Michigan Law Review

Volume 93 | Issue 6

1995

Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law

Charles B. Craver
George Washington University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Labor and Employment Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Charles B. Craver, *Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law*, 93 MICH. L. REV. 1616 (1995).

Available at: <https://repository.law.umich.edu/mlr/vol93/iss6/22>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

REARRANGING DECK CHAIRS ON THE TITANIC: THE INADEQUACY OF MODEST PROPOSALS TO REFORM LABOR LAW

*Charles B. Craver**

AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW. By *William B. Gould IV*. Cambridge: The MIT Press. 1993. Pp. x, 313. \$37.50.

It is impossible for any neutral observer to be sanguine regarding the current state of the American labor movement.¹ The union density rate — the percentage of nonagricultural labor force participants in labor organizations — has declined from a high of 35% in 1954² to 15.5% today.³ When the increase in public sector unionization over the past several decades is discounted, the dire state of private sector unions becomes even more apparent. The private sector density rate is currently an anemic 10.9%⁴ — the lowest figure since 1936. If the rate of membership decline over the past twelve years continues, the private sector union density rate may fall to five percent by the end of this decade.⁵ Labor organizations would only be relevant — and, in light of international competition, would diminish in significance — in such heavy industries as automotive, electronics, and steel.

The decline of labor organizations might be palatable if counterbalanced by increased respect for and protection of individual employee rights. This has not, however, been the case. Even though Congress has enacted more expansive statutes protecting employees against certain forms of invidious discrimination, and even though employees enjoy minimal wage, health and safety, and ben-

* Leroy S. Merrifield Research Professor of Law, George Washington University. B.S. 1967, M. Indus. & Lab. Rel. 1968, Cornell; J.D. 1971, University of Michigan. — Ed.

1. See generally CHARLES B. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT (1993); MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES (1987); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990).

2. See GOLDFIELD, *supra* note 1, at 10, tbl. 1.

3. See Data for 1994 Shows Membership Held Steady at 16.7 Million, Daily Lab. Rep. (BNA) No. 27, at D-1 (Feb. 9, 1995).

4. *Id.*

5. See *Union Coverage of U.S. Private Workforce Predicted to Fall Below 5 Percent by 2000*, Daily Lab. Rep. (BNA) No. 241, at A-1 (Dec. 18, 1989).

efit protection, most American workers are less confident of their future employment security today than they have been since the Great Depression. Under the traditional employment-at-will doctrine that still is accepted in forty-nine states, workers may be terminated at any time for good cause, bad cause, or no cause. Technological advancements may supplant them, or they may lose their positions to workers in emerging nations who earn one-tenth the wages of U.S. personnel. Their employers are under no legal obligation to discuss these possible developments with the directly interested employees before implementing final management decisions and laying off the adversely affected individuals. Nor are firms required to consult their workers regarding other operational modifications that may profoundly alter employee job functions or future employment security. Rank-and-file personnel are given no more respect than the machines they operate.

In his thoughtful book *Agenda for Reform*, Professor William Gould⁶ describes both the demise of the American labor movement and the continuing erosion of worker dignity and job security. He explores the absence of wrongful termination protection for most U.S. employees and the lack of meaningful worker participation programs. He then evaluates the need for National Labor Relations Act amendments that would streamline the certification process and expand the scope of collective bargaining. He also proposes measures that would increase the economic weapons available to representative labor organizations. Gould concludes by comparing the American and Canadian experiences over the past several decades in an effort to understand the unique nature of the American decline in union density.

In *Agenda for Reform*, Gould recommends many legal changes that would enhance individual employment rights, encourage the growth of unions, and contribute to the efficacy of the collective bargaining process. Even though a number of management representatives consider many of Gould's proposals radical, his suggested modifications are truly modest and, in fact, wholly inadequate to alleviate the crises facing both individual workers and labor organizations. They are more reflective of the current conservative political climate than of the true needs of American workers.

It is time to acknowledge that U.S. workers have minimal employment dignity and almost no job security. Instead of being considered an integral part of the production or service process, they are treated like fungible machines. They are ignored by most management officials when critical operational decisions are formu-

6. Charles A. Beardsley Professor of Law, Stanford University. Professor Gould is currently on leave from Stanford University and is Chair of the National Labor Relations Board.

lated, and they enjoy meager statutory protections. The circumstances affecting labor organizations are even worse. Unions have found it extremely difficult to organize new bargaining units, due to the overt hostility of most business firms. The relatively few labor organizations that currently represent employees are fearful of management-encouraged decertification efforts, find it increasingly arduous to negotiate effectively over the most significant issues affecting bargaining unit members, and have few economic weapons they can use to support their bargaining demands. In the coming years, the United States must decide whether it will view free trade unions as an important part of a democratic society or, instead, provide corporate leaders with unrestrained authority over lower-level personnel.

I. FACTORS CONTRIBUTING TO THE RISE AND DECLINE OF UNIONS

In his first substantive chapter, Chapter Two, Gould briefly describes the expansive growth of unions from 1935 until 1955, a growth fueled by the ability of newly created industrial unions to organize the automobile, electronics, rubber, steel, textiles, and transportation industries. Curiously absent from this part of the book is any significant acknowledgement of the momentous impact of the enactment of the National Labor Relations Act (NLRA)⁷ in 1935 and its explicit congressional policy "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association [and] self-organization"⁸

Gould next describes the three major developments that have contributed to the substantial decline of labor organizations over the past several decades. The first factor cited is the development of a global economic system that has forced domestic firms to compete with business enterprises in lower-wage countries (pp. 12-13). The rise of multinational corporations has undermined labor solidarity and forced high-wage American employees to compete against personnel in countries such as Mexico, where wage rates are approximately one-tenth of those in the United States (pp. 12-13). Moreover, the creation of the North American Free Trade Zone will encourage the migration of traditional unionized manufacturing jobs from the United States to Northern Mexico. American production workers whose jobs are not transferred will need to moderate their wage and benefit expectations if they are to avoid ultimate displacement by foreign laborers (p. 13).

7. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1988)).

8. 29 U.S.C. § 151 (1988).

Between 1969 and 1985, 3,500,000 production jobs were transferred from the United States to other countries.⁹ Over the next decade, employers will relocate several million additional production jobs to Mexican facilities to take advantage of the lower labor costs, minimal health and environmental law enforcement, and hostile union climate in that country. Millions of other production jobs have been supplanted by technologically advanced machines, as the United States has changed from a production economy to a post-industrial society composed primarily of white-collar and service personnel.¹⁰ These phenomena will threaten the continued viability of major industrial unions like the United Automobile Workers, the United Steelworkers, the United Mine Workers, and the International Union of Electrical Workers. Although the global economy and deindustrialization have also affected nations such as Canada, Germany, Sweden, Denmark, and the United Kingdom, their labor organizations have not suffered the significant membership losses sustained by U.S. unions (pp. 14-15, tbl. 2.1). This observation would suggest that factors unique to the United States are primarily responsible for the decline of American labor organizations.

