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THE FUTURE OF LABOR LAW: A MISMATCH BETWEEN STATUTORY INTERPRETATION AND INDUSTRIAL REALITY?†

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The National Labor Relations Act (NLRA or Act),¹ governing private sector labor relations in the United States, was designed to foster collective bargaining or to give employees the free choice of whether to be represented by a labor organization.² According to the statute, Congress saw collective bargaining as a means to redress the economic disadvantage faced by an individual employee attempting to negotiate employment terms directly with his or her employer.³ Although Congress enacted the original statute more

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¹ 29 U.S.C. §§ 151-69 (1982 & Supp. IV 1986).

² That this was the intent of the NLRA is indicated by the findings and policy section of the Act, cited and excerpted *infra* note 3. Section 7 of the NLRA, which represents the heart of the Act and the source of employees' protections and rights, also reflects this intent. Section 7 provides in part that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities

29 U.S.C. § 157 (1982).

³ Based on a literal reading of the statute, Congress believed that the bargaining power inequality and the failure of employers to recognize employees' representatives contributed to harmful industrial strife. Title I, section 1 of the NLRA states that: "The inequality of bargaining power between employees and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners . . ." 29 U.S.C. § 151. Moreover, because Congress believed that collective bargaining might contain that strife, it was

declared to be the policy of the United States to eliminate the causes of certain obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full

than fifty years ago,⁴ its words have undergone little change in the past forty years.⁵ Over this span of time, the social, political, and economic forces that partly shape the context in which labor law operates, and, indeed, give meaning to or alter the meaning of the law,⁶ have undergone substantial modification. This paper identifies several critical areas of the NLRA that will need to undergo change if the Act is to retain its vitality in contemporary times. Indeed, an array of societal forces challenges the ability of the NLRA to foster collective bargaining over employees' employment concerns. Such forces include: blurring distinctions among blue and white collar workers, professionals and nonprofessionals, supervisors/managers

freedom of association, self-organization, and designation of representatives of their own choosing. . . .

Id.

There is much debate about the actual underlying purposes of the NLRA. For a discussion of possible aims of the Act, see, e.g., Barron, *A Theory of Protected Employee Rights: A Revisionist Analysis of the Supreme Court's Interpretations of the National Labor Relations Act*, 59 TEX. L. REV. 421 (1981); Gross, *Conflicting Statutory Purposes: 50 Years of the National Labor Relations Board as Seen by Former Chairmen*, 39 INDUS. & LAB. REL. REV. 7 (1985); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

⁴ The basis for the regulation of collective bargaining in the private sector, known as the National Labor Relations Act (NLRA) or the Wagner Act, was enacted in 1935.

⁵ Congress enacted the Taft-Hartley Act, also known as the Labor Management Relations Act (LMRA) in 1947, and incorporated almost all the words of the Wagner Act. Together, these Acts constitute the legal framework governing unionization in the private sector. The only statutory modifications of this framework were enacted in 1959 (Labor-Management Reporting Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519) and 1974 (Public Law 93-360, 88 Stat. 395). These amendments, however, may be viewed as peripheral to the central thrust of labor law. The LMRDA deals primarily with the internal affairs of union, and Public Law 93-360 relates to the coverage of hospitals and health care institutions by the NLRA. As such, these amendments do not significantly modify collective bargaining.

⁶ The role that the law plays in molding reality has long been the subject of debate among observers of labor law. Compare, e.g., Dunlop, *Public Regulation of Collective Bargaining*, A.B.A. SEC. LAB. REL. L. 47 (1953) with Klare, *supra* note 3.

The relationship between law and the social consensus or norms has long been the subject of research by scholars outside of the field of law. For examples of such work, see THE SOCIOLOGY OF LAW: A STRUCTURAL PERSPECTIVE (W. Evans ed. 1980); 1 F. HAYEK, LAW, LEGISLATION AND LIBERTY 105 (1973). There have always been a few scholars who have asserted that these forces determine the law, or that the law, at best, is a simple translation of a social consensus (which it has no or little hand in shaping). Recently, this view, akin to an environmentally deterministic perspective on law, received some support in R. FLANAGAN, LABOR RELATIONS AND THE LITIGATION EXPLOSION (1987). Flanagan has argued that cyclical shifts in the partisanship of the NLRB and changes in Board rules have little impact on litigation. Instead, economic factors, such as the union/nonunion wage differential, help shape how parties behave with respect to the law. But for a different view on the importance of legislation, conducted in the public sector, see Saltzman, *Bargaining Laws as a Cause and Consequence of the Growth of Teacher Unionism* 38 INDUS. & LAB. REL. REV. 335 (1985).

and nonmanagerial employees; expanding interests among a better educated workforce; continuing challenge to the international competitiveness of United States firms; the growing use of employee participation plans; increasing sophistication of employers' anti-union tactics; and emerging telecommunications networks and capabilities.⁷

Specifically, this paper, which consists of six sections, will concentrate on the possible impact of those interrelated societal forces on five important areas of the NLRA. Section I examines coverage by and exclusion from the NLRA — that is, who is eligible to receive the Act's protections. This first section shows that the legally-fostered right to engage in collective bargaining appears to be enjoyed by fewer and fewer individuals, given the somewhat narrow application of employee status⁸ by the National Labor Relations Board (NLRB or Board) and the courts. The diminution of the size of the population qualifying as employees, likely to continue into the future, is attributed to blurring occupational identities and the growing number of independent contractors.⁹ The section concludes that the promise of NLRA protections may become an empty one for the contemporary and future workforce unless changes are made in the way employee status is determined.

In section II, the focus of the paper shifts to the legality of nonunion forms of collective representation, known as employee participation plans.¹⁰ These plans, used increasingly by United

⁷ Although there will always be disagreement over whether labor law is a passive reflection of industrial reality or a critical force that actually shapes that reality, most legal scholars would probably agree that labor law helps shape the reality it reflects. Specifically, most scholars believe that NLRB approaches to deciding cases affect the collective bargaining process and outcomes; indeed, the vast majority of legal research is devoted implicitly or explicitly to descriptive, speculative, or prescriptive analyses of this impact. At the same time, however, scholars generally recognize that NLRB rules partly reflect some underlying social consensus in the industrial community or in the larger society. This consensus is likely shaped by a myriad of social, political, and economic forces. This paper focuses on these dynamic forces' likely impact on the meaningfulness of labor law, which is less frequently the direct subject of legal research and commentary.

⁸ Eligibility for coverage by the NLRA is determined by whether an individual qualifies as an "employee" under the Act. Employee status is defined and discussed *infra* at note 13 and accompanying text.

⁹ "Independent contractors," or individuals who are deemed to work for themselves, are explicitly denied employee status by the statute. See 29 U.S.C. § 152(3), quoted *infra* note 13. Although the NLRA does not define what it means to be an independent contractor, labor tribunals have used various tests to identify independent contractors. These tests are discussed *infra* at notes 46–54 and accompanying text.

¹⁰ "Employee participation plan" may refer to a wide variety of workplace initiatives,

States employers, may be designed to avoid or to circumvent the union, on the one hand, or to enhance morale and productivity, on the other. This section suggests that the continued use and recent, favorable treatment of participation plans by some courts may threaten the ability of the NLRA to foster bargaining (as union alternatives receive further legitimacy).

Sections III and IV consider the scope of collective bargaining and remedies under the NLRA. Section III argues that the contraction in the array of issues over which management and labor are compelled by law to negotiate strikes at the heart of organized labor's bargaining entitlements.¹¹ Thus, in a subtle way, the role that unions and bargaining can play in our society can and has become increasingly limited. In section IV, the long-heralded arguments about the inadequacy of remedies for employer abuses of the Act are reconsidered. In light of recent decisions dissipating the expected costs for breaking the law, coupled with the growth in the number and sophistication of employer unfair labor practices, section IV concludes that expectation of compliance with the NLRA may become increasingly unrealistic.

Finally, in section V, the meaningfulness of rules restricting the conditions under which employees may seek to gather support for a union or may distribute union organizing literature (so-called "no-solicitation" and "no-distribution" rules) is examined.¹² This section argues that the development and growing use of microprocessing technology may challenge the usefulness of such rules. This paper then concludes with a discussion of the significance of these challenges to the vitality of labor law and the argument that the law undergirding unionization will need to be reinvigorated if society wishes to continue to foster collective bargaining.

including quality of worklife experiments, gain-sharing or productivity-sharing relationships (such as Scanlon or Rucker Plans), junior boards of directors, or suggestion boxes. The essence of these plans is that they involve some forum, typically outside a union model, through which employees can achieve some say in their work or worklives.

¹¹ The NLRA requires that both unions and employers, at each other's request, negotiate about subjects falling within the statutory phrase "wages, hours and other terms and conditions of employment." See 29 U.S.C. §§ 158(a)(5), (b)(3), (d). The scope of bargaining is discussed at length *infra* at notes 83-94 and accompanying text.

¹² No specific statutory provision deals explicitly with the legality of no-solicitation and no-distribution rules. Instead, the validity of such rules is derived from interpretation of the prohibition of employer attempts "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by section 7," established as an unfair labor practice by § 8(a)(1) of the Act. See 29 U.S.C. § 158(a)(1).

I. EXCLUSIONS: BLURRING OCCUPATIONAL IDENTITIES AND THE GROWING NUMBER OF INDEPENDENT CONTRACTORS

The meaningfulness of the NLRA is contingent on whether or not any sizeable group of workers is eligible for its coverage: That is, there must be a substantial number of individuals who meet the NLRA's definition of "employee."¹³ Simply stated, without coverage the Act is a nullity. The effectiveness of the Act is also based significantly on an ability to distinguish employees from nonemployees. Yet, it appears that at least two forces may challenge the Act's reach and the ability to distinguish employees from certain nonemployees (such as supervisors,¹⁴ managers,¹⁵ and independent contractors¹⁶) and also to draw lines between classes of employees who are given different rights under the NLRA, such as profes-

¹³ See 29 U.S.C. § 152(3) (1982). "Employees" are defined in § 2(3) as including any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act

29 U.S.C. § 152(3) (1982) (emphasis added).

As this definition suggests, employee status is determined by exclusion. That is, if an individual is not disqualified by membership in any excepted category, he or she is deemed to be an employee.

¹⁴ Supervisors are denied coverage by the NLRA, as they are expressly excepted from the definition of employee in § 2(3). Section 2(11) of the Act defines a "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (1982).

¹⁵ Managers are excluded from coverage by the NLRA by interpretation rather than explicit statutory language. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974). Although managerial status is not defined by the Act, labor tribunals use tests to distinguish managers from nonmanagers. These tests are discussed in *Bell*, and *infra* in the text accompanying notes 22-25.

¹⁶ Like supervisors, independent contractors are expressly excepted from the employee category defined in § 2(3). Though independent contractor status is not defined by the Act, labor tribunals use tests to identify these self-employed individuals. These tests are discussed *infra* at notes 45-52 and accompanying text.

sionals and nonprofessionals.¹⁷ These forces include blurring occupational classifications and identities, and the growing number of independent contractors.

A. *Blurring Occupational Classifications*

For the purposes of applying the NLRA, the classification of individuals as employees, professional employees, managers, or supervisors is significant. But are distinctions among these classifications clearly drawn by application of the NLRA and, moreover, can we apply them to the contemporary workforce? The language of the NLRA, and the cases interpreting it, would seem to imply that supervisors, professionals, managers, and nonmanagers can be clearly distinguished from one another. According to the statute, for example, supervisors are individuals who have the authority, in the interest of the employer, to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees . . .,"¹⁸ and rather than exercising this authority in a "routine" manner, they use "independent judgment." Because supervisors possess the authority to perform one or more of these job functions, they are assumed to have an allegiance to the employer — a loyalty or identification that might be jeopardized if they became unionized.¹⁹ Therefore, supervisors are excluded from coverage by the NLRA.

¹⁷ As discussed in the text, professionals are given the statutory right to be excluded from bargaining units of nonprofessionals. 29 U.S.C. § 159(b)(1) (1982). Section 2(12) of the Act defines a "professional" to be

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

29 U.S.C. § 152(12) (1982).

¹⁸ *Id.* § 152(11).

¹⁹ In addition, some scholars argue that supervisory unionism would give labor organizations too much power over employers, impair efficiency, and deprive management of control over its business. For scholarly comment on the wisdom of such arguments, see, e.g.,

Using remarkably similar language to define professional employees, the NLRA provides coverage to professionals; according to the Act, the work of professionals is "predominantly intellectual and varied in character as opposed to routine" and involves the exercise of "discretion and judgment."²⁰ Yet, although the Act treats professionals and supervisors differently, it also recognizes a difference between professionals and other employees eligible for coverage by the NLRA. Section 9(b)(1), for example, gives professional employees the statutory right to be excluded from bargaining units of nonprofessional employees.²¹ This special right is predicated on the view that professionals have interests that differ from those of nonprofessionals.

