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Of Labor Law and Dissonance

JAMES J. BRUDNEY*

What accounts for the dissonance between the meaning of our national labor law, as decreed primarily by federal judges,¹ and the social and economic realities of workplace relationships addressed by that law? In his darkly eloquent commentary, Professor Getman acknowledges that such dissonance is not unique to the law governing labor-management relations. Yet the courts' often mistrustful approach toward employee rights under the National Labor Relations Act ("NLRA" or "Act")² has had a special impact. The NLRA emerged at a time of social turbulence, and was based on a recognized need to redress the fundamental inequality of bargaining power between labor and management. While other factors help explain the persistence of the inequality six decades later, decisions of the federal judiciary figure prominently in the story.

Professor Getman makes arresting use of the analogy between the British army's rules of military engagement in World War I and the rules of legal engagement applied in federal labor law. One of his central contentions is that elites in each setting developed rules "to control the conduct of people whose situation they did not understand and whose experiences they did not share."³ I will explore two questions that this contention raises for me. First, how should we understand the role played in recent decades by an institutional elite

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1. Professor Getman's critique encompasses the National Labor Relations Board, arbitrators, and academic commentators, as well as judges. See Julius Getman, *Of Labor Law and Birdsong*, 30 CONN. L. REV. 1345, 1349-51 (1998). His principal focus, however, understandably rests with the federal courts; the Supreme Court and the courts of appeals are responsible for resolving major controversies under, and assigning meaning to, the provisions of the National Labor Relations Act.

2. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994). I use "NLRA" to refer to the 1935 statute as amended in 1947, 1959, and at other later dates.

3. Getman, *supra* note 1, at 1348.

presumptively more responsive to social and economic realities—the politically accountable legislative branch? Over the past 25 years, Congress has declined to adjust the meaning of the NLRA despite intense and repeated efforts by the union movement to alter judicial precedent. To what extent is it appropriate to infer that court decisions interpreting the Act have achieved something akin to democratic legitimacy? Second, how are we to explain federal judges' inhospitable attitude toward workers' rights under the NLRA? Professor Getman refers to class bias, which begets lack of understanding, as a major contributor. Drawing on some of my own empirical data, I offer preliminary thoughts on the extent to which class background and other personal characteristics may influence judicial decisionmaking on labor issues.

I. INSTITUTIONAL ALLOCATION AND DISSONANCE

Professor Getman's critique focuses on the courts rather than the legislature: not on the statute as enacted and modified but on the web of decisions and doctrines limiting the promise of the NLRA.⁴ I share Professor Getman's premise that the Act set forth significant redistributive goals and conferred substantial rights on employees in an effort to encourage achievement of those goals. Even after the Taft-Hartley Amendments,⁵ the basic protections given to labor—to organize, bargain collectively, and engage in concerted action—remained in place, largely undisturbed.

To be sure, some of the Act's language is vague or open-ended enough to invite a wide range of interpretations.⁶ Inconclusive text,

4. Other scholars have maintained that the legal order established by the Act itself contributed substantially to a less combative and ultimately more shackled labor movement. See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) (contending that Supreme Court's early pro-labor interpretations of the Wagner Act curtailed rank and file initiatives while institutionalizing union interests); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE. L.J. 1509, 1565 (1981) (contending that arbitration undermines the power of workers).

5. Labor-Management Relations Act of 1947, 29 U.S.C. §§ 141-187 (1994). The addition of a right to refrain from participating in pro-union activity, and the creation of union unfair labor practices, offset to some extent the rights associated with self-organization.

6. See, e.g., 29 U.S.C. § 158(d) (defining collective bargaining as "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession"); 29 U.S.C. § 160(c) (authorizing Board in its remedial capacity to take "such affirmative action . . . as will

however, need not trigger judicial results that diminish employee and union rights. Since 1970, Supreme Court decisions construing the NLRA have become distinctly less favorable toward workers' concerted activity, both in aggregate terms and in important "statute-defining" cases.⁷ The Supreme Court's conservative signals may also have reduced the ability of the courts of appeals to promote or endorse pro-labor interpretive outcomes, to the extent they would be interested in doing so.

