

3-1-1987

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Recommended Citation

Peter E. Millspaugh and Tony Johnson, *Contemporary Law Developments under Conservative Rule: The United States and Great Britain Compared*, 9 Loy. L.A. Int'l & Comp. L. Rev. 319 (1987).

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Contemporary Law Developments Under Conservative Rule: The United States And Great Britain Compared

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The 1980's find Great Britain and the United States turning to politically conservative leadership. A conservative vision of the future and the encroaching realities of global economies have combined to place the industrial relations systems in both countries under stress. Change has been inevitable. This change is manifest in the contemporary labor law reforms taking place on both sides of the Atlantic Ocean.

To explore these developments, this article will first sketch the evolution and traditions of labor law in both Great Britain and the United States. The specific developments in the labor law of each country since 1980 will then be outlined and discussed. In the final section, these contemporary initiatives will be contrasted and compared to each other in light of the traditions and present day industrial relations climate.

I. TRADE UNION LAW TRADITION IN THE UNITED STATES AND GREAT BRITAIN

The evolution of English trade union law and, indeed, labor relations law as a whole, contains one important distinguishing feature.¹ In contrast to most other western nations, the industrial revolution swept over England very early in its modern history. Its impact was felt before democratic rights had been extended to the working

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1. The development of British labor law has been interpreted and chronicled by numerous scholars over the years. Representative of the more current literature would be O. KAHN-FREUND, *LABOUR AND THE LAW, A COMPARATIVE STUDY* (1977); H. PELLING, *A HISTORY OF BRITISH TRADE UNIONISM* (1976); Lewis, *The Historical Development of Labor Law*, 14 BRIT. J. INDUS. REL. 1 (1976).

classes, and at a time when a strong reaction to the excesses of the French Revolution remained infused in England's national psyche.

The first legal response to trade unionism in England was marked by penal legislation. Enactments such as the Combination of Workmen Acts of 1799² and 1800³ provided the trade union movement, like the early church movements, with its founding saints who suffered an array of ignominies for the cause of trade unionism.⁴ The early part of the 19th century, however, saw the gradual repeal of such legislation. By 1867, virtually all the criminal restraints on the activities of trade unions as collective labor organizations had disappeared.⁵

English judicial interpretation of the common law in the context of industrial disputes seriously undermined the early trade union movement. For example, early court decisions resulted in the theory that trade unions operated in restraint of trade because they interfered with the freedom of "master and servant" to bargain over labor.⁶ In this same period the torts of conspiracy⁷ and inducement of breach of contract were also widely used against the unions.⁸ The controversial holding of the now infamous case of *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* in 1901,⁹ combined with the mounting frustration of the trade union movement leadership, provided the impetus for the creation of the British Labour Party. Judicial hostility toward the unions reflected in *Taff Vale* helped to

2. 39 Geo. 3, ch. 12 (1799).

3. 39 & 40 Geo. 3, ch. 106 (1800).

4. By illustration, the Tolpuddle Martyrs are still celebrated by an annual festival in the English labor world. Tolpuddle is a country village on the banks of the river Puddle Dorsetshire where, in the early 1800s, a number of farm laborers attempted to start an Agricultural Worker's Union. In 1834, six of the organizers were arrested, convicted, and transported to Australia under provisions of the Unlawful Oaths Act of 1797. H. PELLING, *supra* note 1, at 20-22.

5. The last penal provision relating to aggravated misconduct was repealed by the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict., ch. 86. See generally B. COOPER & A. BARTLETT, *INDUSTRIAL RELATIONS - A STUDY IN CONFLICT* (1976).

6. See *Hornby v. Close* [1867] 2 L.R.-Q.B. 153. The same courts did not hold that a consortium of employers to fix prices and the wage rates for employees of various categories was in restraint of this freedom to bargain. See *Mogul S.S. Co. v. McGregor Gow & Co.*, [1892] App. Cas. 25.

7. See *Rex v. Bunn*, (1872) 12 Cox C.C. 316; *Quinn v. Leatham*, [1905] App. Cas. 495.

8. See *South Wales Miners' Fed'n v. Glamorgan Coal Co.*, [1905] App. Cas. 239.

9. *Taff Vale Ry. Co. v. Amalgamated Soc'y of Ry. Servants*, [1901] App. Cas. 426. Following a strike of railway workers in South Wales to secure improved pay, the rail company sued the union for the loss of business sustained during the strike. To the surprise of most legal commentators, the House of Lords held that such a claim could succeed, since at that time unions did not enjoy incorporated status. *Id.* at 430-31.

convince a number of influential trade union leaders that direct political participation would be necessary to achieve their aims.¹⁰

Although the industrial revolution in America lagged behind Britain by a period of some five decades, the forerunners of American labor unions began to appear early in the 1900's in the form of small craft and art guilds.¹¹ With no national legislation of consequence affecting labor organization until well into the 20th century, early American labor law was, like Britain, based on judicial interpretation of common law precepts.¹² Courts in America initially viewed collective action, the backbone of the labor movement, as criminal in nature. Up until 1880, such union activity in the United States was still being prosecuted under a criminal conspiracy theory.¹³ Subsequently, it became more to management's benefit to seek a court injunction of such activity since it not only restrained workers from union activity, but kept them out of jail and available to resume work. Based on the common law interpretation that certain forms of union activity constituted a restraint of trade, management was allowed to practice labor relations law by injunction in the United States until 1932.¹⁴

As between the two nations, Britain was first to attempt broad legislation in the field of labor relations.¹⁵ Under the auspices of a liberal government, the comprehensive Trades Disputes Act was added to British law in 1906.¹⁶ The fundamental thrust of this legislation was to remove the field of industrial disputes from the ambit of

10. See O. KAHN-FREUND, *supra* note 1, at 69.

11. For representative historical accounts of the American labor movement, see W. WALLING, *AMERICAN LABOR AND AMERICAN DEMOCRACY* (1926); T. BROOKS, *TOIL AND TROUBLE: A HISTORY OF AMERICAN LABOR* (1971); J. RAYBACK, *A HISTORY OF AMERICAN LABOR* (1966); P. TAFT, *ORGANIZED LABOR IN AMERICAN HISTORY* (1964).

12. For a general treatment of the evolution of American labor law, see B. TAYLOR & F. WHITNEY, *LABOR RELATIONS LAW* (1983); H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* (1968); W. BOULD, *A PRIMER ON AMERICAN LABOR LAW* (1982).

13. As the court explained in an early Philadelphia Cordwinders case: "A combination of workmen to raise their wages may be considered in a two fold point of view: one to benefit themselves [and] the other is to injure those who do not join their society. The rule of law condemns both." 3 COMMONS & GILMORE, *DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY* 63 (1910).

14. See generally F. FRANKFURTER & N. GREEN, *THE LABOR INJUNCTION* (1930); Petro, *Injunctions and Labor Disputes: 1800-1932*, 14 WAKE FOREST L. REV. 341 (1978).

15. Kahn-Freund contends that the Trade Disputes Act of 1906 marked the first "vitaly important occasion when Parliament had to intervene to redress the balance which had been upset by court decisions capable of exercising the most injurious influence on the relations between capital and labour." HAMLIN LECTURE (1971).