Even within the United States, the increase in international competition does not explain the lack of union organizing success in the expanding service sector among employees whose jobs cannot be easily exported to foreign nations. Although employees performing routinized jobs for bureaucratic institutions in the banking, computer, health care, and insurance industries should be ripe for collectivization, union success in these service areas has been minimal. Gould attributes this situation to his second determinative factor — the antilabor environment generated during the Reagan administration (pp. 13-14). The Reagan Labor Board enlarged management prerogatives by refusing to require collective bargaining with respect to corporate decisions that Board members thought management officials should unilaterally decide (pp. 21-25). Support for Gould's view regarding the negative impact of the anti-union Reagan presidency may be found in the data indicating that during the 1980s the absolute number of union members declined for the first time since the enactment of the NLRA.¹¹

Gould fails to ask whether the election of President Reagan actually generated the anti-union climate of the 1980s or merely served as a reflection of an antilabor environment created by private business firms in the mid to late 1970s that culminated in the election of President Reagan in 1980. American business leaders

9. See CRAVER, *supra* note 1, at 45.

10. See *id.* at 40-42.

11. See *id.* at 35.

have historically opposed worker organizing.¹² During the late 1800s and early 1900s, for example, they used antitrust and criminal conspiracy doctrines to prevent unionization.¹³ They required employees to sign "yellow-dog" contracts that precluded union membership and hired private detective agencies to report on the concerted activities of their workers. Employers summarily terminated union sympathizers and blacklisted them, preventing subsequent employment with other area firms.

Business leaders vigorously opposed enactment of the NLRA, and they lobbied diligently for the adoption of the 1947 Labor Management Relations Act¹⁴ and the 1959 Labor Management Reporting and Disclosure Act¹⁵ amendments to the NLRA that were designed to dilute the rights previously extended to employees and labor organizations. In some instances, moreover, legislative modifications were not even necessary because conservative Labor Board and court decisions had already narrowed worker rights. For example, even though the original NLRA explicitly guaranteed employees the right to withhold their labor during bargaining disputes,¹⁶ a probusiness-oriented Supreme Court quickly weakened this fundamental right by holding that employers could hire permanent replacements for striking workers.¹⁷

Unionized firms appeared to tolerate their representative labor organizations during the 1960s and early 1970s, but the hyperinflation of the mid-1970s reminded these employers of the high costs of unionization. Cost-of-living adjustment provisions in bargaining agreements caused the union wage premium — the difference between the wages paid to organized workers and their nonunion counterparts — to increase in many industries to at least fifteen-to-twenty percent. Unionized businesses thus found it more difficult to compete with unorganized companies, so they began to look for ways to undermine the labor movement. In 1977, when union officials sought modest changes in the NLRA through the proposed Labor Law Reform Act, business organizations lobbied diligently

12. See generally *id.* at 47-51.

13. See, e.g., *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925) (holding union strike activity to be violation of antitrust laws); *Loewe v. Lawler*, 208 U.S. 274 (1908) (same); *Plant v. Woods*, 57 N.E. 1011 (Mass. 1900) (holding union strike activity unlawful as criminal conspiracy); *Vegeahn v. Guntner*, 44 N.E. 1077 (Mass. 1896) (same).

14. Pub. L. No. 80-101, 61 Stat. 136 (1947).

15. Pub. L. No. 86-257, 73 Stat. 519 (1959).

16. See Pub. L. No. 74-198, § 13, 49 Stat. 449, 457 (1935) (codified as amended at 29 U.S.C. § 163 (1988)).

17. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938); see also *Trans World Airlines, Inc. v. Independent Fedn. of Flight Attendants*, 489 U.S. 426, 432-43 (1989) (holding that less senior "cross-over" employees refusing to honor initial strike call or deciding to return to work during the stoppage could, after labor dispute had been resolved, retain higher positions obtained while more senior colleagues were on strike).

to prevent these legislative changes. Union leaders felt betrayed by this behavior, which served as a reminder of the increasingly adversarial labor-management environment they faced.

By the late 1970s, the business community realized that control of the White House could prevent the enactment of prolabor legislation and allow it to seize control of the Labor Board and the federal judiciary. Business organizations thus expended millions of dollars in an effort to place Ronald Reagan in the White House. Having accomplished this goal, they then lobbied effectively for appropriate presidential vetoes and for the appointment of judges who believed that unionization generated a cartel-based wage premium that undermined free market efficiency. These judges thought that collective bargaining by representative unions should not be permitted to interfere with the exercise of managerial discretion. The Supreme Court thus ruled that "in view of an employer's need for unencumbered decisionmaking," the duty to bargain over corporate decisions having a substantial impact on the continued employment of bargaining unit personnel "should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."¹⁸ If one acknowledges that a fundamental purpose of unionization is to allow employees to "interfere with" managerial freedom, it becomes obvious that the *First National Maintenance* decision quoted above reads more like a legislative committee report than a judicial decision. The Court's assault on the organizational rights of workers continued in another case that held that university professors are "managerial" personnel who are not subject to NLRA coverage.¹⁹ These holdings encouraged the conservative Reagan Labor Board to erode other doctrines protecting employee rights.²⁰

18. *First Nat. Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981).

19. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); see also *NLRB v. Health Care & Retirement Corp. of America*, 114 S. Ct. 1778, 1782-83 (1994) (holding that professional people who minimally direct the work of nonprofessionals constitute excluded "supervisors"). See generally David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689 (1990) (arguing that traditional collective bargaining subjects are incompatible with professionalism and that modifications to collective bargaining are needed to make the labor system more conducive to professional values); David M. Rabban, *Distinguishing Excluded Managers From Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775 (1989) (arguing that the exclusion of professional employees as managers is contrary to the NLRA's legislative history).

20. See, e.g., *Meyers Indus., Inc.*, 281 N.L.R.B. 882 (1986) (holding that nonunion employees who individually complain about unsafe conditions are not engaged in a protected concerted activity), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988); *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985) (holding that nonunion workers do not have right to have fellow employees accompany them to management investigatory interviews that they think will result in disciplinary action).

The third critical factor that Gould cites to explain both the decline of unions and the erosion of individual employment rights is the recent expansion of more tenuous employment relationships (pp. 25-26). According to Jonathan Hiatt and Lynn Rhinehart, "The past decade has seen tremendous growth in the contingent work force. Together, temporary, contract, and part-time workers make up 25 percent to 30 percent of the work force as a whole."²¹ These attenuated employment relationships have become especially popular in retail and service establishments, making it more difficult for unions to organize these businesses.

To explain the degree of anti-union sentiment exhibited by most American firms as opposed to their European counterparts, Gould emphasizes a crucial difference between collective bargaining in many Western European countries and collective bargaining in the United States. Collective negotiations in nations like Germany and Sweden are conducted on a centralized basis at the regional or national level, with government fiat extending the negotiated wages and benefits to firms throughout the industry involved (p. 35). In the United States, in contrast, bargaining takes place in a highly decentralized manner, with negotiated wages and benefits affecting only the workers in the pertinent bargaining units. This American practice greatly increases the cost of unionization to organized companies by permitting unorganized firms to gain a competitive advantage through the adoption of lower wages and less generous fringe benefits. This factor explains why organized employers have worked diligently over the past fifteen years to decertify, or at least to weaken, incumbent bargaining representatives.

