and due process and, being bad arbitration, give all arbitration a bad name."[19]

It is much too soon to write off the labor movement and collective bargaining, especially when the alternatives are unfair or pie-in-the-sky, and most likely, both. The U.S. labor movement, although clearly imperiled, is still the world's biggest and richest. It is battling to revitalize itself and to preserve and expand the collective bargaining process of which we all are justifiably proud with every resource at its command.

We need your help. So, let me close with George Nicolau's injunction to you:

> Speaking up for collective bargaining and speaking against those who would deny or curtail that fundamental right, as many of us have done and will continue to do, is not about jobs for arbitrators. . . . Nor is it about who wins or loses a particular case. What it is about is the preservation and strengthening of a system of governance that is an imperative in a democratic society. There is no acceptable substitute for free labor unions or for fair labor laws. As responsible individuals, we must do what we can to ensure that the basic right to organize and to be represented by representatives of your own choosing is not curtailed or hindered, but fostered.[20]

No one could say it better.

Management Response

R. THEODORE CLARK, JR.*

Professor Kaufman's paper is comprehensive in its scope and raises any number of interesting issues for discussion and debate. My focus this morning, however, is going to be considerably narrower in that I am going to limit my comments to four areas: First, the sharply contrasting fortunes of organized labor in the public and private sectors of the economy; second, the future of dispute resolution generally and the Academy's role in employment dispute resolution in particular; third, a critique of Professor Kaufman's recommendation that federal legislation be enacted establishing minimum standards for arbitration of nonunion employment disputes; and fourth, a few concluding observations.

---

[19] *Id.* at 4–5.
[20] *Id.* at 7.
*Attorney, Seyfarth, Shaw, Fairweather & Geraldson, Chicago, Illinois.

The Contrasting Fortunes of Organized Labor in the Private and Public Sectors of the Economy

Nearly all discussion in the media and elsewhere about the long-term decline in the role of unions and collective bargaining and their projected decline over the next decade assumes that organized labor is one monolithic group. Organized labor in the United States, however, has two distinctly different faces: one private and one public. The former has been in decline for decades and its future is bleak; the latter is prospering and has a bright future. Examination of just a few statistics illuminates the quantum gulf between the plight of organized labor in the private sector and its success in the public sector.

As we all know, the percentage of the American work force that belongs to unions has been in a constant decline since the 1950s. Between 1960 and 1998, that percentage dropped from 28.6 percent to 13.9 percent. But the statistics on private-sector union membership are even more telling. Between 1960 and 1998, the percentage of the private-sector work force that belongs to unions declined approximately 75 percent, from 36.6 percent to a mere 9.5 percent. In sharp contrast, the percentage of the public-sector work force that belongs to unions has increased nearly fourfold, from 9.8 percent in 1960 to 37.5 percent in 1998. The real dramatic change in the American labor movement, however, is reflected in the change in the public-sector's portion of overall union membership in the United States.[1] Whereas, public-sector union members accounted for only 6 percent of the American labor movement in 1960, today that percentage has skyrocketed to 42.6 percent, of which more than 10 percent is accounted for by the world's largest employer according to *Fortune*, that is, the U.S. Postal Service.[2] As things presently stand, organized labor counts as members less than 1 employee out of every 10 in the private sector and more than 4 out of every 10 in the public sector. Stated differently, the union density rate in the public sector is more than four times greater than it is in the private sector.

The trend line, at least for the foreseeable future, seems clear. In the not too distant future, public-sector union members will constitute a majority of all union members in the United States. In the words of a *Wall Street Journal* editorial, "The labor movement

---

[1] *The Fortune Global 500 List*, Fortune, Aug. 2, 1999, F-1.