16. 6 Edw. 7, ch. 47 (1906).

the courts and their prevailing common law interpretations.¹⁷ The technique employed was not to override common law principles, but rather to extend a selective immunity from their application to trade unions.¹⁸ Specifically, the 1906 Act extended complete immunity to unions with respect to actions in tort relating to industrial conflict, but not to their officers or members. However, the Act provided officers and members of a union immunity from the torts of conspiracy and inducement of breach of contract only if they were acting in contemplation or furtherance of a trade dispute.¹⁹ The result was that actions taken in contemplation or furtherance of a trade dispute were no longer actionable under any tort theory even if such activity should interfere with the legitimate interests of another.²⁰

Since the common law process is conducted at the hands of the judiciary, the courts have repeatedly outflanked the statutory immunity of the 1906 Act over the years. Parliament has had to counter these judicial forays from time to time in order to preserve the intent of the original statute.²¹ The unstabilizing effect that this give-and-take process exerts on British industrial relations has become its distinct signature. The trade unions continue to oppose proposals for alternate forms of legal protection such as a positive "code of rights"

17. It is an interesting historical aside that the Trade Secretary in the new Liberal Government at the time was Winston Churchill who was quoted as supporting the legislation because:

It is a very unseemly thing, and indeed in the House of Commons we must regard it as such, to have the spectacle we have witnessed these last few years of these workmen's guilds - trade union organizations - being enmeshed, harassed, worried and checked at every step and at every turn by all kinds of legal decisions, which came with the utmost surprise to the greatest lawyers in the country. It is not good for trade unions that they should be so brought into contact with the courts, and it is not good for the courts.

B. PERRIN, *TRADE UNION LAW* 311 (1976).

18. 6 Edw. 7, ch. 47, § 1 (1906); see also O. KAHN-FREUND, *supra* note 1, at 232.

19. 6 Edw. 7, ch. 47, § 5 (1906).

20. *Id.* § 2.

21. In *Amalgamated Soc'y of Ry. Servants v. Osborne*, [1910] App. Cas. 87, the House of Lords, contrary to *Steele v. South Wales Miners' Fed'n*, [1907] 1 K.B. 361, held that the law did not permit unions to maintain political funds. This restriction had to be corrected by the Trade Union Act, 1913, 2 & 3 Geo. 5, ch. 30; *Rookes v. Barnard*, [1964] App. Cas.. In *Rookes*, the House of Lords invented the tort of "intimidation," thereby outflanking the 1906 immunities. This loop-hole had to be corrected by the Trade Disputes Act of 1965. The court in *Torquay Hotel Co. v. Cousins*, [1969] 1 All E.R. 522, held that a union could induce a breach of contract, even though no breach of contract resulted due to a "break" clause permitting suspension of obligations during "war, and riot, trade dispute." *Id.* at 529. This had to be corrected in the Trade Union & Labour Relations Act, 1974, ch. 52.

or similar legislation in favor of the existing formula.²² Thus, the immunity device adopted in the early 1906 Act has been carried forward and preserved in the modern consolidation of British statutory labor law which was undertaken recently in the Trade Union & Labour Relations Acts (TULRA) of 1974²³ and 1976.²⁴

Following the British lead, the United States also adopted national industrial labor legislation in the form of the National Labor Relations Act of 1935 (NLRA).²⁵ However, the United States' legislation was comparatively more comprehensive. The NLRA guarantees workers the right to unionize, to bargain collectively over wages and terms and conditions of employment, and to support their organizing and bargaining demands with the use of economic weapons such as strike actions, boycotts, and picketing.²⁶ Five specified employer "unfair labor practices" are statutorily prohibited,²⁷ and procedures are established for certifying and decertifying unions for the purpose of worker representation in dealings with management.²⁸ Implementation of the Act is entrusted to a National Labor Relations Board (NLRB), a permanent regulatory agency which serves as the forum of first impression for representational or unfair labor practice complaints. Within this statutory framework, a private ordering of industrial relations was anticipated through the process of bargaining.

In 1947, the NLRA was amended to achieve a more evenhanded statutory treatment between industry and labor. This legislation, the

22. Evidence of the Trade Union Council to the House of Commons Committee on Employment Law, COMMITTEE ON EMPLOYMENT LAW, 1980, 170, 282.

23. Trade Union & Labour Relations Acts, 1974, ch. 52.

24. Trade Union & Labour Relations Acts (Amendments), 1976, ch. 7.

25. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1976)). As a prelude to the National Labor Relations Act, Congress had passed the Norris-LaGuardia Act three years earlier, forbidding federal courts from enjoining certain union activities, such as non-violent picketing and striking. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1976)).

26. See National Labor Relations Act, § 7, 29 U.S.C. § 157 (1976), which declares that workers "have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

27. These unfair labor practices are set out in the National Labor Relations Act, § 8(a), 29 U.S.C. § 158(a) (1976), and include in abbreviated form:

1. Interference with the rights guaranteed in § 7;
2. Interference with the formation of unions;
3. Discrimination against employees who belong to unions;
4. Discrimination against employees seeking relief under the Act; and
5. Refusal to bargain collectively with union representatives.

28. National Labor Relations Act, § 9, 29 U.S.C. § 159 (1976).

Labor Management Relations Act²⁹ (LMRA), provided some of the new balance by creating certain employer rights by enumerating a list of prohibited employee unfair labor practices analagous to those assigned to the employer under the NLRA.³⁰ Among its other provisions, the amendment also prohibited the "closed shop,"³¹ granted the federal courts power to enforce collective bargaining agreements,³² and created the Federal Mediation and Conciliation Service for labor disputes capable of causing a national emergency.³³

The third major amendment of American labor statutes, the Labor-Management Reporting and Disclosure Act, was enacted in 1959.³⁴ This legislation, aimed at problems of union autocracy and corruption, instituted a series of controls for regulating the internal affairs of unions.³⁵ It also further restricted union picketing under specific circumstances³⁶ and narrowed the loopholes existing in the statutory prohibition against secondary boycotts.³⁷

A retrospective examination of some of the labor law traditions in the United States and Great Britain reveals that collective activity by worker organizations was initially unacceptable as a matter of public policy. The common law provided the courts with little precedent to weigh and balance the merits of organized labor.³⁸ This, along with the prevailing perception that labor was primarily a commodity of commerce, caused members of the labor movement to face criminal and civil sanctions at the hands of the courts throughout its early period in both countries. Statutory intervention protecting organized labor occurred first in Britain at the turn of the century. It immunized most trade union activity from adverse application of common law concepts by the courts. However, the new legislation did not repeal common law doctrine generally, nor did it directly bestow upon the unions new positive statutory rights and benefits. Its intent was

29. Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1976)).

30. *Id.* § 8(b), 29 U.S.C. § 158(b) (1976).

31. *Id.* § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976).

32. *Id.* § 301, 29 U.S.C. § 185 (1976).

33. *Id.* § 202, 29 U.S.C. § 170 (1976).

