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## Articles

### TRADITIONAL LABOR LAW SCHOLARSHIP AND THE CRISIS OF COLLECTIVE BARGAINING LAW: A REPLY TO PROFESSOR FINKIN

KARL E. KLARE\*

“Remembrance of the past may give rise to dangerous insights, and the established society seems to be apprehensive of the subversive contents of memory. Remembrance is a mode of dissociation from the given facts, a mode of ‘mediation’ which breaks, for short moments, the omnipresent power of the given facts.”\*\*

“[The historian] knows the end of the story, and so is under a strong compulsion to see events as a steady and direct march to that end. The history of labor during the New Deal seems to be a subject especially prone to this kind of treatment. We have tended to write as if only one set of results were possible. And this, of course, has a deadly effect on the interpretive potential of the subject.”\*\*\*

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\* Professor of Law, Northeastern University. Heartfelt thanks are owed to many friends for their generous scholarly assistance and critical advice on this project and also for their unforgettable loyalty: Jim Atleson, Fred Block, James Green, Haggai Hurvitz, Alan Hyde, Duncan Kennedy, Howard Lesnick, Staughton Lynd, Ruth Milkman, Gary Minda, Dan Schaffer, Jack Schlegel, Bill Simon, Chris Tomlins, and Paul Weiler. I profited from the able research assistance of Greg Campbell and David Kelly. I am grateful to the John Simon Guggenheim Memorial Foundation for financial support while working on this Article. I am solely responsible for the views expressed in this Article and for any errors that it may contain.

\*\* H. MARCUSE, *ONE-DIMENSIONAL MAN* 98 (1964).

\*\*\* D. BRODY, *WORKERS IN INDUSTRIAL AMERICA* 136 (1980).

Readers of *Maryland Law Review* were no doubt surprised and puzzled to find in the Winter, 1984 issue a lengthy article<sup>1</sup> devoted to establishing the proposition that two earlier pieces published elsewhere,<sup>2</sup> one quite long ago, are undeserving of serious attention (F:86). Curiously, the author of this broadside provided no hint as to why the debate was worth the effort. Thus it falls to me, one of the authors attacked, to supply the background that gives meaning to this seemingly pedantic controversy. Despite Professor Finkin's assiduous efforts to cast it exclusively in technical and arcane academic terms, the debate is really between competing visions of the scope and purposes of labor law scholarship, of the past and future of American collective bargaining, and of the nature of industrial democracy.

Part I of this Article provides the background of the debate, situating it in the context of the current crisis of collective bargaining law. In Part II, I restate some of the central substantive themes and methodological concerns of *Judicial Deradicalization*, and provide a critical assessment of the essay in light of subsequent work. In the sections that follow, I address three major areas of substantive debate. My purpose in these three sections is to draw a clearer portrait of the "critical" approach and how it differs from Professor Finkin's traditionalism. Along the way I refute his criticisms of my scholarship. Part III focuses on the problem of "congressional intent" and demonstrates how Professor Finkin has fundamentally misstated the position he set out to criticize. Part IV addresses the theme of "contractualism" and includes further observations on the questions of statutory intent and the uses of legislative history. Part V discusses worker participation. Part VI is a brief description of, and rejoinder to, Professor Finkin's polemical techniques. In Part VII, I briefly conclude that the need for innovative approaches to industrial democracy justifies efforts to rethink and revise our most basic assumptions about labor law.

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1. Finkin, *Revisionism In Labor Law*, 43 MD. L. REV. 23 (1984). Professor Finkin's article will be cited throughout by the letter "F," followed by the cited page. Thus 43 MD. L. REV. 23, 46 would be cited simply as F:46.

2. The two articles are: Stone, *The Post-War Paradigm In American Labor Law*, 90 YALE L.J. 1509 (1981); and Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978). For convenience, my article will be referred to as *Judicial Deradicalization* and will be cited by the letter "K," followed by the cited page number.

## I. BACKGROUND

Labor unions in the United States now face their toughest challenge and hardest times since the industrial organizing campaigns of the Great Depression.<sup>3</sup> Unions confront declining membership and organizational strength; persistently adverse trade and economic trends; strong pressures to surrender hard-won past achievements in concession bargaining; escalating employer resistance to unionization; a hostile political and public opinion climate; and a labor law system that many unionists increasingly perceive as an obstacle to collective bargaining. While many unions have begun to respond with innovative approaches to organizing and bargaining,<sup>4</sup> most supporters acknowledge the depth of the crisis and the difficulty of the tasks ahead if the labor movement is to regain its momentum and influence.

Friends of collective bargaining, both inside and outside the labor movement, now generally agree that labor law has significantly contributed to the labor movement's current crisis. There is dispute, of course, about precisely how the legal process affects the politics of industrial relations and about how weighty the law-related factors have been in comparison to others. Some regard the structure of labor law as a decisive factor in labor's decline.<sup>5</sup> To cite one of the gloomiest diagnoses, a House Subcommittee whose members declare themselves to "believe as strongly as ever in the system of collective bargaining,"<sup>6</sup> recently concluded that "[l]abor

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3. See generally BUREAU OF NAT'L AFFAIRS, UNIONS TODAY: NEW TACTICS TO TACKLE TOUGH TIMES (1985).

4. *Id.* The AFL-CIO has recently adopted a major policy report on new strategies to expand and revitalize the labor movement. See N.Y. Times, Feb. 23, 1985, at 8, col. 4.

5. See, e.g., Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769-70 (1983) (employer coercive tactics are "a major factor" in decline of unionized sector; legal system "must bear a major share of the blame for providing employers with the opportunity and the incentives to use these tactics").

6. HOUSE SUBCOMM. ON LABOR-MANAGEMENT RELATIONS OF THE COMM. ON EDUC. AND LABOR, THE FAILURE OF LABOR LAW—A BETRAYAL OF AMERICAN WORKERS, H.R. REP. NO. 98, 98th Cong., 2d Sess. 25 (1984) [hereinafter cited as FAILURE]. The record of the hearings upon which this report is based is reprinted in Oversight Hearings on the Subject "Has Labor Law Failed," *Joint Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor and the Manpower and Housing Subcomm. of the House Comm. on Government Operations*, 98th Cong., 2d Sess. (June 21, 25 & 26, 1984) [hereinafter cited as *Oversight Hearings*]. The Subcommittee drew heavily on the data and conclusions of a growing academic literature depicting the current crisis of American labor law. See generally R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 230-38 (1984) (legal and illegal employer tactics are a major cause of declining union electoral success); Summers, *Past Premises, Present Failures, and Future Needs in Labor Legislation*, 31 BUFFALO L. REV. 9, 17 (1982) ("[A]damant refusal by employers to accept collective

law has failed,"<sup>7</sup> "the law has ceased to accomplish its purpose,"<sup>8</sup> indeed, "the evidence is clear that the law does not encourage collective bargaining . . . [r]ather it has become an impediment."<sup>9</sup> Others, myself included, have portrayed the influence of law in more indirect, noninstrumental terms, though I have also argued that labor law imposes substantial limitations on unions in organizing employees, in voicing their needs, and in participating with management in making the industrial decisions that affect workers' lives. But despite this divergence of interpretive and evaluative emphasis, most observers sympathetic to collective bargaining are in accord that, at the very least, the legal system has been an important source of labor's present exigencies.

This, then, is a time that requires the utmost imagination and creativity from those who believe in industrial democracy and collective bargaining, including academics. Now, more than ever, labor law scholars must be open to a searching reexamination of our assumptions and methods, even the most basic. This should properly be a period of experimentation and rebirth in labor law scholarship, not complacent adherence to old verities. We should welcome

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bargaining has bent the National Labor Relations Act from its original premises and purposes . . . [T]he legal rules developed by the Board and the courts do not express or implement the premises and purposes of the statute."); Weiler, *supra* note 5, at 1770 (core weaknesses of statutory scheme provide employers with opportunity and incentive to use coercive tactics to defeat unionization).

7. FAILURE, *supra* note 6, at 1.

8. *Id.*

9. *Id.* at 2. So severe is the crisis that prominent, thoroughly knowledgeable labor union leaders and attorneys have spoken in favor of repeal or overhaul of the Act. See FAILURE, *supra* note 6, at 2. And in a highly publicized recent interview, AFL-CIO President Lane Kirkland "called federal labor laws a 'dead letter' that give labor little protection, and said that workers may be 'better off with the law of the jungle.'" Wall St. J., Aug. 16, 1984, at 8, col. 2.

For the most part, critics place the blame on *post*-Wagner Act developments, particularly the Taft-Hartley Act, Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-87 (1982)), see, e.g., *Oversight Hearings*, *supra* note 6, at 107-109 (statement of James Kane) (scoring Taft-Hartley's departure from sound principles of Wagner Act); recent decisional law under conservative appointees, see, e.g., NATIONAL LABOR COMMITTEE OF THE NATIONAL LAWYERS GUILD, WHITE PAPER ON THE REAGAN LABOR BOARD, *Oversight Hearings*, *supra* note 6, at 583; *Hearings on the Nomination of Rosemary Collyer as NLRB General Counsel before the Senate Comm. on Labor and Resources*, 98th Cong., 2d Sess. (1984) (statement of Thomas R. Donahue, AFL-CIO Secretary-Treasurer), reprinted in Daily Labor Report, May 24, 1984, at D2 (anti-labor bias of Dotson Board); and lawful and unlawful employer resistance to unionization, see generally sources cited *supra* note 6, rather than flaws in our model of collective bargaining. While *Judicial Deradicalization* has much in common with such criticisms, it differs insofar as it argues that we can discern some doctrinal and philosophical roots of the present dilemmas of labor law and the labor movement in the earliest years of the Wagner Act.

a root-and-branch reevaluation of the structure and implicit values of collective bargaining law, institutions, and practices. Particularly is this so in light of the recent emergence of a vigorous conservative academic attack upon collective bargaining.<sup>10</sup>

Labor law scholars have responded to the challenge by developing or extending a variety of promising approaches in recent years. Eloquent and distinguished voices have alerted the academic community to the depth of the problem, the need to reexamine prevailing assumptions, and the need for fresh law reform alternatives, sometimes informed by comparativist perspectives.<sup>11</sup> Others have deployed the tools of empirical sociology and econometrics so as to gain a deeper understanding of the gap between law-on-the-books and law-in-action as a basis for proposing fundamental reforms in the legal structure of collective bargaining.<sup>12</sup>

A third group, of which I am part, has concentrated on uncovering the latent value structure and political and social assumptions built into contemporary labor law.<sup>13</sup> The idea is that a clearer view of the history and implicit values in labor law will release the scholarly and political imagination, permitting us, as appropriate, either to reconceive the nature of industrial democracy or to renew commitments to older but enduring collective bargaining concepts. The approach draws heavily upon recent achievements in social theory and social history. Within this group, there is a progressive political orientation, with an emphasis on democratic, rank-and-file participation. Some in this third group are associated with the Critical Legal Studies (CLS) movement, but it should be clearly noted that others are not.<sup>14</sup>

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

11. See, e.g., Summers, *supra* note 6.

12. For example, Weiler, *supra* note 5, relies extensively on empirical studies of the union certification process in building a case for a proposed reform. See also R. FREEMAN & J. MEDOFF, *supra* note 6. A classic, if highly controversial contribution to the genre, is J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976). James Atleson has long brought a masterly command of the literature of industrial sociology to his analyses of labor law problems. See, e.g., Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 OHIO ST. L.J. 750 (1973).

13. Several times herein I have borrowed the rubric "values and assumptions" from Jim Atleson's title, J. ATLESON, *VALUES & ASSUMPTIONS IN AMERICAN LABOR LAW* (1983).

14. The following sources indicate the variety and depth of the emerging "critical" approach to labor law scholarship. Note, however, that these authors disagree strongly among themselves on a variety of issues, and CLS scholarship is only one strand of the "critical" approach. See J. ATLESON, *supra* note 13; Atleson, *The Circle of Boys Market: A Comment on Judicial Inventiveness*, 7 INDUS. REL. L.J. 88 (1985); Cloke, *Political Loyalty, Labor*

Despite the exciting prospects offered to labor law scholarship by the use of empirical techniques, comparative perspectives, and the "critical" approach, old habits of mind die slowly. Traditional modes of doctrinal analysis exercise a great inertial force, which continues to shape much research in labor law. Moreover, many academics see no need for a fundamental reorientation of the field or for the importation of "outside" disciplines. At a time when industrial relations realities are rapidly diverging from the understandings and arrangements upon which the system of collective bargaining law was erected,<sup>15</sup> and when an ever optimistic but beleaguered labor movement faces the distinct possibility of long-term decline, much labor law scholarship consigns itself to ever more refined embroidery upon the well-worn doctrinal fabric. Creative doctrinal scholarship is terribly important to affected employees, unions, employers, and their advocates, but the nearly exclusive doctrinal preoccupation of much mainstream scholarship must ultimately limit and marginalize its contribution to any process of reexamination and reconstitution of the system. The fact is that the labor movement's "legal problems" are not simply legal in nature;

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*Democracy and the Constitution*, 5 U. SAN FERNANDO VALLEY L. REV. 159 (1976); Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Goldberg, *Affirmative Action in Union Government: The Landrum-Griffin Act Implications*, 44 OHIO ST. L.J. 649 (1983); Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract*, 1982 WIS. L. REV. 1; Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984); Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1 (1981); Kelman, *American Labor Law and Legal Formalism: How "Legal Logic" Shaped and Vitiates the Rights of American Workers*, 58 ST. JOHN'S L. REV. 1 (1983); Lesnick, *The Consciousness of Work and the Values of American Labor Law*, 32 BUFFALO L. REV. 833 (1983); Lesnick, *The Structure of Post-War Labor Relations: Response*, 11 N.Y.U. REV. L. & SOC. CHANGE 142 (1982-83) (contribution to colloquium); Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483 (1981); Lynd, *Investment Decisions and the Quid Pro Quo Myth*, 29 CASE W. RES. L. REV. 396 (1979); Minda, Book Review, 53 GEO. WASH. L. REV. 474 (1984) (reviewing J. ATLESON, VALUES AND ASSUMPTIONS IN LABOR LAW (1983)); Nockelby, *Tortious Interference With Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort*, 93 HARV. L. REV. 1510 (1980); Presser, *Subjects of Bargaining under the NLRA and the Limits of Liberal Political Imagination*, 97 HARV. L. REV. 475 (1983); Seitz, *Legal, Legislative and Managerial Responses to the Organization of Supervisory Employees in the 1940's*, 28 AM. J. LEGAL HIST. 199 (1984).

It is regrettable that Professor Finkin takes no note of this new literature, even though his critique of Professor Stone's and my work will inevitably be taken by some to reflect on the entire body of scholarship.

15. For one view of this problem, see Kochan, McKersie, & Katz, *U.S. Industrial Relations in Transition: A Summary Report*, in INDUSTRIAL RELATIONS RESEARCH ASS'N, *Proceedings of the Thirty-Seventh Ann. Mtg.* 261-76 (1985).

they are inseparable from the economic and political matrix in which they are unfolding.

Surprisingly, Professor Finkin raises the banner of a particularly narrow and rarified version of doctrinalism. As self-appointed guardian of this moribund orthodoxy, he is understandably reticent about the broader context and political roots of contemporary labor law debate. His article betrays no hint of awareness that American collective bargaining is in difficulty, let alone crisis. Professor Finkin is a knowledgeable observer of the labor relations scene, so surely he is thoroughly informed about these matters. Yet for some reason he seems intent here on defending an adamantly traditional approach to legal scholarship.<sup>16</sup>

His approach has two hallmarks.<sup>17</sup> First is the commitment to the autonomy of legal reasoning. All agree that legal reasoning is a technical, specialized mode of argumentation that is to some degree distanced from explicitly moral and ideological controversy such as is found, for example, in political philosophy. But Finkin's rigid traditionalist view embraces the much stronger claim that legal reasoning is an objective, relatively determinate, and self-contained analytical method that is radically distinct from open-ended ethical and political discourse.<sup>18</sup> Discussion that can be counted as a contribution to "professional knowledge" therefore necessarily takes place only within a tightly confined universe of discourse. The sorts of questions Professor Finkin's approach asks, and therefore the kinds of solutions he is capable of deriving, are rigidly structured by a conventional conceptual idiom and a standardized repertoire of formulaic arguments. An inevitable consequence is the tendency to ignore or suppress the moral and political value judgments that are

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16. While it sometimes appears that Professor Finkin sees himself as speaking for the mainstream of the discipline, *see, e.g.*, F:86-87 (purporting to state the opinion of labor lawyers toward the Klare and Stone articles), his professed faith in the power and persuasiveness of conventional legal reasoning techniques is so extreme that I doubt his position is very representative. Indeed, his polemical stance impels him to advance positions that are in conflict with views he himself has published elsewhere, for example, on the question of strike replacements. *See infra* note 225 and accompanying text. Still, his article does reflect many assumptions that I suspect are widely shared among judges and labor lawyers regarding the labor movement and industrial relations system, the limits of democracy in organizations like corporations and unions, and the nature of legal reasoning and legal scholarship. This gives his critique a special interest as an object of study.

17. For related perspectives see Jim Atleson's unpublished manuscript, *Making Sense of the Last 50 Secondary Boycott Decisions, or How I Spent My Summer Vacation* (1985) (on file with author). *See also* Gabel, *Reification in Legal Reasoning*, 3 RESEARCH L. & Soc. 25 (1980).

18. *See* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 564 (1983).



always a part of legal analysis. Perhaps the advocate must adhere closely to the traditional canon of stereotyped arguments and write as though those arguments inexorably command the preferred outcome, but it is not clear why scholarly inquiry should be similarly restricted.

Second is the view that law is autonomous. Law influences behavior according to its stated terms. When it doesn't, there is an "anomaly" to be corrected. The world is assumed to be as it is presented in legal discourse. The only values of legitimate scholarly concern are entirely given by the overt policies of constitutions, statutes, and case law. It is no part of the scholar's job to reflect critically upon these authoritative values or to distill from abstract categories like "industrial peace" and "freedom of contract" their contextualized, historical meanings. Such views are closely connected with the predominant attitude toward history found in American legal thought, namely that society moves along a relatively determined, evolutionary path of progressive adaptation to social needs.<sup>19</sup>

By contrast, I argue that while legal rules and decisions may embody enduring values, they take their meanings from the social contexts in which they are deeply embedded. Like all history, legal history is both structured and discontinuous.<sup>20</sup> It follows no pre-given evolutionary path, but rather is comprised of endless conflicts and choices of a moral and political nature which coalesce partially to constitute and give meaning to social life. Accordingly, critical reflection upon the values expressed in law and upon the choices and foregone possibilities latent in past historical contexts is eminently part of the scholar's task.

Despite its strident and ungenerous tone, Professor Finkin's critique provides me a gratifying opportunity to return to my first labor law article, originally drafted a decade ago. *Judicial Deradicalization* was one of the earliest efforts to provide a theoretical overview of labor law from the emerging "critical" perspective.<sup>21</sup> It

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19. See generally Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) [hereinafter cited as Gordon, *Histories*]; Gordon, *Historicism In Legal Scholarship*, 90 YALE L.J. 1017 (1981).

20. See Unger, *supra* note 18, at 663.

21. Other labor lawyers who shared their own work and assisted with mine were then developing similar approaches, and their contribution, as well as that of the Critical Legal Studies community generally, was essential to anything I was able to accomplish. They are gratefully acknowledged above, see *supra* notes \* & 14; see also K:265 n.\*.

It has become fashionable to poke fun at CLS scholars for citing each other's work, see, e.g., Shapiro, *The Death of the Up-Down Distinction*, 36 STAN. L. REV. 465, 465 n.1

is only recently that academic labor law has begun to acknowledge the depth and seriousness of the crisis in collective bargaining. It is now academically respectable to call attention to the derailment of the federal labor policy of encouraging collective bargaining.<sup>22</sup> This was less true ten years ago. We were then still bathed in the evanescent glow of the golden age of doctrinal scholarship in labor law, and few voices called for the fundamental reorientation that now seems very much on the agenda. Likewise, the concept of workplace participation I extolled, and which Professor Finkin belittles, has emerged in recent years as a central concern in industrial relations and collective bargaining, albeit with somewhat different connotations.<sup>23</sup> I take heart from the fact that mainstream scholarship and industrial relations developments now echo themes that co-workers and I focused on years ago.

As an experimental piece, *Judicial Deradicalization* understandably has its limitations, and I will be candid with the reader about them. I have attempted to correct some of the shortcomings in my subsequent work<sup>24</sup> and others are addressed here. Nonetheless, I

(1984), as though mainstream scholars did not habitually round up the usual sources. The practice of recognizing one's intellectual debts not only fulfills a duty but acknowledges the fact that valuable scholarly approaches often emerge through complex, indistinct processes of exchange and collaboration. It is hard to understand why mainstream academics would make a point of criticizing CLS for embracing the ideal of scholarly community.

22. See National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (1982 & Supp. 1984) [hereinafter referred to as "NLRA," "Wagner Act," or "the Act"] ("It is hereby declared to be the policy of the United States to eliminate [obstructions to commerce] . . . by encouraging the practice and procedure of collective bargaining. . . .").

23. See *infra* notes 238-44 and accompanying text.

24. Professor Finkin targets *Judicial Deradicalization* in isolation, taking no note of the evolution of my views in subsequent work or of the cognate literature. See *infra* notes 53-55.

The ordinary author's privilege to define the scope of his or her discussion is partially qualified in this case for two reasons. By its title and sweeping claims, Professor Finkin's article is postured as a general refutation of revisionism in labor law. Second, he charges me with failing to define, develop or clarify certain key concepts. See *infra* note 325 and accompanying text. Many such concepts were in fact defined in the original article. For example, Professor Finkin says, "At no point . . . do [Klare and Stone] explain what they mean by 'ideology'" (F:84 n.278). ("Ideology" is Finkin's word for the key methodological concepts in *Judicial Deradicalization*.) This criticism is without foundation. The effort of the entire article is to develop these concepts, and, in any event, the follow-up articles provide further and more precise refinement. I do not understand how Finkin can claim that Stone and I have "breathed no hint" of pursuing any alternative "sociopolitical theory." F: 85 n.278. See *infra* notes 53-65 and accompanying text.

Since *Judicial Deradicalization*, I have published seven major and some minor articles that expand upon its themes. I do not pretend that these articles resolve all the difficulties of the early piece, but they do seek to clarify, refine, or qualify the theoretical

hope to show that *Judicial Deradicalization* and, more importantly, the theoretical approach of which it is an example, has much of value to contribute as labor law scholarship faces the future. By contrast, I argue implicitly that the extreme doctrinal traditionalism Professor Finkin endorses is hardly the sure and serviceable guide he assumes it to be.

While this divergence of views on the needs and potential paths of labor law scholarship provides the authentic core of this debate, it remains that Professor Finkin has cast the controversy in terms of criticisms of the scholarly merits of the two "critical" articles (F:86). Accordingly, in addition to restating and updating the views expressed in *Judicial Deradicalization*, it is incumbent upon me to respond to these charges.<sup>25</sup>

Simply put, it is my purpose to show that Professor Finkin's criticisms regarding the legal footing and historical evidence for the positions I advanced are just dead wrong. Even within the four corners of conventional legal analysis, he is unable to sustain a convincing argument on a single non-trivial point of legal or historical research actually in contention between us. His charges regarding my scholarship are without foundation. Professor Finkin is an able scholar whose work in other contexts I very much respect. The explanation for his poor showing on this occasion is that he has viewed my work through the lens of a series of unexamined and conventional assumptions about labor law and labor history. This has induced a myopic perspective that in turn causes him systematically to misstate and misrepresent my position. Much of Finkin's critique is built upon misattribution to me of views I did not advance. Had I actually espoused a fraction of the positions Finkin ascribes to me, my article might deserve the scorn he heaps upon it. But I did not. Accordingly, while his "countervailing" evidence and arguments are

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model, define or redefine key terms, and provide further examples. See generally Klare, *The Bitter and the Sweet: Reflections on the Supreme Court's Yeshiva Decision*, SOCIALIST REV., Sept.-Oct. 1983, at 99 [hereinafter cited as Klare, *Yeshiva Decision*]; *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U. L. REV. 876 (1979) [hereinafter cited as Klare, *Contracts*]; *Critical Theory and Labor Relations Law*, in THE POLITICS OF LAW (D. Kairys ed. 1982) [hereinafter cited as Klare, *Critical Theory*]; *Labor Law as Ideology: Toward A New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981) [hereinafter cited as Klare, *Ideology*]; *Law-Making As Praxis*, TELOS, Summer 1979, at 123 [hereinafter cited as Klare, *Law-Making*]; *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982) [hereinafter cited as Klare, *Public/Private*]; *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives From Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982) [hereinafter cited as Klare, *Quest*].

25. I have focused almost entirely on Professor Finkin's criticisms of my article, confidently leaving it to Professor Stone's able pen to respond to his criticisms of her work.

usually (although not always) accurate enough, they are often wholly irrelevant to the point at issue because he has not grasped or faithfully portrayed my claim.

There is a final note before embarking on the debate. I appreciate Professor Finkin's frustration with a novel, not fully worked-out approach that questions and challenges so many aspects of the world view informing his work. Notwithstanding this, however, the mordantly personal focus and nasty tone of his critique are deeply regrettable and particularly inappropriate in light of his inability to make out a case on the merits. To put it bluntly, his article contains numerous cheap shots and *ad hominem* arguments. At first I was sorely tempted to reply in a personalized and polemical (though hopefully more substantial) vein. However, I have endeavored throughout to stay on the merits, and I have restricted myself to a brief rejoinder on the subject of Professor Finkin's polemical techniques in order to clear the record.<sup>26</sup> The labor law community, particularly those who believe in collective bargaining, will be best served by generous, tolerant, and mutually respecting dialogue between competing perspectives. It is a pity that Professor Finkin could not approach the debate in that spirit. I hope now to reclaim the opportunity his critique originally presented to inaugurate such a dialogue between the "critical" and other perspectives.

## II. A RESTATEMENT AND ASSESSMENT OF JUDICIAL DERADICALIZATION

### A. Major Substantive Themes<sup>27</sup>

*Judicial Deradicalization* focused on the earliest years of Wagner Act<sup>28</sup> interpretation in an effort to determine whether any connections could be drawn between the then brewing crises of labor law and the labor movement, and long-forgotten choices and decisions made nearly a half-century ago.

In essence, *Judicial Deradicalization* is an intellectual history of the Supreme Court's Wagner Act cases during the period from constitutional validation of the statute in 1937<sup>29</sup> until the beginning of World War II.<sup>30</sup> The case analysis is set against the backdrop of

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26. See *infra* text accompanying notes 317-43.

27. As will appear, I have subsequently recast some of the formulations contained in this overview of *Judicial Deradicalization*.

28. NLRA, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-167 (1982)).

29. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

30. The last case from this period treated in detail is *Phelps Dodge Corp. v. NLRB*,

political and jurisprudential issues that arose during the Great Depression.

I began with a portrayal of certain enigmas posed by the Wagner Act itself. The story of how the NLRA came to be enacted—the industrial problems that gave rise to the need for legislation, the contribution of earlier legislation and the experiences of the labor agencies under section 7a of the National Industrial Recovery Act (NIRA)<sup>31</sup> and Public Resolution 44,<sup>32</sup> the role of Senator Wagner and other influentials—is well-known,<sup>33</sup> and I spent little time on it. Yet this often-told, “textbook” version does not begin to grapple with fundamental questions of the *political*, as distinct from the purely legislative, history of the Wagner Act. As William Leuchtenburg aptly put it:

The Wagner Act was one of the most drastic legislative innovations of the decade . . . . No one, then or later, fully understood why Congress passed so radical a law with so little opposition and by such overwhelming margins. A bill which lacked the support of the administration until the very end, and which could expect sturdy conservative opposition, it moved through Congress with the greatest of ease. One observer later wrote: “We who believed in the Act were dizzy with watching a 200-to-1 shot come up from the outside.”<sup>34</sup>

What were the politics of the Wagner Act? What political forces sustained it through the early years of bitter employer and judicial opposition? What worker aspirations did it stir? What fears in management? By what process did business turn from outright, sometimes violent disobedience of the law, toward grudging recognition that industrial unionism and collective bargaining had arrived to stay? And how did employers and unions adjust to the new industrial relations system? These are the broad background ques-

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313 U.S. 177 (1941). During the period treated, the Supreme Court decided over 30 Wagner Act cases, which I discussed. Of these, Finkin treats only four.

31. Pub. L. 73-67, 48 Stat. 198 (1933), *declared unconstitutional in* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

32. 73rd Cong., 2d Sess., as implemented by Exec. Order No. 6763, (June 29, 1934), Sept. 1934 CSA 83, *reprinted in Presidential Executive Orders*, Oct. 14, 1933 to December 18, 1934 (microfilm).

33. *See generally* I. BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* (1950); J. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* (1974); D. Sipe, *A Moment of the State: The Enactment of the National Labor Relations Act 1935* (1981) (unpublished Ph.D. dissertation, Univ. of Pa.).

34. W. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT & THE NEW DEAL, 1932-1940*, at 151-52 (1963) (citation omitted).

tions with which my article was concerned and which the conventional Wagner Act histories do not fully answer.

To be sure, any understanding of how the New Deal contributed to the emergence of the postwar labor relations system turns ultimately on large issues of politics, economics, and working class organization and culture, that is, problems of social history that I noted to be well beyond the scope of my paper (K:268). My goal was to focus on a small piece of the puzzle, namely, the contribution of law, if any, to the emergence of contemporary patterns in labor relations and working class politics (K:268). My inquiry was fueled by the thought that, whereas the 1935 Act made an enormous contribution to industrial democracy, it is also true that the labor law system that has evolved in the subsequent half-century places distinct limitations on industrial democracy and on the growth of the labor movement itself.

The collective bargaining system, I argued, presents two contradictory aspects. In its democratic aspect, collective bargaining provides an institutional framework for employees to aggregate their voices and experience their collective power, to participate in influencing the decisions that affect their industrial lives, and to enhance their working conditions and pride and dignity on-the-job. In this aspect, I extolled the Wagner Act as an extraordinary historical achievement of and for working people.<sup>35</sup> But I also argued that other features of the evolving collective bargaining system have an "institutionalizing" aspect that limits and channels workplace conflict. In this facet, the legal and institutional structure of collective bargaining puts limitations on worker participation in workplace (and union) governance, regulates and formalizes employee concerted activity, and legitimates hierarchy and management control regarding both day-to-day and long-term decisionmaking. The question was whether the mind-set reflected in the initial Wagner Act jurisprudence contributed in any way to the cramped and restrictive aspects of the emerging model of industrial democracy.

This question prompted inquiry into the nature of the industrial relations system contemplated within legal discourse during the early Wagner Act years. Four main issues surfaced.

1. What relationship between public and private power was deemed appropriate under the new statutory scheme? I called this the issue of "contractualism" because it often appeared in cases in which contractual rights were given primacy over statutory rights.

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35. See *infra* note 69 and accompanying text.

My argument was that the contractualist trend unfolded at the expense of participatory and concerted activity rights of employees. An example is *NLRB v. Sands Manufacturing Co.*,<sup>36</sup> holding unprotected certain strike activity during the term of a collective bargaining contract. The Act's protection of employee concerted activity<sup>37</sup> was held subordinate to the employer's interest in enforcing its contract.

2. What model of workplace democracy emerged in Wagner Act thinking? In particular, what degree of direct, day-to-day, rank-and-file participation was contemplated in the new system of industrial relations? I argued that, though the Act's sponsors conceived industrial democracy primarily in traditional representational terms, many American workers whose shopfloor concerted activity was essential to enforcing the Wagner Act had broader aspirations. Regarding the debate with Professor Finkin, the key issue relating to worker participation has to do with the proper assessment of the 1930's sit-down strikes, and with the emergence within NLRA jurisprudence of a distinction between "responsible" and "illegitimate" forms of worker militancy. I argued that the condemnation of certain forms of rank-and-file activity, in moral and political—even more importantly than legal—terms, was in tension with workers' efforts to gain control over the decisions that affect their industrial lives.

3. The third issue concerned the new role of government. Increased federal oversight of business is generally understood to be one of the lasting consequences of the New Deal, and everyone agrees that, under the NLRA, government undertook an unprecedented role in labor relations. What most people take for granted today was not so easily explained or accepted fifty years ago, particularly in the business community. The New Deal revolutionized American thinking about the proper role and responsibilities of government. This conceptual transformation was not primarily the work of theorists. It emerged in a variety of "practical" ways—new legislation, shifts in party allegiances, adjustments in business practice, and so on. I argued that the early Wagner Act cases, specifically those articulating the so-called "public right doctrine,"<sup>38</sup> constituted an important example of this "practical political

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36. 306 U.S. 332 (1939). See *infra* notes 204-20 and accompanying text.

37. See NLRA § 7, 29 U.S.C. § 157 (1982) ("Employees shall have the right to self-organization . . . and to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .").

38. The concept is defined and discussed at K:310-18.

theorizing" through which significant elites in American society adjusted their thinking to modern governmental reality, thereby to some extent bringing that reality about.

Moreover, I argued that this public right doctrine, the notion that a neutral government stands above the "private" conflict of management and labor, had philosophical and practical implications that undermined the growth of labor militancy. As Professor Summers has eloquently shown, the predominant modern posture of governmental neutrality is a departure from the 1935 congressional goal of *affirmatively encouraging* collective bargaining and, hence, union growth.<sup>39</sup> Though it is easy to see this departure in Taft-Hartley,<sup>40</sup> I attempted to trace the roots of the development to the late 1930's.

4. I found in the early cases a tendency to handcuff the Board in remedying unfair labor practices and at the same time to permit employers to deploy their economic power in ways that inhibit employee concerted activity. These tendencies have had a pronounced and destructive impact on the fortunes of organized labor in the postwar period. The growth of union organization and collective bargaining are essential preconditions to the emergence of more advanced forms of industrial democracy and of more politically and socially conscious union militancy. The high points of CIO social unionism coincided with the period of the most rapid and widespread growth in unionization. The same forces, including legal constraints, that have kept the labor movement a besieged minority in American life tend to reinforce the more conservative, business-unionist orientation within labor.