Although Gould notes in a subsequent chapter the use of unlawful tactics by many American employers to discourage worker organizing, he discounts the overall impact of this phenomenon (pp. 151-52). Evaluations of Labor Board data by Professor Paul Weiler²² and by Professors Robert LaLonde and Bernard Meltzer²³ have documented an alarming increase in employer unfair labor practices during organizing campaigns over the past fifteen years. Employers routinely threaten plant closures or production transfers and frequently terminate key union supporters in violation of Section 8(a)(3).²⁴ These tactics make it difficult for unions to organize

21. Jonathan P. Hiatt & Lynn Rhinehart, *The Growing Contingent Work Force: A Challenge for the Future*, 10 LAB. LAW. 143, 144 (1994).

22. See WEILER, *supra* note 1, at 238-39.

23. See Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 961-69 (1991); see also Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015 (1991).

24. 29 U.S.C. § 158(a)(3) (1988). This provision makes it an unfair labor practice for employers to discriminate against employees to encourage or discourage membership in labor organizations. Regarding the pervasive use of questionable anti-union tactics by employ-

new units. Workers who fear employer retaliation are hesitant to demonstrate their union support openly, and many individuals are afraid to sign union authorization cards or to vote for union representation. Anemic Labor Board remedies have done little to discourage these unlawful anti-union tactics. Corporations realize that it is often less costly to defend and even remedy pervasive unfair labor practices than to be saddled with collective bargaining obligations that will place them at a distinct disadvantage vis-à-vis their unorganized competitors. It is this illegal behavior by a number of American firms that distinguishes the rapidly deteriorating union situation in the United States from the more stable union environments in Canada and most Western European countries.

In addition to citing illegal employer practices, Gould notes the relatively unique business union movement in the United States, drawing a comparison to the social and political labor organizations indigenous to Western European nations (pp. 45-47). Foreign labor movements have historically united workers by both socioeconomic class and political affiliation. This factor has enhanced union solidarity during periods of economic crisis and political hostility. In the United States, in contrast, employees tend to view labor organizations solely in terms of the economic benefits they may obtain through the bargaining process. When workers conclude that bargaining representatives are unlikely to advance their economic interests substantially, they opt for nonrepresentation. It would thus be beneficial for American labor leaders to become more politically visible. They must also convince rank-and-file personnel that they need a collective voice to counterbalance the economic power of their corporate employers. The fact that executive compensation has increased much faster than rank-and-file worker pay over the past fifteen years (p. 61) should suggest that employees lack the power to advance their own interests on an individualized basis.

Gould briefly mentions the fact that American labor officials have not provided exemplary leadership (p. 31). He notes that undemocratic and corrupt leaders have contributed to the negative public perception of unions. He also could have cited the fact that union officers no longer reflect the heterogeneous composition of the present labor market. Most national union officers continue to be older, white males who evince the craft or industrial union philosophies of the 1950s or 1960s. They find it difficult to relate to the women and minorities who have been entering the labor force in record numbers. Many union officers also fail to comprehend the need for both novel organizing techniques that will appeal to white-

collar workers and new organizations that might reflect the aspirations of those employees.

In recent years, while many business firms have retained sophisticated behaviorists to convince white-collar workers that it would be demeaning and unprofessional to collectivize, most labor organizers have continued to use blue-collar appeals that repulse most educated employees. The American labor movement must create new organizations that will do for white-collar industries, such as banking, insurance, computers, and health care, what the old industrial unions did for mass production industries during the 1930s and 1940s. Labor organizations will only survive in the coming decades if they can organize physicians, nurses, lawyers, computer specialists, insurance agents, financial institution personnel, and similar workers. As white-collar jobs become increasingly routinized, this task should become easier. Nonetheless, if labor leaders do not develop the necessary institutions now, unions may never be able to regain their previous vitality.

II. JOB SECURITY AND WRONGFUL TERMINATION PROTECTION

In Chapter Three, Gould discusses one of the most significant differences between organized and unorganized workers — the availability of protection against unjust dismissal. He emphasizes the fact that individuals covered by collective bargaining agreements receive protection against unjust discipline through “just cause” provisions and the availability of grievance arbitration procedures to review adverse employer decisions (pp. 63-64). Gould then reviews the traditional employment-at-will doctrine that allows employers to terminate most employment relationships at any time for any reason (pp. 66-67). He examines the three exceptions to that doctrine that many state courts have created to deal with perceived inequities. Most states have adopted a public policy exception that precludes discharges that contravene important public policies (pp. 67-69). A number of jurisdictions have also adopted an express or implied contract theory that enables wrongfully terminated workers to sue to enforce oral management representations or written personnel policy statements indicating that employees will only be discharged for valid reasons (pp. 69-74). A few state courts have provided employees with additional protection against unfair dismissals through their application of implied covenants of good faith and fair dealing in individual employment contracts (p. 72).

Gould notes that the United States is the only major industrial nation that does not provide private sector workers with statutory protection against unjust dismissals (p. 77). Even though he believes that employees receive the most effective job security

through bargaining-agreement just cause and grievance-arbitration provisions, Gould recognizes that the vast majority of American workers who are unorganized enjoy no such protection (p. 77). The author thus proposes the enactment of federal legislation that would prohibit wrongful terminations (pp. 80-87). He discounts labor fears that the enactment of such statutory protection would diminish worker receptivity to unionization because he thinks that unions would still provide the most expansive employment security through just cause provisions (pp. 90-91). Under contractual just cause provisions, labor arbitrators have traditionally required employers to demonstrate the presence of just cause for termination.²⁵ Under a statutorily created wrongful termination law, however, discharged workers would presumably be obliged to establish that they were impermissibly dismissed. This important proof distinction would thus provide unionized personnel with greater protection than would be available to their unorganized cohorts.

After a brief probationary period of up to one year, the statute would cover all nonexecutive personnel employed by firms with at least fifty workers.²⁶ Courts could then use the traditional just cause standards developed by labor arbitrators to determine which terminations are inappropriate. Although unionized grievants could have their cases resolved through grievance-arbitration procedures, unorganized complainants would have their cases resolved by unemployment compensation administrative law judges who regularly determine similar issues under misconduct disqualification provisions (pp. 98-99). Wrongfully terminated individuals would be presumptively entitled to monetary relief, but Gould would be reluctant to create a presumption in favor of reinstatement in the absence of union representatives who could monitor reinstatement directives (p. 101).

Gould's recommendations are similar to those made by Professor Clyde Summers almost twenty years ago.²⁷ They are as valid today as they were then. Despite Montana's enactment of a wrongful termination law²⁸ and the adoption of a Model Employment Termination Act by the Uniform Commissioners on State Laws,²⁹ little progress has been made in this critical area. If courts continue to expand judicial exceptions in egregious discharge cases, employ-

25. See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 661-63 (4th ed. 1985).

26. Pp. 87-88, 95-97. I would encourage Congress to extend wrongful discharge protection to firms with twenty-five or more employees, and possibly even to companies with fifteen or more employees that are now covered by typical federal civil rights statutes.

27. See Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

28. See MONT. CODE ANN. § 39-2-901 to -915 (1993).

29. 9A Lab. Rel. Rep. (BNA) *Individual Employment Rts. Manual* 540:21 (Dec. 1991).

ers will recognize that the cost of defending these claims and of satisfying increasingly generous plaintiff verdicts is becoming extremely burdensome. They may thus realize that legislated protection with prescribed monetary remedies would be preferable to the continued risk of excessive compensatory and punitive damage awards in tort actions.

