CHAPTER 3

THE NATIONAL LABOR RELATIONS ACT: 1935-1985

I. MILESTONE OR MILLSTONE: THE WAGNER ACT AT FIFTY

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Introduction

If there is any one observation that can be made with some degree of confidence during this, the fiftieth anniversary year of the National Labor Relations Act, it is that the authors of the Act would be mightily surprised to hear who is saying what about their offspring.[1] The business community, which excoriated the Wagner Act as the most radical feature of the New Deal, now praises the balanced and constructive character of our legislation. The "God-damned Labor Board", to use Fortune Magazine's sobriquet of 1938, is now applauded by management attorneys for its moderate and even-handed jurisprudence. Meanwhile, the Democratic supporters of the union movement in Congress have just issued a report entitled "Has Labor Law Failed?": their answer to their question is, most emphatically, "Yes!" More and more union leaders—up to and including Lane Kirkland, President of the AFL-CIO—are saying that labor would be better off if the Board were disbanded, the Act repealed, and we were all "to return to the law of the jungle."

I suspect that one explanation for these differences of view is that the two sides are talking about quite different parts of our labor law system. Business leaders tend to focus on that part of

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Editor's note: Lawrence Gold, Esq., General Counsel, AFL-CIO, also was a member of the panel but did not present a formal paper.

[1] A revealing set of capsule comments about the Act and the Board is collected in a BNA, Inc. Special Report, *NLRB at 50* (1985). More detailed testimony and writings are collected in the published volume of the Joint Subcommittee Hearings of the House of Representatives, *Has Labor Law Failed?* (1985).

the legislation which governs established labor-management relationships. Here I believe it is true that our jurisprudence has become progressively more sophisticated as the relationships have become more civilized (and the institution of the National Academy of Arbitrators is some testimonial to that fact). When labor leaders speak of our law and its administration, though, they have in mind those rules which are supposed to control the trench warfare of the representation struggle with nonunion firms who are determined to stay that way. Since, as we shall see, American unions are now replacing nowhere near the number of members they lose every year through the normal attrition process within our changing economy, the union leadership tends naturally to blame the statute which historically was supposed to encourage and protect the right to union representation.

Now fifty years old, modern labor law is a vast, intricate subject. One has to be selective in deciding what to talk about. I shall focus my attention on the "representation" phase of the law, for at least two reasons. First, this is the part of the NLRA which actually was enacted by the Wagner Act whose fiftieth anniversary we are celebrating this year. In a sense, this part of the law has logical priority as well: however sophisticated the legal regulation of established labor-management relationships—including the arbitral elaboration and administration of a law of the collective agreement—if there are fewer and fewer of these relationships being created, eventually that ornate legal edifice will be no more than an elegant tombstone. And as we shall see, that is no longer just idle speculation.[2]

Any critical appraisal of how the law now deals with the representation contest must address a number of distinct questions:

(i) How are American unions actually faring under the NLRA in securing representation rights for nonunion workers?

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[2]An additional reason is that this is the area of American labor law where I have done the bulk of my own research and writing. This research is contained in Weiler, *Promises to Keep: Securing Workers' Right to Self-Organization Under the NLRA,* 96 Harv. L. Rev. 1769 (1983), which deals with the representation campaign, and Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation,* 98 Harv. L. Rev. (1984), dealing with the negotiation of the first contract. In this paper I shall try to distill my earlier analysis and conclusions and place them in a somewhat broader perspective. Since in those articles I canvassed much of the relevant material and literature, I shall not here repeat the citations to all my sources. Where appropriate, though, I will update some of the earlier evidence in footnotes to this piece.

(ii) Is the decline in union success due simply to diminishing worker interest in the institution, or is it also due to increasing employer resistance?

(iii) To the extent that the law has failed to contain illegitimate management tactics, what are the specific weaknesses in the Act?

(iv) Whatever its source, is the erosion of private sector collective bargaining actually such a bad thing, such that we should be prepared to undertake serious reform of the NLRA to give union representation a fairer chance?

(v) If we were inclined to revise the statute to try to make good on the promise made by Senator Wagner and his colleagues fifty years ago, what general strategies, what specific measures, offer the best prospects for success?

As this lengthy list indicates, a serious appraisal of even this one part of our national labor law is a challenging undertaking. In this paper I can do no more than sketch briefly the evidence and arguments relative to each issue.

The Decline in Union Representation

A striking fact which emerges from a review of the course of union representation under the NLRA is that the law has displayed something of a split personality in its fifty-year life. For the first two decades, total union membership increased at a phenomenal rate: a more than five-fold jump in absolute numbers from 1935 to 1955, and from less than 15 percent of the total work force to more than 35 percent. Suddenly, though, events took an entirely different course—at least in the private, nonagricultural sector which is the preserve of the NLRA. Not only has the private sector union membership actually declined somewhat in absolute numbers in the last three decades, but its share of the ever-increasing labor force has been cut fully in half: from over 38 percent in 1954 to just 19 percent in 1984.[3] Absent

[3] I should note briefly some of the complications in tracing union membership figures over time. From 1935 to 1955, Bureau of Labor Statistics data are not broken down by public and private sectors, so the figures I have given are for the economy as a whole. Up to the mid-Fifties, though, the bulk of that union membership and union density was concentrated in the private sector (15.9 out of 16.8 million union members in 1955). From 1955 to 1978, BLS reported that private sector union membership edged up slightly from 15.9 to 16.6 million members. Since then, BLS has discontinued its series on union membership, leaving us with the alternative of the Consumer Population Survey: see Adams, *Changing Employment Patterns of Organized Workers*, Monthly Lab. Rev. 25 (Feb. 1985). A complication, though, is that the CPS surveys only "employed wage and salary workers", and thus does not count the roughly 10% of union members who are now self-

some dramatic changes, by the turn of this century the supposed *right* to engage in collective bargaining will be a largely illusory option for nonunion private sector workers. No wonder, then, the highly uncomplimentary remarks by labor leaders, politicians, and many others about a federal law which appears to have allowed this to happen.

In my own view, the story is rather more complicated than that. As initial support for that claim, I offer a piece of evidence which may be especially telling in a group such as the National Academy of Arbitrators: neutrals from both the United States and Canada who practice within an institution that performs almost exactly the same function within very similar labor-management systems on both sides of our border. The fact is that the Wagner Act model was imported soon thereafter into Canada, where it has remained ever since at the core of Canadian labor law. However, in Canada one does not find that sharp reversal in union representation trends. Initially, overall union density in Canada tracked the American figures very closely, both during the rise from 1935 through 1955, and then through the slight dip into the early 1960s. Since then, though, the trend in Canada has been in exactly the opposite direction to that of the United States, so that by the early 1980s, 40 percent of the Canadian work force are now union members and 45 percent are covered by collective agreements (indeed, over 50 percent, if one counts only nonmanagerial employees who are eligible to be in bargaining units). Of course, these figures include the public sector, which has grown proportionately as fast in Canada as in the United States. The truly startling contrast between the two countries consists in the fact that the very same International Unions which operate in manufacturing, construction, and other areas of the private sector economy, unions whose membership rolls have been hemorrhaging in the United States, have enjoyed growth rates in Canada of 3 to 4 percent *a year* for the last two decades.[4] I believe this Canadian experience is a useful mirror to

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employed, unemployed, laid off or retired, although the latter were included in the earlier BLS figures. As of 1984, the CPS reports that there were 11.8 million private sector wage and salary workers who were union members, or 15.6% of that segment of the labor force. Suppose we were to add to those membership totals *all* the additional two million union members who would be counted by BLS, in order to make the two series more parallel over time. This would bring the total "private sector" union membership to nearly 14 million. However, union density under the NLRA would still be under 19%, or less than half of what it was just 30 years before.

