

1995

# Reflections on Group Action and the Law of the Workplace Symposium: The Changing Workplace

James J. Brudney

*Fordham University School of Law*, [jbrudney@law.fordham.edu](mailto:jbrudney@law.fordham.edu)

Follow this and additional works at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship](http://ir.lawnet.fordham.edu/faculty_scholarship)



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

---

## Recommended Citation

James J. Brudney, *Reflections on Group Action and the Law of the Workplace Symposium: The Changing Workplace*, 74 *Tex. L. Rev.* 1563 (1995-1996)

Available at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship/147](http://ir.lawnet.fordham.edu/faculty_scholarship/147)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# Reflections on Group Action and the Law of the Workplace

James J. Brudney\*

Sixty years after the National Labor Relations Act (NLRA)<sup>1</sup> was passed, collective action appears moribund. Current analysis burying and praising the NLRA has focused primarily on the changed economic realities of the product and labor markets.<sup>2</sup> Yet there is another story to be told involving a comparable transformation of the legal culture. Relying in part on empirical analysis of court decisions, I argue that changes in federal workplace law over the past thirty years have undermined the concept of group action—in particular collective bargaining—as a preferred means of regulating the employment relationship. These changes are the product of leading institutional actors that share general legal responsibility for regulating the workplace: the federal courts of appeals, the Supreme Court, and the Congress.<sup>3</sup>

---

\* Associate Professor of Law, The Ohio State University College of Law. I am grateful to Victor Brudney, Anne Doyle, Alan Hyde, Deborah J. Merritt, and the participants in The Changing Workplace Symposium at The University of Texas School of Law for helpful comments on earlier drafts. I thank Nancy Armstrong, Melanie Putnam, and David Winston for their fine research assistance, and Michele Newton for her careful typing of the manuscript. The research was supported by generous grants from the Fund for Labor Relations Studies and The Ohio State University.

1. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)). The term “NLRA” refers to the 1935 statute as amended at various later dates. I also refer to the 1935 enactment as the Wagner Act, and to the Labor-Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, as the Taft-Hartley Amendments.

2. See, e.g., FACTFINDING REPORT ISSUED BY THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 1-27 (1994) [hereinafter DUNLOP COMMISSION REPORT] (reporting American economic developments and workforce changes over the past four decades and analyzing their effect on the American labor market); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 62-67 (1993) (observing that industry-wide labor unions have become obsolete due, *inter alia*, to foreign competition, deregulation, and the fear of employees that their employer might not survive current market pressures); Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 108-09 (1993) (noting that the typical U.S. firm’s response to increased competition has been to transfer labor-intensive, low-skill operations abroad while threatening workers at home with the possible loss of their jobs).

3. Unlike these three actors, the National Labor Relations Board is charged with implementing the NLRA but has no broader responsibility for developments in federal workplace law. The President plays a more general role, especially through appointments and participation in the legislative process. See Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094, 1101 (1985). Ongoing responsibility, however, rests primarily with the courts and Congress. This Paper does not address the impact of the Presidency on federal workplace law.

To be sure, the diminished legal role for group action in labor relations is in part a function of the diminished power of unions in an economy increasingly subject to global competition and rapid technological change. I want to suggest, however, that changes in the legal status of group action may be cause as well as effect. When the actions of the legislative and judicial branches of government indicate that collective bargaining has become an anachronistic means of promoting employee interests, one inevitable consequence is a loss of legitimacy for unions as the enablers of group action. This loss of legitimacy encourages the business community and the general public to erode and belittle the role of unions, thus making it more difficult for unions to adjust to new economic realities.<sup>4</sup> Accordingly, a proper appreciation for how the legal system has devalued group action may assist in understanding the steady decline of collective bargaining in the American workplace.

Part I examines how group action has been diminished by Congress and the federal courts over the past thirty years.<sup>5</sup> It briefly summarizes the goals of the NLRA, goals that Congress meant to be achieved through collective action in the workplace. It then describes how Congress since 1963 has enacted a series of workplace regulatory statutes that have effectively subordinated the role of group action by making individual rights preeminent. Finally, Part I demonstrates that in a legal world where group action is the exception, both the Supreme Court and the courts of appeals have thwarted the original legislative commitment to collective bargaining when interpreting the NLRA.

Part II raises questions about the subversion of a legislative scheme that has not been revised by Congress for nearly half a century. It discusses different factors that may have led the courts to turn away from vigorous enforcement of the NLRA's core idea. In this context, Part II also probes the extent to which judicial disrespect for collective bargaining may be a natural consequence of the statutory aging process.

## I. The Devaluation of Group Action

### A. *Group Action Under the NLRA*

Congress intended the Wagner Act to reduce industrial strife, restore mass purchasing power, promote a fairer distribution of economic

---

4. See Richard Locke et al., *Reconceptualizing Comparative Industrial Relations: Lessons from International Research*, 134 INT'L LAB. REV. 139, 146 (1995) (observing that the legitimacy of unions in broader society and the degree of resistance from government leaders have affected the ability of unions to adapt in a number of advanced industrial nations, including the U.S.).

5. State courts' erosion of the employment-at-will rule and state legislatures' action to protect employee rights also have contributed to the supplanting of collective bargaining as a dominant regulatory approach. See Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 12-14 (1988). State law developments, however, are beyond the scope of this Paper.

resources, and further self-government by workers.<sup>6</sup> To accomplish these ends, Congress expressly embraced “the practice and procedure of collective bargaining.”<sup>7</sup> By choosing group action as the central technique for improving the lot of workers, the Act reduced certain individual values to secondary status.

In particular, workers in a collectively bargained setting gave up their freedom to contract for terms and conditions of employment on an individual basis.<sup>8</sup> Employers were required to bargain in good faith with the union, again signaling a departure from traditional contract law.<sup>9</sup> This creation of collectively defined rights and responsibilities represented a notable shift from previous conceptions that economic decisionmaking was primarily, if not exclusively, a matter of individual responsibility.<sup>10</sup> Even

6. The Act's major objectives are set forth in its opening paragraphs, pre-enactment congressional debate, and subsequent scholarly commentary. See Pub. L. No. 74-198, § 1, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151 (1994)). For examples of relevant legislative history, see S. REP. NO. 573, 74th Cong., 1st Sess. 1-3 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2300, 2300-02 (1985) [hereinafter LEGIS. HIST.] and 79 CONG. REC. 7573 (1935) (statement of Sen. Wagner), *reprinted in* 2 LEGIS. HIST., *supra*, at 2341-42 (both advocating the pursuit of industrial peace through collective bargaining); S. REP. NO. 573, *supra*, at 3-4, *reprinted in* 2 LEGIS. HIST. at 2302-03 (encouraging collective bargaining as a means of increasing mass purchasing power so that the nation can spend its way out of the Depression); *Hearings Before the Comm. on Education and Labor on S. 1958*, 74th Cong., 1st Sess. 34-35 (statement of Sen. Wagner), 101-03 (statement of William Green, President of American Federation of Labor), 125-26 (statement of Lloyd K. Garrison, Dean, Univ. of Wisconsin Law School and former chair of pre-NLRA National Labor Relations Board), *reprinted in* 1 LEGIS. HIST., *supra*, at 1410-11, 1477-79, 1505-06 (all urging protection for employees to organize and bargain as necessary to offset employers' concentration of economic power); and 79 CONG. REC. 9691 (1935) (statement of Rep. Withrow), *reprinted in* 2 LEGIS. HIST., *supra*, at 3132 (advocating collective bargaining as furthering the “inherent” American right of democratic self-government in the workplace).

For examples of relevant post-enactment commentary, see Kenneth M. Casebeer, *Holder of the Pen: An Interview With Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 286 (1987) (describing the conflict resolution procedures of the Wagner Act as intended to promote industrial peace); Leon H. Keyserling, *Why the Wagner Act?*, in THE WAGNER ACT: AFTER 10 YEARS 5, 8-12 (Louis G. Silverburg ed., 1945) (advocating a central goal of restoring mass purchasing power); IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 100-01 (1950) (discussing the importance of redistributing economic resources); and Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 502-04 (1993) (discussing the significance of providing for workers' voices to be part of industrial decisionmaking). See generally James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 948-52 (1996) (discussing NLRA goals in detail).

7. Pub. L. No. 74-198, § 1, 49 Stat. 449, 449 (1935) (codified at 29 U.S.C. § 151 (1994)).

8. S. REP. NO. 573, at 13, *reprinted in* 2 LEGIS. HIST., *supra* note 6, at 2313; 79 CONG. REC. 7571 (1935) (statement of Sen. Wagner), *reprinted in* 2 LEGIS. HIST., *supra* note 6, at 2336 (both citing majority rule as essential for a collective bargaining system and as the best protection for employees' economic interests); see *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-39 (1944) (holding that individual contracts may not be used to “defeat or delay the procedures prescribed by” the NLRA and that such individual contracts are superseded in order that majority rule may prevail).

9. 29 U.S.C. § 158(a)(5), 158(d) (1994); see S. REP. NO. 573, at 12, *reprinted in* 2 LEGIS. HIST., *supra* note 6, at 2312; Gottesman, *supra* note 2, at 83-84.

10. See Howell Harris, *The Snares of Liberalism? Politics, Bureaucrats and the Shaping of Federal Labour Relations Policy in the United States, ca. 1915-47*, in SHOP FLOOR BARGAINING AND THE

if the Wagner Act was not intended to trigger a radical restructuring of American capitalism,<sup>11</sup> the establishment of group action as the governmentally preferred method of ordering workplace relations was no mean feat. The significance of the change is reflected in the tenacity of business community resistance both to passage<sup>12</sup> and initial implementation.<sup>13</sup>

At the time of its enactment, the NLRA's emphasis on collective decisionmaking was hardly unique. The National Industrial Recovery Act (NIRA)<sup>14</sup> had previously installed a system of "fair competition" codes that replaced traditional rivalries among individual firms with collective action by businesses to control production and prices.<sup>15</sup> The Agricultural Adjustment Act (AAA)<sup>16</sup> continues to sanction collective action by farmers to reduce production in exchange for federal subsidies, and by agricultural processors to fix prices through marketing agreements that are

STATE 148, 152-61 (Steven Tolliday & Jonathan Zeitlin eds., 1985) (describing the individualistic employer-employee relations authorized by courts in the 19th and early 20th centuries, and noting limited federal regulatory efforts in the two decades preceding the New Deal); BERNSTEIN, *supra* note 6, at ix (arguing that New Deal legislation fostered a new orientation toward "a collective responsibility, applied alike to business, to agriculture, and to labor").

11. See Harris, *supra* note 10, at 169-70; David M. Rabban, *Radical Assumptions About American Labor Law*, 84 COLUM. L. REV. 1119, 1124-29 (1984) (both rejecting the argument that the Wagner Act was even potentially a radical charter for participatory democracy in industry, and viewing the Act instead as embodying more modest collectivist goals); see also Theda Skocpol, *Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal*, 10 POL. & SOC'Y 155 (1981) (viewing the Wagner Act as an extension of state power to manage the economy, achieved despite business opposition).

12. See generally BERNSTEIN, *supra* note 6, at 106-10; WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 150-51 (1963); David Plotke, *The Wagner Act, Again: Politics and Labor 1935-37*, 3 STUD. IN AM. POL. DEV. 105, 124 (1989) (all noting the business community's intense campaign against passage of the Wagner Act).

13. Compare 5 NLRB ANN. REP. 17 (1940) (describing the Board's reinstatement during the fiscal year of 10,500 employees who had been discriminatorily discharged and more than 20,000 unfair labor practice strikers who had been unlawfully terminated) and 4 NLRB ANN. REP. 23 (1939) (recounting the Board's reinstatement of 7,738 employees who had been fired for union activity) with 23 NLRB ANN. REP. 146 (1958) (reporting the Board's reinstatement during the fiscal year of 1,067 employees) and 22 NLRB ANN. REP. 164 (1957) (reporting the number of reinstates as down to 922 for the fiscal year). See generally Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1779 (1983) (noting the initial "massive defiance of the [Act] by employers determined not to give up their prerogatives").

14. Pub. L. No. 73-67, 48 Stat. 195 (1933) (codified as amended in scattered sections of 15 U.S.C. and 40 U.S.C.). The Supreme Court declared the NIRA unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

15. See generally PETER H. IRONS, *THE NEW DEAL LAWYERS* 23-26 (1982) (documenting concerns that the NIRA was anticompetitive and delegated too much power to industrial leaders); Ellis W. Hawley, *The New Deal and Business*, in *THE NEW DEAL: THE NATIONAL LEVEL* 50, 60-61 (John Braeman et al. eds., 1975) (recounting the cooperative planning goals of key business leaders who advocated the reform that brought about the NIRA).

16. Pub. L. No. 73-10, 48 Stat. 31 (1933); Pub. L. No. 75-430, 52 Stat. 31 (1938) (codified at 7 U.S.C. §§ 1281-1393 (1994)). The Supreme Court invalidated the 1933 Act in *United States v. Butler*, 297 U.S. 1 (1936), but upheld the 1938 Act as constitutional in *Wickard v. Filburn*, 317 U.S. 111 (1942).

exempted from the antitrust laws.<sup>17</sup> Approval of collective action to ameliorate economic conditions for group members never became an exclusive or dominant regulatory approach. Nonetheless, it is worth recalling that the Wagner Act's promotion of such concerted conduct in the workplace originated as part of a broader legislative pattern affecting other aspects of the economy as well.

