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RE-ENVISIONING LABOR LAW: A RESPONSE TO PROFESSOR FINKIN

KATHERINE VAN WEZEL STONE*

It has become commonplace for labor law writers to speak about the crisis in labor law. In the past two years, almost every prominent labor law scholar and labor movement activist has expressed serious disillusionment with the National Labor Relations Act¹ and discussed the desirability of its repeal. The fiftieth anniversary of the National Labor Relations Act in 1985 provided a tailor-made occasion for such soul-searching.²

In all these discussions, there are several subtextual questions, rarely addressed head-on, which are central to one's views on the future of the Act. That is, in order to evaluate the Act, one must have a position on questions such as: Is the Act, as it has been interpreted, beneficial or harmful to the cause of organized labor? Is the problem with the Act the fact that it adopted an industrial pluralist

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1. 29 U.S.C. §§ 151-167 (1982 & Supp. 1986). In the interest of clarity, I will hereinafter refer to the original 1935 Act as the "Wagner Act," and to the 1947 Act, which incorporated the Taft-Hartley amendments, as the "National Labor Relations Act," the "N.L.R.A.," or simply "the Act."

2. For example, AFL-CIO President Lane Kirkland has advocated that the N.L.R.A. be repealed because it no longer serves labor's cause. *AFL-CIO Chief Calls Labor Law a Dead Letter*, Wall St. J., Aug. 16, 1984, at 8, col. 2. Similarly, Jack Sweeney, President of the Service Employees Int'l Union, AFL-CIO, recently said in a speech delivered to a Fordham Law School symposium on the subject, *Is There A Need To Amend the National Labor Relations Act?*, "So my answer to the question whether the National Labor Relations Act should be amended is simple: No! The National Labor Relations Act . . . is, for all practical purposes, now dead." 52 *FORDHAM L. REV.* 1142, 1143 (1984). See also "Has Labor Law Failed," *Oversight Hearings, Part I, Joint Hearings before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. & Labor and the Subcomm. on Manpower & Housing of the House Gov't Operations Comm.*, 98th Cong., 2d Sess. 82 (1984) (statement of William Gould) ("American labor law has failed to implement basic policy objectives enshrined in the N.L.R.A. itself."); 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, 1018-19 (1984) (because of widespread dissatisfaction with the labor laws, the time has come to review the premises of our entire system of labor law); Summers, *Past Premises, Present Failures and Future Needs in Labor Legislation*, 31 *BUFF. L. REV.* 9, 18 (1982) ("The assumptions on which our labor law have [sic] been based for half a century have not been realized and its purposes have not been fulfilled.").

interpretation³ or that it did not take that interpretation far enough? For those who are critical of the industrial pluralist interpretation, there are further questions to be asked: Was the industrial pluralist interpretation the only possible way of construing the language and history of the statute? Are there other ways of organizing collective bargaining that would be more beneficial to labor? One's position on these questions vitally affects the particular proposals for change that one would make. Interestingly enough, despite the almost universal consensus that there is a crisis in labor law, there is no consensus at all on what is wrong with the Act or how the current deplorable situation, however defined, came about.

Professor Matthew Finkin has written a thought-provoking article that raises several of these questions, albeit in a somewhat indirect form. His piece, *Revisionism in Labor Law*,⁴ criticizes articles by Professor Karl Klare⁵ and me⁶ and implicitly invites debate on these questions. Professor Klare has ably and extensively replied to Professor Finkin's critique of his piece,⁷ and here I want to reply to the critique of mine. I do so with the hope that by addressing some of Professor Finkin's points, I can also clarify my position on some of these questions. Thus, I hope this effort helps us all move forward in our current efforts to reconceptualize and reconstruct a new vision of what collective bargaining is all about, and what role unions can and should play in our political and economic system.⁸

3. In my article, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981), I argue that there was a dominant interpretative tradition of the N.L.R.A., which I label "industrial pluralism." *Id.* at 1511. For an exposition of this tradition, see *infra* pages 980-84.

4. Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984).

5. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

6. Stone, *supra* note 3.

7. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985); See also Finkin, *Does Karl Klare Protest Too Much?*, 44 MD. L. REV. 1100 (1985); Klare, *Lost Opportunity: Concluding Thoughts on the Finkin Critique*, 44 MD. L. REV. 1111 (1985).

8. There is a growing body of critical legal scholarship about labor law that addresses these questions. For example, in addition to the work of Professor Klare and myself mentioned above, *supra* notes 5-7, see J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); Casebeer, *Teaching an Old Dog Old Tricks: Coppage v. Kansas and At-Will Employment Revisited*, 6 CARDOZO L. REV. 1001 (1985); Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939 (1985); Hyde, *Democracy in Collective Bargaining*, 93 YALE L. J. 793 (1984); Lynd, *Investment Decisions and the Quid Pro Quo Myth*, 29 CASE W. RES. L. REV. 396 (1978).

There are also scholars outside the emerging critical legal scholarship tradition who are developing innovative perspectives and proposals in response to the perceived crisis in labor law. For example, Professor Paul Weiler has written an astute analysis of the

Before contending with some of the particular points of disagreement between Professor Finkin and myself, I want to summarize my argument. In my earlier piece, I attempt to provide a framework for analyzing the failures of the existing labor law—failures which I argue inhere not in the National Labor Relations Act, but rather in its interpretive tradition. My central claim is that there was a dominant vision, or paradigm, of collective bargaining in the post-war era that was both created by and reflected in the major post-war scholarly writing and judicial decisions of the time, and that this paradigm has had a detrimental effect on the development of union strength. Stated briefly, the paradigm is based on the analogy of the workplace to a representational democracy, in which labor and management are described as political parties in a legislature, jointly shaping the rules by which all are governed. It is a description and a prescription of the workplace as a microcosmic pluralist democracy.

Such a stark summary of the paradigm makes it sound innocuous enough, if even a bit bland. However, my argument is that the paradigm stands in the way of any effort to create true participatory democracy in the workplace because this paradigm blinds us to the exercise of private power in the workplace and to the need for substantive government intervention. It does this by presupposing that management and labor are equal partners in production and then erecting legal rules on the basis of that fallacy. As a result, this pretense of equality which the paradigm fosters has prevented the Act from fulfilling the aspirations of those who saw it as a substantive intervention into the workplace, the goal of which was to equalize bargaining power by strengthening labor in its dealings with management.

One of the implications of my argument is that this fallacy has had an adverse impact on unions in actual cases. In the name of the paradigm, unions have been reaping the worst of both worlds. On

failures of union organizing efforts, and has presented a compelling proposal to improve the process by which unions are organized and bargaining rights secured. See Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983). Similarly, Professors Summers and Gould are writing about the labor relations laws in other countries to suggest possible improvements in the laws here. See, e.g., W. GOULD, *JAPAN'S RESHAPING OF AMERICAN LABOR LAW* (1984); Summers, *Comparisons in Labor Law: Sweden and the United States*, 7 INDUS. REL. L.J. 1 (1985). In a different vein, James Medoff and Richard Freeman, in their book, *WHAT DO UNIONS DO?* (1984), present an empirical account of the positive contributions of labor unions to our society. Additionally, Charles Sabel and Michael Piore have persuasively argued that there are alternative models of industrial development that have implications for alternative ways of organizing work. See C. SABEL & M. PIORE, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* (1984).

the one hand, courts are taking the obligation side of the paradigm too literally and holding unions jointly responsible for management decisions that violate the law.⁹ On the other hand, this joint responsibility has not entailed joint authority. For example, the courts have recently made it clear that unions are not entitled to have input into managerial decisions about plant relocations, subcontracting, or corporate transformations—decisions that have the most significant impact on union members.¹⁰

9. For example, several courts have found unions jointly liable with management for violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 (1982), on the grounds that by concluding a collective bargaining agreement, unions are jointly responsible with management for all employment decisions. *See, e.g.,* Howard v. Int'l Molders & Allied Workers Union, 779 F.2d 1546 (11th Cir.), *cert. denied*, 106 S. Ct. 2902 (1986) (holding union liable for discrimination which stemmed from employer's use of non-validated test for promotions even though union urged employer to cease using test); Myers v. Gilman Paper Corp., 544 F.2d 837, 849 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977) (court rejected as irrelevant union's argument that it should not be liable for employer's discriminatory promotion and transfer scheme because the union had tried unsuccessfully to eradicate such discrimination in collective bargaining); Patterson v. American Tobacco Co., 535 F.2d 257, 270 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976) (imposing liability on union for discriminatory promotion system even though union had proposed nondiscriminatory promotion provisions during collective bargaining sessions for three successive contracts, spanning a nine year period). *But see* Terrell v. United States Pipe & Foundry Co., 644 F.2d 1112, 1120 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982) (whether union liable for unlawful employment practice depends upon whether court convinced that the union has taken "every reasonable step" to eliminate employer's discriminatory practices). *See generally* Stone, *supra* note 3, at 1575 nn. 348-350 (citing cases where courts have held unions jointly liable with employers for discriminatory employment practices over which unions had no control).

Courts have also found unions jointly liable with management in other types of cases. *See, e.g.,* Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc., 713 F.2d 940, 956 (2d Cir. 1983) ("When a union becomes a party to a discriminatory provision in a collective bargaining agreement binding the employer to an unlawful practice, the union's conduct in aiding and abetting the employer to discriminate against employees renders it independently liable for violation of the ADEA, 29 U.S.C. § 623(c)(3)."), *aff'd in part, rev'd in part*, 469 U.S. 111 (1985); Brown v. Int'l Union, UAW, 512 F. Supp. 1337 (W.D. Mich. 1981), *aff'd*, 689 F.2d 69 (6th Cir. 1982) (union breached duty of fair representation by failing to discover that the employer defaulted in funding pension fund).

The recent Supreme Court decision, Bowen v. United States Postal Service, 459 U.S. 212 (1983), takes this logic to its conclusion by holding a union liable for an employee's back pay, even though it was the employer who caused the wrongful dismissal and who unilaterally controlled the prospects for reinstatement. *Id.* at 237 (White, J., dissenting). *See infra* notes 11-20 and accompanying text.

10. *See, e.g.,* First National Maintenance Corp. v. N.L.R.B., 452 U.S. 666 (1981) (management's decision to close part of its operation is not a subject of mandatory bargaining); Weather Tamer, Inc. v. N.L.R.B., 676 F.2d 483 (11th Cir. 1982), (an economic decision to close part of a plant and transfer operations to a new facility is not a subject of mandatory bargaining); N.L.R.B. v. National Car Rental Sys., Inc., 672 F.2d 1182 (3rd Cir. 1982) (no duty to bargain over company decision to lease its accounts and transfer work to another facility). *See also* Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601 (1984) (no duty to bargain over decision to consolidate operations);

In my opinion, this double whammy has emerged from a chain of seemingly logical applications of the paradigm. The recent Supreme Court case of *Bowen v. United States Postal Service*¹¹ is an example. In that case, a union was found liable for breaching its duty of fair representation by not adequately pursuing the employee's grievance, which alleged that he had been improperly suspended. This type of case is known as a "hybrid Section 301/DFR" case because it involves allegations both that the union breached its duty and that the employer breached the collective bargaining agreement. The issue that went to the Supreme Court was the apportionment of damages between the union and the employer. The district court had instructed the jury that if it found both the union and the employer liable, it could apportion damages between them in such a way as to require the union to pay a portion of the employee's back wages.¹² The union argued that its liability for breach of its duty could render it responsible for the employee's litigation expenses to vindicate his contract claim, and that the union could not be held responsible for back pay because it was not the union's obligation to pay wages in the first place.¹³

The Supreme Court held, on the basis of a pluralist analysis of the unique nature of a collective bargaining agreement,¹⁴ that a union could be found liable for back wages of an employee who was wrongfully dismissed by an employer. It reasoned that the industrial pluralist scheme of industrial self-governance meant that unions had the exclusive right and power to speak for employees, and that therefore employees *and the employer* should be able to rely on

Otis Elevator Co., 169 N.L.R.B. 891 (1968) (no duty to bargain about unilateral management decision to relocate operation). In *First National Maintenance*, 452 U.S. at 676, the Court noted that the Act was never intended to make management and labor "equal partners in running the business." Such language makes the descriptive plausibility of the model, where management and labor are described as equal partners, increasingly difficult to maintain.

