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THE NATIONAL LABOR RELATIONS ACT: WHAT WENT WRONG; CAN WE FIX IT?

JULIUS GETMAN*

Abstract: When the National Labor Relations Act ("NLRA") was enacted, both labor and management believed that it would pave the way for unionization and the spread of collective bargaining. The key provisions that led to such great hopes by unions and their supporters remain in force, but after many years of working with the NLRA, optimism has given way to cynicism and despair about the law's ability to protect workers and enhance collective bargaining. This Essay provides tentative suggestions for structuring a legislative agenda that would make basic labor law more even handed and protective of basic worker rights. Recognizing that basic labor law is currently not a friend to unions, the Essay concludes that even though efforts to improve it are likely to meet with significant resistance, they are, nevertheless, worth the effort.

When the National Labor Relations Act ("NLRA")[1] was enacted, both labor and management believed that it would pave the way for unionization and the spread of collective bargaining.[2] Unlike the National Recovery Administration, which preceded it, the Wagner Act was carefully structured to be effective.[3] Many aspects of the new law were innovative, its provisions were powerful, and its scheme for enforcement was carefully chosen. It contained a sweeping enunciation of employee rights, provisions for determining whether employees wished to be represented by a union, and a requirement that the em-

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[1] Hereinafter also referred to as the "Act."

[2] *See generally* IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY (1950); JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW (1974).

[3] The current NLRA, codified as amended at 29 U.S.C. §§ 151–169 (2000), is a combination of the major provisions of the Wagner Act, Pub. L. No. 198, 49 Stat. 449 (1935) (designated the National Labor Relations Act); the 1947 Taft-Hartley Amendments, Pub. L. No. 101, 61 Stat. 136 (designated the Labor Management Relations Act); and the 1959 Landrum-Griffin Amendments, Pub. L. No. 86-257, 73 Stat. 519 (designated the Labor-Management Reporting and Disclosure Act of 1959).

ployer bargain with a union selected by its employees. Perhaps most encouraging to union supporters, the NLRA was to be developed and applied by an expert agency rather than the courts—labor's historic enemy. The key provisions that led to such great hopes by unions and their supporters remain in force, but after many years of working with the NLRA, optimism has given way to cynicism and despair about the law's ability to protect workers and enhance collective bargaining. How has this come about and what, if anything, should and can be done to make the law fairer and more effective?

I. The Role of the Courts in Limiting the Effectiveness of the Law

A. *The Continuing Role of the Judiciary*

The scheme of the NLRA envisioned no role for the courts with respect to the representation election process, and a limited task of enforcing National Labor Relations Board (the "NLRB" or "Board") orders with respect to unfair labor practices. But the courts are notoriously difficult to replace or control. The notion that courts would simultaneously defer and enforce was unrealistic. So long as the courts had the power to refuse enforcement, it was inevitable that they would use this power to require the Board to interpret the NLRA in accordance with their views of desirable policy. In addition, three factors combined to make them particularly feisty in dealing with Board decisions.

First, the reasons advanced for deferral to the Board—its expertise and neutrality—were quickly perceived to be fictional. As it became obvious that the Board was performing the function of an adjudicatory body—applying or interpreting general language, developing doctrine, and finding facts—and that its policies changed with its political makeup, the reasons to defer seemed less compelling.

Second, because of its concentration on the NLRA, the Board was not in the position to undertake the important task of harmonizing NLRA policy with the policy behind other statutes and laws. This became increasingly important as other labor-related statutes and policies were developed. The courts have primary responsibility for harmonizing the NLRA with the policy favoring arbitration and with the antidiscrimination, antitrust, and bankruptcy laws, and developing the law dealing with the relationship between the employee and the union, an

area not dealt with by the NLRA. The labor injunction was reinstated by the Taft-Hartley Amendments.[4] Because the board lacked injunctive power, this approach increased the role of courts, which then had the primary responsibility for determining the legality of strikes.

Third, the NLRA is a mix of inconsistent policies set forth in broad general language. The statutes that combined to form the NLRA have competing visions of the appropriate role of government, the importance of the strike, and the legitimacy of the labor injunction. Both the Taft-Hartley and Landrum-Griffin amendments reflect in their provisions uneasy compromises between fiercely contending political forces. The result is a hodgepodge of confusion.[5]

B. *The Continuing Influence of Common-Law Concepts*

Under the common law, employers by virtue of their ownership were entitled not only to set wages and working conditions unilaterally, but to fire employees for any reason, blacklist union supporters, and refuse to deal with a union despite the manifest desire of its employees. The NLRA was intended to replace judicial commitment to property rights and instead put the force of law behind the rights of employees to unionize, strike, and bargain collectively. But the common law, like judicial discretion, dies hard. Thus, in 1938, only a few years after the NLRA's passage, and in the face of the ringing en-

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[4] 29 U.S.C. § 160(j) (2000).

[5] Section 7 of the NLRA, its original language largely intact, announces a broad right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157. Section 13, another of the NLRA's original provisions, specifies that "[n]othing in this subchapter, except as specifically provided . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike." *Id.* § 163.

This language is in sharp contrast with the language of § 8(b)(4), which makes it an unfair labor practice:

> to engage in, or to induce . . . any individual . . . to engage in, a strike or a refusal . . . where in either case an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer.