The Taft-Hartley Amendments of 1947 modified the Wagner Act in substantial respects.<sup>18</sup> The addition of a right to refrain from participating in concerted activity, and the creation of union unfair labor practices in response to widespread perceptions of union abuse, created statutory protections that to some degree offset the right to self-organization. At the same time, the Taft-Hartley Amendments did not disturb the NLRA's commitment to collective bargaining as the essential means of attaining the multiple goals identified above.<sup>19</sup> If anything, the addition of provisions making collectively bargained agreements enforceable in federal court extended the basic regulatory scheme.<sup>20</sup>

17. See 7 U.S.C. §§ 1281-1393 (1994). See generally IRONS, *supra* note 15, at 111-35 (detailing the necessity for the AAA, the negotiations preceding enactment, and the initial years of AAA operations); Richard S. Kirkendall, *The New Deal and Agriculture*, in THE NEW DEAL: THE NATIONAL LEVEL, *supra* note 15, at 83, 84-88 (relating the unprofitability of the farming industry in the decade preceding the AAA and the New Deal's responding collectivist measures, such as production control plans and subsidy programs). But cf. David Hosansky, *House Easily Clears Rewrite of Decades-Old Farm Laws*, 54 CONG. Q. 874 (1996) (discussing Freedom to Farm Act (H.R. 2854, Pub. L. No. 104-127, 110 Stat. 888, signed into law April 4, 1996), which weakens or phases out numerous production ceilings and marketing agreements).

18. Labor-Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-187 (1994)). By contrast, the Labor-Management Reporting and Disclosure Act (Landrum-Griffin Amendments) of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.), was directed principally at regulating the internal affairs of unions; it made only minor changes in the regulatory scheme governing the organizing campaign and the collective bargaining process. See ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW 97-98 (11th ed. 1991); ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 5-6 (1976).

19. See JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 47 (1983) (describing Taft-Hartley's effect as "limit[ing] collective activity primarily to the specific relation of employer and certified or legally recognized bargaining agent" while prohibiting "[a]ctivities that were based on class or worker solidarity or that existed outside the contractual regime"); Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, (pt. 2), 61 HARV. L. REV. 274 (1948) (describing the Taft-Hartley approach as follows: "[I]t appears to reject the policy of [affirmatively] encouraging the spread of collective bargaining, [but] accepts the institution . . . as a method by which a large proportion of industrial life is ruled, and attempts to shape its operation so as to increase its effectiveness and reduce its cost."); cf. James A. Gross, *Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making*, 39 INDUS. & LAB. REL. REV. 7, 12-13 (1985) (noting that early versions of the Taft-Hartley Amendments sought to eliminate from the NLRA preamble the declared policy of encouraging the practice of collective bargaining, but that the final compromise version retained NLRA findings and policies with one added paragraph referencing unions' obstructive practices, while also including a more neutral Declaration of Policy that did not itself become part of the NLRA).

20. Pub. L. No. 80-101, § 301, 61 Stat. 136, 156 (codified at 29 U.S.C. § 185(a) (1994)). It may well be argued that the restrictions placed on unions' ability to expand the collective bargaining domain

## B. Congress Forsakes Group Action

In the 1960s, Congress began to shift its legislative approach to workplace relations. Certain NLRA goals had become less compelling with the passage of time. The prosperity of the 1950s and 1960s meant that reducing industrial strife and restoring mass purchasing power were no longer the critical national concerns they had been during the Great Depression and World War II. Another NLRA goal—promoting a fairer distribution of economic resources—retained vitality, but Congress chose to address it through statutes that relied on individual rights and freedoms while virtually ignoring group action. The new generation of workplace statutes focused on two types of individual interests: the right to equal treatment and the right to minimum standards.

Federal laws assuring employees the right to equal or nondiscriminatory treatment<sup>21</sup> were rooted in a recognition of the broader societal problem of race discrimination, and the development of related concerns for other workplace minorities defined by their status as such. Although organized labor played an important role in securing passage of these laws,<sup>22</sup> the collective bargaining regime was part of the problem as well. Unions had negotiated for or acquiesced in racially discriminatory practices in the past, and they were perceived as perpetuating the effects of such practices through seniority systems and other collectively bargained arrangements.<sup>23</sup>

---

helped limit the practical possibility that group action would become the primary mechanism for ordering workplace relations. See JULIUS G. GETMAN & BERTRAND B. POGREBIN, *LABOR RELATIONS* 3-5 (1988) (discussing the restrictive impact of the Taft-Hartley provisions barring most secondary activity and the tension between those provisions and the Wagner Act's broad commitment to group action). For present purposes, however, the key point is that collective bargaining remained the preferred—indeed, the only—operative regulatory model. Any subsequent instances of abuse or overreaching by labor or management were presumably to be addressed by legislating further refinements to the collective bargaining approach. See also *infra* notes 45-52 and accompanying text (discussing the NLRA's "golden age" during the 1960s).

21. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (1994); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994); Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1994); Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (1994).

22. See, e.g., *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 93-105 (1967) (statement of Andrew J. Biemiller, Legislative Director, AFL-CIO) (urging prompt enactment of the age discrimination act and presenting strong support for it, along with suggested changes); *Civil Rights: Hearings on Miscellaneous Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 1789-1809 (1963) (statement of George Meany, President, AFL-CIO) (detailing organized labor's long-standing support for civil rights reform and warmly endorsing the legislative approach proposed in Title VII).

23. See, e.g., *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); see also S. REP. NO. 263, 101st Cong., 2d Sess. 22-23 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1527-28 (accompanying the Older Workers Benefit Protection Act of 1990, and criticizing the long-

Federal statutes establishing minimum standards with respect to specific terms or conditions of employment date from the early 1970s.<sup>24</sup> These laws reflected a sense that certain workplace protections were too costly and complex to be handled through firm-specific negotiations between management and labor.<sup>25</sup> Once again, organized labor lent strong support to the congressional efforts.<sup>26</sup> But once again, the need for a legislative solution revealed shortcomings in the collective bargaining approach. The new federal statutes offered positive protections lacking not only for individuals employed in a nonunion setting—a growing proportion of the workforce—but also for unionized employees whose collectively bargained provisions were inadequate.<sup>27</sup>

It is safe to assume that both organized labor and the enacting coalitions of moderate and liberal members of Congress viewed these early legislative forays as interstitial efforts, intended to do no more than

standing collectively bargained practice of reducing or denying severance pay to older workers based on their pension eligibility).

24. See Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678 (1994); Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1994); see also Federal Coal Mine Safety and Health Act of 1969, 30 U.S.C. §§ 801-962 (1994).

25. See, e.g., H.R. REP. NO. 533, 93d Cong., 2d Sess. 1-12 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4639-48 (accompanying ERISA) (noting that the operations of private pension plans had become complicated and increasingly interstate, and contending that clear, uniform federal legislation would better protect pension rights); S. REP. NO. 1282, 91st Cong., 2d Sess. 4 (1970), reprinted in 1970 U.S.C.C.A.N. 5177, 5180 (accompanying OSHA) (noting that the efforts of individual employers and states to regulate health and safety in the workplace “are too often undercut by those who are not so concerned”); 116 CONG. REC. 37325 (1970) (statement of Sen. Williams) (observing that many employers “simply cannot make the necessary investment in health and safety, and survive competitively, unless all are compelled to do so”); Michael H. Gottesman & Michael R. Seidl, *A Tale of Two Discourses: William Gould’s Journey from the Academy to the World of Politics*, 47 STAN. L. REV. 749, 784 (1995) (describing OSHA and ERISA as addressing subjects that “were beyond the capacity of traditional collective bargaining to handle”).

26. See, e.g., *Occupational Safety and Health Act, 1970: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 387-407 (1970) (statement of Andrew J. Biemiller, Legislative Director, AFL-CIO) (providing statistics of workplace injuries and offering support for the enactment of federal workplace standards); *Retirement Income Security for Employees Act, 1973: Hearings on S. 4 and S. 75 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 523-38 (1973) (statement of John J. Sheehan, Legislative Director, United Steelworkers of America) (urging the passage of the Retirement Income Security for Employees Act and providing examples illustrating that pension fund protection was a major unmet need of working persons).

27. See, e.g., RALPH NADER & KATE BLACKWELL, *YOU AND YOUR PENSION 4-7* (1973) (describing numerous instances in which retirees from unionized companies received no pension, either because of pension fund termination or pension plan disqualification language); 116 CONG. REC. 38376 (1970) (statement of Rep. Daniels) (describing the exposure of unionized workers to a known carcinogen on the job). See generally Summers, *supra* note 5, at 11-12 (providing an overview of federal legislation aimed at protecting employees both inside and outside the collective bargaining process). In this respect, OSHA and ERISA differed from the Fair Labor Standards Act of 1938 (FLSA); the FLSA was regarded as establishing a floor on which collective bargaining would then build. See J. JOSEPH HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 203-04 (1968).

supplement the prevailing legal order based on collective bargaining. Still, the fact that the collective bargaining regime was either unwilling or unable to address certain pervasive workplace problems seems in retrospect a profound signal. In addition, the texts of these new statutes spoke for themselves. Congress offered rights and protections to employees on an individual—and individually enforceable—basis.<sup>28</sup> Employees were now able to pursue their own rights at little or no financial cost, just as they had relied on unions to pursue their contractual and statutory rights in the past. Employees could petition a designated federal agency to proceed on their behalf, or they could pursue a federal court action and receive attorney's fees for prevailing on the merits. Moreover, the relief that became available under these individual rights statutes—notably compensatory and punitive damages and far-reaching injunctive orders—was more generous and powerful than the restorative remedies provided under collective bargaining agreements and the NLRA.<sup>29</sup>

While the new workplace statutes focused attention on the rights and choices of individual employees, they often relegated unions to derivative status even in collectively bargained settings. Under OSHA, the Secretary of Labor is responsible for workplace inspections and the subsequent issuance of citations, but federal inspectors are directed to “consult” with union representatives in the course of performing their duties.<sup>30</sup> Under the Worker Adjustment and Retraining Notification Act (WARN), individual employees are designated as the aggrieved persons, but the required sixty-day notice of plant closing or mass layoff is given to the union for subsequent communication to individual employees.<sup>31</sup> At times, the new statutes placed labor organizations on a par with employers as obstacles to the realization of individual rights. For instance, various antidiscrimination statutes made both employers and unions primary objects of liability.<sup>32</sup>

---

28. See, e.g., 42 U.S.C. § 2000e-5(f), (g) (1994) (authorizing individual employee actions for appropriate relief under Title VII); 29 U.S.C. § 626(c) (1994) (authorizing individual employee actions for legal and equitable relief under ADEA); 29 U.S.C. § 1132(a) (1994) (authorizing individual participant or beneficiary action to secure appropriate relief under ERISA).

29. Compare, e.g., 42 U.S.C. § 1981a (1994) (authorizing recovery of compensatory and punitive damages under Title VII) and 29 U.S.C. § 626 (1994) (authorizing recovery of legal relief including liquidated damages under ADEA) with 29 U.S.C. § 160(c) (1994) (authorizing make-whole relief under NLRA). See generally Weiler, *supra* note 13, at 1787-1803 (discussing the inadequacies of existing NLRA remedies).

30. See 29 C.F.R. § 1960.26(b) (1995); see also 29 C.F.R. § 1960.37(b) (1995) (requiring that employee members of firm-specific occupational safety and health committees be designated by the union).

31. See Worker Adjustment and Retraining Notification Act (WARN), Pub. L. No. 100-379, § 3, 102 Stat. 891 (1988) (codified at 29 U.S.C. § 2102(a) (1994)); see also *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, No. 95-340, 1996 WL 241649, at \*2 (U.S. May 13, 1996) (holding that the union has standing to sue on behalf of its members for monetary damages under WARN).

32. See, e.g., 29 U.S.C. § 623 (1994) (age discrimination); 42 U.S.C. § 2000e-2 (1994) (race and gender discrimination); 42 U.S.C. §§ 12111(2), 12112 (1994) (disability discrimination); see also

Thus, although unions under the NLRA are leading actors seeking to achieve improved working conditions for employees, the individual rights regime assigns unions cameo appearances or even casts them as villains impeding employees' economic progress.

Since the early 1970s, Congress has enacted a continuing series of individual rights statutes that address problems of both discriminatory treatment and minimum standards.<sup>33</sup> At some point during this legislative barrage, it became clear that Congress viewed government regulation founded on individual employee rights, rather than collective bargaining between private entities, as the primary mechanism for ordering employment relations and redistributing economic resources. Congress *could* have strengthened its commitment to group action during this time by amending the NLRA to make it more relevant to the realities of the contemporary labor market. Supporters of collective bargaining made two serious efforts at legislative reform, but failed on both occasions.<sup>34</sup>

The inability of proponents to adapt the NLRA to changing circumstances and newly perceived problems raises doubts as to the extent of public interest in, or commitment to, the statute's basic approach. Moreover, the failure to amend the NLRA is striking when contrasted with Congress's repeated willingness to update major individual rights statutes. Since enacting Title VII, Congress has regularly revisited that statutory scheme to broaden coverage, to address more sophisticated types of race and gender discrimination, and to override unduly restrictive Supreme Court interpretations.<sup>35</sup> Similarly, Congress has modified the ADEA on

---

Donovan v. Mazzola, 716 F.2d 1226 (9th Cir. 1983) (holding union pension fund officials liable for breach of fiduciary duties under ERISA), *cert. denied*, 464 U.S. 1040 (1984); JOHN A. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 626-27, 648-51 (2d ed. 1994) (discussing ERISA's broad definition of "fiduciary," and the legislative understanding that union-controlled pension and employee benefit funds must comply with fiduciary standards).

33. Antidiscrimination statutes include the Equal Employment Opportunity Act of 1972, the Pregnancy Discrimination Act of 1978, the ADEA Amendments of 1978, the ADEA Amendments of 1986, the Civil Rights Restoration Act of 1987, the Americans with Disabilities Act of 1990, the Older Workers Benefit Protection Act of 1990, and the Civil Rights Act of 1991. Minimum standards statutes include the Federal Mine Safety and Health Amendments Act of 1977, the WARN Act of 1988, the Employee Polygraph Protection Act of 1988, the Omnibus Budget Reconciliation Act of 1990 (amending OSHA and ERISA), and the Family and Medical Leave Act of 1993.

34. A major reform effort launched in 1977 proposed expedited union election procedures and stronger unfair labor practice remedies. The bill gained House approval but fell short of the 60 votes needed to cut off Senate debate. *See* 123 CONG. REC. 32613 (1977) (passing the House); 124 CONG. REC. 17749, 18398 (1978) (failing to achieve cloture, leading to withdrawal of the Senate bill). A less comprehensive reform bill would have banned permanent replacement of strikers; it too passed the House but failed on Senate cloture votes in 1992 and 1994. *See* 138 CONG. REC. S8237 (1992); 140 CONG. REC. S8844 (1994). A 1974 amendment narrowly targeted to health care institutions did become law. Pub. L. No. 93-360, 88 Stat. 395 (1974).

35. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 42 U.S.C.); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. 2000e(k) (1994)); Civil Rights Restoration Act of 1987,

several occasions to limit and then prohibit involuntary retirement, and to strengthen antidiscrimination protections for employee benefits.<sup>36</sup> Indeed, the legislative focus of the ADEA has shifted in direct response to changed economic circumstances. An original concern to promote the hiring of older workers in a robust economy has given way to a focus on preserving job security and benefit levels for the existing workforce amidst large-scale structural dislocations.<sup>37</sup> Even ERISA, a complex statute not readily understood or embraced by the public at large, has been amended a number of times by Congress.<sup>38</sup>

In sum, Congress for three decades has championed the virtues of federal regulation to promote and protect individual employee rights, while taking no steps to address perceived problems in the law governing collective bargaining relationships. Without expressly saying so, Congress has declined to make a continuing commitment to group action as a means of regulating the workplace.

### C. *The Supreme Court Circumscribes Group Action*

During the same time period that Congress shifted its legislative focus in employment relations, Supreme Court interpretations of the NLRA became less sympathetic toward group action. Between 1940 and 1994, the Court decided 198 cases in which the Board was a party and the Court construed particular provisions of the NLRA.<sup>39</sup> If one uses 1970 as a

Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29, and 42 U.S.C.); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

36. See ADEA Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (codified as amended in scattered sections of 29 U.S.C.); ADEA Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (codified as amended in scattered sections of 29 U.S.C.); Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (codified as amended in scattered sections of 29 U.S.C.).

37. *Compare* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2, 81 Stat. 602 (reciting that a major purpose of the 1967 Act was to promote the hiring of older persons in an affluent economy) with H.R. REP. NO. 527, 95th Cong., 1st Sess. pt. 1 (1977) (noting the primary purpose of the 1978 Amendments was to reduce the incidence of mandatory retirement) and 136 CONG. REC. S13603 (daily ed. Sept. 24, 1990) (Sen. Pryor) (stating that the primary purposes of the 1990 statute were to protect older workers' employee benefits and to limit older workers' waiver of ADEA rights as part of an exit incentive program).

38. See, e.g., Multiemployer Pension Plan Amendments of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (codified as amended in scattered sections of 29 U.S.C.); Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (codified as amended in scattered sections of 29 U.S.C.); Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, §§ 11001-11019, 100 Stat. 82, 237 (codified as amended in scattered sections of 29 U.S.C.); Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 2101, 103 Stat. 2106, 2123 (codified as amended at 29 U.S.C. § 1132 (1994)); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 12001-12003, 104 Stat. 1388, 1388-562 to 1388-566 (codified as amended at 26 U.S.C. § 4980 (1994) and 29 U.S.C. §§ 1002, 1104 (1994)).

39. See Search of Westlaw, SCT-OLD Database (Mar. 3, 1995) (using search parameters of "TI (N.L.R.B. NLRB 'National Labor Relations Board') & DA (AFT 8/36 & BEF 10/94)"); Search of

dividing line,<sup>40</sup> the results in Supreme Court cases reveal a dramatic decline in the overall “win rate” for unions. While the union-aligned position prevailed nearly eighty percent of the time between 1940 and 1969, unions’ success rate has fallen to fifty percent since 1970.<sup>41</sup>

The most important category of Supreme Court cases—in terms of both volume and relevance to the group action issue—are those in which the Board found employer liability under section 8(a).<sup>42</sup> Nearly half of the 198 cases involved Supreme Court review of a Board determination that

---

Westlaw, SCT Database (Mar. 3, 1995) (same search). The initial search turned up over 2000 cases. Subsequent review led to the elimination of cases in which certiorari was denied or dismissed, disposition was by summary opinion (almost all “vacate-and-remand”), or the decision was issued before 1940. Some three-fourths of the 198 Supreme Court decisions examined here featured construction of § 8, directly affecting the liability of employers or unions. The remaining decisions involved construction of § 10(c) (concerning the appropriateness of certain remedies), § 9 (principally involving certification and election processes), or collateral provisions such as §§ 2 and 6.

This search omitted a number of cases decided by the Court in which the Board was not a party but some provision or dimension of the NLRA was being construed. Such cases include preemption doctrine decisions, cases applying § 301 of the Taft-Hartley Amendments, and cases construing the internal union governance provisions of the 1959 Landrum-Griffin Amendments. Also omitted are Supreme Court decisions construing analogous federal labor relations statutes, such as the Railway Labor Act and the Federal Labor Relations Act, that may rely on or extend NLRA precedents. There is no reason to think that addition of these cases would materially alter the larger picture of a less sympathetic Supreme Court. Still, given the absence of an undetermined number of related Supreme Court decisions, the trends identified here are presented as impressions rather than firm conclusions.

40. Apart from being the rough midpoint of this six-decade period, 1970 also marks the start of Supreme Court efforts to consider the new generation of individual rights statutes. *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 425-26 (argued Dec. 14, 1970, decided Mar. 8, 1971) (considering whether Title VII prohibits an employer from requiring a high school education or completion of a standardized general intelligence test as a condition of employment when neither standard is related to job performance). As its attention was drawn to these newer statutes, the Court spent far less time on Board decisions interpreting the NLRA: two-thirds of the Court’s 198 decisions were rendered before 1970. *See generally* Brudney, *supra* note 6, at 960-65 (documenting the Supreme Court’s diminished interest in the NLRA and suggesting different possible explanations).

41. From 1940 to 1969, the union-aligned position prevailed in 101 of 129 cases, or 78%; from 1970 to 1994, union-aligned positions were upheld in 33 of 66 cases, or 50%. Three of the 198 Supreme Court decisions, involving disputes between unions, were omitted from this count. The union’s interest was always readily apparent, but the Court’s opinion on rare occasions produced a result that was less certain. *See, e.g.*, *NLRB v. Baptist Hosp. Inc.*, 442 U.S. 773, 782 (1979) (deciding in a § 8(a) case that the “correct position lies between those taken by the Board and the court below”). Although there is doubtless room for disagreement at the margins, disputes regarding a very small number of cases would not affect shifts of the magnitude described here.

42. Labor-Management Relations Act, ch. 120, sec. 101, § 8(a), 61 Stat. 136, 140 (1947). Prior to 1947, employer unfair labor practices were identified under § 8 of the NLRA; that provision became § 8(a) when a union unfair labor practices provision (§ 8(b)) was added in 1947. Section 8(a) prohibits a range of employer conduct as unfair labor practices, including interference in the formation of a union, discrimination in hiring or retention practices to discourage union membership, and failure to engage in good faith collective bargaining with a recognized union. Other categories identified for present purposes include Court decisions reviewing Board determinations of union liability under § 8(b), decisions reviewing Board determinations of *no* liability under each of these two provisions, and decisions reviewing Board determinations construing *other* provisions of the Act—principally § 9 and § 10.

an employer had violated section 8(a). Further, section 8(a) is at the core of the NLRA's attempt to protect employee efforts at self-organization and collective bargaining. Supreme Court review of agency determinations that employers have unlawfully frustrated these employee efforts sheds direct light on the value attributed to concerted activity.

Prior to 1970, Board findings of section 8(a) violations were sustained by the Supreme Court in 83% of the cases; since 1970, the success rate has fallen to 58%.<sup>43</sup> The descent was particularly abrupt during the 1970s, and the Board/union position has regained strength since 1980. Even with the more recent recovery, however, the Supreme Court from 1980 through 1994 sustained Board determinations of section 8(a) liability at a lower rate than for almost the entire period prior to 1970.<sup>44</sup>

The Court's perception of group action as the central theme of federal labor relations policy was perhaps most eloquently expressed in a series of decisions issued during the 1960s, a decade that might appropriately be labelled the golden age of the NLRA. During this ten-year period, the Supreme Court honored the core value of concerted activity,<sup>45</sup> and conferred broad protection against sophisticated employer efforts to chill group action through threats,<sup>46</sup> promised benefits,<sup>47</sup> or discriminatory self-help strategies.<sup>48</sup> The Court also repeatedly recognized the importance of the

43. From 1940 to 1969, Board positions finding § 8(a) liability were upheld in 50 of 60 cases; since 1970, such Board determinations have been sustained in 21 of 36 cases. Board positions finding § 8(b) liability against unions have received *increased* deference in recent times; this too contributes to the unions' declining win rate. Determinations of liability under § 8(b) were upheld 50% of the time before 1970 (6 of 12 decisions) and 71% of the time since 1970 (10 of 14 decisions). Board determinations of *no* liability under § 8(a) have reached the Supreme Court on only a handful of occasions: the Court sustained each of two such determinations prior to 1970 and three of four determinations since 1970. Board determinations of *no* liability under § 8(b) have been consistently sustained: 9 of 9 determinations before 1970 and 2 of 2 determinations since 1970. *See* Search of Westlaw, *supra* note 39.

44. Only between 1950 and 1954 did the Board's success rate on its § 8(a) liability determinations drop below 70%; the Board's rate since 1980 has been 60%. The breakdown in terms of five-year intervals is as follows: 1940-44, 17 decisions upheld Board determinations of § 8(a) liability, one decision rejected such a determination (17-1); 1945-49, 9-0; 1950-54, 1-4; 1955-59, 7-2; 1960-64, 9-0; 1965-69, 7-3; 1970-74, 5-6; 1975-79, 7-3; 1980-84, 6-3; 1985-89, 2-0; and 1990-94, 1-3. *See* Search of Westlaw, *supra* note 39.

45. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 14, 16 (1962) (upholding employees' right to walk off the job in a spontaneous protest against cold working conditions, and stating that employees' right to engage in concerted activity exists even if "they do not present a specific demand upon their employer to remedy [the objectionable] condition" and without regard to "the reasonableness of workers' decisions to engage in [such] activity").

46. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 587-89, 616-20 (1969) (holding that when an employer's statements of its views about unions expressly or by implication threaten reprisal in response to union activity, such statements are unlawful).

47. *See* NLRB v. Exchange Parts Co., 375 U.S. 405 (1964) (holding that conferring economic benefits on employees during a union election campaign constitutes an unlawful interference with the right to organize).

48. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) (holding that if an employer's discriminatory conduct is inherently destructive of employee rights, the NLRB may find an unfair labor

collective bargaining process by prohibiting employers from unilaterally altering working conditions without bargaining,<sup>49</sup> by requiring employers to bargain over certain entrepreneurial decisions,<sup>50</sup> and by authorizing the Board to order bargaining when extreme employer misconduct had undermined the union election.<sup>51</sup> A further endorsement for group action as the optimal means of ordering workplace relations was the Court's conclusion that unions had considerable discretion to subordinate individual employee interests when implementing the terms of a collectively bargained agreement.<sup>52</sup>

Just as the Court's 1960s decisions celebrated the ongoing vitality of group action, the Court's declining commitment to group action emerged in several post-1970 cases in which the Court had a chance to give collective bargaining a more vibrant legal status. In at least three notable instances, the Board has sought to maintain or renew the Act's vigor in the contemporary workplace. On each occasion, the Supreme Court discounted the Board's presumed expertise and rejected the agency's position. A brief review of these decisions will show how the Court has restricted the future possibilities for group action in important "statute-defining" cases as well as backing away from collective bargaining in aggregate terms.

*First National Maintenance Corp. v. NLRB*<sup>53</sup> presented the question of whether management was obligated to bargain collectively over a decision to close an unprofitable portion of its business. The issue was impor-

practice even if there is no proof of antiunion motivation); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (holding that while an employer may shut down a business entirely if the employer so chooses, it is an unfair business practice to shut down part of a business if a purpose or predictable effect is to discourage unionism); *NLRB v. Erie Resistor Co.*, 373 U.S. 221 (1963) (holding that an employer may not discriminate between striking and nonstriking workers in determining seniority).

49. See *NLRB v. Katz*, 369 U.S. 736 (1962) (finding a violation where an employer made changes to sick leave and wage increase policies while in negotiations with the union).

50. See *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964) (requiring the employer to negotiate with the union regarding the decision to contract out maintenance instead of using union employees).

51. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 595-616 (1969) (ordering the employer to bargain with a union that had not been elected but had obtained cards signed by a majority of the employees authorizing the union to represent them).

52. See *Vaca v. Sipes*, 386 U.S. 171 (1967) (overturning a damages award in a suit by a discharged employee against a union that refused to take the employee's claim to arbitration); see also *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 582-83 (1960) (holding that an employer's collectively bargained agreement to arbitrate should be interpreted very broadly to compel arbitration, and declaring that "[t]he present federal policy [regulating the employment relationship] is to promote industrial stabilization through the collective bargaining agreement"). The Court's enthusiastic support for collectively bargained industrial democracy throughout the 1960s provides additional evidence that the earlier Taft-Hartley Amendments had done little to undermine the prevailing faith in group action as a preferred regulatory model. See *supra* note 20.

53. 452 U.S. 666 (1981).

tant to unions and their members confronting the unstable conditions of the late 1970s. Collective bargaining was seen as offering at least an opportunity to preserve employment status in an era of economic retrenchment. In broader terms, making job security a mandatory subject of bargaining would allow group action to play a key role in addressing one of the major workplace problems in a changing economy. The language of the Act, along with applicable Supreme Court precedent, seemed to permit such a result.<sup>54</sup> The Board and some courts of appeals had concluded that employers—either presumptively or on a per se basis—were required to bargain over a partial closing decision.<sup>55</sup>

The Supreme Court, however, chose to move in the opposite direction. In holding that partial closing decisions are not a mandatory subject of bargaining, the Court reasoned that management's interest in efficiency trumps any conceivable union interest in protecting the job security of its members.<sup>56</sup> The elevation of managerial concern for profitability to a level that restricts the scope of collective bargaining reveals a cautious if not crabbed approach to the importance of group action. Yet twenty years earlier, the Court had disdained such an approach in an analogous setting.<sup>57</sup> Even more telling is the Court's fear of group action as disruptive and conflict-engendering, both at the bargaining table and at the worksite.<sup>58</sup> A basic premise of the NLRA is that statutory

---

54. 29 U.S.C. § 158(d) (1994) (defining collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . terms and conditions of employment"). The phrase "terms and conditions of employment" is broad enough on its face to cover job security, the predicate to achieving or protecting all other working conditions. See *Fibreboard*, 379 U.S. at 210-15 (holding that a company's decision to subcontract work, resulting in job loss for bargaining unit members, was a mandatory subject of bargaining).

