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Wartime labor regulation, the industrial pluralists, and the law of collective bargaining

JAMES B. ATLESON

Since the end of World War II, labor relations theory and the law of collective bargaining have been closely intertwined. Both systems are premised upon the stabilizing influence of unions, collective bargaining, and arbitration. Yet, as Ronald Schatz notes in this volume, the industrial and economic convolutions of the past decade have created a crisis in the once unchallenged orthodoxy that has until recently constituted industrial relations thought.

A loose-knit group of postwar scholars and practitioners, who might well be characterized as "industrial pluralists," are largely responsible for the body of rules regulating collective bargaining, as well as the supportive vision of industrial relations. This group developed a set of assumptions about the necessary legal structure of collective bargaining, its regulation, and the appropriate forms of dispute resolution, which has been clearly reflected in the Supreme Court decisions of the late 1950s and 1960s. In this period, the federal judiciary for the first time defined

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the legal structure of collective bargaining, creating a system dominated by the promotion of arbitral settlement of contract disputes and the discouragement of collective action.²

Industrial pluralist thought had much in common with consensus theories in other disciplines in the 1940s and 1950s, combining a search for peaceful dispute resolution mechanisms with a reluctance to discuss existing imbalances in power or issues of class. The industrial pluralists focused upon the creation of legal rules and administrative processes to resolve workplace conflicts. The predominant device, however, was to be arbitration, a private mechanism that could supplant self-help, judicial intervention, or administrative regulation. The pluralists desired to humanize and regularize the workplace, transforming "the anarchy of the marketplace, which exploited workers, into the harmony of a 'modern' cooperative capitalism, which protected workers."³ The views of the pluralists themselves can perhaps be traced to the Wisconsin school and John Commons and also to prewar theories of efficient, administrative resolution of industrial relations problems.⁴

Many of the pluralists were in government positions during World War II, a period in which it was critical to find efficient systems for the resolution of labor disputes that would serve as alternatives to strikes. Labor lawyers and economists, often very young and sometimes just out


⁴As Steven Fraser has shown, the current system looks very much like that created by Sidney Hillman's garment workers' union in the 1920s, except for the present supportive legal apparatus. Steven Fraser, "Dress Rehearsal for the New Deal: Shop-Floor Insurgents, Political Elites, and Industrial Democracy in the Amalgamated Clothing Workers," in Michael Frisch and Daniel Walkowitz, eds., Working-Class America (Champaign: University of Illinois Press, 1983), 212.
of college, supplied the demand for wartime specialists. The first public members of agencies such as the National War Labor Board were skilled in mediation and arbitration. As characterized by Howell Harris:

They were liberal pluralists, committed to the development of a labor relations system in which the triple objectives of efficiency, order, and representative democracy could be reconciled. They believed in the Wagner Act's legislative philosophy, and in strong, responsible unions as agents for its implementation. They preferred to see industrial disputes settled in decentralized, voluntarist negotiations between the parties rather than on terms imposed by the state from the center, or unilaterally determined by employers.5

One of the War Labor Board's most important and enduring contributions was the development of a group of experienced arbitrators who profoundly affected postwar labor law and practice. As Edwin Witte noted in 1952, the "great majority of the labor arbitrators of the present day gained their first direct experience in service on the staff of the War Labor Board or on its disputes panels."6 With much justification, a speaker at an early meeting of the National Academy of Arbitrators greeted his audience as the "War Labor Board Alumni Association."7

The academy's first president, Ralph T. Seward, for instance, had been executive secretary of the National Defense Mediation Board and a public member of its successor, the War Labor Board. In 1944, he became the impartial umpire for General Motors and the UAW. William Simkin, one of the academy's vice-presidents, had been chair of the Shipbuilding Commission and associate member of the War Labor Board. The academy's original Board of Governors was also filled with veterans of wartime Washington. Although not active in the formation of the National Academy of Arbitrators, George W. Taylor often spoke at early meetings and helped draft the code of ethics eventually accepted by the academy as well as the American Arbitration Association and the Federal Mediation and Conciliation Service.

Other influential scholars and writers who gained experience in the wartime agency were Benjamin Aaron, David L. Cole, G. Allan Dash, Alex Elson, Nathan E. Finesinger, Jesse Freidin, Alexander H. Frey, Sylvester S. Garrett, Jr., Lloyd Garrison, Lewis M. Gill, James J. Healy, 

Theodore W. Kheel, Thomas E. Larkin, Eli Rock, Peter Seitz, Ralph T. Seward, Harry Shulman, William E. Simkin, George W. Taylor, and W. Willard Wirtz. In addition, WLB staff positions were filled with people who would become influential in labor history, economics, and labor relations, such as E. Wright Bakke, Douglas V. Brown, John T. Dunlop, George H. Hildebrand, Louis Jaffe, Vernon H. Jenson, Clark Kerr, Richard Lester, E. Robert Livernash, Lester B. Orfield, Sumner H. Slichter, Edwin H. Witte, and Dale Yoder.8

Their government experience during the war stressed productivity and the critical need for labor peace, profoundly shaping their views on arbitration and collective bargaining. This group, who would become influential postwar writers and practitioners of labor law and labor relations as well as arbitrators, is the crucial link that explains why the current law of collective bargaining mirrors the web of rules created by the War Labor Board.

This essay focuses on two areas of War Labor Board jurisprudence and their current parallels. The first area concerns the administration and enforcement of collective agreements; the second deals with the range of subjects falling within the scope of mandatory bargaining under the National Labor Relations Act. Prior to the Taft-Hartley Act of 1947, there was little federal law defining collective bargaining or the means by which agreements could be enforced.9 The Wagner Act of 1935 required employers to bargain in good faith, and the Supreme Court had made collective agreements predominant over individual contracts of employment.10 The Wagner Act, however, did not focus on dispute resolution,


9The 1937–41 period was too brief for a significant body of NLRA law to develop. In one significant case, however, the Supreme Court had held that strikes in breach of contract would be unprotected by NLRA Section 7, but the Court assumed it had the power to interpret the agreement. See NLRB v. Sands Manufacturing Co., 306 U.S. 332 (1939); Karl Klare, “Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941,” Minnesota Law Review 62 (1978): 303. The union had sought to enforce its interpretation of the agreement, announcing that employees would not work unless this view was upheld. The Court interpreted the agreement to favor the employer’s contractual position; thus, the workers “were irrevocably committed not to work in accordance with their contract” (306 U.S. at 344). Such a “re-pudiation” by employees of the agreement was deemed a severance of their employment. The decision suggests that the Court would be no less hostile to self-help when an arbitration procedure was present.

and certainly not on arbitration, except for its general encouragement of collective bargaining. The administration and enforcement of collective agreements were necessarily left to the vagaries of state law.

State courts, however, had initially encountered difficulty envisioning collective bargaining agreements as enforceable contracts or unions as proper vindicators of employment rights. Although some courts began to enforce agreements against employers in the 1920s and 1930s, belatedly paralleling the traditional willingness to enjoin breaches of contract by unions or to enjoin strikes, promises to arbitrate were not enforceable in most states. Since the enactment of the Taft-Hartley Act in 1947, however, one of the most creative and vital areas of federal labor policy has concerned the contractual relationship of employers and unions, and the views of the judiciary have been profoundly affected by the writings of the pluralists. Section 301 of this statute permits unions and employers, and employees as well, to bring actions in federal court to enforce collective agreements. To find the statute constitutional, the Supreme Court was moved to hold that federal courts were empowered to create substantive law, that is, judicially created policies that would define the nature of "mature" collective bargaining agreements, their methods of enforcement, and the remedies for breach.

