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Harry T. Edwards

United States Court of Appeals, D.C. Circuit

Virginia A. Seitz

Sidley & Austin

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From Labor Law to Employment Law: What Next?

Abstract

[Excerpt] If bargaining is broad-based (in nonfragmented units) and if the parties have full resort to a reasonable panoply of economic weapons, the stakes usually will be too high for either side to press for impasse. But in the event of a breakdown in negotiations, the parties should be allowed to engage in a fair fight.

Keywords

labor law, employment law, collective bargaining, negotiation

Disciplines

Collective Bargaining | Dispute Resolution and Arbitration | Labor and Employment Law | Unions

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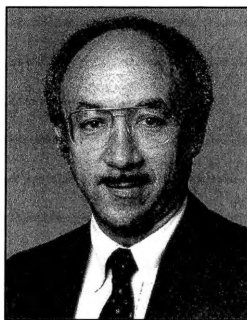
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“If bargaining is broad-based (in nonfragmented units) and if the parties have full resort to a reasonable panoply of economic weapons, the stakes usually will be too high for either side to press for impasse. But in the event of a breakdown in negotiations, the parties should be allowed to engage in a ‘fair fight.’”



Harry T. Edwards is a Circuit Judge in the United States Court of Appeals for the D.C. Circuit. Coauthor of *The Lawyer as Negotiator*, he has practiced labor law, taught at Michigan and Harvard Law Schools, and served as a neutral labor arbitrator.



Virginia A. Seitz, a partner in the firm of Sidley & Austin, practices labor and employment law in the federal courts. She was a Rhodes Scholar and a law clerk for Justice William J. Brennan at the United States Supreme Court.

Harry T. Edwards and Virginia A. Seitz

FROM LABOR LAW TO EMPLOYMENT LAW

What Next?

WHEN PROFESSOR MCKELVEY AND PROFESSOR Neufeld first contacted us about contributing to this volume, they described the proposed publication as “a unique Festschrift which honors—but a beloved savant and teacher—but a beloved group of disciplines which were brought together in 1945 at the first institution of higher learning dedicated to research and teaching in the field of industrial and labor relations.” The tribute is well deserved, for the School of Industrial and Labor Relations at Cornell University has been and remains a truly great institution of scholarship and learning.

More than sixty years have passed since Congress enacted the National Labor Relations Act of 1935 (NLRA),¹ providing employees with “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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”² The ILR School was founded at Cornell as a direct consequence of this enactment. Indeed, as Arnold Weber once observed, institutions like the ILR School were “perceived as signifying the coming of age of organized labor and as confirming its legitimacy in society.”³ However, while the school has grown and flourished over the past five decades, the years have not been so kind to organized labor and collective bar-

gaining in the United States. It would be an overstatement to say that the union movement is facing demise or that collective bargaining has become irrelevant, but there are more than a handful of scholars and practitioners in the field who would argue (or concede) that this is not far from the truth.

The continued decline in American unionism and collective bargaining—and the accompanying perception that unions and collective bargaining are fast becoming an irrelevance in modern industrial life—calls into question the original *raison d’être* of schools of industrial relations. This volume presents an appropriate opportunity, we think, to examine the roots of the present decline of organized labor, collective bargaining (and, arguably, labor law as well), and to speculate about their future relevance, if any, in modern industrial society. Coincidentally, we think that such an examination will serve to reaffirm the importance of the Cornell ILR School, albeit for reasons somewhat different than those perceived by the founders of the school.

At the outset, we should make clear our general view on collective bargaining and the labor laws designed to enhance it. To paraphrase Winston Churchill, we believe that collective bargaining is the worst form of government for the workplace except for all others. We, like many others who have considered the issue, must acknowledge the limitations inherent in any system of collective bargaining and rue the occasional abuses that have been associated with the union movement.

Nonetheless, we worry that the decline of organized labor and collective bargaining is a source of real concern, because we believe that “the process of enlightened employee relations in this country has been inextricable from the rise of the trade union movement,”⁴ and that “strong and effective institutions for worker representation are essential not only to a democratic society but also to the nation’s economic progress.”⁵

Our primary focus in this essay is the role played by law in the decline of organized labor and the role that might be played by law in its potential revitalization. Specifically, we are concerned about the effect of both (1) labor law, i.e., the NLRA, as amended, which is the federal labor law governing employees’ legal rights to organize and act *collectively*, and (2) employment laws, such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), and the Employee Retirement Income Security Act (ERISA), which afford *individual* employees an assortment of legal rights in connection with their employment. But in order to understand the role played by “labor law” and “employment laws” in the decline or the potential improvement in the fortunes of the labor movement, developments in the laws governing employment relationships and employee rights must be placed in a larger context. That is our goal in this essay.

In the first section, we briefly discuss the evidence supporting the premise of this essay—that the influence of organized labor in the United States has significantly declined. In the second section, we explore the causes of this decline, including the significant role played by federal labor law, as an aid to understanding the necessary role that labor law reform might play in any revitalization of the labor movement. In addition, we reject the notion that employment laws—which protect certain legal rights of individuals in the workplace—have contributed significantly to organized labor’s decline or that they can fully replace organized labor as the protector of employees’ interests.

Finally, in the third section, we argue that our national goals—a high-skill, high-technology, high-value-added economy—will require

a joint commitment from government, business, and labor, and that employees cannot participate in this endeavor as equal partners without effective representative institutions. Labor law in its present form often precludes labor unions from creating organizations that can effectively represent employees on the issues of central importance to their lives; some labor law reform is therefore critical to achievement of this goal. With or without labor law reform, however, it is our view that labor unions must adjust their methods and priorities in order to more effectively serve the needs of workers. If nothing else, the past fifty years have shown that “law” alone will not ensure effective collective bargaining or employment relationships.

The Decline of Organized Labor

While it is possible to overstate the influence of law on the decline of organized labor and on the substantive protections actually afforded to unrepresented employees, it would be difficult to exaggerate the dramatic effect that the decline of organized labor and the explosion of federal statutes affecting individual rights in the workplace have had on practice and teaching in these areas.

Within the curricula of law schools, for example, the teaching of labor law has gradually been eclipsed by employment law. In the 1960s, the basic labor law course, covering the NLRA and focusing exclusively on the private sector, was the centerpiece of the labor law package. This package sometimes included a seminar addressing collective bargaining in the public sector, and, occasionally, a seminar offering modest coverage of employment discrimination laws. By the 1970s, the labor law package had expanded; the basic labor law course was joined by full course offerings in labor relations law in the public sector and in Title VII and other employment discrimination laws, by sophisticated courses in collective bargaining, and by a variety of seminars in employment-related subjects, such as sex discrimination, employment for people with disabilities, employment problems in higher education, and arbitration. In the 1980s, the menu of labor and employment law courses was further expanded to include courses in

the Landrum-Griffin Act, often denominated Internal Union Democracy, courses in alternative dispute resolution (of which collective bargaining and arbitration were only a part), and extensive and specialized offerings in areas such as OSHA and ERISA.