55. See, e.g., *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596, 601 (2d Cir. 1980), *rev'd*, 452 U.S. 666 (1981); *Brockaway Motor Trucks v. NLRB*, 582 F.2d 720, 734-35 (3d Cir. 1978) (both adopting the presumption approach); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 564-70 (1966) (adopting the per se rule). But cf. *NLRB v. International Harvester Co.*, 618 F.2d 85, 87 (9th Cir. 1980) (adopting a per se rule against mandatory bargaining); *NLRB v. Drapery Mfg. Co.*, 425 F.2d 1026, 1027-28 (8th Cir. 1970) (adopting presumption against mandatory bargaining).

56. See *First Nat'l Maintenance*, 452 U.S. at 678-79 ("Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."); *id.* at 682-83 (citing management's "great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies").

57. See *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 336-37 (1960) (rejecting the appellate court's argument that union efforts to bargain over job security in a partial closing situation under the Railway Labor Act "represent[ed] an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations").

58. See *First Nat'l Maintenance*, 452 U.S. at 678-79 n.17 (observing that although an employer need not reach agreement with a union over a partial closing decision, it faces the threat of a strike for failing to do so); *id.* at 681 (characterizing a union's purpose at the bargaining table as the uniformly obstructive one of seeking to postpone or prevent the closing).

protection for the collective bargaining process—including the right to strike in support of one's position on mandatory subjects—in the long term reduces the costly effects of labor-management conflicts. Group action was valued as creating a more nearly equal balance of power that would channel inevitable workplace disputes toward negotiated solutions. That original concept is a far cry from the Court's more recent perception that collective bargaining obstructs entrepreneurial initiatives and impinges unacceptably upon managerial freedom.<sup>59</sup>

While *First National Maintenance* addressed the scope of group action in established bargaining relationships, *Lechmere, Inc. v. NLRB*<sup>60</sup> raised the issue of employees' prospects for understanding the importance of such a bargaining relationship in the first place. The extent of nonemployee access to an employer's premises to engage in protected organizing activity once again commanded attention in light of the changed nature of the economy. Thirty-five years earlier, the Court had applied the general language of section 7 and held that an employer's property rights outweighed its employees' statutory right of access to union organizers at the worksite, unless "the *inaccessibility* of employees ma[de] *ineffective* the *reasonable* attempts by nonemployees to *communicate* with them through the *usual* channels."<sup>61</sup> The flexible nature of this judicially devised standard implicitly invited reexamination of the Court's balancing approach in light of evolving social and economic conditions.

By the late 1980s, one could make a persuasive case that the balance to be struck was more complex than it had been in *Babcock*.<sup>62</sup> The shift to more anonymous suburban residential patterns meant that increasingly dispersed employee populations were less accessible to reasonable efforts at off-site communication.<sup>63</sup> The usual channels for such communication—mail, telephone, home visits—also were less likely to be effective because of people's fatigued response to the impersonal tactics of the "solicitation industry" and their concern for privacy and security when visited at home by strangers.<sup>64</sup> At the same time, the employer's right to

59. See generally GETMAN & POGREBIN, *supra* note 20, at 116-17.

60. 502 U.S. 527 (1992).

61. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-13 (1956) (emphasis added); see Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 HOFSTRA LAB. L.J. 1, 3-4, 12 (1991) (examining "the legal background of the issue of union access to private property" and offering a critical evaluation of *Lechmere*).

62. See Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 325-32 (1994) (noting that home visits do not "provide a viable alternative for reaching employees in the majority of workplaces today"); Gorman, *supra* note 61, at 12-13 (endorsing the notion that the NLRB is in a "peculiarly effective position to apply the broad mandates of the statute to the circumstances that surround union communications in a changing society").

63. Leonard Bierman, *Toward a New Model for Union Organizing: The Home Visits Doctrine and Beyond*, 27 B.C. L. REV. 1, 10 (1985).

64. Jay Gresham, Note, *Still as Strangers: Nonemployee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 159-60 (1983).

exclude nonemployees from private property—in furtherance of traditional interests such as safety, security, and discipline—seemed less compelling where, as in *Lechmere*, the property in question was a retail store in a shopping mall to which the public was openly invited for commercial purposes. This diminished interest in limiting access further justified an updated approach to the accommodation between employer property rights and statutory protection for group action.<sup>65</sup>

The Board responded to these changes and formulated a multifactor balancing analysis.<sup>66</sup> Significantly, that analysis included a nuanced concern for “the [varying] extent to which exclusive use of . . . nontrespassory alternatives would dilute the effectiveness of the [union’s] message.”<sup>67</sup> Once again the Supreme Court chose a narrower path, permitting on-site contacts only for employees whose job location leaves them “isolated from the ordinary flow of information that characterizes our society.”<sup>68</sup> Reliance on the single factor of a physically isolated worksite diverted attention from the more difficult challenges that unions today face in communicating with employees. Moreover, by asserting that mere access to workers is “the critical issue,”<sup>69</sup> the Court displayed an attenuated vision of the organizing process. The opportunity to interact with employees in extended substantive terms, to try to convince them regarding the benefits of group action, is a necessary—though hardly sufficient—condition for union success.<sup>70</sup> When unions are denied a meaningful opportunity to persuade during the critical early stages of an organizing campaign, there is less chance that employees will understand why group action might be worth the risk. The Court in *Lechmere* was unwilling to assure or even allow for such an opportunity.

A third key area in which the Board and the Supreme Court have recently disagreed involves access to a protected bargaining relationship for certain types of professional employees who exercise independent authority in their jobs. In *NLRB v. Yeshiva University*<sup>71</sup> and *NLRB v. Health Care and Retirement Corp.*,<sup>72</sup> the Court considered whether groups of professional employees—university faculty and licensed practical nurses—should

---

65. The diluted nature of employer property interests is especially relevant given that a retail establishment in a shopping mall—rather than the stand-apart industrial facility in *Babcock*—is a more typical workplace in today’s service-based economy.

66. Jean Country, 291 N.L.R.B. 11 (1988).

67. *Id.* at 13 (emphasis added).

68. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540 (1992).

69. *Id.*

70. See Estlund, *supra* note 62, at 331 (emphasizing that organizing involves an effort to persuade, not just inform); Gorman, *supra* note 61, at 20 (describing the Court as “trivializing” the § 7 right to learn about the union).

71. 444 U.S. 672 (1980).

72. 114 S. Ct. 1778 (1994).

be excluded from NLRA coverage as managers or supervisors. The issue was important given the perception that unionization among professional employees offered genuine potential for expansion in a post-industrial workforce.<sup>73</sup> The NLRA includes professional employees within its ambit even while explicitly recognizing that such employees are defined by their exercise of independent intellectual judgment in the performance of work.<sup>74</sup> Over the years, the Board had excluded particular individuals as possessing supervisory or managerial status but had not denied employee status to entire groups of professionals.<sup>75</sup> The Board's approach was at least plausible in light of evidence that Congress had contemplated statutory protection for a broad category of professional employees—including those exercising incidental supervisory authority over others—and had meant to exclude only specific persons who held traditional management powers such as control over job security.<sup>76</sup>

The Supreme Court construed the NLRA's exclusions in a more expansive fashion, holding that university faculty as a group were managers and that nurses who directed aides in administering patient care were supervisors. In each case, the Court expressed deep concern over the problem of divided loyalties created by unions. It emphasized that employers, in implementing educational or health care policy, had a right to expect the support of faculty or nurses, and that a bargaining relationship would threaten this right and thereby compromise the employers' professional mission.<sup>77</sup> Yet this concern that unions will impose indirect costs by forcing employers to negotiate over less traditional aspects of

---

73. See generally Marina Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383 (1982); Robert L. Aronson, *Unionization Among Professional Employees in the Private Sector*, 38 IND. & LAB. REL. REV. 352 (1985); David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689 (1990).

74. See 29 U.S.C. § 152(12) (1994) (defining "professional employee" as a subgroup of employees, and emphasizing that professionals perform work that is not "routine" or "standardized" but, rather, is "predominantly intellectual and varied" and requires "the consistent exercise of discretion and judgment").

75. See generally THE DEVELOPING LABOR LAW 1608-18 (Patrick Hardin et al. eds., 3d ed. 1992) (reviewing the Board's case-by-case approach to supervisory and managerial exclusions over several decades).

76. See H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 36 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 540 [hereinafter LMRA LEGIS. HIST.]; S. REP. NO. 105, 80th Cong., 1st Sess. 19 (1947), reprinted in 1 LMRA LEGIS. HIST., supra, at 425 (both describing the wide range of professional employees subject to the Act's protections); S. REP. NO. 105, 4, reprinted in 1 LMRA LEGIS. HIST., supra, at 410 (stating that the statutory definition of supervisor excludes only those "vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action").

77. See NLRB v. Health Care Retirement Corp., 114 S. Ct. 1778, 1783-84 (1994) (discussing the divided loyalty of nurses); NLRB v. Yeshiva Univ., 444 U.S. 672, 689-90 (1980) (discussing the divided loyalty of university faculty).

workplace control implicates the very notion that group action is protected under the NLRA despite the costs imposed on employers.<sup>78</sup> There are admittedly vexing problems of classification in determining whether professionals are seeking leverage regarding a condition of employment or power to shape an entrepreneurial policy. Still, when such professionals feel sufficiently vulnerable to seek unionization, one might expect their claims to be partially—even if imperfectly—accommodated. The Court's restrictive position seems to be reflecting a view that the adversarial and political qualities of group action under the NLRA are incompatible with major aspects of professional employment.

By highlighting several significant Supreme Court decisions, I do not mean to slight the complexity of the doctrinal issues involved in each case.<sup>79</sup> My point is rather that these cases afforded the Court an opportunity to endorse a construction of the Act that would have enhanced the vitality or relevance of group action. In each instance, the construction had been adopted by the expert agency charged with interpreting and enforcing the statute. Accordingly, Supreme Court approval could have been justified under traditional notions of agency deference even without wholehearted agreement on the merits.<sup>80</sup> Yet on each occasion the Court reached out to reject the Board position. In doing so, the Court chose to emphasize the risks and costs of the collective bargaining process rather than its possibilities and benefits. The decisions in these cases signal a genuine reluctance to support group action as a method of ordering workplace relations outside of traditional narrowly defined industrial settings.

---

78. See GETMAN & POGREBIN, *supra* note 20, at 21 (asserting that the Court failed to explain why the risk of divided loyalty was especially severe for faculty members); George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law*, 37 ARIZ. L. REV. 525, 559 (1995) (arguing that the harm of divided loyalty is "the same as that feared by every employer whose workers unionize").

79. See, e.g., Feldman, *supra* note 78 (describing the Supreme Court's struggles to reconcile tension between professional employees' desire for collective protection and their employers' insistence on hierarchical workplace relations); Michael C. Harper, *Leveling the Road From Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982) (suggesting that the courts have pursued a murky doctrinal path in restricting labor bargaining to certain mandatory subjects); David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 175 (1989) (discussing the difficulty of distinguishing management from labor in the context of the Taft-Hartley Amendments and subsequent Supreme Court decisions). I also do not mean to suggest that these are the only recent areas of NLRA interpretation in which the relevance of group action for contemporary workplace law has been presented. See, e.g., *Trans World Airlines v. Independent Fed. of Flight Attendants*, 489 U.S. 426 (1989) (reaffirming the permanent replacement doctrine in the analogous setting of the Railway Labor Act, and protecting the employment status of junior crossovers at the expense of more senior strikers).

80. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-87 (1990) (deferring to the NLRB because it "has the primary responsibility for developing and applying national labor policy"). See generally *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (contending that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator").

#### D. *The Courts of Appeals Distrust Group Action*

When examining decisions by the courts of appeals, the high volume of cases reviewing NLRB orders allows for a more rigorous quantitative approach.<sup>81</sup> I recently gathered data on over twelve hundred appellate court decisions rendered between late October 1986 and early November 1993 that reviewed adjudications by the NLRB.<sup>82</sup> This seven-year period is both lengthy and recent enough to reflect the range of contemporaneous differences in outcome and perspective between the Board and the courts. Further, partisanship and ideology are likely to have played only a minimal role in accounting for whatever Board-court differences exist, because appointments by Presidents Reagan and Bush dominated both the Board and the appellate bench during this period.<sup>83</sup> As part of data collection for the population of appellate court cases, I coded Board results and court outcomes based on the specific NLRA issues adjudicated by the Board and litigated on appeal.<sup>84</sup> My analysis of these issue-specific outcomes focused principally on two types of Board cases—determinations of

---

81. In contrast to the 198 Supreme Court decisions reviewing the Board's interpretations of the NLRA since 1940, the courts of appeals have decided thousands of cases enforcing, modifying, or setting aside the Board's orders. See 55 NLRB ANN. REP. 191 (1990) (Table: Litigation for Enforcement and/or Review of Board Orders, 1990; and Cumulative Totals, Fiscal Years 1936-90) (noting 9999 courts of appeals decisions between July 5, 1935 and Sept. 30, 1990).

