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The Role of Law

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Chapter 5

The Role of Law

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I. Introduction

In the early New Deal days, workers' placards in the coal fields proudly proclaimed, "President Roosevelt wants you to join the union." If not literally true, that boast was well within the bounds of poetic license. After the brief interval of federal laissez-faire treatment of labor relations ushered in by the Norris-La Guardia Act of 1932, the National Labor Relations (Wagner) Act of 1935 declared the policy of the United States to be one of "encouraging the practice and procedure of collective bargaining." Employers, but not unions, were forbidden to coerce or discriminate against employees because of their organizational activities. Employers, but not unions, were required to bargain in good faith. Sparked by this government endorsement, the labor movement went on to enjoy the most spectacular decade of growth in its history.

Only a dozen years after the passage of the NLRA, however, in the wake of the massive strikes that swept the country at the end of World War II, the national mood had changed dramatically. The House of Representatives was even prepared to repeal the

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policy of “encouraging . . . collective bargaining,” although cooler heads like Senator Taft ultimately prevailed and this language was left intact. Taft’s announced purpose was to redress the “balance” of power, so that “the parties can deal equally with each other.” So now unions were prohibited, like employers, from coercing or discriminating against employees. Unions became bound by a reciprocal duty to bargain. More to the point, unions were deprived of one of their principal organizing devices, the secondary boycott, with Senator Taft explicitly disavowing any distinction between “good” and “bad” boycotts. Unions, along with employers, were made liable to suit in federal district court for breach of a labor contract, and subject to an 80-day federal injunction in the event of a strike or lockout imperiling the national “health or safety.”

The Labor Management Relations (Taft-Hartley) Act of 1947 laid the foundations of the federal law that has governed union-employer relations (outside the railroad and airline industries) during the past 30 years. In retrospect, union claims that Taft-Hartley was a “slave labor” law border on the paranoid. Yet the Act did signal a major shift in the predominant American attitudes toward organized labor, from sympathy and support to neutrality at best and increasing distrust or hostility at worst. And passage of Taft-Hartley coincided with an abrupt halt in the forward progress of unionization throughout the country. The reasons for

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10 Rail and air, which are heavily unionized, are regulated by the much less controversial Railway Labor Act, 44 Stat. 577 (1926), as amended 45 U.S.C. §151 (1976). The RLA of 1926 was the product of a agreed-upon bill submitted jointly by the railroads and the rail unions. The Act has emphasized the use of permanent tripartite boards to resolve contract grievances and bargaining disputes. See generally The Railway Labor Act at Fifty, ed. Charles M. Rehmus (Washington: U.S. Government Printing Office, 1976).


12 Except for a short-lived spurt during the Korean War, the trend of the percentage of unionized workers in the United States has been steadily downward since 1947, from a high of 23.9 percent of the total labor force in
this decline are manifold. Probably the most important is the continuing shift of jobs from the blue-collar to the white-collar sectors. Nonetheless, various studies, including comparisons of the superior membership gains of Canadian unions during the years 1947–1957, suggest that Taft-Hartley and amendments to it may have played a substantial role in impeding organization.\(^\text{13}\)

This survey of the role of law in American industrial relations over the last three decades will first deal with the soundness of the power balance between unions and employers that has been struck by the federal government. The ouster of most aspects of state regulation in this field through the so-called "preemption" doctrine will be discussed next. Attention will then focus on the high priority accorded individual rights during the past 20 years, both in the workplace and within labor organizations. This focus on the individual employee will lead naturally to a consideration of the increasing emphasis of federal law on the substantive regulation of employment relationships, union and nonunion alike, as distinguished from the more traditional procedural regulation of collective bargaining. Finally, there will be a word on the elusive goal of "labor reform" at a time when Congress seems immobilized by pressure from conflicting interest groups, and when the political influence of organized labor has sunk to a new low.

II. Federal Neutrality and the Quest for An Appropriate Power Balance

One theory behind the Wagner Act was that collective bargaining was the workers' best hope, but that unions were weak and needed federal protection and assistance against entrenched, oppressive employers. The theory behind Taft-Hartley was that unions themselves had grown too powerful, and that workers, smaller employers, and the general public now needed protection against them. The result was a code of union unfair labor practices,

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including the prohibition of secondary boycotts, and federal sanctions against strikes in breach of contract and strikes that might cause a national emergency. While the official policy favoring collective bargaining was retained, the operative effect of Taft-Hartley was to transform the federal government from a promoter of unionism to something more like an impartial referee, enforcing a set of Marquis of Queensberry rules against two combatants, here, labor and management. Inevitably, however, the infinite variety of union and employer tactics, and the infinite variations in the economic power of the respective parties, have often made it difficult for government to determine a proper stance of neutrality.

**Superseniority, Lockouts, and “Discrimination”**

Without any subjective antiunion animus, and with the wholly legitimate purpose of maintaining production in the face of a strike, an employer offered a 20-year “superseniority” credit to strike replacements and to strikers who would return to work. Violations of Section 8(a)(3) of the NLRA customarily require an “illegal intent,” in this instance, “discrimination . . . to discourage [union] membership.” In *NLRB v. Erie Resistor Corp.*, the Supreme Court was prepared to sustain the National Labor Relations Board’s unfair labor practice finding on the ground the grant of such superseniority was so “inherently discriminatory or destructive” that it “carried its own indicia of intent.” Not unreasonably, the NLRB in two subsequent cases relied on this analysis to strike down employer resorts to a lockout as an offensive bargaining weapon. This time the Court reacted quite differently. In *American Ship Building Co. v. NLRB*, it declared that the statute did “not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party’s bargaining power.” The Board’s unfair labor practice rulings on lockouts were set aside.

One can appreciate the Court’s thesis in the abstract. The referee does not change the rules because the heavyweight contender weighs in at 195 pounds while the champion tips the scales at 210.

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But what then do we make of *Erie Resistor’s* “inherently destructive” rationale? Or of the clear implications in *American Ship* that it might have made a difference if the employer had locked out prior to an impasse in the bargaining or if the employer had continued operations with permanent or even temporary replacements? In defining the Board’s proper role, how does one distinguish in the concrete between its allowable appraisal of certain conduct as “inherently destructive” and its forbidden conclusion that use of a certain weapon could give the employer “too much power”?

The Supreme Court in the superseniority and lockout cases enunciated general principles of scant predictive value. That would not be so bad if employers and unions were simply being informed that the deleterious impact of the diverse economic devices used by either side was intrinsically uncertain and that their categorization as “inherently destructive” of employee rights would have to turn on an ad hoc inquiry into the facts of each particular case. Unfortunately, in the classification process the Supreme Court seems to have relied on armchair speculation rather than on-site inspections. In the lockout cases, for example, the unions sought through “Brandeis briefs” to demonstrate the actual effect of the employers’ action by presenting data on employee savings, the unions’ war chests, and so on. The Court did not deign to dignify this approach with so much as a footnote reference.

These contrasting decisions highlight one of the dilemmas of legal administration in a field like labor. The NLRB must handle some 60,000 cases a year. Efficiency and economy of operation, as well as a concern for predictability, dictate a heavy stress on hard and fast rules and decision-making by categories. Yet drawing such subtle inferences as an employer’s “illegal intent” from the “inherently destructive” nature of its conduct will surely result in frequent injustice unless there is the closest scrutiny of individual facts. To date the Supreme Court has not come close to resolving this dilemma.

**Secondary Boycotts and Industry Differences**

Taft-Hartley, through Section 8(b)(4) of the amended National Labor Relations Act, outlawed the classic secondary boycott. That occurs when a union attempting to organize the Ace Manu-
facturing Co. proceeds to picket Black Retailers, asking the employees of Black to strike him as long as he continues to stock Ace products. The standard analysis is that Ace is the “primary” employer, and that the union is seeking to pressure it by enmeshing a neutral or “secondary” party, Black, in a dispute of no concern to the latter. The NLRB and the courts have spent the last three decades trying, with mixed results, to draw the line between allowable primary activity and forbidden secondary activity.16

The Supreme Court’s most celebrated single essay at such line-drawing was NLRB v. Denver Building & Construction Trades Council.17 Construction unions struck a job site when the unionized general contractor engaged a nonunion subcontractor to do electrical work. The unions contended they had a primary dispute with the general for failing to make the job all-union. The Supreme Court disagreed, holding in effect that the nonunion sub was the unions’ “primary” target, that the sub and the general were independent contractors, and that to strike with an object of forcing the general to cease doing business with the sub was a violation of Section 8(b)(4). The Supreme Court may have flown in the face of reality by refusing to categorize the general contractor and the subcontractors on a building project as “economic allies,” and thus to be treated as a single primary employer for statutory purposes. Indeed, since Denver was decided in 1951, every administration except President Ford’s has favored legislation to overrule or modify it and to authorize “common situs” picketing in the construction industry.18 But Denver remains the law.