Adding to the complexities of drawing distinctions among individuals eligible and ineligible for the Act's coverage in the face of unclear or overlapping statutory language is the treatment of managerial employees. Although managerial employees are not explicitly denied bargaining rights by the NLRA, the United States Supreme Court has held that the Act was not designed to protect those employees.²² To determine whether or not an employee is a manager, labor tribunals consider whether or not the individual is closely related to or aligned with management or is in a position to "formulate, determine, and effectuate management policies."²³ In the view of labor tribunals, the unionization of individuals meeting these tests of managerial status would jeopardize employers' interests because management's loyalties would be divided.²⁴ The prob-

Lederer, *Management's Right to Loyalty of Supervisors*, 32 LAB. L.J. 83, 89, 103 (1981); Petro, *True Supervisory Status*, 1 LAB. L.J. 754 (1950); Raimon, *Management, Union and Public Policy on the Railroads and Airlines*, 11 INDUS. & LAB. REL. REV. 551, 552 (1958); Rains, *Collective Bargaining in the Public Sector and the Need for the Exclusion of Supervisory Personnel*, 23 LAB. L.J. 275 (1972); Note, *Collective Bargaining by Supervisory Employees Under the Wagner Act*, 13 U. CHI. L. REV. 332, 334 (1946). For a review of the arguments about the supervisory exclusions from the NLRA, see Delaney, Lewin, & Sockell, *The NLRA at Fifty: A Research Appraisal and Agenda*, 39 INDUS. & LAB. REL. REV. 46, 49 (1985).

²⁰ 29 U.S.C. § 152(12).

²¹ Section 9(b)(1) states that the Board shall not "decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit . . ." 29 U.S.C. § 159(b)(1).

²² *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

²³ *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946); see also Begin & Lee, *NLRA Exclusion Criteria and Professional Work*, 26 INDUS. REL. 83, 84 (1987); Laureau, *The Issue of Collective Bargaining for School Supervisors and Administrators*, 31 LAB. L.J. 153 (1980).

²⁴ See cases and articles cited *supra* notes 22-23. In addition, insightful discussions of the tests used to distinguish managers from nonmanagers may be found in Barney, *Bell Aerospace and the Status of Managerial Employees Under the NLRA*, 1 INDUS. REL. L.J. 346 (1976); Kohler,

lem with these tests is that, in application, many professional employees who may engage in some, albeit small, degree of self-governance (associated with attempts to maintain occupational performance) would be classified as managers. In so doing, professional employees would be excluded from the Act's protections, rendering section 2(12), which affords them coverage, meaningless.²⁵

Indeed, this concern has motivated, in large part, the widespread criticism of the Supreme Court's opinion in *NLRB v. Yeshiva University*.²⁶ Specifically, many commentators have expressed the concern that the Supreme Court's approach to classifying faculty members at Yeshiva as managers will likely be used to exclude from the Act's protections not only academics at other institutions, but also many nonacademic professionals, including nurses, engineers, and architects.²⁷

Given the potential overlap in how the NLRA and case law define supervisors, professionals, and managers, it is not clear whether distinctions among these categories of workers were ever easy to apply. Part of the difficulty in applying these distinctions may rest in the fact that they are grounded in untested assumptions about differences among these groups of workers²⁸ and similarities

Models of Worker Participation: The Uncertain Significance of Section 8(a)(2), 27 B.C.L. REV. 499, 541-42 (1986); Wahn, *Collective Bargaining Rights of Managerial Employees in the United States and Canada*, 27 LAB. L.J. 343 (1976); see also *infra* note 26 and the articles cited therein.

²⁵ See Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383, 387 (1983); Delaney, Lewin, & Sockell, *supra* note 19, at 49. The text of § 2(12), defining professional employees, is quoted *supra* note 17.

²⁶ 444 U.S. 672 (1980). In that case, Yeshiva University opposed the union's petition for a certification election to be held among all full-time faculty members at 10 of its 13 schools, on the grounds that faculty members were managers. After reviewing congressional history and intent and the faculty's role in the governance of the schools, the Supreme Court concluded that the actual functions served by faculty members at Yeshiva's school qualified them as managers. The Court noted that, "[t]o the extent the industrial analogy applies, the faculty determines within each school, the product to be produced, the terms upon which it will be offered, and the customers who will be served." *Id.* at 686. In reaching the conclusion that these faculty members should be excluded from the NLRA's protections, the Court was concerned about preserving the undivided loyalty of faculty members to the schools — a loyalty that might be jeopardized by unionization. See *id.* at 682, 688-90.

Yeshiva has been the subject of extensive legal commentary. See, e.g., Ashlock, *The Bargaining Status of College and University Professors Under the National Labor Relations Laws*, 35 LAB. L.J. 103 (1984); Douglas, *Distinguishing Yeshiva: A Troubling Task for the NLRB*, 34 LAB. L.J. 104 (1983); Suntrup, *NLRB v. Yeshiva University and Unionization in Higher Education*, 4 INDUS. REL. L.J. 297 (1981); Note, *Collective Authority and Technical Expertise: Reexamining the Managerial Employee Exclusion*, 56 N.Y.U. L. REV. 694 (1981).

²⁷ See, e.g., Klare, *The Bitter and the Sweet: Reflections on the Supreme Court's Yeshiva Decision*, 71 SOCIALIST REV. 99, 101 (1983). Interestingly, the Supreme Court did note that it was "not suggesting an application of managerial status that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them." *Yeshiva*, 444 U.S. at 690.

²⁸ A similar conclusion is reached by Delaney, Lewin, & Sockell, *supra* note 19, at 50.

among workers within a group (e.g., professionals are more like each other than they are like managers or supervisors). Yet, precious little research has illustrated any differences among identifications, allegiances, and interests of these different groups of workers.²⁹ The reality may well be that within any group there has always been a substantial diversity of interests and allegiances that has cut across definitions of employee groups, as drawn by the Act.³⁰ What is clear is that, however difficult it has been in the past to distinguish among workers, it would seem to be increasingly more difficult today. The following employment trends and innovations may prove to be an insurmountable challenge to the meaningfulness of the Act's current definitions of employee groups.

First, the working population has become increasingly professionalized, and a much higher proportion of it maintains managerial jobs today than years ago. As Table 1 reveals, the Census Bureau estimated that 55 percent of the employed labor force occupied managerial, professional, and technical jobs in 1985, compared to just 33 percent in 1940 (shortly after the NLRA was enacted).³¹ Moreover, in just the fifteen-year period between 1970 and 1985, the managerial and professional workforce has grown by over 70 percent and has increased from 48 to 55 percent of the employed labor force. As the more disaggregated data on managers illustrate, the vast proportion of this growth has come from the more than

²⁹ The limited extant research in this area has generated ambiguous conclusions about the similarities/dissimilarities among different classes of workers. See Buchholz, *The Work Ethic Reconsidered*, 31 INDUS. & LAB. REL. REV. 450, 459 (1978); Locke & Whiting, *Sources of Satisfaction and Dissatisfaction among Solid Waste Management Employees*, 59 J. APPLIED PSYCHOLOGY 145, 153-55 (1974). Instead, research on interests and attitudes tends to reveal that organizational attachment and commitment, for example, are related to factors such as age and tenure. See, e.g., Buchanan, *Building in Work Organizations*, 19 ADMIN. SCI. Q. 533, 544-45 (1974); Fukami & Larson, *Commitment to Company and Union: Parallel Models*, 69 J. APPLIED PSYCHOLOGY 367, 370-71 (1984); Hall & Scheider, *Correlates of Organizational Identification as a Function of Career Pattern and Organizational Type*, 15 ADMIN. SCI. Q. 340, 347-49 (1970); Welsch & LeVan, *Inter-Relationships Between Organizational Commitment and Job Characteristics, Job Satisfaction, Professional Behavior and Organizational Climate*, 34 HUM. REL. 1079, 1086-87 (1981).

³⁰ Even the National Labor Relations Board has from time to time recognized a distinction among high level and low level supervisors. For example, the supervisors' level has been deemed important in the context of determining whether their involvement in unions constitutes unlawful domination of a union in violation of § 8(a)(2) of the NLRA. *A.L. Mechling Barge Lines, Inc.*, 197 N.L.R.B. 592 (1972); *Nassau & Suffolk Contractors Ass'n*, 118 N.L.R.B. 174 (1957); see also Kesselring & Brinker, *Employer Domination Under Section 8(a)(2)*, 30 LAB. L.J. 340 (1979) (discussing these two cases). This would seem to suggest that the Board also recognizes that supervisors may not be a homogeneous group.

³¹ In the data reported by the census before 1970, professionals and technical employees were treated as single category. This treatment prohibits us from uncovering the growth of managers and professionals alone over the 45 year time period considered.

100 percent growth in the number of managers employed from 1970 to 1985. By comparison, the size of the operatives and laborers group, in combination with the craftsmen category, grew only 11 percent from 1970 to 1985. Further, as a percentage of the labor force, this group declined from nearly 40 percent in 1950 to 28 percent in 1985. These trends suggest that employment has shifted towards those individuals whose eligibility for the Act's coverage is dubious or, at best, unclear — managers and professionals — and has shifted away from those blue collar workers traditionally associated with collective bargaining — operatives and craftsmen.

Second, some have argued that white collar and professional workers are increasingly finding employment in large, bureaucratic

TABLE I
OCCUPATIONAL CLASSIFICATION OF THE EMPLOYED WORKFORCE,
1940–1985^A

Classification	(in 000's)					
	1985 ^B (%)	1980 (%)	1970 (%)	1960 ^C (%)	1950 ^C (%)	1940 ^C (%)
Managers	12,221 (11)	10,134 (10)	5,882 (3)			
Managers and Professionals	25,851 (24)	22,152 (23)	14,530 (19)	—	—	—
Technical, Sales, and Administrative Support	33,231 (31)	29,594 (30)	22,347 (29)	—	—	—
Subtotal (Managerial, Prof., Technical)	59,082 (55)	51,746 (53)	36,877 (48)	26,375 (41)	20,749 (37)	14,657 (33)
Service Occupations	14,441 (13.5)	12,629 (13)	9,708 (13)	7,472 (12)	5,694 (10)	5,275 (12)
Precision, Production, Craft, and Repair	13,340 (12)	12,594 (13)	10,800 (14)	8,945 (14)	7,773 (14)	5,152 (11)
Operators, Fabricators, and Laborers	16,816 (16)	17,859 (18)	16,263 (21)	14,670 (23)	14,324 (25)	10,955 (24)
Subtotal	30,156 (28)	30,453 (31)	27,063 (35)	23,615 (37)	22,097 (39)	16,107 (35)
Farming, Forestry and Fishing	3,470 (3)	2,811 (3)	2,906 (4)	3,994 (6)	6,945 (12)	8,430 (19)
TOTAL^D	107,150 (100)	97,639 (100)	76,553 (100)	64,639 (100)	56,225 (100)	44,888 (100)

A Data for this table were compiled from United States Census figures, gathered every ten years from 1940–1980. Data reported for 1985 were gathered from the *Statistical Abstract of the United States* (1986).

B This percentage refers to the percent of the employed labor force in the occupational group.

C Figure includes employed workforce aged 14 years or older.

D Figures and percentages may total incorrectly due to rounding errors and because of unreported occupational classifications (prior to 1970).

organizations akin to those employing blue collar workers.³² Because of this, many white collar and professional workers may similarly lack authority in their respective organizations and find themselves equally lacking in influence over decisionmaking (as individuals) as their blue collar counterparts.³³ In other words, professionals who once might have had managerial responsibilities may now be supervised by administrative staffs.³⁴ As a consequence, distinctions among blue and white collar workers may be blurring.³⁵ This phenomenon may be reflected in the fact that unionization among workers falling within the category of professionals has increased substantially in recent years.³⁶

Third, complementing the movement of white collar work toward a more traditional form of blue collar work has been the increasing "professionalism" of blue collar workers through the use of employee participation plans. The number of these plans, which have purportedly given nonmanagerial employees more authority, discretion, or say in their organizations, has increased dramatically in the past decade.³⁷ Assuming that these programs have achieved some redistribution of authority, then blue collar employees may

³² See Angel, *supra* note 25, at 384-87; Craver, *The Vitality of American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633, 650-51 (1983). Unfortunately, although the argument that blue and white collar work is converging seems plausible, it is based on mostly impressionistic evidence. Data to test this hypothesis, such as the average establishment size by job classification, are unavailable.

³³ See Craver, *supra* note 32, at 651.