Yet in the realm of statutory meaning, a misguided judiciary does not have the final word. Congress is capable of correcting mistakes, of refocusing the statutory enterprise, of renewing the earlier commitment to protect and encourage workers' collective action. Congress has not done so. In a few early instances, notably the permanent replacement doctrine announced in *NLRB v. Mackay Radio & Telegraph Co.*,⁸ Congress may even have incorporated the Court's conclusion into statutory text.⁹ More recently, Congress has not revisited the NLRA at all. The labor movement since the 1970s has twice lobbied hard for legislative change. Each effort at reform occurred in political circumstances that made success seem attainable. Neither effort resulted in a legislative enactment.

The application of statutes to shape public policy involves ongoing dialogue and collaboration between the legislative and judicial branches.¹⁰ Perhaps prolonged legislative silence with regard to an entire regulatory scheme invites courts to conclude that they should continue on their chosen path. In the NLRA context, judicial weakening of the statutory commitment to group action may simply accord with modern democratic preferences. Congress, of course, could be criticized for ignoring labor relations realities in the legal rules it tolerates and implicitly approves. But are we then to

effectuate the policies of this subchapter").

7. See James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1572-80 (1996) (discussing sharp decline in Supreme Court's willingness to sustain Board findings of section 8(a) liability after 1970, and analyzing several key Supreme Court decisions that limited employee rights).

8. 304 U.S. 333 (1938).

9. See Labor-Management Relations Act of 1947, Pub. L. No. 80-101, § 9(c)(3), 61 Stat. 136, 144; Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 702, 73 Stat. 519, 542 (first adding and then modifying 29 U.S.C. § 159(c)(3), which appears to recognize that economic strikers in some circumstances are not entitled to reinstatement).

10. See generally William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 56-71 (1994); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 306-14 (1989).

conclude—somewhat awkwardly—that contemporary legislators misunderstand and are biased against the needs and interests of their own working class constituents?

This question provokes a mixed response. The decades-long decline in union density has resulted in less vocal and persistent advocacy for collective bargaining rights in Congress. The flow of campaign funds from the business community has far exceeded spending by unions, further weakening organized labor's voice. For several reasons, however, the diminished political clout of the union movement should not absolve federal courts of their responsibility for eroding NLRA values and priorities.

First, to suggest that contemporary legislators' wariness or ignorance of NLRA protections can legitimate court decisions assumes an inverted set of temporal priorities. Courts are charged with applying statutory text based on what the originating Congress did rather than what later Congresses have failed to do. That charge is especially exacting when the originating Congress has overcome powerful opposition to effect fundamental change in the status quo. In enacting the NLRA, Congress imposed a comprehensive regulatory structure that transformed the prior judicially created mix of rights and duties governing labor-management relations. While judicial tinkering with the new structure was inevitable and even desirable, courts' legitimate role is to sustain or enhance—not diminish or reshape—that structure. Only the emergence of a new legislative consensus can justify weakening or jeopardizing the rights and protections embedded in the regulatory scheme.

Moreover, at a minimum it overstates the meaning of legislative inaction to impute to recent Congresses an indifferent or tolerant mindset toward the diminution of NLRA rights. The complex demands of modern national government require Congress to maximize its use of finite resources—particularly the time and political capital of its members. Any commitment Congress makes to respond to judicial interpretations of older statutes means less time and fewer political resources are available for an already crowded legislative agenda. The Supreme Court has become less interested in NLRA cases over recent decades,¹¹ and court of appeals decisions are unlikely to be noticed even by congressional committees that would have jurisdiction to

11. See James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 960-65 (1996) (documenting Supreme Court's declining attention to the NLRA).

address them.¹² Accordingly, many cases that are hotly debated within the labor-management community do not achieve legislative recognition, much less become agenda priorities.

Congress's resource constraints are reinforced by certain patterns of legislator behavior. Members tend to perceive more tangible political and policy-related benefits from responding to social concerns previously unaddressed in federal law than from refining extant regulatory programs. This perception may be strengthened with regard to an existing statutory regime such as the NLRA that has powerful and well-organized interest groups on both sides of every potential reform issue. Members sympathetic to promoting greater equality or fairness in the workplace can channel their efforts toward other statutory initiatives. In recent decades, organized labor has enjoyed considerable success championing new approaches to various unregulated workplace problems,¹³ notwithstanding its inability to secure legislative changes in the NLRA.