Commencing in the 1990s, what had been the basic labor law course began to be seen as a piece—and not a very significant piece—of a course in employment law. Presently, the notion that the study of “labor law” is the study of private sector labor relations governed by the NLRA is considered outdated. The clear message of today’s law school curriculum is that traditional labor law—that is, the law governing the relationships of employers and unions representing employees in the private sector—has been marginalized.

A similar sea change has occurred in the practice of labor law specialists. In the 1960s, the labor law practitioner was generally involved in collective bargaining negotiations, representation and unfair labor practice cases before the National Labor Relations Board (NLRB), grievance arbitration, and some duty of fair representation cases. The present-day employment law practitioner handles employment discrimination cases of every sort (race, sex, disability, age, national origin), bankruptcy cases, pension and welfare benefit cases, worker health and safety cases, workplace privacy cases, unfair dismissal cases, workplace alcohol and drug abuse cases, duty of fair representation cases, plant closing cases, public sector cases of all varieties, and, incidentally, an occasional representation or unfair labor practice case before the NLRB. As with the law school curriculum, the principal change in emphasis has been away from work associated with traditional collective bargaining and unionized workers to a wider range of employment problems affecting organized and unorganized employees alike.

As stated, at the root of these changes in labor/employment law teaching and practice is the decline of private sector union organization and the increasing number of federal statutes affecting the rights of individuals in the workplace. Traditional labor law has been marginalized in law schools and law firms because labor unions have been marginalized in the private sector of the economy.

The hard data reflecting the decline in the union movement are sobering. Total union membership, as a percentage of the employed population as a whole, has steadily declined from a high of approximately 35 percent in 1954 to approximately 14.5 percent in 1996.⁶ These figures actually disguise the extent of the erosion in union membership, because they include public sector employees. Three-fifths of the union members in the United States are in the private sector; union membership, as a percentage of *private* sector employment, has declined from a high of 38 percent in 1954 to its current low of 10 percent.⁷ Even sympathetic commentators project that union membership will drop to an 8–10 percent share of the workforce by the year 2000.⁸

The effects of the decline in the union movement are magnified by the historic patterns of union organization in this country. Unions dominate in older industries, such as automotive, steel, clothing, and rubber, in older firms, and in older plants; the newer, more dynamic sectors of the economy are primarily non-union.⁹ Unions are not effectively organizing the fastest growing occupations,¹⁰ and are losing ground within traditional strongholds such as mining, construction, and trucking, all of which are not only diminishing in size but also developing significant non-union sectors.¹¹

As one might expect from the evidence of their declining relative numbers, unions’ political influence—always relatively weak when compared to Western Europe, Australia, New Zealand, and Canada, for example—has deteriorated. Unions have been basically unsuccessful in defending or enhancing their own legal rights,¹² or in passing strong general social welfare legislation in this country.¹³ In 1984, union support of the Democratic presidential candidate, Walter Mondale, was widely perceived to have hurt his candidacy.

The recent decline in the union movement cannot be dismissed as an aberration. The historical trend in union density in the private

sector of the United States is “one of initial decline, rapid expansion in the 1930s and early 1940s, stability in the later 1940s and the 1950s, followed by a long period of decline, which accelerated during the past decade [1980s].”¹⁴ Unless the current situation is reversed, the influence of organized labor will continue to plunge.

The Causes of Decline in Organized Labor and the Role of Law

The major causes of organized labor’s decline are inextricably intertwined. As we detail below, there were dramatic, structural changes in the international and national economies, which gave employers irresistible incentives to eliminate or prevent unionization of the workforce; employers were then able to accomplish these ends without serious impediment—and, indeed, sometimes with assistance—from the federal labor laws.

The Causes of Decline in the Union Movement

Traced to its origin, the decline of organized labor and collective bargaining in the United States began with the demise of the economic environment that afforded employers in certain markets monopolistic or oligopolistic profits that organized labor, in turn, had pressed employers to share with their employees in the form of higher wages and other improved terms and conditions of employment. Thus, scholars opined that “stability in collective bargaining could be achieved only as long as unions were successful in organizing a sufficient part of the market and spread a standard wage across the market so as to take wages out of competition.”¹⁵ In other words, collective bargaining took hold in the United States largely within core industries in which employers were earning relatively high profits, and in which unions organized virtually the entire industry so that employers were not confronted by competitors with lower labor costs and greater flexibility.

During the 1970s and 1980s, employers in the core industries, such as steel, automotive, rubber, textile, and mining, which had had the run of the domestic economy for years, were subject to increasingly intense foreign competition. Similarly, as deregulation commenced, employers in heavily unionized, regulated industries, such as the airline, transportation, and communications industries, were confronted with new entrants in markets they had previously dominated. Two consequences of the internationalization and deregulation of the United States economy are critical here.

First, many employers in the core industrial sector of the economy—where unions traditionally had been strongest—did not survive their exposure to the international economy or deregulation. This sector lost jobs—and hence unions lost members—in record numbers.¹⁶

Second, and more importantly, surviving employers in core and regulated industries found their profit margins squeezed, and the historic compromise reached with organized labor—higher wages, benefits,¹⁷ and strict work rules in return for a stable workplace—lost its appeal. Employers shifted their priorities away from labor peace to “controlling labor costs, streamlining work rules . . . , and promoting productivity.”¹⁸ Employers became unwilling to pay the union wage premium¹⁹ or to tolerate restrictions on managerial flexibility (and thus productivity).²⁰

The consequences of the squeeze placed on employers by the international and deregulated economy are well known:

Unionization has long been sufficiently high to impose costs on employer operations . . . , but never sufficiently encompassing, and coordinated with political activities, to take those costs out of competition. . . . Students of American industrial relations have often observed that United States employers, in comparison to their counterparts in Europe, exhibit a striking and essentially unrelieved hostility to unions. This is the basic reason.²¹

In industries, firms, and plants where unions were able to maintain a presence, employers refused to engage in pattern or industry-wide bargaining, and instead insisted on contracts tailored to individual

firms, plants, and regions. In addition, employers forced many unions into concessionary bargaining in order to prevent or ameliorate significant workforce reductions.

