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Justice on the Job: Perspectives on the Erosion of Collective Bargaining in the United States

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Richard N. Block, Sheldon Friedman,
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Dedicated to Dan Hamilton, Marjorie Friedman,
Mary Freeman, and the late Henry Block.

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1

An Introduction to the Current State of Workers' Rights

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“Democracy cannot work unless it is honored in the factory as well as the polling booth; [workers] cannot be truly free in body and in spirit unless their freedom extends into the places where they earn their daily bread.” This quote from Senator Robert Wagner in 1935 as he introduced the bill that came to be known as the Wagner Act captures the importance of workers’ rights in our society. Yet in 2000, no less an authority than Human Rights Watch found that legal protections for the fundamental human rights of U.S. workers to form unions, bargain collectively, and strike fall woefully short of meeting the requirements of international law (Human Rights Watch 2000). The freedom to form a union has been formally recognized as a basic human right by the United Nations and its member states since the Universal Declaration of Human Rights was ratified in 1948 (United Nations 1948). The international importance of freedom of association and the right to bargain collectively was reaffirmed in 1998, when the International Labour Organization (ILO), the tripartite United Nations body that is responsible for labor issues, designated the right to freedom of association and to bargain collectively as one of four workplace rights so universal and

fundamental that they must be honored by all member states, whether or not they have ratified all the relevant ILO conventions (ILO n.d.).¹

Yet in the United States today, the freedom to form unions and bargain collectively is heavily suppressed, and the law provides workers with little protection. According to Bronfenbrenner's survey of 400 National Labor Relations Board (NLRB) elections in 1998 and 1999, private sector employers oppose the efforts of their employees to form unions during 97 percent of all organizing campaigns (Bronfenbrenner 2000). Firing or otherwise discriminating against a worker for trying to form a union is illegal but has become commonplace. The number of instances of discrimination, discharge, or other unfair labor practices against workers for union activity leading to a back-pay order by the NLRB skyrocketed from 1,000 per year in the early 1950s to 15,000–25,000 annually in recent years, despite the fact that private employment in the United States during this period increased less than three-fold (Human Rights Watch 2000; U.S. Bureau of Labor Statistics n.d. d). Almost without limit, employers can and do legally force workers to attend closed-door meetings during work time to dissuade them from forming unions. According to Bronfenbrenner (2000), private sector employers force workers to attend 11 such "captive audience" meetings during a typical organizing campaign. By contrast, unions have virtually no access to the workplace to present their case. Indeed, as political scientist Gordon Lafer recently concluded:

At every step of the way, from the beginning to the end of a union election, NLRB procedures fail to live up to the standards of U.S. democracy. Apart from the use of secret ballots, there is not a single aspect of the NLRB process that does not violate the norms we hold sacred for political elections. The unequal access to voter lists; the absence of financial controls; monopoly control of both media and campaigning within the workplace; the use of economic power to force participation in political meetings; the tolerance of thinly disguised threats; the location of voting booths on partisan grounds; open-ended delays in implementing the results of an election; and the absence of meaningful enforcement measures—every one of these constitutes a profound departure from the norms that have governed U.S. democracy since its inception. (Lafer 2005)

Under U.S. law, employers may lawfully "predict"—but not "threaten"—that the workplace will close or be moved if workers join a union.

The incidence of such “predictions” and (technically illegal but virtually unpenalized) threats that the workplace will close or move occurred in less than 30 percent of organizing campaigns in the mid-1980s, but more than half by the late 1990s—including more than 70 percent in the highly mobile manufacturing sector (Bronfenbrenner 2000, p. 18).

Employers who are so inclined may use NLRB procedures and legal doctrines to create delays and make collective bargaining appear futile so that employees will eventually abandon their struggle to form a union.² The bottom line: as Richard Freeman puts it, “the National Labor Relations Act . . . has institutionalized a process that effectively gives management near veto power over whether or not workers become organized” (Freeman 2004, p. 75).³ The consequences have been devastating for workers’ rights. According to a February 2005 Peter Hart survey, among nonunion workers 53 percent—or some 57 million workers—want union representation in their workplaces but are unable to have it under current law (Hart 2005).

The economic consequences of suppressing workers’ freedom to form unions are severe. Union jobs paid 27.6 percent more than nonunion jobs in 2004—\$781 per week versus \$612 per week (U.S. Bureau of Labor Statistics 2005). Real wages of U.S. workers are 4.7 percent lower in 2004 than they were in 1971, although productivity increased at an annual average of 2.11 percent during that time period (U.S. Bureau of Labor Statistics n.d. b,c). The absence of workplace democracy and the right to negotiate for a share of this increased productivity has contributed to this gap. Indeed, the inability of workers to unionize may threaten middle-class jobs and the associated lifestyles. Collective bargaining raises wages for all workers, union and nonunion alike. One recent study found that, for workers with high school educations in the 1980s, the spillover effect of collective bargaining led to aggregate earnings increases for nonunion workers that were three-fifths as large as the aggregate of earnings increases received by union members as a direct result of collective bargaining (Mishel and Walters 2003).

As workers lose the freedom to form unions, race and gender pay gaps grow. For example, according to the U.S. Bureau of Labor Statistics (2005), in 2004, African-American workers who are members of a union made 29 percent more per week than their nonunion counterparts, and Latino workers who are members of unions earned 59 percent more per week in 2004 than nonunion Latino workers. Furthermore, the union

wage advantage was 34 percent for women workers. Numerous studies have found a link between the erosion of collective bargaining coverage and widening economic inequality (Card 1996, 2001; Card, Lemieux, and Riddell 2003; Mishel and Walters 2003).

Collective bargaining also makes a huge difference in workers' access to pensions, health insurance coverage, and paid time off the job. Union workers are nearly five times more likely to have guaranteed, defined benefit pension plan coverage (U.S. Bureau of Labor Statistics n.d. a) and are 53 percent more likely than nonunion workers to get health insurance benefits through their jobs (Buchmueller, DiNardo, and Valleta 2001). Nonunion workers are six times more likely to lack health insurance coverage than union members; the long-term decline in unionization and collective bargaining coverage is therefore a significant cause of the growth in the number of uninsured Americans (Fronstin 2005). Thus, unions and collective bargaining are vital to preventing low-road employers from shifting the costs for health care of their employees to more responsible employers and the public (Maxwell, Temin, and Zaman 2002; Waddoups 2003).

In a period when the work/family time squeeze is high on the agenda of many social analysts, unions help to maintain a healthy work/life balance. Collective bargaining confers a 28 percent advantage in paid vacation time to union members as compared with nonunion workers (Mishel and Walters 2003).

Furthermore, unions make a huge difference in justice on the job. In 99 percent of unionized workplaces, workers can be disciplined or fired only for a good reason related to work performance (Bureau of National Affairs 1995). By contrast, in virtually all nonunion workplaces in the private sector, workers are "employees at will" who can be disciplined or discharged for no reason at all.

Suppressing the freedom to form unions also harms political participation and weakens a vital component of countervailing power in society (Voos 2004). Radcliff (2001) estimates that each percentage point decline in union density triggers a 0.4 percentage point decline in voter participation. Perhaps most serious of all, workers are denied both a democratic voice in their workplace to shape their terms and conditions of employment and a vehicle to use their expertise to improve organizational performance. This lack of voice harms not only workers and organizations, but, depending on the organization, also the general

public. For example, recent research indicates that heart attack survival rates are higher in hospitals where nurses are unionized than in hospitals where nurses are not unionized (Ash and Seago 2004).

In October 2002, the School of Labor and Industrial Relations at Michigan State University and the AFL-CIO co-sponsored a conference on workers' rights that aimed to encourage much-needed academic research on workers' rights in the United States. The conference organizers believed that if we provided researchers in industrial relations and related disciplines a forum for new inquiries into workers' rights, excellent research would emerge.

This volume is an edited selection of 13 papers presented at the conference. The result is a wide-ranging examination of the state of workers' freedom to form unions and bargain collectively in the United States. The book has a point of view: legal protection for workers' rights in the United States is low, and this situation is adversely affecting the well-being of society as a whole. Justice, fairness, and widely shared prosperity are the watchwords of the papers in this volume.

The book is divided into five parts. Part 1 asks the following question: How free are U.S. workers to form unions and bargain collectively? In the first of three chapters in Part 1, James Gross takes an international, values-based look at workers' rights to bargain collectively in the United States. Gross argues that concepts of fundamental human rights must be applied not only to the individual vis-à-vis the state, but also the individual vis-à-vis the employer. Gross makes the argument that an employer can have an even greater effect on a person than does the state. Yet, in their status as employees—which is one of the most important aspects of life for the day-to-day existence of the average person—people are treated as little more than a physical asset allocated like any other asset. Such a view is values-based—there is nothing inherent in the nature of an economic system, including the capitalist system of private ownership of the means of production, that requires that citizens, in their status as employees, be denied such fundamental rights. The European Union (EU), for example, provides workers with a much broader set of legally protected rights than does the United States (Block, Berg, and Roberts 2003), yet the EU does not question private ownership of the means of production. Gross argues that it is the balance between employer rights and workers' rights that is at issue. Gross points out that a conceptualization of workers' rights as fundamental

rights would change the balance of our labor laws. More importantly, however, it would also change the nature of the employment system in the United States from one that is centered on property rights to one that balances property rights with human rights. Gross calls on us to rethink our views of the nature of the employment relationship, asking why we should consider property rights as fundamental for employers, but not consider organizing and bargaining rights—the right to a voice—as fundamental human rights for workers.

Taking this broad view of the right to organize and bargain collectively as a fundamental human right, David Cingranelli examines the most widely known procedure by which workers form labor unions in the United States—the NLRB representation election—and compares it to democratic political elections. Using accepted international standards for democratic elections as a yardstick, standards that the United States has been active in promulgating, Cingranelli concludes that, by these measures, the NLRB representation election process is neither free nor fair. It is not free because workers are not free from interference or coercion, are not allowed by employers or the law to fully exercise free speech rights, are not free to assemble on company property, do not have free access to information about the union at the workplace, and do not have proper redress for election violations because of inadequate laws, poor enforcement, weak and ineffective remedies, and long delays. Representation elections are not fair because eligibility is not clearly defined, access to resources and information is inequitable, and the two parties are not treated equally. Cinganelli's analysis thus calls into serious question whether the NLRB representation election process truly constitutes a free, fair, and democratic procedure for workers to determine whether or not they want to form a union. If it is not a democratic process, then the entire basis for our current system of employee choice, the NLRB election under “laboratory conditions” (Dana Corporation 314 NLRB No. 150 [2004]), is called into question.

The next chapter examines the status of workers' freedom to form unions and bargain collectively in the public sector. While public sector unionism has fared far better than private sector unionism (in 2004, 36 percent of public sector workers were union members, compared to just 7.9 percent of private sector workers) (U.S. Bureau of Labor Statistics 2005), Donald Wasserman claims that these numbers mask some disturbing facts regarding the rights of public employees to bar-

gain collectively. As Wasserman points out, states that permit collective bargaining among state and local government employees often do so with severe constraints. Moreover, Wasserman notes that “(a) majority of public employees in fully one-half of the states do not now have, and are unlikely to achieve, reasonable bargaining rights in the foreseeable future.” Wasserman also cites a U.S. General Accountability Office study that estimates that roughly one-third of all public employees lack collective bargaining rights. Wasserman also notes the minimal scope of bargaining in the federal sector.

Importantly, Wasserman discusses the extent to which the Bush administration and some governors have stripped their employees of even these narrow rights. In January 2005, the Bush administration adopted rule changes to increase management discretion and narrow the scope of collective bargaining in the Department of Homeland Security on the ground of national security, although we know of no serious scholarship that ties unionization to security risks. Additionally, new governors in Indiana and Missouri removed, by executive order, collective bargaining rights from state employees (Lee 2005; Missouri, State of, 2005; *National Treasury Employees Union et al. v. Tom Ridge and Kay Coles James*;⁴ Office of the Governor [of Indiana] 2005; U.S. Department of Homeland Security and Office of Personnel Management 2005). In Kentucky, even the state’s obligation to meet and confer with public sector unions was abolished by the governor in January 2004 (Wasserman 2005). These actions indicate the precariousness of the status of collective bargaining for public employees, especially when that status is at the discretion of the executive branch. The net result, Wasserman finds, is that—even in the relatively highly unionized public sector—the United States falls short of meeting international human rights standards with respect to protecting the freedom of employees to form unions and bargain collectively.

In Part 2, the focus of the volume shifts from broad human rights doctrine to an examination of the social and economic importance of collective bargaining. Why does free worker access to collective bargaining matter? What does society gain from protecting workers’ rights? How do workers themselves, communities, and indeed, employers, benefit from collective bargaining? Thomas Juravich, Kate Bronfenbrenner, and Robert Hickey; Laura Dresser and Annette Bernhardt; and Adrienne Eaton and Jill Kriesky provide insights into these ques-

tions. The chapter by Juravich, Bronfenbrenner, and Hickey represents the first systematic scholarly analysis ever undertaken of the provisions included in the first contracts workers negotiate with employers after they organize a union. The authors find that three-quarters of the first contracts studied contained antidiscrimination and just-cause language, and 96 percent had a grievance procedure with third-party arbitration. Seniority is created in more than two-thirds of all agreements, but seniority is used primarily in layoffs, recall, and transfer. It is much less likely to be used as the primary criterion in promotions. Most of these provisions prevent management from taking arbitrary action. Thus, the chapter suggests that these first contracts represent significant gains for workers—both in terms of economic benefits and workplace rights. Given the difficulty workers face in securing first contracts over employer opposition—45 percent of initial contract negotiations fail to result in a first contract within two years, according to the latest Federal Mediation and Conciliation Service data—these are significant victories indeed (Federal Mediation and Conciliation Services 2004).

The Dresser and Bernhardt chapter on unionization and the hotel industry addresses a broad range of workplace and unionization issues. From a societal point of view, however, the authors' major contribution may be their focus on a sector that has a large number of low-wage, nonunion service jobs, often held by recent immigrants, which generally require limited formal education. From the late 1930s through the late 1950s, workers with little formal education were an important component of the unionized workforce, for instance, in manufacturing and construction. In essence, unionization and collective bargaining helped move these workers into the middle class with all the implications for consumption and intergenerational mobility that went with middle-class status. The decline of middle-wage, unionized manufacturing jobs available to workers with limited formal education, and the coincident increase in nonunion low-wage service jobs, means that there are fewer pathways into the middle class for such workers. This has serious implications for upward social and intergenerational mobility and income growth and inequality in the United States. The substantial wage effects of unionization found by Dresser and Bernhardt, from 19 percent to 39 percent, depending on the level of analysis, suggests the importance of enhancing workers' freedom to form unions and bargain collectively if we wish to reverse the decline of living standards for workers with

relatively low levels of formal education, recent immigrants, and other workers who occupy a disadvantaged position in the labor market.

Adrienne Eaton and Jill Kriesky examine the minority of employers who choose to respect their employees' freedom to form unions by remaining neutral during organizing campaigns and/or voluntarily recognizing unions when a majority of their employees choose them. The authors find no inconsistency between employer success and employer choice to respect workers' freedom to organize and bargain collectively. Indeed, in many cases, unions are perceived as aiding management in improving the workplace or product. In the auto parts industry, for example, with the interest of the domestic automakers and the UAW in purchasing from unionized suppliers, unionization may actually generate business. More generally, avoiding the conflict and disruption typical of contested NLRB representation election campaigns can foster more positive labor-management relations and permit the relationship between the parties to develop on the basis of mutual respect and trust. Thus, for these firms, and for the workers fortunate enough to be employed with them, respect for workers' freedom to form unions and business success go hand-in-hand. The Eaton and Kriesky chapter, when read against the backdrop of the antidemocratic deficiencies of the NLRB representation elections that Cingranelli's chapter documents, strongly suggests that public policy should promote voluntary recognition agreements and employer neutrality as a valuable and constructive alternative to the contested, adversarial, and coercive NLRB representation election process (*Dana Corporation*, 341 NLRB No. 150 [2004]; Brudney forthcoming).

Part 3 focuses on legal obstacles to workers' rights. While common sense suggests that statutory law matters a great deal, those who do not follow labor law developments closely may not realize the impact specific interpretations of statutory language can have. Steven Abraham, Adrienne Eaton, and Paula Voos; and Ganagram Singh and Ellen Dannin examine the impact of interpretations of the NLRA in two areas: the exclusion of supervisors from being part of the union, and employers unilaterally implementing their proposals when bargaining for a contract has reached an impasse. Abraham, Eaton, and Voos note that the U.S. Supreme Court's decisions in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001) and *NLRB v. Health Care and Retirement Corp. of America*, 511 U.S. 571 (1994) have increased the burden on

union organizing by encouraging delays in the representation process. Employer arguments that some employees are supervisors result in legal disputes that increase the processing time in a case. Employers can, in fact, delay the process by weeks by making arguments about the supervisory status of workers even if the merit of the arguments is questionable. In addition, these cases have encouraged courts of appeals to remand cases to the board for further consideration. This increase in case processing time in representation cases generally decreases the probability that the employees will succeed in forming a union (Roomkin and Block 1981). The increased time associated with remands in court cases further discourages employees from exercising their rights. Thus, Abraham, Eaton, and Voos demonstrate that board and court decisions have an effect not only on the substance of the law, but on NLRB procedures as well. It appears that legal decisions, by creating ambiguity in the law, create openings for litigation that cause delay.

Singh and Dannin provide a unique perspective on a current interpretation of the law of the bargaining process under the National Labor Relations Act (NLRA)—implementation at impasse. They asked a sample of business and law students to share their views of the relative bargaining power of the union and the employer under three regimes, including the current regime, which gives employers the right to implement their final pre-impasse proposal and to replace strikers. As these students knew nothing about the law and had no vested interest in any particular statutory structure, their situation was roughly akin to a Rawlsian “veil of ignorance” (Rawls 1971). The authors report that these disinterested, unknowing parties believed the current regime strongly favored employers, enhancing their bargaining power, and that a regime that permits no implementation at impasse and prohibits striker replacement would enhance worker power. A compulsory arbitration regime favors neither party. Their work suggests that the current law strongly favors employer interests over worker interests.

Part 4 looks beyond U.S. labor law to international perspectives. Industrial relations in the United States often have been discussed in the context of “exceptionalism,” the notion that, in some way, the United States is different from other countries and should not be subject to international scrutiny. It is difficult to understand the justification for this notion, especially in a world of globalized markets. Roy Adams and Richard McIntyre and Matthew Bodah analyze the role of the United

States in the tripartite ILO, the internationally recognized center for monitoring worker rights. They revisit the strained relationship between the United States and the ILO. Adams argues that the real purpose of the United States Council on International Business (USCIB), the U.S. employer representative to the ILO, is to limit the influence of the ILO on U.S. labor and employment practices by denying the very premise of the ILO, namely, that union representation and industrial democracy are the socially desired methods of determining terms and conditions of employment. Adams points out that the USCIB instead takes the position that unions are outsiders and that employee interest in representation is indicative of poor management. This “bad management” principle is used to justify many of the positions taken by the USCIB, such as that ILO principles apply to countries and not corporations, that the United States provides protection that is superior to ILO principles, and that ILO principles should apply outside—but not within—the United States.

McIntyre and Bodah address the reasoning behind the United States' refusal to ratify two specific ILO conventions on collective bargaining and freedom of association. They state that these conventions are part of the “delicate balance-consensus principle,” the principle that U.S. law conforms to the principles of freedom of association and collective bargaining, and that the conventions are inconsistent with the U.S. federal system. McIntyre and Bodah argue that there is no consensus among labor and management that U.S. labor laws are working well, that various international organizations have found that U.S. labor law does not comply with these conventions, and that complying with these conventions would not compromise the U.S. federal system. In other words, to McIntyre and Bodah, the reasons that have been brought forward for the United States' refusal to ratify the two conventions are not convincing.

The last section of the book, Part 5, focuses on alternative strategies for advancing workers' rights. Charles Morris asks us to look within established labor law but through a new lens. He asks us to reconsider a fundamental principle of U.S. labor law: majority rule and exclusive representation. Morris argues that the NLRA requires both exclusive representation when a majority of employees in a bargaining unit select union representation and members-only representation when a union is unable to obtain the support of a majority of the employees in a unit.

Morris bases his conclusion on the legislative history of the NLRA, the text of the act, and the labor relations practices in existence in 1935 that Congress used as a reference for the act. Morris rejects the view that only single union exclusive representation is legal in the United States, concluding that this all or nothing system is incorrect as a matter of legislative intent and may have developed simply through assumption and acquiescence.

Harris Freeman and George Gonos examine the growing labor market role of staffing agencies and their general lack of regulation. They compare this deregulated environment with the detailed regulation of union hiring halls, noting that staffing agencies, in principle, serve a similar function, providing access to short-term employment for employees. Yet, they note that workers in the industry have little protection from such tactics as paying less than promised, exorbitant fees—which may increase the cost to user employers—and the absence of criteria for conversion to permanent status. The use of preferred arrangements restricts worker choice. They argue that the nature of these agencies is such that certain fair representation obligations should be placed on them. In essence, they ask us to reconceptualize the temporary staffing agency from an arm of the employer to a true labor market intermediary that represents the interests of both employers and employees.

Finally, Jayne Elizabeth Zanglein proposes using existing workers' capital in the form of pension funds as a vehicle for expanding workers' rights. She points out that pension funds own approximately \$10 trillion worth of U.S. stock, accounting for 26 percent of the equity in the United States. She argues that pension funds are "universal owners"; they own stock for the long run rather than for a fast return. Zanglein argues that as universal owners of many companies, workers, and the unions that represent those workers, have a financial interest in encouraging socially acceptable corporate behavior. Improper or illegal actions by one firm can cause the value of other stocks in the fund's portfolio to drop, resulting in a loss to the fund. Reasoning that good conduct positively affects the long-term share prices of the stocks in the portfolio, and therefore the value of the portfolio, Zanglein argues for worker and pension activism vis-à-vis managers to assure that the managers behave responsibly.

Taken together, the essays that make up this volume demonstrate that, on the 70th anniversary of the signing of the National Labor Re-

lations Act on July 5, 1935, our system of laws designed to facilitate worker self-organization and access to collective bargaining is badly broken. But they do much more than that. For the first time, they begin to add up the costs to society of the suppression of our right to a voice at work, and they point toward what it will take to revive worker choice and worker voice. In the end, it will doubtless require major statutory reform to allow workers to organize relatively freely again.

We note that after our conference took place, a bill called the Employee Free Choice Act was introduced in the 108th Congress, and it was reintroduced in the 109th Congress by a bipartisan group of legislators led by Edward Kennedy and Arlen Specter in the Senate and George Miller and Peter King in the House. The legislation, which would provide for simple majority sign-up rather than election contests pitting workers against their employers, as well as first contract arbitration and meaningful penalties for violations of workers' rights, has garnered a substantial amount of support, with 210 cosponsors in the House and 38 in the Senate within a year of being introduced.

But the history of the last 100 years suggests that it will take a broad social movement, supplemented by the sophisticated financial strategies Zanglein describes, for workers once again to find their collective voice in the United States. And meaningful change will require much more research exploring both the mechanisms of worker representation and its importance for creating a just and healthy society. While we hope this volume contributes usefully to the discussion of worker rights in the United States, we hope even more that it serves as a catalyst, helping to spawn a significant new wave of research on how workers win collective bargaining and the role it can play in creating a society of workplace democracy, social justice, and broadly shared prosperity. More than that, we hope this volume will contribute to the ongoing efforts to strengthen workers' rights to bargain collectively so that the United States can move toward a more balanced, and more just, society.

Notes

1. The other three fundamental rights at work are the elimination of forced labor, the elimination of child labor, and the elimination of discrimination (ILO n.d.).
2. For example, on October 25, 2001, employees at Northern Michigan Hospital in Petoskey, Michigan, elected Teamsters Local 406 as their collective bargaining representative. Due to a strike and legal procedures, as of April 5, 2005, no contract had been signed (Ray 2005).
3. Indeed, a recent NLRB decision made this “veto power” explicit for workers who are “jointly employed” by a temporary staffing agency and the employer-customer of that agency. Such employees are generally hired by the staffing agency but assigned to work at the premises of, and are supervised by, the employer-customer of the staffing agency. In order for employees so employed to organize a union, both the staffing agency and the employer-customer must agree to permit the employees to organize (Oakwood Care Center 343 NLRB No. 76 [2004]).
4. “Complaint for Declaratory Judgment and Injunctive Relief,” U.S. District Court for the District of Columbia, Case No. 1:05CV00201, January 27, 2005. <http://www.afge.org/Documents/DHS%20COMPLAINT.pdf> (accessed April 1, 2005).

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Part 1

How Free are U.S. Workers to Form Unions and Bargain Collectively?

2

A Logical Extreme

Proposing Human Rights as the Foundation for Workers' Rights in the United States

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A few years ago, Summers (1998) deplored how a labor law that made it the public policy of the United States to “encourage the practice and procedure of collective bargaining” and was intended to enable workers to participate in the decisions that affect their workplace lives had been turned into governmental protection of (even encouragement of) employers’ unilateral decision-making authority and hierarchical workplace control. Similarly, a recent Human Rights Watch report (2000) found that “workers’ freedom of association is under sustained attack in the United States.” Neither the Summers article nor the Human Rights Watch report revealed any previously unknown violations nor deficiencies.

The power of these two works lies elsewhere: in Summers’s call for a new vision in deciding what rule changes are necessary to reaffirm the values of collective representation, and in Human Rights Watch’s use of international human rights standards to judge U.S. employers’ respect for workers’ rights and the government’s exercise of its responsibility to promote and protect workers’ rights. Inherent in Summers’s position is the understanding that the basic foundation of law is moral choice, whether that choice is made by legislators, judges, members of administrative agencies, arbitrators, negotiators of collective bargaining contracts, or unilateral rule-makers in human resources departments. His position acknowledges, moreover, that there is an unavoidable and often powerful subjective component to decision makers’ choices among alternative rules. Consequently, it is simply not enough to know the rules of labor law and labor relations. Those rules must be probed care-

fully and thoroughly because they embody value judgments concerning every vital aspect of labor relations, including the sources of worker and employer rights, which rights get priority when they conflict, and the nature of the relationship between employer and employee.

An honest reexamination of U.S. labor law and policy, therefore, must discuss values and moral choices. Moreover, the use of international human rights principles as the standards for judging those choices constitutes a long overdue beginning toward the promotion of worker rights as human rights (Gross 2003). This combination of values analysis and human rights standards provides the new vision or new perspective that Summers believed was necessary.

This chapter addresses the implications of applying this new vision for, among other things, worker rights; labor law and policy; our understanding of the judicial, administrative and arbitral decision-making process; union-management strategies; and even the future character of industrial relations research. Recognizing worker rights as human rights, for example, means that property rights-based, “free” market values will have to give way to the values of human rights that have not historically influenced U.S. labor law and policy despite the fact that the human rights values are most consistent with the nation’s professed democratic ideals. Consequently, this chapter will be specific concerning the overall significance of this new vision and will discuss in more depth a few examples concerning the freedom of association, labor arbitration and contract administration, human resources values, and the nature and role of labor organizations.

Identifying and analyzing the values underlying labor relations rules and policy choices will also broaden the industrial relations research agenda and require new approaches to that research. This could make industrial relations research truly interdisciplinary because understanding underlying value premises means understanding and applying history, law, philosophy, ethics, economics, religion, and the international and comparative aspects of all these disciplines. This will also require broadening the methodology of industrial relations research beyond quantitative techniques and opening for examination subjects previously not considered because they were not quantifiable. It would reintroduce concepts such as justice and injustice to a field that has come to disparage the “normative” as unscientific and subjective; ill-befitting the objective, value-free social scientist.

This chapter does not aim to discuss the philosophical foundation of human rights or to justify worker rights as human rights. Suffice it to say, therefore, that the chapter accepts the propositions that human rights are a species of moral rights that all persons have simply because they are human, not because those rights are earned or acquired by special enactment or contractual agreements; that all human beings are sacred; and that the United Nations' Universal Declaration of Human Rights (UDHR) as well as the International Covenant on Cultural and Political Rights (ICCPR) assert the interdependence of political and economic rights (Steiner and Alston 1996).

We study people at workplaces. If every person matters because every person has rights by virtue of being a human being, then it is time we begin in a serious and systematic way to include these human rights in our research.

THE CONCEPT OF HUMAN RIGHTS

Human rights are the rights that all persons have simply because they are human. This is not the place to discuss the philosophic foundations of human rights, which historically have their sources in many religious doctrines and theories of natural law that led to the Lockean natural rights theory—the theory most associated with modern human rights (Shestack 1998). More recently, the post–World War II revulsion against the horrors of the Holocaust, in which certain individual human beings counted as nothing, resulted in the 1948 adoption of the UDHR.¹ The UDHR, combined with the International Covenant on Cultural and Political Rights² and the International Covenant on Economic, Social, and Cultural Rights,³ constitute an International Bill of Rights (Donnelly 1989).

Those human rights, which include a wide range of personal, legal, civil, political, economic, social, and cultural rights, are necessary not merely for life, but for a life of dignity (Donnelly 1989, p. 24). Violations of those rights deny a person's humanity. It is generally understood that legal rights arise from the law, contractual rights arise from special agreements such as collective bargaining contracts, and moral rights arise from accepted principles of righteousness. In ordinary cir-

cumstances, however, human rights take priority over those “conventional rights.”

For example, in the United States, the right not to be discriminated against now can be claimed as a constitutional right, a federal and state statutory right, a court decision-based right, or a contractual right in a collective bargaining agreement. At various times in this country’s history, however, the Constitution treated African Americans as less than fully human and permitted slavery, the Supreme Court upheld segregation based on race, state legislatures in particular ratified Jim Crowism, and collective bargaining agreements commonly contained provisions that discriminated against African Americans. Regardless of this widespread legal, contractual, and “moral” approval of racial discrimination, the treatment of African Americans as if they were less than fully human was a violation of their most fundamental human rights. This underscores the fact that the existence of human rights does not depend upon the approval of legislatures, courts, other institutions, or the will of the majority. One has the human right in question, “whether the law is violated or not, whether the bargain is kept or not, whether others comply with the demands of morality or not” (Donnelly 1989, p. 12).

Persons are no less human beings with human rights when they become employees and, as employees, they are no less entitled to respect for their human rights. Consequently, the employer–employee relationship is more than economic in nature (see, for example, Werhane 1985). People can be rendered powerless and have their human rights violated not only by governments but also by employers who have more power to affect people’s lives on a daily basis than do governments. Yet, while assertions of individual rights and freedom are commonly made against the exercise of power by the state, persons are routinely required to leave their rights and freedom outside factory gates and office buildings with barely a murmur of protest. Consequently, too many workers stand before their employers not as adult persons with human rights but as powerless children or servants totally dependent on the will and interests of their employers (Gross 1998).

WORKER FREEDOM OF ASSOCIATION

A full human life requires the kind of participation in the political, economic, and social life of the human community that enables people to have an influence on the decisions that affect their lives. That means people must have sufficient power, individually and collectively, to make the claims of their human rights both known and effective so that respect for their rights is not dependent solely on the interests of the state, their employers or others. Servility, or what some call powerlessness, is incompatible with human rights. Consequently, the freedom of association, which includes the right to organize, to bargain collectively, and to strike, is so essential that it is commonly accepted as the “single human rights standard by which all regimes, all societies, all countries can be judged” (Kahn 1998).

Article 20 of the UDHR issued by the United Nations in 1948 asserts the right to freedom of association, including in Article 23 (4) the right to form and join trade unions. The International Covenant on Civil and Political Rights, which the United States ratified in 1992, incorporates in Article 22 the language of the Universal Declaration: “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” Article 8 of the International Covenant on Economic, Social and Cultural Rights, which the United States has not signed, also affirms the “right of everyone to form trade unions and join the trade union of his choice.” The International Labour Organization’s (ILO’s) 1948 Convention Concerning Freedom of Association and Protection of the Right to Organise (Convention 87) and 1949 Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Convention 98) address in great part the exercise of the freedom of association rights set forth in the International Covenants. Another major international consensus document is the ILO’s 1998 Declaration on Fundamental Principles and Rights at Work, which obligates all ILO members (the United States is a member) to promote certain core labor rights, the first of which is the freedom of association.

The application of the underlying values—human rights standard approach to the old U.S. issue of employer speech in union representation election campaigns and organizer access to employer property provides

a good illustration of the implications of utilizing this new perspective. The current general rules are well established: An employer may express views about unionization as long as those views contain “no threat of reprisal or force or promise of benefit”; (Section 8(c) of the Taft-Hartley Act)⁴ an employer may require employees to attend, on company time, “captive audience” meetings during which antiunion speeches are made, whereas a union has no right to reply on company time;⁵ employees may orally solicit for a union in working and non-working areas but only on the employees’ own nonwork time⁶ and may distribute union literature only in nonwork areas on their own time;⁷ and nonemployee union organizers have no right of access to employers’ property for organizing purposes.⁸

These rules are much more than “the law”; they ought to be seen as value choices. In this country, historically rooted principles of employer property rights still override the basic right of freedom of association. The value choices in the current rules are the antithesis of what the Wagner Act and early NLRB decisions intended. Rights clash—here the right of freedom of speech, property rights, and the right of freedom of association—and, when rights conflict, choices must be made. The Wagner Act established the most democratic procedure in U.S. labor history for the participation of workers in the decisions that affect their workplace lives (Gross 1998). At its core was the promotion and protection of the freedom of association. The Wagner Act was not neutral; the law declared it to be U.S. policy to encourage collective bargaining and to protect workers in the exercise “of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment and other mutual aid and protection.”⁹ The Wagner Act was a moral choice against servility. Wagner also understood, however, that government encouragement and protection are essential to the exercise of participatory rights at the workplace.

The rulings of the first NLRB, for example, were most consistent with the protection and promotion of the freedom of association because they required employers to remain strictly neutral in regard to their employees’ organizational activities. It was convinced that any antiunion statement by an employer to employees who depended on that employer for their livelihoods was bound to carry an implied threat of economic reprisals for disregarding the employer’s wishes. For the

same reason, early NLRBs held that captive audience speeches were in themselves unfair labor practices regardless of the content of the speech delivered (Gross 1995, pp. 104–107).

Labor never came close to achieving the system of workplace democracy envisioned by Wagner. As many experts correctly predicted at the time, the Taft-Hartley amendments to the Wagner Act became law in 1947, the language asserting the right to refrain from collective bargaining (Section 7),¹⁰ the addition of several union unfair labor practices (Section 8(b)),¹¹ and the provision asserting employers' right of "free speech"¹² would be read as a statutory justification for employer resistance to unionization and collective bargaining. More than 50 years after Senator Wagner warned it would happen,¹³ Summers (1998, p. 1806) pointed out that "employer speech has become the primary instrument used by employers to discourage unionization and collective bargaining." The dominant hierarchy of rights established by these rule-makers and subsequent rule-interpreters has given employer speech and property rights priority over employees' rights of freedom of association.

Human rights are standards more fundamental than statutory or even constitutional standards. Consequently, the fundamental human right of freedom of association outweighs employer property and speech rights at the workplace. In 1992, the United Food and Commercial Workers and the AFL-CIO filed a complaint with the ILO's Committee on Freedom of Association against the U.S. government, charging that the Supreme Court's *Lechmere*¹⁴ decision gave private property "absolute priority over rights of freedom of association, whenever [nonemployee] union organizers are involved" (Gross 1999).

The Freedom of Association Committee, in its recommendations, requested the U.S. government "to guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization" (Gross 1999). That recommendation has been ignored. This could be accomplished, however, without unfairly limiting or damaging legitimate employer interests simply by granting nonemployee union organizers access to employer property to meet with employees in nonwork areas on nonwork time. That is the recommendation of the Human Rights Watch report (2000, p. 20), which also advocates "more free speech for

workers not less speech for employers” rather than repeal of Section 8(c).

The Human Rights Watch recommendation is less persuasive when applied to employer election campaign speech in general and captive audience speech in particular. Employer speech is a powerful weapon that promotes the coercion of employees in their human rights to unionize, and has resulted in an increase in union losses in representation elections and a decline in union strength and union membership as a percentage of the labor force (Block and Wolkinson 1986). Even allowing more employee speech and union access would not offset the inherently coercive effect of employer speech. What justification can there be for permitting employers to continue to resist, discourage, and coerce those workers who exercise their human right of freedom of association?

The application of this perspective—the combination of values analysis and human rights standards—to the old issue of employer speech and union representation election campaigns makes it clear that the rules currently in place are the result of deliberate moral choices that violate a fundamental human right: workers’ right of freedom of association. Understood in that context, this becomes a more powerful indictment more likely to be effective in bringing about change.

It is a fact that Section 7 of the Taft-Hartley Act set forth employees’ right to refrain from representation and collective bargaining. It is also a fact that the UDHR says that no one may be compelled to belong to an association. It is also a fact that in the United States workers have routinely been denied a free and uncoerced choice concerning representation and collective bargaining.

Even if workers had a free and uncoerced choice concerning the exercise of their freedom of association right, however, there are, as Adams (2003) argues, “some choices that result in conditions so morally repugnant that they cannot be allowed.” Using the ILO’s core Principles and Rights at Work as a model, Adams points out that we do not permit people to sell themselves into slavery or states to choose apartheid, or children to prostitute themselves. From a human rights perspective, because freedom of association is a fundamental human right, the issue to be decided is not whether there ought to be democratic participation by employees at their workplaces but “rather what form democratic participation ought to take” (p. 153).

LABOR ARBITRATION

When the exercise of the right of freedom of association is successful, however, and collective bargaining produces a written labor-management contract, the protection and promotion of workers' rights depend in great part on the values of those decision makers, particularly labor arbitrators, who interpret and apply those agreements. This has led to the acceptance and repeated application of rules—what arbitrators often call the common law of arbitration—without questioning, or knowing, or caring about a rule's origin or what the rule assumes about the “oughtness” of the power and rights relationship of employees and employers or whether a rule needs to be reexamined, reevaluated, modified, or rejected.

Substantive rules are ways of looking at the workplace—in other words, whether we see the workplace through the eyes of employees on the shop floor, in offices or classrooms, or from the perspective of those who manage the enterprise. It is a question of who is benefited and who is burdened by a particular rule or standard. Arbitrators, as well as courts and administrative agencies, have been the creators, choosers, appropriators, and implementers of these substantive rules. These rules or doctrines go far beyond the rules unions and employers negotiate into their collective bargaining agreements.

Related research demonstrates that labor arbitrators have embraced the generally conservative values of common law but have resisted applying the principle of external law, have rarely utilized constitutional principles, and have ignored human rights concepts. Arbitral common law shows a commitment to extracontractual doctrines of private property rights; employer hierarchical authority and control; management freedom to operate the enterprise most efficiently; and the need to discipline employees whose actions were considered challenges to management's order and control (Gross 1988a,b; Gross and Greenfield 1985). These embody value judgments that, as Rabin (1985) has put it, “reflect the interests of the dominant power in the work relationship.”

The value choices arbitrators make in deciding cases involving employee refusals to work for reasons of health and safety provide good examples. The controlling rule in these cases is the long-established arbitrator-created principle: work first, grieve later. As a consequence of

labor arbitrators' almost universal value judgment that management's freedom to operate the enterprise and direct the workforce is superior to all other rights, including workers' right to a safe and healthful workplace, they treat these cases as insubordination cases and do not except unusual health hazards from the obey first, grieve later rule.¹⁵

The insubordination orientation to these cases, moreover, relegates workers' safety and health claims to that of an affirmative defense to the insubordination charge. Arbitrators, consistent with their value choices in these cases, also place upon these workers the heaviest possible burden of proof, namely, to submit objective evidence of an unhealthful and unsafe workplace. Although employers carry the burden of proof in discipline cases, the practical effect of these value choices is to shift this burden on the decisive issue (health and safety) to the discharged or otherwise disciplined employee. This maximizes an employer's control of employee discipline and thereby minimizes employee interference. The management rights framework used in these cases results in decisions that place property rights and other factors such as profits, efficiency, cost-benefit considerations, management authority, and economic progress over human rights.

The "obey first, grieve later" rule itself is value laden. It favors management control and the need for efficiency, maintenance of discipline and order at the workplace, and private property ownership and prerogatives over union and worker protests about working conditions. The notion that management acts and the union reacts gives employers the right of initiation as well as broad discretion in deciding how to assert its own interpretation of the contract. Employees and a union, however, may not use self-help when they seek to assert their interpretation of the contract. In addition, the employee who may not exercise self-help at the workplace has recourse only to the grievance-arbitration process where an arbitrator will apply the same management rights and authority value judgments that underlie the obey first, grieve later rule.

Some are favored by this rule and some are disfavored. The rule favors management authority and objectives but often confronts employees with an unfair dilemma—in safety and health cases, for example, to obey and risk their health and safety or to refuse to work and risk their jobs. Recognizing workers' rights to refuse hazardous work without retaliation would enable them to take control over and protect their own lives when confronted with threats to their safety and health.

But the current value scheme treats workers as children, or as prisoners, or students, or members of the armed forces, who, if not controlled, will act irresponsibly (Atleson 1985).

Many international declarations, covenants, and treaties, such as the ILO constitution, the Declaration of Philadelphia, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the ILO's Occupational Safety and Health Convention, and various regional treaties and trade agreements recognize workplace safety and health to be a human right.¹⁶ In commenting on the "inexplicable" exclusion of worker safety and health from the ILO's *Fundamental Principles of Rights at Work*, Spieler (2003, p. 94) writes the following:

It can be argued that postponing the improvement of health and safety until market forces can effect change is analogous to postponing the release of political prisoners who may die in prison until a despotic government is replaced through democratic elections. It is in fact the right to life that we are talking about when we talk about workplace safety . . . The right to life is deeply imbedded in every human rights declaration and it is presumed in these declarations that individuals' lives must be protected from those who wield unequal power. This is precisely the issue in occupational safety and health.

As Spieler says, workplace safety and health are essential components of the right to life. A value judgment that would make workers' right to a safe and healthful workplace paramount would place the highest value on a life, or a limb, or an eye and give absolute priority to individual rights over institutional and economic interests. It comes down to the fact that the dignity and human rights of workers must lie at the center of any industrial relations system (Javillier 1996). As former Secretary of Labor Willard Wirtz (1971) told the National Academy of Arbitrators over 30 years ago, "The individual as the owner of rights and interests—job rights, personal rights, human rights—[is] at least as much entitled to protection as a piece of real estate or machinery." He added that the individual is "somebody the system is designed for instead of the other way around."

Application of the human rights standard to refusal to work for reasons of health and safety cases would require a reordering of values so that workers' human right to workplace safety and health would be

given priority over employers' freedom to operate the enterprise and direct the workforce. The major change in the arbitral approach to these cases would be in the recognition that worker self-help is essential. That would release them from the unfair work and risk their safety and health or refuse to work and risk their job dilemma.

HUMAN RESOURCE MANAGEMENT: VALUES, OBJECTIVES, AND HUMAN RIGHTS

Personnel management, as it was known in a less sophisticated time, consisted of management activities that were employee oriented, such as recruitment, training, and staffing. Personnel managers were seen as "people persons," employee advocates, management's conscience, described by one as the "in-house Socialist[s] focused on feel-good events" (Ellig 1997, p. 273).

Regardless of the accuracy of those perceptions, even the old-style personnel administrators managed employees with the ultimate objective of increasing their productivity. Still, many academics, particularly in industrial sociology, human relations, and personnel administration, vigorously defended their research against critics who charged that it was intended to help management achieve its objectives. In the last decade, however, human resources academics and practitioners openly advocate that human resources professionals become strategic partners in executing business strategy (moving "planning from the conference room table to the marketplace"); working to increase employee commitment to the organization; and becoming change agents, enabling the business to shift, move and adapt while constantly decreasing costs and improving efficiency (Ulrich 1998). The overwhelming number of employees have no advocates at the workplace. Human resources departments cannot be advocates for employees when their primary responsibility is defined as "deliver[ing] the behaviors needed to realize business strategy" (Beatty and Schneier 1997). As respected academic Thomas Kochan put it, "Tilting too far in the direction of becoming an advocate for employee concerns would do little other than re-marginalize the function within the management structure" (Kochan 1997).

What being an “employee champion” really means is developing employee assets in order to achieve competitive advantage and win in the marketplace. That requires making the employer’s goals the personal goals of each employee. That objective is best achieved by attracting and retaining people who share an employer’s core values and purposes and letting those who do not share those values go elsewhere (Collins and Porras 1998).

Loyalty and commitment, however, run in only one direction. The human resources literature is full of references to the new “psychological contract,” which makes employees responsible for their own employability and gives them no job security. A leading textbook, granting that many see “employee separations” negatively, points out several benefits, including the possibility that “a persistently low turnover rate may have a negative effect on performance if the workforce becomes complacent and fails to generate innovative ideas” (Gomez-Mejía, Balkin, and Cardy 1995). One prominent authority refers to downsizing as “clearing debris” and “yard work” (Ulrich 1998). To ensure that employers avoid any commitment to their workers, they are advised to include at the end of employee handbooks a declaration that employees can be discharged for any reason or no reason and that the handbook is not an employment contract. The objective, the textbook explains, is to avoid any restriction on an “employer’s freedom to discharge employees without cause” (Gomez-Mejía, Balkin, and Cardy 1995, p. 435).

Clearly, it is not only the state that has the power to violate people’s rights; employers in many ways have even more direct power over individuals’ lives. Judged against a human rights standard, it is an injustice that human beings are treated as things or resources for others to use. A human being has the right to be free from domination regardless of the source. Judged by a human rights standard, moreover, human resources personnel and other managers in a business organization would be held accountable for manipulating human beings and subordinating their rights to the interests of the organization. As Shue (1980, p. 78) writes, “to enjoy something only at the discretion of someone else, especially someone powerful enough to deprive you of it at will[,] is precisely not to enjoy a right to it.” If the boss giveth, then the boss can taketh away, and victims will have no defense without established forms of participation available to them. Inducing workers to see the world through their employer’s frame of reference to legitimize and maintain employ-

er control of the workplace without changing the power relationship of superior employer and subordinate employee constitutes manipulation that is an affront to human beings and human rights.

This critique of human resources values, methods, and objectives using a human rights standard for judgment echoes the critics of the so-called Mayo School of Human Relations of a half-century ago. They rejected the belief that workers needed to submerge self in a business organization and to accept their employer's goals "in order to find freedom" (Landsberger 1958). They also objected to the perception of workers as means to be manipulated to bring about acceptance of management's purposes. They charged that the basic conflict of interest between management and labor had been ignored, as had the associated issues of conflict resolution, which they said had been reduced to ways for employees to blow off steam without changing the hierarchical authority structure or permitting employees to share that power. Finally, these critics accused the Mayo School of an active antiunionism, demonstrated in part by excluding unions as sources of worker power and participation and considering them only as external intrusions on management authority and flexibility or as symptoms of deficiencies in internal management.

It is still human resource doctrine, for example, that unionization is caused by bad management; that unionization is the misfortune that befalls an employer with flawed human resources policies and practices (Adams 2006). That completely ignores the fact that people's right to participate in the decisions that affect their lives is one of the most fundamental human rights principles as well as one of the most fundamental principles of democracy. Regardless of the quality of management or a firm's "good" or "bad" employee relations, exercise of the freedom of association at the workplace is necessary to give workers the opportunity to secure their own rights and interests through participation in workplace decision making and to eliminate the vulnerabilities that leave them at the mercy of others.

CONCLUDING OBSERVATIONS

The U.S. labor relations system is dominated by employer power premised on the inequality and helplessness of most workers and rooted in values that justify the possession and exercise of that power. In this chapter, the application of a new vision—the combination of values analysis and human rights standards—to the freedom of association, labor arbitration, and human resources of U.S. workplaces demonstrates that employer power has been used to violate the fundamental human rights of workers in this country. A just society would not permit this or tolerate anything less than the end of these violations.

The adoption and application of human rights standards to U.S. labor relations would require more than marginal adjustments or fine-tuning; it would require an explicit restatement of property rights as subordinate to human rights, including the human rights of workers. It would also require a major change in the priority given to the rights and interests of the parties in conflict; a major redistribution and sharing of power at the workplace; a major reevaluation of the values currently influencing dispute resolution in judicial, administrative agency and arbitral hearing rooms, and at bargaining tables; as well as major changes in many other areas, such as exclusive representation, the permanent replacement of economic strikers, and the exclusion of workers from laws intended to protect the right to organize and bargain collectively, including the exclusion from the National Labor Relations Act of agricultural and domestic workers. There will be no lack of labor-management conflict here mainly because power will be at stake as well as basic and irreconcilable values. No pretension of unitary goals could keep a lid on that conflict.

It has been argued, correctly in my opinion, that only the people whose rights are at stake can force a government or a private enterprise to respect human rights. Both union leaders and members need to become educated in human rights. Unions must do more than organize workers; they will need to understand that they are human rights organizations because human rights such as freedom of association, collective bargaining, safe and healthful workplaces, and discrimination-free workplaces are at the core of what unions seek to secure. The labor movement will need to be more than just another interest group

protecting its members regardless of the cost to others if it is to appeal to the poor and vulnerable people most in need of organization. Instead, unions will need to develop alliances with other social movements such as civil rights groups, women's rights organizations, environmental groups, immigrant worker support groups, and religious organizations. Until now, human rights principles have been disseminated from the top-down by a privileged elite in governmental and nongovernmental organizations. Organized labor could be a powerful mass human rights movement spreading those principles from the bottom-up. This, of course, will require union leaders and members to determine the extent to which they have accepted the values underlying the current labor relations system. Human rights values also impinge upon the power and authority of unions and their leaders. For many reasons, it is easier to evade moral imperatives, especially when, in this country, the right of freedom of association has been respected only for brief periods of time.

It is not unrealistic to believe in and work for change. The civil rights and women's rights movements in this country are among the precedents that justify some optimism and hope. No matter how discouraging the prospects for fundamental change in our labor relations system, it would be even more irresponsible to fail to act. Change can begin with the ability of challengers to redefine a policy issue. New perspectives on the employer-employee relationship, such as the new vision advocated in this chapter, can bring about major changes in the way people respond to that relationship.

What is certain, however, is that human rights talk without action is hypocrisy in the form of self-righteous posturing pretending that human rights violations occur only somewhere else. An honest reexamination and reassessment of U.S. labor relations values using human rights standards would be a long overdue beginning toward the promotion and protection of worker rights as human rights.

Notes

1. G.A. Res. 217 (III) of Dec. 10, 1948, UNGAOR, 3d. SESS., Resolutions, U.N. Doc. A/810 at 71.
2. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 UNTS 171 (entered into force March 23, 1976).

3. International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 UNTS (entered into force Jan. 3, 1976).
4. 29 U.S.C. § 158(c) (1947).
5. *Livingston Shirt Corp.*, 107 NLRB 400 (1953).
6. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).
7. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).
8. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).
9. Pub. L. No. 74–198, 49 Stat. 449–50 (1935) [codified as amended at 29 U.S.C. §§ 141–44, 167, 171–87 (1947)].
10. 29 U.S.C. § 157 (1947).
11. 29 U.S.C. § 158(b) (1947).
12. 29 U.S.C. § 158(c) (1947).
13. Robert Wagner, “The Wagner Act—A Reappraisal,” 93 Cong. Rec. A895, A896 (1947), reprinted in 2 LMRA Legis. Hist. 935, 938.
14. *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992).
15. For an expanded discussion of the value judgments inherent in arbitral doctrine on employee refusals to work for reasons of health and safety, see Gross (2004), which provides the basis for the discussion of arbitration of health and safety disputes in this chapter.
16. ILO Conventions are available on the ILO Web site: <http://www.ilo.org/>.

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3

International Elections Standards and NLRB Representation Elections

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Many workers' rights, including the right to freedom of association at the workplace and the right to bargain collectively with employers, are recognized in international human rights agreements, including the United Nations Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (United Nations 1948; 1966). Many, if not all, workers' rights recognized in international human rights law were preceded by the passage of Conventions or Recommendations by the International Labour Organization (ILO) on the same subjects (ILO 2003, p. 2). The ILO's Declaration of Fundamental Principles and Rights at Work requires all ILO member states to "respect, to promote, and to realize in good faith" five core rights, which are considered fundamental human rights. They are 1) freedom of association, 2) the right to collective bargaining, 3) the elimination of all forms of forced or compulsory labor, 4) the effective abolition of child labor, and 5) the elimination of discrimination in respect to employment or occupation (ILO n.d.).

In the United States, the National Labor Relations Board (NLRB) representation election is the primary means by which private sector workers exercise their rights to choose to be represented by a union. Because the "win rate" for unions in NLRB elections has declined over the past 50 years, and because increasingly smaller percentages of employees voting in these representation elections select unionization, observers have raised questions about the fairness and the conduct of these elections. Implicit standards for the conduct of democratic elections have existed for a long time. It is only since the end of the cold war, however, that international organizations have developed explicit

best practices that can be directly applied to evaluating the fairness of NLRB representation elections.

This chapter argues that the new international standards for national political elections prove that NLRB representation elections, as currently implemented, are not free or fair. The lack of free and fair NLRB representation elections deprives workers of their rights to freedom of association and collective bargaining at the workplace.

THE NLRB REPRESENTATION ELECTION PROCESS

The basic procedure U.S. workers must use to exercise their right to freedom of association is found in the National Labor Relations Act (NLRA). The procedural details have been filled in through the administrative regulations issued by the NLRB.

The process usually starts, however, outside the structures of the NLRA. The workers in a facility talk among themselves and decide that they would be better off if they joined a union. In most cases, workers call a local union office for help. If the workers can find a union that has an organizer available, the union will usually agree to send an organizer to meet with some of the workers. If, after talking with the initiating workers, the organizer believes that the prospects for a successful organizing drive are good, the union may agree to help organize workers. The following steps outline a typical process for organizing a union:

- 1) Meetings are held before or after work, usually at a worker's home, to discuss the benefits of forming a union and the strategy and tactics of organizing.
- 2) The union organizer and committed workers distribute cards to other workers to sign if they are interested in joining a union.
- 3) After at least 30 percent of workers in a bargaining unit sign the cards, workers can petition the NLRB to hold a secret ballot election. In modern practice, union organizers usually collect cards from 60 to 70 percent of the workers in the bargaining unit before proceeding to the next step (Compa 2000). At this point, the employer can choose to recognize the union without proceeding further.

- 4) If voluntary recognition does not occur, there is a four- to eight-week-long election campaign. During this preelection period there is vigorous campaigning on both sides (Roomkin and Block 1981).
- 5) NLRB agents conduct a secret ballot election at the workplace, allowing all workers to vote during work time. In the past several years, workers have chosen union representation in about half of all elections held (Compa 2000). However, in the past few years, only about 20 percent of workers who have joined unions have done so as a result of the election process (Sweeney 2003).
- 6) Either party may file an objection to the election with the NLRB, claiming unfair practices by the other side.
- 7) If the NLRB certifies the election as fair and finds that a majority of those casting ballots prefer union representation, the employer is required by law to recognize the union and to collectively bargain with workers over the terms and conditions of their work “in good faith.”

There is nothing inherently undemocratic about these steps. Having an election campaign to inform voters and using a secret ballot election to determine whether workers freely choose to join a union seems, on the surface, fair. Over the years, however, there have been numerous disputes between unions and management over the details of the implementation of the preelection, election campaign, and postelection rules. When adjudicating these disputes, the federal courts and the NLRB have given greater weight to the private property and free speech rights of employers than they have to the rights of free speech, freedom of association, and collective bargaining for workers. The cumulative effect of these rulings has been to change the rules, allowing management increasingly greater influence over the process by which workers choose to join a union (Block, Beck, and Kruger 1996; Gross 1999).

ARE THE NLRB ELECTION PROCEDURES DEMOCRATIC?

Scholars have used a variety of approaches to demonstrate that NLRB representation election procedures are not democratic:

- 1) summarizing the testimony of workers concerning the discrimination they have faced when attempting to form a labor union (Block, Beck, and Kruger 1996; Bronfenbrenner 1998; Compa 2000);
- 2) comparing NLRB representation elections with U.S. election procedures (Becker 1998; Levin 2001; Weiler 1997) and with ILO standards (Adams 2001; Compa 2000);
- 3) linking changes in representation election rules to higher win rates for the antiunion party (Block and Wolkinson 1985; Roomkin and Block 1981); and
- 4) presenting survey results showing a high unmet demand for unionization (Freeman and Rogers 1999).

Testimony before the U.S. Departments of Commerce and Labor Commission on the Future of Worker-Management Relations in 1993 indicated that many workers felt that it has become increasingly difficult to form unions using NLRB representation election procedures (Block, Beck, and Kruger 1996). The workplace, which is the principal location of the election campaign, is not a neutral forum where the costs and benefits of unionization are discussed openly and freely. Instead, employers have a near-monopoly over access to voters. Employers have learned how to use procedures under the NLRA to delay the election, thus extending the time in which they can use their campaign advantage. Weak penalties for unfair labor practices under the NLRA encourage employers to push their advantage to the boundary of possible permissibility. Long delays in NLRB adjudication of cases of unfair labor practices against employers mean that the penalties, when administered, are usually hollow victories for workers (Block, Beck, and Kruger 1996).

Many have claimed that U.S. national political elections would be widely condemned as unfair if they were run like NLRB representation elections (Becker 1998; Levin 2001; Sweeney 2003; Weiler 1997). There are, however, no explicit U.S. federal election rules of procedure

that provide best practices for conducting elections. The U.S. Constitution and election laws let individual states decide on most of the details of election procedure. Thus, even U.S. election laws do not provide a set of best practices against which NLRB representation elections can be explicitly compared. After the experiences in the 2000 presidential election, some, including former President Carter, think a statement of democratic principles in U.S. elections is needed (Davis 2001).

Workers' freedom of association in the United States also comes up short when compared against ILO standards for national policies protecting this right (Adams 2001; Compa 2000). The main problem with using ILO Conventions and Recommendations for making the argument that NLRB representation elections in the United States are not democratic is that ILO enactments, like U.S. federal laws, do not directly address the best practices for conducting democratic elections. The dictates of the ILO were drafted to assist all governments of the world, the vast majority of which do not use bargaining-unit elections as a way for workers to express their choices about whether to join a labor union.

Even if the ILO provided such guidance, it is unlikely that employers and Congress would accept the ILO's judgement as constituting the appropriate yardstick for measuring labor policies and practices in the United States. Potter and Youngman (1995) argue that ILO standards reflect a European view. European norms and procedures, they argue, do not transfer well to the U.S. context because of differences in constitutions, history, customs, and institutions. Thus, it is not surprising that out of 143 Conventions passed by the ILO, the United States has ratified only 7, declaring the remainder to be within the jurisdiction of the states (Henkin et al. 1999). The U.S. government has, on occasion, even threatened to withdraw from the ILO, arguing that 1) there are too many nondemocratic members, 2) the ILO is critical of the United States and a handful of other states but ignores worse labor laws and practices elsewhere, and 3) the ILO has become increasingly politicized (Henkin et al. 1999).