Id. § 158(b)(4). The literal provisions of this language are violated in almost every strike in which the strikers seek to prevent pickups or deliveries. The NLRA thus contains language recognizing the common goals of organized labor and language that, if read literally, would outlaw almost all strikes and most inducements to strike. Similar tension exists between the policy favoring free collective bargaining developed by the Wagner and Taft-Hartley Acts and § 8(e), which prohibits agreements by which unions seek to enlist the support of an employer in favor of their organizing efforts elsewhere. *See id.* § 158(e). The NLRA's inconsistencies invite judicial reconciliation.

dorsement of the right to strike in § 7 and § 13, the United States Supreme Court announced in *NLRB v. Mackay Radio & Telegraph Co.* that an employer had not "lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them."[6] This decision, which was of enormous consequence because of its impact on the strike weapon, also helped to set a pattern of interpreting the NLRA to interfere as little as possible with traditional property rights.

The Supreme Court has similarly elevated traditional property rights over the rights of unions in a series of cases dealing with access to employees.[7] It has in these cases essentially rejected the position that the law should balance the advantages of property in representation campaigns by making sure that employees get a chance to learn about the merits of unionization. Employers may assemble employees and make the case against unions. During the campaign that precedes a representation election, employers regularly avail themselves of this right and seek to convince employees of the harm that might come from unionization and the likely futility of collective bargaining. In its decisions in *NLRB v. Babcock & Wilcox Co.*, *NLRB v. United Steelworkers*, and *Lechmere, Inc. v. NLRB*, the Court effectively rejected the idea that the Board could balance the employees' rights under § 7 of the NLRA against employer property rights.[8] The union is not entitled to respond to the employer's captive audience speech; and its organizers, without regard to interest balancing, may be kept from the employer's premises.

Similarly, the courts of appeals have given greater weight to an employer's right to discharge an unsatisfactory employee than to the NLRA's prohibition on discriminatory discharge. In cases where a legitimate reason could be found for discharging a union supporter, courts of appeals have regularly defied the Supreme Court's instruction that they defer to the Board's findings of improper employer mo-

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[6] 304 U.S. 333, 345–46 (1938).

[7] *See* Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN L. REV. 305, 311–25 (1994) (discussing Supreme Court decisions regarding union actions and employer property rights).

[8] *See Lechmere*, 502 U.S. 527, 538, 539 (1992); *United Steelworkers*, 357 U.S. 357, 363 (1958); *Babcock*, 351 U.S. 105, 112 (1956).

tivation.[9] Courts have refused to hold that employers who close down parts of their enterprise in response to unionization have done so to discourage union activity, and they have refused to order employers who discriminatorily close down all or part of their business to restore shut down functions.[10] And the Supreme Court has permitted employers to respond to unionism by going out of business.

In addition, underlying property rights give the employer the final say with regard to the future of workers unlawfully discharged during an organizing campaign and ordered reinstated. The Board does not monitor its decision to determine whether reinstated employees in fact return and remain. Studies suggest that most do not—that they are ultimately forced out by continued harassment.[11] Thus, union activity is regularly costly for those who engage in it. The Court has also rejected the idea that the Board may seek to deter unlawful employer conduct by punishing wrongdoers.[12]

II. The Equivocal Performance of the NLRB

Through most of its history, the Board has been politically motivated and legalistically oriented. Its opinions have been far more often based on conjecture and surmise than on understanding of the realities of labor management relations.

There are a variety of reasons why the Board so little resembles the vision of its earliest advocates. One is the political nature of the appointments process, which sometimes has been used to reward labor for its support and sometimes has been used as a way of punishing labor for opposing the President's policies. The judicial nature of the task has mandated the appointment of lawyers, which historically has meant politicians with little or no labor-relations background, former Board employees, or those with only partisan experience. The vague, contradictory, and complex language of the statute has permitted the Board to express its policy decisions through a myriad of technical

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[9] *See, e.g.*, Mueller Brass Co. v. NLRB, 544 F.2d 815, 817, 821 (5th Cir. 1977); NLRB v. Lassing, 284 F.2d 781, 783 (6th Cir. 1960); NLRB v. Adkins Transfer Co., 226 F.2d 324, 328–29 (6th Cir. 1955).

[10] *See* Coronet Foods, Inc. v. NLRB, 158 F.3d 782, 795 (4th Cir. 1998); Local 57, Int'l Ladies' Garment Workers' Union v. NLRB, 374 F.2d 295, 299–300 (D.C. Cir. 1967).

[11] Archibald Cox et al., Labor Law: Cases & Materials 256–57 (13th ed. 2001).

[12] *See* Consol. Edison Co. v. NLRB, 305 U.S. 197, 235–36 (1938). *See generally* J. Pope, Post-New Deal Economic Due Process and the Decline of the American Labor Movement (Oct. 15, 2003) (unpublished manuscript, on file with author).

doctrines and subdoctrines that have increased the complexity of the law, even as they have limited and reduced the rights of workers.

All of this might be less significant if the personnel and procedures of the Board were such as to permit it to develop true institutional expertise so that it could ultimately draw upon its own experience and whatever is known about labor relations by scholars and experienced people in the field. Unfortunately, this is not the case. The way the Board is constructed, those who are responsible for announcing its policies and applying its decisions have very little to do with those who have field experience, who interview employees, or who hear the cases. Those who investigate in an unfair labor practice proceeding are part of the regional office staff that is responsible to the General Counsel, not to the Board. Cases are not tried by the Board members, but by administrative law judges. For reasons of administrative neutrality, the Board members have little contact with the regional offices or the administrative law judges. Although it has been administering the NLRA for over sixty years, the Board has never engaged in an effort to determine empirically the impact of the law on employer or union conduct: As it has acknowledged "in evaluating the interference resulting from specific conduct, the Board does not attempt to assess its actual effect on employees, but rather concerns itself with whether it is reasonable to conclude that the conduct tended to prevent the free formation and expression of the employees' choice."[13] Thus, the elaborate structure of Board rules is not grounded in any respect on factual data. It largely rests, rather, on guesses or assumptions. There is nothing in the collective activities or experiences of the Board that ensures the accuracy of the assumptions upon which these rules are based.