Employers also sought, and often were able, to eliminate extant organization and to prevent new organization by use of a variety of tactics. Employers routinely considered the risk of unionization in deciding whether to add capacity to old facilities or to build new facilities, in deciding where to locate their operations, and in deciding where to eliminate excess capacity.²² In addition, more and more employers adopted human resource management policies (sometimes referred to as Quality of Work Life programs)²³ designed to prevent unionization by providing locally competitive (albeit lower than union-negotiated) compensation, and instituting internal grievance procedures to ensure that employees' views and complaints were heard and addressed. Finally, many employers eschewed cooperative labor-management relations and engaged in intense anti-union campaigns, utilizing tactics both legal and illegal.²⁴

During the 1980s, employers' resistance to unionization was tacitly encouraged by the Reagan and Bush administrations, which endorsed and enforced an ideology openly hostile to unions and collective bargaining. President Reagan appointed as chair of the NLRB an individual who had publicly stated that "collective bargaining frequently means . . . the destruction of individual freedom and the destruction of the marketplace."²⁵ President Reagan's firm handling of the Professional Air Traffic Controllers Organization strike, including his mass dismissal of striking air traffic controllers, made it very clear that the labor movement would not get a sympathetic ear in national political affairs. "Not since the [pre-Great Depression] days of the American plan and company unionism [was] it . . . as socially or politically acceptable for U.S. management to embrace publicly a 'union-free' preference as it [was during the years of the Reagan administration]."²⁶ As one commentator explained:

The probability of being punished for using illegal union avoidance tactics diminished as the political and social environment became more tol-

erant of open employer opposition to unions and as the legal system became less effective in countering employer resistance to unions. The lack of any broadly shared public commitment to labor as an important social and political movement further compounded labor's loss of influence in national politics.²⁷

In sum, as the macroeconomic conditions that had made possible and profitable the historic compromise between labor and employers in the United States steadily eroded during the 1970s and 1980s, employers in both traditionally unionized and traditionally non-unionized sectors significantly stepped up their resistance to unions, and met with little political or social disapproval.

Our conclusion—that determined employer resistance, caused by significant competition in product markets, is a primary cause of the decline of organized labor—is strongly supported by an examination of the contrast between the successes of public sector organization and the failures of private organization in recent decades. Public sector employers are essentially monopolists; that is, they do not have competitors in the traditional sense. And labor organizations meet significantly lower employer resistance to unionization in the public sector than in the private sector.²⁸ That is not to say that public employers have no interest in controlling costs or maintaining flexibility, but rather that public employers are not subject to the same intense pressures regarding profit maximization as are private sector employers.

The Role of Labor Law in the Decline of Organized Labor

What is particularly noteworthy about the decline in the union movement in the private sector is the effect of law. Employer resistance to organized labor played a major role in the decline, but this resistance was fueled in significant ways by the NLRA—the labor law enacted to facilitate employee representation in the workplace. In other words, the NLRA served as a forceful instrument of employer resistance.²⁹

This is not surprising when one considers the historical effect of law on the labor movement in the United States.

There was no union movement to speak of in the United States before the turn of the twentieth century. Even after 1900, the incipient union movement was severely hampered by the application of anti-trust laws to block organization, the use of injunctions to control unions' economic actions, the enforcement of yellow-dog contracts, and the persistent "American dream" of individual achievement that implicitly rejected notions of the working class, union organization, and collective action.³⁰ It was not until the late 1930s and 1940s that the industrial unions of the CIO finally emerged as a force, due to the advent of major industrial sectors, such as steel, auto, and transport, coupled with the crisis environment created by the Great Depression and World War II.

Despite the Roosevelt administration's basic indifference to organized labor,³¹ the political climate of the time, which strongly supported social welfare programs generally, was favorable to the enactment of legislation benefiting workers. The principal gains came with the passage of the Norris-LaGuardia Act, severely limiting the judiciary's power to issue injunctions in labor disputes; the FLSA, setting minimum wages and maximum hours in the workplace; and the NLRA, recognizing employees' rights to organize and bargain collectively.

In many respects, the labor movement initially benefited significantly from passage of the NLRA. The act established "majority rule" and "exclusive representation" in the workplace, ensuring that a union with majority support could require an employer to bargain about terms and conditions of employment only through the union. Individual rights were thus strictly limited in an organized workplace; unions had a duty of fair representation with respect to individual employees, but the duty was narrowly confined so as not to erode union authority in the negotiation or administration of collective bar-

gaining agreements.³² In addition, the Supreme Court construed the act to provide a legal framework for the enforcement of collective bargaining agreements and arbitration awards and to preempt state regulation of the bargaining parties' relationship, both of which effectuated the act's commitment to industrial self-government.³³ Finally, the NLRA established unfair labor practices (ULPs), prohibiting certain employer conduct that had intimidated, coerced, or retaliated against union sympathizers, and created the NLRB to enforce the prohibitions against ULPs and the employer's duty to bargain.

At the time of its enactment, the regime established by the NLRA was satisfactory to the labor movement. It allowed established unions to maintain their presence and even expand within the sectors of the economy in which they were already strong. In addition, it channeled the labor movement as a whole in the direction advocated by Samuel Gompers and, ultimately, the AFL-CIO—toward "pure and simple trade unionism,"³⁴ which was narrowly focused on wages, hours, and other terms and conditions of employment and which eschewed broad political reform or participation in market or firm management.

But the transformation of the economy between the mid-1970s and mid-1990s has laid bare the NLRA's inherent weaknesses and the danger that "pure and simple unionism" poses for the labor movement. Under present circumstances, the NLRA, as amended, severely limits unions in organizing efforts outside the sectors in which unions have been traditionally strong, permits a steady erosion of union strength even within such sectors, and stifles revitalization of the labor movement by preventing unions from representing their members in the fora and on the issues most critical to modern workers.

For purposes of this analysis, it is useful to divide the act's shortcomings into two categories: (1) provisions of the act that effectively limit organization outside of the (now few) economic sectors in which unions already have sufficient influence to take wages out of competition or to apply decisive economic pressure against employers, and (2) provisions of the act that independently ensure that whatever organization occurs is decentralized, fragmented, and narrowly focused on the work site and on limited issues related to the work site.

Limits on Union Organization. Under the NLRA, it commonly takes the NLRB at least eighteen months to issue an order adjudicating whether the act has been violated and, if so, to order a remedy. Enforcement of any such order requires an appeal to a circuit court of appeals, a process rarely completed in less than a year. The NLRB's delays are often fatal to union representation. Delays in orders reinstating fired union activists, in orders requiring employers to cease and desist from unlawful campaign actions, and in orders requiring employers to bargain in good faith make the union appear ineffectual and make association with the union appear risky; as time passes, turnover in the workforce can diminish union strength.

Furthermore, even if an NLRB order is ultimately enforced, the relief ordered is "make-whole" — that is, it returns the parties to the positions they occupied before the violation occurred.³⁵ Such a remedy has little deterrent value with respect to an employer seeking to stymie an organizing drive by firing union activists, or to eliminate a union by refusing to bargain a first collective bargaining agreement, or to break a strike by promising those who cross the picket line extraordinary benefits.