Over the years a number of loopholes were exposed in the original Taft-Hartley ban on secondary boycotts. Probably the most serious was the so-called “hot cargo” or “hot goods” clause.

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18 Ironically, the only time Congress mustered the votes to pass a common situs picketing bill was during the Ford presidency, and he vetoed it. Presumably, the Reagan Administration would also oppose a change in the Denver rule.
An essential element of a Section 8(b)(4) violation was a strike by employees. If a union went directly to an employer and got him to agree voluntarily, or even under a threat of violence or economic pressure, to cease dealing with another person, that would not be a violation, although the selfsame result effectuated by a strike would be prohibited.\textsuperscript{19} The International Brotherhood of Teamsters made much use of "hot cargo" clauses to require union truckers not to handle freight that had been carried by nonunion firms. In the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959,\textsuperscript{20} Congress added Section 8(e) to the NLRA to prevent such arrangements.

Section 8(e) opened up another problem. By its terms it forbids an employer to agree "to cease or refrain from . . . using . . . the products of another employer, or to cease doing business with any other person." That would apply literally to an outright ban on subcontracting designed to preserve bargaining unit work, a result obviously not intended.\textsuperscript{21} The problem gets sticky if the ban takes the form of an agreement not to use a particular product, like pre-fitted doors on a building project. In \textit{National Woodwork Manufacturers Assn. v. NLRB},\textsuperscript{22} five Justices of the Supreme Court were prepared to say the union objective in such an instance was "preservation of work" traditionally done on site by carpenters, and it was thus primary. According to the majority, the "touchstone" was whether the challenged agreement was "addressed to the labor relations of the contracting employer vis-à-vis his own employees." Four dissenting Justices thought such a patent "product boycott," even for work-preservation purposes, was within both the "clear word" and the intent of the secondary boycott proscription.

The problem of reconciling work preservation and Section 8(e) becomes even stickier if, as so often happens, the work the union is trying to "preserve" has undergone some sort of transformation because of technological innovation. The Supreme Court confronted this situation in dealing with containerized shipping in

\textsuperscript{19} E.g., \textit{Carpenters Local 1976 v. NLRB} [Sand Door], 357 U.S. 93 (1958).


\textsuperscript{21} E.g., \textit{Truck Drivers Local 413 v. NLRB}, 334 F.2d 539 (D.C.Cir. 1964), \textit{cert. den.}, 379 U.S. 916 (1964).

\textsuperscript{22} 386 U.S. 612 (1967).
NLRB v. International Longshoremen's Assn.\textsuperscript{23} The ILA had agreed with a shippers association that ILA labor would have the job of "stuffing" or "stripping" all containers within a 50-mile radius of the port, and that a royalty would be paid on any containers passing over the piers intact. The NLRB concluded that since ILA members had never performed off-pier stuffing or stripping, it was engaged in illegal work acquisition rather than permissible preservation of work within its traditional jurisdiction. In another 5-4 decision, the Court disagreed that the determination that the work of the longshoremen had historically been the loading and unloading of ships was dispositive. Writing for the majority, Justice Marshall declared the question was how the parties "sought to preserve that work, to the extent possible, in the face of massive technological changes." The case was remanded to the Board for initial consideration of whether "the stuffing and stripping reserved for the ILA . . . is functionally equivalent to their former work," or whether "containerization has worked such fundamental changes in the industry that the work formerly done at the pier . . . has been completely eliminated." Although insisting the Board's answer was not preordained, Justice Marshall added pointedly: "This determination will, of course, be informed by an awareness of the congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace."

Justice Marshall's opinion apparently accepts, without explanation, the work preservation–work acquisition dichotomy as critical in boycott analysis. This is not a logical imperative. If an employer's labor relations "vis-à-vis his own employees" is the "touchstone" of primary activity, why is it so significant that he or his employees have never previously done the work he now has at his disposal?\textsuperscript{24} Furthermore, deciding that a particular agreement, if accepted by an employer, does not run afoul of antiboycott strictures says nothing at all about whether the employer had any obligation under the NLRB to bargain about the matter in the first place. Perhaps he could have refused even to discuss it on the

\textsuperscript{23} 100 S.Ct. 2305 (U.S. 1980).

\textsuperscript{24} It is established that an employer must have the "right of control" over disputed work, or union pressure to secure it from him will be secondary. NLRB v. Pipefitters Local 638 [Enterprise Assn.], 429 U.S. 507 (1977).
ground it was a managerial prerogative. That is an issue we shall consider later.\textsuperscript{25} Beyond these legal conundrums lies the more fundamental policy question of how workers' interests in safeguarding their jobs should be balanced against employers' interests in increasing efficiency through technological improvements. Congress of course is the ultimate arbiter here, and, as Justice Harlan once put it, the Court should be cautious about outlawing union-employer arrangements to alleviate the problem "until Congress has made unmistakably clear that it wishes wholly to exclude collective bargaining as one avenue of approach to solutions in this elusive aspect of our economy."\textsuperscript{26}

If the political climate were more propitious, it would be time for a thorough reexamination of boycott law in general. There has been entirely too much moralizing about what is essentially a device for exerting economic force. The boycott's allowance or disallowance should depend on a careful weighing, on the basis of empirical evidence, of union need against business and consumer injury. Some time ago I surveyed 99 cases in which the NLRB had found secondary boycott violations over a 28-month period.\textsuperscript{27} Several conclusions emerged. First, the secondary boycott is largely a construction industry phenomenon. The building trades account for 70 percent of all violations. If the Teamsters were added in, only 15 percent of the secondary boycotts in my sample were left for the unions in all other industries combined. Quantitatively, this should greatly reduce apprehensions about the ravages of the secondary boycott. Picketing and strikes at a common situs in the construction industry would not even constitute violations of Section 8(b)(4) were it not for the much-criticized Denver Building Trades decision.\textsuperscript{28}

Second, my study indicated that over three-fifths of all secondary boycotts had an organizational objective. It has been suggested elsewhere that as long as national policy officially favors collective

\textsuperscript{25} See text at notes 64–67 infra.

\textsuperscript{26} National Woodwork Manufacturers Assn. v. NLRB, 386 U.S. 612 (1967) (concurring opinion).


\textsuperscript{28} See text at note 17 supra.
bargaining, boycotts for organizing purposes should be lawful.\textsuperscript{29} The point has additional appeal now that union membership is down to only about one-fifth of the labor force.\textsuperscript{30} But I am not ready to conclude, for this reason alone, that the restrictions on the boycott should be loosened. Against this evidence of union need must be set the evidence of damage caused by secondary boycotts to primary employers, secondary employers, and the public generally. Another empirical study conducted at the University of Oklahoma found that the injury to neutral parties was “negligible.”\textsuperscript{31} My own results were not quite so sanguine, although they did indicate that primary employers have a larger stake than secondary employers in the enforcement of boycott bans.\textsuperscript{32} In any event, if it could be established that unions have a pressing need to use the secondary boycott for organizational purposes, and that neutrals suffer only small harm from it, Congress might be impelled to a more discriminating judgment than any rendered here-tofore on the availability of this particular economic weapon.

Congress has already drawn some antiboycott lines on an industry-by-industry basis, and this may be a promising approach to pursue. For example, the garment industry is so highly integrated that collective bargaining could not exist if employers were able to subcontract to nonunion firms. Congress has responded by exempting that industry, in practical effect, from the antiboycott provisions of the statute.\textsuperscript{33} Congress has also recognized the special relationships of general contractors and subcontractors at a construction site and has permitted building unions to seek agreements guaranteeing all-union jobs there.\textsuperscript{34} In light of the massive power of the International Brotherhood of Teamsters vis-à-vis small individual truckers, on the other hand, one might always wish to


\textsuperscript{30} See note 12 \textit{supra}, and accompanying text.

\textsuperscript{31} Brinker and Cullison, \textit{supra} note 29, p. 403.