[4]The sources for these Canadian figures can be found in the comprehensive review of union density trends in Canada by Kumar, *Union Growth in Canada: Retrospect and Prospect*

hold up to the American. It helps sharpen our sense of precisely what role, if any, the current law might have played in the United States, and also our views about what might legitimately be done to turn the situation around.

Changes in the Work Force

Needless to say, finding out what the statistics say is only the beginning of understanding of this issue. Interpreting what the figures *mean* is much more important. The natural reaction is that American workers—apparently unlike their Canadian counterparts—are no longer interested in union representation. We do know that Gallup Polls exhibit a considerable drop in general public approval of unions over the last 30 years.[5] At the same time, the traditional stronghold of American unionism—the older, male, blue-collar workers in the "smokestack" industries in the northern United States—have constituted a declining proportion of the work force, while those sectors where unions have always been weak—the younger, female, white-collar workers employed in the service industries in the south—have shown the sharpest employment growth. Given that the purpose of national labor law is to protect worker choice about union representation, not to foist the institution upon groups which would rather not have it, these additional factors suggest that while the unfavorable trends in union density certainly do represent a major problem for the unions and their leaders, they are not something which public policy can or should do anything about.

However, further scrutiny of this supposedly "natural" explanation for union decline—the demographic and attitudinal changes in the work force—shows that it cannot be anything near the whole story.

(December, 1984), a study prepared for the Royal Commission on the Economic Union and Development Prospects for Canada. Should anyone suspect that this much higher level of union density in Canada is due to its industries and jobs being more heavily concentrated in traditionally unionized sectors, the fact is that if Canada had the same industrial distribution as the United States, its union density would actually be 4 or 5 percentage points *higher* than it now is: *see* Meltz, *Labor Movements in Canada and the United States, Are They Really That Different?* (Unpublished paper: July, 1983).

[5]The Gallup Poll in 1953 found that 75% of Americans approved of unions versus 18% who disapproved, while in 1981, the ratio was 55% to 35%. In other words, the approval/disapproval margin in favor of unions dipped from 63% to 20% over the same three decades in which the union share of the work force was also declining. These and other polling data I report in this section are to be found in Medoff, *Study for AFL-CIO on Public's Image of Unions*, 1984 Daily Lab. Rep. (BNA) 247:D-1.

(i) In-depth polling indicates that much of the general public disapproval of unions relates to the actions and performance of their leaders: in particular, their supposedly undue influence upon public affairs (something a recent presidential candidate has just experienced for himself). There does remain a very high level of acceptance of the right of workers to join unions and an appreciation of the need for union representation in voicing and solving employee grievances in the workplace. Indeed, there is a remarkably high degree of approval of the performance of the institution by union members who see how it operates for themselves.[6] And roughly one third the nonunion labor force—more than 25 million workers—say they would vote for union representation right now if offered the opportunity.

(ii) Nor is there any particular antipathy towards collective bargaining within the newer, female, white-collar, service sectors of the work force. These are exactly the kinds of workers—e.g., teachers and nurses—who have been at the vanguard in the rise of public sector unionism in this country. As well, among the nonunion work force as a whole, they are actually *more* likely than male, blue-collar workers in the manufacturing sectors to be interested in union representation at the moment.

Thus, notwithstanding the substantial changes in both public attitudes and the composition of the work force, there remains among American workers substantial approval of and interest in the institution of collective bargaining.

Employer Resistance to Union Representation

Why is that pool of employee interest apparently so incapable of being tapped by unions? To some considerable extent, this is due to the failings of American unions: whether it be lack of

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[6]A Lou Harris poll in the summer of 1984 found an 81% to 11% acceptance of the right of workers to join unions, and an 82% to 15% endorsement of unions as the necessary voice of employees in solving their grievances at work; union members answered in the affirmative by even higher margins. In that latter vein, a recent study found that among male workers, 87% of current union members would vote for union representation. Indeed, fully 82% of workers who were covered by a collective agreement but had chosen not to join their union would vote for collective bargaining nonetheless: see Hills, *The Attitudes of Union and Non-Union Male Workers Towards Union Representation*, 38 Indus. & Lab. Rel. Rev. 179 (1985). I might add that 28% of the work force—or 27 million workers—are former union members who are no longer in a union, almost all because they have left their earlier jobs in a union shop.

interest in or inability effectively to organize, especially outside the union's traditional bailiwicks, or the unwillingness of the movement to address some of the blemishes which lead to the rejection of unions by many employees who might be attracted to the idea of a collective worker voice. This is an issue to which I shall return near the end of this paper. Again, though, I would be loathe to put too much weight on this factor alone. Recall, again, the Canadian figures which show that the self-same International Unions—the Teamsters, the Steelworkers, the Carpenters, the Electrical Workers, the Auto Workers—grew steadily in Canada from the early sixties through the eighties, while membership levels in their American sections first stagnated and are now eroding.

Actually, there is a situation against which to test this hypothesis. Whatever the general reluctance of American workers or the incapacities of our unions, several thousand successful organizing drives *are* conducted every year: a significant number—usually a good majority—of the employees in a shop are signed up by a union which then seeks to use the procedures under the NLRA to seal its representation rights. The law presents two further hurdles. The union first has to win a secret ballot election to get NLRB certification as the legal bargaining agent for the unit. Then it has to win a first collective agreement from the employer in order to secure a real presence within the plant: with the union having an influence on wage rates and working conditions, deploying stewards and grievance committees, enjoying some form of union security, and so forth. Back in the early fifties, American unions would win certification elections for about 80 percent of the workers in potential bargaining units, and then obtain first contracts from nearly 90 percent of these units (these being roughly the same percentages as obtain in Canada right now). By 1980, though, American unions were winning certifications covering less than 40 percent of the potential unit members, and then translating these hard-won certifications into first contracts not much more than half the time. The remarkable fact, then, is that the current NLRA procedures yield meaningful representation rights for only about *one fifth* of the workers who enter into it; and this, recall, in places where the union conducted an apparently successful organizing drive just a few months before.

Throughout this process, there operates another factor in the equation which I have not yet mentioned: employer resistance to

collective bargaining by its employees. By that phenomenon I mean not the behavior of the benign employer which provides its employees with both decent pay and working conditions and satisfactory procedures for hearing their concerns and settling their grievances; all designed, inter alia, to make the union alternative seem *unnecessary*. Such an employer is rarely the subject of a successful union organizing drive, and thus does not even appear in the NLRB statistics which I have given. I refer rather to the employer whose pay and conditions do produce sufficient discontent among its employees that they are fertile ground for initial wooing by the organizer; but when notice of the certification petition is received from the NLRB its management sets out on a vigorous campaign to make union representation an *unpalatable* prospect for its employees. Of course, the Act does make many of these tactics clearly illegal. For my purposes here, though, the issue is the actual incidence of this behavior and its effects in the real world.

What has happened in that regard since the mid fifties when the decline in overall union density and in union success before the NLRB first set in?

(i) Suppose we ignore the relatively marginal Section 8 (a)(1) violations of the statute by employers—threats, interrogation, benefits and inducements, and so on—and focus just on discriminatory discharges and other forms of tangible reprisal against union supporters. Such complaints under Section 8 (a)(3) of the NLRA were up *sixfold* from 1955 to 1980. If we control for the increase in the number of representation elections in that period (since these provide the setting for that behavior), the increase was still 350 percent; from seven Section 8 (a)(3) complaints per ten elections in 1955 to twenty-five per ten elections in 1980.