34. Labor-Management Reporting and Disclosures Act of 1959, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C. (1976)).

35. *Id.* at tits. I-VI.

36. National Labor Relations Act, § 8(b)(7), 29 U.S.C. 158(b)(7) (1976).

37. *Id.* § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

38. O. KAHN-FREUND, *supra* note 1.

merely to provide maneuvering room for trade union activity.³⁹

As in Great Britain, the labor movement in the United States initially required protection from the courts and their common law interpretations. Although this step was essentially accomplished by the Norris-LaGuardia Act in 1932,⁴⁰ more legislation followed shortly. Under the NLRA, some three years later the country's preference for comprehensive legislation appeared. The American choice was to create a statutory framework which imposed a collective-bargaining process at certain points in the existing system, assigned positive statutory rights and duties to the principals, and instituted procedures to continually monitor various aspects of the industry-labor relationship. It is against this background that the contemporary developments in labor law and policy in the two countries over the last five years can be examined.

II. UNITED KINGDOM DEVELOPMENTS: PHASED LEGISLATIVE REFORM

The United Kingdom elected a conservative government in spring of 1979. The new government promptly introduced the first of its proposals for labor law reforms into Parliament which responded by enacting the Employment Act of 1980.⁴¹ In framing the Act, the government indicated an intent to proceed with labor reform in stages, and that this measure was but the first step in that process.⁴²

A. *Employment Act of 1980*

The 1980 Act is an amending enactment and operates by altering some of the basic provisions contained in TULRA 1974/76. The two main areas the government targeted in the 1980 Act were secondary picketing and closed-shop dismissals. In the course of maneuvering the bill through Parliament, however, a third area was included, that of secondary action.

39. *Id.*; see also The Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict., ch. 86.

40. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. § 101 (1976)).

41. Employment Act, 1980, ch. 49.

42. The Conservative Government's general strategy toward the trade unions has been widely discussed. See, e.g., Gregory, *Industrial Relations, the Law and Government Strategy*, 56 POL. Q. 23 (Jan./Mar. 1985); Ball, *Taming Britain's Unions*, 109 FORTUNE, Apr. 16, 1984, at 134.

Under the TULRA 1974/76,⁴³ legal immunity was extended to picketing in contemplation or furtherance of a trade dispute. During the bitter miner's strike which ultimately brought down the Heath government in 1974, extensive use had been made of the 'flying picket'.⁴⁴ This experience was largely responsible for prompting the insertion of a provision in the 1980 Act to the effect that, henceforth, picketing would be entitled to TULRA immunity only if carried out at or near the picketers' own place of work.⁴⁵ Under the mechanics of this provision, picketing at a secondary location is not rendered illegal, it is merely made susceptible to civil actions at common law by the employer.⁴⁶

The 1980 Act also targeted the TULRA provisions recognizing a trade union closed shop⁴⁷ and the TULRA statutory presumption that a dismissal on the base of failure to join a union was fair and appropriate.⁴⁸ To counter the effects of these provisions, the 1980 Act: (1) extended the grounds upon which an employee can refuse to join a union from solely "religious conviction" to "any deeply-held personal conviction;" (2) provided that an employee hired prior to a closed-shop agreement need not join the union; and (3) introduced a closed-shop employee right to claim unreasonable refusal or exclusion from union membership.⁴⁹ Also inserted was the requirement that

43. Trade Union & Labour Relations Act, 1974, ch. 13, *as amended by* Trade Union & Labour Relations Act, 1976, ch. 7, § 3(2); *see also* Employment Act, 1980, ch. 42.

44. Employment Act, 1980, ch. 42, § 16.

45. *Id.*

46. *Mersey Docks & Harbour Co. v. Verrinder* [1982] I.R.L.R. 152. Picketing can also lead to criminal prosecution under some circumstances. The courts have authorized extensive police powers to prevent obstruction and/or to prevent a breach or anticipated breach of the peace as it relates to picketing. *See Broome v. Director of Public Prosecutions* [1974] App. Cas. 587, (pickets may not flag down lorries to stop them), *Tynan v. Balmer* [1967] 1 Q.B. 91, (walking pickets still an obstruction), *Piddington v. Bates* [1961] 3 All E.R. 660, (police can limit number of pickets to as few as two).

47. Trade Union & Labour Relations Act, 1974, ch. 13, § 30. The advantages to a union of the closed-shop are obvious, but it is interesting to note that many British *employers* also see the closed-shop as advantageous, particularly in easing and giving certainty to wage and other employment negotiations. *See* Evidence of the Trade Union Council to the COMMITTEE ON EMPLOYMENT LAW, *supra* note 22.

48. The provisions relating to unfair dismissal were first enacted in the Industrial Relations Act, 1971, re-enacted in the first schedule to Trade Union & Labor Relations Act, 1974, ch. 52, amended by the Employment Protection Act, 1975, ch. 71 and are now contained in the Employment Protection (Consolidated) Act, 1978, pt. v.

49. The common law courts refused to recognize this right. As one court responded, "What right of property, or what existing right of any sort, one must ask, is a person who is not a member of a trade union deprived of by not being permitted to join such a union?" *Tierney v. Amalgamated Soc'y of Woodworkers*, (1959) I.L.R. The 1980 Act provision also

subsequent closed-shop arrangements be supported by 80% of the workers effected, as measured by secret ballot.⁵⁰ As a final protection, the Act conferred joinder powers on employers who could show they were coerced into closed-shop actions by the union.⁵¹

The 1980 Act also focused on the scope of secondary action immunity. This came in light of a recent holding by the House of Lords.⁵² As noted previously, the immunity of 1906 carried forward now as set out in TULRA, extended to any activities performed "in contemplation of furtherance of a trade dispute."⁵³ In a series of recent cases, however, the Court of Appeal had ruled that it was for the judge to determine on a case-by-case basis how far it was reasonable for a union to go in seeking immunity in an industrial dispute.⁵⁴ In 1980 the House of Lords extended immunity to those situations where "the person instigating the course of action honestly and reasonably believe that it *may* further the trade dispute."⁵⁵ If this criteria can be established, then the course of action is held to be in furtherance of that trade dispute, and therefore falls within the immunity of TULRA. To narrow this judicial expansion of the scope of immunity in this area, the 1980 Act sanctioned only secondary action against the "first or immediate supplier" and/or the "first or immediate customer."⁵⁶

B. *Employment Act of 1982*

The 1982 Act⁵⁷ introduced a number of changes but, like its

brings in the requirement for a tribunal to decide questions of unreasonable refusal or exclusion. Employment Act, 1980, ch. 42, § 4.

50. Note that this does not make a closed-shop without a ballot illegal, but merely means that if any employee is dismissed, or in any way harrassed because he or she will not join the union, or resigns from the union, then such action will entitle the employee to compensation for unfair dismissal.