\textsuperscript{32} In the 99 cases examined, primary employers sustained “substantial” damage to their businesses on 65 occasions, while secondary employers sustained such damage on only 46 occasions. St. Antoine, \textit{Labor Law Developments}—1968, \textit{supra} note 27, pp. 11–12.

\textsuperscript{33} NLRA §8(e), 29 U.S.C. §158(e) (1976).

\textsuperscript{34} \textit{Ibid.}
retain bans on boycotts in the trucking industry, even if they were relaxed elsewhere.\textsuperscript{35}

\textbf{Union Election Campaigns—Unrealistic Rules and Ineffective Remedies}

A secret ballot election conducted by the Labor Board is probably the most dramatic manifestation of the rights accorded employees by Section 7 of the NLRA to organize and bargain through "representatives of their own choosing," \textsuperscript{36} or to refrain from such activities. The importance of representation elections has been further enhanced by Supreme Court rulings that an employer who steers clear of unfair labor practices that might preclude a fair vote can ordinarily insist upon a union's filing a petition for an election, and need not grant recognition on the basis of signed authorization cards, which often exaggerate the support for the union.\textsuperscript{37} Ideally, the vote that is finally registered should reflect the employees' free and informed choice, reached after careful consideration of the arguments for and against unionism. In the pursuit of this ideal, the NLRB has expended much time and energy perusing employer and union campaign communications for evidence of "coercive" statements that might have improperly influenced the voters' decision. There is now reason to believe, however, that all these years the Board may have been chasing a mirage in its efforts to ensure fair elections.

A recent empirical study of 31 NLRB elections could find no significant difference between voter behavior in "clean" and "dirty" campaigns.\textsuperscript{38} Employees made up their minds on the basis of predispositions, their direct experience with the employer, and occasionally their personal contacts with the parties’ representatives.


But the actual content of the parties’ speeches and other messages counted for relatively little. Coercion was rarely if ever a factor. The authors recommended that the Board “cease regulating speech,” and that elections should be rerun only where employer conduct “interferes with union access to employees.”39 Shortly after this study, the NLRB was prompted to reexamine its rule concerning misrepresentations in a campaign. A 3-2 majority concluded that the Board generally would no longer set elections aside because of misleading statements.40 Just a year later, however, a new 3-2 majority overruled that decision, returning to the position that an election should be invalidated if there is a substantial misrepresentation that the other side does not have time to refute.41 A priori reasoning had apparently triumphed over the unsettling intrusion of hard fact.

There would be less concern about the substance of campaign propaganda if both parties, like opposing political candidates, had an equivalent opportunity to reach the voters. Unfortunately, the NLRB has seemed inhibited from any attempt to develop equal access rules by two other Supreme Court decisions concerning unfair labor practices. They held, first, that an employer could rely on its property rights to prevent entry to company premises by nonemployee union organizers as long as other channels of communication were reasonably available,42 and, second, that an employer could use its supervisors to conduct an antiunion campaign on company time without allowing similar pro-union activity by employees, so long as this did not create “an imbalance in the opportunities for organizational communication.”43 Thus, the Board has expressly declined to set an election aside because an employer made an antiunion speech on company time shortly before an election and refused the union a chance to reply.44 Yet these situations could readily have been distinguished. First, the Board undoubtedly has greater latitude in prescribing rules for the conduct of a fair election under Section 9 of the NLRA than it has

39 Getman et al., supra note 38, p. 159.
in finding a party guilty of an unfair labor practice under Section 8.\textsuperscript{45} Second, empirical evidence is now available that an employer who addresses his employees at the workplace while denying those facilities to the union normally does reach a substantially larger proportion of his employees, thus producing the requisite imbalance in communication.\textsuperscript{46}

The NLRB also appears to have been stymied in its efforts to fashion effective remedies for employer refusals to bargain by an unnecessarily broad reading of another Supreme Court decision. At the present time an employer who is willing to stand the heat of public opinion can forestall negotiations for several years. Eventually he will be subject to a judicially enforceable order to bargain, but in the meantime the employees will be denied the fruits of any contract that good faith bargaining might have produced. The Labor Board has refused union requests for a “make-whole” reimbursement remedy in these circumstances, even when the employer’s violation is “clear and flagrant.”\textsuperscript{47} Prominent in the Board’s thinking was the often-reiterated view of the Supreme Court that the Labor Act’s philosophy of freedom of contract is antithetical to official compulsion of the actual terms of a collective bargaining agreement.\textsuperscript{48} Thus, the Court has held contract terms may not be imposed even as a remedy for a proven violation.\textsuperscript{49}

There is no gainsaying that a make-whole award would tend to place a floor under any settlement negotiated later. But technically it would not set contract terms for the future; it would merely be a measure of the employees’ losses in the past. The Labor Board also claims that its expertise is not adequate to the task of calculating an appropriate amount. Courts have not been deterred, however, from estimating antitrust damages on the basis of a plaintiff’s lost contracts,\textsuperscript{50} and the availability of Bureau of Labor Statistics figures on union wage scales, comparable labor

\textsuperscript{46} Getman et al., supra note 38, p. 156.
\textsuperscript{48} NLRA §8(d), 29 U.S.C. §158(d) (1976) (“such obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession”).
\textsuperscript{50} See, e.g., Bigelow v. RKO Pictures Inc., 327 U.S. 251 (1946).
contracts in the industry or area, and the like, should ease the Board's chore considerably. The egregious refusal to bargain would seem the paradigm case for application of the principle that if a wrongdoer has itself created the uncertainty, it should not be heard to complain when doubts are resolved against it.

Under the ill-fated Labor Reform Bill of 1978 Congress would have acted with regard to both the problem of union access to employer premises and the problem of inadequate bargaining remedies. The NLRB would have been directed to use its rule-making authority to establish guidelines providing unions an equal opportunity to reply to an employer's antiunion speeches on company property during an organizing drive. An employer would also have been subject to a make-whole remedy in favor of its employees if it unlawfully refused to bargain with a union prior to the execution of a first contract. Although the bill passed the House of Representatives easily, it ran afoul of a prolonged Senate filibuster that an unprecedented six attempts at cloture could not break. Subsequently, partisans of both management and labor were in agreement that business groups had organized "perhaps the most extensive and intense lobbying effort ever to hit Congress,"\(^\text{51}\) with an "all-time high of over three million . . . pieces of mail" pouring in on the Senate.\(^\text{52}\) That is an extraordinary commentary on management hostility to a bill which had the general backing of every living ex-Secretary of Labor, Democrat and Republican, and which was designed not to alter the balance of bargaining power between unions and employers, but only to facilitate the organizing of the unorganized.\(^\text{53}\)

**Duty to Bargain**

Whether imposing a statutory duty to bargain in "good faith" could ever amount to more than a pious exhortation has been the subject of much controversy. At the hearings on the original

\(^{51}\) Gerald E. Rosen, "Labor Law Reform: Dead or Alive?" *University of Detroit Journal of Urban Law* 57 (Fall 1979), pp. 1, 8.


Wagner bill, Harvard's Sumner Slichter caustically likened it to enacting "that the lions and lambs shall not fail to exert every reasonable effort to lie down together." As recently as 1961 a distinguished Labor Study Group branded the requirement "unrealistic," adding that "the provisions designed to bring 'good faith' have become a tactical weapon used in many situations as a means of harassment." Over the years, however, there has been increasing evidence the statute has had practical effect, including voluntary compliance by management. Thus, one survey revealed that successful bargaining relationships were eventually established in 75 percent of the cases sampled that went through to a final Board order, and in 90 percent of the cases that were voluntarily adjusted after the issuance of a complaint. Although a recalcitrant offender, as we have seen, can drag his heels with impunity, the majority of American employers and unions are law-abiding. However hard it may be to classify legally such particular tactics as "take-it-or-leave-it" bargaining, it would seem almost perverse to deny at this late date that overall the statutory duty to negotiate in good faith has had a salutary impact.