Additionally, it is well documented that, under the NLRA, most unions will face great difficulties in seeking recognition as the exclusive representative of a group of employees. Under *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956), and its progeny,³⁶ union organizers rarely have access to employees while on company property. Yet, a union must first organize 30 percent of what it believes is an appropriate bargaining unit and then file a petition with the NLRB simply to obtain an election. There follows an election campaign, a period of time the employer may and often will extend in a variety of ways, because delay is to the employer's benefit. For example, if the union's proposed bargaining unit is challenged, the NLRB must hold a hearing and determine the appropriate bargaining unit prior to the election; this alone can delay an election in excess of a month.³⁷

The campaign period also provides the employer with the opportunity for legal and illegal conduct intended to discourage employees from electing representation. Threats, coercion, and inducements de-

signed to prevent employees from voting to organize are illegal but oft-used employer tactics, which are extremely effective in preventing organization.³⁸ "One careful study concluded that where employers campaigned lightly or not at all, unions won representation elections 53–67% of the time; intense employer campaigning brought the success rate down to the 22–34% range; and campaigning coupled with unfair labor practices reduced it further, to an almost vanishingly small 4–10%."³⁹

Most significantly, the only remedy for an employee fired for union activity is reinstatement with back pay months and usually years later; most never return to their jobs (they have, of necessity, found other work during the long interim), and back pay awards to such employees average \$2,000.⁴⁰ This is a low cost, indeed, for the significant "persuasive" effect that discharge of union supporters during an organizational campaign may have.⁴¹ This is not merely a theoretical point, for a conservative estimate is that one in ten union supporters is discharged for his or her stance.⁴²

If a union succeeds in obtaining recognition or certification as a bargaining representative, it still faces the formidable task of bargaining a first collective agreement with the employer. As is well known, the employer has no obligation to agree to any specific terms or, indeed, to reach *any* agreement with the union; the employer must simply bargain in "good faith" — a vague standard that is breached only by a showing that the employer actively intended not to make any agreement.⁴³ And, in any event, the only "punishment" faced by an employer who fails to bargain in good faith is an order from the NLRB requiring good faith bargaining — hardly an effective deterrent to an employer determined to resist organization.

Adding to the legal obstacles to organization and bargaining faced by unions are the substantial restrictions on a union's use of economic force. First, a no-strike obligation will be implied from the presence of a grievance and arbitration clause in a union's collective bargaining

agreement.⁴⁴ Second, even in connection with a lawful strike, which is considered protected activity under the NLRA, an employer may “permanently replace” striking workers;⁴⁵ in periods of recession, this is an overwhelming weapon in the hands of an employer. Finally, other forms of economic action—such as sit-down strikes, concerted refusals to work overtime, in-plant demonstrations that disrupt production, and slowdowns—are considered “unprotected.” Employees may be disciplined or discharged for engaging in such activities without any legal recourse.

Narrow Bargaining Units and Limited Scope of Bargaining. Even leaving aside the limited effectiveness of the NLRA in protecting employees’ rights to act collectively, several aspects of the NLRA serve to maintain a decentralized and fragmented labor movement in which individual unions are relatively weak and have authority to represent workers only in connection with limited, work site-specific issues. The significance of this is that the decisions most critical to today’s employees often are made at the level of the firm, the relevant market, or the national economy, and involve issues as to which unions have no authority to speak.

At the threshold, the coverage of the NLRA is limited. The act excludes from its protections managers and supervisors.⁴⁶ These exclusions not only limit organization, but also occasionally divide workers in the same workplace who may share a substantial community of interest and prevent some workers from having any input with respect to managerial decisions of consequence to their working lives.⁴⁷

Of greater significance, however, is that, in defining “appropriate” bargaining units, the NLRA strongly favors small units. This bias does, of course, assist a union in obtaining initial certification because it is easier and less expensive to amass support in a smaller unit. However, it also serves to fragment workers because bargaining units

are generally limited to employees in a single location operated by a particular employer, or sub-parts thereof. In fact, employees cannot routinely organize in concert with employees who work for other employers within the same industry, because unions cannot lawfully require employers to bargain jointly with other employers or through employer associations.⁴⁸ These rules reinforce the widespread assumption—among employers and unions alike—that employees of one department, plant, or employer share few concerns with employees of other departments, plants, or employers.

Finally, as to the scope of bargaining, the NLRA requires the parties to bargain only with respect to a limited range of issues—so-called mandatory subjects of bargaining, which are wages, hours, and terms and conditions of employment.⁴⁹ As a result of this limitation, a union is unable to insist that an employer bargain about a number of significant issues—including multiemployer bargaining, capital investments, general firm structure and operations, plant closings, and virtually any issue extending beyond the bargaining unit involved.⁵⁰

The differential treatment of mandatory and permissive subjects of bargaining also reinforces unions’ tendencies to organize small units and to concentrate in bargaining on narrow, unit-specific issues. And, as already stated, the fragmented organizational structure and limited focus of today’s unions, in turn, seriously impede their ability effectively to represent employees on the issues of greatest moment in the workplace today—e.g., massive restructurings of employers, plant shutdowns, the introduction of new technology, the reorganization of work, inter-industry and firm job training and referral, and employee participation in the management of the enterprise.⁵¹

The act also tends to limit unions’ ability to use economic force so that the focal point of such activity is the job site. This legal limitation came in 1947, when the NLRA was amended to prohibit unions from engaging in “secondary” activity. This prohibition restricts union pressure on entities or individuals not directly involved in the labor dispute, if such secondary pressure is intended to put pressure on the primary employer.⁵²

The Net Effect of Labor Law on the Union Movement. As Joel Rodgers has summarized:

The [NLRA] limits the range of initial organization, imposes enormous costs on unions during the recognition process, applies an almost purely procedural requirement on bargaining, limits even this requirement to a sharply restricted range of subject matters, restricts the use of economic weapons, is particularly restrictive of the use of weapons that entail cross-sectoral or cross-firm (or now perhaps, even intra-firm) coordination among or within unions⁵³

The NLRA as amended does not really promote employees' rights to organize and act collectively, and it offers only limited and sometimes questionable protection for those who seek to exercise these rights. Thus, it seems fair to conclude that the act's vision of the role of unions is too limited to serve as the basis for the emergence of revitalized labor organizations that can effectively represent modern employees.

The Relationship between Increased Protection of Individuals' Rights and Union Decline

In recent years, the legislative and executive branches of the federal government have paid increased attention to the interests of employees in the workplace, promulgating a variety of laws and rules addressing discrimination, health and safety, pension rights, pregnancy leave, and the like. Thus, it is now sometimes asserted that the government's increased protection of the legal rights of individuals in the workplace has eliminated or significantly reduced the need for unions.⁵⁴ We view this assertion to be quite without support.⁵⁵

Employment law, by itself, often is not adequate to the task of protecting individual rights in the workplace for several reasons. Whatever the many virtues of the OSHA, ERISA, and FLSA, for example, they must be enforced to be relevant, and a union presence often is critical in this regard. As Paul Weiler summarized with respect to OSHA:

The consensus of research from the first decade of OSHA is that this legislation has produced only a modest reduction in the overall level of workplace injuries. And a key variable that positively influences both the likelihood of OSHA inspections and the size of penalties is whether the employees have been organized into a union with the experience and clout to insist on more effective administration of the law for the benefit of its members.⁵⁶

Unions routinely fund litigation under ERISA to enforce pension and welfare benefits for both active workers and retirees. And large-scale FLSA violations—which generally involve an employer's failure to pay minimum wage or overtime—often are brought to the attention of the Labor Department not by individuals but by unions. At bottom, legal rights are meaningful only if affected individuals have the knowledge, the technical expertise, and the resources to enforce those rights, and protection from the retaliation that may follow any attempt at enforcement. An individual who is part of a union is far more likely to have access to such assistance and protection.⁵⁷

Moreover, the substantive protection afforded by the so-called employment laws in the United States is extremely limited. For example, ERISA sets certain standards for the funding and vesting of employee pensions, but does not require employers to provide or continue pension or health care benefits. The Pregnancy Discrimination Act requires employers to treat pregnancy as they treat any other temporary disability, but does not require employers to grant leave for such disabilities. The Worker Adjustment and Retraining Notification Act requires employers to give employees minimal notice of an impending plant closing, but does not require employers to provide severance pay, retraining, or any other substantive benefit.