51. Employment Act, 1980, ch. 42, § 10. Employee compensation in these instances may be charged wholly against the union or apportioned partly on the employer and partly on the union, as the facts of the case justify. A number of minor provisions also address the unenforceability of "union-only-labour" clauses in contracts, restrict coercive recruitment tactics, and limit personal employment rights in small business situations. *Id.*

52. *Express Newspapers v. McShane*, [1979] I.C.R. 210. In the course of a dispute with a regional newspaper group, the National Union of Journalists called on its members nationwide to support the strike. *Id.* at 212.

53. Trade Union & Labour Relations Act, 1974, ch. 52, § 7.

54. *Beaverbrook Newspapers v. Keys*, [1978] I.C.R. 592; *Associated Newspapers Group v. Wade*, [1979] 1 W.L.R. 697; *Duport Steels v. Sirs*, [1980] 1 W.L.R. 697.

55. *Express Newspapers v. McShane*, [1979] I.C.R. at 212.

56. Employment Act, 1980, ch. 49, § 18.

57. Employment Act, 1982, ch. 46.

predecessor of 1980, introduced no new formulation of immunity. It pursued its objectives by continuing the adjustments to the existing immunity formulation utilized in TULRA. The principal concerns of the 1982 Act were confined to two subject areas: the definition of a "trade dispute," and the civil liability of unions themselves, as distinct from that of their officers and members.

In an attempt to narrow the definition of "trade dispute",⁵⁸ the 1982 Act requires that any such dispute "relate wholly or mainly" to matters pertaining to employment rather than merely being connected with them.⁵⁹ British tradition has afforded industrial strikes or negotiation processes the status of "trade dispute" and therefore legal protection. However, this is not the case where such activity is politically motivated. As a result of several recent court decisions, the Thatcher government felt the need to redefine this distinction.

In the interim, courts seem to be adhering to the intent of the "trade dispute" definition of the 1982 Act by separating trade union activities from politics. Courts are interpreting relatively minor political factors as sufficient to take a dispute outside of the TULRA immunity.⁶⁰ These same 1982 Act provisions also take disputes other than with the workers' own employer, outside the trade dispute definition.⁶¹ Although the intent of this change was to deal with demarcation disputes once highly prevalent in some major industries in Britain, it seems to impinge on recognition issues and the power of strong unions to act in support of the weak.⁶²

As to civil liability, the 1982 Act removes the TULRA immunity which unions as an entity had enjoyed since the *Taff Vale* decision.⁶³ However, this provision can be viewed as largely cosmetic since it had always been possible to sue either the president or general secretary of a union. In such cases, however, the union virtually always covered the costs and expenses of such a suit.

58. Trade Union & Labour Relations Act, 1974, ch. 52, § 29.

59. Employment Act, 1982, ch. 46, § 18.

60. See *BBC v. Hearn*, [1979] I.C.R. 685, (sports telecast to S. Africa); *NWL v. Woods*, [1979] 1 W.L.R. 1294, (flags of convenience on merchant ships to avoid agreed pay and conditions for seamen); *Hadmor Prods. v. Hamilton*, [1982] I.C.R. 690, (television studio subcontracted work out formerly done in the studio).

61. Employment Act, 1982, ch. 44, § 15.

62. This becomes apparent in the likely applicability of this provision in cases such as *Quinn v. Leatham*, [1901] App. Cas. 495; *Stratford & Son v. Linley*, [1965] App. Cas. 269; *Cory Literage v. Transp. & Gen. Workers Union*, [1973] I.C.R. 339; *Grunwick Processing Laboratories v. Advisory, Conciliation and Arbitration Serv.*, [1978] I.C.R. 231.

63. Employment Act, 1982, ch. 44, §§ 15-18.

The 1982 Act also touches on the issue of the closed-shop. It extends the balloting requirements of the 1980 Act to all closed-shop situations, and requires balloting every five years. In order to have or maintain a closed-shop, 80% of the employees covered by closed-shop, or 85% of those voting must approve it. In addition to lost compensation,⁶⁴ the Act also establishes the right to punitive damages of up to 20,000 pounds for employees unfairly dismissed for failure to join a union.⁶⁵

C. Trade Union Act of 1984

The Trade Union Act of 1984 broke more new ground in addressing three main areas: (1) members support for strike actions; (2) ballot requirements concerning union political funds; and (3) the election of union governing bodies. Since a number of its provisions are still being phased into effect at this writing, its impact cannot be fully gauged. However, this third phase of the Government's program could be far reaching.

Under the 1984 Act,⁶⁶ any strike action enjoying TULRA immunity must be supported by a majority of those members likely to be called out on strike. This majority is to be ascertained by "a secret and properly conducted ballot" held not more than 4 weeks before the strike begins.⁶⁷ The Act requires that the balloting be conducted either by mail or at the workplace and must be followed by an announcement of the voting figures to the members involved.⁶⁸ A ballot result is not valid more than 4 weeks from the time it is taken.⁶⁹ When taken together, the implications of these provisions could significantly reduce the flexibility of union negotiating strategy in dealing with industry.⁷⁰

64. Employment Act, 1982, ch. 44, § 3.

65. *Id.* Note that compensation cannot be claimed by an employee dismissed because he will not join a union in a closed-shop situation, provided that all the requirements and embargoes of the 1980 and 1982 Acts have been duly observed and executed. To do this however, is a tall order. The 1982 Act also contains a miscellany of minor provisions, such as the permitting of selective dismissals in a strike and more restraint on union-labor-only requirements in tendering and contract procedures.

66. Trade Union & Labour Relations Act, 1984, ch. 49.

67. *Id.* The ballot must require the voter to indicate "whether he is prepared to take part, or, as the case may be, to continue to take part in a strike involving him in a breach of his contract of employment." Trade Union & Labour Relations Act, 1984, ch. 49, § 11(4).

68. *Id.*

69. *Id.*

70. Trade Union & Labour Relations Act, 1984, ch. 49, § 11 extends the entitlement to vote to "all those members of the trade union who it is reasonable at the time of the ballot for

The Act also addresses union political funds. Phased into force in 1986,⁷¹ the Act requires any union which has an approved political fund to hold a secret ballot of all its members at intervals of not more than 10 years, in order to determine whether that fund shall be maintained.⁷² Supplementary provisions mandate that trade union funds may not be spent on "political objectives" other than out of a fund authorized for this purpose by ballot. Mirroring the Act's pre-strike balloting requirements, union members must vote at their workplace, or by mail, "at no cost to themselves."⁷³

The last matter dealt with in the 1984 Act is a requirement that trade union governing bodies shall be directly elected by a secret ballot of all that union's members.⁷⁴ Again, the voting must be at the members' workplace, or by mail and at no cost to the member.⁷⁵ These provisions are designed to override existing rules or provisions contained in any union constitution.⁷⁶ Failure to comply with these requirements will subject the offending union to civil remedies, including injunction.⁷⁷ Alternatively, enforcement of these provisions can be achieved by application to the Certification Officer⁷⁸ for a declaration which is enforceable by court order.

the union to believe will be called upon in the strike or other industrial action in question to act in breach of . . . contract." *Id.* No other category of person can vote, including those who may be laid off as a result. It is incumbent upon the union to accurately determine exactly those who are likely to be called out on strike. If tactics or circumstances bring about a change in the persons affected, a new ballot may have to be held under these new provisions of the law. Trade Union & Labour Relations Act, 1984, ch. 49, § 7(2).