Over the past 20 years, the most controversial issue concerning the duty to bargain has been the extent to which employers must negotiate about managerial decisions that result in a shrinkage of employee job opportunities. One approach could have been that the parties were simply under an obligation to deal in good faith with one another, whatever the subject might be. The Supreme Court may have made a serious misstep in the famous Borg-Warner case, however, when it went in a quite different direction and endorsed the NLRB's classification of bargaining subjects

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as "mandatory" or "permissive." "Mandatory" is now shorthand for the statutory itemization of "wages, hours, and other terms and conditions of employment" about which the parties are obligated to bargain. Either union or employer may insist on seeking agreement on a given mandatory topic to the point of an impasse or breakdown in negotiations. On the other hand, neither party may demand bargaining on a permissive subject, that is, managerial prerogatives or matters of purely internal union concern, if the other party objects. Insistence on such an item as a condition of contracting will be equated with an unlawful refusal to bargain on mandatory subjects.

The existing rules suffer from several shortcomings. First, government becomes too much the arbiter of the appropriate subject matter of collective bargaining. Why should a federal agency, rather than the parties themselves, determine whether a particular item is so important that it is worth a strike or a lockout? Second, the current doctrine makes for hypocrisy in negotiations. If a party deeply desires a concession on a nonmandatory subject that may not legally be carried to impasse, what can it be expected to do? It will hang the bargaining up on a fake issue that happens to enjoy official approbation as a mandatory topic. Finally, the present mandatory-permissive rules are not logically necessary, and are probably less likely than several possible alternatives to promote sensible collective bargaining.

At least two other tacks could have been taken in Borg-Warner. One would have eliminated the mandatory-permissive distinction entirely. Whatever either party wanted to put on the table would have called for good faith negotiating. Candor would have been enhanced, and unresolved disputes would have been recognized for what they ordinarily become anyway, matters to be decided by economic muscle. A second, middle course was advocated by Justice Harlan in Borg-Warner. He would have retained the mandatory-permissive distinction, but with a difference. Either party would still be required to bargain to impasse about mandatory subjects and not about permissive subjects. That is the existing law. At the same time, however, either party under the Harlan formulation could persist in pursuing any lawful demand, regardless of how the Board might categorize it, and refuse to contract

absent agreement on that item. In short, Justice Harlan read Section 8(d) of the Labor Act to mean what it says, and only that. A party is obligated to bargain about wages, hours, and working conditions. But an insistence on bargaining about more is not the equivalent of a refusal to bargain about a mandatory subject. A union, for example, could dismiss out of hand an employer's demand for a secret-ballot strike vote procedure, but the employer would not commit an unfair labor practice if he remained adamant on it. Either of these two approaches might have comported better with the realities of collective bargaining than the law as now propounded.

*Borg-Wagner* is the accepted standard, however, and the parties must play the hand that has been dealt them. Under that rubric, it is crucial whether certain subjects are classified as working conditions or management rights. For a long time the NLRB held that in the absence of antiunion animus, employers did not have to bargain over decisions to subcontract, relocate operations, or introduce technological improvements, although they did have to bargain about the *effects* of such decisions on the employees displaced. Layoff schedules, severance pay, and transfer rights were thus bargainable, but the basic decision to discontinue or change an operation was not.\(^6^0\) Under the so-called Kennedy Board, however, a whole range of managerial decisions were reclassified as mandatory subjects of bargaining. These included decisions to terminate a department and subcontract its work,\(^6^1\) to consolidate operations through automation,\(^6^2\) and to close one plant of a multiplant enterprise,\(^6^3\)

In *Fibreboard Paper Products Corp. v. NLRB,\(^6^4\) the Supreme Court gave limited approval to this shift of direction. It sustained a bargaining order when a manufacturer wished to subcontract out its maintenance work. The Court emphasized this did not alter the company's "basic operation," or require any "capital investment." There was merely a replacement of one group of employees with

\(^{60}\) E.g., *Brown McLaren Mfg. Co.*, 34 NLRB 984 (1941); *Brown-Dunkin Co.*, 125 NLRB 1379 (1959), enforced 287 F.2d 17 (10th Cir. 1961).


\(^{63}\) *Ozark Trailers, Inc.*, 161 NLRB 1294 (1966).

\(^{64}\) 379 U.S. 203 (1964).
another group to do the same work in the same place under the same general supervision. Bargaining would not “significantly abridge” the employer’s “freedom to manage the business.” One court of appeals has elaborated on this rationale and held there is no duty to bargain about a “change in the capital structure.”65 Other courts of appeals, in cases of partial shutdowns and relocations, have balanced such factors as the severity of any adverse impact on unit jobs, the extent and urgency of the employer’s economic need, and the likelihood that bargaining will be beneficial.66 This has the attraction of maximizing fairness in individual situations, but it can lead to uncertainty and unpredictability. In recent years the Labor Board itself seems to have retreated somewhat from its former firm stand in favor of bargaining. For example, a 2-1 majority held an employer did not violate the statute when it totally terminated the manufacturing portion of its operations without bargaining over the question.67

Within the established framework of the mandatory-permissive dichotomy, the practical inquiry is whether imposing a duty to bargain about these “managerial” decisions will do more harm than good. It will obviously delay proceedings, and may interfere with the confidentiality of negotiations with third parties. In some instances bargaining will be doomed in advance as a futile exercise. Nonetheless, the closer we come to recognizing that employees may have something akin to a property interest in their jobs, the more apparent it may become that not even the employer’s legitimate regard for profit-making or the public’s justified concern for a productive economy should totally override the workers’ claim to a voice in the decisions of ongoing enterprises that will vitally affect their future employment opportunities.68 A leading management attorney of my acquaintance says he has “Fibreboarded” his unions for years, long before the decision itself, simply as a matter

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66 E.g., compare Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978), with Midland Ross Corp. v. NLRB, 617 F.2d 977 (3d Cir. 1980), and NLRB v. Production Molded Plastics, 604 F.2d 451 (6th Cir. 1979).
67 Summit Tooling Co., 195 NLRB 479 (1972). The latest word from the Supreme Court is First National Maintenance Corp. v. NLRB, 49 U.S.L.W. 4769 (1981) (employer has no duty to bargain about decision “to shut down part of its business purely for economic reasons”).
of good personnel relations. In loftier terms, an ethical value is arguably at stake in determining whether employees may be treated as pawns in management decisions. 69 On a crasser level, unions will lose considerable leverage in bargaining even about the effects of a business change if the employer can present them with a fait accompli in the change itself. Occasionally, negotiations will produce a less drastic solution than a shutdown or a relocation. At the very least bargaining may serve a therapeutic purpose. As the Supreme Court put it in Fibreboard, the Labor Act “was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife.” 70

National Emergency Disputes

No provision of Taft-Hartley evoked a louder union outcry than the authorization for the Attorney General to seek an 80-day federal injunction against a strike or lockout when the President concludes, after receiving the report of a board of inquiry, that a work stoppage would imperil the “national health or safety.” 71 In the eyes of the labor movement, this was a return to the dreaded days of “government by injunction” that existed prior to Norris-LaGuardia. But resort to these emergency procedures has declined through the years. They were invoked 27 times between 1947 and 1967, but only eight times since. After one early, heavy fine for contempt against John L. Lewis and the United Mine Workers, there has generally been compliance with the injunctions that were issued. On nine occasions (all involving maritime or longshoring disputes) there were major strikes after the 80 days expired.

Common criticisms of the Taft-Hartley procedure have been: (1) it discriminates against employees, since they must continue to work under the old contract terms; (2) the 80-day injunction period merely postpones the strike deadline and thus delays serious bargaining; (3) the secret vote the NLRB must conduct among the employees on accepting the employer’s final offer during the last 20 days of the injunction is a waste of time (the offer is invariably rejected) and an impediment to late-hour negotiations; (4) denying the board of inquiry the power to make recommendations prevents it from rallying public opinion behind a fair settlement;

70 379 U.S. at 211.
and (5) there is no provision for ultimate resolution of the dispute once the 80-day injunction is dissolved. Perhaps the very element of uncertainty introduced by the latter factor, however, is a spur to voluntary settlement. The absence of a definitive legislative solution may also reflect the reality that in today’s world a genuine national emergency dispute is more a political than a legal problem.