As I was careful to note,<sup>41</sup> the labor movement scored impressive victories in the legal arena during the late 1930's, and NLRA protection was essential to turning around numerous losing battles in auto, steel, and elsewhere. On the other hand, the four trends I discerned—the preference for private contractual (or property) rights over employee statutory rights; for formalized, representational workplace democracy over a more direct, participatory democracy; for governmental neutrality rather than a public

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39. See Summers, *supra* note 6, at 17.

40. See Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 4 (1947) ("The [Taft-Hartley] amendments represent an abandonment of the policy of affirmatively encouraging the spread of collective bargaining . . ."). Note, however, that Congress in 1947 did not delete the language of NLRA § 1, 29 U.S.C. § 151 (1982), declaring it to be the policy of the United States to "encourag[e] the practice and procedure of collective bargaining."

41. See, e.g., K:318-19.



commitment to collective bargaining; and the incipient legal restraints on union growth—introduced a countervailing pressure within the law. Together these mutually reinforcing trends were symptomatic of caution and conservatism rather than openness and experimentation in industrial jurisprudence.

Moreover, I argued that the legal outcomes embodying these developments were not clearly commanded by the text or legislative history<sup>42</sup> of the Act. In broad outline, many of these rulings were plausible or even straightforward readings of the congressional intent. But they were not for the most part *required* or even necessarily suggested by the statute's history. Choices—*political* choices—had to be made and were made in the early interpretation of the Act. Stripped to essentials, my dispute with Professor Finkin turns on whether these trends in fact occurred; if so, whether they were legally and politically inevitable; and whether they were desirable from the standpoint of industrial democracy.

The controversy is significant because these components of labor jurisprudence did not abruptly disappear in 1941. In later articles I argued that values and assumptions found in the early Wagner Act cases cast a long shadow over postwar legal and industrial relations thinking and practice. While not their "cause" in any deterministic sense, this world-view certainly lent intellectual and moral support to the "institutionalizing" and restrictive aspects of contemporary collective bargaining. Reconstruction of the mindset will shed light on certain fundamental and continuing difficulties in the labor law system.

A few examples will suffice to underscore the point. I have already noted the durable potency of the "public right doctrine" evoked in Professor Summer's comments on governmental neutrality toward collective bargaining. Likewise, I have argued elsewhere that modern legal doctrine places significant and unwarranted limitations on employee participation in enterprise governance.<sup>43</sup>

It is now widely believed, at least on the union side, that limitations on the scope and structure of NLRA remedies make the Board unable effectively to combat the spiraling increase in employer

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42. In preparing this Article I have relied upon NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935 (1949) (facsimile reprint by Wm. S. Hein & Co., n.d.) [hereinafter cited as LEGISLATIVE HISTORY]. This compilation is divided into two "volumes" each with two "parts."

43. See, e.g., Klare, *Yeshiva Decision*, *supra* note 24, at 111-20; Klare, *Critical Theory*, *supra* note 24, at 78-79; Klare, *Ideology*, *supra* note 24, at 454-55, 459-65. Professor Atleson explores the hierarchical attitudes implicit in this area of the law in J. ATLESON, *supra* note 13, at 11-35, 50-53, 84-96.

unfair labor practices. Indeed, the ill-fated 1978 Labor Reform Bill<sup>44</sup> was inspired in part by widespread concern that the Board's ineffectual remedial powers have directly contributed to the breakdown of the certification and first-contract bargaining processes. The jurisprudential foundations of the cramped scope of Board remedies can be traced to the notion established in the early Wagner Act cases that Labor Act remedies are to be "remedial, not punitive."<sup>45</sup> That is, remedies are fashioned with an eye toward making unfair labor practice victims whole, not, or not also, toward maximum deterrence of misconduct.<sup>46</sup> Professor Weiler has recently argued that in addition to the baneful practical consequences stemming from remedies limitations, the timid attitudes and instincts basic to this area of the law have imposed unconscious inhibitions on the thinking of would-be reformers.<sup>47</sup>

Finally, the postwar period has witnessed a systematic trend toward curtailment of employees' rights to engage in concerted activity. Most notable are the statutory prohibitions of secondary boycotts and recognitional picketing introduced, respectively, in 1947 and 1959.<sup>48</sup> To these curbs must be added a long, and to my mind, tragic list of Board and judge-made exceptions to employee section 7 rights.<sup>49</sup> To be sure, these complex and varied developments cannot be hinged solely to the jurisprudential themes I cited in *Judicial Deradicalization*. Nonetheless, there are connections to be drawn, as the discussions of *Sands Manufacturing* and *NLRB v. Fansteel Metallurgical Corp.*<sup>50</sup> hopefully will show.<sup>51</sup> In these cases the Supreme Court adumbrated early intellectual underpinnings for the erosive process through which section 7 rights have been devalued and sacrificed to other, private interests, such as employers'

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44. S. 2467, 95th Cong., 2d. Sess. (1978); H.R. 8410, 95th Cong., 1st. Sess. (1977).

45. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 208 (1941) (opinion of Stone, J.); accord *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938).

46. Consistent with this emphasis, the Court held, for example, that amounts a worker inexcusably fails to earn are deductible from back pay awards to employees discharged in violation of the Act. See *Phelps Dodge*, 313 U.S. at 197-98. I argued at K:334 that this rule undercuts effective enforcement of the Act.

47. Weiler, *supra* note 5, at 1787-1804.

48. NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1982) (secondary boycotts) (inserted in the Act by 61 Stat. 141 (1947)); NLRA § 8(b)(7), 29 U.S.C. § 158(b)(7) (1982) (inserted by 73 Stat. 544 (1959)).

49. As I have elsewhere argued, much of the case law of § 7 is concerned with how employees lose its protection. See Klare, *Public/Private*, *supra* note 24, at 1403 n.196; *infra* notes 209-11 and accompanying text.

50. 306 U.S. 240 (1939).

51. See *infra* notes 204-208 & 245-58 and accompanying text.

interests as property owners. Likewise, the ideal of freedom of contract was powerfully invoked to undermine the statutory plan to restructure the economic and institutional context in which labor-management bargaining takes place, with consequences that continue today to impede collective bargaining.<sup>52</sup>

### B. Methodological Issues<sup>53</sup>

*Judicial Deradicalization* was a rough hewn and experimental effort to pursue an approach to the sociology of law called the "theory of legal consciousness."<sup>54</sup> The article itself was a preliminary effort to work out the concept.<sup>55</sup> Additionally, I drew connections be-

52. See *infra* notes 221-36 and accompanying text.

53. Professor Finkin largely ignores the theoretical concerns and methodological issues to which my article was addressed and thereby provides a misleading and unbalanced portrayal of its contents. Indeed, at times he reveals uncertainty as to what my methodological objectives were. He says, on the one hand, that I do not "suggest anything out of the ordinary with respect to how one decides what historical facts are, or how one analyzes a case . . ." (F:24; *cf.* F:25 ("traditional framework")). Yet elsewhere he states that I use an approach to legal analysis that is "fundamentally different" from the conventional one (F:45).

At points, Finkin acknowledges his insecure grasp on the methodological concerns at issue. Over 60 pages into his critique, he casually reveals some doubt as to whether he has employed an appropriate epistemological framework in assessing my work (F:84-85 n.278). He writes: "If something of the latter [i.e., the development of a 'comprehensive sociopolitical theory'] is what Klare and Stone have in mind, then it is conceivable that their writings would not be amenable" to the standards of truth he employs. *Id.* (referring to a positivist epistemology described at F:84-85). I read this as an admission that Professor Finkin is not really sure he has understood what this debate is about or how it fits into contemporary controversies in legal and social theory. He certainly makes no attempt to situate the debate in the context of the pertinent theoretical literature. See *supra* notes 14 & 24; *infra* notes 54, 55 & 58. The stridency of his attacks on my scholarship seem particularly inappropriate in this light.

54. See, e.g., K:268-70, 292. There were at the time few examples of scholarship pursuing this approach. I cited Duncan Kennedy's pathbreaking unpublished manuscript, *The Rise and Fall of Classical Legal Thought, 1865-1940* (1975), see K:278 n.43, and placed a copy on file with MINNESOTA LAW REVIEW. A portion has since been published, see Kennedy, *Toward An Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850-1940*, 3 RESEARCH L. & SOC. 3 (1980). I also relied on published and unpublished work by Morton Horwitz and Roberto Unger. A quite distinct source of my ideas was the tradition of "Western Marxism," the study of which had been my field of specialty prior to law school. See K:268 n.12, 321 n.199, 335 n.276 & 337 nn.279-80 (citing sources); *id.* 321 n.200 (citing my book on the subject, *THE UNKNOWN DIMENSION: EUROPEAN MARXISM SINCE LENIN* (D. Howard & K. Klare eds. 1972)).

55. In the years since, a number of scholars have developed the concept and related approaches. It is not suggested that they were influenced by my article or the sources I cited. See, e.g., Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Frug, *The City As A Legal Concept*, 93 HARV. L. REV. 1057 (1980); Gabel, *supra* note 17; Gabel, *Intention and Structure In Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L.

tween the new Labor Act decisions and the jurisprudential debates engendered by the emergence of Legal Realism.<sup>56</sup> That is, a central purpose of my article was to study the contribution of the NLRA cases to the development of modern public law thinking generally.

The idea of "legal consciousness" was suggested as a way to get beyond the primary available modes of explaining legal decisions, namely formalism and instrumentalism.<sup>57</sup> In essence, "formalism" explains legal outcomes in terms of deduction from or "reasoned elaboration" of rules. "Instrumentalism" explains legal outcomes in terms of the desire to serve or defend specified social interests, values or purposes. I argued that neither pristine reason, nor unadorned political interest, nor even an ad hoc combination of the two, adequately explains legal outcomes, or at any rate, not the outcomes in these cases. Rather, logic and interest were filtered or "mediated" through the justices' emerging understanding of labor relations and of New Deal politics. I tried to reconstruct their conceptual universe or world-view: their assumptions, hidden and overt, about work, organization, and the nature and function of law; their political values; their sense of industrial justice. At a certain point, a vision of this kind can take on a life of its own, shaping the way decisionmakers and other actors in the legal process view their choices and, to some extent, determining case outcomes that do not make sense in conventional legal terms (K:292).<sup>58</sup>

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REV. 601 (1977); Gordon, *Histories*, *supra* note 19; Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979); Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW*, *supra* note 24, at 18; Olsen, *The Politics of Family Law*, 2 LAW & INEQUALITY 1 (1984); Presser, *supra* note 14; Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984). Additionally, I continued to develop the concept in my own work. See, e.g., Klare, *Public/Private*, *supra* note 24; Klare, *Contracts*, *supra* note 24, at 876 n.2 (defining "legal consciousness"); Klare, *Law-Making*, *supra* note 24.

56. See, e.g., K:275-80, 309-10, 325-36.

57. I defined these terms at K:275-79 and in Klare, *Contracts*, *supra* note 24, at 877 n.3, 878 n.4 & 881 n.20.

58. See also Klare, *Contracts*, *supra* note 24, at 876 n.2. One of the best presentations of this argument has been written by one of my strongest critics. See Trubek, *supra* note 55, at 588-600.

One of the reasons why Professor Finkin's critique is so misleading is that he largely disregards the differences between our respective methodologies, and he simply tests my claims according to analytical criteria internal to his approach. See *supra* note 53. His interest is in examining the cases in light of the traditional tools of legal reasoning—deduction from precedent, analysis of legislative intent, application of "policy considerations;" and so on. Thus, for example, he is preoccupied with whether legal arguments are "holding" or "dictum" (see, e.g., F:36). And at one point he takes the extreme view that it is inappropriate to assess a highly important Supreme Court opinion in light of the background social and political realities because the latter were not

It is important to emphasize that the effort to reconstruct the “consciousness” or world-view expressed in labor law would be justified even were I to concede (I do not) that legal values and discourse have no detectable influence on non-legal culture, that is, even if the ideological power of legal ideas is strictly internal to legal culture itself. This is because, so I argued, legal consciousness structures the field of significant decisionmaking and thereby channels the outcomes of the legal process.

However, I additionally asserted that the Court’s outlook on labor matters had significance beyond the legal arena. This argument was perhaps the least refined and most problematical of my article, and it continues to be the focus of sophisticated criticism of my work.<sup>59</sup> *Judicial Deradicalization* has been read as arguing that the vision of collective bargaining embedded in the law directly impressed itself upon the consciousness of actors in the field—managers, union officials, workers—resulting in the cooptation of labor militancy. It is as though some readers thought I had suggested or implied that miners and auto workers regularly sit around during lunch breaks discussing advance sheets of *United States Reports*. I suggested nothing so crude.<sup>60</sup> Nonetheless, my article was perhaps less clear than it ought to have been on whether and how particular elite ideologies spread to and permeate other areas of elite culture and, eventually in some cases, working class culture as well.

My claims were less simplistic than the crude reading they

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discussed in the petitioner’s brief (F:30). What Professor Finkin cannot decipher with the tools of “legal reasoning,” he refers to the catch-all explanatory category of “lawyering.” For example, he purports to explain the important and problematical policy choice made in *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939), by reference to the claim that the employer “out-lawyered” the Board (F:40). On the issue of lawyering, see *infra* note 102 and accompanying text. *Sands Mfg.* is explored *infra*, notes 204-20 and accompanying text.

I would assume that my claims should be tested, at least as an initial matter, in light of the methodological framework I set for myself. I was interested in an entirely different layer of meaning in case law than Professor Finkin, namely what it teaches about the underlying attitudes and consciousness of significant legal actors. From this point of view, “dictum” may be as important as “holding”; myth may be as important as insight; the unsaid may be as important as the written or spoken word. This approach is not entirely unfamiliar in American legal scholarship, and it is also attuned to major twentieth century developments in social thought, e.g., psychoanalysis, cultural anthropology, phenomenology, structuralism, and Marxism.

59. See, e.g., Trubek, *supra* note 55, at 610-15.

60. Therefore I do not think that those readers are correct in deriving from the critical approach a simple “transmission belt” model of the dissemination of legal ideas. See, e.g., *id.* at 613-14.

received.<sup>61</sup> They seem to me still defensible when accurately stated. Several theories about how legal ideas and values are disseminated to and influence the broader political culture were implicit in the article. I suggested, first, that along with countless other instances of “practical theorizing,” judicial thinking influenced the prevailing mentality of political *elites*, perhaps including the high-ranking labor leaders who had moved into working relationships with the Roosevelt Administration by the early 1940’s.<sup>62</sup> Also, by contrast to radical political theories grounded on the notion of class power, images of governmental neutrality developed in labor law indirectly provided intellectual underpinnings for the emerging “pluralist” theory through which significant postwar thinkers made sense of their times.<sup>63</sup> Second, I argued that “legal world views” influence the outcomes in cases, shaping the development of the law and thereby influencing the politics of and balance of forces in the workplace (K:292). The philosophical underpinnings of case law may long outlive its particular context.<sup>64</sup> Thirdly, a highly “legalized” labor relations system has evolved under the NLRA, which demands the constant attention of union officials to legal issues and cases. Legal images of collective bargaining may combine and coalesce into an integrated, convincing set of beliefs about entitlement, obligation, and equity in the workplace. These beliefs may then be internalized and absorbed by labor leaders at all levels, influencing their actions. To the extent that this is true, that is, to the extent that legal discourse informs or encourages widely held beliefs that existing institutions are either necessary or desirable, legal discourse “legitimizes” established arrangements and constrains efforts to

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61. See, e.g., K:268 (denying direct causal links between court cases and changes in social order; suggesting more indirect and complex relationship between legal culture and social outcomes).

62. With his characteristic grace, Bob Gordon has “restated” this aspect of my position as follows:

Klare wouldn’t claim to have done anything more than to explore a fractional contribution to the formation of conventional ways of thinking among the elites about “the labor problem.” The Justices borrowed from, and thus hardened by their authoritative example, some of the prevailing mentalities of their time. In conjunction with hundreds of other acts of consciousness-formation, these set the agenda for the ways in which many decision-makers in that generation framed issues having to do with labor. If one wanted to expand on Klare’s work, one could look for other manifestations of the mentality he describes on the Court in other institutional settings, as well as for deviating and opposing mentalities.

Gordon, *Histories*, *supra* note 19, at 113 n.124.

63. See K:310-18.

64. See, e.g., *infra* notes 245-60 and accompanying text.

forge alternative practices and institutions.<sup>65</sup>

C. *A Retrospective Assessment of Judicial Deradicalization*

As I will shortly demonstrate, Professor Finkin proved unable to identify the weaknesses and limitations of my article. This does not mean that I am not acutely aware of them. My paper no doubt contained many difficulties, although not the sort of basic research error Finkin charges. Not surprisingly for a first trial, the theoretical model was not fully thought out or tested. I did not adequately identify the "transition mechanisms" between legal discourse and the broader political culture. I have been slow to demonstrate how law-generated or law-influenced visions of industrial democracy have had an impact on the thinking and instincts of labor leaders and/or rank-and-file activists. Based upon anecdotal historical and sociological evidence and upon my experiences as a practicing labor lawyer, I continue to believe that the theory is helpful, that it taps into an important social reality, and that it sheds light on significant legal issues. Nonetheless, *Judicial Deradicalization* itself did not attempt to substantiate some of the more problematical hypotheses it advanced in this area.

At points I blurred the distinction between the "ideological" and "practical" dimensions of the unfolding case law, thereby exaggerating the historical impact of law and the legal process. My description of the emerging "legal consciousness" was insufficiently rich and textured even as intellectual history, let alone as social history. I downplayed crucial legal developments outside the Supreme Court, e.g., at the Board and in collective bargaining. I did not adequately develop the interplay between legal and other intellectual currents, e.g., management thinking (both academic and operational), the views of labor leaders, political theory, and so on.

In broader terms, I can now see that I exaggerated the importance of the theory of "corporate liberalism," a perspective on American history that influenced me some years ago. As a result, I did not fully absorb the meaning and importance of either new developments in labor history or advances in business history. I did not even appreciate some of the implications of my own method, which soon after *Judicial Deradicalization* would lead me to abandon the neo-Marxist theory of "relative autonomy."<sup>66</sup> These omissions

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65. See Klare, *Public/Private*, *supra* note 24, at 1358-59, 1415-22; Trubek, *supra* note 55, at 595-600.

66. See K:269 n.13. I later criticized the "relative autonomy" formulation as residually deterministic, see generally Klare, *Law-Making*, *supra* note 24, at 125-28, and began to

combined to introduce an unfortunate ambiguity into the central terms "radical" and "deradicalize." This reflected an undeveloped aspect of my thinking, not just my written expression, and I will try to resolve the ambiguity here.<sup>67</sup>

In addition to these problems, two substantive points about the Wagner Act require clarification. I did not advance these positions, but may have failed to disclaim them with sufficient emphasis, thereby opening the article to misreading. One point has to do with my attack on "contractualism"; it is dealt with in detail in a later section.<sup>68</sup>

Second, some readers came away with the impression that I was insufficiently appreciative of the Wagner Act and the achievements of modern collective bargaining. It has taken me a long time to give any credence to this objection, since I believe and said that the Wagner Act was an incalculable forward step toward industrial democracy. I extolled the Wagner Act as an extraordinary political achievement of "imaginative, courageous" workers who risked so much to make industrial unionism a reality, and I said that the Wagner Act and collective bargaining allowed "millions of workers [to] experience[] a new sense of participation and dignity" (K:266).<sup>69</sup> Nonetheless, I have learned to appreciate the need in writing about the NLRA from a critical perspective to be more explicit about certain essentials I sometimes took for granted. I hope this reflects a maturation of my thinking as well as my writing. In the years since *Judicial Deradicalization* I have consistently and explicitly offset my criticisms with a recognition of the achievements of collective bargaining. For example, I have described the Wagner Act as "a major advance in the moral development of the American people,"<sup>70</sup> and "an exceptional historic achievement."<sup>71</sup> I have written that

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work with the notion of social life as a "constructed totality," see Klare, *Critical Theory*, *supra* note 24, at 65-67; Klare, *Law-Making*, *supra* note 24, at 128-33. Discussion of these issues is beyond the scope of this reply.

67. See *infra* text accompanying notes 78-86.

68. See *infra* text accompanying notes 116-18.

69. Seen in this light, Professor Finkin's baseless canard that Stone and I "denigrate[] an achievement of American workers. . . [and] denigrate as well the perception and intelligence of the men and women who comprise the system" (F:89-90) (citation omitted) is deplorable. True, I criticized the limitations of the existing system, but only because I believe in collective bargaining and industrial democracy, not because I am cynical about it. As Finkin apparently does not understand, it is perfectly possible to believe in collective bargaining without uncritically celebrating every aspect of the status quo.

70. Klare, *Critical Theory*, *supra* note 24, at 82.

71. *Id.*



“working people have indelibly imprinted the law of labor relations with their aspirations, values, and struggles,”<sup>72</sup> and that labor law has therefore been imbued by popular struggle with “enduring and emancipatory values.”<sup>73</sup> In recent work I have been at pains to describe the law of collective bargaining as a complex balance of emancipatory as well as conservatizing tendencies.<sup>74</sup> Professor Finkin’s claim that I believe “the system is all wrong” (F:89) is simply without foundation.

### III. THE INTENT OF THE WAGNER ACT

Professor Finkin elected not to engage me on the terrain of theoretical controversy or methodological debate. Had he done so, he might have made out a case. But this would have required an explicit theorizing effort inconsistent with his goal of defending an unexamined doctrinal traditionalism. Instead, he stakes his case on the narrower ground of claimed errors in my legal and historical interpretation. To readers who are unfamiliar with *Judicial Deradicalization*, his critique may have a surface convincingness, but any such plausibility quickly evaporates when his description of my position is compared with the views I actually advanced. This is particularly true with respect to the basic issue of congressional intent in enacting the Wagner Act.

#### A. *The Lawyer’s Concept of Statutory Intent*

According to Professor Finkin, I believe that Congress intended, in the lawyer’s sense of the word, to impose sweeping, radical changes on the American economic order and that a radical interpretation of the Act is *compelled* by the legislative history. In other words, Finkin takes some of the values I believe in, such as greater worker control over the labor process, and says that I claim these were the values *Congress* held in 1935. Supposedly I go on to claim that the Supreme Court violated and frustrated this “correct” or “true” meaning of congressional intent to inaugurate a sweeping worker takeover of industry. For example, Finkin says that in my view “[t]he Wagner Act was radical, and the Supreme Court distorted it for co-optative, reformist ends” (F:55). And he sums up his case by saying: “Klare’s piece rests entirely on an unsupported (and

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72. *Id.* at 65.

73. *Id.* at 66.

74. See, e.g., Klare, *Yeshiva Decision*, *supra* note 24, at 99-100, 124-25; Klare, *Critical Theory*, *supra* note 24, at 73-76; Klare, *Ideology*, *supra* note 24, at 453-55; Klare, *Quest*, *supra* note 24, at 166.

unsupportable) assumption about the supposed radicalism of the Wagner Act" (K:85).<sup>75</sup>

The only thing that is unsupportable is Professor Finkin's description of my article. I did not claim that Congress "intended" a radical interpretation of the Act. It baffles me that Finkin imagines he can convince anyone that an author such as myself, with intellectual roots in the neo-Marxist tradition, would begin analysis on the assumption that Congress tried to overthrow capitalism in 1935. After all, one of the stated purposes of my article was to develop a theory of the role of the legal process in *preserving* or *reproducing* capitalist social relations (see K:338-39). The intellectual framework and neo-Marxist tenor of the article run counter to the naive view of Congress's supposed socialist aspirations that Finkin places over my signature.

Moreover, my words plainly contradict Professor Finkin's version. True, I said that one could plausibly derive an anti-capitalist interpretation of the Act, but this was a reference to *employers' perceptions and worst fears* (K:266-67, 285), which I described as exaggerated (K:267).<sup>76</sup> I continue to believe that such employer

75. This line appears throughout Professor Finkin's article. When it falls, as it must, so does much of the rest of his critique. Variations on the basic strawman are:

a. Klare posits a world where the workplace is governed by "participatory democracy," where decisions about work processes are made by spontaneous worker self-activity; in short, a utopian, anti-hierarchical world of work in which neither bosses nor union officials have much, if any, power of control. The Wagner Act, Klare argues, could have been read to usher in this world. But this reading, which he claims would be consistent with the Act's intentment, was thwarted by decisions of the Court . . . . (F:25).

b. F:36-37 (Finkin speculates on what a "truly radical, anti-capitalist reading" of the Act would be).

c. F:44-45 (Finkin attributes to me the view that the legislative history favors a "radical interpretation" and therefore expresses surprise when he finds that I actually took the view that the legislative history was inconclusive).

d. F:47 (Klare supposedly believes that Congress's intentions were only ostensibly reformist but in fact embraced the aspirations of the most radical elements of the working class).

At one point Professor Finkin's characterization of my views veers off into the absurd. Without citation, he attributes to me the view that the proper procedure for statutory interpretation would be for the Court to "turn[] to the unarticulated yearnings of a radical element within the working class," (F:45), and then to "attribute[] to the statute the desires of that group, apparently for no better reason than that the group desired it—and that Klare approves of its aspirations" (F:45-46). Professor Finkin is simply making this up as he goes along. I never said anything of the kind. The absurdity of the claim is compounded when Professor Finkin later attributes to me the view that *business* attitudes should govern statutory interpretation (F:46 n.93).

76. See also K:288 n.74 (business rhetoric "sometimes quite exaggerated"). Note that there are actually two points here: that employers *harbored* such fears, and that the fears

perceptions had a basis in the Act as seen within *their* frame of reference, and Finkin adduces no evidence to the contrary. His article is marked throughout by a confusion between what Congress intended and what employers feared.

As for Congress's political intentions, I never suggested they were other than liberal reformist. In fact, I criticized conventional historiography, perhaps incorrectly, for underestimating the conservative implications of New Deal reform.<sup>77</sup> Regarding Congress's "intent" in the lawyer's sense of the term, I did not say that it was "radical" but rather that it was *unclear* on many of the key issues that arose later on.

*B. Intent vs. Potential: The Troublesome Concept of "Radical" Change*

None of this is even slightly inconsistent with arguing, as I did, that the statute was potentially "radical" in its *impact*. As will appear, there are several distinct meanings of the word "radical," and perhaps it would be helpful at this juncture to clarify its various connotations.

The first and perhaps most prosaic is that "radical" simply means "large," "important," or "profound" changes. Everyone seems to agree that the NLRA was "radical" in this sense,<sup>78</sup> including Professor Finkin.<sup>79</sup> A second meaning is the one Finkin attrib-

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had a basis. Professor Finkin denies both points. As to the former, the evidence, including his own, is incontrovertibly against him. See *infra* notes 129-43 and accompanying text. The latter is the more controversial point, *discussed at infra*, notes 183-89 and accompanying text.

77. K:267, 273-74, 275 n.33 ("profoundly conservative implications of New Deal labor law reform").

78. Many authors use the phrase this way to capture changes the Wagner Act helped bring about and about which there is no real dispute, for example, the unprecedented role of the federal government in regulating labor relations and the rise of industrial unionism. For example, James MacGregor Burns described the Wagner Act as "the most radical legislation passed during the New Deal, in the sense that it altered fundamentally the nation's politics by vesting massive economic and political power in organized labor." F. McCULLOCH & T. BORNSTEIN, *THE NATIONAL LABOR RELATIONS BOARD 18* (1974) (quoting James MacGregor Burns). Cf. W. GALENSON, *THE CIO CHALLENGE TO THE AFL xvii* (1960) (describing emergence of mass-production unionism as a "fundamental, almost revolutionary change in the power relationships of American society").

79. F:47 (NLRA "can be considered 'epochmaking' (or 'radical') in the sense that, for the first time, the law firmly allied government with the right to form unions and engage in collective bargaining in the private sector at large"). Interestingly, mainstream thinkers firmly cling to this position, while simultaneously arguing that the Wagner Act merely summed up and codified long developing principles of public policy upon which which a national "consensus" had emerged. See *infra* text accompanying notes 147-48.

utes to me. In this sense, "radical" means consciously antagonistic to and designed to overthrow the established order. For example, in Finkin's strawman, a "radical" interpretation would be one seeing the NLRA as aimed to replace capitalist property and work relations with participatory workplace democracy, in a word, to transform capitalism into a totally different social system (*see* F:25).

Before turning to the sense in which I used the phrase "radical," it is worth noting a curious feature of Professor Finkin's understanding of the term. His analysis indicates that he is committed to the view that there is a kind of objective logic built into statutory interpretation. He seems to assume that there is a true "conventional" or "liberal" interpretation (or zone of such interpretations) for every legal problem, and also a true "radical" interpretation. (Presumably there is a true "conservative" interpretation as well, although we don't hear much about that.) And, of course, Finkin believes that one of these interpretations is "correct." Thus, he repeatedly applies himself to the task of figuring out (before demolishing) what the "truly radical, 'anticapitalist' reading" of the Act would be.<sup>80</sup> That is, Finkin embraces precisely the sort of reductionism that I identified as a weakness in both conventional legal formalism and in Marxist sociology.<sup>81</sup>

The notion that there is a sole "true" interpretation of a legal problem from each political perspective is repugnant to all that I wrote. Finkin's view that there is a one-to-one correspondence between political ideology and legal interpretation, a position errone-

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80. F:37 (emphasis added).

81. A striking illustration of the reductionist approach appears in Judge Posner's recent opinion in *NLRB v. Res-Care, Inc.*, 705 F.2d 1461 (7th Cir. 1983). One issue there was whether certain employees were "supervisors" within the meaning of the Act. *See* NLRA § 2(3), (11), 29 U.S.C. § 152(3), (11) (1982) (defining supervisors and excluding them from Act's protections). In the course of resolving that question, Judge Posner defended the statutory exemption by arguing that, if supervisors were not excluded, "[w]e might become a nation of worker-controlled firms." 705 F.2d at 1465. He adds that "[s]yndicalism is not the theory of the amended National Labor Relations Act." The objectivist fallacy here is that, even assuming Judge Posner is correct on the last point, it does not inexorably follow from "capitalist" or "non-syndicalist" premises that supervisors may not engage in collective bargaining. Supervisors and managerial personnel bargain collectively in several capitalist legal systems. The "non-radical" Wagner Act Congress itself did not think to exclude supervisors explicitly, and the Supreme Court actually upheld supervisory bargaining in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

A similarly superficial appeal to the supposedly objective logic of institutional systems appears in *NLRB v. Village IX, Inc.*, 723 F.2d 1360 (7th Cir. 1983) (Posner, J.) (employer speech found by NLRB to be coercive is held lawful on the ground that it merely embodied objective analysis of allegedly predictable consequences of unionization in a competitive market).

ously attributed to me, typifies what Roberto Unger has called "objectivism" or the "logic of social types." This is the idea of "an inherent and distinct legal structure to each type of social organization."<sup>82</sup> ("Reductionism," such as, e.g., the view that a particular social order like capitalism requires a legal order of a certain type, is a species of "objectivism.") This is the position the Critical Legal Studies movement has *attacked*, not supported. One of the key premises of *Judicial Deradicalization* is that social structure does *not* entirely predetermine the nature of particular legal and institutional arrangements in the workplace. What I most hoped to show was the enormous degree of openness and flexibility (and hence of possibility) in particular institutional contexts such as labor law battles.

In contrast to the objectivist view (that social life is the working out of a "deep logic" or a set of metaprinciples of social organization), the theoretical perspective informing *Judicial Deradicalization* is that the social system is a construction of the countless institutional and personal contexts we create and inhabit. Though these contexts are, of course, framed and patterned by prevailing political and cultural forces, it is likewise true that the accumulation of these particularized social contexts gives shape and meaning to social life.<sup>83</sup>

This perspective is connected to the third meaning of "radical," the primary one employed in my article. Its initial focus is the countless "small" contexts of daily life, including struggles for power in the workplace. To put a fine point on it, the issue was not whether the workers would take ownership of the means of production. The issue was much more concrete, focused, and nuanced: Would workers gain some measure of control over and humanize the conditions of their industrial lives, such as the speed of the line, discipline and lay-off decisions, when strikes would be called, how they would be settled, and so on? "Radical" in this context means challenging rather than reinforcing the basic assumptions and power relations of workplace institutions and social relationships. It means, in particular, questioning and undermining rather than fortifying the hierarchical assumptions that inform the organization of work. It means empowering workers by unfreezing existing social contexts, relationships and organizational forms and opening possibilities for workers to participate in examining and revising the institutional structures within which they work and govern

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82. Unger, *supra* note 18, at 568.

83. See generally *id.* at 663-65 (describing as basic axes of reconstruction of social theory the shaped character of social life and the denial of metastructure of historical development).

themselves.<sup>84</sup> It means engaging workers in, and nurturing their inherent capacities for, democratic self-governance on-the-job. I believe that given its political context, the Wagner Act had “radical potential,” in this sense of the word.<sup>85</sup>

Needless to say, Congress did not “intend” such changes. It will come as no surprise that, judging from what they said, Senator Wagner and his associates did not think in these terms. But they did achieve passage of a statute that fundamentally challenged and invited further challenge to the prevailing assumptions about managerial control and prerogative in the workplace. One can easily agree with Finkin that neither Congress nor the AFL harbored any “intent” to radically restructure capitalist labor relations, and yet still believe that Congress *did something* that was then perceived, with reason, as a drastic and fundamental challenge to business power, something that helped to set in motion processes of change that might well have overflowed the narrower banks contemplated by those who enacted the NLRA. “Unanticipated consequences” and the “clash of world views” surrounding institutional change are not concepts that play a large role in conventional statutory interpretation, but they are familiar tools of the historian.<sup>86</sup>

### C. *Lawyer's Legislative Intent Revisited*

This returns us to the question of legislative intent in the technical sense. As stated, my argument was not that the legislative history of the NLRA was “radical” but that it was unclear. Indeed on many crucial issues, specifically including those I addressed, Congress did not express an “intent” or did so in a vague, contradictory, or ambiguous manner. Moreover, the Act embodied many different stated purposes, some of which could and did come into conflict in the subsequent decision of cases. Because of this, political choices had to be and were made in interpreting the Act, and the accumulation of such choices over the long run imparted one rather than another political direction to labor law (*see* K:291-92).