Employers should also acknowledge other benefits resulting from wrongful termination protection.³⁰ Managers frequently decry the lack of firm loyalty exhibited by contemporary employees. But it is difficult to expect significant loyalty from newly hired individuals who are expressly informed that their new relationships may be terminated at any time for any reason. If workers experienced greater corporate loyalty in the form of meaningful employment security, they would have a greater commitment to their employers. Worker turnover would be reduced, and employee morale and productivity would probably increase. Companies would also be more willing to assume the costs of employee training if they thought that the trainees would be more likely to remain in their employ in future years.

Proponents of wrongful termination statutes have often been as reluctant as Gould to provide for the reinstatement of improperly fired individuals who wish to return to their former employment environments, but this reluctance is unfounded. When labor arbitrators conclude that unionized employees have been discharged in contravention of contractual just cause provisions, they regularly order reinstatement. Federal and state courts also use the reinstatement remedy to rectify discriminatory discharges based on race, religion, gender, national origin, age, disability, or other impermissible factors. In my experience as a labor arbitrator, I have directed the reinstatement of a number of grievants who had been unjustly dismissed. I am not aware of a single case in which employers were unable to return the grievants to their former positions.³¹ If expedited adjudication procedures could be provided through either contractual grievance-arbitration mechanisms or administrative law judge hearings, reinstatement difficulties should be rare. On the other hand, if wrongfully terminated employees are not returned to their former employment environments, they may suffer both emotional and monetary losses that cannot be alleviated satisfactorily through front pay or severance pay awards. Their future employ-

30. For cogent arguments in favor of wrongful termination legislation, see WEILER, *supra* note 1, at 48-104. For an economic argument supporting unrestrained freedom of contract, see Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

31. Federal and state courts rarely encounter difficulties with respect to individuals they reinstate to nonunion settings. If persons reinstated to nonunion environments under wrongful termination laws faced retaliation, they could always file additional wrongful termination claims.

ment security would also be diminished through the loss of their previously accumulated seniority rights. I would thus urge adoption of statutory provisions that would provide for the reinstatement of unjustly discharged individuals.

III. THE NEED TO CREATE WORKER PARTICIPATION PROGRAMS

A. *Gould's Analysis*

Gould next turns, in Chapter Four, to worker participation programs in both the United States and other countries. He initially notes that union leaders have not generally been receptive to such programs because of the frequent use of shop committees and company unions during the 1930s and 1940s to prevent the selection of independent bargaining representatives (p. 110). A number of business firms have recently decided to create various quality of work life (QWL) programs that involve shop-level committees consisting of employees and often managerial personnel. These committees are designed to enhance worker-management communication and to improve productivity and quality (p. 111).

Gould carefully examines the German co-determination model (pp. 115-17). The German Works Council Act requires firms to create works councils at the shop level to enable employees to participate in decisions that affect their employment conditions and job security. Corporate leaders must inform works councils about contemplated decisions that would affect employees and must supply committee members with the information they need to evaluate the possible effects of those decisions. Management officials must then consult with works council members in an effort to achieve mutual accommodations. If no agreements can be reached, arbitral or labor court proceedings resolve the issues (p. 116).

The works councils, which operate at the shop level, do not interfere with the functions of representative labor organizations that negotiate agreements at the regional or national level (p. 116). The Co-determination Act of 1976 provides employees with additional input at the corporate level. Large firms are required to have corporate boards that are composed of one-third or one-half employee-elected representatives (p. 117). Although procedural rules permit shareholder and management representatives to make final decisions regarding deadlocked issues, board members usually endeavor to achieve mutually acceptable results.

Gould also evaluates innovative examples of labor-management cooperation within the United States. He describes the collectively bargained programs involving the United Automobile Workers (UAW) and New United Motors Manufacturing, Inc. (NUMMI), and the UAW and Saturn, a General Motors subsidiary (pp. 123-

31). Employees participate in production planning and learn different jobs that they perform on a rotating basis. General categories replace narrowly defined job classifications, thus providing the companies with managerial flexibility. NUMMI and Saturn executives recognized that cooperative programs designed to increase worker productivity and product quality could succeed only if the company promised employees reasonable job security and a share of the resulting profits (pp. 126-27). Gould emphasizes that these efforts involve "perpetual bargaining" over numerous issues of joint interest that arise regularly in the shop (pp. 130-31).

Worker participation programs function most effectively, according to Gould, when compensation is related to skill levels and to individual or group performance or both (p. 132). The author indicates that employees know when they are being fleeced and says that only meaningful worker participation plans can succeed in the long run (p. 135). If corporate managers are the primary beneficiaries of enhanced firm revenues, lower-level workers will quickly revert to pre-worker participation practices.

Older court and recent Labor Board decisions have made it difficult for firms to establish even bona fide worker participation programs without risking unfair labor practice liability under Section 8(a)(2) of the NLRA,³² which makes it unlawful for employers to dominate or provide financial support to labor organizations. Because the NLRA expansively defines the term *labor organization* to include any "employee representation committee or plan . . . which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work,"³³ court and Labor Board determinations have found certain worker participation committees to constitute employer-dominated labor organizations.³⁴

Gould suggests that Section 8(a)(2) has outlived its usefulness and should simply be repealed (pp. 140-41). Although the abrogation of Section 8(a)(2) might appear to give disingenuous employers the opportunity to create sham worker-management committees as an anti-union device, this fear is unfounded. Any firm that engaged in such insincere behavior would clearly be guilty of restraining or coercing its employees with respect to the exercise

32. 29 U.S.C. § 158(a)(2) (1988).

33. 29 U.S.C. § 152(5) (1988).

34. See, e.g., *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959); *E.I. Du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993); *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (1994).

Some court decisions have been more flexible regarding the legality of bona fide worker participation plans. See, e.g., *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955).

of their protected NLRA rights in violation of Section 8(a)(1).³⁵ Although subtle uses of employee-employer committees to discourage collectivization might be difficult to prove, this is the type of conduct the Labor Board has historically regulated with minimal difficulty.

Despite his support for voluntary worker participation programs, Gould does not propose legislation mandating greater employee involvement in corporate management. Even though I believe that many employees in white-collar and service occupations will eventually decide that collectivization may enhance their employment interests, the union density rate in the private sector will not likely ever exceed twenty to twenty-five percent in the United States. American workers are so individualistic and afraid of being considered part of the working class and employer opposition is so substantial that union membership figures could not conceivably approach those in many Western European countries. Thus, seventy-five to eighty percent of private sector personnel will continue to lack the ability to influence their employment destinies through the traditional bargaining process. Gould deals with this reality by suggesting that unions representing twenty or thirty percent of employees in a particular unit be given the legal right to speak for those individuals (p. 141). Without more formal participation rights, however, it is doubtful that nonmajority representatives would possess the economic leverage they would need to protect the persons they represent.

It is time for Congress to recognize two critical realities. First, the NLRA has truly become an irrelevant statute for the vast majority of private sector employees. If unorganized workers are to have the capacity to affect their employment conditions, the legislature must provide them with new statutory rights guaranteeing that privilege. Second, corporate success is dependent upon three symbiotic groups: (i) the investors who provide the necessary capital, (ii) the managers who provide the requisite leadership, and (iii) the employees who carry out the regular job functions.