82. For a more extensive discussion of empirical method and results, see Brudney, *supra* note 6, at 965-88.

83. Virtually every Board order reviewed by the courts of appeals between late 1986 and late 1993 was issued by the Board between January 1985 and December 1992. The 11 Board members who served during this period were appointed by Presidents Reagan (nine appointees) or Bush (two appointees and two re-appointments), according to the listing of Board members at the front of *Decisions and Orders of the National Labor Relations Board*, volumes 273 through 309. As of October 1986, President Reagan had appointed 59 active appellate court judges, and Republican presidents had appointed a total of 85 active circuit court judges as compared with 63 appointed by Democratic presidents. Reagan appointees constituted an absolute majority on four circuits—the Second, Sixth, Seventh, and D.C. Circuits—each of which reviewed a high volume of Board decisions. Democratic appointees constituted a majority on only one circuit—the Eleventh—which heard relatively few Board cases. By November 1993, Reagan and Bush appointees numbered 99 active judges out of 146, and they constituted a clear majority in every circuit except the Fourth. Even there, Republican appointees outnumbered Democrats by 9 to 4. See *Judges of the Federal Courts with Date of Appointment*, 810 F.2d at vii-xxviii (1987); *Judges of the United States Courts of Appeals with Date of Appointment*, 9 F.3d at vii-xiv (1994). These numbers exclude appointments to the Federal Circuit Court of Appeals because that circuit's jurisdiction does not extend to appeals from NLRB decisions. See 28 U.S.C. §§ 1292, 1295 (1994).

84. For instance, if the Board result being reviewed involved a violation of § 8(a)(5), the classification of case outcomes was broken down into one or more of six issue codes that reoccurred with some frequency in appellate court opinions: bad faith bargaining, good faith doubt as to continued majority status, failure to comply with information requests, disagreement as to whether a topic was a mandatory subject of collective bargaining, unilateral contract modifications, and a general § 8(a)(5) catchall. Technical violations of § 8(a)(5)—consisting of employer challenges to the Board's certification of the union pursuant to § 9—were identified separately and then classified either as challenges to the identity or scope of the bargaining unit, or as challenges to union/employees' conduct during the campaign.

employer liability under section 8(a) and decisions granting requested relief for that liability under section 10(c).<sup>85</sup>

One noteworthy conclusion was that Board determinations of liability for bargaining-related unfair labor practices under section 8(a)(5) were reversed<sup>86</sup> at a rate significantly<sup>87</sup> higher than the reversal rate for the two other major employer violations—sections 8(a)(1) and (3).<sup>88</sup> The higher reversal rate for bargaining-related misconduct may reflect a sympathy for individual rights combined with a distrust for collective action. Judicial distrust in turn may result from a lack of familiarity with bargaining-related concepts or an underlying dislike for such concepts; each of these possibilities is explored in Part II.

Tension between group action and individual rights is contained within the NLRA itself. Of particular relevance here is the Act's simultaneous commitment to the importance of collective action by workers and the right of those same workers to choose the entity that will represent them. In seeking to reconcile a statutory goal of maintaining, and at times establishing, collective bargaining relationships with a goal of protecting employees' free choice of their bargaining representative, the Board and the courts of appeals conspicuously diverged during the period from 1986 through 1993.

Specifically, Board determinations were reversed at a significantly high rate on two issues that directly affect the survival of a collective bargaining relationship. These issues were (i) section 8(a)(5) liability determinations in which an employer refused to bargain based on asserted

85. These are the two largest case categories—over 90% of court decisions reviewed Board determinations of § 8(a) liability, § 10(c) relief against an employer, or both. See Brudney, *supra* note 6, at 971. Accordingly, they offered the greatest scope for classification into subgroups of meaningful size. Employer liability and remedies against employers also are the two categories that lie at the core of the Act's mission of regulating and protecting employee efforts to organize and engage in collective bargaining.

86. "Reversal rate" refers to the rate at which Board determinations are reversed, remanded, or modified, not simply reversed. "Affirmance rate" (which is 100% minus the reversal rate) refers to the rate at which Board determinations are affirmed or enforced in full.

87. The use of "significantly" in this section refers to results that are statistically significant, using the chi-square statistic (Pearson's coefficient). A significant chi-square statistic warrants rejecting the null hypothesis and concluding that the two variables analyzed—in this instance, the Board's finding (§ 8(a)(5) violation versus § 8(a)(1) or § 8(a)(3) violation) and a court's decision (affirmance versus reversal)—are related. A result that is significant at the .05 level means that there is only a 5% chance that a true hypothesis (*i.e.*, no relationship) was rejected. See HUBERT M. BLALOCK, JR., *SOCIAL STATISTICS* 157-64 (rev. 2d ed. 1979). I follow the common social science convention of treating results that are significant at the .05 level as "statistically significant." See IVY LEE & MINAKO MAYKOVICH, *STATISTICS: A TOOL FOR UNDERSTANDING SOCIETY* 281-82 (1995); BLALOCK, *supra*, at 161.

88. There were 102 reversed § 8(a)(5) issues and 544 affirmed § 8(a)(5) issues, a reversal rate of 15.8%. By contrast, there were 108 reversals and 772 affirmances on issues of § 8(a)(1) or 8(a)(3) liability, a reversal rate of 12.3%.

good faith doubt as to the union's continued majority status, and (ii) the imposition of bargaining orders as a remedy, either to establish initial recognition and bargaining status (pure *Gissel*<sup>89</sup> bargaining orders) or to restore recognition of incumbent unions (status quo ante bargaining orders). Courts of appeals reversed section 8(a)(5) determinations based on the good faith doubt issue at a rate significantly above the aggregate reversal rate for all other section 8(a) determinations.<sup>90</sup> Similarly, the courts reversed Board-imposed bargaining orders at a rate significantly in excess of the combined reversal rate for all other "relief against employer" determinations.<sup>91</sup> Judicial reversals on these two issues also occurred in fairly high volume and across a large number of circuits.<sup>92</sup> Further, the good faith doubt and bargaining order issues are related in that both involve Board efforts to protect or promote bargaining relationships in the face of employer assertions that individual employee choice is being compromised. Given the steady attrition in the proportion of the private workforce that operates under a collective bargaining agreement, recurring disagreements

---

89. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969) (approving the use of a bargaining order by the Board in order to counteract employer unfair labor practices during the representation campaign that have a "tendency to undermine majority strength and impede the election process").

90. The reversal rate for 51 good faith doubt issues was 25.5%; the aggregate reversal rate for all other "employer liability" determinations (a total of 1512 issues) was 13.9%. Very few other § 8(a) issues were reversed at a rate significantly above the norm, and almost all of these occurred far less frequently than the good faith doubt issue—for example, § 8(a)(2) occurred as an appellate court issue 11 times; § 8(a)(4) occurred as an issue 13 times. The one statistically significant employer liability issue with a comparably frequent reversal rate was the refusal to provide information requested by the union, also a bargaining-related unfair labor practice under § 8(a)(5). See *supra* note 84; Brudney, *supra* note 6, at 981-86.

Reversal rates between 13% and 26% underrepresent—perhaps substantially—the full measure of Board-court disagreements regarding the substantive meaning of the Act. Employers found liable for discriminatory discharges or failures to bargain often pursue appeals—or force the Board to seek enforcement—primarily to delay final resolution and thereby effectively chill employee organizing efforts or diminish the prospects for negotiation of first contracts. The presence of such strategic motives unrelated to the merits inflates the affirmance rate and masks the extent of genuine conflict between the Board and courts of appeals. See *id.* at 974-76.

91. The reversal rate for 42 bargaining order issues was 38.1%; the aggregate reversal rate for all other "relief against employer" determinations (a total of 170 issues involving, for example, backpay awards, reinstatement, continued operation of certain programs or facilities, and broad cease-and-desist directives) was 25.3%.

92. Ten different circuit courts reversed the Board on a total of 13 good faith doubt issues, while six different circuits reversed 16 Board bargaining orders. The absolute number of reversals for the good faith doubt and bargaining order issues may not seem large. Yet from the Board's perspective, one—or at most two—issue-specific reversals by a circuit court within a relatively short time period may constitute an ominous if not definitive statement of the circuit's position on that issue. The Board may even seek to avoid subsequent enforcement efforts in that circuit by opting to litigate in another circuit where feasible or by settling the dispute. The number of different circuits in which the Board was reversed on these two issues may, therefore, be a more realistic indication of the magnitude of Board-court tensions.

over whether a collective bargaining relationship should be established or maintained assume special importance.

From a doctrinal standpoint, the high reversal rates on these two issues are attributable to diverse disagreements over matters of substantive NLRA law. With regard to the good faith doubt issue, the Board and the courts differed on a range of discrete legal questions that included (i) whether an employer may presume that replacement workers hired during an economic strike oppose the union,<sup>93</sup> (ii) whether an employer may poll its employees to determine possible loss of majority support based on a "lesser" showing of employee discontent than is required to justify employer withdrawal of recognition,<sup>94</sup> and (iii) whether a decertification election or petition tainted by employer misconduct may be used as evidence to support the employer's subsequent assertion of good faith doubt.<sup>95</sup> With respect to the bargaining order issue, the Board and courts disagreed on distinct questions of statutory meaning, including (i) whether the decision to issue a *Gissel* order requires consideration of how "changed circumstances" since the violations were committed (*e.g.*, employee turnover, employer replacement of key wrongdoers, the passage of time) may have improved the prospects for a fair election,<sup>96</sup> (ii) whether the Board

93. Compare *Station KKHJ*, 284 N.L.R.B. 1339, 1344-45 (1987) (concluding that striker replacements should not be presumed to oppose the union, and that an employer challenging an incumbent union's status in connection with a strike must justify its refusal to bargain by producing objective evidence that striker replacements have repudiated the union in sufficient numbers to establish good faith doubt) with *Bickerstaff Clay Prods. Co. v. NLRB*, 871 F.2d 980, 988-89 (11th Cir. 1989), denying enforcement of 286 N.L.R.B. 295 (1987), cert. denied, 493 U.S. 924 (1989), and *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362, 367 (5th Cir. 1988), denying enforcement of 287 N.L.R.B. 350 (1987), *rev'd*, 494 U.S. 775 (1990) (both relying on the presence of striker replacements as itself supporting employer's good faith doubt). The Supreme Court ended this appellate court trend in 1990 when it sustained the Board's position as a reasonable exercise of its discretion. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 796 (1990).

94. Compare *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1059-63 (1989) (applying the same "reasonable good faith doubt" standard to assess whether an employer may poll its employees that is applied to assess whether an employer may withdraw recognition) with *Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398, 402 (5th Cir. 1991), modifying 296 N.L.R.B. 1057 (1989), and *Clesco Mfg. Div. of Cleveland Sales Co. v. NLRB*, 915 F.2d 1570 (6th Cir. 1990) (unpublished disposition), 1990 WL 142349, at \*\*3, modifying 292 N.L.R.B. 1151 (1989) (both allowing the employer to conduct a poll based on substantial, objective evidence of loss of union support even if that evidence does not justify withdrawal of recognition).

95. Compare *Sullivan Indus.*, 302 N.L.R.B. 144, 149 (1991) (concluding that an employer was not permitted to rely on a tainted decertification petition) and *St. Agnes Medical Ctr.*, 287 N.L.R.B. 242, 258 (1987) (noting that employee decertification efforts tainted by employer unfair labor practices may not be used to support good faith doubt) with *Sullivan Indus. v. NLRB*, 957 F.2d 890, 898-99 (D.C. Cir. 1992), denying enforcement of 302 N.L.R.B. 144 (1991), and *St. Agnes Medical Ctr. v. NLRB*, 871 F.2d 137, 146-47 (D.C. Cir. 1989), denying enforcement in part of 287 N.L.R.B. 242 (1987) (both requiring the Board to examine the totality of circumstances in each case to determine whether employer misconduct significantly contributed to employees' subsequent attempt to decertify their union and, therefore, justifies excluding evidence of such a decertification effort).

96. Compare *M.P.C. Plating Inc.*, 295 N.L.R.B. 583, 583-84 (1989) and *Impact Indus., Inc.*, 285 N.L.R.B. 5, 6 (1987) (both concluding that any Board consideration of post-violation events as

must make detailed findings as to the need for a bargaining order instead of a more traditional remedy,<sup>97</sup> and (iii) whether the Board's longstanding policy favoring orders to restore pre-existing bargaining relationships wrongfully terminated by the employer was modified by the *Gissel* decision which applied to nonincumbent unions seeking initial recognition.<sup>98</sup>

Underlying these reversals, however, is a persistent conflict in values between the Board and the courts of appeals. The NLRA recognizes both the central value of stable collective bargaining relationships and the importance of the right of free choice, including the right to refrain from union membership or representation. The Board's restrictive approach to employer professions of good faith doubt and its recourse to bargaining orders in other than extreme circumstances reflect a primary attention to the value of stable bargaining relationships.<sup>99</sup> By establishing a high threshold for evidence of employee opposition to the union that a majority had earlier empowered, and by postponing the employees' opportunity to reject that union for an extended "reasonable" period, the Board temporarily subordinates individual choice in order to encourage the success of

---

"mitigating" would effectively reward employers for their wrongdoing and encourage employers to prolong litigation in order to avoid their bargaining obligation) *with* *Camvac Int'l, Inc. v. NLRB*, 877 F.2d 62 (6th Cir. 1989) (unpublished disposition), 1989 WL 65727, at \*\*3, *remanding* 288 N.L.R.B. 816 (1988), *and* *Impact Indus., Inc. v. NLRB*, 847 F.2d 379, 383 (7th Cir. 1988), *remanding* 285 N.L.R.B. 5 (1987) (both insisting that the Board fully and carefully consider such changed circumstances in order best to effectuate employee free choice at the time the bargaining order issues).

97. *Compare* *Somerset Welding & Steel, Inc.*, 304 N.L.R.B. 32, 33-34 (1991) *and* *Montgomery Ward & Co.*, 288 N.L.R.B. 126, 129-30 (1988) (both offering only a brief explanation for preferring a bargaining order to traditional remedies and invoking the Board's broad authority to select the most appropriate remedy for employer misconduct) *with* *Somerset Welding & Steel, Inc. v. NLRB*, 987 F.2d 777, 780-82 (D.C. Cir. 1993), *remanding* 304 N.L.R.B. 32 (1991), *and* *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1159 (7th Cir. 1990), *remanding* 288 N.L.R.B. 126 (1988) (both demanding that the Board provide a detailed and reasonable explanation for the unavailability or inadequacy of more traditional remedies).