71. Trade Union & Labour Relations Act, 1984, ch. 49, § 10(3).

72. *Id.*

73. *Id.* One manner in which these provisions, if combined, could impact on trade union bargaining in industrial negotiations is on the bargaining leverage of a threatened strike action which in effect terminates four weeks after the authorizing vote, therefore necessitating periodic balloting during extended negotiations.

74. Trade Union & Labour Relations Act, 1984, ch. 49, §§ 12-13. Under the Trade Union Act, 1913, a union is required to hold a ballot of members before it can set up a political fund, but the union is not required to repeat the ballot at set intervals. *Id.*

75. Trade Union & Labour Relations Act, 1984, ch. 49, § 12.

76. This general statutory invasion of trade union autonomy over political funds can be anticipated to bring retribution when and if the Labour Party resumes power. On such an occasion it would seem certain that severe constraints would be placed on companies and wealthy trust funds regarding their ability to donate to political parties.

77. Trade Union & Labour Relations Act, 1984, ch. 49, § 4.

78. Trade Union & Labour Relations Act, 1984, ch. 49, § 5. The Certification Officer is an independent statutory officer appointed under the Employment Protection Act of 1975. He is the successor to the Registrar of Trade Unions who first appeared in 1875. His main duties relate to the keeping of a registrar of duly constituted unions and employer's associations, and monitoring their annual reports and accounts.

As a supplementary requirement, the 1984 Act mandates that British trade unions compile and keep current a register of their members' names and addresses.⁷⁹ This will impose a particularly heavy burden on those unions which inherently experience a large turnover in their membership.⁸⁰

III. UNITED STATES DEVELOPMENTS: ADMINISTRATIVE REFORM

The conservative Administration in the United States since 1980 has shown little interest in formal statutory labor reform and it has not been a prominent political issue. However, significant labor law change has been introduced during this period, through the reinterpretation of a growing number of provisions of the National Labor Relations Act as amended. The lead in this reinterpretation process has been taken by a recently secured majority of presidentially appointed members on the National Labor Relations Board.⁸¹ The significance of this NLRB reinterpretation cannot be lightly dismissed. The new Board's decisional initiatives have started fast and will continue. Furthermore, they have generally been well received by the courts on appeal.⁸²

A. National Labor Relations Board Activism

The reaction in organized labor circles to some of the new Board's decisions has been heated.⁸³ As a result, labor allies in Congress conducted hearings on the conduct of the NLRB in June of 1984. The Democratic majority on the investigating committee subsequently issued a report which decried "the failure of American la-

79. Trade Union & Labour Relations Act, 1984, ch. 49, § 4.

80. For example, the Union of Shop, Distributive & Allied Workers calculates that it has over 100,000 new members every year, with over 300 members joining and leaving every day. 3 TRADE UNION L. BULL. 79-80 (1984).

81. The NLRB is comprised of five members, appointed by the President on confirmation by the Senate for 5 year staggered terms. The President has the authority to designate one member as Chairman. The Board's General Counsel who supervises the operations of the Board, is also appointed by the President upon Senate confirmation for a 4 year term.

82. See D. Dotson & C. Williamson, *infra* note 87, at 3-7. Under NLRB procedure, complaints first considered by an NLRB administrative law judge can be taken to the NLRB *en banc* for *de novo* consideration. Board decisions can be appealed to the federal appellate courts.

83. At one point, the President of the AFL-CIO suggested that Congress repeal the nation's labor laws so that business and labor could battle it out "mano a mano." *Kirkland's Call to Void Labor Laws Ignited a Growing National Debate*, Wall St. J., Nov. 7, 1984, at 31, col. 5.

bor law" as administered under the new Board.⁸⁴ However, the report's conclusions that the new Board's decisions were anti-union and setting new management precedent, ignored much of the testimony of former agency members, labor bar practitioners and legal scholars. The thrust of the testimony, to the contrary, was essentially that the decisions in question merely returned the law to previous lines of established Board precedent.⁸⁵ Board chairman Donald L. Dotson,⁸⁶ the focus of much of the criticism during his initial months in office, appears to have weathered the cries for his resignation as the new Board's actions are becoming better understood.⁸⁷ A degree of calm and reason appears to have returned to the controversy at this writing.

B. Decisional Reforms

The new Board majority has sought to explain a number of its actions as responses to federal circuit court criticisms of the result-oriented tendency of previous Board decisions.⁸⁸ The contention is that these decisions strayed from principle, applicable precedent, and evidentiary rules in order to arrive at the desired outcome. As a result, the new Board's decisions commonly identify and adopt a previously rejected line of Board precedent as support for their rulings.⁸⁹ The major areas of labor policy where the new Board has introduced some readjustments include the redefinition of concerted activity, bargaining requirements associated with industrial restructuring decisions, employer responses to union organizing activity, and Board deference to the arbitration process.

1. The redefinition of concerted activity.

Section 7 of the NLRA protects the worker's right to act collec-

84. *The Failure of Labor Law-A Betrayal of American Workers: Hearings Before the Subcomm. on Labor, 98th Cong., 2d Sess. 98 (1984)* [hereinafter *The Failure of Labor Law*].

85. See minority views and testimony of Edward B. Miller, Chairman, NLRB, 1970-74, John S. Irving, Deputy General Counsel NLRB, 1976-79, and Peter G. Nash, General Counsel, NLRB 1971-75 from *The Failure of Labor Law, supra* note 90.

86. Mr. Dotson represented Wheeling Pittsburgh Steel Corporation and served as an Assistant Secretary of Labor before his appointment to the Board.

87. The Chairman and his Chief Counsel have co-authored a rebuttal to criticisms of the Board concerning the new decisions causing the most controversy. See D. Dotson & C. Williamson, *New Directions at the National Labor Relations Board (1984)* (unpublished). "The first task of the Reagan appointees to this Board was to return the Board to principle and precedent." *Id.* at 7.

88. *Id.* at 3-7.

89. See *infra* notes 95, 102, 108 and accompanying text.

tively or in concert with one another.⁹⁰ In 1975, the Board introduced the notion that even one acting alone could be entitled to concerted action protection under Section 7 of the NLRA.⁹¹ The 1975 Board ruled that a maintenance employee's safety complaints, although dismissed by the administrative law judge, constituted protected concerted action, because industrial safety had been made a subject of both federal and state statutes. Accordingly, "concert of action can emanate from the individual assertion of such statutory rights."⁹² Therefore, concerted action protection was extended to individual acts presumed by the Board to be of interest to the group.⁹³

The new Board argued that such a decision was effectively reading the word "concerted" out of the statute, and substituting Board judgment in place of that intended by the clear language of the statute.⁹⁴ When concerted action protection was claimed by a worker who reported allegedly unsafe conditions to the state Public Service Commission, the new Board used the occasion to overrule *Alleluia* and its progeny as to both the statutory meaning of concerted activity and the burden of proof requirement.⁹⁵ For an employee's action to be concerted, the Board explained, "we shall require that it be engaged in, with or on the authority of other employees, and not solely by and on behalf of the employee himself."⁹⁶ To prove concerted action would once again require evidence of support for the action by other employees. The previous Board had required evidence that other employees disavow support for what the complainant did in order to establish that the activity was not concerted.⁹⁷

The new Board checked the expansionist tendencies of its predecessor with regard to protectable union activity under section 7.⁹⁸ In reality, the type of actions the earlier Board was sheltering under its *Alleluia* doctrine were already largely protected under numerous regulations designed to encourage socially responsible individual initia-

90. National Labor Relations Act, § 7, 29 U.S.C. 157 (1976).

91. *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975).