Perhaps an analogy will illuminate my claim. Consider the

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84. *See generally id.* at 648-75.

85. Over the years, some colleagues have suggested that the title I selected was unnecessarily confusing. Their thought is that “deradicalize” has a conspiratorial flavor evoking a Court plot or conscious plan to frustrate congressional intent. Obviously I had in mind an entirely different meaning, the notion that the Court’s decisions lessened or diminished the “radical potential” connoted in the third meaning in the text.

86. *See infra* text accompanying notes 183-89.

interpretation of Title VII of the Civil Rights Act of 1964.<sup>87</sup> Clearly, Congress intended to bring an end to race discrimination in employment,<sup>88</sup> but important ambiguities lurked within this general consensus. Was Title VII intended to provide relief to entire social groups disadvantaged by the institutional system of race discrimination, or just to proven victims of identifiable discriminatory employment practices? Did Congress intend to permit "race conscious" remedies, such as hiring or layoff quotas, or was "color blind" administration of the statute intended? Did Congress intend to shelter or to condemn otherwise "bona fide" seniority systems that perpetuate past race discrimination? These and related issues of "statutory interpretation"—e.g., the scope of class actions, allowable presumptions and burdens of proof—rapidly emerged as crucial battlegrounds that would in part determine how broad an impact Title VII would have on present and future generations of employees. The Courts of Appeals, particularly in the South, were sympathetic to the egalitarian ideals of the statute and courageous enough to give it a broad interpretation. In resolving a myriad of particular issues within the statutory scheme, these courts fashioned a tough jurisprudence designed to advance black employees as a group. In particular, the Courts of Appeals deciding the issues ruled unanimously that seniority systems that perpetuate the effects of pre-Act race discrimination are not "bona fide" within the meaning of Title VII,<sup>89</sup> and that race conscious remedies may be appropriate under Title VII.<sup>90</sup> The legislative history, in which proponents of the bill were heard to assure Congress that a "color blind" statute

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87. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

88. The extent of congressional commitment in 1964 to end employment discrimination against women is less clear. Some have pointed out that the "prohibition against sex discrimination was added as a floor amendment, in an apparent attempt to defeat passage of the bill." M. PLAYER, *FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL* 125 (2d ed. 1981). But feminists have argued that the sex discrimination prohibition in fact reflects a decades-long struggle to obtain equal employment opportunity for women. Race discrimination is the focus of the example in the text because it presents a case of supposedly unambiguous congressional intent.

89. See cases cited in *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 378 n.2 (1977) (Marshall, J., dissenting) (citing six courts of appeals so holding; deploring Court's departure from this body of law). In my view, the early seniority decisions were correct in according priority to the claims of affirmative action over vested seniority rights, but I recognize that the issue is an extremely complicated one admitting of no quick conclusions. An analysis of the problem is beyond the scope of this Article.

90. See cases cited in *Firefighters Local 1784 v. Stotts*, 104 S. Ct., 2576, 2606 n.10 (1984) (Blackmun, J., dissenting) (citing 10 courts of appeals so holding); *id.* at 2606 ("[T]he Courts of Appeals are unanimously of the view that race-conscious affirmative relief can . . . be 'appropriate' under § 706(g) of Title VII.').

protecting vested seniority rights was intended, might have thwarted these decisions, but thoughtful judges found other legal and social policy considerations more weighty. That Title VII has played so important a role in the "peaceful social revolution"<sup>91</sup> that has occurred since 1965, particularly in the South, is in no small measure due to their efforts.<sup>92</sup>

This emerging body of far-reaching civil rights doctrine, which Professor Blumrosen has called "southern jurisprudence,"<sup>93</sup> was confirmed by two important developments at the national level. In its watershed *Griggs v. Duke Power Co.*<sup>94</sup> decision, the Supreme Court added its imprimatur to wide-ranging equal employment enforcement, oriented toward dismantling institutional barriers to racial equality as well as halting individual acts of discrimination.<sup>95</sup> Second, in the Equal Employment Opportunity Act of 1972,<sup>96</sup> amending Title VII, Congress itself appeared to extend its blessing to the vigorous enforcement concepts emerging in judge-made law,<sup>97</sup> particularly the notion that Title VII relief may appropriately extend to so-called "non-victims" (i.e., minority group members who were not themselves direct victims of discrimination by the defendant-employer).<sup>98</sup> However, in more recent years, the Supreme Court has challenged and undermined numerous civil rights principles

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91. Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 INDUS. REL. L.J. 313, 333 (1984).

92. This story has been most recently told by Professors Blumrosen, *id.* at 340-46, and Spiegelman, *Court-Ordered Hiring Quotas After Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-L. L. REV. 339, 352-53, 395-400 (1985). For discussions of the implementation of Title VII and its treatment in the courts, see generally D. BELL, RACE, RACISM AND AMERICAN LAW 589-665 (2d ed. 1980); Freeman, *supra* note 55.

93. See Blumrosen, *supra* note 91, at 340-50.

94. 401 U.S. 424 (1971).

95. Among other things, *Griggs* holds that Title VII forbids employment practices that have an adverse impact on the employment opportunity of minority group members (unless such practices are justified by business necessity). The plaintiff need not show that the employer intended to discriminate. *Id.* at 432.

96. Pub. L. 92-261, 86 Stat. 107 (current version at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

97. See Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 24-25. Professors Fallon and Weiler point to an analysis accompanying the final bill that states: "it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." *Id.* (citing 118 CONG. REC. 7166 (1972)). See also Spiegelman, *supra* note 92, at 400-06.

98. See *Firefighters Local 1784 v. Stotts*, 104 S. Ct. 2576, 2609 (1984) (Blackmun, J., dissenting) ("The legislative history of [the 1972 amendments] strongly supports the view that Congress endorsed the remedial use of race under Title VII."); cf. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 391 (1977) (Marshall, J., dissenting) ("In [enacting the 1972 amendments] Congress made very clear that it



evolved in the lower courts.<sup>99</sup> These new interpretations coalesce into a markedly more restrictive and cramped vision of the role of equal employment law and, from my point of view, they may be expected to have permanently damaging consequences for civil rights.<sup>100</sup>

The key point for present purposes is that much of the Court's new approach is said to be based on the "intent" of Congress, now suddenly understood with greater clarity than in the first decade of Title VII.<sup>101</sup> The legislative history has not changed in recent years, but the prevailing political winds are different, and so the Court has reinterpreted it. The Court did not suddenly discover new quotations about color-blindness or non-victim relief in the legislative record. All that has occurred is that existing but very pliable legislative materials are now given a different meaning or significance by judges less committed to a vision of Title VII as aimed at the problem of institutional and systemic barriers to progress toward racial justice.

The Title VII analogy suggests several points of present relevance. The legislative history of major enactments, at least in employment law, is often open-textured and leaves enormous latitude for politically significant interpretations. The legislative record may establish a general direction, but judges and other decisionmakers must choose from among numerous channels and tributaries in plotting a course. Many such choices may have been entirely unforeseen by the enacting Congress. The tacks adopted are simply

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approved of the lower court decisions invalidating seniority systems that perpetuate discrimination.").

99. See, e.g., *Stotts*, 104 S. Ct. at 2588-89 (stating in dictum that Title VII make-whole relief is available only to actual victims of illegal discrimination); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982) (otherwise "bona fide" seniority systems that perpetuate post-Act discrimination do not violate Title VII); *General Tel. Co. v. Falcon*, 450 U.S. 1036 (1982) (vacating judgment that endorsed a liberal standard in civil rights class actions); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (tightening plaintiff's burden of proof); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (otherwise "bona fide" seniority systems that perpetuate pre-Act discrimination do not violate Title VII).

100. I should note that there are important exceptions to the more restrictive approach of recent years. For example, the Court has validated voluntary affirmative action designed to advance the interests of minority employees as a group. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979); cf. *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding constitutionality of congressionally mandated "set-aside" reserving fixed percentages of government contracts for minority businesses).

101. Thus, for example, the *Stotts* Court rests its conclusion that make-whole relief is available only to actual victims of illegal discrimination largely on a brief review of the legislative history of the 1964 Act. *Stotts*, 104 S. Ct. at 2588-90.

not inevitable or predetermined by legislative design. Therefore judicial attitudes or world-views play a role in the judicial choices that fix the course of the law. The choices add up, the accumulated interpretations lend shape and spirit to the law; they give meaning and content to its general terms. Over the long run, the accumulated interpretations often impart a distinct political character to that part of the law, either nurturing and encouraging or restricting and foreclosing the most egalitarian, redistributive, change-oriented potentialities of the statutes. Interpreting courts play an exceptionally important role in defining the political character of statutory law, justifying my effort in *Judicial Deradicalization* to identify the political and philosophical underpinnings of the early Wagner Act cases.

In contrast to this view of the open-textured nature of legislative history, the logic of Professor Finkin's substantive position impels him to adopt an "inevitablist" or "predestination" theory of statutory construction. By this I mean the explicit or tacit view that the way labor law has unfolded in case law is, in broad outline, the only way it could have unfolded consistent with congressional command. Finkin sets out to refute the view, wrongly imputed to me, that the legislative history of the Wagner Act compelled a radical interpretation. He cannot do this by merely arguing, as I in fact did, that the legislative history is unclear. This would concede my point about open texture and therefore the political nature of statutory interpretation. Accordingly, Professor Finkin is constrained to deny ambiguity in the legislative history and to show what is patently false, namely that the legislative history not only permitted or suggested but *compelled* the interpretations that were actually adopted by the Court. Finkin thereby boxes himself into defending the common wisdom that the way things turned out is, more or less, the only way they could have turned out. As we shall see, to sustain this exercise Finkin is obliged to give tacit approval to some very anti-labor decisions.

Professor Finkin's "inevitablism" makes his scholarship profoundly apologetic for the status quo. His blindness to potential alternatives in the past occludes his capacity to imagine alternatives for the future. An irony of this is that, while Finkin prides himself on his respect for "the lawyer's diligence and skill" (F:91),<sup>102</sup> because he can only envision one major path of statutory develop-

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102. In the same passage, Finkin charges that I denigrate lawyering (F:90-91). This claim is totally unsupported. Finkin evidently does not know of my long-standing commitment to clinical legal education. See, e.g., Klare, *The Law-School Curriculum in the 1980's: What's Left?* 32 J. LEGAL EDUC. 336 (1982) (AALS plenary address calling,

ment on substantial issues, he cannot give genuine meaning to case law conflict over basic questions of industrial democracy. For this reason, his theoretical framework unwittingly consigns labor lawyers to a marginal, tinkering role.

#### D. Summary

My position on "legislative intent" is the opposite of the one Professor Finkin attributes to me. In his version, there is a "conventional" or "moderate" interpretation of the Act, based on a relatively clear and coherent set of pre-existing ideas, experiences, and legislative signals, and, alternatively, we could concoct a "radical" interpretation to track the aspirations of extremist working class elements. He claims I argued that Congress intended the latter, instead of the former, as the basis for statutory interpretation. Finkin therefore imagines he has refuted me by showing that Congress did not in fact intend a radical transformation of labor relations, but

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among other things, for vast expansion of clinical teaching in American law schools). And one of my articles seeks, in part, to draw conclusions about labor lawyering from my general theoretical model. See Klare, *Yeshiva Decision*, *supra* note 24, at 108-20. (As it happens, my example was a case in which Professor Finkin submitted an important amicus brief on behalf of the side I support. Finkin appeared in the *Yeshiva* case as counsel for the American Association of University Professors as amicus curiae before the Second Circuit. He was joined on that brief by David Feller, a gifted advocate whose appellate victories have made a huge mark on labor law.)

My criticism of Professor Finkin's approach is that he treats "lawyering" as a catch-all, unanalyzable category, surrounded by ineffable mysteries of craft. By contrast, I sought to develop an analytical framework that might allow us to understand, e.g., why the Board and union lost *Yeshiva* in the Supreme Court even though, in my view, their cause was just, drew upon exceptional lawyering talents, and was supported by the pertinent legal authorities. My argument was that ultimately the deep ideological themes in labor law may be more significant than prevailing doctrine in the decision of cases. See Klare, *Yeshiva Decision*, *supra* note 24, at 108-11.

Perhaps this approach will prove unfruitful. Nonetheless, in terms of its motives and intentions it seems to me a more respectful treatment of lawyering than any offered in Finkin's piece. For example, Finkin purports to "explain" the Board's defeat in the landmark case of *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939), by offering his "impression that the Board was simply out-lawyered" (F:40). Employer-counsel's allegedly superior advocacy there consisted of two things. One was to cite in their brief a single, quite inconclusive page in the legislative history. It is hard to take this point seriously, particularly since neither Professor Finkin, the parties, nor the Court focused on other, contrary passages in the legislative history that are arguably more directly on point. See *infra* text accompanying notes 214-17. Counsel's second stroke was to spin out a powerful "contractualist" argument to defeat the employees' statutory claims. The lawyering skill here was to identify the Court's developing ideological emphasis and to package the case accordingly. That is, Finkin's evidence on this point confirms my position and undermines his own effort to subsume the political questions latent in the cases under the rubric of supposedly apolitical technical or lawyering issues.

adhered to the familiar, moderate views ordinarily cited in legal argument.

This is pure nonsense, for which reason evidence that Congress did not have radical intentions is simply beside the point. I said that a liberal, reformist Congress passed an ambiguous statute with a legislative history that left many unanswered questions. That employers feared the worst and that things said in Congress gave credence to some of their fears, however implausible they may seem today. That in terms of *concrete legal issues* (as opposed to grand political design), the Act was open to a variety of plausible interpretations which, as the decisions added up, could give varying political hues to labor law. And that, had some rather than other paths of interpretation been followed, the possibilities for enhancing and deepening workplace democracy might have been increased.

#### IV. PUBLIC POWER, PRIVATE ORDERING, AND THE PREDESTINATION THEORY OF STATUTORY CONSTRUCTION<sup>103</sup>

##### A. Introduction

By all accounts, one of the purposes of the Wagner Act was to alter the institutional and legal context in which labor bargaining occurs. The statutory scheme rested ultimately on private ordering by labor and management, but just as surely the Act embraced the idea of restructuring the institutional framework of wage bargaining.<sup>104</sup> The precise relationship between public power and party

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103. The balance of this Article focuses on two of the four major areas of substantive debate previously identified, *see supra* text accompanying notes 36-42, namely "contractualism" and workplace participation. For reasons entirely unknown, Professor Finkin ignores the problem of remedies. His sole comment on the "public right doctrine" theme is that it "does not strike [him] as doing much to advance Klare's claim" (F:25). This is an odd tack, given that the *existence* of the trend was *one* of my claims, not a supporting argument. In view of this, however, I have leveled my reply at the areas selected by Professor Finkin.

104. The "public power/private ordering" contrast often misleadingly connotes the idea that, prior to the NLRA, the labor market was "unregulated," or that in some "natural" state the labor market is unregulated. Not surprisingly, I expressly disclaim any such suggestions. Before the New Deal, government acted through labor injunctions, antitrust sanctions, the law of torts, equity, and contracts, police and military deployment, and other devices to discourage and interdict a variety of approaches to labor bargaining that otherwise would have commanded the enthusiastic support of employees. Indeed, key provisions of the first of the great 1930's labor reform statutes, the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115 (1982), have a distinctly "deregulatory" character. *See, e.g.*, Norris-LaGuardia Act, §§ 4, 7, 29 U.S.C. §§ 104, 107 (1982) (withdrawing federal judicial power to enjoin certain labor activity). *But see id.* § 3, 29 U.S.C. § 103 (1982) (nonenforceability of "yellow dog" contract curtails "freedom of contract" as traditionally understood). The institutional structures and common

autonomy, the precise contours of the newly reconstructed labor market, obviously were not specified in the Act's broad provisions. Much was left to the subsequent course of interpretation. Yet, at least by contrast to the preexisting situation, the Act clearly sanctioned considerable changes in the legal environment and, therefore, the balance of forces in the labor market, and it was obviously so perceived.

The legislative history speaks to the relationship between public power and private ordering largely in general terms, leaving substantial leeway to decisionmakers in resolving particular cases. Accordingly, the issue provides an excellent case study in how a series of specific and focused interpretations giving voice to a certain mindset on industrial affairs can lend political tilt to a statutory scheme. In particular, I argued that, as the Court was called upon to give content to the rights and obligations outlined in the statute, its interpretations might have reflected either enthusiasm for or disinclination toward the project of refashioning the legal structure of labor bargaining. In important decisions, the Court evinced disinclination, bequeathing a theoretical and practical legacy prejudicial to workers' interests. Rights granted by the Act to enhance employee bargaining power were given narrow interpretations.<sup>105</sup> The justifications for these results led to further evisceration of employee rights in later years, linking the mentality of the early cases to the current crisis of labor law.

Professor Finkin expresses no opinion on these problems. To do so would concede the political context of statutory construction that I evoked. Consistent with his unyielding commitment to the complete autonomy of legal reasoning, Professor Finkin instead insists that these decisions were essentially predestined. His commitment to this view is particularly revealed by the fact that he cannot find one among the many cases under discussion that he will say was wrongly decided. For these and other reasons, this topic presents

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law rules undergirding the so-called "free market" in labor in the nineteenth century were socially constructed or conventional, not "natural," see generally K. POLANYI, *THE GREAT TRANSFORMATION* 33-219 (1957), as thinkers across the political spectrum have agreed, see, e.g., 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, 1016 (1984).

105. Indeed, Professor Barron argues that, as a consequence of their restrictive interpretations of employee rights, the early cases effectively created rights in favor of employers, although the concept of employer rights was not part of the original statutory scheme. See Barron, *A Theory of Protected Employer Rights: A Revisionist Analysis of the Supreme Court's Interpretation of the National Labor Relations Act*, 59 TEX. L. REV. 421, 422-23 (1981).

our competing approaches in sharp contrast. I begin my discussion with a brief restatement and clarification of the major substantive issues.

### B. *The Meaning of "Contractualism"*

In my article, "contractualism" referred to the conventional philosophy of "freedom of contract" or "private ordering" and the associated conception of an unregulated labor market. I argued that many people in the 1930's believed that the NLRA was a threat to freedom of contract and that those fears had a basis, congressional rhetoric to the contrary notwithstanding. It was therefore a noteworthy political development, with lasting consequences, when the Court gave prominence to contractualist themes in early Wagner Act jurisprudence. I identified several problems with the contractualist emphasis.<sup>106</sup> I will quickly reiterate them here without supporting argument (but not, I hope, without some refinements as a result of rethinking the issues over the years).

First, contractualist thinking encouraged the attitude that the statute should be interpreted so as to provide the minimum possible interference with the pre-NLRA law of labor contracts, specifically those aspects of pre-NLRA doctrine that favored the employer. In cases reflecting the contractualist influence, the Court shunned highly interventionist interpretations of the rights of employees and responsibilities of employers, opting instead for readings of the statute providing for minimal incursions on the preexisting legal structure of labor bargaining. The alternative but foregone interpretations might have had marked redistributive consequences favorable to employees and conceivably even a destabilizing political impact. In this sense, contractualist (i.e., minimalist) decisionmaking tended to ratify the existing distribution of social and economic power. "Freedom of contract" is in many (although not all) respects a procedurally rather than substantively oriented vision of justice. Contractualist labor law assumes that "free" bargaining produces just results, without regard to inequality in the starting point of bargaining or to the distributive implications of the "background" regime of legal rules.<sup>107</sup> Indeed, our leading theorists of labor law

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106. Professor Finkin complains that I was not specific about the meaning of "contractualism" (see, e.g., F:33). In fact, the concept of "contractualism" was treated at length in *Judicial Deradicalization* (see, e.g., K:295-98), and my points were developed in some detail there and in subsequent work. See, e.g., Klare, *Public/Private*, *supra* note 24, at 1388-1415; Klare, *Critical Theory*, *supra* note 24, at 71-72, 79.

107. Conventional thinking takes this for granted, yet is not entirely comfortable with

(unlike the most sophisticated tradition within contract law theory) tend to *assume* that the results of collective bargaining are “voluntary” and therefore sensible and just *without inquiry* into inequality of power or issues of substantive fairness.<sup>108</sup>

Second, and consistent with this approach, the private ordering emphasis often meant that contract rights were given precedence over rights deriving from the Act. This generally, although not always, allowed private power to undermine what had been thought to be employees’ political gains, as, e.g., when the employer’s right to stand on its contract was held to supersede the employees’ statutory right to concerted activity.<sup>109</sup> The problem of private power nullifying the democratic aspirations of the statute has been a continuing one, with significant contemporary manifestations.<sup>110</sup> Similarly, contractualism has nurtured a climate of opinion in which collective

it either, particularly in light of the stated policy of the Congress to safeguard commerce by “restoring *equality* of bargaining power between employers and employees.” NLRA, § 1, 29 U.S.C. § 151 (1982) (emphasis added). *See also* *United Steelworkers v. NLRB*, 389 F.2d 295, 300 (D.C. Cir. 1967), *overruled in* *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970): “Th[e] ideal of freedom of contract is both a noble and a practical one. . . . But an equally important policy of the Act is to equalize the bargaining power of employees and employers. . . .”

The typical way decisionmakers overcome their uneasiness is simply to declare that the Act itself puts the parties on a fair or equal footing and then just to forget about substantive outcomes. *See, e.g.*, *New York Tel. Co. v. New York Dep’t of Labor*, 440 U.S. 519, 552 (1979) (Powell, J., dissenting) (Congress intended to establish a “fair” balance of bargaining power; “whatever agreement emerges from bargaining between fairly matched parties is acceptable.”); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965) (declaring labor and management to be “coequal adversaries” after enactment of the NLRA).

108. For a striking example, see *Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 420-21 (1950) (management rights clauses in collective bargaining agreements based on “voluntary acceptance” by workers and “mutual consent” of the parties); *id.* at 405-06 (“[T]he needs of the industrial world can be determined most accurately by examining the arrangements which management and labor have worked out through negotiation, trial, and error.”). Professor Stone’s work has taken the lead on this point, particularly in her discussion of the impact of the “premise of joint sovereignty” on collective bargaining theory. *See* Stone, *supra* note 2, at 1544-49.

Contrast the lack of emphasis on inequality of power within post-World War II labor law scholarship with its centrality as a concern to much twentieth century contracts theory. *See, e.g.*, Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); *see also* K:296 n.98 & 99 (citing Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345 (1937); Hale, *supra*; and Weber, *Freedom and Coercion*, in *ON LAW IN ECONOMY AND SOCIETY* 188-91 (M. Rheinstein ed. 1954)).

109. *See* *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939), discussed *infra* notes 204-20 and accompanying text.

110. Two dramatic examples are employers’ apparent power to undermine the NLRA

bargaining law came to be seen as providing a "neutral" framework for resolving conflicts between the "private" interests of employers and employees. The alternative, suppressed view is that collective bargaining is a democratic process valuable for its own sake, in which the community as a whole has a stake.<sup>111</sup>

This leads to a third point. Under the contractualist emphasis, the *bargained waiver* of statutory rights has become a central feature of our labor law system. In effect, employers are permitted to deploy economic leverage so as to coerce employees into giving back rights they won in Congress. An obvious example is the no-strike clause, a key provision in most collective bargaining agreements, under which employees trade the statutory right to strike for contractual benefits. Another example is the management prerogatives clause, under which employees surrender for a term their statutory right to "co-participation" in the adjustment of the terms and conditions of employment.<sup>112</sup>

The conventional view is, of course, that the very sale of these rights indicates that they are more valuable to workers when cashed in for improved benefits and working conditions than they are simply as rights held. That, supposedly, is what modern collective bargaining is all about. The problem with this complacent view is that it entirely overlooks the deep and pervasive inequality in this

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representation election process and case law permitting employers to transfer bargaining unit work so as to evade collectively bargained terms and conditions of employment. See generally K. Klare, *The Application of the National Labor Relations Act During Union Organizing Drives: How Well Are the Interests of Employers and Employees Balanced?* (speech to Wisconsin State Bar, June 21, 1984), printed in *Oversight Hearings*, *supra* note 6 at 749 (relying heavily upon Weiler, *supra* note 5); see also *Milwaukee Spring Div. of Ill. Coil Spring Co. [Milwaukee Spring II]*, 268 N.L.R.B. No. 87, 115 L.R.R.M. (BNA) 1065 (1984) (holding lawful a unilateral midterm transfer of bargaining unit work to non-union facility so as to avoid paying collectively bargained rates) (overruling 265 N.L.R.B. No. 38, 111 L.R.R.M. (BNA) 1486 (1982)), *petition to review denied sub nom. Int'l Union, UAW v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985).

111. See *supra* text accompanying notes 39-40.

112. Because the no-strike clause and the management prerogatives clause are mandatory subjects of collective bargaining, the employer is privileged to bargain to impose in order to obtain them. See, e.g., *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952) (Court allows hard bargaining for management prerogatives clause); see generally *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) (discussing difference between mandatory and permissive subjects). Clyde Summers has aptly summarized the cumulative effect of *Borg-Warner* and *American National Insurance* (and their respective progeny): "The effect of these two legal rules is that a union cannot use its economic strength to expand the area of participation beyond that described by the statute; but the employer can use his economic strength to limit participation to an area smaller than that described by the statute." Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367, 382 (1980).



society, inequality reflected both in the social and economic context of wage bargaining and in the legal and institutional ground rules under which it takes place. To be sure, unions sometimes have the upper hand in bargaining with some employers. But in by far the more common case, employees routinely surrender their public law rights in the face of economic dependency on the employer and the employer's superior economic resources and maneuverability. The fact that a waiver is "voluntary" does not, by itself, mean that it is just. This is not an argument against waivers or trade-offs as such, but an invitation to examine in social context the *specific* waivers of NLRA rights the Court has allowed or implied. Here again the issue is whether the NLRA would be given a strongly interventionist interpretation, or one that produced a minimal restructuring of the pre-NLRA law of labor contracts. It is simply not obvious that workers should have to put their rights under the NLRA up for sale in the marketplace to the extent and in the particular instances that waivers are now implied or encouraged.<sup>113</sup> Congress may have assumed that no-strike clauses would become commonplace, but the statute and the legislative history provided little guidance on how far the waiver policy should be pushed. Whether waivers should be extensively implied or encouraged at the expense of workers' statutory rights, or whether waivers should be viewed as inherently suspect and permitted only within narrow limits, are questions about which Congress said little in 1935.<sup>114</sup>

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113. Indeed, some rights under the NLRA are deemed *nonwaivable*. For example, in-plant leafletting rights may not be waived by collective contract. *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974). The right to resign from union membership, derivable from the right to refrain from engaging in section 7 activities, NLRA § 7, 29 U.S.C. § 157 (1982), is not waivable or subject to restriction by contract between the union and the employee. *Machinists Local 1414 [Neufeld Porsche-Audi, Inc.]*, 270 N.L.R.B. No. 209, 116 L.R.R.M. (BNA) 1257 (1984). The usual explanation of such rules, solicitude for individual or dissenting employees, rings hollow given that unions can waive employees' right to strike without their consent. The selection of particular NLRA rights for designation as "waivable" or "nonwaivable" rests ultimately on social policy, i.e., political, choices.

114. To take one example of a specific waiver question, the Reagan Board recently held that a strike settlement waived the "fundamental" right of employees to strike without fear of reprisal by the grant of superseniority to strikebreakers. *Gem City Ready Mix Co.*, 270 N.L.R.B. No. 191, 116 L.R.R.M. (BNA) 1266 (1984). The Board ruled that "even the fundamental right to strike . . . can be waived," *id.* at 1267, even though strikebreaker superseniority is deemed "inherently destructive of workers' rights." See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). The types of argument Finkin claims support the result in *Sands Manufacturing* (F:40) could be urged in support of the result in *Gem City*. Of course, the cases are also distinguishable, but the point of distinction must ultimately be, here as elsewhere, a judgment of social policy as to which *particular* labor rights should be waivable under what particular circumstances.

As can be seen, the focus of my critique was that "free contract" theory legitimated inequality by deflecting attention from concerns of substantive justice. I continue to regard this as an important aspect of the ideology embraced in modern collective bargaining law. My attack was leveled not at the idea of bargaining under any and all circumstances, but on the undemocratic and authoritarian consequences of labor bargaining under the regime of the so-called "unregulated market" championed in traditional contractualist thinking, elements of which were carried forward as the statutory scheme unfolded. Specifically, I meant to criticize the manner in which the Court's decisions undermined the potential of the statute to restructure the context and ground rules of labor bargaining. My "anti-contractualism" meant taking seriously the statutory rights that might tilt the balance of power in labor markets away from its location under the common law. This was not an attack on the idea of bargaining as such.

My treatment of "contractualism" was in some respects ambiguous, and this has, perhaps, led to a certain misreading of the article. I did not argue, as some readers have suggested, that as an *a priori* matter I favor governmental determination of workplace conditions to the exclusion of the ideals of autonomy, self-determination, and in particular, self-reliance by workers on their own concerted activity to achieve their industrial goals. My article was, and I remain, committed to the values of worker self-organization and collective activity. These values are sometimes invoked and defended under the banner of contractualism and freedom of contract.<sup>115</sup> On such occasions, contractualist discourse can take on a genuinely emancipatory content.

I have been particularly surprised that a number of thoughtful readers concluded from my article that I meant to advocate that existing governmental institutions, such as the Labor Board, should routinely set the substantive terms and conditions of employment, or that I had thought that Congress had commanded such generalized substantive regulation. These reactions have puzzled me, since I expressly disclaimed such views (K:308 n. 151). A strong anti-statist note is sounded throughout my writing,<sup>116</sup> particularly in

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115. In reviewing the dilemma of employer first-contract intransigence, Paul Weiler has aptly evoked this ideal of employee self-determination. See generally Weiler, *Striking A New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984), particularly at 419.

116. See particularly the discussion in Klare, *Critical Theory*, *supra* note 24, at 83-84 (criticizing both "statism" and "anti-statism" in radical political theory).

the emphasis on worker self-organization and self-activity. Moreover, I specifically identified dependency on governmental intervention as a sign of the weaknesses and limitations of the 1930's organizing upsurge (K:318 & 318 n. 183). Nonetheless, some readers found this implication in my article, so I add another disclaimer here.

American legal thought tends to see the world in terms of a series of dichotomies, one of which is the sharp distinction between "governmental regulation" and "private ordering."<sup>117</sup> If I was critical of the latter, some readers reasoned, I must be advocating the former. In fact, one of the goals of my work is to criticize this entire way of thinking and to demonstrate the empty and false way in which these distinctions are conventionally treated in the prevailing legal discourse.<sup>118</sup> Conventional labor law scholarship regularly commits the error of simply *equating* "private ordering" with worker autonomy and self-determination.

In our social and political context, general, *a priori* views on the regulation v. private ordering question are often unhelpful and unconvincing. The problem of social policy is not *whether* the organized self-regulatory power of society should be deployed to enhance participation and equality, to serve our material and spiritual needs. The problem is to determine the most appropriate forms and content of such interventions, consistent with the ideal of self-determination. To put it another way, both autonomy and collective democratic organization are essential, potentially mutually reinforcing components of human freedom. The task of social policy is to simultaneously nurture both. Returning to the terms of the debate, in specific historical and institutional contexts both governmental regulation and private ordering can contribute to democratizing and politicizing the workplace, although each can also have the opposite effect in other contexts (*see* K:308-309 n. 151). *Judicial Deradicalization* sought to expose the deleterious effects of contractualism in a particular historical setting. The article does not advance (and explicitly disavows) any general philosophical claim or proposal that governmental determination of working conditions is preferable *a priori* to collective bargaining.

### C. Was Freedom of Contract An Issue?

This is not the place to debate these questions. I would

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117. *See generally* Frug, *supra* note 55; Kennedy, *supra* note 55.

118. *See generally* Klare, *Public/Private*, *supra* note 24.

welcome such a debate, but Professor Finkin shows no interest in it. His point is more primitive: Such issues never *arose*, he claims, and therefore there is no need to discuss them. No one ever imagined or suggested that the early Wagner Act cases involved decisions about the moral and political values of contractualism, for the simple reason that Congress left no room for choice. In this Finkin betrays an astonishing ignorance. His own evidence, let alone mine, refutes these mindless claims.

American employers bitterly attacked and resisted what they perceived as the anticontractualist aspects of the NLRA. Their defense of freedom of contract had two distinct branches. First, employers claimed that the statute on its face violated the constitutional guarantee of liberty of contract. Second, they argued that specific features of the statutory scheme would foster governmental control over the employment relationship and thus undermine managerial power and prerogative.

Professor Finkin's precise position is difficult to pin down because, as noted, he never expresses any substantive views on the matter of contractualism. Regarding the constitutional issue, he simply indicates that "the Court relied rather heavily on the law under the Railway Labor Act" (F:35), and that the parallel provisions of the Railway Labor Act had been sustained by the Court (F:34). Surely Professor Finkin would not seriously have us believe that the due process challenge to the NLRA was unequivocally precluded by prior decisions. Whatever optimistic remarks Senator Wagner placed on the public record, he knew full well that the Court was striking down New Deal legislation right and left. The constitutional issue was very much alive to employers and federal judges, as this section shows. The Board's attorneys certainly did not share Professor Finkin's confidence that a finding of constitutionality was a foregone conclusion.<sup>119</sup>

With the exception of *NLRB v. Jones & Laughlin Steel Corp.*,<sup>120</sup> most of the cases and legislative intent issues in debate here touch on the other branch of the employers' free contract concerns, namely, the fear of governmental intrusion in the employment relationship and wage bargaining. Professor Finkin states emphatically that the issues presented in two crucial cases I discussed, *Jones & Laughlin* and *NLRB v. Mackay Radio and Telegraph Co.*,<sup>121</sup> "had

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119. See *infra* note 138.

120. 301 U.S. 1 (1937) (upholding constitutionality of NLRA).