³⁴ See Angel, *supra* note 25, at 393; Suntrup, *supra* note 26, at 307.

³⁵ Of course, from a Marxist perspective, these types of workers have never been different, assuming neither owns the means of production. For an excellent discussion of this point, see R. HYMAN, *INDUSTRIAL RELATIONS: A MARXIST INTRODUCTION* 41 (1975).

³⁶ During the period from 1974 to 1980, a time when the percentage of the labor force that was unionized declined or held roughly constant, unionization among professional, technical and kindred workers increased from 13.8 to 22.9 percent of all such workers (based on the annually administered May Current Population Survey). Particular growth in unionization was evident among lawyers (increasing from 2.7 to 7.6 percent), physicians (from 3.6 to 9.0 percent), and psychologists (from 8.8 to 18.0 percent). See Kokkelenberg & Sockell, *Union Membership in the United States, 1973-1981*, 38 INDUS. & LAB. REL. REV. 497, 505, 506, 522 (1985).

³⁷ See, e.g., Anderson & Feuille, *The Existence and Effectiveness of Labor-Management Committees* (1981) (unpublished paper presented at the Thirty Fourth Annual Meeting of the Industrial Relations Research Association); U.S. DEPARTMENT OF LABOR, *U.S. LABOR LAW AND THE FUTURE OF LABOR MANAGEMENT COOPERATION* (1986). A recent study has found that over 40 percent of nonunion enterprises in 1987 had an employee involvement plan in 1987, compared to only 7 percent of nonunion companies in 1950. Furthermore, that percentage tripled in just the eight-year time period from 1980 to 1987. See Ichniowski, Delaney & Lewin, *The New Human Resource Management in U.S. Workplaces: Is it Really New and is it only Nonunion?* (August 25, 1988) (unpublished paper presented at the First Industrial Relations Congress of the Americas, Quebec City). As discussed *supra* note 10, these plans can exist in a variety of forms.

begin to take on some of the traditional attributes or job functions of supervisors and/or professionals and managers.³⁸ Indeed, for these reasons, some scholars have considered the possibility that employees who participate in such plans may forfeit their "employee" status, rendering them ineligible for coverage by the NLRA.³⁹

Collectively, these trends may further challenge the usefulness of current occupational distinctions that perhaps never served as bright lines separating classes of workers from one another. At perhaps the most superficial level, these trends suggest that some existing classifications may become relatively anachronistic identifiers of segments of the workforce. Because of the increasing professionalization of the workforce, coupled with the growing use of professional titles for essentially nonprofessional work, and the increasing number of post-secondary educational degrees obtained by the working population overall,⁴⁰ it is not clear how many workers will be determined to fall within the Act's definition of employee, and yet be a nonprofessional. This result would suggest that either section 2(3), defining employees, or section 2(12), defining professional employees, would become less necessary, if not meaningless altogether. Of course, this seemingly semantic problem might be overcome by eliminating section 2(12) altogether.⁴¹

But more important than this semantic problem is the possibility that large classes of employees, once eligible for coverage by the NLRA, may now be excluded from the Act's protections. The extent to which this will occur will depend upon how many professionals will be treated as managers, as were faculty members in

³⁸ Angel, *supra* note 25, at 387. Interestingly, such "progressive" policies are adopted with the purpose of reducing the distinction among managers and nonmanagers. *E.g.*, Lawler & Mohrman, *Unions and the New Management* 1 ACAD. MGMT. EXECUTIVE 293 (1987). That such policies may then result in the subsequent exclusion of employees from the Act may be an unintended benefit to some employers.

³⁹ See *e.g.*, Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1672 (1983). Considering that supervisory status is applied in a disjunctive fashion with respect to job function, it is easy to conceive of nonmanagerial employees meeting the threshold of supervisory status under an employee participation plan. But for a different view, see Kohler, *supra* note 24, at 540.

⁴⁰ For data on the growing proportions of the population receiving advanced educational degrees, see U.S. DEPARTMENT OF LABOR, HANDBOOK OF LABOR STATISTICS 164 (1985).

⁴¹ Such a solution would also require the elimination of the portion of § 9(b)(1) that relates to professional employees. For the text of § 9(b)(1), see *supra* note 21. In any case, these occupational trends call into question the wisdom of granting special privileges to professional employees, once in a small minority. Ironically, the persistence of these trends may suggest that the right not to be included in bargaining units with professionals be given to nonprofessionals.

Yeshiva,⁴² and how many blue collar workers will be treated as supervisors or managers. In the face of these trends, rigid applications of supervisory and managerial exclusions may dramatically reduce the Act's coverage below the 56 percent of the labor force estimated to be covered in 1951.⁴³ At a minimum, these trends suggest that the distinctions, definitions, and approaches to classifying workers as covered or excluded may be out of step with societal forces. Alternatively, these increasing exclusions may mean that we see unionization as inappropriate for the contemporary worker in general.⁴⁴

B. Independent Contractors

Like supervisors, independent contractors are expressly excluded from the definition of "employee" included in the NLRA.⁴⁵ Congress enacted this exclusion as part of the Taft-Hartley amendments of 1947, in the wake of extensive controversy about how to determine whether or not an individual is, in effect, self-employed, and is therefore ineligible for the Act's coverage.⁴⁶ But like the distinctions among employee classifications discussed above, the line between independent contractor and "employee" is not a bright one.⁴⁷ Perhaps unlike these other distinctions, however, the confusion over who is an independent contractor is generated by inconsistencies in the explicit tests used to distinguish them. On the one hand, standard principles of the law of agency (viz., "right of control factors," such as an individual's role in determining how the work may be done and the degree of supervision exercised over him or

⁴² *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).

⁴³ See Rosenthal, *Exclusions of Employees Under the Taft-Hartley Act*, 4 INDUS. & LAB. REL. REV. 556, 557 (1951).

⁴⁴ Of course, exclusion from the Act's coverage does not mean that workers are prohibited from unionizing. Many scholars, however, believe that coverage by the NLRA, or an analogous statute, is a necessary condition for becoming unionized. E.g., Dale & Raimon, *Management Unionism and Public Policy on the Railroad and Airlines*, 11 INDUS. & LAB. REL. REV. 551 (1958); Levinson, *Foremen's Unions and the Law*, 1 LAB. L.J. 535, 538 (1950); Lewin, *Representatives of Their Own Choosing: Practical Considerations in the Selection of Bargaining Representatives for Seasonal Farmworkers*, 64 CALIF. L. REV. 732, 733 (1976).

⁴⁵ See 29 U.S.C. § 152(3) (1982). For the text of § 2(3), see *supra* note 13.

⁴⁶ In 1944, the Supreme Court decided a most controversial case in this area. In *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 132 (1944) the Supreme Court held that news vendors were employees under the Act. Congress, in effect, expressed its disapproval of this holding by enacting the explicit independent contractor exception to § 2(3).

⁴⁷ That the application of independent contractor status is either unclear or even inconsistent is suggested by Rosenthal's unwillingness to include them in his estimates of the number of individuals excluded from the NLRA's protection. See Rosenthal, *supra* note 43, at 566.

her), supposedly mandated by Congress in 1947, might be used.⁴⁸ On the other hand, the central inquiry into determining independent contractor status might be whether or not the individual in question is subject to the bargaining power inequality or mischief that the Act was intended to correct (viz., "mischief-remedy factors," such as the ability to make a profit, having a saleable interest in the business, or working solely for one employer).⁴⁹ Although there is much debate over which test is or should be used,⁵⁰ even despite Congress's explicit preference for the "right of control test," elements of both tests often enter the decisionmaking in application.⁵¹ This probably explains why it is difficult to be sure who is an independent contractor, and why, at least in part, there is extensive speculation about the status of fishermen, taxicab drivers, and newspaper employees, among others.⁵²

Although these problems in the identification of independent contractors have persisted for many years,⁵³ current developments are likely to place new strains on how independent contractors are identified. First, in order to avoid unionization, a number of firms appear to be restructuring or structuring relationships with employees (e.g., leasing equipment) in an attempt to ensure that their employees will be viewed as independent contractors.⁵⁴

Second, technological as well as social developments have created both the demand for and supply of telecommuters. That is, there has been a tremendous growth in the employment of individ-

⁴⁸ That the purpose of the Taft-Hartley amendment regarding independent contractors was to have labor tribunals rely on agency principles to identify independent contractors was noted by the Supreme Court in *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968).

⁴⁹ This test was purportedly used by the NLRB prior to the Taft-Hartley amendments in 1947. For an excellent history of the application of independent contractor status, see Motomura, *Employees and Independent Contractors Under the National Labor Relations Act*, 2 *INDUS. REL. L.J.* 278, 279, 284 (1977).

⁵⁰ See, e.g., Jacobs, *Are "Independent Contractors" Really Independent?*, 5 *LAB. L.J.* 345, 349-50 (1954).

⁵¹ See Motomura, *supra* note 49, at 306.

⁵² See, e.g., Denbo, *Taft-Hartley Act and Newspaper Publishers*, 13 *LAB. L.J.* 709 (1962); Grady, *Collective Bargaining Units in the Transportation Industry*, 29 *LAB. L.J.* 118 (1978); Randall, *Labor Agreements in the West Coast Fishing Industry: Restraint of Trade or Basis of Industrial Stability?*, 3 *INDUS. & LAB. REL. REV.* 514 (1950).

⁵³ Indeed, the majority of articles on independent contractor status were written before 1965. E.g., Denbo, *supra* note 52; Hoffman, *We Need a Definition of "Independent Contractors"*, 1 *LAB. L.J.* 684 (1950); Jacobs, *supra* note 50; Parker, *Are Fishermen Employees?*, 1 *LAB. L.J.* 1001 (1950); Randall, *supra* note 52.

⁵⁴ See Grady, *supra* note 52, at 123. For an interesting study of this practice in the taxicab industry, see E.L. Gale, *Unionism, Leasing, Litigation and Regulation in the Chicago Taxicab Industry: An Historical Inquiry* (1981) (unpublished Master's Thesis, University of Illinois, Urbana).

uals who are able to work at home using computer terminals due to expanding telecommunication capabilities and networks.⁵⁵ The status of the growing population of these workers as independent contractors has yet to be determined, although a reasonable case can be made that they would qualify as independent contractors. Such a finding would be likely if a labor tribunal relied upon right of control factors to determine the status of these individuals, and they owned or rented their computer terminals.⁵⁶ Moreover, many of these new independent contractors, who might otherwise have been forced to work outside of the home, would likely have been eligible for the NLRA's protection had they worked on the employer's premises.⁵⁷ What this means is that there is yet another factor that may lead to even further exclusions from the NLRA.⁵⁸

In sum, the challenges to the meaningfulness of the NLRA discussed in this section have revealed the problem of the declining population eligible to receive the Act's protections. In the next part

⁵⁵ Precise estimates of the size and growth of the telecommuter population are not available. Instead, estimates of growth are based primarily on impressionistic or anecdotal evidence. See, e.g., Bellace, *Changing Employment Relationships: Labor Law at the Crossroads*, in *SELECTED PAPERS OF THE AMERICAN BUSINESS LAW ASSOCIATION DISTRICT 1*, 106 (1986); *Survey of San Francisco Area Employers Shows Wide Use of New Work Time Option*, 237 *Daily Lab. Rep.* (BNA) A-2 (Dec. 10, 1986). Based on data from the October 1984 Current Population Survey, administered to 60,000 households, approximately three million people use a computer at home for "job-related" reasons. These data are cited and discussed in *Census Bureau Report Released on Computer Use Trends*, 5 *TELECOMMUTING REV.* 14 (1988) [hereinafter, *Census Bureau Report*]. It is, of course, impossible to determine how many of these individuals work at home exclusively and work for a company.

⁵⁶ Of course, the degree of supervision exercised over these individuals would also matter. Technological capabilities might enable sophisticated forms of supervision through some central system of monitoring key strokes, errors and so forth.

⁵⁷ This argument is based in large part on anecdotal evidence about the kind of work typically performed by nonmanager telecommuters, such as the processing of insurance claims. For a description of this work, see Chamot, *Statements During Symposium on Workstations in the Home*, 224 *Daily Lab. Rep.* (BNA) D-1 (Nov. 18, 1983). The opportunity to engage in industrial homework has probably attracted a segment of the population into the labor force (viz., individuals who would not work if they had to leave their homes, or to meet a fixed work schedule). The status of these individuals, however, is irrelevant to the argument that applications of independent contractor status will result in further exclusions from the Act, because those individuals would not have been working or unionized in the absence of the opportunity to work at home.