92. *Id.* at 1004.

93. *Id.*

94. *Steere Dairy, Inc.*, 237 N.L.R.B. 1350, 1351 (1978); *Ontario Knife Co.*, 247 N.L.R.B. 1288, 1296 (1980).

95. *Meyers Indus., Inc.*, 268 N.L.R.B. 493, 495 (1984).

96. *Id.* at 495-96.

97. *Id.* at 497.

98. *Id.* at 496; see also Guideline Memorandum 84-3, Office of General Counsel, National Labor Relations Board (Feb. 16, 1984).

tives generally.⁹⁹ NLRB protection for such activity needlessly broadened the jurisdiction of a regulatory agency already struggling with a backlog of work.

2. Bargaining and industrial restructuring decisions

The second area the new Board has entered deals with the scope of the NLRA's mandatory bargaining requirement as it applies to plant closings and/or work transfers. Here, the new Board has followed the lead of the Supreme Court's holding in *First National Maintenance Corp. v. NLRB*.¹⁰⁰ This decision resulted in the most comprehensive analysis to date of the mandatory bargaining requirement over work terminations under the NLRA¹⁰¹ and required overruling yet another expansive reading of the Act by the previous Board.¹⁰² In effect, the Supreme Court placed those management decisions which change the scope, nature or direction of the business outside of mandatory bargaining. At the same time it placed those management decisions based on labor costs within the bargaining requirement. Those decisions containing elements of both, the Court noted, require bargaining only "if the benefit for labor management relations and the collective bargaining process outweighs the burden placed on the conduct of the business."¹⁰³

In holdings since the advent of *First National Maintenance*, the new Board has begun to align agency decisions in this area with Supreme Court dictates.¹⁰⁴ One example is the challenge to the Otis Elevator Company's decision to consolidate its research and development work at Mahaw, New Jersey with its operations in East Hartford, Connecticut, which came before the Board in the spring of 1984.¹⁰⁵ Applying the analysis outlined in *First National Maintenance*, the Board found that the company's decision was of the sort that was necessary to the exercise of entrepreneurial control. The deci-

99. These statutes, referred to as "whistle blower" statutes, employ disincentives and sanctions to employers who retaliate against employees who undertake socially desirable actions. See Employment Retirement Income Security Act of 1974 § 510-29, 29 U.S.C. § 1140 (1978); Occupational Safety & Health Act § 11(c), 29 U.S.C. § 660(c) (1978).

100. 452 U.S. 666 (1981).

101. National Labor Relations Act, §§ 8(a)(5), 8(d), 29 U.S.C. §§ 158(a)(5), 158(d) (1976).

102. *First Nat'l Maintenance Corp.*, 242 N.L.R.B. 462 (1979).

103. 452 U.S. at 678.

104. For an analysis of the judicial response to various legal theories now being advanced to challenge management plant closing decisions generally, see Millspaugh, *Plant Closing and the Prospects for a Judicial Response*, 8 J. CORP. L. 483 (1983).

105. *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984).

sion involved effecting a "change in the nature and direction of a significant facet of its business," not labor costs. Therefore the Board concluded that bargaining was not required.¹⁰⁶

Earlier in 1984, the new Board reversed another closely related line of decisions established by its predecessor. This prior line of decision forbade an employer, after bargaining in good faith to impasse with the union, from relocating work during the term of an existing labor contract.¹⁰⁷ The prior Board found that such a work relocation constituted an impermissible modification of a collective bargaining agreement.¹⁰⁸

In a subsequent case some four years later, the Milwaukee Spring Division of Illinois Coil Spring Company found itself in a similar position.¹⁰⁹ Upon bargaining to impasse for a reduction in wages under an existing labor contract containing no work preservation clause, management unilaterally decided to move the unprofitable unit to another location in order to achieve the necessary economies. The union challenged the decision on the basis that union consent was required under previous Board precedent.¹¹⁰ This claim was denied by the new Board.¹¹¹ The Board stated that the company had met the bargaining requirement by bargaining to impasse.¹¹² Further, the Board stated that the company did not unlawfully modify the existing labor contract because a relocation (as opposed to a reassignment) did not breach the terms of the existing pact. The new Board argued that under the previous rule, frank and truthful midterm bargaining would be undermined. By the injection of labor costs into the dispute, union bargaining would be mandated, creating the likelihood of a union veto over the transfer decision.¹¹³ The new Board's inclination to protect management prerogatives and flexibility in this area is explained in part as an effort to facilitate the restructuring presently underway in many of America's basic industries.

106. *Id.* at 892.

107. Los Angeles Marine Hardware Co., 235 N.L.R.B. 720, 733 (1978).

108. *Cf.* The Boeing Co., 230 N.L.R.B. 720 (1977).

109. 268 N.L.R.B. 601 (1982) (supplemental decision and order).

110. *Id.* The new Board actually requested that the Seventh Circuit remand the old Board's 1982 decision (265 N.L.R.B. 206, which was in favor of the union and had gone up on appeal), back to the new Board for reconsideration. The Circuit Court consented and the new Board proceeded to reverse the previous Board's decision. *See* Millspaugh, *Midterm Plant Relocations: The NLRB Puts Humpty Dumpty Together Again*, 35 LABOR L.J. 289 (1984).

111. 268 N.L.R.B. at 602-03.

112. *Id.* at 603.

113. *Id.* at 604.

3. Employer response to organizing activity

There is mounting evidence that the new Board is interested in removing a number of the previous Board's presumptions of employer anti-union motives. The area pertaining to management reaction to union organizing campaigns seems to be of particular interest. It is anticipated that relatively minor adjustments of this nature will result in increased objectivity in Board rulings.

One current example of the new Board's activities in this area is the treatment of in-plant work rules governing union organizing activity. The previous Board departed from a ten year precedent¹¹⁴ when it held that employer rules which prohibited union soliciting during "working time" were presumptively invalid because they applied to the entire work shift, including employee time like lunch periods.¹¹⁵ Rules limiting such solicitation had previously been presumed valid because "working time" was understood to constitute company time, i.e., time when the employee was expected to be working. In contrast, rules limiting solicitation to "working hours" were understood to apply to the entire work shift and to include employee time such as the lunch period, and were presumptively invalid.¹¹⁶ The new Board's recent decision in *Our Way, Inc.*,¹¹⁷ returned the law to the previous industry distinction between "working hours" and "working time", and reinstated the presumption of validity for those work rules which prohibit solicitation only during "working time."¹¹⁸

The new Board also has acted to remove anti-union presumptions in the area of management questioning of employees concerning union organizing activity implicitly recognized by the previous Board. Prior to the recent line of cases which culminated in the previous Board's ruling in *PPG Industries*,¹¹⁹ the NLRB had refused to find an interference with an employee's Section 8(a)(1) protections in employer interrogation situations absent the employer's use of threats.¹²⁰ Prior Boards had traditionally utilized the following long-standing test: whether, under all of the circumstances, the questioning tends to restrain, coerce, or interfere with an employee's rights guaranteed

114. *Essex Int'l*, 211 N.L.R.B. 749 (1974).