**Antitrust**

Labor antitrust issues were quiescent in the Supreme Court during the 1950s and the early 1960s. A trio of major decisions in the forties had established guidelines that appeared to reduce substantially the antitrust implications of union activities. Strong dictum from Justice Stone in the *Apex Hosiery* case\(^7^2\) indicated that the Sherman Act applies only to “some form of restraint upon commercial competition in the marketing of goods or services,” and that it is not directed at “an elimination of price competition based on differences in labor standards.” This was not a matter of a statutory exemption for unions; the Sherman Act, as written, would simply not cover a certain class of restraints. Employers, or employers in combination with unions, would presumably be as free as unions acting alone to halt competition grounded in labor market differentials.\(^7^3\)

A year after *Apex*, a wholly new and different theory of union antitrust immunity was enunciated in *United States v. Hutcheson*.\(^7^4\) Justice Frankfurter examined the anti-injunction provisions of the Clayton\(^7^5\) and Norris-La Guardia\(^7^6\) Acts, and pronounced the startling conclusion that activity immunized against injunctive relief by those two statutes, read together, was not to be deemed a substantive offense under the Sherman Act. The effect was to exempt from antitrust regulation peaceful, nonfraudulent union conduct in the course of a labor dispute, as long as a union acts in its own interest and does not combine with nonlabor groups.

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\(^7^2\) *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495, 503 (1940).


\(^7^4\) *312 U.S.* 219 (1941).


Unlike *Apex*, which focused on the nature of the restraint, regardless of who imposes it, *Hutcheson* created a genuine exemption from the antitrust laws for unions “acting alone.” The corollary to this, as *Allen Bradley*\(^7^7\) subsequently made clear, was that labor organizations lose their immunity when they “aid nonlabor groups to create business monopolies and to control the marketing of goods and services.”

*Hutcheson* appeared at the time a nearly impregnable defense against union antitrust liability. What was overlooked was that it only applies to a union in the midst of combat, to a union engaged in striking, picketing, or similar concerted action against an employer. As soon as a union moves on to the more civilized phase of signing a peace treaty, and entering into collective bargaining, it is no longer “acting alone,” and the *Hutcheson* antitrust exemption no longer applies. In 1965 the Supreme Court had to face up to this realization in a pair of landmark decisions.

In *UMW v. Pennington*\(^7^8\) it was alleged that the Mine Workers and the major coal producers had conspired to drive smaller, less efficient operators out of business by establishing a uniform industry-wide wage rate higher than the smaller producers could afford. If true, the allegation would make it hard for a union to rely on the *Hutcheson* exemption for a union acting alone. Yet the competition that was to be eliminated was competition “based on differences in labor standards”—specifically, on wages, that core mandatory subject of bargaining under the NLRA—and thus arguably the *Apex Hosiery* doctrine came into play. A restraint confined to the labor market would not even be covered by the Sherman Act. Speaking through Justice White, the Supreme Court in *Pennington* added an important qualification to *Apex*. Even an arrangement concerning wages, hours, and working conditions could violate the antitrust laws if it had the “predatory purpose” of eliminating business competitors. The Court was little troubled by dissenting Justice Goldberg’s objection that the proof of such unlawful purpose might turn on some local jury’s determination that the union wage scale was “too high” for inefficient operators to meet.

The second 1965 case, *Meat Cutters Local 189 v. Jewel Tea*

\(^{77}\) *Allen Bradley Co. v. IBEW Local 3*, 325 U.S. 797, 808 (1945).

\(^{78}\) 381 U.S. 657 (1965).
Co., 79 involved a much more direct restraint on the product market. A butchers’ union compelled a grocery chain to limit its meat market hours from 9:00 a.m. to 6:00 p.m. The Court concluded (through two plurality opinions accepted by three Justices each) that this restriction, which in effect defined the butchers’ working hours and their job content, was “intimately related” to working conditions. Hence the union’s effort to secure the provision through arm’s-length bargaining in pursuit of its own labor policies, and not in furtherance of some union-employer conspiracy, was exempt under the Sherman Act. Although the results of *Pennington* and *Jewel Tea* are understandable and defensible given the Court’s reading of the facts, it is probably a confirmation of the inherent incompatibility of the antitrust laws and the labor field that a respectable argument can be made that both these cases were wrongly decided. *Pennington* may have given too much power to fact-finders to draw dubious inferences of union-employer conspiracies to destroy competition, and *Jewel Tea* may have failed to give sufficient weight to consumer interests in market access. In the latter case the butchers actually had a separate contract provision guaranteeing their job content and working hours; the further ban on night self-service operations would seem to have provided the butchers scant additional protection while causing substantial inconvenience to the shopping public.

The Supreme Court’s *Connell* decision 80 in 1975 was a throwback to an earlier era of labor antitrust analysis. A plumbers’ local had secured a commitment from a general contractor that it would subcontract mechanical work only to firms that had a collective bargaining agreement with the union. A 5–4 majority of the Court held the agreement subject to the antitrust laws, and remanded for consideration of the claim it violated the Sherman Act. Although nothing in the record indicated the union was conspiring with local mechanical contractors to exclude outsiders from the market by refusing to bargain with them, the Court concluded the arrangement with the general had “substantial anticompetitive effects, both actual and potential, that would not follow naturally from elimination of competition over wages and working conditions.” 81

79 381 U.S. 676 (1965).
81 *Id.* at 625.
What the Court in Connell did in effect was to classify the use of the union-only subcontracting clause, at least outside a direct bargaining relationship between the general contractor and the plumbers’ local, as a restraint on the product market rather than as a restraint on the labor market. The majority erred in failing to realize that under established precedent, the antitrust laws generally do not apply to agreements aimed at promoting union organization, as well as to agreements aimed at eliminating competition over other labor standards. Connell may foreshadow a stiffer standard for determining what constitutes wages and working conditions within the antitrust immunity afforded by Apex Hosiery and Jewel Tea. If so, that will be an unfortunate development. In dealing with labor abuses, primary reliance should be placed on the labor laws. Unions and the antitrust laws are premised on fundamentally opposing philosophies of competition. There will be anomalies at best, and grave distortions at worst, in attempting to regulate labor organizations through an instrument so at odds with their nature and purposes.

III. The Nationalization of Labor Law

The central achievement of the Warren Court in the labor field was a simple but basic restructuring of intergovernmental relations. In a series of decisions that were hotly controverted at the time but have quietly won general acceptance since, the Court largely succeeded in nationalizing the regulation of labor relations in industries affecting commerce. The importance in the Warren Court’s eyes of “federal preemption”—the exclusion of state substantive law from areas regulated by Congress—can be shown to an extent simply in quantitative terms. About 110 labor decisions of the Warren era can be labelled as “important.” Of these, almost 40, or over a third, deal either directly with the metes and bounds of the preemption doctrine, or with issues that would not have arisen but for the displacement of state law by federal. The cases will be discussed in two categories: those decisions concerned with the extent to which state law may still operate in areas subject to federal regulation, and those decisions concerned with the development of federal law to replace state law as the basis for enforcing collective bargaining agreements.

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STATE SUBSTANTIVE REGULATION

At the time Chief Justice Warren assumed office, the preemption doctrine in its application to labor relations was still in its adolescence. The well-nigh axiomatic principle had been established that a state could not directly impede the exercise of federal rights of self-organization, for example, by imposing onerous licensing requirements on union agents. But states were still free to regulate such labor activities as “quickie” strikes, which technically were neither protected nor prohibited under federal law. More important, no clear rationale had been evolved to justify conclusions that particular kinds of conduct fell either within or without the ambit of state regulation. And there had been little airing of the underlying policy considerations which go to the very heart of our federal system: the balancing of the need for a uniform national policy in matters affecting the country as a whole against the need to accommodate regional differences and desires for local experimentation.

The very first term of the Warren Court ushered in the vanguard of today’s preemption theory. In Garner v. Teamsters, the Court held that a state injunction could not duplicate a federal remedy by forbidding conduct proscribed under the National Labor Relations Act. Diversity of procedures was said to be as apt to produce conflicting adjudications as diversity of substantive rules. It soon became apparent, however, that a majority of the Court regarded a deficiency in the federal remedy as a sufficient reason for sustaining state jurisdiction. Thus, employees or employers suffering monetary losses through tortious conduct that was also an unfair labor practice could maintain a state court action for damages, since the National Labor Relations Board had no general power to award full compensatory relief.