121. 304 U.S. 333 (1938).

nothing to do with 'contractualism' " (F:37). In order to refute my claim that the statutory scheme contained anticontractualist aspects, he produces a few quotations from the legislative history indicating that one of the purposes of the NLRA was to encourage the making of collective contracts (F:41-42). He seems to think this is the end of the matter. He is oblivious to the fact that most employers did not want to make collective contracts, viewed statutory pressure to do so as an invasion of their rights,<sup>122</sup> and denied that Congress had the power to enact such legislation.<sup>123</sup>

I suppose it is possible with the smugness of hindsight to believe that the Act did not raise concerns about contractualism, although even today voices are raised against the NLRA's intrusions on contractual freedom.<sup>124</sup> But Professor Finkin does not really believe it himself, since he ultimately concedes my point. Under NLRA sections 8(3)<sup>125</sup> and 8(5),<sup>126</sup> he writes, "employers cannot circumvent the rights of employees to organize and engage in collective bargaining by *executing individual contracts in derogation of the statutory scheme*" (F:41, emphasis added). This clearly infringes the employer's freedom of contract. (We might also add that NLRA section 9(a) similarly restricts "private ordering" between the employer and individual employees).<sup>127</sup> Still, Finkin tries to wriggle out of this concession. For him, these provisions stand for the "obvious principle" (F:41) that minor incursions on free contract are necessary to make free contract work (F:41-42).<sup>128</sup>

Unfortunately, what is "obvious" in contemporary legal ideol-

122. See *infra* notes 183-86 and accompanying text.

123. See *infra* notes 129-35 and accompanying text.

124. See, e.g., Epstein, *A Common Law For Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983).

125. 29 U.S.C. § 158(a)(3) (1982) (prohibiting employment discrimination on basis of union activity or sympathy).

126. *Id.* § 158(a)(5) (1982) (requiring employers to bargain collectively with majority employee representative).

127. *Id.* § 159(a) (1982) (majority representative is the exclusive bargaining agent of all employees in bargaining unit, whether or not they are union members).

128. He states with apparent approval, that "[t]he government. . . argued [in *Jones & Laughlin*] that freedom of contract was constricted only by the reasonable anti-discrimination provisions of the Act." (F:34, citation omitted). This is what critical legal thinkers sometimes call a "contradiction." The fashion among mainstream thinkers is to call this, with somewhat less emphasis, a "tension" or a "paradox." For a classic example, referring to the problem of governmental control over wage bargaining, see Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1416 (1958):

The employer (or union) must engage in negotiations with a sincere desire to reach an agreement and must make an earnest effort to reach a common ground, but it need make no concessions and may reject any terms it deems unacceptable. One can argue that the formula is too self-contradictory to sur-

ogy was not at all "obvious" or even vaguely convincing to American employers and their allies in the 1930's. The bill, and later the Act, were relentlessly and bitterly attacked by politicians, business people, academics and the press on the ground, among others, that they violated constitutional guarantees of contractual freedom. Indeed, it is a common view that the statute passed with comparatively little debate because many congressmen, a multitude of lawyers, much of the press, and the bulk of the business community took it for granted that the NLRA would be swiftly declared unconstitutional, in part for violating liberty of contract.<sup>129</sup> The fifth and fourteenth amendment due process clauses had long been held to protect freedom of contract,<sup>130</sup> and, while the commerce power issue was central to claims about the Act's unconstitutionality, the due process question was also in the forefront of debate.<sup>131</sup>

Pro-business witnesses scored the bill for invading free contract.<sup>132</sup> Politicians picked up this theme in the debates. For example, one Senator, typical of the bill's opponents, pronounced himself quite certain from his study of the bill that it "denies freedom of contract between an individual and his employer . . . as

vive. . . . But I think that the ambivalent statement has meaning even though it borders on paradox.

It is sometimes deemed an emblem of professional maturity to embrace the ubiquity of such paradoxes in the law. For an extreme view, see Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227-28 (1984) (prominent law school dean questions moral fitness to teach law of those who do not share his faith in the reconciling or secularly religious power of legal principles transcending reason).

129. See I. BERNSTEIN, *supra* note 33, at 116 ("[M]any Senators, convinced that the bill was unconstitutional, shifted the onus of its defeat to the Supreme Court. . . . [T]hey felt certain that the measure would not take effect since employers would withhold compliance until the Court declared it void."); J. GROSS, *supra* note 33, at 149 ("[F]ew people were anxious to serve on the NLRB in 1935 since the record of the Supreme Court . . . left little doubt in most minds that the Wagner Act would not survive the inevitable Supreme Court test.").

130. See *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908); *Lochner v. New York*, 198 U.S. 45 (1905).

131. See R. CORTNER, *THE JONES & LAUGHLIN CASE* 150 (1970) (employer's counsel asserted invasion of liberty of contract as a principal reason for constitutional invalidity of NLRA).

132. See, e.g., *Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 853-54 (1935), reprinted in 2 LEGISLATIVE HISTORY (pt. 1), *supra* note 42, 2239-40 (testimony of James A. Emery, General Counsel, Nat'l Ass'n of Mfrs.) (bill unconstitutionally invades fundamental right of freedom of contract); *Hearings on H.R. 6288*, 74th Cong., 1st Sess. 735-38 (1935), reprinted in 2 LEGISLATIVE HISTORY (pt. 2), *supra* note 42, 2809-12 (brief in opposition submitted by Associated General Contractors of America) (citing *Adair*); see *id.* at 336, reprinted in 2 LEGISLATIVE HISTORY (pt. 2), *supra* note 42, 2810 ("[N]o sound purpose could be served by stripping business and industrial management of its constitutionally conferred right to freedom of contract.").

completely as any bill that has ever been proposed in the Congress."<sup>133</sup> The American Liberty League's notorious 1935 memorandum, designed to torpedo the NLRA in the courts, repeatedly denounced the Act's intrusions on freedom of contract, placing this concern even before the commerce power issue.<sup>134</sup> Academics added weight to such claims. The Dean of the University of Chicago School of Business wrote in 1935:

It cannot be denied that the enforcement of the various provisions of the Wagner Labor Act will substantially interfere with the freedom of contract of both the employer and of the employee . . . . From the point of view of due process of law, the most doubtful aspect of the law is Section 8(5) . . . . This provision is intended to do something more than equalize the bargaining power between employer and employee; it is clearly intended to force the employer to enter into collective agreements . . . .<sup>135</sup>

Prior to the Supreme Court decision upholding the Wagner Act against due process challenge,<sup>136</sup> its validity was judicially questioned on liberty of contract as well as commerce power grounds.<sup>137</sup> And it seems worth recalling that four Supreme Court Justices voted to strike down the NLRA on due process grounds (among

133. 79 CONG. REC. 7677 (May 16, 1935) (debates on S. 1958), *reprinted in* 2 LEGISLATIVE HISTORY (pt. 1), *supra* note 42, at 2403 (remarks of Sen. Hastings, extended by incorporating in the record, but not discussing, legal memorandum citing *Adair*, *Lochner*, and other constitutional freedom of contract cases, 2 LEGISLATIVE HISTORY (pt. 1), *supra* note 42, at 2403-11).

134. See NATIONAL LAWYERS COMMITTEE OF THE AMERICAN LIBERTY LEAGUE, REPORT ON THE CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT, (Sept. 1935) [hereinafter cited as LIBERTY LEAGUE MEMORANDUM] *reprinted in* 8 *Hearings Before the House Comm. on Labor*, 76th Cong., 1st Sess., at 2242-43, 2280 (1939).

135. W. SPENCER, THE NATIONAL LABOR RELATIONS ACT: ITS SCOPE, PURPOSES, AND IMPLICATIONS 66-70 (1935); *see also id.* at 66 ("far-reaching interferences with freedom of contract"). Spencer cites the precise document which to Finkin clearly establishes Congress's contractualist "intent," S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935), *cited in* F:40 n.71, 41-42. But Spencer cites it to support the view that in practical operation the NLRA "means compulsory arbitration of a unilateral character." W. SPENCER, *supra*, at 24. Academic commentators continued for years to view the Act as an attack on contractual freedom. *See, e.g.*, Dickinson, *New Conceptions of Contract in Labor Relations*, 43 COLUM. L. REV. 688 (1943) (treating the subversion of the employer's freedom of contract as an accomplished fact).

136. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43-47 (1937).

137. *See, e.g.*, *NLRB v. Mackay Radio & Tel. Co.*, 87 F.2d 611 (9th Cir. 1937) (Wilbur, J.), *aff'd on rehearing on other grounds*, 92 F.2d 761 (9th Cir. 1937), *rev'd*, 304 U.S. 333 (1938). Indeed, even after *Jones & Laughlin*, some judges continued to view the *Lochner/Adair* freedom of contract cases as compelling a narrow construction of the Act. *See, e.g.*, *Mackay Radio*, *supra*, 92 F.2d at 762-64 (Wilbur, J.).

others).<sup>138</sup>

In sum, as American employers and their sympathizers saw it, the Act directly violated constitutional guarantees of freedom of contract. To put it another way, this was an issue in the 1930's, to which the Court was sensitive even as it upheld the statute. No doubt supporters of the Act sincerely believed that its intrusions on freedom of contract were minor and restricted in nature, and therefore fully consistent with the Constitution. But I was interested in an entirely different question: What did the statute *actually mean* to the people who enacted it and to the people whose conduct it was supposed to govern? There is simply no inconsistency in saying both that the Act's proponents were devoted to freedom of contract and that its opponents—who looked at the world through different eyes—were not persuaded. Professor Finkin supplies no rebutting evidence on the real questions I raised: Were claims that the NLRA impaired freedom of contract sincere (at least in part)? And, with respect to the governmental intrusion aspect of employer opposition, did these fears have a basis in the legislative history? I discuss the latter question in the next section, turning first here to the issue of sincerity.

It is common to treat business criticism of the Act as mere propaganda motivated by a more elementary desire to avoid unionization. But employer opposition to unions was not an abstraction. It was composed of a blend of fears, prejudices and calculations that do not always make sense to contemporary collective bargaining experts. With a half-century of experience, we know today that collective bargaining does not mean employer loss of control over the management of businesses. We now take for granted, sadly enough, that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business

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138. "The right to contract is fundamental . . . . This right is unduly abridged by the Act now upheld." *Jones & Laughlin*, 301 U.S. at 103 (McReynolds, J., dissenting). The outcome of the due process issue was not a foregone conclusion. As Professor Cortner notes, in preparing the *Jones & Laughlin* case the Board was haunted by the ambiguity of the leading (and promising) precedent, the case upholding the constitutionality of remedies under the 1926 Railway Labor Act, *Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930), namely that this case did not overrule the constitutional liberty of contract doctrine of *Adair* and *Coppage*. R. CORTNER, *supra* note 131, at 96. Cf. P. IRONS, *THE NEW DEAL LAWYERS* 232-33 (1982) ("However sound in logic, [Senator] Wagner's exegesis of constitutional precedent [regarding due process] was certainly speculative as prognostication.") Indeed, *Jones & Laughlin* itself did not purport to overrule, but only to distinguish, *Adair* and *Coppage*. 301 U.S. at 45; see K:300 n.114.



enterprise,"<sup>139</sup> and that the law does not mandate collective bargaining over issues "which lie at the core of entrepreneurial control."<sup>140</sup> But these things were not so clear in 1935 or 1937. Employers took a while to learn them.

There is no question but that the Act, and specifically the incursions on free contract, not only reached into employers' pocket-books but threatened—or more precisely *were perceived by employers to threaten*—their most basic assumptions about managerial prerogative.<sup>141</sup> The missing element in Professor Finkin's account is any acknowledgement of the ferocity of early employer opposition to the NLRA. Employer efforts between 1935 and 1937 to nullify the law constitute a massive and ignominious instance of concerted civil disobedience. Out of respect for the ordinary workers for whom he claims to speak (F:89-90), Professor Finkin might have paused to remember that brave men and women had to give their lives—both before *and after* 1935—to secure NLRA rights. Whatever their sympathies, historians have a duty to explain this, to try to understand management's often almost fanatical efforts to resist collective bargaining, to the point where some were prepared to countenance the sacrifice of human life rather than give in.

Historians have recently emphasized that the intensity of the desire to maintain managerial control is one of the distinctive attributes of American businessmen and, hence, of American labor history.<sup>142</sup> Businessmen did not deem the Act's incursions on freedom of contract to be "obvious" or *de minimis* but rather to pose a potentially unbounded threat to values and institutions they most held dear. And this is at least a factor in explaining their intransigent resistance to the NLRA.<sup>143</sup>

139. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981).

140. *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

141. *Fortune* magazine thus summarized the views of "business critics" on the NLRA: It violates the right of free speech, the rights of property, the inviolability of contract. It promotes lawlessness, destroys discipline, and encourages strikes against society. It is in short a dangerous intrusion of a radical bureaucracy into private enterprise.

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[It is] a dangerous threat to the entire industrial structure of the U.S. *The G—D— Labor Board*, 18 *FORTUNE* 52-53 (Oct. 1938).

142. See, e.g., P. Edwards, *The Exceptionalism of the American Labour Movement: The Neglected Role of Workplace Struggle* (1983) (unpublished paper on file with author).

143. Finkin implicitly admits the truth of my basic point. In the course of discussing my views about the sit-down strikes, Finkin notes that all of the strikers' demands involved "routine" subjects of collective bargaining (F:30). I am not certain this is entirely

*D. Was the Legislative History Ambiguous?*

Was the legislative history ambiguous on the question of the degree of governmental intrusion on labor bargaining intended by the statutory scheme? For Professor Finkin this question is not even close. To support his stance, he lifts a few bland sentences from 3000+ pages and considers the matter closed: The legislative history contains no ambiguity on the subject of free contract (F:41-42). It would be difficult to find many lawyers or legal academics whose faith in the determinative character of legislative history is quite as reverential as Finkin's, at least if one is searching among the generations since the rise of Legal Realism. Still, his references to legislative history are characteristic of conventional intellectual instincts and argumentative strategies among many labor lawyers. As such they are worth examining in some detail.

There are two fundamental problems with Professor Finkin's approach. The first is the confusion of distinct levels of analysis or of purpose in studying legislative history. Unable to see beyond the technician's view, he is interested only in what might be called "lawyer's legislative history." Its focus is on giving authoritative meanings to the words and concepts in statutes by uncovering the intellectual provenance of statutory language, particularly as it was understood by the drafters. "Lawyer's legislative history" provides useful tools to advocates in the form of stereotyped, mutually cancelling arguments to which the courts habitually listen.<sup>144</sup> The method makes liberal use of fictions and conventions.<sup>145</sup> It claims the trappings of precision, although everyone knows that "[t]he

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true, but, in any event, Finkin adds: "No doubt management thought of these demands as serious threats to its power, even as a serious threat to capitalism, for these demands challenged management's totally unconstrained right to manage" (F:30). If he concedes as much, it is hard to see what is left to this branch of Finkin's critique. He goes on to say, in effect, that management was *mistaken* to feel that its rights were threatened, since in fact they weren't. The historian's role, however, is to attempt to determine what people thought at the time, not what Professor Finkin now thinks they should have thought.

144. Years ago Karl Llewellyn catalogued many of the routine statutory intent arguments, dramatically illustrating the stereotyped and self-negating character of the genre. See K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521-35 (1960).

145. See, e.g., L. FULLER & R. BRAUCHER, *BASIC CONTRACT LAW* 149-50 (1964):

Th[e] . . . relation between courts and statutes is commonly expressed by saying that the "intention" of the legislature make[s] the law. Yet it is always recognized that the "intention" which the court must respect is a formalized thing, and not the "actual, inner" intention of particular legislators. A statute becomes law only after it has been enacted in accordance with certain rules; when these rules have been followed the statute stands as law even though Senator Sorghum confides to his dinner partner that he was asleep when the bill was read and did not know what he was voting for.

hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."<sup>146</sup>

By contrast, one might be interested—as I was—in a wholly different plane of analysis, what might be called “historian’s legislative history.” Here the focus is on what people actually thought and felt, both inside and outside Congress, particularly insofar as they may have been influenced by prevailing understandings of the language of the bill and the legislative debates. For this purpose, although perhaps not Finkin’s, we might be as interested in the impromptu railings of an obscure Republican Congressman or anti-union corporate officer about the Wagner bill as in the considered reflections of Senator Wagner and his closest aides. Let me emphasize that I am *not* claiming, and never did, that anti-NLRA spokespeople were *correct* in their understanding of Senator Wagner’s intentions. Often, they were not. Senator Wagner and his associates had no intention of enacting governmental supervision of the substantive terms of collective bargaining agreements, as I indicated in my article (K:307). Accordingly, the statements of anti-NLRA legislators may not reflect the “intent” of the Act in the technical sense. But that is only the lawyer’s view of statutory intent.

My article addressed both the lawyer’s and the historian’s views of legislative history at separate junctures, but Professor Finkin systematically conflates the two. For example, referring in part to the political complexity of the legislative process, I remarked that the statute was “not a crystallization of consensus” (K:291). In context, this was obviously a reference to the fact that the nation was profoundly divided over whether the Act should have been passed and what it should mean. Finkin denies this, arguing that the statute expressed an emerging consensus on labor policy based particularly on the 1933-1935 experience under the NIRA and Public Resolution No. 44 and reflected in the congressional debates and reports (F:46-47).

Professor Finkin’s and my comments are both true but they refer to different levels of analysis. For him, “national consensus” means what was agreed among Senator Wagner and his aides and allies. This is said to be the “intent” of the Congress. This simply confuses lawyer’s fiction for the broader historical truth. It is an absolutely standard observation that the NLRA built upon and embodied an emerging consensus among a narrow but influential

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146. H. Hart & A. Sacks, *The Legal Process* 1201 (tent. ed. 1958).

stratum of political, labor,<sup>147</sup> and academic figures on the need for a federal collective bargaining policy, and that the statute represents the triumph of ideas that had been slowly finding their way into public policy since the beginning of the twentieth century.<sup>148</sup> This background is often very helpful in explaining particular concepts and words in the statute. Accordingly, the background experience is said, in conventional parlance, to supply a guide congressional "intent" (F:46-47). But it is the purest fiction to say that *as a nation* we actually achieved political consensus on these ideas in 1935.

Indeed, it is even fiction to assert that the Congressmen who voted for the NLRA did so because they fully understood and/or embraced Senator Wagner's ideas. There are obvious indications that to some extent they did not. To cite one famous example, a classic problem in Wagner Act interpretation is what to make of the remarks of Senator Walsh, a supporter of the bill, on the duty to bargain. Walsh's views are simply inconsistent with those of Wagner.<sup>149</sup> Lawyers usually resolve such difficulties by resort to fiction, e.g., that in determining the "intent" of Congress, we should pro-

147. Chris Tomlins has argued that on at least one major point this elite consensus departed sharply from existing AFL understandings, that is, with regard to the hitherto sacrosanct area of "jurisdiction" and bargaining units. From the AFL point of view, this was an issue that implicated the most fundamental concerns about the self-governance of the trade union movement. The controversy over the Board's unit determination powers rapidly pushed the AFL leadership into a position among the Board's harshest critics. See C. TOMLINS, *THE STATE AND THE UNIONS: LAW, LABOR RELATIONS POLICY, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985).

148. See, e.g., Statement of Senator Wagner, *Hearings on S. 1958 Before the Senate Comm. on Education & Labor*, 84th Cong., 1st Sess. 32, reprinted in 1 LEGISLATIVE HISTORY (pt. 2), *supra* note 42, at 1408 ("[T]he National Labor Relations Bill does not present a single novel principle for the consideration of Congress."); I. BERNSTEIN, *supra* note 33, at 101 (Senator Wagner stressed in Congressional debates that the bill "involved no novel principles but simply affirmed and extended concepts already established in the law."); *id.* at 18 (New Deal labor enactments "gathered up the historical threads [of prior public policy experience] and wove them into law."); J. GROSS, *supra* note 33, at 232 (almost all provisions of Wagner bill can be traced to the 1933-1935 experience of the NLB and "old" NLRB).

One of the poorly concealed tensions in the standard approach is that it simultaneously holds that the NLRA represents a more or less "natural" culmination of public policy development, yet at the same time no one can really explain why it passed. See *supra* text accompanying note 34. See also H.J. Harris, *Responsible Unionism and the Road to Taft-Hartley: The Development of Federal Labor Relations Policy, ca. 1932-1947*, at 13 (paper presented to the Colloquium on Shopfloor Bargaining and the State, King's College Research Centre, Cambridge University, Sept., 1982) (on file with author) ("The fact of passage of the Wagner Act in 1935 . . . was very largely fortuitous.").

149. In a frequently quoted passage, Senator Walsh said:

The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and

ceed as though Senator Walsh did not speak.<sup>150</sup> *A fortiori*, Wagner's words take precedence over those of his opponents in determining congressional intent, and anti-NLRA business sources such as those cited above<sup>151</sup> are not even considered. Such fictions are of limited usefulness if we wish to pursue the historian's aim of ascertaining what people at the time actually thought about the Wagner Act.

Because Professor Finkin is only interested in the stereotyped, lawyer's history of the Wagner Act, for purposes of debate I turn now to legislative history in the technical sense of the term. This raises a second, fundamental difficulty with Finkin's approach, the problem of "predestination."

As noted above, Professor Finkin believes that reasoned elaboration of the values and policies found in the legislative history provides *determinate* answers to specific legal problems. That is, for each problem in interpretation there is a correct solution—or range of solutions—consistent with the core values of the statute; interpretations outside this core are incorrect (F:45).<sup>152</sup> A common attitude linked to this view in the labor law context is that the course of inter-

leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and employee, and the agreements which they may or may not make, voluntary and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded.

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What happens behind those doors is not inquired into, and the bill does not seek to inquire into it. It anticipates that the employer will deal reasonably with the employees, that he will be patient, but he is obliged to sign no agreement: he can say, "Gentlemen, we have heard you and considered your proposals.

We cannot comply with your request" and that ends it.

79 CONG. REC. 7659-60 (May 16, 1935) (debates on S. 1958), *reprinted in* 2 LEGISLATIVE HISTORY (pt. 1), *supra* note 42, at 2373-74.

These views cannot be reconciled with those of Senator Wagner, who took the position (although not with total clarity) that the duty to bargain required employers at a minimum to make counterproposals. *See infra* notes 183-85 and accompanying text. Nor, by the way, are Walsh's views consistent with prevailing law. *See Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 219 n.2 (1964) (Stewart, J., concurring) (citing Walsh statement, then noting: "[b]ut too much law has been built upon a contrary assumption"); *Cox, supra* note 128, at 1403 (1958) ("[T]he law has crossed the threshold into the conference room and now looks over the negotiator's shoulder."). The tension between the Walsh and Wagner views is explored in Miller, *The Enigma of Section 8(5) of the Wagner Act*, 18 INDUS. & LAB. REL. REV. 166 (1965). Miller quotes Leon Keyserling to the effect that "[t]he statement of Senator Walsh . . . certainly did not express the intent of the Congress in Section 8(5)." *Id.* at 184.

150. Miller, *supra* note 149, at 184-85 (so arguing, in effect).

151. *See supra* notes 132-35 and accompanying text.

152. Distinguishing between "core" and "penumbral" values is a classic strategy for repressing conflict in statutory interpretation. *See, e.g.*, Hart, *Positivism and the Separation*

pretation of the NLRA was more or less predestined. In essential respects the structure of collective bargaining law follows logically from the basic principles Congress decreed in 1935 and 1947.

Much of post-Realist American legal thought has been devoted to a failed attempt to sustain the proposition that legal problems give rise to determinate solutions, or at least to a fairly well-defined region of correct outcomes. The main approaches are familiar: institutional competence theory, economic efficiency analysis, rationalist moralism, and Professor Finkin's approach, the most widespread in our legal culture, namely, ad hoc, unsystematic tinkering.<sup>153</sup> Though each of these approaches is more or less committed to the idea of a specialized "legal" method of analysis (as distinct from general political or ethical discourse) through which determinate solutions can be derived to legal problems, none of these theories has come close to convincingly demonstrating the existence of such a method.

There are many reasons why. Here are two that are particularly relevant to this debate. First, most significant statutory schemes, like most common law fields, embrace several *conflicting* social policies. This is particularly true of the Wagner Act. For fifty years, NLRA interpretation has had to choose between (or, in polite fiction, to "balance") well-known pairs of competing statutory values: worker concerted activity vs. industrial peace; promotion of collective bargaining vs. governmental restraint and individual employee rights to refrain; redistribution of bargaining power vs. private ordering; and so on (*see* K:292-93).

Second, even when a decisionmaker is self-consciously committed to a single principle or social policy, it usually turns out that there are multiple ways within the confines of conventional legal argument to implement that value in specific cases, or at least to believe oneself to be doing so, given the limitations of present

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*of Law and Morals*, 71 HARV. L. REV. 593, 607-08 (1958) (use of core/penumbra distinction to defend legal positivism against claims of inextricable linkage of law and morals). "Interstitiality" is another standard concept used to depreciate the problem of judicial legislation. *Cf.* *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting):

I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say "I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court."

Holmes's famous remark is cited and discussed in Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 392-94 (1973).

153. On the general contours of American post-Realism, see D. Kennedy, *The American Critical Legal Studies Movement In A Nutshell* 1-2 (pamphlet, June, 1984).

knowledge. It is little consolation that some outcomes are "closer to" and others "more remote from" core values of the statute or legal order (*see* F:45). The meaning and weight of such values is often sharply contested. Moreover, seemingly marginal interpretive differences *within* the "core" often have profound political significance over the long run.

This point is not exactly news. It is familiar among all who are heirs to the insights of Legal Realism.<sup>154</sup> The energy expended by American law academics in denying them is a symbol of the political potency of these insights. In any event, statutory interpretation necessarily involves politically significant choices between alternative outcomes, each of which may find justification in the legislative history of a major enactment such as the NLRA, even when analyzed within the framework of traditional legal argument.

Space considerations bar extended discussion of the indeterminacy of legislative history.<sup>155</sup> Happily, the point is amply demonstrated by well-known examples in labor law. There are simply too many crucial, split-vote labor law decisions, turning on competent but diametrically opposed interpretations of legislative history, to take seriously the claim that legislative history constrains political choice beyond a certain point. One thinks immediately, for instance, of the case of Justice Brennan, who has made a remarkable career as a labor judge by "shaping" the materials of legislative history to accomplish his goals.<sup>156</sup>

In light of the weak constraints that legislative history imposes

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154. *See generally* Tushnet, *Post-Realist Legal Scholarship*, 15 J. Soc'y PUB. TCHRS. L. 20 (1979).

155. *See generally* Kennedy, *supra* note 152; Tushnet, *supra* note 154; Tushnet, *Book Review*, 68 CORNELL L. REV. 281, 288-89 (1982) (reviewing H. COLLINS, *MARXISM & LAW* (1982)); Unger, *supra* note 18; J. Boyle, *Critical Legal Studies: A Young Person's Guide* (Mar. 1984) (unpublished paper distributed at the Eighth Ann. Conf. on Critical Legal Studies, Washington, D.C.).

156. In each case in the following sample Justice Brennan wrote for the Court, relying heavily on controverted renderings of congressional intent and legislative history. Brennan's interpretations have sometimes provoked bitter response from other Justices. *See e.g.*, *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (5-2 vote, with two Justices likely to be opposed to Brennan view not participating) ("race conscious" collectively bargained affirmative action plan consistent with Civil Rights Act). *But cf. id.* at 282 (Rehnquist, J., dissenting) ("[B]y a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, 'uncontradicted' legislative history, and uniform precedent."). *See also* *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970) (Taft-Hartley Act partially repealed Norris-LaGuardia Act sub silentio) (Court overrules its prior decision in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962) on essentially same facts). *But cf. Boys Markets*, 398 U.S. at 256 (Black, J., dissenting) ("Nothing at all has changed . . . except the membership of the Court and the personal views of one Justice."). *See*

on many politically significant interpretive decisions, most contemporary observers have come to understand arguments about legislative history—like arguments about precedent and institutional competence—to be specialized, stereotyped rhetorical maneuvers that lawyers habitually make, but *not* a distinct mode of “reasoning”

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*also* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) (5-4 vote) (fines of union members for strikebreaking; both sides rely on legislative history); National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967) (5-4 vote) (work-preservation agreements; both sides rely on legislative history); NLRB v. Fruit & Vegetable Packers, 377 U.S. 58 (1964) (6-2 vote, but one of Brennan's majority agreed with dissent on interpretation of legislative history) (secondary picketing); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (5-3 majority for Brennan view with sixth Justice agreeing with Brennan's history but dissenting from remedy) (by exceptionally creative rendering of legislative history, Court avoids ruling on constitutionality of political expenditures from compelled union dues). *But cf. id.* at 784 (Black, J., dissenting) (“[T]he very legislative history relied on by the Court appears to me to prove that its interpretation of [the Railway Labor Act] is without justification.”); *id.* at 799-800 (Frankfurter, J., dissenting) (citing dictum of Justice Cardozo that principle of avoidance of constitutional adjudication should “not be pressed to the point of disingenuous evasion”); Justices Frankfurter and Harlan opine that “[n]o consideration relevant to construction sustains” Brennan's reading of Railway Labor Act).

Sometimes Brennan has found himself on the losing side of the legislative history gambit. For two recent 5-4 decisions in which a dissenting Justice Brennan castigated the majority for, among other things, misreading legislative history, see NLRB v. Yeshiva Univ., 444 U.S. 672, 705 (1980) (Brennan, J., dissenting) (scoring Court's “overbroad and unwarranted” interpretation of managerial exclusion to NLRA coverage); NLRB v. The Catholic Bishop of Chicago, 440 U.S. 490, 511 (1979) (Brennan, J., dissenting) (“The interpretation of the National Labor Relations Act announced by the Court today is not ‘fairly possible.’”); *id.* at 518 (“[I]t is irresponsible [for the Court] to avoid [the constitutional question] by a cavalier exercise in statutory interpretation which succeeds in defying congressional intent.”). *Yeshiva* was itself based on another 5-4 decision turning on conflicting readings of legislative intent, NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (“managerial employees” are not employees within the meaning of the NLRA). *See also* NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984) (5-4 vote) (rejection of collective bargaining agreements under Bankruptcy Code); *id.* at 1204-10 (dissenting in part, Justice Brennan criticizes majority for failing properly to accommodate congressional purposes in Bankruptcy Code and NLRA).

This is not the place to catalog all the 5-4 and 6-3 labor decisions that turn on disputed renderings of congressional “intent.” There are many, including important recent cases. United Steelworkers v. Sadlowski, 457 U.S. 102 (1982) (scope of Landrum-Griffin Title I rights of union members) presents a classic 5-4 split in which the two sides drew opposed conclusions from the very same legislative materials. One should, of course, add Firefighters Local 1784 v. Stotts, 104 S. Ct. 2576 (1984) (upholding seniority based layoffs in preference to Civil Rights Act affirmative action relief aimed at racial balance). Without any need to do so in deciding the case, the Court reached out to give Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), a very restrictive interpretation. The Court split 6-3 on the result, with Brennan joining Justice Blackmun's stinging criticisms of, among other things, the Court's misreading of legislative history. *Id.* at 2609-10 (Blackmun, J., dissenting) (Congress endorsed race conscious relief under Title VII). Justice Stevens joined the Court's judgment, but agreed with the dissent that the “case involves no issue under Title VII . . . .” *Id.* at 2594 (Stevens, J., concurring).



in a determinate manner from general principle to specific result. In a word, most sophisticated modern lawyers understand, though they do not always say, that reasoning from legislative history ultimately rests on political choices. The importance of all this is that over the long run, across many discrete contexts, isolated decisions of statutory interpretation may accumulate so as to provide significant momentum to some, but not other, political values.

Professor Finkin's belief that the NLRA's legislative history provided relatively sure guidance on the particular issues that arose in the early years (let alone later on) is wholly mistaken. In fact, there were numerous important issues as to which the legislative history was at best ambiguous. In other cases the Board and courts disregarded fairly potent legislative signals in order to reach results that Finkin presumably finds unobjectionable. Here are some examples of subjects upon which the legislative history left considerable, politically significant leeway; others are taken up below in the discussion of the lead cases.

1. *Company Unions*.—Clearly the company unions posed a major obstacle to genuine collective bargaining, and clearly Congress intended to remove that obstacle (K:304-05). On this much everyone agrees. Turning to specifics, however, "textbook" legislative history is not always so illuminating. To take an example, the Supreme Court unanimously affirmed an NLRB policy denying company unions a place on the ballot in representation elections.<sup>157</sup> This seems sound, although surely for reasons of social policy, not clarity of congressional intent. The best the Court could do on that score was to cite from a House committee report<sup>158</sup> some vague language condemning company unions. Finkin eagerly cites the experience of the pre-1935 labor agencies as supplying a "relevant guide to judicial interpretation of the Act" (F:46-47). However, both the National Labor Board and the "old" NLRB *allowed* company unions to appear on the ballot.<sup>159</sup>

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157. *Falk Corp.*, 6 N.L.R.B. 654 (1938), *enforced as modified in relevant part*, 102 F.2d 383 (7th Cir. 1939), *modification rev'd*, 308 U.S. 453 (1940). The Board's policy applied when an unaffiliated union had been found to be "dominated" in a collateral § 8(2) proceeding. (NLRA § 8(2) forbids employers to "dominate or interfere with the formation or administration of" a labor organization. 29 U.S.C. § 158(a)(2) (1982).) Different rules applied when no § 8(2) charge was filed or when the "domination" consisted of employer assistance to a union affiliated with a national or international federation.

158. 308 U.S. at 462 n.1.