[2] *Id.* Although the Postal Service ranked 25th in *Fortune*'s list in 1998, it ranked third in terms of number of employees.

will have completed its transformation from Sam Gompers to Uncle Sam."[3]

Why has organized labor been so successful in the public sector and so unsuccessful in the private sector? While there are many schools of thought on this question, let me offer a few observations. First, with respect to the private sector, I agree with Professor Kaufman and many others who have looked at this issue that the decline in union density rates stems from many factors, including the change from a manufacturing economy to an information and services economy, the globalization of the economy and a tremendous increase in competition, deregulation, the need by employers for more flexibility to compete in this changed economic environment, and a distinct move away from a collectivist philosophy to an individualist philosophy. Interestingly, what has happened in the United States has happened in other countries as well. In his recent "American Perspective" review of labour law reforms in Australia and New Zealand, Dennis Nolan noted that the labour law reforms were brought about because in large part Australia and New Zealand could not "immunise themselves from the pressures of foreign competition."[4] He noted that in New Zealand, for example, union density between 1989 and 1995 fell from 44.7 percent to 21.7 percent due to the reforms.[5] Thus, many of the same market forces at work in the United States are also at work elsewhere. The net result is that unions generally have not been able to adapt to the new economic environment and have lost significant market share.

Second, the private- and public-sector collective bargaining settings are vastly different from each other. Apart from the obvious statutory distinctions, collective bargaining in the private sector takes place in a very competitive global environment. In the 1950s, most U.S. markets were secure and global competition was not a fact of life. Private-sector employers today must make constant competitive adjustments just to stay afloat. Unlike public-sector employers, private employers do not have a virtually guaranteed existence. If they fail in the competitive arena, they can and do go out of business. That was the fate of Jones and Laughlin Steel, Eastern Airlines, Woolworth, and Venture stores, to mention just a few recognizable names. That same concern is simply not present,

---

[3]Wall St. J., Oct. 25, 1955.

[4]Nolan, ed., "An American Perspective on Australasian Labour Law Reform," in The Australian Labor Law Reforms: Australia and New Zealand at the End of the Twentieth Century (1998), 242.

[5]*Id.* at 249.

for the most part, in the public sector. In the public sector, with the exception of the U.S. Postal Service and some proprietary activities undertaken by states and local governments, states, cities, counties, and the federal government do not have to complete globally. I am not aware of any that have gone out of existence because of their inability to compete. I would suggest that this very real difference between the public and private sectors helps explain why unions encounter a much more benign environment for organizing and bargaining in the public sector than they do in the private sector.

From my perspective, and I am sure the AFL-CIO has a somewhat different slant on this, if unions are to make any real progress in changing their fortunes in the private sector, they will need to help solve the problems that private-sector employers face in a very competitive and increasingly deregulated economic environment. Complicating matters by adding uncertainty and time to the decisionmaking process will only work against them. The following comments by John Gardner, past president of Common Cause, more than three decades ago in his widely acclaimed book, *Self-Renewal: The Individual and the Innovative Society,* are relevant in this regard:

> Every manager of a large scale enterprise knows the difference between the kinds of organizational commitment that limit freedom of action and the kinds that permit flexibility and easy changes of direction. But few understand how essential that flexibility is for continuous renewal. . . .
>
> As individuals develop vested interests, the organization itself rigidifies. . . . In the labor movement make-work rules, featherbedding, excessively strict seniority provisions and the closed shop all represent arrangements that are the crystallization of vested interests.
>
> It is not my purpose here to make the point that such vested interests exist: that point has frequently been made. It is my purpose to point out that they are among the most powerful forces producing rigidity and diminishing capacity for change. And these are the diseases of which organizations and societies die.[6]

As Dennis Nolan noted in the article I referred to earlier:

> It is far too early to know whether new missions, wiser expenditures, and creative marketing will reverse the unions' fortunes, either in the United States or in Australia. It is safe to predict, however, the pressures for lower labour costs, greater labour productivity, and more workplace

[6]Gardner, Self-Renewal: The Individual and Innovative Society (1964), at 52–63.