At the same time, the War Labor Board would adopt a restrictive view of the scope of mandatory bargaining, that is, the subjects upon which employers were legally compelled to bargain. Although the postwar National Labor Relations Board would adopt a less limited view of such bargaining, the notion that a vague zone of managerial exclusivity existed stems from several key War Labor Board decisions.

THE WAR LABOR BOARD

American entry into the war made necessary a major expansion of the federal role in labor-management relations. Six days after the Japanese attack on Pearl Harbor, President Roosevelt issued a call for a conference of representatives of labor and management. In issuing the proclamation convening the conference, the president declared that he desired speed,


12 Federal courts under Article 2 of the Constitution only have authority to enforce rights under federal statutes and the Constitution. Generally, federal courts cannot be given jurisdiction to enforce rights that do not arise from these sources.
a complete agreement that all wartime disputes would be settled peacefully, and a no-strike pledge. The conference responded by recommending the creation of a war labor board having jurisdiction over all issues, although no agreement was reached on the politically charged union security issue.  

Union leaders independently acted to grant no-strike promises. Immediately after Pearl Harbor, for instance, William Green called a special session of the American Federation of Labor’s executive council, which determined “that a ‘no-strike’ policy shall be applied in all war and defense material production industries.” A meeting of representatives from all the AFL unions endorsed the statement, urging that no repressive legislation should be passed and, ironically, that the right to strike as a last resort weapon be safeguarded. Similarly, the Congress of Industrial Organizations pledged its assistance in achieving “all-out production for the national defense,” but cautioned that it would defend the “material interests of the working people and their democratic rights.” Theoretically a voluntary surrender of labor’s most important right, the no-strike pledge was deemed compulsory by the government, even for unions that were not represented at the 1941 labor-management conference.  

The National War Labor Board was formally created on 12 January 1942, in a tersely worded Executive Order 9017. The board was to be composed of twelve members, of whom four each would represent respectively labor, management, and the public. William Davis, the former chair of the National Defense Mediation Board, was named chair of the National War Labor Board. The other public members were George W. Taylor, Frank P. Graham, and Wayne L. Morse.

If a dispute threatened to interrupt work related to war production,

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13 Fred Witney, Wartime Experiences of the National Labor Relations Board (Urbana: University of Illinois Press, 1949), 118.
14 The president accepted the conference’s agreement and short-circuited the issue by interpreting the conference report as meaning that “all disputes,” including the union shop controversy, were within the jurisdiction of the National War Labor Board. Witney, Wartime Experiences of the National Labor Relations Board, 118–19; Joel Seidman, American Labor from Defense to Reconversion (Chicago: University of Chicago Press, 1953), 80–81.
15 CIO News, 15 December 1941; Seidman, American Labor from Defense to Reconversion, 78–79.
17 See NWLB Termination Report 2:49.
the Department of Labor could certify the case to the War Labor Board if it could not be resolved by its own conciliation service.\textsuperscript{18} Once the board assumed jurisdiction, its powers were all-encompassing. The board was empowered to reach a final settlement of any labor dispute that might interrupt work that "contributes to the effective prosecution of the war." Unlike the National Labor Relations Board, the War Labor Board's responsibility extended to the actual settlement of disputes by "mediation, voluntary arbitration, or arbitration." Under the 1943 War Labor Disputes Act, for instance, the War Labor Board had the power "to decide the dispute and provide by order the wages and hours and all other terms and conditions (customarily included in collective bargaining agreements) governing the relations between the parties" and to "provide for terms and conditions to govern relations between the parties which are to be fair and equitable between an employer and an employee under all the circumstances of the case."\textsuperscript{19}

Thus, the National War Labor Board largely determined the wartime terms of employment in American industry. In its first three years, the WLB decided fourteen thousand dispute cases, affecting a majority of the organized workers in the country. There were twenty-five occasions when government seizure was invoked to enforce compliance. In thirty-one cases, the board called on the president for enforcement action; seventeen involved union defiance and fourteen employer refusal. In four cases, the workers backed down; in one, the employer retreated before the president acted.\textsuperscript{20} Not only was a firm foundation created for the CIO, but wartime regulation had permanent consequences for mass production unionism. As historian Nelson Lichtenstein has noted, "It was the specific social and political context of World War II that created the institutional framework for the kind of collective bargaining that evolved in the decade or so after the war."\textsuperscript{21} The National War Labor Board helped in setting industry-wide wage patterns, legitimized fringe-benefit bargaining, encouraged arbitration as a method of resolving contractual disputes, and influenced the internal structure and role of new unions, primarily through the grant of union security clauses.

\textsuperscript{18} Executive Order 9017, 3 C.F.R. 1075 (1938–43 compilation).
\textsuperscript{19} Public Law No. 89, 59 Stat. 163 (1943). The statute was commonly referred to as the Smith-Connally Act.
Wartime labor regulation

World War II required unprecedented efforts to maintain and stimulate production. The War Labor Board believed:

Maximum production during the war is a duty; the duty is not discharged when production is impaired by lowered morale or strikes caused by the failure to settle grievances. The duty to achieve and maintain production implies, therefore, the establishment of grievance procedures and the prompt settlement of grievances according to that procedure.22

Labor arbitration, backed by federal support, required stable unions, both to effectuate such procedures and to contain rank-and-file militance. World War II, therefore, provided a rational basis for stressing bureaucratic dispute resolution, the restriction of midterm strikes, and union control over rank-and-file action. More broadly, the war itself affected the way Americans viewed labor, and those images remained after the war. After the emergency ended, the “needs of the peacetime economy” replaced the requirements of war, and federal policy continued to be based upon increased and continuous production and the stability of labor relations as well as unions.

The underlying themes of contemporary law were not, of course, exclusively created in wartime, for many of the underlying values in American labor law long predate federal statutes.23 The war, however, helped to create, encourage, or cement visions of the proper labor-management system and the appropriate role of the state. The War Labor Board helped advance a definition of industrial democracy exclusively in process terms—outcomes or fairness were to be irrelevant. Postwar labor law has proceeded in a similar fashion.24 In addition, the Supreme Court in the postwar period has, like the War Labor Board, repeatedly demonstrated its opposition to collective action or self-help in the resolution of labor disputes.25 This concern is especially reflected in cases where “private” and “peaceful” avenues of resolution, such as arbitration, exist. The result is a set of rules that protects the “integrity” of arbitration, permitting the institution to carry out federal policy and making the

25Ibid., 51; Atleson, Values and Assumptions in American Labor Law, chapter 3.
intention of parties less important than the language of contractualism might initially suggest.

THE WAR LABOR BOARD AND THE POSTWAR LAW OF ARBITRATION

Although grievance procedures and arbitration clauses were included in some prewar collective bargaining agreements,\textsuperscript{26} and may well have flourished even without the strong encouragement of the War Labor Board, “it was left to the War Labor Board to convince American industry and labor that here was an indispensable tool to ‘make collective bargaining work.’ ”\textsuperscript{27} As the WLB Termination Report put it in 1947:

The basis for the national war labor policy in America today is still the voluntary agreement between the responsible leaders of labor and industry that there be no strikes or lockouts for the duration of the war. All labor disputes, including grievances, therefore, must be settled by peaceful means.\textsuperscript{28}

The War Labor Board stressed the indispensable value of this dispute-resolution process, refined its structure and scope, forced the system on unwilling employers, and provided rules for legal enforcement that would eventually be adopted by the Supreme Court almost twenty years later.