⁵⁸ The significance of the status of these workers can be debated, however. Bellace argued that the question of whether or not telecommuters are independent contractors may be an academic one only. Even if such workers are independent contractors, they are unlikely to unionize given that they are "isolated from co-workers." See Bellace, *supra* note 55, at 114, 115. Yet, whether or not this argument has validity will depend upon whether new union organizing strategies are developed to accommodate telecommuters. For example, it is plausible that the actual isolation of such workers can be overcome by telecommunications networks, whereby workers can reach each other at their terminals. This point is discussed in section V of the text.

of the paper, I turn to the legality of forums through which individuals potentially covered by the Act may seek to influence their worklives and organizations.

II. EMPLOYEE PARTICIPATION PLANS: INNOVATIVE PRACTICES OR UNION AVOIDANCE TACTICS?

Another problem that has challenged and will continue to challenge the existing state of labor law is the legal status of employee participation programs. Whether the plans appear in the form of quality circles, Scanlon or Rucker plans, or other programs involving employees in some aspect(s) of organizational decisionmaking, scholars generally assume that the number of programs in existence or at the experimental phase has grown in recent years.⁵⁹

In general, the reasons that can be offered for increasing interest in and demand for such programs include: (1) employers have sought to increase morale and productivity in response to concerns about the failure of productivity to grow substantially in the United States and the growth of international competition;⁶⁰ (2) increasing educational attainment of the workforce has been accompanied by increasing desires, on the part of employees, for input into organizational decisionmaking — desires to which employers have responded;⁶¹ (3) following in the human relations tradition, and spurred by the interest in Japanese management styles, employers have instituted programs because they believe that participation programs are “good” for employees;⁶² and (4) increasingly, employers have used such programs unlawfully to avoid unionization or weaken incumbent unions.⁶³ Because it is often

⁵⁹ E.g., U.S. DEPARTMENT OF LABOR, U.S. LABOR LAW AND THE FUTURE OF LABOR MANAGEMENT COOPERATION (1986); Schmidman & Keller, *Employee Participation Plans as Section 8(a)(2) Violations*, 35 LAB. L.J. 772 (1984).

⁶⁰ See, e.g., Beaver, *Are Worker Participation Plans Labor Organizations within the Meaning of Section 2(5): A Proposed Framework of Analysis*, 36 LAB. L.J. 226 (1985); Behrens & Sollenberger, *The National Labor Relations Act: A Potential Legal Constraint Upon Quality Circles and Other Employer-Sponsored Committees*, 34 LAB. L.J. 776 (1983).

⁶¹ See, e.g., Hogler, *Employee Involvement and NLRB v. Scott & Fetzer Co.: The Developing Interpretation of Section 8(a)(2)*, 35 LAB. L.J. 21 (1984).

⁶² Much of the literature “selling” the idea of employee participation programs manifests the implicit value judgment that all employees should want such programs because they are “good” for them. E.g., C. ARGYRIS, *PERSONALITY AND ORGANIZATION* (1957); D. MACGREGOR, *THE HUMAN SIDE OF THE ENTERPRISE* (1960). For a discussion of the underlying values in this literature, see Strauss, *Some Notes on Power Equalization*, in *THE SOCIAL SCIENCE OF ORGANIZATION* at 47–53 (Leavitt ed. 1963).

⁶³ See, e.g., Schmidman & Keller, *supra* note 59, at 772.

unclear which of these different motivations underlies the adoption of any given participation plan, employee participation programs place labor tribunals in a quandary. Perhaps in no other area of the law is it more difficult to chart a line between enlightened personnel policies or legitimate efforts to improve or enhance employee morale and performance, and unlawful union avoidance or union circumvention tactics. Moreover, the multiple reasons for a participation program may also explain why interpretations of the NLRA have been generally and historically unfavorable to employee participation programs existing outside of a union model.⁶⁴ By encouraging all forms of participation to be achieved through the union, the question of whether or not a program was instituted to avoid or circumvent the union is eliminated.

To understand the legal problems engendered by a participation program, it is important to recognize not only that such programs derive from multiple potential motivations, but also that any employee participation plan potentially violates section (8)(a)(5) or (8)(a)(2) of the NLRA.⁶⁵ In organized settings, a participation plan that exists outside of union control can unlawfully challenge the union's exclusivity. Thus, an employer's attempt to deal with employees through that plan will constitute a failure by the employer to bargain in good faith,⁶⁶ provided that the plan is viewed as a labor organization under section 2(5) of the Act.⁶⁷ In unorganized

⁶⁴ Much commentary has focused on the legal treatment of participation plans and the apparent or potential legal bias against such plans in the nonunion environment. *E.g.*, Jackson, *An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice*, 28 SYRACUSE L. REV. 809, 818 (1977); Sockell, *The Legality of Employee Participation Programs in Unionized Firms*, 37 INDUS. & LAB. REL. REV. 541 (1984); Note, *supra* note 39; see also *supra* notes 59-61 and the articles cited therein. Jackson provides a detailed review of the rationales that seem to underlie the Board's unwillingness to sanction many types of nonunion employee participation plans. These rationales include the protection of employee free choice, protection of *bona fide* unions as vehicles of employee participation, and ensuring arms length or vigorous bargaining or representation. See Jackson, *supra*, at 818-23.

⁶⁵ Section 8(a)(5) establishes that it is an unfair labor practice for an employer "to refuse to bargain with representatives of his employees . . ." See 29 U.S.C. § 158(a)(5). In other words, potentially, it would be unlawful for an employer to circumvent the certified bargaining agent by dealing with employees in another forum. Section 8(a)(2) establishes that it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ." See *id.* § 158(a)(2).

⁶⁶ The duty to bargain in good faith is described in § 8(d) of the NLRA, and an employer's failure to bargain in good faith is established as an unfair labor practice in § 8(a)(5).

⁶⁷ Section 2(5) of the Act defines a "labor organization" as any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose,

settings, a participation plan can also violate the law if it meets the definition of a labor organization and an employer unlawfully supports or dominates it. Because the vast majority of such plans in unorganized settings were initiated and implemented by management, unlawful support or domination, prohibited by section 8(a)(2) of the Act, can be relatively easily established.⁶⁸

Recent case law, however, suggests that some labor tribunals are now according legality to employee participation plans in unorganized settings more liberally than in the past. Specifically, several circuit courts have found employee committees to be lawful either by more narrow applications of labor organization status or by restricting the circumstances under which unlawful employer support or domination will be found.⁶⁹ Whether or not these approaches to assessing the legality of participation programs will stand the test of future litigation is less certain than the fact that they are likely to invite litigation from unions and continued controversy among legal scholars.⁷⁰ Beyond this fact, and the fact that the forces giving rise to participation plans will likely continue to do so, there are several specific sources of controversy and litigation likely to be associated with participation plans.⁷¹

First, and perhaps most significant, is that, by taking a sanguine view of employee participation programs and according them legal status, labor tribunals are effectively inviting antiunion employers

in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. § 152(5) (1982). A detailed analysis of the legal status of participation plans outside of union control (in unionized firms) is presented in Sockell, *supra* note 64.

⁶⁸ Virtually all commentaries on the legal status of participation plans include a discussion of this point. See *supra* notes 59-61, 63-64, and authorities cited therein. Also see the statutory language of § 8(a)(2), presented *supra* note 65.

⁶⁹ See, e.g., *NLRB v. Streamway Div.*, 691 F.2d 288 (6th Cir. 1982). This case departs substantially from the approach taken by the Supreme Court in *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959), and does not necessarily accord with approaches taken by other circuits. See, e.g., *NLRB v. Ampex Corp.*, 442 F.2d 82 (7th Cir. 1971). The *Streamway* decision has been roundly criticized by many legal scholars. See, e.g., Beaver, *supra* note 60, at 236-37; Schmidman & Keller, *supra* note 59, at 776-78; Note, *supra* note 39.

⁷⁰ See *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535 (6th Cir. 1984); *NLRB v. Northeastern Univ.*, 601 F.2d 1208 (1st Cir. 1979); *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974). For an earlier case that has, in effect, provided the justifications for these holdings, see *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955). For an insightful discussion of several of these cases and the disagreement among circuits which have decided such cases, see Hogler, *supra* note 61; Note, *supra* note 39.

⁷¹ In recent times, employee participation plans seem to have generated more legal commentary than litigation. Perhaps one possible explanation for this is that where cooperation truly exists, that is, employees have real input into organizational decisionmaking (because the participation plan is effective), there is less likely to be interest in union organizing or attempts to organize workers.

to experiment with plans that can dissipate support for a union. The dramatic growth in employer resistance to union organizing and employer unfair labor practices is well-documented.⁷² Some antiunion employers may view employee participation plans as one weapon in their arsenal of "sophisticated personnel policies which undermine the impetus for worker collectivization."⁷³ In so doing, they will likely implement such programs and attempt to test labor tribunals' conceptions of the line between "enlightened" personnel policies and unlawful avoidance and circumvention techniques. In response to the use of these programs, organizing and incumbent unions will likely be forced to file unfair labor practice charges.

Second, and on a related note, employers seeking to disqualify employee participation programs as labor organizations may have received, in effect, some recent advice from the United States Court of Appeals for the Second Circuit in *NLRB v. North Shore University Hospital*.⁷⁴ That case involved the refusal of a hospital to bargain with a certified representative of nonsupervisory employees. The Second Circuit held that the Board should consider the extent of supervisory influence in the governance and affairs of the bargaining representative in deciding whether that representative qualifies as a labor organization. Because sufficient influence can disqualify the bargaining representative, antiunion employers may be able to ensure that a participation program does not qualify as a labor organization by including supervisors in the forum and by giving supervisors significant roles in the program's operation. If, indeed, *North Shore* is applied in this fashion, and labor organization status can be avoided, then there would be no basis for findings of unlawful domination (in unorganized settings) or unlawful circumvention of the certified bargaining agent (in organized settings).⁷⁵ In this

⁷² See, e.g., Bernstein, *Union Busting: From Benign Neglect to Malignant Growth*, 14 U.C. DAVIS L. REV. 1 (1980); Craver, *The Vitality of the American Law Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633 (1983); Farber, *The Recent Decline of Unionization in the United States*, 238 SCIENCE 915 (1987); Weiler, *Promises to Keep: Securing Workers' Rights to Self Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1781 (1983).

⁷³ Craver, *supra* note 72, at 635-36.

⁷⁴ 724 F.2d 269 (2d Cir. 1983). The precise question at issue in that case was whether supervisory influence over the operation and governance of a multipurpose professional organization would disqualify that organization as a representative of rank and file employees for the purposes of collective bargaining. *Id.* at 270. The court concluded that, although professional organizations are not automatically disqualified, the nurses' association could be disqualified because of the role and influence of supervisors. *Id.* at 273.

⁷⁵ The foregoing analyses are not meant to imply that participation programs are only used by antiunion employers who seek to avoid or circumvent unions. Instead, it is argued that the increasingly liberal treatment of such plans in terms of legality will encourage their adoption, and that participation programs will prove to be an increasingly attractive vehicle for antiunion employers to use in order to escape collective bargaining.

sense, current law may not only be "inviting" the use of participation programs by antiunion employers, it may also be providing them with the means to escape legal sanction.

Third, there appears to be disagreement among circuit courts and between the NLRB and some circuits on how labor organization status should be accorded and what constitutes unlawful domination.⁷⁶ Historically, according to commentators, the Board has applied section 8(a)(2) more strictly than some courts.⁷⁷ These inconsistencies will continue to invite litigation of the legality of employee participation plans.

Finally, tension, if not litigation, on this issue will likely continue as long as both scholars and labor tribunals insist that the purpose of the Act is to foster labor-management cooperation, while others insist that the Act is designed to maintain an adversarial system of labor relations.⁷⁸ Both sides in this debate seem poised to greet decisions consistent with their view with applause and those inconsistent with harsh criticism. What these "advocates" seem to forget, however, is that neither cooperation nor adversarial relations are "ends" promoted by the Act. Rather, they are two means to give workers a say over their work lives, or to achieve industrial democracy — one of the many, though often conflicting, purposes of the NLRA.⁷⁹ And when the means no longer promote this end, legal prohibitions and prescriptions need to be fashioned. In terms of employee participation plans, this amounts to a careful considera-

⁷⁶ See, e.g., Behrens & Sollenberger, *supra* note 60, at 777-79; Note, *supra* note 39, at 1662-71; see also cases cited *supra* notes 69-70.

⁷⁷ See, e.g., Hogler, *supra* note 61, at 25; Jackson, *supra* note 64, at 812-18.