(ii) The incidence of employer bargaining in bad faith seems to have grown twice as fast during the same period; from a ratio of four charges under Section 8 (a)(5) for every ten new certifications in 1955 to twenty-eight in 1980 (or a 700 percent increase in that index).

(iii) Of course, it is one thing to file a charge under the Act and another to substantiate it. The majority of unfair labor practice charges are *not* valid. The fact is, though, that the proportion of charges against employers which the Board rated as "meritorious" rose by one third during the period 1955 to 1980 when the absolute number of charges was itself

spiralling. As tangible a measure as one can find of this phenomenon is that the Board secured reinstatement in 1980 for more than 10,000 illegally fired workers, more than ten times the number in the mid fifties. When one puts this figure side by side with the total of 200,000 workers who voted for union representation elections that year, the current dimensions of such employer action are dismaying indeed.[7]

Given this remarkable rise in illegal employer resistance to collective bargaining for its employees, the natural assumption is that such resistance has played a major role in the decline in union success in securing certification or first contracts in units of employees where initially there was substantial interest in union representation. That inference is not inevitable, though. One might also surmise that employer pressure is either not that influential in changing employee minds, or that it is as likely to backfire as it is to succeed. On that view, the two statistical trends which I have traced over the last three decades would be just coincidence. That position seemed to find firm support in the notable research effort of Getman, Goldberg, and Brett, *Union Representation Elections: Law and Reality* from the mid seventies. These three scholars did an in-depth study of thirty-one election campaigns and were unable to find any statistically significant proof that illegal employer behavior made employees less likely to vote for union representation. Certainly that conclusion, if true, would suggest quite a different point of view about the current labor law and its reform.

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[7]I must add two qualifications to these figures. First, some proportion of § 8(a)(3) discharges do occur outside the representation campaign, and this proportion was likely increasing in the late seventies: compare the 10% estimate by the NLRB in 1978 with the nearly 40% estimate by the GAO in 1982. At the same time, there is a substantial number of employees who are fired during an organizing drive, but either do not make a § 8(a)(3) claim or will settle for back pay without reinstatement because they do not want to go back to that job (there were a total of 15,642 back pay recipients in FY 1980 versus a total of 10,033 reinstatees). To some extent at least, this latter group will offset the portion of the "reinstatee" category which stems from incidents outside the representation campaign.

Secondly, the basic research which I have reported extends through FY 1980 (actually this takes us up to Sept. 30, 1981). The last Annual Report which the NLRB has issued is for FY 1981, which covers the story through Sept. 1982. In that latter year, the number of reinstatees did drop by over a third, to 6,463 (though at the same time, the total of back pay recipients jumped by two thirds, to 26,091). However, the number of elections also dropped, as did the number of votes cast for unions (as one might have anticipated in the midst of the Great Volcker Recession). Thus the ratio of § 8(a)(3) charges to certification elections continued to rise, from 2.50 in FY 1980 to 2.73 in FY 1981, and that of § 8(a)(5) charges to new certifications rose even faster, from 2.82 to 3.30. While the ratio of reinstatees to union voters dropped somewhat, from one in 20 to one in 26, the ratio of back pay recipients to union voters doubled, from one in 13 to one in 6.5 voters. Clearly, then, unions can find no aid and comfort in the recent data.

However, there is now a considerable body of empirical research to the contrary. Some of this research consists in econometric studies of the incidence of both unfair labor practices and election outcomes over time and across states, all of which find significant causal connections between the two patterns of behavior. There is also another in-depth study of a different sample of elections, which found that discriminatory discharges did have a marked effect on union success not just in the representation contest but also in the union's ability to secure a first contract for those units in which it did win certification. Indeed, the Getman, et al. data have been thoroughly reanalyzed, this time looking for the effect of employer behavior on the actual election outcome rather than just on the change in average employee voting behavior (the latter is the key because representation election results are usually decided by rather narrow voting margins). The conclusion was that even in this sample, vigorous and illegal management resistance to unionization did have a pronounced impact on the overall election results.[8] All in all, we are safe in relying on our common sense intuition that so many employers would not have invested so many resources in

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[8]Ellwood & Fine, *The Impact of Right-To-Work Laws on Union Organizing*, 18-22 (NBER, 1983) found that states with a rate of unfair labor practices per election which was one standard deviation higher than the national average had union organization rates that were 10% lower. Freeman & Medoff, *What Do Unions Do?* (New York: Basic Books, 1984), 238, found that a 10% increase in unfair labor practices per election reduced the proportion of workers newly organized in NLRB elections by either 2.5%, 3.4%, or 6% (depending on the measure used); which implied that this factor itself produced somewhere between 30% and 50% of the total decline in union density from 1950 through 1980. Seeber & Cooke, *The Decline of Union Success in NLRB Representation Elections*, 22 Indus. Rel. 33, 43 (1983), using as a proxy for management resistance the decline in "consent" elections, found that each 1% decrease in "consent" elections by employers was associated with a .5% decline in union success in all elections. This factor alone would account for 20 percentage points in the overall decline in union election success from 1963 through 1978.

Cooke, *Illegal Discharge of Union Activists: Its Toll on Union Organizing and Policy Implications* (Unpublished paper: 1985), looked at NLRB elections in Region 25 (Indiana) in 1979 and 1980 and found that a § 8(a)(3) charge reduced union election success by 17 percentage points. Cooke, *The Failure to Negotiate First Contracts: Determinants and Policy Implications*, 38 Indus. & Lab. Rel. Rev. 163–178 (1985), found that a discriminatory discharge would reduce the likelihood of a union getting a first collective agreement by 44 percentage points, considerably more than even the 25 percentage point reduction produced by employer bargaining in bad faith. The combined effect of a discriminatory discharge upon union success at these two successive stages in the NLRA process needs no further comment.

Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 Indus. & Lab. Rel. Rev. 560, 572–573 (1983), found that in the Getman, et. al. sample, if all employers had engaged in the most intense and illegal campaign found in the sample, unions would have won 4 to 5% of the elections studied, if no employers had committed any unfair labor practices at all, the unions would have won 44 to 47% of all these elections, while if there had been no campaign at all, the union would have won 66 to 67%.

fighting unions in the representation campaign without that having had a pronounced favorable impact on the overall outcome of the struggle.

While I have emphasized the significance of employer violations of the National Labor Relations Act, I do not mean to impugn the reputation of American employers generally. The fact is that only a minority of firms which are caught up in representation campaigns or first contract negotiations actually do take retaliatory action against union supporters. (I calculate that in 1980 and 1981 the NLRB obtained either reinstatement or a position on a preferential hiring list for an illegally discharged employee in roughly *one third* the representation cases of those years.) Indeed, when one appreciates how successful this tactic can be and how weak the tangible legal sanctions are against it (as to which more later), one can judge the level of *voluntary* adherence by so much of American management to the principles of the Wagner Act to be remarkably high.

At the same time, one must not assume that the impact of antiunion discrimination is felt only in those units where the behavior occurs. After all, the nonunion state is the "natural," pre-existing employment regime. Even with an entirely hands-off attitude by management, it takes a pretty strong level of dissatisfaction before a group of employees will venture into the uncharted waters of collective bargaining to try to improve their situation. But right now, a large proportion of American workers believe that their employers will strongly resist that step, that there will be a heated and divisive campaign within the unit, and that there is a real chance of retaliation against those identified as union supporters.[9] There is nothing paranoid about those fears: the vast majority of employers do strongly oppose unionization in the campaign, and a substantial minority resort to dirty tactics to try to win the battle. The widespread knowledge that this is happening just has to have a strongly inhibiting effect on any group of workers entertaining the idea of union representation, even if their own management would religiously respect the NLRA's guarantee of worker self-determination. In my own

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[9]The Lou Harris poll asked nonunion workers why they are not now members of unions: while 33% of the respondents said they did not want to join a union, another 38% said it was because of company pressure. Apparently 59% of nonunion, nonmanagerial workers feel that there would be trouble during the campaign between union supporters and opponents, and fully 43% believe that *their* employer would fire, demote, or otherwise make life miserable for union supporters in a representation campaign.

view, this subtler, indirect effect of the rise of illegal employer resistance to collective bargaining may be an even more important barrier to the exercise by nonunion, private sector workers of that option under the Act.

