

60. K. POLANYI, *THE GREAT TRANSFORMATION* 163 (1957).

61. Dunlop, *supra* note 29, at 30 (discussion of the "concessionary era" of the early 1980's).

and that bargaining is realistic in the context of the primary small employer.

The Act also protects small and weak businesses from union power by sanctioning multi-employer bargaining. In their own collectivity, the multi-employer unit, "small employers [attain] enhanced bargaining power with large unions."⁶² In a recent case favoring multi-employer bargaining, the Supreme Court relied on these features of multi-employer bargaining:

"Multiemployer bargaining offers advantages to both management and labor. It enables smaller employers to bargain 'on an equal basis with a large union' and avoid 'the competitive disadvantages resulting from nonuniform contractual terms.' *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957). At the same time, it facilitates the development of industry-wide, worker benefit programs that employers otherwise might be unable to provide. More generally, multiemployer bargaining encourages both sides to adopt a flexible attitude during negotiations; as the Board explains, employers can make concessions 'without fear that other employers will refuse to make similar concessions to achieve a competitive advantage,' and a union can act similarly 'without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers' Finally, by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multiemployer bargaining enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife."⁶³

For these reasons, the Board enforces the solidarity of the multi-employer unit during bargaining. The union cannot bypass the employers' agent by selecting out the weakest employer.⁶⁴ By so enforcing multi-employer bargaining, the Act offers small businesses a meaningful mechanism by which to respond to a powerful union.

62. See F. BARTOSIC & R. HARTLEY, *supra* note 43, at 155.

63. *Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 n.3 (1981) (quoting *Bonanno Linen Serv., Inc. v. NLRB*, 630 F.2d 25, 28 (1st Cir. 1980)).

64. See F. BARTOSIC & R. HARTLEY, *supra* note 43, at 156-58 (discussion of efficiency of multi-employer bargaining).

In spite of these advantages, small business opposition to unionism remains strong.⁶⁵ Were a small entrepreneur to read Judge Posner, this predilection to oppose unionism could well escalate to apoplexy—not only a union, but a cartel. The small entrepreneur must in any event negotiate a pathway through a forest of larger and dominant economic entities—banks, customers, suppliers, insurers and taxing authorities. The thought of a cartel in the very enterprise, on top of all this, is daunting. However, a review of the Act in its entirety surfaces a statutory scheme far more accommodating to small business than some contemporary analyses would suggest.

V. EXCESSIVE LEGALISM AND THE LAWYER CARTEL

These grand disputes aside, the example of the employer who exhausts the Act's representational processes without fanfare may provide a clue to an appropriate labor law reform; one that unions could support along with small business. The very example evokes disbelief. As noted, resistance to unionism among American employers is strong, and among small business, intense.⁶⁶ Judge Posner would describe this resistance as a completely rational response to imposition of the cartel. Yet, there may be an equally rational economic motivation contributing to the persistence of employer resistance to trade unions—the extensive legalization of industrial relations in the United States to the profit of segments of the bar.

It is at least worth considering that a significant element in employer resistance to unionism is explicable by reference to the "divorce lawyer" paradigm. Where fees are to be won in extended contention, simple and inexpensive resolutions are unlikely once litigators become significant decisionmakers in the parties' relationship. A significant portion of the labor bar thus transforms the representation process into an intense "litigation." This occurs with all subjective good intent; vigorous advocacy is an ethical duty. Hearings, briefs, scripted employer speeches and appeals result. Even truncated versions of this service are expensive. If the union wins, the lawyer gets to conduct contract negotiations, because the rules are so "complex" and the

65. See Dunlop, *supra* note 29, at 31.

66. See Dunlop, *supra* note 29, at 31; see also Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560, 572 (1983); Strauss, *Industrial Relations: Time of Change*, 23 INDUS. REL. 1, 6 (1984).

employer has by this point abandoned all decisionmaking to the lawyer. If unfair labor practice proceedings result, so do more hearings, briefs and appeals.⁶⁷ In a system where these techniques are standard means of dispute resolution, what distraught small employer, shocked by the imminent divorce from his employees announced by the union organizer, would not avail himself of these “protections?” The lawyers’ economic interest is to stoke the emotional fires and point to the way to avoidance.⁶⁸

All this litigation leads, of course, to case law, which, as it proliferates and changes, provides further points of departure for yet more litigation.⁶⁹ The ensuing complexity breeds confusion and uncertainty, which in turn makes the “litigation” option more enticing. After all, a party may win without regard to the merits in a “system” where nothing is settled.

This state of affairs evokes Plato’s condemnation of the litigious:

[T]his [is] still more shameful—when a man not only wears out the better part of his days in courts of law as defendant and accuser, but from the lack of all true sense of values is led to plume himself on this very thing, as being a smart fellow to “put over” an unjust act and cunningly to try every dodge and practice, every evasion and wriggle out of every hold in defeating justice, and that too for trifles and worthless things, because he does not know how much nobler and better it is to arrange his life so as to have no need of the nodding juryman.⁷⁰

It is more than anomalous in a statutory scheme with the stated

67. It is no coincidence that the NLRB rules of procedure require, even today, bills of exception on appeal in unfair labor practice proceedings. 29 C.F.R. § 102.46(a) (1988). This archaic practice rule is an amusing symbol of the lawyer’s reign in labor matters.