115. *T.R.W. Bearings*, 257 N.L.R.B. 442, 444 (1981).

116. 211 N.L.R.B. at 750.

117. 268 N.L.R.B. 394 (1983).

118. *Id.* at 394-95.

119. 251 N.L.R.B. 1146 (1980).

120. *See supra* note 27 and accompanying text.

under the Act.¹²¹ Instead of considering all of the circumstances, the previous Board in *PPG Industries* inserted a *per se* rule which, in effect, made any questioning, even though addressed to open, active union supporters, "inherently coercive" and therefore illegal.¹²² The new Board utilized the recent complaint in *Rossmore House*¹²³ to reject this line of decision. In doing so, it returned the law to the requirement that the Board analyze all of the factors in each case so that the realities and practicalities of the workplace can once again be factored into the Board's decisions in this area.¹²⁴

4. NRLB deference to arbitration

To understand the tendencies of the new Board in defining its role in relation to labor arbitration, it is necessary to bear in mind that section 10 of the NLRA requires that Board's power to remedy unfair labor practices be unaffected by other means of adjustment.¹²⁵ Board deferral to arbitration is discretionary, but the Act clearly states a preference for methods "agreed upon by the parties . . . for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."¹²⁶

Labor arbitration has become a favored method of dispute resolution in American industrial relations and is generally encouraged by the courts and the NLRB. Its acceptance in practice is evidenced by the fact that over ninety percent of existing collective bargaining contracts contain a provision for some form of arbitration.¹²⁷ Until recently, the Board had clearly drawn the line between its responsibility to remedy unfair labor practices and to defer to the arbitration process. As to both collective and individual rights in prearbitral situations, the Board customarily gave deference to an arbitration clause and became involved only when an arbitrator's decision was clearly at odds with the Act.¹²⁸ In the aftermath of arbitration, the Board also

121. *Blue Flash Express*, 109 N.L.R.B. 591 (1954).

122. 251 N.L.R.B. at 1147. The previous board stated: "The type of questioning at issue conveys an employer's displeasure with employee's union activity and thereby discourages such activity in the future. The coercive impact of these questions is not diminished by the employee's open union support or by the absence of attendant threats." *Id.*

123. 269 N.L.R.B. 1176 (1984).

124. *Id.* at 1177.

125. National Labor Relations Act, § 10, 29 U.S.C. § 160 (1976).

126. National Labor Relations Act, § 23(d), 29 U.S.C. § 173(d) (1976).

127. D. Dotson & C. Williamson, *supra* note 87, at 14.

128. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971); *National Radio Co.*, 198 N.L.R.B. 527 (1972). For support of pre-arbitral deferral, see *Cary v. Westinghouse Corp.*, 375 U.S. 261

refused to become involved so long as the arbitration was binding, the proceedings appeared regular on their face, and the decision was consistent with the Act.¹²⁹

The previous Board aborted most of this established prearbitral deference.¹³⁰ However, in the recent ruling of *United Technologies Corp.*,¹³¹ the new Board returned to the prior *Collyer* and *National Radio* deferral doctrine.¹³² Under this rule, the Board argued, the statutory purpose of encouraging collective bargaining is better served by holding the parties to their agreement to arbitrate. By so deferring, the Board is not abdicating its statutory responsibility as its critics claim, since it can always reinsert itself in any instance where the parties have contravened the safeguards outlined in *Spielberg*.¹³³

The previous Board, in *Propoco, Inc.*, also abruptly departed from the long established *Spielberg* test for post-arbitral deferral.¹³⁴ The decision declared that deferral henceforth would be applicable only where the Board reached a separate, specific determination that the arbitrator had disposed of the issues just as the Board would have done.¹³⁵ This awkward doctrine would have required the NLRB to conduct endless *de novo* determinations of arbitration awards and would have encouraged disgruntled parties to inevitably appeal to the Board. However, the new Board recently overturned *Propoco*.¹³⁶ The present standard for post-arbitral deferral now requires that the arbitrator's decision be merely "susceptible to interpretation consistent with the act."¹³⁷ Further, adequate consideration of any unfair labor practice charge is satisfied where it can be shown that the facts of the contract issue parallel those of the unfair labor practice issue, and the arbitrator has the facts before him relevant to resolving the unfair labor practice.¹³⁸

(1964). Deferral was extended to § 8(a)(3) cases in *National Radio Co.*, 198 N.L.R.B. 527 (1972).

129. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955). The Board also added the requirement that the arbitrator must have considered any unfair labor practice issue. *Raytheon Co.*, 140 N.L.R.B. 883, 886 (1963).

130. *General Am. Transp. Corp.*, 228 N.L.R.B. 808 (1977).

131. 268 N.L.R.B. 557 (1984).

132. *See supra* note 128 and accompanying text.

133. 268 N.L.R.B. at 560.

134. *Professional Porter & Window Cleaning Co.*, 263 N.L.R.B. 136 (1982).

135. *Id.* at 137-38.

136. 268 N.L.R.B. 573 (1984).

137. *Id.* at 574.

138. *Id.* The Board also placed the burden of "affirmatively demonstrating the defects in the arbitral process or award" on the party seeking Board intervention. *Id.*

IV. CONTEMPORARY ANGLO-AMERICAN LABOR LAW REFORM: CONTRAST AND COMPARISON

Contemporary labor reform in the United States and Britain is more easily understood when analyzed in light of each nation's industrial labor relations history and tradition. The courts' initial rejection of any societal role for organized labor activity in the economic or political life in both nations is illustrative.¹³⁹ A degree of this early judicial reluctance to structure a common law accommodation for worker actions in the new industrial setting remains to this day. In both the United States and Britain, a residual antipathy toward the goals and practices of organized labor emerges from both the form and content of current labor law developments.

The manner in which the labor movements in both countries was eventually able to secure a degree of legitimacy is also important to the analysis of current developments. Although union recognition was secured through statutory intervention by the central government of both countries, the form which that intervention assumed provides a sharp contrast. In Britain, labor's struggle led to direct participation in national political processes with the formation of the British Labour Party at the turn of the century. Thereafter, labor issues in that country have remained on the nation's political agenda and have been addressed on a national scale.¹⁴⁰ This is characterized by its most recent initiatives. In contrast, the labor movement in the United States was never able to solidify and attract sufficient support to sustain itself as a major independent political force. Throughout the evolution of American industrial relations, organized labor has pursued its interests politically through one of the nation's established political parties. Labor's inability to move its concerns to the national agenda today is attributable at least in part to this distinctive feature.