Apart from limited congressional resources and the challenges associated with revisiting older statutes, there has in fact been demonstrated majority support for pro-worker reform of the NLRA. That support, however, has fallen victim to the supermajority demands imposed under modern Senate practice. Since the early 1970s, the filibuster has become a major technique for thwarting approval by coalesced majorities on a wide range of public policy matters.¹⁴ A number of factors have contributed to this dramatic change. The expanded congressional workload imposes greater time constraints on the chamber as a whole while creating more opportunities to engage in obstructive tactics. The adoption of a two-track system for handling

12. See Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653, 662 (1992) (reporting that most lower court decisions are not noticed by committee leaders or their staffs).

13. Examples of such new approaches include the Family and Medical Leave Act of 1993, the Employee Polygraph Protection Act of 1988, the Worker Adjustment and Retraining Notification Act of 1988, and the Employee Retirement Income Security Act of 1974.

14. In the 40 years preceding 1970, the Senate filibuster was used almost exclusively by Southern Democrats and their allies to block civil rights legislation. See SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE* 11 (1997); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 199-200 (1997). Filibuster use has surged and diversified in the past 25 years. See BINDER & SMITH, *supra*, at 9 (reporting that Senate conducted 284 cloture votes between 1975 and 1994, as contrasted with 103 votes in the 58 years preceding 1975); Fisk & Chemerinsky, *supra*, at 201-03 (reporting that number of cloture votes has increased steadily in each decade since 1960s, and that Senators now filibuster on a range of domestic and foreign policy issues).

Senate debate allows for efficient management of floor business but at a cost of making the filibuster more tolerable to the majority and less onerous for the obstructors.¹⁵ As a result of party realignment and more polarized partisan conflict, it has become easier to mount and sustain a party-backed filibuster. Whatever the relative weight of these and other causal factors, there have been many occasions over the past two decades when a majority of Senators favored cutting off debate but were unable to secure the 60 votes needed to invoke cloture and enact the legislation at issue.¹⁶

A number of these instances involved efforts to reform the NLRA. In 1977-78, the House comfortably approved a bill that would have addressed widely shared concerns about inadequate protections for employee organizing and collective bargaining by requiring expedited union election procedures and stronger remedies for unfair labor practices.¹⁷ A Senate majority twice fell several votes short of invoking cloture.¹⁸ In 1991-92 and again in 1993-94, the House by a considerable margin passed a bill that responded to the recently expanded reliance on permanent replacement workers by overriding the *Mackay Radio* decision and banning the permanent replacement of economic strikers.¹⁹ On each occasion, a Senate majority was unable to invoke cloture.²⁰ While these legislative reform measures would not have alleviated the full extent of perceived judicial insensitivity toward

15. See BINDER & SMITH, *supra* note 14, at 13-16 (discussing these and other reasons for expanded use of filibuster); Fisk & Chemerinsky, *supra* note 14, at 201-05 (explaining rise of the "stealth" filibuster, and contending that a major cause was Senate leadership's decision to allow other floor business to move forward while cloture proceedings are pursued simultaneously on a separate track).

16. See BINDER & SMITH, *supra* note 14, at 9 (reporting 46 occasions between 1975 and 1994 in which the coalition voting for cloture was more than a majority but less than a supermajority, and cloture failed).

17. See 123 CONG. REC. 32,613 (1977) (House approves comprehensive labor law reform bill by 257-163).

18. See 124 CONG. REC. 17,749 (1978) (Senate cloture vote on June 15 fails, 58-39; three absent Senators would have voted no); 124 CONG. REC. 18,398 (1978) (Senate cloture vote on June 22 fails, 53-45). President Carter supported the bill and was prepared to sign it into law.

19. See 137 CONG. REC. H5589 (daily ed. July 17, 1991) (House approves bill to ban permanent replacements by 247-182); 139 CONG. REC. H3568 (daily ed. June 15, 1993) (House approves bill to ban permanent replacements by 239-190).

20. See 138 CONG. REC. S8237-38 (daily ed. June 16, 1992) (Senate cloture vote fails 57-42; one absent Senator would have voted no); 140 CONG. REC. S8524 (daily ed. July 12, 1994) (Senate cloture vote fails 53-47); 140 CONG. REC. S8844 (daily ed. July 13, 1994) (Senate cloture vote fails 53-46). President Bush opposed the bill in 1992, but President Clinton supported it in 1994 and was ready to sign it into law.

employee rights under the NLRA, each would have made the operation of legal rules more congruent with the socio-economic realities of the workplace.