San Diego Building Trades Council v. Garmon, decided in 1959, remains the Supreme Court’s most nearly definitive statement on preemption. There the Court in handling the preemption

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issue shifted from an emphasis on the nature of the state relief sought (was it more adequate than the federal remedy?) to an emphasis on the nature of the activity in question (was it regulated under federal law?). The now-famous test was enunciated that if conduct is "arguably" protected by Section 7 of the LMRA, or "arguably" prohibited by Section 8, exclusive primary jurisdiction rests in the NLRB and state (or federal) courts are precluded from acting. Earlier decisions which had appeared to rely on the deficiency of the federal remedy were explained as upholding state court jurisdiction because violence or threatened violence was present, or because the activity was of "merely peripheral concern" to the federal statutory scheme.\textsuperscript{88}

The soundness of that is surely not self-evident. Under the expansive preemption doctrine, states have been sharply limited in the role they can play as "laboratories" for social experiment. Numerous restrictions have been imposed on customary state functions. Thus, although the states can still assert their police power to maintain public order, they cannot take over a public utility to halt a strike.\textsuperscript{89} Laws not dealing specifically with labor relations, such as state antitrust statutes\textsuperscript{90} and even traditional common law libel doctrines,\textsuperscript{91} may also run afoul of the preemption principle. This is so even though it is by no means clear that Congress was as eager as the Supreme Court would suggest to ensure the unsullied uniformity of federal regulation.\textsuperscript{92} Indeed, the Burger Court has provided one major exception to Garmon's "arguably protected or arguably prohibited" formula. An employer may bring a trespass action in state court against a union engaged in peaceful picketing on private property, even though the picketing might be

\textsuperscript{88} Id. at 241-43, citing Laborum, supra note 86 (threatened violence); Russell, supra note 86 (mass picketing); Machinists v. Gonzales, 356 U.S. 617 (1958) (wrongful expulsion of member from union).

\textsuperscript{89} Street, . . . Employees Division 1287 v. Missouri, 374 U.S. 74 (1963).

\textsuperscript{90} Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959).

\textsuperscript{91} Cf. Linn v. Plant Guard Workers Local 14, 383 U.S. 53 (1966) (libel action maintainable only if defamation in course of labor dispute is malicious and actually injurious). Several members of the Burger Court, however, may now be ready to trim back the preemptive effect of federal labor law on state laws of "general applicability." See, e.g., New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 533 (1979).

\textsuperscript{92} When Congress enacted the Landrum-Griffin Act in 1959 to provide the first comprehensive regulation of internal union affairs, it specifically negated any general intent to exclude concurrent state regulation. See 29 U.S.C. §523 (1976).
either protected or prohibited under the NLRA.\textsuperscript{93} The Court stressed that otherwise the employer would be helpless, since it itself could not get a definitive ruling on the legal issue from the Labor Board, and that in all likelihood such picketing is not federally protected.

On balance, the Warren Court acted wisely in most of its pre-emption rulings. Labor law continues to be one of our most divisive domestic issues, and much of the divisiveness runs along regional lines. Federally enforced uniformity thus seems peculiarly necessary, lest either unions or employers be unduly favored in particular states. Such regional variations could hardly fail to have an adverse impact on the nation's economy. For example, plants might be lured from place to place while labor bitterness constantly deepened. The present healthy trend toward a leveling of wage rates for similar jobs across the country could well be reversed. Of course, a different result in almost any given Supreme Court preemption decision would doubtless not have had dire consequences. But by now we probably have sufficient experience under the Court's preemption doctrine to conclude that vital local interests have in fact suffered no serious injury. This alone may be enough to indicate that the Court was right when it began to tip the scales, as a matter of general policy, in favor of national interests rather than local concerns.

One glaring break in the pattern of federal uniformity is attributable to Congress itself. Taft-Hartley's famous (or notorious) Section 14(b)\textsuperscript{94} enables the states to outlaw union security agreements that would otherwise be permissible under the federal statute.\textsuperscript{95} In 1947 this may have been a legislative compromise which was required in order to establish, as a matter of federal law, that a union was entitled to seek agreements preventing "free riders"—persons who reap the benefits of collective bargaining without paying their fair share of the costs.

By now, however, it is difficult to discern a principled basis for retaining 14(b). That the issue is highly charged is all the more reason for a single, federal solution. A national union engaged in

\begin{itemize}
\item \textsuperscript{93}Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1976).
\item \textsuperscript{94}NLRA §14(b), 29 U.S.C. §164(b) (1976).
\end{itemize}
bargaining for a national contract should not, even theoretically, have to impose the total financial burden on those employees who do not reside in a right-to-work state. And there are no longer any grounds for the “moral” argument that no person should be compelled to become a member of any organization as a condition of employment, or be forced to contribute to political causes in which he does not believe. Labor Board and Supreme Court decisions have established that under a union security arrangement an employee need not assume the status or obligations of union membership, and that the only mandatory financial exactions are the pro rata costs of collective bargaining, not the expenses of the union’s political or social activities.\(^96\)

**Enforcement of Labor Contracts**

The Warren Court’s vigor in furthering the primacy of federal law was demonstrated even more strikingly in its rulings on the enforcement of collective bargaining agreements. Labor contracts were traditionally enforced in accordance with state substantive law. It was often hard to sue a union in the state courts, however, because of the difficulty of obtaining jurisdiction over an unincorporated association. Therefore, in 1947, Congress wrote Section 301 into the Taft-Hartley Act\(^97\) to provide that suits on contracts between unions and employers could be brought in the federal district courts. Unions were explicitly made competent to sue or be sued as entities.

But what was the substantive law to be applied in 301 suits—federal or state? If Section 301 were to be treated as merely procedural, with state substantive law applicable, the provision would be of dubious constitutionality; Article III of the Constitution confines the jurisdiction of the federal district courts to cases involving diversity of citizenship or a federal question. Yet Section 301 was silent on the question of applicable law, and Congress had furnished no clear guidance.

The Supreme Court came to grips with the problem in *Textile Workers Union v. Lincoln Mills*.\(^98\) A union sued an employer in

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\(^98\) 353 U.S. 448 (1976).
federal court for specific performance of the arbitration provisions in the parties' collective contract. Jurisdiction was contested. Justice Douglas, for the Court, cut the constitutional knot with one swift stroke, declaring that "the substantive law to apply in suits under §301(a) is federal law which the courts must fashion from the policy of our national labor laws." Once this was established, jurisdiction could constitutionally be reposed in the federal judiciary. Perhaps the magnitude of the Court's undertaking in Lincoln Mills can best be gauged by the contemporaneous concern expressed by two distinguished scholars that this reading of Section 301 demanded of the federal courts a task to which they were "enormously unequal," and "its imposition on them is therefore capable of damaging their usefulness for the essential duties that they are suited to perform." 99

The task shouldered by the Supreme Court, despite the grave apprehensions of some, was the task of fashioning a body of federal contract law to govern the enforcement of collective agreements. Its sources were to be the policies of the federal labor statutes, state contract law where appropriate, arbitrators' decisions, and so on. The scholars looked at these "bits and pieces" and were aghast; the Court had faith that "judicial inventiveness" would find a way. 100 Perhaps that is the difference between professors and practical men. By hindsight, at any rate, it is hard to find justification for the fears of the critics.

Possibly an explanation for the easy survival of the federal judiciary lies in the next maneuver executed by the Warren Court. Having boldly staked out a claim in Lincoln Mills to the whole of the labor contract domain, the Court then turned around in the Warrior trilogy 101 and delegated to arbitrators the principal responsibility for interpreting and applying collective bargaining agreements. Courts are to order arbitration of grievances under a contract "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers


100 353 U.S. at 457.

the asserted dispute."\(^{102}\) Moreover, an arbitrator's award is to be enforced by a court without review on the merits, so long as the award is not the product of fraud or beyond the scope of the submission. Thus, through the Warrior approach, the Court may have finessed many of the problems envisaged by the critics of Lincoln Mills.

Even so, the Warren Court managed to build up a fairly substantial body of basic contract doctrine. For instance, a labor agreement may be binding on a successor employer even though he has not signed it.\(^{103}\) Available grievance and arbitration machinery has to be exhausted before there can be resort to a court suit on a contract.\(^{104}\) And in the absence of a federal statute of limitations, state statutes apply to Section 301 actions.\(^{105}\) These are the kinds of questions one might have anticipated the Court would have to resolve. They hardly seem a threat to its institutional capacities.