159. See I. BERNSTEIN, *supra* note 33, at 61, 85 (describing development of "common law" by (old) NLRB). A leading case allowing a "dominated" union to appear on the ballot was *Kohler Co.*, 1 N.L.R.B. (old) 72 (1934). The old Board's refusal to deny

While these issues may have an antiquated ring, as it happens this very question of congressional intent regarding company unions and "dominated" labor organizations has recently re-emerged as "hot" topic in light of the current interest in employee participation plans. A recent, careful review of the legislative history concluded that it is susceptible to two opposing conclusions on the question of whether Congress intended to allow employee participation structures outside normal collective bargaining channels.<sup>160</sup> Although the author found that one of the opposed interpretations is "probably more reasonable,"<sup>161</sup> it is clear from what she wrote that the questions of contemporary importance were simply not resolved or even for the most part attended to by Congress. Sockell's study provides a good example of the vague and at times contradictory character of the Wagner Act legislative history on even the most basic issues.<sup>162</sup>

2. *Representation and Race Discrimination.*—In 1944, the Court ruled in a landmark case that a majority union's privilege of exclusive representation carries with it the correlative duty of fair representation toward minorities within the bargaining unit, in that instance, black workers denied membership in the union.<sup>163</sup> This was a Railway Labor Act (RLA)<sup>164</sup> case, but the fair representation principle was soon carried over to the NLRA.<sup>165</sup>

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ballot access was a judgment of principle, not merely a reflection of the absence in the enabling legislation of an equivalent provision to NLRA § 8(2). The decision was criticized in Note, *The Decisions of the National Labor Relations Board*, 48 HARV. L. REV. 630, 647-48 (1935). *Kohler* was specifically discussed in the 1935 hearings on the Wagner bill, S. 1958. See *Hearings on S. 1958 Before The Senate Comm. on Education & Labor*, 74th Cong. 1st Sess. 166-67 (1935), reprinted in 1 LEGISLATIVE HISTORY (pt. 1), *supra* note 42, at 2250-51 (testimony of James A. Emery, General Counsel, Nat'l Ass'n of Mfrs., referring to electoral defeat of "outside" union by the company union). The House Report cited in *Falk* is a general condemnation of company unions, but characteristically says nothing about the precise issue at hand. Moreover, even this relatively straightforward area involves a conflict between two "core" statutory values—"free choice" vs. promoting genuine collective bargaining. See, e.g., *NLRB v. Link-Belt Co.*, 311 U.S. 584 (1941) (discussed at K:305 n. 135), in which the Supreme Court upheld a "disestablishment" remedy over a claim that the "dominated union" was in fact a bona fide labor organization despite that the employer preferred it to a CIO affiliate.

160. Sockell, *The Legality of Employee-Participation Programs in Unionized Firms*, 37 INDUS. LAB. REL. REV. 541, 553 (1984).

161. *Id.*

162. See, e.g., *id.* at 549-53.

163. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

164. 45 U.S.C. §§ 151-188 (1982).

165. See, e.g., *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). That the fair representation principle applies to the NLRA was already implicit in *Wallace Corp. v. NLRB*, 323 U.S. 248, 255-56 (1944), decided the same day as *Steele*.

Does the legislative history of either the RLA or the NLRA inspire confidence that unions, many of which followed Jim Crow policies, were intended to be under a duty to fairly represent black employees? In an opinion said to turn on the intent of Congress, the *Steele* Court failed to cite a single sentence of the legislative history of the Railway Labor Act. The only legislative history reference is to a House and a Senate Report on the Wagner bill, which purportedly indicates that Congress in 1935 understood the principle of majority rule in the 1934 railway statute to require the employer to provide equal working conditions to non-union members of the bargaining unit.<sup>166</sup> The Court did not mention the embarrassing fact that managers of the Wagner bills, both in 1934 and 1935, failed to include a provision barring unions from discrimination on the basis of race.<sup>167</sup> Civil rights organizations openly campaigned for inclusion of a non-discrimination provision, and at one point in the 1934 process Senator Wagner was inclined to go along. But, under pressure from the AFL, he proposed drafts that did not include such provisions for fear that he could not otherwise obtain passage of a bill.<sup>168</sup>

The *Steele* Court's holding that Congress intended a duty of fair representation, even one that, as in *Steele*, still allowed unions to continue their whites-only membership policy,<sup>169</sup> is questionable. To be sure, we can sweep this background under the rug with the polite fiction that Congress could not have intended an unconstitutional result and therefore the labor statutes must be interpreted in conformity with equal protection norms. But this only reinforces my point that statutory interpretations are not pre-ordained by the legislative history, but depend crucially on the philosophical commitments and moral sensibilities of the interpreting court. While *Steele* represented enormous progress for civil rights, the Court's

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166. See *Steele*, 323 U.S. at 202 n.3 (citing H. REP. NO. 1147, 74th Cong., 1st Sess. 20-22 (1935); S. REP. NO. 573, 74th Cong., 1st Sess. 13 (1935)). The cited references do not speak either of a general duty of fair representation or of the problem of race discrimination.

167. See I H. HILL, BLACK LABOR & THE AMERICAN LEGAL SYSTEM 100-06 (1977); see also I. BERNSTEIN, TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933-1941, at 189-90 (1970).

168. H. HILL, *supra* note 167, at 104-06. As regards the Railway Labor Act, see *Oliphant v. Brotherhood of Locomotive Firemen & Enginemen*, 156 F. Supp. 89 (N.D. Ohio), *cert. denied*, 355 U.S. 893 (1957), *aff'd*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959), *reh'g denied*, 359 U.S. 962 (1959): "Apparently the Act itself would not have been acceptable to the Congress if Negro membership in the [bargaining] agent had been required." 156 F. Supp. at 93.

169. See *Steele*, 323 U.S. at 204.

timidity stopped it from striking an even deeper and more lasting blow for racial justice by ordering non-discriminatory admission to union membership, a result that would have been no less consistent with the intent of Congress than the other remedies the Court created in *Steele*.<sup>170</sup>

3. *Foremen*.—Did Congress intend to include foremen and low-level supervisors under the coverage of the Act? This was a highly visible and politicized issue, particularly during World War II, when foremen joined unions in large numbers.<sup>171</sup> The Board ruled initially that foremen are statutory employees with organizational rights,<sup>172</sup> then reversed itself under political pressure,<sup>173</sup> then decided that foremen are employees for some but not other purposes,<sup>174</sup> then reversed itself again,<sup>175</sup> once more extending organizational rights to foremen. This last decision was upheld by a 5-4 vote in the Supreme Court.<sup>176</sup> The majority found nothing in the Act signaling a congressional intention to deny NLRA rights to foremen. Justice Jackson thought the meaning of the relevant statutory provisions “plain”<sup>177</sup> and lacking in any ambiguity requiring clarificatory resort to legislative history.<sup>178</sup> Justice Douglas wrote for four dissenters that Congress’s failure to speak to the issue implied not inclusion, but an “absence of purpose to bring [foremen] under the Act.”<sup>179</sup> I leave it to Professor Finkin to explain what the “correct” answer dictated by the legislative history was. Congress soon overruled the Court, “clarifying” its intention to exclude supervisors.<sup>180</sup>

### E. *Legislative History and the Duty to Bargain*

From these examples of problems in NLRA legislative history, we now return to our initial question: Was the legislative history of the NLRA ambiguous on the question of contractualism, in the

170. I discuss this aspect of *Steele* at length in Klare, *Quest*, *supra* note 24, at 185-98.

171. See generally Seitz, *supra* note 14; D. BRODY, *supra* note \*\*\*, at 180-81.

172. *Godchaux Sugar, Inc.*, 44 N.L.R.B. 874 (1942); *Union Collieries Coal Co.*, 41 N.L.R.B. 961 (1942).

173. *Maryland Drydock Co.*, 49 N.L.R.B. 733 (1943).

174. *Soss Mfg. Co. & Republic Steel Corp.*, 56 N.L.R.B. 348 (1944).

175. *Packard Motor Car Co.*, 61 N.L.R.B. 3 (1945).

176. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

177. *Id.* at 493.

178. *Id.* at 492.

179. *Id.* at 498.

180. See NLRA § 2(3), (11), 29 U.S.C. § 152(3), (11) (1982) (inserted by ch. 120, title I, § 101, 61 Stat. 137 (1947)) (defining “supervisor” and excluding supervisors from the definition of employee).

sense of governmental intrusion in the employment relationship? Senator Wagner and those close to him repeatedly reaffirmed their faith in freedom of contract and saw the bill as making only minor, prophylactic incursions on free bargaining. Specifically, the bill's sponsors repeatedly stated for the official record that there was no intention that the section 8(5) duty to bargain<sup>181</sup> would or should interfere with freedom of contract.<sup>182</sup> Thus far, Finkin and I are (and always were) in agreement.

Many employer spokespersons nonetheless charged that the NLRA, specifically section 8(5), would lead to government regulation of the substantive terms of collective contracts. Were they perverse or was there a basis for their fears? For one thing, as I argued above, some employers saw *any* invasion of free contract, even "obvious" provisions such as the prohibition on retaliatory discharge, as undermining their way of life. But, leaving this aside, did the legislative history of section 8(5) itself, when read from the employers' perspective, justify concerns about governmental incursion upon freedom of contract?

The employers' fear was not an abstract one, nor was it concerned primarily with Senator Wagner's motives. No one suggested that Senator Wagner had deliberately set out to inaugurate governmental control over wages and working conditions. The employers'

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181. NLRA § 8(5) (current version at 29 U.S.C. § 158(a)(5) (1982)) (unfair labor practice for employers to refuse to bargain collectively with majority representative). Senator Wagner's ill-fated 1934 bill contained a duty to bargain, *see* S. 2926, 73d. Cong., 2d Sess. § 5(2) (1934), *reprinted in* 1 LEGISLATIVE HISTORY (pt. 1), *supra* note 42, at 3, but his initial draft in 1935 did not, *see* S. 1958, 74th Cong., 1st Sess. § 8 (1935), *reprinted in* 1 LEGISLATIVE HISTORY (pt. 2), *supra* note 42, at 1299-1300. Professor Gross notes, "Senator Wagner was particularly concerned that an explicit good faith bargaining requirement in S. 1958 would intensify and strengthen attacks on the bill by making it more vulnerable to charges that the law would require an employer to reach an agreement with a union . . . , that is, a kind of compulsory arbitration." J. GROSS, *supra* note 33, at 137 (citation omitted). The (old) NLRB, with union support, urged inclusion of a duty to bargain. *See id.* at 136-37; 1 LEGISLATIVE HISTORY (pt. 2), *supra* note 42, at 1331 (draft of § 8(5) submitted by Francis Biddle, (old) NLRB Chairman). It was inserted by the Senate Education and Labor Committee, *see* J. GROSS, *supra* note 33, at 139-40; S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935), *reprinted in* 2 LEGISLATIVE HISTORY (pt. 1), *supra* note 42, at 2312, and adopted on May 16, 1935, 79 CONG. REC. 7650, *reprinted in* 2 LEGISLATIVE HISTORY (pt. 1), *supra* note 42, at 2348.

182. For key legislative references *see* S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935) [hereinafter cited as SENATE REPORT], *reprinted in* 2 LEGISLATIVE HISTORY (pt. 1), *supra* note 42, at 2312; 79 CONG. REC. 7571 (May 15, 1935) (remarks of Sen. Wagner), *reprinted in* 2 LEGISLATIVE HISTORY (pt. 1), *supra* note 42, at 2335-36; 79 CONG. REC. 7659-60 (May 16, 1935) (remarks of Senator Walsh), *reprinted in* 2 LEGISLATIVE HISTORY (pt. 1), *supra* note 42, at 2373-74. SENATE REPORT, *supra*, was actually prepared by Senator Wagner and Leon Keyserling and is generally deemed a particularly authoritative source on statutory intent. *See* Miller, *supra* note 149, at 180-81.

fear was a much more particularized concern about how section 8(5) would work out in practice. Let me give a specific example of the type of argument heard in 1935.<sup>183</sup> Although the exact contours of section 8(5) were, of course, unknown, it was certainly plausible to assume that section 8(5) might at least require the making of counterproposals. Here, I mean that this was “plausible” *within* the traditional confines of the lawyer’s understanding of the legislative history. An employer who listened to the union, but made no counteroffer, could easily be said to be avoiding good faith bargaining, indeed not to be bargaining at all. In fact, the old Board had so ruled in the celebrated *Houde Engineering* case.<sup>184</sup> Now, once the employer has made a legally-required counterproposal, the union is free to accept it. Since the counteroffer surely could not then be withdrawn with impunity, so the argument went, the employer is effectively compelled to make a substantive agreement with the union. Senator Wagner said *in general terms* that the duty to bargain “does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him,”<sup>185</sup> but his general statements did not negate, and his specific references to *Houde* supported, the possibility that counterproposals would be required, creating in turn very real *practical* pressures toward the making of unwanted agreements.

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183. This example appeared in many places. See, e.g., LIBERTY LEAGUE MEMORANDUM, *supra* note 134, at 2286. It was particularly forcefully argued in W. SPENCER, *supra* note 135, at 23-25. Though Spencer of course knew that § 8(5) “does not . . . openly avow compulsory arbitration,” *id.* at 72, he felt that in *practical operation* the statute would compel employers to agree to unwanted contract terms to avoid Board condemnation, *id.* at 24. Interestingly, Spencer cites the precise document upon which Finkin relies for the opposite view, namely SENATE REPORT, *supra* note 182, at 12, to argue that it is “sheer sophistry” to say that § 8(5) does *not* amount to “compulsory arbitration.” W. SPENCER, *supra* note 135, at 24 n.30. The fear that § 8(5) would create practical pressure on employers to agree to unwanted terms persisted for years. Indeed, some writers insisted that such fears had come true. See, e.g., Dickinson, *supra* note 135, at 694-96 (NLRA seen as subverting freedom of contract; legal constraints respecting content of collective bargaining agreements deemed an accomplished fact).

184. *Houde Eng'g Corp.*, 1 N.L.R.B. (old) 35 (1934) (good faith bargaining, impliedly required under NIRA § 7a, obligates employer “to match [union’s] proposals, if unacceptable, with counter-proposals”). *Houde* was cited approvingly many times by supporters of the Wagner bill, as Finkin obligingly notes (F:47 n.94). Senator Wagner himself quoted this language saying it “clearly set[s] forth” the meaning of the duty to bargain, 79 CONG. REC. 7571 (1935), reprinted in 2 LEGISLATIVE HISTORY (pt. 1), *supra* note 42, at 2336. The conventional wisdom is that the legislative history “incorporates” *Houde*, but for a cogent argument that we cannot assume this, see Smith, *The Evolution of the “Duty to Bargain” Concept in American Law*, 39 MICH. L. REV. 1065, 1084-89 (1941).

185. 79 CONG. REC. 7571 (1935), reprinted at 2 LEGISLATIVE HISTORY (pt. 1), *supra* note 42, at 2335-36.

The counterproposal issue is but one example of how section 8(5) could reasonably have been seen to create legal pressure on employers to "give in" to the union. To take another, why should not employers have assumed that the duty to bargain would evolve "practically" toward obligating employers to offer "reasonable" terms to the union, despite Senator Wagner's assurances to the contrary? In the same passage Senator Wagner quoted, *Houde* held that the duty to bargain required employers "to make every reasonable effort to reach an agreement."<sup>186</sup> Given the patent inconsistency and basically unilluminating character of the legislative history of section 8(5), employers could plausibly have feared that, in searching for "bad faith," the NLRB might in some cases explicitly or implicitly review the reasonableness of the employer's offers. If so, this would exert an indirect but potent pressure on employers to extend better offers to unions than they would otherwise prefer to do.

This is not the place to sort out the "correct" interpretation of section 8(5). It is ludicrous of Professor Finkin to suggest that my efforts in *Judicial Deradicalization* were directed toward constructing a traditional, legal argument for the view that the Board *should* engage in substantive review. I merely asserted that business fears were grounded in the fundamental ambiguity of the *Houde* slogan ("make every reasonable effort to reach an agreement"), which was incorporated in the (lawyer's) legislative history of the Act.

It is not news to the labor bar that scholars and practitioners alike have wrestled with the ambiguity of the good faith bargaining duty since 1935. Professor Cox's leading article on the subject<sup>187</sup> tried to strike the balance anew after more than two decades, yet he conceded that his own careful effort to say what "good faith bargaining" requires "borders on paradox" and is arguably "too self-contradictory to survive."<sup>188</sup> Over the years, and particularly in the pre-Taft-Hartley period, Board decisions have been bitterly attacked for going too far in the direction of substantive regulation of bargaining terms. By the same token, the Board's countervailing tendency to resist even implicit scrutiny of the substance of employer offers in section 8(a)(5) cases has recently led many labor supporters to conclude that the well-counseled employer can evade genuine collective bargaining by engaging in "surface" negotiations. The NLRB's

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186. *Houde*, 1 N.L.R.B. (old) 35 (1934).

187. Cox, *supra*, note 128.

188. *Id.* at 1416. See *supra* note 128 for quotation of Professor Cox's conclusion. Cox discusses the ambiguity in the legislative history at Cox, *id.* at 1404-09.

inability or unwillingness to remedy the surface bargaining problem has emerged as one of the central and lasting weaknesses of the statutory scheme,<sup>189</sup> one at least in part grounded in the contractarian emphasis that has prevailed over the years in NLRA interpretation.

This profound contemporary dilemma is at least in part rooted in the ambiguities of the initial legislative scheme to which I pointed. Professor Finkin's predestinationist proclivities prevent him from seeing this. He is therefore necessarily myopic on the depth of the problem and the scope of the reforms necessary to tackle it. My article sought an opening to that broader perspective by reminding us of the fluidity and discretion in statutory interpretation.

#### F. *Contested Cases*

The contrast between our approaches to the issue contractualism is highlighted by focusing on certain leading cases. Professor Finkin's narrow perspective on the cases is essentially concerned with how counsel's arguments and the "holdings" in each case add to or detract from the rational implementation of congressional intent. Any thought that the cases might involve implicit political choices, and that therefore their underlying philosophical assumptions are worth studying, is foreign to his mentality. Most of what he has to say about my reading of the cases is therefore wholly unresponsive to the effort in which I was engaged. His criticisms are directed to a different discourse. Moreover, as I will show, even in technical terms his criticisms are misplaced or erroneous.

Finkin centers on three cases developing the contractarian theme. The first point of my discussion of these cases in *Judicial Deradicalization* was that the *particular* results were not legally or politically foreordained, as shown, e.g., by the fact that the Board sometimes disagreed with the Court. The second was that each case was wrongly decided in relevant part, and that the cases as a group (along with the others I discussed) left an intellectual legacy that has disserved labor's interests. And the third was that the philosophical underpinnings of these cases were slowly woven into an emerging judicial ideology that was and is, in important respects, supportive of hierarchy rather than democracy in work.

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189. See *Oversight Hearings*, *supra* note 6, at 71, 174, 106, 6 (testimony, respectively, of William Bywater, Bernard Jolles, James Kane, Richard Trumka) (prominent union leaders and attorneys identify lack of effective remedies against surface bargaining as a central failure of NLRA).



By contrast, Professor Finkin appears to argue that the results in question were legally inevitable, i.e., no real alternatives were available within conventional legal analysis. Second, because Finkin's perspective is seemingly informed by no values external to the generalities of the conventional, textbook version of legislative history, he ignores or even justifies certain baneful consequences of these decisions. Third, he generally derides and belittles any alternative perspective that might be brought to bear on the problems to which these and similar cases gave rise.

The form of Professor Finkin's attack makes it difficult to approach the cases on the level of social policy. His primary tack is to avoid such discussion by focusing on a series of collateral research and interpretive issues raised by the cases in question. Accordingly, I will not here rehearse my arguments about the ultimate significance of the three cases, but rather respond on the detailed level Finkin has chosen for debate. The discussion is nonetheless worthwhile in the sense that it permits us to identify the types of information and the perspectives that Professor Finkin's doctrinal traditionalism has difficulty acknowledging and accommodating.

1. *Jones & Laughlin*.<sup>190</sup>—Finkin treats this great decision as though it were an obscure nineteenth-century subterranean water-flow case of the type used to teach first-year students the difference between holding and dictum. One would never know from his account<sup>191</sup> that *Jones & Laughlin* is one of the dozen most momentous cases in American legal history. Besides being uninformed and pe-

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190. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The primary decision in this case was, of course, to sustain the Wagner Act as a constitutional exercise of Congress's commerce power. As such, it stands as a great victory for labor and collective bargaining. For purposes of this discussion, however, Finkin and I are concerned only with certain less well-known aspects of the case, namely its treatment of due process challenges to the NLRA and a certain dictum about the nature of the statutory scheme.

191. Professor Finkin writes: "As the government was at pains to point out in defending the Act, the 'entire theory of collective bargaining' was not before the Court" (F:34, citation omitted). Finkin is technically correct that only the non-discrimination provisions of the Act were before the Court. (I never said anything to the contrary.) The government's position was somewhat self-serving, however, since the NLRB pursued a deliberate policy of holding back on duty to bargain cases so as to narrow the focus of the Act's initial constitutional test. See *infra* note 195 and accompanying text. It is therefore hardly the telling point Professor Finkin deems it to be that the employer concentrated its arguments on the non-discrimination provisions of the Act. Despite this "narrow" focus, the employer still argued that "all freedom of contract . . . is gone" if the non-discrimination provisions were constitutional. (F:35 n.48 (citing Oral Argument on Behalf of Jones & Laughlin Steel Corp., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937))). But leaving this aside, would Professor Finkin seriously have us believe that the *Jones & Laughlin* case had no political or symbolic importance? It is school-book

destrian, his reading of *Jones & Laughlin* repeatedly violates his own admonition that we carefully heed what the lawyers involved thought of their cases (F:90-91).<sup>192</sup>

Finkin's first point is that *Jones & Laughlin* did not involve any issue of "contractualism" (F:34, 35, 37). This is simply wrong, as his own evidence shows. NLRB reinstatement of union organizers, such as was ordered and upheld in the case, forces an unwanted contract of employment on the employer. The employer's attorney so stated at the oral argument, which Finkin quotes (F:35 n.48). Company counsel argued that, if the Board can order reinstatement of discharged union activists, "all freedom of contract, all right to manage your own business, is gone."<sup>193</sup> Likewise, NLRB attorneys conceded that the provision of the statute at issue in *Jones & Laughlin* interfered with the employer's freedom of contract.<sup>194</sup> Indeed, the

history that this was *the* fundamental case to test the constitutionality of the government's commitment to collective bargaining as the foundation of federal labor policy. Does Finkin think this wholly irrelevant to the concerns of the legal historian?

192. It bears mention that the brilliant and dedicated NLRB staff who steered *Jones & Laughlin* to victory did not labor under Professor Finkin's illusion that cases are decided solely on the basis of rational extrapolation from precedent and doctrine. To be sure, the Board's team included superb legal craftsmen such as General Counsel Charles Fahy, Thomas Emerson, and Philip Levy of the Board, and Charles Wyzanski in the Solicitor General's office. See generally P. IRONS, *supra* note 138, at 280-89 (1982). But no one seriously doubts that the primary explanation for the Court's turn in *Jones & Laughlin* was "a tide of forces for change which the Court could no longer resist." *Id.* at 289. As Wyzanski put it: "[T]he cases were won not by Mr. Wyzanski but either by Mr. Roosevelt or, if you prefer it, by Mr. Zeitgeist." *Id.* (quoting interview with Nathan Witt, Nov. 2, 1979). Cf. 2 NLRB ANN. REP. 47 (1937) (Court decision in *Jones & Laughlin* showed "complete disregard for finely spun legal distinctions reaffirm[ing] the appropriateness of the 'economic approach'" in brief).

Moreover, Board personnel were acutely sensitive to the fact that the political climate crucially affects the success of novel statutes. Therefore, in the early years the Board pursued a two-pronged strategy: a conventional legal advocacy approach and an "outside" strategy to stir up the political waters and thereby generate favorable public support. Pursuant to the outside strategy, Board personnel played an instrumental role in bringing about the electrifying La Follette Committee Hearings and in ensuring their success. To that end, some Board staff went so far as to approach and perhaps even bribe janitors at the offices of various labor espionage firms to retrieve scrapped records of anti-union activity. The records were laboriously pieced together by Board staff in Washington to obtain evidence for Senator La Follette's hearings. This fascinating detail of Wagner Act history is recounted in J. GROSS, *supra* note 33, at 211-23, under the title "An Alternative Route to Constitutionality."

193. Oral Argument on Behalf of Jones & Laughlin Steel Corp., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), cited in F:35 n.48. Surprisingly, Professor Finkin cites counsel's claim that if § 8(3) is enforceable "all freedom of contract . . . is gone" for the proposition that the employer did *not* argue that the statute broadly attacked private ordering.

194. See Petition for a Writ of Certiorari at 23, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938):

NLRB deliberately held back on section 8(5) duty to bargain cases before 1937, attempting to insure that the inevitable Supreme Court commerce power test would arise in a discriminatory discharge case. This was done on the correct assumption that a duty to bargain case would raise even riskier free contract issues.<sup>195</sup>

Because I was most interested in its latent philosophy rather than its famous commerce power holding, I focused on an important dictum of Chief Justice Hughes to the effect that the Act "does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.'"<sup>196</sup> Insofar as the dictum suggested that employers might continue to bargain directly with individual employees after a union had attained majority status, it was firmly repudiated seven years later.<sup>197</sup> I attached significance to the dictum as evidence of the contractualist, anti-interventionist attitude of the labor jurisprudence that would soon emerge in the Court's cases. It evidences the attitude, reflected in the other lead cases under discussion, that the NLRA should be interpreted so as to make the least possible

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The [*Jones & Laughlin*] Court upheld an order of the Board that discharged employees be reinstated with back pay, on the ground that it was a proper sanction for the enforcement of a valid regulation. 301 U.S. at 48. This order interfered with the freedom of contract which the employer would have enjoyed apart from the statute.

This point was reiterated in similar terms in the Board's main brief, see Brief for Petitioner at 44. Of course, the Board did not concede that such intrusions on free contract were constitutionally infirm.

The Board's position in *Jones & Laughlin* regarding freedom of contract was contained in its brief for the companion case of *Associated Press v. NLRB*, 301 U.S. 103 (1937). See Brief for National Labor Relations Board at 18, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (referring Court to brief in *Associated Press* for arguments regarding 5th amendment due process). In its brief in *Associated Press*, the Board acknowledged that NLRA § 8(3) infringes the employer's liberty, but of course argued that such interference is constitutional. See, e.g., Brief for the National Labor Relations Board at 21-22, *Associated Press v. NLRB*, 301 U.S. 103 (1937) ("Thus the present Act merely safeguards the recognized and essential liberty of employees by a limited restriction on the employer's power of discharge. Similar curtailments of employer's [*sic*] liberty have repeatedly been sustained by this Court."); see also *id.* at 93-94.

195. J. GROSS, *supra* note 33, at 187; P. IRONS, *supra* note 138, at 282.

196. *Jones & Laughlin*, 301 U.S. at 45 (quoting from Court's own two-week-old decision in *Virginian Ry. v. System Fed'n No. 40, Ry. Employees*, 300 U.S. 515, 548 n.6 (1934) (assessing constitutionality of Railway Labor Act), specifically from a footnote reproducing a portion of the Government's brief).

Professor Finkin accuses me of ignoring the railway cases (F:35, 47). Actually I said that Court "lean[ed] heavily" on their authority in *Jones & Laughlin* (K:299 n.110).

197. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (majority rule precludes individual bargaining in derogation of collective contract).

incursion on the preexisting legal relationship of employer and employee, consistent with the statutory scheme.

For this purpose it is irrelevant that the quotation misstates the law, that it is dictum, and even that the words are derived from a misguided government brief.<sup>198</sup> What matters is that the Court adopted the formulation, thereby straining to reassure employers on the free contract point.<sup>199</sup> "Straining" is an appropriate word because regardless of what the government brief said, better informed observers knew that the dictum was not consistent with the legislative history. If anything is clear in the legislative record, it is the importance Congress attached, despite fierce opposition, to the concept of majority rule. The dictum is in plain conflict with that principle.<sup>200</sup> Moreover, it shows the Court making an unfortunate choice to emphasize one legislative value (free contract) at the expense of others (e.g., majority rule, the promotion of collective bargaining) at the very outset of NLRA interpretation.

Professor Finkin's fixation on the narrow holding blinds him to the significance of the dictum. Its importance was well understood at the time. NLRB lawyers regretted the concession in the railroad brief.<sup>201</sup> Distinguished academics like Calvert Magruder immediately called attention to the dictum, fearing that employers would exploit the Court's words to resist genuine collective bargaining.<sup>202</sup> And other well-informed and insightful observers similarly criticized the Court's formulation.<sup>203</sup> The *Jones & Laughlin* episode is an early

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198. Though quick to accuse me of neglecting counsel's perspective on the cases (F:90-91, 91 n.293), Finkin himself neglects to inform his readers that there was a struggle within the government over whether this watered-down formulation of the duty to bargain should be put before the Court. As Irons notes, Fahy "succeeded in excising this concession from the Wagner Act briefs, but its inclusion in the railroad case brief returned to haunt the Board." P. IRONS, *supra* note 138, at 282.

199. Other scholars have concurred on this point. See, e.g., J. ATLESON, *supra* note 13, at 113: "The language used [in *Jones & Laughlin*] is defensive in tone and indicates, perhaps, the primary audience to which it is addressed. Do not fear, it seems to say, private ordering is still the order of the day except insofar as narrow incursions are required by the NLRA."

200. See Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556, 568-69 (1945) (citing the *Jones & Laughlin* dictum) (constitutionality of NLRA sustained "by ignoring the clear intent of Congress respecting the meaning of the majority rule provision").

201. P. IRONS, *supra* note 138, at 282-83.

202. Magruder, *A Half-Century of Legal Influence Upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071, 1105 (1937).

203. See, e.g., Watt, *The New Deal Court, Organized Labor and the Taft-Hartley Act* (pt. 1), 7 LAW. GUILD REV. 193, 202-04 (1947); Weyand, *supra* note 200. Pro-business commentators later deplored the Court's retreat from the dictum. See, e.g., Dickinson, *supra* note 135, at 694-96.

symbol of the Court's reluctance over the years to probe the outer boundaries of section 8(5), which is in turn connected to the law's impotence respecting the cancerous problem of union avoidance through surface bargaining. Yet because Chief Justice Hughes's unfortunate words are technically classifiable as dictum, Finkin closes his eyes to the baneful significance of the incident.

2. *Sands Manufacturing*.<sup>204</sup>—This case is often cited for the fundamental proposition that a strike in violation of a contractual no-strike clause is unprotected, so that the employer may discharge the strikers.<sup>205</sup> In fact, the contract in *Sands* did not contain an express waiver of the right to strike.

The situation in *Sands* is hard to grasp because it runs counter to today's basic assumptions. A dispute arose during the contract. The union claimed that it was an honest dispute over contract interpretation, as the Board later agreed. The employer claimed the union actually sought to modify the contract, as the Court eventually agreed. Today we have a straightforward solution to such difficulties. We look to the grievance-arbitration process to resolve interpretation disputes, and the parties are forbidden to use economic weapons either to effect midterm contract modifications or to enforce a particular interpretation.<sup>206</sup> But the contract in *Sands* contained no binding arbitration procedure of the kind now typical, and the statutory bar to midterm strikes and lockouts was not added to the statute until eight years later. Inefficient as it may sound to our ears, *Sands* actually typified the effective industrial relations system in a significant portion of basic industry at the time. While many

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204. NLRB v. *Sands Mfg. Co.*, 306 U.S. 332 (1939).

205. *E.g.*, R. GORMAN, *BASIC TEXT ON LABOR LAW* 306 (1976). Professor Barron has pointed out that, even if the employer should be entitled to stand on its contract, it does not follow, and *Sands* gave no reason, why the employer should be permitted to discharge, as opposed to permanently replacing, the strikers. The then recent case of NLRB v. *Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938), would have seemed to suggest the latter remedy. See Barron, *A Theory of Protected Employer Rights: A Revisionist Analysis of the Supreme Court's Interpretation of the National Labor Relations Act*, 59 *TEX. L. REV.* 421, 429 n.29 (1981).

206. NLRA § 8(d), 29 U.S.C. § 158(d) (1982), forbids strikes or lockouts to modify existing contracts during their terms (or until 60 days after statutory notice, whichever is later). *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), holds that a strike over an arbitrable grievance is an implied breach of the contract.

Note that under recent Board doctrine the employer is free, despite § 8(d), to "modify" existing contracts by transferring bargaining unit work to non-union locations in order to subvert the contractual wage scale. *Milwaukee Spring Div. of Ill. Coil Spring Co.* [*Milwaukee Spring II*], 268 N.L.R.B. No. 87, 115 L.R.R.M. (BNA) 1065 (1984) (overruling 265 N.L.R.B. No. 38, 111 L.R.R.M. (BNA) 1486 (1982)), *petition to review denied sub nom.* *Int'l Union, UAW v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985).

believe there are sound reasons of social policy to bar midterm strikes, *Sands* reminds us that it is not *impossible* to run a complex enterprise upon other assumptions.

The Court in *Sands* validated the employer's use of its economic strength—namely, ownership and control of the business—to get its way on midterm disputes, subject to the duty to bargain. But it impeded the union in using its chief economic resource, the concerted withholding of labor power or strike.<sup>207</sup> Even Professor Finkin grudgingly concedes that this has something to do with contractualism as I defined the term (F:38). Nonetheless, he says that he cannot see that *Sands* had anything to do with social inequality, describing as “drawn . . . from thin air” and “not mak[ing] all that much sense” my claim that it did (F:38). Because the employees were quickly replaced, he argues, they could not have won a strike anyway (F:38), and therefore presumably the case is of little practical significance.

Professor Finkin's arguments simply confirm the points for which I contended. Indeed, they represent a classic illustration of the contractualist mentality I sought to criticize. For Finkin, the balance of power in the workplace is primarily a function of market forces (F:38). He apparently assumes that the mission of the statute is to inaugurate collective wage bargaining in markets that are otherwise left largely untouched by the law. It is no wonder, then, that he does not take seriously the possibility that the statute might be interpreted so as to alter and restructure the labor market. In *Sands* and other cases, the Court's interpretations of the statute ratified preexisting imbalances of power rather than giving a sturdier content to workers' statutory rights that might have enhanced employees' bargaining power. Professor Finkin apparently believes this is natural and inevitable. In that he is wrong. As I will show momentarily, the result in *Sands* was not legally preordained; the decision expresses a political choice. There is, ultimately, no real dispute that *Sands* confirmed rather than altered an existing pattern of social inequality. We differ only in our evaluations of that development from the standpoint of social policy.<sup>208</sup>

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207. The employee-concerted action in *Sands* arose in a somewhat untypical manner. In response to alternatives put by the employer, the employees took the stand that they would prefer a temporary close-down of the plant to operating under the employer's reading of the contract. *See Sands Mfg. Co.*, 1 N.L.R.B. 546, 552 (1936). The Supreme Court characterized the action as a “repudiation” of the contract, *Sands Manufacturing*, 306 U.S. at 344, and “a concerted refusal on the part of [the union] to permit its members to perform their contract. . . .” *Id.* at 345.