The Weakness of National Labor Law

A. The Board

The conclusions of the previous section simply raise the next set of questions. After all, this kind of employer behavior is supposed to be in violation of a statute enacted fifty years ago. The NLRA announces, clearly and unmistakably, that workers have the *right* to union representation if they want it: free of any employer interference, let alone coercion or discrimination. Why, then, has national labor law apparently done so poorly in making good on that promise?

In the last two or three years, a number of politicians, pundits, and even some labor leaders who should know better, have singled out as a prime culprit the "Reagan" Labor Board. It is true that the Reagan appointees are pretty proemployer in their sentiments. They came to the Board with a definite program to roll back a number of decisions of their Carter Board predecessor which had been favorable to unions and workers. But whatever one might say about the Reagan Board jurisprudence—and I for one find much of it attractive[10]—none of these decisions

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[10]I do so at least to the extent that many of these decisions pare away some of the elaborate network of legal regulation of the collective bargaining and employment relationship. Recent decisions which illustrate this theme include:

1. *Meyer Indus.*, 115 LRRM 1025 (1984), *remanded sub nom. Prill v. NLRB*, 118 LRRM 2649 (D.C. 1985), and *Sears Roebuck*, 118 LRRM 1329 (1985), which exclude from the scope of protected concerted activity under § 7 of the Act the claims of nonunion workers when the latter are basically acting on their own.
2. *United Technologies*, 115 LRRM 1049 (1984) and *Olin Corp.*, 115 LRRM 1056 (1984), which hold that union members covered by collective agreements should be required to rely primarily on the grievance arbitration procedure to secure their statutory rights under the Act.
3. *Midland Nat'l Life Ins.*, 110 LRRM 1489 (1982), which gets the Board out of the time-consuming job of scrutinizing the accuracy of the literature and speeches in the campaign.

I do not mean to naively picture the Reagan Board as engaged in no more than the neutral deregulation of labor law, rather than in a substantive tilt to the employer side. To dispel any such illusions, it is sufficient to mention *Neufeld-Porsche-Audi*, 116 LRRM 1257 (1984), in which the Board tightened the legal control on union discipline of strike breakers, or *Gulton Electro-Voice*, 112 LRRM 1361 (1983), in which the Board expanded the legal regulation of superseniority clauses freely negotiated by unions and employers. My point, simply, is that whatever the actual motivation of the Reagan Board, there is a thread running through its rulings which should not only be applauded but expanded. We need

has anything to do with the plight of union organizing under the Act. The undeniable fact is that the steep rise in employer resistance and the steady decline in union success at the Board had developed during the twenty-five years before President Reagan was even elected. These trends were especially pronounced during the Carter Administration, notwithstanding the numerous victories which the Carter Board awarded unions and their attorneys. The lesson from this history is that the flaws in our national labor law are buried deep in the structure of the statute, which has and will take its toll irrespective of the current political complexion of the Board.

B. The Act

When we turn our attention to the Act, again the problem is not to be found in the substantive rules which define the scope of permissible behavior in the campaign and at the bargaining table. Even after some discreet pruning by the Reagan Board, there is no shortage of such legal doctrines, nor of work to be performed by labor lawyers. Indeed, the major contemporary problem is the threat (and the reality) of discriminatory discharge of union adherents, which is clearly prohibited on the face of the statute. The problem is that this standard of behavior which Congress wrote into the Wagner Act a half century ago, and which the Supreme Court ratified in *Jones and Laughlin* two years later, seems just as far from being realized now as it was then. To understand why, we must focus on the remedial scheme of the NLRA.

Any remedial regime consists of two components: the ultimate sanctions for violating the law and the procedural mechanisms through which these are administered. The precise source of the weakness of our labor law is the *conjunction* of certain characteristic weaknesses along these two dimensions.

To the outside observer, the legal consequences for violating the Act might seem quite mild. If an employer deliberately fires a number of key union members during the midst of a representation campaign, there are no criminal consequences for this

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to sharply scale back on the use of the cumbersome, badly clogged NLRB machinery, rather than try to put it into motion to resolve every plausible grievance which employees may have in the work place. Only in this way can we give the necessary priority to what I take to be the central focus of § 8(a) of the Act, the ban on discriminatory discharge of union supporters at the representation and first contract stage, and thus save the very institution upon which stands all the rest of our elaborate labor law.

action, not even monetary fines. There is just a right of civil compensation for the victims. Even then, the employees who have been fired have no right to sue for general damages for consequential economic losses or emotional trauma. The employees can collect just the net back pay which they have lost, after they have taken reasonable steps to mitigate their losses by finding another job in the interim. Such back-pay awards under the Act average about $2,000 apiece, hardly a meaningful deterrent to an employer determined to keep a union out of its plant by fair means or foul.

This feature is no accident. From the outset, our national labor policy has deliberately taken a different remedial tack. We have concentrated on repairing the harm to the victim rather than imposing punitive sanctions upon the violator. More important, even, we have preferred to repair the harm "in kind" rather than "in cash." Thus, if a key union supporter is fired, the primary relief offered by the Board is reinstatement of the employee in his job, rather than a large lump sum award for the permanent loss of that job. If the union loses the election as well, the typical remedy from the Board is installation of the union as bargaining agent in the plant, rather than a monetary "make whole" award to the unit and the union for the loss of the opportunity to have collective bargaining there.

In principle, this line of attack would seem well-suited to secure the purposes of the Act. In the immediate case, the Board reproduces the situation which the law was supposed to guarantee, rather than just calculate and award a financial substitute. More important, perhaps, an employer that violates the law finds that these tactics have backfired. It ends up with the union supporters back in the plant with their union installed as bargaining agent: worse, the rest of the employees have been taught the lesson that collective worker action backed up by national labor law really can trump the exercise of management's hitherto absolute power in the workplace. The further assumption, of course, is that when other employees see that scenario played out to its denouement, this will serve as ample disincentive to their giving in to the same initial temptation to contravene the Act.

Unfortunately, this is where the other characteristic weakness of NLRA remedies manifests itself. The Act establishes an elaborate four-step process for administering labor law: a formal complaint from a Regional Office of the NLRB, followed by a

trial-type hearing before an Administrative Law Judge, then a decision and order by the Board itself, one which must be legally enforced by a circuit court of appeals. The problem is that whatever this procedure may add to the legal quality of the verdict, it more than loses in the efficacy of the ultimate order. Any employer which is prepared to invest the legal fees to secure all the administrative and judicial process which it is due under the Act can postpone the legal day of reckoning for a discriminatory discharge for one thousand days or more. That kind of delay would be bad enough for someone who was waiting for a cash award for loss of his job. The real problem is that it renders the "in kind" remedies of reinstatement and bargaining order largely illusory.[11]

I realize, of course, that only a tiny handful of the tens of thousands of charges against employers are pushed along this entire procedural journey (which might actually include another couple of months for a *pro forma* petition for review by the Supreme Court). Indeed, the vast majority of even the meritorious charges are settled well before that, usually just before or just after the issuance of a formal complaint by the regional office. For at least these two reasons, though, that is not a sufficient response to our concern about delay.