Still others have argued that the low and declining level of union density in the United States and the increasing avoidance of NLRB representation elections as a way for workers to join unions is evidence of unfair NLRB representation election rules (Sweeney 2003). There is a substantial literature showing the economic benefits of union mem-

bership in the United States (see, for example, Buchmueller, DiNardo, and Valletta 1999; Fay 1998). Yet, the current unionization rate among private sector employees is approximately 9 percent, and 80 percent of those who join unions do not join by participating in NLRB representation elections, they join by accepting a job with a unionized employer (Sweeney 2003). Is this low level of union density the result of union representation election procedures that are biased against workers who wish to join a union?

To answer this question, one must consider the results of surveys showing what workers want. In their now well-known survey of U.S. workers, Freeman and Rogers (1999) asked nonunionized workers in the private sector, "Would you vote for or against a union in an NLRB election at your workplace?" They also asked nonunion workers how they thought their colleagues would vote in such an election. Putting those numbers together, Freeman and Rogers estimated that one-third of nonunionized workers in the private sector wanted a union and believed that, were an election to be held, workers at their firm would support a union. According to a national survey by Peter D. Hart Research Associates conducted for the AFL-CIO in 2002, half of nonmanagement workers who do not already have a union say they would join a union tomorrow if given the chance. This was a full 8 percentage points higher than in 2001. Among all workers—including union members—54 percent said that they would vote for a union tomorrow (Sweeney 2003).

There is also some supporting research linking specific bad results for the pro-union party to changes in NLRB interpretations of election rules (Block and Wolkinson 1985). For example, research demonstrates that employers commonly prolong the election campaign phase of the process. Based on an analysis of 45,000 NLRB representation elections occurring between 1972 and 1978, Roomkin and Block (1981) found that the longer the election campaigns, the greater the rate of employer victories. They also found that nonparticipation increased with delay, suggesting that the campaign itself discouraged participation.

Some argue that surveys and signed authorization cards are useless as indicators of demand, because workers lack the information necessary to make an informed decision about whether they want to be represented by a union, and they can only get that information in an election campaign (Greer 2003; Potter and Youngman 1995). By im-

plication, longer campaigns result in more employer victories, because longer campaigns allow voters to receive more information about the disadvantages of unions. Moreover, a secret ballot election, they assert, is a fundamental device in any democratic system and is the best way to allow workers to freely choose whether to join a union (Greer 2003; Potter and Youngman 1995).

Critics of the “bad results” arguments claim that they provide an unconvincing critique of the fairness of NLRB representation elections. After reviewing a wide variety of surveys on worker attitudes toward unions, Farber and Krueger (1993) concluded that almost the entire decline in union membership between 1977 and 1991 was due to a decline in demand for union representation. This decline in demand for union representation has been caused by the steady expansion of federal and state laws protecting workers, more enlightened management practices, and increased vulnerability of U.S. workers to global competition (Employment Policy Foundation 1998; Potter and Youngman 1995). Controlling for these and other factors contributing to the declining demand for unionization among U.S. workers, studies have shown that management opposition has virtually no effect on union density (Employment Policy Foundation 1998; Moore and Newman 1988). But these issues are essentially irrelevant to the question of eliminating bias from NLRB representation election procedures. If, as critics of the “bad results” view argue, the demand for union representation has declined, workers would continue to vote against union representation even in unbiased elections.

NEW INTERNATIONAL STANDARDS FOR DEMOCRATIC POLITICAL ELECTIONS

As noted, the purpose of this chapter is to demonstrate that NLRB representation election procedures do not even meet recently developed minimum international standards for what constitutes a free and fair democratic national political election. The new international standards were designed to provide an explicit set of best practices for achieving free and fair democratic elections in countries with a wide variety of institutional arrangements and economic endowments. Since they address

elections specifically, they can be applied directly to the evaluation of the fairness of NLRB representation elections. They are particularly useful in this context because it is hard to argue that these standards are biased in any way or alien to U.S. culture.

The new international standards are free of bias because they were produced in settings relatively free of the ideologically infused, self-interested, conflict-based politics of the usual debates over proper public policy regulating management–labor relations. They are not regionally biased either. Whether the particular statement of standards was developed in Latin America, Europe, or Africa, the same or at least very similar elements are present. They are the kinds of standards for a democratic election that might have been produced if experienced and informed people came together to set union election rules under what political theorist John Rawls (1999) calls the “veil of ignorance.” In the union election context, the veil of ignorance is a hypothetical situation where those who develop the election procedures must do so before they know what roles they will play—employer or worker—once the rules have been established.

Most important, the international standards cannot be criticized as alien to U.S. culture, because the U.S. government has been a leader—perhaps *the* leader—in the setting of international standards for national political elections. In 1976, the Commission on Security and Cooperation in Europe, an independent U.S. government agency, was created to address and assess democratic, economic, and human rights developments in the 55 countries participating in the Organization for Security and Cooperation in Europe (OSCE). The commission consists of nine members of the U.S. House of Representatives, nine from the U.S. Senate, and one member each from the Departments of State, Defense, and Commerce. The OSCE’s Office for Democratic Institutions and Human Rights is the lead agency in Europe in the field of election observation. It coordinates and organizes the deployment of thousands of observers every year to assess whether elections in the OSCE area are in line with international standards for democratic elections and other democratic political institutions.¹

Of course, international standards for democratic elections are not objective in the sense of being “value free.” They are unabashedly designed to promote democratic practices around the world. Therefore, they are useful and impartial for the purpose of evaluating the NLRB

representation election process in the United States as long as it is agreed that NLRB representation elections should be as democratic as possible.

WHY NLRB-SUPERVISED UNION REPRESENTATION ELECTIONS ARE NOT FREE

According to international standards for political elections, a “free” electoral process is one where fundamental human rights and freedoms are respected. The following criteria are necessary for a free, democratic election:

Freedom from violence, intimidation, or coercion. According to the NLRA’s Section 8(a)(3), any discrimination against workers by employers for concerted activity, including union activity, is prohibited. Nonetheless, according to Compa, “Firing a worker for organizing is illegal but commonplace in the United States” (2000, p. 18). According to Bronfenbrenner (2000), 25 percent of employers illegally fire at least one worker for union activity during organizing campaigns, and 52 percent of employers threaten to call the Immigration and Naturalization Service during organizing drives that include undocumented employees. After studying 407 union representation campaigns in 1998 and 1999, Bronfenbrenner found that, in 51 percent of the campaigns, employers threatened to close or move if the pro-union party won. Thus, it is no surprise that workers in a nonunionized, private sector workplace are usually afraid to openly support the pro-union party. Intimidation of members of the pro-union party is illegal, but the law is not vigorously enforced.

Freedom of speech and expression by voters, parties, candidates, and the media. Unfortunately, limiting workers’ free speech rights in the workplace is both common and legal. During many, if not most, union election campaigns, workers are subjected to mandatory captive audience meetings and mandatory one-on-one meetings with supervisors in their workplaces (Bronfenbrenner 2000). These measures are allowed under Section 8(c) of the NLRA, the 1947 “employer

free speech” clause. Bronfenbrenner (2000) also found that 78 percent of employers force employees to attend one-on-one antiunion meetings with managers and 92 percent force their employees to attend mandatory antiunion presentations. In contrast, workers can be and usually are prohibited from engaging in pro-union speech in the workplace during work times (Block, Beck, and Kruger 1996).

Freedom of assembly to hold political rallies and to campaign. Technically, workers have this right but have difficulties exercising it because it is illegal for pro-union workers to assemble on company property, even during nonworking hours, without the permission of the employer. Workers who favor forming unions are limited to contacting their colleagues outside the workplace or during breaks and lunch periods (Block, Beck, and Kruger 1996). Many low-wage workers, who need union representation the most, do not own a car, so attending meetings in a location different from the workplace may be difficult (Ehrenreich 2001). There are no similar obstacles to freedom of assembly by the employer, because the employer may use work time to present its message.

Freedom of access to and by voters to transmit and receive political and electoral information messages. While workers are allowed to receive information from union advocates in nonwork areas and on nonwork time within the workplace (Block, Beck, and Kruger 1996), the worker access of pro-union workers is far less than that of the employer, who controls the workers’ work day and who can use that control to deliver its antiunion message. Moreover, the union may not enter the employer’s property unless the workers live on the property (Block, Beck, and Kruger 1996).

Freedom to question, challenge, and register complaints or objections without negative repercussions. This freedom is crucial to ensuring respect for all the other freedoms. Individuals do not really have any right unless it is recognized in law, and there is an effective, speedy, legal remedy for those who feel that the right guaranteed to them under law has not been respected. The labor relations law does allow for legal avenues of appeal by workers who feel that their rights were not respected during an NLRB union representation election. However, the

long delays in the U.S. labor law system, coupled with weak penalties for employers who eventually are found guilty of an infraction, make the exercise of this right fruitless. If a terminated worker appeals to the NLRB for help, the appeal usually takes years, and the potential reward for the persistent worker is small (reinstatement with back pay). For many employers, this penalty is a small price to pay to destroy a workers' organizing effort by firing its leaders (Compa 2000, p. 18).

WHY NLRB-SUPERVISED UNION REPRESENTATION ELECTIONS ARE NOT FAIR

According to international standards for political elections, a "fair" electoral process is one where the playing field is *reasonably* level and accessible to all voters, parties, and candidates. Therefore, the following criteria are required in a fair democratic election:

Clearly defined universal suffrage. The question of who should vote in a union election is often a matter of dispute. The NLRB determines which workers make up the bargaining unit and which do not. Employers work hard to influence this part of the process, often claiming that pro-union groups of workers should not be included in the vote. Although unions also try to influence the definition of the bargaining unit too, perhaps the biggest impact of the dispute of the definition of the bargaining unit is delay. Delay prolongs the election campaign, which, in turn, helps the employer because of the employer's access advantages (Block and Wolkinson 1986; Roomkin and Block 1981).

Equitable access to financial and material resources for party and candidate campaigning. In the union representation election context, there is rarely "equitable access to financial and material resources" by the pro-union and antiunion parties. The employer almost always has an overwhelming resource advantage. Logan (2002) estimates that during 75 percent of union representation campaigns, employers hire high-priced, experienced, professional, antiunion consultants to help them conduct their antiunion campaign. The pro-union "party" is almost always financially overmatched.

Equitable opportunities for the electorate (workers) to receive election-relevant information. Becker (1998) argues that the abilities of the pro-union and antiunion parties to communicate with workers are so unequal that many “workers vote against representation because they have never heard the union’s arguments” (p. 101). As noted, the substantial workplace-access advantage of the employer makes it impossible for the workers to receive as much information from the union as from the employer.

Equitable treatment of voters (workers), candidates, and parties, by elections officials (the NLRB), the government, the police, the military, and the judiciary. While the most important reason for the inability of workers to exercise their freedom of association at the workplace has been determined opposition by employers, government agencies have played their part too. Gross (1999) writes the following about government support for freedom of association rights, particularly over the past 30 years: “The White House, no matter who the occupant, has either been hostile or non-committal; Congress has also been hostile, finding it more politically profitable to run against the NLRA than to be for it; the courts, including the Supreme Court, have issued decisions freeing employers from the constraints of the law” (p. 80). Thus, although there is no evidence that the NLRB staff that administers elections are biased against workers, it is clear that there is little support at higher levels of government for workers’ rights to unionize.

CONCLUSION

As this chapter shows, the procedures under which NLRB representation elections are conducted violate international standards for free and fair elections. Our conclusion concerning the undemocratic nature of NLRB representation elections supports most previous research on the subject. It contributes to previous research findings because it is based on a different, arguably neutral, and more explicit standard for what elements should be present in a democratic election. The law should be changed to make it easier for workers to exercise their right to freedom of association at the workplace. Workers should have the

freedom to make their own choices about joining a union without interference from management. While a free and fair election campaign can provide useful information to voters, NLRB representation election campaigns are not free or fair. The election procedures and remedies permit employers to intimidate voters, thereby frustrating the desire of workers at many workplaces to join a union and to have a collective voice at work.

In all societies, employers inherently have more power than unorganized workers because unorganized workers are dependent on the employer for their livelihoods. If the U.S. federal courts and the NLRB had wanted to level the playing field, they would have developed union representation election procedures that gave more weight to the importance of workers' freedom of speech, freedom of association, and right to collective bargaining than they did to employers' property and free speech rights. Because the courts and NLRB took a different path, too many biased preelection and postelection practices have accumulated and have become entrenched in U.S. labor law. Compa (2000) contends that the broken election procedures can be fixed by tinkering with the existing rules. Unfortunately, it would take decades, perhaps generations, to undo the harm that has been done. Union representation election procedures, therefore, for all practical purposes, are beyond repair.

Note

1. The benchmark standards used in this paper are based on international standards for free and fair elections that have been developed and promulgated by governmental and nongovernmental organizations. See, especially, OSCE (1990, 2003), and Inter-Parliamentary Union (1994). International nongovernmental organizations have promulgated similar principles, such as the guidelines developed by the International Foundation for Election Systems (<http://www.ifes.org>); Common Borders (<http://www.commonborders.org>); and the Administration and Cost of Elections Project (<http://www.aceproject.org>). Information about election standards also can be found on the Web sites of the International Institute for Democracy and Electoral Assistance at <http://www.idea.int>; and the National Democratic Institute for International Affairs at <http://www.ndi.org>.

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4

Collective Bargaining Rights in the Public Sector

Promises and Reality

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When the National Labor Relations Act (NLRA) was enacted in 1935, unions in the public sector were virtually nonexistent, with a few notable exceptions. This was also true in many private sector industries, such as services and retail trade. Nevertheless, no private sector nonagricultural industry meeting interstate commerce standards was excluded, unless already covered by the Railway Labor Act. The framers of the NLRA did not consider covering public employees because at the time it was unthinkable to mandate that the sovereign (federal or state) bargain with its workforce. Until the 1960s, public workers were excluded from coverage of all worker protection and labor standards legislation enacted during the New Deal and beyond.

The legislative history of the NLRA lacks any suggestion that there was discussion concerning coverage of public employees (NLRB 1949). The only reference to this matter is a letter from a company president to New York Senator Robert Wagner stating that the exclusion of government workers may be reasonable in government agencies that perform purely governmental functions, but that the exclusion should not apply “where these governmental divisions are engaged in pursuits competing with private enterprise” (NLRB 1949, p. 325). The letter went on to cite several examples of such competing activity in federal and local government.

Almost a quarter of a century elapsed between the passage of the NLRA and Wisconsin’s adoption of the first state collective bargaining statute in 1959, which provided bargaining rights to local government

employees. A subsequent statute enacted in 1966 extended limited bargaining rights to state employees. This was followed by legislation in other states (Schneider 1988).

In 1962, President Kennedy issued the landmark Executive Order 10988, which for the first time established a process for union recognition and extended a very limited form of collective bargaining to federal employees in the executive branch. Most importantly, it mandated the federal government to confer with unions and it stamped the federal government's imprimatur on unions of public employees at all levels of government. President Nixon's Executive Order 11491 in 1969 and the 1978 Civil Service Reform Act, with its Federal Service Labor-Management Relations Statute (FSLMRS), further codified the right of federal employees to a limited form of collective bargaining (Schneider 1988).

These limited and belated developments stand in contrast with International Labour Organization (ILO) Convention 87, adopted in 1948, and Convention 98, adopted in 1949 (ILO n.d.). Convention 87 covers the freedom of association and protection of the right to organize, while Convention 98 deals directly with the right to organize and bargain collectively. It was left to each nation to decide how these conventions applied to police and the armed forces. Apart from a few narrow exceptions, the rights of all public sector workers were protected by these conventions. In 1978, Convention 151 on Labor Relations in the Public Sector made it clear that employees covered by Convention 98's exclusion of those "engaged in the administration of the state" applied only to "high-level public employees" (ILO n.d.).

Although the United States has not ratified any of these conventions, it has submitted annual reports to the ILO that purport to demonstrate adherence to them (ILO 2001). As will be discussed below, however, U.S. practice with respect to providing legal protection for public sector workers' freedom to form unions and bargain collectively falls far short of the requirements of international law. During the Bush administration many more federal employees have lost or risked losing bargaining rights, based on stated concerns about national security, management flexibility, and efficiency. By early 2005 the rollback of legal protection spilled over to the states as Republican governors in Kentucky, Indiana, and Missouri issued executive orders rescinding collective bargaining rights for state employees.

Given this legal framework, unionization rates in the public sector remained relatively strong through the 1990s and into the early 2000s, staying high relative to the unionization rate in the private sector. Since 1992, the average public sector unionization rate has been four to five times larger than the private sector unionization rate. In 2004, only 7.9 percent of private nonagricultural employees were represented by unions, while the union representation rate in the public sector was approximately 36 percent (U.S. Bureau of Labor Statistics 2005).

Yet, when one looks underneath these data to the structure supporting public sector bargaining, the situation for the rights of public employees to bargain collectively is far less healthy than one might believe. Public sector unionization is declining. Although the rate of decline is far less than the rate in the private sector (between 1992 and 2004 the private sector rate declined by 31.5 percent, while the public sector rate declined by only 5.7 percent), the rate has declined steadily since 1994 (U.S. Bureau of Labor Statistics 2005).

Looking beyond the numbers, there is wide variation in the scope of bargaining rights provided to public employees. In addition, events in the past five years have demonstrated the precariousness of legal protection for public employee bargaining rights. This chapter will address these latter two issues in the context of examining bargaining in the federal government, and then bargaining in state and local government.

THE FEDERAL SECTOR

The Federal Service Labor-Management Relations Statute (FSLMRS) protects collective bargaining rights for a large majority of nonpostal federal employees. The FSLMRS declared that “labor organizations and collective bargaining in the civil service are in the public interest” (FSLMRS 1978). The scope of bargaining allowed by this law, however, is limited to conditions of employment. Any matter covered by federal statute is also outside the scope of bargaining including all of Title V of the United States Code, which covers many of the conditions of employment for federal employees. Moreover, no collective bargaining agreement provision may be contrary to a governmentwide regulation. The statute’s management rights provision is very broad and

prohibits statutory management rights from being bargained away, even for the duration of a collective bargaining agreement.

This limited legal protection for workers' rights has been further eroded since 9/11. The Aviation Transportation Security Act (ATSA)¹ in November 2001 and the Homeland Security Act (HSA)² in November 2002 provided the Bush administration with virtually complete authority and flexibility in the management of these agencies and in establishing conditions of employment, including authority over the right to bargain.³ ATSA provides for the establishment of a new Transportation Security Administration (TSA) in the Transportation Department. The HSA provides for the establishment of a new Department of Homeland Security (DHS) (Greenhouse 2002; Shimabukuro 2002).

In January 2003, the TSA stripped collective bargaining rights from airport screeners (Lee and Goo 2003). In March 2003, the TSA was transferred to the DHS. Both the ATSA and the HSA authorized the removal of employees from Title V coverage. This legislation was enacted despite the fact that Section 7112 of the FSLMRS provides the president with the authority to exclude from bargaining rights employees "engaged in intelligence, counter-intelligence, investigative, or security work which directly affects national security" (FSLMRS 1978).

Bush administration representatives have resisted permitting these employees to have bargaining rights, opposed bargaining rights for employees of the proposed DHS, and spoke against federal sector unions and the alleged inflexibility of collective bargaining (Greenhouse 2002). The administration took these positions despite the fact that the FSLMRS gives the president and/or agency heads sufficient authority to exclude from bargaining rights employees whose work directly affects national security. Additionally, Section 7103 (b)(1) specifically empowers the president to "issue an order excluding any agency or subdivision thereof from coverage under this chapter if the president determines that a) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and b) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations." Section 7103 also gives the president authority to "issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 states and the District of Columbia, if the president determines that the suspension is

necessary in the interest of national security.” Finally, the same section excludes all employees of the CIA, FBI, and NSA from coverage under the statute. (FSLMRS 1978).

The administration’s position is that ATSA gives the TSA director sole and exclusive discretion to determine screeners’ conditions of employment, including collective bargaining rights (*DHS v. American Federation of Government Employees* 2003). In early January 2003, faced with representation petitions filed by screeners at 14 major airports, the TSA director declared that collective bargaining “is not compatible with the flexibility required to wage war against terrorism” (*DHS v. American Federation of Government Employees* 2003). In early July a Federal Labor Relations Authority (FLRA) regional director ruled that the TSA director, by then part of the DHS, had unfettered discretion to deny the screeners bargaining rights (*U.S. Department of Homeland Security v. American Federation of Government Employees* 2003).

When Congress debated the plan to create a Department of Homeland Security with 176,000 employees, President Bush threatened to veto any such government reorganization that did not give him the authority to strip the right of representation from workers who historically had these rights, as well as prevent new employees, such as screeners, from achieving collective bargaining rights (Greenhouse 2002). The Homeland Security Act, adopted soon after the 2002 elections, gave the president authority to act as final arbiter in disputes over which DHS employees will be entitled to or denied collective bargaining rights. In January 2005, the Bush administration used this authority to introduce a new system that further reduced the matters about which unions could bargain beyond even the limits in the FSLMRS (Lee 2005). At the same time, the administration said it would propose similar legislation covering all agencies (Lee 2005). In February 2005, rules similar to the DHS rules were proposed for the Department of Defense (DOD) (Kauffman 2005).

The potential for damage to federal workers’ collective bargaining rights from these policies is illustrated by a recent FLRA decision. In that case, the FLRA granted a request from the Social Security Administration (SSA) to exclude from a bargaining unit—and therefore from collective bargaining—certain workers on the grounds that the positions were related to the security of the Social Security database (*SSA v. American Federation of Government Employees* 2003). Thus, using

incrementalism, national security is now being defined to include not only alleged terrorism, through the DHS, and foreign threats, through the DOD, but now identity theft and the productive capacity of the nation, through the SSA.

On August 12, 2005, Judge Rosemary M. Collyer of the U.S. District Court of the District of Columbia ruled, in a suit brought by a group of unions representing DHS employees, that the collective bargaining regulations issued by the DHS were illegal and therefore could not be implemented (*National Treasury Employees Union et al. v. Chertoff et al.* 2005). After being given “extraordinary authority” by Congress to rewrite employee bargaining rights, the administration exceeded that authority, according to Judge Collyer’s ruling. Moreover, as noted, because the DOD proposed similar rules, it is likely that the DOD rules would fare no better in front of Judge Collyer than the DHS rules.

Judge Collyer is no stranger to labor law. President Ronald Reagan appointed her as General Counsel of the National Labor Relations Board in 1984 and she served until 1989 in that capacity, and President Bush appointed her to the federal bench in 2002 (Federal Judicial Center n.d.). Her decision stated in part that “significant aspects of the HR system fail to conform to the express dictates of the Homeland Security Act.” As it specifically concerns collective bargaining, Collyer wrote, “Collective bargaining has at least one irreducible minimum that is missing from the HR System; a binding contract.” She continued that, “Collective bargaining agreements would no longer be legally binding on the Secretary or enforceable by the Unions if management exercised its unreviewable discretion to declare some aspect of a contract inimical to the Department’s mission.” The judge also wrote that, “[w]hile DHS may be required to bargain in good faith, there is no effective way to hold it to that bargain . . . Under such circumstances, a deal is not a deal, a contract is not a contract, and the process of collective bargaining is a nullity.” Also of interest is her upholding of the unions’ complaint that the DHS regulations would dictate the role of the FLRA. The DHS had no authority to in effect direct the work of that agency. The Bush administration may appeal this decision (see, for example, Associated Press 2005).

An opportunity to rationalize federal sector labor relations in the 1990s through President Clinton’s Executive Order 12871, issued in 1993, was revoked by President Bush in 2001 (Masters and Albright

2002; Olson and Woll 1999; U.S. National Archives and Records Administration n.d.). The Clinton executive order and its call for partnership set forth the blueprint for the parties to move to a more mature, collaborative, and mutually productive relationship. The unfulfilled promise of the executive order was that it provided a structure in which the parties could actually engage in problem solving outside of negotiations of the collective bargaining agreement. Executive Order 12871 afforded unions an opportunity to become involved on a predecisional basis, in subject matter otherwise considered permissive or outside the scope of bargaining.

In sum, the legal structure for federal sector collective bargaining is in need of repair. Although approximately 35 percent of federal sector employees were represented by unions in 2004 (U.S. Bureau of Labor Statistics 2005), a very high percentage relative to the private sector, this number masks a very narrow Scope of bargaining and collective bargaining “rights” that, increasingly, may be exercised only at the discretion of the employer. Furthermore, the proportion of the federal workforce for which even these limited rights are protected is declining.

PUBLIC SECTOR BARGAINING AT THE STATE AND LOCAL LEVEL

Table 4.1 provides a summary of state-level public sector laws and provides a clear picture of the unevenness of current arrangements. Twenty-five states and the District of Columbia have comprehensive laws that provide broad scope bargaining for a majority of state and local government employees. For purposes of this analysis, states with comprehensive statutes are those states with one or more laws that cover a substantial majority of public employees (excluding managers, supervisors, and confidential employees). Such statutes provide procedures for unit and representation determination and exclusivity; establish the duty to bargain on wages, hours and conditions of employment; and define unfair labor practices. These laws also provide for a neutral independent administrative agency, as well as procedures for resolving grievances and negotiating impasses.⁴

Table 4.1 State and Local Collective Bargaining Arrangements Provided by State Statute, Civil Service Law, or Executive Order

State	Employee coverage	Bargaining rights	Independent admin. agency	Scope of bargaining	Impasse procedure
Alabama	Firefighters	Meet and confer	No	Wages and conditions of employment	None
Alaska	All (unless local government opts out)	Collective bargaining	Alaska Labor Relations Agency	Wages, hours, and conditions of employment	Mediation, arbitration
Arizona	None				
Arkansas	None				
California	State civil service and Dept. of Education teachers	Collective bargaining (law states meet and confer)	Public Employment Relations Board (PERB)	Wages, hours, and conditions of employment	Mediation
	Local	Collective bargaining (law states meet and confer)	PERB or local agency	Wages, hours, and conditions of employment	Mediation
	School district and community college employees	Collective bargaining	PERB	Wages, hours, and conditions of employment	Mediation, fact-finding
	Employees of UC, Hastings College of Law, and California State University and colleges	Collective bargaining (law states meet and confer)	PERB	Wages, hours, and conditions of employment	Mediation, fact-finding

Colorado	None				
Connecticut	State	Collective bargaining	State Board of Labor Relations (SBLR)	Wages, hours, and conditions of employment	Mediation, arbitration
	Local	Collective bargaining	SBLR	Wages, hours, and conditions of employment	Mediation, arbitration
	Teachers	Collective bargaining	State Board of Education; SBLR	Wages, hours, and conditions of employment	Mediation, arbitration
Delaware	State and local (cities of under 100 employees must opt in to be covered)	Collective bargaining	PERB	Wages, hours, and conditions of employment: local government Conditions of employment: state employees	Mediation, arbitration
	Teachers	Collective bargaining	PERB	Conditions of employment	Mediation, fact-finding
	Police officers and firefighters	Collective bargaining	PERB	Wages, hours, and conditions of employment	Mediation, fact-finding
District of Columbia	All	Collective bargaining	PERB	Wages, hours, and conditions of employment	Mediation, arbitration

Table 4.1 (continued)

State	Employee coverage	Bargaining rights	Independent admin. agency	Scope of bargaining	Impasse procedure
Florida	All	Collective bargaining	Public Employees Relations Commissions (PERC)	Wages, hours, and conditions of employment	Mediation, fact-finding (local governments only)
Georgia	Firefighters (pop. 20,000+)	Meet and confer	No	Wages, hours, and conditions of employment	Fact-finding
	Atlanta Rapid Transit Authority		No	Wages, hours, and conditions of employment	
Hawaii	All	Collective bargaining	Hawaii Labor Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Idaho	Firefighters	Collective bargaining	No	Wages and conditions of employment	Fact-finding
	Teachers	Collective bargaining	No	Wages and conditions of employment	Mediation, fact-finding
Illinois	State and local (employing 35 or more)	Collective bargaining	Illinois (local) labor relations boards	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	Education employees	Collective bargaining	Illinois Educational Labor Relations Boards	Wages, hours, and conditions of employment	Mediation, fact-finding

Indiana	Teachers	Collective bargaining	Indiana Education Employment Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	State employees (executive order)	Collective bargaining	PERB	Wages, hours, and conditions of employment	None
Iowa	All	Collective bargaining	PERB	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Kansas	State and local government that opt in	Meet and confer	PERB	State: hours and conditions of emp. All others: Wages, hours, and conditions of emp.	Mediation, fact-finding
	Teachers	Collective bargaining	No	Wages, hours, and conditions of employment	Mediation, fact-finding
Kentucky	State employees (executive order)	Meet and confer	No	Wages, benefits, terms and conditions of employment	None
	Firefighters (pop. 300,000 if city opts in)	Collective bargaining	Kentucky State Labor Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding
	Police (pop. 300,000 with merit system)	Collective bargaining	No	Wages, hours, and conditions of employment	None

Table 4.1 (continued)

State	Employee coverage	Bargaining rights	Independent admin. agency	Scope of bargaining	Impasse procedure
Louisiana	None				
Maine	State	Collective bargaining	Maine Labor Relations Board (MLRB)	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	Local and teachers	Collective bargaining	MLRB	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	University employees	Collective bargaining	MLRB	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	Judicial employees	Collective bargaining	MLRB	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Maryland	State employees	Collective bargaining	State Labor Relations Board (not independent)	Wages, hours, and conditions of employment	None
	Higher education	Collective bargaining	Higher Ed. Labor Relations Board	Wages, hours, and conditions of employment	None

	Teachers	Collective bargaining	No	Wages, hours, and conditions of employment	Mediation, fact-finding
	Non-certified school employees	Collective bargaining	No	Wages, hours, and conditions of employment	Mediation, fact-finding
	Park and planning commission police	Collective bargaining	No	Wages, hours, and conditions of employment	Mediation, fact-finding
Massachusetts	All	Collective bargaining	Labor Relations Commission	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Michigan	State by civil service regulations	Collective bargaining	Employment Relations Board (Civil Service Commission) (not independent)	Wages, hours, and conditions of employment (exc. merit)	Mediation, fact-finding, arbitration
	Local and university system	Collective bargaining	Michigan Employment Relations Comm.	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Minnesota	All	Collective bargaining	Bureau of Mediation Services	Wages, hours, and conditions of employment	Mediation, arbitration
Mississippi	None				

Table 4.1 (continued)

State	Employee coverage	Bargaining rights	Independent admin. agency	Scope of bargaining	Impasse procedure
Missouri	All (except law enforcement and teachers)	Meet and confer	Board of Mediation	Wages and conditions of employment	None
	State (executive order)	Collective bargaining (Exec. order states meet and confer)	Board of Mediation	Wages and conditions of employment	Mediation, arbitration
Montana	All (except nurses)	Collective bargaining	Board of Personnel Appeals	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	Nurses	Collective bargaining	Board of Personnel Appeals	Wages, hours, and conditions of employment	None
Nebraska	Local and county employees (except teachers)	Collective bargaining	Commission of Industrial Relations	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	State	Collective bargaining	Commission of Industrial Relations	Wages, hours, and conditions of employment	Mediation, fact-finding (binding)
	Teachers	Meet and confer	No	Conditions of employment	Fact-finding

Nevada	Local and county employees	Collective bargaining	Employee – Management Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
New Hampshire	All	Collective bargaining	Public Employee Labor Relations Board (PELRB)	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
New Jersey	All	Collective bargaining	PERC	Wages, hours, and conditions of employment	Mediation, fact-finding
	Police and firefighters				Mediation, fact-finding, arbitration
New Mexico	All	Collective bargaining	PELRB	Wages, hours, and conditions of employment	Mediation, arbitration
New York	All	Collective bargaining	PERB or local board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
North Carolina	None				
North Dakota	Teachers and school administrators	Collective bargaining	Education Fact Finding Commission (not independent)	Wages, hours, and conditions of employment	Mediation, fact-finding
Ohio	All	Collective bargaining	State Employment Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration

Table 4.1 (continued)

State	Employee coverage	Bargaining rights	Independent admin. agency	Scope of bargaining	Impasse procedure
Oklahoma	Teachers and non- certified school employees	Collective bargaining	No	Conditions of employment	Fact-finding
	Police and firefighters	Collective bargaining	PERB	Wages, hours, and conditions of employment	Arbitration (not binding)
Oregon	All	Collective bargaining	Employment Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Pennsylvania	All	Collective bargaining	Pa. Labor Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Rhode Island	State employees	Collective bargaining	State Labor Relations Board (SLRB)	Wages, hours, and conditions of employment	Fact-finding, arbitration
	Local employees	Collective bargaining	SLRB	Wages, hours, and conditions of employment	Mediation, arbitration

	Police and firefighters	Collective bargaining	SLRB	Wages, hours, and conditions of employment	Arbitration
	Teachers	Collective bargaining	SLRB	Wages, hours, and conditions of employment	Mediation, arbitration
South Carolina	None				
South Dakota	All employees	Collective bargaining	South Dakota Department of Labor (not independent)	State: Hours and conditions of emp. All others: Wages, hours, and conditions of emp.	Conciliation
Tennessee	Teachers	Collective bargaining	No	Wages and conditions of employment	Mediation, fact-finding
Texas	Police and firefighters if approved by voters	Collective bargaining	No	Wages, hours, and conditions of employment	Mediation, arbitration
Utah	None				
Vermont	State employees	Collective bargaining	Vermont Labor Relations Board (VLRB)	Wages, hours, and conditions of employment	Mediation, fact-finding
	Local employees	Collective bargaining	VLRB	Wages, hours, and conditions of employment	Mediation, fact-finding

Table 4.1 (continued)

State	Employee coverage	Bargaining rights	Independent admin. agency	Scope of bargaining	Impasse procedure
Vermont	Teachers	Collective bargaining	None	Wages, hours, and conditions of employment	Mediation, fact-finding
	Judiciary	Collective bargaining	VLRB	Wages, hours, and conditions of employment	Mediation, fact-finding
Virginia	None				
Washington	State and state universities	Collective bargaining	PERC	Wages, hours, and conditions of employment	Mediation, fact-finding
	Local and state police (except for wages)	Collective bargaining	PERC	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	Teachers	Collective bargaining	PERC	Wages, hours, and conditions of employment	Mediation, fact-finding
	Academic employees (community colleges)	Collective bargaining	PERC	Wages, hours, and conditions of employment	Mediation
West Virginia	None				

Wisconsin	State employees	Collective bargaining	Wisconsin Employment Relations Commission (WERC)	Wages, hours, and conditions of employment	Mediation, fact-finding
	Local employees	Collective bargaining	WERC	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Wyoming	Firefighters	Collective bargaining	No	Wages and conditions of employment	Arbitration

Sixteen states and the federal government have statutes that protect collective bargaining or meet and confer rights for 1) only specific occupations (police, fire fighters, teachers, or nurses) or classes (public safety or education); 2) only a specific level of government (municipalities).⁵ Nine states have no legislation protecting either collective bargaining or meet and confer rights for any employees.⁶

Thus, this legal framework shows that a majority of public employees in half of the states lack reasonable bargaining rights and are unlikely to achieve them in the foreseeable future. Moreover, rights to only meet and confer provide employees with much less than rights to bargain collectively, most specifically the right to negotiate wages, hours and other economic terms of employment.

Overall, state and local government arrangements are problematic, largely because workers in so many states are denied meaningful bargaining rights. During the 1960s and 1970s, states demonstrated a diversity of responses in how they addressed or ignored public employees' interest in the right to unionize and bargain collectively, a right that was available to almost all private sector workers. In the 1960s several state administrations and legislatures debated and resolved the so-called sovereignty issue as well as issues revolving around impasse resolution. A handful of states permitted a limited right to strike while other states opted for fact-finding or arbitration provisions in their collective bargaining laws (Schneider 1988).

Frustrated by the slow pace of enactment of state legislation, public sector unions initiated efforts to secure federal legislation in the late 1960s and early 1970s. This effort was deflected, in part, when many scholars and writers as well as public employers embraced the idea of states as "laboratories of experimentation." Part of the rationale was the diversity of the 80,000 governments across the nation (Colosi and Rynecki 1975). These observers did not foresee that 35 years later fully one-half of the states would not provide meaningful bargaining rights to a majority of public workers.

In the last 20 years, only three states have enacted new comprehensive bargaining statutes covering state and local government employees: Illinois and Ohio in 1983, and New Mexico in 1992 and then again in 2003. (In 1999, the New Mexico law was effectively repealed as a result of a governor's veto of the legislature's attempt to extend the statute's sunset period.) Washington passed a bargaining law for state

employees in 2001, thereby joining the list of states with comprehensive coverage. In 2003, however, the governor of Kentucky acted to cancel an executive order providing for union representation and limited bargaining rights for state employees (Wolfe 2003). Additionally, in 2005, however, two states, Missouri and Indiana, stripped state employees of collective bargaining via gubernatorial executive order (Access Indiana 2005; Missouri, Governor of, 2005).

In 1990, the AFL-CIO filed a complaint with the ILO protesting the failure of the U.S. government to protect public employee (including federal employees) rights. The aforementioned Conventions 87, 98, and 151 formed the basis of the complaint (ILO 1990). The ILO accepted the complaint and requested that the U.S. government supply information with respect to bargaining rights in the states. The government did respond in both 1992 (Bush administration) and 1993 (Clinton administration). The 1992 response claimed that “a majority of public sector employees are workers which the ILO would view as being engaged in the administration of the state” (ILO 1990). The ILO Committee of Experts reminded the U.S. government that not only should governments give priority to collective bargaining in the fullest sense possible, but they also emphasized that bargaining which excludes wages and other benefits and monetary items does not meet the requirements of the principle of voluntary collective bargaining (ILO 1990).

In reality, the government’s own estimates do not justify exempting more than a small fraction of public employees from coverage on these grounds. In October 1992, The U.S. Office of Personnel Management reported to the U.S. Census Bureau that about 7.2 percent of all federal employees were involved in administration. Even adding those employees “not elsewhere classified” would bring the proportion to only 12.6 percent. For state and local employees the comparable figure was just under 7 percent (U.S. Census Bureau 1994). A 2002 study by the U.S. General Accounting Office (USGAO) estimates that more than a third of the public sector employees in the United States do not have legally protected collective bargaining rights. According to the USGAO, close to 1 million of these are federal employees whose entire agency is exempt from FSLMRS or who are managers or supervisors, while roughly 6 million state and local government workers are without legally protected rights (USGAO 2002).

A Legislative Proposal

In the 10 years since the U.S. government's response to the ILO, only fire and police unions have initiated the introduction of federal bargaining legislation in Congress, most notably in the post-9/11 period. This proposed legislation has been limited to public safety workers. Indeed, it has been more than 30 years since the need for uniform national legal protection of public sector workers' freedom to form unions and bargain collectively has been seriously considered.

What might federal legislation look like? One principle worthy of consideration may be to think about the uniformity of process rather than of substance. It may be broadly applicable across states as a framework for public sector labor relations. Such a federal statute need not be comprehensive in its detail. Rather, it could establish standards for assessing the acceptability of a comprehensive law. States that opt to enact a law that conformed to the standards would be authorized to administer their statute. Some observers might view this as another exploration of the experimentation–diversity argument. Perhaps this is so with respect to details of its substance, but not as to the mandated basic elements of a statute. Alternatively, a state could opt to be covered by the federal standards, administered by a federal board that would be the arbiter of conformity, as well as maintain oversight authority. Certainly, this is not revolutionary or even an entirely new concept. However, it would extend to public employees in the United States the kind of legal protection of their fundamental human right to form unions and bargain collectively that they deserve—and which international law requires.

CONCLUSIONS

Collective bargaining rights of public employees in the United States have a much shorter history than collective bargaining rights of private sector employees. While broad-based collective bargaining rights of private employees in the United States can be traced to the NLRA of the 1930s, it was not until the mid-1960s that substantial numbers of public employees won protection for such rights.

The collective bargaining rights of federal sector employees have always been limited to a small number of issues. Relevant statutes and executive orders provide the administration with a great deal of control over collective bargaining coverage. Since 9/11, the Bush administration has attempted to use this control to remove collective bargaining rights from segments of the federal workforce in the interest of national security, without a definition of “national security” and without demonstrating that collective bargaining for employees engaged in national security (however defined) would compromise national security. That this can happen indicates the fragility and tenuousness of collective bargaining for federal sector employees, with “coverage” dependent on the administration in office and perceived policy needs.

Turning to the states, public sector state workers in Indiana and Missouri lost collective bargaining rights with a stroke of their governors’ pen early in 2005; Kentucky state workers lost their meet and confer rights at the end of 2003. For more than two decades prior, there had been but a minimal expansion of bargaining rights for state and local workers nationwide. Today, public employees in roughly half of the states lack meaningful protection of their fundamental right to collective bargaining.

Legal protections for workers’ rights to collective bargaining in the public sector in the United States are clearly out of step with international benchmarks, as established by the ILO. The only reason for this gap appears to be ideology and political will. The rights of public employees to bargain collectively should not depend on the prevailing political winds.

Notes

1. Aviation and Transportation Security Act (ATSA), Pub.L.107-71, codified as 49 U.S.C. § 114.
2. Homeland Security Act (HSA), Pub.L.107-296, codified as 6 U.S.C. § 101.
3. Federal Labor Relations Authority Boston Regional Director, Department of Homeland Security Border and Transportation Administration (Agency) and American Federation of Government Employees, AFL-CIO (Labor Organization/Petitioner), July 7, 2003.
4. The 25 states are Alaska, California, Connecticut, Florida, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Penn-

sylvania, Rhode Island, Vermont, Washington, Wisconsin. Admittedly, Maryland does not meet the “comprehensive” test. Not all of its statutes provide for an independent administrative agency or impasse procedures; local government employees in most municipalities and counties are provided collective bargaining rights by charter or ordinance not state statute; teachers and other education employees in most counties are covered by state statute as are employees of the state universities. In sum, a large majority of Maryland public employees do have the right to genuine collective bargaining through *de jure* arrangements; hence its qualified inclusion. New Mexico is the only state with a comprehensive statute that was effectively repealed, despite not being ruled unconstitutional. The law’s sunset provision was extended by the legislature but failed to override the governor’s veto in 1999. Subsequent to the 2002 election of Governor Richardson, New Mexico adopted an almost identical statute in March 2003.

5. Alabama, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Missouri, Nevada, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, Wyoming. The breadth of coverage, scope of rights, and degree of comprehensiveness of these statutes vary widely and are set forth in the table. For example, the statutes in Kansas, Missouri and South Dakota cover almost all employees but the scope of meet and confer rights differ not only between these states but within each state. A common thread is that local government workers are extended broader rights than state employees. For example, local government employees can negotiate wages, while state employees in Kansas and South Dakota cannot. In Kansas, however, local governments must opt in to be covered. Kansas also has a separate statute for teachers. Georgia and Texas are at the other end of this spectrum. The Georgia statute gives meet and confer rights to fire fighters only in those cities of over 20,000 population that opt in by ordinance. A Texas statute provides “consultation” rights to teachers only. A second Texas law extends bargaining rights to police and fire fighters only in those local governments where the union is able to meet the standard required to petition for an election open to all qualified voters in that local government. The union then must be successful in that election to achieve recognition and bargaining rights. The broadest Texas statute however, prohibits a public employer from recognizing a union as bargaining agent and prohibits collective bargaining by public employers. Arrayed elsewhere on this spectrum, Indiana has a bargaining statute covering teachers. Kentucky has a statute applicable to fire fighters in cities of at least 300,000 population (only Louisville) or to any other city that petitions for coverage by the law. Another statute covers police in counties of at least 300,000 population and which also have a merit system. Statutes covering fire fighters and/or police and/or teachers or education employees have been adopted in Alabama, Idaho, Kansas (as mentioned above), North Dakota, Oklahoma, Tennessee, Utah and Wyoming. Nevada’s statute covers only municipal employees.
6. Arizona, Arkansas, Colorado, Louisiana, Mississippi, North Carolina, South Carolina, Virginia and West Virginia. Even among these states the legal framework is not simple. A North Carolina law forbids an employer from bargaining or making an agreement with a union. The law also prohibits employees from join-

ing a union, which is clearly unconstitutional. A 1977 Virginia Supreme Court decision ruled that the state or local governments could not recognize a union as exclusive representative or negotiate an agreement. Prior to this decision local governments and school boards in several parts of the state had actually adopted collective bargaining ordinances. A subsequent 1993 statute, in effect, codified the earlier Supreme Court decision.

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Part 2

What's at Stake: Why Freedom to Form Unions Matters to Workers and Communities

5

Significant Victories

An Analysis of Union First Contracts

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After two decades of massive employment losses in heavily unionized sectors of the economy and exponential growth of the largely unorganized service sector, the U.S. labor movement is struggling to remain relevant. Despite new organizing initiatives and practices, union organizing today remains a tremendously arduous endeavor, particularly in the private sector, as workers and their unions are routinely confronted with an arsenal of aggressive legal and illegal antiunion employer tactics. This vigorous opposition to unions in the private sector does not stop once an election is won, but continues throughout bargaining for an initial union agreement, all too often turning organizing victories into devastating first-contract defeats (Bronfenbrenner 1997b, 2001).

Despite these overwhelming obstacles, workers still organize and win—through certification elections and voluntary recognition campaigns in both the private and public sectors. And each year unions successfully negotiate thousands of first contracts in the United States, providing union representation for the first time to hundreds of thousands of new workers. This research takes an in-depth look at what unions achieve in these initial union contracts. Why, when confronted with such powerful opposition, do unorganized workers continue to want to belong to unions and newly organized workers want to stay union? What do these first contracts provide that makes the struggle worthwhile?

To explore these questions, we analyze and evaluate union first contracts along four primary dimensions. First, we inventory the basic workers' rights provided by these contracts, which go beyond the very limited rights provided by federal and state labor law under the "employment at will" system. Second, we evaluate how first contracts provide workers and their unions with the institutional power to shape work and the labor process on a day-to-day basis. Third, we explore how first contracts codify the presence and power of unions in daily work life, and we evaluate which institutional arrangements provide a meaningful role for workers and their unions in their workplaces. Fourth, we examine the kinds of workplace benefits that are codified and supplemented in first contracts, gaining important insights into the types of human resource practices that exist in newly unionized workplaces. Finally, by examining the interactions among these four dimensions, we explore the limitations of what first contracts have been able to achieve in the current organizing environment, and what it would take for unions to improve the quality of first contracts.

PREVIOUS RESEARCH ON FIRST CONTRACTS

There is a growing body of literature on organizing in both the private and public sectors (Bronfenbrenner et al. 1998; Milkman and Voss 2004). However, only a small portion of this research extends to first-contract campaigns (Bronfenbrenner 1996, 2001; Hickey 2002; Hurd 1996). Collective bargaining agreements are regularly evaluated for patterns, outcomes, and emerging basic language, yet this work rarely distinguishes between first and subsequent agreements (Bureau of National Affairs 1995; Kumar 1989). A series of studies evaluates the financial impact of unionization and first contracts on employers (DiNardo and Lee 2004; Freeman 1981).

The U.S. Bureau of Labor Statistics (BLS) regularly gathers data on the wage differential between the union and nonunion sectors of the economy (BLS 2003a,b). But, here too, little effort has been made to look specifically at the impact of union first contracts. Furthermore, it is inadequate to focus only on the financial rewards of unionization. Nonfinancial issues such as dignity, fairness, and workplace control are

often the key issues in organizing campaigns and remain central in the development of initial union contracts (Bronfenbrenner 1996; Bronfenbrenner and Hickey 2004). Comparing firms where organizing did or did not take place, Freeman and Kleiner (1990, S8) found only moderate wage gains through unionization but suggest that “newly organized workers made significant gains in the areas of grievance procedures, job posting and bidding, and seniority protection.” To date, however, there is no detailed quantitative assessment of these nonfinancial yet crucially important aspects of first agreements.

RESEARCH METHODS

This research is based on a content analysis of 175 union first contracts in both the public and private sectors. The contracts were assembled as part of Bronfenbrenner’s previous research on private sector first-contract campaigns (1997a) and on research on public sector first-contract campaigns by Bronfenbrenner and Juravich (1995) and Juravich and Bronfenbrenner (1998).¹ We recognize that these contracts from 1987 through 1996 are less than current, but they draw from the only existing national random samples of first contract campaigns in both the public and private sectors. A review of first contracts collected as part of Bronfenbrenner’s most recent first-contract study (2001) suggests no major changes in the nature and extent of first contracts in the last decade.

Because of the lack of prior research on first-contract content, we were forced to develop an entirely new research typology to evaluate the multiple dimensions of first-contract gains.² For all 175 first contracts, we evaluated each contract along 296 parameters, measuring the extent and nature of various contract provisions.³ Unfortunately, due to the absence of previous research in this area, there are no analogous earlier data to which our findings can be compared. Thus, our hope is that this research typology will provide a baseline upon which future union contracts can be compared and will encourage further research in this area.

Table 5.1 provides baseline information on our sample. The first contracts are almost equally divided between the private and public

Table 5.1 Characteristics of the Sample

	All contracts		Private sector		Public sector	
	Number	Mean or proportion	Number	Mean or proportion	Number	Mean or proportion
Number of contracts	175	1.00	94	0.54	81	0.46
Average contract duration (in months)	—	28.50	—	30.30	—	26.30
Signatories						
Local	144	0.82	82	0.87	62	0.78
Region/district	4	0.02	2	0.02	2	0.03
International	3	0.02	2	0.02	1	0.01
Unit scope						
All employees	25	0.14	11	0.12	14	0.17
Regular full-time employees only	19	0.11	15	0.16	4	0.05
Regular full-time and all part-time employees	63	0.36	37	0.39	26	0.32
Regular full-time plus some part-time	35	0.20	22	0.23	13	0.16
Part-time, per-diem, and/or temporary	5	0.03	1	0.01	4	0.05
Number of workers covered under contracts	27,651	159	11,453	123	16,198	200
Unit type						
Blue collar	45	0.26	37	0.39	8	0.10
White collar	10	0.06	4	0.04	6	0.07
Professional/technical	21	0.12	7	0.07	14	0.17
Professional/technical	21	0.12	7	0.07	14	0.17
Service and maintenance	54	0.31	19	0.20	35	0.43

Wall-to-wall	26	0.15	15	0.16	11	0.14
Other	18	0.10	11	0.12	7	0.09
Industry						
Manufacturing	32	0.19	32	0.34	0	—
Communications and utilities	5	0.03	5	0.05	0	—
Construction	2	0.01	2	0.02	0	—
Retail	5	0.03	5	0.05	0	—
Transportation	6	0.04	6	0.06	0	—
Health care (both public and private)	31	0.18	29	0.31	2	0.03
Social, business and other services	13	0.08	13	0.14	0	—
City/county government	36	0.21	0	—	36	0.44
Public education (including higher education)	43	0.25	0	—	43	0.53
Bargaining unit demographics						
At least 50% workers of color	57	0.33	44	0.47	13	0.16
No workers of color in the unit	37	0.21	12	0.13	25	0.31
Proportion of workers of color in the unit	—	0.31	—	0.43	—	0.18
At least 50% women workers	104	0.59	38	0.40	66	0.82
No female workers	10	0.06	10	0.11	0	—
Proportion female workers in unit	—	0.52	—	0.38	—	0.67
At least 25% part-time workers	42	0.24	18	0.19	24	0.30
No part-time workers	91	0.52	49	0.52	35	0.43

sectors. The vast majority (82 percent) of the contracts were negotiated on a local level, with an average duration of slightly more than two years. In the private sector the major industries represented include manufacturing (34 percent) and health care (31 percent). Blue-collar units represent the largest proportion (39 percent) of the private sector contracts, followed by service and maintenance units, wall-to-wall units, and professional/technical and white-collar units. In the public sector the contracts are concentrated in service and maintenance units (43 percent) and professional/technical units (17 percent), primarily in education (53 percent) and municipalities (44 percent).

A majority of the workers covered under these agreements are women. This is especially true in the public sector, where women average 67 percent of the unit compared to 38 percent in the private sector. Workers of color are more concentrated in private sector units, where they represent the majority in almost half the units.

BEYOND EMPLOYMENT AT WILL

Table 5.2 summarizes the basic workplace rights provided for in first contracts. Most of these protections are already “guaranteed” by federal and state legislation. Yet, contractual antidiscrimination language is important for two reasons. First, it demonstrates to the employer, union members, and the broader community that the union is concerned about these issues. But equally important, it provides an enforcement mechanism that involves significantly less effort, cost, and time than claims filed under state or federal law.

As we can see from Table 5.2, nearly three-quarters of the contracts in our sample contained a discrimination clause, with about two-thirds covering a range of types of discrimination including race, gender, national origin, religion, age, and disability. Of the units with at least 25 percent women, 63 percent had gender discrimination language, while 73 percent of the units with at least 25 percent workers of color had language covering race discrimination. Fewer than 25 percent of the contracts cover other types of discrimination, such as sexual orientation, political affiliation, and veteran status. Only 6 percent had sepa-

rate sexual harassment language, and 1 percent had separate pay equity language.

For nearly all the most common antidiscrimination protections, the percentage of public sector contracts including these protections was 10–20 percent lower than the private sector contracts. This may result from the fact that many public sector workers may be covered by state and local discrimination laws that provide them a more streamlined process for filing antidiscrimination suits than federal protections.

Seventeen percent of the first contracts go beyond basic workplace rights to include specific contract language that requires management to treat employees with respect and dignity. Respect and dignity issues are often core elements of successful organizing campaigns, and these clauses provide an opportunity for the union to file grievances and publicly question management's reputation, even when other contract clauses have not been violated.

As is clear in Table 5.2, in a significant departure from the nonunion employment-at-will environment, nearly three-quarters of the contracts we examined require discipline and discharge to be based on just cause, thus constraining management's ability to play favorites or to intimidate and threaten workers who challenge them. Nearly 40 percent of first contracts also codify *Weingarten* rights for union members to obtain union representation when they believe that they will be disciplined, and 13 percent expand on those rights by requiring the employer to notify the employee of his or her right to union representation before the disciplinary meeting begins.

Virtually all the contracts in our sample (96 percent) create a grievance procedure with third-party arbitration. Employers, who before the first contract was settled retained sole authority to make decisions in the workplace, become bound by a system that allows for independent third-party review of disputes between management and employees. This due process language is the most widespread provision in this study, and provides the enforcement mechanism that guarantees all the other clauses in the first agreement. A quarter of the contracts permit class-action grievances where the remedies apply to all those affected by the violation.

Table 5.2 Workplace Rights Provided by First Contracts

	All contracts		Private sector		Public sector	
	Number	Mean or proportion	Number	Mean or proportion	Number	Mean or proportion
Antidiscrimination protections	128	0.730	80	0.85	48	0.59
Union activity	101	0.58	51	0.54	50	0.62
Race ^a	123	0.70 (0.73)	75	0.80 (0.78)	48	0.59 (0.62)
Gender ^b	122	0.70 (0.63)	74	0.79 (0.74)	48	0.59 (0.54)
Age	112	0.64	66	0.70	46	0.57
Disability	92	0.53	52	0.55	40	0.49
National origin	118	0.67	72	0.77	46	0.57
Family status	8	0.05	2	0.02	6	0.07
Marital status	48	0.27	17	0.18	31	0.38
Sexual orientation	31	0.18	19	0.20	12	0.15
Political affiliation	38	0.22	14	0.15	24	0.30
Religion	115	0.66	68	0.72	47	0.58
Veteran status	26	0.15	20	0.21	6	0.07
Separate sexual harassment clause	10	0.06	5	0.05	5	0.06
Pay equity	2	0.01	1	0.01	1	0.01
Compliance with all state, local, and federal laws	9	0.05	9	0.10	0	—
Respect and dignity clause	29	0.17	25	0.27	4	0.05
Discipline and discharge						
Just cause	122	0.70	67	0.71	55	0.68

Specified progressive discipline procedure	48	0.27	19	0.20	29	0.36
Grievable <i>Weingarten</i> rights (notification)	22	0.13	14	0.15	8	0.10
Grievable <i>Weingarten</i> rights (no notification)	42	0.24	16	0.17	26	0.32
Grievance procedure						
Grievance procedure with 3rd party arbitration	168	0.96	93	0.99	75	0.93
Expedited grievance procedures	50	0.29	25	0.27	25	0.31
Class-action grievances permitted	47	0.27	11	0.12	36	0.44

^aNumbers in parentheses report the proportion of units with 25% or more workers of color that have no race discrimination language.

^bNumbers in parentheses report the proportions of units with 25% or more female workers that have gender discrimination language.

UNION RESTRICTIONS ON MANAGEMENT RIGHTS

In addition to these basic rights, first contracts contain language outlining a system of rational and equitable rules and procedures for workplace practices, restraining unilateral decisions by management. As we can see in Table 5.3, seniority plays a key role in developing consistent, nonarbitrary procedures for promotions, layoffs, recall, transfers, and vacation and overtime scheduling. However, seniority is less of a feature in public than in private sector agreements because in many cases it is already codified in civil service law.

It is important to note that none of the seniority clauses in the first contracts in our sample include affirmative action language to protect women and workers of color from being “last hired, first fired.” This is a relevant issue for the labor movement, particularly since women and workers of color continue to make up the majority of new workers organized. This lack of language on affirmative action may not just be the result of bargaining. Over the past decade we have seen an increasing number of legal challenges to affirmative action, which has made many public entities hesitant to sign on to these types of provisions.

The first contracts we examined also contain language laying out the process for promotions and the filling of vacancies beyond basic seniority rights. More than three-quarters of agreements in both sectors provide for the posting of vacancies. In 40 percent of the contracts internal candidates are given priority in hiring. More than one-third of the contracts provide for provisional transfer to newly posted positions. However, very few contracts provide opportunities for part-time employees to bid on full-time work.

Thirty-eight percent of the contracts go beyond state and federal wage and hour laws to require overtime pay after 8 hours and 6 percent provide overtime for work beyond an employee’s regularly scheduled hours. This is particularly important for part-time workers, who otherwise are frequently asked to work additional hours but not enough to reach the legislated threshold of 40 hours a week.

While expanded hours and mandatory overtime are an increasing problem in today’s workplaces, virtually none of the contracts set limits on mandatory overtime. These provisions mirror contract negotiations in general, where even after long strikes few unions have succeeded

in eliminating 12-hour days or cutting back on mandatory overtime (Franklin 2001).

A number of contracts in our sample, particularly those in the private sector, where weekend and evening shifts are more common, have clauses that codify and/or expand upon shift differentials (supplemental pay) for those employees who work outside of the regular workday or workweek. Nearly one-half of private sector first contracts guarantee a shift differential for evening work, while a smaller percentage establish differentials for weekend work.

One-third of private sector contracts and 51 percent of public sector contracts have language outlining work schedules and hours. Many contracts also require the posting of schedules and notice of, or protection from, changes outside workers' regularly scheduled hours. These clauses are important because they provide workers predictability and control over their work schedules. Workload and minimum staffing, serious issues in almost every workplace, are addressed in only 7 percent of first agreements. This reflects the fact that most employers aggressively oppose any inclusion of staff and workload protections in the contract and frequently argue that these are absolute management rights.