Corporate laws carefully protect the rights of business investors. Prospective shareholders receive extensive firm information before they decide to purchase shares, and they participate in the election of corporate directors. Firm managers owe shareholders a fiduciary duty and are liable to stockholders who are injured by breaches of this duty. Because capital is a highly mobile commodity, shareholders can protect their interests through diversification and through transfer of their financial support from poorly performing businesses to other investments.

35. 29 U.S.C. § 158(a)(1) (1988).

Corporate managers also possess the capacity to protect themselves against adverse corporate decisions. They usually exercise meaningful discretion with respect to decisions affecting their own futures. Corporate managers can often avoid employment-at-will insecurity through individual employment contracts that guarantee their continued employment for specified time periods. They may be able to obtain generous severance packages in case they lose their positions through corporate reorganizations or buy-outs. Moreover, they directly benefit from business success through bonus payments and stock options that are unavailable to most subordinate personnel. Finally, corporate managers even have access to confidential business information that would let them know when they should begin to contemplate alternative employment.

Rank-and-file employees are treated the same as the equipment they use or operate. Even though they commit their working lives to the success of their respective employers, their employment can normally be terminated at any time for any reason. They are not privy to confidential firm information, and they are not consulted about contemplated business decisions that may affect their employment destinies. Although workers may resort to the "exit voice" and seek other jobs when they are dissatisfied with firm developments, most lack the unique skills to enjoy significant mobility. Furthermore, their pension rights and length of service frequently induce them to remain with their current employers during periods of declining firm performance.

B. *Legislative Approach*

The time has come to provide rank-and-file personnel with fundamental employment dignity. Congress should enact an employer-employee relations statute similar to the German Works Constitution Act of 1972.³⁶ The statute would require every employer with at least fifteen or twenty-five employees to create a specified minimum number of works councils. One works council would be required for each separate facility with no more than a certain number of employees — for example, two hundred and fifty employees. For large facilities, the law would require separate works councils for each distinct department and for each group of interrelated departments containing employees who share a com-

36. Betriebsverfassungsgesetz [Works Constitution Act], BGBI.I 13 (1972) (amended 1985) (F.R.G.) (discussed on p. 117). Professor Paul Weiler previously proposed the creation of similar employee participation committees for American workers. See WEILER, *supra* note 1, at 283-306; see also Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHL-KENT L. REV. 149 (1993). For an explication of the German model, see Rudolf Buschmann, *Workers Participation and Collective Bargaining in Germany*, 15 COMP. LAB. L.J. 26 (1993).

munity of employment interest.³⁷ Every two years, employees would nominate and elect the members of their respective works councils. To ensure a meaningful dialogue between employees and management and to provide some employment protections for managerial personnel whose employment interests are more aligned with their subordinates than their superiors, lower and middle managers would be allowed to elect one-fifth or one-quarter of the council members.

Business firms would need to provide works council members with information regarding basic operations and contemplated changes that would meaningfully affect working conditions or employee job security.³⁸ Proposed corporate changes concerning basic operations, new technology, health and safety concerns, significant job transfers to other facilities, group layoffs, and individual terminations would have to be presented to the appropriate works council for consideration.³⁹ In most cases, works council members and firm managers would likely agree upon the proper course to be taken. Rank-and-file employees understand the need for firm efficiency and increased productivity to remain competitive in a global economy, and they recognize that superfluous or incompetent personnel cannot be retained indefinitely without threatening the employment security of all workers.⁴⁰ Managers would obtain a better understanding of worker concerns and would be forced to recognize the need to formulate corporate decisions that would maximize worker morale and loyalty. Congress should provide that when a majority — or perhaps a weighted majority⁴¹ — of works council members reject proposed managerial action, a mediator with business expertise who was previously selected by managers and works council members would endeavor to achieve a conciliated agreement. In those infrequent instances in which no mutual accord could be reached, arbitrators selected by management and council members would ultimately resolve the issue. Expedited procedures

37. Criteria similar to those presently used to define appropriate bargaining units under the NLRA could be used to determine appropriate works council groupings under my proposal.

38. Without the elimination of the information imbalance that currently exists between managers and lower-level personnel, employees would be unable to influence the corporate decisionmaking process significantly. See Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI-KENT L. REV. 59, 76-78 (1993).

39. When fundamental issues would affect personnel covered by several works councils, management would be required to consult with the relevant councils jointly in an effort to achieve a mutually acceptable accommodation of the competing interests.

40. See JAMES C. FURLONG, *LABOR IN THE BOARDROOM* 45, 131 (1977).

41. To minimize works council-manager confrontations and the difficulties those controversies could generate, weighted majorities of 60% or two-thirds might be required to reject managerial decisions. Congress might alternatively allow councils bare majority rejections for less significant issues and require weighted-majority rejections for fundamental policy determinations.

could be used to generate final decisions within several days with respect to matters that must be resolved quickly.

Congress should also mandate the election of one-quarter or one-third of corporate board members by nonexecutive personnel. Both rank-and-file employees and lower-level managers should be given the opportunity to vote. This would guarantee board consideration of worker interests when important firm policies are debated. All corporate board members should be both obliged to consider worker interests when making business decisions and subject to liability to rank-and-file employees when they violate this fiduciary obligation.⁴² Statutory provisions should recognize their dual loyalties to shareholders and to workers by granting the board members sufficient discretion to make good faith managerial decisions when stockholder and employee interests conflict without the fear of liability. On the other hand, when board members fail to consider worker interests adequately, they should be subject to the same legal accountability that would result if they failed to respect the interests of shareholders.

The adoption of mandated worker participation programs would not render labor organizations obsolete. They could continue to provide employees with the expertise and assistance they would need when dealing with corporate boards or works councils.⁴³ Unions should have the right to nominate employee slates for works council positions and should serve as a deterrent preventing employer agents from coercing or restraining employees with respect to the nomination and election of council or corporate board members. Such activities would significantly diminish firm conduct designed to undermine free worker elections.

If a majority of employee-elected council members were affiliated with a particular labor organization, that entity would be granted exclusive bargaining rights similar to those currently enjoyed by majority bargaining agents under the NLRA. If no labor organization enjoyed majority support, each union with twenty or twenty-five percent employee-elected council member support would be entitled to formal consultation rights.⁴⁴ Firm managers would be required to consult with representatives from each organization with the requisite support before they made final decisions concerning matters affecting employee interests. Even though for-

42. See Gottesman, *supra* note 38, at 93-95; see also Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty To Protect Displaced Workers*, 69 N.C. L. REV. 1189 (1991).

43. See generally Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169 (1991).

44. In chapter 5, Professor Gould supports the concept of minority union representation rights similar to those proposed here; see also Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993).

mal bargaining would not be necessary, these minority entities could provide managers with critical input, such as proposing alternatives that would be less injurious to employee interests.

Business leaders would undoubtedly denounce legislative proposals calling for the establishment of works councils and worker-elected board members as unworkable and inefficient. What they would most resent would be the need to share their corporate power with rank-and-file personnel. Employees are not ignorant people. They usually understand basic operations, sometimes even more thoroughly than upper managers. Workers are in an advantageous position to enhance productivity and firm quality, but they are presently hesitant to do so because such improvements might undermine their job security. If employers treated them as corporate partners in a cooperative venture and employees realized that new developments would not unduly affect their employment rights, the employees would be more inclined to propose and support operational changes.