208. It is worth noting that there is some tension between Professor Finkin's

No doubt many readers regard the *Sands* decision as just, but I believe they do so at least partly in light of inapplicable contemporary assumptions about the no-strike/arbitration tradeoff. *Sands* is considerably more questionable when it is recalled that no arbitral alternative to direct action was available through which the union could press its case. My attack on *Sands* does not rest upon or entail the absurd position Professor Finkin attributes to me, e.g., that workers should eschew contract grievance procedures and “engage in sit-down strikes over any dispute” (F:89). I never said anything of the kind. The *Sands* discussion is not about the theoretical issue of whether and under what circumstances a waiver of concerted activity in return for an enforceable grievance procedure is a sensible, fair bargain for labor. The Court in *Sands* did not rest on a bargained waiver of the right to job action. It proceeded on the basis of a much more rudimentary and unrefined distaste for midterm job action, irrespective of the availability of due process alternatives under the contract.

In so doing, the Court gave its blessing to and created intellectual groundwork for a process of erosion and curtailment of rights to concerted activity that has been going on ever since.<sup>209</sup> *Sands* was an early precursor of the judicial attitudes that brought us cases that, in my view, grievously disserve workers’ rights and interests. For example, upon reasoning similar to that in *Sands* the NLRB later held that employee concerted activity aimed at pacing work on a basis fair to the employees is unprotected because in conflict with the inherent contractual right of the employer to command

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lukewarm defense of *Sands* and his lukewarm discussion of the right of employers to permanently replace economic strikers. (This right was established in *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938), discussed at *infra* text accompanying notes 221-36). In discussing *Sands*, Finkin assumes that the employer should have the right of permanent replacement, a point that is actually in debate. But, given this assumption, Finkin argues that, when workers face adverse market circumstances, there is no functional difference between discharge and permanent replacement. (This claim is implied in his argument that the decision to deny § 7 protection in *Sands* was of little practical significance.) Of course, it is not entirely true that discharge and permanent replacement are identical, even under the market conditions Finkin specifies. In some circumstances, replaced employees have significantly greater rights than discharges, (e.g., rights to preferential recall). Finkin is quite correct, however, that often permanent replacement amounts to discharge for all practical purposes. But doesn’t this cast some doubt upon Finkin’s defense of *Mackay Radio*? Doesn’t this imply that Professor Finkin should join my criticisms of *Mackay Radio* rather than attacking them? Plainly the Act did not contemplate discharge for the exercise of the § 7 right to strike, yet that is precisely what he seems to say *Mackay Radio* effectively allows.

209. See *supra* text accompanying notes 48-52.

obedience.<sup>210</sup> Likewise, the Court's distaste for midterm concerted activity is evident in cases finding implied contractual waivers of statutory rights to concerted activity.<sup>211</sup> It is not obvious, indeed, it begs explanation, why section 7 rights deserve such disfavored treatment at law. *Sands* staked out some of the political bases of this process many years ago and well illustrates the Court's comfortable sense of its own important policy-making role in industrial affairs.

Professor Finkin's second point about *Sands* is characteristic of the disregard for section 7 rights that is so widespread in contemporary labor law thinking. He agrees that there might have been a viable argument against the *Sands* result, namely that the union had made a contractual reservation of the right to strike (F:40-41). However, this provides little help to my questioning of contractualism, he claims, because this is an "intensely contractual" argument (F:41, emphasis in original). Finkin's fundamental assumption seems to be that in order to exercise *statutory* rights employees must win a *contract* that permits them to do so. That is, they must buy back their statutory rights from the employer at the bargaining table.

Besides confirming precisely the point I was trying to make, this argument contains a perverse inversion of values. Assuming that the right to strike is under some circumstances waivable, surely the burden is on the employer to purchase a waiver from the employees, not the other way around, as Finkin would have it. My argument was not that employees had a *contractual* right to strike, but a *statutory* right. Finkin's framework hinders him from acknowledging this simple point.<sup>212</sup>

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210. Elk Lumber Co., 91 N.L.R.B. 333 (1950). See J. ATLESON, *supra* note 13, at 50-66; *infra* notes 256-58 and accompanying text.

211. See, e.g., *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 382 (1974) (explicit contractual provision required to preserve the right to strike against a judicially implied waiver of that right); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105-06 (1962) (implied obligation not to strike); cf. *Goya Foods, Inc.*, 238 N.L.R.B. 1465 (1978) (explicit contractual provision required to preserve right to strike over midterm grievances after the expiration of contract). On the Court's treatment of the implied waiver issue in *Gateway Coal*, see Atleson, *Threats to Health and Safety: Employee Self-Help Under the NLRA*, 59 MINN. L. REV. 647, 676-81 (1975).

212. There is a related aspect of Finkin's approach that is somewhat characteristic of mainstream thinking. On the one hand, he chides me for not understanding that everything ultimately depends on the parties' bargaining power (F:38). On the other hand, he utterly ignores issues of power whenever it is convenient for him to do so. For example, he offers the following remarkable statement: If the union thinks "traditional self-help (the strike) preferable to resort to any outside party, all the union need do is so provide in the collective agreement . . . reserving the right to strike over grievances" (F:65). Surely Professor Finkin knows that labor agreements are not written by the



Professor Finkin cannot seem to make up his mind about *Sands*. He is reluctant to endorse it whole-heartedly, and he says with a tinge of regret that the Company "out-lawyered" the Board (F:40). On the other hand, his conceptual apparatus provides him no basis to criticize the decision. He therefore escapes into the last refuge of traditional doctrinal scholarship. He argues that the law compelled the result. This claim is based on the view that "the labor Act's protection of bargaining was precisely to secure collective agreements."<sup>213</sup> Finkin's arguments are historically inaccurate and logically untenable.

To begin with, *Sands* was one of the few cases under debate to which the legislative history spoke with some specificity. From the floor of the House (sitting as a committee of the whole), Representative Biermann moved to amend section 13 of the bill to restrict the right to strike to the period *before* consummation of a collective agreement. His proposed language read: "After that agreement has been made, and so long as it shall be observed by the employer, a strike shall be considered as a violation of the spirit of this act."<sup>214</sup> This amendment actually passed, but Congressman Connery asked for tellers and rounded up some votes. On recount, the amendment was rejected and found its way into oblivion.<sup>215</sup>

Surely under the customary usages of "lawyer's legislative history" this episode could, at the least, be said to suggest that Congress considered the *Sands* issue and rejected the approach later taken by the Court.<sup>216</sup> I did not refer to the Biermann amendment

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union but result from a compromise between the union and management reflecting the balance of power between them.

213. F:40 (citing a single, albeit famous page of the legislative history). Well-informed contemporary observers did not share Finkin's view that the legislative history is clear on the *Sands* point. For example, Lloyd Garrison testified in 1940 that, prior to *Sands*, he had advocated that the Act be *amended* to achieve the *Sands* result. *Hearings before Special House Comm. to Investigate NLRB*, 76th Cong., 3d. Sess. 2962 (1940).

214. 79 CONG. REC. 9730 (1935), *reprinted in* 2 LEGISLATIVE HISTORY (pt. 2), *supra* note 42, at 3226.

215. *Id.*, *reprinted in* 2 LEGISLATIVE HISTORY (pt. 2), *supra* note 42, at 3227.

216. Further support for this argument might perhaps be drawn from the defeat of an amendment proposed by Congressman Rich, which would, among other things, have excluded from the definition of "labor organization" any union that would not file a pledge with the NLRB not to strike in violation of an existing collective bargaining agreement. *See* 79 CONG. REC. 9721 (1935), *reprinted in* 2 LEGISLATIVE HISTORY (pt. 2), *supra* note 42, at 3204-05. To be sure, the Rich proposal was undoubtedly part of a shotgun effort to torpedo the bill by proposing unpalatable amendments. Accordingly, under the prevailing conventions it would be given limited weight.

in my 1978 article<sup>217</sup> because I was not there engaged in traditional advocacy in which one uses a conventional repertoire of arguments to "prove" what "the" legislative history "establishes." But from Professor Finkin's perspective, the Biermann amendment should be an all-important datum. One therefore wonders how he can possibly say that the reasoning of *Sands* is "firmly rooted in the legislative history of the Act" (F:40) without even mentioning it, if only somehow to dismiss it.

But let us assume that the Biermann initiative never occurred, and focus on the legislative history according to Finkin. The statute was designed, he says, "to secure collective agreements" (F:40). For this he cites a page from Senate Report No. 573.<sup>218</sup> That page speaks in general terms of the hope that employers and unions will negotiate in a "bona fide effort to arrive at a collective bargaining agreement."<sup>219</sup> The passage says nothing, except by interpretive construction, about the issues in *Sands*. Moreover, even assuming that Senate Report No. 573 means what Finkin claims, he is still left with the difficulty that the statute also embodies other, conflicting values, such as protection for employees' right to engage in concerted activity. How the delicate balance between securing agreements and protecting concerted activity should be struck in a particular case like *Sands* presents a matter of choice that is not self-evidently constrained by the legislative history and that might very well be informed by underlying philosophical visions or policy preferences held by the decisionmakers.

But let us set aside not only the Biermann incident, but also all other statutory values except that of the policy of securing agreements. Assume with Finkin that the legislative history unambiguously promotes securing the agreement as the ultimate value. There remains the problem of indeterminacy.<sup>220</sup> Finkin takes for granted that the policy of securing agreements requires the *Sands* result. This is not correct. To be sure, there is a sound legal and policy argument that the goal of securing agreements would be well served by the *Sands* result. But one could equally argue, remaining well within the boundaries of traditional legal discourse, that the

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217. My attention was originally called to the episode by Professor Bernstein's classic study. See I. BERNSTEIN, *supra* note 33, at 124.

218. SENATE REPORT, *supra* note 182, at 2311-12. Actually the passage was cited by the employer, then the *Sands* Court, 306 U.S. at 342 n.5, then by Finkin who cites the employer's argument approvingly (F:39-40).

219. SENATE REPORT, *supra* note 182, at 2311-12.

220. See *supra* text accompanying notes 152-55.

*Sands* rule impedes the goal of securing agreements. The argument, made by dozens of supporters of arbitration, was that absent any sort of due process mechanism for resolving midterm disputes, unions would have no incentive to enter contracts which deprived them of their freedom of economic action, and therefore fewer agreements overall would be made. This is the basic and familiar "quid pro quo" idea that triumphed in the 1950's and 1960's.

In a word, the rule that wildcat strikes are unprotected does not follow as a matter of legal logic from the 1935 Act. It represents a choice of social policy, if you will, a political choice. It may be a wise choice, as perhaps most labor lawyers today believe. But evaluation of *Sands* then ought to be candidly grounded at the level of social policy and judgment, rather than hidden behind the untenable argument that a broad and open-ended statute compelled a particular result. And if so, then, contrary to Finkin, it seems a worthwhile endeavor to attempt to uncover and explore the philosophical assumptions, the "legal consciousness," that interpreting courts brought to their task.

3. *Mackay Radio*.<sup>221</sup>—This famous case established the basic rule that, while the employer may not discharge economic strikers, it may permanently replace them without showing any business necessity for doing so.<sup>222</sup> The rule works particular hardship on low-skill employees in times of high unemployment. Anyone who has ever counseled employees on the eve of a strike knows the significance of the rule and knows also that workers often tend to regard the distinction between discharge and permanent replacement as a lawyer's absurdity. Vulnerable employees, wanting to know whether they can be fired for exercising their statutory right to strike, frequently take little comfort from learning that, because the law prevents the employer from firing them, they can only lawfully lose their jobs by being replaced.

Professor Finkin's treatment of the *Mackay Radio* case is extraordinarily revealing of the limitations of his approach precisely because he has so little to say. His discussion entirely misses the real point of the case and trivializes it by focusing on hypertechnical details. Finkin's evident discomfort with this case has two sources. One is his eagerness to discredit the critical approach. This poses an awkward problem with respect to *Mackay* because Professor Finkin has elsewhere published a view of the case that is, in essence,

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

222. *See id.* at 345-46.

not all that different from mine.<sup>223</sup> One suspects that, when all is said and done, Professor Finkin is as critical of *Mackay* as I am. Indeed, the case has been the target of substantial academic criticism.<sup>224</sup> On the other hand, Finkin's methodology contains no tools for understanding or explaining *Mackay* other than hidebound notions of holding and dictum in case law. Even Professor Finkin seems dimly aware of the limitations of this conceptual equipment when it comes to social analysis.

As with *Jones & Laughlin*, Professor Finkin insists that *Mackay* has nothing to do with contractualism (F:35-37). But here it is somewhat more difficult to carry off this claim since, in another article, Finkin has written that "*Mackay Radio* exacerbated any existing disparity in bargaining power between employers and unions."<sup>225</sup> The *Mackay* case stresses "free" market ordering over statutory rights by exalting an "inherent," private right of employers to protect their businesses over employees' statutory right to strike. It is therefore perfectly consistent with the theme to which I called attention. It is also consistent with the developing Supreme Court view in labor cases that the final measure of workplace justice is the parties' relative bargaining power. Indeed, Finkin does not appear to dispute that, as applied, e.g., in low-skill, high unemployment markets, *Mackay* allows the employer's economic power to undermine the value of the legal right to strike. It is just that, from his point of view, it is inconceivable that employers would be denied the permanent replacement weapon. He seems unaware that other capitalist industrial relations systems get along quite well with a different rule.<sup>226</sup>

Eschewing substantial analysis of the case, Professor Finkin largely restricts his argument about *Mackay* to the claim that the permanent replacement issue was not presented to the Court. (F:36,

223. See *infra* text accompanying note 225.

224. See, e.g., J. ATLESON, *supra* note 13, at 19-34; Barron, *supra* note 205, at 440-442; Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1203-04 (1967); Schatzki, *Some Observations & Suggestions Concerning A Mismomer—"Protected" Concerted Activities*, 47 TEX. L. REV. 378, 382-89 (1969).

225. Finkin, *The Truncation of Laidlaw Rights by Collective Agreement*, 3 INDUS. REL. L.J. 591, 593 (1981) (citation omitted). Professor Finkin emphasizes, however, that "[s]ubsequent cases . . . considerably softened the effect of the *Mackay Radio* dictum." *Id.* at 593-95 (citing cases beginning in 1963, 25 years after *Mackay*). See *infra* text accompanying notes 227-29. But see also *infra* note 235 and accompanying text.

226. In Ontario, for example, lawful strikers may return to their jobs for up to six months from the commencement of the strike, even if replacements must be discharged to make room for them. See ONT. REV. STAT. ch. 232, § 64 (1970), discussed in Weiler, *supra* note 115, at 393 n.141.

85). He labels the permanent replacement rule “dictum”<sup>227</sup> and argues that case law decided three decades later, which I also cited (K:302 n. 121), “deprive[s] the ‘Mackay rule’ of some of its vitality” (F:37 n.59). If these arguments are intended to suggest that the *Mackay* rule is not black-letter law or that it is not of continuing importance to workers, they are plainly erroneous. The *Mackay* rule is solidly embedded in law, despite recent cases enhancing the recall rights of replaced strikers. *Mackay* plays a fundamental role in strike counseling. It would be irresponsible to suggest to workers considering strike action that, because the rule is “dictum,” it is anything less than a full-fledged legal principle with which they must contend. When market conditions are adverse, workers correctly attribute great practical significance to the rule. As Professor Weiler has noted, among the ordinary tactics in collective bargaining, permanent replacement is “the most important economic weapon in the employer’s arsenal.”<sup>228</sup> Nor was *Mackay*’s practical significance lost on contemporary observers. The textbook view was that “[t]he employer still retains the upper hand over the union in an economic trial of strength.”<sup>229</sup> It is hard to give serious credit to Professor Finkin’s dictum argument, since the Court indisputably *decided* the issue and the rule has endured for nearly half a century. For purposes of the arguments I raised, nothing turns on whether the ruling was holding or dictum. In short, this seems an extraordinarily picayune basis for discussion.

But, following this tack, was the issue “in” the case, as I indeed claimed (K:301 n.117)? In this footnote, of which Professor Finkin makes so much, I noted explicitly that the Board did not contest the employer’s right to hire permanent replacements. This I found and still find surprising. My statement that the replacement issue was “presented in” the case, which may well have been an inartful way of putting the point, was simply directed to urging scholars to examine *why* the Board and Court took the approach they did.

Finkin seems to have read my footnote as a claim that certiorari was granted for the express purpose of resolving the replacement

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227. F:25, 36. The permanent replacement rule was not treated as a peripheral aspect of the case at the time. It was immediately understood to be of central importance. *See, e.g.*, Case Comment, 27 *Geo. L.J.* 95, 95-96 (1938) (discussing employer’s rights in strike situation without treating Court’s rule as dictum).

228. Weiler, *supra* note 115, at 388-89.

229. J. ROSENFARB, *THE NATIONAL LABOR POLICY AND HOW IT WORKS* 99 (1940). Rosenfarb was an NLRB attorney. His book is graced with a preface by Senator Wagner and a foreword by NLRB Chairman J. Warren Madden.

question.<sup>230</sup> He is absolutely correct that this was not so, but neither did I assert such a claim. I merely pointed out that the court below rested on the antiquated theory that strikers voluntarily sever the employment relationship. Moreover, the employer briefed the case on the assumption that it was invulnerable to an unfair labor practice finding *because* it had the right to permanently replace strikers. The employer reasoned, incorrectly as the Court ruled, that given this right, the maximum remedy for the discriminatees in *Mackay* should have been reinstatement to the status of applicants for employment.<sup>231</sup> These were not convincing arguments, since the statute expressly provides that the employment relationship continues during ongoing labor disputes.<sup>232</sup> Nonetheless, in order to answer them, the Court predictably explored the rights of employers vis-a-vis economic strikers. Indeed, the Board anticipated this in its Reply Brief, which, in explicitly declining to argue against a right to replace, showed an awareness that the employer's arguments, rightly or wrongly, touched on the issue.<sup>233</sup> The Board's failure to contest the point was not inadvertent. This is what I meant in saying the issue was presented in the case.<sup>234</sup>

Candidly, though, it is hard to see what Professor Finkin thinks turns on this detail. The fact that the Board and the Court agreed

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230. "Presented in" was an unfortunate choice of words. I meant simply that the replacement issue was "posed by" or "lurking in" the case, or that the "case presented" the issue. But Professor Finkin transposes the phrase to "presented to the Supreme Court" (F:85) (emphasis added). That is, he attributes to me the view that this was the issue upon which the Court set or heard argument.

231. See Respondent's Brief at 24-31, 35-36, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

232. NLRA § 2(3), 29 U.S.C. § 152(3) (1982) ("The term 'employee' . . . include[s] . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute. . . .").

233. Reply Brief for NLRB at 15-18, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

234. I also referred to the policy of allowing permanent replacement as "[t]he issue before the Court" (K:301). In context, this phrase is transparently a reference to the issue before the Court *once it had elected to speak* on the question of permanent replacement. It is not a reference to the narrower question of what issues were expressly raised by the parties or properly lodged before the Court.

Professor Finkin somewhat misleadingly lifts my phrase from its proper context, see F:36, text accompanying note 53; F:36 n.55, by treating it as equivalent to statements made elsewhere to the effect that the permanent replacement issue was "presented in the case" in a more technical sense of the term, see F:36 n.55 (citing K: 301 n.117). Professor Finkin purports to rebut only the claim that the issue was "presented" in the narrower sense. He tacitly concedes, as he must, that the policy questions on which I focused were in the broader sense "present" in the case, once the Court elected to pronounce on the issue of permanent replacement. Professor Finkin does not, however, substantially address himself to those policy questions.

on the replacement issue is what needs to be explained. It is not a reason to forego analysis. Nothing in the legislative history specifically supports the result, although nothing contradicts it either. While the legislative materials contain references to the question of whether strikers retain their status as employees, the precise issue decided in *Mackay* was not, so far as I am aware, explicitly addressed. The Court cited no authority for its rule, which endures today, though it now conflicts with other authority.<sup>235</sup> The Court did not have to uphold the permanent replacement tactic. The legislative history did not bar it from ruling, for example, that struck employers may continue to operate but only with temporary replacements (or, with permanent replacements but only upon a substantial showing of the need therefor). Had the Court so ruled, it would have enlarged labor's opportunities and might have injected somewhat different concerns and themes into its emerging industrial jurisprudence. Thus, as with the other cases, *Mackay* ultimately reflects a political choice, a solicitude for traditional concepts of managerial prerogative, that Professor Finkin's methodology does not enable him to explain.<sup>236</sup>

## V. PARTICIPATION

One of the goals of *Judicial Deradicalization* was to explore the intellectual foundations of the circumspect, even grudging approach of labor law toward employee participation. Of course collective bargaining is itself a form of worker participation and, as such, an essential component of industrial democracy. But it is also true that the legal structure of conventional collective bargaining has not been particularly encouraging toward either day-to-day employee participation in managing the pace and flow of work or toward co-

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235. For example, other cases hold that the employer must come forward with a legitimate and substantial business justification for action adverse to employee status. *See, e.g.,* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967) (reinstatement of strikers); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) (discrimination).

236. Finkin's second point on *Mackay Radio* deserves only a footnote. He conjures up "a truly radical, anti-capitalist reading" of the right to strike, under which the statute would guarantee workers "an effective strike under all circumstances" (F:37, emphasis in original). He then shoots down this position I never advanced by saying that, even if this were the law, collective agreements would still reflect the relative strength of the parties. Hence, "contractualism" would still reign. I cannot imagine that Finkin really believes that employers would regard as a system of "private ordering" in any traditional sense a legal regime under which the government guaranteed labor success in all its actions and forbade any efforts to resist a strike. Such a system would necessarily treat as legitimate far more severe intrusions on freedom of contract than anything now accepted in American political and legal discourse. In a word, it is hard to take this argument seriously.

determination by workers and management at the level of major capital investment and product design decisions.<sup>237</sup>

Professor Finkin has nothing but scorn and ridicule for my interest in expanding workplace participation. He regards only one model of industrial democracy—the status quo—as *possible*, let alone

237. Professor Finkin does not address himself to the question of union or worker participation in investment policy decisions, despite that unions have in fact sought such participation though the law has often stood in the way, *see, e.g.*, First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (partial close-down not a mandatory subject of collective bargaining), and that in other countries workers have sought and the law grants a co-determination role.

As to day-to-day participation, my primary focus, Finkin repeatedly misattributes to me the erroneous view that workers do not have significant, informal mechanisms for exerting pressure on the organization and pace of work, both through and apart from the grievance procedure, (*see* F:49, 52-54). I explicitly rejected exaggerated claims about the co-optation of working class struggle (K:267 n.10). And I never questioned the importance of the phenomena Finkin cites, e.g., Kuhn's discussion of "fractional bargaining" (*see* F:52-53, citing J. KUHN, *BARGAINING IN GRIEVANCE SETTLEMENT: THE POWER OF INDUSTRIAL WORK GROUPS* (1961)). Quite the opposite, I called attention to a similar sort of pressure in the context of my discussion of the sit-down strikes (K:324-25). I submit that Finkin's claims support the position for which I contend and which he *opposes*, namely that the actual practice and struggles of the working class evidence a continuing desire for greater control over operational decisions and for more autonomy on the job, desires that are not fully satisfied by conventional collective bargaining.

In one of the most egregious misattributions of his article, Professor Finkin tells his readers, without supporting citation, that my argument "is built upon the *assumption* of a fundamental disjuncture between the union and those who comprise it" (F:53) (emphasis in original). Really, this is a bit much. True enough, I discussed the muted but powerful theme in some collective bargaining case law that conceives of the union as an institutional entity apart from its members (K:319-20). But I clearly and unambiguously identified this as a perspective implicit in some of the *Court's* views, not *my* views. The point of my article was to *criticize* this assumption. Likewise, everything I have written since *Judicial Deradicalization* clearly *attacks* the position Finkin attributes to me. In particular, *see* Klare, *Quest*, *supra* note 24, at 189-92 (criticism of Court's opinion in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), for assuming that union can fulfill duty of fair representation toward black employees, while not permitting them to attend and participate in union meetings).

In passing, I note that Kuhn's study has been recently and thoughtfully commented upon by the English comparativist P.K. Edwards, who notes:

[O]n the question of the use of shopfloor bargaining, it is reasonable to conclude that the processes described by Kuhn were relatively small-scale and marginalized compared with activities in comparable industries in Britain . . . . After the Second World War American employers were able and willing to make strenuous efforts to regain control of their factories which they felt they had lost, or had been in danger of losing, during the New Deal and war periods. There was a serious, and in some cases at least a carefully planned, attempt to undercut shopfloor organizations, to sever their links with national union organizations, and to channel the shopfloor discontents on which they were built through formal grievance procedures. The result was a closely regulated system.

P. Edwards, *supra* note 142, at 12-13.



desirable.<sup>238</sup> And he lambasts the idea of participatory democracy in work as "an inchoate, primitive Rousseauism."<sup>239</sup> One would never know from Finkin's article—indeed, he himself seems unaware—that the question of employee involvement in decisionmaking is now a central preoccupation of both managers and unionists. To cite but one reference from among the vast emerging literature, the New York Stock Exchange, that well-known crowd of Rousseauian romantics—recently issued a widely-noted report on efforts to increase employee participation in shopfloor decisionmaking.<sup>240</sup> The study found that while "employee involvement" is a recent and still minority movement, it has already touched a huge portion of corporate life: About 32% of workers in businesses employing 100 or more employees are involved in at least one "QWL" ("quality of working life") or other "human resource" program.<sup>241</sup> Employers have responded positively to employee participation programs, linking them to increased productivity, higher morale, and improved product quality.<sup>242</sup> Unions have had a mixed response, with leaders of the Communications Workers perhaps among the most positive, and the Machinists' leadership among the most critical.<sup>243</sup> But all sophisticated union leaders now understand that they must develop a program on employee participation issues. Many are considering ways to respond to the QWL movement not just as a management trap but as an opportunity, under the proper circumstances, genuinely to improve employees' lives on the job.<sup>244</sup> In a word,

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238. Finkin claims that "it is hard to see" how any system but representational democracy on a majority rule basis could work (F:49), despite the fact that proportional representation models have a widespread existence in Europe. Even American-style collective bargaining does not always involve a united front of employees. There are many instances in which an enterprise is carved up into a multiplicity of bargaining units represented by different unions. Indeed, the AFL wanted the system of craft organization to continue under the NLRA. And there is also the phenomenon of informal, "fractional bargaining" to which Finkin himself calls attention.

239. F:49 (citing now dated remarks from D. BELL, *MARXIAN SOCIALISM IN THE UNITED STATES* xi (1967)). See also F:25 (mocking characterization of my views on industrial democracy).

240. OFFICE OF ECONOMIC RESEARCH, *NEW YORK STOCK EXCHANGE, PEOPLE & PRODUCTIVITY—A CHALLENGE TO CORPORATE AMERICA* (1982).

241. *Id.* at 23.

242. *Id.* at 28-29, 40.

243. See generally T. KOCHAN, H. KATZ, & N. MOWER, *WORKER PARTICIPATION & AMERICAN UNIONS: THREAT OR OPPORTUNITY?* 153-83 (1984); Communications Workers & Quality of Work Life Programs, 110 *LAB. REL. REP.* (BNA) 14-16 (1982); Kenefick, *Going "Round-and-Round" In "Quality Circles,"* *MACHINIST*, June, 1982, at 7.

244. See generally T. KOCHAN, H. KATZ, & N. MOWER, *supra* note 243; Remarks of AFL-CIO Industrial Union Department President Howard Samuel, *Daily Labor Report* (BNA), at D-1 (Jan. 13, 1984).

employee participation now poses a fundamental agenda for the future of American and Canadian industrial relations. The emphasis in my article on the labor law treatment of employee participation was in keeping with one of the most salient labor relations developments of the current period.

As will be seen, our debate about worker participation primarily arises in the context of interpreting the 1930's sit-down strikes, rather than contemporary developments. I turn first to a subsidiary argument about the Court's famous sit-down strike decision.

### A. *Fansteel*

1. *The Significance of the Case.*—*NLRB v. Fansteel Metallurgical Corp.*,<sup>245</sup> held that discharged employees whose concerted activity involved tortious or criminal conduct are not eligible for reinstatement by the Board.<sup>246</sup> In the modern understanding, such concerted activity is said to fall outside the protection of section 7. This is true even if the employee action is provoked by serious employer misconduct.<sup>247</sup> In general terms, *Fansteel* is still "good law": "It is commonly understood that employees lose the protection of section 7 when they engage in violence, assault and trespass in contravention of clearly applicable state criminal and tort law."<sup>248</sup> Indeed, the *Fansteel* principle has been greatly enlarged so that today section 7 protection is denied when employees engage in "indefensible" (though lawful) conduct. On the other hand, the reasoning of *Fansteel*—which was blasted by distinguished critics at the time<sup>249</sup>—has since been discredited.<sup>250</sup> And some tribunals have occasionally

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245. 306 U.S. 240 (1939), discussed in K:322-25.

246. 306 U.S. at 252-61.

247. *Id.* at 253-54.

248. R. GORMAN, *supra* note 205, at 311 (citing *Fansteel*).

249. See Hart & Prichard, *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275 (1939).

250. The Board in *Fansteel* considered the strikers' misconduct in light of the employer's blatant unfair labor practices. In effect, the Board argued that sustaining the discharges would allow the employer to reap the fruits of its own wrongdoing. (This was not, by the way, a simple "two wrongs make a right" argument. The issue before the Board was whether the sit-down strikers should suffer the penalty of discharge *in addition* to the punishments they had already received under the state criminal law.) The Board's approach was firmly rejected by the Court. *Fansteel*, 306 U.S. at 257-58. In more recent times, however, the courts and the Board have revived the Board's initial reasoning in *Fansteel*. See, e.g., *Kohler Co.*, 148 N.L.R.B. 1434 (1964), enforced, 345 F.2d 748 (D.C. Cir.), cert. denied, 382 U.S. 836 (1965) (reinstatement of picketers who barred access to plant so as to prevent employer from taking advantage of its own wrongdoing); *Local 833, Auto Workers v. NLRB*, 300 F.2d 699 (D.C. Cir.), cert. denied *sub nom.* *Kohler Co. v. Local 833, Auto Workers*, 370 U.S. 911 (1962) (Board ordered to evaluate strike

given *Fansteel* a narrow reading so as to afford protection to certain sit-down activity.<sup>251</sup>

My article was primarily concerned with *Fansteel*'s ideological and symbolic significance. The case was a political bombshell.<sup>252</sup> More importantly, along with *Sands*, decided the same day, *Fansteel* inaugurated in Supreme Court jurisprudence a theme of great importance to modern labor law, namely, the distinction between legitimate and illegitimate forms of militancy. The latter category was later used to condemn a variety of forms of concerted activity that have nothing to do with violence or trespass. *Fansteel* and its progeny validated certain unarticulated but nonetheless pervasive underlying assumptions of modern collective bargaining law. Of course, it is rare, if ever, that a single case entirely transforms the intellectual landscape, and I did not suggest that *Fansteel* was of that stature. Rather, I saw it as an emblem of the Court's emerging consciousness or perspective on industrial politics (K:325).

In particular, *Fansteel* gave sustenance to two basic anti-democratic assumptions. The first is that there is a point at which concerted activity threatens management's fundamental authority and legitimacy, and that, when that point is reached, those activities are beyond the pale. In *Fansteel* the boundary line was said to be drawn at tort and crime, and most lawyers might instinctively assume this to be a reasonable initial boundary of statutory protection. But my suspicion was that the real issue had to do with *management's* authority and power, not the *state's*. If so, *Fansteel* and its progeny lent weight to the justification of hierarchy and to a restricted vision of workplace democracy.

The second assumption is that, in return for their legal rights, unions are expected to keep their members on good industrial

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misconduct in light of employer provocation); *NLRB v. Thayer Co.*, 213 F.2d 748, 755 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954) (in deciding whether to reinstate unfair labor practice strikers, Board must "balance the severity of the employer's unfair labor practice which provoked the industrial disturbance against whatever employee misconduct occurred during the strike"). *But see* *Clear Pine Mouldings*, 268 N.L.R.B. No. 173, 115 L.R.R.M. (BNA) 1113 (1984) (two members of Reagan Board vote to reverse balancing policy).

251. *See, e.g.*, *NLRB v. Pepsi Cola Bottling Co.*, 449 F.2d 824 (5th Cir. 1971), *cert. denied*, 407 U.S. 910 (1972) (Ninety-seven employees who "sat-in" to protest discharge of co-workers held immune from discharge when no violence, no interference with non-strikers, and no real usurpation of owner's right of possession occurred).

252. *See* J. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD* 83-84 (1981).

behavior.<sup>253</sup> This assumption, too, may seem natural and unobjectionable on the surface, but I argued that its secondary consequences have constrained rank-and-file participation. The good behavior assumption has many secondary expressions today, such as the arbitration/no-strike quid pro quo idea, and judicial efforts, particularly in the 1970's, to impose vicarious liability on unions for wildcat strikes. Both developments, at least in my view, have sometimes intolerably restricted employee rights of self-organization and concerted activity, or even forced unions to become disciplinary agents for management.<sup>254</sup> Of course, many readers will not share this assessment, but that is not essential for present purposes. The relevant point here is more modest, namely that the case law is inescapably informed by judgments on the propriety and wisdom of various kinds of labor militancy, political judgments that Professor Finkin cannot show (or at any rate has not shown) to be deducible from the legislative history.

*Fansteel's* ideological overtones are not of mere academic significance. They have had a tangible, if sometimes subtle connection to important later developments. The sit-down wave was over by then, but the World War II years were nonetheless a period of intense shopfloor struggle and wildcat activity. The attitudes expressed in *Fansteel* endured in that context. They have resurfaced in recent times in a condemnation of civil rights protest.<sup>255</sup> At another level, the *Fansteel* mentality is reflected in numerous cases condemning concerted activity totally unconnected with disruptive trespass. An example is *Elk Lumber Co.*<sup>256</sup> In response to the employer's unilateral changes in work methods and the pay system, the employees in *Elk Lumber* agreed among themselves on a fair pace of work for the

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253. See, e.g., *Republic Steel Corp. v. UMW*, 570 F.2d 467, 479 (3d Cir. 1978) (The union "simply must bear certain obligations if it is to continue to be entitled to the rights and benefits accorded by our national labor policy.").