Health and safety is another area that dramatically distinguishes union from nonunion workplaces. Forty-two percent of all contracts and 55 percent of private sector contracts have grievable health and safety clauses. Thirty-one percent include language requiring employers to provide protective equipment, and 30 percent establish a joint health and safety committee. Only a small number (6 percent) give workers the right to refuse unsafe work, and only 5 percent guarantee workers and unions the right to health and safety information.

Unions have not been very successful in gaining significant job security protections in first contracts, despite the increasing importance of such language in a climate of corporate restructuring, technological change, privatization, and capital mobility. As described in Table 5.3, approximately one-third of private sector first agreements include some language governing restrictions on successorship, restricting the use of temporary workers, subcontracting, and supervisors doing bargaining-unit work. Much less common are provisions relating to new owners honoring the agreement, union notification of closure, and technological change.

Table 5.3 Union Restrictions on Management Rights

	All contracts		Private sector		Public sector	
	Number	Mean or proportion	Number	Mean or proportion	Number	Mean or proportion
Seniority						
Overtime	36	0.21	27	0.29	9	0.11
Layoff	132	0.75	79	0.84	53	0.65
Recall	116	0.66	70	0.75	46	0.37
Transfer	48	0.27	35	0.37	13	0.16
Promotions where minimum qualifications are met	16	0.09	10	0.11	6	0.07
Promotions where equally qualified	72	0.41	51	0.54	21	0.26
Shift assignments	10	0.06	6	0.06	4	0.05
Holidays	3	0.02	3	0.03	0	—
Vacation	63	0.36	46	0.49	17	0.21
Prorated for part-time employees ^a	18	0.10 (0.07)	7	0.07 (0.11)	11	0.14 (0.04)
Full seniority for part-time employees ^a	7	0.04 (0.05)	4	0.04 (0.06)	3	0.04 (0.04)
Layoffs or reduction of hours						
Long-term layoff notice	74	0.42	41	0.44	33	0.41
Average minimum number of days notice	—	17	—	9.9	—	23.7
Short-term layoff without seniority consideration	9	0.05	8	0.09	1	0.01
Bumping rights	81	0.46	46	0.49	35	0.43
Severance pay	7	0.04	6	0.06	1	0.01
Retraining	4	0.02	4	0.04	0	—
Recall rights	142	0.81	82	0.87	60	0.74

Promotions and filling of vacancies						
Posting of vacancies	140	0.80	75	0.80	65	0.80
Internal candidates first priority	70	0.40	40	0.43	30	0.37
Opportunity of temporary trial/return	65	0.37	42	0.45	23	0.28
Part-timers can bid for full-time ^a	7	0.04 (0.10)	5	0.05 (0.11)	2	0.03 (0.08)
Overtime						
Overtime for over regularly scheduled hours	10	0.06	6	0.06	4	0.05
Overtime pay for over 40 hours per week	24	0.19	22	0.23	2	0.03
Overtime pay for over 8 hours	67	0.38	43	0.46	24	0.30
Overtime equalization	32	0.18	21	0.22	11	0.14
No mandatory overtime	3	0.02	0	—	3	0.04
Limits on mandatory overtime	9	0.05	8	0.09	1	0.01
Premium pay for over 12 hours work	6	0.03	6	0.06	0	—
Premium pay for over 6 days a week	4	0.02	3	0.03	1	0.01
Shift and other pay differentials						
Evening differential	60	0.34	46	0.49	14	0.17
Saturday differential	24	0.14	15	0.16	9	0.11
Sunday differential	35	0.20	25	0.27	10	0.12
Relief in higher classification	63	0.36	33	0.35	30	0.37
Schedules, hours of work, and minimum staffing/workload						
Hours and scheduling specified in the contract	72	0.41	31	0.33	41	0.51
Posting of schedules required	39	0.22	29	0.31	10	0.12
Minimum staffing/workload	13	0.07	8	0.09	5	0.06

Table 5.3 (continued)

	All contracts		All contracts		All contracts	
	Number	Mean or proportion	Number	Mean or proportion	Number	Mean or proportion
Health and safety						
Right to refuse unsafe work	10	0.06	7	0.07	3	0.04
Employer provided protective equipment	54	0.31	33	0.35	21	0.26
Health and safety committee	52	0.30	36	0.38	16	0.20
Right to information	8	0.05	7	0.07	1	0.01
Grievable health and safety language	73	0.42	52	0.55	21	0.26
Employees will alert employer of safety concerns	7	0.04	5	0.05	2	0.03
Job security and protecting bargaining unit work						
Subcontracting rules	40	0.23	21	0.22	19	0.24
Restrictions on the use of temporary workers	28	0.16	25	0.27	3	0.04
Restrictions on supervisors doing bargaining unit work	41	0.23	33	0.35	8	0.10
Successorship language	35	0.20	30	0.32	5	0.06
Purchaser must honor contract	11	0.06	7	0.07	4	0.05
Union notified, request purchaser to honor agreement	6	0.03	6	0.06	0	—
New technology language	8	0.05	8	0.09	0	—

^aNumbers in parentheses report the proportion of units with at least 25% part-time workers.

UNION RIGHTS AND PRACTICES UNDER FIRST CONTRACTS

Table 5.4 presents data on how union rights and practices become codified and institutionalized after the signing of an initial union agreement. First contracts lay out the parameters by which unions operate on a day-to-day basis. Nearly two-thirds of all the first contracts in our sample have an agency or union shop, thereby laying a foundation upon which the union can more easily establish and maintain its presence in the workplace. For those with open shops, 91 percent of the private sector contracts and 69 percent of the public sector contracts were in right-to-work states, where open shops are required. Union security is further strengthened in the three quarters of the first contracts that allow for dues check-off—where union dues and/or agency fees are automatically deducted from workers' paychecks.

Another essential element of union representation is language guaranteeing staff and officers access to the workplace and to bargaining-unit members. Forty-five percent of private sector first contracts and 25 percent of public sector first contracts have liberal union access policies allowing union representatives to meet with employees in the workplace without having prior authorization from the employer or being restricted to certain times and certain areas. This is less of an issue in the public sector, however, because a combination of open meeting and public access laws provides union representatives, as members of the public, equal access to any public areas or public meetings.

Nearly one-half of first contracts provide stewards release time to investigate grievances, although this is more prevalent in the private sector than in the public sector. Approximately one-third grant stewards paid release time to investigate grievances on company time. Fifty-eight percent of first contracts grant stewards release time for grievance processing, and almost half allow this to take place on paid company time. Less than 10 percent of the contracts in both sectors have contract language allowing for new member orientation, despite the importance of such language in recently organized units, where everyone is new to the union.

More than one-third of the contracts provide union leave for officers and 25 percent provide union leave for members to attend union

Table 5.4 Union Practice after First Contracts

	All contracts		Private sector		Public sector	
	Number	Mean or proportion	Number	Mean or proportion	Number	Mean or proportion
Type of shop						
Union	61	0.35	57	0.61	4	0.05
Agency	51	0.29	12	0.13	39	0.48
Open	34	0.19	21	0.22	13	0.16
Proportion of open shops in right-to-work states	28	0.82	19	0.91	9	0.69
Dues check-off	128	0.73	67	0.71	61	0.75
Union staff access to workplace						
Liberal	62	0.35	42	0.45	20	0.25
Restricted	50	0.29	33	0.35	17	0.21
No access specified in contract	63	0.36	19	0.20	44	0.54
Union access						
Union bulletin board for union postings	142	0.81	82	0.87	60	0.74
Union right to information	17	0.10	12	0.13	5	0.06
Officer/steward rights						
Stewards' time to investigate grievances	78	0.45	53	0.56	25	0.31
Paid release time to investigate grievances	56	0.32	32	0.34	24	0.30
Stewards' time to process grievances	102	0.58	62	0.66	40	0.49
Paid release time to process grievances	83	0.47	44	0.47	39	0.48
Paid release time for other meetings with management	44	0.25	13	0.14	31	0.38
Union orientation	14	0.08	7	0.07	7	0.09
Union leave for officers to conduct union business	15	0.09	6	0.06	9	0.11

Union leave for officers to attend meetings conventions	64	0.37	28	0.30	36	0.42
Paid union leave to attend meetings/conventions	29	0.17	5	0.05	24	0.30
Unpaid leave for officers to take higher union office	33	0.19	22	0.23	11	0.14
Paid leave for members to process grievances	11	0.06	10	0.11	1	0.01
Union leave for members to attend meetings/conventions	43	0.25	21	0.22	22	0.27
Paid leave to attend meetings/conventions	18	0.10	3	0.03	15	0.19

meetings and conventions. Only a few of the contracts in our sample (9 percent) provide union leave for officers to conduct union business outside the workplace, while 19 percent provide for union leaders to take union-funded positions, protecting their right to return to the bargaining unit.

BENEFITS IN NEWLY ORGANIZED WORKPLACES

Table 5.5 summarizes the workplace benefits provided by the first contracts in our sample. Health insurance, pension plans, leaves of absence, pay systems, training, and continuing education are fundamental concerns for unorganized workers, and are areas that have shown a substantial differential between union and nonunion workplaces. For example, according to BLS data, 72 percent of unionized workers are covered by defined benefit pension funds compared to only 15 percent of nonunion workers, while 60 percent of unionized workers have medical care benefits compared to 44 percent of nonunion workers (BLS 2003a,b). Beyond ensuring basic rights, fair and equitable standards, and an institutional presence already discussed, these workplace benefits help to create and protect a certain quality of life for workers and their families. The extent and nature of these contract clauses also inform us about the kinds of human resources practices in operation in newly organized workplaces, some of which existed before the organizing campaign but then were codified and guaranteed in the first agreement.

Overall, 89 percent of the first contracts provide contractual guarantees for some form of health insurance. Yet, reflecting the spiraling costs of health care that had begun to escalate during the period these contracts were negotiated, only 10 percent provide fully paid health insurance for workers and dependents. This is a significant departure from union contracts a generation ago, when many newly organized workers were brought into master agreements, which provided fully paid family health insurance and union health and welfare plans.

Pension plans are provided for in only 39 percent of first agreements, with employer-sponsored saving plans offered in an additional 12 percent and retiree health benefits offered in only 8 percent. Here,

too, we see a significant departure from the kinds of retirement benefits that once were a common element of large industrial and public sector agreements reflecting, in part, the growing efforts by U.S. employers to cut costs and long-term liabilities by shifting to a more contingent and less costly workforce.

Nearly three-quarters of the first contracts provide for some sick leave benefits. Sick leave benefits are much more prevalent in the public sector than in the private sector, but are more likely to be prorated for part-time workers in private sector units with significant numbers of part-time workers. In approximately one-third of the contracts, sick leave may be taken for sick children and other sick dependents.

Unlike sick leave, vacation and holiday benefits are slightly less common in the public sector, partly because most public sector holidays are set by law and, for public school employees, vacations are often taken outside of the nine-month employment period. Seventy-two percent of private sector contracts provide at least five paid holidays and 83 percent provide at least one week of vacation, while only 42 percent of public sector contracts provide a minimum of five paid holidays and 62 percent provide at least one week's vacation. A variety of other leaves are provided for in first contracts as well, with the majority of contracts including leaves for jury duty, bereavement, military service, and personal days.

Table 5.5 also presents data on the kinds of pay systems established by first contracts. Almost two-thirds of agreements provide for step systems. Given the arbitrariness of most nonunion pay systems that frequently involve wages being negotiated on a person-by-person basis, step systems are a significant accomplishment. In contrast, only 2 percent of the contracts had merit pay systems, which are the systems that dominate the nonunion environment. At the same time, cost-of-living adjustments are provided in only 2 percent of first contracts.

Training benefits are limited, with only one-quarter of agreements specifying job training or in-service training provided for by the employer. Finally, employee involvement clauses were included in 28 percent of the first contracts we examined. However, most of these clauses lack union protections. Particularly with the growing management interest in joint programs, unions clearly need bargaining language that ensures that these programs are indeed joint and do not undermine the union or the contract.

Table 5.5 Benefits in Newly Organized Workplaces

	All contracts		Private sector		Public sector	
	Number	Mean or proportion	Number	Mean or proportion	Number	Mean or proportion
Health and other insurance						
Health insurance	156	0.89	85	0.90	71	0.88
Full individual only	12	0.07	8	0.09	4	0.05
Full individual plus full family	17	0.10	4	0.04	13	0.16
Full individual and part family	24	0.14	14	0.15	10	0.12
Dental insurance	90	0.51	45	0.48	45	0.56
Short-term disability	38	0.22	27	0.29	11	0.14
Long-term disability	31	0.18	14	0.15	17	0.21
Employer contribute to union health and welfare plan	11	0.06	8	0.09	3	0.04
Life insurance	106	0.61	59	0.63	47	0.58
Vision insurance	18	0.10	6	0.06	12	0.15
Drug insurance	22	0.13	8	0.09	14	0.17
Workers compensation provision	55	0.31	24	0.26	31	0.38
Retirement benefits						
Pension plan	68	0.39	36	0.38	32	0.40
Employer-sponsored savings plan	21	0.12	20	0.21	1	0.01
Retirement health plan	14	0.08	5	0.05	9	0.11
Leaves of absence						
Sick leave	122	0.70	50	0.53	72	0.89
At least 10 sick days a year	72	0.41	14	0.15	58	0.72

Average number of days veteran employees	—	11.61	—	9.71	—	12.44
Prorated for part-time workers ^a	43	0.25 (0.29)	21	0.22 (0.44)	22	0.27 (0.17)
Apply to sick children	63	0.36	13	0.14	50	0.61
Apply to other sick dependents	57	0.33	9	0.10	48	0.59
Sick bank	84	0.48	27	0.29	57	0.70
Vacation	132	0.75	82	0.87	50	0.62
At least one week vacation shutdown a year	128	0.73	78	0.83	50	0.62
Average number of days new employees	—	6.60	—	6.60	—	6.59
Average number of days veteran employees	—	19.84	—	18.53	—	22.02
Prorated for part-time workers ^a	47	0.27 (0.26)	31	0.33 (0.44)	16	0.20 (0.13)
Mandatory vacation for plant shutdown	9	0.05	9	0.10	0	0
Holidays	152	0.87	92	0.98	60	0.74
At least five holidays a year	102	0.58	68	0.72	34	0.42
Average number of days new employees	—	7.83	—	7.89	—	7.77
Average number of days veteran employees	—	10.52	—	9.44	—	11.33
Prorated for part-time workers ^a	33	0.19 (0.17)	16	0.17 (0.28)	17	0.21(0.08)
Premium pay	106	0.61	71	0.76	35	0.43
Parental leave	50	0.29	9	0.10	41	0.51
Bereavement leave	137	0.78	80	0.85	57	0.70
Education leave	27	0.15	11	0.12	16	0.20
Medical/disability leave	76	0.43	48	0.51	28	0.35
Personal leave of absence	114	0.65	65	0.69	49	0.61
Military leave	106	0.61	54	0.57	52	0.64
Jury leave	142	0.81	76	0.81	66	0.82

Table 5.5 (continued)

	All contracts		Private sector		Public sector	
	Number	Mean or proportion	Number	Mean or proportion	Number	Mean or proportion
Pay system						
Step	106	0.61	57	0.61	48	0.61
Merit	3	0.02	1	0.01	2	0.03
Combination of step and merit	5	0.03	4	0.04	1	0.01
COLA step	3	0.02	0	—	3	0.04
Rate set in contract, not necessarily step	48	0.27	30	0.32	18	0.22
Regular bonuses granted	15	0.09	11	0.12	4	0.05
Profit or gain-sharing	5	0.03	5	0.05	0	—
Training						
Job training/in-service training paid by employer	40	0.23	19	0.20	21	0.26
Continuing education	30	0.17	9	0.10	21	0.26
Tuition paid	45	0.26	15	0.16	30	0.37
Tuition for children/spouse	5	0.03	0	—	5	0.06
Employee involvement						
Labor/management committee	49	0.28	25	0.27	24	0.30
Equal number of union and management	27	0.15	13	0.14	14	0.17 (0.58)
No discussion of contractual issues	9	0.05	8	0.09	1	0.01 (0.04)
Service/product quality committee	5	0.03	4	0.04	1	0.01
Drug insurance	22	0.13	8	0.09	14	0.17
Workers compensation provision	55	0.31	24	0.26	31	0.38

^aNumbers in parentheses represent proportion of units with at least 25% part-time workers.

HOW COMPREHENSIVE ARE FIRST CONTRACTS?

In order to assess just how comprehensive these first contracts are, we also examined whether and how these individual provisions cluster together. While there are a number of methods that could be used to evaluate the comprehensiveness of initial union agreements, we evaluated the contracts in our sample based on whether they contained what we would consider a core set of provisions. This core includes anti-discrimination clauses, grievance and arbitration, steward rights in investigating and processing grievances, union access, and seniority for layoff.⁴ While many contracts include important individual contract clauses, only 14 percent of the contracts in our sample contain all five of these core provisions. These data suggest that, while unions have made important strides in first contracts, considerably more work is necessary to achieve strong basic agreements.

We need to recognize that good contracts, like organizing victories, don't just happen. Given the increasing level of employer opposition to unions, extending all the way through the first-contract process, winning first contract requires much more than simply good bargaining skills. As previous research has shown, unions can win first contracts only when they utilize a comprehensive, multifaceted, union-building strategy throughout both the organizing and the first-contract campaign (Bronfenbrenner 1996; Bronfenbrenner and Hickey 2004).

In the final analysis, the quality of the first contract that a union achieves is a direct product of their power—the power to stop or slow production, to interfere with companies' profit centers, growth strategies, or key relationships, or to bring influence to bear on the key decision makers of a larger employer. In the context of growing employer opposition, it is not enough to infer this power at the bargaining tables. Instead, unions that have successfully achieved stronger first agreements have continued to use the same kind of comprehensive grassroots tactics inside and outside the workplace and in the broader community that helped them first achieve a union victory in the certification election or card check recognition process and then throughout the first-contract bargaining campaign that follows. These direct expressions of members support and activism—whether it be wearing union buttons or t-shirts, or holding solidarity days, community events, or mini-job ac-

tions—combined with more indirect but still member-intensive leverage strategies involving customers, suppliers, regulators, or investors, are clear reminders to management of union power and are fundamental in achieving positive results.

Indeed, a cursory analysis of the data here suggest that, in those units where the union runs a moderately aggressive organizing campaign, the likelihood that any of the five core elements will be included in a first contract rises between 5 and 20 percentage points. More aggressive and strategic organizing and first-contract campaigns not only increase the probability of winning the organizing campaign and settling the first contract, but also improves the quality and strength of the first contracts themselves.

Clearly, more energy and attention need to be devoted to developing and implementing more comprehensive and strategic first-contract campaigns. In addition to running more aggressive first-contract campaigns, unions need to work together to share hallmark first-contract language and to explore creative contract language. One of the discouraging findings of this research is that few contracts contained language addressing job loss, staffing, mandatory overtime, technological change, privatization, and plant closing—crucial issues facing workers today. While these are difficult issues to take on even in mature bargaining relationships, unions need to begin addressing these issues in first agreements.

It is also important to recognize that first-contract language is simply that—language—until and unless the union does what it takes to implement and enforce what it has negotiated in the agreement. Anti-discrimination language is worthless if members of a local union are too intimidated to file and follow through on grievances, or the local leadership fails to take discrimination violations seriously. Seniority and bidding language are meaningless if the union turns a blind eye when less senior workers are moved into higher-paying jobs.

While we have not gathered data on the operation and effectiveness of the local unions where these first contracts were negotiated, we suggest that the shape and scope of the organizing and first-contract campaign is a major predictor of a local's ability to use and enforce a first contract to its fullest. Campaigns that develop and utilize representative rank-and-file leadership, and that start acting like a union long before the first contract is reached, are much more likely to already have in

place the leadership structure and membership involvement necessary to make the most of the first-contract language they negotiate. When both organizing and first-contract campaigns are weak, it not only leads to weaker first-contract language, but also to less capacity to utilize and enforce that language once the first contract is won.

CONCLUSIONS

As we have seen, first contracts constitute significant victories for workers and their unions. These contracts provide important basic rights that go far beyond employment-at-will and institute a grievance procedure that allows for the enforcement of these rights. They also contain important restrictions on management rights, substituting seniority and equitable systems for the assignment of work, promotions, and layoffs, for arbitrary employer control. In addition, they establish an institutional presence for the union and the rank-and-file leadership in the workplace. Finally, first contracts establish, codify, and expand health insurance, pensions, and substantial paid leave benefits.

While some unions are more successful in some areas than others, clearly these contracts provide the foundation for a fundamentally different employment relationship than that which existed prior to the union organizing campaign. We must remember that these agreements are only the first in what typically become stronger agreements over time. The establishment of a grievance system, just cause, union access, and stewards' rights is an enormous accomplishment for workers and unions confronting employers who for decades clung to their absolute "right to manage" and who fought the union organizing effort with everything they could. Even if less than comprehensive, these agreements make significant inroads into management prerogatives and, in future negotiations, leave room to strengthen and expand these inroads into management control.

Our findings also suggest that union first contracts could be more comprehensive. While this does not diminish the significant victories that the first contracts we studied represent, it reminds us of the promise and potential for strong first contracts and the strong unions that go with them. Workers risk so much to bring a union into their workplace; it is

imperative that the labor movement do everything in its power to ensure that the contracts they achieve, and the unions they build, make those risks worthwhile.

Notes

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1. The 55 contracts in the first private sector study were based on the 119 elections won in a random sample of 261 organizing campaigns that took place between July 1986 and June 1987. Copies of the first contracts were collected from 55 (69 percent) of the 80 negotiators who returned surveys in units where the first contract was reached (Bronfenbrenner 1996). The 39 contracts collected in the second private sector study were based on 155 elections and 18 voluntary recognitions won from a random sample of 525 NLRB organizing campaigns that took place from 1993 to 1995 (Bronfenbrenner 1997b). First contracts were collected for 39 (59 percent) of the 69 returned surveys from campaigns where a first contract was won. The 81 contracts collected in the third study were based on the 149 elections won from a random sample of 250 state and local certification elections in 1991 and 1992. First contracts were collected in 81 (63 percent) of the 129 cases in our sample where the election or voluntary recognition was won (Juravich and Bronfenbrenner 1998).
2. Anyone interested in a copy of the instrument we developed to conduct the content analysis should contact the authors at juravich@lrrc.umass.edu or klb23@cornell.edu.
3. We did not include wage gains in these data because we were unable to obtain reliable information on the pre-organizing campaign base wage rate, since so few unorganized workplaces had established wage scales and employers frequently grant illegal wages increases during the course of the union campaign (Bronfenbrenner 2001).
4. These five fundamentals are defined as follows: race and gender discrimination plus at least one of the following antidiscrimination clauses: union activity, age, sexual harassment, sexual orientation, family status, handicap, or national origin; just cause; steward release time to investigate and process grievances (paid or unpaid); at least some union access (liberal or restricted); and seniority for layoffs.

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6

Bad Service Jobs

Can Unions Save Them? Can They Save Unions?

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Any serious observer of the U.S. economy will notice the growth of low-wage jobs. Concentrated in the service sector, these jobs are marked not only by low wages but also by fluctuating and low hours, few or no benefits, few opportunities for upward mobility, and little worker voice. Welfare reform and its failure to reduce poverty have increased policy attention to this set of jobs. But solutions that truly address and improve job quality in the service sector are elusive. Minimum wage increases and living-wage campaigns get at part of the problem, but even if fully implemented they simply are not enough—they raise the wage floor but have no direct influence on what happens above it, or on dimensions other than wages. Absent any truly revolutionary changes in the nation's other labor market institutions, unions may be the most promising institution for the improvement of these bad jobs.

At the same time, any serious observer of the U.S. labor movement will notice plummeting membership and declining union density. Typically strong in the manufacturing sector, unions have watched as the economy has literally grown away from them. With private sector union density down to 8.2 percent in 2003, the challenges for labor movement are clear. And while solutions must be developed at a number of levels, the baseline answer of organizing is equally clear, with one principal target: low-wage service jobs.

In this chapter we discuss some of the evidence about low-wage service work, what unions do for these jobs, and whether there is a real

future for the labor movement in these industries. We draw especially on in-depth field work conducted on the hotel industry and the main union representing hotel workers in major metropolitan areas.

THE “BAD JOBS” PROBLEM IN THE SERVICE SECTOR

The deterioration of the U.S. wage structure over the past three decades has been well documented, but it is important to take a closer look at some of the dynamics involved. Figure 6.1 looks at job growth between 1973 and 1999, and documents the clear shift toward service industries that offer both low wages and low union density.

But these industries and the jobs they contain are quite diverse. Table 6.1 lists some of the key service industries that have high concentrations of low-wage jobs, as well as examples of some of the occupations and wages involved. Note the high percentages of low-wage workers, using both a stringent and a more generous definition; the very low rate of unionization, with the exception of grocery stores; and the complete absence of median wages in the double digits.

In the United States, low-wage jobs also generally come with a set of other negative attributes. Especially in the service sector, they tend to be short term and high turnover, meaning that yearly earnings are forced down by both bad pay and insufficient hours (Lane 2000). Moreover, those hours tend to change frequently and include night shifts and other awkward hours. Low-wage jobs are also much less likely to offer health care and pension benefits. In 2000, just 33 percent of the lowest-paid fifth of workers received employer-provided health insurance, and only 18 percent had some form of employer-provided pension; these rates of coverage are less than half those of median workers (Mishel, Bernstein, and Boushey 2003). Training is an additional area where low-wage workers are at a clear disadvantage. In 1995, just 22 percent of workers in the bottom quintile received training from their employers, compared with 40 percent of top quintile workers (Ahlstrand et al. 2001). Similarly, a low-wage worker's chances for upward mobility are severely limited and have become even more so in recent years. Bernhardt et al. (2001) document a substantial increase over the past three decades in the share of white male workers stuck in “low-wage careers”

Figure 6.1 U.S. Job Growth, 1973–2001, and Wages, 2001 (with 2001 union density in parentheses)

Table 6.1 Examples of Service Industries with High Percentages of Low-Wage Workers, 2001

Industry	Percent below poverty line	Percent below twice the poverty line	Percent frontline workers unionized	Examples of low-wage occupations	Median wage (\$)
Retail food stores	50.0	89.2	19.0	Cashiers	6.97
				Stock clerks and order fillers	7.93
Retail nonfood stores	44.4	85.6	2.1	Retail salespersons	7.56
				Cashiers	6.87
Eating and drinking places	68.5	94.6	1.9	Food preparation and serving workers	6.43
				Waiters and waitresses	6.38
Building services	40.4	86.5	8.5	Janitors and cleaners	7.39
				Maids and housekeeping cleaners	7.29
Personnel supply and other business services	24.3	73.2	14.3	Telemarketers	8.34
				Mail clerks (except postal service)	8.56
Repair services	27.5	79.5	3.8	Parking lot attendants	7.37
				Taxi drivers and chauffeurs	8.17

Hotels, motels, etc.	46.5	88.3	11.7	Maids and housekeeping cleaners	7.09
				Hotel, motel, and resort desk clerks	7.84
Beauty and barber shops	48.7	90.1	1.9	Hairdressers, hairstylists, cosmetologists	8.47
				Receptionists and information clerks	6.91
Entertainment and recreation services	37.9	77.6	10.5	Amusement and recreation attendants	6.63
				Landscaping and groundskeeping workers	8.35
Nursing and personal care facilities	35.5	85.6	12.0	Nursing aides, orderlies, and attendants	8.61
				Maids and housekeeping cleaners	7.43
Social services	37.4	81.1	6.8	Child care workers	7.15
				Personal and home care aides	7.83

NOTE: Poverty line used here is the official federal poverty line for a family of four.

SOURCE: Authors' analysis of Current Population Survey Outgoing Rotation Group files, 2001.

over the long term, rising from 12 percent of the 1960s and 1970s, to close to 30 percent in the 1980s and 1990s. Finally, and perhaps worst of all, low-wage workers usually get very little respect and have no voice in their jobs.

Bad jobs are a premier American problem. More than a quarter of workers earn poverty wages, and the U.S. Bureau of Labor Statistics projects substantial growth in service jobs that require at most a high school degree. It is clear that devising strategies around this sector is one of the great challenges of the twenty-first century. Will unions be a significant force in this effort?

THE HOTEL INDUSTRY RESEARCH

For our discussion of what unions can do for low-wage jobs, we rely principally on our own research on the hospitality industry. Bernhardt, Dresser, and Hatton (2003) discuss research methods, general industry trends, and findings in greater detail. Briefly, the core of our research consists of in-depth case studies of eight hotels in four U.S. cities. These cities are major business, convention, and urban tourist markets and rank in the top 30 hospitality markets nationwide. They also are all characterized by strong competition, an expanding hotel sector, a rapidly changing labor pool, and wage trends that mirror national changes over the past several decades. In each city, we selected one union hotel and one nonunion hotel for our case studies, with two of the cities having high union density in the hotel industry, and the other two having low density.¹

Our choice of hotels was restricted to high-end, full-service “Class A” hotels that cater to the business, convention, and tourist markets. Partly, this ensures comparability and simplifies design. Additionally, Class A hotels typically have high profit margins, averaging between 20 and 40 percent in our case studies. If there is any potential for the “high road” in this decidedly low-wage industry, it will be found here.

We focused our field work on those departments where the majority of low-wage and lesser-educated workers are employed: the housekeeping department (responsible for the cleaning of rooms and public areas), and food and beverage services (restaurants, banquets, and room ser-

vice). These jobs embody the archetype of low-wage, dead-end service jobs—room cleaners, dishwashers, bussers, cooks—with the exception that they are more back-breaking than many.

HOTEL INDUSTRY RESTRUCTURING

Hospitality is an \$86.5 billion a year industry that employs roughly 1.9 million workers in over 40,000 establishments nationwide. It is a highly urban industry (metropolitan areas account for about two-thirds of the rooms) and, until recently, a fast-growing one (employment almost tripled between 1970 and 2000). Like almost every sector of the economy, the industry has undergone pronounced changes over the past several decades in terms of competition, industry concentration, market segments, the organization of production, and corporate governance.

And, as is the case with a number of other service industries, these changes have been largely domestic—they cannot be explained by either globalization or technology, perhaps the two most commonly identified reasons for changes in low-wage jobs. Globalization is not the core issue for the obvious reason that much of what hotels do is firmly rooted in time and place: the rooms and casinos themselves aren't movable, and neither are the workers who make the beds and dice the vegetables. To the extent that globalization has had a direct impact, the large influx of less-educated immigrant workers in recent years has clearly enabled some low-wage business strategies (see Cranford 1998). Nor has technology significantly affected frontline work. The bread and butter services of hotels—cleaning rooms, preparing and serving food and beverages—remain, at heart, labor-intensive processes.²

The real change in hospitality has been the increasing emphasis on cost cutting. On the ground, intensifying competition and performance pressures have resulted in organizational restructuring to cut costs and increase revenue flows. Industry analysts explain this effort to “trim the fat” as a response to the overbuilding and overindulgence of the 1980s, when hotels were built without regard to demand and amenities were offered without regard for price (Bernstein 1999). The prevailing dictum in the industry today is “do more with less” (Gillette 1995). Yet at the same time, there has also been a push to provide more and better

quality service (Marinko 1991). This obvious tension is rarely solved successfully. At present, most hotels seem to be focusing on cutting costs first and improving service quality second.

As a result of the drive to reduce costs, the hotel industry has undergone many of the negative trends in job quality and workplace reorganization that have been documented in other service industries: stagnant wages, increased workloads, growing use of subcontracting and outsourcing, lack of voice, and so forth. These trends have been borne largely by frontline workers in the housekeeping and food and beverage departments, in jobs that require at most a high school degree and that have few characteristics, such as “skills,” that can yield leverage in negotiating over job quality and the reorganization of the workplace. Have unions been able mitigate the effect of firm restructuring on workers, and if so, under what conditions?

WHAT UNIONS DO FOR WORKERS IN THE HOTEL INDUSTRY

Hospitality offers a perfect industry for studying the potential of unions in the service sector.³ Mirroring the national declines, coverage in the hotel industry has fallen substantially over the last two decades, though at 12 percent it still exceeds the national private sector rate of less than 10 percent. Metropolitan areas in particular have relatively high unionization rates; in 2000, metro-area hotel union membership was 13.8 percent (see Table 6.2) and, in a number of large business and tourist destinations, unionization rates can exceed 50 percent. Yet in other comparable cities, only a small handful of hotels are organized. As described at the outset, we explicitly captured this variation in our research design, studying both union and nonunion hotels, in both high- and low-density cities.⁴

The question, then, is whether unions have been able to mediate the form that hotel restructuring has taken, under which conditions, and along which dimensions. As summarized in Table 6.3, we focus on the following key aspects of industry restructuring: wages, work intensity, hours and scheduling, subcontracting, and career ladders. We examine each in turn and analyze the role that unions have played in negotiat-

**Table 6.2 Unions and Wages in the Hotel Industry,
U.S. Metropolitan Areas**

	1983	1989	1995	2000
Percent union members	14.5	15.0	14.8	13.80
All workers				
Union median hourly wage (\$)	8.87	9.73	9.04	10.50
Nonunion median hourly wage (\$)	7.79	7.65	7.91	9.00
Union/nonunion wage ratio	1.14	1.27	1.14	1.17
Nonmanagerial workers only				
Union median hourly wage (\$)	8.82	9.73	9.04	10.37
Nonunion median hourly wage (\$)	7.09	7.30	7.35	8.00
Union/nonunion wage ratio	1.24	1.33	1.23	1.30

NOTE: All wages in 2000 dollars.

SOURCE: Authors' analysis of Current Population Survey Outgoing Rotation Group files.

ing the issue in the context of high and low union density, as well as union and nonunion hotels. Taken altogether, we find that unions have been able to make significant progress on some but not all fronts, and that very often their success is a function of hotel union density in the region.

Wages

First and foremost, unions matter in this industry because they influence wages. In 2000, overall unionized hotel workers in metropolitan areas earned 17 percent more per hour than nonunionized workers (see Table 6.2). If we narrow the scope to frontline workers (the focus of our study), the union wage effect grows even larger, to 30 percent. For full-time, year-round workers, the union wage advantage provides more than \$4,900 dollars of annual income: at \$10.37 per hour, full-time union hotel workers earn \$21,570, while their nonunion counterparts earning \$8.00 bring in just \$16,640 per year. It is noteworthy that the union's wage effect is strongest for the lowest-paid occupations. Janitors and food preparers stand to gain the most from representation, with a national union wage premium of 39.5 percent and 36.0 percent in 2000, respectively. For bartenders and baggage porters, who earn significantly more, the premium was 19.1 and 19.4 percent, respectively (Hirsch and Macpherson 2001).

Table 6.3 The Effect of Unions on Firm Restructuring in Eight Case Study Hotels

Dimension of restructuring	Union effect?	Degree of effect	Relevant conditions
Wages	Yes	Within markets, union wages higher by \$0.25 to \$1.70 per hour.	Union density matters more than union presence—high-density wages \$3.00 higher than low-density wages.
Work intensity	Some	Work intensity is at the forefront of labor-management relations. Some union hotels have lower workloads (as measured by room quotas). Some hotels make sure that workers get paid for the added work (in the case of cross-training).	Strongest effects are seen in high-density cities, but not always apparent even there.
Hours and scheduling	Some	Hours and scheduling are at the forefront of labor-management relations. Successful protection of full-time jobs seen in some cities.	Strongest effects are seen in high-density cities. Union attention and priority to this area critical.
Subcontracting	Some, but weak	In some cities, subcontracting of restaurants has been resisted and/or effects on workers have been mitigated through negotiations. Most other forms of outsourcing are unchallenged.	Strongest effects are seen in high-density cities, especially where unions are making this a priority.
Career ladders	Little	Not relevant.	Only in germination stage where density is high.

Among our case study hotels, union wages were higher than non-union wages, but just slightly so (the premium within any one city ranged from 25 cents per hour to \$1.70). Far more important was union density. As a vice president of hotel operations for a major hotel observed, “In a union town, you pay if you’re nonunion. In a nonunion town, you pay if you’re union.” The highest-paying hotels in our study, whether unionized or not, were located in high-density cities. In these hotels, housekeepers start at well over \$10.00 per hour (and in one city, both union and nonunion hotels pay over \$13.00). By contrast, the worst-paying hotels in our study were located in a low-density city, where housekeeping wages started between \$6.00 and \$7.00 per hour, regardless of whether the hotel was unionized or not.⁵ Our case study finding on the important wage effect of union density also echoes Waddoup’s (1999) research on the effects of union density on Las Vegas nonunion wages in hotels, and more representative studies across industries (Belman and Voos 1993; Neumark and Wachter 1995).

That unions matter for wages may seem a mundane point. But in this low-wage, heavily immigrant service industry, it is clear that many workers still see this as the principal role and benefit of the union. Union leaders themselves consistently pointed to higher wages as their key contribution to the workforce, and they were consistently cited as a top priority in future contract negotiations. In fact, one union leader pointed out that the importance of wage demands in bargaining is increased by the diversity of hotel union membership: only the housekeepers (generally one-half or less of total union membership) care about room quotas, while only food and beverage workers care about restaurant subcontracting, but all workers can rally around wage increases. As a result, for both unions and their members, higher wages remain the central benefit and priority of the union.⁶

Work Intensity

Since restructuring has often resulted in increased workloads for many frontline hotel workers, the issue has become a critical focal point for both unions and their workers. For example, housekeepers have witnessed a bewildering increase in amenities in recent years, from in-room coffee pots to the ever more elaborate bedding and pillow schemes. We found that workers in union hotels had a much higher

sense of awareness about increasing workloads and their rights in this process. Most union workers we interviewed could automatically recite the contract rules on workload, and could remember precisely when certain amenities were added and how conflicts over their addition were resolved. This sense of history and awareness was clearly less present at nonunion hotels.

However, in the end, it is not clear the extent to which unions and/or union density have been able to stop the speed-up of work. For example, all of the hotels we studied required between 14 and 17 rooms per housekeeper per day. Still, 3 rooms a day can make a big difference, and it is no coincidence that the low quota (14 rooms) was posted by a union hotel in a high-density city, and the high quota (17 rooms) was posted by a nonunion hotel in a low-density city. But all the other hotels in our study required 16 rooms per day.

Similarly, the main work intensity issue in kitchens is cross-training, and unions have generally not been able to staunch the inroads of this practice. However, they have been able to ensure that workers get compensated fairly when assigned to another job (that is, get paid a higher rate when working a higher level job), which is often not the case in nonunion hotel kitchens. For example, one worker at a nonunion hotel expressed intense frustration that he, classified as a basic cook, is often required to do the same work as an advanced cook but is paid \$4 less an hour.

Unions have had the most success in bringing issues of workload to the forefront of labor-management relations, ensuring that speed-up is at least negotiated and duly compensated. In a few cases (all in high-density cities), unions have successfully forestalled attempts to increase workload altogether. There are also signs that this issue will gain priority in the future: several hotel locals we interviewed have begun to conduct their own time studies of different housekeeping and food-prep tasks in order to prepare stronger arguments against workload increases.

Hours and Scheduling

For both workers and managers in our hotels, the issues of hours, scheduling, and staffing level are all closely intertwined. A predominant image of the past is that hotels kept staff around even in slack times, assigning busy work and deep cleaning. But as firms have pushed to

cut costs and increase productivity, staffs are kept leaner to begin with, and workers who may have once waited idle during slow times are now sent home without pay. At the same time, firms are searching for ways to increase the efficiency of the staff that remain on site. It is not surprising, then, that scheduling and hours of work are central concerns of all workers in the industry, and ones in which unions have played a critical role.

In general, the scheduling strategy at union hotels has been to assign work hours, shifts, and stations on the basis of seniority. This traditional structure allows the most senior worker to take all the work she is interested in (up to 40 hours), and on down the seniority list until the necessary work for the week is filled. Obviously, this system secures full-time, year-round employment for the most senior workers. By contrast, nonunion hotels employ much looser systems for scheduling. Tenure matters in nonunion hotels, but managers report that they try to get their “best workers” the shifts they need and appreciate the flexibility that their own system allows. At these hotels, workers do not pay as much attention to the rules of shift, hour, and station assignment, as it is simply an area of management prerogative; although a number of workers we interviewed found fault with this system, often claiming favoritism, it had never occurred to them that it could be changed.

The union’s long history of negotiating over scheduling issues has also aided its fight against another recent trend in the hotel industry: the conversion of full-time jobs into part-time jobs. Recent contracts in cities with high union density have begun to shape the definition of “part-time” and the rules for employment of (as well as the numbers of) part-time workers. One contract, for example, required that everyone working two shifts or more a week would qualify for full-time benefits, to a large degree eliminating the advantages of converting full- into part-time jobs. In another city, the union contract contains explicit language about the percentage of the workforce that can be classified as full-time, part-time, and “on call.”

Subcontracting

Subcontracting and outsourcing are ubiquitous in the hotel industry, and unions have largely been unable to stop the trends, though in some instances they mitigate the effect of those trends on members. The

hardest subcontracting trend to fight has been the outsourcing of labor-intensive kitchen tasks, such as baking, cleaning and chopping produce, and making stocks and sauces. The purchasing of prepared foods has become such a fundamental business strategy in the industry that it has been almost impossible for unions to stop it. In the end, the economics of using preprepared food are simply too compelling, and because the outsourcing is usually done piecemeal, the union would have to fight over just one or two jobs at a time. However, when the numbers of jobs involved are bigger and the economic advantages are less clear—for example, subcontracting an entire laundry unit—unions have been able to focus their efforts and have had somewhat more success, slowing or limiting the process.

Additionally, unions in high-density cities have largely been able to resist the otherwise prevalent trend of subcontracting hotel restaurants.⁷ And sometimes, even in low-density cities, they have been able to negotiate the terms of the subcontracting. In one such instance, an interesting hybrid emerged: the hotel's restaurant was subcontracted but the staff remained employees of the hotel and members of the union. In another example, a union hotel wanted to reduce staff and operation hours of its upscale restaurant. Union leadership negotiated a transition process, where the number of restaurant staff decreased over time through attrition and reassignment. While restructuring was not stopped in these instances, from the perspective of workers, this type of "managed change" was a vast improvement over the way that subcontracting normally proceeds, most often with the dismissal of large numbers of workers.

Career Ladders

In theory, the dismal working conditions and wages described so far could be tempered by a strong system of internal promotion, so that entry-level workers quickly moved out of these bad jobs to good ones. But upward mobility in the hotel industry has always been, and remains today, severely circumscribed.

The large majority of workers enter hotels via the housekeeping or food and beverage departments, where mobility opportunities are quite slim. Entry-level workers comprised a full 93–96 percent of the housekeeping department's staff. Food and beverage departments are

not quite as heavily weighted toward the bottom but are also quite flat. In both divisions, frontline supervisors comprise only 1–5 percent of the staff, and senior managers only 1–3 percent. Moreover, while the job structure in the hotel industry has always been flat, in recent years there has been a trend toward eliminating many supervisory positions. For example, in seven of our eight hotels, the position of inspectress, a supervisory position, had been eliminated.

This grim lack of mobility opportunity, unfortunately, is characteristic of both union and nonunion hotels; there simply are not many career ladders in this industry, and the mere presence of a union does not create more middle-tier jobs. However, some hotel unions in high-density cities are beginning to focus on, and find ways of chipping away at, structural barriers to mobility. In one innovative program, for example, housekeepers are trained and employed as kitchen workers or servers during the winter season, when room occupancy is low, thus potentially opening up routes to promotion. However, this is in fact quite rare in the industry and is found only in several very high-density cities.

WHAT CAN WE LEARN FROM THE HOTEL EXAMPLE?

Given the pervasive eulogies for the American labor movement, it is important to reiterate several basic lessons. First, in some settings unions have turned bad service jobs into much better jobs, providing better wages and benefits and improving workers' understanding of the rules and power dynamics that affect their workplace. Second, union density matters, especially for establishing higher regional wage floors and improving other basic measures of job quality, such as workload. Third, unions can become a leading voice for immigrants, the fastest-growing constituency of low-wage workers.

In short, unions can play a substantial role in improving bad service jobs. Indeed, in the hotel industry, unions may stand as the single most effective institution for increasing the pay and quality of the jobs. Next we discuss factors that account for this success.

Density is Destiny

Like many service industries, hotels compete in local markets. In such situations, union density is absolutely critical for establishing worker-friendly wage, benefit, and workload norms. Where density is low, it is difficult if not impossible to move the few union hotels toward high wages by themselves. Nonunion hotels set the industry norm, and unions struggle to move much above those norms; the contracts they negotiate are often relatively weak. Where union density is high, a completely different dynamic emerges. Unions define the norm. Nonunion properties come close to (and sometimes even exceed) union contract wages in order to compete for workers and to convince their own staff that a union won't have much effect. As in other sectors where competition is local, high density in the hotel sector takes wages out of competition.

The most successful hotel union locals across the United States have focused relentlessly on gaining and maintaining high density in their regional markets. In fact, both of the low-density cities we studied had actually been high density in the 1970s; but as the cities expanded, industry growth decimated density and unions moved from the center of wage determination to the periphery. But only in the cities where the hotel union maintains high density in the market do those unions set work standards.

Moreover, as we saw above, high union density allows progress on fronts other than simply wages and benefits. Once they have captured significant market share, unions can begin to address issues such as workload, cross-training, subcontracting, and the reorganization of job titles. And thus emerges a reinforcing cycle: density grows, unions become more deeply engaged in the industry's workforce and economic development, which more thoroughly cements labor's role as a permanent actor at the table. In the best cases, the union and union properties become allied in the project of strengthening and unionizing the industry.

If density really is destiny, then low union representation in most cities and most sectors presents a substantial challenge. The observation should, however, support the idea of moving against multiple targets in a single region at once (a strategy Justice for Janitors among others has pursued), rather than diffuse "hot shop" approaches. Even within

regions, it argues for developing clear focus on the segments of an industry that can really deliver “density,” or the power to reshape the regional labor market. The point is that unions often measure success in membership, but securing the fruits of density requires more careful thinking about who the members and their employers are.

Smart Organizing Strategies

The only way to get density, of course, is to organize. But in the hotel industry, organizing today looks different than it did 30 years ago. To preserve their density and vitality, successful locals have developed innovative strategies for organizing and expansion. The first of these strategies—bargaining to organize—uses leverage provided by existing labor–management relationships to extend union representation to other properties in the corporate chain. Interestingly, this strategy derives power from the increasing concentration of ownership in the hotel industry (a trend often regarded as negative). In fact, some union leaders we interviewed actually expressed a preference for more concentrated ownership because it provides leverage for expanding the union.

A second innovative strategy has been the involvement of hotel unions in the politics of the development of new properties. In fact, hotel unions are getting involved in development decisions as aggressively as construction unions, and they are showing willingness to use labor’s political muscle to help promote organizing. In recent years, unions representing hotel workers have conditioned their political support for a specific development on the basis of guaranteed “card check” rules on organizing the property once it is running. From state federations, central labor councils, and a variety of internationals, the message is clear that union labor must not only build the property, but also work in it when it is complete. In many cities, getting such broad labor movement consensus and support remains difficult, but strong leadership in some cities has made this possible.

A third way that hotel unions, especially the Hotel Employees and Restaurant Employees International Union (HERE), have succeeded in organizing is through their efforts to connect in new ways with their increasingly immigrant members.⁸ One way has been through increasing work with community groups on issues outside the workplace that face the community. The most obvious example is HERE’s early leadership

in encouraging amnesty for Mexican workers. Another example is one of the union contracts we studied, which provides for a set number of paid days off for workers to deal with immigration status problems. But perhaps the best illustration of sustained community involvement is the Los Angeles Alliance for a New Economy, where HERE worked with a number of local groups in passing the city's living-wage law and a community-based development agreement.

Partnerships That Serve Labor and Management Alike

In several cities, successful hotel union locals have used their connections with multiple properties to bring together regional partnerships that take on the key industry problems of recruitment, retention, training, leadership, and communication. For example, the San Francisco Hotels Partnership Project was formed to provide job security and solid compensation to workers, while also allowing for increased competitiveness by the hotels. The Partnership achieves these ends through a "living contract," which establishes an unprecedented structure to facilitate labor-management collaboration. The Partnership provides training and support to labor-management problem solving teams. To date, those teams have developed solutions to work restructuring issues, increased training and skills for frontline workers, founded a pilot project to create career ladders in the industry, and built the communications and leadership skills of workers and managers at member properties.

In Las Vegas, the hotel union local has created the Culinary and Hospitality Academy (CHA) with a group of local hotel casinos. The academy provides skills training for all union workers, as well as classes in ESL, GED, and customer service skills. Since its inception, more than 16,000 workers have graduated from the academy and over 70 percent have been placed in jobs. The training is cost-effective and highly tailored to the industry. Many hotels in Las Vegas treat the training center as their main source of entry-level workers—even nonunion hotels hire the academy trainees. CHA has been able to secure this important role because it solves two critical problems facing the hotel and gaming industry in Las Vegas. First, it has solved severe recruitment and retention problems by providing a steady stream of workers to union hotels. Second, by successfully training recent immigrants and welfare leavers,

CHA has addressed the problems of lack of skills and work experience in the new workforce.

Hotel unions, in both high- and low-density cities, have begun to look to these partnership strategies as another part of the complex package that can make their organizing and member services effective. No union leader hopes that the partnership strategy alone could possibly be enough. However, the opportunity to play a positive role in training and work restructuring is appealing because strength in this area can be leveraged for power in more contentious discussions.

BARRIERS TO EXTENDING THE HOTEL MODEL

It is clear that some hotel union locals have significantly improved the quality of entry-level jobs in their industry. It is equally clear that such cases are the exception, not the rule. Can these model examples be usefully applied to the rest of the hotel industry as well as to other key service industries? To the extent that the successes described earlier are the result of a renewed focus on organizing and density as the driving engines of union power, the answer is yes. At the same time, there are several key barriers to extending the lessons described above to the rest of the service sector.

First, many service industries are distinguished by small firms and small units, unlike the core of the hotel industry, where large properties and large chains dominate. In big cities, organizing 20 major hotels can get you substantial density; organizing 20 restaurants is a drop in the bucket. In recognition of this problem, The Service Employees International Union (SEIU) got to critical density in LA's home health care market by forcing the public sector, which funded home health services, to admit to and act as the employer of record in the sector. So it is clear that there are some solutions to the problem; but the route to high density in many sectors remains mired with the problem of so many small units.

Second, workforce turnover is a substantial service sector problem and one that makes organizing notoriously difficult. While hotels complain about having 30 percent turnover, the turnover rates in retail, restaurants, and health care (specifically certified nursing assistants) of-

ten exceed 100 and even 200 percent. In these sectors, high turnover reduces the solidarity of staff, impedes the development of frontline union advocates, and makes getting to a vote, or predicting the result of that vote, difficult. Unions are challenged to find ways to break into the dynamic before they can even get the firm organized.

Third, hotel unions have focused on the high end of the market, where profit margins can run 20–40 percent and can therefore sustain wage increases. But in a number of key service industries, margins are much smaller. The margin problem is most acute in caregiving sectors. Consider child care, an industry with very low profit margins, where many businesses already commit more than 70 percent of gross revenues to wages, and where customers (parents) are unlikely to be able to afford higher costs. Or take health care, where the flow of funds for home health and nursing home work is constrained by the government, which pays for the services through Medicare and Medicaid. In both of these cases, the service being provided is qualitatively different from hotels: it is a high-cost public good, and resolving the chronic problems in job and care quality will ultimately require increased (perhaps even comprehensive) public funding and will not be solved by organizing alone.

These problems for union organizing in the service sector are often observed. But the fact that some union locals in hotels, health care, building services, and telecommunications have found a way around these problems should inspire confidence that innovative forms of organizing can be developed throughout the service sector. For example, public money is central to child care and health care, and quality care is clearly linked to the quality of jobs. Leveraging public money and public interest could potentially replicate SEIU's success in Los Angeles across the country. Large corporate chains are found not only in hotels but in other service industries as well, and are often the drivers of industry standards. But it is clear that one size of organizing won't fit all service industries and all regions. Unions will have to come up with a variety of strategies if they hope to get membership and density to levels that will allow them to influence the quality of jobs in the service sector.

CONCLUSION

There is clear potential to build a mutually beneficial relationship between service workers (in what are usually bad jobs) and the labor movement (which can improve those jobs). Under a regime of firm restructuring that is systematically undermining job quality at the front line, unions are one of the few institutions that actually make real contributions in terms of wages and work organization. It is also the case that unions have little choice in the matter: the U.S. labor movement is dead unless it aggressively pursues and succeeds in organizing bad service jobs. The good news is that there are plenty of jobs to work with, and that some strategies seem to be bearing fruit in terms of organizing success. A dismal legal and legislative climate notwithstanding, the ball is firmly in the organizing court.

Notes

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1. Specifically, hotels with unions representing the frontline workforce were identified as “union hotels.” In each of the four towns, the Hotel Employees and Restaurant Employees International Union (HERE) represented the workers at the union hotels.
2. The only place where technology appears to have had a substantial labor effect is in recent advances in the packaging, refrigeration, and delivery of precut foods (Baumann 1997). These new systems have enabled a rather pronounced shift in the hotel industry to buying prepared foods (e.g., diced onions, soup stock, sliced meats), rather than making them from scratch in house. This shift has clearly moved frontline jobs to subcontractors.
3. This section draws heavily on Bernhardt, Dresser, and Hatton (2003, pp. 57–63).
4. In each city, we worked with union leadership to identify geographic boundaries, the numbers of workers, hotels, and rooms in each market segment, and finally,

the union/nonunion breakdown on each count. We do not here present the exact density estimates (again to protect the anonymity of the cities and their hotels), but on all measures, two of the cities have high hotel union density and two have low hotel union density.

5. Authors' analysis of these data shows that wages do not simply reflect differences in the cost of living in these cities.
6. Furthermore, these higher wages may also indirectly benefit the hotels themselves by reducing turnover rates (which some industry insiders estimate costs the hotel \$5,000 per employee [see Worcester 1999]). As the president of a large hotel corporation observed: "Unions buy long-term commitment. Once they're in, [the employees] generally stick around."
7. Both of our unionized hotels in high-density cities had no subcontracted restaurants.
8. When we did this research, HERE was a distinct union. In July 2004, HERE and The Union of Needletrades, Textiles and Industrial Employees (UNITE) merged to form UNITE HERE.

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7

Dancing with the Smoke Monster

Employer Motivations for Negotiating Neutrality and Card Check Agreements

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Heads would spin on some of the old local managers who had spent years opposing the union. But there have been many conversions to the new philosophy. The horror of unionization wanes with the reality of it. It turns out to be a smoke monster, not a real monster.

—Manager describing internal reaction to the negotiation of a neutrality and card check agreement.

For decades the labor movement in the United States, along with many industrial relations and legal scholars, has argued that the union recognition procedures provided under national labor law do not sufficiently protect workers' rights to join, form, or assist unions. In particular, the requirement of an election, the procedures leading up to an election, and the timing of those procedures allow employers to undertake extensive antiunion campaigns that at best undermine worker free choice and at worst violate the law. This was not always so. Under section 9(c) of the original National Labor Relations Act (NLRA), the National Labor Relation Board (NLRB) was permitted to certify unions using "secret ballot elections or utiliz[ing] any other suitable method." Until a board policy change in 1939, the method most often used was the simple process of evaluating cards signed by workers indicating they wanted the union to represent them. If a majority of the workforce signed such cards, the board certified the union. The Taft-Hartley Act

took away the board's discretion as to the method used to verify majority status. However, employers may still recognize a union voluntarily based on cards.

Referencing this earlier experience in the United States, the use of similar procedures in several Canadian provinces (Thomason 1994; Thomason and Pozzebon 1998), and the chilling effect of legal and illegal management resistance in this country, some proposals for comprehensive labor law reform call for a return to card check recognition procedures (for the most recent discussion see Godard [2003]). In the absence of this or any other reform, unions have increasingly negotiated agreements directly with employers to use card check recognition procedures as well as to remain neutral on the subject of union organizing. In a recent study (Eaton and Kriesky 2001), we conclude that these types of agreements, particular those calling for card checks, substantially reduce management campaigning—including illegal tactics such as firing union supporters—and produce much greater rates of union success. For example, across organizing campaigns under all types of organizing agreements, we estimate a union win rate of 67.7 percent compared to an NLRB election win rate of 45.6 percent over roughly the same time period.¹ Thus, these agreements have the potential to enhance the exercise of workers' rights to collective bargaining and freedom of association.

This chapter serves as a follow-up to Eaton and Kriesky (2001). While the sources for that study were primarily interviews with union representatives and the review of contract language, this study focuses on management's experience with these agreements. In interviews with representatives of 34 employing organizations, we explore the reasons management has agreed to negotiate neutrality and card check agreements (N/CC), their impact on management campaigning, and reactions to N/CC from the employer's own management team and the broader management community. We use these interviews to shed light on two overarching questions. Do these agreements actually encourage greater management respect for workers' rights to freely decide whether or not they want union representation, or are employers who agree to N/CC softer in their opposition to unions to start with? To what extent is the source of managerial antiunionism economic and rational, as some of the literature suggested (Freeman and Kleiner 1990; Kleiner 2001), and

to what extent is it rooted in management values, ideology, and culture (Jacoby 1991) that deny workers' rights?

The chapter is organized as follows. We first provide a description of the sample of employers interviewed. Next we present a comprehensive discussion of the reasons respondents gave for negotiating these agreements. This discussion follows the logic of earlier studies of employer opposition to union organizing, in assuming employers make cost/benefit analyses in deciding whether or not to accept N/CC language. We follow with a section on the impact of these agreements on managerial campaigning. Next we look at reactions to the negotiation of these agreements from both the internal and external management communities. Finally, we conclude with an analysis of the broader meaning of these results for the nature of managerial antiunionism in the United States.

SAMPLE AND METHODS

The sample was drawn from the same companies that were in our original survey (Eaton and Kriesky 2001).² There was substantial attrition from our original list of about 130 agreements from various sources, including the merger or failure of companies and bad contact information.³ Elimination of these categories brought us down to 69 organizations. Of these, 10 refused outright, 20 refused passively by failing to reply to our repeated attempts to contact them, and 5 told us they either never had or no longer had an organizing agreement, leaving us with 34 interviews, some only partially done. This constitutes a response rate of about 50 percent.

Based on our previous research, the industries represented in this employer-based study correspond fairly closely to the industries in which these agreements have been concentrated (see Table 9.1). The bulk of the interviews (19) were conducted with representatives from steel, hotel and gaming, telecommunications, and auto assembly and supply. Most respondents were high-level human resource or labor relations executives, often at the vice president level. In some cases, we talked instead to lower-level, facility-based labor relations managers. Most often, the level of the manager interviewed was the individual

Table 9.1 Number of Companies, by Industry, that Participated in the Study

	Number of companies
Steel/steel fab.	5
Hotel	4
Gaming	3
Telecommunications services	3
Auto assembly	2
Auto parts	2
Health care	2
Nonprofit social services	2
Telecomm. equipment	1
Food service	1
Construction/agricultural equipment	1
Nursing home	1
Aluminum	1
Mining	1
Apparel	1
Forest products	1
Electrical	1
Agriculture	1
Retail (groceries)	1
Total	34

whose scope of responsibility included oversight or implementation of the organizing agreements within the organization. Interviews were conducted over the phone and lasted from 30 to 90 minutes.