11. 459 U.S. 212 (1983).

12. 459 U.S. at 215.

13. 459 U.S. at 218-20; *see also id.* at 215 n.3 (counsel for the union stated, "Traditionally the Union does not pay wages.").

14. Justice Powell, writing for the majority, reasoned from the premise that a collective bargaining agreement was more than "a simple contract of hire." Rather, it "creat[es] relationships and interests under the federal common law of labor policy," 459 U.S. at 220, and is a "'generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.'" *Id.* at 224 (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960)). Furthermore, "fundamental to federal labor policy is the grievance procedure." *Bowen*, 459 U.S. at 225. From this by-now-commonplace statement of the industrial pluralist position, the Court reached its rather startling holding.

that right being exercised properly.¹⁵ When the union fails to exercise that right responsibly, it should have to indemnify the employer for the consequences.¹⁶

Justice White, in a strongly worded dissent, decried any analysis of collective bargaining that shifted the burden of paying wages from the employer to the union. He said that it was the employer who caused the employee to be wrongfully dismissed in the first place and who unilaterally controlled prospects for reinstatement.¹⁷ He stated that "neither the collective bargaining agreement nor the union's duty of fair representation provides any support for the Court's conclusion that the union has somehow committed itself to protect the employer, and that the employer has the right to rely on the union to cut off its liability."¹⁸ Likewise, the *Bowen* decision has evoked strong criticism in the labor movement and the scholarly community for being one more instance in which the courts are saddling unions with crushing liabilities.¹⁹

Although my article appeared before the *Bowen* decision, I believe my analysis helps us understand how the labor laws have come

15. 459 U.S. at 225-26.

16. 459 U.S. at 229. The *Bowen* court did not announce any particular formula for apportioning damages between unions and employers in hybrid suits—that issue was not before it on appeal. The narrow issue before the Court was whether the union could be liable for back pay at all. The Court thus left open the question of what particular apportionment of back pay liability is appropriate in such cases. See generally VanderVelde, *Making Good on Vaca's Promise: Apportioning Back Pay to Achieve Remedial Goals*, 32 UCLA L. REV. 302 (1984) (proposing apportionment rule and discussing several other possible ones, including that permitted by the Supreme Court in *Bowen*).

17. 459 U.S. at 230-31, 239 (White, J., dissenting).

18. *Id.* at 240. Justice White further stated that "there is no reason why the matter should not be governed by the traditional rule of contract law," *id.* at 238, in effect suggesting that the pluralist paradigm be abandoned in the analysis of damages for breach of the duty of fair representation.

19. See, e.g., 1984 BNA LABOR RELATIONS YEARBOOK 175 (1984) (union attorney Sarah Siskind said of the *Bowen* decision that "serious unions, seeking to vindicate the collective bargaining rights of their employees, have been loaded with staggering costs and burdens that should not be theirs."); 1983 LABOR RELATIONS YEARBOOK 127-28 (1983) (union attorney Hugh Beins called the *Bowen* decision an "'absolute bombshell'" which will make it "'inevitable' that unions will now press all grievances to arbitration 'until the union goes bankrupt.'"); Francis, *The New Apportionment Rule Under Bowen v. United States Postal Service*, 35 LAB. L.J. 71, 74, 87, (1984) (*Bowen* increases adversarialness between management and labor, exaggerates union's responsibilities in collective bargaining, aggravates tensions between individuals and their unions, and will erode trust between union leaders and the rank-and-file.); Murray, *Apportionment of Damages in Section 301 Duty of Fair Representation Actions: The Impact of Bowen v. United States Postal Service*, 32 DE PAUL L. REV. 743, 771 (1983) (the majority in *Bowen* imposes a duty on unions to indemnify the employer for its breach of contract); Comment, *Adding Injury to Insult: Bowen and the Duty of Fair Representation*, 67 MARQUETTE L. REV. 317, 339 (1984) (*Bowen* majority inappropriately imposed on the union a duty to the employer).

to this sorry state. For by identifying the deep structure, or paradigm, that characterizes the post-war developments of labor law, we can make sense of such developments. Moreover, by showing how the paradigm came to be embedded in post-war labor law doctrine by a series of key Supreme Court decisions and developments at the National Labor Relations Board, I implicitly (and sometimes explicitly) suggest that there were alternatives possible, both for the outcomes of particular cases and for the theories of the Act's interpretation that emerged. Such an argument, it is hoped, makes it possible for all of us to break through the appearance of inevitability and re-envision the fundamental issues of the legal organization of labor relations.²⁰

Professor Finkin profoundly disagrees with my overall approach and my conclusions about the possibility and desirability of other means of organizing collective bargaining. Here I would like to pick out some of the major areas where we join issue to see how and in what ways we disagree.

I. THE PLURALIST POSTULATE

Professor Finkin rejects one of the central ideas in my article—that the particular ways in which the N.L.R.A. was interpreted were up for grabs and could have evolved differently. He claims that I arrive at this “pluralist postulate” by what he characterizes as a “coterie theory of legal history,” in which a “bunch of lawyers and economists—primarily identified with Harvard University”—fashioned an ideology and foisted it on the “willing instrument” of the United States Supreme Court.²¹ He then attempts to refute his rendition of my argument by saying that what I call a post-war paradigm is to be found “not in post-war theorizing but in the philosophy of the labor Act.”²² Thus he concludes that, by the logic of “Occam’s razor,” the “pluralist postulate becomes superfluous.”²³

20. My notion that there is such a paradigm of collective bargaining is itself a product of history. Only now after several decades of judicial interpretation of the National Labor Relations Act and the concomitant experience of fully legalized and “mature” collective bargaining, has it become clear that alternative interpretations of various provisions of the Act are possible, and that the pattern of interpretation which actually emerged is the product of a number of choices which, taken together, reflect a particular ideology.

21. Finkin, *supra* note 4, at 55. See also *id.* at 88 (“In Stone’s piece, the United States Supreme Court is a passive instrument.”).

22. *Id.* at 56.

23. *Id.*

He presents his argument by discussing three of the five propositions that I identified as the basic tenets of industrial pluralism,²⁴ and says they can be found in either the legislative history of the Act²⁵ or in the “‘practice and philosophy of collective bargaining’ as it had developed out of the experience of the American labor movement.”²⁶ Significantly, he omits the two tenets that are the most central to the industrial pluralist vision. They are the beliefs that: “(2) private arbitration is a necessary element in the workplace mini-democracy; [and] (3) in order to foster arbitration and to ensure the functioning of the mini-democracy, the processes of the state must not intervene.”²⁷ I demonstrate in my article that these two omitted tenets constitute the backbone of the paradigm, for they, taken together, define the centrality of private arbitration and prescribe the noninterventionist stance of the courts. By omitting them from his discussion, Finkin ignores the crux of my argument.²⁸

Despite the fact that Professor Finkin’s razor omits the two crucial tenets, his interpretation is still wrong in several respects. In the first place, my article nowhere says that any small group of conspirators tricked anyone to get them to interpret the Act in a particular way. To the contrary, I clearly state at the beginning of my piece that the paradigm I am describing was a vision of collective bargaining that was widely shared in the post-war era—shared by policy-makers, the framers of the statute, the judges who interpreted it, and the academics who advocated and analyzed it. Thus, I say in my Introduction: “This article argues that the industrial pluralist model of collective bargaining represents an ideology shared by legal theorists, judges, industrial sociologists, and labor economists in the post-war era.”²⁹ I am not describing a conspiracy; rather, I am describing a pervasive set of views. Such shared sets of views are

24. Stone, *supra* note 3, at 1516. These propositions are:

(1) the workplace under collective bargaining can be analogized to a political democracy; (2) private arbitration is a necessary element in the workplace mini-democracy; (3) in order to foster arbitration and to ensure the functioning of the mini-democracy, the processes of the state must not intervene; (4) individual rights in collective bargaining must yield to the collective rights of the union; and (5) under the Act, labor’s only rights are to bargain collectively and to arbitrate its disputes with its employer.

25. Finkin, *supra* note 4, at 56-58.

26. *Id.* at 57.

27. Stone, *supra* note 3, at 1516.

28. Similarly, at a later point Finkin says that “with the exception of arbitration, [Stone] declines to connect the case treatment to the pluralist postulate.” Finkin, *supra* note 4, at 58 (emphasis added). Since my argument is primarily about the centrality of arbitration and its effects in the developing case law, this is no small “exception.”

29. Stone, *supra* note 3, at 1515.

what I mean by “ideology.”³⁰ The individuals I discuss, and many others too numerous to mention, shared a common view of collective bargaining that led them to formulate problems and advocate solutions in a particular way—not out of dissembling, but out of honest and well intentioned belief.

Just as I do not claim that certain legal academics duped the Justices of the Supreme Court, neither do I claim that the true purposes of the legislators were warped by this (or any) group of scholars. Indeed, it would not surprise me if some of the legislators who drafted the National Labor Relations Act shared the view as well. This would not refute my postulate but rather would confirm it.

The difference between Professor Finkin and me on this point reflects a basic methodological difference. Professor Finkin suggests that if a belief is pervasive, it is in some sense true, and that to study it is a waste of time. I believe, on the other hand, that it is just such beliefs that most warrant critical examination because belief structures and ideologies are part of what constitute the real world. They have an important influence on human behavior and the course of events. By articulating and analyzing shared beliefs and paradigms, we achieve a critical distance that enables us to reevaluate them, and possibly to reconstitute our reality.³¹

There is a further flaw in Professor Finkin’s critique of the

30. Contrary to Finkin’s assertion that at no point do I explain what I mean by the term “ideology,” Finkin, *supra* note 4, at 84 n.278, I state at the outset that:

Ideology is an elusive concept whose meaning has been defined differently by various writers. For the purposes of this article, I define ideology as the set of categories with which one views the world. Individuals and societies formulate categories in order to navigate in the world. Individuals need categories in order to organize experience and to act These categories are abstractions of experience and observation; they embody both a description of the world and a prescription for action. It is the formal coherence of such categories that I call “ideology.”

Stone, *supra* note 3, at 1515 n.28 (citation omitted).

31. By identifying and separating out the vision of reality embedded in the law from the reality itself, we learn something about the role law plays in shaping social interactions. Thus, I am interested in describing the disjuncture between labor law and the actuality of class relations in our society—disembedding the law from social existence—so that we can see how the law functions ideologically.

In a book rightly renowned for its theoretical as well as its historical contribution, Karl Polanyi in *THE GREAT TRANSFORMATION* (1973) discusses how the science of economics only emerged once the market system developed, so that it became possible to imagine such a thing as an “economy” disembedded from general social relations. In a much less ambitious way, I am suggesting that class relations can be disembedded from the labor laws that regulate them, and from the particular ideas about collective bargaining that have come to dominate most thinking about class relations.