98. *Compare* *Williams Enters.*, 312 N.L.R.B. 937, 940-42 (1993) *and* *Inland Steel Co.*, 9 N.L.R.B. 783, 814-16 (1938), *remanded on other grounds*, 109 F.2d 9 (7th Cir. 1940) (both viewing a bargaining order in an incumbent union setting as the customary restorative remedy for wrongful refusal to bargain, and declining to give any specific *Gissel*-type justification for the order) *with* *NLRB v. Thill Inc.*, 980 F.2d 1137, 1142-43 (7th Cir. 1992), *denying enforcement in relevant part of* 298 N.L.R.B. 669 (1990), *and* *Sullivan Indus.*, 957 F.2d at 903-05, *and* *NLRB v. Laverdiere's Euters.*, 933 F.2d 1045, 1053-56 (1st Cir. 1991), *remanding* 297 N.L.R.B. 826 (1990) (all refusing to enforce incumbent-restoration bargaining orders, and relying on the *Gissel* balancing analysis to conclude that an election or a cease-and-desist order were the only suitable remedies).

For a detailed treatment of doctrinal disagreements between the Board and the courts regarding the good faith doubt and bargaining order issues, see Brudney, *supra* note 6, at 988-1018.

99. The Board certainly does not *ignore* employee choice as a statutory value. When minimizing employer doubts or assertions about majority status, the Board invokes previously expressed majority support as what it considers the best available evidence of *genuine* employee free choice. See *Conair Corp. v. NLRB*, 721 F.2d 1355, 1394-95 (D.C. Cir. 1983) (Wald, J., dissenting) (describing the dilemma of "how the employees, having been subjected to relentless employer pressures not to choose a union, can be best restored to some kind of equilibrium in which they can choose freely for or against the Union"), *cert. denied*, 467 U.S. 1241 (1984).

the collective bargaining enterprise. The Board's pronounced preference for fostering bargaining stability is consistent with the Act's original emphasis on preserving and promoting the collective bargaining process, and is well rooted in the Board's own historic practices.

While the Board gives primary weight to preserving or establishing bargaining relationships based on earlier evidence of majority employee endorsement, the courts of appeals have worried more about the risk of retaining or imposing a representative that current employees may not want. In their sympathetic treatment of good faith doubt assertions and their skeptical approach to bargaining orders, the courts have elevated the value of employee free choice, allowing employers to become in effect a primary vehicle for expression of their employees' discontent. The courts have minimized the goal of deterring employer misconduct and have largely ignored the objective of establishing, maintaining, or restoring bargaining stability. Their recalibration of the statutory balance toward individual choice and away from group action represents not only a break with original congressional intent but also a departure from related Supreme Court pronouncements on these matters.<sup>100</sup> In regularly discrediting Board expertise and discretion on the good faith doubt and bargaining order issues, the courts of appeals have defied conventional Supreme Court wisdom in this regard as well.<sup>101</sup>

The extraordinary and deep-seated Board-court tension identified here has weakened the status of group action under the NLRA. One specific example is the precipitous decline in the number of initial recognition

---

100. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987) (recognizing the value of preserving bargaining stability in the successor employer context because such stability "enable[s] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support"); *NLRB v. Financial Inst. Employees of Am., Local 1182*, 475 U.S. 192, 209 (1986) (observing that "allow[ing] employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace]" (quoting *Brooks v. NLRB*, 348 U.S. 96, 103 (1954))); cf. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 794 (1990) (observing that the Board's refusal to assume that workers hired to replace striking employees would be against union representation was consistent with its presumption of continuing majority support for a union, and that this presumption eliminates any incentive for an employer to delay good-faith bargaining in an effort to undermine union strength). See generally *Brooks*, 348 U.S. at 100-03 (discussing the union certification and decertification provisions of the NLRA and concluding that "Congress has devised a formal mode for selection and rejection of bargaining agents . . . with a view of furthering industrial stability").

101. See, e.g., *Curtin Matheson Scientific, Inc.*, 494 U.S. at 786-87 (discussing the Court's approach of according Board rules considerable deference as long as the rule is rational and consistent with the NLRA); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612-15 (1969) (giving the Board broad deference on when to apply a bargaining order as a remedy). See generally *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984) (propounding the general rule that, in reviewing an agency's decision, a court will respect the agency's regulations "unless they are arbitrary, capricious, or manifestly contrary to the statute" that conveys authority to the agency).

bargaining orders issued since 1970. In the late 1960s when *Gissel* was litigated and decided, the Board was imposing over one hundred bargaining orders per year.<sup>102</sup> Although the *Gissel* decision unanimously sustained the Board's broad remedial authority to issue such orders, the courts of appeals have expressed discomfort over the exercise of that authority almost from the moment *Gissel* was decided.<sup>103</sup> The number of *Gissel* orders issued by the Board fell to sixty-seven per year during the 1970s and to approximately fifteen per year in the late 1980s and early 1990s.<sup>104</sup> While *Gissel* orders are hardly a panacea to assure stability or continuity of collective bargaining,<sup>105</sup> they can enable unions to procure a first contract in a substantial number of situations.<sup>106</sup> Yet in light of the remarkable judicial hostility to this exercise of Board authority, one might well suspect that the courts of appeals have contributed to the ultimate weakness of the bargaining order remedy, and even effectively encouraged employer opposition to bargaining.

The courts' resistance to bargaining stability in these two areas also has broader implications. Because their reviewing relationship with

---

102. See *Gissel*, 395 U.S. at 596 n.7 (noting that the Board issued 117 bargaining orders based on a card majority in 1966 and 157 in 1967); Memorandum from Robert Volger, NLRB Deputy Executive Secretary, to John R. Van de Water, NLRB Chairman (Sept. 14, 1981) (reporting that the Board issued 139 bargaining orders in 1968 based on a card majority that was subsequently destroyed by employer unfair labor practices, and 92 such bargaining orders in 1969) (on file with the *Texas Law Review*).

103. See, e.g., *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1369-72 (7th Cir. 1983) (Posner, J.); *NLRB v. General Stencils, Inc.*, 472 F.2d 170, 173-76 (2d Cir. 1972) (Friendly, J.). See generally Terry A. Bethel & Catherine A. Melfi, *Judicial Enforcement of NLRB Bargaining Orders: What Influences the Courts?*, 22 U.C. DAVIS L. REV. 139 (1988) (identifying various factors that make a court's enforcement of a bargaining order less likely).

104. See Brudney, *supra* note 6, at 1008 & n.223 (concluding that the Board issued at most 15 bargaining orders per year between 1985 and 1993); Benjamin W. Wolkinson et al., *The Remedial Efficacy of Gissel Bargaining Orders*, 10 IND. REL. L.J. 509, 509 n.2 (1989) (noting that the Board issued an average of 67.5 *Gissel* orders per year between 1970 and 1979). The decline of 85% since *Gissel* was decided substantially exceeds the 50% decline in election activity during this period. Moreover, given that the number of § 8(a)(3) charges increased by 28% between 1970 and 1990, one can scarcely attribute the decrease in *Gissel* orders to increased law-abiding conduct by the employer community. See Brudney, *supra* note 6, at 1009 & n.227.

105. A remedy that simply requires the parties to sit down and negotiate cannot guarantee that the process will end in a collective bargaining agreement, particularly when one party already has demonstrated unlawful hostility to the very presence of the other. Moreover, some scholars have questioned *Gissel's* underlying assumption that employer misconduct really alters election results on a sufficiently regular basis to justify a bargaining order remedy. See generally JULIUS G. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 113-16 (1976).

106. See Weiler, *supra* note 13, at 1795 n.94 (citing a 1982 study indicating that 37% of unions operating under a *Gissel* order procured a first contract). While this was less than the 63% of certified unions that obtained a first contract, *id.*, it was doubtless more than the proportion of unions that win a re-run election and go on to secure such a contract. See generally Daniel H. Pollitt, *NLRB Re-Run Elections: A Study*, 41 N.C. L. REV. 209, 212 (1963) (concluding that objecting unions won 30% of re-run elections in 1960-62). Assuming *arguendo* that 63% of unions studied by Pollitt secured a first contract, 19% of re-run elections would have resulted in a collective bargaining agreement.

agencies is regular and constant instead of discretionary and episodic, intermediate court decisions arguably have a more lasting effect on agency conduct than do Supreme Court rulings. This is especially relevant for an older statute such as the NLRA. As the Supreme Court directs less attention to questions of NLRA construction,<sup>107</sup> the courts of appeals are likely to have the final word on statutory meaning. In the instant setting, the courts have exhibited a profound distrust for promoting stability in bargaining relationships because they perceive the continuity and longevity of such relationships as a threat to individual freedom of choice. This subordination of collective bargaining and elevation of individual rights is one more example of how group action has been eclipsed in the law of the workplace.

## II. Seeking Insights Within the Legal System

The series of developments in federal workplace law described in Part I reveals the decline of group action as a robust concept animating regulation of employment relations. I want to suggest several lines of inquiry that may help in understanding the dramatic changes that have occurred. My focus here is on the legal system, in particular the judicial and legislative branches that have shaped workplace law. While larger economic and social factors obviously contribute to legal change, there is a dynamic within the legal structure that deserves separate analysis.

### A. Courts as Agents of Change

Statutes, particularly comprehensive regulatory schemes like the NLRA, are generally meant to be effective over an extended period. Courts interpreting such regulatory laws decades after enactment face the challenge of implementing original legislative objectives while responding to social and legal developments that were unforeseen or even unforeseeable at the time of passage. Courts interpreting the NLRA in more recent times have been criticized for failing to meet that challenge. To what extent are the federal courts responsible for undermining the Act's promise?

One can make a case for judicial subversion. The Supreme Court on several key occasions has declined to recognize or credit the evolving potential of collective action. It has restricted bargaining on a pressing subject in today's uncertain economy<sup>108</sup> and limited access to the bargaining relationship for prominent groups of employees in the modern

---

107. See *supra* note 40.

108. See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (holding that an employer's decision to deprive employees of job security is not itself subject to mandatory bargaining).

workforce.<sup>109</sup> By overruling Board applications of the NLRA's collectivist premise, the Court has prevented the statute from achieving its stated policy in a new employment environment.

Subversion may stem from lack of understanding rather than lack of sympathy. The courts of appeals in recent years have shifted priority away from establishing or preserving stable bargaining relationships. In seeking to explain the significant reversal rate for section 8(a)(5) violations compared with employer violations of sections 8(a)(1) and (3), one might point to the distinctive nature of bargaining-related misconduct. Allegations of unlawful threats and promised benefits under section 8(a)(1), or of discriminatory discharges and layoffs under section 8(a)(3), typically involve employer actions directed against individual employees. Such employer speech or conduct is comparable to prohibited activity in other areas of public law.<sup>110</sup> Courts reasoning by analogy may, therefore, find it easier to accept, or at least to engage and incrementally influence, the Board's analytic approach. By contrast, an unlawful refusal to bargain under section 8(a)(5) entails employer conduct directed against the union as an entity. Allegations that an employer failed to show good faith doubt as to the union's continued inmajority status, or that it has not provided the union with requested information relevant to the bargaining process, implicate a clash of complex strategies between two collective enterprises, both at and away from the bargaining table. The assessment of bargaining dynamics required under section 8(a)(5) has no obvious parallels in public law outside the NLRA. Accordingly, a lack of judicial familiarity with the types of misconduct that threaten the collective bargaining enterprise may leave courts less willing to accept or even defer to Board contentions predicated on the importance of that enterprise.

A more skeptical observer might add that federal courts in general are sufficiently distrustful of group action as a concept to doubt that it should prevail when the group's agenda conflicts with more familiar and favored legal norms. In that regard, high reversal rates may reflect the judgment—often not fully articulated—that a union's interest in stable and successful bargaining relations is outweighed by an employer's interest in retaining absolute control over "sensitive" entrepreneurial decisionmaking, or by the risk that assertions of employee discontent signal a loss of majority support for the union.

---

109. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (limiting effective access for retail and service employees); *NLRB v. Health Care & Retirement Corp.*, 114 S. Ct. 1778 (1994); *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (both limiting access for groups of professional employees).

110. See 26 AM. JUR. 2D *Elections* §§ 374-385 (1966) (discussing the range of political election misconduct analogous to § 8(a)(1) that is prohibited by federal or state law, including electioneering, bribery, illegal advertising, and voter intimidation); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-52 (1989) (plurality opinion); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-87 (1977) (both addressing mixed motive discriminatory conduct issues analogous to § 8(a)(3)).

Even if federal courts have been generally suspicious of unions and group action,<sup>111</sup> one must still explain why judicial reservations when construing the NLRA have intensified in recent years. In subordinating the central idea of "encouraging the practice and procedure of collective bargaining,"<sup>112</sup> the courts seem to be relying at least implicitly on changes in extrinsic legal norms to enhance the value of individual employee freedom.<sup>113</sup> One such change, previously discussed, is the ascension of a statutory regime in which individual rights and choices are controlling and unions receive little or no credit for ameliorating employees' economic difficulties.<sup>114</sup> Under this new statutory order, the importance of group action to redress economic imbalance may be less readily apparent to federal judges. Another change is the constitutionalization of the right to refrain, whereby the Supreme Court has established an individual's right not to participate in, or be identified with, the speech or conduct of a group to which she is compelled to belong.<sup>115</sup> Employees are now perceived as having valid *constitutional* interests in objecting to certain aspects of forced union association. One result may be that courts of appeals are

---

111. Federal judges traditionally have had far more in common with management than organized labor in terms of both class background and ideological orientation. Prior to enactment of the NLRA, federal courts were consistently hostile to workers' interest in unionization and collective action. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 33, 52 n.79, 151-52, 199-201 (1991) (citing reasons for and examples of courts taking antilabor positions). See generally WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994). Since 1935, federal courts have often been viewed as limiting, if not undermining, protections accorded under the NLRA for various forms of concerted activity. See, e.g., CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 239-241 (1985); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941*, 62 *MINN. L. REV.* 265, 293-336 (1978).

112. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151 (1994)).