(i) First, any settlement short of the full legal process requires the *voluntary* acceptance by the employer. I am sure that consent to a decent settlement is often forthcoming from firms which do respect the Act but still find themselves responding to an unfair labor practice charge, perhaps due to the actions of an overly zealous manager at a particular location. But any firm which consciously chooses to violate national labor law in order to undermine a union organizing

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[11] In *Promises To Keep*, *supra* note 2, I review research about reinstatement by Aspin and by Stevens and Chaney (text at notes 80–86) which found that only 40% of employees who win the right of reinstatement actually do go back to their old jobs, and of those who do, four out of five are gone by the end of the year, most blaming vindictive treatment by their employer. I refer as well to research about *Gissel* bargaining orders by O'Shea (text at note 94) which indicates that only one in three reported *Gissel* orders is translated into a first contract and, of these, only one in six would likely be renewed. In *Striking a New Balance*, *supra* note 2, I review additional research by Ross, McDonald, and Wolkinson (notes 31, 198, and 200) which find that much the same lack of union success followed judicial bargaining orders in the late fifties and early sixties. These studies did find better results if the bargaining orders were secured earlier and voluntarily: a first contract was won two thirds of the time if the order was the product of a prehearing settlement and half the time if the order followed a Board decision without the need for judicial enforcement. However this research was about a period when overall first contract achievement rates were considerably higher than they are now. McDonald reports that a bargaining order from the Board will now produce a first contract only one third the time.

drive will likely concede only the type of relief which will not frustrate that strategy: e.g., a settlement which pays the dismissed union members their lost wages if the latter drop any claim for reinstatement in the shop (and recall that there were over 25,000 back-pay dispositions in 1981, but less than 7,000 reinstatements).

(ii) A strategy of just "dragging one's heels" in settlement negotiations at the Board is likely to prove successful because the amount of time which the determined employer needs is measured in months, not in years. In other words, if an employer quickly and freely concedes its legal error and agrees to accept the discharged employee back into the plant and/or to recognize the union as bargaining agent, this legal transplant does have a fair chance of "taking." But if the firm and its counsel spin the process out for just a modest three or four months, the employees involved will likely have found another job which they will be reluctant to give up for the chance to return to what might be an unpleasant reception in their old plant. Meanwhile, the momentum of the union's organizing drive will have subsided, the election will have been lost or postponed, and the work force will be gradually turning over under the auspices of a now watchful management, with the union on the outside looking in. None of these conditions are conducive to a union being able to wield effective authority in winning a first contract from this employer even if the latter were grudgingly to accept a bargaining order before a final Board order or court enforcement or both. In reflecting on how easy it might be for the employer to win the breathing space it needs, it is sufficient to note that the first hearing date for the charge will not be scheduled until some six months or more after the events in question.

These pessimistic appraisals of the efficacy and the durability of the standard Board remedies are now being documented by systematic empirical research. They have always been intuitively evident, though, to any shrewd employer and its advisors. The "in-kind" remedies favored by the Act now evoke little more concern than the comparatively trivial cash awards for lost back pay. Thus the failure of the NLRA to stem the tide of illegal resistance by determined antiunion employers is easily explained. Indeed, as I observed earlier, the more remarkable fact may be that the majority of American employers still do comply with our federal labor law even while they vigorously

contend against the union for the hearts and minds of their employees. Unfortunately, this may be something of an uneasy equilibrium. To the extent that some firms use dirty campaign tactics and thereby successfully stay nonunion, that puts considerable competitive pressures on other firms (in particular, on their management and their counsel) to resort to the same tactics if this seems necessary. What may lie beneath the surface, then, of the recent jump in the rate of increase of discriminatory discharges and similar employer behavior is a form of Gresham's Law of labor relations, under which the "bad" firms and managers are driving out the "good."

The Alternative of Employment Regulation

This has been a rather bleak picture of the way the NLRA is now working in the representation contest. At the level of the individual unit and firm, the standard Board remedies are largely ineffective. In the aggregate, employer violations of the Act have spiralled, with the result that unions have proved increasingly unable to win either certifications or first contracts. The stark reality is that private sector unions are now able, through NLRA procedures, to replace only one quarter of the members which they lose through the normal attrition process in an economy within which existing plants are constantly being closed or moved, and replaced by new business enterprises. The fewer union members there are, the smaller are the resources with which to organize new ones; and at the same time the greater the incentive for employers to stay or to become nonunion to meet the competition. The best projection we have from current trends is that union representation will be available to less than 10 percent of private sector workers by the turn of this century, and still falling.

That is simply a *factual* projection, based on investigation and analysis of what has been happening. Whether this trend is good or bad turns ultimately upon a *value* judgment about the virtues or vices of union representation. I suspect that most people have somewhat mixed feelings on that score. On the one hand, few will deny the historic contributions of collective bargaining: employee compensation and working conditions have been tangibly improved and mechanisms have been devised through which grievances are resolved and employees are given some meaningful influence upon what is happening to them in the

workplace. On the other hand, there is perennial concern about the propensity of some trade unions to act as cartels which obstruct the efficient operation of our labor markets, and which may even produce economic conditions that threaten the very survival of the firms and industries in which unions have long been entrenched. To the extent these latter concerns are valid and increasing, one can perhaps understand the reaction of the owner of a business who feels compelled to preserve his non-union status and prospects, even if this means flouting our national labor laws. And, as if in counterpoint to that developing attitude in the real world, there has emerged in the law reviews a strong critique of contemporary labor law from the right. This scholarship celebrates the virtues of employment at will, of management's prerogative to set the terms of employment at the level which the firm finds necessary to recruit and retain a qualified workforce. It questions the central tenet of the Wagner Act itself—that workers should have the unilateral right to union representation and collective bargaining if that is what *they* want, with the employer having no business denying them that option as the price of continuing to work for the firm.[12]

This opens up a large and complicated subject which I cannot pursue here. I mention it mainly to make clear that I for one do not believe it to be self-evident that collective bargaining is an institution worth saving; that the fact that the NLRA has made worker self-determination the litmus test for union representation for the last half-century means that this should continue to be so for the next; or that the only question for serious labor law reform is how to make the current legal policy work better, rather than whether we should have any such protective policy at all. These are crucial and complex questions which I plan to tackle in another forum.

I should allude, though, to one rather artificial assumption of this critique: that the choice we face is between the 19th Century norm of an *unfettered* labor market, in which the firm sets its terms and conditions of employment at a point which is necessary to remain competitive both in keeping its work force and selling its product, and the New Deal/Wagner Act alternative of

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[12]The best exposition of this position is Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 Yale L.J. 1357 (1983). This evoked a vigorous response by Getman and Kohler, *The Common Law, Labor Law, and Reality*, 92 Yale L.J. 1415 (1983) and then a rejoinder by Epstein, *Common Law, Labor Law, and Reality*, 92 Yale L.J. 1435 (1983).

a *reconstructed* labor market, in which the employees of the firm develop a cohesive organization through which they can participate in setting the terms upon which their work will be provided and paid for. There is a third option under which workers may influence their terms of employment: the political process which produces a legally regulated labor market. While that alternative has been around for a long time—the Fair Labor Standards Act was also a product of the New Deal—traditionally it stayed discreetly in the background, fixing only the bare minimum standards of employment. Collective bargaining was supposed to be the major impetus for improving conditions at work. In the last couple of decades, though, the situation has changed dramatically. As politicians and judges have realized that worker self-help through unionization is no longer a viable option for the vast majority of the labor force, they have moved to provide government help through direct legal regulation of the employment relationship. Actually, I date this change back not so far as to the enactment of the Equal Pay Act of 1963, the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967—with their initial relatively discreet antidiscrimination policy—as to the more activist affirmative action policy of the early seventies (as seen both in the judicial interpretation of Title VII and administrative action under the Executive Order),[13] then the federal enactment of such statutes as OSHA and ERISA, and comparable initiatives on the state level (again, what often is more significant than the initial passage of these statutes is their aggressive interpretation and elaboration by judges and administrators). How far the law is now prepared to go in scrutinizing management's personnel and pay practices is best illustrated by the growing judicial willingness to restrict the firing of at-will employees, and even to tackle the gender gap in wages through something like a "comparable worth" theory of wage discrimination.