“pluralist postulate.”³² In his repeated assertions that the paradigm is “superfluous” because it is to be found “in the philosophy of the labor Act”³³ and/or that it “developed out of the experience of the American labor movement,”³⁴ he betrays too simplistic a view of history. Presumably we are all aware that any claim about the *philosophy* of any act of Congress is highly suspect. The legislature does not speak with a single voice; even less does it formulate its texts with a single thought or philosophy. Finkin does not cite any legal text or court decision as his authority for the proposition that there is such a thing as a “legislative philosophy” of the Act. The only source Finkin provides is a statement by the historian Howell Harris about the philosophy of the *Wagner Act*.³⁵ Finkin provides no authority at all for the claim that there is such a thing as the “legislative philosophy” of the *National Labor Relations Act*. This is no small matter because it is that Act, not the Wagner Act, that is the subject of my article.³⁶

Professor Finkin’s claim that there is one “‘practice and philosophy of collective bargaining,’ [that] developed out of the experience of the American labor movement”³⁷ is even more dubious than

32. Finkin, *supra* note 4, at 56.

33. *Id.*

34. *Id.* at 57.

35. *Id.* at 56 n.134 and accompanying text (emphasis added). Finkin cites as authority H. HARRIS, *THE RIGHT TO MANAGE: INDUSTRIAL RELATIONS POLICIES OF AMERICAN BUSINESS IN THE 1940s* (1982), to demonstrate that there is such a thing as a “philosophy of the labor Act.” Finkin, *supra* note 4, at 56. The quote from Harris indicates that this supposed “philosophy” is the “philosophy” of the original 1935 Act, not the “philosophy” of the 1947 amendments. However, it is unfair to Harris’ book to use it as authority for the philosophy of the 1935 Act. The book is about the 1940s, and Harris has only one paragraph in the book in which he even discusses the passage of the original Wagner Act. HARRIS, *supra*, at 22; and there he gives only the most general and broad summary of its provisions. The book nowhere purports to recount the “philosophy of the Wagner Act.” Rather, the quote upon which Finkin relies is an off-hand, and not particularly well-chosen, phrase in Harris’ book in which he equates a belief in the “‘the Wagner Act’s legislative philosophy’” with a belief in collective bargaining in the most general sense.

36. If Professor Finkin wanted to use the Harris book to establish a single “philosophy” of the 1947 Act, he would have been hard-pressed. The book shows that there was not one single, unified philosophy of collective bargaining underlying the 1947 Act, but at least two different philosophies—that of organized labor and that of the business community. Harris also argues that there were at least two distinctly different philosophies within the business community itself, HARRIS, *supra* note 35, at 179, and that the statute that emerged (which he characterizes as “complex and poorly drafted,” *id.* at 125) was a complicated composite of those views, together with the views of the members of Congress involved and some of their particularly powerful constituencies. *See id.* at 123-24.

37. Finkin, *supra* note 4 at 57 (quoting *J.I. Case v. N.L.R.B.*, 321 U.S. 332, 338 (1944)).

his claim that the Act had one "legislative philosophy." For this proposition Finkin gives only two citations: an autobiographical work by John Commons,³⁸ and a reference to *J.I. Case v. N.L.R.B.*³⁹ The passage cited in *J.I. Case* states that the "philosophy and practice of collective bargaining looks with suspicion on . . . individual advantages."⁴⁰ Similarly, the quote from Commons says that in his experience, "the meaning of collective action in control of individual action" was a basic principle in the labor movement. These citations are relevant to one of my tenets—that "individual rights in collective bargaining must yield to the collective rights of the union"⁴¹—in fact they support it. However, they certainly are not adequate as authority for the entire jurisprudence of collective bargaining that emerged under Section 301 of the N.L.R.A. In fact, *J.I. Case* was decided before Section 301 was enacted and, as I explain in my article, the Court's treatment of collective bargaining in that case "was not a wholesale adoption of the industrial pluralist perspective."⁴² The Commons autobiography was written in 1934, before the Wagner Act was even passed.

Finkin's characterization of the "practice and philosophy of the American labor movement" ignores almost one hundred years of debate and discussion, both within and without the American labor movement, about the best form for union organization and about the best means for unions to better the conditions of working people. Within American labor history, there have been many different practices and philosophies of collective bargaining. Participants in and scholars of that history have drawn sharply different conclusions from the same experiences. To suggest that the labor movement looks back over its own history, understands it in one single way, and draws from it one unified conclusion—as Professor Finkin seems to do—is to ignore the many complex, rich, and passionate debates which have persisted for generations among the movement's activists and philosophers.

If there is no single "basic philosophy of the Labor Act" or "experience of the American labor movement," it cannot be said that the interpretations of the Act that I describe in my article were necessary or inevitable. Neither were they mandated by the bare lan-

38. J. COMMONS, *MYSELF* (1934), discussed at Finkin, *supra* note 4, at 57 n.143.

39. 321 U.S. 332 (1944).

40. *Id.* at 338.

41. Stone, *supra* note 3, at 1516.

42. *Id.* at 1522.

guage of the statute itself.⁴³ Thus, there was necessarily an interpretive process that led to the doctrinal developments I describe. Finkin describes these developments as “well worked ground,”⁴⁴ but he does not succeed in providing an alternative explanation for the particular constellation of interpretations that emerged. Thus, it seems that far from being superfluous, the “pluralist postulate” stands.

II. RETAINED MANAGEMENT RIGHTS

Just as Professor Finkin rejects the idea that industrial pluralism was the result of a particular interpretation of the Act, rather than an immanent aspect of it, so too does he reject my argument that the pluralist interpretation created the illusion, but not the reality, of industrial democracy. Thus, he criticizes my discussion of retained management rights, in which I attempt to show that the realm of democracy in the hypothetical mini-democracy is both small and vulnerable. Finkin claims that I carefully select which writers I include in “the circle of pluralists”⁴⁵ and then “take[] the fact of disagreement among the writers to evidence the ‘collapse’ of the pluralist ‘structure’ without entertaining the possibility that such a ‘structure,’ in the sense [I] would have it, never existed.”⁴⁶ He calls this a “transparent device”:

Select a group of independent-minded scholars, who agree at a great many points, but disagree at others; attribute to

43. All of the legal developments I trace involve interpretations of Section 301(a) of the 1947 Act. Its bare sixty words say:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1982). Upon these sparse words, the Court erected the entire jurisprudence of favoring arbitration and promoting it as the only forum for redressing breaches of collective bargaining agreements.

It cannot be maintained that in deciding such cases as *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the three cases known as the *Steelworkers Trilogy*, *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), or *Carey v. Westinghouse*, 375 U.S. 261 (1964), the Supreme Court was simply applying the statute. This would be a rather naive claim in any context, but particularly far-fetched in relation to the text of Section 301(a).

44. Finkin, *supra* note 4, at 63.

45. *Id.* at 62.

46. *Id.* at 63.

them a common ideology (which, to the best of my knowledge, they have never attributed to themselves); show where they differ among themselves; and, conclude that their ideology is fatally flawed by "incoherence." Q.E.D.⁴⁷

Unfortunately, here Finkin has read my article incorrectly. I do indeed argue that the industrial pluralist paradigm does not offer a coherent solution to the problem of retained management rights, but not in the way that he claims I do. That is, I argue that the analogy of the workplace to a mini-democracy and the justificatory logic that goes with the analogy suggest that those issues over which the union might want input should be up for grabs, both at the bargaining table and in the grievance procedure. I then show that this has never been the interpretation given by the architects and most vocal advocates of industrial pluralism. I suggest that even those most committed to the paradigm have not taken it that far, because to put all issues of concern to workers up for grabs would seriously challenge their notions of the entailments of private property.⁴⁸ Thus, I maintain that none of the industrial pluralists embraces a pure joint sovereignty perspective. They all believe, to varying extents, in the existence of some inherent retained management rights. I then show that while none of the advocates can embrace a pure joint sovereignty position, neither does any have a satisfactory way of defining in a logical way which issues belong in the sphere of joint control and which issues are retained management rights.

To demonstrate my claim, I go through the published writings of some of the leading industrial pluralists to see if they reconcile the contradiction between the assertion of retained management rights and the pluralist theory of joint decision-making. I choose several writers who have decidedly different perspectives within the paradigm, to try to give a fair range of approaches. I take them up *seriatim* and show how each one, in his own terms, fails to articulate a coherent boundary principle to reconcile the two conflicting principles.⁴⁹ I do not compare them one to the other, contrary to Finkin's claim.

My discussion does indeed conclude with the observation that the leading industrial pluralists display a "uniform descent into incoherence . . . when they confront the problem of retained management rights."⁵⁰ But, as the text makes clear, the incoherency is *not*

47. *Id.*

48. Stone, *supra* note 3, at 1558.

49. *Id.* at 1552-57.

50. *Id.* at 1557.

because the scholars I discuss disagree with each other, but because none of them, *taken alone*, solves the fundamental problem of deciding which issues are in the realm of democratic decision-making and which are in the realm of retained management rights. That is, none of them reconciles a belief in retained rights with the idea of joint sovereignty.

To refute me on this point, Finkin would have to show a logical solution to the retained rights problem—whether his own or someone else's. He does not even try. Instead, he dismisses my claim that no scholar has provided an adequate solution to the problem by saying merely that the problem of retained rights is one to which "various authors have proposed equally various solutions."⁵¹ Not a single citation is offered.

Rather than taking the issue of retained rights seriously, Finkin asks why I choose such a select few among the circle of pluralists I discuss and do not include Professors Clyde Summers or Jack Getman. The answer should be obvious. My piece is about the enforcement of collective bargaining agreements. Professor Summers' major writings have been about the relationship between individual rights and collective rights.⁵² Professor Getman's major works are about the processes by which unions are organized.⁵³ Both of these are important subjects in labor relations, but they are not the subjects of my article.

No doubt my point about retained rights could have been demonstrated by discussing the work of other scholars, perhaps even the ones Finkin criticizes me for omitting. But in discussing an ideology, one must necessarily analyze it as it is expressed by some of its spokespeople. I select several major scholars to discuss, each of whom takes a somewhat different approach to the question. I do this to show that even within the range of discourse in the paradigm, none of the approaches presented yields a satisfactory answer to the retained rights-joint sovereignty dilemma.⁵⁴

51. Finkin, *supra* note 4, at 61.

52. See, e.g., Summers, *The Rights of Individual Workers: The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082 (1984); *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation*, 126 U. PA. L. REV. 251 (1977).

53. See, e.g., J. GETMAN, S. GOLDBERG & E. HERMAN, UNION REPRESENTATIVE ELECTIONS: LAW AND REALITY (1976); Getman, *The Challenges of Organizing*, 11 N.Y.U. REV. L. & SOC. CHANGE 57 (1982-1983).