One of the most nettlesome issues of labor contract enforcement was the impact of the Norris-La Guardia Act. The Act generally prohibits the federal courts from issuing injunctions against peaceful strikes. When Congress in Section 301 of the Taft-Hartley Act gave the federal courts jurisdiction over suits to enforce contracts, it deliberately rejected proposals to amend Norris-La Guardia to take account of this new development. In *Sinclair Refining Co. v. Atkinson*,\(^{106}\) the Warren Court made the obvious, logical deduction. Even strikes in breach of contract remained covered by Norris-La Guardia's ban on federal injunctions. But there were evident policy deficiencies in this position. Most important, employers were deprived of what was often the most efficacious and sensible weapon against forbidden strikes. In the first year of the Burger era, the Supreme Court in *Boys Market, Inc. v. Retail Clerks Local 770*\(^{107}\) managed to confound the logic of *Sinclair* (and probably the intent of Congress) and do justice at last. A crafty opinion by Justice Brennan declared that Con-

\(^{102}\) 363 U.S. at 582–83.


\(^{106}\) 370 U.S. 195 (1962).

gress's refusal to amend Norris-La Guardia when enacting Taft-Hartley did not mean the injunction ban was left intact. It simply meant Congress was prepared to leave to the federal judiciary the task of working out an appropriate "accommodation" between the two statutes. Justice Brennan's solution was to authorize federal injunctions against strikes where the underlying grievance is subject to a "mandatory grievance adjustment or arbitration procedure" in a collective bargaining agreement. While it may offend purists in statutory construction, this rule has much to commend it in elementary fairness. Norris-La Guardia was designed to protect struggling unions against a biased and injunction-wielding judiciary, especially in organizing settings. When an established union has committed itself contractually not to strike, and has been provided an effective alternative means of redress through arbitration, it is hardly a desecration of Norris-La Guardia philosophy to grant the employer an injunction if the union goes back on its word and strikes.

In two cases involving "successor" employers, the Burger Court blurred, if it did not eradicate, major Warren Court teachings on the nature of the collective bargaining agreement. The earlier view was that it was "not an ordinary contract," but a "generalized code" setting forth "the common law" of a particular industry or of a particular plant. 108 A predecessor's labor contract, in the Warren period, could bind a successor employer where there was "substantial continuity of identity in the business enterprise," without regard to the existence of actual consent. In NLRB v. Burns International Security Services, Inc. 109 and Howard Johnson Co. v. Hotel & Restaurant Employees Detroit Local Joint Board, 110 the Burger Court refocused attention on traditional common law notions of the need for "consent" under "normal contract principles," and on the question of whether certain rights and duties were "in fact" "assigned" or "assumed."

On their facts, Burns and Howard Johnson held a predecessor's contract not binding on a rival company taking over through competitive bidding or on a purchaser who retained only a minority

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of the seller's employees. This left open the possibility that the Warren successorship doctrine might still apply where there was a genuine link between predecessor and successor *and* a majority of the former's employees remained with the latter. What was more likely reflected here, however, was a clash of fundamental values in the labor field. The Warren majority was concerned about protecting employees against a sudden and unforeseen loss of bargaining and contract rights. There was also a concern about maintaining industrial stability and labor peace, through reducing the number of representation elections and sustaining the life of labor agreements. On the other hand, the Burger majority laid stress on the freedom and voluntariness of the collective bargaining process, on the importance of saddling neither unions nor employers with substantive contract terms to which they have not agreed. Stress was further laid on providing maximum flexibility in business arrangements, so that employers may respond to changing market conditions without being straitjacketed by the bargaining or contractual obligations that may have been assumed by imprudent predecessors. The future development of successorship law undoubtedly depends far more on the way the members of the Supreme Court ultimately balance out these competing values than on any logical deductions from the decisions to date.

**IV. Individual Rights in the Workplace**

Just as the federalization of labor regulation was the major preoccupation of the Warren Court in industrial relations, the overriding concern of the Court throughout the Burger decade of the seventies (perhaps to some persons' surprise) was the defining of individual rights in the workplace. The Burger Court has averaged over a dozen noteworthy labor decisions a term. Over half of these dealt with the rights of employees in relation to their employers or labor organizations.

**Fair Representation**

During World War II, in a case involving black railroad employees, the Supreme Court established the principle that a union exercising the power of exclusive representation under a federal statute had the concomitant obligation to represent all employees
in the bargaining unit fairly and without discrimination.\textsuperscript{111} An individual employee may now sue his employer for breach of contract, and may join the union or sue it alone if it has treated him arbitrarily, capriciously, or in bad faith.\textsuperscript{112} An employee has no absolute right to have a grievance arbitrated,\textsuperscript{113} however, and he must first pursue any remedies available under the contract before he can file suit.\textsuperscript{114} At the same time a union may not “ignore a meritorious grievance or process it in perfunctory fashion.”\textsuperscript{115}

In \textit{Hines v. Anchor Motor Freight, Inc.},\textsuperscript{116} the Burger Court held that an employer could not rely on the finality of an arbitration award as a defense against employee suits “if the contractual processes have been seriously flawed by the union’s breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct.” The standard enunciated in \textit{Hines} can hardly be faulted in the abstract. Yet with the Supreme Court moving beyond the more clearcut instances of discrimination and bad faith to reach “arbitrariness” and “perfunctoriness,” the lower courts may be tempted to go on to negligence, or at least gross negligence. This would undoubtedly mean greater justice for individual employees in a given case. But union business agents, not schooled in the niceties of due process, must often act quickly under pressure, and their customary aim has been the maximization of group interests, not the farthest pursuit of every individual claim. Moreover, decisions like \textit{Hines} mean an employer cannot work out a grievance settlement with its employees’ statutory bargaining representative which will have the same finality as an adjustment reached with a party’s lawyer or other personally chosen agent. Unless carefully controlled, increasing judicial intervention and scrutiny of such union judgments may not bode well for the total collective bargaining process.

\begin{footnotes}


\textsuperscript{113} \textit{Vaca v. Sipes}, 386 U.S. 171 (1967).

\textsuperscript{114} \textit{Republic Steel Corp. v. Maddox}, 379 U.S. 650 (1965).


\textsuperscript{116} 424 U.S. 554, 570 (1976).
\end{footnotes}
Union Democracy

One of the happier ironies of recent labor history can be found in the impetus given union democracy by the Landrum-Griffin Act of 1959.\(^\text{117}\) At the time the Act was passed, the thinking of disinterested observers had not yet crystallized on the merits of running a union’s affairs democratically.\(^\text{118}\) It is probably fair to say that the main push in Congress for Landrum-Griffin and, particularly, its “bill of rights” title, came from a conservative coalition that was less concerned with promoting the individual rights of working people than with blunting the effectiveness of labor organizations.\(^\text{119}\) There is hardly anything unique in such a situation; the purification of any well-established institution is likely to require a sizable (if unwitting) contribution by its enemies. Yet today most commentators would likely agree that the foes of unionism in the 1959 Congress performed their role in especially commendable style. By and large, the provisions of the Landrum-Griffin Act respecting internal union affairs have significantly advanced the cause of union democracy while doing little, if any, damage to the structure of organized labor.

Nevertheless, some reservations are in order about too hasty and naive an equation of ethical unionism with union populism. Unions are not merely debating societies. They are militant organizations that must act quickly and decisively in times of crisis. Real friends of the worker would not insist that every union decision be argued out and voted upon in town-meeting fashion. At the same time, however, both management and the public arguably stand to suffer from the irresponsibility in collective bargaining which is a possible side-effect of a massive injection of democracy


\(^{119}\) See Cox, supra note 118, pp. 820–21, 831–33.
into labor organizations. Two such savvy onlookers as Harvard's Derek Bok and John Dunlop have thus suggested, now that Landrum-Griffin has installed basic safeguards, that the issue of union democracy should move toward particular problems which vary from one organization to another.\textsuperscript{120}

An example of the Supreme Court's efforts to balance membership claims and institutional interests can be seen in its handling of Landrum-Griffin's safeguards for internal union elections. The Court has approved the Secretary of Labor's pragmatic approach toward determining what are "reasonable qualifications" for elective union office under Title IV of the Act. If too many members (perhaps more than two-thirds) are disqualified by a particular rule or combination of rules, the provisions are presumed invalid. The Court agreed that a requirement of attendance at one-half of a local's meetings during the three years preceding an election was unreasonable, where the effect was that 96.5 percent of the local's 660 members were ineligible.\textsuperscript{121} In an effort to assure unions an initial opportunity to police their own house, however, the Court has ruled that the Secretary of Labor may not sue to challenge an election on a ground that the complaining member, although aware of the facts, had not included them earlier in his internal protest to the union itself.\textsuperscript{122}

\textbf{Equal Employment Opportunity}

In the 1960s Congress turned its attention to outlawing job discrimination by employers or unions because of race, color, religion, sex, national origin, or age. The most important of these statutes was of course Title VII of the 1964 Civil Rights Act.\textsuperscript{123} In his second year of office Chief Justice Burger authored the most significant decision to date concerning the elements of a Title VII violation. In \textit{Griggs v. Duke Power Co.},\textsuperscript{124} a unanimous Supreme Court held that the Act did not merely proscribe conscious, pur-


\textsuperscript{121} Steelworkers Local 3489 v. Usery, 429 U.S. 305 (1977).