Less understandable than its own failure to investigate reality is how little effort the Board makes to incorporate into its decisional process what has been learned by research into labor management relations. To read through a volume of Board opinions is to be struck by the perfunctory nature of its opinions and the lack of sophisticated analysis when the Board does undertake to analyze a labor law issue. Its effort is almost always confined to elaborating its own doctrine and treating as established reality its previous assumptions.

The Board has had to apply its myriad of doctrines and subdoctrines to the complex facts of labor management relations. The result would be confusion and uncertainty, even if there were significant continuity on the Board. Given the political nature of the Board and

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[13] *See* 33 NLRB ANN. REP. 60 (1969).

its tendency to change complexion with the political environment, however, the problem becomes magnified many times. New Boards are always in a position to distinguish away most of the precedent that is inconsistent with their political values, and to refuse to accept much of the rest. The matter is further complicated by the fact that the Board often attempts to adjust its doctrine or to articulate it in such a way as to avoid judicial rejection. This has meant a significant difference between doctrines as announced and as applied.

For those reasons, the Board has supplied neither expertise, nor clear doctrine, nor consistency.

A. *The Impact of Other Laws and Other Decisionmakers*

1. The Reemergence of State Law

It was recognized from the early days of the NLRA that state tort law was a major potential threat to strikes and a lesser but nonetheless significant threat to organizing drives. Much that happens during strikes can be construed as tortious by an unfriendly state court. Picket lines, meant to prevent scabs from working, coexist uneasily with the tort of interference with business relationships. Angry shouts and insults typically hurled by pickets at those crossing the line are intended to inflict emotional harm. Raised fists, threats, pushing and shoving, and pounding on cars can all be characterized as assaults. In a major strike, the potential liability of unions for tortious conduct may be great.

In the early days of the NLRA, when the right to strike was treated with greater solicitude by the courts than it is now, two doctrines were developed to protect union activity from the reach of state law. Major protection came from the broad doctrine of preemption articulated by the U.S. Supreme Court's 1959 holding in *San Diego Building Trades Council v. Garmon* that if union activity was even arguably protected or prohibited by the NLRA, then state jurisdiction was displaced.[14] The second important doctrinal protection came from robust enforcement of § 6 of the Norris-LaGuardia Act, which provides that unions and their leaders are not to be held liable "except upon clear proof of actual participation in, or actual authorization of . . . or of ratification of such acts."[15]

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[14] *See* 359 U.S. 236, 246 (1959).

[15] Norris-LaGuardia Act § 6, 47 Stat. 71 (1932) (codified at 29 U.S.C. § 106 (2000)).

Both of these protections have been significantly reduced. The sweeping rules of preemption set forth in *Garmon* were undercut first, in 1966, in *Linn v. United Plant Guard Workers of America, Local 114*, in which the Court held that libel and defamation claims against a union during an organizing drive could be dealt with under state law.[16] Then, in 1977, *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25* expanded the *Linn* holding by permitting a suit against the union for intentionally inflicting emotional harm.[17] Although in both defamation and emotional harm cases federal guidelines require the state court to find that the action in question is not protected under the federal statute, the limitation is not a serious one. Almost by definition any action which constitutes a tort under state law is likely to be held unprotected by the Board. In addition, efforts to protect unions and union leaders from vicarious liability have been substantially undercut by a series of cases broadly applying the concepts of authorization and ratification. As Ray Marshall and I have written, with regard to instances of violence directed against strike breakers, "[r]ecent cases suggest movement towards a standard in which union leaders will be held liable unless they take what the court or jurors consider to be reasonable steps to *prevent* violence."[18]

Thus any serious strike these days will carry with it the threat not only of injunctions and Board unfair labor practice findings but also of liability under state law.

2. Arbitration

The Supreme Court's decisions adding the force of law to the arbitration process had originally been thought of as a victory for organized labor. After all, it was the Steelworkers that brought the cases to the Court that constituted the first "trilogy" and was the victorious party in them.[19] The new policy supporting arbitration has, however, through a series of remarkable Board decisions, become a basis for routinely ignoring statutory rights.

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[16] *See Linn*, 383 U.S. 53, 55 (1966).

[17] *See Farmer*, 430 U.S. 290, 302–03 (1977).

[18] Julius G. Getman & F. Ray Marshall, *The Continuing Assault on the Right to Strike*, 79 TEX. L. REV. 703, 725 (2001).

[19] These cases dealt with the enforcement of the promise to arbitrate and of the arbitrator's decision. *See* United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 585 (1960); United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 569 (1960).