54. Since the appearance of my article, several scholars have attempted to develop a principle by which to divide the realm of retained rights from that of joint sovereignty. See, e.g., Harper, *Leveling the Road From Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1462-84 (1982) (arguing for a "product

My point about the retained rights controversy is that even those who most adamantly profess their belief in industrial pluralism and the possibility of joint sovereignty do not embrace this position wholeheartedly or provide a means to reconcile it with their equally adamant belief in retained management rights. This is not an accusation of hypocrisy. Rather, it is a claim that there is a deep and irreconcilable contradiction in the industrial pluralist theory itself.⁵⁵

Professor Finkin also makes the error of treating my discussion of retained rights as if it pertains only to the scope of mandatory bargaining under the Act. What Finkin ignores, and what lies at the heart of my discussion of retained rights, is my claim that the retained rights issue arises over and over again in different guises. Thus, I argue that the question about retained rights, which arises in the context of defining the scope of the duty to bargain, is the same issue as, for example, the issue of how an arbitrator should decide a case that turns on the existence *vel non* of a silent clause in a collective bargaining agreement, or the issue of how a court should decide a question of arbitrability in a dispute over a silent term.⁵⁶ My point about many versions of the retained rights controversy is that the problem of delineating the two realms is pervasive and compelling.⁵⁷ Furthermore, my larger point about the pluralists' inability

market principle" to delineate the scope of mandatory bargaining); Note, *Worker Participation: Industrial Democracy and Managerial Prerogative in the Federal Republic of Germany, Sweden and the United States*, 8 HASTINGS INT'L & COMP. L. REV. 93, 128-33 (1984) (arguing that a modified version of the *First National Maintenance* balancing test would provide a reasoned basis to delineate the realm of mandatory bargaining). These efforts do not provide a rational basis for distinguishing the two realms, because each one's proposed criteria are too vague and malleable to withstand scrutiny. Detailed analysis of these proposals is beyond the scope of this piece. Here I merely wish to note that only recently has the effort even been made.

55. Professor Finkin ignores the essence of my argument about retained rights when he purports to summarize it. He says "the claim of 'incoherence' rests upon a syllogism: The law of collective bargaining announced by the Supreme Court adopts the pluralist ideology; *Borg-Warner* constricts the scope of bargaining in a way that is inconsistent with that ideology; therefore the pluralist ideology is fatally flawed." Finkin, *supra* note 4, at 60. My argument had nothing to do with *Borg-Warner*, a case that I mention only once, in a footnote. Stone, *supra* note 3, at 1547 n.207. True, my argument had to do with the manner in which the Court and others distinguish between mandatory and permissive bargaining. *Id.* at 1552-57. But I am less concerned with the fact of the distinction than I am with the means by which the distinction is made and justified in particular cases. See, e.g., *id.* at 1578-79 (industrial pluralism cannot explain why the realm of joint sovereignty will grow rather than shrink).

56. Stone, *supra* note 3, at 1548-52.

57. Even if my argument about retained rights were relevant only to delineating the scope of mandatory bargaining, it would nonetheless be an important aspect of the pluralist edifice. Although some commentators have stated that the distinction is immate-

to delineate the boundaries of the mini-democracy is that the theory cannot, despite its claims, create or defend any particular definition of democracy in the workplace.

III. THE PRIVATIZATION DEBATE

Professor Finkin focuses much of his disagreement with me on my discussion of the role of private ordering in collective bargaining. It is here that he most pointedly disputes my claim that there are alternative ways of organizing collective bargaining. My privatization point begins with a discussion of the leading cases of *Textile Workers Union v. Lincoln Mills*⁵⁸ and the *Steelworkers Trilogy*,⁵⁹ the cases in which the Supreme Court selected the private forum of arbitra-

rial in practice because a strong union can always devise a strategy that will achieve bargaining on a permissive item, *see, e.g.*, Feller, *Response to Stone, The Structure of Post-War Labor Relations*, 11 N.Y.U. REV. L. & SOC. CHANGE 136 (1982-1983), the mandatory-permissive distinction has an importance for unions that goes far beyond what is or is not discussed at the bargaining table. Perhaps the distinction's primary significance is that when one side has failed to bargain and a strike ensues, the distinction determines whether a strike is protected or not, and thus whether strikers who engage in strike activity have a right to reinstatement. Stone, *supra* note 3, at 1547 n.207. That is, when the employer has failed to bargain over a mandatory item, or has insisted on a nonmandatory item to impasse, the strikers have a right to reinstatement. *See, e.g.*, N.L.R.B. v. Crystal Springs Shirt Corp., 637 F.2d 399 (5th Cir. 1981) (employer's unilateral change in piece rates and production quotas without bargaining with union was Section 8(a)(5) violation, so that ensuing strike was unfair labor practice strike, making strikers entitled to reinstatement.); Newport News Shipbuilding & Dry Dock Co. v. N.L.R.B., 602 F.2d 73, 78 (4th Cir. 1979) (employer violated Section 8(a)(5) by insisting on a nonmandatory item to impasse, so that ensuing strike was unfair labor practice strike, entitling strikers to reinstatement). If the alleged failure to bargain is merely over a permissive item, any ensuing strike is deemed an economic strike, and strikers do not have automatic reinstatement rights. *See* N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938) (if employer had bargained in good faith with union and strike ensued, employer justified in hiring permanent replacements). Thus, the mandatory or non-mandatory nature of an item is crucial in many strike situations. Indeed, some commentators have noted that the mandatory-permissive distinction defines those issues over which a union is free to exercise economic weapons and those on which it is not. *See, e.g.*, Harper, *supra*, note 54, at 1447 ("employers and unions . . . may not resort to economic pressure to obtain agreement unless the proposal concerns 'wages, hours, [or] other terms and conditions of employment'") (quoting 29 U.S.C. § 158(d) (1976)); Note, *Worker Participation*, *supra* note 54, at 99 ("a finding that a subject is not mandatory means that if a party refuses to discuss the matter, the other party may not bring any economic pressure"); Atleson, *Management Prerogatives, Plant Closings, and the NLRA*, 11 N.Y.U. REV. L. & SOC. CHANGE 83, 92 (1982-1983) ("Most judicial and Board decisions . . . have attempted to place restraints on the unlimited use of economic power by mapping out areas in which mandatory bargaining is to occur.").

58. 353 U.S. 448 (1957).

59. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

tion as the preferred method for resolving disputes which arise under collective bargaining agreements. These cases established the proposition that unions and individual workers are required to use arbitration to decide disputes involving an alleged breach of a collective agreement (when arbitration clauses exist), and may not sue in court for breach of contract.⁶⁰ My analysis concludes that the institutional implications of the industrial pluralist paradigm relegated labor-management disputes arising during the life of a collective bargaining agreement to a private forum.⁶¹

Finkin does not disagree with my characterization of the Act's dominant interpretation as a privatization of labor disputes. Rather, he disputes my attitude toward it.⁶² His disagreement operates on several levels: he has a normative disagreement with me as to the desirability of a public versus a private forum for resolving labor issues; he disputes my contention that there was another possibility presented either by the statute or in its history; he proposes a reading of the statute's legislative history to the effect that my posited interpretation is contrary to legislative intent; and he proposes his own solution to the tension I claim exists between public intervention and private ordering, a solution that he claims preserves the purely private forum for contract adjudication.

On the normative level, Finkin challenges my implicit claim that privatization of disputes about the enforcement of collective bargaining agreements is not a good thing for labor. He makes his normative argument by stating that if workers do not want their disputes decided in a private arena, they can insist that their unions explicitly reserve in their collective bargaining agreements the right to go to court or the right to strike over grievances.⁶³ Because

60. Stone, *supra* note 3, at 1530.

61. *Id.* at 1529-30. Finkin quotes my statement that under industrial pluralism workers and unions are "deprive[d]" of a judicial forum, and says he finds my use of the concept of deprivation in this context "mildly puzzling." Finkin, *supra* note 4, at 65. However, he omits my authority, a well-known dissent by Justice Black in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 664 (1968) (Black, J., dissenting), in which Justice Black says that because of the Court's excessive deference to arbitration, "workers lose their rights to appeal to the courts for redress." See Stone, *supra* note 3, at 1530 n.114 and accompanying text.

62. See, e.g., Finkin, *supra* note 4, at 55 (concerning Stone's "extraordinary distaste for the emphasis pluralist ideology places on private ordering"); *id.* ("it is not altogether clear who or what is the object of [Stone's] ire"); *id.* at 64 ("The theme that pervades the discussion of both arbitration and fair representation is Stone's distaste for private ordering."); *id.* at 65 (concerning "Stone's distaste for the idea of private ordering"); *id.* at 85 ("Stone is downright hostile to the real world.")

63. *Id.* at 65.

unions do not do this, he concludes, they must not see it as advantageous.

This is a good point, and well worth answering. But first I need to make my position clear. I never took the position that unions would be better off reserving the right to self-help every time the employer breaches the collective bargaining agreement.⁶⁴ In most cases, a union can only call a successful strike when the issue involved is very serious or has a significant impact on a large number of people in the bargaining unit. Not all issues are experienced as sufficiently serious or pervasive to permit a strike mobilization. Thus, if the strike weapon were the sole weapon unions had to remedy employer breaches of collective agreements, unions would be effectively helpless to enforce many contractual provisions.

I also agree with Professor Finkin that in many cases unions are reluctant to seek a judicial forum for enforcement of their collective bargaining agreements because they fear that to do so would entail tremendous expense and delay. This may, however, stem from a misperception. Recent studies suggest that arbitration is becoming as expensive as litigation, and is taking, on average, almost as long.⁶⁵ Furthermore, the Act, as presently constituted, does not give mandatory priority in the federal courts to Section 301 cases, so even if there were a right to sue to enforce a collective agreement, the judicial system would probably move slowly.⁶⁶ Thus, if the only

64. *Id.* Professor Finkin attributes this position to Professor Karl Klare, not to me. However, he includes it in his discussion of my piece, and suggests that it is a position I also share.

65. For a long time it was assumed that arbitration was faster and less expensive than adjudication. See, e.g., Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. CHI. L. REV. 233, 253 (1950). Over the past few years, many have observed that this is not always true, or at least not as true as it was. In 1983, Byron Abernethy, President of the National Academy of Arbitrators, acknowledged that in certain areas arbitration had proven to be "something less than initially hoped for . . . [W]ith the greater legalisms and greater use of lawyers, transcripts, posthearing briefs, and declining informality, in some instances it may have become more expensive as well as more time-consuming." Abernethy, *The Presidential Address: The Promise and the Performance of Arbitration: A Personal Perspective*, in ARBITRATION PROMISE AND PERFORMANCE, PROC. THIRTY-SIXTH ANN. MEETING NAT'L ACAD. ARB. 1, 10 (1983). See also Feller, *Arbitration: The Days of Its Glory are Numbered*, 2 INDUS. REL. L.J. 97, 97-98 (1977) (one cannot base a claim to the superiority of arbitration on speed and informality; certain judicial procedures like small claims court and injunctions are more flexible and faster than any known form of arbitration).

66. Both federal and state courts give calendar preferences to certain types of cases. For example, the federal courts give a mandatory preference to criminal cases. See FED. R. CRIM. P. 50(a) (in the federal district courts, "[p]reference shall be given to criminal proceedings as far as practicable"). See also E.D.N.Y. CRIM. R. 1(a) app. ("Insofar as is practicable: (a) the trial of criminal cases shall be given preference over civil cases, as

available options are litigation in a federal court or arbitration, many unions would no doubt choose arbitration, at least for most grievances, even though it lacks the full range of due process guarantees of a federal court.

However, I suggest that those were not the only options: There was a logical third alternative that never received adequate consideration. That alternative is adjudication of breach of contract cases by the National Labor Relations Board.⁶⁷ The Board is the most obvious and probably most appropriate forum for deciding allegations of breaches of collective bargaining agreements. It has an immense adjudicative capability and the expertise to resolve disputes of this type at least equal to that of private arbitrators. In my article, I point out that all of the arguments for the superiority of arbitration—expertise, informality, and flexibility—are equally true of the N.L.R.B., and that such an arrangement “would have quieted the systemic fears expressed that such breach of contract suits would swamp the courts.”⁶⁸ I also argue that support for this alternative can be found in the language of the statute through an expansive

provided by Rule 50(a), Federal Rules of Criminal Procedure.”). Similarly, certain kinds of civil cases are given priority in some state courts. *See, e.g.*, N.Y. CIV. PRAC. L. & R. 3403 (McKinney 1963 & Supp. 1986) (creating trial preferences for, *inter alia*, actions involving parties who are age seventy or older, and actions alleging medical or dental malpractice). *See also*, N.Y. STATE FIN. LAW § 123-c (McKinney Supp. 1986) (providing a preference that citizen-taxpayer actions “shall have preference over all other causes in all courts”).