IV. PROPOSED REFORM OF THE NLRA

In Chapter Five, Gould suggests that after sixty years, it is time to reassess the efficacy of the NLRA. He notes the call of some unionists for repeal of this legislation based on its unfair constraints on the exercise of collective power through secondary activity (pp. 153-54). The author rejects this position, believing that a modified NLRA can continue to protect employee rights. Although my proposed statutory changes mandating the creation of works councils and the election of employee representatives to corporate boards would render NLRA amendments superfluous, I realize that a probusiness Congress would be unlikely to contemplate seriously such radical changes in American employment law. People who think that President Clinton might consider my proposals should remember that his major legislative accomplishments at the time of this review have been the Senate approval of the Republican-negotiated and business-community-supported North American Free Trade Agreement with Mexico and the enactment of a relatively conservative crime bill. The election of Republican majorities in the House and Senate further diminishes the likelihood of proworker legislative reform.

A. Representation Election and Certification Reform

Gould maintains that the Labor Board excessively regulates the representation election process, especially with respect to campaign propaganda (p. 152). The empirical study of representation elections conducted by Professors Getman, Goldberg, and Herman dur-

ing the early 1970s provides support for this notion.⁴⁵ Although subsequent evaluations of the same database have suggested that these experts may have underestimated the impact of coercive employer statements on employee voting,⁴⁶ Gould believes that employees are capable of recognizing electioneering for what it is. Because I agree with the Supreme Court's admonition that "any balancing of [employer and employee] rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear,"⁴⁷ I have argued in favor of *greater* Labor Board regulation of this area.⁴⁸ If truly free elections are to occur, neither party should be permitted to mislead intentionally or to threaten implicitly prospective voters in a manner that would be likely to affect their vote.

Gould notes that nonemployee union organizer access to employer premises is severely limited (pp. 157-58). Such organizers are not permitted to distribute union literature even on retail store parking lots that are open to prospective customers.⁴⁹ Employees may proselytize in favor of collectivization only during nonworktime, even though employer agents may disseminate their anti-union message during worktime.⁵⁰ Employers can inundate workers with anti-union propaganda through captive audience speeches, supervisory discussions, bulletin board notices, and personal memoranda or letters. Business firms thus enjoy an enormous advantage during organizing campaigns. Gould would alleviate this substantial imbalance through rules providing union organizers with access to company property open to the public and access to other appropriate areas after representation petitions have been filed (p. 158). This change in existing NLRA law would greatly enhance the opportunity of union organizers to communicate with targeted employees.

Gould acknowledges that extended representation proceedings tend to provide employers with the extra time they need to defeat union organizing drives. He notes that some Canadian provinces

45. See JULIUS G. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976).

46. See, e.g., William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560, 567-75 (1983).

47. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

48. See Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 411, 419 (1992).

49. See *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992); see also *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (banning union organizers from distributing literature on company-owned parking lots).

50. See *NLRB v. United Steelworkers*, 357 U.S. 357 (1958).

conduct elections within five days after union petitions have been filed, and he proposes similarly expedited procedures for NLRA elections (p. 158). The author also documents the two- or three-year delay between the unlawful termination of union supporters and their judicially enforced reinstatement orders (pp. 158-59). He suggests that the Labor Board make greater use of Section 10(j)⁵¹ temporary restraining orders that would allow the immediate reinstatement of union sympathizers illegally discharged during organizing campaigns (pp. 160-61). This procedure would greatly diminish the chilling effect of discriminatory terminations during union organizing drives.

Gould indicates that prolonged delays could be avoided if Congress amended the NLRA to authorize Labor Board certifications based upon authorization card demonstrations of adequate support (pp. 162-63). Several Canadian provinces allow card-based certification when unions establish fifty-five or sixty percent support, and this approach would greatly enhance union organizing. Gould appropriately recognizes that peer pressure may induce some workers to sign authorization cards they might not have otherwise signed, and therefore he proposes that card-based certification require a supermajority of fifty-five or sixty percent (p. 163). Such a requirement would not affect most labor organizations, because few petition for Labor Board elections until they have obtained cards signed by sixty or seventy percent of the employees in proposed units.

B. *Obligation To Bargain and Scope of Bargaining Reforms*

Even when unions obtain Labor Board certification, their struggle for representation rights is not over. Employers frequently decline to recognize newly certified organizations, forcing them to prosecute refusal-to-bargain charges. It may take a year or more for the Labor Board to issue remedial bargaining orders in these cases, and losing employers can avoid bargaining for an additional year while the Labor Board petitions for court of appeals enforcement orders. To curtail these delays, Gould proposes that Labor Board certifications include bargaining directives that may be directly appealed to courts of appeal without the need for unfair labor practice proceedings before administrative law judges (p. 164). This practice would greatly diminish the delay between certifications and court-enforced bargaining orders. In cases in which employer objections to union certification are clearly without merit, the Labor Board should be required to seek temporary bargaining orders under Section 10(j) to allow prevailing unions to demand

51. 29 U.S.C. § 160(j) (1988) authorizes district courts to grant temporary injunctive relief while unfair labor practice cases are being litigated.

bargaining while certification cases are being appealed to appellate courts.

In almost forty percent of cases in which unions obtain certification, they are unable to negotiate initial bargaining agreements.⁵² Many of these negotiation failures are due to employer recalcitrance, as employers are disappointed with their election loss and hope to defeat the prevailing unions at the bargaining table through disingenuous bargaining. Gould supports the laws of certain Canadian provinces⁵³ that require parties that are unable to achieve first contracts to resolve their disputes through binding interest arbitration (pp. 168-70). Because I believe that the Labor Board should be given the authority to provide make-whole relief to workers victimized by manifestly unjustified employer refusals-to-bargain through compensation awards approximating what the employees would presumably have obtained had the firms negotiated in good faith,⁵⁴ I would have no difficulty accepting the concept of first contract interest arbitration.

The negotiating parties would initially attempt to achieve a voluntary resolution of their competing differences. If that objective could not be attained because of uncompromising employer behavior, arbitral determination would resolve the conflict. Arbitrators should be required to follow legislatively prescribed standards, and they must decide which party made the more reasonable final offer on an issue-by-issue or total-package basis. These constraints would prevent unprincipled arbitral awards. The availability of final-offer arbitration would also encourage parties to resolve their initial differences through the bargaining process, in recognition of the fact that negotiation impasses would no longer lead to the premature emasculation of newly certified labor organizations.

Finally, Gould decries the limited scope of bargaining currently available to representative labor organizations (pp. 170-73). In *First National Maintenance Corp. v. NLRB*,⁵⁵ the Supreme Court completely ignored the proper function of unions as it severely restricted the scope of bargaining required over management decisions affecting employee job security:

Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling

52. See SUBCOMM. ON LABOR-MANAGEMENT RELATIONS, HOUSE COMM. ON EDUC. & LABOR, 98TH CONG., 2D SESS., *THE FAILURE OF LABOR LAW — A BETRAYAL OF AMERICAN WORKERS*, 10 (Comm. Print 1984), excerpted in LEROY S. MERRIFIELD ET AL., *LABOR RELATIONS LAW* 59, 62 (9th ed. 1994).