254. Thus, for example, I think *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974) (enjoining safety strike), premised in part on the quid pro quo idea, was wrongly decided and should be overruled. Happily, some of the vicarious liability doctrines, see, e.g., *Eazor Express, Inc. v. International Bhd. of Teamsters*, 520 F.2d 951 (3d Cir. 1975), cert. denied, 424 U.S. 935 (1976) (million dollar judgment against union arising from wildcat strike because union failed to exhaust all reasonable means within its power, including disciplinary sanctions, to halt strike), have now been undermined by *Carbon Fuel Co. v. UMW*, 444 U.S. 212 (1979) (no liability on international union for failure to use all reasonable means to prevent or end wildcat strikes), although questions still remain after *Carbon Fuel*.

255. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803-04 (1973) (statutory right to oppose race discrimination in employment does not protect disruptive, unlawful protest).

256. 91 N.L.R.B. 333 (1950). See *supra* note 210 and accompanying text.

wages offered and proceeded to work at that pace. This was said to contravene the employer's inherent authority to command the workforce and, therefore, to warrant discharge as indefensible conduct.<sup>257</sup> *Elk Lumber* is a vivid example of how prevailing legal images of industrial justice legitimate and reinforce workplace hierarchy.<sup>258</sup>

2. *Professor Finkin's View.*—As with the *Jones & Laughlin* dictum, *Sands Manufacturing*, and *Mackay Radio*, Finkin proves unable to take a stand on *Fansteel* or to give us a sense of his views on the justice of the result. Perhaps he thinks all of these cases were correctly decided. But, assuming that he might view this case and/or some of the others as wrongly decided, his theory provides him no conceptual apparatus with which to explain this succession of unfortunate outcomes. He might cite a coincidence of lapses in analysis, but this would induce terminal disbelief in the power of legal reasoning. He cannot pass the decisions off as the product of an anti-labor Court, because his position is that the Court's approach to the new statute was generally a benign and straightforward elaboration of congressional intent. To explain this series of decisions in light of the Court's overall record in the period requires a methodological innovation of the kind I sought.

That he has not grasped the methodological problem can be seen by Finkin's misrepresentation of my approach. As previously noted,<sup>259</sup> his analytical repertoire consists entirely of the categories of formalism and instrumentalism. Obviously I was not engaged in a formalistic analysis of *Fansteel*, so he naturally assumes I must have meant to take the instrumentalist approach. He therefore attributes it to me, even though I clearly rejected it. In concrete terms, Finkin apparently believes that I was trying to prove that the Supreme Court intended its *Fansteel* decision to bring an end to the sit-down strikes. For example, he emphasizes that I suggest that the Court condemned the sit-downs "because" of their unique political characteristics (F:31). Likewise, he argues that I must be wrong in thinking that the Court's decision in *Fansteel* was motivated by a desire to end the sit-downs, because they had largely disappeared by 1939 anyway

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257. *Id.* at 337. *Elk Lumber* relies in part on *International Union, UAW, Local 232 v. Wisconsin Employment Relations Bd. [Briggs-Stratton]*, 336 U.S. 245 (1949) (intermittent, unannounced work stoppages), which in turn relies in part on *Fansteel*. See 336 U.S. at 257, 259. *Briggs-Stratton* was overruled in *Lodge 76, Int'l Ass'n Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 154 (1976).

258. Jim Atleson's work first called my attention to the significance of *Elk Lumber*. He provides a thoughtful and illuminating discussion of the case in J. ATLESON, *supra* note 13, at 50-66.

259. See *supra* notes 17-18 & 57-58 and accompanying text.

(in Finkin's words, the sit-downs were "eradicat[ed] . . . by collective agreement" (F:32)), and, presumably, shopfloor militancy with political overtones permanently vanished from the American scene shortly after the Flint strike ended (F:32-33).

The problem with this line of argument is that my analysis of *Fansteel* was agnostic on the Court's motives, and my methodology in *Judicial Deradicalization* explicitly *rejected* the instrumental approach both in legal analysis and political theory.<sup>260</sup> The word "because" does not appear in my text, either in italics or roman. I said only that the *Fansteel* decision (not the Court) condemned a tactic with certain political characteristics, a statement wholly consistent with my emphasis on the symbolic and ideological level. My analysis at that level may be erroneous or exaggerated. But I am at least entitled to have my claims judged for what they were, not the substitutes Finkin cares to invent.

*B. The Sit-down Strikes and the Struggle For Shopfloor Control*<sup>261</sup>

This brings us to the sit-down strikes themselves. Broadly speaking the question is, what can we learn from the sit-down experience about the aspirations of American workers of the time? While answering this will involve us in a myriad of factual and interpretive details, the sit-down discussion is also revealing of the most basic assumptions about and attitudes toward rank-and-file efforts to challenge management's unilateral control over the structure and pace of work.

1. *The Liberal Institutional Approach.*—Professor Finkin's article exemplifies what Nelson Lichtenstein has called the "liberal institutionalist" perspective on American labor history.<sup>262</sup> In this view, "the establishment of collective bargaining on a legal, routine, and unchallenged basis represents the goal toward which all labor history moves."<sup>263</sup> Two features of this approach, readily observable in Finkin's article, are relevant here. First, although there is interest in and sympathy for ordinary workers and their struggles, liberal institutionalism tends to assume an identity between the needs and aspirations of the rank-and-file and the outlook and goals

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260. See, e.g., K:268 (denying direct causal links between legal decisions and social outcomes); *id.* at 269 (rejecting determinism); *id.* at 292 (denying that result-orientation explains legal outcomes); see also *id.* at 269 n.13 (questioning instrumentalism within political theory).

261. This discussion is heavily indebted to James Green and Ruth Milkman, though neither is responsible for the errors or omissions it may contain.

262. N. LICHTENSTEIN, *LABOR'S WAR AT HOME: THE CIO IN WORLD WAR II* 3 (1982).  
263. *Id.*

of union leadership. Second, liberal institutionalism so sanctifies routine collective bargaining and the collective bargaining contract that it often has difficulty seeing beyond them. For example, the 1930's sit-downs are appreciated primarily as a step in the inexorable march toward normal collective bargaining.

Much of what we have learned about labor history in the past decade or so casts doubt upon these aspects of the liberal institutionalist approach. *Judicial Deradicalization* was written at a time of very new beginnings in labor history, influenced in part by the European social historians practicing "history-from-the-bottom-up" (see K:290). In the past decade a new labor history influenced by rank-and-file perspectives has flowered in the United States, generating a literature of great insight and promise.<sup>264</sup>

The new labor history has challenged conventional preoccupations. For example, we can no longer assume an equation between rank-and-file aspirations and leadership agendas. Twentieth century labor history reveals recurring tension and mistrust between workers and union leaders. This was particularly evident during some of the 1930's sit-down strikes, and the tension has often resurfaced in the post-World War II period.

Likewise, twentieth century labor history provides little support for the notion that workers have been single-mindedly fixated on obtaining union recognition and contracts above all else and as distinct from the broader goal of humanizing their working lives. At the very least, one can say that there is considerable contrary evidence, in light of which the conventional view stands challenged. For example, regarding the New Deal, the new labor history has sought to uncover "the dimension of depression-era insurgency that

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264. Contributions to this literature include: J. BRECHER, *STRIKE!* (1972); M. GLABERMAN, *WARTIME STRIKES* (1980); J. GREEN, *THE WORLD OF THE WORKER* (1980); N. LICHTENSTEIN, *supra* note 262; D. MONTGOMERY, *WORKERS' CONTROL IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY & LABOR STRUGGLES* (1979); *RANK & FILE: PERSONAL HISTORIES BY WORKING-CLASS ORGANIZERS* (A. Lynd & S. Lynd eds. 1973); Brody, *The Uses of Power*, in D. BRODY, *supra* note \*\*\*, at 173-257; Weir, *The Informal Work Group*, in *RANK & FILE: PERSONAL HISTORIES BY WORKING-CLASS ORGANIZERS, supra*; Weir, *Conflict in American Unions and the Resistance to Alternative Ideas from the Rank and File*, in *WORKERS' STRUGGLES, PAST AND PRESENT: A "RADICAL AMERICA" READER* (J. Green ed. 1983). Before turning to law study, Professor Stone published a celebrated contribution to the new labor history. See Stone, *The Origins of Job Structures In the Steel Industry*, in *LABOR MARKET SEGMENTATION* 27 (R. Edwards, D. Gordon & M. Reich eds. 1975).

Along with the new labor history, note should be paid to several exceptional recent contributions to labor sociology. See H. BRAVERMAN, *LABOR AND MONOPOLY CAPITAL* (1974); L. HIRSCHHORN, *BEYOND MECHANIZATION* (1984); C. SABEL, *WORK AND POLITICS* (1982).

sought a fundamental transformation of power relationships in the factory, mill, and office,"<sup>265</sup> and explores "unionization . . . as but one step among many that altered the relationship of ordinary workers to their job, family, workmates, and boss."<sup>266</sup>

Professor Finkin apparently chooses to ignore these recent reappraisals of American labor history. Uncritically devoted to liberal institutionalist assumptions, he interprets all evidence in their light.<sup>267</sup> And because he can only see the sit-downs through the conventional lens, he is unable to appreciate certain basic questions that the experience poses. Herein lies a point that illuminates our entire debate, from the "radical potential" of the 1930's, to the meaning of "radical change," to methodology in legal and social research.

Professor Finkin sees but two possible interpretations of the sit-downs. His view, the conventional one, is that they were solely aimed to secure union recognition and collective bargaining contracts (F:31). The only other possibility from his perspective, one which he rejects, is that the sit-downs had a "revolutionary intent,"<sup>268</sup> a purpose to shake the foundations of the capitalist order (F:54). What Finkin means by the second, "radical" possibility is that participants in the strike sought to challenge the system of private ownership of the means of production and to operate the plants themselves (F:29, 44).

2. *Another Perspective.*—There is a third alternative, the one I actually advanced. In this view, the sit-downs were part of a struggle that had been going on throughout the industrial epoch and which

265. N. LICHTENSTEIN, *supra* note 262, at 5.

266. *Id.*

267. Symptomatic of this short-sighted view, Professor Finkin reduces his discussion of the sit-down experience largely to a single strike, the General Motors strike at Flint, Michigan, which he calls "*the* sit-down of the time" (F:27 n.18 (emphasis in original)). He incorrectly implies that I restricted myself to the Flint case. See F:85 (Klare "makes powerful claims for the Flint sit-down.>"). Finkin treats evidence regarding Flint as dispositive of any and all sit-down questions (F:27-30), but this assumption is unjustified.

The Flint strike was, of course, the most important and famous. But precisely for that reason it was in many respects atypical. The MONTHLY LABOR REVIEW recorded 48 sit-downs in 1936, affecting tens of thousands of workers, not counting strikes lasting less than a day. 44 MONTHLY LAB. REV. 1234 (1937). There were 477 recorded sit-downs in 1937, affecting nearly 400,000 workers, 47 MONTHLY LAB. REV. 360 (1938). In March 1937 alone, that is, after the successful conclusion of the Flint strike, there were 170 recorded sit-down strikes. *Id.* at 361. There were 52 in 1938. 48 MONTHLY LAB. REV. 1129 (1939). These strikes exhibited a diversity of characteristics on issues germane to this debate.

268. F:29 (quoting S. FINE, SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936-1937, at 174 (1969)).



continues today. It is a struggle of and by workers on the shopfloor to humanize labor; to gain direct control over the conditions and pace of work; to broaden autonomy and dignity on the job; and to challenge the hierarchy of industrial life. The goal was not ownership of the plants and factories, but autonomy on the job and some control over working life in the senses just mentioned. The sit-downs reflected a fundamental challenge to management's unilateral authority in the workplace. Put another way, the goal was democracy in working life, which I take to be "radical" in the sense used in this and my original paper.

To be sure, unionization and collective bargaining were often valued and sought by the strikers—not as ends in themselves, however, but because workers saw them as a means toward these broader goals. But winning a contract clause on the speed-up was not necessarily the sit-downer's only notion of how to slow the line. They also knew, or learned in the course of the sit-downs themselves, that they could slow down production through their own direct action. The fact that this is "disruptive" from Finkin's perspective (F:31-32) hardly means that it was not part of the sit-down experience.

I argued in 1978 that the sit-downs bespoke an authentic aspiration for the democratic transformation and humanization of work. Perhaps some of my rhetoric on the subject was exaggerated (*see, e.g.* K:325). But, in the end, Finkin offers no persuasive evidence that my assessment was fundamentally incorrect, and I happily stand by it today.

By contrast, Professor Finkin's arguments are marked by an elitist insensitivity to the democratic aspirations expressed in the sit-down experience. He assumes that all the sit-down strikers wanted was a contract, after which they were ready to turn the collective bargaining process over to leaders and experts. He assumes that industrial workers are only interested in bread-and-butter issues and somehow do not share the academic's or the professional's concern for autonomy, self-governance, and work-satisfaction. This attitude is at the root of a series of specific historical errors upon which Finkin's argument is built.

### C. *The Sit-Down Experience*

This is not the occasion to provide a history of the sit-down strikes. Nor, by the way, did I purport to be offering such an overview in my earlier piece. The short answer to many of Professor Finkin's criticisms is that I was not writing a history of the sit-downs,

but simply relating certain themes in the emerging legal consciousness to certain aspects of the strikes pointed up in the new and in conventional labor history.<sup>269</sup> My purpose in this reply is the still narrower one of showing, with respect to a few major issues, that Finkin misapprehends the historical record and that his mistakes show an unwillingness to come to grips with evidence challenging to the mainstream view.

1. *Agendas.*—What were the goals of the sit-down strikes, including, but not limited to, the one at Flint? Finkin's big point seems to be that the strikes were *solely and consciously* directed toward securing union recognition and collective contracts (F:27, 27 n.17, 31). Even on his own terms, he has a problem sustaining this view. He says that once union recognition was achieved, the *unions* had no further need of the sit-down strikes, but that the *rank-and-file* continued to engage in them (now dubbed "disruptive tactics") for other, unstated purposes (F:31-32). But Finkin cheerfully notes that the CIO unions "eradicated" the tactic by agreeing in the new collective agreements to outlaw it (F:32). He therefore feels able to ignore his own qualification and to stick with the view that the sit-downs had exclusively recognitional and contract objectives.

Finkin implies that I failed to acknowledge the sit-downs' recognitional and bargaining objectives (F:27), although at one point, quoting contrary language from my article, he narrows the charge to the claim that I mention such objectives "obliquely" (F:27). This is nonsense. I described the Fansteel sit-down as a response to the employer's effort to block unionization (K:322). I described the sit-down movement as "essentially" a reaction to employer refusals to meet their collective bargaining obligations under the Act (K:324). (In retrospect, this statement may have gone too far toward accepting the conventional view.) I unambiguously extolled the sit-downs as a device workers used to secure compliance with the Wagner Act and to make industrial unionism and collective bargaining a widespread reality, at a time when the Board and the unions themselves proved unable to enforce the Act (K:266, 324). I credited the Flint strike for the first GM-UAW agreement and for U.S. Steel's de-

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269. Professor Finkin betrays annoyance that I did not discuss a variety of topics on his agenda for a sit-down history, for example, the ACLU's views on the legality of the sit-downs as they reflect on the issue of Communist influence in that organization (see F:28 & 28 n.20). While that and other items he injects might be interesting topics, Professor Finkin enlightens us not at all on their relevance to my discussion. Ironically, having impliedly criticized me for not writing a definitive history of the sit-downs, Finkin himself discusses only one strike and relies almost exclusively on one source. See *supra* note 267; *infra* note 270.

cision to bargain with the Steel Workers Organizing Committee (K:266 n.7). Finally, I said that at the level of overt political programs, e.g., as advanced by the left-wing groups and the articulate rank-and-file militants, collective bargaining was universally viewed as the working class's prime objective. By contrast, I noted a dearth of explicit, socialist-oriented demands for worker or public ownership (K:290-91 n.79). This may be Finkin's idea of "oblique" or no acknowledgment of the collective bargaining objectives of the sit-downs, but in fact he has simply created yet another extravagant strawman.<sup>270</sup>

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270. Perhaps I was not as explicit as Finkin would like because I was not writing a history of the sit-downs and, more importantly, because I took the collective bargaining objectives of the sit-downs, particularly the Flint strike, for granted. My interest was in whether there was more to the story as well.

Finkin repeatedly criticizes me (F:26-28, 85) for failing to cite Sidney Fine's classic book on the Flint strike, S. FINE, *supra* note 268, and instead quoting from Jeremy Brecher's pamphlet, Brecher, *The Sitdown Strikes of the 1930's: From Baseball to Bureaucracy*, in 4 ROOT & BRANCH PAMPHLET 23 (n.d.), cited in K:325 n.222. Finkin darkly hints that I ignored relevant evidence: "[Klare] studiously ignores the leading study of the [Flint strike] that flatly contradicts his claims" (F:85).

Fine's book is, of course, a superb contribution to the literature, although subsequent research has added and continues to add to our understanding of the Flint strike and the sit-down movement. But, despite the nasty imputation, Finkin shows nothing in Fine that contradicts my views. Indeed, Finkin himself says that "Fine confirms much of what Klare says" (F:27). Fine says that the sit-downs were "primarily" aimed to secure recognition, but he does not ignore evidence that other things were going on. S. FINE, *supra* note 268, at 332. Fine confirms that the sit-downs were perceived as a radical threat, see, e.g., S. FINE, *supra* note 268, at 332-33; see also F:29-30 (citing Brecher who cites Fine). He confirms that the speed-up of the line was a crucial auto workers' grievance underlying the Flint strike, S. FINE, *supra* note 268, at 55-59. He confirms that the sit-downs continued after union recognition, *id.* at 321-29. Above all, Fine confirms the profound psychological and emotional impact of the sit-down experience, *id.* at 156-77. It is obviously true that I have a different focus and draw different conclusions than Fine, but that, presumably, is another matter.

Professor Finkin's claim that Fine contradicts me boils down to two erroneous readings of my work. Fine clearly argues that union recognition was the key objective of the Flint and other strikes. My article does not purport to challenge this (though I also pointed to other agendas), so I do not see Finkin's "contradiction." Second, Fine is quoted to the effect that the Flint strike lacked "revolutionary" intentions, as contrasted say, to the 1920 Turin factory occupations. Since I never argued that the workers had a "revolutionary intent" in this sense, indeed, given that I explicitly denied it, K:290-91 n.79, Finkin's second "contradiction" also evaporates.

Had I been writing the sit-down history Finkin assigns me, instead of the article I actually wrote, I surely would have cited Fine. I quoted Brecher for the unremarkable reason that, given my narrower focus, Brecher best put the particular point I wanted to underscore. In any event, Finkin notes that in relevant part Fine confirms Brecher (F:27). I might add that three of the whopping seven quoted lines on the subject are quoted not from Brecher but from Louis Adamic, a noted labor writer who at the time of the sit-downs was close to the CIO. I also note in passing that, contrary to Finkin's

This strawman, that I denied the sit-downs' recognitional objectives, is not the real issue. The controversial point is whether the sit-downs had additional objectives and a broader context. Here I include, although Finkin largely neglects, the large number of "quickie strikes," brief protest actions lasting for a few hours or the balance of a shift (as distinct from the longer, "stay in" factory occupations such as occurred, e.g., at Flint). It is well known that even excluding the "quickies" often utilized to press grievances, only "slightly more than half of the sit-down strikes in 1937 were for [the] purpose" of "gain[ing] recognition from recalcitrant employers."<sup>271</sup> In 1938, 36% of sit-downs (again, excluding quickies), were aimed at grievances, whereas only 35% in that year were directed at

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assertion (F:26), Brecher is not and has never been the editor of the journal *RADICAL AMERICA*.

271. S. FINE, *supra* note 268, at 332. Fine relies on *Number of Sit-Down Strikes in 1937*, 47 *MONTHLY LAB. REV.* 360 (1938), which indicates that "[u]nion organization matters were the major issues in 53.4 percent" of the 1937 sit-downs. *Id.* at 362. These data do not include strikes lasting less than one day. *Id.* at 360.

Professor Finkin cites this reference from Fine for the proposition that "the general goal of most sit-down strikes" (F: 27 n.17, emphasis added) was "achieving union recognition and, most importantly, a collective agreement" (F: 27). I assume that Finkin is here referring to first contracts, since he says that "once union recognition and a collective agreement were secured, the unions that had employed the sit-down as an organizational tactic would have no need of it. . . ." (F: 31). It is not clear that Finkin's broad assertion is supported by Fine's more precisely worded discussion. Following the Bureau of Labor Statistics (BLS) data, Fine notes that an additional 29.4% of the 1937 sit-downs were aimed at securing improved wages and hours, S. FINE, *supra* note 268, at 332. In support of his claim, Finkin might seek to add some of these strikes to the recognition strike category. The BLS aimed to single out the major or dominant issue in each strike, but recognized that characterization of the causes of strikes is necessarily inexact, and that strikes often have overlapping causes. *See* F. Peterson, *Strikes in the United States*, Bureau of Labor Statistics Bulletin No. 651 (1938), at 166-67. Wage-and-hour issues seemed to arise frequently in recognition strikes, *id.* at 58, and we may assume that some strikes launched over wage-and-hour issues developed into contests for recognition. Nonetheless, it is not disclosed in how many cases within the wage-and-hour dispute category, if any, these demands were sought to be embodied in a contract, particularly a first contract. During this period, workers sometimes employed the sit-down tactic even though a contract was or had previously been in effect, and, alternatively, they sometimes deployed sit-downs to achieve benefits and working conditions improvements even when they could not get or did not seek to achieve a contract. It therefore cannot be assumed that all or even most of the strikes in the wage-and-hour category were necessarily or directly linked to the goal of achieving a contract relationship. Moreover, it appears that BLS included strikes that were over both recognition and wage-and-hour issues under the "union organization" subcategory. *See, e.g., Analysis of Strikes in 1937*, 46 *MONTHLY LAB. REV.* 1186, 1200 (1938) (Table 10); *Analysis of Strikes in April 1938*, 47 *MONTHLY LAB. REV.* 350, 354-55 (1938). Accordingly, there is considerable reason to doubt Finkin's sweeping claim, at least on the basis of the evidence he has urged in its support. In any event, even if his claim proved accurate as a description of the non-quickie sit-downs, this would not undermine the argument in the text, which accepts the recognitional goals of many of the sit-downs but is premised on the un-

union organization matters.<sup>272</sup>

Unionization and collective agreements are not abstractions, desired for their own sake. They were viewed as means to larger ends. To say that the employees wanted a contract begs the question, what did they want the contract for? Finkin assumes that sit-down participants had the same view of the goals and meaning of collective bargaining agreements as was held by the CIO leadership. There is considerable reason to doubt this.

Interpreting the sit-downs in light of industrial workers' broader aspirations, the reasons *why* they sought unionization, the evidence indicates that many sit-downs were revolts against the hierarchy and authoritarianism of factory work, particularly as experienced in the speed-up and unjust discipline. The sit-downs were a protest and challenge to management's unilateral authority over the organization and particularly the pace of work. For example, Fine writes regarding the Flint strike: "It was the speed-up in the view of the principal participants that was the major cause for the GM sit-down strike."<sup>273</sup> To be sure, having a strong contract is one of the best ways to constrain management's authority. Finkin correctly notes that the UAW asked for a prohibition on speedups as one of its demands in the Flint strike (F:30), although he neglects to tell us that the union conceded management's authority over production speeds in the contract resulting from the strike.<sup>274</sup> Unionization also provided protection for rank-and-file militants in the ongoing, post-recognition struggle over working conditions. As James Green has written:

Workers in large mass-production industries, who were mainly concerned with speedup, tried to use the occupation to gain some control over the process of production. . . . [U]nion recognition allowed organized workers to reduce speedup through concerted actions and to begin to humanize their workplaces.<sup>275</sup>

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remarkable notion that an important social experience may have more than one purpose or meaning.

For an eyewitness description by steel union activist and leader John Sargent of how direct shopfloor action was used in the late 1930's to secure wage and working conditions improvements without a contract, see RANK & FILE, *supra* note 264, at 107-08. Mr. Sargent, who was five times elected as president of a large Steelworkers local, pointedly claims that conditions for labor were superior in the period without a contract.

272. See *Sit-Down Strikes*, 48 MONTHLY LAB. REV. 1129, 1130 (1939). About 29% of the 1938 sit-downs were due to wage-and-hour issues.

273. S. FINE, *supra* note 268, at 55.

274. *Id.* at 325.

275. J. GREEN, *supra* note 264, at 157.

Clearly the sit-downer's purpose to challenge hierarchy in work was inextricably linked to their collective bargaining and recognition objectives.

But the distinctive feature of much of the sit-down activity was that it directly involved workers themselves in attempts to wrest control of production conditions from management. In describing the 1936-1937 sit-down wave, David Montgomery notes the use of sit-downs, before and after union recognition, to revise piece rates, slow the line, and reduce production quotas. He writes:

The power which unionizing workers won on the job at this time was far more significant to them and to their employers than whatever wage gains they won. Shop stewards and committee men and women, backed up (often physically) by the employees in the departments they represented, translated the inextinguishable small-group resistance of workers into open defiance and conscious alternatives to the directives of management.<sup>276</sup>

And when workers launched sit-downs without a conscious objective to fight for control over the production process, they often learned their powers in the struggle for control in the course of the strikes. The post-Flint quickies, for example, were a continuation of the shopfloor conflict that in part had led to the big sit-downs, and they reflected workers' unwillingness to rely solely on collective bargaining institutions to press their struggles.

There is, then, a dimension to the sit-down experience that was not and could not be neatly cabined within conventional collective bargaining. For it is a basic assumption of collective bargaining as we know it that the employer has the authority to interpret and enforce plant rules, and it is ordinarily the duty of employees to obey the employer's commands. To be sure, management's decisions in violation of the contract are subject to correction by the grievance procedure. But on a day-to-day basis, the collective agreement "is understood as embodying the understanding that management acts and the worker obeys, and that coercive force will not be used to resolve disputes over whether management has complied with the

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276. D. MONTGOMERY, *supra* note 264, at 163-64. Montgomery and other practitioners of the new labor history carefully credit union contracts, where achieved, for curtailing management power and strengthening employees' sense of collectivity. See, e.g., *id.* at 164. My views are in complete accord on this point, and I regret that I did not formulate them in my earlier article with Montgomery's exacting sense of balance.

rules."<sup>277</sup> To put it another way, "the essential characteristic of the industrial agreement [is] an acceptance of the authoritarian nature of the employment relationship. The rules contained in it are standards against which management's actions are to be measured, but management retains the right to act, to manage the business and direct the working forces."<sup>278</sup> That is, conventional collective bargaining, whatever its many accomplishments in improving working conditions, assumes the legitimacy of an authority relationship that the sit-downs threatened, for a time, to undermine. To disregard these aspects of the sit-down experience is to fundamentally misunderstand what they were about and to ignore the oppressively authoritarian conditions of 1930's mass production industry which gave rise to them, particularly in auto.

There is another aspect of the sit-down experience worthy of note. The sit-downs were a tactic through which, intentionally or otherwise, workers put pressure on labor leaders. The sit-downs sometimes emerged as a way in which workers organized themselves in situations in which union leaders lagged behind and seemed unable to accomplish organization. Moreover, the sit-downs effectively made a statement to CIO leaders about worker dissatisfaction with prior, ineffective union efforts in the mass production industries. In this sense, the sit-downs were connected with the massive explosion of rank-and-file militancy in 1934-1935 which was, in one of its elements, a rebellion against the old-style AFL leadership.<sup>279</sup> The sit-down put greater control over strikes, negotiations and grievance settlements in the hands of rank-and-file workers, who were anxious to insure that their own union leaders would not cede too much to managerial prerogative. The AFL experience with mass-production workers, such as it was, did not inspire confidence regarding union leadership understanding of such paramount issues as controlling speedup.<sup>280</sup> Little in the attitudes of top union officials, certainly in the AFL but also including many top CIO leaders, suggested a central emphasis on workers' control issues (as the term is used here).

2. *Spontaneity*:<sup>281</sup> This brings us to the issue of the origins of

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277. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 770 (1973).

278. *Id.* at 737.

279. See, e.g., Nelson, *Origins of the Sit-Down Era: Worker Militancy and Innovation in the Rubber Industry, 1934-38*, 23 LAB. HIST. 198, 204-05 (1982).

280. See, e.g., J. GREEN, *supra* note 264, at 153.

281. "Spontaneity," in this context, means that the initiative in precipitating a strike is taken at the plant level, with or without local union leadership support. It is meant to

the sit-downs. Professor Finkin portrays the sit-downs as a tactic controlled by union officials on the outside, turned on or off like electricity in the calculated service of union objectives (F:27, 31-32). The crucial decisions were made by non-striking union leaders, which, from his point of view, is as it should have been. This description is not supported by the historical record. Accounts of the period stress the spontaneous, rank-and-file origins of the sit-down strikes. For example, David Brody tells us that the 1936-1937 sit-downs "were generally not a calculated tactic of the union leadership. . . . Spontaneous sitdowns within the plants accounted for the initial victories in auto and rubber."<sup>282</sup> In many instances union leaders initially opposed pre-recognition sit-down strikes, or supported them only with grave reservations.<sup>283</sup> The CIO never officially endorsed the sit-down tactic, and the AFL explicitly condemned and disavowed it.<sup>284</sup> CIO leaders condemned post-recognition sit-downs.<sup>285</sup>

Even the Flint strike belies Professor Finkin's view, as Fine's history clearly demonstrates. Other sources place greater emphasis on rank-and-file initiative than does Fine,<sup>286</sup> but for simplicity I will

distinguish strikes called or other union actions taken by higher level union officials. The key issue is the degree of rank-and-file participation in the process of deciding to act. The term "spontaneous" does *not* imply that the action involved lacks the characteristics of planning, direction, coordination, and leadership. Likewise, "spontaneous" does *not* imply that the particular strike is or was an elemental, instinctive, non-functional protest, as distinct from a rational response to the employees' situation.

282. D. BRODY, *supra* note \*\*\*, at 103. See also J. GREEN, *supra* note 264, at 153; J. WALSH, CIO 175 (1937); Cary, *Institutionalized Conservatism In the Early CIO: Adolph Germer, A Case Study*, 13 LAB. HIST. 475, 487 (1972).

283. D. BRODY, *supra* note \*\*\*, at 103; J. GREEN, *supra* note 264, at 153.

284. S. FINE, *supra* note 268, at 331. Fine notes that AFL affiliates "did not necessarily feel themselves constrained by this pronouncement." *Id.* (citation omitted).

285. H. HARRIS, AMERICAN LABOR 290-91 (1939) (quoting CIO officials); N. LICHTENSTEIN, *supra* note 262, at 15-16. See also F:32 (CIO unions agreed to contracts outlawing the sit-down strike).

286. In a 1970 interview, Genora Dollinger (formerly Genora Johnson), organizer of the Women's Emergency Brigade, insisted that her husband, Kermit Johnson, initially formulated the plan to seize Chevrolet Plant Number 4. See "GM Strike Settled!" (oral history interview with Genora Dollinger) in WIN, Oct. 15, 1970, at 8 (available on microfilm, "Underground Newspaper Collection," Bell & Howell Micro Photo Div., Reel No. 48, Item 3). Kermit Johnson was a rank-and-file auto worker of leftist views who worked in the Chevrolet plant. See S. FINE, *supra* note 268, at 6, 57, 221. The brilliantly conceived and executed seizure of Chevrolet No. 4 on February 1, 1937, at a point in the strike when the union's fortunes were flagging, is generally regarded as the crucial tactical move that won the strike. See generally *id.* at 266-312. Fine credits Robert Travis and Roy Reuther as "the principal originators of the strategem," *id.* at 267, although he notes that Travis himself acknowledged that "his own thinking had been influenced by Kermit Johnson," *id.*, and that Johnson advised him to create a diversion elsewhere in the General Motors complex, *id.* The diversionary maneuver was, in fact, successfully



rely here solely on Finkin's preferred text. According to Finkin, "the basic tactical and strategic decisions governing the [Flint] sit-down from its inception to the eventual contractual settlement with General Motors were made . . . by union leaders. . ." (F:27). Finkin would have us believe that the United Auto Workers (UAW) in late 1936 was a well-oiled machine capable of planning, timing, and executing the strike on a top-down basis. There is simply no reality to this image of the inception of the Flint strike.

For one thing, the UAW was in a state of near-anarchy in the period leading up to the strike.<sup>287</sup> Many crucial decisions were made at the local level, and factionalism was rife within the union. Membership was low until just before the strike, and the greatest surge in UAW organizational strength did not occur until after the strike. While top leaders of the UAW and the CIO were aware that a climactic confrontation was imminent, when the strike actually began in late December, 1936, they were still assuming it would occur in January, and it is not clear that even that late in the course of events they had consciously opted for a sit-down strike instead of a conventional strike.<sup>288</sup>

Fine says that the conventional version, "assumed at the time . . . and accepted ever since [is] that the CIO was caught unawares by the sit-downs in Cleveland and Flint."<sup>289</sup> He questions this view, but only partially, by suggesting that John L. Lewis understood the crucial importance of the organizing drive in auto, and that CIO leaders assumed that a major confrontation was brewing for January.<sup>290</sup> He adds that UAW leaders, notably President Homer Martin and First Vice-President Wyndham Mortimer, played key roles in the timing of some of the sit-downs that led to the Flint strike,<sup>291</sup> but his detailed description of how the Flint strike actually came about is

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employed by the UAW during the takeover of No. 4. I am indebted to my friend Staughton Lynd for calling Genora Johnson's interview to my attention. I note in passing that the Women's Emergency Brigade played an important tactical role in the seizure of No. 4 that is often overlooked or underplayed in traditional accounts of the strike.