Even without government encouragement, grievance procedures provided advantages for unions and employers. Although employers generally resisted arbitration both before and during the war, arbitral systems provided an orderly means to resolve contractual disputes, discouraging strikes or other job actions, and they also served to enforce a system of rules for both employees and managerial personnel. A system of rules was important for unions as well because employees have historically objected to arbitrary supervisory behavior. Unions also found it valuable to have a means that avoided the constant need to consider strikes over every dispute. As Sidney Lens so persuasively argued forty years ago, arbitration procedures were not necessarily reflective of a loss of union power. Unions could not strike over every dispute, and a grievance pro-


\textsuperscript{28}NWLB Termination Report 1 (1947): 65.
Grievance procedures offered an "opportunity for realignment of forces, for fencing, minor skirmishing, for strengthening of positions." A well-operating and effective grievance procedure, therefore, continued membership support during the life of a contract. "The grievance procedure in actual practice is used as a weapon...as a way to muster strength for class warfare." The existence of arbitration procedures also could shield union leadership from the constant pressure to take or support workplace action, a consideration that helped explain the support for arbitration by unions such as the UAW even before the war.

Grievance procedures also tend to centralize dispute resolution in the union hierarchy, not in the affected work group, and the union generally controls the decision to initiate grievances and how far to pursue them. Indeed, the multilayered grievance process exactly mirrors the hierarchies of both employer and union. Unions, however, defended institutional control as democratic because the representative of the employees controlled the dispute, and arbitration would serve as a judicial-like restraint upon managerial excess. This argument nicely meshes with the view of industrial democracy held by the War Labor Board and the postwar Supreme Court, focusing less on worker participation and influence than on routine and peaceful processing of grievances. Notions of hierarchy and control were embedded in this view of industrial democracy, since, given the policies of international officials, independent rank-and-file action or wildcat strikes could be seen as undemocratic.

It is difficult to plot precisely the development of the War Labor Board's views on arbitration, and perhaps it is misleading to try to rationalize its actions based upon the random flow of cases. From the beginning, the board set up arbitration panels to decide specific cases, generally appointing the arbitrator. Early decisions merely encouraged...
the parties to accept voluntarily arbitration clauses for future disputes.\textsuperscript{34} Unions that had voluntarily surrendered the right to strike had an especially critical need to find a means to hold employers to their promises and, after 1943, the board often imposed arbitration clauses\textsuperscript{35} because outsiders would decide matters within the proper control of management. The board’s public members noted that “grievance procedures without eventual arbitration is a one-sided affair.” The absence of arbitration systems “does not assure the employees of any settlement except on the company’s terms and in that respect it invites labor trouble.”\textsuperscript{36}

The structure of arbitration advocated by the War Labor Board strongly resembled arbitral systems established in the hosiery and clothing industry by the Amalgamated Clothing Workers union in the 1920s. George W. Taylor, the vice-chair of the War Labor Board, had been heavily influenced by the experience of the needle trades.\textsuperscript{37} In a chronically unstable industry, the union and larger manufacturers strove to control the anarchy caused by both the market and the mass of small entrepreneurs by instituting procedures that would permit advanced planning. The hosiery experience was influential in a variety of ways. For instance, a General Motors representative observed hosiery arbitrations prior to the creation of the General Motors—United Automobile Workers arbitral arrangement. General Motors, however, insisted upon a more restrictive umpireship, in which decisions were to be based upon evidence submitted in a formal hearing and on the basis of contractual language. Its first umpire in 1941 was George Taylor. Thus, Taylor had experience with both the more fluid hosiery system and the more legalistic process in the auto industry.

The War Labor Board’s own experience served to confirm the value of arbitration, and the situation at Chrysler, where arbitration was imposed upon a vigorous shop steward system, is instructive. At Chrysler’s Dodge Main plant in Detroit, the very first collective agreement provided that both the elected plantwide bargaining committee and the chief stewards could confer with foremen or other management representatives

\textsuperscript{34}Acmeline Manufacturing Co., \textit{War Labor Reports} 9 (1943): 524.
\textsuperscript{36}Niles-Bement-Pond Co., \textit{War Labor Reports} 5 (1943): 489.
\textsuperscript{37}From 1931–41 Taylor served as the second impartial chair of the Full-Fashioned Hosiery Manufactures and the American Federation of Hosiery Workers, and in 1934, became the chair of the Philadelphia Men’s Clothing Arbitration Board.
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During working hours. As historian Steve Jefferys notes, the agreement provided for "two parallel systems of plant bargaining." After a crucial 45-day strike in 1939, Local 3 altered its constitution, establishing the "primacy of the steward over the plant committee on departmental issues" and rank-and-file control over the chief shop steward. Deputy stewards were to be provided for every twenty employees. What is most fascinating about this development is that it occurred solely within the union's own internal legal system and not via collective bargaining.

By 1943, many activists at Dodge Main, as at many other industrial plants, had been dispersed to other locations or to the armed services; but a core remained, one sufficient to instruct the newly hired war workers on issues of job control. Like other companies in 1943, Chrysler attempted to tighten workplace discipline, refusing to deal with stewards and referring issues to the seriously backlogged War Labor Board. A walkout followed by firings led to a widespread sympathy strike in all of Chrysler's Detroit plants, at the very moment when the War Labor Board was holding hearings on the failure of the UAW and Chrysler to reach a new agreement. The board viewed its duty as resolving "the problems of which the industrial unrest is a symptom," noting that there had been sixty-six strikes at Chrysler between 23 December 1941 and 8 January 1943. To that end, the board insisted on an arbitration procedure similar to the system created at General Motors in 1940 and at Ford in 1941. At both firms, the UAW had advocated a grievance procedure that terminated in final arbitration by a permanent arbitrator or umpire. The existing grievance procedure involved a board consisting of two representatives of labor and management. The grievance would remain unresolved should the parties fail to agree, a system the board viewed as "obsolete." Instead, the board appointed an "impartial chairman." The board's action in Chrysler, therefore, meshed with national UAW policy.

Within a year of the board's creation, the basic contours and rules of labor arbitration were established. Decisions in 1943 reflected the board's support for a formalized, multistep grievance process that would ultimately end in adjudication by a neutral arbitrator, a pattern that has

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long since become commonplace.40 The Supreme Court in the 1960s would adopt the basic design set by the War Labor Board, albeit without attribution.41 The War Labor Board’s structure of rules, although explainable by wartime exigencies, would also be consistent with the themes of industrial pluralism in the postwar period. More broadly, these themes were congruent with contractualist notions long present in American legal thought. Thus, for instance, the jurisdiction of the arbitrator would be restricted to the settlement of questions concerning the interpretation or application of the terms of collective bargaining agreements.42 Arbitration fit a voluntarist, contractual model of industrial relations in which disputes could be settled without apparent government involvement.43

The contractualist vision extended beyond the scope of arbitration. If the parties had an arbitration agreement, for instance, the War Labor Board would order arbitration despite an employer objection that the grievance lacked merit.44 Moreover, once an award was rendered, the board held that “every reasonable presumption is made in favor of such an award,” and that awards would be upheld if there was no proof “of fraud, misconduct or other equally valid objection.”45 Thus the refusal to comply with an award was treated as a refusal to comply with an order of the War Labor Board.46 Moreover, the War Labor Board affirmed arbitration awards despite an employer’s contention that compliance would not be “in the interests of full production.” As the board noted in one decision, “labor and industry generally throughout the country have come to regard arbitration as the wisest, fairest, and speediest method of settling industrial disputes, especially during wartime.”47