⁷⁸ Compare, e.g., *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955) (discussed in Note, *supra* note 39, at 1667) with, e.g., Kohler, *supra* note 24. The *Chicago Rawhide* case involved the legality of an employee-initiated shop committee, designed to deal with grievances and other employment matters. The employer permitted elections to be held on company property, notices to be posted on bulletin boards, shop-committee business to be transacted on company premises, and some grievance processing to be conducted on company time, among other things. In the Seventh Circuit's view, unlike the NLRB's, those acts constituted "laudable cooperation with the employees' organization," rather than unlawful support. See *Chicago Rawhide*, 221 F.2d at 170. Thus, by being unwilling to permit the NLRB to destroy "a happy and cooperative employer-employee relationship," *id.*, the Seventh Circuit may not only have viewed cooperation as consistent with the NLRA and collective bargaining, but it may also have viewed cooperation as an employee relations goal. Kohler argues, by contrast, that the norms that underlie cooperative or human relationist models of employee relations are "antipodal to those that underlie the collective bargaining model." Kohler, *supra* note 24, at 517. He believes that collective bargaining requires the structural independence of the means through which labor may influence management decisionmaking — a condition violated by participative management or cooperative schemes. See Kohler, *supra* note 24, at 543-45 (discussing *Chicago Rawhide*).

⁷⁹ For an insightful discussion of the contradictory purposes of the National Labor Relations Act, see Gross, *supra* note 3.

tion of where the line between enlightened personnel policies and union avoidance or circumvention tactics should be drawn or re-drawn.

In short, the growing use of participation plans and increasing employer resistance to unions, as well as an uncertain or changing policy on the legal status of participation plans, are likely to pose an important challenge for labor law. Specifically, that challenge will entail a reconsideration of how best to achieve worker say in the work place or where to draw the line between lawful and unlawful forums for that input.

III. THE SCOPE OF MANDATORY BARGAINING: THE UNION'S ROLE IN AN ENTERPRISE

The duty to bargain and the scope of that mandatory bargaining obligation lie at the heart of organized labor's collective bargaining entitlements. Although parties are allowed to "cooperate" in making decisions on a voluntary basis, they are compelled by law (at each other's request) to negotiate or engage in joint decision-making over "wages, hours, and other terms and conditions of employment."⁸⁰ Without that legal compulsion, many unions, even those obtaining certification, would probably find it difficult to bring employers to the negotiating table and to obtain concessions on issues important to their constituents.⁸¹ Indeed, this may explain, in part, why the NLRA was needed to foster the use of collective bargaining and why coverage by the Act is viewed by many to be necessary for successful organization and effective representation.⁸²

⁸⁰ See 29 U.S.C. § 158(d) (1974). Failure to bargain about those subjects is established as an unfair labor practice in § 8(b)(3) and § 8(a)(5).

⁸¹ Of course, the law is not the only source of a union's bargaining power or its ability to get management to concede on its terms. For this definition of bargaining power and an insightful discussion of the antecedents and consequences of bargaining power, see N. CHAMBERLAIN & J. KUHN, *COLLECTIVE BARGAINING* (1986). It is, however, reasonable to expect that unions weaker in sources of bargaining power other than the law would be more likely disadvantaged by the absence of a bargaining obligation. See, e.g., Sockell & Delaney, *Who Wins If Fewer Items Are Mandatory Subjects of Bargaining?*, 11 *LAB. STUD. J.* (1986).

⁸² For a discussion of this point in the context of agricultural laborers, see Lewin, *supra* note 44, at 734 n.4. For a review of other articles in which this argument is made, see Delaney, Lewin, & Sockell, *supra* note 19, at 48. To be sure, coverage by the Act is not the *sine qua non* for successful organizing campaigns, as many individuals, viewed as employees for the purposes of the Act, have "chosen" not to become unionized. Furthermore, specific features of the NLRA and interpretations of the Act would also seem to affect the success of organizing campaigns. For example, bargaining unit decisions, as well as rules governing how and where organizing campaigns may be conducted (that is, restrictions on propaganda and solicitation), may well affect election outcomes. See, e.g., Delaney & Sockell, *Hospital Unit Determinations and the Preservation of Employee Free Choice*, 39 *LAB. L.J.* 259 (1988); Dickens, *The Effect of*

Beyond contributing to the existence and effectiveness of a union in a firm, however, the subjects over which the mandatory bargaining obligations extend are critical to establishing what role the union serves in an enterprise.⁸³ This is because lawful bargaining subjects that fall outside of the statutory phrase "wages, hours, and other terms and conditions of employment," referred to as permissive subjects, are treated differently from mandatory subjects. Not only does the bargaining obligation fail to encompass permissive issues, parties are prohibited from pursuing permissive issues to impasse (that is, to strike or to lockout workers).⁸⁴ Primarily for this reason, many scholars argue that effective or meaningful negotiations over permissive issues are less likely;⁸⁵ indeed, research in the private sector and studies on analogous distinctions in the public sector has provided some empirical support for this argument.⁸⁶ Because the bargaining obligation and the right to use economic muscle extend to only mandatory subjects, decisions about what is mandatory limit the range of issues over which management is compelled to negotiate with unions. Thus, such decisions may ultimately influence what a union does in an enterprise.

In essence, therefore, because the breadth of the legally-fostered and guaranteed union access to management shapes the scope

Company Campaigns on Certification Elections: Law and Reality Once Again, 36 INDUS. & LAB. REL. REV. 560 (1983). Controls on the organizing process and restrictions on tactics that may be used to resist unionization, among other things, also play a central role in the attempts to become unionized.

⁸³ An extensive discussion of this point can be found in Sockell, *Towards a Theory of the Union's Role in an Enterprise*, 1 ADVANCES INDUS. & LAB. REL. 221, 225-34 (1983).

⁸⁴ The Supreme Court acknowledged the distinction between mandatory and permissive subjects, and established this difference between mandatory and permissive items, in *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). In addition, unilateral changes in mandatory, but not permissive items are prohibited (unless an impasse is reached). See *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 481 (5th Cir. 1963).

⁸⁵ See, e.g., Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 272 (1964); St. Antoine, *Judicial Caution and the Supreme Court's Labor Decisions*, 4 ABA SEC. LAB. REL. L. PROC. 11 (1973); Note, *The Impact of the Borg-Warner Case on Collective Bargaining*, 43 MINN. L. REV. 1225, 1235-36 (1959).

⁸⁶ See Delaney, *The Effects of Impasses on Teacher Bargaining Outcomes* (1983) (unpublished dissertation, University of Illinois); Delaney, Sockell & Brockner, *Bargaining Effects of the Mandatory-Permissive Distinction*, 27 INDUS. REL. 21 (1988); Woodbury, *The Scope of Bargaining and Bargaining Outcomes in the Public Schools*, 38 INDUS. & LAB. REL. REV. 195 (1985). Moreover, this evidence notwithstanding, there are those scholars who are skeptical about the impact of the mandatory-permissive distinction. Some scholars argue that permissive status may not serve as a barrier to effective negotiations if a party engages in bogus insistence on a mandatory item to gain concessions on a permissive one. See, e.g., J.B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 111-35 (1983); Dunlop, *Public Regulation of Collective Bargaining*, ABA SEC. LAB. REL. L. PROC. 47 (1953); Weisberger, 1977 Wis. L. REV. 685, 692-93.

of union activity or the sphere of union influence, a more narrow interpretation of the issues embraced by "wages, hours, and terms and conditions of employment" will likely lead to a more limited union role in enterprise decisionmaking. A broader interpretation, by contrast, may facilitate an expanded union presence in enterprise affairs. Furthermore, the breadth of the bargaining obligation notwithstanding, the type and nature of issues classified as mandatory will affect the function a union serves in the firm. For this reason, a labor tribunal's construction of the statutory phrase, "wages, hours, and other terms and conditions of employment" would seem to reflect, at least in part, its underlying view of the appropriate place and role of the union. Moreover, regardless of the precise rationale offered for a given interpretation of the statutory bargaining obligation, such as notions of how best to advance efficiency within a bargaining framework, employers' private property rights, conceptions of what workers are or should be interested in, custom and purposes of the Act, or some combination of these rationales,⁸⁷ such determinations may inevitably rest on labor tribunals' conceptions of what belongs on the bargaining table or what decisions affecting the firm are appropriately resolved with union input.

Given these implications and consequences, it is no wonder that the scope of mandatory bargaining, or the application of the mandatory-permissive distinction, has generated almost continuous scholarly debate and legal challenge.⁸⁸ This controversy has been

⁸⁷ A detailed discussion of the rationales offered by the Board and the courts for interpretation of the scope of the mandatory bargaining obligation may be found in Sockell, *The Scope of the Mandatory Bargaining Obligation: A Critique and a Proposal*, 40 *INDUS. & LAB. REL. REV.* 19, 24-27 (1986); see also J.B. ATLESON, *supra* note 86.

⁸⁸ Indeed, even though it has been three decades since *Borg-Warner* was decided, there seems to be neither a fall-off among commentaries published that deal with the mandatory-permissive distinction nor a time period in which legal commentators neglected to consider the distinction. For a subset of articles dealing primarily or exclusively with the distinction, which span the time period since *Borg-Warner* was decided, see Wollett, *The Borg-Warner Case and the Role of the NLRB in the Bargaining Process*, 12 *N.Y.U. ANN. CONF. ON LAB. PROC.* 39 (1959); Fleming, *The Obligation to Bargain in Good Faith*, 47 *VA. L. REV.* 988 (1961); H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 63-90 (1963); Note, *The Development of the Fibreboard Doctrine: The Duty to Bargain Over Economically Motivated Subcontracting Decisions*, 33 *U. CHI. L. REV.* 315 (1966); Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 *COLUM. L. REV.* 803 (1971); Note, *Application of the Mandatory-Permissive Dichotomy to the Duty-to-Bargain and Unilateral Action: A Review and Reevaluation*, 15 *WM. & MARY L. REV.* 918 (1974); Morris, *The Role of the NLRB and the Court in the Collective Bargaining Process: A Fresh Look at Conventional Wisdom and Unconventional Remedies*, 30 *VAND. L. REV.* 661 (1977); Note, *Duty to Bargain about Termination of Operations: Brockway Motor Trucks v. NLRB*, 92 *HARV. L. REV.* 768 (1979) [hereinafter Note, *Duty to Bargain about Termination of Operations*]; Gacek, *The Employer's Duty to Bargain on*

fueled not only by differing, underlying conceptions of unions' place in society, but also by the substantial inconsistency among labor tribunals' interpretations of what is within the scope of statutory bargaining.⁸⁹ But beyond the debate have been some recent, interrelated developments likely to challenge current definitions of the scope of bargaining.

First, recently, an array of items critical to labor, such as partial plant closures,⁹⁰ relocations,⁹¹ and even forms of subcontracting once held to be mandatory,⁹² classified inconsistently in the past,

Termination of Unit Work, 32 LAB. L.J. 659 (1981); Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982); Kohler, *Distinctions Without Differences: Effects Bargaining in Light of First National Maintenance*, 5 INDUS. REL. L.J. 402 (1983); Susser, *NLRB Restricts Mandatory Bargaining Over Managerial Changes*, 35 LAB. L.J. 415 (1984); George, *To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 667 (1986). For additional articles, see *supra* notes 81-83.

⁸⁹ Discussions of these inconsistencies may be found in Gacek, *supra* note 88; Harper, *supra* note 88, at 1449; Oldham, *Organized Labor, the Environment, and the Taft-Hartley Act*, 71 MICH. L. REV. 935, 936 (1973); Sockell, *supra* note 87, at 22; Note, *Duty to Bargain about Termination of Operations*, *supra* note 88.

⁹⁰ *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (*FNM*). In *FNM*, the Supreme Court found that a partial plant closure (the termination of a maintenance contract) was a permissive subject of bargaining, because it turned on a change in the nature and direction of the business, not on labor costs. It noted that "the harm likely to be done to an employer's need to operate freely in deciding whether or not to shut down parts of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." *Id.* at 686. In so doing, the Court changed the balancing test from what had been suggested and applied by some previous courts and boards; namely, instead of balancing employees' and employer's interests or harm to reach decisions on the status of partial plant closures or analogous forms of subcontracting, the Court balanced the benefits to the employer of union input versus the costs of obtaining that input — the union/employee's side of the equation was neglected. For a discussion of earlier approaches to determining the status of issues, see, e.g., *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), discussed *infra* note 92; Gacek, *supra* note 88; Harper, *supra* note 88; see also *FNM*, 452 U.S. at 689 (Brennan, J., dissenting).

As discussed above, the critical factor, according to the Court, and in the tests used by labor tribunals in cases subsequent to *FNM*, has been the "essence of the decision itself" — that is, whether or not the decision hinged on labor costs or general profitability concerns. *FNM*, 452 U.S. at 686; see also *Weather Tamer, Inc. v. NLRB*, 673 F.2d 483 (11th Cir. 1982); *NLRB v. Gibraltar Indus.*, 653 F.2d 1091 (6th Cir. 1981); *Penntech Papers, Inc.*, 263 N.L.R.B. 264 (1982), *enforced*, 706 F.2d 18 (1st Cir. 1983). Because all such decisions may be couched in terms of profitability, rather than labor costs *per se*, partial plant closures are now virtually always permissive items. For a discussion of this point, see Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 16 (1981); Sockell, *supra* note 87, at 22-23; Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1573 (1981).