If such a mandatory preference were provided for Section 301 cases, or if there were special small claims types of procedures available, the option of litigation would undoubtedly be more appealing to unions.

67. Stone, *supra* note 3, at 1531. There might well be other alternatives such as a system of mandatory priority for breach of contract cases by workers and unions in the federal courts, with increased use of procedural devices like magistrates, special masters and summary judgment.

My argument in favor of giving the N.L.R.B. jurisdiction over allegations of breaches of collective bargaining agreements is an argument against privatization of the Act, and in favor of an interpretation that facilitates public intervention to implement the stated goal of fostering equality of bargaining power between management and labor. This does not mean that I blindly approve of everything the current National Labor Relations Board does, nor that I find it more pro-labor than arbitrators. Rather, I believe that if there were a public forum to decide questions concerning the enforcement of collective bargaining agreements, the results would be more pro-labor in the long run because the Board would receive more public scrutiny and be more accountable to the electorate than it presently is. I further believe that by bringing issues of concern to labor into a public arena, the public life of our society would be enriched. That is, if labor issues were up for grabs in the political arena, our national political debate would come to reflect people's real concerns, voter participation would be enhanced, and as a result, our society, as well as the workplace, would become more democratic. *See* Stone, *supra* note 3, at 1580.

68. *Id.*

reading of the Board's Section 8(a)(1) jurisdiction⁶⁹ and a commitment to implementing Section 10(a).⁷⁰

Finkin does not discuss this suggestion at the normative level. Rather, he dismisses my suggestion with the comment that in 1947 Congress explicitly rejected a provision that would have made breach of a collective bargaining agreement an unfair labor practice within the jurisdiction of the Board.⁷¹ However, even if my proposal were totally at odds with some unequivocal "congressional intent," that is no reason to utterly dismiss it. One of the tasks of legal scholarship is to suggest alternatives and thereby broaden the parameters of discussion, with the possibility of influencing decision-makers and statute-framers in the future. And one of the points of my article, a point which Professor Finkin's indignation demonstrates, is that the paradigm of industrial pluralism has not only constricted the universe of options, it has also constricted our imagination.⁷²

Furthermore, the statute's legislative history is not as clear as Professor Finkin would have us believe. The first version of what became the 1947 amendments to the Act did indeed contain a provision that made it a union or employer unfair labor practice "[t]o violate the terms of a collective-bargaining agreement or the terms

69. 29 U.S.C. § 158(a)(1) (1982). That provision states: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

70. 29 U.S.C. § 160(a) (1982). That provision states, in pertinent part:

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce.

This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise

(Emphasis added.)

Recently, in *N.L.R.B. v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984), the Supreme Court gave such an expansive interpretation of Section 8(a)(1) by holding that actions by union members to enforce a collective bargaining agreement were "concerted activity" within the meaning of the Act. Thus, the Court upheld the Board's finding that an employer who discharged an employee for taking an action which the collective agreement authorized had violated Section 8(a)(1). (The Court remanded for a determination as to whether the activity was also "protected.") This decision has been criticized for undermining private collective bargaining by providing an end-run around the contractual grievance procedure. See, e.g., Bethel, *Recent Labor Law Decisions of the Supreme Court*, 45 MD. L. REV. 179, 185 (1986)

71. Finkin, *supra* note 4, at 66.

72. See also Lesnick, Response to Stone, *The Structure of Post-War Labor Relations*, 11 N.Y.U. REV. OF L. & SOC. CHANGE, 142, 145 (judicial and arbitration decisions have become increasingly pro-management over time, but many lose sight of that because "our norms have changed little by little over the years").

of an agreement to submit a labor dispute to arbitration."⁷³ This provision was deleted in the final version with almost no discussion,⁷⁴ as Professor Finkin correctly points out.

The Conference Report on the final bill gave an opaque, one sentence explanation as to why it had deleted this proposal from the final bill. It said, "Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of law and not to the National Labor Relations Board."⁷⁵ There was no further explanation.

Despite this virtual silence⁷⁶ by the Conference Committee as to why the revision was made, there is evidence in the hearings, committee deliberations and floor debates on the bill which suggests a different conclusion than Professor Finkin proffers. In the deliberations that gave rise to the bill, there was considerable discussion about the problem of the lack of enforceability of collective bargaining agreements. Virtually all the speakers who addressed that question took for granted that collective bargaining agreements were enforceable against employers in state courts and that the problem that needed to be addressed was how to make them enforceable against unions. To that effect, several different proposals were made, including forcing unions to incorporate so as to acquire legal personality and thus be amenable to suit,⁷⁷ and withdrawing N.L.R.B. certification and bargaining rights from unions that breach their no-strike pledges.⁷⁸ The proposal that a breach of a collective bargaining agreement be an unfair labor practice was another suggestion to the same effect. With that proposal, as with the others, the discussion was primarily about its effect on unions that breached

73. S. REP. NO. 105, 80th Cong., 1st Sess., 13, 16 (1947), reprinted in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947 114 (1949).

74. H.R. REP. NO. 510, 80th Cong., 1st Sess., 41-42 (1947).

75. H.R. REP. NO. 510, 80th Cong., 1st Sess., 41-42 (1947), quoted in Finkin, *supra* note 4, at 66.

76. The Supreme Court warned in a related context, "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)) (congressional silence following *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1963), did not constitute adoption of the doctrine that federal courts were precluded from issuing injunctions pursuant to Section 301).

77. See *Hearings on Amendments to the NLRA Before the House Comm. on Educ. & Labor*, 80th Cong., 1st Sess. (1947) (statement of Mr. Cook), reprinted in 2 AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT 533 (1947).

78. See *Hearings on Amendments to the NLRA Before the Comm. on Educ. & Labor*, 80th Cong., 1st Sess. 26 (1947) (statement of Mr. Landis), reprinted in 2 AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT 545-56 (1947).

no-strike clauses by engaging in strikes while a contract was in effect. This proposal, along with the others, was rejected in favor of Section 301, apparently in the belief that Section 301 would give federal courts jurisdiction to enforce collective bargaining agreements against *both* unions and employers in ordinary breach of contract actions—most particularly against unions.⁷⁹ To this effect, the final Conference Committee explained its decision to omit the proposal from the final version of the bill and to include Section 301 as a choice to leave parties, for the enforcement of their agreements, to the “usual processes of the law”⁸⁰

This more expanded reading of the legislative history suggests that the legislators expected, and in fact intended, that Section 301 would create jurisdiction in the federal courts for adjudication *on the merits* of cases involving breaches of collective bargaining agreements. Thus, if congressional intent were the decisive guide, then Justice Douglas was way out of line in the *Lincoln Mills* decision. The doctrine he developed there, and in subsequent cases,⁸¹ of judicial deference to arbitration, was a vast departure from this reading of congressional intent.⁸²

This expanded account of the history of Section 301 also suggests that the policy of promoting arbitration over all other forms of dispute resolution, which Professor Finkin suggests can be found in the “legislative philosophy” of the statute itself, was not quite as firmly entrenched as he would have us believe. Rather, upon reading the legislative history, one is struck by how committed the legislators were to judicial enforcement of collective bargaining agreements.

My proposal that the National Labor Relations Board adjudicate breach of contract claims, while it does not follow directly from this history, is at least as consistent with both the language and the

79. See Wollett & Wellington, *Federation and Breach of the Labor Agreement*, 7 STAN. L. REV. 445, 472-74 (1955) (arguing that Section 301 was primarily concerned with removing procedural barriers to suits against labor unions).

80. H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess., 41-42, (1947), reprinted in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947 545-46 (1949).

81. See *supra* notes 58-59 and accompanying text.

82. Many other commentators have criticized Justice Douglas' treatment of congressional intent in Section 301 on similar grounds. See, e.g., Aaron, *On First Looking into the Lincoln Mills Decision*, in ARBITRATION AND THE LAW: PROC. TWELFTH ANN. MEETING, NAT'L ACAD. ARB. 1, 2 (1959) (concerning the “awesome spectacle” of Justice Douglas “scall[ing] the formidable barrier of the Norris-LaGuardia Act and . . . skirt[ing] the treacherous crevasse of the U.S. Arbitration Act” to decide the *Lincoln Mills* case as he did); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 6 (1957) (*Lincoln Mills* represented failure of judicial process).

history of the statute as the privatization approach embraced by Justice Douglas in *Lincoln Mills*.⁸³ In fact, neither the language nor the history of Section 301 provide an answer to the question of whether labor disputes should be decided in a public or a private forum.⁸⁴ Rather, in deciding that question, the Court had to make a normative choice—a choice which is, or at least should be, fair game for criticism and debate.

One aspect of my critique of the Court's choice of privatization

83. One further point bears making. At the time of the 1947 amendments, the N.L.R.B. was routinely deciding breach of contract claims in many contexts, within its existing unfair labor practice jurisdiction. For example, in *Consolidated Aircraft Corp. v. N.L.R.B.*, 141 F.2d 785 (9th Cir. 1944), the court affirmed the Board's finding that the employer had violated the union's Section 7 rights and thus Section 8(a)(1) by unilaterally cancelling contractual wage increases and by refusing to comply with the contractual grievance and arbitration provisions for certain other disputes. Similarly, in *Marlboro Cotton Mills*, 53 N.L.R.B. 965 (1943), the Board found that the union president had not violated the collective bargaining agreement and that his discharge consequently violated Section 8(a)(3). In *Carrolls Transfer Co.*, 56 N.L.R.B. 935 (1944), the Board found that a company's violation of the closed shop clause in the collective agreement was a violation of Section 8(a)(5). Also, in *U.S. Automatic Corp.*, 57 N.L.R.B. 124, 133-34 (1944), the Board interpreted the scope of the arbitration clauses and required the employer to utilize them.

Courts in the pre-1947 period used a "public right" doctrine, *inter alia*, to delineate the scope of N.L.R.B. jurisdiction in cases where there were other remedies available. Under that doctrine, the existence of a public right, as compared to a mere private right, was the precondition for N.L.R.B. jurisdiction; if such a public right existed, there was no deferral to private dispute resolution. That is, the courts had a conception of a public right in the administration of the Act that enabled the courts to decide when the Board should have jurisdiction notwithstanding the existence of other remedial fora and when it should not. Thus, for example, in *N.L.R.B. v. Newark Morning Ledger Co.*, 120 F.2d 262, 268 (3rd Cir.), *cert. denied*, 314 U.S. 693 (1941), the court decided that an employee could secure redress at the N.L.R.B. for her alleged wrongful discharge because a public right was implicated. The court said that despite the possible existence of remedies for her "private right" under the contract or in the state courts, "the existence of such a private right . . . in no way affects the public right or the exclusive jurisdiction of the Board to enforce it." Professor Klare has discussed the public right doctrine in other contexts, such as its use to delineate who can be parties to proceedings to enforce Board orders and how bargaining units are determined. See Klare, *supra* note 5, at 310-18. See also *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 362-64 (1940) (Board properly found employer had committed an unfair labor practice by negotiating individual contracts with its employees even though affected employees were not parties to the Board proceeding because Board was asserting a "public right").