40See, for example, Eclipse Fuel Engineering Co., War Labor Reports 6 (1943): 279.
41By 1960, the date of the Supreme Court’s trilogy, arbitration clauses were found in over 90 percent of collective agreements. BLS Bull. No. 1425-1, “Grievance Procedures” (1964), 1. The Supreme Court may have wished to support the arbitration process, but the War Labor Board had already accomplished that result over fifteen years earlier.
43See, for example, NWLB Termination Report 1: 131; Realty Advisory Board, War Labor Reports 2 (1942): 183.
This broad protection of arbitration awards would also be reflected in the Supreme Court's postwar jurisprudence.\(^48\)

The state courts had generally been hostile to arbitral arrangements, apparently because they viewed arbitration as a threat to supplant the courts.\(^49\) Many, therefore, refused to enforce such promises. Breaking from the common law view, the War Labor Board held that parties to an arbitration agreement must live up to their promises to arbitrate, and the board would enforce such awards.\(^50\) In addition, the determinations of the War Labor Board would not be affected by any arbitration laws that might exist in various states.\(^51\) Subsequently, the Supreme Court would also determine that collective bargaining law was exclusively federal, thereby preempting contrary state statutes and rules.

Despite the board's protection of arbitral systems, some revealing limitations were recognized, perhaps because of managerial concern that arbitrators would have "the final decision on all matters which the union may want to treat as grievances."\(^52\) The board made clear in 1942 that arbitration would not involve matters of "managerial prerogative."\(^53\) In

\(^48\)In the famous arbitration trilogy of 1960, the Supreme Court held that courts should apply broad presumptions of coverage when questions arise about the scope of arbitration clauses and, second, that arbitration awards should be presumed valid unless their "words manifest an infidelity to the agreement." The arbitration trilogy involves three Supreme Court decisions decided on the same day in which the United Steelworkers successfully achieved broad protections for arbitration: United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960). These conclusions not only mirrored the decisions of the War Labor Board, but they also flowed directly from concern by pluralists that courts would unduly enmesh themselves in the private dispute-resolution process unless they deferred to arbitration procedures.

These decisions made clear that arbitration was to be the primary vehicle for the resolution of industrial disputes involving the interpretation or application of collective bargaining agreements. In line with pluralist precepts, the courts would support the grievance and arbitration process while concurrently trying not to interfere with it, since the collective bargaining system was viewed as a form of private self-government. The emphasis upon enforcing the intentions of the parties masks the attempt to "civilize" industrial relations and restrain " jungle warfare."

\(^49\)See, for example, Gatliff Coal Co. v. Cox, 142 F. 2d 876 (6th Cir. 1944); Charles Gregory and Richard Orlikoff, "The Enforcement of Labor Arbitration Agreements," University of Chicago Law Review 17 (1950): 233.


\(^51\)Ibid.

\(^52\)Montgomery Ward and Co., War Labor Reports 10 (1943): 415, 420.

\(^53\)See, for example, Atlas Power Co., War Labor Reports 5 (1942): 371. (Denial of extension of arbitration to cover transfer and promotion disputes where hazardous nature of op-
the highly publicized *Montgomery Ward* decision in 1942 in which management prerogatives were an issue, the board ordered a contractual definition of a "grievance" that would exclude "changes in business practice, the opening and closing of new units, the choice of personnel (subject, however, to the seniority provision), the choice of merchandise to be sold, or other business questions of a like nature not having to do directly and primarily with the day-to-day life of the employees and their relations with supervisors."\(^5^4\)

Managerial authority was also recognized in areas clearly within arbitral jurisdiction. The board had no difficulty in holding that disciplinary matters were subject to arbitration, especially given the high incidence of clauses in collective bargaining agreements preventing discipline or discharge without "just cause." But the board nevertheless strongly supported management's authority to take prompt action, including suspending or removing an employee from a job pending investigation or a hearing, subject to the right of the employee or the union to grieve. As War Labor Board public members Jesse Freidin and Francis Ulman confidently stated in 1945, "Arrangements have never been directed whereby the union's approval must be secured before discipline can be meted out." Indeed, the authors noted that a contractual requirement of union approval had existed at Brewster Aeronautical Corporation, but it was "changed by the parties in conferences in which a Board representative participated, so as to restore to management its initial power to discipline. The Board approved the changes."\(^5^5\). Thus, the now common notion that the employer acts and the employee or union can only grieve is not so much designed to avoid the possibility that employees will otherwise engage in self-help or because it is a necessary requirement of the grievance process as would be argued after the war. Instead, it is based upon the board's assumption that such a concept was an incident of managerial prerogative protecting hierarchy and aiding continued production.\(^5^6\)

Yale Law School's Harry Shulman helped propound these views in a most forceful manner.\(^5^7\) Shulman, who became umpire for the Ford


\(^{57}\)Harry Shulman's 1955 Holmes lecture, "Reason, Contract and Law in Labor Relations," was printed both in *Harvard Law Review* 68 (1955): 999, and Jean McKelvey, ed.,
tor Company–UAW in 1943, recognized the role of law in protecting unions, but he stressed that the law left the conditions of work to the "autonomous determination" of employers and unions.\(^{58}\) Like all the pluralists, Shulman recognized that employment was a conflictual relationship, a contention which must have been repeatedly highlighted by the contentious labor relations at Ford; but he believed conflict should be restricted due to the imperatives of production, and disputes "will be adjusted by the application of reason guided by the light of the contract, rather than by force or power."\(^{59}\) Strikes, an "integral part of the system of collective bargaining," were referred to as a "cessation of production" rather than as a refusal to work. Although Shulman believed that litigation was unsuited to the enforcement of agreements, he stressed that it did not "follow that the alternative is jungle warfare" because arbitration is an integral part of the system of self government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government.\(^{60}\)

Grievance procedures to Shulman were not only an "orderly, effective and democratic way of adjusting such disputes," but the procedure also represented the substitution of "civilized collective bargaining for jungle warfare."\(^{61}\) The repeated reference to "jungle warfare" is instructive for the notion apparently includes the concerted withdrawal of labor, the basic right underlying the NLRA. Note that Shulman's argument is not premised upon an explicit union promise to avoid strikes. Instead, the very existence of an arbitration procedure foreclosed strikes over matters that fell within the ambit of such clauses.

Shulman was the most influential arbitrator during the war and in the immediate postwar period, but many of his most cited decisions were reached in wartime. Thus, his statement that "while management and

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\(^{59}\) Ibid., 1007.

\(^{60}\) Ibid., 1024.

labor are in adverse bargaining positions, they are joint participants in
the productive effort,” flows smoothly from wartime needs, as does his
comment that “maintenance of efficient production is of vital importance
... to the community as a whole.”

In perhaps his most well-known award, issued in 1944, Shulman
stressed the requirement that employees follow the grievance procedure
instead of resorting to self-help. Such behavior was “essential in order
to avoid disruption of relations between the parties and anarchy in the
operation of the plant.” In one of his most famous phrases, he argued
that an “industrial plant is not a debating society.” This sentiment,
reflected in thousands of postwar arbitration awards, makes clear that
contract rights of unions will be treated differently from the assertion of
such rights by employers because “to refuse obedience because of a
claimed contract violation would be to substitute individual action for
collective bargaining and to replace the grievance procedure with extra­
contractual methods.” Self-help, therefore, was “extracontractual” where
a grievance procedure was in existence. “When a controversy arises,
production cannot wait for exhaustion of the grievance procedure. While
that procedure is pursued, production must go on.” A challenge to a
managerial order interferes with the “authority to direct work,” which,
Shulman believed, is vested in supervision “because the responsibility for
production is also vested there; and responsibility must be accompanied
by authority.” Shulman’s concerns were not limited to enterprises run
for profit; instead, “any enterprise in a capitalist or socialist economy
requires persons of authority and responsibility to keep the enterprise
going.”