The framers of the NLRA recognized the possibility of overlapping jurisdiction between the Board and arbitrators, and specifically declared that the Board's power to remedy unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."[20] Nevertheless, the Board, in its famous 1971 *Collyer Insulated Wire* decision, announced a policy of refusing to process charges where the underlying issue could be arbitrated.[21] The *Collyer* decision, which at first applied only where the employers' breach of contract was alleged to violate § 8(a)(5), was soon extended to cases in which it was claimed that the employers punished employees for engaging in protected union activity. For a variety of reasons this decision was a serious blow to employees and unions and at odds with the basic policies of the NLRA. As the Supreme Court later itself pointed out, arbitration is typically not a good process for dealing with difficult issues of fact, and arbitrators are unlikely to be expert in NLRA law nor do they have the support system that the Board does for fact finding or following precedent.[22] In addition, forcing unions to arbitrate means forcing them to spend money from their treasury. By contrast, the Board was established to make the enforcement of statutory labor rights a public expense. The sweep of this policy is very broad because almost any employer violation of the Act during the term of an agreement is likely to be subject to arbitration under the terms of the agreement.

The Board's pre-hearing deferral policy has been exacerbated by its post-hearing policy of refusing any but the most limited review of arbitral opinions. In *Olin Corp.* the Board announced in 1984 that if the issues were "factually parallel" and if the arbitrator was "presented generally with the facts relevant to resolving the unfair labor practice" it would accept the arbitrator's award unless it was "not susceptible to an interpretation consistent with the Act."[23]

The combination of the *Collyer* and *Olin* doctrines constitutes a general refusal by the Board to enforce statutory rights during the term of an agreement. It has ceded this role to decisionmakers who are not

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[20] 29 U.S.C. § 160(a).

[21] 192 N.L.R.B. 837, 841–42 (1971). *See generally* Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979); Cornelius J. Peck, *A Proposal to End NLRB Deferral to the Arbitration Process*, 60 WASH. L. REV. 355, 359 (1985).

[22] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 56–58 (1974) (discussing reasons arbitration is inappropriate for resolving issues regarding rights arising under Title VII).

[23] 268 N.L.R.B. 573, 576, 577 (1984).

expert in interpreting the law and a process that is not devised for dealing with difficult statutory issues. Thus, when it comes to protecting § 7 job rights, the Board is ineffectual prior to unionization and largely indifferent thereafter.

B. *The Declining Role of Collective Bargaining*

One of the least predictable aspects of the law's development has been the retreat from collective bargaining. The NLRA originally seemed to envision collective bargaining as the end product of mature labor relations, the process by which employee participation and industrial peace could be achieved, management rights protected, and rival claims articulated and resolved. Collective bargaining, where given a chance, has generally been successful in achieving these important goals. Where it has not been defeated by union failure or management intransigence, it has helped employees to achieve greater power, wealth, and dignity. The widespread use of seniority as a result of collective bargaining, and the almost automatic limitation on the employer's right to discharge, established the principle that employees, through their work, develop a legally enforceable claim to their jobs, and that most management decisions affecting significant employee interests must be based on legitimate, objective standards. Through bargained-for pensions and supplemental benefits, employees under collective bargaining are provided protection for their old age and a cushion against unemployment. It is noteworthy that, in all these areas, the benefits achieved through collective bargaining have been gradually made available to employees more generally.

Collective bargaining has given American unions a visible, significant presence on the shop floor, and it has brought many of them great resources, political power, and economic leverage. For many employers this system, although limiting control and possibly raising labor costs, has provided stability. It has reduced quit rates, encouraged the development of reasonable rules uniformly applied, helped to create a sense of common enterprise, and thereby often promoted productivity and efficiency. Through collective bargaining, labor and management have developed a private system of dispute resolution culminating in arbitration, the success of which has been widely acknowledged. This has given impetus to private and public efforts to develop similar systems in various areas of society. Despite this record of achievement, the judicial attitude towards collective bargaining has increasingly become one of suspicion, hostility, and indifference. By narrowly defining "wages," "hours," and "conditions

of employment," the courts have significantly increased the ability of employers to take action unilaterally. They have also held that employers are not required to bargain about decisions that are deemed to lie at the "core of entrepreneurial control," but only about the impact and effects of those core entrepreneurial decisions.[24]

The reason for the courts' retreat from collective bargaining is difficult to identify, but it seems to rest on a shift in contemporary judicial thinking about economic issues. The NLRA, when originally passed, had a Keynesian justification. Collective bargaining, it was believed, would increase the wealth of employees, thereby stimulating the economy and reducing the likelihood of depression and recession. Today, courts are more likely to see collective bargaining as an interference with the benevolent working of the market, and, thus, inconsistent with economic efficiency most likely to be achieved by unencumbered management decision making. This change in theory is well illustrated by the Supreme Court's 1981 decision in *First National Maintenance Corp. v. NLRB* removing the issue of plant closings from the bargaining table, and by subsequent decisions removing other areas involving capital investment from the bargaining requirement.[25]

C. *The Continued Weakening of the Right to Strike*

Since the NLRA's passage, the legal protection of the strike weapon has been significantly reduced. At the moment, the right to strike is so constrained by legal and practical barriers that strikes are rarely used and even more rarely used effectively. Strikers and unions employing the strike face panoply of official sanctions that, taken together, make the right to strike a costly and risky endeavor. In addition to their legal right to hire permanent replacements, employers can often bring lawsuits against unions that, one way or another, run afoul of the many legal proscriptions on the strike. The range of penalties that might be imposed on strikers and unions by employers, courts, and government has been broad, and the penalties imposed often costly. Major strikes have been responded to by martial law, criminal indictments, fines, and military action. Strikes and picketing have been enjoined. Strikers have been fired, and unions have been fined and held liable for damages. Union leaders have been arrested, jailed, and con-

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[24] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring); *see* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 676–80 (1981).