113. One could argue that the courts of appeals are in fact relying on *intrinsic* legal norms by acceding proper respect to the employees' right to refrain from union-related activity under Taft-Hartley. But as noted earlier, Taft-Hartley focused on union misconduct that interfered with employees' new § 7 choice to refrain. The good faith doubt and bargaining order issues involve no such union misconduct. Rather, they presuppose wrongdoing by an employer that then asserts employee free choice as a shield against liability or substantial affirmative relief.

114. See *supra* text accompanying notes 28-32.

115. Over the past 35 years, the Court has given broad recognition to a First Amendment protection against government-compelled speech or association. See, e.g., *Keller v. State Bar*, 496 U.S. 1 (1990) (holding that the state bar's use of attorneys' mandatory dues to further its political and ideological views opposed by petitioners violated petitioners' right of free speech); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that an individual has a right to refrain from displaying the state motto on her license plate); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) (holding that a union cannot use an objecting employee's dues to support political causes the employee opposes). Moreover, by relying—explicitly or implicitly—on the canon of construing statutes to avoid constitutional problems, the Court has strengthened the right of private employees to refrain from certain union activities under federal labor law. E.g., *Street*, 367 U.S. at 749-50 (construing the Railway Labor Act); *Communication Workers v. Beck*, 487 U.S. 735, 745-54 (1988) (construing the NLRA).

implying a comparable constitutional urgency when considering employees' interest in objecting to representation that assertedly no longer enjoys majority support.<sup>116</sup>

Diminished judicial respect for group action in the workplace is probably attributable in part to each factor identified here: fading familiarity with the concept of collective bargaining, an underlying distaste for the concept, and increased deference to competing legal norms. Whatever weight attaches to these different factors, the Supreme Court's refusal to extend core NLRA policy, and the appellate courts' weakening of that policy, raise the same interpretive dilemma. Congress in 1935 and 1947 imposed a comprehensive self-contained regulatory scheme that ordered an entire area of law. Judicial efforts to retreat from that scheme seem to reflect less disagreement over what Congress meant than discomfort over the wisdom of adhering to what Congress is known to have meant,<sup>117</sup> or at least what the Board rationally concludes is consistent with the Act's meaning.<sup>118</sup> Yet isn't Congress, and not the judiciary, the proper place to debate and resolve concerns about the wisdom of NLRA policy? And doesn't Congress's failure to pass significant reform in either direction for fifty years indicate a lack of consensus to alter the historic scheme?

### B. *Legislative Silence*

The questions just posed implicate larger concerns about basic theories of statutory interpretation for which there are no easy answers.<sup>119</sup> For my purposes, however, a few observations can be made. Federal courts operate in the present to resolve current legal controversies. It may be unreasonable to expect that, when construing inconclusive text from an older statute, federal courts can or should ignore substantial intervening changes in legal norms or political circumstances. It may even be too

---

116. Courts seem to be implying this additional urgency even though the employees' interest as objectors is typically asserted not by them but by their employer. The Board has been less willing to credit at face value such employer concerns.

117. Cf. *NLRB v. K & K Gourmet Meats Inc.*, 640 F.2d 460, 470-74 (3d Cir. 1981) (Gibbons, J., dissenting) (suggesting that judges on the Third Circuit who believe *Gissel* was wrongly decided are engaged in "guerilla warfare" to alter the legislative balance that had been struck in favor of bargaining orders).

118. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (stating that a rational Board interpretation consistent with the Act should be upheld even if the Court would have formulated a different rule and even if it represents departure from prior Board policy, and adding that the Board's use of an evolutionary approach to update the Act's application "is particularly fitting").

119. See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 69-80 (1994) (contending that courts inevitably interpret statutes to make them effective over time in light of changing social, political, and legal circumstances); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (suggesting that judges called upon to interpret a statute should engage in imaginative reconstruction in which they try to ascertain how the enacting legislators would have wanted the statute applied to the case at bar).

much to expect that federal courts, through their creative and superintending authority of implementation, will continue to infuse vitality into legal concepts that Congress has not reaffirmed for many decades and seems to have lost interest in monitoring. Moreover, as the interpretive enterprise is further removed from its statutory origins, predicting or controlling the relationship between interpretation and central theme becomes more difficult. Periodic renewal of legislative interest may be needed to guide, if not shape, the direction of judicial efforts.<sup>120</sup> What these observations suggest is that the legislative branch *matters* over the long term, and its extended silence with regard to an entire statutory scheme may send a cautionary signal to generalist courts.<sup>121</sup> Even if the courts can be criticized for their recent interpretive judgments, it may be helpful to probe further into the significance of Congress's own conduct.

One important aspect of recent legislative performance has been the failure of Congress to renew a commitment to the NLRA's central idea of encouraging group action. The absence of public and political reaffirmation for the NLRA in part reflects more general patterns of long-term institutional behavior.<sup>122</sup> Major legislative programs such as the NLRA cannot indefinitely sustain high levels of public interest and political leadership. Organized adherents become tired, they shift attention to other public issues, or their power diminishes. A continuing regulatory presence itself serves to placate public concern that the problem must be addressed. Further, regulated entities over time use superior resources to help soften public attitudes regarding the urgency of the problem. And new generations of politicians are reluctant to fight for a regulatory approach that their constituents do not overwhelmingly or fervently endorse.

---

120. The ongoing dialogue between Congress and the courts in the area of federal antidiscrimination law is instructive in this regard. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (overriding numerous Supreme Court decisions); Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (overriding Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989)); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (overriding *Grove City College v. Bell*, 465 U.S. 555 (1984)); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (overriding *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)); ADEA Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (overriding *United Air Lines v. McMann*, 434 U.S. 192 (1977) and endorsing *Lorillard v. Pons*, 434 U.S. 575 (1978)). *See generally* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1 (1994).

121. Further, one cannot necessarily expect that federal courts will defer as readily to administrative interpretations of the original text. Agency officials charged with implementing a regulatory statute like the NLRA have no occasion to consider the prolonged silence of Congress and no responsibility to consider intervening developments in the broader legal culture. Thus, insofar as courts conclude that Congress has modified or weakened its commitment to the original text, the agency's fidelity to that text may be of little moment. *See* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 49 (1982).

122. *See generally* MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 74-95 (1955) (setting forth a model of agency obsolescence from which many of the identified characteristics can be borrowed to describe aging statutes as well).

A necessary condition for legislative change is the perception by Congress that an urgent problem needs to be addressed. Although many legal academics and members of organized labor have pleaded this case, a majority of the relevant policy community<sup>123</sup> working in and around Congress remains unpersuaded. The NLRB as the implementing agency might be expected to help advocate for reform, but it has not done so. The Board's short-term interest seems to be in maintaining a low profile, thereby avoiding risks in the policy arena. Such a profile reduces the chance that organized labor or the management community will retaliate by triggering punitive action from a congressional committee.<sup>124</sup> Yet the expert agency's unwillingness to discuss the need for serious change probably reinforces a legislative tendency to inertia regarding the existing federal approach.

Absent legislative reform, Congress might still generate substantial intensity of interest in the NLRA by exercising its own oversight powers. Traditionally, congressional oversight has been a lesser priority for members, ranking well behind legislating and service to constituents.<sup>125</sup> Congress has used oversight of the bureaucracy more often since the 1970s to stimulate agency and public sensitivity to the importance of particular

123. By "policy community," I refer to legislators, congressional staffs, interest groups, academic experts, and agency personnel who devote significant attention to labor-management relations. See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* 92, 122-23 (1984) (suggesting that policy communities are composed of specialists in a given policy area who become interested in certain problems related to their area and then seek to generate technically and politically feasible proposals that respond to these problems). Problem recognition is an important element of the legislative endeavor, but it is not the only element. Key players in the congressional policy community must also agree on a proposed solution and simultaneously master the politics of the legislative process if there is to be a statutory product. See *id.* at 122-72.

124. In recent years, Board efforts to depart from a low-key, status quo approach when applying the Act have generated heated responses from congressional committees. See, e.g., Kenneth Winkler, *Baseball, Apple Pie and Section 10(j): The Americanization of Injunctive Relief Under the NLRA*, 46 LAB. L.J. 504 (1995) (discussing the General Counsel's substantially increased pursuit of injunctive relief under § 10(j) since early 1994); *GOP Appropriators Slash NLRB's Budget, Restrict Requests for 10(j) Injunctions*, 1995 Daily Lab. Rep. (BNA) 134, at D-4 (July 13, 1995) (reporting the House Appropriations Committee approval of a 30% reduction in the NLRB budget and a requirement that all § 10(j) injunction requests be supported by a four-fifths Board majority because the agency's enforcement stance has become "too intrusive" against management); *Hearing Before the Senate Comm. on Labor and Human Resources on John R. Van de Water to be Chairman, National Labor Relations Board*, 97th Cong., 1st Sess. 34-37, 74-96 (1981) (statement of Thomas R. Donohue, Secretary-Treasurer, AFL-CIO) (reporting the AFL-CIO's strong opposition to the nominee on the grounds he is aggressively pro-management); *Senate Panel Blocks Nominee for NLRB Post*, WASH. POST, Nov. 20, 1981, at A3 (reporting that the Labor Committee refused to send the Van de Water nomination to the Senate floor). See also *Hearings Before the Senate Comm. on Labor and Human Resources on William B. Gould IV to Be a Member of the National Labor Relations Board*, 103d Cong., 1st Sess. 3, 17-19 (statement of Sen. Hatch), 35-40 (statement of Sen. Kassebaum), 53-54 (statement of Sen. Thurmond) (1993) (reporting critiques of the nominee by Republican committee members on the grounds that his academic writings are aggressively pro-union).

125. See, e.g., MORRIS S. OGUL, *CONGRESS OVERSEES THE BUREAUCRACY* 181-83 (1976).

legislative programs.<sup>126</sup> Serious oversight efforts have occurred with respect to other workplace statutes,<sup>127</sup> but NLRA review has been quite feeble. Oversight hearings conducted by the relevant authorizing committees have been rare, low-key, and addressed only in cursory terms to problems of statutory implementation or coverage.<sup>128</sup> The confirmation process for agency nominees, which the Senate has used to generate heightened interest in other workplace legislation, also has been virtually ignored with respect to the NLRA.<sup>129</sup>

126. See generally JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* (1990).

127. See, e.g., *Oversight of the Occupational Safety and Health Administration: Hearings Before the Senate Comm. on Labor and Human Resources*, 100th Cong., 2d Sess. (1988) (reporting on three days of hearings, including extensive testimony from top Labor Department officials and bipartisan participation by committee members); *Oversight of the Mine Safety and Health Administration: Hearings Before the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. (1987) (reporting on two days of hearings, featuring lengthy testimony from top MSHA officials and bipartisan committee participation); *Equal Employment Opportunity Commission Policies Regarding Goals and Timetables in Litigation Remedies: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 2d Sess. (1986) (reporting on two days of hearings focused on recent changes in the EEOC's affirmative action enforcement policy, and including testimony from all five EEOC Commissioners and the EEOC General Counsel); *Oversight Hearing on the Equal Employment Opportunity Commission's Enforcement Policies: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. (1985) (reporting statements from an EEOC Commissioner and from critics of the EEOC's enforcement policy).

128. While the Democrats controlled one or both chambers of Congress between 1985 and 1993, the authorizing committees conducted one brief and underpublicized set of oversight hearings in each chamber; Board officials were not even invited to testify. See *National Labor Relations Act Practices and Operations: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 100th Cong., 2d Sess. (1988) (containing only the prepared statement of James M. Stephens, Chairman, NLRB); *Oversight Hearings on Practices and Operations Under the National Labor Relations Act: Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. (1988) (containing only letters and other supplemental material from NLRB personnel).

In the House, a subcommittee of the Committee on Government Operations did hold a series of oversight hearings between 1985 and 1990, focused on the extent and causes of delays in deciding cases before the Board. See, e.g., *Oversight on the National Labor Relations Board: Hearings Before the Subcomm. on Employment and Housing of the House Comm. on Government Operations*, 101st Cong., 2d Sess. (1990); *id.*, 100th Cong., 1st Sess. (1987); *id.*, 99th Cong., 1st Sess. (1985) (all containing testimony from NLRB Chair and General Counsel). Unlike the House Committee on Education and Labor, the Committee on Government Operations has no power to recommend and report out substantive changes in the NLRA.

129. Between 1985 and the Gould nomination in 1994, the Senate did not hold a single nomination hearing on a Board member or General Counsel. By contrast, the Senate regularly convened hearings on nominees responsible for implementing other workplace statutes, at which committee members closely examined agency operations and future plans. See, e.g., *Hearing Before the Senate Comm. on Labor and Human Resources on Nomination of Elizabeth Hanford Dole to be Secretary of Labor*, 101st Cong., 1st Sess. (1989); *Hearing Before the Senate Comm. on Labor and Human Resources on Nomination of Ann Dore McLaughlin to be Secretary of Labor*, 100th Cong., 1st Sess. (1987); *Hearing Before the Senate Comm. on Labor and Human Resources on Nomination of Clarence Thomas to be Chairman of the Equal Employment Opportunity Commission*, 99th Cong., 2d Sess. (1986); *Hearings*

Neither amendment of NLRA provisions nor routine review of NLRB activities and events has served as a source for legislative renewal. Moreover, this conspicuous congressional silence regarding the importance of group action has been accompanied by ample legislative attention to enhanced individual rights as a means of addressing workplace problems. The proliferation of federal statutes offering individually enforceable rights and protections to employees has occurred simultaneously with a steep decline in private sector support for unions.<sup>130</sup> Increased statutory regulation is in part a product of the failure of collective bargaining to mitigate the inherent inequalities of the labor market. In the words of one noted labor law scholar, "[I]f collective bargaining does not protect the individual employee, the law will find another way to protect the weaker party."<sup>131</sup> While there is surely force to this argument, it does not fully explain why first Congress and then the federal courts have been willing to enhance individual rights but not collective action in an effort to safeguard employee interests. The commitment to group action under the NLRA was diluted not only because collective bargaining was losing market share but also because emphasis on such a commitment no longer fit comfortably within our broader legal culture.