The argument that arbitration tames the often unruly rank and file
has been used both to criticize the institution and, by the postwar judi­
ciary, to strengthen it. Few authorized strikes occurred during the war,
but workers demonstrated their power through the large number of wild­
cat strikes that did occur. It is not at all clear that arbitration procedures
avert wildcat strikes, for arbitral resolution is not necessarily quick nor
does the process always involve the workers actually affected. Indeed,
the existence of arbitration and the War Labor Board seemed almost
irrelevant to most wildcat strikers, except to the extent that frustration

63 Opinions of the Umpire, A–116; also published as Matter of Ford Motor Co., 3 LA 779
(1944). See also, A–29.
64 Opinions of the Umpire, A–116.
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with War Labor Board delays and policies can be deemed to have been the partial cause of some wartime stoppages. Regulators might have believed in such a connection, however, and experience in the apparel industry earlier in the century suggested that rank-and-file militance can be moderated and, at least with time, replaced by a more bureaucratized system of dispute resolution. 65

Even on this question, however, there was a long and heated postwar debate among arbitrators and labor scholars on the scope of the grievance process. To most of the pluralists, and with perhaps George Taylor and Harry Shulman in mind, arbitrators were believed to be superior to judges because they could be less rigid, less rule-oriented, as well as more informed of the "practices, assumptions, understandings, and aspirations of the going industrial concern." 66 Indeed, this confident view of the arbitrator's role and ability was used by the Supreme Court in 1960 to explain its broad deference given to arbitration: "Even the ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." 67

The job of the arbitrator, however, was to do more than simply search for, or create, the "intentions of the parties." As Katherine Stone has effectively demonstrated, the pluralist approach also was based upon the assumption that arbitration can be used as part of a therapeutic effort


This suggests that such activity cannot be fully suppressed by contract, institutional pressure, or law. As David Brody has perceptively noted, the contractual regime cannot totally supplant the "core of informal shop-floor activity," but it does "narrow the scope of such activity" and increasingly designates noncontractual activity and prerogatives as "extralegal in character." Brody, Workers in Industrial America, 202.


to lessen underlying tensions and discontent at the workplace.\textsuperscript{68} It is doubtful whether most arbitrators actually decide cases on the basis of alleviating workplace tensions, but the assumption reveals the role arbitrators are theoretically to play in easing tensions, rather than simply interpreting the agreement. The War Labor Board, however, had more immediate concerns, and its arbitration and union security policies were basically in place before the wildcat strike wave of 1943 and 1944. Moreover, the board’s common grant of arbitration clauses was not simply based upon the need to find a peaceful and effective means to resolve workplace conflicts but also to find a fair method to settle conflict in a situation in which unions had surrendered the right to strike.\textsuperscript{69}

By war’s end, the basic structure of today’s common arbitral system was in place. Typically, contracts called for a multistep grievance process that had the effect of transferring authority from shop-floor leaders to the union hierarchy. Rights were no longer to be based upon tradition or custom but upon the contract and arbitral case law, a process thought to parallel the “rule of law” in society. Discharge or discipline could only be for “just cause,” but supervisory orders had to be obeyed, that is, the grievance system would substitute for self-help. Such a process requires patience over militancy, substituting third-party resolution for the exercise of shop-floor power.\textsuperscript{70}

Wayne Morse, one of the four public members of the War Labor Board, strongly believed the board should not resolve disputes while a strike was in progress. Previously dean of the Oregon Law School, Morse had extensive arbitral experience on the West Coast prior to joining the War Labor Board. Experience in the “bare-knuckle environment” of longshoring, said former WLB member Lewis Gill, “had doubtless convinced him that only a firm grip by the arbitrator, in a strictly judicial proceeding, could insure a reasonably orderly and workable \textit{modus op-}

\textsuperscript{68} Stone, “The Post-war Paradigm,” 1559–73.
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As Morse stated in a 1944 law review article, "the effective prosecution of the war cannot wait until the leisure of the party litigants." More broadly, the board would insist that strikes were improper even while disputes were being processed through the contractual grievance system. This notion would find favor long after, both in the Supreme Court and in arbitral decisions barring self-help where grievance systems existed.

Collective bargaining and the arbitration process were also thought to require a different kind of union leader. Golden and Ruttenberg noted in 1942 that "most militant local union leaders, who rise to the surface in the organizing stage of unions, fall by the side when the union moves into the state of constructive relations with management." "Constructive" labor relations, therefore, requires responsible unions led by "cooperative" leaders.

In addition to the supposed need to alter the kind of leaders needed, bargaining and arbitration tend to change the issues to be decided. A grievance process transforms disputes, which could be based upon concerns for personal integrity or moral and political issues, into narrower, more legalistic questions. Indeed, over time, disputes become contractual or else they are improper. For as rights become more clearly based solely upon the contract, disputes over other matters are treated as irrelevant, unimportant or, at least, unjustifiable.

The move from a system of workplace confrontation to higher-level bargaining or arbitration, therefore, may alter the substance of bargaining, that is, the nature of the issues. Workplace conflict tended to deal

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74 Although nonmilitant, "constructive" union officials were not the exclusive type of leader, but the pattern described does seem to parallel some revolutions in which militant leaders are forced out, killed, or shipped abroad to be replaced by more managerial, bureaucratic types.
with speed of production, discipline, or actions of foremen. With "Mature" collective bargaining, on the other hand, often deals with other issues. Thus, a change in focus of concern, in the definition of what is important, occurred, rather than simply a change in the location of and participants in dispute resolution. Although unions of the 1940s often declared their intention to invade hitherto sacred management preserves, and employers seemed to have believed that such threats were real, the labor movement primarily sought involvement in major capital decisions, not the types of workplace issues that often seem of greater immediacy to workers. Nevertheless, the combination of legal restrictions on the scope of bargaining and the protection of arbitration tended to deprive workers of influence on both capital decisions and workplace conflicts.

MANAGERIAL PREROGATIVES: COLLECTIVE BARGAINING'S FORBIDDEN ZONE

At the end of the war, the primary fear of American employers was the union challenge to managerial control of the workplace. Executives focused this concern less upon strikes than upon "the serious and lasting limitations on their freedom of action resulting from the orderly collective bargaining achievements of bureaucratic unionism, assisted by the orders of arbitrators and the NWLB." Managerial fears, however, must have been based primarily upon union bargaining power and workplace pressures because the wartime "law" was certainly sympathetic toward managerial prerogatives.