⁹¹ E.g., *Milwaukee Spring Div. (II)*, 268 N.L.R.B. 601, 602 (1984). In that case, the Board held that an economically-motivated, unilateral decision to relocate assembly operations, made during the term of the agreement, did not constitute a § 8(a)(5) violation because the decision did not modify a specific term contained in the contract.

⁹² E.g., *Garwood-Detroit Equip., Inc.*, 274 N.L.R.B. 113, 114-15 (1985). In *Garwood*, the

has been virtually excluded from the bargaining obligation. The Board's opinion in *Otis Elevator Co.*⁹³ may permit other decisions that involve both management interests in directing the firm and substantial traditional union interests in preserving bargaining unit employment also to be classified as permissive.⁹⁴ Such substantial diminutions of organized labor's bargaining table entitlements are likely to invite substantial challenge from a labor movement already troubled by a declining proportion of the labor force unionized, by increasing losses in certification elections, and by the growing number of employer unfair labor practices.⁹⁵

Second, this contraction in the mandatory bargaining obligation has occurred at a time when there is an important need for flexibility and innovation in union-management relationships. Indeed, observers have called for an expanded labor-management agenda to address problems of international competition and productivity.⁹⁶ But the mandatory-permissive distinction may work at cross-purposes with those recommendations, as the bargaining agenda is biased away from permissive issues (because, in large part, parties may simply refuse to negotiate about them).⁹⁷ If it is true that

NLRB found that subcontracting, which was characterized by the Administrative Law Judge as resulting in the replacement of work normally performed by members of the bargaining unit, was a permissive subject of bargaining. In so holding, the NLRB relied upon *Milwaukee Spring* and *Otis Elevator* (discussed *infra* note 93) and held that the essence of the decision involved in *Garwood* affected the scope and direction of the enterprise, rendering it to be permissive. See *Garwood*, 274 N.L.R.B. at 114. That the Board relied upon *Otis Elevator* and *Milwaukee Spring* is at least curious, if not misguided, in light of the Supreme Court's longstanding precedent that subcontracting, which involves a mere replacement of bargaining unit work, is a mandatory subject of bargaining. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

⁹³ 269 N.L.R.B. 891 (1984). In *Otis*, the NLRB held that management's decision to relocate and consolidate some of its operations was a permissive subject of bargaining. In reaching that opinion, the NLRB focused on whether the essence of the decision turned "upon a change in the nature or direction of the business, or turn[ed on] labor costs." 269 N.L.R.B. at 392. Significantly, though the Board's decision in *Otis* was based, in substantial part, on the Supreme Court's holding in *First National*, the *First National* Court specifically stated that its holding did not deal with management decisions other than partial plant closures. 452 U.S. 666, 686 n.22 (1981).

⁹⁴ In effect, all an employer needs to demonstrate to ensure that such decisions are deemed permissive is that its decision was not motivated primarily by labor costs.

⁹⁵ Unions once won a majority of certification elections, though today they lose a majority of them. For data on trends in union membership and election victories as well as explanations for these trends, see R.B. FREEMAN & J.L. MEDOFF, *WHAT DO UNIONS DO?* 221-45 (1984); Farber, *supra* note 72; Fiorito & Maranto, *The Contemporary Decline in Union Strength*, 5 *CONTEMP. POL'Y ISSUES* 12 (1987); Weiler, *supra* note 72.

⁹⁶ See, e.g., BUREAU OF LABOR MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. DEPARTMENT OF LABOR, *U.S. LABOR LAW AND THE FUTURE OF LABOR MANAGEMENT COOPERATION* (1986).

⁹⁷ See, e.g., WELLINGTON, *supra* note 88; Fleming, *supra* note 88, at 996; Wollett, *supra*

bargaining over permissive items is likely (or often) ineffective, then the narrowing of the mandatory bargaining obligation simply increases the potential rigidities in the bargaining process introduced by the mandatory-permissive distinction.⁹⁸ Specifically, as a number of scholars have suggested, the distinction itself may encourage undesirable uniformity among collective agreements, as the distinction itself is not necessarily responsive to changing times, economic developments, and industry or regional idiosyncracies.⁹⁹ The costs that such rigidities pose are more salient when the mandatory bargaining obligation shrinks at precisely the time when economic circumstances require innovation in collective bargaining relationships.

Moreover, because of the economic crisis posed by international competition facing many heavily unionized industries (such as the automobile and steel industry), the instability in labor relations caused by labor tribunals' inconsistent interpretations of the bargaining obligation would seem to be particularly costly today. As such, this decisional inconsistency may also prove to be a powerful force propelling a reassessment of the scope of bargaining.

Finally, the scope of bargaining seems to be founded on a narrow, though traditional, view of workers' interests and competencies. That view, suggested by labor tribunals' holdings that certain subjects of bargaining should not be within the compulsory bargaining obligation, seems to be based on the assumption that workers are or should be interested primarily (if not exclusively) in issues that have a direct and immediate impact on the terms of their employment.¹⁰⁰ As well, such cases suggest that workers would likely

note 88, at 42; Note, *Bargaining on Nonmandatory Topics Constitutes Refusal to Bargain*, 11 STAN. L. REV. 188, 190 (1958); studies cited *supra* note 85. In an empirical study of bargaining behaviors, based on a laboratory experiment, parties were found to spend less time negotiating about an issue classified as permissive than when that same issue was classified as mandatory. Permissive status was also found to reduce concessionary behavior. See Delaney, Sockell, & Brockner, *supra* note 86.

⁹⁸ For a discussion of this point and a review of studies in which the mandatory-permissive distinction is indicted on these grounds, see Sockell, *supra* note 87, at 28.

⁹⁹ See, e.g., Cox, *Law and the Future of Labor Management Relations*, 51 NW. U.L. REV. 240, 246 (1953); studies cited *supra* note 94. Of course, both parties may voluntarily agree to expand the agenda to realize the benefits of agreements tailored to their own circumstances, the studies of bargaining issues notwithstanding. For this reason, the distinction hurts parties that are either misinformed of such benefits or are failing to maximize their joint interests. See a discussion of this point in Sockell, *supra* note 87, at 28.

¹⁰⁰ E.g., *Detroit Resilient Floor Decorators Local 2265 (Mill Floor Coverings, Inc.)*, 136 N.L.R.B. 769 (1962), *enforced*, 317 F.2d 269 (6th Cir. 1963). In that case, the NLRB held that contributions to an industry promotion fund were not a mandatory subject of bargaining.

be incompetent to deal with workplace issues outside of their more "parochial" employment interests.¹⁰¹ Like approaches in the exclusion area, these views seem to be based on a static notion of the typical worker's interests as well as clear divisions between employees' and managers' identities, capabilities, and interests. The potential folly of these notions was addressed in section I. Suffice it to add here that, if the occupational and educational trends discussed earlier continue, this traditional view of workers' interests and abilities may become inappropriate. Thus, by placing more issues outside of the bargaining obligation, workers may fail to have input into various aspects of organizational functioning in which they have become interested and have developed competencies.¹⁰² As a result, pressure for a reconsideration of the appropriateness of a limited scope of bargaining may also come from workers who demand more say in their enterprises.

IV. REMEDIES: DECLINING EFFECTIVENESS IN AN AGE OF INCREASING NEED

Commentators have long criticized the efficacy of remedies for employer unfair labor practices.¹⁰³ Recently, studies have cited the

Id. at 771. In so holding, the NLRB noted that a compulsory bargaining obligation over the issue of advertising "would transform bargaining over the compensation, hours and conditions of employment into a debate over policy objectives." *Id.* For similar holdings implying that "policies" do not belong on the bargaining table, see *Sheet Metal Workers, Local 38*, 231 N.L.R.B. 669 (1977), *enforced*, 575 F.2d 394 (2d Cir. 1978); *Local 264, Laborers*, 216 N.L.R.B. 40 (1975). Of course, this narrow view of workers' interests is not a fiction created by labor tribunals. Instead, it reflects the predominant type of "bread and butter" unionization normally associated with the United States labor movement.

¹⁰¹ See, e.g., *G.M., GMC Truck & Coach Div.*, 191 N.L.R.B. 951, 952 (1971). In *G.M.*, the Board held that the sale of equipment and leasing of property were not mandatory subjects of bargaining. *Id.* In so holding, the Board noted that "decisions such as these, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of the enterprise, are matters essentially financial and managerial in nature." *Id.* Further, the Board stated that "[s]uch managerial decisions oftentimes require secrecy as well as the freedom to act quickly and decisively. They also involve subject areas as to which the determinative financial and operational considerations are likely to be unfamiliar to the employees and their representatives." *Id.*

¹⁰² See Angel, *supra* note 25, at 429.

¹⁰³ See, e.g., Samoff, *The Impact of Taft-Hartley Job Discrimination Victories*, 4 *INDUS. REL.* 77 (1965); Drotning & Lipsky, *The Effectiveness of Reinstatement as a Public Policy Remedy*, 22 *INDUS. & LAB. REL. REV.* 179 (1969); Greer & Martin, *Calculative Strategy Decisions During Union Organization Campaigns*, 19 *SLOAN MGMT. REV.* 61 (1978); Weiler, *supra* note 72, at 1787-95; Kleiner, *Unionism and Employer-Discrimination: Analysis of 8(a)(3) Violations*, 23 *INDUS. REL.* 234 (1984). For a review of these and other comments on the adequacy of remedies, see Delancy, Lewin, & Sockell, *supra* note 19, at 55-57.

inadequacy of remedies as a major factor contributing to increasing union losses in certification elections and the declining proportion of the labor force unionized.¹⁰⁴ Although this relationship probably cannot be established empirically,¹⁰⁵ it appears that today, as perhaps unlike any other time since the Wagner and Taft-Hartley Acts were passed, there are even stronger indications that the adequacy and timeliness of the remedial process contain serious flaws. The basis for this argument is set forth below.

Statistics generally reveal that the number of unfair labor practices has increased significantly.¹⁰⁶ Commentators also generally agree that the sophistication of employers' union resistance tactics has increased.¹⁰⁷ In particular, the "rapid and recent" growth of the union busting business, consisting of some private consulting firms, law firms, industrial psychologists, and employer and trade associations, among other groups,¹⁰⁸ as well as the increased reliance on consultants during organizing campaigns,¹⁰⁹ are used as support for this argument. Research has shown that the use of consultants, specifically, is significantly and negatively related to union election victories.¹¹⁰ Moreover, based upon an in-house survey of union organizers conducted by the AFL-CIO, approximately 70 percent of 226 elections held between July 1982 and February 1983 were directed by consultants.¹¹¹ In addition, according to those same organizers, in more than half of such elections there were employer unfair labor practices,¹¹² while 90 percent of election-organizing attempts were actively resisted by employers, who used captive au-

¹⁰⁴ For a review of this and other explanations for the decline in union membership, see studies cited *supra* note 95.

¹⁰⁵ This is because the arsenal of remedies has remained roughly constant over the entire period of the decline in unionization.

¹⁰⁶ See, e.g., Craver, *The NLRA at Fifty: From Youthful Exuberance to Middle-Aged Complacency*, 36 LAB. L.J. 604 (1985); Farber, *supra* note 72, at 919; Weiler, *supra* note 72, at 1781.

¹⁰⁷ See, e.g., Bernstein, *supra* note 72, at 3-4; Craver, *supra* note 72, at 642.

¹⁰⁸ Bernstein, *supra* note 72, at 5-10.

¹⁰⁹ C. McDonald, Speech before the Senate Oversight Committee on the Landrum Griffin Act (Feb. 1984).

¹¹⁰ See Lawler, *The Influence of Management Consultants on the Outcome of Union Certification Elections*, 38 INDUS. & LAB. REL. REV. 38 (1984); Lawler & West, *Attorneys, Consultants and Union Avoidance Strategies in Representative Elections*, 24 INDUS. REL. 406 (1985).

¹¹¹ The AFL-CIO Department of Field Research has recently re-administered a version of this survey. It is anticipated that the results will be reported in the spring of 1989.