> flexibility will only increase. Given these pressures, unions have no choice but to carve out a new role for themselves. Failure to do so . . . will only guarantee their demise.[7]

The Future of Dispute Resolution and the Role of the Academy

The prospects for labor arbitration very much depend on the sector of the economy that we are talking about. If it is the private sector and it is confined to arbitration under collective bargaining agreements, the prospects are not terribly encouraging. On the other hand, arbitration of both rights and interest disputes in the public sector is very much alive and well, and the prospects for its continued growth are excellent. From the many members of the Academy with whom I have discussed this issue, I know that most of you regularly handle cases in both the private and public sectors and that for many of you, the public-sector caseload actually exceeds the private-sector one. That is not surprising given the statistics I reviewed earlier.

While the Academy's membership has apparently declined somewhat over the years and there is considerable gnashing of teeth over what the future holds, from my observation point in the heartland, the rumors of labor arbitration's demise are, to paraphrase Mark Twain, greatly exaggerated. From my own personal experience, it is not at all uncommon for Academy members selected as arbitrators to offer the parties available hearing dates 3, 4, or 5 months down the road. While there may be some arbitrators who are starving for work, it would appear that established arbitrators in the Midwest are getting all the cases they can handle and then some. I can only conclude from personal experience and observations that traditional labor arbitration definitely is not vanishing from the face of the earth, and that there is a continuing need for qualified and competent labor arbitrators.

The continued importance and vitality of the Academy is also reflected in such things as the composition of Presidential Emergency Boards under the Railway Labor Act. Of the 23 Emergency Boards that issued decisions over the last 30 years, 22 were composed exclusively of Academy members, and a member of the Academy chaired the remaining one.

---

[7]Nolan, *supra* note 4, at 253.

While I would not quarrel with the proposition that the Academy should maintain as its primary purpose the arbitration of disputes under collective bargaining agreements, this should not be its sole purpose. If the Academy is to continue to be a major player in employment dispute resolution, its focus must be increasingly open and responsive to dispute resolution in all its forms, in both the union and nonunion sectors. It should not be limited to arbitration in a collective bargaining setting. There will always be a need for conventional grievance arbitration, but I would suggest that the Academy's focus must be more broad.

In the past decade there has been an unmistakable statutory encouragement of arbitration as part of the broad movement toward alternative dispute resolution (ADR), a movement that employers, especially large employers, have endorsed and supported. For example, both the Americans with Disabilities Act[8] and the Civil Rights Act of 1991[9] encourage the use of ADR. Thus, section 118 of the Civil Rights Act of 1991 provides:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, mini trials, and *arbitration*, is encouraged to resolve disputes arising under the Acts. . . .[10]

In an attempt to estimate the current involvement of Academy members in ADR beyond the collective bargaining context, I used membership in the Society of Professionals in Dispute Resolution (SPIDR) as a proxy. I took the most recent Academy membership roster and made a list of all the members whose last names start with A, B, or C, from Ben Aaron to Bernard Cushman, and then I checked this list against the most recent SPIDR membership roster. Of the 105 American members with last names starting with A through C, only 24 were also members of SPIDR. Analyzed in terms of age groups, however, a different picture emerges. Only 6 of the 61 Academy members who were born before 1940 were also SPIDR members. On the other hand, 18 out of the 44 members born in 1940 or after were SPIDR members. And, of the 8 members born in 1950 or after, 4 were also SPIDR members. If my use of SPIDR membership as a proxy for involvement in ADR beyond traditional labor arbitration under a union contract is appropriate, it strongly

---

[8]42 U.S.C. §12,212 (West Supp. 1993).
[9]Pub. L. No. 102-166, 105 Stat. 1081 (1991).
[10]*Id.* §118 (emphasis added).

suggests that the younger members of the Academy are beginning to see the future and have opted to broaden their focus. It is likely that they are using their dispute resolution skills in areas beyond traditional labor arbitration.