I do find it rather ironic that the business leaders who decry these government intrusions into the workplace as among the most cumbersome and insensitive forms of regulation are many of the same people who have vigorously fought the collective bargaining alternative; or at least helped defeat the Labor Reform Act which would have made it somewhat more difficult

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[13]*See* Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, Sup. Ct. Rev. 1, 10–27 (1984).

for other employers to fight off unionization. I should also add that it is just as ironic that union leaders, who should be emphasizing the virtues of their reconstructed market approach to workplace problems, are usually at the forefront of the effort to get more and more employment regulation (from the judges and administrators as well as from the legislators) which will benefit nonunion workers as much as their own members.

On the merits, though, I tend to agree with much of the business concern about the modern social regulation of the workplace. Take the "comparable worth" issue as an example. There is a strong popular perception, with some empirical basis, that traditionally, "female" jobs are somewhat undervalued and underpaid (though nowhere near so much as the popular mythology would have it). It is not likely that this issue can be left to be solved by the pure "competitive" labor market. Pressures are building up for administrative, judicial, and legislative responses at the federal and state level. There is real ground for concern, though, that the kind of regulation contemplated could do more harm than any good it might achieve. My own research persuades me that if we want to satisfy as much as we can of the legitimate claims of the workers involved, while minimizing the economic dislocation to the employer, the collective bargaining approach exhibited by the recent contract settlement in the City of Los Angeles is much to be preferred to the judicial imposition of new wage scales upon the State of Washington. Without saying any more on this topic, I do suggest that serious reflection on that example might help us appreciate at least a little the New Deal preference for collective bargaining as the instrument for preserving and reshaping the operation of our decentralized, pluralistic labor market.

Strategies for Reforming the NLRA

A. The Regulatory Model

If we recognize, as I think we must, that union representation is gradually being squeezed out of the private sector of our economy, and if we assume, at least hypothetically, that collective bargaining is an institution worth saving, the next question is whether and how one might change our labor laws to accomplish that latter aim. I shall not here canvass in detail any particular

proposal, having done so at length elsewhere.[14] Rather, I shall sketch alternative strategies for labor law reform which provide some perspective for appraising particular suggestions.

The traditional American strategy, exemplified in the variety of specific proposals in the abortive Labor Reform Act of the late seventies, I shall call the *regulatory* model. By this, I mean the effort by the law to specify certain undesirable forms of behavior and then to effectively enforce legal prohibitions against them (here improper employer resistance in the representation campaign or in the negotiation of the first contract). For reasons given earlier, one would hardly give much priority in labor law reform to adding new substantive rules of behavior. This is not to deny that, to take one favored reform proposal, an intuitively plausible and empirically supportable case can be made for giving unions some right of access to the plant to reply to the employer in the campaign (especially if we were to move, as I think we should, toward major deregulation of the content of the campaign). But what proponents of this feature of the Labor Reform Act never really addressed was how one could possibly expect the Board to enforce such an ambitious new "right" when the Act has failed so miserably in containing crude and obvious employer coercion in the campaign. In my view, the focus of any regulatory approach to labor law reform must be improvement of the implementation of the current rules, not the addition of new ones.

Consistent with my earlier diagnosis, the task is to enhance the speed and the force of NLRB remedies for violations of the Act. I have two favorite candidates.

(i) *Interim Injunctive Relief.* There should be automatic NLRB petitions for immediate federal injunctions against especially serious forms of misconduct under the Act. Like the majority in Congress who supported the Labor Reform Act, I would target in particular the discriminatory discharge during the representation campaign and the negotiation of the first contract. The point, of course, is to obtain reinstatement within the short month or two that the employee would realistically be able to take advantage of this right, and, not incidentally, to get this union supporter back in the plant at a time

[14] In the pieces cited *supra* note 2.

when an employer which has violated the Act would thereby suffer a considerable setback in its still live contest with the union.

(ii) *Civil Damage Suits.* I am pessimistic, though, about the ability of even the federal courts to regularly and successfully implement the in-kind remedy of reinstatement, let alone the much more delicate instrument of the *Gissel* bargaining order (and certainly not the new Canadian remedy of first contract arbitration after egregious bad faith bargaining). Thus, the regulatory approach requires an additional measure: entitling the union to sue, on behalf of itself and the bargaining unit, for at-large damages for an employer's willful denial to its employees of their right to union representation and good faith bargaining. This proposal maintains the statute's traditional focus upon reparative rather than punitive measures. However, it would lift the artificial "back-pay" constraint upon the scope of legally cognizable harm suffered by the employees. Instead the community, speaking through the jury, should hear of the employer's entire pattern of behavior throughout the campaign (e.g., in such eye-opening cases as *United Dairy Association* and *Conair*),[15] and then be able to award the level of monetary redress appropriate to this group of workers who have been denied their federal rights.

I might note, in passing, that a reform strategy such as this concedes defeat for the New Deal commitment to the administrative over the judicial process. Fifty years later, we simply are not prepared to entrust the NLRB—the flagship of the new administrative process of the thirties—with even the minimal tools necessary to enforce the statute for which it is responsible. What about the *legitimacy* of these new measures which would enlist the federal judiciary in that cause? Perhaps it is sufficient for me to say that this is essentially the remedial strategy adopted by the Congress in 1947 to enforce Taft-Hartley's new ban on the secondary boycott: which was seen as an especially abusive union tactic for coercive "top-down" organizing of workers. If we really believe what the Wagner Act says, that employer intimidation of its employees in their decision about union representation is equally indefensible, then it is hard to see what

[15] *United Dairy Ass'n*, 257 NLRB 722, 107 LRRM 1577 (1981); *Conair Corp.*, 261 NLRB 1189, 110 LRRM 1161 (1982).

principled arguments can be made against the adoption of comparable measures for enforcing this other part of our federal labor law.

B. The Environmental Model

However, while there are no significant differences in principle between the two, there are important differences in practice between the law's ability to control such union tactics as the secondary organizational boycott and the variety of forms of employer coercion and discrimination. Any particular case of antiunion retaliation is inherently more difficult to detect in the flow of management decisions made in a plant where life and work must go on during the campaign. As well, in aggregate terms illegal employer action has now reached dimensions which would likely swamp any new judicial remedies, rendering them ineffective from the outset. Thus, while I believe that these two key implications of the regulatory model for reform of labor law are necessary, they are far from sufficient. If we are serious about saving the institution of private sector collective bargaining, we shall have to think considerably more unconventional thoughts about labor law and its reform. In particular, we shall have to step outside our traditional regulatory set of mind and pursue what, for want of a better term, I call the *environmental* approach.