[25] *See* 452 U.S. at 686. *See generally* Julius G. Getman, *The Courts and Collective Bargaining*, 59 CHI.-KENT L. REV. 969 (1983) (discussing *First National*).

victed of crimes for encouraging violence, sometimes with very little evidence of personal misconduct. The combination of RICO,[26] a newly expanded view of the Hobbs Act,[27] and a greater willingness to find that union officials encouraged or participated in violence, all combine to increase the vulnerability of unions and union leaders to criminal and civil penalties for acts of strike misconduct.[28]

Without an effective right to strike, collective bargaining becomes ineffectual, and the desire of employees to join unions is inevitably reduced.

D. *Inhibiting Flexibility*

The hallmark of the new union tactics described by other scholars is flexibility and innovation. Flexibility involves dealing with employers in nontraditional ways and utilizing union strength to achieve recognition without waiting for Board certification and electoral process. It also means a new focus on economic pressure and less concentration on the traditional picket line. This new approach differs sharply from the traditional Board-oriented approaches to organizing and collective bargaining where representation campaigns and elections followed a customary path in which the behavior on both sides was predictable and the result was either formal certification or the union's disappearance from the workplace.

How much flexibility does the law permit in terms of union tactics and employer response or initiatives? In terms of protecting employees who use innovative tactics, the courts have traditionally read § 7 and the right to engage in concerted action very narrowly, creating limitations not suggested by either the language or underlying policies of the NLRA. With respect to bargaining, the law is also likely to be hostile to innovative processes. We know that the concept of exclusivity together with § 8(a)(2) forbids an employer from bargaining with a minority union on behalf of a unit in which the union does not represent a majority. In other respects, questions abound. Does a union that seeks minority representation violate the NLRA? Is its activity protected? May a union seek to bargain for its members alone? At least two major legal scholars, Clyde Summers and Charles Morris,

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[26] Racketeer Influenced and Corrupt Organizations Act, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968 (2000)).

[27] 18 U.S.C. §§ 1951–1960.

[28] *See generally* Getman & Marshall, *supra* note 18.

believe that minority unions may bargain for their own members.[29] According to Professor Summers:

> Although there is no duty on the employer to bargain with a minority union, if a minority union is able to obtain a contract, a "members only" contract is legal and enforceable in the absence of a majority union. In that case, a minority union is legally protected in engaging in concerted activity such as striking and picketing to pressure an employer to sign such a contract.[30]

Despite the support of such distinguished scholars, this position is, in my view, wrong.

My basic reasons for disagreeing are first, that any agreement which applies to union members only would violate § 8(a)(3).[31] This proposition was established in 1952 when the U.S. Court of Appeals for the Second Circuit held in *NLRB v. Gaynor News Co.* that granting benefits to union members that were denied to nonunion members violated § 8(a)(3) because it was "inherently conducive to increased union membership."[32] The Supreme Court affirmed in 1954, stating, "[i]n holding that a natural consequence of discrimination, based solely on union membership or lack thereof, is discouragement or encouragement of membership in such union, the court merely recognized a fact of common experience."[33] Second, any agreement that either overtly or tacitly applies more generally to the work force violates the concept of exclusivity and therefore violates § 8(a)(2).[34]

If minority bargaining is unlawful, we must still determine what constitutes bargaining and what conduct short of bargaining an employer and a minority union may engage in. New forms of bargaining

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[29] *See* Charles J. Morris, *A Blueprint for Reform of the National Labor Relations Act*, 8 ADMIN. L.J. AM. U. 517, 553–55 (1994); Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 COMP. LAB. L. & POL'Y J. 47, 57 (1998).

[30] Summers, *supra* note 29, at 57.

[31] "Thus both the Board and the courts automatically find a violation when an employer treats union members differently from non-union members." Julius G. Getman, *Section 8 (a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 736 n.6 (1965).

[32] 197 F.2d 719, 722, 755 (2d Cir. 1952), *aff'd sub nom.* Radio Officers' Union of the Commercial Tel. Union v. NLRB, 347 U.S. 17 (1954).

[33] *Radio Officers' Union*, 347 U.S. at 46.

[34] *See* Int'l Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 739 (1961) (holding that granting a minority union the right to bargain for the entire unit violated § 8(a)(2) without regard to employer motivation). "There could be no clearer abridgment of § 7 of the Act." *Id.* at 737.

supported by new tactics also raise questions about the reach of § 7 and what George Schatzki refers to as the "misnomer" of protected activity.[35] Can employers fire employees who use either traditional or unorthodox forms of pressure on behalf of bargaining demands by minority unions or groups of employees? Unfortunately, this is yet another area in which the labor movement cannot safely look to the NLRA or the courts for help. As already noted, the broad language of § 7 has been narrowed by the courts to the point that unorthodox pressure tactics are usually held unprotected and even strikes seeking unorthodox goals are rarely protected.[36] Thus, under the law, traditional organizing and strike tactics are perilous, and innovations even more risky.

Although it is impossible to trace the impact of any specific aspect of labor law, the overall anti-union trend of the law must certainly have some role in the overall difficulty unions face in organizing and in striking. As Professor James Pope has commented in an article dealing with many of these same cases: "[t]aken together they may account for a substantial proportion of the decline in the American labor movement."[37]

III. Suggestions

How should labor and its allies go about the complex task of seeking change in the basic labor law to make it more even handed and more protective of basic worker rights? In the current political climate, labor is so busy protecting its remaining rights that significant reform is difficult to pursue actively. But what if the political climate changed so that labor's friends are in the majority? How should labor's agenda for legal reform be shaped? It is a pleasant problem to contemplate, and I offer some tentative suggestions as to how a legislative agenda should be framed. Three emphasizing principles should guide the decision making.