There are many legal issues yet to be decided concerning the arbitration of statutory discrimination claims. However, I see nothing in any of the Supreme Court's decisions to date that suggests it is backing away from *Gilmer*.[11] In its recent decision in *Wright v. Universal Maritime Service Corp.*,[12] the Supreme Court unanimously held through an opinion authored by Justice Scalia that an employee who had filed a federal lawsuit under the Americans with Disabilities Act could not be required to pursue that claim through the arbitration procedure in a collective bargaining agreement. The Supreme Court did not hold that such a requirement was necessarily illegal; rather, it held that the contractual provisions in question did not constitute a clear and unmistakable waiver of the employee's right to pursue the claim in a federal forum. Citing *Gilmer*, the Court said that although the right to a judicial forum was not "a substantive right,"[13] *Gardner-Denver*[14] "at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against [a] less-than-explicit union waiver in a CBA [collective bargaining agreement]."[15] Although the Court admittedly did not find it necessary "to resolve the question of the validity of a union-negotiated waiver,"[16] it set forth a standard and specifically held that the right to a federal judicial forum was not a substantive right. That holding suggests that the Court may ultimately enforce a clear and unmistakable waiver. Apart from that issue, my reading of *Wright* is that *Gilmer* remains fully intact, but the holding in *Gardner-Denver*[17] has been somewhat significantly limited. This suggests that the arbitration of statutory claims is very much alive and well, especially in the nonunion sector of the economy.

I agree with Professor Kaufman that "public policy will try to shift the locus of dispute resolution back to the workplace and out of the courts and regulatory agencies." In the last decade, the number of

---

[11]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).
[12]119 S.Ct. 391, 159 LRRM 2769 (1998).
[13]*Id.* at 396, 159 LRRM at 2774.
[14]*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).
[15]119 S.Ct. at 396, 159 LRRM at 2774.
[16]*Id.* at 395, 159 LRRM at 2773.
[17]*Supra* note 14.

organizations offering ADR, including arbitration, for the resolution of employment and other disputes, has grown dramatically. In fact, ADR is such a growth industry that if there were a stock known as ADR.COM, I am sure that the IPO would be oversubscribed and the price would triple on its first day of trading. In addition to JAMS / Endispute, the following are among the organizations where Web sites offer ADR services for employment and other disputes:

- Abiding Mediation & Arbitration Services
- ADR Associates, Inc.
- ADR Systems of America
- Arbitration & Mediation Management, Inc.
- Center for Litigation Alternatives, Inc.
- Employment Law Mediation Services
- Judicial Dispute Resolution, Inc.
- Mediation, Inc.
- National Arbitration and Mediation
- Out of Court, Inc.
- Private Judges Inc.
- Resolute Systems, Inc.
- Resolution Forum, Inc.
- Resolution Resources Corporation
- United States Arbitration & Mediation Midwest
- United States Labor Court

One of these organizations, National Arbitration and Mediation, even notes on its Web page that it is a "national company publicly traded on the NASDAQ under the symbol NAMC."

To say that many of these organizations are aggressive in advertising and marketing their ADR services would be an understatement. One such organization, Out of Court, Inc., says in one of its ads: "Be the Chief Operating Officer in your territory and a member of the decisionmaking body in your state."

The trend toward ADR in general and ADR in employment disputes in particular is a trend that the Academy, to my mind, can only ignore at its peril. As a result of the onslaught of ADR providers, the Academy is no longer as big a fish in the dispute resolution pond as it once was. That does not mean that the National Academy of Arbitrators is becoming less relevant. To the contrary, I would suggest that as the number of persons holding themselves out as resolvers of employment disputes grows, the Academy becomes more important in terms of vetting those who are qualified from those who are not. Because of the overabun-

dance of individuals who want to be arbitrators and the appearance of their names on lists provided by various agencies, the Academy plays a critical role in separating the wheat from the chaff. In part because of the increasing number of unknowns and rookies on panels, virtually every contract that I have negotiated over the past decade provides that in the event the parties are unable to mutually agree upon an arbitrator, all panel members on Federal Mediation and Conciliation Service (FMCS) and American Arbitration Association (AAA) lists must be members of the National Academy of Arbitrators. What these parties are saying, loudly and clearly, is that they want their disputes heard by fully qualified and competent arbitrators. Academy membership is their assurance of that.