77Harris, The Right to Manage. Although unions seemed to de-emphasize such attempted incursions during the 1945-49 period, there were economic reasons for such behavior. The primary concern of unions during this period was job security and the protection against raging inflation concurrent with a vigorous managerial counterattack. See David Brody, Workers in Industrial America (New York: Oxford University Press, 1980), 173-214.
79Despite the wartime statements by some union officials expressing their interest in further influence in management, statements by unionists supporting the concept of managerial rights could also be found. Thus, Philip Murray and Morris Cooke stated in 1940: "To relieve the boss or the management of proper responsibility for making a success of the enterprise is about the last thing any group of employees—organized or unorganized—would consider workable or even desirable. The Unions are on record in numerous instances as recognizing that in the last analysis management has to manage, if any concern is to be a success financially or in any other way." Philip Murray and Morris Cooke,
The first National Labor Relations Board, created by executive order in 1934, had endorsed a broad reading of the duty to bargain, expanding interpretations from its predecessor, the National Labor Board. Employers had been ordered to bargain over a wide range of matters that had an impact on terms and conditions of employment, including changes in terms occasioned by plant relocation or the introduction of a new line of products.80 Despite this history, the War Labor Board at an early date recognized an area of decision making it designated as "managerial prerogatives." The determination that a matter is solely a management function means, first, that the employer need not bargain about such a matter despite the union's request that it do so, nor would the War Labor Board restrict managerial authority in these areas. Second, and often most important, an employer may initiate action in these areas without first bargaining with the union and without subsequent arbitral challenge. Although the scope of bargaining would be a vital question under the NLRA, little litigation under that statute had occurred on these questions between the determination that the NLRA was constitutional in 1937 and the outbreak of war.81 Thus, the War Labor Board's assumptions would become deeply embedded in NLRA jurisprudence after the war.82

In 1946, Ludwig Teller, prolific writer of labor law articles and treatises, was pleased to report that "the decisions of the War Labor Board in labor dispute cases did much to reinstate management confidence in business continuity, in the right to initiate business decisions."83 Teller argued that when the war and the War Labor Board ended, there was "increasing reliance" on the decisions of the War Labor Board "because of the belief that its decisions are a source of guidance for desirable practices in the field of labor relations." As Teller perceptively noted in 1946, the War Labor Board's "decisions are the beginnings of a labor jurisprudence." Indeed, it is the War Labor Board, not the National Labor Relations Board, that institutionalized the notion that the scope of mandatory bargaining is restricted by certain inherent managerial rights.

When faced with a dispute over the terms of the collective bargaining

Organized Labor and Production (New York: Harper, 1940), 84. As David Montgomery and Howell Harris demonstrate in this volume, labor's lack of desire "to manage or to interfere in the least with the employee's affairs" is longstanding.

80 Atleson, Values and Assumptions in American Labor Law, 118.
81 Ibid., 115–22.
82 See, generally, Atleson, Values and Assumptions in American Labor Law.
agreement, the board might be required to write much or all of the agreement for the parties. The board might be faced with a dispute concerning a right asserted by the employer or a practice that either the employer or the union wanted established or terminated. In either case, employers often contended that the exercise of a particular right should be or remain part of the employer's "reserved rights." These asserted "managerial prerogatives" often involved production matters as well as union proposals for health insurance, company-financed unemployment funds, sick leave, and medical, hospital, pregnancy, and maternity benefits.

The War Labor Board tended to be keenly protective of managerial rights, and it routinely denied union welfare proposals. The War Labor Board, it was said, was "hesitant about breaking new ground." The War Labor Board, however, did grant unions a measure of participation in many matters previously thought to be exclusively managerial. For instance, the board supported automatic wage progression plans that affected employers' control of labor costs and the work force. In addition, board-ordered job classification plans and other work arrangements gave unions the right to be consulted in both the creation and the administration of such schemes.

Nevertheless, what is noteworthy about the board's rulings is the lack of any felt need to explain the nature or scope, or to even justify the existence, of managerial prerogatives.

The board's clearest statement of its approach is probably to be found in its Montgomery Ward decision. Management functions were excluded from arbitration to the extent that they related to:

changes in the general business practice, the opening or closing of new units, the choice of personnel, the choice of merchandise to be sold, or other business questions of a like nature not having to do directly and primarily with the day-to-day life of the employees and their relations with their supervisors.

The scope of bargaining, therefore, was to be narrowed to the "day-to-day" concerns of employees. As under the National Labor Relations Act,

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86 "One of the most remarkable features of the War Labor Board cases dealing with management functions is the failure to define at length the meaning of management function in a union relationship, or even to discuss its essential qualities as a guide to future policies." Teller, "The War Labor Board and Management Functions," 365.
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it is the challenge to the employer's control of production and the state's unwillingness to sanction such challenges that seem to underlie these cases.

A good deal of labor's creativity in creating bargaining proposals arose from the fact that possible wage gains were strictly controlled by the board's Little Steel formula. Even matters clearly involving working conditions, however, were often avoided by the board. The board would not always explicitly rule that particular issues were improper subjects for bargaining; instead, the War Labor Board often sent such issues back to the parties for further negotiation, a resolution with foreseeable results given the no-strike pledge. As Aaron Levenstein, a strong critic of the WLB, noted:

[The board's] refusal to decide made it impossible for the unions to bargain on those matters altogether. Since the strike weapon had been put in cold storage, the issues remained an economic no man's land which the Board would not enter and which labor could not invade because it had no persuasive power. In this region of disputed issues, the employers' only obligation was to negotiate before saying no. 88

The unions argued that the no-strike pledge obliged the board to rule on all issues. The "no-strike, no lockout agreement," they argued in vain, was conditioned on the submission of "all disputes" to the board. The board's position was essentially that its jurisdiction was narrower than the no-strike promise. Effectively, then, the no-strike obligation was unlimited, but the right to bargain was not. 89

The United Auto Workers, for instance, demanded that General Motors create an employee security fund equal to the one it had already put aside for postwar business contingencies. The fund would purchase war bonds and, after the war, it would supplement unemployment insurance for workers who could not be provided with a forty-hour workweek. The board agreed with General Motors that the union's demand was essentially a "profit-sharing plan and is beyond the powers of the War Labor Board to adjudicate." 90 The public members of the board believed

89Unions did broaden the scope of bargaining, however, despite the board's lack of support. The UMW developed the concept of a royalty for every ton of coal mined to be used to create a fund for medical service, hospitalization, rehabilitation, and general economic protection. Levenstein, Labor Today and Tomorrow, 103-4. Other unions like the International Ladies' Garment Workers' Union required employers to contribute to union health and vacation funds.
90General Motors Company, War Labor Reports 22 (1945): 484.
they should prevent the introduction of "sociological innovations" during the war. The powerful wartime interest in labor peace could have led to a broad, inclusive reading of the scope of bargaining, especially given the unions' no-strike pledge. Yet, the interest in co-option, or in the institutionalization of dispute resolution, was apparently weaker than the War Labor Board's preference for unrestricted managerial freedom over certain matters.

In the War Labor Board's first decision in which the issue was raised, *Arcade Malleable Iron Co.*, the board denied an employer's request for a clause that specifically listed various management functions. The board's denial was accompanied with the statement that "adequate protection is afforded the company by law and by the many decisions of the courts and of other tribunals concerned with the question." Given the paucity of NLRA decisions dealing with the scope of bargaining, it is difficult to know what body of law the board had in mind. Even in this case, however, the board, without dissent from its labor representatives, agreed to insert a clause to the effect that "the functions of management are vested exclusively in the Company except as modified by the specific provisions of this agreement." The union was enjoined from interfering "in the rights of the management in the matter of hiring, transfer, or promotion of any employees and in the general management of the plant." The board's only objection was to the employer's proposed "long list" of exclusive management functions.

The basis for the decision became clear in the later *Banner Iron Works* case: "The rights are inherent in management anyhow." Nevertheless, the board in 1942, often without comment, began to approve management requests to insert clauses into collective bargaining agreements which would protect specific management rights. Inherent rights, apparently, were sometimes deemed worthy of clear expression. These clauses generally gave management, among other things, the exclusive power to hire, promote, fire for just cause, and to maintain and schedule production. Moreover, the clauses often explicitly acknowledged the employer's exclusive control over the products to be manufactured as well as the location of plants.