What I mean by this can be put quite simply. The assumption of the NLRA is that we should have a vigorous representation campaign between employer and union, followed by hard bargaining about the first contract. Since each of these contests engenders strong incentives to use questionable tactics to win the struggle, the law establishes legal counterincentives to try to reduce the incidence of this behavior and to repair the damage done when it does occur. While we can and should do a considerably better job on that latter score, there are intractable limits upon what labor law can so accomplish. In effect, the help which the government can bring to a fledgling bargaining unit of employees which wants union representation and a collective agreement too often comes too little and too late. What we need to do, then, is to restructure the underlying environment so as both to reduce the employer's initial incentive to engage in illegal action, and also to enhance the ability of workers to help themselves when this does occur. Needless to say, any such steps

require a major rethinking of some entrenched assumptions of American labor law. Here I can only sketch briefly some specific indications of what I have in mind.

(i) *Eliminating the Representation Campaign.* My favorite illustration of this theme is drawn from Canadian labor law—the elimination of the pitched representation campaign. I would not use the standard Canadian technique, though, of certifying unions solely on the basis of a majority of workers signing union membership cards and paying minimum initiation fees. Instead, I prefer an immediate representation vote, after a petition from a union which has already signed up more than a bare majority in the unit (e.g., 55 percent). In British Columbia, for example, just north of the border, the Labor Board now conducts representation elections ten days after receipt of the union's petition, and unions are winning roughly 80 percent of these votes (a success rate comparable to the peak achieved by unions here in the fifties). More important for our purposes, since there is very little opportunity for discriminatory discharges or other forms of coercive tactics to influence the election verdict, the relative incidence of this behavior in British Columbia (and elsewhere in Canada) is only a fraction of what it is in the United States. An ironic, but a telling, index of the different attitudes towards labor law in our two countries is the fact that when this new voting procedure was enacted in British Columbia last year, it was seen by its critics as a retrograde, antiunion step by a right-wing Social Credit government. As someone who has advocated this policy for the last several years on both sides of our border, I can only reiterate my position that this is a justifiable step for any government to take, whatever its political stripe.

(ii) *Enhancing the Right to Strike for a First Contract.* One reason why I have always felt comfortable with such a truncated representation contest is that I view the certification of a trade union as having comparatively little practical significance: certification just licenses the union to sit down with the employer at the bargaining table to try to hammer out a contract. If there is disagreement and deadlock—as almost invariably there will be in any relationship where the employer would have vigorously fought the union in a representation campaign—then a system of free collective bargaining means

that the union has to persuade the work force to go out on strike to win a better offer from their employer. *That* is the real "laboratory test" of whether this unit of employees actually does want to have collective bargaining. While that may be the answer to our concern about the representation decision, it simply raises the next question of how the unit can get a first contract from an employer that may be prepared to carry on the struggle for a union-free shop by "stonewalling" at the bargaining table (as we saw earlier, this is a growing and serious problem in the United States). Any such solution must respect and maintain the basic principle of free collective bargaining—that the parties themselves are entitled to shape and agree to the terms of their contract, not have the state impose one on them. However, I think there are things which the law can and should do to enhance this principle of freedom of contract: in particular, by giving some real-life force to the exercise of the right to strike by smaller, weaker units, so that these workers can have some actual influence upon the contents of the contract to which they formally agree. As I have argued in detail elsewhere, I would try to achieve this by guaranteeing strikers who have been replaced the right to get their jobs back after the strike is over (at least for the period of six months specified in Ontario labor law), and also by permitting the strikers to ask other *workers* not to handle the struck product if the employer continues to operate (just as the U.S. Supreme Court held in *Tree Fruits* that strikers were entitled to ask *consumers* not to buy the struck product).

I am aware, of course, not only that these proposals are quite controversial, but that they raise serious issues that I have not been able to address here with the care they deserve. I do want to conclude this section, though, with a general observation about the "environmental" strategy for labor law reform. Ultimately, this approach stems from a marked skepticism about what we can expect the law to accomplish in the often turbulent world of labor relations. This means, first, that we must establish some priorities in the use of our legal resources and not dissipate these in the pursuit of relatively marginal problems: e.g., inaccurate campaign literature. Even as to the more serious problems—e.g., discriminatory discharges—we must not place too much weight on purely legal measures to curb them. Instead, we should try to imagine ways of subtly reshaping the setting in

which this behavior occurs, in the hope that this can produce a more satisfactory equilibrium between private employer action and employee reaction. In that respect, such an environmental approach bears some resemblance to the way in which the Wagner Act set out to solve the problems of the labor market through the exercise of private countervailing power in collective bargaining.

The Uses of Federalism in Labor Law Reform

The inevitable reaction to the thesis I have put forward is that it is political "pie in the sky." If the combination of a Democratic President and Congress could not pass the modest package contained in the Labor Reform Act of the late seventies, how can one even imagine the enactment of the more sweeping changes which I have suggested here?[16] One response to that objection is that in the eighties there will be no reform at all of the National Labor Relations Act, whether modest or major, proemployer or prounion. Given that fact of life, the task of the scholar is to go back to fundamentals, to develop the case for the more profound but more worthwhile changes which practical politicians might consider if and when labor law reform does come back on the agenda. However, I shall not rest content with that easy answer. There are some significant things one can say about the process as well as the substance of legal change. I shall touch briefly on one of these, the potential virtues of federalism for labor law reform.

For me, at least, the source of that lesson is again the Canadian experience. From the mid thirties through the mid sixties, Canadian labor legislation was largely derivative of the American. But while American labor law has been largely becalmed for the last two decades, there has been a remarkable burst of innovation in Canada.[17] One reason for the latter is the allocation of constitutional jurisdiction. Canada never had the so-called "switch in time that saved nine" of *Jones & Laughlin,* which eventually gave the national government of the United States legal authority over all of private sector labor relations. By contrast, constitutional federalism in Canada leaves the provinces basically in

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[16]*See* Edsall, The New Politics of Inequality: How Political Power Shapes Economic Policy (New York: Norton, 1984), especially Ch. 4, *Labor Unions and Political Power.*

[17]*See generally* Weiler, Reconcilable Differences: New Directions in Canadian Labor Law (Toronto: Carswell, 1980).

charge of labor-management relations: e.g., Ontario in control of its auto and steel industries and British Columbia of its forest product and mining industries. That large responsibility has given provincial governments both the opportunity and the incentive to act, in Brandeis' phrase, as "laboratories for social experimentation" in labor law. Each jurisdiction can try out new-fangled ideas within its borders which, if successful, can then be imported by others: e.g., first contract arbitration was first used in British Columbia and then adopted in Quebec, expedited representation votes were initially tried out in Nova Scotia and recently implemented by British Columbia. Thus, while I think there is a characteristically "Canadian" approach to labor law, it comes not from a single statutory framework imposed by the central government, but rather from the eleven governments across the country grappling with their common problems, learning from each other what is useful and worth emulating, and what proved unhelpful and thus should be discarded.

Needless to say, there is nothing un-American about the uses of federalism. Indeed, for the last two decades in the United States there has been essentially the same creative experimentation by state governments in public sector labor law (especially in devising techniques for dispute resolution). Such state activity has not been possible, though, in the private sector, where the NLRA covers almost the entire ground.[18] True, the NLRA has always had the authority to decide how much of its sweeping constitutional/statutory jurisdiction it will exercise. Since the fifties, the bulk of its jurisdictional requirements have been expressed in monetary terms: e.g., retail establishments with an annual business volume of $500,000. The problem is that in 1959, in *Landrum-Griffin,* Congress froze the nominal dollar value of these jurisdictional thresholds. Twenty-five years of inflation have produced a gradual but continuous creep in the Board's jurisdiction so that the cutoff points are now at only one third the real level they were originally. Those few commentators who have noted this phenomenon have done so primarily

[18]Actually, there is one important exception that stems from the exclusion of farm workers from the NLRA. This limitation upon the federal law freed California to enact its Agricultural Labor Relations Act, which has successfully used many of the innovations proposed in the abortive Labor Reform Act: a right of union access to workers on the employer premises, expedited representation votes, "make whole" remedies for bad faith bargaining, and so on. This is a particularly revealing illustration of what is possible if proponents of labor law reform were to pay serious attention to the possibilities at the state level.

to lament its effect on the burgeoning caseload of the Board and thus on the efficient functioning of the national administrative apparatus. I suggest that a more subtle, perhaps more important, consequence is that this has removed almost all prospects for state responsibility and innovation in private sector labor law.