In addition, the prospect for enactment in the United States of a comprehensive social safety net, including substantive employment

rights akin to those present in Western Europe, for example, is slight. As Derek Bok has explained, legislators in the United States have a traditional aversion to substantive employment legislation.⁵⁸ Employment law does not now, and is not soon likely to, provide sufficient protection to obviate employees' need to engage in collective activity for mutual aid and protection.⁵⁹

It has also been argued that employment laws have contributed to the decline of unionization by means of a "substitution effect"—that is, that legislation has provided employees with benefits previously available only through unions, and that employees have therefore ceased to embrace unions. Most studies cast significant doubt on this hypothesis,⁶⁰ as does the relatively stable and successful union movement in Western Europe, where social programs far outstrip those of the United States.

Two additional explanations for union decline are often heard but, in our judgment, are secondary at best. First, some commentators have attempted to explain the phenomenon of union decline by asserting that unions are institutions primarily servicing white males holding full-time, blue-collar production jobs in the Northeast and Midwest, and that as the nature of workers and work has evolved, unions possess a shrinking potential membership pool. Female and minority workforce participation has increased dramatically; and the U.S. economy has lost numerous jobs in the manufacturing sector and gained jobs in the services sector, the South and Southwest, and in part-time and temporary employment, traditionally non-union areas. But the data show that only one-quarter of the decline in union density can be explained by demographic and structural shifts in employment from manufacturing to services.⁶¹ And, indeed, several of the fastest-growing occupations strongly "resemble those where unions traditionally flourished."⁶²

Second, union detractors often blame internal union problems for the recent decline. Unions must accept some responsibility for their

plight. They appeared to neglect issues—such as pay equity and family leave—critical to the commitment of female and minority workers who will constitute a large percentage of new workforce entrants in coming decades; these groups thus found outlets in other collectivities—the feminist and civil rights movements—which labor only half-heartedly embraced.⁶³ In addition, unions were slow to shift their organizing efforts toward sectors of the economy not traditionally organized, particularly service industries.⁶⁴ But unions' difficulties in dealing with the demographic and structural changes in the workforce cannot be laid only at their door; unions' failure to organize effectively is inescapably tied to the legal environment and the likelihood that a determined employer will successfully resist unionization.

In short, we are unpersuaded that either the limited package of substantive employment laws protecting certain legal rights of individual employees or the other factors discussed in this section have contributed in any significant way to the current malaise in the U.S. union movement.

What Next?

As we suggested at the outset, union organization and collective bargaining are not ends in themselves. The only reason to pause over the decline of the union movement in the private sector and to reflect on the effects of labor and employment laws is that these matters may be inexorably tied to our goals in pursuit of a better society. As previously stated, a principal premise of this essay is that "strong and effective institutions for worker representation are essential not only to a democratic society but also to the nation's economic progress."⁶⁵

Nonetheless, in considering these issues, we recognize that unions are not necessarily worthwhile institutions if their policies and practices are rigidly short-sighted and cannot adjust to changing economic markets, changing technology, and the changing demographics and needs of the workforce. Likewise, even if we are correct in assuming that workers should have a meaningful voice in establishing the policies and benefits affecting their lives at work, it does not follow

that this can or should be done only through traditional forms of collective bargaining.

In thinking about the future, there is an apparent consensus in the United States that we should aim to reduce our national debt, establish a strong competitive base in international markets, and achieve something approaching full employment. We also seek to afford full and fair opportunities to all workers, both to gain employment and to pursue advancements in the job market. In our view, in order to achieve these goals, government and business must commit themselves to a strategy that will entice to this country capital investment in facilities for production. The inducements to achieve this end must include the promise of a highly skilled, highly educated labor force capable of the production of technologically advanced goods and services.

Those advanced industrial nations that have been most successful in international markets are promoting high-quality goods and services requiring flexible methods of organizing both production and work. For instance, the last 15 years have seen a celebration of the so-called “small states” of Western Europe (e.g., Austria, Belgium, Denmark), which are highly dependent on exports and therefore have no choice but to rely on *highly skilled, high-wage labor producing high labor-value-added goods and services*. This choice uses the quality of labor input as a powerful comparative advantage in international markets.⁶⁶

We also believe that labor must be treated as a partner in pursuit of this strategy:

The evidence from abroad shows that most often extensive worker representation and labor participation in strategic managerial decision making and in organizing skills and training programs (i.e., internal labor markets) and managing flexibility in the allocation of human resources across firms and industries (i.e., external labor markets) play important roles in sustaining these successful economic strategies.⁶⁷

It only stands to reason that a significant worker “voice” is necessary for the United States economy to transform itself as described above. The postindustrial economy requires nothing less than the

gradual transformation of the American worker; postindustrial technology demands significantly increased involvement, flexibility, and commitment from employees. It is doubtful that workers will accept the kinds of revolutionary reforms necessary in the postindustrial economy unless they participate in the major strategic decisions shaping the economy and, more specifically, their workplaces. And, in any event, there is now a recognition by enlightened members of the business community that it is foolhardy for government and/or business willy-nilly to implement major changes in the production process without consulting those who know the most about that process—employees.⁶⁸

With this said, we face at least two very difficult questions: How can the employee participation essential to the reformation of our national economy best be achieved? And, more specifically, what role can the law play in bringing it about? That is, what are the legitimate interests of postindustrial employees and what should labor organizations seeking to represent those interests be legally authorized to do?

The modern American employee is prototypically a low-wage, low-skill employee in a traditional service industry, or a high-wage, high-skill employee in a knowledge- or information-based industry. Although American unions may continue to represent such workers on traditional matters such as wages and to prevent the arbitrary imposition of workplace rules and discipline, they *must* do more to survive. The international economy is such that unions generally will not be able to negotiate a significant wage differential for their members; and protection from discharge without just cause may soon be available to all employees. Thus, unions must focus on more than just “bread and butter” issues, must operate in fora beyond the traditional “appropriate units” for collective bargaining, and must speak on behalf of *all* workers (whether or not represented in traditional collective bargaining), or be replaced by associations that can meet the urgent representational needs of modern workers. We offer the following suggestions.