In addition to some skepticism on the question of rank-and-file participation, Fine's account underplays the crucial role of the organized left in the Flint strike. See generally R. KEERAN, *THE COMMUNIST PARTY & THE AUTO WORKERS UNIONS* 183-84 (1980).

287. See S. FINE, *supra* note 268, at 94.

288. See *id.* at 139, 143-44, 146-47. Curiously, in a set of goals for the automobile organizing campaign announced as late as November, 1936, top UAW and CIO leaders failed to include exclusive recognition. *Id.* at 97.

289. *Id.* at 146.

290. See *id.* at 147.

291. See *id.* at 147-48.

totally inconsistent with Finkin's understanding that the union called the shots in a calculated fashion to obtain recognition.

This is not the place to recite the history of the strike. I will highlight several major points that emerge from Fine's account. The crucial elements of the Flint strategy, particularly the idea of militant strike action aimed at closing down the key plants in the General Motors empire, emerged not from the heads of top union leaders but from the thinking and experience of lower level union activists in the "progressive" or "militant" wing of the union, particularly based in Cleveland and Toledo.<sup>292</sup> (To be sure, certain key figures in Flint, notably Mortimer, emerged from this wing of the union to take on high union office.) The prelude to the Flint strike included a series of spontaneous or unauthorized strikes, of which the most important was an electrifying sit-down in the Fisher Body Plant No. 1 on November 13, 1936. The strike was not called by the union but by shop-floor militants, notably Bud Simons.

The main GM strike began with sit-downs, leading to a conventional strike, in Atlanta. At the head was Fred Pieper, local leader and a member of the UAW executive board. Pieper was a militant, although not allied with the "progressive" wing. While the origins of the Atlanta strike are somewhat obscure, it is clear that the UAW leadership did not make a considered decision to precipitate the final GM campaign at this time. Indeed, it is clear that the Atlanta strike itself was not authorized by the union.<sup>293</sup> This points up the decentralization and organizational anarchy that prevailed in the UAW prior to Flint. The GM strike spread in a similarly undisciplined fashion, with another sit-down in Kansas City that turned into a conventional strike.<sup>294</sup> Rank-and-file militants next precipitated a sit-down in Cleveland at the end of December. Fine notes that, in the customary view, the Cleveland strike was entirely spontaneous in origin.<sup>295</sup> He questions this view, citing Homer Martin's claim that he had ordered the Cleveland strike, but Fine's description emphasizes the militant, rank-and-file pressure that brought it about.<sup>296</sup>

At this point Mortimer understood that the moment of truth was at hand, and he told Travis to strike Flint. Fine notes that "[t]here is no reason to think that Mortimer consulted with other

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292. *See id.* at 72-81.

293. *See id.* at 135-36.

294. *See id.* at 138.

295. *See id.* at 142.

296. *See id.* at 142-43.

UAW officers before advising this course of action."<sup>297</sup> Moreover, rank-and-file workers played a role in choosing the moment for beginning the Flint strike. "[T]he precise timing of [the Flint] strike may have surprised even most of the UAW high command."<sup>298</sup> The opening skirmish was a sit-down in Fisher Body Plant No. 2 on December 30, 1936, which appears to have been "entirely spontaneous" in origin.<sup>299</sup> Robert Travis took the initiative in calling the strike in the more important Fisher Body No. 1, which occurred later in that day, setting in motion the events we know as the Flint strike. As Fine notes, however, it is not clear whether even Travis himself had finally weighed the advantages and disadvantages of a sit-down vs. a conventional strike at the time the sit-down began.<sup>300</sup>

In sum, the historical record yields a quite different portrait of the origins of the strike than is given by Professor Finkin. The strike did not come about simply as a result of a calculated decision of the union to deploy a certain tactic to gain recognition. It was the product of an extremely complex interplay of decentralized pressures and local and national developments, in which rank-and-file initiative played an important role and over which top leaders of the union and the CIO had very little control. And once the strike was under way, there was considerable participatory democracy in the day-to-day administration of strike affairs inside the plants.<sup>301</sup>

3. *The Aftermath.*—Finally, there is the uncomfortable fact for Professor Finkin that sit-downs and similar "disruptive tactics" did not disappear with the coming of collective bargaining. GM employees, for example, expecting "radical change" after the Flint victory, "'ran wild in many plants for months.'"<sup>302</sup> Many local, autonomous sit-downs occurred,<sup>303</sup> far too many to be passed off as the work of isolated hotheads. There were 170 sit-downs in GM plants between March and June, 1937.<sup>304</sup> Indeed, Roy Reuther later declared that the post-Flint quickie grievance strikes were "the greatest organizers,"<sup>305</sup> because successful grievance settlements

297. *Id.* at 143.

298. *Id.* at 144.

299. *Id.*

300. *See id.* at 146.

301. *See, e.g., id.* at 157-58. *See also supra* note 286.

302. S. FINE, *supra* note 268, at 321 (citation omitted); cf. I. BERNSTEIN, *TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933-1941*, at 559 (1970) (persistent appearance of the sit-down in auto after collective agreement signed).

303. S. FINE, *supra* note 268, at 222-31; *see also* J. WALSH, *supra* note 282, at 134.

304. S. FINE, *supra* note 268, at 329; I. BERNSTEIN, *supra* note 302, at 559.

305. Quoted in S. FINE, *supra* note 268, at 328 (quoting Roy Reuther).

won in unauthorized sit-downs enhanced the union's prestige.<sup>306</sup>

More generally, most accounts are in accord that sit-downs (although not necessarily lengthy stay-in plant occupations) lasted long after the Flint breakthrough or union recognition at other companies.<sup>307</sup> As Professor Lichtenstein has written:

Few workers accepted the modern distinction between contract negotiation and contract administration, so shop-floor assemblies, confrontations, slowdowns, and stoppages were endemic in the spring of 1937. These demonstrations of collective strength legitimated the union's presence for thousands of heretofore hesitant workers, at the same time offering many their first sense of participation and control. Such job actions extended the meaning of collective bargaining left unresolved in the early, sketchily written, signed contracts. . . . Through such tactics, the union secured de facto recognition of the shop steward system and a partial veto over production line speeds.<sup>308</sup>

While factory occupations largely (although not entirely) disappeared by the time of *Fansteel*, high levels of shopfloor direct action continued up to and through World War II.<sup>309</sup> In most instances these involved "quickie" grievance sit-downs or wildcat strikes. Many were led by militants "seasoned" in the earlier sit-down wave. Indeed, wildcat and slowdown activity continues to this day in industries organized forty-five years ago (or longer).<sup>310</sup>

Post-recognition sit-downs were not an unmixed blessing. The sit-downs themselves, and "the episodic and ephemeral consciousness of the rank-and-file" they sometimes reflected, posed enormous problems for unions and for the labor movement as a whole, as Lichtenstein is quick to point out.<sup>311</sup> For many reasons, CIO leaders in this period worked hard toward achieving routine collective bargaining and institutional security, goals leaving little room for sit-down tactics.<sup>312</sup> Virtually the entire CIO leadership

306. Cf. D. BRODY, *supra* note \*\*\*, at 97 ("Direct action was another expression of CIO militancy. Sudden strikes and slowdowns, although often against official policy, were frequently encouraged by local officers.").

307. See, e.g., C. GOLDEN & H. RUTTENBERG, *THE DYNAMICS OF INDUSTRIAL DEMOCRACY* 51-52 (1942) (sit-downs after contract to push grievances).

308. N. LICHTENSTEIN, *supra* note 262, at 12-13.

309. See generally M. GLABERMAN, *supra* note 264.

310. The case of coal mining is well known. For a revealing discussion of one otherwise unremarked incident in auto, see Lippert, *Fleetwood Wildcat: Anatomy of a Wildcat Strike*, *RADICAL AM.*, Sept.-Oct. 1977, at 7.

311. See N. LICHTENSTEIN, *supra* note 262, at 13-16.

312. *Id.* at 20-21. For an exceptionally revealing source on the attitudes and thinking

condemned the wildcats and unauthorized sit-downs.<sup>313</sup> At one point UAW leaders entered into a highly unpopular, subsequently repudiated agreement giving GM sole control over production standards and the right to discipline employees who instigated unauthorized job actions.<sup>314</sup> The persistent problem of unauthorized shopfloor action dragged on for years, intimately connected in unions like the UAW with questions of local autonomy and internal union democracy.<sup>315</sup>

Ultimately, the question of post-recognition shopfloor action merges into the larger question of how collective bargaining can be organized on a stable, institutionally sound, and democratic basis, while still retaining the sit-down virtues of spontaneity, participation, and direct employee control. I by no means think there are simple answers to this question, and I regret if my earlier article left some readers with the impression that I do. Neither I nor the labor historians cited focused on the sit-downs because we think the tactic should be routinely used to solve all labor-management grievances. The point of the discussion is that our present industrial relations system did not appear full blown when GM settled with the UAW in 1937, as Professor Finkin's account suggests. The system was worked out slowly, over time, and always in the context of political struggles between opposed interests contending over alternative institutional possibilities. And it is, to say the very least, a matter of serious debate whether rank-and-file interests received optimal protection in the system that finally took form in the 1940's and 1950's. In any event, prevailing collective bargaining rules and institutions were not legally inevitable or technologically determined. They were constructed of countless choices and actions in a lengthy, continuing process of struggle for and over the meaning of industrial democracy.

The sit-downs expressed certain values that are worth remembering in any effort to evaluate today's collective bargaining regime. In particular, the sit-downs often reflected direct worker participation in and control over the work environment and the processes

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of CIO leaders at the time, see C. GOLDEN & H. RUTTENBERG, *supra* note 307, particularly the discussion of the conflict between disruptive tactics and the demands of mature collective bargaining, *id.* at 43-61.

313. See *supra* note 285 and accompanying text.

314. See I. BERNSTEIN, *supra* note 302, at 563; N. LICHTENSTEIN, *supra* note 262, at 15-16.

315. M. GLABERMAN, *supra* note 264, at 10-13; N. LICHTENSTEIN, *supra* note 262, at 16-17.

utilized to resolve workers' grievances. They embodied an aspiration that control over the nature and shape of jobs not be ceded entirely to management. These values can get lost in routinized, institutionally top-heavy collective bargaining. David Brody concludes his brilliant essay on the emergence of modern collective bargaining by quoting a union representative who said:

When the men settled things on the floor, it was something they did themselves. . . . They directly participated in determining their working conditions. When things are settled legalistically, through the grievance procedure, it's something foreign. They don't see it.<sup>316</sup>

Professor Stone and I are deeply committed to the democratic value of direct participation. Apparently this is a value of less importance to Professor Finkin. For example, he has ill-concealed disdain for the idea that strikers should make or be involved in making strike decisions on a democratic basis, and he treats as natural a situation in which union officials control and dictate all strategic choices (F:27, 31-32). It may be that Finkin is right and that my concerns are misguided or overdone. Perhaps CIO leaders were wise in seeking to curtail and clamp down on shopfloor militancy. But these are not simple questions of fact or law; they return us, as always, to values, assumptions, and judgments of a political nature. I invite Professor Finkin to make whatever argument he wants at that level. But his apparent disinterest in or disdain for my democratic concerns should not obscure the historical record of profound conflict between rank-and-file workers and top and middle-level union leaders over when and how the sit-down tactic should be deployed, about the proper locus of decisionmaking in labor conflict, and about labor's direction and aspirations in collective bargaining.

## VI. PROFESSOR FINKIN'S POLEMICAL TECHNIQUES: A BRIEF REJOINDER

Throughout this Article, I have attempted to treat Professor Finkin's critique of my work as a serious invitation to academic ex-

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316. D. BRODY, *supra* note \*\*\*, at 210 (quoting interview in Strauss, *The Shifting Power Balance in the Plant*, 1 *INDUS. REL.* 65, 90 (1962)). Professor Finkin paints an entirely uncritical portrait of today's grievance procedures, ignoring the evidence—much coming from workers themselves, not academics—of alienation and unresponsiveness in the grievance process. See, e.g., C. SPENCER, *BLUE COLLAR* (1977) (steelworker and active unionist speaks candidly about pathology of the grievance procedure in large plant; describes delay, depersonalization, unresponsiveness, overlegalism, and top-heavy management control).

change about issues of importance to labor law scholarship. This has not always been easy to do. Unfortunately, Professor Finkin deployed a variety of polemical techniques that, whatever he may have intended, have the effect of discouraging meaningful controversy on the issues and trivializing the dialogue between us. Finkin's polemical style deflects attention from the fundamental and often unspoken political and institutional choices assumed by his approach to labor law scholarship. In addition, it creates an exceedingly unfair portrait of my work. For the record, therefore, before concluding this reply, I will briefly catalog the principle devices in Professor Finkin's arsenal and show how his use of these techniques distorts his rendition of my positions.<sup>317</sup>

The primary characteristic of Professor Finkin's critique is its misrepresentation of my views. We saw this most notably in his strawman treatment of my arguments regarding the "intent" of the Wagner Act.<sup>318</sup> There are a number of variations on the misrepresentation theme. Often, when Professor Finkin offers what he deems a devastating refutation, it turns out that his point is wholly irrelevant to the claim I advanced. For example, sometimes he purports to rebut my description of judicial perceptions of industrial life by adducing evidence that these perceptions are inaccurate. His observations are often true enough, but simply unresponsive to the point under discussion, namely, what judges *thought*. Similarly, Finkin treats my descriptions of other people's views as though I were stating my own views.<sup>319</sup> He imputes positions to me on issues I did not address and then attacks his own speculations as though they were my views.<sup>320</sup> He attacks his extreme caricatures of my

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317. I note with regret that Professor Finkin chose not to share his manuscript with me until just prior to publication. This was despite my request for a copy and despite that his paper was delivered as a public lecture and circulated within the profession (*see* F:23 n.\*).

318. *See supra* notes 75-77 and accompanying text.

319. *E.g.*, F:49 (describing the "image of the American worker that Klare conjures up with these sentences" where the referenced sentences refer not to *my* views on workplace reality but views I ascribed, respectively, to conventional labor historians and to prevailing legal doctrine); *id.* at 53 (evidence from "real world" said to be irrelevant to Klare because his argument is built on basic "assumption," which I in fact do not hold); *id.* (Klare posits "passive" industrial world, whereas I used the word "passive" only once in passing footnote to describe the prevailing view: within collective bargaining law on employee's proper role in day-to-day industrial decisionmaking); *id.* at 88-89 (Finkin incorrectly claims that my article identifies the law of collective bargaining with industrial relations realities).

320. For examples of this technique, *see, id.* at 37 (attributing to me without basis a certain position on the right to strike and then explaining purported difficulties with that position "in terms of Klare's argument"); *id.* at 47 (speculating on and criticizing views

positions, rather than the more modest formulations I actually offered.<sup>321</sup>

Professor Finkin also claims that I ignored countervailing evidence,<sup>322</sup> although in virtually every instance it turns out that the evidence he has in mind is either supportive of my claims,<sup>323</sup> irrelevant to them, or actually cited by me.<sup>324</sup> One of Finkin's most frustrating techniques is simply to ignore what he does not understand, and then to tell the reader that I did not address the particular question or define the particular concept.<sup>325</sup> His polemic twists quotations out of context,<sup>326</sup> and patches unrelated quotations together

on railway collective bargaining law that Finkin attributes to me without basis); *id.* at 51-52 (speculating on and then criticizing an argument I did not make, in light of the "orthodox" theory of collective bargaining, which I did not discuss).

321. For example, when I question the loss by employees of certain legal rights to engage in concerted activity, Professor Finkin ascribes to me the ludicrous claim that concerted activity, indeed, sit-down strikes should *always* be launched by employees to redress their every grievance (F:89). Likewise, in discussing *Sands Mfg. Co. v. NLRB*, 306 U.S. 332 (1939), he suggests that my complaint about the case boils down to the fact that workers do not own the means of production (F:38). Ultimately he acknowledges that, with respect to this case, I made the somewhat more modest criticism that a contract without a no-strike clause ought not be deemed a waiver of the right to strike (F:39-41).

322. F:85, 91.

323. This is true with respect to much of the evidence regarding the sit-down strikes, *see, e.g., supra* note 270.

324. For example, Finkin never establishes the relevance of the railway cases to my argument (as opposed to his), and in any event I cited them. *See* K:299 n.110. *See also supra* note 196.

325. Professor Finkin ignores my development of the central category of "legal consciousness" or "ideology," as he terms it. *Compare* F:84-85 n.278 (Klare and Stone do not provide explanation of concept of "ideology"), *with supra* notes 24 & 54-58 and accompanying text (describing how concept of "legal consciousness" was developed in *Judicial Deradicalization* and subsequent work).

Here is another example of this technique: "Klare never explains what an 'anti-contractual' interpretation of the labor Act would be, beyond a vague notion of collective bargaining as an ongoing 'participatory' process that is somehow distinct from collective bargaining as we know it today" (F:33).

This combines caricature with denial. I discussed contractualism at length (K:293-98 (citing literature)), and followed up in subsequent work, *see, e.g.,* Klare, *Critical Theory*, *supra* note 24, at 71-72, 79; Klare *Public/Private*, *supra* note 24, at 1399-1415. My application of the concept to specific cases is discussed *supra* text accompanying notes 190-236. Professor Finkin is correct that I was not very specific in *Judicial Deradicalization* about alternative models of workplace participation (*see* F:48). But he talks as though this were some sort of far-out concept (F:49), seemingly oblivious to the fact that it has now become a central concern of contemporary industrial relations debate. *See supra* text accompanying notes 240-44.

326. Here are two examples:

(1) "Klare dismisses the obvious connection of the labor Act to prior law with the



pronouncement that 'this was interesting as intellectual history, but politically disingenuous, given the extraordinary opposition that greeted the Wagner Act' (F:47). Finkin goes on to say that I do not illuminate what I meant by "politically disingenuous."

I cannot imagine what I could possibly have meant by saying (had I said it) that a perceptible connection between the Wagner Act and prior law is "disingenuous." But in any event, the quotation from my article is not, as Professor Finkin suggests, a general statement about the origins of the Wagner Act. Rather, it was a specific reference to a 1935 letter from Felix Frankfurter to President Roosevelt, and to a passage in Frankfurter's opinion in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), both of which portray the Wagner Act as codifying prior labor relations experience. I did "illuminate," in specific detail which Finkin ignores, why I thought Frankfurter's statements were disingenuous. For example, I thought it was disingenuous for Frankfurter to cite the Erdman Act, ch. 370, 30 Stat. 424 (1898) (repealed 1913), without mentioning that the portion most relevant to *Phelps Dodge* had been declared unconstitutional in the celebrated case of *Adair v. United States*, 208 U.S. 161 (1908). See K:330 n.251. And, in both documents, Frankfurter tried to persuade his readers that a consensus existed among all honest observers in favor of legal protection for employee self-organization and legal prohibitions on employer discrimination. For example, in *Phelps Dodge* he wrote: "Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise." 313 U.S. at 182. The problem is that many, if not most, American employers did not see things that way. I commented that Frankfurter was less than candid in not acknowledging this fact. Finkin is only interested in textbook legislative history. I was clearly referring to something different, to the deeper *politics* of the Wagner Act. By taking my statement out of context he misleads the reader into thinking that I espoused foolish positions on statutory interpretation, which I then failed to illuminate.

(2) The second example is particularly unfortunate because of the emphasis Professor Finkin places on his distorted rendering of what I wrote. Several times Professor Finkin quotes (F:48, 54, 89) my words that the Court's labor jurisprudence rejected the moral and political position that "workers' organizations ought to affirm and advance the proposition that those whose collective efforts make social production possible should have a decisive say in the decisions that affect the process . . ." (K:321). Finkin takes great exception to the word "ought," using it as the basis for his otherwise unsupported charge that I am an elitist who wants to tell the workers what is best for them (F:89-90). See, e.g., F:89 ("The necessary if tacit assumption is that Klare knows far better than those who live the reality of day-to-day life in capitalist society what is good for them.").

As I will argue in a moment, see *infra* notes 339-41 and accompanying text, this charge is without foundation and introduces a disappointingly *ad hominem* tone into the debate. See also *supra* note 69 and accompanying text. For the record, I note here that even the isolated quotation of which he makes so much does not support Professor Finkin's strident rhetoric. Admittedly I made an unhappy choice of words in putting my point. But on any fair reading of the relevant passage, the context of the quoted words is an effort to outline a spectrum of alternative ideological premises, not to give advice to the labor movement. And in proper context, the word "ought" clearly refers to what, from one political perspective, workers are *morally entitled to*, what they *deserve* or "ought" to get, as contrasted to what, within the judicial ideology under discussion, they were said to be entitled to. This connotation of "ought" is markedly different from the one Finkin attributes to me.

To be sure, even in the sense I used it, the phrase implies a value judgment or criticism. But it is a criticism of the limitations of existing institutions and elite ideologies, *not* a criticism of the workers' efforts, as Finkin implies. Particularly in the context of the high value placed upon worker self-activity throughout my writing, it seems per-

in a misleading way.<sup>327</sup>

Easy victories over strawman arguments naturally invite overconfidence. In Professor Finkin's case, this turns into a nasty and, if I may say with all due respect, unjustified condescension. He dispenses aspersions freely, describing Professor Stone's and my work as nonsense (F:86, 91), grandiose and silly (F:86), arrogant (F:90), misleading at best (F:50), and immature (F:84-85). He says that we debate language (F:85)

At his worst moments, Professor Finkin descends to purely *ad hominem* argument. For example, his article is sprinkled with red-baiting, McCarthyite innuendo. Finkin appears obsessed with the Communist Party and refers to it constantly, even though his references have no apparent bearing on the issues in debate. My article had no occasion to discuss or evaluate the role of the Communist Party. It contained one passing reference (K:290-91 n.79), the substance of which Finkin confirms (F:29 n.22). Despite its irrelevance, Finkin brings up the Communist Party no fewer than seven times in the roughly forty pages devoted to my work.<sup>328</sup> For example, for a reason never disclosed he advises us at one point that the American Civil Liberties Union opposed the Wagner Act due to the Communist sympathies of some of its leaders.<sup>329</sup> Likewise, Finkin inserts

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fectly appropriate to offer such criticisms, unless Professor Finkin wishes to adopt the wholly apologetic position that *any* criticism of the status quo is automatically a denigration of the struggles of the American working class. Compare F:89-90 with *supra* note 69 and accompanying text.

327. In an egregiously deceptive case that sets the framework for much of his critique, Professor Finkin writes: "Karl Klare argues that the labor Act 'was susceptible of an overtly anticapitalist interpretation' which the United States Supreme Court could have reached by 'employing accepted, competent, and traditional modes of judicial analysis and remaining well within the boundaries of the legislative history of the Act' " (F:24) (notes omitted citing, respectively, K:285, 292). Finkin makes it appear that I was arguing that the radical interpretation was the "correct" or "true" view of the Wagner Act, contrary to my actual position that the "legislative intent" was often unclear. See *supra* text accompanying notes 76-86. What he has done here is very misleading. The first quotation refers specifically to employer fears about the Act. I described these fears as exaggerated, and I said that the radical interpretation was "*not* compelled by the legislative history" (K:285 n.62 (emphasis added)). The second quotation is on a totally different point. It does *not* refer to the "overtly anticapitalist interpretation," but to the "alternative results" the Court might have reached in particular cases, for example, a result upholding the Board as opposed to overruling it. I obviously did not suggest, as Finkin's patchwork quotation implies, that the Board's alternatives to the Court's rulings were or could be expected to be "overtly anticapitalist."

328. See F:28 n.20; *id.* at 29 n.22; *id.* at 43-44 & nn.85-86; *id.* at 45; *id.* at 47-48 & n.98; *id.* at 88 n.284; *id.* at 90 n.292.

329. See F:28 n.20. As long as Finkin deems this relevant, I should correct the misimpression he leaves. The membership of the ACLU did not support ACLU leader Roger Baldwin's views. Internal opposition to Baldwin and his associates forced him to rescind

discussions of Communist behavior in CIO unions (F:44 n.86) and Communist Party attitudes toward the New Deal (F:48 n.98) into portions of his analysis where these discussions have no apparent relevance to the issues at hand.

It is possible that Professor Finkin's attention to the Communist Party is the product of an honest confusion on his part. He thinks that I was trying to show that the Act was "radical" in his sense of the phrase.<sup>330</sup> Perhaps he deems the Communist experience relevant because he "presumes" (F:47) that the Communist Party spoke for "a significant portion of the radical minority" in the labor movement.<sup>331</sup> Finkin apparently imagines that, by pointing out that the Communist Party briefly opposed the Wagner Act, he will have shown that it wasn't supported by "radicals," and that therefore it wasn't "radical."<sup>332</sup>

The problem with this logic is that it makes the erroneous assumption that the broad concept of "radical social change" used in my article<sup>333</sup> can be reduced to or equated with the position of the Communist Party at a particular moment in its complicated political evolution. Surely Professor Finkin is aware that there have been many currents of opinion on the Left in the past fifty years. My work has been written within a democratic, non-Communist Left tradition and from a frame of reference heavily critical of orthodox Marxist categories.<sup>334</sup> No one minimally informed about the relevant background could possibly read my 1978 article against my 1972 book<sup>335</sup> and my more recent work<sup>336</sup> and even vaguely imagine that I would

the anti-NLRA position, and by 1936 the ACLU had emerged as one of the NLRA's most vocal defenders. See C. DANIEL, *THE ACLU & THE WAGNER ACT* 109-27 (1980) (same author cited by Finkin). For a different perspective on the ACLU's position see Lynd, *Ideology and Labor Law*, 36 *STAN. L. REV.* 1273, 1295-98 (1984) (reviewing J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983)).

330. See *supra* notes 79-83 and accompanying text.

331. F:48. It is not at all clear that this was true in 1934-1935. See, e.g., Lynd, *The United Front In America: A Note*, *RADICAL AM.*, July-Aug. 1974, at 29, 33-37 (suggesting powerful rank-and-file labor pressure on Communist Party to alter its line on labor movement issues).

332. Another detail that Finkin overlooks is that, with the end of the so-called "Third Period" and the turn to the Popular Front in 1935, the Communists rapidly became ardent supporters of the Wagner Act and the CIO.

333. See *supra* notes 84-85 and accompanying text.

334. Among other sources on my political ideas, I cited my own book on dissenting currents in twentieth century Western European socialist thought (K:321 n.200, citing *THE UNKNOWN DIMENSION: EUROPEAN MARXISM SINCE LENIN* (D. Howard & K. Klare eds. 1972)).

335. See *supra* note 334.

336. See *supra* note 24.

look to the 1934 Communist Party line as the touchstone of radical outlook on the Wagner Act.<sup>337</sup>

There is, then, something more to Professor Finkin's references to the Communist Party. Their effect is to dismiss and stigmatize political ideas with which he is uncomfortable. This shows up most clearly in his regrettable and unsupported accusation that Professor Stone and I mirror radical intellectuals who, some argue, manipulated and betrayed workers a generation ago (F:90 n.292). Finkin's obsessiveness rises to bizarre heights with his contemptuous suggestion that law academics find my work interesting because of a pervasive Left concern among the American legal-academic intelligentsia.<sup>338</sup>

In a second variant of *ad hominem* attack, Professor Finkin indicts me as an intellectual and elitist (F:88-90). ("Intellectual" is a term of disparagement and contempt in his lexicon.<sup>339</sup>) I deeply regret

337. This is not the place for a detailed and balanced assessment of the role of the Communist Party and other Left organizations in the rise of industrial unionism in the 1930's. But I should note that any such assessment would necessarily credit these groups with many critically important and valuable contributions. See also *supra* note 286 (role of the Left in Flint strike).

338. See F:87-88 & 88 n.284 (non-labor law legal academics pay attention to my work because they are "intellectuals" who enjoy seeing the status quo attacked from the left; "intellectual" contemptuously defined by reference to Daniel Bell's comments on Communist penetration of American intellectual and professional life) (citing D. BELL, *MARXIAN SOCIALISM IN THE UNITED STATES* 152 (1967)).

339. This is apparent from Professor Finkin's effort to explain why non-labor legal academics have paid attention to obviously meritless work such as Professor Stone's and my articles (F:87-88). First, our articles appeal to academics because they are "intensely ideational," and because a key concept I use is the "product of intellection" (F:87). "Ideational" means "of the formation of ideas," and "intellection" means "the process of using the intellect." Apparently Professor Finkin believes that it is a defect in a work of scholarship for it to be a product of thought.

Second, he says we "make large claims . . . for the practical effect of those who think and write about law" (F:88). This is misleading. If anything, I stressed the role of ordinary workers in translating the ideals of collective bargaining and industrial unionism into reality (see, e.g., K:266), and I drew Finkin's *ire* for attacking professional elitism in the legal process (see F:88, questioning K:338).

Finally, Professor Finkin offers the view that his colleagues do not know anything about labor law and therefore are not fit to judge articles about it (F:86-87). "[S]cholars in their own corners of the law, but intellectuals outside it, would be intrigued [by Klare's and Stone's articles]" (F:87), he tells us. Here clearly the word "intellectual" is used with contempt. Professor Finkin tells us that an "intellectual" is one who "seeks to understand and express the *Zeitgeist* . . . [who] creates intuitive knowledge about the world." By contrast, a scholar "starts from a given set of objective problems and seeks to fill the gaps'" (F:87-88, quoting D. BELL, *MARXIAN SOCIALISM IN THE UNITED STATES* 152 (1967)). This choice of quotation aptly illustrates Finkin's assumption that labor law scholarship operates entirely within a narrowly restricted field of professionally acknowledged problems, of legitimate modes of discourse, and of recognized argumentative techniques. See *supra* text accompanying notes 16-20.

that Professor Finkin has permitted himself to question my background in and commitment to the labor movement. For one thing, there is no substance to his charges; I write from a solid labor background.<sup>340</sup> My ideas are very much the product of my experiences in and around the labor movement.<sup>341</sup>

Moreover, Professor Finkin's "intellectual-baiting" evokes the deep and unhappy tension between unions and intellectuals in American labor history (although a less superficial discussion than his would have rooted this tension not only in the misbehavior and elitism of intellectuals but also in the labor movement's philosophy, culture, and strategic situation).<sup>342</sup> Whatever its origins, this tension is now simply a barrier to urgently needed progress on the complex agenda of political, economic, and organizational issues facing the labor movement. Academics and other intellectuals can play a valuable, if appropriately limited, role in developing new ideas and policy proposals for a revitalized labor movement.<sup>343</sup> Seen in this light, Professor Finkin's appeal to the labor movement's most narrow-minded, anti-intellectual prejudices profoundly dis-serves workers' interests.

## VII. CONCLUSION

*Judicial Deradicalization* has many limitations. Professor Finkin proved unable to identify most of them. His charges of factual and

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340. I come from a union family, and I proudly acknowledged my parents' influence on my article (*see* K:265 n.\*). My father has devoted virtually his entire adult life to labor organizing. My late mother was also an active union member or supporter throughout her life. After a brief career as a political scientist, I became a labor lawyer and practiced with the NLRB and later with a union-side labor law firm. I continue to represent employees and unions *pro bono*, to work for labor law reform, and to support union organizing drives.

341. To be sure, this by itself is no guarantee of the accuracy or value of my ideas. I may have drawn all the wrong conclusions from my experiences, and it is fair game for critics to say so. But Professor Finkin is simply in error in implying that my ideas are ungrounded in labor movement experience.

342. A thoughtful discussion of this historical background, with particular reference to issues of workplace participation, appears in C. Heckscher, *Democracy At Work: In Whose Interests? The Politics of Worker Participation 184-99, 302-03* (1981) (unpublished Ph.D. dissertation, Harvard University).

343. Organized professors themselves make up a part of the labor movement, even though the *Yeshiva* decision has blocked faculty union growth in the private sector. *See* *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (classifying university professors at that institution as managerial employees excluded from NLRA coverage). *See generally* Klare, *Yeshiva Decision*, *supra* note 24. And professors have a valuable role to play in supporting the collective bargaining efforts of clerical, maintenance, and other university personnel, witness the important faculty role during the 1984-1985 strike by Yale University clerical and technical employees.

interpretive inadequacy are groundless, and his critique is itself marred by consistent error and misunderstanding. Most of his "refutations" are unresponsive to the arguments I made. On the key substantive issues of this debate—e.g., whether the line of cases discussed served or disserved the cause of democratic collective bargaining, and whether these decisions were legally and/or politically inevitable—Finkin contributes nothing.

Professor Finkin's misreadings and inaccuracies are a product of the ideological lenses through which he sees the industrial world. He interprets all evidence and argument in the light of a series of conventional assumptions and commitments. While I am anxious to clear the air of Finkin's intemperate charges, the energy devoted to this rebuttal is justified by a broader goal: to expose the values, assumptions, and limitations that mark the kind of scholarship Finkin represents. His approach substitutes stereotyped argumentation within the accepted repertoire of legal analysis for an open-ended search for truth. It has great difficulty acknowledging the component of political and moral choice implicit in all legal decisions and arguments. It judges research not in terms of its quality or imagination but its conformity to orthodox assumptions. And it is hostile to any effort at fundamental reexamination or questioning of accepted views. This approach to labor law scholarship disables itself from seeking innovative solutions by ruling out of bounds the sort of difficult questions that point to the need for new directions.

As for industrial relations, Professor Finkin's version of orthodoxy adheres to an unstated but pervasive belief in the inevitability of the status quo. It has difficulty imagining that history could have turned out differently but for the choices people made and the actions they took. It treats established arrangements as natural and just, and it copes poorly with evidence that prevailing arrangements may not fully serve the needs of those they are intended to serve. His perspective is skeptical about the capacity of workers to place their imprint on history.

This is no time for such scholarly quiescence. As all who believe in industrial democracy know, American labor law is in a moment of profound crisis. This is a time for bold and imaginative rethinking, in both the worlds of practice and of scholarship. In these circumstances, the myopic close-mindedness Professor Finkin celebrates is a hindrance to the effort to forge the new approaches so urgently needed. By contrast, and despite its limitations, critical labor law has taken a fresh, productive look at the assumptions underlying labor law doctrine and our industrial relations system, in

light of a deep-felt commitment to workplace democracy. In so doing, it has sought to be and has been of service to the ideal of industrial democracy and to the labor law community. That contribution will endure when Professor Finkin's critique has long been forgotten.