Consider this alternative approach. The basic thresholds for NLRB jurisdiction would be lifted sharply, not just to restore their earlier real values, but to raise them to much higher levels (perhaps it would be more rational to express these limits in terms of the number of employees rather than volume of business). However, these broader exclusions from the NLRA would be applicable only in states which themselves enacted private sector labor laws giving workers the right to decide whether they wanted union representation and collective bargaining. With that one caveat, that the states must act *somehow,* I would leave them entirely free as to how they would legally define and protect that right and how they would enforce their laws. In effect, this would return to the states the responsibility for labor law and labor relations in the small business sector: in which firms with less than twenty-five employees employ fully 35 percent of the private sector labor force, workers who are paid considerably less and enjoy far fewer benefits than their counterparts in bigger companies, but only 6 percent of whom are now unionized. The challenge to the states would be to see whether, if they were so inclined, they could devise more effective ways of protecting the right of these workers to have collective bargaining if that is what they want.

The immediate reaction, of course, from the trade union movement and its supporters is that far too many states would *not* be so inclined. Can you imagine, they would ask, what kind of labor law would be passed in North Carolina or in Utah? Ever since the passage of the Wagner Act in the New Deal, unions have always felt that they must use the congressional delegations from New York or California, for example, to secure national legal standards which both extend their benefits to workers in the more conservative states, and protect those in the more progressive states from being "whipsawed" by mobile capital seeking the weakest levels of labor legislation.

What is the reality, though? Whatever may have been true thirty years ago, right now the trends in union organizing and employer resistance are not appreciably better in the north than in the south. To the extent that the law is a factor, the political

fact of life is that senators from states such as Utah and North Carolina will block even modest federal labor reform. In the representation area, at least, our national labor law is now the lowest common denominator, not the progressive standard. In their current straits, union leaders no longer have the luxury of defending the federalism shibboleths of the New Deal (no more than the preference for the administrative over the judicial process). In my own view, if there is any prospect at all of breaking the political logjam over serious labor law reform, it is to be found in certain state capitals, not in Washington, D.C.

Conclusion

When I look back on my analysis in this paper, and on the research I have done on this subject during the last three to four years, I am struck by the conclusions to which my argument has taken me. If labor law is really to make good on its promise to American workers that they can actually have union representation if they want it, then we shall have to rely more on the states than on the national government, on the judicial rather than the administrative process, and on collective self-help by the employees rather than legal help from the government. Taken together, these would seem to be the principles for a possible Republican platform for labor law reform, and that is another ironic commentary on the current state of the Wagner Act, one of our most important legal legacies from the New Deal.

However, labor law reform, even as unconventional as I have suggested, is by no means enough. What is also needed is some profound self-reflection and self-renewal by the union movement itself. Along one front, in its dealings with employers, that change of course seems to be well under way. Union leaders generally recognize in the eighties that they have to be much more realistic in scrutinizing and adjusting the contract standards and bargaining practices inherited from the fifties, if and when these no longer fit with new technology or new competition (as exemplified by the new contract negotiated by the United Auto Workers to cover General Motors' new Saturn Project). Such a change in attitude is needed not just to protect the jobs of current union members, but also to allay somewhat the concerns that have led more and more employers to strongly resist the spread of collective bargaining into nonunion plants. I might add that the more astute union leaders are looking to

trade such economic concessions for some form or other of "neutrality clause": a provision which seeks to respond to some of the ailments of the NLRA by, in effect, "contracting out" of the statute.[19]

At the same time, while I have dwelt here on the phenomenon of employer resistance under the Act, I do not want to leave the impression that this is anywhere near the whole story in the decline of private sector union representation. This is the part which lawyers tend to see, especially in its pathological form: after all, these are the cases which come within the purview of the NLRB after a union has been successful in an initial organizing drive. In fact, from the mid fifties through the mid seventies, union success in organizing out in the field did continue to increase (at least as measured by the growth in NLRB representation elections, which nearly doubled between 1955 and 1975), even while the union yield from these organizing drives, in the form of new certifications and first contracts, was sharply diminishing. For the last several years, though, the number of union petitions to the Board has also dipped markedly, thus compounding the overall problem.[20] To some extent, I am sure, the drop in union organizing is due to the economic downturn during this same period, with its concomitant effects on both union resources and on the willingness of workers, faced with double-digit unemployment, to take their chances with collective bargaining. To some extent, though, this is likely also due to the inability of many unions to evoke a sufficiently responsive chord among unorganized workers. To the extent the latter is true, what are the kinds of things which unions themselves will have to do to make collective action more attractive to American workers?

I shall make only these brief observations about one line of analysis and its implications. Polls indicate that there is a sizeable but as yet untapped pool of worker sentiment for union representation. There is also evidence that this is due not so much to dissatisfaction with current wages and benefits as to more subtle objections to the way that individual workers are treated by their supervisors, and to the lack of employee influence upon what is happening in their workplace. But while concerns such as these

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[19]*See* Guzick, *Employer Neutrality Agreements: Union Organizing Under a Nonadversarial Model of Labor Relations*, 6 Indus. Rel. L.J. 421 (1984).

[20]*See* Dickens & Leonard, *Accounting for the Decline in Union Membership*, 1950–1960, 38 Indus. & Lab. Rel. Rev. 323 (1985).

can motivate workers to look for alternative forms of protection and voice, they are no guarantee that union representation will be the route actually taken. I suspect that one reason for this reluctance is the widespread feeling that employees face some risk of arbitrary treatment at the hands of union officials as well as from management, that union members do not have much more democratic input into the actions of their union than of their employer. This is not to suggest that these feelings accurately reflect the typical conduct of union affairs (the polls I referred to earlier show a very high level of satisfaction on the part of current members with the operation of their own unions). But the *existence* of these feelings (which do reflect occasional and well-publicized real-life examples) is as important as their *truth*. If I am right about this, then American unions are going to have to think seriously about some pretty substantial changes in their mode of governance: e.g., to consider more widespread adoption of such constitutional mechanisms as the Public Review Board of the United Auto Workers (in the interest of full disclosure, I must add that I am a member of that Board). This is so not just because we have the right to expect better guarantees of protection and participation from trade unions, whose *raison d'être*, after all, is insuring fair treatment and employee voice in the workplace.[21] Just as important, some such dramatic steps as these are probably necessary to persuade the American people, and the politicians whom they elect, that union representation is a sufficiently worthwhile institution that it deserves once more the kind of legal lifeline which it received in the Wagner Act, fifty years ago. Otherwise, I fear, fifty years from now there will be few left to celebrate the centennial of our national labor law.

II. THE PENDULUM SWINGS

LEE C. SHAW*

The National Labor Relations Act of 1935 (the Wagner Act) was amended by the Labor-Management Relations Act of 1947

[21] I do not mean to downplay the difficulties many unions now face in displaying both economic restraint towards management and democratic accountability towards their membership. For a sustained argument that the latter value must always trump the former, *see* Hyde, *Democracy in Collective Bargaining*, 93 Yale L.J. 793, 833–854 (1984).

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