The tradition of labor law by legislation is not the only feature retained by the recent labor law developments in Great Britain. The continued tug-of-war between the common law courts and Parliament has also been assured by retention of the legislative immunity device to secure union protections. The courts should find the recent immunity adjustments of the Conservative government more to their liking, however, since they generally seek to contract the scope of trade union immunity.¹⁴¹ These preferences for a legislative initiative and

139. See *supra* notes 2-14 and accompanying text.

140. See *supra* notes 15-20 and accompanying text.

141. See *supra* notes 41-80 and accompanying text.

the retention of the immunity device, are in character with British labor reform tradition.

The long-standing political impotence of organized labor in the United States, by comparison, has foreclosed the prospects for significant pro-labor federal legislation in recent years. Labor's inability to secure a modest streamlining of the NLRA's representational processes and a strengthening of its remedies through a proposed Labor Reform Act in the late 1970's under a Democratic President, is illustrative.¹⁴² The absence of British-style labor legislation in recent years in the United States is attributable to more than simply labor's political weakness. In contrast to British legislative intervention by the implementation of judicial immunity, American intervention installed permanent industrial relations machinery and procedures. By design, the law sought to establish an on-going process whereby labor relations would essentially be self-regulating.¹⁴³ The struggle for labor law reform in the United States therefore has been largely defined by the ability to control and manipulate the industrial relations system from within. Contemporary developments have come in the form of internal adjustment in the United States largely because legislative change imposed from outside the established system is the exception rather than the rule.

Moreover, pushing for national labor reform legislation would be out of character for a contemporary American administration unless such reforms were incorporated as part of its political program. In part, this explains the absence of significant legislative labor reform initiatives under the present Administration. Nonetheless, substantial changes comporting to the Administration's conservative vision of industrial relations are presently rooting in American labor law. The power of appointment is proving to be an effective agent of change as it influences the content and tenor of contemporary industrial relations laws. In a few short years, the present Administration has already begun to neutralize the persistent labor-oriented perspective which has dominated NLRB rulings in recent decades.

Concerning the content of the reforms emerging in both nations, only some tentative observations are possible at this early juncture. Reforms since 1980 have been piecemeal. More time must elapse before the full extent and impact of specific changes can be accurately gauged. It is clear however that the Conservative leadership in Great

142. See Rosen, *Labor Law Reforms: Dead or Alive?*, 57 U. DET. J. URB. L. 1 (1979).

143. See *supra* notes 25-37 and accompanying text.

Britain has succeeded in enacting restrictions on the union practices of secondary picketing and secondary boycotting, while imposing further limits on the establishment and conduct of union closed shops.¹⁴⁴ Two years later, the government was able to narrow the legal definition of a "trade dispute" through a second phase of labor legislation which also removed unions, as entities themselves, from TULRA immunity.¹⁴⁵ A third legislative initiative in 1984 instituted far-reaching union governance requirements, including a secret ballot requirement among other pre-strike conditions, procedures giving members greater control over the use of union political funds, and the selection of union leadership.¹⁴⁶

Beyond their clear pro-industry orientation, the British reforms appear essentially unrelated and do not reflect a dominant or unifying theme. While a contracted TULRA immunity is the principal mechanism utilized to curb union activity, the insertion of certain statutory procedures are aimed at increasing union accountability to its membership with regard to statutorily specified matters.

In light of the mechanism through which current reforms are being implanted in American labor law over this same period, it would be unrealistic to expect much coherence. The agent for change, the NLRB, is largely confined to the issues framed in the cases presented to it for resolution. It can be anticipated, however, that the management segment of the labor relations bar will be alert to opportunities for the present Board to set additional precedent.

In the contemporary American setting, the NLRB has just begun to exert its influence on American labor law and practice. Already its interpretations have narrowed the scope of protected "concerted action."¹⁴⁷ In a short span of time, the new Board has also utilized opportunities to afford management increased entrepreneurial flexibility by protecting its prerogatives concerning work transfers and relocations.¹⁴⁸ The new Board has been able to re-institute the presumption of validity as to employer solicitation bans limited to "working time" only, and remove the unqualified *per se* illegality previously associated with all employee interrogations.¹⁴⁹ It appears also that the new Board has been able to re-establish the previous standard for Board

144. See *supra* notes 44-56 and accompanying text.

145. See *supra* notes 63-65 and accompanying text.

146. See *supra* notes 66-80 and accompanying text.

147. See *supra* notes 95-99 and accompanying text.

148. See *supra* notes 109-13 and accompanying text.

149. See *supra* notes 114-18 and accompanying text.

deferral to arbitration, restoring this important dispute resolution mechanism to its traditional place in American labor law jurisprudence.¹⁵⁰

These early isolated actions obscure specific trends in the law. It is clear, however, that the administrative nerve center of the United States industrial relations systems is concerned with the competitiveness of American industry in world markets. Its inclination, for example, is to restrict its own jurisdiction where it appears that market forces will circumscribe the behavior of the parties. The Board's new Chairman himself recently suggested a number of themes expected to be embodied in the agency's future rulings.¹⁵¹ These include the protection of individual employee rights (as against both unions and corporations), greater Board adherence to Congressional intent, and a reduction of the federal government's role in collective bargaining and labor contract administration.¹⁵²

V. CONCLUSIONS

Labor law development in the United Kingdom and the United States have been nurtured by conservative governments since 1980. The form which these developments have assumed are in character with the distinct traditions in each country for instituting labor law. The British have now completed a three-phased legislative program, while the United States is promulgating change through the decisional process which controls its industrial relations system.

In both nations the reforms have been hodge-podge in content, and gradually phasing into effect. The British measures have primarily addressed a seemingly unrelated list of isolated union practices in an effort to restrict these practices. TULRA immunity has been continued as the principal legislative device for regulating trade union power in the United Kingdom. Because industrial relations are largely self-regulating under the American system, labor law reform is emanating from NLRB adjudication. The content of the reform therefore is primarily a function of those issues placed before the Board in the ongoing course of affairs with little opportunity for a larger coherence in its promulgation.

Neither government is intent on launching a major assault against the institution of organized labor. There is a degree of accept-

150. See *supra* notes 136-38 and accompanying text.

151. D. Dotson & C. Williamson, *supra* note 87, at 10.

152. *Id.*

ance of the status quo as to the more general role of unions on the part of both governments. In Great Britain, however, where labor relations law has traditionally been the handmaiden of political dogma, specific, perceived union abuses have been promptly and directly addressed through national legislation. By any reasonable measure, these steps represent incremental, rather than radical, changes in British labor law.

Closely linked through heritage, custom, and language, Britain and the United States nevertheless reflect industrial relations experiences which differ distinctly in a number of major respects. These distinctions largely account for the disparity in form which contemporary labor law developments have taken in the two countries. In perspective, the measures taken under conservative rule this decade amount to little more than a modest oscillation in the continuum of labor relations law in both nations. The elimination of many of today's changes will constitute the reforms of tomorrow when the pendulum returns.