Table 9.2 presents data regarding unionization in the sample organizations. Research in the 1980s provided evidence that labor relations strategy, specifically union avoidance, was explained in part by union density: high density employers were less likely to pursue active avoidance strategies (Cooke and Meyer 1990; Kochan, Katz, and McKersie 1986, p. 60). Thus, we would expect companies that have agreed to neutrality and card check to also have high union density. Indeed, our sample tilts toward heavily unionized companies dominated by a single union perceived to have a great deal of bargaining power. Still, almost a quarter of the companies have low union density (0–25 percent), indicating that unions are pursuing neutrality and card check as both a

Table 9.2 Unionization Levels in the Sample Organizations

	Number	Percent of total
Percentage unionized ^a		
0–25	7.0	21.9
26–50	7.0	21.9
51–75	6.0	18.8
76–100	12.0	37.5
Total	32.0	
Average	57.0	
Percent unionized by largest union		
0–25	2.0	6.9
26–50	5.0	17.2
51–75	4.0	13.8
76–100	18.0	62.1
Total	29.0	
Average	73.7	
Trend in unionization at time agreement signed		
Growing	3.0	10.7
Stable	19.0	67.9
Declining	6.0	21.4
Total	28.0	
Dominant union has a great deal of bargaining power		
Strongly agree or agree	22.0	68.8
Neutral	7.0	21.9
Strongly disagree or disagree	3.0	9.4

^aThis is the current percentage. But in most cases, the agreements have not led to major increases in density.

growth strategy (expanding into new employers and markets) and a defensive strategy (maintaining representation among traditionally organized employers and businesses).

Some observers have argued that it is important to look beyond general density to concentration of union power, most often indicated by centralization of representation by a single union.⁴ Table 9.2 also includes data on the percentage of unionized workers represented by the single largest union. It is interesting to note that in the 14 cases where overall density is 50 percent or below, there is still a single dominant

union in all but two, suggesting that concentration of union representation may be a more important factor in winning organizing agreements than overall density. At the same time, the very low-density cases are also those with the weakest and most ineffective language.

Given union motivations for negotiating these agreements, we found it surprising (and not quite credible) that the majority of our respondents claimed that unionization rates had been stable in their organizations at the time they first agreed to N/CC. Less surprising is the final result in Table 9.2: that employers consider the unions, to whom they have had to concede organizing agreements, to have a great deal of bargaining power. Interestingly, the most frequently mentioned sources of that bargaining power were the density of the union *within the firm or organization* and the union's political connections.

NEGOTIATIONS

It is difficult to quantify the motivations for bargaining organizing agreements. Relying on existing industrial relations literature, we use a cost/benefit framework to organize the issues employers reported considering in deciding whether to agree to some form of organizing language.⁵ We extend the cost side of the discussion by using a conventional framework for analyzing bargaining power, which weighs the projected cost of not agreeing to an opponent's proposal against the projected cost of agreeing to that proposal. Although in each case, the parties weigh their particular cost and benefit estimates in deciding whether to enter into a neutrality agreement, below we summarize the sample as a whole on the benefits and two types of costs. The specific costs and benefits reported are listed in Table 9.3.

Benefits of Agreeing

The majority of respondents emphasized that in negotiating organizing agreements, they were attempting to avoid costs. However, a significant minority emphasized instead the benefits of agreeing. Most of the benefits anticipated focus on the value that unions can add to the

Table 9.3 Employer Objectives in Negotiating Organizing Agreements

Benefits of agreeing

- Union willing to add value to the business
 - Labor–management partnership
 - Assistance in increased funding for nonprofits
 - Assistance in obtaining qualified, skilled labor
 - Assistance in attracting business/customers
- Maintenance of good relations with workforce
- Ability to shape organizing campaigns

Costs of not agreeing

- Work stoppage (18)
- Loss of specific, needed concessions
- Organizational picketing
- Loss of a client or project

Costs of agreeing

- None (6)
 - Low (7)
 - Some (20)
 - Increased wages and benefits (13)
 - Decreased attractiveness as takeover/merger target
 - Loss of flexibility
 - Loss of employee rights
 - Loss of cooperative, nontraditional work culture
-

business or to a particular business strategy. There were several different specific examples of unions adding value.

In two cases, respondents emphasized union–management partnership as their dominant strategic goal in negotiating organizing agreements. In both, these employers had decided to pursue business strategies that were tied to embracing a strong role for unions and employees in management decision making. To establish such significant partnering required recognizing the union’s legitimate interest in representing workers’ rights in the workplace and in their own institutional survival and growth. Other employers engaged in partnerships, particularly those involving the United Steelworkers of America, also talked about partnership, formal or informal, and union willingness to negotiate more flexible agreements. This includes the recognition in new bargaining

agreements that new business lines might not be able to support the same wage levels or work rules as in the traditional businesses. Specific examples of this union response are detailed in the section on costs of agreeing.

One company, an auto parts supplier, observed that the UAW had become a force in sourcing decisions for the Big Three and was advocating for increasing business with unionized suppliers. Thus, welcoming unionization could secure or expand customers. A group of Massachusetts residential care facilities were motivated to reach organizing agreements by the potential for the union involved, SEIU, to extract increased funding from the legislature: “Anybody who could help bring more money, better working conditions, more respect, we were willing to accommodate their needs.”⁶ These employers also hoped to be able to establish a constructive, nontraditional relationship with the union once organized. In yet another set of cases, the value added by the union was in supplying qualified, skilled labor. Representatives of casinos in one of the large, unionized markets reported (as did the union representatives in the earlier study) that when the casinos originally opened, they were desperate for skilled labor. The unions (Hotel Employees and Restaurant Employees International Union and the building trades) could supply that labor. Further, the unions continue to add value to the industry in this way today, which is one reason the language endures.

In some interviews, managers reported that the give and take of bargaining over organizing language provided an opportunity to reach a specific, high priority management bargaining goal in negotiations with currently organized workplaces. The specific issues mentioned in these cases included restrictions on subcontracting, the length of the contract, wage reductions, and other concessions to cope with bankruptcy.

Beyond adding value to the business, employers realized additional benefits through the bargaining over the details of the organizing agreement itself. This bargaining offers management the opportunity to shape how organizing is conducted. This was especially important to employers who believed organizing was going to take place whether or not there was language addressing it. As one employer put it:

Other companies may be dealing with unions that aren’t factual and therefore feel the need to be able to respond factually. But this kind of problem can be handled in the language. For instance, if you think home visits are coercive, use the neutrality agreement to

ban them. Employers need to realize they can shape the campaign through the give and take in negotiating these agreements.

Costs of Not Agreeing

As described earlier, our analysis of costs incorporates two elements relevant to the bargaining environment in which neutrality and card check is established. These are the costs of not agreeing to the language and the cost of agreeing. They are evaluated in turn below. Despite the fact that most aspects of neutrality and card check have been typically understood to be permissive subjects of bargaining and the strike has been widely viewed as waning in power, the principal projected cost of not agreeing for more than half (18) of our respondents was an anticipated work stoppage. Though in most cases, the threat sufficed. One large and well-known telecommunications employer took and lost a strike widely reported to have hinged in substantial part on this issue.⁷

Respondents cited other projected costs of not agreeing aside from work stoppages.⁸ In one case, a partially organized chain of stores agreed to neutrality language to avoid picketing that would potentially damage their business. In other cases, the union used action(s) of a third party to impose (or threaten to impose) costs on the employer. These third parties included a primary employer's clients, municipalities providing financial support to a business, union pension funds (a potential source of investment), or religious and other community groups. These third parties imposed costs by either withholding investment dollars or withholding business as customers.

Campaigns involving multiple pressure points to move employers to agree to neutrality and card check are not always successful. Indeed, one company reported that it always carefully weighs the business case for opening an operation in a particular market against union or investor pressure when responding to a demand for N/CC. Another respondent successfully resisted union pressures involving "politicians, negative PR, and sit-ins at referral agencies."⁹ The evidence presented here makes clear that, contrary allegations notwithstanding, employers do have choices to make about organizing agreements, and that the decision to agree to organizing language is often, at root, a business decision, with employer concerns about workers' rights playing at best, a secondary role.¹⁰

Costs of Agreeing

Twenty-eight respondents supplied information about their perceived costs of agreeing to some type of organizing language. Of these, a significant majority (20) projected some additional costs, although about a third of these (7) thought the costs would be low.

The respondents reporting either no costs (6) or low costs (7) can be lumped together for analytical purposes. A significant portion of this group had low-cost expectations because they expected either no, or a very low level of, organizing. For some, most covered workers were already organized and the company was either not planning to expand or was actually downsizing. As one put it, "If we get to the point of opening new facilities, that will mean we have succeeded and that will be great." Others simply expected little successful organizing, in some cases because they had negotiated weak language. Others expected costs to be low because of their good relationship with the union and the union's flexibility. One manufacturer in this category is involved in an extensive union-management partnership, including a joint effort to redesign work and provide a more rapid response time to customers, therefore presumably increasing market share. Thus, any increases in wages and benefits would be offset by reduced production costs and increased sales. Several respondents in this category indicated that the union was willing to reach "an innovative, lower-cost agreement" in new facilities. One final employer in this group expected the union to organize successfully and labor costs to increase. However, they also expected that many, if not most or even all, of their competitors would also be organized so that there would be little competitive consequence.¹¹

The largest single group (13) stated that they did expect successful organizing and therefore increased labor costs. A few companies within this group indicated that, as stated earlier, because the union had shown a willingness to negotiate "nontraditional," flexible labor contracts, at least some of the wage and benefit increases were offset by looser work rules. Two respondents identified costs related to mergers or takeovers. A couple of respondents reported that the neutrality and card check agreement made the company a less attractive merger or takeover target.

It is important to note that many respondents weighed differently the costs of including “core” or “strategic” occupations within the N/CC agreement from those with newer, more competitive business lines. In these cases, the potential costs of agreeing were seen as outweighing the costs of not agreeing.¹² Respondents reported that they either would resist or had actually resisted coverage of these employees. These include, in particular, salaried workforces, especially in manufacturing companies, and gaming occupations (dealers, slot attendants, etc.) in gaming establishments. As one employer put it, “Neutrality and card check covers traditional union occupations, not [occupations labeled as management]. [We] are definitely not neutral about whether these should be union. This seems to be an irritant to the union, but they are not pushing hard to change it.”

For other employers, the issue is the competitiveness of particular lines of business. For instance, large, diversifying manufacturing companies need to protect new lines of business from what they perceive to be noncompetitive labor costs and work rules: “[Union] wages would kill [our noncore/nontraditional] businesses.” But, as discussed earlier, other companies have successfully sought the union’s recognition that some lines of business need sheltering and have thus been able to agree to more comprehensive coverage: “The union has been willing to reach nontraditional types of contracts . . . If you’re honest, you assume unionization is going to make for higher costs. But this doesn’t necessarily have to be true. [Nontraditional business unit] managers are happy with their contracts.”

Although most respondents defined costs in financial and economic terms, two suggested difficult-to-quantify costs. One hospitality employer suggested a cost was in “giving up employee rights [under federal labor law].” A nonprofit human service agency feared the loss of a cooperative, nontraditional work culture.

In sum, then, although some employers did see the potential for higher labor costs resulting from these agreements, that view was certainly not universal. Some saw these costs offset by some benefit. Others simply found that these costs of agreeing were less than the costs of not agreeing. Finally, with rare exceptions, management did not perceive these agreements as jeopardizing workers’ rights. In the cases in which respondents implied that these rights were an issue, it was re-

flected in concern for the crafting and enforcement of language, rather than whether or not language would exist.

Indeed, although our respondents emphasized the cost/benefit reasoning for their decision, several respondents also mentioned what might be called a consistency argument for neutrality. Many employers, particularly those working in partnership with a union, found it difficult to argue with this logic: “[The union] said, ‘How can you talk out of both sides of your mouth at once?’ The [nonunion property] is literally attached by a tunnel—joined at the hip with a union property and it just didn’t make sense.” In short, some managers agreed to neutrality or card check to be consistent in their approach to their relationship with the union.

IMPACT ON MANAGEMENT’S BEHAVIOR IN CAMPAIGNS

We looked at the impact of N/CC agreements on employers in two ways. We asked about 1) management campaign behavior before and after the agreement, and 2) management behavior in organizing campaigns covered by the agreement versus campaigns among work groups not covered by the agreement. Overall, employers found these questions odd and were surprised that anyone would think that the agreements don’t make a difference.¹³

Twenty-six respondents answered the question about whether there had been organizing before the agreement. Only 4 said there had not been. Of the 22 indicating there had been organizing, 17 (81 percent) said that they responded differently after the agreement than before. Some employers just indicated that they used to respond “traditionally” and now do not. Others were more specific. One employer said, “Prior to the organizing agreement, we had a design called ‘Fully Informed Employee Choice.’ We presented pros and cons of unionization. Managers were free to express opinions either way. Now—full neutrality.” Another responded, “Now we’re limited. Before we showed videotapes, had meetings, hired consultants. Now we do none of these.”

Several employers indicated that they did use a softer approach to organizing prior to the agreement, but that that approach had been further toned down by the organizing agreement. One employer respond-

ed, “We never ran a Southern-style campaign, with real mud-slinging, ‘[The] Union’s going to come into town in Cadillacs, steal your money and your women’ kind of campaign . . . After [the agreement] we are much more careful.” Three respondents indicated that their response to organizing had not changed.¹⁴

Twenty-nine respondents answered our question about coverage of the agreement, all but one indicating that there are union-eligible employees who are not covered. Of these, only 17 answered the question about whether or not the response to organizing is different for covered employees than noncovered. (Many could not answer this question because there had been no organizing among noncovered employees.) Here again, the majority (88 percent) of those answering indicated that they respond to organizing by covered employees differently than noncovered:

[For noncovered employees, we run t]raditional campaigns—limited access to associates, we communicate much more: the company is the point of information. In [neutrality/card check] campaigns, we give the union access, allow the union to be the visible point of information. The company remains in the shadows.

[For noncovered employees, we run] very typical [campaigns]—6 weeks of communications so that employees can make informed decisions. We hire consultants, run full tilt campaigns, the works.

However, some indicated that there is a kind of spill-over from the organizing agreement even to those not covered and that the campaigns they ran were not as intense as they would otherwise have been:

The [union] made a play for salaried workers in one plant. We were a little more aggressive, but still high road. There was a difference in what we could say . . . with this group, we could say we preferred to remain nonunion.

While we cannot conclude from these results that these companies were not “soft” campaigners to start with, we can say that the agreement has changed, specifically softened or even eliminated their campaign behavior. Some respondents clearly viewed themselves as soft campaigners, but it is not clear that unions perceive these same employers as “soft” in their tactics.

An additional indicator of the impact on management behavior is management’s desire to change the language. The respondents split al-

most evenly on this question. Twelve individuals thought their language either worked well or had been in place so long that it would cause more trouble to change than to retain.

Among the 13 managers who indicated that they wanted to change the language, a second notable division occurred. About half of this group suggested specific revisions, including more employer latitude to talk to employees and more controls on the union's behavior, especially home visits. The other (approximately) half of this group stated clearly that, although it was not currently possible, they would like to be rid of the neutrality or card check language.

This result is further supported by data recorded on a more hypothetical question. Near the end of the survey, we asked participants, "Recognizing that you might prefer to pursue both options . . . if your company was forced to choose, would it prefer to keep as much of the company nonunion as possible, or build a cooperative relationship with existing unions?" Fifty-five percent answering the question indicated that preserving nonunion status where possible was preferable. This level of resistance is remarkable.

REACTIONS IN THE MANAGEMENT COMMUNITY

Initial Internal Management Reaction

It was not surprising that a strong majority (75 percent) of the respondents answering these questions described strong opposition within the managerial hierarchy. Some respondents talked about general dissatisfaction within management ranks, citing no specific pockets of opposition:

But most managers think [neutrality and card check] is foolish. They are still thinking in the old model—that the union is an obstacle rather than in the new model where the unions can help them manage and meet their goals.

The majority were opposed but as long as the CEO was for it, no one was going to say anything.

In a handful of cases, virtually everyone appeared to oppose the language:

We were pariahs—we'd failed. Nobody thought it was worthwhile. There were no supporters within management.

But in many cases, particular management types stood out in their opposition. The largest single group mentioned was managers of newly developed and/or nonunion businesses within larger diversified organizations. In some cases, these managers were used to operating in largely or entirely nonunion companies that had been purchased or merged into more unionized companies:

There are deep cultural and philosophical differences. [The merged company] was largely nonunion and managers from that world don't understand.

Some junior department heads—say, 25 percent—couldn't accept it. They came from down the street [in nonunion businesses] and just didn't understand the give and take in the union environment and why this was the right thing to do. They were philosophically opposed.

Less commonly mentioned were particular functional groups within management. Some respondents specifically mentioned that their lawyers, either internal or external counsel, were opposed to language that the company was willing to accept, a phenomenon that raises questions about the role of lawyers in labor relations strategy:

The lawyers were outraged—said it was stupid.

Management Compliance

In our earlier study (Eaton and Kriesky 2001), union representatives reported that many of the problems relating to employer compliance with neutrality and card check agreements occurred in large, centralized bargaining relationships. In these relationships, unions often complained that lower-level managers, for a variety of reasons, did not adhere to the organizing agreement. Thus, we asked our management respondents about whether they “encountered obstacles in getting local managers to comply,” and if so, what they did about it.

The sample was evenly divided on this question, with 11 reporting problems and 12 reporting no problems or only minor ones.¹⁵ Some of

those reporting problems have found some lower-level managers to be a major headache:

I've had some knock-down, drag-out fights. 'What do you mean I can't do x!?!' . . . They also fight over control [of the campaign].

As with the initial reactions described above, compliance was most difficult for managers habituated to a nonunion environment:

It's been very, very tedious in one area that has been entirely non-union.

Regardless of the compliance problems encountered, the means of ensuring ultimate compliance were similar. Some managers focus on education to secure compliance:

[We have] a certain amount of complaints with noncompliance with the design. [We respond] with education—so the problems are more from misunderstanding than real resistance. Education is the best remedy.

Local managers want advice on how to do it. They don't want to screw up. They look to HR and legal to explain it, define the meaning. They're not happy, but they want to do it right.

At times, pointed messages about the organizational consequences have been necessary. Some companies have resorted to either the threat of or actual individual consequences in the form of discipline:¹⁶

The owners were very serious and managers were under threat of losing their jobs . . . [T]he company hired private investigators to investigate [union] charges and actually transferred or put managers on leave.

Some thought they could say publicly, 'Yes sir!' but continue opposition . . . People got in trouble. The message was clear.

Maybe 25 percent of lower-level managers couldn't ever accept [it], couldn't catch on and had to leave.

There would not be [obstacles from local managers], because we take this very, very seriously. No ifs, ands, or buts . . . For local managers, the stakes are very high if they don't comply.

Freeman and Kleiner (1990) present evidence that union opposition is rational at the level of the individual manager—managerial careers often suffer following a successful union organizing drive. As the above

comments suggest, the environment in some organizations had changed with neutrality/card check such that managerial careers will suffer from failure to abide by the organizing agreement. This appears to be a crucial aspect of the implementation of these agreements from the perspective of union activists who argue that workers are afraid to support unionization because of management reprisals for doing so.

Reactions in External Management Community

To determine how employers willing to engage in neutrality or card check were viewed by their business colleagues, we asked: “To the best of your knowledge, has the company been criticized within the management community for signing this agreement?” If necessary, we prompted respondents to think in terms of their particular industry or geographical region. Although a handful couldn’t answer the question, most did answer. Among those who answered, a majority (about 60 percent) said they had not been criticized. Most of these respondents came either from industries like steel or telecommunications, where some form of organizing agreement has become common practice, or where operations are located in metropolitan areas that are heavily unionized. As one put it, “This is standard practice in the industry.”

Still, in these industries, the employers who had agreed to the language most favorable to the union came under fire:

Yes, within [our] industry. I hear that [the union] throws [our agreement] in other company’s faces regularly. So, I do hear [criticism] in the [industry] labor relations community.

When there was criticism, it is typically from within the industry:

Yes, the [industry] community feels very threatened. They don’t necessarily agree [with our strategy]. Traditionalists are saying, ‘Oh, my God. What would happen to me, to [the industry] if we lose control?’

To some extent, within [the] industry, but we get criticized for a lot of stuff . . . In certain cities, if the facility becomes union, similar facilities locally would criticize the local management.

Indicative of the strong antiunion sentiments permeating employer circles across the country, some respondents experienced criticism in either industry-based or locally based social relationships:

I'd walk into a room and get the cold shoulder.

I've been called a Communist.

The local management will hear it from other managers at local business group meetings.

At the local level, within local business communities, we have definitely been criticized, called a cancer. We have 'abandoned' everyone else. This doesn't come from within the . . . industry. It is local.

Some respondents suggested the pressure is especially intense in the South:

Yes, particularly within some communities. For instance, with one acquisition in South Carolina, [we heard, 'You] are welcome but please don't bring the union along with you.'

This is the South and there have been a lot of threats of customers to pull out [business] if the union wins, which is a real concern.

ANALYSIS AND CONCLUSIONS

There is clear evidence from these interviews that most organizing agreements make a difference in employer campaign behavior. Employers themselves report that their campaign behavior changes in the face of these agreements, even in some cases in the face of weak agreements. Although it remains possible that these employers were not the most aggressive antiunion campaigners to start with, these agreements are still having an effect on their conduct. As such, these interviews provide further evidence that these agreements serve to enhance workers rights to free choice and to engage in collective bargaining.

The interviews also make clear, however, that employers remain extremely reluctant to engage in these agreements. This finding is clearly consistent with the emerging legislative efforts by the HR Policy Association (formerly the Labor Policy Association) and others to prohibit card check recognition (see Eaton and Kriesky 2003). Further, these agreements represent a privatization of rights and rights enforcement. The enhancement of rights through these agreements comes about

through union bargaining power. The use of power to enforce the right to unionization and collective bargaining is precisely what the Wagner Act sought to avoid. Thus, while N/CC agreements expand worker rights, they cannot ultimately substitute for comprehensive labor law reform.

Beyond these observations, the interviews also tell us something about employer antiunionism, perhaps the single most important factor undermining workers rights to collective action in the United States. We see considerable evidence for the Freeman and Kleiner (1990) view that the employer decision to oppose unionization (or in this case, *not* to oppose it) is rooted in economic rationality. In their terms, union campaigns to win organizing language have focused both on increasing the cost of opposition and, at least in several cases, decreasing the cost of unionization, the costs involved with organizing itself, or other costs. Further, employers clearly had their eyes on their competitors when deciding what to do about N/CC; employers in industries where the negotiation of organizing agreements has become commonplace were less concerned about the consequences and reported less of a negative reaction.

There is evidence for motivations beyond economic rationality, however. In particular, the strong opposition to the extension of N/CC to and unionization of salaried and other strategically located occupational groups appears to result from a desire to maintain managerial control. Of course, most respondents recognized that a significant source of union bargaining power is the union's density within the firm. Many further worried that agreeing to N/CC would increase the union's density. This increase in union power and control could ultimately translate into higher costs as well.

Finally, we close by noting that there are also indicators of the irrational or cultural/ideological component of the decision as well (Jacoby 1991), revealed through our interview process. For instance, there is evidence that some managers cling to their antiunionism past the point when it is rational for their career with a particular employer. Further, there is often a strong negative reaction in the external management community and among external counsel. While Freeman and Kleiner argue that it is economic rationality that sends employers to antiunion consultants and law firms, it appears to us that those consultants and law firms may themselves not always be acting in the employer's eco-

monic interest—recommending opposition to unionization even when the employer has concluded that there are sound business reasons not to do so. This suggests that further research into the balance between rational economic choices and power relations and ideology is in order to fully understand the decision-making process about union opposition in general and neutrality and card check agreements in particular.

Notes

1. See Eaton and Kriesky (2001) for a full explanation of the comparability of these statistics.
2. That original sample was assembled from a variety of sources. We developed the initial list through a short survey sent to representatives of all U.S. unions with over 100,000 members; the survey asked respondents about the types of organizing agreements they had negotiated. We added to this group agreements identified by a review of legal and popular business publications. Finally, when we conducted more thorough interviews with union representatives about each agreement, we asked them to identify additional agreements that they were aware of, a process known as snowball sampling. For more information, see Eaton and Kriesky (2001).
3. We also did not attempt to contact employers for whom we had not been able to obtain contract language, who were very small, or who the union asked us not to contact. The sample size was further reduced by the merger of multiple agreements into a single entity. We were unable to find contact information for the handful of multiemployer associations in the original sample. We were able to do an interview with a representative from a multiemployer association that was not in the original database. That interview is not included in the results reported here.
4. Indeed, this argument is at the center of SEIU's current proposals for reorganizing and rationalizing the labor movement.
5. We emphasize that we recount here what managers told us about the bargaining process. While these reports are no doubt filtered through the lenses of the respondents, there are few, if any, major differences in the stories told by manager and union respondents about the same case. If anything, managers may have emphasized union bargaining power to a greater extent than the union representatives did.
6. For a published account of these negotiations, see Green (1997).
7. In another case, an employer was motivated by a union's prolonged and ultimately successful campaign to win neutrality and card check from a nonunion competitor: "We all saw [our competitor] go through a long, expensive battle to remain nonunion and then succumb."
8. Given that the dynamics of bargaining are complicated and multifaceted, some

of the strike threat cases referred to above also involved these other forms of pressure.

9. This case remains in the sample because the end result was extremely weak language about organizing—so weak that, until recently, the union chose not to attempt organizing at this employer. Unions who obtain very weak language do so for a variety of reasons, including saving face with members and observers and the possibility that the language will serve as a “foot in the door” and can later be improved upon.
10. For an example of the argument that management is so bullied that it abrogates its responsibility to protect workers’ rights, see Yager, Bartl, and LoBue (1998).
11. It is interesting to note that this mass organizing did not come to pass: “The owners had thought the whole industry would fall . . . Instead, there has been no other successful organizing.”
12. Sometimes explicit but often implicit in these discussions was the belief that the union was unwilling to push hard by imposing costs to cover nontraditional employee groups.
13. This reaction is consistent with anecdotal evidence that the same multinational employer will deal differently with unions in different countries, suggesting that at least part of the difference is conditioned by different regulatory regimes.
14. Two of these involved a neutrality-only agreement with a weak definition of neutrality and claim that the agreement has made no difference in how they respond to organizing. The other was a successor employer who indicated that their response thus far had been to deny coverage of the agreement but even if that failed they would still not change their negative approach.
15. This is the one substantial difference in the overlapping findings from the original union study and the employer study.
16. In one case, an organizing agreement that called for neutrality and non-NLRB elections provided for arbitration if the union alleged a pattern of noncompliance. If the union won the arbitration, the agreement called for card check as a blanket remedy. Our respondent told us that local managers were asked “if they really wanted to shoulder the responsibility for provoking a card check imposition on the whole corporation?” This was quite effective in modifying their behavior.

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Part 3

Legal Obstacles to Workers' Rights: Erected and Eliminated

8

Supreme Court Supervisory Status Decisions

The Impact on the Organizing of Nurses

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Registered nurses (RNs) have become attracted to union representation in recent years, and by 2003, 16.9 percent were union members (in contrast to 15.6 percent in 1985). Licensed practical nurses (LPNs) had a 10.8 percent unionization rate in that same year. Health care is clearly a major arena in which many professionals and technicians are now attempting to organize.¹ The National Labor Relations Act (NLRA) explicitly defines professionals as employees and grants them organizing and collective bargaining rights. The Supreme Court, however, has interpreted U.S. labor law in a way that puts barriers in the path of health care professionals who seek to join unions.²

Supervisory employees are excluded from coverage in the statute itself, and managerial employees have been excluded by judicial interpretation of the act. On the other hand, professionals often act in a supervisory or managerial capacity at times, insofar as they direct the work of less-skilled employees (e.g., nurses often direct nursing assistants). Thus, the NLRB and the courts have struggled with where to draw the line with regard to which professionals are employees whose rights to organize are protected by the law. In the last 10 years, the Supreme Court has reduced the number of health care professionals

who have such protection in two decisions, *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001) and *NLRB v. Health Care and Retirement Corp. of America*, 511 U.S. 571 (1994). Both decisions find certain groups of nurses to be supervisors and hence not employees with protected organizing rights. While these decisions were widely decried by the labor movement and clearly had an impact on the nurses in the two facilities concerned, their wider impact is less certain. In this chapter, we assess the effect of the more recent *Kentucky River* decision on organizing, with a primary focus on nurses and related health care professionals. We look at two different types of evidence: interviews with union organizers and attorneys and post-*Kentucky River* legal decisions.

THE DEFINITION OF SUPERVISORS ACCORDING TO THE NLRA AND THE SUPREME COURT

While the NLRA provides certain protections to workers (e.g., the right to join unions, the right to strike), those protections only apply to “employees,” as defined by Section 2(3) of the act. According to that section, “The term ‘employee’ shall include any employee . . . but shall not include . . . any individual employed as a supervisor (29 U.S.C. §152(3) (2001).” Thus, an individual employed as a “supervisor” as defined in section 2(11) is *not* considered an employee and is therefore *not* entitled to the act’s protections. However, professional employees are expressly included as employees in section 2(12).³

The terms *employee*, *supervisor*, and *professional employee* are defined by the text of the NLRA itself, but the Supreme Court has further defined their meanings in a number of decisions, two of which have been especially important in the field of health care. The first was *NLRB v. Health Care and Retirement Corp. of America*, a case that began with employer discipline of four LPNs in the context of an organizing drive. In response, the LPNs filed unfair labor practice charges with the NLRB.

Initially, the administrative law judge (ALJ) and the board had found that the nurses were not supervisors (*Health Care and Retirement Corp. of America*, 306 NLRB 63, 1992). In reaching that conclusion, the ALJ

and the board relied on “patient care analysis” (see Keller [1996] and Straight [1999] for a fuller discussion). To be considered a supervisor under section 2(11) of the act, a person has to exercise 1 of the 12 supervisory functions *in the interests of the employer*.⁴ Patient care analysis drew a distinction between “the interests of the employer” and “the interests of the patient.” According to patient care analysis, when a nurse utilized independent judgment in connection with his (her) professional judgment, (s)he would be considered a professional employee and not a supervisor. In applying that analysis, the ALJ held that the four LPNs were entitled to protection under the NLRA because their work did “not equate to ‘responsibly . . . directing’ the aides in the interest of the employer” and that “the nurses’ focus [was] on the well-being of the residents rather than [that] of the employer” (306 NLRB at 70).

In its 5–4 decision upholding the Sixth Circuit Court’s reversal of the board and determining that the LPNs were supervisors, the Supreme Court noted that there is a three-part test for determining whether individuals are supervisors: Individuals are deemed to be “supervisors” if 1) they hold the authority to exercise 1 of the 12 supervisory functions listed in section 2(11); 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and 3) their authority is held “in the interest of the employer.” Writing for the majority, Justice Anthony M. Kennedy concluded that the board impermissibly distorted the statutory language in trying to distinguish between “the interest of patients” and “the interest of the employer.” Kennedy stated

. . . the Board has created a false dichotomy—in this case, a dichotomy between acts taken in connection with patient care and acts taken in the interest of the employer. That dichotomy makes no sense. Patient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer’s customers, is in the interest of the employer. (511 U.S. at 577)

The second case in which the Supreme Court held that nurses were supervisors and therefore not entitled to the NLRA’s protections was *NLRB v. Kentucky River Community Care Inc., et al.* In *Kentucky River*, the Kentucky State District Council of Carpenters petitioned the NLRB in 1997 to represent a unit of professional and nonprofessional employees. The employer objected to the inclusion of six registered nurses in

the bargaining unit, arguing that they were supervisors under the act. The regional director found that the employer had not carried its burden of proof demonstrating that the nurses were supervisors—hence, he included them in the bargaining unit. The union won the election and was certified as the employees’ bargaining representative.

The board held that the nurses involved were employees and not supervisors because they did not exercise “independent judgment.” In its brief before the Supreme Court, the board stated

[t]he National Labor Relations Board has long held that an employee does not exercise “independent judgment” that triggers supervisory status under Section 2(11) of the National Labor Relations Act when he uses ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. That interpretation, which the Board has applied to a variety of industries and employees, is entitled to deference because it is rational and consistent with the Act. (Citations omitted; NLRB brief to Supreme Court at 11.)

In other words, the board made a distinction between independent judgment, which the board found as warranting supervisor status, and ordinary professional or technical judgment in accordance with employer specified standards, which the board found to be not supervisory.

The Supreme Court, however, in another 5–4 decision, affirmed another Sixth Circuit reversal of the NLRB. Justice Antonin Scalia, writing for the majority, found the board’s distinction to be without basis in law.

The Board, however, argues further that the judgment even of employees who are permitted by their employer to exercise a sufficient degree of discretion is not “independent judgment” if it is a particular kind of judgment, namely, “ordinary professional or technical judgment in directing less-skilled employees to deliver services.” (Brief for Petitioner 11.) The first five words of this interpretation insert a startling categorical exclusion into statutory text that does not suggest its existence. The text, by focusing on the “clerical” or “routine” (as opposed to “independent”) nature of the judgment, introduces the question of degree of judgment that we have agreed falls within the reasonable discretion of the Board to resolve. But the Board’s categorical exclusion turns on factors that have nothing to do with the degree of discretion an employee exercises. (532 U.S. at 714)

Acknowledging that the board has the discretion to determine the degree to which an employee's exercise of judgment places her within the exemption, Scalia nonetheless pointed out that the text of section 2(11) focuses on the clerical or routine nature of the judgment, not whether it is professional or technical. "What supervisory judgment worth exercising, one must wonder, does not rest on professional or technical skill or experience?" he asked (532 U.S. at 714). These two cases, combined with the ongoing reorganization of nursing work to include more supervisory duties in the job of the typical nurse, raise questions about whether or not nurses will be able to avail themselves of their rights granted by the NLRA.

OPINIONS OF UNION ORGANIZERS, ORGANIZING DIRECTORS, AND UNION LEGAL COUNSEL

We began to investigate the impact of *Kentucky River* by interviewing practitioners who are in a position to evaluate what effects, if any, the ruling is having on nurse organizing. We talked to union staff involved in organizing or supporting organizing from groups that represent nurses in two states and one metropolitan area: California, Illinois, and greater New York City. The purpose was not to do a statistically valid survey but rather to explore what effects, if any, *Kentucky River* may be having "on the ground" in three major geographic areas that have seen a great deal of interest in representation among nurses.

We talked to eight individuals in the following organizations: United American Nurses, California Nurses Association, New York State Nurses Association, Illinois Nurses Association, Health Professionals and Allied Employees/AFT and the Service Employees (the international and two of its California locals); we also received a brief e-mail response from the Steelworkers, who stated that they were organizing nurses primarily in other states. The specific questions we posed varied somewhat depending on the main responsibility of the individual to whom we were speaking, but questions focused primarily on whether or not the union had seen an increase or decrease of interest in organizing among nurses in the 18 months following the *Kentucky River* decision, whether or not the union had witnessed a change in employer tactics as

a result of the decision, whether or not the union had changed what it was doing to organize in light of the decision, and whether or not the union was involved in litigation as a result of *Kentucky River*.⁵

Most union staff stated they had not see any diminution of interest in representation on the part of nurses. Some claimed that, if anything, interest in unionization has increased, as a result of the workload pressures on nurses occasioned by the shortage of nurses and continued cost-cutting by hospitals affecting staffing levels.⁶ Others argued that, although *Kentucky River* appears to have had little impact on interest in organizing among nurses, there has been some diminution of interest in the recent period due to the increased individual bargaining power of nurses stemming from the nursing shortage, the efforts of hospitals to avoid unionization by granting large increases in wages and benefits, and the rise of opportunities to work desired hours as an agency nurse.⁷

No organization has changed the groups that it was targeting for organizing as a result of the *Kentucky River* decision; organizations were not shifting organizing resources from the private to the public sector, from one type of health care worker to another, or from one type of health care provider (acute care, long-term care, etc.) to another. In at least one case, this was because a sector was already union-saturated (the public sector in the New York City metropolitan region), so sectoral shifts were not possible. Interestingly, in this case, the earlier *Health Care Retirement* decision had caused a shift away from organizing RNs in nursing homes and toward nurses in hospitals; *Kentucky River*, however, has made little difference.⁸

Naturally, all the union staff saw the *Kentucky River* decision as problematic, but its effects on employer tactics, on union tactics, and on the ultimate ability of nurses to organize were seen as being incrementally negative rather than as disastrous. Several staff pointed out that employers began contending that nurses are supervisors well before the decision. *Kentucky River* deepened the problem but did not fundamentally change the situation. A number of organizers did report, however, that *Kentucky River* has lengthened delays in elections and/or first contract bargaining. This is potentially a serious problem in that election delays have long been associated with union losses (Roomkin and Block 1981).

Some organizers reported that *Kentucky River* has lengthened delays because it has increased the ability of hospitals to challenge bargaining units before the election on the grounds that charge nurses are really supervisors. New York State Nurses Association organizer John O’Conner spoke of two hospitals in the New York City area that have done this and said, “I believe the employer, in both cases, used the supervisory status as a stall-tactic based on the *Kentucky River* decision.” SEIU Associate General Counsel Diana Ceresi also emphasized the problems that were being caused by uncertainty over whether or not individuals would be considered supervisors and the accompanying delay:

Nurses are organizing because of real concerns about their working conditions—systematic understaffing resulting in forced overtime, floating out of specialty areas and lack of adequate time for individual patients. Instead of welcoming nurse input, some employers go to great lengths to instill fear and fight the nurses’ organizing efforts. In one case, they have gone so far as to claim that every nurse in a hospital is a supervisor . . . Even if the argument is a losing one in the end for the employer, hashing out the supervisory questions through the various levels of appeal results in months if not years of delay before nurses can even get to the table to negotiate for simple workplace changes.

As suggested by this quote, the delay can come after a successful representation election but before bargaining. Nicole Fefferman, a staff organizer for SEIU Local 121 in Los Angeles, cited the situation at one employer subsequent to the decision. This employer refused to come to the bargaining table for a unit that contained charge nurses, even though the NLRB earlier had found them to be eligible to vote in an election when the employer challenged their eligibility at that time. The uncertain legal situation, in her opinion, was adding to the delay. This view was echoed by Beth Kean of the California Nurses Association, who stated, “If unions get caught up in the *Kentucky River* legal trap, union recognition and first contracts could be delayed for many, many years, with the continued uncertainty during that time about charge nurse/team leader eligibility and even whether or not recognition will ever happen at all.”

Unions are finding ways to cope with this difficult environment, however. Several organizations told us that they were responding by

applying community pressure on the employers involved. For instance, the CNA said that it was getting groups of charge nurses who want union representation to step down from their charge positions into regular staff positions before the eligibility cutoff date to ensure their eligibility. This happened, for example, at St. Joseph's Hospital in Eureka, California, where a 300-RN unit refused the extra pay and responsibilities of the charge nurse position. Kean claimed that, after this, another hospital in the same chain did not challenge the charge nurse/team leader union eligibility at all, apparently deciding that it did not want to receive the bad publicity accompanying the Eureka job action. Similarly, Andrew Strom, Associate General Counsel for the SEIU in Los Angeles, stated that, in at least one case, his organization attempted to mount community pressure rather than turn to litigation as a way to counteract employer claims that charge nurses were supervisors. John O'Connor of the New York State Nurses Association talked about a current campaign where the health care agency had claimed many nurses to be supervisors:

Our strategy will be to apply community pressure on the employer. We plan to picket the hospital board members' businesses and we have obtained the support and participation from other community organizations . . . We plan to use the militancy of the nurses to get what they want. In addition, we plan to educate the nurses on their collective bargaining power in the workplace.

It would appear that *Kentucky River* is reinforcing a tendency among labor organizations to utilize community organizing strategies and membership-mobilization in order to counteract the general problems occasioned by the current legal process for representation.

Attorney Andrew Strom, of the SEIU in Los Angeles, pointed out that the *Kentucky River* decision is having ramifications for other types of workers besides nurses:

The issue goes beyond the nurses and hospitals. We have a group of security officers who are organizing. Every building has a lead person. The existence of a lead person could cause the employer to push the issue of supervisory status. I don't think it was the intention of the act to turn 'lead' people into supervisors.

It is interesting to note that Strom's opinion is borne out by the case analysis that we conducted for this study, which demonstrates as much impact of *Kentucky River* outside health care as within that sector.

IMPACT OF *KENTUCKY RIVER* ON SUBSEQUENT LEGAL DECISIONS

We assessed the importance of *Kentucky River* on subsequent legal decisions by reading every opinion that mentioned the case after the Supreme Court's decision and evaluating the extent to which the Court's decision in *Kentucky River* influenced the outcome. We used Lexis to locate all cases that mentioned *Kentucky River* for the period from the decision until November 1, 2004. Our goal was not to do a statistical analysis of cases but rather to gain an understanding of how *Kentucky River* is affecting subsequent decisions by the NLRB and the courts. We also were interested in determining whether or not the effects of *Kentucky River* are being felt in other industries besides health care and by other occupational groups besides nurses.

Court of Appeals Cases

According to Lexis, *Kentucky River* has been cited in 14 court of appeals decisions and in a 15th case by the dissenting judge. Table 7.1 lists all 15 decisions. According to our reading of these decisions, the Supreme Court's opinion does seem to be of some import at the circuit court level. While it is too early to determine with certainty just how much the case has mattered, it is clear that *Kentucky River* is influencing the decisions of the circuit courts. Two of the 14 decisions in which *Kentucky River* was cited involved health care. In both, the NLRB had found certain nursing professionals to be employees protected by the act but the court reversed and remanded the cases back to the board to reconsider its decision in light of *Kentucky River*. One recent decision involving a health care facility was rendered in *Evergreen New Hope Health & Rehab. Ctr. v. NLRB*, 2003 U.S. App. LEXIS 10644 (9th Cir. May 27, 2003), a case that has been very heavily influenced by *Kentucky River* throughout. An election was held in a bargaining unit that included "[a]ll full-time and regular part-time licensed vocational nurses, nurses aides, certified nursing assistants" and a small number of registered nurses. Since the regional director had found that to be an appropriate unit prior to *Kentucky River*, the board, in light of the Supreme Court's decision, granted the employer's request for review. Following

Table 7.1 Appellate Court Cases Referring to *Kentucky River*

	Industry; employees	Effect of <i>Kentucky River</i> (KR)
Circuit court cases		
<i>Albertson's v. NLRB</i> , 301 F. 3d 441 (6th Cir. 2002)	Grocery; n/a	None. Procedural citation.
<i>Beverly Enterprises-Minnesota, Inc. v. NLRB</i> , 266 F 3d 785 (8th Cir. 2003)	Health care (nursing home); RN/LPN	Some. Remanded to NLRB.
<i>Brusco Tug & Barge v. NLRB</i> , 247 F 3d 273 (DC Cir. 2001)	Inland shipping; mates	None.
<i>Coastal Lumber v NLRB</i> , 117 L.R.R.M 3215 (4th Cir. 2001)	Lumber; n/a	Some. Remanded to NLRB.
<i>Coursen v. United States Postal Serv.</i> , 256 F. 3d 1353 (Fed. Cir. 2001)	Postal service; postal worker	None.
<i>Entergy Gulf States v. NLRB</i> , 253 F. 3d 303 (5th Cir. 2001)	Elec. power; operations coordinator	Probably none. Reversed NLRB but KR not important.
<i>Evergreen New Hope Health & Rehab. Cr.</i> , 2003 U.S. App. LEXIS 10644 (9th Cir. 2003)	Health care; charge nurses	Matters. Court reversed NLRB citing KR.
<i>Multimedia KSDK, Inc. v. NLRB</i> , 271 F.3d 744 (8th Cir. 2002)	Television; editors/producers	None.
<i>NLRB v. Dole Fresh Vegetables</i> , 2003 U.S. App. LEXIS 10788 (6th Cir. 2003)	Vegetable packing; maintenance leads	None. Cited on burden of proof.
<i>NLRB v. Interstate Builders</i> , 351 F. 3d 1020 (10th Cir. 2003)	Iron works; n/a	None. Cited on procedural issue on dissent.
<i>NLRB v. Quinipiac College</i> , 256 F 3d 68 (2nd Cir. 2001)	College; sec. officers and shift supervisors	Probably none. Reversed NLRB but KR not important.
<i>Nathan Katz Realty LLC v. NLRB</i> , 251 F 3d 981 (DC Cir. 2001)	Real Estate; apartment supervisors	None. Cited on burden of proof.

<i>Public Service Co. v. NLRB</i> , 271 F.3d 1213 (10th Cir. 2001)	Utility; transmission workers	Matters. Refused to enforce bargaining order. Because of KR; remanded to NLRB.
<i>Webco Industries, Inc. v. NLRB</i> 90 Fed. Appx. 276 (10th Cir. 2003)	Steel manufacturing; trainer	None. Cited on burden of proof.
<i>Westchester Iron Works v. NLRB</i> , 2002 U.S. App. LEXIS 20755 (DC Cir. 2002)	Iron works; n/a	None.
California appellate court case		
<i>Rodney Lee Roth et al., Bice, et al.</i> 2002 Cal. App. Unpub. LEXIS 3368	Construction; foremen	None. Would have been supervisor prior to KR.
Arizona court of appeals		
<i>Smith v. Cigna Health Plan of Arizona</i> , 2002 Ariz. App. LEXIS 120	Health care; chief of staff (MD)	None. Clearly supervisory before KR.

a hearing on remand, the regional director issued a supplemental decision and direction of election in which he, applying *Kentucky River*, reaffirmed his finding that the employer had failed to establish that its registered nurses were statutory supervisors. On September 21, 2001, the board denied the employer's request for review of this supplemental decision. When the 9th Circuit heard the case, however, it reversed the decision and remanded the case to the regional director, ordering him to review his finding on the supervisory status of the registered nurses, stating:

That these decisions rely on the charge nurses' professional training and experience does not mean that it is not also an exercise of independent judgment . . . There is substantial evidence in the record that the charge nurses exercise independent judgment and that they are 'responsibly to direct' the other employees. There is not substantial evidence in the record to support the regional director's conclusion that the charge nurses are not 'supervisors' as defined by 29 U.S.C. § 152(11) (2003 U.S. App. LEXIS 10655 at p. 5) (citations omitted)

Similarly, in *Beverly Enterprises-Minnesota, Inc. v. NLRB*, 266 F.3d 785, (8th Cir. 2001) the 8th Circuit remanded the case to the board for reconsideration in light of *Kentucky River*. This case became one of the three lead cases designated for decision by the board in July, 2003, and has yet to be determined by the board on remand. It will be discussed further below.

Kentucky River also has had an impact on court of appeals decisions outside of health care. In two cases at this level, the courts specifically relied on *Kentucky River* in reversing an NLRB decision. The clearest negative outcome for employee rights came in *Public Service Company of Colorado v. NLRB*, 271 F. 3d 1213 (10th Cir. 2001), a case in which the 10th Circuit Court refused to enforce the board's bargaining order or even remand the case:

[The Board's] decision specifically traces the standard that it applies to the line of charge nurse cases overturned by *Kentucky River*. Rather the finding was by necessity based on the very categorical distinction struck down by the Supreme Court. Hence the Board's erroneous interpretation of "independent judgment" precludes us from enforcing its order in this case. Accordingly we reverse the Board's entry of summary judgment, vacate its bargaining order di-

recting the Company to negotiate with a Union bargaining unit that includes the transmission employees, and deny enforcement. The Board's request for remand is also denied. (271 F/ 3d., p. 1218)

Similarly, in *Coastal Lumber v. NLRB*, 2001 U.S. App. LEXIS 23424; 24 Fed. Appx. 120 (4th Cir. 2001), the NLRB had certified a bargaining unit in 2001, but the employer appealed to the 4th Circuit, contending that six employees in the unit were supervisors and therefore not entitled to organize and bargain collectively. The board cross-petitioned for enforcement of its order. The Circuit Court remanded the case to the board for reconsideration in light of *Kentucky River*, "[b]ecause the decision in this case can be read to have been premised in part on an incorrect legal standard" (24 Fed. Appx., p. 121). Here again, *Kentucky River* was the basis for a court of appeals' refusal to enforce a bargaining order.⁹ In this case however, the remand to the board may or may not result in an ultimate change in the board's decision as to the supervisory status of the employees.

In the remaining court of appeals decisions, the courts cite *Kentucky River* in a routine way, as the Supreme Court's latest pronouncement on supervisory status. The outcomes in these cases do not appear to turn on *Kentucky River*, however.

NLRB Cases

In examining the impact of *Kentucky River* at the NLRB level, we divide our discussion into two periods. On July 24, 2003, the NLRB invited the parties and interested *amici* to file briefs addressing supervisory issues in light of the *Kentucky River* decision for three lead cases: *Oakwood Healthcare*, *Beverly Enterprises—Minnesota, d/b/a Golden Crest Healthcare Center*, and *Croft Metals*. This announcement signaled a decision by an NLRB increasingly dominated by appointees of President Bush, as opposed to those appointed by President Clinton, to reexamine its approach to the entire question of supervisory status. While the NLRB has not issued a decision or ruling in these three lead cases upon completion of this chapter in late 2004, its general counsel, Arthur F. Rosenfeld, filed an amicus brief on September 18, 2004 and the perspective espoused in this brief may well be adopted by the NLRB, in whole or in part. Since the board's notice in July 2003 may well indicate a shift in its views, we discuss this brief and the few cases

in the area decided by the board after July 2003, separately from our discussion of its position up to July 24, 2003.

Cases prior to July 24, 2003

According to LEXIS, *Kentucky River* was cited in 39 NLRB decisions prior to July 24, 2003.¹⁰ Table 7.2 contains the cases for this period. Ten of the cases involve the health care industry, broadly construed to include hospitals, long-term care facilities/nursing homes, medical clinics, group homes, and home health care workers. In most of these cases, the supervisory status of nurses is at issue, although two involve doctors and one involves the program managers of group homes for the developmentally disabled. Further, outside health care, there are some major industrial/occupational groupings that have been analyzed under the rationale announced in *Kentucky River*: a number of cases involve mates, pilots, and captains in boats/casinos operating in inland waterways, and another group involves coordinators for electric utilities. We divide our discussion by industry beginning with health care.

Throughout this period, the board generally continued to classify nurses as employees rather than supervisors despite *Kentucky River*, even in cases that had been remanded to the board after the Supreme Court decision. The board reached this conclusion by focusing on the nonindependent nature of the nurses' decisions, rather than on their professional nature—and in nursing, direction of nurses' aides and other employees is often carried out in accord with detailed guidelines established by the employer. For example, *Nurses United for Improved Patient Healthcare*, 2002 NLRB LEXIS 319 (2002), dealt with a clinical coordinator's eligibility for inclusion in a bargaining unit over the employer's contention that she was a supervisor. Despite *Kentucky River*, the ALJ found her to be an employee, stating: "The degree of discretion which O'Roark exercises is simply too minimal for her to be considered a supervisor" (2002 NLRB LEXIS 319 at p. 11). Similarly, in *Norton Health Care, Inc.* 2003 NLRB LEXIS 96 (NLRB Mar. 14, 2003), the board conducted an extensive analysis on the status of two clinical coordinators (charge nurses) in light of *Kentucky River* and still found them to be employees, protected by the act.

Kentucky River influenced the outcome in several cases at the board outside of health care during this period, however. In two cases, the Court's decision in *Kentucky River* caused an ALJ to issue a "supple-

mental decision on remand” reversing an earlier decision that had found several people associated with a shipping company to be employees rather than supervisors. (*Marquette Transportation/Bluegrass Marine*, 2001 NLRB LEXIS 655 (2001) and *American Commercial Barge Line Co.*, 2001 NLRB LEXIS 591 [2001]). These cases were part of a larger group of cases, all arising from a multiemployer recognition strike by a pilots union. In two of these cases, the ALJ had decided that the pilots were supervisors and, although *Kentucky River* was decided in the interim, the board affirmed the ALJ decision without any reliance on the new decision. In both *Marquette* and *American Commercial Barge*, a different ALJ had come to the opposite conclusion—that the pilots were employees (the original decisions were (*Marquette Transportation/Bluegrass Marine*, 1999 NLRB LEXIS 462 [1999] and *American Commercial Barge Line Co.*, 1999 NLRB LEXIS 662 [1999]). After the Court’s decision in *Kentucky River*, the board remanded these cases to the ALJ who, after reconsidering the evidence, found the same people to be employees. While *Kentucky River* was cited in the new decisions, however, the ALJ actually relied more on an earlier line of cases in the maritime industry. The board itself, in affirming the second ALJ decision in *American Commercial Barge*, more clearly relies on *Kentucky River* (2002 NLRB LEXIS 355). Thus, in these cases, *Kentucky River* was clearly the stimulus for reconsideration of an earlier decision, but appears to have been less important in the actual substance of the new decisions. At the same time, the ultimate outcome was the loss of jobs and rights by all these pilots.

Similarly, in *Majestic Star Casino*, 335 NLRB No. 36 (2001), the regional director had determined that the mates on the employer’s riverboat were employees rather than supervisors, and the employer appealed the regional director’s finding to the NLRB. In August 2001, the board remanded the case to the regional director, stating: “In light of *Kentucky River*, the Board has decided to remand this proceeding to the Regional director to reopen the record on the issue of whether the Employer’s mates ‘assign’ and ‘responsibly direct’ and on the scope and degree of ‘independent judgment’ used in the exercise of such authority” (335 NLRB No. 36, at p. 9).

The large number of cases in our sample in which *Kentucky River* is merely cited on burden of proof or in which it merely results in a remand for reconsideration either by the board or the ALJ may be reflect-

Table 7.2 NLRB Cases Referring to *Kentucky River* before July 24, 2004

	Industry; employees	Effect of <i>Kentucky River</i> (KR)
Health care cases		
<i>Beverly Health & Rehabilitation Services</i> , 335 NLRB No. 54	Long-term care; LPN	None
<i>Franklin Hosp. Med. Ctr d/b/a Franklin Home Health</i> , 337 NLRB No. 132	Health care; staff nurses	None
<i>Ken-Crest Services</i> , 335 NLRB No. 63	Health care; program manager	None
<i>Lutheran Home at Moorestown</i> , 334 NLRB No. 47	Long-term care; RN & LPN	None
<i>Maui Medical Group, Inc.</i> , 2002 NLRB LEXIS 125	Clinics; nurses	None
<i>Norton Health Care Inc.</i> , 2003 NLRB LEXIS 96	Hospital; clinical coordinator	None
<i>Nurses United for Improved Patient Health care</i> , 2003 NLRB LEXIS 107	Home health care agency; IV clinical coordinator	None. Cited on burden of proof.
<i>St. Barnabas Hosp.</i> , 334 NLRB No.125	Hospital; doctors	None
<i>Staten Island Univ. Hosp.</i> , 2001 LEXIS 519	Hospital; charge nurse	None. Cited on burden of proof.
<i>Wilshire at Lakewood</i> , 2002 NLRB LEXIS 301	Long-term care center; RN	Probably none. Probably would have been supervisor prior to KR.
Non-health care cases		
<i>Adriana Distributors, Inc.</i> , 2001 LEXIS 551	Pharmaceutical distributor; general manager	None
<i>Alter Barge Lines, Inc</i> , 336 NLRB No. 132 (2001)	Inland shipping; pilots	None. Ingram Barge is key.
<i>American Commercial Barge Line Co.</i> , 2001 LEXIS 591	Inland shipping; pilots	Matters. ALJ reversed decision.
<i>Arlington Masonry Supply</i> 2003 NLRB LEXIS 398	Building materials; maintenance supervisor	Matters. NLRB reversed ALJ decision.

<i>B&A Associates</i> , 2003 NLRB LEXIS 267	Building management; service manager	None
<i>Bay Harbour Electric</i> , 2002 NLRB LEXIS 577	Construction; foremen	None. Cited on burden of proof.
<i>Brad Snodgrass, Inc.</i> , 2003 NLRB LEXIS 157	Construction; foremen	None
<i>Chardon Rubber Company</i> , 335 NLRB No. 92 (2001)	Rubber; production and maintenance workers	None. Cited on burden of proof.
<i>Citywide Corporate Transportation</i> , 2002 NLRB LEXIS 537	Limo service; driver	None
<i>Clock Electric</i> , 2003 NLRB LEXIS 123	Construction; project manager	None
<i>David Van Os & Assocs. PC</i> , 2002 NLRB LEXIS 16	Law firm; attorney and administrative staff	None
<i>Dist. No. 1, Marine Engrs Ben. Asso.</i> , 2003 NLRB LEXIS 36	Shipping; licensed assistant marine engineers	Unclear. Possibly some. Union used to support case.
<i>Dole Fresh Vegetables</i> 2003 NLRB Lexis 395	Cannery; maintenance leads	None. Cited on burden of proof
<i>Ducommun Aerostructures</i> , 2002 NLRB LEXIS 312	Aerospace mnfg; leadmen	None
<i>Dynamic Science, Inc.</i> , 334 NLRB No. 57 (2001)	Military contractor; artillery test leaders	None
<i>E.C. Waste, Inc.</i> , 2001 LEXIS 718	Waste collection; customer service reps.	None. Cited on burden of proof
<i>Ferguson Enterprises</i> , 2002 NLRB LEXIS 504	Construction supply; foremen	None
<i>Freeman Decorating Co.</i> , 336 NLRB No.1(2001)	Construction; carpenters	None. Procedural cite.
<i>Fuji Foods US, Inc.</i> , 2002 NLRB LEXIS 313	Meat processing; quality control assistant	None. Cited on burden of proof
<i>GFC Crane Consultants, Inc.</i> , 2002 NLRB LEXIS 121	Crane repair; port engineers	None
<i>Ingram Barge Co.</i> , 336 NLRB No. 131 (2001)	Inland shipping; pilots	None
<i>Inter-con Security Systems, Inc.</i> , 2003 NLRB LEXIS 329	Guard services; various	None. Cited on NLRB determines degree of discretion.