¹¹² Precise estimates of the number of unfair labor practices could not be calculated given the way the data were reported. What could be ascertained was that 52 percent of the sample of 226 elections involved employer unfair labor practices other than discharge and 28 percent involved discriminatory discharges.

dience speeches, company letters, and/or supervisory meetings with employees to state their cases.¹¹³

Yet despite all of these developments, the arsenal of remedies, arguably deficient in the past, has remained constant, and the employer's expected costs for breaking the law have not increased to keep step with the types and frequency of activities in which employers have engaged. Indeed, if anything, those costs have decreased, as is exemplified by the NLRB's decision to withdraw non-majoritarian bargaining orders from its arsenal of remedies for employer unfair labor practices.¹¹⁴ Nonmajoritarian bargaining orders, which require the employer to recognize and bargain with a union even though it has not demonstrated majority status, may be issued when an employer has engaged in "outrageous and pervasive" unfair labor practices.¹¹⁵ Despite the fact that such orders have been rarely issued,¹¹⁶ they probably deter employers from engaging in extensive unfair labor practices designed to prevent the union from obtaining majority status.¹¹⁷ This potential benefit of nonma-

¹¹³ Of course, the frequency with which employers use sophisticated union avoidance tactics or actively resist union organizing does not necessarily indicate that unfair labor practices were committed. Employers who actively seek to remain nonunion, however, are more likely to test the limits of the law, and cross the dividing line between lawful and unlawful behavior.

¹¹⁴ *Gourmet Foods*, 270 N.L.R.B. 578 (1984). For a discussion of the significance of this holding, see Sockell & Delaney, *Union Organizing and the Reagan NLRB*, 5 *CONTEMP. POL'Y ISSUES* 28, 39 (1987).

¹¹⁵ Majoritarian bargaining orders are issued when a fair election cannot be held and the union has demonstrated that it has obtained a majority of employees' authorization cards. The potential appropriateness of a bargaining order absent a card majority, in the face of egregious unfair labor practices, was acknowledged by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-14 (1969).

¹¹⁶ See, e.g., *United Dairy Farmers Coop. Ass'n (II)*, 257 N.L.R.B. 772 (1981). In that case, described as "unquestionably an exceptional one" by the NLRB, *id.* at 774, the Board issued a bargaining order even though a card majority had not been obtained. As the Board noted, "A careful balancing of all the considerations herein indicates that our traditional remedies would be ineffectual in dissipating the coercive effects of the [employer's] unfair labor practices." *Id.* at 774-75.

Similar logic was used to grant a nonmajoritarian bargaining order where intimidation tactics, interrogation, threats of plant closure, discharge, and loss of benefits, discriminatory discharges, and promises of benefits, among other tactics, were used by the employer to thwart the union organizing campaign. See *Conair Corp.*, 261 N.L.R.B. 1189 (1982), *enforcement denied in pertinent part*, *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983).

¹¹⁷ The logic behind this argument is simply that the ability to use non-majority bargaining orders yields a probability that, even though an employer may thwart a union's attempt to organize workers (that is, the employer may prevent the union from winning an election or obtaining a card majority), the employer may still be compelled to recognize and negotiate with that union. Stated more succinctly, as Judge Wald insightfully suggested in her *Conair* dissent, "[f]or even if the company wins the organizational battle, it may lose the collective bargaining war." 721 F.2d at 1400 (Wald, J., dissenting).

majoritarian bargaining orders notwithstanding, the NLRB, comprised of a majority of Reagan appointees, announced in *Gourmet Foods* that "under no circumstances" would it issue a nonmajoritarian bargaining order.¹¹⁸ In so holding, the Board forfeited an important deterrent to unfair practices, and thus "employers who offend the law most egregiously will escape the most stringent remedy in the NLRB's arsenal."¹¹⁹

The effects of decisions like *Gourmet Foods* are only compounded by the extensive delays in imposing remedies in the first place. For example, between the years 1970 and 1978, the median unfair labor practice case-processing time (from the filing of a charge until its final disposition by the NLRB) was under 400 days.¹²⁰ Although the median case-processing record rose to between 400 and 500 days between 1978 and 1981, in the most recent years for which we have data, this record has worsened to a median case-processing time of over 600 days.¹²¹ Decisional delay reduces the likely costs imposed on a party that violates the Act, particularly when the remedy involves cease and desist orders or the reholding of an election as much as two to three years after the organizing drive has begun.

In short, the extensive delays in imposing remedies, the failure to raise the costs of remedies, and the continuous challenges posed by the increasing number and sophistication of employer unfair labor practices are likely to raise the clamor for stronger, more effective remedies to even newer heights. In essence, these problems may force society and labor tribunals to reassess the wisdom behind the remedial or make-whole philosophy of remedies mandated by the NLRA and cases interpreting it.¹²²

¹¹⁸ 270 N.L.R.B. at 580.

¹¹⁹ *Conair*, 721 F.2d at 1355. Interestingly, despite this recognition, the D.C. Circuit was unwilling to uphold the legitimacy of the Board's use of a non-majority bargaining order.

¹²⁰ The source of these data is the annual reports of the National Labor Relations Board, which have been published every year from 1936 to 1983.

¹²¹ Recently, there has been a backlog in the publication of NLRB Annual Reports. The most recent report available covers 1983.

¹²² The NLRB is given discretion to fashion remedies that effectuate the Act's purposes. The NLRA states that:

If upon the preponderance of testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative

V. NO-SOLICITATION RULES: AN ANACHRONISM IN THE TELECOMMUTER'S WORLD

Unlike the challenge of current exclusions from the Act and the distinctions drawn among employees, the legality of participation plans, the scope of bargaining, and remedial adequacy, new attacks on the meaningfulness and enforceability of no-solicitation and no-distribution rules are yet to begin. Nonetheless, these challenges are on the horizon, given changes in the workplace likely to accompany an expanding reliance on and use of work station computers, as well as emerging telecommunication networks and capabilities.

Restrictions on attempts to garner support for a union and to distribute union literature (termed "no-solicitation" and "no-distribution" rules), enforced during union organizing campaigns, are built on reasonably fixed notions of time and space. It is well-established that no-solicitation and no-distribution rules are presumptively valid if they are not discriminatorily applied and are enforced on company premises against employees on working time.¹²³ As the NLRB observed in *Peyton Packing*, "working time is for work."¹²⁴ Nevertheless, employees may generally solicit union support among their peers during nonwork time, such as breaks or lunch (when they are, in effect, nonworking employees), in nonwork areas.¹²⁵ The ability to distinguish company premises from territory outside of the firm, nonworking time from working time, and work areas from nonwork areas is central to the application and enforcement of these rules. In much the same way, the rule that outside organizers (nonemployees) may be denied access to an employer's property when reasonable access to employees may be gained through other means¹²⁶ is based on the notion that a line between

action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

29 U.S.C. § 160(c) (1982); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941).

¹²³ *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943), *enforced*, 142 F.2d 1009 (5th Cir.), *cert. denied*, 323 U.S. 730 (1944).

¹²⁴ *Id.*

¹²⁵ *Id.* Although such rules are presumptively lawful, special circumstances may justify broader prohibitions of no-solicitation rules. See, e.g., *United States Steel Corp.*, 223 N.L.R.B. 1246, 1248 (1976); R.E. WILLIAMS, *NLRB REGULATION OF ELECTION CONDUCT* 312-13 n.13 (1985). Rules against the distribution of union literature on company premises may be more strict than those that apply to solicitation alone. For a useful summary of these rules, see R.E. WILLIAMS, *supra*, at 312-23.

¹²⁶ See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

an employer's property and the area surrounding that property exists and may be identified. Also embedded in that rule is some view of what constitutes an alternative reasonable access to employees.

What the NLRB has discovered over time is that, despite the relative clarity of these rules, they are not always easy to apply, given the simplistic notions upon which they are based. As examples of the large array of questions that have arisen over these rules, the Board has been forced to deal with issues of whether nonwork time includes unscheduled breaks,¹²⁷ whether areas occupied by both nonworking employees and others, such as customers, constitute nonwork areas for the purposes of such rules,¹²⁸ whether off-duty employees should be treated as nonemployees (that is, as outside organizers) or as nonworking employees,¹²⁹ and about what constitutes a reasonable alternate access to employees.¹³⁰

These questions, among others, the inconsistent ways they have been answered, the logic behind according presumptive validity or invalidity to certain rules, and the underlying assumptions about what is the appropriate balance between employers' property rights and employees' organizational rights (used to develop these rules) have generated substantial criticism from legal scholars.¹³¹ Yet, more important for the purposes of this paper, the existence of these questions illustrates that, at least to some extent, the time and space constraints of solicitation rules cannot be easily fixed.

¹²⁷ See *I.F. Sales Co.*, 82 N.L.R.B. 137, 138 (1949), *enforced*, 188 F.2d 931 (6th Cir. 1951) (NLRB held that employees' unscheduled lunch breaks were nonwork time, and therefore solicitation could not be prohibited lawfully).

Substantial confusion about the treatment of working hours and working time has arisen and whether or not working time is generally understood to mean the time spent working, rather than the time at work. At least partly at issue is whether or not the employees will recognize that no-solicitation rules enforced on working time (which are presumptively lawful) cannot generally be used to prohibit solicitation by employees on nonwork time.

¹²⁸ *The Times Publishing Co.*, 231 N.L.R.B. 207, 208 (1977) (NLRB held that the employer could not lawfully prohibit union solicitation in a lobby used by customers).

¹²⁹ See *Tri-County Medical Center, Inc.*, 222 N.L.R.B. 1089 (1976); *GTE Lenkurt, Inc.*, 204 N.L.R.B. 921, 921 (1973).

¹³⁰ In fact, it is rarely the case that employees are viewed as inaccessible to outside organizers (that is, there are no other means of reasonable access to employees). See, e.g., *Belcher Towing Co.*, 238 N.L.R.B. 446 (1978); see also R.E. WILLIAMS, *supra* note 125, at 336-44.

¹³¹ See, e.g., R.E. WILLIAMS, *supra* note 125, at 311-45; Dereshinsky, *The Solicitation and Distribution Rules Of The NLRB*, 40 U. CIN. L. REV. 417 (1971); Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 MINN. L. REV. 505 (1965); Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964).

But if no-solicitation rules already manifest blind faith in the fixity of time and space, then the workplace changes associated with telecommunications networking are likely to provide insurmountable obstacles to the application and enforcement of such rules. To understand the challenges telecommunications pose for solicitation rules, we need only recognize that interfirm and intrafirm networks and systems of electronic mail are accessible by workstation computers, and provide a virtually costless (to the user) and instantaneous method of communicating with all users tied into that network. Thus, the use of telecommunications networks may prove to be a valuable organizing tool for unions.¹³² At the same time, however, the advantages of telecommunications may prove disastrous for solicitation and distribution rules, as they further challenge definitions of working time, working employees, work areas, and nonemployees, as well as the demarcation of the line between employers' property and the area outside of the firm. The precise form that this challenge will take depends, to a large degree, on whether the network established is intrafirm or interfirm, and whether telecommuters attempt to organize, as discussed below.

A. *Intrafirm Networks*

Many companies have adopted the technology that enables computer operators within their firm to contact one another. Although there do not appear to be precise estimates of the number of such companies or the number of users tied into such networks, a 1984 study estimated that over 24 million people use computers at work.¹³³ This number has probably grown since then and will continue to grow in the future.

But with the growth in the number of users and those having access to networks will come some thorny questions, as illustrated by the following example. An employee who uses electronic mail to notify and rally support on his break time for an upcoming union meeting will, in effect, be communicating with other operators. First, because the employee is clearly at his or her workstation, or in a work area, and the use of electronic mail may be viewed as akin to the distribution of union materials, may the employer law-

¹³² Little is currently known about the extent to which unions have organized through the airwaves. On the other hand, the potential for unionizing telecommuters has been considered. See *Union Membership Redefined: Prospects for "Organized" Telecommuters?*, 3 TELECOMMUTING REV. 10, 11 (1986).

¹³³ See *Census Bureau Report*, *supra* note 55, at 14.

fully prohibit the employee from this activity? Second, because all operators will likely not share the same break (or nonwork) time, then it is probable that this message will appear on the screen of some number of employees while they are on working time. Are these grounds for refusing to allow such activity? Third, given that many employees are able to do some of their work at home¹³⁴ and are able to access their workplace networks from home terminals, an at-home employee could attempt to communicate with employees working on the employer's premises. Will this employee then be viewed as a nonemployee (or outside organizer) and be lawfully denied access to the employer's premises? What if this employee were at work in his or her home (and, therefore, not technically off-duty) and was taking a "scheduled break" at the time he or she sent organizing messages to other operators?¹³⁵ And finally, to complicate these issues even more, what if this employee were at home and were seeking to organize other employees who were also working at their homes?