### C. *Ends and Means*

Collective bargaining has been described as a central premise of the NLRA, and the Act in its opening section is explicit in embracing group action as an end.<sup>132</sup> I have referred to collective bargaining as a technique deemed essential to realizing various legislative ends,<sup>133</sup> and group action may usefully be conceived of in those terms.<sup>134</sup> It has been observed in the context of other New Deal legislation that goals identified by the legislature are more likely to stand the test of time than is the identification of particular techniques for accomplishing those goals.<sup>135</sup>

---

*Before the Senate Comm. on Labor and Human Resources on Nomination of Ford Barney Ford to be Chairman of the Federal Mine Safety Review Commission, 99th Cong., 1st Sess. (1985).*

130. See DUNLOP COMMISSION REPORT, *supra* note 2, at 24 (reporting the significant increase over the past twenty-five years in statutes and regulations that affect the workplace); Leo Troy, *The Rise and Fall of American Trade Unions: The Labor Movement from FDR to RR*, in UNIONS IN TRANSITION 75, 82 (Seymour M. Lipset ed., 1986) (noting that union representation of the private sector nonagricultural workforce declined from 35.7% in the 1950s to 26.6% in 1973 and 17.8% in 1983); Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 9-10 & n.23 (1993) (observing that the union density rate had sunk to 13% by 1993).

131. Summers, *supra* note 5, at 10.

132. See *supra* text accompanying note 7.

133. See *supra* text accompanying note 6.

134. This paragraph draws on the insights of Edward Rubin regarding the structure of modern legislation. See generally Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

135. See *id.* at 414 (discussing the Glass-Steagall Act, Pub. L. No. 73-66, 48 Stat. 162 (1933), and noting that although the primary goal of assuring safety and soundness in the banking industry has

The asserted reason for this differential lifespan is that legislative goals tend to relate directly to broadly held social norms, invoking values such as fairness, safety, security, or democracy. By contrast, techniques for realizing those goals are more often linked to the current state of technical knowledge or social faith regarding the effectiveness of specific regulatory approaches. Such knowledge or faith generally rests on “empirical assumptions or subsidiary beliefs that will change more rapidly” with the passage of time.<sup>136</sup>

The distinction between fundamental norms and subsidiary beliefs seems directly applicable to the status of group action by labor. Key NLRA goals such as promoting a fair distribution of economic resources and encouraging employee participation in the workplace arguably retain broad social and political support sixty years after enactment. The same cannot be said for the technique of collective bargaining. The NLRA’s commitment to collectivizing the employment relationship was part of a larger fascination for group action that arose at an unusual moment in our history, a time when Congress and the public had lost confidence in the free market’s ability to produce a healthy economy.<sup>137</sup> Today, that confidence has been largely restored and unfettered entrepreneurial initiative is again seen as a means of boosting both wages and profits.

There is also a renewed and even increased faith that freedom of contract between employer and employee is instrumental in enhancing the well-being of workers and possibly in effecting an appropriate distribution of material goods in the society.<sup>138</sup> With the reestablishment of widespread acceptance—if not support—for private contracting and the efficiency of markets, Congress and the courts have become at best indifferent and at

---

remained, the specific measures in the Act are viewed as “an incumbrance and an embarrassment”); Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672 (1987) (discussing how the technique of separating commercial banking and securities trading could not survive technological and structural changes in the banking industry).

136. Rubín, *supra* note 134, at 415.

137. See, e.g., Kenneth Finegold & Theda Skocpol, *State, Party and Industry: From Business Recovery to the Wagner Act in America’s New Deal*, in STATEMAKING AND SOCIAL MOVEMENTS 159, 182-84 (Charles Bright & Susan Harding eds., 1984) (arguing that despite nearly unanimous disapproval from the business community, Congress was able to pass the Wagner Act because the failure of the National Recovery Administration had proved that business could not deliver economic recovery).

138. See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 321-30 (4th ed. 1992) (contrasting the inefficient cartelization of labor markets under the NLRA with the efficiency of employment at will contracts); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 24-27 (1992) (identifying antidiscrimination laws as unduly costly, and asserting that voluntary exchanges “produce[ ] gains not only for the parties but also, by indirection, for the larger society as a whole”). *But see* PAUL C. WEILER, GOVERNING THE WORKPLACE 71-78 (1990) (arguing that the private labor market includes inherent imperfections that call for government intervention).

worst hostile to group action.<sup>139</sup> Indeed, judicial complaints regarding the adversarial nature of collective bargaining,<sup>140</sup> and judicial support for the virtues of individual free choice,<sup>141</sup> should be understood as embodying at least in part a concern for what the majority of employees may inflict on themselves, rather than what an unrepresentative or coercive union may do to the majority. In short, the perception that concerted activity in the workplace unduly restrains the freedom of employees as well as employers may have fatally compromised the ongoing legitimacy of group action as a regulatory technique.

### III. Conclusion

There is, of course, some irony in the fact that key NLRA goals remain unmet despite the disfavored legal status of collective bargaining. As the twentieth century draws to a close, real earnings for U.S. workers have stagnated for over two decades.<sup>142</sup> Moreover, the 1970s and 1980s witnessed a substantial increase in income inequality between the top one-fifth and bottom three-fifths of American families, and a decline of some twenty percent in real wages for young men without college degrees.<sup>143</sup>

---

139. See Hosansky, *supra* note 17, at 874-75 (describing 1996 legislation that modifies the 1938 Agricultural Adjustment Act to weaken production ceilings and marketing agreements). See also Diana B. Henriques, *Efforts to Harness S.E.C. Worry Agency Critics Too*, N.Y. TIMES, Oct. 23, 1995, at A1, C8 (describing the rush to deregulate the securities industry by the federal courts and the Republican Congress).

140. See *NLRB v. Health Care & Retirement Corp.*, 114 S. Ct. 1778, 1783-84 (1994) (citing the possibility that nurses' loyalties may be divided between nursing home owners and nursing home employees); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678-79 (1981) (indicating concerns regarding the burdens collective bargaining places on the conduct of business); *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 689-90 (1980) ("The large measure of independence enjoyed by [university] faculty members can only increase the danger that divided loyalty will lead to those harms that the Board traditionally has sought to prevent.").

141. See generally *Chicago Tribune Co. v. NLRB*, 965 F.2d 244, 249-50 (7th Cir. 1992) (criticizing the scope of the Board's contract bar doctrine as "giv[ing] too much weight to the interests of unions and too little to the interests of workers"), *denying enforcement of* 303 N.L.R.B. 682, 692 (1991); *Sullivan Indus. v. NLRB*, 957 F.2d 890, 903-05 (D.C. Cir. 1992) (insisting that a bargaining order that bars decertification for a reasonable period is an extreme remedy requiring detailed justification even though the union had represented employees for 40 years until the employer unlawfully refused to recognize and bargain with it), *remanding* 302 N.L.R.B. 144 (1991).

142. DUNLOP COMMISSION REPORT, *supra* note 2, at 16; see also Sheldon H. Danziger & Daniel H. Weinberg, *The Historical Record: Trends in Family Income, Inequality and Poverty*, in *CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE* 18, 20-23 (Sheldon H. Danziger et al. eds., 1994) [hereinafter *CONFRONTING POVERTY*] (describing the virtual lack of change in median family income between 1973 and 1992).

143. See Richard B. Freeman & Lawrence F. Katz, *Rising Wage Inequality: The United States v. Other Advanced Countries*, in *WORKING UNDER DIFFERENT RULES* 29, 32-33 (Richard B. Freeman ed., 1994) (noting that "[in] the 1980s overall wage dispersion increased in the United States to levels greater than at any time since 1940" and "the real hourly wages of young men with twelve or fewer years of schooling dropped by some twenty percent from 1979 to 1989"); Danziger & Weinberg, *supra* note 142, at 21-25 ("[S]ince 1969, the shares of the bottom three quintiles have dropped and that of

The magnitude of earnings differentials, and of the decline in real earnings for the less skilled, substantially exceeded what other advanced countries went through during this period;<sup>144</sup> a major factor exacerbating the inequities of the U.S. wage structure was the sharp decline of unionism.<sup>145</sup> This decline also left U.S. employees with a much weaker collective voice in workplace governance matters than their Canadian and European counterparts enjoy.<sup>146</sup>

The ascension of an individual rights statutory regime has failed to relieve the downward pressure on distribution of economic resources and employee participation in workplace governance. Minimum standards legislation has not been nearly effective enough in redistributive terms to offset the loss of meaningful union pressure; further, its inflexible approach denies workers the ability to establish priorities for themselves.<sup>147</sup> Status discrimination laws have been followed by a narrowing of historic earnings gaps experienced by women, though the evidence is less positive for racial minorities.<sup>148</sup> However, the redistribution that has occurred may well be

the richest quintile has reached a post-World War II high.”). Women without college degrees experienced a slight increase in real wages during this period, due in large part to the increased amount of time they spent working. See Suzanne M. Bianchi, *Changing Economic Roles of Women and Men*, in STATE OF THE UNION: AMERICA IN THE 1990S, VOL. I: ECONOMIC TRENDS 107, 132-33 (Reynolds Farley ed., 1995); see also Rebecca M. Blank, *The Employment Strategy: Public Policies to Increase Work and Earnings*, in CONFRONTING POVERTY, *supra* note 142, at 168, 173 (reporting that “less skilled women can expect to earn at least as much if not more than their mothers did twenty years ago” because less skilled women are working in occupations and industries that have not been hit as hard by wage declines).

144. Richard B. Freeman, *Lessons for the United States*, in WORKING UNDER DIFFERENT RULES, *supra* note 143, at 223, 224 (reporting that unlike the United States, other advanced countries did not experience either massive increases in wage differentials and wage inequality or decreases in the real earnings of the less skilled).

145. Freeman & Katz, *supra* note 143, at 48.

146. See Freeman, *supra* note 144, at 224-25 (discussing workers’ maintenance of a collective voice in Canada through higher unionization, and in Europe through legally mandated works councils).

147. The recently enacted Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (1994)) mandates uniform *unpaid* leave for employees facing birth or adoption of a child, or serious illness of a child, spouse, or parent. 29 U.S.C. § 2612(a), (c) (1994). In a world in which collective bargaining was more prevalent, all parties might be better served if leave policies were negotiated based on the firm-specific needs of employees and management. See WEILER, *supra* note 138, at 26-29 (discussing the procrustean aspects of a positive-law regulatory approach to labor-management relations).

148. See BARBARA RESKIN & IRENE PALAVIC, WOMEN AND MEN AT WORK 103-07 (1994) (relying on census data to demonstrate that the pay gap between men and women narrowed from 41.2% in 1975 to 28.9% in 1990; during the same time period, the pay gap between white men and black men remained relatively constant (25-30%) and the pay gap between white men and Hispanic men increased from 27% to 37%); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2160 (1994) (describing some narrowing of the aggregate wage gap between men and women since the 1970s, and a dramatic narrowing of the “corrected” wage gap that compares similarly skilled and experienced men and women).

primarily at the expense of other rank and file members of the workforce rather than management or shareholders.<sup>149</sup>

Assuming as I do that the goals of fair distribution and meaningful worker participation remain compelling, the question resurfaces as to whether group action has a future as a preferred legal means to achieving these goals. This is not the place to discuss particular revisions in the NLRA that might amplify the role of concerted activity by employees.<sup>150</sup> Whatever reforms are deemed desirable, meaningful change will require legislative action. If the current political climate in Congress is hospitable to change at all, it is not in the direction of enhancing the scope or subtlety of collective action by employees. Even proponents of reform in that direction have adopted a fitful and defensive posture.<sup>151</sup> There remains the possibility that economic and political crisis might trigger renewed congressional attention.<sup>152</sup> The NLRA emerged from a crisis that disrupted public faith in an individual rights based common-law regime. Perhaps a comparable set of circumstances is what would be needed to rekindle widespread respect for—or commitment to—group action in the law of the workplace.

---

149. See generally Bianchi, *supra* note 143, at 127-33 (describing the gender-based earnings gap as narrowing since 1980 among non-college-educated workers primarily due to deteriorated earnings of men rather than increased wages for women; a similar earnings gap between college-educated men and women narrowed due to men making minimal gains while women received much larger increases). Cf. Tracy S. Johnson, Note, *Pay for Performance: Corporate Executive Compensation in the 1990s*, 20 DEL. J. CORP. L. 183, 189-90 (1995) (discussing the steady rise of executive compensation levels during the 1980s, fueled by stock options and other performance-based add-ons); Arch Patton, *The Executive Pay Boom Is Over*, 66 HARV. BUS. REV., Sept.-Oct. 1988, at 154-55 (reporting that “[e]xecutive compensation has soared to unprecedented heights during the last few decades” and that “the unprecedented affluence of our executive class stands in sharp contrast to the mixed fortunes of the population as a whole”).

150. For a discussion of such revisions, see Estreicher, *supra* note 130, at 35-46 (proposing *inter alia* modification of § 8(a)(2) to encourage alternative forms of workplace representation and elimination of the mandatory-permissive distinction under § 8(a)(5)); Gottesman, *supra* note 2, at 81-96 (discussing *inter alia* legislative action to encourage growth of service providers for nonunion workplaces); and Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993) (proposing a “members-only” representation approach that would modify or abandon the current exclusive representation system). See generally RESTORING THE PROMISE OF AMERICAN LABOR LAW (Sheldon Friedman et al. eds., 1994).

151. See Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, REG., 1995, at 28 (arguing that the Commission’s recommendations were diluted in light of congressional elections because the focus of the labor movement shifted from legal reform to damage control); Leo Troy, *Sacred Cows and Trojan Horses: The Dunlop Commission Report*, REG., 1995, at 38 (suggesting that the Dunlop Commission would have recommended a version of German works councils to restructure American labor law, but the 1994 Republican sweep of Congress led the Commission to propose only modest reforms that will not affect the decline of private sector unionism).

152. See generally KINGDON, *supra* note 123, at 95-101, 199 (discussing routine review and crisis or disaster as the two means by which problems ripe for legislative action come to the attention of the policy community); Alan Hyde, *A Theory of Labor Legislation*, 38 BUFF. L. REV. 383, 431-32 (1990) (contending that in advanced industrial countries, legislative changes in labor-management relations typically result from concessions to disruptive worker movements by threatened elites).