Table 7.2 (continued)

	Industry; employees	Effect of <i>Kentucky River</i> (KR)
Non-health care cases		
<i>Majestic Star Casino, LLC</i> , 335 NLRB No. 36 (2001)	Riverboat casino; mates	Some. NLRB remanded to ALJ.
<i>Marquette Trans/Bluegrass Marine</i> , 2001 NLRB LEXIS 655	Inland shipping; pilots	Matters. ALJ reversed decision.
<i>New York Law Publishing Co</i> , 336 NLRB No. 93 (2001)	Publishing; production & editorial	None
<i>Quality Mechanical Insulation</i> , 2003 NLRB Lexis 367	Insulation contractor; foreman in warehouse	None. Cited on burden of proof.
<i>Rhee Brothers</i> , 2003 NLRB LEXIS 3	Food warehouse; assistant & section managers	None. Cited on burden of proof.
<i>Sheet Metal Wkrs Local U 102 & 105</i> , 2003 NLRB LEXIS 270	Construction; jobsite foreman	None.
<i>Williamette Industries</i> , 336 NLRB No. 59 (2001)	Manufacturing; leadmen	None. Cited on burden of proof.

ing the recentness of the decision given the length of time that it takes cases about supervisory status to go through the NLRB and the courts.

More recently, in *Arlington Masonry Supply*, 339 NLRB No. 99 (2003), the board overturned an ALJ decision that a “maintenance supervisor” was not a supervisor under the act in a case that hinged on the degree of independent judgment that was involved. The board found that the individual in question used independent judgment because he assigned work—“a primary indicia of supervisory authority” according to the board. In overturning the ALJ, the board stated (339 NLRB No. 99, footnote 9 at p. 717): “In *Kentucky River*, supra, the Supreme Court rejected the rationale relied on by the hearing officer here that judgment involving assignment and direction of work which is based on technical skill and experience does not constitute ‘independent judgment’ within the meaning of Sec. 2(11).”

CHANGE IN THE NLRB’S APPROACH TO SUPERVISORY STATUS?

As mentioned earlier, on July 24, 2003, the NLRB invited parties and interested *amici* to file briefs addressing supervisory status issues in light of *Kentucky River* for three “lead cases,” *Oakwood Healthcare*, *Beverly Enterprises—Minnesota, d/b/a Golden Crest Health Care Center* and *Croft Metals*. Clearly the board is reconsidering its approach to the question of supervisory status in light of *Kentucky River*, and nurses are especially likely to be affected; two of the three cases involve nurses—RNs acting in a charge nurse capacity in a hospital (*Oakwood*) and charge nurses (both RNs and LPNs) in a long-term care facility (*Beverly Enterprises*). The third case involves “leadmen” and “load supervisors” in a manufacturing facility. All three cases turn on the degree of “independent judgment” used by the individuals in question in assigning work and/or directing other employees (the issue in *Kentucky River*) and all are cases in which ALJs and regional directors, applying the earlier criteria of the NLRB, found individuals not to be supervisors under the act. While the board has not yet issued its decisions in these three cases, it would seem fairly certain that it will attempt to apply similar standards to health care and other employees.

Given that the NLRB could rule at any moment, we will discuss these cases only briefly. Our discussion will necessarily be speculative—only time will tell what the Bush NLRB will decide is sufficient “independent judgment” for an individual to be considered a supervisor under the act. We view the brief filed by General Counsel Arthur F. Rosenfeld (Rosenfeld 2003) as likely giving an indication of the direction of the board, but it is not evident that its recommendations will be adopted in their entirety.

Oakwood Healthcare is a case involving charge nurses at a Minnesota acute-care hospital. While a few charge nurses fill the position on a continuing basis, most are RNs who rotate into the job temporarily once or twice every two weeks; while they function in that capacity they earn an additional \$1.50 per hour. The charge nurses have various responsibilities, including meeting with a doctor if the doctor has an issue with a particular nurse or patient, meeting with a patient or a patient’s family if they have a complaint, and filling out an incident report if there is an error or an accident (like a fall). Most importantly, the charge nurse assigns staff nurses to work with individual patients. Much of the assignment, however, is done in accordance with detailed written hospital policies to equalize workloads and maintain continuity of care from one day to the next. The ALJ ruled and the regional director agreed, that this level of independent judgment did not make these nurses supervisors—but the board’s ruling in *Arlington Masonry Supply* and the Rosenfeld brief indicate that NLRB may be about to change its standard in this area. Rosenfeld proposes, “The Section 2(11) power to assign with independent judgment is demonstrated by evidence that the alleged supervisor has discretion to assign work of differing degrees of difficulty or desirability on the basis of his or her own assessment of an employee’s ability or attitude” (Section 2a).

Beverly Enterprises involves RNs and LPNs acting as charge nurses in a skilled nursing facility. As far back as 1999, a union sought an election in a unit of LPNs and RNs, but the employer sought to exclude as supervisors all 8 RNs and 11 of the 12 LPNs who served as charge nurses. In March 1999, the regional director issued a decision and direction of election in which he included all of the disputed personnel in the unit, finding that they possessed no indicia of supervisory authority. Eventually, the case was appealed to the 8th Circuit, which, as mentioned above, remanded the case to the board because it had “employed

an improper legal standard in finding that the nurses were not statutory supervisors.” The board further remanded the case back to the regional director to examine whether the nurses in question utilized “independent judgment” under the standard adopted by the Court in *Kentucky River*. Then, in a decision rendered in August 2002, the regional director again found the nurses to be employees rather than supervisors. The bulk of his decision turned on whether or not they “exercise independent judgment to assign and responsibly direct other employees.” In concluding that they did not, he relied on the fact that their judgments “are so circumscribed by existing policies, orders and regulations of the Employer that they do not exercise independent judgment within the meaning of Section 2(11).”

It is difficult to predict how the board will decide *Beverly*. In ruling that the nurses were not supervisors in his most recent decision, the regional director took great pains to point out the minimal amount of independent judgment they exercise in making their decisions. For example, he pointed out that many of their decisions are dictated by a collective bargaining agreement, while others must be approved by the director of nursing or her assistant. On the other hand, the employer argued that the charge nurses can make changes in the room and floor assignments of the certified nursing assistants. While the regional director found the employer had not met the burden of proof in this regard, the board may disagree.

Croft Metals involves “lead persons” at a facility manufacturing aluminum and vinyl doors and windows. One group of lead persons are load supervisors. Load supervisors work with three others who load merchandise onto trucks. In addition to counting and scanning the merchandise, the load supervisor instructs the other employees on where and how to place the material in the truck, which is dictated largely by the delivery schedule. Other lead persons work in particular areas in the plant, like the tool room, or ensure that production lines run properly, for instance, by calling maintenance if a machine needs a repair.¹¹ The ALJ and regional directors found that the employer had not met its obligation, under *Kentucky River* to prove that the independent judgment of these individuals is sufficient to render them supervisors. While we cannot be certain what the NLRB will do with this case, it seemed to us that the extremely low level of authority and judgment involved

makes it likely that that the board will uphold the earlier decisions of the agency.

CASES DECIDED BY THE NLRB AFTER JULY 2003

The NLRB cited *Kentucky River* in 36 decisions between July 24, 2003, and November 1, 2004,¹² and while NLRB may be signaling a change in its approach to supervisor status, as evinced by its call for briefs in the three cases discussed above, we do not see a significant change in the board's approach as of yet. In other words, the board has not expanded its interpretation of who is a supervisor to date. For example, the most recent board decision as of this writing was *Wilshire at Lakewood*, 343 NLRB No. 23, (September 30, 2004). One of the issues in that case was whether an RN who acted as a weekend supervisor was a supervisor, and in 2002, relying on *Kentucky River*, an ALJ had found that she was. In 2004, however, the board, in a 2–1 decision, reversed the ALJ and found her to be an employee, not a supervisor. It may be interesting to note, however, that the one dissenting board member was Chairman Battista, a Bush appointee.

United Cerebral Palsy of New York City, Inc., 343 NLRB No. 1, is another health care case involving supervisory status. The procedural history in that case alone is worthy of note. In 2001, a regional director found that certain personnel were employees but on February 15, 2002, the respondent filed a cross-motion for summary judgment, contending that in light of the U.S. Supreme Court's decision in *Kentucky River*, the board should find that all the individuals in the two voting groups (teachers, rehabilitation specialists, developmental specialists, and pool coordinators) are statutory supervisors. By unpublished order dated October 29, 2002, the board denied both the general counsel's and respondent's motions and ordered the region to reopen the record in the case for further consideration of whether the disputed employees are supervisors in light of *Kentucky River*. On August 6, 2003, the acting regional director issued a supplemental decision, again finding that the disputed employees were not supervisors. On September 2, 2003, the respondent filed a request for review of the supplemental decision, which the board denied by unpublished order dated May 28, 2004. Thus, while *Kentucky River*

led the board to reconsider the status of various employees in light of the Court's decisions, and the resulting delay hurt employee's chances of unionizing, the legal outcome was unchanged. In fact, in none of the 36 cases decided between July 24, 2003, and November 1, 2004, does it appear that persons who might have been found to be employees prior to *Kentucky River* were found to be supervisors because of the Supreme Court's decision.

FINAL OBSERVATIONS

The U.S. courts have, over time, reduced the number of persons who are deemed to have rights under the NLRA by gradually expanding the supervisory exclusion, and by making it applicable to those professional employees who direct the work of less-skilled employees. The decision of the Supreme Court in *Kentucky River* initially struck us as being potentially very damaging to nurses who were attempting to organize. Arguments about the actual degree of independent judgment used by nurses (many of whom operate in a work environment characterized by detailed written employer standards for care), however, have been persuasive to numerous ALJs and regional directors of NLRB. To date, *Kentucky River*, has not caused a sea-change in NLRB rulings regarding the status of nurses as employees under the law. Rather, it appears to be one more case in a long line of cases that gradually have eroded the rights of certain individuals to choose whether or not they wish to be represented by a labor organization.

The case has been important in adding to delays in numerous representation cases—delays that decidedly harm employees who want union representation. Unions are finding tactics to counteract employers' use of the law to delay and to block collective bargaining for nurses and other health care professionals, but the problem persists. Unions in health care, like unions elsewhere, are trying to pressure employers to both enforce and expand rights under the NLRA through the negotiation of neutrality and card check agreements.

Things are likely to get more problematic in the next few months, with a more conservative NLRB and with a judiciary that is quite willing to find tugboat pilots and other relatively low-level employees to

be without the right to organize simply because they direct the work of other employees and in so doing exercise a degree of independent judgment. While it is unclear how the NLRB will rule in each of the three “lead cases” discussed in this chapter, it is clear that the board will apply the same standard in health care as it has in other industries, most likely to the detriment of some nurses.

Ultimately, labor law needs to be changed in a number of respects; one particularly problematic aspect of the law that is ripe for reconsideration is its narrow coverage. It is not clear why the right to organize on the part of nurses, tugboat pilots, and electrical transmission employees should even be subject to hair-splitting legal contention. *Kentucky River* made it harder for such employees to organize, but as yet has not made a major change in the existing legal situation. It may provide the excuse for a major change in policy on the part of the Bush-appointed-dominated NLRB.

Notes

1. In 2003, 18.1 percent of all professionals were union members, in contrast to 12.9 percent of all wage and salary workers. Recently there has been a marked increase in interest in unionization among pharmacists (McHugh and Bodah 2002) and physicians (9 percent of pharmacists and 5 percent of physicians are now members). See Hirsch and MacPherson (1996, 2001) for detailed occupation unionization rates based on the Current Population Survey, or the Web site maintained by them at <http://www.unionstats.com/>. Data here were obtained from that site on November 18, 2004.
2. Particularly important decisions include *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974) and *NLRB v. Yeshiva University*, 444 U.S. 672 (1979).
3. Section 2(12) provides, that “The term ‘professional employee’ means (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of

- a professional person to qualify himself to become a professional employee as defined in paragraph (a).
4. Section 2(11) of the act states, "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."
 5. Interviews were conducted by a University of Illinois graduate student, Lisa Roan, who is a registered nurse, as part of an independent study on her part. We thank her for her persistence and dedication in exploring these issues with union staff.
 6. Beth Kean, Director of Organizing, California Nurses Association; telephone interview. L. Roan, June 19, 2002.
 7. Mike Slott, Education Director, HPAE/AFT, New Jersey; conversation. P. Voos, August 2, 2002.
 8. See previous note.
 9. Of course, we cannot say with certainty that the bargaining order in either of these cases would have been enforced in the absence of *Kentucky River*.
 10. Two authors read each case and made an assessment of whether or not *Kentucky River* made a difference in the outcome of the case; if the two readers disagreed (an unusual outcome), then the third author read the case and we talked in order to come to a consensus on our understanding of the impact of *Kentucky River*.
 11. In earlier years, a different labor organization than the one petitioning for representation represented some employees at this same manufacturing facility. Leadmen were included with other plant employees in one bargaining unit at that time.
 12. Mays Elec. Co., 343 NLRB No. 20 (Sept. 30, 2004); Duer Constr. Co., 2004 NLRB LEXIS 594 (NLRB Sept. 30, 2004); Valley Slurry Seal Co. And Constr. And General Laborers' Local 185, 343 NLRB No. 34 (Sept. 30, 2004); Wilshire at Lakewood, 343 NLRB No. 23 (Sept. 30, 2004); United Cerebral Palsy of N.Y. City, Inc., 343 NLRB No. 1 (Sept. 28, 2004); K. W. Elec., Inc., 342 NLRB No. 126 (Sept. 24, 2004); John T. Jones Constr. Co., 2004 NLRB LEXIS 536 (NLRB Sept. 24, 2004); Brevard Achievement Ctr., Inc., 342 NLRB No. 101 (Sept. 10, 2004); Wackenhut Corp., 2004 NLRB LEXIS 493 (NLRB Sept. 7, 2004); Deffenbaugh Disposal Servs., 2004 NLRB LEXIS 443 (NLRB July 30, 2004); Taylor, 2004 NLRB LEXIS 387 (NLRB July 13, 2004); Sara Lee Bakery Group, 342 NLRB No. 12 (June 25, 2004); Kelly Bros. Sheet Metal, Inc., 342 NLRB No. 9 (June 21, 2004); Donaldson Bros. Ready Mix, Inc., 341 NLRB No. 124 (May 19, 2004); K. W. Elec., 2004 NLRB LEXIS 252 (NLRB May 18, 2004); Volair Contrs., Inc., 341 NLRB No. 98 (Apr. 30, 2004); Serv. Spring Corp., 2004 NLRB LEXIS 196 (NLRB Apr. 29, 2004); Trane, an Operating Div. of Am. Std., Emplr., 2004 NLRB LEXIS 124 (NLRB Mar. 19, 2004); Mays Elec. Co., 2004 NLRB LEXIS 73 (NLRB Feb. 20, 2004); Solvay Iron Works,

Inc., 341 NLRB No. 25 (Feb. 17, 2004); Safe Disposal Sys., 2003 NLRB LEXIS 814 (NLRB Dec. 29, 2003); Allied Mech., Inc., 2003 NLRB LEXIS 810 (NLRB Dec. 19, 2003); Sheet Metal Workers Int'l Ass'n, Local Unions 102 & 105, 340 NLRB No. 149 (Dec. 11, 2003); Sara Lee Bakery Group, 2003 NLRB LEXIS 776 (NLRB Dec. 2, 2003); L.A. Water & Power Emples. Ass'n, 340 NLRB No. 146 (Nov. 28, 2003); Flat Dog Prods., 2003 NLRB LEXIS 743 (NLRB Nov. 24, 2003); Jewish Home for the Elderly of Fairfield County, 2003 NLRB LEXIS 745 (NLRB Nov. 21, 2003); Quality Mech. Insulation, Inc., 340 NLRB No. 91; Int'l Transp. Serv. (ITS), 2003 NLRB LEXIS 604 (NLRB Sept. 10, 2003); Kelly Bros. Sheet Metal, Inc., 2003 NLRB LEXIS 527 (NLRB Sept. 3, 2003); Barstow Cmty. Hosp., 2003 NLRB LEXIS 536 (NLRB Aug. 29, 2003); Univar USA, Inc., 2003 NLRB LEXIS 528 (NLRB Aug. 28, 2003); Solvay Iron Works, Inc., 2003 NLRB LEXIS 471 (NLRB Aug. 20, 2003); Lenawee Long Term Care, Inc., 2003 NLRB LEXIS 459 (NLRB Aug. 14, 2003); Arlington Masonry Supply, Inc., 339 NLRB No. 99 (July 21, 2003); Dole Fresh Vegetables, Inc., 2003 NLRB LEXIS 395, 339 NLRB No. 90 (July 17, 2003); Quality Mech. Insulation, Inc., 2003 NLRB LEXIS 367 (NLRB July 7, 2003); Inter-Con Sec. Sys., 2003 NLRB LEXIS 329 (NLRB June 23, 2003).

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9

Law and Collective Bargaining Power

An Experiment to Test Labor Law Reform Proposals

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Labor law reform is passionately debated among union activists and officials, labor economists, and industrial relations scholars. Some who are concerned that the decline in union membership in the United States threatens workers' rights and working conditions believe labor law is an impediment to union success. Others believe that changes in employment structures and innovations in human relations methods mean unions and collective bargaining are no longer needed by today's workers.

In addition, for decades most of the focus of labor law reform has been on organizing, with scant attention given to collective bargaining. Organizing new members is important, but organizing campaigns alone cannot succeed in increasing union membership. Workers join unions to improve their working conditions. Improved working conditions come from collective bargaining. The fact is that organizing does not matter if unions have no bargaining power. Furthermore, increased union bargaining power should make unions more attractive to the unorganized. Union success at the bargaining table affects organizing success, and the degree of organization affects bargaining success.

These debates are passionate despite—or perhaps because of—the lack of empirical evidence as to how a law reform proposal would oper-

ate. We believe that there is a great deal to be gained by using empirical methodology as one way to examine how a proposed labor law is likely to work, and that there should be more focus on the relationship between law and collective bargaining.

We have used an experiment here in order to explore one discrete aspect of collective bargaining to examine whether law affects perceptions of bargaining power. We first discuss how law can be used by unions and employers as a resource to bolster bargaining power. We then outline the methodology we used to test whether different legal regimes affected perceptions of the bargaining power of unions and employers. We end the chapter with a discussion of our results and conclusions.

LAW AS A RESOURCE

Many laws—both statutory and judge-made—control or potentially affect collective bargaining. We hypothesize that the laws that determine how bargaining impasses are handled have a shadow effect on parties' conduct preceding impasse. In other words, impasse laws are more than mere rules on how to handle deadlock. Each party will have taken a measurement of how and whether an impasse helps or hinders it and its bargaining partner. While that consideration will include economics and the parties' continued relationship, it will also depend on how the law treats an impasse. The parties will adjust their behavior based on their actual or perceived relative bargaining power based on the law. Furthermore, experienced bargainers will also shape their conduct based on their bargaining partner's anticipated assessment and response.

There are many different theories about the constituents and operation of bargaining power. Among the many factors that can collectively affect bargaining power are its economic context, state of the industry, bargainers' knowledge and abilities, degree of union organization, community sentiment and support, and law. Each can be seen as a resource, unevenly distributed between the bargainers in any one negotiation. Although some resources, such as degree of union solidarity, that strengthen one side will weaken the other, not all factors will have that

effect. Unlike commercial bargaining, collective bargaining concerns parties whose fates are profoundly intertwined. Thus, a poor economy or a decline in an industry may weaken both parties. Strong leadership may lead to better outcomes for both sides. Engaging in a scorched earth policy may destroy both sides. Bargainers can potentially enlist these resources through strategies to make the best use of each in order to achieve their individual and mutual goals. Having more resources strategically employed should increase a party's bargaining power. Having fewer resources or an inability to make use of one's resources should decrease bargaining power. Certainly, the call for labor law reform manifests a belief that law plays an important role in bolstering or undermining union power.

We have taken up that challenge by setting up a social science experiment to explore some discrete aspects of the question whether law matters to collective bargaining, specifically, features of law that can affect bargaining power. The results reported here are only part of a larger experiment, and that experiment is the first part of a multiphase study. Results from that larger experiment are reported in Dannin and Singh (2004).

Three Impasse Regimes: Implementation on Impasse, Interest Arbitration, and Economic Power

We tested three regimes with different ways of resolving bargaining impasses based on the current private sector system (Regime A); interest arbitration, commonly used in the public sector and advocated as a reform for the private sector (Regime B); and the bargaining system created under the National Labor Relations Act before judges created the doctrines of striker replacement and implementation upon impasse (Regime C).

We chose these three legal regimes for a number of reasons. First, we theorized that if law affects the process and substance of collective bargaining, these laws are sufficiently distinctive that we should see different responses, including different perceptions of bargaining power.

We also chose these legal regimes because each currently presents unique practical and theoretical issues connected with collective bargaining. Therefore, an examination of these three methods for resolving impasses should be helpful as an initial step toward law reform. Briefly,

Regimes A and B currently are laws affecting actual bargaining. Regime C provides an interesting alternative to Regime A, if the NLRA were stripped of judicial amendments and returned to the way Congress initially intended the NLRA operate.

Regime A (permanent striker replacement and employer implementation on impasse) is based on current private sector impasse law. The NLRA was enacted with no provisions concerning the specifics of how to conduct bargaining. It said nothing about the use of weapons or how to resolve impasses. The courts almost immediately began to create legal doctrines that applied to bargaining and to the weapons employers, employees, and unions were allowed to use (Budd 1996; Dannin, Wagar, and Singh 2001; *McClatchey Newspapers, Inc. v. NLRB*, 131 F.3d 1026 (D.C. Cir 1997; *Sam M. Jackson*, 34 NLRB 194 (1941); *Westchester Newspapers, Inc.* 26 NLRB 630 (1940)). Employees were forbidden from using partial strikes and sit-down strikes; and employers were permitted to permanently replace strikers and to implement their final offers upon reaching an impasse. Judges have added to and tinkered with the use of these weapons over the years (Dannin 1997, 2004).

Regime A focuses on the two key private sector impasse methods created by judicial decisions: the employer's right to permanently replace strikers and the employer's right to implement its final offer when the employer and union reach an impasse in bargaining. The latter doctrine is not as widely explored in industrial relations research but has been described in Dannin (1987, 1997). The doctrines of implementation upon impasse and striker replacement have been criticized as violations of human rights (Dannin 2004; Dannin, Wagar, and Singh 2001; Human Rights Watch 2000).

Under Regime A, at impasse, an employer may implement its final offer. No party is required to make concessions. If a union strikes, the employer may hire permanent replacements but may not fire strikers. When a strike ends, strikers may be recalled as positions become available. If an employer bargains in bad faith, the penalty is to be ordered to bargain in good faith (Dannin 1987, 1997; Dannin and Singh 2002; Dannin and Wagar 2000; Stolzenburg 2002).

We theorize that an employer in Regime A is likely to behave in a particular strategic way. When unemployment is high and/or if there is low employee solidarity, an employer is likely to assert an extreme position and not concede any demand. The employer has an incentive

to reach impasse, because then it can implement its final offer, permanently replace strikers, and, perhaps, de-unionize. The union's strategy is to make concessions to avoid impasse and thus implementation and a strike, and to accept poor offers because other alternatives are so unappealing. Thus, a union is likely to move toward the employer's position but not vice versa. As a result, the law moves the union's bargaining power a notch lower than it would otherwise be in given economic or social circumstances (cf. Regime C). We propose, therefore, that under Regime A the employer's bargaining power is strengthened and that of the union is weakened.

Regime B (interest arbitration) is based on public sector bargaining law. Strikes and lockouts are illegal. At impasse, the parties submit final offers to interest arbitration. The arbitrator chooses the best proposal based on the evidence offered. Interest arbitration is significant for law reform because it is being proposed to resolve first contract impasses in the private sector (U.S. Commission on the Future of Worker-Management Relations 1994).

We hypothesize that, with strike and lockout leverage removed, both parties must rely on persuading the other to accede to a proposal. Part of that persuasion is an awareness of how an arbitrator will react. Thus, both the employer and union are encouraged to make proposals that will be seen as reasonable and move toward the middle. We propose, therefore, that under Regime B, neither the employer nor the union is favored in terms of bargaining power.

Regime C (economic power) is Regime A without implementation or striker replacement. Strikes and lockouts are legal, but replacements may not be hired. At impasse no terms can be changed until agreement is reached. Regime C provides a method for resolving impasses that gives the employer and union the same or reciprocal rights when an impasse is reached. It also can be argued that this is the method closest to that originally enacted, without the judicial interpretations of striker replacement and implementation upon impasse that have transformed its operation. Regime C leaves it to each party to resolve impasses by deciding whether the proposals made are satisfactory to it.

We theorize that, under Regime C, the role law plays is to make negotiation more attractive than strategies such as trying to reach an impasse and avoid negotiation. Under Regime C the parties have un-

fettered and equal use of strikes and lockouts as resources to create bargaining power.

We predict that under Regime C employers and unions will frame their strategies based on their perceptions of their own and their bargaining partner's bargaining power. So if the employer sees union power as low because unemployment is high, its strike fund is depleted, and there is low union solidarity, the employer will be less likely to make concessions. If, on the other hand, the employer sees the union as having high bargaining power because unemployment is low, the strike fund is adequate, and there is high solidarity, the employer is more likely to believe the union will stick to its demands, so the employer will make concessions to avoid a strike. The union should make similar calculations. The Regime C employer cannot count on reaching impasse to get its way, and the union would not have to make concessions solely to avoid an impasse, since only agreement would change the status quo. Thus, we propose that neither the employer nor the union would be favored in bargaining strength as a result of the law.

One way of thinking about the degree to which each legal regime would affect bargaining power is to consider the following scenario. If a party was told to maximize its chances of attaining its bargaining goals and could choose to be either an employer or a union and also choose which regime to bargain under, we argue it would choose to be an employer under Regime A (EA). Put another way, if a party could choose the role it most wanted to avoid in order to minimize the chances of not being able to achieve its bargaining goals, it should choose to avoid being a union under Regime A (UA). Or if one rank ordered the six roles based on degree of bargaining power, the end points would be EA and UA. All other roles and regimes would be somewhere in the middle.

METHODOLOGY

Subjects were 120 students who were attending a large public university and a small private law school on the West Coast of the United States. Our sample consisted of 43 business and 77 law students. Forty males and 80 females participated in the study. The average age of the respondents was 27 years old ($s.d. = 7.52$). Twenty-eight percent of the

students who participated in the study had previous negotiation experience, although not collective bargaining or labor law experience.

The administration of the study followed the guidelines of the Committee on the Protection of Human Subjects (at both institutions), which mandated voluntary participation, informed consent, and subject anonymity. All subjects received remuneration of \$30 each for the two hours they participated. The recruitment message invited students to participate in a two-hour research project on collective bargaining. It was e-mailed to the law students and read to a random selection of business classes (management, accounting and finance, and marketing). Nothing specific about the research project was mentioned in the advertisements. The studies were administered in groups of approximately 20–30 participants in each session.

When participants arrived at their scheduled session, they were randomly assigned to a two-person group. In a few cases, when we had an odd number of participants, we had a three-person group. Each caucus was seated some distance from other caucuses, so they could not overhear other discussions.

Each group was randomly assigned to one of six different caucuses: union caucuses UA, UB, or UC, or employer caucuses EA, EB, or EC. The participants were first told to read a one-page sheet. The sheet for all caucuses contained the following information:

Owen Corporation produces computer components. It is about to begin negotiating a collective bargaining agreement with the United Employees Association. The UEA represents hourly production, plant clerical, quality control, shipping, warehouse, and clerical workers—approximately 256 employees. Employees are exposed to many chemicals used to produce the computer components. The union is concerned that these may be hazardous and may cause health problems. Several workers compensation claims are now pending involving cases of pancreatic, throat, and lung cancer and various respiratory and skin ailments. In addition, this past year, several workers had babies with serious defects.

The union proposes 1) an across-the-board raise of 2 percent a year in each of the next three years, 2) installing a system to monitor levels of toxic substances in the workplace, 3) establishing a joint employer-union health and safety committee, and 4) improved health insurance.

The employer takes the position that health problems are the result of improper use of safety devices and employee alcohol or drug abuse. The employer proposes 1) subcontracting the most hazardous work in the plant, 2) implementing random drug testing, and 3) making hazardous work voluntary and paying a premium for it.

All union caucus information sheets contained the following additional information:

You are meeting in a union caucus to discuss your strategies for bargaining. You are aware that you have the following individuals among your membership. Some employees may be HIV positive and would not want this known. Several are members of the Libertarian Party. Sixty percent of the workforce is female. Seventy-three percent of the workforce is of child-bearing age. Your strategies must accommodate your constituents' interests, your predictions as to your opponent's strategies, and your plan to deal with those strategies. Keeping all this in mind, what strategy will put the union in the strongest position possible? Strongest means what will get the union the most possible.

All employer caucus information sheets contained the following additional information:

You are meeting in an employer caucus to discuss your strategies for bargaining. You are aware that your managers, supervisors, and employees include individuals with diverse interests and views.

The union has provided attorneys for all employees who have filed workers compensation claims and has informed you that it will be considering grievances and further legal action concerning workplace health and safety.

You have been solicited by the president of a company which performs both drug testing and assists in applicant screening and who hopes to gain your business. In fact, this is what first interested the company in testing. There has been news recently about other companies which ran into trouble because of drug use by employees.

Your strategies must accommodate your constituents' interests, your predictions as to your opponent's strategies, and your plan to deal with those strategies. Keeping all this in mind, what strategy will put the employer in the strongest position possible? Strongest means what will get the employer the most possible.

Finally, each caucus had information about the way its legal regime resolved bargaining impasses. The information sheets for employer and union caucuses in Regime A (EA and UA) stated:

If a union and employer reach an impasse in bargaining, the employer may implement its final offer. There is no requirement to make concessions. If the union strikes, the employer may hire permanent replacements to take the jobs of the strikers but may not fire them. At the strike's end the strikers are placed on a recall list and will be recalled if and as positions become available. If the employer bargains in bad faith, the only penalty is an order to bargain in good faith.

Regime A is based on the law that currently controls bargaining in the private sector in the United States as a consequence of various judicially developed doctrines permitting implementation upon impasse and striker replacement.

The information sheets for employer and union caucuses in Regime B (EB and UB) stated:

Strikes and lockouts are outlawed. When impasse is reached, the parties must submit their final offers to "final offer interest arbitration." This means that each side will present evidence to support its proposals to an arbitrator at a hearing. The arbitrator will then choose the best proposal based on the evidence offered.

Regime B is based on interest arbitration, a method commonly used to resolve impasse in many public sector collective bargaining laws, and it is usually the case that strikes and lockouts are illegal in the public sector.

The information sheets for employer and union caucuses in Regime C (EC and UC) stated:

Strikes and lockouts are legal. When impasse is reached, no replacement workers may be hired in either a strike or lockout situation. No terms may be changed until an agreement has been reached.

Regime C is a scenario that emphasizes the parties' use of the equal economic weapons of strike and lockout and that appears to be congruent with the law contemplated by the drafters of the NLRA.

After the participants had finished reading the information sheet for that caucus, they were told to develop a strategy for reaching the most favorable bargaining outcome for their side. After 15 minutes, the par-

ticipants were told to switch positions—that if they were originally an employer, they should begin to develop a strategy from a union point of view, and if they were a union, they should begin to develop a strategy from an employer point of view. After another 15 minutes, they were told to return to their original identities and develop their final strategies. Then after 10 minutes, they were told to begin writing down their strategies.

When all groups completed their strategies, we administered a survey that each participant was to fill out individually. When they were finished, we administered a survey that each caucus was to answer by group consensus. We then held a debriefing session during which we discussed the various caucuses' laws and solicited participant reactions. The participants were not aware until the debriefing session that there were different legal regimes. Finally, we administered an individual questionnaire that permitted participants to add information or reactions they wanted to report as a result of the debriefing.

No actual bargaining occurred, although the participants believed throughout the study that they would be bargaining. We did not define the term *impasse* but rather let the participants use their own sense of its meaning, one that is close to the various legal definitions without necessitating an understanding of the legal complexities of the doctrine. The results discussed here rely on two of the three surveys—the individual level response and caucus level response.

In evaluating and drawing any implications from our results, we have borne in mind that there are important limitations in using this research methodology, although there are also advantages. The advantages are those inherent in any modeling that first simplifies a complex system by limiting variables and then is used to examine and predict the workings of that more complex system (Roth 1995). Here, we have constructed a controlled environment in which to examine and contrast a limited number of features of the negotiation processes preceding *impasse* procedures. The subjects were given only a handful of issues to consider, although they were ones likely to be included in real negotiation.

The primary disadvantage is that the exercise was not real. The subjects had virtually no experience with collective bargaining law or with bargaining. They faced no losses and no real risks and thus were likely to have little invested in the process. The subjects had no opportunity to

learn from past negotiations and apply that experience nor to have been trained—things one would expect with real negotiators. Severe time limits meant emphasizing quick assessments and reactions. Finally, they never bargained but rather simply formulated strategies.

We were aware of all these problems and therefore tried to construct this social science experiment in a way that minimized as many of these problems as possible. In order to inject greater realism into the process, we chose bargaining issues that are commonly encountered in bargaining and have ramifications the subjects could easily grasp. We provided the subjects with information about their respective constituents' interests in order to help them gauge how their proposals and strategies would likely be received. To help them behave more like an experienced and sophisticated bargainer, we had subjects temporarily shift sides and act in the role of their bargaining partner. This was intended to help them appreciate potential strategies and the other side's reactions and then reconsider their own strategies in light of that experience. In fact, during the sessions we heard them actually reacting in this way when they progressed through the session, as they realized what their bargaining partner's limitations or strengths were.

In addition, we recruited participants who lacked experience with collective bargaining and labor law so we would have reactions to the law that would be as untainted by bias and disinterested as is possible. We realize, of course, that law and business students do not come to a collective bargaining exercise with no opinions concerning unions, collective bargaining, or employers. Labor and collective bargaining are highly contested, and proposals for law reform are highly partisan. The participants in this exercise were therefore in the unique situation of having some practical experience with collective bargaining while being relatively nonpartisan in their responses and in having no real stake in the outcomes.

Finally, we stopped short of collective bargaining because we wanted to retain a focus on the law and participants' reactions to it. The give and take of real negotiating, especially with unsophisticated bargainers, might have muddled their responses and made interpretation more difficult. In addition, we were concerned that we have sufficient participants to have statistically reliable results. Sessions of sufficient length to include bargaining would have drastically reduced our pool size. Time was limited to two hours total so we could include a larger number of subjects.

This is the first part of a long-term, phased study to measure the operation of discrete aspects of law with regard to bargaining. In this initial phase, we measured the impact of impasse law in a fairly unsubtle way. This makes it more likely to get a clear cut answer to the question whether law in general—and impasse law in particular—has an effect on bargaining. In this chapter we examine only the question of whether law has an impact on bargaining power. We use the participants’ perceptions of their power versus the power of their bargaining partner in their regime as a proxy for actual bargaining power. The ultimate measure of power would be a study of actual or simulated bargaining. However, perceptions of one’s own power relative to the party one bargains with can translate into real power. Therefore, measuring perceptions of power also measures a component of bargaining power.

RESULTS AND DISCUSSION

Participant responses confirmed our overarching theory: different legal regimes resulted in different perceptions of bargaining power (Table 8.1). First, using the individual level responses, in general we found that under Regime A, the participants rated the employer’s bargaining

Table 8.1 A Preliminary View of Bargaining Strength (Individual Response)

Legal regime	Employer stronger	Employer weaker	Union stronger	Union weaker	E/U strength
AU	23	1	6	17	
AE	17	3	4	16	
BU	4	11	11	4	
BE	8	4	7	6	
CU	9	6	13	1	
CE	2	10	15	0	
AU+E	40	4	10	33	E: 36/U: (23)
BU+E	12	15	18	10	E: (3)/U: 8
CU+E	11	16	28	1	E: (5)/U: 27

NOTE: The raw score does not add up to 120 since we did not include “no effect” and “did not answer” in this table. Parentheses indicate a negative value.

power as net 59 points stronger than the union's. Under Regime B, the participants rated the union's bargaining power as net 5 points stronger than the employer's, essentially a tie. Under Regime C, the participants rated the union as net 22 points stronger than the employer. Each regime has a different pattern of perceptions of bargaining power. These differences are confirmed in other data from this study reported in Dannin and Singh (2004).

While our general theory that law affects perceptions of bargaining power is supported by the data, our theories as to individual regimes were only partly supported. Thus, in two cases (Regimes A and B), our hypotheses were confirmed, and in one (Regime C) they were not. The detailed data on which those conclusions are based are included below.

In Regime A individual responses, the union participants thought the law weakened the union (23 percent union stronger versus 65 percent union weaker), and saw the law as greatly strengthening the employer (89 percent employer stronger but 4 percent employer weaker). The employer respondents agreed that the law strengthened the employer (77 percent employer stronger versus 14 percent employer weaker) and weakened the union (18 percent union stronger but 73 percent union weaker) (Tables 8.2A and 8.2B).

The caucus level responses were in the same direction but more highly skewed. Union respondents saw Regime A as weakening the union (8 percent union stronger to 83 percent union weaker) and as strengthening the employer (92 percent employer stronger to 8 percent employer weaker). Employer respondents also saw the regime as weakening the union (0 percent union stronger versus 82 percent union weaker) and strengthening the employer (82 percent employer stronger to 9 percent employer weaker) (Tables 8.3A and 8.3B).

In short, these results support the hypotheses as to Regime A with respect to bargaining strength. The participants saw the law as creating a highly unbalanced bargaining structure, with employer bargaining power from three to four times greater than the union's. Such skewed bargaining power could destabilize or undermine collective bargaining to such a degree that it recreates the power relations the NLRA was enacted to rebalance (Dannin 2004). These results were in accord with other data from this study that found strong dislike for Regime A among the participants. They saw the law as highly unbalanced. Far more of

Table 8.2A The Effect of Caucus on the Strength of Your Own Bargaining Position (Individual Response, %)

	UA	UB	UC	EA	EB	EC	Total
Strengthened	23.1	52.4	76.5	77.3	50.0	11.1	47.5
Weakened	65.4	19.0	5.9	13.6	25.0	55.6	32.5
Did not affect		9.5			12.5		3.3
No answer	11.5	19.0	17.6	9.1	12.5	33.3	16.7
<i>N</i>	26	21	17	22	16	18	120

NOTE: Chi-square = 48.31; d.f. = 15; and $p < 0.01$.

Table 8.2B The Effect of Caucus on the Strength of Your Partner's Bargaining Position (Individual Response, %)

	UA	UB	UC	EA	EB	EC	Total
Strengthened	88.5	19.0	52.9	18.2	43.8	83.3	51.7
Weakened	3.8	52.4	35.3	72.7	37.5		33.3
Did not affect						5.6	0.8
No answer	7.7	28.6	11.8	9.1	18.8	11.1	14.2
<i>N</i>	26	21	17	22	16	18	120

NOTE: Chi-square = 55.36; d.f. = 15; and $p < 0.01$.

the participants wanted to alter the law of Regime A to make it more fair (Dannin and Singh 2005).

The results of Regime B show a very different pattern. The individual responses from union respondents saw the law as tending to strengthen the union (52 percent union stronger and 19 percent union weaker, and 29 percent no answer or no effect) and weaken the employer (19 percent employer stronger, 52 percent employer weaker, and 29 percent no answer or no effect). Employer respondents, however, tended to see the law as strengthening the employer (50 percent employer stronger, 25 percent employer weaker, and 25 percent no effect or no answer), while having a more neutral impact on the union (44 percent union stronger versus 38 percent union weaker and 19 percent no answer) (Tables 8.2A and 8.2B).

The caucus level results were similar. Union caucuses saw the law as strengthening the union (67 percent stronger versus 11 percent union weaker and 22 percent no response or no effect) and weakening the em-

Table 8.3A The Effect of Caucus on the Strength of Your Own Bargaining Position (Caucus Response, %)

	UA	UB	UC	EA	EB	EC	Total
Strengthened	8.3	66.7	88.9	81.8	62.5	11.1	51.7
Weakened	83.3	11.1		9.1	37.5	77.8	37.9
Did not affect		11.1					1.7
No answer	8.3	11.1	11.1	9.1		11.1	8.6
<i>N</i>	12	9	9	11	8	9	58

NOTE: Chi-square = 36.29; d.f. = 15; and $p < 0.01$.

Table 8.3B The Effect of Caucus on the Strength of Your Partner's Bargaining Position (Caucus Response, %)

	UA	UB	UC	EA	EB	EC	Total
Strengthened	91.7	11.1	33.3		50.0	100.0	47.4
Weakened	8.3	44.4	55.6	81.8	50.0		40.4
Did not affect				9.1			1.8
No answer		44.4	11.1	9.1			10.5
<i>N</i>	12	9	9	11	8	8	57

NOTE: Chi-square = 46.43; d.f. = 15; and $p < 0.01$.

ployer (11 percent employer stronger versus 44 percent employer weaker and 44 percent no response). However, the employer caucuses saw the law as strengthening the employer (62 percent employer stronger versus 38 percent weaker) and having no effect on the union's bargaining power (50 percent union stronger and 50 percent union weaker). These results support our hypothesis that neither Regime B employer nor union is favored in terms of bargaining strength (Tables 8.3A and 8.3B).

Certainly, the perception of Regime B's impact on bargaining strength differs markedly from that of Regime A. Both Regime B unions and employers saw the law as more likely to strengthen themselves and weaken their partner. Obviously this cannot reflect reality. What it may suggest is that each saw the law as treating them fairly and as providing ways to increase their bargaining power. This overall satisfaction with Regime B suggests resolving private sector impasses through interest arbitration could be more acceptable to both employers and unions than the current system (U.S. Commission on the Future of Worker-Management Relations 1994).

Of course, experience with actual interest arbitration might alter this attitude. There is a well-known concern that interest arbitration creates dependency and weans employers and unions away from real collective bargaining (the “narcotic effect”) (Kochan and Katz 1992). Certainly, anyone who pays attention to public sector collective bargaining knows that the availability of interest arbitration has not brought about labor relations nirvana.

Nonetheless, given the study results, it seems worthwhile to rethink potential uses for interest arbitration in the context of private sector collective bargaining. For example, it is widely believed that private sector bargaining is undermined by the weak remedy of a bargaining order when an employer has engaged in bad faith bargaining. This is seen as giving an employer who is determined to engage in bad faith bargaining a virtual license to continue this conduct. The NLRA says nothing about bargaining orders and certainly does not mandate them as a remedy for bad faith bargaining. What the NLRA does require under §10(c) is that remedies effectuate the policies of the NLRA. Section 1 states: “It is hereby declared to be the policy of the United States . . . [to encourage] the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of [workers’] employment . . .” If interest arbitration is more likely to promote the practice and procedure of collective bargaining than an order to bargain in good faith, then it might make sense for the NLRB to order interest arbitration in appropriate cases (Dannin forthcoming).

The point is that an employer who faced an order to interest arbitration if it engages in bad faith bargaining might be more interested in reaching a negotiated agreement than in having an arbitrator impose terms. The results of this study and other survey answers by Regime B participants not discussed would support such a remedy (Dannin and Singh 2002, 2004, 2005).

Regime C responses demonstrate yet a third pattern. Individual union negotiators saw the law as greatly strengthening union bargaining power (77 percent union stronger, 6 percent union weaker, and 20 percent no answer or no effect), and also as generally enhancing employer bargaining power (53 percent employer stronger versus 35 percent union weaker, and 12 percent no answer). Employers, however, saw the law as greatly strengthening union bargaining power (83 percent union stronger and 17 percent no effect or no answer) while weakening

employer bargaining power (11 percent employer stronger versus 56 percent employer weaker, and 33 percent no answer) (Tables 8.2A and 8.2B).

The caucus level response for Regime C shows a similar pattern. Union participants saw the law as greatly strengthening union bargaining power (89 percent union stronger and 11 percent no answer) and tending to weaken employers (33 percent employer stronger and 56 percent employer weaker, with 11 percent no answer). Employer participants again saw the law as giving unions overwhelming strength (100 percent union stronger) and greatly weakening employers (11 percent employer stronger versus 78 percent employer weaker, with 11 percent no answer) (Tables 8.3A and 8.3B).

We had theorized that Regime C would have a fairly neutral impact on bargaining strength since both employers and unions had the economic weapons of lockout and strike but no others. Put in economic game theory terms, we saw it as akin to an ultimatum game with punishment. That is, if a party made an unacceptable offer, the offeree's refusal to accept would mean that neither received the benefits of change. Furthermore, the parties could use the strike and lockout weapons to punish the other for an unacceptable offer.

The results, however, did not support our predictions that the law in Regime C would have a neutral effect. Participants did not see the law as neutral. They perceived it as strongly increasing union bargaining power. It is possible the participants, who had little experience with collective bargaining, felt the strike was a very strong weapon (Fossum 2002). In addition, at the time the sessions were run, unemployment was low and the economy so strong that it was well known that employers were having trouble finding workers. As a result, the environment was one in which employers had relatively low leverage. It is also possible that the participants felt that employers should control workplace terms or that employees and unions were likely to behave irresponsibly. Yet another possibility is that the participants thought that Regime C would let even a weak union in poor economic conditions hold negotiations hostage.

Again, turning to economic game theory, Regime C is an ultimatum game with punishment except that, in some cases, the punishment does not fall equally on both. A party can use punishment to give itself a reward. It gives a party who lacks the strength to use economic weap-

ons the power to hold up changes the other party needs or desires by simply refusing to agree. It may also disproportionately reward a party who is happy with the status quo. Unlike Regime A, Regime C does not pick winners and losers. That is, it will not always be the union or the employer who wants to hold up change. For example, an employer who did not want to increase wages could simply refuse to agree, and a union that opposed subcontracting or other structural changes could easily retain the status quo.

Of course, over time, the parties would develop strategies to negotiate their way out of impasses. A union might accede to changes that harmed employees if it believed this was preferable to harming the company and losing all jobs, and an employer might accept wage increases, because it would be better to give workers a bigger slice of the pie than have no pie at all. In other words, the “dog in the manger” phenomenon that lurks in this scenario might be overcome, because we can trust the parties to create a fair structure over time. If not, it may be useful to consider lessons from economic bargaining experiments and provide some sanction for a non-cooperator. Imposing interest arbitration as a remedy for overly long and destructive impasses could be a sanction that would resolve the impasse and push the parties to bargain.

On the other hand, if these results reveal how such a law would work in reality, it could lead to deep employer grievance, essentially the mirror image of what unions feel under private sector law now. The question this raises for law reform is whether it is possible to alleviate the employer sense of unfairness without making unions feel deeply aggrieved. These results are particularly interesting, given the advocacy for a system of collective bargaining based on economic weapons (Troy 1999).

CONCLUSION

In this study, we found that each law had a different impact on participants’ perceptions of bargaining strength. The scenarios were the same with the exception of the law that applied to impasse resolution. The results show that this fact alone had a powerful effect on the participants’ perceptions of bargaining power, and that these perceptions im-

bued the entire process of bargaining and not only to the single event of reaching an impasse. The study therefore provides support for the basic theory that collective bargaining law should properly be seen as a resource that, along with other resources, can affect bargaining strength. Thus, the results suggest that theories about bargaining power that fail to include law will lack predictive power.

The results also confirm theoretical and anecdotal contentions that the judicially created doctrines of permanent striker replacement and implementation of the employer's final offer upon impasse seriously weaken union bargaining power relative to the employer (Dannin 2005).

The study design provided a fertile way to test how specific laws operate. Given the nature of social science experiments in general and of these in particular, we interpret our results with caution. The way we use them is if our predictions were not confirmed or were found not to exist in the study context, then this would not prove that the effects did not exist in actual labor negotiations, but such a result would suggest caution in assuming they would. On the other hand, if predicted effects are found, this does not mean they will be found in actual labor negotiations, but it makes the expectation more plausible and provides insights and a baseline for comparing what actually happens.

In addition, the results provide guidance as to how discrete aspects of the law affect bargaining power and the formulation of bargaining strategy. Ultimately these ought to affect collective bargaining outcomes. The results also provide some evidence whether common sense instincts about a regime's effects are reflected in human behavior.

Finally, we think it is important to emphasize that we examined the reactions of nonpartisan, disinterested participants to different collective bargaining regimes. For this reason, their responses provide a special window into the operation of the law. Most of those who comment on labor law are highly partisan and self-interested. Therefore, the intensity and unanimity of the views of both those who took the roles of employer and union negotiators in their caucuses as to impasse resolution in the private sector deserves special attention. The NLRA was enacted to promote equality of bargaining power between employers and employees. The study participants, however, perceived a law that is highly unbalanced. The participants saw the judicially created doctrines

of striker replacement and the employer's right to implement its final offer upon impasse as heavily skewing power toward the employer.

The NLRA was enacted because Congress concluded that law—corporate law at the time—so unbalanced bargaining power that workers had lost the ability to bargain as equals with their employers. As a result, wage rates and the purchasing power of workers were depressed, leading to industrial strife and unrest. The results of this study suggest that at least in the private sector, law—in this case, judge-made law—has so unbalanced bargaining power that private sector worker rights are again in danger.

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Part 4

International Perspectives on Workers' Rights in the United States

10

America's Union-Free Movement in Light of International Human Rights Standards

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Within North America there is a school of thought that holds that unions have no place in well-managed enterprises. From that point of view, remaining “union free” and “union avoidance” are legitimate objectives of corporate policy. Maintaining a union-free environment not only relieves corporate management from the necessity of dealing with a potentially disruptive influence, it is also a public symbol suggesting that good human resource practices and business practices are in place. Thus, from this perspective, unionization of a nonunion enterprise or facility suggests poor management.¹

The International Labour Organization (ILO), on the other hand, promotes a philosophy that is completely at odds with union-free principles. The vision of the ILO is that of an industrial relations system whose basic elements are those of social partnership—with worker representatives and employer representatives as the partners—and social dialogue in which the partners discuss and negotiate a broad range of issues of mutual interest. Unions are seen to be the major institutions through which workers are able to participate in employment decision-making. So that social dialogue may take place, unions and collective bargaining are to be encouraged rather than discouraged as indicated by union-free philosophy.

The ILO is a tripartite agency affiliated with the United Nations. Representatives from governments, trade unions, and the business community from most of the world's countries meet once a year in Geneva to legislate international standards for workers around the globe.

Employer and union representatives are appointed by their national governments. At a minimum one might expect those representatives to respect and help to foster acceptance of the ILO's mission. If so, with regard to the employer representatives from the United States, that expectation would not be met. Instead, the U.S. Council on International Business, the organization delegated the responsibility for dealing with the ILO, pursues policies that have the effect of thwarting acceptance of ILO philosophy in the United States while accepting and sheltering adherents of the union-free philosophy.

THE UNION-FREE MOVEMENT IN NORTH AMERICA

The fundamental tenets of the union-free philosophy may be summarized as follows:

- Unions are unnecessary if workers are fairly treated and well managed.
- Unions are disruptive and frequently result in poor enterprise performance.
- Because of one and two above, managers have a responsibility to the enterprise to institute policies that will maintain a union-free environment.
- Unions are "outside organizations" standing disruptively between enterprise management and its employees.

As Kaufman (1993) has demonstrated, union-free philosophy has long had a strong following within the ranks of U.S. management. In the first decades of the twentieth century the labor problem was a major sociopolitical issue as workers protested their conditions of work and demanded that they be treated with respect and dignity rather than as soulless commodities. One answer to this social issue was good "personnel management" unilaterally instituted by employers with as much or as little employee input as the benevolent employer deemed to grant. As Kaufman (1993, p. 41) notes:

PM [personnel management] advocates held labor unions in low regard. While they were prepared to admit that workers are all too

often driven to seek a union by autocratic, exploitative employers, they thought unions are not only incapable of solving the underlying problem (poor management) but often saddle the firm, and workers with restrictive work rules, inflated wage demands, strikes, and international political intrigues.

Moreover,

(t)hey also believed that labor unions are run by outsiders whose self-interest is served by fomenting conflict.

Among the organizations most firmly supporting this position was and continues to be the National Association of Manufacturers (NAM). Throughout the twentieth century it consistently backed initiatives designed to check the growth of unions and collective bargaining. In the 1970s it organized the Council For a Union-Free Environment, whose mission is explicitly to foster union-free philosophy and behavior (Derber 1984, p. 105). The council and the NAM continue to be closely interconnected, and the NAM actively circulates material produced by the council designed to aid employers intent on remaining union free.²

The philosophy has been embraced not only by organizations whose major purpose is to thwart the advance of unionism, but also by human resources academics who have accepted "union substitution" as a legitimate corporate goal. Consider the following comments that appear in a popular Canadian human resources text. In order to effectively implement a union-substitution strategy, "Human resource managers need to apply the ideas discussed in earlier chapters of this book. Failure to implement sound human resource policies and practices provides the motivation for workers to form unions" (Schwind, Das, and Wagar 1999, pp. 661–662).

THE ILO AND ITS PHILOSOPHY OF EMPLOYMENT RELATIONS

The ILO was formed at the end of World War I. Its mission was to promote "social justice" as an essential condition for a lasting peace (Bartolomei de la Cruz, von Potobsky, and Swepston 1996). Its annual labor conference, attended by delegates not only from states but also,

as noted above, by representatives of labor and management, was conceived of as a kind of World Parliament of Labor (Kaufman 2004, p. 205). Its function was to establish, by the passage of conventions and recommendations, basic standards applicable globally. A professional bureau was created with a permanent professional staff whose job was to promote the standards and culture of the organization. One of its major missions was to pressure, cajole, or otherwise convince member states to make ILO conventions and recommendations part of their domestic labor legislation and to foster practices that are consistent with ILO principles.

Except for a period in the 1970s, when it withdrew as a protest against what it perceived to be undue influence of the Soviet Union, the United States has been a major supporter of the ILO and its mission (Kaufman 2004, p. 552; McIntyre and Bodah 2006). Indeed, although its enforcement capacity is limited by both custom and constitution, one reason for the considerable amount of success that the ILO has had over the years (see, e.g., Valticos 1998) is that the United States pressures nations depending on it for trade and development aid to institute labor practices consistent with ILO standards (see Compa and Diamond 1996). The flaw in this arrangement is that there is no world power strong enough to ensure that the United States itself abides by the standards it fosters elsewhere.

Over the years the ILO has adopted nearly 200 conventions. Although they establish the standard for all nations, most of them do not become binding unless ratified by the legislature of each state individually. A small subset, however, addresses “fundamental human rights.” These deal with freedom of association, collective bargaining, discrimination, forced labor, and child labor. The failure of any state to institute practices consistent with the principles inherent in these instruments is considered to be improper and offensive to the international order.

Recently, in its Declaration on Fundamental Principles and Rights at Work, the ILO affirmed its support for the human rights nature of the core set of labor standards (ILO 2000). Labor, business, and state representatives from the United States all supported and voted in favor of this declaration.

With respect to unions and collective bargaining, the ILO’s philosophy is embedded in two major conventions—numbers 87 (Freedom of Association and Protection of the Right to Organize Convention) and 98

(Right to Organize and Collective Bargaining Convention). It is further elaborated in the jurisprudence of the ILO's Committee on Freedom of Association, which hears complaints and issues public opinions which have accumulated into a body of international case law (Bartolomei de la Cruz, von Potobsky, and Swepston, 1996, pp. 102–107). Whether they have ratified conventions or not, all member states of ILO are required, as a constitutional condition of membership, to institute policies consistent with the ILO's interpretation of the meaning of the term Freedom of Association. Through its opinion on specific cases, it is the job of the Committee on Freedom of Association to give the concept concrete substance.

A review of relevant documents reveal the ILO philosophy on unions and collective bargaining to have the following basic tenets:

- As stated in Article 2 of Convention 87, “All workers without distinction whatsoever, shall have a right to establish and . . . to join organizations of their own choosing.”
- All workers have the right to select representatives of their own choosing (Bartolomei de la Cruz, von Potobsky, and Swepston, 1996, p. 192).
- Legitimately selected worker representatives have the right to be recognized by employers and other relevant authorities. As stated in Bartolomei de la Cruz, von Potobsky, and Swepston (1996), “The general principle is that employers, including governmental authorities in their capacity as employers, should recognize for collective bargaining the organizations that represent the workers employed by them” (pp. 219–220).
- Employers have a responsibility both to recognize and negotiate with legitimately selected worker representatives. As Bartolomei de la Cruz, von Potobsky, and Swepston (1996) put it, “Without recognition of the right to negotiate the rest of the guarantees in the Convention (no. 87) are meaningless” (p. 228).
- Member states have a responsibility, not merely to permit but rather to “promote” collective bargaining. As stated in the Declaration on Fundamental Principles and Rights at Work, “all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of member-

ship in the Organization, to respect, to promote and to realize in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining.” (ILO 2000, Annex 1)

- Budd’s (2004, p. 13) statement that “participation in decision making is an end in itself for rational human beings in a democratic society” is an almost perfect expression of fundamental ILO philosophy.

The ILO’s position on worker representation is well expressed in the report of the Director General to the 87th Session of the International Labour Conference in 1999 entitled *Decent Work* (Somavia 1999). Somavia says, “The ILO is a forum for building consensus. Its tripartite structure reflects a conviction that the best solutions arise through social dialogue in its many forms and levels, from national tripartite consultations and cooperation to plant-level collective bargaining.” He goes on to announce an initiative to “strengthen employers’ organizations, workers’ organizations and the government authorities that deal with labor.” A key objective of the programme is to “stress the importance of building strong bipartite and tripartite institutions.” In short, decent work for all is the central objective of the ILO and a collective voice for all workers is a keystone element of decent work.

Union-free philosophy and that of the ILO are clearly irreconcilable. The ILO’s mission is to promote acceptance of unionism and the use of collective bargaining. The object of the union-free movement is to highlight the negative side of unionism and to encourage employers to take steps that will dissuade employees from unionizing and bargaining collectively.

U.S. EMPLOYER REPRESENTATIVES AND THE ILO

In 1980, when the United States rejoined the ILO, it invited the U.S. Chamber of Commerce to appoint a representative for employers. The Chamber refrained but instead turned the task over to the U.S. Council of the International Chamber of Commerce, which later became the

U.S. Council on International Business (USCIB) (Derber 1984, p. 105). That organization continues to represent the interests of the U.S. business community at the ILO. In general, the USCIB, like the U.S. government, has supported efforts by the ILO to promote its mission in countries outside of the United States. With respect to the United States, however, it has instituted policies that have the effect of hindering the mission of the ILO and protecting adherents of union-free philosophy.

One of the major affiliates of the USCIB is the NAM, an organization that, as noted earlier, has been promoting union avoidance since early in the twentieth century.³ Although the USCIB has not taken such an active role in the United States in promoting union-free philosophy, its activities at the national and international level have been consistent with those of the NAM.

A keystone element of USCIB strategy is the assertion that ILO standards apply only to states and not to corporations.⁴ Within the ILO (where consensus is a prime operating principle), they and their international employer colleagues have insisted on that interpretation. As a result, to achieve its mission, the ILO secretariat is, for the most part, limited procedurally to work through the aegis of domestic legislation rather than through direct pressure on labor organizations and employers. Nevertheless, according to recent legal research on international human rights law, that employer position is untenable with respect to a subset of ILO standards that have been heralded to be fundamental human rights.