First, with respect to both low-skill and high-skill employees, dislocation is a major problem. This will remain true as our national economy continues to adjust to international competition, deregulation, and new technologies. At present when a union member loses his or her job, the relationship between union and worker more often than not terminates, because the union is legally designated to represent only employees in a bargaining unit at a particular work site. To effectively represent members of the present workforce, unions must forge a connection with their members that goes beyond the employee's job and encompasses his or her career.⁶⁹ Thus, unions must not only serve the needs of members who hold jobs in organized workplaces, but also offer membership and services to individuals who are seeking work or who are working in an unorganized workplace.

More concretely, the current work site-based structure for union membership simply does not serve the representational needs of workers in low-wage, low-skill service jobs. Workers in these jobs experience a high rate of turnover and often work in temporary or part-time jobs, but also have a long-term tendency to hold the same *type* of job based in a confined geographical area. What such employees require is a union organized "geographically along loose occupational lines"—a modern hiring hall or job referral and training service through which employees can move in and out of similar jobs offering uniform wages, and *portable* seniority, pension credits, and associated benefits.⁷⁰

The needs of high-wage, high-skill knowledge workers are similarly ill-met by the current work site-based structure for union membership. The hallmarks of new, high-technology companies are their small size, their often short lives, and the skill and flexibility required of the workforce. High-wage, high-skill employees need access to comprehensive, updated information about the external job market and about educational and training opportunities. There is no reason that unions—perhaps unions that evolve from professional standards organizations—should not fulfill these needs.

There are many other ways in which unions might effectively assist members presently employed in unorganized workplaces. For example, in a second trilogy relating to arbitration,⁷¹ the Supreme Court has expanded judicial deference to arbitration beyond the context of collectively bargained arbitration procedures to include arbitration of any disputes arising in the employer-employee relationship, including claims of statutory violations.⁷² Unions can offer employees expert representation, including access to legal services, in the context of such arbitrations. And unions could provide similar services to employees seeking to enforce individual legal rights under some of the employment laws discussed above.

Finally, all postindustrial employees need an effective representative at the firm, industry, and national level where strategic decisions affecting their careers take place. In the latter context, unions should be the "leading voice in advocating skills intensive competitive strategies at the firm and industry levels and a human capital intensive economic policy at the local, state and national policy-making levels."⁷³ To effectively perform this role, unions must act as one, moving beyond the straitjacket of traditional collective bargaining and the fragmented union movement it fosters.

Thus, unions must transform themselves so that they can take on the above-described role of representative and advocate of individual employees not simply when they are members of bargaining units at particular work sites, but also in the economy as a whole. This transformation will require wholesale changes in the union movement, and a great deal of it can occur without any changes in the labor laws. But it would be naive to assume that there can be a fully effective transformation absent some legislative revisions to the NLRA.

At its core, the NLRA is overly rigid in its prescriptions, unnecessarily cumbersome in its scheme of enforcement, and patently unfair in the balance that it strikes on certain issues. Worst of all, the act tends to promote harsh confrontation, not consultation or deliberation, between management and labor. The Supreme Court once said, "The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be chan-

neled into constructive, open discussions leading, it was hoped, to mutual agreement.”⁷⁴ With the benefit of hindsight, we now recognize that this is a fanciful notion. The problem is that although the act purports to legalize employee representation and collective bargaining, there are too many procedural strictures and substantive limitations in the way of “constructive” relationships.

For example, as already noted, the NLRA as construed distinguishes between so-called mandatory and permissive subjects of bargaining. Thus, the NLRB and the courts often are faced with patently absurd questions regarding the necessity of bargaining over matters such as merit pay,⁷⁵ pension benefits for retired workers,⁷⁶ plant closings and relocations,⁷⁷ and the like, all of which raise issues of extraordinary importance and concern to both management and labor. There is no way that such issues can be “removed” from the minds of the parties at the bargaining table, yet the NLRA purports to do so.

The net result of the mandatory/permissive dichotomy often is prolonged confrontation and litigation over what is and is not bargainable, or over whether a strike with respect to such issues is illegal and thus unprotected, or over whether an employer must negotiate to “impasse” before acting with respect to the disputed issues. The act thus promotes adjudication over issues that ought to be left exclusively to negotiations between the bargaining parties. And once the battle is engaged it often will consume years in litigation, and, in the end, the judgment of the board or court usually does not come close to resolving the real dispute between the parties. If the union wins, the remedy may be too little and too late; and if management wins, it still may face an angry workforce that has been denied any opportunity to discuss a matter of grave and mutual concern to the parties. This makes no sense. Thus, in our view, the distinction between mandatory and permissive subjects of bargaining—which artificially confines bargaining—should be eliminated.

Furthermore, unions should be permitted to organize in units that actually reflect workers’ interests and that correspond to relevant divisions within the economy; the fragmentation of bargaining units now seen in the private sector is pointless and counterproductive. Indeed,

in the public sector, the general practice has been to certify unions only in the broadest appropriate units; fragmented units often are prohibited. If this idea was followed in the private sector, this would allow for bargaining units “geographically along loose occupational lines,” and also more multiemployer units organized either by industry, occupation, or skill level. This would be a salutary development, because unions should be free to insist on bargaining units that foster the effective representation of employees.

Initially, a move from narrow units might pose problems for unions in organization campaigns, for it is easier to organize on a work site than in units organized by industry or occupation. But this problem would be minimized if the board was required to hold representation elections *immediately* upon any showing of interest by a union in any reasonably configured unit. The act should eliminate the board’s 30 percent rule, ban “hearings” on certification petitions, and eliminate the opportunity for election campaigns by either side. The question of representation should be decided quickly, yes or no, and then the parties should get on with bargaining if the union wins.

With respect to the obligation to bargain, the NLRB and the courts ought to be barred from adjudicating any issues concerning good faith bargaining or the permissible subjects of bargaining. Litigation in these areas has mostly served to distract the parties from their principal mission of reaching agreement. If the parties cannot agree, they should be left to their economic weapons. Unions should be allowed to strike and employers should be allowed to lock out and take unilateral action (even absent an “impasse”).

Our assumption is that if bargaining is left wide open, the parties will more often than not successfully air their grievances at the bargaining table. We also assume that, if bargaining is broad-based (in nonfragmented units) and if the parties have full resort to a reasonable panoply of economic weapons, the stakes usually will be too high for either side to press for impasse. But, in the event of a breakdown in negotiations, the parties should be allowed to engage in a “fair fight.”

Thus, we disagree with the judicial interpretation of the NLRA that authorizes employers to permanently replace strikers. The rule allowing such action should be eliminated. It should be acknowledged that an employer can continue to operate and to hire workers for that purpose, but the immediate permanent replacement of those who simply exercise their right to act collectively puts too high a price on the collective action that the NLRA was designed to encourage.⁷⁸ Likewise, the NLRA's prohibition on secondary activity—which allows workers to act in concert only on behalf of workers employed by a single employer at a single work site, and not on behalf of all workers with whom they share a common interest—should be eliminated. If employers are allowed to temporarily replace strikers and take unilateral action even without an impasse, as we suggest, unions should be free to broadcast their message and seek and obtain support within the community as they see fit.