53. See WEILER, *supra* note 1, at 249-51.

54. See Craver, *supra* note 48, at 433-34.

55. 452 U.S. 666 (1981).

its conduct an unfair labor practice. . . . [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.⁵⁶

The *First National Maintenance* majority was unduly concerned about labor interference with managerial freedom. It failed to acknowledge that when Congress enacted the NLRA, it made the legislative determination that worker "interference" with managerial discretion was an appropriate consequence of an industrial relations system that provides employees with meaningful input regarding their basic employment conditions. Despite the curtailment of managerial freedom involved, I agree with Gould's proposal to expand the scope of bargaining to include most issues of real concern to employees (pp. 170-73). I also concur in his proposal to require business firms to provide representative unions with greater corporate information to enable them to perform their representational function more effectively (p. 175).

Although I support the NLRA proposals that Gould makes and believe that they would be of limited benefit to organizing unions and represented employees, I also think that these modifications would be analogous to the rearranging of deck chairs on the Titanic. The American labor movement is in dire trouble, and minor NLRA changes will not make a significant difference. If the vast majority of U.S. workers who are unlikely to select union representation is to receive meaningful employment rights, legislatures must enact laws similar to those proposed earlier with respect to the creation of works councils and the election of employee representatives on corporate boards.⁵⁷ Only these legislative programs could provide workers with the scope of industrial democracy that one should expect in a truly free society.

V. THE ENHANCEMENT OF WORKER ECONOMIC POWER

Gould acknowledges that industrial and economic developments have significantly diminished the efficacy of the traditional strike weapon (pp. 181-83). Increasingly diverse and technologically advanced business enterprises are finding it easier to withstand the impact of work stoppages. Managerial personnel can often maintain production by keeping automated equipment func-

56. 452 U.S. at 678-79.

57. Regarding the need for more expansive and more innovative labor law reform, see Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHL-KENT L. REV. 3, 20-46 (1993).

tioning. Lost production may be transferred to facilities in other states or other countries.

Another important factor contributing to the decline of the work stoppage concerns the lack of legal protection given to striking personnel. As early as 1938, the Supreme Court held that employers could hire permanent replacements for striking employees, despite the negative impact of the replacement option on the exercise of the statutorily protected right to strike.⁵⁸ The Court apparently believed employers' need to continue operations during a strike outweighed employees' right to engage in work stoppages. Nonetheless, for over four decades, few American firms exercised their "right" to hire permanent replacements during work stoppages. Employers have used the *Mackay Radio* doctrine more frequently in recent years, however, following President Reagan's 1981 decision to terminate 11,000 unlawfully striking air traffic controllers. A recent AFL-CIO study found that employers permanently replaced eleven percent of the 243,300 individuals who participated in major work stoppages during 1990.⁵⁹ It is doubtful that the thousands of displaced strikers received solace from the fact they had been "permanently replaced" due to employer desires to continue operations rather than "discharged" because of anti-strike motivations. Most were forced to seek other gainful employment, and their representative labor organizations probably ceased to function as viable bargaining agents for the new workers.

The year before *Mackay Radio*, when the Supreme Court sustained the constitutionality of the NLRA, it eloquently acknowledged that individuals lacked the capacity to counterbalance the economic power possessed by their corporate employers:

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.⁶⁰

If meaningful collective bargaining is to exist without the need for excessive government intervention, the strike weapon must be preserved and even strengthened.

Gould recommends a statutory modification of the *Mackay Radio* rule that would prohibit the hiring of permanent replacements

58. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-47 (1938).

59. *AFL-CIO Study Indicates Increase in Permanent Replacement of Strikers*, Daily Lab. Rep. (BNA) No. 114, at A-3 (June 13, 1991).

60. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

until a work stoppage has continued for at least six months (pp. 201-02). I previously suggested a balancing approach that would allow struck employers to continue operations initially through the retention of *temporary* replacements.⁶¹ They could only hire *permanent* replacements if they could demonstrate — after a one-, two-, or three-month period — that local labor market conditions precluded the employment of qualified *temporary* personnel.

Congress enacted the original NLRA to provide individual workers with collective empowerment. Pursuant to that statute, employees involved in a labor dispute could exert direct pressure against the target firm, and they could enlist the support of secondary parties. By inducing the employees of secondary companies to cease handling products going to or coming from the struck business, the primary workers were able to increase their bargaining leverage. In 1947, business leaders induced Congress to proscribe many forms of secondary behavior, and in 1959, the legislature prohibited most of the remaining forms of secondary action.

If Congress wants to maintain a *laissez faire* posture, it should amend the NLRA to permit some forms of secondary activity.⁶² When a work stoppage is effective, it shuts down the operations of the target firm. As a result, that firm suspends its purchases of raw materials and reduces its shipment of finished goods. When striking employees are unable to generate a complete cessation of primary firm operations, they could be allowed to expand their concerted appeal to employees of those secondary businesses that deal directly with the struck employer as suppliers or customers. They could induce the workers of those secondary firms to refuse to handle the raw materials destined for the struck plant or the finished goods coming from that establishment during the primary work stoppage.

Business leaders would undoubtedly resist any efforts to reverse *Mackay Radio* or to expand the secondary appeals for support that could be made by striking employees. They realize that they are in a superior economic position, and they do not wish to let legislative modifications redress the substantial power imbalance that currently exists. Nonetheless, if Congress believes that viable labor organizations are indispensable attributes of industrial democracy, it must increase the economic leverage available to those entities. If members of Congress are concerned about the production losses that expanded work stoppages would generate, they could consider alternatives that would not cause operational disruptions. They could require resort to tripartite interest arbitration to resolve bargaining disputes, with the arbitration panel selecting the more rea-

61. See Craver, *supra* note 48, at 422-23.

62. See *id.* at 424-25.

sonable final offer made by the employer or the representative union — on an issue-by-issue or total-package approach.

Alternatively, Congress could amend the NLRA to authorize only "statutory strikes" that would not entail actual work disruptions.⁶³ Once a bargaining impasse was reached, the employer or the union could declare a "strike." Production and services would continue as usual, but employee compensation would be reduced by a specified amount — for example, ten or fifteen percent — and firm revenues would be reduced by a similar percentage. If the parties resolved their dispute expeditiously, the withheld compensation and revenues could be returned to the workers and the company. If the controversy was not settled quickly, however, the withheld funds could be permanently transferred to the public treasury. Although statutory strikes would not involve work disruptions, the statutorily prescribed financial incentives would encourage labor and management negotiators to resolve their controversies in an expeditious manner.

As Gould recognizes, meaningful collective bargaining is impossible if one party to the interaction lacks real leverage. Over the past several decades, the bargaining power of labor has waned while that of employers has increased. Many unions are so weak that they are effectively reduced to collective begging. They are forced to take whatever the employers are willing to give them. Congress must decide whether the United States should become the only country in the advanced world to have no viable labor movement. If it does not move quickly, the issue will unfortunately become entirely academic.