Until recently the ILO had not "found it necessary to adopt an official position designating some conventions as those covering 'fundamental human rights'" (Bartolomei de la Cruz, von Potobsky, and Swepston 1996, p. 129). But in the context of globalization and concerns about the negative effects of expanding global trade on labor conditions, it has recently taken steps to clarify that certain core rights are human rights and, as such, are subject to the same respect and obligations as pertain to other universally accepted human rights. These core labor human rights are, according to the ILO's recent Declaration on Fundamental Principles and Rights at Work, the right to be free from discrimination, slavery, and child labor; the right to freedom of association; and the right to organize and bargain collectively one's conditions of work. Underlying these rights are eight ILO conventions and a body of case law, which define the behavior required for compliance with the standards

(ILO 2000). Although ordinary standards and conventions respecting them apply only to states, human rights standards apply universally.

According to Paust (2002), international human rights standards apply not only to states but also to individuals including corporations, which, at law, are simply juridic persons. In the words of the International Court of Justice (quoted by Paust), international human rights are *obligatio erga omnes*. They apply not only to states but instead are “owing by and to all humankind.”

This interpretation was recently supported by a United Nations Sub-commission for the Promotion and Protection of Human Rights, which produced a report entitled *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. With regard to corporations, the subcommission, composed of human rights experts from around the globe, stated that

even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.⁵

Freedom of association is prominently mentioned in the Universal Declaration, and the ILO and its organs (such as the Committee on Freedom of Association) are considered by the international community to be the appropriate vehicles for interpreting that right (see, for example, OECD 1996).

Not surprisingly some employer representatives found fault with the report. As an article at the USCIB’s Web site noted:

The International Chamber of Commerce and the International Organisation of Employers have opposed adoption of the Norms [by the full Human Rights Commission], contrasting the dichotomy of this compulsory approach to company behavior with the voluntary ‘good-practices’ approach of other UN initiatives, most importantly Secretary-General Kofi Annan’s Global Compact. (USCIB 2003)

After hearing from various stakeholders, in February 2005 the UN’s High Commissioner for Human Rights issued a report on “The responsibilities of transnational corporations and related business enterprises

with regard to human rights.”⁶ In the report, the high commissioner suggests that business has three types of responsibilities with respect to human rights: to respect and support human rights and to make sure they are not complicit in human rights abuses. Respect requires “business to refrain from acts that could interfere with the enjoyment of human rights.” With regard to complicity, she notes “one definition of ‘complicity’ states that a company is complicit in human rights abuses if it authorizes, tolerates, or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse.”

After noting that the responsibilities of corporations are not as extensive as those of states, the high commissioner goes on to consider the human rights that are most relevant to business. Among them she identifies freedom of association and the right to organize. Rather than draw firm binding conclusions, the high commissioner called for continuing dialogue with a view toward better clarifying the responsibilities of business. Nevertheless, it seems clear from the high commissioner’s comments that business does have human rights responsibilities and in some areas those responsibilities are obvious. Labor relations would appear to qualify as one of those areas. Active attempts by companies to dissuade their employees from evoking their right to organize and bargain collectively surely “interfere with the enjoyment of human rights” and thus constitute human rights violations.⁷

Since the right to organize and to bargain collectively is a fundamental human right, behavior with respect to it is subject to the standard laid out by Paust (2002). U.S. employers who put in place policies intended to maintain union-free status do not offend contemporary U.S. labor relations norms. They do, however, offend international human rights law. And, by insisting that the ILO promote its agenda through governments rather than directly, the USCIB shelters U.S. employers from criticism for implementing union-free strategy and thereby reneging on their human rights obligations.

Below is a quote from a document of the International Organisation of Employers (the organization, of which the USCIB is a constituent, whose primary role is representing employer interests at the ILO and in other international forums) interpreting the Global Compact which incorporates the declaration:

The Global Compact is not a code of conduct nor is it a prescriptive instrument . . . Instead, the Compact creates a forum for learning and sharing experiences in the promotion of the nine principles. Through the Global Compact, companies demonstrate to their employees and communities how they are being responsible corporate citizens. *How, or even whether, a company seeks to display this commitment is a matter of choice.* (International Organisation of Employers 2001, italics added)

In other words, it is the employer representative position that it is perfectly acceptable for corporate members of IOE-affiliated employer associations, such as the USCIB, to ignore or offend the principles included in the compact, even when they publicly endorse it and even though some of those principles deal with fundamental human rights and thus are subject to international human rights law. This stance has led one international trade union official to wonder whether employer strategy with respect to this issue has more to do with image manipulation than with making an honest behavioral commitment to comply with international standards (Baker 2004).

Although it supports ILO work with respect to the behavior of other countries, many aspects of U.S. law do not comply with ILO principles. The United States has ratified neither of the two basic conventions (numbers 87 and 98) having to do with freedom of association, unions, and collective bargaining. This failure is due in part to opposition by the USCIB despite endorsement of those principles by its Geneva representatives who voted in favor of the Declaration of Fundamental Principles. Its rationale for doing so is its position that, although many U.S. laws fail to conform to the letter of international labor law, the body of U.S. law, nevertheless, provides protection equivalent to or better than international norms. U.S. workers are, it is claimed, better off than those in most other countries and so the details of how that is accomplished are unimportant (Morehead 2003; Potter 1984).

A recent study by Human Rights Watch (2000), which reported research indicating that denial of basic labor rights is rampant in the United States, found great difficulty with the position that U.S. law and practice conforms to international standards. McIntyre and Bodah (2006) are also critical of that position. The notion that the United States has the right to institute laws it considers to be adequate, even if they are inconsistent with ILO requirements, makes a mockery of the prin-

ciple that all of the world's workers should enjoy certain common standards. It is also offensive to the basic democratic notion that all (nations in this case) are equal under the law. Nevertheless, that position is used by U.S. governments, supported by U.S. employer representatives, to justify their failure to ratify core ILO human rights conventions, while at the same time insisting that other countries conform to them.

One way in which U.S. law may be technically in line with ILO jurisprudence has to do, oddly enough, with union recognition. Recent research by Morris (2005, 2006) suggests that policies intended to preserve union-free status offend existing U.S. law. Building on previous legal analysis by Summers (1992), Morris demonstrates that U.S. employers have a legal duty under the National Labor Relations Act and the U.S. constitution to recognize and negotiate with representatives chosen by their employees whether or not those representatives have been certified by the National Labor Relations Board. If no union has exclusive representation, then the employer responsibility is, voluntarily, to recognize and deal with the legitimately chosen bargaining agent of any group of employees.

The ILO standard with respect to union recognition is identical to the Morris/Summers interpretation of U.S. law. According to the authors of a recent review of ILO collective bargaining principles: "If no union covers more than 50 percent of the workers, collective bargaining rights should be granted to all unions in this unit, at least on behalf of their own members" (Gernigon, Odero, and Guido 2000, p. 38).

The Morris/Summers interpretation of U.S. labor law arrived as a surprise to many academics and practitioners. In practice, U.S. employers commonly refuse to deal with any union other than exclusive representatives who have been certified by the state and the norm is for employers vigorously to oppose certification. That practice has gone on for some time, without challenge, so it is still a matter of legal opinion whether or not the courts would uphold the Morris/Summers position. It is clear, however, that refusal to recognize and deal with minority unions is a violation of ILO human rights standards, and thus of international human rights law binding on all. In short, failure to recognize and deal with a minority union is a human rights offense of the same order as engaging in overt discrimination or employing child labor.

Another element of USCIB strategy, as already mentioned, is to oppose ratification of ILO standards by the United States. One of the main

justifications for doing so is the assertion that many U.S. laws would have to be altered as a result. There is differing legal opinion about the validity of that assertion (McIntyre and Bodah 2006). Nevertheless, it is certainly beyond doubt that many laws regulating labor relations in the United States are offensive to the letter and spirit of ILO standards.

Edward E. Potter has long been one of the USCIB's main spokespersons at the ILO. In the mid-1980s he wrote a monograph entitled *Freedom of Association, the Right to Organize and Collective Bargaining* (1984). His avowed purpose in doing so was to elaborate the American employer view that ratification of basic ILO conventions would have a disruptive effect on the United States by requiring changes to many U.S. laws. The document was, in fact, a compendium of instances in which U.S. law fails to comply with international standards. For example, while ILO standards require governments to "encourage and promote the full development and utilization of the machinery for voluntary negotiations between employers or employers' associations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements," in the United States "a number of states . . . do not provide collective bargaining rights for all or some categories of employees and, in Virginia, collective bargaining has been determined by the courts to violate the state constitution" (Potter 1984, pp. 58–59). To one formally committed to seeing the standards of the ILO implemented globally, bringing U.S. law up to international standard might seem to be the obvious solution to this situation. Instead, the USCIB defends the continuation of practices clearly offensive to ILO philosophy.

Not only does the USCIB shelter the union-free movement by opposing ratification by the United States of ILO human rights conventions and insisting that ILO standards apply to governments but not corporations, it also has recruited outspoken union-free advocates to serve as ILO representative. Morehead (2003) made the following statement at a meeting on human rights in employment, to which he was invited because of his role as an employer representative at the ILO:

I was bemused at the naiveté in one part of the Human Rights Watch Report (2000) where as evidence of management hostility to unions they cited a study by Professors Freeman and Rogers that a majority of managers would oppose any unionization effort in their workplace, and at least one-third of them said it could

hurt their advancement in the company if employees they manage formed a union. Of course it is going to hurt their advancement. If I have learned one thing in over 30 years of dealing with unions, it is managements—not unions—which organize a workplace. I should add bad management at that, so of course it will reflect badly on them. In hundreds of conversations with local union leaders over the years, it was never wages or benefits that got them interested in a union: it was their treatment by management.

The statement is an excellent example of union-free philosophy at work.

CONCLUSION

Union-free philosophy is irreconcilable with international human rights standards and the philosophy of employment relations advocated by the ILO. The two cannot coincide with integrity. The union-free philosophy is offensive to the human right of workers to organize and bargain collectively. Union-free philosophy must be rejected by everyone who supports the international human rights consensus and the work of the ILO. It follows then that the appropriate course for the agency chosen to designate representatives and develop employer strategy within the ILO is to reject it. America's employer representatives at the ILO should be expected to embrace the standards and philosophy of that organization and work toward its vision of ethical industrial relations. If the USCIB is unwilling to commit to that project, the U.S. government should appoint another, more progressive organization to fulfill that task.

Notes

1. This view is well articulated in the management manual of a large, nonunion U.S. firm and in the seminar materials of a law firm advertising itself as specializing in "union avoidance." Both of these documents are available from the author on request.
2. See http://www.nam.org/s_nam/doc1.asp?CID=22&DID=201891 and http://www.cueinc.com/about_us/overview.asp?id=0&tkn=0.

3. The president of the NAM serves as a USCIB trustee (see the USCIB Web site, at <http://www.uscib.org/index.asp?documentID=742>, accessed December 10, 2004).
4. Interviews and written exchanges with ILO officials, including Lee Swepston and Ed Potter. Potter has long been a key member of the USCIB's team of representatives to the ILO. Most of these exchanges took place during 2002.
5. See <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>.
6. Available online at <http://www.business-humanrights.org/Home>.
7. In July 2005 the UN appointed John Ruggie of the United States, an expert on human rights and one-time UN official, Special Representative on Business Enterprise and Human Rights. Ruggie's prime mandate is to clarify the human rights responsibilities of corporations. He is expected to issue an interim report in 2006 and a final report in 2007.

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11

The United States and ILO Conventions 87 and 98

The Freedom of Association and the Right to Bargain Collectively

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Opposition to the international criminal court, the refusal to sign the Kyoto agreement on global warming, the unwillingness to join a global ban on land mines, and the war in Iraq are only a few examples of the United States' reluctance to heed world opinion or join multilateral humanitarian efforts. This chapter focuses on another example of American "exceptionalism": the U.S. record on ratification of International Labour Organization (ILO) conventions.

To date, the United States has ratified only 14 of the 184 conventions adopted by the ILO¹ and only 2 of the 8 core conventions² (ILO 2002). Only 23 of the 175 ILO member nations have ratified fewer conventions; none of these nations is western or industrialized (ILO 2002).³ Until 1988, the United States had ratified only one convention that did not concern a maritime issue, a purely administrative matter that switched the ILO's affiliation from the defunct League of Nations to the newly formed United Nations. There has been a spate of activity in the past 15 years, but of the 6 conventions ratified since 1988, half concern administrative or technical matters.⁴

We examine U.S. reluctance to ratify the ILO conventions concerning the freedom of association and right to bargain collectively: Convention 87 and Convention 98.⁵ Both conventions were adopted by the

ILO in the late 1940s, and while Convention 87 was recommended for ratification by the Secretary of Labor in 1949 and by the Solicitor of Labor in 1980 (U.S. Department of Labor 1980; U.S. Senate 1949), no legislative action has been taken on either.

The United States offers three principal reasons for not ratifying Conventions 87 or 98. First, national labor policy is well established, insures a delicate balance between the interests of business and labor, and should not be upset to accommodate the wishes of an international agency. Second, based on the recent ILO Declaration on Fundamental Principles and Rights at Work (ILO 1998), as well as long-standing ILO policy,⁶ the United States has a responsibility as a member of the ILO—and regardless of whether it has ratified the conventions or not—to uphold the spirit of Conventions 87 and 98. Since the United States largely fulfills that responsibility, actual ratification is superfluous (ILO 2000; U.S. Department of Labor 1997a,b; U.S. Senate 1985). Third, our federal system, which reserves certain rights to the states, impedes ratification since the conventions would affect the employees of state and local governments and others who fall outside the coverage of federal labor statutes.⁷ We dispute all three claims.

HISTORICAL BACKGROUND

The United States was instrumental in both establishing the ILO and assuring that its constitution took into account the concerns of federal states (Tayler 1935). After weeks of difficult negotiations with several European delegates, the United States was successful in including language in Article 19 of the ILO constitution that protects the interests of such states by allowing them to treat a draft convention “as a recommendation only” (Tayler 1935, p. 62). In fact, when the United States joined the ILO in 1934, the congressional resolution supporting admission cited the provision (Tayler 1935, p. 150). However, legal scholars immediately raised questions as to whether the federal state proviso would apply to the United States based on a 1920 Supreme Court decision.⁸ Further, business interests were wary of ILO goals: the adoption of Conventions 87 and 98 so soon after the passage of the Taft-Hartley

Amendments only increased their suspicion that the ILO might override U.S. labor law (Galenson 1980, p. 27; Lorenz 2001, p. 171).

With this concern over the power of the United Nations and its specialized agencies, Senator John Bricker proposed a constitutional amendment in 1951 that would have limited the executive branch's treaty-making power. During hearings on the Bricker Amendment, the ILO came in for particularly harsh treatment.⁹ No version of the Bricker Amendment passed, but its spirit continues to control U.S. policy concerning ILO conventions: no convention will be adopted that could interfere with existing state or federal law.

In 1978, due mainly to disputes centered on cold war and Middle East politics, the United States withdrew from the ILO only to rejoin less than three years later. With reentry, the United States appeared to have made a fresh start in its relations with an organization that it had, over the years, treated casually at best (Galenson 1980, pp. 23–26). A major move was the creation of the high-level President's Advisory Committee on the ILO, which is chaired by the Secretary of Labor and includes the Secretaries of State and Commerce as well as labor and business representatives. The Tri-Partite Advisory Panel on International Labor Standards (TAPILS) chaired by the Solicitor of Labor and providing legal analysis to the President's Committee was also established (U.S. General Accounting Office 1984, pp. 16–26).¹⁰ The job of both bodies is to make determinations about ILO conventions. At one time, both were quite busy; after ratifying no conventions for 35 years, the United States ratified seven between 1998 and 2001 (ILO 2002). However, Conventions 87 and 98 received no attention.

Momentum for new ratifications began with hearings by a Senate committee in 1985 (U.S. Senate 1985). Secretary of State George Schultz argued that ratifications would be helpful in pressing his (anti-Soviet) agenda: "It is my judgment that an improved ratification record would have served U.S. foreign policy interests better" (U.S. Senate 1985, p. 8). Although basic ILO principles are found in U.S. laws, Schultz believed that the United States was still vulnerable to criticism for not ratifying ILO conventions: "[O]ur behavior sends a message that ILO procedures do not apply to us. The message we send is—do as we say, not as we do" (U.S. Senate 1985, p. 9).

However, shortly before Schultz's testimony, a number of legal problems concerning ratification of Conventions 87 and 98 had been

laid out in an influential book by Edward E. Potter (1984).¹¹ Potter's findings formed the basis of the U.S. Council on International Business (USCIB) opposition to the ratification of these conventions.¹² The principal concerns expressed in Potter's book echo the Bricker-era rhetoric: if ILO conventions were ratified, existing laws would be superseded. In turn, committee chair Orrin Hatch stated his concern that domestic labor laws "have been delicately drawn and have a delicate balance and which, although both sides can point to difficulties with them from time to time, still have worked rather well in our country" (U.S. Senate 1985, p. 11). According to U.S. Department of Labor and ILO officials with whom we spoke, the present posture of the United States is to ratify only conventions that conform to current U.S. law. The job of TAPILS, therefore, is to make sure that conventions under consideration do not interfere with any current statute. Hence, Conventions 87 and 98 are "off-the-table" for many of the reasons cited in Potter's book.

A Critique of the U.S. Position

To reiterate, the current U.S. position against ratification of ILO Conventions 87 and 98 is based largely on three assertions: 1) that well-established national labor policy supports a delicate balance between business and labor and should not be meddled with; 2) that under the recent *Declaration on Fundamental Principles and Rights at Work*, as well as the ILO constitution, the United States has a responsibility, based on its membership in the ILO, to conform to the spirit of Conventions 87 and 98—which it already does (ILO 2000; U.S. Department of Labor 1997a,b; U.S. Senate 1985); and 3) that our federal system, which reserves certain rights to the states, makes ratification problematic since the conventions would affect employees who fall outside the coverage of federal labor statutes.

Federal Labor Policy and the Balance of Interests

First, we address the assertion that current labor policy is well-established and provides for a balance in labor-management relations. While current labor policy has its roots in statutes that are seven decades old, age should not be confused with acceptance.¹³ Organized labor, in particular, has long fought for changes in labor policy. In the late

1940s and early 1950s the labor movement pushed for Taft-Hartley repeal (Dulles and Dubofsky 1984, pp. 343–362); some years later, labor sought substantial changes to the National Labor Relations Act (NLRA) through the unsuccessful Labor Law Reform Act of 1978 (Dark 1999, pp. 99–124); and recently the labor movement spent considerable resources in trying to pass legislation to prevent the use of permanent striker replacements (Gould 1993, pp. 181–203).

Employers have also signaled their displeasure with certain aspects of labor policy, most notably the NLRA's restrictions on employer-dominated labor organizations, which might restrict the establishment of employee-involvement programs. The TEAM Act attempted to amend the NLRA to allow employers greater latitude in establishing such programs (U.S. Senate 1995). Narrower issues, such as the use of "salting" as an organizing tactic by building trades unions and the so-called "garment industry provisos," which provide exceptions to the NLRA's "hot cargo" proscription, have also been criticized by employers (Bodah 1999; U.S. House of Representatives 1999). In short, the reports of at least two government commissions—the Commission on the Future of Worker-Management Relations appointed by President Clinton (i.e., the Dunlop Commission) and the American Worker at a Crossroads Project, led by Republican Representative Peter Hoekstra—are filled with both labor and management complaints about U.S. labor policy (U.S. Department of Labor 1994; U.S. House of Representatives 1999).

This lack of consensus is also reflected in the decisions of the National Labor Relations Board (NLRB), which has been criticized by both scholars (Cooke and Gautschi 1982; Cooke et al. 1995; Estreicher 1985) and the federal courts (*Mosey Manufacturing v. NLRB* 701 F2d 610, 1983) for its decisional oscillations. Indeed, over the years, Congress has held a number of hearings concerning abrupt changes by the board in the application of legal standards (see Bodah [2001] for a list of such hearings). Clearly, the "balance" mentioned by defenders of the status quo has not resulted in any sense of equilibrium in national labor policy. Instead, we have seen wide swings in the application of labor statutes, accompanied by a general erosion of the legal status of collective bargaining (Gross 1995). Gross (1994, p. 53), in an article entitled "The Demise of National Labor Policy: A Question of Social Justice," writes:

This country needs a definite, coherent, and consistent national labor policy. That requires more than changing NLRB case doctrines or amending Taft Hartley to tighten or loosen government regulation of the labor-management relationship. The recrafting of a national labor policy must begin with a precise and certain statement of its purposes and objectives. Fundamental questions must be confronted and answered.

The Gap between U.S. Law and the Requirements of Conventions 87 and 98

A second assertion is that current U.S. standards generally conform to at least the spirit of Conventions 87 and 98. This is easily challenged. The U.S. government itself admitted to a lack of conformance in the *Review of Annual Reports under the Follow-up to the ILO Declaration on the Fundamental Principles and Rights at Work*. After beginning on a positive note in stating that “[t]he United States recognizes, and is committed to, the fundamental principle of freedom of association and the effective recognition of the right to collective bargaining” (ILO 2000, p. 144), the report later states: “Nonetheless, the United States acknowledges that there are aspects of this system that fail to fully protect the rights to organize and bargain collectively of all employees in all circumstances” (ILO 2000, p. 153). It went on to cite evidence from the Dunlop Commission’s *Fact-Finding Report*, including the frequent firing of union activists, the failure of many newly organized units to achieve a first contract, union organizers’ lack of access to employees, and generally insufficient remedies available to the NLRB. The report also cited the United States’s lack of protection for economic strikers.

In the same report, the observations submitted by the International Confederation of Free Trade Unions (ICFTU) were even more critical. Too lengthy to summarize adequately, the ICFTU’s indictment contained at least two dozen specific shortcomings of U.S. labor law at each stage of the collective bargaining process (ILO 2000, pp. 160–163). The ICFTU noted the harsh treatment and insufficient remedies available to union activists; employers’ union avoidance strategies, such as the frequent use of antiunion consultants, the failure of new units to get first contracts, and the restrictions on certain types of concerted activities. The ICFTU was also critical of U.S. labor policy in the public sector,

noting the severe limits on bargaining subjects in certain jurisdictions and broad restrictions on striking.

Yet another source of evidence of the gap between ILO standards and U.S. labor policy is the findings of the ILO Committee on Freedom of Association (CFA). All members of the ILO have a responsibility to respect the freedom of association and right to bargain collectively (Gernigon, Odero, and Guido 2000; Hodges-Aeberhard 1989; International Labour Review [ILR] 1949). In 1950, the ILO set up a special tripartite committee to monitor compliance. Unlike other ILO committees, complaints can be lodged with the CFA even if a country has not ratified the corresponding conventions (Freeman 1999). Since its establishment, the CFA has issued 32 decisions involving the United States.

Focusing only on cases since reaffiliation, the CFA has found U.S. labor policy at variance with ILO standards in number of cases.¹⁴ In Case 1557 (1993), the CFA requested the U.S. government to "... draw the attention of the authorities concerned, and in particular in those jurisdictions where public servants are totally or substantially deprived of collective bargaining rights, to the principle that all public services workers other than those engaged in the administration of the State should enjoy such rights" In Case 1543 (1991), the CFA stated that "... recourse to the use of labour drawn from outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike, which may affect the free exercise of trade union rights." In Case 1523 (1992), the CFA "requests the Government to guarantee access of trade union representatives to the workplace, with due respect to for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of unionization." In Case 1467 (1989), the CFA indicated its "regret" over the "excessive length of appeals procedures" for unfair labor practices. Case 1467 also includes: "the CFA points out with concern that this is the fourth recent complaint lodged—by different complainants—against the United States on the grounds of antiunion tactics and unfair labor practices" In Case 1437 (1988), the CFA wrote that "subcontracting accompanied by the dismissal of union leaders can constitute a violation of principle that no one should be prejudiced in his employment on the grounds of union membership and activities." In Case 1074 (1982), the CFA stated that it was "of the view that the application of excessively severe sanctions (i.e., the ter-

mination of air traffic controllers) against public servants on account of their participation in a strike cannot be conducive to the development of harmonious industrial relations.”¹⁵

Finally, we offer the 2000 Human Rights Watch (HRW) report *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* as evidence of the shortcomings in U.S. labor policy (HRW 2000). The HRW report contains 15 general findings of variance between U.S. and international labor standards, and several more concerning the rights of immigrant and agricultural workers. Most of the charges against U.S. labor policy concern limits on the freedom of association resulting from inadequate protections for union activists during the organizing process—specifically, HRW notes, discrimination against union supporters, a lack of access to employees by union organizers, and imbalances in communication power between employers and unions.

The Federal–State Issue

Finally, we take issue with the assertion that the United States's federal structure is a bar to ratification of Conventions 87 and 98. First, we note that there are two (somewhat contradictory) streams to this argument. Some argue that the ratification of Conventions 87 and/or 98 would (or could) override certain aspects of current federal labor law and the prerogatives of the states; others argue that ratification would not be self-executing and, therefore, the United States would be out of compliance with conventions unless the federal government and many states changed their current statutes (Bradley 1998; Potter 1984; U.S. Senate 1985).

Starting with the latter, we recognize that the United States could be criticized for not being in compliance with ratified conventions based on the actions (or inactions) of the states—in fact, this situation has arisen elsewhere. For example, there have been a number of cases brought against Canada for the actions of its provinces (see, for example, CFA Case 327 [2002] and CFA Case 324 [2001]). However, typically, the Canadian government has forwarded the CFA's charges to the provinces for their response. We would expect that the U.S. Department of Labor could do the same for the states.

If the ratification of either Conventions 87 or 98 were self-executing, the United States could still be found out of compliance if the federal government or the states did not take effective action to see that the provisions of the conventions were, in fact, put into practice. Potter (1984, p. 81, note 258) notes that Mexico continued to be criticized by the ILO for not truly carrying out the requirements of Conventions 87 and 98 after ratification. But a larger fear seems to be that Conventions 87 and 98 would effectively override or void contrary federal or state statutes in the eyes of the courts. We respond by citing the comments of the Secretary of Labor in recommending to President Truman in 1949 that he seek ratification of Convention 87 by the Senate, and to the comments of the Solicitor of Labor in a briefing paper written in 1980.¹⁶

In 1949 (U.S. Senate 1949, p. 9) the Secretary of Labor wrote:

It is our view that the subject matter of this convention [No. 87] is appropriate under our system for federal action . . .

It is our view that this convention should be ratified by the United States, and we recommend that the President of United States transmit this convention to the Senate of the United States with a request for the advice and consent of the Senate to its ratification. It is also our view that no new Federal legislation or revision of existing Federal law is necessary to effect compliance by the United States with the terms of this convention.

In 1980, the Solicitor of Labor (U.S. Department of Labor 1980, p. 1) wrote:

Although it is our conclusion that Convention 87 may unequivocally be ratified by the United States without entailing any undertaking to enact legislation or to modify existing law, we recognize that some parties may still anticipate that ratification would unwillingly nullify domestic legislation through creative judicial construction.

The solicitor went on to suggest two strategies that “would absolutely preclude such a result”:

First, the Convention could be ratified with a declaration that it is non-self-executing. Second, the Convention could be ratified with an understanding that ‘all necessary and appropriate measures’ as provided by Article 11 means, in the context of the United States, that the obligations contained in the Convention have been acceded to only to the extent of the Commerce Power.

Although Convention 98 was never subjected to such analysis by the federal government, we believe that such provisos could also be used to avoid upsetting existing statutes.

It has been noted (Potter 1984, pp. 78–82) that it is the ILO and not a member state that ultimately determines whether a nation has met its obligation. The Committee of Experts, Committee on the Application of Conventions and Recommendations, and the CFA could all continue to find fault with the United States's implementation of Conventions 87 and 98. However, as mentioned earlier, Conventions 87 and 98 are unusual in that member states are subject to criticism by the CFA whether they have ratified the conventions or not. Hence, the United States cannot (and has not) escaped international rebuke by simply refusing to ratify the conventions.

The current powers of the CFA do not, however, mean that ratification is superfluous. Article 19 (5) of the ILO Constitution requires member states to seek ratification of approved conventions.¹⁷ Conformance is not a substitute for ratification. This remains true even after adoption of the *Declaration on Fundamental Principles and Rights at Work*.

CONCLUSION

In this chapter we have presented and critiqued U.S. policy toward the ratification of ILO Conventions 87 and 98. We believe that the principal reasons for not ratifying these conventions are contradicted by a careful analysis of the documentary evidence and historical record.

The current political climate would seem to preclude adoption of the ILO conventions on freedom of association and collective bargaining. However, were the balance of power to shift in the White House or the Senate, we believe that these conventions should be considered by the President's Committee on the ILO and TAPILS, and that hearings might be held by the U.S. Senate Committee on Health, Education, Labor, and Pensions. Public consideration of Conventions 87 and 98 would be both a way into clarifying labor policy in the United States and might also lend support to key U.S. foreign policy goals.

As Gross (1994) writes, "The recrafting of a national labor policy must begin with a precise and certain statement of its purposes and

objectives. Fundamental questions must be confronted and answered.” While clearly stated in the preamble of the Wagner Act, U.S. labor policy was obfuscated by the Taft-Hartley Amendments and subsequent NLRB and court decisions. Is it U.S. policy to encourage collective bargaining or merely to provide a means for employees to vote for or against union representation (Gross 1985)?

As well, we accept George Schultz’s conclusion that the lack of ratification by the United States erodes its moral authority abroad. This is particularly important if the United States wishes—for humanitarian or purely pragmatic economic reasons—to urge the enforcement of labor standards in the developing world.

In its second report to the Secretary and the President, in December 2002, the State department’s Advisory Commission on Labor Diplomacy argued strongly that the promotion of internationally recognized core labor rights supports current U.S. foreign policy goals:

Trade unions exist in varying degrees in Muslim countries and have a role to play in the struggle against terrorism and for democracy. However, there is often little protection in law or practice for trade unionists. The Middle East stands out as the region where the right to organize trade unions is least likely to be protected by law. Where unions do exist, their independence is often threatened by authoritarian governments on the one hand and Islamist political factions on the other. A policy that aims to cultivate union leadership at the enterprise and industry levels represents a promising approach to inculcate modern economic incentives and democratic political values among workers in Muslim countries. (U.S. Department of State 2001)

Among its suggestions, the committee includes revisiting the ratification of ILO core labor standards:

The United States has one of the worst records of ratification of ILO conventions of any member state of the ILO, especially of the core labor conventions. This failure to ratify the core conventions undermines U.S. efforts to lead the international campaign to eliminate child labor, forced labor, and discrimination. (U.S. Department of State 2001)

As was the case during the cold war, the United States could find the ratification of ILO conventions expedient in advancing its foreign policy objectives. The ratification of either Convention 87 or 98 would

promote the type of moral suasion envisioned by the advisory commission.

Notes

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1. In comparison, the number of conventions ratified by the other "Group of Eight" large industrialized nations is: Canada, 30; France, 116; Germany, 77; Italy, 109; Japan, 46; Russia, 58; and the United Kingdom, 85.
2. The eight core conventions concern fundamental principles of human rights at work: the elimination of forced and compulsory labor, the elimination of employment discrimination, the abolition of child labor, and the freedom of association and right to bargain collectively (ILO 1998). Two conventions correspond to each of these areas. The United States has ratified only Conventions 105 and 182 concerning the abolition of forced labor and the abolition of the worst forms of child labor, respectively—with the former ratified 34 years after its adoption (ILOLEX 2002).
3. They are Armenia, Bahrain, Burma, Cambodia, Cape Verde, Eritrea, Gambia, Georgia, Iran, Kiribati, Laos, Mongolia, Namibia, Nepal, Oman, Qatar, St. Kitts, Sao Tome, Sudan, Thailand, Turkmenistan, United Arab Emirates, and Uzbekistan.
4. Convention 144 reaffirms the ILO's tripartite structure by assuring that labor and employer associations, along with governments, may respond to ILO requests for information; Convention 160 pledges support for the ILO's statistics gathering activities; and Convention 150 requires nations to support labor bureaus for the purpose of enforcing national labor standards.
5. The full texts of conventions are available on-line at <http://www.ilo.org/ilolex/english/convdisp1.htm>. The critical section of Convention 87 (Article 2) states: "Workers and employers, without distinction whatsoever, shall have the right to establish, and, subject only to the rules of the organization concerned, to join organizations of their own choosing without authorization." The critical section of Convention 98 (Article 4) states: "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

6. See ILO Constitution, Annex, Article III at <http://www.ilo.org/public/english/about/iloconst.htm#annex>.
7. Principally, the National Labor Relations Act, Railway Labor Act, and Civil Service Reform Act.
8. In 1920, the Court overturned a lower court's ruling that a federal statute protecting migratory birds (which had been passed to fulfill treaty obligations with the United Kingdom) violated the Tenth Amendment (which addresses powers reserved to the states). In *Missouri v. Holland* (252 U.S. 416, 1920), the Supreme Court held that the federal government has the authority to pass all laws "necessary and proper" for carrying out its treaty-making prerogatives. Therefore, some argued that, based on *Missouri v. Holland*, the federal government's ability to ratify ILO conventions is not "subject to limitations," the necessary trigger for the federal-state proviso to take effect (Chamberlain 1920; Tayler 1935). Adding to the fears of those who thought that the UN would put the country on the road to world government were the Supreme Court's decision in *Oyama v. California* (332 U.S. 633, 1948) and the subsequent adoption of the UN Declaration of Human Rights. In *Oyama*, the Supreme Court overturned a California law (arising out of anti-Japanese hysteria) that prohibited land ownership by aliens. While the Court relied primarily on the Fourteenth Amendment for its decision, four justices also cited Articles 55 and 56 of the UN charter in voiding the law. Soon after *Oyama*, the UN Declaration on Human Rights was adopted causing fear among conservatives that social and economic policies of the UN would, among other things, overturn segregation laws and interfere with the property rights of business (Tananbaum 1988, p. 6).
9. Bricker portrayed the ILO as a tool of socialism largely at odds with the values of the American people. Such attitudes are still heard in Congress, although other elected representatives have sometimes seen the ILO as a bulwark of "free enterprise" (Hatch in U.S. Senate 1985, p. 12). McIntyre and Ramstad (2003) present an analysis of the ILO as embodying the commitments of Institutional Labor Economics. Official U.S. policy has generally been supportive of the work of the ILO, at least since reentry at the beginning of the 1980s. This support has not extended to U.S. ratification of conventions, our focus here.
10. Unfortunately, the business of the President's Committee is difficult to examine, since it typically meets behind closed doors in the interest of national security and to protect the confidentiality of U.S. treaty negotiating positions.
11. Potter argued that Convention 87 would subordinate employee rights to those of the union; would broaden the classes of workers covered by labor law; would revoke portions of the Landrum-Griffin Act, particularly those prohibiting persons with criminal records from holding union office; would repeal employer free speech provisions of the NLRA; would limit restrictions on the right to strike and secondary boycotts; would prohibit restrictions on union participation by members of subversive organizations; would repeal prohibitions on hot cargo agreements; would restrict the withdrawal of exclusive representation; would revoke limitations on the use of union monies for political purposes; and would remove limitations on the disaffiliation of local unions from national bodies and the dis-

solution of multiemployer units. According to Potter, Convention 98 would have many of the same effects, but also would limit discretion in instituting wage/price controls; would prohibit legislation restricting the scope of bargaining and distinctions between mandatory and permissive subjects; would provide union officials with special job protections; would modify the burden of proof and remedies under NLRA Section 10(c) [which concerns NLRB remedies]; and would put the United States at the mercy of evolving ILO standards.

12. The USCIB is the official U.S. employer representative to the ILO. It took over this role from the U.S. Chamber of Commerce in 1980.
13. The Railway Labor Act was passed in 1926 and the National Labor Relations Act in 1935. Elements of both acts can be found in the Erdman Act, which was passed in 1898 but subsequently found unconstitutional by the U.S. Supreme Court (Millis and Montgomery 1945, pp. 731–732).
14. CFA cases can be found on-line at <http://www.ilo.org/ilolex/english/casframeE.htm>.
15. According to interviews with ILO officials in Geneva, CFA filings from the United States tailed off in the nineties because the AFL-CIO was willing to give the Clinton administration the benefit of the doubt.
16. The secretary was speaking on behalf of the departments of labor, state, justice, interior, navy, and the Federal Security Agency, all of which reviewed Convention 87.
17. The ILO Constitution is available on-line at <http://www.ilo.org/public/english/about/iloconst.htm#a19p2>.

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Part 5

Where Do We Go From Here? Strategies for Advancing Workers' Rights

12

Members-Only Collective Bargaining

A Back-to-Basics Approach to Union Organizing

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My purpose and concern in this chapter is to call attention to a critical missing link in the U.S. system of industrial relations. That link is members-only minority-union collective bargaining, which is a natural preliminary stage in the development of mature, majority-based exclusivity bargaining. What follows is an abbreviated version of some of the key elements of that thesis, which is more fully developed in my recent book, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*.¹ Minority-union bargaining was commonly practiced immediately before and after enactment of the Wagner Act² (the National Labor Relations Act) in 1935, and as I demonstrate in that book, it was not Congress' intent to deny protection to such bargaining under that act. During the early years following its passage, such bargaining prevailed widely. The decisive provisions of the act, which were not affected by either the Taft-Hartley³ or Landrum-Griffin⁴ amendments, are still fully in effect today. Under those provisions, in workplaces where no exclusive bargaining agent has yet been "designated or selected . . . by the majority of the employees" in an appropriate bargaining unit pursuant to Section 9(a)⁵ of the act, minority employees are entitled "to bargain collectively through representatives of their own choosing."⁶ But as the industrial relations community is well aware, latter-day conventional wisdom assumes the contrary. This is so despite the absence of any decisional authority to support such a negative conclusion, for neither the National Labor Relations Board (NLRB) nor the courts have ever held that an employer has no duty to bargain with a nonmajority union for its members only.⁷ Indeed, that conventional wisdom has become so entrenched that it has not been questioned by most labor law

scholars, almost all of whom have assumed that the majoritarian/exclusivity concept—which so uniquely characterizes U.S. labor law—implies a prohibition on all minority-union bargaining even where no majority representative has been selected. Although many scholars have criticized that system, only two have unequivocally contended that in the absence of a designated majority representative, minority unions have legally enforceable collective bargaining rights. They are E.G. Latham⁸ and Clyde Summers,⁹ who expressed their views in law review articles separated by more than half a century.¹⁰

Immediately after passage of the act, Latham wrote that under what “appears to be a reasonable construction of [the pertinent] sections, the employer may be bound to bargain with minority groups until . . . ‘proper majorities’ have been selected.”¹¹ Summers, writing in 1990, continued where Latham had left off. After reviewing the statutory language and the historical role of minority unions, Summers concluded that “[t]he plain words of section 7, section 8(1) and section 8(5) would seem to require an employer, in the absence of a majority union, to bargain collectively with a non-majority union for its own members.”¹² I have added my voice to that of Latham and Summers as to the intended meaning of the act regarding such bargaining. Statutory text provides that such minority bargaining is fully protected by the act, and legislative history supports that conclusion.

My analysis begins by focusing on the 14-word phrase in Section 7 that declares that “employees shall have the right to . . . bargain collectively through representatives of their own choosing.” This simple but elegantly worded declaration is the substantive mandate that grants the right of collective bargaining to all employees covered by the act. Until a majority of the employees in an appropriate bargaining unit select an exclusive representative under Section 9(a), this right to bargain prevails, for there is no other provision in the act that diminishes that right. This 14-word phrase has a clear and long-established meaning, the evolution of which can be traced through a direct line of succession beginning with identical text contained in a proclamation by President Wilson in World War I,¹³ then to the preamble of the Norris-LaGuardia Act of 1932,¹⁴ then to the corresponding phrase in Section 7(a) of the Depression-era National Industrial Recovery Act (NIRA) of 1933,¹⁵ and finally to the Wagner Act in 1935—the language in the statute today. Even the accompanying unfair-labor-practice text in Section 8(a)(1),

“to interfere with, restrain, or coerce employees in the exercise of [that] right,” is the same as the corresponding prohibitory language in those earlier sources.¹⁶ This juxtaposition of text in its various legislative incarnations confirms that the substantive law here in issue—albeit not its enforcement procedure—has been continuously in effect in one or more manifestations since 1932. Thus, when Congress passed the Wagner Act it was reenacting the substantive bargaining requirements that had prevailed under the “Blue Eagle” of the NIRA, where the critical statutory language in Sections 7 and 8(1)¹⁷ had already acquired a recognized meaning.¹⁸

Historically, including the years immediately preceding passage of the Wagner Act, collective bargaining as an institution was intertwined with the concept of union membership,¹⁹ for unions normally bargained only on behalf of their members.²⁰ Union recognition by an employer usually occurred only after the union’s membership was strong enough to demand and receive recognition—which more often than not resulted from a strike or threat of a strike. Union membership was the *sine qua non* of collective bargaining, whereas majority selection by the employees was not a requisite for bargaining and it played little or no role in the process.²¹

Even closed-shop agreements fitted the connection of membership to collective bargaining. When a union’s membership was large enough to represent an effective voice for most if not all of the involved employees, union leaders would usually perceive a need to ensure job security for their members and protection for the bargaining process, which only a closed-shop agreement could provide. On the other hand, when a union was not strong enough to obtain a closed shop or even full recognition, it often settled for a members-only collective agreement,²² for this was considered a logical step in an organizational process that would eventually lead to total employee recognition.

During the pre-Wagner Act years, strikes and boycotts or threats of such activity were usually a union’s only means of securing recognition, for employers vigorously opposed dealing with outside unions. Under the NIRA, the collective bargaining process mandated by Section 7(a) required only three factors: 1) a union representing a group of employees, 2) a demand for recognition and bargaining, and 3) an employer who was expected to respond by engaging in good-faith negotiations. It quickly became apparent under that statute, however, that almost all

employers vigorously resisted union recognition unless it was forced upon them by strikes or boycotts. for there was no adequate enforcement mechanism to require compliance with the law.²³ The Wagner Act was designed to correct those procedural deficiencies but not to change the substantive law.²⁴

In conducting my research I was fortunate to discover a reliable description of the essential characteristics of employer–employee relations prevailing at that stage in the nation’s labor history. In November 1933, the National Industrial Conference Board (Conference Board)²⁵ conducted an extensive empirical study to determine the nature of collective bargaining as it was practiced immediately following enactment of Section 7(a) of the NIRA.²⁶ That study covered the fields of manufacturing and mining. These proved to be the most appropriate industries to investigate for they included the companies mainly impacted by Section 7(a) and were also the ones that would ultimately be most affected by the Wagner Act.

The data²⁷ show that a variety of bargaining arrangements existed during this period. 45.7 percent of employees dealt with their employers on an individual basis, 45 percent dealt through employee-representation plans (i.e., company unions), and 9.3 percent dealt through independent labor unions. 68.9 percent of the reporting companies engaged in no bargaining at all—i.e., neither with an independent union nor a company union. The remaining 31.1 percent engaged in bargaining with either an independent union or a company union or with both, including arrangements whereby employees in many of the companies also engaged in individual bargaining. This group of 31.1 percent of the reporting companies consisted of 1,030 of the 3,314 responding companies in a representative sample of 10,335 companies. Two hundred and thirty of those companies bargained with independent unions representing 189,756 employees on an exclusive basis, and 186 bargained with independent unions representing 51,100 employees on a nonexclusive basis.

Accordingly, of the latter total of 416 companies that bargained with independent unions, 55 percent did so on an exclusive basis and 45 percent bargained on a members-only-basis. The 51,110 union employees who were not involved in exclusive representation—i.e., the union employees in the companies that engaged in members-only bargaining—were thus working, in varying combinations and job catego-

ries, alongside 124,101 other employees who were either wholly non-union or were represented by company unions. Together, those workers comprised a total of 175,211 employees, which may be compared to the slightly higher number of 189,756 employees covered by exclusive union representation. Extrapolating from the survey group to the nationwide employee populations of companies in manufacturing and mining, one arrives at totals of approximately 189,260 union employees covered by members-only collective bargaining, as compared with approximately 702,800 union employees covered by exclusive collective bargaining. In other words, of all union members employed in manufacturing and mining in 1933, approximately 21 percent were represented by independent minority unions that engaged in members-only bargaining. And, as noted above, the percentage of companies that bargained with these minority unions was considerably higher, comprising 45 percent of all the companies that engaged in some form of collective bargaining. These data dramatically portray the eclectic nature of trade-union representation in the manufacturing and mining industries when Section 7(a) was enacted and thus confirm that members-only bargaining through independent minority unions was a common phenomenon in those industries; there is no reason to believe that manufacturing and mining were unique in this regard. Although the findings by the Conference Board may seem surprising today, that same general information was common knowledge at the time.²⁸ Thus, on the eve of congressional consideration of the Wagner bill, minority-union bargaining was a highly visible part of the industrial relations landscape.²⁹

Indeed, under Section 7(a) of the NIRA, majority status was not a prerequisite for collective bargaining. The National Labor Board, an executive agency that President Roosevelt had created to implement Section 7(a), routinely found breaches of the duty to bargain with less-than-majority unions. That agency only used elections to determine majority status when there was a dispute between two unions claiming representation—one of which was usually a company union—or when an employer questioned a union's claim of majority representation, or when a substantial number of employees requested it; otherwise, majority status was deemed irrelevant.³⁰

The legislative history of Wagner's first attempt, his 1934 Labor Disputes bill,³¹ as well as his ultimately successful 1935 National Labor Relations bill, demonstrates that the bargaining provisions in both bills

were intended to protect minority-union bargaining. The 1934 bill—S. 2926—was silent regarding majority representation,³² clearly indicating that an employer had a duty to bargain with any union that represented its employees, whether a majority union or a minority union.³³ And the history of the enactment of the 1935 bill—S. 1958—positively indicates that minority-union bargaining preliminary to mature majority-based exclusive bargaining would be fully protected by the statutory text. Although many aspects of that history support this conclusion,³⁴ one feature not previously recognized is especially revealing—in fact, it is the “smoking gun” that confirms such intent behind the passage of Section 8(5).³⁵

The bill Senator Wagner introduced in the Senate on February 21, 1935, S. 1958,³⁶ was intentionally designed to be substitute legislation that would correct the enforcement shortcomings of Section 7(a). It achieved this by codifying, clarifying, and slightly strengthening the substantive rights contained in Section 7(a) and by incorporating and giving statutory status to the majority-rule concept that the old NLRB had previously adopted by decision and practice; specifically, the old NLRB *Houde*³⁷ decision required bargaining exclusivity after selection of a majority representative but left standing the requirement to bargain with minority unions prior to such majority designation.³⁸ To administer and enforce those rights and corresponding duties, the bill created a new labor board that was “styled National Labor Relations Board to provide continuity with the existing agency.”³⁹ Thus, the new bill was not intended to create new law but rather to reestablish old law, adding only clarity and teeth. Recognition of that purpose is of prime importance to the construction of the act for, as Professor William Eskridge points out, “when Congress borrows a statute, it adopts by implication interpretation placed on that statute, absent express statement to the contrary.”⁴⁰

It should be noted that the original Wagner bill did not contain a separate Section 8(5) duty-to-bargain unfair labor practice. Wagner and Leon Keyserling, his legislative assistant and primary author of both bills,⁴¹ were of the opinion that such a specific provision was unnecessary because the employer’s duty to bargain was adequately covered by the broad collective-bargaining requirement contained in Section 7—i.e., the vintage 14-word phrase previously noted—under which a refusal to bargain represented an *interference* with the workers’ right to

bargain collectively, hence was enforceable under Section 8(1). Wagner's testimony to that effect, which expressly cited the *Houde* decision, was unequivocal:

The right of employees to bargain collectively implies a duty on the part of the employer to bargain with their representatives. [T]he incontestably sound principle is that the employer is obligated by the statute to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable with counter proposals; and to make every reasonable effort to reach an agreement.⁴²

Section 9(a), with its specification of exclusivity *when* and *if* employees choose a majority representative, which was—and still is—the only limitation on the bargaining requirement, provided that

representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . .

The bargaining requirement, however, was contained only in Section 7 and in the unfair-labor-practice enforcement mechanism in Section 8(1).

The inclusion of a separate duty-to-bargain unfair labor practice—Section 8(5)—was an afterthought that was not intended to change the substantive bargaining requirements of the original bill. In fact, that provision was not added until two and a half months after S. 1958 had been introduced. Francis Biddle, chairman of the old NLRB under the NIRA, had lobbied long and hard for its inclusion. Although Wagner finally agreed to the inclusion, he and the Senate committee in its report, and later also the House committee in its report, made it expressly clear that all four separate unfair-labor-practice provisions following Section 8(1)—including the new Section 8(5)—would “*not . . . impose any limitations or restrictions on the general guarantees of [Section 8(1)]*”, for they were designed only to amplify and spell out specifically the most troubling unfair labor practices.”⁴³ They were thus meant to reinforce those unfair labor practices, not to diminish them.

Regarding the meaning of the belated amendment, a previously unrecognized aspect of the history of Section 8(5) shows unequivocally that it was not intended to exclude the requirement of a duty to bargain

with a minority union where there was not yet an exclusive Section 9(a) majority union. I found this historical feature in a post-introduction draft of S. 1958 (third draft) that had been prepared between February 21 and March 11, 1935. It contained various proposed amendments, including the one relevant to this inquiry. (This draft had been in the possession of Leon Keyserling and was published in 1989 by Professor Kenneth Casebeer.⁴⁴) After S. 1958 had been introduced and referred to the Senate Committee on Education and Labor on February 21, 1935, Biddle presented two versions of Section 8(5)—contained in this third draft—for the committee’s consideration, i.e., alternative texts of this proposed new unfair-labor-practice provision. They show conclusively that the addition of Section 8(5), which was added to S. 1958 when it was reported by the Senate Education and Labor Committee on May 2, was never intended to confine an employer’s bargaining duty to majority-unions only. Here, verbatim, are the two versions from this draft:

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

or, (5) *To refuse to bargain collectively with employees through their representatives, chosen as provided in Section 9(a).*⁴⁵

By adopting the first version, Biddle, Keyserling (hence also Wagner⁴⁶), and the Senate committee were consciously choosing language that would assure that the duty to bargain with a majority union would not exclude the duty to bargain with a minority union prior to the establishment of majority representation.⁴⁷ Patently, had the drafters intended to exclude such nonmajority bargaining they would have selected the second version, for it would have unequivocally limited the bargaining obligation under Section 8(5) to majority unions “chosen as provided in Section 9(a).” Here was the smoking gun.

The subject of minority-union bargaining prior to the designation of majority representation was not even an issue in the congressional debates. Although minority-union members-only bargaining was common knowledge and the history of the legislative drafts demonstrates that the draftsmen were well aware of the need to protect such bargaining, it was not viewed as a controversial issue. There was, however, considerable controversy about the ultimate configuration of mature bargaining. Proponents of the bill believed that *majority-rule* bargaining—the bill’s solution to the problem of dual unionism—would mean more effective

bargaining, hence that was unequivocally the goal sought by Wagner and his supporters.⁴⁸ On the other side of that debate, the employer lobby advocated plurality bargaining, opposed majority rule as a denial of the rights of minorities, and asserted that the board's authority to determine the bargaining unit would lead to a closed shop.⁴⁹ In that context, employers clearly defended the right of minority unions to engage in collective bargaining.

The debates focused on the anticipated presence of multiple unions and on whether a minority union should have bargaining rights after a majority union had been chosen. There was no discussion about minority-union bargaining prior to the establishment of majority representation, and numerous statements by the proponents of the bill showed full recognition that the majority rule provided by Section 9(a) would apply to bargaining only after employees had selected their majority representative.⁵⁰ There was never a question voiced about the nonapplicability of that restriction prior to majority selection. And although elections were looked upon as one of the best means to settle disputes over union representation, the disputes that were generally anticipated concerned the choice of which union would represent the employees, not whether the employees would be represented.

Legislative history therefore confirms what the nonambiguous language of the statute requires. That text, standing alone, establishes that in workplaces where employees have not yet selected a majority representative, an employer has an affirmative duty to engage in good-faith bargaining with a nonmajority union that seeks to negotiate only on behalf of its employee members.⁵¹ This is a fundamental right of constitutional proportions. As the Supreme Court characterized Section 7 in *NLRB v. Jones & Laughlin Steel Corp.*⁵² (its first case construing the NLRA), "the right of employees to self-organization and to select representatives of their own choosing for collective bargaining . . . is a *fundamental right* . . ."⁵³ As I demonstrate in *The Blue Eagle at Work*, such right of association is protected by the First Amendment to the U.S. Constitution.⁵⁴ Indeed, the Supreme Court declared in the *Gissel*⁵⁵ case in a comparative reference to an employer's freedom of expression under Section 8(c),⁵⁶ which the Court said "merely implements the First Amendment,"⁵⁷ "an employer's rights cannot outweigh the *equal rights* of the employees to associate freely, as those rights are embodied in §7 and protected by §8(a)(1) . . ."⁵⁸ Furthermore, the right of employees

in a less-than-majority union to engage in collective bargaining is also a fundamental human right that is recognized by international law to which the United States is a party.⁵⁹

What then is the state of the currently recognized law on this issue? Although there have been no decisions explicitly holding that an employer has a duty to bargain with a minority union on a members-only basis where there is not presently a Section 9(a) representative, several cases from both the Supreme Court and the Labor Board actually point in that direction. Indeed, these cases confirm the legality of such bargaining and resulting contracts under Sections 8(a)(1), 8(a)(2), and 8(a)(3).⁶⁰ Furthermore, there are no NLRB or court decisions holding that such minority-union bargaining is not required by the act.⁶¹ Although latter-day conventional wisdom assumes that the only bargaining duty countenanced by the act is bargaining with a majority union in an appropriate unit, such conventional wisdom, like the emperor, has no clothes.

Immediately after passage of the act in 1935, however, conventional wisdom indicated otherwise. For several years following its enactment, no legal questions were raised as to the scope of the act's bargaining requirements, either as to members-only minority-union bargaining or majority-exclusivity bargaining.⁶² As previously noted, both types of bargaining had prevailed under the old NIRA and now both prevailed under the new NLRA. By 1938, a year after the Wagner Act was declared constitutional,⁶³ members-only contracts were perhaps as common—if not more common—than majority-exclusivity contracts,⁶⁴ and their coverage may have been even more extensive. Both unions and employers in large numbers found members-only agreements pragmatically useful. At places where unions had organized a substantial number—but less than a majority—of a company's bargaining-unit employees and majority support did not seem likely or easily attainable, membership-based contracts were welcomed and many were signed. Such contracts were viewed as a preliminary stage in the organizational and collective bargaining process. When the unions achieved majority status these contracts were almost always replaced by conventional exclusive-recognition agreements. Although employers generally resisted unionization of their employees, there seems to be no indication of any employer contending that it had no legal duty to bargain with a minority union for its members only. Numerous companies engaged in such

bargaining and signed members-only agreements—often readily—for they considered this limited form of recognition a lesser evil than exclusive recognition inasmuch as the latter was usually accompanied by a demand for a closed shop.

On March 2, 1937, U.S. Steel recognized the CIO's Steel Workers Organizing Committee (SWOC) as bargaining agent for employees who were its members,⁶⁵ and that agreement became the model for the steel industry.⁶⁶ By December 15, 1937, of the 445 contracts entered into by the SWOC, 85 percent provided for members-only recognition,⁶⁷ and “[o]n the basis of number of employees embraced, the model agreement had a coverage of 98 percent of all those working under contracts with the union.”⁶⁸ Eventually these members-only agreements were replaced by exclusive agreements.⁶⁹ What happened in steel was also happening in many other workplaces in U.S. industry.⁷⁰

General Motors (GM) was a part of this pattern, though reluctantly. Following a series of sit-down strikes, pressure from the White House, and dogged mediation by Michigan's governor Frank Murphy, GM on February 11, 1937, agreed to recognize the United Automobile Workers (UAW) as the representative of its members only.⁷¹ On March 24, Chrysler followed suit with similar recognition. The members-only agreement thus emerged as a critical part of the UAW organizing program. By 1938, of the 537 auto industry contracts signed by the UAW, 343—i.e., 64 percent—were members-only agreements.⁷² These agreements were considered useful stepping stones on the path to majority membership and mature collective bargaining.⁷³ By 1942 nearly all the plants where the UAW had first achieved recognition on a members-only basis were now locked in for “sole bargaining rights.”⁷⁴

Not surprisingly, however, by the early 1940s, members-only agreements had become increasingly rare and were soon forgotten, for unions were now taking the path of least resistance and bypassing that early bargaining stage, seeking instead—and in most cases achieving—majority-bargaining rights directly through NLRB representation procedures. During the board's first decade, unions were successful in winning recognition in over 85 percent of their representation cases.⁷⁵ NLRB elections thus became habit-forming in a relatively short period of time.

Although unions originally favored board elections out of sheer convenience, reliance on the election process, especially during and af-

ter World War II, now became routine, with concomitant unawareness of the true scope of bargaining offered by the statute. As for employers, they had no reason to question dependence on the election process, for they were learning that elections provided an ideal forum in which to mount offensive campaigns against union representation. NLRB elections therefore became the centerpiece of the statute and eventually the established norm. In due time, the interplay of the employers' self-interest and the unions' acquiescence in relying on elections effectively repressed all institutional memory of minority-union bargaining.

Today, with the prospect of restoring that memory, it is time for the labor movement to return to its roots, to return to organizing on the basis of members-only collective bargaining, for this may be labor's best opportunity to reverse the precipitous decline of union membership in the private sector. Such organizational efforts will of course have to be accompanied by appropriate legal action designed to reaffirm and articulate the original and correct interpretation of the law.⁷⁶

How will this less-than-majority organizational process differ from conventional organizing usually designed to culminate in an election? The differences, which are substantial, concern both form and substance. From the very beginning, the emphasis in a union's organizational campaign will be on building a union, not on winning an election. This process will call for a totally different mind-set. For example, a membership-based campaign will not seek or solicit union-authorization cards—rather, it will seek and offer genuine union membership, just as unions did before they became addicted to the election process. Employees who join and pay dues⁷⁷ to a developing union will know they are making a meaningful commitment to the organization. To accommodate the resulting new categories of membership, unions that engage in member-based organizing will probably adjust their dues structures accordingly, perhaps by instituting a multitiered plan. Payment of union dues, even though nominal in amount, will mean that pro-union employees will have “put their money where their mouth is,” and having paid their dues there will be no doubt as to their voluntary choice of union representation.⁷⁸

The position of union steward in the new organization will be especially important, for that person will have an early role to play in dealing with the employer. Acting pursuant to the long-standing rule in the *Weingarten*⁷⁹ case, i.e., in a *recognized union* setting, the union steward

will be the person called upon to aid an employee in need of assistance at a potentially disciplinary interview, for since the board's 2004 decision in *IBM Corporation*,⁸⁰ an unrepresented employee in a nonunion workplace is no longer entitled to the assistance of an ordinary coworker at a *Weingarten* interview. Accordingly, the newly organized union should make known to every employee in the workplace that its union steward is available to aid union members, both old and new, who are called in for investigatory interviews that might result in disciplinary action. The law requires that if the employer proceeds with such an interview, the steward must be permitted to attend and participate if the member requests the steward's presence. The steward of this new union—who ideally will be an experienced and well-respected employee—will thus be the logical person to provide a targeted employee with support and representation in the interview. And because the *Weingarten* rule does not require the employer to give employees any notice of their right to representation, not even to the employee slated for the interview, for the “right arises only in situations where the employee requests representation,”⁸¹ it will behoove the organizing union to make known to all employees that this guaranteed right is available to all represented employees. As a practical matter, the right can also be made available to any nonunion employee who takes advantage of expedited union membership that is likely to be offered by the union steward.