Finally, if the transformation that we envision is to occur, representatives from government, management, and labor must have an official forum in which to meet and confer outside of the context of traditional collective bargaining. Because there is no parliamentary system of government in the United States, labor's access to national policymakers is limited to that of lobbyists. With respect to certain issues, however, labor should be at the table with government and business officials to address matters of national priority, such as international competition, the balance of trade, capital investment, business relocations, workforce training, unemployment, and the national debt. If labor is allowed to give real input with respect to such issues—even in nonbinding deliberations—its positions in this and other contexts probably will be less parochial, its perspectives are bound to be useful, and its cooperation is more likely to be forthcoming in future efforts to promote economic progress.

Conclusion

We have outlined an ambitious vision of labor law reform that plainly cannot come about without a consensus among government, business, and labor that a major overhaul of our national economic policy is required, and that a critical component of any such overhaul is the full and effective participation of representatives of the workforce. Obviously, we see merit in the ideas that we have outlined, many of which are not original with us. We recognize, however, that certain of these proposals may be unobtainable due to political realities. Nonetheless, we leave this exercise sure of two things: first, labor law reform is needed and it is essential to economic progress; second, the work of the ILR School at Cornell University will be more important than ever in the years to come as society continues to search for answers to the problems outlined in this and other essays in this volume. ■

Notes

- 1 49 Stat. 449 (1935), as amended by Pub. L. No. 101, 80th Cong., 1st Sess., 1947, and Pub. L. No. 257, 86th Cong., 1st Sess., 1959; 29 U.S.C. §§ 151–68.
- 2 Section 7 of the NLRA, 29 U.S.C. § 157.
- 3 A. Weber, "Industrial Relations and Higher Education," in *The Future of Industrial Relations* 8, 12 (IIR 1987).
- 4 Weber, *supra* note 3, at 26.
- 5 T. Kochan and K. Wever, "American Unions and the Future of Worker Representation," *The State of the Unions* 364 (Strauss, Gallagher, Fiorito, eds., IRR 1991).
- 6 M. Goldfield, *The Decline of Organized Labor in the United States* 10–15 (Univ. of Chicago Press 1987) (1954 figure); Department of Labor, Bureau of Labor Statistics, *Employment and Earnings* (January 1997) (current figure).
- 7 See P. Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA," 96 Harv. L. Rev. 1769, 1772 n.4 (1983) (1954 figure); *Employment and Earnings*, *supra* note 6 (January 1997) (current figure).
- 8 R. Freeman and J. Medoff, *What Do Unions Do?* 241–42 (Basic Books 1984); Weber, Address, cited in *Daily Labor Reporter* A-1 (May 29, 1992).

- 9 T. Kochan, H. Katz, and R. McKersie, *The Transformation of American Industrial Relations* 8 (Basic Books 1986).
- 10 That is, cashier, nurse, janitor, truck driver, and waiter/waitress. See P. Weiler, *Governing the Workplace* 108 n.7 (Cambridge 1990).
- 11 R. Freeman and J. Medoff, "New Estimates of Private Sector Organization in the United States," *Industrial and Labor Relations Review* 32 (Jan. 1969); L. Adams, "Changing Employment Patterns of Organized Workers," *Monthly Labor Review* 107 (Feb. 1985) (cited in Kochan et al., *supra* note 9, at 49).
- 12 For example, unions have been entirely unsuccessful in securing a repeal of any portion of the Taft-Hartley Act. When legislation legalizing common situs picketing—permitting one craft to strike an entire construction site—passed both houses in the 1970s, it was vetoed by President Ford. Similarly, the Labor Law Reform Act of 1978 failed to pass despite a full-scale mobilization by labor.
- 13 By almost any measure of social welfare, the United States lags well behind other "rich" countries. See Goldfield, *supra* note 6, at ch. 2 for a detailed discussion of this point.
- Labor has successfully gained passage of general reforms only in combination with other movements. For example, in the 1960s, the movement for racial equality won passage of social legislation which some unions had sought for years. *Id.* at 31.
- 14 G. Chaison and J. Rose, "The Macrodeterminants of Union Growth and Decline," in *The State of the Unions* 3 (Strauss, Gallagher, Fiorito, eds., IRRRA 1991); see also Goldfield, *supra* note 6, ch. 1.
- 15 Kochan et al., *supra* note 9, at 26.
- 16 See R. Alleyne, "The Future of Public Sector Collective Bargaining," in *The Future of Industrial Relations* 31, 33 (IIR 1987). Technological advances also contributed to job loss in the core industrial sectors. *Id.*
- 17 The wage differential between union and non-union labor increased from 10–15 percent in the 1950s and 1960s to 20–30 percent in the mid- to late 1970s. Kochan et al., *supra* note 9, at 70.
- 18 *Id.* at 65. See also R. Marshall, "The Future of Private Sector Collective Bargaining," in *The Future of American Industrial Relations* 63, 69 (IIR 1987).
- 19 The difference between union and non-union wages is relatively high in the United States; see Chaison and Rose, *supra* note 14, at 23. This is in part because the United States, unlike many Western European nations, has a highly decentralized bargaining system in which union wages are not generally extended to non-union companies in the same industries.
- 20 In addition, there always have been potent psychological factors operating in managerial resistance to organization—a, for want of a better word, "macho" perception that unions are a direct challenge to authority which must be squashed, and a correlative perception that unions arise because of managerial "failure." See generally H. J. Harris, *The Right to Manage* (Madison 1982).
- 21 J. Rodgers, "Divide and Conquer: Further 'Reflections on the Distinctive Character of American Labor Laws,'" 1990 Wisc. L. Rev. 1, 76 (footnote omitted).
- 22 Kochan et al., *supra* note 9, at 65, 68.
- 23 *Id.* at 64 ("Wherever plants were designed and run on the new human resource management model, they were essentially immune to unionization in the 1970s.")
- 24 For example, charges of violations of the NLRA increased more than fourfold between 1960 and 1980. Freeman and Medoff, *What Do Unions Do?*, *supra* note 8, at 232.
- 25 See AFL-CIO Committee on the Evolution of Work, *The Changing Situation of Workers and Their Unions* 11 (Feb. 1985).
- 26 Kochan et al., *supra* note 9, at 9.
- 27 Kochan and Wever, *supra* note 5, at 368.
- 28 See Chaison and Rose, *supra* note 14, at 10; see also Alleyne, *supra* note 16, at 34.
- 29 The mutually reinforcing variables of "public policy and employer opposition to unionism . . . serve as leading explanations of the divergence in union growth rates among industrialized countries." See Chaison and Rose, *supra* note 14, at 36. The examination of pairs of countries with similar economies and industrial relations systems—such as the United States and Canada, the United Kingdom and Ireland, the Netherlands and Belgium—suggests that "relatively modest differences in industrial relations laws and institutions can significantly affect the evolution of unionism." R. Freeman, *On the Divergence in Unionism among Developed Countries*, Working Paper No. 2817 (National Bureau of Economic Research, Cambridge, Mass., 1989) (quoted in Chaison and Rose, *supra* note 14, at 20).
- 30 See, e.g., F. Frankfurter and N. Greene, *The Labor Injunction* 17–18, 23 (1930); J. Atleson, *Values and Assumptions in American Labor Law* (Amherst 1983).