Particular over General: As already argued, the general language of the NLRA has permitted the Board and the courts to insert their own often anti-union, property-right-friendly views into the law. The more general the language of change, the more likely that pro-union policies may be subverted. The most successful pro-labor legislation was

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[35] *See generally* George Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 Tex. L. Rev. 378, 378 (1969).

[36] *See generally id.*

[37] Pope, *supra* note 12.

Norris-LaGuardia, a carefully constructed statute that dealt with a specific problem.[38]

A Negative over a Positive. It is easier to bring about the desired change by eliminating limits on union activity than it is by increasing regulation of employer response and judicial action.

Collective Bargaining over Organizing. It is apparent that collective bargaining and organizing are complementary. They fuel each other's success, and each one's gain leads to success in the other. But which should be the first priority for legal change?

I believe that legislation strengthening collective bargaining is easier to achieve, and that once achieved, it is most likely to be effective and to spur union organizing. My experience in talking to hundreds of workers in organizing situations persuades me that they frequently end up rejecting a union because they become convinced that bargaining will be futile and dangerous.[39]

If unions are to choose specific targets, what should they be?

A. *Overturn the* Mackay *Doctrine*

In my view, the most needed and most useful change would be overturning the *Mackay* doctrine.[40] The *Mackay* doctrine not only weakens the strike weapon, which is crucial to effective collective bargaining, but also is a destroyer of lives and communities.[41] It also provides employers with a powerful argument against unionization. In almost every NLRB representation campaign, employers have made a variant of the following argument:

> *If you vote for the union, I will bargain but I will bargain hard; and under the law I am not required to accept any proposals that I think would be harmful to the enterprise. The only way the union can try*

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[38] Norris-Laguardia Act, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (2000)).

[39] The Workplace Fairness Act, the Labor Reform Act of 1977, and the Dunlop Commission report all contain recommendations that, if enacted, would make the law more protective of workers' rights and the interests of labor unions. *See* H.R. 5, 102d Cong. (1991); H.R. 8410, 95th Cong. (1977); COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: REPORT AND RECOMMENDATIONS (1994) [hereinafter DUNLOP COMMISSION]. It is difficult to imagine, however, their wholesale adoption any time in the immediate future. Even if the law was amended, it is difficult to imagine a successful strategy for restraining the anti-union biases of the courts and conservative Board.

[40] *See* NLRB v. Mackay Radio & Tele. Co., 304 U.S. 333, 345–46 (1938) (recognizing an employer's right to hire permanent replacements for striking employees).

[41] *See generally* JULIUS GETMAN, THE BETRAYAL OF LOCAL 14 (1998) (recounting a seventeen-month strike and how it permanently changed participants' lives).

> *to get me to change my mind is by pulling you out on strike. If that happens, I have the right to permanently replace anyone who strikes. That means when you are ready to come back you will no longer have a job.*

The availability of such tactics might explain why the Getman-Goldberg study found the perception of threats by employees was not significantly different in hard-fought legal campaigns than in hard-fought illegal campaigns.[42]

Repeal of the *Mackay* doctrine poses no great technical or drafting problems. It is an issue on which public support can be achieved, and one that has the capacity to invigorate rank and file activism.

B. *Eliminate § 8(b)(4) of the NLRA*

Another high-priority goal should be the repeal of § 8(b)(4), which would mean the legalization of union boycotts and expansion of the concept of mutual aid.[43] Section 8(b)(4) places massive and unique limitations upon the ability of unions to use economic pressure to support each other's strikes. No one doubts that its repeal would be a great victory for unions and that legislative achievement of this goal has been long sought and almost impossible to achieve.

The practical elimination of § 8(b)(4) may, however, be achievable through the courts, although it would require rethinking the relationship between labor law and the First Amendment. For a long time union lawyers have been engaged in a frustrating effort to limit the content of employer speech in representation elections to prevent the use of threats and promises. The effort has been largely fruitless and is likely to remain so. No matter where the line between threats and prediction is drawn, an expression of carefully crafted employer propaganda will be able to convey the dangers of unionism and the promise of benefits essentially as effectively as prohibited speech. And even if employer speech is found to be illegal, the remedies are likely to be worthless.[44]

Even in the context of representative elections, speech regulation hurts unions more than employers. Setting aside an employer victory is almost always meaningless, because the employer will remain in

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[42] *See* JULIUS G. GETMAN ET AL., UNION REPRESENTATIVE ELECTIONS: LAW AND REALITY 118 (1976).

[43] *See* 29 U.S.C. § 158(b)(4).

[44] Even in those very, very rare cases in which the Board orders and the courts accept, the chances for crafting a bargaining relationship are remote.

control of wages and working conditions. But setting aside a union victory based on appeals to face promises, or threats, or racial attacks, reverses the express will of the employees.

More significantly, restrictions on employer speech invite reciprocal regulation of union speech. Reciprocity underlies the courts' willingness to uphold restrictions on union picketing in situations where picketing would otherwise be constitutionally protected. Under any analysis consistent with First Amendment holdings in other areas, the provisions of § 8(b)(4) and § 8(b)(7) should both be held unconstitutional. But the U.S. Supreme Court continues to apply them and to assume their validity.