Thus, it is entirely possible that Section 301 was not intended to curtail existing Board jurisdiction but only to provide another forum, at least for those cases which did not fall within the Board's jurisdictional net. If so, then there is no justification for the Court's diminishing the Board's jurisdiction over unfair labor practices, as it did in *Vaca v. Sipes*, 386 U.S. 171 (1967), *Carey v. Westinghouse*, 375 U.S. 261 (1964), and some of the other the cases I discuss. See Stone, *supra* note 3, at 1531-38.

84. See *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421, 427-28 (1967) (legislative history of Section 301 does not mean Board is without power to decide any questions of interpretation of collective bargaining agreement).

is that it creates a recurring and irreconcilable tension between private ordering and public intervention, and has led to unworkable doctrinal structures. To demonstrate my point, I discuss the leading case of *Vaca v. Sipes*,⁸⁵ a case which involved claims that the union had breached its duty of fair representation,⁸⁶ and that the employer had breached the collective agreement. In that case, the Supreme Court held that the federal courts had jurisdiction for both a breach of duty claim against a union and a breach of contract claim against an employer, but that the latter claim cannot be heard until the union's breach of its duty is established.⁸⁷

In practice, the *Vaca* decision means that an individual who has suffered from an employer breach of a collective agreement must prove wrongdoing on the part of the union as well as the employer in order to recover. This is cumbersome for the aggrieved individual, and effectively pits individuals against their unions in many situations in which the union is not at fault. Thus, the *Vaca* "solution" has been criticized by all concerned.⁸⁸

I argue that the solution resulted from the Court's desire to impose external standards of behavior on union decision-making without undermining the industrial pluralist mandate of exclusive union

85. 386 U.S. 171 (1967), discussed in Stone, *supra* note 3, at 1536-37.

86. The duty of fair representation is a judicially-created doctrine by which courts enforce a standard for union behavior in contract negotiations and in the grievance procedure. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944).

87. *Vaca*, 386 U.S. at 186-87.

88. See, e.g., Kroner, *The Individual Employee—His 'Rights' in Arbitration After Vaca v. Sipes*, 20TH AM. CONF. LAB., N.Y.U. 75, 81-82 (1967) (criticizing *Vaca* for increasing the difficulty for individuals in suits against their employers for violating their collective agreements); Aaron, *The Union's Duty of Fair Representation Under the Railway Labor and National Labor Relations Acts*, 34 J. AIR L. & COM. 167, 206 (1968) (arguing that *Vaca* effectively destroys an individual's opportunity to sue the employer for breach of contract, and that instead, individuals should be able to sue whenever they can show that the union refused to take their cases to arbitration); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 817 (1973) (criticizing remedy in *Vaca* as inconsistent with proper understanding of role of arbitration in collective bargaining, and arguing that the proper remedy when a union breaches its duty of fair representation is for the court to direct the union to take the affected employee's case to arbitration, not to provide the individual with contractual remedy on the collective bargaining agreement); Note, *Individual Control Over Personal Grievances after Vaca v. Sipes*, 77 YALE L.J. 559, 574 (1968) ("*Vaca v. Sipes* does not afford adequate protection to the individual employee."); Note, *Labor Law—Federal Preemption—NLRA Does Not Preempt Court Jurisdiction of Suit Against Union For Breach of its Duty of Fair Representation*, 13 WAYNE L. REV. 602, 611 (1967) (criticizing *Vaca* for not giving NLRB exclusive jurisdiction over duty of fair representation claims). Note, *The Employee's Remedy For a Union Breach of the Duty of Fair Representation: Vaca v. Sipes*, 14 UCLA L. REV. 1351 (1967) (courts should not be the sole forum for hearing cases of alleged union breach of its duty to represent fairly).

control of the grievance and arbitration process.⁸⁹ The externally imposed standard necessarily is in tension with the Court's hands-off approach to resolving breach of contract suits. That is, by thus policing union decision-making under the rubric of the duty of fair representation, courts necessarily are intervening in the self-functioning mini-democracy of the workplace. This is in conflict with the courts' commitment to the opposing policies of industrial pluralism, so that the intervention that results is erratic, cumbersome, and arbitrary.

Professor Finkin acknowledges that the duty of fair representation "functions as an externally imposed limit on the union's administration of the grievance-arbitration procedure."⁹⁰ However, he denies that the tension between private ordering and public intervention is inevitable or irreconcilable. Instead he responds to my argument with a proposal of his own. He proposes that the Act be amended to give individual workers a statutory right to take their own cases to arbitration—thereby guaranteeing individual workers access to the grievance and arbitration procedure and supposedly eliminating the possibility of a union's breaching its duty of fair representation in that regard.⁹¹ He states that pursuant to such an approach, "[u]nions would be relieved of their role in selecting the cases to be heard," so that this would solve the duty of fair representation problem while retaining arbitration as "a private, not a public forum for the adjudication of the grievance, and the *Steelworkers Tril-*

89. Stone, *supra* note 3, at 1537-38. Professor Finkin offers four petty "corrections" to my account of *Vaca v. Sipes*, all of them debatable. For example, contrary to Finkin's first "correction," Finkin, *supra* note 4, at 69, I never stated that a suit against an employer was anything other than a Section 301 action. I merely said that when there was a grievance and arbitration machinery in a collective agreement, the Court treated that as a bar to an action in court unless the union had breached its duty of fair representation. Justice White, in his dissenting opinion in *Bowen*, makes the same point. See 459 U.S. at 236 (White, J., dissenting). Professor Finkin's second "correction" concerns whether or not a union's breach of its duty of fair representation violates Section 8(b)(1) of the Act, and is thus an unfair labor practice. Although I may inadvertently suggest that was definitively the case, Stone, *supra* note 3, at 1536, I refer to that part of the Supreme Court's *Vaca* decision in which the Court said, "We may assume for present purposes that such a breach of duty by the union is an unfair labor practice, as the NLRB and the Fifth Circuit have held." 386 U.S. at 186. There the Court treated breach of the duty as an *arguable* unfair labor practice, and that was all that my argument required.

On the whole, Finkin's "corrections" go to the issue of whether the *Vaca* decision really involved a jurisdictional or choice-of-forum issue—which it clearly did—and whether the court gave adequate reasons for adopting the choice that it did—about which Professor Finkin and I evidently disagree.

90. Finkin, *supra* note 4, at 71.

91. *Id.*

ogy would be totally unaffected.”⁹²

This proposal is interesting, and it might have ramifications worth exploring. However, whatever its virtues, the suggestion that it would solve the duty of fair representation problem and leave the *Steelworkers Trilogy* “totally unaffected” is simply wrong. Arbitration is expensive and consumes a lot of union resources. If every employee had a statutory right to take his or her grievance to arbitration, then many unions might choose, or be forced to choose, to get out of the grievance and arbitration business altogether and thus cease negotiating such provisions in their agreements.⁹³ This would totally undermine the basis of the *Trilogy*, which is to encourage the parties to agree to resolve their disputes through arbitration and to leave management and the union free to design and operate the grievance procedures as they wish.⁹⁴

Furthermore, under Finkin’s proposal, unions that did not abandon grievance and arbitration procedures altogether would presumably remain accountable under some standard of fair representation for decisions to pursue some cases more vigorously than others, or to devote more union resources to some rather than others. Courts would be left with the messy task of deciding whether in any particular case the union gave the grievant the kind of support that the duty requires, and whether it made an arbitrary or otherwise improper decision to bring certain cases to arbitration on its own, while relegating other cases to the individual’s own resources. In addition, judicial scrutiny would be necessary to decide whether any particular arbitration procedure measured up to the minimum standards which the statute envisioned, and whether the union adequately bore its share of the costs. All of these forms of judicial involvement would again open the door for the courts to intervene in the process, and substance, of the “privatized” world of arbitration.⁹⁵ Thus, Professor Finkin’s proposal, while interesting,

92. *Id.*

93. Aaron, *The Union’s Duty of Fair Representation Under the Railway Labor and National Labor Relations Acts*, 34 J. AIR L. & COM. 167, 205 (1968) (if employees were permitted to compel arbitration on anything they wished over the union’s objection, and if the union had to pay the expenses of such arbitrations, it “would quickly bankrupt many unions”).

94. The proposal that individuals have guaranteed access to the grievance procedure has also been criticized on the grounds that the employer would no longer be able to rely on the procedure as being final and binding and/or may have to arbitrate all cases. In such situations, the employer may refuse to agree to arbitration provisions, and instead risk strikes. *See, e.g., Murray, supra* note 19, at 782-83.

95. Courts have already been called upon in fair representation cases to judge the manner in which a union handles particular cases in arbitration and the degree of arbitral due process provided. *See, e.g., Hines v. Motor Anchor Freight*, 424 U.S. 554 (1976)

does not demonstrate that there can be a solution to the duty of fair representation problem which does not implicate the pluralists' choice of a private forum for deciding disputes over breaches of collective agreements. In fact, it demonstrates the contrary.

IV. THE ROLE OF THE ARBITRATOR

Two other aspects of my article with which Professor Finkin takes issue are my discussions of the role of the arbitrator and of the relationship between industrial pluralism and the human relations school of industrial sociology. Although he treats these as two separate points, they are actually two aspects of the same point and concern the most central question of all—whether industrial pluralism is harmful or helpful to organized labor. Given the centrality of private arbitration to the pluralist vision of collective bargaining, it is necessary to ask whether arbitral decision-making in disputes about the enforcement of collective agreements furthers the goal of democratic participation by labor in the workplace.

In making my argument that it does not, I argue that many arbitrators see their task as more than the mere interpretation and application of the language of an agreement: They see their mandate as the alleviation of tensions in a shop.⁹⁶ I further argue that by tailoring their interventions in such a way as to preserve order and alleviate tensions, these arbitrators are preserving a management-serving order.⁹⁷ I also show how these arbitrators justify these interventions in the language of the human relations approach to personnel management, an approach which itself aims to alleviate tensions in order to enhance worker productivity for the benefit of management.⁹⁸

Professor Finkin treats this as an argument that arbitrators con-

(union breached the duty of fair representation by inadequately investigating the facts involved in the case); *Milstead v. Local 957, IBT*, 580 F.2d 232, 235 (6th Cir. 1978) ("the duty of fair representation may be breached wherever a union ineptly handles a grievance"); *Holodnak v. Avco Corp.*, 381 F. Supp. 191 (D. Conn.) (assessing damages against union for failure to raise free speech defense at arbitration), *modified*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975). See also Feller, *Arbitration: The Days of Its Glory are Numbered*, 2 INDUS. REL. L.J. 97, 127 (1977) ("[J]udicial intrusion . . . may . . . result in the correction of what appears to be injustice. But the price to be paid for that correction may be too high."). Professor Finkin's proposal would open the floodgates even wider to judicial scrutiny of union activities behind the green door of arbitration.

96. Stone, *supra* note 3, 1563-64. I suggest that this definition of the arbitrators' role makes the arbitrator more like an "industrial relations psychiatrist" than like a judge, despite the division of powers and mini-democracy rhetoric of industrial pluralism. *Id.*

97. *Id.* at 1565.

98. *Id.* at 1566-68.

sciously "co-opt" grievants, and he says he finds this astonishing.⁹⁹ However, beyond his expressions of dismay, his actual arguments are difficult to follow. This is because he switches back and forth between two different lines of attack, lines which are somewhat inconsistent with each other and which are never clearly sorted out. On the one hand, he disagrees with my claim that arbitrators see their role as involving active intervention into plant life. On the other hand, he disagrees with my assertion that when arbitrators intervene in the name of preserving order, they are *de facto* acting on the side of management.