There is nothing illegitimate about a determined minority using Senate procedures to frustrate the will of a reform-minded majority. Still, the failure of these reform efforts underlines the difficulty of correcting judicially imposed meaning in the congressional arena. Commentators or judges who rely on extended legislative silence and the inability to muster a supermajority as grounds for inferring support or approval from Congress can do so only by ignoring the realities of the modern legislative process. The primary focus for our inquiry into the dissonance highlighted by Professor Getman should remain with the federal courts.

II. JUDICIAL ATTITUDES AND DISSONANCE

There is some evidence to support the assertion that in the aggregate, federal courts of appeals have been steadily and unusually hostile to the statutory rights asserted by workers and their unions. An early study found that between 1936 and 1954, the NLRB had less success than other administrative agencies in having its orders fully enforced by the courts of appeals.²¹ The same study concluded that appellate courts were far more likely to enforce Board unfair labor practice findings against unions than similar agency findings against employers.²² More recently, a study of judicial review covering diverse federal agencies found that the NLRB has a lower affirmance rate in the courts of appeals than other agencies that also act almost exclusively through adjudication and have a similarly high volume of cases.²³

21. See RONDAL GENE DOWLING, *THE FEDERAL COURTS AND LABOR RELATIONS POLICY, 1936-1954: A STUDY OF JUDICIAL DECISION-MAKING* 137-38 (1956) (Ph.D. dissertation, University of Illinois (Urbana)) (reporting that NLRB orders were fully enforced in 63.3% of all unfair labor practice cases reviewed between 1936 and 1954, compared with full judicial enforcement for 80% of orders issued by Securities and Exchange Commission, 70% of orders issued by Federal Trade Commission, and 66% of orders issued by Federal Power Commission; but cautioning against conclusive generalizations in light of lower caseload volume for the three latter agencies).

22. See *id.* at 138-39 (reporting that 86.5% of Board orders finding liability against unions under section 8(b) were sustained, while only 62.4% of Board orders finding liability against employers under section 8(a) were sustained during same period).

23. See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1013-22 (1990) (reporting that in 1984-85, courts of appeals affirmed in full 75% of NLRB orders, 83% of orders issued by

It would be difficult to evaluate the Labor Board's success rate in the Supreme Court relative to other agencies, given the discretionary nature of certiorari jurisdiction. One can, however, observe the Court's differential treatment of unions and corporations when reviewing certain comparable aspects of their relationship to their own constitutive membership and also of their respective efforts to influence the general public. Thus, the Court has concluded that corporations may compel their shareholders to subsidize management positions on policy issues even when those issues are unrelated to the furtherance of the corporate enterprise.²⁴ By contrast, labor organizations are barred from requiring their bargaining unit members to underwrite union positions on policy or legislative matters that bear a substantial relationship to employee welfare, including such matters as organizing new members and lobbying the legislature to require better wages or working conditions.²⁵

In a similar vein, a union's secondary consumer picketing tailored to a struck product and a utility company's pro-usage policy statement inserted in a monthly billing are each forms of protected expression. The former encourages consumers to avoid doing business with a certain company; the latter encourages consumers to do more business with a certain company. The Supreme Court on the same day held that government could ban the union's expression as unlawful²⁶ but that the corporation's expression was constitutionally protected against

Immigration and Naturalization Service, and 90% of orders issued by Merit Systems Protection Board). In a slightly later period, 1986-93, appellate courts fully enforced Board unfair labor practice findings against unions more often than against employers, though the difference was not statistically significant. See Brudney, *supra* note 11, at 976-78 (reporting 85.5% enforcement rate for union unfair labor practices and 80.3% enforcement rate for employer unfair labor practices). During this seven year period, employer unfair labor practice cases in the courts of appeals outnumbered union unfair labor practice cases by a ratio of nine to one. See *id.* at 973.

24. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (holding that government may not prohibit corporate management from spending corporate funds on policy matters unrelated to the economic life of the corporation).

25. See *Communication Workers v. Beck*, 487 U.S. 735 (1988) (holding that union may expend agency fees over fee-payer objection only for matters directly related to the collective bargaining process); *Ellis v. Brotherhood of Ry., Airline, & S.S. Clerks*, 466 U.S. 435 (1984) (holding that union expenditures for organizing new members outside the bargaining unit are not sufficiently related to the collective bargaining process); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (holding that union expenditures for lobbying to improve working conditions are not sufficiently related to the collective bargaining process).