The most vivid illustration of the Court's singling labor out as an area of limited First Amendment applicability is contained in its 1982 opinion in *NAACP v. Claiborne Hardware Co.*[45] In that case, the Court held that secondary picketing by the NAACP, that would have been illegal secondary activity if undertaken by a labor union, was constitutionally protected.[46] The Court in *Claiborne* attempted to distinguish labor picketing and speech from NAACP picketing and speech on two grounds: first, that boycott activities by unions are economic rather than political; and second, that labor speech is part of a special system of balanced congressional regulation. The Court stated:

> This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. . . . Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."[47]

The rationale is so weak and inconsistent with general First Amendment jurisprudence that perhaps the Court can be persuaded

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[45] *See* 458 U.S. 886 (1982).

[46] *Id.* at 912–13. For this conclusion the Court relied on its opinion in *Thornhill v. Alabama*, 310 U.S. 88 (1940), the case that first held labor picketing to be constitutionally protected. *See Claiborne*, 458 U.S. at 909, 911–12. The *Thornhill* case has since been distinguished to the point of irrelevance in the labor context. The Court's reviving of it might be a signal that the Court is willing to rethink the issue of labor picketing and the First Amendment.

[47] *Claiborne*, 458 U.S. at 912 (citations omitted) (quoting NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 617–18 (1980) (Blackmun, J., concurring in part)).

to re-examine its previous perfunctory analysis of labor picketing. Such reconsiderations may in fact be underway. In 1988, in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* the Court abandoned the conclusion that labor union appeals to customers are necessarily a form of commercial speech.[48] It concluded instead that union handbills that "pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace," were a form of constitutionally protected political speech.[49] What remains then of the *Claiborne* defense of greater regulation of union speech is the argument that the NLRA is an area of balanced speech regulation. The delicate balance described by the Court is the balance between union free-speech rights and the rights "of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."[50] This balancing approach is inconsistent with all other First Amendment analyses of boycotts which hold boycotts legal and do not attempt to balance speech rights against the claims of neutral employers or customers. In other boycott situations it is assumed that free speech trumps the interests of neutral employers and customers.

Thus, it appears that the delicate balance the Court finds in labor law is actually the balance of restrictions on both employers and unions. This balance needs to be reconsidered. Unions can facilitate the process of reconsideration in several ways. First, the labor movement can choose appropriate cases in which to raise First Amendment picketing claims—cases in which picketing is peaceful with no intimation of physical intimidation and in which the picket signs cast labor's claim in broad societal terms. Second, unions should indicate a general willingness, as part of the effort to restore First Amendment rights in labor, to permit any employer speech that does not contain an explicit threat. The risk is small and the potential gain great.

The effort to expand labor's right to picket and make common cause with each other should be a part of the new, and in my view, promising effort to make the public understand that labor rights are a critical part of human rights. The picket line is one place where workers get to state their case and inform other workers of their grievances. It provides a small counterweight to the distorted view of labor regularly portrayed in the media. To eliminate § 8(b)(4) and § 8(b)(7) in

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[48] *See* 485 U.S. 568, 576 (1988).

[49] *Id.*

[50] *Claiborne,* 458 U.S. at 912 (quoting *Retail Store Employees,* 447 U.S. at 617–18 (Blackmun, J., concurring in part)) (quotations omitted).

the name of free speech would certainly justify increasing employee speech rights.

C. *Modify NLRA § 8(a)(2)'s Prohibition of Company Unions*

Another possible compromise with employer concerns that should be considered is modification of prohibition of company unions. Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute . . . support to it."[51] This broad language is given great breadth by the NLRA's definition of labor organization as "any organization of any kind, or any agency or employee represented committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[52]

In 1959, early in the NLRA's history, the Supreme Court announced that this language was to be interpreted as broadly as its wording suggests. In *NLRB v. Cabot Carbon Co.*, the employer set up a system of employee committees that met regularly with management "to consider and discuss problems of mutual interest."[53] The Board held the committees to be dominated labor organizations because they were formed for the purpose, in whole or in part, of dealing with employers.[54] The Supreme Court affirmed, stressing that the term "dealing with" should not be read as "synonymous with the more limited term 'bargaining with.'"[55] Thus, schemes or plans that are not called unions, which do not involve collective bargaining, strikes, or the settlement of grievance, may still constitute labor organizations. They were dominated because they were the employer's creation and could be dissolved by the employer. This opinion, together with the broad language of the statute, served to put in doubt the legitimacy of any employer-initiated scheme of worker involvement and convinced many employers that the expense of setting up a new program was not worth the risk.

In the late '70s and early '80s, commentators became increasingly aware of the costs of applying § 8(a)(2) literally, which seemed to pre-

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[51] 29 U.S.C. § 158(a)(2) (2000).
[52] *Id.* at § 152(5).
[53] 360 U.S. 203, 204 (1959).
[54] *See id.* at 207.
[55] *Id.* at 211.

vent experimentation with employee participation programs. Several commentators argued that § 8(a)(2) was outdated and that it kept U.S. companies from competing with companies in Europe and Japan that used more innovative systems of labor relations.[56] Judge John Minor Wisdom decried what he saw as its adversarial assumptions: "an inflexible attitude of hostility toward employee committees defeats the Act. It erects an iron curtain . . . penetrable only by . . . a certified union . . . preventing the development of a decent, honest, constructive relationship between management and labor."[57] The U.S. Court of Appeals for the Sixth Circuit in *NLRB v. Streamway Division of Scott & Fetzer Co.* declared in 1982 that "the adversarial model of labor relations is an anachronism."[58]

In 1994, the Dunlop Commission[59] recommended that "nonunion employee participation programs should not be unlawful simply because they involve discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these programs."[60] The Commission also recommended that "[t]he law should continue to prohibit companies from setting up . . . dominated labor organizations."[61] The recommendation was mild and probably consistent with current law, but it drew a dissent from Douglas Fraser, the labor member of the commission who insisted that "[s]ection 8(a)(2) stands as a bulwark against forms of representation which are inherently illegitimate because they deny workers the right to a voice through the independent representatives of their own choosing and put the employer on 'both sides of the table.'"[62]

Fraser's dissent was endorsed by labor spokespeople and by several pro-labor academics. It reflects the fear that loosening up the strictures of the NLRA would confuse workers and lead them to ac-

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[56] This development is traced in Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. Rev. 499 (1986).