- 31 Atleson, *supra* note 30, at 39.
- 32 See *Vaca v. Sipes*, 386 U.S. 171 (1967).
- 33 See *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).
- 34 S. Gompers, *Seventy Years of Life and Labors* 385 (1967).
- 35 See 29 U.S.C. § 160(c).
- 36 See *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992).
- 37 Rodgers, *supra* note 21, at 127 n.353.
- 38 An employer has a constitutionally protected right to attempt to persuade—not coerce—its employees to reject organization. See *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941); see also 29 U.S.C. § 158(c).
- 39 Rodgers, *supra* note 21, at 128 and n.358.
- 40 See Weiler, *Governing the Workplace*, *supra* note 10, at 234–35.
- 41 See Weiler, “Promises to Keep,” *supra* note 7, at 1778.
- 42 Weiler, *Governing the Workplace*, *supra* note 10, at 112.
- 43 See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970); see also 29 U.S.C. § 158(d).
- 44 See *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).
- 45 See *NLRB v. MacKay Radio & Tele. Co.*, 304 U.S. 333 (1938).
- 46 See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (managerial employees excluded); *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (same); 29 U.S.C. § 152(3) (supervisors excluded).
- 47 See *Electromation, Inc.*, 309 N.L.R.B. No. 163 (1992).
- 48 P. Hardin, ed., *The Developing Labor Law* 471–72, 511 (3rd ed. 1992).
- 49 See *NLRB v. Borg-Warner*, 356 U.S. 342 (1958). Although a union and an employer may voluntarily bargain about “permissive” subjects of bargaining, a union may not demand that an employer do so, or use economic power to enforce such a demand without risking the discharge of any participating employee.
- 50 E.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).
- 51 The act’s restriction of “legitimate” union activity to narrow bread-and-butter issues is also reflected in the Supreme Court’s decision in *CWA v. Beck*, 487 U.S. 735 (1988), and the NLRB’s Proposed Rulemaking enforcing that decision, 29 C.F.R. Part 103 (1992). Members of a bargaining unit who are not union members are required to pay that portion of union dues used in the negotiation and administration of the collective bargaining agreement, but are not required to pay that portion of dues used for, e.g., political purposes, organizing, or other extra-unit purposes.
- 52 See 29 U.S.C. § 158(b)(4). Secondary activity may be enjoined and the union may be held responsible for any damage to the employer’s business; see *id.* § 187.
- 53 Rodgers, *supra* note 21, at 143–44.
- 54 E.g., C. Fried, “Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects,” 51 *U. Chi. L. Rev.* 1012 (1984).
- 55 Paul Weiler has effectively demonstrated that Congress is institutionally unsuited to the task of evaluating and addressing the myriad specific concerns that arise in the different workplaces in different industries across the nation. See Weiler, *Governing The Workplace*, *supra* note 10, at 154–56.
- 56 *Id.* at 157–58 (footnote omitted).
- 57 The same can be said of Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and other employment discrimination legislation. Such statutes are most effectively enforced through collective action, be it by a union, the NAACP Legal Defense Fund, the NOW Legal Defense Fund, etc.
- 58 D. Bok, “Reflections on the Distinctive Character of American Labor Laws,” 84 *Harv. L. Rev.* 1394, 1417–25 (1971).
- 59 One possible counterexample to those cited in text is the Uniform Law against unjust dismissal recently recommended for adoption by the states. This law would provide a significant, substantive benefit which was formerly one of the chief attractions of union representation. But many states have thus far failed to adopt the standard of just cause dismissal, and it is unlikely that the mere prospect of just-cause legislation has contributed to unions’ decline.
- 60 See Chaison and Rose, *supra* note 14, at 22 (citing several empirical studies); N. Hauserman and C. Maranto, “The Union Substitution Hypothesis Revisited: Do Judicially Created Exceptions to the Termination-at-Will Doctrine Hurt

- Unions?" 72 *Marq. L. Rev.* 317, 339-43 (no statistical correlation between the decline of unions and increased legal protection for employees) (1989).
- 61 See Chaison and Rose, *supra* note 14, at 13-14 (citing numerous studies); Rodgers, *supra* note 21, at 146 (job loss in traditional union strongholds has little explanatory power for union decline in the 1980s).
- 62 M. Gottesman, "Whither Goest Labor Law," 100 *Yale L. J.* 2767, 2799 (1991).
- 63 Rodgers, *supra* note 21, at 82 n.222.
- 64 See AFL-CIO Committee on the Evolution of Work, *supra* note 25, at 8.
- 65 Kochan and Wever, *supra* note 5, at 364.
- 66 *Id.* (citations omitted).
- 67 *Id.*
- 68 See C. Morris, Keynote Address at First Annual U.S.-Mexico International Labor Law Conference (Oct. 26, 1992), in *Daily Labor Reporter* E-1, (citing cooperative processes at Ford Motor Company, General Motors, Corning, Inc., Xerox Corporation, and Rohr Industries): "We may have thus reached a point in labor-management relations in the United States where employers, particularly those involved in the production and distribution of technologically advanced products and services, may not recognize that they can better compete in the international marketplace if their employees have a significant voice in the decisional process. American employers must surely be aware that within the industrial setting of all their competitors in Western Europe and Japan, there is an important labor union presence."
- 69 The AFL-CIO has recognized this fact (see AFL-CIO Committee on the Evolution of Work, *supra* note 25, at 19), and has established the Union Privilege Benefit Program, which allows employees not presently represented by a union to become union members at reduced dues, and thereby to receive some of the benefits of organization, such as health insurance, discounts on credit cards, etc. See A. Shostak, *Robust Unionism* 63-64 (1991). See also C. Summers, "Unions without Majorities: The Potentials of the NLRA," *Proceedings of the Forty-third Annual Meeting of the Industrial Relations Research Association*, 154 (Dec. 28-30, 1990).
- 70 See H. Wial, "The Emerging Organizational Structure of Unionism in Low-Wage Services" (Mar. 1992) (copy provided by author); D. S. Cobble, "Union Strategies for Organizing and Representing the New Service Workforce," *Proceedings of the Forty-third Annual Meeting of the Industrial Relations Research Association* 76, 78-82 (Dec. 28-30, 1990).
- 71 The first trilogy is the famous Steelworkers trilogy, already cited in note 33.
- 72 See *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991); *Bird v. Shearson Lehman-American Express*, 110 S.Ct. 225 (1991).
- 73 Kochan and Wever, *supra* note 5, at 373.
- 74 *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970).
- 75 *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153 (1992).
- 76 *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).
- 77 *First National Maintenance v. NLRB*, 452 U.S. 666 (1981).
- 78 See J. Canzoneri, "Management's Attitudes and the Need for the Workplace Fairness Act," 41 *Buff. L. Rev.* 205 (1993).