26. See *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980).

government regulation.²⁷

The Court, to be sure, offered neutral, doctrine-based explanations for the differential results in these cases, although several Justices expressed concern over what they regarded as inconsistent reasoning.²⁸ Professor Getman has proposed a different explanation, pointing to the ideological attitudes and biographical attributes of the judges themselves. In effect, he suggests that judges, who "have been through the transformative experiences of law school, judicial clerking, and high level legal practice,"²⁹ have ignored or eroded the potential of the NLRA at least partly because they understand and sympathize with the lives and hopes of corporate executives more than the lives and hopes of workers.

This is a substantial concern, and Professor Getman is not alone in raising it. Indeed, his commentary places him in the middle of a lively debate among social scientists who study judicial decisionmaking. Empirical research into judicial behavior recognizes that case-specific fact situations and legal precedent play a major role, but posits that judges' personal attributes, educational background, and pre-judicial experience also help explain court decisions.³⁰ There is disagreement over the relative explanatory value of judicial attitudes as shaped by political party identification, religion, status of college attended, and other background variables.³¹ In addition, social

27. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980).

28. See *Retail Store Employees*, 447 U.S. at 618 (Stevens, J., concurring in result); *Consolidated Edison Co.*, 447 U.S. at 552-55 (Blackmun, J., dissenting); *Bellotti*, 435 U.S. at 812-21 (White J., dissenting).

29. Getman, *supra* note 1, at 1349.

30. See, e.g., C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-1988*, 35 AM. J. POL. SCI. 460 (1991); Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277 (1988). Personal attributes may include factors such as race, gender, religion, and year of birth. Educational background may include the status and geographic region of the college and law school from which the judge graduated, and also the years of graduation. Pre-judicial experience covers such factors as whether an individual held elective office or a state court judgeship prior to becoming a federal judge, and the political party of the President who appointed the individual to the federal bench.

31. See, e.g., Sheldon Goldman, *Voting Behavior on the U.S. Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 503-05 (1975) (describing study of split decisions in courts of appeals over seven year period, and reporting that Democrats, Catholics, and younger judges tended to be more liberal on economic issues although correlations between background variables and liberal or conservative issue positions were generally weak, with notable exception for NLRA issues); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-*

scientists have struggled to quantify the importance of various familial, educational, professional, and political experiences.³² Yet as Professor Getman's critique suggests, the consequences for explaining judicial behavior in this area justify further investigation.

Professor Getman's assertion that class bias and lack of understanding are major contributors to judicial resistance in the NLRA setting could spark numerous inquiries. For instance, in studying over 1200 recent court of appeals decisions that reviewed NLRB unfair labor practice ("ULP") adjudications, I found that the courts reversed Board determinations of bargaining-related employer misconduct under section 8(a)(5) at a rate significantly higher than they reversed Board determinations of employer misconduct against individual employees under sections 8(a)(1) and 8(a)(3).³³ One factor that might help account for the differential is lack of judicial sympathy, if one posits that unions and group action among workers are a special object of class-related judicial hostility. The differential also might be explained by pointing to lack of judicial familiarity: unlike unlawful threats under section 8(a)(1) or discriminatory discharges under section 8(a)(3), both of which are comparable to prohibited conduct in other areas of public law, bargaining-related misconduct has no obvious parallels in public law outside the NLRA.³⁴ Determining which judicial background variables are significantly associated with more frequent votes to overturn section 8(a)(5) liability may shed light on the relative importance of these two explanatory factors, and may also help us understand whether the two can be meaningfully separated.

In broader terms, preliminary analyses of my data base show that

1978, 75 AM. POL. SCI. REV. 355 (1981) (challenging the prevailing view that judges' background characteristics cannot satisfactorily help explain their judicial behavior). See generally LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997) (critically examining quantitative and qualitative research approaches to judicial decisionmaking).

32. See AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR 374 (Sheldon Goldman & Austin Sarat eds., 1978) (arguing that judicial background and attribute variables do not necessarily represent identical experiences, and therefore are not readily linked to a single set of attitudes or values); S. Sidney Ulmer, *Are Social Background Models Time-Bound?*, 80 AM. POL. SCI. REV. 957 (1980) (suggesting that social background variables may have substantially different explanatory value with respect to distinct eras or time periods of a court's operation).

33. See Brudney, *supra* note 11, at 982. The use of "significantly" refers to results that are statistically significant, meaning it is very unlikely (less than a 5% possibility) that the different reversal rates are the result of random error in sampling or coding. See *id.* at 972 n.100 (explaining statistical significance).