In his attempt to refute my claim that most arbitrators believe that they should adopt an interventionist posture, Professor Finkin gives an account of the development of the "standing umpire" systems in the United Auto Workers contracts with General Motors and the Ford Motor Company, and recounts a debate among arbitrators about how interventionist an arbitrator should be.¹⁰⁰ From this he claims that my characterization of arbitrators is flawed because I incorrectly generalize from the personal and idiosyncratic style of Harry Shulman.¹⁰¹

If Finkin's point is that I ignore the complexity of the debates about the arbitrator's proper role, I believe he is mistaken. In my discussion of this subject, I say that "Shulman's view reflects an extreme position in the debate about the role of arbitrators that took place in the 1950s and 1960s."¹⁰² I then go on to discuss some of the most important issues around which the debate crystallized. I state that while there were various views on the various issues, "[p]ositions on these issues tended to cluster. In general, the pluralists favored Shulman's approach of the creative, free-wheeling, sometimes-mediator arbitrator."¹⁰³ I then contrast these views with those of Lon Fuller, who advocated a more judicial and detached role for the arbitrator,¹⁰⁴ and point out the irony that those who

99. Finkin, *supra* note 4, at 74. See also *id.* at 71 ("The thrust of Stone's piece is that pluralist ideology, as embodied in the law and practice of grievance arbitration, contributes to the co-optation of the working class."). The word "co-optation" is Professor Finkin's word, not mine, and it is not clear to me exactly what he would have it mean or what he is accusing me of saying.

100. *Id.* at 72-73.

101. *Id.* at 74.

102. Stone, *supra* note 3, at 1561.

103. *Id.*

104. *Id.* at 1562-63, citing Fuller, *Collective Bargaining and the Arbitrator*, in *COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE* 8 (M. Kahn ed. 1962). Other nonpluralists of the era adopted the approach of Lon Fuller. See, e.g., Stone, *supra* note 3, at 1562 n.283 (citing cases). See also Hays, *The Future of Labor Arbitration*, 74 *YALE L.J.* 1019, 1034

most ardently advocated the metaphor of the workplace as a mini-democracy, with arbitration as the metaphoric judiciary, were the same who advocated or implemented a less-than-judicial role for the arbitrator.¹⁰⁵

Finkin disagrees with my statement that the pluralists, on the whole, favored the Shulman approach over the Fuller approach. As evidence, Finkin cites an article by Killingsworth and Wallen to the effect that Shulman's approach was not the prevailing one, even within the Ford-UAW Umpireship for which Shulman served for many years.¹⁰⁶ However, according to Killingsworth and Wallen, what was rejected by other arbitrators was Shulman's predilection for *mediation* at the expense of adjudication altogether. Thus, they state that for the first ten years of Shulman's tenure as the standing umpire, "most of the important decisions were the product of mediation rather than adjudication,"¹⁰⁷ and that even after that, Shulman continued to take a mediative rather than adjudicative approach.¹⁰⁸

I never claim that the pluralists called for mediation instead of arbitration. I claim that the pluralists had an interventionist view of how arbitrators should handle cases while acting in an adjudicative capacity. I locate this view in their positions on issues such as whether arbitrators should inject their own values into the contract interpretation process or whether arbitrators should actively participate in hearings.¹⁰⁹ Wallen and Killingsworth do not refute this, and in fact their descriptions of how they handle their own cases bear this out.¹¹⁰

(1965) (faulting arbitration for departing from the model of *judicial* administration of contract violations); Morse, *The Judicial Theory of Arbitration*, in UNIONS, MANAGEMENT AND THE PUBLIC 489-90 (W. Bakke & C. Kerr eds. 1948) (arguing that too often arbitrators depart from judicial procedures by such actions as imposing a compromise on the parties or taking judicial notice of interests and facts not established in the record of the hearing; when they do so, they wrong the parties and impair the effectiveness of arbitration as a judicial method of settling labor disputes).

105. Stone, *supra* note 3, at 1563.

106. Finkin, *supra* note 4, at 74 (citing Killingsworth & Wallen, *Constraint and Variety in Arbitration Systems*, 17 NAT'L ACAD. ARB. 67-68 (1964)).

107. Killingsworth & Wallen, *supra* note 106, at 67.

108. *Id.* at 67-68.

109. Stone, *supra* note 3, at 1561-62 & n.283.

110. Wallen himself, at the same meeting at which he delivered the paper Finkin cites, spoke on a panel with several other noted arbitrators about the conduct of arbitration hearings. There he and others gave detailed descriptions of their own manner of conducting arbitration hearings, in which it is clear that he and the co-panelists depart from a judicial model in many respects. For example, Wallen said he believed in intervening in the arbitration hearing, at least when one of the parties has presented its case incompetently. As he said, "I am of the school that wants to find out what the case is about, even if I am courting the risk of appearing to make out a case for one of the parties."

Finkin's argument does, however, point out an interesting fact about the history of arbitration. That is, throughout the history of arbitration there was a recurring debate between those who believed arbitration should replicate formal judicial procedures and those who believed that the very essence of arbitration is its informality. This debate lies at the heart of many of the controversies within the arbitration community for the past thirty-five years.¹¹¹ In the early days, the controversy was between those who saw arbitrators as mediators or counselors and those who saw them as adjudicators of disputes. George Taylor and Harry Schulman represented the former position and the American Arbitration Association represented the latter. In this dispute, as Finkin says, the Taylor-Schulman model of arbitrator as mediator/father confessor lost out to the view of arbitrator as adjudicator.¹¹² But this is not the end of the story.

Among those who believed in the adjudicative role of the arbitrator, there was a further controversy as to how far the judicial analogy went.¹¹³ Some believed that it should be taken literally, and thus advocated that hearings be conducted like trials, with formal rules of procedure and evidence, and that decision-making be based solely upon the language of the agreement and duly admitted evidence of bargaining history and contractual intent.¹¹⁴ Others believed that procedures should be more lax, that all kinds of proffered testimony and evidence should be admitted, and that arbitrators should decide cases based on considerations other than the

Wallen, *Procedural Problems in the Conduct of Arbitration Hearings: A Discussion*, in LABOR ARBITRATION: PERSPECTIVES AND PROBLEMS, PROC. 17TH ANN. MEETING NAT'L ACAD. ARB. 1, 12 (1964).

At another point, in discussing the scope of cross-examination, Wallen suggested that he is disinclined to impose limits because "[e]ventually everybody says what he wants to say and is supposed to say." *Id.* at 9. He also made it clear that he only applied his somewhat lax procedures in "a typical arbitration," not in those which are "in its essential character, a trial." *Id.* See also B. LANDIS, *VALUE JUDGMENTS IN ARBITRATION: A CASE STUDY OF SAUL WALLEN* (1977) 164-65.

111. See generally Dunsford, *The Role and Function of the Labor Arbitrator*, 30 ST. LOUIS U.L.J. 109, 114 (1985) (describing the various debates that have raged during the history of the National Academy of Arbitrators).

112. Braden, *The Function of the Arbitrator in Labor-Management Disputes*, 4 ARB. J. (n.s.) 35 (1949) (the American Arbitration Association and some sixty individual arbitrators rejected the mediation approach of Taylor in favor of the view that the arbitrator was a judicial officer).

113. See generally Gitelman, *The Evolution of Labor Arbitration*, 9 DE PAUL L. REV. 181, 189 (1959) (describing divergence of opinion between arbitrators who believe in a "'labor relations' approach," whereby awards "must be palatable" to the parties, and arbitrators who believe that arbitration is quasi-judicial and that disputes should be resolved "in terms of the bargaining agreement").

114. See, e.g., Fuller, *supra* note 104; Morse, *supra* note 104; Hays, *supra* note 104.

language of the contract.¹¹⁵ This latter conception of the arbitrator's role was the one that became dominant in the post-war period.¹¹⁶

Thus, while there was controversy about the mediative style of Schulman, most arbitrators nonetheless adopted an interventionist style of arbitration. They did this because they believed that the arbitral process was different from the judicial process in important ways, and that, at least to some extent, it called for decision-making on the basis of other factors. For example, many arbitrators spoke about the importance of "acceptability" of their decisions as a major factor in labor arbitration.¹¹⁷ Other arbitrators stressed the importance of rendering decisions that promoted efficiency or preserved smooth operations.¹¹⁸ The interjection of these extraneous factors into the decision-making process is justified in a variety of ways,¹¹⁹

115. See, e.g., Wallen's comments in *Procedural Problems*, *supra* note 110.

116. See *supra* note 110; Stone, *supra* note 3, at 1565 n.300.

117. See, e.g., Fleming, *Reflections on the Nature of Labor Arbitration*, 61 MICH. L. REV. 1245, 1245-46 (1963) ("A greater premium is placed on the acceptability of an arbitrator's award by the parties in a dispute than would normally be the case with a court decision.") Cf. Hays, *supra* note 104, at 1035 (the fact that arbitrators are dependent upon the parties themselves for their livelihood, and thus must render "acceptable awards" means that their decision-making process may be distorted).

118. See, e.g., B. LANDIS, *supra* note 110, at 164 (Wallen frequently injected "considerations of productive efficiency, industrial relations stability, and equity" into his arbitration decisions, even where there was evidence that the parties intended otherwise. "In a very few exceptional instances, he was even willing to ignore the agreement's clear written terms where the result of those terms was repugnant to his personal values."); Gross, *Value Judgments in the Decisions of Labor Arbitrators*, 21 INDUS. & LAB. REL. REV. 55, 70 (1967-68) ("Examination of arbitral opinion on management rights, subcontracting, and out-of-unit transfers of work has borne witness to the existence of a dominant value theme—efficiency, as the *summum bonum*.").

The Labor and Employment Law Committee of the American Bar Association reported in 1981 that arbitrators often "split the baby" rather than give either side a clear remedy because they often feel that this is "politically expedient and also proper." *Report of the Committee on Labor Arbitration and the Law of Collective Bargaining Agreements*, 1981 A.B.A. SEC. LABOR & EMPLOYMENT LAW REP., vol. 2, at 196.

119. Recently, Professor John Dunsford, former President of the National Academy of Arbitrators, has argued that arbitrators should not adopt a judicial model of arbitration because such a model would "petrify" the arbitration process. See Dunsford, *supra* note 111, at 126. However, Dunsford does not specify exactly what that means, i.e., what arbitrators can do that judges or administrative law judges cannot, other than to say that by dispensing with the "judge-in-court model. . .the decision-maker may. . .penetrate, unimpeded by the burden of judge-made rules, to the elements that are of importance to the industrial relations process." *Id.* at 128. Although this formulation sounds compelling, it does not adequately justify a model of arbitration that differs from a judicial one. We are not told what is so unique or exotic about the "industrial relations process" that demands special skills or procedures and that eludes judicial, or administrative, capability. Dunsford attempts to make his argument about the specialness of the "industrial relations process" by listing a series of differences between arbitration and judi-

but few arbitrators would deny that it occurs.¹²⁰

If it is in fact true that arbitrators inject their own values into their decisions, and if those values generally include considerations of stability, efficiency, and the continuity of operations, then the question of which side benefits from such considerations assumes paramount importance.¹²¹ This is an important question: It is about the legitimacy of arbitration as a substitute for litigation.¹²² It is also a question about the desirability of industrial pluralism. Unfortunately, while Professor Finkin objects to my argument on this point, he does not ever join issue on this question.

I argue that when arbitrators intervene to preserve stability and order, they are acting *de facto* on the side of management.¹²³ This is because of the dual nature of the concept of "order" in an environ-

cial adjudication which he claims justify a different approach. He notes that the arbitration forum is private, that arbitrators are not bound by precedent or by the rules of procedure or evidence, and that arbitrators have no enforcement powers. *Id.* at 126-27. However, these differences between arbitration and litigation cannot justify a non-judicial methodology for arbitration because they *are* the very differences that Dunsford is attempting to explain. That is, Dunsford's argument is circular.