The Academy should not relax its high standards. If this means that the size of the Academy membership shrinks somewhat, so be it. To the parties, membership in the Academy means that the arbitrator has met the high standards for Academy membership and is qualified to serve as a labor-management arbitrator.

Parenthetically, I would note that there are apparently at least some in the labor-management community who believe, for whatever reason, that the Academy may have already lowered its standards in order to attract new members. In this regard, I recently came across a collective bargaining agreement that not only provided all members of arbitration panels provided by FMCS or AAA must be members of the Academy, but also that they had to have been members of the Academy for at least 5 years!

The Case Against Establishing Minimum Standards for Nonunion Arbitration of Employment Disputes

Professor Kaufman suggests that organized labor should support "movement of dispute resolution from government and the courts to inside firms—union OR nonunion." He advocates the adoption of "minimum standards mandated by government," and posits that such standards will bring unions "a brighter and more prosperous future." The Professor asserts that employers will screw up such dispute procedures and, as a consequence, "their employees will end up dissatisfied and interested in union representation." These notions seem more than just a little far-fetched. In the first place, I am aware of no evidence in this country that employer-initiated arbitration procedures, of which there are many now in existence, have been so badly managed that employees have rushed out to seek union representation. That simply has not

happened. Nor do I believe it would happen if there were federally mandated standards.

Let me turn next to Professor Kaufman's suggestion that the federal government establish minimum standards for the resolution of employment disputes involving nonunion employers. There is something very ironic about this suggestion. The employment litigation explosion has been caused in no small part by a plethora of federal statutes regulating more and more aspects of the employment relationship. Examples range from the Americans with Disabilities Act and the Family and Medical Leave Act[18] to Title VII of the Civil Rights Act of 1964[19] and the Worker Adjustment and Retraining Notification Act of 1988.[20] If I understand Professor Kaufman correctly, he is suggesting that in dealing with the increasing use of ADR to handle an overwhelming caseload we should turn to the federal government for minimum standards to govern ADR. I suspect most employers would strongly object to any efforts to establish minimum standards governing the resolution of disputes in a nonunion setting, especially if the legislation did not cover the resolution of such disputes in a union setting. The only circumstance in which employers might, and I stress *might*, be willing to consider minimum standards would be if they were truly reasonable and if the legislation further provided that any ADR procedure that met such minimum standards would be enforceable. That is, employees would be required to use such procedures in lieu of pursuing statutory claims in federal court.

Concluding Observations

Let me gently suggest that it is perhaps time for the National Academy of Arbitrators to stop bemoaning the perceived decline in the importance of traditional labor arbitration and call a halt to its nostalgic yearning to return to the so-called "golden age." Rather than looking backward, the Academy should accept that the landscape has changed in ways that are not going to be reversed in the foreseeable future. Indeed, the trends that Professor Kaufman and I have noted suggest that more and more employment arbitration cases are going to be in the nonunion sector. From my perspective, the Academy has much to offer the parties in both the union and nonunion sectors. As I suggested earlier, the Academy

---

[18]26 U.S.C. §2601 (1994).
[19]42 U.S.C. §2000e et seq. (1964).
[20]19 U.S.C. §2101 (1989).

should maintain its historic priority of serving the labor-management community, yet should give increasing attention to the resolution of disputes in the nonunion sector. In some respects that is what the FMCS has been doing in recent years. In light of the changed times we live in, it is appropriate for the Academy to reinvent itself as well.

One final note. I think the Academy should give more attention to substantive arbitration issues at its public sessions rather than spending as much time as it does looking inward. Arbitration, in all its formats, is alive and well and the advocates for all parties would welcome more attention to the kind of issues that they have to deal with day in and day out.