This brings me to the collective-bargaining role that distinguishes how a developing union will henceforth operate at its organizational stage, as compared with the manner in which most unions presently conduct their organizing campaigns. Once the new union has achieved sufficient size and structure—and only good judgment and experience, and perhaps good luck in the absence of experience, will indicate when that has occurred—the new union will notify the employer (preferably in writing) of its existence, of its representational status for its members, and of any immediate requests for negotiations on their behalf. This initial notification might also introduce a request to bargain about a limited number of general subjects that it deems urgent or worthy of prompt attention—for example, employee discipline and grievance procedures, bulletin board space, or any other pressing issue requiring early resolution.

After the company has thus been notified of the union's representational status and members-only recognition has been requested, the

union's chief function will be simply to act like a union, which means concentrating on representing its members regarding a multiplicity of work-related issues. This should prove to be of assistance not only to existing members, but also should serve to attract new members. As Freeman and Rogers have pointed out, workers who experience union membership, especially current membership, overwhelmingly tend to favor union representation.⁸² Employees who have participated personally in the developing union will be its strongest advocates, and their enthusiasm is likely to be contagious. The organizational process is thus merged with the representational process.

The raw material for the new union's initial forays into collective bargaining will be the numerous changes in employment conditions that frequently arise in any workplace, i.e., the routine employment decisions that nonunion employers typically make unilaterally, though sometimes with nominal input from affected employees. Where employees are represented by a bargaining agent—which will now be the case for minority-union members—any such unilateral change in employees' working conditions or status will almost always represent a *per se* refusal to bargain.⁸³ Such separate potential bargaining situations may now be actively addressed by the new union.

As these ad hoc incidents arise concerning changes in bargainable subjects that might affect one or more union members, it will be the union's responsibility to provide assistance and voice to the person or persons affected, for, as the Supreme Court stressed in *Conley v. Gibson*,⁸⁴ “[c]ollective bargaining is a continuing process”⁸⁵ that involves day-to-day adjustments in working conditions—it is not a condition that occurs only when a bargaining contract is being negotiated.⁸⁶ Inasmuch as good-faith bargaining requires negotiating to *impasse* as a precondition to unilateral implementation,⁸⁷ if time is a factor the employer will have some legal incentive to reach a mutually satisfactory resolution of the issue. Usually, however, if a union has little or no means to pressure an employer—which will probably be the case for almost all less-than-majority unions at the organizational stage—success at ad hoc bargaining, if there is any, will depend largely on the reasonableness of the union's proposals and the persuasiveness of its spokesperson. That person will probably be an outside union representative whose physical presence inside the workplace will in itself convey a powerful message to wavering nonunion employees. This mini-bargaining process may

thus bring its own reward even if the meetings prove to be no more than meet-and-confer sessions. In many cases, however, especially during the early stages of this unfamiliar procedure, the process will undoubtedly require the support—whether explicitly or implicitly—of NLRB enforcement; lawful economic pressure may also be required.

Bargaining while organizing will certainly not be trouble-free. Nevertheless, this direct participation by employees and their union should provide a more potent response to an employer's effort to spread its anti-union message through captive audiences and one-on-one contact. But without an election goal, and with its obligation to bargain continuing regardless of the union's lack of majority, the employer may eventually find its antiunion presentations less effective and perhaps even counter-productive.

In workplaces where members-only organizing and bargaining is finally accepted—which will undoubtedly require considerable time, a good deal of patience, and persuasive legal education—ad hoc bargaining episodes will probably continue until the parties jointly decide to initiate serious negotiations for a comprehensive agreement or the union on its own feels that it has sufficient members (albeit less than a majority) to exercise enough bargaining clout to request full contract negotiations. When a collective bargaining contract is finally agreed upon, it will apply to union members only; but it will be a legally enforceable agreement.⁸⁸ In all probability, the company will make the same economic benefits available to comparably situated nonunion employees, which will be its right and undoubtedly its preference. The contractual grievance procedure, however, will be applicable to union members only.⁸⁹

When a minority union finally achieves majority membership, it will of course need to demonstrate that fact in order to become the employees' exclusive bargaining representative. It may be anticipated, however, that many unions will have no need to resort to elections or other external means to prove majority status, for their visible growth with members-only bargaining will have achieved a *fait accompli* that convinces the employer that an election or other verification would serve no useful purpose. In other workplaces, however, an election may be needed to confirm the new union's majority, although such a union may well be advised not to proceed to an election until it is actively functioning as a viable labor organization. This was the election pat-

tern that commonly occurred during the early years following passage of the Wagner Act, especially in the steel and automobile industries.⁹⁰ That pattern may now be repeated, but not universally. Considering the endemic nature of most U.S. employers' deep-seated opposition to unions and the aversion of some workers toward unions, it is likely that some minority unions will not develop into majority unions—at least not promptly, and in many cases never. Even so, the workers in those unions will be exercising their right “to bargain collectively through representatives of their own choosing” notwithstanding that a majority of their coworkers have not chosen to join with them. These minority-union employees will at least have some degree of union protection and benefits—though with limited bargaining power. Yet their status need not necessarily be viewed as temporary or incomplete. Union members and nonmembers ought to be able to work side-by-side with each other without special problems, provided the employer does not interfere with the exercise of freedom of choice to belong or not to belong to a labor union, and provided the union in turn recognizes that its existence does not require absolute majority status. Minority unionism is not uncommon in many other countries, especially in Europe.

This brings to a conclusion my brief restatement of the law regarding minority-union bargaining and my thumbnail descriptive forecast of the organizational and bargaining procedures that minority unions may now follow. I am not suggesting, however, that once the law recognizes the right of minority unions to bargain for their members only prior to establishment of Section 9(a) representation that union organizing will be easy. Nor am I predicting that employers will cease fighting unions and thereafter abandon their efforts to maintain a union-free environment. But when employers realize that henceforth workers will require neither a majority union nor an election to be entitled to engage in collective bargaining, a major incentive for mounting aggressive anti-union campaigns will have vanished. Furthermore, employers will no longer have election targets with finite campaign timelines in which to persuade, promise, intimidate, or punish employees to discourage them from voting for union representation. Nevertheless, many employers will probably persist in discharging and otherwise discriminating against union employees, and undoubtedly many will continue to issue threats and promises-of-benefits to discourage unionization. But at some point in time, compliance with the NLRA may actually be-

come the established norm. That was Senator Wagner's intended goal. Despite the debilitating administrative and judicial constructions that have been inflicted on the act over the years, its core provisions remain intact. With the prospect of a resumption of members-only organizing and bargaining, democratic rights may finally be reclaimed in the U.S. workplace.

Notes

This chapter conforms generally to the Bluebook legal style of citation. For the latest edition, see *The Bluebook: A Uniform System of Citation*, 18th ed. (Cambridge, MA: Harvard Law Review Association, 2005).

1. Cornell University Press, Ithaca, NY (2005) (hereinafter *BLUE EAGLE AT WORK*). In addition to a more thorough exposition of the statutory and historical bases for the thesis, the book also presents applicable constitutional and international human-rights dimensions, detailed guidelines for the legal establishment of members-only, minority-union bargaining, and an alternative rationale premised on NLRB permissive construction of the National Labor Relations Act. The book also provides an in depth exploration of the anticipated changes in the process of union organizing and bargaining, a review of the variety of employee groups likely to be created or affected by these unfamiliar phenomena, and the impact that such changes will likely have on employer-employee relationships.
2. 49 Stat. 449 (1935), 29 U.S.C. §§ 151-69 (as amended).
3. 61 Stat. 136 (1947).
4. 73 Stat. 519 (1959).
5. 29 U.S.C. §159(a).
6. §7. 29 U.S.C. §157.
7. See Ch. 9 in *BLUE EAGLE AT WORK*, *supra* note 1.
8. E.G. Latham, *Legislative Purpose and Administrative Policy under the National Labor Relations Act*, GEO. WASH. L. REV., 433 (1936) (hereinafter Latham).
9. Clyde Summers, *The Kenneth M. Piper Lecture: Unions Without Majority-A Black Hole?*, 66 Chi-Kent. L. Rev. 531, 539 (1990) (hereinafter Summers).
10. While not questioning the basic thesis, Alan Hyde and Matthew Finkin take the position that because of the passage of time legislative action would be required to reaffirm the true meaning of the law, and even Summers suggests that "it may be much too late to open this question . . ." *Id.* at 538. See Alan Hyde, *After Smyrna: Rights and Powers of Unions that Represent Less than a Majority*, 45 Rutgers L. Rev. 637, 639 n. 8 (1993); Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195, 198 n. 18 (1993) (hereinafter Finkin). I am obviously in disagreement with these overly pessimistic concerns.
11. Latham, *supra* note 8 at 453.
12. Summers, *supra* note 9 at 539.

13. U.S. BUREAU OF LABOR STATISTICS, BULLETIN No. 287, NATIONAL WAR LABOR BOARD 32, quoted in Raymond S. Rubinow, SECTION 7(A): ITS HISTORY, INTERPRETATION AND ADMINISTRATION (Office of National Recovery Administration, Div. of Review, Labor Studies Section, 11 (1936).
14. 29 U.S.C. §§101-115.
15. Ch. 90, §7(a), 48 Stat. 195 (1933).
16. Except for immaterial changes in syntax.
17. The present §8(a)(1).
18. The only substantive change in the bargaining requirement in the Wagner Act was contained in §9(a), which was a reaffirmation of the non-statutory practice of the two earlier labor boards that had operated under §7(a), to wit, that once a majority of the employees in an appropriate bargaining unit select a union to represent them, that union becomes the *exclusive* representative for all the employees in that unit. See BLUE EAGLE AT WORK, *supra* note 1 at chs. 1 & 2.
19. See Minier Sargent, *Majority Rule in Collective Bargaining Under Section 7(a)*, 29 ILL. L. Rev. 275, 280 (1934) (hereinafter Sargent) ("For many years it has been customary for each employee to select his own union or organization to act for him in collective bargaining"). See also Finkin, *supra* note 10 at 197 ("[T]he tradition of American 'trades unions' throughout the nineteenth and the early twentieth century was to bargain only for their members; but this was coupled to the demand that employers hire union members exclusively . . .").
20. For example, as noted in the REPORT OF THE UNITED STATES INDUSTRIAL COMMISSION, H. Doc. 7, V73 No. 179, 830, 861-64, 898-900 (1902), the Iron Molders Union's agreements in the stove industry contained members-only provisions, as did agreements in the glass industry.
21. Milton Derber, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965 94 (1970); THE TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS: A SURVEY OF EXPERIENCE IN LEADING AMERICAN INDUSTRIES (Harry A. Millis, Research Director) 689 (1942)
22. See Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 Duq. L. Rev. 779, 804 (1992); THE TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS: A SURVEY OF EXPERIENCE IN LEADING AMERICAN INDUSTRIES (Harry A. Millis, Research Director) 689 (1942).
23. Lloyd K. Garrison, *The National Labor Boards*, 184 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 145 (1936).
24. On the day of its introduction, Wagner told the Senate: "The national labor relations bill which I now propose is novel neither in philosophy nor in content. It creates no new substantive rights." 2 LEGISLATIVE HISTORY OF THE NLRA, 1935 (1949), (hereinafter 2 LEGIS. HIST.) at 1312. That concept of intent behind the Wagner bill has been widely recognized, e.g., see Melvyn Dubofsky, THE STATE AND LABOR IN MODERN AMERICA 127 (1994).
25. Presently known as "The Conference Board." The organization was founded in 1916. See <http://www.conference-board.org/whowere>.
26. National Industrial Conference Board, Inc., INDIVIDUAL AND COLLECTIVE BARGAINING UNDER THE N.I.R.A.—A STATISTICAL STUDY OF PRESENT PRACTICE (1933)

(hereinafter Conference Board).

27. *Id.* at 16, Table II. Senator Wagner was well aware of the Conference Board study, for he referenced it in a New York Times article on March 11, 1934 (made a part of the Congressional Record during consideration of his Labor Disputes bill, S. 2926, March 12, 1934), 1 LEGISLATIVE HISTORY OF THE NLRA, 1935 (1949), (hereinafter 1 LEGIS. HIST.) at 23.
28. Sargent, *supra* note 19 at 275, 285 (1934).
29. A 1935 BLS study confirms that a large number of employers dealt with both trade unions and company unions in roughly the same proportions as found earlier by the Conference Board study. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 634, CHARACTERISTICS OF COMPANY UNIONS 1935 191, 203 (1937).
30. This construction of Section 7(a) was illustrated in several cases, including decisions subsequent to Denver Tramway, 1 NLB 64 (1934), where the board established the principle of majority rule applicable to a union that proves its majority in a board-ordered election. *See* National Lock Co., 1 NLB (Part 2) 15 (1934); *Bee Bus Line Co.*, 1 NLB (Part 2) 24 (1934); *Eagle Rubber Co.*, 1 NLB (Part 2) 31 (1934). *See also* discussion in BLUE EAGLE AT WORK, *supra* note 1 at 37–39.
31. *See* ch. 2 in BLUE EAGLE AT WORK, *supra* note 1.
32. *Id.* at 236.
33. *Id.*
34. *Id.* at 44–45, 56, 69–71, & 74–75.
35. The present §8(a)(5).
36. 1 LEGIS. HIST. at 1295.
37. Houde Engineering Corp., *id.* at 35.
38. *See* BLUE EAGLE AT WORK, *supra* note 1 at 48–52 & 70.
39. Irving Bernstein, TURBULENT YEARS, A HISTORY OF THE AMERICAN WORKER 1933–1941 326 (1971) (hereinafter Bernstein TURBULENT YEARS). The reference is to the National Labor Relations Board, created by Exec. Order No. 6073, June 29, 1934.
40. The “Borrowed statute” rule. William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION, *Appendix 3, The Rehnquist Court's Cannons of Statutory Construction*, 323, 324, (1994), *citing* *Molzof v. United States*, 112 S. Ct. 711, 716 (1992); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).
41. *See* note 46 *infra*.
42. 1 LEGIS. HIST. at 1419. Several weeks later Wagner reaffirmed that position. 2 LEG. HIST. at 2102. For the same view reconfirmed by Keyserling in an interview in March, 1986, *see* Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 330 (1987) (hereinafter Casebeer *Holder of the Pen*). These views were consistent with the key decision of the old NLRB, Houde Engineering Corp., 1 NLRB (old) 35 (1934), as well as several other cases cited therein. *See* BLUE EAGLE AT WORK, *supra* note 1 at 73, n. 86.
43. Senate Committee Report, 2 LEGIS. HIST. at 2309. Emphasis added. *See also* Wagner statement and House Committee Report, *id.* at 2333 and 2971, respectively.

44. Kenneth Casebeer, *Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 INDUS. REL. L. J. 73, 120 (1989) (hereinafter Keyserling drafts). The proposed changes in this draft are reproduced by Casebeer in the Appendix to his article, *id.* at 130–131, though under the misleading heading, “NLRA Draft 2 - February 15, 1935 - New Preamble, Amendments in Committee Annotated by L. Keyserling in Margin.” The document is clearly a *third draft*, not the second draft (the second draft was S. 1958 as introduced on February 21, 1935), nor are all of the changes “amendments in Committee”—some were and some were not. (The original of this draft is in the collection of the Leon Keyserling papers in the Lauinger Library of Georgetown University, which graciously provided me with a photocopy.) In his description of the draft earlier in his text, *id.* at 86, Professor Casebeer does explain that the draft “represents the National Labor Relations Act as introduced February 15, 1935, together with amendments of the Committee on Education and Labor annotated by Keyserling as to their source or sponsor.” That clarification, however, is also partially inaccurate, for only some of the inserted proposals were ultimately adopted by the committee. The photocopy in my files shows that it is a revision superimposed on an officially printed version of S. 1958 introduced on Feb. 21, 1935 (which is the calendar day, though it also bears the session date of Feb. 15, 1935). All of the changes on the document appear either in handwriting or as typed copy on inserted flaps—the latter being how the two versions of §8(5) noted here appear, but with the handwritten identification: “Biddle.” (There are also other handwritten marginal designations elsewhere in the document showing the sources or sponsors of the changes, except—presumably—when Keyserling was himself the source or sponsor.) Comparisons of the proposed changes inserted in the document with the written proposals attributed to various sources by the Senate Committee in its March 11, 1935, *Comparison of S. 2926 and S. 1958*, 1 LEGIS. HIST. at 1319–71, and also the changes that were incorporated in the bill as reported by the committee on May 2, 1935, show that this was a preliminary and tentative committee mark-up of the original bill, i.e., a working draft composed during committee consideration between Feb. 21 and March 11, 1935. Most but not all of those changes were incorporated in the bill as reported, which demonstrates the preliminary nature of the draft’s mark-up status, and—more important—that every change or proposed change included in this draft occurred within the Senate committee and thus had the consideration of that committee.
45. Emphasis added.
46. Although Keyserling was the primary draftsman of all of Wagner’s public statements and materials—including his speeches, his legislative bills, and also key committee reports—the Senator was kept fully advised at all stages of the work and was in total agreement with the final product. Casebeer *Holder of the Pen*, *supra* note 42 at 295, 302–303, 341–343, and 361; Casebeer *Keyserling Drafts*, *supra* note 44 at 76; Bernstein *TURBULENT YEARS*, *supra* note 39 at 340. *See also* Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 215 (1960).

47. It was nevertheless essential to include reference to §9(a) in order to ensure that where there was a majority designation in an appropriate bargaining unit, the representative would be bargaining exclusively on behalf of all employees in that unit, and an employer's recognition or bargaining with any other union would not be permitted—which was the ultimate bargaining objective of the statute.
48. 1 Legis. Hist. 1419; Summers, *supra* note 9 at 539 (“[t]he history of the majority rule principle shows that its purpose was not to limit the ability of a non-majority union to represent its own members, but to protect a majority union's ability to bargain collectively.”).
49. Irving Bernstein, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 109 (1950). See *BLUE EAGLE AT WORK*, *supra* note 1, at 35–36 and 50–52.
50. E.g., see *BLUE EAGLE AT WORK*, *supra* note 1 at 70 and 79.
51. See ch. 5, *id.*, for a detailed analysis of the statutory text.
52. 301 U.S. 1 (1937)
53. *Id.* at 33. Emphasis added. See generally *BLUE EAGLE AT WORK*, *supra* note 1 at ch. 8. See also James A. Gross, *Worker Rights as Human Rights: Wagner Act Values and Moral Choices*, 4 U. Pa. J. Lab. and Emp. L. 479 (2002); Roy J. Adams, *Choice or Voice? Rethinking American Labor Policy in Light of the International Human Rights Consensus*, 5 EMPLOYEE RTS. AND EMP. POL'Y J. 521 (2001).
54. For treatment of the constitutional issue, see *BLUE EAGLE AT WORK*, *supra* note 1 at ch. 6.
55. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).
56. 29 U.S.C. §158(c).
57. 395 U.S. at 617.
58. *Id.* Emphasis added.
59. See INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (adopted in 1966, entered into force in 1976, ratified by U.S. in 1992); 42 U.S.C. §1983 (1994); 6 I.L.M. 368; INTERNATIONAL LABOUR ORGANIZATION DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK, International Labour Conf., 86th Sess. (June 1998), available at <http://www.ilo.org/public/english/standards/decl/declaration/text>. For details of these obligations, see *BLUE EAGLE AT WORK*, *supra* note 1 at ch. 8.
60. *NLRB v. Jones and Laughlin Steel Corp.*, *supra* note 52; *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236-37 (1938); *International Ladies Garment Workers v. NLRB* (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 736, 741-43 (1961); *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17, 29 (1962); *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984); *Solvay Process Co.*, 5 NLRB 330 (1938); *The Hoover Co.*, 90 NLRB 1614, 1618 (1950); *Consolidated Builders, Inc.*, 99 NLRB 972, 975 (1952). In *Consolidated Edison*, where the board had previously dismissed an unfair labor practice charge under §8(2), the Supreme Court found that minority-union members-only bargaining and contracts did not violate Sections 8(1) and 8(3). And in the *Solvay*, *Hoover*, and *Consolidated Builders* cases, the board found members-only bargaining to be lawful under Sections 8(a)(1) and 8(a)(2). See *BLUE EAGLE AT WORK*, *supra* note 1 at 93-97.
61. See *BLUE EAGLE AT WORK*, *id.* at ch. 9.

62. The only legal question of serious consequence raised by employers at that time concerned the Act's constitutionality, which the Supreme Court put to rest in *NLRB v. Jones & Laughlin Steel Corp.*, *supra* note 52. See James A. Gross, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* 183–88 (1974).
63. *NLRB v. Jones & Laughlin Steel Corp.*, *id.*, decision rendered on April 12, 1937.
64. *Union Recognition as Shown in Contracts*, 1-A L.R.R.M. (BNA) 781 (1938). Of the 23 “typical” contracts reported, 13 (57 percent) were members-only agreements, whereas only 8 (35 percent) were exclusive agreements (2 were ambiguous as to coverage).
65. Bernstein *TURBULENT YEARS*, *supra* note 39 at 465.
66. See Robert R. Brooks, *AS STEEL GOES, . . . : UNIONISM IN A BASIC INDUSTRY*, 166–167 (1940) (hereinafter Brooks).
67. *Collective Bargaining Contracts and Industrial Practices: Bargaining in the Steel Industry*, 3 LRRM (BNA) 553 (1939).
68. *Id.*
69. Brooks, *supra* note 66 at 166; however, in 1940 the union's contracts with U.S. Steel were still “for members only.” *Id.* at 248.
70. Here is a snapshot-view of union organizational status during that period: “Most unions seek a closed, union or preferential shop, but newly organized ones usually have difficulty in winning any one of these from employers traditionally opposed to unionism. Ten years ago most agreements provided for the closed shop. In recent years there have been more exceptions than at any time since the 1880s; unions were willing to take what they could get in order to secure a foothold in areas previously closed to them. For example, *many agreements in the 1930s with new industrial unions in the mass production industries stated that the union was to bargain for members only. However, as collective bargaining gained more general acceptance and as unions won National Labor Relations Board elections, these “membership” agreements were generally replaced by contracts designating the union as exclusive representative of all employees . . .*” THE TWENTIETH CENTURY FUND, *HOW COLLECTIVE BARGAINING WORKS: A SURVEY OF EXPERIENCE IN LEADING AMERICAN INDUSTRIES* (Harry A. Millis, Research Director) 24 (1942). Emphasis added.
71. Sidney Fine, *SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936–1937* 266–312 (1969) (hereinafter Fine).
72. *Bargaining in the Automobile Industry*, 2 L.R.R.M. 952–53 (1938).
73. For example, following NLRB election victories in 1940, the UAW was officially certified as exclusive bargaining agent for 130,000 workers at GM and for 50,000 workers at Chrysler. 5 NLRB Ann. Rep. 18–19, 141, 151 (1941). See also Fine, *supra* note 71 at 329.
74. W. H. McPherson, *Automobiles*, in *HOW COLLECTIVE BARGAINING WORKS* 571, 595 (Harry A. Millis ed., 1942)
75. 2 NLRB ANN. REP. 25–26 (1937); 3 NLRB ANN. REP. 39, 49 (1939); 4 NLRB ANN. REP. 43, 53 (1940); 5 NLRB ANN. REP. 17–18, n. 6, 29 (1941); 6 NLRB ANN. REP. 37, Table 19 (1942); 7 NLRB ANN. REP. 90, Table 18 (1943); 8 NLRB

- ANN. REP. 37, 38, 90, Table 18 (1944); 9 NLRB ANN. REP. 88, Table 13 (1944); 10 NLRB ANN. REP. 4 (1946). See BLUE EAGLE AT WORK, *supra* note 1 at 86.
76. See BLUE EAGLE AT WORK, *supra* note 1 at ch. 10.
 77. Our Canadian neighbors have long recognized that “[t]he usual method of which trade unions establish representativeness in order to acquire bargaining rights is through evidence of membership.” H.W. Arthurs, D.D. Carter, H.J. Glasbeek, *LABOUR LAW AND INDUSTRIAL RELATIONS IN CANADA* 189 (2nd ed. 1984).
 78. Compare *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).
 79. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), in which the Supreme Court upheld an NLRB rule that an employee in a unionized workplace who is called in by management for an investigatory interview that the employee reasonably fears may result in disciplinary action has a statutory right to refuse to submit to such an interview without union representation.
 80. 341 NLRB No.148 (June 9, 2004), which reversed *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92, *aff’d in pertinent part*, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied*, 2002 U.S. LEXIS 4231 (U.S. June 10, 2002). Inasmuch as the *Weingarten* rule is based on the right to engage in concerted activity for “mutual aid or protection” pursuant to §7—not on the duty to engage in collective bargaining under §8(a)(5)—the Board held in *Epilepsy Foundation*, as it had previously ruled twelve years earlier in *Materials Research Corp.*, 262 NLRB 1010 (1982), (which was overruled three years later by a different Board in *Sears, Roebuck & Co.*, 274 NLRB 230 (1985)), that employees in nonunion workplaces are entitled to *Weingarten*-like protection. It held that “where employees are not represented by a union [they have a] right to have a coworker present at an investigatory interview” that the employee reasonably believes could result in disciplinary action. In reversing *Epilepsy Foundation* in *IBM Corporation*, the current Board distinguished between the status of a coworker and a union representative (steward), noting that “[t]he union representative typically is accustomed to dealing with the employer on a regular basis [whereas a] coworker is unlikely to bring such skills to an interview because he has no experience as the statutory representative of a group of employees.” 341 NLRB No.148, slip op. at 5.
 81. *Weingarten*, *supra* note 79 at 256. Emphasis added.
 82. Richard B. Freeman and Joel Rogers, *WHAT WORKERS WANT* 69 (1999).
 83. *NLRB v. Katz*, 369 U.S. 736 (1962). See also *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (“[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change in an existing term or condition of bargaining.”).
 84. 355 U.S. 41 (1957).
 85. *Id.* at 46.
 86. Examples of mandatory subjects of bargaining likely to arise on an ad hoc basis would include changes in wages and hours of work, discharges and discipline, work-rule changes, safety and health issues, and changes in vacation and holiday pay. These are but a few, for a comprehensive list of mandatory subjects would be lengthy. For discussion and authorities regarding these and other mandatory

subjects of bargaining, see *BLUE EAGLE AT WORK*, *supra* note 1 at 194–195.

87. “Upon impasse, the employer may make unilateral changes in working conditions, but unilateral changes implemented before a genuine impasse has been reached violate the Act.” Patrick Hardin and John E. Higgins, Jr., eds. *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 926 (4th ed. 2001).
88. *See Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962).
89. For treatment of NLRB changes in the collective bargaining process likely to result from members-only bargaining, *see BLUE EAGLE AT WORK*, *supra* note 1 at 211–217.
90. *See supra* at notes 69 and 73–74.

13

The Commercial Temp Agency, the Union Hiring Hall, and the Contingent Workforce

Toward a Legal Reclassification of For-Profit Labor Market Intermediaries

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An integral feature of today's volatile labor markets is the pervasive use of temporary help and staffing firms to respond to the cyclical economy's fluctuating labor needs. Modern workplace law has not kept pace with this development. Federal labor law was enacted and developed during the middle decades of the twentieth century to govern stable, long-term employment relationships, not the vicissitudes of the now-ubiquitous temporary work relationship. The Labor Management Relations Act (LMRA) does not address temporary work in the statutory text, and it has not provided an effective regulatory regime to govern the operations of contemporary staffing firms and other profit-driven labor market intermediaries (LMIs).¹ Despite certain notable legal breakthroughs and some exemplary efforts at creating alternative, nonexploitative agencies to challenge the likes of Labor Ready and Manpower, advocates of the rights of temporary workers have not yet crafted an effective legal framework that can advance the unionization and fair treatment of workers who are deployed by commercial, profit-driven LMIs. In this regard, little attention has been paid to the legal

status of the for-profit temporary agency, the primary institution driving the expanded use of contingent workers. This chapter aims to help remedy this neglect by examining the history and sociolegal character of the temp agency, an institution which by conservative industry estimates deploys more than 2.5 million workers each day—more than the number employed by Wal-Mart or the “Big Three” automakers combined.

A central issue continually arises in the context of efforts to win meaningful labor rights for workers employed through commercial LMIs: how to legally characterize the status and obligations of the staffing agency that supplies “temp workers” when it is the user firm that actually engages these workers in productive labor. As previous research has shown, determining which entity is the actual employer has profound repercussions for union organizing and for the application of a wide range of employment laws (Gonos 1997). Treating staffing agencies as bona fide independent employers of agency workers, as was the NLRB’s accepted practice during the temp industry’s boom period in the last quarter of the twentieth century, makes it practically impossible for temps to exercise their union rights.

It was only in 2000 that a landmark NLRB ruling offered a resolution to one aspect of this issue by recognizing the social and economic realities of contingent employment relationships involving temp agencies. In *M.B. Sturgis, Inc./Jeffboat Division*² the board reversed decades-old policy on the status of temp workers, ruling that, for purposes of collective bargaining, the user firm is the actual employer of both the direct and temporary employees who are engaged in common work at the user firm’s place of business. Significantly, *M.B. Sturgis* recognized that in many circumstances staffing agencies have little or no claim to employer status and thus have no say as to whether temp workers join a union with workers permanently employed at the user firm’s business. Moreover, the board indicated that the new policy driving its ruling in *M.B. Sturgis* resulted from a significant shift in the employment paradigm, i.e., the “tremendous growth in the temporary help supply industry.”³

Not surprisingly, whatever potential *M.B. Sturgis* may have had to advance the labor rights of temp workers was recently quashed by President Bush’s appointees to the NLRB. In November 2004, Chairman Robert J. Battista spearheaded a 3–2 decision reversing *M.B. Sturgis*.

The board's decision in *Oakwood Care Center and N&W Agency, Inc.* revived the notion that contingent workers deployed by a temp agency cannot share a common bargaining unit with permanently employed workers without the permission of the temp agency.⁴ Despite the setback that *Oakwood Care* represents, *M.B. Sturgis* was a meaningful attempt to provide a modicum of protection for temp workers' rights and a laudable effort to creatively apply federal labor law to the widespread, but problematic, triangular employment relationship.

Yet, the analysis in *M.B. Sturgis* left an important question largely unanswered. If, as that ruling declared, the user firm is in many circumstances the *actual employer* of temp workers, then how does one legally characterize the temp agency? The answer offered in *M.B. Sturgis*—that the user firm and the supplier firm are both employers of the temp workers—failed to address critical issues that arise when employers use temps to supplement their “regular” workforces. Consider, for example, what legal justification exists for the disparate wage rates often earned by temps and permanent workers who share a common work experience (a condition that the *Sturgis* decision tolerated even among those belonging to the same bargaining unit). Creating an effective regime of regulation for the commercial staffing industry requires that labor advocates provide a more searching answer to the question of how to legally characterize commercial LMIs.

Based on a reconsideration of their role in U.S. labor and legal history, this chapter argues that a fundamental shift in the current legal characterization of temporary help and staffing firms is necessary to effectuate a fair regime of regulation for these formidable players in the labor relations arena. The argument has four parts. First, we locate for-profit employment agencies within the history of U.S. labor by presenting early examples of how the labor movement responded to abusive private staffing practices. Second, we discuss the rise and fall of the regulatory regime that constrained for-profit agencies for the larger part of the twentieth century, and, specifically, how the contemporary staffing industry was able to escape effective regulation in the latter decades of the century by acquiring the undeserved legal status of “employer.” Third, we present empirical data and legal principles that call into question staffing firms' current *de facto* legal status as employers.

Finally, informed by this sociolegal reevaluation of the staffing industry's history and structure, we propose a legal reclassification, urg-

ing legislative reform to assign temp agencies and staffing firms a dual status, that of employer *and* labor market intermediary, analogous to the legal characterization of the temp agency's pro-worker counterpart, the union hiring hall. The notion of creating an explicit legal definition for commercial staffing agencies rests on a fundamental principle of U.S. labor law: parity in the legal treatment of employees by all parties to the employment relationship.⁵ Currently, this principle is not applied to for-profit LMIs. As this chapter explains, in the last third of the twentieth century, the commercial staffing industry waged a successful national campaign to free itself of state government regulation. Moreover, certain historical factors permitted the industry to avoid express regulation under the Taft-Hartley and Landrum-Griffin amendments to the LMRA. Given the prominent role of the private staffing industry in today's labor markets, we argue that federal labor law should restore legal parity by subjecting for-profit temp and staffing firms to a regime of regulation and structural transparency similar to that which governs union hiring halls, their functional equivalent on the labor side of the employment equation.

THE TEMP AGENCY AND THE UNION HIRING HALL

Labor market intermediaries have played a prominent role in the U.S. economy, especially during periods of economic transition and high labor market volatility. This was evidenced in the late nineteenth and early twentieth centuries, when the expansion of industrial capitalism spawned the rapid proliferation of private fee-charging agencies to supply cheap, no-frills labor to a range of industries. This era also witnessed a response to this form of exploitation in the growth and institutionalization of union hiring halls in certain economic sectors. Thus, the union hiring hall and the commercial staffing agency arose as two primary kinds of labor market intermediaries, occupying—at times in direct competition with each other—a common socioeconomic niche, i.e., both organized and provided human capital to industry on a short-term, seasonal, or cyclical basis.

Today, although both forms of LMIs operate in the labor market, multinational corporations such as Manpower and Adecco clearly dom-

inate the field, with outlets in large and small communities throughout the United States and the world. Also ubiquitous are small ad hoc or specialized commercial temp operations, providing lower-cost, no-frills labor in industries as varied as fish processing, manufacturing, accounting, and law. At the same time, union hiring halls persist and continue to provide skilled and semiskilled labor to employers on a seasonal and temporary basis, most notably in the construction, maritime, and entertainment industries. One thing is clear: as long as the current need for cyclical and temporary labor remains high, LMIs will remain an important feature of the economy. It remains an open historical question, however, whether the predominant form of LMI will engage in the commercial exploitation of workers employed in fluid labor markets or, alternatively, some kind of pro-worker vehicle will emerge that can meet the flexible labor needs of our society and, at the same time, provide workers with labor representation, decent compensation, and a level of empowerment associated with the unionized sectors of the economy.

Disparate Legal Treatment of Two Equivalent Labor Market Institutions

Wilborn (1997) offers a useful functional definition of labor market intermediaries that explains the similarities between union hiring halls and temporary staffing agencies. He points out that both these kinds of LMIs limit frictional unemployment, i.e., the time a worker spends searching for work, and both have the potential to provide an institutional continuity that allows workers to acquire medical/welfare coverage and pension benefits that otherwise would be unavailable to them as contingent workers.⁶ Further, both union hiring halls and commercial staffing firms are often the contractually designated gatekeepers that provide an exclusive vehicle by which employees gain access to jobs in a given industry or with a certain employer.⁷ In the mid-1990s, *Business Week* noted the functional similarity of temp agencies like Labor Ready and union hiring halls in that both provide employers with a “database of willing workers” (Weiss 1996). Or, as one federal appellate court recently put it, an “exclusive hiring hall is akin to an employment agency where all employees hired by an employer are those referred by the union.”⁸

Another key structural characteristic shared by both types of LMIs is crucial to our argument for subjecting commercial staffing agencies to strict regulation: Throughout the history of modern U.S. capitalism, unregulated labor market intermediaries of all kinds have been prime purveyors of workplace abuse and exploitation.⁹ On point is a recent article in the *New York Times*, titled “Middlemen in the Low-Wage Economy,” which reports on the inherently exploitive triangular relationship involving private labor contractors, low-wage workers, and the economic conglomerates that actually employ contingent labor (Greenhouse 2003). This is but one of an ever-increasing number of stories about contingent workers brought to public attention in recent years by labor activists, scholars, and journalists, that makes it clear that the pervasive use of unregulated commercial LMIs continues to result in widespread abuse of a vulnerable strata of workers. Notably, at this historical juncture, unregulated LMIs, i.e., commercial temp and staffing agencies, dominate the contingent labor market, while their highly regulated counterpart, the union hiring hall, is relegated to a relatively marginal role as a provider of labor.

The assertion that union hiring halls and commercial staffing firms perform common socioeconomic functions is not intended to gloss over their significant differences. Workers organized and dispensed by temp agencies experience substandard wages, nonexistent benefits, high levels of alienation, and long-term economic insecurity, while workers organized and represented by union hiring halls are not subject to anything like the same level of exploitation and uncertainty (Polivka, Cohany, and Hipple 2000). Indeed, rarely, if at all, are workers employed through union hiring halls considered “contingent” workers since they have acquired a level of income, job stability, and benefits that are characteristic of workers in the mainstream economy. A second related but largely unexplored distinction separates union hiring halls and staffing agencies: the diametrically opposite paths that government regulation of these two different types of labor market intermediaries has taken. Today, union hiring halls are highly regulated under federal labor law, while staffing agencies are largely unregulated and unchecked at both the state and federal levels. Given their near-equivalent economic functions, it is worth exploring what accounts for such disparate levels of government regulation.

The Rise of a Regulatory Regime for Private Employment Agencies

From the late nineteenth century until World War II, a constant stream of public criticism targeted the widespread abuses fostered by the private employment agency business. Voluminous government reports catalogued the standard industry abuses: excessive fees charged to workers, collusion with employers, and various forms of extortion and misrepresentation (see, e.g., U.S. Commission on Industrial Relations 1916). Fee-charging practices in particular became a widely recognized “social evil” in early twentieth century labor markets.¹⁰ Private agents earned the label of “employment sharks” by charging exorbitant fees and sending workers to nonexistent jobs. Agencies and employers colluded to bilk workers by intentionally promoting high turnover, hiring and quickly dismissing workers referred by the agency to maximize the number of fees collected (Gonos 2001). One of the earliest labor struggles and legal battles addressing these employment agency practices occurred in Spokane, Washington, in 1909, led by militant workers affiliated with the Industrial Workers of the World (IWW). Their organizing, soap box speechmaking, and massive civil disobedience (over 400 arrests) inspired a successful boycott of the exploitive agencies by migratory workers and culminated in a statewide ballot referendum in which voters banned private fee-charging agencies (Foner 1965, pp. 177–185). The battle only ended when a U.S. Supreme Court decision, *Adams v. Tanner*,¹¹ employing the now-discredited constitutional doctrine of liberty of contract, held that the Fourteenth Amendment prevented the Washington legislature from banning private fee-charging agencies. Over the course of struggles like the one in Spokane, workers came to favor the establishment of free public or union-operated employment offices as an alternative to mistreatment at the hand of the agency sharks.

Along with workers’ protests, government investigations of private agencies laid the basis for extensive state and municipal regulation. As early as 1914, 25 states had detailed employment agency laws on the books, and 19 had established free labor exchanges as an alternative to for-profit offices. State regulation typically required licensing and bonding of agency operators. The laws also placed ceilings on fees or required that fee schedules be posted or filed with the state. Agencies were required to keep records, open to inspection, of all placements

made and fees charged, and receipts had to be provided to workers. Many state laws made extra charges for additional “services” illegal, and also mandated refunds of fees when jobs were not obtained or turned out to be of short duration. Most states outlawed collusive fee-splitting, where agencies and employers shared in the fees charged to workers. Statutory provisions also prohibited misleading ads and required that workers be informed of labor disputes so as to allow them to avoid functioning as scabs. The laws had teeth that provided remedies for victims and criminal penalties for agents that violated the law (Moses 1971). Still, public outrage regularly flared up over continued gross abuses, leading to calls for even stricter regulation (e.g., Andrews 1929).

It was only in the “New Deal period” that public enmity toward private employment agencies was quieted. During this period, employers strengthened internal labor markets as a means of recruiting and retaining workers, aided in large measure by the growth of industrial unionism, which secured job stability. In external labor markets, the free public Employment Service was firmly institutionalized, complementing the relatively strict regime of state regulation that was in place for private employment agencies—the precursors of the modern temporary help firm. Through the mid-1960s, state departments of labor vigorously pursued enforcement of employment agency laws for both permanent and temporary placements, and the U.S. Department of Labor provided strong federal support (U.S. Department of Labor 1962). As a result, the private employment agency became, relatively speaking, a marginalized actor in the labor marketplace, and its abusive practices became much less prevalent.

Federal Regulation of Union Hiring Halls

Union hiring halls came into existence as a means of ending the irregularity of work in temporary and seasonal labor markets, and to ameliorate employer discrimination and other abuses associated with the hiring process. A notable example is the celebrated West Coast longshoreman’s strike in 1934, which aimed to establish an independent union hiring hall as a response to years of abuse at the hands of a company-dominated shape-up (Yellen 1974, pp. 327–334). Widely recognized as one of the labor battles that paved the way for the successes of the Congress of Industrial Organizations (CIO), the campaign was car-

ried out by “casual” employees who sought unionism and a hiring hall as a means of ending the exploitation associated with their contingent employment status. But in the years following World War II, there was growing recognition that union hiring halls can also subject workers to unfair treatment, and their practices came under harsh criticism from antiunion forces. As a result of two rounds of revision to the NLRA, union hiring halls are now subject to an extensive set of federal regulations that, however pertinent they may be, do not apply to commercial staffing agencies.

First, the Taft-Hartley amendments spelled an end to the closed shop, which was well established in many industries where hiring halls predominated; no longer could employees be compelled to join a union as a condition of seeking employment. Second, the addition of a new class of union unfair labor practices in Section 8(b) of the LMRA provided administrative and judicial remedies to workers for a host of unfair practices that might be committed by a union-run hiring hall. Hence, a union hiring hall cannot force an employer to discriminate against applicants or employees so as to encourage or discourage union membership,¹² nor make access to skills programs dependent on union membership, or on a requirement that referral be from a union member.¹³ Access to referral list information and out-of-work lists that serve as the basis for job referrals must be made available to all persons using the hiring hall.¹⁴ Failure to abide by lists that determine the order in which applicants are to be referred is illegal. Further, separate and apart from being subject to unfair labor practice claims, union hiring halls are also subject to suit in federal court by any user when a departure from established hiring hall procedures results in a denial of employment.¹⁵ Finally, union hiring halls cannot charge fees not reasonably related to the cost of providing their services.

Another provision of federal labor law germane to our analysis is the outright ban of negotiated prehire agreements outside the construction industry. Prehire agreements that permit a union to negotiate a contract without achieving majority status are considered highly suspect because they impose terms of employment on unrepresented workers. The fact that such agreements are routine business transactions in the commercial staffing industry reveals the glaring contrast in the scope of regulation between union hiring halls and for-profit LMIs. Significantly, it was only after extensive debate that the Landrum-Griffin amend-

ments to the LMRA allowed even the limited use of prehire agreements, and then only in accordance with specific objective guidelines (Hardin 1998, pp. 1517–1523).¹⁶

In sum, under federal labor law, union hiring halls have become highly regulated LMIs. Consequently, they function transparently, their operations easily subject to open scrutiny by users to ensure fair, neutral practices. Many of the regulations governing union hiring halls are analogous to state regulations, which used to govern employment agencies. Yet, none of these federal regulations apply to commercial temp or staffing agencies. Unlike union hiring halls, the story of commercial staffing agencies since the post–World War II period is one of almost complete deregulation, as discussed next.

The Fall of Regulation Governing the Commercial Staffing Industry

The last 25 years of the twentieth century saw the steady decline of the New Deal model of employment—based on long-term attachment to a single employer—and heralded the return of high velocity labor markets reminiscent of the late nineteenth and early twentieth centuries. With this came a resurgence of for-profit LMIs in the U.S. economy, signaled by the now legendary expansion of the temporary help industry that began in the 1970s. Ironically, the temporary help industry, a branch of the old employment agency business, was founded immediately after the close of World War II, the same time that the Taft-Hartley amendments weakened the position of organized labor. Nonetheless, consistent with the proregulatory mindset of the postwar period, temporary help offices were classified as employment agencies well into the 1960s, and state lawmakers and regulatory agencies continued to regulate them under laws that, as noted earlier, were enacted early in the twentieth century.

Over the next several decades, however, the industry fought for and won exemption from these laws and fashioned an existence in what an earlier government study had called the “no man’s land” between state and federal labor regulation (U.S. Department of Labor 1943, p. 16). Astonishingly, the deregulation of this entire industry was achieved not through the searching process of judicial review, but rather by political means. Beginning in the 1950s, the young temporary help industry

(later renamed the “staffing industry”) organized a low-profile, fierce, protracted, and ultimately successful assault on the states’ regulatory regimes. Largely unopposed, and without any public hearings or debate, the industry managed between 1961 and 1971 to induce business-oriented state legislatures across the country to enact relatively simple but far reaching statutory modifications of existing employment agency laws (Gonos 1997).

Through its lawmaking efforts, the industry achieved two related, crucial objectives. First, it evaded the classification of temporary help firms as “employment agencies,” thus exempting them from state regulation and oversight; and second, it redefined temp firms as statutory “employers,” a status that was institutionalized in practice throughout the country in subsequent years.¹⁷

Winning employer status for temp agencies was literally the key to success for the emerging temp industry. Temp agencies’ newly minted employer status effectively shielded user firms from most legal obligations toward agency workers, and ultimately, this became the temp industry’s unspoken *raison d’être*. Importantly, this legal change facilitated a split workforce strategy whereby workers “employed” by the staffing agency were now understood as comprising a separate and distinct unit, despite the similarity in work performed by “regular” and “temporary” employees. Even before this so-called “core and periphery” staffing strategy was sanctioned by the NLRB,¹⁸ the employer status of temp firms made it almost impossible for temps to organize or join existing bargaining units at their place of work over the last three decades of the twentieth century. The importance of this fact was noted in the final report of the Dunlop Commission.¹⁹

The other aspect of the staffing industry’s political victory—avoiding the classification of temp firms as employment agencies—was also crucial. The detailed provisions of state employment agency law, many parallel to those governing union hiring halls under federal law, were made irrelevant by the temp industry’s aggressive lobbying effort to avoid state regulation. Temp firms were no longer required to keep records of placements made, wages paid, and fees charged open to inspection, as they previously had been in 37 states. Nor were they subject to different forms of fee regulation, as they had been in 30 states where statutory provisions reflected decades of public opposition to widespread abuses and exploitive fee charges. In short, deregulation

eliminated the transparency and public scrutiny that state regulation of staffing agencies was intended to achieve, replacing this with secrecy in regard to placement practices, fees, and the wages and other terms negotiated with client companies. Thus, the temp agency—an institution never considered by law or popular wisdom to have fulfilled the social function of employer—achieved employer status politically and escaped the purview of state employment agency regulation under which its predecessors had operated for most of the twentieth century.

Yet, ironically, due to the very fact that staffing agencies were not considered employers for most of the last century, they have also largely passed below the radar of federal labor regulation, which has as its primary concern the relationship between employers, employees, and labor organizations. As federal labor law was being developed, employment agencies, including those handling temporary labor, were tacitly understood as labor market *neutrals* engaged in simply “matching” employees with employers. As such, they were ignored in the NLRA, and their regulation—or lack thereof—was left to the states. At the same time that industry efforts to deregulate temp firms were beginning to make headway, government regulation of labor unions and union hiring halls was being increased. With passage of the Landrum-Griffin amendments in 1959, labor unions became subject to a range of reporting and disclosure requirements, as well as to claims for violation of an individual member’s rights, so as to protect workers from abuses by unions and hiring halls run by them.

But while the Taft-Hartley and Landrum-Griffin amendments purportedly established statutory parity between employers and labor organizations—subjecting both to claims of unfair labor practices—private employment agencies and their progeny, temporary help and staffing firms, were given no clear classification in this statutory scheme. To this day, their status remains largely unaddressed by federal labor law, despite the fact that they have formally abandoned a neutral posture.²⁰ Consequently, the staffing industry is free of any particular federal or state oversight of its operation as a labor market intermediary. As a result, widespread agency abuses of the same kinds as those encountered by workers early in the twentieth century have returned as a daily feature of the employment scene.

RECONCEPTUALIZING THE LEGAL STATUS OF TEMP AND STAFFING FIRMS

The presumptive employer status that staffing firms have come to hold in practice lacks a solid socioeconomic or legal foundation and has become subject to a critical reassessment. Indeed, what the NLRB considers the most important factor in deciding employer status, the degree of control exercised over the work of employees, is usually nonexistent in the relationship between the staffing agency and temp worker.²¹ The legal treatment of staffing firms as “employers” rests almost entirely on the fact that they perform a series of ministerial acts—issuing paychecks, collecting withholding tax, and carrying workers’ compensation insurance.²² Hence, their employer status is increasingly seen as tenuous and flawed.²³

Of many recent legal decisions that have effectively eroded the legal status of staffing firms as employers, we highlight three. Consider first *Vizcaino v. Microsoft*,²⁴ which involved long-term “contractors” who worked under the direct supervision of Microsoft managers on software products integral to the company’s core business. Because they were payrolled through outside staffing agencies, Microsoft officially treated them as “temporary” nonemployees and denied them company benefits and other rights and privileges enjoyed by similarly situated traditional employees. The 9th Circuit Court of Appeals found that the agency temps were employees of Microsoft—not the staffing firms—and therefore entitled to participate in the company’s stock purchase plan. Ultimately, this case cast a bright light on the staffing industry’s practices and called into question temp agencies’ status as the “real employers” of temp workers.²⁵

In the second case, *Sturgis*,²⁶ the NLRB addressed the question of who is the employer of temp agency employees for the purpose of collective bargaining. The conditions were typical of the standard staffing arrangement: temps supplied by the staffing agencies performed the same work as unionized employees, under common work and safety rules, and were subject to the same user firm supervision. The board found “no evidence of any assignment or direction by the onsite [agency] representative.” Differences in employment conditions were limited to wage rates, availability of overtime and, presumably, the rules

for hiring and promotions. In its landmark decision, the NLRB held that the consent of both the user and supplier firms is not required in order to permit the temporary employees bargaining unit status at the user employer's place of business.²⁷ Pointing out that "all of the work is being performed for the user employer" and that "all the employees in fact share the same employer, i.e., the user employer," the board concluded that staffing agencies are not "independent employers." In circumstances such as this, i.e., when the locus of control rests entirely with the user employer, the board recognized that the supplier's consent to include the temp workers in the unit is irrelevant. Instead, the traditional community of interest test should determine the composition of the appropriate bargaining unit.

In a subsequent case, *Tree of Life*, the board extended this reasoning by ruling that a unionized user firm was obligated to include agency temps in its bargaining unit and had a duty to bargain over those aspects of the temps' working conditions that it controlled.²⁸ In a modification of the administrative law judge's ruling, the board backed away from what would have been a truly significant ruling: ordering that union wage rates be applied to the temps. This severely blunted the potentially explosive nature of the ruling. Notably, however, in a concurring opinion, board member Wilma B. Leibman stated that she would have upheld the ALJ's ruling applying *all* the terms and conditions of the collective bargaining agreement—including those affecting wages—to the temporary workers, "just as if the [user employer] had hired them without using an intermediary." Although *Tree of Life* suggests an unwillingness to provide a remedy for the core disparities in pay and benefits experienced by temp workers, the decision nonetheless signaled the board's continuing recognition of the organizational reality that staffing firms control virtually none of the terms and conditions of the workers they supply to client firms.²⁹

Another rationale also calls into question the staffing firm's status as employers. Harper (1998) argues that the test for determining who is an employer for purposes of collective bargaining should not hinge solely on supervisory control, but rather on whether a given entity is a "primary direct capital provider," i.e., whether a business supplies a substantial proportion of the capital made productive by the employees. This formula would also exclude staffing firms from the category of employers, even in circumstances where a staffing agency takes on

a certain degree of supervisory authority over temp workers at a user firm's place of business. This analysis highlights an obvious structural characteristic of temp and staffing agencies: these entities perform few, if any, of the traditional economic functions associated with bona fide employers that utilize labor to make their capital productive.

TOWARDS A LEGAL RECLASSIFICATION OF COMMERCIAL LMIs

The previous analysis calls into question the classification of temp and staffing firms as mere employers, and it underscores the need for a definition that more accurately describes their sociolegal character. In this regard, an important lesson can be applied from the legal treatment of union hiring halls. Federal labor law has long characterized union hiring halls as having a dual status, as nominal employers and, more importantly, as labor organizations, i.e., a type of LMI. As one federal court of appeals explained, “When a union operates a hiring hall and assumes a dual role of *employer and representative*, its obligation to deal fairly extends to all users of the hiring hall” (emphasis added).³⁰ Because temp and staffing firms perform functions equivalent to union hiring halls, it makes sense to craft a legal definition that assigns to them an analogous dual status—as nominal employers but primarily as LMIs. By the same logic, the law should impose on commercial staffing agencies the obligation of fair dealing with workers that is imposed on a labor union that administers a hiring hall.

Subjecting temp agencies to a set of legal obligations similar to those imposed on its prolabor counterpart would achieve the goal of restoring parity to the legal treatment of these two predominant kinds of LMIs. Certainly the commercial nature of temp and staffing firms does not change the economic realities surrounding the employment relationships they foster, nor does it justify a privileged legal classification exempting them from government oversight. In fact, since labor unions and nonprofit organizations historically generated less suspicion of wrongdoing, it was these organizations that were usually exempted from coverage by early state employment agency laws.

The Temp Agency as an Exploitative Labor Market Intermediary

Research has revealed an array of common abuses perpetrated by contemporary temp and staffing firms. Case studies by journalists, academics, unions, and community organizations now span several decades, recording a host of temp industry abuses too numerous to list completely in this chapter (Henson 1996; e.g., Rogers 2000). What follows is a summary of the well-documented abuses of temp workers by this industry.

Favoritism and the use of arbitrary criteria in making assignments are common complaints among temps. Moreover, pay rates can vary widely for the same jobs and even within the same workplace. Since no receipt or written agreement is provided, temps are left with no recourse when, through “bait and switch” tactics, they are paid at a lower rate than promised. And fees—measured as the temp agency’s markup over wages paid—are exorbitant, far beyond the levels that state regulations had historically permitted. This has not prevented temp agencies from also charging workers for safety equipment, transportation, or check cashing.

Misleading advertisements of “temp-to-perm” arrangements are widely used as a marketing technique to present temp employment as a stepping stone to a “real” job. But these empty promises specify no time period or performance criteria by which a worker will be converted to “permanent” worker status. Consequently, workers can be indefinitely strung along in “temporary” work arrangements without benefits or job security. Moreover, because temps are not employees of the user firm, they often do not benefit from handbooks or established work rules that provide even the bare minimum of fair treatment. As a result, temps are used to intensify the pace of work and perform the least desirable tasks. Agencies routinely require temps at all levels to sign legally dubious noncompete agreements containing restrictive covenants that put a “price on their head” if they accept a permanent position with the user employer. Long a constant complaint among temps, these agreements are the basis of the oft-heard charge that agency work is a modern form of indentured servitude. Staffing agencies deliberately obstruct workers from access to unemployment insurance or workers compensation, and judicial decisions provide examples of how staffing agencies shield their client firms from claims of race or gender discrimination.

Not surprisingly, today's complaints are not qualitatively different from those expressed by agency workers a century ago, before state regulation of private agencies addressed the most exploitive conditions of temporary employment. Simply put, they are standard to the unregulated operation of for-profit LMIs and more than justify a call for strict regulation. To date, however, community-based organizations and some progressive legislators have been able to enact only a piecemeal bundle of state laws that, for example, prohibit certain specific exploitive practices, such as charges for transportation and check cashing. There has been no comprehensive effort to reregulate the commercial staffing industry.

Why Staffing Agencies Should Owe a Duty of Fair Representation to Temp Workers

A strong case can be made for imposing a comprehensive duty of fair representation on temp and staffing firms, analogous to that which federal law now imposes on labor unions. Commercial staffing agencies make their profit by negotiating an agreement with user firms to deploy workers in productive jobs at the user firm's business for an amount greater than the wages paid the temp workers. Indeed, the temp agency in most respects acts as if it were representing the workers' best interests in bargaining with the user firm. However, as we have pointed out, temp workers deployed under this arrangement are extremely vulnerable and subject to exploitation. Moreover, the negotiating activities of staffing agencies impede workers' ability to engage in concerted activity to effectuate meaningful bargaining over the terms and conditions of their employment. The nature of the triangular relationship itself—involving a user employer, a staffing agency, and a temporary employee—results in a level of abuse that in the past has justified the adoption of a regulatory regime that imposed on private agencies an obligation of fair treatment, akin to a fiduciary duty, in order to protect workers. Because staffing agencies, like labor unions, are both gatekeepers to employment opportunities and representatives involved in setting the terms and conditions of work, imposing a legal obligation akin to a duty of fair representation is appropriate and necessary.

Consider the usual scenario: staffing agency personnel meet or communicate with representatives of the user firm to discuss costs and ex-

change proposals concerning the agency's billing rates and the pay rates of various classes of workers the agency is to send (and in some cases other conditions of employment, e.g., procedures for handling grievances and dismissals). Hidden from workers, billing rates and wages are settled in private negotiations so as to allow for "cost savings" to the user firm and a reasonable operating margin for the agency.³¹ In this process, user firms treat an agency's staff, for all intents and purposes, as the temp employees' representatives, explicitly recognizing their authority to come to agreement on wage rates, to sign contracts, and to take wage offers back to workers. The parties conclude what amounts to a prehire collective bargaining agreement, banned for unions in all but the construction industry because it is seen as violating workers' right to choose their own representatives.

The staffing agency acts as if it were representing the workers' interests, opportunistically advertising that it provides workers with good wages and benefits at the user firm's business. Staffing industry executives are careful to avoid language denoting worker representation, but local agency managers are less guarded. "We are the unions now," one says. Or, as an industry enthusiast from the Cato Institute states, "The supposedly unique services of unions—bargaining on behalf of workers for higher wages, improving worker skills, providing access to desired benefits or flexibility—are being duplicated by staffing companies that deliver those services to individual workers more efficiently and more broadly" (Lips 1998, p. 31). These candid comments from those "on the ground" more accurately reflect social reality than staffing industry propaganda.

Mimicking labor unions, staffing agencies go to great lengths to become what amounts to the *exclusive* agents of workers, monopolizing access to certain job markets. On their application, workers are required to sign an agreement not to discuss wages or conditions of employment directly with representatives of the user firm.³² Likewise, user firms are expressly instructed in agency contracts not to discuss wages or any personnel matters directly with temp workers, to deal only through the staffing agency.³³

Staffing agencies' monopolistic lock on access to jobs restricts workers' mobility. Temp workers often have little or no ability to choose an agency to represent them, or to deal directly with employers. For example, in "payrolling" arrangements, workers recruited directly by large

corporate employers are required to affiliate with a specific agency as a condition of being hired and must sign a noncompete agreement, even if they found the assignment on their own (Neuwirth 2002; van Jaarsveld 2000, p. 130). Workers who apply directly are referred to this “preferred vendor” (Smith 1998, p. 422; Strong 2001, pp. 667–668).³⁴ Job seekers in smaller communities face a similar situation, often finding that employment opportunities listed in the classified ads of the local daily newspaper are available only through particular temporary help agencies (McAllister 1998, p. 223).