Although this final question raises complex issues dealt with under the section below on telecommuters' attempts to organize, it may be sufficient to note here that the question may involve a determination of whether or not employers' premises or property extend to off-site locations (such as employees' homes while they are on-line) for the purpose of no-solicitation rules. In other words, does the use of intrafirm networks for organizing purposes, which are financially established and maintained by employers, amount to an attempt to organize on employers' property, and may these activities be lawfully restricted by valid no-solicitation rules applicable at the traditional workplace? The essential point of these questions is to illustrate that current no-distribution and no-solicitation rules are probably ill-equipped to address such issues likely to arise in the telecommunications world.

B. *Interfirm Networks and Telecommuters*

Further wrinkles in and challenges to the meaningfulness of solicitation rules, in addition to those discussed in the context of

¹³⁴ See *supra* note 55. Moreover, a U.S.C. study in 1986 indicated that three percent of "mid-level" corporate employees in large corporations telecommute to work (that is, they work at home) at least one day per week. See Niles, *Telecommuting: The First 100 Years*, 5 TELECOMMUTING REV. 1, 3 (1988).

¹³⁵ For example, the employee might be paid by the hour and given fifteen minutes of paid break time for every two hours worked.

intrafirm networks, are introduced by the existence of interfirm networks and the possibility that telecommuters will attempt to organize. First, although there are likely fewer interfirm networks than intrafirm networks in existence, this number could grow if United States enterprises discovered that some forms of collaboration might be in their own best, long-run interest (and the interest of the United States economy, in general).¹³⁶ With the adoption of these networks, however, will come new opportunities to organize workers and important questions regarding the restriction of solicitation and distribution.

To illustrate these points, we can consider a scenario that could arise under a widely known interfirm network called BITNET, developed by the City University of New York. More than 1,000 universities and research establishments are tied into BITNET, which enables users to send electronic messages and files to users at other establishments. Therefore, it might be very easy for a person at University A to attempt to organize computer operators, for example, at University B (or many other universities at the same time) through BITNET. In fact, leaving aside the question of the organizers' unauthorized or authorized use of the computer facilities, all that might be required is that the organizer obtain an access code to University B and its "node" or establishment identification number; or the organizer may use query facilities or electronic phone directories to identify the user identifications of employees at University B currently logged onto the system. The organizer may then send messages directly to those employees. In either case, the ease with which this organizer from University A may contact University B's employees, in terms of both time and cost, will effectively give this outsider the same access to employees that an employee in University B would have to his or her own colleagues through an intrafirm network. Perhaps unlike an insider employee's attempts to solicit support among University B's employees, can the outsider from University A be lawfully prohibited from gaining access to or using his or her access to University B's employees? The answer to this question would seem to depend, at least in part, on whether or not the organizer is viewed as "trespassing" or encroaching on University B's property. In turn, this issue would

¹³⁶ Collaboration on research and development and information-sharing might benefit a domestic industry vis-a-vis its foreign competitors. Of course, the public good aspects of these networks, as well as the potential antitrust implication, might well discourage firms from participating in them.

appear to revolve around whether University B possesses any claim to the BITNET airwaves received on its property, because the organizer has not physically crossed any property lines. It cannot be gainsaid that this issue is likely to pose serious problems, as private property is a muddy construct in the context of a telecommunications network. The fact that an interfirm network may well be used by hundreds of organizations at any one point in time will cause additional confusion in the area of no-solicitation rules.

In short, interfirm networks such as BITNET, though providing valuable opportunities to unionize workers (by giving organizers an almost costless and instantaneous access to employees within and across many organizations), may pose additional obstacles to the meaningful application of no-solicitation rules. In addition to creating challenging time and space problems, these networks also blur the lines between or among organizations, obfuscating the issue of who owns what property and of what private property consists in a world of telecommunications.

Although it is difficult to imagine that the application of no-solicitation rules could be even more complex than the examples of organizing attempts through intra and interfirm networks discussed above, even further uncertainty and confusion may be caused by attempts of telecommuters to organize. For if the telecommuter works exclusively at home (and, therefore, would receive all of his or her electronic mail at home), then the employers' organizational boundaries become irrelevant. "Outside" organizing could flourish in this environment because, in effect, we would either view every organizer as an outsider or no organizer as an outsider (because no private property of the employer is at issue). It is indeed challenging to conceive of a lawful no-solicitation rule that could be promulgated in this environment that would completely deny access to a union organizer. This problem may become moot, however, if telecommuters are viewed as independent contractors and are, therefore, denied the protection of the NLRA.¹³⁷

In sum, the above questions may merely be a subset of the complex issues that will be faced by labor tribunals as they attempt to apply current no-solicitation and no-distribution rules to a workplace that is increasingly reliant on computers. Stated simply, the "air waves" are difficult to pin down; they can escape easy classification according to time and space. But even assuming *arguendo*

¹³⁷ See *supra* notes 55-58 and accompanying text for a brief discussion of this point.

that agreement could be reached on organizational boundaries and on the meaning of working time and work areas among users of telecommunication technology, such an agreement might amount to a pyrrhic victory for no-solicitation rules. This is because perhaps an even greater challenge than how to define what constitutes permissible and impermissible solicitations in the telecommunications world is the question of how to enforce those rules. For although it is one thing to decide that an employee may not use electronic mail to solicit union support while working, it is quite another thing to monitor all of the transmissions of large numbers of employees in highly automated offices and "mobile" workplaces all of the time. The enforcement of such no-solicitation and no-distribution rules may well require a tighter supervision, more akin to the futuristic, omnipresent "big brother," than we have ever witnessed in industry. Alternatively, such rules may be neglected altogether.

VI. SOME FINAL THOUGHTS

As Hayek has implied, regulations emanating from legislation almost appear to presuppose that the context in which the law operates is static.¹³⁸ Yet, for a law to retain its vitality or its meaningfulness, it must keep up with the changes in that context. Indeed, the industrial context is dynamic. It cannot be gainsaid that given the age of the NLRA, it has been forced to withstand many challenges posed by changes in the social, political, and economic forces that shape industry. Among these changes have been shifts from a manufacturing to a service economy, the globalization of markets, increasing labor force participation among women, increasing educational attainment of employees, and technological advances including automation and the development and widespread use of microprocessing technology, to name just a few. But despite the gravity of these developments, the words of the NLRA have remained unchanged. Instead, it is presumed that to withstand these tests of time, labor tribunals have used their ability to alter interpretations of exactly the same statutory language. Indeed, a sanguine view of these shifting interpretations is that they reflect the underlying social consensus at any point in time.¹³⁹

¹³⁸ This argument is implicit in much of Hayek's book, *supra* note 6. But see, in particular, his discussion of the "Law of Legislation," *id.* at 124-44.

¹³⁹ A less charitable view of these shifting interpretations is that labor tribunals decide cases in ways that suit their own predilections about which party should be "favored" in the bargaining context or their own vision of the appropriate place of collective bargaining and

The fine tuning of labor law that can be achieved through subtle reinterpretations of statutory language (and rules derived therefrom), however, may be insufficient to ensure that a labor law enacted so many years ago is able to keep pace with industrial reality today. It is the premise of this paper that forces such as the increasing professionalization of the workforce, the blurring of occupational distinctions, the increasing education and expanding interests among employees, the continuing challenge to the competitiveness of United States enterprises, the growing number and sophistication of employer antiunion tactics, and emerging telecommunications networks and capabilities have resulted in a new social consensus that may not be sufficiently accommodated by subtle changes in the law. Instead, labor tribunals will be forced to confront directly major issues involving who should receive and who should be denied the Act's protections, the legality of employee participation plans, the scope of the compulsory bargaining obligation, the adequacy of remedies, and the appropriateness of no-solicitation rules. This paper has underscored those contentious areas of the law likely to pose challenges for the future of labor law. But beyond the general observation that the areas covered here are likely to undergo continued challenge and future change are two specific but related observations.

First, a consequence of the neglect by labor tribunals (or even the legislature) to address these challenges in ways other than on a case-by-case basis is the destabilization of actual or potential union-management relationships. Critical uncertainties about who is covered by the Act, the legality of many union avoidance tactics, and what must be negotiated at the collective bargaining table, combined with the lack of deterrence to engage in unfair labor practices, can only introduce or invite further questioning of an already troubled labor movement. Moreover, they serve to distract industry from

unions in society. See, e.g., Sockell & Delaney, *supra* note 114, at 41-43. More generally, it can be argued that the NLRB has promoted the views of the political administration in power. Implicit support for this view may be found in the plethora of articles devoted to a description of the policies of the NLRB under different Presidents. See, e.g., Scher, *Regulatory Agency Control Through Appointment: The Case of the Eisenhower Administration and the NLRB*, 23 J. POL. 677 (1961); Stern, *The Kennedy Policy: A Favorable View*, 3 INDUS. REL. 21 (1964); Vladeck, *The Nixon Board and Retail Bargaining Units*, 61 CORNELL L. REV. 416 (1976). For an empirical study of the favoritism demonstrated by Republican and Democratic appointees to the NLRB, see Cooke & Gautchi, *Political Bias in the NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539 (1982).

meeting the challenge of foreign competition and deregulation¹⁴⁰ by encouraging litigation among employers who concentrate instead on minimizing their bargaining obligations. At a time when some have argued that competition has never been more fierce, and management has been held increasingly accountable by constituencies other than labor,¹⁴¹ management's potential preoccupation with "delegitimizing" organized labor may prove especially costly to employers and to the United States industry overall.

Second, although it is unclear how labor tribunals will deal with challenges to no-solicitation rules, based on recent decisions by labor tribunals in other areas of the law, these controversial aspects of the law appear to be moving in a similar direction. Specifically, decreases in the Act's coverage, the scope of mandatory bargaining, and remedial effectiveness to discourage unfair labor practices, combined with more liberal allowance of participation plans or union alternatives, are generally unfavorable to unions. In light of the centrality of these areas of the law to the NLRA, this trend would seem to suggest that the usefulness and appropriate place of unions and collective bargaining in contemporary society are being challenged. That underlying questioning, as well as views on the ability and limitations of workers to contribute directly or indirectly (through representation) to the organizations for which they work, are both likely to play roles in shaping the future of labor law in general. For now, what is clear is that, in deciding just what unions should do, how they should perform that role, on whose behalf they should be empowered to act, as well as what protections and advantages unions should be given to carry out their missions (that is, deciding questions of bargaining scope, remedies, exclusions, the legality of participation plans, and the future of solicitation rules) labor tribunals will be forced to reassess the wisdom behind the very fabric of and assumptions underlying United States labor law.

In the end, regardless of whether or not labor tribunals or legislators directly confront these challenges, they will be making

¹⁴⁰ For a similar conclusion based on different areas of the law, see Gould, *Fifty Years under the National Labor Relations Act: A Retrospective View*, 37 *LAB. L.J.* 235 (1986).

¹⁴¹ See KUHN & SHRIVER, *MANAGERS AND NEW CORPORATE CONSTITUENCIES: SOCIAL RESPONSIBILITY AND A BUSINESS ETHIC FOR THE NINETIES* (forthcoming). Kuhn and Shriver argue that it would be in management's best, long-run interest to stop challenging the legitimacy of constituencies (or refusing to acknowledge their existence), whose support management needs to fend off challenges, and demands, from shareholders. See, in particular, Chapter 5, "The Socially Responsible, Autonomous Corporation."

choices about the future of the NLRA and of unionism. An unwillingness to take account of industrial developments in the application and interpretation of the Act may amount to a willingness to accept its increasing meaninglessness or inappropriateness in modern times. Because unionism may still fail to accord with underlying business norms, narrowly defined, this neglect of the legal framework undergirding collective bargaining may further contribute to a withering away of unionism.¹⁴² Alternatively, the choice to reinvigorate the NLRA, whether by labor tribunals or legislative reconsideration, would reaffirm the value and place of unions in society.

¹⁴² It might be argued that collective bargaining and unions are inconsistent with management's view of its right to make unilateral decisions in the running of enterprises. This argument is examined in depth in N.W. CHAMBERLAIN, *UNION CHALLENGE TO MANAGEMENT CONTROL* (1948); N.W. CHAMBERLAIN, *LABOR* (1958). As well, it might be argued that collective action runs contrary to the individualistic achievement orientation of American workers, in general. For a history and discussion of those attitudes, see S. LIPSET, *THE FIRST NEW NATION* 170-99 (1963). Of course, that collective bargaining may be inconsistent with those norms does not necessarily mean that unions, or the NLRA, which fosters their formulation, are undesirable. Indeed, one can argue that the NLRA was enacted despite these norms because the Act and unionism are consistent with other perhaps more widely shared social norms, such as the institutionalization of conflict, the reduction of disorderly industrial strife, and the facilitation of employee participation in organizational decision making, among other norms. Because of a potential conflict in the more narrowly defined business norms (among managers and employees) and broader social norms, for unionism to continue to thrive, the vitality of the NLRA would need to be enhanced.

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