\textsuperscript{122} Hodgson v. Steelworkers Local 6799, 403 U.S. 333 (1971).


\textsuperscript{124} 401 U.S. 424 (1971).
poseful discriminatory treatment. Employment practices entirely neutral on their face and even in their design, such as job qualifications or aptitude tests, were also barred if in actual practice they had a disproportionately adverse impact on protected classes like minorities and females and if they could not be justified by "business necessity."

One difficulty that has emerged in applying antidiscrimination legislation has been reconciling it with traditional labor relations values, such as seniority. In Teamsters v. United States [T.I.M.E.–D.C.]\(^{125}\) the Supreme Court overturned a long, unbroken line of courts of appeals decisions in ruling that otherwise "bona fide" seniority plans do not violate Title VII even though they perpetuate the effects of pre-Act discrimination. The Court was almost surely correct as a matter of the original congressional intent. But coming as late as it did, T.I.M.E.–D.C. could be criticized for lack of judicial statesmanship in rekindling black-white antagonsisms concerning seniority, and for failure to take adequate account of congressional acquiescence in the earlier approach of the courts of appeals when Title VII was amended in 1972.\(^{126}\)

In the often frustrating struggle to eradicate the last, tenacious vestiges of centuries-old discrimination in employment, no weapon has proved more effective, or more controversial, than "affirmative action" programs instituted pursuant to Executive Order 11246.\(^{127}\) Under this presidential directive, employers and unions must make "good faith" efforts to meet certain specified goals of minority and female hires as a condition for securing and retaining government contracts. Although the Supreme Court has not yet passed on challenges that this is "reverse discrimination" against white males under Title VII and a denial of their right to equal protection under the Constitution, the program has been upheld by the courts of appeals.\(^{128}\) Furthermore, in Steelworkers v. Weber\(^{129}\) the Supreme Court held (5–2) that Title VII did not prohibit a private,


voluntary race-conscious affirmative action job-training program initiated under a collective bargaining agreement between a union and employer in an attempt to eliminate segregated patterns of employment. And in Fullilove v. Klutznick\textsuperscript{130} the Court sustained (6–3) the constitutionality of the provision in the Public Works Employment Act of 1977 that at least 10 percent of the federal funds granted for local projects must be set aside for minority business enterprises. Absent a change in the Court’s membership, this would seem to ensure the validity of affirmative action under Executive Order 11246, unless a couple of Justices felt that the presence of congressional action in Fullilove was critical, and that the President was acting alone and with lesser authority in issuing the Order.

There is no blinking the fact that affirmative action and preferential treatment in favor of one race or sex raise grave moral questions, as well as questions going to the core of American traditions of individual merit and group neutrality. The essence of affirmative action is an effort to achieve justice among groups; in ordinary circumstances the essence of morality and law alike is justice among individuals.\textsuperscript{131} The Appalachian white or the white ethnic from a ghetto may, personally, be far more disadvantaged by his background than the third-generation offspring of a professional black family, and yet it is the latter who will be favored under the usual affirmative action plan. I justify this, not without misgivings, on the ground we are dealing with no ordinary situation but with a national problem of staggering dimensions. A group wrong has been perpetuated for generation upon generation, and the wounds are deep, pervasive, and persistent. Heroic measures are called for in the treatment, specifically, a group remedy to cure this group wrong.

V. Employment Relations Law

This study has primarily concentrated on laws dealing with union-employer-employee relations in a collective bargaining set-

\textsuperscript{130}100 S.Ct. 2758 (U.S. 1980).

\textsuperscript{131}See, e.g., McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976) (any individual, whether white or black, is protected under Title VII and 42 U.S.C. §1981 (1976)). See also City of Los Angeles v. Manhart, 435 U.S. 702 (1978) (female annuitants must be treated as individuals instead of components of a sexual class for Title VII purposes).
ting. But the Civil Rights Act of 1964 could be said to signal the beginning of a new era in government controls, which came to full flower in the 1970s. Previously, Congress was chiefly concerned with regulating the *procedural* aspects of union organizing, bargaining, and so on. It has now become increasingly concerned with the *substantive* aspects of the employment relationship, whether or not in a unionized situation. Space does not permit consideration of the enormous impact of such laws as the Occupational Safety and Health Act of 1970\(^{132}\) and the Employee Retirement Income Security Act,\(^{133}\) or the momentous implications they hold for the future directions of collective bargaining and arbitration.\(^{134}\)

The malaise currently afflicting the labor movement\(^{135}\) makes it likely that, at least for the foreseeable future, unorganized workers are going to constitute the great bulk of the labor force. Although they may be willing to forgo the full range of benefits provided by collective bargaining, it is inevitable they will come to demand that most elemental of job protections: protection against arbitrary, unfair discharge or discipline. The next major development in American industrial law may well be to prescribe "just cause" as a legal standard instead of leaving it simply as a standard imposed by union contracts.\(^{136}\) Western Europe has already gone this route, and I am confident we will follow. Whether we shall do so by statute\(^ {137}\) or common law,\(^ {138}\) by judicial or administrative procedure, I do not know. In any event, the complex and some-

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\(^{135}\) See note 12, *supra*, and accompanying text.


\(^{137}\) Michigan and New Jersey legislators have bills under consideration.

times cumbersome structure of our labor laws could hardly have a more fitting capstone.

VI. Conclusion

Ideally, our labor laws should be closely attuned to the needs of workers and unions in using persuasion and certain economic weapons to organize and bargain effectively, and to the competing interests of employers, employees, and the general public in being free from injurious pressures. Much evidence suggests that these needs and interests may differ significantly from industry to industry, even from firm to firm, and that different balances should be struck accordingly. Congress has recognized some of the disparity by loosening union security and hot cargo regulations in the construction industry and by exempting most of garment manufacturing from secondary boycott prohibitions. There should probably be more of these discriminating legislative judgments.

Even within the existing statutory pattern, the NLRB and the courts ought to pay less heed to armchair speculation and more to particular facts and empirical studies in assessing union and employer conduct. Thus arguably both sides have suffered as a result of administrative or judicial unwillingness to grub for a better sense of the real impact of such matters as superseniority, lockouts, employer communications and limited union access to employees in organizing campaigns, and union restrictive practices that allegedly restrain trade in the product market.

Grave procedural and remedial deficiencies remain in Taft-Hartley. The Labor Board’s processes are clogged by an overwhelming number of cases and by lack of discretion to deny review of trial-level decisions. An intransigent employer can evade for years, if not indefinitely, its duty to bargain with a majority union, and the employees receive no monetary award for the contract benefits they presumably have lost. Legislation that would have gone far to cure these defects died in 1978 at the hands of one of the best engineered Senate filibusters of recent times. In today’s conservative political climate, the likelihood that a beleaguered labor movement can revive support for such much-needed reforms seems nil.

The focus of public interest in labor relations, and the corresponding focus of our enacted legislation, has shifted dramati-
cally over the decades. From the thirties through the fifties the emphasis was on workers' institutional rights, their freedom to organize or not without employer or union coercion, and their entitlement to democratically run unions. In the sixties and the seventies the emphasis was on workers' individual rights. They were entitled to equal employment opportunity, to a safe place to work, to various safeguards for their pensions and similar employee benefits. In the foreseeable future even the nonunionized worker may win protection against arbitrary and unjust discipline. Yet perhaps one may still harbor the hope that this quite healthy concern for individuals will not wholly obliterate concern for organizations. The post-industrial world, hardly less than the industrial world, may be a bleak place for the isolated individual. Whether a guild, a union, or a professional society, it has usually been through an institutional means that most working people have found the fullest expression of their common goals and the greatest capacity for realizing them. Neither the worker nor the law should be too quick to forget that lesson.