93 Because of space limitations and my own interests, I have not discussed internal debates within the board. The emphasis here is on the board's orders and parallels in current law.
Under the rubric of "plant operations," the WLB deferred to many aspects of management decision making. For instance, the board denied a union request to reestablish a six-day workweek instead of a five-day swing-shift week, stating that "this matter is a technical administrative problem, which should be left to management to decide, involving as it does the rearrangement of working schedules by large-scale transfers of personnel and changes in the entire system of the company's operations."\(^9^5\) The War Labor Board also generally believed that restriction and arbitration of employee transfers would interfere with efficiency.\(^9^6\)

Indeed, the board's decisions on the scope of managerial prerogatives were far broader than the positions of the postwar NLRB. For instance, the War Labor Board held that even the distribution of overtime work was within the exclusive prerogative of management. Thus, the board denied a union's request for an equal division of overtime work on the ground that the "ultimate decision as to who is qualified to perform specific overtime work should rest with management."\(^9^7\) Other matters swept into the broad management prerogatives category were the initiation of technological changes, even if layoffs should occur, determination of the size of the work force, and the determination of supervisory members.\(^9^8\) Subcontracting work was also generally regarded as a managerial prerogative despite a union's claim that the company had used subcontracting in the past to evade contractual provisions and wage rates.\(^9^9\)

Nor were "management functions" to be subject to arbitration.\(^1^0^0\) Thus, the board had occasion to exclude expressly from arbitration the transfer and promotion of employees, the adjustment of piece rates, the determination whether additional employees should be hired for certain

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\(^9^6\) See, for example, Detroit Steel Products Co., *War Labor Reports* 6 (1943): 495.


\(^9^8\) Riverside and Dan River Cotton Mills, Inc., *War Labor Reports* 8 (1943): 274. Western Union Telegraph Co., *War Labor Reports* 6 (1943): 133; Petroleum Specialties Co., *War Labor Reports* 24 (1945): 597. (The board refused the union request to remove a supervisor who had been convicted of assaulting employees.)


\(^1^0^0\) Teller, "The War Labor Board and Management Functions," 329.
operations, the retention of probationary employees, and the determination of work schedules.\textsuperscript{101}

The board's willingness to grant a detailed management prerogative clause, after its initial refusal to do so, actually reflects a more liberal approach to collective bargaining. The board initially may have believed that no explication of management rights was required because they were "inherent" in the relationship. This is a reflection of what could be referred to as the "Genesis" theory of collective bargaining, one often found in judicial decisions and especially in postwar arbitration awards. "In the beginning," the theory goes, there was light, and then there were inherent managerial powers over the direction of the enterprise. Such power obviously included unfettered control to direct production and the work force and to make all decisions involving these matters. Later there came statutes and collective bargaining, but employers nevertheless still possess all powers that have not been expressly restricted by statute or agreement. The inclusion of express managerial rights in collective agreements, however, weakens the argument that certain prerogatives are "inherent" in the relationship.

A more sophisticated argument, and one made by the conservative legal scholar Ludwig Teller, is that collective bargaining was a replacement rather than a supplement to common law theories of labor relations. Thus, collective bargaining was created to supplant "common law individualism" with "new conceptions suitable to problems and situations that did not exist when the common law molded its intensely individualistic structure." Teller was aware that having replaced the old order with the new, "organized labor is properly suspicious of efforts to give continued life to the old order through the medium of emphasis upon 'the common law rights of management.' " Moreover, as many observers of industrial relations recognized, there is no objective or rational way to determine what is or what is not a managerial prerogative.\textsuperscript{102} A decision concerning which matters should be exclusively in the managerial domain is basically a determination of the area from which labor should be excluded. In addition, as David Montgomery's work has shown, the context of this issue involves those areas in which management/ownership

\textsuperscript{101}Ibid., 339. See also, Bethlehem Steel Corp., \textit{War Labor Reports} 11 (1943): 190. Similarly, the hazardous nature of the work was used to deny arbitral jurisdiction over transfer and promotion grievances, suggesting some lack of faith in both arbitrators and unions. Atlas Powder Co., \textit{War Labor Reports} 5 (1942): 371.

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has taken power from employees as well as those areas in which collective employee action and statutes have restricted managerial control.

An explicit managerial prerogatives clause offers a number of other values, both real and symbolic. First, according to Teller, it "has certain value in teaching the contracting union to think in terms of the problems and rights of management." More importantly, such a clause limits the scope of proper union concern, a serious matter in a period in which many unions were both developing and experiencing economic power. Thus, the board upheld the grant of a management functions clause by a regional board because:

the present union is a new union and the inclusion of the clause will serve to educate the union more definitely as to management functions, thus serving to reduce the areas of conflict between union and management without loss of protection of the union under the other terms of the contract and especially of the grievance machinery.

In addition, the managerial functions clause creates a source of legitimation when management takes a particular action, a further reflection of the contractualization of labor-management relations.

The War Labor Board's recognition of a zone of managerial exclusivity would eventually be employed by the Supreme Court to narrow the scope of bargaining under the NLRA. The Supreme Court held in 1964, for instance, that subcontracting, at least in certain situations, was within the ambit of mandatory bargaining in *Fibreboard Paper Products v. NLRB.* The opinion, typical of Warren Court opinions, began with broad statements of policy only to finish by narrowing the ruling to the precise and very limited facts of the case before it. A concurring opinion by Justice Potter Stewart noted that not "every management decision which necessarily terminates an individual's employment is subject to the duty to bargain." Echoing *Montgomery Ward,* Stewart noted that even decisions clearly affecting "conditions of employment" are excluded because of the nature of the managerial action, listing, among others, decisions to invest in labor-saving machinery or decisions to liquidate assets.

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106 "We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of 'contracting' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d)." Ibid., 223.
and go out of business. These decisions, Stewart argued, "lie at the core of entrepreneurial control." Stewart's explanation was that "decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessary to terminate employment." Thus, excluded from the zone of mandatory bargaining are matters of capital investment and decisions "fundamental to the basic direction of a corporate enterprise." Despite the union's victory in Fibreboard, Stewart's cautionary phrases were not significantly at variance with the majority's conclusion that mandatory bargaining in this instance would not "significantly abridge [the employer's] freedom to manage the business."

The Court's concern for the freedom to manage would subsequently become the basis for restrictive rulings of the Burger Court. In 1981, for instance, the Supreme Court held that a partial closing of the enterprise was not subject to mandatory bargaining. The issue, said Justice Blackmun, is whether a decision to terminate "should be considered part of petitioner's retained freedom to manage its affairs unrelated to employment." Like the War Labor Board, Blackmun thus assumed that an inherent body of exclusive management functions existed, and "management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business." Congress, said the Court, "had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."