34. See *id.* at 982-83.

judicial votes to reject the union's position on issues of ULP liability or relief³⁵ were closely related to certain background variables. Bivariate comparisons indicate that judges were significantly more likely to reject the union's position if they were male, had graduated from a more elite college, had not held elected office, and had been appointed by a Republican President.³⁶ A preliminary multiple regression analysis suggests that the more ideological factor—party of the appointing President—loses significance when controlling for the effect of other variables, but that gender, college background, and elected office experience remain significant.³⁷ Female judges, those who graduated from less prestigious colleges, and those who held elective office, were significantly more likely to support the union's position in the courts of appeals. The results are only tentative and further analysis is needed. Still, if the findings hold up they may

35. Some 95% of Board results reviewed in the 1200 appellate court cases fall into one of three issue categories: employer liability under section 8(a); union liability under section 8(b); and relief against the employer under section 10(c). On a section 8(a) issue, a rejection of the union's position is a vote to reverse the Board determination of employer liability or a vote to affirm the Board determination of no employer liability. On a section 8(b) issue, a rejection of the union's position is a vote to affirm the Board determination of union liability or a vote to reverse the Board determination of no union liability. On a section 10(c) issue, a rejection of the union's position is a vote to reverse the Board grant of broad relief against the employer or a vote to affirm the Board grant of narrow or no relief against the employer.

36. Bivariate comparisons use statistical techniques to examine the relationship between two variables without controlling for other variables that might affect that relationship. In this instance, the comparisons are between the dependent variable, judge's vote (agree with union or reject union), and independent variables such as gender and political party of appointing President. See generally JANET BUTTOLPH JOHNSON & RICHARD A. JOSLYN, *POLITICAL SCIENCE RESEARCH METHODS* 325-73 (3d ed. 1995) (explaining bivariate comparisons); R. MARK SIRKIN, *STATISTICS FOR THE SOCIAL SCIENCES* 247-77, 345-424 (1995) (same). In measuring the prestige of colleges from which judges graduated, I used a system devised by Alexander Astin and relied on by other researchers. See ALEXANDER W. ASTIN, *WHO GOES WHERE TO COLLEGE?* 57-83 (1965); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 *COLUM. L. REV.* 199, 222 n.75 (1997) (discussing scholars' frequent reliance on Astin). A number of studies have suggested that a college's prestige is related to the socio-economic status of its students. See *id.* at 230 n.101 (citing studies).

37. Multiple regression analyses control simultaneously for all independent variables in the regression equation; they are more sophisticated in identifying relationships between dependent and independent variables. See generally BUTTOLPH JOHNSON & JOSLYN, *supra* note 36, at 389-401 (explaining multiple regression analyses); SIRKIN, *supra* note 36, at 446-67 (same). I used a logistic regression to analyze the dichotomous dependent variable of whether a judge voted for or against the union. The regression equation includes numerous independent variables, but I have coded other types of judicial attributes and background factors. It is possible that adding some of these other variables to the equation will modify the findings reported in text.

support the hypothesis that in the ideologically divisive labor relations area, certain personal, educational, and career experiences play an important role in shaping judicial behavior.³⁸

In the end, some dissonance between statutory meaning and social reality is inevitable. Legal rules do a better job of encouraging or limiting individuals' conduct than of accurately reflecting the experiences that comprise the conduct. Insofar as judicial departures from social reality are especially acute and visible with regard to decisions interpreting the NLRA, it is worth exploring possible reasons linked to the attributes and attitudes of the judges involved. Efforts to educate current and prospective judges are more likely to be effective if premised on a fuller understanding of what motivates judicial mistrust toward union and employee rights.

Such efforts in turn presuppose an attitude other than despair on the part of those who purport to do the educating. It is possible to be critical and even skeptical about the development of NLRA doctrine while alerting law students to the possibilities for modification and reform. When he taught me labor law some twenty years ago, Professor Getman conveyed just that combination, as he has to many others now engaged in teaching the subject. I hope he does not abandon the approach he modeled with such success.

38. Such results also would diverge from recent studies that have found political party of the judge or the appointing President to be the background variable with the most powerful explanatory value. See AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR 382 (Sheldon Goldman & Austin Sarat eds., 2d ed. 1989) (discussing several studies); Aliotta, *supra* note 30, at 278 (same).