68. Presumably, if the employer is economically rational, he or she will only engage these services if he or she can afford them and they hold out the likelihood of a concomitant benefit. But the attraction of the emotionally disappointed to litigation and their behavior once so engaged is not invariably rational.

69. See Murphy & Ford, *Unit Determination by the Dotson Board*, 4 *The Labor L. Exchange* 17 (1985). The authors state: “[I]n virtually every unit determination made in 1984-1985, the Reagan-appointed NLRB found that the unit sought by the . . . union, which would have been . . . appropriate . . . under controlling precedent, was too small, and that the only appropriate unit was a larger one.” *Id.*

70. PLATO, REPUBLIC III, in *THE COLLECTED DIALOGUES OF PLATO* 650 (E. Hamilton & H. Cairns eds. 1961).

objectives of industrial agreement and peace.⁷¹

The American labor relations system is, in Professor Dunlop's patient words, "highly legalistic in both administrative procedures and in the courts treating the most detailed matters and requiring enormous lengths of time."⁷² As Professor Dunlop also notes, this tedious legalism is accompanied by "intense" employer opposition to unionism that "has been only slightly modified in its forms by 50 years of legislation."⁷³ Thus, the conjunction of the two enduring features of the system, opposition to unions, and the legalization of labor relations, may be more than a random occurrence.

In 1940, William M. Leiserson wrote his mentor, John R. Commons, predicting:

it won't be long before we will have an association of practitioners before the Labor Board, to whose members both employers and unions will be forced to go to get the benefits of the Act because no layman could understand the legal practices and procedures. . . . [A] new body of technical law [will appear] just as ill-adapted to dealing with modern problems as the common law and the equity law now are. . . . [This will undermine] the whole idea of flexible and informed handling of modern economic problems by expert administrative agencies.⁷⁴

Leiserson was prophetic.

The use of legal procedures by management to delay unionization of an enterprise, to shield the employer from the sanctions of the law when he or she engages in predatory behavior or to impede implementation of a collective bargaining contract can be viewed as a form of exemption. The inordinate delay in the Board's process equates, in the real world workers inhabit, with no coverage at all. The reinstatement of, and award of back pay to, a worker years after being fired for union activity in an election campaign may be a boon to the pocket book. However, the

71. 29 U.S.C. § 141(b) states that the "purpose and policy of [the LMRA] . . . [is] to provide orderly and peaceful procedures for preventing the interference by either [labor or management] with the legitimate rights of the other." 29 U.S.C. § 141(b).

72. Dunlop, *supra* note 29, at 31.

73. *Id.*

74. C. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* 210 (1985) (quoting letter from William M. Leiserson to John R. Commons (Mar. 27, 1940), Leiserson Papers, Box 9, held at State Historical Society of Wisconsin, Madison).

message *in medias res* is that you are exposed, and the employer can do what he or she wants.⁷⁵

This exemption by legal protraction must be purchased. The price is the legal bill. The small business is, presumably, less able to buy the exemption than is the larger business. Thus, the exemption by legal action is not targeted to small business needs. This exemption compares unfavorably with the protections afforded small business by the prohibitions against secondary activity. A small employer, confronted with secondary activity, can utilize the Board's prosecutorial services to advance his or her position. The device of the contingency fee may make resort to courts under section 303 less expensive, in out-of-pocket terms, and thus more accessible to small businesses. By contrast, legal delay of the Board's administrative process designed to forestall unionization can only be purchased by paying "the association of practitioners" foreseen by Leiserson in 1940—a cartel that has little claim to legitimacy in economics or in social policy.

A major impulse underlying the Wagner Act was dissatisfaction with the legalistic approach prevalent in labor disputes prior to 1935.⁷⁶ A return to the vision of administration instead of litigation would be in the long-term benefit of both unions and small business. A less litigious system of labor relations would not impair the effectiveness of those features of the Act which protect small business against overwhelming union power—the prohibitions on secondary and like activity. The exemption by protraction is expensive, and, in the end, illegitimate. By turning union representation and collective bargaining into litigation, we have created a means of escaping unionism that may often cost more in fees and disruption than it is worth. Small business has little stake in that method of union avoidance.

75. R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* 232-33 (1984) (one in twenty workers who favored union was fired; one reason illegal discharges have become so popular is slight penalties imposed upon employers for such activity and effectiveness in chilling organizing campaign); see also Weiler, *Promises To Keep: Securing Workers' Rights To Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (attributing decline in union membership to employer opposition, and viewing opposition as being fostered by adversarial representation process established by NLRA).

76. See, e.g., *Truax v. Corrigan*, 257 U.S. 312, 365 (1921) ("[j]udges exercis[ing] a quasi-legislative function"); F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 46 (1930) ("In dealing with these lively issues, sterility and unconscious partisanship readily assume the subtle guise of 'legal principles.'") For further discussion of *Truax*, see *supra* note 57.