CONCLUSION

Although there are negative aspects of contractualism and legalization, there are also clear advantages for unions. Institutionally, grievance procedures, like collective bargaining, centralize power in the hands of union officials, but there are gains for employees as well. Guarantees written into collective agreements cannot easily be taken away, and this becomes the basis for one of the unions' most powerful arguments for representative status. In light of labor's relative weakness, the constant and very

107 379 U.S. at 223 (Stewart, J., concurring).
real threat of hostile legislation throughout the war, and the erosion of public support due to wartime strikes, these gains are significant.\footnote{110} The WLB strongly criticized strikes as early as mid-1942, and public member Wayne L. Morse, especially upset over union jurisdictional conflicts, warned that the laws against treason would be applied to strikers in such disputes. In the Seventy-seventh Congress alone, twenty-one bills were introduced dealing with wartime strikes, three of which sought to make strikes in defense plants treasonous and punishable by death. Employer groups, notably the National Association of Manufacturers, charged that strikes were damaging war production even though workdays lost due to strikes were very low. It was the successive miners’ strikes of 1943 that made that year so exceptional, walkouts that led to the War Labor Disputes Act of 1943 and helped inflame public opinion against strikes.\footnote{111}

Nevertheless, despite the gains, the practices and law of arbitration also have negative effects on industrial democracy. First, arbitration focuses upon the written agreement as the exclusive source of employee rights. The agreement is the result of economic struggle and, thus, represents the balance or imbalance of economic power. Indeed, the reliance upon contractualism means that rights are based upon the very kinds of economic imbalance that the Wagner Act sought to ameliorate. Moreover, the relative power of the parties is itself affected by the interpretations of the NLRA, often not favorable to union interests, especially in periods when unions are perceived to be weak. Second, arbitration removes the conflict, and its resolution, from the workplace and its affected workers. Just as important, arbitration and centralized bargaining alter the kinds of issues that are thought to be important.

Finally, arbitration procedures reflect the hierarchical system of the plant, and the substantive rules indicate, despite the rhetoric, that no

\footnote{110}Strong pressures were applied to unions during both the mobilization period and the war to curb the rank and file and strikes in general. Indeed, proposals for outlawing strikes in defense plants were introduced as early as 1941. Seidman, \textit{American Labor from Defense to Reconversion}, 43–46. Hatton W. Sumners, chair of the House Judiciary Committee, suggested that “If it is necessary to preserve this country, [the committee] would not hesitate one split second to enact legislation to send them to the electric chair.” \textit{New York Times}, 29 March 1941.

Four days later a bill was introduced to make strikes treasonable, providing for twenty-five years in prison as a minimum penalty and execution as the maximum sentence. Throughout the war period, unions would fear such legislation and such fear would explain a good deal of their behavior.

participatory democracy is to be created. The key rule of arbitration, that employees must obey work orders and grieve, makes it clear that management may act upon its interpretation of the agreement but the union may not. Arbitration becomes the device to maintain production and the only avenue to test the union's view of its contractual rights. Inherent in the rule itself is a choice of managerial hegemony and continued production over more participatory industrial self-government.

This is not to argue that legal rules necessarily reflect reality or substantially affect behavior. The argument is only that the very assumptions of, and tensions within, pluralist thought would affect the shape of postwar law and aid in creating restrictive rulings, especially when labor's power is perceived to wane. Pluralist thought, after all, was immeasurably aided by the appearance of relative equality in the postwar period. Alan Fox's perceptive analysis of labor relations in the United Kingdom in the early 1970s is also applicable to the experience of the United States to the 1970s. With few exceptions, labor accepted

as given those major structural features which are crucial for the power, status and rewards of the owners and controllers. It is because this condition is usually fulfilled that owners and controllers are rarely driven to call upon their reserves of power in any overt and public exercise. Only the margins of power are needed to cope with marginal adjustments. This, then, is what accounts for the illusion of a power balance. Labour often has to marshal all its resources to fight on these marginal adjustments; capital can, as it were, fight with one hand behind its back and still achieve in most situations a verdict that it finds tolerable.\(^{112}\)

The generally superior power of capital has been unleashed in a period when reduced profit margins and international competition induced management to contest labor and working conditions, the one aspect of production over which it has historically had most control.

Arbitration is but a part, albeit perhaps a necessary part, of collective bargaining, and it is no more confining than bargaining itself. Bargaining, after all, is affected by relative economic power, and imbalances will be reflected in the resulting contracts that arbitrators are called upon to interpret. Perhaps the most important legacy of the War Labor Board is its view that the scope of bargaining is itself limited to only those matters not deemed critical to managerial efficiency and, especially, capital mobility. Such assumptions after the war became part of the underlying basis

of the NLRA, helping to render unions impotent when faced with the torrent of plant removals and closures in the 1970s and 1980s.

Pluralist premises rest upon substantially equal power because only then can collective bargaining be considered "industrial self-government." The current sharp decline in the labor movement, matched by a crisis in pluralist circles, reveals that equal power does not exist and that the bargaining system, both defined and limited by legal decisions, will not likely result in substantial equality. The seeds of the problem stem in part from the War Labor Board's recognition and protection of inherent managerial or property rights, concerns even the needs of wartime could not weaken. The recognition of managerial rights would lead the Supreme Court to hold in 1981 that the Wagner Act Congress "had no expectation that the elected representative would become an equal partner in the running of the business enterprise in which the union's members are employed."

The pluralists as well as the War Labor Board deferred to the rights of owners and managers to direct their enterprises, although they qualified the arbitrary exercise of such power by insisting that responsible unions have a voice in the determination of those conditions of employment that did not invade the protective zone of managerial prerogative. The conflict between the protection of management decision making and the encouragement of collective bargaining has never been resolved, either by the pluralists or the courts. \(^{113}\) The language of pluralism reflected in the writings of scholars and arbitrators is proudly antitheoretical and ahistorical. The pluralist vision is seen as pragmatic, an emphasis on what worked. Thus, William P. Murphy, president of the National Academy of Arbitrators during its fortieth year, recently discussed the accomplishments and continued problems of arbitration. Some problems such as "reserved management rights, implied obligations, past practice," he noted, still remained unresolved. Murphy suggested "that the subject has no final definitive answer, that we are now burdened by over-analysis, and that the best a conscientious arbitrator can do is to be aware of and understand the various points of view and then do what seems right in the particular case."\(^{114}\) Noteworthy are both the absence of any discus-

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sion of the profound changes in industrial structure and labor relations and the assumption that choices of the unresolved issues in arbitration do not involve choices in policy and theory. Another reaction in industrial relations circles is simple denial that fundamental changes have occurred in American industrial and labor relations. 115

Collective bargaining in its decentralized American form has left the labor movement particularly dependent upon the success and viability of certain mass production industries. Their decline weakens the institutional strength of unions, but the unions’ history provides no way to question current institutional arrangements or to propose transformative ideas. Union structure has tended to match that of the employers with whom they bargain, but locally based bargaining would appear to make little sense in relation to large, multiplant firms with typically centralized labor policy making. Moreover, the modern growth of conglomerates and multinational corporations drastically affects the power relationships of labor and capital. Unions find themselves increasingly dealing with firms that can easily weather economic struggles, conceal information, and transfer, or more credibly threaten to transfer, work to other locales or, indeed, other countries. This drastic change in corporate and capital structure mandates a rethinking of our labor laws.

Labor law reform, however, is unlikely so long as unions are perceived to be weak, for the system responds to the strong and the troublesome. Instead, unions are likely to participate more willingly in “non-adversarial” participation schemes, such as quality circles and team arrangements, generally more favored by employees than union officials. These arrangements, hearkening back to employee representation structures in the early part of the century, 116 will likely become the hallmark of unorganized employers as well. A 1982 survey found that at least a third of Fortune 500 companies, organized and unorganized, have some form of participative management or quality of worklife program and that such programs have generally resulted in improved employee morale and increased productivity. 117 Although these arrangements are some-

117 Office of Economic Research, New York Stock Exchange, People and Productivity: A
times created to deter the possibility of union organization, they tend in organized workplaces to deal with matters not covered by collective bargaining. Indeed, participation plans in unionized workplaces generally restrict the jurisdiction of participatory arrangements to matters not covered by the collective agreement. These arrangements, therefore, actually recognize the failure of collective bargaining to deal with the full range of employee interests and to respond to employee concerns for integrity on the job.