VI. CONTRASTING THE AMERICAN AND CANADIAN EXPERIENCES

When observers attempt to understand the reasons for the substantial decline of U.S. labor organizations over the past several decades, they frequently make comparisons to the Canadian union experience. That nation's provincial labor relations statutes are similar to the NLRA, and many of their industries and trade unions have close ties to U.S. entities. In Chapter Seven, Gould explores the Canadian situation and attempts to explain why Canadian trade unions have not experienced the same membership losses as their U.S. counterparts. He notes that Canadians tend to be less individualistic than U.S. residents and that Canadians exhibit greater social and class cohesiveness.⁶⁴

63. See generally George W. Goble, *The Non-Stoppage Strike*, 2 LAB. L.J. 105 (1951); David B. McCalmont, *The Semi-Strike*, 15 INDUS. & LAB. REL. REV. 191 (1962).

64. P. 208; see Thomas C. Kohler, *Individualism and Communitarianism at Work*, 1993 B.Y.U. L. REV. 727.

In addition, most Canadian employers respect the right of their employees to organize and do not resort to the overtly coercive tactics used by many U.S. firms to defeat organizing campaigns. Several of the Canadian labor statutes facilitate union organizing by permitting authorization-card based certification when unions obtain fifty-five or sixty percent support (p. 215). Even when elections are required, they are conducted in an expedited manner — often within five days after representation petitions are filed (pp. 215-16). These two practices preclude unnecessary delays and limit the opportunity for resort to the anti-union conduct so prevalent during drawn-out organizing campaigns in the United States.

U.S. employers frequently characterize proposals to allow card-based certification under the NLRA as “radical.” They overlook the fact that the original Wagner Act authorized card-based certification as it provided that the Labor Board “may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.”⁶⁵ In a perfect world, I would prefer secret ballot elections to card checks because of the possibility that employees may have signed authorization cards due to social pressure, misunderstanding, or outright coercion. Congress must acknowledge, however, that neutral elections do not usually occur. Employers frequently imply that pro-union votes will result in lost employment, and a number of firms graphically demonstrate this possibility through the unlawful termination of key union supporters during the organizing campaigns.

If we could guarantee elections within five or ten days after the filing of representation petitions — and if coercive campaign techniques could be effectively proscribed — resort to secret ballot elections would be the preferable option. If the Labor Board could not conduct elections on an expedited basis, then I would favor card-based certification in limited circumstances. I would prefer to have Congress amend the NLRA to mandate elections within five or ten days after petitions are filed, except when extraordinary circumstances would preclude an expedited election.

Gould recognizes that only about two-thirds of the unions that receive Labor Board certification ever obtain first contracts (p. 222). This figure is substantially below the eighty-four percent success rate experienced by certified labor organizations in Ontario (p. 223, tbl. 7-3). Two factors account for this difference: (i) U.S. employers know that if they can avoid the execution of bargaining agreements during the certification year, they can often defeat the newly certified unions;⁶⁶ and (ii) the Ontario labor relations statute

65. Wagner Act, ch. 372, sec. 9(c), 49 Stat. 449, 453 (1935), *set forth in* N.L.R.B., LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3274 (1959).

66. *See* LEVITT & CONROW, *supra* note 24, at 201-25.

mandates first-contract interest arbitration when the negotiating parties are unable to achieve their own agreements due to employer recalcitrance (pp. 222-27).

VII. OVERALL ASSESSMENT

William Gould has written a thoughtful and provocative book that is especially timely due to the election of President Clinton, the creation of the Dunlop Commission to study the need for labor law reform, and the appointment of Gould himself as Chair of the NLRB. Americans must decide whether we believe that independent labor organizations are an important aspect of a democratic society. If we do not act quickly to reverse the long-standing union decline, labor entities may become irrelevant by the end of this decade. The NLRA changes that Gould proposes would certainly help. Election campaigns would become less coercive, and the certification process would be greatly expedited. Employee free choice would be more effectively protected, and unions would probably obtain more certifications than they do under existing NLRA doctrines.

Gould implicitly acknowledges, however, that a labor movement revival would not likely extend collective protection to a majority of U.S. employees. Many would be hesitant to organize for fear of being considered unprofessional or even lower class. Nevertheless, innovative new entities may be created that would be more analogous to the American Bar Association or the American Medical Association than to present AFL-CIO affiliates, and such organizations would have a greater appeal to white-collar and professional personnel. It is important to remember that the American Nurses Association, the National Education Association, the American Association of University Professors, and similar entities were, not so long ago, wholly professional groups with no labor agendas. The British Medical Association, by contrast, has been a registered trade union for several decades.

Despite the image of U.S. residents as rugged individualists, most Americans are group-oriented when they endeavor to advance their economic interests. Business firms are associated with various groups, such as the Chamber of Commerce, the National Association of Manufacturers, and specific industry organizations. Attorneys have the American Bar Association, physicians the American Medical Association, older people the American Association of Retired Persons, women the National Organization for Women, and African-Americans the National Association for the Advancement of Colored People. Each distinct profession has at least one professional group to advance member interests. It is indeed ironic that although collective power is appropriate for profes-

sionals and independent entrepreneurs, it is considered inappropriate and unprofessional for rank-and-file workers. Those persons who most lack individual bargaining power and who most need a collective voice to advance their interests are expected and even encouraged to eschew organizational strength. Employers go to great lengths to prevent their employees from enjoying the same group benefits they derive from their own professional associations. Congress should finally ensure that workers have the unfettered right to organize that the Wagner Act originally granted to employees. The adoption of Gould's proposed NLRA amendments would constitute a significant improvement over the status quo.

Labor law experts must now admit that the NLRA has become an antiquated and relatively meaningless statute. It no longer protects worker organizational rights, nor does it provide unionized employees with expansive bargaining opportunities or meaningful economic leverage. If the vast majority of private sector personnel are to enjoy employment rights beyond the minimal terms unilaterally offered by their employers, those privileges will have to be provided through federal legislation.

The most effective way to grant employees meaningful influence over their terms of employment would be to mandate the creation of shop-level works councils and the election of employee representatives to corporate boards. These worker participation programs would give individual employees the right to be consulted regarding contemplated firm policies that would affect their employment interests. Local works councils could also explore ways in which to increase productivity and product or service quality in a manner that would simultaneously advance the interests of both workers and employers. I am disappointed that Gould does not support legislatively-mandated worker participation programs.

I agree with Gould that specific statutory provisions should prohibit unjust dismissals and provide administrative or arbitral procedures to review challenged terminations. I also think that Congress should acknowledge the unconscionably low wages and minimal fringe benefits enjoyed by millions of American workers. Elected representatives can no longer assume that these issues are resolved through private collective bargaining, because so few individuals have their employment terms determined through the collective process. The minimum wage should be increased to an appropriate level, with variable scales adopted to take into account the capacity of different industries to afford specified labor costs.

Anyone concerned with the rights of American workers should read *Agenda for Reform*. It contains many proposals that would enhance the employment interests of most persons. Nonetheless, readers should recognize that Gould's suggestions provide only a

modest beginning. If U.S. personnel are to enjoy the fundamental rights already available to workers in most other advanced nations, far more legislative protections are necessary. These changes may initially seem radical, but they would merely prepare the United States for the twenty-first century. The other industrial nations have already demonstrated that firms can maintain humane employment conditions and still be competitive in a global economy. It is time for the United States to exhibit a similar commitment to its most precious resource — its human capital.⁶⁷

67. See generally Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law To Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993).