120. Even Finkin acknowledges that "arbitrators must be guided by sources outside the collective agreement." Indeed, he calls this a "truism." Finkin, *supra* note 4, at 74. As authority for this, he cites Justice Douglas' statement in the *Trilogy* that considerations of morale, productivity, and whether "tensions will be heightened or diminished" are properly part of the arbitrator's judgment. This supports my point.

121. These considerations may sound neutral and innocuous to outsiders, but to participants they can sometimes mean that hard-fought and important contractual rights are disregarded. A recent and wide-spread example is the effort in the late 1970s and early 1980s for companies to institute what they call "no fault" absenteeism programs. Under these programs, workers are subject to progressive discipline, up to and including termination, on the basis of absences of any kind, whether for good reasons or for bad. Unions contended that these programs violated various provisions of their contracts, including existing sickness benefit provisions, absence provisions, and just cause for discharge provisions. Almost universally, arbitrators upheld such "no-fault absence" programs on the grounds that they were a reasonable response to high rates of absenteeism which caused severe economic impact on the companies concerned. See, e.g., *Union Tank Car Co. and Oil, Chemical and Atomic Workers Int'l Union*, 77 Lab. Arb. (BNA) 249 (1981) (upholding no-fault absence program against union's challenge that it violated sick benefit and discipline provisions in the collective agreement); *Lima Register Co. and United Independent Workers*, 76 Lab. Arb. (BNA) 935 (1981) (upholding no-fault absence program against union's challenge that it violated absence and discipline provisions in collective agreement). See generally *Report of the Committee on Labor Arbitration and the Law of Collective Bargaining Agreements*, 1980 A.B.A. SEC. LABOR & EMPLOYMENT LAW REP., vol. 2, at 60. ("In the private sector, the most frequently arbitrated issues [of the past year] dealt with absenteeism and discipline over absentee control procedures, especially of the 'no fault' type whereby absences, irrespective of their reasons, are all counted and progressive discipline is imposed after certain levels of absenteeism are reached.")

122. See generally Fuller, *supra* note 104, at 26-27 (intervention by arbitrator's to "rig" awards, even if for good motives, undermines legitimacy of arbitration process).

123. Stone, *supra* note 3, at 1565.

ment of unequal power. In such a situation, "order" means simultaneously the absence of chaos *and* the preservation of the unequal status quo. In the labor-management relationship, there is an asymmetry in the two sides' ability to take unilateral action. Management is the party that initiates unilateral action in a workplace; the union's only options are to acquiesce or grieve.¹²⁴ Stated differently, management creates the status quo and the union is always in the position of seeking to change it. Thus, "normalcy" is, by definition, a management-created normalcy. Therefore, when an arbitrator seeks to preserve normalcy, it is a management-serving form of "order."¹²⁵

I am not the first to note this lack of symmetry between the power of management and labor to change the status quo. Jack Barbash, a respected industrial relations scholar, explains it this way:

There is no direct management analogue to the strike, although the lockout is so perceived. Actually, the employer need not resort to the lockout to have his way. Since the worker cannot change the terms of employment unilaterally and the employer's consent is always required to make any change operative, all the employer needs to do is to say no in order to oppose union demands. Therefore, the initiative to withhold always has to come from the union and/or a group of workers.¹²⁶

124. See, e.g., Fleming, *The Labor Arbitration Process*, in LABOR ARBITRATION: PERSPECTIVES AND PROBLEMS, PROC. 17TH ANN. MEETING NAT'L ACAD. ARB., 33, 51 (1964) ("With relatively minor exceptions the accepted pattern of conduct under a collective bargaining contract in the United States is for the company to retain the initiative, subject to complaints on the part of the union that the contract has been violated."). *Accord* Stone, *supra* note 3, at 1551 n.229 ("There is a commonly accepted doctrine among arbitrators that a worker who is aggrieved by a company order that he believes violates the agreement must obey first and then file a grievance."); *id.* at 1565 n.300 (citing cases on the origin and application of the "obey now—grieve later" rule).

125. Solicitor General Charles Fried disagrees with my argument that the preservation of order in the industrial setting tends to favor management over labor. See 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, 1014-15 (1984). He asserts that unions, by consenting to the collective bargaining agreement, have consented to the substitution of arbitration for strikes, thus suggesting that they must see arbitration as an adequate substitute means of exercising their power. This statement demonstrates my claim that industrial pluralism has constricted the universe of options both in fact and in the imagination. I never argue that strikes are always, or even usually, preferable to arbitration for settling disputes. My argument is about the superiority of judicial or administrative fora for resolving disputes—*fora* which would, at least presumably, resolve them on the merits and not on the basis of preserving a management-serving form of "order."

126. J. BARBASH, *THE ELEMENTS OF INDUSTRIAL RELATIONS* 62 (1984).

Thus, when arbitrators decide cases on the basis of preserving order without questioning who benefits from the status quo, they are unwittingly acting in favor of management.

As part of this argument, I show that one of the ways in which arbitrators justify their interventionist role comes from the human relations school's approach to personnel management.¹²⁷ The human relations school of industrial psychology had as its stated aim to improve productivity by inducing workers to view their problems as individual, rather than collective, in nature.¹²⁸ I show the similarity between the ideas embodied in human relations writings and certain key passages in the writings of some of industrial pluralism's leading advocates—most notably Professor Archibald Cox and Justice Douglas.¹²⁹

Professor Finkin wholeheartedly rejects my argument that the industrial pluralist interpretation of the arbitrator's role draws on the human relations school of industrial psychology.¹³⁰ While he agrees that human relations sociology was designed to manipulate workers and co-opt their discontent,¹³¹ he says I have not proved that the industrial pluralists shared anything with the "Hawthornizers."¹³² He cites Ivar Berg for the proposition that the two groups were in fundamental and irreconcilable opposition.¹³³

Professor Finkin's rejection of my argument is a little too smug. While it is true that some practitioners of human relations sociology saw an irreconcilable conflict between the ideas of human relations and the concept of collective bargaining, others sought to reconcile them. For example, Professor Benjamin Selekman of the Harvard Business School wrote a highly regarded book in 1947, in which he sought to convince the business community to accept unionism precisely because it was compatible with human relations theories of personnel management.¹³⁴ Similarly, Ivar Berg in a work with Eli

127. Stone, *supra* note 3, at 1571-72.

128. *Id.* at 1572-73.

129. *Id.* at 1571-72.

130. Finkin, *supra* note 4, at 79.

131. *Id.* at 77-78.

132. The human relations school of industrial sociology had its origin in experiments on the effects of lighting on worker productivity at Western Electric's Hawthorne Works. Stone, *supra* note 3, at 1567.

133. Finkin, *supra* note 4, at 79.

134. B. SELEKMAN, *LABOR RELATIONS AND HUMAN RELATIONS v-ix* (1947). See discussion in Stone, *supra* note 3, at 1569. See also M. DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965*, 476 (1970), in which he says that "[a]lthough Mayo [the founder of the human relations school] himself virtually ignored unionism, some of his colleagues, like Ben Selekman, and followers, like William Whyte, made persuasive cases

Ginzberg wrote about the compatibility of human relations and unions in 1963. Like many of the progressive industrial relations writers in that period, Berg and Ginzberg sought to reconcile human relations with collective bargaining by expounding an industrial pluralist justification for collective bargaining, while at the same time advocating a flexibility of approach for arbitrators in which the goal of their intervention was to alleviate tensions in the plant. Thus, they state, with echoes of human relations writings:

[A]rbitration is a more flexible method [than judicial procedures] of adjudicating conflicting claims. Since the objective of arbitration is to keep the disagreements between management and labor at a minimum, and, when disagreements do arise, to handle them in a manner that contributes to the major goal of both parties (which is to keep on working and producing), arbitrators are always future oriented. They must understand the logic of industrial enterprise and they must attempt at all times to render decisions that are in harmony, not in conflict with this logic.¹³⁵

Others made similar arguments.¹³⁶ These writings indicate not only a departure from a judicial model of arbitration, but a rationale for doing so which emphasizes the arbitrator's ability to identify and alleviate tensions in the workplace. This emphasis is characteristic of the human relations approach.¹³⁷

for the application of human relations ideas and techniques to grievance handling and contract administration."

135. E. GINZBERG & I. BERG, *DEMOCRATIC VALUES AND THE RIGHTS OF MANAGEMENT*, 198 (1963). Later in the same book, Ginzberg and Berg juxtapose their idea of an interventionist arbitration with the industrial pluralist paradigm:

[The arbitrator's] decision must not only be conducive to management's search for efficiency but must be acceptable to the workers in their search for equity. Thus, the arbitrator becomes unwittingly the instrument for expanding the reach of democracy at the workplace. He helps to extend and deepen the area within which democratic values find expression. In this process, he makes a significant contribution to the strengthening of industry and to the expansion of democracy.

Id. at 205.

136. See, e.g., Carlston, *Arbitration: An Institutional Procedure*, 4 *ARB. J.* (n.s.) 248 (1949), in which he says:

The decision in a labor arbitration case must seek a just solution, and *adjustment*, of the tensions between groups, i.e., management and labor, whose greatest interest lies in cooperation within the institution of which they are a part The task of the arbitrator is to ascertain 'the inside story' of the dispute with which he is confronted.

(Emphasis in original).

137. See also Justice Douglas' reference, in the *Steelworkers Trilogy*, to "whether tensions will be heightened or diminished," 363 U.S. at 582, discussed *supra* note 120.

Professor Finkin claims that I have not "proved" my point.¹³⁸ What, however, would constitute "proof?" I describe the ways in which many of the advocates of industrial pluralism depart from the judicial model of arbitration, discuss how they interject factors such as efficiency and stability into the decision-making process, and then show that they justify this departure from a judicial method in the language of the human relations approach.¹³⁹ Although more examples could have been given, I doubt if even hundreds of examples could have "proved" my argument with the scientific certainty that Professor Finkin seems to expect. Mine is an argument about the similarities and cross-influences of two different schools of thought that emerged in two different fields at approximately the same time. The only "proof" possible for an argument of this type is whether the examples given are convincing and/or illuminating of some aspect of either school which is otherwise mysterious.

Finkin concludes, as if in summation, by saying, "If Klare is indifferent to the real world, Stone is downright hostile to it."¹⁴⁰ He then says that I not only engage in debasement of language, but present a world that bears an "inverse relation to reality, [which] . . . ends in Newspeak."¹⁴¹ The alleged Newspeak is my assertion, in conclusion to my discussion of the relationship between the human relations approach and the industrial pluralist view of the grievance procedure, that the industrial pluralist conception of "'collective bargaining undermines collective action.'"¹⁴² This assertion is indeed striking: It is intended as a pithy summation of the antinomy between the support for collective action that the Act embodies and the individualizing effect that the human relations approach to grievances seeks to achieve. By so starkly juxtaposing the concepts of collective bargaining and collective action, I had hoped to call attention to the basic idea, embodied in the preamble of the National Labor Relations Act, but too frequently lost in its interpretative tradition, that one of the Act's main purposes is to promote, provide, and protect the possibility for collective action by workers in the belief that by doing so, we could re-envision the possibilities for attaining true equality between management and labor, and true democracy in the workplace.

138. Finkin, *supra* note 4, at 78-79.

139. Stone, *supra* note 3, at 1566-73.

140. Finkin, *supra* note 4, at 85.

141. *Id.* at 86.

142. *Id.* (quoting Stone, *supra* note 3, at 1577).