[57] NLRB v. Walton Mfg. Co., 289 F.2d 177, 182 (5th Cir. 1961) (Wisdom, J., dissenting in part).

[58] 691 F.2d 288, 293 (6th Cir. 1982).

[59] The Commission on the Future of Worker-Management Relations was announced by Secretary of Labor Robert B. Reich and Secretary of Commerce Ronald H. Brown on March 24, 1993 to study and report on ways to improve labor management cooperation. It was chaired by John T. Dunlop, former Secretary of Labor (1975–1976), hence the short name "the Dunlop Commission." *See* Dunlop Commission, *supra* note 39, at x.

[60] *Id.* at 8.

[61] *Id.*

[62] The dissenting opinion of Douglas A. Fraser, dated January 3, 1995, is included as an insert in Dunlop Commission, *supra* note 39 (attributing quote to Senator Wagner in 1935) (quoting Legislative History of the National Labor Relations Act 1416–17).

cept a meaningless voice in the operation of the enterprises for which they work rather than insisting on true collective bargaining.

The § 8(a)(2) traditionalists have legitimate concerns about the potential abuse that might result from well-orchestrated but ultimately meaningless worker involvement programs. Nevertheless, I, along with a growing number of pro-union commentators, believe that they are fundamentally in error.[63] Intermediate forms of organization should be thought of as opportunities for organization rather than as inhibitors of unionization. The steel unions and the National Education Association both evolved in part from company unions. German unions were able to use the works councils that they once feared (for the same reasons that American unions fear worker involvement schemes) as a way of increasing their power.

When amendments to § 8(a)(2) are proposed, I believe that the wiser approach for organized labor would be not to oppose them outright but to try to structure them so that they can be used to foster union organizing. For example, § 8(a)(2) might be amended to specify programs in which employees selecting their own representatives through secret ballot will be presumed legal. Americans trust elections, and elections would provide unions an opportunity to have their leaders or members installed as the worker representatives in such programs.

Even if new employee organizations do not lead to unionization, they could make life better for employees. The contours of § 8(a)(2) are changing, in any case, to permit more experimentation by employers. It would be, in my opinion, unwise for organized labor to assume that changes in § 8(a)(2) were forestalled by the Board's 1992 decision in *Electromation, Inc.*[64] In that case, the employer, in the wake of an organizing drive, established a series of employer committees designed to discuss and address issues ranging from absenteeism and attendance bonuses to compensation and no-smoking policies.[65] The Board unanimously held that the committees were dominated labor organizations.[66] However, several of the Board members issued separate opinions explaining why they would be reluctant to apply § 8(a)(2) to bona fide employer efforts to share power. Board member Oviatt insisted that this decision did not apply to "management's

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[63] *See, e.g.*, PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 186–224 (1990).

[64] 309 N.L.R.B. 990 (1992).

[65] *Id.* at 991.

[66] *See id.* at 990.

attempt to draw on the creativity of its employees by including them in decisions that affect their work lives."[67] Board member Raudabaugh insisted that he would apply § 8(a)(2) more leniently in the future to permit employee participation programs that were not used to stifle unionization.[68]

The Board's most recent opinion in *Crown Cork & Seal Co.*[69] shows a retreat from *Electromation* and a further move away from *Cabot Carbon*.[70] The employer in that 2001 case established a series of work teams with considerable voice in working conditions.[71] The Board held that because the managerial functions had been "flatly delegated" to the teams, they were not labor organizations.[72]

Thus, like it or not, § 8(a)(2) is changing, and the only questions are how much and how quickly. In my view, it behooves the labor movement to try and shape the changes and to not limit itself to decrying and resisting them.

Conclusion

In sum, our basic labor law is currently not a friend to unions. Efforts to improve it are likely to meet with significant resistance. Nevertheless, they are worth the effort.

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[67] *Id.* at 1004 (Oviatt, concurring).

[68] *See id.* at 1013–14 (Raudabaugh, concurring).

[69] 334 N.L.R.B. 699 (2001).

[70] For an interesting discussion of the case's meaning, see generally H. Victoria Hedian, *The Implications of* Crown Cork & Seal Co. *for Employee Involvement Committees as "Labor Organizations" Under the Wagner Act: What Constitutes "Dealing With" Pursuant to Section 2(5) of the Act since* Electromation, Inc.*?*, 18 Lab. Law. 235 (2002); Gerald L. Pauling II & M. Andrew McGuire, *The Implications of* Crown Cork & Seal Co. *for Employee Involvement Committees as Labor Organizations Under the NLRA: What Constitutes "Dealing With" Pursuant to Section 2(5) of the Act Since* Electromation, Inc.*?*, 18 Lab. Law. 215 (2002).

[71] *See Crown Cork*, 334 N.L.R.B. at 699.

[72] *See id.* at 701.