In effect, staffing agencies having exclusive contracts with employers resemble closed-shop hiring halls, illegal for unions under the LMRA. Even in situations where hiring halls are lawful, the LMRA precludes such exclusive hiring arrangements absent certain assurances that workers are hired by objective criteria (including training, seniority, etc.) to eliminate arbitrary and unfair practices.³⁵ And in all circumstances where exclusive bargaining and representation is lawful for unions, the law imposes on them a duty of fair representation. There is good reason to treat temp and staffing agencies in the same manner. The words of “temps” at Microsoft speak volumes on this point:

[I]f we are truly independent, then let us choose our own agency. S&T [the agency] offers its workers poor customer service . . . Yet, because it is a ‘preferred vendor’ in my job category I could not escape their clutches when I found a new assignment . . . because of their preferred status, they have no incentive to improve their service. They’ll get workers no matter how messed up they are. When I tried to change agencies between assignments, an MS contingent staffing person told me twice, ‘Microsoft reserves the right to choose your payroll agency.’

I know of another agency that will compensate me more (\$, paid health and dental) without carrying over the cost to Microsoft. Volt [the agency] has done nothing to re-negotiate compensation even though original job spec has changed . . . Volt has never contacted me to ask if I’m satisfied . . . (van Jaarsveld 2000, p. 129)

Workers’ rights of self-organization and freedom to choose their own representatives are obviously impaired in these situations.³⁶ They are not solicited for input in setting targets and have no voice in the negotiations. It is a common complaint among temps that when contracts are renegotiated, agencies do not always request a wage increase. Clearly, the staffing or temp agency’s substantive bargaining relation-

ship with the user employer is one of collusion with that employer to minimize workers' wages and benefits and to maximize profits. As the following comments of another agency worker indicate, there is often a feeling of betrayal, or in legal terms what can be characterized as a breach of fiduciary duty, in the way temp agencies treat the workers they deploy:

During the negotiations for pay rate, I felt that [the agency] represented Microsoft's best interest and not my own. I had agreed to a rate with the MS manager and [the agency] still tried to get me to accept a lower rate of pay . . . The discussions I had with [the agency] were limited.

I think it's unfortunate that all temps are beholden to their agencies, which are beholden to Microsoft . . . [M]y temp agency (and all the others, because they're all in the same boat) will fight only so hard for me, because if they do something to tick Microsoft off, Microsoft can decide not to use them any more. (van Jaarsveld 2000, p. 115–116)

Thus, the private staffing arrangement effectively precludes temp workers from engaging in bargaining themselves or involving labor unions to represent them in negotiating the terms and conditions of employment under which they work. Yet, in most everyday situations agencies do not stand up for the workers they deploy. Rather, as one study says, major staffing firms help maintain "workplace and labor-market discipline . . . driving down and holding down the costs/wages of cheap labor" (Peck and Theodore 2001, p. 494; see also Forde 2001).

This is also evident in the temp agency's handling of grievances. In Kelly Services' contract with a major client, for instance, we find that "Kelly hears and acts upon complaints from its employees about working conditions, etc." Again emphasizing their exclusive representational capacity, Kelly and other firms instruct their clients never to discuss grievances directly with temp employees. "[H]ave Kelly interact with temp employees where personnel matters arise," the client agreement states.³⁷ But workers speak about staffing agencies' lack of vigor in representing their interests on these matters: ". . . I noticed that most agencies, even when they knew I was being taken advantage of, they wouldn't go to bat for you . . . They very often wimped out. They wanted to keep the accounts or whatever: 'Just accommodate them.' What does that mean, 'accommodate them'?" (Rogers 2000, p. 105)

Temp workers' grievances are typically not conveyed to the employer, but rather bottled up in the agency. In shielding the employer from temp employees' actual complaints and demands, commercial agencies shirk the duty to fairly represent workers that their own claims have implied they would fulfill.

Absent the legal imposition of a duty to fairly represent temp workers, it is hard to imagine how temp workers will achieve fair treatment by the temp industry. Moreover, the imposition of such a duty in this industry does no more than bring a fair measure of parity to the legal treatment of all labor market intermediaries, whether they are private, for-profit companies or bona fide labor organizations.

CONCLUSION: CORRECTING THE IMBALANCE

Forbath (1991) has forcefully argued that the descriptive language of the law can shape the political consciousness of those engaged in labor struggles, possibly enhancing the fight for workers' rights. In this spirit, this chapter aims to provide labor activists and scholars with legal concepts and language that better capture the actual role of the temp or staffing agency, so that meaningful and realistic regulation can be part of the program of current and future labor struggles.

The temporary help industry is certainly deserving of the attention it has received from critics of contingent work relations. Yet, with certain exceptions, its actual history and sociological functions have been sorely neglected. This is unfortunate since the issue of temporary and contingent work has had an important, and at times central, place in U.S. labor struggles since industrialization. The ever-present reality of temporary work in twenty-first century labor markets makes it important to incorporate into our labor history and legal lexicon the forgotten story of how profit-driven private agencies were characterized by workers and regulated by proworker legislation. Awareness of these past labor struggles can assist in forming a new vision of how to craft laws and build organization to halt the spread of the contemporary staffing industry's nonunion empire. This chapter employs this history in conjunction with established principles of workplace law to construct an understanding of commercial staffing agencies and to bring the legal

analysis of these entities into line with their actual labor market role. Our analysis points to the need for a legal reclassification of these for-profit LMIs in order to create meaningful standards of regulation.

In recent years, unions and community-based organizations have undertaken reform efforts to regulate some of the most egregious temp agency practices on a state by state basis. This, of course, is in no way objectionable and may indeed represent the beginnings of a more comprehensive reform movement. It should be kept in mind, however, that piecemeal legislative initiatives enacted in any state cannot effectively regulate the multinational staffing business. Indeed, the same conclusion was reached early in the twentieth century by the progressive reformers who crafted state-level regulatory regimes for private employment agencies that were far more extensive than anything being proposed today. Ultimately, the reformers proposed federal regulation, which nearly materialized in 1941 with the introduction of "A Bill to Regulate Private Employment Agencies Engaged in Interstate Commerce" (U.S. Congress 1941). Essentially, this legislation would have required private agencies to be licensed under the U.S. Department of Labor and to comply with a list of detailed provisions modeled on the most stringent state employment agency laws at the time.

If not for the entrance of the United States into World War II and the concomitant changes in employment brought on by the war, we might have federal regulation of the staffing industry today. It took another 30 years before Senator Walter Mondale and Congressman Abner Mikva introduced similar bills to have the U.S. Department of Labor regulate the temporary help industry.³⁸ Unfortunately, these bills were introduced long before organized labor recognized the temp industry as an expansive and exploitative purveyor of low wage work. Recent attention to the vulnerability of day laborers has resulted in a new legislative initiative, the Day Labor Fairness and Protection Act. The bill's provisions include a series of measures that specifically target temp agencies which deploy day laborers involved in construction and manufacturing. These include mandating wage parity with full-time permanent workers at a worksite, prohibitions on any restrictions on a day laborer's right to accept permanent work at the employer's workplace, health and safety provisions, and the registration of day labor agencies.³⁹

This bill is in line with reform proposals that stem from our analysis and are aimed at incorporating the regulation of for-profit LMIs into

federal labor law, an approach that is far more appropriate and parsimonious than prior reform measures. For one, the solution we suggest eliminates the legal double standard that bifurcates the regulation of LMIs—extensive federal oversight and regulation of union-run hiring halls on the one hand, and a *laissez-faire* system for the profit-driven temp industry on the other. Moreover, this approach replaces the long list of detailed and difficult-to-administer provisions contained in the early state employment agency laws with an overarching and well-established legal principle—a fiduciary-like duty of the temp or staffing agency to fairly represent the workers it deploys in the labor market. Specifically, this proposed legal reform involves two changes to federal labor law: first, adding a definition of for-profit LMIs to Section 2 of the LMRA to identify them as legal entities distinct from employers, and second, incorporating into the law—possibly through a revision to the Labor-Management Reporting and Disclosure Act—a legal duty which requires for-profit LMIs to fully inform and fairly represent the workers they deploy. Fulfilling this duty might require temp agencies to, for example, provide workers with written receipts specifying pay rates and other terms of employment, make known the difference between the wages paid a temp worker and the amount the agency is receiving from the user firm, and require the use of objective standards to determine which workers are referred to preferred jobs.

In sum, by crafting a statutory provision defining for-profit LMIs and developing a concomitant set of legal obligations owed temp workers, federal law would impose an enforceable level of transparency on temp agencies comparable to that which it requires of hiring halls and unions. Such a change would make it an unfair labor practice for a temp agency to breach its legal obligation to fairly represent the workers it sends to user firms.

Second, labor advocates should push to level the playing field so that union-run LMIs can compete in the labor market with for-profit agencies. Currently, commercial staffing agencies regularly enter into contracts with user firms that function as prehire agreements, and very often they enforce what are in effect exclusive “closed shop” hiring arrangements. The statutory text of the LMRA as currently interpreted turns a blind eye to these staffing industry practices, thus privileging for-profit LMIs over traditional union hiring halls, since the latter are legally precluded from using prehire agreements outside the construc-

tion industry, and are prohibited in all cases from instituting a closed shop. To remedy this imbalance, Section 8(f) of the LMRA should be reformed to allow prehire agreements for all private sector unions in order to create a modicum of parity with the manner in which the commercial staffing industry routinely negotiates its hiring agreements with employers. The logic behind this proposal becomes clearly apparent when it is recalled that the construction industry was allowed an exemption from the prohibition against prehire agreements in recognition of the short-term and transient nature of employment in that industry. Today, it is widely recognized that such casual labor markets are a reality throughout the economy, which is the very reason for the commercial success of the temp and staffing industry.

Most labor activists recognize that, given current political realities, U.S. labor law is, for the time being, relatively impermeable to revision in labor's favor. The courts have been averse to providing an expansive judicial interpretation of federal workplace law, and labor's needs have fared no better in Congress. But the mood and views of legislators and judges can change quickly, as demonstrated by the rapid adoption of legal reforms following the labor movement's popular upsurge in the early 1930s. Indeed, labor and its allies are now organizing for and anticipating the next working class upsurge or social movement as a means of shifting the balance of class forces in America (Clawson 2003). It is during these upsurges that fundamental legal reform becomes possible. We hope that this chapter provides some tools that, in the course of future struggles, can aid in ending the mistreatment of temp workers by commercial staffing agencies, and in building pro-worker alternatives.

Notes

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1. The national trade association officially altered its name from "temporary help" to "staffing" industry in the 1990s. In this chapter we use those two terms, as well as "temporary help firm" and "staffing firm," interchangeably. A version of this chapter appears elsewhere (see Freeman and Gonos 2005).
2. 331 NLRB 173 (2000).
3. From 1982 to 1998 the number of temporary jobs rose 577 percent, while the

total number of jobs in the workforce grew only 41 percent. Consequently, the board noted, "certain industries and communities have begun to rely heavily on agency temps." From 331 NLRB 173 (2000), citing and quoting U.S. General Accounting Office (2000).

4. *H.S. Care L.L.C., D/B/A Oakwood Care Center and N&W Agency, Inc. and New York's Health and Human Service Union, 1199, Service Employees International Union, Petitioner*, 343 NLRB 76 (November 19, 2004).
5. Since 1947, national labor policy has been guided by the principle that federal labor law encourages equality of bargaining power for workers by protecting statutorily defined employees from employer and labor union interference with workers rights. See Findings and Policies of the Labor Management Relations Act, 29 U.S.C. § 1. More specifically, the parity principle is exemplified in the parallel provisions of Sections 8(a) and 8(b) of the LMRA, which, respectively, subject employers and unions to charges of unfair labor practices. 29 U.S.C. §8(a) & (b).
6. Of course, as Wilborn (1997) also points out, even though both union hiring halls and staffing firms are in a position to institute multi-employer benefits plans, such plans are only routinely provided by union hiring halls.
7. Union hiring halls, of course, are designated as an exclusive representative and provider of labor pursuant to a collective bargaining agreement. 29 U.S.C. Section 159(a); *Breining v. Sheet Metal Workers Intl. Assoc. Local Union No. 6*, 493 U.S. 67, 87 (1989). But staffing firms also routinely enter into agreements with employers that preclude workers' abilities to secure jobs with a certain employer except through the agency (van Jaarsveld 2000).
8. *Lucas v. NLRB*, 333 F.3d 927 (9th Cir. 2003).
9. The agricultural labor contractor is a third conspicuous type of LMI, which despite attempts at regulation, remains another prime source of exploitation of low-wage workers.
10. See generally *Adams v. Tanner*, 244 U.S. 590 (1917).
11. 244 U.S. 590 (1917). But see Justice Brandeis's dissent, which would have upheld the "Abolishing Employment Offices Measure," and which details the exploitive practices which, in his view, justifiably permitted the state to ban exploitive hiring agency practices.
12. See David J. Oliveiri, "Unions Discriminatory Operation of Exclusive Hiring Hall as Unfair Labor Practice Under Section 8(b) of the National Labor Relations Act," Section 3, 73 *American Law Reports Fed.* 171 (1985).
13. *IBEW Local 99 (Crawford Electric Construction Co.)*, 214 NLRB 723 (1974); *NLRB v. Int'l Longshoremen's & Warehousemen's Union*, 549 F.2d 1436 (9th Cir. 1977), *cert. denied*, 434 U.S. 922.
14. *NLRB v. Local 139, IUOE*, 796 F.2d 985 (7th Cir. 1986); *NLRB v. Sheet Metal Workers' Int'l. Assoc.*, 491 F.2d 1017 (6th Cir. 1974).
15. *Breining v. Sheet Metal Workers Int'l. Assoc. Local 6*, 493 U.S. 67, 78 n. 3 (1989).
16. See 29 U.S.C. §8(f).
17. See, e.g., Private Employment and Information Agencies, Conn. Gen. Stat. ch.

564. Section 129(e) defines a temporary help service as a “business which consists of *employing individuals directly* for the purpose of furnishing part-time or temporary help to others” (emphasis added). Section 130(c) states that the provisions of chapter 564, the employment agency law, do not apply to any temporary help service.

18. *Lee Hospital*, 300 NLRB 947 (1990).
19. Technically, temps could always legally organize unions vis à vis their agency employer, but for practical reasons this proved a non-viable strategy. See *All-Work, Inc. and Warehouse and Mail Order Employees Union, Local 743 IBT*, 193 NLRB No. 137 (1971). See also Mehta and Theodore (2000–2001, 2003–2004).
20. Temp firms still characterize themselves as labor market neutrals when it suits their purposes, e.g., in public relations where they claim to serve workers and client firms equally. Inappropriately, some academic studies are still prone to understand them as neutral “matching” institutions, despite their clear alliance with employers.
21. Grounded in the common law precept, the NLRB has stated that an employer-employee relationship exists “where the person for whom the services are performed reserves the right to control not only the end to be achieved, but also the means to be used in reaching such end.” *Deaton Truck Line*, 143 NLRB 1372 (1963).
22. While the question of withholding taxes and social security payments from workers is a relevant factor, it has not been considered determinative. *Frederick O. Glass* 135 NLRB 217, enforced in part 317 F.2d 726 (6th Cir. 1963). See also Hardin (1998, p. 1595).
23. One reaches the same conclusion applying the “hybrid test” that combines the right of control and economic realities tests (Rahebi 2000).
24. *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997).
25. The immediate ramifications of the decision for other companies were limited due to the fact that the court’s ruling was based on specific pension plan language that other major user firms could learn to avoid, and also because other circuits were unlikely to follow the 9th Circuit’s lead.
26. 331 NLRB 173 (2000).
27. Prior Board decisions had established a bargaining unit rule which, in effect, precluded temporary workers from joining or accreting into a bargaining unit comprised of the user employer’s workers without the consent of both the temporary agency and the user firm. *Greenhoot, Inc.*, 205 NLRB 250 (1973); *Lee Hospital*, 300 NLRB 947 (1990).
28. *Tree of Life, Inc. d/b/a Gourmet Award Foods, N. E.*, 336 NLRB 77 (2001).
29. *Oakwood Care Center*, the board’s new, regressive ruling on the temp agency work relationship, reserves a good deal of indignation for what it labels the “anomalous” *Tree of Life* ruling because it extended what it calls “the strained logic of *Sturgis*” by ordering the accretion of the temp workers into the user employer’s bargaining unit and mandating that the temps be subject to terms of the user employer’s collective bargaining agreement with its union. See *Oakwood*

- Care Center*, 343 NLRB 76 (2004). *Tree of Life* is, of course, in the direct lineage of the *M.B. Sturgis* decision and, therefore, is implicitly overruled by *Oakwood Care*. See note 4.
30. See *Plumbers and Pipe Fitters Local Union No. 32 v. NLRB*, 50 F.3d 29, 34 (D.C. Cir. 1995) citing, inter alia, *Breining v. Sheet Metal Workers Int'l. Ass'n. Local Union No. 6*, 493 U.S. 67, 89 (1989).
 31. The "settlement range" within which this bargaining takes place is sometimes quite narrow. Some employers set their "purchase price" for specific classes of labor which is then marked down by the agency to arrive at the workers wage (van Jaarsveld 2000, p. 115). In other cases a simple "cost-plus" formula is used, as when staffing agencies engaged in "payrolling" add their standard mark-up to the hourly wage paid at the time of the agreement.
 32. A typical "employees' agreement" states, "I understand that all matters relating to wages and rates are necessarily confidential and will never discuss same with clients or others" (Lewis and Schuman 1988, p. 62).
 33. "Do not discuss pay rates with Kelly employees; Kelly is their employer and should handle all pay rates." From the *Users Guide for Ordering & Managing Contract Labor—Johnson & Johnson/Kelly Services*.
 34. By 1994, Manpower reportedly controlled 330 client sites, up from just 15 in 1992 (Feder 1995, 37).
 35. Sec. 8(f)(4). See Rep. No. 187 on S.1555, 86th Cong., 1st Session 27–29 (1959), *Legislative History of the Landrum-Griffin Amendments to the LMRA*.
 36. Responding to criticism, Microsoft announced in 1999 that it would open up competition among agencies to allow temporary software testers a choice from among three "approved" agencies. Washington Alliance of Technology Workers, "Microsoft Revises Contingent Worker Policies" (April 2, 1999).
 37. *Users Guide for Ordering & Managing Contract Labor—Johnson & Johnson/Kelly Services*, n.d., 26–27.
 38. See H.R. 10349, "A Bill to Establish and Protect the Rights of Day Laborers" (1971) and H.R. 9298, "The Temporary Help Employee Protection Act" (1977). Although somewhat different in nature, there were also legislative efforts to obtain fairness for temp workers introduced the 1980s and 1990s, respectively, by Congresswoman Pat Schroeder ("Part-Time and Temporary Workers Protection Act," 1987) and Senator Howard Metzenbaum ("Contingent Workforce Equity Act," 1994).
 39. 2003 Cong. U.S. HR 2870, introduced July 24, 2003.

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14

No More Business as Usual

Using Pension Activism to Protect Workers' Rights

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Exporting jobs, reincorporating in off-shore tax havens, rewriting the bottom line, defrauding shareholders, polluting the environment, paying sky-rocketing executive compensation, and overinvesting 401(k) assets in employer stock—it is all business as usual for U.S. corporations. But the international outcry that erupted after the stock market reached a five-year low post-Enron has caused organized labor to rally under the slogan “No more business as usual.” Corporate campaigns aimed at law-evading corporations are becoming increasingly common. Shareholder proposals on corporate governance issues have proliferated, and activists have taken the drastic step of petitioning the State of California to revoke Unocal’s corporate charter. These actions, once seen as radical, are now being accepted by a public that has lost faith in the ability of corporations to restrain management greed.

This chapter will discuss the duties of pension fund trustees as universal owners, the role of trustees in ensuring corporate accountability, the potential of pension fund activism to encourage corporations to respect workers’ rights to organize and bargain collectively, and the tactics being used by pension fund activists to encourage good corporate citizenship.

UNIVERSAL OWNERS

Workers have over \$10 trillion invested in their pension funds: \$2.2 trillion in defined contribution plans, \$4.5 trillion in defined benefit

plans, \$2.3 trillion in individual retirement accounts, and \$1.2 trillion in annuities (Schneyer 2003). Of this amount, \$302 billion is jointly managed by workers and employers through Taft-Hartley funds (Jacobius 2003)—collectively bargained funds which, under the Taft-Hartley Act, must be managed by equal employer and employee representatives. The New York Stock Exchange (NYSE) has reported that stock ownership is concentrated among two groups: individuals and institutions. As of 1998, individuals directly own 41.1 percent of U.S. corporate stock (NYSE 2000, Table 16). Institutional investors hold the remaining 58.9 percent of corporate stock through mutual funds (16.3 percent), state and local government retirement plans (11.4 percent), defined contribution private pension funds (8.9 percent), defined benefit private pension plans (5.6 percent), banks (3.8 percent), life insurance companies (3.5 percent), other institutional investors (2.2 percent) and foreign investors (7.2 percent) (NYSE 2000, Table 16).

As the owners of nearly 26 percent of U.S. equity (PR Newswire Association 2000), pension funds are in a position to influence corporate and public policy. The largest pension funds, such as TIAA-CREF, California Public Employees Retirement System, and New York City Employees' Retirement System, hold such large concentrations of company stock that they cannot sell off stock of poorly performing or irresponsible corporations without suffering a loss caused by their divestment.

The solution to this catch-22—that pension fund investors are too large to sell off poorly performing stock without taking a loss caused by their own sale—is the exercise of universal ownership rights. Hawley and Williams (2000, p. xv) describe the universal owner as “a large institutional investor that holds in its portfolio a broad cross section of the economy, holds its shares for the long term, and on the whole does not trade except to maintain its index.” Most large pension funds are universal owners: as long-term investors, they invest in diversified index funds and patiently hold on to corporate stock while meeting with corporate executives to encourage corporate reform.

As permanent holders of a large segment of U.S. and foreign corporations, pension funds must look beyond the financial performance of individual stock holdings to the performance of the economy as a whole. When a corporation dumps the cost of doing business onto an unsuspecting third party (called “externalities” in economic terms), the

universal owner has a stake in that third party and will suffer a loss. For example, the profit made by a pension fund that owns shares of a corporation that produces tobacco will be offset by significant increases in health care costs and decreases in worker productivity. Likewise, a pension fund that invests in corporations that engage in financial manipulation will suffer financially when the entire stock market declines because of loss of investor confidence in the efficiency of the markets. The cost of the externality is simply shifted to another entity owned by the pension fund. Thus, it is in the financial interest of a universal owner to support public policy initiatives that reward corporations who pay for the damage caused by their actions (i.e., corporations who internalize costs). Hawley and Williams (2000) observe that “a universal owner that really wants to maximize the shareholder value of its portfolio . . . need[s] to develop a public policy-like position and monitor regulatory developments and legislation on a number of key issues [important] to the economy as a whole (p. 170).” Such issues include the health and well-being of corporate employees, the impact of corporate actions on the ecology and the environment, respect for diversity and human rights, and the economic impact on the community in which the company operates (Grayson and Hodges 2002). The emphasis will thus shift from maximizing short-term profits to maximizing long-term value.

THE ROLE OF PENSION FUND FIDUCIARIES

Pension fund trustees must act solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries. (29 U.S.C. § 1104 (a)(1)(A)).¹ Trustees must also act prudently, that is, “with the care, skill, prudence and diligence under the circumstances then prevailing” that a prudent trustee would use (29 U.S.C. § 1104 (a)(1)(B)). This prudence rule extends to the trustees’ duty to vote on management and shareholder proposals in their capacity as stockholders. The U.S. Department of Labor (USDOL) has stated that trustees have a fiduciary duty to vote on corporate proxy issues² and actively monitor corporate management. (USDOL 1994). According to a 1988 letter from the USDOL to Helmuth Fandl, chairman of the retirement board of Avon

Products, Inc., a trustee should vote on proxies that may affect the value of stock held by the plan.

Where proxy voting decisions may have an effect on the value of a plan's underlying investment, plan fiduciaries should make proxy voting decisions with a view to enhancing the value of the shares of stock, taking into account the period over which the plan expects to hold such shares.

However, the trustee may not subordinate the interest of plan participants to unrelated goals. A trustee may engage in shareholder activism if the trustee concludes that the activism is likely to "enhance the value of the plan's investment in the corporation, after taking into account the costs involved" (USDOL 1994). Shareholder activism is particularly appropriate where a stock portfolio such as an index fund is being held on a long-term basis or where the plan cannot easily dispose of the stock without affecting the stock's value (USDOL 1994).

The USDOL suggests ways that trustees can engage in shareholder activism: by corresponding and meeting with corporate directors, voting on proxies, sponsoring shareholder proposals, and filing shareholder litigation. The purpose of the activism, however, must be to enhance the value of corporate stock held by the pension fund. Where the costs of activism outweigh the potential increase in shareholder value, activism should not be undertaken. It may be more appropriate, therefore, for a large public fund to engage in shareholder activism rather than a small welfare fund.

EFFECTS OF CORPORATE CONDUCT ON STOCK PRICE

Studies have shown that corporate conduct, both positive and negative, has an effect on stock price. Such conclusions seem obvious in light of the stock market's clear reaction to recent events such as Merck's deception about the safety of Vioxx, Safeway's antiunion campaign, the collapse of Enron, the announcement of widespread corporate accounting fraud, the shredding of documents by Anderson, the bankruptcy filing of WorldCom, the indictment of Adelphia's corporate officers, and the criminal indictment of Tyco's chief executive. Likewise, the recent \$9.8 million settlement against Dow Corning and the court's decision to

permit a nationwide, punitive damage class-action lawsuit against the tobacco industry impact stock prices as corporations are forced to pay for their externalities.

On the other hand, laudable conduct also affects share price over the long run.³ For example, Enterprise Rent-A-Car's reputation was enhanced when, after September 11, it made an exception to its round-trip requirement and allowed stranded airline travelers to rent cars to return home. Alexis Hocevar, vice president and general manager of an Enterprise regional office, said, "We knew we had to do the right thing and worry about the rest later" (Reichheld 2002). As a result, Enterprise suffered losses from displaced and stolen cars. But it decided to live its philosophy to "put customers first, and employees second, and profit will take care of itself" (Reichheld 2002).

According to a 2001 Hill & Knowlton survey, called "Corporate Citizen Watch," "79 percent of Americans take corporate citizenship into account when deciding whether to buy a particular company's product, with 36 percent considering it an important factor" (Business Wire 2001). The results are surprising, given that most Americans don't appear to boycott products. The survey was conducted in Spring 2001 and consisted of 2,594 people participating in an on-line interview. The survey also found that 71 percent consider corporate citizenship in their investment decisions. However, less than 2 percent of those surveyed believe that U.S. companies are excellent corporate citizens, and about 25 percent believe corporations are "above average" citizens. Harlan Teller, executive vice president and director of Hill & Knowlton's Worldwide Corporate Practice says, "There is no question that Americans believe companies have a responsibility to their communities. But our survey findings suggest that corporations need to do more than simply give away dollars. They need to act in ways that are meaningful to their stakeholders—consumers, investors, employees, and members of the local community—and that genuinely demonstrate their core corporate values" (Business Wire 2001).

According to Hill & Knowlton's "Corporate Reputation Watch 2002" survey of more than 600 chief executive officers, 94 percent of CEOs believe corporate reputation is very important (Hill & Knowlton 2002, p. 6). The survey found that CEOs rank the top three influences on corporate reputation as customers, employees, and the reputation of the CEO (Hill & Knowlton 2002, p. 8). CEOs of corporations with

revenues greater than \$500 million are also strongly influenced by industry analysts, financial analysts, print media, and shareholders (Hill & Knowlton 2002, p. 25). CEOs of companies in the energy, utilities, financial services, and health care fields noted that they are strongly influenced by regulators. Overall, however, the responding CEOs ranked customers, employees, and CEO reputation as the top three motivators.

Empirical studies show that corporations on *Fortune* magazine's annual list of most admired corporations are shrouded in a financial halo (Brown and Perry 1994; Black, Carnes, and Richardson 1999). Edvinsson and Malone (1997) note, "Somehow, if only by hunches and intuitions, the market is putting a value on invisible assets [such as reputation]. And some of these qualitative assets seem to hover in the ether almost indefinitely, converting to line items on the balance sheet years after the market has accounted for them." Some researchers have verified that a correlation exists between high returns and good reputation (Black, Carnes, and Richardson 1999). Even though the financial literature does not unanimously conclude that good corporate citizenship results in better firm performance, shareholders have seized this intuitive concept and are lobbying corporations to act responsibly.

For example, shareholder activist Robert Monks has spearheaded the ExxonMobil Campaign, which charges that "ExxonMobil's attitude toward climate change is fraught with 'unnecessary risks and missed opportunities' that could put at risk more than \$100 billion in long-term shareholder value in the company" (Campaign ExxonMobil 2002). Monks, the Coalition for Environmentally Responsible Economies and Campaign ExxonMobil commissioned a report entitled, *Risking Shareholder Value? ExxonMobil and Climate Change: An Investigation of Unnecessary Risks and Missed Opportunities* (Campaign ExxonMobil 2002). The report concludes that, "While ExxonMobil continues to gain respect in many quarters for its financials, it has also marched into a potential minefield of reputational risk, future shareholder losses, exposure to litigation, and policy costs on the issue of climate change . . . We find real and increasingly serious risks to shareholders that have arisen from the way ExxonMobil has stood out from the crowd and let itself become the obvious chief 'climate change villain'" (Campaign ExxonMobil 2002, p. 4). The report provides justification for shareholders who wish to challenge ExxonMobil to act responsibly

on climate change issues so as to avoid a decline in share value because of reputational harm.

Human rights violations are also increasingly affecting multinational corporations' reputations and shareholder value. For example, in 2002 the Ninth Circuit Court of Appeals held that 11 Burmese villagers could sue Unocal for its complicity in forced labor, murder, rape, and torture at the company's construction of a Burmese pipeline (*Doe I v. Unocal Corp.*, 395 F. 3d 932 (9th Cir. 2002), *dismissed on reh. en banc*, 403 F. 3d 708 (9th Cir. 2005)). Paul Hoffman, the villagers' attorney stated: "This decision is important not only because it allows a U.S. company to be held liable for abuses committed overseas, but also because it tells other multinational corporations that go into business with repressive dictatorships that they are responsible if they assist their partners' abuses" (Earthrights 2002). Co-counsel added: "This ruling puts the plaintiffs one step closer to having their day in court. We are confident that a jury reviewing the facts of this case will be horrified. We expect a huge verdict on their behalf" (Earthrights 2002). Such corporate conduct has an effect on the corporation's reputation and its bottom line. Unocal settled the lawsuit three years later for an undisclosed amount, which is estimated to exceed \$15 million.⁴ Katie Redford, a lawyer for Earthrights, announced "Companies have been able to mislead themselves and the public that human rights concerns would not affect their bottom line. That's just not the case anymore" (Eviatar 2005).

TACTICS TO ENCOURAGE RESPONSIBLE CORPORATE CITIZENSHIP

Richard Ferlauto, Director of Pension and Benefit Investment Policy with AFSCME, has developed a continuum of pension fund activism (Table 14.1). We will look at the various tactics along this continuum, starting with the most passive and proceeding to the most aggressive tactics.

Table 14.1 Continuum of Pension Fund Activism

Inactive trustees	Management-oriented trustees	Trustees who focus on corporate governance issues	Trustees who encourage corporate accountability	Pension fund activists
No effort to comply with fiduciary standards relating to proxy voting	Votes in support of management proposals	Drafts and adopts own proxy voting guidelines	Adopts principles such as the CERES and McBride principles ^a	Engages corporate directors in a dialog about corporate governance issues
Has not adopted proxy voting guidelines	Votes for management slate of directors	Monitors executive pay	Encourages corporations to comply with basic workplace standards such as ILO standards	Sponsors shareholder proposals
	Uses policy guidelines developed by investment professionals	Monitors directors' performance	Considers social impact of board decisions	Uses focus lists to encourage better corporate performance
	Delegates proxy voting and corporate governance responsibility to investment professionals	Monitors proxy voting by professionals	Supports legislative reform requiring independent auditors	Uses litigation to remedy unlawful corporate conduct
	Does not monitor proxy voting by professionals		Encourages pay for performance	Works toward legislative reform on corporate accountability and financial transparency

^aThe CERES Principles were created by the Coalition of Environmentally Responsible Economies, a group of investors and environmental activists. Corporations may endorse these principles to show their commitment to environmental protection, including emissions reduction, environmental restoration, environmental sustainability, and responsible waste reduction. The principles can be found at <http://www.ceres.org/coalitionandcompanies/principles.php>. The McBride Principles are a code of corporate conduct designed to prevent religious discrimination by employers in Northern Ireland. Many pension funds have adopted investment policies that prohibit investment in a corporation that does business in Northern Ireland unless the corporation has adopted the McBride Principles.

Silence of the Funds

The right to vote proxies is a plan asset. In Interpretive Bulletin 94-2, USDOL stated that trustees have a fiduciary duty to develop proxy voting guidelines and vote in accordance with those guidelines on proxy issues that are likely to have a financial impact on shares held by the pension fund. Common examples of proposals that affect stock value include reincorporation,⁵ poison pills,⁶ antitakeover devices,⁷ and greenmail^{8,9} (Securities and Exchange Commission 1984, 1985; Pound 1987, p. 362). Since most shareholder and management proposals would likely affect stock value if adopted, a strong argument can be made that trustees must vote on all proxies, or must delegate their authority to vote to investment professionals who will vote on the proxies in accordance with the fund's guidelines.

Many trustees delegate this activity to mutual funds that consistently vote with management but refuse to disclose their vote.¹⁰ Vanguard Group founder John Bogle calls this phenomenon "Silence of the Funds" (Brown 2002). For example, mutual fund Fidelity Investments is the largest institutional holder of Nabors Industries and holds over \$537 million (10.55 percent) of Nabors' shares. Fidelity also holds 7.6 percent (over \$266 million) of Stanley Works and 5.33 percent (\$1.4 billion) of Tyco International. These corporations held votes on reincorporating in Bermuda to avoid U.S. taxes. Tyco and Nabors have already reincorporated in Bermuda, as did Fidelity in the 1960s. In that 1988 letter to Helmuth Fandl, chairman of the retirement board of Avon, the USDOL clearly stated that trustees have a duty to vote on reincorporation issues. Yet, until recently it appears that not only has Fidelity voted in support of management and against the interests of shareholders, but it has refused to inform the shareholders of the nature of its vote (AFL-CIO 2002).

Fidelity, which manages assets of \$859.8 billion, or 12.5 percent of the market share (AFL-CIO 2002), excuses its conduct by saying that disclosure of proxy voting guidelines and votes could impact the company's stock price. That's precisely the point that pension activists have been making, and it is the basis for the USDOL's mandate that trustees vote on proxies that may affect stock value. Instead, Fidelity used this argument to support its refusal to disclose its proxy voting records to the beneficial owner of the stock. Fidelity said that its voting

records are “proprietary information” and thus, not disclosable (Lauricella and Schroeder 2002). Fidelity’s argument, however, flies in the face of USDOL’s Interpretive Bulletin, which implies that delegation of proxy voting authority without monitoring to make sure the proxy is voted in such a manner as to increase shareholder value is a breach of fiduciary duty.

Investment managers and mutual fund managers such as Fidelity often face a conflict of interest in voting proxies. Fidelity has 9,600 clients and manages 7.8 million 401(k) accounts (Kirchhoff 2002). As the largest provider of 401(k) plans, Fidelity has an incentive to vote with management so that management will continue to offer Fidelity as one of their 401(k) vendors (AFL-CIO 2002). Reporter Steven Syre calls Fidelity the “ultimate fund management fee machine” (Syre 2002). Fees for Fidelity’s largest mutual fund alone totaled \$556.3 million in 2001 (Syre 2002). According to Mercer Bullard, founder of Fund Democracy, mutual funds “serve two masters” and “may avoid taking a stand against company management for fear of losing pension plan business” (Friedman 2002; Day 2002). At the urging of the AFL-CIO, the Securities and Exchange Commission voted to require mutual fund managers to disclose publicly how they cast proxy votes on behalf of their investors (Securities and Exchange Commission 2003). In September 2004, the AFL-CIO released a report entitled, *Behind the Curtain: How the 10 Largest Mutual Fund Families Voted when Presented with 12 Opportunities to Curb CEO Pay Abuse in 2004*. According to the report, Fidelity ranked 9th out of 10 in the survey, voting to curb CEO pay only 25 percent of the time (AFL-CIO 2004).

Meeting with Management

Not only does USDOL believe that trustees must vote proxies, it has stated that trustees should meet with management on corporate governance issues whenever “the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management, by the plan alone or together with other shareholders, is likely to enhance the value of the plan’s investment in the corporation, after taking into account the costs involved” (USDOL 1994). USDOL acknowledges that where a pension fund is a long-term investor in an index fund, “the prudent exercise of proxy voting rights or other forms

of corporate monitoring or communication may be the only method available for attempting to enhance the value of the portfolio” (USDOL 1994). Other issues that USDOL considers appropriate topics of conversation with management include “the appropriateness of executive compensation, the corporation’s policy regarding mergers and acquisitions, the extent of debt financing and capitalization, the nature of long-term business plans, the corporation’s investment in training to develop its work force, other workplace practices, and financial and non-financial measures of corporate performance” (USDOL 1994). Workplace practices would include the corporation’s attitude toward unionization.

Management meetings work. For example, in the 2003 proxy season, pension funds and unions negotiated settlement of shareholder resolutions with 105 corporations. Thirty-one corporations, including Halliburton, Caterpillar, and Reebok, negotiated agreements on expensing stock options. Although a small number, it is quite remarkable that in light of the AFL-CIO/AFSCME/CalPERS “Come Home to America” campaign, three corporations (Transocean, Schlumberger, and McDermott) agreed to discuss reincorporation in the United States. Seven leading underwriting firms including J.P. Morgan & Chase, Goldman Sachs, Merrill Lynch, Morgan Stanley, Lehman Brothers, and Citigroup agreed to analyst independence. And because shareholder votes are not binding, two corporations agreed, at the request of NYCERS, to adopt proposals supported by majority vote. The AFL-CIO reached agreement with four corporations on chairman independence. Twenty-three corporations settled shareholder resolutions requesting performance-based options (Georgeson 2003; Investor Responsibility Research Corporation 2003).

While fund-sponsored corporate governance proposals frequently pass, the success rate for social proposals is infrequent. A common shareholder proposal calls for the targeted corporation to adopt International Labour Organization (ILO) standards:

- **RESOLVED:** The shareholders request that the board of directors of the Coca-Cola Company . . . adopt an enforceable policy to be followed by the company, its subsidiaries, bottlers, and distributors with respect to operations in Columbia, said policy to be based on ILO’s declaration on fundamental principles and rights at work and to include the following:

- All workers have the right to form and join trade unions and bargain collectively (Conventions 87 and 98).
- There shall be no discrimination or intimidation in employment . . . (Conventions 100 and 111).
- Employment shall be freely chosen. There shall be no use of forced, including bonded or voluntary prison, labor or of child labor (Conventions 29 and 105, 138 and 182) (Coca-Cola Company 2003).

In the 2003 proxy season, unions and funds filed shareholder proposals at seven companies, calling for adherence to the ILO standards. Agreements were reached at Sears and Unocal. Although the other proposals did not pass, the resolution at Hudson's Bay received a stunning 36.8 percent.

Perhaps the most important event in the 2003 proxy season occurred in May 2003, when competing slates of directors for El Paso, an energy company that provides natural gas and other energy-related products, met with pension fund investment managers at the headquarters of the AFL-CIO to explain their corporate philosophy and long-term corporate goals. As a result of the meeting, pension funds endorsed the competing slate of directors. The insurgents lost by a narrow margin and tabulators recounted the vote (Perin 2003). Even though the final tally declared the incumbents victors, the pension fund shareholders were truly the victors since they garnered enough votes to make them influential in the shareholder vote.

Using Pension Fund Activism to Encourage Organizing

The most common tactic pension fund activists use to create union jobs is the Responsible Contractor Policy. The Service Employees International Union (SEIU), CalPERS, and the New York State Common Retirement Fund have adopted Responsible Contractor Policies which require all fund real estate holdings, loans, or maintenance contracts, to contain an agreement that all work performed on the fund property will be done in accordance with all applicable labor laws. As the SEIU policy puts it,

[i]n order to ensure a competitive return on its real estate investments, the Fund seeks to invest in properties that are well-run and

maintained where tenants receive high quality services . . . Assuring the availability of a qualified staff and avoiding labor disruption and costly employee turnover requires employers to pay fair and reasonable compensation, to treat workers fairly and abide by applicable labor laws. (SEIU 1998)

Similarly, the New York Common Retirement Fund has a contractor selection program that emphasizes the fund's "deep interest in the condition of workers employed by the fund and its advisors" (New York Common Retirement Fund 1998). The policy requires investment managers to hire program contractors who pay "workers a fair wage and a fair benefit as evidenced by payroll and employee records, and who compl[y] with the fund's minority and women business policy" (New York Common Retirement Fund 1998). Although these policies do not literally require union representation of building and maintenance workers, they have had this effect.

Responsible contractor policies give hiring preferences to employers who pay their workers a fair wage and provide employer-paid health insurance, pension benefits, and training opportunities. By adopting a responsible contractor policy, pension funds can meet their fiduciary duty to achieve a competitive rate of return while ensuring the fair treatment of employees working on their properties.

Building trade unions use another tactic: they buy raw land, build the project union, and sell the property with a responsible contractor clause. This tactic is not limited to the building trade unions, however, because pooled real estate funds such as the AFL-CIO Housing Investment Trust (HIT) and Building Investment Trust (BIT) accomplish the same result by offering commingled funds that guarantee union work. During the 10-year period from 1993–2003, BIT has generated over 11 million hours of union construction as well as union jobs for the members of 17 AFL-CIO unions in the construction, servicing, and maintenance of properties. As of March 31, 2003, BIT's net assets exceeded \$1.5 billion and were invested in nearly 12 million square feet of commercial development in the communities where union members live and work (HIT 2003).

Sponsoring Shareholder Proposals

The USDOL also encourages trustees to sponsor shareholder proposals where the proposal may affect the corporation's stock value (USDOL 1994). In the 2003 proxy season, trustees of pension funds and union representatives filed approximately 381 shareholder proposals, more than double the proposals filed in 2002. Sixty-nine labor-sponsored proposals passed and settlements were reached on 105 proposals. The AFL-CIO won majority support for its resolutions on executive pensions at U.S. Bancorp (52 percent), golden parachutes¹¹ at Alcoa (65 percent), and shareholder approval of severance plans at Tyco (57.7 percent). Although its proposal at United Technologies only garnered 47 percent of the vote, the company agreed to review its policy on golden parachutes. The Culinary Workers scored big at The Cheesecake Factory, winning proposals to submit stock option plans¹² to shareholder vote (66 percent), require annual election of directors (72 percent), submit a poison pill to shareholder vote (67 percent), and eliminate the 80 percent supermajority voting requirement¹³ (81 percent). The Teamsters won stock option expensing¹⁴ proposals at Coke Enterprises, PPG Industries, and Weyerhaeuser, and the Carpenters won 78 percent support for a similar resolution at Exxon Mobil. AFSCME settled a proposal on golden parachutes at Electronic Data Systems. Other victories include BellTel Retirees' proposal for shareholder approval of severance plans at Verizon (59 percent) and Connecticut Retirement Plans' proposal to declassify the board at Reebok (63 percent) and Stanley (55 percent). Certainly, it was a successful year for shareholder activists.

Table 14.2 lists pension fund and related shareholder proposals that passed in 2003. This table may understate the funds' success rate because it does not include the 105 resolutions that corporations agreed to in principle and, therefore, were withdrawn. Also, fund-sponsored shareholder proposals at 35 corporations that did not pass received votes in excess of a third of shareholders (a stunning amount, especially for first-time proposals).

Encouraging Legislative Reform

Pension funds have been among the prime movers in the fight to enact legislation that addresses corporate accountability and transpar-

ency. For example, as part of its legislative agenda, CalPERS will do the following:

- 1) Actively oppose the election of any director who, while sitting on the company's audit committee, approved retaining an external audit firm when that firm also provides consulting or internal audit services to a company.
- 2) Publicly oppose shareholder approval of any auditor that has been retained by the company for more than five years, or also performs consulting or internal audit services to the company. CalPERS believes that current moves by the accounting industry to separate their consulting relationships from their auditing relationships is too late and too narrowly defined to accomplish the overall goal of restoring confidence in the industry.
- 3) Join forces with other significant users of financial statements to provide concrete and responsible proposals for accounting standards reform to Congress, the Securities & Exchange Commission, the Financial Accounting Standards Board, the International Accounting Standards Board and the American Institute of Certified Public Accountants.
- 4) Form a commission made up of regulators, legislative representatives, and investors to examine ways in which conflicts of interests (by investment banks, equity analysts, rating agencies, lending institutions, outside attorneys and other consultants) can be identified, disclosed and managed.
- 5) Immediately prepare, promote, and pursue proposals within Congress, the SEC and Exchanges that truly strengthen and clarify the meaning and importance of an "independent" director (CalPERS 2002b).

Many of CalPERS' legislative proposals were adopted as part of the Sarbanes-Oxley Act of 2002 (CalPERS 2002a).

Shareholder Litigation

In conventional shareholder litigation, the plaintiff typically claims that the corporate issuer violated federal securities law by engaging in fraud with respect to SEC filings. For example, CalPERS, the Cali-

Table 14.2 Pension Fund and Related Shareholder Proposals That Passed in 2003 as of November 14, 2003, Tally

Company	Proposal	Sponsor	Vote
AK Steel	Approval of severance	Longview Fund	59.2
Alcoa, Inc.	Approval of severance	AFL-CIO	64.7
Apple Computer	Expense stock options	UBC	56.4
Arden Realty	Submit poison pill to shareholder (SH) vote	SEIU	83.0
Avon Industries	Expense stock options	IBEW	56.4
Black & Decker	Expense stock options	UBC	52.0
Boston Scientific	Performance-based exec. comp.	Sheet metal workers	90.1
Capital One Financial	Expense stock options	UBC	55.0
Calpine	Repeal classified board	IBEW	62.8
Calpine	Submit poison pill to SH vote	Plumbers, Pipefitters	66.3
CenterPoint Energy	Performance-based exec. comp.	Sheet metal workers	75.5
The Cheesecake Factory	Submit executive comp. plans for approval	Culinary workers	56.4
The Cheesecake Factory	Annual election of directors	Culinary workers	62.0
The Cheesecake Factory	Submit poison pill to SH vote	Culinary workers	57.7
The Cheesecake Factory	Eliminate supermajority vote	Culinary workers	69.6
Circuit City Stores	Submit poison pill to SH vote	AFSCME	79.3
Citrix Systems	Expense stock options	LIUNA	54.8
Coke Enterprises	Expense stock options	IBT	Majority
Covance	Declassify board	NYCERS	72.3
Crescent Real Estate Equities	Declassify board	SEIU	72.7
Delta Airlines	Expense stock options	Delta pilots	61.4
Delta Airlines	Approval of severance	Delta pilots	54.3
Eastman Kodak	Expense stock options	LIUNA	56.3

Company	Proposal	Sponsor	Vote
Equifax	Expense stock options	UBC	60.7
Exxon Mobil	Expense stock options	UBC	78.0
Fluor	Expense stock options	UBC	79.7
Genzyme Corp.	Expense stock options	UBC	63.2
Georgia Pacific	Expense stock options	IBT General Fund	65.0
Hercules	Authorize written consent	NYC Firefighters	63.1
Hewlett-Packard	Approval of severance	SEIU	52.4
International Paper	Approval of severance	AFL-CIO	61.0
Kilroy Realty	Submit poison pill to SH vote	SEIU	87.1
Kimberly-Clark	Expense stock options	UBC	53.0
Kohl's	Expense stock options	UBC	50.6
Lowe's	Submit poison pill to SH vote	BAC	70.2
Manor Care	Declassify board	NYC Firefighters	71.8
Massey Energy	Approval of severance	Longview Fund	72.5
MBNA	Expense stock options	AFSCME	52.1
McKesson	Approval of severance	IBT	68.1
Mercury Interactive	Expense stock options	UBC	52.3
Mirant	Expense stock options	IBEW	61.7
NCR	Expense stock options	LIUNA	53.2
J.C. Penney	Expense stock options	LIUNA	52.0
Office Depot	Submit poison pill to SH vote	BAC	78.7
PPG	Expense stock options	IBT General Fund	52.4
Pitney Bowes	Submit poison pill to SH vote	AFSCME	62.2
Providian Financial Capital	Expense stock options	SMWIA	54.5
Raytheon	Approval of severance	AFL-CIO	66.4
Reebok	Declassify board	Connecticut Retirement Plans	63.0
RyderSystems	Submit poison pill to SH vote	AFSCME	76.6
Safeway	Expense stock options	Plumbers, Pipefitters	62.7

Table 14.2 (continued)

Company	Proposal	Sponsor	Vote
Safeway	Declassify board	Longview Fund	61.0
Sprint	Approval of severance	Longview Fund	63.7
Stanley Works	Declassify board	Connecticut Retirement Plans	55.0
Starwood Hotels	Expense stock options	IBEW	60.5
Supervalu	Expense stock options	UBC	64.3
Tellabs	Declassify board	Longview Fund	68.3
Thermo Electron	Expense stock options	SMWIA	59.7
Tyco International	Approval of severance	AFL-CIO	57.7
U.S. Bancorp	Executive pensions	AFL-CIO	51.6
U.S. Bancorp	Expense stock options	UBC	59.9
Union Pacific	Approval of severance	Longview Fund	56.8
United Technologies	Approval of severance	AFL-CIO	54.0
Veritas Software	Expense stock options	Plumbers, Pipefitters	64.3
Verizon	Approval of severance	BellTel Retirees, Inc.	59.0
VF	Declassify board	Longview Fund	56.7
Wells Fargo	Abolish stock option	AFL-CIO	56.3
Weyerhaeuser	Expense stock options	Teamsters	50.0
Whole Food Markets	Declassify board	Longview Fund	60.5
Yahoo!	Submit poison pill to SH vote	Longview Fund	56.2

NOTE: AFL-CIO = American Federation of Labor–Congress of Industrial Organizations; AFSCME = American Federation of State, County and Municipal Employees; BAC = Bricklayers and Allied Craftworkers; IBEW = International Brotherhood of Electrical Workers; IBT = International Brotherhood of Teamsters; LIUNA = Laborers’ International Union of North America; NYCERS = New York City Employees’ Retirement System; SEIU = Service Employees International Union; SMWIA = Sheet Metal Workers International Association; UBC = United Brotherhood of Carpenters and Joiners of America.

SOURCE: Compiled from various sources including *Georgeson Shareholder, Annual Corporate Governance Review: Shareholder Proposals and Proxy Contests* (2002) and *Investor Responsibility Corporation 2003 Vote Results*. This table was originally published in Zanglein and Clark (2004).

fornia Teachers' Retirement System (CalSTRS), and the Los Angeles County Employees Retirement Association recently sued WorldCom for losses exceeding \$300 million with respect to fraudulent statements made in the prospectus issued for the sale of corporate bonds in May 2001 (CalPERS 2002c). Likewise, the law firm of Milberg Weiss, a class-action specialist, filed a class-action lawsuit against Enron seeking to recover losses relating to Enron's fraudulent statements.

An example of an innovative use of securities litigation can be found in the action brought against Phelps Dodge by the Steelworkers. The lawsuit, filed during impasse of the union's collective bargaining agreement, alleged that Phelps Dodge violated federal securities laws when it understated environmental liability in its reports to shareholders. (*In re Phelps Dodge, Inc.*, SEC File No. 001-00082 (undated circa 1998)). ICEM General Secretary Vic Thorpe stated "Phelps Dodge has continued to show its disdain for its stakeholders. It's time they realize that bad corporate behavior is bad for business."¹⁵ At the company's annual shareholder meeting USWA President Leo Girard said, "Phelps Dodge's environmental clean-up obligations hang like a sword of Damocles over the investing public."¹⁶ While the lawsuit was later dropped, it did influence other groups to propose expanded environmental and social disclosure requirements to the Securities and Exchange Commission.

Revocation of Corporate Charters

Perhaps the most aggressive action taken against a corporation is the attempted revocation of Unocal's corporate charter. In 1998, Robert Benson, on behalf of the National Lawyers Guild, filed a petition with the Attorney General for the State of California to revoke Unocal's charter. Petitioners contended that the charter should be revoked because, among other things, Unocal

- has been identified as a potentially responsible party at 82 "Superfund" or similar toxic sites;
- has committed hundreds of Occupational Safety and Health Act violations in the last 12 years;
- has treated U.S. workers unethically and unfairly; and
- carries on ventures with foreign business partners in a fashion that makes the company complicit in and legally liable for their

partners' unspeakable human rights violations against women, gays, laborers, villagers, ethnic minorities, and indigenous people (Benson 1999).

While the petition has been unsuccessful, it has heightened public awareness that a corporate charter is granted by the state and can be revoked by the state. It has also increased political pressure on Unocal, which has been targeted by activists for its human rights violations in Burma.

CONCLUSION

In the 12 years since the USDOL issued Interpretive Bulletin 94-2 encouraging pension funds to become shareholder activists, many trustees have taken the lead. However, far more trustees are lagging behind because they have neither the resources nor the education to implement these strategies. Additionally, most plans do not have worker representatives who can promote these issues.¹⁷

Trustees should take comfort in the fact that the USDOL has encouraged shareholder activism and has stated that trustees are not required to take the "quick buck" but may base their decisions on the long-term best interests of the corporation. Trustees can use this statement in support of their increased demands for corporate accountability. In addition, trustees should take advantage of the public's current demand for corporate transparency and accountability to compel directors to adopt measures that will increase the long-term value of the corporation. In a 1999 survey of the most respected companies, CEOs listed "increased pressure from stakeholder groups" as the second most important upcoming business challenge (Grayson and Hodges 2002, p. 74). Corporations are facing increased attention in the form of shareholder resolutions, and pressure from institutional investors, nongovernmental organizations, regulatory agencies, consumers, and the public (Grayson and Hodges 2002, pp. 217–218). As one author put it, "Customers and employees care. That means the equity markets care. And that means

CEOs care” (Grayson and Hodges 2002, p. 78). And if they don’t care, pension trustees and activists can motivate them through tactics such as shareholder resolutions, corporate dialogue, corporate campaigns, and litigation.

Notes

Portions of this chapter are adapted, with permission, from Zanglein and Clark (2004).

1. Although public funds are excluded from ERISA coverage, these standards are still applicable as they are contained in the Internal Revenue Code, the Uniform Management of Public Employees Retirement System Act, and state laws, which incorporate these duties.
2. Trustees may delegate their proxy voting authority, but if they do, the trustees should adopt proxy voting policies for their investment managers to follow and must monitor the managers’ votes.
3. Interbrand, a research company, estimates that 96 percent of Coca-Cola’s stock value is in intangibles such as reputation, knowledge, and brand. Kellogg’s stock value is 97 percent in intangibles, American Express 84 percent, and IBM 83 percent. Rita Clifton, CEO of Interbrand, says “Brand equity is now a key asset.” Brand alone, accounts for 59 percent of Coke’s stock value, 64 percent of McDonald’s, and 61 percent of Disney’s value (Grayson and Hodges 2002).
4. Unocal sued its reinsurer for reimbursement for claims in excess of \$15 million, leading experts to conclude that Unocal’s costs were significantly higher than \$15 million (Eviatar 2005).
5. By reincorporating, a corporation chooses to reincorporate in another state or country (most notably the Bahamas or the Cayman Islands) that has less restrictive corporate laws and lower (or nonexistent) corporate taxes.
6. Poison pills are shares issued to current shareholders at extremely low prices to encourage shareholders to buy the new shares, with the result that the raider must buy more shares at a higher price.
7. Antitakeover devices are charter and bylaw amendments that make it more difficult for a corporation to be taken over.
8. Greenmail is money paid to a corporate raider to “go away.”
9. Letter from the Department of Labor to Helmuth Fandl, Chairman of the Retirement Board of Avon Products, Inc. February 23, 1988.
10. Letter from Harvey Pitt, Chair, Securities and Exchange Commission to John Higgins, President of Ram Trust Services. Feb. 12, 2002.
11. Golden parachutes are severance payments made to management employees on termination or change of control and are designed to “soften the landing” by providing gold.
12. Stock option plans are generally provided to upper management and grant the

employee the right to buy company stock at a stated exercise price. In the event the stock price rises, the employee can profit by purchasing stock at the lower exercise price. Stock options are subject to abuse when the board of directors agree to reprice the stock options so that the executives can profit even when the corporation is not profiting.

13. Supermajority voting requirements are usually placed on changes of corporate control such as mergers and acquisitions.
14. Funds have been lobbying corporations to expense stock options as this requires the corporation to include the costs of issuing stock options in their financial reports.
15. "Showdown at Phelps Dodge." Available at <http://www.icemna.org/ephelps3.htm> (accessed December 1999).
16. See note 14.
17. Legislative proposals, such as the Visclosky bill, H.R. 323 (108th Congress) which would provide joint trusteeship for single employer plans, would significantly enhance the ability of workers to become pension activists and push for policies such as responsible contractor policies.

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The W.E. Upjohn Institute for Employment Research is a nonprofit research organization devoted to finding and promoting solutions to employment-related problems at the national, state, and local levels. It is an activity of the W.E. Upjohn Unemployment Trustee Corporation, which was established in 1932 to administer a fund set aside by Dr. W.E. Upjohn, founder of The Upjohn Company, to seek ways to counteract the loss of employment income during economic downturns.

The Institute is funded largely by income from the W.E. Upjohn Unemployment Trust, supplemented by outside grants, contracts, and sales of publications. Activities of the Institute comprise the following elements: 1) a research program conducted by a resident staff of professional social scientists; 2) a competitive grant program, which expands and complements the internal research program by providing financial support to researchers outside the Institute; 3) a publications program, which provides the major vehicle for disseminating the research of staff and grantees, as well as other selected works in the field; and 4) an Employment Management Services division, which manages most of the publicly funded employment and training programs in the local area.

The broad objectives of the Institute's research, grant, and publication programs are to 1) promote scholarship and experimentation on issues of public and private employment and unemployment policy, and 2) make knowledge and scholarship relevant and useful to policymakers in their pursuit of solutions to employment and unemployment problems.

Current areas of concentration for these programs include causes, consequences, and measures to alleviate unemployment; social insurance and income maintenance programs; compensation; workforce quality; work arrangements; family labor issues; labor-management relations; and regional economic development and local labor markets.

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